

9-2-2011

Berry v. McFarland Clerk's Record Dckt. 37951

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Karletta Grace Berry, Estate of Jerry Lee Roy Berry, Captain's Wheel Resort Inc vs. Michael Burton McFarland,
Michael B McFarland PA, Karen M Zimmerman

Date	Code	User		Judge
4/4/2007	NCOC	JANUSCH	New Case Filed - Other Claims	John T. Mitchell
		JANUSCH	Filing: J1B - Special Motions Change Of Venue With Prior Appearance Paid by: John Whelan/Berry Receipt number: 0739123 Dated: 4/4/2007 Amount: \$9.00 (Check) For: [NONE]	John T. Mitchell
4/5/2007	ORDR	CRAMER	Order Granting Change Of Venue	John T. Mitchell
4/16/2007		PARKER	Filing: J8B - Special Motions Counterclaim With Prior Appearance Paid by: John P Whelan Receipt number: 0740502 Dated: 4/16/2007 Amount: \$14.00 (Check) For: [NONE]	John T. Mitchell
	ANSW	PARKER	Answer, Counterclaim and Demand for Jury Trial	John T. Mitchell
5/11/2007	HRSC	CLAUSEN	Hearing Scheduled (Scheduling Conference 06/13/2007 04:00 PM)	John T. Mitchell
	NOTC	CLAUSEN	Notice of Scheduling Conference	John T. Mitchell
5/15/2007	MNDQ	PARKER	Motion To Disqualify Judge	John T. Mitchell
5/16/2007	HRVC	CLAUSEN	Hearing result for Scheduling Conference held on 06/13/2007 04:00 PM: Hearing Vacated	John T. Mitchell
	ORDR	CLAUSEN	Order to Disqualifying Judge Mitchell	John T. Mitchell
5/21/2007		BOOTH	Order Assigning Judge on Disqualification Without Cause	John P. Luster
5/31/2007	MNDQ	LEPIRE	Motion To Disqualify--Judge Luster	John P. Luster
	MOTN	LEPIRE	Motion To Assign District Judge Verby	John P. Luster
6/7/2007	ORDR	BOOTH	Order to disqualify (Judge Luster)	John P. Luster
	DISA	BOOTH	Disqualification Of Judge - Automatic	John P. Luster
		BOOTH	Order Assigning Judge on Disqualification Without Cause	Steve Verby
6/20/2007	NTSV	HUFFMAN	Notice Of Service	Steve Verby
7/20/2007	NTSV	HULL	Notice Of Serving Plaintiff's and Responses to Requests for Admissions, Set One	Steve Verby
7/25/2007	ORDR	JANUSCH	Scheduling Order	Steve Verby
7/31/2007	MISC	PARKER	Scheduling Form/John P Whelan	Steve Verby
8/7/2007	MISC	PARKER	Scheduling Form/ Rex Finney	Steve Verby
9/7/2007	HRSC	MITCHELL	Hearing Scheduled (Motion to Compel 10/12/2007 09:00 AM) To be held in Kootenai.	Steve Verby
9/12/2007	MNCL	VICTORIN	Motion To Compel	Steve Verby
	AFFD	VICTORIN	Affidavit of John Whelan in Support of Motion to Compel	Steve Verby
	NOHG	VICTORIN	Notice Of Hearing	Steve Verby
10/11/2007	HRVC	REYNOLDS	Hearing result for Motion to Compel held on 10/12/2007 09:00 AM: Hearing Vacated Per Sherri. To be held in Kootenai.	Steve Verby
10/12/2007	INHD	JANUSCH	Interim Hearing Held	Steve Verby

Karletta Grace Berry, Estate of Jerry Lee Roy Berry, Captain's Wheel Resort Inc vs. Michael Burton McFarland, Michael B McFarland PA, Karen M Zimmerman

Date	Code	User		Judge
11/1/2007	ORDR	JANUSCH	Order Granting Motion to Compel	Steve Verby
3/17/2008	NOTD	SHEDLOCK	Notice Of Deposition - Karletta Grace Berry	Steve Verby
3/27/2008	MOTN	LSMITH	Motion to Dismiss	Steve Verby
	AFFD	LSMITH	Affidavit of John P. Whelan In Support of Motion to dismiss	Steve Verby
	AFFD	LSMITH	Affidavit of Michael B McFarland in Support of Motion to dismiss	Steve Verby
	MEMO	LSMITH	Memorandum in support of Defendants Motion to dismiss	Steve Verby
	NOHG	LSMITH	Notice Of Hearing	Steve Verby
4/2/2008	HRSC	JANUSCH	Hearing Scheduled (Motion 04/11/2008 01:30 PM)	Steve Verby
4/10/2008	AFFD	BAXLEY	Affidavit of Karletta Grace Berry	Steve Verby
4/11/2008	NOTH	MCCORD	Notice Of Hearing	Steve Verby
	APPL	MCCORD	Application for order shortening time	Steve Verby
	MOTN	MCCORD	Motion to strike	Steve Verby
	AFFD	MCCORD	Affidavit of Toby McLaughlin	Steve Verby
	MEMO	MCCORD	Memorandum in opposition to motion to dismiss	Steve Verby
	DCHH	RICKARD	Hearing result for Motion held on 04/11/2008 01:30 PM: District Court Hearing Held Court Reporter: Val Larsen Number of Transcript Pages for this hearing estimated: (Under 100 Pages)	Steve Verby
	FILE	MCCOY	New File Created - FILE #2	Steve Verby
4/25/2008	BRIE	SHEDLOCK	Brief Regarding Standard For Defendants' Motion To Dismiss	Steve Verby
4/30/2008	BRIE	SHEDLOCK	Plaintiff's Brief Regarding Standard On Memorandum In Opposition To Defendants' Motion To Dismiss	Steve Verby
5/1/2008	MOTN	BAXLEY	Motion to Strike	Steve Verby
6/16/2008	CVDI	MCCOY	Civil Disposition entered for: McFarland, Michael B, Defendant; Michael B McFarland PA, Defendant; Zimmerman, Karen M, Defendant; Berry, Karletta Grace, Plaintiff; Captain's Wheel Resort Inc, Plaintiff; Estate of Jerry Lee Roy Berry, Plaintiff. Filing date: 6/16/2008	Steve Verby
	FJDE	MCCOY	Memorandum Decision and Opinion	Steve Verby
	STAT	MCCOY	Case status changed: Closed	Steve Verby
2/6/2009	RFTS	VICTORIN	Request For Trial Setting	Steve Verby
4/2/2009	HRSC	BOOTH	Hearing Scheduled (Status Conference 04/10/2009 09:00 AM)	Steve Verby
	STAT	BOOTH	Case status changed: Reopened	Steve Verby
		BOOTH	Notice of Hearing	Steve Verby

Karletta Grace Berry, Estate of Jerry Lee Roy Berry, Captain's Wheel Resort Inc vs. Michael Burton McFarland,
Michael B McFarland PA, Karen M Zimmerman

Date	Code	User		Judge
4/2/2009	MOTN	BAXLEY	Motion To Allow Attorney To Appear By Telephone	Steve Verby
4/10/2009	HRHD	BUTLER	Hearing result for Status Conference held on 04/10/2009 09:00 AM: Hearing Held in Bonner County	Steve Verby
5/28/2009	HRSC	MITCHELL	Hearing Scheduled (Jury Trial Scheduled 01/14/2010 09:00 AM) 10 DAY JURY TRIAL IN KOOTENAI COUNTY	Steve Verby
	NOTC	MITCHELL	Notice Of Trial	Steve Verby
10/19/2009	AFSV	COCHRAN	Corrected Certificate of Service	Steve Verby
	NOTC	COCHRAN	Plaintiffs' Notice of Expert Witness Disclosure	Steve Verby
12/6/2009	FILE	PARKER	New File Created ---File 3---	Steve Verby
12/7/2009	CERT	CRUMPACKER	Corrected Certificate Of Service	Steve Verby
	MNAM	PARKER	Plaintiffs' Motion To Amend Complaint for Fugitive Damages	Steve Verby
	MEMO	PARKER	Memorandum in Support of Plaintiffs' Motion to Amend Complaint	Steve Verby
	AFFD	PARKER	Second Affidavit of Karletta Grace Berry	Steve Verby
	AFFD	PARKER	Affidavit of David Noohan	Steve Verby
	NOTH	PARKER	Notice Of Hearing Re: Plaintiffs' Motion to Amend Complaint for Punitive Damages	Steve Verby
12/8/2009	NOTC	CRUMPACKER	Notice of Examination by Audio & Video Deposition of Michael McFarland & Request for Production of Documents & Things	Steve Verby
	NTSV	CRUMPACKER	Notice Of Serving Plaintiffs Supplemental Responses to Interrogatory No 1	Steve Verby
	NOTD	CRUMPACKER	Notice Of Examination by Audio & Video Deposition of Karen Zimmerman & Request for Production of Documents & Things	Steve Verby
12/9/2009	OBJT	BAXLEY	Objection To Notice Of Examination Of Karen Zimmerman And Request For Production Of Documents And Things	Steve Verby
	OBJT	BAXLEY	Objection To Notice Of Examination Of Michael McFarland And Request For Production Of Documents And Things	Steve Verby
12/15/2009	NOTC	COCHRAN	Amended Notice of Examination By Audio and Video Deposition of Michael McFarland and Request for Production of Documents and Things	Steve Verby
	NOTC	COCHRAN	Amended Notice of Examination By Audio and Video Deposition of Karen Zimmerman and Request for Production of Documents and Things	Steve Verby
12/16/2009	NOTC	BAXLEY	SECOND AMENDED Notice of Examination By Audio and Video Deposition of Karen Zimmerman and Request for Production of Documents and Things	Steve Verby

Karletta Grace Berry, Estate of Jerry Lee Roy Berry, Captain's Wheel Resort Inc vs. Michael Burton McFarland, Michael B McFarland PA, Karen M Zimmerman

Date	Code	User		Judge
12/16/2009	NOTC	BAXLEY	SECOND AMENDED Notice of Examination By Audio and Video Deposition of Michael McFarland and Request for Production of Documents and Things	Steve Verby
	AFFD	BAXLEY	Affidavit Of John P Whelan In Support Of The Opposition Of Defendants To Plaintiffs' Motion To Amend Complaint For Punitive Damages	Steve Verby
	AFFD	BAXLEY	Affidavit Of Michael B McFarland In Opposition To Plaintiffs' Motion To Amend Complaint For Punitive Damages	Steve Verby
12/17/2009	MISC	HUFFMAN	Opposition of Defendants to Plaintiffs' Motion to Amend Complaint for Punitive Damages	Steve Verby
12/22/2009	MOTN	LEU	Motion for Order Permitting Telephonic Appearance	Steve Verby
	AFFD	CRUMPACKER	Affidavit of Rex Finney	Steve Verby
12/23/2009	INHD	LEU	Interim Hearing Held	Steve Verby
12/28/2009	ORDR	RICKARD	Order Permitting Telephonic Appearance	Steve Verby
	ORDR	LEU	Order Regarding Amendment For Punitive Damages	Steve Verby
12/31/2009	PLWL	CRUMPACKER	Plaintiff's Witness List	Steve Verby
	PLTX	CRUMPACKER	Plaintiff's Exhibit List	Steve Verby
1/4/2010	MISC	HUFFMAN	Defendants' Statement of Witnesses	Steve Verby
1/5/2010	SUBI	SREED	Subpoena Issued - Sharilyn Cano	Steve Verby
	DEFX	COCHRAN	Defendant's Exhibits List	Steve Verby
	DSWL	COCHRAN	Defendant's Supplemental Statement of Witnesses	Steve Verby
1/12/2010	HRSC	MITCHELL	Hearing Scheduled (Jury Trial Scheduled 01/19/2010 09:00 AM) 4-5 DAY JURY TRIAL IN KOOTENAI COUNTY	Charles W. Hosack
	HRVC	MITCHELL	Hearing result for Jury Trial Scheduled held on 01/14/2010 09:00 AM: Hearing Vacated 10 DAY JURY TRIAL IN KOOTENAI COUNTY	Steve Verby
	HRSC	MITCHELL	Hearing Scheduled (Conference 01/15/2010 02:00 PM) Teleconference	Charles W. Hosack
	WITD	RICKARD	Defendant's Second Supplemental Statement Of Witnesses	Steve Verby
1/13/2010	MISC	HUFFMAN	Plaintiffs Requested Jury Instructions And Requested Form Of Special Verdict (S)	Steve Verby
1/14/2010	DSWL	COCHRAN	Defendant's Third Supplemental Statement of Witnesses	Steve Verby
	DEFX	COCHRAN	Defendant's Supplemental Exhibit List	Steve Verby
1/15/2010	DRJI	BURRINGTON	Defendant's Proposed Jury Instructions	Charles W. Hosack
	MOTN	BURRINGTON	Motion in Limine	Charles W. Hosack
	PLTX	BAXLEY	Plaintiffs' AMENDED Exhibit List	Steve Verby

Karletta Grace Berry, Estate of Jerry Lee Roy Berry, Captain's Wheel Resort Inc vs. Michael Burton McFarland, Michael B McFarland PA, Karen M Zimmerman

Date	Code	User		Judge
1/15/2010	PLTX	BAXLEY	Plaintiffs' SECOND AMENDED Exhibit List	Steve Verby
	PLTX	BAXLEY	Plaintiffs' THIRD AMENDED Exhibit List	Steve Verby
	HRHD	BURRINGTON	Hearing result for Conference held on 01/15/2010 02:00 PM: Hearing Held Teleconference	Charles W. Hosack
1/19/2010	SUBI	LEU	Subpoena Issued	Steve Verby
	SUBI	PARKER	Subpoena Issued	Steve Verby
	JTST	BURRINGTON	Hearing result for Jury Trial Scheduled held on 01/19/2010 09:00 AM: Jury Trial Started 10 DAY JURY TRIAL IN KOOTENAI COUNTY	Charles W. Hosack
	DEFX	BURRINGTON	Defendant's Supplemental Exhibits List	Charles W. Hosack
	PLTX	BURRINGTON	Plaintiff's Fourth Amended Exhibit List	Charles W. Hosack
	FILE	HAMILTON	New File Created 5	Steve Verby
	JTST	BURRINGTON	Hearing result for Jury Trial Scheduled held on 01/19/2010 09:00 AM: Jury Trial Started 10 day jury trial	Charles W. Hosack
1/25/2010	PRSB	BURRINGTON	Plaintiff's Brief	Charles W. Hosack
1/26/2010	PRJI	BURRINGTON	Plaintiff's Supplemental Requested Jury Instructions and Requested Form of Special Verdict	Charles W. Hosack
1/28/2010	MISC	BURRINGTON	Jury Instructions Given	Charles W. Hosack
	VERD	BURRINGTON	Special Verdict	Steve Verby
3/9/2010	HRSC	HAMILTON	Hearing Scheduled (Judgment on Pleadings 04/05/2010 03:00 PM)	Charles W. Hosack
3/18/2010	NOHG	CRUMPACKER	Notice Of Hearing Re: Plaintiffs Motion for Entry of Findings, Conclusions, Finald Order & Judgment	Steve Verby
	MODF	CRUMPACKER	Motion For Entry Of Findings Conclusions, Finald Order & Judgment	Steve Verby
3/25/2010	FILE	COCHRAN	*****New File #6*****	Steve Verby
	AFFD	COCHRAN	Affidavit of Jessica Tvrdy in Support of Opposition to Plaintiffs' Motion for Findings, Conclusions, Final Order and Judgment	Steve Verby
	MISC	COCHRAN	Opposition to Plaintiffs Motion for Findings, Conclusions, Final Order and Judgment	Steve Verby
4/5/2010	DCHH	CLAUSEN	Hearing result for Judgment on Pleadings held on 04/05/2010 03:00 PM: District Court Hearing Hel Court Reporter: JOANNE SCHALLER TAKEN UNDER ADVISEMENT	Charles W. Hosack
4/7/2010	BRIE	HAMILTON	Plaintiff's Brief After Hearing on 4/5/2010	Charles W. Hosack
4/16/2010	MEMO	HAMILTON	Memorandum Opinion on Motion for Entry of Judgment	Charles W. Hosack
	ORDR	HAMILTON	Judgment	Charles W. Hosack
4/29/2010	MOTN	COCHRAN	Motion for Judgment Notwithstanding the Verdict	Steve Verby

Karletta Grace Berry, Estate of Jerry Lee Roy Berry, Captain's Wheel Resort Inc vs. Michael Burton McFarland, Michael B McFarland PA, Karen M Zimmerman

Date	Code	User		Judge
4/29/2010	MOTN	COCHRAN	Motion for Remittitur	Steve Verby
	MOTN	COCHRAN	Motion for New Trial	Steve Verby
	AFFD	COCHRAN	Affidavit of John P Whelan in Support of Defendants' Post Trial Motions	Steve Verby
	AFFD	COCHRAN	Affidavit of Jessica Tvrdy in Support of Defendants' Post Trial Motions	Steve Verby
4/30/2010	MEMO	COCHRAN	Memorandum in Support of Defendants' Post Trial Motions	Steve Verby
	MOTN	COCHRAN	Motion for Pre-Judgment Interest from Date of Breach of Fiduciary Duty (July 4, 2006) until Entry of Judgment (April 16, 2010)	Steve Verby
	MEMO	COCHRAN	Plaintiffs' Memorandum of Attorney Fees and Costs	Steve Verby
5/3/2010	NOTH	SHEDLOCK	Notice Of Hearing	Steve Verby
5/4/2010	HRSC	HAMILTON	Hearing Scheduled (Motion 05/19/2010 02:00 PM) Post Trial Motions by John Whelan	Charles W. Hosack
5/5/2010	NOHG	SREED	Notice Of Hearing Re: Plaintiff's Motion for Pre-Judgment Interest from Date of Breach of Fiduciary Duty (July 4, 2006) Until Entry of Judgment (April 16, 2010)	Steve Verby
5/12/2010	MOTN	HUFFMAN	Motion To Disallow Costs And Attorneys Fees	Steve Verby
	MISC	HUFFMAN	Opposition To Plaintiffs' Motion For Pre-Judgment Interest From Date Of Breach Of Fiduciary Duty Until Entry Of Judgment	Steve Verby
5/19/2010	CONT	HAMILTON	Hearing result for Motion held on 05/19/2010 02:00 PM: Continued Post Trial Motions by John Whelan	Charles W. Hosack
5/25/2010	HRSC	HAMILTON	Hearing Scheduled (Motion 05/26/2010 11:00 AM)	Charles W. Hosack
	HRVC	HAMILTON	Hearing result for Motion held on 05/26/2010 11:00 AM: Hearing Vacated	Charles W. Hosack
	HRSC	HAMILTON	Hearing Scheduled (Motion 06/02/2010 11:00 AM) Post Trial Motions by John Whelan	Charles W. Hosack
5/26/2010	NOHG	CRUMPACKER	Notice Of Hearing re: Plaintiffs Motion for Pre Judgment Interest from Date of Breach of Fiduciary Duty(July 4, 2006) Until Entry of Judgment (April 16, 2010)	Steve Verby
	NOHG	CRUMPACKER	Amended Notice Of Hearing	Steve Verby
6/1/2010	FILE	LISONBEE	*****File 7 Created*****	Steve Verby
6/2/2010	HRHD	BURRINGTON	Hearing result for Motion held on 06/02/2010 11:00 AM: Hearing Held Post Trial Motions by John Whelan	Charles W. Hosack
6/10/2010	OPIN	HAMILTON	Memorandum Opinion on Post Trial Motions and Order Granting New Trial	Charles W. Hosack
7/19/2010	APDO	LISONBEE	Appeal Filed in District Court	Steve Verby

Karletta Grace Berry, Estate of Jerry Lee Roy Berry, Captain's Wheel Resort Inc vs. Michael Burton McFarland,
Michael B McFarland PA, Karen M Zimmerman

Date	Code	User		Judge
7/19/2010		LISONBEE	Filing: L4 - Appeal, Civil appeal or cross-appeal to Supreme Court Paid by: Finney, Rex A. (attorney for Estate of Jerry Lee Roy Berry) Receipt number: 0031131 Dated: 7/19/2010 Amount: \$101.00 (Check) For: Estate of Jerry Lee Roy Berry (plaintiff)	Steve Verby
	NOTC	LISONBEE	Notice Of Appeal	Steve Verby
7/20/2010	NOTC	LISONBEE	Amended Notice Of Appeal	Steve Verby
7/21/2010	BNDC	RICKARD	Bond Posted - Cash (Receipt 31768 Dated 7/21/2010 for 100.00)	Steve Verby
	BNDC	RICKARD	Bond Posted - Cash (Receipt 31772 Dated 7/21/2010 for 200.00)	Steve Verby
8/9/2010	SUBC	LEU	Substitution Of Counsel	Steve Verby
9/15/2010	BNDV	RICKARD	Bond Converted (Transaction number 2163 dated 9/15/2010 amount 71.50)	Steve Verby
11/29/2010	ORDR	LISONBEE	Order Granting Court Reporter's Motion For Extension Of Time	Steve Verby
1/19/2011	STAT	JOKELA	Case status changed: closed pending clerk action	Steve Verby
2/22/2011	ORDR	BIELEC	Order Granting Court Reporter's Motion For Extension Of Time---4/15/11	Steve Verby
5/5/2011	MISC	LEU	Request For Clerk's Record to Be In Electronic Format	Steve Verby
6/21/2011	BNDC	RICKARD	Bond Posted - Cash (Receipt 26357 Dated 6/21/2011 for 5200.00)	Steve Verby
6/29/2011	NOTC	LISONBEE	Amended Notice Clerk's Record And Transcript Due Date Reset	Steve Verby

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STATE OF IDAHO
COUNTY OF BONNER
FIRST JUDICIAL DIST.

2007 FEB 14 P 2: 16

MARIE SCOTT
CLERK DISTRICT COURT
efw
DEPUTY

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF BONNER

KARLETTA GRACE BERRY, a widow,) Case No. CV-2007- 00301
KARLETTA GRACE BERRY, Personal)
Representative of the Estate)
of Jerry Lee Roy Berry,)
CAPTAIN'S WHEEL RESORT, INC.) COMPLAINT
an Idaho Corporation,) AND
) DEMAND FOR JURY TRIAL
Plaintiffs,)
) Category: A(1)
v.) Fee: \$88.00
)
MICHAEL B MCFARLAND, MICHAEL)
B. MCFARLAND, P.A., and KAREN)
ZIMMERMAN,)
Defendants.)

COME NOW, the Plaintiffs, and for a complaint against the
above named defendants, alleges, as follows:

THE PARTIES

1. The Plaintiff, KARLETTA GRACE BERRY, is the surviving
spouse of JERRY LEE ROY BERRY, DECEASED, and is a resident of
Kootenai County, Idaho.

ASSIGNED TO STEVE VERBY
DISTRICT JUDGE

2. JERRY LEE ROY BERRY died on November 4, 2006. At the time of his death, the Decedent was domiciled of Kootenai County, Idaho.

3. The Plaintiff KARLETTA GRACE BERRY is the Personal Representative of the Estate of JERRY LEE ROY BERRY pursuant to Kootenai County Case No. CV-2006-8514.

4. The Plaintiff, CAPTAIN'S WHEEL RESORT, INC. is an Idaho Corporation in good standing and this direct action is brought by the incorporation through its director, KARLETTA GRACE BERRY.

5. The Defendant(s), MICHAEL B. MCFARLAND, is an attorney licensed to practice law within the state of Idaho. MICHAEL B. MCFARLAND's law firm is the Defendant, MICHAEL B. MCFARLAND, P.A., located at 421 Coeur d'Alene Ave, Coeur d'Alene, Idaho 83814.

6. The Defendant KAREN M. ZIMMERMAN, is a licensed real estate broker in the State of Idaho and a resident of Kootenai County, Idaho. Karen M. Zimmerman is the broker and owner of Treaty Rock Realty in Kootenai County, Idaho.

JURISDICTION

7. The Court has personal jurisdiction over each of the Defendants.

8. The Court has in rem jurisdiction as this suit involves real property and personal property located in Kootenai County Idaho.

9. The general allegations of damages exceed ten thousand dollars (\$10,000.00) and the relief sought by the Plaintiffs meet the District Court's jurisdictional requirements.

THE FACTS

10. Prior to the death of Jerry Lee Roy Berry, the marital community of Jerry Lee Roy Berry and Karletta Grace Berry owned one hundred percent (100%) of stock in the Captain's Wheel Resort, Inc.

11. The Captain's Wheel Resort, Inc owns and operates the bar and restaurant with a dock with over twenty boat slips known as the Captain's Wheel Resort in Bayview, Idaho on the shore of Lake Pend Oreille. The Captain's Wheel Resort, Inc. owns the real property upon which the business is situated.

12. Defendant Michael B McFarland, and/ or Michael B. McFarland, P.A. was the attorney for Jerry Lee Roy Berry, Karletta Grace Berry, and the Captain's Wheel Resort, Inc at all times relevant hereto. Defendant McFarland provided legal advise to said persons and entity and entered into a fiduciary relationship and/or assumed a fiduciary relationship with said persons and entity at all times relevant hereto.

13. Among other things the Defendant Michael B. McFarland was providing advice on how the stock and assets of the Captain's Wheel Resort, Inc. could be protected from creditors of Jerry Lee Roy Berry, and maintained the corporate records for the Captain's Wheel Resort, Inc.

14. The Defendant Karen M. Zimmerman is involved in a relationship with Michael B. McFarland and they are the owner of several assets as joint tenants with rights of survivorship including homes and real property.

15. On or about August 9, 2003 the Defendants made a loan in the total amount ONE HUNDRED THOUSAND DOLLARS to the marital community of Jerry Lee Roy Berry and Karletta Grace Berry. No documentation, promissory note or other written document was signed at the time of the loan.

16. Jerry Lee Roy Berry was diagnosed with pancreatic cancer in November 2005 and was treated for cancer between said date and his death on November 4, 2006. Among other treatments, Jerry Lee Roy Berry was treated with chemotherapy.

17. Jerry Lee Roy Berry was in the hospital from June 17, 2006 until June 21, 2006 for chemo toxicity from his treatments.

18. Subsequent to August 9, 2003 and on or about July 4, 2006 Jerry Lee Roy Berry met with Michael B. McFarland and Karen M. Zimmerman and a Stock Purchase and Sale Agreement was signed with Jerry Lee Roy Berry as seller and with Karen M. Zimmerman

and Michael B. McFarland as buyers. The Stock Purchase and Sale Agreement reads as if it were signed and executed on August 9, 2003, but the agreement was actually signed on or about July 4, 2006. A true and correct copy of the stock purchase and sale agreement is attached hereto as Exhibit 1.

19. The Stock Purchase and Sale Agreement was drafted by Michael B. McFarland.

20. A second alternative Stock Sale Agreement attached hereto as Exhibit 2 was also drafted and proposed for execution by Michael B. McFarland, but it was rejected by Jerry Lee Roy Berry.

21. At the time of meeting and signing the Stock Purchase and Sale Agreement, Jerry Lee Roy Berry, brought with him a proposed Loan Agreement with Stock as Collateral, a copy of which is attached as Exhibit 3. The Defendants refused to sign the Loan Agreement and insisted upon signing the Stock Purchase and Sale Agreement instead.

22. McFarland considered the Loan Agreement with Stock as Collateral a slap in the face because he stated that he makes more than ten percent on his loans.

23. No new consideration was given from the Defendants to Jerry Lee Roy Berry or any other plaintiff at the time the Stock Purchase and Sale Agreement was signed on or about July 4, 2006.

24. At the time the Stock Purchase and Sale Agreement was signed, Jerry Lee Roy Berry, had just been treated for cancer with chemotherapy and lacked capacity to enter into said agreement and had been diagnosed as being terminally ill.

25. The Stock Purchase and Sale Agreement contains terms that unfairly place risk and liability upon the seller while providing for an equal share in benefits to the buyers.

26. On both August 9, 2003 and July 4, 2006 (the date the Stock Purchase and Sale Agreement was signed), the net value of the corporate assets exceeded one million dollars. The Defendants bought into the corporation at far below fair market value and received a benefit of the bargain to the detriment of Michael B. McFarland's and/or Michael B. McFarland, P.A.'s Clients.

27. On or about October 15, 2006 and prior to the pending death of Jerry Berry, the Defendant McFarland and the Defendant Zimmerman were appointed as directors of the Captain's Wheel Resort, Inc. The appointment was made at the request of Michael B. McFarland and was set forth in the Minutes of the Special Meeting of Shareholders attached hereto as Exhibit 4. The Minutes were prepared by Michael B. McFarland as attorney for the Plaintiffs.

28. At the time of Jerry Lee Roy Berry's death on November 4, 2006, Jerry Berry was a shareholder, director and president of the Captain's Wheel Resort, Inc.

29. On or about November 13, 2006 when Karletta Grace Berry arrived home in the evening, the Defendant Michael B. McFarland was waiting at her residence and insisted that she sign one of two resolutions, copies of which are attached hereto as Exhibit 5 and 6 respectively. Among other proposed resolutions the corporate assets including the business and real property would be listed for sale at a price of TWO-MILLION TWO-HUNDRED THOUSAND DOLLARS (\$2,200,000.00).

30. Karletta Grace Berry did not agree to sign either of the resolution proposed to her by the Defendant McFarland on November 13, 2006. As a result on November 16, 2006 the Defendants as directors, provided one day notice for a special meeting to occur at 5:00 pm on November 18, 2006 at 8729 Cloverleaf Drive, Hayden, Idaho which is a residence held in a joint tenancy with rights of survivorship between the Defendants.

31. Karletta Grace Berry appeared at 5:00 pm on November 18, 2006 at 8729 Cloverleaf Drive, Hayden, Idaho residence and objected to the meeting because of improper notice under the duly adopted corporate bylaws. At that time the Defendant

McFarland gave oral notice of a special meeting to be held on November 29, 2006.

32. On November 29, 2006 a special meeting was called on at 5:00 pm on November 18, 2006 at 8729 Cloverleaf Drive, Hayden, Idaho. Because McFarland and Zimmerman were appointed as directors, and Jerry Lee Roy Berry had passed away, the Defendants cumulatively had two votes against Karletta Grace Berry's one vote at Directors meetings. At the meeting Mr. McFarland and Karen M. Zimmerman exercised there two votes against Karletta Grace Berry's one vote to pass the following resolutions among others:

- a. Elect McFarland as President
- b. Elect Zimmerman as Treasurer
- c. Approve the sale of the business and real property with the listing to be with Karen M. Zimmerman, Broker at Treaty Rock Realty.

33. Pursuant to the ByLaws, Karletta Berry was to obtain the role of President as a result of Jerry Lee Roy Berry's death, but the Defendants refused to accept her succeeding to president.

FIRST CAUSE OF ACTION - LACK OF CONSIDERATION

34. The Stock Purchase and Sale Agreement was executed on July 4, 2006 without any new or additional consideration above

and beyond the \$100,000.00 loaned to Jerry Lee Roy Berry and Karletta Grace Berry in 2003.

35. The Stock Purchase and Sale Agreement is void and of no force or effect.

36. The Plaintiff is entitled to have the Stock Purchase and Sale Agreement set aside and declared a nullity and for all actions taken by McFarland and Zimmerman as corporate officers, directors and shareholders to be set aside.

37. The loan agreement should be reinstated by the court with an accounting for interest accrued, minus payments made and the reasonable amount of goods and services provided to the Defendants at the Captain's Wheel Resort without charge.

SECOND CAUSE OF ACTION - LACK OF CAPACITY

38. The Stock Purchase and Sale Agreement was executed on July 4, 2006 at a time when Jerry Lee Roy Berry lacked capacity to contract.

39. The Defendant McFarland was aware of Jerry Lee Roy Berry's weakened state and lack of capacity on July 4, 2006.

40. The Stock Purchase and Sale Agreement is void and of no force or effect.

41. The Plaintiff is entitled to have the Stock Purchase and Sale Agreement set aside and declared a nullity and for all actions taken by McFarland and Zimmerman as corporate officers, directors and shareholders to be set aside.

42. The loan agreement should be reinstated by the court with an accounting for interest accrued, minus payments made and the reasonable amount of goods and services provided to the Defendants at the Captain's Wheel Resort without charge.

THIRD CAUSE OF ACTION - BREACH OF FIDUCIARY DUTY

43. Michael B. McFarland entered into the Stock Purchase and Sale Agreement with Jerry Berry while his pecuniary interest were adverse to the interest of Jerry Lee Roy Berry, Karletta Grace Berry, and Captain's Wheel Resort Incorporated, his clients.

44. The Defendant was under a fiduciary duty to deal with a client in a way that exercises the utmost of loyalty, good faith, integrity, fairness and fidelity

45. The Defendant Michael B. McFarland derived a benefit to the detriment of his clients by entering into the Stock Purchase and Sale Agreement.

46. In entering the Stock Purchase and Sale Agreement, the Defendant Michael B. McFarland failed to fully disclose the effect of the transaction.

47. The Stock Purchase and Sale Agreement is overreaching in the Defendants' favor as the Defendants provided inadequate consideration and placed the risk of loss and taxes on the client.

48. Entering into the Stock Purchase and Sale Agreement with Jerry Berry constitutes breach of a fiduciary duty by Michael B. McFarland and/or Michael B. McFarland, P.A..

49. Negotiating for and passing a resolution to list the corporate assets, including real property, with the Defendant Zimmerman's real estate brokerage at the time she was a corporate director is a breach of fiduciary duty and constitutes self dealing.

50. The Plaintiffs were injured as a result of the Defendant Michael B. McFarland's breach of fiduciary duty

51. Based upon the breach of the fiduciary duty, the Plaintiffs are entitled to:

- a. Rescission of the Stock Purchase & Sale Agreement
- b. Recover compensatory damages
- c. Imposition of a constructive trust and or a resulting trust on the stock the defendants received from Jerry Lee Roy Berry.
- d. Quiet title to all of the stock of the corporation in favor of the Karletta Grace Berry and/or the Estate of Jerry Lee Roy Berry.
- e. Disgorgement of profits earned by the defendants as a result of the transaction.

f. For all actions taken by McFarland and Zimmerman as corporate officers, directors and shareholders to be set aside.

g. For prejudgment interest at the legal rate.

FOURTH CAUSE - UNDUE INFLUENCE BY ATTORNEY IN SELF DEALING

52. Michael B. McFarland entered into the Stock Purchase and Sale Agreement with Jerry Berry while his pecuniary interest were adverse to the interest of Jerry Lee Roy Berry, Karletta Grace Berry, and Captain's Wheel Resort Incorporated, his clients.

53. The Defendant was under a duty to deal with a client in a way that exercises the utmost of loyalty, good faith, integrity, fairness and fidelity

54. The Defendant Michael B. McFarland derived a benefit to the detriment of his clients by entering into the Stock Purchase and Sale Agreement.

55. In entering the Stock Purchase and Sale Agreement, the Defendant Michael B. McFarland failed to fully disclose the effect of the transaction.

56. The Stock Purchase and Sale Agreement is overreaching in the Defendant's favor as the Defendants provided inadequate consideration and placed the risk of loss and taxes on the client.

57. Entering into the Stock Purchase and Sale Agreement with Jerry Berry constitutes undue influence by self dealing of the attorney Michael B. McFarland.

58. The Plaintiffs were injured as a result of the Defendant Michael B. McFarland's undue influence by self dealing.

59. Based upon the undue influence by self dealing, the Plaintiffs are entitled to

- a. Rescission of the Stock Purchase & Sale Agreement
- b. Recover compensatory damages
- c. Imposition of a constructive trust and or a resulting trust on the stock the defendants received from Jerry Lee Roy Berry.
- d. Quiet title to all of the stock of the corporation in favor of the Karletta Grace Berry and/or the Estate of Jerry Lee Roy Berry.
- e. Disgorgement of profits earned by the defendant as a result of the transaction.
- f. For all actions taken by McFarland and Zimmerman as corporate officers, directors and shareholders to be set aside.
- g. For prejudgment interest at the legal rate.

FIFTH CAUSE OF ACTION - NEGLIGENCE

60. The Plaintiffs were clients of the Defendant Attorney Michael B. McFarland and/or Michael B. McFarland, P.A. and as such said Defendants owed the Plaintiffs a duty to provide advice and to act in the Plaintiffs' best interest.

61. The Defendants, Attorney Michael B. McFarland and/or Michael B. McFarland, P.A. breached his/its duties to the Plaintiffs.

62. The breached duties of Attorney Michael B. McFarland and/or Michael B. McFarland, P.A. are the actual and proximate cause of damages to the Plaintiff in an amount to be proven at trial in excess of ten thousand dollars.

SIXTH CAUSE OF ACTION - QUIET TITLE

63. The Plaintiffs Karletta Grace Berry and/or the estate of Jerry Lee Roy Berry are entitled to a decree of quiet title to all of the stock of the Captain's Wheel Resort, Inc. in her/its favor free and clear of any right, title, interest or claim of the Defendants McFarland and Zimmerman.

SEVENTH CAUSE OF ACTION - GOOD FAITH AND FAIR DEALING

64. The Defendant Michael B. McFarland has breached his obligation to deal fairly and in good faith in the facts recited herein.

65. Based upon the breach of the obligation of good faith and fair dealing, the Plaintiffs are entitled to

- a. Rescission of the Stock Purchase & Sale Agreement
- b. Recover compensatory damages
- c. Imposition of a constructive trust and or a resulting trust on the stock the defendants received from Jerry Lee Roy Berry.
- d. Quiet title to all of the stock of the corporation in favor of the Karletta Grace Berry and/or the Estate of Jerry Lee Roy Berry.
- e. Disgorgement of profits earned by the defendant as a result of the transaction.
- f. For all actions taken by McFarland and Zimmerman as corporate officers, directors and shareholders to be set aside.
- g. For prejudgment interest at the legal rate

EIGHT CAUSE OF ACTION - RESULTING OR CONSTRUCTIVE TRUST

66. The Defendants McFarland and Zimmerman hold the stock to the Captain's Wheel Resort, Inc. under an equitable duty to convey it to the Karletta Grace Berry, a widow, and/or Karletta Grace Berry, Personal Representative of the Estate of Jerry Lee Roy Berry.

67. The imposition of a resulting or constructive trust is consistent with the trial courts power to shape and fashion injunctive relief to fit the particular facts, circumstances and equities before it.

68. The imposition of a resulting or constructive trust will achieve substantial justice and the Court should impose a constructive or resulting trust upon the stock of the Captain's Wheel Resort, Inc. now held by the Defendants McFarland and Zimmerman.

ACCOUNTING

69. The Plaintiffs have been frozen out of management of the Captain's Wheel Resort, Inc. by the Defendants and has been deprived of all information regarding the business.

70. The Plaintiffs are entitle to a full accounting for all expenditures and receipts made during the time they were in control of the Captain's Wheel Resort, Inc. and the corporate assets and bank accounts.

DAMAGES

71. Plaintiffs are entitled to recover damages in an amount in excess of ten thousand dollars.

ATTORNEY FEES AND COSTS

72. Pursuant to contract, statute, and court rule the Plaintiffs are entitled to attorney fees against the Defendants in the event of default or contest. In the event of default, a

reasonable amount is FIFTEEN THOUSAND DOLLARS (\$15,000.00), and in the event of contest, as the Court deems proper.

RELIEF SOUGHT

WHEREFORE, the Plaintiffs seek the entry of judgment and the following relief:

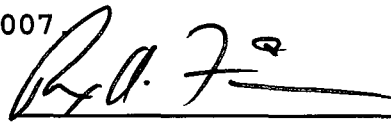
1. all relief set forth above.
2. Rescission of the Stock Purchase & Sale Agreement.
3. Recover compensatory damages in excess of ten thousand dollars.
4. Imposition of a constructive trust and or a resulting trust on the stock the defendants received from Jerry Lee Roy Berry.
5. Quiet title to all of the stock of the corporation in favor of the Karletta Grace Berry and/or the Estate of Jerry Lee Roy Berry, free of any claim of the Defendants.
6. Disgorgement of profits earned by the defendants as a result of the transaction.
7. For all actions taken by McFarland and Zimmerman as corporate officers, directors and shareholders to be set aside.
8. For prejudgment interest at the legal rate.

- 9. For an award of attorney fees and costs in the amount of \$15,000.00 in the event of default and in a reasonable amount in the event of contest or answer.
- 10. For any other relief the Court deems appropriate.

DEMAND FOR JURY TRIAL

THE PLAINTIFFS HEREBY DEMAND A TRIAL BY A JURY OF TWELVE PERSONS.

DATED THIS 14 DAY OF FEBRUARY, 2007



 REX A. FINNEY
 Attorney At Law

VERIFICATION

STATE OF IDAHO)
 : s.s.
 COUNTY OF BONNER)

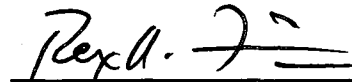
I, KARLETTA GRACE BERRY, first being duly sworn upon oath depose and say the following:

I am a Plaintiff in this case and I have read the foregoing COMPLAINT, and know the contents therein stated and believe the same to be true.



 KARLETTA GRACE BERRY
 Plaintiff

SUBSCRIBED AND SWORN to before me this 14 day of February, 2007.



 Notary Public-State of Idaho
 Residing at: Sundpoint
 My Commission Expires: 5/7/07



STOCK PURCHASE AND SALE AGREEMENT

This agreement executed August 9, 2003 between JERRY LEE ROY BERRY, of 6555 E. Remington Road, Athol, ID 83801, hereinafter referred to as "Seller" and KAREN M. ZIMMERMAN and MICHAEL B. McFARLAND of 8729 W. Cloverleaf Drive, Hayden, Idaho 83835, hereinafter referred to as "Buyers".

For and in consideration of One-hundred thousand dollars (\$100,000) and other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, Seller agrees to sell, assign and convey to Buyers, as joint tenants with right of survivorship, with full power to transfer the shares on the books of the corporation, TWO HUNDRED (200) shares of the common stock of CAPTAIN'S WHEEL RESORT, INC., a corporation organized and existing under the laws of the State of Idaho and having its principal place of business at 100 Scenic Drive, Bayview, Idaho 83803. The stock is represented by Certificates 1 and 2, (100 shares each) which were assigned to the Seller by Jean A. and James M. Campbell.

Seller warrants that the stock conveyed hereby represents 50% of the shares which have been issued to date by said corporation.

As additional consideration, it is agreed between Buyers and Seller that Seller shall retain his offices as director and president of the corporation, with full operational control of the business of the corporation through calendar year 2005. It is further agreed, as additional consideration, that the transfer of the shares shall be effective on January 1, 2006, and that Seller shall be considered the owner for tax and all other purposes through midnight, December 31, 2005.

IN WITNESS WHEREOF, the parties have executed this Agreement, which is effective on the day and year first above written.

BUYERS:

SELLER:


KAREN M. ZIMMERMAN


JERRY LEE ROY BERRY


MICHAEL B. McFARLAND

STOCK PURCHASE AND SALE AGREEMENT

This agreement executed August 9, 2003 between JERRY LEE ROY BERRY, of 6555 E. Remington Road, Athol, ID 83801, hereinafter referred to as "Seller" and KAREN M. ZIMMERMAN and MICHAEL B. McFARLAND of 8729 W. Cloverleaf Drive, Hayden, Idaho 83835, hereinafter referred to as "Buyers".

For and in consideration of One-hundred thousand dollars (\$100,000) and other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, Seller agrees to sell, assign and convey to Buyers, as joint tenants with right of survivorship, with full power to transfer the shares on the books of the corporation, FOUR HUNDRED (400) shares of the common stock of CAPTAIN'S WHEEL RESORT, INC., a corporation organized and existing under the laws of the State of Idaho and having its principal place of business at 100 Scenic Drive, Bayview, Idaho 83803. The stock is represented by Certificates 1 and 2, (100 shares each) which were assigned to the Seller by Jean A. and James M. Campbell and Certificate number 3, which was issued to the Seller directly.

Seller warrants that the stock conveyed hereby represents 100% of the shares which have been issued to date by said corporation.

As additional consideration, it is agreed between Buyers and Seller that Seller shall retain his offices as director and president of the corporation, with full operational control of the business of the corporation through calendar year 2005. It is further agreed, as additional consideration, that the transfer of the shares shall be effective on January 1, 2006, and that Seller shall be considered the owner for tax and all other purposes through midnight, December 31, 2005. After such time, Seller may, at his option, continue to maintain operational control of the corporation's business, and to receive reasonable compensation therefor, and may hold such office or offices in the corporation as he deems appropriate.

As additional consideration, Buyers hereby covenant and agree that they will establish a trust or equivalent arrangement under which fifty percent (50 %) of the stock transferred hereby shall be held by the Buyers or the trustee for the benefit of Karletta Berry and (in the event of her demise) her son, Dale. In the event of the sale of the corporation, fifty percent (50%) of the net



sale proceeds shall be distributed to Karletta Berry, if then living. If she is not living at the time of the sale of the corporation, such proceeds shall be held in trust and used for Dale's benefit, maintenance and education until he reaches the age of twenty-one years, at which time the amount remaining in trust shall be distributed to him. Until Dale reaches twenty-one, the trustee shall invest the principal amount in an interest-bearing account or other secure investment, and shall pay from the interest on such account such sums as, in the trustee's discretion, are reasonably necessary to provide for Dale's health, welfare, maintenance and education. If the interest on such account is insufficient to meet Dale's reasonable needs, the trustee shall be authorized to pay such sums from the principal as are, in the trustee's discretion, reasonable and necessary to provide adequately for Dale.

IN WITNESS WHEREOF, the parties have executed this Agreement, which is effective on the day and year first above written.

BUYERS:

SELLER:

KAREN M. ZIMMERMAN

JERRY LEE ROY BERRY

MICHAEL B. McFARLAND

LOAN AGREEMENT WITH STOCK AS COLLATERAL

This agreement executed between Jerry L. Berry, of 10691 E Reminton Road, Arnoi Idaho, hereinafter referred to as "Borrower" and Karen M. Zimmerman and Michael B. McFarland of 8729 W. Cloverleaf, Hayden Idaho 83835, hereinafter referred to as "Lenders".

For and in consideration of a total of One-hundred thousand dollars (\$100,000) loan, of which Forty thousand dollars (\$40,000) was from Michael B. McFarland and Sixty thousand (\$60,000) was from Karen M. Zimmerman. The Borrower agrees to hold two hundred (200) shares of common stock of CAPTAIN'S WHEEL RESORT, INC., a corporation organized and existing under the laws of the State of Idaho, and having as it's principal place of business at 100 Scenic Drive, Bayview, Idaho 83803. The stock is represented by Certificates 1 and 2 (100 shares each) which was assigned to the Borrower by Jean A. and James M. Campbell.

Borrower warrants that the stock represents 50% of the shares which have been issued to date by said corporation.

Said stock is to act as collateral for said loan. In the event of sale of the corporation, the Lenders are entitled to original monies lent with a 10% (ten percent) per annum interest there on. Lenders shall be entitled to use of Resort (ex. dining, refreshments, moorage) at no expense to them, for duration of loan. At Borrower's discretion, said stock may be assigned to Lenders, at which time all interest on loan will be considered paid to that date.

At time of signing this agreement, Lenders are responsible for any loans they acquired on their own behalf to make this loan to the Borrower.

In the event of Borrower's untimely demise (death), then surviving spouse, Karletta Berry of the same address as Borrower, will uphold loan agreement as written.



LENDERS :

BORROWER:

KAREN M. ZIMMERMAN

JERRY L. BERRY

MICHAEL M. McFARLAND

KARLETTA BERRY

DATED THIS DAY July 4, 2006

MINUTES OF SPECIAL MEETING OF SHAREHOLDERS

OF

CAPTAIN'S WHEEL RESORT, INC.

A special meeting of shareholders of the above captioned corporation was held on the date, time and at the place set forth in the written waiver of notice signed by the shareholders, fixing such time and place, and prefixed to the minutes of this meeting. The following shareholders, being all the shareholders of the corporation, were present: Jerry L. Berry, Michael B. McFarland and Karen M. Zimmerman.

The meeting was called to order by the president, Jerry L. Berry, who then appointed Michael B. McFarland to moderate the meeting and prepare the notes thereof.

Mr. McFarland then reported on his review of the corporate minute book, and the need to correct some deficiencies, including the absence of minutes of an organizational meeting or annual meetings of shareholders and directors. It was noted that, since the minute book had been maintained in the offices of the corporation's former attorney, Paul Daugherty, and Mr. Daugherty was not present at any of the meetings, whatever written minutes may have been prepared did not get placed in the minute book. Further, since the original incorporators and directors are no longer associated with the corporation, it is not reasonably possible to obtain any of the original minutes.

Upon motion duly made, seconded and carried, it was unanimously agreed that an updated organizational meeting should be conducted by the board of directors as soon as possible.

The next item of business was the election of directors. After discussion and nominations, the following were elected directors to serve in office until the next annual meeting of shareholders and

until qualified successors have been elected:

Jerry L. Berry,
Karletta G. Berry,
Karen M. Zimmerman,
Michael B. McFarland

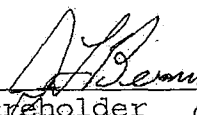
Upon a motion duly made, seconded and carried, the special meeting of shareholders was adjourned to permit the directors to conduct an special organizational meeting.

The meeting re-convened following the special meeting of the directors, with the same persons present.

The president reported on the special meeting of the board of directors, reviewed the minutes of the said meeting which included the adoption of the By-Laws, the election of officers and other pertinent matters.

Upon motion duly made, seconded and carried, the shareholders approved and ratified all of the actions taken by the board of directors.

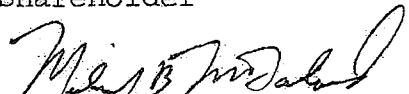
There being no further business and , upon a motion duly made, seconded and carried, the meeting was adjourned.



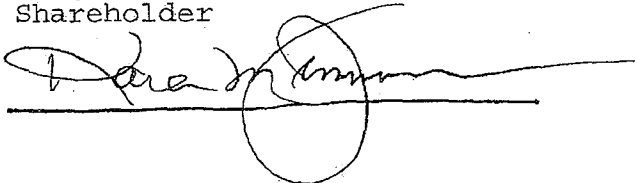
Shareholder



Shareholder



Shareholder



Shareholder

RESOLUTION IN LIEU OF SPECIAL MEETING OF BOARD OF DIRECTORS

OF

CAPTAIN'S WHEEL RESORT, INC.

The Board of Directors of Captain's Wheel Resort, Incorporated, an Idaho Corporation, in accordance with the by-laws, adopted the following resolutions made in lieu of a special meeting of the directors, effective November 6, 2006. By their signatures below, each of the directors waives formal notice of a meeting and consents to the resolutions set forth below:

WHEREAS, as a result of the death of Jerry L. Berry, President and Treasurer of the corporation, it is necessary to appoint a successor or successors, it was

RESOLVED, that Michael B. McFarland is appointed President of the corporation and Karen M. Zimmerman is appointed Treasurer of the corporation. The remaining offices are unchanged.

WHEREAS, in order to carry on the business of the corporation effectively, it is necessary that the President and Treasurer be authorized full access to the corporation's bank account, it was

RESOLVED, that Michael B. McFarland and Karen M. Zimmerman are authorized to sign checks drawn upon, and/or make withdrawals from all of the corporation's bank accounts, including without limitation the accounts at Wells Fargo Bank located in Hayden, Idaho.

Dated:

Director

Director

Director



RESOLUTION IN LIEU OF SPECIAL MEETING OF BOARD OF DIRECTORS

OF

CAPTAIN'S WHEEL RESORT, INC.

The Board of Directors of Captain's Wheel Resort, Incorporated, an Idaho Corporation, in accordance with the by-laws, adopted the following resolutions made in lieu of a special meeting of the directors, effective on the date set forth below. By their signatures below, each of the directors waives formal notice of a meeting and consents to the resolutions set forth below:

WHEREAS, as a result of the death of Jerry L. Berry, the surviving shareholders and directors have determined that they do not wish to remain involved in the operation of the corporation's business indefinitely, it was

RESOLVED, that the President of the corporation is authorized to list the corporation's business and real property, (which constitute all of the assets of the corporation) for sale with Treaty Rock Realty, Inc., a licensed real estate firm, at an initial asking price of two-million two-hundred thousand dollars (\$2,200,000). Such price may be adjusted to an amount no less than the value indicated by a current appraisal, the cost for which is authorized as a corporate expenditure.

The listing agency is authorized to place the property in the Multiple Listing Service (MLS) and other appropriate lists and publications; but is not to be authorized to place signs or other indicia that the property is for sale on or near the real property itself. The listing agreement will also provide that the property will be shown by appointment only, and to qualified buyers only. Acceptance of any offer which is less than the full asking price (or the appraised value plus realtor's commissions) will require approval by the Board of Directors.

Dated: November __, 2006

Director

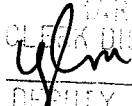
Director

Director

REX A. FINNEY
 FINNEY FINNEY & FINNEY, P.A.
 Attorneys at Law
 Old Power House Building
 120 East Lake Street, Suite 317
 Sandpoint, Idaho 83864-1366
 Phone: (208) 263-7712
 Fax: (208) 263-8211
 ISB No. 6313

STATE OF IDAHO
 COUNTY OF BONNER
 FIRST JUDICIAL DIST.

2007 FEB 27 P 1:53

MARIE SCOTT
 CLERK DISTRICT COURT

 DEPUTY

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE
 STATE OF IDAHO, IN AND FOR THE COUNTY OF BONNER

KARLETTA GRACE BERRY, a widow,	)	Case No. ^{CV} CR-2007- <u>00301</u>
KARLETTA GRACE BERRY, Personal)	
Representative of the Estate	)	SUMMONS
of Jerry Lee Roy Berry,)	
CAPTAIN'S WHEEL RESORT, INC.)	
an Idaho Corporation,)	
)	
Plaintiffs,)	
)	
v.)	
)	
MICHAEL B MCFARLAND, MICHAEL)	
B. MCFARLAND, P.A., and KAREN)	
ZIMMERMAN,)	
)	
Defendants.)	
)	

NOTICE: YOU HAVE BEEN SUED BY THE ABOVE-NAMED PLAINTIFFS. THE COURT MAY ENTER JUDGMENT AGAINST YOU WITHOUT FURTHER NOTICE UNLESS YOU RESPOND WITHIN 20 DAYS. READ THE INFORMATION BELOW:

TO: MICHAEL B MCFARLAND, MICHAEL B. MCFARLAND, P.A., and KAREN ZIMMERMAN:

You are hereby notified that in order to defend this lawsuit, an appropriate written response must be filed with the above designated Court within 20 days after service of this on you. If you fail to so respond, the Court may enter judgment against you as demanded by the plaintiff in the Complaint. A copy of the

ASSIGNED TO STEVE VERBY
 DISTRICT JUDGE

Complaint is served with this Summons. If you wish to seek the advice of representation by an attorney in this matter, you should do so promptly so that your written response, if any, may be filed in time and other legal rights protected.

An appropriate written response requires compliance with Rule 10(a) (1) and other Idaho Rules of Civil Procedure and shall also include:

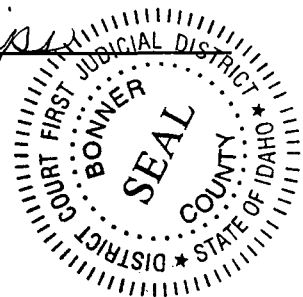
1. The title and number of this case.
2. If your response is an Answer to the Complaint, it must contain admissions or denials of the separate allegations of the Complaint and other defenses you may claim.
3. Your signature, mailing address and telephone number, or the signature, mailing address, and telephone number of your attorney.
4. Proof of mailing or delivery of a copy of your response to Plaintiff's attorney, as designated above.

To determine whether you must pay a filing fee with your response, contact the Clerk of the above-named Court.

DATED this 14 day of February, 2007.

CLERK OF THE DISTRICT COURT

BY: A. Phillips
Deputy



**IN THE DISTRICT COURT FOR THE FIRST JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF BONNER.**

STATE OF IDAHO
COUNTY OF BONNER
FIRST JUDICIAL DIST.

2007 FEB 27 P 1:53

KARLETTA GRACE BERRY, a widow,)
 KARLETTA GRACE BERRY, Personal)
 Representative of the Estate of JERRY LEE ROY)
 BERRY, CAPTAIN'S WHEEL RESORT, INC.)
 an Idaho Corporation,)

Plaintiff,)

vs.)

MICHAEL B. MCFARLAND, MICHAEL B.)
 MCFARLAND, P.A., and KAREN ZIMMERMAN,)

Defendants.)

DAVE SCOTT
CLERK DISTRICT COURT
dfm
DEPUTY

Case No. CV-2007-00301

AFFIDAVIT OF SERVICE

STATE OF IDAHO)
) :ss.
 County of Kootenai)

Lynn Taylor, being first duly sworn on oath, deposes and states as follows:

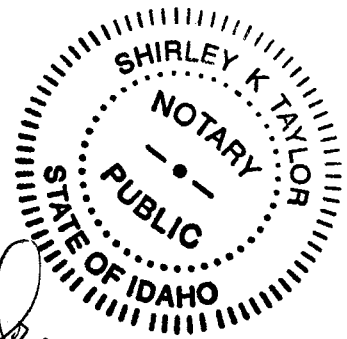
That he is over the age of eighteen (18) years and was not a party to the above entitled action; that he received a copy of the Summons and Complaint in the above-referenced matter and served the same upon Defendant, KAREN ZIMMERMAN by leaving a true and correct copy of said documents as follows:

 X with Defendant, KAREN ZIMMERMAN, personally, at 8729 W. Cloverleaf, Hayden, Idaho

Said documents were served on February 24, 2007, at 10:26 AM

Lynn Taylor

Lynn Taylor
 Taylor Investigations
 P. O. Box 5032
 Coeur d' Alene ID 83814-1956



SUBSCRIBED AND SWORN to before me, *Shirley K. Taylor*
 Notary Public for the State of Idaho this 26th of February, 2007

Notary Public for the State of Idaho
 Residing at Coeur d' Alene Idaho
 My Commission Expires July 14, 2011

STATE OF IDAHO
COUNTY OF BONNER
FIRST JUDICIAL DIST.
FEB 27 P 1:53

**IN THE DISTRICT COURT FOR THE FIRST JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF BONNER**

KARLETTA GRACE BERRY, a widow,)
KARLETTA GRACE BERRY, Personal)
Representative of the Estate of JERRY LEE ROY)
BERRY, CAPTAIN'S WHEEL RESORT, INC.)
an Idaho Corporation,)

Plaintiff,)

vs.)

MICHAEL B. MCFARLAND, MICHAEL B.)
MCFARLAND, P.A., and KAREN ZIMMERMAN,)

Defendants.)

Case No. CV-2007-00301

CLERK OF DISTRICT COURT
DEPUTY

AFFIDAVIT OF SERVICE

STATE OF IDAHO)
:ss.)
County of Kootenai)

Lynn Taylor, being first duly sworn on oath, deposes and states as follows:

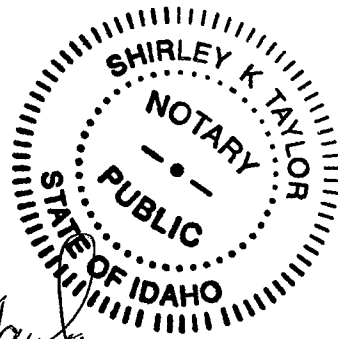
That he is over the age of eighteen (18) years and was not a party to the above entitled action; that he received a copy of the Summons and Complaint in the above-referenced matter and served the same upon Defendant, MICHAEL B. MCFARLAND, P.A. by leaving a true and correct copy of said documents as follows:

X with Defendant, MICHAEL B. MCFARLAND, Registered Agent of MICHAEL MCFARLAND P.A. personally, at 421 Coeur d' Alene Ave Ste 1L, Coeur d' Alene Idaho

Said documents were served on February 23, 2007, at 2:25 PM

Lynn Taylor

Lynn Taylor
Taylor Investigations
P. O. Box 5032
Coeur d' Alene ID 83814-1956



SUBSCRIBED AND SWORN to before me, *Shirley K Taylor*

Notary Public for the State of Idaho this 26th of February, 2007

Notary Public for the State of Idaho
Residing at Coeur d' Alene Idaho
My Commission Expires July 14, 2011

STATE OF IDAHO
COUNTY OF BONNER
FIRST JUDICIAL DIST.

2007 FEB 27 P 1:54

CLERK OF DISTRICT COURT
[Signature]
DEPUTY

**IN THE DISTRICT COURT FOR THE FIRST JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF BONNER**

KARLETTA GRACE BERRY, a widow,)
KARLETTA GRACE BERRY, Personal)
Representative of the Estate of JERRY LEE ROY)
BERRY, CAPTAIN'S WHEEL RESORT, INC.)
an Idaho Corporation,)

Plaintiff,)

vs.)

MICHAEL B. MCFARLAND, MICHAEL B.)
MCFARLAND, P.A., and KAREN ZIMMERMAN,)

Defendants.)

Case No. CV-2007-00301

AFFIDAVIT OF SERVICE

STATE OF IDAHO)
:ss.)
County of Kootenai)

Lynn Taylor, being first duly sworn on oath, deposes and states as follows:

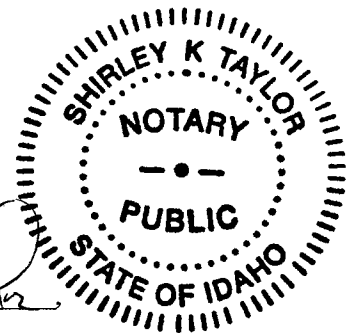
That he is over the age of eighteen (18) years and was not a party to the above entitled action; that he received a copy of the Summons and Complaint in the above-referenced matter and served the same upon Defendant, MICHAEL B. MCFARLAND, by leaving a true and correct copy of said documents as follows:

X with Defendant, MICHAEL B. MCFARLAND, personally, at 421 Coeur d' Alene Ave Ste 1L,
Coeur d' Alene Idaho

Said documents were served on February 23, 2007, at 2:25 PM

[Signature: Lynn Taylor]

Lynn Taylor
Taylor Investigations
P. O. Box 5032
Coeur d' Alene ID 83814-1956



SUBSCRIBED AND SWORN to before me, *[Signature: Shirley K Taylor]*
Notary Public for the State of Idaho this 26th of February, 2007

Notary Public for the State of Idaho
Residing at Coeur d' Alene Idaho
My Commission Expires July 14, 2011

STATE OF IDAHO
COUNTY OF BONNER
JUDICIAL DIST.

2007 MAR 23 P 3:48

LAINE SCOTT
CLERK DISTRICT COURT
LS
DEPUTY

J.P. Whelan, P.C.
Attorney at Law
213 N. 4th Street
Coeur d' Alene, Idaho 83814
Telephone: (208) 664-5891
Facsimile: (208) 664-2240
ISB No. 6083

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE STATE OF
IDAHO, IN AND FOR THE COUNTY OF BONNER

KARLETTA GRACE BERRY, a widow,
KARLETTA GRACE BERRY, Personal
Representative of the Estate of Jerry
Lee Roy Berry, CAPTAIN'S WHEEL
RESORT, INC., an Idaho Corporation,

Plaintiffs,

vs.

MICHAEL B. MCFARLAND, MICHAEL B.
MCFARLAND, P.A., and KAREN
ZIMMERMAN,

Defendants.

Case No. CV-07-00301

STIPULATION FOR CHANGE OF VENUE

Plaintiffs, Karletta Grace Berry, et al., by and through their attorney of
record, Rex A. Finney, and Defendants, Michael B. McFarland, Michael B.
McFarland, P.A. and Karen Zimmerman, by and through their attorney, John P.

STIPULATION FOR CHANGE OF VENUE- 1

Whelan, hereby stipulate to change venue from Bonner County to Kootenai County.

Dated: 3/23/07

Rex A. Finney

Rex A. Finney
Attorney for Plaintiffs

Dated: ~~3~~-14-07

John P. Whelan

John P. Whelan
Attorney for Defendants

STIPULATION FOR CHANGE OF VENUE- 2

J.P. Whelan, P.C.
Attorney at Law
213 N. 4th Street
Coeur d' Alene, Idaho 83814
Telephone: (208) 664-5891
Facsimile: (208) 664-2240
ISB No. 6083

STATE OF IDAHO
County of Bonner } ss
FILED 3-30-07
AT 3:21 O'CLOCK P M
CLERK, DISTRICT COURT
Ullm

STATE OF IDAHO } ss
COUNTY OF KOOTENAI }
FILED: 739122

2007 APR -4 PM 4: 35

CLERK DISTRICT COURT

DEPUTY
[Signature]
[Signature]

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE STATE OF
IDAHO, IN AND FOR THE COUNTY OF BONNER

KARLETTA GRACE BERRY, a widow,
KARLETTA GRACE BERRY, Personal
Representative of the Estate of Jerry
Lee Roy Berry, CAPTAIN'S WHEEL
RESORT, INC., an Idaho Corporation,

Plaintiffs,

vs.

MICHAEL B. MCFARLAND, MICHAEL B.
MCFARLAND, P.A., and KAREN
ZIMMERMAN,

Defendants.

Case No. CV-07-00301

CV 07-2409

ORDER GRANTING CHANGE OF VENUE

The Court, having before it the Stipulation for Change of Venue; NOW,
THEREFORE:

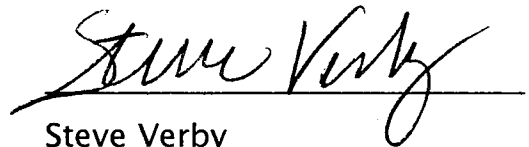
IT IS HEREBY ORDERED that the Bonner County District Court is not the

ORDER GRANTING CHANGE OF VENUE- 1

proper venue for the above-entitled matter.

IT IS HEREBY FURTHER ORDERED that this case shall be reassigned to the Kootenai County District Court.

Dated: 3/30/07

A handwritten signature in black ink, appearing to read "Steve Verby", written over a horizontal line.

Steve Verby
District Judge

ORDER GRANTING CHANGE OF VENUE- 2

CERTIFICATE OF CLERK'S RULE 77(d) SERVICE

I hereby certify that a true and correct copy, with the clerk's filing stamp thereon showing the date of filing, of the foregoing, was served by U.S. Mail, postage prepaid, this 2 day of ~~March~~ April 2007, and was addressed as follows:

Rex A. Finney
Finney Finney & Finney, P.A.
Attorneys at Law
Old Power House Building
120 East Lake Street, Suite 317
Sandpoint, Idaho 83864

J.P. Whelan, P.C.
Attorney at Law
213 N. 4th Street
Coeur d'Alene, Idaho 83816

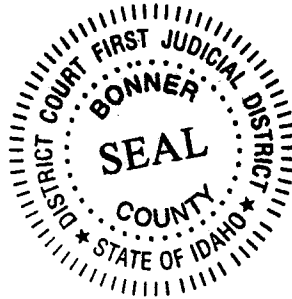
By: Jody Moreland
Clerk of Court

STATE OF IDAHO
County of Bonner

I, Marie Scott, Clerk of the District Court of the First Judicial District of the State of Idaho, in and for the County of Bonner, do hereby certify that the foregoing instrument is a true and correct copy of the original thereof now on file in this office. Witness my hand and seal of said Court on this,

the 2 day of April 2007
MARIE SCOTT, Clerk

By Jody Moreland Deputy



STATE OF IDAHO } SS
COUNTY OF KOOTENAI }
FILED: 740502

2007 APR 16 AM 9:25

CLERK DISTRICT COURT
Joanna Larkin
DEPUTY

J.P. Whelan, P.C.
Attorney at Law
213 N. 4th Street
Coeur d' Alene, Idaho 83814
Telephone: (208) 664-5891
Facsimile: (208) 664-2240
ISB No. 6083

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE STATE OF
IDAHO, IN AND FOR THE COUNTY OF KOOTENAI

KARLETTA GRACE BERRY, a widow,
KARLETTA GRACE BERRY, Personal
Representative of the Estate of Jerry
Lee Roy Berry, CAPTAIN'S WHEEL
RESORT, INC., an Idaho Corporation,

Plaintiffs,

vs.

MICHAEL B. MCFARLAND, MICHAEL B.
MCFARLAND, P.A., and KAREN
ZIMMERMAN,

Defendants.

Case No. CV-07-2409

ANSWER; COUNTERCLAIM; DEMAND
FOR JURY TRIAL

Filing Fee: \$ 14.00

Defendants, Michael B. McFarland, Michael B. McFarland, P.A. and Karen Zimmerman, by and through their attorney John P. Whelan, respond to the Complaint of Plaintiff as follows:

1. Defendants admit the following paragraphs:

ANSWER; COUNTERCLAIM; DEMAND FOR JURY TRIAL- 1

1, 2, 5, 6 (first sentence), 11, 14 (however, Defendants do not own real property together), 16, 18, 19, first sentence of 27 only, 28, 30 (joint tenancy portion denied), 31, 32.

2. Defendants deny the following paragraphs:

6 (second sentence), 7, 8, 9, 10, 12, 13, 15, 22, 24, 25, 26, 27 (balance of paragraph), 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57-72 except as noted above

3. Defendants lack sufficient information and belief to respond to the following paragraphs, therefore they are denied:

3, 4, 17, 20, 21, 23.

4. Defendants deny any other paragraphs not specifically admitted herein.

AFFIRMATIVE DEFENSES

1. The Complaint and each cause of action thereof, fails to state facts sufficient to constitute a cause of action.

2. Accord and Satisfaction.

3. Waiver.

4. Estoppel due to the fact that Plaintiff authorized the corporate action which she now contests.

5. Laches.

6. Unclean Hands

7. Standing

8. Karletta Berry does not have standing to speak for Captain's Wheel Resort, Inc. and has no authority to pursue litigation on behalf of the corporation.

9. Karletta Berry has failed to satisfy the conditions precedent to a

ANSWER; COUNTERCLAIM; DEMAND FOR JURY TRIAL- 2

derivative lawsuit.

COUNTERCLAIM

1. Michael B. McFarland and Karen Zimmerman are acting directors of Captain's Wheel Resort, Inc. ("Corporation"), an Idaho Corporation in good standing.

2. Karletta Grace Berry (hereinafter "Berry" was an acting director of the Corporation until she was removed for cause by the board of directors. As such, Berry had access to corporate records and corporate funds. Berry has failed to turn the corporate records over to the board of directors and a court order is necessary and proper to compel Berry to return the corporate records to the corporation. It is also necessary and proper to have Berry account for any and all corporate funds that have come into her possession.

3. Jerry Lee Roy Berry (hereinafter "Jerry") was married to counter-defendant Berry until his death recently. Jerry was a director and corporate officer of the corporation until his death. As such, Jerry routinely had financial dealings and transaction with the corporation. The corporate records reveal that Jerry had borrowed corporate funds, but the same records do not show repayment. Jerry's estate is now responsible for the repayment of the debts, the exact amount of which will be established by proof at trial of this matter.

4. It is believed that the estate of Jerry will seek set-offs from the corporation against the debt owed to the corporation by Jerry's estate. A present controversy exists as to the validity of debts claimed against the corporation by Jerry's estate. Accordingly, the corporation and Defendants McFarland and Zimmerman, seek a declaration from the Court declaring the rights and obligations of the interested parties.

5. In the event that the evidence suggests that either Berry and/or

ANSWER; COUNTERCLAIM; DEMAND FOR JURY TRIAL- 3

Jerry has wrongfully converted corporate assets to their own use, damages are sought to award to the corporation for such conduct.

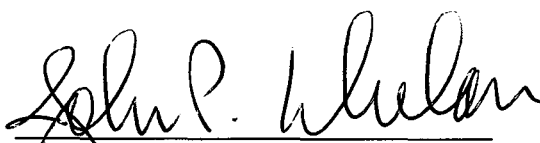
DEFENDANTS REQUEST A TRIAL BY JURY

Wherefore, Defendants pray for judgment as follows:

1. That Plaintiff take nothing by pursuant to its Complaint;
2. That Defendants recover the reasonable attorney fees they have incurred in defending this action in accordance with I.C. 12-120, 12-121 or other applicable statutes;
3. For a declaration from the Court of the rights and obligations of the parties;
4. For such set-offs as may be warranted;
5. For a money judgment in favor of the corporate entity if appropriate;
6. For such other and further relief as the Court deems proper.

DATED this 13 day of April, 2007.

JOHN P. WHELAN, P.C.

By: 

John P. Whelan
Attorney for Defendants

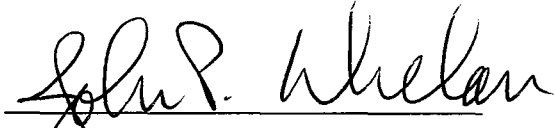
ANSWER; COUNTERCLAIM; DEMAND FOR JURY TRIAL- 4

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 13 day of April, 2007, I caused to be served a true and correct copy of the foregoing by the method indicated below, and addressed as indicated below:

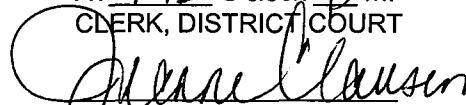
Rex A. Finney
Finney, Finney & Finney
120 East Lake Street, Suite 317
Sandpoint, ID 83865

- U.S. Mail, Postage Prepaid
 Hand Delivered
 Overnight Mail
 Facsimile to:



John P. Whelan

STATE OF IDAHO)
County of KOOTENAI)
FILED 5-11-07)
AT 4:13 O'clock P.m.)
CLERK, DISTRICT COURT)


Deputy

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE
STATE OF IDAHO IN AND FOR THE COUNTY OF KOOTENAI

KARLETTA GRACE BERRY, et al,	)	Case No. CV 2007 2409
)	
Plaintiff,	)	NOTICE OF SCHEDULING
vs.	)	CONFERENCE PURSUANT TO
	)	I.R.C.P. 16(b) & 16(c)
MICHAEL B. MCFARLAND, et al,)	
)	
Defendant.)	

The complaint in this matter having been filed on 2-14-07 the Court determines that this matter is appropriate for a Scheduling Order under *I.R.C.P. 16(b)*.

IT IS ORDERED, that if by no later than **6-6-07** all parties agree on all matters set forth on the attached Stipulation for Scheduling, and all the parties have completed, signed and filed such Stipulation with the Clerk of Court, with a copy to the Court in chambers, the Court shall issue a Scheduling Order setting the matter for trial with the following deadlines:

1. Plaintiff shall disclose expert witnesses by **180 days before trial**.
2. Defendants shall disclose expert witnesses by **120 days before trial**.
3. Last day for hearing MSJ - **90 days before trial**.
4. Last day for filing pretrial motions - **21 days before trial**.
5. Last day for filing motions *in limine* concerning designated witnesses or exhibits - **7 days before trial**.

If all the parties (or their attorneys) have signed the Stipulation for Scheduling and the Scheduling Order has been filed by the Court, then the Status Conference scheduled below is **vacated**.

In the event the parties are not able to comply with the above,

IT IS HEREBY ORDERED that a Status Conference in this matter will be at **4:00 PM on 6-13-07** in one of the courtrooms of this Court, at the Kootenai County

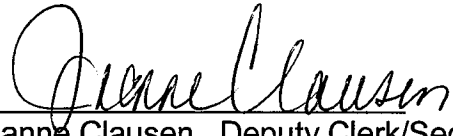
Courthouse, Coeur d'Alene, Idaho. A Scheduling Order under *I.R.C.P. 16(b)* will issue following this conference. All parties must appear at this time in person or by counsel. Counsel must be the handling attorney, or be fully familiar with the case, and have authority to bind his or her client and law firm on all matters set forth in *I.R.C.P. 16(a)* and *16(b)*.

IT IS FURTHER ORDERED that prior to the above hearing plaintiff shall serve a copy of this order on any party who first appears in this action after the date of this order. Proof of such service shall be filed with the Court.

IT IS FURTHER ORDERED that in addition to any original brief or memorandum lodged with the Clerk of Court, counsel shall also provide the Court with a copy. To the extent counsel rely on legal authorities not contained in the *Idaho Reports*, a copy of each case cited shall be attached to the Court's copy of the brief or memorandum.

DATED this 11 day of May, 2007.

By Order of John T. Mitchell, District Judge



Jeanne Clausen, Deputy Clerk/Secretary

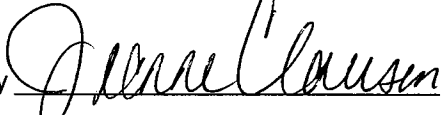
CERTIFICATE OF MAILING

I hereby certify that on 11 May, 2007, true copies of the foregoing were mailed, postage prepaid, or was sent by interoffice mail to:

Rex A. Finney
120 E Lake St, Ste 317
Sandpoint, ID 83864

208-263-8211

J.P. Whelan
213 N. 4th St
Coeur d'Alene, ID 83814 664-2240

By 

Jeanne Clausen, Deputy Clerk/Secretary

STATE OF IDAHO)
 County of KOOTENAI)^{ss}
 FILED _____
 AT _____ O'clock ____ m
 CLERK, DISTRICT COURT

 Deputy

**IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE
 STATE OF IDAHO IN AND FOR THE COUNTY OF KOOTENAI**

KARLETTA GRACE BERRY, et al,)
)
 Plaintiff,)
 vs.)
)
MICHAEL B. MCFARLAND, et al,)
)
 Defendant.)
 _____)

Case No. **CV 2007 2409**
STIPULATION FOR SCHEDULING
 Case filed 2-14-07

The parties stipulate that this matter is at issue and to the following:

- 2. Plaintiff shall disclose expert witnesses by **180 days before trial.**
- 3. Defendants shall disclose expert witnesses by **120 days before trial.**
- 5. Last day for hearing MSJ - **90 days before trial.**
- 6. Last day for filing pretrial motions - **21 days before trial.**
- 7. Last day for filing motions *in limine* concerning designated witnesses or exhibits - **7 days before trial.**
- 8. Set for () court trial for _____ day(s)
 () 12 person jury trial for _____ day(s)

The parties reserve the right to amend this stipulation by agreement of all parties, subject to Court approval; each party reserves the right to seek amendment hereof by Court order, and to request further status conferences for such purpose, in accordance with *I.R.C.P. 16(a)* and *16(b)*.

Dated this _____ day of _____, 20____.
 (To be signed by all parties or their counsel)

 Rex A. Finney

 J.P. Whelan

STATE OF IDAHO }
COUNTY OF KOOTENAI } SS
FILED: *NSJ*
10:35 AM
2007 MAY 15 AM 10: 35

CLERK DISTRICT COURT
Anna Baker
DEPUTY *NY*

J.P. Whelan, P.C.
Attorney at Law
213 N. 4th Street
Coeur d' Alene, Idaho 83814
Telephone: (208) 664-5891
Facsimile: (208) 664-2240
ISB No. 6083

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE STATE OF
IDAHO, IN AND FOR THE COUNTY OF KOOTENAI

KARLETTA GRACE BERRY, a widow,
KARLETTA GRACE BERRY, Personal
Representative of the Estate of Jerry
Lee Roy Berry, CAPTAIN'S WHEEL
RESORT, INC., an Idaho Corporation,

Plaintiffs,

vs.

MICHAEL B. MCFARLAND, MICHAEL B.
MCFARLAND, P.A., and KAREN
ZIMMERMAN,

Defendants.

Case No. CV-07-2409

MOTION TO DISQUALIFY JUDGE

COMES NOW, the Defendants, Michael B. McFarland, Michael B. McFarland, P.A., and Karen Zimmerman, by and through their attorney of record, John P. Whelan, P.C., and moves this Court pursuant to I.R.C.P. 40(d)(1) for an Order disqualifying the Honorable John Mitchell in this matter and assigning a new district judge. This motion is not made to hinder, delay or

MOTION TO DISQUALIFY JUDGE- 1

STATE OF IDAHO
COUNTY OF KOOTENAI
FILED 3-30-07
AT 3:30 O'CLOCK P.M.
Jenni Clauson
CLERK DISTRICT COURT
DEPUTY

J.P. Whelan, P.C.
Attorney at Law
213 N. 4th Street
Coeur d' Alene, Idaho 83814
Telephone: (208) 664-5891
Facsimile: (208) 664-2240
ISB No. 6083

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF KOOTENAI

KARLETTA GRACE BERRY, a widow,
KARLETTA GRACE BERRY, Personal
Representative of the Estate of Jerry
Lee Roy Berry, CAPTAIN'S WHEEL
RESORT, INC., an Idaho Corporation,

Plaintiffs,

vs.

MICHAEL B. MCFARLAND, MICHAEL B.
MCFARLAND, P.A., and KAREN
ZIMMERMAN,

Defendants.

Case No. CV-07-2409

ORDER DISQUALIFYING JUDGE

The Court, having before it the Defendants' Motion to Disqualify the Honorable John Mitchell; NOW, THEREFORE:

IT IS HEREBY ORDERED that the Honorable John Mitchell is hereby disqualified in the above-entitled matter.

IT IS HEREBY FURTHER ORDERED that this case shall be reassigned to a

ORDER DISQUALIFYING JUDGE- 1

FIRST JUDICIAL DISTRICT COURT, STATE OF IDAHO
IN AND FOR THE COUNTY OF KOOTENAI
324 W. GARDEN AVENUE
COEUR D'ALENE, IDAHO 83814

FILED 5/21/2007 AT 09:06 AM
STATE OF IDAHO, COUNTY OF KOOTENAI SS
CLERK OF THE DISTRICT COURT

BY  DEPUTY

KARLETTA GRACE BERRY, ETAL.

VS.

MICHAEL B MCFARLAND, ETAL.

Case No: CV-2007-0002409

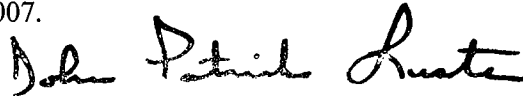
ORDER ASSIGNING DISTRICT JUDGE
ON DISQUALIFICATION WITHOUT CAUSE

The Honorable John T. Mitchell, District Judge, being disqualified pursuant to I.R.C.P Rule 40(d)(1) from proceeding further in the above entitled action:

IT IS HEREBY ORDERED that the Honorable John P. Luster, District Judge of the First Judicial District of the State of Idaho, is hereby assigned to take jurisdiction of the above entitled action for all further proceedings herein. The following alternate judges are hereby assigned to preside in this case: Charles W. Hosack, John T. Mitchell, John P. Luster, Lansing L. Haynes; Fred M. Gibler, James R. Michaud, and George R. Reinhardt, III.

IT IS FURTHER ORDERED that the Clerk of the District Court of Kootenai County shall cause a copy of this Order Assigning District Judge on Disqualification to be mailed or faxed to counsel for each of the parties, or if either of the parties are represented pro se, directly to the pro se litigant.

DATED this 21st day of May, 2007.



John P. Luster, Administrative District Judge

I certify that copies of this Order were served as follows:

Honorable John P. Luster,

Plaintiff's Counsel: Rex A. Finney
120 East Lake Street, Ste 317
Sandpoint ID 83864
Mailed _____ Hand Delivered _____ Faxed (208) 263-8211

Defendant's Counsel: John P Whelan
213 North Fourth Street
Coeur d'Alene ID 83814
Mailed _____ Hand Delivered _____ Faxed (208) 664-2240

Dated: May _____, 2007
Daniel J. English
Clerk Of The District Court

By: 

REX A. FINNEY
FINNEY FINNEY & FINNEY, P.A.
Attorneys at Law
Old Power House Building
120 East Lake Street, Suite 317
Sandpoint, Idaho 83864
Phone: (208) 263-7712
Fax: (208) 263-8211
ISB No. 6313

STATE OF IDAHO }
 COUNTY OF KOOTENAI } SS
 FILED: *CAF*
 19-90
 2007 MAY 31 PH 3:31
 CLERK DISTRICT COURT
[Signature]
 DEPUTY

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF KOOTENAI

KARLETTA GRACE BERRY, a widow,	)	Case No. CV-2007-2409
KARLETTA GRACE BERRY, Personal)	
Representative of the Estate	)	MOTION TO DISQUALIFY
of Jerry Lee Roy Berry,)	
CAPTAIN'S WHEEL RESORT, INC.,)	
an Idaho Corporation,)	
)	
Plaintiffs,)	
)	
v.)	
)	
MICHAEL B. MCFARLAND, MICHAEL)	
B. MCFARLAND, P.A., and KAREN)	
ZIMMERMAN,)	
)	
Defendant.)	
)	

COMES NOW, the Plaintiff, through counsel, Rex A. Finney,
 Finney Finney & Finney, P.A. and move to disqualify the
 Honorable John P. Luster, District Judge, assigned to this
 action pursuant to I.R.C.P. 40(d) (1), as follows:

1. This motion is not made to hinder, delay or obstruct
 the administration of justice.

REX A. FINNEY
FINNEY FINNEY & FINNEY, P.A.
Attorneys at Law
Old Power House Building
120 East Lake Street, Suite 317
Sandpoint, Idaho 83864
Phone: (208) 263-7712
Fax: (208) 263-8211
ISB No. 6313

STATE OF IDAHO }
COUNTY OF KOOTENAI } SS
FILED: *ML 5:30* *CV*
2007 MAY 31 PM 3:31
CLERK DISTRICT COURT
[Signature]
DEPUTY

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF KOOTENAI

KARLETTA GRACE BERRY, a widow,) Case No. CV-2007-2409
KARLETTA GRACE BERRY, Personal)
Representative of the Estate) MOTION TO ASSIGN TO DISTRICT
of Jerry Lee Roy Berry,) JUDGE VERBY
CAPTAIN'S WHEEL RESORT, INC.,)
an Idaho Corporation,)
)
Plaintiffs,)
)
v.)
)
MICHAEL B. MCFARLAND, MICHAEL)
B. MCFARLAND, P.A., and KAREN)
ZIMMERMAN,)
)
Defendants.)
)

COMES NOW, the Plaintiff, by and through counsel, and moves
the court to confirm assignment or alternatively to assign the
case to District Judge Verby. A Notice Of Scheduling Conference
pursuant to I.R.C.P 16(b) & 16(c), signed by the clerk, was
entered in the file, setting the matter for hearing before Judge
Mitchell, and an Order Assigning District Judge On

MOTION TO ASSIGN TO DISTRICT JUDGE VERBY - 1

REX A. FINNEY
FINNEY FINNEY & FINNEY, P.A.
 Attorneys at Law
 Old Power House Building
 120 East Lake Street, Suite 317
 Sandpoint, Idaho 83864
 Phone: (208) 263-7712
 Fax: (208) 263-8211
 ISB No. 6313

STATE OF IDAHO
 COUNTY OF KOOTENAI
 FILED: 11:34 AM
 DISTRICT COURT
 DEPUTY

**IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF
 THE STATE OF IDAHO, IN AND FOR THE COUNTY OF KOOTENAI**

KARLETTA GRACE BERRY, a)
widow, KARLETTA GRACE BERRY,)
Personal Representative of)
the Estate of Jerry Lee Roy)
Berry, CAPTAIN'S WHEEL)
RESORT, INC., an Idaho)
Corporation,)

Plaintiffs,)

v.)

MICHAEL B. MCFARLAND, MICHAEL)
B. MCFARLAND, P.A., and KAREN)
ZIMMERMAN,)

Defendant.)

Case No. CV-2007-2409
ORDER TO DISQUALIFY

PURSUANT TO the Motion To Disqualify and I.R.C.P. 40(d)(1),
 it is hereby ordered that the Honorable John P. Luster, District
 Judge, is disqualified.

DATED this 6th day of June, 2007.



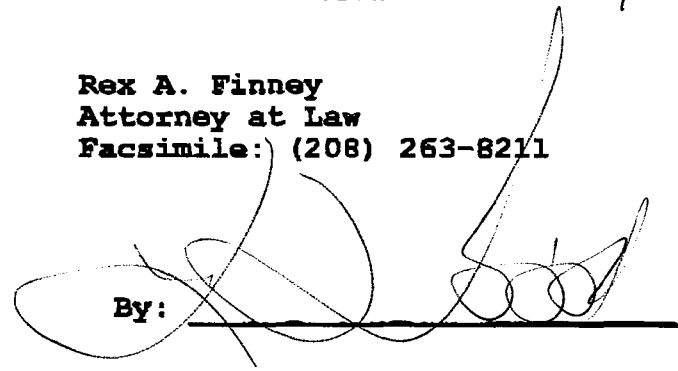
 District Judge

CLERK'S RULE 77 (d) MAILING

I hereby certify that a true and correct copy, with the clerk's filing stamp thereon showing the date of filing, of the ORDER TO DISQUALIFY was served by facsimile, this 7 day of June, 2007, and was addressed as follows:

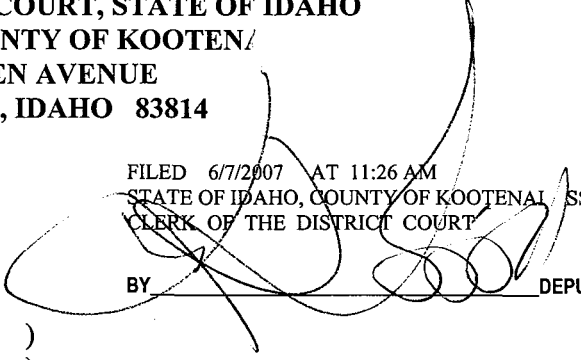
J. P. Whelan
Attorney at Law
Facsimile: (208) 664-2240

Rex A. Finney
Attorney at Law
Facsimile: (208) 263-8211

By: 

FIRST JUDICIAL DISTRICT COURT, STATE OF IDAHO
IN AND FOR THE COUNTY OF KOOTENAI
324 W. GARDEN AVENUE
COEUR D'ALENE, IDAHO 83814

FILED 6/7/2007 AT 11:26 AM
STATE OF IDAHO, COUNTY OF KOOTENAI, SS
CLERK OF THE DISTRICT COURT

BY  DEPUTY

KARLETTA GRACE BERRY, ETAL.)

VS.)

MICHAEL B MCFARLAND, ETAL.)

Case No: CV-2007-0002409


ORDER ASSIGNING DISTRICT JUDGE
ON DISQUALIFICATION WITHOUT CAUSE

The Honorable John Patrick Luster, District Judge, being disqualified pursuant to I.R.C.P Rule 40(d)(1) from proceeding further in the above entitled action:

IT IS HEREBY ORDERED that the Honorable Steve Verby, District Judge of the First Judicial District of the State of Idaho, is hereby assigned to take jurisdiction of the above entitled action for all further proceedings herein. The following alternate judges are hereby assigned to preside in this case: Charles W. Hosack, John T. Mitchell, John P. Luster, Lansing L. Haynes; Fred M. Gibler, James R. Michaud, and George R. Reinhardt, III.

IT IS FURTHER ORDERED that the Clerk of the District Court of Kootenai County shall cause a copy of this Order Assigning District Judge on Disqualification to be mailed or faxed to counsel for each of the parties, or if either of the parties are represented pro se, directly to the pro se litigant.

DATED this 7 day of June, 2007.



John P. Luster, Administrative District Judge

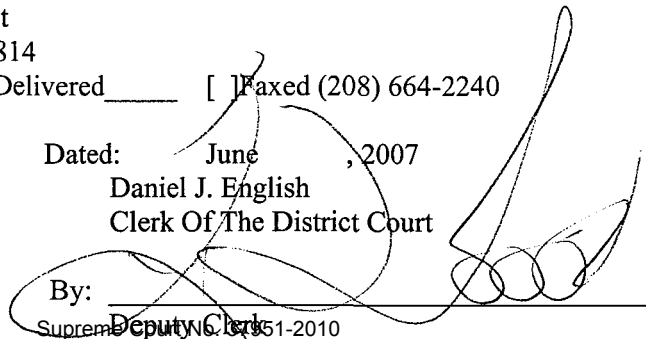
I certify that copies of this Order were served as follows:

Honorable Steve Verby, FAX 208-263-0896

Plaintiff's Counsel: Rex A. Finney
120 East Lake Street, Ste 317
Sandpoint ID 83864
Mailed _____ Hand Delivered _____ Faxed (208) 263-8211

Defendant's Counsel: John P Whelan
213 North Fourth Street
Coeur d'Alene ID 83814
Mailed _____ Hand Delivered _____ Faxed (208) 664-2240

Dated: June , 2007
Daniel J. English
Clerk Of The District Court

By: 
Deputy Clerk

STATE OF IDAHO }
COUNTY OF KOOTENAI } SS
FILED: *[Signature]*
2007 JUN 20 PM 3: 23

J.P. Whelan, P.C.
Attorney at Law
213 N. 4th Street
Coeur d' Alene, Idaho 83814
Telephone: (208) 664-5891
Facsimile: (208) 664-2240
ISB No. 6083

CLERK DISTRICT COURT
[Signature]
DEPUTY

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF KOOTENAI

KARLETTA GRACE BERRY, a widow,
KARLETTA GRACE BERRY, Personal
Representative of the Estate of Jerry
Lee Roy Berry, CAPTAIN'S WHEEL
RESORT, INC., an Idaho Corporation,

Plaintiffs,

vs.

MICHAEL B. MCFARLAND, MICHAEL B.
MCFARLAND, P.A., and KAREN
ZIMMERMAN,

Defendants.

Case No. CV-07-2409

NOTICE OF SERVICE

PLEASE TAKE NOTICE that Defendants, Michael B. McFarland, Michael B. McFarland, P.A and Karen Zimmerman served their Interrogatories, Requests for Production And Requests for Admissions to Plaintiffs, Set One in compliance with Rule 5, Idaho Rules of Civil Procedure.

NOTICE OF SERVICE-1

STATE OF IDAHO }
COUNTY OF KOOTENAI } SS
FILED:

2007 JUL 25 AM 9:34

CLERK DISTRICT COURT

Nease Jensen
DEPUTY

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF KOOTENAI

KARLETTA GRACE BERRY, a widow,)
KARLETTA GRACE BERRY, Personal)
Representative of the Estate of Jerry Lee)
Roy Berry, CAPTAIN'S WHEEL RESORT,)
INC., an Idaho Corporation,)

Plaintiffs,)

vs.)

MICHAEL B. MCFARLAND, MICHAEL)
B. MCFARLAND, P.A., and KAREN)
ZIMMERMAN,)

Defendants.)

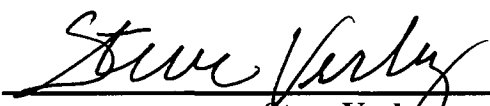
Case No. CV 07-2409

SCHEDULING ORDER

IT IS HEREBY ORDERED that each party shall complete and file with the Clerk of Court the attached Scheduling Form. A copy of the Scheduling Form filed with the court shall be served on all parties and one copy shall be submitted to Judge Verby at his chambers in Sandpoint, 215 S. First Avenue, Sandpoint, ID 83864. In the alternative, a written stipulation containing the requested information may be submitted.

The Scheduling Form or stipulation must be completed and filed within fourteen (14) days from the date of this Order. If not returned, this matter will be set for trial at the Court's discretion.

DATED this 24th day of July, 2007.



Steve Verby
District Judge

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was mailed, U.S. postage prepaid, this 24 day of July, 2007, to the following:

Rex A. Finney
Finney, Finney & Finney, P.A.
Old Power House Building
120 East Lake Street, Suite 317
Sandpoint, ID 83864

J.P. Whelan, P.C.
Attorney at Law
213 N. 4th Street
Coeur d'Alene, ID 83814

Linda Cappel
Deputy Clerk of Benner County

SCHEDULING FORM

In response to the Scheduling Order, please complete this form and file it within 14 days, with service of copies to all parties and one copy to Judge Verby's chambers in Sandpoint.

1. Case Title: Karletta Grace Berry, etal v. Michael B. Mcfarland, etal.
2. Case Number: CV-2007-0002409 (Kootenai County)
3. Nature of Claims: _____
4. Court or Jury Case: _____
5. Number of Days Needed for Trial: _____
(If requesting more than five (5) days, please explain the reasons below.)
6. Should the court order mediation? Yes _____ No _____
7. Will you schedule a motion for summary judgment? Yes _____ No _____
Note: If you wish to schedule a motion for summary judgment, please contact Cherie Moore, (208) 265-1445, as soon as possible for scheduling.
8. The undersigned agrees to the following pretrial schedule unless specifically noted otherwise:
 - a. Plaintiffs disclose expert witnesses by **90** days before trial.
 - b. Defendants disclose expert witnesses by **60** days before trial.
 - c. **Last day** for hearing motions for summary judgment is **60 days** before trial.
 - d. The other deadlines in the court's standard pre-trial order.
9. Comments: _____

Dated this _____ day of _____, 2007.

Sign and Print or Type Attorney's Name

Attorney for _____
Print or Type Client's Name

REX A. FINNEY
FINNEY FINNEY & FINNEY, P.A.
Attorneys at Law
Old Power House Building
120 East Lake Street, Suite 317
Sandpoint, Idaho 83864
Phone: (208) 263-7712
Fax: (208) 263-8211
ISB No. 6313

STATE OF IDAHO }
COUNTY OF KOOTENAI } SS
FILED

2007 JUL 20 PM 3:15

316 pkmc

CLERK DISTRICT COURT
Cody Hill
DEPUTY

2m.

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF KOOTENAI

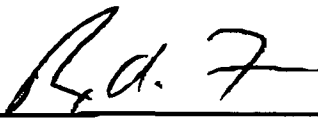
KARLETTA GRACE BERRY, a widow,	)	Case No. CV-2007-2409
KARLETTA GRACE BERRY, Personal)	
Representative of the Estate	)	NOTICE OF SERVING PLAINTIFF'S
of Jerry Lee Roy Berry,	)	AND RESPONSES TO REQUESTS FOR
CAPTAIN'S WHEEL RESORT, INC.,	)	ADMISSIONS, SET ONE
an Idaho Corporation,)	
)	
Plaintiff,)	
)	
v.)	
)	
MICHAEL B. MCFARLAND, MICHAEL)	
B. MCFARLAND, P.A., and KAREN)	
ZIMMERMAN,)	
)	
Defendant.)	
)	

COMES NOW the Plaintiffs, KARLETTA GRACE BERRY, a widow,
KARLETTA GRACE BERRY, Personal Representative of the Estate of
Jerry Lee Roy Berry, and CAPTAIN'S WHEEL RESORT, INC., an Idaho
Corporation, and gives notice that on the 20th day of July
Responses to the Defendant's Requests For Admissions from, Set
One dated June 20, 2007, were faxed and mailed to JP Whelan at
(208)-664-2240 and 213 N. 4th Street, Coeur d'Alene, Idaho 83814,

NOTICE OF SERVING PLAINTIFF'S ANSWERS AND RESPONSES TO REQUESTS FOR
ADMISSIONS TO PLAINTIFFS, SET ONE - 1

respectively.

DATED this 20 day of July, 2007.

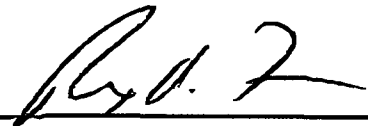


REX A. FINNEY
Attorney at Law

CERTIFICATE OF SERVICE

I hereby certify that the original of the foregoing was delivered by first class mail, postage prepaid, this 20 day of July, 2007, and was addressed as follows:

J.P. WHELAN P.C.
Attorney at law
213 N. 4th Street
Coeur d'Alene, Idaho 83814
And by fax: 208-664-2240



STATE OF IDAHO }
COUNTY OF KOOTENAI } SS
FILED 2:49pm

SCHEDULING FORM

2007 JUL 31 PM 2:49

In response to the Scheduling Order, please complete this form and file it within 14 days, with service of copies to all parties and one copy to Judge Verby's chambers in Sandpoint.

1. Case Title: Karletta Grace Berry, etal v. Michael B. McFarland, etal. *Joanna Parker*
2. Case Number: CV-2007-0002409 (Kootenai County)
3. Nature of Claims: Allegations of breach of fiduciary duty, counterclaim
4. Court or Jury Case: Jury
5. Number of Days Needed for Trial: 4
(If requesting more than five (5) days, please explain the reasons below.)
6. Should the court order mediation? Yes No
7. Will you schedule a motion for summary judgment? Yes probably no
Note: If you wish to schedule a motion for summary judgment, please contact Cherie Moore, (208) 265-1445, as soon as possible for scheduling.
8. The undersigned agrees to the following pretrial schedule unless specifically noted otherwise:
 - a. Plaintiffs disclose expert witnesses by 90 days before trial.
 - b. Defendants disclose expert witnesses by 60 days before trial.
 - c. Last day for hearing motions for summary judgment is 60 days before trial.
 - d. The other deadlines in the court's standard pre-trial order.
9. Comments: _____

Dated this 31 day of July, 2007.

John P. Whelan John P. Whelan
Sign and Print or Type Attorney's Name

Attorney for Michael B. McFarland, Michael B. McFarland, P.A.,
Print or Type Client's Name
and Karen Zimmerman

STATE OF IDAHO
COUNTY OF KOOTENAI } SS
FILED *NS* 11:38pm

SCHEDULING FORM

2007 AUG -7 PM 1:37

In response to the Scheduling Order, please complete this form and file it within 14 days with service of copies to all parties and one copy to Judge Verby's chambers in Sandpoint.

Janna Parker
JERRY DISTRICT

1. Case Title: Karletta Grace Berry, etal v. Michael B. McFarland, etal.
2. Case Number: CV-2007-0002409 (Kootenai County)
3. Nature of Claims: Attorney Malpractice / Breach of Fiduciary Duty
4. Court or Jury Case: Jury
5. Number of Days Needed for Trial: 7
(If requesting more than five (5) days, please explain the reasons below.)
6. Should the court order mediation? Yes _____ No _____
7. Will you schedule a motion for summary judgment? Yes _____ No X
Note: If you wish to schedule a motion for summary judgment, please contact Cherie Moore, (208) 265-1445, as soon as possible for scheduling. likely to schedule motion to amend for punitive damages
8. The undersigned agrees to the following pretrial schedule unless specifically noted otherwise:
 - a. Plaintiffs disclose expert witnesses by 90 days before trial.
 - b. Defendants disclose expert witnesses by 60 days before trial.
 - c. Last day for hearing motions for summary judgment is 60 days before trial.
 - d. The other deadlines in the court's standard pre-trial order.
9. Comments: _____

Dated this 7 day of August, 2007.

Rex A. Finney Rex A. Finney
Sign and Print or Type Attorney's Name

Attorney for Karletta Grace Berry
Print or Type Client's Name

Fax to Whelan: 208-664-2240

SCHEDULING FORM

Chamber's Copy to Verby
Berry v. McFarland

STATE OF IDAHO
COUNTY OF KOOTENAI } SS
FILED:

2007 SEP 12 AM 10:30 10³² KMC

CLERK DISTRICT COURT
Cathy Victoria
DEPUTY

J.P. Whelan, P.C.
Attorney at Law
213 N. 4th Street
Coeur d' Alene, Idaho 83814
Telephone: (208) 664-5891
Facsimile: (208) 664-2240
ISB No. 6083

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE STATE OF
IDAHO, IN AND FOR THE COUNTY OF KOOTENAI

KARLETTA GRACE BERRY, a widow,
KARLETTA GRACE BERRY, Personal
Representative of the Estate of Jerry
Lee Roy Berry, CAPTAIN'S WHEEL
RESORT, INC., an Idaho Corporation,

Plaintiffs,

vs.

MICHAEL B. MCFARLAND, MICHAEL B.
MCFARLAND, P.A., and KAREN
ZIMMERMAN,

Defendants.

Case No. CV-07-2409

AFFIDAVIT OF JOHN P. WHELAN IN
SUPPORT OF MOTION TO COMPEL

Date: October 12, 2007

Time: 9:00 a.m.

Judge: Steve Verby

Location: Kootenai County Courthouse
324 W. Garden Ave.
Coeur d' Alene, ID 83814

STATE OF IDAHO)
) ss.
County of Kootenai)

John P. Whelan, being first duly sworn, deposes and says:

AFFIDAVIT OF JOHN P. WHELAN IN SUPPORT OF MOTION TO COMPEL-1

1. I am the attorney for Defendants in this action. I have personal knowledge of the following facts and could competently testify.

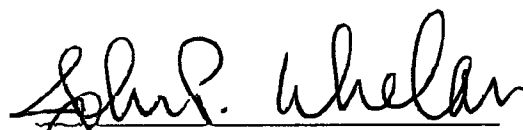
2. On June 20, 2007, my office served Interrogatories, Requests for Production of Documents and Requests for Admissions to Plaintiffs, Set One. To date, Plaintiff has only responded to the Requests for Admissions.

3. I have attached as Exhibit A a true and correct copy of the Interrogatories, Requests for Production of Documents and Requests for Admissions to Plaintiffs, Set One. I have attached as Exhibit B a true and correct copy of Plaintiff's Answers and Responses to Requests for Admissions Only to Plaintiffs, Set One.

5. On August 7, 2007 I sent a letter to Plaintiffs' counsel regarding the overdue discovery responses. Attached hereto as Exhibit C is a true and correct copy of said letter. I have received no response to the letter.

6. I will have devoted a total of at least three (3) hours of time to this matter by the time the Court hears the Motion. My reasonable hourly rate charged to my client is \$175.00 per hour. I request that the Court award my client \$525.00 in attorneys fees and costs for having to pursue this Motion.

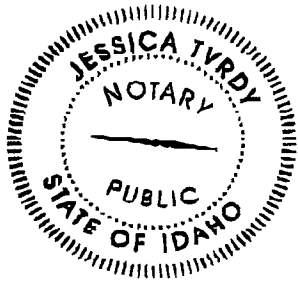
Dated: 9/12/07



John P. Whelan

AFFIDAVIT OF JOHN P. WHELAN IN SUPPORT OF MOTION TO COMPEL-2

Subscribed and sworn before me this 12TH day of September, 2007.



[Signature]
Notary Public in and for the State of Idaho
Residing at: Post Falls
My Comm. Expires: 12/29/11

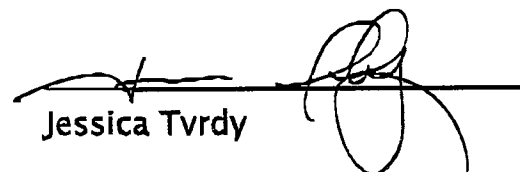
AFFIDAVIT OF JOHN P. WHELAN IN SUPPORT OF MOTION TO COMPEL-3

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 12th day of September, 2007, I caused to be served a true and correct copy of the foregoing by the method indicated below, and addressed as indicated below:

Rex A. Finney
Finney, Finney & Finney
120 East Lake Street, Suite 317
Sandpoint, ID 83865

- U.S. Mail, Postage Prepaid
 Hand Delivered
 Overnight Mail
 Facsimile to:


Jessica Tvrdy

J.P. Whelan, P.C.
 Attorney at Law
 213 N. 4th Street
 Coeur d' Alene, Idaho 83814
 Telephone: (208) 664-5891
 Facsimile: (208) 664-2240
 ISB No. 6083

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE STATE OF
 IDAHO, IN AND FOR THE COUNTY OF KOOTENAI

KARLETTA GRACE BERRY, a widow,
 KARLETTA GRACE BERRY, Personal
 Representative of the Estate of Jerry
 Lee Roy Berry, CAPTAIN'S WHEEL
 RESORT, INC., an Idaho Corporation,

Plaintiffs,

vs.

MICHAEL B. MCFARLAND, MICHAEL B.
 MCFARLAND, P.A., and KAREN
 ZIMMERMAN,

Defendants.

Case No. CV-07-2409

INTERROGATORIES, REQUESTS FOR
 PRODUCTION OF DOCUMENTS AND
 REQUESTS FOR ADMISSIONS TO
 PLAINTIFFS, SET ONE

TO: KARLETTA GRACE BERRY, CAPTAIN'S WHEEL RESORT, INC., PLAINTIFFS
 FROM: MICHAEL B. MCFARLAND, MICHAEL B. MCFARLAND, P.A., and KAREN
 ZIMMERMAN, DEFENDANTS.

INTERROGATORIES, REQUESTS FOR PRODUCTION OF DOCUMENTS AND REQUESTS FOR
 ADMISSIONS TO PLAINTIFFS, SET ONE-1

YOU WILL PLEASE TAKE NOTICE that Defendants hereby request that you answer under oath the following Interrogatories within thirty (30) days from service hereof, in accordance with the provisions of Rule 33, Idaho Rules of Civil Procedure.

In answering these Interrogatories, furnish all information available to you, including information in the possession of your attorney (and investigators, experts, etc., retained by you and your attorney), not merely information known of your own personal knowledge. If you cannot answer the following Interrogatories in full, after exercising due diligence to secure the information to do so, so state, then answer to the extent possible, specifying your inability to answer the remainder, and stating whatever information and knowledge you have concerning the unanswered portion.

These Interrogatories are deemed continuing and your answers thereto are to be supplemented as additional information and knowledge becomes available or known to you.

The Requests for Production of Documents shall be responded to by producing for inspection and/or reproduction the originals or true and correct copies of the documents and items listed below, in whatever form, whether electronic, written, xeroxed, filmed or otherwise, at the offices of John P. Whelan, P.C., 213 N. 4th Street, Coeur d' Alene, Idaho 83814 within thirty (30) days of service hereof.

These Requests for Production are deemed continuing in nature, and your responses thereto are to be supplemented as additional information or material

INTERROGATORIES, REQUESTS FOR PRODUCTION OF DOCUMENTS AND REQUESTS FOR ADMISSIONS TO PLAINTIFFS, SET ONE-2

becomes available or known to you.

As used herein, the term "document" means and refers to any written or other recorded, graphic or photographic matter of any kind or character, however produced or reproduced, and includes, without limiting the generality of the foregoing, all letters, telegrams, teletypes, correspondence, contracts, agreements, drafts, work papers, notes, memoranda, evaluations, telephone logs, studies, reports, minutes, articles, announcements, ledgers, vouchers, checks, invoices, mechanical and electrical sound recordings or transcripts thereof, including originals and copies of any of the foregoing whether typed, printed, handwritten or on tape or other mechanical recording, and any material supporting or used in the preparation of any such document as herein defined.

The term "identify" when used in these Request for Production of Documents in reference to a "document" means to state the date; the author or signer, the person who prepared the document; the person from whom the document was obtained; the person who sent and the person receiving the document. If any such document was, but is no longer in your possession or subject to your control, state what disposition was made of it and the reason for such disposition.

The term "subject property" when used in these Request for Production of Documents means and refers to the property identified in the Plaintiff's Complaint.

The term "you" refers to the Plaintiffs in this action, or any of them.

INTERROGATORIES, REQUESTS FOR PRODUCTION OF DOCUMENTS AND REQUESTS FOR ADMISSIONS TO PLAINTIFFS, SET ONE-3

INTERROGATORY NO. 1: Please set forth the names, addresses, and telephone numbers of any person who you believe to have knowledge of the facts of this case.

RESPONSE:

INTERROGATORY NO. 2: Please set forth the names, addresses, and telephone numbers of any person having knowledge of the facts of this case whom you may call as witnesses at the trial and for each person state the substance of his or her expected testimony.

RESPONSE:

INTERROGATORY NO. 3: As to all persons whose names are set forth in the answers to the preceding Interrogatories, have you, your agents, investigators or attorneys, or anyone acting on your behalf, obtained statements of any kind, whether written, recorded, stenographically transcribed, oral or otherwise, from any of the persons so named in these Answers to Interrogatories.

RESPONSE:

INTERROGATORY NO. 4: If your answer to the preceding Interrogatory is in the affirmative, please state separately for each person:

- a. The name, occupation, and address for each person.
- b. The type of statement which was taken (whether written, recorded, or transcribed).
- c. The name and address of the present custodian of each statement so taken.
- d. The date on which the statement was taken

INTERROGATORIES, REQUESTS FOR PRODUCTION OF DOCUMENTS AND REQUESTS FOR ADMISSIONS TO PLAINTIFFS, SET ONE-4

Please attach a copy of each such statement taken.

RESPONSE:

INTERROGATORY NO. 5: Please identify any physical or documentary evidence that supports or pertains to the allegations of your Complaint.

RESPONSE:

INTERROGATORY NO. 6: Please list any physical or documentary evidence you intend to use as exhibits during the trial.

RESPONSE:

INTERROGATORY NO. 7: Please identify each and every communication between you and the Defendants or their agents regarding the Stock Purchase and Sale Agreement at issue in your complaint by identifying the parties to each communication, the date of each communication and the place where each communication occurred.

RESPONSE:

INTERROGATORY NO. 8: Please identify each and every communication between you and the Defendants or their agents regarding the Loan Agreement identified in your complaint by identifying the parties to each communication, the date of each communication and the place where each communication occurred.

RESPONSE:

INTERROGATORY NO. 9: Please describe, in detail, all facts pertaining to your allegation that Jerry Lee Roy Berry lacked the capacity to execute the Stock Purchase and Sale Agreement on July 4, 2007.

INTERROGATORIES, REQUESTS FOR PRODUCTION OF DOCUMENTS AND REQUESTS FOR ADMISSIONS TO PLAINTIFFS, SET ONE-5

RESPONSE:

REQUEST FOR PRODUCTION NO. 1: Please produce any and all documents supporting or pertaining to your claim that Jerry Lee Roy Berry lacked the capacity to execute the Stock Purchase and Sale Agreement on July 4, 2007.

RESPONSE:

INTERROGATORY NO. 10: Please describe, in detail, all facts pertaining to your allegation that Michael McFarland breached a fiduciary duty owed to Jerry Lee Roy Berry and/or Captain's Wheel Resort, Inc.

RESPONSE:

REQUEST FOR PRODUCTION NO. 2: Please produce any and all documents supporting or pertaining to your claim that Michael McFarland breached a fiduciary duty owed to Jerry Lee Roy Berry and/or Captain's Wheel Resort, Inc.

RESPONSE:

INTERROGATORY NO. 11: Please describe, in detail, all facts pertaining to your allegation that Michael McFarland engaged in undue influence and self dealing when he entered into the Stock Purchase and Sale Agreement referenced in your complaint.

RESPONSE:

REQUEST FOR PRODUCTION NO. 3: Please produce any and all documentation supporting or pertaining to your allegation that Michael

INTERROGATORIES, REQUESTS FOR PRODUCTION OF DOCUMENTS AND REQUESTS FOR ADMISSIONS TO PLAINTIFFS, SET ONE-6

McFarland engaged in undue influence and self dealing when he entered into the Stock Purchase and Sale Agreement referenced in your complaint.

RESPONSE:

INTERROGATORY NO. 12: Please state, in detail, all facts supporting or pertaining to your allegation that Michael McFarland acted negligently.

RESPONSE:

REQUEST FOR PRODUCTION NO. 4: Please produce any and all documents supporting or pertaining to your allegation that Michael McFarland acted negligently.

RESPONSE:

INTERROGATORY NO. 13: Please state, in detail, all facts supporting or pertaining to your allegation that Michael McFarland breached his obligation to deal fairly and in good faith with Jerry Lee Roy Berry or Captain's Wheel Resort, Inc.

RESPONSE:

REQUEST FOR PRODUCTION NO. 5: Please produce any and all documentation supporting or pertaining to your allegation that Michael McFarland breached his obligation to deal fairly and in good faith.

RESPONSE:

INTERROGATORY NO. 14: Who drafted the document attached to your complaint as Exhibit 3?

RESPONSE:

INTERROGATORIES, REQUESTS FOR PRODUCTION OF DOCUMENTS AND REQUESTS FOR ADMISSIONS TO PLAINTIFFS, SET ONE-7

INTERROGATORY NO. 15: Please identify all facts in support of your claim that Exhibit 1 attached to the complaint was actually signed on July 4, 2006 and not August 9, 2003.

RESPONSE:

INTERROGATORY NO. 16: Please state all facts known to you regarding the agreement between Jerry Lee Roy Berry and Michael McFarland for the issuance of stock to Michael McFarland and Karen Zimmerman.

RESPONSE:

INTERROGATORY NO. 17: Have you come into possession of any funds belonging to Captain's Wheel Resort, Inc. since November 1, 2006? If so, please provide the following information:

- a. The dates when you first came into possession of any such funds;
- b. The amount(s) that came in to your possession;
- c. The reasons why the funds came to be in your possession;
- d. The dates when you transferred any such funds to the corporation;
and
- e. The reasons why you have not transferred such funds to the corporation.

RESPONSE:

REQUEST FOR PRODUCTION NO. 6: Please produce any and all documents referencing or pertaining to any Captain's Wheel Resort, Inc. funds that have come into your possession.

RESPONSE:

INTERROGATORIES, REQUESTS FOR PRODUCTION OF DOCUMENTS AND REQUESTS FOR ADMISSIONS TO PLAINTIFFS, SET ONE-8

INTERROGATORY NO. 18: Please state with specificity the facts in support of your claim that you are entitled to seek rescission of the Stock Purchase and Sale Agreement.

RESPONSE:

INTERROGATORY NO. 19: Please state with specificity the facts in support of your claim that you are entitled to the imposition of a constructive trust or resulting trust on the stock received by Defendants from Jerry Berry.

RESPONSE:

INTERROGATORY NO. 20: Please state with specificity the facts in support of your claim that you are entitled to compensatory damages from the Defendants.

RESPONSE:

INTERROGATORY NO. 21: Have you been appointed as the personal representative of the estate of Jerry Lee Roy Berry?

RESPONSE:

INTERROGATORY NO. 22: Please list the names of each person who assisted you in the preparation of your responses to these interrogatories, requests for admissions, and requests for production of documents.

RESPONSE:

INTERROGATORY NO. 23: Please recite all facts within your knowledge regarding any statements made to you by Jerry Lee Roy Berry regarding his agreement with Michael McFarland for the issuance of the stock that was issued

INTERROGATORIES, REQUESTS FOR PRODUCTION OF DOCUMENTS AND REQUESTS FOR ADMISSIONS TO PLAINTIFFS, SET ONE-9

to Michael McFarland and/or Karen Zimmerman.

RESPONSE:

REQUEST FOR PRODUCTION NO. 7: Please produce any and all documents in your possession pertaining to the Captain's Wheel Resort, Inc.

RESPONSE:

REQUEST FOR PRODUCTION NO. 8: Please produce any and all documents which pertain to or support your allegation that an attorney client relationship existed between Mike McFarland and Jerry Lee Roy Berry.

RESPONSE:

REQUEST FOR PRODUCTION NO. 9: Please produce any and all documents which support or pertain to the allegation in your complaint that the \$100,000.00 supplied to Jerry Berry by Mike McFarland and Karen Zimmerman was merely a loan and not for the purchase of stock.

RESPONSE:

REQUEST FOR PRODUCTION NO. 10: Please produce any and all documents in support of your claim that the marital community existing between Karletta Grace Berry and Jerry Berry owned 100% of the stock in Captain's Wheel Resort, Inc.

RESPONSE:

REQUEST FOR PRODUCTION NO. 11: Please produce any and all records which pertain or relate to your claim that you have the legal right to assert claims on behalf of Captain's Wheel Resort, Inc.

INTERROGATORIES, REQUESTS FOR PRODUCTION OF DOCUMENTS AND REQUESTS FOR ADMISSIONS TO PLAINTIFFS, SET ONE-10

RESPONSE:

REQUEST FOR PRODUCTION NO. 12: Please produce any and all records pertaining to the real property owned by Captain's Wheel Resort, Inc.

RESPONSE:

REQUEST OR PRODUCTION NO. 13: Please produce any and all documents relating to your claim that Mike McFarland provided legal advice to Jerry Berry or Captain's Wheel Resort, Inc.

RESPONSE:

REQUEST FOR PRODUCTION NO. 14: Please produce any and all documents supporting your allegations that Karen Zimmerman and Michael McFarland own assets together as joint tenants.

RESPONSE:

REQUEST FOR PRODUCTION NO. 15: Please produce any and all documents supporting your allegations that Defendants made a \$100,000.00 loan to the marital community of Jerry Berry and Karletta Berry.

RESPONSE:

REQUEST FOR PRODUCTION NO. 16: Please produce any and all documents in support of your claim that Jerry Berry lacked capacity to enter into the Stock Purchase and Sale Agreement referenced in your complaint.

RESPONSE:

INTERROGATORIES, REQUESTS FOR PRODUCTION OF DOCUMENTS AND REQUESTS FOR ADMISSIONS TO PLAINTIFFS, SET ONE-11

REQUEST FOR PRODUCTION NO 17: Please produce any and all documents in support of your claim that the Stock Purchase and Sale Agreement contains terms that unfairly place risk and liability upon the "Seller".

RESPONSE:

REQUEST FOR PRODUCTION NO. 18: Please produce any and all documents in support of your allegation that the value of the corporate assets exceed \$1,000,000.00.

RESPONSE:

REQUEST FOR PRODUCTION NO. 19: Please produce any and all documents sent by you or otherwise delivered to the Defendants, or either of them, on behalf of Captain's Wheel Resort, Inc., including any demands of whatever nature.

RESPONSE:

REQUEST FOR PRODUCTION NO. 20: Please produce any and all corporate records of Captain's Wheel Resort, Inc. in your possession or subject to your control.

RESPONSE:

REQUEST FOR PRODUCTION NO. 21: Please produce any and all documents in support of the first cause of action of your complaint.

RESPONSE:

REQUEST FOR PRODUCTION NO. 22: Please produce any and all documents in support of the second cause of action of your complaint.

INTERROGATORIES, REQUESTS FOR PRODUCTION OF DOCUMENTS AND REQUESTS FOR ADMISSIONS TO PLAINTIFFS, SET ONE-12

RESPONSE:

REQUEST FOR PRODUCTION NO. 23: Please produce any and all documents in support of the third cause of action of your complaint.

RESPONSE:

REQUEST FOR PRODUCTION NO. 24: Please produce any and all documents in support of the fourth cause of action of your complaint.

RESPONSE:

REQUEST FOR PRODUCTION NO. 25: Please produce any and all documents in support of the fifth cause of action of your complaint.

RESPONSE:

REQUEST FOR PRODUCTION NO. 26: Please produce any and all documents in support of the sixth cause of action of your complaint.

RESPONSE:

REQUEST FOR PRODUCTION NO. 27: Please produce any and all documents in support of the seventh cause of action of your complaint.

RESPONSE:

REQUEST FOR PRODUCTION NO. 28: Please produce any and all documents in support of the eighth cause of action of your complaint.

RESPONSE:

REQUEST FOR PRODUCTION NO. 29: Please produce any and all

INTERROGATORIES, REQUESTS FOR PRODUCTION OF DOCUMENTS AND REQUESTS FOR ADMISSIONS TO PLAINTIFFS, SET ONE-13

documents which reference Jerry Berry's testamentary plan of distribution, if any, for the assets he held before his death.

RESPONSE:

REQUEST FOR PRODUCTION NO. 30: Please produce any and all records pertaining to any action on your behalf to probate the estate of Jerry Lee Roy Berry.

RESPONSE:

REQUEST FOR PRODUCTION NO. 31: Please produce any and all documents evidencing that you have an ownership interest in Captain's Wheel Resort, Inc.

RESPONSE:

REQUEST FOR ADMISSION NO. 1: Please admit that prior to the death of Jerry Lee Roy Berry, the marital community existing between Karletta Berry and Jerry Lee Roy Berry owned only fifty percent (50%) of the stock in the Captain's Wheel Resort, Inc.

RESPONSE:

REQUEST FOR ADMISSION NO. 2: Please admit that Michael McFarland was not the attorney for Jerry Lee Roy Berry at any time.

RESPONSE:

REQUEST FOR ADMISSION NO. 3: Please admit that Michael McFarland was not the attorney for Karletta Grace Berry at any time.

RESPONSE:

INTERROGATORIES, REQUESTS FOR PRODUCTION OF DOCUMENTS AND REQUESTS FOR ADMISSIONS TO PLAINTIFFS, SET ONE-14

REQUEST FOR ADMISSION NO. 4: Please admit that Michael McFarland was not the attorney for Captain's Wheel Resort, Inc.

RESPONSE:

REQUEST FOR ADMISSION NO. 5: Please admit that the One Hundred Thousand Dollars (\$100,000.00) supplied to Jerry Lee Roy Berry on or about August 9, 2003 was for the purchase of stock.

RESPONSE:

REQUEST FOR ADMISSION NO. 6: Please admit that you signed the document attached hereto as Exhibit A.

RESPONSE:

REQUEST FOR ADMISSION NO. 7: Please admit that Jerry Berry signed the document attached hereto as Exhibit A.

RESPONSE:

REQUEST FOR ADMISSION NO. 8: Please admit that Karen Zimmerman and Michael McFarland were appointed directors upon a vote of the shareholders of Captain's Wheel Resort, Inc.

RESPONSE:

REQUEST FOR ADMISSION NO. 9: Please further admit that Jerry Lee Roy Berry participated in the shareholder vote that resulted in the appointment of Michael McFarland and Karen Zimmerman as directors.

RESPONSE:

INTERROGATORIES, REQUESTS FOR PRODUCTION OF DOCUMENTS AND REQUESTS FOR ADMISSIONS TO PLAINTIFFS, SET ONE-15

REQUEST FOR ADMISSION NO. 10: Please admit that Jerry Berry was a shareholder, a director and the president of Captain's Wheel Resort, Inc. when Karen Zimmerman and Michael McFarland were installed as directors for the corporation.


RESPONSE:

REQUEST FOR ADMISSION NO. 11: Please admit that you attended, in person or through others, the special meetings that occurred on November 18, 2006 and November 29, 2006 as alleged in your Complaint.

RESPONSE:

DATED this 20 day of June, 2007.

JOHN P. WHELAN, P.C.



John P. Whelan
Attorney for Defendants

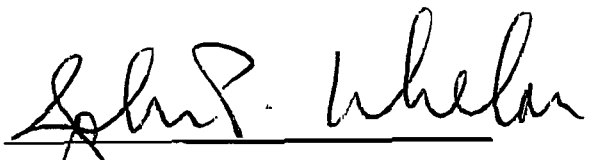
INTERROGATORIES, REQUESTS FOR PRODUCTION OF DOCUMENTS AND REQUESTS FOR ADMISSIONS TO PLAINTIFFS, SET ONE-16

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 20 day of June, 2007, I caused to be served a true and correct copy of the foregoing by the method indicated below, and addressed as indicated below:

Rex A. Finney
Finney, Finney & Finney
120 East Lake Street, Suite 317
Sandpoint, ID 83865

- U.S. Mail, Postage Prepaid
- Hand Delivered
- Overnight Mail
- Facsimile to:



 John P. Whelan

MINUTES OF SPECIAL MEETING OF SHAREHOLDERS**OF****CAPTAIN'S WHEEL RESORT, INC.**

A special meeting of shareholders of the above captioned corporation was held on the date, time and at the place set forth in the written waiver of notice signed by the shareholders, fixing such time and place, and prefixed to the minutes of this meeting. The following shareholders, being all the shareholders of the corporation, were present: Jerry L. Berry, Michael B. McFarland and Karen M. Zimmerman.

The meeting was called to order by the president, Jerry L. Berry, who then appointed Michael B. McFarland to moderate the meeting and prepare the notes thereof.

Mr. McFarland then reported on his review of the corporate minute book, and the need to correct some deficiencies, including the absence of minutes of an organizational meeting or annual meetings of shareholders and directors. It was noted that, since the minute book had been maintained in the offices of the corporation's former attorney, Paul Daugherty, and Mr. Daugherty was not present at any of the meetings, whatever written minutes may have been prepared did not get placed in the minute book. Further, since the original incorporators and directors are no longer associated with the corporation, it is not reasonably possible to obtain any of the original minutes.

Upon motion duly made, seconded and carried, it was unanimously agreed that an updated organizational meeting should be conducted by the board of directors as soon as possible.

The next item of business was the election of directors. After discussion and nominations, the following were elected directors to serve in office until the next annual meeting of shareholders and

Exhibit

until qualified successors have been elected:

- Jerry L. Berry,
- Karletta G. Berry,
- Karen M. Zimmerman,
- Michael B. McFarland


Upon a motion duly made, seconded and carried, the special meeting of shareholders was adjourned to permit the directors to conduct an special organizational meeting.

The meeting re-convened following the special meeting of the directors, with the same persons present.

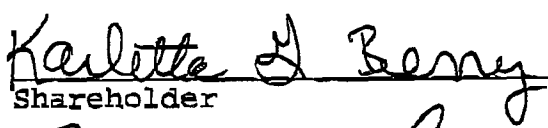
The president reported on the special meeting of the board of directors, reviewed the minutes of the said meeting which included the adoption of the By-Laws, the election of officers and other pertinent matters.

Upon motion duly made, seconded and carried, the shareholders approved and ratified all of the actions taken by the board of directors.

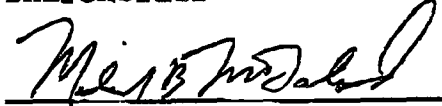
There being no further business and , upon a motion duly made, seconded and carried, the meeting was adjourned.



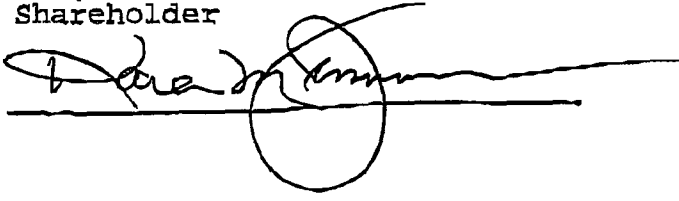
 Shareholder



 Shareholder



 Shareholder



REX A. FINNEY
FINNEY FINNEY & FINNEY, P.A.
 Attorneys at Law
 Old Power House Building
 120 East Lake Street, Suite 317
 Sandpoint, Idaho 83864
 Phone: (208) 263-7712
 Fax: (208) 263-8211
 ISB No. 6313

**IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE
 STATE OF IDAHO, IN AND FOR THE COUNTY OF KOOTENAI**

KARLETTA GRACE BERRY, a widow,	)	Case No. CV-2007-2409
KARLETTA GRACE BERRY, Personal)	
Representative of the Estate	)	PLAINTIFF'S ANSWERS AND
of Jerry Lee Roy Berry,	)	RESPONSES TO REQUESTS FOR
CAPTAIN'S WHEEL RESORT, INC.,	)	ADMISSIONS ONLY TO PLAINTIFFS,
an Idaho Corporation,	)	SET ONE
)	
Plaintiff,)	
)	
v.)	
)	
MICHAEL B. MCFARLAND, MICHAEL)	
B. MCFARLAND, P.A., and KAREN)	
ZIMMERMAN,)	
)	
Defendant.)	
)	

COMES NOW the Plaintiffs, KARLETTA GRACE BERRY, a widow, KARLETTA GRACE BERRY, Personal Representative of the Estate of Jerry Lee Roy Berry, CAPTAIN'S WHEEL RESORT, INC., an Idaho Corporation, pursuant to I.R.C.P. 33 and I.R.C.P. 34, and for denials to the Defendant's Requests For Admissions from, Set One dated June 20, 2007, and responds as follows:

REQUEST FOR ADMISSION NO. 1: Please admit that prior to

PLAINTIFF'S ANSWERS AND RESPONSES TO REQUESTS FOR ADMISSIONS TO PLAINTIFFS, SET ONE - 1

the death of Jerry Lee Roy Berry, the marital community existing between Karletta Berry and Jerry Lee Roy Berry owned only fifty percent (50%) of the stock in the Captain's Wheel Resort, Inc.

RESPONSE TO REQUEST FOR ADMISSION NO. 1: DENY.

REQUEST FOR ADMISSION NO. 2: Please admit that Michael McFarland was not the attorney for Jerry Lee Roy Berry at any time.

RESPONSE TO REQUEST FOR ADMISSION NO. 2: DENY.

REQUEST FOR ADMISSION NO. 3: Please admit that Michael McFarland was not the attorney for Karletta Grace Berry at any time.

RESPONSE TO REQUEST FOR ADMISSION NO. 3: DENY.

REQUEST FOR ADMISSION NO. 4: Please admit that Michael McFarland was not the attorney for Captain's Wheel Resort, Inc.

RESPONSE TO REQUEST FOR ADMISSION NO. 4: DENY.

REQUEST FOR ADMISSION NO. 5: Please admit that the One Hundred Thousand Dollars (\$100,000.00) supplied to Jerry Lee Roy Berry on or about August 9, 2003 was for the purchase of stock.

RESPONSE TO REQUEST FOR ADMISSION NO. 5: DENY.

REQUEST FOR ADMISSION NO. 6: Please admit that you signed the document attached hereto as Exhibit A.

RESPONSE TO REQUEST FOR ADMISSION NO. 6: DENY.

REQUEST FOR ADMISSION NO. 7: Please admit that Jerry Berry signed the document attached to the Defendants' Interrogatories,

Requests for Production of Documents and Requests for Admissions to Plaintiffs, Set One as Exhibit A.

RESPONSE TO REQUEST FOR ADMISSION NO. 7: DENY.

REQUEST FOR ADMISSION NO. 8: Please admit that Karen Zimmerman and Michael McFarland were appointed directors upon a vote of the shareholders of Captain's Wheel Resort, Inc.

RESPONSE TO REQUEST FOR ADMISSION NO. 8: DENY.

REQUEST FOR ADMISSION NO. 9: Please further admit that Jerry Lee Roy Berry participated in the shareholder vote that resulted in the appointment of Michael McFarland and Karen Zimmerman as directors.

RESPONSE TO REQUEST FOR ADMISSION NO. 9: DENY.

DATED this 20 day of July, 2007.



 REX A. FINNEY
 Attorney at Law

CERTIFICATE OF SERVICE

I hereby certify that the original of the foregoing was delivered by first class mail, postage prepaid, this 20 day of July, 2007, and was addressed as follows:

J.P. WHELAN P.C.
 Attorney at law
 213 N. 4th Street
 Coeur d'Alene, Idaho 83814
 And by fax: 208-664-2240



PLAINTIFF'S ANSWERS AND RESPONSES TO REQUESTS FOR ADMISSIONS TO PLAINTIFFS,
 SET ONE - 3

FINNEY FINNEY & FINNEY, P.A.

**ATTORNEYS AT LAW
OLD POWER HOUSE BUILDING
120 EAST LAKE STREET, SUITE 317
SANDPOINT, IDAHO 83864**

PHONE: 1-208-263-7712 FAX: 1-208-263-8211

Gary A. Finney / John A. Finney / Rex A. Finney

July 20, 2007

**J.P. Whelan, P.C.
Attorney at Law
213 N. 4th Street
Coeur d'Alene, ID 83814
And VIA FACSIMILE: 208-664-2240
Total pages: 6**

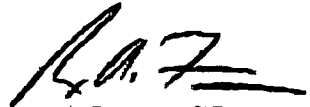
**Re: Karletta Berry; Estate of Jerry Lee Roy Berry; and
Captains Wheel's Resort, Inc.
Our File No. 6689**

Dear J.P.:

**Attached are the responses to the Requests For Admission No.
1-9.**

If you have any questions or concerns, please call.

Very truly yours,



**REX A. FINNEY
Attorney at Law**

**RAF:hs
cc: Karli Berry**



August 7, 2007

Rex A. Finney
Finney, Finney & Finney
120 East Lake Street, Suite 317
Sandpoint, ID 83865

Via Fax: (208) 263-8211

Re: Berry v. McFarland

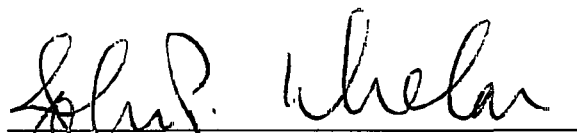
Dear Rex:

On June 20, 2007 I served Interrogatories, Requests for Production of Documents and Requests for Admissions. To date, I have only received responses to the Requests for Admissions. Please immediately serve responses to the Interrogatories and Requests for Production of Documents.

If you have any questions or comments, please do not hesitate to contact me.

Sincerely,

JOHN P. WHELAN, P.C.



John P. Whelan

jt
cc: Michael McFarland

213 N. 4th Street • Coeur d' Alene, Idaho 83814
(208) 664-5891 • Fax (208) 664-2240

Admitted in Idaho & California
Supreme Court No. 37951-2010

Berry v. McFarland

Exhibit
8 of 1268

STATE OF IDAHO }
COUNTY OF KOOTENAI } SS
FILED:

2007 SEP 12 AM 10:31

10³² KMC

CLERK DISTRICT COURT

Cathy Victoria
DEPUTY

J.P. Whelan, P.C.
Attorney at Law
213 N. 4th Street
Coeur d' Alene, Idaho 83814
Telephone: (208) 664-5891
Facsimile: (208) 664-2240
ISB No. 6083

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF KOOTENAI

KARLETTA GRACE BERRY, a widow,
KARLETTA GRACE BERRY, Personal
Representative of the Estate of Jerry
Lee Roy Berry, CAPTAIN'S WHEEL
RESORT, INC., an Idaho Corporation,

Plaintiffs,

vs.

MICHAEL B. MCFARLAND, MICHAEL B.
MCFARLAND, P.A., and KAREN
ZIMMERMAN,

Defendants.

Case No. CV-07-2409

MOTION TO COMPEL

Date: October 12, 2007

Time: 9:00 a.m.

Judge: Steve Verby

Location: Kootenai County Courthouse
324 W. Garden Ave.
Coeur d' Alene, ID 83814

COMES NOW, Defendants, Michael B. McFarland, Michael B. McFarland, P.A. and Karen Zimmerman, by and through their attorney of record, John P. Whelan, and pursuant to Rule 37 of the Idaho Rules of Civil Procedure hereby respectfully moves the Court for an order compelling Plaintiffs to produce

documents in response to the Request for Production of Documents and answers to Interrogatories served by Defendants dated the 20th day of June, 2007, a copy of which is attached to the accompanying Affidavit and incorporated herein by reference on the grounds that Plaintiffs have failed and refused to provide documentation responsive to proper and relevant discovery in this action. This Motion is based on the accompanying Affidavit of John P. Whelan offered in support of the Motion, the pleadings and court file, as well as such other and further evidence as may be offered at the oral hearing of this Motion.

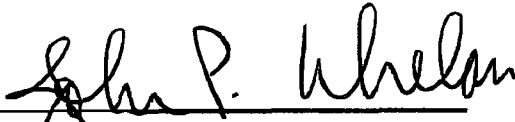
Defendant hereby respectfully requests the right to present oral argument and evidence in support of this Motion, and cross-examine the Plaintiff and her witnesses at any hearing hereon.

Defendant further requests costs and attorney fees necessary to pursue this Motion to Compel.

DATED this 12 day of September, 2007.

Respectfully submitted,

JOHN P. WHELAN, P.C.



John P. Whelan

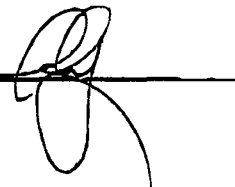
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 12th day of September, 2007, I caused to be served a true and correct copy of the foregoing by the method indicated below, and addressed as indicated below:

Rex A. Finney
Finney, Finney & Finney
120 East Lake Street, Suite 317
Sandpoint, ID 83865

- U.S. Mail, Postage Prepaid
 Hand Delivered
 Overnight Mail
 Facsimile to:

Jessica Tvrdy



STATE OF IDAHO }
COUNTY OF KOOTENAI } SS
FILED:

2007 SEP 12 AM 10:31 10³² KUC

J.P. Whelan, P.C.
Attorney at Law
213 N. 4th Street
Coeur d' Alene, Idaho 83814
Telephone: (208) 664-5891
Facsimile: (208) 664-2240
ISB No. 6083

CLERK DISTRICT COURT

Cathy Victoria
DEPUTY

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE STATE OF
IDAHO, IN AND FOR THE COUNTY OF KOOTENAI

KARLETTA GRACE BERRY, a widow,
KARLETTA GRACE BERRY, Personal
Representative of the Estate of Jerry
Lee Roy Berry, CAPTAIN'S WHEEL
RESORT, INC., an Idaho Corporation,

Plaintiffs,

vs.

MICHAEL B. MCFARLAND, MICHAEL B.
MCFARLAND, P.A., and KAREN
ZIMMERMAN,

Defendants.

Case No. CV-07-2409

NOTICE OF HEARING

Date: October 12, 2007 *ok*

Time: 9:00 a.m.

Judge: Steve Verby

Location: Kootenai County Courthouse
324 W. Garden Ave.
Coeur d' Alene, ID 83814

TO ALL PARTIES AND THEIR ATTORNEY OF RECORD:

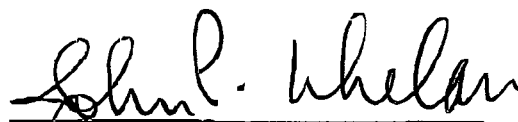
PLEASE TAKE NOTICE that on the date of October 12, 2007 at 9:00 a.m.
before the Honorable Steve Verby, Defendants, will have their motion to compel
heard by the Court.

NOTICE OF HEARING-1

DATED this 12 day of September, 2007.

Respectfully submitted,

JOHN P. WHELAN, P.C.

A handwritten signature in cursive script that reads "John P. Whelan". The signature is written in black ink and is positioned above a horizontal line.

John P. Whelan

NOTICE OF HEARING-2

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 12th day of September, 2007, I caused to be served a true and correct copy of the foregoing by the method indicated below, and addressed as indicated below:

Rex A. Finney
Finney, Finney & Finney
120 East Lake Street, Suite 317
Sandpoint, ID 83865

- U.S. Mail, Postage Prepaid
 Hand Delivered
 Overnight Mail
 Facsimile to:


Jessica Tvrdy

REX A. FINNEY
FINNEY FINNEY & FINNEY, P.A.
Attorneys at Law
Old Power House Building
120 East Lake Street, Suite 317
Sandpoint, Idaho 83864
Phone: (208) 263-7712
Fax: (208) 263-8211
ISB No. 6313

STATE OF IDAHO
COUNTY OF BONNER
FIRST JUDICIAL DISTRICT

2007 OCT 26 P 4: 20

MARIE SCOTT
CLERK DISTRICT COURT
[Signature]

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF BONNER

KARLETTA GRACE BERRY, a widow,	)	Case No. <i>CV-2007-00301</i>
KARLETTA GRACE BERRY, Personal)	
Representative of the Estate	)	NOTICE OF SERVING PLAINTIFF'S
of Jerry Lee Roy Berry,	)	ANSWERS AND RESPONSES TO
CAPTAIN'S WHEEL RESORT, INC.,	)	INTERROGATORIES, REQUESTS FOR
an Idaho Corporation,	)	PRODUCTION OF DOCUMENTS TO
	)	PLAINTIFF, SET ONE
Plaintiff,)	
	)	I.R.C.P. 33, 34, & 36
v.)	
)	
MICHAEL B. MCFARLAND, MICHAEL)	
B. MCFARLAND, P.A., and KAREN)	
ZIMMERMAN,)	
)	
Defendants.)	

COMES NOW the Plaintiff, by and through counsel, REX A.
FINNEY, Finney Finney & Finney, P.A. and pursuant to
I.R.C.P. 33, 34, and 36, gives notice of serving upon the
Defendants, by and through counsel, J.P. WHELAN, Attorney at
Law, the PLAINTIFF'S ANSWERS AND RESPONSES TO INTERROGATORIES,
REQUESTS FOR PRODUCTION OF DOCUMENTS TO PLAINTIFF, SET ONE,

Dated the 26th day of October, 2007, by hand delivery on the 26th
day of October, 2007.

DATED this 26th day of October, 2007.

for REX A. FINNEY

REX A. FINNEY
Attorney at Law

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the
foregoing was delivered, by U.S. mail, postage prepaid, this 26th
day of October, 2007, and was addressed as follows:

J.P. Whelan. P.C.
Attorney at Law
213 N. 4th Street
Coeur d'Alene, ID 83814

REX A. FINNEY

STATE OF IDAHO }
COUNTY OF KOOTENAI } ss
FILED:

2007 NOV - 1 PM 3: 05

CLERK DISTRICT COURT

[Signature]
DEPUTY

J.P. Whelan, P.C.
Attorney at Law
213 N. 4th Street
Coeur d' Alene, Idaho 83814
Telephone: (208) 664-5891
Facsimile: (208) 664-2240
ISB No. 6083

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF KOOTENAI

KARLETTA GRACE BERRY, a widow,
KARLETTA GRACE BERRY, Personal
Representative of the Estate of Jerry
Lee Roy Berry, CAPTAIN'S WHEEL
RESORT, INC., an Idaho Corporation,

Plaintiffs,

vs.

MICHAEL B. MCFARLAND, MICHAEL B.
MCFARLAND, P.A., and KAREN
ZIMMERMAN,

Defendants.

Case No. CV-07-2409

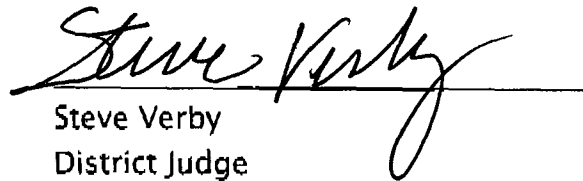
ORDER GRANTING MOTION TO
COMPEL

Defendants', Michael B. McFarland, Michael B. McFarland, P.A. and Karen Zimmerman, Motion to Compel came regularly before the Court on October 12, 2007. John P. Whelan appeared for Defendants. Rex A. Finney appeared for Plaintiff.

ORDER GRANTING MOTION TO COMPEL- 1

Having heard the argument of counsel and having reviewed the evidence, the Court hereby orders Plaintiff, Karletta Grace Berry, to produce responses to Interrogatories, without objections, and to produce documentation responsive to Defendants' Requests for Production of Documents to the office of John P. Whelan by the close of business on October 26, 2007. The Plaintiff, Karletta Grace Berry, is also ordered pay to Defendants attorney fees in the amount of \$350.00.

Dated: 10/31/07


Steve Verby
District Judge

ORDER GRANTING MOTION TO COMPEL- 2

CLERK'S CERTIFICATE OF SERVICE

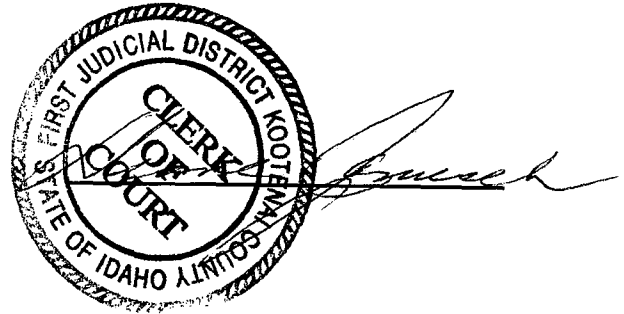
I HEREBY CERTIFY that on the 1 day of ~~October~~ ^{NOV} 2007, I caused to be served a true and correct copy of the foregoing by the method indicated below, and addressed as indicated below:

Rex A. Finney
Finney, Finney & Finney
120 East Lake Street, Suite 317
Sandpoint, ID 83865

Via: U.S. Mail, postage prepaid
 Facsimile (208) 263-8211

John P. Whelan, P.C.
213 N. 4th
Coeur d' Alene, ID 83814

Via: U.S. Mail, postage prepaid
 Facsimile (208) 664-2240



**IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF BONNER**

COURT MINUTES

JUDGE: STEVE VERBY
REPORTER: VAL LARSON
CLERK: CHERIE MOORE
DIVISION: DISTRICT

CASE NO. CV-2007-2409 (KOOTENAI CO. CASE)
DATE: 10/12/2007 TIME: 09:00 AM
CD: 07-42

KARLETTA BERRY, et al.

vs MICHAEL McFARLAND, et al.

Plaintiff / Petitioner

Defendant / Respondent

Atty: **REX A. FINNEY**

Atty: **JP WHELAN (BY TELEPHONE)**

SUBJECT OF PROCEEDINGS MOTION TO COMPEL
CHARGE

INDEX SPEAKER PHASE OF CASE

9:00	J	Calls Case
		Present:
	J	MR. WHELAN, YOUR MOTION
	JW	SERVED DISCOVERY IN JUNE OF THIS YEAR – I RECEIVED THE RESPONSES TO REQUESTS FOR ADMISSIONS ON A TIMELY BASIS EVEN THOUGH ALL DENIED – INTERROGATORIES WERE NOT TIMELY – I CALLED OPPOSING COUNSEL – I DIDN'T RECEIVE A RETURN CALL – NOTHING WAS FORTHCOMING – RECEIVED NO RESPONSE TO MY LETTER – I WAITED AND FILED A MOTION AND HEARD NOTHING UNTIL THE DAY BEFORE THE HEARING – I STILL DON'T HAVE THE RESPONSES – I BELIEVE THAT SANCTIONS ARE APPROPRIATE – REQUEST COURT ISSUE ORDER COMPELLING DISCOVERY AND THAT DOCUMENT BE PRODUCED HERE IN COEUR D'ALENE – A SIMPLE PHONE CALL COULD HAVE PREVENTED THIS COURT APPEARANCE – I WANT THE DISCOVERY – REQUESTING SANCTIONS FOR THE CONDUCT
	J	MR. FINNEY?
9:05	RF	DO NOT SEE ANY CALL FROM COUNSEL – I TOLD HIM I WOULD SEND THE ANSWERS – THE NATURE OF THE CASE IS AGAINST AN ATTORNEY – MR. BERRY SOUGHT ADVICE FROM MR. MCFARLAND – NEAR TIME OF JERRY BERRY'S DEATH AN AGREEMENT WAS SIGNED – DON'T THINK THAT WITH ATTORNEY'S ACTIONS TO PROTECT ESTATE – DON'T THINK IT DESERVES SANCTIONS – HAVE MANY EXCUSES, NONE OF WHICH ARE VERY GOOD – NO OBJECTION TO COURT ORDERING PREPARATION OF ANSWERS – RULE ALLOWS FOR PROVIDING ACCESS FOR COPYING – DON'T FEEL SANCTIONS ARE APPROPRIATE – I REVIEWED DISCOVERY WITH MY CLIENT – FAILED TO PREPARE THE DISCOVERY – I HAVE TIME TO WORK ON ANSWERS THIS WEEKEND BUT REQUEST 10 DAYS TO HAVE MY CLIENT REVIEW AND SIGN AND DELIVER TO OPPOSING COUNSEL
	J	REBUTTAL?
	JW	I DIDN'T HEAR ANY EXCUSE – I THINK SANCTIONS SHOULD BE AWARDED – REQUEST COURT ORDER OF ANSWERS TO BE PRODUCED TO MY OFFICE WITHIN 10 DAYS AND SANCTIONS OF \$525
9:09	J	I RECOGNIZE THAT THE AWARD FOR SANCTIONS ARE SOMEWHAT AT THE DISCRETION OF THE COURT – (CITES RULE) – MY PRACTICE AS A JUDGE HAS BEEN THAT ONE SIDE HAS A HEARING AND RESPONSES WEREN'T MADE – MUST RESPOND

		I ORDER THAT ANSWERS TO INTERROGATORIES BE ANSWERED, NOT OBJECTED TO - ANSWERS AND RESPONSES ARE TO BE DELIVERED TO JOHN WHELAN BY OCTOBER 26 TH ORDER \$320 AS ATTORNEYS FEES FOR SANCTIONS WILL GIVE MR. FINNEY UNTIL CLOSE OF BUSINESS ON OCTOBER 26 TH
	JW	THANK YOU.

STATE OF IDAHO }
COUNTY OF KOOTENAI } SS
FILED:

2007 NOV 15 PM 3: 56

CLERK DISTRICT COURT

DEPUTY

J.P. Whelan, P.C.
Attorney at Law
213 N. 4th Street
Coeur d' Alene, Idaho 83814
Telephone: (208) 664-5891
Facsimile: (208) 664-2240
ISB No. 6083

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF KOOTENAI

KARLETTA GRACE BERRY, a widow,
KARLETTA GRACE BERRY, Personal
Representative of the Estate of Jerry
Lee Roy Berry, CAPTAIN'S WHEEL
RESORT, INC., an Idaho Corporation,

Plaintiffs,

vs.

MICHAEL B. MCFARLAND, MICHAEL B.
MCFARLAND, P.A., and KAREN
ZIMMERMAN,

Defendants.

Case No. CV-07-2409

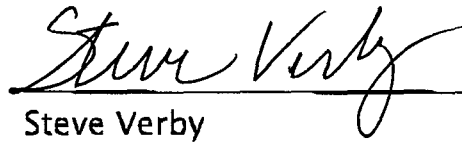
ORDER GRANTING MOTION TO
COMPEL

Defendants', Michael B. McFarland, Michael B. McFarland, P.A. and Karen Zimmerman, Motion to Compel came regularly before the Court on October 12, 2007. John P. Whelan appeared for Defendants. Rex A. Finney appeared for Plaintiff.

ORDER GRANTING MOTION TO COMPEL- 1

Having heard the argument of counsel and having reviewed the evidence, the Court hereby orders Plaintiff, Karletta Grace Berry, to produce responses to Interrogatories, without objections, and to produce documentation responsive to Defendants' Requests for Production of Documents to the office of John P. Whelan by the close of business on October 26, 2007. The Plaintiff, Karletta Grace Berry, is also ordered pay to Defendants attorney fees in the amount of \$350.00.

Dated: November 9, 2007



Steve Verby
District Judge

CLERK'S CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 9 day of ~~October~~^{November}, 2007, I caused to be served a true and correct copy of the foregoing by the method indicated below, and addressed as indicated below:

Rex A. Finney
Finney, Finney & Finney
120 East Lake Street, Suite 317
Sandpoint, ID 83865

Via: U.S. Mail, postage prepaid
 Facsimile (208) 263-8211

John P. Whelan, P.C.
213 N. 4th
Coeur d' Alene, ID 83814

Via: U.S. Mail, postage prepaid
 Facsimile (208) 664-2240

Cherie Moore
Secretary to Judge Verby



**Court Reporting
Service, Inc.**

816 E. Sherman Ave. , Suite 7
Coeur d'Alene, ID 83814
208-765-1700
208-765-8097 (fax)
email csmith@mmcourt.com

NORTHERN OFFICES
1 800 879-1700
Spokane, Washington

SOUTHERN OFFICES
1 800 234-9611

421 W. Franklin Street
P.O. Box 2636
Boise, Idaho 83701-2636
208 345-9611
208 345-8800 (fax)
email m-and-m@qwest.net

Twin Falls, Idaho
208 734-1700
Pocatello, Idaho
208 232-5581
Ontario, Oregon
541 881-1700

STATE OF IDAHO
COUNTY OF KOOTENAI } SS
FILED: March 10, 2008

2008 MAR 17 AM 10:32

CLERK DISTRICT COURT
Linda Stueland
DEPUTY

John P. Whelan
John P. Whelan, P.C.
213 N. Fourth Street
Coeur d'Alene ID 83814

RE: Berry v. McFarland/Zimmerman
Case No. CV 07-2409 (Kootenai County, Idaho)
Deponent: Karletta Grace Berry
Taken on 12/18/2007
M & M Job No. 2395C2

We have obtained the signature of the deponent on the original transcript of the above referenced deposition. We are forwarding the same to you in accordance with the Idaho Rules of Civil Procedure.

Attached find a copy of the Certificate of Witness and Change Sheet.

Very truly yours,

M & M Court Reporting Service, Inc.

pc: Mr. Rex A. Finney
Clerk of the District Court, Kootenai County

Enc.

CERTIFICATE OF KARLETTA GRACE BERRY

I, **KARLETTA GRACE BERRY**, being first duly sworn, depose and say:

That I am the witness named in the foregoing deposition; that I have read said deposition and know the contents thereof; that the questions contained therein were propounded to me; and that the answers therein contained are true and correct, except for any changes that I may have listed on the Change Sheet attached hereto.

DATED this 20 day of February, 2008.

Karletta Grace Berry
KARLETTA GRACE BERRY

SUBSCRIBED AND SWORN to before me this 20 day of February, 2008.



Rex A. Finney
NAME OF NOTARY PUBLIC Rex A. Finney
NOTARY PUBLIC FOR Idaho
RESIDING AT Sandpoint
MY COMMISSION EXPIRES 5/7/2013

2395C2

ERRATA SHEET FOR KARLETTA GRACE BERRY

PAGE 64 LINE 16 REASON FOR CHANGE wrong name

READS Jerry

SHOULD READ Mike McFarland

PAGE _____ LINE _____ REASON FOR CHANGE _____

READS _____

SHOULD READ _____

PAGE _____ LINE _____ REASON FOR CHANGE _____

READS _____

SHOULD READ _____

PAGE _____ LINE _____ REASON FOR CHANGE _____

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READS _____

SHOULD READ _____

WITNESS SIGNATURE Karletta Berry

2395C2

STATE OF IDAHO }
COUNTY OF KOOTENAI } SS
FILED: }
2008 MAR 27 PM 3:25 ³ ^{2nd} ^{Kne}
CLERK DISTRICT COURT
[Signature]
DEPUTY

J.P. Whelan, P.C.
Attorney at Law
213 N. 4th Street
Coeur d' Alene, Idaho 83814
Telephone: (208) 664-5891
Facsimile: (208) 664-2240
ISB No. 6083

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ~~BONNER~~

KARLETTA GRACE BERRY, a widow,
KARLETTA GRACE BERRY, Personal
Representative of the Estate of Jerry
Lee Roy Berry, CAPTAIN'S WHEEL
RESORT, INC., an Idaho Corporation,

Plaintiffs,

vs.

MICHAEL B. MCFARLAND, MICHAEL B.
MCFARLAND, P.A., and KAREN
ZIMMERMAN,

Defendants.

2409
Case No. CV-07-00301

MOTION TO DISMISS

COMES NOW the Defendants, Michael B. McFarland, Michael B. McFarland, P.A. and Karen Zimmerman, by and through their counsel of record, John P. Whelan, and hereby motions this court for an Order dismissing Captain's Wheel Resort, Inc. as a Plaintiff in the above-entitled matter. This motion is made pursuant to I.R.C.P. Rule 41(a)(2) and 41(b) on the grounds that Plaintiff Berry

MOTION TO DISMISS- 1

J.P. Whelan, P.C.
Attorney at Law
213 N. 4th Street
Coeur d' Alene, Idaho 83814
Telephone: (208) 664-5891
Facsimile: (208) 664-2240
ISB No. 6083

STATE OF IDAHO }
COUNTY OF KOOTENAI } SS
FILED:

2008 MAR 27 PM 3:24

326 kwe

CLERK DISTRICT COURT
[Signature]
DEPUTY

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF KOOTENAI

KARLETTA GRACE BERRY, a widow,
KARLETTA GRACE BERRY, Personal
Representative of the Estate of Jerry
Lee Roy Berry, CAPTAIN'S WHEEL
RESORT, INC., an Idaho Corporation,

Plaintiffs,

vs.

MICHAEL B. MCFARLAND, MICHAEL B.
MCFARLAND, P.A., and KAREN
ZIMMERMAN,

Defendants.

Case No. CV-07-2409

AFFIDAVIT OF JOHN P. WHELAN IN
SUPPORT OF MOTION TO DISMISS

Date: April 11, 2008

Time: 1:30 p.m.

Judge: Steve Verby

Location: Kootenai County Courthouse
324 W. Garden Ave.
Coeur d' Alene, ID 83814

STATE OF IDAHO)
) ss.
County of Kootenai)

John P. Whelan, being first duly sworn, deposes and says:

1. I am the attorney for Defendants in this action. I have personal

knowledge of the following facts and could competently testify.

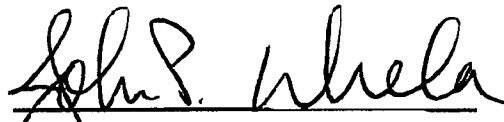
2. Attached as Exhibit A is a true and correct copy of the relevant portions of the deposition transcript of the deposition of Karletta Berry taken on December 18, 2007.

3. Ms. Berry made no demand upon the corporation before joining the corporation in this action. Furthermore, she has no facts in support of the allegations of her complaint, only speculation and hearsay.

4. Prior to filing the current motion to dismiss, I sent a letter to opposing counsel requesting that he voluntarily dismiss Captain's Wheel Resort from the current action. Attached hereto as Exhibit B is a true and correct copy of that letter. I did not receive a response to the letter.

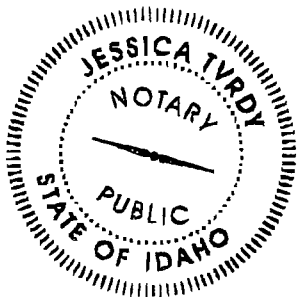
5. In drafting and filing the instant motion to dismiss, I have devoted three hours of my time. I expect to spend one more hour appearing in Court to argue the motion. My reasonable hourly rate is \$175.00. Accordingly, an attorney fee award of \$700.00 would reasonably compensate my clients for the expenses of pursuing the instant motion to dismiss.

Dated: 3/27/08



John P. Whelan

Subscribed and sworn before me this 27th day of March, 2008.



[Signature]
 Notary Public in and for the State of Idaho
 Residing at: Post Falls
 My Comm. Expires: 12/29/11

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF KOOTENAI

KARLETTA GRACE BERRY,)
a widow, KARLETTA GRACE)
BERRY, Personal)
Representative of the)
Estate of Jerry Lee Roy)
Berry, CAPTAIN'S WHEEL)
RESORT, INC., an Idaho)
Corporation,)

COPY

Plaintiffs,)

Case No. CV-07-2409

vs.)

MICHAEL B. MCFARLAND,)
MICHAEL B. MCFARLAND,)
P.A., and KAREN)
ZIMMERMAN,)

Defendants.)

DEPOSITION OF KARLETTA GRACE BERRY

TAKEN ON BEHALF OF THE DEFENDANTS

AT 816 SHERMAN AVENUE, COEUR D'ALENE, IDAHO

DECEMBER 18, 2007, AT 9:00 A.M.

REPORTED BY:

JULIE MCCAUGHAN, C.S.R. NO. 684
Notary Public



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1.800.879.1700
www.mmcourt.com

Boise, Idaho
Southern Offices
208.345.9611
1.800.234.9611

APPEARANCES

REX A. FINNEY, Attorney at Law, of the firm of FINNEY, FINNEY & FINNEY, 120 East Lake Street, Suite 317, Sandpoint, Idaho 83865, appearing for and on behalf of the Plaintiffs.

JOHN P. WHELAN, Attorney at Law, 213 North 4th Street, Coeur d'Alene, Idaho 83814, appearing for and on behalf of the Defendants.

Also Present: MICHAEL B. MCFARLAND KAREN ZIMMERMAN

THE DEPOSITION OF KARLETTA GRACE BERRY, was taken on behalf of the DEFENDANTS, on DECEMBER 18, 2007, at the offices of M & M Court Reporting, 816 SHERMAN AVENUE, COEUR D'ALENE, IDAHO, before M & M Court Reporting Services, Inc., by JULIE MCCAUGHAN, Court Reporter and Notary Public within and for the State of Idaho, to be used in an action pending in the District Court of the First Judicial District for the State of Idaho, in and for the County of Kootenai, said cause being Case No. CV-07-2409 in said Court.

AND THEREUPON, the following testimony was adduced, to wit:

KARLETTA GRACE BERRY, having been first duly sworn to tell the truth, the whole truth, and nothing but the truth, relating to said cause, deposes and says:

EXAMINATION

QUESTIONS BY MR. WHELAN:

Q. Okay. Will you please state your name for the record and spell your last name, please?

A. Karletta Berry, B-e-r-r-y.

Q. Have you ever had a deposition taken before?

A. No.

Q. Okay. Let me tell you a little bit about

INDEX

TESTIMONY OF KARLETTA GRACE BERRY PAGE Examination by Mr. Whelan 4 Examination by Mr. Finney 197 Further Examination by Mr. Whelan 205

DEPOSITION EXHIBITS: PAGE A Stock Purchase and Sale Agreement 96 B Stock Purchase and Sale Agreement 96 C Loan Agreement with Stock as Collateral 96 D Minutes of Special Meeting of Shareholders of Captain's Wheel Resort, Inc. 96 E Resolution in lieu of Special Meeting of Shareholders of Captain's Wheel Resort, Inc. 96 F Resolution in lieu of Special Meeting of Shareholders of Captain's Wheel Resort, Inc. 96 G Letter Dated January 28, 2007 139

It. It's -- a deposition is basically a fact-finding session. I'll be asking questions and hopefully you'll be giving me responses. This young lady over to my left is taking everything down that's on the record down in shorthand. Okay? When all is said and done and the deposition's done, this young lady's going to transcribe it into a booklet form. Okay?

You're going to be given an opportunity to review that booklet to make sure that your testimony is accurate and to review it to see if you need any corrections or additions or anything like that. If you do that, though, I gotta caution you, because I have the right to point out the fact at trial, if this matter goes to trial, that you made changes to your deposition transcript. So the thing I'd urge you to do is give your best response to my spontaneous questions, which the law deems to be the best form of testimony. Your responses to my questions are better than you going back and changing the transcript. You certainly have the right to do that, but at trial that would be pointed out. Okay?

So I'll be asking you questions, and I'd request that you pause a moment to give me a chance to make sure all of my question is out, because I might, you know, put a little trailer on or something to that

1 put it in the bank bag, and leave it in the office or in
 2 the safe for the managers to do what they had to do
 3 with.
 4 Q. Okay. And then lastly, October 2, 2006,
 5 you took apparently \$800 from the bank account and then
 6 one hundred and something from the ATM at Super One, and
 7 that was again to purchase groceries?
 8 A. From the bank, would have gone back to the
 9 restaurant. October 2 would have been for whatever
 10 groceries and gas.
 11 Q. So the business paid to fill your tank?
 12 Is that it?
 13 A. Yes, because I was doing the running for
 14 the business.
 15 Q. And where was the Super One located?
 16 A. In Hayden Lake.
 17 Q. So you'd drive down from Bayview?
 18 A. I would drive from my home to Bayview,
 19 pick up the deposits and go to the bank and go do my
 20 shopping. Sometimes I had to go to Costco for the
 21 restaurant, also.
 22 Q. Okay. Did you ever fill your tank on your
 23 own dime or did the company always paid for it?
 24 A. No, I paid my own on several occasions.
 25 Q. How many occasions?

1 A. Yes.
 2 Q. You've identified some persons who would
 3 have knowledge about those records. Those persons would
 4 include yourself, Jerry Berry, Mike McFarland, Karen
 5 Zimmerman, possibly Paul Daugharty. Are there any
 6 others that you can think of who may have knowledge
 7 about that, other than Toby McLaughlin, as well?
 8 A. No. Not until I acquired Mr. Finney as my
 9 attorney and this all started.
 10 Q. Now, before your filing of the lawsuit
 11 against Karen and Mike, did you make any written demand
 12 upon the board of directors to take any specific
 13 activity for you?
 14 A. I don't think so. I don't know how -- we
 15 barely spoke. So as they're the other board of
 16 directors, I don't know.
 17 Q. Okay. I didn't ask you about
 18 conversations. I asked you about writings.
 19 A. I don't believe so.
 20 Q. Okay. Now, you joined the corporation as
 21 a plaintiff in your action against Mike and Karen. Is
 22 there a reason why you did that?
 23 A. As Jerry's heir, yes.
 24 Q. And why is that?
 25 A. Because I don't feel that things have been

1 A. I don't know exactly.
 2 Q. Would it be a fair statement that most of
 3 the time the company paid to fill your gas tank?
 4 A. As working for the company as doing the
 5 running, probably, yes.
 6 Q. Okay. Did your duties at the Captain's
 7 Wheel restaurant ever materially change after you were
 8 appointed the vice-president?
 9 A. Not really, no.
 10 Q. You were active in the operation of the
 11 restaurant by purchasing groceries and occasionally
 12 helping out the kitchen and washing dishes?
 13 A. And cooking, yes.
 14 Q. How often did you cook?
 15 A. I don't remember -- as prep cook and
 16 working doing the dishes, it could have been at any time
 17 or all the time or every day I was scheduled or
 18 whatever. Because I was also the pizza cook, so on the
 19 days I was scheduled as dishwasher and helper, it was
 20 also pizza cooking. And if we were really busy and I
 21 could do something particular in another -- on the other
 22 stove, I could do the cooking there, too. So it varied.
 23 Q. Earlier on in your deposition, I asked you
 24 about Exhibits A through F. Do you recall those
 25 exhibits?

1 handled like they should have been. Mike and Karen made
 2 a loan. They did not buy into the corporation.
 3 Q. And what proof do you have of that other
 4 than the statements of Jerry? Do you have any other
 5 proof of that?
 6 A. A receipt stating that --
 7 Q. Anything else?
 8 A. No.
 9 Q. Okay. Now, why did you figure you had the
 10 right to join the corporation as a plaintiff in this
 11 lawsuit against Karen and Mike?
 12 A. I was advised by my attorney. He is the
 13 one that wrote up the paperwork as far as listing me as
 14 plaintiff.
 15 Q. I didn't ask about you. I asked about the
 16 corporation. I'm asking you why you felt -- and I don't
 17 want to get into your attorney's mind, and I don't want
 18 to ask you about some confidential relationship or issue
 19 you discussed in that confidential relationship. My
 20 question to you is: Why did you feel you had the right
 21 to join the corporation in this action?
 22 A. I'm a member of the corporation.
 23 Q. Any other reason?
 24 A. No, I guess. I don't know how to -- what
 25 you're wanting me to say.

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1 of action, and I'm not asking you for a legal opinion.
 2 I'm only seeking to discover facts that you rely upon in
 3 making these allegations in this Complaint. Now, your
 4 first Cause of Action alleges that Mike and Karen were
 5 issued stock without consideration. Do you have any
 6 facts in support of that allegation?

7 A. There was no paperwork. Can I have a
 8 moment, please?

9 Q. Certainly. Take as much time as you want.
 10 (Recess taken.)

11 BY MR. WHELAN:

12 Q. I was talking about the first Cause of
 13 Action for lack of consideration. And again, I don't
 14 want a legal opinion from you, but I just want to make
 15 sure that I understand all the facts that you're
 16 alleging in support of this Cause of Action. And as I
 17 understand it, you claim that Karen and Mike should not
 18 have been issued stock, that they had a loan, and it's
 19 still a loan. Is that your position?

20 A. Correct.

21 Q. And can you tell me how you reconcile that
 22 position in light of the fact that Jerry issued them
 23 stock?

24 A. They loaned Jerry the money in 2003, and
 25 for there to be a stock purchase, there should have been

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1 more moneys.

2 Q. And who determines something like that?

3 A. I would assume the stockholders.

4 Q. Or Jerry?

5 A. Or Jerry, or the corporate by-laws or
 6 whatever.

7 Q. Would it be a fair statement that Jerry
 8 probably issued stock to Karen and Mike because he
 9 wanted them to have stock? Would that be a fair
 10 statement?

11 A. Yes.

12 Q. So this lack of consideration -- can you
 13 tell me or can you add anything in your own words that
 14 reconciles that Cause of Action? What do you mean by
 15 lack of consideration in this Cause of Action?

16 A. No other moneys were forthcoming for stock
 17 purchase. They had loaned Jerry the money with the
 18 stock to be held as collateral. So to change from
 19 collateral to be a purchase, there should have been some
 20 sort of finances.

21 Q. Well, if it was agreeable to Jerry to
 22 issue stock in lieu of the debt, isn't that Jerry's
 23 call? I mean, you're not even on the paperwork at that
 24 point. Is that a fair statement?

25 A. Yes.

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1 Q. So if Jerry wanted to issue you stock and
 2 he wanted to issue Karen and Mike stock, and at that
 3 point Jerry's the sole shareholder, don't you think
 4 that's Jerry's call?

5 A. Jerry, as husband and wife, was not sole
 6 shareholder. It was just his name on the shares, but
 7 that does not make him sole shareholder.

8 Q. Okay. Well, that's a legal conclusion.
 9 We'll leave that to the lawyers and judges and juries.

10 A. Okay. Sorry.

11 Q. But if Jerry made the call to issue you
 12 stock, do you think Mike's got the right to say, "Hey,
 13 that's not proper"?

14 A. No.

15 Q. But you figure you've got the right to say
 16 it's not proper if Jerry issued Karen and Mike stock?

17 A. At the time, Jerry and I were sole owners.

18 Q. You weren't on the stock. Or is there
 19 something I'm missing? I mean, you're offering -- I
 20 don't want a legal opinion from you. I'll probably go
 21 to a lawyer for that. And you know, your thoughts on
 22 separate property and community property might be
 23 revealing, but not particularly relevant to this
 24 proceeding. Because all I want to know is if you think
 25 that Jerry wanted to issue them stock, if Jerry had the

Page 165

1 right to do that.

2 A. Yes.

3 Q. So your -- your second Cause of Action is
 4 lack of capacity, that somehow Mike McFarland took
 5 advantage of Jerry in his weakened state. Can you
 6 explain why you feel that's the case?

7 A. Because Mr. McFarland was not interested
 8 in having anything signed until after Jerry was
 9 diagnosed with cancer.

10 Q. Okay. Now, I took it from your testimony
 11 that you thought it was a good idea for Jerry to take
 12 care of things and put you on the stock. That was a
 13 good idea?

14 A. Yes.

15 Q. And you didn't have any writing with Jerry
 16 regarding, you know, your claimed interest under the
 17 community property laws. You didn't have any writing
 18 like that, did you?

19 A. No.

20 Q. Okay. And it's your claim that Mike
 21 should have had some writing. Is that it? Should have
 22 had some writing regarding what this deal was all about?

23 A. Yes.

24 Q. But again, that was between Mike and
 25 Jerry?

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1 A. Yes.

2 Q. And Mike and Jerry probably have the right

3 to determine what paperwork they want to have reflective

4 of their transactions. Is that a fair statement?

5 A. Yes.

6 Q. Okay. So can you explain to me how it is

7 that you feel that Jerry lacked capacity or how Mike

8 somehow took advantage of Jerry? Can you enlighten me?

9 And I just want you to tell me facts.

10 A. The loan was made in 2003. The paper

11 giving them or saying that they bought stock was not

12 signed until 2006.

13 Q. And what's the importance of that?

14 A. I would think if you were concerned about

15 your investment, that you would want paperwork showing

16 such investment all along.

17 Q. Okay. Now, what if somebody wasn't

18 concerned about their investment?

19 A. Not concerned about a \$100,000 investment?

20 Q. Yeah. What if?

21 A. I don't have an answer for that.

22 Q. Okay. So your position is that because

23 someone loans someone else \$100,000, that there must be

24 paperwork. Is that what I'm understanding here?

25 A. There ought to be.

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1 Q. Do you deny for a moment that Mike and

2 Karen -- Mike McFarland and Karen Zimmerman supplied the

3 money for the stock that they were issued? Do you

4 dispute that for a minute?

5 A. They gave Jerry a loan that was to be

6 secured by the stock as collateral.

7 Q. Okay. And -- yeah, you keep saying that.

8 Now, that was for \$100,000. Is that true?

9 A. Total, yes.

10 Q. Mike and Karen paid \$100,000 to Jerry. Is

11 that true?

12 A. Yes.

13 Q. You don't dispute that?

14 A. No.

15 Q. You just claim that that's a debt that's

16 still owed to Mike and Karen and they shouldn't have

17 been issued stock. That's your claim?

18 A. No.

19 Q. What is your claim then?

20 A. The stock should have been held as

21 collateral, not signed over.

22 Q. Okay. And who do you think made the

23 mistake there?

24 A. Jerry.

25 Q. Okay. And why is that a mistake?

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1 A. Because that gives them the ownership of

2 the stock instead of it being held as collateral.

3 Q. And you think it should have been held as

4 collateral because you think that that's what Jerry

5 wanted? Is that it?

6 A. It was a loan, yes.

7 Q. That wasn't the question I asked.

8 A. Yes.

9 Q. And can you tell me why Jerry didn't have

10 any paperwork on this \$100,000 transaction?

11 A. Because it was a loan, and we did have

12 paperwork to the effect that -- that receipt is the

13 paperwork that Jerry had as --

14 Q. Okay. Did you ever repay this loan?

15 A. Ms. Zimmerman received monthly payments on

16 the loan that she took out on her home.

17 Q. I think the word I used was you. Okay?

18 If I can interrupt you. I asked you: Did you repay

19 this loan?

20 A. I actually hand-delivered payments to Ms.

21 Zimmerman, yes.

22 Q. I asked if you repaid this loan. Did you

23 repay the \$100,000 loan?

24 A. It has not been called in as being due and

25 payable.

Page 169

1 Q. And who has the right to do that?

2 A. Mr. McFarland and Ms. Zimmerman.

3 Q. And where is that reflected?

4 A. They're the ones that loaned Jerry the

5 money.

6 Q. I said: Where is that reflected?

7 A. I don't know.

8 Q. You just think it ought to be like that.

9 Is that what I'm taking out of this? You've got an

10 understanding of what you think the paperwork should

11 have looked like between Jerry and Karen and Mike?

12 A. Yes.

13 Q. Okay. Now, I'm asking you of evidence of

14 lack of capacity and evidence in support of your claim

15 that somehow Mike McFarland took advantage of Jerry.

16 Would you tell me specifically what facts you have in

17 support of that allegation?

18 A. Jerry had been in the hospital in June for

19 chemotoxicity. He was seeing things and hearing things,

20 and it was just a few days after he came out of the

21 hospital from that that Mr. McFarland wanted him to

22 sign -- specifically called to have an appointment made

23 to meet at his ranch to sign the papers, the stock

24 purchase agreement.

25 Q. I asked for evidence in support of your

1 allegation. Do you have any evidence in support of the
2 allegation that Mike McFarland took advantage of Jerry
3 Berry? Do you have evidence?

4 A. As in a piece of paper saying "I'm taking
5 advantage of him"? No.

6 Q. Anything. Do you have anything other than
7 your mere speculation?

8 A. The facts I think are going to speak for
9 themselves.

10 Q. What facts are those? That's the whole
11 purpose of this deposition. Would you please enlighten
12 me on what those facts are?

13 MR. FINNEY: Tell him why you're upset with them,
14 what they did.

15 MR. WHELAN: I don't really care about your
16 opinion. I want to know the facts.

17 Q. What facts do you allege support your
18 allegation that Mike McFarland somehow took advantage of
19 Jerry Berry?

20 A. As far as pushing the stock purchase and
21 sale agreement, Mr. Berry, my husband, was in the
22 hospital with chemotoxicity. Before he came home from
23 the hospital, Mr. McFarland brought me your Exhibit A
24 and Exhibit B and told me to give them to Jerry. I told
25 Mr. McFarland that Jerry needed a couple days after he

1 Q. Okay. Do you have any other facts that
2 support these allegations?

3 A. No.

4 Q. Okay. And ma'am, I don't know what your
5 understanding is of trials and all that, but normally,
6 what somebody hears from somebody else, that's called
7 hearsay, and that doesn't come into a legal proceeding.
8 I mean, do you have anything other than that, other than
9 your understanding of what your husband told you? Do
10 you have any other hard facts?

11 A. No.

12 Q. Okay. Then your claim that Mr. McFarland
13 took advantage of your husband is largely based on
14 statements from your husband? Is that it?

15 A. And -- yes. And my confrontation with Mr.
16 McFarland.

17 Q. Okay. And when was that?

18 A. When he brought me the paperwork and said
19 that we didn't have the time, that it needed to be done
20 now.

21 Q. Okay. And that was in --

22 A. June.

23 Q. June 20, something like that? June 21,
24 22?

25 A. Yeah, somewhere around there. 2006.

1 got out of the hospital to have a chance to look at
2 them. Mr. McFarland's response was, "We don't have that
3 kind of time."

4 Q. Anything else?

5 A. Not at this point, no.

6 Q. Okay. And then as I understand it, it was
7 not until July 4 that Jerry jumps into his car and
8 drives himself over to Mr. McFarland's ranch and meets
9 with Mr. McFarland and has this documentation signed
10 which he brings back with him. Is that a fair
11 statement?

12 A. Jerry went that day, yes.

13 Q. Okay. Anything else you have in support
14 of your allegation that Mike McFarland somehow took
15 advantage of Jerry Berry? Anything else?

16 A. That was 4th of July weekend. The 1st was
17 I believe on a Friday. When he called to tell Jerry he
18 wanted the appointment, Jerry asked if he could come
19 another day, and Mr. McFarland's answer to Jerry was
20 that he had spent his whole weekend waiting for Jerry to
21 come over and that he needed it done now.

22 Q. And did you speak to Mr. McFarland?

23 A. No. It's what Jerry told me.

24 Q. So all this is hearsay?

25 A. What my husband told me.

Berry v. McFarland

Supreme Court No. 37951-2010

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1 Q. And then two weeks later, your husband
2 goes to Mr. McFarland's ranch to get that paperwork
3 signed?

4 A. About 10 days later, yeah.

5 Q. Okay. And your third Cause of Action is
6 against Mr. McFarland alleging breach of fiduciary duty.
7 Essentially that Mr. McFarland was acting as Jerry

8 Berry's lawyer and that somehow Mr. McFarland took
9 advantage of that position. Do you have facts in
10 support of that allegation?

11 A. Mr. McFarland was Jerry's attorney and he
12 knew that Mr. Campbell needed out of the restaurant.
13 And when our refinance didn't go through, he approached
14 Jerry with giving him the loan.

15 Q. And you know this because Jerry told you.
16 Is that it?

17 A. Pretty much, yeah.

18 Q. Anything else?

19 A. No.

20 Q. Other than what Jerry told you?

21 A. No.

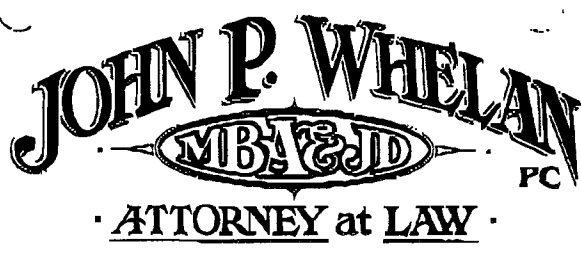
22 Q. And just to recapitulate some of the
23 testimony I've heard here, you don't have any writings
24 of Mike McFarland billing Jerry for legal services?
25 You've never seen anything like that?

1 A. Not that I could find.
 2 Q. And certainly you looked for them. Right?
 3 A. Oh, yes.
 4 Q. And you've told us that the business kept
 5 receipts and all that, that the manager should have
 6 receipts for all the purchases and that type of thing.
 7 Is that true?
 8 A. Yes.
 9 Q. So it's not a matter of simply not keeping
 10 records. Records were kept.
 11 A. Records were kept.
 12 Q. And it would be a fair statement to say
 13 that had Jerry received a bill from Mike, he probably
 14 would have kept the receipt. Is that a fair statement?
 15 A. Yes.
 16 Q. And you've made a diligent search through
 17 the records that Jerry had kept before his demise, and
 18 you didn't find any such billing statements?
 19 A. No.
 20 Q. So the only evidence we have in support of
 21 your claim that Mike was Jerry's lawyer is what you
 22 heard from Jerry and that Jerry somehow introduced Mike
 23 as his lawyer to people?
 24 A. Yes.
 25 Q. Anything else?

1 Q. Well, Byron something?
 2 A. Powell is in Washington, yes.
 3 Q. And Jerry was using Byron Powell?
 4 A. Yes.
 5 Q. And then somebody replaced Byron Powell?
 6 A. I can't remember if Byron replaced the
 7 other attorney or which way it went, but I remember
 8 Byron Powell's name.
 9 Q. Okay. And Jerry retained him for some
 10 purpose?
 11 A. Right.
 12 Q. Okay. And any other lawyers besides Byron
 13 Powell?
 14 A. Not names that I can remember.
 15 Q. Okay. Now, I'm not asking you to remember
 16 any names, but were there any other lawyers, seeing that
 17 you and Jerry had these frequent conversations about
 18 his -- who he used as his lawyers?
 19 A. It would have been the attorney that was
 20 with the same case that either -- it was Byron that
 21 turned over or turned the other -- I don't know. Either
 22 Byron turned the case over to the other attorney or the
 23 other attorney turned it over to Byron, but I don't
 24 remember that attorney's name, and he was in Washington.
 25 Q. Okay. Any other attorneys besides that

1 A. The restaurant managers contacted Mike for
 2 information under the understanding that he was working
 3 as or operating as the corporate attorney.
 4 Q. How do you know they had that
 5 understanding? Were you in their mind when they called
 6 him?
 7 A. Why else would they call him?
 8 Q. Well, see, I get to ask the questions.
 9 Okay? So ma'am, I want to know facts. I don't really
 10 want to hear speculation. I'm hearing a lot of
 11 speculation, and I just want to know facts. So are
 12 there any other facts that we haven't already covered
 13 that dictate or reveal or demonstrate that Mike
 14 McFarland was Jerry Berry's lawyer? Anything else that
 15 we haven't talked about yet?
 16 A. No.
 17 Q. Okay. And did -- you mentioned one
 18 Washington lawyer that Jerry had contacted sometime in
 19 2000 or 2001. Did Jerry have dealings with any other
 20 lawyers?
 21 A. I don't -- as far as just the judgments
 22 against him, I don't know the names, but he had received
 23 letters from -- on judgments or creditors or --
 24 Q. From lawyers in Washington?
 25 A. I don't know where they came from.

1 attorney and Byron Powell?
 2 A. Not that I can remember, other than Mr.
 3 McFarland.
 4 Q. Okay. Now, the money that was supplied by
 5 Karen and Mike, that was supplied when? 2003?
 6 A. Yes.
 7 Q. And Jerry was not diagnosed with cancer
 8 until November of 2005?
 9 A. Correct.
 10 Q. Okay. So I mean, he wasn't in a state of
 11 failing health before November of 2005, presumably?
 12 A. No.
 13 Q. So you don't claim that his falling -- or
 14 that his health affected any negotiations or
 15 transactions he had with Karen and/or Mike prior to
 16 November of 2005?
 17 A. No.
 18 Q. Do you allege that prior to November of
 19 2005, that somehow Mike McFarland had engaged in
 20 improper conduct as a lawyer in dealing with Jerry
 21 Berry?
 22 A. Prior to 2005?
 23 Q. Prior to November of 2005.
 24 A. No.
 25 Q. So it's only after Jerry was diagnosed



March 4, 2008

Rex A. Finney
 Finney, Finney & Finney
 120 East Lake Street, Suite 317
 Sandpoint, ID 83865

Via Fax: (208) 263-8211

Re: Berry v. McFarland

Dear Rex:

By this letter I seek your voluntary cooperation in dismissing Captain's Wheel Resort, Inc. from the litigation between our respective clients. Stated simply, your client has no standing to take action on behalf of the corporate entity. Your client is but a mere shareholder of the corporation and but one of three of the directors of the company.

Captain's Wheel Resort, Inc. can only act through its board of directors. Action by board requires a majority vote of a quorum of the directors. Your client does not constitute a quorum, and no resolution has been placed before the board to take action against Mike McFarland and/or Karen Zimmerman for breach of fiduciary duty.

The allegations of your client's complaint against Mr. McFarland and Ms. Zimmerman are, at best, *derivative*. Essentially your client claims that Mr. McFarland and Ms. Zimmerman have wronged the corporate entity through their conduct, and somehow this alleged conduct has damaged your client. In fact, even if the allegations were true, it would be the corporate entity that would have standing to pursue the claims—not your client. There are strict prerequisites to the maintenance of a shareholder derivative action that your client has not met. Accordingly, she lacks standing to sue the corporate entity or to sue on its behalf, which is apparently what she is attempting to accomplish by naming the corporation as a party plaintiff in the action against Mr. McFarland and Ms. Zimmerman.

213 N. 4th Street • Coeur d' Alene, Idaho 83814
 (208) 664-5891 • Fax (208) 664-2240

Exhibit

copy to Client Berry v. McFarland

Admitted in Idaho & California Supreme Court No. 27951-2010

B
19 of 1268

Prior to writing this letter, I had begun drafting a motion to dismiss the corporate entity. However, the law is so clearly on the side of my clients on this issue that I thought I might save a considerable amount of time, effort and expense by first asking you to voluntarily dismiss the corporate entity. The case of *McCann v. McCann*, 138 Idaho 228, 61 P.3d 585 (2002) is directly on point.

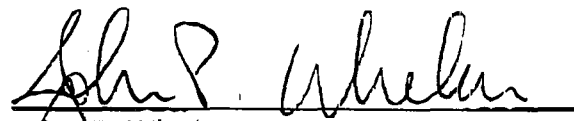
In that case, the Plaintiff insisted on taking action against a corporate entity of which he was a shareholder without first satisfying the prerequisites to a shareholder derivative action. This procedural error was repeatedly brought to the attention of the Plaintiff to no avail. The Plaintiff refused to dismiss the action. Nevertheless, the trial court dismissed the action with prejudice and awarded the defendant attorney fees.

You may also wish to pursue Idaho Code 30-1-741 and I.R.C.P. 23(f).

Please consider the foregoing and advise me of your response. If I do not hear from you, I will pursue a motion to dismiss.

Sincerely,

JOHN P. WHELAN, P.C.



John P. Whelan

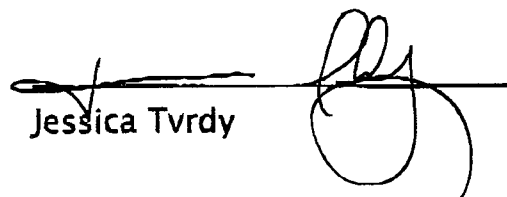
jt
cc: Michael McFarland

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 27 day of March, 2008, I caused to be served a true and correct copy of the foregoing by the method indicated below, and addressed as indicated below:

Rex A. Finney
Finney, Finney & Finney
120 East Lake Street, Suite 317
Sandpoint, ID 83865

- () U.S. Mail, Postage Prepaid
- () Hand Delivered
- () Overnight Mail
- () Facsimile to: (208) 263-8211


Jessica Tvrdy

J.P. Whelan, P.C.
Attorney at Law
213 N. 4th Street
Coeur d' Alene, Idaho 83814
Telephone: (208) 664-5891
Facsimile: (208) 664-2240
ISB No. 6083

STATE OF IDAHO
COUNTY OF KOOTENAI } SS
FILED:
2008 MAR 27 PM 3:24 3²⁶ ke
CLERK DISTRICT COURT
[Signature]
DEPUTY

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE STATE OF
IDAHO, IN AND FOR THE COUNTY OF KOOTENAI

KARLETTA GRACE BERRY, a widow,
KARLETTA GRACE BERRY, Personal
Representative of the Estate of Jerry
Lee Roy Berry, CAPTAIN'S WHEEL
RESORT, INC., an Idaho Corporation,

Plaintiffs,

vs.

MICHAEL B. MCFARLAND, MICHAEL B.
MCFARLAND, P.A., and KAREN
ZIMMERMAN,

Defendants.

Case No. CV-07-2409

AFFIDAVIT OF MICHAEL B. MCFARLAND
IN SUPPORT OF MOTION TO DISMISS

Date: April 11, 2008

Time: 1:30 p.m.

Judge: Steve Verby

Location: Kootenai County Courthouse
324 W. Garden Ave.
Coeur d' Alene, ID 83814

STATE OF IDAHO)
) ss.
County of Kootenai)

Michael B. McFarland, being first duly sworn, deposes and says:

1. I am one of the Defendants in the above-entitled action. I have

personal knowledge of the following facts and could competently testify.

2. I am one of the three members of the board of directors of a business entity known as Captain's Wheel Resort, Inc., an Idaho corporation in good standing. The second member of the board is my co-Defendant Karen Zimmerman. The third member is Plaintiff, Karletta Berry. Ms. Zimmerman and I own 50% of the stock in the corporation, Plaintiff has owned the other fifty percent since her husband passed away in November of 2006.

3. Plaintiff, Karletta Berry, is not authorized to take any action on behalf of the corporation. Furthermore, she is not authorized to pursue any litigation on behalf of the corporation. In addition, Karletta Berry has made no written demands to the corporation to take any action whatsoever to protect her rights as a shareholder or any rights that might belong to the corporation.

4. Accordingly, Karletta Berry has seemingly failed to satisfy the prerequisites to filing a shareholder derivative action on behalf of Captain's Wheel Resort, Inc.

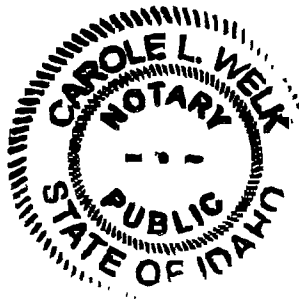
Dated: 3/27/08



Michael B. McFarland

AFFIDAVIT OF MICHAEL B. MCFARLAND IN SUPPORT OF MOTION TO DISMISS-2

Subscribed and sworn before me this 27th day of March, 2008.



Carole L. Welk

Notary Public in and for the State of Idaho

Residing at: Coeur d'Alene, ID. 83815

My Comm. Expires: 09-09-12

AFFIDAVIT OF MICHAEL B. MCFARLAND IN SUPPORT OF MOTION TO DISMISS-3

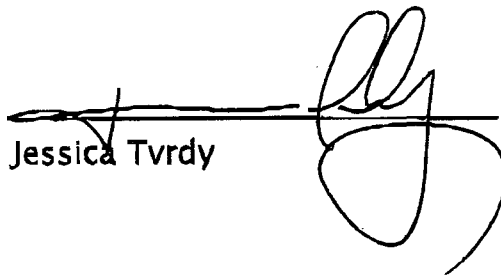
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 27 day of March, 2008, I caused to be served a true and correct copy of the foregoing by the method indicated below, and addressed as indicated below:

Rex A. Finney
Finney, Finney & Finney
120 East Lake Street, Suite 317
Sandpoint, ID 83865

- U.S. Mail, Postage Prepaid
 Hand Delivered
 Overnight Mail
 Facsimile to: (208) 263-8211

Jessica Tvrdy

A handwritten signature in black ink, appearing to read 'Jessica Tvrdy', is written over a horizontal line. The signature is stylized and cursive.

STATE OF IDAHO }
COUNTY OF KOOTENAI } SS
FILED:

2008 MAR 27 PM 3:25 3²⁶ *me*

CLERK DISTRICT COURT
[Signature]
DEPUTY

J.P. Whelan, P.C.
Attorney at Law
213 N. 4th Street
Coeur d' Alene, Idaho 83814
Telephone: (208) 664-5891
Facsimile: (208) 664-2240
ISB No. 6083

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF KOOTENAI

KARLETTA GRACE BERRY, a widow,
KARLETTA GRACE BERRY, Personal
Representative of the Estate of Jerry
Lee Roy Berry, CAPTAIN'S WHEEL
RESORT, INC., an Idaho Corporation,

Plaintiffs,

vs.

MICHAEL B. MCFARLAND, MICHAEL B.
MCFARLAND, P.A., and KAREN
ZIMMERMAN,

Defendants.

Case No. CV-07-2409

MEMORANDUM IN SUPPORT OF
DEFENDANTS' MOTION TO DISMISS

Date: April 11, 2008

Time: 1:30 p.m.

Judge: Steve Verby

Location: Kootenai County Courthouse
324 W. Garden Ave.
Coeur d' Alene, ID 83814

Defendants, Michael B. McFarland, Michael B. McFarland, P.A. and Karen Zimmerman, submit the following memorandum in support of their motion to dismiss:

MEMORANDUM IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS-1

STATEMENT OF CASE

Plaintiff, Karletta Berry, initiated this action in February of 2007. Although the Plaintiff lived in Kootenai County, along with all of the Defendants, the action was filed in Bonner County. Plaintiff stipulated to move the action to Kootenai County. On Plaintiff's motion, the matter was re-assigned to the Honorable Steve Verby.

Without any authorization, Plaintiff added Captain's Wheel Resort, Inc., an Idaho Corporation, as a party Plaintiff. Yet Plaintiff took none of the action which is a prerequisite to the maintenance of a shareholder derivative action. Plaintiff is not authorized by the corporation to do anything, much less to join it as a party Plaintiff. Furthermore, Plaintiff's counsel was not hired by the corporation nor authorized to pursue any action on the part of the corporation.

Plaintiff is but one of the three directors of the corporation. She became the owner of fifty percent (50%) of the stock in the corporation when her husband, Jerry Berry, passed away in November of 2006.

The other two directors are the Defendants, Michael McFarland and Karen Zimmerman, who own the remaining fifty percent (50%) of the stock in the corporation.

The instant motion to dismiss seeks to dismiss the corporation as a party plaintiff.

PLAINTIFF LACKS STANDING TO PURSUE THE INSTANT ACTION UNDER THE NAME OF THE CAPTAIN'S WHEEL RESORT, INC.

Every action shall be prosecuted in the name of the real party in interest.
I.R.C.P. Rule 17(a).

MEMORANDUM IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS-2

**PLAINTIFF HAS FAILED TO ADHERE TO THE PREREQUISITES FOR A
SHAREHOLDER DERIVATIVE ACTION**

The prerequisites for the filing of a shareholder derivative action are set forth in I.R.C.P. Rule 23(f), which requires the following:

"The complaint shall also allege with particularity the efforts, if any, made by the Plaintiff to obtain the action which Plaintiff desires from the directors or comparable authority and, if necessary, from the shareholder or members, and the reasons for the Plaintiff's failure to obtain the action or for not making the effort. The derivative action may not be maintained if it appears that the Plaintiff does not fairly and adequately represent the interests of the shareholders or members similarly situated in enforcing the right of the corporation or association."

**DISMISSAL IS THE PROPER RELIEF FOR PLAINTIFF'S FAILURE TO SATISFY THE
PREREQUISITES TO A DERIVATIVE ACTION**

The case of *McCann v. McCann*, 138 Idaho 228, 61 P.3d 585 (2002) is directly on point with the instant matter. In that case, Plaintiff sought to pursue claims that rightfully belonged to a corporate entity. Yet Plaintiff took no action to request that the corporation or its directors pursue the claims. The trial court (the Honorable George Reinhardt) advised Plaintiff that he had to satisfy the notice and demand requirements that were a prerequisite to his maintaining a shareholder derivative action to enforce the claims, in accordance with Idaho Code 30-1-742. The case was dismissed by Judge Reinhardt after the Plaintiff failed to comply with the prerequisites of the statute.

Stated simply, a written demand for action by the corporation and/or the board of directors must be made by a shareholder who wants to pursue a

MEMORANDUM IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS-3

derivative action. A shareholder must give the corporation 90 days in which to act on the shareholder demand—only after the 90 day period has passed, without action by the corporation or its directors, may a derivative be pursued by the shareholder. *McCann, Id.*

ARGUMENT

In the matter at hand, Plaintiff has made no written demand on the corporation or its directors to take any action whatsoever (see deposition transcript of K. Berry—Exhibit A, Affidavit of John P. Whelan). Plaintiff simply filed a lawsuit and named the corporation as a co-party Plaintiff. Having made no written demand, and having not given the corporation and its directors the mandatory 90 day period in which to respond to the demand, dismissal of the corporation from the instant action is the appropriate remedy.

Furthermore, Plaintiff has no authority from the corporate directors to pursue any claim or action on the part of the corporation (see Affidavit of Michael McFarland).

Prior to filing the instant motion, Defendants' counsel sent a letter to Plaintiff's counsel asking him to dismiss the corporation as a party Plaintiff without the necessity of a motion to dismiss (see Exhibit B—Affidavit of John P. Whelan). Plaintiff's counsel did not respond to the letter. The subject motion to dismiss followed.


An award of attorney fees to the party successfully opposing a shareholder derivative action is within the sound discretion of the trial court. *McCann, Id*; I.C. 30-1-746(2). Fees are warranted in the matter at hand due to the flagrant disregard for the statutory prerequisites for maintaining a shareholder derivative action. Having placed Plaintiff on notice of her failure to abide by the statutory prerequisites through the letter sent to Plaintiff's

counsel, Defendant's counsel did not even receive the courtesy of a response.
An award of attorney fees is warranted.

DATED: 3/27/08

Respectfully Submitted,

JOHN P. WHELAN, P.C.



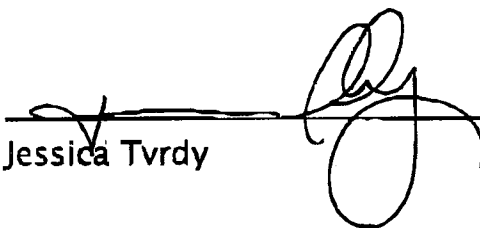
John P. Whelan

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 27 day of March, 2008, I caused to be served a true and correct copy of the foregoing by the method indicated below, and addressed as indicated below:

Rex A. Finney
Finney, Finney & Finney
120 East Lake Street, Suite 317
Sandpoint, ID 83865

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- Facsimile to: (208) 263-8211



 Jessica Tvrdy

J.P. Whelan, P.C.
Attorney at Law
213 N. 4th Street
Coeur d' Alene, Idaho 83814
Telephone: (208) 664-5891
Facsimile: (208) 664-2240
ISB No. 6083

STATE OF IDAHO }
COUNTY OF KOOTENAI } SS
FILED.

2008 MAR 27 PM 3:25 ^{3²⁶} *Kye*

CLERK DISTRICT COURT
[Signature]
DEPUTY

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF KOOTENAI

KARLETTA GRACE BERRY, a widow,
KARLETTA GRACE BERRY, Personal
Representative of the Estate of Jerry
Lee Roy Berry, CAPTAIN'S WHEEL
RESORT, INC., an Idaho Corporation,

Plaintiffs,

vs.

MICHAEL B. MCFARLAND, MICHAEL B.
MCFARLAND, P.A., and KAREN
ZIMMERMAN,

Defendants.

Case No. CV-07-2409

NOTICE OF HEARING

Date: April 11, 2008

Time: 1:30 p.m.

Judge: Steve Verby

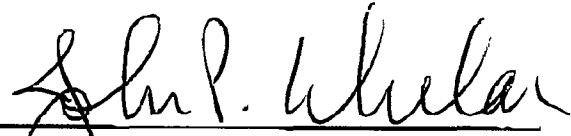
Location: Kootenai County Courthouse
324 W. Garden Ave.
Coeur d' Alene, ID 83814

TO ALL PARTIES AND THEIR ATTORNEY OF RECORD:

PLEASE TAKE NOTICE that on the date of April 11, 2008 at 1:30 p.m. before the Honorable Steve Verby, Defendants, will have their motion to dismiss heard by the Court.

NOTICE OF HEARING-1

Dated this 27 day of March, 2008.



John P. Whelan

Attorney for Defendants

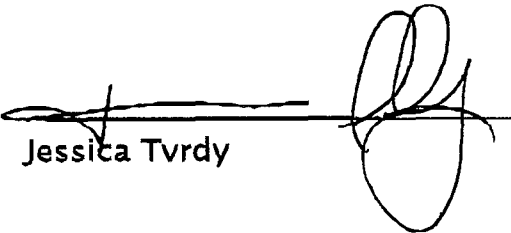
NOTICE OF HEARING-2

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 Jessica Tvrdy

STATE OF IDAHO }
COUNTY OF KOOTENAI } SS
FILED: 4:52pm
N8P

2008 APR 10 PM 4:51

CLERK DISTRICT COURT
Patricia [Signature]
DEPUTY

REX A. FINNEY
FINNEY FINNEY & FINNEY, P.A.
Attorneys at Law
Old Power House Building
120 East Lake Street, Suite 317
Sandpoint, Idaho 83864
Phone: (208) 263-7712
Fax: (208) 263-8211
ISB No. 6313

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF KOOTENAI

KARLETTA GRACE BERRY, a widow,	)	Case No. CV-2007-0002409
KARLETTA GRACE BERRY, Personal)	
Representative of the Estate	)	AFFIDAVIT OF KARLETTA GRACE
of Jerry Lee Roy Berry,	)	BERRY
CAPTAIN'S WHEEL RESORT, INC.,)	
an Idaho Corporation,)	
)	
Plaintiff,)	
)	
v.)	
)	
MICHAEL B. MCFARLAND, MICHAEL)	
B. MCFARLAND, P.A., and KAREN)	
ZIMMERMAN,)	
)	
Defendants.)	
)	

STATE OF IDAHO)
: ss.
County of Bonner)

COMES NOW, the undersigned and being first duly sworn on
oath, and states:

1. I am over the age of 18 years and competent to make this Affidavit.

2. I am a Plaintiff with regard to the above-entitled matter.

3. Michael B. McFarland is a licensed Idaho attorney and his law firm is designated as Michael B. McFarland, P.A.

4. I am presently the sole director for the Captain's Wheel Resort, Incorporated.

5. I was first made director of the Captain's Wheel Resort, Incorporated on August 7, 2003 by way of the Resolution In Lieu of Special Meeting Of the Board of Directors and Shareholders of Captain's Wheel Resort, Incorporated attached hereto as Exhibit 1.

6. I am rightfully the president of the Captain's Wheel Resort, Incorporated.

7. I am rightfully the shareholder of all of the stock of Captain's Wheel Resort, Incorporated.

8. Any stock currently held in the name of the Defendants is held under a constructive trust for my benefit due to the breach of Michael McFarland's fiduciary duty owed to myself and to my deceased husband Jerry Berry, and to the Captain's Wheel Resort, Incorporated because he was our attorney and violated his high duties.

9. Jerry Lee Roy Berry was diagnosed with pancreatic cancer in November 2005 and was treated for cancer between said date and his death on November 4, 2006. Among other treatments, Jerry Lee Roy Berry was treated with chemotherapy.

10. Jerry Lee Roy Berry was in the hospital from June 17, 2006 until June 21, 2006 for chemo toxicity from his treatments.

11. Subsequent to August 9, 2003 and on or about July 4, 2006 Jerry Lee Roy Berry met with Michael B. McFarland and Karen M. Zimmerman and a Stock Purchase and Sale Agreement was signed with Jerry Lee Roy Berry as seller and with Karen M. Zimmerman and Michael B. McFarland as buyers. The Stock Purchase and Sale Agreement reads as if it were signed and executed on August 9, 2003, but the agreement was actually signed on or about July 4, 2006. A true and correct copy of the stock purchase and sale agreement is attached hereto as Exhibit 2.

12. Michael B McFarland as an attorney and also acting through his professional association, Michael B. McFarland, P.A., was the attorney for Jerry Lee Roy Berry, myself, and the Captain's Wheel Resort, Inc. prior to and including up to and through July 4, 2006. During said time, Defendant McFarland provided legal advise to Jerry Lee Roy Berry, myself, and the Captain's Wheel Resort, Inc. and entered into a fiduciary

relationship and/or assumed a fiduciary relationship with said persons and entity at all times relevant hereto.

13. Among other things the Defendant Michael B. McFarland and his professional association were providing advice on how the stock and assets of the Captain's Wheel Resort, Inc. could be protected from creditors of Jerry Lee Roy Berry, and said Defendants maintained the corporate records for the Captain's Wheel Resort, Inc.

14. The Defendant Karen M. Zimmerman is involved in a boyfriend-girlfriend relationship with Michael B. McFarland and they purport to be owners of one half of the stock of the corporation as joint tenants with rights of survivorship. This action against Karen Zimmerman includes a breach of fiduciary duty claim.

15. Attached hereto as Exhibit 3 is a true and correct copy of the Bylaws of the Captain's Wheel Resort, Incorporated, as enacted by the original shareholders. Pursuant to Article III of the Bylaws, the Corporation was to have 2 directors. The attached Bylaws were in effect at the time of Jerry Berry's death.

16. At no time were the bylaws amended to provide for more than two (2) directors. Any appointment of the Defendants as directors was purportedly made when myself and Jerry Berry were

the two (2) directors and is in violation the Bylaws and the appointment is void. The document purporting to appoint Michael McFarland and Karen Zimmerman as directors was prepared by Michael McFarland when he was attorney for myself, Jerry Lee Roy Berry, and for the CAPTAIN'S WHEEL RESORT, INC., an Idaho Corporation.

17. I am pursuing this action as a direct action against the Defendants for a breach of fiduciary duty, among other causes of action, to myself, for the Estate of Jerry Lee Roy Berry, and for the CAPTAIN'S WHEEL RESORT, INC., an Idaho Corporation.

18. The Stock Purchase and Sale Agreement was drafted by Michael B. McFarland during a time he was attorney for to myself, for Jerry Lee Roy Berry, and for the CAPTAIN'S WHEEL RESORT, INC., an Idaho Corporation.

19. In the event my action is successful, I am the only shareholder that will benefit by the direct action brought by CAPTAIN'S WHEEL RESORT, INC., an Idaho Corporation.

20. Attached hereto as Exhibit 4 is the Stock Purchase and Sale Agreement from when my deceased husband and I purchased some of the stock in the corporation. If Jerry's signature is compared on Exhibit 4 with his signature on Exhibit 3, it is

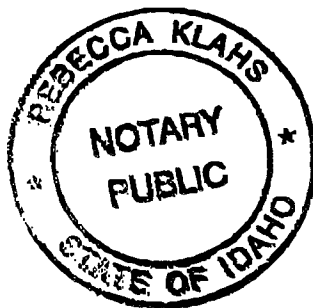
apparent that Jerry was in poor health at the time he signed

Exhibit 2.

DATED this 10th day of April 2008.

Karletta Grace Berry
KARLETTA GRACE BERRY

SUBSCRIBED AND SWORN TO before me, this 10th day of April 2008.



Rebecca Klahs
Notary Public - State of Idaho
Residing at Sandpoint
My Commission expires 12/14/2011

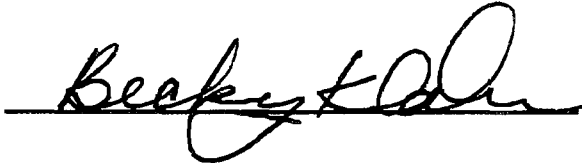
CERTIFICATE OF SERVICE

I hereby certify that the original of the foregoing was delivered via facsimile, this 10th day of April, 2008, and was addressed as follows:

J.P. WHELAN P.C.
Attorney at law
213 N. 4th Street
Coeur d'Alene, Idaho 83814
Fax No.: (208) 664-2240

Judge Verby
chamber's copy

Via Facsimile: 263-0890



STOCK PURCHASE AGREEMENT

Agreement executed between JAMES T. CAMPBELL and JEAN A. CAMPBELL of P.O. Box 517, Bayview, ID 83803, hereinafter referred to as "Sellers" and JERRY LEE ROY BERRY, of 6555 E. Remington Road, Athol, ID 83801, hereinafter referred to as "Buyer".

For and in consideration of ONE HUNDRED THOUSAND DOLLARS (\$100,000.00), receipt of which is hereby acknowledged, Sellers agrees to sell, assign and convey to Buyer, Buyer's executors, administrators, and assigns, with full power to transfer the shares on the books of the corporation, TWO HUNDRED (200) shares of the common stock of CAPTAIN'S WHEEL RESORT, INC., a corporation organized and existing under the laws of the State of Idaho and having its principal place of business at 100 Scenic Drive, Bayview, ID 83803. The stock is represented by the following certificates: No. 1 and No. 2.

Sellers warrant that the stock now stands in Sellers' names on the books of the corporation, and that all assessments to date are paid on the shares. Buyer agrees to purchase the shares for the consideration set forth in this agreement, however, Buyer understands and agrees that the sale of this stock by Sellers can only be consummated on the written approval of Sellers' Board of Directors.

IN WITNESS WHEREOF, the parties have executed this Agreement the day and year first above written.

BUYER:

SELLER:


JERRY LEE ROY BERRY


JAMES T. CAMPBELL


JEAN A. CAMPBELL

Exhibit - 1

STOCK PURCHASE AND SALE AGREEMENT

This agreement executed August 9, 2003 between JERRY LEE ROY BERRY, of 6555 E. Remington Road, Athol, ID 83801, hereinafter referred to as "Seller" and KAREN M. ZIMMERMAN and MICHAEL B. McFARLAND of 8729 W. Cloverleaf Drive, Hayden, Idaho 83835, hereinafter referred to as "Buyers".

For and in consideration of One-hundred thousand dollars (\$100,000) and other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, Seller agrees to sell, assign and convey to Buyers, as joint tenants with right of survivorship, with full power to transfer the shares on the books of the corporation, TWO HUNDRED (200) shares of the common stock of CAPTAIN'S WHEEL RESORT, INC., a corporation organized and existing under the laws of the State of Idaho and having its principal place of business at 100 Scenic Drive, Bayview, Idaho 83803. The stock is represented by Certificates 1 and 2, (100 shares each) which were assigned to the Seller by Jean A. and James M. Campbell.

Seller warrants that the stock conveyed hereby represents 50% of the shares which have been issued to date by said corporation.

As additional consideration, it is agreed between Buyers and Seller that Seller shall retain his offices as director and president of the corporation, with full operational control of the business of the corporation through calendar year 2005. It is further agreed, as additional consideration, that the transfer of the shares shall be effective on January 1, 2006, and that Seller shall be considered the owner for tax and all other purposes through midnight, December 31, 2005.

IN WITNESS WHEREOF, the parties have executed this Agreement, which is effective on the day and year first above written.

BUYERS:

SELLER:


KAREN M. ZIMMERMAN


JERRY LEE ROY BERRY


MICHAEL B. McFARLAND

Stock Purchase and Sale Agreement

Exhibit 2

BYLAWS
OF
CAPTAIN'S WHEEL RESORT, INCORPORATED

ARTICLE I

OFFICES AND REGISTERED AGENT

Section 1.01. Principal Executive Office. The Corporation shall maintain its Principal Executive Office in the State of Idaho.

Section 1.02. Registered Office. The Corporation shall maintain a Registered Office as required by the Idaho Business Corporation Act, as amended from time to time (the "Act"), at a location in the State of Idaho designated by the Board of Directors from time to time.

Section 1.03. Other Offices. The Corporation may have such other offices within and without the State of Idaho as the business of the Corporation may require from time to time. The authority to establish or close such other offices may be delegated by the Board of Directors to one or more of the Corporation's Officers.

Section 1.04. Registered Agent. The Corporation shall maintain a Registered Agent as required by the Act who shall have a business office at the Corporation's Registered Office. The Registered Agent shall be designated by the Board of Directors from time to time to serve at its pleasure.

Section 1.05. Filings. In the absence of directions from the Board of Directors to the contrary, the Secretary of the Corporation shall cause the Corporation to maintain currently all filings with respect to the Registered Office and Registered Agent with all governmental officials as required by the Act or otherwise by law.

ARTICLE II

SHAREHOLDERS

Section 2.01. Annual Meetings. An annual meeting of the Corporation's Shareholders shall be held once each calendar year for the purpose of electing Directors and for the transaction of such other business as may properly come before the meeting. The annual meeting shall be held at the time and place designated by the Board of Directors from time to time. In the absence of any such designation, the annual meeting shall be held on the 15 day of April each year; but if that day shall be a legal holiday, then such annual meeting shall be held on the next succeeding business day.

Exhibit 3

Section 2.02. Special Meetings. Special meetings of the Corporation's Shareholders may be called for any one or more lawful purposes by the Corporation's President or a majority of the Board of Directors. Special meetings of the Shareholders shall be held at the Corporation's Principal Executive Office at the time designated in the notice of the meeting in accordance with Section 2.03; provided, however, that such meetings called by a majority of the Board of Directors may be held at such places as the Board of Directors may determine.

Section 2.03. Notice of Meetings, Waiver or Notice. Written or printed notice of all meetings of Shareholders shall be delivered not less than ten (10) nor more than fifty (50) days before the meeting date, either personally or by registered or certified mail, to all Shareholders of record entitled to vote at such meeting. If mailed, the notice shall be deemed to be delivered when deposited with postage thereon prepaid in the United States mail, addressed to the Shareholder at the Shareholder's address as it appears on the Corporation's records, or if a Shareholder shall have filed with the Secretary of the Corporation a written request that notices to him be mailed to some other address, then directed to him at that other address. The notice shall state the date, time, and place of the meeting and, in the case of a special meeting, the purpose or purposes for which such meeting was called. Notice of a meeting of Shareholders need not be given to any Shareholder who, in person or by proxy, signs a waiver of notice either before or after the meeting. To be effective the waiver shall contain recitals sufficient to identify beyond some reasonable doubt the meeting to which it applies. Such recitals may, but need not necessarily, include reference to the date and purpose of the meeting and the business transacted thereat. Recital of the proper date of a meeting shall be conclusive identification of the meeting to which a waiver of notice applies.

Section 2.04. Quorum. Except as may otherwise be required by law or the Corporation's Articles of Incorporation, at any meeting of Shareholders the presence, in person or by proxy, of the holders of a majority of the outstanding shares entitled to vote thereat shall constitute a quorum for the transaction of any business properly before the meeting.

Section 2.05. Transaction of Business. Business transacted at an annual meeting of Shareholders may include all such business as may properly come before the meeting. Business transacted at a special meeting of Shareholders shall be limited to the purposes stated in the notice of the meeting.

Section 2.06. Voting. Except as may otherwise be required by law or the Corporation's Articles of Incorporation, a person (or their proxy) present at a meeting of Shareholders shall be entitled to one vote for each share of voting stock as to which such person is the Shareholder of Record.

Section 2.07. Adjournments. A majority of the voting shares held by Shareholders of record present in person or by proxy at a meeting of Shareholders may adjourn a meeting from time to time to a date, time, and place fixed by notice as provided for above or, if such date is less than thirty days from the date of adjournment, to a date, time, and place fixed by the majority and announced at the original meeting prior to adjournment.

Section 2.08. Action Without Meeting. Any action required or permitted to be taken at a meeting of the Shareholders may be taken without a meeting if a consent in writing, setting

forth the action taken, shall be signed by all of the Shareholders entitled to vote with respect to the subject matter thereof.

Section 2.09. Proxies. At all meetings of Shareholders, a Shareholder may vote in person or by proxy executed in writing by the Shareholder or by their duly authorized attorney in fact. Such proxy shall be filed with the Secretary of the Corporation before or at the time of the meeting. No proxy shall be valid after eleven months from the date of its execution unless it qualifies as an irrevocable proxy under the Act.

Section 2.10. Voting of Shares by Certain Holders. Except as inconsistent with any stockholder agreement, shares standing in the name of another corporation may be voted by the officer, agent or proxy as the bylaws of that corporation may prescribe, or, in the absence of such provision, as the Board of Directors of the other corporation may determine.

Shares held by an administrator, executor, guardian or conservator may be voted by him, either in person or by proxy, without a transfer of such shares into their name. Shares standing in the name of a trustee may be voted by him, either in person or by proxy, but no trustee shall be entitled to vote shares held by him without a transfer of the shares into their name.

Shares standing in the name of a receiver may be voted by the receiver, and shares held by or under the control of a receiver may be voted by the receiver without the transfer thereof into their name if authority to do is contained in an appropriate order of the court by which such receiver was appointed.

A Shareholder whose shares are pledged shall be entitled to vote such shares until the shares have been transferred into the name of the pledgee, and thereafter the pledgee shall be entitled to vote the shares so transferred.

Section 2.11. Action. Approval of actions by Shareholders shall be in accordance with the requirements of the Act, except to the extent otherwise provided by the Articles of Incorporation.

Section 2.12. Order of Business. The order of business at the annual meeting, and so far as practicable at all other meetings of Shareholders, shall be as follows:

1. Proof of notice of the meeting
2. Determination of a quorum
3. Reading and disposal of unapproved Minutes
4. Reports of Officers and Committees
5. Election of Directors
6. Unfinished business
7. New business
8. Adjournment

Except with respect to a specific rule to the contrary in these Bylaws or the Act, the latest edition of Robert's Rules of Order as available at meeting shall be used to resolve any procedural disputes that might arise in a Shareholders' meeting.

ARTICLE III

DIRECTORS

Section 3.01. Authority. The Board of Directors shall have ultimate authority over the conduct and management of the business and affairs of the Corporation.

Section 3.02. Number. The Corporation shall initially have two (2) Directors. Changes to the number of Directors must be approved by a majority of the Shareholders.

Section 3.03. Tenure. Each Director shall hold office from the date of their election and qualification until their successor has been duly elected and qualified, or until their earlier removal, resignation, death, or incapacity. An election of all Directors by the Shareholders shall be held at each annual meeting of the Corporation's Shareholders.

Section 3.04. Removal. Any Director may be removed from office, with or without cause, by a vote of the holders of a majority of the shares of the Corporation's voting stock. Any Director may be removed from office with cause by a majority vote of the Board of Directors at a meeting at which only the removal and replacement of the Director or Directors in question shall be considered.

Section 3.05. Vacancies. The remaining Director(s) shall elect a new Director to fill any vacancy on the Board of Directors in the same manner and subject to the same restrictions and voting rights as apply to the election of the Director whose removal, resignation, death, or newly created directorship created the vacancy.

Section 3.06. Regular Meetings. A regular meeting of the Board of Directors shall be held without notice other than by this Bylaw immediately after, and at the same place as, the annual meeting of Shareholders. The Board of Directors may by resolution provide for the holding of additional regular meetings without notice other than such resolution; provided, however, the resolution shall fix the date, time, and place (which may be anywhere within or without the State of the Corporation's Principal Executive Office) for these regular meetings.

Section 3.07. Special Meetings; Notice of Special Meeting. Special meetings of the Board of Directors may be called for any lawful purpose or purposes by any Director or the President of the Corporation. The person calling a special meeting shall give, or cause to be given, to each Director notice of the date, time and place of the meeting by any normal means of communication not less than ten (10) days nor more than sixty (60) days prior thereto. The notices may, but need not, describe the purpose of the meeting. If mailed, the notice shall be deemed to be delivered when deposited in the United States mail at the Director's business or home address, with postage thereon prepaid. If notice is given by telegram, the notice shall be deemed delivered when the telegram is delivered to the telegraph company. Any time or place

fixed for a special meeting must permit participation in the meeting by means of telecommunications as authorized below.

Section 3.08. Waiver of Notice of Special Meetings. Notice of a special meeting need not be given to any Director who signs a waiver of notice either before or after the meeting. To be effective the waiver shall contain recitals sufficient to identify beyond some reasonable doubt the meeting to which it applies. The recitals may, but need not necessarily, include reference to the date and purpose of the meeting and the business transacted thereat. Recital of the proper date of a meeting shall be conclusive identification of the meeting to which a waiver of notice applies unless the waiver contains additional recitals creating a patent ambiguity as to its proper application. The attendance of a Director at a special Directors meeting shall constitute a waiver of notice of that meeting, except where the Director attends the meeting for the sole and express purpose of objecting to the transaction of any business because the meeting is not lawfully called or convened.

Section 3.09. Participation by Telecommunications. Any Director may participate in, and be regarded as present at, any meeting of the Board of Directors by means of conference telephone or any other means of communication by which all persons participating in the meeting can hear each other at the same time.

Section 3.10. Quorum. A majority of Directors in office shall constitute a quorum for the transaction of business at any meeting of the Board of Directors.

Section 3.11. Action. The Board of Directors shall take action pursuant to resolutions adopted by the affirmative vote of a majority of the Directors participating in a meeting at which a quorum is present, or the affirmative vote of a greater number of Directors where required by the Corporation's Articles of Incorporation or otherwise by law.

Section 3.12. Action Without Meeting. Any action required or permitted to be taken by the Board of Directors at an annual, regular, or special meeting may be taken without a meeting if a consent in writing, setting forth the action taken, shall be signed by all of the Directors.

Section 3.13. Presumption of Assent. A Director of the Corporation who is present at a meeting of the Board of Directors at which action on any corporate matter is taken shall be presumed to have assented to the action taken unless the Directors' dissent shall be entered in the minutes of the meeting, or unless the Directors' written dissent to such action be filed with the Secretary of the meeting before the adjournment thereof or shall forward the dissent by registered mail to the Secretary of the Corporation immediately after the adjournment of the meeting. The right to dissent shall not apply to a Director who voted in favor of such action.

Section 3.14. Committees. The Board of Directors may by resolution designate and delegate authority to an Executive Committee and other committees with such authority as may be permitted by the Act. Special meetings of any committee may be called at any time by any Director who is a member of the committee or by any person entitled to call a special meeting of the full Board of Directors. Except as otherwise provided in the section, the conduct of all meetings of any committee, including notice thereof, shall be governed by Sections 3.06 through 3.13 of this Article.

Section 3.15. Compensation. The Board of Directors may by resolution authorize payment to all Directors of a uniform fixed sum for attendance at each meeting or a uniform stated salary as a Director. No such payment shall preclude any Director from serving the Corporation in any other capacity and receiving compensation therefore. The Board of Directors may also by resolution authorize the payment of reimbursement of all expenses of each Director related to the Director's attendance at meetings.

Section 3.16. Order of Business. The order of business at all meetings of the Board of Directors shall be:

1. Determination of a quorum
2. Reading and disposal of all unapproved minutes
3. Reports of Officers and committees
4. Unfinished business
5. New business
6. Adjournment

Except with respect to a specific rule to the contrary in these Bylaws or the Act, the latest edition of Robert's Rules of Order (available at meeting) shall be used to resolve any procedural dispute that might arise in a Board of Directors' meeting.

ARTICLE IV

OFFICERS

Section 4.01. In General. The officers of the Corporation shall consist of a President, Vice-President and a Secretary/Treasurer and such additional assistant secretaries/treasurers and other officers and agents as the Board of Directors deems advisable from time to time. All officers shall be appointed by the Board of Directors to serve at its pleasure. Except as may otherwise be provided by law or in the Articles of Incorporation, any officer may be removed by the Board of Directors at any time, with or without cause. Any vacancy, however occurring, in any office may be filled by the Board of Directors for the unexpired term. One person may hold two or more offices. Each officer shall exercise the authority and perform the duties as may be set forth in these Bylaws and any additional authority and duties as the Board of Directors shall determine from time to time.

Section 4.02. President. The President shall be the chief executive officer of the Corporation and, subject to the authority of the Board of Directors, shall manage the business and affairs of the Corporation. Absent written delegation by the President, the President shall preside at all meetings of the Shareholders and all meetings of the Board of Directors, and shall see that the resolutions of the Board of Directors are put into effect. The President shall have full authority to execute on the Corporation's behalf any and all contracts, agreements, notes, bonds, deeds, mortgages, certificates, instruments, and other documents except as may be specifically limited by resolution of the Board of Directors. The President's authority shall be completed with the consensus of the Secretary.

Section 4.03 Vice-President. The Vice President shall serve under the direction of the President. In the event of incapacity, or inability or refusal of the President to act, the Vice President shall assume the authority and perform the duties of the President. If the Board of Directors appoints more than one Vice President, the seniority of the Vice Presidents shall be determined from their dates of appointment unless the Board of Directors shall otherwise specify. By written act, the President or the Board of Directors, may delegate to the Vice President all, or any portion of , the President's duties.

Section 4.04. Secretary. Except as otherwise provided by these Bylaws or determined by the Board of Directors, the Secretary shall serve under the direction of the President. The Secretary shall attend all meetings of the Shareholders and the Board of Directors and record the proceedings thereof. The Secretary shall give, or cause to be given, all notices in connection with such meetings. The Secretary shall be the custodian of the Corporate seal and affix the seal to any document requiring it.

Section 4.05. Treasurer. Except as otherwise provided by these Bylaws or determined by the Board of Directors, the Treasurer shall serve under the direction of the President. The Treasurer shall, under the direction of the President, keep safe custody of the Corporation's funds and maintain complete and accurate books and records of account. The Treasurer shall upon request report to the Board of Directors on the financial condition of the Corporation.

Section 4.06. Assistant Officers. Except as otherwise provided by these Bylaws or determined by the Board of Directors, the Assistant Secretaries and Assistant Treasurers, if any, shall serve under the immediate direction of the Secretary and the Treasurer, respectively, and under the ultimate direction of the President. The Assistant Officers shall assume the authority and perform the duties of their respective immediate superior officer as may be necessary in the absence, incapacity, or inability or refusal of such immediate superior officer to act. The seniority of Assistant Officers shall be determined from their dates of appointment unless the Board of Directors shall otherwise specify.

Section 4.07. Salaries. The salaries of the officers shall be fixed from time to time by the Board of Directors and no officer shall be prevented from receiving a salary by reason of the fact that he is also a Director of the Corporation.

ARTICLE V

INDEMNIFICATION

Section 5.01. Definitions. For purposes of this Article the following definitions shall apply:

"Corporation" means this Corporation and any domestic or foreign predecessor entity of this Corporation in a merger or other transaction in which the predecessor's existence ceased upon consummation of the transaction.

"Expenses" include counsel fees, expert witness fees, and costs of investigation, litigation, and appeal, as well as any amounts expended in asserting a claim for indemnification.

"Liability" means the obligation to pay a judgment, settlement, penalty, fine, or other such obligation, including, without limitation, any excise tax assessed with respect to an employee benefit plan.

"Legal Entity" means a corporation, partnership, joint venture, trust, employee benefit plan, or other enterprise.

"Predecessor Entity" means a legal entity the existence of which ceased upon its acquisition by the Corporation in a merger or otherwise.

"Proceeding" means any threatened, pending, or completed action, suit, proceeding, or appeal whether civil, criminal, administrative, or investigative and whether formal or informal.

Section 5.02. Indemnification of Directors and Officers. The Corporation shall indemnify and may contract in advance to indemnify an individual who is, was, or is threatened to be made a party to a proceeding because he is or was a Director or Officer of the Corporation or, while a Director or Officer of the Corporation, is or was serving the Corporation or any other legal entity in any capacity at the request of the Corporation against all liabilities and reasonable expenses incurred in the proceeding to the fullest extent permissible under and pursuant to the Act and regardless of whether the proceeding is by or in the right of the Corporation. The determination that indemnification under this Section is permissible and the evaluation as to the reasonableness of expenses in a specific case shall be made, in the case of a Director, as provided by law, and in the case of an Officer, as provided in Section 5.03 of this Article; provided, however, that if a majority of the Directors of the Corporation has changed after the date of the alleged conduct giving rise to a claim for indemnification, such determination and evaluation shall, at the option of the person claiming indemnification, be made by special legal counsel agreed upon by the Board of Directors and such person. Unless a determination has been made that indemnification is not permissible, the Corporation shall make advances and reimbursements for expenses incurred by a Director or Officer in a proceeding upon receipt of an undertaking from him to repay the same if it is ultimately determined that he is not entitled to indemnification. Such undertaking shall be an unlimited, unsecured general obligation of the Director or Officer and shall be accepted without reference to their ability to make repayment. The termination of a proceeding by judgment, order, settlement, conviction, or upon a plea of nolo contendere or its equivalent shall not of itself create a presumption that a Director or Officer acted in such a manner as to make him ineligible for indemnification.

Section 5.03. Indemnification of Others. The Corporation may, to a lesser extent or to the same extent that the Corporation is required to provide indemnification and make advances and reimbursements for expenses to its Directors and Officers, provide indemnification and make advances and reimbursements for expenses to its employees and agents, the directors, officers, employees, and agents of its subsidiaries and predecessor entities, and any person serving any other legal entity in any capacity at the request of the Corporation, and, if authorized by general or specific action of the Board of Directors, may contract in advance to do so. The determination that indemnification under this Section is permissible, the authorization of such indemnification, and the evaluation as to the reasonableness of expenses in a specific case shall be made as authorized from time to time by general or specific action of

the Board of Directors, which action may be taken before or after a claim for indemnification is made, or as otherwise provided by law. No person's rights under Section 5.02 of this Article shall be limited by the provisions of this paragraph.

Section 5.04. Miscellaneous. Every reference in this Article to persons who are or may be entitled to indemnification shall include all persons who formerly occupied any of the positions referred to and their respective heirs, executors, and administrators. Special legal counsel selected to make determinations under this Article may be counsel for the Corporation. Indemnification pursuant to this Article shall not be exclusive of any other right of indemnification to which any person may be entitled, including indemnification pursuant to valid contract, indemnification by legal entities other than the Corporation and indemnification under policies of insurance purchased and maintained by the Corporation or others. However, no person shall be entitled to indemnification by the Corporation to the extent he is indemnified by another, including an insurer. The Corporation is authorized to purchase and maintain insurance against any liability it may have under this Article or to protect any of the persons named above against any liability arising from their service to the Corporation or any other legal entity at the request of the Corporation, regardless of the Corporation's power to indemnify against such liability. The provisions of this Article shall not be deemed to prohibit the Corporation from entering into contracts otherwise permitted by law with any individuals or legal entities, including those named above, for the purpose of conducting the business of the Corporation. If any provision of this Article or its application to any person or circumstance is held invalid by a court of competent jurisdiction, the invalidity shall not affect other provisions or applications of this Article, and to this end the provisions of this Article are severable.

ARTICLE VI

CONTRACTS, LOANS, CHECKS AND DEPOSITS

Section 6.01. Contracts. The Board of Directors may authorize any officer or officers, agent or agents, to enter into any contract or execute and deliver any instrument in the name of and on behalf of the Corporation, and such authority may be general or confined to specific instances.

Section 6.02. Loans. No loans shall be contracted on behalf of the Corporation and no evidences of indebtedness shall be issued in its name unless authorized by a resolution of the Board of Directors, and such authority may be general or confined to specific instances.

Section 6.03. Checks, Drafts, etc. All checks, drafts or other orders for the payment of money, notes or other evidences of indebtedness issued in the name of the Corporation shall be signed by the officer or officers, agent or agents of the Corporation and in such manner as shall from time to time be determined by these Bylaws or by resolution of the Board of Directors.

Section 6.04. Deposits. All funds of the Corporation not otherwise employed shall be deposited from time to time to the credit of the Corporation in such banks, trust companies or other depositories as the Board of Directors may select.

Section 6.05. Conflict of Interest. No contract or transaction between this Corporation and any of its Directors, or between this Corporation and any other corporation, firm, association or legal entity shall be invalidated by the reason of the fact that a Director of this Corporation has a direct or indirect interest, pecuniary or otherwise, in such corporation, firm, association, or legal entity or because the interested Director was present at the meeting of the Board of Directors which acted upon or in reference to such contract or transaction, or because he participated in such action; provided that the interest of each Director shall have been disclosed to or known by the Board and disinterested majority of the Board shall have nonetheless ratified and approved such contract or transaction. Such interested Director or Directors may be counted in determination of whether quorum is present and may vote upon the issue on which the Director or officer may have financial interest, and said vote shall not be void or voidable because of such relationship or interest if the fact of such relationship or interest is disclosed or known to the Board of Directors, or the fact of such relationship or interest is disclosed or known to the Shareholders entitled to vote, or that the contract or transaction is fair and reasonable to the Corporation and that the fact of such relationship or interest is fully or fairly disclosed or known to the Corporation.

ARTICLE VII

MISCELLANEOUS

Section 7.01. Certificates for Shares. Certificates representing shares of capital stock of the Corporation shall state upon the face thereof the name of the person to whom issued, the number of shares, the par value per share and the fact that the Corporation is organized under the laws of the State of Idaho. Each certificate shall be signed by the President and by the Secretary. All certificates for shares shall be consecutively numbered. The name and address of the person to whom the shares represented thereby are issued, with the number of shares and date of issuance, shall be entered on the stock transfer books of the Corporation. All certificates surrendered to the Corporation for transfer shall be canceled and no new certificate shall be issued until the former certificate for a like number of shares shall have been surrendered and canceled, except that in case of a lost, destroyed or mutilated certificate a new one may be issued therefor upon the making of an affidavit by the holder of record of the shares represented by such certificate setting forth the facts concerning the loss, theft or mutilation thereof and upon such bond or indemnity to the Corporation as the Board of Directors may prescribe. A new certificate may be issued without requiring any bond when, in the judgment of the Board of Directors, it is not imprudent to do so.

Section 7.02. Transfer of Shares. Subject to the provisions of the Act and to any transfer restrictions binding on the Corporation, transfer of shares of the Corporation shall be made only on the stock transfer books of the Corporation by the holder of record thereof or by their agent, attorney-in-fact or other legal representative, who shall furnish proper evidence of authority to transfer, upon surrender for cancellation of the certificate for such shares. The person in whose name shares stand on the stock transfer books of the Corporation shall be deemed by the Corporation to be the owner thereof for all purposes.

Section 7.03. Voting of Shares in Other Corporations Owned By The Corporation. Subject always to the specific directions of the Board of Directors, any share or shares of stock

issued by any other corporation and owned or controlled by the Corporation may be voted at any shareholders' meeting of the other corporation by the President of the Corporation if he be present, or in their absence by any Vice-President of the Corporation who may be present. Whenever, in the judgment of the President, or, in their absence, of any Vice-President, it is desirable for the Corporation to execute a proxy or give a shareholders' consent in respect to any share or shares of stock issued by any other corporation and owned or controlled by the Corporation, the proxy or consent shall be executed in the name of the Corporation by the President or one of the Vice-Presidents of the Corporation without necessity of any authorization by the Board of Directors. Any person or persons designated in the manner above stated as the proxy or proxies of the Corporation shall have full right, power and authority to vote the share or shares of stock issued by the other corporation.

Section 7.04. Fiscal Year. The fiscal year of the Corporation shall be the calendar year, but this may be changed by resolution of the Board of Directors from time to time as the Board deems advisable.

Section 7.05. Dividends. The Board of Directors may from time to time declare, and the Corporation may pay, dividends on its outstanding shares in the manner and upon the terms and conditions as the Board of Directors deems advisable and as permitted by law.

Section 7.06. Seal. The seal of the Corporation shall be circular in form and shall have inscribed thereon the name of the Corporation, the year of its organization, and the words "Corporate Seal, State of Idaho."

Section 7.07. Amendments. These Bylaws may be altered, amended, or repealed and new Bylaws may be adopted by the Shareholders representing a majority of the outstanding shares entitled to vote to elect Directors at a meeting of the Shareholders called for that purpose.

Section 7.08. Severability. Any provision of these Bylaws, or any amendment or alteration thereof, which is determined to be in violation of the Act shall not in any way render any of the remaining provisions invalid.

Section 7.09. References to Gender and Number Terms. In construing these Bylaws, feminine or neuter pronouns shall be substituted for those masculine in form and vice versa, and plural terms shall be substituted for singular and singular for plural in any place in which the context so requires.

Section 7.10. Headings. The Article and Section headings in these Bylaws are inserted for convenience only and are not to be strictly construed to determine the content of any pertinent section.

Section 7.11. Inspection of Records by Shareholders. A Shareholder is entitled to inspect and copy, during regular business hours at the Corporation's Principal Executive Office, any of the following records of the Corporation, if such gives the Corporation written notice of their demand at least five (5) business days before the date on which they wish to inspect and copy:

- (1) Its Articles of Incorporation or Restated Articles of Incorporation and all amendments to them currently in effect;
- (2) its Bylaws or restated Bylaws and all amendments to them currently in effect;
- (3) resolutions adopted by its Board of Directors;
- (4) the minutes of all Shareholders' meetings, and records of all action taken by Shareholders without a meeting, for the past three (3) years;
- (5) all written communications to Shareholders, generally, within the past three (3) years, including the financial statements furnished for the past (3) three years;
- (6) a list of the names and business addresses of its current Directors and Officers;
- (7) its most recent Annual Report delivered to the Secretary of State; and
- (8) all contracts or other written agreements between the Corporation and any of its Shareholders and all contracts or other written agreements between two (2) or more of the Shareholders.

A Shareholder's agent or attorney has the same inspection and copying rights as the Shareholder represented. The right to copy records under this section includes, if reasonable, the right to receive copies made by photographic, xerographic, or other means. The Corporation may impose a reasonable charge, covering the costs of labor and material, for copies of any documents provided to the Shareholder. The charge may not exceed the estimated cost of production or reproduction of the records.

Section 7.12. Reimbursement of Disallowed Compensation Expenses. Any payments made to a Director or Officer of the Corporation to compensate them for services rendered which shall be disallowed in whole or in part as a deductible expense for federal income tax purposes shall be reimbursed to the Corporation by such person to the full extent of such disallowance, together with interest thereon at the rate then in effect for interest on federal income tax deficiencies from the date of payment to the date of reimbursement, within sixty (60) days of notice of the disallowance to such person by the Board of Directors. Such notice shall be promptly given upon a determination, as defined in Section 1313(a) of the Internal Revenue Code of 1986 (as now in effect and hereafter amended), that such payment shall be disallowed in whole or in part as a deductible expense for federal income tax purposes. It shall be the duty of the Board of Directors to enforce payment by such person of each such amount disallowed. In lieu of payment by such person, subject to the approval of the Board of Directors, proportionate amounts may be withheld from such person's future compensation payments until the full amount owed to the Corporation has been recovered. Reimbursement of such disallowed expenses shall constitute a condition of election to any office or directorship of the Corporation.

Section 7.13. Stock Transfer. No Shareholder of this Corporation shall have the right to sell, pledge, transfer or make any other disposition of his/her shares without the express written consent of all other Shareholders.

ARTICLE VIII

DEADLOCK


Section 8. Coin Toss and Arbitration. If the Directors are equally divided and cannot agree on any issue, or the Shareholders are so divided that no Board can be elected, or internal dissension prevents the normal business of the Board, then the disagreement shall be resolved by the toss of a two different sided coin. Each side of the deadlock shall be represented by a side of the coin, the corporate counsel shall toss the coin into the air and allow the coin to fall to a flat surface. Whichever side of the deadlock was represented by the upside of the coin shall be enacted by the corporate officers or stockholders as the case may be. In the event that the deadlock can not separated into two sides of an issue, then the matter shall be resolved by compulsory and binding arbitration. In the event such deadlock shall arise, any Director may call for arbitration by appointing an arbitrator, reasonably qualified to resolve the issue on which there is a disagreement and/or deadlock. The party so appointing shall bear all cost associated with that arbitration. Within three (3) days of written notice of appointment, the other party shall then select an arbitrator who is similarly qualified and shall pay the expenses for that arbitrator. The two arbitrators so selected shall, within three (3) days, select a third arbitrator whose expenses shall be borne equally by the appointing Directors personally. The three arbitrators so selected shall settle the disagreement or deadlock within three (3) days from the appointment of the third arbitrator. In the event that either Director shall fail to appoint an arbitrator within three (3) days of notice of the appointment of the first arbitrator, or in the event the first two arbitrators shall fail to select a third arbitrator within three (3) days of notice of the appointment of the appointment of the first arbitrator, or in the event the first two arbitrators shall fail to select a third arbitrator within three (3) days after they have been selected, then the unappointed arbitrator shall be appointed by the Senior District Court Judge of the First Judicial District of the State of Idaho, in and for the County of Kootenai.

NOW, THEREFORE, we, the undersigned Directors of Captain's Wheel Resort, Incorporated, do hereby on this effective date of April 15, 1996, give our written consent to the adoption of the foregoing Bylaws, and do hereby endorse the same as the code of Bylaws of the said corporation.


James T. Campbell


Norman R. Nordstrom


Jean A. Campbell


Susan F. Nordstrom

**RESOLUTION IN LIEU OF SPECIAL MEETING
OF THE BOARD OF DIRECTORS AND SHAREHOLDERS
OF
CAPTAIN'S WHEEL RESORT, INCORPORATED**

The Board of Directors and Shareholders of CAPTAIN'S WHEEL RESORT, INCORPORATED, an Idaho corporation, in accordance with the Bylaws, adopted the following resolutions made in lieu of a Special Meeting by the Directors, JAMES T. CAMPBELL and JEAN A. CAMPBELL on the 7 day of August, 2003.

On motion duly made, seconded, and carried, the following preambles and resolutions were unanimously adopted:

WHEREAS, the corporation desires to authorize the sale of JAMES T. CAMPBELL's and JEAN A. CAMPBELL's interest to in the corporation to JERRY L. BERRY for the consideration of ONE HUNDRED THOUSAND DOLLARS (\$100,000.00).

WHEREAS, the corporation desires by and through its Directors, JAMES T. CAMPBELL and JEAN A. CAMPBELL to sell and transfer Stock Certificate Nos. 1 and 2 to JERRY L. BERRY for the consideration mentioned above.

WHEREAS, Director/President James T. Campbell desires to resign as a Director and as the President of the corporation, to be effective immediately.

WHEREAS, Director Jean A. Campbell desires to resign as a Director and Secretary of the corporation, to be effective immediately.

WHEREAS, the corporation desires to nominate Jerry L. Berry as President and Treasurer of the corporation, to be effective immediately as it is in the best interests of the Corporation.

WHEREAS, the corporation desires to nominate Karletta Berry as Director and Secretary of the corporation, to be effective immediately as it is in the best interest of the Corporation.

NOW, THEREFORE, BE IT RESOLVED, that the interest in the corporation of JAMES T. CAMPBELL and JEAN A. CAMPBELL, be sold for the sum of ONE HUNDRED THOUSAND DOLLARS (\$100,000.00) to JERRY L. BERRY as it is in the best interest of the corporation.

FURTHER BE IT RESOLVED that Stock Certificates Nos. 1 and 2 be sold to JERRY

RESOLUTION - 1.

CaptainsWheel.Res2.8.19.03.wpd

Exhibit 4

L. BERRY and that said transfer shall be effective upon the execution of this resolution and that the Secretary of the Corporation transfer the same on the books of the corporation.

FURTHER BE IT RESOLVED, that effective immediately, the resignations of JAMES T. CAMPBELL as a Director and President and JEAN A. CAMPBELL as a Director and Secretary of the corporation is hereby accepted as it is in the best interests of the Corporation.

FURTHER BE IT RESOLVED, that effective immediately the nomination of JERRY L. BERRY Director, President and Treasurer of the corporation is hereby accepted and said nomination is to be effective immediately as it is in the best interests of the Corporation.


FURTHER BE IT RESOLVED, that effective immediately the nomination of KARLETTA BERRY as Director and Secretary of the corporation is hereby accepted and said nomination is to be effective immediately as it is in the best interests of the Corporation.

DATED this 7 day of August, 2003.

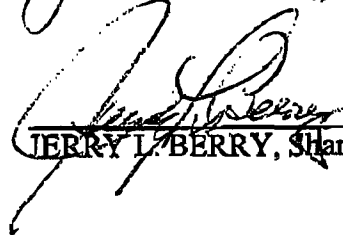
DIRECTOR:



JAMES T. CAMPBELL, Director/Shareholder



JEAN A. CAMPBELL, Director/Shareholder



JERRY L. BERRY, Shareholder

STATE OF IDAHO }
COUNTY OF KOOTENAI } SS
FILED:

2008 APR 11 AM 11:06 ^{11⁰⁷} *Kve*

J.P. Whelan, P.C.
Attorney at Law
213 N. 4th Street
Coeur d' Alene, Idaho 83814
Telephone: (208) 664-5891
Facsimile: (208) 664-2240
ISB No. 6083

CLERK DISTRICT COURT

Katharine
DEPUTY

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF KOOTENAI

KARLETTA GRACE BERRY, a widow,
KARLETTA GRACE BERRY, Personal
Representative of the Estate of Jerry
Lee Roy Berry, CAPTAIN'S WHEEL
RESORT, INC., an Idaho Corporation,

Plaintiffs,

vs.

MICHAEL B. MCFARLAND, MICHAEL B.
MCFARLAND, P.A., and KAREN
ZIMMERMAN,

Defendants.

Case No. CV-07-2409

NOTICE OF HEARING

Date: April 11, 2008

Time: 1:30 p.m.

Judge: Steve Verby *SV*

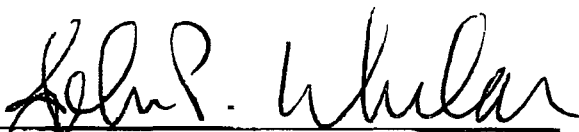
Location: Kootenai County Courthouse
324 W. Garden Ave.
Coeur d' Alene, ID 83814

TO ALL PARTIES AND THEIR ATTORNEY OF RECORD:

PLEASE TAKE NOTICE that on the date of April 11, 2008 at 1:30 p.m. before the Honorable Steve Verby, Defendants, will have their application for order shortening time and motion to strike heard by the Court.

NOTICE OF HEARING-1

Dated this 14 day of April, 2008.



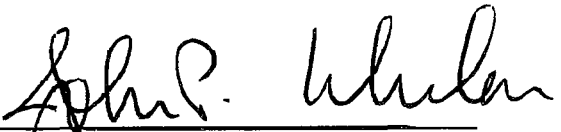
John P. Whelan
Attorney for Defendants

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 11 day of April, 2008, I caused to be served a true and correct copy of the foregoing by the method indicated below, and addressed as indicated below:

Rex A. Finney
Finney, Finney & Finney
120 East Lake Street, Suite 317
Sandpoint, ID 83865

- () U.S. Mail, Postage Prepaid
- () Hand Delivered
- () Overnight Mail
- () Facsimile to: (208) 263-8211



 John P. Whelan

STATE OF IDAHO }
COUNTY OF KOOTENAI } SS
FILED:

2008 APR 11 AM 11:06

11⁰⁷ Kve

CLERK DISTRICT COURT

DEPUTY

J.P. Whelan, P.C.
Attorney at Law
213 N. 4th Street
Coeur d' Alene, Idaho 83814
Telephone: (208) 664-5891
Facsimile: (208) 664-2240
ISB No. 6083

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF KOOTENAI

KARLETTA GRACE BERRY, a widow,
KARLETTA GRACE BERRY, Personal
Representative of the Estate of Jerry
Lee Roy Berry, CAPTAIN'S WHEEL
RESORT, INC., an Idaho Corporation,

Plaintiffs,

vs.

MICHAEL B. MCFARLAND, MICHAEL B.
MCFARLAND, P.A., and KAREN
ZIMMERMAN,

Defendants.

Case No. CV-07-2409

APPLICATION FOR ORDER
SHORTENING TIME

Date: April 11, 2008

Time: 1:30 p.m.

Judge: Steve Verby

Location: Kootenai County
Courthouse

COMES NOW, the attorney for the above-named Defendants, John P. Whelan, and respectfully moves the Court for an order that the time required for service of the Motion to Strike be shortened so that this matter can be heard on the 11th day of April, 2008, at 1:30 p.m., before the Honorable Steve Verby.

This Motion is made for the reason and upon the grounds that there is

not sufficient time to give statutory notice. Plaintiff will not be disadvantaged in any fashion, and further, it would be in the interest of justice.

PLEASE TAKE NOTICE that John P. Whelan will present oral argument and evidence at this hearing.

DATED this 11th day of April, 2008.

Respectfully Submitted,



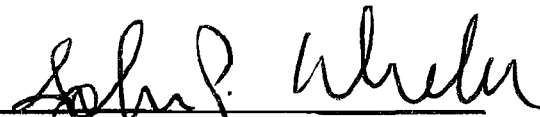
John P. Whelan
Attorney for Defendants

CERTIFICATE OF SERVICE

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Finney, Finney & Finney
120 East Lake Street, Suite 317
Sandpoint, ID 83865

- U.S. Mail, Postage Prepaid
 Hand Delivered
 Overnight Mail
 Facsimile to: (208) 263-8211



John P. Whelan

STATE OF IDAHO }
COUNTY OF KOOTENAI } SS
FILED:

2008 APR 11 AM 11:06 ^{11⁰⁷} *kme*

CLERK DISTRICT COURT
[Signature]
DEPUTY

J.P. Whelan, P.C.
Attorney at Law
213 N. 4th Street
Coeur d' Alene, Idaho 83814
Telephone: (208) 664-5891
Facsimile: (208) 664-2240
ISB No. 6083

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE STATE OF
IDAHO, IN AND FOR THE COUNTY OF KOOTENAI

KARLETTA GRACE BERRY, a widow,
KARLETTA GRACE BERRY, Personal
Representative of the Estate of Jerry
Lee Roy Berry, CAPTAIN'S WHEEL
RESORT, INC., an Idaho Corporation,

Plaintiffs,

vs.

MICHAEL B. MCFARLAND, MICHAEL B.
MCFARLAND, P.A., and KAREN
ZIMMERMAN,

Defendants.

Case No. CV-07-2409

MOTION TO STRIKE

Date: April 11, 2008

Time: 1:30 p.m.

Judge: Steve Verby

Location: Kootenai County
Courthouse

COMES NOW the Defendants, Michael B. McFarland, Michael B. McFarland, P.A. and Karen Zimmerman, by and through their counsel of record, John P. Whelan, move to strike the following from the Affidavit of Karletta Grace Berry filed on April 10, 2008, the day before Defendants' scheduled motion to dismiss:

MOTION TO STRIKE- 1

1. The affidavit in its entirety in that it is untimely under I.R.C.P. Rule 7(b)(3), as the affidavit was filed the afternoon before the hearing scheduled on Defendants' motion to dismiss. Rule 7(b)(3) requires that affidavits in opposition to motions be filed and served seven (7) days before the scheduled hearing to which the affidavit pertains.
2. Paragraph 4, lacks foundation, violates the best evidence rule, and is patently false as per the exhibit upon which the affiant relies in making the statement.
3. Paragraph 5, lacks foundation, violates the best evidence rule, and is patently false as per the exhibit upon which the affiant relies in making the statement. Furthermore, no foundation has been laid for Exhibit 1 and it should, therefore, be stricken as hearsay.
4. Paragraph 6, lacks foundation and is argumentative and irrelevant.
5. Paragraph 7, lacks foundation and is argumentative and irrelevant.
6. Paragraph 8, lacks foundation. The statement is also a legal conclusion which the witness is not qualified to make and is therefore impermissible opinion evidence.

MOTION TO STRIKE- 2

7. Paragraph 11, lacks foundation as the affiant has not established that she has personal knowledge of the events she purports to describe. Furthermore, the affiant has not laid the foundation for the exhibit she incorporates into her conclusionary statements (Exhibit 2), therefore the exhibit should be stricken as hearsay. The allegations as to when the document was signed also violate the best evidence rule.
8. Paragraph 12, lacks foundation and the affiant fails to establish her personal knowledge of the fact alleged. Further, the affiant attempts to offer an impermissible legal opinion.
9. Paragraph 13, lacks foundation and the affiant fails to establish her personal knowledge of the fact alleged.
10. Paragraph 14, lacks foundation and the affiant fails to establish her personal knowledge of the fact alleged.
11. Paragraph 15, no foundation is laid for Exhibit 3 and it is therefore hearsay. Further, no foundation is laid for any of the other conclusionary remarks included in the paragraph.
12. Paragraph 16, the conclusionary statements provide no foundation and fail to establish personal knowledge on the part of the affiant. Further, the allegations about the document allegedly prepared by McFarland violates the best evidence rule.

MOTION TO STRIKE- 3

13. Paragraph 18, lack of foundation and the affiant fails to establish her alleged personal knowledge of the allegations.
14. Paragraph 19, lack of foundation and the affiant fails to establish her alleged personal knowledge of the allegations.
15. Paragraph 20, lack of foundation and the affiant fails to establish her alleged personal knowledge of the allegations. Furthermore, no foundation is laid for Exhibit 4 so it is therefore hearsay. Further, the affiant's allegations in this paragraph are not supported by the document she purports to rely upon in making the statement, therefore the affiant's allegations violate the best evidence rule as well. Lastly, the allegation about the signature and Jerry's health constitutes an impermissible opinion on the part of a lay person.

Defendants request oral argument.

DATED this 11 day of April, 2008.

JOHN P. WHELAN, P.C.

By:



John P. Whelan

Attorney for Defendants

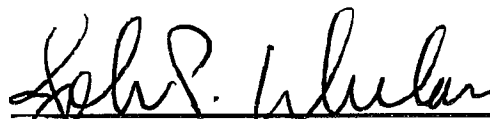
MOTION TO STRIKE- 4

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 11 day of April, 2008, I caused to be served a true and correct copy of the foregoing by the method indicated below, and addressed as indicated below:

Rex A. Finney
Finney, Finney & Finney
120 East Lake Street, Suite 317
Sandpoint, ID 83865

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 Overnight Mail
 Facsimile to: (208) 263-8211



John P. Whelan

REX A. FINNEY
FINNEY FINNEY & FINNEY, P.A.
Attorneys at Law
Old Power House Building
120 East Lake Street, Suite 317
Sandpoint, Idaho 83864
Phone: (208) 263-7712
Fax: (208) 263-8211
ISB No. 6313

STATE OF IDAHO
COUNTY OF KOOTENAI } SS
FILED:

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CLERK DISTRICT COURT
Kathryn
DEPUTY

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF KOOTENAI

KARLETTA GRACE BERRY, a widow,	)	Case No. CV-2007-0002409
KARLETTA GRACE BERRY, Personal)	
Representative of the Estate	)	AFFIDAVIT OF TOBY McLAUGHLIN
of Jerry Lee Roy Berry,)	
CAPTAIN'S WHEEL RESORT, INC.,)	
an Idaho Corporation,)	
)	
Plaintiff,)	
)	
v.)	
)	
MICHAEL B. MCFARLAND, MICHAEL)	
B. MCFARLAND, P.A., and KAREN)	
ZIMMERMAN,)	
)	
Defendants.)	

STATE OF IDAHO)
: ss.
County of Bonner)

COMES NOW, the undersigned and being first duly sworn on
oath, and states:

1. I am over the age of 18 years and competent to make this
Affidavit.

2. I am an attorney licensed to practice law within the State of Idaho.

3. On November 18, 2006 I attended a meeting at 8729 W. Cloverleaf Drive in Hayden, Idaho, together with Karletta Grace Berry, as her attorney. Also present at the meeting were Michael B. McFarland and Karen Zimmerman.

4. Prior to the start of the November 18, 2006 meeting, I requested some time to ask background questions. I explained to Mr. McFarland that Mr. Finney had provided me with some paperwork and I wanted to be sure I understood the background of the paperwork prior to the meeting.

5. Among the paperwork were various agreements relating to money paid by McFarland and Zimmerman to the late Mr. Berry. The only signed agreement was a Stock Purchase and Sale Agreement which was dated August 9, 2003. This agreement stated that McFarland and Zimmerman were purchasing 50% of the Captain's Wheel Resort corporate shares for \$100,000.00. The second agreement was a longer version of the Stock Purchase and Sale Agreement. This agreement, also dated August 9, 2003 stated that McFarland and Zimmerman were purchasing all of the corporate share for \$100,000.00, but indicated that 50% of the shares were to be held in trust for Karletta Berry and her son, Dale Berry. This agreement was unsigned. The third and final agreement was a document titled "Loan Agreement with Stock as Collateral." This agreement stated that the \$100,000.00 was

merely a loan which was to be repaid with 10% interest. This agreement was also unsigned. I asked Mr. McFarland to explain these agreements. According to MR. McFarland, he and Ms. Zimmerman had previously given Jerry Berry \$100,000.00 to help run the Captains Wheel in 2003. Mr. McFarland took the position that this money was for the purchase of 50% of the business, and was not a loan. The agreement was verbal, and was not committed to writing until 2006. In the summer of 2006, Mr. Berry met with Mr. McFarland and Ms. Zimmerman to discuss matters related to the corporation. All three of the above described agreements were discussed at this meeting. Mr. Berry had brought with him the Loan Agreement, but Mr. McFarland and Ms. Zimmerman refused to sign it. Instead, Mr. Berry signed the Stock Purchase and Sale Agreement that stated that Mr. McFarland and Ms. Zimmerman were purchasing 50% of the stock for \$100,000.00. Mr. McFarland admitted that although the agreement is dated August 9, 2003, it was actually not signed until the summer of 2006. I then asked Mr. McFarland about the other, unsigned, Stock Purchase and Sale Agreement. Mr. McFarland explained that he had drafted the document and had tried to convince Mr. Berry to sign it at the meeting that occurred in the summer of 2006. Mr. McFarland told Mr. Berry that the corporate shares would be better protected from Mr. Berry's creditors if all of the shares were conveyed to Mr. McFarland and Ms. Zimmerman. Mr. Berry refused to sign this agreement. Attached hereto as Exhibit 1 (1 page) is a true and

correct copy of the signed Stock Purchase and Sale Agreement dated August 9, 2003. Attached hereto as Exhibit 2 (2 pages) is a true and correct copy of the unsigned Stock Purchase and Sale Agreement. Attached hereto as Exhibit 3 (2 pages) is a true and correct copy of the unsigned Loan Agreement With Stock As Collateral.

6. At the meeting on November 18, 2006, Michael McFarland stated words to me to the effect that Mr. Berry had previously been involved in a property development in Washington that had failed, resulting in at least two judgments against Jerry Lee Roy Berry. Michael McFarland also stated that Mr. Berry had approached Mr. McFarland, who is a bankruptcy attorney, asking for advice in filing for bankruptcy to obtain relief from these judgments, but a bankruptcy petition had never been filed. Mr. McFarland could not remember the names of the judgment creditors or their attorneys, but he did say that an attorney of one of the judgment creditors had contacted Mr. McFarland within the last year asking if he still represented Jerry Berry. Mr. McFarland stated that he probably still had a letter from that attorney in his files.

7. At the meeting on November 18, 2006, Mr. McFarland's statements indicated to me that he was, at some time, both the attorney for Mr. Berry and the Captain's Wheel Resort, Incorporated.

8. Attached hereto as Exhibit 4 is a true and correct copy of a Memo dated November 22, 2006 which I made at a time when my memories of the events occurring at the meeting on November 18, 2006 were fresh in my mind to reflect the knowledge correctly. The information in said Memo is true and correct to the best of my information and belief.

9. On November 29, 2006 I attended a meeting at 8729 W. Cloverleaf Drive in Hayden, Idaho together with Karletta Grace Berry, as her attorney. Also present at the meeting were Michael B. McFarland and Karen Zimmerman.

10. At the November 29 meeting noted above, I engaged in conversations with Michael B. McFarland. Mr. McFarland indicated that he had obtained the corporate book for the Captain's Wheel Resort, Incorporated from the corporation's prior attorney, Paul Daugherty and indicated that he was the successor attorney to Paul Daugherty.

11. Attached hereto as Exhibit 5 (4 pages) is a true and correct copy of a Memo dated November 30, 2006 which I made at a time when my memories of the events occurring at the meeting on November 29, 2006 were fresh in my mind to reflect the knowledge correctly. The information in said Memo is true and correct to the best of my information and belief.

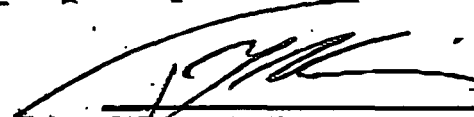
12. On February 15, 2007 I attended a meeting at 8729 W. Cloverleaf Drive in Hayden, Idaho together with Karletta Grace

Berry, as her attorney. Also present at the meeting were
Michael B. McFarland and Karen Zimmerman.

13. At the February 15, 2007 meeting I explained Karletta
Grace Berry's position that the original bylaws only provided
for two directors and the number of directors was never formally
changed by the Corporation. Thus any past election of four
directors in October 2006 was void. For this reason, Mr.
McFarland and Ms. Zimmerman are not valid directors of the
Corporation, and do not have authority under the Bylaws to
remove Mrs. Berry as a Director, or to act as Directors.

14. Attached hereto as Exhibit 6 (Exhibit 6 is a total of
7 pages and it has an Exhibit A and Exhibit B attached thereto)
is a true and correct copy of a Memo dated February 15, 2007
which I made at a time when my memories of the events occurring
at the meeting on February, 15, 2007 were fresh in my mind to
reflect the knowledge correctly. The information in said Memo
is true and correct to the best of my information and belief.

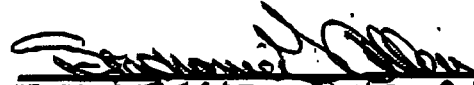
DATED this 11th day of April 2008.



TONY McLAUGHLIN
Attorney at Law

SUBSCRIBED AND SWORN TO before me, this 11th day of April
2008.





Notary Public - State of Idaho
Residing at Sandpoint
My Commission expires 7/31/2012

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was delivered as indicated, this 11th day of April, 2008, and was addressed as follows:

J.P. WHELAN P.C.
Attorney at law
213 N. 4th Street
Coeur d'Alene, Idaho 83814
(Via Facsimile: (208) 664-2240)

Judge Verby
chamber's copy
(Via Hand Delivery)



STOCK PURCHASE AND SALE AGREEMENT

This agreement executed August 9, 2003 between JERRY LEE ROY BERRY, of 6555 E. Remington Road, Athol, ID 83801, hereinafter referred to as "Seller" and KAREN M. ZIMMERMAN and MICHAEL B. McFARLAND of 8729 W. Cloverleaf Drive, Hayden, Idaho 83835, hereinafter referred to as "Buyers".

For and in consideration of One-hundred thousand dollars (\$100,000) and other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, Seller agrees to sell, assign and convey to Buyers, as joint tenants with right of survivorship, with full power to transfer the shares on the books of the corporation, TWO HUNDRED (200) shares of the common stock of CAPTAIN'S WHEEL RESORT, INC., a corporation organized and existing under the laws of the State of Idaho and having its principal place of business at 100 Scenic Drive, Bayview, Idaho 83803. The stock is represented by Certificates 1 and 2, (100 shares each) which were assigned to the Seller by Jean A. and James M. Campbell.

Seller warrants that the stock conveyed hereby represents 50% of the shares which have been issued to date by said corporation.

As additional consideration, it is agreed between Buyers and Seller that Seller shall retain his offices as director and president of the corporation, with full operational control of the business of the corporation through calendar year 2005. It is further agreed, as additional consideration, that the transfer of the shares shall be effective on January 1, 2006, and that Seller shall be considered the owner for tax and all other purposes through midnight, December 31, 2005.

IN WITNESS WHEREOF, the parties have executed this Agreement, which is effective on the day and year first above written.

BUYERS:

SELLER:


KAREN M. ZIMMERMAN


JERRY LEE ROY BERRY


MICHAEL B. McFARLAND

Stock Purchase and Sale Agreement

EXHIBIT 1

STOCK PURCHASE AND SALE AGREEMENT

This agreement executed August 9, 2003 between JERRY LEE ROY BERRY, of 6555 E. Remington Road, Athol, ID 83801, hereinafter referred to as "Seller" and KAREN M. ZIMMERMAN and MICHAEL B. McFARLAND of 8729 W. Cloverleaf Drive, Hayden, Idaho 83835, hereinafter referred to as "Buyers".

For and in consideration of One-hundred thousand dollars (\$100,000) and other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, Seller agrees to sell, assign and convey to Buyers, as joint tenants with right of survivorship, with full power to transfer the shares on the books of the corporation, FOUR HUNDRED (400) shares of the common stock of CAPTAIN'S WHEEL RESORT, INC., a corporation organized and existing under the laws of the State of Idaho and having its principal place of business at 100 Scenic Drive, Bayview, Idaho 83803. The stock is represented by Certificates 1 and 2, (100 shares each) which were assigned to the Seller by Jean A. and James M. Campbell and Certificate number 3, which was issued to the Seller directly.

Seller warrants that the stock conveyed hereby represents 100% of the shares which have been issued to date by said corporation.

As additional consideration, it is agreed between Buyers and Seller that Seller shall retain his offices as director and president of the corporation, with full operational control of the business of the corporation through calendar year 2005. It is further agreed, as additional consideration, that the transfer of the shares shall be effective on January 1, 2006, and that Seller shall be considered the owner for tax and all other purposes through midnight, December 31, 2005. After such time, Seller may, at his option, continue to maintain operational control of the corporation's business, and to receive reasonable compensation therefor, and may hold such office or offices in the corporation as he deems appropriate.

As additional consideration, Buyers hereby covenant and agree that they will establish a trust or equivalent arrangement under which fifty percent (50 %) of the stock transferred hereby shall be held by the Buyers or the trustee for the benefit of Karletta Berry and (in the event of her demise) her son, Dale. In the event of the sale of the corporation, fifty percent (50%) of the net

sale proceeds shall be distributed to Karletta Berry, if then living. If she is not living at the time of the sale of the corporation, such proceeds shall be held in trust and used for Dale's benefit, maintenance and education until he reaches the age of twenty-one years, at which time the amount remaining in trust shall be distributed to him. Until Dale reaches twenty-one, the trustee shall invest the principal amount in an interest-bearing account or other secure investment, and shall pay from the interest on such account such sums as, in the trustee's discretion, are reasonably necessary to provide for Dale's health, welfare, maintenance and education. If the interest on such account is insufficient to meet Dale's reasonable needs, the trustee shall be authorized to pay such sums from the principal as are, in the trustee's discretion, reasonable and necessary to provide adequately for Dale.

IN WITNESS WHEREOF, the parties have executed this Agreement, which is effective on the day and year first above written.

BUYERS:

SELLER:

KAREN M. ZIMMERMAN

JERRY LEE ROY BERRY

MICHAEL B. McFARLAND

LOAN AGREEMENT WITH STOCK AS COLLATERAL

This agreement executed between Jerry L. Berry, of 10691 E Reminton Road, Arnot Idaho, hereinafter referred to as "Borrower" and Karen M. Zimmerman and Michael B. McFarland of 8729 W. Cloverleaf, Hayden Idaho 83835, hereinafter referred to as "Lenders".

For and in consideration of a total of One-hundred thousand dollars (\$100,000) loan, of which Forty thousand dollars (\$40,000) was from Michael B. McFarland and Sixty thousand (\$60,000) was from Karen M. Zimmerman. The Borrower agrees to hold two hundred (200) shares of common stock of CAPTAIN'S WHEEL RESORT, INC., a corporation organized and existing under the laws of the State of Idaho, and having as it's principal place of business at 100 Scenic Drive, Bayview, Idaho 83803. The stock is represented by Certificates 1 and 2 (100 shares each) which was assigned to the Borrower by Jean A. and James M. Campbell.

Borrower warrants that the stock represents 50% of the shares which have been issued to date by said corporation.

Said stock is to act as collateral for said loan. In the event of sale of the corporation, the Lenders are entitled to original monies lent with a 10% (ten percent) per annum interest there on. Lenders shall be entitled to use of Resort (ex. dining, refreshments, moorage) at no expense to them, for duration of loan. At Borrower's discretion, said stock may be assigned to Lenders, at which time all interest on loan will be considered paid to that date.

At time of signing this agreement, Lenders are responsible for any loans they acquired on their own behalf to make this loan to the Borrower.

In the event of Borrower's untimely demise (death), then surviving spouse, Karletta Berry of the same address as Borrower, will uphold loan agreement as written.

EXHIBIT 3

LENDERS :

BORROWER:

KAREN M. ZIMMERMAN

JERRY L. BERRY

MICHAEL M. McFARLAND

KARLETTA BERRY

DATED THIS DAY July 4, 2006

MEMO BERG & McLAUGHLIN, CHTD.

To: File
From: DTM
Client: Karletta Berry
Subject: Meeting re: Captain's Wheel Resort, Inc.
Date: November 22, 2006

Background

On November 17, 2006, I was contacted by Rex Finney about attending a meeting on his behalf on November 18, 2006. Mr. Finney represents Karletta Berry, who is a shareholder for the Captain's Wheel Resort, which is a restaurant and marina in Bayview, Idaho. The company is in the form of a corporation, and was previously managed by Jerry Berry, Karletta's late husband. Mr. Berry passed away only a few weeks ago.

Mr. Finney informed me that two individuals, Michael McFarland and Karen Zimmerman were claiming to be part owners in the corporation and had called a corporate meeting for November 18, 2006. They had given only two days notice of the meeting.

According to Mr. Finney, there is some dispute as to whether Mrs. Berry is the sole shareholder, or whether she owns only 50% of the shares. I agreed to attend the meeting as counsel for Ms. Berry.

This Memorandum is intended to memorialize my recollections of the events that occurred on November 18, 2006.

Prior to Meeting: Various Stock/Loan Agreements

On November 18, 2006, I met Karletta Berry at her home prior to the scheduled corporate meeting for the Captain's Wheel Resort, Inc. We drove to the meeting which, according to the notice provided by Michael McFarland and Karen Zimmerman, was to be held at 5:00 p.m. at 8729 W. Cloverleaf Drive, in Hayden, Idaho. We arrived at that address a few minutes before 5:00.

We were greeted by Mike McFarland and Karen Zimmerman. I introduced myself and explained that I was substituting for Mr. Finney and was representing Mrs. Berry for the limited purpose of dealing with the meeting called by Mr. McFarland and Ms. Zimmerman.

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EXHIBIT 4

Prior to the start of the meeting, I requested some time to ask background questions. I explained to Mr. McFarland that Mr. Finney had provided me with some paperwork and I wanted to be sure I understood the background of the paperwork prior to the meeting.

Among the paperwork were various agreements relating to money paid by McFarland and Zimmerman to the late Mr. Barry. The only signed agreement was a Stock Purchase and Sale Agreement which was dated August 9, 2003. This agreement stated that McFarland and Zimmerman were purchasing 50% of the corporate shares for \$100,000.00.

The second agreement was a longer version of the Stock Purchase and Sale Agreement. This agreement, also dated August 9, 2003, stated that McFarland and Zimmerman were purchasing all of the corporate shares for \$100,000.00 but indicated that 50% of the shares were to be held in trust for Karletta Berry and her son, Dale Berry. This agreement was unsigned.

The third and final agreement was a document titled "Loan Agreement with Stock as Collateral." This agreement stated that the \$100,000.00 was merely a loan which was to be repaid with 10% interest. This agreement was also unsigned.

I asked Mr. McFarland to explain these agreements. According to Mr. McFarland, he and Ms. Zimmerman had previously given Jerry Berry \$100,000.00 to help run the Captains Wheel in 2003. Mr. McFarland took the position that this money was for the purchase of 50% of the business, and was not a loan. The agreement was verbal, and was not committed to writing until 2006.

In the summer of 2006, Mr. Berry met with Mr. McFarland and Ms. Zimmerman to discuss matters related to the corporation. All three of the above described agreements were discussed at this meeting. Mr. Berry had brought with him the Loan Agreement, but Mr. McFarland and Ms. Zimmerman refused to sign it. Instead, he signed the Stock Purchase and Sale Agreement that stated that Mr. McFarland and Ms. Zimmerman were purchasing 50% of the stock for \$100,000. Mr. McFarland admitted that although the agreement is dated August 9, 2003, it was actually not signed until the summer of 2006.

I then asked Mr. McFarland about the other, unsigned, Stock Purchase and Sale Agreement. Mr. McFarland explained that he had drafted the document and had tried to convince Mr. Berry to sign it at the meeting that occurred in the summer of 2006. Mr. McFarland told Mr. Berry that the corporate shares would be better protected from Mr. Berry's creditors if all of the shares were conveyed to Mr. McFarland and Ms. Zimmerman. Mr. Berry refused to sign this agreement.

Judgment Creditors

When asked to explain about the judgment creditors, Mr. McFarland stated that Mr. Berry had previously been involved in a property development in Washington. This development failed, resulting in at least two judgments against Mr. Berry. Mr. Berry had approached Mr. McFarland,

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who is a bankruptcy attorney, asking for advice in filing for bankruptcy to obtain relief from these judgments, but a bankruptcy petition had never been filed. Mr. McFarland could not remember the names of the judgment creditors or their attorneys, but he did say that an attorney of one of the judgment creditors had contacted Mr. McFarland within the last year asking if he still represented Jerry Berry. Mr. McFarland stated that he probably still had a letter from that attorney in his files.

Mr. McFarland explained that he drafted the longer Stock Purchase and Sale Agreement in an effort to protect the shares of the corporation from attachment by these judgment creditors. He tried to convince Mr. Berry that if all of the shares were transferred to Mr. McFarland and Ms. Zimmerman, then the judgment creditors would never be able to find those assets. If, however, half of the shares remained in the name of Karletta Berry, then the creditors could seize the shares. Mr. Berry refused to sign the longer agreement, instead executing the shorter Purchase and Sale Agreement.

Mr. McFarland's statements indicated to me that he was, at some time, both the attorney for Mr. Berry and the Corporation. He indicated that Mr. Berry had sought his legal advice in filing for bankruptcy. He also stated that the attorneys for the judgment creditors had contacted him with respect to the judgments against Mr. Berry. Also, Mr. McFarland stated that now that he was on the Board of Directors, he no longer was going to act as the attorney for the corporation, indicating to me that he had been acting as corporate attorney prior to being appointed to the board.

Prior to Meeting: Value of the Property

I then asked Mr. McFarland about what he and Ms. Zimmerman planned to do with the corporate property and how much they thought it was worth. Mr. McFarland pointed to a draft resolution in which it was proposed that the Captains Wheel was to be listed for \$2.2 million dollars. He stated that there had previously been a "pocket listing" for the property for \$2.1 million, but it never sold. There had also been an appraisal of the property conducted in 2002 or 2003 which indicated the value of the property was between \$1.2 and \$1.5 million. At some point, there was also an offer for the property but the offer was not accepted.

Mr. McFarland also admitted that the property was to be listed with a real estate company in which Ms. Zimmerman was the broker. Consequently, any commission would be paid to Ms. Zimmerman. When I asked about commission, Mr. McFarland stated that the standard commission for commercial property is 10%, but that listing it through Ms. Zimmerman's company would provide flexibility in terms of providing a means to waive the real estate commissions and fees if necessary to complete a sale.

Meeting: Objection

Once I indicated that I was done asking preliminary questions, Mr. McFarland asked Ms. Berry if she had read the proposed resolution and whether she was prepared to sign it. I then explained Ms. Berry was not prepared to do anything other than to object to the improper notice of the meeting. I told Mr.

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McFarland and Ms. Zimmerman that Mrs. Berry had only been provided two days notice for the meeting and needed more time to consider their proposal.

Mr. McFarland then pulled out the corporate books and directed us to a set of bylaws that indicated only one day's notice was necessary. The bylaws in the corporate books had been executed in October of 2006. I then showed Mr. McFarland the set of bylaws that I had been provided by Mr. Finney. This set had been executed April 15, 1996, and required ten days notice of a meeting. Mr. McFarland stated that he had never seen these previous bylaws and they were not in the corporate books. I stated that given the legal uncertainties regarding the various bylaws, my client had no choice but to simply object to the improper meeting. Mr. McFarland stated that he would postpone the meeting. The corporate meeting never took place.

Resolution/Written Objection

Mr. McFarland said that he hoped the issues could be resolved without another meeting. At this point, I handed him a proposed resolution in lieu of a meeting. He read through the first few lines, and said "absolutely not, no way." At this point, he seemed to be getting upset.

He specifically took issue with the section of the notice of objection indicating that Mrs. Berry was automatically appointed President as the senior (i.e. longest tenured) vice-president.

Bank Accounts

Mr. McFarland expressed some displeasure regarding the bank account for the Captain's Wheel. He stated that the business was currently running at a loss and that he had deposited \$8,000.00 of his own money into the account to keep the business running, even though he was not a signatory on the account. He asked for the consent of Mrs. Berry to be added to the business checking account. I explained that now was not the appropriate time to be asking for this as Mr. Finney was Mrs. Berry's primary attorney and he would need to be consulted before consent could be given.

Weekly Stipend

At this point, Mr. McFarland seemed to be agitated. He stated that there was another matter to be addressed. According to Mr. McFarland, it had been Mr. Berry's wish, although it was not in writing, that Mrs. Berry would be paid \$200 per week for her efforts related to the business. Mr. McFarland stated that he had made sure that Mrs. Berry was receiving these payments, but he was no longer willing to pay her the \$200 per week, unless it was as repayment for money's currently owing to Mrs. Berry, and only if she stopped being "obstructionist."

Corporate Books

At this point Mrs. Berry asked to see the corporate books, which were sitting open in front of Mr.

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McFarland. He refused, saying that he would not let her see the books because she was delaying the meeting and he had previously informed her that she could only see them at the meeting. He stated that she could make an appointment to see the books at a later date, but she could not see them at that time. I asked directly if he was refusing to let Mrs. Berry, who was the majority corporate shareholder, see the corporate books. He said he was.

Next Meeting

Mr. McFarland then gave verbal notice that the next corporate meeting would take place in his law office on Wednesday, November 29, 2006.

I have drafted this Memorandum at a time when my memory of the events discussed herein is fresh in an effort to reflect the knowledge correctly.

Toby McLaughlin

Date

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MEMO BERG & McLAUGHLIN, CHTD.

To: File
From: DTM
Client: Karletta Berry
Subject: Meeting re: Captain's Wheel Resort, Inc.
Date: November 30, 2006

Background

On November 29, 2006, I attended a special meeting for the Captain's Wheel Resort, Inc. on behalf of Karletta Berry, who owns *at least* 50% of the shares of the corporation. Also in attendance was Michael McFarland, Karen Zimmerman, and Karletta Berry.

This Memorandum is intended to memorialize my recollections of the events that occurred on November 29, 2006.

Prior to Meeting: Corporate Books

On November 29, 2006, I met Karletta Berry at her home prior to the scheduled corporate meeting for the Captain's Wheel Resort, Inc. We drove to the meeting which was held at 5:30 p.m. at 8729 W. Cloverleaf Drive, in Hayden, Idaho.

We were greeted by Mike McFarland and Karen Zimmerman. I explained that I was again substituting for Mr. Finney and was representing Mrs. Berry for the limited purpose of dealing with the meeting called by Mr. McFarland and Ms. Zimmerman.

Prior to the start of the meeting, Mr. McFarland wanted to discuss documents that he had earlier that day sent to Rex Finney, Mrs. Berry's primary attorney. I was provided with copies of these documents earlier in the day by Mr. Finney.

Mr. McFarland explained that the bylaws that were executed on October 15, 2006, were originally provided as forms in the corporate book that Mr. McFarland obtained from Paul Daugherty, the corporation's prior attorney. He stated that the forms not been filled in, so he took it upon himself to fill these in at the October 15, 2006, meeting. Mr. McFarland stated that, at the time he received the corporate book, most of the documents in the book were simply forms with blanks that left to be filled in.

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EXHIBIT

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Mr. McFarland stated that he had sent all of the documents in the corporate book except those that were simply blank forms or those that were in the "miscellaneous" portion of the book. The miscellaneous section contained letters, proposed resolutions that had never been adopted, the demand promissory note that Jerry Berry had executed in favor of the corporation, and correspondence.

Meeting: McFarland's Intro

Mr. McFarland called the meeting to order. He initially noted that he had made two loans (\$5,000 and \$3,000) to the corporation to cover an overdrawn business checking account. He stated that he had deposited his own funds into the account.

Mr. McFarland then noted that the corporation currently had the following debts: \$220,000 small business loan to ~~CFI~~; \$500 monthly payment for parking lot; \$4,900 owing on a line of credit; the above referenced \$8,000 in loans from Mike and Karen to cover the overdrafts. Mr. McFarland stated that he believed the checking account be overdrawn as soon as the current mortgage payment cleared, as the payment was \$2,800.00 and the checking account had a balance of only \$2,500.00.

First Motion: Election of Officers

McFarland moved to elect a new President and Treasurer. McFarland nominated himself for president, and Karen Zimmerman for Treasurer. Acting on behalf of Mrs. Berry, I nominated Mrs. Berry for both positions. The votes were two to one in favor of McFarland as President, Zimmerman as Treasurer.

Second Motion: Access to Corporate Bank Accounts

McFarland then moved to grant signature authority on all corporate bank accounts to both McFarland and Zimmerman pursuant to the terms of the proposed resolution previously provided. This would also allow McFarland and Zimmerman to start new business accounts. The motion passed two to one, with Mrs. Berry voting against.

Third Motion: Repayment of Loan to McFarland

McFarland moved to adopt resolution allowing corporation to repay the above referenced \$8,000 loan to Mr. McFarland upon the same terms as were granted to Jerry Berry in the Demand Promissory Note dated September 22, 2000.

I initially objected on the grounds that Mrs. Berry had not been notified that this issue was to be addressed at the meeting, as required under Section 2 of the October 15, 2006 bylaws. After briefly discussing the issue with Mrs. Berry, however, I withdrew the objection. The motion passed unanimously.

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Fourth Motion: Sale of Business and Real Property

McFarland moved to approve the sale of the business and real property pursuant to the terms outlined in the previously provided resolution. The motion passed two to one, with Mrs. Berry voting against.

Weekly Payments to Mrs. Berry

McFarland then noted Mrs. Berry was currently being paid \$200 per week from the corporation. The payments were currently "under the table." He indicated that he was going to bring a motion to approve the \$200 weekly payments to Mrs. Berry as loan repayments, and that he was unwilling to continue paying her the \$200 "from my own pocket." He also wanted the payments to be contingent upon the business generating positive income. He then asked if I was going to object to the motion if brought, and I stated that I was. He then said that he was going to forego bringing the motion until the next special meeting, after proper notice had been provided.

Issuance of Single share to Marie Streeter

McFarland indicated that at the next meeting, he wanted to propose issuing a single share of stock in the corporation to Marie Streeter, the current manager of the Captains Wheel Resort, with the consideration being her continued employment. McFarland claimed that this was originally Jerry's idea. He also said that it might be appropriate to also issue a share to "Monty," the other manager. He said he would propose this at the next meeting.

My impression was that he wanted the share issued to avoid ever having a tie vote of the shareholders, which would require the issue to be resolved by a coin toss, pursuant to the older of the two versions of the bylaws.

Other Issues

McFarland indicated that at the next meeting the shareholders/directors should address adopting a single set of bylaws.

He also stated that he intended to sell the current pool table in the restaurant which is in disrepair and enter into a contract with a company to provide a new table. The contract would allow the company to take half the profits for the pool table, and they would also install slot machines. McFarland stated that he did not think it necessary to have a vote on this issue, as it was a matter of the daily operations of the business.

I have drafted this Memorandum at a time when my memory of the events discussed herein is fresh in an effort to reflect the knowledge correctly.

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Toby McLaughlin

Date

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MEMO BERG & McLAUGHLIN, CHTD.

To: File
From: DTM
Client: Karletta Berry
Subject: Meeting re: Captain's Wheel Resort, Inc.
Date: February 15, 2007

Background

On February 15, 2007, I attended a special meeting for the Captain's Wheel Resort, Inc. on behalf of Karletta Berry, who is a shareholder, officer and director of the corporation. Also in attendance was Michael McFarland, Karen Zimmerman, and Karletta Berry.

This Memorandum is intended to memorialize my recollections of the events that occurred earlier today.

Prior to Meeting

On February 15, 2007, I met Karletta Berry at her home prior to the scheduled corporate meeting for the Captain's Wheel Resort, Inc. We drove to the meeting which was held at 9:30 a.m. at 8729 W. Cloverleaf Drive, in Hayden, Idaho.

We were greeted by Mike McFarland and Karen Zimmerman.

Meeting: McFarland's Intro

Mr. McFarland called the meeting to order. As he had done at the prior meeting, Mr. McFarland taped the meeting with a hand-held tape recorder.

Mr. McFarland indicated that all of the directors were present, satisfying the necessary quorum. He identified the prior notice that had been given, and explained that the only purpose of the meeting was the removal of Mrs. Berry as a director of the corporation.

McFarland indicated that it was not necessary to review the minutes of the corporation's last meeting as they had already been approved by a majority of the board of directors, apparently outside of any corporate meeting. He did not provide Mrs. Berry or her counsel with a copy of those minutes, and, to my knowledge, never has. He also failed to provide Mrs. Berry with the opportunity to review

MEMORANDUM:

EXHIBIT 6

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those minutes for accuracy. Consequently, I cannot determine at this time whether those minutes correctly reflect the events of the prior meeting.

Motion to Remove Mrs. Berry - Objections

McFarland made a motion to remove Mrs. Berry as a director, and Ms. Zimmerman seconded. I verbally objected to the motion on behalf of Mrs. Berry and also provided a written objection. A true and correct copy of the objection is attached hereto as exhibit A, although the copy provided to Mr. McFarland at the meeting was signed by Mrs. Berry prior to the meeting.

First Objection – Invalid Appointment of Directors

I explained Mrs. Berry's objections by noting that the original bylaws only provided for two directors, and the number of directors was never formally changed by the corporation. Thus, the election of four directors in October of 2006 was void. For this reason, Mr. McFarland and Ms. Zimmerman are not valid Directors of the Corporation, and do not have the authority under the Bylaws to remove Mrs. Berry as a Director.

The only valid Directors of the Corporation were Mr. Berry and Mrs. Berry. Mr. Berry recently passed away. Consequently, Mrs. Berry, as the only valid Director, is authorized under the Bylaws to fill the vacancy on the Board. As such, the current motion put forth by Mr. McFarland was improper.

Mr. McFarland responded by arguing that Mrs. Berry had waived the right to object when she signed the resolution at the October 2006 meeting. He also stated that Mrs. Berry had never been elected as a Board member until the October 2006 meeting. This is incorrect as Mrs. Berry was elected to the Board of directors on August 7, 2003, as reflected in the Resolution attached hereto as Exhibit B.

Second Objection – Failed to Establish "Cause" for Removal

I then asked Mr. McFarland to identify the provision in the Bylaws upon which he was relying to remove Mrs. Berry. He stated that he was relying upon the "for cause" provision in Section 3.04 of the Bylaws adopted on April 15, 1996, and not on the first sentence in Section 3.04.

I next objected that Mr. McFarland had failed to establish that cause existed for the removal of Mrs. Berry. I noted that the Bylaws failed to define "for cause" and that Mrs. Berry, through Rex Finney's letter of February 14, 2007, had addressed Mr. McFarland's concerns about the corporate bank account.

Mr. McFarland stated that the grounds for removing Mrs. Berry did not include the allegations about Mrs. Berry improperly appropriating funds. Rather, Mr. McFarland alleged that Mrs. Berry had changed the address to which the bank account records were sent from the "corporate mailing address" to her own, had kept corporate records "without permission," and that Mrs. Berry had not been acting "as a team player."

MEMORANDUM:

2

With respect to this last allegation, Mr. McFarland noted that Mrs. Berry had filed a "meritless" lawsuit against him which he felt was indicative of her failure to act as a team player. He then attempted to correct himself by saying that the filing of the lawsuit was not the basis of the cause for removal, but was merely an indication of Mrs. Berry's uncooperative attitude.

Mr. McFarland appeared agitated, claimed that "there had been sand bagging going on," and accused Mrs. Berry of wanting the whole business for herself. I did not challenge Mr. McFarland at this point, as I did not want the meeting to escalate into an unproductive emotional debate.

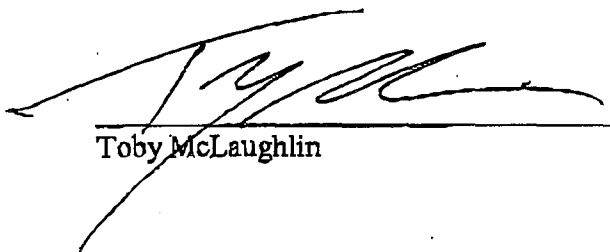
Mr. McFarland next called for a vote. The motion passed two to one, with Mrs. Berry voting against. It should be noted that the vote did not even purport to remove Mrs. Berry from her position as an officer of the Corporation.

Appointment of Successor Director - Tabled

Mr. McFarland then noted that the other order of business identified in the notice of special meeting was the appointment of a successor Director. Mr. McFarland then tabled that issue "for logistical reasons" having something to do with the renewal of the Corporation's liquor license. He felt that the appointment of a new director might somehow interfere with the renewal of the license, which could threaten the operation of the business. I did not ask for further clarification although Mr. McFarland's explanation made very little sense. In any case, a successor Director has not been appointed.

Close of Meeting

A motion to end the meeting was passed unanimously.



Toby McLaughlin

2/15/07

Date

OBJECTION TO
SPECIAL MEETING OF DIRECTORS
OF CAPTAIN'S WHEEL RESORT, INC.

Kareletta Berry, director of the Captain's Wheel Resort, Inc. (hereinafter "the Corporation"), hereby objects to the attempts by Michael B. McFarland and Karen Zimmerman to remove Ms. Berry from the Board of Directors of the Corporation, for the following reasons.

(1) **Michael McFarland and Karen Zimmerman are Not Valid Directors**

(a) Pursuant to Section 3.02 of the Bylaws of the Corporation adopted April 15, 1996, the Corporation was to have only two Directors. Although the provision allows changes to the number of directors, the number of directors has never been formally changed by the Corporation. Consequently, only two directors are currently authorized.

(b) The purported appointment of four Directors for the Corporation in October of 2006 was void, as there was never any Corporate action to amend the authorized number of directors.

(c) Karletta Berry and Jerry Berry were the only valid Directors at the time of Jerry Berry's death. Pursuant to Section 3.05 of the Bylaws, Ms. Berry, as the remaining Director, has the authority to fill the vacancy on the Board of Directors left by Jerry Berry.



(d) Michael McFarland and Karen Zimmerman have not been validly elected to the Board of Directors, and do not have the authority under the Bylaws to remove Ms. Berry as a Director.

(2) There are Insufficient Votes of the Shareholders to Remove Ms. Berry

(a) Section 3.04 provides that a Director can be removed with the vote of a majority of the shares of the Corporation's voting stock.

(b) Ms. Berry owns, at the very least, fifty percent (50%) of the shares of the Corporation's voting stock.

(c) Consequently, Ms. Berry cannot be removed by a vote of Mr. McFarland and Ms. Zimmerman acting as shareholders.

(3) There is No Cause to Remove Ms. Berry

(a) Section 3.04 provides for the removal of a director by a majority vote of the Board of Directors for "cause." The Bylaws do not define the term "cause."

(b) The Notice of Special Meeting dated February 5, 2007, fails to indicate the justification for removing Ms. Berry.

(c) There have, however, been allegations of embezzlement by Mr. McFarland. These allegations have no merit. Ms. Berry has provided an accounting of the corporate bank account.

(d) Mere allegations by a purported Director are insufficient to demonstrate cause exists to remove a Director.

Kareletta Berry, Director

**RESOLUTION IN LIEU OF SPECIAL MEETING
OF THE BOARD OF DIRECTORS AND SHAREHOLDERS
OF
CAPTAIN'S WHEEL RESORT, INCORPORATED**

The Board of Directors and Shareholders of CAPTAIN'S WHEEL RESORT, INCORPORATED, an Idaho corporation, in accordance with the Bylaws, adopted the following resolutions made in lieu of a Special Meeting by the Directors, JAMES T. CAMPBELL and JEAN A. CAMPBELL on the 7 day of August, 2003.

On motion duly made, seconded, and carried, the following preambles and resolutions were unanimously adopted:

WHEREAS, the corporation desires to authorize the sale of JAMES T. CAMPBELL's and JEAN A. CAMPBELL's interest in the corporation to JERRY L. BERRY for the consideration of ONE HUNDRED THOUSAND DOLLARS (\$100,000.00).

WHEREAS, the corporation desires by and through its Directors, JAMES T. CAMPBELL and JEAN A. CAMPBELL to sell and transfer Stock Certificate Nos. 1 and 2 to JERRY L. BERRY for the consideration mentioned above.

WHEREAS, Director/President James T. Campbell desires to resign as a Director and as the President of the corporation, to be effective immediately.

WHEREAS, Director Jean A. Campbell desires to resign as a Director and Secretary of the corporation, to be effective immediately.

WHEREAS, the corporation desires to nominate Jerry L. Berry as President and Treasurer of the corporation, to be effective immediately as it is in the best interests of the Corporation.

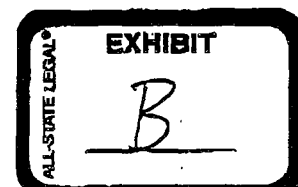
WHEREAS, the corporation desires to nominate Karletta Berry as Director and Secretary of the corporation, to be effective immediately as it is in the best interest of the Corporation.

NOW, THEREFORE, BE IT RESOLVED, that the interest in the corporation of JAMES T. CAMPBELL and JEAN A. CAMPBELL, be sold for the sum of ONE HUNDRED THOUSAND DOLLARS (\$100,000.00) to JERRY L. BERRY as it is in the best interest of the corporation.

FURTHER BE IT RESOLVED that Stock Certificates Nos. 1 and 2 be sold to JERRY

RESOLUTION - 1.

CaptainsWheel_Res2.8.19.03.wpd



L. BERRY and that said transfer shall be effective upon the execution of this resolution and that the Secretary of the Corporation transfer the same on the books of the corporation.

FURTHER BE IT RESOLVED, that effective immediately, the resignations of JAMES T. CAMPBELL as a Director and President and JEAN A. CAMPBELL as a Director and Secretary of the corporation is hereby accepted as it is in the best interests of the Corporation.

FURTHER BE IT RESOLVED, that effective immediately the nomination of JERRY L. BERRY Director, President and Treasurer of the corporation is hereby accepted and said nomination is to be effective immediately as it is in the best interests of the Corporation.

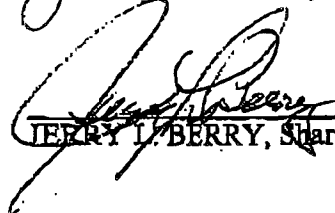
FURTHER BE IT RESOLVED, that effective immediately the nomination of KARLETTA BERRY as Director and Secretary of the corporation is hereby accepted and said nomination is to be effective immediately as it is in the best interests of the Corporation.

DATED this 7 day of August, 2003.

DIRECTOR:


JAMES T. CAMPBELL, Director/Shareholder


JEAN A. CAMPBELL, Director/Shareholder


JERRY L. BERRY, Shareholder

REX A. FINNEY
FINNEY FINNEY & FINNEY, P.A.
Attorneys at Law
Old Power House Building
120 East Lake Street, Suite 317
Sandpoint, Idaho 83864
Phone: (208) 263-7712
Fax: (208) 263-8211
ISB No. 6313

STATE OF IDAHO
COUNTY OF KOOTENAI } SS
FILED:

2008 APR 11 PM 1:19

CLERK DISTRICT COURT

Kashmir
DEPUTY

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF KOOTENAI

KARLETTA GRACE BERRY, a widow,	)	Case No. CV-2007-2409
KARLETTA GRACE BERRY, Personal)	
Representative of the Estate	)	MEMORANDUM IN OPPOSITION TO
of Jerry Lee Roy Berry,	)	DEFENDANTS' MOTION TO DISMISS
CAPTAIN'S WHEEL RESORT, INC.,)	
an Idaho Corporation,)	
)	
Plaintiffs,)	
)	
v.)	
)	
MICHAEL B. MCFARLAND, MICHAEL)	
B. MCFARLAND, P.A., and KAREN)	
ZIMMERMAN,)	
)	
Defendants.)	
)	

COME NOW, the above named Plaintiffs, by and through
counsel, and hereby submits this memorandum in opposition to the
Defendants' Motion To Dismiss 27th day of March, 2007 and object
to said Motion and the Notice of Hearing on said Motion, as
follows: .

1. The Motion To Dismiss is based upon I.R.C.P. 41(a) (2). By its terms 41(a) (2) is not relevant to a Motion to Dismiss, it merely sets forth the rule that a Plaintiff may not dismiss an action at its instance without order of the court.

2. Additional grounds for the Motion to Dismiss are based upon I.R.C.P. 41(b) which is only relevant for failure to prosecute and or comply with the civil rules.

3. The proper civil grounds for the Motion to Dismiss would be I.R.C.P. 12(b) (6).

4. In this action the Defendants have filed the Affidavit of _____ in support of the Motion to Dismiss.

5. In response, the Plaintiff has filed the Affidavit of Karletta Grace Berry and the Affidavit of Toby McLaughlin.

6. When the District Court considers affidavits in reaching its decision, the Motion to Dismiss must be "treated as one for summary judgment and disposed of as provided in Rule 56". Goodman v. Lothrop, 143 Idaho 622, 626, 151 P.3d 818, 822 (2007).

7. The Motion to Dismiss fails to comply with the notice requirements of I.R.C.P. 56(c). The motion, affidavit and supporting brief shall be served at least twenty-eight (28) days before hearing. Defendants' Motion to Dismiss was served late in the afternoon by facsimile to Plaintiffs' Attorney and it is not properly noticed for hearing.

8. In the present action the Corporation Plaintiff, and the other Plaintiffs, have brought suit against the Defendants for breach of fiduciary duty stemming from the fact that Michael McFarland was the corporate attorney and attorney for the shareholders at a time that he and his girlfriend acquired one half of the shares of the corporation from his client, while the client was near death. Mr. McFarland attempted to obtain all of the shares of the corporation and to hold one half of the shares as trustee for Karletta Grace Berry and her son.

9. Soon after the death of Jerry Berry, the Defendants as alleged shareholders and directors of the corporation, purported to remove Karletta Grace Berry from her role in the corporation and purported passed resolutions to sell off the corporation's assets.

10. The Defendant's bought into the corporation for less than fair market value.

11. There is very little case law in Idaho concerning individual or direct actions. *McCann v. McCann*, 138 Idaho 228, 233 (2002).

12. As this Court has recognized in Decker et. ux. v. Stoneridge Property Owners Association, Inc, et al., Bonner County Case No. CV-2003-722 in the Order Granting Plaintiff's Motion For Reconsideration In Part and Denying Plaintiff's Motion For An Interlocutory Appeal entered on June 15, 2005:

"It is generally held that a stockholder may maintain an action in his own right for an injury directly affecting him, although the corporation also may have a cause of action growing out of the same wrong, where it appears that the injury to the stockholder resulted from the violation of some special duty owed to the stockholder resulted from the violation of some special duty owed to the stockholder by the wrongdoer and having its origin in circumstances independent of the plaintiff's status as a shareholder. 19 AM.JUR.2D Corporations §2249, 151 (1986).

A stockholders derivative action is an action brought by one or more stockholders of a corporation to enforce a corporate right or remedy a wrong to the corporation in cases where the corporation, because it is controlled by the wrongdoers or for other reasons fails and refuses to take appropriate action for its own protection...

An action brought by a shareholder is derivative if the gravamen of the complaint is the injury to the corporation or to the whole body of its stock or property and not injury to the plaintiff's individual interests as a stockholder. 19 AM.JUR.2D Corporations § 2250, 151-152

13. In the present case, the claims are for a direct injury and are not derivative in nature.

14. In Steelman v. Mallory, 110 Idaho 510, (1986) the Idaho Supreme Court recognized the principle that a shareholder in a closely held corporation who was also director was not required to bring derivative suit rather than direct action against other directors for breach of fiduciary duty and stated that the court "cannot agree with appellants' contention that this case should have been dismissed because it is a "direct action" rather than a shareholder's derivative suit.

15. In any event appointment of the Defendants as directors of the corporation is void and in violation of the

corporate Bylaws. See Twin Lakes Village Property Association, Inc. v. Twin Lakes Investment, 124 Idaho 132 (1992).

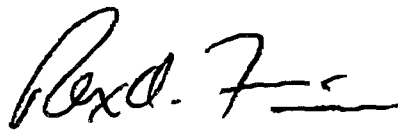
16. Karletta Grace Berry is entitled to maintain a direct action against the Defendants on behalf of the corporation.

CONCLUSION AND REQUEST FOR RELIEF

17. The Court should vacate the hearing on the Motion to dismiss to be properly re-noticed by the Defendants.

18. Alternatively the court should deny the Defendants Motion To Dismiss.

DATED this 11 day of April, 2008.



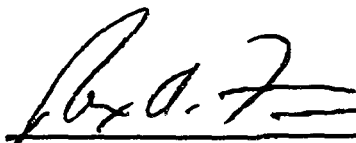
REX A. FINNEY
Attorney at Law

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was delivered as indicated, this 11 day of April, 2008, and was addressed as follows:

J.P. WHELAN P.C.
Attorney at law
213 N. 4th Street
Coeur d'Alene, Idaho 83814
(Via Facsimile: (208) 664-2240)

Judge Verby
chamber's copy
(Via Hand Delivery)



Court Minutes:

Session: VERBY041108P
Session Date: 04/11/2008
Judge: Verby, Steve
Reporter: Larsen, Val

Division: DIST
Session Time: 13:28

Courtroom: Courtroom9

Clerk(s): Rickard, Todd

State Attorney(s):

Public Defender(s):

Prob. Officer(s):

Court interpreter(s):



Case ID: 0001

Case number: CV2007-2409
Plaintiff: Berry, Karletta Grace
Plaintiff Attorney: Finney, Rex
Defendant: McFarland, Michael B
Pers. Attorney: Whelan, J. P.
Co-Defendant(s):
State Attorney:
Public Defender:

04/11/2008

13:53:23

Recording Started:

13:53:23

Case called

13:53:34

Judge: Verby, Steve
Calls Case -- PA, Plaintiff, DA

13:53:44

Motion

13:54:08

Comments to Parties RE: Current issues.

13:54:21

Pers. Attorney: Whelan, J. P.
I first learned of this theory, when I recieved

the call from Mr. Finney.
13:54:48 Rul 12b is the basic dismissal rule.
13:54:56 12 b is a subtle rule. 12 b is every issue
specific.
13:55:10 Reads from Rule 12 b
13:55:51 This is not a motion on a basis to state a
claim.
13:56:05 Comments RE: Rule 56 motion.
13:56:20 This is a 12b(6) case.
13:56:33 Reads from West Law Citation.
13:56:57 Our motion is based on jurisdictional.
13:57:10 The law says beginning with Rule 17a. This was
all pointed out to counsel.
13:57:35 Reads Rule 17a
13:57:56 The corporation is not the real party in
interest.
13:58:17 The claim is that somehow Mr. McFarland took
advantage of her husband.
13:58:34 Ms. Berry only became a member when she was
issued stock.
13:58:49 Rule 23 goes on to state, that the complaint
shall also allege with
13:59:14 particularity.
13:59:17 The case I cited is directly on point.
13:59:46 Comments RE: Case Law
13:59:55 Ms. Berry believes that she has a right to
maintain an action for the
14:00:27 corporation.
14:00:37 I don't think I have anything further to argue,
but I am not done with my
14:00:50 motion.
14:01:05 **Judge: Verby, Steve**
I would like to hear Mr. Finney's response
first.
14:01:26 **Plaintiff Attorney: Finney, Rex**
This is a 12b(6) motion.
14:01:34 **Judge: Verby, Steve**
The basis for the dismissal has been 41a2, 41b,
and 23. This is a derivative
14:02:00 action, is that all?
14:02:10 **Pers. Attorney: Whelan, J. P.**
Comments.

14:02:13 If Mr. Finney is attacking the motion because
14:02:30 the motion didn't cite 12b, we
are seeking a dismissal under Rule 23

14:02:41 **Judge: Verby, Steve**
Rule 12 would be referenced in what way?

14:03:00 **Pers. Attorney: Whelan, J. P.**
The caption of my motion says Motion to Dismiss

14:03:12 **Judge: Verby, Steve**
What part of 12b are you relying on?

14:03:23 **Pers. Attorney: Whelan, J. P.**
It's a jurisdictional case.
14:03:33 it would be subsection 1, and not following rule
23
14:03:53 Continued comments.

14:04:04 **Plaintiff Attorney: Finney, Rex**
12b, 1, 2, 4 require sepcial appearance.
14:04:24 That issue has been waived when the answer was
filed.
14:04:43 Somehow the defendant's have made a claim
against one of the plaintiffs.
14:05:00 Comments RE: Rule 40(a)(2)

14:05:18 **Judge: Verby, Steve**
I think Mr. Whelan has waived those issues.

14:05:29 **Pers. Attorney: Whelan, J. P.**
I suppose the technical issue is that the
motion doesn't reference Rule
14:05:44 12(b)
14:05:46 Comments RE: shareholder dirivative action.
14:05:58 The substance here, is the plaintiff doesn't
have standing.
14:06:11 Standing is always an issue.
14:06:29 I want to try and limit the jury trial

14:07:00 **Plaintiff Attorney: Finney, Rex**
Whatever the defendant's have called this
motion, they have filed supportive
14:07:17 affidavits. I feel my case is on point.
14:07:29 To call our filings late, under a motion for
summary judgment.

14:07:54 Comments RE: Repsonse Time for motions.
14:08:18 I disagree with me being sanctionable.
14:08:30 This is not a dirivative suite. We have alleged
14:08:47 that Mr. McFarland as
14:09:01 attorney for the corporation, somehow got 50% of
14:09:04 the stock in the
14:09:01 corporation.
14:09:04 Comments RE: McCann case. The McCann case is
14:09:35 not directly on point.
14:09:35 Whatever we have called this, the court needs to
14:09:55 carefully look at the
14:09:58 issues.
14:10:21 There is also an issue as to the bylaws of the
14:10:43 corporation. There should be
14:11:11 two directors. In contradiction to the bylaws,
14:11:23 a meeting was called by
14:11:23 **Judge: Verby, Steve**
14:11:23 I have a fundamental question. If we have an
14:11:38 agreement to proceed, then we
14:11:38 can and if not then I need some briefing.
14:11:47 It seems to me with that affidavits and counter-
14:12:04 affidavits, I am being asked
14:12:04 to make decisions on this motion on issues of
14:12:25 fact, arent those issues to be
14:12:25 resolved by the jury.
14:12:30 Am I to apply the summary judgment standard?
14:12:59 Are there material issues of fact, or are these
14:13:13 legal issues?
14:13:13 Before we go further, Mr. Whelan, what standard
14:13:30 am I going to apply?
14:13:30 **Pers. Attorney: Whelan, J. P.**
14:13:30 This is a procedural issue. Comments RE: Rule
14:13:48 23
14:13:48 There is no dispute on the facts.
14:14:03 I think we have a stipulation, or close to it,
14:14:24 that the plaintiff didn't give
14:14:24 the required 90 day notice to the corporation.
14:14:41 **Judge: Verby, Steve**
14:14:41 If I am to determine whether it is a dirivative
14:14:41 action, will I have to take

14:15:00 into account some of the corporation issues.

14:15:22 **Pers. Attorney: Whelan, J. P.**
I am asking the court to dismiss the corporation as a party.

14:15:51 I move to strike the affidavit of Karletta Berry
14:16:03 under rule 7
14:16:06 Comments RE: Rule 7
14:16:53 I don't think the Court has to determine facts here because of the
14:17:07 admissions.
14:17:41 The plaintiff admits she doesn't have standing.
14:18:12 The affidavit of Karletta Berry is
conclusionary.
14:18:27 I think the Court just has to look at the
Standard in Rule 23, and the McCann
14:18:41 case.
14:18:54 I don't think the Court needs to make Findings
of Fact.
14:19:10 Comments RE: Dismissal
14:19:34 She is trying to pursue a cause of action for the
corporation.
14:19:49 Standing is jurisdictional, I would say Rule 12a
and 12b apply.
14:20:34 I know the corporation didn't hire this attorney
because I represent the
14:20:49 attorney for the corporation.

14:20:53 **Judge: Verby, Steve**
Doesn't your position carry some issues that
become factual?

14:21:07 Continued Comments RE: Bylaws and directorship

14:23:04 **Pers. Attorney: Whelan, J. P.**
Comments RE: Exhibit 3 or Affidavit of Karletta
Berry.
14:24:57 If the plaintiff comes in and convinces the Court
she should be able to pursue
14:25:10 a direct action on behalf of the corporation,
then that is fine, we have not
14:25:29 burned that bridge.

14:25:37 **Plaintiff Attorney: Finney, Rex**
My belief that the standard to be applied is
that of Summary Judgment.
14:26:02 I think the standard is just that of summary

judgment.

- 14:26:17 **Judge: Verby, Steve**
I am not comfortable to proceed today as it relates to that issue.
- 14:26:37 I would like briefing on the issue as to the standard that I am to apply and
- 14:26:50 I will reschedule this for summary judgment.
- 14:26:59 How much do you think you will need Mr. Whelan?
- 14:27:21 **Pers. Attorney: Whelan, J. P.**
I do intend to make at least a motion for partial summary judgment, and I
- 14:27:43 would hate to come back several times on each issue.
- 14:27:53 **Judge: Verby, Steve**
Do you wish to convert this to a motion for summary judgment and other issues
- 14:28:06 and hear them all at once.
- 14:28:11 **Pers. Attorney: Whelan, J. P.**
I would like to do that.
- 14:28:18 **Judge: Verby, Steve**
Generally what I am doing, is this is the only Kootenai County case that I
- 14:28:34 have. If you want to look at a time about six weeks, that is fine.
- 14:28:59 **Pers. Attorney: Whelan, J. P.**
I didn't realize this was your only case.
- 14:29:09 **Judge: Verby, Steve**
I am certainly willing to come down to Kootenai and hear the issues.
- 14:29:35 **Pers. Attorney: Whelan, J. P.**
I would like to set this out about 60 days.
- 14:29:45 **Plaintiff Attorney: Finney, Rex**
I am intending on some extensive interrogatories and requests for production.
- 14:30:11 I would like a little additional time, and I would be committed to starting
- 14:30:27 my discovery on Monday. I would think 10 weeks

would be more appropriate. I
14:30:42 would like a scheduling conference to get a
trial on the books.
14:30:55 I would think about two weeks for trial.

14:31:04 **Judge: Verby, Steve**
I recall 7 days in your request. Mr. Whelan
indicated it could take up to 4
14:31:22 weeks.

14:31:24 **Pers. Attorney: Whelan, J. P.**
I think when we are done with some of this
summary judgment, a lot of issues
14:31:36 will go by the wayside.
14:31:42 I can try this case in one week realistically.

14:32:13 **Judge: Verby, Steve**
Comments RE: Trial Setting Timeframe.

14:32:30 **Pers. Attorney: Whelan, J. P.**
I can get the trial done in a week.

14:32:36 **Judge: Verby, Steve**
Mr. Finney do you think we can get the whole
case done in 2 weeks.

14:32:50 **Plaintiff Attorney: Finney, Rex**
If we don't spend a lot of time micromanaging
some of the issues, and too
14:33:07 many objections, I would think we could do it in
two weeks. Depending on
14:33:21 some of the issues it could take 3 weeks.

14:33:31 **Judge: Verby, Steve**
I would intend on setting it for more than two
weeks sometime in 2009
14:33:50 Counsel why don't you contact my office after
you go through some of your
14:34:05 discovery.
14:34:09 I will leave it to counsel to reschedule time to
hear additional motions,
14:34:23 including this one.

14:34:46 **Pers. Attorney: Whelan, J. P.**
I would like to take this up and get a ruling on
this. I would ask for a

14:34:59 date and deal with the other issues at a later date.

14:35:10 **Judge: Verby, Steve**
The issue is what standard am I to apply. This is a motion to dismiss

14:35:30 because this derivative action.

14:35:46 **Pers. Attorney: Whelan, J. P.**
The court would just like to see briefs, no further affidavits.

14:36:00 **Judge: Verby, Steve**
Correct.

14:36:02 Please send the briefs to my office in Sandpoint.

14:36:22 I will send you notice after I have absorbed your briefs.

14:36:36 **Stop recording**

STATE OF IDAHO }
COUNTY OF KOOTENAI } SS
FILED: 12:02 PM
M

2008 APR 25 PM 12:01

CLERK DISTRICT COURT
Anda Shultz
DEPUTY

John P. Whelan, P.C.
Attorney at Law
213 N. 4th
Coeur d'Alene, ID 83814
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Facsimile: (208) 664-2240
ISB No. 6083

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE STATE OF
IDAHO, IN AND FOR THE COUNTY OF KOOTENAI

KARLETTA GRACE BERRY, a widow,
KARLETTA GRACE BERRY, Personal
Representative of the Estate of Jerry
Lee Roy Berry, CAPTAIN'S WHEEL
RESORT, INC., an Idaho Corporation,

Plaintiffs,

vs.

MICHAEL B. MCFARLAND, MICHAEL B.
MCFARLAND, P.A., and KAREN
ZIMMERMAN,

Defendants.

Case No. CV-07-2409

BRIEF REGARDING STANDARD FOR
DEFENDANTS' MOTION TO DISMISS

Defendants, Michael B. McFarland, Michael B. McFarland, P.A. and Karen
Zimmerman, submit the following brief at the Court's request:

STATEMENT OF CASE

Plaintiff, Karletta Grace Berry, in her individual capacity and as a personal representative of the Estate of Jerry Lee Roy Berry, has filed her complaint against Defendants for various alleged wrongful acts.

At paragraph "4" of her complaint, Ms. Berry recites: "The Plaintiff, Captain's Wheel Resort, Inc., is an Idaho corporation in good standing and this direct [sic] action is brought by the incorporation [sic] through its director, Karletta Grace Berry."

A careful reading of Ms. Berry's allegations reveals that the "direct action" she is attempting to take as a director for the corporation is, in reality, a shareholder derivative action, as the complaint alleges (at paragraph 27) that Defendants McFarland and Zimmerman were appointed as directors of the corporation before the death of Jerry Lee Roy Berry. The complaint goes on to state that Exhibit 4 to the complaint sets forth the minutes of the special meeting of the shareholders wherein the Defendants were appointed directors.

A review of Plaintiff's Exhibit "4" reveals that, although the exhibit was purportedly prepared by Defendant McFarland, *the exhibit recites that Jerry L. Berry, Karletta G. Berry, Karen M. Zimmerman and Michael B. McFarland were all elected directors, and each of the directors, including Ms. Berry, signed the exhibit, which was ratified by all four as shareholders as well.*

Ms. Berry's own exhibit recites that she is but one of four directors appointed for the corporation. She alleges, without dispute, that Jerry L. Berry

has died, leaving three directors. Her complaint does not allege that this number has changed.

Accordingly, Ms. Berry's own complaint reveals that she lacks standing to pursue her "direct action" "brought by the incorporation [sic] through its director, Karletta Grace Berry", as the corporation, in fact, has three remaining directors. In reality, Ms. Berry is attempting to pursue a shareholder derivative action and she has named the corporation as a party Plaintiff in her action.

MOTION TO DISMISS

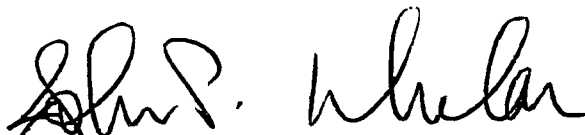
Defendants filed and served a motion to dismiss the corporation as a party plaintiff. The motion was properly noticed. On the day before the scheduled hearing, Ms. Berry submitted an affidavit in opposition to the motion (the Affidavit of Karletta Berry). On the day of the hearing, Ms. Berry filed yet another affidavit (of Toby McLaughlin) and a memorandum in opposition to the motion.

Plaintiff's counsel incorrectly argued in his memorandum that Defendants' motion had to be treated as a motion for summary judgment because Defendants submitted affidavits with their motion. While Plaintiff's argument would be true for a motion under I.R.C.P. Rule 12(b)(6), Defendants' motion is not based on I.R.C.P. Rule 12(b)(6)—which permits dismissal on the failure of Plaintiff to state a cause of action. Defendants' motion to dismiss is, in fact, procedural and jurisdictional in that Defendants argue that Plaintiff lacks standing to pursue a cause of action on behalf of the corporation, an

Dated: 4-25-08

Respectfully Submitted,

JOHN P. WHELAN, P.C.

A handwritten signature in cursive script, appearing to read "John P. Whelan", written over a horizontal line.

John P. Whelan

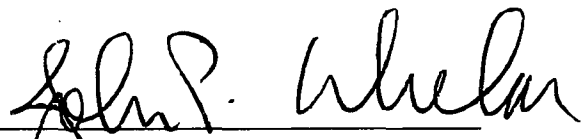
Attorney for Defendants

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 25 day of April, 2008, I caused to be served a true and correct copy of the foregoing by the method indicated below, and addressed as indicated below:

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120 East Lake Street, Suite 317
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John P. Whelan

REX A. FINNEY
FINNEY FINNEY & FINNEY, P.A.
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STATE OF IDAHO
COUNTY OF KOOTENAI } SS
FILED:

2008 APR 30 AM 10:56

CLERK DISTRICT COURT
Linda Hedlock
DEPUTY

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF KOOTENAI

KARLETTA GRACE BERRY, a widow,	)	Case No. CV-2007-2409
KARLETTA GRACE BERRY, Personal)	
Representative of the Estate	)	PLAINTIFFS' BRIEF REGARDING
of Jerry Lee Roy Berry,	)	STANDARD ON MEMORANDUM IN
CAPTAIN'S WHEEL RESORT, INC.,	)	OPPOSITION TO DEFENDANTS'
an Idaho Corporation,	)	MOTION TO DISMISS
)	
Plaintiffs,)	
)	
v.)	
)	
MICHAEL B. MCFARLAND, MICHAEL)	
B. MCFARLAND, P.A., and KAREN)	
ZIMMERMAN,)	
)	
Defendants.)	
)	

COME NOW, the above named Plaintiffs, by and through
counsel, and hereby submits this brief, as follows: .

1. In this action the Defendants have filed Affidavit in
support of the Motion to Dismiss and the Plaintiffs have filed
Affidavits opposing dismissal.

2. When the District Court considers affidavits in reaching its decision, the Motion to Dismiss must be "treated as one for summary judgment and disposed of as provided in Rule 56". Goodman v. Lothrop, 143 Idaho 622, 626, 151 P.3d 818, 822 (2007). The Goodman Court set forth the relevant standard as follows:

In reviewing a ruling on a summary judgment motion, this Court employs the same standard as that used by the district court. Sprinkler Irrigation Co. v. John Deere Ins., 139 Idaho 691, 695, 85 P.3d 667, 671 (2004). Summary judgment is appropriate "if the pleadings, deposition, and admissions on file, together with the affidavits, if any, show that there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law." I.R.C.P. 56(c). "All disputed facts are to be construed liberally in favor of the non-moving party, and all reasonable inferences that can be drawn from the record are to be drawn in favor of the non-moving party." Sprinkler Irrigation Co., 139 Idaho at 695-96, 85 P.3d 667. 85 P.3d at 671-72. Summary judgment is inappropriate where "reasonable people could reach different conclusions or draw conflicting inferences from the evidence" regarding a genuine issue of material fact. Kalange v. Rencher, 136 Idaho 192, 195, 30 P.3d 970, 973 (2001).

3. In the present action the Corporation Plaintiff, and the other Plaintiffs, have brought suit against the Defendants for breach of fiduciary duty stemming from the fact that Michael McFarland was the corporate attorney and attorney for the shareholders at a time that he and his girlfriend acquired one half of the shares of the corporation from his client, while the client was near death. Mr. McFarland attempted to obtain all of

the shares of the corporation and to hold one half of the shares as trustee for Karletta Grace Berry and her son.

4. Soon after the death of Jerry Berry, the Defendants as alleged shareholders and directors of the corporation, purported to remove Karletta Grace Berry from her role in the corporation and purported passed resolutions to sell off the corporation's assets.

5. There is very little case law in Idaho concerning individual or direct actions. *McCann v. McCann*, 138 Idaho 228, 233 (2002).

6. In *Steelman v. Mallory*, 110 Idaho 510, (1986) the Idaho Supreme Court recognized the principal that a shareholder in a closely held corporation who was also director was not required to bring derivative suit rather than direct action against other directors for breach of fiduciary duty and stated that the court "cannot agree with appellants' contention that this case should have been dismissed because it is a "direct action" rather than a shareholder's derivative suit.

7. In any event appointment of the Defendants as directors of the corporation is void and in violation of the corporate Bylaws.

8. Karletta Grace Berry is entitled to maintain a direct action against the Defendants on behalf of the corporation.

9. If a shareholder and a corporate attorney breaches his fiduciary duty to the shareholder and corporate clients, the aggrieved shareholder must be allowed in fairness to bring a direct action in the name of the corporation for the breach of the duty of the attorney. Likewise, a direct action may be brought against the Defendants, if they are valid directors, for breach of fiduciary duty as directors, including the self dealing in the attempt to list the corporate real property with the Defendant Zimmerman's brokerage.

10. In this case the Plaintiff has asked the court to set aside the Defendants' actions and to impose a constructive trust. To dismiss would be a miscarriage of justice.

11. As previously noted, there is very little case law in Idaho. 19 Am. Jur. 2d Corporations § 1956, (copy attached) supports the Plaintiffs' position and provides the following

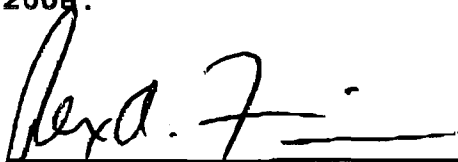
The fiduciary obligation of dominant or controlling stockholders[FN1] or directors[FN2] is ordinarily enforceable through a stockholder's derivative action, [FN3] although, in a proper case, a breach of this duty may give rise to a direct action by stockholders in their own right. [FN4] An individual action by a stockholder, as distinguished from a derivative action, may be sustained against an officer, director, or other wrongdoer for a breach of a special fiduciary duty to a stockholder, other than the mere duty of an officer or director to the corporation and its stockholder, by virtue of his or her position as a stockholder. [FN5] In addition, an individual action will be allowed if there is a fiduciary relationship between the parties, which requires the wrongdoer to protect the interest of the stockholder, and if that duty has been violated and

full relief to the stockholder cannot be had through a recovery by the corporation. [FN6]

12. The Court should consider the Affidavits and deny the Motion to Dismiss after the proper procedure is followed by the Defendants. Issues of fact exist and judgment is not appropriate as a matter of law.

13. Even without considering the Affidavits the Court should deny the motion to dismiss as this is a direct action for breach of fiduciary duty for self dealing by an attorney for the benefit of himself and his significant other as joint tenants with rights of survivorship.

DATED this 30 day of April, 2008.



REX A. FINNEY
Attorney at Law

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was delivered as indicated, this 30th day of April, 2008, and was addressed as follows:

J.P. WHELAN P.C.
Attorney at law
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Coeur d'Alene, Idaho 83814
(Via Facsimile: (208) 664-2240)

Judge Verby
chamber's copy
(Via Hand Delivery)



19 Am. Jur. 2d Corporations § 1956

American Jurisprudence, Second Edition
Database updated March 2008

Corporations

Laura Hunter Dietz, J.D., Christine M. Gimeno, J.D., Rosemary Gregor, J.D., Alan J. Jacobs, J.D., Theresa Leming, J.D., Jack K. Levin, J.D., William Lindsley, J.D., Anne M. Payne, J.D., Jeanne Philbin, J.D., Jeffrey Shampo, J.D., Eric Surette, J.D., Lisa A. Zakolski, J.D., and Suzanne L. Bailey, J.D., Ruth E. Kochard, J.D., Mary Babb Morris, J.D., Jaqualin Friend Peterson, J.D., of the staff of the National Legal Research Group, Inc.

XIX. Actions by Shareholders
B. Grounds of Action

Topic Summary Correlation Table References

§ 1956. Breach of fiduciary duty

West's Key Number Digest

West's Key Number Digest, Corporations ¶189(.5) to (14), 204

The **fiduciary** obligation of dominant or controlling stockholders[FN1] or directors[FN2] is ordinarily enforceable through a stockholder's derivative **action**,[FN3] although, in a proper case, a **breach** of this duty may give rise to a **direct action** by stockholders in their own right.[FN4] An individual action by a stockholder, as distinguished from a derivative action, may be sustained against an officer, director, or other wrongdoer for a breach of a special fiduciary duty to a stockholder, other than the mere duty of an officer or director to the corporation and its stockholder, by virtue of his or her position as a stockholder.[FN5] In addition, an individual action will be allowed if there is a fiduciary relationship between the parties, which requires the wrongdoer to protect the interest of the stockholder, and if that duty has been violated and full relief to the stockholder cannot be had through a recovery by the corporation.[FN6]

CUMULATIVE SUPPLEMENT

Cases:

Individual shareholder suits, as opposed to derivative action, could be brought against major shareholder of closely held corporation, claiming breach of fiduciary duty under Nevada law as predicted by federal court; individual wrongs were alleged, all shareholders were parties to suit, there were no outside creditors, and derivative action would end up benefiting alleged wrongdoer. Simon v. Mann, 373 F. Supp. 2d 1196 (D. Nev. 2005).

[END OF SUPPLEMENT]

[FN1] §§ 644, 645.

[FN2] § 1455.

[FN3] Linge v. Ralston Purina Co., 293 N.W.2d 191 (Iowa 1980); Salvadore v. Connor, 87

Mich. App. 664, 276 N.W.2d 458 (1978).

[FN4] Pepper v. Litton, 308 U.S. 295, 60 S. Ct. 238, 84 L. Ed. 281 (1939).
As to direct actions by shareholders, generally, see §§ 1937 to 1943.

[FN5] Wilson v. H.J. Wilson Co., Inc., 430 So. 2d 1227 (La. Ct. App. 1st Cir. 1983), writ denied, 437 So. 2d 1166 (La. 1983); Gieselmann v. Stegeman, 443 S.W.2d 127 (Mo. 1969).

[FN6] Funk v. Spalding, 74 Ariz. 219, 246 P.2d 184 (1952); Commonwealth of Massachusetts v. Davis, 140 Tex. 398, 168 S.W.2d 216 (1942).

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AMJUR CORPORATNS § 1956

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STATE OF IDAHO }
COUNTY OF KOOTENAI } SS
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CLERK DISTRICT COURT
Patty Bayley
DEPUTY

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF KOOTENAI

KARLETTA GRACE BERRY, a widow,
KARLETTA GRACE BERRY, Personal
Representative of the Estate of Jerry
Lee Roy Berry, CAPTAIN'S WHEEL
RESORT, INC., an Idaho Corporation,

Plaintiffs,

vs.

MICHAEL B. MCFARLAND, MICHAEL B.
MCFARLAND, P.A., and KAREN
ZIMMERMAN,

Defendants.

Case No. CV-07-2409

MOTION TO STRIKE

COMES NOW the Defendants, Michael B. McFarland, Michael B. McFarland, P.A. and Karen Zimmerman, by and through their counsel of record, John P. Whelan, move to strike the following from the Plaintiff's Brief Regarding the Standard on Memorandum in Opposition to Defendants' Motion to Dismiss that was filed on April 30, 2008.

MOTION TO STRIKE- 1

The motion is based on the following:

1. The brief in its entirety is untimely. Briefs were to be filed by April 25, 2008 by order of the Court.

Defendants request oral argument.

DATED this 15th day of May, 2008.

JOHN P. WHELAN, P.C.

By: 

John P. Whelan

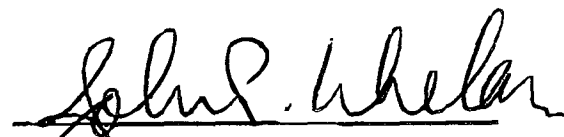
Attorney for Defendants

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 1 day of May, 2008, I caused to be served a true and correct copy of the foregoing by the method indicated below, and addressed as indicated below:

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 Hand Delivered
 Overnight Mail
 Facsimile to: (208) 263-8211



John P. Whelan

STATE OF IDAHO }
COUNTY OF KOOTENAI } SS
FILED:

2008 JUN 16 AM 10:33

CLERK DISTRICT COURT
Christina
DEPUTY *jm*

**IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF KOOTENAI**

KARLETTA GRACE BERRY, a widow,)
KARLETTA GRACE BERRY, Personal)
Representative of the Estate of Jerry Lee)
Roy Berry, CAPTAIN'S WHEEL)
RESORT, INC., an Idaho corporation,)

Plaintiffs,)

vs.)

MICHAEL B. MCFARLAND, MICHAEL)
B. MCFARLAND, P.A., and KAREN)
ZIMMERMAN,)

Defendants.)

CASE NO. CV-2007-2409

MEMORANDUM
DECISION AND ORDER

The Defendants contend that the corporation's claims in this case should be classified as a derivative suit. Because Karletta Berry did not comply with the requirements specified by statute for filing a derivative action, the Defendants argue that the corporation must be dismissed as a plaintiff. The court determines that whether or not the corporation's claims are a derivative action turn on factual findings that are to be made by a jury. Because a jury must determine essential facts, the motion to dismiss is denied.

I. PROCEDURAL BACKGROUND

This case is before the court pursuant to the Defendants' motion to dismiss. Oral argument on the motion was heard on April 11, 2008. At the conclusion of the hearing the court requested additional briefing. The Defendants filed their brief on April 25, 2008. The plaintiffs lodged their brief on April 30, 2008, which prompted the Defendants to file a motion to strike, based on the fact that the Plaintiffs' brief was untimely.

The Defendants' motion to strike was filed on May 1, 2008, and oral argument was requested. No reply to the motion to strike was presented to the court by the Plaintiffs and no hearing date was set for the motion by the Defendants. The court recognizes that the issues presented are important to all parties and that further delay is counterproductive to the administration of justice.

II. THE PARTIES' POSITIONS

A. The Defendants' Motion to Dismiss

The Defendants request dismissal of the claim brought by Plaintiff Captain's Wheel Resort, Inc. based on I.R.C.P. Rules 41(a)(2) and 41(b). In their motion, the Defendants argue that Plaintiff Karletta Berry has joined the corporation as a party plaintiff without first satisfying the statutory prerequisites for filing a shareholder derivative action. Thus, according to the Defendants, Karletta Berry has no standing to pursue an action by the corporation against the Defendants.

In support of the motion to dismiss, two affidavits were submitted. Counsel for

the Defendants provided an affidavit with attachments. The attachments included a portion of Karletta Berry's deposition testimony as well as a letter requesting that Plaintiff's counsel voluntarily "dismiss" Captain's Wheel Resort from the current action. In his affidavit, Mr. Whelan, legal counsel for the Defendants, states that Mrs. Berry "has no facts in support of the allegations in her complaint, only speculation and hearsay."

In his affidavit, Defendant Michael McFarland states that he and his co-Defendant, Karen Zimmerman, are two of the three members of the board of directors of Captain's Wheel Resort, Inc. He contends that together they own fifty percent of the stock in the corporation, and that Mrs. Berry has owned the other fifty percent since Mr. Berry passed away in November of 2006.

In the Defendants' memorandum in support of the motion to dismiss, they contend that the corporation's claim is in essence a derivative action and that the statutory prerequisites to filing a "shareholder derivative action" have not been met.

The Defendants also argue in their post hearing brief that because this is a "derivative action" and because "Plaintiff lacks standing to pursue a cause of action on behalf of the corporation," Plaintiff Captain's Wheel Resort must be dismissed pursuant to I.R.C.P. 12(b)(1) or (2).

Defendants object to the filing of the affidavit of Toby McLaughlin as well as the affidavit of Karletta Berry in opposition to their motion, arguing that they were untimely.

B. The Plaintiffs' Response

1. Affidavit of Karletta Berry

Mrs. Berry states that Defendant Michael McFarland provided legal advice to her husband, Jerry Lee Roy Berry, to her, and to Captain's Wheel Resort, Inc., and served as the attorney for each individual as well as the corporation. As the lawyer for all three parties, a fiduciary relationship resulted. She also claims that Karen Zimmerman is Mr. McFarland's girlfriend.

Mrs. Berry states that she became the president and the sole director of the corporation after the death of her husband. She also asserts that any stock currently held in the name of the Defendants is held under a constructive trust for her benefit based on Defendant McFarland's breach of his fiduciary duties as an attorney.

In addition, Mrs. Berry claims that the original bylaws were never amended to allow for more than two directors. Thus, according to Mrs. Berry, the Defendants' assertion that they are directors of the corporation is factually incorrect because any election of two additional directors was void. She states that she is pursuing this action as a "direct action against the Defendants for a breach of fiduciary duty, among other causes of action, to myself, for the Estate of Jerry Lee Roy Berry, and for the Captain's Wheel Resort, Inc., an Idaho corporation."

2. Affidavit of Toby McLaughlin

Toby McLaughlin is a lawyer who reviewed documents on behalf of Mrs. Berry relating to the positions taken by the Defendants. He also attended a meeting with Mr.

McFarland and Ms. Zimmerman on November 13, 2006, while acting as Mrs. Berry's lawyer.

Among the paperwork reviewed by Toby McLaughlin were various agreements regarding money paid by Mr. McFarland and Ms. Zimmerman to the late Mr. Berry. The only signed agreement was a Stock Purchase and Sale Agreement which was dated August 9, 2003.¹ This agreement stated that Mr. McFarland and Ms. Zimmerman were purchasing fifty percent of the corporate shares for \$100,000.00.

The second agreement was a longer version of the Stock Purchase and Sale Agreement. This agreement, also dated August 9, 2003, stated that Mr. McFarland and Ms. Zimmerman were purchasing all the corporate shares for \$100,000.00, but indicated that fifty percent of the shares were to be held in trust for Karletta Berry and her son, Dale Berry. This agreement was unsigned.

The third and final agreement was a document titled "Loan Agreement with Stock as Collateral." This agreement stated that the \$100,000.00 was merely a loan which was to be repaid with ten percent interest. This agreement was also unsigned.

Mr. McFarland was asked to explain these agreements. According to Mr. McFarland, he and Ms. Zimmerman had given Mr. Berry \$100,000.00 to help run Captain's Wheel in 2003. Mr. McFarland took the position that this money was for the purchase of fifty percent of the business and was not a loan. The agreement was verbal,

¹ According to Mrs. Berry's affidavit, although the agreement was dated August 9, 2003, it was not signed until about July 4, 2006. This signing occurred shortly after a four day hospital stay for chemotherapy treatment as a result of Mr. Berry's pancreatic cancer.

and was not committed to writing until 2006. At the meeting Mr. McFarland admitted that the agreement was not signed until the summer of 2006.

III. STANDARD OF REVIEW

A. I.R.C.P. 41

The Defendants' motion recites that it is made "pursuant to I.R.C.P. Rule 41(a)(2) and 41(b)." These rules, however, appear to be inapposite in the present case. Rule 41(a)(2) applies to a request for dismissal "at the *plaintiff's* instance." I.R.C.P. 41(a)(2) (emphasis added). In this case, the Defendants have filed the motion to dismiss.

Rule 41(b) states that a defendant may move for dismissal "for failure of the plaintiff to prosecute or to comply with these rules or any order the court" The Defendants' position that the corporation's cause of action is a derivative suit is based on three assumptions: (1) Karletta Berry is not the sole shareholder; (2) The outcome of the court proceedings will not result in a constructive trust being imposed; and (3) Michael McFarland and Karen Zimmerman are stockholders and members of the board of directors. No "standard of review" which is directly applicable to a Rule 41(b) analysis and which is supported by citation to case law or to another salient rule has been set forth by the Defendants. Nonetheless, as can be seen in the analysis section of the decision, the "standard" to be applied does not determine the outcome of the pending motion.

B. I.R.C.P. 12

The Defendants' post-hearing brief states that the motion to dismiss is *not* based on Rule 12(b)(6). Instead, the Defendants claim that their motion is "in fact, procedural

and jurisdictional in that Defendants argue that Plaintiff lacks standing to pursue a cause of action on behalf of the corporation, an I.R.C.P. 12(b)(1) or (2) motion.” Defendants cite *Owsley v. Idaho Indus. Comm’n*, 141 Idaho 129, 133, 106 P.3d 455, 459 (2005), for the proposition that on a motion to dismiss, the court must look only at the pleadings, and all inferences are viewed in favor of the non-moving party.

The Idaho Supreme Court has held, however, that when matters outside the pleadings, in the form of affidavits, are presented to and considered by the court “it is the *duty* of the court to treat such motion to dismiss as a motion for summary judgment.” *Hellickson v. Jenkins*, 118 Idaho 273, 276, 796 P.2d 150, 153 (Ct. App. 1990) (emphasis in original). Rule 12(b) expressly provides that when a court considers material outside the pleadings, “the motion *shall* be treated as one for summary judgment and disposed of as provided in Rule 56” I.R.C.P. 12(b) (emphasis added); *Goodman v. Lothrop*, 143 Idaho 622, 626, 151 P.3d 818, 822 (2007).

In this case, the Defendants’ motion to dismiss was accompanied by the affidavits of John P. Whelan and Michael B. McFarland. Because matters outside the pleadings were presented to and not excluded by the court, the motion is to be treated as a motion for summary judgment. Therefore, the Plaintiffs’ affidavits are allowed because they were timely filed.

The standard for reviewing a dismissal is the same as the standard for reviewing a grant of summary judgment. *Coghlan v. Beta Theta Pi Fraternity*, 133 Idaho 388, 398,

987 P.2d 300, 310 (1999); *Rim View Trout Co. v. Dep't. of Water Resources*, 119 Idaho 676, 677, 809 P.2d 1155, 1156 (1991).

C. Summary Judgment Standard of Review

1. No Genuine Issue of Material Fact

Rule 56(c) of the Idaho Rules of Civil Procedure allows summary judgment to be "rendered forthwith if the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Rule 56(c).

2. Liberally Construe in Favor of Non-Moving Party

All disputed facts are to be construed liberally in favor of the non-moving party, and all reasonable inferences that can be drawn from the record are to be drawn in favor of the non-moving party. *Fenwick v. Idaho Dept. of Lands*, 160 P.3d 757, 760 (2007). "[M]otions for summary judgment should be granted with caution." *Bailey v. Ness*, 109 Idaho 495, 497, 708 P.2d 900, 902 (1985). If reasonable persons could reach differing conclusions or draw conflicting inferences from the evidence, summary judgment must be denied. *Cates v. Albertson's Inc.*, 126 Idaho 1030, 1033, 895 P.2d 1223, 1226 (1995). If the evidence reveals no disputed issues of material fact, then the motion should be granted. *Loomis v. City of Hailey*, 119 Idaho 434, 436, 807 P.2d 1272, 1274 (1991).

3. Burden

The burden of establishing the absence of a genuine issue of material fact rests with the party moving for summary judgment. *Smith v. Meridian Joint School District*

No. 2, 128 Idaho 714, 719, 918 P.2d 583, 588 (1996) (citing *Tingley v. Harrison*, 125 Idaho 86, 89, 867 P.2d 960, 963 (1994)). In order to meet its burden, the moving party must challenge in its motion and establish through evidence the absence of any genuine issue of material fact on an element of the nonmoving party's case. *Id.* If the moving party fails to challenge an element or fails to present evidence establishing the absence of genuine issue of material fact on that element, the burden does not shift to the nonmoving party, and the nonmoving party is not required to respond with supporting evidence. *Id.*

IV. ANALYSIS

A. Material Issues of Fact

Having reviewed the submissions and the affidavits of the parties, and after applying all reasonable inferences in favor of the Plaintiffs, the court concludes that there are material issues of fact which preclude the granting of summary judgment at this time. The determination of these material issues of fact will affect the court's conclusion as to whether the action by the corporation should be viewed as a direct action or a derivative action. Factual findings may also affect legal conclusions relating to who is or are the rightful owner(s) of the corporate shares as well as the validity of the Defendants' appointments as directors. Because a jury trial is requested, the jurors must make all factual determinations. If Mrs. Berry is determined to be the sole stockholder, the suit filed by the corporation would not be a derivative action. Regardless of what "standard of review" is to be applied, the court cannot make determinations of fact at this juncture

of the suit.

Applying all inferences in favor of Mrs. Berry, the nonmoving party, a jury could determine that the facts are as follows: Mrs. Berry is the sole director of the corporation and is the rightful shareholder of all of the stock of Captain's Wheel Resort, Inc. The corporation's bylaws were never amended to provide for more than two directors, and because any appointment or election of the Defendants as directors would have been made when Mr. and Mrs. Berry were the only two directors, the appointments and/or elections were void.

B. Motion to Strike

Because no hearing was set on the motion to strike, and because the court decides the motion to dismiss without considering the Plaintiffs' post hearing brief, the court need not address the issue because it is moot.

IT IS SO ORDERED.

DATED THIS 10th day of June, 2008.

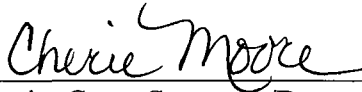

Steve Verby
District Judge

CERTIFICATE OF MAILING

I hereby certify that a true and correct copy of the foregoing was sent postage pre-paid, or faxed, this 10th day of June, 2008, to:

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District Court Secretary/Deputy Clerk

REX A. FINNEY
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Attorneys at Law
Old Power House Building
120 East Lake Street, Suite 317
Sandpoint, Idaho 83864
Phone: (208) 263-7712
Fax: (208) 263-8211
ISB No. 6313

STATE OF IDAHO
COUNTY OF KOOTENAI } SS
FILED:

1963

2009 APR -2 PM 2:15

J.K.

CLERK DISTRICT COURT

Patty Bayley
DEPUTY

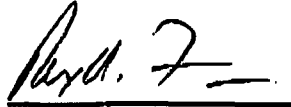
IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF KOOTENAI

KARLETTA GRACE BERRY, a widow,	)	Case No. CV-2007-0002409
KARLETTA GRACE BERRY, Personal)	
Representative of the Estate	)	MOTION TO ALLOW ATTORNEY TO
of Jerry Lee Roy Berry,	)	APPEAR BY TELEPHONE
CAPTAIN'S WHEEL RESORT, INC.,)	
an Idaho Corporation,)	
)	
Plaintiff,)	
)	
v.)	
)	
MICHAEL B. MCFARLAND, MICHAEL)	
B. MCFARLAND, P.A., and KAREN)	
ZIMMERMAN,)	
)	
Defendants.)	

COMES NOW REX A. FINNEY, attorney for the Plaintiff in the
above matter, and hereby requests to be allowed to appear by
telephone at the Status Conference currently scheduled in the
above matter for April 10, 2009. The reasons and grounds for

this motion are that counsel for the Plaintiff has two (2) Pretrial Conferences scheduled in Bonner County on April 10, 2009 at 9:30 a.m. and is therefore unavailable for a hearing in Kootenai County with regard to the above matter on that date at 9:00 a.m.

DATED this 2 day of April, 2009.

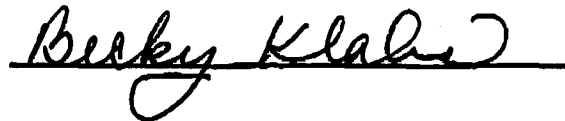


REX A. FINNEY
Attorney at Law

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was delivered via facsimile, this 2nd day of April, 2009, and was addressed as follows:

J.P. WHELAN P.C.
Attorney at law
213 N. 4th Street
Coeur d'Alene, Idaho 83814
(Fax No.: (208) 664-2240)



REX A. FINNEY
FINNEY FINNEY & FINNEY, P.A.
Attorneys at Law
Old Power House Building
120 East Lake Street, Suite 317
Sandpoint, Idaho 83864
Phone: (208) 263-7712
Fax: (208) 263-8211
ISB No. 6313

STATE OF IDAHO }
COUNTY OF KOOTENAI } SS
FILED:

2009 FEB -6 PM 2:24

CLERK DISTRICT COURT

Cathy Victoria
DEPUTY

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF KOOTENAI

KARLETTA GRACE BERRY, a widow,	)	Case No. CV-2007-2409
KARLETTA GRACE BERRY, Personal)	
Representative of the Estate	)	REQUEST FOR TRIAL SETTING
of Jerry Lee Roy Berry,)	
CAPTAIN'S WHEEL RESORT, INC.,)	
an Idaho Corporation,)	
)	
Plaintiffs,)	
)	
v.)	
)	
MICHAEL B. MCFARLAND, MICHAEL)	
B. MCFARLAND, P.A., and KAREN)	
ZIMMERMAN,)	
)	
Defendant.)	

The undersigned hereby acknowledges the requirements of the
First Judicial District Rule 5 and further certifies that the
above case is ready for trial and advises as follows:

1. Type of Action: Lack of consideration, lack
of capacity, breach of fiduciary duty, undue influence by
attorney in self dealing, negligence, quiet title, good faith
and fair dealing, resulting or constructive trust

FIRST JUDICIAL DISTRICT COURT, STATE OF IDAHO
COUNTY OF KOOTENAI
324 W. GARDEN AVENUE
COEUR D'ALENE, IDAHO 83816-9000

FILED 4/2/2009 AT 11:58 AM
STATE OF IDAHO, COUNTY OF KOOTENAI
CLERK OF THE DISTRICT COURT

BY  DEPUTY

KARLETTA GRACE BERRY, ETAL.)

VS.)

MICHAEL B MCFARLAND, ETAL.)

Case No: CV-2007-0002409

NOTICE OF HEARING

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

Status Conference Friday, April 10, 2009 09:00 AM
Judge: Steve Verby
Courtroom:

*Heard in Bonner
County - 4/10/09
Wanda Butler
4/10/09*

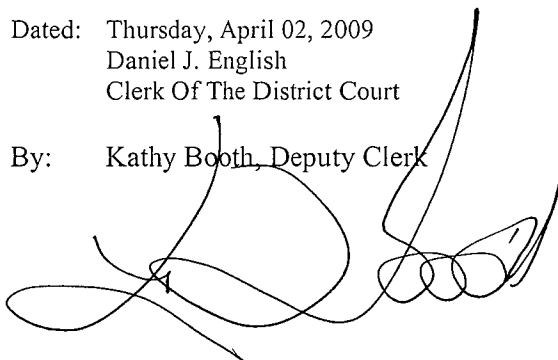
I certify that copies of this Notice were served as follows on April 2nd, 2009.

Plaintiff's Counsel: Rex A. Finney
120 East Lake Street, Ste 317
Sandpoint ID 83864
Mailed _____ Hand Delivered _____ [] Faxed (208) 263-8211

Defendant's Counsel: John P Whelan
213 North Fourth Street
Coeur d'Alene ID 83814
Mailed _____ Hand Delivered _____ [] Faxed (208) 664-2240

Dated: Thursday, April 02, 2009
Daniel J. English
Clerk Of The District Court

By: Kathy Booth, Deputy Clerk



**IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF KOOTENAI**

COURT MINUTES

JUDGE:	STEVE VERBY	CASE NO.	CV-2007-0002409
REPORTER:	VAL LARSON	DATE:	04/10/2009 TIME: 9:00 AM
CLERK:	CHERIE MOORE	CD:	09-094
DIVISION:	DISTRICT		

KARLETTA GRACE BERRY, et al.	vs.	MICHAEL B. MCFARLAND, et al.
_____		_____
Plaintiff / Petitioner		Defendant / Respondent
Attorney: REX A. FINNEY		Attorney: JOHN P. WHELAN

SUBJECT OF PROCEEDINGS: STATUS
CHARGE:

INDEX SPEAKER PHASE OF CASE

9:00	J	Calls Case
		Present: REX FINNEY, JOHN WHELAN BY TELEPHONE
	J	REASON STATUS CONFERENCE SCHEDULED WAS BECAUSE OF HOW MUCH TIME TRIAL WILL ACTUALLY TAKE – MR. FINNEY INDICATED THAT IT WOULD TAKE 14 DAYS – MR. WHELAN, WHAT ARE YOUR THOUGHTS
	JW	NOT GOING TO TAKE 14 DAYS – MY THOUGHTS ARE 4 DAYS, 5 AT MOST – WE HAVE TAKEN DEPOSITION – THERE WAS A POINT OF MALPRACTICE – I DON'T SEE THIS CASE BEING COMPLICATED – I STICK BY A 4 OR 5 DAY JURY TRIAL ESTIMATE
	J	THE REASON I AM CONCERNED IS BECAUSE OF EVENT 5 OR SO YEARS AGO WHERE CASE ENDED UP TAKING OVER 8 WEEKS – I WANT TO MAKE SURE THAT WE ESTABLISH THE TIME PARAMETERS
	JW	I CAN MEET MY TIME STANDARDS - I REQUEST THAT MR. FINNEY ENLIGHTEN US
	J	THIS TYPE OF MATTER CAN BECOME COMPLICATED – SOME ISSUES OF 10 DAY TRIAL ARE COMPARABLE – MR. FINNEY, WHAT ARE YOU LOOKING AT?
9:04	RF	IT'S TOUGH TO ANTICIPATE – I HAVE IDENTIFIED 30 WITNESSES AND 2 ADDITIONAL EXPERT WITNESSES – SOME WITNESSES COULD TAKE 2 DAYS OF TRIAL TIME – I FEEL THAT I CAN PROBABLY MAKE IT FIT INTO 10 DAYS – DON'T WANT TO HAVE TO EXTEND THE TIME
	J	FOR YOUR CASE, TAKING INTO CONSIDERATION, CROSS EXAMINATION, HOW LONG WILL YOU NEED TO TRY YOUR CASE?
	RF	I BELIEVE 7 TRIAL DAYS
	J	MR. WHELAN, HOW LONG WILL YOU NEED TO TRY YOUR CASE?
	JW	I WOULD SAY 2 DAYS
	J	GOING TO HOLD BOTH OF YOUR FEET TO THE FIRE AND BECOME VERY SPECIFIC – WE HAVE TO GIVE THE JURY INSTRUCTIONS AND ALLOW FOR ARGUMENT – MR. WHELAN, DO YOU THINK YOU CAN REALISTICALLY TRY YOUR CASE IN 2 DAYS?

	JW	I DO – WE TOOK MS. BERRY'S DEPOSITION AND ASKED HER ABOUT WITNESSES WHO WILL TRY TO ESTABLISH SOME TYPE OF ATTORNEY/CLIENT RELATIONSHIP – I DON'T SEE THAT WILL TAKE 7 DAYS – WHY DON'T WE SET IT FOR 8 – 10 JURY DAYS
	J	WE'LL ESTABLISH WHAT SEEMS REASONABLE – MR. FINNEY CAN COMMIT TO 7 DAYS, YOU'RE COMMITTING TO 2 DAYS OF TRIAL TIME – ½ DAY TO PICK A JURY – ½ DAY TO INSTRUCT A JURY – GOING TO SET THIS MATTER FOR 10 DAYS – MR. FINNEY?
	RF	WILL NEED ADDITIONAL TIME – I NEED 2 DEPOSITION DAYS, YOUR HONOR
	J	MR. WHELAN, ARE YOU GOING TO NEED TIME FOR DISCOVERY?
	JW	WE CAN DO THAT WITHOUT DELAYING THE TRIAL – PROBABLY LOOKING TOWARDS NEXT YEAR
	RF	I WAS THINKING NOVEMBER WOULD BE APPROPRIATE
9:10	J	MR. WHELAN?
	JW	WE WOULD TAKE THE JUNE TRIAL DATE
	J	MR. FINNEY, WHERE ARE YOU WITH REGARDS TO YOUR EXPERT – DO YOU HAVE EXPERT WITNESSES DISCLOSED?
	RF	AT THIS TIME, I DO NOT – WE HAVE AN IDEA OF WHAT WE WANT TO DO
	J	COULD START ON JANUARY 13 WHICH IS A THURSDAY
	JW	THAT'S OKAY WITH MY CALENDAR
	J	MR. FINNEY?
	RF	THAT'S GREAT
	J	THE ONLY ISSUE THERE IS THE 3 DAY WEEKEND – WOULD RESUME ON TUESDAY THE 19 TH – I AM GOING TO ESTABLISH TRIAL TO BEGIN ON JANUARY 14TH AT 9:00 AM
	J	DO YOU FEEL THAT MEDIATION WOULD ASSIST THE PARTIES IN RESOLUTION?
	JW	I DON'T KNOW JUDGE – I SUPPOSE IT'S WORTH A TRY
	RF	NOT SURE – WOULD ASSIST BUT I MAY BE MISTAKEN
	J	IN CASES LIKE THIS, PERSONAL EMOTIONS CAN RUN HIGH WHICH MAKES IT DIFFICULT – IS THERE A NEGLIGENCE CLAIM?
	JW	I CAN'T ANSWER – THERE IS A MALPRACTICE CLAIM – I DON'T KNOW IF THE CARRIERS WOULD BE INVOLVED OR NOT
	J	I AM LOOKING AT REARRANGING THE COURT SCHEDULE TO ACCOMMODATE THE ATTORNEYS SCHEDULE – DON'T COME TO ME A WEEK BEFORE TO CONTINUE THIS – WARNING IN ADVANCE, I AM CUTTING OUT A FULL WEEK OF LAW DAYS AND SHORTENING MY CRIMINAL TRIAL WEEK TO ACCOMMODATE THE WISHES OF THE TRIAL
	JW	I'LL BE READY, JUDGE
	J	ANYTHING FURTHER?
	JW/RF	NO
9:17	END	

STATE OF IDAHO } ss
 COUNTY OF KOOTENAI
 FILED: 5/28/09
 AT 8:52 O'CLOCK AM
 CLERK, DISTRICT COURT
Dawn Mitchell
 DEPUTY

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE
 STATE OF IDAHO, IN AND FOR THE COUNTY OF KOOTENAI

KARLETTA GRACE BERRY, a widow,)
 KARLETTA GRACE BERRY, Personal)
 Representative of the Estate of Jerry Lee)
 Roy Berry, CAPTAIN'S WHEEL)
 RESORT, INC., an Idaho Corporation,)

Plaintiffs,)

vs.)

MICHAEL B. MCFARLAND,)
 MICHAEL B. MCFARLAND, P.A.,)
 and KAREN ZIMMERMAN,)

Defendants.)

CASE NO: CV-2007-0002409

NOTICE OF TRIAL

PLEASE TAKE NOTICE that the above-entitled case is set for:


Ten-Day Jury Trial 9:00 a.m. on January 14, 2010, in Kootenai County
Judge: Steve Verby
Additional Presiding Judges: Charles W. Hosack, John P. Luster, John T. Mitchell,
 Fred M. Gibler, Lansing Haynes, George Reinhardt, III, James R. Michaud, John H.
 Bradbury

All parties shall comply with the terms of any pretrial order issued herewith; provided however, if this matter was previously set for trial, and a pretrial order issued, then any deadlines therein shall be calculated from the date of the new trial setting.

If any party claims a conflict in scheduling and seeks a continuance of this trial, said party shall file such request forthwith. Parties are encouraged to avoid last minute attempts to obtain a continuance.

Any party aggrieved by this order shall notify the court in a timely manner.

DATED this 18th day of May, 2009.



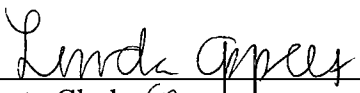
Steve Verby
District Judge

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was mailed, U.S. postage prepaid or by interoffice mail, this 18 day of May, 2009, to:

Rex A. Finney
Finney Finney & Finney, P.A.
120 East Lake Street, Suite 317
Sandpoint, ID 83864

John P. Whelan, P.C.
Attorney at Law
213 N. 4th Street
Coeur d'Alene, ID 83814



Deputy Clerk (Banner County)

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF KOOTENAI

PRETRIAL ORDER
(Attachment to Trial Notice)

IT IS HEREBY ORDERED as follows:

1. DISCOVERY All written discovery shall be initiated so that timely responses shall be completed thirty-five (35) days before trial. The last day for taking any discovery depositions shall be twenty-one (21) days before trial.

2. EXPERT WITNESSES Not later than ninety (90) days before trial, Plaintiffs shall disclose all experts to be called at trial. Not later than sixty (60) days before trial, Defendant(s) shall disclose all experts to be called at trial. Such disclosure shall consist of at least the information required to be disclosed pursuant to I.R.C.P. 26(b)(4)(A)(i). Notice of compliance shall be contemporaneously filed with the Court.

3. PRETRIAL MOTIONS Motions for summary judgment shall be timely filed so as to be heard not later than sixty (60) days before trial. Motions in limine concerning designated witnesses and exhibits shall be submitted in writing at least seven (7) days before trial. The last day for hearing all other pretrial motions including other motions in limine shall be twenty-one (21) days before trial.

4. MOTIONS FOR SUMMARY JUDGMENT There shall be served and filed with each motion for summary judgment a separate, concise statement, together with a reference to the record, of each of the material facts as to which the moving party contends there are no genuine issues of dispute.

PRETRIAL ORDER - 1.

The motion, affidavits and supporting brief shall be served at least twenty eight (28) days before the time fixed for the hearing. Any party opposing the motion shall, not later than fourteen (14) days before hearing on the motion for summary judgment and the statement of facts, serve and file a separate, concise statement, together with a reference to the record, setting forth all material facts as to which it is contended there exist genuine issues necessary to be litigated. In determining any motion for summary judgment, the Court may assume that the facts as claimed by the moving party are admitted to exist without controversy, except and to the extent that such facts are asserted to be actually in good faith controverted by a statement filed in opposition to the motion. If the party filing the motion for summary judgment fails to comply with the twenty eight (28) day time limit set forth in I.R.C.P. 56(c), the court, on its own, will vacate the summary judgment hearing.

5. DISCOVERY DISPUTES Unless otherwise ordered, the Court will not entertain any discovery motion, except those brought by a person appearing pro se and those brought pursuant to I.R.C.P. 26(c) by a person who is not a party, unless counsel for the moving party files with the Court, at the time of filing the motion, a statement showing that the lawyer making the motion has made a reasonable effort to reach agreement with opposing counsel on the matters set forth in the motion. The motion shall not refer the Court to other documents in the file. For example, if the sufficiency of an answer to an interrogatory is in issue, the motion shall contain, verbatim, both the interrogatory and the allegedly insufficient answer, followed by each party's contentions, separately stated.

6. EXHIBITS AND EXHIBIT LISTS Exhibit lists and copies of exhibits shall be prepared and exchanged between parties and filed with the Clerk at least fourteen (14) days before trial. The original exhibits should be filed with the Clerk at the time of trial. Each party shall prepare a list of exhibits it expects to offer. Two copies of the exhibit list are to be filed with the Clerk, and a copy is to be provided to opposing parties. Exhibits should be listed in the order that the party anticipates they

PRETRIAL ORDER - 2.

will be offered. Exhibit labels can be obtained from the court clerk. Each party shall affix labels to their exhibits before trial. After the labels are marked and attached to the original exhibit, copies should be made. Plaintiff's exhibits should be marked in numerical sequence. Defendant's exhibits should be marked in alphabetical sequence. The civil action number of the case and the date of the trial should also be placed on each of the exhibit labels. It is expected that each party will have a copy of their exhibits for use at trial.

7. LISTS OF WITNESSES Witness lists shall be prepared and exchanged between parties and filed with the Clerk at least fourteen (14) days before trial. Each party shall provide opposing parties with a list of the party's witnesses and shall provide the Court with two copies of each list of witnesses. Witnesses should be listed in the order they are anticipated to be called.

8. JURY INSTRUCTIONS Jury instructions shall be prepared and exchanged between the parties and filed with the Clerk at least seven (7) days before trial. All instructions shall be prepared in accordance with I.R.C.P. 51(a).

9. BRIEFS AND MEMORANDA In addition to any original brief or memorandum filed with the Clerk of the Court, a copy shall be provided to the Court. To the extent counsel rely on legal authorities not contained in the Idaho Reports, a copy of each case or authority cited shall be attached to the Court's copy of the brief or memorandum.

10. TRIAL BRIEFS Trial briefs shall be prepared and exchanged between the parties and filed with the Clerk at least seven (7) days before trial.

11. PROPOSED FINDINGS AND CONCLUSIONS If the trial is to the Court, each party shall, at least seven (7) days prior to trial, file with the opposing parties and the Court proposed Findings of Fact and Conclusions of Law supporting their position.

12. TRIAL SETTINGS Because more than one case is set to begin on the designated trial
PRETRIAL ORDER - 3.

date, upon completion of one trial another trial will begin. Due to this possibility, counsel, clients, and witnesses will need to be available during the entire week the trial is set.

13. MODIFICATION This Pretrial Order may be modified by stipulation of the parties upon entry of an order by the Court approving such stipulation. Any party may, upon motion for good cause shown, seek leave of Court modifying the terms of this order, upon such terms and conditions as the Court deems fit. Any party may request a pretrial conference pursuant to I.R.C.P. 16.

14. SANCTIONS FOR NONCOMPLIANCE Failure to timely comply in all respects with the provisions of this order shall subject noncomplying parties to sanctions pursuant to I.R.C.P. Rule 16(i), which may include:

- a) An order refusing to allow the disobedient party to support or oppose designated claims or defenses, or prohibiting such party from introducing designated matters in evidence;
- b) An order striking out pleadings or parts thereof, or staying further proceedings until the order is obeyed, or dismissing the action or proceeding or any part thereof, or rendering a judgment by default against the disobedient party;
- c) In lieu of any of the foregoing orders or in addition thereto, an order treating as contempt of court the failure to comply;
- d) In lieu of or in addition to any other sanction, the judge shall require the party or the attorney representing such party or both to pay the reasonable expenses incurred because of any noncompliance with this rule, including attorney's fees, unless the judge finds that the noncompliance was substantially justified or that other circumstances make an award of expenses unjust.

IT IS FURTHER ORDERED that any vacation or continuation of the trial date shall not
PRETRIAL ORDER - 4.

change or alter any of the discovery or disclosure dates established by the initial trial setting. Any party may, upon motion and for good cause shown, request that the discovery and disclosure dates be altered on vacation or continuance of the trial date.

BY ORDER OF THE COURT

<u>Civil Stock No. Subject</u>	<u>Source</u>
1. Introduction Instruction to Jury	IDJI2d 1.00
2. Jury Deliberation Procedures	IDJI2d 1.01
3. Claims of Parties	Specially Prepared
4. Statement of Claims Not Evidence	IDJI2d 1.05
5. Burden of Proof	IDJI2d 1.20
6. Direct & Circumstantial Evidence	IDJI2d 1.24.2
7. Jurors Not to Discuss	IDJI2d 1.03
8. Insurance Cautionary	IDJI2d 1.04
9. Deposition Evidence	IDJI2d 1.22

ISSUE INSTRUCTIONS

10. Damage Instruction: Doesn't Imply Injury	IDJI2d 9.00
11. Communication With the Court	IDJI2d 1.11
12. Quotient Verdict	IDJI2d 1.09
13. How to Use Special Verdict Form	IDJI2d 1.15.2
14. How to Deliberate	IDJI2d 1.13
15. Filling Out Verdict	IDJI2d 1.15.1

PRETRIAL ORDER - 5.

ORIGINAL

STATE OF IDAHO
COUNTY OF KOOTENAI } SS
FILED:

2009 OCT 19 AM 10:23

CLERK DISTRICT COURT
Jessie Cahoon
DEPUTY

REX A. FINNEY
FINNEY FINNEY & FINNEY, P.A.
Attorneys at Law
Old Power House Building
120 East Lake Street, Suite 317
Sandpoint, Idaho 83864
Phone: (208) 263-7712
Fax: (208) 263-8211
ISB No. 6313

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF KOOTENAI

KARLETTA GRACE BERRY, a widow,	)	Case No. CV-2007-2409
KARLETTA GRACE BERRY, Personal)	
Representative of the Estate)	
of Jerry Lee Roy Berry,)	
CAPTAIN'S WHEEL RESORT, INC.,)	
an Idaho Corporation,)	
	)	PLAINTIFFS' NOTICE OF EXPERT
Plaintiffs,	)	WITNESS DISCLOSURE
)	
v.)	
)	
MICHAEL B. MCFARLAND, MICHAEL)	
B. MCFARLAND, P.A., and KAREN)	
ZIMMERMAN,)	
)	
Defendants.)	
)	

COME NOW, the above named Plaintiffs, by and through
counsel, and hereby disclose and give notice of the expert
witnesses that the Plaintiffs will call at trial to testify, as
follows:

1. David Noonan and/or James H. Black with Appraisal Associates, 120 E. Lake Street, Suite 319, Sandpoint Idaho 83864.

A. A true and correct copy of the complete appraisal report is attached hereto as Exhibit 3 (150 pages).

B. A complete statement of all opinions to be expressed and the basis and reasons therefore: These witnesses will provide an opinion that the estimated fair market value of the real property owned by the Captain's Wheel Resort, Inc. located at or near 16908 East Pier Road in Bayview, Idaho as of July 4, 2006 is one million three hundred thousand dollars (\$1,300,000.00).

C. The data or other information considered by the witness in forming the opinions; All data sources are clearly discussed and identified in the Appraisal Report attached, sources include the Karletta Berry, employee at the Kootenai County Assessor's Office, Spokesperson from the Bonner County Assessors office, site visits, comparable real property sales.

D. any exhibits to be used as a summary of or support for the opinions; The Appraisal Report is attached.

E. any qualifications of the witness, including a list of all publications authored by the witness within the preceding ten years; A list of David Noonan's Qualifications is attached As Exhibit 1 hereto (3 pages). A list of James H. Black's qualifications is attached hereto as Exhibit 2 (2 pages), Neither witness has any publications authored.

F. the compensation to be paid for the testimony; the Rate for any Appearance such as a deposition, pretrial, testimony, etc is a minimum flat fee of \$200.00 for a scheduled appearance that does not take place; a minimum flat fee of \$300 if any of the above does take place plus a rate of \$90.00 per hour. Hourly Rate for professional services is at \$90.00 per hour.

G. A listing of any other cases in which the witness has testified as an expert at trial or by deposition within the preceding four years: David Noonan believes that in the last four years, he has given testimony by deposition in a highway 95 taking by the State of Idaho and he believes that is the only time in the last four years that he has testified.

2. Kootenai County Assessor, Mike McDowell, and or employees from the Kootenai County Assessor's office.

A. A complete statement of all opinions to be expressed and the basis and reasons therefore: This witness will testify that the total market assessed value of the Captain's Wheel Resort, Inc. property was in 2006, 2007, 2008 and 2009. The current valuation is \$1,280,721.00 for the waterfront parcel (B00000341575) and \$82,312.00 for the parking lot parcel (B00000341565).

B. The data or other information considered by the witness in forming the opinions: Site visits, comparable real property sales are a part of the data, information is available on the Kootenai county assessors basis for valuing property including a property tax video on the following site:
<http://www.co.kootenai.id.us/departments/assessor/>.

C. Any exhibits to be used as a summary of or support for the opinions; Printout of the Kootenai County Assessor's valuation report showing Assessment Information, are available on the Assessor's website, also the assessor's worksheet may be used as an exhibit.

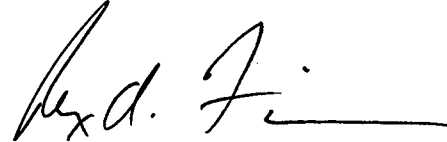
D. Any qualifications of the witness, including a list of all publications authored by the witness within the preceding ten years; Mike McDowell is the

Kootenai County Assessor and information is available on the website listed above.

E. The compensation to be paid for the testimony; It is anticipated that no fees will be paid to this witness.

F. A listing of any other cases in which the witness has testified as an expert at trial or by deposition within the preceding four years: This is unknown to Plaintiffs and Plaintiffs' attorney.

DATED this 16 day of October, 2009.



REX A. FINNEY
Attorney at Law

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was delivered as indicated, this 16 day of October, 2009, and was addressed as follows:

J.P. WHELAN P.C.
Attorney at law
213 N. 4th Street
Coeur d'Alene, Idaho 83814
(Via Hand Delivery)
(And by e-mail jpwhelanattorney@yahoo.com)

Judge Verby
chamber's copy
(Via Hand Delivery)

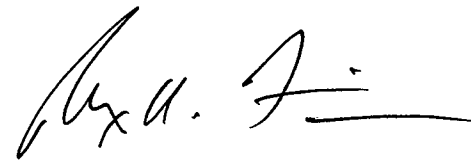


EXHIBIT 1
3 PAGES

EXPERT WITNESS DISCLOSURE

DAVID NOONAN IFA - QUALIFICATIONS
STATE OF IDAHO CERTIFIED GENERAL APPRAISER CGA #60
STATE OF WASHINGTON CERTIFIED GENERAL APPRAISER

OWNER: APPRAISAL ASSOCIATES/120 E. LAKE STREET, SUITE #319
SANDPOINT, IDAHO 83864
PHONE: (208) 263-6322 FAX: (208) 265-4484*

ORGANIZATIONS:

Designated Member National Association of Independent Fee Appraisers
Past State Director/National Association of Independent Fee Appraisers
President/ Sandpoint Chapter, N.A.I.F.A. 1985-96
Member of National Association of Realtors
Member Selkirk Association of Realtors
Member MLS Covering Bonner, Boundary and Kootenai Counties in Idaho and the Spokane system covering Spokane, Pend Oreille, Whitman, Stevens and Lincoln Counties in Washington State.

EDUCATION:

Graduated Chaminade College Prep High School/1965-1969
Graduated University of Northern Colorado with B.S. degree in
Business Finance and Economics/1969-1973
Completed Educational Requirements and Courses given by The National
Association of Independent Fee Appraisers
Completed and passed Educational Requirements given by the State
of Idaho for Real Estate Brokers Licensing/1981
Certified through 2001 in the Mandatory Program of Continuing Education
in the National Association of Independent Fee Appraisers
On more than One Occasion Appointed "Special Master" Under Provision 706 - ID
Acting as an Expert Witness "For the District Court" ; "Magistrate Court";
U.S. Federal Court, all as Expert Witness.

MOST RECENT APPRAISAL CLASSES:

"Technology for Today's Appraiser
Sandpoint, Idaho 2009
"The Dirty Dozen (Continuing End)
Sandpoint, Idaho 2009
"Mortgage Fraud: Protect Yourself!
Sandpoint, Idaho 2009
"National USPAP Update Equivalent"
Coeur ' Alene, ID/July, 2008
"Rates and Ratios: Making Sense of GIMs, OARs, and DCFs"
Las Vegas, NV/July 2007
"The Real Estate Economy: What's in Store for 2008?"
Las Vegas, NV/July 2007
"Fannie Mae Revisions and the Appraiser"
Spokane, WA/August, 2005
"Appraisal Trends"
Spokane, WA/August, 2005
"National USPAP" Update Equivalent"
Boise, ID/July, 2005
"Appraising Multi-Family Properties"
Boise, ID/July, 2005
"National USPAP Update Equivalent"
Boise, ID/July, 2005
"Rates & Ratios: Making Sense of GIMs, OARs & DCF"
Boise, ID/Sept. 2003
"Market Data Abstraction"
Boise, ID/Sept. 2003
"The Effects of Wetlands & Other Factors on Rural Land Value"

Las Vegas, NV/July 2000 (Valuation 2000)
 "The Fannie Mae REO Appraisal Workshop"
 Las Vegas, NV/July 2000 (Valuation 2000)
 "Conservation Easements Seminar"
 Las Vegas, NV/July 2000 (Valuation 2000)
 "Appraisal Technology Forum"
 Las Vegas, NV/July 2000 (Valuation 2000)
 "Uniform Standards of Professional Appraisal Practice"
 St. Louis, MO/June 1999 (NAIFA)
 "Thirty Specialized Appraisal Issues"
 Spokane, Washington/April 1998 (Appraisal Institute)
 "Income Capitalization Techniques"
 Boise, Idaho/April 1998 (McKissock Systems)
 "Review Appraising"
 Boise, Idaho/April 1998 (McKissock Systems)
 "Environmental Considerations"
 Boise, Idaho/April 1998 (McKissock Systems)
 "Rural Business Valuation"
 Jackpot, Nevada/May 1998 (Farm Managers & Rural Appraisers)
 "Market Data Analysis of Residential Real Estate"
 Helena, Montana/September 1991 (NAIFA/Challenge)
 "Report Writing of Residential Real Estate"
 Helena, Montana/September 1991 (NAIFA/Challenge)
 "Real Estate Construction & Development"
 Helena, Montana/September 1991 (NAIFA)
 "Techniques of Income Property Appraising"
 Helena, Montana/December 1990 (NAIFA)
 "Uniform Standards of Professional Appraisal Practice"
 Spokane, Washington/July 1990 (NAIFA)
 "Legal Aspects of Easements"
 Spokane, Washington/April 1990 (IR/WA)
 "Review of the New URAR"
 Spokane, Washington/December 1993 (NAIFA)
 "Uniform Standards of Professional Appraisal Practice"
 Spokane, Washington/May 1994 (NAIFA)
 "Market Data Analysis"
 Sandpoint, Idaho/May 1994 (NAIFA)

EXPERIENCE:

Owner, Appraisal Associates in Sandpoint, Idaho (1985-Current)
 Associate Appraiser, Appraisal Associates (1980-85)
 Associate Appraiser, Noonan Appraisers (1977-80)
 Inactive Sales Broker, State of Idaho
 Active Sales Broker, State of Missouri (1974-81)
 Associate Appraiser, Noonan Appraisers (1978-80)
 Numerous Court Appearances in Bonner, Boundary, Kootenai Counties
 in Idaho and in St. Louis County, Missouri

APPRAISED REAL PROPERTY IN THE FOLLOWING STATES:

Missouri, Illinois, Idaho, Montana, Oregon and Washington

VALUATION OF THE FOLLOWING TYPES OF REAL PROPERTY:

Apartment Buildings	Office and Professional Buildings
Condominiums	Lakefront
Manufacturing Facilities	Churches
Industrial Properties	Schools
Retail Sales Buildings	Single Family Dwellings

*Service Stations
Restaurants
Vacant Land
Shopping Center Sites
Warehouses
Sawmills
Timberlands and Stumpage
Golf Courses
Research and Development Centers
Motels
Marinas
Many Others.....*

*Farms
Ranches
Recreational Retreats
Subdivisions
Grain Elevators
Sand and Gravel Pits
Beer Distributorship
Bonner County Airport
Convenience Stores
Manufactured Home Parks
Theaters*

*ASSIGNMENTS COMPLETED FOR:
District of Idaho Department of Justice
State of Idaho
County of Bonner
City of Sandpoint, Idaho
Farmers Home Administration
Bank of America/Sandpoint, Coeur d'Alene
First Interstate Bank/Sandpoint, Bonners Ferry, Boise
First Security Bank/Sandpoint, Bonners Ferry, Hayden Lake
Pend Oreille Bank/Sandpoint, Idaho, Newport Washington
Panhandle State Bank/Sandpoint, Bonners Ferry, Priest River
Transamerica Finance Company
Bancshares Mortgage Company
Equitable Relocation Company
Metropolitan Mortgage Company
Lenders Services
Credit Union Mortgage Association
Sterling Savings & Loan Association*

*Better Homes & Gardens
Relocation Service
Stars Mortgage
Farmers and Merchants Bank
Moore Financial Service
Liberty Funding
and over 200 more.....*

EXHIBIT 2
2 PAGES

EXPERT WITNESS DISCLOSURE

James H. Black

120 E. Lake St., Suite 319, Sandpoint, ID 83864

Phone: (208) 263-6322 Fax: (208) 265-4484

Email Address: jblack@sandpoint.net

License Number RT-2371

Summary of Qualifications

Results oriented, hands on, highly motivated professional, with a successful term of tenure as a supervisor for a moderately sized construction company. Posses a knowledge of construction materials, practices and standards along with the ability to read and understand blueprints and discern various levels of quality in materials and craftsmanship. Always a leader and independent thinker who is well versed on the computer and internet with very acute attention to detail, organization and scheduling. Very high level of mathematical competence along with being dedicated to completing projects on time. Two years on the job experience as a real estate appraiser trainee with nearly 300 appraisals completed to date.

Professional Accomplishments

Spent the past two years working on all available appraisal assignments. Have completed work on a variety of property styles including residential, acreage, vacant land, commercial and estate work in narrative format, as well as condominium appraisals and high-end waterfront properties. Have also completed REO work, alternative energy dwellings and multifamily projects, relocation work and numerous private party assignments.

Previously supervised three to ten man crews for over a three year period in custom residential and commercial construction projects in the three northern counties of Idaho. Handled day to day jobsite operations as well as quality control. Spent time in the construction office bidding jobs, doing detailed material take-offs, and interfacing with sub-contractors to help ensure that jobs ran smoothly and finished on time. Trained many new recruits and focused on jobsite safety.

Spent time as a sales associate in sporting goods store in Pensacola, Fl, receiving numerous awards for customer service and work ethic, while contributing to the team mentality of the organization.

Operated side by side scanning electron microscope computer systems at Hyundai Semiconductor, demonstrating excellent computer skills along with speed and efficiency.

Work History

- Appraisal Trainee, Appraisal Associates, Sandpoint, ID 2008-current
- Appraisal Trainee, Ahern Appraisals, Sandpoint, ID 2007
- Construction Supervisor, Cutting Edge Construction, Sandpoint, ID 2004-2007
- Carpenter, Cutting Edge Construction, Sandpoint, ID 2002-2004
- Sales Associate, Academy Sports, Pensacola, FL 2002-2002
- Bartender/Waiter, Skopelos Restaurant, Pensacola, FL 2001-2002
- Technician, Hyundai Semiconductor, Eugene, OR 1999-2001
- Sales/Checker, Safeway Inc, Eugene, OR 1996-1999

Education

- Dave Shoemakers School of Real Estate Appraisal, Spokane WA, Nov 2007- Statistics, Modeling and Finance (15 hrs) and Residential Sales Comparison and Income Approach (30 hrs)
- Executrain of Idaho, Boise ID, Sept 2007- Appraisal Principles (30 hrs), Appraisal Procedures (30 hrs), USPAP (15 hrs)
- Lane Community College, Eugene, OR 1999-2001
- Elmira High School, Elmira, OR 1995-1998, Graduated Salutatorian with Honors 4.07 GPA excelling in Mathematics and English

Have Completed Assignments For

Bank of America	Towne & Country Mortgage
Countrywide	Loanstar Mortgage
US Bankcorp	US Marshalls Service
Wells Fargo	Willow Creek Lending
Washington Trust	CapitalOne Bank
Navy Federal Credit Union	Citi Bank
Potlatch No1 Federal Credit Union	Lighthouse Mortgage
Mountain West Bank	Your Equity Source
Syringa Bank	Affinity Mortgage
Northwest Mortgage	Golf Savings Bank

EXHIBIT 3
150 PAGES

EXPERT WITNESS DISCLOSURE

APPRAISAL
OF

THE CAPTAIN'S WHEEL RESORT
BAYVIEW, IDAHO
AS OF JULY 4, 2006

PREPARED EXCLUSIVELY FOR
MR. REX FINNEY, ATTORNEY AT LAW
FINNEY, FINNEY AND FINNEY, P.A.

PREPARED BY DAVID NOONAN
IDAHO CERTIFIED GENERAL APPRAISER #60

APPRAISAL ASSOCIATES

120 E. LAKE STREET, SUITE 319 • SANDPOINT IDAHO 83864 • (208) 263-6322 • FAX (208) 265-4484

APPRAISAL ASSOCIATES

120 E. LAKE STREET, SUITE 319 • SANDPOINT IDAHO 83864 • (208) 263-6322 • FAX (208) 265-4484

Mr. Rex Finney

October 9, 2009

Finney, Finney & Finney, P.A.
Old Power House Building
120 E. Lake St. Suite 317

RE: Market Value Estimate for the Captain's Wheel Resort property and buildings located on Pier Road in Bayview, Idaho. The property address is 16908 East Pier Road Bayview, ID 83803.

Dear Mr. Finney,

Per your request and authorization, the property and building(s) on which you requested an appraisal have been observed. The subject property and comparable properties have been observed for the purpose of comparison. The observations and subsequent investigations were conducted to assist in the appraisal of the property described in this report.

The appraisal report includes a description and analysis of the market data and comparable properties information, and my assumptions, analysis, and conclusions. Please refer to the following narrative for general information, photographs, maps and value conclusion.

The appraisal was prepared in compliance with the Standards and Code of Ethics suggested by the National Association of Independent Fee Appraisers and conforms to the Uniform Standards of Professional Appraisal Practice of the Appraisal Foundation (USPAP) and is subject to contingent and limiting conditions and assumptions set forth. It is considered to be a "Limited Summary Report".

This report has an Effective Date of July 4, 2006 per the request of the client. Information and other data from the time period near the Effective Date have been included in this report so as

to give the reader an idea of the market conditions as of that time period. I completed a report on a marina in Bonner County during that time period which has allowed me to include ample amounts of data which is no longer available. This includes data on slip rentals and other market information. Data from that report and from my files has been utilized in the preparation of this report.

After consideration of the pertinent facts, I have concluded that the Estimated Market Value of the Subject Property as of July 4, 2006 is:

ONE MILLION THREE HUNDRED THOUSAND DOLLARS
(\$1,300,000)

Respectfully submitted,



David Noonan, IFA/CGA #60

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SUMMARY - LIMITING CONDITIONS / ASSUMPTIONS:

- *The appraiser has inspected as far as possible by observation, the land and the improvements; however, it was not possible to personally observe conditions beneath the soil or possible hidden structural defects or toxic materials which would render the property more or less valuable. The appraiser does not warrant against problems arising from soil conditions, including toxic wastes.*
- *The legal description as given is assumed correct. No survey or search of title to the property has been made for this report and no responsibility is assumed for such matters including encumbrances, ownership, etc. The property is appraised in fee simple estate as though free and clear of all encumbrances except as specifically noted within this report.*
- *The data, statistics, and opinions furnished by others and contained herein have been reasonably checked and are considered reliable and correct. The appraiser assumes no responsibility for their accuracy. If errors or omissions are subsequently found which might directly affect the information and/or conclusions offered in this report, the appraiser reserves the right to modify or correct such errors, omissions and conclusions.*
- *Possession of this report or any copy thereof does not carry with it the right of publication nor may it be used for other than its intended use. Regulations require the appraiser to control the use and distribution of each appraisal report; only the client may distribute copies of this appraisal report in its entirety to such third parties as they may select. However, selective portions of this appraisal report shall not be given to third parties without the prior written consent of the appraiser.*
- *Neither all nor any part of the contents of this report shall be conveyed to the public through advertising, public relations, news, sales, or other media without first obtaining the written consent and approval of the appraiser. In particular, no representations concerning the valuations, the identity of the appraiser or firm with which he is affiliated shall be conveyed.*
- *The liability of Appraisal Associates and David Noonan IFA/CGA60 is limited to the client only and to the fee actually received by the appraiser. Further, there is no accountability, obligation or liability to any third party. If this report is placed in the hands of anyone other than the client, the client shall make such party aware of all limiting conditions and assumptions of the assignment and related discussions.*

- *All maps, plans, and diagrams contained in this report are for illustrative purposes only and are not to be construed as accurate.*
- *Where the value of land and component or proposed site improvements are shown separately, the value of each is segregated only as an aid to better estimate the value which it lends to the whole parcel, rather than the value of that particular item as if it were by itself.*
- *The appraisal is based on the premise that the subject property is in full compliance with all applicable federal, state and local environmental regulations and laws unless otherwise stated in this report. Improvements proposed, if any, as well as repairs required are considered for purposes of this appraisal to be completed in good and workmanlike manner according to information submitted or considered by the appraiser.*
- *It is assumed that the subject property will be under prudent and competent ownership and management, neither inefficient nor super-efficient.*
- *The appraiser by reason of this report is not required to give testimony or attendance in a court of law or any other government hearing with reference to the property in question, unless prior arrangements have been made.*
- *In this appraisal assignment, the existence of potentially hazardous material has not been considered. Examples include the presence of urea-formaldehyde foam insulation, toxic waste and natural waste such as radon gas, which may or may not be present on the property. The appraiser is not qualified to detect such substances. I urge the client or any other interested party to obtain an expert in the field if desired.*
- **I assume for the purpose of this report that the ownership of the subject property includes all riparian rights.**
- **The appraiser was not able to inspect or observe all areas of the subject property. It is assumed that the condition of areas not inspected such as the kitchen, foundation and crawlspace areas are in a condition which is similar to the balance of the improvements.**

- **The primary source of information concerning the condition of the building improvements as well as docks and boat slips as of July 4, 2006 was Ms. Karletta Berry. It is assumed that her descriptions are true and accurate.**

- **The subject property was not fully inspected by the appraisers, nor were measurements taken of any of the improvements. This was requested by my client due to the ongoing dispute between Ms. Karletta Berry and Mr. Michael McFarland and Ms. Karen Zimmerman. My client felt it best that we not identify ourselves while on site. Information gained on property fixtures and condition of areas not seen by the appraisers was either conveyed by Ms. Karletta Berry or by the Kootenai County Assessor's Office.**

- **Mr. Jim Brady of the Idaho Department of Lands provided all information regarding land areas leased to the subject as well as owned by the subject which are below the high water mark on Lake Pend Oreille. He was not able to offer specific measurements of areas located under the water owned by the Captain's Wheel or leased by the Captain's Wheel. He indicated that the majority of the land under the moorage area is owned by the Captain's Wheel and that only a very small portion under the "finger" which extends out perpendicular to the shore line was leased from the State. His recommendation was for the State to discontinue the lease as, according to him, there was very little of the State's land that was actually leased to the Captain's Wheel.**

DEFINITIONS:

EXTRAORDINARY ASSUMPTION: an assumption, directly related to a specific assignment, which, if found to be false, could alter the appraiser's opinions or conclusions. Comment: Extraordinary assumptions presume as fact otherwise uncertain information about physical, legal, or economic characteristics of the subject property; or about conditions external to the property, such as market conditions or trends; or about the integrity of data used in an analysis.

HYPOTHETICAL CONDITION: that which is contrary to what exists but is supposed for the purpose of analysis. Comment: Hypothetical conditions assume conditions contrary to known facts about physical, legal, or economic characteristics of the subject property; or about conditions external to the property, such as market conditions or trends; or about the integrity of data used in an analysis.

SUMMARY OF SALIENT FACTS:

- Vested Owner: Captains Wheel Resort, INC.
- Location: 16908 East Pier Road Bayview, ID 83803
- Parcel #: B00000341575 & B00000341565
- Total Land Area: 0.923 Acre
- Improvements: Frame Constructed Buildings; Boat Slips & associated site improvements described in this report.
- Date of Last Observation: October 8, 2009
- Date of Valuation: July 4, 2006
- Date of Report: October 9, 2009
- Estimated Value "As Is": \$1,300,000

CERTIFICATION:

"I certify that, to the best of my knowledge and belief:

- 1) The statements of fact contained in this report are true and correct;
- 2) The reported analyses, opinion and conclusions are limited only by the reported assumptions and limiting conditions, and are my personal, impartial and unbiased professional analyses, opinions, and conclusions;
- 3) I have no present or prospective interest in the property that is the subject of this report and we have no personal interest with respect to the parties involved;
- 4) I have no bias with respect to the property that is the subject of this report or to the parties involved with this assignment;
- 5) My engagement in this assignment was not contingent upon developing or reporting predetermined results;
- 6) My compensation for completing this assignment is not contingent upon the development or reporting of a predetermined value or direction in value that favors the cause of the client, the amount of the value opinion, the attainment of a stipulated result, or the occurrence of a subsequent event directly related to the intended use of this appraisal;
- 7) My analyses, opinions or conclusions were developed, and this report has been prepared, in conformity with the Uniform Standards of Professional Appraisal Practice;
- 8) David Noonan IFA/CGA#60, has made a personal observation of the property that is the subject of this report and prepared this appraisal report;
- 9) James Black, RT-2371 provided significant real property appraisal assistance to David Noonan, IFA/CGA#60, and the signer of this certification."



David Noonan, IFA/CGA #60

GENERAL INFORMATION/DATA/ASSUMPTIONS

SCOPE OF APPRAISAL/APPRAISAL PROBLEM:

The appraisal of real estate interests requires the appraiser to gain, as far as practical, a familiarity and understanding of the subject property and the surrounding area. The subject of this assignment has been identified and observed, and analyzed in context with the region and neighborhood in which it is located. Market data pertinent to the appraisal problem has been obtained and analyzed for indications of value for the subject. Finally, an analysis of the most comparable properties has been completed and described in detail to arrive at a conclusion of Market Value of the subject property as legally described in the report.

The subject property is a restaurant/bar facility along with a small marina which rents docks/slips for watercraft. The restaurant/bar is the main source of revenue on the property, with the slip rental providing for added income, as well as providing boaters on the lake with access to the restaurant.

I have not been provided with complete profit and loss statements for the business, but did have access to tax returns from 2004 – 2006. This provided a limited look at the business and accounting for the years leading up to the Effective Date of the report. This type of a lack of information is typical of these types of owner ran, “mom and pop” type ventures. For that reason the revenue and expense numbers are based on my research and data gathered in the investigation portion of the appraisal process and data gained from similar projects that I have worked on in the last 25 years.

INTENT OF APPRAISAL:

It is intended that this appraisal conform to the Standards of Professional Appraisal Practice of the Appraisal Foundation (USPAP), and the Code of Ethics and Standards of Professional Practice of the National Association of Independent Fee Appraisers.

FUNCTION OF APPRAISAL:

The function of this appraisal is for the exclusive use of Rex Finney and his assignees for use in court proceedings.

DEFINITION OF MARKET VALUE:

The most probable price which a property should bring in a competitive and open market under all conditions requisite to a fair sale, the buyer and seller, each acting prudently, knowledgeably and assuming the price is not affected by undue stimulus. Implicit in this definition are the consummation of a sale as of a specified date and the passing of title from seller to buyer under conditions whereby:

- 1) buyer and seller are typically motivated;
- 2) both parties are well informed or well advised, and each acting in what he considers his own best interest;
- 3) a reasonable time is allowed for exposure in the open market;
- 4) payment is made in terms of cash in U.S. dollars or in terms of financial arrangements comparable thereto; and
- 5) the price represents the normal consideration for the property sold unaffected by special or creative financing or sales concessions granted by anyone associated with the sale.

PERSONAL PROPERTY:

Personal property is identified as portable and tangible objects that are considered by the general public as being personal, e.g., furnishings, machinery and equipment, etc., as defined by USPAP. No personal property has been included or valued in this report. All docks, permanently installed winches, slips and fixed property that are part of the marina operation are considered real property and have been included in the valuation within this report. Permanently installed kitchen equipment is considered real property.

The subject property has not been fully inspected by the appraisers, nor were measurements taken of any of the improvements.

PROHIBITED INFLUENCE:

This appraisal assignment was not based on a requested minimum valuation, a specific valuation, approval of a loan, or a value within a given range. No current or future employment prospects were dependent upon this appraisal producing a specific value.

COMPARABLE SALES USED:

Sales used in the comparison analysis are confirmed closed transactions, and no deductions, discounts, or concessions affecting value were noted unless otherwise indicated. The State of Idaho is a non-disclosure state. This means that property owners (buyers and sellers) are not required to disclose the sale price or terms of any sales transaction to any State or County authority. Physical data on the sale properties and improvements such as size of site, frontage, etc., and transaction data regarding sale prices, terms, etc. is usually gained from local real estate brokers (MLS), county assessor's office and local title companies, etc.

EASEMENTS, RESTRICTIONS AND RESERVATIONS, ETC:

The easements, restrictions, etc., observed during the physical observation and/or pointed out during the physical observation of the subject property will be taken into consideration in this report. No title policy has been provided to this appraiser and no easements, etc. were pointed out or observed during my observation of the subject property other than the roadway easements for both Pier Road and for Limekiln Road. I was unable to determine an exact width on either of these easements due to the fact that I was not provided with a title report. It is assumed for the purpose of this report that none of the improvements are encroaching on any of the previously mentioned easements.

HAZARDOUS MATERIALS:

Unless otherwise stated in this report, the existence of hazardous material, which may or may not be present on or in the subject property, was not observed by the appraiser. The appraiser has no knowledge of the existence of such materials on or in the subject property. The appraiser, however, is not qualified to detect such substances. The presence of substances such as asbestos, urea-formaldehyde foam insulation, radon or other potentially hazardous materials or substances may affect the value of the property. The value estimated is predicated on the assumption that there is no such material on or in the property that would cause a loss in value.

In this appraisal assignment, the existence of potentially hazardous material has not been considered. Examples include the presence of urea-formaldehyde foam insulation, toxic waste and natural waste such as radon gas, which may or may not be present on the property. The appraiser is not qualified to detect such substances. I urge the client or any other interested party to obtain an expert in the field if desired

CONFIDENTIALITY:

In accordance with the USPAP, your appraiser agrees that he shall reveal value and analysis conclusions and opinions to no one other than the client, except with the permission of the client or by due process of law. The fee for this report does not include communication regarding the report with any party except the client.

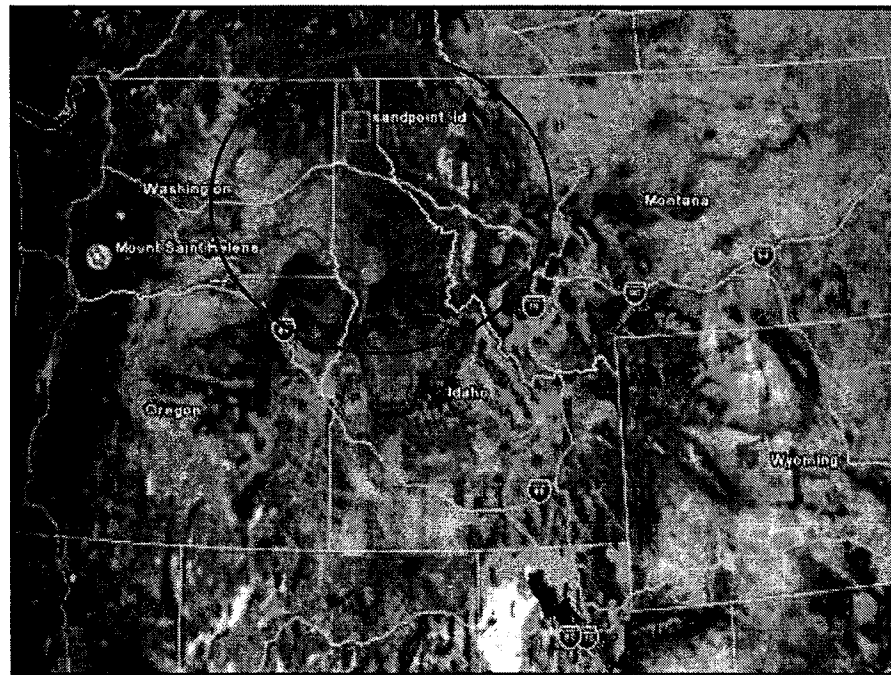
THREE APPROACHES TO VALUE:

When applicable the Cost, Market Data, and Income Approaches to Value are employed. In the case of this appraisal, all three Approaches are presented with the Cost and Income being applied.

COMPETENCY:

By acceptance of this assignment, the appraiser who signed this report certifies that he possesses sufficient educational and technical skills required to complete this appraisal in a professional manner.

REGIONAL MAPS



REGIONAL ANALYSIS:

The general area of the subject property lies near the border of Bonner County and Kootenai County, which is located in the Northern Panhandle of Idaho. The Panhandle consists of five counties bounded on the north by British Columbia, Canada; on the east by Montana; on the west by Washington State; and on the south by the remainder of Idaho.

The topography of the area is generally rolling to mountainous and varies in altitude from 2,000 feet to peaks in excess of 6,000 feet. The majority of the area is forested except for an area of about 75 square miles immediately northwest of Coeur d'Alene, which is known as the Rathdrum Prairie, a cleared, and nearly level agricultural area utilized for seed crops, beans and grain production.

Within the Panhandle are three of the largest natural fishing lakes in the nation, Priest Lake, Lake Pend Oreille, and Lake Coeur d'Alene. In addition, there are numerous smaller recreational lakes including Hayden Lake, Spirit Lake, Twin Lakes, Lake Cocolalla, and hundreds of miles of trout streams.

Year-round recreational activities include boating, camping, fishing, hunting, snow skiing and snowmobiling. The facilities of the Kaniksu, Coeur d'Alene and St. Joe National Forests are readily available to residents and vacationers alike. There are four regional downhill ski areas including Schweitzer Mountain Resort, Lookout Pass, Mount Spokane, and Silver Mountain, a recently expanded resort that has the world's longest gondola.

The area is served by Interstate Highway 90 for east-west travel and U.S. Highway 95 for north-south travel. All highways are paved and well maintained in all seasons. Railroad transportation is provided by BNSF Railroad. The nearest major airline service is at Spokane, Washington. Smaller companies offer chartered flights from private and municipal airports in the area.

The Panhandle area of North Idaho has long been recognized for its recreational opportunities and natural scenic beauty. The five counties comprising this area are sparsely populated, with most of the population found around the communities of Coeur d'Alene and Sandpoint. There is a definite trend, however, of increasing population and job opportunities. The result has

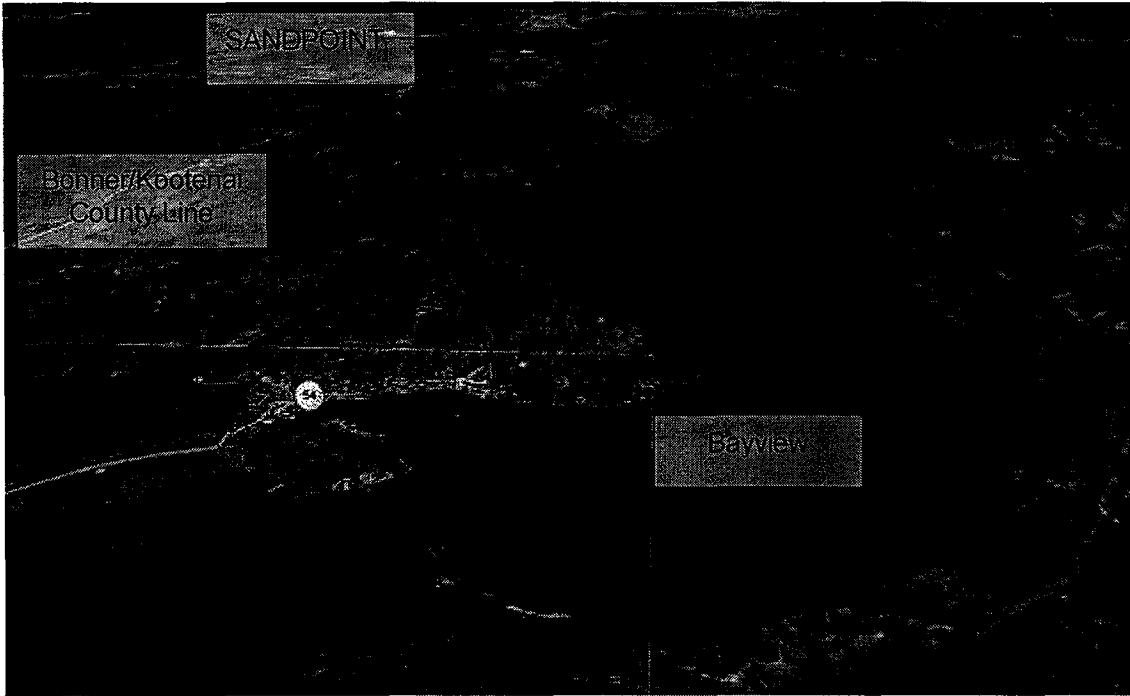
been increasing real estate values and more division of large acreage holdings into smaller acreage home sites. Rural land that sold for \$500 to \$1,500 per acre fifteen years ago is now bringing \$5,000 to \$10,000 per acre in twenty to 100 acre tracts. The influx of population and upward pressure on real estate values have caused a transition in use from former timber production or agricultural uses to small acreage mini-farms, gentlemen's ranches, and residential home sites. This trend is expected to continue into the foreseeable future.

Amenities such as fire protection, police, schools, city streets, utilities, etc. are all more than adequate. Employment stability is good for this expanding community of Northern Idaho.

AREA MAP



AREA MAP



GENERAL NEIGHBORHOOD DESCRIPTION:

The subject property is located in a unique area at the southern end of Lake Pend Oreille whose southern tip reaches into Kootenai County while the greater majority of the lake lies north into Bonner County. The lake is the defining natural feature in this report, yet the subject location, on the border of both counties, with similar access to both county seats and both commercial hubs, requires somewhat of a general discussion of both counties and both market areas, as they both influence the subject's immediate neighborhood. Data points about both counties, their economies, and general real estate market trends into and through 2006 will follow. Some news quotes and other items which were significant at or around the time of the Effective Date of the report may be included so as to provide the reader of a better understanding of the market conditions/attitudes/etc. around the Effective Date of this report.

Bonner County

Bonner County is characterized by mountains rising to 7,000 ft. with several glacial valleys running mostly north and south through the mountain ranges. There are two large lakes, Priest Lake, and Lake Pend Oreille with several other smaller mountain lakes. Schweitzer ski area is located just to the northwest of Sandpoint. Other land uses include: agriculture, timber reproduction, single family residential and vacant land.

Sandpoint (pop. 7,167) is the county seat of Bonner County, Idaho (pop. 37,579). Sandpoint lies at the northwest end of Lake Pend Oreille in a mostly level glacial valley with mountains rising to the west and northwest a short distance from town. Amenities such as fire protection, police, schools, city streets, utilities, etc., are average. Sandpoint is the county seat and main employment center in the area. Most of the employment in the area is state and federal government and small service related businesses for the recreation, logging and transportation systems in the area.

The county employment base is diverse and the majority of jobs are generated from many small and medium sized employers with recreational and tourism type employment being one of the fastest growing job classifications. Most of the employment in the area is local, state and federal government, education, tourism, and small service related businesses for the recreation, logging and transportation systems in the area. The top five major employers include Coldwater Creek, Lake Pend Oreille School District, Litehouse, Life Care Center, and

Encoder Products. Tourism, followed by manufacturing and construction provides the largest employment by industry.

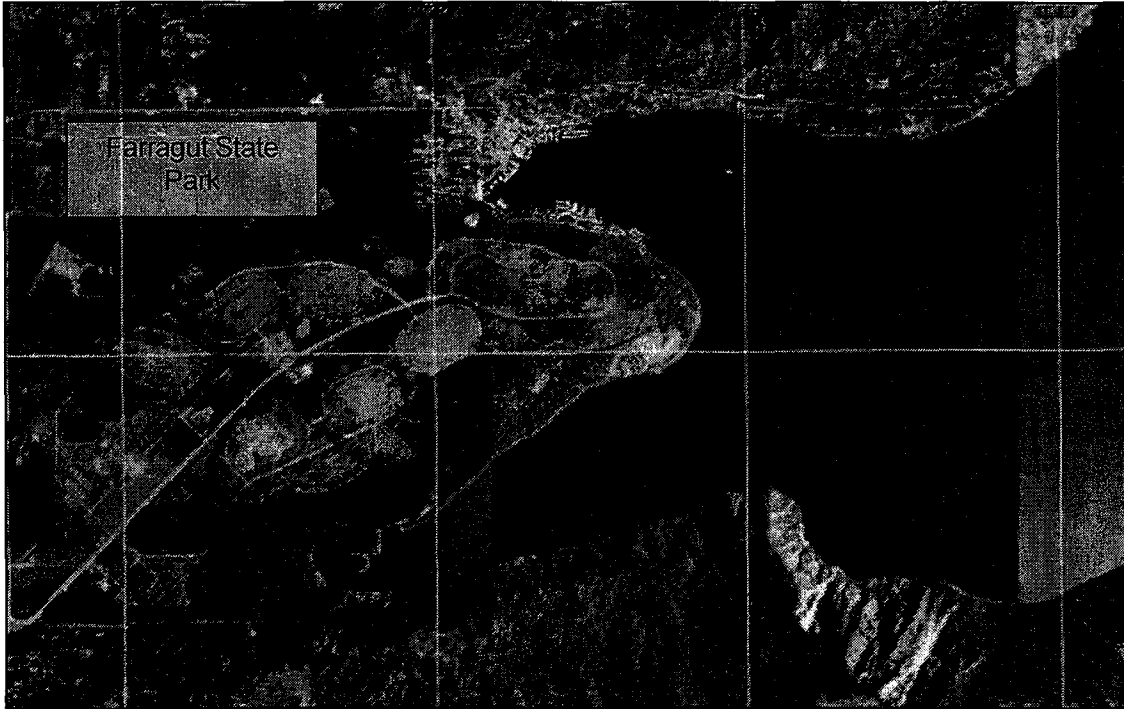
Median family income in the county is \$32,800 having risen by 52% in the last decade, as compared with increases for the State of Idaho at 47%, and 42% nationwide.

Kootenai County

The general neighborhood is the suburban area of central Kootenai County (pop. 134,442) including the cities of Coeur d'Alene (pop. 41,300), Post Falls (pop. 24,500), Hayden (pop. 12,300), and Rathdrum (pop. 6,300). The city of Coeur d'Alene lies on the shores of Lake Coeur d'Alene, and is the county seat, as well as the primary employment and service center for North Idaho.

Kootenai County is surrounded by scenic mountains and more than twenty pristine lakes, creating an outdoor enthusiast's dream. Recreational activities include hunting, boating, fishing, and snow skiing. The county has experienced more than a 55% increase in population in the last decade, being the third largest demographic center in the State of Idaho, which is the fifth fastest growing state in the nation. Land uses include: agriculture in the Rathdrum Prairie; timber reproduction in the foothills and mountains to the east; single family residential in suburban and rural settings.

IMMEDIATE SUBJECT NEIGHBORHOOD



The sub-neighborhood is the Bayview area, located approximately 20 miles north of Coeur d'Alene, Idaho and 30 miles south of Sandpoint, Idaho. Bayview is located at the very southern tip of Lake Pend Oreille in the northeast corner of Kootenai County. This is the only area of Lake Pend Oreille, and Bayview is the only town on Lake Pend Oreille which lies in Kootenai County. The balance of the Lake lies north into Bonner County. Lake Pend Oreille and is the largest lake in Idaho and it offers over 200 miles of fresh water shoreline stretching over 42 miles from Bayview to Sandpoint.

Farragut state park, located at the foot of the Coeur d'Alene Mountains in the Bitterroot Range, is just 4 miles to the west of Bayview. At 4,000 acres, it is one of Idaho's largest state parks and borders Lake Pend Oreille. The park features a small beach, a trail network connected to Bayview, and 2 disc golf courses. It is also an excellent wildlife viewing area and is home to mountain goats, whitetail deer, badgers, black bears, coyotes, bobcats and an occasional elk.

Though the immediate neighborhood is located at the southern end of the lake, the market area consists of all property located on the lake with emphasis on those properties which are slightly more rural in nature. Much of the west side of the lake and the entire east side of the lake are fairly rural in nature. Travel times to Sandpoint can range anywhere from 15 minutes to 30 minutes or more. The eastside of the lake is the most undeveloped. This is mostly due to terrain, with the eastside being dominated by the Green Monarch Mountains. This chain has extraordinarily steep faces rising directly out of the water for hundreds, sometimes thousands of feet. A couple of small, generally summertime towns exist on the eastside including Lakeview, Cedar Creek, Whiskey Rock and Kilroy Bay. The closest Marina from Bayview is located in Garfield Bay approximately 15 miles to the North.

Bayview has a number of marinas, a couple of small restaurants and convenience shopping. The water is very deep near Bayview which allows for year round boat moorage at many of the facilities in Bayview. Only a couple of the marinas on the lake are able to offer year round moorage. The marinas in Hope as well as the marina in Garfield Bay offer these services generally, as they have fairly deep water as well. The US Navy has a base in Bayview and conducts underwater submarine and sonar testing as the lake approaches 1200 feet in depth just out of Bayview.

Bayview is generally very active in the summer months, with activity, especially tourist and water related activity, slowing drastically in the winter months. Homes are a mix of owner occupied and second/vacation homes. Dwellings in the area demonstrate an average degree of upkeep and maintenance. There is school bus service that runs to the area, but no public transportation, which is common in north Idaho. Schools are located in Athol approximately 10 miles west of Bayview.

ECONOMY¹:

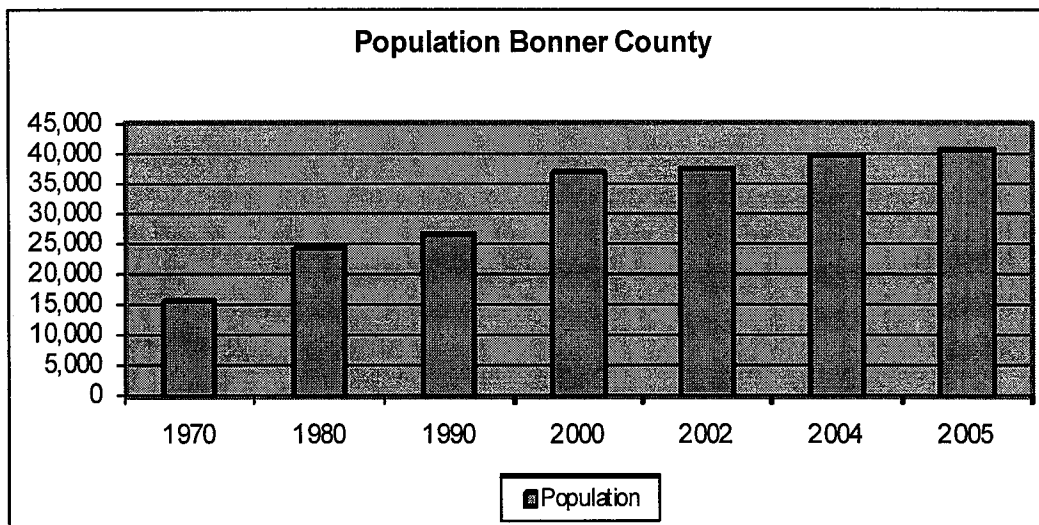
While the timber industry has long been the major economic base of the county, the decline in that industry has resulted in a concerted push by local officials and business people toward broadening the economic base by encouraging the development of clean, light industry as evidenced by a number of new enterprises in Sandpoint over the past several years and an increased emphasis on tourism as a major source of income for the area.

Organizations in the area have committed themselves to improving and diversifying the local economy and creating more jobs. Goals set have been broken down into five categories:

- 1) infrastructure development;
- 2) new business development and recruitment;
- 3) business retention and expansion;
- 4) education enhancement;
- 5) downtown development and re-development.

These goals have continued to be paramount by local organizations. The following are some of indicators for Sandpoint and Bonner County:

**One of the Fastest Growing Counties in Idaho / from 1980 to 2005
the population increased at a rate of 2.8% annually.**



¹ Information and news articles from the time period around the Effective Date of this report have been included to provide the reader with a general idea as to the economic conditions at that time. At times this information may be presented in the present tense, however it is referring to the time period in which it was written and is not a reference to the time period in which this report was put together.

BONNER COUNTY POPULATION FORECAST									
	1970	1980	1990	2000	2005	2010	2015	2020	2025
Total Population	15,568	24,114	26,622	36,581	39,574	42,514	45,491	48,408	51,073
Total Households	5,209	8,814	10,268	14,064	15,474	17,002	18,626	20,077	21,203
Persons per Household	3.01	2.73	2.58	2.59	2.54	2.49	2.43	2.4	2.4

Recent research reveals that many small towns are evolving due to three fundamental factors of change:

- An increasing accessibility to the national metropolitan economy due to advances in communication and transportation. Distance is no longer the powerful growth constraint it once was. People are increasingly able to settle in places such as the Sandpoint area, yet not be isolated from large metropolitan urban centers as once was the case.
- The decentralization of manufacturing that started occurred in the 1980's.
- Changes in the American lifestyle which include the trend toward early retirement, the expansion of retirees' roles as consumers and small businesspersons, and an increased orientation of all ages toward leisure activities and recreation.

These growth inducing activities will increasingly be centered in amenity-rich areas such as Bonner County while the economic future of the County rests heavily on growth in trade and service industries—particularly those business activities oriented toward capturing a large share of the tourism industry and catering to outdoor recreationalists, retirees and the post WW II “Baby Boomers” who are entering their fifties poised to enter their sixties. Recreation and solitude are key demands of these respective groups, and the Sandpoint environment fits both.

The older "Baby Boomers" are having an impact on Bonner County and make up a growing segment of the population in Bonner County, as supported by the following: In a recent area meeting, Pearl Buchard, director of Aging and Adult Services, said that the population of seniors in North Idaho is increasing at a 6.7 annual percent rate. She also said that Idaho is the fifth fastest growing state in the nation in terms of growth in population of people older than 60.

Employment Conditions: (Early 2006)

Office manager (State Department of Unemployment - Sandpoint) Bridgette Bradshaw-Fleer hasn't seen these current conditions in the nearly two decades during which she has been with the Department of Labor².

"We are having a very hard time filling jobs," said Bradshaw-Fleer. "We have seen a huge increase in our job listings that has gone above 300 in the last year. Employers in Bonner County want to expand and are asking "where are all the job applicants?"(sic)

"This is by far the best job market I've seen here in 17 years. It shows that employment in Bonner County is more year-round than just something seasonal."

Once posting some of the highest unemployment figures in Idaho, Bonner County has become something of a superstar in the past 12 months. Since 2003, the number of jobs listed by area employers with the Sandpoint office more than doubled, growing 119 percent while the number of job applicants fell 43 percent.

Not only were nearly 1,000 more residents employed here than last year; the county's total employment grew the same rate as the state of Idaho's and more than twice as fast as the nation's 2 percent increase.

Her computer is loaded with 13 different listings for carpentry positions from entry-level to experienced journeymen ranging from \$8 to \$16 per hour, a dozen manufacturing jobs paying up to \$10 per hour plus a large block of medical-related jobs from nursing to home health-care.

² Sandpoint Daily Bee

"Starting wages have dramatically improved, and we're also seeing more professional and entry-level positions in accounting and management," she said.

But it's construction-related jobs that Bradshaw-Fleer has noticed the largest demand for in the last year.

"It's no secret that the housing market has helped fuel the construction boom," she said. "Employers can't keep up with it and are calling us for qualified workers. Our job listings haven't declined from last year.

We're also seeing employers attending more than one job fair in the region to get more applicants. That's very unusual for North Idaho. There's more competition now, which there wasn't years ago, and job seekers now can be a little pickier about who they work for."

That's a luxury that North Idaho job applicants never really had before.

Thanks to its continuing surge in its growing labor market, Bonner County's unemployment rate last year fell to the lowest level since 1989. By the summer of 2004, its jobless rate was as low as it has been since unemployment rates were first calculated for the county in 1970.

In the last two years Bonner County has added more than 1,600 jobs, growing 12.5 percent. Records show that there have never been two successive years when the county has added such a high percentage of jobs.

The county's robust employment picture shows no sign of slowing down. For the last several months the unemployment rate has logged in at historical lower numbers.

BONNER COUNTY ECONOMY

Bonner County, especially the greater Sandpoint area, has enjoyed considerable success in growing and diversifying its economy. Over the past 20 years, the local economic base has shifted from an over-reliance on the timber industry to a vital mixture of tourism, manufacturing, retail, and services. During that period, the number of payroll jobs in Bonner County grew 83% to 13,300.

AN ATTRACTIVE PLACE TO LIVE

Bonner County's beauty, recreational opportunities, and quality of life have attracted thousands of new residents since the mid-1980s. The resulting population growth has influenced the Bonner County's economy in many ways. Population growth spurred growth in the construction industry, retail stores, health care providers, public schools, service organizations, and government agencies. It also increased competition for jobs, increasing unemployment and keeping wages low. Between 1990 and 2000, the county's population grew 38% from 26,622 to 36,835. In the next three years, it grew to 39,162. Since 2003, population growth has accelerated, and very rapid population growth is likely over the next few years.

A GROWING LABOR FORCE

The "labor force" comprises civilian residents 16 years and over, who are not living in institutions such as prisons, nursing homes, and mental hospitals that are either:

- 1) employed or
- 2) unemployed and actively seeking employment.

Approximately 18,500 people participate in Bonner County's labor force.

From 1994 to 2004 Bonner County's labor force grew 28%, while the U.S. labor force grew 12%. One reason why Bonner County's labor force grew faster than the nation's is that Bonner County had proportionately more youth entering the labor force. Bonner County is fortunate, because its population between 15 and 34 years of age grew 26% in the 1990s, while the U.S. population between 15 and 34 years of age declined 1%. That U.S. decline in the under-35 population is one reason why the U.S. labor market became so tight before the U.S. economic slowdown began in 2001. Bonner County's employers benefit from the rapid growth of the working-age population.

Forest activities, agriculture, and summer tourism play major roles in Bonner County, so employment has traditionally peaked in late summer and falls throughout the winter. Employment falls to its lowest level in spring when muddy roads hinder loggers and winter tourism draws to an end. In 2004, for example, the county's unemployment rate peaked at 8.6% in March and fell to 4.8% in August.

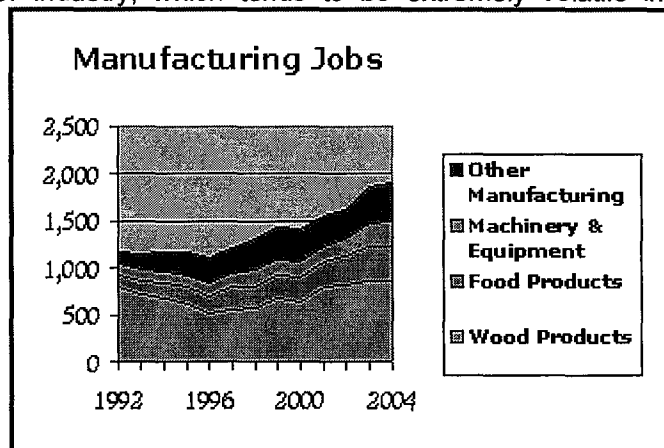
Although Bonner County created hundreds of jobs, its unemployment rate continually hovered above 8% from 1990 to 2003. The highly seasonal employment pattern and the loss of high-paying lumber jobs caused some of the unemployment. Another factor boosting unemployment is the tendency of population growth to outstrip employment growth. Many new residents possess good job skills and are often willing to accept jobs for which they are overqualified in order to remain in Bonner County.

A SUCCESSFUL MANUFACTURING BASE

For more than a century, Bonner County's economy depended almost entirely on logging and lumber mills. The U.S. Forest Service also played an important role in the economy—both as a source of logs and as an employer. Between their peak in 1992 and 2004, Bonner County lost 190 of the 1,380 jobs in logging, wood products manufacturing, and the U.S. Forest Services.

While forest products employment declined slightly, other manufacturing sectors have expanded to create a greater variety of jobs. This has helped Bonner County overcome its long-term dependence on the lumber industry, which tends to be extremely volatile in economic cycles, as well as providing a greater range of job opportunities for residents.

In the 1980s, electronics and food processing jobs entered the economic mix. In 1984, non-wood-products manufacturing operations employed only 251 people. By 1994, they employed 526 people. Since 2000, producers of plastic products and equipment



have grown at a strong rate. By 2004, non-wood-products manufacturing operations employed an estimated 1,140 people.

The county's largest manufacturers that do not produce lumber or other wood products include: Litehouse, which employs approximately 350 people making salad dressing and sauces; Unicep Packaging, which employs more than 100 people making one-dose plastic applicators; Encoder Products, which employs more than 100 people making electronics products; Cygnus, which employs more than 70 people fabricating customized metal products; Thorne Research Products, which employs more than 60 people making nutritional supplements; and Diedrich Roasters, which employs more than 50 people making coffee-roasting equipment.

The growth of these larger manufacturing concerns and the relocation of more than a dozen manufacturers to the county since 2000 have led to astonishing growth in the manufacturing sector. While the U.S. economy lost nearly 3 million manufacturing jobs, experiencing a decline of 17% in manufacturing jobs between 2001 and 2004, Bonner County gained 500 manufacturing jobs, experiencing growth of 36% in manufacturing jobs.

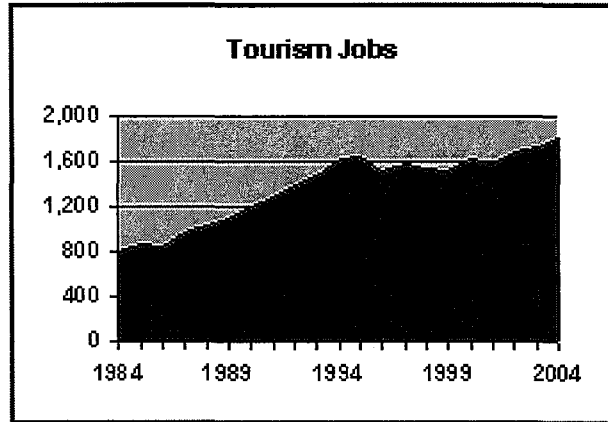
A TOURIST MECCA

Tourism grew rapidly in the late 1980s and early 1990s. Summer tourism grew, as North Idaho became better known as a tourist destination. Sandpoint's reputation as a haven for the arts also contributed to the growth of tourism. In 1990, a major expansion of the Schweitzer Mountain ski area boosted winter tourism. In the last two years, tourism has been growing at a strong clip again.

The unprecedented national attention that Sandpoint received this year is likely to greatly increase the number of tourists over the next few years.

Tourism employment normally reaches its high point of the year in August, falls to its lowest level before Thanksgiving, rises to its winter peak between

Christmas and New Year's, and then falls to its lowest point in April. For example, in 2004, tourism employment went from 1,840 in January to 1,447 in April, then rose to 1,962 in August, then fell back to 1,520 in October.



SUCCESS IN OTHER SECTORS

The biggest source of new jobs in Bonner County in the 1990s was Coldwater Creek, the Sandpoint-based mail-order catalog company. Started 20 years ago at the kitchen table of Dennis and Ann Pence, Coldwater Creek became the county's largest employer by 2000. In 2001, it downsized, but it continues to have 400 high-paying corporate headquarters jobs in Bonner County.

The construction, finance, insurance, and real estate industries in Bonner County are nearly three times larger than they would be in most counties of its size. That reflects the county's exceptionally strong population growth, the large number of vacation homes built here, the high level of commercial and industrial development over the last decade, and the growth of the home-grown independent bank, Panhandle State Bank.

Population growth and the aging of the population boosted health care 89% from 583 jobs in 1994 to 1,100 jobs in 2004. Bonner General Hospital, the Sandpoint hospital serving all of Bonner County, is the county's largest health care provider. In 1997, Life Care Centers celebrated the grand opening of its Sandpoint nursing home facility. In recent years, a wide variety of medical offices and other health care providers have grown up to take care of Bonner County's growing population.

As in many forested counties in the West, Bonner County's largest landlord is the federal government. The federal government owns 45% of the 1,918-square mile county, and the state government owns 15%. The U.S. Forest Service has played a major role in the economy of Bonner County for decades. About 120 people work year-around for the Forest Service, while another 80 people work only in the summers. In addition, several Forest Service contractors employ people in Bonner County. The U.S. Postal Service is the next largest federal employer. Altogether, federal agencies employ 220 people in the winter and up to 330 people in the summer.

MEETING ECONOMIC DEVELOPMENT CHALLENGES

Despite strong job growth, many Bonner County residents are struggling with low incomes. In 2002, Bonner County's per capita income was \$21,865, while the State of Idaho's per capita income was \$25,476 and U.S. per capita income was \$30,906. Economists consider per capita income to be one of the best measures of an area's economic prosperity. The gap between Bonner County and U.S. incomes has persisted for two decades, and is a cause for some concern. About 15% of Bonner County's population lives below the poverty level, while 13% of the U.S. population does.

To increase employment and income, the Bonner County Economic Development Corporation is working hard to bring new businesses into the community and to help existing businesses expand. It already has succeeded in helping to bring the unemployment rate down. From its inception in early 2001 through the fall of 2004, BCEDC has brought 350 jobs to Bonner County. That's roughly one-third of the total jobs added in the county during that period. The jobs created through BCEDC's assistance pay an average of \$35,600, compared to an average annual wage of \$24,700 for all jobs in Bonner County.

LOCAL KOOTENAI COUNTY ECONOMY

For 20 years, Kootenai County's economy has grown at an astounding rate as it diversifies its manufacturing base, expands its tourism sector and adds call centers. In addition, tourism and population growth fueled high levels of construction and boosted retail, health care, service, and government jobs.

The opening of the Coeur d'Alene Resort in 1987 led to incredible growth in tourism. The Silverwood theme park opened in 1988 and has continued to grow every year. In 1994, the Coeur d'Alene Tribe opened a casino in Worley. Today, the casino, golf course and hotel employ more than 900 people. In 2007, tourism-related jobs averaged 8,800.

Also promoting the diversification and growth of the economic base during the last decade were the relocation on many manufacturing operations and six call centers to

Labor Force	June 2007	June 2008
Civilian Labor Force	70,336	70,485
Total Employment	68,479	67,805
Unemployed	1,858	2,680
% of Labor Force Unemployed	2.6	3.8
State of Idaho % Unemployed	2.7	3.8
U.S. % Unemployed	4.6	5.5

Kootenai County. About 4,800 people work in the county's manufacturing businesses while 2,100 people work at call centers. Kootenai County's low business costs, good business climate and quality of life have attracted many new businesses. In 2005, Sysco opened a distribution center serving the food service industry that employs 180 people, Buck Knives opened a manufacturing plant that employs 280 people and U.S. Bank opened a customer service center that will employ 500 people.

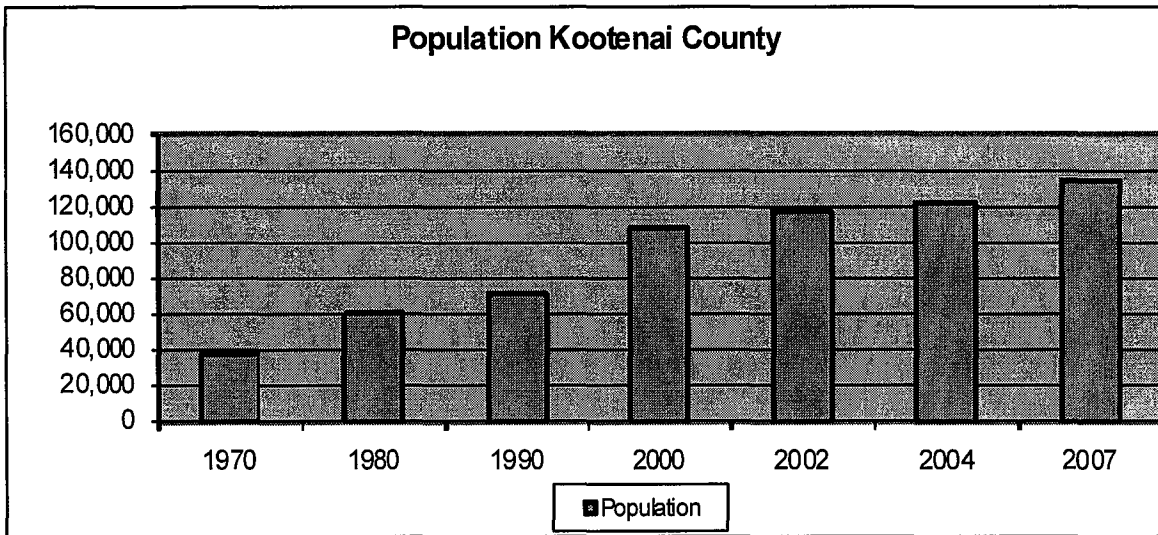
The County has created so many jobs that it has received national attention for its booming economy as well as for its great lifestyle. Although growth is slowing, the county continues to lay the foundation for further economic success.

Labor Force	1997	1998	1999	2000	2001	2002	2003	2004	2005	2006	2007
Civilian Labor Force	53,695	55,206	55,809	56,473	59,356	60,188	61,443	63,607	66,574	68,051	69,859
Unemployment	4,304	4,341	4,207	3,499	4,040	4,216	3,925	3,521	2,689	2,356	2,061
% of Labor Force Unemployed	8.0	7.9	7.5	6.2	6.8	7.0	6.4	5.5	4.3	3.5	2.9
Employment	49,591	50,864	51,602	52,974	55,316	55,973	57,518	60,086	63,885	65,695	67,798

Kootenai County's growing population and economic development provide many opportunities for business creation. Between 1997 and 2007, the number of private-sector employers increased 45 percent from 3,529 to 5,104. Jobs Plus, the local economic

development organization, has recruited dozens of businesses to Kootenai County over the last ten years. Low business costs, a pleasant business climate, low electricity and natural gas costs, and an affordable workforce are among the county's attractions for new business.

The county employment base is diverse and the majority of jobs are generated from many small and medium sized employers with recreational and tourism type employment being one of the fastest growing job classifications. Most of the employment in the area is local, state and federal government, education, tourism, and small service related businesses for the recreation, logging and transportation systems in the area. The top major employers include Center Partners (call centers), Coeur d'Alene Resort, Coeur d'Alene Casino, Esterline Advanced Input Systems (manufacturer), Kimball Office (furniture manufacturer), Kootenai Health (hospital), North Idaho College, and U.S. Bank (including customer service center).³



³ Information provide by Kathryn Tacke, Regional Economist, Idaho Department of Labor

MARKET CONDITIONS / TRENDS:

The following data primarily focuses on residential waterfront as in general, there is very little waterfront that is zoned "Commercial" or in an area where other zoning could allow a commercial use.

In the decade from 1990 through 1999 the residential waterfront market on Lake Pend Oreille and the Pend Oreille River remained relatively stable. Prices and values moved slightly up and down during that period but no significant change in value was recorded. In the period from 2000 through most of 2002, the market for improved and unimproved water frontage picked up with very apparent upward trending prices and decreasing marketing times. Unimproved waterfront, as opposed to improved waterfront, showed more movement and activity.

Observations of our improved waterfront marketplace during that period suggested that in the great majority of cases, buyers in the mid to upper price ranges elected to purchase unimproved waterfront sites and build a dwelling to their own desires, dreams and specifications. An example of this is: many buyers during that period who looked at a number of the improved competing properties for sale at the time, in the end, decided to build "their" dream home. Most of the time qualified buyers choose not to buy someone else's home. They elect to build. As long as desirable unimproved waterfront sites were available, it took a discount of the depreciated cost of the existing property to induce a qualified buyer to deviate from this desire to buy and build on their own waterfront parcel.

This was best indicated in the continued difference in indicated values by the cost and market approaches when completing an appraisal report in the mid to upper price ranges. The spread between the two approaches (ranging from 10% to 30%) was basically the discount that the buyer required to induce a sale. At that time the difference between the indicated values was considered to be functional obsolescence or in some cases economic obsolescence.

Moving forward brings us to one of the items that were briefly mentioned above, that is, these buyers chose to build as long as desirable unimproved waterfront sites were available in the period of late 2002 forward. We started seeing increases in selling prices and decreasing marketing time on both improved and unimproved waterfront. Some say this "pop" was due

to a national magazine running a feature on Sandpoint and others say it was the continued national trend of moving from the major metropolitan areas to a more "rural" area. Nevertheless, we saw increased activity in waterfront during this time and along with all other types of real property. Available desirable unimproved waterfront sites began to dry up leaving potential buyers of waterfront with only one choice and that was to look at improved properties.

In the spring of 2003 (after the snow melt) we continued to see brisk market activity in all segments markets but at a larger and more dramatically increasing pace as selling prices appeared to be increasing in double digit multiples. As a result, inventories of properties for sale⁴ decreased at a progressively faster pace. In the first six months of 2003, it "felt" as if selling prices were rising at a rate of 50% or more. I say "felt", as hard data was not yet available to measure the amount of increasing appreciation.

MARKET TRENDS: BONNER COUNTY

For 2003, in the Sandpoint Area for single family dwellings, the average sale price was **\$163,825**. Average days on market were 165. The sales price as a percentage of list price was 96.8%. The number of sales for the year was 483.

For 2004, in the Sandpoint Area for single family dwellings, the average sale price was **\$200,470**. Average days on market were 92. The sales price as a percentage of list price was 97.9%. The number of sales for the year was 586.

For 2005 in the Sandpoint Area for single family dwellings, the average sale price was **\$290,248**. Average days on market were 59. The sales price as a percentage of list price was 97.0%. The number of sales was 619.

For 2006 in the Sandpoint area for single family dwellings, the average sale price was **\$333,661**. Average days on the market were 96. The sales price as a percentage of the list price was 96%. The number of sales for the year was 438.

⁴ In all types of property but my focus is on waterfront.

For 2007 in the Sandpoint area for single family dwellings, the average sale price was **\$338,314**. Average days on the market were 93. The sales price as a percentage of the list prices was 94.3%. The number of sales for the year was 399.

Based on trend analysis and neighborhood information and with support from the comparables' days on market, the subject is estimated to sell at the appraised value in a time period of approximately 3 to 12 months with appropriate marketing techniques. These techniques include proper exposure with an asking price at approximately market value. Many items can drastically affect marketing times including economic conditions, property condition, asking price, access, etc.

MARKET TRENDS: KOOTENAI COUNTY

For 2004 in Kootenai County for single family dwellings, the average sale price was **\$181,817**. Average days on market were 97. The total number of sales for the year was 4,227. Average list to sale price ratio was 98.1%

For 2005 in Kootenai County for single family dwellings, the average sale price was **\$238,301**. Average days on market were 82. The total number of sales for the year was 4,311. Average list to sale price ratio was 98.5%

For 2006 in Kootenai County for single family dwellings, the average sale price was **\$272,030**. Average days on market were 113. The total number of sales for the year was 3,150. Average list to sale price ratio was 96.9%

For 2007 in Kootenai County for single family dwellings, the average sale price was **\$280,236**. Average days on market were 121. The total number of sales for the year was 2,718. Average list to sale price ratio was 96.0%.

As one can see from both Kootenai County and Bonner County market stats, values increased steadily from 2003 through 2006 with a leveling beginning to occur into and through 2007 as values would later show to have peaked in late 2007 and slowly begin to decline into 2008.

Time Adjustments:

Market conditions indicate the application of time adjustments for waterfront properties. Time adjustments are based in part upon the following paired sales of waterfront residences in the general Sandpoint Area, which indicates market appreciation in the 3% to 5% per month basis. These four sale pairs suggest market appreciation of improved waterfront properties in the range of 4% of the sale price per month for the period through 2005. Things began to slow a bit into 2006 and 2007, with values finally peaking in 2007 in most cases. Beyond the pairs included below, I have included further data which indicates the possibility of even greater appreciation over the time period of 2004 to 2005 in vacant land. See the following pages for more information.

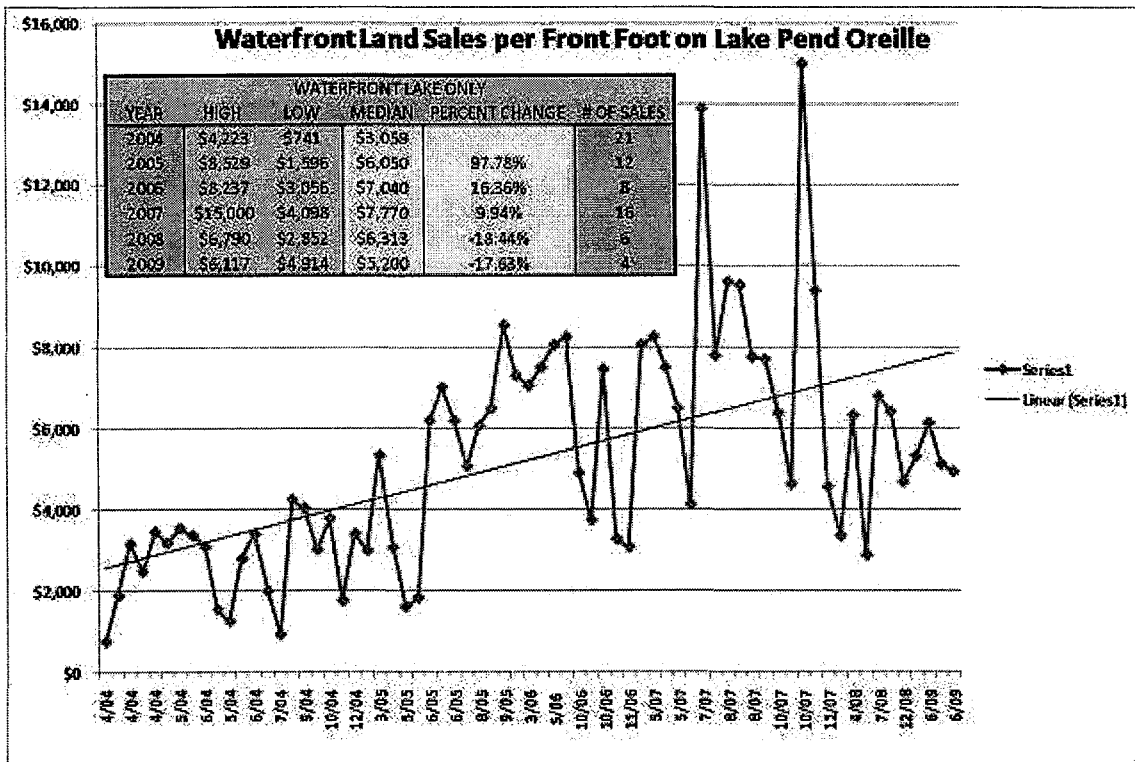
WATERFRONT SALE PAIRS ON PEND OREILLE RIVER/LAKE:

	ADDRESS	SITE	PREVIOUS SALE	RESALE	MONTHLY
1)	504 Larch, Priest River	200 ff	\$280,000/09-03-03	\$475,000/08-24-05	3%
2)	199 Lakeshore, Sagle	50 ff	\$238,500/06-03-02	\$769,000/06-01-05	4%
3)	2555 Lakeshore, Sagle	60 ff	\$395,000/09-24-02	\$775,000/10-15-04	5%
4)	105 Secret Cove, Sdpt	180 ff	\$1,155,000/1-7-04	\$2,450,000/12-14-05	4%
.....					

The following vacant waterfront transactions include site sales that are "broken-out" on a price per front footage basis. These are included to provide an overview of the past and recent market conditions for waterfront properties on Lake Pend Oreille. These sales include only waterfront sales on Lake Pend Oreille and the mouth of the Pend Oreille River.

LOCATION	SALES PRICE	DATE	FRONT FT	PRICE/FF
1) BOTTLE BAY ROAD	\$180,000	4/04	243 FF	\$741
2) TAX 90 PONDER POINT	\$375,000	4/04	200 FF	\$1,875
3) LOT 6 PONDER POINT	\$345,000	4/04	110 FF	\$3,136
4) LOT 4 PONDER POINT	\$280,000	4/04	110 FF	\$2,454
5) CROOKED EAR LOT 1, BLK. 1	\$240,000	4/04	70 FF	\$3,429
6) CROOKED EAR LOT 5, BLK. 1	\$267,840	5/04	85 FF	\$3,151
7) CROOKED EAR LOT 4, BLK. 1	\$299,000	5/04	85 FF	\$3,518
8) CROOKED EAR LOT 3, BLK. 1	\$284,000	5/04	85 FF	\$3,341
9) CROOKED EAR LOT 2, BLK. 1	\$260,000	6/04	85 FF	\$3,059
10) BEL TAN	\$275,000	5/05	180 FF	\$1,528
11) BEAVER POINT	\$250,100	5/04	202 FF	\$1,238
12) BOTTLE BAY RD.	\$395,500	6/04	143 FF	\$2,766
13) 127 HUBBARD LANE	\$800,000	6/04	237 FF	\$3,376
14) BOTTLE BAY ROAD	\$395,500	6/04	200 FF	\$1,978
15) GARFIELD BAY ROAD	\$200,000	7/04	220 FF	\$909
16) LOT 4 BLK. 2 PONDER POINT	\$462,500	8/04	110 FF	\$4,223
17) LOT 5, BLK. 2 WHISKEY JACK	\$649,000	9/04	162 FF	\$4,006
18) LOT 2, BLK. 2 WHISKEY JACK	\$290,000	10/04	97 FF	\$2,990
19) TAX 89 PONDER POINT	\$699,000	10/04	186 FF	\$3,758
20) GARFIELD BAY ROAD	\$174,000	11/04	100 FF	\$1,740
21) PIERCE LANE	\$675,000	12/04	200 FF	\$3,375
22) SOURDOUGH LANE	\$349,900	1/05	118 FF	\$2,965
23) POULIN DRIVE	\$340,000	3/05	64 FF	\$5,313
24) 3079 BOTTLE BAY ROAD	\$499,000	4/05	164 FF	\$3,043
25) SUNNYSIDE ROAD	\$399,000	5/05	250 FF	\$1,596
26) SUNNYSIDE ROAD	\$455,000	6/05	250 FF	\$1,820
27) E. CROOKED EAR DRIVE	\$525,000	6/05	85 FF	\$6,176
28) LAKESHORE DRIVE*	\$1,400,000(ADJ)	4/05	200 FF	\$7,000
29) CROOKED EAR LANE	\$525,000	6/05	85 FF	\$6,176
30) BEL TANE	\$505,000	9/05	100 FF	\$5,050
31) MARIMOUNT BEACH	\$605,000	8/05	100 FF	\$6,050
32) KANIKSU SHORES	\$700,000	9/05	108 FF	\$6,481

33) DIVISION STREET	\$725,000	9/05	85 FF	\$8,529
34) SHANNON, DOVER BAY, LOT 5*	\$1,750,000	8/05	240 FF	\$7,292
35) LAKESHORE, DOVER BAY, LOT 6*	\$697,000	3/06	99 FF	\$7,040
36) SUNNYSIDE ROAD, TAX 93	\$749,000	4/06	100 FF	\$7,490
37) LAKESHORE WAY, LOT 11*	\$700,000	5/06	87 FF	\$8,046
38) LAKESHORE, LOT 10*	\$799,000	7/06	97 FF	\$8,237
39) SHANNON, DOVER BAY, LOT 6 *	\$1,200,000	10/06	246 FF	\$4,878
40) LAKESHORE, SANDY BEACH *	\$1,300,000	8/06	350 ff	\$3,714
41) LAKESHORE, RIVERSIDE*	\$745,000	10/06	100 FF	\$7,450
42) BEL TANE (GAGES RD)	\$550,000	11/06	180 FF	\$3,056
43) LOT 13 LAKESHORE*	\$749,000	2/07	93 FF	\$8,054
44) CROOKED EAR	\$710,000	5/07	86 FF	\$8,256
45) PONDER POINT DR	\$749,000	5/07	100 FF	\$7,490
46) 3937 BOTTLE BAY RD	\$700,000	5/07	108 FF	\$6,481
47) CAPE HORN DR. BAYVIEW	\$750,000	6/07	183 FF	\$4,098
48) NNA HWY 2 DOVER (8.36 AC)	\$2,500,000	7/07	180 FF	\$13,889
49) 1227 GLENGARY RD	\$779,000	7/07	100 FF	\$7,790
50) LOT 6 O'DONNELL*	\$950,000	8/07	99 FF	\$9,596
51) LOT 8 LAKESHORE*	\$799,000	8/07	84 FF	\$9,512
52) 1600 PENINSULA RD	\$775,000	8/07	100 FF	\$7,750
53) POULIN DRIVE	\$485,000	9/07	63 FF	\$7,698
54) 7095 BOTTLE BAY(5.07 AC)	\$1,700,000	10/07	267 FF	\$6,367
55) 7095 BOTTLE BAY(5.18 AC)	\$1,300,000	10/07	282 FF	\$4,610
56) LOT 4 BRYCE LANE	\$750,000	10/07	50 FF	\$15,000
57) LOT 8/9 LAKESHORE SANDY*	\$1,500,000	10/07	160 FF	\$9,375
58) SUNNYSIDE RD (10.4 ACRES)	\$1,500,000	11/07	330 FF	\$4,545
59) 2205/915 GLENGARY (9.5 ACRES)	\$3,335,000	2/08	1000 FF	\$3,335
60) LOT 5 LAKESHORE*	\$625,000	4/08	99 FF	\$6,313
61) LOT 4 SHANNON*	\$750,000	4/08	263 FF	\$2,852
62) LOT 1 LAKESHORE*	\$679,000	7/08	100 FF	\$6,790
63) BLUE HERON RD	\$640,000	8/08	100 FF	\$6,400
64) LOT 7/8 SHANNON*	\$1,100,000	12/08	236 FF	\$4,661
65) 0 BOTTLE BAY ROAD	\$530,000	6/09	100 FF	\$5,300
66) BL 1 LT 5 CROOKED EAR	\$520,000	6/09	85 FF	\$6,117
67) NNA BLUE HERON	\$510,000	6/09	100FF	\$5,100
68) ROCKY POINT RD	\$575,000	6/09	117FF	\$4,914



Based on the above graph, a comparison of the 2005 median sales price of \$6,050 per front foot with that of the 2004 median price of \$3,059 per front foot, suggests price appreciation of more than 97%. This compares with and supports the market appreciation indicated by the previous improved waterfront sales pairs suggesting a 4% increase per month or 48% over a 12 month period. It appears that waterfront home sites appreciating at approximately 8% per month out-paced existing waterfront home sales.

There are exceptions that are outside the above ranges. Another site sold for approximately \$2,200 in 2003 and more recently it sold for \$8,529. The increase over that period is approximately 124% annually.

From 2005 to 2007, one can see that median sales price increased at a much slower pace, in the range of 1% per month over that period, with median prices beginning to decline into 2008 and 2009. This shows quite conclusively that the market was continuing to appreciate as of the Effective Date of this appraisal report.

I have located two paired sales of commercial property which sold in Bayview. Both of these properties are of land that was utilized as mobile home parks in Bayview. One is located directly across from a public boat launch and is being developed into either a motel or condominiums as I understand.

ADDRESS	SITE	PREVIOUS SALE	RESALE	MONTHLY
5) 33972 Corbin, Bayview	2.2 Ac	\$470,000/08-2002	\$1,600,000/08-2007	4%
6) 16326 Emerson, Bayview	6.35 Ac	\$87,500/11-2000	\$180,000/07-2004	2.5%

These paired sales, along with the previous paired sales and market data indicate strong appreciation from 2004 through 2007. I will utilize a 5% per month adjustment for sales in 2004 and 2005 as this period had the strongest measurable appreciation and will use 1% per month for sales occurring in 2006 and 2007. If sales are utilized before the Effective Date they will be increased by a corresponding percentage. If sales are utilized after the Effective Date they will be decreased by a corresponding percentage.

Note: A few things about waterfront property should be strongly considered. During the time period around the Effective Date of this report, namely 2005 – 2007, the market was in the midst of a surge. It was a strong market. Property of all types was being bought and developed. When it came to waterfront property, the attitude was, you'd better buy it now because it is only going to get more expensive. Also, residential waterfront is a very emotional thing for people. It is something that cannot be explained. Often times the same thing is experienced with views. People react emotionally. Money was available, the economy was good, and people were willing to buy their dream. Property values continued to climb for another 18 months, more or less, from the Effective Date of this report before the scale finally tipped.

Commercial property:

Sales of commercial properties in somewhat rural areas like Bayview are often very sporadic and difficult to track. I have completed some analysis on the commercial markets in the northern three counties of Idaho from the period of 2004 through 2007. The market did appear to appreciate throughout that time period alongside residential properties, though not

at the same pace. Below is some information regarding these overall trends. These include all types of commercial property including commercial land.

In 2004 for the northern 3 counties in Idaho, the average sales price for commercial property was **\$410,000**. The total number of properties sold was 135. The average number of days on market was 208 with a list to sales price ratio of 91%.

In 2005 for the northern 3 counties in Idaho, the average sales price for commercial property was **\$484,000**. The total number of properties sold was 152. The average number of days on market was 185 with a list to sales price ratio of 96%.

In 2006 for the northern 3 counties in Idaho, the average sales price for commercial property was **\$530,000**. The total number of properties sold was 150. The average number of days on market was 142 with a list to sales price ratio of 94%.

In 2007 for the northern 3 counties in Idaho, the average sales price for commercial property was **\$795,000**. The total number of properties sold was 103. The average number of days on market was 103 with a list to sales price ratio of 93%.

SALES AND OWNERSHIP HISTORY:

Standards Rule 1-5

(This Standards Rule contains binding requirements from which departure is not permitted.)

In developing a real property appraisal, when the value opinion to be developed is market value, an appraiser must, if such information is available to the appraiser in the normal course of business'

- (a) analyze all agreements of sale, options, or listings of the subject property current as of the Effective Date of the appraisal; and**
- (b) analyze all sales of the subject property that occurred within the three (3) years prior to the Effective Date of the appraisal.¹⁴**

There have been no reported sales or listings of the subject property in the three years prior to the Effective Date of this appraisal. According to my client, the subject property was not offered for sale at any point during that time period either.

In the State of Idaho, buyers, sellers, agents, title companies, etc. are not required to disclose the sale price or terms of any sales transaction to any Federal, State or County authority other than The Internal Revenue Service. The local multiple listing service is our only source of data regarding the listing and the sale of properties in Kootenai and Bonner Counties. There are many sales that do not go through the MLS and are what we consider "private party sales" i.e. from party to party not being accounted for by any services.

Physical data on the sale properties and improvements such as size of site, frontage, etc., and transaction data regarding sale prices, terms, etc. is usually gained from local real estate brokers (MLS), county assessor's office and local title companies, etc

PROPERTY APPRAISED:

See attached addendum.

ZONING:

According to Kathy Perry at the Kootenai County Planning Department, the subject property is/was zoned "Commercial". See below for full ordinance. It should be noted that the ordinance below was adopted in May of 2007, however Kathy at P & Z indicated that the ordinance had not changed in the new draft and was the same as it was in 2006.

**CHAPTER 9
COMMERCIAL ZONE (C)**

SECTIONS:

- 9-9-1 GENERAL COMMERCIAL ZONE DEFINED
- 9-9-2 9.01 PERFORMANCE STANDARDS
- 9-9-3 9.02 SITE AREAS
- 9-9-4 9.03 USES PERMITTED
- 9-9-5 9.04 FRONT, SIDE, AND REAR YARDS
- 9-9-6 9.05 USES PERMITTED - STORAGE
- 9-9-7 9.06 USES PROHIBITED
- 9-9-8 9.07 CONDITIONAL USES
- 9-9-9 9.08 RECREATIONAL VEHICLE PARK PERFORMANCE STANDARDS
- 9-9-10 9.09 SPECIAL NOTICE PERMITS

9-9-1: GENERAL COMMERCIAL ZONE DEFINED:

The "General Commercial zone" is a land use classification for a district suitable for wholesale and retail sales and services.

9-9-2: PERFORMANCE STANDARDS:

In the Commercial zone, no building or premises shall be used, nor any building or structure be hereafter erected or altered, unless otherwise provided in this title, except for one (1) or more of the following uses in accordance with the following standards. A Commercial lot shall have direct access from a public road.

All uses shall meet the following standards:

- A. Requirements of Chapter 17 of this title, Design Standards
- B. Requirements of Chapter 19 of this title, Supplementary Regulations
- C. Anticipated traffic impacts will be determined for all commercial uses using the most current edition of the "Trip Generation Manual." A Special Notice Permit shall be required for commercial uses or buildings that are anticipated to generate traffic impacts in excess of the following thresholds:
 - 1. For sites which access directly onto a State or Federal Highway- 25 cars per hour, or 250 vehicles per day.
 - 2. For sites which access onto other public roads - 50 cars per day.
- D. Uses on all lots or parcels in the Commercial zone which front on a state or federal highway shall require a Special Notice Permit.
- E. Requirements of the applicable Highway District and Idaho Transportation Department or if the site is within an area of city impact, the city's standards for access, approaches, and street design, whichever is the higher standard.
- F. If an existing community water system within 1,000 feet of the site is willing and able to provide water service to the use, connection to that system shall be required.
- G. Requirements of the Panhandle Health District for sanitary sewage disposal.
- H. Requirements of the Panhandle Health District's Critical Materials Regulation.

I. All uses shall be in a structural Fire Protection District and meet all applicable District regulations; or absent a structural Fire Protection District, shall incorporate fire protection measures recommended by the State Fire Marshall.

J. No uses shall generate sound pressure levels greater than 80 dBA as measured at the property line.

9-9-3: SITE AREAS:

Fifty percent (50%) of the area of all sites must be left in open spaces free from structures.

9-9-4: USES PERMITTED:

- A. Parks, playgrounds, and golf courses.
- B. Community facilities, including fire stations, public utility installations, etc.
- C. Public or non-profit recreational buildings.
- D. Any wholesale, retail or service business.
- E. Public or private office buildings.
- F. Any eating or drinking establishment or other entertainment facility.
- G. Hospitality businesses, such as hotels and motels, and meeting and convention facilities.
- H. Transfer, storage, and warehouse facilities, except outside storage must be within a sight-obscuring fence.
- I. Single family, two-family or multi-family dwellings are allowed provided they are on the second and/or third floors of a commercial building, or in a separate structure provided it is accessory to the commercial use of the site. Residential uses are subject to the density requirements of the High Density Residential (HDR) zone.
- J. Recreational vehicle park.
- K. General farming, except the minimum lot area for the keeping of livestock shall be 3/4 acre.
- L. Vocational, trade, or private instructional schools, providing a specialized or single-item curriculum.
- M. Churches.

9-9-5: FRONT, SIDE, AND REAR YARDS:

The following front, side, and rear yard setback requirements shall apply in the Commercial zone.

All Buildings:

- A. Front yard.....35 feet
- B. Side yard.....none
- C. flanking Street.....20 feet
- D. Rear yard.....15 feet

9-9-6: USES PERMITTED STORAGE:

No premises in the Commercial zone shall be used as a storage area for any purpose other than storage of materials required in connection with the enumerated permitted uses in the Commercial zone. Storage areas must conform to the minimum setback regulations of the zone. Automobiles and other machinery normally displayed for sales purposes on an open lot may be so displayed.

9-9-7: USES PROHIBITED:

- A. Automobile wrecking yards and junk yards.
- B. Processing and manufacturing are prohibited, unless they are part of the operation of a business or service specifically permitted in the Commercial zone. Such processing and manufacturing uses must be clearly incidental to the permitted use on the site.

9-9-8: CONDITIONAL USES:

- A. Outdoor Theaters.
- B. Public Utility Complex Facility.
- C. Zoos.
- D. Radio and Television Towers.
- E. Special Events Location (Note: See the definitions of Special Events and Special Events Location in Section 9-2-2 of this Title).
- F. Wireless Communication Facility (WCF).

9-9-9: RECREATIONAL VEHICLE PARK PERFORMANCE STANDARDS:

- A. Intent - The intent of these standards is for temporary living quarters and not permanent or year-round housing.
- B. Accessory Uses - Management headquarters, recreational facilities, toilets, dumping stations, coin-operated laundry facilities, and other convenience establishments are permitted as accessory uses incidental to the operation of the recreational vehicle park.
- C. Recreational vehicles shall be separated from each other and from other structures by at least ten (10) feet. Any accessory structures, such as attached awnings or carports, shall, for the purpose of this separation requirement, be considered to be part of the recreational vehicle.
- D. Each recreational vehicle lot/space shall contain a stabilized vehicular parking pad composed of paving, compacted crushed gravel, or other all-weather material.
- E. Interior drives in recreational vehicle parks which enter and exit onto a public road must be approved by the applicable Highway District or the Idaho Transportation Department.
- F. Yards, fences, walls, or vegetative screening shall be provided at the property lines of a recreational vehicle park where the park adjoins adjacent lands that are zoned or used for residential purposes. In particular, extensive off-street parking areas and service areas for loading and unloading purposes other than for passenger uses and areas for storage and collection of refuse shall be screened.
- G. If it is determined by the applicable Highway District or Idaho Transportation Department that traffic control devices or other traffic regulation improvements are required as a result of development of a recreational vehicle park, the Sponsor shall be responsible for the cost of installation or construction of said improvements.
- H. Internal roads and parking service areas shall provide safe and convenient access for service and emergency vehicles and to amenities within the recreational vehicle park. Internal roads shall not be designed to encourage use by outside traffic to traverse the recreational vehicle park to adjoining developed areas.
- I. Each recreational vehicle lot shall have one (1) off-street vehicle parking space.
- J. Any action toward removal of wheels of a recreational vehicle, except for temporary purposes of repair or to attach the recreational vehicle to the grounds for stabilizing purposes is prohibited.

- K. Occupancy of a recreational vehicle park space by a particular recreational vehicle shall be limited each year to only those days between Memorial Day and October 1, and/or a maximum of thirty (30) consecutive days during the remaining months of the calendar year.
- L. A site plan shall be submitted upon application for a building permit with a North arrow and date of drawing, showing uses and structures which are proposed. Said plan shall include adequate information to clearly depict existing and proposed structures and their uses, existing and proposed roads, easements, points of access, recreational vehicle lot dimensions, number of acres in site, dimensions of property lines, property line setbacks, reserved or dedicated open space, major landscape features (both natural and man-made), locations of existing and proposed utility lines, accessory off-street parking and loading facilities, parking space areas, wastewater drainfield area, traffic circulation patterns, refuse and service areas, signs, outdoor storage, and fences, yards, or wall or vegetative screening.

9-9-10: SPECIAL NOTICE PERMITS:

- A. Outdoor Lighting of Permitted Recreational Uses.
- B. Railroad car or truck cargo container/trailer used for storage or any other purpose not associated with the active operation of a railroad or trucking business.
- C. As required by section 9-9-2 of this chapter.
- 3. Prior to issuance of the Certificate of Occupancy, the designer shall submit a completion report attesting to the correct installation of healthy trees, shrubs, groundcover and other landscape treatments as shown on the landscape site plan, and that the installation is a correct representation of the plan.
- 4. The Director may authorize a delay in the completion of planting during the months of November, December, January, February, and up to March 15th (or adverse weather conditions which threaten survivability of plants). Should a delay occur, a guarantee of financial surety equal to one hundred fifty percent (150%) of the costs of landscaping will be provided by the owner/developer and held by the County until the landscaping is complete. No Certificate of Occupancy shall be issued until the required landscape development is complete, or a financial guarantee has been approved.

D. Alternative Methods of Compliance

It is recognized that with certain site conditions, a strict interpretation of requirements may be physically impossible or economically impractical. In cases of hardship, these alternative compliance procedures allow modifications to the above landscaping requirements. Requests for use of alternative landscaping schemes are justified only when one or more of the following apply:

- 1. The site has space limitations or the parcel is unusually shaped.
- 2. Topography, soil, vegetation or other physical hardship site conditions are such that full compliance is impossible or impractical.
- 3. Due to a change of use of an existing site, the required buffer is larger than can be provided.
- 4. Legitimate safety considerations from other public agencies are raised. An applicant applying for relief under this provision shall submit, in addition to the information required in the Landscape Plan, a written narrative explaining the alternative methods of compliance, also prepared by a designer, and the applicable fees. The proposed solution shall equal or exceed existing requirements. Upon receipt of the completed application, the Director shall review the request and submit a decision to the applicant within 10 working days of the request. If the application is denied, the Applicant may appeal the Director's decision to the County Hearing Examiner. The Hearing Examiner shall make a recommendation to the Board of County Commissioners. The decision from the Board shall be final.

9-17-6: PARKING:

A. General Requirements

- 1. Parking and Circulation Plan Required - Off-street parking and loading facilities shall be shown on a site plan for review. The plan submitted shall show a detailed functional parking arrangement and on-site circulation and shall be prepared at a scale of not less than one inch equals one hundred feet (1"=100').

2. **Parking Area Limitations** - A required parking area shall be used exclusively for parking of vehicles in operating condition and shall be used in conjunction with a permitted land use. No inoperable or unlicensed vehicle shall be parked or stored within a space which is required to meet the minimum number of spaces of this Section. Following approval, off-street parking facilities shall not be reduced or encroached upon in any manner unless provisions of this chapter have been met and approval for the change has been received.
3. **Changes in Parking Facility** - Whenever a use or building constructed or established after December 21, 1998 is enlarged in floor area, number of employees, number of dwelling units, seating capacity, or any other change that creates an increase in the need for additional parking spaces, a site plan shall be prepared and submitted to the Director for approval.
4. **Access** - All parking facilities shall be provided with safe and convenient access to a street. Ingress and egress to streets shall be provided only through approved driveways. Approaches onto a public road shall meet the requirements of the applicable Highway jurisdiction.

B. Parking Lot Design Standards

1. **Number of Parking Spaces Required** - The minimum number of off-street parking spaces required for each type of use, or similar use, shall be in accordance with the following list. Gross floor space shall be used where the number of spaces is based on a square footage type requirement. In determining the number of parking spaces required, fractions shall be rounded to the nearest whole number. If a specific use is not listed for parking standards, then the requirements for the closest similar use shall be used. If there is no similar use, then one space shall be required for every 200 square feet of gross floor space.

Manufactured Home Park: 2 per dwelling unit

Community Uses:

Auditoriums, churches, theaters:

Fixed Seating: 1 per 4 seats

No Fixed Seating: 1 per 150 square feet

Schools or higher educational facilities: 1 per classroom, 1 per office, and 1 per each 4 seats in the largest gathering room

Day care centers: 1 per 350 square feet

Hospitals: 1 per each bed

Libraries: 1 per 250 square feet

Nursing homes: 1 per 5 beds

Parks/Athletic fields: 30 spaces, and 50 per each playing field

Commercial:

Offices: 3 per 1000 square feet

Medical/Dental Clinics: 1 per 250 square feet

Retail sales, personal services: 1 per 250 square feet

Furniture and motor vehicle showrooms: 1 per 800 square feet

Hotels/Motels: 1 per rental unit, and 1 per each regular employee of the largest shift

Indoor Recreation, such as bowling alleys/skating rinks: 1 per 100 square feet

Restaurants/night clubs/bars: 1 per 250 square feet

Club/lodge: 1 per every 6 fixed seats or 1 for every 10 members, whichever is larger

Outdoor Recreation Activities (depending upon the activity):

1 per every cabin; or

1 per every equestrian stall; or

1 per every 100 square foot of floor space in the primary lodge or club; or

1 per every four tickets sold;

Research Park: 1 per 600 square feet

Industrial:

Manufacturing: 1 for every 2 employees on the largest shift

Warehouse and Wholesale: 1 per 800 square feet

Mining: 1 for every 2 employees on the largest shift

2. Location of Parking Facilities - Required off-street parking shall be either on the same lot or premises as the principal building or within three hundred feet (300') of the building. The 300 foot requirement shall be measured from the nearest point of the principal building to the nearest point of the parking facility. Off-street parking facilities for separate uses may be provided jointly when operating hours of users do not conflict and provided the total number of spaces is not less than the required spaces for each individual use. Off-site parking areas shall require approval as a conditional use permit.
3. Dimensions
 - a. Parking Lot Space Dimensions - Eight feet (8') in width by eighteen feet (18') in length. At the developer's option, 25 percent (25%) of the lot may be marked "compact only" with individual parking space dimensions of seven and one-half feet (7'2") in width by fifteen feet (15') in length.
 - b. Aisle Width - Parking area aisle widths shall conform to the following table, which varies the width requirement according to the angle of parking:

Parking Angle (degrees):	0° 30° 45° 60° 90°
Aisle Width (feet): One-Way Traffic	13' 12' 15' 18' 24'
Two-Way Traffic	19' 20' 21' 23' 24'
 - c. Driveway Entrances and Exits - One-way traffic entrance and exit driveways for all uses except residential: fourteen feet (14'). Two-way traffic entrance and exit driveways used for all uses except residential: twenty-six feet (26').
4. Bicycle Parking - One bicycle parking space shall be provided for every ten (10) required auto parking spaces. Bicycle parking shall not obstruct vehicular or pedestrian circulation.
5. Parking for Physical Limitations - Where off-street parking is required for uses other than residential, handicapped parking spaces shall be provided on the ratio of one handicapped parking space per thirty-five (35) required auto parking spaces, and shall meet the following standards:
 - a. The spaces shall be at least twelve feet (12') wide and twenty feet (20') long and shall be open on one side to allow wheelchair access.
 - b. Spaces shall be signed in accordance with *Idaho Code* §49-695.
 - c. Spaces shall be located on the shortest possible accessible circulation route to an accessible entrance to a building.

6. Construction Requirements

- a. Parking areas and access driveways shall be paved with plant mix asphalt concrete or traffic rated concrete unit pavers.
- b. There shall be continuous curbing between parking areas and buildings and along both sides of the approach(es) across the road right-of-way. Curb cuts shall be allowed for driveways, access ways, walkways, and stormwater conveyance.
- c. Where four (4) or more parking spaces are required, each parking space shall be designated by a three inch (3") painted line defining the side of each space for its entire length.
- d. When off-street parking lots abut residential property, the site plan shall include a 50% sight obscuring fence not less than 6 feet in height and a 50% sight-obscuring vegetative screen along the entire boundary that is common to both the residential and parking lot areas.

7. Circulation Requirements

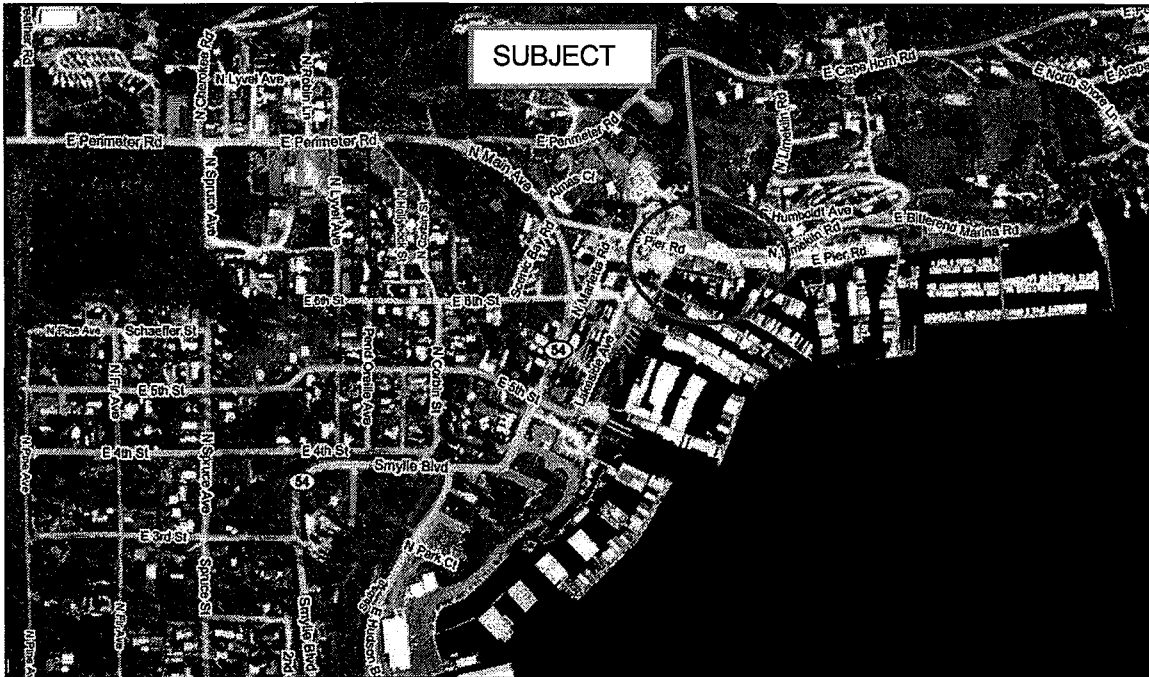
- a. All on-site traffic patterns shall be designated and clearly marked.
 - b. Circulation within an off-street parking lot shall be such that a vehicle shall not have to exit and re-enter the lot in order to reach another parking aisle, and a vehicle shall not exit the parking lot by backing into the street.
 - c. Turn-arounds shall be a minimum of twenty-four feet (24') in width.
8. Parking Lot Lighting - Lighting used to illuminate a parking lot shall be shown on the site plan, and shall be downward directed and shielded to prevent illumination at the property line greater than 0.2 footcandles.

UTILITIES:

Public utilities available and in use at the subject property include telephone and electric power. Domestic water and sewage disposal is provided by the Bayview Water and Sewer District. I conducted an interview with Ms. Linda Williams, spokeswoman for Bayview Water and Sewer District, at the plant site office. Ms. Williams indicated that as of the date of preparation of this report in October of 2009, there is a moratorium in effect, not allowing for any new hookups to the sewer system to be granted. The moratorium went into effect April 17, 2007. This is prior to the Effective Date of this report. According to Ms. Williams, additional sewer and water hookups were available for purchase as of the Effective Date on July 4, 2006.

ACCESS:

Access to the subject is off Pier Road. This roadway effectively splits the two subject parcels in half. The restaurant and marina area are located on the south side of Pier Road, while the parking area (vacant lot with an outbuilding) is located north of Pier Road. Limekiln Road also begins its ascent to the northeast in the far northeast corner of the subject property. Pier Road is a public roadway which is, according to Kootenai County, privately maintained.



HIGHEST AND BEST USE:

Briefly, the Highest and Best Use is that use, at the time of the appraisal, which is most likely to produce the greatest net return to the land and/or building(s) over a given period of time. The use must be *physically possible, financially feasible, maximally productive and legally permissible.*

Legal

The current use of the subject property is a legal use in a Commercial zone.

Physical

The subject topography is generally level throughout the site and the subject certainly has the physical attributes for its current use.

Supply & Demand

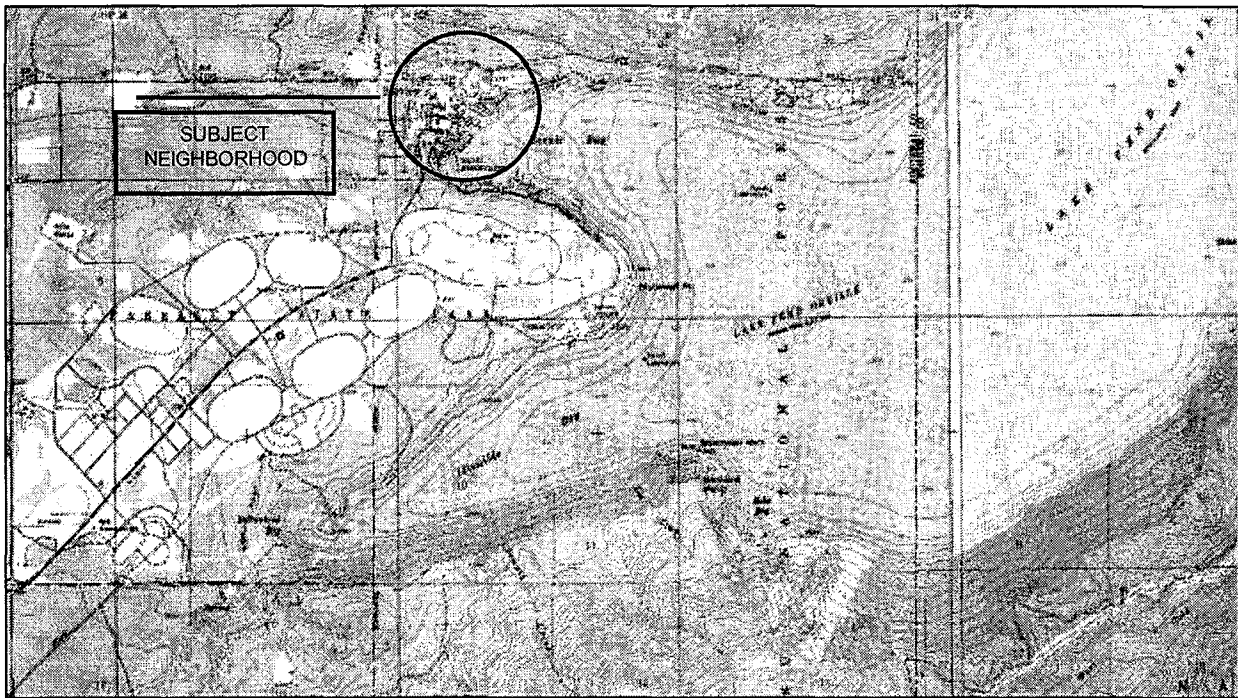
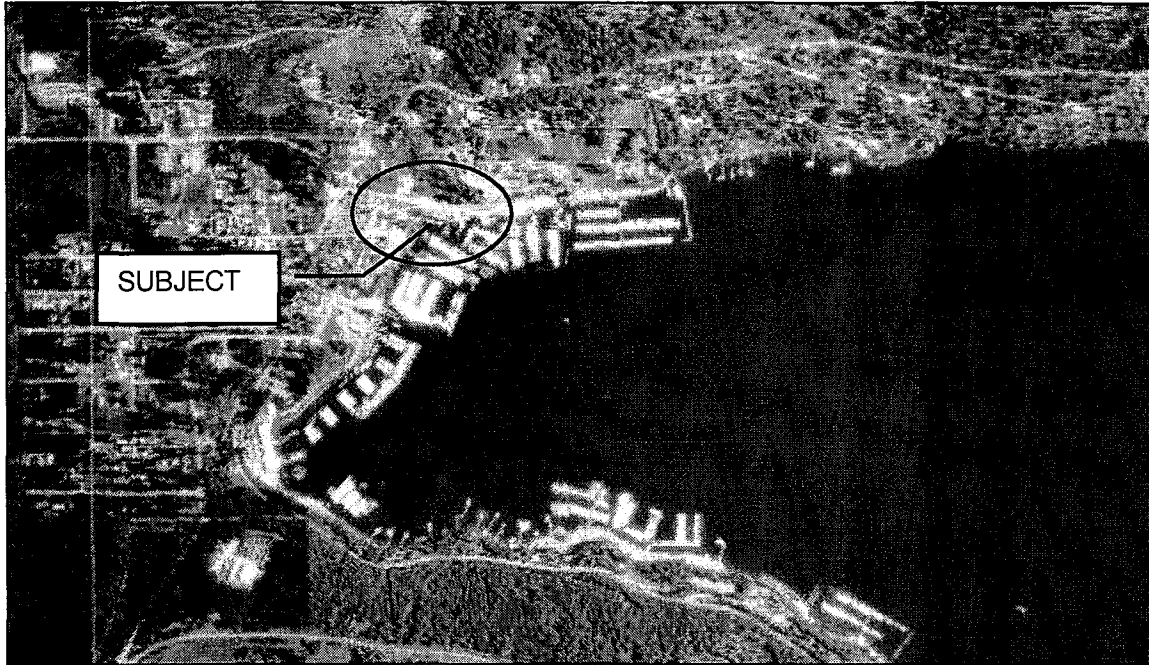
Current market conditions include all the attributes for a demand for waterfront moorage and restaurant facilities.

Feasibility

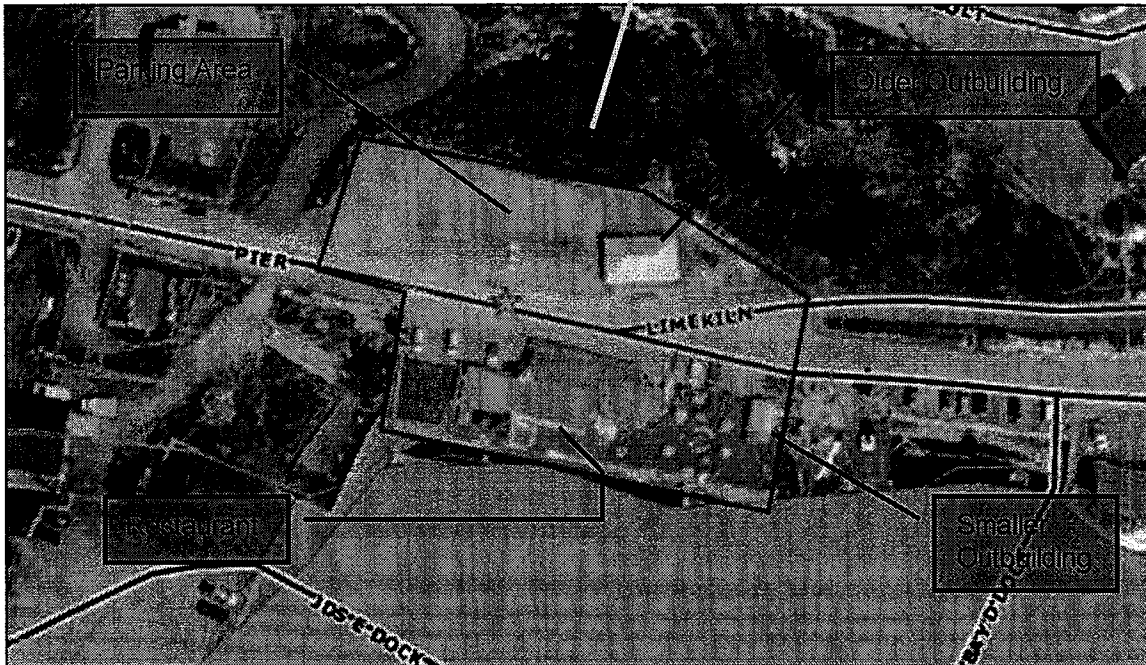
The subject's current use was legally and physically possible and there was demand for it as of the Effective Date of the report. I believe that it is at its highest and best use, as improved.

Due to some questions regarding the physical makeup of the subject site and easement widths pertaining to the roadway which runs through the property, I was not fully able to analyze the Highest and Best Use of the subject site as unimproved, as size is a determinant. That being said we believe that a Possible Highest and Best Use of the subject property could include things like a multi story project for condominiums or a hotel in conjunction with the marina activities or possibly a restaurant in conjunction with residential development on the upper levels. Bayview is nearly totally built up in terms of commercial property and in terms of water front property in close proximity to the center of the city. The subject site has the size and proximity to water, along with favorable enough zoning, that the possibilities for this site if unimproved are many.

AERIAL AND TOPO MAPS



AERIAL MAPS



SITE DESCRIPTION:

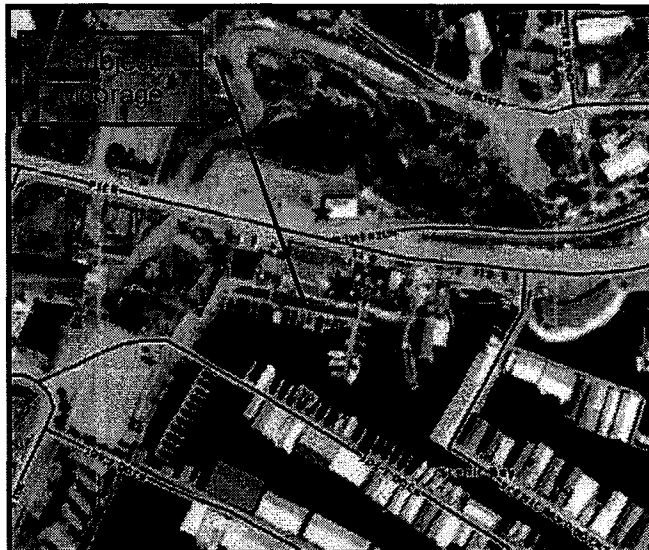
The attached photo library, map layouts, topography maps and aerial photos provide a very good overview of the subject. That overview will be supplemented by the following narrative information.

SUBJECT SITE DESCRIPTION:

According to the Kootenai County Assessor's Office, the subject site is made up of two contiguous tax parcels containing 0.923 acre and approximately 232 feet of frontage on Lake Pend Oreille. The site is mostly level and is slightly irregular in shape though the ratio of frontage to depth is favorable. Pier Road, the roadway which serves as the access road to the subject site, bisects the parcel running west to east. The majority of the improvements lie on the south side of this road, with the majority of the parcel on the north side of the road being utilized as a parking area for restaurant and marina patrons.

The entire site is generally level at street grade and gently slopes down to the water. The shore line has been retained with a combination of concrete and masonry as well as treated timbers to create a bulkhead. The water is fairly deep right up to the edge of the bank during summer pool. The site provides for good views of the lake and mountains, though the view could be very good with a multi story structure.

Bayview is located at the eastern end of Scenic Bay on Lake Pend Oreille and the subject site is located at the very northwestern corner of Scenic Bay. The subject's specific location within Scenic Bay allows for a site which is very protected from the elements. There are two large marinas located to the east of the subject along the shoreline and three located to the south of the subject along the western end of the bay.



JD's Scenic Bay Marina is located both to the east and to the south of the subject and virtually surrounds the subject on the water with docks which extend considerably further out into the water than what the subject docks do. The

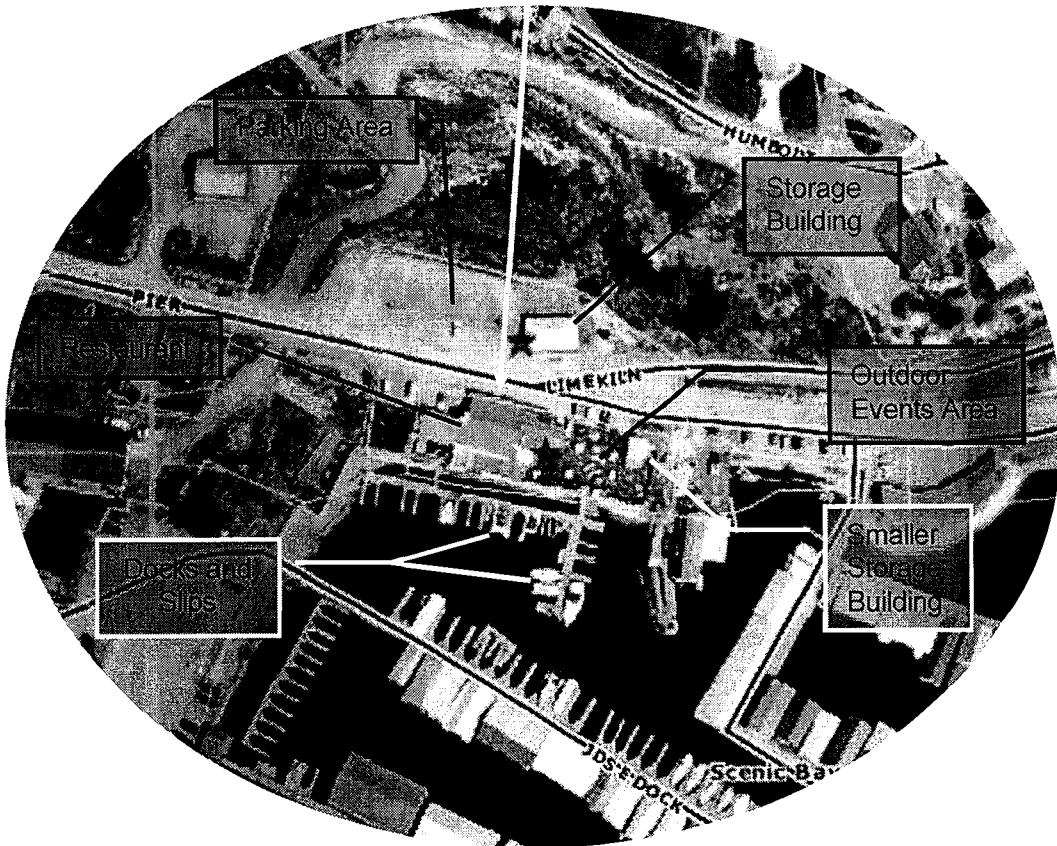
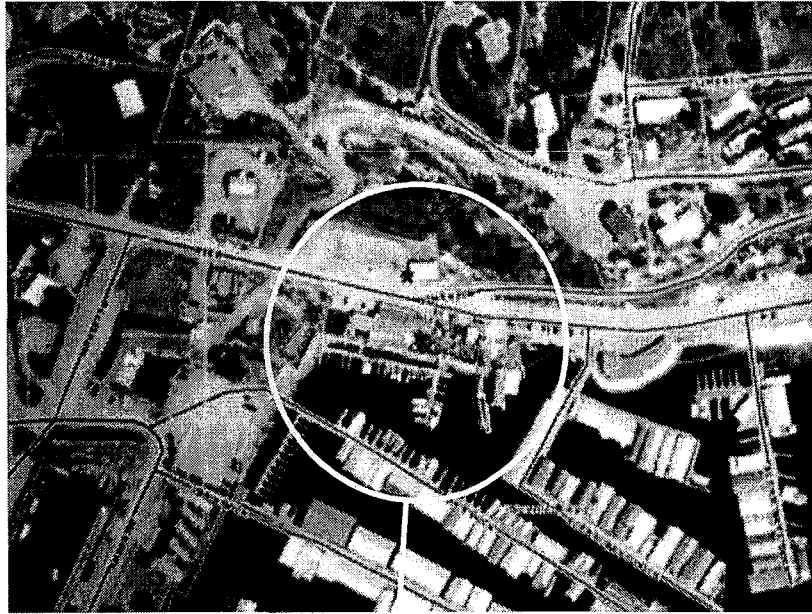
moorage area located on the water is not able to be expanded due to the proximity of the other marinas. This is certainly not looked upon negatively however. The subject docks are the most protected in the bay, as all of the other docks and boat houses in front of them bear the brunt of the elements, which can be quite substantial.

In addition to the fee simple property of the subject, the subject leases submerged land from the State of Idaho for the placement of slips and supporting structures. A copy of that document is attached along with a copy of the encroachment permit which is required for the placement of docks and slips.

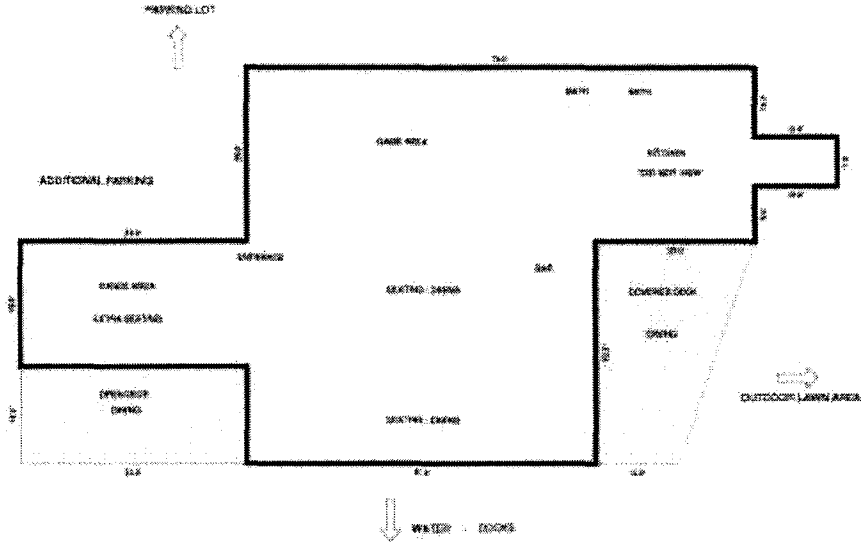
According to Jim Brady of Idaho Department of Lands, only a very small portion of the subject docks are located over State of Idaho property. According to him, the balance of the docks is located over submerged lands that are part of the subject property.

The subject site is centrally located within Bayview, and the parking area is one of the last undeveloped pieces of level commercial land located near the water in the town. The commercial areas surrounding the water are very nearly completely built up. Those sites that are not built up to the east beyond the subject site, or on the opposite side of the bay, are generally very steep. As can be seen on the attached topography map, the mountains immediately surrounding Bayview are very steep. The subject site, with its gentle terrain, ample and adequate frontage on the lake, and availability of city services creates a very desirable combination. Include the moorage area, and this becomes one of the desirable and versatile commercial locations in Bayview. Since the subject is two legal tax parcels, the two sites could be developed together, in conjunction with one another, or separately depending upon the need.

SKETCH/LAYOUTS



SKETCH



Continued

AREA CALCULATIONS SUMMARY			
Code	Description	Net Area	Net Total
0000	1st Floor	4160.0	4160.0
0000	DECK DECK	882.0	
0000	COVERED DECK	882.0	3022.0
Net BUILDING Area		(Rounded)	4160

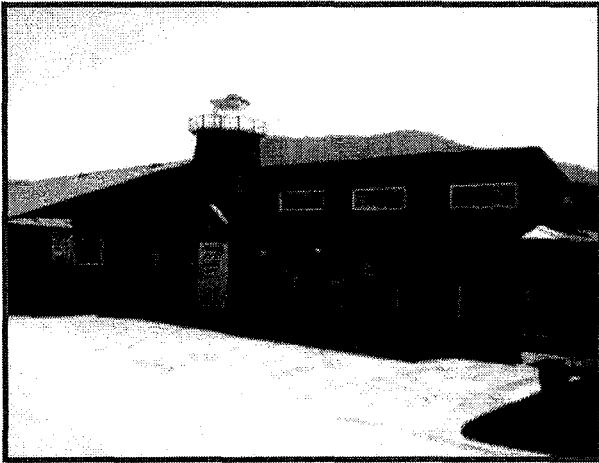
BUILDING AREA BREAKDOWN			
Breakdown		Statistics	
FLOOR	Area	Count	Total
1st Floor	18.0 * 96.0		1728.0
	14.0 * 52.0		728.0
	7.0 * 12.0		84.0
	23.0 * 74.0		1702.0
4 Items		(Rounded)	4160

Improvements were not measured by the appraiser. Building size is taken from information supplied by the Kootenai County Assessor's Office and from a visual observation of the subject site.

DESCRIPTION OF IMPROVEMENTS:

PRIMARY BUILDING

The primary frame constructed building contains approximately 4,160 square feet on one level. It has a pair of attached decks, one covered and one open containing approximately 500 square feet each. The exterior of the building is covered in wood siding and the roof coverings are enameled steel. The building is has been utilized as a restaurant and bar facility. Interior room divisions are separated into a couple of dining areas, a dance room, an area which houses game equipment such as a pool table, pinball, machine, etc., a bar, kitchen, and men's and women's restrooms.



Some of the above noted areas were visually observed and some were not. Most notably not inspected was the kitchen facility. It is estimated to be of similar quality as the balance of the improvement and is estimated to contain real property fixtures which would be similar to other restaurant type facilities. Wall coverings inside the dwelling are a mixture of wood and drywall or paneling, with wood being

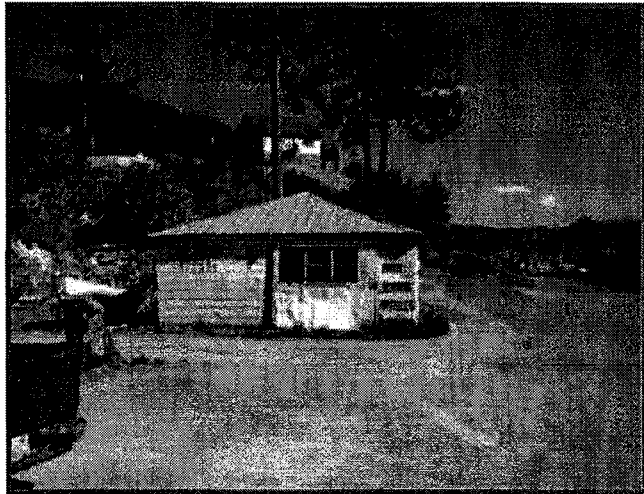
the most common. Ceiling coverings are the same. One can easily see from both the interior and exterior appearance of the building that it has been added onto several times over the years. The building was originally constructed in 1983, but with the additions and updating, the building has an estimated Effective Age of 15 years.

Floor coverings are a combination of carpet and hard surface coverings including laminate/vinyl/tile and the heating system appeared to be a combination of both forced warm air and electric zonal heaters. The restaurant is set up to seat approximately 100+/- people inside with an additional 20 seats at the bar and another 35-40 seats available on exterior decks.

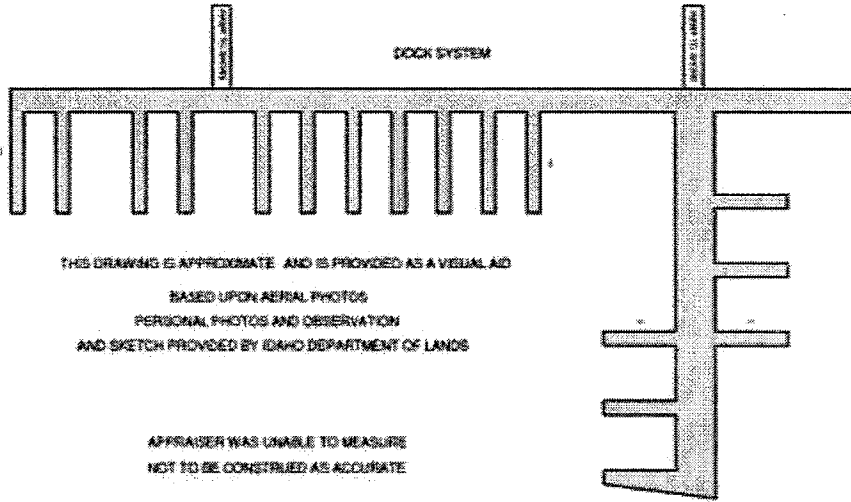


There is a large grass covered area on the east side of the building which appears to be an outdoor event type space. There is a fire pit, horseshoe pits, a barbecue, etc. There are also two storage buildings associated with the property. One is located in the corner of this lawn area. According to the assessor, it is a wood framed storage shed measuring approximately 12' x 14'. It appeared to

be in average condition, though the interior was not inspected. The second building is located on the parking lot parcel, is approximately 24' x 30' according to the assessor, and appeared to be near the end of its economic and physical life.



DOCKS AND WATERFRONT IMPROVEMENTS



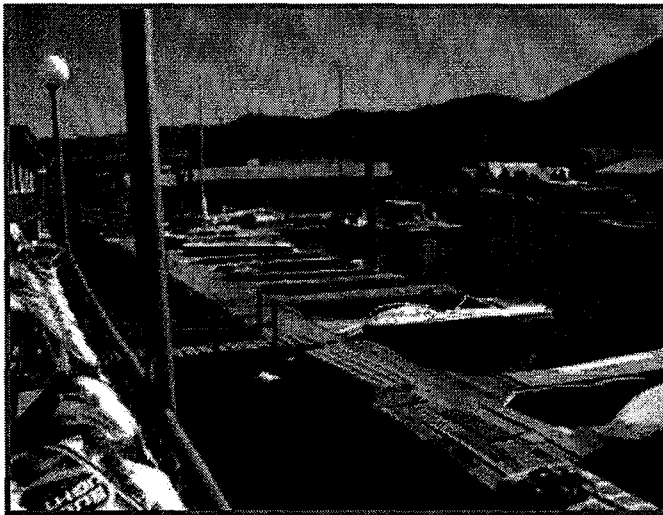
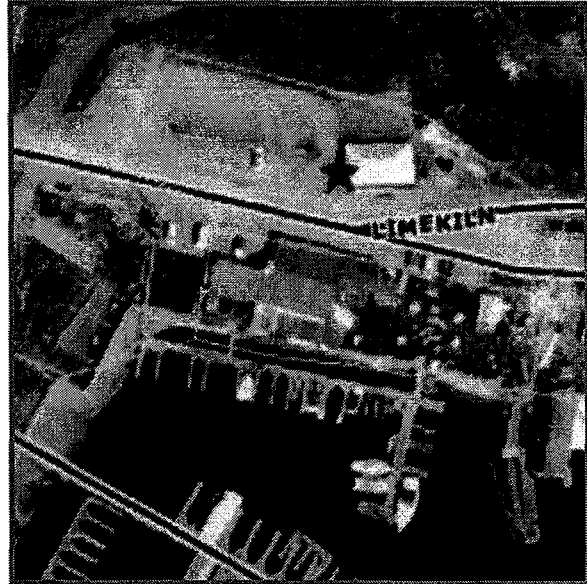
Comments

AREA CALCULATIONS SUMMARY			
Code	Description	Net Size	Net Totals
000	DOCKS	2474.3	
	WATER TO DOCKS	72.0	
	WATER TO DOCKS	72.0	2618.3

AREA BREAKDOWN	
Breakdown	Subtotal

BOAT SLIPS:

According to the Kootenai County Assessor's Office, the subject had approximately 24 boat slips available for moorage in 2006. According to Karletta Berry, all of the slips were usable and in average or better condition as of the Effective Date of this report in July of 2006. According to Ms. Berry, the majority of the slips were rented out on an annual basis, and the rest of the slips were available for restaurant patrons to use while dining, though it is unknown what the exact number of slips rented out annually was. I will be utilizing 22 slips as the number of rentable slips during the Income Approach portion later in the report with two left for restaurant moorage.



The moorage and docking system appeared to be constructed mostly of cedar logs, covered with cedar decking. It appeared to be a floating type system. Over the course of a couple of weeks of site visits, the lake level dropped approximately 4 feet, causing a portion of the docks to rest on the ground near the west side of the property where the water is the shallowest. The lake is typically

raised each year around April/May and lowered in October/November. There is anywhere from 7-11 feet of fluctuation in lake height. Portions of the floatation under the docks appeared to be uncontained Styrofoam, which is not in compliance with government regulations. All Styrofoam type products must be sealed in water tight containers for EPA approval. Effective age, based on 2006 descriptions, is estimated at 10 years with approximately 10 years remaining economic life.

The above slips range in size from 16 to 22+ feet with a couple of docks being removed on one end allowing for a boat that appeared to be in the 30' range. The average boat size in 2006 on Lake Pend Oreille was estimated from 20' to 26' in length with the most popular slips being the 20 foot and 24 foot slips. There is electrical power located in a couple of locations on the docks.

SUBJECT PHOTOS



DINING AREA



BAR AREA



VIEW FROM GAME AREA WITH BAR ON LEFT



DANCE ROOM WITH ADDITIONAL SEATING



BAR WITH GAME AREA ON LEFT, DANCE AREA BEHIND PHOTOGRAPHER



BAR ON RIGHT AND GAME AREA TOWARD THE LEFT



VIEW FROM GAME AREA TOWARD DANCE ROOM



DINING AREA WITH COVERED OUTSIDE DINING BEYOND SLIDING GLASS DOORS AT THE FAR END OF THE PICTURE



DINING AREA



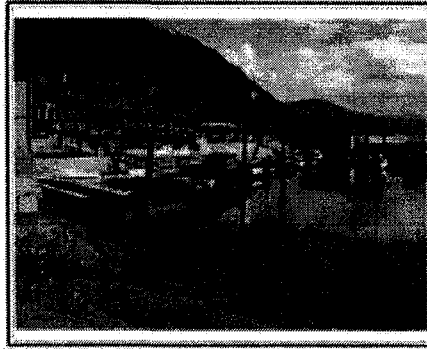
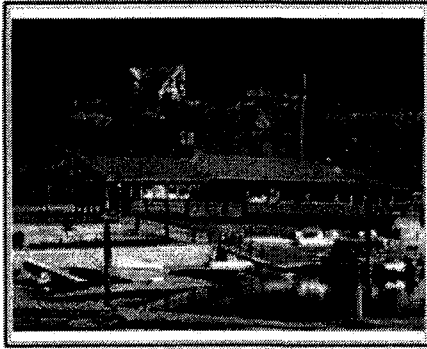
MENS RESTROOM



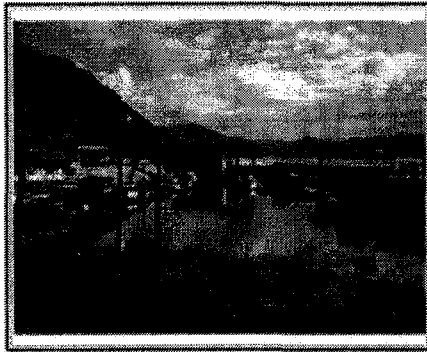
COVERED OUTDOOR SEATING / DINING ON EAST END OF BUILDING



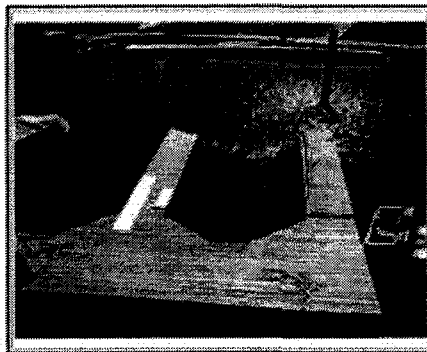
SAME AS PREVIOUS PHOTO

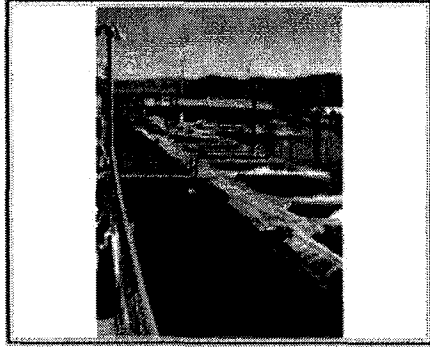


SOUTH SIDE OF THE RESTAURANT FROM JOE DOCKS

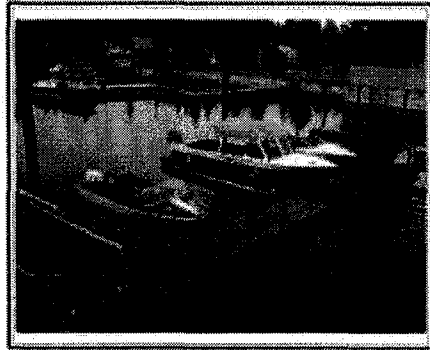
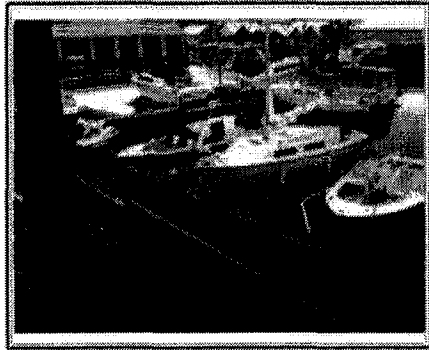


OPEN DECK AREA ON SOUTH SIDE OF RESTAURANT



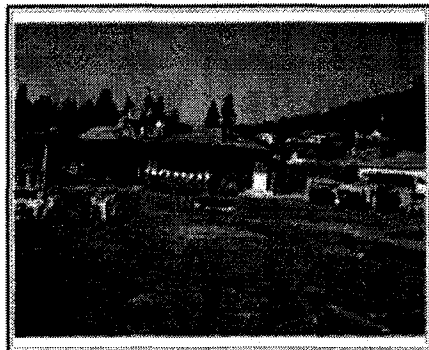


SUBJECT DOCKS LOOKING EAST



DOCKS FROM THE EAST END COVERED EATING AREA

SAME



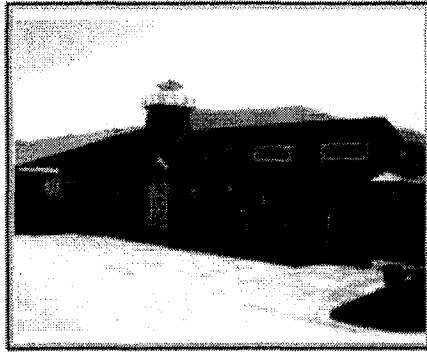
VIEW FROM THE SOUTH EAST PROPERTY CORNER



EAST SIDE OF BUILDING



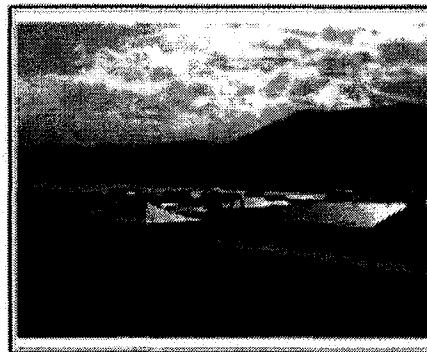
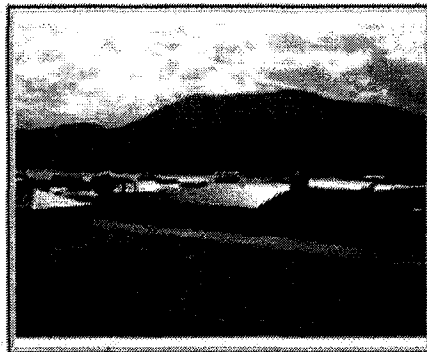
LAWN AREA ON EAST SIDE OF BUILDING



FRONT VIEW OF RESTAURANT



VIEW DOWN FROM THE HILL JUST ABOVE THE PARKING AREA





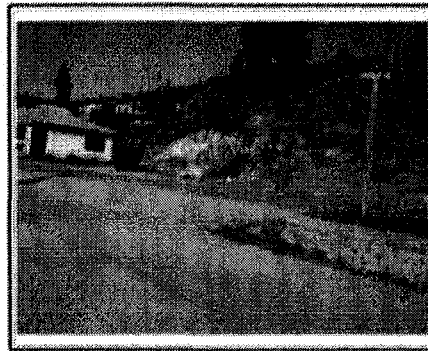
PARKING AREA



OLD STORAGE BUILDING ON PARKING LOT SITE



BANK LOOKING WEST



VIEW OF RESTAURANT TOWARD THE WEST



BOAT AND RESTAURANT FROM PIER ROAD

APPROACHES TO VALUE

In the appraisal process, there are three recognized approaches to Market Value. Each approach is based on data pertinent to that method of valuation and produces an independent estimate of Market Value. They include the Cost Approach, the Market Data Approach and the Income Approach.

Cost Approach: The first step in the Cost Approach is the estimation of the land value. The estimate of land value involves locating sales of similar sites and comparing these sites with the subject property. After the individual sale prices are adjusted for differences, which are found to affect value, the range of adjusted comparable values indicates the value of the subject land. The second step in the Cost Approach is the calculation of the replacement cost new of the subject improvements, utilizing cost manuals, architects', builders' and contractors' figures, if available. Due to the fact that the estimate produces a new cost, deductions must be made for the loss in utility the improvements have suffered, if any, due to physical deterioration and functional and economic obsolescence. After the cost is reduced to account for all forms of depreciation, the depreciated value of the improvements is added to the land value. The resulting figure is the estimated Market Value of the subject based on the Cost Approach.

Market Data Approach: In this method of valuation, also known as the Direct Comparison Approach, the market is investigated and sales of similarly improved properties are analyzed and compared with the subject property. The analysis involves the extraction of common units of comparison such as the price per square foot of improvement area, and the price per unit of other applicable elements. After all of the adjustments are made to the comparable properties, the range of adjusted values indicates the Market Value of the subject property based on the Market Data Approach.

Income Approach: The net rental income after deductions for expenses is capitalized into a value estimate. The resulting sum is the present value of the net income produced by the property payable over a protracted period of time. The resulting figure is the estimated Market Value of the subject based on the Income Approach.

VALUATION

For the purposes of valuation, the subject land will be appraised utilizing the Direct Comparison Method of the Market Approach. Factors of comparison include but are not limited to location, access, views, shape, frontage quality topography, etc. Comparisons are made for variation between the subject and the comparable sales for the value influencing characteristics as demonstrated in the local market.

Overall examination and analysis of the waterfront land market over the last several years on the Pend Oreille River and Lake Pend form the majority of the valuation portion of the report. After adjustment for market appreciation, comparisons between the most applicable market data and the subject property result in a most probable value indication. The appraiser weighs these comparisons and all other data collected to arrive at an estimate of the Market Value for the subject property.

Many properties have been researched and considered for the purpose of comparison to the subject property. Those considered the best indicators of the value of the subject parcel are the comparables utilized for direct comparison; other market data is presented for general market perspective. Each of the direct comparisons has been observed by the appraiser. Market research includes the following sources: Selkirk Multiple Listing Service, serving Bonner and Boundary Counties, Bonner County Assessor's Office, local real estate brokers, appraisers, developers and other knowledgeable persons.

The primary search criteria for the Comparables were larger size of water frontage (front feet), recent sales and smaller sites (in terms of acreage).

LAND COMPARABLE #1

LOCATION: Lakeshore Ave, Dover, ID
SIZE: 1.9 Acres
FRONT FT: 350 FF

SELLER: Dover Bay
BUYER: N/A

SALE DATE: 09/19/2006
PRICE: \$1,300,000

MARKETING: 181 Days
TERMS: Conventional
UNIT PRICE: \$3,714/FF



PARCEL#: Lots 8 & 9 Sandy Beach

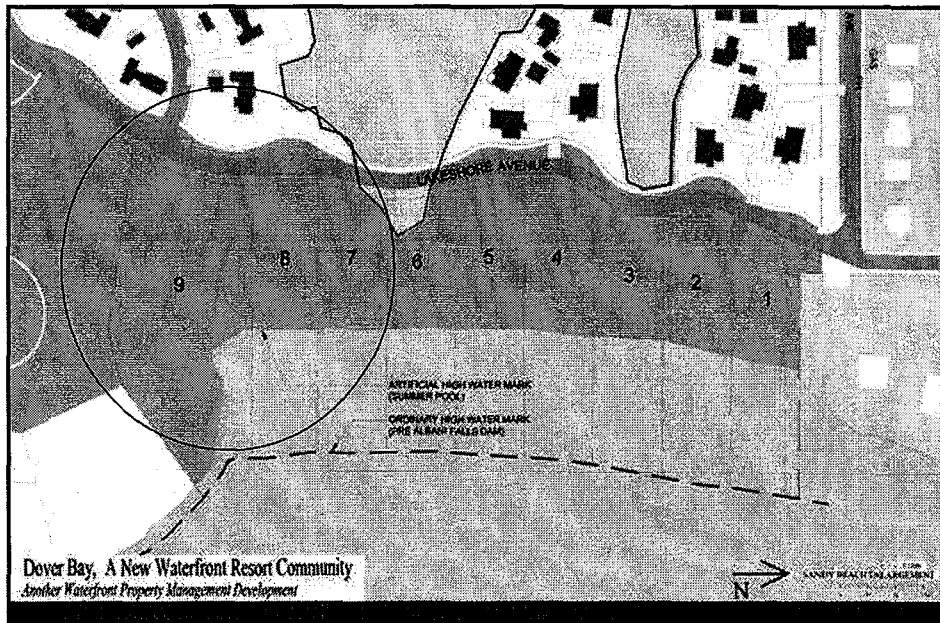
ZONING: POD (Planned Unit Development)
ACCESS: Paved - Public Road
UTILITIES: On-Site
TERRAIN: Sloping/Level, Waterfront on Pend Oreille River

HIGHEST AND BEST USE: Waterfront home site or sites

CONTRIBUTORY VALUE OF IMPROVEMENTS: None

LAND DESCRIPTION: This is one of the premier lots in the new Dover Point Project which is located approximately three miles west of Sandpoint, south of US Highway 2. Property enjoys views down the Pend Oreille as well as access to the extensive common areas within the project, including the nearby proposed marina, parks and hiking trails. The purchase of two lots allows the owners the freedom to build a guest house without having to deal with zoning requirements. Waterfrontage of Lot 8 is sandy beach and Lot 9 is generally rock outcroppings. Agent indicated that this was a positive (rock outcroppings) as it provides for extreme privacy and excellent views.
(see following page).





LAND COMPARABLE #2

LOCATION: Shannon Lane, Dover, ID
SIZE: 1.25 Acres
FRONT FT: 246 FF

SELLER: Dover Bay
BUYER: N/A

SALE DATE: 10/2006
PRICE: \$1,200,000

MARKETING: 191 days
TERMS: Conventional
UNIT PRICE: \$4,878/FF



PARCEL#: Lot 6 in Blk. 8 Dover Bay

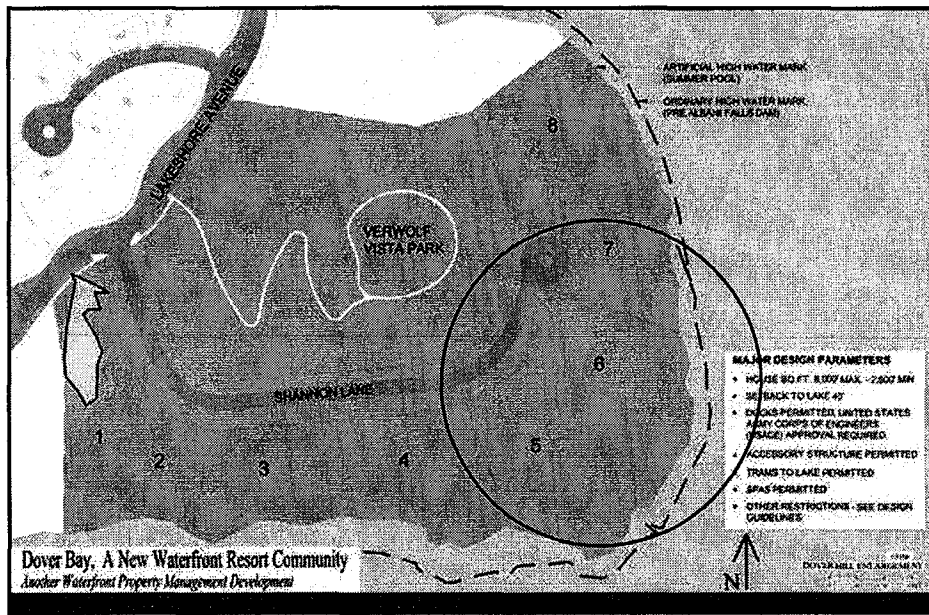
ZONING: PUD (Planned Unit Development)
ACCESS: Paved - Public Road
UTILITIES: On-Site
TERRAIN: Sloping/Level, Waterfront on Pend Oreille River

HIGHEST AND BEST USE: Waterfront home site

CONTRIBUTORY VALUE OF IMPROVEMENTS: None

LAND DESCRIPTION: This is one of the premier view lots in the new Dover Point Project which located approximately three miles west of Sandpoint, south of US Highway 2. This property enjoys the best views of the river, mountains, etc., in this new project. The frontage is most steeply and has rocky frontage area. Ownership includes access to the extensive common areas within the project, including the nearby proposed marina, parks and hiking trails.





LAND COMPARABLE #3

LOCATION: Lakeshore Drive, Sagle, ID
SIZE: 4.18 Acres
FRONT FT: 200 FF

SELLER: Shoong
BUYER: N/A

SALE DATE: 09/2006
PRICE: \$1,650,000

MARKETING: 99 Days
TERMS: Conventional
UNIT PRICE: \$8,250/FF

PARCEL#: 56N2W034270

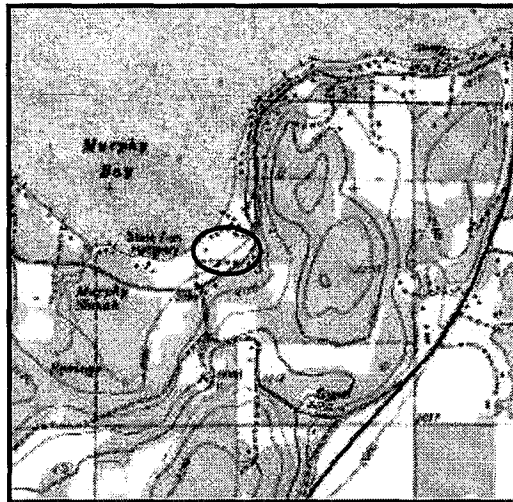


ZONING: Suburban
ACCESS: Public Paved Road
UTILITIES: On Site
TERRAIN: Sloping, Level, Waterfront on Pend Oreille River

HIGHEST AND BEST USE: Waterfront home sites

CONTRIBUTORY VALUE OF IMPROVEMENTS: None, mature farm house makes no contribution

LAND DESCRIPTION: Located on Lakeshore Drive and west of US Highway 95. Property has gentle terrain with approximately 200 feet on the Pend Oreille River. The property included a dwelling, which is not considered the Highest and Best Use of the property. This property sold in December 2002 for \$576,000.



LAND COMPARABLE #4

LOCATION: Pierce Lane, Sagle, ID
SIZE: 4.75 Acres
FRONT FT: 318 FF

SELLER: Leedy
BUYER: Stonehedge Partners LLC

SALE DATE: 07/2004
PRICE: \$830,000

MARKETING: 277 Days
TERMS: Cash to Seller
UNIT PRICE: \$2,610/FF; \$174,737/Acre



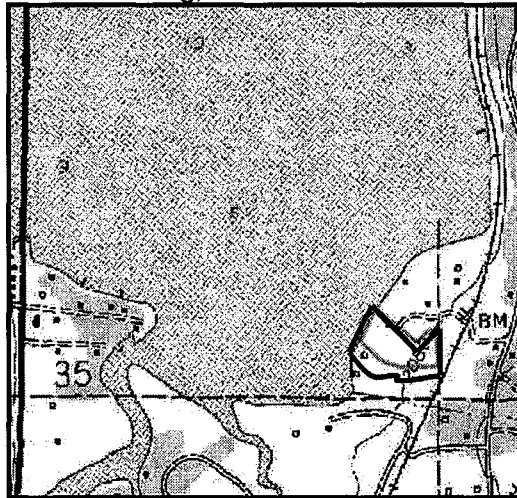
PARCEL#: RP57N02W359500

ZONING: Suburban
ACCESS: Gravel, Private Road
UTILITIES: On Site
TERRAIN: Sloping to Level, Waterfront on Pend Oreille River

HIGHEST AND BEST USE: Waterfront home site

CONTRIBUTORY VALUE OF IMPROVEMENTS: None

LAND DESCRIPTION: Located off Bottle Bay Road east of US Highway 95 with access off a private lane. The sale included a dwelling, which is not considered the Highest and Best Use of the property.



LAND COMPARABLE #5

LOCATION: Pierce Lane, Sagle, ID
SIZE: 5.51 Acres
FRONT FT: 200 FF

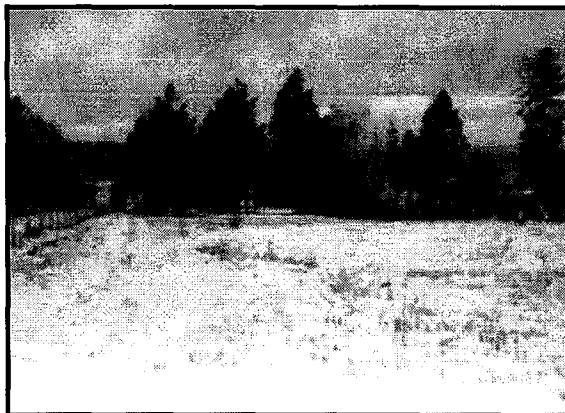
SELLER: La Moreaux Trust
BUYER: N/A

SALE DATE: 12/2004
PRICE: \$675,000

MARKETING: 108 Days
TERMS: Owner Contract
UNIT PRICE: \$3,375/FF

PARCEL#: RP57N02W359901

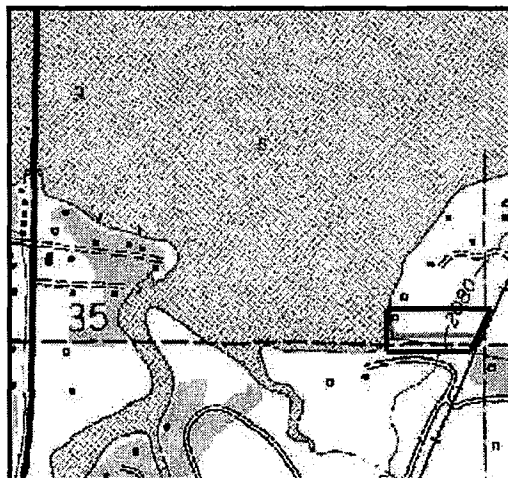
ZONING: Suburban
ACCESS: Gravel, Private Road
UTILITIES: On Site
TERRAIN: Sloping, Level, Waterfront on Pend Oreille River



HIGHEST AND BEST USE: Waterfront home site

CONTRIBUTORY VALUE OF IMPROVEMENTS: None

LAND DESCRIPTION: Located off Bottle Bay Road east of US Highway 95 with access off a private lane.



LAND COMPARABLE #6

LOCATION: Cape Horn Dr. Bayview, ID
SIZE: 1.13 Acres
FRONT FT: 187 FF

SELLER: Nail
BUYER: White

SALE DATE: 06/2007
PRICE: \$750,000 with improvements
\$720,000 without improvements



MARKETING: 144 Days
TERMS: Owner Finance
UNIT PRICE: \$3,850/FF; \$637,168/Acre

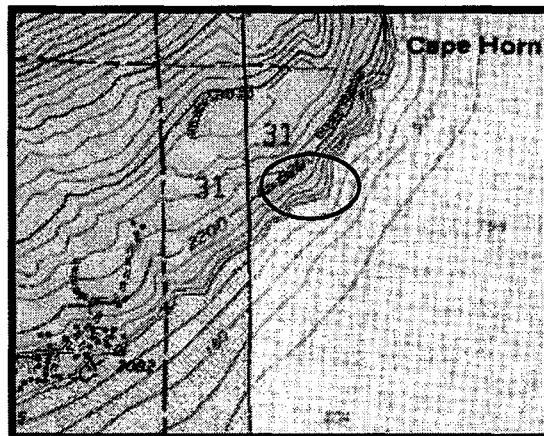
PARCEL#: RP0004400a0160A, 31-54N-1W
Block A, Lot 16 Cape Horn Estates

ZONING: Residential
ACCESS: Private Gravel Road
UTILITIES: On Site/Available
TERRAIN: Sloping to steep, Waterfront on Lake Pend Oreille

HIGHEST AND BEST USE: Waterfront home site

CONTRIBUTORY VALUE OF IMPROVEMENTS: \$30,000

LAND DESCRIPTION: Located off Cape Horn Road in Bayview. This is one of the larger lots in Cape Horn Estates Subdivision. Property is generally sloping to steep and provides for good views of the lake. Waterfront area is generally rocky and water is fairly deep at shore line. An average to good quality dock system was included in the sales price.



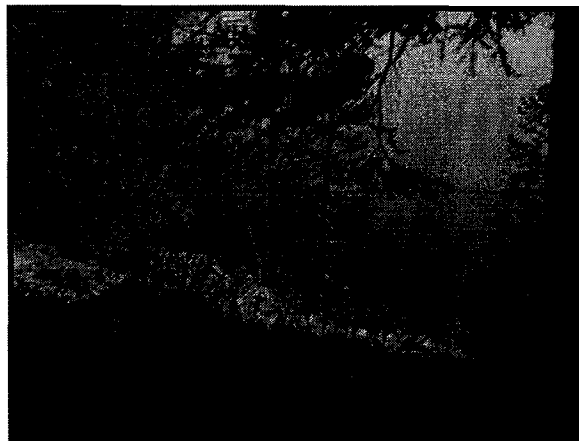
LAND COMPARABLE #7

LOCATION: Cape Horn Dr., Bayview, ID
SIZE: 0.50 Acre
FRONT FT: 127 FF

SELLER: U.S.A.
BUYER: Kutrowski

SALE DATE: 04/2006
PRICE: \$325,000

MARKETING: 153 Days
TERMS: Conventional
UNIT PRICE: \$2,559/FF



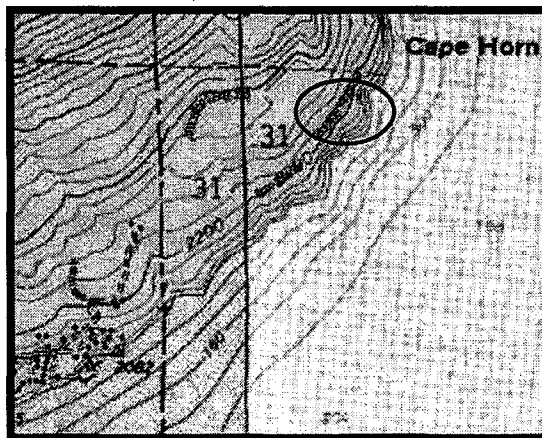
PARCEL#: RP0004400A0280A, Section 31-54N-1W
Block A, Lot 28 Cape Horn Estates

ZONING: Residential
ACCESS: Private Gravel Road
UTILITIES: On-site/Available
TERRAIN: Benched, Level, Waterfront on Pend Oreille River

HIGHEST AND BEST USE: Waterfront home site

CONTRIBUTORY VALUE OF IMPROVEMENTS: None

LAND DESCRIPTION: Located off Cape Horn Road in Bayview. Property is generally sloping to steep and provides for good views of the lake. This site is one of the steeper sites in the subdivision and would be somewhat challenging to build on. Waterfront area is generally rocky and water is fairly deep at shore line



LAND COMPARABLE #8

LOCATION: North Shore Lane, Bayview,
ID
SIZE: 0.35 Acre
FRONT FT: 75 FF

SELLER: Moore
BUYER: Ames

SALE DATE: 09/2005
PRICE: \$295,000

MARKETING: 330 Days
TERMS: Conventional loan
UNIT PRICE: \$3,933/FF



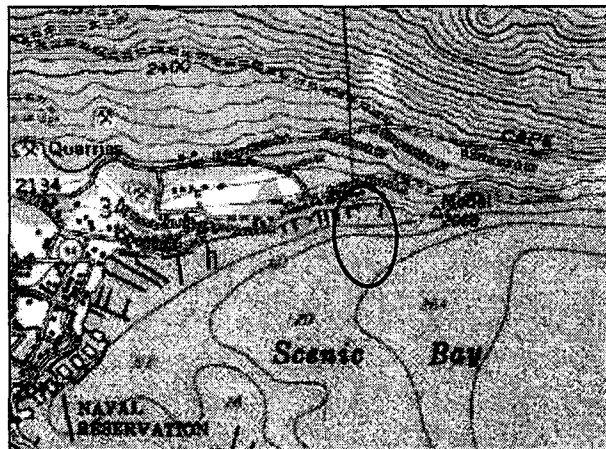
PARCEL#: B00000354110, 35-54N-2W
TAX#5342

ZONING: Restricted Residential
ACCESS: Gravel, Private Road
UTILITIES: On Site/Available
TERRAIN: Sloping, Waterfront on Lake Pend Oreille

HIGHEST AND BEST USE: Waterfront home site

CONTRIBUTORY VALUE OF IMPROVEMENTS: None

LAND DESCRIPTION: Located off North Shore Lane in Bayview. Lot is sloping, but not too steep. Site has a driveway easement on it which effectively cuts the site in half. This limits the size of the improvement that could be put on the site. The improvements seen in the above photo are on a piece of property located next door and are not considered in this valuation.



LAND COMPARABLE #9

LOCATION: North Shore Lane, Bayview,
ID

SIZE: 0.44 Acre

FRONT FT: 100 FF

SELLER: Moore

BUYER: Alfonso

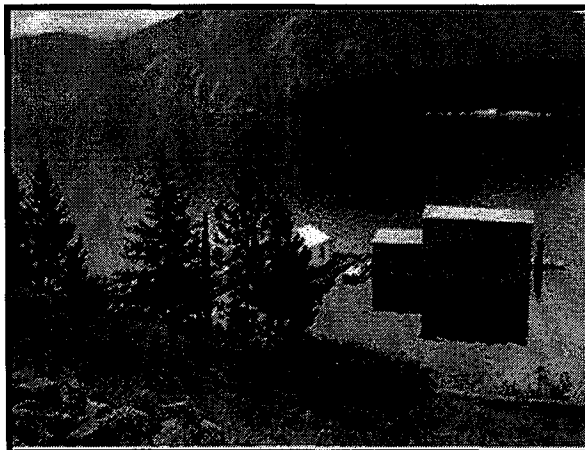
SALE DATE: 07/2005

PRICE: \$306,000

MARKETING: 284 Days

TERMS: Cash

UNIT PRICE: \$3,060/FF



PARCEL#: B199900D009A, 35-54N-2W
E1/2 OF Lot 8, Lot 9, BL 1 Daniels Pend Oreille Home Sites

ZONING: Restricted Residential

ACCESS: Gravel, Private Road

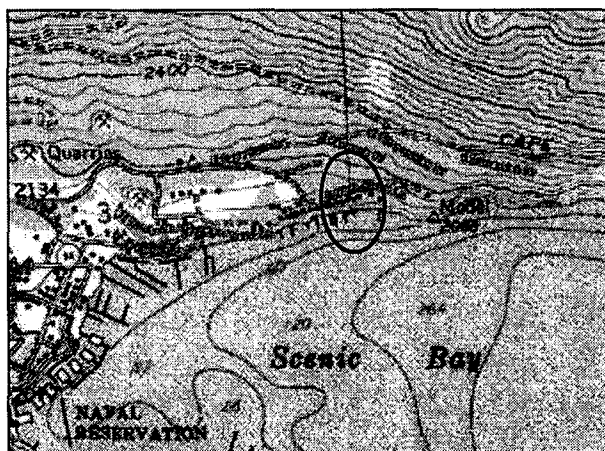
UTILITIES: On Site/Available

TERRAIN: Sloping, Waterfront on Lake Pend Oreille

HIGHEST AND BEST USE: Waterfront home site

CONTRIBUTORY VALUE OF IMPROVEMENTS: None

LAND DESCRIPTION: Located off North Shore Lane in Bayview. Lot is sloping, but not too steep. Site has a driveway easement on it near the upper part of the site. According to the listing agent, the boat garage that is seen above contributed little to no value as it was in very poor condition.



LAND COMPARABLE #10

LOCATION: NNA Gages Road, Sagle, ID
SIZE: 0.84 Acre
FRONT FT: 180 FF

SELLER: Antonsen
BUYER: Hatch

SALE DATE: 10/2006
PRICE: \$550,000

MARKETING: 103 Days
TERMS: Owner Contract
UNIT PRICE: \$3,056/FF



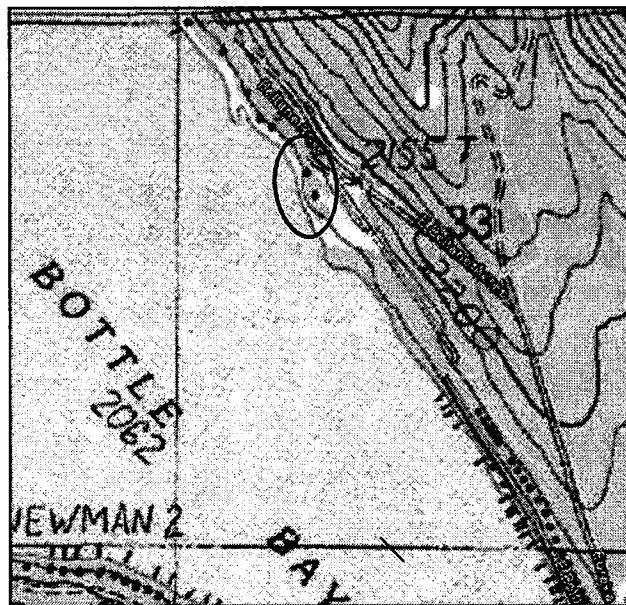
PARCEL#: RP005340020090A 33-57N-1W, Bel Tane Acres Blk 2 lot 9

ZONING: Res
ACCESS: Gravel, Private Road
UTILITIES: Available
TERRAIN: Sloping to steep, Waterfront on Lake Pend Oreille

HIGHEST AND BEST USE: Waterfront home site

CONTRIBUTORY VALUE OF IMPROVEMENTS: None

LAND DESCRIPTION: Located in the Bottle Bay community off of east bottle bay road. Very difficult winter access. Road is rough, but frontage is nice and most lots in the neighborhood are around an acre.



LAND COMPARABLES

Market conditions indicate the application of time adjustments for waterfront properties. The supporting data for the time adjustments applied in this valuation is included in the previous Market Condition Section.

In comparing each market indication directly to the subject, the subject represents the base or 100% level. If a market indication is inferior overall to the subject, it represents a relationship to the subject of less than 100% and is processed by division so that the subject remains at base level (100%). As an example, Comparable 2 is 15% superior to the subject at \$4,878 per front foot or 115% of the base or subject level. The resulting indication of value of the subject's land is arrived at as follows: \$4,878 per front foot divided by 1.15 = \$4,242 per front foot.

	Sale #1	Sale #2	Sale #3	Sale #4	Sale #5	Sale #6	Sale #7	Sale #8	Sale #9	Sale #10
	Sep-06	Oct-06	Sep-06	Jul-04	Dec-04	Jun-07	Apr-06	Sep-05	Jul-05	Oct-06
Location:	Lakeshore Dr.	Shannon Dr.	Lakeshore Dr.	Pierce Lane	Pierce Lane	Cape Horn Dr	Cape Horn	North Shore Ln	North Shore Ln	Gages Rd
Price:	\$1,300,000	\$1,200,000	\$1,650,000	\$830,000	\$675,000	\$750,000	\$325,000	\$295,000	\$306,000	\$550,000
Improvement Allocation:	\$0	\$0	\$0	\$0	\$0	\$30,000	\$0	\$0	\$0	\$0
Land Allocation:	\$1,300,000	\$1,200,000	\$1,650,000	\$830,000	\$675,000	\$720,000	\$325,000	\$295,000	\$306,000	\$550,000
Water Frontage	350	246	200	318	200	187	127	75	100	180
Acres:	1.90	1.25	4.18	4.75	5.51	1.13	0.50	0.35	0.44	0.84
Time Adjustment:	0.00	0.00	0.00	0.77	0.52	-0.10	0.00	0.22	0.36	0.00
Adjusted price:	\$1,300,000	\$1,200,000	\$1,650,000	\$1,469,100	\$1,026,000	\$648,000	\$325,000	\$359,900	\$416,160	\$550,000
\$ Per Acre:	\$684,211	\$960,000	\$394,737	\$309,284	\$186,207	\$573,451	\$650,000	\$1,028,286	\$945,818	\$654,762
\$ Per FF:	\$3,714	\$4,878	\$8,250	\$4,620	\$5,130	\$3,465	\$2,559	\$4,799	\$4,162	\$3,056
Relationship of Market Indicators to Subject:										
Location:	15%	15%	15%	5%	5%	0%	0%	0%	0%	0%
Waterfront Quality:	-5%	-10%	20%	0%	0%	-10%	-20%	0%	0%	0%
Appeal to Market:	10%	10%	15%	0%	0%	0%	-10%	0%	0%	-10%
Shape/Access:	0%	0%	0%	0%	5%	0%	0%	-15%	-15%	-10%
Size:	0%	0%	5%	5%	5%	0%	0%	20%	15%	0%
Topography/View:	0%	0%	5%	0%	0%	-10%	-15%	0%	0%	-5%
Utilities:	0%	0%	0%	0%	0%	0%	0%	0%	0%	-5%
Total Adjustment:	20%	15%	60%	10%	15%	-20%	-45%	5%	0%	-30%
Indicated Value \$/Acre	\$570,175	\$834,783	\$246,711	\$281,167	\$161,919	\$716,814	\$1,181,818	\$979,320	\$945,818	\$935,374
Indicated Value \$/FF.	\$3,095	\$4,242	\$5,156	\$4,200	\$4,461	\$4,332	\$4,653	\$4,570	\$4,162	\$4,365

ANALYSIS OF LAND SALES – DIRECT COMPARISON

In the above sales grid individual comparisons is made between several of the comparable properties and the subject. Comparisons include, but are not limited to, characteristics such as property size including overall parcel size, useable land area and frontage width; frontage quality including terrain with a defined river bank verses marshy frontage; accessibility, availability of utilities, primarily sewage disposal; topography of the land and available views; and perception of developmental potential and overall market appeal.

Adjustments are made for variation between the subject and the comparable sales. Overall examination and analysis of the waterfront land market over the last several years, along with comparison to specific land sales is considered reflective of the market and forms the primary basis for valuing the subject property. The comparable sales, after being adjusted for differences, result in a suggested value. The appraiser then weighs these comparisons and all other data collected to arrive at an estimate of value for the land. Adjustments for time are made prior to the other adjustments.

The Comparable Sales discussed below have just been shown on the previous pages. Comparables 1 and 2 are from the Dover Bay project. The Dover Project is located approximately three miles west of Sandpoint, south of US Highway 2. Both these sales enjoy better than typical views down the Pend Oreille as well as access to the extensive common areas within the project, including the mostly proposed nearby marina, parks and hiking trails. These parcels are superior in terms of market appeal as well as location.

Sale 3 is a sale of a property of 200 front feet. Located on Lakeshore Drive, west of US Highway 95 and has very gentle terrain and is part cleared and part wooded. The property included a dwelling, which did not add value to the property. This property sold in December 2002 for \$576,000 (current Sale amount \$1,650,000).

Sale 4 is a sale property that contains 318 front feet and Sale 5 contains 200 front feet. They are both located on the lake in an area of somewhat shallow water which necessitates using a longer dock system. Views were very open and desirable. They are both located off Bottle Bay Road, east of US Highway 95, with access off a private lanes.

Sale 6 and Sale 7 are located in Bayview in a small subdivision known as Cape Horn Estates. Both have more than 100 feet of frontage. The terrain is generally fairly steep, especially on Sale 7. The water frontage is rocky and somewhat unforgiving.

Sales 8 and 9 are located next door to one another in Bayview. The property terrain is sloping, but not nearly as steep as Sales 6 and 7. The area near the water levels out and is quite desirable. These properties both have an easement for a neighboring driveway which runs through the property and effectively makes the lots smaller reducing the size of dwelling which could be built. It has more effect on Sale 8 than on Sale 9.

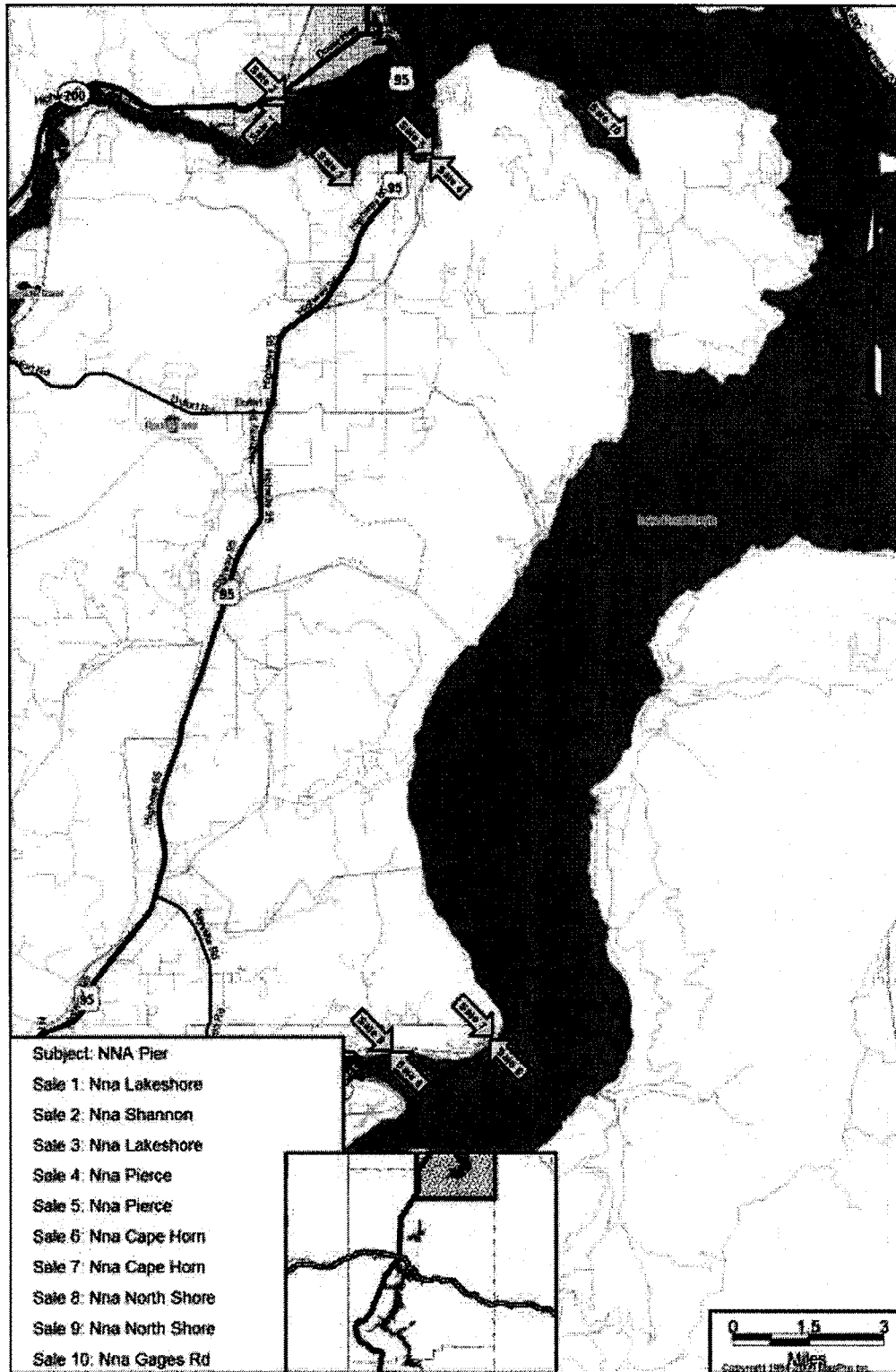
Sale 10 is located in Bottle Bay. This property offers good views and good quality frontage, yet it is located in an area which has questionable winter access, a poor quality access road in general and is some distance from any services with the exception of the Bottle Bay Resort.

Water frontage size adjustment: in most cases, larger parcels sell for less per front foot than smaller parcels (less front feet). Sites with less frontage get the enjoyment of a location on the water with all the amenities and recreational opportunities Lake Pend Oreille provides. This is the same with sites with larger frontage, though with this increased size there is more flexibility in dwelling design, more privacy and of course more water frontage.

Similar weight is being placed on all ten sales. The estimated value of the subject site lies at or just above the mid-range of \$3,095 to \$5,156 indicators at \$4,500 per front foot.

Estimated Value of the Subject Site is \$4,500 X 232 feet of frontage = \$1,044,000

COMPARABLE LAND SALES LOCATION MAP



COST APPROACH SUMMARY

BUILDING				
Restaurant- Class D Average				
Total Square Feet	4,160	Sq. Ft.	\$120	\$499,200
Physical Depreciation:			38%	<u>\$187,200</u>
Age/Life Method	OB. AGE	TOTAL LIFE		
	15	40		\$312,000
As-is Contribution of Site Improvements, outbuildings, etc.				
				\$35,000
DOCKS/SLIPS				
Total Square Feet				
Total SF.	2,600	Sq. Ft.	\$41	\$106,600
Physical Depreciation:			50%	<u>\$53,300</u>
Age/Life Method	OB. AGE	TOTAL LIFE		
	10	20		\$53,300
Subtotal				\$53,300
TOTAL				\$400,300

Indicated Value of Subject Land: \$1,044,000

Indicated Value of Subject Improvements: \$400,000(R)

**ESTIMATED VALUE OF THE SUBJECT
PROPERTY BY THE COST APPROACH IS
\$1,444,000**

INCOME APPROACH

INCOME APPROACH SUMMARY

The Income Approach is based on the Principle of Anticipation, which assumes that the value is created through the expectation of future benefits to be derived from property ownership. In other words, value in an income producing property lies in the present worth of future income streams producible by that property. The Income Approach is a process of converting net income into an indication of value. To utilize this approach income (Market Rent) is estimated for the subject property. Vacancies and annual expenses typical to the owner are estimated using either historical operating information from the subject property or operating information from other properties. These estimates are treated as charges against the gross income potential of the property and are deducted to arrive at a net operating income which, as previously noted, is converted into a value indication by the capitalization method.

Income Capitalization is a valuation method appraisers and real estate investors use to estimate the value of income producing real estate. It is based upon the premise of **anticipation** (i.e., the expectation of future benefits).

CAPITALIZATION RATES

The Capitalization Rate or Cap Rate is a ratio used to estimate the value of income producing properties. Put simply, the cap rate is the net operating income divided by the sales price or value of a property expressed as a percentage. Investors, lenders and appraisers use the cap rate to estimate the purchase price for different types of income producing properties. A market cap rate is determined by evaluating the financial data of similar properties which have recently sold in a specific market. It provides a more reliable estimate of value than a market Gross Rent Multiplier since the cap rate calculation utilizes more of a property's financial detail. The GRM calculation only considers a property's selling price and gross rents. The Cap Rate calculation incorporates a property's selling price, gross rents, non rental income, vacancy amount and operating expenses thus providing a more reliable estimate of value.

If we have a seller and an interested buyer for a particular piece of income producing property, the seller is trying to get the highest price for the property or sell at the lowest cap rate possible. The buyer is trying to purchase the property at the lowest price possible which translates into a higher cap rate. (The lower the selling price the higher the cap rate; the

higher the selling price, the lower the cap rate). In summary, from an investor's or buyer's perspective, the higher the cap rate, the better.

Investors expect a larger return when investing in high risk income properties (the higher the risk, the higher the rate of return). The Cap rate may vary in different areas of a city or county for many reasons such as desirability of location, level of crime, business potential and general condition of an area. You would expect lower capitalization rates in newer or more desirable areas of a city and higher cap rates in less desirable areas to compensate for the added risk. Also, the newer the building, the rate or amount of recapture is generally less. In a real estate market where net operating incomes are increasing and cap rates are declining over time for a given type of investment property such as office buildings, values will be generally increasing. If net operating incomes are decreasing and capitalization rates are increasing over time in a given market place, property values will be declining. Also, if a particular property is very "land heavy", (i.e. the land alone makes up a significant portion of the value) then the cap rates tend to be much lower as well since the rate of recapture, or the worry of a depreciating asset is significantly reduced. This is generally the case with the subject, as land value makes up a significant portion of the value.

The initial step of the Income Approach is to estimate the current rent producing capabilities or economic rent for the subject property (slips, building, etc.) in the current market.

Throughout the entire sales search made within the general areas of Sandpoint, Hope, Coolin (Priest Lake) Clark Fork, Coeur d'Alene, and similar competing areas, the appraiser was unable to locate marinas that were leased to a single tenant. Generally marinas are owner operated with the owner hiring a manager to oversee or run the facility.

The appraiser was provided with some (but not a great lot) of historical data in regard to rates or costs of the rentable areas of the subject property. As an example, the appraiser was only provided with gross rental data on the boat slips for two seasons, though this is not an issue since there is ample data in the market for comparing and estimating market rents. The restaurant was owner operated and there was no lease to examine for rent of that facility.

The moorage rental rate can be estimated and building rents can also be estimated based on comparable market rental data for commercial buildings and for rental fees of boat slips in the

market area. This will provide us with a market rent figure. A net income from those portions of the property which can be rented is then developed after deducting estimated expenses for maintenance, real estate taxes, insurance, etc. Other expenses would include some utilities and a management fee to coordinate slip leasing as well as handling any of the issues arising with the commercial building above and beyond what would be expected from a tenant.

RESTAURANT/BAR:

In small neighborhoods or communities like Bayview cafés/bars need time to be established and develop a cliental. As of the Effective Date the owners had operated the facility for several years with an established cliental. According to Ms. Berry, as of the Effective Date it was the only year round dining facility in Bayview serving 2-3 meals per day. The subject generally served dinner and then the bar remained open until late. While at an onsite visit, I observed what appeared to be regular cliental still frequenting the establishment, as the servers knew what these gentlemen already wanted to drink. Most communities have a locals' spot, and according to multiple sources that I interviewed, the Captain's Wheel is that spot in Bayview.

The Restaurant has a "Resort Liquor License" according to a spokeswoman for the Alcohol Beverage Control Bureau. This type of liquor license allows an establishment which meets the "resort" qualifications apply for a license to serve all types of alcohol and spirits. Idaho has three types of licenses. One will allow the serving of beer and wine, and can be rather easily obtained. Number two is the "full liquor license". The state regulates the number of "full liquor licenses" by allowing only 1 per 1500 people in a city. For the most part, these licenses are all spoken for. They become the personal property of the person or establishment to whom it is issued. They can be sold or transferred (with state approval) and are somewhat of a commodity due to their finite nature. I have heard of these selling for \$75,000 to \$150,000. They are not tied to a particular location. The third type of license is the "Resort Liquor License". The full code by which they are provided is included in the addendum of this report, but I will provide a summary. This license can be granted to an establishment which has 200+ feet of frontage on a Lake over 160 acres in size that has a suitable docking facility. The establishment must be either a hotel which can accommodate 50 people and have a restaurant that serves 2+ meals per day for 4 months out of the year, or it can be a restaurant with 3000+ square feet of public space which serves 2+ meals per day for 4 months out of the

year and have parking available for 50+ people. The subject met these requirements and was granted a "Resort Liquor License". If the owners were to sell the subject property, the liquor license could not transfer, however a new owner could apply and, if the requirements were still met, one would be granted to the new owners.

No value is estimated for either the liquor license, business "blue sky" or any of the personal property associated with the Captain's Wheel Resort. Personal property definition was provided earlier in the report and would include items such as tables, chairs, silverware and linens, etc. Only items which are permanently affixed are considered and included in this valuation.

Below is a group of Commercial/Retail rents from Bonner County. They are utilized and adjusted to estimate Market Rent for the subject building.

Comp.	Type	Location	Tenant Space	Monthly Rent	Annual Rent	Energy Adjustment	Annual Rent/ SF of Bldg
1	Office	Hwy 2 & Olive	1,250	\$1,250	\$15,000	0.00	\$12.00
2	Office	Professional Drive	1,000	\$1,100	\$13,200	0.00	\$13.20
3	Office	Pine Street	2,288	\$2,630	\$31,560	0.00	\$13.79
4	Office	Pine Street	1,180	\$1,370	\$16,440	0.00	\$13.93
5	Office	Pine Street	600	\$582	\$6,984	1.50	\$10.14
6	Office	Lake Street	550	\$720	\$8,640	1.50	\$14.21
7	Office	Cedar Street	1,200	\$1,200	\$14,400	1.50	\$10.50
8	Office	North Fourth Ave	320	\$350	\$4,200	1.50	\$11.63
9	Office	First Avenue	1,428	\$1,828	\$21,936	0.00	\$15.36
10	Office	Highway 2	2,172	\$1,700	\$20,400	0.00	\$9.39
11	Office	Michigan Street	1,200	\$1,320	\$15,840	0.00	\$13.20
12	Office	Second Street	4,800	\$6,800	\$81,600	0.00	\$17.04
13	Office	Baldy Mtn Road	2,128	\$2,500	\$30,000	0.00	\$14.10
14	Office	Superior Street	1,017	\$865	\$10,380	0.00	\$10.21
15	Office	South First Ave	1,800	\$1,500	\$18,000	0.00	\$10.00
16	Office	Lake Street	5,496	\$4,351	\$52,212	0.00	\$9.50
17	Office	Ontario Street	12,000	\$14,750	\$177,000	3.00	\$11.75
18	Restaurant	Main Street Hope	3,440	\$5,000	\$60,000	0.00	\$17.44
19	Residential	Lincoln Ave & Pine	960	\$800	\$9,600	0.00	\$10.00
20	Residential	Division Street	900	\$800	\$9,600	0.00	\$10.67
21	Residential	Arbor Lane	1,200	\$850	\$10,200	0.00	\$8.50
22	Residential	Main Street	1,620	\$900	\$10,800	0.00	\$6.67
23	Mixed	First Avenue	2,054	\$3,389	\$40,668	0.00	\$19.80
24	Retail	First Avenue	3,125	\$3,900	\$46,800	0.00	\$14.98

From the above and knowledge gained from other projects, I estimate Market Rent for the subject building as shown on the following page. Market rent is based upon a number of factors including but not limited to size, amenities, exposure, parking availability, quality, etc. Generally speaking, warehouse type space usually rents for the lowest amount per square foot, followed by retail space, then depending on options, professional office and restaurant space fill out the upper ranges. Restaurant space generally command rents toward the upper end of the range due to higher costs to build and maintain, along with offering more features for lease. Generally restaurants have commercial kitchens which add a significant amount to construction costs and rental amounts.

The subject restaurant building has a number positive attributes. There is ample onsite parking and an ample amount of outdoor seating areas as well as a large lawn area to the

east of the building which could easily be utilized by a tenant for functions with catering available from the restaurant. The building has both indoor and outdoor dining areas and there is a large open room which can be separated from the rest of the building that can be used for larger parties, private parties, as a dance floor, or for extra seating when the restaurant is extremely busy.

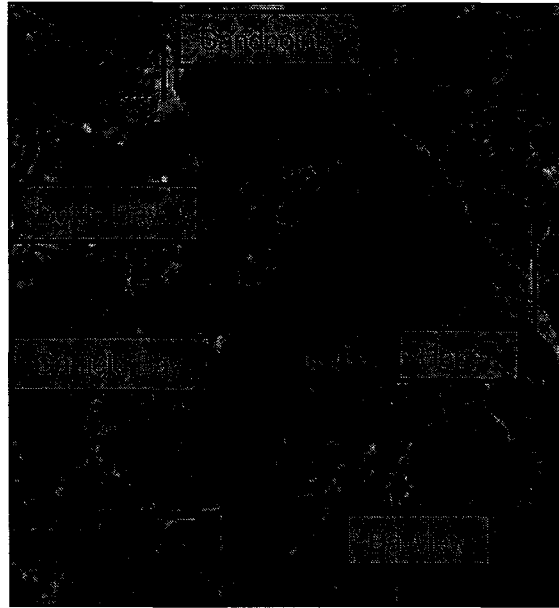
There is also the fact that the subject provides for waterfront dining, which is considered to be very desirable by patrons. Waterfront locations for restaurants provides a great marketing tool for bringing in customers, and with a few of the boat slips dedicated as boater parking for dining, the location is favorable.

All of these positive factors indicate a Market Rent in the upper ranges of those expressed by the comparables listed above.

Estimated Market Rent for the Building is \$1.40 per square foot per month or
 $\$1.40 \times 4,160 \text{ SF} = \$5,824$ per month $\times 12 = \$69,888$ or say \$70,000 annual Market Rent

MARINA MOORAGE:

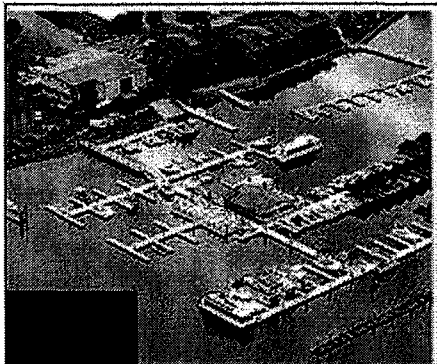
Much of the information that follows was gained from a previous moorage study that I conducted around late 2006 for another marina located on Lake Pend Oreille. The marinas surveyed on Lake Pend Oreille from which data was collected to estimate slip rent generally had a seasonal rental rate that covered the months of May to November. The length of the season can vary somewhat depending upon the drawdown of the lake level, as well as the deep water location of the particular marinas. Generally the Bonner County marinas are able to handle boats ranging from the small boat to boats over 30' in length and sailboats. Typically, however, both covered and uncovered moorage finds boats ranging in size from 22' to 28', with perhaps the most typical pricing being for a 24' boat. Though many of the marinas on the lake offer more amenities than the subject, the primary focus of the marina is a protected place to moor a boat for the season, and the subject does provide that. All other services that one may need, such as fuel/repair/service/etc., are located within a couple of hundred yards of the subject site.



The property is improved with a newer two-story building used as maintenance, shop, marina, service, small store and manager's apartment. The property is further improved with 110 to 150 slips (depending on configuration) with approximately 1/3 developed as covered slips. Hope Marine is considered to have a somewhat superior dock

HOPE MARINE SERVICES:

The property is improved with a newer two-story building used as maintenance, shop, marina, service, small store and manager's apartment. The property is further improved with 110 to 150 slips (depending on configuration) with approximately 1/3



developed as covered slips. Hope Marine is considered to have a somewhat superior dock

Uncovered \$45.00 per foot up to 29'	Uncovered \$51.00 per foot up to 40'	Covered \$58.00 per foot up to 29'	Covered \$65.00 per foot up to 32'
20 - 900.00	30 - 1530.00	20 - 1160.00	30 - 1950.00
21 - 945.00	31 - 1581.00	21 - 1218.00	31 - 2015.00
22 - 990.00	32 - 1632.00	22 - 1276.00	32 - 2080.00
23 - 1035.00	33 - 1683.00	23 - 1334.00	33 - Unavailable
24 - 1080.00	34 - 1734.00	24 - 1392.00	
25 - 1125.00	35 - 1785.00	25 - 1450.00	
26 - 1170.00	36 - 1836.00	26 - 1508.00	
27 - 1215.00	37 - 1887.00	27 - 1566.00	
28 - 1260.00	38 - 1938.00	28 - 1624.00	
29 - 1305.00	39 - 1989.00	29 - 1682.00	
	40 - 2040.00		

Minimum of 28' price (1,624.00) to be in large covered slips

Over 40' \$53.00 per foot plus \$500.00 for annual rate
 Winter \$400.00 for seasonal customers for annual rate
 \$200.00 per month up to 24'
 \$250.00 per month over 24'

Seasonal Daily \$ 25.00 up to 24' / \$30.00 over 24'
 Weekly \$ 175.00 per week up to 24' / \$200.00 over 24'
 Monthly \$ 250.00 per month up to 24' / \$300.00 over 24'

Electricity \$ 35.00 per month April - Oct / \$55.00 Nov - March

construction, including EPA approved tank floatation systems. Positive factors for this marina include full repair services and marine gas sales. The singular most positive influence for persons that are staying on their boat is the ability to dine and have dinner at the floating restaurant without having to leave the marina by vehicle. Considerable down side is the lack of enforceable security as the slips are open and not secured, as the public gets to the restaurant via the slips area. Parking is nearly inadequate and there is shallow water early in the spring and in the fall.

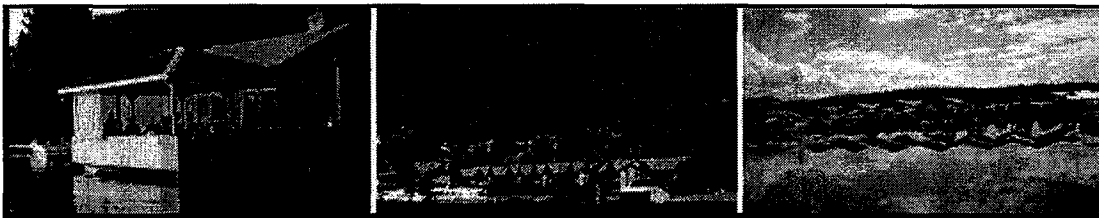
HOLIDAY SHORES MARINA:

Most of the existing slips have been reconditioned and rebuilt where necessary. There are



approximately 180 slips of which approximately 60 are covered. Slips range in size from 20 feet to approximately 40 feet in length. The average boat size is estimated from 24' to 26' in length with the most popular slips being the 20 foot covered and 24 foot covered.

Some existing breakwater pilings were utilized and some newer pilings have been added. What had been the exiting floating fuel dock was reconditioned, including two new pumps.



Most of the marina slips have access to power and water for tenant use and both the west and east sides of the moorage are secured with combination locking doorways. The slips and access walkways are wood decked with log floatation.

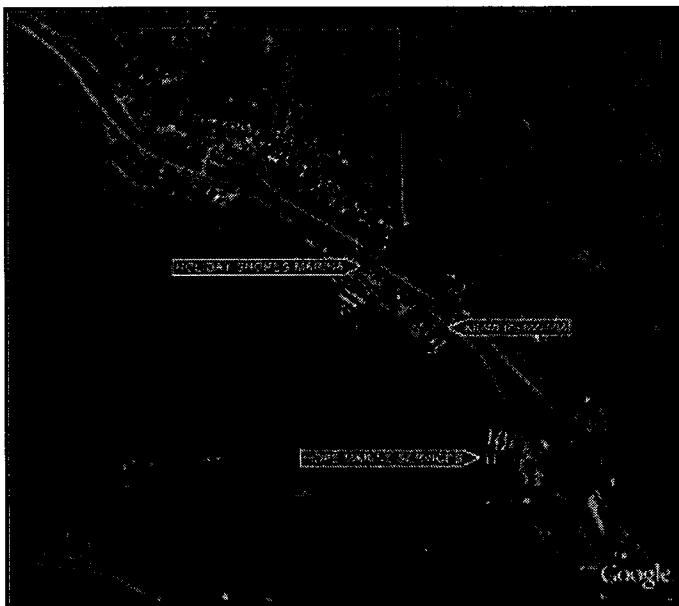
Positive factors for this marina include full repair services, café/convenience store and marine gas sales. Security is good with shop/repair building located as well to watch the slips and slips secured. Parking is good.

KRAMER MARINA:

Kramer Marina has some newer and older moorage construction. There is a vehicular security gate and a pump out station. It has a marina building that offers bathrooms, and laundry but few other amenities. Some of the water is shallow in the spring and fall though in the last several years had remedied most of this problem. This is a 105 to 150± slip development that includes nearly ½ covered slips. It should be noted that

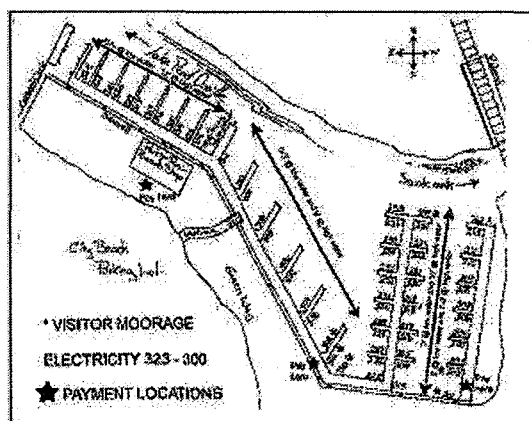
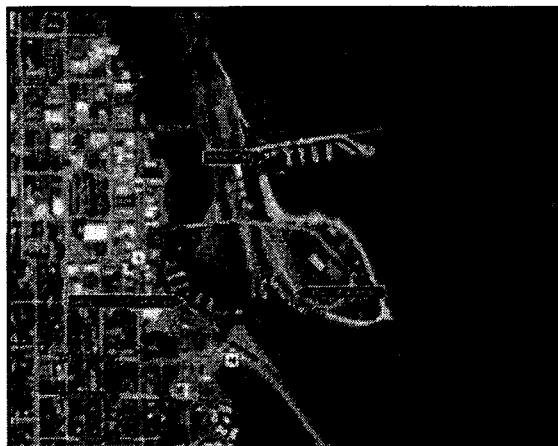
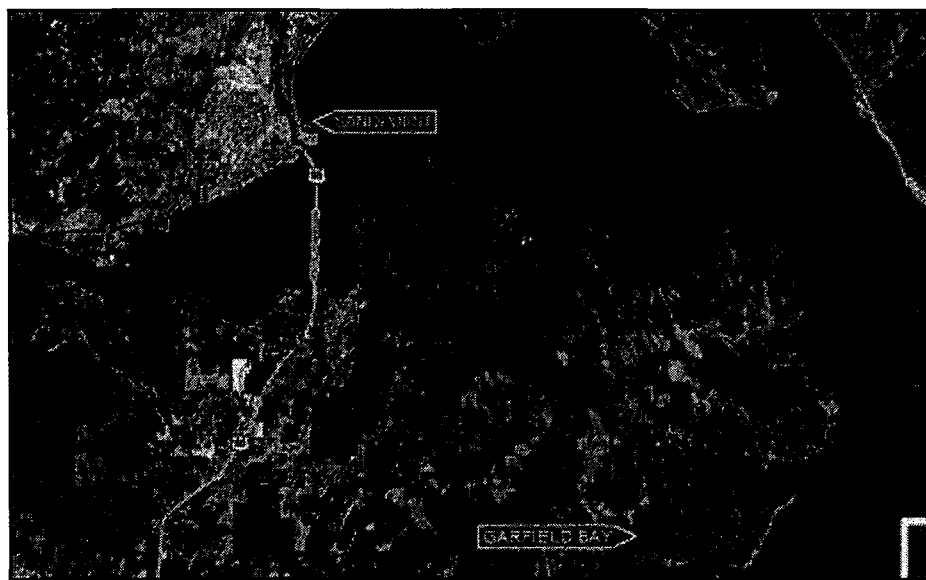


somewhere near the effective date of this report, this marina was nearly doubled in size in order to provide more moorage. Demand for boat slips is and was very high on Lake Pend Oreille.



SANDPOINT MARINAS:

In the City of Sandpoint there are three marinas. They are the Sandpoint Marina, the Windbag Marina and the marine slips owned by the City of Sandpoint.

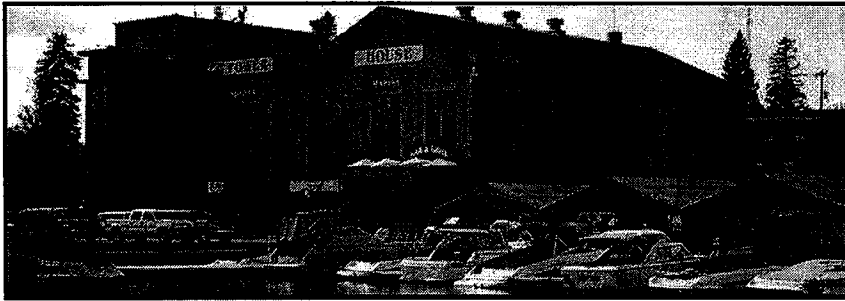


The maps above show the layout of the moorage owned by the City of Sandpoint. Discussion over the years has been why is the City competing with the private sector? The answer has always been that there is a need for improved low cost moorage and all they are doing is filling that need. These marinas have always been the lowest priced on the lake due to the fact that they are public owned.

Below is a list of moorage fees for the Windbag/City Beach Moorage in 2006.

<u>E-Mail</u>	<u>City of Sandpoint</u>	<u>City Code</u>	<u>City History</u>
Sandpoint City Beach and Windbag Marina's			
<p>The City of Sandpoint offers seasonal moorage at both the City Beach Marina and the Windbag Marina on the 300 and 400 docks. At present all slips are full. Current customers receive renewal applications in the spring. However, waiting lists are available for each marina, should an opening become available. To be placed on a waiting list contact Sandpoint Parks and Rec. 1123 Lake Street (208) 263-3613</p>			
<p>For visitor moorage within the city click HERE</p>			
City Beach Moorage Rates 2006			
35' Slips	County: \$755/season	City: \$646/season	
30' Slips	County: \$666/season	City: \$569/season	
20' Slips	County: \$519/season	City: \$446/season	
Windbag Moorage Rates 2006			
5 Docks:	County: \$409/season	City: \$318/season	
300 Docks:	County: \$661/season	City: \$564/season	
400 Docks:	County: \$687/season	City: \$589/season	
City Beach Marina Map			
Windbag Marina Map			
City Beach Marina Waiting List 30-35' Slips			
City Beach Marina Waiting List 20' Slips			
City Beach Marina Waiting List 20' Continued Slips			
<p>click on the magnifying glass to enlarge and the rotation buttons to view as needed.</p>			
Windbag Marina Waiting List 300 & 400 docks			
<p>click on the magnifying glass to enlarge and the rotation buttons to view as needed.</p>			
<p>Other Sandpoint Marina's include: Bottle Bay Resort & Marina (208) 263-5916 115 Resort Rd Sagle Holiday Shores Resort & Marina (208) 264-5515 46624 Hwy 200 Hope Kramer's Marina (208) 264-3021 46820 Hwy 200 Hope Sandpoint Marina Windbag Marina, (208) 263-0447</p>			
RETURN TO PARKS AND REC. HOME			
recreation@ci.sandpoint.id.us			
Links	Current Activity Booklet	Parks	
	Registration Form	Boat Moorage	
	Adult Sports & Rec Opportunities	Transient Moorage	
	Youth Sports & Rec Opportunities	Lifeguarding	
	Photo Gallery	Avalanche Information	
	Outdoor Range		

Below are illustrations of the Sandpoint Marina which is arguably the most desirable marina in



the County. Reasons are: slips in good condition, great central location, restaurant/bars and all other

services within easy walking. Also see below for services they advertise.

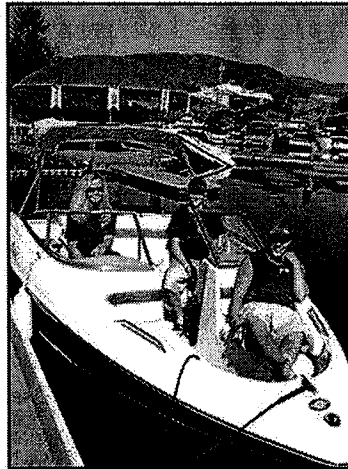
Rentals - [click to see boats](#)
Fun on the Lake Starts Here!

- Wakeboard boats
- Ski boats (Rinker, Camplon)
- Pontoons
- Tubes, Boards, Skis
- Kayaks
- Canoes

Contact us for Boat Rental.

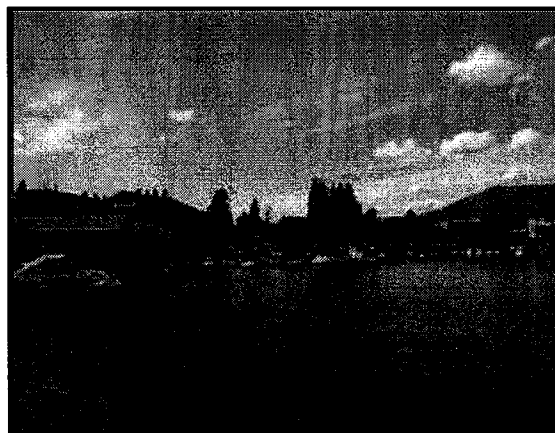
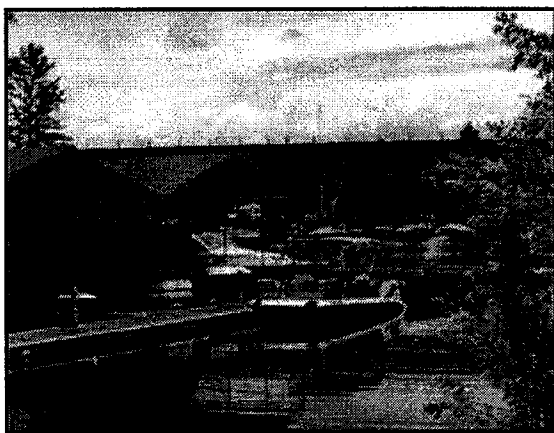
Moorage

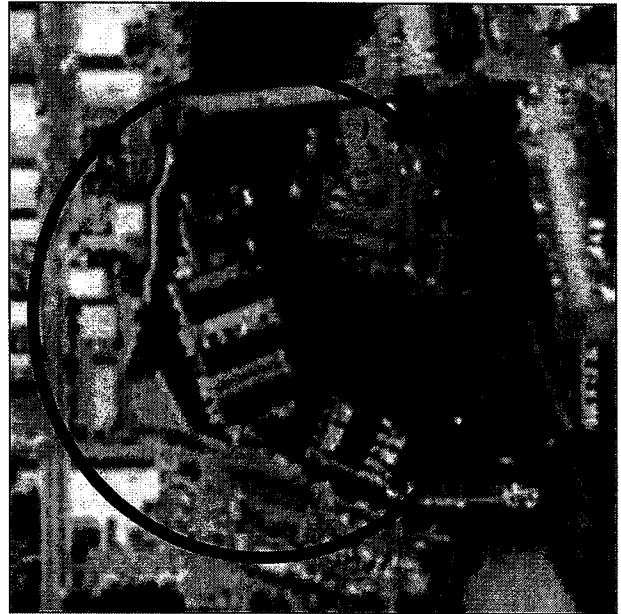
- Seasonal Moorage (May-October)
- Overnight Moorage
- Covered and Open slips
- Security gates
- 24-hour fueling facility
- Pump-out station
- Restrooms and Showers
- Dockside power and water available
- Convenience Store
- Marine Supplies
- Free Parking
- Public Boardwalk
- Friendly staff



Most of the slips have been maintained so they are in good condition. The average boat slip size in the Sandpoint Marina is from 24' to 26' in length. Most of the marina slips have access to power and water and are secured with combination locking doorways. The slips and access walkways are in good

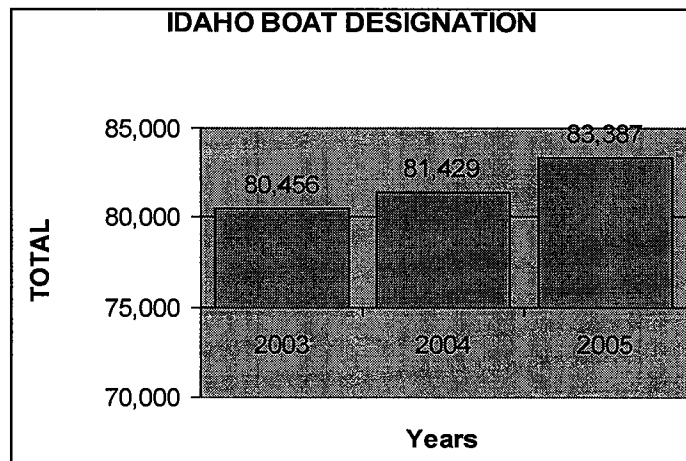
condition.






Positive factors for this marina include small marine store and marine gas sales. Security is good with office located at slip area. Parking is good.

The chart below indicates that boater registration in Idaho has continued to climb year after year resulting in an increased need for moorage. A chart included on page 109 shows that Kootenai and Bonner Counties have considerably more registered boat owners than any of the other counties in the State of Idaho.



Below is information about a marina located in Bottle Bay. This marina serves the Bottle Bay area and has a number of amenities including shower and cabins. It also has a restaurant and offers gas as well. Its location is a bit prohibitive in terms of its connectivity to the rest of the lake and it has somewhat of a negative stigma associated with it as well. It has generally been thought of as an inferior marina. It seems to be mostly due to its location way down Bottle Bay Road, which is very narrow and windy. Seasonal rates for 2006 are posted below, though it is my understanding that they deal mostly in fee simple long term moorage.

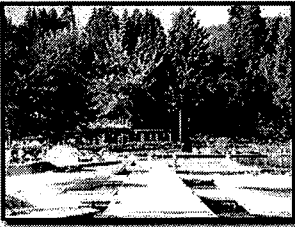


Vacation Rentals | Marina | Reservations | Restaurant | Photo Gallery | Store | Visitor's Guide

Marina

The marina at Bottle Bay Resort is located in a quiet wind protected bay. In 2002 we completed our new docks with moorage for 65 boats. We will have electricity to the docks for the 2004 season. We have gas pumps and a public boat launch. Showers, laundry facilities, and restrooms are available for our slip guests.

The marina is ten minutes from Sandpoint by boat or a scenic eleven mile drive by car. Stay for a day, a week, a month or a full season. Slips are free for our cabin guests so bring your boat. Bottle Bay is a friendly and fun destination stop while out enjoying the lake. Come in for a Huckleberry Daiquiri, cold beer or a glass of wine. Relax over lunch or dinner on our lakeside deck or pick up an ice cold soda, ice cream or snack from the marina store and get back out on the lake.



[\[View More Images\]](#)

Moorage	Marina Rentals
\$10.00 per night for boats 24 feet and under	Kayaks \$15.00 half day
\$20.00 per night for large boats over 24 feet	\$25.00 full day
\$40.00 per night for large Houseboats	Damage Deposit \$100.00
\$50.00 per week	Credit Card Required
\$150.00 per month	
\$525.00 per season for renewals	Canoes \$20.00 half day
\$550.00 per season for new customers	\$35.00 full day
	Damage Deposit \$100.00
	Credit Card Required

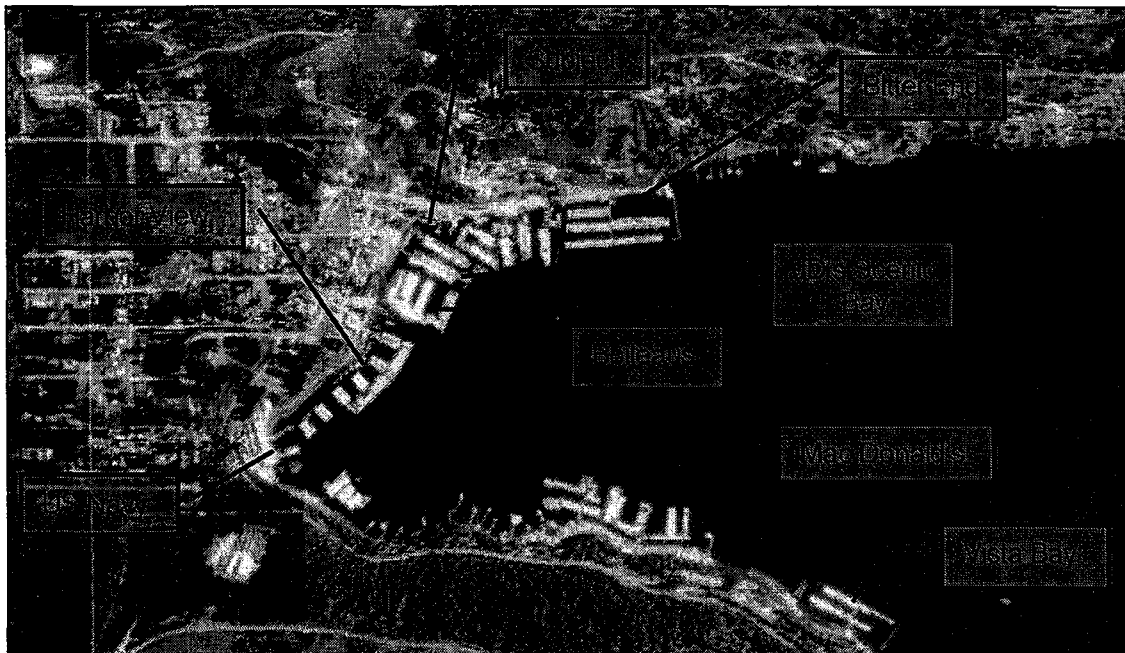
About Bottle Bay Resort

Contact Bottle Bay Resort

©2006 bottlebayresort.com
Marina / Resort
Lake Pend Oreille, Idaho

Developed & Hosted by
Astarna Web Development

BAYVIEW MARINAS: Included below is information that is current as well as information that we were able to gain regarding the 2006 time period.



Bayview is home to approximately 7 different marinas including the subject. The subject is the smallest of all the marina operations in Bayview by a considerable margin. I was unable to confirm rental rates on all the marinas, but the Kootenai County Assessor's Office did provide me with physical data on the other marinas including boat slip and float home site counts. The smallest marina in competition with the subject that I could find contained approximately 50 boat slips and 21 float home sites. Nearly all of the marinas offered 100+ slips, amongst other amenities. The subject utilizes its marina as a secondary operation to its restaurant facility, while the other marinas utilize their actual marinas as their primary source of revenue or at least their primary focus. Nearly all of the marinas also have secondary operations which would include fuel, motel rooms, recreational vehicle sites, dry storage and/or boat repair facilities, etc. Some combination of these things is present in all of the marina competition in Bayview. In the following pages I will provide a bit of information about the current marina operations in Bayview (also 2006) as best as I could gather.

Rents for the 2009/2010 rental season were ascertained for the majority of the marinas in Bayview. I conducted a previous survey of slip rental rates around 2006 for marinas on the lake from Garfield Bay to Sandpoint. Slip fees have been fairly stable with only slight

increases over the past 3-5 years on most of those marinas. Every marina representative that I spoke with in Bayview had only current information available. I will present the findings of both studies, and weigh in on both in order to estimate Market Rent as of July 4, 2006.

Starting in the 2005 period, a developer by the name of Bob Holland came in and began purchasing all of the commercial property that was available in Bayview. He has been in the news/local papers. I attempted to get in contact with Mr. Holland, but my requests were not returned. His company, Waterford Park Homes, LLC., operates three marinas in the area. In conjunction with his marinas, is a combination of condominiums and slips available for purchase rather than lease. He purchased Boileaus Marina, Vista



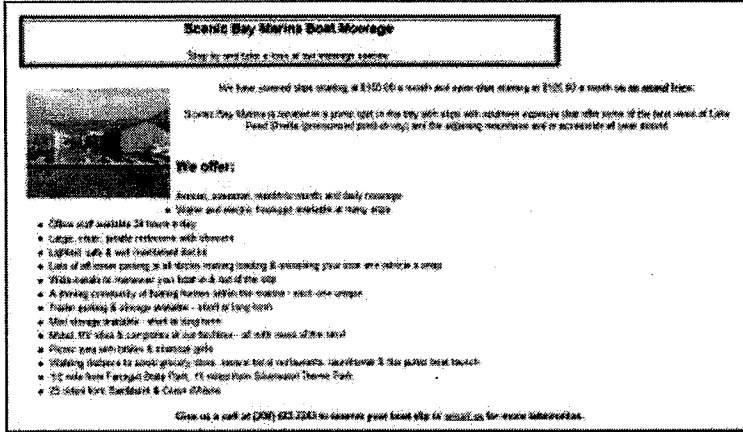
Bay Marina, and Fran's/Bayview Marina all for undisclosed prices from 2004-2006. Fran's was demolished and has since been rebuilt and is now known as Harbor View Marina. During a recent phone conversation with a staff member at Waterford Park, pricing for slips was estimated at \$1,000 to \$3,600 per season depending on slip length and whether or not a slip is covered. I was told that a 22 foot uncovered slip would rent for \$1,200 for the season at one of their facilities. There was some availability at Vista Bay, very little at Boileaus and Harbor View had some vacancy as it is just now being completed (2009). It was not operational as of the Effective Date of the appraisal.

McDonalds Hudson Bay Resort is a full service marina offering covered and uncovered slips up to 40+ feet in length. They have a full service boat repair facility, fuel docks, cabins, full service store C-store, crane service, dry storage, etc. Rents for a slip around 22' in length started at \$1,450 for the season for uncovered and



\$2,100 for covered. The gentleman that I spoke with indicated that I would have to be put onto a wait list for a slip as they have no vacancy.

JD's Scenic Bay Resort offers a wide array of covered and uncovered slips as well as float



Scenic Bay Marina Boat Moorage
Slips for rent take a turn at our moorage system.

We have covered slips starting at \$200.00 a month and uncovered slips starting at \$100.00 a month on an annual basis.

Slips at this Marina are covered in a granite light in the bay with slips with overhead awnings that offer some of the best views of Lake Pend Oreille (uncovered ponds) and the adjoining mountains and its scenery all year around.

We offer:
Electric, water, maintenance and daily moorage
Water and electric hookups available at every slip.

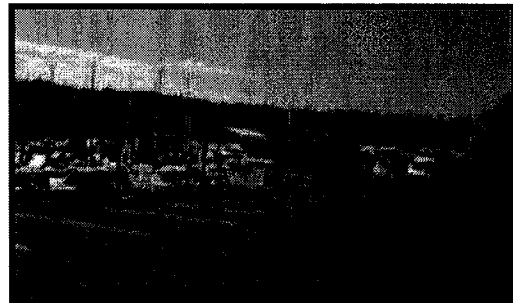
- Office staff available 24 hours a day
- Large, clean, private restrooms with showers
- 24-hour staff and well-maintained dock
- Lots of full-time parking for all motor vehicles, including your own and vehicle storage
- Fully available maintenance for boat and out of the dock
- A parking area for all motor vehicles within the marina - most one owner.
- Private parking & storage available - staff of long term
- Slip storage available - short or long term
- Annual, 24-hour & computerized dock facilities - all with sound of the lake
- Open air parking area & covered slip
- Working docks for boat repairs, clean, seasonal hot water showers, hand saws & the power boat launch
- 1/2 mile from Fairchild State Park, 1/4 mile from Silverwood Theme Park
- 25 other boat marinas & camps nearby

Give us a call at (208) 833-2243 to reserve your boat slip for annual or for season moorage.

home sites. They also offer motel rooms, RV and campsites, restrooms with shower, storage facilities and lots of parking. They had a restaurant for a while, but it was closed at the time of the writing of this report. I do not know the status of the restaurant as of the Effective

Date. A representative indicated that slips were available for seasonal rentals starting at \$1,500 for the season climbing to \$4,800 for the season depending on boat size. For a 22' boat, slips start at \$1,500.

I tried attempted to contact the Bitter End Marina numerous times during my investigation, however my phone calls were not returned. They do not have a website, so seasonal rates are unknown. Their facility caters to sailboats and it appeared to be rented to capacity during my observation of the neighborhood.



In the middle of 2006, when the economy and real estate markets were strong, marina vacancy rates were extremely low, and there were waiting lists at nearly all of the established marinas on Lake Pend Oreille. I spoke with numerous knowledgeable parties about moorage on the lake and those I spoke with indicated that moorage rates have been fairly stable with only small incremental increases over the past couple of years.

I estimate that the rental fees for moorage that were quoted in Bayview for 2009/2010 are similar enough to moorage fees in 2006 that they can be strongly considered when estimating the subject's market rent for 2006.

I did make a call to the subject facility to inquire on slip rental fees and availability as well. The person that I spoke to indicated that slips typically rent for \$800 per season and that the available slips were always rented out though. She also thought that they were the least expensive in the bay.

The \$800 figure puts the subject at least \$200- \$400 below its closest competitor and nearly \$700 below the next competitor above that when considering the competition in Bayview alone. The subject provides adequate onsite parking, power available if necessary and bathroom facilities available in the restaurant. There is no security or restricted access to protect the boats (though the area is very visible); however the subject location within the bay (the fact that it is surrounded by other marinas) makes for one of the safest and calmest moorage locations on the lake. Lake Pend Oreille is known for its strong winds and weather. The subject marina provides very safe moorage as it is nearly completely isolated from the wind and waves at the back of the bay.

Below is a chart provided by the Kootenai County Assessor's Office showing the number of slips and float home sites at each of the marinas in Bayview.

Marina	Float Homes	Slips
Bitter End	1	191
Vista Bay	1	87
Harbor View	20	51
Boileus	18	108
Mac Donalds	19	177
JD's Scenic Bay	45	186
Captains Wheel	0	24

Below is data collected of seasonal rent amounts for uncovered slips located on Lake Pend Oreille (other than Cavanaugh Bay @ Priest Lake) for the 2007 season. Some are not the exact amount. When that occurs I have interpolated.

LOCATION	20	20 C.	22	22 C.	24	24 C.	26	26 C.	28	28 C.	30	30 C.	32	32 C.	35
SANDPOINT	519										666				\$755
SANDPOINT					661										
HOPE	900		990		1,080		1,170		1,260		1,530		1,632		\$1,785
BOTTLE BAY	600		650												
CAVANAUGH BAY	750					1,300	1,225				1,275	1,425			\$1,625
SANDPOINT	880	1,140	968	1,254	1,056	1,368	1,144	1,482	1,232	1,596	1,450	1,860			
HOPE	860	1,120	946	1,232	1,032	1,344	1,118		1,204	1,568			1,504	1,796	\$2,196
GARFIELD BAY	750		900												

The subject slips are estimated to be able to generally accommodate a 22' to 24' boat. Average to good quality 22' to 24' uncovered boat slip moorage seasonal rates around Lake Pend Oreille are estimated at \$900 to \$1,100 per season. The Bottle Bay Resort and Marina, which is the smallest marina that was interviewed in 2006/2007 had rental rates around \$650 for a similar slip. That marina is located on a rather isolated bay that does not provide for good access to other parts of the lake by virtue of its location. The subject location is somewhat similar in its highly protected status within a bay, however the Bottle Bay Resort is the only commercial enterprise located in Bottle Bay, whereas the subject is a part of the larger community. Bayview is a destination for summertime visitors and offers fantastic access to numerous recreational opportunities.

After considering both current rents in Bayview and past rents on Lake Pend Oreille, it is my estimation that Market Rent as of the Effective Date of this report is \$950 per slip. This may be conservative as it is at the lower end of the range for slip rental fees, especially in Bayview.

Estimated Market Rent for the Subject's 22 slips is $22 \times \$950 = \$20,900$ per year. This is supported by the Subject's Actual Moorage Income as reported on their 2003 and 2004 taxes. Moorage income in the amount of \$15,913 is indicated for 2003 and \$16,000 is indicated for 2004. No specific breakdown of moorage was available for 2005 or 2006.

See below for Idaho Boat Registration by County for 2001-2005. Note the significant number of boaters in Bonner and Kootenai Counties compared to all other Counties in Idaho.

Idaho Primary Boat Registration Designation Statistics 2001-2005						
County	2001 Registrations	2002 Registrations	2003 Registrations	2004 Registrations	2005 Registrations	2001-2005 % Change
North						
Beneviah	1,331	1,333	1,288	1,312	1,324	-0.83%
Bonner	8,728	9,284	9,046	9,339	9,587	9.84%
Boundary	701	733	716	720	729	3.60%
Kootenai	17,400	16,332	17,752	18,576	19,235	10.51%
Shoshone	724	715	708	707	646	-10.77%
North Total	28,850	30,398	29,514	30,656	31,321	9.11%
North Central						
Clearwater	1,843	1,729	1,708	1,724	1,719	-4.83%
Idaho	543	545	541	539	572	6.63%
Latah	1,030	1,030	1,062	1,055	1,028	-0.18%
Lewis	119	115	123	136	162	36.13%
Nez Perce	3,183	3,210	3,242	3,228	3,220	2.12%
North Central Total	6,488	6,629	6,678	6,682	6,708	3.35%
Southwest						
Ada	6,976	7,083	7,196	7,240	7,322	4.96%
Adams	442	478	489	488	467	5.89%
Boise	975	990	956	1,023	1,076	10.50%
Canyon	3,327	3,529	3,528	3,657	3,942	18.49%
Elmore	2,285	2,351	2,306	2,301	2,295	1.32%
Gem	948	1,039	992	1,022	1,024	8.02%
Owyhee	1,043	1,041	1,060	1,058	1,095	4.99%
Payette	835	899	970	989	1,011	8.13%
Valley	4,881	5,036	5,043	4,985	4,991	2.67%
Washington	1,773	1,654	1,840	1,899	1,952	10.10%
Southwest Total	23,545	24,400	24,380	24,672	25,177	6.93%
South Central						
Baine	1,002	1,037	1,038	984	959	-4.20%
Camas	217	282	191	181	188	-13.39%
Cassia	1,409	1,472	1,499	1,457	1,470	0.07%
Gooding	594	531	555	581	600	0.38%
Jerome	401	394	390	411	418	4.24%
Minidoka	581	563	565	540	524	-8.80%
Twin Falls	2,329	2,410	2,474	2,488	2,574	10.52%
South Central Total	6,543	6,609	6,712	6,642	6,733	2.90%
Southeast						
Bannock	896	882	777	772	801	-10.60%
Bear Lake	728	739	750	711	705	-3.18%
Bingham	1,230	1,219	1,248	1,214	1,301	5.77%
Caribou	608	489	435	498	403	-33.72%
Franklin	712	697	637	623	639	-10.25%
Oneida	237	249	233	243	259	9.28%
Power	1,509	1,459	1,371	1,320	1,350	-10.54%
Southeast Total	5,920	5,654	5,451	5,291	5,458	-7.80%
East						
Bonneville	4,085	4,124	4,114	4,063	4,215	3.69%
Custer	483	465	459	430	462	-4.35%
Fremont	1,911	1,989	1,902	1,828	1,882	-1.62%
Jefferson	395	427	450	437	450	13.92%
Lemhi	259	245	262	242	254	-1.93%
Madison	285	272	275	261	263	-0.70%
Teton	237	246	261	225	244	2.95%
East Total	7,635	7,689	7,723	7,486	7,730	2.03%
Grand Total	79,021	81,379	80,456	81,429	83,387	5.53%

Note: This table only includes primary designations. Idaho boaters are able to designate to a primary and secondary county boating program where the registration fees go.

Source: IDPR Recreation
Registration Information System

Prepared by Jeff Cook,
Outdoor Recreation Analyst

05/04/2006

EXPENSES

Estimated vacancy and credit loss charges are deducted from the Potential Gross Income to arrive at Effective Gross Income. Estimated Expenses are then deducted from Effective Gross Income. These expenses include real property taxes, passive management, insurance, maintenance and upkeep, some utilities, etc. The resulting difference then is the considered Net Operating Income, or NOI, that is used as the basis for the capitalization process.

Summary of some of the expenses:

- * Real estate taxes
- * Insurance
- * Maintenance & repairs
- * Water and sewer
- * Passive Management
- * Replacement reserve

PASSIVE MANAGEMENT

A management fee is considered necessary for the subject property. I believe that an owner manager could coordinate slip leases and provide passive management for the leased building, just dealing with any major issues above and beyond what a tenant would be expected to handle. Coordination of these items is estimated at a flat rate of \$3,000 per year.

RESERVE FOR REPLACEMENTS

A replacement reserve is similar to a savings account where the funds that are set aside will be used to replace certain segments and income producing units of a commercial property that wear out. The replacement reserve, for example, is used to replace short-mid lived items, roofs, replace floor coverings, plumbing systems, water lines, sewer lines, and to replace the HVAC units, etc. These components wear out every 5 to 20 years, so the commercial property owner has to set aside or allocate money every month/year to replace these items.

According to Ms. Berry, the restaurant and moorage and docking areas were in average to good condition and were regularly maintained as of 2006. That being said, due to the subject location on or near the water, and with the docking system being located in the water as well

as portions of it resting on the ground during the winter months, I estimate that a slightly higher than average amount of funds should be allocated for a replacement reserve fund. I estimate the proper annual reserve at \$7,000 annually, the most of which should be held for repair and replacement of the dock facilities as they have a shorter physical and economic life due to their exposure to the elements.

TAXES

Based on previous years real estate taxes, tax amount is estimated at \$7,000.

INSURANCE

Insurance cost which includes the structure and lessor liability is estimated at \$3,000 annually.

MAINTENANCE/REPAIRS

The estimated cost of maintenance includes items that need repair in the normal course of business. It is estimated at an annual cost of \$2,400 annually or \$200 per month.

UTILITIES

I am assuming the Lessor pays water, sewer, garbage, and a small portion of the power bill for exterior lighting, etc. and the Lessee pays telephone service and a pro rata share of the power bill. Utilities are estimated at approximately \$1,200 annually.

VALUATION (RATE):

Development of the Income Approach includes estimation of the subject's market rent by direct comparison, from which appropriate vacancy/credit loss and expenses are deducted. The resulting net operating income is capitalized at a rate developed from market transactions involving properties leased at the time of sale or ones where I have estimated NOI or other items in the formula. Capitalization rates plunged to lows that have not been seen in decades during the mid 2000's. Helping push these rates lower was the cost of money at or near all time lows. Capitalization rates as of the Effective Date of this report were in the range of 4% to 8% for most all kinds of buildings and locations. The rate used below is 5%.

Potential Gross Income is: \$70,000 for the restaurant building and \$20,900 for the boat slips.
 Total Potential Gross is estimated at: \$90,900

Potential Gross Annual Income:	\$90,900	
Vacancy/Credit Loss 5%:	<u>\$4,500</u>	
Effective Gross Income:		\$86,400
Operating Expenses:		
Management	\$3,000	
Taxes	\$7,000	
Insurance	\$3,000	
Maintenance	\$2,400	
Reserves	\$7,000	
Utilities	\$1,200	
Total Expenses:		\$23,600
Net Operating Income		\$62,800
Capitalization Rate 5.0%:		
Indicated Value of Subject by Income Approach:		\$1,256,000

**INDICATED VALUE OF THE SUBJECT PROPERTY BY
 THE INCOME APPROACH IS \$1,256,000**

SALES COMPARISON APPROACH

A sales search was made for comparable marinas on Lake Pend Oreille and expanded to competing areas of Priest Lake and Lake Coeur d'Alene to find comparable improved sales similar to that proposed for the subject property. Several other comparables were found that were not illustrated below.

Marinas in general cover a wide range of waterfront marina improvement development. A sample list of uses and/or improvements located on properties called "Marinas" include: covered and open slip moorage, gas docks, restaurants, cafes, general stores, bar, motel, residence, floating gas docks, repair facilities, equipment, RV stations, cabins, offices, retail building and showroom. On top of this, these sales have differing land sizes and values.

In other marina appraisal assignments, as well as with this appraisal assignment, I have found that the makeup of the physical improvements and uses (as shown above) are so varied and diverse that direct comparison conclusions are fair at best and in most cases becomes very subjective rendering any conclusions unreliable and making a reasonable conclusion of indicated value futile and misleading. Also, without operating and revenues figures from any comparables no ratios can be developed. What part of the operation made money?, which lost money?, what margins were greater?, what was the occupancy (or vacancy)?

At best, in most cases, appraisers rely on information and data from the Income Approach to fill in the gaps for differing improvements and the Direct Comparison Approach becomes no more than a re-statement of the Income Approach data. For that reason, I am not completing a Direct Comparison.

Now, with all that being said, it should be noted that a Market Approach or Direct Comparison Approach was employed to estimate the value of the land in the Cost Approach and the land alone makes up nearly 75% of the value of the entire property with the improvements included.

CORRELATION AND CONCLUSION

Analysis of the waterfront land and commercial building market pertinent to property on Lake Pend Oreille along with comparison to subject, of specific market transactions considered reflective of the market formed the primary basis for valuation of the subject land and improvements.

Indicated Value by the Cost Approach \$1,418,000

Indicated Value by the Income Approach \$1,256,000

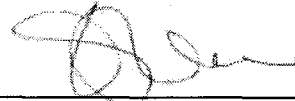
The Cost Approach is most indicative of Market Value when the major improvements are relatively newer and there is little or no depreciation from any cause and/or when the estimated value of the land is well supported. In the case of this report, the land value is very well supported by the most applicable market data. It did require considerable adjustments for estimated depreciation. The Cost Approach is an average indicator and is supportive of the Income Approach to Value.

The Income Approach is most reliable when a property is purchased as an income producing investment motivation. The Income Approach, in this case, is considered to be the primary perspective of a potential owner/investor. This Approach is considered a good indicator of the subject's value. As suggested above, most weight is being placed on the Income Approach to Value.

After consideration of the pertinent facts, I have concluded that the Estimated Market Value of the Subject Property as of July 4, 2006 is:

ONE MILLION THREE HUNDRED THOUSAND DOLLARS
(\$1,300,000)

Respectfully submitted,



David Noonan, IFA/CGA #60

ADDENDUM

RESORT LIQUOR LICENSE INFORMATION

TITLE 23

ALCOHOLIC BEVERAGES

CHAPTER 9

RETAIL SALE OF LIQUOR BY THE DRINK

23-948. WATERFRONT RESORTS – LICENSING EVEN IF OUTSIDE CORPORATE LIMITS

OF CITY. (a) Nothing contained in section 23-903, Idaho Code, shall prohibit the issuance of a license to the owner, operator or lessee of a waterfront resort, even if situated outside the incorporated limits of a city. The provisions of section 23-910, Idaho Code, shall apply to licenses issued under the provisions of this section. For the purpose of this section, a waterfront resort shall comprise real property with not less than two hundred (200) feet of lake frontage upon a lake or reservoir as defined by the army corps of engineers of not less than one hundred and sixty (160) acres, or river frontage upon a river with at least an average six (6) months' flow of eleven thousand (11,000) cubic feet per second, and shall be open to the public, where people assemble for the purpose of vacationing, boating or fishing, and each waterfront resort must have suitable docks or permanent improved boat launching facilities not less than sixteen (16) feet in width on property owned or leased by the resort operator or on property contiguous thereto owned by this state or the federal government open to the public for recreational uses for the purpose of caring for vacationers, or other recreational users and either of the following:

- (1) Hotel or motel accommodations for not less than fifty (50) persons, including a full service restaurant which serves regularly at least two (2) meals per day to the public during a continuous period of at least four (4) months per year; or
- (2) A building of not less than three thousand (3,000) square feet of public use floor space, including a full service restaurant which serves regularly at least two (2) meals per day to the public during a continuous period of at least four (4) months per year and paved or gravelled parking for fifty (50) automobiles on the operator's owned or leased property and any contiguous property upon which are the docks or boat launching facilities described above.

(b) The fees for licenses granted under the provisions of this section shall be the same as those prescribed for golf courses as set forth in section 23-904, Idaho Code, unless said resort be located within the corporate limits of a city or village, in which case the license fee shall be the same as for other licensees within such corporate limits.

(c) The provisions of this section shall not be construed to interfere with the privileges of the holder of a lake resort license issued under section 23-948, Idaho Code, prior to the Effective Date of this section.

LEGAL DESCRIPTIONS

Tax No. 10,359 Contract - Bk. 86, Pg. 763 - 2/9/77

A parcel of land being a portion of Tax No. 3257 as recorded in Deed Book 143, Page 35 in the office of the Kootenai County Recorder, located in the Southeast quarter of Section 34, Township 54, North, Range 2 West B.M., Kootenai County, Idaho, described as follows: Beginning at the established center of Sec. 34; thence N. $37^{\circ}13'$ West, 55.0 feet to the SW corner of Tax No. 1999; thence along the Southwesterly line of said Tax No. 1999, South $57^{\circ}50'$ East, 240.0 feet to the Southeast corner of said Tax No. 1999; thence S. $22^{\circ}04'$ West, 27.6 feet to a point on the Northerly line of Tax No. 3257; thence along said Northerly line as follows: S. $56^{\circ}00'$ East, 216.50 feet; thence S. $59^{\circ}00'$ East, 230.0 feet; thence S. $37^{\circ}00'$ East, 100.0 feet to a point on the East line of said Tax No. 3257; thence along said East line, S. $01^{\circ}51'17''$ East, 101.03 feet to a point on the South line of a private access road; thence along said South line, N. $84^{\circ}18'57''$ West, 197.0 feet to the

Cont'd.

Tax No. 10,359, Cont'd.

true point of beginning; thence N. $78^{\circ}30'21''$ West, 232.66 feet; thence S. $09^{\circ}35'13''$ West, 72 feet more or less to a point on the approximate high water line of Lake Pend O'Reille; thence Easterly along said approximate high water line to a point which bears S. $10^{\circ}41'03''$ West, 75 feet more or less from the point of beginning; thence N. $10^{\circ}41'03''$ East, 75 feet more or less to the true point of beginning including appurtenant shore lines and riparian rights.

A parcel of land being a portion of Tax No. 3257 in Government Lot 2, Section 34, Township 54 North, Range 2 West, Boise Meridian, Kootenai County, Idaho, and being described by metes and bounds as follows:

BEGINNING at a found iron rod and PLS 4194 cap marking the Northeast corner of Tax No. 10,359 as described in Miscellaneous Book 86, Page 763; thence

Along the North line of Tax No. 10,359, North 78°56'29" West, a distance of 232.66 feet to a found iron rod and PLS 4194 cap marking the Northwest corner of Tax No. 10,359; thence

Along the West line of Tax No. 10,359 extended, North 09°17'04" East, a distance of 8.80 feet to a set iron rod and PLS 4194 cap in the centerline of a private road; thence

Along the centerline of said private road, North 76°34'23" West, a distance of 51.90 feet; thence

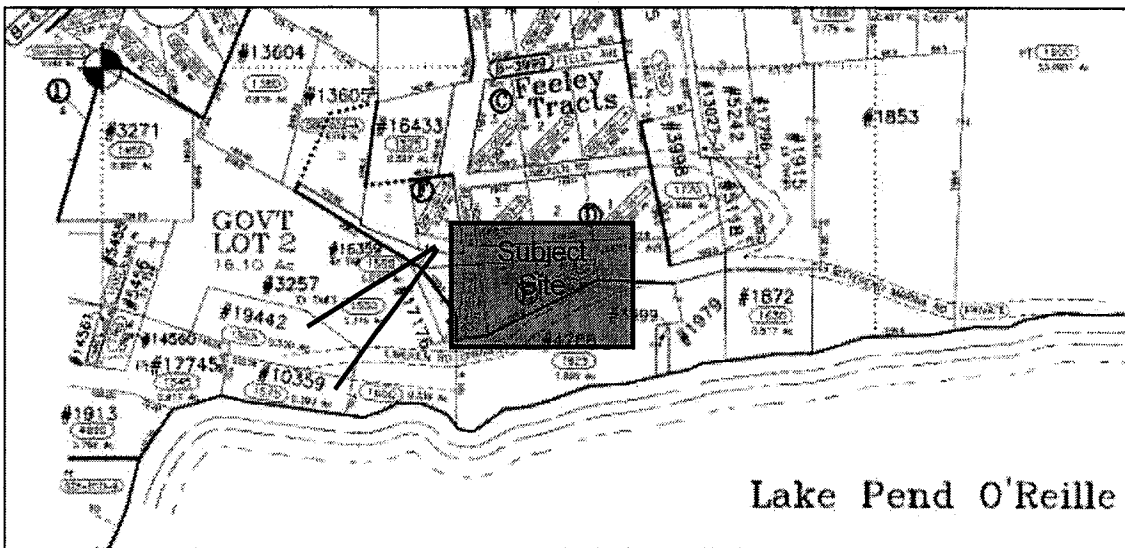
Along a line 65 feet East of and parallel with the West line of Tax No. 3257, North 18°48'21" East, a distance of 80.20 feet to a set iron rod and PLS 4194 cap; thence

South 79°41'55" East, a distance of 168.82 feet to a set iron rod and PLS 4194 cap; thence

South 57°56'44" East, a distance of 111.99 feet to a set iron rod and PLS 4194 cap on the East line of Tax No. 10,359 extended; thence

Along the East line of Tax No. 10,359 extended, South 10°22'54" West, a distance of 52.52 feet to the POINT OF BEGINNING.

PLAT MAP



IDAHO DEPARTMENT OF LANDS INFORMATION

DIVISION OF LANDS, MINERALS AND RANGE
BUREAU OF SURFACE AND MINERAL RESOURCES
300 NORTH 9TH STREET, SUITE 103
POST OFFICE BOX 83720
BOISE ID 83720-0000
PHONE (208) 334-2200
FAX (208) 334-3808



GEORGE B. BACOS, DIRECTOR
BUREAU OF SURFACE AND MINERAL RESOURCES

STATE BOARD OF LAND COMMISSIONERS
C. J. "Butch" Otter, Governor
Ben Yarcus, Secretary of State
Lawrence G. Wasden, Attorney General
Dennis M. Junge, State Controller
Tom Luna, Sup't of Public Instruction

March 26, 2008

CAPTAINS WHEEL RESORT INC
PO BOX 265
BAYVIEW ID 83803

 COPY

Reference: Insurance for Submerged Lands Lease B2074

Upon a review of your file, we noticed you have not submitted current insurance documentation. Please provide proof of insurance as per the terms of your lease by April 28, 2008.

All lessees shall, at their own expense and at all times, procure and keep in force comprehensive general liability insurance from claims for damages in limits of not less than \$500,000.00 for property damage. Lessee will further ensure the State of Idaho and the Idaho Department of Lands, are named by certificate as an additional insured to the fullest extent allowed by article VIII, §4, of the Idaho Constitution, and the Idaho Tort Claims Act. Please provide a copy of your Proof of Insurance.

Should you have any questions, you may contact me at the above address or telephone (208) 334-0281.

Eric Wilson
Navigable Waters/Minerals Program Manager

DEPT OF LANDS

MAR 31 2008

Enclosures
EW:dh

PEND OREILLE LAKE

cc: Bureau File
Pend Oreille, 2550 Highway 2 West, Sandpoint, ID 83884

DIVISION OF LANDS, MINERALS AND RANGE
BUREAU OF SURFACE AND MINERAL RESOURCES
254 West Jefferson, Post Office Box 23720
Boise ID 83720-0250
Phone (208) 334-2200
Fax (208) 334-3689



STATE BOARD OF LAND COMMISSIONERS
C. L. "Butch" Cifer, Governor
Ben Viscusi, Secretary of State
Lawrence G. Wadsworth, Attorney General
Doris M. Jones, State Controller
Tom Lane, Sup't of Public Instruction

GEORGE B. BACON, DIRECTOR
EQUAL OPPORTUNITY EMPLOYER

 COPY

June 7, 2007

Captains Wheel Resort Inc
PO Box 517
Bayview ID 83803

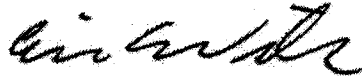
SUBJECT: State of Idaho Submerged Lease No. B2074

This correspondence is notification the subject Submerged Lease will expire on December 31, 2007. If you have a continuing interest in the lands covered by the lease, you will need to complete the enclosed renewal application and return it to my attention, along with the \$50.00 application fee.

Generally, most terms and conditions of any new lease you may be offered will be the same as your existing lease.

If you wish to apply for renewal of the miscellaneous lease, please complete the enclosed application and return it to my attention with the \$50.00 fee by July 9, 2007.

If you have any questions, please contact me at (208) 334-0261.



Eric Wilson
Navigable Waters/Minerals Program Manager

Enclosure

cc: Bureau File
Pend Oreille

DIVISION OF LANDS, MINERALS AND RANGE
BUREAU OF SURFACE AND MINERAL RESOURCES
300 NORTH 8TH STREET, SUITE 103
POST OFFICE BOX 83720
BOISE ID 83720-0000
PHONE (208) 334-0200
FAX (208) 334-3098



STATE BOARD OF LAND COMMISSIONERS
C. L. "Butch" Otter, Governor
Ben Yount, Secretary of State
Lawrence G. Wasden, Attorney General
Donna M. Jones, State Controller
Tom Lamm, Superintendent of Public Instruction

December 17, 2007

Captain's Wheel Resort Incorporated
PO Box 517
Bayview ID 83803

Reference: Commercial Submerged Land Lease No. B-2074

Enclosed are two original lease documents for the above referenced lease. Please have the leases executed and notarized, and return both originals to this office along with the other documents requested in this letter by January 4, 2008.

You will need to provide proof of liability insurance as defined in the lease terms (see Section 3-Insurance). Please request that your insurance agent pay special attention to the cancellation comments on the insurance certificate; the comments must be crossed out and/or the wording must match the sample exactly.

Once we have received the signed lease in duplicate, the insurance certificate, we will request the lease be signed by the State Board of Land Commissioners and then return one original to you for your files.

If you have any questions, please contact me at (208) 334-0261.


Eric Wilson
Navigable Waters/Minerals Program Manager

Enclosures

cc: ~~Area Office~~
Bureau File

DIVISION OF LANDS, MINERALS AND RANGE
BUREAU OF SURFACE AND MINERAL RESOURCES
300 North 8th Street, Suite 100
Boise, ID 83702-5958
Phone (208) 334-2220
Fax (208) 334-3898

334-0290



George B. Bacon, Director
Bureau of Surface and Mineral Resources

STATE BOARD OF LAND COMMISSIONERS
C. L. "Bub" Oler, Governor
Ben Youns, Secretary of State
Lawrence G. Warden, Attorney General
Dorva M. Jones, State Controller
Tom Luns, Sup't of Public Instruction

Pend Oreille

DEPT OF LANDS

APR 21 2008

LEASE NO. B2074

LESSEE: Captain's Wheel Resort, Inc.

PEND OREILLE LAKE

GROSS RECEIPTS REPORT FOR 2007

MOORAGE

▶ TOTAL GROSS RECEIPTS FROM MOORAGE (Enter on Line 1) \$ 5,770.00 Line 1

▶ TOTAL GROSS RECEIPTS CALCULATION

Total Gross Receipts x 3.75%
(Multiply Line 1 by 0.0375 and enter on Line 2) \$ 201.38 Line 2

If a lease discount DOES NOT apply, enter the amount from Line 2 into Line 5.
If a lease discount DOES apply, complete the Adjusted Gross Receipts section next.

▶ ADJUSTED GROSS RECEIPTS — PUBLIC ACCESS DISCOUNT *

(Complete ONLY One Option Below Per the Terms of Your Lease)

☐ 25% Discount Calculation

1. Line 2 x 0.25 = Discount (Enter on Line 3)
2. Line 2 Minus Line 3 = Adjusted Gross Receipts (Enter on Line 5) \$ Line 3

☐ 50% Discount Calculation

1. Line 2 x 0.50 = Discount (Enter on Line 4)
2. Line 2 Minus Line 4 = Adjusted Gross Receipts (Enter on Line 5) \$ Line 4

ADJUSTED GROSS RECEIPTS: \$ 201.38 Line 5

▶ GROSS RECEIPTS DUE

- 1. If amount on Line 5 is greater than the base rent of \$250, subtract base rent from Line 5; enter on Line 6.
- 2. If amount on Line 5 is equal to, or less than \$250, enter -zero- on Line 6.

SUBMIT PAYMENT FOR THIS AMOUNT: \$ 0 Line 6

I hereby certify that the above amount accurately and correctly states the gross receipts for the above-referenced lease site and use(s) to the best of my knowledge.

SIGNED: Mave Stastic

DATE: 4-11-08

DIVISION OF LANDS, MINERALS AND RANGE
BUREAU OF SURFACE AND MINERAL RESOURCES
954 West Jefferson, Post Office Box 83720
Boise ID 83720-0080
Phone (208) 334-0200
Fax (208) 334-3498



STATE BOARD OF LAND COMMISSIONERS
C. L. "Boach" Otter, Governor
Ben Taylor, Secretary of State
Lawrence G. Hixson, Attorney General
Dennis M. Jones, State Comptroller
Tom Latta, Sup't of Public Instruction

GEORGE B. BACON, DIRECTOR
SOCIAL SECURITY EMPLOYER

30 April 2007

James Campbell
Captain's Wheel Resort, Inc.
PO Box 265
Bayview ID 83803

Re: State of Idaho Lease No. B-2074

Section 1 of your lease requires that your Gross Receipts form be completed and returned by February 1 of each year. We have yet to receive this information. I am enclosing another Gross Receipts form for your convenience. Please remit the enclosed 2006 Gross Receipts form with payment prior to May 31, 2007, so that we may bring your lease into good standing and avoid cancellation.

Should you have any questions, you may contact me at the above address or telephone (208) 334-0261.

ERIC WILSON, Program Manager
Navigable Waters/Minerals

EW/ih

cc: Bureau file
Pend Oreille Area Office: 2550 Highway 2 West Sandpoint ID 83864 208.263.5104

IDAHO DEPARTMENT OF LANDS

954 W. Jefferson St., PO Box 83720
Boise, Idaho 83720-0350
Phone (208) 334-0200 Fax (208) 334-2339
WINSTON WIGGINS - DIRECTOR

BOARDS OF LAND COMMISSIONERS
BRK HEMPTHORNE
Secretary
SEN YBURGA
Secretary of State
LAWRENCE D. WADSWORTH
Attorney General
KEITH L. JOHNSON
State Controller
WALTER H. HOWARD
Board of Public Education

COPY

March 6, 2006

Captains Wheel Resort Inc.
c/o James T Campbell
PO Box 517
Bayview ID 83803

Re: State of Idaho Lease # B-2074 - 2006 Rental Overpayment

We received duplicate payments of 2006 rental from you. We received a \$250.00 payment from you on December 19, 2005 and a \$250.00 payment again on December 30, 2005. Your 2005 Gross Receipts report showed no additional rent due.

The \$250.00 credit to this lease account will be applied to the 2007 rental in November 2006.

If you have any questions, please contact me at 208-334-0200.


Michael J. Murphy, Program Manager
Bureau of Surface and Mineral Resources

cc: Area

KEEP IDAHO GREEN
PREVENT WILDFIRE
EQUAL OPPORTUNITY EMPLOYER

Lease Data Form

New Renewal Assignment Inspection

Lessee Number:	B-2074
Lessor/Lessee Name:	Captain's Wheel Resort, Inc.
Contact Person: <small>(IF DIFFERENT THAN LESSOR)</small>	James Campbell
Address:	P.O. Box 265 Bayview, ID 83803
Phone Number:	
Term (LENGTH OF LEASE):	10 years
Legal Description:	Adjacent to Tax # 3257, Sec. 34, T54N, R2W, B.M., State of Idaho
County:	Bonner
Use:	24-slip marina for commercial use & patrons of lounge & restaurant
Rent:	\$250 base rent or 3.75% GMR (whichever is greater)
If Communication Site, Name of Site <small>(e.g. cell tower, tower site)</small>	
CPI or IPD yearly increase?	
Insurance:	\$1,000,000 Standard
Miscellaneous:	Encroachment Permit # L-96-S-241 This facility was in existence prior to 1970 & only 3-4 slips sit over State land, so 3.75% GMR will not likely exceed \$250
Application Fees Paid:	<input type="checkbox"/> Yes <input type="checkbox"/> No

Preparer: Vicki Nault-Carey
Date: 7/10/06

Please provide copies of permits, maps and/or photos if possible



Bureau of Surface and Mineral Resources
 954 West Jefferson Street
 P.O. Box 83720, Boise, Idaho 83720-0050
 (208) 334-0200
 Fax (208) 334-3691

Winston A. Wiggins
 Director

LEASE NO. B2074
 LESSEE: Captain's Wheel Resort, Inc.

GROSS RECEIPTS REPORT FOR THE CALENDAR YEAR 2002

GROSS RECEIPTS (before subtracting annual base rent)	<u>2002 Gross Receipts:</u>
1. Moorage Gross Receipts	$\frac{\$ 2320}{\times 3.75\%} = \$ 8700$
Discount for Public Access: (see explanation below)	
A. Annual Compensation from Step 1 above x 25%: (If Applicable)	2175
OR:	
B. Annual Compensation from Step 1 above x 50%: (If Applicable)	-
LESS BASE RENT PAID:	<u>-\$250.00</u>
GROSS RECEIPTS RENT DUE:	<u>\$ 8450</u>

SIGNED: James Campbell Date: 3/24/03

*A. If a marina makes all of its marina facilities available to the public on a first come, first served basis, the annual compensation shall be discounted by twenty five percent (25%); except that the rent, after discount, shall not be less than two hundred fifty dollars (\$250.00)

*B. If a marina makes all of its marina facilities available to the public on a first come, first served basis and fifty percent (50%) or more of the boat slips are set aside for day use only, then the annual compensation shall be discounted by fifty percent (50%); except that the rent, after discount, shall not be less than two hundred fifty dollars (\$250.00)

RECEIVED
 APR 10 2003
 BOISE, IDAHO



SUBMERGED LANDS LEASE - COMMERCIAL
Lease No. B-2074
Captain's Wheel Resort, Inc.

The lease agreement is made and entered into by and between the State of Idaho, acting by and through the State Board of Land Commissioners (LESSOR) and James T. Campbell the Captain's Wheel Resort, Inc. (LESSEE), P.O. Box 266, Bayview, ID 83803-0266, collectively referred to herein as the "Parties." In consideration of the mutual covenants and conditions contained herein, the Parties agree as follows:

The lease shall commence July 1, 1998 and terminate December 31, 2007.

The LESSOR, in consideration of the rental paid and the covenants, conditions and restrictions hereinafter set forth in Attachment A and incorporated herein by reference, does hereby lease and demise unto the LESSEE, at the rate and for the use specified herein, the lands described in Agreement to Tax #257, Section 34, Township 04 North, Range 2 West, B.M., as set forth in Encroachment Permit No. C-96-5-241A.

(Bonneville County, Idaho)

In consideration of the foregoing, the covenants, restrictions and conditions in the attached, herein incorporated by reference, are hereby agreed to by LESSEE and LESSOR.

IN WITNESS WHEREOF, the parties hereto have caused their presents to be duly executed the day and year first above written.

IDAHO STATE BC

POSTER FILE NO. 7871

DATE FILED

BY

TO	Carl	DATE	8/20/02
FROM	Rob	DATE	8/21/02

Secretary of State

Paula J. Brannan
Deputy, Department of Lands

STATE OF IDAHO, COUNTY OF ADA

On this 16 day of August 1998 before me, a Notary Public, to and for said State, personally appeared Philip E. Burt, known to me to be the President of the Idaho State Board of Land Commissioners and the Governor of the State of Idaho, and said T. Campbell, known to me to be the Secretary of the State of Idaho and Stanley F. Harrington, known to me to be the Director, Department of Lands, that executed the within instrument, and acknowledged to me that the State Board of Land Commissioners of the State of Idaho and the State of Idaho executing the same.

IN WITNESS WHEREOF, I have hereunto set my hand and seal on the day and year last above written.

Philip E. Burt
Notary Public

Stanley F. Harrington
Residence

5/29/2001
Commission Expires

LESSOR

James T. Campbell LESSOR

STATE OF Idaho COUNTY OF Kootenai (LESSOR)

On this 23 day of March 1998 before me, a Notary Public in and for said State, personally appeared Carl and Rob, known to me to be the LESSEES that executed the within instrument, and acknowledged to me that they executed same.

IN WITNESS WHEREOF, I have hereunto set my hand and seal on the day and year last above written.

William Davidson Notary Public

7-8-2002 Commission Expires

LESSEE

Carl LESSEE

Rob LESSEE

ATTACHMENT A
Encroachment

1. Rent:

Lessee shall pay the Lessor, as rent for the Leased Site, the following amounts, determined and payable in the manner and at the time set forth herein.

- A. **Annual Rent.** Lessee shall pay to Lessor as annual rent, without abatement, offset or deduction of any kind, unless allowed by this lease, the sum of TWO HUNDRED FIFTY DOLLARS (\$250.00) annual base rent or 3.75% of annual gross boat moorage receipts, whichever is greater. Base rent for lease year 1998 shall be due on or before July 1, 1998. Beginning 1999, annual base rent shall be due on or before the 1st day of January of each lease year. For instructions for reporting and payment of gross receipts rent for boat moorage, see 1.B., below. All rent shall be paid in lawful money of the United States of America forwarded to the Lessor or as otherwise directed by the Lessor in writing.
- B. **Gross Receipts Rent and Report.** Lessee shall calculate and report annual gross receipts by February 1 following the end of each lease year. It is incumbent upon Lessee to furnish said report and payment to Lessor without further notification.
1. **Calculation of Gross Receipts Rent.** Gross receipts rent is owed when the amount of annual gross receipts times 3.75% exceeds the amount of base rent paid in advance for the lease year:

$$(\text{Gross Receipts} \times 3.75) - \$250.00 \text{ Base Rent} = \text{Gross Receipts Rent Payment Due}$$
 2. **Report.** Whether or not gross receipts rent is due, Lessee shall provide to Lessor a verified report of gross receipts for the previous calendar year. It is incumbent upon Lessee to furnish said report and payment to Lessor without further notification.
- C. **Annual rent subject to modification.** Lessor reserves the right to increase or decrease the annual rent to be paid by the Lessee effective on January 1 of any calendar year by first providing Lessee with one hundred and eighty (180) calendar days prior written notification of the change in the annual lease amount.
- D. **If a marina makes all of its marina facilities available to the public on a first-come, first-served basis, the annual compensation shall be discounted by twenty-five percent (25%); except that the rent, after discount, shall not be less than two hundred fifty dollars (\$250.00). If a marina makes all of its marina facilities available to the public on a first-come, first-served basis and fifty percent (50%) or more of the boat slips are set aside for day use only, then the annual compensation shall be discounted by fifty percent (50%); except that the rent, after discount, shall not be less than two hundred fifty dollars (\$250.00).**
- E. **Late Payment Fee.** Any late payment of annual rent shall be cause for the Lessor to declare a default herein. If any rent payment is not made to Lessor on or before January 1 as provided herein, the Lessee shall pay to the Lessor, as a late payment fee an amount equal to \$25.00 or one percent (1%) of the amount due, whichever is greater, plus one percent (1%) per month of said amount due including interest thereafter until paid in full.

2. Right to Renew:

Lessor grants to Lessee the option to renew this Lease for one additional term of ten (10) years commencing upon expiration of the original Lease, provided that written notice of the exercise of the option shall be given by Lessee to Lessor at least ninety (90) calendar days prior to the expiration of this Lease. This option to renew may be exercised by Lessee only in the event that: (1) all rents due have been paid in full; (2) Lessee continues to hold a valid Encroachment Permit and is in compliance with all the provisions of the Encroachment Permit; and (3) Lessee has complied with all provisions of this Lease and fully and faithfully performed all obligations herein.

3. Use of Premises:

The Leased Site shall be used for a 24-slip marina for commercial use and for patrons of lounge and restaurant in accordance with Encroachment Permit #L-98-S-241A and any successor permit. This Lease is contingent upon Lessee continuously maintaining and complying with the provisions contained in the Encroachment Permit. Any new or change of use requires Lessor's prior written amendment of the Encroachment Permit and prior written adjustment of this Lease Agreement.

Submerged Lands Lease #S-2014
Page 1 of Attachment A

4. Sublease and Assignment:

- A. **Sublease.** This Lease may not be subleased without first Lessee obtaining the prior written consent of Lessor, or Lessor's designee.
- B. **Assignment.** This Lease may not be assigned without first Lessee obtaining the prior written consent of the Lessor, or Lessor's designee.

5. Lessee's Compliance with Applicable Laws and Rules:

- A. **Full Compliance.** Lessee's use of the Leased Site shall fully comply with all statutes, ordinances, rules, regulations and laws of applicable federal, state and local governmental authorities. Lessee shall comply with all applicable rules and regulations and standards promulgated by the State Land Board or the Idaho Department of Lands, including but not limited to the Rules Governing Leases on State-Owned Submerged Lands and Formerly Submerged Lands, IDAPA 20.03.17, which rules are expressly incorporated by reference into this lease.
- B. **No Waste or Nuisance.** Lessee shall not use the Leased Site in any manner that would constitute waste, nor shall the Lessee allow the same to be committed thereon. The Lessee shall not do anything which will create a nuisance or a danger to persons or property.

6. Environmental, Safety and Sanitary Requirements:

- A. **Sanitary Requirements.** Lessee shall at all times keep the Leased Site in a clean and sanitary condition, free of trash, noxious weeds, garbage and filth, so that the Leased Site is maintained in as nearly natural state as possible. Lessee shall not dispose of sewage except in conformity with applicable federal, state, and local law, rules and regulations pertinent to Lessee's use. The Lessee shall store and dispose of all trash and garbage within conformity with all legal requirements. Lessee is responsible for all costs associated with sewage, garbage and litter disposal.
- B. **Fire and Safety Regulations.** Lessee shall comply with all applicable state laws and rules of the Department of Lands, for fire protection and prevention. Lessee agrees to keep the Leased Site free from fire hazards. Lessee is prohibited from burning of garbage or household trash. The burning of wood or other debris requires the prior written permission of Lessor and must comply with applicable federal, state, or local law, regulation, rule or ordinance.
- C. **No Hazardous Materials.** Lessee shall neither commit nor permit the use, placement, transport or disposal of any hazardous waste such as oil, gasoline or any other substance that is or is suspected to be hazardous substance or material, except in accordance with applicable federal, state, or local laws, regulations, rules or ordinances. Lessee shall be responsible, and shall pay all costs for the removal or taking other appropriate remedial action regarding any hazardous waste, substances, or materials which Lessee may have caused to be introduced on the Leased Site. Any such remediation or removal or storage must be conducted in accordance with applicable federal, state or local law, regulation, rule or ordinance.

7. No Warranty of Suitability:

- A. **No Warranty.** Lessee acknowledges that the Lessor, nor any agent or designee of the Lessor has made any representation or warranty with respect to the Leased Site or concerning the suitability of the Leased Site for the uses intended by the Lessee. Lessee acknowledges that it has accepted the Leased Site in an "AS IS CONDITION", accepting liability for any and all known or unknown faults therein.
- B. **Quiet Enjoyment.** Lessor agrees that the Lessee, upon payment of the rent and performing the terms of this Lease, may quietly have, hold and enjoy the Leased Site during the term hereof.

8. Payment of Taxes and Assessments:

The Lessee agrees to pay, when due, before delinquency, any real or personal property taxes, assessment or fees that may be assessed or levied by a governmental authority asserting such authority over the Leased Site or its improvements. Lessee shall make such payment directly to the taxing authority and hold Lessor harmless from any claim or assessment.

Submerged Lands Lease #B-2074
Page 2 of Attachment A

9. Construction and Improvements.

- A. Water Development.** Lessee shall not drill or use a new water well, nor develop any use of any water source without first obtaining the prior written consent of the Lessor and the applicable governmental authorities responsible for adjudicating and developing water rights.
- B. Construction of Improvements.** Lessee may construct improvements upon the Leased Site under limited circumstances in accordance with the following conditions. Lessee must first obtain an Encroachment Permit under the Idaho Lake Protection Act, I.C. §§ 58-1301, et seq. The construction of the improvements must also comply with all applicable zoning and local building codes, to the extent they apply, and the rules and regulations of the Idaho Department of Lands. Lessee may not place a lien or encumber the Leased Site.
- C. Treatment of Approved Improvements Upon Lease Expiration.** Upon expiration of this Lease or any renewal period, the Lessor shall have the right to purchase the approved improvements from Lessee at the fair market value of the improvements as of the date of the lease expiration, or Lessor may require Lessee to remove all approved improvements placed or caused to be placed upon the Leased Site and have the Lessee restore the Leased Site to its nearly natural condition as practicable. The removal of the approved improvements shall be at the Lessee's sole cost and expense and will be the restoration of the Leased Site. Lessee shall maintain the Leased Site free of any encumbrance or lien.
- D. Non-Approved Improvements.** Any improvements to the Leased Site which are not approved by Lessor shall be removed by the Lessee at the Lessee's sole cost and expense. Upon the expiration of the lease term if unapproved improvements remain on the Leased Site, then Lessor may remove such unapproved improvements and charge the cost of removal and restoration to Lessee. Lessee shall also be responsible for all collection costs including legal fees and interest.

10. Release of the Parties.

Lessee is not an officer, employee or agent of the Lessor. Lessee covenants that it will satisfy and hold Lessor harmless against any lien, judgment or encumbrance filed or made against the Leased Site at the Lessee's sole and separate cost or expense.

11. Insurance.

Lessee shall purchase and keep in force all insurance required by this Lease, including business interruption insurance to the extent it is available, to assure payment of the annual rental rate.

- A. Commercial General Liability.** Lessee shall obtain, at Lessee's expense, and keep in effect during the term of this Lease, Commercial, General, Liability Insurance covering bodily injury and property damage. This insurance shall include personal injury coverage, contractual liability coverage for the indemnity provided under this Lease. Coverage shall be combined single limit per occurrence which shall not be less than ONE MILLION DOLLARS (\$1,000,000.00), or the equivalent. Each annual aggregate limit shall not be less than ONE MILLION DOLLARS (\$1,000,000.00), when applicable.
- B. Additional Insured.** The liability insurance coverage, required for performance of the Lease shall include the State of Idaho, the Board of Land Commissioners, and the Department of Lands, its officers, agents and employees as Additional Insureds, but only with respect to the Lessee's activities arising during the performance of this Lease. There should be no cancellation, material change, potential exhaustion of aggregate limits or intent not to renew insurance coverage without thirty (30) calendar days written notice from the Lessee or its insurer to the Department of Lands. Any failure to comply with the reporting provisions of this insurance, except for the potential exhaustion of aggregate limits, shall not affect coverages provided to the State of Idaho, the Board of Land Commissioners and the Department of Lands, its officers and employees.

12. Indemnification.

Lessee shall indemnify, defend and save harmless the Lessor, the State of Idaho, its officers, agents and employees from and against any liability, claims, damages, losses, expenses or actions, including reasonable attorneys' fees, caused by or arising out of the performance, act or omission of Lessee, or Lessee's agents or employees or otherwise arising out of the use or occupation of the Leased Site; or arising from the Lessee or Lessee's agents, or employees failure to comply with any applicable state, federal, or local law, statute, rule, regulation or act. This indemnification shall survive the termination or expiration of this Lease.

Submerged Lands Lease #S-2074
Page 3 of Attachment A

13. Inspection and Audit Rights.

- A. **Inspection by Lessor.** Lessee shall permit Lessor, or Lessor's authorized agent or designee to inspect and enter the Leased Site and any improvements at any reasonable time.
- B. **Audit Rights.** The Lessor shall have the right to audit, in such a manner at all reasonable times as it deems appropriate, all activities of the Lessee arising in the course of its undertakings under this Lease. Lessee must maintain its books, records, documents, and other evidence of accounting in accordance with generally accepted accounting principles so as to properly reflect its business.

14. Reservations by Lessor.

The Lessor expressly reserves and accepts the following rights from the Lessee:

- A. The rights and interests of the public in the Leased Site under the Equal Footing and Public Trust Doctrines.
- B. All rights for oil and gas, geothermal rights, mineral rights, easements and rights-of-way, fee title to the Leased Site, and title to all appurtenances and improvements placed thereon by the Lessor.
- C. The right to grant easements over the Leased Site, providing, said easements do not conflict with the approved improvements installed and maintained or operated by the Lessee upon the Leased Site.
- D. The right to require that changes are made to the ventilation or other facilities for the protection of public health, safety or preservation of the Leased Site.
- E. The right to issue leases for exploration and development of oil, gas, geothermal and mineral resources or any other lease, so long as such other use does not materially interfere with the authorized use under this Lease.

15. Lessee's Default.

Lessee's breach of any of the terms of this Lease or a breach of any of the terms of the applicable Encroachment Permit is a basis for termination of the Lease. Lessee's violation of any Land Board or Department of Lands rule or regulation currently or hereafter adopted is a further basis for termination of this Lease. Lessor shall provide Lessee written notice of the breach for violation and, if applicable, the corrective action required of Lessee. This notice shall specify the reasonable time to make a correction or cure the violation or breach. If the corrective action or cure is not taken within the specified time or does not occur, then the Lessor, or Lessor's designee shall cancel the Lease effective on the date specified in the written cancellation notice, provided however, that the notice shall be provided to Lessee no later than thirty (30) calendar days prior to the effective date of such cancellation.

16. Notices.

Any notice or demand given under the terms of this Lease shall be deemed given and delivered on the date when personally delivered or if mailed, the date same is deposited in the United States Mail, and mailed by registered or certified mail, return receipt requested, postage prepaid and properly addressed to the appropriate party. Until changed by notice in writing, notice, demands and communications shall be addressed as follows:

TO: Idaho Department of Lands (LESSOR)	TO: James T. Campbell
954 W. Jefferson St.	aka Captain's Wheel Resort, Inc. (LESSEE)
P.O. Box 83720	P.O. Box 265
Boise, ID 83720-0050	Bayview, ID 83803

17. Waiver.

The waiver by the Lessor of any breach of any term, covenant or condition of this Lease shall not be deemed to be a waiver of any past, present or future breach of the same or any other term, covenant or condition of this Lease. The acceptance of rent by the Lessor hereunder shall not be construed to be a waiver of any term of this Lease. No payment by the Lessee of a lesser amount than shall be due according to the terms of this Lease shall be deemed or construed to be other than a part payment on account of the most recent rent due, nor shall any endorsement or statement of any check or letter accompanying any payment be deemed to create an accord and satisfaction.

Submerged Lands Lease #B-2074
Page 4 of Attachment A

18. Attorneys' Fees and Costs.

In the event that either party to this Lease shall interpret or enforce any of the provisions hereof by any action at law or in equity, the unsuccessful party to such litigation agrees to pay to the prevailing party all costs and expenses, including reasonable attorneys' fees, accountants' fees and appraisers and fees of other experts, incurred therein by the prevailing party, including all such costs and expenses incurred with respect to an appeal and such may be included in the judgment entered in such action.

19. Surrender of Leased Site.

Upon the expiration of this Lease term, all right, title, and interest of Lessee in any of the improvements constructed upon or placed upon the Leased Site that are not removed shall be deemed to revert to the State of Idaho. Lessee upon termination of this Lease shall quietly surrender the Leased Site to Lessor.

20. Officials, Agents and Employees Not Personally Liable.

In no event shall any official, officer, employee or agent of the State be in any way personally liable or responsible for any covenant or obligation contained in this Lease, express or implied, nor for any statement, representation or warranty made in connection herewith.

21. Miscellaneous.

- A. **Modification.** This Lease may be modified in any particular only by the prior written consent of the authorized representatives of the Lessor and Lessee.
- B. **Complete Statement of Terms.** No other understanding, whether oral or written, whether made prior to or contemporaneously with this Lease, shall be deemed to enlarge, limit or otherwise effect the operation of this Lease.
- C. **Lessee's Non-Discrimination.** Lessee shall not discriminate against any person because of race, creed, religion, color, sex, national origin or disability.
- D. **Paragraph Headings.** The paragraph headings, titles and captions used in this Lease are for convenience only and are not part of the Lease.
- E. **Entire Agreement.** This Lease contains the entire agreement between the parties as of the date concerning the subject matter hereof and supersedes all prior agreements. The execution of this lease has not been induced by either party, or any agent of either party, by representations, promises or undertakings not expressed herein and, further, there are no collateral agreements, stipulations, covenants, promises, inducements or undertakings whatsoever between the respective parties concerning this Lease except those which are expressly contained herein.
- F. **Governing Law and Forum.** This Lease shall be construed in accordance with and governed by the laws of the State of Idaho and the parties consent to the jurisdiction of Idaho State Courts located in Ada County in the event of any dispute with respect to this Lease.
- G. **Binding on Heirs and Successors.** It is understood and agreed that all terms, covenants and conditions hereof shall be binding upon the approved assignees, approved assignees and Lessor's heirs or successors in interest.
- H. **Severability.** In the event any provision of this Lease shall be held invalid or unenforceable according to law, for any reason whatsoever, then the validity, legality or enforceability of the remaining provisions shall not in any way be affected or impaired.

Submerged Lands Lease #D-2074
Page 3 of Attachment A



Bureau of Range Management & Surface Leasing
 954 W. Jefferson St.
 P.O. Box 83720, Boise, Idaho 83720-0050
 (208) 334-0251

December 19, 2001

LEASE NO. B-2074
 LESSEE: Captain's Wheel Resort, Inc.
 James Campbell

*Carl -
 cool Ron
 King on Area 1
 ones*

GROSS RECEIPTS REPORT FOR THE CALENDAR

1. Activity:	2001 Gross Receipts
Marina	<u>5082.⁰⁰</u>
	X 3.75%
ANNUAL RENT	<u>190.58</u>
2. Discount for Public Access: (see explanation below)	
A Annual Compensation from Step 1 above X 25%:	<u>- 25% (\$47.64)</u>
OR:	
B Annual Compensation from Step 1 above x 50%:	<u>..</u>
3. Base Rent Paid for 2001:	<u>- \$250.00</u>
4. GROSS RECEIPTS RENT DUE FOR 2001	<u>\$ 0</u>

(If gross receipts rent is less than base rent paid for 2001, enter "0")

SIGNED: Jan A. Campbell Date: 1/27/02

*A. If a marina makes all of its marina facilities available to the public on a first come, first served basis, the annual compensation shall be discounted by twenty five percent (25%); except that the rent, after discount, shall not be less than two hundred fifty dollars (\$250.00)

B. If a marina makes all of its marina facilities available to the public on a first come, first served basis and fifty percent (50%) or more of the boat slips are set aside for day use only, then the annual compensation shall be discounted by fifty percent (50%); except that the rent, after discount, shall not be less than two hundred fifty dollars (\$250.00).



954 W. Jefferson St., PO Box 83720
Boise, Idaho 83720-0050
Phone (208) 334-0200 Fax (208) 334-2300
STANLEY F. HAMILTON - DIRECTOR

BOARD OF LAND COMMISSIONERS

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Chairman

PETE T. DEANERUDA
Secretary of State

BLAKE LANCE
Attorney General

J.D. WILLIAMS
State Controller

MARILYN HOWARD
Supt. of Public Instruction

July 29, 1999

James T. Campbell
P.O. Box 265
Bayview ID 83805

Re: Insurance on Lease No. B-2074

Dear Mr. Campbell:

In reviewing our files we note that we do not have a current certificate of insurance for the above-referenced lease as required in paragraph 11. Please forward an updated certificate to us at your earliest convenience.

Sincerely,

Meredith Dille
Senior Secretary
Bureau of Range Management & Surface Leasing

/md

c: Carl Washburn

KEEP IDAHO GREEN
PREVENT WILDFIRE
EQUAL OPPORTUNITY EMPLOYER



SUBMERGED LANDS LEASE - COMMERCIAL
Lease No. B-2074
Captain's Wheel Resort, Inc.

This lease agreement is made and entered into by and between the State of Idaho, acting by and through the State Board of Land Commissioners (LESSOR) and James T. Campbell dba Captain's Wheel Resort, Inc. (LESSEE), P.O. Box 265, Bayview, ID 83803-0265, collectively referred to herein as the "Parties." In consideration of the mutual covenants and conditions contained herein, the Parties agree as follows:

This lease shall commence July 1, 1998 and terminate December 31, 2007.

The LESSOR, in consideration of the rental paid and the covenants, conditions and restrictions hereinafter set forth in Attachment A and incorporated herein by reference, does hereby lease and demise unto the LESSEE, at the rate and for the use specified herein, the lands described as: Adjacent to Tax #3257; Section 34, Township 54 North, Range 2 West, B.M., as set forth in Encroachment Permit No. L-98-S-241A.

[Bonner County, LM20-10]

In consideration of the foregoing, the covenants, restrictions and conditions in the attached, herein incorporated by reference, are hereby agreed to by LESSEE and LESSOR.

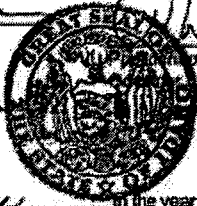
IN WITNESS WHEREOF, the parties hereto have caused these presents to be duly executed the day and year first above written.

IDAHO STATE BOARD OF LAND COMMISSIONERS

Pete T. Cenarrusa
 Secretary of State

Philip E. Batt
 President of the State Board of Land Commissioners
 of the State of Idaho

Stanley F. Hamilton
 Director, Department of Lands



STATE OF IDAHO, COUNTY OF ADA

On this 10 day of June in the year 1998, before me, a Notary Public in and for said State, personally appeared Philip E. Batt, known to me to be the President of the Idaho State Board of Land Commissioners and the Governor of the State of Idaho; and Pete T. Cenarrusa, known to me to be the Secretary of the State of Idaho and Stanley F. Hamilton, known to me to be the Director, Department of Lands, that executed the within instrument, and acknowledged to me that the State Board of Land Commissioners of the State of Idaho and the State of Idaho executed the same.

IN WITNESS WHEREOF, I have hereunto set my hand and seal on the day and year last above written.

Shirley A. Baker Notary Public
Meredith ID Residence
5/22/2001 Commission Expires

LESSEE	
<u>James T. Campbell</u> (LESSEE)	<u>James T. Campbell</u> (LESSEE)
STATE OF <u>Idaho</u>	COUNTY OF <u>Kootenai</u>
On this <u>20</u> day of <u>July</u> in the year <u>1998</u> , before me, a Notary Public in and for said State, personally appeared <u>James T. Campbell</u> known to me to be a LESSEE that executed the within instrument, and acknowledged to me that they executed same.	
IN WITNESS WHEREOF, I have hereunto set my hand and seal on the day and year last above written.	
<u>Kelly Woodstrom</u> Notary Public	<u>COH</u> Residence
	<u>7-8-2000</u> Commission expires

IDAH0 DEPARTMENT OF LANDS

844 W. Jefferson St., PO Box 83720
Boise, Idaho 83720-0030
Phone (208) 334-0200 Fax (208) 334-2338

STANLEY F. HAMILTON - DIRECTOR

**BOARD OF LAND
COMMISSIONERS**

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Director

PIERRE T. GONZALEZ

Secretary of State

ALAN G. LANCE

Attorney General

J. B. WILLIAMS

State Controller

WENDY C. FOX

Sup't of Public
Instruction

June 10, 1998

James T. Campbell
Captain's Wheel Resort, Inc.
P.O. Box 265
Bayview, Idaho 83803-0265

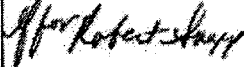
Re: Submerged Lands Lease #B-2074

Dear Mr. Campbell,

Your lease has been completed and is enclosed. Please store this document in a safe place, you will need it for future reference. Also, please be sure to notify us of any change in your use of the lease.

We appreciate the prompt attention you have given this matter.

Sincerely,



Robert Snapp
Leasing Specialist

RS/ff

enclosure

**KEEP IDAHO GREEN
PREVENT WILDFIRE**

SOIL CONSERVATION SERVICE

IDAHO DEPARTMENT OF LANDS

364 W. Jefferson St., PO Box 83720
Boise, Idaho 83720-0050
Phone (208) 334-0200 Fax (208) 334-2139

STANLEY F. HAMILTON - DIRECTOR

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BOARD OF LAND COMMISSIONERS

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PETE T. CENAPRIGA
Secretary of State

ALAN G. LANCE
Adjunct Governor

J.R. WILLIAMS
State Comptroller

ANNE C. FOX
State of Finance
Commissioner

April 16, 1998

CERTIFIED MAIL # P 590 136 080

James T. Campbell dba
Captain's Wheel Resort, Inc.
P.O. Box 265
Bayview, ID 83603-0265

Encroachment Permit #L-96-S-241A, Bayview, Pend Oreille Lake

Re: Legislative Approval of Rules Governing Leases on State-Owned Submerged Lands
and Formerly Submerged Lands (IDAPA 20 Title 03 Chapter 17)

Dear Mr. Campbell,

Several years ago, the Idaho Department of Lands undertook the writing of rules for submerged lands leasing to recognize the state's title to public trust lands and the state's right to establish equitable leasing rules and rental. This letter is to provide you with some background on the purpose and development of these rules and to notify you that you are now required to enter into and maintain a lease with the state to occupy public trust land.

A Blue Ribbon committee of individuals and industry representatives has worked with this department since 1987 to develop these rules for submerged lands leasing. Public hearings on the proposed rules were held throughout the state in September 1996. Following the recommendation of the Land Board Subcommittee on Submerged Lands Leasing, the Land Board approved these rules for final adoption in November, 1996. The Idaho Legislature approved these rules during the 1997 session with an effective date of July 1, 1997, and reviewed and affirmed the rules in 1998.

These rules are a furtherance of the Land Board interim leasing policy that was adopted in February 1984. The 1984 policy required that any new or enlarged commercial marina, multifamily dock, or non-navigational encroachment over navigable lakes and streams enter into a lease with the state. Over the last several years, the interim leasing policy created an inequity among those dock systems that had a lease and the older systems that did not. The new rules will eliminate this inequity by requiring all existing commercial marinas, multi-family docks, and non-navigational uses to pay an equitable rental to the state.

Your Encroachment Permit L-96-S-241A has been identified as a use that will require a lease under the new rules. The encroachment permit, by itself, no longer authorizes you to use public trust land. Encroachment permits and leases are separate documents with different functions. The encroachment permit controls or regulates what occurs on navigable lakes. The lease requires payment of rental to use state-owned public trust land for the encroachment.

KEEP IDAHO GREEN
PREVENT WILDFIRE

FOR A COPY OF THE RULES

James T. Campbell
Page 2

Our file for your encroachment shows that you have a 24-slip machine for commercial use and for patrons of a lounge and restaurant. The enclosed lease documents have been developed from the file. If you believe our file is not accurate, please provide a written statement to us to describe your current actual encroachment. If the enclosed lease documents are accurate regarding your facilities, please sign both copies, have your signatures notarized and return both copies to us. When the lease has been signed by state officials, we will forward one original copy to you. You must also include payment for the base rental at the time you return the signed leases. The amount of rent for your lease is specified in Section 1 of Attachment A of the lease. Gross receipts rental will be due February 1, 1998 and each February 1 thereafter. We will send you notice about gross receipts rental in December 1998.

The files also require that an application to lease be included if your encroachment is existing and is not being modified at this time. We have enclosed an application form in this package. A \$50.00 administrative fee for the application is also required.

In addition to the above, we have been advised by the state Attorney General's office and the state Division of Risk Management that to protect yourself and the state (lessor), you must acquire and maintain commercial, general, liability insurance in the minimum amount of \$1,000,000.00 per section 11A of the lease. It is likely that you already have liability insurance on your marina for your own protection. If that is the case, you should work with your insurance agent to include the state, the land board, and this department as Additional Insureds per section 11B of the lease and to make sure your policy meets the requirements of sections 11A and B. Proof of commercial, general, liability insurance must be provided to us when you send back your lease and payment.

Please return your signed and notarized lease documents with payment of rent for 1998, your signed lease application form with payment of the \$50.00 application fee, and proof of insurance before June 1, 1998 to ensure finalizing of your lease by the effective date of July 1, 1998.

If you have questions or would like to discuss the requirements of your lease, please contact Bob Snapp, Lands Leasing Specialist, Recreational and Commercial, Boise, (208) 324-0290, or Carl Washburn, Navigable Waters Specialist, Cour. d'Alene, (208) 788-1535.

Sincerely,



Bryce Taylor
Chief
Bureau of Range Management & Surface Leasing

BT:#

- enclosures:
1. IDAPA 20 Title 03 Chapter 17, Rules Governing Leases on State-Owned Submerged Lands & Formerly Submerged Lands
 2. Rental Rates for Submerged Lands Leases
 3. Fees for Submerged Lands Leases
 4. Application to Lease State Land
 5. Lease Documents

IDAHO DEPARTMENT OF LANDS

1910 NW Blvd., Ste. 201
Coeur d'Alene, Idaho 83814-2815
Phone (208) 769-1235 Fax (208) 769-1836 1537

STANLEY F. HAMILTON - DIRECTOR

BOARD OF LAND
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PETE T. CONRADSON
Secretary of State

ALAN G. LANCE
Attorney General

J.D. WILLIAMS
Deen Director

ANNIE C. FOX
Supt. of Public
Education

March 25, 1988

James T. Campbell
dba Captain's Wheel Resort, Inc.
P.O. Box 285
Bayview, ID 83803-0285

Dear Mr. Campbell:

Re: Encroachment Permit L-98-S-241A.

Enclosed is subject permit in accordance with the application you filed with this office. Please comply with all special terms and conditions.

You are required to validate this original notarized permit by recording this document with Kootenai County. Also, encroachment permit number 241A must be displayed upon the most waterward area of your encroachment with metal, plastic or vinyl numerals at least three inches in size.

Thank you for your cooperation.

Sincerely,

Carl Washburn

CARL WASHBURN
Navigable Waters Specialist

mc

enclosures

c: Surface Leasing Specialist, Boise
COE-CDA

COPY

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PREVENT WILDFIRE

YOUR OPPORTUNITY EMPLOYER

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 J.S. WILLIAMS
 State Controller
 MARGIE FOX
 Dept of Public
 Instruction

ENCROACHMENT PERMIT NO. L-96-S-241A

Permission is hereby granted to JAMES T. CAMERELL dba CAPTAIN'S WHEEL RESORT, INC. of P.O. Box 265 Bayview, ID 83803-0265 to maintain and repair 80 linear feet of retaining wall existing 152 lin.ft. wall per approved plans, located: Pond Grapple Lake @ Bayview, Tax #3257, Section 34, Township 54N, Range 2W, Boise Meridian, Kootenai County.

1. All applicable provisions of the Rules for Regulation of Beds, Waters, and Airspace over Navigable Lakes and Streams in the State of Idaho are incorporated herein by reference and made a part hereof.
2. Construction will follow details and specifications shown on the approved drawings and data provided by the applicant. Should such information and data prove to be materially false, incomplete and/or inaccurate, this authorization may be modified, suspended, or revoked in accordance with the Administrative Procedures Act, Idaho Code title 67, chapter 52.
3. This permit does not convey the State's title to or jurisdiction or management of lands lying below the natural or ordinary high water mark.
4. Acceptance of this permit constitutes permission by the Permittee for representatives of the Department of Lands to come upon Permittee's lands at all reasonable times to inspect the encroachment authorized by this permit.
5. The Permittee assumes all liability for damages which may result from the exercise of this permit.
6. This permit does not relieve the Permittee from obtaining additional local or federal permits as required.
7. This permit is not valid until the identification number is displayed on the outermost area of the encroachment.
8. If the activity authorized herein is not completed on or before the 25th day of March, 2001 (three years from the date of issuance), this permit shall automatically expire unless it was previously revoked or otherwise extended.

KEEP IDAHO GREEN
 PREVENT WILDFIRE

EQUAL OPPORTUNITY EMPLOYER

ENCROACHMENT PERMIT NO. L-96-S-241A
March 25, 1998
Page two

9. Construction materials shall be natural or pressure treated utilizing only those preservative chemicals registered for the specific uses, such as CCA (Chromated Copper Arsenate), by the U.S. Environmental Protection Agency (EPA). All treated wood materials shall be produced in compliance with "Best Management Practices (BMPs) For the Use of Treated Wood in Aquatic Environments" issued by the Western Wood Preservers Institute (WWPI), July 1996. Treated materials not in contact with the water shall be completely dry before use near navigable waters. Contact Idaho Department of Health and Welfare, Division of Environmental Quality, with questions regarding treated materials.
10. Location of the bulkhead must be as specified in the attached site plan.
11. All construction material must be stockpiled landward of the ordinary high water mark.
12. A fiber filter shall be placed between the natural shoreline and riprap material.
13. The permittee shall maintain the structure or work authorized herein in a good and safe condition and in accordance with the plans and drawings attached hereto.
14. All construction will be done according to the specifications detailed in the attached design plan.
15. All construction shall be completed in accordance with descriptions and methods provided unless otherwise specified. Any changes shall be approved in writing by the department prior to construction.
16. All work shall be performed on a dry lakebed above present level of Pend Oreille Lake.
17. No repair work or encroachment shall extend more than 4 feet waterward of existing wall.
18. All wood material used to repair existing wall shall be natural or treated material approved or acceptable to Idaho Division of Environmental Quality.
19. All material determined damaged from the floods shall be removed from the lakebed or waterway and be relocated to an area where it will not reenter the waters of Idaho.

ENCROACHMENT PERMIT NO. L-96-S-241A
March 25, 1998
Page three

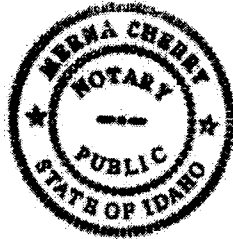
UPON TRANSFER OF THIS REAL PROPERTY, YOU ARE REQUIRED TO NOTIFY
THIS OFFICE OF THE SUBSEQUENT NAME CHANGE (SEE ENCLOSURE).

FOR THE DIRECTOR

By: Carl Washburn
CARL WASHBURN
Navigable Waters Specialist

STATE OF IDAHO)
) ss
COUNTY OF KOOTENAI)

Subscribed and sworn to before me this 25th day of
March, 1998.



Merina Cherry
Notary Public for Idaho
Residing at Post Falls, Idaho
Commission expires: 1/24/2004

JOINT APPLICATION FOR PERMIT
U.S. ARMY CORPS OF ENGINEERS
IDAHO DEPARTMENT OF WATER RESOURCES
IDAHO DEPARTMENT OF LANDS

SEPARATE PERMIT DECISIONS MUST BE RECEIVED FROM BOTH THE STATE OF IDAHO AND THE CORPS OF ENGINEERS PRIOR TO START OF WORK

The Department of the Army permit program is authorized by Section 10 of the Rivers and Harbors Act of 1899 and Section 404 of the Clean Water Act. These laws require permits authorizing structures and work in or affecting navigable waters of the United States and the discharge of dredged or fill material into waters of the United States, including their adjacent wetlands. State permits are required under the State of Idaho, Stream Channel Protection Act (Title 42, Chapter 33, Idaho Code) and the Idaho Lake Protection Act, Section 54-142 et. seq, Idaho Code. This application will meet the requirements of the above agencies.

1. Corps of Engineers # _____ Date Received _____	2. State of Idaho # <u>6-56-S-241A</u> Date Received _____ S20 Rec'd By: _____ Receipt # _____
--	--

PLEASE TYPE OR PRINT

3. Applicant <u>CAPTAIN'S WHEEL RESORT, Inc.</u> Mailing Address <u>PO Box 265</u> <u>Bayview, ID 83803-0265</u> Work Phone <u>208 683-1903</u> Home <u>208 683-2273</u> Fax Number <u>(208) 683-2929</u>	4. Authorized Agent _____ Mailing Address _____ Work Phone (Area) _____ Home (Area) _____																								
5. Location where proposed activity exists or will occur. Waterway <u>Lake Pend Oreille</u> <table style="width:100%; border-collapse: collapse;"> <tr> <td style="width:33%;"><u>Bayview</u></td> <td style="width:33%;"><u>Kootenai</u></td> <td style="width:33%;"><u>ID</u></td> </tr> <tr> <td><small>Inland city or town</small></td> <td><small>County</small></td> <td><small>State</small></td> </tr> <tr> <td colspan="3" style="text-align:center;"><u>County</u></td> </tr> <tr> <td><small>Zip Code</small></td> <td colspan="2"><small>Local jurisdiction (city or county)</small></td> </tr> </table>	<u>Bayview</u>	<u>Kootenai</u>	<u>ID</u>	<small>Inland city or town</small>	<small>County</small>	<small>State</small>	<u>County</u>			<small>Zip Code</small>	<small>Local jurisdiction (city or county)</small>		Tributary of: _____ Assessor's Desc. (Tax No. or Subdivision, Lot & Block No.) <u>83257</u> <table style="width:100%; border-collapse: collapse;"> <tr> <td style="width:33%;"><u>34</u></td> <td style="width:33%;"><u>34 N</u></td> <td style="width:33%;"><u>2 W</u></td> </tr> <tr> <td><small>1/4 1/4</small></td> <td><small>Section</small></td> <td><small>Township</small></td> </tr> <tr> <td colspan="3" style="text-align:center;"><small>UTM Coordinate Grid</small></td> </tr> <tr> <td><u>2006</u></td> <td><u>Northing</u></td> <td><u>Easting</u></td> </tr> </table>	<u>34</u>	<u>34 N</u>	<u>2 W</u>	<small>1/4 1/4</small>	<small>Section</small>	<small>Township</small>	<small>UTM Coordinate Grid</small>			<u>2006</u>	<u>Northing</u>	<u>Easting</u>
<u>Bayview</u>	<u>Kootenai</u>	<u>ID</u>																							
<small>Inland city or town</small>	<small>County</small>	<small>State</small>																							
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<small>Zip Code</small>	<small>Local jurisdiction (city or county)</small>																								
<u>34</u>	<u>34 N</u>	<u>2 W</u>																							
<small>1/4 1/4</small>	<small>Section</small>	<small>Township</small>																							
<small>UTM Coordinate Grid</small>																									
<u>2006</u>	<u>Northing</u>	<u>Easting</u>																							

6. Describe the proposed activity. Provide a general description of the proposed work including all discharges of fill material and any structures such as piers, floats, boat lifts, bulkheads, and cofferdams.

Work to repair approx 80 feet of a 232 foot bulkhead damaged by spring flooding of 1997. Work includes use of all salvageable timbers and use of used railroad ties that are well bleached with no visible leechable creosote.

Describe construction methods and equipment: **Will be hand built using hammers and rebar, with filter cloth between ties and fill.**

List all acid series located at project site, and indicate if any are on the county's hydroic soils list:

Length of project along the stream or extension into lake or reservoir: about 80 feet

Will material be placed waterward of ordinary high water mark? yes If yes, volume: approx 5 Cu Yd (cubic yards)
 (BOTH TEMPORARY AND PERMANENT)

Will material be placed in wetlands? No If yes, total area: _____ (acres)

Type and composition of fill material: existing soil & gravel (i.e. sand, etc.) Material Source: Rickie Excavation

Will excavation or dredging be required? No If yes, volume: _____ (cubic yards) Composition: _____

Disposal site for excavated material: _____ Method of excavation: _____

Stream gradient: _____

Method of controlling turbidity and/or sedimentation: Filter cloth

7. Size and flow capacity of proposed bridge or culvert and area of drainage served (sq. miles) (Idaho Department of Water Resources requirement)

2. Preparation of drawings. One set of original or good quality reproducible drawings must be attached to this application. NOTE: DRAWINGS NO LARGER THAN 8-1/2 X 11 INCHES IN SIZE. See the application pamphlet for instructions and a checklist for completing the drawings. Include photographs of the project site mounted on 8-1/2 x 11 sheets.

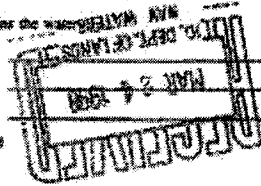
9. Purpose and intended use. Commercial Public Private Other Describe _____

Necessity and justification for project Collapse of bulkhead is threatening deck & main bldg

10. Proposed Starting Date 23 March 98 Estimated Duration about 2 weeks

11. If any portion of the activity is complete, indicate month and year of completion _____
Indicate the existing work on the drawings.

12. Names, addresses, and telephone numbers of adjoining property owners, lessors, etc., whose property also adjoins the waterway.
JD's Resort Scenic Bay Resort
PO Box 770 Bayview, ID 83803
Bayview, ID 83803



Check here if the alteration is located on encroachment lands administered by the Idaho Department of Lands

13. LEGAL OWNER IF OTHER THAN APPLICANT _____

Mailing Address _____
City, State, Zip Code _____

Phone _____
Area _____ Area _____
Work _____ Home _____

14. List other applications, approvals, or certifications from other Federal, interstate, state, or local agencies for any structures, consummations, discharges, deposits, or other activities described in the application.

Issuing Agency	Type of Approval	Identification No.	Date of Application	Date of Approval

15. Has any agency denied approval for the activity described herein or for any activity directly related to the activity described herein? Yes _____ No _____
(If "Yes" explain) _____

16. Remarks or additional information: _____

17. Application is hereby made for a permit or permits to authorize the activities described herein. I certify that I am familiar with the information contained in this application, and that to the best of my knowledge and belief, such information is true, complete, and accurate. I further certify that I possess the authority to order and take the proposed activities. I hereby grant to the agencies to which this application is made, the right to come upon the above-described location to inspect the proposed or completed work.

Date 3/23/98
Signature of Applicant (ORIGINAL SIGNATURE REQUIRED) James J. Campbell

18. If an authorized agent is to be designated, Item 4 and the following information should be completed:
I hereby designate _____ as my agent in matters related to this permit application. I understand that if a Federal permit is issued, I must sign the permit.

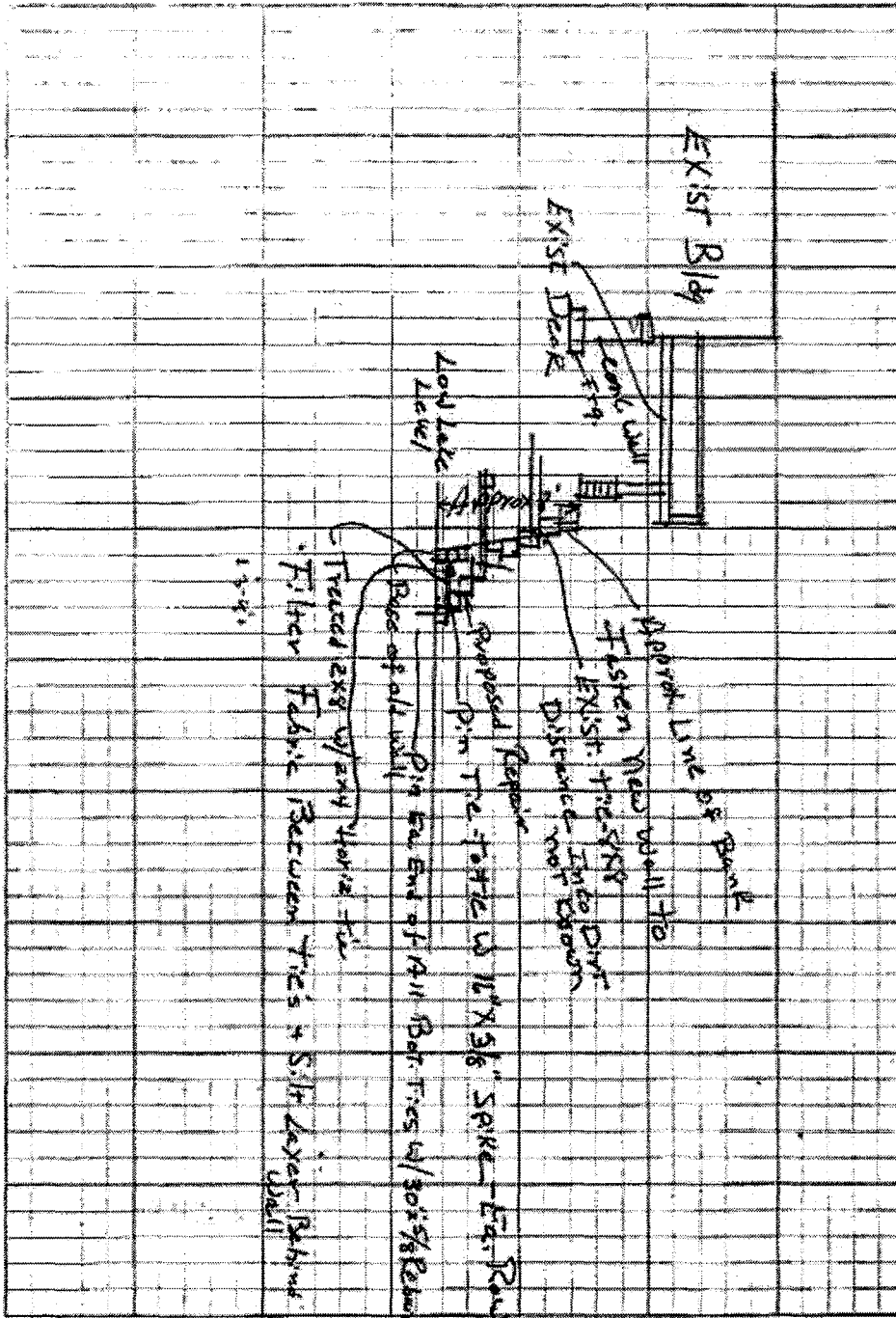
Date _____ Original Signature of Authorized Agent _____ Original Signature of Applicant _____

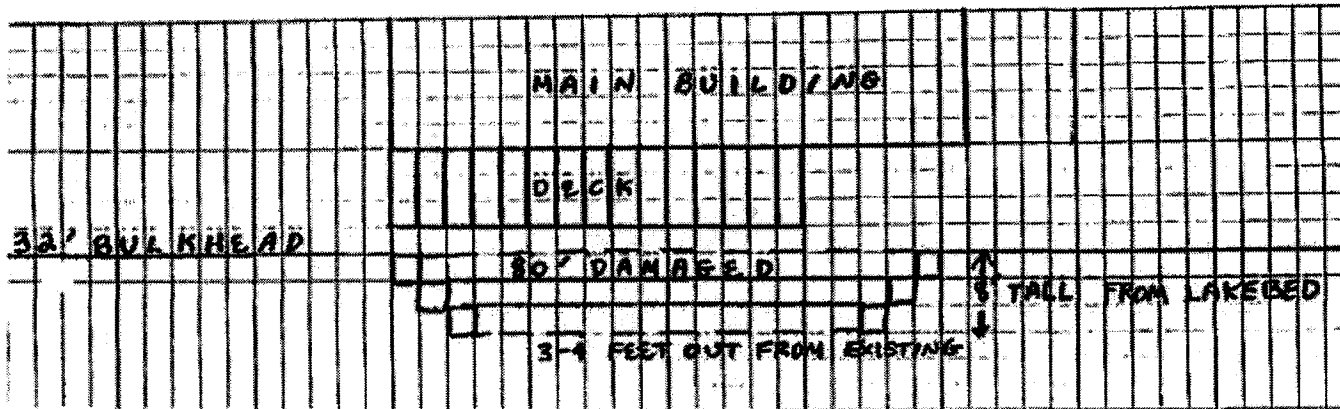
19 U.S.C. Section 1081 provides that: Whoever, in any matter within the jurisdiction of any department or agency of the United States knowingly falsifies, conceals, or covers up by any trick, scheme, or device a material fact or makes any false, fictitious, or fraudulent statements or representations or makes or uses any false writing or document knowing same to contain any false, fictitious, or fraudulent statement or entry, shall be fined not more than \$25,000 or imprisoned not more than 5 years or both. Do not use a Federal permit processing fee with this application. The application fee will be assessed when a permit is issued.

DO NOT SEND FEDERAL PROCESSING FEE WITH APPLICATION

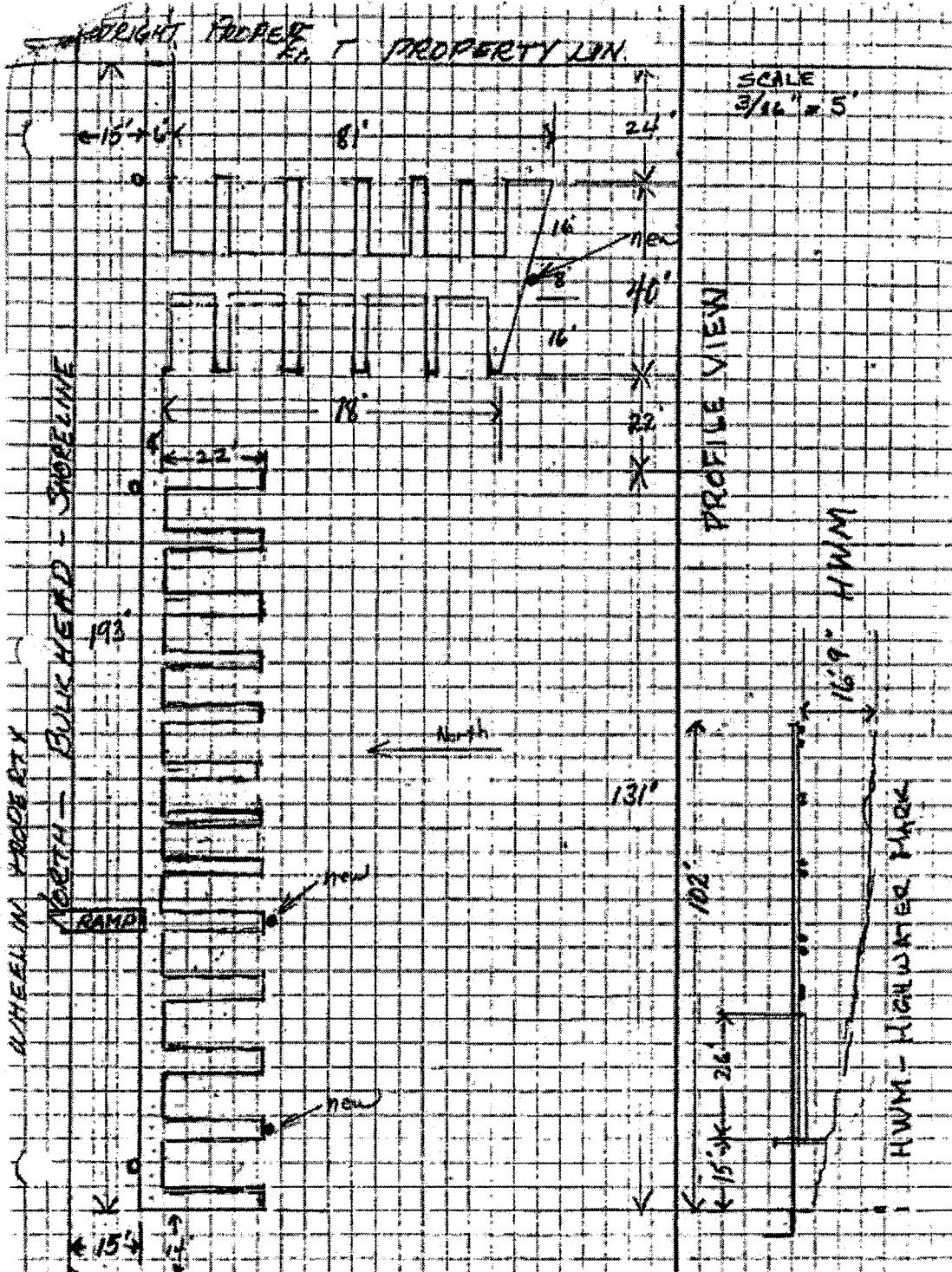
JPW Form 304
Feb 94 (REV)

IDWR Form 3804-B
Feb 94 (REV)





1. Repair/Replace flood damaged bulkhead that is undermining deck and building. Use railroad ties that are 1960's vintage. Per DRQ railroad ties cozing creosote are not to be used. Salvage and use all existing ties possible.
2. Wall will start 3-4 feet out from old wall to allow cantilevering for strength.
3. Filter fabric is to be used between railroad ties and fill for erosion control.
4. All debris is to be removed from lake and disposed of properly upon completion of work.



DAVID NOONAN IFA - QUALIFICATIONS
STATE OF IDAHO CERTIFIED GENERAL APPRAISER CGA #60
STATE OF WASHINGTON CERTIFIED GENERAL APPRAISER

OWNER: APPRAISAL ASSOCIATES/120 E. LAKE STREET, SUITE #319
SANDPOINT, IDAHO 83864
PHONE: (208) 263-6322 FAX: (208) 265-4484*

ORGANIZATIONS:

Designated Member National Association of Independent Fee Appraisers
Past State Director/National Association of Independent Fee Appraisers
President/ Sandpoint Chapter, N.A.I.F.A. 1985-96
Member of National Association of Realtors
Member Selkirk Association of Realtors
Member MLS Covering Bonner, Boundary and Kootenai Counties in Idaho and the Spokane system covering Spokane, Pend Oreille, Whitman, Stevens and Lincoln Counties in Washington State.

EDUCATION:

Graduated Chaminade College Prep High School/1965-1969
Graduated University of Northern Colorado with B.S. degree in Business Finance and Economics/1969-1973
Completed Educational Requirements and Courses given by The National Association of Independent Fee Appraisers
Completed and passed Educational Requirements given by the State of Idaho for Real Estate Brokers Licensing/1981
Certified through 2001 in the Mandatory Program of Continuing Education in the National Association of Independent Fee Appraisers

On more than One Occasion Appointed "Special Master" Under Provision 706 - ID Acting as an Expert Witness "For the District Court" ; "Magistrate Court"; U.S. Federal Court, all as Expert Witness.

MOST RECENT APPRAISAL CLASSES:

"Technology for Today's Appraiser
Sandpoint, Idaho 2009
"The Dirty Dozen (Continuing End)
Sandpoint, Idaho 2009
"Mortgage Fraud: Protect Yourself!
Sandpoint, Idaho 2009
"National USPAP Update Equivalent"
Coeur d' Alene, ID/July, 2008

"Rates and Ratios: Making Sense of GIMs, OARs, and DCFs"
Las Vegas, NV/July 2007
"The Real Estate Economy: What's in Store for 2008?"
Las Vegas, NV/July 2007
"Fannie Mae Revisions and the Appraiser"
Spokane, WA/August, 2005

"Appraisal Trends"
Spokane, WA/August, 2005

"National USPAP" Update Equivalent"
Boise, ID/July, 2005

"Appraising Multi-Family Properties"
Boise, ID/July, 2005

"National USPAP Update Equivalent"
Boise, ID/July, 2005

"Rates & Ratios: Making Sense of GIMs, OARs & DCF"
Boise, ID/Sept. 2003

"Market Data Abstraction"
Boise, ID/Sept. 2003

"The Effects of Wetlands & Other Factors on Rural Land Value"
Las Vegas, NV/July 2000 (Valuation 2000)

"The Fannie Mae REO Appraisal Workshop"
Las Vegas, NV/July 2000 (Valuation 2000)

"Conservation Easements Seminar"
Las Vegas, NV/July 2000 (Valuation 2000)

"Appraisal Technology Forum"
Las Vegas, NV/July 2000 (Valuation 2000)

"Uniform Standards of Professional Appraisal Practice"
St. Louis, MO/June 1999 (NAIFA)

"Thirty Specialized Appraisal Issues"
Spokane, Washington/April 1998 (Appraisal Institute)

"Income Capitalization Techniques"
Boise, Idaho/April 1998 (McKissock Systems)

"Review Appraising"
Boise, Idaho/April 1998 (McKissock Systems)

"Environmental Considerations"
Boise, Idaho/April 1998 (McKissock Systems)

"Rural Business Valuation"
Jackpot, Nevada/May 1998 (Farm Managers & Rural Appraisers)

"Market Data Analysis of Residential Real Estate"
Helena, Montana/September 1991 (NAIFA/Challenge)

"Report Writing of Residential Real Estate"
Helena, Montana/September 1991 (NAIFA/Challenge)

"Real Estate Construction & Development"
Helena, Montana/September 1991 (NAIFA)

"Techniques of Income Property Appraising"
Helena, Montana/December 1990 (NAIFA)

"Uniform Standards of Professional Appraisal Practice"
Spokane, Washington/July 1990 (NAIFA)

"Legal Aspects of Easements"
Spokane, Washington/April 1990 (IR/WA)

"Review of the New URAR"
Spokane, Washington/December 1993 (NAIFA)

"Uniform Standards of Professional Appraisal Practice"
Spokane, Washington/May 1994 (NAIFA)

"Market Data Analysis"
Sandpoint, Idaho/May 1994 (NAIFA)

EXPERIENCE:

Owner, Appraisal Associates in Sandpoint, Idaho (1985-Current)
Associate Appraiser, Appraisal Associates (1980-85)
Associate Appraiser, Noonan Appraisers (1977-80)
Inactive Sales Broker, State of Idaho
Active Sales Broker, State of Missouri (1974-81)
Associate Appraiser, Noonan Appraisers (1978-80)

**Numerous Court Appearances in Bonner, Boundary, Kootenai Counties
in Idaho and in St. Louis County, Missouri**

APPRAISED REAL PROPERTY IN THE FOLLOWING STATES:

Missouri, Illinois, Idaho, Montana, Oregon and Washington

VALUATION OF THE FOLLOWING TYPES OF REAL PROPERTY:

Apartment Buildings	Office and Professional Buildings
Condominiums	Lakefront
Manufacturing Facilities	Churches
Industrial Properties	Schools
Retail Sales Buildings	Single Family Dwellings
Service Stations	Farms
Restaurants	Ranches
Vacant Land	Recreational Retreats
Shopping Center Sites	Subdivisions
Warehouses	Grain Elevators
Sawmills	Sand and Gravel Pits
Timberlands and Stumpage	Beer Distributorship
Golf Courses	Bonner County Airport
Research and Development Centers	Convenience Stores
Motels	Manufactured Home Parks
Marinas	Theaters
Many Others.....	

ASSIGNMENTS COMPLETED FOR:

District of Idaho Department of Justice	
State of Idaho	
County of Bonner	
City of Sandpoint, Idaho	
Farmers Home Administration	
Bank of America/Sandpoint, Coeur d'Alene	
First Interstate Bank/Sandpoint, Bonners Ferry, Boise	
First Security Bank/Sandpoint, Bonners Ferry, Hayden Lake	
Pend Oreille Bank/Sandpoint, Idaho, Newport Washington	
Panhandle State Bank/Sandpoint, Bonners Ferry, Priest River	
Transamerica Finance Company	Better Homes & Gardens
Bancshares Mortgage Company	Relocation Service
Equitable Relocation Company	Stars Mortgage
Metropolitan Mortgage Company	Farmers and Merchants Bank
Lenders Services	Moore Financial Service
Credit Union Mortgage Association	Liberty Funding
Sterling Savings & Loan Association	and over 200 more.....

ORIGINAL

REX A. FINNEY
FINNEY FINNEY & FINNEY, P.A.
Attorneys at Law
Old Power House Building
120 East Lake Street, Suite 317
Sandpoint, Idaho 83864
Phone: (208) 263-7712
Fax: (208) 263-8211
ISB No. 6313

STATE OF IDAHO }
COUNTY OF KOOTENAI } SS
FILED:

2009 OCT 19 AM 10:23

CLERK DISTRICT COURT
Tracy A. ...
DEPUTY

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF KOOTENAI

KARLETTA GRACE BERRY, a widow,	)	Case No. CV-2007-2409
KARLETTA GRACE BERRY, Personal)	
Representative of the Estate	)	CORRECTED CERTIFICATE OF
of Jerry Lee Roy Berry,	)	SERVICE
CAPTAIN'S WHEEL RESORT, INC.,)	
an Idaho Corporation,)	
)	
Plaintiffs,)	
)	
v.)	
)	
MICHAEL B. MCFARLAND, MICHAEL)	
B. MCFARLAND, P.A., and KAREN)	
ZIMMERMAN,)	
)	
Defendant.)	
)	

COMES NOW, the Plaintiffs, through counsel, Rex A. Finney, Finney Finney & Finney, P.A. and hereby corrects the Certificate of Service with regard to the Plaintiffs' Notice of Expert Witness Disclosure. Counsel for the Plaintiffs had intended to hand deliver a copy of the Plaintiffs' Notice of Expert Witness Disclosure to Attorney J.P. Whelan. At approximately 2:00 p.m. on October 16, 2009 counsel for the Plaintiffs attempted to

travel to Coeur d'Alene from Sandpoint to file the pleading and hand deliver a copy to opposing counsel and ended up stopped in traffic in the middle of the long bridge for an extended period of time due to road construction (paving Highway 95 in Sagle). Counsel for the Plaintiffs decided to turn around and go back to Sandpoint and to mail rather than hand deliver

DATED this 16 day of October, 2009.



REX A. FINNEY
Attorney At Law

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was served as indicated, this 16th day of October, 2009 and was addressed to:

J. P. Whelan
Attorney at Law
213 N. 4th Street
Coeur d'Alene, ID 83814
(Via U.S. Mail)

The Honorable Steve Verby
District Judge
(Via Hand Delivery)



STATE OF IDAHO }
COUNTY OF KOOTENAI } SS
FILED 839
KJ

2009 DEC -7 PM 4:29

CLERK DISTRICT COURT
Paul Crump
DEPUTY

REX A. FINNEY
FINNEY FINNEY & FINNEY, P.A.
Attorneys at Law
Old Power House Building
120 East Lake Street, Suite 317
Sandpoint, Idaho 83864
Phone: (208) 263-7712
Fax: (208) 263-8211
ISB No. 6313

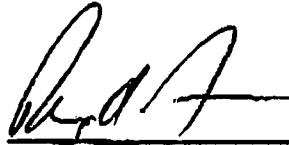
IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF KOOTENAI

KARLETTA GRACE BERRY, a widow,	)	Case No. CV-2007-2409
KARLETTA GRACE BERRY, Personal)	
Representative of the Estate	)	CORRECTED CERTIFICATE OF
of Jerry Lee Roy Berry,	)	SERVICE
CAPTAIN'S WHEEL RESORT, INC.,)	
an Idaho Corporation,)	
)	
Plaintiffs,)	
)	
v.)	
)	
MICHAEL B. MCFARLAND, MICHAEL)	
B. MCFARLAND, P.A., and KAREN)	
ZIMMERMAN,)	
)	
Defendant.)	
)	

COME NOW, the Plaintiffs, through counsel, Rex A. Finney,
Finney Finney & Finney, P.A. and hereby corrects the Certificate
of Service with regard to the Second Affidavit of Karletta Grace
Berry. Counsel for the Plaintiffs faxed, e-mailed and hand
delivered this document as indicated on the Certificate of

Berry v. McFarland, Supreme Court No. 37951-2010
Service which was inadvertently left unsigned.

DATED this 7 day of December, 2009.



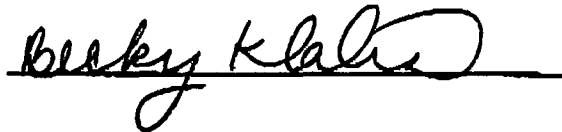
REX A. FINNEY
Attorney At Law

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was served Via Facsimile this 7th day of December, 2009 and was addressed to:

J. P. Whelan
Attorney at Law
213 N. 4th Street
Coeur d'Alene, ID 83814
(Fax No: (208) 664-2240)

The Honorable Steve Verby
District Judge
(Fax No.: 263-0896)



STATE OF IDAHO }
COUNTY OF KOOTENAI } SS
FILED: 811
NY

2009 DEC -7 PM 3: 56

CLERK DISTRICT COURT
Joanna Parker
DEPUTY NY

REX A. FINNEY
FINNEY FINNEY & FINNEY, P.A.
Attorneys at Law
Old Power House Building
120 East Lake Street, Suite 317
Sandpoint, Idaho 83864
Phone: (208) 263-7712
Fax: (208) 263-8211
ISB No. 6313

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF KOOTENAI

KARLETTA GRACE BERRY, a widow,	)	Case No. CV-2007-2409
KARLETTA GRACE BERRY, Personal)	
Representative of the Estate	)	PLAINTIFFS' MOTION TO AMEND
of Jerry Lee Roy Berry,	)	COMPLAINT FOR PUNITIVE DAMAGES
CAPTAIN'S WHEEL RESORT, INC.,)	
an Idaho Corporation,)	
)	
Plaintiffs,)	
)	
v.)	
)	
MICHAEL B. MCFARLAND, MICHAEL)	
B. MCFARLAND, P.A., and KAREN)	
ZIMMERMAN,)	
)	
Defendants.)	
)	

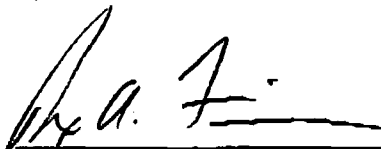
COME NOW the Plaintiffs, by and through counsel, and pursuant to Idaho Rule of Civil Procedure 15 and Idaho Code §6-1604 and hereby moves the Court for an Order allowing Plaintiffs to amend the Complaint to allow an additional claim for punitive damages against the Defendants, MICHAEL B. MCFARLAND, MICHAEL B.

MCFARLAND, P.A., and KAREN ZIMMERMAN. The motion is based upon and supported by:

1. The Second Affidavit of Karletta Grace Berry filed on December 7, 2009;
2. The Affidavit of Karletta Grace Berry filed on April 10, 2008;
3. The Affidavit of Toby McLaughlin filed on April 11, 2009;
4. The verified Complaint and Demand for Jury Trial filed on February 14, 2007;
5. The Affidavit of David Noonan dated December 7, 2009.
6. The Memorandum in Support of Motion to Amend for Punitive Damages;
7. The record and files herein.

Oral argument is requested.

DATED this 7 day of December, 2009.



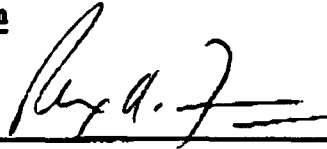
REX A. FINNEY
Attorney at Law

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was served by facsimile and by e-mail, this 7 day of December, 2009, and was delivered as follows:

J.P. WHELAN P.C.
Attorney at law
213 N. 4th Street
Coeur d'Alene, Idaho 83814
[x]Via Facsimile: (208) 664-2240
[x]Via e-mail: jpwhelanattorney@yahoo.com

Judge Verby
chamber's copy
[x]Via Hand Delivery

By: 

STATE OF IDAHO }
COUNTY OF KOOTENAI } SS
FILED 8/11
KJP

2009 DEC -7 PM 3:58

CLERK DISTRICT COURT
Janice Barker
DEPUTY

REX A. FINNEY
FINNEY FINNEY & FINNEY, P.A.
Attorneys at Law
Old Power House Building
120 East Lake Street, Suite 317
Sandpoint, Idaho 83864
Phone: (208) 263-7712
Fax: (208) 263-8211
ISB No. 6313

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF KOOTENAI

KARLETTA GRACE BERRY, a widow,)
KARLETTA GRACE BERRY, Personal)
Representative of the Estate)
of Jerry Lee Roy Berry,)
CAPTAIN'S WHEEL RESORT, INC.,)
an Idaho Corporation,)
Plaintiff,)
v.)
MICHAEL B. MCFARLAND, MICHAEL)
B. MCFARLAND, P.A., and KAREN)
ZIMMERMAN,)
Defendants.)

Case No. CV-2007-0002409
SECOND AFFIDAVIT OF KARLETTA
GRACE BERRY

STATE OF IDAHO)
: ss.
County of Bonner)

COMES NOW, the undersigned and being first duly sworn on
oath, and states:

1. I am over the age of 18 years and competent to make this
Affidavit.

2. I am a Plaintiff with regard to the above-entitled matter.
3. I am the surviving spouse of Jerry Lee Roy Berry, deceased and I am a resident of Kootenai County, Idaho.
4. Jerry Lee Roy Berry was diagnosed with pancreatic cancer in November 2005 and was treated for cancer between said date and his death on November 4, 2006. Among other treatments, Jerry Lee Roy Berry was treated with chemotherapy.
5. Jerry Lee Roy Berry was in the Kootenai Medical Center from June 17, 2006 until June 21, 2006 for chemo toxicity from his treatments.
6. Jerry Lee Roy Berry died on November 4, 2006.
7. I am the Personal Representative of the Estate of Jerry Lee Roy Berry pursuant to Kootenai County Case No. CV-2006-8514. I am the devisee of Jerry Lee Roy Berry's Estate.
8. The Captain's Wheel Resort, Inc. (herein sometimes referred to as the corporation) is an Idaho Corporation in good standing and I am the rightful director and rightful owner of all of the stock of the Captain's Wheel Resort, Inc.
9. The Defendant, Michael B. McFarland, is an attorney licensed to practice law within the state of Idaho. Michael B. McFarland's law firm is the Defendant, MICHAEL B. MCFARLAND, P.A., located at 421 Coeur d'Alene Ave, Coeur d'Alene, Idaho 83814.

10. The Defendant Karen M. Zimmerman, is a licensed real estate broker in the State of Idaho and a resident of Kootenai County, Idaho. Karen M. Zimmerman was a broker at Treaty Rock Realty in Kootenai County, Idaho during all times relevant to this case.

11. Prior to July 4, 2006, the marital community of Jerry Lee Roy Berry and myself owned one hundred percent (100%) of stock in the Captain's Wheel Resort, Inc.

12. The Captain's Wheel Resort, Inc owns and operates a bar with a liquor license and a restaurant with a dock with over twenty boat slips known as the Captain's Wheel Resort on approximately 232 front feet on the shore of Lake Pend Oreille together with a parking lot and structure across the street at or near 16908 E. Pier Road, Bayview, Kootenai County, Idaho.

13. The Captain's Wheel Resort, Inc. owns two separate parcels of real property upon which the Captain's Wheel Resort and the parking lot across the street are located. The two parcels of real property owned by the Captain's Wheel Resort, Inc. are identified by the Kootenai County Assessor as Parcel Number B00000341575 and Parcel Number B00000341565.

14. Defendant Michael B McFarland, and the law firm Michael B. McFarland, P.A. were providing legal services and were the attorney for Jerry Lee Roy Berry, myself, and the

Captain's Wheel Resort, Inc at all times relevant hereto, including prior to July 4, 2006.

15. Michael B. McFarland provided legal advise to myself, Jerry Lee Roy Berry and the Captain's Wheel Resort, Inc. and entered into a fiduciary relationship and assumed a fiduciary relationship with myself, Jerry Lee Roy Berry and the Captain's Wheel Resort, Inc. prior to lending money to Jerry and myself in 2003 and prior to obtaining Jerry's signature on the Stock Purchase and Sale Agreement On July 4, 2006 wherein Michael B. McFarland and Karen M. Zimmerman received 50% of the stock of the Captain's Wheel Resort, Inc. as joint tenants with rights of survivorship.

16. Among other things, the Defendant Michael B. McFarland was providing advice on how the stock and assets of the Captain's Wheel Resort, Inc. could be protected from judgment creditors of Jerry Lee Roy Berry, and he maintained the corporate records for the Captain's Wheel Resort, Inc. A chapter 13 bankruptcy was discussed.

17. The Defendant Karen M. Zimmerman is involved in a relationship with Michael B. McFarland as boyfriend and girlfriend.

18. On or about August 9, 2003 Michael B. McFarland and Karen M. Zimmerman made a loan in the total amount ONE HUNDRED THOUSAND DOLLARS to the marital community of Jerry Lee Roy Berry

and Karletta Grace Berry. No documentation, promissory note or other written document was signed at the time of the loan.

19. Subsequent to August 9, 2003 and on or about July 4, 2006 Jerry Lee Roy Berry met with Michael B. McFarland and Karen M. Zimmerman and signed a Stock Purchase and Sale Agreement with Jerry Lee Roy Berry as seller and with Karen M. Zimmerman and Michael B. McFarland as buyers as joint tenants with rights of survivorship. The Stock Purchase and Sale Agreement reads as if it were signed and executed on August 9, 2003, but the Agreement was actually signed on or about July 4, 2006. A true and correct copy of the stock purchase and sale agreement is attached hereto as "Exhibit 1".

20. At the time the Stock Purchase and Sale Agreement was signed, Jerry Lee Roy Berry, had just been treated for cancer with chemotherapy, had been diagnosed as being terminally ill and was in very poor mental and physical condition.

21. It is my opinion that on both August 9, 2003 (the date that McFarland and Zimmerman loaned Jerry and I the \$100,000.00) and July 4, 2006 (the date the Stock Purchase and Sale Agreement was signed), the net value (value of assets minus debts) of the assets of the Captain's Wheel Resort, Inc. was approximately one million dollars (\$1,000,000.00) and probably more.

22. The most substantial asset of the Captain's Wheel Resort, Incorporated is the two parcels of real property it

owns. The Captain's wheel resort also owns miscellaneous personal property and a liquor license.

23. True and correct copies of the Kootenai County Assessors Assessment information on the two parcels of real property are attached hereto as Exhibit 2 and Exhibit 3. The Net taxable value of the waterfront parcel is \$1,283,890.00 and the net taxable value of the parking lot next to the resort is \$82,312.00.

24. I believe and it my opinion that the value of the real property owned by the Captain's Wheel Resort, Inc. is approximately \$1,300,000 and possibly more as of both August 9, 2003 and on July 4, 2006.

25. The only significant debts of the Captain's Wheel Resort Inc is an AT&T Small Business Lending Corporation loan secured by a Deed of Trust from the Captain's Wheel Resort Incorporated recorded June 28, 1996 under Instrument No 1452022 securing a note in the original principal sum of \$300,000.00 and a Deed of Trust dated July 20, 2002 from Captain's Wheel Resort, Incorporated for the benefit of Barbara Lucile Hayes, an unmarried woman recorded July 30, 2002 under instrument No. 1744744 securing a note in the original amount of \$25,000.00. Both of these loans have been paid down substantially.

26. The net value of the Captain's Wheel Resort, Inc was approximately \$1,000,000.00, and probably more, after

considering the value of the corporate assets minus the corporate debts on both August 9, 2003 and on July 4, 2006.

27. The Defendants enjoy the benefit of the bargain in the amount of approximately \$400,000.00, and probably more, by purchasing 50% of the stock in the Captain's Wheel Resort, Inc which is valued at least in the amount of \$500,000.00 in exchange for only \$100,000.00.

28. The Defendants bought 50% of the stock in the Captain's Wheel Resort, Inc. at far below fair market value from my husband and I and they received a benefit of the bargain to the detriment of Michael B. McFarland's and/or Michael B. McFarland, P.A.'s clients, who were myself, my deceased husband and the Captain's Wheel Resort, Inc.

29. On or about November 13, 2006 when I arrived home in the evening, the Defendant Michael B. McFarland was waiting at my residence and insisted that I sign one of two proposed resolutions. One of the resolutions for the Captain's Wheel Resort, Inc proposed to sell and list all of the corporate assets including the business and real property would be listed for sale at a price of TWO-MILLION TWO-HUNDRED THOUSAND DOLLARS (\$2,200,000.00) through Karen Zimmerman's real estate brokerage, Treaty Rock Realty with a commission of 10%. This resolution was passed at a time when Karen Zimmerman purported to be a shareholder and director of the corporation.

30. I did not agree to sign either of the resolutions proposed by the Defendant McFarland on November 13, 2006. As a result on November 16, 2006 the Defendants as directors, provided one day notice for a special meeting to occur at 5:00 pm on November 18, 2006 at 8729 Cloverleaf Drive, Hayden, Idaho where they were proposing to have me removed as a Director for the corporation.

31. I appeared at 5:00 pm on November 18, 2006 at the Defendants' 8729 Cloverleaf Drive, Hayden, Idaho residence and objected to the meeting because of improper notice under the duly adopted corporate bylaws. At that time the Defendant McFarland gave oral notice of a special meeting to be held on November 29, 2006.

32. On November 29, 2006 a special meeting for the corporation was called by the Defendants' on at 5:00 pm on November 18, 2006 at 8729 Cloverleaf Drive, Hayden, Idaho. Because McFarland and Zimmerman were appointed as directors, and Jerry Lee Roy Berry had passed away, the Defendants cumulatively had two votes against my one vote at the Directors meetings. At the meeting Mr. McFarland and Karen M. Zimmerman exercised their two votes against my one vote to pass the following resolutions among others:

a. Elect McFarland as President

b. Elect Zimmerman as Treasurer

c. Approve the sale of the business and real property with the listing to be with Karen M. Zimmerman, Broker at Treaty Rock Realty.

33. Pursuant to the true ByLaws of the corporation, I was to obtain the role of president as a result of Jerry Lee Roy Berry's death (Jerry was president at the time of his death), but the Defendants refused to accept me succeeding to president.

34. Since the meeting on November 29, 2006 the Defendants' have not notified me of any corporate activity, have blocked me from the corporate bank accounts, have not given me any benefit from my ownership in the corporation, and have not provided me with any money from the corporation.

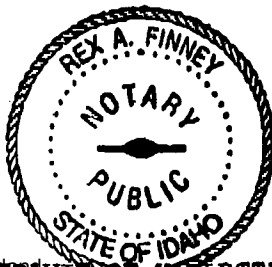
35. I have been financially injured a result of the Defendants actions set forth herein.

36. I am asking the court to allow me to amend my complaint to request punitive damages against the Defendants'.

DATED this 7th day of December, 2009.

Karletta Grace Berry
KARLETTA GRACE BERRY

SUBSCRIBED AND SWORN TO before me, this 7th day of December 2009.



Rex A. Finney
Notary Public - State of Idaho
Residing at *Sandpoint*
My Commission expires *5/7/2013*

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was served by facsimile and by e-mail, this ___ day of December, 2009, and was delivered as follows:

J.P. WHELAN P.C.

Attorney at law

213 N. 4th Street

Coeur d'Alene, Idaho 83814

[x]Via Facsimile: (208) 664-2240

[x]Via e-mail: jpwhelanattorney@yahoo.com

Judge Verby

chamber's copy

[x]Via Hand Delivery

By: _____

STOCK PURCHASE AND SALE AGREEMENT

This agreement executed August 9, 2003 between JERRY LEE ROY BERRY, of 6555 E. Remington Road, Athol, ID 83801, hereinafter referred to as "Seller" and KAREN M. ZIMMERMAN and MICHAEL B. McFARLAND of 8729 W. Cloverleaf Drive, Hayden, Idaho 83835, hereinafter referred to as "Buyers".

For and in consideration of One-hundred thousand dollars (\$100,000) and other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, Seller agrees to sell, assign and convey to Buyers, as joint tenants with right of survivorship, with full power to transfer the shares on the books of the corporation, TWO HUNDRED (200) shares of the common stock of CAPTAIN'S WHEEL RESORT, INC., a corporation organized and existing under the laws of the State of Idaho and having its principal place of business at 100 Scenic Drive, Bayview, Idaho 83803. The stock is represented by Certificates 1 and 2, (100 shares each) which were assigned to the Seller by Jean A. and James M. Campbell.

Seller warrants that the stock conveyed hereby represents 50% of the shares which have been issued to date by said corporation.

As additional consideration, it is agreed between Buyers and Seller that Seller shall retain his offices as director and president of the corporation, with full operational control of the business of the corporation through calendar year 2005. It is further agreed, as additional consideration, that the transfer of the shares shall be effective on January 1, 2006, and that Seller shall be considered the owner for tax and all other purposes through midnight, December 31, 2005.

IN WITNESS WHEREOF, the parties have executed this Agreement, which is effective on the day and year first above written.

BUYERS:

SELLER:


KAREN M. ZIMMERMAN


JERRY LEE ROY BERRY


MICHAEL B. McFARLAND

Stock Purchase and Sale Agreement

EXHIBIT 1

Kootenai County, Idaho

generated on 10/16/2009 1:58:27 PMCDT

Parcel

Parcel Number B00000341575 **AIN** 148510 **Situs Address** 16908 E PIER RD, BAYVIEW

Owner Information

Owner Name CAPTAINS WHEEL RESORT INC
Owner Address PO BOX 517
 BAYVIEW ID 83803
Transfer Date 06/01/1996

Location / Description

Tax Authority Group 077000 **Legal Desc.** TAX #10359 34 54N 02W
Situs Address 16908 E PIER RD, BAYVIEW
Acreage .3930

Parcel Type

Property Class Code 442- Com Imp lot/tract in city
Neighborhood Code 101 PEND O'REILLE COMMERCIAL WF

Assessment Information

Appraisal Date	01-01- 2009	Current Year - 2009	0	Prior Year - 2008	0
Market Value Land	\$1,014,660	Homeowners Eligible Amt Land	\$0	Homeowners Eligible Amt Land	\$0
Market Value Improvement	\$266,061	Homeowners Eligible Amt Imp	\$0	Homeowners Eligible Amt Imp	\$0
Total Market Value	\$1,280,721	Sum Homeowners Eligible Amt	\$0	Sum Homeowners Eligible Amt	\$0
		Homeowners Exemption Allowed	\$0	Homeowners Exemption Allowed	\$0
Acreage	0.3930	Total Market Value	\$1,280,721	Total Market Value	\$1,283,890
Front Feet	232.7600	Homeowners Exemption Allowed	\$0	Homeowners Exemption	\$0
		Ag/Timber Exemption	\$0	Ag/Timber Exemption	\$0
		Net Taxable Value	\$1,280,721	Net Taxable Value	\$1,283,890

EXHIBIT 2

Site Provided by...
governmax.com T1.14

Parcel



Parcel Number
1 of 1

Property Info
Parcel

Print View
Parcel Map →

Searches

Address
Parcel Number
Owner
AIN

Functions

Home
Department Index
Assessor Home
Treasurer Home
Welcome Page
Login / Logout
Property Search
Printing Parcel Maps
Help
Contact Us
Subscriptions
Treasurer Search

Parcel Number B00000341565
AIN 237982
Situs Address

Owner Information
Owner Name CAPTAINS WHEEL RESORT INC
Owner Address PO BOX 517
BAYVIEW ID 83803

Transfer Date

Location / Description
Tax Authority Group 077000
Legal Desc. TAX#19442 [IN GL2] 34
54N 02W
Situs Address
Acreage .5300

Parcel Type
Property Class Code 442- Com Imp lot/tract in city
Neighborhood Code 27 RESORTS/MARINAS

Assessment Information					
Appraisal Date	01-01-2009	Current Year - 2009	0	Prior Year - 2008	0
Market Value Land	\$81,312	Homeowners Eligible Amt Land	\$0	Homeowners Eligible Amt Land	\$0
Market Value Improvement	\$1,000	Homeowners Eligible Amt Imp	\$0	Homeowners Eligible Amt Imp	\$0
Total Market Value	\$82,312	Sum Homeowners Eligible Amt	\$0	Sum Homeowners Eligible Amt	\$0
		Homeowners Exemption Allowed	\$0	Homeowners Exemption Allowed	\$0
Acreage	0.5300	Total Market Value	\$82,312	Total Market Value	\$82,312

EXHIBIT 3

Homeowners Exemption Allowed	\$0	Homeowners Exemption	\$0
Ag/Timber Exemption	\$0	Ag/Timber Exemption	\$0
Net Taxable Value	\$82,312	Net Taxable Value	\$82,312

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STATE OF IDAHO }
COUNTY OF KOOTENAI } SS
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DEPUTY

KX

REX A. FINNEY
FINNEY FINNEY & FINNEY, P.A.
Attorneys at Law
Old Power House Building
120 East Lake Street, Suite 317
Sandpoint, Idaho 83864
Phone: (208) 263-7712
Fax: (208) 263-8211
ISB No. 6313

Joanna Parker
KX

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF KOOTENAI

KARLETTA GRACE BERRY, a widow,	)	Case No. CV-2007-2409
KARLETTA GRACE BERRY, Personal)	
Representative of the Estate	)	MEMORANDUM IN SUPPORT OF
of Jerry Lee Roy Berry,	)	PLAINTIFFS' MOTION TO AMEND
CAPTAIN'S WHEEL RESORT, INC.,	)	COMPLAINT
an Idaho Corporation,)	
)	
Plaintiffs,)	
)	
v.)	
)	
)	
MICHAEL B. MCFARLAND, MICHAEL)	
B. MCFARLAND, P.A., and KAREN)	
ZIMMERMAN,)	
)	
Defendants.)	
)	

COME NOW, the Plaintiffs, by and through counsel, and
hereby submits her memorandum in support of the Motion To Amend
Complaint For Punitive Damages.

FACTS

Jerry Lee Roy Berry and Karletta Berry were the owners of all of the stock in the Captain's Wheel Resort, Inc., an Idaho Corporation.

The Captain's Wheel Resort, Inc owns and operates a bar with a liquor license and a restaurant with a dock with over twenty boat slips known as the Captain's Wheel Resort on approximately 232 front feet on the shore of Lake Pend Oreille together with a parking lot and structure across the street at or near 16908 E. Pier Road, Bayview, Kootenai County, Idaho. The Captain's Wheel Resort, Inc. owns the real property upon which the resort and parking lot are situated.

The value of the real property owned by the Captain's Wheel Resort, Inc. was approximately \$1,300,000.00 on July 4, 2006.

The only significant debts of the Captain's Wheel Resort, Inc. at the time are to notes secured by deeds of trust totaling less than \$325,000.00.

Michael McFarland and Karen Zimmerman got Jerry Berry to sign a stock purchase and sale agreement on July 4, 2006 for 50% of the stock in the Captain's Wheel Resort, Inc. for the sum of \$100,000.00 and took title to the stock as joint tenants with rights of survivorship.

Michael B. McFarland and Karen Zimmerman are boyfriend and girlfriend.

Michael B. McFarland a licensed Idaho attorney, at the law firm of Michael B. McFarland, P.A. was the attorney for Jerry Lee Roy Berry, Karletta Berry and the Captain's Wheel Resort, Inc. at the time of the transfer of stock noted above.

Michael B. McFarland was advising Jerry Lee Roy Berry and Karletta Berry on how to protect the stock in the Captain's Wheel Resort, Inc. from creditors, and ended getting a deal for himself and his girlfriend to purchase one half of the stock in the Captain's Wheel Resort, Inc. at a substantial discount from the fair market value of the stock.

AMENDMENT TO INCLUDE A PUNITIVE DAMAGE CLAIM

The Plaintiffs, seeks to amend the Complaint to include a request for punitive damages against the Defendants.

Idaho Code §6-1604 provides that a complaint may be amended to allow a claim for punitive damages. That statute states in relevant part:

In all civil actions in which punitive damages are permitted, no claim for damages shall be filed containing a prayer for relief seeking punitive damages. However, a party may, pursuant to a pretrial motion and after hearing before the court, amend the pleading to include a prayer for relief seeking punitive damages. The court shall allow the motion to amend the pleadings, if, after weighing the evidence presented, the court concludes that, the moving party has established at such hearing a reasonable likelihood of proving facts at trial sufficient to support an award of punitive damages.

The decision whether to allow the jury to consider punitive damages rests in the discretion of the trial court. *Fayne v. Wallace*, 136 Idaho 303, 308, 32 P.2d 695 (Ct.App. 2001). An award of punitive damages is permissible only where the defendant's conduct was "oppressive, fraudulent, wanton, malicious or outrageous." *Id.* at 307. To support a motion to add punitive damages under I.C. § 6-1604, a plaintiff is required to establish a reasonable likelihood she could prove by a preponderance of the evidence that the defendant acted oppressively, fraudulently, wantonly, maliciously or outrageously. *Vendelin v. Costco Wholesale Corp.*, 140 Idaho 416, 95 P.3d 34 (2004).

In the instant case, the record and Affidavits on file establish the wanton, malicious behavior of each of the defendants. The Idaho Supreme Court has described the circumstances necessary to justify punitive damages:

An award of punitive damages will be sustained on appeal only when it is shown that the defendant acted in a manner that was "an extreme deviation from reasonable standards of conduct, and that the act was performed by the defendant with an understanding of or disregard for its likely consequences." The justification for punitive damages must be that the defendant acted with an extremely harmful state of mind, whether that be termed "malice, oppression, fraud or gross negligence"; "malice, oppression, wantonness"; or simply "deliberate or willful."

Payne, 136 Idaho at 307, citing *Cheney v. Palos Verdes Inv. Corp.*, 104 Idaho 897, 665 P.2d 661 (1983).

Defendants' acts of purchasing 50% of the stock in the Captain's Wheel Resort, Inc. as joint tenants with rights of survivorship at a substantial discount from the fair market value of the stock from Jerry Lee Berry at a time when he was diagnosed as being terminally ill and suffering from cancer, and when the Defendant Michael B. McFarland was acting as the attorney for the Plaintiffs are ample evidence of the malicious, oppressive, wanton, and outrageous conduct by the Defendants.

Defendant McFarland was supposed to be protecting the Plaintiffs from creditors, not acquiring a significant amount of the Plaintiffs' assets for himself and his girlfriend at a substantial discount from the fair market value of the assets so acquired.

Likewise, negotiating for and passing a resolution to list the corporate assets, including real property, with the Defendant Zimmerman's real estate brokerage at the time she was a corporate director and stockholder is a breach of fiduciary duty and constitutes self dealing.

Conscious disregard of the property rights of another may entitle a plaintiff to punitive damages. *Aztec Limited, Inc. v. Creekside Investment Co.*, 100 Idaho 566, 570, 602 P.2d 64 (1979).

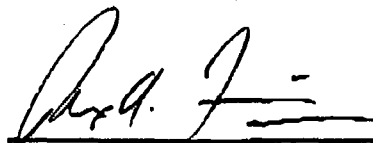
The Court should have no problem determining that Plaintiffs can establish a reasonable likelihood of proving facts at trial sufficient to support an award of punitive damages. The numerous acts of the Defendants were done in conscious disregard of the plaintiffs property rights and in breach of fiduciary obligations that were owed to the Plaintiffs.

The Court should grant Plaintiffs' motion to amend the complaint to include a claim for punitive damages

CONCLUSION

The Court should grant Plaintiffs motion in full for the foregoing reasons.

DATED this 7 day of December, 2009.



REX A. FINNEY
Attorney at Law

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was served by facsimile and by e-mail, this 7 day of December, 2009, and was delivered as follows:

J.P. WHELAN P.C.
Attorney at law
213 N. 4th Street
Coeur d'Alene, Idaho 83814
[x]Via Facsimile: (208) 664-2240
[x]Via e-mail: jpwhelanattorney@yahoo.com

Judge Verby
chamber's copy
[x]Via Hand Delivery

By: 

STATE OF IDAHO }
COUNTY OF KOOTENAI } SS
FILED: 8/11
NS

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CLERK DISTRICT COURT
Joanna Parker
DEPUTY

REX A. FINNEY
FINNEY FINNEY & FINNEY, P.A.
Attorneys at Law
Old Power House Building
120 East Lake Street, Suite 317
Sandpoint, Idaho 83864
Phone: (208) 263-7712
Fax: (208) 263-8211
ISB No. 6313

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF KOOTENAI

KARLETTA GRACE BERRY, a widow,	)	Case No. CV-2007-0002409
KARLETTA GRACE BERRY, Personal)	
Representative of the Estate)	
of Jerry Lee Roy Berry,	)	AFFIDAVIT OF DAVID NOONAN
CAPTAIN'S WHEEL RESORT, INC.,)	
an Idaho Corporation,)	
)	
Plaintiff,)	
)	
v.)	
)	
MICHAEL B. MCFARLAND, MICHAEL)	
B. MCFARLAND, P.A., and KAREN)	
ZIMMERMAN,)	
)	
Defendants.)	

STATE OF IDAHO)
: ss.
County of Bonner)

COMES NOW, the undersigned and being first duly sworn on
oath, and states:

1. I am over the age of 18 years and competent to make this
Affidavit.

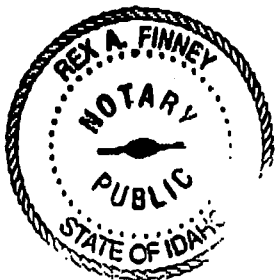
- 2. I am a certified real property appraiser within the States of Idaho and Washington.
- 3. I have been an appraiser for approximately 35 years.
- 4. Attached hereto as Exhibit 1 is a three page printout detailing my education and experience as a real estate appraiser.
- 5. I have appraised the fair market value of the real property owned by the Captain's Wheel Resort, Inc. as of July 4, 2006 and located at 16908 East Pier Road, Bayview, ID 83803 and identified as Kootenai County Assessor Parcel # B00000341575 and B00000341565 at the amount of ONE MILLION THREE HUNDRED THOUSAND DOLLARS (\$1,300,000.00).
- 6. My analyses, opinions and conclusions were developed and prepared in conformity with the Uniform Standards of Professional Appraisal Practice.

DATED this 7th day of December 2009.

[Signature]
David Noonan

SUBSCRIBED AND SWORN TO before me, this 7 day of December, 2009.

[Signature]
Notary Public - State of Idaho
Residing at Sard point
My Commission expires 5/7/2013



CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was served by facsimile and by e-mail, this 7 day of December, 2009, and was delivered as follows:

J.P. WHELAN P.C.
Attorney at law
213 N. 4th Street
Coeur d'Alene, Idaho 83814
[x]Via Facsimile: (208) 664-2240
[x]Via e-mail: jpwhelanattorney@yahoo.com

Judge Verby
chamber's copy
[x]Via Hand Delivery

By: 

[Type text]

APPRAISAL ASSOCIATES

120 E. LAKE STREET, SUITE 319 • SANDPOINT IDAHO 83864 • (208) 263-6322 • FAX (208) 265-4484

I believe that in the last four years I have given testimony by deposition in a Highway 95 Taking by the State of Idaho. I believe that is the only time in the last four years. .

DAVID NOONAN IFA - QUALIFICATIONS
STATE OF IDAHO CERTIFIED GENERAL APPRAISER CGA #60
STATE OF WASHINGTON CERTIFIED GENERAL APPRAISER

OWNER: APPRAISAL ASSOCIATES/120 E. LAKE STREET, SUITE #319
SANDPOINT, IDAHO 83864
PHONE: (208) 263-6322 FAX: (208) 265-4484*

ORGANIZATIONS:

Designated Member National Association of Independent Fee Appraisers
Past State Director/National Association of Independent Fee Appraisers
President/ Sandpoint Chapter, N.A.I.F.A. 1985-96
Member of National Association of Realtors
Member Selkirk Association of Realtors
Member MLS Covering Bonner, Boundary and Kootenai Counties In Idaho and the Spokane system covering Spokane, Pand Oreille, Whitman, Stevens and Lincoln Counties In Washington State.

EDUCATION:

Graduated Chamblade College Prep High School/1965-1969
Graduated University of Northern Colorado with B.S. degree in Business Finance and Economics/1969-1973
Completed Educational Requirements and Courses given by The National Association of Independent Fee Appraisers
Completed and passed Educational Requirements given by the State of Idaho for Real Estate Brokers Licensing/1981
Certified through 2001 In the Mandatory Program of Continuing Education in the National Association of Independent Fee Appraisers
On more than One Occasion Appointed "Special Master" Under Provision 706 - ID
Acting as an Expert Witness "For the District Court" ; "Magistrate Court";
U.S. Federal Court, all as Expert Witness.

MOST RECENT APPRAISAL CLASSES:

"Technology for Today's Appraiser
Sandpoint, Idaho 2009
"The Dirty Dozen (Continuing End)
Sandpoint, Idaho 2009
"Mortgage Fraud: Protect Yourself
Sandpoint, Idaho 2009
"National USPAP Update Equivalent"
Coeur ' Alene, ID/July, 2008
"Rates and Ratios: Making Sense of GIMs, OARs, and DCFs"
Las Vegas, NV/July 2007
"The Real Estate Economy: What's in Store for 2008?"
Las Vegas, NV/July 2007

EXHIBIT 1

[Type text]

APPRAISAL ASSOCIATES

120 E. LAKE STREET, SUITE 319 • SANDPOINT IDAHO 83864 • (208) 263-6322 • FAX (208) 265-4484

- "Fannie Mae Revisions and the Appraiser"**
Spokane, WA/August, 2005
- "Appraisal Trends"**
Spokane, WA/August, 2005
- "National USPAP" Update Equivalent"**
Boise, ID/July, 2005
- "Appraising Multi-Family Properties"**
Boise, ID/July, 2005
- "National USPAP Update Equivalent"**
Boise, ID/July, 2005
- "Rates & Ratios: Making Sense of GIMs, OARs & DCF"**
Boise, ID/Sept. 2003
- "Market Data Abstraction"**
Boise, ID/Sept. 2003
- "The Effects of Wetlands & Other Factors on Rural Land Value"**
Las Vegas, NV/July 2000 (Valuation 2000)
- "The Fannie Mae REO Appraisal Workshop"**
Las Vegas, NV/July 2000 (Valuation 2000)
- "Conservation Easements Seminar"**
Las Vegas, NV/July 2000 (Valuation 2000)
- "Appraisal Technology Forum"**
Las Vegas, NV/July 2000 (Valuation 2000)
- "Uniform Standards of Professional Appraisal Practice"**
St. Louis, MO/June 1999 (NAIFA)
- "Thirty Specialized Appraisal Issues"**
Spokane, Washington/April 1998 (Appraisal Institute)
- "Income Capitalization Techniques"**
Boise, Idaho/April 1998 (McKissock Systems)
- "Review Appraising"**
Boise, Idaho/April 1998 (McKissock Systems)
- "Environmental Considerations"**
Boise, Idaho/April 1998 (McKissock Systems)
- "Rural Business Valuation"**
Jackpot, Nevada/May 1998 (Farm Managers & Rural Appraisers)
- "Market Data Analysis of Residential Real Estate"**
Helena, Montana/September 1991 (NAIFA/Challenge)
- "Report Writing of Residential Real Estate"**
Helena, Montana/September 1991 (NAIFA/Challenge)
- "Real Estate Construction & Development"**
Helena, Montana/September 1991 (NAIFA)
- "Techniques of Income Property Appraising"**
Helena, Montana/December 1990 (NAIFA)
- "Uniform Standards of Professional Appraisal Practice"**
Spokane, Washington/July 1990 (NAIFA)
- "Legal Aspects of Easements"**
Spokane, Washington/April 1990 (IR/WA)
- "Review of the New URAR"**
Spokane, Washington/December 1993 (NAIFA)
- "Uniform Standards of Professional Appraisal Practice"**
Spokane, Washington/May 1994 (NAIFA)

[Type text]

APPRAISAL ASSOCIATES

120 E. LAKE STREET, SUITE 319 • SANDPOINT IDAHO 83864 • (208) 263-6322 • FAX (208) 265-4484
 "Market Data Analysis"

Sandpoint, Idaho/May 1994 (NAIFA)

EXPERIENCE:

Owner, Appraisal Associates in Sandpoint, Idaho (1985-Current)
Associate Appraiser, Appraisal Associates (1980-85)
Associate Appraiser, Noonan Appraisers (1977-80)
Inactive Sales Broker, State of Idaho
Active Sales Broker, State of Missouri (1974-81)
Associate Appraiser, Noonan Appraisers (1978-80)
Numerous Court Appearances in Bonner, Boundary, Kootenai Counties
in Idaho and in St. Louis County, Missouri

APPRAISED REAL PROPERTY IN THE FOLLOWING STATES:

Missouri, Illinois, Idaho, Montana, Oregon and Washington

VALUATION OF THE FOLLOWING TYPES OF REAL PROPERTY:

<i>Apartment Buildings</i>	<i>Office and Professional Buildings</i>
<i>Condominiums</i>	<i>Lakefront</i>
<i>Manufacturing Facilities</i>	<i>Churches</i>
<i>Industrial Properties</i>	<i>Schools</i>
<i>Retail Sales Buildings</i>	<i>Single Family Dwellings</i>
<i>Service Stations</i>	<i>Farms</i>
<i>Restaurants</i>	<i>Ranches</i>
<i>Vacant Land</i>	<i>Recreational Retreats</i>
<i>Shopping Center Sites</i>	<i>Subdivisions</i>
<i>Warehouses</i>	<i>Grain Elevators</i>
<i>Sawmills</i>	<i>Sand and Gravel Pits</i>
<i>Timberlands and Stumpage</i>	<i>Beer Distributorship</i>
<i>Golf Courses</i>	<i>Bonner County Airport</i>
<i>Research and Development Centers</i>	<i>Convenience Stores</i>
<i>Motels</i>	<i>Manufactured Home Parks</i>
<i>Marinas</i>	<i>Theaters</i>
<i>Many Others.....</i>	

ASSIGNMENTS COMPLETED FOR:

District of Idaho Department of Justice
State of Idaho
County of Bonner
City of Sandpoint, Idaho
Farmers Home Administration
Bank of America/Sandpoint, Coeur d'Alene
First Interstate Bank/Sandpoint, Bonners Ferry, Boise
First Security Bank/Sandpoint, Bonners Ferry, Hayden Lake
Pend Oreille Bank/Sandpoint, Idaho, Newport Washington
Panhandle State Bank/Sandpoint, Bonners Ferry, Priest River
Transamerica Finance Company
Bancshares Mortgage Company
Equitable Relocation Company
Metropolitan Mortgage Company
Lenders Services
Credit Union Mortgage Association
Sterling Savings & Loan Association

Better Homes & Gardens
Relocation Service
Stars Mortgage
Farmers and Merchants Bank
Moore Financial Service
Liberty Funding
and over 200 more.....

REX A. FINNEY
FINNEY FINNEY & FINNEY, P.A.
Attorneys at Law
Old Power House Building
120 East Lake Street, Suite 317
Sandpoint, Idaho 83864
Phone: (208) 263-7712
Fax: (208) 263-8211
ISB No. 6313

STATE OF IDAHO }
COUNTY OF KOOTENAI } SS
FILED 8/11
K/P

2009 DEC -7 PM 3:56

CLERK DISTRICT COURT
J. Parker
DEPUTY

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF KOOTENAI

KARLETTA GRACE BERRY, a widow,	)	Case No. CV-2007-2409
KARLETTA GRACE BERRY, Personal)	
Representative of the Estate	)	NOTICE OF HEARING RE:
of Jerry Lee Roy Berry,	)	PLAINTIFFS' MOTION TO AMEND
CAPTAIN'S WHEEL RESORT, INC.,	)	COMPLAINT FOR PUNITIVE DAMAGES
an Idaho Corporation,)	
	)	(December 23, 2009 at 10:15
Plaintiffs,	)	a.m. - <u>Bonner County</u>)
)	
v.)	
)	
MICHAEL B. MCFARLAND, MICHAEL)	
B. MCFARLAND, P.A., and KAREN)	
ZIMMERMAN,)	
)	
Defendant.)	
)	

NOTICE IS HEREBY GIVEN that the Plaintiffs' Motion To Amend
Complaint For Punitive Damages shall come for hearing before the
Honorable Steve Verby on December 23, 2009 at the hour of
10:15 a.m., or as soon thereafter as counsel may be heard, in a

courtroom of the Bonner County Courthouse, 215 South First
Avenue, Sandpoint, Idaho 83864.

DATED this 7 day of December, 2009.



REX A. FINNEY
Attorney At Law

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the
foregoing was served by facsimile and by e-mail, this 7 day of
December, 2009, and was delivered as follows:

J.P. WHELAN P.C.

Attorney at law

213 N. 4th Street

Coeur d'Alene, Idaho 83814

[x]Via Facsimile: (208) 664-2240

[x]Via e-mail: jpwhelanattorney@yahoo.com

Judge Verby

chamber's copy

[x]Via Hand Delivery

By: 

REX A. FINNEY
FINNEY FINNEY & FINNEY, P.A.
Attorneys at Law
Old Power House Building
120 East Lake Street, Suite 317
Sandpoint, Idaho 83864
Phone: (208) 263-7712
Fax: (208) 263-8211
ISB No. 6313

STATE OF IDAHO }
COUNTY OF KOOTENAI } SS
FILED: #913 dex

2009 DEC -8 AM 9:33

CLERK DISTRICT COURT
Barb Crump
DEPUTY

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF KOOTENAI

KARLETTA GRACE BERRY, a widow,	)	Case No. CV-2007-2409
KARLETTA GRACE BERRY, Personal)	
Representative of the Estate)	
of Jerry Lee Roy Berry,	)	NOTICE OF EXAMINATION BY AUDIO
CAPTAIN'S WHEEL RESORT, INC.,	)	AND VIDEO DEPOSITION OF
an Idaho Corporation,	)	KAREN ZIMMERMAN
	)	And
Plaintiffs,	)	REQUEST FOR PRODUCTION OF
	)	DOCUMENTS AND THINGS
v.)	
)	
MICHAEL B. MCFARLAND, MICHAEL)	
B. MCFARLAND, P.A., and KAREN)	
ZIMMERMAN,)	
)	
Defendants.)	
)	

COMES NOW REX A. FINNEY, attorney for the Plaintiffs, and gives notice that he will depose KAREN ZIMMERMAN, upon verbal examination, on December 16, 2009, commencing at the hour of 8:30 a.m., and continuing on to December 18, 2009 at the hour of 8:30 a.m. if needed, ON A TO FOLLOW BASIS AT THE CONCLUSION OF THE

NOTICE OF EXAMINATION BY AUDIO AND VIDEO DEPOSITION OF KAREN ZIMMERMAN
And
REQUEST FOR PRODUCTION OF DOCUMENTS AND THINGS

DEPOSITION OF MICHAEL MCFARLAND, before a certified court reporter at Naegeli Reporting, 2120 Lakewood Drive, Suite B, Coeur d'Alene, Idaho 83814.

Pursuant to I.R.C.P. 30(b)(4) the deposition will be recorded by audio-visual means, while simultaneously being recorded as a stenographic recording.

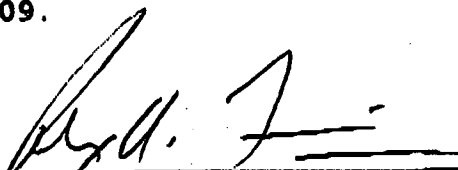
Demand is made that Karen Zimmerman bring to said deposition true copies of all documents, audio recordings, electronic items, records, exhibits, financial records, and all other written documents concerning the subject matter of the above pending litigation, including but not limited to:

1. All audio recordings made during any meetings of the directors, shareholders, or officers of. CAPTAIN'S WHEEL RESORT, INC., an Idaho Corporation;
2. Any e-mails by or to KAREN M. ZIMMERMAN to or from any other person or entity in regard to the Captain's Wheel Resort, Inc.;
3. All corporate records for the CAPTAIN'S WHEEL RESORT, INC., an Idaho Corporation.;
4. All e-mail, correspondence, or other tangible, or appraisal, comparative market listing or document establishing or tending or purporting to

- establish the value of the assets or any asset of Captain's Wheel Resort, Inc.;
5. Copies of any and all real estate listing agreements proposed or entered into in regard to the Captain's Wheel Resort, Inc.;
 6. Copy of your real estate broker license;
 7. All statement, document, e-mail, correspondence, or other tangible item that purports to show or evidences any debts of the Captain's Wheel Resort, Inc. including the balance at the time of inception of the debt and the current balance;
 8. Copies of all bank and/or credit line account statements in the name of or associated with the Captain's Wheel Resort, Inc. from 2003 through present;
 9. Copies of all bank account statements in the name of or associated with the Captain's Wheel Resort, Inc. from November 2006 through present;
 10. Copies of all applications for credit made in the name of or on behalf of or associated with the Captain's Wheel Resort, Inc. from 2003 through present;

11. Copies of KAREN ZIMMERMAN'S complete 2003, 2004, 2005, 2006, 2007, 2008 and 2009 state and federal tax returns;

DATED this 8 day of December, 2009.



REX A. FINNEY
Attorney at Law

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was served AS INDICATED BELOW, this 8 day of December, 2009, and was delivered as follows:

J.P. WHELAN P.C.

Attorney at law

213 N. 4th Street

Coeur d'Alene, Idaho 83814

[x]Via Facsimile: (208) 664-2240

[x]Via e-mail: jpwhelanattorney@yahoo.com

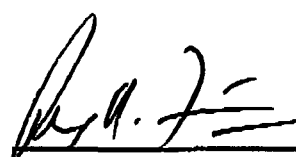
Judge Verby

chamber's copy

[x]Via Hand Delivery

Nageli Court Reporting

[x] by fax: 503-226-2343

By:  _____

REX A. FINNEY
FINNEY FINNEY & FINNEY, P.A.
Attorneys at Law
Old Power House Building
120 East Lake Street, Suite 317
Sandpoint, Idaho 83864
Phone: (208) 263-7712
Fax: (208) 263-8211
ISB No. 6313

STATE OF IDAHO
COUNTY OF KOOTENAI } SS
FILED

2009 DEC -8 AM 9:33

CLERK DISTRICT COURT
Barb Crump
DEPUTY

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF KOOTENAI

KARLETTA GRACE BERRY, a widow,	)	Case No. CV-2007-2409
KARLETTA GRACE BERRY, Personal)	
Representative of the Estate	)	NOTICE OF SERVING PLAINTIFF'S
of Jerry Lee Roy Berry,	)	SUPPLEMENTAL RESPONSES TO
CAPTAIN'S WHEEL RESORT, INC.,	)	INTERROGATORY NO. 1
an Idaho Corporation,)	
)	
Plaintiff,)	
)	
v.)	
)	
MICHAEL B. MCFARLAND, MICHAEL)	
B. MCFARLAND, P.A., and KAREN)	
ZIMMERMAN,)	
)	
Defendant.)	
)	

COMES NOW the Plaintiffs, KARLETTA GRACE BERRY, a widow,
KARLETTA GRACE BERRY, Personal Representative of the Estate of
Jerry Lee Roy Berry, and CAPTAIN'S WHEEL RESORT, INC., an Idaho
Corporation, and gives notice that on the 9th day of DECEMBER,
2009 A Supplemental Response to the Defendant's Interrogatory
No. 1, was faxed to JP Whelan at (208)-664-2240.

DATED this 8 day of December, 2009.



REX A. FINNEY
Attorney at Law

CERTIFICATE OF SERVICE

I hereby certify that the original of the foregoing was delivered by first fax, this 8 day of December, 2009, and was addressed as follows:

J.P. WHELAN P.C.
Attorney at law
213 N. 4th Street
Coeur d'Alene, Idaho 83814
And by fax: 208-664-2240



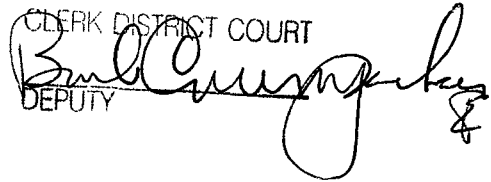
REX A. FINNEY
FINNEY FINNEY & FINNEY, P.A.
Attorneys at Law
Old Power House Building
120 East Lake Street, Suite 317
Sandpoint, Idaho 83864
Phone: (208) 263-7712
Fax: (208) 263-8211
ISB No. 6313

STATE OF IDAHO
COUNTY OF KOOTENAI } SS
FILED

913 *ju*

2009 DEC -8 AM 9:33

CLERK DISTRICT COURT
DEPUTY



IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF KOOTENAI

KARLETTA GRACE BERRY, a widow,	)	Case No. CV-2007-2409
KARLETTA GRACE BERRY, Personal)	
Representative of the Estate)	
of Jerry Lee Roy Berry,	)	NOTICE OF EXAMINATION BY AUDIO
CAPTAIN'S WHEEL RESORT, INC.,	)	AND VIDEO DEPOSITION OF
an Idaho Corporation,	)	MICHAEL MCFARLAND
	)	And
Plaintiffs,	)	REQUEST FOR PRODUCTION OF
	)	DOCUMENTS AND THINGS
v.)	
)	
MICHAEL B. MCFARLAND, MICHAEL)	
B. MCFARLAND, P.A., and KAREN)	
ZIMMERMAN,)	
)	
Defendants.)	

COMES NOW REX A. FINNEY, attorney for the Plaintiffs, and gives notice that he will depose MICHAEL MCFARLAND, upon verbal examination, on December 16, 2009, commencing at the hour of 8:30 a.m., and continuing on to December 18, 2009 at the hour of 8:30 a.m. if needed, before a certified court reporter at Naegeli

NOTICE OF EXAMINATION BY AUDIO AND VIDEO DEPOSITION OF MICHAEL MCFARLAND
And
REQUEST FOR PRODUCTION OF DOCUMENTS AND THINGS - 1

Berry v. McFarland

Supreme Court No. 37951-2010

Reporting, 2120 Lakewood Drive, Suite B, Coeur d'Alene, Idaho
83814.

Pursuant to I.R.C.P. 30(b)(4) the deposition will be recorded
by audio-visual means, while simultaneously being recorded as a
stenographic recording.

Demand is made that Michael McFarland bring to said
deposition true copies of all documents, audio recordings,
electronic items, records, exhibits, financial records, and all
other written documents concerning the subject matter of the above
pending litigation, including but not limited to:

1. Any e-mail, correspondence, or other tangible item
from Michael McFarland to Paul Daugherty in
reference to the Captain's Wheel Resort, Inc. or
regarding Jerry Barry.
2. Any e-mail, correspondence, or other tangible item
from Paul Daugherty to Michael McFarland in
reference to the Captain's Wheel Resort, Inc. or
regarding Jerry Barry.
3. Any correspondence, e-mail, judgment, or other item
from creditors of Jerry Barry or their/its attorney
to Michael McFarland, or Michael B. McFarland, P.A.
or any employee or attorney thereof.
4. All audio recordings made during any meetings of
the directors, shareholders, or officers of.

NOTICE OF EXAMINATION BY AUDIO AND VIDEO DEPOSITION OF MICHAEL MCFARLAND

And

Berry v. McFarland, Supreme Court No. 27951-2010

REQUEST FOR PRODUCTION OF DOCUMENTS AND THINGS 2

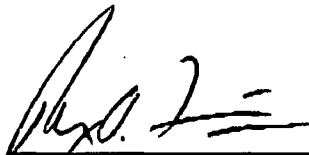
468 of 1268

**CAPTAIN'S WHEEL RESORT, INC., an Idaho
Corporation;**

5. **Any e-mails to or from Michael B. McFarland to or from any other person or entity in regard to the Captain's Wheel Resort, Inc.;**
6. **All corporate records for the CAPTAIN'S WHEEL RESORT, INC., an Idaho Corporation.;**
7. **All e-mail, correspondence, or other tangible, or appraisal, comparative market listing or document establishing or tending or purporting to establish the value of the assets or any asset of Captain's Wheel Resort, Inc.;**
8. **Copies of any and all real estate listing agreements proposed or entered into in regard to the Captain's Wheel Resort, Inc.**
9. **All statement, document, e-mail, correspondence, or other tangible item that purports to show or evidences any debts of the Captain's Wheel Resort, Inc. including the balance at the time of inception of the debt and the current balance;**
10. **Copies of all bank and/or credit line account statements in the name of or associated with the Captain's Wheel Resort, Inc. from 2003 through present;**

11. Copies of all bank account statements in the name of or associated with the Captain's Wheel Resort, Inc. from November 2006 through present;
12. Copies of all applications for credit made in the name of or on behalf of or associated with the Captain's Wheel Resort, Inc. from 2003 through present;
13. Copies of Michael B. McFarland's complete 2003, 2004, 2005, 2006, 2007, 2008 and 2009 state and federal tax returns;
14. Copies of Michael B. McFarland, P.A.'s complete 2008 and 2009 state and federal tax returns.

DATED this 8 day of December, 2009.



REX A. FINNEY
Attorney at Law

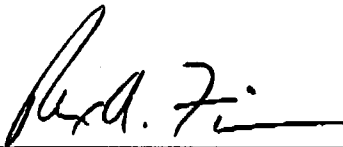
CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was served AS INDICATED BELOW, this 8 day of December, 2009, and was delivered as follows:

J.P. WHELAN P.C.
Attorney at law
213 N. 4th Street
Coeur d'Alene, Idaho 83814
[x]Via Facsimile: (208) 664-2240
[x]Via e-mail: jpwhelanattorney@yahoo.com

Judge Verby
chamber's copy
[x]Via Hand Delivery

Nageli Court Reporting
[x] by fax: 503-226-2343

By: 

STATE OF IDAHO
COUNTY OF KOOTENAI } SS
FILED: 4/8/09

2009 DEC -9 PM 3:23

CLERK DISTRICT COURT

[Signature]
DEPUTY

John P. Whelan, P.C.
Attorney at Law
213 N. 4th Street
Coeur d' Alene, Idaho 83814
Telephone: (208) 664-5891
Facsimile: (208) 664-2240
ISB No. 6083

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF KOOTENAI

KARLETTA GRACE BERRY, a widow,
KARLETTA GRACE BERRY, Personal
Representative of the Estate of Jerry
Lee Roy Berry, CAPTAIN'S WHEEL
RESORT, INC., an Idaho Corporation,

Plaintiffs,

vs.

MICHAEL B. MCFARLAND, MICHAEL B.
MCFARLAND, P.A., and KAREN
ZIMMERMAN,

Defendants.

Case No. CV-07-2409

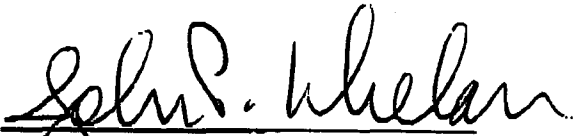
OBJECTION TO NOTICE OF
EXAMINATION OF MICHAEL
McFARLAND AND REQUEST FOR
PRODUCTION OF DOCUMENTS AND
THINGS

Defendant, Michael McFarland, by and through his attorney of record, John P. Whelan, hereby objects to the Notice of Examination by Audio and Video Deposition of Michael McFarland and Request for Production of Documents and Things served on December 8, 2009 on the grounds that I.R.C.P. Rule 34(b) requires thirty (30) days notice as a prerequisite to the production of documents and/or things at a deposition. Accordingly, the documentation and

OBJECTION TO NOTICE OF EXAMINATION OF MICHAEL MCFARLAND AND REQUEST FOR PRODUCTION OF DOCUMENTS AND THINGS-1

things requested at the deposition of Michael McFarland will not be produced at the deposition as requested.

DATED: 12/9/09


John P. Whelan
John P. Whelan

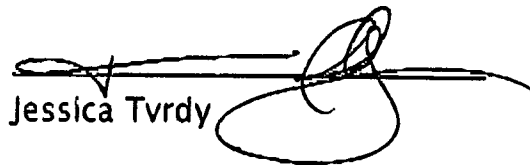
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 9TH day of December, 2009, I caused to be served a true and correct copy of the foregoing by the method indicated below, and addressed as indicated below:

Rex A. Finney
Finney, Finney & Finney
120 East Lake Street, Suite 317
Sandpoint, ID 83865

- U.S. Mail, Postage Prepaid
- Hand Delivered
- Overnight Mail
- Facsimile to: (208) 263-8211

Jessica Tvrdy



STATE OF IDAHO } SS
COUNTY OF KOOTENAI } 4/9
FILED

2009 DEC -9 PM 3: 23

CLERK DISTRICT COURT

[Signature]
DEPUTY *[Signature]*

John P. Whelan, P.C.
Attorney at Law
213 N. 4th Street
Coeur d' Alene, Idaho 83814
Telephone: (208) 664-5891
Facsimile: (208) 664-2240
ISB No. 6083

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF KOOTENAI

KARLETTA GRACE BERRY, a widow,
KARLETTA GRACE BERRY, Personal
Representative of the Estate of Jerry
Lee Roy Berry, CAPTAIN'S WHEEL
RESORT, INC., an Idaho Corporation,

Plaintiffs,

vs.

MICHAEL B. MCFARLAND, MICHAEL B.
MCFARLAND, P.A., and KAREN
ZIMMERMAN,

Defendants.

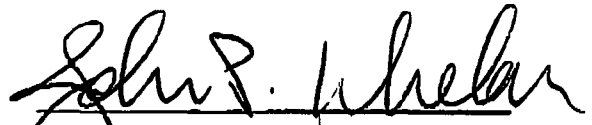
Case No. CV-07-2409

OBJECTION TO NOTICE OF
EXAMINATION OF KAREN ZIMMERMAN
AND REQUEST FOR PRODUCTION OF
DOCUMENTS AND THINGS

Defendant, Karen Zimmerman, by and through her attorney of record, John P. Whelan, hereby objects to the Notice of Examination by Audio and Video Deposition of Karen Zimmerman and Request for Production of Documents and Things served on December 8, 2009 on the grounds that I.R.C.P. Rule 34(b) requires thirty (30) days notice as a prerequisite to the production of documents and/or things at a deposition. Accordingly, the documentation and

things requested at the deposition of Karen Zimmerman will not be produced at the deposition as requested.

DATED: 12/9/09

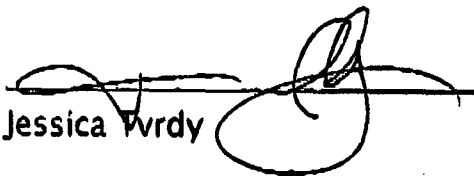

John P. Whelan

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 9TH day of December, 2009, I caused to be served a true and correct copy of the foregoing by the method indicated below, and addressed as indicated below:

Rex A. Finney
Finney, Finney & Finney
120 East Lake Street, Suite 317
Sandpoint, ID 83865

- () U.S. Mail, Postage Prepaid
- () Hand Delivered
- () Overnight Mail
- () Facsimile to: (208) 263-8211

Jessica Vrady 

REX A. FINNEY
FINNEY FINNEY & FINNEY, P.A.
Attorneys at Law
Old Power House Building
120 East Lake Street, Suite 317
Sandpoint, Idaho 83864
Phone: (208) 263-7712
Fax: (208) 263-8211
ISB No. 6313

STATE OF IDAHO }
COUNTY OF KOOTENAI } SS
FILED 815
#88

2009 DEC 15 PM 1:20

CLERK DISTRICT COURT
Jane Jordan
DEPUTY

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF KOOTENAI

KARLETTA GRACE BERRY, a widow,	)	Case No. CV-2007-2409
KARLETTA GRACE BERRY, Personal)	
Representative of the Estate)	
of Jerry Lee Roy Berry,	)	AMENDED NOTICE OF EXAMINATION
CAPTAIN'S WHEEL RESORT, INC.,	)	BY AUDIO AND VIDEO DEPOSITION
an Idaho Corporation,	)	OF
	)	KAREN ZIMMERMAN
Plaintiffs,	)	And
	)	REQUEST FOR PRODUCTION OF
v.	)	DOCUMENTS AND THINGS
)	
MICHAEL B. McFARLAND, MICHAEL)	
B. McFARLAND, P.A., and KAREN)	
ZIMMERMAN,)	
)	
Defendants.)	
)	

COMES NOW REX A. FINNEY, attorney for the Plaintiffs, and gives notice that he will depose KAREN ZIMMERMAN, upon verbal examination, on December 21, 2009, commencing at the hour of 2:30 p.m., and continuing on December 23, 2009 at the hour of 11:30 a.m. if needed on a to follow basis at the conclusion of the

AMENDED NOTICE OF EXAMINATION BY AUDIO AND VIDEO DEPOSITION OF KAREN ZIMMERMAN
And
REQUEST FOR PRODUCTION OF DOCUMENTS AND THINGS

Deposition of Michael McFarland, before a certified court reporter at the The law office of John P. Whelan, 213 N. 4th Street, Coeur d'Alene, Idaho 83814.

Pursuant to I.R.C.P. 30(b)(4) the deposition will be recorded by audio-visual means, while simultaneously being recorded as a stenographic recording.

Demand is made that KAREN ZIMMERMAN bring to said deposition true copies of all documents, audio recordings, electronic items, records, exhibits, financial records, and all other written documents concerning the subject matter of the above pending litigation, including but not limited to:

1. All audio recordings made during any meetings of the directors, shareholders, or officers of. CAPTAIN'S WHEEL RESORT, INC., an Idaho Corporation;
2. Any e-mails by or to KAREN M. ZIMMERMAN to or from any other person or entity in regard to the Captain's Wheel Resort, Inc.;
3. All corporate records for the CAPTAIN'S WHEEL RESORT, INC., an Idaho Corporation.;
4. All e-mail, correspondence, or other tangible, or appraisal, comparative market listing or document establishing or tending or purporting to establish the value of the assets or any asset of Captain's Wheel Resort, Inc.;

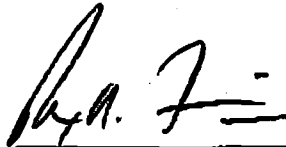
AMENDED NOTICE OF EXAMINATION BY AUDIO AND VIDEO DEPOSITION OF KAREN ZIMMERMAN

And

REQUEST FOR PRODUCTION OF DOCUMENTS AND THINGS

5. Copies of any and all real estate listing agreements proposed or entered into in regard to the Captain's Wheel Resort, Inc.;
6. Copy of your real estate broker license;
7. All statement, document, e-mail, correspondence, or other tangible item that purports to show or evidences any debts of the Captain's Wheel Resort, Inc. including the balance at the time of inception of the debt and the current balance;
8. Copies of all bank and/or credit line account statements in the name of or associated with the Captain's Wheel Resort, Inc. from 2003 through present;
9. Copies of all bank account statements in the name of or associated with the Captain's Wheel Resort, Inc. from November 2006 through present;
10. Copies of all applications for credit made in the name of or on behalf of or associated with the Captain's Wheel Resort, Inc. from 2003 through present;
11. Copies of KAREN ZIMMERMAN'S complete 2003, 2004, 2005, 2006, 2007, 2008 and 2009 state and federal tax returns;

DATED this 15 day of December, 2009.



REX A. FINNEY
Attorney at Law

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was served AS INDICATED BELOW, this 15th day of December, 2009, and was delivered as follows:

J.P. WHELAN P.C.
Attorney at law
213 N. 4th Street
Coeur d'Alene, Idaho 83814
[x]Via Facsimile: (208) 664-2240
[x]Via e-mail: jpwhelanattorney@yahoo.com

Judge Verby
chamber's copy
[x]Via Hand Delivery

Nageli Court Reporting
[x] by fax: 503-227-7123
[x] by e-mail: Alicia@naegeliereporting.com

By: *Berky Klais*

STATE OF IDAHO }
COUNTY OF KOOTENAI } SS
FILED 815 48

2009 DEC 15 PM 1:20

CLERK DISTRICT COURT
Trace Johnson
DEPUTY

REX A. FINNEY
FINNEY FINNEY & FINNEY, P.A.
Attorneys at Law
Old Power House Building
120 East Lake Street, Suite 317
Sandpoint, Idaho 83864
Phone: (208) 263-7712
Fax: (208) 263-8211
ISB No. 6313

**IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF KOOTENAI**

KARLETTA GRACE BERRY, a widow,	)	Case No. CV-2007-2409
KARLETTA GRACE BERRY, Personal)	
Representative of the Estate)	
of Jerry Lee Roy Berry,	)	AMENDED NOTICE OF EXAMINATION
CAPTAIN'S WHEEL RESORT, INC.,	)	BY AUDIO AND VIDEO DEPOSITION
an Idaho Corporation,	)	OF
	)	MICHAEL MCFARLAND
Plaintiffs,	)	And
	)	REQUEST FOR PRODUCTION OF
v.	)	DOCUMENTS AND THINGS
)	
MICHAEL B. MCFARLAND, MICHAEL)	
B. MCFARLAND, P.A., and KAREN)	
ZIMMERMAN,)	
)	
Defendants.)	
)	

**COMES NOW REX A. FINNEY, attorney for the Plaintiffs, and
gives notice that he will depose MICHAEL MCFARLAND, upon verbal
examination, on Friday December 18, 2009, commencing at the hour
of 8:30 a.m., and continuing on Wednesday December 23, 2009 at the
hour of 11:30 a.m. if needed, before a certified court reporter at**

**AMENDED NOTICE OF EXAMINATION BY AUDIO AND VIDEO DEPOSITION OF MICHAEL
MCFARLAND
And
REQUEST FOR PRODUCTION OF DOCUMENTS AND THINGS**

The law office of John P. Whelan, 213 N. 4th Street, Coeur d'Alene, Idaho 83814.

Pursuant to I.R.C.P. 30(b)(4) the deposition will be recorded by audio-visual means, while simultaneously being recorded as a stenographic recording.

Demand is made that Michael McFarland bring to said deposition true copies of all documents, audio recordings, electronic items, records, exhibits, financial records, and all other written documents concerning the subject matter of the above pending litigation, including but not limited to:

1. Any e-mail, correspondence, or other tangible item from Michael McFarland to Paul Daugherty in reference to the Captain's Wheel Resort, Inc. or regarding Jerry Berry.
2. Any e-mail, correspondence, or other tangible item from Paul Daugherty to Michael McFarland in reference to the Captain's Wheel Resort, Inc. or regarding Jerry Berry.
3. Any correspondence, e-mail, judgment, or other item from creditors of Jerry Berry or their/its attorney to Michael McFarland, or Michael B. McFarland, P.A. or any employee or attorney thereof.

4. All audio recordings made during any meetings of the directors, shareholders, or officers of CAPTAIN'S WHEEL RESORT, INC., an Idaho Corporation;
5. Any e-mails to or from Michael B. McFarland to or from any other person or entity in regard to the Captain's Wheel Resort, Inc.;
6. All corporate records for the CAPTAIN'S WHEEL RESORT, INC., an Idaho Corporation.;
7. All e-mail, correspondence, or other tangible, or appraisal, comparative market listing or document establishing or tending or purporting to establish the value of the assets or any asset of Captain's Wheel Resort, Inc.;
8. Copies of any and all real estate listing agreements proposed or entered into in regard to the Captain's Wheel Resort, Inc.
9. All statement, document, e-mail, correspondence, or other tangible item that purports to show or evidences any debts of the Captain's Wheel Resort, Inc. including the balance at the time of inception of the debt and the current balance;

AMENDED NOTICE OF EXAMINATION BY AUDIO AND VIDEO DEPOSITION OF MICHAEL MCFARLAND

And

REQUEST FOR PRODUCTION OF DOCUMENTS AND THINGS

484 of 1268

10. Copies of all bank and/or credit line account statements in the name of or associated with the Captain's Wheel Resort, Inc. from 2003 through present;
11. Copies of all bank account statements in the name of or associated with the Captain's Wheel Resort, Inc. from November 2006 through present;
12. Copies of all applications for credit made in the name of or on behalf of or associated with the Captain's Wheel Resort, Inc. from 2003 through present;
13. Copies of Michael B. McFarland's complete 2003, 2004, 2005, 2006, 2007, 2008 and 2009 state and federal tax returns;
14. Copies of Michael B. McFarland, P.A.'s complete 2008 and 2009 state and federal tax returns.

DATED this 15 day of December, 2009.



REX A. FINNEY
Attorney at Law

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was served AS INDICATED BELOW, this 15th day of December, 2009, and was delivered as follows:

J.P. WHELAN P.C.
Attorney at law
213 N. 4th Street
Coeur d'Alene, Idaho 83814
[x] Via Facsimile: (208) 664-2240
[x] Via e-mail: jpwhelanattorney@yahoo.com

Judge Verby
chamber's copy
[x] Via Hand Delivery

Nageli Court Reporting
[x] by fax: 503-227-7123
[x] by e-mail: Alicia@naegelireporting.com

By: Bekky Klalis

AMENDED NOTICE OF EXAMINATION BY AUDIO AND VIDEO DEPOSITION OF MICHAEL
MCFARLAND

And

REQUEST FOR PRODUCTION OF DOCUMENTS AND THINGS

REX A. FINNEY
FINNEY FINNEY & FINNEY, P.A.
Attorneys at Law
Old Power House Building
120 East Lake Street, Suite 317
Sandpoint, Idaho 83864
Phone: (208) 263-7712
Fax: (208) 263-8211
ISB No. 6313

STATE OF IDAHO
COUNTY OF KOOTENAI } SS
FILED

#161 deb

2009 DEC 16 AM 10:50

CLERK DISTRICT COURT

DEPUTY

Patty Bailey
PK

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF KOOTENAI

KARLETTA GRACE BERRY, a widow,	)	Case No. CV-2007-2409
KARLETTA GRACE BERRY, Personal)	
Representative of the Estate)	
of Jerry Lee Roy Berry,	)	SECOND AMENDED NOTICE OF
CAPTAIN'S WHEEL RESORT, INC.,	)	EXAMINATION BY AUDIO AND VIDEO
an Idaho Corporation,	)	DEPOSITION OF
	)	KAREN ZIMMERMAN
Plaintiffs,	)	And
	)	REQUEST FOR PRODUCTION OF
v.	)	DOCUMENTS AND THINGS
)	
MICHAEL B. McFARLAND, MICHAEL)	
B. McFARLAND, P.A., and KAREN)	
ZIMMERMAN,)	
)	
Defendants.)	
)	

COMES NOW REX A. FINNEY, attorney for the Plaintiffs, and gives notice that he will depose KAREN ZIMMERMAN, upon verbal examination, on December 21, 2009, commencing at the hour of 2:30 p.m., and continuing on December 23, 2009 at the hour of 11:30 a.m. if needed on a to follow basis at the conclusion of the

SECOND AMENDED NOTICE OF EXAMINATION BY AUDIO AND VIDEO DEPOSITION OF KAREN ZIMMERMAN

Deposition of Michael McFarland, before a certified court reporter at The law office of Art Bistline, 1423 N. Government Way, Coeur d'Alene, Idaho.

Pursuant to I.R.C.P. 30(b)(4) the deposition will be recorded by audio-visual means, while simultaneously being recorded as a stenographic recording.

Demand is made that KAREN ZIMMERMAN bring to said deposition true copies of all documents, audio recordings, electronic items, records, exhibits, financial records, and all other written documents concerning the subject matter of the above pending litigation, including but not limited to:

1. All audio recordings made during any meetings of the directors, shareholders, or officers of. CAPTAIN'S WHEEL RESORT, INC., an Idaho Corporation;
2. Any e-mails by or to KAREN M. ZIMMERMAN to or from any other person or entity in regard to the Captain's Wheel Resort, Inc.;
3. All corporate records for the CAPTAIN'S WHEEL RESORT, INC., an Idaho Corporation;
4. All e-mail, correspondence, or other tangible, or appraisal, comparative market listing or document establishing or tending or purporting to establish the value of the assets or any asset of Captain's Wheel Resort, Inc.;

SECOND AMENDED NOTICE OF EXAMINATION BY AUDIO AND VIDEO DEPOSITION OF KAREN ZIMMERMAN

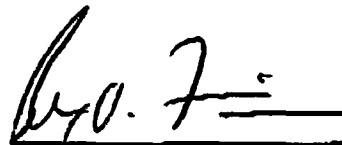
And
Berry v. McFarland
REQUEST FOR PRODUCTION OF DOCUMENTS AND THINGS - 2

Supreme Court No. 37951-2010

488 of 1268

5. Copies of any and all real estate listing agreements proposed or entered into in regard to the Captain's Wheel Resort, Inc.;
6. Copy of your real estate broker license;
7. All statement, document, e-mail, correspondence, or other tangible item that purports to show or evidences any debts of the Captain's Wheel Resort, Inc. including the balance at the time of inception of the debt and the current balance;
8. Copies of all bank and/or credit line account statements in the name of or associated with the Captain's Wheel Resort, Inc. from 2003 through present;
9. Copies of all bank account statements in the name of or associated with the Captain's Wheel Resort, Inc. from November 2006 through present;
10. Copies of all applications for credit made in the name of or on behalf of or associated with the Captain's Wheel Resort, Inc. from 2003 through present;
11. Copies of KAREN ZIMMERMAN'S complete 2003, 2004, 2005, 2006, 2007, 2008 and 2009 state and federal tax returns;

DATED this 16 day of December, 2009.



REX A. FINNEY
Attorney at Law

SECOND AMENDED NOTICE OF EXAMINATION BY AUDIO AND VIDEO DEPOSITION OF KAREN ZIMMERMAN

And Berry v. McFarland

Supreme Court No. 37951-2010

REQUEST FOR PRODUCTION OF DOCUMENTS AND THINGS - 3

489 of 1268

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was served AS INDICATED BELOW, this 16th day of December, 2009, and was delivered as follows:

J.P. WHELAN P.C.
Attorney at law
213 N. 4th Street
Coeur d'Alene, Idaho 83814
[x]Via Facsimile: (208) 664-2240
[x]Via e-mail: jpwhelanattorney@yahoo.com

Judge Verby
chamber's copy
[x]Via Hand Delivery

Nageli Court Reporting
[x] by fax: 503-227-7123
[x] by e-mail: Alicia@naegeliereporting.com

By: 

TRANSMISSION JOURNAL

G377SY0U301

F562-A06

TIME : 12-16-'09 11:44
 FAX NO.1 : +208-446-1188
 FAX NO.2 :
 NAME : Kootenai Dist Court

NO.	FILE NO.	DATE TIME	DURATION	PGS	TO	DEPT	MODE	STATUS
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977	020	12.16 08:13	00:07	1	96657290	EC	603	OK
978	021	12.16 08:14	00:09	1	96657290	EC	603	OK
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015	046	12.16 09:19	00:21	4	94462181	EC	602	OK

REX A. FINNEY
FINNEY FINNEY & FINNEY, P.A.
Attorneys at Law
Old Power House Building
120 East Lake Street, Suite 317
Sandpoint, Idaho 83864
Phone: (208) 263-7712
Fax: (208) 263-8211
ISB No. 6313

STATE OF IDAHO }
COUNTY OF KOOTENAI } SS
FILED }
#161 deb
2009 DEC 16 AM 10:50
CLERK DISTRICT COURT
DEPUTY *Patty Bayley*

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF KOOTENAI

KARLETTA GRACE BERRY, a widow,) Case No. CV-2007-2409
KARLETTA GRACE BERRY, Personal)
Representative of the Estate)
of Jerry Lee Roy Berry,) SECOND AMENDED NOTICE OF
CAPTAIN'S WHEEL RESORT, INC.,) EXAMINATION BY AUDIO AND VIDEO
an Idaho Corporation,) DEPOSITION OF
MICHAEL MCFARLAND
Plaintiffs,) And
v.) REQUEST FOR PRODUCTION OF
DOCUMENTS AND THINGS
MICHAEL B. MCFARLAND, MICHAEL)
B. MCFARLAND, P.A., and KAREN)
ZIMMERMAN,)
Defendants.)

COMES NOW REX A. FINNEY, attorney for the Plaintiffs, and
gives notice that he will depose MICHAEL MCFARLAND, upon verbal
examination, on Friday December 18, 2009, commencing at the hour
of 8:30 a.m., and continuing on Wednesday December 23, 2009 at the
hour of 11:30 a.m. if needed, before a certified court reporter at

The law office of Art Bistline, 1423 N. Government Way, Coeur
d'Alene, Idaho 83814.

Pursuant to I.R.C.P. 30(b)(4) the deposition will be recorded by audio-visual means, while simultaneously being recorded as a stenographic recording.

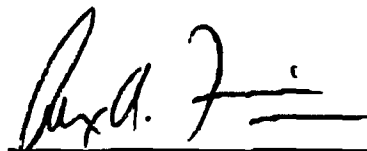
Demand is made that Michael McFarland bring to said deposition true copies of all documents, audio recordings, electronic items, records, exhibits, financial records, and all other written documents concerning the subject matter of the above pending litigation, including but not limited to:

1. Any e-mail, correspondence, or other tangible item from Michael McFarland to Paul Daugherty in reference to the Captain's Wheel Resort, Inc. or regarding Jerry Berry.
2. Any e-mail, correspondence, or other tangible item from Paul Daugherty to Michael McFarland in reference to the Captain's Wheel Resort, Inc. or regarding Jerry Berry.
3. Any correspondence, e-mail, judgment, or other item from creditors of Jerry Berry or their/its attorney to Michael McFarland, or Michael B. McFarland, P.A. or any employee or attorney thereof.

4. All audio recordings made during any meetings of the directors, shareholders, or officers of CAPTAIN'S WHEEL RESORT, INC., an Idaho Corporation;
5. Any e-mails to or from Michael B. McFarland to or from any other person or entity in regard to the Captain's Wheel Resort, Inc.;
6. All corporate records for the CAPTAIN'S WHEEL RESORT, INC., an Idaho Corporation.;
7. All e-mail, correspondence, or other tangible, or appraisal, comparative market listing or document establishing or tending or purporting to establish the value of the assets or any asset of Captain's Wheel Resort, Inc.;
8. Copies of any and all real estate listing agreements proposed or entered into in regard to the Captain's Wheel Resort, Inc.
9. All statement, document, e-mail, correspondence, or other tangible item that purports to show or evidences any debts of the Captain's Wheel Resort, Inc. including the balance at the time of inception of the debt and the current balance;

10. Copies of all bank and/or credit line account statements in the name of or associated with the Captain's Wheel Resort, Inc. from 2003 through present;
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13. Copies of Michael B. McFarland's complete 2003, 2004, 2005, 2006, 2007, 2008 and 2009 state and federal tax returns;
14. Copies of Michael B. McFarland, P.A.'s complete 2008 and 2009 state and federal tax returns.

DATED this 16 day of December, 2009.



REX A. FINNEY
Attorney at Law

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was served AS INDICATED BELOW, this 10th day of December, 2009, and was delivered as follows:

J.P. WHELAN P.C.
Attorney at law
213 N. 4th Street
Coeur d'Alene, Idaho 83814
[x]Via Facsimile: (208) 664-2240
[x]Via e-mail: jpwhelanattorney@yahoo.com

Judge Verby
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[x]Via Hand Delivery

Nageli Court Reporting
[x] by fax: 503-227-7123
[x] by e-mail: Stacey@naegelireporting.com

By: Becky Klatsch

STATE OF IDAHO }
COUNTY OF KOOTENAI } SS
FILED #424 det
127
2009 DEC 16 PM 4:20

CLERK DISTRICT COURT
Patty Kayley
DEPUTY

John P. Whelan, P.C.
Attorney at Law
213 N. 4th Street
Coeur d' Alene, Idaho 83814
Telephone: (208) 664-5891
Facsimile: (208) 664-2240
ISB No. 6083

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF KOOTENAI

KARLETTA GRACE BERRY, a widow,
KARLETTA GRACE BERRY, Personal
Representative of the Estate of Jerry
Lee Roy Berry, CAPTAIN'S WHEEL
RESORT, INC., an Idaho Corporation,

Plaintiffs,

vs.

MICHAEL B. MCFARLAND, MICHAEL B.
MCFARLAND, P.A., and KAREN
ZIMMERMAN,

Defendants.

Case No. CV-07-2409

AFFIDAVIT OF JOHN P. WHELAN IN
SUPPORT OF THE OPPOSITION OF
DEFENDANTS TO PLAINTIFFS' MOTION
TO AMEND COMPLAINT FOR PUNITIVE
DAMAGES

Date: December 23, 2009
Time: 10:15 a.m.
Judge: Steve Verby

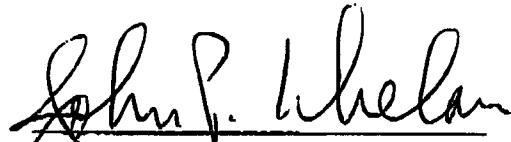
STATE OF IDAHO)
) ss.
County of Kootenai)

John P. Whelan, being first duly sworn, deposes and says:

1. I am the attorney for Defendants in this action. I have personal knowledge of the following facts and could competently testify.

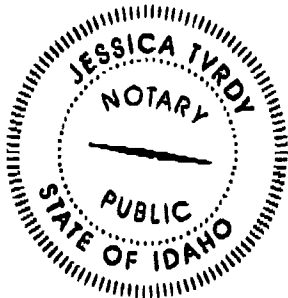
2. Attached hereto as Exhibit A is a true and correct copy of the relevant portions of the deposition transcript of Karletta Grace Berry.


Dated: 12/16/09



John P. Whelan

Subscribed and sworn before me this 16TH day of December, 2009.





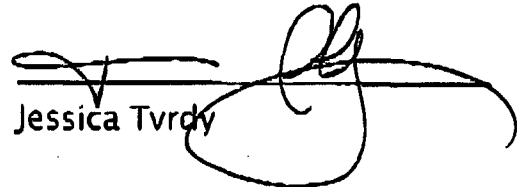
Notary Public in and for the State of Idaho
Residing at: Post Falls
My Comm. Expires: 12/29/11

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 16TH day of December, 2009, I caused to be served a true and correct copy of the foregoing by the method indicated below, and addressed as indicated below:

Rex A. Finney
Finney, Finney & Finney
120 East Lake Street, Suite 317
Sandpoint, ID 83865

- U.S. Mail, Postage Prepaid
- Hand Delivered
- Overnight Mail
- Facsimile to: (208) 263-8211


Jessica Tvrdy

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF KOOTENAI

KARLETTA GRACE BERRY,)
a widow, KARLETTA GRACE)
BERRY, Personal)
Representative of the)
Estate of Jerry Lee Roy)
Berry, CAPTAIN'S WHEEL)
RESORT, INC., an Idaho)
Corporation,)

Plaintiffs,)

Case No. CV-07-2409

vs.)

MICHAEL B. MCFARLAND,)
MICHAEL B. MCFARLAND,)
P.A., and KAREN)
ZIMMERMAN,)

Defendants.)

DEPOSITION OF KARLETTA GRACE BERRY

TAKEN ON BEHALF OF THE DEFENDANTS

AT 816 SHERMAN AVENUE, COEUR D'ALENE, IDAHO

DECEMBER 18, 2007, AT 9:00 A.M.

REPORTED BY:

JULIE MCCAUGHAN, C.S.R. NO. 684
Notary Public



Coeur d'Alene, Idaho
Northern Offices
208.765.1700
1.800.879.1700

Spokane, Washington
509.455.4515
1.800.879.1700
www.mmcourt.com

Boise, Idaho
Southern Offices
208.345.9611
1.800.234.9611

1 Q. And what year was that?
 2 A. 2002, 2003.
 3 Q. And this was done solely for the purpose
 4 of attempting to obtain's refinance?
 5 A. Yes.
 6 Q. Okay. And that never took place?
 7 A. No.
 8 Q. Okay. So if Jerry borrowed \$60,000 to
 9 participate in this Captain's Wheel investment
 10 opportunity, where did the other 37,000 come from?
 11 A. From savings. Jerry had stocks -- not
 12 stocks. What did they call it?
 13 Q. Bonds? Securities? CDs?
 14 A. He had CDs, as well as he had loaned money
 15 to someone and they were paying him back.
 16 Q. Okay. So what? Jerry cashed in his CDs
 17 and collected his notes, and that's how he amassed the
 18 other 37,000?
 19 A. Yes.
 20 Q. Now, did Jerry own these CDs before he
 21 married you?
 22 A. Yes.
 23 Q. And he received payments on notes that he
 24 had before he got married, as well?
 25 A. Correct. There were a couple after we

1 into it, yes.
 2 Q. Okay. And you used the term
 3 "partnership." You really meant to say "shareholder"?
 4 Is that true?
 5 A. Yes. Also, partners with Jim and Jean in
 6 the running of the corporation.
 7 Q. Okay. But all the while, the Captain's
 8 Wheel Resort was a corporation and it is today. Is that
 9 true?
 10 A. Yes.
 11 Q. Okay. And when you and Jerry bought into
 12 this opportunity, stock was received representing an
 13 ownership interest?
 14 A. Yes.
 15 Q. Okay. And that stock that was received
 16 represented a 50-percent ownership interest?
 17 A. Yes.
 18 Q. And whose name was that stock in?
 19 A. Jerry's.
 20 Q. And this was in 2002?
 21 A. No. It would have been 2000.
 22 Q. I'm sorry. 2000. So when the stock was
 23 initially acquired or purchased, it was placed in
 24 Jerry's name?
 25 A. Yes.



1 became married, also.
 2 Q. But this was his separate property?
 3 A. At the time of the purchase of the
 4 corporation, yes.
 5 Q. At the time of purchase of the
 6 corporation. Now, I'm a bit confused. You've used the
 7 term "partnership" and you've used the term
 8 "corporation" several times.
 9 A. The partnership in the corporation.
 10 Q. Did the partnership become a corporation
 11 at some point?
 12 A. It was a corporation when we bought into
 13 it.
 14 Q. So it wasn't a partnership?
 15 A. Partners --
 16 MR. FINNEY: Can we go off the record for a second
 17 here, John?
 18 MR. WHELAN: Sure.
 19 (Off the record.)
 20 BY MR. WHELAN:
 21 Q. Now, ma'am, when you and Jerry were
 22 advised that there was an opportunity with this
 23 Captain's Wheel investment, in reality, that was a
 24 corporation, the Captain's Wheel Resort. Is that true?
 25 A. It was a corporation at the time we bought

1 Q. And it was placed in Jerry's name at the
 2 end of the six-months period of the negotiations. Is
 3 that about right?
 4 A. Yes.
 5 Q. So for six months, you and Jerry talked to
 6 people about going into this corporation. Jerry
 7 apparently talked to his buddy in California and his
 8 bankers and all that, and went about trying to get the
 9 money together to buy the stock?
 10 A. Yes.
 11 Q. And about six months after you found out
 12 about the availability of the Captain's Wheel
 13 opportunity, the stock was purchased and the stock was
 14 placed in Jerry's name?
 15 A. Correct.
 16 Q. Okay. Now, at any point in time, was that
 17 stock taken out of Jerry's name and put into some other
 18 name?
 19 A. No.
 20 Q. So that stock still is in Jerry's name?
 21 A. It's in mine and Jerry's name, with right
 22 of survivorship.
 23 Q. Okay. I'll repeat the question. I said:
 24 At any time after the stock was placed in Jerry's name,
 25 was it placed in another name?



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1 A. It is -- my name was put on there with
 2 Jerry with right of survivorship.
 3 Q. Okay. When was that?
 4 A. In 2003. No. 2006. ★
 5 Q. Prior to the time that the stock was
 6 placed in your name and Jerry's name in 2006, had the
 7 stock stayed in the name of Jerry only?
 8 A. Yes.
 9 Q. Okay. And what was the reason for putting
 10 the stock in your name and Jerry's name with right of
 11 survivorship?
 12 A. Jerry was ill, and he wanted to make sure
 13 I was protected.
 14 Q. And what do you mean by that or what did
 15 he mean by that?
 16 A. He had cancer and was dying.
 17 Q. Okay. And you said that he wanted to make
 18 sure you were protected. And I asked you: What did he
 19 mean by that?
 20 A. To be sure that I received what was -- he
 21 wanted me to receive. It's my son and I's security.
 22 Q. Okay. When Jerry passed away in 2006, did
 23 he have a will?
 24 A. Yes.
 25 Q. Did Jerry have a will in 2006 when he

1 agreed on that?
 2 MR. FINNEY: We're agreed on that, Mr. Whelan.
 3 MR. WHELAN: Okay.
 4 Q. How did McFarland become a vice-president?
 5 A. He was voted in after he and Ms. Zimmerman
 6 loaned Jerry money to buy out Mr. Campbell and his wife
 7 because Mr. Campbell had developed health problems.
 8 Q. Okay. Let's talk about that. How is it
 9 that you know that Mike McFarland loaned money to Jerry?
 10 A. I was present when they discussed it.
 11 Q. And when was that?
 12 A. In 2003.
 13 Q. You remember this distinctly?
 14 A. Yes.
 15 Q. Where were you?
 16 A. We were at the Captain's Wheel.
 17 Q. Okay. And who else was there?
 18 A. My husband and Ms. Zimmerman.
 19 Q. Okay. And what were the circumstances
 20 that led to this conversation?
 21 A. Mr. Campbell had developed health problems
 22 and wanted out of his obligations with the corporation
 23 and the restaurant.
 24 Q. Okay. But I asked you -- okay. And that
 25 was the circumstances, the backdrop for the conversation

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1 transferred the stock to you?
 2 A. Yes.
 3 Q. And did you and Jerry talk about the
 4 prospect of putting the stock in right of survivorship
 5 title?
 6 A. He's the one that put it in right of
 7 survivorship.
 8 Q. You didn't participate in that?
 9 A. It was his -- he said, "Put it in right of
 10 survivorship."
 11 Q. He said that to whom?
 12 A. Mr. McFarland, who was acting, at the
 13 time, as president of the corporation. Or vice -- no,
 14 he wasn't president at the time. As -- I don't remember
 15 what his title is. Vice-president?
 16 Q. Okay. So Jerry instructed McFarland to
 17 place the stock in your names?
 18 A. Yes.
 19 Q. And at this point in time, Mike McFarland
 20 was a vice-president or something?
 21 A. Yes. He was --
 22 MR. WHELAN: Hey, Rex, watch that. Will you?
 23 Okay? Why don't you put the notes in front of you. And
 24 I'm going to start commenting that you're writing notes
 25 to your client during this deposition. Okay? Are we

1 that you had with -- or that Jerry had with Mike
 2 McFarland?
 3 A. Yes. It all led up to that.
 4 Q. Okay. Now, I want to know: How is it
 5 that Jerry and Mike started talking about a loan during
 6 one night at the Captain's Wheel? Can you explain that
 7 to me?
 8 A. Mike was Jerry's attorney, so Jerry spoke
 9 to Mike frequently.
 10 Q. Okay. And what brought about this
 11 conversation between Mike and Jerry regarding this loan?
 12 A. Mr. Campbell was ill. He wanted out of
 13 the corporation and the restaurant responsibilities.
 14 Some other parties had attempted to buy Jim's shares.
 15 That did not work out. So Mike and Ms. Zimmerman came
 16 to Jerry and said that they would loan the money if
 17 Jerry wanted to have the full partnership, the full
 18 corporation.
 19 Q. And you know this because you were
 20 standing there or sitting there?
 21 A. I was present for several of the
 22 conversations. We would all sit together when we would
 23 go in and have dinner and go dancing. Mike and Karen
 24 would come in on the weekends and go dancing, and we
 25 would usually sit together and have dinner.

1 Q. So in 2003, you had more conversations
 2 with Mike and Karen regarding their loaning money to
 3 Jerry?
 4 A. Yes.
 5 Q. And what was said during -- let's start
 6 with the second conversation and we'll just work our way
 7 through. What was said during this second conversation
 8 you participated in with Mike, Karen and Jerry?
 9 A. How they were going to -- what time
 10 deadlines they had and who was going to meet who to hand
 11 over the finances.
 12 Q. Anything else?
 13 A. It was in 2003. I let my husband do the
 14 business aspect.
 15 Q. So your husband took care of the business
 16 aspect of the Captain's Wheel?
 17 A. Of the loan and...
 18 Q. So it was your husband Jerry who handled
 19 the loan from Mike and Karen?
 20 A. Yes.
 21 Q. And what direct participation did you
 22 have, if any?
 23 A. None, I guess, other than conversations
 24 with Jerry.
 25 Q. Okay. So Jerry would come and report to

1 similar discussions with other persons?
 2 A. With Jim and Jean, to keep Jim updated on
 3 how it was progressing and how soon he could be free of
 4 the partnership and the corporation.
 5 Q. Okay. He talked to the Campbells about
 6 the status. Jerry would talk to the Campbells about the
 7 status of the Mike-and-Karen loan?
 8 A. Not by name, but just how he was getting
 9 the money. Because he did not tell Jim and Jean that he
 10 was -- who he was getting the finances from.
 11 Q. Okay. So Jim and Jean never knew where
 12 the money was coming from?
 13 A. No.
 14 Q. Okay. Would Jerry have conversations with
 15 anyone other than you and Jim and Jean regarding the
 16 loans from Mike and Karen?
 17 A. I don't think so.
 18 Q. Now, to your knowledge, was there
 19 paperwork prepared for these loans?
 20 A. What kind of paperwork?
 21 Q. Any paperwork.
 22 A. I have a receipt stating that -- showing
 23 when he received money from partial payment on the loan,
 24 but that's about the only thing I have, as well as
 25 copies of the cashier's checks that he received on the

1 you what was going on? Is that what you're saying?
 2 A. We would have discussions, yes.
 3 Q. And during these discussions, Jerry would
 4 tell you what's going on?
 5 A. Yes.
 6 Q. And he would bring you up to date?
 7 A. Yes.
 8 Q. Now, did you take notes of any of these
 9 discussions?
 10 A. No.
 11 Q. Did you record any of these discussions?
 12 A. No.
 13 Q. Did you videotape any of these
 14 discussions?
 15 A. No.
 16 Q. Do you have any type of writing that
 17 resulted from any of these discussions with Jerry
 18 wherein he brought you up to date as to the status of
 19 the Mike-and-Karen loan?
 20 A. No, I would not take notes on a discussion
 21 or a conversation with my husband.
 22 Q. Okay. So you have no documents that
 23 resulted from these discussions?
 24 A. No.
 25 Q. Now, to your knowledge, would Jerry have

1 loan.
 2 Q. Okay.
 3 A. But as far as a document, no.
 4 Q. You said "he." You're referring to --
 5 A. Jerry.
 6 Q. Jerry?
 7 A. Yes.
 8 Q. And you said there's paperwork regarding
 9 partial payments. What paperwork is that?
 10 A. I have a receipt that states that he
 11 received partial payment on a loan from Mike McFarland.
 12 Q. That Mike McFarland paid money to Jerry?
 13 A. To Jerry, on the loan, so he could give
 14 it -- pass it on to Jim and Jean.
 15 Q. Okay. And did this paperwork say that
 16 it's a loan from Mike to Jerry?
 17 A. Yes.
 18 Q. And where is that paperwork?
 19 A. Mr. Finney has it.
 20 Q. Was that produced to us?
 21 A. I believe so.
 22 Q. Okay. Well, we'll take that out here in a
 23 moment.
 24 MR. FINNEY: Should be a receipt about three
 25 inches by four or five inches.

1 BY MR. WHELAN:

2 Q. Okay. So there's a copy of a receipt from
3 a receipt book that acknowledges that Jerry received
4 money from Mike McFarland?

5 A. Yes.

6 Q. And that doesn't say anything about a
7 loan, though, does it?

8 A. Yes, it does say "loan" on it.

9 Q. It does? Okay. I'll find that somewhere.

10 And what was the amount in the receipt?

11 A. 40,000, I believe.

12 Q. And when did this occur? Was the date on
13 the piece of paper?

14 A. Yes.

15 Q. And the receipt of the money took place
16 around that time?

17 A. Yes.

18 Q. The date on the receipt?

19 A. Yes.

20 Q. And you said that was a partial payment of
21 a loan. I take it there was more money paid on this
22 loan?

23 A. Yes.

24 Q. And how do you know that?

25 A. Because we have the copies of the

1 loan that she took out to help finance the loan to
2 Jerry.

3 Q. Okay. Do you have anything signed by my
4 clients, Mike McFarland and Karen Zimmerman, that they
5 had loaned this money to Jerry as opposed to advancing
6 it for some other purpose?

7 A. As like a loan agreement?

8 Q. Yeah.

9 A. No.

10 Q. Okay. Or anything signed by either Mike
11 McFarland or Karen Zimmerman or both of them that reveal
12 that they were loaning money to Jerry or the Captain's
13 Wheel restaurant?

14 A. No.

15 Q. Are you aware of anyone having any such
16 documentation?

17 A. I don't think so.

18 Q. Okay. Can you tell me why your name
19 wasn't put on the stock when Jerry first invested in the
20 Captain's Wheel?

21 A. No, I don't know why he didn't.

22 Q. Okay. You knew he was obviously

23 purchasing -- buying into this business. Right?

24 A. Correct.

25 Q. And you knew that he was going to be



1 cashier's checks.

2 Q. You have copies of cashier's checks?

3 A. I believe that was also given to you with
4 the copy of the receipt.

5 Q. Okay. Do you have any other writings
6 indicating that this money was for a loan or any other
7 purpose?

8 A. No.

9 Q. Is there any handwritten document or notes
10 from Jerry that explains these loans?

11 A. Not that I'm aware of.

12 Q. Is there any recording or videotape of
13 Jerry stating how these loans came about and what the
14 loans are and that type of thing?

15 A. Not that I am aware of.

16 Q. Then can you tell me what leads you to
17 believe that Mike McFarland and Karen Zimmerman made
18 loans to Jerry, as opposed to investing in this
19 corporation?

20 A. Because that is what Jerry said, that they
21 were loaning him the money. It's written on the receipt
22 as a loan.

23 Q. On the receipt you've described?

24 A. Yes. And Jerry was also paying Ms.
25 Zimmerman a monthly payment so she could pay off the

1 taking stock?

2 A. Yeah.

3 Q. Okay. And you knew that he was borrowing
4 \$60,000 from his friend Tony in California?

5 A. Correct.

6 Q. And you knew that he was using his house
7 as collateral for that loan?

8 A. Our house, yes.

9 Q. My understanding was the house was in his
10 name at the time he put the house up for the loan?

11 A. It was in his name, but he still

12 considered it our house.

13 Q. Okay.

14 A. It was our home.

15 Q. So in light of all that knowledge, can you
16 explain to me why you didn't have Jerry put your name on
17 the stock back in 2000?

18 A. I trusted my husband to do the business.
19 I didn't go to the meetings at the corporate attorney's
20 office at that particular time. The only meeting that I
21 was at that I remember was when everything was finalized
22 and handed over.

23 Q. Okay. When was that?

24 A. I was with Jerry when he signed papers
25 with the Campbells becoming a partner, but I don't know

1 why my name was not put on the stock.
 2 Q. Okay. So you actually participated in
 3 this meeting when shares were issued to Jerry? Is that
 4 a true statement?
 5 A. I was there, but I don't know what kind of
 6 participating -- sitting there as his wife would entail.
 7 I was there.
 8 Q. You were there.
 9 A. Yes.
 10 Q. You were there at the corporate meeting
 11 when Jerry was issued stock?
 12 A. I believe he was issued -- well, I don't
 13 know about issued stock at the time, but he signed into
 14 as becoming their partner in the corporation. So I
 15 don't know when the stock was issued.
 16 Q. Okay. So you -- then that was at a
 17 corporate meeting?
 18 A. It was at the attorney's office with all
 19 of us.
 20 Q. Okay. And what attorney was that?
 21 A. Paul Daugharty. At the time, he was the
 22 corporate attorney.
 23 Q. And this was 2000?
 24 A. Yes.
 25 Q. Okay. And Jerry received stock as a

1 what Jerry told me afterwards.
 2 Q. Okay. So you were never at any meetings
 3 between Jerry and Mike McFarland where Mike gave Jerry
 4 legal advice?
 5 A. Not at the meetings, but I would, you
 6 know, answer the phone and he was calling for Jerry
 7 or...
 8 Q. Did Jerry file a bankruptcy at some point?
 9 A. No.
 10 Q. Okay. Do you have any records indicating
 11 whether or not Mike McFarland charged for any of these
 12 meetings he had with Jerry?
 13 A. Not that I have found. ★
 14 Q. So your claim that Mike McFarland was
 15 Jerry's attorney is based on statements that Jerry made
 16 to you?
 17 A. And Jerry would introduce Mr. McFarland as
 18 his attorney.
 19 Q. Okay. Anything else?
 20 A. No.
 21 Q. Okay. So Jerry would come and report back
 22 to you his confidential communications with Mike
 23 McFarland?
 24 A. Yes.
 25 Q. And what were those confidential

1 result of that meeting?
 2 A. Yes.
 3 Q. And everything was finalized?
 4 A. I believe it was at that time, yes.
 5 Q. And at this time, the Nordstroms were out,
 6 Jerry was in?
 7 A. Correct.
 8 Q. Okay. Now, you've mentioned that Mike was
 9 Jerry's attorney?
 10 A. Yes.
 11 Q. Why don't you tell me all the knowledge
 12 that you have regarding that issue?
 13 A. In 2000, and 2001, when we met Mike and
 14 Karen, Mike announced that he was a bankruptcy attorney.
 15 Jerry had a prospect house started in Spokane. And
 16 through that, he ended up with some judgments against
 17 him because of circumstances, and so he went to Mr.
 18 McFarland to discuss about bankruptcy. And Mike -- they
 19 became involved with that, and he -- Jerry talked to him
 20 about filing bankruptcy.
 21 Q. Did you attend this meeting?
 22 A. No.
 23 Q. Did you attend any meetings?
 24 A. Oh I was privy to was the conversations
 25 that they had between each other at the restaurant and

1 communications?
 2 A. Talking about filing bankruptcy on the
 3 Washington project and what Mike had advised, filing a
 4 Chapter 13 and getting things set up so we'd all be
 5 protected in case the judgments or creditors came after
 6 the house and stuff.
 7 Q. And is this about the time that the house
 8 was placed in your name?
 9 A. No, that was before the house was put in
 10 my name.
 11 Q. These conversations took place before the
 12 house was placed in your name?
 13 A. Yes.
 14 Q. So the house was placed in your name
 15 sometime after these conversations took place between
 16 Mike and Jerry regarding filing bankruptcy?
 17 A. Correct.
 18 Q. And the house was put in your name at
 19 whose suggestion?
 20 A. Jerry's.
 21 Q. Okay. And who did the paperwork?
 22 A. Jerry and the title company, I guess.
 23 Q. Okay. You don't know who prepared the
 24 paperwork?
 25 A. He brought me a paper to sign, and we

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1 Q. Okay. What I asked you, though, was: Do
2 you have any documentary evidence that illustrates any
3 legal work that Mike McFarland did for Jerry? ★

4 A. Not that I have found.

5 Q. And you just think that Mike did legal
6 work for Jerry because Jerry told you he talked to Mike?

7 A. I know Mike did legal work for Jerry,
8 because Jerry had appointments with Mike on several
9 occasions and advised about how to protect in the case
10 of the judgments coming forth and then trying to take
11 Jerry's assets and our assets. I don't know.

12 Q. But you didn't participate in any of these
13 meetings?

14 A. No.

15 Q. So your claimed knowledge about these
16 meetings comes from Jerry?

17 A. Yes, and verifying with Mr. McFarland's
18 secretary that the appointments were set.

19 Q. Oh, you would verify Jerry's appointments
20 with Mr. McFarland?

21 A. If Jerry -- more than once, yes, you had
22 to call and find out what time the appointment was,
23 because Jerry would forget.

24 Q. So you would do this for Jerry, you're
25 saying?

1 for me?

2 A. That Mike advised a Chapter 13 if he was
3 going to do a bankruptcy, or to put -- at that time we
4 had the -- Jerry was -- we had the restaurant. I don't
5 know the particulars about the difference between what
6 bankruptcies or what, but Jerry just said that he was
7 advised a Chapter 13.

8 Q. Anything else?

9 A. Not that I can think of specifically, no.

10 Q. Okay. So Jerry reported to you that he
11 had met with Mike and that Mike had advised a Chapter
12 13. Anything else?

13 A. Not at that time, no.

14 Q. Okay. At any other time?

15 A. About bankruptcy, no.

16 Q. At any other time, did Jerry talk to you
17 about what he had discussed with Mike in consultations
18 with Mike?

19 A. Other than when he became full owner and
20 had all the stocks, Mike suggested that to prevent any
21 problems with the creditors or judgments, that stock be
22 put into his name or in a situation that would -- he
23 would be able to protect my son and I in the event
24 something happened to Jerry.

25 Q. Okay. And I appreciate that, but the

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1 A. On occasion I did, yes.

2 Q. And who did you talk to at Mike
3 McFarland's office?

4 A. I don't remember the lady's name.

5 Q. Okay. And how many times did you call
6 Mike McFarland's office to verify appointments with
7 Jerry?

8 A. Once or twice.

9 Q. And what proof do you have that you did
10 that?

11 A. I don't.

12 Q. And you don't recall who you spoke to?

13 A. I don't remember her name.

14 Q. And as far as what was discussed at those
15 meetings, you don't have a clue?

16 A. Other than what Jerry told me, no.

17 Q. Okay. And what did Jerry tell you was
18 discussed?

19 A. How to -- about bankruptcy and filing or
20 not filing, and --

21 Q. I want to know exactly what Jerry told you
22 about what was discussed with Mike McFarland.

23 A. This was in 2000 and 2001. I don't

24 remember the exact words.

25 Q. Okay. Well, then can you paraphrase it

1 question I asked was: Did Jerry inform you that he had
2 talked to Mike McFarland about any other subject other
3 than filing a bankruptcy when he met with Mike
4 McFarland?

5 A. At those meetings, no.

6 Q. Okay. And I asked if Jerry -- for the
7 third time, I've asked you if Jerry told you that he had
8 discussed any other topic with Mike McFarland other than
9 bankruptcy at one of the meetings that Jerry had with
10 Mike?

11 A. No. Or yes, he -- no, he didn't say there
12 was anything else other than that topic.

13 Q. Okay. And when was the last meeting that
14 Jerry had with Mike McFarland presumably at Mike's law
15 office?

16 A. I don't know the date.

17 Q. So how about the year?

18 A. Last meeting with Mike at his office?

19 Would have been probably 2005 or early 6.

20 Q. And why would that have to have been?

21 A. Concerning the loan and becoming -- Mike
22 becoming the corporate attorney and receiving the
23 corporate books from Mr. Daugharty.

24 Q. And how do you know that such a meeting
25 took place?

1 A. Jerry told me.
 2 Q. And when did Jerry tell you this?
 3 A. At the time of the meeting.
 4 Q. Okay. Well, ma'am, I had just asked you
 5 three times to tell me if Jerry ever discussed with you
 6 the fact that he and Mike had discussed anything other
 7 than bankruptcy during Jerry's appointments with Mike.
 8 Okay? Now you're telling me that now they talked about
 9 him becoming the corporate lawyer. Do you want to
 10 change some of your prior testimony? Are you --
 11 A. I assumed from your previous three
 12 questions that we were still speaking of 2000 and 2001
 13 bankruptcy meetings.
 14 Q. Okay. I was talking of any meetings.
 15 A. Then yes, there was other meetings.
 16 Q. Okay. Then I tell you what. I'm going to
 17 go ahead and repeat to you that if you go ahead and
 18 answer one of my questions, I'm going to assume that you
 19 understood it. That's what a judge is going to do in a
 20 trial. Okay?
 21 A. Okay.
 22 Q. So if you have any questions about any of
 23 my questions, you ask me before you respond.
 24 A. Okay.
 25 Q. Now, I'm asking you for the fourth or

1 place at Mr. McFarland's office. Is that a fact?
 2 A. Not at the office, no, I was not there. I
 3 did pick up paperwork for Jerry at Mr. McFarland's
 4 office, but I was not at any of the meetings.
 5 Q. And what paperwork was that?
 6 A. I picked up a paper from Mr. McFarland's
 7 office for Jerry to sign to give to Paul Daugharty to
 8 confirm that yes, Mr. McFarland was to receive the
 9 corporate books.
 10 Q. Okay. Now, at this point, Mr. McFarland
 11 was the corporate secretary. Is that a fair statement?
 12 A. No, not at that time.
 13 Q. No? And when did you pick up the
 14 paperwork at Mike's office?
 15 A. It would have been just about the time
 16 that the corporate book was transferred to Jerry, and
 17 that was in early 2006, I believe.
 18 Q. Okay. Now, aside from talking to Jerry
 19 about Mike advising him about bankruptcy and about Mike
 20 obtaining the corporate records and about the Wagon
 21 Wheel employee who sold liquor to a minor --
 22 A. Captain's Wheel employee.
 23 Q. Captain's Wheel. I'm sorry. Did Jerry
 24 ever advise you that he had any other specific
 25 conversations with Mike McFarland?

1 fifth time whether or not Jerry ever indicated to you
 2 that he talked to Mike McFarland at one of their
 3 meetings about any topic other than bankruptcy.
 4 A. Yes.
 5 Q. Okay. And can you identify any such
 6 meetings and what was discussed?
 7 A. They met concerning Mike becoming the
 8 corporate attorney and Mike receiving the corporate
 9 books from Mr. Daugharty.
 10 Q. And what year was that?
 11 A. Late 2005, early 2006.
 12 Q. And this was after these loans made by
 13 Karen and Mike?
 14 A. Yes.
 15 Q. And what else did Jerry say, if anything?
 16 A. Mike had -- on several occasions, Jerry
 17 had talked to Mike about different legal things. One of
 18 the employees at the restaurant had been cited for
 19 serving alcohol to a minor, so Jerry talked to Mr.
 20 McFarland about that, also.
 21 Q. Anything else?
 22 A. Just -- I wasn't privy to all his
 23 conversations with Mr. McFarland.
 24 Q. It sounds like you weren't privy to any of
 25 the conversations between me and McFarland that took

1 A. He may have, but I don't remember at this
 2 point exactly what the topics were.
 3 Q. Okay. Generally, what were the topics,
 4 then?
 5 A. Legal whatever. You know, questions
 6 about the -- I guess no. It would be no.
 7 Q. Okay. And at any point in time, did you
 8 ever see any statements from Mike McFarland's office
 9 where he billed Jerry or anyone else for these meetings
 10 between Jerry and Mike?
 11 A. I have not found them.
 12 Q. My question was: Have you ever seen any?
 13 A. Yes.
 14 Q. Okay. And tell me what you saw and when
 15 you saw it.
 16 A. It was a statement from Mr. McFarland's
 17 office, or letterhead. I don't recall the -- maybe it
 18 was just a letter, but there was a piece of paper with
 19 Mr. McFarland's letterhead on it that I have not been
 20 able to find.
 21 Q. I asked you about billing statements.
 22 A. No.
 23 Q. You've never seen any billing statements
 24 from Mr. McFarland's office?
 25 A. Not that I'm aware of or can remember



1 specifically seeing.

2 Q. Okay. And how many times have you met
3 with Mr. McFarland in his office to talk about legal
4 matters?


5 A. I have not met with him in his office, but
6 I have called him several times.

7 Q. Okay. And do you claim that somehow Mr.
8 McFarland was your lawyer?

9 A. I called him for advice.

10 Q. Okay. And do you claim that Mr. McFarland
11 is your lawyer?

12 A. Yes. He was Jerry's lawyer, so I assumed
13 that that would entitle me to ask him questions, also,
14 and he never refused to talk to me.

15 Q. Okay. Did you ever receive a bill from
16 Mike for any advice? 

17 A. No. No. As of 2003, when they gave Jerry
18 the loan, it was assumed or presented as they would come
19 enjoy the facilities for free and -- I assumed and it
20 was presented by Jerry that, as our attorney, we could
21 talk to him and it would be evened out.

22 Q. Are there any documents to support this?

23 A. I know that Jerry kept track of their
24 meals and the cost of those, but as far as a written
25 agreement that we could speak to him without being


1 from one of Jerry's creditors eight or so months before
2 that particular meeting.

3 Q. And do you have any proof of this? I
4 mean, was this in writing?

5 A. In Mike's writing, no.

6 Q. Okay. Can you point to any document that
7 was ever created by Mike McFarland in his role as the
8 attorney for Jerry?

9 A. Just the document I picked up that he
10 wrote up for Jerry to sign giving him permission to get
11 the corporate book is the only document I have actually
12 seen.

13 Q. Okay. Is there any other evidence of any
14 nature out there that suggests to you that Mike
15 McFarland was Jerry's attorney, other than what you
16 already testified to? 

17 A. Other than what I've already testified?

18 No. Not that I'm aware of.

19 Q. Have you ever retained any attorneys in
20 the last five years?

21 A. Mr. Finney.

22 Q. Other than Mr. Finney?

23 A. No.

24 Q. And when did you retain Mr. Finney?

25 A. When Jerry passed away.

1 billed, no.

2 Q. Okay. Did Mike McFarland ever file a
3 bankruptcy for either you or Jerry, to your knowledge?

4 A. No.

5 Q. Did he ever complete a bankruptcy schedule
6 for either you or Jerry?

7 A. Not that I know of.

8 Q. Did he file anything with the bankruptcy
9 court for either you or Jerry?

10 A. Not that I'm aware of.

11 Q. Are you aware of Mike McFarland even doing
12 a letter to any third party regarding a possible
13 bankruptcy by Jerry?

14 A. I don't know about a letter, but I know he
15 received a phone call, because Jerry had received a
16 phone call at the house from a creditor, and he gave him
17 Mike's number.

18 Q. Anything else?

19 A. Not that I know of.

20 Q. Okay. And what leads you to believe that
21 Mike contacted that person or that that person contacted
22 Mike?

23 A. Because at a meeting with Mike between
24 myself and him and Karen as the corporation situation,
25 he said that he had received correspondence or notice

1 Q. So prior to Jerry passing away, did you
2 have an attorney that you had done business with
3 previously?

4 A. Not as a capacity as my attorney, no.

5 Q. Okay. Had you dealt with any attorney who
6 was working in any capacity for Jerry?

7 A. No, other than Mr. McFarland.

8 Q. And just so that I'm clear, your claims
9 that Mr. McFarland was Jerry's attorney are based on
10 what Jerry reported to you. Is that a fair statement?

11 A. That and conversations when Jerry would
12 introduce Mr. McFarland as his attorney and Mr.
13 McFarland never said no.

14 Q. Mr. McFarland never said that, "No, I'm
15 not an attorney."

16 A. He never said that he was not Jerry's
17 attorney when Jerry would introduce him as "This is my
18 attorney, Mike McFarland."

19 Q. And this was in a restaurant, a crowded
20 restaurant?

21 A. Jerry didn't do things in a crowd, not
22 like that. He would have brought -- you know, he
23 introduced Mr. McFarland to his daughter as his
24 attorney.

25 Q. Okay. Anybody else?

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1 Q. Okay. But did you hear what question I
2 asked?

3 A. I don't know. He may have. I'm not -- I
4 wasn't with Mr. McFarland every time.

5 Q. I didn't ask if you were with Mr.
6 McFarland every time. I asked you: Did Mike ever
7 acknowledge that he was Jerry's personal attorney?

8 A. Yes.

9 Q. Okay. And when, where and who was
10 present?

11 A. As far as our conversations, Jerry and I's
12 conversations with Mr. McFarland and asking him
13 questions, he reacted as an attorney giving advice.

14 Q. Okay. Did you hear the question I asked,
15 though? I asked, for the third time, whether or not
16 Mike McFarland ever acknowledged to being Jerry's
17 personal attorney. Do you understand that question?

18 A. As far as Jerry saying he did, yes, but as
19 far as me hearing Mike say, "I am Mr. Berry's attorney,"
20 no.

21 Q. So again, all your knowledge about Mike
22 being Jerry's personal attorney is based on statements
23 from Jerry?

24 A. Yes.

25 Q. Okay. Now, in that you have knowledge

1 approximately?

2 A. Yes. Almost to the day.

3 Q. And what form of cancer did Jerry have?

4 A. Pancreatic.

5 Q. And what type of treatment did Jerry
6 receive?

7 A. He was on chemotherapy -- Dr. Tezcan at
8 the cancer center was his primary doctor.

9 Q. I'm sorry. How do you spell that name?

10 A. T-e-z-c-a-n.

11 Q. T-e-z- --

12 A. -- -c-a-n.

13 Q. Okay. At the cancer center. And you're
14 talking about the one on U.S. 95 and Ironwood?

15 A. Yes.

16 Q. And what is Dr. Tezcan's first name?

17 A. I don't remember. He's Turkish.

18 Q. Okay. And what form did the treatment
19 take?

20 A. Chemotherapy, as well -- by IV as well as
21 some experimental biological controls and chemo through
22 pills.

23 Q. When did the chemo start and when did it
24 stop?

25 A. Chemo started first part of January, I

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1 about this topic of Mike being Jerry's attorney, can you
2 tell me what was the scope of the representation? What
3 did Mike do for Jerry?

4 A. Discussed with him about bankruptcy, gave
5 him advice concerning a situation with the restaurant
6 employee that was cited for serving alcohol to a minor.
7 I don't know every conversation Jerry had with Mike.

8 Q. Okay. Do you have any other knowledge of
9 any specific legal topics the two discussed?

10 A. Not right offhand, no.

11 Q. Do you have documents that might tend to
12 refresh your memory?

13 A. Documents showing that Mr. McFarland
14 was --

15 Q. Documents that might tend to refresh your
16 memory on this subject. Do you have any documents or
17 any evidence whatsoever that might tend to refresh your
18 memory on this subject?

19 A. On the subject of --

20 Q. The question I just asked about the scope
21 of the representation.

22 A. No.

23 Q. When was Jerry diagnosed with cancer?

24 November 2005.

25 Q. And he died 12 months later,

1 believe. It was after he had his implant done.

2 Q. Okay. You're talking about an IV feeding
3 tube?

4 A. Port. They call it a port.

5 Q. A port, yes. Okay. So he had a port put
6 in in January?

7 A. It was December. It was shortly after he
8 got out of the hospital. They got it arranged really
9 quick. So I think he got the port in December and then
10 Christmas was there, so they waited until after the
11 first of the year to give -- to start the chemo.

12 Q. Okay. And how long did the chemo last?

13 A. Up until a few weeks before Jerry passed
14 away.

15 Q. He had chemotherapy from January through
16 November, straight through?

17 A. It was like once a week or once every
18 other week, and they were doing different -- trying
19 different -- what the doctor referred to as a cocktail
20 of chemo and oral medication. So he'd be on for like a
21 few weeks at a time, and then he'd be off the IV chemo
22 for a while, and then they took him off of some of the
23 pills because of the reactions to them. And -- yeah.

24 Off and on. He was on chemotherapy for the duration.

25 Q. And how do you -- what's your

1 A. I said I would give them to Jerry, but he
 2 needed to give him a few days to recover from being in
 3 the hospital.
 4 Q. Okay. Now, when Jerry made the July 4
 5 trip to Mike's ranch, was Jerry carrying this Exhibit A
 6 with him?
 7 A. Yes.
 8 Q. So when did you first give Exhibit A to
 9 Jerry?
 10 A. The day after he came home from the
 11 hospital, which would have been around the 22nd or 23rd
 12 of June.
 13 Q. And did Jerry read this, to your
 14 knowledge, this Exhibit A, after you gave it to him?
 15 A. Yes.
 16 Q. And did the two of you discuss it?
 17 A. Yes.
 18 Q. And what was stated?
 19 A. That it was supposed to be a loan and not
 20 a sale. The stock was supposed to be collateral for the
 21 loan, not as an actual purchase.
 22 Q. Okay. And this is what you talked with --
 23 talked about with Jerry?
 24 A. Yes.
 25 Q. Okay. And what did Jerry say in response

1 other paperwork with him?
 2 A. Your Exhibit B and your Exhibit C.
 3 Q. Okay. And how do you know that Jerry had
 4 this paperwork with him?
 5 A. Because he walked out of the house with it
 6 in his hand.
 7 Q. And you saw that?
 8 A. Yes.
 9 Q. And then you saw that he returned with the
 10 same paperwork in his hand?
 11 A. The only piece of paper he returned with
 12 was Exhibit A.
 13 Q. Okay. And what did Jerry say about
 14 Exhibit A after he returned?
 15 A. That he signed it because Mr. McFarland
 16 was trying to protect his partner and helped loan the
 17 money to Jerry.
 18 Q. Okay. Anything else?
 19 A. No.
 20 Q. Okay. That's all Jerry had to say about
 21 this Exhibit A after he returned from Mike's ranch?
 22 A. Yes. It was a closed subject at the time.
 23 Q. Okay. What do you mean by that?
 24 A. I didn't want to talk about it anymore.
 25 Q. So you and Jerry had talked about this

1 to that?
 2 A. He agreed. And so we wrote up the "Loan
 3 Agreement with Stock as Collateral" paper, your Exhibit
 4 C.
 5 Q. Okay. Now, on Exhibit A, that is Jerry's
 6 signature?
 7 A. It's hard to read, but I'm assuming it was
 8 Jerry's signature since he took the paper to meet Mr.
 9 McFarland.
 10 Q. Okay. And you're aware that he took the
 11 paper to meet with Mr. McFarland?
 12 A. Yes.
 13 Q. And then he brought the paper back. Is
 14 that true?
 15 A. Yes.
 16 Q. And he also indicated that he had signed
 17 this Exhibit A. Is that true?
 18 A. Yes.
 19 Q. Along with Mike and Karen?
 20 A. Yes.
 21 Q. Okay. And Jerry returned to the family
 22 home after the trip to Mike's ranch on July 4. Is that
 23 true?
 24 A. Yes.
 25 Q. Aside from Exhibit A, did Jerry have any

1 several times?
 2 A. Yes. That's why we wrote up the Exhibit
 3 C, your Exhibit C.
 4 Q. So you and Jerry wrote up Exhibit C?
 5 A. Yes.
 6 Q. Okay. And who wrote up Exhibit B?
 7 A. Mr. McFarland did.
 8 Q. Okay.
 9 A. As well as Exhibit A.
 10 Q. And how do you know that?
 11 A. Because he's the one that handed them to
 12 me.
 13 Q. Okay. Did he state that he had prepared
 14 those?
 15 A. Yes.
 16 Q. Okay. Now, by the time that Mr. Berry had
 17 signed this Exhibit A on apparently the 4th of July,
 18 2006 --
 19 A. Yes.
 20 Q. -- by that time, had Jerry transferred
 21 stock into your name?
 22 A. No.
 23 Q. So at that time that Jerry signed this,
 24 this Exhibit A, he was the sole shareholder of the
 25 Captain's Wheel Resort, Inc.?



1 A. On paper.
 2 Q. Is that yes?
 3 A. Yes.
 4 Q. And what, you claim that you had an
 5 ownership interest somehow because Idaho is a community
 6 property state?
 7 A. Correct.
 8 Q. Any other reason?
 9 A. Jerry said it was our business.
 10 Q. Okay. Anything else?
 11 A. No.
 12 Q. Okay. I'd like to invite your attention
 13 to -- by the way, just for the record, I've marked the
 14 document entitled "Stock Purchase and Sale Agreement" as
 15 Exhibit A, the document entitled "Stock Purchase and
 16 Sale Agreement" as Exhibit B, the document that's
 17 entitled "Loan Agreement with Stock as Collateral" as
 18 Exhibit C. I've marked the "Minutes of Special Meeting
 19 of Shareholders of Captain's Wheel Resort, Inc." as D.
 20 I've marked a Resolution in Lieu of Special Meeting of
 21 Board of Directors of Captain's Wheel Resort, Inc." as
 22 F. And I marked as E a "Resolution in Lieu of Special
 23 Meeting of Captain's Wheel Resort, Inc."
 24 Okay. Now, I'd like to invite your
 25 attention to Exhibit D. I'd like to ask you what

1 corporation was held on the date, time and at the place
 2 set forth in the written waiver of notice signed by the
 3 shareholders. Do you recall signing a written waiver of
 4 notice?
 5 A. I remember signing several things, but
 6 this isn't the ones that we signed. Mr. McFarland had
 7 papers already typed up and ready for us to sign, and
 8 then next to our signatures, we had initialed.
 9 Q. Okay. Now, this Exhibit D, does that bear
 10 a copy of your signature?
 11 A. The second page has a copy of my
 12 signature.
 13 Q. Okay. The second page of Exhibit D?
 14 A. As shareholder, yes.
 15 Q. And is that a -- did your husband sign
 16 that, as well? Is that Jerry's signature?
 17 A. Barely, yes.
 18 Q. And were you present when Jerry signed
 19 this?
 20 A. Yes.
 21 Q. And who else was present?
 22 A. Mr. McFarland and Ms. Zimmerman.
 23 Q. Okay. So did they, too, sign this
 24 document?
 25 A. That page, yes.

1 knowledge you have about Exhibit D.
 2 A. I have seen it before.
 3 Q. And when did you first see Exhibit D?
 4 A. After the meeting with Mr. McFarland and
 5 Ms. Zimmerman. Would have been in -- I'm not sure when.
 6 It was October, I believe.
 7 Q. Okay. October of 2006?
 8 A. Yes.
 9 Q. Okay. And what were the circumstances
 10 pursuant to which you first saw Exhibit D?
 11 A. We had had the October meeting at Mr.
 12 McFarland's residence.
 13 Q. And "we" referring to whom?
 14 A. Jerry and I and Ms. Zimmerman and Mr.
 15 McFarland.
 16 Q. Okay. And that was a corporate meeting?
 17 A. Yes.
 18 Q. Was that a meeting of the directors of the
 19 corporation?
 20 A. It was supposed to have been.
 21 Q. Was that a meeting of the shareholders of
 22 the corporation, as well?
 23 A. Yes.
 24 Q. Now, this document references that a
 25 special meeting of shareholders of the above-captioned

1 Q. Okay.
 2 A. Or at least showing that's their
 3 signatures.
 4 Q. Okay. Now, when you first saw Exhibit D,
 5 was it a two-page document in the same or similar form
 6 as it is in now?
 7 A. When I first saw it?
 8 Q. Yes.
 9 A. When we were at the meeting, Mr. McFarland
 10 had pages already prepared and said that he would go
 11 through -- after all his notes and everything, he would
 12 go through and type up the minutes so they would be
 13 legible.
 14 Q. Okay.
 15 A. So this is not the actual one that we had
 16 at the meeting. This was done -- Mr. McFarland did this
 17 after the meeting.
 18 Q. Now, when you signed this Exhibit D,
 19 though, it had a page 1 and a page 2 where you signed.
 20 Is that true?
 21 A. There was a lot of pages that day, because
 22 it was all in the corporate book.
 23 Q. Okay. So you don't recall how many pages
 24 were on Exhibit D when you signed it?
 25 A. No.

1 allegation. Do you have any evidence in support of the
2 allegation that Mike McFarland took advantage of Jerry
3 Berry? Do you have evidence?

4 A. As in a piece of paper saying "I'm taking
5 advantage of him"? No.

6 Q. Anything. Do you have anything other than
7 your mere speculation?

8 A. The facts I think are going to speak for
9 themselves.

10 Q. What facts are those? That's the whole
11 purpose of this deposition. Would you please enlighten
12 me on what those facts are?

13 MR. FINNEY: Tell him why you're upset with them,
14 what they did.

15 MR. WHELAN: I don't really care about your
16 opinion. I want to know the facts.

17 Q. What facts do you allege support your
18 allegation that Mike McFarland somehow took advantage of
19 Jerry Berry?

20 A. As far as pushing the stock purchase and
21 sale agreement, Mr. Berry, my husband, was in the
22 hospital with chemotoxicity. Before he came home from
23 the hospital, Mr. McFarland brought me your Exhibit A
24 and Exhibit B and told me to give them to Jerry. I told
25 Mr. McFarland that Jerry needed a couple days after he

1 Q. Okay. Do you have any other facts that
2 support these allegations?

3 A. No.

4 Q. Okay. And ma'am, I don't know what your
5 understanding is of trials and all that, but normally,
6 what somebody hears from somebody else, that's called
7 hearsay, and that doesn't come into a legal proceeding.
8 I mean, do you have anything other than that, other than
9 your understanding of what your husband told you? Do
10 you have any other hard facts?

11 A. No.

12 Q. Okay. Then your claim that Mr. McFarland
13 took advantage of your husband is largely based on
14 statements from your husband? Is that it?

15 A. And -- yes. And my confrontation with Mr.
16 McFarland.

17 Q. Okay. And when was that?

18 A. When he brought me the paperwork and said
19 that we didn't have the time, that it needed to be done
20 now.

21 Q. Okay. And that was in --

22 A. June.

23 Q. June 20, something like that? June 21,
24 22?

25 A. Yeah, somewhere around there. 2006.

1 got out of the hospital to have a chance to look at
2 them. Mr. McFarland's response was, "We don't have that
3 kind of time."

4 Q. Anything else?

5 A. Not at this point, no.

6 Q. Okay. And then as I understand it, it was
7 not until July 4 that Jerry jumps into his car and
8 drives himself over to Mr. McFarland's ranch and meets
9 with Mr. McFarland and has this documentation signed
10 which he brings back with him. Is that a fair
11 statement?

12 A. Jerry went that day, yes.

13 Q. Okay. Anything else you have in support
14 of your allegation that Mike McFarland somehow took
15 advantage of Jerry Berry? Anything else?

16 A. That was 4th of July weekend. The 1st was
17 I believe on a Friday. When he called to tell Jerry he
18 wanted the appointment, Jerry asked if he could come
19 another day, and Mr. McFarland's answer to Jerry was
20 that he had spent his whole weekend waiting for Jerry to
21 come over and that he needed it done now.

22 Q. And did you speak to Mr. McFarland?

23 A. No. It's what Jerry told me.

24 Q. So that's hearsay?

25 A. What my husband told me.

1 Q. And then two weeks later, your husband
2 goes to Mr. McFarland's ranch to get that paperwork
3 signed?

4 A. About 10 days later, yeah.

5 Q. Okay. And your third Cause of Action is
6 against Mr. McFarland alleging breach of fiduciary duty,
7 essentially that Mr. McFarland was acting as Jerry
8 Berry's lawyer and that somehow Mr. McFarland took
9 advantage of that position. Do you have facts in
10 support of that allegation?

11 A. Mr. McFarland was Jerry's attorney and he
12 knew that Mr. Campbell needed out of the restaurant.
13 And when our refinance didn't go through, he approached
14 Jerry with giving him the loan.

15 Q. And you know this because Jerry told you.
16 Is that it?

17 A. Pretty much, yeah.

18 Q. Anything else?

19 A. No.

20 Q. Other than what Jerry told you?

21 A. No.

22 Q. And just to recapitulate some of the
23 testimony I've heard here, you don't have any writings

24 from Mr. McFarland billing Jerry for legal services?

25 You've never seen anything like that?

1 A. Not that I could find.
 2 Q. And certainly you looked for them. Right?
 3 A. Oh, yes.
 4 Q. And you've told us that the business kept
 5 receipts and all that, that the manager should have
 6 receipts for all the purchases and that type of thing.
 7 Is that true?
 8 A. Yes.
 9 Q. So it's not a matter of simply not keeping
 10 records. Records were kept.
 11 A. Records were kept.
 12 Q. And it would be a fair statement to say
 13 that had Jerry received a bill from Mike, he probably
 14 would have kept the receipt. Is that a fair statement?
 15 A. Yes.
 16 Q. And you've made a diligent search through
 17 the records that Jerry had kept before his demise, and
 18 you didn't find any such billing statements?
 19 A. No.
 20 Q. So the only evidence we have in support of
 21 your claim that Mike was Jerry's lawyer is what you
 22 heard from Jerry and that Jerry somehow introduced Mike
 23 as his lawyer to people?
 24 A. Yes.
 25 Q. Anything else?

1 Q. Well, Byron something?
 2 A. Powell is in Washington, yes.
 3 Q. And Jerry was using Byron Powell?
 4 A. Yes.
 5 Q. And then somebody replaced Byron Powell?
 6 A. I can't remember if Byron replaced the
 7 other attorney or which way it went, but I remember
 8 Byron Powell's name.
 9 Q. Okay. And Jerry retained him for some
 10 purpose?
 11 A. Right.
 12 Q. Okay. And any other lawyers besides Byron
 13 Powell?
 14 A. Not names that I can remember.
 15 Q. Okay. Now, I'm not asking you to remember
 16 any names, but were there any other lawyers, seeing that
 17 you and Jerry had these frequent conversations about
 18 his -- who he used as his lawyers?
 19 A. It would have been the attorney that was
 20 with the same case that either -- it was Byron that
 21 turned over or turned the other -- I don't know. Either
 22 Byron turned the case over to the other attorney or the
 23 other attorney turned it over to Byron, but I don't
 24 remember that attorney's name, and he was in Washington.
 25 Q. Okay. Any other attorneys besides that

1 A. The restaurant managers contacted Mike for
 2 information under the understanding that he was working
 3 as or operating as the corporate attorney.
 4 Q. How do you know they had that
 5 understanding? Were you in their mind when they called
 6 him?
 7 A. Why else would they call him?
 8 Q. Well, see, I get to ask the questions.
 9 Okay? So ma'am, I want to know facts. I don't really
 10 want to hear speculation. I'm hearing a lot of
 11 speculation, and I just want to know facts. So are
 12 there any other facts that we haven't already covered
 13 that dictate or reveal or demonstrate that Mike
 14 McFarland was Jerry Berry's lawyer? Anything else that
 15 we haven't talked about yet?
 16 A. No.
 17 Q. Okay. And did -- you mentioned one
 18 Washington lawyer that Jerry had contacted sometime in
 19 2000 or 2001. Did Jerry have dealings with any other
 20 lawyers?
 21 A. I don't -- as far as just the judgments
 22 against him, I don't know the names, but he had received
 23 letters from -- on judgments or creditors or --
 24 Q. ~~From where?~~ From Washington?
 25 A. I don't know where they came from.

1 attorney and Byron Powell?
 2 A. Not that I can remember, other than Mr.
 3 McFarland.
 4 Q. Okay. Now, the money that was supplied by
 5 Karen and Mike, that was supplied when? 2003?
 6 A. Yes.
 7 Q. And Jerry was not diagnosed with cancer
 8 until November of 2005?
 9 A. Correct.
 10 Q. Okay. So I mean, he wasn't in a state of
 11 falling health before November of 2005, presumably?
 12 A. No.
 13 Q. So you don't claim that his falling -- or
 14 that his health affected any negotiations or
 15 transactions he had with Karen and/or Mike prior to
 16 November of 2005?
 17 A. No.
 18 Q. Do you allege that prior to November of
 19 2005, that somehow Mike McFarland had engaged in
 20 improper conduct as a lawyer in dealing with Jerry
 21 Berry?
 22 A. Prior to 2005?
 23 Q. Prior to November of 2005.
 24 A. Yes.
 25 Q. So it's only after Jerry was diagnosed

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1 with cancer?
 2 A. Correct.
 3 Q. Now, it's undisputed that Jerry had the
 4 \$100,000 from Mike and Karen long prior to November of
 5 2005. Is that true?
 6 A. Correct.
 7 Q. Do you have any facts other than what
 8 we've covered already regarding proof that Michael
 9 McFarland had engaged in self-dealing with Jerry Berry?
 10 A. Other than what we've already discussed?
 11 Q. That was what I stated.
 12 A. No.
 13 Q. Your fifth Cause of Action is for
 14 negligence. And just so I'm clear on this, you're
 15 claiming that somehow Michael McFarland owed a duty to
 16 you that he breached and therefore you can sue him for
 17 negligence? Is that what you're alleging?
 18 A. He acted as my attorney as well as
 19 Jerry's, when I would call and ask him for information.
 20 Q. Oh, so Mike is your lawyer now, too?
 21 A. That's already been stated.
 22 Q. When did you state that?
 23 A. Back when you asked me about it the first
 24 time.
 25 Q. Okay. And your testimony is going to

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1 state that throughout?
 2 A. Yes.
 3 Q. Okay. So you claim that Michael McFarland
 4 was your lawyer, too?
 5 A. In conjunction with my husband as a
 6 spousal pair, and answering my questions when I would
 7 call him.
 8 Q. So if my wife deals with a lawyer, that's
 9 my lawyer, too? Is that what I'm taking from this? I
 10 just want to be clear on it.
 11 A. If that lawyer answered your questions,
 12 then yes, I think he could be considered yours, also.
 13 Q. Yeah. What questions did you have?
 14 A. Concerning power of attorney and how to
 15 get it, and I don't remember all the legal things. I
 16 did ask Mr. McFarland precisely about my rights when the
 17 highway department comes through my property and they
 18 inform me that they're getting an appraisal and ask what
 19 I should do, and Mr. McFarland told me that I should go
 20 ahead and get my own appraisal done at the same time.
 21 Q. Okay. So that makes Mike McFarland your
 22 lawyer, too?
 23 A. I felt I was able to talk to him as my
 24 lawyer and ask questions, that he would act as such in
 25 giving me advice.

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1 Q. Okay. And how many times did you meet
 2 with Mike McFarland in his law office?
 3 A. None.
 4 Q. And how many billing statements did you
 5 receive from Mike McFarland for this advice?
 6 A. None.
 7 Q. And all this advice took place over the
 8 telephone?
 9 A. The advice about the highway department
 10 was face to face.
 11 Q. Okay. Where? At the restaurant while
 12 Mike's having dinner?
 13 A. At the restaurant as we were all sitting
 14 and talking.
 15 Q. Okay. Karen, too?
 16 A. Yes, Karen was there, also.
 17 Q. Okay. And you allege that somehow this
 18 was a confidential communication between you and your
 19 lawyer?
 20 A. I did not expect Mr. McFarland to go
 21 around telling it to anybody else, no.
 22 Q. How about Karen?
 23 A. Karen was present during the conversation.
 24 If I did not want her to hear, I would have asked Mr.
 25 McFarland to come aside.

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1 Q. Okay. So your fifth Cause of Action for
 2 negligence, that Mike was your lawyer, too, and somehow
 3 Mike breached a duty that was owed to you. Is that your
 4 allegation?
 5 A. Yes.
 6 Q. And how did he breach that duty?
 7 A. Not explaining how signing over property
 8 to them would affect myself and my son and Jerry.
 9 Q. And I take it you consulted with Mr.
 10 McFarland on that issue?
 11 A. No.
 12 Q. Well, can you tell me how Mr. McFarland
 13 was negligent? In your own words, tell me how he's
 14 negligent here.
 15 A. He never brought the subject up to explain
 16 anything like that.
 17 Q. And you figure he should have done that?
 18 A. I think so.
 19 Q. And by not doing that, somehow he's
 20 negligent?
 21 A. Yes.
 22 Q. And can you enlighten me? I'm trying to
 23 find the logic there. Can you just tell me what the
 24 logic is? If there is any logic to it. You've accused
 25 this man of being negligent, and I want to know how.

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1 What proof do you have in support of that allegation?

2 That's all I want to know.

3 A. What proof?

4 Q. Yeah.

5 A. Nothing in writing.

6 Q. Okay. Any other proof?

7 A. No.

8 Q. Okay. The plaintiff's sixth Cause of

9 Action for quiet title. You and/or the estate of Jerry
10 are entitled to a decree of quiet title to all the stock
11 of the Captain's Wheel Resort, Inc. Can you tell me
12 what proof you have in support of that allegation?

13 A. The stock was to be collateral.

14 Q. Yeah. You talked about that. Do you have
15 any proof, though?

16 A. The receipt that states that he received
17 partial payment on the loan with stock to be held as
18 collateral.

19 Q. Anything else?

20 A. No.

21 Q. Do you have any other evidence, anything,
22 in support of this allegation that all of the stock of
23 the Captain's Wheel Resort, Inc., ought to be
24 essentially given to you? Anything else?

25 A. No.

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1 Q. Your seventh Cause of Action is Mr.
2 McFarland was not dealing fairly, not dealing fairly
3 with somebody. Can you tell me how it is that Mr.
4 McFarland wasn't dealing fairly with somebody?

5 A. Somebody who?

6 Q. It's your Complaint, ma'am. I'm just
7 reading it. "Seventh Cause of Action: Good faith and
8 fair dealing. The defendant, Michael B. McFarland, has
9 breached his obligation to deal fairly."

10 A. Do you have that?

11 MR. FINNEY: I don't have that document with me.

12 BY MR. WHELAN:

13 Q. You can look at mine.

14 A. This one?

15 Q. Yeah. I'll read it to you and you just
16 tell me if that's your understanding.

17 A. Oh. "Defendant, Michael B. McFarland,
18 has breached his obligation to deal fairly and in good
19 faith in the facts recited herein." Yes, he has.

20 Q. And what proof do you have in support of
21 that allegation?

22 A. He was Jerry's attorney.

23 Q. Yeah. And what else?

24 A. He made a loan, not a purchase, until
25 Jerry was ill.

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1 Q. Anything else?

2 A. No.

3 Q. So I take it that what your allegation
4 really is is that somehow Mike McFarland was able to
5 coerce Jerry into doing something that he didn't want to
6 do and this occurred after Jerry got sick?

7 A. Yes.

8 Q. Okay. You got any new proof that we
9 haven't talked about? Any allegations, anything? You
10 got anything in support of that?

11 A. Mr. McFarland had nothing to do with the
12 business, running it or otherwise, until after Jerry
13 became ill, and Jerry signed the stock purchase and sale
14 agreement with them, and presented them with -- signing
15 the stocks after they became --

16 Q. Do you have any other proof in support of
17 that allegation?

18 A. No. I don't.

19 Q. You allege that somehow the stock is held
20 by Karen and Mike in trust for you and you ought to own
21 all the stock of this corporation. Do you have any new
22 or additional facts?

23 A. Can I read that, please?

24 Q. No, you don't need to read it, if you can
25 listen to my questions. I've told you that you put this

Page 185

1 in your Complaint. Do you have any facts in support of
2 that allegation?

3 A. I'm sorry. I would like to read the
4 paragraph, please.

5 Q. Talk to your lawyer, then.

6 MR. FINNEY: Please just restate the question as
7 slow and concisely as you can, Mr. -- I almost called
8 you McFarland. Mr. Whelan.

9 THE WITNESS: The full paragraph, please.

10 BY MR. WHELAN:

11 Q. You allege in paragraph 66 as your eighth
12 Cause of Action for resulting or constructive trust, you
13 allege that the defendants McFarland and Zimmerman hold
14 the stock to Captain's Wheel Resort, Inc., under an
15 equitable duty to convey it to Karletta Grace Berry, a
16 widow, or Karletta Grace Berry, personal representative
17 of the estate of Jerry Lee Roy Berry.

18 A. Yes.

19 Q. And what facts do you have in support of
20 that that have not been already covered?

21 A. That have not been already covered?

22 Q. Uh-huh.

23 A. None.

24 Q. Okay. And you claim that you're entitled
25 to an accounting and that the plaintiffs, quote/unquote,

STATE OF IDAHO
COUNTY OF KOOTENAI } SS
FILED

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429

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CLERK DISTRICT COURT

DEPUTY

John P. Whelan, P.C.
Attorney at Law
213 N. 4th Street
Coeur d'Alene, Idaho 83814
Telephone: (208) 664-5891
Facsimile: (208) 664-2240
I.S.B. No. 6083

**IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF KOOTENAI**

KARLETTA GRACE BERRY, a widow,
KARLETTA GRACE BERRY, Personal
Representative of the Estate of Jerry
Lee Roy Berry, CAPTAIN'S WHEEL
RESORT, INC., an Idaho Corporation,

Plaintiffs,

vs.

MICHAEL B. McFARLAND, MICHAEL
B. McFARLAND, P.A., and KAREN
ZIMMERMAN,

Defendants.

CASE NO. CV-07-2409

AFFIDAVIT OF MICHAEL B. McFARLAND
IN OPPOSITION TO PLAINTIFFS' MOTION
TO AMEND COMPLAINT FOR PUNITIVE
DAMAGES

STATE OF IDAHO)
)ss.
County of Kootenai)

Michael B. McFarland, being first duly sworn, deposes and says:

1. I am one of the Defendants in the above-entitled action. I have personal knowledge of the following facts, and am competent to testify thereto. I have been the president of Captain's Wheel Resort, Inc. since shortly after the passing of Jerry Berry and the custodian of the corporate records.

**AFFIDAVIT OF MICHAEL B. McFARLAND IN OPPOSITION TO
PLAINTIFFS' MOTION TO AMEND COMPLAINT FOR PUNITIVE DAMAGES - I**

2. The corporate records reveal that Jerry Lee Roy Berry and Karletta Berry never owned all of the stock in the Captain's Wheel Resort, Inc., as alleged on page 2 of the Plaintiffs' Memorandum. According to the corporate record book, as of September 22, 2000, there were three (3) stock certificates representing the total ownership of the Captain's Wheel Resort, Inc. (hereinafter "Captain's Wheel"):

Certificate #1 was issued to Jean A. Campbell, representing 100 shares;

Certificate #2 was issued to James T. Campbell, representing 100 shares;

Certificate #3 was issued to Jerry Lee Roy Berry, representing 200 shares.

Copies of those certificates (now cancelled) are attached hereto as Exhibits 1, 2 and 3, respectively.

3. On August 7, 2003, according to the corporate record book, a Resolution was signed by James T. Campbell, Jean A. Campbell and Jerry L. Berry resolving, *inter alia*, that "Stock Certificates Nos. 1 and 2 be sold to JERRY L. BERRY and that said transfer shall be effective upon the execution of this resolution and that the Secretary of the Corporation transfer the same on the books of the corporation." The resolution also nominated Jerry L. Berry Director, President and Treasurer of the corporation, and Karletta Berry as Director and Secretary. An undated Stock Purchase Agreement, between James and Jean Campbell as "Sellers" and Jerry Lee Roy Berry as "Buyer" provided for the sale of two-hundred (200) shares, represented by stock certificates No. 1 and No. 2.

Copies of the Resolution and Stock Purchase Agreement are attached hereto as Exhibits 4 and 5, respectively.

4. The funds which Jerry L. Berry used to purchase the stock were provided to him by the Defendants, Karen Zimmerman and myself, in two installments (\$40,000 and \$60,000 respectively) in the two weeks prior to August 7, 2003.

5. Despite the Resolution and Stock Purchase Agreement, Certificates No. 1 and 2 were not actually transferred, either on their faces or on the books of the corporation until October 15, 2006. At that time, Certificates No. 1 and 2 were endorsed as cancelled and transferred to Certificate No. 4, issued to Michael B. McFarland & Karen M. Zimmerman, JTWROS representing 200 shares. At the same

time, Jerry L. Berry's original certificate No. 3 was endorsed as cancelled and transferred to Certificate No. 5, issued to Jerry L. Berry & Karletta G. Berry, JTWROS, representing 200 shares. Copies of those certificates are attached hereto as Exhibits 6 and 7, respectively.

6. The statement on page 2 of Plaintiffs' Memorandum that "Michael McFarland and Karen Zimmerman got Jerry Berry to sign a stock purchase and sale agreement" is false. We all, in fact, signed the stock purchase agreement that I had prepared to memorialize the agreement we had reached some time ago. The stock purchase agreement was Jerry's idea and it was designed to swap equity in the corporation for the debt owed to us. I prepared several different versions of the stock purchase agreement, and we all eventually chose the one that was signed.

In the early summer of 2006, Jerry was having good days and bad, and it was difficult to coordinate our schedules so that we could meet personally when he was up to it. When I finished the two draft agreements, I dropped them off at his home, at his request. Karletta wouldn't let me talk to him then, so I left the drafts with her to give to him.

The next time I spoke to Jerry on the phone, he told me that Karletta didn't like the trust idea, and he would respect her wishes. He said he was ready to sign the one without the trust provision, and I asked if he would like Karen and me to go to his place. He said the house was filthy, that he didn't want us to see it, and that he'd rather do it when he was in town in a few days.

Shortly thereafter, on July 4, 2006, he drove from Athol to Hayden to meet with Karen and me, and signed the agreement. It's true that he brought a copy of an alternative draft of an agreement that he said his wife, Karletta, had prepared. He said he had told her that he'd ask us to take a look at it, which we did. Jerry acknowledged that Karletta's proposal was not consistent with our deal, but that he'd promised Karletta that he'd show it to us. He made it very clear that this was her idea, not his. Once Karen and I reviewed Karletta's proposal, and declined to accept it, Jerry said, "What's she have to do with this anyway? She was never a part of this deal." [or words to that effect]. We then went through the Stock Purchase and Sale Agreement, line by line, aloud, and all of us agreed that it was an accurate recitation of what we had understood and agreed to from the beginning. All three of us signed it, and each of us received a copy.

7. According to Plaintiffs' Memorandum, (page 3) I was the attorney for Jerry Berry, Karletta Berry and the Captain's Wheel at the time of the transfer of the stock.

A. I have never been the attorney for Karletta Berry. I have never given advice to, or discussed any legal matters with Karletta Berry, either before or after July of 2006. After a diligent search of my records, I have located no notes, bills, fee agreements or any other documentation that even suggests that I was ever her attorney.

B. I have never been the attorney for the Captain's Wheel. To the best of my knowledge, information and belief, Attorney Paul Daugherty had possession of the corporate minute book from the year 2000 or before until 2006. Jerry Berry informed me that Mr. Daugherty handled the 2003 agreement regarding the acquisition of the stock from James and Jean Campbell. I don't personally know whether he represented the corporation or the Campbells.

To the best of my recollection, Jerry Berry asked Mr. Daugherty, or someone in his office, to let me have a look at the minute book in early 2006. I needed it to prepare our stock purchase and sale agreement, since I had no knowledge about the number of shares, certificate numbers or other details prior to that time.

There has never been a corporate resolution appointing me a counsel for the corporation. I have never prepared or filed any documents for the corporation, with the exception of preparation of minutes for meetings I attended after becoming a shareholder, filing annual reports and obtaining renewals of licenses and permits (none of which require an attorney).

After a diligent search of my records, I have located no notes, bills, fee agreements or any other documentation that even suggests I was ever the attorney for the corporation.

C. I have never been Jerry Berry's attorney. He was a close personal friend, starting around 2001. He did some work for me, such as setting and finishing a mobile home (for which he was paid), did some repairs on a rental unit (for which he was paid) and assisted me with some other work at my place for free - just as a neighbor and a friend. He came to my cabin to visit Karen and me regularly - sometimes weekly, sometimes more, less in bad weather, long before we ever became involved in the Captain's Wheel. We would sit, talk & share a beverage for hours at a time, discussing everything imaginable, as friends do. He never brought his wife, Karletta, and rarely mentioned her. We also socialized some at the Captain's Wheel, but for shorter periods, since he

worked there.

Among many other subjects we discussed over drinks, he talked about a project in Washington that had resulted in a judgment against him. He had placed his home in Karletta's name to protect it from his creditors.

On another occasion, he described some problems that Karletta was having with an espresso stand she was running - something about losing her lease, I believe. We talked in general terms only. I said I couldn't advise him without looking at the documents, and knowing the specifics. I was never shown any documents. He subsequently told me they had decided it wasn't worth fighting, or something to that effect. I was never retained, and never got involved beyond a very general discussion.

In approximately 2001 or 2002, Jerry (who had already told Karen and me about the Washington judgment) came to my office to inquire about bankruptcy. I informed him about the various chapters, the procedures, exemptions and other general information about bankruptcy. It was more or less a "standard" initial consultation, for which I usually charge a modest fee. I did not charge Jerry anything, made no notes, opened no file; and thus have no written record of when this meeting occurred. I do recall that he told me his stock in the Captain's Wheel was in his name only, and that he didn't want Karletta's name on it. He talked about putting the stock in a trust for her if something happened to him, but he didn't ask me to prepare anything at that time. He never retained me to file a bankruptcy for him, and I don't recall discussing it with him in any detail after that meeting in my office.

To the best of my understanding, an initial consultation regarding bankruptcy options does not create an attorney-client relationship. I have given the same type of explanation of bankruptcy in public, such as Rotary Club luncheons, etc. The Bankruptcy Local Rules require a written fee agreement, containing specific provisions, when an attorney is engaged to file a bankruptcy petition. I follow this rule with all bankruptcy clients. No such agreement was entered into with Jerry Berry, at any time.

I acknowledge that Jerry Berry did, occasionally, refer to me as "my attorney" when introducing me. Numerous other friends - and some family members - have done the same on occasion, despite the fact that I was not. I submit that such a statement, without more, is insufficient

to create an attorney-client relationship.

After a diligent search of my records, I have located no notes, bills, fee agreements or any other documentation that even suggests that I was ever Jerry Berry's attorney. Jerry talked to me but did not confide in me.

8. I deny that I was advising Jerry and Karletta Berry on how to protect the stock in the Captain's Wheel from creditors, as alleged on page 3 of Plaintiff's Memorandum. Jerry told me in 2001 or 2002 that he was thinking about setting up a trust when we talked about bankruptcy. My practice rarely involves any trust work, and I don't recall any discussion of this idea until 2006 or so. I never discussed the idea of a trust with Karletta Berry at any time. When Jerry asked me to write up our agreement (see Paragraph 8, *supra*), we talked very briefly about whether or not he wanted his stock put in trust. At his request, I prepared two alternative agreements. In one, Karen Zimmerman and I would agree to establish a trust; in the other there was no such provision. I did not advise Jerry which one to choose. My primary concern was to get our agreement documented while we still could. My personal preference was the simpler agreement, but I was willing to accommodate Jerry's wishes. I didn't even know if he had a will, and knew nothing about any of his estate planning, since we never discussed it. Had I been his attorney, as alleged by the Plaintiff, we undoubtedly would have - especially after his diagnosis of cancer.

9. Regarding the Plaintiff's allegation of action by Karen Zimmerman or me which was "oppressive, fraudulent, wanton, malicious or outrageous." Before Karen and I invested, Jerry Berry owned 50% of the stock in the Captain's Wheel. His estate and heir(s) still own(s) 50%. Nothing was wrongfully taken from him by either of us. In 2003, we (or anyone else) could have purchased the Campbells' half interest in the corporation for \$100,000 - which was undisputedly a fraction of its true value at the time, but it was the price the Campbells agreed to. Jerry Berry bought the stock with Karen's and my money. Jerry was very clearly competent to negotiate and sign the stock purchase agreement negotiated between the three of us, a true and correct copy of which is attached as Exhibit 8. Another couple was actively negotiating with the Campbells to acquire their stock when Jerry urged us to buy it and be his "silent partners." He told us what he thought the place

was worth, what a bargain it was, and its potential in a couple of years. He told us it wasn't making money enough money to pay us anything until it sold, and that he wanted the chance to run it himself for a couple of years before selling it. At Jerry's request, we agreed to allow him to acquire and hold the stock for us, with the agreement that we would split the profit when the Captain's Wheel sold. We entrusted Jerry with our money; he didn't entrust us with anything. We allowed him to run the business as he saw fit, all on a handshake, until we could get something in writing.

10. According the Plaintiff's Memorandum (page 5), "Defendant McFarland was supposed to be protecting the Plaintiffs from creditors." I was never hired, engaged, paid or asked to do so by either Jerry or Karletta Berry, and do not believe I had any obligation to do so.

11. Plaintiff's Memorandum (page 5) alleges that passing a resolution to list the corporate assets with Defendant Zimmerman's real estate brokerage "is a breach of fiduciary duty and constitutes self dealing." Karen Zimmerman does not now, and has never had an ownership interest in the brokerage in question. Even if such a resolution was somehow improper, (which is not admitted), no such listing has ever taken place.

12. In the Second Affidavit of Karletta Grace Berry, (p.4, para 15) Plaintiff alleges that I provided legal services and "entered into a fiduciary relationship and assumed a fiduciary relationship with myself, Jerry Lee Roy Berry and the Captain's Wheel Resort, Inc. prior to lending money to Jerry and myself in 2003 and prior to obtaining Jerry's signature on the Stock Purchase and Sale Agreement on July 4, 2006. . . ."

Aside from receiving the stock which was purchased with our money, I have never received any money, property, or authority over any property of Jerry or Karletta Berry of any kind, which would constitute entry into or assumption of a fiduciary obligation. Karen Zimmerman and I gave Jerry Berry \$100,000, for a specified purpose. Consequently, Jerry was the party assuming the fiduciary obligation.

13. In her Second Affidavit, (p.4, para 18) Karletta Berry alleges that Karen Zimmerman and I

made a loan of one-hundred thousand dollars to the marital community of Jerry Lee Roy Berry and Karletta Grace Berry. Karletta Berry, however, was never involved in the discussions between Karen, Jerry and myself, was not present when the money was given to Jerry, and she never signed nor was she asked to sign any document related to the transaction. Before we gave Jerry the money, he made it very clear that Karletta was not involved in our deal in any way. He assured us that he would hold the stock, in his name only (as he did his existing stock). Karen and I both emphasized that she was not to be involved in any way, as a condition of giving Jerry the money. We both trusted him completely, but did not trust her. Jerry had told me that his interest in the business was his separate property, acquired with funds he had before his marriage to Karletta. But for that assurance, we would not have given him the funds, but would have gone to the Campbells to purchase the stock directly from them.

14. In her Second Affidavit, (p.7, para. 28) Plaintiff alleges that Defendants bought 50% of the stock "from my husband and I" None of the documents reflect that Karen and I bought anything from Jerry and Karletta Berry. The stock was in the Campbells' and Jerry's name alone until October 15, 2006, as reflected in the corporate records. The initial verbal agreement and subsequent written agreement [the Stock Purchase and Sale Agreement] were between Jerry Berry, Karen Zimmerman and myself only. Karletta Berry's name does not appear on stock certificates 1 and 2, or any document connected with those certificates.

15. From the time Karen and I gave Jerry Berry the money to acquire the stock, the corporation has consistently lost money. At the time of his death, the bank account was overdrawn, numerous bills were past due, and it has been necessary for me to regularly advance substantial funds to the business to keep it operating. As a result of the Plaintiff's lawsuit in this case, it was not possible to list or sell the business and property when the market was at its peak, or at any time since then.

This concludes affiant's statement.

Michael B. McFarland
Michael B. McFarland

SUBSCRIBED AND SWORN TO before me, the undersigned Notary Public in and for the State of Idaho, this 16th day of December, 2009.



Carole L. Welk
Notary Public
Residing at: Coeur d'Alene ID.
My Commission expires: 09/08/12.

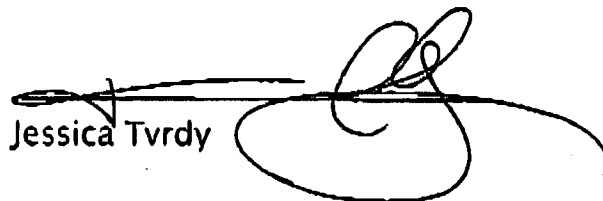
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 16TH day of December, 2009, I caused to be served a true and correct copy of the foregoing by the method indicated below, and addressed as indicated below:

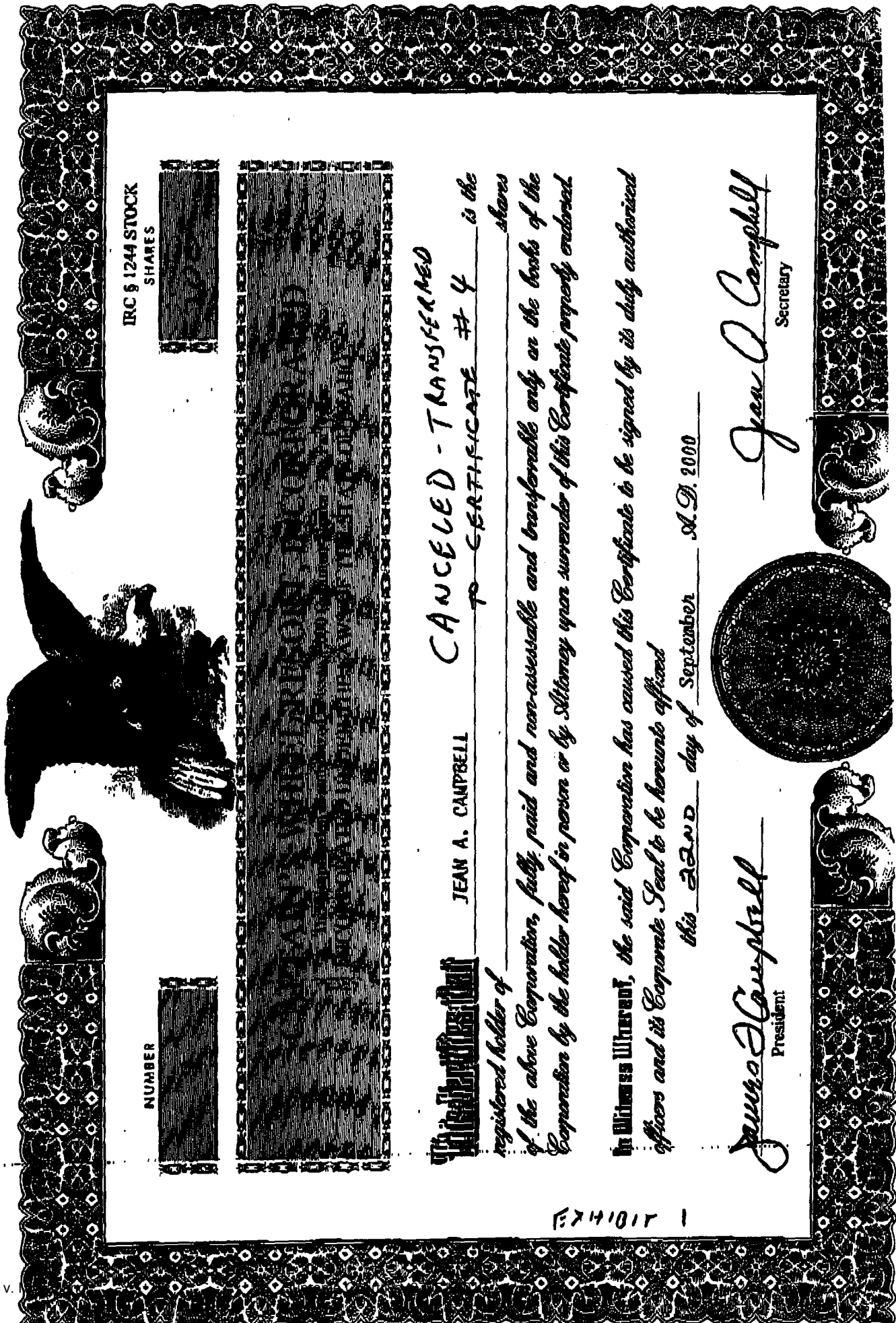
Rex A. Finney
Finney, Finney & Finney
120 East Lake Street, Suite 317
Sandpoint, ID 83865

- U.S. Mail, Postage Prepaid
- Hand Delivered
- Overnight Mail
- Facsimile to: (208) 263-8211

Jessica Tvrdy



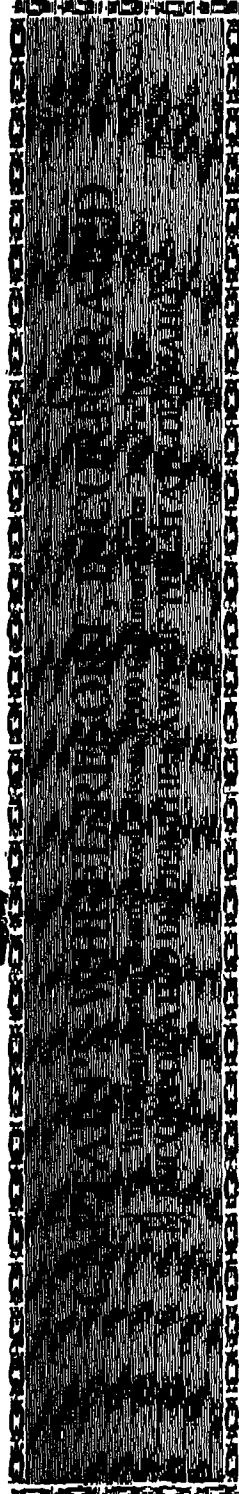
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IRC § 1244 STOCK
SHARES



NUMBER



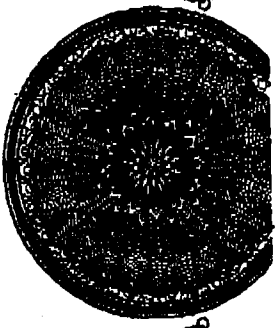
CANCELED - TRANSFERRED
 TO CERTIFICATE # 4 is the _____ shares
 registered holder of
 of the above Corporation, fully paid and non-assessable and transferable only on the books of the
 Corporation by the holder hereof in person or by Attorney upon surrender of this Certificate properly endorsed.

JEAN A. CAMPBELL

In Witness Whereof, the said Corporation has caused this Certificate to be signed by its duly authorized
 officers and its Corporate Seal to be hereunto affixed

this 22ND day of September A.D. 2000

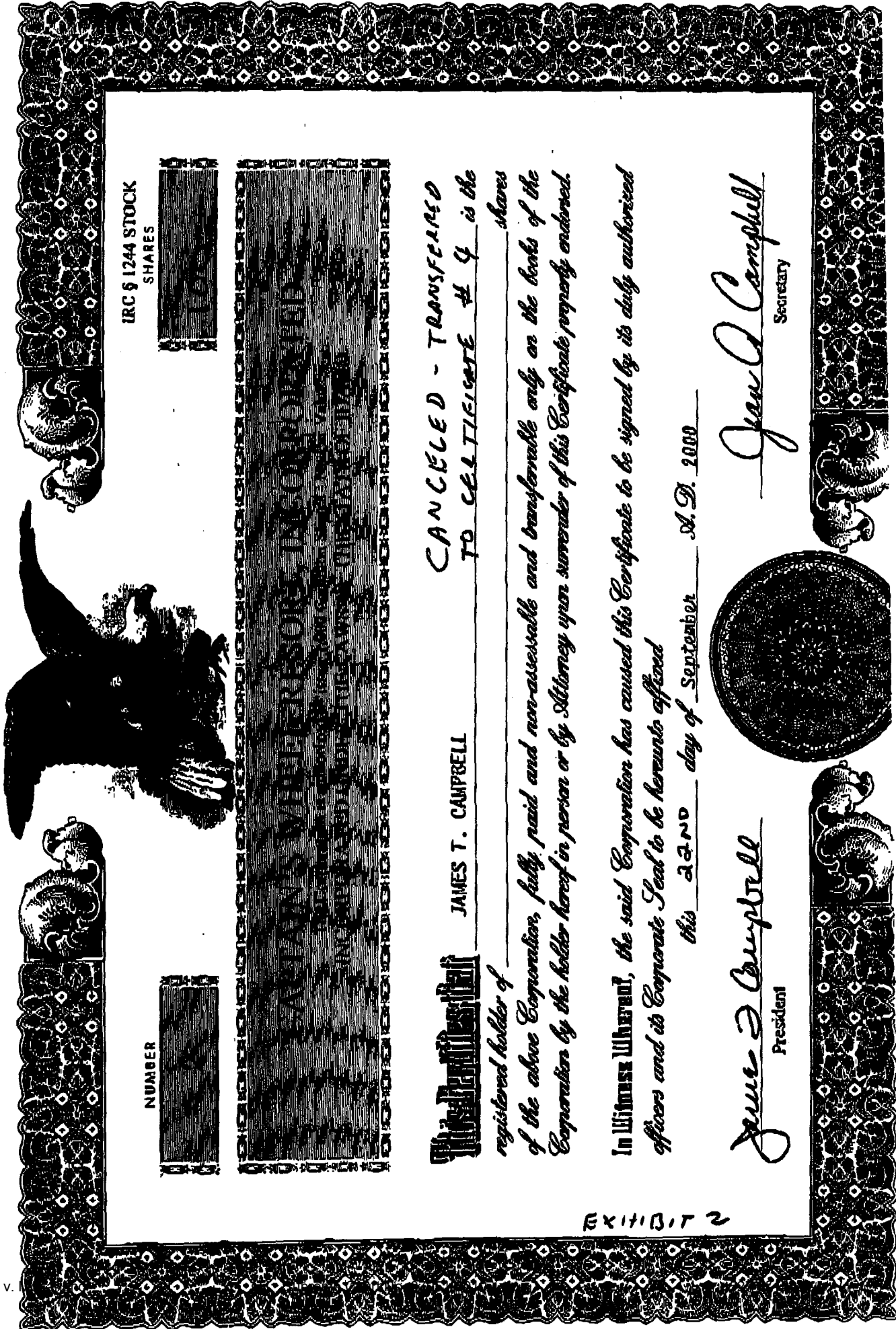
Jean A Campbell
 President



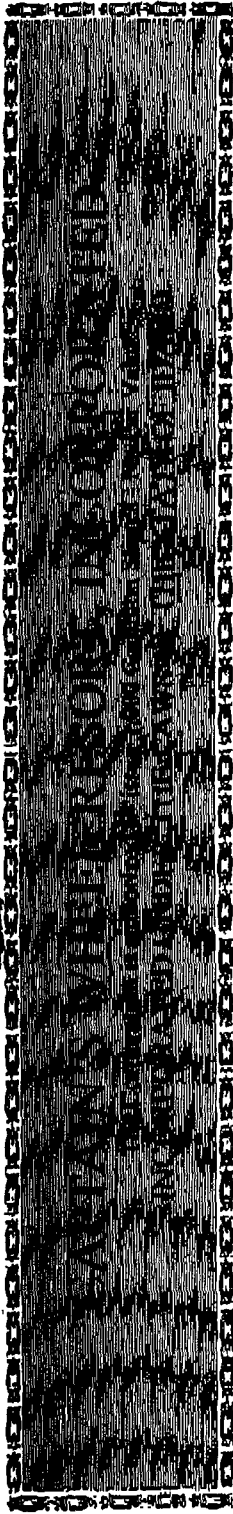
Jean A Campbell
 Secretary

EXHIBIT 1

Printed in the U.S.A.



IRC § 1244 STOCK
SHARES



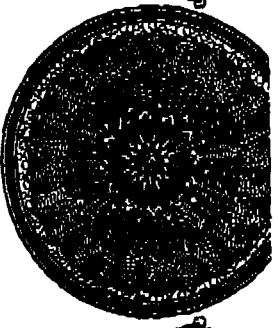
WELLS FARGO BANK
 registered holder of
 of the above Corporation, fully paid and non-assessable and transferable only on the books of the
 Corporation by the holder hereof in person or by Attorney upon surrender of this Certificate properly endorsed.

CANCELED - TRANSFERRED
 TO CERTIFICATE # 4 is the
 shares

JAMES T. CAMPBELL

In Witness Whereof, the said Corporation has caused this Certificate to be signed by its duly authorized
 officers and its Corporate Seal to be hereunto affixed

this 22ND day of September A.D. 2000

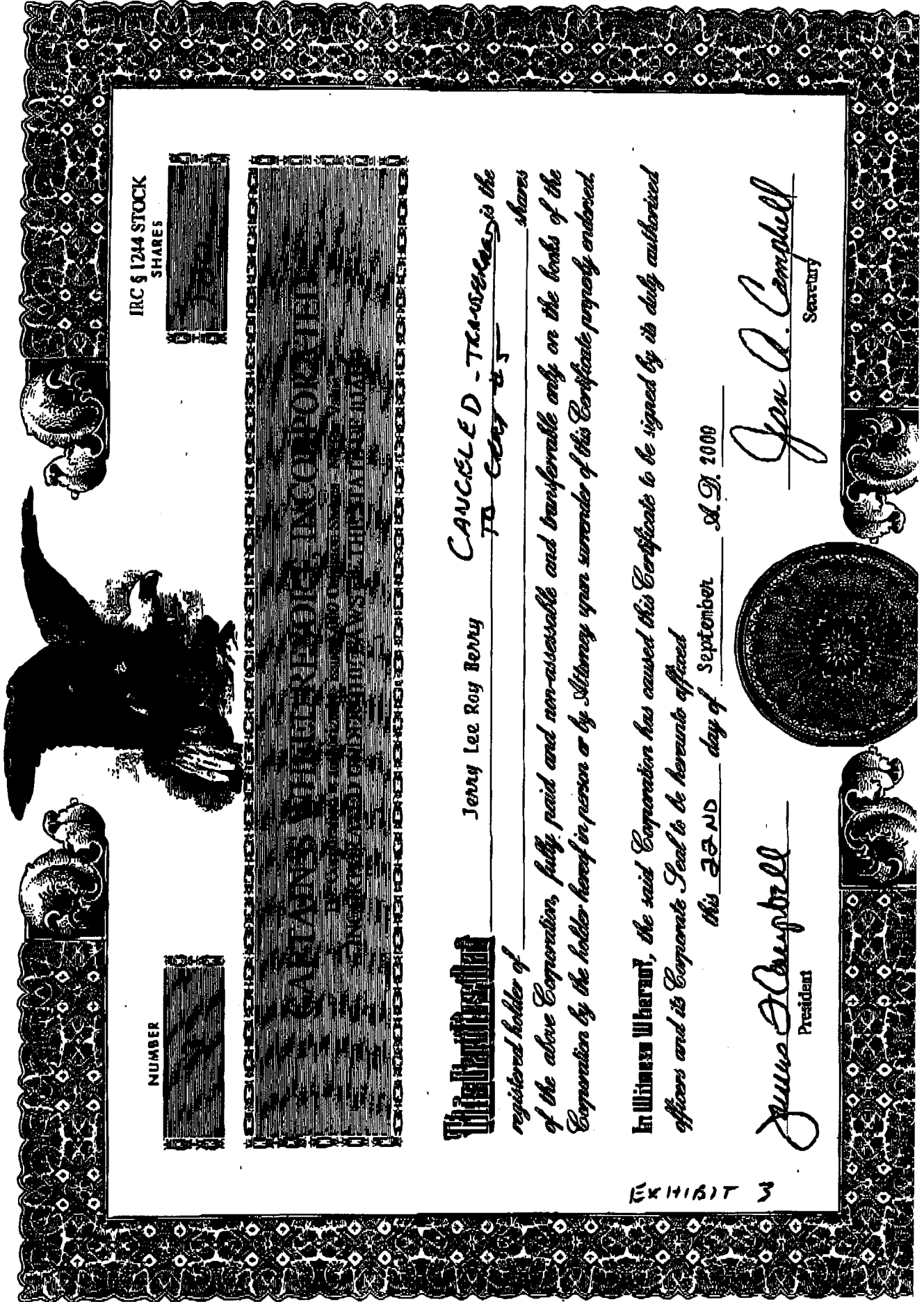


Jan O Campbell
 Secretary

James T Campbell
 President

EXHIBIT 2

Printed in the USA



IRC § 1214 STOCK
SHARES



NUMBER



THE CARBON PAPER COMPANY, INCORPORATED
 INCORPORATED IN THE STATE OF CALIFORNIA
 1000 CALIFORNIA STREET, SAN FRANCISCO, CALIFORNIA 94109
 CAPITAL STOCK

The Carbon Paper Company

Jerry Lee Roy Berry

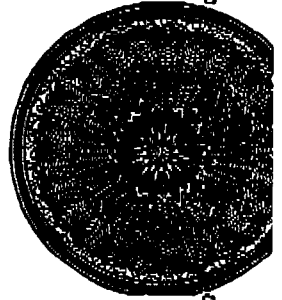
CANCELED - TRANSFERRED is the
TO CERTIFY _____ shares

registered holder of _____
of the above Corporation, fully paid and non-assessable and transferable only on the books of the
Corporation by the holder hereof in person or by Attorney upon surrender of this Certificate properly endorsed.

In Witness Whereof, the said Corporation has caused this Certificate to be signed by its duly authorized
officers and its Corporate Seal to be hereunto affixed

this 27th day of September A.D. 2000

James A. Campbell
President



James A. Campbell
Secretary

EXHIBIT 3

**RESOLUTION IN LIEU OF SPECIAL MEETING
OF THE BOARD OF DIRECTORS AND SHAREHOLDERS
OF
CAPTAIN'S WHEEL RESORT, INCORPORATED**

The Board of Directors and Shareholders of CAPTAIN'S WHEEL RESORT, INCORPORATED, an Idaho corporation, in accordance with the Bylaws, adopted the following resolutions made in lieu of a Special Meeting by the Directors, JAMES T. CAMPBELL and JEAN A. CAMPBELL on the 7 day of August, 2003.

On motion duly made, seconded, and carried, the following preambles and resolutions were unanimously adopted:

WHEREAS, the corporation desires to authorize the sale of JAMES T. CAMPBELL's and JEAN A. CAMPBELL's interest to in the corporation to JERRY L. BERRY for the consideration of ONE HUNDRED THOUSAND DOLLARS (\$100,000.00).

WHEREAS, the corporation desires by and through its Directors, JAMES T. CAMPBELL and JEAN A. CAMPBELL to sell and transfer Stock Certificate Nos. 1 and 2 to JERRY L. BERRY for the consideration mentioned above.

WHEREAS, Director/President James T. Campbell desires to resign as a Director and as the President of the corporation, to be effective immediately.

WHEREAS, Director Jean A. Campbell desires to resign as a Director and Secretary of the corporation, to be effective immediately.

WHEREAS, the corporation desires to nominate Jerry L. Berry as President and Treasurer of the corporation, to be effective immediately as it is in the best interests of the Corporation.

WHEREAS, the corporation desires to nominate Karletta Berry as Director and Secretary of the corporation, to be effective immediately as it is in the best interest of the Corporation.

NOW, THEREFORE, BE IT RESOLVED, that the interest in the corporation of JAMES T. CAMPBELL and JEAN A. CAMPBELL, be sold for the sum of ONE HUNDRED THOUSAND DOLLARS (\$100,000.00) to JERRY L. BERRY as it is in the best interest of the corporation.

FURTHER BE IT RESOLVED that Stock Certificates Nos. 1 and 2 be sold to JERRY

RESOLUTION - 1.

CaptainsWheel.Res2.0.19.03.wpd

L. BERRY and that said transfer shall be effective upon the execution of this resolution and that the Secretary of the Corporation transfer the same on the books of the corporation.

FURTHER BE IT RESOLVED, that effective immediately, the resignations of JAMES T. CAMPBELL as a Director and President and JEAN A. CAMPBELL as a Director and Secretary of the corporation is hereby accepted as it is in the best interests of the Corporation.

FURTHER BE IT RESOLVED, that effective immediately the nomination of JERRY L. BERRY Director, President and Treasurer of the corporation is hereby accepted and said nomination is to be effective immediately as it is in the best interests of the Corporation.

FURTHER BE IT RESOLVED, that effective immediately the nomination of KARLETTA BERRY as Director and Secretary of the corporation is hereby accepted and said nomination is to be effective immediately as it is in the best interests of the Corporation.

DATED this 7 day of August, 2003.

DIRECTOR:

James T. Campbell

JAMES T. CAMPBELL, Director/Shareholder

Jean A. Campbell

JEAN A. CAMPBELL, Director/Shareholder

Jerry L. Berry

JERRY L. BERRY, Shareholder

STOCK PURCHASE AGREEMENT

Agreement executed between JAMES T. CAMPBELL and JEAN A. CAMPBELL of P.O. Box 517, Bayview, ID 83803, hereinafter referred to as "Sellers" and JERRY LEE ROY BERRY, of 6555 E. Remington Road, Athol, ID 83801, hereinafter referred to as "Buyer".

For and in consideration of ONE HUNDRED THOUSAND DOLLARS (\$100,000.00), receipt of which is hereby acknowledged, Sellers agrees to sell, assign and convey to Buyer, Buyer's executors, administrators, and assigns, with full power to transfer the shares on the books of the corporation, TWO HUNDRED (200) shares of the common stock of CAPTAIN'S WHEEL RESORT, INC., a corporation organized and existing under the laws of the State of Idaho and having its principal place of business at 100 Scenic Drive, Bayview, ID 83803. The stock is represented by the following certificates: No. 1 and No. 2.

Sellers warrant that the stock now stands in Sellers' names on the books of the corporation, and that all assessments to date are paid on the shares. Buyer agrees to purchase the shares for the consideration set forth in this agreement, however, Buyer understands and agrees that the sale of this stock by Sellers can only be consummated on the written approval of Sellers' Board of Directors.

IN WITNESS WHEREOF, the parties have executed this Agreement the day and year first above written.

BUYER:

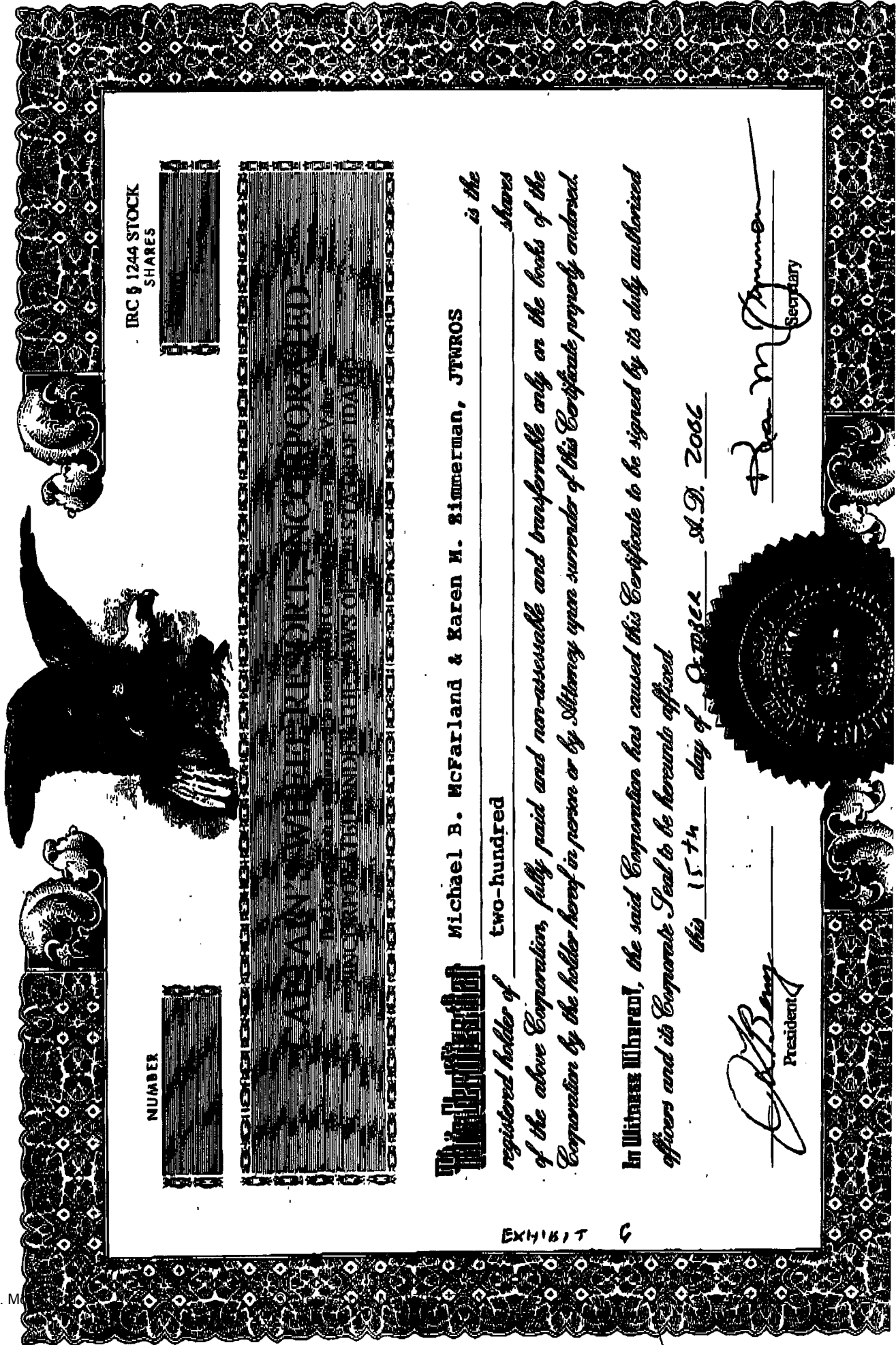
SELLER:


JERRY LEE ROY BERRY


JAMES T. CAMPBELL


JEAN A. CAMPBELL

Printed in U.S.A.



IRC § 1244 STOCK
SHARES



NUMBER



MCFARLAND & ZIMMERMAN INCORPORATED
INCORPORATED IN THE STATE OF CALIFORNIA
CORPORATION

McFarland & Zimmerman is the registered holder of two-hundred shares of the above Corporation, fully paid and non-assessable and transferable only on the books of the Corporation by the holder hereof in person or by Attorney upon surrender of this Certificate properly endorsed.

In Witness Whereof, the said Corporation has caused this Certificate to be signed by its duly authorized officers and its Corporate Seal to be hereunto affixed this 15th day of October A.D. 2006

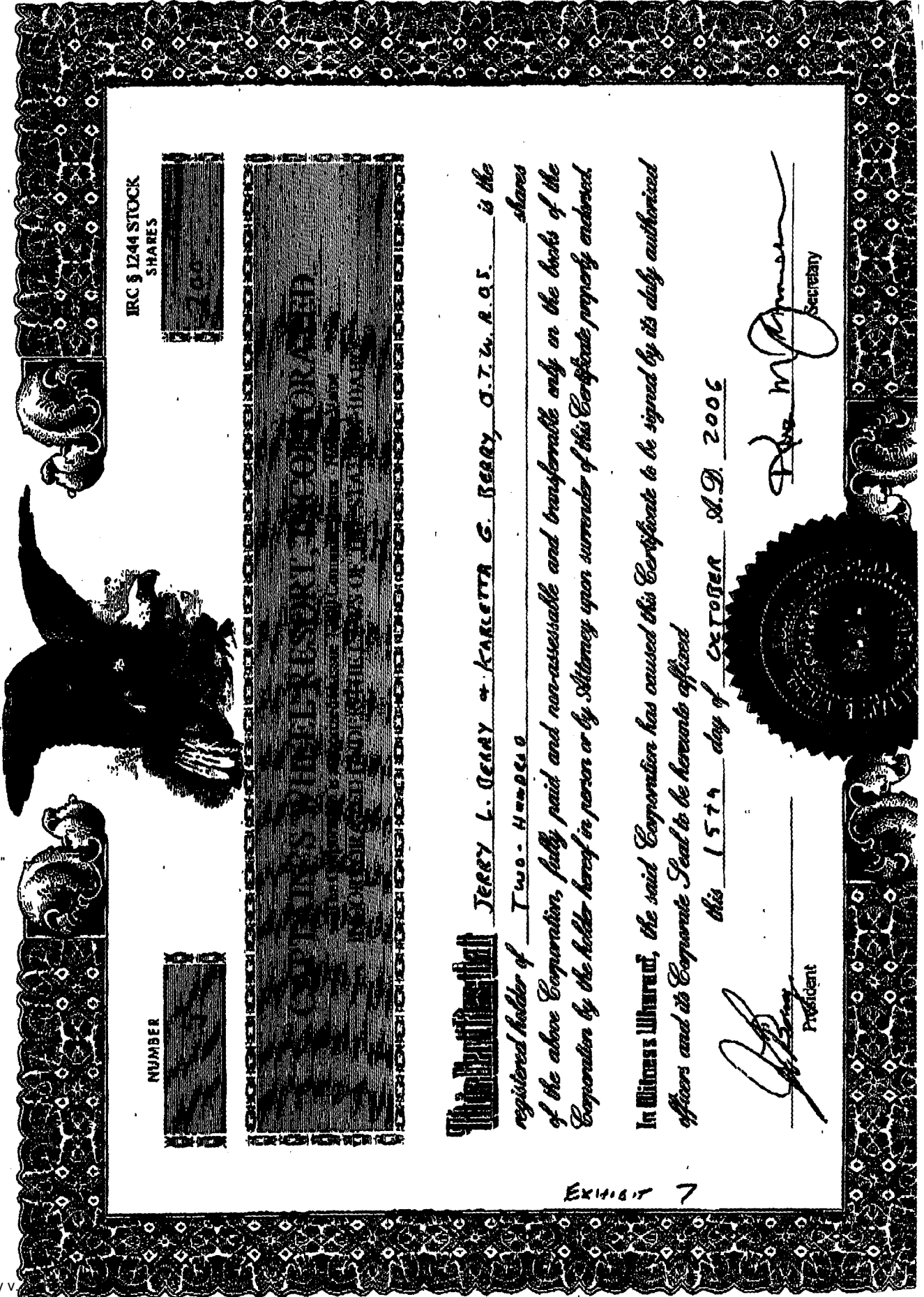
[Signature]
Secretary



[Signature]
President

EXHIBIT C

Printed in U.S.A.



IRC § 1244 STOCK
SHARES

200

NUMBER

100

THE BERRY COMPANY INCORPORATED
INCORPORATED IN THE STATE OF CALIFORNIA
CORPORATION

The Berry Company

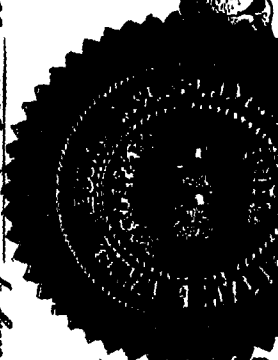
JERRY L. BERRY + KARLETTA G. BERRY, C.T.W. R.O.S. is the registered holder of Two - Hundred shares

of the above Corporation, fully paid and non-assessable and transferable only on the books of the Corporation by the holder hereof in person or by Attorney upon surrender of this Certificate properly endorsed.

In Witness Whereof, the said Corporation has caused this Certificate to be signed by its duly authorized officers and its Corporate Seal to be hereunto affixed

this 15th day of OCTOBER A.D. 2006

[Signature]
President



[Signature]
Secretary

EXHIBIT 7

STOCK PURCHASE AND SALE AGREEMENT

This agreement executed August 9, 2003 between JERRY LEE ROY BERRY, of 6555 E. Remington Road, Athol, ID 83801, hereinafter referred to as "Seller" and KAREN M. ZIMMERMAN and MICHAEL B. McFARLAND of 8729 W. Cloverleaf Drive, Hayden, Idaho 83835, hereinafter referred to as "Buyers".

For and in consideration of One-hundred thousand dollars (\$100,000) and other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, Seller agrees to sell, assign and convey to Buyers, as joint tenants with right of survivorship, with full power to transfer the shares on the books of the corporation, TWO HUNDRED (200) shares of the common stock of CAPTAIN'S WHEEL RESORT, INC., a corporation organized and existing under the laws of the State of Idaho and having its principal place of business at 100 Scenic Drive, Bayview, Idaho 83803. The stock is represented by Certificates 1 and 2, (100 shares each) which were assigned to the Seller by Jean A. and James M. Campbell.

Seller warrants that the stock conveyed hereby represents 50% of the shares which have been issued to date by said corporation.

As additional consideration, it is agreed between Buyers and Seller that Seller shall retain his offices as director and president of the corporation, with full operational control of the business of the corporation through calendar year 2005. It is further agreed, as additional consideration, that the transfer of the shares shall be effective on January 1, 2006, and that Seller shall be considered the owner for tax and all other purposes through midnight, December 31, 2005.

IN WITNESS WHEREOF, the parties have executed this Agreement, which is effective on the day and year first above written.

BUYERS:

SELLER:


KAREN M. ZIMMERMAN


JERRY LEE ROY BERRY


MICHAEL B. McFARLAND

STATE OF IDAHO } SS
COUNTY OF KOOTENAI }
FILED } 764

2009 DEC 17 PM 3:43

CLERK DISTRICT COURT

Dierry Huff
DEPUTY

John P. Whelan, P.C.
Attorney at Law
213 N. 4th Street
Coeur d' Alene, Idaho 83814
Telephone: (208) 664-5891
Facsimile: (208) 664-2240
ISB No. 6083

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF KOOTENAI

KARLETTA GRACE BERRY, a widow,
KARLETTA GRACE BERRY, Personal
Representative of the Estate of Jerry
Lee Roy Berry, CAPTAIN'S WHEEL
RESORT, INC., an Idaho Corporation,

Plaintiffs,

vs.

MICHAEL B. MCFARLAND, MICHAEL B.
MCFARLAND, P.A., and KAREN
ZIMMERMAN,

Defendants.

Case No. CV-07-2409

OPPOSITION OF DEFENDANTS TO
PLAINTIFFS' MOTION TO AMEND
COMPLAINT FOR PUNITIVE DAMAGES

Hearing Date: December 23, 2009

Time: 10:15 a.m.

Judge: Steve Verby

Defendants, Michael B. McFarland, Michael B. McFarland, P.A. and Karen Zimmerman, submit the following opposition to Plaintiffs' Motion to Amend Complaint for Punitive Damages:

STATEMENT OF CASE

In the present action, Plaintiff alleges that attorney Michael McFarland breached a fiduciary duty owed to Plaintiff and her deceased husband, Jerry Berry, by engaging in a transaction between himself, his friend Karen Zimmerman and Jerry Lee Roy Berry for the purchase of stock representing a fifty percent (50%) ownership interest in the Captain's Wheel Resort, Inc. located in Bayview, Idaho.

Plaintiff alleges further in her complaint that Defendants Michael McFarland and Karen Zimmerman must disgorge the stock so that she, Plaintiff, becomes the sole owner of the Captain's Wheel Resort, Inc. Plaintiff alleges further that her deceased husband was subjected to undue influence by Michael McFarland or, alternatively, that her husband lacked capacity to enter into the stock agreement with McFarland and Zimmerman. Plaintiff has offered various affidavits in support of her claim. She now seeks leave to amend the complaint to add a request for punitive damages.

PRELIMINARY STATEMENT

Plaintiff does not deny that Defendants paid the \$100,000.00 to her deceased husband for the stock; rather, she vaguely claims that somehow the transaction should be enforced as a loan transaction and not a stock purchase agreement. Apparently the argument hinges upon Plaintiff's additional allegation that Mr. McFarland was her lawyer, her deceased husband's lawyer and the lawyer for Captain's Wheel Resort, Inc. Yet Plaintiff has no documentation whatsoever to support her claim that McFarland was her lawyer, her husband's lawyer and the lawyer for the corporation when the stock

purchase agreement was negotiated and signed.¹

Mr. McFarland steadfastly denies that he served as Mr. and Mrs. Berry's attorney. He also denies ever representing the corporate entity. Mr. McFarland freely admits that he engaged in an arms length transaction with Plaintiff's deceased husband for the purchase of fifty percent (50%) of the stock in the Captain's Wheel Resort, Inc. Mr. McFarland denies any and all claims of over-reaching or undue influence in the transaction.

ARGUMENT

In a shotgun fashion, Plaintiff levels numerous allegations of wrongdoing against the Defendants Michael McFarland and Karen Zimmerman. However, when confronted at her deposition, it became obvious that Plaintiff had little or no evidence in support of her allegations (see Affidavit of John P. Whelan and the excerpts from the deposition of Karletta Grace Berry of December 18, 2007).

In order to provide some credence to her allegations, Plaintiff alleges additionally that Michael McFarland was a fiduciary vis-a-vis the Plaintiff, her deceased husband and the very business entity that is at the core of this dispute. By making such an allegation, Plaintiff hopes that a very high standard will be applied to Mr. McFarland's conduct simply because he is an attorney by profession. Yet the only apparent evidence that Plaintiff has in support of her claim is her own speculation and conjecture.

¹ See accompanying affidavit of John P. Whelan for the relevant portions of Ms. Berry's deposition transcript.

REASONABLE LIKELIHOOD OF SUCCESS

In order to be granted leave to add a request for punitive damages to her complaint, Plaintiff must demonstrate a reasonable likelihood that she can prove facts at trial sufficient to support an award of punitive damages. I.C. 6-1604(2). Yet Plaintiff offers only unsubstantiated circumstantial evidence in support of her allegations. The evidence offered in support of the current motion is comprised of the following affidavits:

The Affidavit of Toby McLaughlin: One of Plaintiff's other lawyers, Mr. McLaughlin, opines about his discussions with Michael McFarland regarding paperwork that was prepared to transfer fifty percent (50%) of the stock of Captain's Wheel Resort, Inc. The self-serving affidavit provides no evidence on the key issue of whether Michael McFarland was ever Jerry Berry's lawyer except for Mr. McLaughlin's speculation at paragraph 7 of his affidavit where he states:

"At the meeting on November 18, 2006, Mr. McFarland's statements indicated to me that he was, at some time, both the attorney for Mr. Berry and the Captain's Wheel Resort, Inc."

Yet no where does Mr. McLaughlin identify the alleged statements upon which he bases his speculation that Mr. McFarland was the attorney for Mr. Berry. The remainder of the affidavit addresses the various documents created in the course of the transaction and outlines Mr. McLaughlin's participation in several corporate meetings. No foundation is laid for punitive damages however.

Affidavit of David Noonan: This affidavit offered in support of Plaintiff's motion merely addresses an opinion of the gross value of the Captain's Wheel Resort, Inc. without adequately laying the foundation for the opinion of value. The affidavit offers nothing in support of Plaintiff's request to add punitive damages to her complaint.

Affidavits of Karletta Berry: Plaintiff offers not one but two of her

affidavits in support of her request for leave to add punitive damages. In her first affidavit, Plaintiff offers numerous conclusions but very few facts in support of her claims. She reiterates her allegations that Mr. McFarland was her and her deceased husband's attorney but not one shred of evidence is offered in support of the allegations. Ms. Berry lays no foundation for her claimed knowledge of her deceased husband's affairs. The affidavits contain one conclusionary statement after another with no foundation supporting the allegations. No foundation is laid for punitive damages.

**PLAINTIFFS MUST PROVE THAT DEFENDANTS ACTED OPPRESSIVELY,
FRAUDULENTLY, WANTONLY, MALICIOUSLY OR OUTRAGEOUSLY**

To support a motion to add punitive damages under I.C. 6-1604, Plaintiff is required to establish a reasonable likelihood that they can prove that Defendants, Michael B. McFarland, Michael B. McFarland, P.A. and Karen Zimmerman, acted oppressively, fraudulently, wantonly, maliciously or outrageously. Vaught v. Dairyland Ins. Co., 131 Idaho 357, 362.

The Idaho Supreme Court has stated in Weaver v. Stafford, 134 Idaho 691, that an award of punitive damages will be sustained only when it is shown that the Defendants acted in a manner that was "an extreme deviation from reasonable standards of conduct, and that the act was performed by the Defendants with an understanding of or disregard for its likely consequences."

As stated by the Supreme Court in the case of (Harwood v. Talbert, 136 Idaho 672), "punitive damages are not favored in law and should be awarded in only the most unusual and compelling circumstances".

In the case of Rockefeller v. Grabon, 136 Idaho 637, 647, the Idaho Supreme Court stated that "substantial evidence" is required to support the submitting of the issue of punitive damages to a jury and "the evidence must

show the Defendants ... acted with an extremely harmful state of mind, whether that state be termed "malice, oppression, fraud or gross negligence".

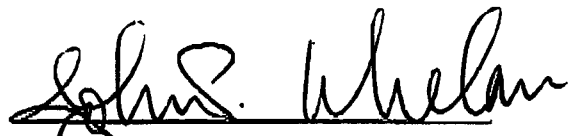
CONCLUSION

Plaintiff's motion for leave to add punitive damages should be denied in its entirety, as Plaintiff has offered no facts in support of her request. Although unsubstantiated conclusions were offered by Plaintiff in support of her motion, the conclusionary statements are not a substitute for facts. Plaintiff has failed to demonstrate that she has a reasonable likelihood of success of her allegations.

DATED: 12/17/09

Respectfully Submitted,

JOHN P. WHELAN, P.C.

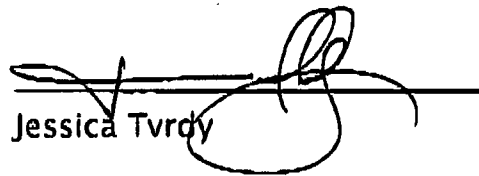

John P. Whelan

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 17TH day of December, 2009, I caused to be served a true and correct copy of the foregoing by the method indicated below, and addressed as indicated below:

Rex A. Finney
Finney, Finney & Finney
120 East Lake Street, Suite 317
Sandpoint, ID 83865

- () U.S. Mail, Postage Prepaid
- () Hand Delivered
- () Overnight Mail
- () Facsimile to: (208) 263-8211


Jessica Tvrdy

John P. Whelan, P.C.
Attorney at Law
213 N. 4th Street
Coeur d' Alene, Idaho 83814
Telephone: (208) 664-5891
Facsimile: (208) 664-2240
ISB No. 6083

STATE OF IDAHO }
COUNTY OF KOOTENAI } SS
FILED:

2009 DEC 22 AM 9:54

CLERK DISTRICT COURT
Debra De
DEPUTY

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF KOOTENAI

KARLETTA GRACE BERRY, a widow,
KARLETTA GRACE BERRY, Personal
Representative of the Estate of Jerry
Lee Roy Berry, CAPTAIN'S WHEEL
RESORT, INC., an Idaho Corporation,

Plaintiffs,

vs.

MICHAEL B. MCFARLAND, MICHAEL B.
MCFARLAND, P.A., and KAREN
ZIMMERMAN,

Defendants.

Case No. CV-07-2409

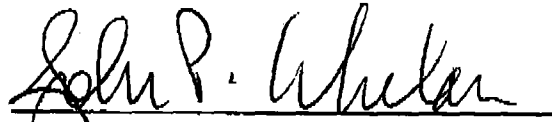
MOTION FOR ORDER PERMITTING
TELEPHONIC APPEARANCE

COMES NOW, John P. Whelan, attorney for Michael B. McFarland, Michael B. McFarland, P.A. and Karen Zimmerman, and moves this Court for an order permitting telephonic appearance for the hearing scheduled December 23, 2009 at 10:15 a.m. This motion is not made to hinder, delay or obstruct the administration of justice.

Oral argument is not requested.

MOTION FOR ORDER PERMITTING TELEPHONIC APPEARANCE-1

Dated: 12/9/09

A handwritten signature in black ink, appearing to read "John P. Whelan", written over a horizontal line.

John P. Whelan
Attorney for Defendants

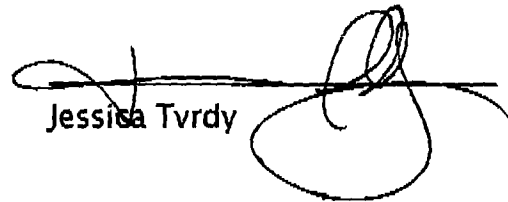
MOTION FOR ORDER PERMITTING TELEPHONIC APPEARANCE-2

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 9th day of December, 2009, I caused to be served a true and correct copy of the foregoing by the method indicated below, and addressed as indicated below:

Rex A. Finney
Finney, Finney & Finney
120 East Lake Street, Suite 317
Sandpoint, ID 83865

- U.S. Mail, Postage Prepaid
- Hand Delivered
- Overnight Mail
- Facsimile to: (208) 263-8211


Jessica Tvrdy

REX A. FINNEY
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ISB No. 6313

STATE OF IDAHO }
COUNTY OF KOOTENAI } SS
FILED: 715
198
2009 DEC 22 PM 1:48

CLERK DISTRICT COURT
Paul Crump
DEPUTY

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF KOOTENAI

KARLETTA GRACE BERRY, a widow,) Case No. CV-2007-0002409
KARLETTA GRACE BERRY, Personal)
Representative of the Estate) AFFIDAVIT OF REX FINNEY
of Jerry Lee Roy Berry,)
CAPTAIN'S WHEEL RESORT, INC.,)
an Idaho Corporation,)
Plaintiff,)
v.)
MICHAEL B. MCFARLAND, MICHAEL)
B. MCFARLAND, P.A., and KAREN)
ZIMMERMAN,)
Defendants.)

STATE OF IDAHO)
: ss.
County of Bonner)

COMES NOW, the undersigned and being first duly sworn on
oath, and states:

1. I am over the age of 18 years and competent to make this Affidavit.

2. I am the Plaintiffs' attorney in this matter and licensed to practice law within the State of Idaho.

3. On December 16, 2009 I received the Affidavit of Michael B. McFarland In Opposition To Plaintiffs' Motion To Amend Complaint For Punitive Damages.

4. On December 18, 2009 I took Michael B. McFarland's deposition, and also had the deposition recorded by audio visual means. The deposition is scheduled to reconvene on December 23, 2009 at 1:00 pm.

5. On December 22, 2009 I received the transcript and Exhibits of the Deposition of Michael B. McFarland from December 18, 2009.

6. Attached hereto is a true and correct copy of the transcript of the testimony from the deposition of Michael B. McFarland from December 18, 2009, and including Exhibit 1 to the Deposition of Michael B. McFarland.

7. Of critical importance regarding the loan issue included in this case is Exhibit 1 and McFarland's testimony regarding Exhibit 1, contained at Page 59, Line 17-25 and Page 60, Line 1-25.

8. Of critical importance regarding the issue of the attorney client relationship between Jerry Lee Roy Berry and

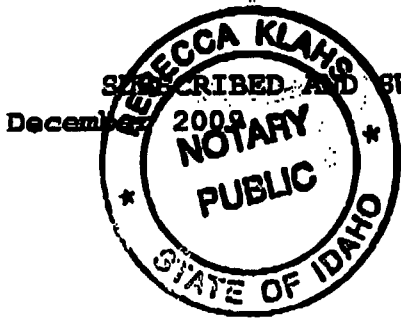
Michael B. McFarland, is the testimony contained at Pages 39, Line 17-25, Page 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50 (Line 20-25) which are testimony regarding the attorney client relationship between Jerry Lee Roy Berry and Michael McFarland and regarding the fact that Jerry Lee Roy Berry was "looking to protect stock in the Captain's Wheel Resort from attachment by one of more creditors" quote from Page 50, Line 21-23).

9. It is also noteworthy that opposing counsel in this matter, John Whelan, invoked the attorney client privilege between Jerry Lee Roy Berry and Michael McFarland during the deposition at Page 45 Line 11.

DATED this 22 day of December, 2009.

Rex A. Finney

Rex A. Finney
Attorney at Law



SUBSCRIBED AND SWORN TO before me, this 22nd day of December, 2009

Rebecca Klans
Notary Public - State of Idaho
Residing at Sandpoint
My Commission expires 12/14/2011

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was delivered as indicated, this 22nd day of December, 2009, and was addressed as follows:

J.P. WHELAN P.C.
Attorney at law
213 N. 4th Street
Coeur d'Alene, Idaho 83814
(Via Facsimile: (208) 664-2240)

Judge Verby
chamber's copy
(Via Hand Delivery)

Rebecca Klans

Court Reporting
Videography
Document Management
Trial Presentation
Videoconferencing

**IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT
STATE OF IDAHO, IN AND FOR THE COUNTY OF KOOTENAI**

KARLETTA GRACE BERRY, a widow,
KARLETTA GRACE BERRY, Personal
Representative of the Estate of
Jerry Lee Roy Berry, CAPTAIN'S
WHEEL RESORT, INC., an Idaho
Corporation,



Plaintiffs,

vs.

Case No. CV-2007-2409

MICHAEL B. McFARLAND, MICHAEL B.
McFARLAND, P.A., and KAREN ZIMMERMAN,

Defendants.

**DEPOSITION OF MICHAEL B. McFARLAND
Taken on behalf of the Defendants
Friday, December 18, 2009**

2	<p>1 APPEARANCES:</p> <p>2</p> <p>3 Appearing on behalf of the Plaintiffs:</p> <p>4 REX A. FINNEY, ESQ.</p> <p>5 Finney Finney & Finney, P.A.</p> <p>6 120 East Lake Street</p> <p>7 Sandpoint, Idaho 83864</p> <p>8 (208) 263-7712</p> <p>9 (208) 263-8211 Fax</p> <p>10 rexfinney@finneylaw.net</p> <p>11</p> <p>12 Appearing on behalf of the Defendants:</p> <p>13 JOHN P. WHELAN, ESQ.</p> <p>14 John P. Whelan, P.C.</p> <p>15 213 North 4th Street</p> <p>16 Coeur d'Alene, Idaho 83814</p> <p>17 (208) 664-5891</p> <p>18 (208) 664-2240 Fax</p> <p>19 jpwhelanattorney@yahoo.com</p> <p>20</p> <p>21 Also Present: Karletta Berry</p> <p>22</p> <p>23</p> <p>24</p> <p>25</p>	4
3	<p>1 EXHIBITS</p> <p>2 Exhibit Page</p> <p>3</p> <p>4 1 RECEIPT NO. 645197 - DATED 07-25-03 6</p> <p>5</p> <p>6 9 AFFIDAVIT OF MICHAEL B. MCFARLAND IN 6</p> <p>7 OPPOSITION TO PLAINTIFFS' MOTION TO</p> <p>8 AMEND COMPLAINT FOR PUNITIVE DAMAGES</p> <p>9</p> <p>10</p> <p>11</p> <p>12</p> <p>13</p> <p>14</p> <p>15</p> <p>16</p> <p>17</p> <p>18</p> <p>19</p> <p>20</p> <p>21</p> <p>22</p> <p>23</p> <p>24</p> <p>25</p>	5
3	<p>1 INDEX</p> <p>2 Page</p> <p>3</p> <p>4 EXAMINATION BY MR. FINNEY 8</p> <p>5</p> <p>6</p> <p>7</p> <p>8</p> <p>9</p> <p>10</p> <p>11</p> <p>12</p> <p>13</p> <p>14</p> <p>15</p> <p>16</p> <p>17</p> <p>18</p> <p>19</p> <p>20</p> <p>21</p> <p>22</p> <p>23</p> <p>24</p> <p>25</p>	5
3	<p>1</p> <p>2</p> <p>3</p> <p>4</p> <p>5</p> <p>6</p> <p>7 DEPOSITION OF MICHAEL B. MCFARLAND</p> <p>8 Taken on behalf of the Defendants</p> <p>9 Friday, December 18, 2009</p> <p>10</p> <p>11</p> <p>12 BE IT REMEMBERED THAT, pursuant to the Idaho</p> <p>13 Rules of Civil Procedure, the deposition of</p> <p>14 MICHAEL B. MCFARLAND, was taken before Marilyn</p> <p>15 J. Broyles, #971, Certified Court Reporter for</p> <p>16 the State of Idaho, on Friday, December 18,</p> <p>17 2009, commencing at the hour of 9:01 a.m.,</p> <p>18 the proceedings being reported at Bristolne</p> <p>19 Law Offices, 1423 North Government Way, Coeur</p> <p>20 d'Alene, Idaho.</p> <p>21</p> <p>22</p> <p>23</p> <p>24</p> <p>25</p>	5

6	<p>1 DEPOSITION OF MICHAEL B. McFARLAND</p> <p>2 Friday, December 18, 2009</p> <p>3 9:03 a.m.</p> <p>4</p> <p>5 (Whereupon, a one-page photocopy of a</p> <p>6 receipt for \$40,000 dated 7-25-03 was marked Exhibit</p> <p>7 1 for identification.)</p> <p>8 (Whereupon, a 19-page document, consisting</p> <p>9 of Affidavit of Michael B. McFarland in Opposition</p> <p>10 to Plaintiffs' Motion to Amend Complaint for</p> <p>11 Punitive Damages, and photocopies of stock</p> <p>12 certificates was marked Exhibit 9 for</p> <p>13 identification.)</p> <p>14 THE VIDEOGRAPHER: We are on the record.</p> <p>15 This is a statement for a video deposition. I'm the</p> <p>16 technician. My name is Lawrence Zeringer. This is</p> <p>17 a videoconferenced deposition. It has been noticed</p> <p>18 by attorney Mr. Rex Finney, and is being held on</p> <p>19 December 18th, 2009 at 9:03 a.m. The location is</p> <p>20 1423 North Government Way, Coeur d'Alene, Idaho.</p> <p>21 The case caption is Karletta Grace Berry,</p> <p>22 a widow, Karletta Grace Berry, personal</p> <p>23 representative of the Estate of Jerry Lee Roy Berry,</p> <p>24 Captain's Wheel Resort Inc., an Idaho Corporation,</p> <p>25 plaintiffs, versus Michael B. McFarland, Michael B.</p>	8	<p>1 THE REPORTER: Thank you.</p> <p>2</p> <p>3 MICHAEL B. McFARLAND, having been first duly sworn,</p> <p>4 was examined and testified as follows:</p> <p>5</p> <p>6 EXAMINATION</p> <p>7 BY MR. FINNEY:</p> <p>8 Q. Mr. McFarland, can you please state your</p> <p>9 name and spell your last name.</p> <p>10 A. Michael B. McFarland, M-c-F-a-r-l-a-n-d.</p> <p>11 Q. Okay. And your current age?</p> <p>12 A. 64.</p> <p>13 Q. Where do you reside?</p> <p>14 A. 10714 East McFarland Road, Athol, Idaho</p> <p>15 83801.</p> <p>16 Q. Do you have other residences in the county</p> <p>17 that you sometimes spend time at?</p> <p>18 A. Do I own any other --</p> <p>19 Q. Other, yes. Do you own?</p> <p>20 A. No. I own a number of residences on that</p> <p>21 property, some -- a couple of mobile homes and a</p> <p>22 cabin.</p> <p>23 Q. Do you have a residence or any interest in</p> <p>24 a residence where corporate meetings have taken</p> <p>25 place in Hayden on, I believe it's Cloverleaf?</p>
7	<p>1 McFarland P.A., and Karen Zimmerman, Defendants.</p> <p>2 This is in the District Court of Kootenai</p> <p>3 County, State of Idaho. The case number is CV-2007-</p> <p>4 2409. The deponent is Mr. Michael McFarland.</p> <p>5 Would the counsel and all present please</p> <p>6 identify yourselves and state whom you represent.</p> <p>7 MR. FINNEY: I am Rex Finney. I am the</p> <p>8 attorney for the plaintiff, Karletta Grace Berry, a</p> <p>9 widow, who is seated to my left. I am the attorney</p> <p>10 for also the other plaintiff, Karletta Grace Berry,</p> <p>11 as personal representative of the estate of Jerry</p> <p>12 Berry, and I'm also attorney for Captain's Wheel</p> <p>13 Resort Inc., an Idaho corporation, all plaintiffs in</p> <p>14 the matter.</p> <p>15 MR. WHELAN: John Whelan, and I represent</p> <p>16 the defendants.</p> <p>17 THE VIDEOGRAPHER: The deposition is being</p> <p>18 taken before Marilyn Broyles, court reporter, who</p> <p>19 will now swear in the witness.</p> <p>20 THE REPORTER: Mr. McFarland, would you</p> <p>21 raise your right hand. Do you solemnly state that</p> <p>22 the testimony you will give in this matter will be</p> <p>23 the truth, the whole truth, and nothing but the</p> <p>24 truth, so help you God?</p> <p>25 THE WITNESS: I do.</p>	9	<p>1 A. I have no ownership interest in that piece</p> <p>2 of property.</p> <p>3 Q. Who owns that residence?</p> <p>4 A. Frances Sundstrom, Karen Zimmerman's</p> <p>5 mother.</p> <p>6 Q. Okay. Do you own a cabin on Nunn Road?</p> <p>7 A. No. It's off Nunn Road. McFarland Road</p> <p>8 leaves Nunn Road at one corner of my property, and</p> <p>9 runs through my property.</p> <p>10 Q. Do you own any properties as joint tenants</p> <p>11 with Karen Zimmerman?</p> <p>12 A. No.</p> <p>13 Q. Are you licensed to practice law within</p> <p>14 the state of Idaho?</p> <p>15 A. Yes.</p> <p>16 Q. Okay. When did you complete your legal</p> <p>17 education in terms of law school?</p> <p>18 A. 1977.</p> <p>19 Q. Where did you attend school?</p> <p>20 A. Law school?</p> <p>21 Q. Yes.</p> <p>22 A. George Washington University in</p> <p>23 Washington, D.C.</p> <p>24 Q. When did you first become licensed to</p> <p>25 practice law within the state of Idaho?</p>

10

1 A. The spring of 1980.
 2 Q. At that time, did you take up practice in
 3 law?
 4 A. Yes.
 5 Q. And where was that done at?
 6 A. Initially, out of my home on 6th Street
 7 here in Coeur d'Alene.
 8 Q. Is that a home you do not own anymore?
 9 A. That's correct.
 10 Q. Jumping forward to approximately the year
 11 2000, where were you practicing law from at that
 12 time?
 13 A. 2000, I had recently moved to my present
 14 office at 421 Coeur d'Alene Avenue, Suite 1L, in
 15 Coeur d'Alene.
 16 Q. Did you have any sort of a professional
 17 association at the time for your office, for your
 18 law firm?
 19 A. I don't believe I incorporated until --
 20 take me a moment to remember. It was around -- it
 21 was in the mid '90s. I don't remember the -- the
 22 exact year.
 23 Q. Okay. And you say you incorporated. What
 24 is the name of that incorporation?
 25 A. Michael B. McFarland, P.A.

11

1 Q. And what does the P.A. stand for?
 2 A. Pompous Ass. No, Professional
 3 Association.
 4 Q. Thank you. Is that your current
 5 professional association which you practice law
 6 under?
 7 A. Yes.
 8 Q. And you say you have continuously used
 9 that professional association since the 1990s until
 10 current; is that accurate?
 11 A. Yes.
 12 Q. What areas of law do you practice in
 13 primarily?
 14 A. Now, primarily bankruptcy.
 15 Q. Did you do other types of work in the past
 16 prior to switching to primarily bankruptcy?
 17 A. Yes.
 18 Q. What types of work did you engage in?
 19 A. When I initially started practicing, I
 20 took anything that was available, generally domestic
 21 relations, family law. Primarily divorces.
 22 And it -- over the years, I have done
 23 fewer and fewer divorces, and did a little
 24 administrative law for a while many years ago. I
 25 have done some criminal defense, primarily DUIs.

12

1 some personal injury work. And that's not an
 2 exclusive list.
 3 Q. Do you do any probate work?
 4 A. I have done some probate work, yes.
 5 Q. Do you know when you took your first,
 6 filed your first probate matter as attorney,
 7 roughly?
 8 A. I can't remember that right now. I -- I -
 9 - I might have to think about that one.
 10 Q. Okay. Have you prepared wills for people?
 11 A. Yes.
 12 Q. Do you make it -- when you first begin
 13 preparing wills?
 14 A. A long time ago.
 15 Q. Have you ever prepared wills in which you
 16 have named yourself as personal representative of
 17 the testator's estate?
 18 A. I don't recall having ever done that, but
 19 I have been -- I have been named as personal
 20 representative. I am not -- I don't believe I
 21 prepared the will.
 22 Q. How many occasions have you been personal
 23 representative?
 24 A. I may have to think about that for a
 25 moment.

13

1 Q. Okay.
 2 A. It's three, I believe.
 3 Q. Can you give me the names of the estates?
 4 A. Thomas Pinter, P-i-n-t-a-r, William Baer,
 5 B-a-e-r. Those are the only two I can remember
 6 right now.
 7 Q. Okay. Can you tell me approximately when
 8 your practice switched to primarily bankruptcy?
 9 A. Well, it's been a gradual -- it wasn't all
 10 at once. It's been a gradual change. Probably I
 11 was doing a majority of my work in the bankruptcy
 12 area around mid to October of 2005, which is when
 13 the Bankruptcy Abuse Prevention and Consumer
 14 Protection Act, very poorly named, was passed, and
 15 in the rush to beat the change in the law, the
 16 volume of bankruptcies increased tremendously, and
 17 for a while, I was doing almost nothing but
 18 bankruptcies.
 19 Q. My question was: When did you start
 20 primarily doing bankruptcy? Was it 2005 or sometime
 21 earlier?
 22 A. I don't keep track of my practice in that
 23 way. I could only -- I could only guess.
 24 Q. Do you have a guess for me?
 25 MR. WHELAN: You're not obligated to

14

1 speculate. You testify from personal knowledge if
 2 you have personal knowledge. If you don't, then you
 3 can't answer the question.
 4 A. No, I'd rather not guess.
 5 Q. (By Mr. Finney) Okay. Did you begin
 6 practicing in bankruptcy court in, say, as early as
 7 1990?
 8 A. Oh, yes.
 9 Q. Okay. Do you know approximately when you
 10 began practicing in bankruptcy?
 11 A. I was still on 6th Street, and I practiced
 12 on 6th Street from 1980 to 1990.
 13 Q. Okay. What type of bankruptcy practice
 14 did you have? What type of cases did you handle?
 15 A. Chapter 7s and Chapter 13s.
 16 Q. Are those the only two types of
 17 bankruptcies that you're familiar with?
 18 A. No.
 19 Q. Okay. What are the other types?
 20 A. Under Title XI, which is the governing
 21 statute, Title XI of the U.S. Code, there are
 22 several operating -- operating chapters; 7, 9, 11,
 23 12, 13, and 15. I'm familiar with all of them, but
 24 I do not practice in any except Chapter 7 and
 25 Chapter 13.

15

1 Q. Okay. Can you describe for me what
 2 generally Chapter 7 bankruptcy is?
 3 A. Chapter 7 bankruptcy is a liquidation,
 4 it's what generally referred to. In a Chapter 7
 5 bankruptcy, the debtor, after preparing a set of
 6 schedules and a number of other documents, is
 7 required to surrender to the trustee who is
 8 appointed, any nonexempt property that he or she
 9 has, if there is any. If there is some, it's
 10 referred to as an asset case, and the trustee sells
 11 the nonexempt property and pays dividends, typically
 12 pennies on the dollar, to creditors who file allowed
 13 claims.
 14 Q. And can you briefly just tell me what
 15 exempt property is?
 16 A. Yes. Exempt property is -- in the
 17 District of Idaho, so each bankruptcy district has
 18 to select whether it's going to use federal or state
 19 exemptions in bankruptcy, and in the District of
 20 Idaho, we use the Idaho state exemptions for the --
 21 for the majority. There are some other exemptions
 22 as well.
 23 Idaho state exemptions include, among
 24 other things, equity in the homestead, up to
 25 \$100,000, household goods, furnishings, clothing,

16

1 personal effects, up to \$5,000 per person, up to
 2 \$500 per item.
 3 Health aids are exempt without limitation;
 4 canes, crutches, wheelchairs, oxygen, even a hot tub
 5 if it was prescribed. Also exempt are any IRA,
 6 401(k), pension and retirement benefits. Social
 7 Security is actually exempt under a different
 8 statute. One firearm worth up to \$500. A burial
 9 plot is exempt. One motor vehicle per person up to
 10 \$5,000 in value. And -- and there are some others.
 11 Q. Okay. So am I understanding this
 12 correctly, in Chapter 7, a person can keep their
 13 exempt assets; they have to turn over nonexempt
 14 assets to the trustee, who then liquidates those,
 15 pays any -- any funds obtained to creditors, and
 16 then the person who is in the bankruptcy, or people,
 17 then receives a discharge of all remaining debts?
 18 A. Not all remaining debts. There are
 19 exceptions to discharge.
 20 Q. Okay. Can you tell me what the basics are
 21 on a Chapter 13 bankruptcy?
 22 A. Yes.
 23 Q. Okay. Please do.
 24 A. A Chapter 13 bankruptcy is referred to --
 25 used to be called a Wage -- or a Wage Earner Plan

17

1 under the former Bankruptcy Act. It's now referred
 2 to as a Reorganization of Debts for an individual,
 3 or a couple, with a regular income. And in a Chapter
 4 13, payments are made pursuant to a plan of
 5 reorganization, payments to the trustee, and the
 6 creditors must receive, at a minimum, as much as
 7 they would have in a Chapter 7, but it can be paid
 8 out over the term of the plan.
 9 In addition, certain other things have to
 10 be paid in a Chapter 13, such as if they are -- if
 11 the person is going to retain a contract on a motor
 12 vehicle or a home or any other item, they need to
 13 provide in the plan to retain that and to, in the
 14 case of a mortgage, for example, if they are in
 15 arrears, the plan can provide for them to continue
 16 making their regular monthly payments, but they
 17 would be able to catch up their arrears over the
 18 term of the plan.
 19 And with respect to other -- any secured
 20 debt, they can either surrender the collateral or
 21 they can make arrangements in the plan to keep it
 22 and pay for it.
 23 There's a difference between whether a --
 24 a debt is going to last longer than the term of the
 25 plan. The maximum term of the plan is five years.

<p style="text-align: right;">18</p> <p>1 So, if a debt such as home mortgage is current in 2 its final payment is due after the end of the plan, 3 they don't have to include in the plan. 4 Q. This Chapter 13 that you have explained, 5 is that prior to the change in law or after the 6 change in law? 7 A. It's pretty much the same -- 8 MR. WHELAN: Change of what law? 9 Q. (By Mr. Finney) Mr. McFarland, you had 10 noted a change in the law in 2005 when the 11 bankruptcy code was amended? 12 A. Yes. 13 Q. And in your first response you said there 14 had been some changes. 15 A. Yes. 16 Q. So the version that you have described, 17 can you tell me what time period that applied to? 18 A. The provisions of Chapter 13 that I have 19 described so far are largely unchanged. From the 20 original 1980 bankruptcy actually -- the bankruptcy 21 code was adopted in about 1978, as I recall. And it 22 had all the same chapters except Chapter 15, the 23 international bankruptcy. And it did not have 24 Chapter 12 at that time. Chapter 12 is more recent. 25 But Chapters 7, 9, 11 and 13 were</p>	<p style="text-align: right;">20</p> <p>1 MR. FINNEY: Okay. I'd like the deponent 2 to ask -- 3 MR. WHELAN: So I'm going to object to the 4 form of the question. I'm objecting on the grounds 5 of relevance. 6 MR. FINNEY: Okay. I'm going to ask you 7 to answer the question. We can take up your 8 objection for the court. 9 A. Restate the question, please. 10 Q. (By Mr. Finney) The question is: You 11 described two instances; one where the majority of 12 debts would be paid, then there would be protection 13 under the bankruptcy court, and a second option 14 where the majority of debts are not paid; maybe a 15 fraction are paid. How do you determine which 16 happens? Does it depend on the amount of assets a 17 person has? 18 MR. WHELAN: Objection, relevance. 19 A. It depends on a lot of things. There is a 20 whole litany of things that are used to determine 21 that, including a 59-line means test form, with all 22 kinds of calculations in it, that has to be gone 23 through. 24 Q. (By Mr. Finney) Can you tell me who your 25 employees at Michael McFarland, P.A. in the year</p>
<p style="text-align: right;">19</p> <p>1 essentially similar from 19 -- well, from the time I 2 started practicing, until the -- until the present 3 day. There are just some -- there are some internal 4 changes, but the bankruptcy, the Chapter 13 is -- 5 essentially functions in a similar fashion to what 6 it did prior to the act, or to change in the -- in 7 the law. 8 Q. Which was 2005? 9 A. Yes. 10 Q. In lay person's terms, is Chapter 13 11 essentially where a person obtains protection from 12 the bankruptcy court and basically repays the 13 majority of their debts? 14 A. Not necessarily. Not necessarily the 15 majority of the debts. In many cases, they end up 16 paying a very small fraction of the debt; in other 17 cases, they may pay 100 percent. 18 Q. How do you determine which avenue is 19 taken, whether they pay 100 percent or a small 20 portion? 21 MR. WHELAN: Okay. At this point I'm 22 going to object to the relevance. This is not 23 leading to discoverable evidence. Okay. And this 24 is just a seminar on bankruptcy law, and those 25 aren't the facts of this case.</p>	<p style="text-align: right;">21</p> <p>1 1999? 2 A. Myself. I had several different people 3 working for me at different times. I -- only one at 4 a time. 1999 probably was -- I may have had more 5 than one. I am not -- I'm not certain. It was 6 probably Delorse Meredith. 7 Q. Can you please spell her name. 8 A. I am not sure I can. She spells it 9 strangely. I think it's D-e-l-o-r-s-e, Meredith, M- 10 e-r-e-d-i-t-h. 11 Q. Do you know, did Delorse Meredith continue 12 employment in years beyond 1999? 13 A. Yes, but I don't know. And I'm not even 14 positive that that's who was working for me at that 15 time. 16 Q. Do you know who succeeded or came in after 17 Delorse? 18 A. Yes. 19 Q. Will you please state the name. 20 A. Carole Welk. 21 Q. And please spell that. 22 A. Actually, no. Carole Welk is not an 23 employee. Carole Welk helps me from time to time. 24 Q. And is this position legal 25 secretary/receptionist?</p>

22

1 A. Which position?

2 Q. Any positions of other people you have

3 employed at that time other than yourself.

4 A. I've had -- for a brief period, I employed

5 Daniel Fisher, who's an attorney, and that was about

6 9 -- that was in around 1999 also. He only was

7 employed by me for a short time. The only other

8 employees that and I've had have been in the

9 position of receptionist, secretary or the like, and

10 one at a time.

11 Q. Do you know who filled that position in

12 the years 2000 and 2001?

13 A. I have to think about what was going on

14 then.

15 Q. Maybe I can --

16 A. My divorce was final in 1999 in December.

17 At that time Daniel Fisher was working for me as an

18 employee. At about that time, there were a number

19 of temporary assistants, some were there for just a

20 couple of weeks, some for a couple of months. And I

21 don't -- and a couple of them I'd even have to look

22 to see what, what their names were.

23 Q. Okay. Did Jerry Berry ever come to your

24 office, your law office?

25 A. Yes.

23

1 Q. Do you know what year that was in?

2 A. I think he came in two different years.

3 Q. Can you please tell me the years he came

4 at.

5 A. The first time would have been in 2001, or

6 possibly 2002. I think it was 2001.

7 Q. Do you know who was employed at that time

8 Jerry Berry came to your office?

9 A. Not off the top of my head.

10 Q. Do you have records or documents that

11 would indicate who was employed at that time?

12 A. Oh, I'm sure I do.

13 Q. Do you believe it would be Carole Welk or

14 Delorse?

15 A. It would not have been Carole Welk. And I

16 think it was probably prior to Delorse.

17 Q. Do you know the names of the employees

18 prior to Delorse?

19 A. Yes.

20 Q. And please state those.

21 A. I can -- I can remember most of them.

22 Prior to Delorse, Darcy Johnson. Susan Thalman.

23 Q. Can you please spell Thalman.

24 A. T-h-a-l-m-a-n, Jan -- I don't remember

25 Jan's last name at the moment. Kelli Engstrom, K-e-

24

1 I-I-i,

2 Q. Do you maintain a phone log at your law

3 office?

4 A. Yes.

5 Q. Okay. And when did you begin maintaining

6 a phone log at your office?

7 A. Well, I shouldn't say -- excuse me. Not a

8 phone log. If there are messages, there's a message

9 pad to -- to write down messages on. But there is

10 not a phone log per se. If I have a conversation

11 with someone on the telephone, I normally put it on

12 -- on my notes, but that goes into that individual's

13 file.

14 Q. Okay. And if a person does not have a

15 file, do you keep a miscellaneous file of people who

16 do not have a file in your office?

17 A. I have a new matter form that I have

18 clients fill out, or potential clients fill out,

19 whether I am retained or not, and we keep those new

20 matter forms in the file, in that file, until and

21 unless I am retained.

22 Q. Do you know, did Jerry Berry complete a

23 new matter form?

24 A. I don't believe he did.

25 Q. Is there some reason he was treated

25

1 differently than other people that you meet with?

2 MR. WHELAN: Objection. Assumes facts not

3 in evidence.

4 Q. (By Mr. Finney) Please answer.

5 A. I -- please restate the question.

6 Q. I believe you indicated when someone comes

7 in, a potential client, you have all potential

8 clients fill out a new matter form.

9 A. I should made that clear, that that's all

10 potential clients that I don't know. If -- I don't

11 keep track of -- I don't have everyone fill out the

12 new matter form if I already know that person. So I

13 -- if I indicated to you that every single person

14 that comes in fills out a new matter form, that --

15 that wouldn't be correct.

16 Q. Okay. Thank you for clarifying.

17 Do you maintain in your office any log of

18 people who come to your office?

19 A. No.

20 Q. Have you ever maintained such an item?

21 A. No.

22 MR. FINNEY: I'd like to take a break for

23 just one moment.

24 THE VIDEOGRAPHER: The time is 9:35, and

25 we are off the record.

26

1 (Recess.)
 2 THE VIDEOGRAPHER: We are back on the
 3 record. The time is 9:41 a.m.
 4 MR. FINNEY: For the record, this is Rex
 5 Finney, continuing with the deposition questioning.
 6 Q. (By Mr. Finney) Mr. McFarland, you
 7 indicated one helper you have is named Carole Weik?
 8 A. Yes.
 9 Q. Do you believe that she was also a helper
 10 at or near the times that Jerry Berry came to your
 11 office?
 12 A. No.
 13 Q. Do you know who was your employee at the
 14 time?
 15 A. Not without looking at my records.
 16 Q. You do have those records?
 17 A. Not with me.
 18 Q. Okay. You say you were divorced in 1999?
 19 A. Yes.
 20 Q. Can you please state your ex-wife's name.
 21 A. Marilyn Kay Vanverwill.
 22 Q. Can you spell the last name.
 23 A. V-a-n-v-e-r-w-i-l-l.
 24 Q. Can you tell me where Marilyn resides?
 25 A. In the Blanchard area somewhere.

27

1 Q. Is that Kootenai or Bonner County, do you
 2 know?
 3 A. I believe it's Bonner.
 4 Q. Thank you. I had received, from Attorney
 5 John P. Whelan, by facsimile on December 16, 2009,
 6 a, what's marked here as Deposition Exhibit 9, and
 7 that would be the Affidavit of Michael B. McFarland
 8 in Opposition to Plaintiffs' Motion to Amend
 9 Complaint for Punitive Damages.
 10 Can you take one moment and review the
 11 affidavit and all the attachments. I believe there
 12 should be nine pages of affidavit, followed by a
 13 Certificate of Service, and Exhibit 1, 2, 3, 4,
 14 which would be two pages, Exhibit 5, Exhibit 6,
 15 Exhibit 7 and an Exhibit 8.
 16 A. (Viewing documents.)
 17 Q. Okay. And are familiar with that
 18 document?
 19 A. I am.
 20 MR. WHELAN: Do you have a copy of that
 21 for my benefit, Counsel?
 22 MR. FINNEY: I don't have an additional
 23 copy. I have one copy, which I can let you review.
 24 Why don't you review the one the witness is looking
 25 at real quickly, if you don't mind.

28

1 MR. WHELAN: Okay. (Viewing documents).
 2 Okay.
 3 Q. (By Mr. Finney) You've had a chance to
 4 review what's marked as Exhibit 9 for this
 5 deposition. Are you familiar with that document?
 6 A. Yes.
 7 Q. Okay. And is that an affidavit that you,
 8 yourself, have signed this on page 9?
 9 A. Yes.
 10 Q. Are all the attachments correct
 11 attachments -- or exhibits? Excuse me.
 12 A. (Viewing documents.) They are copies, not
 13 very good copies. But, yes.
 14 Q. Those are the exhibits referred to
 15 throughout -- or within the affidavit?
 16 A. Yes.
 17 Q. Did you know an individual named Jerry Lee
 18 Roy Berry at any time?
 19 A. Yes.
 20 Q. Okay. When did you meet Jerry Lee Roy
 21 Berry?
 22 A. I don't remember exactly. Around 2000,
 23 perhaps 2001.
 24 Q. Do you know how you came to meet Mr.
 25 Berry?

29

1 A. Yes.
 2 Q. Will you please tell me.
 3 A. I was introduced to him at the Captain's
 4 Wheel by Larry Pierce.
 5 Q. How do you spell Mr. Pierce's last name?
 6 A. P-i-e-r-c-e.
 7 Q. Do you know when that took place, roughly?
 8 A. Not really. It -- it was -- the weather
 9 was decent, so it wasn't midwinter.
 10 Q. Okay. And that would have approximately
 11 the year 2000?
 12 A. Or 2001.
 13 Q. Approximately.
 14 A. Yes, approximately.
 15 Q. Okay. Do you know where Larry Pierce
 16 resides?
 17 A. Larry Pierce is deceased.
 18 Q. Do you know what type of discussions took
 19 place when you first met Mr. Berry? Did you talk to
 20 him, become friends, drink together?
 21 A. In the first meeting?
 22 Q. Yes.
 23 A. I don't remember a lot of details about
 24 the first meeting, other than he was very pleasant
 25 and we chatted, and -- but, no, we -- we certainly

30

1 wouldn't be characterized as friends, having just
 2 met.
 3 Q. Okay. Subsequent to the first meeting,
 4 did you get to know Jerry better?
 5 A. Yes.
 6 Q. Okay. And can you describe how that
 7 relationship developed subsequent to the first
 8 meeting, including time periods, if you would.
 9 MR. WHELAN: I'm going to object to the
 10 form of that question. It calls for a narrative.
 11 If you can respond to it.
 12 A. I -- I remember a couple of specifics, and
 13 that's -- that's pretty much it.
 14 When we first met Jerry, when -- when
 15 Larry introduced -- and it was Karen Zimmerman and
 16 myself that met him together. We were there with --
 17 at the Captain's Wheel with Larry Pierce, who had
 18 already met Jerry, and said, "You got to meet this
 19 guy." Jerry was surprisingly pleasant and happy, so
 20 much so that Karen commented later that she thought
 21 he must have been drinking.
 22 But during our first discussion, we had
 23 talked about how he did work setting mobile homes
 24 and that sort of thing, and we happened to have a
 25 mobile home that needed to be set. And when Karen

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1 called -- she had been Jerry's card, and she called
 2 him to see if he would take a look at the mobile
 3 home that was to be set.
 4 And I wasn't party to that conversation,
 5 but she did comment that he was just as happy when
 6 she talked to him, just as pleasant as he had been
 7 before. So initially she thought he was drunk, but
 8 then she just said, "No, he's just that way. He's
 9 just a very happy, nice guy."
 10 And ultimately, he did come out and set
 11 the mobile home and did some other work for us there
 12 at the -- at -- at my property on McFarland Road.
 13 And that's when we began talking a lot more with
 14 him, while he was there doing work for us, or doing
 15 it for me.
 16 Q. (By Mr. Finney) Do you know the
 17 approximate date by year and season?
 18 A. When the -- well, the mobile home was
 19 being set. Let me think on that for a second. I'm --
 20 - I am not positive. I think it was in the --
 21 during the winter, which could have been at 2000-
 22 2001, or '01-02.
 23 Jerry, before the -- before this double
 24 wide was set, had done some work to preserve it
 25 through -- and I don't remember if it was winter or

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1 If was just -- just rainy weather. But he did some
 2 work to preserve it first, and then arranged, when
 3 weather permitted, as I recall, to have the slab
 4 poured and to -- to have the mobile home set.
 5 But -- and at the same time, there was a
 6 septic tank that was being put in, a drain field and
 7 all that, so that a portion of that work would have
 8 been done, not maybe in winter, by in -- in decent
 9 weather. But beyond that, I don't...
 10 Q. Was that 2002 you guess, or --
 11 A. I -- I would guess, but I am not positive.
 12 Now, I do have photographs that might have the dates
 13 on them that could reflect -- refresh my
 14 recollection, but I don't -- I don't remember the
 15 year.
 16 Q. Sorry to jump around on you, but Carole
 17 Weld, do you have her telephone number?
 18 A. No.
 19 Q. Do you know where she resides?
 20 A. Yes.
 21 Q. Would you please state that.
 22 A. Well, I don't know her street address. I
 23 mean, she lives in Coeur d'Alene.
 24 Q. Do you know what street it's on?
 25 A. No.

33

1 Q. Do you know generally where her residence
 2 is?
 3 A. Well, I'm not sure. She's -- I think she
 4 may have moved. I don't -- I know that she is about
 5 to -- to be married, and I don't know if she just
 6 moved or not.
 7 Q. Do you know who she would be about to be
 8 married to?
 9 A. I happen to know the person, but I don't --
 10 - I don't know any of the details.
 11 Q. What's his name?
 12 A. Terry.
 13 Q. Last name, please?
 14 A. Carr.
 15 Q. Can you spell the last name?
 16 A. C-a-r-r.
 17 Q. Okay. Thank you.
 18 In just prior answers, you have said the
 19 name Karen had talked to Jerry?
 20 A. Yes.
 21 Q. Who are you referring to when you say the
 22 name Karen?
 23 A. Karen Zimmerman.
 24 Q. Okay. Are you currently in a relationship
 25 with Karen Zimmerman?

34

1 A. Define relationship.
 2 Q. Do you spend time together?
 3 A. Yes.
 4 Q. Okay. Do you consider that you're in a
 5 relationship with Karen Zimmerman?
 6 A. Yes.
 7 Q. Okay. And by relationship, what do you
 8 consider the term "relationship" to mean when you
 9 say that you consider you're in a relationship with
 10 Karen?
 11 A. I am not -- I never attempted to define
 12 our relationship. We are very close.
 13 Q. Do you spend much time together?
 14 A. Yes.
 15 Q. Do you own any assets together?
 16 A. I think we have both our names on an
 17 Oldsmobile. I think that's the only thing we own
 18 together.
 19 Q. Do you purport to own stock together with
 20 Karen Zimmerman in any corporation?
 21 A. Just the Captain's Wheel.
 22 Q. Okay. And you -- what is that stock that
 23 you purport to own with Karen Zimmerman?
 24 A. I believe it's 200 shares.
 25 Q. And that's one half of the outstanding

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1 half, but it does not pass to the survivor upon the
 2 demise of the joint tenant, or the other tenant.
 3 Q. Do you share finances with Karen?
 4 A. No.
 5 Q. Why did you decide to take this stock as
 6 joint tenancy with rights of survivorship?
 7 A. We both had contributed to its
 8 acquisition. It was something we did together from
 9 the beginning.
 10 Q. Okay. Do you reside with Karen?
 11 A. I spend a lot of time there. Sometimes
 12 she spends time at my place.
 13 Q. Like as in do you spend the night with
 14 each other?
 15 A. Yes.
 16 Q. Okay. Do you sleep in the same bed?
 17 A. Yes.
 18 Q. Has she ever been employed at your law
 19 firm?
 20 A. No.
 21 Q. Has Karen ever worked in any of the
 22 estates or for any of the estates in which you have
 23 been personal representative?
 24 A. No. No. She did work for one estate. I
 25 don't believe I was the personal representative.

35

1 stock of the Captain's Wheel?
 2 A. Yes.
 3 Q. And how do you own that stock together
 4 with Karen?
 5 A. It's a long story.
 6 Q. I mean, what's the title on? Is it
 7 tenants in common? Is it a divided interest?
 8 A. Oh, joint tenants. It's abbreviated.
 9 JTWRORS, Joint Tenants With Right of Survivorship.
 10 Q. Can you explain what the rights of
 11 survivorship language means, in lay person's terms?
 12 A. Well, if you don't know, I suppose I
 13 could. It's really common knowledge.
 14 Q. I have an idea, but, would you, on the
 15 record here, answer my question as to what that
 16 means between you and Karen?
 17 A. Joint tenants with right of survivorship
 18 means the same for everyone. It's a form of joint
 19 ownership different from a tenancy-in-common, where
 20 both parties have, essentially, during their
 21 lifetimes, they might only have a half interest, but
 22 the -- actually, they each own 100 percent
 23 interest. On the passing of one, the other one
 24 inherits everything, as contrasted with a tenancy-
 25 in-common, where each party owns an undivided one

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1 Q. And which estate was that?
 2 A. I don't remember the name of it.
 3 Q. Okay. What type of work did she do?
 4 A. Inventoried an apartment.
 5 Q. Okay. And was she paid for those
 6 services?
 7 A. By the estate.
 8 Q. Do you know the amount of payment?
 9 A. No.
 10 Q. Okay.
 11 A. Not much.
 12 Q. Going back to Mr. Jerry Berry, you
 13 indicated you had met him at the Captain's Wheel?
 14 A. Yes.
 15 Q. Was he any sort of an owner in the stock
 16 at the Captain's Wheel at the time that you've --
 17 you had met him?
 18 A. I didn't know that at the time. I believe
 19 he was.
 20 Q. Okay. Was he working in the establishment
 21 known as the Captain's Wheel?
 22 A. Yes.
 23 Q. And for the record, can you describe the
 24 Captain's Wheel to me. What is the Captain's Wheel
 25 Resort?

38	<p>1 A. Well, it's a little under an acre of 2 ground, bisected by pure road, with some water 3 frontage, a number of slips, boat slips. I don't 4 know the square footage of the building, with a 5 kitchen, a bar, a dance floor area, an enclosed 6 deck, and a couple of unenclosed decks, a yard with 7 -- that's used in the summertime with outdoor 8 barbecue facilities. 9 Q. You mentioned it has frontage on water? 10 A. Yes. 11 Q. What is the water it fronts on? 12 A. Lake Pend Oreille. 13 Q. Do you know how many front feet? 14 A. No, not off the top of my head. 15 Q. Do you know an approximate figure? 16 A. 300 plus, I think, but I -- no. I don't 17 know. 18 Q. And you say there are boat slips? 19 A. Yes. 20 Q. How many boat slips? 21 A. 20 some. 22 Q. Subsequent to meeting Jerry Berry, you 23 indicated that you had had meetings with Jerry at 24 your law office? 25 A. Yes. Twice.</p>	40	<p>1 would have come in? 2 A. Not that I -- well, I don't think so. I 3 don't remember for certain. He would have probably 4 asked if I was going to be there. Or we may have 5 scheduled it. I -- I don't recall. 6 Q. Do you have any calendar or other document 7 that would show what your scheduled appointments 8 were in the past? 9 A. I have looked through them, and I didn't 10 find anything. I -- yes, I do. But, you know -- I 11 don't -- I -- I haven't found anything on any 12 schedule. Some of my appointments are scheduled. 13 some are not. 14 Q. Okay. I'm assuming this first instance, 15 when Mr. Berry came to your office was at his 16 choosing or his desire rather that you called him 17 and asked him to come to your office? 18 A. Oh, sure. Uh-huh. 19 Q. And can you tell me what the meeting was 20 about at your office with Mr. Berry, the first 21 meeting? 22 A. Yes. It was about the forms of relief 23 available under the various bankruptcy chapters. 24 Jerry was thinking about a possible bankruptcy, and 25 wanted to know what was involved.</p>
39	<p>1 Q. Okay. Can you -- were there also 2 telephone calls from Jerry Berry to your office? 3 A. Probably, but I -- well, there had to be 4 at least one. 5 Q. Okay. Did you receive telephone calls at 6 your office from Karietta Berry ever? 7 A. I don't think so. Not that I can 8 remember. 9 Q. Okay. 10 A. I mean, it's possible that -- you know, I 11 don't recall every phone call that I've had and 12 which number I got it at from years ago. But no 13 time lately. 14 Q. Okay. Do you know if you made telephone 15 calls to Jerry Berry from your law office? 16 A. Again, not specifically. Probably. 17 Q. Okay. What do you believe the first date 18 that Mr. Jerry Berry met with you in your law office 19 was? 20 A. Around 2001 or maybe 2002. 21 Q. Do you happen to remember anything about 22 the condition of the weather, if it was summer like, 23 rainy? 24 A. No, I don't. 25 Q. Was this a scheduled appointment when he</p>	41	<p>1 Q. Had you previously informed him that you 2 knew about the laws of bankruptcy, or was it just a 3 shot in the dark, you're a lawyer, he needs to know 4 some information? 5 A. No. He -- he knew I practiced in that 6 area. 7 Q. Okay. Do you know why Jerry was 8 considering bankruptcy? 9 A. Well, only from what he had told me. 10 Q. What was it that he had told you? 11 A. He said that there were some -- well, one 12 or more, and I don't recall -- judgments that he 13 owed stemming from some construction project that he 14 had been involved in Washington state, I believe. 15 Q. Okay. Do you know anything about the 16 amounts of the judgments, the total amount, or the 17 amount of either? 18 A. No. 19 Q. I believe you had previously indicated 20 that it was under 40,000 was your belief? 21 A. I don't recall any statement like that. 22 Q. Okay. Was Jerry concerned -- strike that. 23 At the time Jerry came in, did he tell you 24 what assets he owned? 25 A. Oh, probably.</p>

42	<p>1 Q. Okay. He would have indicated he owned 2 stock in the Captain's Wheel Resort Inc.? 3 A. Yeah. 4 Q. And how much stock in the Captain's Wheel 5 Resort Inc. did he own at the time? 6 A. I don't know. I think we probably would 7 have talked about what it was worth or something 8 like that, but that would be it. I didn't get any 9 specific lists from Jerry at that time. I only -- 10 we talked generally about what he owned, and we 11 talked in the context of exempt property, and we 12 talked about the procedures involved in bankruptcy 13 and the exemptions and that sort of thing. 14 Q. You say you talked about what it was 15 worth. Do you recall what that was? 16 A. No, I don't. 17 Q. You currently have the Captain's Wheel 18 Resort Inc. book. Do you know how much stock he 19 owned at the time you met with Jerry? 20 A. I presume. I'd have to look at the book. 21 Q. We can take one moment while you review 22 that. 23 A. (Viewing documents.) Well, certificate 24 number three, for the amount of 200 shares, shows 25 that it was issued to Jerry on the 22nd of September</p>	44	<p>1 A. Yes. And I don't know whether it was -- 2 whether he told me it was in her name at that time 3 or not. It may have put in her name subsequently. 4 I honestly don't know. I knew that he owned an 5 interest in the Wheel. Although I had examined the 6 certificates, I didn't see them until much later. 7 Whatever we discussed about his property, 8 I -- I -- I don't remember much about it. It would 9 -- it would have been discussing it in relation to 10 what is exempt and what is not under bankruptcy. 11 Q. So in general terms, you talked about what 12 he owned and also the debts that he owed? 13 A. In very general terms. 14 Q. Okay. Were you aware of any other debts, 15 aside from the judgments you have referenced from 16 the state of Washington? 17 A. I don't remember any. He may have told me 18 about them, but I don't have any notes of that. 19 Q. Was Jerry concerned that judgment 20 creditors may try and attach his shares in the 21 Captain's Wheel? 22 A. I wouldn't say concerned, no. Not at that 23 time. It was in his name and it was unregistered 24 stock. Nobody knew that he had it. 25 Q. So if he wasn't concerned about the</p>
43	<p>1 of 2000, signed by James and Jean Campbell. So, I 2 guess that's what he owned at the time, were those 3 200 shares. 4 Q. So it would be half of the outstanding 5 stock at the time? 6 A. Yes. 7 Q. Okay. Do you know who -- you may not want 8 to put that away just yet. 9 A. Uh-huh. 10 Q. Do you know who was the other -- who owned 11 the other outstanding stock at the time? 12 A. Yes, that, too, refer specifically. 13 (Viewing documents.) Jean A. Campbell at 100 14 shares, reflected on certificate number one, and 15 James T. Campbell had 100 shares issued the same 16 date, the 22nd of September. 17 Q. Okay. Aside from the Captain's Wheel 18 stock, did he indicate any other items that he 19 owned? 20 A. I'm going from -- purely from memory. I 21 believe, but am not sure why -- I knew he had a 22 house. He told me about that, but I don't know -- 23 it seems like he had -- at some point, Jerry told me 24 that the -- that the house was in Karletta's name. 25 Q. And that's his wife?</p>	45	<p>1 Captain's Wheel, what was his fear of creditors? 2 Why did he come to explore relief? 3 MR. WHELAN: Objection, calls for 4 speculation, lack of foundation. 5 Q. (By Mr. Finney) I'd ask you to please 6 answer the question. We can take that up -- 7 A. Say it again, please. 8 Q. You say he was not concerned about 9 creditors attaching the stock in the Captain's 10 Wheel? 11 MR. WHELAN: Well, hang on a minute. Now 12 he wants to get into an attorney-client 13 relationship. He doesn't hold the right. If that 14 right is waived, I supposed he can go ahead and talk 15 about it, but it hasn't been waived, to my 16 knowledge. 17 MR. FINNEY: Okay. Miss Berry is present 18 in the room here. Miss Berry is the personal 19 representative of the estate of Jerry Berry, and you 20 waive that right, correct? 21 MS. BERRY: Explain to me -- 22 MR. FINNEY: Attorney-client, anything 23 that -- the attorney-client privilege existing 24 between Mr. McFarland and your husband has now been 25 raised as an objection to answering the question.</p>

46	<p>1 Are you willing to waive?</p> <p>2 MS. BERRY: If -- if I waive it, then he</p> <p>3 can answer the question?</p> <p>4 MR. FINNEY: Yes.</p> <p>5 MS. BERRY: I will waive the -- the</p> <p>6 restriction on the attorney-client confidentiality.</p> <p>7 MR. FINNEY: Okay.</p> <p>8 Q. (By Mr. Finney) So we now have a waiver</p> <p>9 of the attorney-client privilege, so if could tell</p> <p>10 me about the attorney-client information you had</p> <p>11 from Mr. Jerry Berry, please.</p> <p>12 A. To the best of my recollection -- and I am</p> <p>13 not using -- I'm not going to say he was</p> <p>14 unconcerned. I just didn't necessarily agree with</p> <p>15 that particular term.</p> <p>16 Jerry had stock in the Captain's Wheel, as</p> <p>17 he represented to me, and it was not exempt. We</p> <p>18 talked about the fact that it was not registered,</p> <p>19 it's not publicly traded, that there is no public</p> <p>20 record of the ownership of the stock in a closely-</p> <p>21 held corporation. It's not reported to the</p> <p>22 Secretary of State.</p> <p>23 But if a judgment creditor -- number one,</p> <p>24 it would not be exempt in bankruptcy; number two, if</p> <p>25 the judgment creditor were to conduct a debtor's</p>	48	<p>1 approximate amount?</p> <p>2 A. He probably did, but I don't remember.</p> <p>3 Q. Do you know, was it a large amount or a</p> <p>4 small amount?</p> <p>5 A. As I said, I don't remember.</p> <p>6 Q. Would the amount of debts play into</p> <p>7 consideration of whether or not the stock was at</p> <p>8 risk?</p> <p>9 A. Well, if -- if he only owed ten dollars,</p> <p>10 he wouldn't have much to worry about. If he owed a</p> <p>11 lot of money, he would have more to worry about. I</p> <p>12 don't know, I don't remember how much he owed. I</p> <p>13 was enough that he was exploring options.</p> <p>14 Q. What bankruptcy options did you speak</p> <p>15 about with Jerry?</p> <p>16 A. I would have explained, as I do routinely,</p> <p>17 the different chapters, the relief available under</p> <p>18 the different chapters, and what's exempt and what's</p> <p>19 not.</p> <p>20 Q. Okay.</p> <p>21 A. Among other things.</p> <p>22 Q. Earlier under questioning you explained a</p> <p>23 Chapter 13 and a Chapter 7 of the video here today.</p> <p>24 A. Uh-huh.</p> <p>25 Q. Would that have been similar information</p>
47	<p>1 exam, it would certainly be discoverable. And since</p> <p>2 no such exam had been conducted, he didn't feel that</p> <p>3 it was at risk at the moment, as I recall.</p> <p>4 But he did talk about getting it into a</p> <p>5 trust or some other device, so that it ultimately,</p> <p>6 if there were to be some sort of a creditor's exam</p> <p>7 or something were to happen to him, it would be --</p> <p>8 he will be able to protect it. To the best of my</p> <p>9 recollection, the trust was his idea.</p> <p>10 Q. And I'm assuming that Jerry Berry got all</p> <p>11 the advice you've just given me from you, rather</p> <p>12 than he told you that it was no way creditors could</p> <p>13 find it without a debtor's exam?</p> <p>14 A. No. We talked about whether bankruptcy</p> <p>15 would give him the protection that he wanted, and</p> <p>16 ultimately determined that it would not, because</p> <p>17 there wasn't a way to exempt the stock in -- in a</p> <p>18 bankruptcy proceeding.</p> <p>19 And when a bankruptcy didn't seem like the</p> <p>20 appropriate thing, it seems to me that Jerry said he</p> <p>21 had considered putting it into a trust. That</p> <p>22 wouldn't have been my suggestion. And I think he</p> <p>23 brought that up.</p> <p>24 Q. Did he indicate the amount of the debts</p> <p>25 that he had, the reason he was coming to you, or any</p>	49	<p>1 that you would have told to Jerry Berry?</p> <p>2 A. Yes.</p> <p>3 Q. Was Chapter 7 an option?</p> <p>4 A. It wouldn't -- well, I don't know. There</p> <p>5 is always an option, but I don't think Jerry was</p> <p>6 talking about -- I don't know. We just -- we talked</p> <p>7 -- I explained what was available, and I explained</p> <p>8 the exemptions and how bankruptcy law works. It's</p> <p>9 an option for anyone.</p> <p>10 Q. You indicated earlier that Jerry had told</p> <p>11 you what he thought his stock in the Captain's Wheel</p> <p>12 was worth.</p> <p>13 A. Yes, but I don't recall what he said at</p> <p>14 that time. I don't know whether that stock was even</p> <p>15 paid for at that time. It was issued to him. I</p> <p>16 don't know if he owed anything. I don't know what</p> <p>17 it was worth then. He didn't -- I -- I have no</p> <p>18 recollection of that back then.</p> <p>19 Q. Did anyone else attend the meeting that we</p> <p>20 are speaking about with Jerry Berry?</p> <p>21 A. No.</p> <p>22 Q. Do you know who was working in your office</p> <p>23 the day that Jerry came in?</p> <p>24 A. No.</p> <p>25 Q. Did you make copies of any documents or</p>

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1 review any documents that day?
 2 A. I don't believe I did. I mean, I don't
 3 have any copies, so if Jerry asked me to make a copy
 4 of something, I would have done that, but I don't
 5 remember reviewing any documents at all.
 6 Q. And you say Jerry brought up the idea of
 7 creating a trust?
 8 A. Uh-huh.
 9 Q. Who -- did he say who would be the
 10 trustee, or the person to administer the trust?
 11 A. Oh, no.
 12 Q. To the best of your recollection, what was
 13 said about a trust?
 14 A. Something to the effect that bankruptcy
 15 didn't seem to provide any protection, or the
 16 protection that he was looking for, but maybe a
 17 trust would.
 18 Q. Did you tell him what types -- strike
 19 that.
 20 What protection was he looking for?
 21 A. My understanding was that he was looking
 22 to protect the stock in the Captain's Wheel from
 23 attachment by one or more creditors.
 24 Q. Okay. What protection did he believe a
 25 trust would provide that bankruptcy would not?

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1 A. I don't know.
 2 MR. WHELAN: I'm going to object on the
 3 grounds it calls for speculation, but if you have a
 4 guess.
 5 A. No. It's just bankruptcy wouldn't do it,
 6 because it was not exempt, and that might be another
 7 alternative. But, you know, I don't know how much he
 8 knew about trusts.
 9 Q. (By Mr. Finney) Can you explain, for my
 10 benefit, for people that don't know what exempt
 11 means, in lay terms, what you're saying?
 12 A. In bankruptcy -- or actually, in the state
 13 of Idaho, even if you're not in bankruptcy, your
 14 creditors may not take exempt property from you,
 15 with the exception of certain obligations for taxes
 16 or child support. If property is exempt, it can't
 17 be reached by your creditors. Stock is not exempt.
 18 Q. And also due to the value of the stock,
 19 meaning it's worth more than, presumably, a debt
 20 against it, is why it would be not be -- it would be
 21 -- excuse me -- an asset that creditors might try to
 22 attach?
 23 A. Equity in stock is an asset which is
 24 attachable by creditors.
 25 Q. You understood Jerry had equity in the

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1 stock?
 2 A. I don't recall. I'm thinking he must have
 3 either thought he did or thought -- or hoped to, but
 4 whether he did at that time and how much, I don't
 5 know.
 6 Q. Okay. Do you know who the judgment
 7 creditors out of the state of Washington were?
 8 A. No.
 9 Q. Do you know who their attorney is or was?
 10 A. No.
 11 Q. You did speak to an attorney for the
 12 judgment creditors, though, at some time?
 13 A. Not that I remember, but it is
 14 conceivable. I -- I don't know.
 15 Q. Have you reviewed the affidavit of Toby
 16 McLaughlin that was filed in this case?
 17 A. Yes.
 18 Q. Do you have a copy of that?
 19 A. Somewhere.
 20 Q. Can we take a second while you find it,
 21 please.
 22 A. (Viewing documents.)
 23 MR. WHELAN: Counsel, you don't have a
 24 copy of the exhibit you want to ask him about?
 25 MR. FINNEY: I'm not intending to make it

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1 an exhibit. I'm simply trying to refresh his
 2 memory. I have an unsigned copy, and I'm not sure
 3 it's the one that was actually filed. I do have the
 4 actual file document in my file, and I can locate
 5 that if necessary.
 6 A. (Viewing documents.) Okay. It might take
 7 me a minute to find it.
 8 Q. Well, let's go forward here.
 9 I have before me a memo from Berg &
 10 McLaughlin Chartered signed -- not signed -- but
 11 authored by Toby McLaughlin, in which he indicates
 12 on November 18, 2006, that he attended some sort of
 13 a corporate meeting for the Captain's Wheel Resort,
 14 and I believe it's at 8729 West Cloverleaf Drive in
 15 Hayden, Idaho, at 5:00 p.m. that the meeting took
 16 place.
 17 Have you seen a memorandum from Mr.
 18 McLaughlin as such?
 19 A. I have seen a copy of one, yes.
 20 Q. Okay. In this memorandum, Mr. McLaughlin
 21 indicates that you told him about the judgment
 22 creditors. Do you agree that you told Mr. McLaughlin
 23 about the judgment creditors?
 24 A. I don't remember what I talked to Mr.
 25 McLaughlin about. The -- the meeting was recorded,

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<p>1 and that's -- and the tapes are available to you to 2 review what was discussed. 3 Q. Okay. Do you recall telling Mr. 4 McLaughlin that you could not remember the name of 5 the judgment creditors or their attorneys, but that 6 an attorney of one of the judgment creditors had 7 contacted you, Mr. McFarland, within the last year 8 asking if you still represented Jerry Barry? 9 A. No, I don't remember that. 10 Q. Are you saying that didn't happen? 11 A. Saying what didn't happen? 12 Q. You did not tell him that, or are you 13 saying that you don't remember telling him that? 14 A. I doubt that I told him that. I certainly 15 don't remember telling him that. These are his 16 notes, not mine. 17 Q. Okay. 18 A. What he thinks he heard, you know, I have 19 no control over that. 20 Q. And you are indicating that you have here 21 today an audio recording of that conversation? 22 A. I have an audio recording of two meetings. 23 I don't know what conversation you're referring to. 24 Q. I'm referring to the conversation I have 25 just referenced where Mr. McLaughlin contends you</p>	<p>1 what property can be protected and what property 2 can't be protected. 3 I normally inform anyone who asks pretty 4 much the same thing. It's much like the speeches 5 that I might give at a Rotary Club luncheon, in 6 which I have done in the past, going through exactly 7 the same thing. Here is what bankruptcy is, here's 8 how it works, here's what's exempt, here are 9 procedures, et cetera. It doesn't involve giving 10 advice. It's information. 11 Q. So you consider yourself to be well 12 knowledgeable in bankruptcy? 13 A. There's always more to learn, but I've 14 done a lot of them. 15 Q. Was the answer yes? I saw you shaking 16 your head. 17 A. Restate the question. 18 Q. Do you consider yourself to have expertise 19 or knowledge in the bankruptcy area? 20 A. Knowledge, yes. 21 Q. Sufficient knowledge that people sometimes 22 ask you to speak at public events or at Rotary Club 23 meetings? 24 A. Yes. 25 Q. Do you know who has asked you to speak at</p>
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<p>1 told him that you had been contacted by an attorney 2 who had -- represented someone with a judgment 3 against Jerry Berry. 4 A. Uh-huh. 5 Q. Do you have an audio recording of that 6 conversation? 7 A. I'm not sure that conversation occurred. 8 I have an audio recording of the things that we 9 discussed when Mr. McLaughlin was at the house. 10 Q. Okay. 11 A. If it's not on that tape, it probably 12 wasn't said. 13 Q. Have you ever spoken to an attorney 14 representing a judgment creditor against Jerry 15 Berry? 16 A. Not that I can remember. 17 Q. It's possible, though? 18 A. It's possible. 19 Q. Okay. Back to your first meeting with 20 Jerry Berry you've talked about with me here today. 21 A. Uh-huh. 22 Q. What advice did you give Jerry at the 23 conclusion of the meeting? 24 A. I don't think I gave him advice. I 25 explained the options available in bankruptcy and</p>	<p>1 those meetings in the past? 2 A. Yes. 3 Q. Who would that be? 4 A. One that comes to mind is Mark Young, an 5 architect. 6 Q. Okay. And how long have you possessed 7 that knowledge that made you rise to the level where 8 people would ask you to speak at public meetings 9 about bankruptcy? 10 MR. WHELAN: I object to the form of the 11 question. 12 MR. FINNEY: I would ask you to go ahead 13 and answer, and we can take any objections up before 14 the court. 15 MR. WHELAN: If you don't understand it, 16 then rephrase it or reask it. 17 THE WITNESS: Yeah. Please reask the 18 question. 19 Q. (By Mr. Finney) How long have you had 20 this level of knowledge -- I'm saying from what 21 year, approximately, to make you this person that 22 people would come to and ask to speak at public 23 events about bankruptcy? 24 MR. WHELAN: I object to the form of the 25 question, but if you understand it, go ahead and</p>

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<p>1 answer.</p> <p>2 A. Well, I'm not sure I understand it. The</p> <p>3 level of knowledge was that required to pass the bar</p> <p>4 exam, so I imagine since 1980.</p> <p>5 Q. (By Mr. Finney) So for a long time?</p> <p>6 A. Yes.</p> <p>7 Q. Okay. And you held that level of</p> <p>8 knowledge in -- at the time you met with Jerry Berry</p> <p>9 in 2000 or 2001?</p> <p>10 A. I was licensed to practice before the</p> <p>11 United States Bankruptcy Court and have been since</p> <p>12 the early '80s.</p> <p>13 Q. Okay. You have indicated that you believe</p> <p>14 you had another meeting with Jerry Berry at your</p> <p>15 office in addition to the first one you've</p> <p>16 referenced?</p> <p>17 A. Yes.</p> <p>18 Q. Can you tell me when that took place.</p> <p>19 A. In July 2003.</p> <p>20 Q. Do you know the specific date in July of</p> <p>21 2003?</p> <p>22 A. I would have to look at the records. It's</p> <p>23 when Jerry came down to get the money, the 40,000.</p> <p>24 Q. Okay. I would like to let you go ahead</p> <p>25 and review that, the records.</p>	<p>1 Q. (By Mr. Finney) Okay. I have handed you</p> <p>2 what's marked as Deposition Exhibit 1. Have you</p> <p>3 seen this item before?</p> <p>4 A. Yes.</p> <p>5 Q. Can you tell me what it is.</p> <p>6 A. It's a receipt that I prepared and Jerry</p> <p>7 signed, dated July 25th of 2003.</p> <p>8 Q. And what is the receipt for?</p> <p>9 A. For \$40,000.</p> <p>10 Q. Am I correct to understand that the</p> <p>11 receipt indicates you gave \$40,000 to Jerry Berry?</p> <p>12 A. Yes.</p> <p>13 Q. Okay. And you have indicated you prepared</p> <p>14 it. Do you mean that you filled in all of the words</p> <p>15 on the receipt excluding Jerry Berry's signature</p> <p>16 and/or anything else?</p> <p>17 A. And the date, yes.</p> <p>18 Q. Okay. I draw your attention to what it</p> <p>19 says for, "There's a check mark "For."</p> <p>20 A. Yes.</p> <p>21 Q. It says, "Advance partial on loan to be</p> <p>22 secured by stock." Is that in your writing?</p> <p>23 A. Yes, it is. In my printing, uh-huh.</p> <p>24 Q. Okay. The receipt is dated 7-25-03; is</p> <p>25 that accurate?</p>
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<p>1 MR. WHELAN: Review what?</p> <p>2 MR. FINNEY: He indicated he has records</p> <p>3 that would tell him what the date Jerry came in was,</p> <p>4 and I'd like to go ahead and let him figure out what</p> <p>5 that day from his records.</p> <p>6 MR. WHELAN: Can you do that readily</p> <p>7 without taking two hours to look through all,</p> <p>8 through your bankers boxes?</p> <p>9 THE WITNESS: Well, it would be -- I think</p> <p>10 there is enough other information that shows when --</p> <p>11 when Jerry came to the office. It was whatever the</p> <p>12 date was, two weeks before he -- he got the other</p> <p>13 60,000.</p> <p>14 Q. (By Mr. Finney) Maybe I can assist.</p> <p>15 A. Okay.</p> <p>16 Q. Okay. I have here what's marked as</p> <p>17 Deposition Exhibit 1.</p> <p>18 A. (Viewing document.)</p> <p>19 Q. Maybe -- do you mind if I let your</p> <p>20 attorney see that first?</p> <p>21 A. No.</p> <p>22 MR. FINNEY: Sorry about not having an</p> <p>23 additional copy for you. (Handing document to</p> <p>24 counsel.)</p> <p>25 MR. WHELAN: (Viewing document.)</p>	<p>1 A. Yes.</p> <p>2 Q. And can you tell me what the \$40,000 was</p> <p>3 for?</p> <p>4 A. It was -- the first -- well, it was for</p> <p>5 the purchase of stock, if we were able to get the</p> <p>6 other 60. We needed \$100,000 to buy out the</p> <p>7 Campbells' share.</p> <p>8 This was all that was available at the</p> <p>9 time. We weren't even sure if we can get the other</p> <p>10 60. And so we got this much to him and made</p> <p>11 arrangements to try to borrow the -- the balance.</p> <p>12 Q. When you say "we," who are referring to?</p> <p>13 A. Karen Zimmerman and myself.</p> <p>14 Q. So the 40,000 that this receipt represents</p> <p>15 was your money and Karen Zimmerman's money?</p> <p>16 A. Yes.</p> <p>17 Q. Where did you hold this money?</p> <p>18 A. I don't remember. It could have been --</p> <p>19 if there was a check, and it says there was, it must</p> <p>20 have been put into a bank account, and which account</p> <p>21 I don't know.</p> <p>22 Q. Do you know, did you borrow the money from</p> <p>23 a trust which you were involved with?</p> <p>24 A. I wouldn't borrow money from a trust. No.</p> <p>25 This was -- this money was money that belonged to</p>

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1 Karen and Karen Zimmerman and me. And it was put
2 into some account and a check was drawn, and we paid
3 it to Jerry.
4 Q. Okay. And did you hold any cash before
5 putting it into the account or was it --
6 A. I don't remember that.
7 Q. Did you have large sums of cash available
8 at the time or a cash equivalent?
9 A. I never have large sums -- sums of cash
10 available. No. Cash equivalent, if -- if you mean
11 like in a checking or a savings account?
12 Q. A CD, a money market account, anything
13 like that?
14 A. Yeah. No, we didn't -- well, this 40,000
15 would have been our combined available liquid
16 assets.
17 Q. That was the entire amount of liquid
18 assets that you and Karen --
19 A. That we could -- that we could up -- no,
20 we didn't have together until it was combined for
21 this purpose. Probably more than half of it was
22 Karen's. I don't remember the exact proportions.
23 Q. Do you have any idea of where you got your
24 money from to combine with Karen's?
25 A. Earnings, savings.

1 wrote something down and -- and gave it to him.
2 But the basic idea was, we were getting
3 him \$40,000 to hold the stock in hopes that we could
4 get the other 60 and complete the transaction, if
5 we hadn't been able to get the other 60, it would
6 have basically been a loan, we couldn't -- it we
7 couldn't -- it we couldn't make -- make the deal
8 work.
9 Q. So where it says, "To be secured by
10 stock," you really didn't mean what you wrote?
11 MR. WHELAN: Objection. Argumentative.
12 assumes facts not in evidence, it miss --
13 misreferences the exhibit. The exhibit will speak
14 for itself.
15 Q. (By Mr. Finney) What stock referenced is
16 when the word "stock" appears on the receipt?
17 A. No stock is referenced. What I meant was
18 Captain's Wheel stock owned by James and Jean
19 Campbell.
20 Q. And who would be securing that stock for
21 this loan?
22 MR. WHELAN: Object to the form of the
23 question.
24 Q. (By Mr. Finney) Were James and Jean
25 Campbell pledging their stock to repay to the loan

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1 Q. Did you have a savings account at the
2 time?
3 A. I don't remember.
4 Q. Do you think you had it in cash, or did
5 you have it in an account that you drew it out of?
6 A. I don't remember that.
7 Q. You have referenced that the money
8 represented by the receipt for \$40,000 was to be
9 used to purchase stock, and you used the term "we."
10 Can you be more specific with name as to who was
11 purchasing stock and who we is?
12 A. Karen Zimmerman and I would be the we.
13 This was given to Jerry after we had discussions
14 about purchasing an interest in the Wheel, the
15 Captain's Wheel.
16 Q. And what -- the reference line says,
17 "Advance partial on loan to be secured by stock."
18 A. Uh-huh.
19 Q. Can you explain what that line means to
20 me?
21 A. What that means is it was -- what I
22 scratched out at the moment, for one thing. I
23 hadn't -- Jerry had said, "I suppose I should give
24 you a receipt for this." Hadn't even occurred to me
25 prior to that. So I got out my receipt book, and I

1 as security?
2 A. James and Jean Campbell didn't know about
3 this.
4 Q. Okay.
5 A. It's -- it's awkwardly worded. It was
6 done in probably less time than it takes to say it.
7 It was scribbled out, and it was -- basically this
8 was temporary. At that moment in time, it was more
9 like a loan than anything else, because we didn't
10 even know if we could come up with the rest of it,
11 of the money.
12 Q. Okay. Is this the only writing that was
13 made at the time that you gave the -- your \$40,000
14 combined with Karen to Jerry?
15 A. Yes.
16 Q. There was no other written document?
17 A. No. Should have been, but there wasn't.
18 Q. Were you concerned that Jerry Berry's
19 creditors may somehow attach this money?
20 A. No.
21 Q. Did you think they wouldn't be able to
22 find it, or did you believe they had been paid? Why
23 were you not worried about creditors?
24 A. I wasn't thinking about creditors. I was
25 thinking about acquiring -- or acquiring an interest

<p style="text-align: right;">66</p> <p>1 in the -- in the Captain's Wheel.</p> <p>2 Q. Okay. You have referenced the names James</p> <p>3 and Jean Campbell. I'm not sure it's real clear,</p> <p>4 for the purposes of our deposition today, who those</p> <p>5 people are.</p> <p>6 A. Uh-huh.</p> <p>7 Q. And also relevant to the time 7-25-03.</p> <p>8 Can you tell me first who James and Jean Campbell</p> <p>9 are in relation to the Wheel at that time?</p> <p>10 A. James and Jean Campbell owned half of the</p> <p>11 shares of the Captain's Wheel at this time, and they</p> <p>12 were wanting to sell them, rather desperate to sell</p> <p>13 them, for \$100,000.</p> <p>14 Q. Did you know of James and Jean Campbell</p> <p>15 yourself?</p> <p>16 A. Just as acquaintances. Never socialized</p> <p>17 with them.</p> <p>18 Q. And was Jerry trying to buy those shares</p> <p>19 of stock; Jerry Berry?</p> <p>20 A. Yes.</p> <p>21 Q. Were you aware if Jerry had tried to</p> <p>22 obtain financing from some other source other than</p> <p>23 yourself and Karen?</p> <p>24 A. He told me he had.</p> <p>25 Q. Can you be specific as to what he told</p>	<p style="text-align: right;">68</p> <p>1 concerned that the -- another couple who was trying</p> <p>2 to buy the Campbells out, Dan and Wendy, whose last</p> <p>3 names I don't know. He was afraid they were going</p> <p>4 to be able to -- to do that before -- before he</p> <p>5 could. The Campbells were very anxious to leave,</p> <p>6 and -- and Jerry talked to Karen and me.</p> <p>7 It was in -- in July, and especially</p> <p>8 around the 4th of July, Dan and Wendy, who hadn't</p> <p>9 even put any money down yet, were greeting people at</p> <p>10 the door and acting like they owned the place, and</p> <p>11 kind of taking over, and they hadn't even bought in</p> <p>12 yet.</p> <p>13 And this was really frustrating to Jerry,</p> <p>14 and he said to Karen and me -- because we had been</p> <p>15 friends for some time by then -- and he said, "Geez,</p> <p>16 I wish you guys could somehow buy in," you know, and</p> <p>17 we talked about -- we talked about it over several</p> <p>18 times.</p> <p>19 But eventually, when we -- when we talked</p> <p>20 about how we might be able to come up with -- with</p> <p>21 part of it, might be able to borrow it, then Jerry</p> <p>22 was just ecstatic. He -- "If you guys can come in,</p> <p>23 you know, we can -- I can run the place, you can be</p> <p>24 silent partners. We'll split the profit when --</p> <p>25 when the place sells."</p>
<p style="text-align: right;">67</p> <p>1 you?</p> <p>2 A. Basically that this -- this went on over a</p> <p>3 few weeks, when Campbells decided to sell. And</p> <p>4 Jerry was trying everything he could think of to</p> <p>5 come up with the money to be able to buy them out,</p> <p>6 and he related that to Karen and me.</p> <p>7 Q. Were you in a relationship with Karen at</p> <p>8 that time as well?</p> <p>9 A. Yes.</p> <p>10 Q. Did Jerry inform you that he had tried to</p> <p>11 obtain some sort of financing through a lending</p> <p>12 institution and was rejected?</p> <p>13 A. I don't think he talked -- I don't</p> <p>14 remember any of the specifics. He talked about</p> <p>15 contacting friends. He may have talked to lending</p> <p>16 agencies. I don't remember the details. I just</p> <p>17 know he -- he was trying everything he could think</p> <p>18 of, and he just wasn't able to come up with the</p> <p>19 money.</p> <p>20 Q. Okay. Did you then approach Jerry about</p> <p>21 loaning him money?</p> <p>22 A. No. No.</p> <p>23 Q. How did the topic of this \$40,000 loan</p> <p>24 come up?</p> <p>25 A. The -- it came up by Jerry -- Jerry was</p>	<p style="text-align: right;">69</p> <p>1 And his -- he talked to us about how --</p> <p>2 how the value was -- how valuable this -- this deal</p> <p>3 was and how much he didn't want to be partners with</p> <p>4 -- are we --</p> <p>5 MR. FINNEY: I was trying to determine the</p> <p>6 amount of time we have left.</p> <p>7 THE WITNESS: Oh, okay.</p> <p>8 MR. FINNEY: I think I have determined we</p> <p>9 have about 20 minutes before we --</p> <p>10 MR. WHELAN: I would still like to take a</p> <p>11 break about now. We've been going about an hour.</p> <p>12 MR. FINNEY: Okay.</p> <p>13 MR. WHELAN: An hour and a few minutes.</p> <p>14 MR. FINNEY: All right.</p> <p>15 MR. WHELAN: So let's take five.</p> <p>16 MR. FINNEY: Thanks.</p> <p>17 THE VIDEOGRAPHER: Okay. Hold on please.</p> <p>18 Okay. The time is 10:50, and we are off the record.</p> <p>19 (Recess.)</p> <p>20 THE VIDEOGRAPHER: We are back on the</p> <p>21 record. The time is 11:03.</p> <p>22 Q. (By Mr. Finney) Mr. McFarland, we were</p> <p>23 just speaking about the \$40,000 that's represented</p> <p>24 on Exhibit 1 for our deposition here today. The</p> <p>25 "For" line says, "Advance partial on loan to be</p>

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1 secured by stock."
 2 Can you explain to me what the agreement
 3 was, if any, at the time that receipt was delivered
 4 to Mr. Berry?
 5 A. The agreement was, Jerry had asked us to
 6 basically buy out the Campbells, but as silent
 7 partners. He was essentially our agent, and he was
 8 going to use our money to acquire Campbells' half
 9 interest in the Captain's Wheel.
 10 And it was -- he was going to run
 11 everything. We were to be silent partners. We were
 12 not to be involved in the negotiations with the
 13 Campbells. He wanted to do it all himself, but
 14 using our money.
 15 At the time that we got him the first
 16 40,000, we were hopeful that we could borrow the
 17 rest, actually, that Karen could borrow the rest,
 18 but we weren't certain.
 19 So, at that point, it was a loan of
 20 \$40,000 with the idea that we needed to get the
 21 balance of the 60, the other 60,000, to bring it to
 22 a total of 100,000 in order for him to be able to
 23 buy the Campbells' stock and hold it for us.
 24 Q. What were the terms of that loan that you
 25 have referenced, the \$40,000, loan?

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1 A. Yes. The 40 -- the 40 would have -- I
 2 guess my thinking at the time, and -- and, you know,
 3 I remember just writing this out very hurriedly, but
 4 basically, yeah, at that time it's a -- it's a loan
 5 until we can get the balance. If we couldn't get
 6 the balance, Jerry would have get it elsewhere or it
 7 might get sold to the other people and we'd get that
 8 back.
 9 Q. Okay. Typically a loan has terms, which
 10 include interest and a repayment date or schedule.
 11 Was there any interest rate agreed upon?
 12 A. No.
 13 Q. Was there any repayment schedule on the
 14 loan?
 15 A. No. It would either be -- it was -- it
 16 was a temporary situation that was going to be
 17 resolved very shortly. Either the -- either we get
 18 the other 60 and the deal would go through, or we
 19 couldn't, and we'd get it back. There was no talk
 20 about any interest. This was a temporary, a very
 21 short-term situation.
 22 Q. Was any -- strike that.
 23 To your knowledge, were any of the funds
 24 represented by the \$40,000 paid as earnest money or
 25 any sort of consideration to keep the deal open so

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1 that Jerry could purchase the stock from Campbell?
 2 A. I don't know details. I know that the
 3 money went to Paul Daugherty, or was handled through
 4 Paul Daugherty's office. I wasn't party to any of
 5 those discussions. Jerry wanted to handle that all
 6 himself.
 7 Q. And who was Paul Daugherty?
 8 A. He was the attorney, presumably the
 9 attorney for either the Captain's Wheel or for the
 10 Campbells or both. I don't know.
 11 Q. Could he have been an attorney for Jerry
 12 Berry at all?
 13 A. Possibly, I don't know. I don't know who
 14 Paul represented.
 15 Q. Did the 40,000 go directly to Paul
 16 Daugherty?
 17 A. I don't know.
 18 Q. Was there some reason you gave out 40,000
 19 rather than wait until you had the one entire
 20 100,000?
 21 A. Oh, yes.
 22 Q. And what was that?
 23 A. Dan and Wendy were negotiating with not
 24 only the Campbells, but with Jerry. They were
 25 apparently able to put together around 40,000.

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1 Campbells wanted the -- the whole hundred. And the
 2 only way that -- well, I shouldn't say the only way.
 3 Dan and Wendy had even asked Jerry to subrogate his
 4 interest in the stock that he owned so that they
 5 could get a loan against the -- the Captain's Wheel,
 6 but they needed the -- the full authority; they
 7 needed to be ahead of -- of Jerry. They needed 100
 8 percent of the stock to secure a loan they were
 9 going to get for the -- for the balance. They
 10 hadn't paid anything, to the best of my knowledge,
 11 in yet. They just were able to raise that amount.
 12 And it's one of -- one of the things that
 13 Jerry mentioned was that he was afraid that if we --
 14 if he couldn't lock the deal, then the Campbells,
 15 who were getting desperate, might go ahead and take
 16 that deal from the -- from Dan and Wendy, and he
 17 would have lost his opportunity.
 18 So, that was one of the reasons he asked
 19 us in the first place was, if we can get in, if we
 20 can buy in, he'd much rather have us as partners
 21 than -- than -- than Dan and Wendy, and we would
 22 just let him run it. We wouldn't have to do
 23 anything. We just -- he would buy the stock and
 24 hold it for us as our -- as our agent to -- and it
 25 was -- it was all his suggestion, and he basically

74	<p>1 sold us on it, and we we -- we bought in.</p> <p>2 Q. Did you have any concerns that after Jerry</p> <p>3 acquired the stock in his name, creditors may attach</p> <p>4 that stock?</p> <p>5 A. I don't remember having any such concerns.</p> <p>6 Q. The entire proposed purchase price to</p> <p>7 acquire the one half of the stock owned by the</p> <p>8 Campbells was a total of 100,000?</p> <p>9 A. Yes.</p> <p>10 Q. And were you able to generate an</p> <p>11 additional 60,000 to give to Jerry?</p> <p>12 A. Yes.</p> <p>13 Q. When did the next 60,000 go to Jerry?</p> <p>14 A. Almost exactly two weeks later after this</p> <p>15 date.</p> <p>16 Q. I have looked through all of the things I</p> <p>17 can find, and I don't see a second receipt. Do you</p> <p>18 have any receipt or a document that shows a transfer</p> <p>19 of an additional 60,000 to Jerry Berry?</p> <p>20 A. No.</p> <p>21 Q. Do you have a copy of a certified check?</p> <p>22 A. I don't.</p> <p>23 Q. Have you seen one that was produced in</p> <p>24 discovery?</p> <p>25 A. Not from -- no. Well, I don't know. I --</p>	76	<p>1 Q. And Karen paid a portion of the 40?</p> <p>2 A. Yes.</p> <p>3 Q. Do you know how much was Karen's of the</p> <p>4 40?</p> <p>5 A. More than half I would say.</p> <p>6 Q. Do you know where she got her half from?</p> <p>7 A. No.</p> <p>8 Q. And -- and the remaining 60 was a loan</p> <p>9 that she had taken out?</p> <p>10 A. Yes.</p> <p>11 Q. Do you know, was the loan for the 60,000</p> <p>12 taken out by Karen secured by anything?</p> <p>13 A. I presume so, but I wasn't a party to that</p> <p>14 -- that transaction.</p> <p>15 Q. Did Karen tell you anything about the</p> <p>16 loan?</p> <p>17 A. Well, she -- sure. But I don't -- I don't</p> <p>18 know the specifics. I did not sign the documents.</p> <p>19 She's a very capable lady. She was able to arrange</p> <p>20 this herself.</p> <p>21 Q. Did she take a loan against real property?</p> <p>22 A. Presumably.</p> <p>23 Q. And did that loan have a monthly payment</p> <p>24 amount that had to be repaid against it for the</p> <p>25 60,000?</p>
75	<p>1 I have seen some checks maybe that were -- maybe a</p> <p>2 copy of a check given to the Campbells or something.</p> <p>3 But, no. The -- the check that went to Jerry --</p> <p>4 actually, Karen -- Karen is the one that gave him</p> <p>5 the check. I don't know if I -- I was probably -- I</p> <p>6 was probably there, but I didn't -- I didn't sign</p> <p>7 the check. I didn't -- Karen borrowed the money, I</p> <p>8 didn't.</p> <p>9 Q. So we're talking two weeks after 7-25-03?</p> <p>10 A. Yes, give or take a day, uh-huh.</p> <p>11 Q. And you say Karen borrowed the money?</p> <p>12 A. Yes.</p> <p>13 Q. Do you understand where she borrowed it</p> <p>14 from or have any knowledge about that?</p> <p>15 A. I believe it was from Idaho Independent</p> <p>16 Bank.</p> <p>17 Q. And you did not sign as an applicant?</p> <p>18 A. No.</p> <p>19 Q. Did you have any interest in those loan</p> <p>20 proceeds?</p> <p>21 A. No. Well, no. They -- no, they were</p> <p>22 Karen's.</p> <p>23 Q. Okay. So of the total 100,000, you paid a</p> <p>24 portion of the 40.</p> <p>25 A. Yes.</p>	77	<p>1 A. My recollection is that it was interest</p> <p>2 only. Yes, uh-huh.</p> <p>3 Q. Okay.</p> <p>4 THE VIDEOGRAPHER: Okay. This marks the</p> <p>5 end of disk number one in the deposition of Michael</p> <p>6 McFarland. The time is 11:13, and we are off the</p> <p>7 record.</p> <p>8 (Recess.)</p> <p>9 THE VIDEOGRAPHER: We are back on the</p> <p>10 record.</p> <p>11 Here marks the beginning of disk number</p> <p>12 two in deposition of Michael McFarland. The time is</p> <p>13 11:17.</p> <p>14 MR. FINNEY: For the record, this is Mr.</p> <p>15 Finney, plaintiffs' attorney, continuing with the</p> <p>16 questioning.</p> <p>17 Q. (By Mr. Finney) Mr. McFarland, when we</p> <p>18 switched disks, you were explaining that Karen had</p> <p>19 obtained a loan to get \$60,000 to give to Jerry to</p> <p>20 combine with the 40,000. You said there was a</p> <p>21 payment amount on that loan that Karen had taken</p> <p>22 out?</p> <p>23 A. Yes.</p> <p>24 Q. And what do you understand that payment to</p> <p>25 be?</p>

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1 A. I think it varied, because I believe it
2 was an interest-only loan with a variable rate. And
3 I know at one point it was running around \$300 a
4 month, but at other times it may have been more or
5 less.

6 Q. Do you know what the interest rate was?

7 A. No.

8 Q. Did you ever make the payment on that
9 loan?

10 A. No.

11 Q. Do you know what was security for the
12 \$60,000 that Karen borrowed?

13 A. I am not -- not certain. Some land that
14 she had.

15 Q. Jerry Berry made payments that loan; is
16 that correct?

17 A. No. No. Jerry never was a party to that
18 loan. Jerry knew that Karen had had to borrow the
19 money, and he insisted on, when he had the funds, on
20 reimbursing her so that it wasn't costing her
21 anything out of pocket.

22 We were getting nothing from the Wheel in
23 terms of income, and was just an investment, and we
24 weren't being salaried or being paid any way by the
25 Wheel, and Jerry voluntarily insisted on reimbursing

1 weren't even to know that we were involved.

2 Q. What was the tactical reason to keep it
3 secret from the Campbells?

4 A. I don't know if I'd characterize it as
5 tactical. Jerry's reasons were twofold, at least

6 twofold. One was, he was a very proud man. He

7 wanted to be -- he didn't want to have to share

8 things with Dan and Wendy. He wanted partners that

9 would allow him to run it the way he wanted to, and

10 represent himself as the owner and the host and so

11 forth.

12 And he was particularly trifle, I guess,

13 when it came to his partners. He wanted to

14 establish, in their minds at least, that he -- he

15 had the -- the horsepower to do this. That was --

16 that was certainly one of the reasons.

17 The -- the other was that he wanted us to

18 be truly silent partners. He didn't want us

19 involving ourselves in the management, partly

20 because we both already worked and had -- had our

21 own things going on, and he wanted the ability to

22 run that by himself, just -- it was his dream to --

23 to run that business by himself and see if he could

24 turn it into something that he had envisioned. He

25 wanted to do that before selling it. He thought he

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1 her for the -- for the payment, and he did it

2 sometimes, and sometimes he was not able to.

3 Q. So at times Jerry paid the interest on the

4 loan that was to acquire you and Karen's stock?

5 A. Yes. Well, he paid it to Karen. He

6 reimbursed Karen for the interest that it was

7 costing her.

8 Q. Okay. Did you know how many payments

9 Jerry made to Karen?

10 A. No.

11 Q. Do you know any amounts of payments Jerry

12 made to Karen?

13 A. I'm -- as I say, I -- I know that there

14 were -- at one point, the payment amount was around

15 -- the interest amount was around \$300.

16 Q. When Karen gave the additional \$60,000 to

17 Jerry, do you know was Jerry able to obtain the

18 Campbells' stock in the Captain's Wheel?

19 A. Yes, he was.

20 Q. Were you present at any of those meetings?

21 A. Which meetings?

22 Q. Any meeting where Jerry obtained the stock

23 from the Campbells.

24 A. No. He was our agent. We are not -- we

25 were not involved. We were not to -- the Campbells

1 could make it even more valuable and more

2 marketable.

3 And so we were -- and he didn't want the

4 community at large to know that we were involved.

5 He wanted to be able to represent that business as

6 his to the community, and everything was to look

7 that way. He wanted us in, but he wanted us as

8 silent partners, and we were fine with that.

9 Q. Prior to giving this \$100,000 to Jerry in

10 2003, were you a regular at the Captain's Wheel?

11 A. Yes.

12 Q. Okay. And how often did you come in?

13 A. You know, depending on the weather and the

14 season, most -- I'd say weekly during -- during --

15 during the summer, when there was music and

16 sometimes when there wasn't as well, but at least

17 weekly.

18 Q. Do you know what day Jerry obtained the

19 Campbells' shares and became owner of 100 percent of

20 the stock in the Captain's Wheel?

21 MR. WHELAN: Objection, misstates the

22 testimony, assumes facts not in evidence, calls for

23 speculation.

24 Q. (By Mr. Finney) Okay. If you can answer,

25 that would be great.

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1 A. When Jerry used our money acquire the
2 Campbells' stock was around August 7th, give or
3 take. I'm not sure of the exact date. It was -- it
4 was around two weeks after July 25th.
5 Q. Of which year?
6 A. Of 2003.
7 Q. August 7th, 2003, was there any written
8 agreement entered into between yourself and Jerry
9 Berry?
10 A. No.
11 Q. Was there any written agreement between
12 Jerry Berry and Karen or yourself?
13 A. No.
14 Q. Assuming August 7, 2003 is when Jerry
15 acquired the Campbells' stock, did you begin to come
16 into the restaurant more often after this August
17 7th, 2003?
18 A. I don't think more often. Probably as
19 often.
20 Q. Okay. Prior to the time Jerry acquired
21 the Campbells' stock, did you pay for your meals?
22 A. Yes.
23 Q. Did you pay for your drinks?
24 A. Yes.
25 Q. Okay. After Jerry acquired the Campbells'

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1 minute book, and I'd like to make a photocopy and
2 have it marked as an exhibit.
3 A. (Viewing documents.) Okay. They're in
4 here. They are also attached to my affidavit that
5 you already had marked as --
6 O. Okay.
7 A. -- a deposition exhibit. Did you want a
8 separate -- want to mark it separate?
9 Q. No, we don't need a separate one. If you
10 can identify it on -- is it Exhibit 9 to the
11 deposition?
12 A. (Viewing documents.) It is -- the
13 resolution is Exhibit 4, consisting of two pages,
14 and the stock purchase agreement is Exhibit 5.
15 Q. To clarify the record, that's Exhibit 4
16 and Exhibit 5 to what's Exhibit 9 for the
17 deposition?
18 A. Correct.
19 Q. Okay.
20 A. Anything else out of here?
21 Q. Not at this moment.
22 . Okay. Once again, reviewing Exhibit 4 and
23 Exhibit 5 to what's -- and those are not exhibits
24 for this deposition, but they're attached to Exhibit
25 9 of this deposition -- which is an affidavit you

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1 stock in his name in 2003, did that arrangement
2 change?
3 A. Yes.
4 MR. WHELAN: Hold it. Hold it. I object
5 on the grounds you're assuming facts not in
6 evidence. You're assuming that that stock that
7 Jerry acquired for the defendants was put in his
8 name. There is no evidence of that.
9 MR. FINNEY: Okay.
10 Q. (By Mr. Finney) Mr. McFarland, was the
11 stock Jerry acquired from Jean and James Campbell
12 put into Jerry's name?
13 A. Eventually.
14 Q. Did Jerry have any sort of a purchase and
15 sale agreement for the stock?
16 A. I presume so. I didn't -- unless it's in
17 the -- anything in addition to the resolution that
18 Jerry and the Campbells signed, and there was a -- I
19 believe there was an agreement, a stock purchase and
20 sale agreement or something in the minute book.
21 Q. Okay.
22 A. Those are the -- if it -- if it's in the
23 minute book, I've seen it. If it's not in the
24 minute book, I probably haven't.
25 Q. Okay. I'd ask you to obtain that from the

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1 have prepared.
2 A. Uh-huh.
3 Q. What date did Jerry obtain the stock
4 purchase and sale agreement from the Campbells?
5 A. The stock purchase and sale agreement
6 doesn't have a date on it, but it was evidently
7 signed around the same time that Exhibit 4, which
8 was dated August 7th, 2003.
9 Q. There has been some ado made about the
10 fact that the stock certificates were not actually
11 transferred at that time? At that time being August
12 7, 2003, the stock certificates were not actually
13 transferred to Jerry Berry in the corporate book; is
14 that correct?
15 A. What do you mean by ado?
16 Q. Some noise being made that somehow Jerry
17 didn't own the stock at that time?
18 A. I'm not aware of any noise.
19 Q. Okay. So, would you agree that Jerry at
20 that time owned the stock that Campbells had
21 previously owned?
22 A. The stock -- the resolution and the stock
23 purchase agreement both say what they say. The --
24 the stock certificate from Campbells to Jerry --
25 their purchase and sale agreement is between the

86	<p>1 Campbells and Jerry. Jerry was to buy that with our 2 money for us. Our names would not be on it, were 3 not to be on it.</p> <p>4 These agreements were signed. But on the 5 face of the stock certificates and on the record of 6 the corporation, they weren't actually transferred, 7 new certificates made out, until much later.</p> <p>8 I'm not saying that Jerry had not acquired 9 -- for all practical purposes hadn't acquired the 10 stock for us. It's just it wasn't actually 11 transferred on the -- on the stock transfer ledger 12 or a new -- new certificate entered -- created.</p> <p>13 Q. Okay. So subsequent to the date of the 14 resolution and the stock purchase and sale 15 agreement, I believe that's the same date the 16 \$100,000 was transferred to Campbell, did Jerry make 17 any form of payments to you?</p> <p>18 A. To me, no.</p> <p>19 Q. Did he make any -- did you obtain goods or 20 services at the Captain's Wheel at a discount or 21 without paying at the end of your meal or drinks?</p> <p>22 A. Starting with the second meal, we went to 23 dinner at the -- at the Wheel not -- not longer 24 after this was done and had dinner and -- 25 MR. WHELAN: "This." What are you</p>	88	<p>1 He said, "You guys are owners. You don't pay. You 2 don't have to pay."</p> <p>3 Q. Well, was the decision any more his as 4 half owner? You're taking the position you were half 5 owner, correct?</p> <p>6 A. He was taking that position. Yes, I take 7 that position, too. But that's what he said, "You 8 guys are --" "You guys are owners. You don't have 9 to pay."</p> <p>10 Q. As owner, was that your position as well?</p> <p>11 A. I was fine with it. I didn't -- I didn't 12 see -- I wasn't able to kick a gift horse in the 13 mouth. Well, it wasn't a gift horse. But I wasn't 14 going to insist on paying if -- if one of the perks 15 of being an owner was that you got to eat free.</p> <p>16 Q. During that time, did you provide any 17 capital or any money to the business to help it run?</p> <p>18 A. In --</p> <p>19 Q. '03.</p> <p>20 A. -- '03, no.</p> <p>21 Q. It wasn't necessary?</p> <p>22 A. Not that I am aware.</p> <p>23 Q. Okay.</p> <p>24 A. Jerry never asked us for any further 25 contribution.</p>
87	<p>1 referring to?</p> <p>2 A. After this -- after this -- after August 3 7th, we went sometimes just a few days later to the 4 -- to the Captain's Wheel, and Karen that I had 5 dinner and drinks, and we paid for them. And Jerry 6 -- Jerry came to us and said -- after we had already 7 paid, he said, "You guys are owners. You don't have 8 to pay. What you have -- the money you hadn't spent 9 yet?" And from then on we didn't pay.</p> <p>10 Q. (By Mr. Finney) Do you know, did Jerry 11 maintain any record or keep any documents and 12 receipts that showed what you ate and drank --</p> <p>13 A. Oh, sure.</p> <p>14 Q. -- at the Captain's Wheel?</p> <p>15 A. Yes.</p> <p>16 Q. Okay. And did he keep a tabulation on 17 those?</p> <p>18 A. I'm sure he did keep track -- you keep 19 track of everything, whether you're bringing in 20 money or whether you're comping it or whether it's 21 an owner, you always keep track.</p> <p>22 Q. Okay. And your position is, those were 23 somehow given to you as gratuity because you were 24 part owner?</p> <p>25 A. I wouldn't characterize it as gratuity.</p>	89	<p>1 Q. Was this free meals and drinks similar to 2 the way Jerry paid the loan payments on Karen's 3 loan?</p> <p>4 A. No. No. These were -- we just signed for 5 the meals.</p> <p>6 Q. Did you keep track of how much in meals 7 you were given --</p> <p>8 A. No.</p> <p>9 Q. -- during 2003?</p> <p>10 A. No.</p> <p>11 Q. I have provided to your attorney a stack 12 of receipts that -- in a discovery response that we 13 purport are all items you received for free at the 14 Captain's Wheel from 2003, some from 2004. Have you 15 reviewed those documents?</p> <p>16 A. Some time ago I looked at them.</p> <p>17 Q. Do you know how much you were receiving in 18 free food and beverage from the Wheel?</p> <p>19 A. No, I don't recall that at the time. It 20 was -- it was -- it was not minimal. We -- we ate 21 there regularly.</p> <p>22 Q. Okay. Subsequent to Jerry Berry's death, 23 have you continued to exercise that privilege where 24 you eat for free?</p> <p>25 A. Yes, but to a much lesser extent,</p>

90	<p>1 particularly recently.</p> <p>2 Q. Do you agree Jerry passed away November 4,</p> <p>3 2006?</p> <p>4 A. That sounds about right.</p> <p>5 Q. Okay. After November 4, 2006, have you</p> <p>6 made any effort to keep track of the free meals and</p> <p>7 drinks that you have received -- and when I say you,</p> <p>8 I mean you and Karen -- have received at the Wheel?</p> <p>9 A. No.</p> <p>10 Q. No? No record?</p> <p>11 A. I haven't maintained a record of it.</p> <p>12 Q. Has anyone maintained a record?</p> <p>13 A. I would think so. I would imagine the --</p> <p>14 when the -- when the meals are written up, that</p> <p>15 those -- those tickets go somewhere. But I -- I</p> <p>16 haven't really discussed that with the -- with the</p> <p>17 staff, and I didn't -- I didn't ask for that --</p> <p>18 wasn't asked to bring that, or at least I didn't</p> <p>19 think I was asked to bring that for today.</p> <p>20 Q. Do you have any idea how much in free food</p> <p>21 and free drinks you have received since Jerry's</p> <p>22 death?</p> <p>23 A. No, not really.</p> <p>24 Q. Would it be in the hundreds of dollars?</p> <p>25 A. Probably.</p>	92	<p>1 don't -- I mean, that -- that kind of thing</p> <p>2 happened. I wouldn't say that was necessary --</p> <p>3 necessarily typical.</p> <p>4 Q. Okay. Do you know the charge for one of</p> <p>5 these orders of oysters?</p> <p>6 A. No.</p> <p>7 Q. Have you reviewed the menu?</p> <p>8 A. Yeah, but I hadn't made any attention to</p> <p>9 it.</p> <p>10 Q. Do you believe it's over ten dollars?</p> <p>11 A. Probably, uh-huh.</p> <p>12 Q. Okay. And your typical meal with those</p> <p>13 oysters, what would you typically have or sometimes</p> <p>14 have?</p> <p>15 A. It might be -- if there was a special, it</p> <p>16 could be fish, it could be chicken, it could be just</p> <p>17 normal restaurant fare. Quite often we would -- we</p> <p>18 would try the special if there was one.</p> <p>19 Q. Did you eat prime rib?</p> <p>20 A. I certainly have.</p> <p>21 Q. At the Captain Wheel?</p> <p>22 A. I think so.</p> <p>23 Q. Tenderloin?</p> <p>24 A. Maybe, but I -- I really don't keep track</p> <p>25 of exactly what I have -- what I have eaten at</p>
91	<p>1 Q. What is it that you -- strike that.</p> <p>2 Since Jerry's death, how often do you come</p> <p>3 in to the restaurant to eat?</p> <p>4 A. It's been some time, and it's -- it's</p> <p>5 varied. We haven't eaten there for several months.</p> <p>6 Q. Okay. Starting with November 2006, do you</p> <p>7 know how regularly you came in to the restaurant?</p> <p>8 A. No. Weekly or so I would guess, but it</p> <p>9 could have been more or less.</p> <p>10 Q. Okay. And when you come in, and say it</p> <p>11 was on a weekly basis, what is it you order for</p> <p>12 dinner typically?</p> <p>13 A. I don't know if there's a typical order.</p> <p>14 I have some favorites, but I don't think there's a</p> <p>15 typical order.</p> <p>16 Q. One witness named Scott Robertson, who was</p> <p>17 employed at the restaurant, indicated you came in</p> <p>18 and ate -- was it oysters I believe?</p> <p>19 A. Oh, yeah, uh-huh.</p> <p>20 Q. So, when you come in, do you typically</p> <p>21 have oysters and a meal?</p> <p>22 A. I don't know if there is a typical. At</p> <p>23 times I might have a meal and a side of oysters, and</p> <p>24 then I would take them out for breakfast in the</p> <p>25 morning, the uneaten portion. But, you know, I</p>	93	<p>1 various places.</p> <p>2 Q. Have you logged what you eat as a</p> <p>3 distribution from the corporation or is it --</p> <p>4 A. No.</p> <p>5 Q. Do you to consider it just a fringe</p> <p>6 benefit?</p> <p>7 A. I never considered it one way or the</p> <p>8 other. Jerry said owners don't pay, and I didn't</p> <p>9 think further about it.</p> <p>10 Q. Okay. Have you brought people, guests</p> <p>11 with you to the restaurant and paid for their meals</p> <p>12 in the same fashion?</p> <p>13 A. I don't -- maybe. Maybe on a -- on a rare</p> <p>14 occasion.</p> <p>15 Q. Okay. And what are the names of the</p> <p>16 guests that you have brought in and provided -- you</p> <p>17 have signed for their meal?</p> <p>18 A. I think I brought my son and his wife on</p> <p>19 his birthday.</p> <p>20 Q. What is your son's name?</p> <p>21 A. Kevin.</p> <p>22 Q. And what is his birth date?</p> <p>23 A. May 9th.</p> <p>24 Q. Which year did you celebrate his birthday?</p> <p>25 A. Oh, we celebrate it every year.</p>

94	<p>1 Q. Which year did you celebrate his birthday 2 at the Wheel where you purchased his food? 3 A. I don't know. 4 Q. Have you done it in 2009? 5 A. No. 6 Q. 2008? 7 A. Possibly. 8 Q. Does he have children as well? 9 A. Yes, small. 10 Q. Did the children attend, too? 11 A. Yes. 12 Q. Do you have a phone number for Kevin? 13 A. No. Well, I have one, but not with me. 14 Q. Do you know where he can be reached? 15 A. Yeah. 16 Q. Where would that be? 17 A. At his home. 18 Q. Okay. Is Kevin employed as a law 19 enforcement officer? 20 A. No. 21 Q. Okay. Where is Kevin's home? 22 A. In Coeur d'Alene. 23 Q. Do you know the address? 24 A. Not off the top of my head. 25 Q. Can you track down his phone number if I</p>	96	<p>1 A. No. 2 Q. Have you brought any other person, aside 3 from Kevin, and signed for their meal? 4 A. Not that I can recall with the -- well, I 5 wouldn't have signed for it. We have had members of 6 the band who have eaten. I don't think I signed for 7 them, though. One -- one of the bands that plays 8 there has -- my -- my daughter is a part of that 9 band. And -- and normally as part of the 10 consideration for the performance, they eat. 11 Q. What is the name of that band? 12 A. Ozmo Boggie. 13 Q. And what is your daughter's name? 14 A. Erin. 15 Q. How do you spell Erin? 16 A. E-r-i-n. 17 Q. And what is her last name? 18 A. Cooper. 19 Q. Does she reside in Kootenai County? 20 A. Yes. 21 Q. Do you know her address? 22 A. No. 23 Q. Do you know which street or road she lives 24 on? 25 A. She lives off Skid Road.</p>
95	<p>1 give you a few minutes? 2 MR. WHELAN: He is not obligated to do 3 that. If you have questions you want him to ask, 4 you can ask him. But he's required to do your 5 research for you. 6 So do you know what your son's address is? 7 THE WITNESS: No. 8 MR. WHELAN: Okay. The next question. 9 Q. (By Mr. Finney) Do you know which street 10 he lives on? 11 A. Yes. 12 Q. Which street does your son Kevin live on? 13 A. Easy. 14 Q. Easy Street? 15 A. Yes. 16 Q. Is that within the city limits of Coeur 17 d'Alene? 18 A. I believe so. 19 Q. I presuming Kevin's last name is 20 McFarland? 21 A. That's right. 22 Q. Did you keep track of the free food that 23 you provided to Kevin -- 24 A. No. 25 Q. -- how much?</p>	97	<p>1 Q. Since Jerry Berry's death, the only people 2 you have provided free food to are your son and his 3 wife and family and your daughter? 4 A. I didn't say that. 5 Q. Okay. Who would the other people be? 6 A. I don't -- I don't remember right now. 7 There -- there may be others, there may not. I 8 haven't kept track of it. 9 Q. In the last three years, have you had 10 dinner with other people in the Wheel? 11 A. Uh-huh, yes. 12 Q. And who would those people be? 13 A. I don't know. 14 Q. Would you have signed for their meal as 15 owner, provided them with their dinner for eating 16 with you? 17 A. Generally not. There could be exceptions, 18 but I don't want to just give away the -- the 19 Wheel's money. So, no. Generally, I rarely -- 20 rarely pay for other people's meals. 21 Q. Do you know the names of any of the people 22 who you have paid for their meals? 23 A. No, not at this time. I can't remember 24 any specifics. 25 Q. Do you also -- excuse me. Starting with</p>

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1 Jerry Berry's death, did you also get alcohol served
 2 for free?
 3 A. Yes.
 4 Q. What is your beverage of choice, as far as
 5 alcohol?
 6 A. Red wine.
 7 Q. Do you get a bottle of wine with dinner?
 8 A. Sometimes.
 9 Q. Okay. And what is the typical cost or
 10 sales price for the Wheel for a bottle of wine that
 11 you would get?
 12 A. The type that we normally drink, it's
 13 called Bistro Rouge, out of Pend d'Oreille Winery,
 14 and I think we get it from Odom at somewhere around
 15 seven dollars a bottle.
 16 Q. That seems to be a fairly inexpensive
 17 wine. Are there any more expensive types that you
 18 drink?
 19 A. Not at the Captain's Wheel. Maybe once,
 20 but --
 21 Q. What would that one be there you had?
 22 A. I have no idea. I do you remember one
 23 that, Lonnie, one of the managers, had recommended.
 24 We were out of Bistro, and she recommend it. I
 25 don't remember the name of it. I have no idea

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1 whether it cost more or less.
 2 Q. Do you know when that time was?
 3 A. Within the past year or so.
 4 Q. Okay. Since Jerry's death, do you know,
 5 has Kerletta been in and been eating for free at the
 6 restaurant?
 7 A. Since his death, yes. She came in at
 8 least and signed for herself and her boyfriend
 9 shortly after Jerry's death.
 10 Q. Okay. Isn't it true that after she came
 11 in that one time, you informed her she could not
 12 bring a boyfriend?
 13 A. No, I didn't inform her she couldn't bring
 14 her boyfriend. I informed the staff that she was
 15 not authorized to sign for guests. She was
 16 authorized to sign for her own meals, but not for
 17 guests.
 18 Q. But you retained the privilege to sign for
 19 guests?
 20 A. Yes.
 21 Q. Have you given any other free services to
 22 people since Jerry Berry's death?
 23 A. Free services?
 24 Q. Well, you have boat slips at the Captain's
 25 Wheel, correct?

100

1 A. Yes.
 2 Q. Have you allowed anyone to park a boat at
 3 the Captain's Wheel boat parking spots without
 4 charge?
 5 A. Well, there are two slips that are for
 6 guests only, so they are never charged. And, yes,
 7 part of the -- we traded several of the members of
 8 Ozmo Boogie, the band, have a boat, and rather than
 9 paying for -- paying cash for music, we have a given
 10 them credit against the boat slip rental, so they've
 11 -- they've worked off their boat slip by -- by
 12 paying without us having to be out of pocket.
 13 Q. What would the rate or charge be for that
 14 boat slip?
 15 A. Depending on the -- on the season and how
 16 much competition there is, there's lots of slips in
 17 Bayview, and these are not in very good shape. But
 18 I'd say somewhere around \$700, 7 to -- 7 to 750.
 19 Q. Per month?
 20 A. No, for the season.
 21 Q. And referring to season, you're referring
 22 to some time of the year, a set of months?
 23 A. From -- well, you can't use the docks all
 24 year, because they've drawn the lake down so far the
 25 docks are sitting on the gravel right now. The

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1 season is from when the lake comes up and there's no
 2 ice until either things freeze up or until they draw
 3 the lake back down. So, basically summer.
 4 Q. Okay. Now, does the band own this boat,
 5 or does it belong to your daughter?
 6 A. It belongs to three -- I think three --
 7 just three couples. My daughter is one of those
 8 couples. The other two couples are both members of
 9 the band.
 10 Q. And what are their names?
 11 A. Josh and Heidi Cooper, and Zach and
 12 Marshana Cooper, and my daughter and her husband
 13 Jeremy are co-owners of that boat.
 14 Q. Is Erin Cooper a real estate agent?
 15 A. No.
 16 Q. Okay. And has this boat rental or boat
 17 slip provided to the band taken place subsequent to
 18 Jerry's death?
 19 A. Yes.
 20 Q. Are there any other payments made to the
 21 band, aside from free food and free boat parking?
 22 A. That particular band, yes.
 23 Q. Okay.
 24 A. Once they used up their -- once they had
 25 paid off the boat slip, they did one or two

102	<p>1 subsequent performances for which they were paid.</p> <p>2 Q. What is their charge for a performance?</p> <p>3 A. I don't remember. Probably a couple</p> <p>4 hundred bucks, 2- to 300.</p> <p>5 Q. Do they still eat for free --</p> <p>6 A. I don't know.</p> <p>7 Q. -- and get paid?</p> <p>8 A. I -- I don't know.</p> <p>9 Q. Going back to the time that Jerry first</p> <p>10 came to your office, and that would be in 2000 or</p> <p>11 2001; is that right?</p> <p>12 A. About that.</p> <p>13 Q. Do you know what the debts of the</p> <p>14 Captain's Wheel Resort were at that time?</p> <p>15 A. No clue.</p> <p>16 Q. Okay. When did you first make any</p> <p>17 determination as to what the debts of the Captain</p> <p>18 Wheel Resort were; what year?</p> <p>19 A. I don't know that I made the determination</p> <p>20 initially. Jerry told us that, when he was trying</p> <p>21 to sell us on the idea of buying in, that he figured</p> <p>22 the place was worth -- and I think there were</p> <p>23 several different numbers popped around -- but worth</p> <p>24 800 to a million, but then there was about, he said</p> <p>25 -- it was less than 300,000 SBA loan, so that the --</p>	104
103	<p>1 the net value was, you know, it could have been 6-</p> <p>2 700,000, a hundred thousand of -- but he only talked</p> <p>3 about the corporate debt in the context of the SBA</p> <p>4 loan. I didn't know if there were other -- other</p> <p>5 debts or not.</p> <p>6 Q. What date, approximate date was that</p> <p>7 information given to you?</p> <p>8 A. It would have been somewhere prior to --</p> <p>9 probably at least a couple of weeks prior to our</p> <p>10 getting him that first 40,000. It would have been</p> <p>11 during our discussions, when he was trying to tell</p> <p>12 us what a -- what a bargain it is.</p> <p>13 Q. Were those same topics addressed in the</p> <p>14 meeting in your office, what the business was worth,</p> <p>15 the corporation?</p> <p>16 A. The meeting in my office was in 2001 or</p> <p>17 so, this other one was in 2003, a couple of years</p> <p>18 later. Which meeting are you talking about?</p> <p>19 Q. I'm talk -- I said the one in your office</p> <p>20 in 2001, when he was worried about possibly losing</p> <p>21 that equity in his shares.</p> <p>22 A. I don't remember what the situation was</p> <p>23 back then. It's too far back. I don't remember any</p> <p>24 of the specifics other than going over bankruptcy</p> <p>25 with him, and I remember him mentioning the stock</p>	105
102	<p>1 and mentioning the possibility of a trust. I don't</p> <p>2 know if he represented to me how much, if any,</p> <p>3 equity he had at that time or not. I just don't</p> <p>4 remember. The only -- first time I came -- became</p> <p>5 aware of any debt of the Captain's Wheel itself was</p> <p>6 probably in conjunction with his telling us what a</p> <p>7 deal it was and why we should be buying in.</p> <p>8 Q. So, the way Jerry explained it was the</p> <p>9 value of the real state was 800 to a million, and</p> <p>10 the debts were 300,000; you just simply subtract the</p> <p>11 debt --</p> <p>12 A. Bellpark.</p> <p>13 Q. -- from the -- okay. Do you agree that's</p> <p>14 a fair way to somewhat value the equity in the</p> <p>15 stock?</p> <p>16 A. Well, it -- it's certainly a component.</p> <p>17 The stock is worth, bottom line, what the net worth</p> <p>18 of the corporation is.</p> <p>19 Q. And that would be the value of the assets</p> <p>20 minus the value of the debts?</p> <p>21 A. Uh-huh.</p> <p>22 Q. Okay. Did you have any appraisal done as</p> <p>23 to the value of the real property at the time you</p> <p>24 gave Jerry the \$100,000?</p> <p>25 A. No.</p>	104
103	<p>1 Q. Did you seek any opinion from Karen, or</p> <p>2 any other person, as to the value of the real</p> <p>3 estate?</p> <p>4 A. No.</p> <p>5 Q. Did you have any opinion of your own?</p> <p>6 A. I thought that Jerry was probably pretty</p> <p>7 close in his estimates.</p> <p>8 Q. Had you been informed of any appraisals at</p> <p>9 that time?</p> <p>10 A. It seems like Jerry had an appraisal done</p> <p>11 some time prior, or perhaps around the same time,</p> <p>12 but I don't -- I never saw it. It seems like he may</p> <p>13 have -- he discussed it at one time, but I didn't</p> <p>14 know when it was.</p> <p>15 Q. Okay. When did you first identify what</p> <p>16 the actual debts of the corporation were; which</p> <p>17 year?</p> <p>18 A. 2006, and after Jerry passed away.</p> <p>19 Q. Okay. And what debts were you able to</p> <p>20 identify for the corporation at that time?</p> <p>21 A. Well, I knew there was the SBA loan, the</p> <p>22 bank account was overdrawn, there were suppliers</p> <p>23 that weren't paid. As far as itemization, I don't -</p> <p>24 - you know, I don't recall it. But the -- the</p> <p>25 corporation was in -- it was not keeping up. And we</p>	105

106	<p>1 never talked with Jerry about the -- about the debts</p> <p>2 prior to his -- to his death, other -- I -- I -- no,</p> <p>3 I correct -- I correct myself on that one.</p> <p>4 When Jerry was still living, when we</p> <p>5 talked about -- at the -- it think it at the meeting</p> <p>6 where -- where the stock was ultimately transferred</p> <p>7 and where the officers were elected, we talked --</p> <p>8 Jerry told us at that time that he normally tried to</p> <p>9 go into the winter with about 25,000, and that</p> <p>10 management cost money, and since he had been sick,</p> <p>11 he hadn't been able to really run it the way he</p> <p>12 wanted to, and we were -- he told us that it was</p> <p>13 behind about 20- to 25,000.</p> <p>14 Q. I believe I have reviewed a resolution,</p> <p>15 indicated that the corporation owed some money to</p> <p>16 Jerry. was it \$77,000. Is that --</p> <p>17 A. Yes.</p> <p>18 Q. Okay. At the time in 2006 you were</p> <p>19 referencing after Jerry's death, does the</p> <p>20 corporation still owe Jerry Berry 7 -- was it</p> <p>21 \$77,000?</p> <p>22 A. That was the number that was put in the</p> <p>23 resolution.</p> <p>24 Q. Has that debt been paid by the</p> <p>25 corporation?</p>	108	<p>1 don't think there was much left on it. But I'd have</p> <p>2 to check.</p> <p>3 MR. FINNEY: Due to your attorney needs to</p> <p>4 leave for some other matters, we're going to</p> <p>5 continue this deposition as stated in the notice,</p> <p>6 and we'll reconvene on Wednesday, December 23rd, at,</p> <p>7 I believe, noon or as soon as possible after the</p> <p>8 hearing on the motion to amend for punitive damages.</p> <p>9 I'll see you then.</p> <p>10 THE WITNESS: Okay. The same place?</p> <p>11 MR. FINNEY: Yes.</p> <p>12 THE VIDEOGRAPHER: Here marks the end of</p> <p>13 video disk number two in the deposition of Michael</p> <p>14 McFarland. We are off the record.</p> <p>15 THE REPORTER: Would you like a copy of</p> <p>16 this transcript, Mr. Finney?</p> <p>17 MR. FINNEY: Yes. I want the transcript,</p> <p>18 I want the video package.</p> <p>19 THE VIDEOGRAPHER: Okay.</p> <p>20 MR. FINNEY: I guess we can talk about</p> <p>21 that after we --</p> <p>22 THE VIDEOGRAPHER: Sure.</p> <p>23 THE REPORTER: Would you like a copy of</p> <p>24 the transcript?</p> <p>25 MR. WHELAN: Yeah, I'll take a copy.</p>
107	<p>1 A. No, except possibly a few hundred dollars</p> <p>2 of it, when Karietta was still receiving weekly</p> <p>3 money from the Wheel. But that's never been</p> <p>4 resolved --</p> <p>5 Q. Okay.</p> <p>6 A. -- whether that's an offset or not.</p> <p>7 Q. Okay. Back to -- you say you checked into</p> <p>8 the SBA, the small business loan? Was it an AT&T</p> <p>9 small business loan?</p> <p>10 A. CIT.</p> <p>11 Q. CIT. What was the balance owed on that</p> <p>12 debt when you checked it in 2006?</p> <p>13 A. I don't recall. 200 and -- 240, 50-ish.</p> <p>14 Q. \$240,000?</p> <p>15 A. Or so, I think.</p> <p>16 Q. I believe something I have seen indicated</p> <p>17 there might be a purchase money loan on the lot next</p> <p>18 door in the amount of 25,000?</p> <p>19 A. Oh, yes. And that -- that -- whatever</p> <p>20 that was, that's subsequently been paid, yes. It is</p> <p>21 no longer in this.</p> <p>22 Q. Okay. When was the lot next door the</p> <p>23 Captain's Wheel now owns paid off?</p> <p>24 A. Either right before or right after Jerry's</p> <p>25 death, reason -- reasonably close to that time. I</p>	109	<p>1 (Whereupon, deposition of MICHAEL B.</p> <p>2 McFARLAND concluded at 12:02 p.m.)</p> <p>3</p> <p>4</p> <p>5</p> <p>6</p> <p>7</p> <p>8</p> <p>9</p> <p>10</p> <p>11</p> <p>12</p> <p>13</p> <p>14</p> <p>15</p> <p>16</p> <p>17</p> <p>18</p> <p>19</p> <p>20</p> <p>21</p> <p>22</p> <p>23</p> <p>24</p> <p>25</p>

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1 CERTIFICATE

2

3 I, Marilyn J. Broyles, do hereby certify that pursuant

4 to the Rules of Civil Procedure, the witness named

5 herein appeared before me at the time and place set

6 forth in the caption herein; that at the said time

7 and place, I reported in stenotype all testimony

8 adduced and other oral proceedings had in the

9 foregoing matter, and that the foregoing transcript

10 pages constitute a full, true and correct record of

11 such testimony adduced and oral proceeding had and

12 of the whole thereof.

13

14 IN WITNESS HEREOF, I have hereunto set my hand this

15 22nd day of December, 2009.

16

17

18

19

20 /Signed April 21, 2010

21 Marilyn J. Broyles Commission Expiration

22

23

24

25

112

1 CORRECTION SHEET

2

3 Deposition of: Michael McFarland Date: 12/18/09

4 Regarding: Berry Vs. McFarland

5

6 Please make all corrections, changes or clarifications

7 to your testimony on this sheet, showing page and line

8 number. If there are no changes, write "none" across

9 the page. Sign this sheet on the line provided.

10 Page Line Reason for Change

11 _____

12 _____

13 _____

14 _____

15 _____

16 _____

17 _____

18 _____

19 _____

20 _____

21 _____

22 _____

23 _____

24 Signature _____

25 Michael McFarland

111

1 Date: December 23, 2009 Assignment #: 11867-3

2 Attorney: John Whelan, Esquire

3 Deponent: Michael McFarland

4 Case: Berry Vs. McFarland

5

6 ATTORNEY - TRANSCRIPT ENCLOSED: Signature of your

7 client

8 is required. Please have your client make any corrections

9 necessary. Sign the Correction Sheet where indicated.

10 Forward a COPY of the executed Correction Sheet directly

11 to the attorney(s) listed below. (The Address(es) can be

12 found on the Appearance page of the deposition.) Also,

13 send a COPY of the executed Correction Sheet to our

14 corporation.

15

16

17 CC: Rex Finney, Esquire

18

19

20

21

22

23

24

25

113

1 DECLARATION

2

3 Deposition of: Michael McFarland Date: 12/18/09

4 Regarding: Berry Vs. McFarland

5

6

7

8 I declare under penalty of perjury the following to

9 be true:

10

11 I have read my deposition and the same is true and

12 accurate save and except for any corrections as made

13 by me on the Correction Page herein.

14

15 Signed at _____

16 on the _____ day of _____, 2009

17

18

19

20

21

22

23

24 _____

25 Michael McFarland

RECEIPT

DATE 7/25/03 No. 605197

RECEIVED FROM MICHAEL B MCFARLAND \$40000

Forty Thousand DOLLARS

FOR RENT
 FOR ADVANCE (PARTIAL) ON LOAN TO BE SECURED BY STOCK

ACCOUNT		<input type="checkbox"/> CASH
PAYMENT		<input checked="" type="checkbox"/> CHECK
BAL. DUE		<input type="checkbox"/> MONEY ORDER

FROM _____ TO _____

BY [Signature] 7-25-03 1182

EXHIBIT

_____ / _____

DATE: 12-18-09
NAME: Michael McFarland

STATE OF IDAHO
COUNTY OF KOOTENAI } SS
FILED:

John P. Whelan, P.C.
Attorney at Law
213 N. 4th Street
Coeur d' Alene, Idaho 83814
Telephone: (208) 664-5891
Facsimile: (208) 664-2240
ISB No. 6083

2009 DEC 28 PM 4:53

CLERK DISTRICT COURT

DEPUTY

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE STATE OF
IDAHO, IN AND FOR THE COUNTY OF KOOTENAI

KARLETTA GRACE BERRY, a widow,
KARLETTA GRACE BERRY, Personal
Representative of the Estate of Jerry
Lee Roy Berry, CAPTAIN'S WHEEL
RESORT, INC., an Idaho Corporation,

Plaintiffs,

vs.

MICHAEL B. MCFARLAND, MICHAEL B.
MCFARLAND, P.A., and KAREN
ZIMMERMAN,

Defendants.

Case No. CV-07-2409

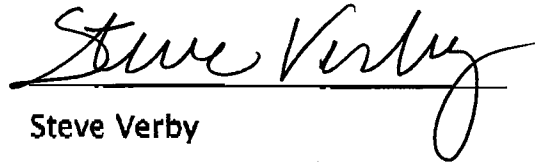
ORDER PERMITTING TELEPHONIC
APPEARANCE

The Court, having before it the Motion to Appear Telephonically filed John P. Whelan, attorney for Michael B. McFarland, Michael B. McFarland, P.A., and Karen Zimmerman; NOW, THEREFORE:

IT IS HEREBY ORDERED that John P. Whelan may appear telephonically at the hearing scheduled December 23, 2009 at 10:15 a.m.

ORDER PERMITTING TELEPHONIC APPEARANCE-1

DATED this 11th day of December, 2009.

A handwritten signature in cursive script that reads "Steve Verby". The signature is written in black ink and is positioned above a horizontal line.

Steve Verby
District Judge

ORDER PERMITTING TELEPHONIC APPEARANCE-2

CLERK'S CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 11th day of December, 2009, I caused to be served a true and correct copy of the foregoing by the method indicated below, and addressed as indicated below:

Rex A. Finney
Finney, Finney & Finney
120 East Lake Street, Suite 317
Sandpoint, ID 83865

Via: U.S. Mail, postage prepaid
 Facsimile (208) 263-8211

John P. Whelan, P.C.
213 N. 4th
Coeur d' Alene, ID 83814

Via: U.S. Mail, postage prepaid
 Facsimile (208) 664-2240

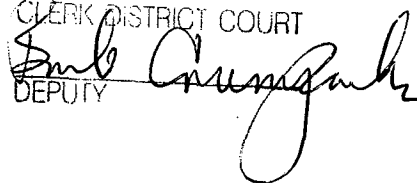
Cherie Moore
Clerk for Judge Verby

STATE OF IDAHO }
COUNTY OF KOOTENAI } SS
FILED

#720666

2009 DEC 31 PM 3:18

CLERK DISTRICT COURT
DEPUTY



REX A. FINNEY
FINNEY FINNEY & FINNEY, P.A.
Attorneys at Law
Old Power House Building
120 East Lake Street, Suite 317
Sandpoint, Idaho 83864
Phone: (208) 263-7712
Fax: (208) 263-8211
ISB No. 6313

**IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF KOOTENAI**

KARLETTA GRACE BERRY, a widow,	)	Case No. CV-2007-2409
KARLETTA GRACE BERRY, Personal)	
Representative of the Estate	)	PLAINTIFFS' EXHIBIT LIST
of Jerry Lee Roy Berry,)	
CAPTAIN'S WHEEL RESORT, INC.,)	
an Idaho Corporation,)	
)	
Plaintiff,)	
)	
v.)	
)	
MICHAEL B. MCFARLAND, MICHAEL)	
B. MCFARLAND, P.A., and KAREN)	
ZIMMERMAN,)	
)	
Defendant.)	

COMES NOW the Plaintiffs and submits the following as a list of exhibits to be used in trial. Counsel is planning to reorganize the exhibits into a format that is more consistent with the order the exhibits will be offered or used during trial.

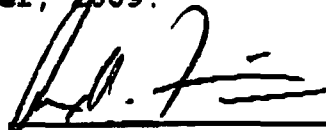
1. **Appraisal Report from David Noonan (already provided)**
2. **John P. Whelan, fax of December 30, 2009 with**

- attached fax from Michael B. McFarland to JP Whelan dated 12/26/09.
3. Audio visual and transcript and exhibits of deposition of Michael McFarland from 12/18/09 and 12/23/09.
 4. Audio visual and transcript and exhibits of deposition of Karen Zimmerman from December 21, 2009.
 5. Affidavit of Michael McFarland
 6. Cashier's check No. 1081104 in amount of \$60,000.00 from Jerry Berry to James and Jean Campbell date 8/4/03
 7. Cashier's Check to Jerry Berry dated 8/4/03 in amount of \$60,000.00
 8. cashier's check to Campbell dated July 25, 2009 from Jerry Berry for \$40,000.00
 9. Cashier's check to Jerry L. Berry in the amount of \$40,000.00 dated July 25, 2003
 10. receipt from Jerry Berry to Michael B. McFarland in amount of \$40,000.00 dated 7/25/03
 11. Check from Jerry Berry to Karen Zimmerman dated 9/29/03 in the amount of \$823.50
 12. Check from Jerry L. Berry to Karen Zimmerman dated 10/11/03 in the amount of \$301
 13. Letters of Personal Representative in Estate of Jerry Lee Roy Berry
 14. Bylaws of Captain's Wheel Resort Inc. by Nordstrom and Campbell
 15. Resignation of Susan Nordstrom as Officer and director
 16. Resignation of Norman Nordstrom as Officer and director
 17. Resolution in Lieu of Special Meeting of Board of Directors of Captain's Wheel Resort, Inc. date August 7, 2003
 18. Stock Purchase Agreement from Campbell to Jerry Berry
 19. Stock Purchase Agreement from Nordstrom to Jerry Berry
 20. Demand Promissory Note dated September 22, 2000
 21. Minutes of Organizational Meeting of Directors/Incorporators of Captain's Wheel Resort Incorporated signed by Campbell
 22. Resolution In Lieu of Special Meeting of Board of Directors of Captain's Wheel (unsigned)
 23. Resolution In Lieu of Special Meeting of Board of Directors of Captain's Wheel Resort, Inc.

- (unsigned)
24. Reinstatement Notice showing Karletta G. Berry as V-pres/Sec dated 7/18/06
 25. August 11, 2003 letter from Paul Daugherty to Whom it May Concern
 26. Resolution in Lieu of Special Meeting signed by Campbell and Jerry Berry
 27. April 28, 2004 letter from Paul Daugherty to Jerry Berry
 28. Hand written letter from Jerry Berry to Paul Daugherty
 29. To Whom It May Concern handwritten note regarding 40,000.00 payment to Campbell
 30. Sept 29, 2003 Letter from Paul Daugherty to Jerry Berry
 31. Business Card for Captain's Wheel showing Hosts as Jerry & Karletta Berry
 32. November 18, 2006 letter from Karletta Berry to Michael McFarland and Karen Zimmerman
 33. Objection to Notice of Special Meeting dated November 18, 2009 signed by Karletta Berry
 34. Proposed resolution dated November 18, 2006 from Karletta Berry
 35. November 17, 2006 letter from Karletta G. Berry to the Board of the Captain's Wheel
 36. Minutes of the Special Meeting of Shareholders of Captain's Wheel signed by Jerry, Karletta, Michael and Karen
 37. Waiver of Notice dated October 15, 2006
 38. Notice of Special Meeting of Directors dated 10/15/06 3:00
 39. Minutes of Special Meeting dated 10/15/06
 40. Notice of Special meeting for October 15, 2006 at 2:30 pm
 41. Waiver of Notice of Special Meeting for October 15, 2006 at 2:30 pm
 42. Minutes of Special Meeting (2pgs)
 43. Bylaws of Captain's Wheel Resort, Inc - unsigned and blanks filled in by Michael McFarland (9 pgs)
 44. Stock Purchase and Sale Agreement from Jerry Berry to Karen Zimmerman and Michael McFarland
 45. Proposed but unsigned stock purchase and sale agreement establishing trust
 46. loan agreement with stock as collateral - unsigned
 47. marriage license - Jerry Berry and Karletta Berry
 48. Memo from Toby McLaughlin date 2/15/07 with

- Exhibit A and B
49. Memo from Toby McLaughlin dated November 30, 2006
 50. Memo from Toby McLaughlin dated November 22, 2006
 51. November 16, 2006 correspondence from Michael McFarland to Rex Finney with attached Notice of special meeting
 52. November 29, 2009 correspondence from Michael McFarland to Rex Finney
 53. January 28, 2007 correspondence from Michael McFarland to Rex Finney
 54. February 5, 2007 correspondence from Michael McFarland to Rex Finney with Notice of Special Meeting to remove Karletta as Director
 55. Notice of Stock
 56. copy of manila envelope and 118 pages of meal tickets which represent free food and drink to McFarland and Zimmerman during 2003 and 2004 in the amount of \$657.40 (2003) and \$2,087.83 (2004) totaling 119 pages.

DATED this 31 day of December, 2009.



REX A. FINNEY
 Attorney at Law

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was served by facsimile and by e-mail, this 31st day of December, 2009, and was delivered as follows:

J.P. WHELAN P.C. Attorney at law 213 N. 4 th Street Coeur d'Alene, Idaho 83814	Judge Verby chamber's copy [x]Via Hand Delivery (w/out exbts)
[x]Via Facsimile: (208) 664-2240 without exhibits	
[x]Via e-mail: <u>jpwhelanattorney@yahoo.com</u> with exhibits	

By: Besky Klalis

REX A. FINNEY
FINNEY FINNEY & FINNEY, P.A.
Attorneys at Law
Old Power House Building
120 East Lake Street, Suite 317
Sandpoint, Idaho 83864
Phone: (208) 263-7712
Fax: (208) 263-8211
ISB No. 6313

STATE OF IDAHO }
 COUNTY OF KOOTENAI } SS
 FILED #650 del

2009 DEC 31 PM 1:30

CLERK DISTRICT COURT
Paul Crump
 DEPUTY

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF KOOTENAI

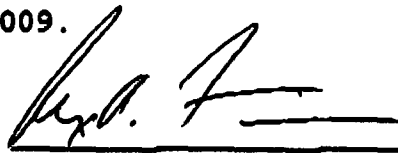
KARLETTA GRACE BERRY, a widow,	)	Case No. CV-2007-2409
KARLETTA GRACE BERRY, Personal)	
Representative of the Estate	)	PLAINTIFFS' WITNESS LIST
of Jerry Lee Roy Berry,)	
CAPTAIN'S WHEEL RESORT, INC.,)	
an Idaho Corporation,)	
)	
Plaintiff,)	
)	
v.)	
)	
MICHAEL B. MCFARLAND, MICHAEL)	
B. MCFARLAND, P.A., and KAREN)	
ZIMMERMAN,)	
)	
Defendant.)	
)	

COMES NOW the Plaintiffs and submits the following as a
list of witnesses to be called at trial:

1. **Karletta Grace Berry**
2. **Michael McFarland**
3. **Karen Zimmerman**
4. **Toby McLaughlin, Attorney**
5. **Paul Wilson Daugharty, Attorney**
6. **David Noonan (expert)**
7. **Jimmy Black (expert)**
8. **Sharilyn Cano**
9. **Richard Cano**

10. Scott Robertson
11. Monnie Cripe
12. Marie Streater
13. Erin Cooper
14. Kevin Mcfarland
15. Jim Campbell
16. Jean Campbell
17. Merry Cusack, Attorney
18. Tony Dejong
19. Theresa Clifton
20. Dr. Morich
21. Dr. Tezcan
22. Dr Grossett
23. Dorothy Carpenter
24. Daveana Plegnac Huff
25. Cheyenne Valdez
26. Michael L. Perrizo
27. Byron G. Powell
28. Frank Conklin
29. Ben Darrell
30. McCall Lanwier, Buck and Burkhart, or employee thereof
31. Mark Witham at Wells Fargo Bank
32. Dan & Wendy Tallarico
33. Randy Mote

DATED this 31 day of December, 2009.



 REX A. FINNEY
 Attorney at Law

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was delivered as indicated, this 31st day of December, 2009, and was addressed as follows:

J.P. WHELAN P.C.
 Attorney at law
 213 N. 4th Street
 Coeur d'Alene, Idaho 83814
 (Via Facsimile: (208) 664-2240)

Judge Verby
 chamber's copy
 (Via Hand Delivery)



John P. Whelan, P.C.
Attorney at Law
213 N. 4th Street
Coeur d' Alene, Idaho 83814
Telephone: (208) 664-5891
Facsimile: (208) 664-2240
ISB No. 6083

STATE OF IDAHO }
COUNTY OF KOOTENAI } SS
FILED: 130

2010 JAN -4 PM 4: 13

CLERK DISTRICT COURT

Henry Huppman
DEPUTY

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE STATE OF
IDAHO, IN AND FOR THE COUNTY OF KOOTENAI

KARLETTA GRACE BERRY, a widow,
KARLETTA GRACE BERRY, Personal
Representative of the Estate of Jerry
Lee Roy Berry, CAPTAIN'S WHEEL
RESORT, INC., an Idaho Corporation,

Plaintiffs,

vs.

MICHAEL B. MCFARLAND, MICHAEL B.
MCFARLAND, P.A., and KAREN
ZIMMERMAN,

Defendants.

Case No. CV-07-2409

DEFENDANTS' STATEMENT OF
WITNESSES

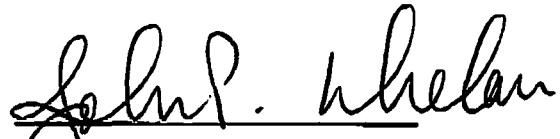
Defendants, Michael B. McFarland, Michael B. McFarland, P.A. and Karen
Zimmerman, by and through their attorney of record, John P. Whelan, submit the
following witness list:

1. Michael McFarland
2. Karen Zimmerman
3. Karletta Grace Berry

4. Herb Huseland
5. Monnie Cripe
6. Marie Streater
7. Ralph Jones
8. Any witnesses called by the defense.

And such other witnesses as may be necessary for rebuttal.

DATED this 4th day of January, 2010.



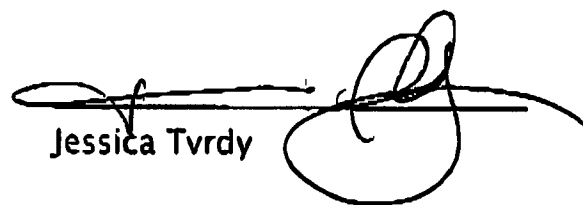
John P. Whelan
Attorney for Defendants

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 4TH day of January, 2010, I caused to be served a true and correct copy of the foregoing by the method indicated below, and addressed as indicated below:

Rex A. Finney
Finney, Finney & Finney
120 East Lake Street, Suite 317
Sandpoint, ID 83865

- U.S. Mail, Postage Prepaid
- Hand Delivered
- Overnight Mail
- Facsimile to: (208) 263-8211


Jessica Tvrdy

**IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF BONNER**

COURT MINUTES

**JUDGE: STEVE VERBY
REPORTER VAL LARSON
CLERK: LYNNE ANDERSON**

**CASE NO. CV 2007-0002409 - KOOTENAI CO.
DATE: 12/23/2009 TIME: 10:15 AM
CD: 09-304**

KARLETTA BERRY, ETAL

Vs MICHAEL MCFARLAND, ETAL

Plaintiff / Petitioner

Defendant / Respondent

Atty: JOHN WHELAN

Atty: REX FINNEY

SUBJECT OF PROCEEDINGS

MOTION FOR PUNITIVE DAMAGES

INDEX	SPEAKER	PHASE OF CASE
10:16	J	Calls Case
		Present: REX FINNEY; JOHN WHELAN BY PHONE
	J	MR FINNEY, THIS IS YOUR MOTION
	RF	AFFIDAVITS OF TOBY MCLAUGHLIN, KARLETTA BERRY, DAVID NOONAN, REX FINNEY INCLUDING DEPOSITION OF MICHAEL MCFARLAND. THERE IS AN ATTORNEY-CLIENT RELATIONSHIP BETWEEN MR MCFARLAND AND MS BERRY. HE STATED HE HAD NOT REPRESENTED JERRY BERRY AT ANY TIME. MR MCFARLAND DID HAVE 2 MEETINGS WITH MR BERRY AT HIS OFFICE. THERE WAS DISCUSSION OF BANKRUPTCY. IT IS POSSIBLE THAT MR MCFARLAND DID NOT BELIEVE THAT HE HAD AN ATTORNEY-CLIENT RELATIONSHIP. BUT MR BERRY CAME TO A BANKRUPTCY ATTORNEY, MR MCFARLAND, AND INQUIRED HOW TO PROTECT ASSETS IN CAPTAIN'S WHEEL. RESORT. ARGUMENT TO AMEND COMPLAINT FOR PUNITIVE DAMAGES.
	J	WITH REGARD TO CLAIM AGAINST KAREN ZIMMERMAN, WHAT FACTS DO YOU HAVE?
	RF	THAT IS IN AFFIDAVIT OF TOBY MCLAUGHLIN. HE SPOKE TO MR MCFARLAND AT ONE OF THE MEETINGS. MCFARLAND SAID THAT SHE WORKED FOR TREATY ROCK REALTY AND IS ENGAGED TO HIM
10:30	JW	MOVE TO STRIKE THIS LATE FILED AFFIDAVIT OF MR FINNEY. IT IS UNTIMELY UNDER CIVIL RULE. MIKE MCFARLAND COUNSELED JERRY BERRY IN 2001 AND HE BECOMES JERRY BERRY'S ATTORNEY FOR LIFE? HE COUNSELED JERRY BERRY 2 TIMES REGARDING BANKRUPTCY. ANY TIME A PERSON COUNSELS WITH AN ATTORNEY THAT IS COVERED BY ATTORNEY-CLIENT PRIVILEGE. IT DOESN'T NECESSARY MEAN THAT HE IS HIS ATTORNEY. JERRY BERRY AND THE CAMPBELL'S OWNED THE RESORT IN BAYVIEW. THE PARTNERS WANTED OUT AND OFFERED TO SELL THEIR STOCK FOR \$100,000.00. MCFARLAND AND ZIMMERMAN ADMIT THEY KNEW JERRY BERRY AND WERE FRIENDS WITH HIM BUT MCFARLAND WAS NOT JERRY'S ATTORNEY. MCFARLAND AND ZIMMERMAN HAD TO COME UP WITH \$100,000.00 TO BUY OUT THE CAMPBELL'S. THEY COULD ONLY COME UP WITH \$40,000.00 WHICH WAS CONSIDERED A LOAN. JERRY BERRY TREATS MIKE MCFARLAND AND KAREN ZIMMERMAN AS SILENT PARTNERS. IT WASN'T UNTIL 2006 THAT THE STOCK WAS PUT IN THEIR NAMES. THIS EVENT BEGAN IN 2003 AND FINALIZED IN 2006. IT HAD TO BE BECAUSE MR BERRY WAS DYING. THIS IS NOT A PUNITIVE DAMAGE CASE.

		THERE IS ALSO THE ALLEGATION THAT MIKE MCFARLAND WAS THE ATTORNEY FOR THE CAPTAIN'S WHEEL RESORT. THERE IS NOT ANY DOCUMENT TO SUPPORT THAT ALLEGATION. THE FACTS DON'T FIT THE ALLEGATIONS HERE. THIS CASE IS MADE UP OF CIRCUMSTANTIAL EVIDENCE.
10:44	J	MR FINNEY, YOU HEARD MR WHELAN'S SUGGESTION TO TAKE THE ISSUE OF PUNITIVE DAMAGES UNDER ADVISEMENT UNTIL PLAINTIFF RESTS ITS CASE AT TRIAL? DO AGREE WITH THAT?
	RF	THAT WOULD BE ALRIGHT AS LONG AS WE ARE ALLOWED TO ARGUE AFTER RESTING
	JW	THAT IS THE WAY IT IS DONE
	J	RESERVE RULING UNTIL TRIAL. THE PLAINTIFF SHOULD THEY PROVED A PRIMA FACIE CASE AND SHOULD THE COURT ALLOW THE AMENDMENT FOR PUNITIVE DAMAGES, THE PLAINTIFF WOULD BE ALLOWED TO PUT ON FURTHER EVIDENCE REGARDING
	JW	IT SHOULD BE ONLY IF THE PRIMA FACIE CASE REGARDING PUNITIVE DAMAGES THEN PRESENT MORE EVIDENCE
	J	YES. THIS CASE IS SCHEDULED FOR TRIAL IN KOOTENAI COUNTY ON JANUARY 14. THERE WILL BE A NEW DISTRICT JUDGE IN KOOTENAI COUNTY. THIS CASE HAS BEEN DISCUSSED AND BECAUSE OF THE LENGTH OF THIS TRIAL (10 DAYS) IT HAS BEEN SUGGESTED THAT JUDGE HOSACK TRY THIS CASE RATHER THAN HAVE ME TRAVEL TO KOOTENAI COUNTY TO TRY THE CASE. THE GOVERNOR WILL BE APPOINTING A NEW DISTRICT JUDGE. THERE ARE 3 CANDIDATES. WE DON'T KNOW HOW LONG BEFORE THE SUCCESSOR WILL TAKE JUDGE HOSACK'S PLACE. THE TRIAL MAY BE CONTINUED. WE DON'T KNOW AT THIS POINT. I SUGGEST THAT YOU CONTINUE TO PREPARE FOR TRIAL. BECAUSE OF THE ISSUES IN THIS CASE, THAT COUNSEL WORK ON JURY INSTRUCTIONS.
10:58		END

REX A. FINNEY
 FINNEY FINNEY & FINNEY, P.A.
 Attorneys at Law
 Old Power House Building
 120 East Lake Street, Suite 317
 Sandpoint, Idaho 83864
 Phone: (208) 263-7712
 Fax: (208) 263-8211
 ISB No. 6313

STATE OF IDAHO
 County of ~~Bonner~~ Kootenai } ss
 FILED 12.28.09
 AT 11th O'Clock 9 M
 CLERK, DISTRICT COURT
Debra J. [Signature]
 Deputy

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE
 STATE OF IDAHO, IN AND FOR THE COUNTY OF KOOTENAI

KARLETTA GRACE BERRY, a widow,	)	Case No. CV-2007-0002409
KARLETTA GRACE BERRY, Personal)	
Representative of the Estate)	
of Jerry Lee Roy Berry,)	
CAPTAIN'S WHEEL RESORT, INC.,	)	ORDER REGARDING AMENDMENT FOR
an Idaho Corporation,	)	PUNITIVE DAMAGES
)	
Plaintiff,)	
)	
v.)	
)	
MICHAEL B. MCFARLAND, MICHAEL)	
B. MCFARLAND, P.A., and KAREN)	
ZIMMERMAN,)	
)	
Defendants.)	
)	

WHEREAS, the Plaintiffs' Motion To Amend Complaint For
 Punitive Damages came on for hearing on the 23 day of December,
 2009, with Rex Finney, attorney for the Plaintiffs, Karletta
 Berry, Plaintiff, and John P. Whelan, attorney for the
 Defendants, all being present.

AND WHEREAS, the attorneys for the parties set forth an agreement on the record in regard to amending the Complaint to seek punitive damages.

NOW THEREFORE, IT IS HEREBY ORDERED THAT the Plaintiffs may amend their Complaint to seek punitive damages, should a prima facia case for punitive damages be presented by the Plaintiffs at trial, and the Court determines that the evidence presented is sufficient to, and allows amendment to seek punitive damages. Then the Plaintiffs may amend the Complaint to seek punitive damages and may present additional evidence and testimony in regard to issues relevant to an award of punitive damages to the jury.

DATED this 28th day of December, 2009.


STEVE VERBY
DISTRICT JUDGE

CERTIFICATE OF CLERK'S RULE 77(d) SERVICE

I hereby certify that a true and correct copy, with the clerk's filing stamp thereon showing the date of filing, of the foregoing, was served Via U.S. Mail, Postage Prepaid, this 30 day of December, 2009 and was addressed to:

J.P. WHELAN P.C.
Attorney at law
213 N. 4th Street
Coeur d'Alene, Idaho 83814

Rex A. Finney
Finney Finney & Finney, P.A.
Attorneys at Law
Old Power House Building
120 East Lake Street, Suite 317
Sandpoint, Idaho 83864

By: Linda Appert

John P. Whelan, P.C.
Attorney at Law
213 N. 4th Street
Coeur d' Alene, Idaho 83814
Telephone: (208) 664-5891
Facsimile: (208) 664-2240
ISB No. 6083

STATE OF IDAHO
COUNTY OF KOOTENAI } SS
FILED
JK #402
2010 JAN -5 PM 1:07
CLERK DISTRICT COURT
DEPUTY

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF KOOTENAI

KARLETTA GRACE BERRY, a widow,
KARLETTA GRACE BERRY, Personal
Representative of the Estate of Jerry
Lee Roy Berry, CAPTAIN'S WHEEL
RESORT, INC., an Idaho Corporation,

Plaintiffs,

vs.

MICHAEL B. MCFARLAND, MICHAEL B.
MCFARLAND, P.A., and KAREN
ZIMMERMAN,

Defendants.

Case No. CV-07-2409

DEFENDANTS' SUPPLEMENTAL
STATEMENT OF WITNESSES

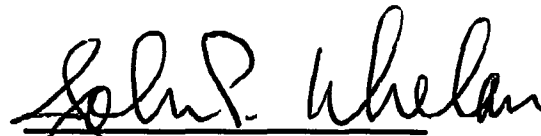
Defendants, Michael B. McFarland, Michael B. McFarland, P.A. and Karen Zimmerman, by and through their attorney of record, John P. Whelan, submit the following witness list:

1. Michael McFarland
2. Karen Zimmerman
3. Karletta Grace Berry

- 4. Herb Huseland
- 5. Monnie Cripe
- 6. Marie Streater
- 7. Ralph Jones
- 8. Dee Meredith
- 8. Any witnesses called by Plaintiffs.

And such other witnesses as may be necessary for rebuttal.

DATED this 5 day of January, 2010.



John P. Whelan
John P. Whelan
Attorney for Defendants

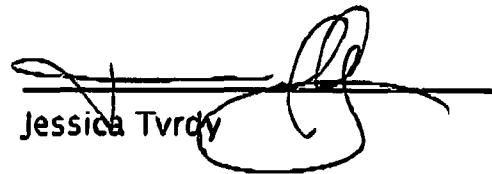
DEFENDANTS' SUPPLEMENTAL STATEMENT OF WITNESSES-2

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 5TH day of January, 2010, I caused to be served a true and correct copy of the foregoing by the method indicated below, and addressed as indicated below:

Rex A. Finney
Finney, Finney & Finney
120 East Lake Street, Suite 317
Sandpoint, ID 83865

- U.S. Mail, Postage Prepaid
- Hand Delivered
- Overnight Mail
- Facsimile to: (208) 263-8211


Jessica Tvrdy

John P. Whelan, P.C.
Attorney at Law
213 N. 4th Street
Coeur d' Alene, Idaho 83814
Telephone: (208) 664-5891
Facsimile: (208) 664-2240
ISB No. 6083

STATE OF IDAHO
COUNTY OF KOOTENAI } SS

FILED: *SR* #402

2010 JAN -5 PM 1:07

CLERK DISTRICT COURT

Michael B. McFarland
DEPUTY

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF KOOTENAI

KARLETTA GRACE BERRY, a widow,
KARLETTA GRACE BERRY, Personal
Representative of the Estate of Jerry
Lee Roy Berry, CAPTAIN'S WHEEL
RESORT, INC., an Idaho Corporation,

Plaintiffs,

vs.

MICHAEL B. MCFARLAND, MICHAEL B.
MCFARLAND, P.A., and KAREN
ZIMMERMAN,

Defendants.

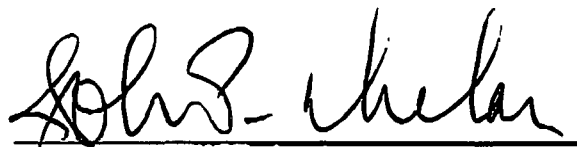
Case No. CV-07-2409

DEFENDANTS' EXHIBIT LIST

Defendants, Michael B. McFarland, Michael B. McFarland, P.A. and Karen Zimmerman, may offer the exhibits identified in the attached Defendants' Exhibit List and may also offer such evidence as has been identified by Plaintiffs in their evidence disclosure statement as necessary.

Dated: 1/5/10

JOHN P. WHELAN, P.C.



John P. Whelan

Attorney for Defendants

DEFENDANTS' EXHIBIT LIST

Case No. CV-07-2409

Date: January 5, 2010

Title of Case: Karletta Grace Berry, et al. v. Michael B. McFarland, et al.

 Plaintiff's Exhibits (list numerically)

 X Defendant's Exhibits (list alphabetically)

 Third Party Exhibits State Party:

No.	Description	Admitted by Stip	Offered	Rec'd	Refused	Reserve Ruling
A	Receipt for \$40,000.00 dated 7/25/03					
B	Receipt for \$60,000.00 dated 8/4/03					
C	Articles of Incorporation and yearly filings of Captain's Wheel Resort, Inc.					
D	Bylaws					
E	Corporate Minutes—unsigned					
F	Corporate Minutes, April 15, 1997					
G	Resolution of September 22, 2000/Resignations					

H	Resolution August 7, 203					
I	Stock Purchase Agreement Berry/Campbell					
J	Stock Purchase and Sale Agreement					
K	Special Meeting Notices					
L	Waiver of Notice of 10/15/06					
M	Minutes of Special Meeting					
N	Waiver of Notice of Special Meeting/Notice					
O	Minutes dated 10/15/06					
P	Minutes dated Nov. 29, 2006					
Q	Letter to Finney, Feb. 5, 2007 with notice					
R	Minutes dated Feb. 16, 2007					
S	Objection to Special Meeting					
T	Resolutions in lieu					
U	Offer/Acceptance of stock					
V	Stock Purchase Agreement					
W	Stock Purchase and Sale Agreement					
X	Stock Certificates					
Y	Letter from Finney, Feb. 14, 2007					
Z	Letter to Finney, Feb. 5, 2007					
AA	Letter to Finney, Jan. 8, 2007					

BB	Emails					
CC	Letter to Finney, Nov. 29, 2006					
DD	Letter from Finney, Nov. 21, 2006					
EE	Objection to notice					
FF	Letter to Board, Nov. 17, 2006					
GG	Letter to McFarland, Nov. 18, 2006					
HH	Letter to McFarland, Nov. 14, 2006					
II	McFarland letter, Nov. 16, 2006					
JJ	Letter from Daugharty dated April 28, 2004					
KK	Demand note					
LL	August 11, 2003 receipt					
MM	Unsigned minutes					
NN	Wells Fargo letter dated January 17, 2007					
OO	Miscellaneous corporate records					
PP	Fax and memo from Daugharty's office					
QQ	Letter from Daugharty, February 21, 2006					

SS	Summary of costs and expenses advanced by McFarland					
TT	2006 Corporate Tax Returns					
UU	2007 Corporate Tax Returns					
VV	2008 Corporate Tax Returns					

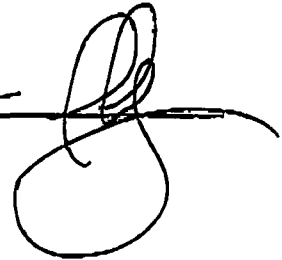
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 5TH day of January, 2010, I caused to be served a true and correct copy of the foregoing by the method indicated below, and addressed as indicated below:

Rex A. Finney
Finney, Finney & Finney
120 East Lake Street, Suite 317
Sandpoint, ID 83865

- U.S. Mail, Postage Prepaid
- Hand Delivered
- Overnight Mail
- Facsimile to: (208) 263-8211

Jessica Tvrdy



ORIGINAL

STATE OF IDAHO }
COUNTY OF KOOTENAI } SS
FILED:

REX A. FINNEY
FINNEY FINNEY & FINNEY, P.A.
Attorneys at Law
Old Power House Building
120 East Lake Street, Suite 317
Sandpoint, Idaho 83864
Phone: (208) 263-7712
Fax: (208) 263-8211
ISB No. 6313

2010 JAN -5 PM 1:59

CLERK DISTRICT COURT
Cham Reed
DEPUTY *SR*

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF KOOTENAI

KARLETTA GRACE BERRY, a widow,	)	Case No. CV-2007-0002409
KARLETTA GRACE BERRY, Personal)	
Representative of the Estate	)	SUBPOENA
of Jerry Lee Roy Barry,)	
CAPTAIN'S WHEEL RESORT, INC.,)	
an Idaho Corporation,)	
)	
Plaintiffs,)	
)	
v.)	
)	
MICHAEL B. MCFARLAND, MICHAEL)	
B. MCFARLAND, P.A., and KAREN)	
ZIMMERMAN,)	
)	
Defendants.)	
)	

The State Of Idaho To: Sharilyn Cano

You are hereby commanded to appear before District Judge
Steve Verby of the above entitled court at a courtroom of the
Kootenai County Courthouse, 324 W. Garden Avenue, Coeur d'Alene,

Idaho on January 19, 20 and 21, 2010 at 9:00 a.m. as a witness
for the Plaintiffs in the above entitled action.

You are further notified that if you fail to appear at the
place and time specified above, that you may be held in contempt
of court and that the aggrieved party may recover from you the
sum of \$100.00 and all damages which the parties may sustain by
your failure to attend as a witness.

Dated this 5 day of January 2010.

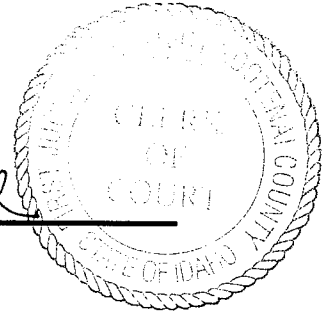
By order of the court.

DANIEL J. ENGLISH

Clerk of Court

Susan Reed

By: Deputy Clerk



John P. Whelan, P.C.
Attorney at Law
213 N. 4th Street
Coeur d' Alene, Idaho 83814
Telephone: (208) 664-5891
Facsimile: (208) 664-2240
ISB No. 6083

STATE OF IDAHO }
COUNTY OF KOOTENAI } SS
FILED: *JK #584*
2010 JAN 12 PM 4:53
CLERK DISTRICT COURT
[Signature]
DEPUTY

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF KOOTENAI

KARLETTA GRACE BERRY, a widow,
KARLETTA GRACE BERRY, Personal
Representative of the Estate of Jerry
Lee Roy Berry, CAPTAIN'S WHEEL
RESORT, INC., an Idaho Corporation,

Plaintiffs,

vs.

MICHAEL B. MCFARLAND, MICHAEL B.
MCFARLAND, P.A., and KAREN
ZIMMERMAN,

Defendants.

Case No. CV-07-2409

DEFENDANTS' SECOND SUPPLEMENTAL
STATEMENT OF WITNESSES

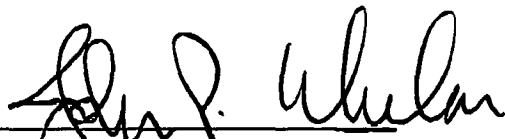
Defendants, Michael B. McFarland, Michael B. McFarland, P.A. and Karen Zimmerman, by and through their attorney of record, John P. Whelan, submit the following witness list:

1. Michael McFarland
2. Karen Zimmerman
3. Karletta Grace Berry

4. Herb Huseland
5. Monnie Cripe
6. Marie Streater
7. Ralph Jones
8. Dee Meredith
9. Jessica Tvrdy
10. Any witnesses called by Plaintiffs.

And such other witnesses as may be necessary for rebuttal.

DATED this 12 day of January, 2010.



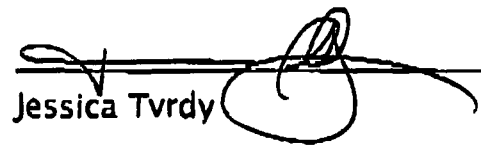
John P. Whelan
Attorney for Defendants

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 12TH day of January, 2010, I caused to be served a true and correct copy of the foregoing by the method indicated below, and addressed as indicated below:

**Rex A. Finney
Finney, Finney & Finney
120 East Lake Street, Suite 317
Sandpoint, ID 83865**

- () U.S. Mail, Postage Prepaid
- () Hand Delivered
- () Overnight Mail
- Facsimile to: (208) 263-8211


Jessica Tvrdy

REX A. FINNEY
 FINNEY FINNEY & FINNEY, P.A.
 Attorneys at Law
 Old Power House Building
 120 East Lake Street, Suite 317
 Sandpoint, Idaho 83864
 Phone: (208) 263-7712
 Fax: (208) 263-8211
 ISB No. 6313

ORIGINAL
 STATE OF IDAHO
 COUNTY OF KOOTENAI
 FILED

2010 JAN 13 AM 10:07

CLERK DISTRICT COURT

Amy Hulman
 DEPUTY

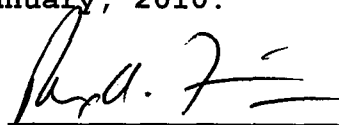
IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE
 STATE OF IDAHO, IN AND FOR THE COUNTY OF KOOTENAI

KARLETTA GRACE BERRY, a	)	Case No. CV-2007-2409
widow, KARLETTA GRACE BERRY,)	
Personal Representative of	)	PLAINTIFFS REQUESTED JURY
the Estate of Jerry Lee Roy	)	INSTRUCTIONS and REQUESTED
Berry, CAPTAIN'S WHEEL	)	FORM OF SPECIAL VERDICT(S)
RESORT, INC., an Idaho)	
Corporation,)	
)	
Plaintiffs,)	
)	
v.)	
)	
MICHAEL B. MCFARLAND,)	
MICHAEL B. MCFARLAND, P.A.,)	
and KAREN ZIMMERMAN,)	
)	
Defendants.)	

COME NOW, the Plaintiffs, by and through counsel, REX
 A. FINNEY, Finney Finney & Finney, P.A., and submits the
 Plaintiffs' Requested Jury Instructions and proposed

verdict. Some of the Instructions are for use if the Jury makes advisory findings pursuant to I.R.C.P. 39.

DATED this 12 day of January, 2010.



REX A. FINNEY
Attorney for Plaintiffs

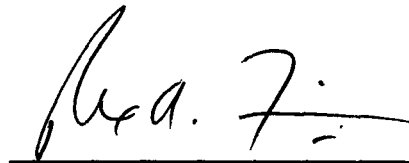
CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was served as indicated, this 12 day of January, 2010, and was addressed as follows:

J.P. WHELAN P.C.
Attorney at law
Via U.S. Mail
213 N. 4th Street
Coeur d'Alene, Idaho 83814

The Honorable Charles Hosack
Chamber's Copy
(Via e-mail: cw.hosack@gmail.com)

AND (Via e-mail jpwhelanattorney@yahoo.com)



PLAINTIFFS' PROPOSED INSTRUCTION NO. _____

The Claims of the Plaintiffs are as follows:

Jerry Lee Roy Berry died on November 4, 2006. Karletta Grace Berry is Jerry Lee Roy Berry's surviving widow.

Jerry Lee Roy Berry and Karletta Berry were husband and wife the owners of all of the stock in the Captain's Wheel Resort, Inc., an Idaho Corporation.

The Captain's Wheel Resort, Inc. owns land on Lake Pend Oreille where it operates a bar and restaurant together with a dock with boat slips, and a parking lot across the street.

Jerry Lee Roy Berry has judgment creditors out of the state of Washington resulting from a failed real estate development.

Michael B. McFarland is an attorney within the State of Idaho and practices bankruptcy law from his law firm Michael B. McFarland, P.A. located in Kootenai County, Idaho.

Michael B. McFarland and Karen Zimmerman are engaged to be married.

Plaintiffs claim that Michael B. McFarland and his law firm Michael B. McFarland, P.A. were the attorney for the Plaintiffs and among other thing were providing legal advice on how to protect the Plaintiffs' stock in the Captain's Wheel Resort, Inc. from judgment creditors of Jerry Lee Roy Berry and advised regarding a possible bankruptcy.

On July 4, 2006 Jerry Lee Roy Berry transferred one half of the shares in the Captain's Wheel Resort, Inc. to Michael McFarland and Karen Zimmerman as joint tenants with rights of survivorship.

The shares were sold to McFarland and Zimmerman at far below the fair market value of the shares of stock purchased.

Michael B. McFarland of the firm of Michael B. McFarland, P.A. was the attorney for Jerry Lee Roy Berry, Karletta Berry and the Captain's Wheel Resort, Inc. at the time of the transfer of stock noted above.

Plaintiffs claim that it was a breach of the duties Michael B. McFarland owed to his clients as their attorney to purchase the shares of stock in the Captains Wheel Resort, Inc at less than fair market value.

The Plaintiffs are asking for money damages against the defendants Michael B. McFarland, Michael B. McFarland, P.A. and Karen Zimmerman.

GIVEN
REFUSED
MODIFIED
COVERED
OTHER

PLAINTIFFS' PROPOSED INSTRUCTION NO. ____

These instructions explain your duties as jurors and define the law that applies to this case. It is your duty to determine the facts, to apply the law set forth in these instructions to those facts, and in this way to decide the case. Your decision should be based upon a rational and objective assessment of the evidence. It should not be based on sympathy or prejudice.

It is my duty to instruct you on the points of law necessary to decide the case, and it is your duty to follow the law as I instruct. You must consider these instructions as a whole, not picking out one and disregarding others. The order in which these instructions are given or the manner in which they are numbered has no significance as to the importance of any of them. If you do not understand an instruction, you may send a note to me through the bailiff, and I will try to clarify or explain the point further.

In determining the facts, you may consider only the evidence admitted in this trial. This evidence consists of the testimony of the witnesses, the exhibits admitted into evidence, and any stipulated or admitted facts. While the arguments and remarks of the attorneys may help you understand the evidence and apply the instructions, what they say is not evidence. If an attorney's

argument or remark has no basis in the evidence, you should disregard it.

The production of evidence in court is governed by rule of law. At times during the trial, I sustained an objection to a question without permitting the witness to answer it, or to an offered exhibit without receiving it into evidence. My rulings are legal matters, and are solely my responsibility. You must not speculate as to the reason for any objection, which was made, or my ruling thereon, and in reaching your decision you may not consider such a question or exhibit or speculate as to what the answer or exhibit would have shown. Remember, a question is not evidence and should be considered only as it gives meaning to the answer.

The law does not require you to believe all of the evidence admitted in the course of the trial. As the sole judges of the facts, you must determine what evidence you believe and what weight you attach to it. In so doing, you bring with you to this courtroom all of the experience and background of your lives. There is no magical formula for evaluating testimony. In your everyday affairs, you determine for yourselves whom you believe, what you believe and how much weight you attach to what you are told. The considerations you use in making the more important decisions in your everyday dealings are the same considerations you should apply in your deliberations in this case.

GIVEN
REFUSED

_____ MODIFIED
_____ COVERED
_____ OTHER

IDJI 1.00 - Introductory instruction to jury

PLAINTIFFS' PROPOSED INSTRUCTION NO. _____

During your deliberations, you will be entitled to have with you my instructions concerning the law that applies to this case, the exhibits that have been admitted into evidence and any notes taken by you in the course of the trial proceedings.

If you take notes during the trial, be careful that your attention is not thereby diverted from the witness or his testimony; and you must keep your notes to yourself and not show them to other persons or jurors until the jury deliberations at the end of the trial.

_____ GIVEN
_____ REFUSED
_____ MODIFIED
_____ COVERED
_____ OTHER

IDJI 1.01 - Deliberation procedures

PLAINTIFFS' PROPOSED INSTRUCTION NO. _____

There are certain things you must not do during this trial:

1. You must not associate in any way with the parties, any of the attorneys or their employees, or any of the witnesses.

2 You must not discuss the case with anyone, or permit anyone to discuss the case with you. If anyone attempts to discuss the case with you, or to influence your decision in the case, you must report it to me promptly.

3. You must not discuss the case with other jurors until you retire to the jury room to deliberate at the close of the entire case.

4. You must not make up your mind until you have heard all of the testimony and have received my instructions as to the law that applies to the case.

5. You must not contact anyone in an attempt to discuss or gain a greater understanding of the case.

6. You must not go to the place where any alleged event occurred.

_____ GIVEN
_____ REFUSED
_____ MODIFIED
_____ COVERED
_____ OTHER

IDJI 1.03 - Admonition to jury

PLAINTIFFS' PROPOSED INSTRUCTION NO. _____

Whether a party has insurance is not relevant to any of the questions you are to decide. You must avoid any inference, speculation or discussion about insurance.

_____ GIVEN
_____ REFUSED
_____ MODIFIED
_____ COVERED
_____ OTHER

IDJI 1.04 - Insurance cautionary

comment:

This instruction has been revised to comply with Lehmkuhl v. Bolland, 114 Idaho 503, 757 P.2d 1222 (Ct. App. 1988).

PLAINTIFFS' PROPOSED INSTRUCTION NO. _____

The corporation involved in this case is entitled to the same fair and unprejudiced treatment that an individual would be under like circumstances. You should decide this case with the same impartiality that you would use in deciding a case between individuals.

_____ GIVEN
_____ REFUSED
_____ MODIFIED
_____ COVERED
_____ OTHER

IDJI 1.02 - Corporate parties

PLAINTIFFS' PROPOSED INSTRUCTION NO. _____

In deciding this case, you may not delegate any of your decisions to another or decide any question by chance, such as by the flip of a coin or drawing of straws. If money damages are to be awarded or percentages of fault are to be assigned, you may not agree in advance to average the sum of each individual juror's estimate as the method of determining the amount of the damage award or percentage of negligence.

- _____ GIVEN
- _____ REFUSED
- _____ MODIFIED
- _____ COVERED
- _____ OTHER

IDJI 1.09 - Quotient verdicts

PLAINTIFFS' PROPOSED INSTRUCTION NO. _____

If it becomes necessary during your deliberations to communicate with me, you may send a note signed by one or more of you to the bailiff. You should not try to communicate with me by any means other than such a note.

During your deliberations, you are not to reveal to anyone how the jury stands on any of the questions before you, numerically or otherwise, unless requested to do so by me.

_____ GIVEN
_____ REFUSED
_____ MODIFIED
_____ COVERED
_____ OTHER

IDJI 1.11 - Communications with court

PLAINTIFFS' PROPOSED INSTRUCTION NO. _____

Members of the Jury: In order to return a verdict, it is necessary that at least three-fourths of the jury agree. Your verdict must represent the considered judgment of each juror agreeing to it.

It is your duty, as jurors, to consult with one another and to deliberate with a view to reaching an agreement, if you can do so without violence to individual judgment. Each of you must decide the case for yourself, but do so only after an impartial consideration of the evidence with your fellow jurors. In the course of your deliberations, do not hesitate to reexamine your own views and change your opinion if convinced it is erroneous. But do not surrender your honest conviction as to the weight or effect of evidence solely because of the opinion of your fellow jurors, or for the mere purpose of returning a verdict.

You are not partisans. You are judges - judges of the facts. Your sole interest is to ascertain the truth from the evidence in the case.

_____ GIVEN
_____ REFUSED
_____ MODIFIED
_____ COVERED
_____ OTHER

IDJI 1.13.1 Alternate form - concluding remarks

PLAINTIFFS' PROPOSED INSTRUCTION NO. _____

On retiring to the jury room, select one of your number as a foreman, who will preside over your deliberations.

An appropriate form of verdict will be submitted to you with any instructions. Follow the directions on the verdict form, and answer all of the questions required of you by the instructions on the verdict form.

A verdict may be reached by three-fourths of your number, or nine of you. As soon as nine or more of you have agreed upon each of the required questions in the verdict, you should fill it out as instructed, and have it signed. It is not necessary that the same nine agree on each question. If your verdict is unanimous, your foreman alone will sign it; but if nine or more, but less than the entire jury, agree, then those so agreeing will sign the verdict.

As soon as you have completed and signed the verdicts, you will notify the bailiff, who will then return you into open court.

_____ GIVEN
_____ REFUSED
_____ MODIFIED
_____ COVERED
_____ OTHER

IDJI 1.15.2 - Completion of verdict form on special interrogatories

PLAINTIFFS' PROPOSED INSTRUCTION NO. _____

Certain evidence is about to be presented to you by deposition. A deposition is testimony taken under oath before the trial and preserved in writing and upon video with audio. This evidence is entitled to the same consideration you would give had the witness testified from the witness stand.

You will only receive this testimony in open court. Although there is a record of the testimony you are about to hear and see, this record will not be available to you during your deliberations.

_____ GIVEN
_____ REFUSED
_____ MODIFIED
_____ COVERED
_____ OTHER

IDJI 1.22 - Deposition testimony (modified regarding video and sound)

Comment:

The last sentence has been added to IDJI 124 to anticipate inquiry from the jury.

PLAINTIFFS' PROPOSED INSTRUCTION NO _____

Evidence may be either direct or circumstantial. Direct evidence is evidence that directly proves a fact. Circumstantial evidence is evidence that indirectly proves the fact, by proving one or more facts from which the fact at issue may be inferred.

The law makes no distinction between direct and circumstantial evidence as to the degree of proof required; each is accepted as a reasonable method of proof and each is respected for such convincing force as it may carry.

_____ GIVEN
_____ REFUSED
_____ MODIFIED
_____ COVERED
_____ OTHER

IDJI 1.24.2

PLAINTIFFS' PROPOSED INSTRUCTION NO. _____

When I say that a party has the burden of proof on a proposition, or use the expression "if you find" or "if you decide," I mean you must be persuaded that the proposition is more probably true than not true.

_____ GIVEN
_____ REFUSED
_____ MODIFIED
_____ COVERED
_____ OTHER

IDJI 1.20.1 - Burden of proof - preponderance of evidence

PLAINTIFFS' PROPOSED INSTRUCTION NO. _____

When I say a party has the burden of proof on a proposition by clear and convincing evidence, I mean you must be persuaded that it is highly probable that such proposition is true. This is a higher burden than the general burden that the proposition is more probably true than not true.

_____ GIVEN
_____ REFUSED
_____ MODIFIED
_____ COVERED
_____ OTHER

IDJI 1.20.2 - Burden of proof - clear and convincing evidence

PLAINTIFFS' PROPOSED INSTRUCTION NO. _____

Whether an attorney-client relationship exists is a question for the trier of fact.

_____ GIVEN
_____ REFUSED
_____ MODIFIED
_____ COVERED
_____ OTHER

O'Neil v. Vasseur, 118 Idaho 257, 262, 796 P.2d 134, 139 (Idaho App., 1990)

PLAINTIFFS' PROPOSED INSTRUCTION NO. _____

The attorney-client relationship may be established not only by a technical business association between an attorney and client, but also through informal personal relationships which engender trust and confidence by one in another.

_____ GIVEN
_____ REFUSED
_____ MODIFIED
_____ COVERED
_____ OTHER

Cause of Action 1 (2006) § 5

PLAINTIFFS' PROPOSED INSTRUCTION NO. _____

Usually the payment of a fee or retainer is evidence of an attorney-client relationship, but it is not necessary.

_____ GIVEN
_____ REFUSED
_____ MODIFIED
_____ COVERED
_____ OTHER

Stuart v. State, 118 Idaho 932, 934, 801 P.2d 1283, 1285
(Idaho, 1990)

PLAINTIFFS' PROPOSED INSTRUCTION NO. _____

An attorney-client relationship can be established when the attorney is sought for assistance in matters pertinent to his profession.

_____ GIVEN
_____ REFUSED
_____ MODIFIED
_____ COVERED
_____ OTHER

Stuart v. State, 118 Idaho 932, 934, 801 P.2d 1283, 1285
(Idaho, 1990)

PLAINTIFFS' PROPOSED INSTRUCTION NO. _____

As a representative of clients, a lawyer performs various functions. As advisor, a lawyer provides a client with an informed understanding of the client's legal rights and obligations and explains their practical implications. As advocate, a lawyer zealously asserts the client's position under the rules of the adversary system. As negotiator, a lawyer seeks a result advantageous to the client but consistent with requirements of honest dealings with others. As an evaluator, a lawyer acts by examining a client's legal affairs and reporting about them to the client or to others.

_____ GIVEN
_____ REFUSED
_____ MODIFIED
_____ COVERED
_____ OTHER

Idaho Rules of Professional Conduct, Preamble: A Lawyer's Responsibilities, Paragraph 2

PLAINTIFFS' PROPOSED INSTRUCTION NO. _____

Idaho Rule of Professional of Professional Conduct 1.7,
Conflict of Interest: Current Clients, provides:

(a) Except as provided in paragraph (b), a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if:

(1) the representation of one client will be directly adverse to another client; or

(2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by the personal interests of the lawyer, including family and domestic relationships.

(b) Notwithstanding the existence of a concurrent conflict of interest under paragraph (a), a lawyer may represent a client if:

(1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;

(2) the representation is not prohibited by law;

(3) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; and

(4) each affected client gives informed consent, confirmed in writing.

_____ GIVEN
_____ REFUSED
_____ MODIFIED
_____ COVERED
_____ OTHER

Idaho Professional Rule 1.7: Conflict of Interest: Current Clients

PLAINTIFFS' PROPOSED INSTRUCTION NO. _____

Rule 1.7(b) of the Idaho Rules of Professional Conduct mandates that a lawyer shall not represent a client if the representation of that client may be materially limited by the lawyer's responsibilities to another client or to a third person, or by the lawyer's own interest. Loyalty to a client prohibits undertaking representation directly adverse to that client without the client's consent.

_____ GIVEN
_____ REFUSED
_____ MODIFIED
_____ COVERED
_____ OTHER

Blough v. Wellman, 132 Idaho 424, 426, 974 P.2d 70, 72
(Idaho, 1999) IDAHO RULES OF PROFESSIONAL CONDUCT 1.7 comment
(1986)

PLAINTIFFS' PROPOSED INSTRUCTION NO. _____

Idaho Rule of Professional Conduct 1.8, Current Clients:

Specific Rules, provides:

A lawyer shall not enter into a business transaction with a client or knowingly acquire an ownership, possessory, security or other pecuniary interest adverse to a client unless:

(1) the transaction and terms on which the lawyer acquires the interest are fair and reasonable to the client and are fully disclosed and transmitted in writing in a manner that can be reasonably understood by the client;

(2) the client is advised in writing of the desirability of seeking and is given a reasonable opportunity to seek the advice of independent legal counsel on the transaction; and

(3) the client gives informed consent, in a writing signed by the client, to the essential terms of the transaction and the lawyer's role in the transaction, including whether the lawyer is representing the client in the transaction.

_____ GIVEN
_____ REFUSED
_____ MODIFIED
_____ COVERED
_____ OTHER

Idaho Professional Rule 1.8(a), (b) and (c): Conflict Of Interest: Current Clients: Specific Rules

PLAINTIFFS' PROPOSED INSTRUCTION NO. _____

A lawyer's legal skill and training, together with the relationship of trust and confidence between lawyer and client, create the possibility of overreaching when the lawyer participates in a business, property or financial transaction with a client, for example, a loan or sales transaction or a lawyer investment on behalf of a client.

_____ GIVEN
_____ REFUSED
_____ MODIFIED
_____ COVERED
_____ OTHER

Idaho Rules of Professional Conduct: Conflict Of Interest:
Current Clients: Specific Rules, Commentary Paragraph [1]

PLAINTIFFS' PROPOSED INSTRUCTION NO. _____

Idaho Professional of Professional Conduct 1.8(c), provides: A lawyer shall not solicit any substantial gift from a client, including a testamentary gift, or prepare on behalf of a client an instrument, giving the lawyer or a person with whom the lawyer has a familial, domestic or close relationship any substantial gift unless the lawyer or other recipient of the gift is related to the client. For purposes of this paragraph, related persons include a spouse, child, grandchild, parent, grandparent or other relative or individual with whom the lawyer or the client maintains a close, familial relationship.

_____ GIVEN
_____ REFUSED
_____ MODIFIED
_____ COVERED
_____ OTHER

Idaho Professional Rule 1.8(c): Conflict Of Interest: Current Clients: Specific Rules

PLAINTIFFS' PROPOSED INSTRUCTION NO. _____

A lawyer may accept a gift from a client, if the transaction meets general standards of fairness. For example, a simple gift such as a present given at a holiday or as a token of appreciation is permitted. If a client offers the lawyer a more substantial gift, the lawyer is not prohibited from accepting it, although such a gift may be voidable by the client under the doctrine of undue influence, which treats client gifts as presumptively fraudulent. In any event, due to concerns about overreaching and imposition on clients, a lawyer may not suggest that a substantial gift be made to the lawyer or for the lawyer's benefit, except where the lawyer is related to the client as set forth in paragraph (c).

_____ GIVEN
_____ REFUSED
_____ MODIFIED
_____ COVERED
_____ OTHER

Idaho Rules of Professional Conduct: Conflict Of Interest:
Current Clients: Specific Rules, Commentary Paragraph [6]

PLAINTIFFS' PROPOSED INSTRUCTION NO. _____

Where attorney-client relationship exists, attorney's actions in name of friendship are bound by rule that attorney must make full disclosure when engaging in business transaction with client.

_____ GIVEN
_____ REFUSED
_____ MODIFIED
_____ COVERED
_____ OTHER

In re May, 538 P.2d 787, (Idaho, 1975)

PLAINTIFFS' PROPOSED INSTRUCTION NO. _____

The relationship between an attorney and client is a fiduciary relationship of the highest character, binding the attorney with the strictest accountability and fidelity to his client's interests.

_____ GIVEN
_____ REFUSED
_____ MODIFIED
_____ COVERED
_____ OTHER

In re Carter, 86 P.2d 162

PLAINTIFFS' PROPOSED INSTRUCTION NO. _____

Attorneys owe fundamental duties to their clients. Among the most important of these duties are the duties of zealous representation and loyalty. This duty of loyalty is perhaps the most basic of counsel's duties.

_____ GIVEN
_____ REFUSED
_____ MODIFIED
_____ COVERED
_____ OTHER

Heinze v. Bauer, 145 Idaho 232, 238, 178 P.3d 597, 603 (Idaho, 2008)

Strickland v. Washington, 466 U.S. 668, 692, 104 S.Ct. 2052, 2067, 80 L.Ed.2d 674, 696 (1984).

See Idaho Rules of Professional Conduct, Preamble: A Lawyer's Responsibilities (2004) (stating 'A advocate, a lawyer zealously asserts the client's position under the rules of the adversary system.'")

PLAINTIFFS' PROPOSED INSTRUCTION NO. _____

Lawyers have an overriding duty of zealous representation of a client's interest and an obligation to put their clients' interests ahead of their own.

_____ GIVEN
_____ REFUSED
_____ MODIFIED
_____ COVERED
_____ OTHER

Heinze v. Bauer, 145 Idaho 232, 238, 178 P.3d 597, 603
(Idaho, 2008)

PLAINTIFFS' PROPOSED INSTRUCTION NO. _____

As a matter of law, an attorney owes his client a duty to use and exercise reasonable care, skill, discretion, and judgment in the representation.

_____ GIVEN
_____ REFUSED
_____ MODIFIED
_____ COVERED
_____ OTHER

Sun Valley Potatoes, Inc. v. Rosholt, Robertson & Tucker, 133 Idaho 1, 4, 981 P.2d 236, 239 (Idaho, 1999)

PLAINTIFFS' PROPOSED INSTRUCTION NO. _____

The relationship between an attorney and a client is highly fiduciary in its nature and of a very delicate, exacting, and confidential character, requiring a high degree of fidelity and good faith. A fundamental principle in the attorney-client relationship is that the attorney shall maintain the confidentiality of any information learned during the attorney-client relationship. The identify of an attorney's clients is sensitive personal information and implicates the clients' rights of privacy; every person has the right to freely confer with and confide in his or her attorney in an atmosphere of trust and serenity. Thus, an attorney should not place himself or herself in a position where there may be the temptation to take advantage of information derived from confidential communications.

_____ GIVEN
_____ REFUSED
_____ MODIFIED
_____ COVERED
_____ OTHER

7 Am. Jur. 2d Attorneys at Law § 138

PLAINTIFFS' PROPOSED INSTRUCTION NO. _____

The relationship of client and attorney is one of trust, binding an attorney to the utmost good faith in fair dealing with his client, and obligating the attorney to discharge that trust with complete fairness, honor, honesty, loyalty, and fidelity.

_____ GIVEN
_____ REFUSED
_____ MODIFIED
_____ COVERED
_____ OTHER

Blough v. Wellman, 132 Idaho 424, 426, 974 P.2d 70, 72 (Idaho,1999)

Beal v. Mars Larsen Ranch Corp., Inc., 586 P.2d 1378 (Idaho,1978)

Benting v. Spanbauer, 58 Idaho 44, 69 P.2d 983 (1937)

7 C.J.S. Attorney and Client s 125

PLAINTIFFS' PROPOSED INSTRUCTION NO. _____

If an attorney enters into an attorney client relationship with a client in regard to certain property, that attorney can never thereafter, unless his client consents in compliance with the Idaho Rules of Professional Conduct, buy the opposing title to the property, without holding it in trust for the client.

_____ GIVEN
_____ REFUSED
_____ MODIFIED
_____ COVERED
_____ OTHER

Ainsworth, et al. v. Harding, 22 Idaho 645, 128 P. 92
Idaho Rules of Professional Conduct 1.7, 1.8

PLAINTIFFS' PROPOSED INSTRUCTION NO. _____

The confidence reposed in the attorney by the client is so carefully guarded by the law that it places the burden of proving the entire fairness of a pecuniary transactions between the attorney and the client upon the attorney.

_____ GIVEN
_____ REFUSED
_____ MODIFIED
_____ COVERED
_____ OTHER

Ainsworth, et al. v. Harding, 22 Idaho 645, 128 P. 92

PLAINTIFFS' PROPOSED INSTRUCTION NO. _____

The law imposes fiduciary obligations on the parties when the parties are partners, attorney and client, or close friends.

_____ GIVEN
_____ REFUSED
_____ MODIFIED
_____ COVERED
_____ OTHER

Gray v. Tri-Way Const. Services, Inc., 210 P.3d 63, 71 (Idaho, 2009)

PLAINTIFFS' PROPOSED INSTRUCTION NO. _____

For a breach or violation of an attorney's professional duties, the client may hold the attorney liable or accountable.

_____ GIVEN
_____ REFUSED
_____ MODIFIED
_____ COVERED
_____ OTHER

Blough v. Wellman, 132 Idaho 424, 426, 974 P.2d 70, 72
(Idaho, 1999)

PLAINTIFFS' PROPOSED INSTRUCTION NO. _____

A director of a corporation has a fiduciary responsibility
to both the corporation and to shareholders.

_____ GIVEN
_____ REFUSED
_____ MODIFIED
_____ COVERED
_____ OTHER

Steelman v. Mallory, 110 Idaho 510

PLAINTIFFS' PROPOSED INSTRUCTION NO. _____

As fiduciaries, corporate directors are bound to exercise the utmost good faith in managing the corporation.

_____ GIVEN
_____ REFUSED
_____ MODIFIED
_____ COVERED
_____ OTHER

Steelman v. Mallory, 110 Idaho 510

PLAINTIFFS' PROPOSED INSTRUCTION NO. _____

A person or corporation may recover damages from an attorney for breach of fiduciary duty even though there is no attorney-client relationship between them, if it is shown that the defendant assumed a fiduciary duty to the plaintiff.

_____ GIVEN
_____ REFUSED
_____ MODIFIED
_____ COVERED
_____ OTHER

Taylor v. Maile 142 Idaho 253, 259, 127 P.3d 156,
162 (Idaho,2005)

PLAINTIFFS' PROPOSED INSTRUCTION NO. _____

Breach of fiduciary duty, attorney malpractice, and breach of fiduciary duty by attorney for self dealing are intentional torts.

_____ GIVEN
_____ REFUSED
_____ MODIFIED
_____ COVERED
_____ OTHER

PLAINTIFFS' PROPOSED INSTRUCTION NO. _____

Where several people actively participate in any manner in the commission of a tort, not only the actual actor or assailant is liable but all others who aid, abet, counsel or encourage the wrongdoer by words, gestures, looks or signs are equally liable with him to the injured person.

- _____ GIVEN
- _____ REFUSED
- _____ MODIFIED
- _____ COVERED
- _____ OTHER

Todd v. Sullivan Const. LLC 146 Idaho 118, 125, 191 P.3d 196, 203 (Idaho, 2008)

PLAINTIFFS' PROPOSED INSTRUCTION NO. _____

A party shall be jointly and severally liable for the fault of another person where they were acting in concert or when a person was acting as an agent or servant of another party. As used in this section, "acting in concert" means pursuing a common plan or design which results in the commission of an intentional or reckless tortious act.

_____ GIVEN
_____ REFUSED
_____ MODIFIED
_____ COVERED
_____ OTHER

Idaho Code § 6-803(5)

Horner v. Sani-Top, Inc. 143 Idaho 230, 235, 141 P.3d 1099, 1104 (Idaho, 2006)

PLAINTIFFS' PROPOSED INSTRUCTION NO. _____

On the Plaintiffs' claim of breach of fiduciary duty against the Defendants as directors of the Captains' Wheel Resort, Inc. the Plaintiffs have the burden of proof on each of the following propositions:

- (1) the existence of a fiduciary duty between the Plaintiffs and Defendants;
- (2) breach of the fiduciary duty by the Defendants;
- (3) the breach of the duty either caused injury to the Plaintiffs or benefited the Defendants.

You will be asked the following question on the jury verdict form: Are the Plaintiffs entitled to recover damages from the Defendants on their claim of breach of fiduciary duty as directors of the Captain's Wheel Resort, Inc.?

ANSWER: YES _____ No _____

If you find from your consideration of all the evidence that each of these propositions has been proved, then you should answer this question "yes." If you find from your consideration of all of the evidence that any of these propositions has not been proved, then you should answer this question "no."

- _____ GIVEN
- _____ REFUSED
- _____ MODIFIED
- _____ COVERED
- _____ OTHER

IDJI 1.41.2 - Charging instruction, plaintiffs case, verdict on special interrogatories

PLAINTIFFS' PROPOSED INSTRUCTION NO. _____

On Plaintiffs' claim of breach of fiduciary duty by attorney for self dealing against the Defendants, the Plaintiffs have the burden of proof on each of the following propositions:

- (1) the existence of an attorney-client relationship between the Plaintiffs and Defendants;
- (2) a transaction between the attorney and the clients;
- (3) a breach of the fiduciary duty, and;
- (4) the breach of the duty either caused injury to the Plaintiffs or benefited the Defendants.

You will be asked the following question on the jury verdict form:

Are the Plaintiffs entitled to recover damages from the Defendants on their claim of breach of fiduciary duty by attorney for self dealing? ANSWER: YES _____ No _____

If you find from your consideration of all the evidence that each of these propositions has been proved, then you should answer this question "yes." If you find from your consideration of all of the evidence that any of these propositions has not been proved, then you should answer this question "no."

_____ GIVEN
_____ REFUSED
_____ MODIFIED
_____ COVERED
_____ OTHER

IDJI 1.41.2 - Charging instruction, plaintiffs case, verdict on special interrogatories

25 Causes of Action 1 (2006) § 4

Talbot v. Schroeder, 13 Ariz. App 230, 231, 475 P.2d 520, 521 (1970)

PLAINTIFFS' PROPOSED INSTRUCTION NO. ____

On Plaintiffs' claim against the Defendants for attorney malpractice against the Defendants, the Plaintiffs have the burden of proof on each of the following propositions:

1. the creation of an attorney-client relationship;
2. the existence of a duty on the part of the lawyer;
3. the breach of the duty or the standard of care by the lawyer; and
4. that the failure to perform the duty was a proximate cause of the damages suffered by the client.

You will be asked the following question on the jury verdict form: Are the Plaintiffs entitled to recover damages from the Defendants on their claim of attorney?

ANSWER: YES _____ No _____

If you find from your consideration of all the evidence that each of these propositions has been proved, then you should answer this question "yes." If you find from your consideration of all of the evidence that any of these propositions has not been proved, then you should answer this question "no."

_____ GIVEN
_____ REFUSED
_____ MODIFIED
_____ COVERED
_____ OTHER

Spur Products Corp. v. Stoel Rives, LLP, 142 Idaho 41, 44-45, 122 P.3d 300, 303-304 (Idaho,2005)

PLAINTIFFS' PROPOSED INSTRUCTION NO. ____

On Plaintiffs' claim against the Defendants for professional negligence against the Defendants, the Plaintiffs have the burden of proof on each of the following propositions:

1. the existence of an attorney-client relationship;
2. the existence of a duty on the part of the lawyer;
3. the failure to perform that duty; and
4. the failure to perform the duty must be a proximate cause of the injuries suffered by the client.

You will be asked the following question on the jury verdict form:

Are the Plaintiffs entitled to recover damages from the Defendants on their claim of professional negligence? ANSWER:

YES _____ No _____

If you find from your consideration of all the evidence that each of these propositions has been proved, then you should answer this question "yes." If you find from your consideration of all of the evidence that any of these propositions has not been proved, then you should answer this question "no."

J-U-B Engineers, Inc. v. Security Ins. Co. of Hartford, 146 Idaho 311, 317, 193 P.3d 858, 864 (Idaho,2008)

PLAINTIFFS' REQUESTED INSTRUCTION NO. _____

When I use the term "value" or the phrase "fair market value" or "actual cash value" in these instructions as to any item of property, I mean the amount of money that a willing buyer would pay and a willing seller would accept for the item in question in an open marketplace, in the item's condition as it existed immediately prior to the occurrence in question.

_____ GIVEN
_____ REFUSED
_____ MODIFIED
_____ COVERED
_____ OTHER

IDJI 9.12 - "Value" or "fair market value" defined

PLAINTIFFS' PROPOSED INSTRUCTION NO. ____

In determining the fair market value of property, you may consider not only the opinions of the various witnesses who testified as to market value, but also all other evidence in the case which may aid in determining market value, such as location of the property, the surroundings and general environment, any peculiar suitability of the property for particular uses, and the reasonable probabilities as to future potential uses, if any, for which the property is or would be suitable or physically adaptable, all as shown by the evidence in the case to have existed on July 4, 2006.

_____ GIVEN
_____ REFUSED
_____ MODIFIED
_____ COVERED
_____ OTHER

IDJI 7.07 - Fair market value - factors to be considered

PLAINTIFFS' PROPOSED INSTRUCTION NO. ____

If the jury decides the Plaintiffs are entitled to recover from the Defendants on the claim for breach of fiduciary duty as directors of the Captains Wheel Resort, Inc., the jury must determine the amount of money that will reasonably and fairly compensate the Plaintiffs for any damages proved to be proximately caused by the Defendants' breach of fiduciary duty.

The elements of damage the jury may consider are:

1. The amount necessary to make the Plaintiffs whole for the Defendants' mis-management of the Captain's Wheel Resort, Inc.;
2. Reasonable value of goods and services received by the Defendants from the Captain's Wheel Resort, Inc. which were not paid for;
3. Reasonable value of goods and services given away from the Captain's Wheel Resort, Inc. by the Defendants;
4. Any other specific item based upon the evidence.
5. Any incidental or consequential damage suffered by the Plaintiff that is within the foreseeable chain of proximate causation.

_____ GIVEN
_____ REFUSED
_____ MODIFIED
_____ COVERED
_____ OTHER

IDJI 9.01 - Damage instruction for injuries to plaintiff - general case

PLAINTIFFS' PROPOSED INSTRUCTION NO. _____

If the jury decides the Plaintiffs are entitled to recover from the Defendants on the claim for breach of fiduciary duty by attorney for self dealing, the jury must determine the amount of money that will reasonably and fairly compensate the Plaintiffs for any damages proved to be proximately caused by the Defendants breach of fiduciary duty by attorney for self dealing.

The elements of damage the jury may consider are:

1. The difference between the price Michael McFarland and Karen Zimmerman paid for the stock of the Captain's Wheel Resort, Inc and the actual value of the stock purchased.

2. The amount necessary to make the Plaintiffs whole for the Defendants' mis-management of the Captain's Wheel Resort, Inc.;

3. Reasonable value of goods and services received by the Defendants from the Captain's Wheel Resort which were not paid for;

4. Reasonable value of goods and services given away from the Captain's Wheel Resort, Inc. by the Defendants;

5. Any other specific item based upon the evidence.

6. Any incidental or consequential damage suffered by the Plaintiffs that is within the foreseeable chain of proximate causation.

Whether the Plaintiffs have proved any of these elements is for the jury to decide.

_____ GIVEN
_____ REFUSED
_____ MODIFIED
_____ COVERED
_____ OTHER

IDJI 9.01 - Damage instruction for injuries to plaintiff - general case

PLAINTIFFS' PROPOSED INSTRUCTION NO. ____

If the jury decides the Plaintiffs are entitled to recover from the Defendants on the claim for Attorney Malpractice, the jury must determine the amount of money that will reasonably and fairly compensate the Plaintiffs for any damages proved to be proximately caused by the Attorney Malpractice.

The elements of damage the jury may consider are:

1. The difference between the price Michael McFarland and Karen Zimmerman paid for the stock of the Captain's Wheel Resort, Inc and the actual value of the stock purchased.
2. The amount necessary to make the Plaintiffs whole for the Defendants' mis-management of the Captain's Wheel Resort, Inc.;
3. Reasonable value of goods and services received by the Defendants from the Captain's Wheel Resort which were not paid for;
4. Reasonable value of goods and services given away from the Captain's Wheel Resort, Inc. by the Defendants;
5. Any other specific item based upon the evidence.
6. Any incidental or consequential damage suffered by the Plaintiffs that is within the foreseeable chain of proximate causation.

Whether the Plaintiffs have proved any of these elements is for the jury to decide.

____ GIVEN
____ REFUSED
____ MODIFIED
____ COVERED
____ OTHER

IDJI 9.01 - Damage instruction for injuries to plaintiff - general case

PLAINTIFFS' PROPOSED INSTRUCTION NO. ____

If the jury decides the Plaintiffs are entitled to recover from the Defendants on the claim for Professional Negligence, the jury must determine the amount of money that will reasonably and fairly compensate the Plaintiffs for any damages proved to be proximately caused by the defendants professional negligence.

The elements of damage the jury may consider are:

1. The difference between the price the Michael McFarland and Karen Zimmerman paid for the stock of the Captain's Wheel Resort, Inc and the actual value of the stock purchased.

2. The amount necessary to make the Plaintiffs whole for the Defendants' mis-management of the Captain's Wheel Resort, Inc.;

3. Reasonable value of goods and services received by the Defendants from the Captain's Wheel Resort which were not paid for;

4. Reasonable value of goods and services given away from the Captain's Wheel Resort, Inc. by the Defendants;

5. Any other specific item based upon the evidence.

6. Any incidental or consequential damage suffered by the Plaintiffs that is within the foreseeable chain of proximate causation.

Whether the Plaintiffs have proved any of these elements is for the jury to decide.

_____ GIVEN
_____ REFUSED
_____ MODIFIED
_____ COVERED
_____ OTHER

IDJI 9.01 - Damage instruction for injuries to plaintiff - general case

PLAINTIFFS' PROPOSED INSTRUCTION NO. _____

The usual measure of damages in an action for breach of fiduciary duty by a corporate director is the profit which the director received and which the corporation was deprived of by the transaction.

- _____ GIVEN
- _____ REFUSED
- _____ MODIFIED
- _____ COVERED
- _____ OTHER

Steelman v. Mallory, 110 Idaho 510

PLAINTIFFS' REQUESTED INSTRUCTION NO. ____

When I use the expression "proximate cause," I mean a cause that, in natural or probable sequence, produced the injury, the loss or the damage complained of. It need not be the only cause. It is sufficient if it is a substantial factor in bringing about the injury, loss or damage. It is not a proximate cause if the injury, loss or damage likely would have occurred anyway.

There may be one or more proximate causes of an injury. When the negligent conduct of two or more persons or entities contributes concurrently as substantial factors in bringing about an injury, the conduct of each may be a proximate cause of the injury regardless of the extent to which each contributes to the injury.÷

_____ GIVEN
_____ REFUSED
_____ MODIFIED
_____ COVERED
_____ OTHER

IDJI 2.30.2 - Proximate cause - "substantial factor," without "but for" test.

INSTRUCTION NO. _____

In this case, you will be given a special verdict form to use in returning your verdict. This form consists of a series of questions that you are to answer. I will read the verdict form to you now.

Question No. 1. Are the Plaintiffs entitled to recover damages from the Defendants on their claim of BREACH OF FIDUCIARY DUTY BY DEFENDANTS AS DIRECTORS OF THE CAPTAIN'S WHEEL RESORT, INC.? ANSWER:

YES _____ No _____

If so, how much: \$ _____.

Question No. 2. Are the Plaintiffs entitled to recover damages from the Defendants on their claim of BREACH OF FIDUCIARY DUTY BY ATTORNEY FOR SELF DEALING?

ANSWER: YES _____ No _____

If so, how much: \$ _____.

Question No. 3. Are the Plaintiffs entitled to recover damages from the Defendants on their claim of ATTORNEY MALPRACTICE?

ANSWER: YES _____ No _____

If so, how much: \$ _____.

Question No. 4. Are the Plaintiffs entitled to recover damages from the Defendants on their claim of PROFESSIONAL NEGLIGENCE?

ANSWER: YES _____ No _____

If so, how much: \$ _____.

- _____ GIVEN
- _____ REFUSED
- _____ MODIFIED
- _____ COVERED
- _____ OTHER

IDJI 1.43.1 - Instruction on special verdict form

PLAINTIFFS' PROPOSED INSTRUCTION NO. _____

If you find that Defendants' acts which proximately caused injury to the Plaintiffs were an extreme deviation from reasonable standards of conduct and that these acts were performed by the defendant with malice, fraud, oppression, wantonness or gross negligence, you may, in addition to any compensatory damages to which you find the plaintiff entitled, award to plaintiff an amount which will punish the defendant and deter the defendant and others from engaging in similar conduct in the future.

_____ GIVEN
_____ REFUSED
_____ MODIFIED
_____ COVERED
_____ OTHER

IDJI 9.20 - Punitive damages

PLAINTIFFS' PROPOSED INSTRUCTION NO. _____

Punitive damages are not a matter of right, but may be awarded in the jury's sound discretion, which is to be exercised without passion or prejudice. The law provides no mathematical formula by which such damages are to be calculated, other than any award of punitive damages must bear a reasonable relation to the actual harm done, to the cause thereof, to the conduct of the defendant, and to the primary objective of deterrence.

_____ GIVEN
_____ REFUSED
_____ MODIFIED
_____ COVERED
_____ OTHER

Comments:

See Robinson v. State Farm Insurance, 137 Idaho 173, 45 P.3d 829 (2002).

PLAINTIFFS' PROPOSED INSTRUCTION NO. _____

You have been permitted to hear evidence pertaining to defendant's wealth and financial condition. This evidence was admitted for your consideration only with reference to the question of punitive damages in light of all other evidence before you if you determine that such an award should be made in this case.

Punitive damages are not a matter of right, but may be awarded in the jury's sound discretion, which is to be exercised without passion or prejudice. The law provides no mathematical formula by which such damages are to be calculated, other than any award of punitive damages must bear a reasonable relation to the actual harm done, to the cause thereof, to the conduct of the defendant, and to the primary objective of deterrence.

_____ GIVEN
_____ REFUSED
_____ MODIFIED
_____ COVERED
_____ OTHER

IDJI 9.20.5 - Punitive damages - consideration of defendant's wealth
Robinson v. State Farm Insurance, 137 Idaho 173, 45 P.3d 829 (2002).

PLAINTIFFS' PROPOSED INSTRUCTION NO. _____

You have now completed your duties as jurors in this case and are discharged with the sincere thanks of this Court. You may now discuss this case with the attorneys or with anyone else. For your guidance, I instruct you that whether you talk to the attorneys, or to anyone else, is entirely your own decision. It is proper for you to discuss this case, if you want to, but you are not required to do so, and you may choose not to discuss the case with anyone at all. If you choose to talk to someone about this case, you may tell them as much or as little as you like about your deliberations or the facts that influenced your decisions. If anyone persists in discussing the case over your objection, or becomes critical of your service, either before or after any discussion has begun, you may report it to me.

_____ GIVEN
_____ REFUSED
_____ MODIFIED
_____ COVERED
_____ OTHER

IDJI 1.17 - Post verdict jury instruction

PLAINTIFFS' PROPOSED INSTRUCTION NO. _____

The issue of the existence of the attorney-client relationship is a question of fact. The attorney-client relationship may be created by express or implied contract. It is not dependent on the payment of a fee.

_____ GIVEN
_____ REFUSED
_____ MODIFIED
_____ COVERED
_____ OTHER

Cause of Action 1 (2006) § 5

PLAINTIFFS' PROPOSED INSTRUCTION NO. _____

Among the factors which may be considered in determining the existence of a fiduciary relationship are the degree of kinship of the parties, disparity in age, health, mental condition, education, and business experience, and the extent to which one party entrusts the handling of business and financial affairs to the other party.

- _____ GIVEN
- _____ REFUSED
- _____ MODIFIED
- _____ COVERED
- _____ OTHER

Cause of Action 1 (2006) § 5

The rules of law governing the transactions of an attorney with his client are most strict, and operate to protect the client from any advantage that may be possessed by the attorney on account of superior knowledge or confidence reposed in him by the client. What the law does not consider unfair dealing between other parties, where no fiduciary relation exists, will frequently not be sustained as between attorney and client. While the relation exists an attorney is not permitted to take advantage of the client's affairs, against his interests, to make money. This doctrine's strict enforcement is necessary for the proper protection of the client. The application of this rule forbids the attorney to purchase, against the interest of his client, property sold in the course of litigation in which he is retained, and such sales will be held void, or the attorney will be held as the trustee of his client, and required to account as such.

_____ GIVEN
_____ REFUSED
_____ MODIFIED
_____ COVERED
_____ OTHER

Ainsworth, et al. v. Harding, 22 Idaho 645, 128 P. 92

PLAINTIFFS' PROPOSED INSTRUCTION NO. _____

If counsel be retained to defend a particular title to property, he can never thereafter, unless his client consent, buy the opposing title without holding it in trust for those then having the title he was employed to sustain.

_____ GIVEN
_____ REFUSED
_____ MODIFIED
_____ COVERED
_____ OTHER

Ainsworth, et al. v. Harding, 22 Idaho 645, 128 P. 92

PLAINTIFFS' PROPOSED INSTRUCTION NO. _____

A lawyer, as a member of the legal profession, is a representative of clients, an officer of the legal system and a public citizen having special responsibility for the quality of justice.

_____ GIVEN
_____ REFUSED
_____ MODIFIED
_____ COVERED
_____ OTHER

Idaho Rules of Professional Conduct, Preamble: A Lawyer's Responsibilities, Paragraph 1

PLAINTIFFS' PROPOSED INSTRUCTION NO. _____

A lawyer can be sure that preserving client confidences ordinarily serves the public interest because people are more likely to seek legal advice, and thereby heed their legal obligations, when they know their communications will be private.

_____ GIVEN
_____ REFUSED
_____ MODIFIED
_____ COVERED
_____ OTHER

Idaho Rules of Professional Conduct, Preamble: A Lawyer's Responsibilities, Paragraph 8

PLAINTIFFS' PROPOSED INSTRUCTION NO. _____

In the nature of law practice, however, conflicting responsibilities are encountered. Virtually all difficult ethical problems arise from conflict between a lawyer's responsibilities to clients, to the legal system and to the lawyer's own interest in remaining an ethical person while earning a satisfactory living.

_____ GIVEN
_____ REFUSED
_____ MODIFIED
_____ COVERED
_____ OTHER

Idaho Rules of Professional Conduct, Preamble: A Lawyer's Responsibilities, Paragraph 9

PLAINTIFFS' PROPOSED INSTRUCTION NO. _____

In regard to the Idaho Rules of Professional Conduct "confirmed in writing," when used in reference to the informed consent of a person, denotes informed consent that is given in writing by the person or a writing that a lawyer promptly transmits to the person confirming an oral informed consent.

_____ GIVEN
_____ REFUSED
_____ MODIFIED
_____ COVERED
_____ OTHER

Idaho Rules of Professional Conduct, Rule 1.0 Terminology,
Paragraph (b)

PLAINTIFFS' PROPOSED INSTRUCTION NO. _____

"Firm" or "law firm" denotes a lawyer in a professional corporation, sole proprietorship or other association authorized to practice law.

_____ GIVEN
_____ REFUSED
_____ MODIFIED
_____ COVERED
_____ OTHER

Idaho Rules of Professional Conduct, Rule 1.0 Terminology,
Paragraph (c)

PLAINTIFFS' PROPOSED INSTRUCTION NO. _____

"Informed consent" denotes the agreement by a person to a proposed course of conduct after the lawyer has communicated adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct.

_____ GIVEN
_____ REFUSED
_____ MODIFIED
_____ COVERED
_____ OTHER

Idaho Rules of Professional Conduct, Rule 1.0 Terminology,
Paragraph (e)

PLAINTIFFS' PROPOSED INSTRUCTION NO. _____

Many of the Rules of Professional Conduct require the lawyer to obtain the informed consent of a client or other person before pursuing a course of conduct. The lawyer must make reasonable efforts to ensure that the client or other person possesses information reasonably adequate to make an informed decision. Ordinarily, this will require communication that includes a disclosure of the facts and circumstances giving rise to the situation, any explanation reasonably necessary to inform the client or other person of the material advantages and disadvantages of the proposed course of conduct and a discussion of the client's or other person's options and alternatives. In some circumstances it may be appropriate for a lawyer to advise a client or other person to seek the advice of other counsel. A lawyer need not inform a client or other person of facts or implications already known to the client or other person; nevertheless, a lawyer who does not personally inform the client or other person assumes the risk that the client or other person is inadequately informed and the consent is invalid. In determining whether the information and explanation provided are reasonably adequate, relevant factors include whether the client or other person is experienced in legal matters generally and in making decisions of the type involved, and whether the client or other person is independently represented by other counsel in giving the consent. Normally, such persons need less

information and explanation than others, and generally a client or other person who is independently represented by other counsel in giving the consent should be assumed to have given informed consent.

- _____ GIVEN
- _____ REFUSED
- _____ MODIFIED
- _____ COVERED
- _____ OTHER

Idaho Rules of Professional Conduct, Rule 1.0 Terminology, Commentary, Informed Consent, Paragraph (6)

PLAINTIFFS' PROPOSED INSTRUCTION NO. _____

A lawyer shall promptly inform the client of any decision or circumstance with respect to which the client's informed consent is required by these Rules.

_____ GIVEN
_____ REFUSED
_____ MODIFIED
_____ COVERED
_____ OTHER

Idaho Professional Rule 1.4(a)(1)

PLAINTIFFS' PROPOSED INSTRUCTION NO. _____

Loyalty and independent judgment are essential elements in the lawyer's relationship to a client. Concurrent conflicts of interest can arise from the lawyer's responsibilities to another client, a former client or a third person or from the lawyer's own interests.

_____ GIVEN
_____ REFUSED
_____ MODIFIED
_____ COVERED
_____ OTHER

Idaho Rules of Professional Conduct 1.7: Conflict of Interest:
Current Clients, Commentary, General Principles

PLAINTIFFS' PROPOSED INSTRUCTION NO. _____

Loyalty to a current client prohibits undertaking representation directly adverse to that client without that client's informed consent.

_____ GIVEN
_____ REFUSED
_____ MODIFIED
_____ COVERED
_____ OTHER

Idaho Rules of Professional Conduct 1.7: Conflict of Interest:
Current Clients, Commentary

Prohibited Representations

Ordinarily, clients may consent to representation notwithstanding a conflict. However some conflicts are nonconsentable, meaning that the lawyer involved cannot properly ask for such agreement or provide representation on the basis of the client's consent. When the lawyer is representing more than one client, the question of consentability must be resolved as to each client.

_____ GIVEN
_____ REFUSED
_____ MODIFIED
_____ COVERED
_____ OTHER

Idaho Rules of Professional Conduct 1.7: Conflict of Interest:
Current Clients, Commentary 14

IN THE SUPREME COURT OF THE
STATE OF IDAHO

KARLETTA GRACE BERRY, a widow,)
KARLETTA GRACE BERRY, Personal)
Representative of the Estate of Jerry)
Lee Roy Berry, CAPTAIN'S WHEEL)
RESORT, INC. an Idaho Corporation)

Plaintiffs/Appellants)

vs)

MICHAEL B MCFARLAND,)
MICHAEL B. MCFARLAND, P.A.,)
and KAREN ZIMMERMAN)

Defendants/Respondents)

SUPREME COURT NO.
37951-2010

CLERK'S RECORD ON APPEAL

Rex A. Finney
120 E Lake St, Ste 317
Sandpoint, ID 83864

John P. Whelan
1213 N 4th Street
Coeur d'Alene, ID 83814

PLAINTIFFS' PROPOSED INSTRUCTION NO. _____

A lawyer for a corporation or other organization who is also a member of its board of directors should determine whether the responsibilities of the two roles may conflict. The lawyer may be called on to advise the corporation in matters involving actions of the directors. Consideration should be given to the frequency with which such situations may arise, the potential intensity of the conflict, the effect of the lawyer's resignation from the board and the possibility of the corporation's obtaining legal advice from another lawyer in such situations. If there is material risk that the dual role will compromise the lawyer's independence of professional judgment, the lawyer should not serve as a director or should cease to act as the corporation's lawyer when conflicts of interest arise. The lawyer should advise the other members of the board that in some circumstances matters discussed at board meetings while the lawyer is present in the capacity of director might not be protected by the attorney-client privilege and that conflict of interest considerations might require the lawyer's recusal as a director or might require the lawyer and the lawyer's firm to decline representation of the corporation in a matter.

- _____ GIVEN
- _____ REFUSED
- _____ MODIFIED
- _____ COVERED
- _____ OTHER

PLAINTIFFS' PROPOSED INSTRUCTION NO. _____

A lawyer shall not use information relating to representation of a client to the disadvantage of the client unless the client gives informed consent, except as permitted or required by these Rules.

_____ GIVEN
_____ REFUSED
_____ MODIFIED
_____ COVERED
_____ OTHER

Idaho Professional Rule 1.8(b): Conflict Of Interest: Current Clients: Specific Rules

PLAINTIFFS' PROPOSED INSTRUCTION NO. _____

A lawyer shall not acquire a proprietary interest in the cause of action or subject matter of litigation the lawyer is conducting for a client, except that the lawyer may:

(1) acquire a lien authorized by law to secure the lawyer's fee or expenses; and

(2) contract with a client for a reasonable contingent fee in a civil case.

- _____ GIVEN
- _____ REFUSED
- _____ MODIFIED
- _____ COVERED
- _____ OTHER

Idaho Professional Rule 1.8(i): Conflict Of Interest: Current Clients: Specific Rules

PLAINTIFFS' PROPOSED INSTRUCTION NO. _____

Paragraph (a)(1) requires that the transaction itself be fair to the client and that its essential terms be communicated to the client, in writing, in a manner that can be reasonably understood. Paragraph (a)(2) requires that the client also be advised, in writing, of the desirability of seeking the advice of independent legal counsel. It also requires that the client be given a reasonable opportunity to obtain such advice. Paragraph (a)(3) requires that the lawyer obtain the client's informed consent, in a writing signed by the client, both to the essential terms of the transaction and to the lawyer's role. When necessary, the lawyer should discuss both the material risks of the proposed transaction, including any risk presented by the lawyer's involvement, and the existence of reasonably available alternatives and should explain why the advice of independent legal counsel is desirable. See Rule 1.0(e) (definition of informed consent).

- _____ GIVEN
- _____ REFUSED
- _____ MODIFIED
- _____ COVERED
- _____ OTHER

Idaho Rules of Professional Conduct: Conflict Of Interest:
Current Clients: Specific Rules, Commentary Paragraph [2]

PLAINTIFFS' PROPOSED INSTRUCTION NO. _____

A lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client unless the former client gives informed consent, confirmed in writing.

- _____ GIVEN
- _____ REFUSED
- _____ MODIFIED
- _____ COVERED
- _____ OTHER

Idaho Professional Rule 1.9: Duties To Former Clients

PLAINTIFFS' PROPOSED INSTRUCTION NO. _____

If a grantor is unduly influenced, he does not have the requisite intent to transfer property. The transfer is voidable.

_____ GIVEN
_____ REFUSED
_____ MODIFIED
_____ COVERED
_____ OTHER

Krebs v. Krebs 114 Idaho 571, 575-576, 759 P.2d 77, 81 - 82 (Idaho App., 1988)

To establish undue influence, the party must prove each of the following propositions:

- (1) a grantor who is subject to influence;
- (2) an opportunity to exert undue influence;
- (3) a disposition to exert undue influence;
- (4) a result indicating undue influence

Undue influence must usually be inferred from circumstantial evidence. Factors to be considered include the age and physical and mental condition of the grantor, whether he or she received disinterested advice in the transaction, the providence or improvidence of the decision, the amount or adequacy of consideration for any contract made, distress of the person influenced, his or her predisposition to make the transfer in question, the extent of the transfer in relation to his or her whole worth, failure to provide for one's children in the event of a transfer, active solicitation by the grantee, and the relationship of the parties.

If the parties to the transaction occupied a confidential or fiduciary relationship, and the transfer is to the Fiduciary, a rebuttable presumption of undue influence arises, which the proponent of the transaction must refute.

_____ GIVEN
_____ REFUSED
_____ MODIFIED
_____ COVERED
_____ OTHER

PLAINTIFFS' PROPOSED INSTRUCTION NO. _____

The implied covenant of good faith and fair dealing arises only regarding terms agreed to by the parties. No covenant will be implied which is contrary to the terms of the contract negotiated and executed by the parties. The covenant requires "that the parties perform in good faith the obligations imposed by their agreement," and a violation of the covenant occurs only when either party violates, nullifies or significantly impairs any benefit of the contract.

_____ GIVEN
_____ REFUSED
_____ MODIFIED
_____ COVERED
_____ OTHER

Bushi v. Sage Health Care, PLLC 146 Idaho 764, 768, 203 P.3d 694, 698 (Idaho, 2009)

CONSTRUCTIVE TRUST

INSTRUCTION NO. _____

In this case, Karletta Grace Berry, a widow and Personal Representative of the Estate of Jerry Lee Roy Berry alleges that Jerry Lee Roy Berry was not competent to enter into the Stock Purchase and Sale Agreement with the Defendants. In order to be competent to contract, a natural person must be of legal age and have the mental capacity to enter into a contract.

_____ GIVEN
_____ REFUSED
_____ MODIFIED
_____ COVERED
_____ OTHER

IDJI 6.02.1 - Capacity to contract - individual

INSTRUCTION NO. _____

A person has the mental capacity to enter into a contract when the person possesses sufficient mind to understand, in a reasonable manner, the nature, extent, character, and effect of the contract in question.

_____ GIVEN
_____ REFUSED
_____ MODIFIED
_____ COVERED
_____ OTHER

IDJI 6.02.4 - Capacity to contract - mental capacity to contract

PLAINTIFFS' PROPOSED INSTRUCTION NO. ____

In this case, the Plaintiffs alleges that there was insufficient consideration to support the Stock Purchase and Sale Agreement between Jerry Lee Roy Berry and the Defendants.

A promise is not enforceable as a contract unless something of value was given or was agreed to be given in exchange for it. In law, the giving of value or agreement to give value is called "consideration." Consideration is the benefit given or agreed to be given by one party in exchange for the other party's performance or promise to perform.

Consideration can be a promise to do something the party is not required to do, or a promise not to do something the party otherwise would be free to do.

Consideration must have value; if it has no value at all, it is not sufficient. If the parties have agreed upon the specific consideration to be given in this case, then any value, however slight, is sufficient.

IDJI 6.04.1 - Consideration

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF KOOTENAI

KARLETTA GRACE BERRY, a widow,) Case No. CV-2007-0002409
KARLETTA GRACE BERRY, Personal)
Representative of the Estate)
of Jerry Lee Roy Berry,)
CAPTAIN'S WHEEL RESORT, INC.,) JURIES SPECIAL VERDICT WITH
an Idaho Corporation,) SPECIAL INTERROGATORIES
)
Plaintiff,)
)
v.)
)
MICHAEL B. MCFARLAND, MICHAEL)
B. MCFARLAND, P.A., and KAREN)
ZIMMERMAN,)
)
Defendants.)
)

We the jury in the above entitled action, find the following Special Verdict on the questions submitted:

Question No. 1. Are the Plaintiffs entitled to recover damages from the Defendants on their claim of BREACH OF FIDUCIARY DUTY BY DEFENDANTS AS DIRECTORS OF THE CAPTAIN'S WHEEL RESORT, INC.? ANSWER: YES _____ No _____

If so, how much: \$ _____.

Question No. 2. Are the Plaintiffs entitled to recover damages from the Defendants on their claim of BREACH OF FIDUCIARY DUTY BY ATTORNEY FOR SELF DEALING?

ANSWER: YES _____ No _____

If so, how much: \$ _____.

Question No. 3. Are the Plaintiffs entitled to recover damages from the Defendants on their claim of ATTORNEY MALPRACTICE?

ANSWER: YES _____ No _____

If so, how much: \$ _____.

Question No. 4. Are the Plaintiffs entitled to recover damages from the Defendants on their claim of PROFESSIONAL NEGLIGENCE?

ANSWER: YES _____ No _____

If so, how much: \$ _____.

FOREMAN

JUROR

JUROR

JUROR

JUROR

JUROR

JUROR

JUROR

JUROR

JUROR

JUROR

JUROR

STATE OF IDAHO }
COUNTY OF KOOTENAI } SS
FILED:

John P. Whelan, P.C.
Attorney at Law
213 N. 4th Street
Coeur d' Alene, Idaho 83814
Telephone: (208) 664-5891
Facsimile: (208) 664-2240
ISB No. 6083

2010 JAN 14 PM 4: 24

CLERK DISTRICT COURT
[Signature]
DEPUTY

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF KOOTENAI

KARLETTA GRACE BERRY, a widow,
KARLETTA GRACE BERRY, Personal
Representative of the Estate of Jerry
Lee Roy Berry, CAPTAIN'S WHEEL
RESORT, INC., an Idaho Corporation,

Plaintiffs,

vs.

MICHAEL B. MCFARLAND, MICHAEL B.
MCFARLAND, P.A., and KAREN
ZIMMERMAN,

Defendants.

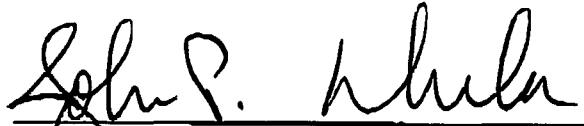
Case No. CV-07-2409

DEFENDANTS' SUPPLEMENTAL EXHIBIT
LIST

Defendants, Michael B. McFarland, Michael B. McFarland, P.A. and Karen Zimmerman, may offer the exhibits identified in the attached Defendants' Supplemental Exhibit List and may also offer such evidence as has been identified by Plaintiffs in their evidence disclosure statement as necessary.

Dated: 1/14/10

JOHN P. WHELAN, P.C.



John P. Whelan

Attorney for Defendants

DEFENDANTS' EXHIBIT LIST

Case No. CV-07-2409

Date: January 14, 2010

Title of Case: Karletta Grace Berry, et al. v. Michael B. McFarland, et al.

 Plaintiff's Exhibits (list numerically) X Defendant's Exhibits (list alphabetically) Third Party Exhibits State Party:

No.	Description	Admitted by Stip	Offered	Rec'd	Refused	Reserve Ruling
A	Receipt for \$40,000.00 dated 7/25/03					
B	Receipt for \$60,000.00 dated 8/4/03					
C	Articles of Incorporation and yearly filings of Captain's Wheel Resort, Inc.					
D	Bylaws					
E	Corporate Minutes—unsigned					
F	Corporate Minutes, April 15, 1997					
G	Resolution of September 22, 2000/Resignations					

H	Resolution August 7, 203					
I	Stock Purchase Agreement Berry/Campbell					
J	Stock Purchase and Sale Agreement					
K	Special Meeting Notices					
L	Waiver of Notice of 10/15/06					
M	Minutes of Special Meeting					
N	Waiver of Notice of Special Meeting/Notice					
O	Minutes dated 10/15/06					
P	Minutes dated Nov. 29, 2006					
Q	Letter to Finney, Feb. 5, 2007 with notice					
R	Minutes dated Feb. 16, 2007					
S	Objection to Special Meeting					
T	Resolutions in lieu					
U	Offer/Acceptance of stock					
V	Stock Purchase Agreement					
W	Stock Purchase and Sale Agreement					
X	Stock Certificates					
Y	Letter from Finney, Feb. 14, 2007					
Z	Letter to Finney, Feb. 5, 2007					
AA	Letter to Finney, Jan. 8, 2007					

BB	Emails					
CC	Letter to Finney, Nov. 29, 2006					
DD	Letter from Finney, Nov. 21, 2006					
EE	Objection to notice					
FF	Letter to Board, Nov. 17, 2006					
GG	Letter to McFarland, Nov. 18, 2006					
HH	Letter to McFarland, Nov. 14, 2006					
II	McFarland letter, Nov. 16, 2006					
JJ	Letter from Daugharty dated April 28, 2004					
KK	Demand note					
LL	August 11, 2003 receipt					
MM	Unsigned minutes					
NN	Wells Fargo letter dated January 17, 2007					
OO	Miscellaneous corporate records					
PP	Fax and memo from Daugharty's office					
QQ	Letter from Daugharty, February 21, 2006					

DEFENDANTS' SUPPLEMENTAL EXHIBIT LIST-5

SS	Summary of costs and expenses advanced by McFarland					
TT	2006 Corporate Tax Returns					
UU	2007 Corporate Tax Returns					
VV	2008 Corporate Tax Returns					
WW	2007 Profit and Loss Statement					
XX	2008 Profit and Loss Statement					
YY	2009 Profit and Loss Statement					
ZZ	2010 Profit and Loss Statement					
AAA	Letter and attachments from McCall and Landwehr, P.A. dated April 20, 2004					
BBB	Tape of special meeting held on November 29, 2006 (not duplicated)					
CCC	Transcript of minutes of November 29, 2006 special board meeting					
DDD	Tape of February 15, 2007 board meeting (not duplicated)					

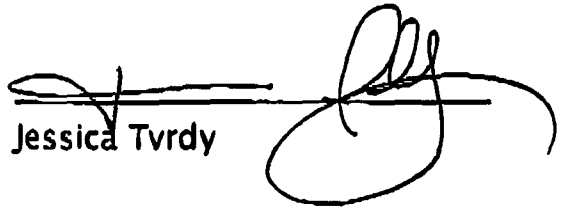
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 14TH day of January, 2010, I caused to be served a true and correct copy of the foregoing by the method indicated below, and addressed as indicated below:

Rex A. Finney
Finney, Finney & Finney
120 East Lake Street, Suite 317
Sandpoint, ID 83865

- () U.S. Mail, Postage Prepaid
() Hand Delivered
() Overnight Mail
() Facsimile to: (208) 263-8211

Jessica Tvrdy

A handwritten signature in black ink, appearing to read 'Jessica Tvrdy', is written over a horizontal line. The signature is stylized and cursive.

John P. Whelan, P.C.
Attorney at Law
213 N. 4th Street
Coeur d' Alene, Idaho 83814
Telephone: (208) 664-5891
Facsimile: (208) 664-2240
ISB No. 6083

STATE OF IDAHO }
COUNTY OF KOOTENAI } SS
FILED:

2010 JAN 14 PM 4:24

CLERK DISTRICT COURT

DEPUTY

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF KOOTENAI

KARLETTA GRACE BERRY, a widow,
KARLETTA GRACE BERRY, Personal
Representative of the Estate of Jerry
Lee Roy Berry, CAPTAIN'S WHEEL
RESORT, INC., an Idaho Corporation,

Plaintiffs,

vs.

MICHAEL B. MCFARLAND, MICHAEL B.
MCFARLAND, P.A., and KAREN
ZIMMERMAN,

Defendants.

Case No. CV-07-2409

DEFENDANTS' THIRD SUPPLEMENTAL
STATEMENT OF WITNESSES

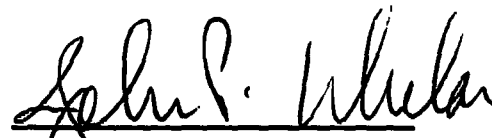
Defendants, Michael B. McFarland, Michael B. McFarland, P.A. and Karen Zimmerman, by and through their attorney of record, John P. Whelan, submit the following witness list:

1. Michael McFarland
2. Karen Zimmerman
3. Karletta Grace Berry

4. Herb Huseland
5. Monnie Cripe
6. Marie Streater
7. Ralph Jones
8. Dee Meredith
9. Jessica Tvrdy
10. David C. Johnston
11. Any witnesses called by Plaintiffs.

And such other witnesses as may be necessary for rebuttal.

DATED this 14 day of January, 2010.


John P. Whelan
John P. Whelan
Attorney for Defendants

STATE OF IDAHO
COUNTY OF KOOTENAI
FILED: LSS

2010 JAN 15 AM 9: 21

CLERK DISTRICT COURT

John A. Boyle
DEPUTY

J.P. Whelan, P.C.
Attorney at Law
213 N. 4th Street
Coeur d' Alene, Idaho 83814
Telephone: (208) 664-5891
Facsimile: (208) 664-2240
ISB No. 6083

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE STATE OF
IDAHO, IN AND FOR THE COUNTY OF KOOTENAI

KARLETTA GRACE BERRY, a widow,
KARLETTA GRACE BERRY, Personal
Representative of the Estate of Jerry
Lee Roy Berry, CAPTAIN'S WHEEL
RESORT, INC., an Idaho Corporation,

Plaintiffs,

vs.

MICHAEL B. MCFARLAND, MICHAEL B.
MCFARLAND, P.A., and KAREN
ZIMMERMAN,

Defendants.

Case No. CV-07-2409

MOTION IN LIMINE

Defendants, Michael McFarland, Michael B. McFarland, P.A. and Karen
Zimmerman, submit the following motion in limine:

EXCLUSION OF WITNESSES

Defendants served written discovery on Plaintiffs on June 20, 2007.

Plaintiffs submitted responses on October 26, 2007. On December 8, 2009, Plaintiffs served their "Plaintiff's Supplemental Answer to Interrogatory No. 1". The supplemental responses were received thirty-six (36) days before the original trial date established for this action (January 14, 2010). The supplemental discovery responses identified two (2) new witnesses:

- (1) Byron Powell
- (2) Frank Conklin

The witnesses were identified only one (1) day before the discovery cutoff established by the scheduling order in this case. The witnesses were not identified until after it was too late to serve a subpoena duces tecum on the witnesses. The late disclosure prejudiced Defendants in that Defendants were denied an opportunity to seek discovery from these witnesses.

The witnesses should be barred from testifying.

OPINION OF MEDICAL DOCTORS

The Plaintiffs' witness list identified the following medical doctors:

- (1) Dr. Morich
- (2) Dr. Tezcan
- (3) Dr. Gossett

None of these witnesses were identified as expert witnesses.

It is anticipated that one or more of these witnesses will be asked about their opinion of Jerry Berry's physical or mental condition. Such inquiry would necessarily involve an opinion. The opinions of the doctor should be excluded as evidence in that the doctors were not identified as expert witnesses.

STATEMENTS OF DECEDENT JERRY BERRY

In light of the deposition testimony of Plaintiff Karletta Berry, it is anticipated that Plaintiffs will attempt to offer various statements of Jerry Berry

MOTION IN LIMINE-2

made during his life. These anticipated statements will no doubt center around conversations which Karletta Berry alleges she had with her deceased husband. None of the anticipated conversations pertained to any will of Jerry Berry.

In the matter at hand, Plaintiffs will no doubt attempt to offer statements of the decedent to bolster claims that Mike McFarland was Jerry Berry's attorney and that the transaction between Defendants and decedent was a loan and not a stock purchase. These statement will take the form of what Jerry Berry allegedly said to Plaintiff Karletta Berry regarding meetings which Plaintiffs alleged to have occurred between Michael McFarland and Jerry Berry, the decedent. Any such statements would constitute inadmissible hearsay for which no exceptions exist.

The state of mind exception to the hearsay rule (Rule 803(3)) would not apply to the statements that may be offered, as Rule 803(3) specifically excludes statements of memory or belief to prove the fact remembered or believed—unless related to the execution, revocation, identification or terms of a declarant's will.

Accordingly, Defendants seek an order barring Plaintiffs from offering any such statements.

**STATEMENTS OF DECEDENT INTRODUCING MICHAEL MCFARLAND AS "MY
LAWYER" OR ATTORNEY**

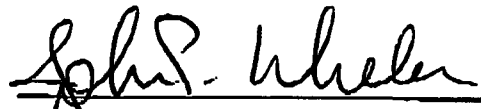
It is anticipated that Plaintiffs will attempt to offer the testimony of third parties who allegedly overheard introductions made by decedent Jerry Berry to the effect that "this is Mike McFarland, my lawyer". Any such statements would be inadmissible hearsay on the part of a party opponent (in that one of the Plaintiffs in the action is Jerry Berry's estate).

Jerry Berry is deceased and Plaintiff should be barred from offering any of his statements unless the given statement falls within a well defined exception to the hearsay rule.

DATED this 14 day of January, 2010.

Respectfully submitted,

JOHN P. WHELAN, P.C.



John P. Whelan

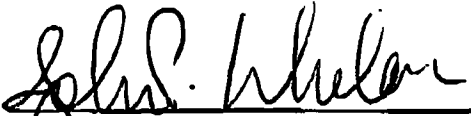
MOTION IN LIMINE-4

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 15 day of January, 2010, I caused to be served a true and correct copy of the foregoing by the method indicated below, and addressed as indicated below:

Rex A. Finney
Finney, Finney & Finney
120 East Lake Street, Suite 317
Sandpoint, ID 83865

- () U.S. Mail, Postage Prepaid
- () Hand Delivered
- () Overnight Mail
- () Facsimile to: (208) 263-8211



John P. Whelan

STATE OF IDAHO }
COUNTY OF KOOTENAI } SS
FILED:

2010 JAN 15 AM 9: 21

John P. Whelan, P.C.
Attorney at Law
213 N. 4th Street
Coeur d' Alene, Idaho 83814
Telephone: (208) 664-5891
Facsimile: (208) 664-2240
ISB No. 6083

CLERK DISTRICT COURT

John P. Whelan
DEPUTY

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE STATE OF
IDAHO, IN AND FOR THE COUNTY OF KOOTENAI

KARLETTA GRACE BERRY, a widow,
KARLETTA GRACE BERRY, Personal
Representative of the Estate of Jerry
Lee Roy Berry, CAPTAIN'S WHEEL
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Plaintiffs,

vs.

MICHAEL B. MCFARLAND, MICHAEL B.
MCFARLAND, P.A., and KAREN
ZIMMERMAN,

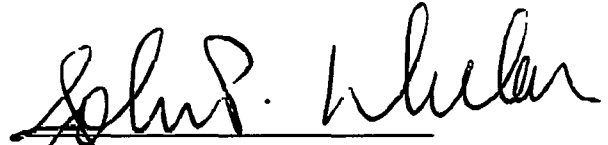
Defendants.

Case No. CV-07-2409

DEFENDANTS' PROPOSED JURY
INSTRUCTIONS

Defendants, Michael B. McFarland, Michael B. McFarland, P.A. and Karen
Zimmerman, by and through their attorney of record, John P. Whelan, submit
Defendants' Proposed Jury Instructions.

DATED this 14 day of January, 2010.

A handwritten signature in black ink, appearing to read "John P. Whelan", written over a horizontal line.

John P. Whelan
Attorney for Defendants

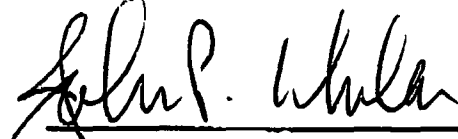
DEFENDANTS' PROPOSED JURY INSTRUCTIONS-2

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 15 day of January, 2010, I caused to be served a true and correct copy of the foregoing by the method indicated below, and addressed as indicated below:

**Rex A. Finney
Finney, Finney & Finney
120 East Lake Street, Suite 317
Sandpoint, ID 83865**

- () U.S. Mail, Postage Prepaid
- () Hand Delivered
- () Overnight Mail
- () Facsimile to: (208) 263-8211



 John P. Whelan

**DEFENDANT'S REQUESTED
INSTRUCTION NO. _____**

A minority shareholder's action against any of the director's of a corporation is derivative, rather than individual, in nature. Accordingly, a shareholder cannot commence an action against the directors of a corporation without first serving a demand in writing on the directors to take the action the shareholder desires or challenges. After the expiration of a 90 day period following the demand may the shareholder file suit against the directors to compel the act requested.

If you find that Plaintiff, Karletta Berry made no written demand on Karen Zimmerman or Michael McFarland as directors of Captain's Wheel Resort, Inc. to refrain from taking the action she objects to as a shareholder, no action against Karen Zimmerman and Michael McFarland would exist. I.C. 30-1-742; *McCann v. McCann*, 138 Idaho 228, 61 P.3d 585 (2002).

**GIVEN _____
REFUSED _____
MODIFIED _____
COVERED _____
OTHER _____**

DERIVATIVE ACTION



**DEFENDANT'S REQUESTED
INSTRUCTION NO. _____**

A contract may be written or oral, or may contain both written terms and oral terms. So long as all the required elements are present, it makes no difference whether the agreement is in writing.

GIVEN	_____
REFUSED	_____
MODIFIED	_____
COVERED	_____
OTHER	_____

IDJI 6.06.1 - CONTRACT MAY BE ORAL OR WRITTEN

(2)

**DEFENDANT'S REQUESTED
INSTRUCTION NO. _____**

**An oral agreement that contains all of the elements of a contract is a binding
contract.**

GIVEN	_____
REFUSED	_____
MODIFIED	_____
COVERED	_____
OTHER	_____

IDJI 6.06.5- ORAL CONTRACTS ARE BINDING

3

**DEFENDANT'S REQUESTED
INSTRUCTION NO. _____**

In this case, Karletta Berry alleges that there was no consideration to support the existence of a contract between Jerry Berry and Karen Zimmerman and Michael McFarland.

A promise is not enforceable as a contract unless something of value was given or was agreed to be given in exchange for it. In law, the giving of value or agreement to give value is called "consideration." Consideration is the benefit given or agreed to be given by one party in exchange for the other party's performance or promise to perform.

Consideration must have value; if it has no value at all, it is not sufficient. If the parties have agreed upon the specific consideration to be given in this case, then any value, however slight, is sufficient.

GIVEN	_____
REFUSED	_____
MODIFIED	_____
COVERED	_____
OTHER	_____

IDJI 6.04.1 - CONSIDERATION

4

DEFENDANT'S REQUESTED
INSTRUCTION NO. _____

If you find that Karen Zimmerman and Michael McFarland paid \$100,000.00 in exchange for the issuance to them of the 200 shares of stock in the Captain's Wheel Resort, Inc. then you must find that Ms. Zimmerman and Mr. McFarland supplied "*consideration*" for the stock.

GIVEN	_____
REFUSED	_____
MODIFIED	_____
COVERED	_____
OTHER	_____

LACK OF CONSIDERATION

(5)

**DEFENDANT'S REQUESTED
INSTRUCTION NO. _____**

In this case, Karletta Berry alleges that Jerry Berry was not competent to enter into a contract with Karen Zimmerman and Michael McFarland. In order to be competent to contract, a natural person must be of legal age and have the mental capacity to enter into a contract.

GIVEN	_____
REFUSED	_____
MODIFIED	_____
COVERED	_____
OTHER	_____

IDJI 6.02.1—CAPACITY TO CONTRACT—INDIVIDUAL

6

DEFENDANT'S REQUESTED
INSTRUCTION NO. _____

The test to determine whether a person has the mental capacity to contract is whether the party possesses sufficient mind to understand in a reasonable manner the nature, extent, character, and effect of the proposed contract. *Olsen v. Hawkins*, 90 Idaho 28, 408 P.2d 462 (1965).

GIVEN	_____
REFUSED	_____
MODIFIED	_____
COVERED	_____
OTHER	_____

CAPACITY



**DEFENDANT'S REQUESTED
INSTRUCTION NO. _____**

A contract is an agreement between two or more parties to do or not do something that is supported by consideration.

There are four elements to complete a contract. Every contract must have these four elements. The four elements are:

- 1. Competent parties;**
- 2. A lawful purpose;**
- 3. Valid consideration; and**
- 4. Mutual agreement by all parties to all essential terms.**

GIVEN _____
REFUSED _____
MODIFIED _____
COVERED _____
OTHER _____

IDJI 6.01.0—ELEMENTS OF CONTRACT—INTRODUCTORY—(Modified)

8

**DEFENDANT'S REQUESTED
INSTRUCTION NO. _____**

Plaintiff, Karletta Berry, claims that Karen Zimmerman and Michael McFarland obtained their stock in the Captain's Wheel Resort, Inc. as the result of undue influence exercised by Karen Zimmerman and Michael McFarland over Jerry Berry. To establish the claim of undue influence, the party must prove each of the following propositions:

- 1. The party was compelled to accept the contract by deceit, force or fear;**
- 2. But for the deceit, force or fear, the party would not have entered into the contract.**

A person has a right by fair persuasion or argument to induce another person of sound mind to contract in his favor, and a transaction under such influence will not be invalid on that account.

If you find from your consideration of all the evidence in the case that each of the foregoing propositions has been proved, your verdict should be for the Karletta Berry. If you find that any of the propositions has not been proved, then your verdict should be for Karen Zimmerman and Michael McFarland.

GIVEN	_____
REFUSED	_____
MODIFIED	_____
COVERED	_____
OTHER	_____

IDJI 6.28.6- UNDUE INFLUENCE (Modified)

9

**DEFENDANT'S REQUESTED
INSTRUCTION NO. _____**

Plaintiff, Karletta Berry, claims that Karen Zimmerman and Michael McFarland obtained Jerry Berry's signature on the Stock Purchase Agreement as the result of duress.

Duress consists of oppressive, coercive or wrongful acts or conduct on the part of one party towards another that was intended to overcome the other party's free choice of decision to enter into the contract. The party oppressed must be overwhelmed by such conduct, or must believe there is no means of relief or other alternative to submission.

If you find that there was duress, then the contract is void.

GIVEN	_____
REFUSED	_____
MODIFIED	_____
COVERED	_____
OTHER	_____

IDJI 6.28.4- DURESS—PHYSICAL OR EMOTIONAL DURESS

10

DEFENDANT'S REQUESTED
INSTRUCTION NO. _____

Plaintiff, Karletta Berry, claims that Michael McFarland was representing her and her husband Jerry Berry and the Captain's Wheel Resort, Inc. as their attorney when Mr. McFarland signed the Stock Purchase and Sale Agreement with Jerry Berry in July of 2006.

If you find that Mr. McFarland was acting as the attorney for Jerry and Karletta Berry and the Captain's Wheel Resort, Inc. when the Stock Purchase Agreement was signed, Mr. McFarland would owe *fiduciary duties* to his clients.

The relationship of client and attorney is one of trust, binding an attorney to utmost good faith in dealing with his clients and in the discharge of that trust, an attorney must act in complete fairness, honor, honesty, loyalty, and fidelity in all his dealings with his client. An attorney can be held liable for the damages suffered by a client as the result of a breach of the duties owed. *Beal v. Mars Larson Ranch Corp. Inc.*, 99 Idaho 662, 586 P.2d 1378 (1978).

GIVEN	_____
REFUSED	_____
MODIFIED	_____
COVERED	_____
OTHER	_____

FIDUCIARY DUTIES



**DEFENDANT'S REQUESTED
INSTRUCTION NO. _____**

Plaintiff accuses Michael McFarland and his firm Michael B. McFarland, P.A. of attorney malpractice. A Plaintiff asserting a claim for attorney malpractice or attorney negligence must show the following:

- (1) The existence of an attorney-client relationship;**
- (2) The existence of a duty on the part of the lawyer;**
- (3) The breach of the duty or the standard of care by the lawyer; and**
- (4) That the failure to perform the duty was a proximate cause of the damages suffered by the client.**

Spur Products Corp. v. Steel Rives, LLP, 142 Idaho 41, 122 P.3d 300.

GIVEN	_____
REFUSED	_____
MODIFIED	_____
COVERED	_____
OTHER	_____

MALPRACTICE

12

**DEFENDANT'S REQUESTED
INSTRUCTION NO. _____**

When I use the word "negligence" in these instructions, I mean the failure to use ordinary care in the management of one's property or person. The words "ordinary care" mean the care a reasonably careful person would use under circumstances similar to those shown by the evidence. Negligence may thus consist of the failure to do something which a reasonably careful person would do, or the doing of something a reasonably careful person would not do, under circumstances similar to those shown by the evidence. [The law does not say how a reasonably careful person would act under those circumstances. That is for you to decide.]

GIVEN	_____
REFUSED	_____
MODIFIED	_____
COVERED	_____
OTHER	_____

IDJI 2.20- DEFINITION OF NEGLIGENCE

13

**DEFENDANT'S REQUESTED
INSTRUCTION NO. _____**

**The existence or non-existence of an attorney-client relationship is a fact
to be determined by the triers of fact.**

GIVEN	_____
REFUSED	_____
MODIFIED	_____
COVERED	_____
OTHER	_____

ATTORNEY/CLIENT RELATIONSHIP

(14)

**DEFENDANT'S REQUESTED
INSTRUCTION NO. _____**

**A corporation is a legal entity recognized by law. A corporation acts through
its directors and officers.**

**GIVEN _____
REFUSED _____
MODIFIED _____
COVERED _____
OTHER _____**

CORPORATION

15

DEFENDANT'S REQUESTED
INSTRUCTION NO. _____

In determining whether a result indicates undue influence, a result is suspicious if it appears unnatural, unjust or irrational, but even apparently unnatural dispositions may be sufficiently explained.

GIVEN	_____
REFUSED	_____
MODIFIED	_____
COVERED	_____
OTHER	_____

UNDUE INFLUENCE

Berry v. McFarland

16

Supreme Court No. 37951-2010

734 of 1268

PLAINTIFFS' PROPOSED INSTRUCTION NO. _____

You have now completed your duties as jurors in this case and are discharged with the sincere thanks of this Court. You may now discuss this case with the attorneys or with anyone else. For your guidance, I instruct you that whether you talk to the attorneys, or to anyone else, is entirely your own decision. It is proper for you to discuss this case, if you want to, but you are not required to do so, and you may choose not to discuss the case with anyone at all. If you choose to talk to someone about this case, you may tell them as much or as little as you like about your deliberations or the facts that influenced your decisions. If anyone persists in discussing the case over your objection, or becomes critical of your service, either before or after any discussion has begun, you may report it to me.

_____ GIVEN
_____ REFUSED
_____ MODIFIED
_____ COVERED
_____ OTHER

IDJI 1.17 - Post verdict jury instruction

**DEFENDANT'S REQUESTED
INSTRUCTION NO. _____**

A party seeking to establish liability by circumstantial evidence must establish circumstances of such nature and so related to each other that their theory of liability is the more reasonable conclusion to be drawn therefrom. Mere suspicion, innuendo, insinuation, speculation or conjecture is no substitute for direct or circumstantial evidence that normally sets forth the basis for your verdict. *Denton v. Hardware Mutual Casualty Co.*, 86 Idaho 427, 388 P.2d 89 (1963).

**GIVEN _____
REFUSED _____
MODIFIED _____
COVERED _____
OTHER _____**

CIRCUMSTANTIAL EVIDENCE

Court Minutes:

Session: HOSACK011510P
Session Date: 01/15/2010
Judge: Hosack, Charles
Reporter:

Division: MAG
Session Time: 11:50

Courtroom: Courtroom6

Clerk(s): Burrington, Talisa

State Attorney(s):

Public Defender(s):

Prob. Officer(s):

Court interpreter(s):



Case ID: 0001

Case number: CV2007-2409
Plaintiff: BERRY, KARLETTA
Plaintiff Attorney:
Defendant: MCFARLAND, MICHAEL
Pers. Attorney:
Co-Defendant(s):
State Attorney:
Public Defender:

01/15/2010

14:02:19

Recording Started:

14:02:19

Case called

14:02:29

Judge: Hosack, Charles
STATUS CONFERENCE HEARING. ALL PARTIES
TELEPHONICALLY. MR. FINNEY FOR

14:03:02

PLANTIFF AND MR. WHELAN FOR DEF. THE MAJOR ISSUE
FOR TODAY WAS A DISPUTE

14:03:24

BETWEEN THE ATTORNEYS ABOUT OPENING STATEMENTS.

14:03:50 **Add Ins: WHEELAN, JOHN**
BASIC ISSUE - PLANTIFFS ARE SAYING MCFARLAND WAS
14:04:25 REP THE BERRYS AND THE WHEEL
WHEN HE ENGAGED IN A BUSINESS TRANSACTION.
14:04:56 REFERS TO IDAHO RULES AND OFFER
THO RULES AS JURY INSTRUCTIONS. THOSE RULES ARE
NOT THE LAW IN IDAHO
14:05:17 ESPECIALLY FOR JURY INSTRUCTIONS, THEY ARE
RULES OF ETHICS, THEY ARE NOT
14:05:40 NECESSARY, CONFUSE THE JURY PANEL. THOSE ARE
RULES OF PROFESSIONAL CONDUCT.
14:06:23 THEY ARE MISLEADING AND NOT RELEVANT AND SHOULD
NOT BE PART OF THE JURY
14:06:43 INSTRUCTIONS. REFERENCES PARTICULAR PAGES.

14:07:24 **Add Ins: FINNEY, REX**
OPENING STATEMENTS - WILL REFER TO THE
PROFESSIONAL REQUIREMENTS TO A CLIENT
14:08:00 RLE 1.7 AND RULE 1.8.

14:08:30 **Judge: Hosack, Charles**
OPENING STATEMENT IS TO BRIEF DESCRIP OF
ALLEGATION. NEED TO FIND OUT WHAT
14:09:25 THE OPENING STATEMENT IS.

14:09:45 **Add Ins: FINNEY, REX**
I WILL DESCRIBE WHAT THE CLAIM IS AND WHAT THE
EVIDENCE WILL SHOW. BREACH OF
14:10:16 DUTY BY THE ATTORNEY.

14:10:48 **Judge: Hosack, Charles**
MOSTLY NEEDS TO A WAY OF PHRASING OPENING
STATEMENT. OPENING STATEMENT IS NOT
14:11:51 A TIME FOR ARGUMENT. YOU CAN SAY WHAT THE ACTS
WHERE -

14:12:35 **Add Ins: WHEELAN, JOHN**
I DONT WANT TO HEAR ARGUMENT AT OPENING
STATEMENT - NOT APPROPRIATE AND I
14:13:05 WILL OBJECT.

14:13:13 **Add Ins: FINNEY, REX**
NOT AN ISSUE.

14:13:36 **Judge: Hosack, Charles**
DONT REFERENCE LEGAL RULES. TALKS ABOUT

PARAMETERS OF OPENING STATEMENT.

- 14:14:56 **Add Ins: FINNEY, REX**
IN ADDITION TO NEGLIGENCE - ALLEGATIONS -
INTENTIONAL BREACH OF DUTY.
- 14:16:19 REFERENCES PAGE 22 - RULE 1.7B. CASES ON POINT.
CLAIM FOR NEGLIGENCE AND
- 14:17:32 BREACH OF CONDUCT.
- 14:18:01 **Judge: Hosack, Charles**
I HAVE NOT READ THAT CASE REFERENCED ON THAT
PAGE.
- 14:18:19 **Add Ins: FINNEY, REX**
RULE WAS NOT CITED BUT THESE ARE FAIR GAME FOR
JURY INSTRUCTIONS.
- 14:19:00 **Judge: Hosack, Charles**
AGAIN PROPER PHRASING IN OPENING STATEMENT. TO
SAY RULE 1.7 SAYS SO AND SO IS
- 14:20:02 NOT A ISSUE APPROP FOR OPENING STATEMENT.
USUALLY THE INSTRUCTIONS ARE FAIRLY
- 14:20:53 GENERAL IN MALPRACTICE TYPE OF HEARINGS.
- 14:22:17 **Add Ins: WHEELAN, JOHN**
FAIR DEALING WITH CLIENT. REFERENCES
PROFESSIONAL CONDUCT.
- 14:22:47 **Judge: Hosack, Charles**
AGAIN PURPOSE OF OPENING STATEMENT. BRIEF
DESCRIP OF ALLEGATION.
- 14:23:21 **Add Ins: FINNEY, REX**
I WILL SUBMIT ON MONDAY
- 14:24:00 **Judge: Hosack, Charles**
YOU COULD E MAIL THE CLAIMS INSTRUCTION TO ME.
GENERALLY WORK FROM THE CLAIMS
- 14:24:23 INSTRUCTIONS WHEN ADDRESSING THE PANEL. - JURY
NEEDS TO KNOW WHAT THE CLAIM
- 14:25:01 IS. SO E MAIL THAT TO ME.
- 14:25:28 **Add Ins: FINNEY, REX**
WILL GET THAT TO.
- 14:25:43 **Judge: Hosack, Charles**

WILL MEET OUT AT THE JAIL AT 08 30 ON TUES. TO
GET ORGANIZED.

14:26:46 BEGINING TO GET SOME IDEA OF WHAT THE ISSUES
ARE.

14:27:14 YES I SAW THE MOTION IN LIMINE.

14:27:27 **Add Ins: WHEELAN, JOHN**
WITNESSES TO BE EXCUSED. THE TWO ATTORNEYS FROM
WASH - DONT PLAN ON CALLING

14:28:01 THEM AS WITNESSES, POWELL AND CONKLIN WILL NOT
BE CALLED. NO MEDICAL

14:28:56 TESTIMONY

14:28:59 **Add Ins: FINNEY, REX**
NO MEDICAL TESTIMONY. THERE WILL BE SOME ISSUES
REGARDING HEAR SAY.

14:29:32 **Add Ins: WHEELAN, JOHN**

14:29:58 **Judge: Hosack, Charles**
DONT KNOW THE WITNESS AND THE CONTEXT REFERING
TO MR. MCFARLAND BEING

14:30:36 INTRODUCED AS A LAWYER. FIRST STEP IS TO LAY THE
FOUNDATION.

14:31:25 **Add Ins: WHEELAN, JOHN**
EVIDENTARY ISSUES WITH KARLETTA.

14:32:59 **Add Ins: FINNEY, REX**
REVIEWED HIS JURY INSTRUCTIONS. HIS ARE CLEAN.
HAS THE COURT REVIEWED THE

14:33:35 MEMORANDUM ORDER FROMM JUDGE VERBY

14:33:54 **Judge: Hosack, Charles**
YES I HAVE READ

14:34:07 **Add Ins: FINNEY, REX**
REFERENCES LAST PAGE PARAGRAPH.

14:34:49 **Judge: Hosack, Charles**
THIS WAS ON A DIRECTIVE, HE JUST REFERS TO
QUESTION OF FACT. WE DONT SEND

14:35:29 INTERGOTERIES TO THE JURY. CROSS THAT BRIDGE
WHEN WE GET THERE LATER IN THE

14:36:39 TRIAL.

14:36:45 **Add Ins: WHEELAN, JOHN**
YOU HAVE A SHOT GUN APPROACH TO THIS LAWSUIT.
PREMATURE TO TALK ABOUT
14:37:11 INTEROGETORIES.
14:37:36 COUNTER CLAIM

14:37:44 **Add Ins: FINNEY, REX**
WE WILL PROVIDE YOU WITH ACCOUNTING. YOU
REQUESTED AND WE WILL PROVIDE.

14:38:10 **Judge: Hosack, Charles**
THIS ISNT REALLY A COUNTER CLAIM.
14:38:40 DONT HAVE ANY INSTRUCTIONS ABOUT A COUNTER
CLAIM.
14:39:07 GO THRU THE WITNESS LIST ON TUES MORNING
14:39:58 COURTROOM 12 ON TUES MORNING.

14:41:34 **Stop recording**

REX A. FINNEY
FINNEY FINNEY & FINNEY, P.A.
Attorneys at Law
Old Power House Building
120 East Lake Street, Suite 317
Sandpoint, Idaho 83864
Phone: (208) 263-7712
Fax: (208) 263-8211
ISB No. 6313

STATE OF IDAHO }
COUNTY OF KOOTENAI } SS
FILED: 315

2010 JAN 15 PM 1:17

CLERK DISTRICT COURT

Patty Bailey
DEPUTY

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF KOOTENAI

KARLETTA GRACE BERRY, a widow,	)	Case No. CV-2007-2409
KARLETTA GRACE BERRY, Personal)	
Representative of the Estate	)	PLAINTIFFS' AMENDED EXHIBIT
of Jerry Lee Roy Berry,	)	LIST
CAPTAIN'S WHEEL RESORT, INC.,)	
an Idaho Corporation,)	
)	
Plaintiff,)	
)	
v.)	
)	
MICHAEL B. MCFARLAND, MICHAEL)	
B. MCFARLAND, P.A., and KAREN)	
ZIMMERMAN,)	
)	
Defendant.)	
)	

COMES NOW the Plaintiffs and submits the following as a list of exhibits to be used in trial. Counsel is planning to reorganize the exhibits into a format that is more consistent with the order the exhibits will be offered or used during trial:

Pls	Def's	Description	Admit by stip	offered	Rec'd	Refused	Reserve ruling
1		Marriage license					
2		Letters of Personal Rep					
3		Articles of Incorporation					
4		Minutes of Organizational meeting					
5		Bylaws by Nordstrom & Campbell (Apr. 15, 1996)					
6		Stock Puchase Agmt (Nordstrom to Berry)					
7		Resignation by S. Nordstrom					
8		Resignation by N. Nordstrom					
9		Promissory Note (pd in full)					
10		Check to Berry (\$40,000.00)					
11		Receipt for \$40,000.00					
12		Check to Campbell (\$40,000)					
13		Check to Berry (\$60,000.00)					
14		Check to Campbell (\$60,000)					
15		Check to Zimmerman (\$823.50)					

Pls	Defcs	Description	Admit by stip	offered	Rec'd	Refused	Reserve ruling
16		Check to Zimmerman (\$301)					
17		Resolution in Lieu of Special mtng (Aug. 7, 2003)					
18		To Whom It May Concern: ltr (Aug. 11, 2003)					
19		Letter to Jerry Berry from Daugherty 9/29/03					
20		Stock Purchase Agreement Campbell to Berry					
21		Letter to Jerry Berry from Daugherty Apr 28, 2004					
22		Letter to Daugherty August 1, 2004					
23		Stock Purchase & Sale Agreement Berry to Zimmerman & McFarland					
24		Unsigned Stock Purchase & Sale Agmt, Berry to Zimmerman & McFarland as trustees					
25		Loan Agmt with Stock as Collateral					

Pls	Defs	Description	Admit by stip	offered	Rec'd	Refused	Reserve ruling
26		Reinstatement 7-18-06					
27		Notice of Special Meeting Shareholders 10-15-06					
28		Waiver of Notice - Shareholders					
29		Minutes of Shareholder Meeting					
30		Notice of Special Meeting Directors 10-15-06					
31		Waiver of Notice - Directors 10-15-06					
32		Minutes of Director Meeting					
33		Bylaws (unsigned) with handwriting in Blanks					
34		Resolution (unsigned)					
35		Resolution (unsigned)					
36		Nov 16, 2006 letter from McFarland with Notice of Special Meeting for 11/18					

Pls	Def's	Description	Admit by stip	offered	Rec'd	Refused	Reserve ruling
37		Memo McLaughlin 11/22/06					
38		11/18/06 Letter from Karletta					
39		Objection to Notice of Special Meeting 11/18/06					
40		Proposed Resolution (Karletta)					
41		November 17, 2006 letter from Karletta					
42		Letter to McFarland November 21, 2006					
43		Letter from McFarland November 29, 2006					
44		Memo McLaughlin 11/30/06					
45		Transcript of 11/29/09 special board meeting					
46		Minutes of 11/29/06 mtng					
47		e-mail Finney to McFarland 12/11/06					
48		e-mail Finney to McFarland 1/12/07					

Pls	Defa	Description	Admit by stip	offerred	Rec'd	Refused	Reserve ruling
49		Letter from McFarland January 28, 2007					
50		Letter from McFarland February 5, 2007					
51		Letter to McFarland February 14, 2007					
52		Objection to Special Meeting of Directors of Captain's Wheel Resort, Inc.					
53		Memo McLaughlin February 15, 2007					
54		Transcript of Minutes of February 15, 2007 Board Meeting					
55		Minutes of Special Meeting of Directors of Captain's Wheel Resort, Inc. 2/16/2007					

Pls	Def's	Description	Admit by stip	offered	Rec'd	Refused	Reserve ruling
56		Resolution in Lieu of Special Meeting of Board of Directors of Captain's Wheel Resort, Inc. February 17, 2007					
57		Resolution in Lieu of Special Meeting of Board of Directors of Captain's Wheel Resort, Inc. February 17, 2007					
58		Special Meeting of Board of Directors of Captain's Wheel Resort, Inc. February 20, 2007					
59		Agreement to sell stock to Marie Streater February 17, 2007					
60		Agreement to sell stock to Monnie Cripe February 17, 2007					
61		Transfer certificate August 19, 2003					


Pls	Defs	Description	Admit by stip	offered	Rec'd	Refused	Reserve ruling
62		Transfer stub August 19, 2004					
63		Transfer certificate September 22, 2000					
64		Transfer certificate August 19, 2003					
65		Transfer stub August 19, 2003					
66		Transfer certificate September 22, 2000					
67		Transfer stub September 22, 2000					
68		Transfer certificate October 15, 2006					
69		Transfer stub January 1, 2006					
70		Transfer certificate October 15, 2006					
71		Transfer certificate February 21, 2007					
72		Transfer stub February 21, 2007					

Pls	Defs	Description	Admit by stip	offered	Rec'd	Refused	Reserve ruling
73		Transfer certificate February 21, 2007					
74		Transfer stub February 21, 2007					
75		Transfer certificate (no date)					
76		McFarland's Answer; Counterclaim; Demand for Jury Trial April 13, 2007					
77		Affidavit of Michael B. McFarland in Opposition to Plaintiff's Motion to Amend Complaint for Punitive Damages					
78		Letter from Whelan December 30, 2009					
79		Captain's Wheel Resort business card					
80		Captain's Wheel Resort Profit and Loss Statement, January through December 2007					

Pls	Defs	Description	Admit by stip	offered	Rec'd	Refused	Reserve ruling
81		Captain's Wheel Resort Profit and Loss Statement, January through December 2008					
82		Captain's Wheel Resort Profit and Loss Statement, January through December 2009					
83		Captain's Wheel Resort Profit and Loss Statement, January 1 - 5, 2010					
84		Letter from McCall and Landwehr, P.A. April 20, 2004					
85		Captain's Wheel Resort Assets and Liabilities and Equity balance sheet December 31, 2003					
86		Captain's Wheel Resort Income Statement for year ended December 31, 2003					
87		McFarland's meal tickets					

Pls	Defs	Description	Admit by stip	offered	Rec'd	Refused	Reserve ruling
88		David A Noonan's curriculum vitae					
89		Appraisal of The Captain's Wheel Resort October 9, 2009					
90		Deposition of Michael B. McFarland December 18, 2009					
91		Deposition of Michael B. McFarland, Volume II, December 23, 2009					
92		Deposition of Karen Zimmerman December 21, 2009					
93		Picture of the Captain's Wheel Resort					

DATED this 15 day of January, 2010.



 REX A. FINNEY
 Attorney at Law

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was served by facsimile , this 15 day of January, 2010, and was delivered as follows:

J.P. WHELAN P.C.
Attorney at law
213 N. 4th Street
Coeur d'Alene, Idaho 83814
[x]Via Facsimile: (208) 664-2240 without exhibits
(Exhibits were hand delivered)

By: 

STATE OF IDAHO
COUNTY OF KOOTENAI } SS
FILED: 484
XY

2010 JAN 15 PM 4:20

CLERK DISTRICT COURT
Patty Bailey
DEPUTY

REX A. FINNEY
FINNEY FINNEY & FINNEY, P.A.
Attorneys at Law
Old Power House Building
120 East Lake Street, Suite 317
Sandpoint, Idaho 83864
Phone: (208) 263-7712
Fax: (208) 263-8211
ISB No. 6313

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF KOOTENAI

KARLETTA GRACE BERRY, a widow,	)	Case No. CV-2007-2409
KARLETTA GRACE BERRY, Personal)	
Representative of the Estate	)	PLAINTIFFS' SECOND AMENDED
of Jerry Lee Roy Berry,	)	EXHIBIT LIST
CAPTAIN'S WHEEL RESORT, INC.,)	
an Idaho Corporation,)	
)	
Plaintiff,)	
)	
v.)	
)	
MICHAEL B. MCFARLAND, MICHAEL)	
B. MCFARLAND, P.A., and KAREN)	
ZIMMERMAN,)	
)	
Defendant.)	
)	

COMES NOW the Plaintiffs and submit the following as a
second amended list of exhibits to be used in trial. Exhibits
94, 95 and 96 are attached hereto:

Pls	Defs	Description	Admit by stip	offered	Rec'd	Refused	Reserve ruling
1		Marriage license					
2		Letters of Personal Rep					
3		Articles of Incorporation					
4		Minutes of Organizational meeting					
5		Bylaws by Nordstrom & Campbell (Apr. 15, 1996)					
6		Stock Puchase Agmt (Nordstrom to Berry)					
7		Resignation by S. Nordstrom					
8		Resignation by N. Nordstrom					
9		Promissory Note (pd in full)					
10		Check to Berry (\$40,000.00)					
11		Receipt for \$40,000.00					
12		Check to Campbell (\$40,000)					
13		Check to Berry (\$60,000.00)					
14		Check to Campbell (\$60,000)					
15		Check to Zimmerman (\$823.50)					

Pls	Def's	Description	Admit by stip	offered	Rec'd	Refused	Reserve ruling
16		Check to Zimmerman (\$301)					
17		Resolution in Lieu of Special mtng (Aug. 7, 2003)					
18		To Whom It May Concern: ltr (Aug. 11, 2003)					
19		Letter to Jerry Berry from Daugherty 9/29/03					
20		Stock Purchase Agreement Campbell to Berry					
21		Letter to Jerry Berry from Daugherty Apr 28, 2004					
22		Letter to Daugherty August 1, 2004					
23		Stock Purchase & Sale Agreement Berry to Zimmerman & McFarland					
24		Unsigned Stock Purchase & Sale Agmt, Berry to Zimmerman & McFarland as trustees					
25		Loan Agmt with Stock as Collateral					

Pls	Defs	Description	Admit by stip	offered	Rec'd	Refused	Reserve ruling
26		Reinstatement 7-18-06					
27		Notice of Special Meeting Shareholders 10-15-06					
28		Waiver of Notice - Shareholders					
29		Minutes of Shareholder Meeting					
30		Notice of Special Meeting Directors 10-15-06					
31		Waiver of Notice - Directors 10-15-06					
32		Minutes of Director Meeting					
33		Bylaws (unsigned) with handwriting in Blanks					
34		Resolution (unsigned)					
35		Resolution (unsigned)					
36		Nov 16, 2006 letter from McFarland with Notice of Special Meeting for 11/18					

Pls	Defs	Description	Admit by stip	offered	Rec'd	Refused	Reserve ruling
37		Memo McLaughlin 11/22/06					
38		11/18/06 Letter from Karletta					
39		Objection to Notice of Special Meeting 11/18/06					
40		Proposed Resolution (Karletta)					
41		November 17, 2006 letter from Karletta					
42		Letter to McFarland November 21, 2006					
43		Letter from McFarland November 29, 2006					
44		Memo McLaughlin 11/30/06					
45		Transcript of 11/29/09 special board meeting					
46		Minutes of 11/29/06 mtng					
47		e-mail Finney to McFarland 12/11/06					
48		e-mail Finney to McFarland 1/12/07					

Pls	Def's	Description	Admit by stip	offered	Rec'd	Refused	Reserve ruling
49		Letter from McFarland January 28, 2007					
50		Letter from McFarland February 5, 2007					
51		Letter to McFarland February 14, 2007					
52		Objection to Special Meeting of Directors of Captain's Wheel Resort, Inc.					
53		Memo McLaughlin February 15, 2007					
54		Transcript of Minutes of February 15, 2007 Board Meeting					
55		Minutes of Special Meeting of Directors of Captain's Wheel Resort, Inc. 2/16/2007					

Pls	Def's	Description	Admit by stip	offered	Rec'd	Refused	Reserve ruling
56		Resolution in Lieu of Special Meeting of Board of Directors of Captain's Wheel Resort, Inc. February 17, 2007					
57		Resolution in Lieu of Special Meeting of Board of Directors of Captain's Wheel Resort, Inc. February 17, 2007					
58		Special Meeting of Board of Directors of Captain's Wheel Resort, Inc. February 20, 2007					
59		Agreement to sell stock to Marie Streater February 17, 2007					
60		Agreement to sell stock to Monnie Cripe February 17, 2007					
61		Transfer certificate August 19, 2003					

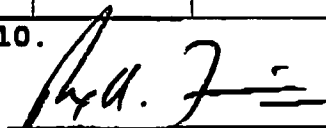
Pls	Def's	Description	Admit by stip	offered	Rec'd	Refused	Reserve ruling
62		Transfer stub August 19, 2004					
63		Transfer certificate September 22, 2000					
64		Transfer certificate August 19, 2003					
65		Transfer stub August 19, 2003					
66		Transfer certificate September 22, 2000					
67		Transfer stub September 22, 2000					
68		Transfer certificate October 15, 2006					
69		Transfer stub January 1, 2006					
70		Transfer certificate October 15, 2006					
71		Transfer certificate February 21, 2007					
72		Transfer stub February 21, 2007					

Pls	Def's	Description	Admit by stip	offered	Rec'd	Refused	Reserve ruling
73		Transfer certificate February 21, 2007					
74		Transfer stub February 21, 2007					
75		Transfer certificate (no date)					
76		McFarland's Answer; Counterclaim; Demand for Jury Trial April 13, 2007					
77		Affidavit of Michael B. McFarland in Opposition to Plaintiff's Motion to Amend Complaint for Punitive Damages					
78		Letter from Whelan December 30, 2009					
79		Captain's Wheel Resort business card					
80		Captain's Wheel Resort Profit and Loss Statement, January through December 2007					

Pls	Defs	Description	Admit by stip	offered	Rec'd	Refused	Reserve ruling
81		Captain's Wheel Resort Profit and Loss Statement, January through December 2008					
82		Captain's Wheel Resort Profit and Loss Statement, January through December 2009					
83		Captain's Wheel Resort Profit and Loss Statement, January 1 - 5, 2010					
84		Letter from McCall and Landwehr, P.A. April 20, 2004					
85		Captain's Wheel Resort Assets and Liabilities and Equity balance sheet December 31, 2003					
86		Captain's Wheel Resort Income Statement for year ended December 31, 2003					
87		McFarland's meal tickets					

Pls	Defs	Description	Admit by stip	offered	Rec'd	Refused	Reserve ruling
88		David A Noonan's curriculum vitae					
89		Appraisal of The Captain's Wheel Resort October 9, 2009					
90		Deposition of Michael B. McFarland December 18, 2009					
91		Deposition of Michael B. McFarland, Volume II, December 23, 2009					
92		Deposition of Karen Zimmerman December 21, 2009					
93		Picture of the Captain's Wheel Resort					
94		Idaho Rules of Professional Conduct					
95		Idaho Rule Professional Conduct 1.7					
96		Idaho Rule Professional Conduct 1.8					

DATED this 15 day of January, 2010.



 REX A. FINNEY
 Attorney at Law

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was served by facsimile, this 15 day of January, 2010, and was delivered as follows:

J.P. WHELAN P.C.

Attorney at law

213 N. 4th Street

Coeur d'Alene, Idaho 83814

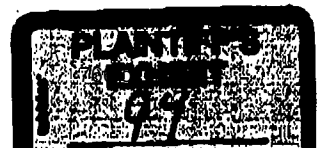
[x]Via Facsimile: (208) 664-2240 (with exhibit 94, 95, and 96)

By: 

IDAHO RULES OF PROFESSIONAL CONDUCT (2003)

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PREAMBLE: A LAWYER'S RESPONSIBILITIES

[1] A lawyer, as a member of the legal profession, is a representative of clients, an officer of the legal system and a public citizen having special responsibility for the quality of justice.

[2] As a representative of clients, a lawyer performs various functions. As advisor, a lawyer provides a client with an informed understanding of the client's legal rights and obligations and explains their practical implications. As advocate, a lawyer zealously asserts the client's position under the rules of the adversary system. As negotiator, a lawyer seeks a result advantageous to the client but consistent with requirements of honest dealings with others. As an evaluator, a lawyer acts by examining a client's legal affairs and reporting about them to the client or to others.

[3] In addition to these representational functions, a lawyer may serve as a third-party neutral, a nonrepresentational role helping the parties to resolve a dispute or other matter. Some of these Rules apply directly to lawyers who are or have served as third-party neutrals. See, e.g., Rules 1.12 and 2.2. In addition, there are Rules that apply to lawyers who are not active in the practice of law or to practicing lawyers even when they are acting in a nonprofessional capacity. For example, a lawyer who commits fraud in the conduct of a business is subject to discipline for engaging in conduct involving dishonesty, fraud, deceit or misrepresentation. See Rule 8.4.

[4] In all professional functions a lawyer should be competent, prompt and diligent. A lawyer should maintain communication with a client concerning the representation. A lawyer should keep in confidence information relating to representation of a client except so far as disclosure is required or permitted by the Rules of Professional Conduct or other law.

[5] A lawyer's conduct should conform to the requirements of the law, both in professional service to clients and in the lawyer's business and personal affairs. A lawyer should use the law's procedures only for legitimate purposes and not to harass or intimidate others. A lawyer should demonstrate respect for the legal system and for those who serve it, including judges, other lawyers and public officials. While it is a lawyer's duty, when necessary, to challenge the rectitude of official action, it is also a lawyer's duty to uphold legal process.

[6] As a public citizen, a lawyer should seek improvement of the law, access to the legal system, the administration of justice and the quality of service rendered by the legal profession. As a member of a learned profession, a lawyer should cultivate knowledge of the law beyond its use for clients, employ that knowledge in reform of the law and work to strengthen legal education. In addition, a lawyer should further the public's understanding of and confidence in the role of law and the justice system because legal institutions in a constitutional democracy depend on popular participation and support to maintain their authority. A lawyer should be mindful of deficiencies in the administration of justice and of the fact that the poor, and sometimes persons who are not poor, cannot afford adequate legal assistance. Therefore, all lawyers should devote professional time and resources and use civic influence to ensure equal access to our system of justice for all those who because of economic or social barriers cannot afford or secure adequate legal counsel. A lawyer should aid the legal profession in pursuing these objectives and should help the bar regulate itself in the public interest.

[7] Many of a lawyer's professional responsibilities are prescribed in the Rules of Professional Conduct, as well as substantive and procedural law. However, a lawyer is also guided by personal conscience and the approbation of professional peers. A lawyer should strive to attain the highest level of skill, to improve the law and the legal profession and to exemplify the legal profession's ideals of public service.

[8] A lawyer's responsibilities as a representative of clients, an officer of the legal system and a public citizen are usually

harmonious. Thus, when an opposing party is well represented, a lawyer can be a zealous advocate on behalf of a client and at the same time assume that justice is being done. So also, a lawyer can be sure that preserving client confidences ordinarily serves the public interest because people are more likely to seek legal advice, and thereby heed their legal obligations, when they know their communications will be private.

[9] In the nature of law practice, however, conflicting responsibilities are encountered. Virtually all difficult ethical problems arise from conflict between a lawyer's responsibilities to clients, to the legal system and to the lawyer's own interest in remaining an ethical person while earning a satisfactory living. The Rules of Professional Conduct often prescribe terms for resolving such conflicts. Within the framework of these Rules, however, many difficult issues of professional discretion can arise. Such issues must be resolved through the exercise of sensitive professional and moral judgment guided by the basic principles underlying the Rules. These principles include the lawyer's obligations, as an advocate, to zealously protect and pursue a client's legitimate interests within the bounds of the law and, as an officer of the court, to preserve the integrity of the legal system's search for the truth while maintaining a professional, courteous and civil attitude toward all persons involved in the process.

[10] The legal profession is largely self-governing. Although other professions also have been granted powers of self-government, the legal profession is unique in this respect because of the close relationship between the profession and the processes of government and law enforcement. This connection is manifested in the fact that ultimate authority over the legal profession is vested largely in the courts.

[11] To the extent that lawyers meet the obligations of their professional calling, the occasion for government regulation is obviated. Self-regulation also helps maintain the legal profession's independence from government domination. An independent legal profession is an important force in preserving government under law, for abuse of legal authority is more readily challenged by a profession whose members are not dependent on government for the right to practice.

[12] The legal profession's relative autonomy carries with it special responsibilities of self-government. The profession has a responsibility to assure that its regulations are conceived in the public interest and not in furtherance of parochial or self-interested concerns of the bar. Every lawyer is responsible for observance of the Rules of Professional Conduct. A lawyer should also aid in securing their observance by other lawyers. Neglect of these responsibilities compromises the independence of the profession and the public interest which it serves.

[13] Lawyers play a vital role in the preservation of society. The fulfillment of this role requires an understanding by lawyers of their relationship to our legal system. The Rules of Professional Conduct, when properly applied, serve to define that relationship.

SCOPE

[14] The Rules of Professional Conduct are rules of reason. They should be interpreted with reference to the purposes of legal representation and of the law itself. Some of the Rules are imperatives; cast in the terms "shall" or "shall not." These define proper conduct for purposes of professional discipline. Others, generally cast in the term "may," are permissive and define areas under the Rules in which the lawyer has discretion to exercise professional judgment. No disciplinary action should be taken when the lawyer chooses not to act or acts within the bounds of such discretion. Other Rules define the nature of relationships between the lawyer and others. The Rules are thus partly obligatory and disciplinary and partly constitutive and descriptive in that they define a lawyer's professional role. Many of the Comments use the term "should." Comments do not add obligations to the Rules but provide guidance for practicing in compliance with the Rules.

[15] The Rules presuppose a larger legal context shaping the lawyer's role. That context includes court rules and statutes relating to matters of licensure, laws defining specific obligations of lawyers and substantive and procedural law in general. The Comments are sometimes used to alert lawyers to their responsibilities under such other law.

[16] Compliance with the Rules, as with all law in an open society, depends primarily upon understanding and voluntary compliance, secondarily upon reinforcement by peer and public opinion and finally, when necessary, upon enforcement through disciplinary proceedings. The Rules do not, however, exhaust the moral and ethical considerations that should inform a lawyer, for no worthwhile human activity can be completely defined by legal rules. The Rules simply provide a framework for the ethical practice of law.

[17] Furthermore, for purposes of determining the lawyer's authority and responsibility, principles of substantive law external to these Rules determine whether a client-lawyer relationship exists. Most of the duties flowing from the client-lawyer relationship attach only after the client has requested the lawyer to render legal services and the lawyer has agreed to do so. But there are some duties, such as that of confidentiality under Rule 1.6, that attach when the lawyer agrees to consider whether a client-lawyer relationship shall be established. See Rule 1.18. Whether a client-lawyer relationship exists for any specific purpose can depend on the circumstances and may be a question of fact.

[18] Under various legal provisions, including constitutional, statutory and common law, the responsibilities of government lawyers may include authority concerning legal matters that ordinarily reposes in the client in private client-lawyer relationships. For example, a lawyer for a government agency may have authority on behalf of the government to decide upon settlement or whether to appeal from an adverse judgment. Such authority in various respects is generally vested in the attorney general and the state's attorney in state government, and their federal counterparts, and the same may be true of other government law officers. Also, lawyers under the supervision of these officers may be authorized to represent several government agencies in intragovernmental legal controversies in circumstances where a private lawyer could not represent multiple private clients. These Rules do not abrogate any such authority.

[19] Failure to comply with an obligation or prohibition imposed by a Rule is a basis for invoking the disciplinary process. The Rules presuppose that disciplinary assessment of a lawyer's conduct will be made on the basis of the facts and circumstances as they existed at the time of the conduct in question and in recognition of the fact that a lawyer often has to act upon uncertain or incomplete evidence of the situation. Moreover, the Rules presuppose that whether or not discipline should be imposed for a violation, and the severity of a sanction, depend on all the circumstances, such as the willfulness and seriousness of the violation, extenuating factors and whether there have been previous violations.

[20] Violation of a Rule should not itself give rise to a cause of action against a lawyer nor should it create any presumption in such a case that a legal duty has been breached. In addition, violation of a Rule does not necessarily warrant any other nondisciplinary remedy, such as disqualification of a lawyer in pending litigation. The Rules are designed to provide guidance to lawyers and to provide a structure for regulating conduct through disciplinary agencies. They are not designed to be a basis for civil liability. Furthermore, the purpose of the Rules can be subverted when they are invoked by opposing parties as procedural weapons. The fact that a Rule is a just basis for a lawyer's self-assessment, or for sanctioning a lawyer under the administration of a disciplinary authority, does not imply that an antagonist in a collateral proceeding or transaction has standing to seek enforcement of the Rule. Nevertheless, since the Rules do establish standards of conduct by lawyers, a lawyer's violation of a Rule may be evidence of breach of the applicable standard of conduct.

[21] The Commentary accompanying each Rule explains and illustrates the meaning and purpose of the Rule. The Preamble and this note on Scope provide general orientation. The Comments are intended as guides to interpretation, but the text of each Rule is authoritative.

RULE 1.0 TERMINOLOGY

(a) "Belief" or "believes" denotes that the person involved actually supposed the fact in question to be true. A person's belief may be inferred from circumstances.

(b) "Confirmed in writing," when used in reference to the informed consent of a person, denotes informed consent that is given in writing by the person or a writing that a lawyer promptly transmits to the person confirming an oral informed consent. See paragraph (e) for the definition of "informed consent." If it is not feasible to obtain or transmit the writing at the time the person gives informed consent, then the lawyer must obtain or transmit it within a reasonable time thereafter.

(c) "Firm" or "law firm" denotes a lawyer or lawyers in a law partnership, professional corporation, sole proprietorship or other association authorized to practice law; or lawyers employed in a legal services organization or the legal department of a corporation or other organization.

(d) "Fraud" or "fraudulent" denotes conduct that is fraudulent under the substantive or procedural law of the applicable jurisdiction and has a purpose to deceive.

(e) "Informed consent" denotes the agreement by a person to a proposed course of conduct after the lawyer has communicated adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct.

(f) "Knowingly," "known," or "knows" denotes actual knowledge of the fact in question. A person's knowledge may be inferred from circumstances.

(g) "Partner" denotes a member of a partnership, a shareholder in a law firm organized as a professional corporation, or a member of an association authorized to practice law.

(h) "Reasonable" or "reasonably" when used in relation to conduct by a lawyer denotes the conduct of a reasonably prudent and competent lawyer.

(i) "Reasonable belief" or "reasonably believes" when used in reference to a lawyer denotes that the lawyer believes the matter in question and that the circumstances are such that the belief is reasonable.

(j) "Reasonably should know" when used in reference to a lawyer denotes that a lawyer of reasonable prudence and competence would ascertain the matter in question.

(k) "Screened" denotes the isolation of a lawyer from any participation in a matter through the timely imposition of procedures within a firm that are reasonably adequate under the circumstances to protect information that the isolated lawyer is obligated to protect under these Rules or other law.

(l) "Substantial" when used in reference to degree or extent denotes a material matter of clear and weighty importance.

(m) "Tribunal" denotes a court, an arbitrator in a binding arbitration proceeding or a legislative body, administrative agency or other body acting in an adjudicative capacity. A legislative body, administrative agency or other body acts in an adjudicative capacity when a neutral official, after the presentation of evidence or legal argument by a party or parties, will render a binding legal judgment directly affecting a party's interests in a particular matter.

(n) "Writing" or "written" denotes a tangible or electronic record of a communication or representation, including handwriting, typewriting, printing, photostating, photography, audio or video recording and e-mail. A "signed" writing includes an electronic sound, symbol or process attached to or logically associated with a writing and executed or adopted by a person with the intent to sign the writing.

Commentary

Confirmed In Writing

[1] If it is not feasible to obtain or transmit a written confirmation at the time the client gives informed consent, then the lawyer must obtain or transmit it within a reasonable time thereafter. If a lawyer has obtained a client's informed consent, the lawyer may act in reliance on that consent so long as it is confirmed in writing within a reasonable time thereafter.

Firm

[2] Whether two or more lawyers constitute a firm within paragraph (c) can depend on the specific facts. For example, two practitioners who share office space and occasionally consult or assist each other ordinarily would not be regarded as constituting a firm. However, if they present themselves to the public in a way that suggests that they are a firm or conduct themselves as a firm, they should be regarded as a firm for purposes of the Rules. The terms of any formal agreement between associated lawyers are relevant in determining whether they are a firm, as is the fact that they have mutual access to information concerning the clients they serve. Furthermore, it is relevant in doubtful cases to consider the underlying purpose of the Rule that is involved. A group of lawyers could be regarded as a firm for purposes of the Rule that the same lawyer should not represent opposing parties in litigation, while it might not be so regarded for purposes of the Rule that information acquired by one lawyer is attributed to another.

[3] With respect to the law department of an organization, including the government, there is ordinarily no question that the members of the department constitute a firm within the meaning of the Rules of Professional Conduct. There can be uncertainty, however, as to the identity of the client. For example, it may not be clear whether the law department of a corporation represents a subsidiary or an affiliated corporation, as well as the corporation by which the members of the department are directly employed. A similar question can arise concerning an unincorporated association and its local affiliates.

[4] Similar questions can also arise with respect to lawyers in legal aid and legal services organizations. Depending upon the structure of the organization, the entire organization or different components of it may constitute a firm or firms for purposes of these Rules.

Fraud

[5] When used in these Rules, the terms "fraud" or "fraudulent" refer to conduct that is characterized as such under the substantive or procedural law of the applicable jurisdiction and has a purpose to deceive. This does not include merely negligent misrepresentation or negligent failure to apprise another of relevant information. For purposes of these Rules, it is not necessary that anyone has suffered damages or relied on the misrepresentation or failure to inform.

Informed Consent

[6] Many of the Rules of Professional Conduct require the lawyer to obtain the informed consent of a client or other person (e.g., a former client or, under certain circumstances, a prospective client) before accepting or continuing representation or pursuing a course of conduct. See, e.g., Rules 1.2(c), 1.8(a) and 1.7(b). The communication necessary to obtain such consent will vary according to the Rule involved and the circumstances giving rise to the need to

obtain informed consent. The lawyer must make reasonable efforts to ensure that the client or other person possesses information reasonably adequate to make an informed decision. Ordinarily, this will require communication that includes a disclosure of the facts and circumstances giving rise to the situation, any explanation reasonably necessary to inform the client or other person of the material advantages and disadvantages of the proposed course of conduct and a discussion of the client's or other person's options and alternatives. In some circumstances it may be appropriate for a lawyer to advise a client or other person to seek the advice of other counsel. A lawyer need not inform a client or other person of facts or implications already known to the client or other person; nevertheless, a lawyer who does not personally inform the client or other person assumes the risk that the client or other person is inadequately informed and the consent is invalid. In determining whether the information and explanation provided are reasonably adequate, relevant factors include whether the client or other person is experienced in legal matters generally and in making decisions of the type involved, and whether the client or other person is independently represented by other counsel in giving the consent. Normally, such persons need less information and explanation than others, and generally a client or other person who is independently represented by other counsel in giving the consent should be assumed to have given informed consent.

[7] Obtaining informed consent will usually require an affirmative response by the client or other person. In general, a lawyer may not assume consent from a client's or other person's silence. Consent may be inferred, however, from the conduct of a client or other person who has reasonably adequate information about the matter. A number of Rules require that a person's consent be confirmed in writing. See Rules 1.7(b) and 1.9(a). For a definition of "writing" and "confirmed in writing," see paragraphs (n) and (b). Other Rules require that a client's consent be obtained in a writing signed by the client. See, e.g., Rules 1.8(a) and (g). For a definition of "signed," see paragraph (n).

Screened

[8] This definition applies to situations where screening of a personally disqualified lawyer is permitted to remove imputation of a conflict of interest under Rules 1.11 or 1.12.

[9] The purpose of screening is to assure the affected parties that confidential information known by the personally disqualified lawyer remains protected. The personally disqualified lawyer should acknowledge the obligation not to communicate with any of the other lawyers in the firm with respect to the matter. Similarly, other lawyers in the firm who are working on the matter should be informed that the screening is in place and that they may not communicate with the personally disqualified lawyer with respect to the matter. Additional screening measures that are appropriate for the particular matter will depend on the circumstances. To implement, reinforce and remind all affected lawyers of the presence of the screening, it may be appropriate for the firm to undertake such procedures as a written undertaking by the screened lawyer to avoid any communication with other firm personnel and any contact with any firm files or other materials relating to the matter, written notice and instructions to all other firm personnel forbidding any communication with the screened lawyer relating to the matter, denial of access by the screened lawyer to firm files or other materials relating to the matter and periodic reminders of the screen to the screened lawyer and all other firm personnel.

[10] In order to be effective, screening measures must be implemented as soon as practical after a lawyer or law firm knows or reasonably should know that there is a need for screening.

Client Lawyer Relationship

RULE 1.1: COMPETENCE

A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill,

thoroughness and preparation reasonably necessary for the representation.

Commentary

Legal Knowledge and Skill

[1] In determining whether a lawyer employs the requisite knowledge and skill in a particular matter, relevant factors include the relative complexity and specialized nature of the matter, the lawyer's general experience, the lawyer's training and experience in the field in question, the preparation and study the lawyer is able to give the matter and whether it is feasible to refer the matter to, or associate or consult with, a lawyer of established competence in the field in question. In many instances, the required proficiency is that of a general practitioner. Expertise in a particular field of law may be required in some circumstances.

[2] A lawyer need not necessarily have special training or prior experience to handle legal problems of a type with which the lawyer is unfamiliar. A newly admitted lawyer can be as competent as a practitioner with long experience. Some important legal skills, such as the analysis of precedent, the evaluation of evidence and legal drafting, are required in all legal problems. Perhaps the most fundamental legal skill consists of determining what kind of legal problems a situation may involve, a skill that necessarily transcends any particular specialized knowledge. A lawyer can provide adequate representation in a wholly novel field through necessary study. Competent representation can also be provided through the association of a lawyer of established competence in the field in question.

[3] In an emergency lawyer may give advice or assistance in a matter in which the lawyer does not have the skill ordinarily required where referral to or consultation or association with another lawyer would be impractical. Even in an emergency, however, assistance should be limited to that reasonably necessary in the circumstances, for ill-considered action under emergency conditions can jeopardize the client's interest.

[4] A lawyer may accept representation where the requisite level of competence can be achieved by reasonable preparation. This applies as well to a lawyer who is appointed as counsel for an unrepresented person. See also Rule 6.2

Thoroughness and Preparation

[5] Competent handling of a particular matter includes inquiry into and analysis of the factual and legal elements of the problem, and use of methods and procedures meeting the standards of competent practitioners. It also includes adequate preparation. The required attention and preparation are determined in part by what is at stake; major litigation and complex transactions ordinarily require more extensive treatment than matters of lesser complexity and consequence. An agreement between the lawyer and the client regarding the scope of the representation may limit the matters for which the lawyer is responsible. See Rule 1.2(c).

Maintaining Competence

[6] To maintain the requisite knowledge and skill, a lawyer should keep abreast of changes in the law and its practice, engage in continuing study and education and comply with all continuing legal education requirements to which the lawyer is subject.

RULE 1.2: SCOPE OF REPRESENTATION

(a) Subject to paragraphs (c) and (d), a lawyer shall abide by a client's decisions concerning the objectives of representation and, as required by Rule 1.4, shall consult with the client as to the means by which they are to be pursued. A lawyer may take such action on behalf of the client as is impliedly authorized to carry out the representation. A lawyer shall abide by a client's decision whether to settle a matter. In a criminal case, the lawyer

shall abide by the client's decision, after consultation with the lawyer, as to a plea to be entered, whether to waive jury trial and whether the client will testify.

(b) A lawyer's representation of a client, including representation by appointment, does not constitute an endorsement of the client's political, economic, social or moral views or activities.

(c) A lawyer may limit the scope of the representation if the limitation is reasonable under the circumstances and the client gives informed consent.

(d) A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent, but a lawyer may discuss the legal consequences of any proposed course of conduct with a client and may counsel or assist a client to make a good faith effort to determine the validity, scope, meaning or application of the law.

Commentary

Allocation of Authority between Client and Lawyer

[1] Paragraph (a) confers upon the client the ultimate authority to determine the purposes to be served by legal representation, within the limits imposed by law and the lawyer's professional obligations. The decisions specified in paragraph (a), such as whether to settle a civil matter, must also be made by the client. See Rule 1.4(a)(1) for the lawyer's duty to communicate with the client about such decision. With respect to the means by which the client's objectives are to be pursued, the lawyer shall consult with the client as required by Rule 1.4(a)(2) and may take such action as is impliedly authorized to carry out the representation.

[2] On occasion, however, a lawyer and a client may disagree about the means to be used to accomplish the client's objectives. Clients normally defer to the special knowledge and skill of their lawyer with respect to the means to be used to accomplish their objectives, particularly with respect to technical, legal and tactical matters. Conversely, lawyers usually defer to the client regarding such questions as the expense to be incurred and concern for third persons who might be adversely affected. Because of the varied nature of the matters about which a lawyer and client might disagree and because the actions in question may implicate the interests of a tribunal or other persons, this Rule does not prescribe how such disagreements are to be resolved. Other law, however, may be applicable and should be consulted by the lawyer. The lawyer should also consult with the client and seek a mutually acceptable resolution of the disagreement. If such efforts are unavailing and the lawyer has a fundamental disagreement with the client, the lawyer may withdraw from the representation. See Rule 1.16(b)(4). Conversely, the client may resolve the disagreement by discharging the lawyer. See Rule 1.16(a)(3).

[3] At the outset of a representation, the client may authorize the lawyer to take specific action on the client's behalf without further consultation. Absent a material change in circumstances and subject to Rule 1.4, a lawyer may rely on such an advance authorization. The client may, however, revoke such authority at any time.

[4] In a case in which the client appears to be suffering mental disability, the lawyer's duty to abide by the client's decisions is to be guided by reference to Rule 1.14.

Independence from Client's Views or Activities

[5] Legal representation should not be denied to people who are unable to afford legal services, or whose cause is controversial or the subject of popular disapproval. By the same token, representing a client does not constitute approval of a client's views or activities.

Agreements Limiting Scope of Representation

[6] The scope of services to be provided by a lawyer may be limited by agreement with the client or by the terms under which the lawyer's services are made available to the client. When a lawyer has been retained by an insurer to represent an insured, for example, the representation may be limited to matters related to the insurance coverage. A limited representation may be appropriate because the client has limited objectives for the representation. In addition, the terms upon which representation is undertaken may exclude specific means that might otherwise be used to accomplish the client's objectives. Such limitations may exclude actions that the client thinks are too costly or that the lawyer regards as repugnant or imprudent.

[7] Although this Rule affords the lawyer and client substantial latitude to limit the representation, the limitation must be reasonable under the circumstances. If, for example, a client's objective is limited to securing general information about the law the client needs in order to handle a common and typically uncomplicated legal problem, the lawyer and client may agree that the lawyer's services will be limited to a brief telephone consultation. Such a limitation, however, would not be reasonable if the time allotted was not sufficient to yield advice upon which the client could rely. Although an agreement for a limited representation does not exempt a lawyer from the duty to provide competent representation, the limitation is a factor to be considered when determining the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation. See Rule 1.1.

[8] Although paragraph (c) does not require that the client's informed consent to a limited representation be in writing, it is encouraged. See Rule 1.0(e) for the definition of "informed consent."

[9] All agreements concerning a lawyer's representation of a client must accord with the Rules of Professional Conduct and other law. See, e.g., Rules 1.1, 1.8 and 5.8.

Criminal, Fraudulent and Prohibited Transactions

[10] Paragraph (d) prohibits a lawyer from knowingly counseling or assisting a client to commit a crime or fraud. This prohibition, however, does not preclude the lawyer from giving an honest opinion about the actual consequences that appear likely to result from a client's conduct. Nor does the fact that a client uses advice in a course of action that is criminal or fraudulent of itself make a lawyer a party to the course of action. There is a critical distinction between presenting an analysis of legal aspects of questionable conduct and recommending the means by which a crime or fraud might be committed with impunity.

[11] When the client's course of action has already begun and is continuing, the lawyer's responsibility is especially delicate. The lawyer is required to avoid assisting the client, for example, by drafting or delivering documents that the lawyer knows are fraudulent or by suggesting how the wrongdoing might be concealed. A lawyer may not continue assisting a client in conduct that the lawyer originally supposed was legally proper but then discovers is criminal or fraudulent. The lawyer must, therefore, withdraw from the representation of the client in the matter. See Rule 1.16(a). In some cases, withdrawal alone might be insufficient. It may be necessary for the lawyer to give notice of the fact of withdrawal and to disaffirm any opinion, document, affirmation or the like. In extreme cases, substantive law may require a lawyer to disclose information relating to the representation to avoid being deemed to have assisted the client's crime or fraud. See Rule 4.1.

[12] Where the client is fiduciary, the lawyer may be charged with special obligations in dealings with a beneficiary.

[13] Paragraph (d) applies whether or not the defrauded party is a party to the transaction. Hence, a lawyer must not participate in a transaction to effectuate criminal or fraudulent avoidance of tax liability. Paragraph (d) does not preclude undertaking a criminal defense incident to a general retainer for legal services to a lawful

enterprise. The last clause of paragraph (d) recognizes that determining the validity or interpretation of a statute or regulation may require a course of action involving disobedience to the statute or regulation or of the interpretation placed upon it by governmental authorities.

[14] If a lawyer comes to know or reasonably should know that a client expects assistance not permitted by the Rules of Professional Conduct or other law or if the lawyer intends to act contrary to the client's instructions, the lawyer must consult with the client regarding the limitations on the lawyer's conduct. See Rule 1.4(a)(5).

RULE 1.3: DILIGENCE

A lawyer shall act with reasonable diligence and promptness in representing a client.

Commentary

[1] A lawyer should pursue a matter on behalf of a client despite opposition, obstruction or personal inconvenience to the lawyer, and take whatever lawful and ethical measures are required to vindicate a client's cause or endeavor. A lawyer must also act with commitment and dedication to the interests of the client and with zeal in advocacy upon the client's behalf. A lawyer is not bound, however, to press for every advantage that might be realized for a client. For example, a lawyer may have authority to exercise professional discretion in determining the means by which a matter should be pursued. See Rule 1.2. The lawyer's duty to act with reasonable diligence does not require the use of offensive tactics or preclude the treating of all persons involved in the legal process with courtesy and respect.

[2] A lawyer's workload must be controlled so that each matter can be handled competently.

[3] Perhaps no professional shortcoming is more widely resented than procrastination. A client's interests often can be adversely affected by the passage of time or the change of conditions; in extreme instances, as when a lawyer overlooks a statute of limitations, the client's legal position may be destroyed. Even when the client's interests are not affected in substance, however, unreasonable delay can cause a client needless anxiety and undermine confidence in the lawyer's trustworthiness. A lawyer's duty to act with reasonable promptness, however, does not preclude the lawyer from agreeing to a reasonable request for a postponement that will not prejudice the lawyer's client.

[4] Unless the relationship is terminated as provided in Rule 1.16, a lawyer should carry through to conclusion all matters undertaken for a client. If a lawyer's employment is limited to a specific matter, the relationship terminates when the matter has been resolved. If a lawyer has served a client over a substantial period in a variety of matters, the client sometimes may assume that the lawyer will continue to serve on a continuing basis unless the lawyer gives notice of withdrawal. Doubt about whether a client-lawyer relationship still exists should be clarified by the lawyer, preferably in writing, so that the client will not mistakenly suppose the lawyer is looking after the client's affairs when the lawyer has ceased to do so. For example, if a lawyer has handled a judicial or administrative proceeding that produced a result adverse to the client and the lawyer and the client have not agreed that the lawyer will handle the matter on appeal, the lawyer must consult with the client about the possibility of appeal before relinquishing responsibility for the matter. See Rule 1.4(a)(2). Whether the lawyer is obligated to prosecute the appeal for the client depends on the scope of the representation the lawyer has agreed to provide to the client. See Rule 1.2.

[5] To prevent neglect of client matters in the event of a sole practitioner's death or disability, the duty of diligence may require that each sole practitioner prepare a plan, in conformity with applicable rules, that designates another competent lawyer to review client files, notify each client of the lawyer's death or disability, and determine whether there is a need for immediate protective action.

Cf. Rule 519 of the Idaho Bar Commission Rules.

RULE 1.4: COMMUNICATION

(a) A lawyer shall:

- (1) promptly inform the client of any decision or circumstance with respect to which the client's informed consent, as defined in Rule 1.0(e), is required by these Rules;**
- (2) reasonably consult with the client about the means by which the client's objectives are to be accomplished;**
- (3) keep the client reasonably informed about the status of the matter;**
- (4) promptly comply with reasonable requests for information; including a request for an accounting as required by Rule 1.6(f); and**
- (5) consult with the client about any relevant limitation on the lawyer's conduct when the lawyer knows that the client expects assistance not permitted by the Rules of Professional Conduct or other law.**

(b) A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.

Commentary

[1] Reasonable communication between the lawyer and the client is necessary for the client effectively to participate in the representation.

Communicating with Client

[2] If these Rules require that a particular decision about the representation be made by the client, paragraph (a)(1) requires that the lawyer promptly consult with and secure the client's consent prior to taking action unless prior discussions with the client have resolved what action the client wants the lawyer to take. For example, a lawyer who receives from opposing counsel an offer of settlement in a civil controversy or a proffered plea bargain in a criminal case must promptly inform the client of its substance unless the client has previously indicated that the proposal will be acceptable or unacceptable or has authorized the lawyer to accept or to reject the offer. See Rule 1.2(e).

[3] Paragraph (a)(2) requires the lawyer to reasonably consult with the client about the means to be used to accomplish the client's objectives. In some situations - depending on both the importance of the action under consideration and the feasibility of consulting with the client - this duty will require consultation prior to taking action. In other circumstances, such as during a trial when an immediate decision must be made, the exigency of the situation may require the lawyer to act without prior consultation. In such cases the lawyer must nonetheless act reasonably to inform the client of actions the lawyer has taken on the client's behalf. Additionally, paragraph (a)(3) requires that the lawyer keep the client reasonably informed about the status of the matter, such as significant developments affecting the timing or the substance of the representation.

[4] A lawyer's regular communication with clients will minimize the occasions on which a client will need to request information concerning the representation. When a client makes a reasonable request for information, however, paragraph (a)(4) requires prompt compliance with the request, or if a prompt response is not feasible, that the lawyer, or a member of the lawyer's staff, acknowledge receipt of the request and advise the client when a response may be expected. Client telephone calls should be promptly returned or acknowledged. Regular communication also requires a lawyer to

make an accounting for monies received from or on the client's behalf. That duty is more specifically set forth in Rule 1.5(f).

Explaining Matters

[5] The client should have sufficient information to participate intelligently in decisions concerning the objectives of the representation and the means by which they are to be pursued, to the extent the client is willing and able to do so. Adequacy of communication depends in part on the kind of advice or assistance that is involved. For example, when there is time to explain a proposal made in a negotiation, the lawyer should review all important provisions with the client before proceeding to an agreement. In litigation a lawyer should explain the general strategy and prospects of success and ordinarily should consult the client on tactics that are likely to result in significant expense or to injure or coerce others. On the other hand, a lawyer ordinarily will not be expected to describe trial or negotiation strategy in detail. The guiding principle is that the lawyer should fulfill reasonable client expectations for information consistent with the duty to act in the client's best interests, and the client's overall requirements as to the character of representation. In certain circumstances, such as when a lawyer asks a client to consent to a representation affected by a conflict of interest, the client must give informed consent, as defined in Rule 1.0(e).

[6] Ordinarily, the information to be provided is that appropriate for a client who is a comprehending and responsible adult. However, fully informing the client according to this standard may be impracticable, for example, where the client is a child or suffers from mental disability. See Rule 1.14. When the client is an organization or group, it is often impossible to inform every one of its members about its legal affairs; ordinarily, the lawyer should address communications to the appropriate officials of the organization. See Rule 1.13. Where many routine matters are involved, a system of limited or occasional reporting may be arranged with the client.

Withholding Information

[7] In some circumstances, a lawyer may be justified in delaying transmission of information when the client would be likely to react imprudently to an immediate communication. Thus, a lawyer might withhold a psychiatric diagnosis of a client when the examining psychiatrist indicates that disclosure would harm the client. A lawyer may not withhold information to serve the lawyer's own interest or convenience or the interests or convenience of another person. Rules or court orders governing litigation may provide that information supplied to a lawyer may not be disclosed to the client. Rule 3.4(c) directs compliance with such rules or orders.

RULE 1.5: FEES

(a) A lawyer shall not make an agreement for, charge, or collect an unreasonable fee or an unreasonable amount for expenses. The factors to be considered in determining the reasonableness of a fee include the following:

- (1) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;**
- (2) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;**
- (3) the fee customarily charged in the locality for similar legal services;**
- (4) the amount involved and the results obtained;**
- (5) the time limitations imposed by the client or by the circumstances;**
- (6) the nature and length of the professional relationship with the client;**

- (7) the experience, reputation, and ability of the lawyer or lawyers performing the services; and
- (8) whether the fee is fixed or contingent.
- (b) The scope of the representation and the basis or rate of the fee and expenses for which the client will be responsible shall be communicated to the client, preferably in writing, before or within a reasonable time after commencing the representation, except when the lawyer will charge a regularly represented client on the same basis or rate. Any changes in the basis or rate of the fee or expenses shall also be communicated to the client.
- (c) A fee may be contingent on the outcome of the matter for which the service is rendered, except in a matter in which a contingent fee is prohibited by paragraph (d) or other law. A contingent fee agreement shall be in a writing signed by the client and shall state the method by which the fee is to be determined, including the percentage or percentages that shall accrue to the lawyer in the event of settlement, trial or appeal, litigation and other expenses to be deducted from the recovery, and whether such expenses are to be deducted before or after the contingent fee is calculated. The agreement must clearly notify the client of any expenses for which the client will be liable whether or not the client is the prevailing party. Upon conclusion of a contingent fee matter, the lawyer shall provide the client with a written statement stating the outcome of the matter and, if there is a recovery, showing the remittance to the client and the method of its determination.
- (d) A lawyer shall not enter into an arrangement for, charge, or collect:
- (1) any fee in a domestic relations matter, the payment or amount of which is contingent upon the securing of a divorce or upon the amount of alimony or support, or property settlement in lieu thereof; or
 - (2) a contingent fee for representing a defendant in a criminal case.
- (e) A division of a fee between lawyers who are not in the same firm may be made only if:
- (1) the division is in proportion to the services performed by each lawyer or each lawyer assumes joint responsibility for the representation;
 - (2) the client agrees to the arrangement, including the share each lawyer will receive, and the agreement is confirmed in writing; and
 - (3) the total fee is reasonable.
- (f) Upon reasonable request by the client, a lawyer shall provide, without charge, an accounting for fees and costs claimed or previously collected. Such an accounting shall include at least the following information:
- (1) Itemization of all hourly charges, costs, interest assessments, and past due balances.
 - (2) For hourly rate charges, a description of the services performed and a notation of the person who performed those services. The description shall be of sufficient detail to generally apprise the client of the nature of the work performed.

Commentary**Reasonableness of Fee and Expenses**

(1) Paragraph (a) requires that lawyers charge fees that are reasonable under the circumstances. The factors specified in (1) through (8) are not exclusive. Nor will each factor be relevant in each instance. Paragraph (a) also requires that expenses for which the client will be charged must be reasonable. A lawyer may seek reimbursement for the cost of services performed in-house, such as copying, or for other expenses incurred in-house, such as telephone charges, either by charging a reasonable amount to which the client has agreed in advance or by charging an amount that reasonably reflects the cost incurred by the lawyer.

Basis or Rate of Fee

(2) When the lawyer has regularly represented a client, they ordinarily will have evolved an understanding concerning the basis or rate of the fee and the expenses for which the client will be responsible. In a new client-lawyer relationship, however, an understanding as to fees and expenses must be promptly established. Generally, it is desirable to furnish the client with at least a simple memorandum or copy of the lawyer's customary fee arrangements that states the general nature of the legal services to be provided, the basis, rate or total amount of the fee and whether and to what extent the client will be responsible for any costs, expenses or disbursements in the course of the representation. A written statement concerning the terms of the engagement reduces the possibility of misunderstanding.

(3) Contingent fees, like any other fees, are subject to the reasonableness standard of paragraph (a) of this Rule. In determining whether a particular contingent fee is reasonable, or whether it is reasonable to charge any form of contingent fee, a lawyer must consider the factors that are relevant under the circumstances. Applicable law may impose limitations on contingent fees, such as a ceiling on the percentage allowable, or may require a lawyer to offer clients an alternative basis for the fee. Applicable law also may apply to situations other than a contingent fee, for example, government regulations regarding fees in certain tax matters.

Terms of Payment

(4) A lawyer may require advance payment of a fee, but is obliged to return any unearned portion. See Rule 1.16(d). A lawyer may accept property in payment for services, such as an ownership interest in an enterprise, providing this does not involve acquisition of a proprietary interest in the cause of action or subject matter of the litigation contrary to Rule 1.8(i). However, a fee paid in property instead of money may be subject to the requirements of Rule 1.8(a) because such fees often have the essential qualities of a business transaction with the client.

(5) An agreement may not be made whose terms might induce the lawyer improperly to curtail services for the client or perform them in a way contrary to the client's interest. For example, a lawyer should not enter into an agreement whereby services are to be provided only up to a stated amount when it is foreseeable that more extensive services probably will be required, unless the situation is adequately explained to the client. Otherwise, the client might have to bargain for further assistance in the midst of a proceeding or transaction. However, it is proper to define the extent of services in light of the client's ability to pay. A lawyer should not exploit a fee arrangement based primarily on hourly charges by using wasteful procedures.

Prohibited Contingent Fees

(6) Paragraph (d) prohibits a lawyer from charging a contingent fee in a domestic relations matter when payment is contingent upon the securing of a divorce or upon the amount of alimony or support or property settlement to be obtained. This provision does not preclude a contract for a contingent fee for legal representation in connection with the recovery of post-judgment balances due under support, alimony or other financial orders because such contracts do not implicate the same policy concerns.

Division of Fee

[7] A division of fee is a single billing to a client covering the fee of two or more lawyers who are not in the same firm. A division of fee facilitates association of more than one lawyer in a matter in which neither alone could serve the client as well, and most often is used when the fee is contingent and the division is between a referring lawyer and a trial specialist. Paragraph (e) permits the lawyers to divide a fee either on the basis of the proportion of services they render or if each lawyer assumes responsibility for the representation as a whole. In addition, the client must agree to the arrangement, including the share that each lawyer is to receive, and the agreement must be confirmed in writing. Contingent fee agreements must be in a writing signed by the client and must otherwise comply with paragraph (c) of this Rule. Joint responsibility for the representation entails financial and ethical responsibility for the representation as if the lawyers were associated in a partnership. A lawyer should only refer a matter to a lawyer whom the referring lawyer reasonably believes is competent to handle the matter. See Rule 1.1.

[8] Paragraph (e) does not prohibit or regulate division of fees to be received in the future for work done when lawyers were previously associated in a law firm.

Disputes over Fees

[9] If a procedure has been established for resolution of fee disputes, such as an arbitration or mediation procedure established by the bar, the lawyer must comply with the procedure when it is mandatory, and, even when it is voluntary, the lawyer should conscientiously consider submitting to it. Law may prescribe a procedure for determining a lawyer's fee, for example, in representation of an executor or administrator, a class or a person entitled to a reasonable fee as part of the measure of damages. The lawyer entitled to such a fee and a lawyer representing another party concerned with the fee should comply with the prescribed procedure.

Reasonable Request for Accounting

[10] Rule 1.5(f) requires a lawyer, upon reasonable request from the client, to provide an accounting to the client for fees and costs claimed or previously collected. The duty is limited to reasonable requests, to prevent the client from unduly burdening the lawyer with duplicative requests or from demanding detail beyond that reasonably calculated to inform the client about the handling and disposition of money. The lawyer is not permitted to charge a fee for the time spent in preparing such a billing statement, although reasonable copying charges may still be appropriate.

RULE 1.6: CONFIDENTIALITY OF INFORMATION

(a) A lawyer shall not reveal information relating to representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation or the disclosure is permitted by paragraph (b).

(b) A lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary:

- (1) to prevent the client from committing a crime, including disclosure of the intention to commit a crime;
- (2) to prevent reasonably certain death or substantial bodily harm;
- (3) to prevent, mitigate or rectify substantial injury to the financial interests or property of another that is reasonably certain to result or has resulted from the client's commission of a crime in

furtherance of which the client has used the lawyer's services;

- (4) to secure legal advice about the lawyer's compliance with these Rules;
- (5) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of a client; or
- (6) to comply with other law or a court order.

Commentary

[1] This Rule governs the disclosure by a lawyer of information relating to the representation of a client during the lawyer's representation of the client. See Rule 1.18 for the lawyer's duties with respect to information provided to the lawyer by a prospective client, Rule 1.9(c)(2) for the lawyer's duty not to reveal information relating to the lawyer's prior representation of a former client and Rules 1.9(b) and 1.9(c)(1) for the lawyer's duties with respect to the use of such information to the disadvantage of clients and former clients.

[2] A fundamental principle in the client-lawyer relationship is that, in the absence of the client's informed consent, the lawyer must not reveal information relating to the representation. See Rule 1.0(e) for the definition of informed consent. This contributes to the trust that is the hallmark of the client-lawyer relationship. The client is thereby encouraged to seek legal assistance and to communicate fully and frankly with the lawyer even as to embarrassing or legally damaging subject matter. The lawyer needs this information to represent the client effectively and, if necessary, to advise the client to refrain from wrongful conduct. Almost without exception, clients come to lawyers in order to determine their rights and what is, in the complex of laws and regulations, deemed to be legal and correct. Based upon experience, lawyers know that almost all clients follow the advice given, and the law is upheld.

[3] The principle of client-lawyer confidentiality is given effect by related bodies of law: the attorney-client privilege, the work-product doctrine and the rule of confidentiality established in professional ethics. The attorney-client privilege and work-product doctrine apply in judicial and other proceedings in which a lawyer may be called as a witness or otherwise required to produce evidence concerning a client. The rule of client-lawyer confidentiality applies in situations other than those where evidence is sought from the lawyer through compulsion of law. The confidentiality rule, for example, applies not only to matters communicated in confidence by the client but also to all information relating to the representation, whatever its source. A lawyer may not disclose such information except as authorized or required by the Rules of Professional Conduct or other law. See also Scope.

[4] Paragraph (a) prohibits a lawyer from revealing information relating to the representation of a client. This prohibition also applies to disclosures by a lawyer that do not in themselves reveal protected information but could reasonably lead to the discovery of such information by a third person. A lawyer's use of a hypothetical to discuss issues relating to the representation is permissible so long as there is no reasonable likelihood that the listener will be able to ascertain the identity of the client or the situation involved.

Authorized Disclosure

[5] Except to the extent that the client's instructions or special circumstances limit that authority, a lawyer is impliedly authorized to make disclosures about a client when appropriate in carrying out the representation. In some situations, for example, a lawyer may be impliedly authorized to admit a fact that cannot properly be disputed or to make a disclosure that facilitates a satisfactory conclusion to a

matter. Lawyers in a firm may, in the course of the firm's practice, disclose to each other information relating to a client of the firm, unless the client has instructed that particular information be confined to specified lawyers.

Disclosure Adverse to Client

[6] Although the public interest is usually best served by a strict rule requiring lawyers to preserve the confidentiality of information relating to the representation of their clients, the confidentiality rule is subject to limited exceptions. Paragraph (b)(1) recognizes an exception for a client's stated intention to commit a crime. Idaho's rule differs from the ABA Model Rule in that a lawyer may reveal the client's stated intention to commit any crime, not just those involving potential death or potential bodily injury. It is also important to note that this is a permissive rule, in that the lawyer may reveal such confidences but is not required to do so.

[7] Paragraph (b)(2) recognizes the overriding value of life and physical integrity and permits disclosure reasonably necessary to prevent reasonably certain death or substantial bodily harm. Such harm is reasonably certain to occur if it will be suffered imminently or if there is a present and substantial threat that a person will suffer such harm at a later date if the lawyer fails to take action necessary to eliminate the threat. Thus, a lawyer who knows that a client has accidentally discharged toxic waste into a town's water supply may reveal this information to the authorities if there is a present and substantial risk that a person who drinks the water will contract a life-threatening or debilitating disease and the lawyer's disclosure is necessary to eliminate the threat or reduce the number of victims.

[8] Paragraph (b)(3) addresses the situation in which the lawyer does not learn of the client's crime until after it has been consummated. Although the client no longer has the option of preventing disclosure by refraining from the wrongful conduct, there will be situations in which the loss suffered by the affected person can be prevented, rectified or mitigated. In such situations, the lawyer may disclose information relating to the representation to the extent necessary to enable the affected persons to prevent or mitigate reasonably certain losses or to attempt to recoup their losses. Paragraph (b)(3) does not apply when a person who has committed a crime thereafter employs a lawyer for representation concerning that offense.

[9] A lawyer's confidentiality obligations do not preclude a lawyer from securing confidential legal advice about the lawyer's personal responsibility to comply with these Rules. In most situations, disclosing information to secure such advice will be impliedly authorized for the lawyer to carry out the representation. Even when the disclosure is not impliedly authorized, paragraph (b)(4) permits such disclosure because of the importance of a lawyer's compliance with the Rules of Professional Conduct.

[10] Where a legal claim or disciplinary charge alleges complicity of the lawyer in a client's conduct or other misconduct of the lawyer involving representation of the client, the lawyer may respond to the extent the lawyer reasonably believes necessary to establish a defense. The same is true with respect to a claim involving the conduct or representation of a former client. Such a charge can arise in a civil, criminal, disciplinary or other proceeding and can be based on a wrong allegedly committed by the lawyer against the client or on a wrong alleged by a third person, for example, a person claiming to have been defrauded by the lawyer and client acting together. The lawyer's right to respond arises when an assertion of such complicity has been made. Paragraph (b)(5) does not require the lawyer to await the commencement of an action or proceeding that charges such complicity, so that the defense may be established by responding directly to a third party who has made such an assertion. The right to defend also applies, of course, where a proceeding has been commenced.

[11] A lawyer entitled to a fee is permitted by paragraph (b)(5) to prove the services rendered in an action to collect it. This aspect of the rule expresses the principle that the beneficiary of a fiduciary relationship may not exploit it to the detriment of the fiduciary.

[12] Other law may require that a lawyer disclose information about a client. Whether such a law supersedes Rule 1.6 is a question of law beyond the scope of these Rules. When disclosure of information relating to the representation appears to be required by other law, the lawyer must discuss the matter with the client to the extent required by Rule 1.4. If, however, the other law supersedes this Rule and requires disclosure, paragraph (b)(6) permits the lawyer to make such disclosures as are necessary to comply with the law.

[13] A lawyer may be ordered to reveal information relating to the representation of a client by a court or by another tribunal or governmental entity claiming authority pursuant to other law to compel the disclosure. Absent informed consent of the client to do otherwise, the lawyer should assert on behalf of the client all nonfrivolous claims that the order is not authorized by other law or that the information sought is protected against disclosure by the attorney-client privilege or other applicable law. In the event of an adverse ruling, the lawyer must consult with the client about the possibility of appeal to the extent required by Rule 1.4. Unless review is sought, however, paragraph (b)(6) permits the lawyer to comply with the court's order.

[14] Paragraph (b) permits disclosure only to the extent the lawyer reasonably believes the disclosure is necessary to accomplish one of the purposes specified. Where practicable, the lawyer should first seek to persuade the client to take suitable action to obviate the need for disclosure. In any case, a disclosure adverse to the client's interest should be no greater than the lawyer reasonably believes necessary to accomplish the purpose. If the disclosure will be made in connection with a judicial proceeding, the disclosure should be made in a manner that limits access to the information to the tribunal or other persons having a need to know it and appropriate protective orders or other arrangements should be sought by the lawyer to the fullest extent practicable.

[15] Paragraph (b) permits but does not require the disclosure of information relating to a client's representation to accomplish the purposes specified in paragraphs (b)(1) through (b)(6). In exercising the discretion conferred by this Rule, the lawyer may consider such factors as the nature of the lawyer's relationship with the client and with those who might be injured by the client, the lawyer's own involvement in the transaction and factors that may extenuate the conduct in question. A lawyer's decision not to disclose as permitted by paragraph (b) does not violate this Rule. Disclosure may be required, however, by other Rules. Some Rules require disclosure only if such disclosure would be permitted by paragraph (b). See Rules 1.2(d), 4.1(b), 8.1 and 8.3. Rule 3.3, on the other hand, requires disclosure in some circumstances regardless of whether such disclosure is permitted by this Rule. See Rule 3.3(c).

Withdrawal

[16] If the lawyer's services will be used by the client in materially furthering a course of criminal or fraudulent conduct, the lawyer must withdraw, as stated in Rule 1.16(a)(1). After withdrawal the lawyer is required to refrain from making disclosure of the client's confidences, except as otherwise permitted by Rule 1.6. Neither this Rule nor Rule 1.8(b) nor Rule 1.16(d) prevents the lawyer from giving notice of the fact of withdrawal, and the lawyer may also withdraw or disaffirm any opinion, document, affirmation, or the like.

Acting Competently to Preserve Confidentiality

[17] A lawyer must act competently to safeguard information relating to the representation of a client against inadvertent or unauthorized disclosure by the lawyer or other persons who are participating in the representation of the client or who are subject to the lawyer's supervision. See Rules 1.1, 5.1 and 5.3.

[18] When transmitting a communication that includes information relating to the representation of a client, the lawyer must take reasonable precautions to prevent the information from coming into the hands of unintended recipients. This duty, however, does

not require that the lawyer use special security measures if the method of communication affords a reasonable expectation of privacy. Special circumstances, however, may warrant special precautions. Factors to be considered in determining the reasonableness of the lawyer's expectation of confidentiality include the sensitivity of the information and the extent to which the privacy of the communication is protected by law or by a confidentiality agreement. A client may require the lawyer to implement special security measures not required by this Rule or may give informed consent to the use of a means of communication that would otherwise be prohibited by this Rule.

Former Client

[19] The duty of confidentiality continues after the client-lawyer relationship has terminated. See Rule 1.9(c)(2). See Rule 1.9(c)(1) for the prohibition against using such information to the disadvantage of the former client.

RULE 1.7: CONFLICT OF INTEREST: CURRENT CLIENTS

(a) Except as provided in paragraph (b), a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if:

- (1) the representation of one client will be directly adverse to another client; or
- (2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by the personal interests of the lawyer, including family and domestic relationships.

(b) Notwithstanding the existence of a concurrent conflict of interest under paragraph (a), a lawyer may represent a client if:

- (1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;
- (2) the representation is not prohibited by law;
- (3) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; and
- (4) each affected client gives informed consent, confirmed in writing.

Commentary

General Principles

[1] Loyalty and independent judgment are essential elements in the lawyer's relationship to a client. Concurrent conflicts of interest can arise from the lawyer's responsibilities to another client, a former client or a third person or from the lawyer's own interests. For specific Rules regarding certain concurrent conflicts of interest, see Rule 1.8. For former client conflicts of interest, see Rule 1.9. For conflicts of interest involving prospective clients, see Rule 1.18. For definitions of "informed consent" and "confirmed in writing," see Rule 1.0(e) and (b).

[2] Resolution of a conflict of interest problem under this Rule requires the lawyer to: 1) clearly identify the client or clients; 2) determine whether a conflict of interest exists; 3) decide whether the representation may be undertaken despite the existence of a conflict, i.e., whether the conflict is consentable; and 4) if so, consult with the clients affected under paragraph (a) and obtain their informed consent, confirmed in writing. The clients affected under paragraph

(a) include both of the clients referred to in paragraph (a)(1) and the one or more clients whose representation might be materially limited under paragraph (a)(2).

[3] A conflict of interest may exist before representation is undertaken, in which event the representation must be declined, unless the lawyer obtains the informed consent of each client under the conditions of paragraph (b). To determine whether a conflict of interest exists, a lawyer should adopt reasonable procedures, appropriate for the size and type of firm and practice, to determine in both litigation and non-litigation matters the persons and issues involved. See also Comment to Rule 5.1. Ignorance caused by a failure to institute such procedures will not excuse a lawyer's violation of this Rule. As to whether a client-lawyer relationship exists or, having once been established, is continuing, see Comment to Rule 1.3 and Scope.

[4] If a conflict arises after representation has been undertaken, the lawyer ordinarily must withdraw from the representation, unless the lawyer has obtained the informed consent of the client under the conditions of paragraph (b). See Rule 1.16. Where more than one client is involved, whether the lawyer may continue to represent any of the clients is determined both by the lawyer's ability to comply with duties owed to the former client and by the lawyer's ability to represent adequately the remaining client or clients, given the lawyer's duties to the former client. See Rule 1.9. See also Comments [5] and [29].

[5] Unforeseeable developments, such as changes in corporate and other organizational affiliations or the addition or realignment of parties in litigation, might create conflicts in the midst of a representation, as when a company sued by the lawyer on behalf of one client is bought by another client represented by the lawyer in an unrelated matter. Depending on the circumstances, the lawyer may have the option to withdraw from one of the representations in order to avoid the conflict. The lawyer must seek court approval where necessary and take steps to minimize harm to the clients. See Rule 1.16. The lawyer must continue to protect the confidences of the client from whose representation the lawyer has withdrawn. See Rule 1.9(c).

Identifying Conflicts of Interest: Directly Adverse

[6] Loyalty to a current client prohibits undertaking representation directly adverse to that client without that client's informed consent. Thus, absent consent, a lawyer may not act as an advocate in one matter against a person the lawyer represents in some other matter, even when the matters are wholly unrelated. The client as to whom the representation is directly adverse is likely to feel betrayed, and the resulting damage to the client-lawyer relationship is likely to impair the lawyer's ability to represent the client effectively. In addition, the client on whose behalf the adverse representation is undertaken reasonably may fear that the lawyer will pursue that client's case less effectively out of deference to the other client, i.e., that the representation may be materially limited by the lawyer's interest in retaining the current client. Similarly, a directly adverse conflict may arise when a lawyer is required to cross-examine a client who appears as a witness in a lawsuit involving another client, as when the testimony will be damaging to the client who is represented in the lawsuit. On the other hand, simultaneous representation in unrelated matters of clients whose interests are only economically adverse, such as representation of competing economic enterprises in unrelated litigation, does not ordinarily constitute a conflict of interest and thus may not require consent of the respective clients.

[7] Directly adverse conflicts can also arise in transactional matters. For example, if a lawyer is asked to represent the seller of a business in negotiations with a buyer represented by the lawyer, not in the same transaction but in another, unrelated matter, the lawyer could not undertake the representation without the informed consent of each client.

Identifying Conflicts of Interest: Material Limitation

[8] Even where there is no direct adverseness, a conflict of interest exists if there is a significant risk that a lawyer's ability to consider, recommend or carry out an appropriate course of action for the client will be materially limited as a result of the lawyer's other responsibilities or interests. For example, a lawyer asked to represent several individuals seeking to form a joint venture is likely to be materially limited in the lawyer's ability to recommend or advocate all possible positions that each might take because of the lawyer's duty of loyalty to the others. The conflict in effect forecloses alternatives that would otherwise be available to the client. The mere possibility of subsequent harm does not itself require disclosure and consent. The critical questions are the likelihood that a difference in interests will eventuate and, if it does, whether it will materially interfere with the lawyer's independent professional judgment in considering alternatives or foreclose courses of action that reasonably should be pursued on behalf of the client.

Responsibilities to Former Clients and Other Third Persons

[9] In addition to conflicts with other current clients, a lawyer's duties of loyalty and independence may be materially limited by responsibilities to former clients under Rule 1.9 or by the lawyer's responsibilities to other persons, such as fiduciary duties arising from a lawyer's service as a trustee, executor or corporate director.

Personal Interest Conflicts

[10] The lawyer's own interests should not be permitted to have an adverse effect on representation of a client. For example, if the probity of a lawyer's own conduct in a transaction is in serious question, it may be difficult or impossible for the lawyer to give a client detached advice. Similarly, when a lawyer has discussions concerning possible employment with an opponent of the lawyer's client, or with a law firm representing the opponent, such discussions could materially limit the lawyer's representation of the client. In addition, a lawyer may not allow related business interests to affect representation, for example, by referring clients to an enterprise in which the lawyer has an undisclosed financial interest. See Rule 1.9 for specific Rules pertaining to a number of personal interest conflicts, including business transactions with clients. See also Rule 1.10 (personal interest conflicts under Rule 1.7 ordinarily are not imputed to other lawyers in a law firm).

[11] When lawyers representing different clients in the same matter or in substantially related matters are closely related by blood, marriage or other domestic relationship, there may be a significant risk that client confidences will be revealed and that the lawyer's domestic relationship will interfere with both loyalty and independent professional judgment. As a result, each client is entitled to know of the existence and implications of the relationship between the lawyers before the lawyer agrees to undertake the representation. Thus, a lawyer related to another lawyer, e.g., as parent, child, sibling, spouse or domestic partner, ordinarily may not represent a client in a matter where that lawyer is representing another party, unless each client gives informed consent. The disqualification arising from a close family or domestic relationship is personal and ordinarily is not imputed to members of firms with whom the lawyers are associated. See Rule 1.10.

[12] A lawyer is prohibited from engaging in sexual relationships with a client unless the sexual relationship predates the formation of the client-lawyer relationship. See Rule 1.8(j).

Interest of Person Paying for a Lawyer's Service

[13] A lawyer may be paid from a source other than the client, including a co-client, if the client is informed of that fact and consents and the arrangement does not compromise the lawyer's duty of loyalty or independent judgment to the client. See Rule 1.8(f). If acceptance of the payment from any other source presents a significant risk that the lawyer's representation of the client will be materially limited by the lawyer's own interest in accommodating the person paying the lawyer's fee or by the lawyer's responsibilities to a payer who is also a co-client, then the lawyer must comply with the requirements of paragraph (b) before accepting the representation,

including determining whether the conflict is consentable and, if so, that the client has adequate information about the material risks of the representation.

Prohibited Representations

[14] Ordinarily, clients may consent to representation notwithstanding a conflict. However, as indicated in paragraph (b), some conflicts are nonconsentable, meaning that the lawyer involved cannot properly ask for such agreement or provide representation on the basis of the client's consent. When the lawyer is representing more than one client, the question of consentability must be resolved as to each client.

[15] Consentability is typically determined by considering whether the interests of the clients will be adequately protected if the clients are permitted to give their informed consent to representation burdened by a conflict of interest. Thus, under paragraph (b)(1), representation is prohibited if in the circumstances the lawyer cannot reasonably conclude that the lawyer will be able to provide competent and diligent representation. See Rule 1.1 (competence) and Rule 1.3 (diligence).

[16] Paragraph (b)(2) describes conflicts that are nonconsentable because the representation is prohibited by applicable law. For example, in some states substantive law provides that the same lawyer may not represent more than one defendant in a capital case, even with the consent of the clients, and under federal criminal statutes certain representations by a former government lawyer are prohibited, despite the informed consent of the former client. In addition, decisional law in some states limits the ability of a governmental client, such as a municipality, to consent to a conflict of interest.

[17] Paragraph (b)(3) describes conflicts that are nonconsentable because of the institutional interest in vigorous development of each client's position when the clients are aligned directly against each other in the same litigation or other proceeding before a tribunal. Whether clients are aligned directly against each other within the meaning of this paragraph requires examination of the context of the proceeding. Although this paragraph does not preclude a lawyer's multiple representation of adverse parties to a mediation (because mediation is not a proceeding before a "tribunal" under Rule 1.0(m)), such representation may be precluded by paragraph (b)(1).

Informed Consent

[18] Informed consent requires that each affected client be aware of the relevant circumstances and of the material and reasonably foreseeable ways that the conflict could have adverse effects on the interests of that client. See Rule 1.0(e) (informed consent). The information required depends on the nature of the conflict and the nature of the risks involved. When representation of multiple clients in a single matter is undertaken, the information must include the implications of the common representation, including possible effects on loyalty, confidentiality and the attorney-client privilege and the advantages and risks involved. See Comments [30] and [31] (effect of common representation on confidentiality).

[19] Under some circumstances it may be impossible to make the disclosure necessary to obtain consent. For example, when the lawyer represents different clients in related matters and one of the clients refuses to consent to the disclosure necessary to permit the other client to make an informed decision, the lawyer cannot properly ask the latter to consent. In some cases the alternative to common representation can be that each party may have to obtain separate representation with the possibility of incurring additional costs. These costs, along with the benefits of securing separate representation, are factors that may be considered by the affected client in determining whether common representation is in the client's interests.

Consent Confirmed In Writing

[20] Paragraph (b) requires the lawyer to obtain the informed consent of the client, confirmed in writing. Such a writing may consist of a document executed by the client or one that the lawyer promptly records and transmits to the client following an oral consent. See Rule 1.0(b). See also Rule 1.0(n) (writing includes electronic transmission). If it is not feasible to obtain or transmit the writing at the time the client gives informed consent, then the lawyer must obtain or transmit it within a reasonable time thereafter. See Rule 1.0(b). The requirement of a writing does not supplant the need in most cases for the lawyer to talk with the client, to explain the risks and advantages, if any, of representation burdened with a conflict of interest, as well as reasonably available alternatives, and to afford the client a reasonable opportunity to consider the risks and alternatives and to raise questions and concerns. Rather, the writing is required in order to impress upon clients the seriousness of the decision the client is being asked to make and to avoid disputes or ambiguities that might later occur in the absence of a writing.

Revoking Consent

[21] A client who has given consent to a conflict may revoke the consent and, like any other client, may terminate the lawyer's representation at any time. Whether revoking consent to the client's own representation precludes the lawyer from continuing to represent other clients depends on the circumstances, including the nature of the conflict, whether the client revoked consent because of a material change in circumstances, the reasonable expectations of the other client and whether material detriment to the other clients or the lawyer would result.

Consent to Future Conflict

[22] Whether a lawyer may properly request a client to waive conflicts that might arise in the future is subject to the test of paragraph (b). The effectiveness of such waivers is generally determined by the extent to which the client reasonably understands the material risks that the waiver entails. The more comprehensive the explanation of the types of future representations that might arise and the actual and reasonably foreseeable adverse consequences of those representations, the greater the likelihood that the client will have the requisite understanding. Thus, if the client agrees to consent to a particular type of conflict with which the client is already familiar, then the consent ordinarily will be effective with regard to that type of conflict. If the consent is general and open-ended, then the consent ordinarily will be ineffective, because it is not reasonably likely that the client will have understood the material risks involved. On the other hand, if the client is an experienced user of the legal services involved and is reasonably informed regarding the risk that a conflict may arise, such consent is more likely to be effective, particularly if, e.g., the client is independently represented by other counsel in giving consent and the consent is limited to future conflicts unrelated to the subject of the representation. In any case, advance consent cannot be effective if the circumstances that materialize in the future are such as would make the conflict nonconsentable under paragraph (b).

Conflicts in Litigation

[23] Paragraph (b)(3) prohibits representation of opposing parties in the same litigation, regardless of the clients' consent. On the other hand, simultaneous representation of parties whose interests in litigation may conflict, such as coplaintiffs or codefendants, is governed by paragraph (a)(2). A conflict may exist by reason of substantial discrepancy in the parties' testimony, incompatibility in positions in relation to an opposing party or the fact that there are substantially different possibilities of settlement of the claims or liabilities in question. Such conflicts can arise in criminal cases as well as civil. The potential for conflict of interest in representing multiple defendants in a criminal case is so grave that ordinarily a lawyer should decline to represent more than one codefendant. On the other hand, common representation of persons having similar interests in civil litigation is proper if the requirements of paragraph (b) are met.

[24] Ordinarily a lawyer may take inconsistent legal positions in different tribunals at different times on behalf of different clients. The mere fact that advocating a legal position on behalf of one client might create precedent adverse to the interests of a client represented by the lawyer in an unrelated matter does not create a conflict of interest. A conflict of interest exists, however, if there is a significant risk that a lawyer's action on behalf of one client will materially limit the lawyer's effectiveness in representing another client in a different case; for example, when a decision favoring one client will create a precedent likely to seriously weaken the position taken on behalf of the other client. Factors relevant in determining whether the clients need to be advised of the risk include: where the cases are pending, whether the issue is substantive or procedural, the temporal relationship between the matters, the significance of the issue to the immediate and long-term interests of the clients involved and the clients' reasonable expectations in retaining the lawyer. If there is significant risk of material limitation, then absent informed consent of the affected clients, the lawyer must refuse one of the representations or withdraw from one or both matters.

[25] When a lawyer represents or seeks to represent a class of plaintiffs or defendants in a class-action lawsuit, unnamed members of the class are ordinarily not considered to be clients of the lawyer for purposes of applying paragraph (a)(1) of this Rule. Thus, the lawyer does not typically need to get the consent of such a person before representing a client suing the person in an unrelated matter. Similarly, a lawyer seeking to represent an opponent in a class action does not typically need the consent of an unnamed member of the class whom the lawyer represents in an unrelated matter.

Nonlitigation Conflicts

[26] Conflicts of interest under paragraphs (a)(1) and (a)(2) arise in contexts other than litigation. For a discussion of directly adverse conflicts in transactional matters, see Comment [7]. Relevant factors in determining whether there is significant potential for material limitation include the duration and intimacy of the lawyer's relationship with the client or clients involved, the functions being performed by the lawyer, the likelihood that disagreements will arise and the likely prejudice to the client from the conflict. The question is often one of proximity and degree. See Comment [8].

[27] For example, conflict questions may arise in estate planning and estate administration. A lawyer may be called upon to prepare wills for several family members, such as husband and wife, and, depending upon the circumstances, a conflict of interest may be present. In estate administration the identity of the client may be unclear under the law of a particular jurisdiction. Under one view, the client is the fiduciary; under another view the client is the estate or trust, including its beneficiaries. In order to comply with conflict of interest rules, the lawyer should make clear the lawyer's relationship to the parties involved.

[28] Whether a conflict is consentable depends on the circumstances. For example, a lawyer may not represent multiple parties to a negotiation whose interests are fundamentally antagonistic to each other, but common representation is permissible where the clients are generally aligned in interest even though there is some difference in interest among them. Thus, a lawyer may seek to establish or adjust a relationship between clients on an amicable and mutually advantageous basis; for example, in helping to organize a business in which two or more clients are entrepreneurs, working out the financial reorganization of an enterprise in which two or more clients have an interest or arranging a property distribution in settlement of an estate. The lawyer seeks to resolve potentially adverse interests by developing the parties' mutual interests. Otherwise, each party might have to obtain separate representation, with the possibility of incurring additional cost, complication or even litigation. Given these and other relevant factors, the clients may prefer that the lawyer act for all of them.

Special Considerations in Common Representation

[29] In considering whether to represent multiple clients in the same matter, a lawyer should be mindful that if the common

representation fails because the potentially adverse interests cannot be reconciled, the result can be additional cost, embarrassment and recrimination. Ordinarily, the lawyer will be forced to withdraw from representing all of the clients if the common representation fails. In some situations, the risk of failure is so great that multiple representation is plainly impossible. For example, a lawyer cannot undertake common representation of clients where contentious litigation or negotiations between them are imminent or contemplated. Moreover, because the lawyer is required to be impartial between commonly represented clients, representation of multiple clients is improper when it is unlikely that impartiality can be maintained. Generally, if the relationship between the parties has already assumed antagonism, the possibility that the clients' interests can be adequately served by common representation is not very good. Other relevant factors are whether the lawyer subsequently will represent both parties on a continuing basis and whether the situation involves creating or terminating a relationship between the parties.

[30] A particularly important factor in determining the appropriateness of common representation is the effect on client-lawyer confidentiality and the attorney-client privilege. With regard to the attorney-client privilege, the prevailing rule is that, as between commonly represented clients, the privilege does not attach. Hence, it must be assumed that if litigation eventuates between the clients, the privilege will not protect any such communications, and the clients should be so advised.

[31] As to the duty of confidentiality, continued common representation will almost certainly be inadequate if one client asks the lawyer not to disclose to the other client information relevant to the common representation. This is so because the lawyer has an equal duty of loyalty to each client, and each client has the right to be informed of anything bearing on the representation that might affect that client's interests and the right to expect that the lawyer will use that information to that client's benefit. See Rule 1.4. The lawyer should, at the outset of the common representation and as part of the process of obtaining each client's informed consent, advise each client that information will be shared and that the lawyer will have to withdraw if one client decides that some matter material to the representation should be kept from the other. In limited circumstances, it may be appropriate for the lawyer to proceed with the representation when the clients have agreed, after being properly informed, that the lawyer will keep certain information confidential. For example, the lawyer may reasonably conclude that failure to disclose one client's trade secrets to another client will not adversely affect representation involving a joint venture between the clients and agree to keep that information confidential with the informed consent of both clients.

[32] When seeking to establish or adjust a relationship between clients, the lawyer should make clear that the lawyer's role is not that of partisanship normally expected in other circumstances and, thus, that the clients may be required to assume greater responsibility for decisions than when each client is separately represented. Any limitations on the scope of the representation made necessary as a result of the common representation should be fully explained to the clients at the outset of the representation. See Rule 1.2(c).

[33] Subject to the above limitations, each client in the common representation has the right to loyal and diligent representation and the protection of Rule 1.9 concerning the obligations to a former client. The client also has the right to discharge the lawyer as stated in Rule 1.16.

Organizational Clients

[34] A lawyer who represents a corporation or other organization does not, by virtue of that representation, necessarily represent any constituent or affiliated organization, such as a parent or subsidiary. See Rule 1.13(a). Thus, the lawyer for an organization is not barred from accepting representation adverse to an affiliate in an unrelated matter, unless the circumstances are such that the affiliate should also be considered a client of the lawyer, there is an understanding between the lawyer and the organizational client that the lawyer will

avoid representation adverse to the client's affiliates, or the lawyer's obligations to either the organizational client or the new client are likely to limit materially the lawyer's representation of the other client.

[35] A lawyer for a corporation or other organization who is also a member of its board of directors should determine whether the responsibilities of the two roles may conflict. The lawyer may be called on to advise the corporation in matters involving actions of the directors. Consideration should be given to the frequency with which such situations may arise, the potential intensity of the conflict, the effect of the lawyer's resignation from the board and the possibility of the corporation's obtaining legal advice from another lawyer in such situations. If there is material risk that the dual role will compromise the lawyer's independence of professional judgment, the lawyer should not serve as a director or should cease to act as the corporation's lawyer when conflicts of interest arise. The lawyer should advise the other members of the board that in some circumstances matters discussed at board meetings while the lawyer is present in the capacity of director might not be protected by the attorney-client privilege and that conflict of interest considerations might require the lawyer's recusal as a director or might require the lawyer and the lawyer's firm to decline representation of the corporation in a matter.

RULE 1.8: CONFLICT OF INTEREST: CURRENT CLIENTS: SPECIFIC RULES

- (a) A lawyer shall not enter into a business transaction with a client or knowingly acquire an ownership, possessory, security or other pecuniary interest adverse to a client unless:
- (1) the transaction and terms on which the lawyer acquires the interest are fair and reasonable to the client and are fully disclosed and transmitted in writing in a manner that can be reasonably understood by the client;
 - (2) the client is advised in writing of the desirability of seeking and is given a reasonable opportunity to seek the advice of independent legal counsel on the transaction; and
 - (3) the client gives informed consent, in a writing signed by the client, to the essential terms of the transaction and the lawyer's role in the transaction, including whether the lawyer is representing the client in the transaction.
- (b) A lawyer shall not use information relating to representation of a client to the disadvantage of the client unless the client gives informed consent, except as permitted or required by these Rules.
- (c) A lawyer shall not solicit any substantial gift from a client, including a testamentary gift, or prepare on behalf of a client an instrument, giving the lawyer or a person with whom the lawyer has a familial, domestic or close relationship any substantial gift unless the lawyer or other recipient of the gift is related to the client. For purposes of this paragraph, related persons include a spouse, child, grandchild, parent, grandparent or other relative or individual with whom the lawyer or the client maintains a close, familial relationship.
- (d) Prior to the conclusion of representation of a client, a lawyer shall not make or negotiate an agreement giving the lawyer literary or media rights to a portrayal or account based in substantial part on information relating to the representation.
- (e) A lawyer shall not provide financial assistance to a client in connection with pending or contemplated litigation, except that:

- (1) a lawyer may advance court costs and expenses of litigation, the repayment of which may be contingent on the outcome of the matter; and
- (2) a lawyer representing an indigent client may pay court costs and expenses of litigation on behalf of the client.
- (f) A lawyer shall not accept compensation for representing a client from one other than the client unless:
- (1) the client gives informed consent;
 - (2) there is no interference with the lawyer's independence of professional judgment or with the client-lawyer relationship; and
 - (3) information relating to representation of a client is protected as required by Rule 1.6.
- (g) A lawyer who represents two or more clients shall not participate in making an aggregate settlement of the claims of or against the clients, or in a criminal case an aggregated agreement as to guilty or nolo contendere pleas, unless each client gives informed consent, in a writing signed by the client. The lawyer's disclosure shall include the existence and nature of all the claims or pleas involved and of the participation of each person in the settlement.
- (h) A lawyer shall not:
- (1) make an agreement prospectively limiting the lawyer's liability to a client for malpractice unless the client is independently represented in making the agreement; or
 - (2) settle a claim or potential claim for such liability with an unrepresented client or former client unless that person is advised in writing of the desirability of seeking and is given a reasonable opportunity to seek the advice of independent legal counsel in connection therewith.
- (i) A lawyer shall not acquire a proprietary interest in the cause of action or subject matter of litigation the lawyer is conducting for a client, except that the lawyer may:
- (1) acquire a lien authorized by law to secure the lawyer's fee or expenses; and
 - (2) contract with a client for a reasonable contingent fee in a civil case.
- (j) A lawyer shall not have sexual relations with a client unless a consensual sexual relationship existed between them when the client-lawyer relationship commenced.
- (k) While lawyers are associated in a firm, a prohibition in the foregoing paragraphs (a) through (i) that applies to any one of them shall apply to all of them.

Commentary

Business Transactions between Client and Lawyer

[1] A lawyer's legal skill and training, together with the relationship of trust and confidence between lawyer and client, create the possibility of overreaching when the lawyer participates in a business, property or financial transaction with a client, for example, a loan or sales transaction or a lawyer investment on behalf of a client. The requirements of paragraph (a) must be met even when the transaction is not closely related to the subject matter of the representation, as when a lawyer drafting a will for a client learns that the client needs money for unrelated expenses and offers to

make a loan to the client. The Rule applies to lawyers engaged in the sale of goods or services related to the practice of law, for example, the sale of title insurance or investment services to existing clients of the lawyer's legal practice. See Rule 5.7. It also applies to lawyers purchasing property from estates they represent. It does not apply to ordinary fee arrangements between client and lawyer, which are governed by Rule 1.5, although its requirements must be met when the lawyer accepts an interest in the client's business or other nonmonetary property as payment of all or part of a fee. In addition, the Rule does not apply to standard commercial transactions between the lawyer and the client for products or services that the client generally markets to others, for example, banking or brokerage services, medical services, products manufactured or distributed by the client, and utilities' services. In such transactions, the lawyer has no advantage in dealing with the client, and the restrictions in paragraph (a) are unnecessary and impracticable.

[2] Paragraph (a)(1) requires that the transaction itself be fair to the client and that its essential terms be communicated to the client, in writing, in a manner that can be reasonably understood. Paragraph (a)(2) requires that the client also be advised, in writing, of the desirability of seeking the advice of independent legal counsel. It also requires that the client be given a reasonable opportunity to obtain such advice. Paragraph (a)(3) requires that the lawyer obtain the client's informed consent, in a writing signed by the client, both to the essential terms of the transaction and to the lawyer's role. When necessary, the lawyer should discuss both the material risks of the proposed transaction, including any risk presented by the lawyer's involvement, and the existence of reasonably available alternatives and should explain why the advice of independent legal counsel is desirable. See Rule 1.0(e) (definition of informed consent).

[3] The risk to a client is greatest when the client expects the lawyer to represent the client in the transaction itself or when the lawyer's financial interest otherwise poses a significant risk that the lawyer's representation of the client will be materially limited by the lawyer's financial interest in the transaction. Here the lawyer's role requires that the lawyer must comply, not only with the requirements of paragraph (a), but also with the requirements of Rule 1.7. Under that Rule, the lawyer must disclose the risks associated with the lawyer's dual role as both legal adviser and participant in the transaction, such as the risk that the lawyer will structure the transaction or give legal advice in a way that favors the lawyer's interests at the expense of the client. Moreover, the lawyer must obtain the client's informed consent. In some cases, the lawyer's interest may be such that Rule 1.7 will preclude the lawyer from seeking the client's consent to the transaction.

[4] If the client is independently represented in the transaction, paragraph (a)(2) of this Rule is inapplicable, and the paragraph (a)(1) requirement for full disclosure is satisfied either by a written disclosure by the lawyer involved in the transaction or by the client's independent counsel. The fact that the client was independently represented in the transaction is relevant in determining whether the agreement was fair and reasonable to the client as paragraph (a)(1) further requires.

Use of Information Related to Representation

[5] Use of information relating to the representation to the disadvantage of the client violates the lawyer's duty of loyalty. Paragraph (b) applies when the information is used to benefit either the lawyer or a third person, such as another client or business associate of the lawyer. For example, if a lawyer learns that a client intends to purchase and develop several parcels of land, the lawyer may not use that information to purchase one of the parcels in competition with the client or to recommend that another client make such a purchase. The Rule does not prohibit uses that do not disadvantage the client. For example, a lawyer who learns a government agency's interpretation of trade legislation during the representation of one client may properly use that information to benefit other clients. Paragraph (b) prohibits disadvantageous use of client information unless the client gives informed consent, except as permitted or required by these Rules. See Rules 1.2(d), 1.6, 1.9(c), 3.3, 4.1(b), 8.1 and 8.3.

Gifts to Lawyers

[6] A lawyer may accept a gift from a client, if the transaction meets general standards of fairness. For example, a simple gift such as a present given at a holiday or as a token of appreciation is permitted. If a client offers the lawyer a more substantial gift, paragraph (c) does not prohibit the lawyer from accepting it, although such a gift may be voidable by the client under the doctrine of undue influence, which treats client gifts as presumptively fraudulent. In any event, due to concerns about overreaching and imposition on clients, a lawyer may not suggest that a substantial gift be made to the lawyer or for the lawyer's benefit, except where the lawyer is related to the client as set forth in paragraph (c).

[7] If effectuation of a substantial gift requires preparing a legal instrument such as a will or conveyance, the client should have the detached advice that another lawyer can provide. The sole exception to this Rule is where the client is a relative of the donee.

[8] This Rule does not prohibit a lawyer from seeking to have the lawyer or a partner or associate of the lawyer named as executor of the client's estate or to another potentially lucrative fiduciary position. Nevertheless, such appointments will be subject to the general conflict of interest provision in Rule 1.7 when there is a significant risk that the lawyer's interest in obtaining the appointment will materially limit the lawyer's independent professional judgment in advising the client concerning the choice of an executor or other fiduciary. In obtaining the client's informed consent to the conflict, the lawyer should advise the client concerning the nature and extent of the lawyer's financial interest in the appointment, as well as the availability of alternative candidates for the position.

Literary Rights

[9] An agreement by which a lawyer acquires literary or media rights concerning the conduct of the representation creates a conflict between the interests of the client and the personal interests of the lawyer. Measures suitable in the representation of the client may detract from the publication value of an account of the representation. Paragraph (d) does not prohibit a lawyer representing a client in a transaction concerning literary property from agreeing that the lawyer's fee shall consist of a share in ownership in the property, if the arrangement conforms to Rule 1.5 and paragraphs (a) and (f).

Financial Assistance

[10] Lawyers may not subsidize lawsuits or administrative proceedings brought on behalf of their clients, including making or guaranteeing loans to their clients for living expenses, because to do so would encourage clients to pursue lawsuits that might not otherwise be brought and because such assistance gives lawyers too great a financial stake in the litigation. These dangers do not warrant a prohibition on a lawyer lending a client court costs and litigation expenses, including the expenses of medical examination and the costs of obtaining and presenting evidence, because these advances are virtually indistinguishable from contingent fees and help ensure access to the courts. Similarly, an exception allowing lawyers representing indigent clients to pay court costs and litigation expenses regardless of whether these funds will be repaid is warranted.

Person Paying for a Lawyer's Services

[11] Lawyers are frequently asked to represent a client under circumstances in which a third person will compensate the lawyer, in whole or in part. The third person might be a relative or friend, an indemnitor (such as a liability insurance company) or a co-client (such as a corporation sued along with one or more of its employees). Because third-party payers frequently have interests that differ from those of the client, including interests in minimizing the amount spent on the representation and in learning how the representation is progressing, lawyers are prohibited from accepting or continuing such representations unless the lawyer determines that

there will be no interference with the lawyer's independent professional judgment and there is informed consent from the client. See also Rule 5.4(c) (prohibiting interference with a lawyer's professional judgment by one who recommends, employs or pays the lawyer to render legal services for another).

[12] Sometimes, it will be sufficient for the lawyer to obtain the client's informed consent regarding the fact of the payment and the identity of the third-party payer. If, however, the fee arrangement creates a conflict of interest for the lawyer, then the lawyer must comply with Rule 1.7. The lawyer must also conform to the requirements of Rule 1.6 concerning confidentiality. Under Rule 1.7(a), a conflict of interest exists if there is significant risk that the lawyer's representation of the client will be materially limited by the lawyer's own interest in the fee arrangement or by the lawyer's responsibilities to the third-party payer (for example, when the third-party payer is a co-client). Under Rule 1.7(b), the lawyer may accept or continue the representation with the informed consent of each affected client, unless the conflict is nonconsentable under that paragraph. Under Rule 1.7(b), the informed consent must be confirmed in writing.

Aggregate Settlements

[13] Differences in willingness to make or accept an offer of settlement are among the risks of common representation of multiple clients by a single lawyer. Under Rule 1.7, this is one of the risks that should be discussed before undertaking the representation, as part of the process of obtaining the clients' informed consent. In addition, Rule 1.2(a) protects each client's right to have the final say in deciding whether to accept or reject an offer of settlement and in deciding whether to enter a guilty or nolo contendere plea in a criminal case. The rule stated in this paragraph is a corollary of both these Rules and provides that, before any settlement offer or plea bargain is made or accepted on behalf of multiple clients, the lawyer must inform each of them about all the material terms of the settlement, including what the other clients will receive or pay if the settlement or plea offer is accepted. See also Rule 1.0(e) (definition of informed consent). Lawyers representing a class of plaintiffs or defendants, or those proceeding derivatively, may not have a full client-lawyer relationship with each member of the class; nevertheless, such lawyers must comply with applicable rules regulating notification of class members and other procedural requirements designed to ensure adequate protection of the entire class.

Limiting Liability and Settling Malpractice Claims

[14] Agreements prospectively limiting a lawyer's liability for malpractice are prohibited unless the client is independently represented in making the agreement because they are likely to undermine competent and diligent representation. Also, many clients are unable to evaluate the desirability of making such an agreement before a dispute has arisen, particularly if they are then represented by the lawyer seeking the agreement. This paragraph does not, however, prohibit a lawyer from entering into an agreement with the client to arbitrate legal malpractice claims, provided such agreements are enforceable and the client is fully informed of the scope and effect of the agreement. Nor does this paragraph limit the ability of lawyers to practice in the form of a limited-liability entity, where permitted by law, provided that each lawyer remains personally liable to the client for his or her own conduct and the firm complies with any conditions required by law, such as provisions requiring client notification or maintenance of adequate liability insurance. Nor does it prohibit an agreement in accordance with Rule 1.2 that defines the scope of the representation, although a definition of scope that makes the obligations of representation illusory will amount to an attempt to limit liability.

[15] Agreements settling a claim or a potential claim for malpractice are not prohibited by this Rule. Nevertheless, in view of the danger that a lawyer will take unfair advantage of an unrepresented client or former client, the lawyer must first advise such a person in writing of the appropriateness of independent representation in connection with such a settlement. In addition, the

lawyer must give the client or former client a reasonable opportunity to find and consult independent counsel.

Acquiring Proprietary Interest In Litigation

[16] Paragraph (i) states the traditional general rule that lawyers are prohibited from acquiring a proprietary interest in litigation. Like paragraph (e), the general rule has its basis in common law champerty and maintenance and is designed to avoid giving the lawyer too great an interest in the representation. In addition, when the lawyer acquires an ownership interest in the subject of the representation, it will be more difficult for a client to discharge the lawyer if the client so desires. The Rule is subject to specific exceptions developed in decisional law and continued in these Rules. The exception for certain advances of the costs of litigation is set forth in paragraph (e). In addition, paragraph (i) sets forth exceptions for liens authorized by law to secure the lawyer's fees or expenses and contracts for reasonable contingent fees. The law of each jurisdiction determines which liens are authorized by law. These may include liens granted by statute, liens originating in common law and liens acquired by contract with the client. When a lawyer acquires by contract a security interest in property other than that recovered through the lawyer's efforts in the litigation, such an acquisition is a business or financial transaction with a client and is governed by the requirements of paragraph (a). Contracts for contingent fees in civil cases are governed by Rule 1.5.

Client-Lawyer Sexual Relationships

[17] The relationship between lawyer and client is a fiduciary one in which the lawyer occupies the highest position of trust and confidence. The relationship is almost always unequal; thus, a sexual relationship between lawyer and client can involve unfair exploitation of the lawyer's fiduciary role, in violation of the lawyer's basic ethical obligation not to use the trust of the client to the client's disadvantage. In addition, such a relationship presents a significant danger that, because of the lawyer's emotional involvement, the lawyer will be unable to represent the client without impairment of the exercise of independent professional judgment. Moreover, a blurred line between the professional and personal relationships may make it difficult to predict to what extent client confidences will be protected by the attorney-client evidentiary privilege, since client confidences are protected by privilege only when they are imparted in the context of the client-lawyer relationship. Because of the significant danger of harm to client interests and because the client's own emotional involvement renders it unlikely that the client could give adequate informed consent, this Rule prohibits the lawyer from having sexual relations with a client regardless of whether the relationship is consensual and regardless of the absence of prejudice to the client.

[18] Sexual relationships that predate the client-lawyer relationship are not prohibited. Issues relating to the exploitation of the fiduciary relationship and client dependency are diminished when the sexual relationship existed prior to the commencement of the client-lawyer relationship. However, before proceeding with the representation in these circumstances, the lawyer should consider whether the lawyer's ability to represent the client will be materially limited by the relationship. See Rule 1.7(a)(2).

[19] When the client is an organization, paragraph (j) of this Rule prohibits a lawyer for the organization (whether inside counsel or outside counsel) from having a sexual relationship with a constituent of the organization who supervises, directs or regularly consults with that lawyer concerning the organization's legal matters.

Imputation of Prohibitions

[20] Under paragraph (k), a prohibition on conduct by an individual lawyer in paragraphs (a) through (i) also applies to all lawyers associated in a firm with the personally prohibited lawyer. For example, one lawyer in a firm may not enter into a business transaction with a client of another member of the firm without complying with paragraph (a), even if the first lawyer is not personally involved in the representation of the client. The prohibition set forth in paragraph (j) is personal and is not applied to

associated lawyers.

RULE 1.9: DUTIES TO FORMER CLIENTS

(a) A lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client unless the former client gives informed consent, confirmed in writing.

(b) A lawyer shall not knowingly represent a person in the same or a substantially related matter in which a firm with which the lawyer formerly was associated had previously represented a client

(1) whose interests are materially adverse to that person; and

(2) about whom the lawyer had acquired information protected by Rules 1.6 and 1.9(c) that is material to the matter;

unless the former client gives informed consent, confirmed in writing.

(c) A lawyer who has formerly represented a client in a matter or whose present or former firm has formerly represented a client in a matter shall not thereafter:

(1) use information relating to the representation to the disadvantage of the former client except as these Rules would permit or require with respect to a client, or when the information has become generally known; or

(2) reveal information relating to the representation except as these Rules would permit or require with respect to a client.

Commentary

[1] After termination of a client-lawyer relationship, a lawyer has certain continuing duties with respect to confidentiality and conflicts of interest and thus may not represent another client except in conformity with this Rule. Under this Rule, for example, a lawyer could not properly seek to rescind on behalf of a new client a contract drafted on behalf of the former client. So also a lawyer who has prosecuted an accused person could not properly represent the accused in a subsequent civil action against the government concerning the same transaction. Nor could a lawyer who has represented multiple clients in a matter represent one of the clients against the others in the same or a substantially related matter after a dispute arose among the clients in that matter, unless all affected clients give informed consent. See Comment [9]. Current and former government lawyers must comply with this Rule to the extent required by Rule 1.11.

[2] The scope of a "matter" for purposes of this Rule depends on the facts of a particular situation or transaction. The lawyer's involvement in a matter can also be a question of degree. When a lawyer has been directly involved in a specific transaction, subsequent representation of other clients with materially adverse interests in that transaction clearly is prohibited. On the other hand, a lawyer who recurrently handled a type of problem for a former client is not precluded from later representing another client in a factually distinct problem of that type even though the subsequent representation involves a position adverse to the prior client. Similar considerations can apply to the reassignment of military lawyers between defense and prosecution functions within the same military jurisdictions. The underlying question is whether the lawyer was so involved in the matter that the subsequent representation can be justly regarded as a changing of sides in the matter in question.

[3] Matters are "substantially related" for purposes of this Rule if they involve the same transaction or legal dispute or if there otherwise is a substantial risk that confidential factual information as would normally have been obtained in the prior representation would materially advance the client's position in the subsequent matter. For example, a lawyer who has represented a businessperson and learned extensive private financial information about that person may not then represent that person's spouse in seeking a divorce. Similarly, a lawyer who has previously represented a client in securing environmental permits to build a shopping center would be precluded from representing neighbors seeking to oppose rezoning of the property on the basis of environmental considerations; however, the lawyer would not be precluded, on the grounds of substantial relationship, from defending a tenant of the completed shopping center in resisting eviction for nonpayment of rent. Information that has been disclosed to the public or to other parties adverse to the former client ordinarily will not be disqualifying; nor will government information that the lawyer is impliedly authorized to use or disclose or that is otherwise known to persons outside the government agency involved. Information acquired in a prior representation may have been rendered obsolete by the passage of time, a circumstance that may be relevant in determining whether two representations are substantially related. In the case of an organizational client, general knowledge of the client's policies and practices ordinarily will not preclude a subsequent representation; on the other hand, knowledge of specific facts gained in a prior representation that are relevant to the matter in question ordinarily will preclude such a representation. A former client is not required to reveal the confidential information learned by the lawyer in order to establish a substantial risk that the lawyer has confidential information to use in the subsequent matter. A conclusion about the possession of such information may be based on the nature of the services the lawyer provided the former client and information that would in ordinary practice be learned by a lawyer providing such services.

Lawyers Moving Between Firms

[4] When lawyers have been associated within a firm but then end their association, the question of whether a lawyer should undertake representation is more complicated. There are several competing considerations. First, the client previously represented by the former firm must be reasonably assured that the principle of loyalty to the client is not compromised. Second, the rule should not be so broadly cast as to preclude other persons from having reasonable choice of legal counsel. Third, the rule should not unreasonably hamper lawyers from forming new associations and taking on new clients after having left a previous association. In this connection, it should be recognized that today many lawyers practice in firms, that many lawyers to some degree limit their practice to one field or another, and that many move from one association to another several times in their careers. If the concept of imputation were applied with unqualified rigor, the result would be radical curtailment of the opportunity of lawyers to move from one practice setting to another and of the opportunity of clients to change counsel.

[5] Paragraph (b) operates to disqualify the lawyer only when the lawyer involved has actual knowledge of information protected by Rules 1.6 and 1.9(c). Thus, if a lawyer while with one firm acquired no knowledge or information relating to a particular client of the firm, and that lawyer later joined another firm, neither the lawyer individually nor the second firm is disqualified from representing another client in the same or a related matter even though the interests of the two clients conflict. See Rule 1.10(b) for the restrictions on a firm once a lawyer has terminated association with the firm.

[6] Application of paragraph (b) depends on a situation's particular facts, aided by inferences, deductions or working presumptions that reasonably may be made about the way in which lawyers work together. A lawyer may have general access to files of all clients of a law firm and may regularly participate in discussions of their affairs; it should be inferred that such a lawyer in fact is privy to all information about all the firm's clients. In contrast, another lawyer may have access to the files of only a limited number of clients and participate

in discussions of the affairs of no other clients; in the absence of information to the contrary, it should be inferred that such a lawyer in fact is privy to information about the clients actually served but not those of other clients. In such an inquiry, the burden of proof should rest upon the firm whose disqualification is sought.

[7] Independent of the question of disqualification of a firm, a lawyer changing professional association has a continuing duty to preserve confidentiality of information about a client formerly represented. See Rules 1.6 and 1.9(c).

[8] Paragraph (c) provides that information acquired by the lawyer in the course of representing a client may not subsequently be used or revealed by the lawyer to the disadvantage of the client. However, the fact that a lawyer has once served a client does not preclude the lawyer from using generally known information about that client when later representing another client.

[9] The provisions of this Rule are for the protection of former clients and can be waived if the client gives informed consent, which consent must be confirmed in writing under paragraphs (a) and (b). See Rule 1.0(e). With regard to the effectiveness of an advance waiver, see Comment [22] to Rule 1.7. With regard to disqualification of a firm with which a lawyer is or was formerly associated, see Rule 1.10.

RULE 1.10: IMPUTATION OF CONFLICTS OF INTEREST: GENERAL RULE

(a) While lawyers are associated in a firm, none of them shall knowingly represent a client when any one of them practicing alone would be prohibited from doing so by Rules 1.7 or 1.9, unless the prohibition is based on a personal interest of the prohibited lawyer and does not present a significant risk of materially limiting the representation of the client by the remaining lawyers in the firm.

(b) When a lawyer has terminated an association with a firm, the firm is not prohibited from thereafter representing a person with interests materially adverse to those of a client represented by the formerly associated lawyer and not currently represented by the firm, unless:

- (1) the matter is the same or substantially related to that in which the formerly associated lawyer represented the client; and
- (2) any lawyer remaining in the firm has information protected by Rules 1.6 and 1.9(c) that is material to the matter.

(c) A disqualification prescribed by this rule may be waived by the affected client under the conditions stated in Rule 1.7.

(d) The disqualification of lawyers associated in a firm with former or current government lawyers is governed by Rule 1.11.

Commentary

Definition of "Firm"

[1] For purposes of the Rules of Professional Conduct, the term "firm" denotes lawyers in a law partnership, professional corporation, sole proprietorship or other association authorized to practice law; or lawyers employed in a legal services organization or the legal department of a corporation or other organization. See Rule 1.0(c). Whether two or more lawyers constitute a firm within this definition can depend on the specific facts. See Rule 1.0, Comments [2] - [4].

Principles of Imputed Disqualification

[2] The rule of imputed disqualification stated in paragraph (a) gives effect to the principle of loyalty to the client as it applies to lawyers who practice in a law firm. Such situations can be considered from the premise that a firm of lawyers is essentially one lawyer for purposes of the rules governing loyalty to the client, or from the premise that each lawyer is vicariously bound by the obligation of loyalty owed by each lawyer with whom the lawyer is associated. Paragraph (a) operates only among the lawyers currently associated in a firm. When a lawyer moves from one firm to another, the situation is governed by Rules 1.9(b) and 1.10(b).

[3] The rule in paragraph (a) does not prohibit representation where neither questions of client loyalty nor protection of confidential information are presented. Where one lawyer in a firm could not effectively represent a given client because of strong political beliefs, for example, but that lawyer will do no work on the case and the personal beliefs of the lawyer will not materially limit the representation by others in the firm, the firm should not be disqualified. On the other hand, if an opposing party in a case were owned by a lawyer in the law firm, and others in the firm would be materially limited in pursuing the matter because of loyalty to that lawyer, the personal disqualification of the lawyer would be imputed to all others in the firm.

[4] The rule in paragraph (a) also does not prohibit representation by others in the law firm where the person prohibited from involvement in a matter is a nonlawyer, such as a paralegal or legal secretary. Nor does paragraph (a) prohibit representation if the lawyer is prohibited from acting because of events before the person became a lawyer, for example, work that the person did while a law student. Such persons, however, ordinarily must be screened from any personal participation in the matter to avoid communication to others in the firm of confidential information that both the nonlawyers and the firm have a legal duty to protect. See Rules 1.0(k) and 5.3.

[5] Rule 1.10(b) operates to permit a law firm, under certain circumstances, to represent a person with interests directly adverse to those of a client represented by a lawyer who formerly was associated with the firm. The Rule applies regardless of when the formerly associated lawyer represented the client. However, the law firm may not represent a person with interests adverse to those of a present client of the firm, which would violate Rule 1.7. Moreover, the firm may not represent the person where the matter is the same or substantially related to that in which the formerly associated lawyer represented the client and any other lawyer currently in the firm has material information protected by Rules 1.6 and 1.9(c).

[6] Rule 1.10(c) removes imputation with the informed consent of the affected client or former client under the conditions stated in Rule 1.7. The conditions stated in Rule 1.7 require the lawyer to determine that the representation is not prohibited by Rule 1.7(b) and that each affected client or former client has given informed consent to the representation, confirmed in writing. In some cases, the risk may be so severe that the conflict may not be cured by client consent. For a discussion of the effectiveness of client waivers of conflicts that might arise in the future, see Rule 1.7, Comment [22]. For a definition of informed consent, see Rule 1.0(e).

[7] Where a lawyer has joined a private firm after having represented the government, imputation is governed by Rule 1.11(b) and (c), not this Rule. Under Rule 1.11(d), where a lawyer represents the government after having served clients in private practice, nongovernmental employment or in another government agency, former-client conflicts are not imputed to government lawyers associated with the individually disqualified lawyer.

[8] Where a lawyer is prohibited from engaging in certain transactions under Rule 1.8, paragraph (k) of that Rule, and not this Rule, determines whether that prohibition also applies to other lawyers associated in a firm with the personally prohibited lawyer.

RULE 1.11: SPECIAL CONFLICTS OF INTEREST FOR FORMER AND CURRENT GOVERNMENT OFFICERS AND EMPLOYEES

(a) Except as law may otherwise expressly permit, a lawyer who has formerly served as a public officer or employee of the government:

- (1) is subject to Rules 1.9(a) and (b), except that "matter" is defined as in paragraph (e) of this Rule;
- (2) is subject to Rule 1.9(c); and
- (3) shall not otherwise represent a client in connection with a matter in which the lawyer participated personally and substantially as a public officer or employee, unless the appropriate government agency gives its informed consent, confirmed in writing, to the representation.

(b) When a lawyer is disqualified from representation under paragraph (a), no lawyer in a firm with which that lawyer is associated may knowingly undertake or continue representation in such a matter unless:

- (1) the disqualified lawyer is timely screened from any participation in the matter and is apportioned no part of the fee therefrom; and
- (2) written notice is promptly given to the appropriate government agency to enable it to ascertain compliance with the provisions of this rule.

(c) Except as law may otherwise expressly permit, a lawyer having information that the lawyer knows is confidential government information about a person acquired when the lawyer was a public officer or employee, may not represent a private client whose interests are adverse to that person in a matter in which the information could be used to the material disadvantage of that person. As used in this Rule, the term "confidential government information" means information that has been obtained under governmental authority and which, at the time this Rule is applied, the government is prohibited by law from disclosing to the public or has a legal privilege not to disclose and which is not otherwise available to the public. A firm with which that lawyer is associated may undertake or continue representation in the matter only if the disqualified lawyer is timely screened from any participation in the matter and is apportioned no part of the fee therefrom.

(d) Except as law may otherwise expressly permit, a lawyer currently serving as a public officer or employee:

- (1) is subject to Rules 1.7 and 1.9; and
- (2) shall not:
 - (i) participate in a matter in which the lawyer participated personally and substantially while in private practice or nongovernmental employment, unless the appropriate government agency gives its informed consent, confirmed in writing; or
 - (ii) negotiate for private employment with any person who is involved as a party or as lawyer for a party in a matter in which the lawyer is participating personally and substantially, except that a lawyer serving as a law clerk to a judge, other adjudicative officer or arbitrator may negotiate for private employment as permitted by Rule 1.12(b) and subject to the conditions stated in Rule 1.12(b).

(e) As used in this Rule, the term "matter" includes:

- (1) any judicial or other proceeding, application, request for a ruling or other determination, contract, claim, controversy, investigation, charge, accusation, arrest or other particular matter involving a specific party or parties, and
- (2) any other matter covered by the conflict of interest rules of the appropriate government agency.

Commentary

[1] A lawyer who has served or is currently serving as a public officer or employee is personally subject to the Rules of Professional Conduct, including the prohibition against concurrent conflicts of interest stated in Rule 1.7. In addition, such a lawyer may be subject to statutes and government regulations regarding conflict of interest. Such statutes and regulations may circumscribe the extent to which the government agency may give consent under this Rule. See Rule 1.0(e) for the definition of informed consent.

[2] Paragraphs (a)(1), (a)(2) and (d)(1) restate the obligations of an individual lawyer who has served or is currently serving as an officer or employee of the government toward a former government or private client under Rule 1.9. Rule 1.10, however, is not applicable to the conflicts of interest addressed by this Rule. Rather, paragraph (b) sets forth a special imputation rule for former government lawyers that provides for screening and notice. Because of the special problems raised by imputation within a government agency, paragraph (d) does not impute the conflicts of a lawyer currently serving as an officer or employee of the government to other associated government officers or employees, although ordinarily it will be prudent to screen such lawyers.

[3] Paragraphs (a)(3) and (d)(2) impose additional obligations on a lawyer who has served or is currently serving as an officer or employee of the government. They apply in situations where a lawyer is not adverse to a former client and are designed to prevent a lawyer from exploiting public office for the advantage of another client. For example, a lawyer who has pursued a claim on behalf of the government may not pursue the same claim on behalf of a later private client after the lawyer has left government service, except when authorized to do so by the government agency under paragraph (a). Similarly, a lawyer who has pursued a claim on behalf of a private client may not pursue the claim on behalf of the government, except when authorized to do so by paragraph (d). As with paragraphs (a)(1), (a)(2) and (d)(1), Rule 1.10 is not applicable to the conflicts of interest addressed by these paragraphs.

[4] This Rule represents a balancing of interests. On the one hand, where the successive clients are a government agency and another client, public or private, the risk exists that power or discretion vested in that agency might be used for the special benefit of the other client. A lawyer should not be in a position where benefit to the other client might affect performance of the lawyer's professional functions on behalf of the government. Also, unfair advantage could accrue to the other client by reason of access to confidential government information about the client's adversary obtainable only through the lawyer's government service. On the other hand, the rules governing lawyers presently or formerly employed by a government agency should not be so restrictive as to inhibit transfer of employment to and from the government. The government has a legitimate need to attract qualified lawyers as well as to maintain high ethical standards. The provisions for screening and waiver in paragraph (b) are necessary to prevent the disqualification rule from imposing too severe a deterrent against entering public service. The limitation of disqualification in paragraphs (a)(1), (a)(3) and (d)(2) to matters involving a specific party or parties, rather than extending disqualification to all substantive issues on which the lawyer worked, serves a similar function.

[5] When a lawyer has been employed by one government agency and then moves to a second government agency, it may be appropriate to treat that second agency another client for purposes

of this Rule, as when a lawyer is employed by a city and subsequently is employed by a federal agency. However, because the conflict of interest is governed by paragraph (d), the latter agency is not required to screen the lawyer as paragraph (b) requires a law firm to do. The question of whether two government agencies should be regarded as the same or different clients for conflict of interest purposes is beyond the scope of these Rules. See Rule 1.13 Comment [6].

[6] Paragraphs (b) and (c) contemplate a screening arrangement. See Rule 1.0(k) (requirements for screening procedures). These paragraphs do not prohibit a lawyer from receiving a salary or partnership share established by prior independent agreement, but that lawyer may not receive compensation directly relating the lawyer's compensation to the fee in the matter in which the lawyer is disqualified.

[7] Notice, including a description of the screened lawyer's prior representation and of the screening procedures employed, generally should be given as soon as practicable after the need for screening becomes apparent. When disclosure is likely to significantly injure the client, a reasonable delay may be justified.

[8] Paragraph (c) operates only when the lawyer in question has knowledge of the information, which means actual knowledge; it does not operate with respect to information that merely could be imputed to the lawyer.

[9] Paragraphs (a) and (d) do not prohibit a lawyer from jointly representing a private party and a government agency when doing so is permitted by Rule 1.7 and is not otherwise prohibited by law.

RULE 1.12: FORMER JUDGE, ARBITRATOR, MEDIATOR OR OTHER THIRD-PARTY NEUTRAL

(a) Except as stated in paragraph (d), a lawyer shall not represent anyone in connection with a matter in which the lawyer participated personally and substantially as a judge or other adjudicative officer or law clerk to such a person or as an arbitrator, mediator or other third-party neutral, unless all parties to the proceeding give informed consent, confirmed in writing.

(b) A lawyer shall not negotiate for employment with any person who is involved as a party or as lawyer for a party in a matter in which the lawyer is participating personally and substantially as a judge or other adjudicative officer or as an arbitrator, mediator or other third-party neutral. A lawyer serving as a law clerk to a judge or other adjudicative officer may negotiate for employment with a party or lawyer involved in a matter in which the clerk is participating personally and substantially, but only after the lawyer has notified the judge or other adjudicative officer.

(c) If a lawyer is disqualified by paragraph (a), no lawyer in a firm with which that lawyer is associated may knowingly undertake or continue representation in the matter unless:

- (1) the disqualified lawyer is timely screened from any participation in the matter and is apportioned no part of the fee therefrom; and
- (2) written notice is promptly given to the parties and any appropriate tribunal to enable them to ascertain compliance with the provisions of this rule.

(d) An arbitrator selected as a partisan of a party in a multimember arbitration panel is not prohibited from subsequently representing that party.

Commentary

[1] This Rule generally parallels Rule 1.11. The term "personally and substantially" signifies that a judge who was a member of a multimember court, and thereafter left judicial office to practice law, is not prohibited from representing a client in a matter pending in the court, but in which the former judge did not participate. So also the fact that a former judge exercised administrative responsibility in a court does not prevent the former judge from acting as a lawyer in a matter where the judge had previously exercised remote or incidental administrative responsibility that did not affect the merits. Compare the Comment to Rule 1.11. The term "adjudicative officer" includes such officials as judges pro tempore, referees, special masters, hearing officers and other parajudicial officers, and also lawyers who serve as part-time judges. Compliance Canons A(2), B(2) and C of the Model Code of Judicial Conduct provide that a part-time judge, judge pro tempore or retired judge recalled to active service, may not "act as a lawyer in any proceeding in which he served as a judge or in any other proceeding related thereto." Although phrased differently from this Rule, those Rules correspond in meaning.

[2] Like former judges, lawyers who have served as arbitrators, mediators or other third-party neutrals may be asked to represent a client in a matter in which the lawyer participated personally and substantially. This Rule forbids such representation unless all of the parties to the proceedings give their informed consent, confirmed in writing. See Rule 1.0(e) and (b). Other law or codes of ethics governing third-party neutrals may impose more stringent standards of personal or imputed disqualification. See Rule 2.2.

[3] Although lawyers who serve as third-party neutrals do not have information concerning the parties that is protected under Rule 1.6, they typically owe the parties an obligation of confidentiality under law or codes of ethics governing third-party neutrals. Thus, paragraph (c) provides that conflicts of the personally disqualified lawyer will be imputed to other lawyers in a law firm unless the conditions of this paragraph are met.

[4] [Requirements for screening procedures are stated in Rule 1.0(k). Paragraph (c)(1) does not prohibit the screened lawyer from receiving a salary or partnership share established by prior independent agreement, but that lawyer may not receive compensation directly related to the matter in which the lawyer is disqualified.

[5] Notice, including a description of the screened lawyer's prior representation and of the screening procedures employed, generally should be given as soon as practicable after the need for screening becomes apparent. When disclosure is likely to significantly injure the client, a reasonable delay may be justified.

RULE 1.13: ORGANIZATION AS CLIENT

(a) A lawyer employed or retained by an organization represents the organization acting through its duly authorized constituents.

(b) If a lawyer for an organization knows that an officer, employee or other person associated with the organization is engaged in action, intends to act or refuses to act in a matter related to the representation that is a violation of a legal obligation to the organization, or a violation of law that reasonably might be imputed to the organization, and that is likely to result in substantial injury to the organization, then the lawyer shall proceed as is reasonably necessary in the best interest of the organization. Unless the lawyer reasonably believes that it is not necessary in the best interest of the organization to do so, the lawyer shall refer the matter to higher authority in the organization, including, if warranted by the circumstances, to the highest authority that can act on behalf of the organization as determined by applicable law.

(c) Except as provided in paragraph (d), if

(1) despite the lawyer's efforts in accordance with paragraph (b) the highest authority that can act on behalf of the organization insists upon or fails to address in a timely and appropriate manner an action or a refusal to act, that is clearly a violation of law, and

(2) the lawyer reasonably believes that the violation is reasonably certain to result in substantial injury to the organization,

then the lawyer may reveal information relating to the representation whether or not Rule 1.6 permits such disclosure, but only if and to the extent the lawyer reasonably believes necessary to prevent substantial injury to the organization.

(d) Paragraph (c) shall not apply with respect to information relating to a lawyer's representation of an organization to investigate an alleged violation of law, or to defend the organization or an officer, employee or other constituent associated with the organization against a claim arising out of an alleged violation of law.

(e) A lawyer who reasonably believes that he or she has been discharged because of the lawyer's actions taken pursuant to paragraphs (b) or (c), or who withdraws under circumstances that require or permit the lawyer to take action under either of those paragraphs, shall proceed as the lawyer reasonably believes necessary to assure that the organization's highest authority is informed of the lawyer's discharge or withdrawal.

(f) In dealing with an organization's directors, officers, employees, members, shareholders or other constituents, a lawyer shall explain the identity of the client when the lawyer knows or reasonably should know that the organization's interests are adverse to those of the constituents with whom the lawyer is dealing.

(g) A lawyer representing an organization may also represent any of its directors, officers, employees, members, shareholders or other constituents, subject to the provisions of Rule 1.7. If the organization's consent to the dual representation is required by Rule 1.7, the consent shall be given by an appropriate official of the organization other than the individual who is to be represented, or by the shareholders.

Commentary

The Entity as the Client

[1] An organizational client is a legal entity, but it cannot act except through its officers, directors, employees, shareholders and other constituents. Officers, directors, employees and shareholders are the constituents of the corporate organizational client. The duties defined in this Comment apply equally to unincorporated associations. "Other constituents" as used in this Comment means the positions equivalent to officers, directors, employees and shareholders held by persons acting for organizational clients that are not corporations.

[2] When one of the constituents of an organizational client communicates with the organization's lawyer in that person's organizational capacity, the communication is protected by Rule 1.6. Thus, by way of example, if an organizational client requests its lawyer to investigate allegations of wrongdoing, interviews made in the course of that investigation between the lawyer and the client's employees or other constituents are covered by Rule 1.6. This does not mean, however, that constituents of an organizational client are the clients of the lawyer. The lawyer may not disclose to such constituents information relating to the representation except for disclosures explicitly or implicitly authorized by the organizational

client in order to carry out the representation or as otherwise permitted by Rule 1.6.

[3] When constituents of the organization make decisions for it, the decisions ordinarily must be accepted by the lawyer even if their utility or prudence is doubtful. Decisions concerning policy and operations, including ones entailing serious risk, are not as such in the lawyer's province. Paragraph (b) makes clear, however, that when the lawyer knows that the organization is likely to be substantially injured by action of an officer or other constituent that violates a legal obligation to the organization or is in violation of law that might be imputed to the organization, the lawyer must proceed as is reasonably necessary in the best interest of the organization. As defined in Rule 1.0(f), knowledge can be inferred from circumstances, and a lawyer cannot ignore the obvious. The terms "reasonable" and "reasonably" imply a range within which the lawyer's conduct will satisfy the requirements of Rule 1.13. In determining what is reasonable in the best interest of the organization, the circumstances at the time of determination are relevant. Such circumstances may include, among others, the lawyer's area of expertise, the time constraints under which the lawyer is acting, and the lawyer's previous experience and familiarity with the client. For example, the facts suggesting a violation may be part of a large volume of information that the lawyer has insufficient time to comprehend fully. Or the facts known to the lawyer may be sufficient to signal the likely existence of a violation to an expert in a particular field of law but not to a lawyer who works in another specialty. Under such circumstances the lawyer would not have an obligation to proceed under paragraph (b).

[4] In determining how to proceed under paragraph (b), the lawyer should give due consideration to the seriousness of the violation and its consequences, the responsibility in the organization and the apparent motivation of the person involved, the policies of the organization concerning such matters, and any other relevant considerations. Ordinarily, referral to a higher authority would be necessary. In some circumstances, however, it may be appropriate for the lawyer to ask the constituent to reconsider the matter; for example, if the circumstances involve a constituent's innocent misunderstanding of law and subsequent acceptance of the lawyer's advice, the lawyer may reasonably conclude that the best interest of the organization does not require that the matter be referred to higher authority. If a constituent persists in conduct contrary to the lawyer's advice, it will be necessary for the lawyer to take steps to have the matter reviewed by a higher authority in the organization. If the matter is of sufficient seriousness and importance or urgency to the organization, referral to higher authority in the organization may be necessary even if the lawyer has not communicated with the constituent. Any measures taken should, to the extent practicable, minimize the risk of revealing information relating to the representation to persons outside the organization. Even in circumstances where a lawyer is not obligated by Rule 1.13 to proceed, a lawyer may bring to the attention of an organizational client, including its highest authority, matters that the lawyer reasonably believes to be of sufficient importance to warrant doing so in the best interest of the organization.

[5] Paragraph (b) also makes clear that when it is reasonably necessary to enable the organization to address the matter in a timely and appropriate manner, the lawyer must refer the matter to higher authority. Including, if warranted by the circumstances, the highest authority that can act on behalf of the organization under applicable law. The organization's highest authority to whom a matter may be referred ordinarily will be the board of directors or similar governing body. However, applicable law may prescribe that under certain conditions the highest authority reposes elsewhere, for example, in the independent directors of a corporation.

Relation to Other Rules

[6] The authority and responsibility provided in this Rule are concurrent with the authority and responsibility provided in other Rules. In particular, this Rule does not limit or expand the lawyer's responsibility under Rules 1.8, 1.16, 3.3 or 4.1. Paragraph (c) of this Rule supplements Rule 1.6(b) by providing an additional basis upon

which the lawyer may reveal information relating to the representation, but does not modify, restrict, or limit the provisions of Rule 1.6(b)(1) - (6). Under paragraph (c) the lawyer may reveal such information only when the organization's highest authority insists upon or fails to address threatened or ongoing action that is clearly a violation of law, and then only to the extent the lawyer reasonably believes necessary to prevent reasonably certain substantial injury to the organization. It is not necessary that the lawyer's services be used in furtherance of the violation, but it is required that the matter be related to the lawyer's representation of the organization. If the lawyer's services are being used by an organization to further a crime by the organization, Rules 1.6(b)(1) and 1.6(b)(3) may permit the lawyer to disclose confidential information. In such circumstances Rule 1.2(d) may also be applicable, in which event, withdrawal from the representation under Rule 1.16(a)(1) may be required.

[7] Paragraph (d) makes clear that the authority of a lawyer to disclose information relating to a representation in circumstances described in paragraph (c) does not apply with respect to information relating to a lawyer's engagement by an organization to investigate an alleged violation of law or to defend the organization or an officer, employee or other person associated with the organization against a claim arising out of an alleged violation of law. This is necessary in order to enable organizational clients to enjoy the full benefits of legal counsel in conducting an investigation or defending against a claim.

[8] A lawyer who reasonably believes that he or she has been discharged because of the lawyer's actions taken pursuant to paragraph (b) or (c), or who withdraws in circumstances that require or permit the lawyer to take action under either of these paragraphs, must proceed as the lawyer reasonably believes necessary to assure that the organization's highest authority is informed of the lawyer's discharge or withdrawal.

Government Agency

[9] The duty defined in this Rule applies to governmental organizations. Defining precisely the identity of the client and prescribing the resulting obligations of such lawyers may be more difficult in the government context and is a matter beyond the scope of these Rules. See Scope [18]. Although in some circumstances the client may be a specific agency, it may also be a branch of government, such as the executive branch, or the government as a whole. For example, if the action or failure to act involves the head of a bureau, either the department of which the bureau is a part or the relevant branch of government may be the client for purposes of this Rule. Moreover, in a matter involving the conduct of government officials, a government lawyer may have authority under applicable law to question such conduct more extensively than that of a lawyer for a private organization in similar circumstances. Thus, when the client is a governmental organization, a different balance may be appropriate between maintaining confidentiality and assuring that the wrongful act is prevented or rectified, for public business is involved. In addition, duties of lawyers employed by the government or lawyers in military service may be defined by statutes and regulation. This Rule does not limit that authority. See Scope.

Clarifying the Lawyer's Role

[10] There are times when the organization's interest may be or become adverse to those of one or more of its constituents. In such circumstances the lawyer should advise any constituent, whose interest the lawyer finds adverse to that of the organization of the conflict or potential conflict of interest, that the lawyer cannot represent such constituent, and that such person may wish to obtain independent representation. Care must be taken to assure that the individual understands that, when there is such adversity of interest, the lawyer for the organization cannot provide legal representation for that constituent individual, and that discussions between the lawyer for the organization and the individual may not be privileged.

[11] Whether such a warning should be given by the lawyer for the organization to any constituent individual may turn on the facts of each case.

Dual Representation

[12] Paragraph (g) recognizes that a lawyer for an organization may also represent a principal officer or major shareholder.

Derivative Actions

[13] Under generally prevailing law, the shareholders or members of a corporation may bring suit to compel the directors to perform their legal obligations in the supervision of the organization. Members of unincorporated associations have essentially the same right. Such an action may be brought nominally by the organization, but usually is, in fact, a legal controversy over management of the organization.

[14] The question can arise whether counsel for the organization may defend such an action. The proposition that the organization is the lawyer's client does not alone resolve the issue. Most derivative actions are a normal incident of an organization's affairs, to be defended by the organization's lawyer like any other suit. However, if the claim involves serious charges of wrongdoing by those in control of the organization, a conflict may arise between the lawyer's duty to the organization and the lawyer's relationship with the board. In those circumstances, Rule 1.7 governs who should represent the directors and the organization.

RULE 1.14: CLIENT WITH DIMINISHED CAPACITY

- (a) When a client's capacity to make adequately considered decisions in connection with a representation is diminished, whether because of minority, mental impairment or for some other reason, the lawyer shall, as far as reasonably possible, maintain a normal client-lawyer relationship with the client.
- (b) When the lawyer reasonably believes that the client has diminished capacity, is at risk of substantial physical, financial or other harm unless action is taken and cannot adequately act in the client's own interest, the lawyer may take reasonably necessary protective action, including consulting with individuals or entities that have the ability to take action to protect the client and, in appropriate cases, seeking the appointment of a guardian ad litem, conservator or guardian.
- (c) Information relating to the representation of a client with diminished capacity is protected by Rule 1.6. When taking protective action pursuant to paragraph (b), the lawyer is impliedly authorized under Rule 1.6(a) to reveal information about the client, but only to the extent reasonably necessary to protect the client's interests.

Commentary

[1] The normal client-lawyer relationship is based on the assumption that the client, when properly advised and assisted, is capable of making decisions about important matters. When the client is a minor or suffers from a diminished mental capacity, however, maintaining the ordinary client-lawyer relationship may not be possible in all respects. In particular, a severely incapacitated person may have no power to make legally binding decisions. Nevertheless, a client with diminished capacity often has the ability to understand, deliberate upon, and reach conclusions about matters affecting the client's own well-being. For example, children as young as five or six years of age, and certainly those of ten or twelve, are regarded as having opinions that are entitled to weight in legal proceedings concerning their custody. So also, it is recognized that some persons of advanced age can be quite capable of handling routine financial matters while needing special legal protection concerning major transactions.

[2] The fact that a client suffers a disability does not diminish the lawyer's obligation to treat the client with attention and respect. Even if the person has a legal representative, the lawyer should as far as possible accord the represented person the status of client, particularly in maintaining communication.

[3] The client may wish to have family members or other persons participate in discussions with the lawyer. When necessary to assist in the representation, the presence of such persons generally does not affect the applicability of the attorney-client evidentiary privilege. Nevertheless, the lawyer must keep the client's interests foremost and, except for protective action authorized under paragraph (b), must to look to the client, and not family members, to make decisions on the client's behalf.

[4] If a legal representative has already been appointed for the client, the lawyer should ordinarily look to the representative for decisions on behalf of the client. In matters involving a minor, whether the lawyer should look to the parents as natural guardians may depend on the type of proceeding or matter in which the lawyer is representing the minor. If the lawyer represents the guardian as distinct from the ward, and is aware that the guardian is acting adversely to the ward's interest, the lawyer may have an obligation to prevent or rectify the guardian's misconduct. See Rule 1.2(d).

Taking Protective Action

[5] If a lawyer reasonably believes that a client is at risk of substantial physical, financial or other harm unless action is taken, and that a normal client-lawyer relationship cannot be maintained as provided in paragraph (a) because the client lacks sufficient capacity to communicate or to make adequately considered decisions in connection with the representation, then paragraph (b) permits the lawyer to take protective measures deemed necessary. Such measures could include: consulting with family members, using a reconsideration period to permit clarification or improvement of circumstances, using voluntary surrogate decision making tools such as durable powers of attorney or consulting with support groups, professional services, adult-protective agencies or other individuals or entities that have the ability to protect the client. In taking any protective action, the lawyer should be guided by such factors as the wishes and values of the client to the extent known, the client's best interests and the goals of intruding into the client's decision making autonomy to the least extent feasible, maximizing client capacities and respecting the client's family and social connections.

[6] In determining the extent of the client's diminished capacity, the lawyer should consider and balance such factors as: the client's ability to articulate reasoning leading to a decision; variability of state of mind and ability to appreciate consequences of a decision; the substantive fairness of a decision; and the consistency of a decision with the known long-term commitments and values of the client. In appropriate circumstances, the lawyer may seek guidance from an appropriate diagnostician.

[7] If a legal representative has not been appointed, the lawyer should consider whether appointment of a guardian ad litem, conservator or guardian is necessary to protect the client's interests. Thus, if a client with diminished capacity has substantial property that should be sold for the client's benefit, effective completion of the transaction may require appointment of a legal representative. In addition, rules of procedure in litigation sometimes provide that minors or persons with diminished capacity must be represented by a guardian or next friend if they do not have a general guardian. In many circumstances, however, appointment of a legal representative may be more expensive or traumatic for the client than circumstances in fact require. Evaluation of such circumstances is a matter entrusted to the professional judgment of the lawyer. In considering alternatives, however, the lawyer should be aware of any law that requires the lawyer to advocate the least restrictive action on behalf of the client.

Disclosure of the Client's Condition

(8) Disclosure of the client's diminished capacity could adversely affect the client's interests. For example, raising the question of diminished capacity could, in some circumstances, lead to proceedings for involuntary commitment. Information relating to the representation is protected by Rule 1.6. Therefore, unless authorized to do so, the lawyer may not disclose such information. When taking protective action pursuant to paragraph (b), the lawyer is impliedly authorized to make the necessary disclosures, even when the client directs the lawyer to the contrary. Nevertheless, given the risks of disclosure, paragraph (c) limits what the lawyer may disclose in consulting with other individuals or entities or seeking the appointment of a legal representative. At the very least, the lawyer should determine whether it is likely that the person or entity consulted with will act adversely to the client's interests before discussing matters related to the client. The lawyer's position in such cases is an unavoidably difficult one.

Emergency Legal Assistance

(9) In an emergency where the health, safety or a financial interest of a person with seriously diminished capacity is threatened with imminent and irreparable harm, a lawyer may take legal action on behalf of such a person even though the person is unable to establish a client-lawyer relationship or to make or express considered judgments about the matter, when the person or another acting in good faith on that person's behalf has consulted with the lawyer. Even in such an emergency, however, the lawyer should not act unless the lawyer reasonably believes that the person has no other lawyer, agent or other representative available. The lawyer should take legal action on behalf of the person only to the extent reasonably necessary to maintain the status quo or otherwise avoid imminent and irreparable harm. A lawyer who undertakes to represent a person in such an exigent situation has the same duties under these Rules as the lawyer would with respect to a client.

(10) A lawyer who acts on behalf of a person with seriously diminished capacity in an emergency should keep the confidences of the person as if dealing with a client, disclosing them only to the extent necessary to accomplish the intended protective action. The lawyer should disclose to any tribunal involved and to any other counsel involved the nature of his or her relationship with the person. The lawyer should take steps to regularize the relationship or implement other protective solutions as soon as possible. Normally, a lawyer would not seek compensation for such emergency actions taken.

RULE 1.15: SAFEKEEPING PROPERTY

(a) A lawyer shall hold property of clients or third persons that is in a lawyer's possession in connection with a representation separate from the lawyer's own property. Funds shall be kept in a separate account maintained in the state where the lawyer's office is situated, or elsewhere with the consent of the client or third person. Other property shall be identified as such and appropriately safeguarded. Complete records of such account funds and other property shall be kept by the lawyer and shall be preserved for a period of five years after termination of the representation.

(b) A lawyer shall deposit into a client trust account legal fees and expenses that have been paid in advance, to be withdrawn by the lawyer only as fees are earned or expenses incurred.

(c) Upon receiving funds or other property in which a client or third person has an interest, a lawyer shall promptly notify the client or third person. Except as stated in this Rule or otherwise permitted by law or by agreement with the client, a lawyer shall promptly deliver to the client or third person any funds or other property that the client or third person is entitled to receive and, upon request by the client or third person, shall promptly render a full accounting regarding such property.

(d) When in the course of representation a lawyer is in possession of property in which two or more persons (one of whom may be the lawyer) claim interests, the property shall be kept separate by the lawyer until the dispute is resolved. The lawyer shall distribute all portions of the property as to which the interests are not in dispute.

(e) Nothing in these Rules shall prohibit a lawyer or law firm from placing clients' funds which are nominal in amount or to be held for a short period of time in one or more interest-bearing accounts for the benefit of the charitable purposes of a Court-approved Interest on Lawyer Trust Accounts (IOLTA) program.

(f) Unless an election not to do so is submitted in accordance with the procedure set forth in subsection (j) of this Rule, a lawyer or law firm with which the lawyer is associated who receives client funds shall maintain a pooled interest-bearing depository account for disposition of client funds that are nominal in amount or expected to be held for a short period of time. Such an account shall comply with the following provisions:

(1) The account shall include all clients' funds which are nominal in amount or are expected to be held for a short period of time.

(2) No interest from such an account shall be made available to a lawyer or law firm.

(3) The determination of whether clients' funds are nominal in amount or to be held for a short period of time rests in the sound judgment of each lawyer or law firm.

(4) Notification to clients whose funds are nominal in amount or to be held for a short period of time is not required.

**(Section (f) amended 6-5-06)*

(g) An interest-bearing trust account established pursuant to subsection (a) of this Rule shall be established in accordance with I.B.C.R. 302(a)(2).

(h) Lawyers or law firms depositing clients' funds which are nominal in amount or to be held for a short period of time in an interest-bearing depository account under subsection (f) of this Rule shall direct the depository institution:

(1) to remit interest or dividends, net of reasonable service charges or fees, on the average monthly balance in the account, or as otherwise computed in accordance with the institution's standard accounting practice for other depositors, at least quarterly, to the Idaho Law Foundation;

(2) to transmit with each remittance to the Idaho Law Foundation a statement showing the name of the lawyer or law firm for whom the remittance is sent, the rate of interest applied, and the average account balance of the period for which the report is made; and

(3) to transmit to the depositing lawyer or law firm at the same time a report showing the amount paid to the Foundation, the rate of interest applied, and the average account balance of the period for which the report is made.

(i) Interest transmitted to the Idaho Law Foundation shall, after deduction for the necessary and reasonable administrative expenses of the Idaho Law Foundation for operation of the IOLTA program, shall be distributed by that entity in proportions it deems appropriate, for the following purposes:

- (1) to provide legal aid to the poor;
- (2) to provide law related education programs for the public;
- (3) to provide scholarships and student loans;
- (4) to improve the administration of justice; and
- (5) for such other programs for the benefit of the public as are specifically approved from time to time by the Supreme Court of Idaho.

*** (j) A lawyer or law firm that elects to decline to maintain accounts described in subsection (e) of this Rule shall submit a Notice of Declination in writing to the Executive Director of the Idaho State Bar or designee by February 1 of the year to which the Notice of Declination will apply.**

- (1) Notwithstanding the foregoing, any lawyer or law firm may petition the Court at any time and for good cause shown may be granted leave to file a Notice of Declination at a time other than those specified above. An election to decline participation may be revoked at any time by filing a request for enrollment in the program.
- (2) A lawyer or law firm that does not file with the Executive Director of the Idaho State Bar a Notice of Declination in accordance with the provisions of this Rule shall be required to maintain account in accordance with subsection (f) of this Rule.

**(Section (j) amended 6-5-06)*

(k) Each active member of the Idaho State Bar shall certify, each year, upon making application for licensure the following year that he or she has and intends to keep in force, in the state of Idaho, a separate bank account or accounts for the purpose of keeping money in trust for his or her clients, which account conforms to the requirements of this disciplinary rule, or that because of the nature of his or her practice no client funds are received. Certification shall be upon a form to be provided by the Idaho State Bar and shall include the following:

- (1) The name and address of the lawyer or law firm filing the certification;
- (2) The name and address of each financial institution in which the account or accounts are maintained;
- (3) The number of each account maintained pursuant to this rule;
- (4) The dates covered by the certification; and
- (5) The signature, under penalty of perjury, of the lawyer making the certification.

Commentary

[1] A lawyer should hold property of others with the care required of a professional fiduciary. Securities should be kept in a safe deposit box, except when some other form of safekeeping is warranted by special circumstances. All property that is the property of clients or third persons, including prospective clients, must be kept separate from the lawyer's business and personal property and, if monies, in one or more trust accounts. Separate trust accounts may be warranted when administering estate monies or acting in similar fiduciary capacities. A lawyer should maintain on a current basis books and records in accordance with generally accepted accounting practice and comply with any recordkeeping rules established by law or court order. See, e.g., ABA Model Financial Recordkeeping Rule.

[2] While some jurisdictions permit lawyer to keep a minimal balance in the trust account to cover bank service charges, Idaho does not permit this practice.

[3] Lawyers often receive funds from which the lawyer's fee will be paid. The lawyer is not required to remit to the client funds that the lawyer reasonably believes represent fees owed. However, a lawyer may not hold funds to coerce a client into accepting the lawyer's contention. The disputed portion of the funds must be kept in a trust account and the lawyer should suggest means for prompt resolution of the dispute, such as arbitration. The undisputed portion of the funds shall be promptly distributed.

[4] Paragraph (d) also recognizes that third parties may have lawful claims against specific funds or other property in a lawyer's custody, such as a client's creditor who has a lien on funds recovered in a personal injury action. A lawyer may have a duty under applicable law to protect such third-party claims against wrongful interference by the client. In such cases, when the third-party claim is not frivolous under applicable law, the lawyer must refuse to surrender the property to the client until the claims are resolved. A lawyer should not unilaterally assume to arbitrate a dispute between the client and the third party, but, when there are substantial grounds for dispute as to the person entitled to the funds, the lawyer may file an action to have a court resolve the dispute.

[5] The obligations of a lawyer under this Rule are independent of those arising from activity other than rendering legal services. For example, a lawyer who serves only as an escrow agent is governed by the applicable law relating to fiduciaries even though the lawyer does not render legal services in the transaction and is not governed by this Rule.

[6] The Client Assistance Fund (Section VI of the Idaho Bar Commission Rules) refers to the collective efforts of the bar to reimburse persons who have lost money or property as a result of dishonest conduct of a lawyer.

[7] Paragraphs (e) through (j) of this Rule set forth the provisions of Idaho's Interest on Lawyer Trust Accounts (IOLTA) rule.

[8] Paragraph (k) notes the requirement in the Idaho Bar Commission Rules that lawyers certify compliance with trust account practices on the annual license form.

RULE 1.16: DECLINING OR TERMINATING REPRESENTATION

(a) Except as stated in paragraph (c), a lawyer shall not represent a client or, where representation has commenced, shall withdraw from the representation of a client if:

- (1) the representation will result in violation of the rules of professional conduct or other law;
- (2) the lawyer's physical or mental condition materially impairs the lawyer's ability to represent the client; or
- (3) the lawyer is discharged.

(b) Except as stated in paragraph (c), a lawyer may withdraw from representing a client if:

- (1) withdrawal can be accomplished without material adverse effect on the interests of the client;
- (2) the client persists in a course of action involving the lawyer's services that the lawyer reasonably believes is criminal or fraudulent;
- (3) the client has used the lawyer's services to perpetrate a crime or fraud;

- (4) the client insists upon taking action that the lawyer considers repugnant or with which the lawyer has a fundamental disagreement;
 - (5) the client fails substantially to fulfill an obligation to the lawyer regarding the lawyer's services and has been given reasonable warning that the lawyer will withdraw unless the obligation is fulfilled;
 - (6) the representation will result in an unreasonable financial burden on the lawyer or has been rendered unreasonably difficult by the client; or
 - (7) other good cause for withdrawal exists.
- (c) A lawyer must comply with applicable law requiring notice to or permission of a tribunal when terminating a representation. When ordered to do so by a tribunal, a lawyer shall continue representation notwithstanding good cause for terminating the representation.
- (d) Upon termination of representation, a lawyer shall take steps to the extent reasonably practicable to protect a client's interests, such as giving reasonable notice to the client, allowing time for employment of other counsel, surrendering papers and property to which the client is entitled and refunding any advance payment of fee or expense that has not been earned or incurred. The lawyer may retain papers relating to the client to the extent permitted by other law.

Commentary

[1] A lawyer should not accept representation in a matter unless it can be performed competently, promptly, without improper conflict of interest and to completion. Ordinarily, a representation in a matter is completed when the agreed-upon assistance has been concluded. See Rules 1.2(c) and 6.5. See also Rule 1.3, Comment [4].

Mandatory Withdrawal

[2] A lawyer ordinarily must decline or withdraw from representation if the client demands that the lawyer engage in conduct that is illegal or violates the Rules of Professional Conduct or other law. The lawyer is not obliged to decline or withdraw simply because the client suggests such a course of conduct; a client may make such a suggestion in the hope that a lawyer will not be constrained by a professional obligation.

[3] When a lawyer has been appointed to represent a client, withdrawal ordinarily requires approval of the appointing authority. See also Rule 6.2. Similarly, court approval or notice to the court is often required by applicable law before a lawyer withdraws from pending litigation. Difficulty may be encountered if withdrawal is based on the client's demand that the lawyer engage in unprofessional conduct. The court may request an explanation for the withdrawal, while the lawyer may be bound to keep confidential the facts that would constitute such an explanation. The lawyer's statement that professional considerations require termination of the representation ordinarily should be accepted as sufficient. Lawyers should be mindful of their obligations to both clients and the court under Rules 1.6 and 3.3.

Discharge

[4] A client has a right to discharge a lawyer at any time, with or without cause, subject to liability for payment for the lawyer's services. Where future dispute about the withdrawal may be anticipated, it may be advisable to prepare a written statement reciting the circumstances.

[5] Whether a client can discharge appointed counsel may depend on applicable law. A client seeking to do so should be given

a full explanation of the consequences. These consequences may include a decision by the appointing authority that appointment of successor counsel is unjustified, thus requiring self-representation by the client.

[6] If the client has severely diminished capacity, the client may lack the legal capacity to discharge the lawyer, and in any event the discharge may be seriously adverse to the client's interests. The lawyer should make special effort to help the client consider the consequences and may take reasonably necessary protective action as provided in Rule 1.14.

Optional Withdrawal

[7] A lawyer may withdraw from representation in some circumstances. The lawyer has the option to withdraw if it can be accomplished without material adverse effect on the client's interests. Withdrawal is also justified if the client persists in a course of action that the lawyer reasonably believes is criminal or fraudulent, for a lawyer is not required to be associated with such conduct even if the lawyer does not further it. Withdrawal is also permitted if the lawyer's services were misused in the past even if that would materially prejudice the client. The lawyer may also withdraw where the client insists on a taking action that the lawyer considers repugnant or with which the lawyer has a fundamental disagreement.

[8] A lawyer may withdraw if the client refuses to abide by the terms of an agreement relating to the representation, such as an agreement concerning fees or court costs or an agreement limiting the objectives of the representation.

Assisting the Client upon Withdrawal

[9] Even if the lawyer has been unfairly discharged by the client, a lawyer must take all reasonable steps to mitigate the consequences to the client. The lawyer may retain papers as security for a fee only to the extent permitted by law. See Rule 1.15.

RULE 1.17: SALE OF LAW PRACTICE

A lawyer or a law firm may sell or purchase a law practice, including good will, if the following conditions are satisfied:

- (a) The seller ceases to engage in the private practice of law or in the substantive practice area subject of the sale in the geographic area in which the practice has been conducted;
- (b) The practice or part thereof is sold to other lawyers or law firms;
- (c) Actual written notice is given to each of the seller's clients directly affected by the sale regarding:
 - (1) the proposed sale;
 - (2) the fees charged clients shall not be increased by reason of the sale;
 - (3) the client's right to retain other counsel or to take possession of the file; and
 - (4) the fact that the client's consent to the sale will be presumed if the client does not take any action or does not otherwise object within ninety (90) days of receipt of the notice. If a client cannot be given notice, the representation of that client may be transferred to the purchaser only upon entry of an order so authorizing by a court having jurisdiction. The seller may disclose to the court *in camera* information relating to the representation only to the extent necessary to obtain an order authorizing the transfer of a title.

Commentary

[1] The practice of law is a profession, not merely a business. Clients are not commodities that can be purchased and sold at will. Pursuant to this Rule, when a lawyer or an entire firm ceases to practice and other lawyers or firms take over the representation, the selling lawyer or firm may obtain compensation for the reasonable value of the practice as may withdrawing partners of law firms. See Rules 5.4 and 5.6.

Termination of Practice by the Seller

[2] Idaho's rule on the sale of a law practice differs from the ABA Model Rule, in that it does not require that a lawyer sell the entire practice, nor does it require the lawyer to be retiring or otherwise leaving the practice.

Client Confidences, Consent and Notice

[3] Negotiations between seller and prospective purchaser prior to disclosure of information relating to a specific representation of an identifiable client no more violate the confidentiality provisions of Model Rule 1.6 than do preliminary discussions concerning the possible association of another lawyer or mergers between firms, with respect to which client consent is not required. Providing the purchaser access to client-specific information relating to the representation and to the file, however, requires client consent. The Rule provides that before such information can be disclosed by the seller to the purchaser the client must be given actual written notice of the contemplated sale, including the identity of the purchaser, and must be told that the decision to consent or make other arrangements must be made within 90 days. If nothing is heard from the client within that time, consent to the sale is presumed. The foregoing notice only need be provided to affected clients and not to clients whose legal matters will continue to be handled by the lawyer.

[4] A lawyer or law firm ceasing to practice cannot be required to remain in practice because some clients cannot be given actual notice of the proposed purchase. Since these clients cannot themselves consent to the purchase or direct any other disposition of their files, the Rule requires an order from a court having jurisdiction authorizing their transfer or other disposition. The Court can be expected to determine whether reasonable efforts to locate the client have been exhausted, and whether the absent client's legitimate interests will be served by authorizing the transfer of the file so that the purchaser may continue the representation. Preservation of client confidences requires that the petition for a court order be considered in camera. (A procedure by which such an order can be obtained needs to be established in jurisdictions in which it presently does not exist.)

[5] All the elements of client autonomy, including the client's absolute right to discharge a lawyer and transfer the representation to another, survive the sale of the practice.

Fee Arrangements Between Client and Purchaser

[6] The sale may not be financed by increases in fees charged the clients of the practice. Existing agreements between the seller and the client as to fees and the scope of the work must be honored by the purchaser.

Other Applicable Ethical Standards

[7] Lawyers participating in the sale of a law practice are subject to the ethical standards applicable to involving another lawyer in the representation of a client. These include, for example, the seller's obligation to exercise competence in identifying a purchaser qualified to assume the practice and the purchaser's obligation to undertake the representation competently (see Rule 1.1); the obligation to avoid disqualifying conflicts, and to secure the client's informed consent for those conflicts that can be agreed to (see Rule 1.7 regarding conflicts and Rule 1.0(e) for the definition of informed consent); and the obligation to protect information relating to the representation (see Rules 1.6 and 1.9).

[8] If approval of the substitution of the purchasing lawyer for the selling lawyer is required by the rules of any tribunal in which a matter is pending, such approval must be obtained before the matter can be included in the sale (see Rule 1.16).

Applicability of the Rule

[9] This Rule applies to the sale of a law practice by representatives of a deceased, disabled or disappeared lawyer. Thus, the seller may be represented by a non-lawyer representative not subject to these Rules. Since, however, no lawyer may participate in a sale of a law practice which does not conform to the requirements of this Rule, the representatives of the seller as well as the purchasing lawyer can be expected to see to it that they are met.

[10] Admission to or retirement from a law partnership or professional association, retirement plans and similar arrangements, and a sale of tangible assets of a law practice, do not constitute a sale or purchase governed by this Rule.

[11] This Rule does not apply to the transfers of legal representation between lawyers when such transfers are unrelated to the sale of a practice.

RULE 1.16: DUTIES TO PROSPECTIVE CLIENT

(a) A person who discusses with a lawyer the possibility of forming a client-lawyer relationship with respect to a matter is a prospective client.

(b) Even when no client-lawyer relationship ensues, a lawyer who has had discussions with a prospective client shall not use or reveal information learned in the consultation, except as Rule 1.9 would permit with respect to information of a former client.

(c) A lawyer subject to paragraph (b) shall not represent a client with interests materially adverse to those of a prospective client in the same or a substantially related matter if the lawyer received information from the prospective client that could be significantly harmful to that person in the matter, except as provided in paragraph (d). If a lawyer is disqualified from representation under this paragraph, no lawyer in a firm with which that lawyer is associated may knowingly undertake or continue representation in such a matter, except as provided in paragraph (d).

(d) Representation is permissible if both the affected client and the prospective client have given informed consent, confirmed in writing.

Commentary

[1] Prospective clients, like clients, may disclose information to a lawyer, place documents or other property in the lawyer's custody, or rely on the lawyer's advice. A lawyer's discussions with a prospective client usually are limited in time and depth and leave both the prospective client and the lawyer free (and sometimes required) to proceed no further. Hence, prospective clients should receive some but not all of the protection afforded clients.

[2] Not all persons who communicate information to a lawyer are entitled to protection under this Rule. A person who communicates information unilaterally to a lawyer, without any reasonable expectation that the lawyer is willing to discuss the possibility of forming a client-lawyer relationship, is not a "prospective client" within the meaning of paragraph (a).

[3] It is often necessary for a prospective client to reveal information to the lawyer during an initial consultation prior to the decision about formation of a client-lawyer relationship. The lawyer often must learn such information to determine whether there is a conflict of interest with an existing client and whether the matter is one that the lawyer is willing to undertake. Paragraph (b) prohibits

the lawyer from using or revealing that information, except as permitted by Rule 1.9, even if the client or lawyer decides not to proceed with the representation. The duty exists regardless of how brief the initial conference may be.

[4] In order to avoid acquiring disqualifying information from a prospective client, a lawyer considering whether or not to undertake a new matter should limit the initial interview to only such information as reasonably appears necessary for that purpose. Where the information indicates that a conflict of interest or other reason for non-representation exists, the lawyer should so inform the prospective client or decline the representation. If the prospective client wishes to retain the lawyer, and if consent is possible under Rule 1.7, then consent from all affected present or former clients must be obtained before accepting the representation.

[5] A lawyer may condition conversations with a prospective client on the person's informed consent that no information disclosed during the consultation will prohibit the lawyer from representing a different client in the matter. See Rule 1.0(e) for the definition of informed consent. If the agreement expressly so provides, the prospective client may also consent to the lawyer's subsequent use of information received from the prospective client.

[6] Even in the absence of an agreement, under paragraph (c), the lawyer is not prohibited from representing a client with interests adverse to those of the prospective client in the same or a substantially related matter unless the lawyer has received from the prospective client information that could be significantly harmful if used in the matter.

[7] Under paragraph (c), the prohibition in this Rule is imputed to other lawyers as provided in Rule 1.10, but, under paragraph (d), imputation may be avoided if the lawyer obtains the informed consent, confirmed in writing, of both the prospective and affected clients. While some jurisdictions also permit internal screening within a firm to avoid conflicts, commonly called a "Chinese Wall," Idaho does not recognize such screening.

[8] For the duty of competence of a lawyer who gives assistance on the merits of a matter to a prospective client, see Rule 1.1. For a lawyer's duties when a prospective client entrusts valuables or papers to the lawyer's care, see Rule 1.15.

Counselor

RULE 2.1: ADVISOR

In representing a client, a lawyer shall exercise independent professional judgment and render candid advice. In rendering advice, a lawyer may refer not only to law but to other considerations such as moral, economic, social and political factors, that may be relevant to the client's situation.

Commentary

Scope of Advice

[1] A client is entitled to straightforward advice expressing the lawyer's honest assessment. Legal advice often involves unpleasant facts and alternatives that a client may be disinclined to confront. In presenting advice, a lawyer endeavors to sustain the client's morale and may put advice in as acceptable a form as honesty permits. However, a lawyer should not be deterred from giving candid advice by the prospect that the advice will be unpalatable to the client.

[2] Advice couched in narrow legal terms may be of little value to a client, especially where practical considerations, such as cost or effects on other people, are predominant. Purely technical legal advice, therefore, can sometimes be inadequate. It is proper for a lawyer to refer to relevant moral and ethical considerations in giving advice. Although a lawyer is not a moral advisor as such, moral and ethical considerations impinge upon most legal questions and may decisively influence how the law will be applied.

[3] A client may expressly or impliedly ask the lawyer for purely technical advice. When such a request is made by a client experienced in legal matters, the lawyer may accept it at face value. When such a request is made by a client inexperienced in legal matters, however, the lawyer's responsibility as advisor may include indicating that more may be involved than strictly legal considerations.

[4] Matters that go beyond strictly legal questions may also be in the domain of another profession. Family matters can involve problems within the professional competence of psychiatry, clinical psychology or social work; business matters can involve problems within the competence of the accounting profession or of financial specialists. Where consultation with a professional in another field is itself something a competent lawyer would recommend, the lawyer should make such a recommendation. At the same time, a lawyer's advice at its best often consists of recommending a course of action in the face of conflicting recommendations of experts.

Offering Advice

[5] In general, a lawyer is not expected to give advice until asked by the client. However, when a lawyer knows that a client proposes a course of action that is likely to result in substantial adverse legal consequences to the client, the lawyer's duty to the client under Rule 1.4 may require that the lawyer offer advice if the client's course of action is related to the representation. Similarly, when a matter is likely to involve litigation, it may be necessary under Rule 1.4 to inform the client of forms of dispute resolution that might constitute reasonable alternatives to litigation. A lawyer ordinarily has no duty to initiate investigation of a client's affairs or to give advice that the client has indicated is unwanted, but a lawyer may initiate advice to a client when doing so appears to be in the client's interest.

RULE 2.2: LAWYER SERVING AS THIRD-PARTY NEUTRAL

(a) A lawyer serves as a third-party neutral when the lawyer assists two or more persons who are not clients of the lawyer to reach a resolution of a dispute or other matter that has arisen between them. Service as a third-party neutral may include service as an arbitrator, a mediator or in such other capacity as will enable the lawyer to assist the parties to resolve the matter.

(b) A lawyer serving as a third-party neutral shall inform unrepresented parties that the lawyer is not representing them. When the lawyer knows or reasonably should know that a party does not understand the lawyer's role in the matter, the lawyer shall explain the difference between the lawyer's role as a third-party neutral and a lawyer's role as one who represents a client.

Commentary

[1] Alternative dispute resolution has become a substantial part of the civil justice system. Aside from representing clients in dispute-resolution processes, lawyers often serve as third-party neutrals. A third-party neutral is a person, such as a mediator, arbitrator, conciliator or evaluator, who assists the parties, represented or unrepresented, in the resolution of a dispute or in the arrangement of a transaction. Whether a third-party neutral serves primarily as a facilitator, evaluator or decision maker depends on the particular process that is either selected by the parties or mandated by a court.

[2] The role of a third-party neutral is not unique to lawyers, although, in some court-connected contexts, only lawyers are allowed to serve in this role or to handle certain types of cases. In performing this role, the lawyer may be subject to court rules or other law that apply either to third-party neutrals generally or to lawyers serving as third-party neutrals. Lawyer-neutrals may also be subject to various codes of ethics, such as the Code of Ethics for Arbitration in Commercial Disputes prepared by a joint committee of the American Bar Association and the American Arbitration Association or the Model Standards of Conduct for Mediators jointly prepared by

the American Bar Association, the American Arbitration Association and the Society of Professionals in Dispute Resolution.

[3] Unlike nonlawyers who serve as third-party neutrals, lawyers serving in this role may experience unique problems as a result of differences between the role of a third-party neutral and a lawyer's service as a client representative. The potential for confusion is significant when the parties are unrepresented in the process. Thus, paragraph (b) requires a lawyer-neutral to inform unrepresented parties that the lawyer is not representing them. For some parties, particularly parties who frequently use dispute-resolution processes, this information will be sufficient. For others, particularly those who are using the process for the first time, more information will be required. Where appropriate, the lawyer should inform unrepresented parties of the important differences between the lawyer's role as third party neutral and a lawyer's role as a client representative, including the inapplicability of the attorney-client evidentiary privilege. The extent of disclosure required under this paragraph will depend on the particular parties involved and the subject matter of the proceeding, as well as the particular features of the dispute-resolution process selected.

[4] A lawyer who serves as a third-party neutral subsequently may be asked to serve as a lawyer representing a client in the same matter. The conflicts of interest that arise for both the individual lawyer and the lawyer's law firm are addressed in Rule 1.12.

[5] Lawyers who represent clients in alternative dispute-resolution processes are governed by the Rules of Professional Conduct. When the dispute-resolution process takes place before a tribunal, as in binding arbitration (see Rule 1.0(m)), the lawyer's duty of candor is governed by Rule 3.3. Otherwise, the lawyer's duty of candor toward both the third-party neutral and other parties is governed by Rule 4.1.

RULE 2.3: EVALUATION FOR USE BY THIRD PERSONS

- (a) A lawyer may provide an evaluation of a matter affecting a client for the use of someone other than the client if the lawyer reasonably believes that making the evaluation is compatible with other aspects of the lawyer's relationship with the client.
- (b) When the lawyer knows or reasonably should know that the evaluation is likely to affect the client's interests materially and adversely, the lawyer shall not provide the evaluation unless the client gives informed consent.
- (c) Except as disclosure is authorized in connection with a report of an evaluation, information relating to the evaluation is otherwise protected by Rule 1.6.

Commentary

Definition

[1] An evaluation may be performed at the client's direction or when impliedly authorized in order to carry out the representation. See Rule 1.2. Such an evaluation may be for the primary purpose of establishing information for the benefit of third parties; for example, an opinion concerning the title of property rendered at the behest of a vendor for the information of a prospective purchaser, or at the behest of a borrower for the information of a prospective lender. In some situations, the evaluation may be required by a government agency; for example, an opinion concerning the legality of the securities registered for sale under the securities laws. In other instances, the evaluation may be required by a third person, such as a purchaser of a business.

[2] A legal evaluation should be distinguished from an investigation of a person with whom the lawyer does not have a client-lawyer relationship. For example, a lawyer retained by a purchaser to analyze a vendor's title to property does not have a client-lawyer relationship with the vendor. So also, an investigation into a person's affairs by a government lawyer, or by special counsel

by a government lawyer, or by special counsel employed by the government, is not an evaluation as that term is used in this Rule. The question is whether the lawyer is retained by the person whose affairs are being examined. When the lawyer is retained by that person, the general rules concerning loyalty to client and preservation of confidences apply, which is not the case if the lawyer is retained by someone else. For this reason, it is essential to identify the person by whom the lawyer is retained. This should be made clear not only to the person under examination, but also to others to whom the results are to be made available.

Duties Owed to Third Person and Client

[3] When the evaluation is intended for the information or use of a third person, a legal duty to that person may or may not arise. That legal question is beyond the scope of this Rule. However, since such an evaluation involves a departure from the normal client-lawyer relationship, careful analysis of the situation is required. The lawyer must be satisfied as a matter of professional judgment that making the evaluation is compatible with other functions undertaken in behalf of the client. For example, if the lawyer is acting as advocate in defending the client against charges of fraud, it would normally be incompatible with that responsibility for the lawyer to perform an evaluation for others concerning the same or a related transaction. Assuming no such impediment is apparent, however, the lawyer should advise the client of the implications of the evaluation, particularly the lawyer's responsibilities to third persons and the duty to disseminate the findings.

Access to and Disclosure of Information

[4] The quality of an evaluation depends on the freedom and extent of the investigation upon which it is based. Ordinarily a lawyer should have whatever latitude of investigation seems necessary as a matter of professional judgment. Under some circumstances, however, the terms of the evaluation may be limited. For example, certain issues or sources may be categorically excluded, or the scope of search may be limited by time constraints or the noncooperation of persons having relevant information. Any such limitations that are material to the evaluation should be described in the report. If after a lawyer has commenced an evaluation, the client refuses to comply with the terms upon which it was understood the evaluation was to have been made, the lawyer's obligations are determined by law, having reference to the terms of the client's agreement and the surrounding circumstances. In no circumstances is the lawyer permitted to knowingly make a false statement of material fact or law in providing an evaluation under this Rule. See Rule 4.1.

Obtaining Client's Informed Consent

[5] Information relating to an evaluation is protected by Rule 1.6. In many situations, providing an evaluation to a third party poses no significant risk to the client; thus, the lawyer may be impliedly authorized to disclose information to carry out the representation. See Rule 1.6(a). Where, however, it is reasonably likely that providing the evaluation will affect the client's interests materially and adversely, the lawyer must first obtain the client's consent after the client has been adequately informed concerning the important possible effects on the client's interests. See Rules 1.6(a) and 1.0(e).

Financial Auditors' Requests for Information

[6] When a question concerning the legal situation of a client arises at the instance of the client's financial auditor and the question is referred to the lawyer, the lawyer's response may be made in accordance with procedures recognized in the legal profession. Such a procedure is set forth in the American Bar Association Statement of Policy Regarding Lawyers' Responses to Auditors' Requests for Information, adopted in 1975.

Advocate

RULE 3.1: MERITORIOUS CLAIMS AND CONTENTIONS

A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis in law and fact for doing so that is not frivolous, which includes a good faith argument for an extension, modification or reversal of existing law. A lawyer for the defendant in a criminal proceeding, or the respondent in a proceeding that could result in incarceration, may nevertheless so defend the proceeding as to require that every element of the case be established.

Commentary

[1] The advocate has a duty to use legal procedure for the fullest benefit of the client's cause, but also a duty not to abuse legal procedure. The law, both procedural and substantive, establishes the limits within which an advocate may proceed. However, the law is not always clear and never is static. Accordingly, in determining the proper scope of advocacy, account must be taken of the law's ambiguities and potential for change.

[2] The filing of an action or defense or similar action taken for a client is not frivolous merely because the facts have not first been fully substantiated or because the lawyer expects to develop vital evidence only by discovery. What is required of lawyers, however, is that they inform themselves about the facts of their clients' cases and the applicable law and determine that they can make good faith arguments in support of their clients' positions. Such action is not frivolous even though the lawyer believes that the client's position ultimately will not prevail. The action is frivolous, however, if the lawyer is unable either to make a good faith argument on the merits of the action taken or to support the action taken by a good faith argument for an extension, modification or reversal of existing law.

[3] The lawyer's obligations under this Rule are subordinate to federal or state constitutional law that entitles a defendant in a criminal matter to the assistance of counsel in presenting a claim that otherwise would be prohibited by this Rule.

RULE 3.2: EXPEDITING LITIGATION

A lawyer shall make reasonable efforts to expedite litigation consistent with the interests of the client.

Commentary

Dilatory practices bring the administration of justice into disrepute. Although there will be occasions when a lawyer may properly seek a postponement for personal reasons, it is not proper for a lawyer to routinely fail to expedite litigation solely for the convenience of the advocates. Nor will a failure to expedite be reasonable if done for the purpose of frustrating an opposing party's attempt to obtain rightful redress or repose. It is not a justification that similar conduct is often tolerated by the bench and bar. The question is whether a competent lawyer acting in good faith would regard the course of action as having some substantial purpose other than delay. Realizing financial or other benefit from otherwise improper delay in litigation is not a legitimate interest of the client.

RULE 3.3: CANDOR TOWARD THE TRIBUNAL

(a) A lawyer shall not knowingly:

- (1) make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer;
- (2) fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel; or

(3) offer evidence that the lawyer knows to be false. If a lawyer, the lawyer's client, or a witness called by the lawyer, has offered material evidence and the lawyer comes to know of its falsity, the lawyer shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal. A lawyer may refuse to offer evidence, other than the testimony of a defendant in a criminal matter, that the lawyer reasonably believes is false.

(b) A lawyer who represents a client in an adjudicative proceeding and who knows that a person intends to engage, is engaging or has engaged in criminal or fraudulent conduct related to the proceeding shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal.

(c) The duties stated in paragraphs (a) and (b) continue to the conclusion of the proceeding, and apply even if compliance requires disclosure of information otherwise protected by Rule 1.6.

(d) In an ex parte proceeding, a lawyer shall inform the tribunal of all material facts known to the lawyer that will enable the tribunal to make an informed decision, whether or not the facts are adverse.

Commentary

[1] This Rule governs the conduct of a lawyer who is representing a client in the proceedings of a tribunal. See Rule 1.0(m) for the definition of "tribunal." It also applies when the lawyer is representing a client in an ancillary proceeding conducted pursuant to the tribunal's adjudicative authority, such as a deposition. Thus, for example, paragraph (a)(3) requires a lawyer to take reasonable remedial measures if the lawyer comes to know that a client who is testifying in a deposition has offered evidence that is false.

[2] This Rule sets forth the special duties of lawyers as officers of the court to avoid conduct that undermines the integrity of the adjudicative process. A lawyer acting as an advocate in an adjudicative proceeding has an obligation to present the client's case with persuasive force. Performance of that duty while maintaining confidences of the client, however, is qualified by the advocate's duty of candor to the tribunal. Consequently, although a lawyer in an adversary proceeding is not required to present an impartial exposition of the law or to vouch for the evidence submitted in a cause, the lawyer must not allow the tribunal to be misled by false statements of law or fact or evidence that the lawyer knows to be false.

Representations by a Lawyer

[3] An advocate is responsible for pleadings and other documents prepared for litigation, but is usually not required to have personal knowledge of matters asserted therein, for litigation documents ordinarily present assertions by the client, or by someone on the client's behalf, and not assertions by the lawyer. Compare Rule 3.1. However, an assertion purporting to be on the lawyer's own knowledge, as in an affidavit by the lawyer or in a statement in open court, may properly be made only when the lawyer knows the assertion is true or believes it to be true on the basis of a reasonably diligent inquiry. There are circumstances where failure to make a disclosure is the equivalent of an affirmative misrepresentation. The obligation prescribed in Rule 1.2(d) not to counsel a client to commit or assist the client in committing a fraud applies in litigation. Regarding compliance with Rule 1.2(d), see the Comment to that Rule. See also the Comment to Rule 8.4(b).

Legal Argument

[4] Legal argument based on a knowingly false representation of law constitutes dishonesty toward the tribunal. A lawyer is not required to make a disinterested exposition of the law, but must

recognize the existence of pertinent legal authorities. Furthermore, as stated in paragraph (a)(2), an advocate has a duty to disclose directly adverse authority in the controlling jurisdiction that has not been disclosed by the opposing party. The underlying concept is that legal argument is a discussion seeking to determine the legal premises properly applicable to the case.

Offering Evidence

[5] Paragraph (a)(3) requires that the lawyer refuse to offer evidence that the lawyer knows to be false, regardless of the client's wishes. This duty is premised on the lawyer's obligation as an officer of the court to prevent the trier of fact from being misled by false evidence. A lawyer does not violate this Rule if the lawyer offers the evidence for the purpose of establishing its falsity.

[6] If a lawyer knows that the client intends to testify falsely or wants the lawyer to introduce false evidence, the lawyer should seek to persuade the client that the evidence should not be offered. If the persuasion is ineffective and the lawyer continues to represent the client, the lawyer must refuse to offer the false evidence. If only a portion of a witness's testimony will be false, the lawyer may call the witness to testify but may not elicit or otherwise permit the witness to present the testimony that the lawyer knows is false.

[7] The duties stated in paragraphs (a) and (b) apply to all lawyers, including defense counsel in criminal cases. See *State v. Waggoner*, 124 Idaho 716, 864 P.2d 162 (Ct. App. 1993) (where client insisted on testifying falsely, counsel informed court testimony would be given in narrative form without assistance of counsel, implying a basis for believing the testimony would be false; counsel's conduct was appropriate, and met his duty of candor to the tribunal while not participating in the presentation of perjured testimony). See also *Nix v. Whiteside*, 475 U.S. 157, 173-4, 106 S. Ct. 986, 89 L. Ed.2d 123 (1986) (criminal defendant has no right to testify falsely; counsel's duty to disclose client's intention to commit crime involving fraud on tribunal is the same whether the client intends to bribe a witness or commit perjury). See also Comment [9].

[8] The prohibition against offering false evidence only applies if the lawyer knows that the evidence is false. A lawyer's reasonable belief that evidence is false does not preclude its presentation to the trier of fact. A lawyer's knowledge that evidence is false, however, can be inferred from the circumstances. See Rule 1.0(f). Thus, although a lawyer should resolve doubts about the veracity of testimony or other evidence in favor of the client, the lawyer cannot ignore an obvious falsehood.

[9] Although paragraph (a)(3) only prohibits a lawyer from offering evidence the lawyer knows to be false, it permits the lawyer to refuse to offer testimony or other proof that the lawyer reasonably believes is false. Offering such proof may reflect adversely on the lawyer's ability to discriminate in the quality of evidence and thus impair the lawyer's effectiveness as an advocate. Because of the special protections historically provided criminal defendants, however, this Rule does not permit a lawyer to refuse to offer the testimony of such a client where the lawyer reasonably believes but does not know that the testimony will be false. Unless the lawyer knows the testimony will be false, the lawyer must honor the client's decision to testify. See also Comment [7].

Remedial Measures

[10] Having offered material evidence in the belief that it was true, a lawyer may subsequently come to know that the evidence is false. Or, a lawyer may be surprised when the lawyer's client, or another witness called by the lawyer, offers testimony the lawyer knows to be false, either during the lawyer's direct examination or in response to cross-examination by the opposing lawyer. In such situations or if the lawyer knows of the falsity of testimony elicited from the client during a deposition, the lawyer must take reasonable remedial measures. In such situations, the advocate's proper course is to remonstrate with the client confidentially, advise the client of the lawyer's duty of candor to the tribunal and seek the client's cooperation with respect to the withdrawal or correction of the false

statements or evidence. If that fails, the advocate must take further remedial action. If withdrawal from the representation is not permitted or will not undo the effect of the false evidence, the advocate must make such disclosure to the tribunal as is reasonably necessary to remedy the situation, even if doing so requires the lawyer to reveal information that otherwise would be protected by Rule 1.6. It is for the tribunal then to determine what should be done — making a statement about the matter to the trier of fact, ordering a mistrial or perhaps nothing.

[11] The disclosure of a client's false testimony can result in grave consequences to the client, including not only a sense of betrayal but also loss of the case and perhaps a prosecution for perjury. But the alternative is that the lawyer cooperate in deceiving the court, thereby subverting the truth-finding process which the adversary system is designed to implement. See Rule 1.2(d). Furthermore, unless it is clearly understood that the lawyer will act upon the duty to disclose the existence of false evidence, the client can simply reject the lawyer's advice to reveal the false evidence and insist that the lawyer keep silent. Thus the client could in effect coerce the lawyer into being a party to fraud on the court.

Preserving Integrity of Adjudicative Process

[12] Lawyers have a special obligation to protect a tribunal against criminal or fraudulent conduct that undermines the integrity of the adjudicative process, such as bribing, intimidating or otherwise unlawfully communicating with a witness, juror, court official or other participant in the proceeding, unlawfully destroying or concealing documents or other evidence or failing to disclose information to the tribunal when required by law to do so. Thus, paragraph (b) requires a lawyer to take reasonable remedial measures, including disclosure if necessary, whenever the lawyer knows that a person, including the lawyer's client, intends to engage, is engaging or has engaged in criminal or fraudulent conduct related to the proceeding.

Duration of Obligation

[13] A practical time limit on the obligation to rectify false evidence or false statements of law and fact has to be established. The conclusion of the proceeding is a reasonably definite point for the termination of the obligation. A proceeding has concluded within the meaning of this Rule when a final judgment in the proceeding has been affirmed on appeal or the time for review has passed.

Ex Parte Proceedings

[14] Ordinarily, an advocate has the limited responsibility of presenting one side of the matters that a tribunal should consider in reaching a decision; the conflicting position is expected to be presented by the opposing party. However, in any ex parte proceeding, such as an application for a temporary restraining order, there is no balance of presentation by opposing advocates. The object of an ex parte proceeding is nevertheless to yield a substantially just result. The judge has an affirmative responsibility to accord the absent party just consideration. The lawyer for the represented party has the correlative duty to make disclosures of material facts known to the lawyer and that the lawyer reasonably believes are necessary to an informed decision.

Withdrawal

[15] Normally, a lawyer's compliance with the duty of candor imposed by this Rule does not require that the lawyer withdraw from the representation of a client whose interests will be or have been adversely affected by the lawyer's disclosure. The lawyer may, however, be required by Rule 1.16(a) to seek permission of the tribunal to withdraw if the lawyer's compliance with this Rule's duty of candor results in such an extreme deterioration of the client-lawyer relationship that the lawyer can no longer competently represent the client. Also see Rule 1.16(b) for the circumstances in which a lawyer will be permitted to seek a tribunal's permission to withdraw. In connection with a request for permission to withdraw that is premised on a client's misconduct, a lawyer may reveal information relating to the representation only to the extent reasonably necessary to comply

with this Rule or as otherwise permitted by Rule 1.6.

RULE 3.4: FAIRNESS TO OPPOSING PARTY AND COUNSEL

A lawyer shall not:

- (a) unlawfully obstruct another party's access to evidence or unlawfully alter, destroy or conceal a document or other material having potential evidentiary value. A lawyer shall not counsel or assist another person to do any such act;
- (b) falsify evidence, counsel or assist a witness to testify falsely, or offer an inducement to a witness that is prohibited by law;
- (c) knowingly disobey an obligation under the rules of a tribunal, except for an open refusal based on an assertion that no valid obligation exists;
- (d) In pretrial procedure, make a frivolous discovery request or fail to make reasonably diligent effort to comply with a legally proper discovery request by an opposing party;
- (e) In trial, allude to any matter that the lawyer does not reasonably believe to be relevant or that will not be supported by admissible evidence, assert personal knowledge of facts in issue except when testifying as a witness, or state a personal opinion as to the justness of a cause, the credibility of a witness, the culpability of a civil litigant or the guilt or innocence of an accused; or
- (f) request a person other than a client to refrain from voluntarily giving relevant information to another party unless:
 - (1) the person is a relative or an employee or other agent of a client; and
 - (2) the lawyer reasonably believes that the person's interests will not be adversely affected by refraining from giving such information.

Commentary

[1] The procedure of the adversary system contemplates that the evidence in a case is to be marshaled competitively by the contending parties. Fair competition in the adversary system is secured by prohibitions against destruction or concealment of evidence, improperly influencing witnesses, obstructive tactics in discovery procedure, and the like.

[2] Documents and other items of evidence are often essential to establish a claim or defense. Subject to evidentiary privileges, the right of an opposing party, including the government, to obtain evidence through discovery or subpoena is an important procedural right. The exercise of that right can be frustrated if relevant material is altered, concealed or destroyed. Applicable law in many jurisdictions makes it an offense to destroy material for purpose of impairing its availability in a pending proceeding or one whose commencement can be foreseen. Falsifying evidence is also generally a criminal offense. Paragraph (a) applies to evidentiary material generally, including computerized information. Applicable law may permit a lawyer to take temporary possession of physical evidence of client crimes for the purpose of conducting a limited examination that will not alter or destroy material characteristics of the evidence. In such a case, applicable law may require the lawyer to turn the evidence over to the police or other prosecuting authority, depending on the circumstances.

[3] With regard to paragraph (b), it is not improper to pay a witness's expenses or to compensate an expert witness on terms permitted by law. The common law rule in most jurisdictions is that it is improper to pay an occurrence witness any fee for testifying and that it is improper to pay an expert witness a contingent fee.

[4] Paragraph (f) permits a lawyer to advise employees of a client to refrain from giving information to another party, for the employees may identify their interests with those of the client. See also Rule 4.2.

RULE 3.5: IMPARTIALITY AND DECORUM OF THE TRIBUNAL

A lawyer shall not:

- (a) seek to influence a judge, juror, prospective juror or other official by means prohibited by law;
- (b) communicate ex parte with such a person during the proceeding unless authorized to do so by law or court order;
- (c) communicate with a juror or prospective juror after discharge of the jury if:
 - (1) the communication is prohibited by law or court order;
 - (2) the juror has made known to the lawyer a desire not to communicate; or
 - (3) the communication involves misrepresentation, coercion, duress or harassment; or
- (d) engage in conduct intended to disrupt a tribunal.

Commentary

[1] Many forms of improper influence upon a tribunal are proscribed by criminal law. Others are specified in the ABA Model Code of Judicial Conduct, with which an advocate should be familiar. A lawyer is required to avoid contributing to a violation of such provisions.

[2] During a proceeding a lawyer may not communicate ex parte with persons serving in an official capacity in the proceeding, such as judges, masters or jurors, unless authorized to do so by law or court order.

[3] A lawyer may on occasion want to communicate with a juror or prospective juror after the jury has been discharged. The lawyer may do so unless the communication is prohibited by law or a court order but must respect the desire of the juror not to talk with the lawyer. The lawyer may not engage in improper conduct during the communication.

[4] The advocate's function is to present evidence and argument so that the cause may be decided according to law. Refraining from abusive or obstreperous conduct is a corollary of the advocate's right to speak on behalf of litigants. A lawyer may stand firm against abuse by a judge but should avoid reciprocation; the judge's default is no justification for similar dereliction by an advocate. An advocate can present the cause, protect the record for subsequent review and preserve professional integrity by patient firmness no less effectively than by belligerence or theatrics.

[5] The duty to refrain from disruptive conduct applies to any proceeding of a tribunal, including a deposition. See Rule 1.0(m).

RULE 3.6: TRIAL PUBLICITY

- (a) A lawyer who is participating or has participated in the investigation or litigation of a matter shall not make an extrajudicial statement that the lawyer knows or reasonably should know will be disseminated by means of public communication and will have a substantial likelihood of materially prejudicing an adjudicative proceeding in the matter.
- (b) Notwithstanding paragraph (a), a lawyer may state:

- (1) the claim, offense or defense involved and, except when prohibited by law, the identity of the persons involved;
- (2) information contained in a public record;
- (3) that an investigation of a matter is in progress;
- (4) the scheduling or result of any step in litigation;
- (5) a request for assistance in obtaining evidence and information necessary thereto;
- (6) a warning of danger concerning the behavior of a person involved, when there is reason to believe that there exists the likelihood of substantial harm to an individual or to the public interest; and
- (7) in a criminal case, in addition to subparagraphs (1) through (6):
 - (i) the identity, residence, occupation and family status of the accused;
 - (ii) if the accused has not been apprehended, information necessary to aid in apprehension of that person;
 - (iii) the fact, time and place of arrest; and
 - (iv) the identity of investigating and arresting officers or agencies and the length of the investigation.

(c) Notwithstanding paragraph (a), a lawyer may make a statement that a reasonable lawyer would believe is required to protect a client from the substantial undue prejudicial effect of recent publicity not initiated by the lawyer or the lawyer's client. A statement made pursuant to this paragraph shall be limited to such information as is necessary to mitigate the recent adverse publicity.

(d) No lawyer associated in a firm or government agency with a lawyer subject to paragraph (a) shall make a statement prohibited by paragraph (a).

Commentary

[1] It is difficult to strike a balance between protecting the right to a fair trial and safeguarding the right of free expression. Preserving the right to a fair trial necessarily entails some curtailment of the information that may be disseminated about a party prior to trial, particularly where trial by jury is involved. If there were no such limits, the result would be the practical nullification of the protective effect of the rules of forensic decorum and the exclusionary rules of evidence. On the other hand, there are vital social interests served by the free dissemination of information about events having legal consequences and about legal proceedings themselves. The public has a right to know about threats to its safety and measures aimed at assuring its security. It also has a legitimate interest in the conduct of judicial proceedings, particularly in matters of general public concern. Furthermore, the subject matter of legal proceedings is often of direct significance in debate and deliberation over questions of public policy.

[2] Special rules of confidentiality may validly govern proceedings in juvenile, domestic relations and mental disability proceedings, and perhaps other types of litigation. Rule 3.4(c) requires compliance with such rules.

[3] The Rule sets forth a basic general prohibition against a lawyer's making statements that the lawyer knows or should know will have a substantial likelihood of materially prejudicing an adjudicative proceeding. Recognizing that the public value of informed commentary is great and the likelihood of prejudice to a

proceeding by the commentary of a lawyer who is not involved in the proceeding is small, the rule applies only to lawyers who are, or who have been involved in the investigation or litigation of a case, and their associates.

[4] Paragraph (b) identifies specific matters about which a lawyer's statements would not ordinarily be considered to present a substantial likelihood of material prejudice, and should not in any event be considered prohibited by the general prohibition of paragraph (a). Paragraph (b) is not intended to be an exhaustive listing of the subjects upon which a lawyer may make a statement, but statements on other matters may be subject to paragraph (a).

[5] There are, on the other hand, certain subjects that are more likely than not to have a material prejudicial effect on a proceeding, particularly when they refer to a civil matter triable to a jury, a criminal matter, or any other proceeding that could result in incarceration. These subjects relate to:

- (1) The character, credibility, reputation or criminal record of a party, suspect in a criminal investigation or witness, or the identity of a witness, or the expected testimony of a party or witness;
- (2) In a criminal case or proceeding that could result in incarceration, the possibility of a plea of guilty to the offense or the existence or contents of any confession, admission, or statement given by a defendant or suspect or that person's refusal or failure to make a statement;
- (3) The performance or results of any examination or test or the refusal or failure of a person to submit to an examination or test, or the identity or nature of physical evidence expected to be presented;
- (4) Any opinion as to the guilt or innocence of a defendant or suspect in a criminal case or proceeding that could result in incarceration;
- (5) Information that the lawyer knows or reasonably should know is likely to be inadmissible as evidence in a trial and that would, if disclosed, create a substantial risk of prejudicing an impartial trial; or
- (6) The fact that a defendant has been charged with a crime, unless there is included therein a statement explaining that the charge is merely an accusation and that the defendant is presumed innocent until and unless proven guilty.

[6] Another relevant factor in determining prejudice is the nature of the proceeding involved. Criminal jury trials will be most sensitive to extrajudicial speech. Civil trials may be less sensitive. Non-jury hearings and arbitration proceedings may be even less affected. The Rule will still place limitations on prejudicial comments in these cases, but the likelihood of prejudice may be different depending on the type of proceeding.

[7] Finally, extrajudicial statements that might otherwise raise a question under this Rule may be permissible when they are made in response to statements made publicly by another party, another party's lawyer, or third persons, where a reasonable lawyer would believe a public response is required in order to avoid prejudice to the lawyer's client. When prejudicial statements have been publicly made by others, responsive statements may have the salutary effect of lessening any resulting adverse impact on the adjudicative proceeding. Such responsive statements should be limited to contain only such information as is necessary to mitigate undue prejudice created by the statements made by others.

[8] See Rule 3.8(f) for additional duties of prosecutors in connection with extrajudicial statements about criminal proceedings.

RULE 3.7: LAWYER AS WITNESS

- (a) A lawyer shall not act as advocate at a trial in which the lawyer is likely to be a necessary witness unless:
- (1) the testimony relates to an uncontested issue;
 - (2) the testimony relates to the nature and value of legal services rendered in the case; or
 - (3) disqualification of the lawyer would work substantial hardship on the client.
- (b) A lawyer may act as advocate in a trial in which another lawyer in the lawyer's firm is likely to be called as a witness unless precluded from doing so by Rule 1.7 or Rule 1.9.

Commentary

[1] Combining the roles of advocate and witness can prejudice the tribunal and the opposing party and can also involve a conflict of interest between the lawyer and client.

Advocate-Witness Rule

[2] The tribunal has proper objection when the trier of fact may be confused or misled by a lawyer serving as both advocate and witness. The opposing party has proper objection where the combination of roles may prejudice that party's rights in the litigation. A witness is required to testify on the basis of personal knowledge, while an advocate is expected to explain and comment on evidence given by others. It may not be clear whether a statement by an advocate-witness should be taken as proof or as an analysis of the proof.

[3] To protect the tribunal, paragraph (a) prohibits a lawyer from simultaneously serving as advocate and necessary witness except in those circumstances specified in paragraphs (a)(1) through (a)(3). Paragraph (a)(1) recognizes that if the testimony will be uncontested, the ambiguities in the dual role are purely theoretical. Paragraph (a)(2) recognizes that where the testimony concerns the extent and value of legal services rendered in the action in which the testimony is offered, permitting the lawyers to testify avoids the need for a second trial with new counsel to resolve that issue. Moreover, in such a situation the judge has firsthand knowledge of the matter in issue; hence, there is less dependence on the adversary process to test the credibility of the testimony.

[4] Apart from these two exceptions, paragraph (a)(3) recognizes that a balancing is required between the interests of the client and those of the tribunal and the opposing party. Whether the tribunal is likely to be misled or the opposing party is likely to suffer prejudice depends on the nature of the case, the importance and probable tenor of the lawyer's testimony, and the probability that the lawyer's testimony will conflict with that of other witnesses. Even if there is risk of such prejudice, in determining whether the lawyer should be disqualified, due regard must be given to the effect of disqualification on the lawyer's client. It is relevant that one or both parties could reasonably foresee that the lawyer would probably be a witness. The conflict of interest principles stated in Rules 1.7, 1.9 and 1.10 have no application to this aspect of the problem.

[5] Because the tribunal is not likely to be misled when a lawyer acts as advocate in a trial in which another lawyer in the lawyer's firm will testify as a necessary witness, paragraph (b) permits the lawyer to do so except in situations involving a conflict of interest.

Conflict of Interest

[6] In determining if it is permissible to act as advocate in a trial in which the lawyer will be a necessary witness, the lawyer must also consider that the dual role may give rise to a conflict of interest that will require compliance with Rules 1.7 or 1.9. For example, if there is

likely to be substantial conflict between the testimony of the client and that of the lawyer, the representation involves a conflict of interest that requires compliance with Rule 1.7. This would be true even though the lawyer might not be prohibited by paragraph (a) from simultaneously serving as advocate and witness because the lawyer's disqualification would work a substantial hardship on the client. Similarly, a lawyer who might be permitted to simultaneously serve as an advocate and a witness by paragraph (a)(3) might be precluded from doing so by Rule 1.9. The problem can arise whether the lawyer is called as a witness on behalf of the client or is called by the opposing party. Determining whether or not such a conflict exists is primarily the responsibility of the lawyer involved. If there is a conflict of interest, the lawyer must secure the client's informed consent, confirmed in writing. In some cases, the lawyer will be precluded from seeking the client's consent. See Rule 1.7. See Rule 1.0(b) for the definition of "confirmed in writing" and Rule 1.0(e) for the definition of "informed consent."

[7] Paragraph (b) provides that a lawyer is not disqualified from serving as an advocate because a lawyer with whom the lawyer is associated in a firm is precluded from doing so by paragraph (a). If, however, the testifying lawyer would also be disqualified by Rule 1.7 or Rule 1.9 from representing the client in the matter, other lawyers in the firm will be precluded from representing the client by Rule 1.10 unless the client gives informed consent under the conditions stated in Rule 1.7.

RULE 3.8: SPECIAL RESPONSIBILITIES OF A PROSECUTOR

The prosecutor in a criminal case shall:

- (a) refrain from prosecuting a charge that the prosecutor knows is not supported by probable cause;
- (b) make reasonable efforts to assure that the accused has been advised of the right to, and the procedure for obtaining, counsel and has been given reasonable opportunity to obtain counsel;
- (c) not seek to obtain from an unrepresented accused a waiver of important pretrial rights, such as the right to a preliminary hearing;
- (d) make timely disclosure to the defense of all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense, and, in connection with sentencing, disclose to the defense and to the tribunal all unprivileged mitigating information known to the prosecutor, except when the prosecutor is relieved of this responsibility by a protective order of the tribunal;
- (e) not subpoena a lawyer in a grand jury or other criminal proceeding to present evidence about a past or present client unless the prosecutor reasonably believes:
 - (1) the information sought is not protected from disclosure by any applicable privilege;
 - (2) the evidence sought is essential to the successful completion of an ongoing investigation or prosecution; and
 - (3) there is no other feasible alternative to obtain the information;
- (f) except for statements that are necessary to inform the public of the nature and extent of the prosecutor's action and that serve a legitimate law enforcement purpose, refrain from making extrajudicial comments that have a substantial likelihood of heightening public condemnation of the accused and exercise reasonable care to prevent investigators, law enforcement personnel, employees or other persons assisting or associated with the prosecutor in a criminal case from making an extrajudicial statement

that the prosecutor would be prohibited from making under Rule 3.6 or this Rule.

Commentary

[1] A prosecutor has the responsibility of a minister of justice and not simply that of an advocate. This responsibility carries with it specific obligations to see that the defendant is accorded procedural justice and that guilt is decided upon the basis of sufficient evidence. Precisely how far the prosecutor is required to go in this direction is a matter of debate and varies in different jurisdictions. Many jurisdictions have adopted the ABA Standards of Criminal Justice Relating to the Prosecution Function, which in turn are the product of prolonged and careful deliberation by lawyers experienced in both criminal prosecution and defense. Applicable law may require other measures by the prosecutor and knowing disregard of those obligations or a systematic abuse of prosecutorial discretion could constitute a violation of Rule 8.4.

[2] In some jurisdictions, a defendant may waive a preliminary hearing and thereby lose a valuable opportunity to challenge probable cause. Accordingly, prosecutors should not seek to obtain waivers of preliminary hearings or other important pretrial rights from unrepresented accused persons. Paragraph (c) does not apply, however, to an accused appearing *pro se* with the approval of the tribunal. Nor does it forbid the lawful questioning of an uncharged suspect who has knowingly waived the rights to counsel and silence.

[3] The exception in paragraph (d) recognizes that a prosecutor may seek an appropriate protective order from the tribunal if disclosure of information to the defense could result in substantial harm to an individual or to the public interest.

[4] Paragraph (e) is intended to limit the issuance of lawyer subpoenas in grand jury and other criminal proceedings to those situations in which there is a genuine need to intrude into the client-lawyer relationship.

[5] Paragraph (f) supplements Rule 3.6, which prohibits extrajudicial statements that have a substantial likelihood of prejudicing an adjudicatory proceeding. In the context of a criminal prosecution, a prosecutor's extrajudicial statement can create the additional problem of increasing public condemnation of the accused. Although the announcement of an indictment, for example, will necessarily have severe consequences for the accused, a prosecutor can, and should, avoid comments which have no legitimate law enforcement purpose and have a substantial likelihood of increasing public opprobrium of the accused. Nothing in this Comment is intended to restrict the statements which a prosecutor may make which comply with Rule 3.6(b) or 3.6(c).

[6] Like other lawyers, prosecutors are subject to Rules 5.1 and 5.3, which relate to responsibilities regarding lawyers and nonlawyers who work for or are associated with the lawyer's office. Paragraph (f) reminds the prosecutor of the importance of these obligations in connection with the unique dangers of improper extrajudicial statements in a criminal case. In addition, paragraph (f) requires a prosecutor to exercise reasonable care to prevent persons assisting or associated with the prosecutor from making improper extrajudicial statements, even when such persons are not under the direct supervision of the prosecutor. Ordinarily, the reasonable care standard will be satisfied if the prosecutor issues the appropriate cautions to law-enforcement personnel and other relevant individuals.

RULE 3.9: ADVOCATE IN NONADJUDICATIVE PROCEEDINGS

A lawyer representing a client before a legislative body or administrative agency in a nonadjudicative proceeding shall disclose that the appearance is in a representative capacity and shall conform to the provisions of Rules 3.3(a) through (c), 3.4(a) through (c), and 3.5.

Commentary

[1] In representation before bodies such as legislatures, municipal councils, and executive and administrative agencies acting in a rule-making or policy-making capacity, lawyers present facts, formulate issues and advance argument in the matters under consideration. The decision-making body, like a court, should be able to rely on the integrity of the submissions made to it. A lawyer appearing before such a body must deal with it honestly and in conformity with applicable rules of procedure. See Rules 3.3(a) through (c), 3.4(a) through (c) and 3.5.

[2] Lawyers have no exclusive right to appear before nonadjudicative bodies, as they do before a court. The requirements of this Rule therefore may subject lawyers to regulations inapplicable to advocates who are not lawyers. However, legislatures and administrative agencies have a right to expect lawyers to deal with them as they deal with courts.

[3] This Rule only applies when a lawyer represents a client in connection with an official hearing or meeting of a governmental agency or a legislative body to which the lawyer or the lawyer's client is presenting evidence or argument. It does not apply to representation of a client in a negotiation or other bilateral transaction with a governmental agency or in connection with an application for a license or other privilege or the client's compliance with generally applicable reporting requirements, such as the filing of income-tax returns. Nor does it apply to the representation of a client in connection with an investigation or examination of the client's affairs conducted by government investigators or examiners. Representation in such matters is governed by Rules 4.1 through 4.4.

Transactions with Persons Other Than Clients

RULE 4.1: TRUTHFULNESS IN STATEMENTS TO OTHERS

In the course of representing a client a lawyer shall not knowingly:

- (a) make a false statement of material fact or law to a third person; or
- (b) fail to disclose a material fact when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client, unless disclosure is prohibited by Rule 1.6.

Commentary

Misrepresentation

[1] A lawyer is required to be truthful when dealing with others on a client's behalf, but generally has no affirmative duty to inform an opposing party of relevant facts. A misrepresentation can occur if the lawyer incorporates or affirms a statement of another person that the lawyer knows is false. Misrepresentations can also occur by partially true but misleading statements or omissions that are the equivalent of affirmative false statements. For dishonest conduct that does not amount to a false statement or for misrepresentations by a lawyer other than in the course of representing a client, see Rule 8.4.

Statements of Fact

[2] This Rule refers to statements of fact. Whether a particular statement should be regarded as one of fact can depend on the circumstances. Under generally accepted conventions in negotiation, certain types of statements ordinarily are not taken as statements of material fact. Estimates of price or value placed on the subject of a transaction and a party's intentions as to an acceptable settlement of a claim are ordinarily in this category, and so is the existence of an undisclosed principal except where nondisclosure of the principal would constitute fraud. Lawyers should be mindful of their obligations under applicable law to avoid criminal and tortious misrepresentation.

Crime by Client

[3] Under Rule 1.2(d), a lawyer is prohibited from counseling or assisting a client in conduct that the lawyer knows is criminal. Paragraph (b) states a specific application of the principle set forth in Rule 1.2(d) and addresses the situation where a client's crime takes the form of a lie or misrepresentation. Ordinarily, a lawyer can avoid assisting a client's crime by withdrawing from the representation. Sometimes it may be necessary for the lawyer to give notice of the fact of withdrawal and to disaffirm an opinion, document, affirmation or the like. In extreme cases, substantive law may require a lawyer to disclose information relating to the representation to avoid being deemed to have assisted the client's crime. If the lawyer can avoid assisting a client's crime only by disclosing this information, then under paragraph (b) the lawyer is required to do so, unless the disclosure is prohibited by Rule 1.6. Rule 1.6 permits a lawyer to disclose information when necessary to prevent or rectify crimes. See Rule 1.6(b). If disclosure is permitted by Rule 1.6, then such disclosure is required under this Rule, but only to the extent necessary to avoid assisting a client crime.

RULE 4.2: COMMUNICATION WITH PERSON REPRESENTED BY COUNSEL

In representing a client, a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized to do so by law or a court order.

***Commentary**

[1] This Rule contributes to the proper functioning of the legal system by protecting a person who has chosen to be represented by a lawyer in a matter against possible overreaching by other lawyers who are participating in the matter, interference by those lawyers with the client-lawyer relationship and the uncounseled disclosure of information relating to the representation.

[2] This Rule applies to communications with any person who is represented by counsel concerning the matter to which the communication relates.

[3] The Rule applies even though the represented person initiates or consents to the communication. A lawyer must immediately terminate communication with a person if, after commencing communication, the lawyer learns that the person is one with whom communication is not permitted by this Rule.

[4] This Rule does not prohibit communication with a represented person, or an employee or agent of such a person, concerning matters outside the representation. For example, the existence of a controversy between a government agency and a private party, or between two organizations, does not prohibit a lawyer for either from communicating with nonlawyer representatives of the other regarding a separate matter. Nor does this Rule preclude communication with a represented person who is seeking advice from a lawyer who is not otherwise representing a client in the matter. A lawyer may not make a communication prohibited by this Rule through the acts of another. See Rule 6.4(a). Parties to a matter may communicate directly with each other, and a lawyer is not prohibited from advising a client concerning a communication that the client is legally entitled to make. Also, a lawyer having independent justification or legal authorization for communicating with a represented person is permitted to do so.

[5] Communications authorized by law may include communications by a lawyer on behalf of a client who is exercising a constitutional or other legal right to communicate with the government. Communications authorized by law may also include investigative activities of lawyers representing governmental entities, directly or through investigative agents, prior to the commencement of criminal or civil enforcement proceedings. When communicating with the accused in a criminal matter, a government lawyer must comply with this Rule in addition to honoring the constitutional rights

of the accused. The fact that a communication does not violate a state or federal constitutional right is insufficient to establish that the communication is permissible under this Rule.

[6] A lawyer who is uncertain whether a communication with a represented person is permissible may seek a court order. A lawyer may also seek a court order in exceptional circumstances to authorize a communication that would otherwise be prohibited by this Rule, for example, where communication with a person represented by counsel is necessary to avoid reasonably certain injury.

[7] In the case of a represented organization, this Rule prohibits communications with a constituent of the organization who supervises, directs or regularly consults with the organization's lawyer concerning the matter or has authority to obligate the organization with respect to the matter or whose act or omission in connection with the matter may be imputed to the organization for purposes of civil or criminal liability. Consent of the organization's lawyer is not required for communication with a former constituent. If a constituent of the organization is represented in the matter by his or her own counsel, the consent by that counsel to a communication will be sufficient for purposes of this Rule. Compare Rule 3.4(f). In communicating with a current or former constituent of an organization, a lawyer must not use methods of obtaining evidence that violate the legal rights of the organization. See Rule 4.4, Comment [2].

[8] The prohibition on communications with a represented person only applies in circumstances where the lawyer knows that the person is in fact represented in the matter to be discussed. This means that the lawyer has actual knowledge of the fact of the representation; but such actual knowledge may be inferred from the circumstances. See Rule 1.0(f). Thus, the lawyer cannot evade the requirement of obtaining the consent of counsel by closing eyes to the obvious.

[9] In the event the person with whom the lawyer communicates is not known to be represented by counsel in the matter, the lawyer's communications are subject to Rule 4.3.

(Commentary to Rule 4.2 amended 3-17-05)

RULE 4.3: DEALING WITH UNREPRESENTED PERSON

In dealing on behalf of a client with a person who is not represented by counsel, a lawyer shall not state or imply that the lawyer is disinterested. When the lawyer knows or reasonably should know that the unrepresented person misunderstands the lawyer's role in the matter, the lawyer shall make reasonable efforts to correct the misunderstanding. The lawyer shall not give legal advice to an unrepresented person, other than the advice to secure counsel, if the lawyer knows or reasonably should know that the interests of such a person are or have a reasonable possibility of being in conflict with the interests of the client.

Commentary

[1] An unrepresented person, particularly one not experienced in dealing with legal matters, might assume that a lawyer is disinterested in loyalties or is a disinterested authority on the law even when the lawyer represents a client. In order to avoid a misunderstanding, a lawyer will typically need to identify the lawyer's client and, where necessary, explain that the client has interests opposed to those of the unrepresented person. For misunderstandings that sometimes arise when a lawyer for an organization deals with an unrepresented constituent, see Rule 1.13(d).

[2] The Rule distinguishes between situations involving unrepresented persons whose interests may be adverse to those of the lawyer's client and those in which the person's interests are not in conflict with the client's. In the former situation, the possibility that the lawyer will compromise the unrepresented person's interests is so great that the Rule prohibits the giving of any advice, apart from

the advice to obtain counsel. Whether a lawyer is giving impermissible advice may depend on the experience and sophistication of the unrepresented person, as well as the setting in which the behavior and comments occur. This Rule does not prohibit a lawyer from negotiating the terms of a transaction or settling a dispute with an unrepresented person. So long as the lawyer has explained that the lawyer represents an adverse party and is not representing the person, the lawyer may inform the person of the terms on which the lawyer's client will enter into an agreement or settle a matter, prepare documents that require the person's signature and explain the lawyer's own view of the meaning of the document or the lawyer's view of the underlying legal obligations. Similarly, a prosecuting attorney may negotiate with a *pro se* defendant in an effort to resolve a criminal charge by plea agreement. So long as the prosecutor has explained that the prosecutor is adverse to the defendant and is not representing the defendant's interest, the prosecutor may inform the defendant of the prosecutor's view of the merits of the prosecution and defense, and of the possible outcomes if an agreement is not reached.

RULE 4.4: RESPECT FOR RIGHTS OF THIRD PERSONS

- (a) In representing a client, a lawyer shall not:
- (1) use means that have no substantial purpose other than to embarrass, delay, or burden a third person, including conduct intended to appeal to or engender bias against a person on account of that person's gender, race, religion, national origin, or sexual preference, whether that bias is directed to other counsel, court personnel, witnesses, parties, jurors, judges, judicial officers, or any other participants
 - (2) use methods of obtaining evidence that violate the legal rights of such a person;
 - (3) present or participate in presenting criminal charges solely to obtain advantage in a civil matter; or
 - (4) threaten to present criminal charges in order to obtain advantage in a civil matter
- (b) A lawyer who receives a document and knows or reasonably should know that the document was inadvertently sent shall promptly notify the sender.

Commentary

[1] Responsibility to a client requires a lawyer to subordinate the interests of others to those of the client, but that responsibility does not imply that a lawyer may disregard the rights of third persons. It is impractical to catalogue all such rights, but they include legal restrictions on methods of obtaining evidence from third persons and unwarranted intrusions into privileged relationships, such as the client-lawyer relationship.

[2] Paragraph (a) contains an anti-bias provision, requiring lawyers to refrain from pejorative conduct that serves no purpose other than to exploit differences based on the listed categories. Nothing in the rule is intended to limit a lawyer's full advocacy on behalf of a client.

[3] Paragraph (a) also maintains Idaho's more traditional view, abandoned in most jurisdictions, prohibiting the threat of or presentation of criminal charges solely to gain advantage in a civil matter.

[4] Paragraph (b) recognizes that lawyers sometimes receive documents that were mistakenly sent or produced by opposing parties or their lawyers. If a lawyer knows or reasonably should know that a document was sent inadvertently, then this Rule requires the lawyer to promptly notify the sender in order to permit that person to take protective measures. Whether the lawyer is required to take

additional steps, such as returning the original document, is a matter of law beyond the scope of these Rules, as is the question of whether the privileged status of a document has been waived. Similarly, this Rule does not address the legal duties of a lawyer who receives a document that the lawyer knows or reasonably should know may have been wrongfully obtained by the sending person. For purposes of this Rule, "document" includes e-mail or other electronic modes of transmission subject to being read or put into readable form.

[5] Some lawyers may choose to return a document unread, for example, when the lawyer learns before receiving the document that it was inadvertently sent to the wrong address. Where a lawyer is not required by applicable law to do so, the decision to voluntarily return such a document is a matter of professional judgment ordinarily reserved to the lawyer. See Rules 1.2 and 1.4.

Law Firms and Associations

RULE 5.1: RESPONSIBILITIES OF PARTNERS, MANAGERS, AND SUPERVISORY LAWYERS

- (a) A partner in a law firm, and a lawyer who individually or together with other lawyers possesses comparable managerial authority in a law firm, shall make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that all lawyers in the firm conform to the Rules of Professional Conduct.
- (b) A lawyer having direct supervisory authority over another lawyer shall make reasonable efforts to ensure that the other lawyer conforms to the Rules of Professional Conduct.
- (c) A lawyer shall be responsible for another lawyer's violation of the Rules of Professional Conduct if:
 - (1) the lawyer orders or, with knowledge of the specific conduct, ratifies the conduct involved; or
 - (2) the lawyer is a partner or has comparable managerial authority in the law firm in which the other lawyer practices, or has direct supervisory authority over the other lawyer, and knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action.

Commentary

[1] Paragraph (a) applies to lawyers who have managerial authority over the professional work of a firm. See Rule 1.0(c). This includes members of a partnership, the shareholders in a law firm organized as a professional corporation, and members of other associations authorized to practice law; lawyers having comparable managerial authority in a legal services organization or a law department of an enterprise or government agency; and lawyers who have intermediate managerial responsibilities in a firm. Paragraph (b) applies to lawyers who have supervisory authority over the work of other lawyers in a firm.

[2] Paragraph (a) requires lawyers with managerial authority within a firm to make reasonable efforts to establish internal policies and procedures designed to provide reasonable assurance that all lawyers in the firm will conform to the Rules of Professional Conduct. Such policies and procedures include those designed to detect and resolve conflicts of interest, identify dates by which actions must be taken in pending matters, account for client funds and property and ensure that inexperienced lawyers are properly supervised.

[3] Other measures that may be required to fulfill the responsibility prescribed in paragraph (a) can depend on the firm's structure and the nature of its practice. In a small firm of experienced lawyers, informal supervision and periodic review of

compliance with the required systems ordinarily will suffice. In a large firm, or in practice situations in which difficult ethical problems frequently arise, more elaborate measures may be necessary. Some firms, for example, have a procedure whereby junior lawyers can make confidential referral of ethical problems directly to a designated senior partner or special committee. See Rule 5.2. Firms, whether large or small, may also rely on continuing legal education in professional ethics. In any event, the ethical atmosphere of a firm can influence the conduct of all its members and the partners may not assume that all lawyers associated with the firm will inevitably conform to the Rules.

[4] Paragraph (c) expresses a general principle of personal responsibility for acts of another. See also Rule 8.4(a).

[5] Paragraph (c)(2) defines the duty of a partner or other lawyer having comparable managerial authority in a law firm, as well as a lawyer who has direct supervisory authority over performance of specific legal work by another lawyer. Whether a lawyer has supervisory authority in particular circumstances is a question of fact. Partners and lawyers with comparable authority have at least indirect responsibility for all work being done by the firm, while a partner or manager in charge of a particular matter ordinarily also has supervisory responsibility for the work of other firm lawyers engaged in the matter. Appropriate remedial action by a partner or managing lawyer would depend on the immediacy of that lawyer's involvement and the seriousness of the misconduct. A supervisor is required to intervene to prevent avoidable consequences of misconduct if the supervisor knows that the misconduct occurred. Thus, if a supervising lawyer knows that a subordinate misrepresented a matter to an opposing party in negotiation, the supervisor as well as the subordinate has a duty to correct the resulting misapprehension.

[6] Professional misconduct by a lawyer under supervision could reveal a violation of paragraph (b) on the part of the supervisory lawyer even though it does not entail a violation of paragraph (c) because there was no direction, ratification or knowledge of the violation.

[7] Apart from this Rule and Rule 8.4(a), a lawyer does not have disciplinary liability for the conduct of a partner, associate or subordinate. Whether a lawyer may be liable civilly or criminally for another lawyer's conduct is a question of law beyond the scope of these Rules.

[8] The duties imposed by this Rule on managing and supervising lawyers do not alter the personal duty of each lawyer in a firm to abide by the Rules of Professional Conduct. See Rule 5.2(a).

RULE 6.2: RESPONSIBILITIES OF A SUBORDINATE LAWYER

a) A lawyer is bound by the Rules of Professional Conduct notwithstanding that the lawyer acted at the direction of another person.

b) A subordinate lawyer does not violate the Rules of Professional Conduct if that lawyer acts in accordance with a supervisory lawyer's reasonable resolution of an arguable question of professional duty.

Commentary

[1] Although a lawyer is not relieved of responsibility for a violation by the fact that the lawyer acted at the direction of a supervisor, that fact may be relevant in determining whether a lawyer had the knowledge required to render conduct a violation of the Rules. For example, if a subordinate filed a frivolous pleading at the direction of a supervisor, the subordinate would not be guilty of a professional violation unless the subordinate knew of the document's frivolous character.

[2] When lawyers in a supervisor-subordinate relationship encounter a matter involving professional judgment as to ethical duty, the supervisor may assume responsibility for making the judgment. Otherwise a consistent course of action or position could

not be taken. If the question can reasonably be answered only one way, the duty of both lawyers is clear and they are equally responsible for fulfilling it. However, if the question is reasonably arguable, someone has to decide upon the course of action. That authority ordinarily reposes in the supervisor, and a subordinate may be guided accordingly. For example, if a question arises whether the interests of two clients conflict under Rule 1.7, the supervisor's reasonable resolution of the question should protect the subordinate professionally if the resolution is subsequently challenged.

RULE 6.3: RESPONSIBILITIES REGARDING NONLAWYER ASSISTANTS

With respect to a nonlawyer employed or retained by or associated with a lawyer:

(a) a partner, and a lawyer who individually or together with other lawyers possesses comparable managerial authority in a law firm shall make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that the person's conduct is compatible with the professional obligations of the lawyer;

(b) a lawyer having direct supervisory authority over the nonlawyer shall make reasonable efforts to ensure that the person's conduct is compatible with the professional obligations of the lawyer; and

(c) a lawyer shall be responsible for conduct of such a person that would be a violation of the Rules of Professional Conduct if engaged in by a lawyer if:

(1) the lawyer orders or, with the knowledge of the specific conduct, ratifies the conduct involved; or

(2) the lawyer is a partner or has comparable managerial authority in the law firm in which the person is employed, or has direct supervisory authority over the person, and knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action.

Commentary

[1] Lawyers generally employ assistants in their practice, including secretaries, investigators, law student interns, and paraprofessionals. Such assistants, whether employees or independent contractors, act for the lawyer in rendition of the lawyer's professional services. A lawyer must give such assistants appropriate instruction and supervision concerning the ethical aspects of their employment, particularly regarding the obligation not to disclose information relating to representation of the client, and should be responsible for their work product. The measures employed in supervising nonlawyers should take account of the fact that they do not have legal training and are not subject to professional discipline.

[2] Paragraph (a) requires lawyers with managerial authority within a law firm to make reasonable efforts to establish internal policies and procedures designed to provide reasonable assurance that nonlawyers in the firm will act in a way compatible with the Rules of Professional Conduct. See Comment [1] to Rule 5.1. Paragraph (b) applies to lawyers who have supervisory authority over the work of a nonlawyer. Paragraph (c) specifies the circumstances in which a lawyer is responsible for conduct of a nonlawyer that would be a violation of the Rules of Professional Conduct if engaged in by a lawyer.

RULE 6.4: PROFESSIONAL INDEPENDENCE OF A LAWYER

(a) A lawyer or law firm shall not share legal fees with a nonlawyer, except that:

- (1) an agreement by a lawyer with the lawyer's firm, partner, or associate may provide for the payment of money, over a reasonable period of time after the lawyer's death, to the lawyer's estate or to one or more specified persons;
- (2) a lawyer who purchases the practice of a deceased, disabled, or disappeared lawyer may, pursuant to the provisions of Rule 1.17, pay to the estate or other representative of that lawyer the agreed-upon purchase price;
- (3) a lawyer or law firm may include nonlawyer employees in a compensation or retirement plan, even though the plan is based in whole or in part on a profit-sharing arrangement; and
- (4) a lawyer may share court-awarded legal fees with a nonprofit organization that employed, retained or recommended employment of the lawyer in the matter.
- (b) A lawyer shall not form a partnership with a nonlawyer if any of the activities of the partnership consist of the practice of law.
- (c) A lawyer shall not permit a person who recommends, employs, or pays the lawyer to render legal services for another to direct or regulate the lawyer's professional judgment in rendering such legal services.
- (d) A lawyer shall not practice with or in the form of a professional corporation or association authorized to practice law for a profit, if:
- (1) a nonlawyer owns any interest therein, except that a fiduciary representative of the estate of a lawyer may hold the stock or interest of the lawyer for a reasonable time during administration;
- (2) a nonlawyer is a corporate director or officer thereof or occupies the position of similar responsibility in any form of association other than a corporation, except as provided by *Idaho Code* § 30-1513(d); or
- (3) a nonlawyer has the right to direct or control the professional judgment of a lawyer.
- (b) A lawyer admitted to practice in another jurisdiction, but not in this jurisdiction, does not engage in the unauthorized practice of law in this jurisdiction when:
- (1) the lawyer is authorized by law or order, including *pro hac vice* admission pursuant to *Idaho Bar Commission Rule 222*, to appear before a tribunal or administrative agency in this jurisdiction or is preparing for a potential proceeding or hearing in which the lawyer reasonably expects to be so authorized; or
- (2) other than engaging in conduct governed by paragraph (1):
- (i) a lawyer who is an employee of a client acts on the client's behalf or, in connection with the client's matters, on behalf of the client's commonly owned organizational affiliates;
- (ii) the lawyer acts with respect to a matter that arises out of or is otherwise reasonably related to the lawyer's representation of a client in a jurisdiction in which the lawyer is admitted to practice; or
- (iii) the lawyer is associated in the matter with a lawyer admitted to practice in this jurisdiction who actively participates in the representation.
- (c) A lawyer shall not assist another person in the unauthorized practice of law.

Commentary

Commentary

[1] The provisions of this Rule express traditional limitations on sharing fees. These limitations are to protect the lawyer's professional independence of judgment. Where someone other than the client pays the lawyer's fee or salary, or recommends employment of the lawyer, that arrangement does not modify the lawyer's obligation to the client. As stated in paragraph (c), such arrangements should not interfere with the lawyer's professional judgment.

[2] This Rule also expresses traditional limitations on permitting a third party to direct or regulate the lawyer's professional judgment in rendering legal services to another. See also Rule 1.8(f) (lawyer may accept compensation from a third party as long as there is no interference with the lawyer's independent professional judgment and the client gives informed consent).

RULE 6.5: UNAUTHORIZED PRACTICE OF LAW

- (a) A lawyer shall not practice law in a jurisdiction where doing so violates the regulation of the legal profession in that jurisdiction.

[1] A lawyer may regularly practice law only in a jurisdiction in which the lawyer is admitted to practice. The practice of law in violation of lawyer-licensing standards of another jurisdiction constitutes a violation of these Rules. This Rule does not restrict the ability of lawyers authorized by federal statute or other federal law to represent the interests of the United States or other persons in any jurisdiction.

[2] There are occasions in which lawyers admitted to practice in another jurisdiction, but not in this jurisdiction, will engage in conduct in this jurisdiction under circumstances that do not create significant risk to the interests of their clients, the courts or the public. Paragraph (b) identifies four situations in which the lawyer may engage in such conduct without fear of violating this Rule. This Rule does not address the question of whether other conduct constitutes the unauthorized practice of law. The fact that conduct is not included or described in this Rule is not intended to imply that such conduct is the unauthorized practice of law. With the exception of paragraph (b)(2)(i), nothing in this Rule is intended to authorize a lawyer to establish an office or other permanent presence in this jurisdiction without being admitted to practice here.

[3] Lawyers not admitted to practice generally in the jurisdiction may be authorized by law or order of a tribunal or an administrative agency to appear before a the tribunal or agency. Such authority may be granted pursuant to formal rules governing admission *pro hac vice* or pursuant to informal practice of the tribunal or agency. Under paragraph (b)(1), a lawyer does not violate this Rule when the lawyer appears before such a tribunal or agency. Nor does a lawyer violate this Rule when the lawyer engages in conduct in anticipation of a proceeding or hearing, such as factual investigations and discovery conducted in connection with a litigation or administrative proceeding, in which an out-of-state lawyer has been admitted or in which the lawyer reasonably expects to be admitted. Nothing in paragraph (b)(1) is intended to authorize a lawyer not licensed in this jurisdiction to solicit clients in this jurisdiction.

[4] When lawyers appear or anticipate appearing before a tribunal or administrative agency with authority to admit the lawyer to practice pro hac vice, their conduct is governed by paragraphs (a) and (b)(1) and not by (b)(2). Paragraph (b)(2) authorizes a lawyer to engage in certain conduct other than making or preparing for appearances before such a tribunal. For example, paragraph (b)(2)(i) recognizes that some clients hire a lawyer as an employee in circumstances that may make it impractical for the lawyer to become admitted to practice in this jurisdiction. Given that these clients are unlikely to be deceived about the training and expertise of these lawyers, lawyers may act on behalf of such a client without violating this Rule. The lawyer may also act on behalf of the client's commonly owned organizational affiliates but only in connection with the client's matters. Lawyers authorized to practice under this paragraph may be subject to registration or other requirements, including assessments for client protection funds and mandatory continuing legal education.

[5] Paragraph (b)(2)(ii) recognizes that the complexity of many matters requires that a lawyer whose representation of a client consists primarily of conduct in a jurisdiction in which the lawyer is admitted to practice, also be permitted to act on the client's behalf in other jurisdictions in matters arising out of or otherwise reasonably related to the lawyer's representation of the client. This conduct may involve negotiations with private parties, as well as negotiations with government officers or employees, and participation in alternative dispute-resolution procedures. This provision also applies when a lawyer is conducting witness interviews or other activities in this jurisdiction in preparation for a litigation or other proceeding that will occur in another jurisdiction where the lawyer is either admitted generally or expects to be admitted pro hac vice.

[6] Paragraph (b)(2)(iii) recognizes that association with a lawyer licensed to practice in this jurisdiction is likely to protect the interests of both clients and the public. The lawyer admitted to practice in this jurisdiction, however, may not serve merely as a conduit for an out-of-state lawyer but must actively participate in and share actual responsibility for the representation of the client. If the admitted lawyer's involvement is merely pro forma, then both lawyers are subject to discipline under this Rule.

[7] The definition of the practice of law is established by law and varies from one jurisdiction to another. Whatever the definition, limiting the practice of law to members of the bar protects the public against rendition of legal services by unqualified persons. Paragraph (c) does not prohibit a lawyer from employing the services of paraprofessionals and delegating functions to them, so long as the lawyer supervises the delegated work and retains responsibility for their work. See Rule 5.3.

[8] Lawyers may also provide professional advice and instruction to nonlawyers whose employment requires knowledge of law, for example, claims adjusters, employees of financial or commercial institutions, social workers, accountants and persons employed in government agencies. Lawyers may assist independent nonlawyers authorized by the law of a jurisdiction to provide particular legal services, for example, paraprofessionals authorized to provide some kinds of legal services. In addition, a lawyer may counsel nonlawyers who wish to proceed pro se.

[9] Nothing in this rule is intended to conflict with Idaho Bar Commission Rule 222, which provides for pro hac vice admission of lawyers from other jurisdictions.

RULE 5.6: RESTRICTIONS ON RIGHT TO PRACTICE

A lawyer shall not participate in offering or making:

(a) an agreement that restricts the rights of a lawyer to practice law after termination of a practice relationship, except agreements concerning benefits upon retirement; and except in situations involving sale of a law practice, or part thereof, as described in Rule 1.17, or

(b) an agreement in which a restriction on the lawyer's right to practice is part of the settlement of a controversy between private parties.

Commentary

[1] An agreement restricting the right of lawyers to practice after leaving a firm not only limits their professional autonomy but also limits the freedom of clients to choose a lawyer. Paragraph (a) prohibits such agreements except for restrictions incident to provisions concerning retirement benefits for service with the firm.

[2] Paragraph (b) prohibits a lawyer from agreeing not to represent other persons in connection with settling a claim on behalf of a client.

[3] This Rule does not apply to prohibit restrictions that may be included in the terms of the sale of a law practice pursuant to Rule 1.17.

RULE 5.7: RESPONSIBILITIES REGARDING LAW-RELATED SERVICES

(a) A lawyer shall be subject to the Rules of Professional Conduct with respect to the provision of law-related services, as defined in paragraph (b), if the law-related services are provided:

(1) by the lawyer in circumstances that are not distinct from the lawyer's provision of legal services to clients; or

(2) by a separate entity controlled by the lawyer individually or with others if the lawyer fails to take reasonable measures to assure that a person obtaining the law-related services knows that the services of the separate entity are not legal services and that the protections of the client-lawyer relationship do not exist.

(b) The term "law-related services" denotes services that might reasonably be performed in conjunction with and in substance are related to the provision of legal services, and that are not prohibited as unauthorized practice of law when provided by a nonlawyer.

Commentary

[1] When a lawyer performs law-related services or controls an organization that does so, there exists the potential for ethical problems. Principal among these is the possibility that the person for whom the law-related services are performed fails to understand that the services may not carry with them the protections normally afforded as part of the client-lawyer relationship. The recipient of the law-related services may expect, for example, that the protection of client confidences, prohibitions against representation of persons with conflicting interests, and obligations of a lawyer to maintain professional independence apply to the provision of law-related services when that may not be the case.

[2] Rule 5.7 applies to the provision of law-related services by a lawyer even when the lawyer does not provide any legal services to the person for whom the law-related services are performed. The Rule identifies the circumstances in which all of the Rules of Professional Conduct apply to the provision of law-related services. Even when those circumstances do not exist, however, the conduct of a lawyer involved in the provision of law-related services is subject to those Rules that apply generally to lawyer conduct, regardless of whether the conduct involves the provision of legal services. See, e.g., Rule 8.4.

[3] When law-related services are provided by a lawyer under circumstances that are not distinct from the lawyer's provision of legal services to clients, the lawyer in providing the law-related services must adhere to the requirements of the Rules of Professional Conduct as provided in Rule 5.7(a)(1).

[4] Law-related services also may be provided through an entity that is distinct from that through which the lawyer provides legal services. If the lawyer individually or with others has control of such an entity's operations, the Rule requires the lawyer to take reasonable measures to assure that each person using the services of the entity knows that the services provided by the entity are not legal services and that the Rules of Professional Conduct that relate to the client-lawyer relationship do not apply. A lawyer's control of an entity extends to the ability to direct its operation. Whether a lawyer has such control will depend upon the circumstances of the particular case.

[5] When a client-lawyer relationship exists with a person who is referred by a lawyer to a separate law-related service entity controlled by the lawyer, individually or with others, the lawyer must comply with Rule 1.8(a).

[6] In taking the reasonable measures referred to in paragraph (a)(2) to assure that a person using law-related services understands the practical effect or significance of the inapplicability of the Rules of Professional Conduct, the lawyer should communicate to the person receiving the law-related services, in a manner sufficient to assure that the person understands the significance of the fact, that the relationship of the person to the business entity will not be a client-lawyer relationship. The communication should be made before entering into an agreement for provision of or providing law-related services, and preferably should be in writing.

[7] The burden is upon the lawyer to show that the lawyer has taken reasonable measures under the circumstances to communicate the desired understanding. For instance, a sophisticated user of law-related services, such as a publicly held corporation, may require a lesser explanation than someone unaccustomed to making distinctions between legal services and law-related services, such as an individual seeking tax advice from a lawyer-accountant or investigative services in connection with a lawsuit.

[8] Regardless of the sophistication of potential recipients of law-related services, a lawyer should take special care to keep separate the provision of law-related and legal services in order to minimize the risk that the recipient will assume that the law-related services are legal services. The risk of such confusion is especially acute when the lawyer renders both types of services with respect to the same matter. Under some circumstances the legal and law-related services may be so closely entwined that they cannot be distinguished from each other, and the requirement of disclosure and consultation imposed by paragraph (a)(2) of the Rule cannot be met. In such a case a lawyer will be responsible for assuring that both the lawyer's conduct and, to the extent required by Rule 5.3, that of nonlawyer employees in the distinct entity that the lawyer controls complies in all respects with the Rules of Professional Conduct.

[9] A broad range of economic and other interests of clients may be served by lawyers' engaging in the delivery of law-related services. Examples of law-related services include providing title insurance, financial planning, accounting, trust services, real estate counseling, legislative lobbying, economic analysis, social work, psychological counseling, tax preparation, and patent, medical or environmental consulting.

[10] When a lawyer is obliged to accord the recipients of such services the protections of those Rules that apply to the client-lawyer relationship, the lawyer must take special care to heed the proscriptions of the Rules addressing conflict of interest (Rules 1.7 through 1.11, especially Rules 1.7 and 1.8(a), (b) and (f)), and to scrupulously adhere to the requirements of Rule 1.6 relating to disclosure of confidential information. The promotion of the law-related services must also in all respects comply with Rules 7.1 through 7.3, dealing with advertising and solicitation. In that regard, lawyers should take special care to identify the obligations that may be imposed as a result of a jurisdiction's decisional law.

[11] When the full protections of all of the Rules of Professional Conduct do not apply to the provision of law-related services, principles of law external to the Rules, for example, the law of principal and agent, govern the legal duties owed to those receiving the services. Those other legal principles may establish a different degree of protection for the recipient with respect to confidentiality of information, conflicts of interest and permissible business relationships with clients. See also Rule 8.4 (Misconduct).

Public Service

RULE 6.1: VOLUNTARY PRO BONO PUBLICO SERVICE

Every lawyer has a professional responsibility to provide legal services to those unable to pay. A lawyer should aspire to render at least (50) hours of *pro bono publico* legal services per year. In fulfilling this responsibility, the lawyer should:

(a) provide a substantial majority of the (50) hours of legal services without fee or expectation of fee to:

- (1) persons of limited means or
- (2) charitable, religious, civic, community, governmental and educational organizations in matters that are designed primarily to address the needs of persons of limited means; and

(b) provide any additional services through:

- (1) delivery of legal services at no fee or substantially reduced fee to individuals, groups or organizations seeking to secure or protect civil rights, civil liberties or public rights, or charitable, religious, civic, community, governmental and educational organizations in matters in furtherance of their organizational purposes;
- (2) delivery of legal services at a substantially reduced fee to persons of limited means; or
- (3) participation in activities for improving the law, the legal system or the legal profession.

In addition, a lawyer should voluntarily contribute financial support to organizations that provide legal services to persons of limited means.

Commentary

[1] Every lawyer, regardless of professional prominence or professional work load, has a responsibility to provide legal services to those unable to pay, and personal involvement in the problems of the disadvantaged can be one of the most rewarding experiences in the life of a lawyer. The Idaho State Bar urges all lawyers to provide a minimum of 50 hours of *pro bono* services annually. It is recognized that in some years a lawyer may render greater or fewer hours than the annual standard specified, but during the course of his or her legal career, each lawyer should render on average per year, the number of hours set forth in this Rule. Services can be performed in civil matters or in criminal or quasi-criminal matters for which there is no government obligation to provide funds for legal representation, such as post-conviction death penalty appeal cases.

[2] Paragraphs (a)(1) and (2) recognize the critical need for legal services that exists among persons of limited means by providing that a substantial majority of the legal services rendered annually to the disadvantaged be furnished without fee or expectation of fee. Legal services under these paragraphs consist of a full range of activities, including individual and class representation, the provision of legal advice, legislative lobbying, administrative rule making and the provision of free training or mentoring to those who represent persons of limited means. The variety of these activities

should facilitate participation by government lawyers, even when restrictions exist on their engaging in the outside practice of law.

[3] Persons eligible for legal services under paragraphs (a)(1) and (2) are those who qualify for participation in programs funded by the Legal Services Corporation and those whose incomes and financial resources are slightly above the guidelines utilized by such programs but nevertheless, cannot afford counsel. Legal services can be rendered to individuals or to organizations such as the Idaho Volunteer Lawyers Program, homeless shelters, battered women's centers and food pantries that serve those of limited means. The term "governmental organizations" includes, but is not limited to, public protection programs and sections of governmental or public sector agencies.

[4] Because service must be provided without fee or expectation of fee, the intent of the lawyer to render free legal services is essential for the work performed to fall within the meaning of paragraphs (a)(1) and (2). Accordingly, services rendered cannot be considered pro bono if an anticipated fee is uncollected, but the award of statutory attorneys' fees in a case originally accepted as pro bono would not disqualify such services from inclusion under this section. Lawyers who do receive fees in such cases are encouraged to contribute an appropriate portion of such fees to organizations or projects that benefit persons of limited means.

[5] While it is possible for a lawyer to fulfill the annual responsibility to perform pro bono services exclusively through activities described in paragraphs (a)(1) and (2), to the extent that any hours of service remained unfulfilled, the remaining commitment can be met in a variety of ways as set forth in paragraph (b). Constitutional, statutory or regulatory restrictions may prohibit or impede government and public sector lawyers and judges from performing the pro bono services outlined in paragraphs (a)(1) and (2). Accordingly, where those restrictions apply, government and public sector lawyers and judges may fulfill their pro bono responsibility by performing services outlined in paragraph (b).

[6] Paragraph (b)(1) includes the provision of certain types of legal services to those whose incomes and financial resources place them above limited means. It also permits the pro bono lawyer to accept a substantially reduced fee for services. Examples of the types of issues that may be addressed under this paragraph include First Amendment claims, Title VII claims and environmental protection claims. Additionally, a wide range of organizations may be represented, including social service, medical research, cultural and religious groups.

[7] Paragraph (b)(2) covers instances in which lawyers agree to and receive a modest fee for furnishing legal services to persons of limited means. Participation in judicial care programs and acceptance of court appointments in which the fee is substantially below a lawyer's usual rate are encouraged under this section.

[8] Paragraph (b)(3) recognizes the value of lawyers engaging in activities that improve the law, the legal system or the legal profession. Serving on bar association committees, serving on boards of pro bono or legal services programs, taking part in Law Day activities, acting as a continuing legal education instructor, a mediator or an arbitrator and engaging in legislative lobbying to improve the law, the legal system or the profession are a few examples of the many activities that fall within this paragraph.

[9] Because the provision of pro bono services is a professional responsibility, it is the individual ethical commitment of each lawyer. Nevertheless, there may be times when it is not feasible for a lawyer to engage in pro bono services. At such times a lawyer may discharge the pro bono responsibility by providing financial support to organizations providing free legal services to persons of limited means. Such financial support should be reasonably equivalent to the value of the hours of service that would have otherwise been provided. In addition, at times it may be more feasible to satisfy the pro bono responsibility collectively, as by a firm's aggregate pro bono activities.

[10] Because the efforts of individual lawyers are not enough to meet the need for free legal services that exists among persons of limited means, the government and the profession have instituted additional programs to provide those services. Every lawyer should financially support such programs, in addition to either providing direct pro bono services or making financial contributions when pro bono service is not feasible.

[11] Law firms should act reasonably to enable all lawyers in the firm to provide the pro bono legal services called for by this Rule.

[12] The responsibility set forth in this Rule is not intended to be enforced through disciplinary process.

RULE 6.2: ACCEPTING APPOINTMENTS

A lawyer shall not seek to avoid appointment by a tribunal to represent a person except for good cause, such as:

- (a) representing the client is likely to result in violation of the Rules of Professional Conduct or other law;
- (b) representing the client is likely to result in an unreasonable financial burden on the lawyer; or
- (c) the client or the cause is so repugnant to the lawyer as to be likely to impair the client-lawyer relationship or the lawyer's ability to represent the client.

Commentary

[1] A lawyer ordinarily is not obliged to accept a client whose character or cause the lawyer regards as repugnant. The lawyer's freedom to select clients is, however, qualified. All lawyers have a responsibility to assist in providing pro bono publico service. See Rule 6.1. An individual lawyer fulfills this responsibility by accepting a fair share of unpopular matters or indigent or unpopular clients. A lawyer may also be subject to appointment by a court to serve unpopular clients or persons unable to afford legal services.

Appointed Counsel

[2] For good cause a lawyer may seek to decline an appointment to represent a person who cannot afford to retain counsel or whose cause is unpopular. Good cause exists if the lawyer could not handle the matter competently, see Rule 1.1, or if undertaking the representation would result in an improper conflict of interest, for example, when the client or the cause is so repugnant to the lawyer as to be likely to impair the client-lawyer relationship or the lawyer's ability to represent the client. A lawyer may also seek to decline an appointment if acceptance would be unreasonably burdensome, for example, when it would impose a financial sacrifice so great as to be unjust.

[3] An appointed lawyer has the same obligations to the client as retained counsel, including the obligations of loyalty and confidentiality, and is subject to the same limitations on the client-lawyer relationship, such as the obligation to refrain from assisting the client in violation of the Rules.

RULE 6.3: MEMBERSHIP IN LEGAL SERVICES ORGANIZATION
A lawyer may serve as a director, officer or member of a legal services organization, apart from the law firm in which the lawyer practices, notwithstanding that the organization serves persons having interests adverse to a client of the lawyer. The lawyer shall not knowingly participate in a decision or action of the organization:

- (a) if participating in the decision or action would be incompatible with the lawyer's obligations to a client under Rule 1.7; or
- (b) where the decision or action could have a material adverse effect on the representation of a client of the organization whose interests are adverse to a client of the lawyer.

Commentary

[1] Lawyers should be encouraged to support and participate in legal service organizations. A lawyer who is an officer or a member of such an organization does not thereby have a client-lawyer relationship with persons served by the organization. However, there is potential conflict between the interests of such persons and the interests of the lawyer's clients. If the possibility of such conflict disqualified a lawyer from serving on the board of a legal services organization, the profession's involvement in such organizations would be severely curtailed.

[2] It may be necessary in appropriate cases to reassure a client of the organization that the representation will not be affected by conflicting loyalties of a member of the board. Established, written policies in this respect can enhance the credibility of such assurances.

RULE 6.4: LAW REFORM ACTIVITIES AFFECTING CLIENT INTERESTS

A lawyer may serve as a director, officer or member of an organization involved in reform of the law or its administration notwithstanding that the reform may affect the interests of a client of the lawyer. When the lawyer knows that the interests of a client may be materially benefited by a decision in which the lawyer participates, the lawyer shall disclose that fact but need not identify the client.

Commentary

[1] Lawyers involved in organizations seeking law reform generally do not have a client-lawyer relationship with the organization. Otherwise, it might follow that a lawyer could not be involved in a bar association law reform program that might indirectly affect a client. See also Rule 1.2(b). For example, a lawyer specializing in antitrust litigation might be regarded as disqualified from participating in drafting revisions of rules governing that subject. In determining the nature and scope of participation in such activities, a lawyer should be mindful of obligations to clients under other Rules, particularly Rule 1.7. A lawyer is professionally obligated to protect the integrity of the program by making an appropriate disclosure within the organization when the lawyer knows a private client might be materially benefited.

RULE 6.5: NONPROFIT AND COURT-ANNEXED LIMITED LEGAL SERVICES PROGRAMS

(a) A lawyer who, under the auspices of a program sponsored by a nonprofit organization or court, provides short-term limited legal services to a client without expectation by either the lawyer or the client that the lawyer will provide continuing representation in the matter:

- (1) is subject to Rules 1.7 and 1.9(a) only if the lawyer knows that the representation of the client involves a conflict of interest; and
- (2) is subject to Rule 1.10 only if the lawyer knows that another lawyer associated with the lawyer in a law firm is disqualified by Rule 1.7 or 1.9(a) with respect to the matter.

(b) Except as provided in paragraph (a)(2), Rule 1.10 is inapplicable to a representation governed by this Rule.

Commentary

[1] Legal services organizations, courts and various nonprofit organizations have established programs through which lawyers provide short-term limited legal services — such as advice or the completion of legal forms — that will assist persons to address their legal problems without further representation by a lawyer. In these programs, such as legal-advice hotlines, advice-only clinics or pro se

counseling programs, a client-lawyer relationship is established, but there is no expectation that the lawyer's representation of the client will continue beyond the limited consultation. Such programs are normally operated under circumstances in which it is not feasible for a lawyer to systematically screen for conflicts of interest as is generally required before undertaking a representation. See, e.g., Rules 1.7, 1.9 and 1.10.

[2] A lawyer who provides short-term limited legal services pursuant to this Rule must secure the client's informed consent to the limited scope of the representation. See Rule 1.2(c). If a short-term representation would not be reasonable under the circumstances, the lawyer may offer advice to the client but must also advise the client of the need for further assistance of counsel. Except as provided in this Rule, the Rules of Professional Conduct, including Rules 1.6 and 1.9(c), are applicable to the limited representation.

[3] Because a lawyer who is representing a client in the circumstances addressed by this Rule ordinarily is not able to check systematically for conflicts of interest, paragraph (a) requires compliance with Rules 1.7 or 1.9(a) only if the lawyer knows that the representation presents a conflict of interest for the lawyer, and with Rule 1.10 only if the lawyer knows that another lawyer in the lawyer's firm is disqualified by Rules 1.7 or 1.9(a) in the matter.

[4] Because the limited nature of the services significantly reduces the risk of conflicts of interest with other matters being handled by the lawyer's firm, paragraph (b) provides that Rule 1.10 is inapplicable to a representation governed by this Rule except as provided by paragraph (a)(2). Paragraph (a)(2) requires the participating lawyer to comply with Rule 1.10 when the lawyer knows that the lawyer's firm is disqualified by Rules 1.7 or 1.9(a). By virtue of paragraph (b), however, a lawyer's participation in a short-term limited legal services program will not preclude the lawyer's firm from undertaking or continuing the representation of a client with interests adverse to a client being represented under the program's auspices. Nor will the personal disqualification of a lawyer participating in the program be imputed to other lawyers participating in the program.

[5] If, after commencing a short-term limited representation in accordance with this Rule, a lawyer undertakes to represent the client in the matter on an ongoing basis, Rules 1.7, 1.9(a) and 1.10 become applicable.

Information About Legal Services**RULE 7.1: COMMUNICATIONS CONCERNING A LAWYER'S SERVICES**

A lawyer shall not make a false or misleading communication about the lawyer or the lawyer's services. A communication is false or misleading if it:

- (a) contains a material misrepresentation of fact or law, or omits a fact necessary to make the statement considered as a whole not materially misleading;
- (b) is likely to create an unjustified expectation about results the lawyer can achieve, or states or implies that the lawyer can achieve results by means that violate the rules of professional conduct or other law; or
- (c) compares the lawyer's services with other lawyer's services, unless the comparison can be factually substantiated.

Commentary

[1] This Rule governs all communications about a lawyer's services, including advertising permitted by Rule 7.2. Whatever means are used to make known a lawyer's services, statements about them must be truthful. The prohibition in paragraph (b) of statements that may create "unjustified expectations" would

ordinarily preclude advertisements about results obtained on behalf of a client, such as the amount of a damage award or the lawyer's record in obtaining favorable verdicts, and advertisements containing client endorsements. Such information may create the unjustified expectation that similar results can be obtained for others without reference to the specific actual and legal circumstances.

[2] Truthful statements that are misleading are also prohibited by this Rule. A truthful statement is misleading if it omits a fact necessary to make the lawyer's communication considered as a whole not materially misleading. A truthful statement is also misleading if there is a substantial likelihood that it will lead a reasonable person to formulate a specific conclusion about the lawyer or the lawyer's services for which there is no reasonable factual foundation.

[3] An advertisement that truthfully reports a lawyer's achievements on behalf of clients or former clients may be misleading if presented so as to lead a reasonable person to form an unjustified expectation that the same results could be obtained for other clients in similar matters without reference to the specific factual and legal circumstances of each client's case. Similarly, an unsubstantiated comparison of the lawyer's services or fees with the services or fees of other lawyers may be misleading if presented with such specificity as would lead a reasonable person to conclude that the comparison can be substantiated. The inclusion of an appropriate disclaimer or qualifying language may preclude a finding that a statement is likely to create unjustified expectations or otherwise mislead a prospective client.

[4] See also Rule 6.4(e) for the prohibition against stating or implying an ability to influence improperly a government agency or official or to achieve results by means that violate the Rules of Professional Conduct or other law.

RULE 7.2: ADVERTISING

(a) Subject to the requirements of Rules 7.1 and 7.3, a lawyer may advertise services through written, recorded or electronic communication, including public media.

(b) A copy or recording of an advertisement or communication shall be kept for two years after its last dissemination along with a record of when and where it was used.

(c) A lawyer shall not give anything of value to a person for recommending the lawyer's services except that a lawyer may

(1) pay the reasonable costs of advertisements or communications permitted by this Rule;

(2) pay the usual charges of a legal service plan or a not-for-profit or qualified lawyer referral service. A qualified lawyer referral service is a lawyer referral service that has been approved by an appropriate regulatory authority; and

(3) pay for a law practice in accordance with Rule 1.17.

(d) Any communication made pursuant to this rule shall include the name and office address of at least one lawyer or law firm responsible for its content.

Commentary

[1] To assist the public in obtaining legal services, lawyers should be allowed to make known their services not only through reputation but also through organized information campaigns in the form of advertising. Advertising involves an active quest for clients, contrary to the tradition that a lawyer should not seek clientele. However, the public's need to know about legal services can be fulfilled in part through advertising. This need is particularly acute in the case of persons of moderate means who have not made

extensive use of legal services. The interest in expanding public information about legal services ought to prevail over considerations of tradition. Nevertheless, advertising by lawyers entails the risk of practices that are misleading or overreaching.

[2] This Rule permits public dissemination of information concerning a lawyer's name or firm name, address and telephone number; the kinds of services the lawyer will undertake; the basis on which the lawyer's fees are determined, including prices for specific services and payment and credit arrangements; a lawyer's foreign language ability; names of references and, with their consent, names of clients regularly represented; and other information that might invite the attention of those seeking legal assistance.

[3] Questions of effectiveness and taste in advertising are matters of speculation and subjective judgment. Some jurisdictions have had extensive prohibitions against television advertising, against advertising going beyond specified facts about a lawyer, or against "undignified" advertising. Television is now one of the most powerful media for getting information to the public, particularly persons of low and moderate income; prohibiting television advertising, therefore, would impede the flow of information about legal services to many sectors of the public. Limiting the information that may be advertised has a similar effect and assumes that the bar can accurately forecast the kind of information that the public would regard as relevant. Similarly, electronic media, such as the Internet, can be an important source of information about legal services, and lawful communication by electronic mail is permitted by this Rule. But see Rule 7.3(a) for the prohibition against the solicitation of a prospective client through a real-time electronic exchange that is not initiated by the prospective client.

[4] Neither this Rule nor Rule 7.3 prohibits communications authorized by law, such as notice to members of a class in class action litigation.

Record of Advertising

[5] Paragraph (b) requires that a record of the content and use of advertising be kept in order to facilitate enforcement of this Rule. It does not require that advertising be subject to review prior to dissemination. Such a requirement would be burdensome and expensive relative to its possible benefits, and may be of doubtful constitutionality.

Paying Others to Recommend a Lawyer

[6] Lawyers are not permitted to pay others for channeling professional work. Paragraph (b)(1), however, allows a lawyer to pay for advertising and communications permitted by this Rule, including the costs of print directory listings, on-line directory listings, newspaper ads, television and radio airtime, domain-name registrations, sponsorship fees, banner ads, and group advertising. A lawyer may compensate employees, agents and vendors who are engaged to provide marketing or client-development services, such as publicists, public-relations personnel, business-development staff and website designers. See Rule 5.3 for the duties of lawyers and law firms with respect to the conduct of nonlawyers who prepare marketing materials for them.

[7] A lawyer may pay the usual charges of a legal service plan or a not-for-profit or qualified lawyer referral service. A legal service plan is a prepaid or group legal service plan or a similar plan that assists prospective clients to secure legal representation. A lawyer referral service, on the other hand, is any organization that holds itself out to the public as a lawyer referral service. Such referral services are understood by laypersons to be consumer-oriented organizations that provide unbiased referrals to lawyers with appropriate experience in the subject matter of the representation and afford other client protections, such as complaint procedures or malpractice insurance requirements. Consequently, this Rule only permits a lawyer to pay the usual charges of a not-for-profit or qualified lawyer referral service. A qualified lawyer referral service is one that is approved by an appropriate regulatory authority as affording adequate protections for prospective clients. See, e.g., the

American Bar Association's Model Supreme Court Rules Governing Lawyer Referral Services and Model Lawyer Referral and Information Service Quality Assurance Act (requiring that organizations that are identified as lawyer referral services (i) permit the participation of all lawyers who are licensed and eligible to practice in the jurisdiction and who meet reasonable objective eligibility requirements as may be established by the referral service for the protection of prospective clients; (ii) require each participating lawyer to carry reasonably adequate malpractice insurance; (iii) act reasonably to assess client satisfaction and address client complaints; and (iv) do not refer prospective clients to lawyers who own, operate or are employed by the referral service.)

[8] — A lawyer who accepts assignments or referrals from a legal service plan or referrals from a lawyer referral service must act reasonably to assure that the activities of the plan or service are compatible with the lawyer's professional obligations. See Rule 5.3. Legal service plans and lawyer referral services may communicate with prospective clients, but such communication must be in conformity with these Rules. Thus, advertising must not be false or misleading, as would be the case if the communications of a group advertising program or a group legal services plan would mislead prospective clients to think that it was a lawyer referral service sponsored by a state agency or bar association. Nor could the lawyer allow in-person, telephonic, or real-time contacts that would violate Rule 7.3.

RULE 7.3: DIRECT CONTACT WITH PROSPECTIVE CLIENTS

(a) A lawyer shall not by in-person, live telephone or real-time electronic contact solicit professional employment from a prospective client when a significant motive for the lawyer's doing so is the lawyer's pecuniary gain, unless the person contacted:

- (1) is a lawyer; or
- (2) has a family, close personal, or prior professional relationship with the lawyer.

(b) A lawyer shall not solicit professional employment from a prospective client by written, recorded or electronic communication or by in-person, telephone or real-time electronic contact even when not otherwise prohibited by paragraph (a), if:

- (1) the prospective client has made known to the lawyer a desire not to be solicited by the lawyer; or
- (2) the solicitation involves coercion, duress or harassment.

(c) Every written, recorded or electronic communication from a lawyer soliciting professional employment from a prospective client known to be in need of legal services in a particular matter shall include the words "Advertising Material" on the outside envelope, if any, and at the beginning and ending of any recorded or electronic communication, unless the recipient of the communication is a person specified in paragraphs (a)(1) or (a)(2).

(d) Notwithstanding the prohibitions in paragraph (a), a lawyer may participate with a prepaid or group legal service plan operated by an organization not owned or directed by the lawyer that uses in-person or telephone contact to solicit memberships or subscriptions for the plan from persons who are not known to need legal services in a particular matter covered by the plan.

Commentary

[1] There is a potential for abuse inherent in direct in-person, live telephone or real-time electronic contact by a lawyer with a prospective client known to need legal services. These forms of

contact between a lawyer and a prospective client subject the layperson to the private importuning of the trained advocate in a direct interpersonal encounter. The prospective client, who may already feel overwhelmed by the circumstances giving rise to the need for legal services, may find it difficult fully to evaluate all available alternatives with reasoned judgment and appropriate self-interest in the face of the lawyer's presence and insistence upon being retained immediately. The situation is fraught with the possibility of undue influence, intimidation, and over-reaching.

[2] This potential for abuse inherent in direct in-person, live telephone or real-time electronic solicitation of prospective clients justifies its prohibition, particularly since lawyer advertising and written and recorded communication permitted under Rule 7.2 offer alternative means of conveying necessary information to those who may be in need of legal services. Advertising and written and recorded communications which may be mailed or audiotaped make it possible for a prospective client to be informed about the need for legal services, and about the qualifications of available lawyers and law firms, without subjecting the prospective client to direct in-person, telephone or real-time electronic persuasion that may overwhelm the client's judgment.

[3] The use of general advertising and written, recorded or electronic communications to transmit information from lawyer to prospective client, rather than direct in-person, live telephone or real-time electronic contact, will help to assure that the information flows cleanly as well as freely. The contents of advertisements and communications permitted under Rule 7.2 can be permanently recorded so that they cannot be disputed and may be shared with others who know the lawyer. This potential for informal review is itself likely to help guard against statements and claims that might constitute false and misleading communications, in violation of Rule 7.1. The contents of direct in-person, live telephone or real-time electronic conversations between a lawyer and a prospective client can be disputed and may not be subject to third-party scrutiny. Consequently, they are much more likely to approach (and occasionally cross) the dividing line between accurate representations and those that are false and misleading.

[4] There is far less likelihood that a lawyer would engage in abusive practices against an individual who is a former client, or with whom the lawyer has a close personal or family relationship, or in situations in which the lawyer is motivated by considerations other than the lawyer's pecuniary gain. Nor is there a serious potential for abuse when the person contacted is a lawyer. Consequently, the general prohibition in Rule 7.3(a) and the requirements of Rule 7.3(c) are not applicable in those situations. Also, paragraph (a) is not intended to prohibit a lawyer from participating in constitutionally protected activities of public or charitable legal service organizations or bona fide political, social, civic, fraternal, employee or trade organizations whose purposes include providing or recommending legal services to its members or beneficiaries.

[5] But even permitted forms of solicitation can be abused. Thus, any solicitation which contains information which is false or misleading within the meaning of Rule 7.1, which involves coercion, duress or harassment within the meaning of Rule 7.3(b)(2), or which involves contact with a prospective client who has made known to the lawyer a desire not to be solicited by the lawyer within the meaning of Rule 7.3(b)(1) is prohibited. Moreover, if after sending a letter or other communication to a client as permitted by Rule 7.2 the lawyer receives no response, any further effort to communicate with the prospective client may violate the provisions of Rule 7.3(b).

[6] This Rule is not intended to prohibit a lawyer from contacting representatives of organizations or groups that may be interested in establishing a group or prepaid legal plan for their members, insureds, beneficiaries or other third parties for the purpose of informing such entities of the availability of and details concerning the plan or arrangement which the lawyer or lawyer's firm is willing to offer. This form of communication is not directed to a prospective client. Rather, it is usually addressed to an individual acting in a fiduciary capacity seeking a supplier of legal services for others who may, if they choose, become prospective clients of the

lawyer. Under these circumstances, the activity which the lawyer undertakes in communicating with such representatives and the type of information transmitted to the individual are functionally similar to and serve the same purpose as advertising permitted under Rule 7.2.

[7] The requirement in Rule 7.3(c) that certain communications be marked "Advertising Material" does not apply to communications sent in response to requests of potential clients or their spokespersons or sponsors. General announcements by lawyers, including changes in personnel or office location, do not constitute communications soliciting professional employment from a client known to be in need of legal services within the meaning of this Rule.

[8] Paragraph (d) of this Rule permits a lawyer to participate with an organization which uses personal contact to solicit members for its group or prepaid legal service plan, provided that the personal contact is not undertaken by any lawyer who would be a provider of legal services through the plan. The organization must not be owned by or directed (whether as manager or otherwise) by any lawyer or law firm that participates in the plan. For example, paragraph (d) would not permit a lawyer to create an organization controlled directly or indirectly by the lawyer and use the organization for the in-person or telephone solicitation of legal employment of the lawyer through memberships in the plan or otherwise. The communication permitted by these organizations also must not be directed to a person known to need legal services in a particular matter, but is to be designed to inform potential plan members generally of another means of affordable legal services. Lawyers who participate in a legal service plan must reasonably assure that the plan sponsors are in compliance with Rules 7.1, 7.2 and 7.3(b). See 8.4(a).

RULE 7.4: COMMUNICATION OF FIELDS OF PRACTICE AND SPECIALIZATION

- (a) A lawyer may communicate the fact that the lawyer does or does not practice in particular fields of law.
- (b) A lawyer admitted to engage in patent practice before the United States Patent and Trademark Office may use the designation "Patent Attorney" or a substantially similar designation.
- (c) A lawyer engaged in Admiralty practice may use the designation "Admiralty," "Proctor in Admiralty" or a substantially similar designation.
- (d) A lawyer shall not state or imply that a lawyer is certified as a specialist in a particular field of law, unless:

- (1) the lawyer has been certified as a specialist by an organization that has been approved by the Idaho State Bar; and
- (2) the name of the certifying organization is clearly identified in the communication.

Commentary

[1] Paragraph (a) of this Rule permits a lawyer to indicate areas of practice in communications about the lawyer's services. If a lawyer practices only in certain fields, or will not accept matters except in a specified field or fields, the lawyer is permitted to so indicate. A lawyer is generally permitted to state that the lawyer is a "specialist," practices a "specialty," or "specializes in" particular fields, but such communications are subject to the "false and misleading" standard applied in Rule 7.1 to communications concerning a lawyer's services.

[2] Paragraph (b) recognizes the long-established policy of the Patent and Trademark Office for the designation of lawyers practicing before the Office. Paragraph (c) recognizes that designation of Admiralty practice has a long historical tradition associated with maritime commerce and the federal courts.

[3] Paragraph (d) permits a lawyer to state that the lawyer is certified as a specialist in a field of law if such certification is granted by an organization approved by the Idaho State Bar pursuant to Section X of the Idaho Bar Commission Rules. Certification signifies that an objective entity has recognized an advanced degree of knowledge and experience in the specialty area greater than is suggested by general licensure to practice law. Certifying organizations may be expected to apply standards of experience, knowledge and proficiency to insure that a lawyer's recognition as a specialist is meaningful and reliable. In order to insure that consumers can obtain access to useful information about an organization granting certification, the name of the certifying organization must be included in any communication regarding the certification.

RULE 7.5: FIRM NAMES AND LETTERHEAD

- (a) A lawyer shall not use a firm name, letterhead or other professional designation that violates Rule 7.1. A trade name may be used by a lawyer in private practice if it does not imply a connection with a government agency or with a public or charitable legal services organization and is not otherwise in violation of Rule 7.1.
- (b) A law firm with offices in more than one jurisdiction may use the same name or other professional designation in each jurisdiction, but identification of the lawyers in an office of the firm shall indicate the jurisdictional limitations on those not licensed to practice in the jurisdiction where the office is located.
- (c) The name of a lawyer holding a public office shall not be used in the name of a law firm, or in communications on its behalf, during any substantial period in which the lawyer is not actively and regularly practicing with the firm.
- (d) Lawyers may state or imply that they practice in a partnership or other organization only when that is the fact.

Commentary

[1] A firm may be designated by the names of all or some of its members, by the names of deceased members where there has been a continuing succession in the firm's identity or by a trade name such as the "ABC Legal Clinic." A lawyer or law firm may also be designated by a distinctive website address or comparable professional designation. Although the United States Supreme Court has held that legislation may prohibit the use of trade names in professional practice, use of such names in law practice is acceptable so long as it is not misleading. If a private firm uses a trade name that includes a geographical name such as "Springfield Legal Clinic," an express disclaimer that it is a public legal aid agency may be required to avoid a misleading implication. It may be observed that any firm name including the name of a deceased partner is, strictly speaking, a trade name. The use of such names to designate law firms has proven a useful means of identification. However, it is misleading to use the name of a lawyer not associated with the firm or a predecessor of the firm.

[2] With regard to paragraph (d), lawyers sharing office facilities, but who are not in fact associated with each other in a law firm, may not denominate themselves as, for example, "Smith and Jones," for that title suggests that they are practicing law together in a firm.

RULE 7.6: POLITICAL CONTRIBUTIONS TO OBTAIN GOVERNMENT LEGAL ENGAGEMENTS OR APPOINTMENTS BY JUDGES

A lawyer or law firm shall not accept a government legal engagement or an appointment by a judge if the lawyer or law firm makes a political contribution or solicits political contributions for the purpose of obtaining or being considered for that type of legal engagement or appointment.

Commentary

[1] Lawyers have a right to participate fully in the political process, which includes making and soliciting political contributions to candidates for judicial and other public office. Nevertheless, when lawyers make or solicit political contributions in order to obtain an engagement for legal work awarded by a government agency, or to obtain appointment by a judge, the public may legitimately question whether the lawyers engaged to perform the work are selected on the basis of competence and merit. In such a circumstance, the integrity of the profession is undermined.

[2] The term "political contribution" denotes any gift, subscription, loan, advance or deposit of anything of value made directly or indirectly to a candidate, incumbent, political party or campaign committee to influence or provide financial support for election to or retention in judicial or other government office. Political contributions in initiative and referendum elections are not included. For purposes of this Rule, the term "political contribution" does not include uncompensated services.

[3] Subject to the exceptions below, (i) the term "government legal engagement" denotes any engagement to provide legal services that a public official has the direct or indirect power to award; and (ii) the term "appointment by a judge" denotes an appointment to a position such as referee, commissioner, special master, receiver, guardian or other similar position that is made by a judge. Those terms do not, however, include (a) substantially uncompensated services; (b) engagements or appointments made on the basis of experience, expertise, professional qualifications and cost following a request for proposal or other process that is free from influence based upon political contributions; and (c) engagements or appointments made on a rotational basis from a list compiled without regard to political contributions.

[4] The term "lawyer or law firm" includes a political action committee or other entity owned or controlled by a lawyer or law firm.

[5] Political contributions are for the purpose of obtaining or being considered for a government legal engagement or appointment by a judge if, but for the desire to be considered for the legal engagement or appointment, the lawyer or law firm would not have made or solicited the contributions. The purpose may be determined by an examination of the circumstances in which the contributions occur. For example, one or more contributions that in the aggregate are substantial in relation to other contributions by lawyers or law firms, made for the benefit of an official in a position to influence award of a government legal engagement, and followed by an award of the legal engagement to the contributing or soliciting lawyer or the lawyer's firm would support an inference that the purpose of the contributions was to obtain the engagement, absent other factors that weigh against existence of the proscribed purpose. Those factors may include among others that the contribution or solicitation was made to further a political, social, or economic interest or because of an existing personal, family, or professional relationship with a candidate.

[6] If a lawyer makes or solicits a political contribution under circumstances that constitute bribery or another crime, Rule 8.4(b) is implicated.

Maintaining the Integrity of the Profession**RULE 8.1: BAR ADMISSION AND DISCIPLINARY MATTERS**

An applicant for admission to the bar, or a lawyer in connection with a bar admission application or in connection with a disciplinary matter, shall not:

- (a) knowingly make a false statement of material fact; or
- (b) fail to disclose a fact necessary to correct a misapprehension known by the person to have arisen in

the matter, or knowingly fail to respond to a lawful demand for information from an admissions or disciplinary authority, except that this rule does not require disclosure of information otherwise protected by Rule 1.6.

Commentary

[1] The duty imposed by this Rule extends to persons seeking admission to the bar as well as to lawyers. Hence, if a person makes a material false statement in connection with an application for admission, it may be the basis for subsequent disciplinary action if the person is admitted, and in any event may be relevant in a subsequent admission application. The duty imposed by this Rule applies to a lawyer's own admission or discipline as well as that of others. Thus, it is a separate professional offense for a lawyer to knowingly make a misrepresentation or omission in connection with a disciplinary investigation of the lawyer's own conduct. Paragraph (b) of this Rule also requires correction of any prior misstatement in the matter that the applicant or lawyer may have made and affirmative clarification of any misunderstanding on the part of the admissions or disciplinary authority of which the person involved becomes aware.

[2] This Rule is subject to the provisions of the fifth amendment of the United States Constitution and corresponding provisions of state constitutions. A person relying on such a provision in response to a question, however, should do so openly and not use the right of nondisclosure as a justification for failure to comply with this Rule.

[3] A lawyer representing an applicant for admission to the bar, or representing a lawyer who is the subject of a disciplinary inquiry or proceeding, is governed by the rules applicable to the client-lawyer relationship, including Rule 1.6 and, in some cases, Rule 3.3.

RULE 8.2: JUDICIAL AND LEGAL OFFICIALS

(a) A lawyer shall not make a statement that the lawyer knows to be false or with reckless disregard as to its truth or falsity concerning the qualifications or integrity of a judge, adjudicatory officer or public legal officer, or of a candidate for election or appointment to judicial or legal office.

(b) A lawyer who is a candidate for judicial office shall comply with the applicable provisions of the Code of Judicial Conduct.

Commentary

[1] Assessments by lawyers are relied on in evaluating the professional or personal fitness of persons being considered for election or appointment to judicial office and to public legal offices, such as attorney general, prosecuting attorney and public defender. Expressing honest and candid opinions on such matters contributes to improving the administration of justice. Conversely, false statements by a lawyer can unfairly undermine public confidence in the administration of justice.

[2] When a lawyer seeks judicial office, the lawyer should be bound by applicable limitations on political activity.

[3] To maintain the fair and independent administration of justice, lawyers are encouraged to continue traditional efforts to defend judges and courts unjustly criticized.

RULE 8.3: REPORTING PROFESSIONAL MISCONDUCT

(a) A lawyer who knows that another lawyer has committed a violation of the Rules of Professional Conduct that raises a substantial question as to that lawyer's honesty, trustworthiness or fitness as a lawyer in other respects, shall inform the appropriate professional authority.

- (b) A lawyer who knows that a judge has committed a violation of applicable rules of judicial conduct that raises a substantial question as to the judge's fitness for office shall inform the appropriate authority.
- (c) This Rule does not require disclosure of information otherwise protected by Rule 1.6 or information gained by a lawyer or judge while participating in an approved lawyers assistance program.

Commentary

[1] Self-regulation of the legal profession requires that members of the profession initiate disciplinary investigation when they know of a violation of the Rules of Professional Conduct. Lawyers have a similar obligation with respect to judicial misconduct. An apparently isolated violation may indicate a pattern of misconduct that only a disciplinary investigation can uncover. Reporting a violation is especially important where the victim is unlikely to discover the offense.

[2] A report about misconduct is not required where it would involve violation of Rule 1.6. However, a lawyer should encourage a client to consent to disclosure where prosecution would not substantially prejudice the client's interests.

[3] If a lawyer were obliged to report every violation of the Rules, the failure to report any violation would itself be a professional offense. Such a requirement existed in many jurisdictions but proved to be unenforceable. This Rule limits the reporting obligation to those offenses that a self-regulating profession must vigorously endeavor to prevent. A measure of judgment is, therefore, required in complying with the provisions of this Rule. The term "substantial" refers to the seriousness of the possible offense and not the quantum of evidence of which the lawyer is aware. A report should be made to the bar disciplinary agency unless some other agency, such as a peer review agency, is more appropriate in the circumstances. Similar considerations apply to the reporting of judicial misconduct.

[4] The duty to report professional misconduct does not apply to a lawyer retained to represent a lawyer whose professional conduct is in question. Such a situation is governed by the Rules applicable to the client-lawyer relationship.

[5] Information about a lawyer's or judge's misconduct or fitness may be received by a lawyer in the course of that lawyer's participation in an approved lawyers or judges assistance program. In that circumstance, providing for an exception to the reporting requirements of paragraphs (a) and (b) of this Rule encourages lawyers and judges to seek treatment through such a program. Conversely, without such an exception, lawyers and judges may hesitate to seek assistance from these programs, which may then result in additional harm to their professional careers and additional injury to the welfare of clients and the public. These Rules do not otherwise address the confidentiality of information received by a lawyer or judge participating in an approved lawyers assistance program; such an obligation, however, may be imposed by the rules of the program or other law.

***RULE 8.4 MISCONDUCT**

It is professional misconduct for a lawyer to:

- (a) violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another;
- (b) commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects;
- (c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation;

- (d) engage in conduct that is prejudicial to the administration of justice;
- (e) state or imply an ability to influence improperly a government agency or official or to achieve results by means that violate the Rules of Professional Conduct or other law; or
- (f) knowingly assist a judge or judicial officer in conduct that is a violation of applicable rules of judicial conduct or other law.

**(Rule 8.4 amended 3-17-05)*

Commentary

[1] Lawyers are subject to discipline when they violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so or do so through the acts of another, as when they request or instruct an agent to do so on the lawyer's behalf. Paragraph (a), however, does not prohibit a lawyer from advising a client of action the client is lawfully entitled to take.

[2] Many kinds of illegal conduct reflect adversely on fitness to practice law, such as offenses involving fraud and the offense of willful failure to file an income tax return. However, some kinds of offenses carry no such implication. Traditionally, the distinction was drawn in terms of offenses involving "moral turpitude." That concept can be construed to include offenses concerning some matters of personal morality, such as adultery and comparable offenses, that have no specific connection to fitness for the practice of law. Although a lawyer is personally answerable to the entire criminal law, a lawyer should be professionally answerable only for offenses that indicate lack of those characteristics relevant to law practice. Offenses involving violence, dishonesty, breach of trust, or serious interference with the administration of justice are in that category. A pattern of repeated offenses, even ones of minor significance when considered separately, can indicate indifference to legal obligation.

[3] A lawyer who, in the course of representing a client, knowingly manifests by words or conduct, bias or prejudice based upon race, sex, religion, national origin, disability, age, sexual orientation or socioeconomic status, violates paragraph (d) when such actions are prejudicial to the administration of justice. Legitimate advocacy respecting the foregoing factors does not violate paragraph (d). A trial judge's finding that peremptory challenges were exercised on a discriminatory basis does not alone establish a violation of this rule.

[4] A lawyer may refuse to comply with an obligation imposed by law upon a good faith belief that no valid obligation exists. The provisions of Rule 1.2(d) concerning a good faith challenge to the validity, scope, meaning or application of the law apply to challenges of legal regulation of the practice of law.

[5] Lawyers holding public office assume legal responsibilities going beyond those of other citizens. A lawyer's abuse of public office can suggest an inability to fulfill the professional role of lawyers. The same is true of abuse of positions of private trust such as trustee, executor, administrator, guardian, agent and officer, director or manager of a corporation or other organization.

RULE 8.5: DISCIPLINARY AUTHORITY; CHOICE OF LAW

- (a) **Disciplinary Authority.** A lawyer admitted to practice in this jurisdiction is subject to the disciplinary authority of this jurisdiction, regardless of where the lawyer's conduct occurs. A lawyer not admitted in this jurisdiction is also subject to the disciplinary authority of this jurisdiction if the lawyer renders or offers to render any legal services in this jurisdiction. A lawyer may be subject to the disciplinary authority of both this jurisdiction and another jurisdiction for the same conduct.

(b) **Choice of Law.** In any exercise of the disciplinary authority of this jurisdiction, the rules of professional conduct to be applied shall be as follows:

- (1) for conduct in connection with a matter pending before a tribunal, the rules of the jurisdiction in which the tribunal sits, unless the rules of the tribunal provide otherwise; and
- (2) for any other conduct, the rules of the jurisdiction in which the lawyer's conduct occurred, or, if the predominant effect of the conduct is in a different jurisdiction, the rules of that jurisdiction shall be applied to the conduct. A lawyer is not subject to discipline if the lawyer's conduct conforms to the rules of a jurisdiction in which the lawyer reasonably believes the predominant effect of the lawyer's conduct will occur.

Commentary

Disciplinary Authority

[1] It is longstanding law that conduct of a lawyer admitted to practice in this jurisdiction is subject to the disciplinary authority of this jurisdiction. Extension of the disciplinary authority of this jurisdiction to other lawyers who render or offer to render legal services in this jurisdiction is for the protection of the citizens of this jurisdiction.

Choice of Law

[2] A lawyer may be potentially subject to more than one set of rules of professional conduct which impose different obligations. The lawyer may be licensed to practice in more than one jurisdiction with differing rules, or may be admitted to practice before a particular court with rules that differ from those of the jurisdiction or jurisdictions in which the lawyer is licensed to practice. Additionally, the lawyer's conduct might involve significant contacts with more than one jurisdiction.

[3] Paragraph (b) seeks to resolve such potential conflicts. Its premise is that minimizing conflicts between rules, as well as uncertainty about which rules are applicable, is in the best interest of

both clients and the profession (as well as the bodies having authority to regulate the profession). Accordingly, it takes the approach of (i) providing that any particular conduct of a lawyer shall be subject to only one set of rules of professional conduct, (ii) making the determination of which set of rules applies to particular conduct as straightforward as possible, consistent with recognition of appropriate regulatory interests of relevant jurisdictions, and (iii) providing a safe harbor for lawyers who act reasonably in the face of uncertainty.

[4] Paragraph (b)(1) provides that as to a lawyer's conduct relating to a proceeding pending before a tribunal, the lawyer shall be subject only to the rules of professional conduct of that tribunal. As to all other conduct, including conduct in anticipation of a proceeding not yet pending before a tribunal, paragraph (b)(2) provides that a lawyer shall be subject to the rules of the jurisdiction in which the lawyer's conduct occurred, or, if the predominant effect of the conduct is in another jurisdiction, the rules of that jurisdiction shall be applied to the conduct. In the case of conduct in anticipation of a proceeding that is likely to be before a tribunal, the predominant effect of such conduct could be where the conduct occurred, where the tribunal sits or in another jurisdiction.

[5] When a lawyer's conduct involves significant contacts with more than one jurisdiction, it may not be clear whether the predominant effect of the lawyer's conduct will occur in a jurisdiction other than the one in which the conduct occurred. So long as the lawyer's conduct conforms to the rules of a jurisdiction in which the lawyer reasonably believes the predominant effect will occur, the lawyer is not subject to discipline under this Rule.

[6] If two admitting jurisdictions were to proceed against a lawyer for the same conduct, they should, applying this rule, identify the same governing ethics rules. They should take all appropriate steps to see that they do apply the same rule to the same conduct, and in all events should avoid proceeding against a lawyer on the basis of two inconsistent rules.

[7] The choice of law provision applies to lawyers engaged in transnational practice, unless international law, treaties or other agreements between competent regulatory authorities in the affected jurisdictions provide otherwise.

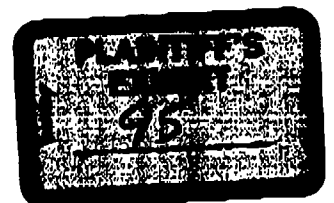
RULE 1.7: CONFLICT OF INTEREST: CURRENT CLIENTS

(a) Except as provided in paragraph (b), a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if:

- (1) the representation of one client will be directly adverse to another client; or
- (2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by the personal interests of the lawyer, including family and domestic relationships.

(b) Notwithstanding the existence of a concurrent conflict of interest under paragraph (a), a lawyer may represent a client if:

- (1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;
- (2) the representation is not prohibited by law;
- (3) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; and
- (4) each affected client gives informed consent, confirmed in writing.



**RULE 1.6: CONFLICT OF INTEREST: CURRENT CLIENTS:
SPECIFIC RULES**

- (a) A lawyer shall not enter into a business transaction with a client or knowingly acquire an ownership, possessory, security or other pecuniary interest adverse to a client unless:
- (1) the transaction and terms on which the lawyer acquires the interest are fair and reasonable to the client and are fully disclosed and transmitted in writing in a manner that can be reasonably understood by the client;
 - (2) the client is advised in writing of the desirability of seeking and is given a reasonable opportunity to seek the advice of independent legal counsel on the transaction; and
 - (3) the client gives informed consent, in a writing signed by the client, to the essential terms of the transaction and the lawyer's role in the transaction, including whether the lawyer is representing the client in the transaction.
- (b) A lawyer shall not use information relating to representation of a client to the disadvantage of the client unless the client gives informed consent, except as permitted or required by these Rules.
- (c) A lawyer shall not solicit any substantial gift from a client, including a testamentary gift, or prepare on behalf of a client an instrument, giving the lawyer or a person with whom the lawyer has a familial, domestic or close relationship any substantial gift unless the lawyer or other recipient of the gift is related to the client. For purposes of this paragraph, related persons include a spouse, child, grandchild, parent, grandparent or other relative or individual with whom the lawyer or the client maintains a close, familial relationship.
- (d) Prior to the conclusion of representation of a client, a lawyer shall not make or negotiate an agreement giving the lawyer literary or media rights to a portrayal or account based in substantial part on information relating to the representation.
- (e) A lawyer shall not provide financial assistance to a client in connection with pending or contemplated litigation, except that:
- (1) a lawyer may advance court costs and expenses of litigation, the repayment of which may be contingent on the outcome of the matter; and
 - (2) a lawyer representing an indigent client may pay court costs and expenses of litigation on behalf of the client.
- (f) A lawyer shall not accept compensation for representing a client from one other than the client unless:
- (1) the client gives informed consent;
 - (2) there is no interference with the lawyer's independence of professional judgment or with the client-lawyer relationship; and
 - (3) information relating to representation of a client is protected as required by Rule 1.6.
- (g) A lawyer who represents two or more clients shall not participate in making an aggregate settlement of the claims of or against the clients, or in a criminal case an aggregated agreement as to guilty or nolo contendere pleas, unless each client gives informed consent, in a writing signed by the client. The lawyer's disclosure shall include the existence and nature of all the claims or pleas involved and of the participation of each person in the settlement.
- (h) A lawyer shall not:
- (1) make an agreement prospectively limiting the lawyer's liability to a client for malpractice unless the client is independently represented in making the agreement; or
 - (2) settle a claim or potential claim for such liability with an unrepresented client or former client unless that person is advised in writing of the desirability of seeking and is given a reasonable opportunity to seek the advice of independent legal counsel in connection therewith.
- (i) A lawyer shall not acquire a proprietary interest in the cause of action or subject matter of litigation the lawyer is conducting for a client, except that the lawyer may:
- (1) acquire a lien authorized by law to secure the lawyer's fee or expenses; and
 - (2) contract with a client for a reasonable contingent fee in a civil case.
- (j) A lawyer shall not have sexual relations with a client unless a consensual sexual relationship existed between them when the client-lawyer relationship commenced.
- (k) While lawyers are associated in a firm, a prohibition in the foregoing paragraphs (a) through (i) that applies to any one of them shall apply to all of them.



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ISB No. 6313

STATE OF IDAHO }
COUNTY OF KOOTENAI } SS
FILED: 501

2010 JAN 15 PM 4:39

CLERK DISTRICT COURT

Patty Bayley
DEPUTY

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF KOOTENAI

KARLETTA GRACE BERRY, a widow,	)	Case No. CV-2007-2409
KARLETTA GRACE BERRY, Personal)	
Representative of the Estate	)	PLAINTIFFS' THIRD AMENDED
of Jerry Lee Roy Berry,	)	EXHIBIT LIST
CAPTAIN'S WHEEL RESORT, INC.,)	
an Idaho Corporation,)	
)	
Plaintiff,)	
)	
v.)	
)	
MICHAEL B. MCFARLAND, MICHAEL)	
B. MCFARLAND, P.A., and KAREN)	
ZIMMERMAN,)	
)	
Defendant.)	
)	

COMES NOW the Plaintiffs and submit the following as a
second amended list of exhibits to be used in trial. Exhibits
97 and 98 are served to opposing counsel herewith but not filed
with the clerk:

Pls	Def's	Description	Admit by stip	offered	Rec'd	Refused	Reserve ruling
1		Marriage license					
2		Letters of Personal Rep					
3		Articles of Incorporation					
4		Minutes of Organizational meeting					
5		Bylaws by Nordstrom & Campbell (Apr. 15, 1996)					
6		Stock Purchase Agmt (Nordstrom to Berry)					
7		Resignation by S. Nordstrom					
8		Resignation by N. Nordstrom					
9		Promissory Note (pd in full)					
10		Check to Berry (\$40,000.00)					
11		Receipt for \$40,000.00					
12		Check to Campbell (\$40,000)					
13		Check to Berry (\$60,000.00)					
14		Check to Campbell (\$60,000)					
15		Check to Zimmerman (\$823.50)					

Pls	Defs	Description	Admit by stip	offered	Rec'd	Refused	Reserve ruling
16		Check to Zimmerman (\$301)					
17		Resolution in Lieu of Special mtng (Aug. 7, 2003)					
18		To Whom It May Concern: ltr (Aug. 11, 2003)					
19		Letter to Jerry Berry from Daugherty 9/29/03					
20		Stock Purchase Agreement Campbell to Berry					
21		Letter to Jerry Berry from Daugherty Apr 28, 2004					
22		Letter to Daugherty August 1, 2004					
23		Stock Purchase & Sale Agreement Berry to Zimmerman & McFarland					
24		Unsigned Stock Purchase & Sale Agmt, Berry to Zimmerman & McFarland as trustees					
25		Loan Agmt with Stock as Collateral					

Pls	Def's	Description	Admit by stip	offered	Rac'd	Refused	Reserve ruling
26		Reinstatement 7-18-06					
27		Notice of Special Meeting Shareholders 10-15-06					
28		Waiver of Notice - Shareholders					
29		Minutes of Shareholder Meeting					
30		Notice of Special Meeting Directors 10-15-06					
31		Waiver of Notice - Directors 10-15-06					
32		Minutes of Director Meeting					
33		Bylaws (unsigned) with handwriting in Blanks					
34		Resolution (unsigned)					
35		Resolution (unsigned)					
36		Nov 16, 2006 letter from McFarland with Notice of Special Meeting for 11/18					

Pls	Defs	Description	Admit by stip	offered	Rec'd	Refused	Reserve ruling
37		Memo McLaughlin 11/22/06					
38		11/18/06 Letter from Karletta					
39		Objection to Notice of Special Meeting 11/18/06					
40		Proposed Resolution (Karletta)					
41		November 17, 2006 letter from Karletta					
42		Letter to McFarland November 21, 2006					
43		Letter from McFarland November 29, 2006					
44		Memo McLaughlin 11/30/06					
45		Transcript of 11/29/09 special board meeting					
46		Minutes of 11/29/06 mtng					
47		e-mail Finney to McFarland 12/11/06					
48		e-mail Finney to McFarland 1/12/07					

Pls	Defts	Description	Admit by stip	offered	Rec'd	Refused	Reserve ruling
49		Letter from McFarland January 28, 2007					
50		Letter from McFarland February 5, 2007					
51		Letter to McFarland February 14, 2007					
52		Objection to Special Meeting of Directors of Captain's Wheel Resort, Inc.					
53		Memo McLaughlin February 15, 2007					
54		Transcript of Minutes of February 15, 2007 Board Meeting					
55		Minutes of Special Meeting of Directors of Captain's Wheel Resort, Inc. 2/16/2007					

Pls	Defs	Description	Admit by stip	offered	Rec'd	Refused	Reserve ruling
56		Resolution in Lieu of Special Meeting of Board of Directors of Captain's Wheel Resort, Inc. February 17, 2007					
57		Resolution in Lieu of Special Meeting of Board of Directors of Captain's Wheel Resort, Inc. February 17, 2007					
58		Special Meeting of Board of Directors of Captain's Wheel Resort, Inc. February 20, 2007					
59		Agreement to sell stock to Marie Streater February 17, 2007					
60		Agreement to sell stock to Monnie Cripe February 17, 2007					
61		Transfer certificate August 19, 2003					

Pls	Defs	Description	Admit by stip	offered	Rec'd	Refused	Reserve ruling
62		Transfer stub August 19, 2004					
63		Transfer certificate September 22, 2000					
64		Transfer certificate August 19, 2003					
65		Transfer stub August 19, 2003					
66		Transfer certificate September 22, 2000					
67		Transfer stub September 22, 2000					
68		Transfer certificate October 15, 2006					
69		Transfer stub January 1, 2006					
70		Transfer certificate October 15, 2006					
71		Transfer certificate February 21, 2007					
72		Transfer stub February 21, 2007					

Pls	Defs	Description	Admit by stip	offered	Rec'd	Refused	Reserve ruling
73		Transfer certificate February 21, 2007					
74		Transfer stub February 21, 2007					
75		Transfer certificate (no date)					
76		McFarland's Answer; Counterclaim; Demand for Jury Trial April 13, 2007					
77		Affidavit of Michael B. McFarland in Opposition to Plaintiff's Motion to Amend Complaint for Punitive Damages					
78		Letter from Whelan December 30, 2009					
79		Captain's Wheel Resort business card					
80		Captain's Wheel Resort Profit and Loss Statement, January through December 2007					

Pls	Defs	Description	Admit by stip	offered	Rec'd	Refused	Reserve ruling
81		Captain's Wheel Resort Profit and Loss Statement, January through December 2008					
82		Captain's Wheel Resort Profit and Loss Statement, January through December 2009					
83		Captain's Wheel Resort Profit and Loss Statement, January 1 - 5, 2010					
84		Letter from McCall and Landwehr, P.A. April 20, 2004					
85		Captain's Wheel Resort Assets and Liabilities and Equity balance sheet December 31, 2003					
86		Captain's Wheel Resort Income Statement for year ended December 31, 2003					
87		McFarland's meal tickets					

Pls	Defs	Description	Admit by stip	offered	Rec'd	Refused	Reserve ruling
88		David A Noonan's curriculum vitae					
89		Appraisal of The Captain's Wheel Resort October 9, 2009					
90		Deposition of Michael B. McFarland December 18, 2009					
91		Deposition of Michael B. McFarland, Volume II, December 23, 2009					
92		Deposition of Karen Zimmerman December 21, 2009					
93		Picture of the Captain's Wheel Resort					
94		Idaho Rules of Professional Conduct					
95		Idaho Rule Professional Conduct 1.7					
96		Idaho Rule Professional Conduct 1.8					
97		Idaho Rule Professional Conduct 1.7, with comments					

ORIGINAL

**REX A. FINNEY
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Phone: (208) 263-7712
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ISB No. 6313**

STATE OF IDAHO }
COUNTY OF KOOTENAI } SS
FILED:

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2010 JAN 19 AM 9:06

CLERK DISTRICT COURT

DEPUTY

TMB

**IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF KOOTENAI**

KARLETTA GRACE BERRY, a widow,	)	Case No. CV-2007-0002409
KARLETTA GRACE BERRY, Personal)	
Representative of the Estate	)	SUBPOENA
of Jerry Lee Roy Berry,)	
CAPTAIN'S WHEEL RESORT, INC.,)	
an Idaho Corporation,)	
)	
Plaintiffs,)	
)	
v.)	
)	
MICHAEL B. MCFARLAND, MICHAEL)	
B. MCFARLAND, P.A., and KAREN)	
ZIMMERMAN,)	
)	
Defendants.)	
)	

**The State Of Idaho To: Theresa Clifton
1903 W#. Boekel Rd
Rathdrum, Idaho 83858**

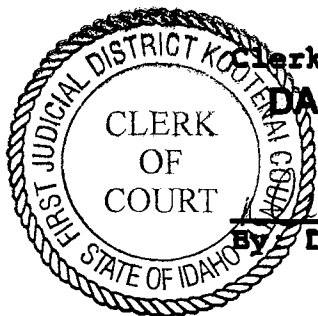
**You are hereby commanded to appear before District Judge
Charles W. Hosack of the above entitled court at Courtroom #12**

at the Kootenai County Safety Building, 5500 N. Government Way, Coeur d'Alene, Idaho on January 20 and 21, 2010 and at 9:00 a.m. as a witness for the Plaintiffs in the above entitled action.

You are further notified that if you fail to appear at the place and time specified above, that you may be held in contempt of court and that the aggrieved party may recover from you the sum of \$100.00 and all damages which the parties may sustain by your failure to attend as a witness.

Dated this 19th day of January 2010.

By order of the court.



Clerk of Court
DANIEL J. ENGLISH

[Handwritten Signature]
By Deputy Clerk

ORIGINAL

STATE OF IDAHO
COUNTY OF KOOTENAI } SS
FILED:

REX A. FINNEY
FINNEY FINNEY & FINNEY, P.A.
Attorneys at Law
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120 East Lake Street, Suite 317
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Phone: (208) 263-7712
Fax: (208) 263-8211
ISB No. 6313

2010 JAN 19 PM 3:53

CLERK DISTRICT COURT
Joanna Parker
DEPUTY TMB

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF KOOTENAI

KARLETTA GRACE BERRY, a widow,	)	Case No. CV-2007-0002409
KARLETTA GRACE BERRY, Personal)	
Representative of the Estate	)	SUBPOENA
of Jerry Lee Roy Berry,)	
CAPTAIN'S WHEEL RESORT, INC.,)	
an Idaho Corporation,)	
)	
Plaintiffs,)	
)	
v.)	
)	
MICHAEL B. MCFARLAND, MICHAEL)	
B. MCFARLAND, P.A., and KAREN)	
ZIMMERMAN,)	
)	
Defendants.)	

The State Of Idaho To: Scott Robertson

You are hereby commanded to appear before District Judge
Charles W. Hosack of the above entitled court at Courtroom #12
at the Kootenai County Safety Building, 5500 N. Government Way,

Coeur d'Alene, Idaho on January 21 and 22, 2010 and January 25, 26, 27, 28 and 29, 2010 at 9:00 a.m. as a witness for the Plaintiffs in the above entitled action.

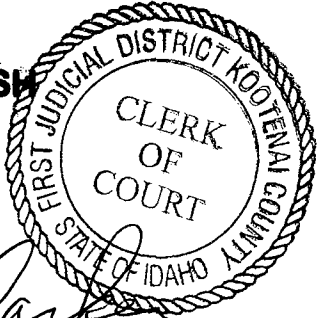
You are further notified that if you fail to appear at the place and time specified above, that you may be held in contempt of court and that the aggrieved party may recover from you the sum of \$100.00 and all damages which the parties may sustain by your failure to attend as a witness.

Dated this 15 day of January 2010.

By order of the court.

DANIEL J. ENGLISH

Clerk of Court


Joanna Barker
By Deputy Clerk

John P. Whelan, P.C.
Attorney at Law
213 N. 4th Street
Coeur d' Alene, Idaho 83814
Telephone: (208) 664-5891
Facsimile: (208) 664-2240
ISB No. 6083

1/29/10
8:30 AM

John P. Whelan
TmB

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE STATE OF
IDAHO, IN AND FOR THE COUNTY OF KOOTENAI

KARLETTA GRACE BERRY, a widow,
KARLETTA GRACE BERRY, Personal
Representative of the Estate of Jerry
Lee Roy Berry, CAPTAIN'S WHEEL
RESORT, INC., an Idaho Corporation,

Plaintiffs,

vs.

MICHAEL B. MCFARLAND, MICHAEL B.
MCFARLAND, P.A., and KAREN
ZIMMERMAN,

Defendants.

Case No. CV-07-2409

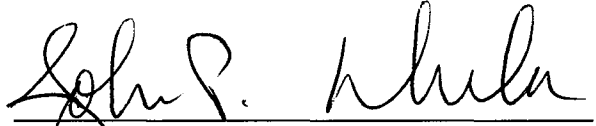
DEFENDANTS' SUPPLEMENTAL EXHIBIT
LIST

Defendants, Michael B. McFarland, Michael B. McFarland, P.A. and Karen Zimmerman, may offer the exhibits identified in the attached Defendants' Supplemental Exhibit List and may also offer such evidence as has been identified by Plaintiffs in their evidence disclosure statement as necessary.

DEFENDANTS' SUPPLEMENTAL EXHIBIT LIST-1

Dated: 1/19/10

JOHN P. WHELAN, P.C.

A handwritten signature in cursive script, reading "John P. Whelan", written over a horizontal line.

John P. Whelan

Attorney for Defendants

DEFENDANTS' SUPPLEMENTAL EXHIBIT LIST-2

DEFENDANTS' EXHIBIT LIST

Case No. CV-07-2409

Date: January 14, 2010

Title of Case: Karletta Grace Berry, et al. v. Michael B. McFarland, et al.

_____ Plaintiff's Exhibits (list numerically)

X Defendant's Exhibits (list alphabetically)

_____ Third Party Exhibits State Party:

No.	Description	Admitted by Stip	Offered	Rec'd	Refused	Reserve Ruling
A	Receipt for \$40,000.00 dated 7/25/03	✓				
B	Receipt for \$60,000.00 dated 8/4/03	✓				
C	Articles of Incorporation and yearly filings of Captain's Wheel Resort, Inc.	↓				
D	Bylaws					
E	Corporate Minutes—unsigned					
F	Corporate Minutes, April 15, 1997					
G	Resolution of September 22, 2000/Resignations	↓				

DEFENDANTS' SUPPLEMENTAL EXHIBIT LIST-3

	Resolution August 7, 203					
I	Stock Purchase Agreement Berry/Campbell					
J	Stock Purchase and Sale Agreement					
K	Special Meeting Notices					
L	Waiver of Notice of 10/15/06					
M	Minutes of Special Meeting					
N	Waiver of Notice of Special Meeting/Notice					
O	Minutes dated 10/15/06					
P	Minutes dated Nov. 29, 2006					
Q	Letter to Finney, Feb. 5, 2007 with notice					
R	Minutes dated Feb. 16, 2007					
S	Objection to Special Meeting					
T	Resolutions in lieu					
U	Offer/Acceptance of stock					
V	Stock Purchase Agreement					
W	Stock Purchase and Sale Agreement					
X	Stock Certificates					
Y	Letter from Finney, Feb. 14, 2007					
Z	Letter to Finney, Feb. 5, 2007					
AA	Letter to Finney, Jan. 8, 2007	✓				

DEFENDANTS' SUPPLEMENTAL EXHIBIT LIST-4

B	Emails					
CC	Letter to Finney, Nov. 29, 2006	✓				
DD	Letter from Finney, Nov. 21, 2006	✓				
EE	Objection to notice					
FF	Letter to Board, Nov. 17, 2006					
GG	Letter to McFarland, Nov. 18, 2006					
HH	Letter to McFarland, Nov. 14, 2006					
II	McFarland letter, Nov. 16, 2006					
JJ	Letter from Daugharty dated April 28, 2004					
KK	Demand note					
LL	August 11, 2003 receipt					
MM	Unsigned minutes	✓				
NN	Wells Fargo letter dated January 17, 2007					
OO	Miscellaneous corporate records					
PP	Fax and memo from Daugharty's office					
QQ	Letter from Daugharty, February 21, 2006	✓				

DEFENDANTS' SUPPLEMENTAL EXHIBIT LIST-5

		Admitted	Offered	Recd	Refused	
S	Summary of costs and expenses advanced by McFarland	✓	✓			
TT	2006 Corporate Tax Returns	✓	✓			
UU	2007 Corporate Tax Returns	✓	✓			
VV	2008 Corporate Tax Returns	✓	✓			
WW	2007 Profit and Loss Statement	✓	✓			
XX	2008 Profit and Loss Statement	✓	✓			
YY	2009 Profit and Loss Statement	✓	✓			
ZZ	2010 Profit and Loss Statement	✓	✓			
AAA	Letter and attachments from McCall and Landwehr, P.A. dated April 20, 2004	X	✓			
BBB	Tape of special meeting held on November 29, 2006 (not duplicated)		✓		✓	
CCC	Transcript of minutes of November 29, 2006 special board meeting	✓	✓			
DDD	Tape of February 15, 2007 board meeting (not duplicated)		✓		✓	

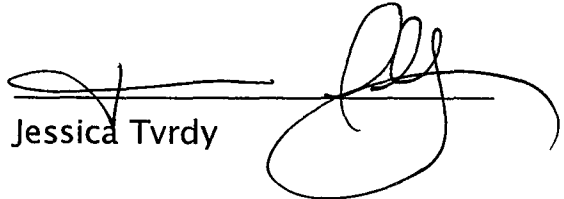
DEFENDANTS' SUPPLEMENTAL EXHIBIT LIST-6

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 14TH day of January, 2010, I caused to be served a true and correct copy of the foregoing by the method indicated below, and addressed as indicated below:

Rex A. Finney
Finney, Finney & Finney
120 East Lake Street, Suite 317
Sandpoint, ID 83865

- U.S. Mail, Postage Prepaid
- Hand Delivered
- Overnight Mail
- Facsimile to: (208) 263-8211


Jessica Tvrdy

STATE OF IDAHO
COUNTY OF KOOTENAI
FILED: 1/19/10
AT 8:30 O'CLOCK A.M.

REX A. FINNEY
FINNEY FINNEY & FINNEY, P.A.
Attorneys at Law
Old Power House Building
120 East Lake Street, Suite 317
Sandpoint, Idaho 83864
Phone: (208) 263-7712
Fax: (208) 263-8211
ISB No. 6313

CLERK, DISTRICT COURT
J. Lee - Blythe
TMB

ORIGINAL

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF KOOTENAI

KARLETTA GRACE BERRY, a widow,	)	Case No. CV-2007-2409
KARLETTA GRACE BERRY, Personal)	
Representative of the Estate	)	PLAINTIFFS' FOURTH AMENDED
of Jerry Lee Roy Berry,	)	EXHIBIT LIST
CAPTAIN'S WHEEL RESORT, INC.,)	
an Idaho Corporation,)	
)	
Plaintiff,)	
)	
v.)	
)	
MICHAEL B. MCFARLAND, MICHAEL)	
B. MCFARLAND, P.A., and KAREN)	
ZIMMERMAN,)	
)	
Defendant.)	
)	

COMES NOW the Plaintiffs and submit the following as a
second amended list of exhibits, with Plaintiffs' Exhibits # 1-
100 to be used in trial. Exhibits 99 and 100 are served to
opposing counsel herewith but not filed with the clerk:

Pls	Defs	Description	Admit by stip	offered	Rec'd	Refused	Reserve ruling
1		Marriage license	↓				
2		Letters of Personal Rep	↓				
3		Articles of Incorporation	✓				
4		Minutes of Organizational meeting	✓				
5		Bylaws by Nordstrom & Campbell (Apr. 15, 1996)	✓				
6		Stock Purchase Agmt (Nordstrom to Berry)	↓				
7		Resignation by S. Nordstrom	↓				
8		Resignation by N. Nordstrom	↓				
9		Promissory Note (pd in full)	↓				
10		Check to Berry (\$40,000.00)	↓				
11		Receipt for \$40,000.00	↓				
12		Check to Campbell (\$40,000)	↓				
13		Check to Berry (\$60,000.00)	↓				
14		Check to Campbell (\$60,000)	↓				
15		Check to Zimmerman (\$823.50)	↓				
16		Check to Zimmerman (\$301)	↓				
17		Resolution in Lieu of Special mtng (Aug. 7, 2003)	✓				
18		To Whom It May Concern: ltr (Aug. 11, 2003)	↓				
19		Letter to Jerry Berry from Daugherty 9/29/03	↓				
20		Stock Purchase Agreement Campbell to Berry	✓				
21		Letter to Jerry Berry from Daugherty Apr 28, 2004	↓				
22		Letter to Daugherty August 1, 2004	↓				
23		Stock Purchase & Sale Agreement Berry to Zimmerman & McFarland	✓				
24		Unsigned Stock Purchase & Sale Agmt, Berry to Zimmerman & McFarland as trustees	✓				
25		Loan Agmt with Stock as Collateral	↓				
26		Reinstatement 7-18-06	↓				
27		Notice of Special Meeting Shareholders 10-15-06	↓				
28		Waiver of Notice - Shareholders	✓				

Pls	Defs	Description	Admit by stip	offered	Rec'd	Refused	Reserve ruling
29		Minutes of Shareholder Meeting	✓				
30		Notice of Special Meeting Directors 10-15-06	✓				
31		Waiver of Notice - Directors 10-15-06	✓				
32		Minutes of Director Meeting	✓				
33		Bylaws (unsigned) with handwriting in Blanks	✓				
34		Resolution (unsigned)	✓				
35		Resolution (unsigned)	✓				
36		Nov 16, 2006 letter from McFarland with Notice of Special Meeting for 11/18	✓				
37		Memo McLaughlin 11/22/06		✓		Ⓢ	
38		11/18/06 Letter from Karletta	✓				
39		Objection to Notice of Special Meeting 11/18/06	✓				
40		Proposed Resolution (Karletta)	✓				
41		November 17, 2006 letter from Karletta	✓				
42		Letter to McFarland November 21, 2006	✓				
43		Letter from McFarland November 29, 2006	✓			Ⓢ	
44		Memo McLaughlin 11/30/06		✓		Ⓢ	
45		Transcript of 11/29/09 special board meeting	✓				
46		Minutes of 11/29/06 mtng	✓				
47		e-mail Finney to McFarland 12/11/06	✓				
48		e-mail Finney to McFarland 1/12/07	✓				
49		Letter from McFarland January 28, 2007	✓				
50		Letter from McFarland February 5, 2007	✓				
51		Letter to McFarland February 14, 2007	✓				
52		Objection to Special Meeting of Directors of Captain's Wheel Resort, Inc.	✓				

Pls	Defs	Description	Admit by stip	offered	Rec'd	Refused	Reserve ruling
70		Transfer certificate October 15, 2006					
71		Transfer certificate February 21, 2007					
72		Transfer stub February 21, 2007					
73		Transfer certificate February 21, 2007					
74		Transfer stub February 21, 2007					
75		Transfer certificate (no date)					
76		McFarland's Answer; Counterclaim; Demand for Jury Trial April 13, 2007					
77		Affidavit of Michael B. McFarland in Opposition to Plaintiff's Motion to Amend Complaint for Punitive Damages					
78		Letter from Whelan December 30, 2009					
79		Captain's Wheel Resort business card					
80		Captain's Wheel Resort Profit and Loss Statement, January through December 2007					
81		Captain's Wheel Resort Profit and Loss Statement, January through December 2008					
82		Captain's Wheel Resort Profit and Loss Statement, January through December 2009					
83		Captain's Wheel Resort Profit and Loss Statement, January 1 - 5, 2010					
84		Letter from McCall and Landwehr, P.A. April 20, 2004					
85		Captain's Wheel Resort Assets and Liabilities and Equity balance sheet December 31, 2003	✓				

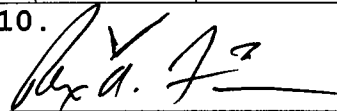
PLAINTIFFS' FOURTH AMENDED EXHIBIT LIST - 5

Berry v. McFarland, Kootenai County, Idaho: CV-07-2409

Pls	Defs	Description	Admit by stip	offered	Rec'd	Refused	Reserve ruling
86		Captain's Wheel Resort Income Statement for year ended December 31, 2003	✓				
87A		McFarland's meal tickets	✓				
88		David A Noonan's curriculum vitae		✓		✓	
89		Appraisal of The Captain's Wheel Resort October 9, 2009	✓				
90		Deposition of Michael B. McFarland December 18, 2009		✓		✓	
91		Deposition of Michael B. McFarland, Volume II, December 23, 2009					
92		Deposition of Karen Zimmerman December 21, 2009					
93		Picture of the Captain's Wheel Resort	✓				
94		Idaho Rules of Professional Conduct		✓		✓	
95		Idaho Rule Professional Conduct 1.7		✓		✓	
96		Idaho Rule Professional Conduct 1.8		✓		✓	
97		Idaho Rule Professional Conduct 1.7, with comments		✓		✓	
98		Idaho Rule Professional Conduct 1.8 with comments		✓		✓	
99		Michael B. McFarland, P.A. December 7, 2006 fax to Secretary of State (as filed)	✓				
100	SS	Summary of Loans to Captain's Wheel 10/16/06-12/21/09		✓		✓	
101		Business card - Wheel	✓				
102		Business card - Mr. McFarland	✓				

DATED this 17 day of January, 2010.

103 Photos - offered not Admitted



REX A. FINNEY
Attorney at Law

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was served by facsimile, this 17 day of January, 2010, and was delivered as follows:

J.P. WHELAN P.C.

Attorney at law

213 N. 4th Street

Coeur d'Alene, Idaho 83814

[x]Via Facsimile: (208) 664-2240 (together with Exhibit 99 and 100)

By: _____

[Handwritten Signature]

Court Minutes:

Session: HOSACK012610A
Session Date: 01/26/2010
Judge: Hosack, Charles
Reporter:

Division: Div1
Session Time: 08:37

Courtroom: local

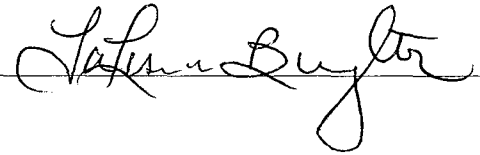
Clerk(s): Burrington, Talisa

State Attorney(s):

Public Defender(s):

Prob. Officer(s):

Court interpreter(s):



Case ID: 0002

Case number: CV2007-2409
Plaintiff: BERRY, KARLETTA
Plaintiff Attorney:
Defendant: MCFARLAND, MICHAEL
Pers. Attorney:
Co-Defendant(s):
State Attorney:
Public Defender:
Additional audio and annotations can be found in case: 0003.

01/26/2010

09:39:37

Case called

09:39:37

Recording Started:

09:39:43

Judge: Hosack, Charles
JURY TRIAL - DAY SIX

09:40:19 **Plaintiff Attorney:**
REX FINNEY - PROCEED

09:41:19 **Stop recording**

Court Minutes:

Session: HOSACK012610A
Session Date: 01/26/2010
Judge: Hosack, Charles
Reporter:

Division: Div1
Session Time: 08:37

Courtroom: local

Clerk(s): Burrington, Talisa

State Attorney(s):

Public Defender(s):

Prob. Officer(s):

Court interpreter(s):

Case ID: 0003

Case number: CV2007-2409
Plaintiff: BERRY, KARLETTA
Plaintiff Attorney:
Defendant: MCFARLAND, MICHAEL
Pers. Attorney: Walker, Glen
Co-Defendant(s):
State Attorney:
Public Defender:
Previous audio and annotations can be found in case: 0002
Additional audio and annotations can be found in case: 0004.

01/26/2010

09:41:21

Case recalled

09:41:21

Recording Started:

09:41:29

Add Ins: WHELAN, JOHN
RECALLS MICHAEL MCFARLAND AS WITNESS

09:41:47 **Defendant: MCFARLAND, MICHAEL**
ITEMS ON RECEIPT THAT I PAID FOR, CHARGE FOR
COPIES, FIRST LOAN TO THE CORP.

09:42:48 MOST OF THE REST OF THE ENTRIES ARE JUST
DESCRIBED AS LOANS. EXCEPT FOR

09:43:08 SUPPLIES - STAPLERS ETC. CASH ENTRIES WERE USED
TO PUT INTO THE ATM CASH

09:43:36 MACHINE. TAX PREPARATION WAS PAID THROUGH MY
ACCOUNT AND THEN PUT ON THIS

09:44:17 RECEIPT. PAID FOR RENEWAL OF LIQUOR ACCOUNT. IF
IT JUST SAYS LOAN IT WAS TO

09:44:39 CAPTAINS WHEEL BANKING ACCOUNT. YES PAPER TRAIL
EXCEPT FOR 1.73 FOR POSTAGE

09:45:10 AND A COUPLE OF OTHER ITEMS I COULD NOT LOCATE.
YES SEVERAL DOZEN ENTRIES

09:45:31 ENTITLED LOANS.

09:46:12 **Add Ins: WHELAN, JOHN**
CX

09:46:20 **Defendant: MCFARLAND, MICHAEL**
12/20 CASH LOAN ENTRY - 400 DOLLARS THAT IS ONE
I COULD NOT LOCATE

09:46:59 DOCUMENTATION YET - WE HAD NOT BECOME
COMPUTERIZED AT THE WHEEL YET. MY

09:47:21 RECOLLECTION - CHRISTMAS BONUSES. HAD STOCKINGS
ALONG THE WALL AND AS I

09:47:44 RECALL I GAVE 50 CASH TO THE BULK OF EMPLOYEES
AND 100 TO MONNIE AND MARIE.

09:48:06

09:48:09 MONEY CAME FROM VARIOUS SOURCES, SOME OF THESE
ITEMS I HAVE COMPUTER COPIES

09:48:33 OF CHECKS THAT I DEPOSITED AND SOME RECEIPTS
FROM WELLS FARGO BANK. I USE

09:49:10 QUICK BOOKS NOW - USE FOR PERSONAL AND BUSINESS
ACCOUNTS. ENTRIES ENTERED

09:50:00 INTO COMPUTER. IF I HAD A RECEIPT THAT WOULD GO
IN A DIFFERENT FILE. TWO

09:50:29 RENEWALS FOR LIQ LICENSE.

09:51:43 ANY ENTRY WAS MADE INTO QUICK BOOKS. SOFTWARE
PROGRAM TO KEEP TRACK OF

09:52:15 EXPENSES. SYSTEM IT SELF PRINTS OUT CHECKS. SOME
OF THESE LOANS WERE

09:52:46 TRANSFERS FROM LINE OF CREDITS. WOULD NOT HAVE
PAPER TRIAL IN THOSE AS THEY

09:53:49 WERE ELECTRONIC TRANSFERS. YES THIS WAS A

09:54:37 RUNNING LOG. I FOUND THAT I MISSED
TWO ENTRIES AUG 2007 FOR TAX PREPERATION 159.00
AND ALSO 03/23/09 5000 LINE
09:55:21 OF CREDIT, EVERYTHING ELSE IS IN CHRONIGICAL
ORDER EXCEPT THESE TWO THAT I
09:55:44 WROTE. I WOULD GET NOTICES OF OVERDRAFT FROM
WELLS FARGO, HUNDREDS OF
09:56:06 DOLLARS. ALSO CAN GET ON WELLS FARGO
ELECTRONICALLY AND FIRST THING IN THE
09:56:27 MORNING I WOULD GET ON AND TO MY DISMAY WE WERE
OVERDRAWN.
09:58:05 EXHIBIT SS
09:58:12 **Add Ins: FINNEY, REX**
OBJECT
09:58:18 **Judge: Hosack, Charles**
OVER RULED EXHIBIT SS ADMITTED INTO EVIDENCE
09:58:33 **Add Ins: WHELAN, JOHN**
RE CX
09:58:40 **Defendant: MCFARLAND, MICHAEL**
YES TOTAL IS OVER 184 THOUSAND THAT I HAVE PUT
INTO THE WHEEL IN EXPENSES.
09:59:09 PAID BERNHARDT BUCK 1/15/10 - THEY ARE
ACCOUNTANTS, THAT IS FOR PAYROLL
09:59:35 SERVICES AND PRIOR BALANCES. THERE WAS A PAST
BALANCE FOR PRIOR SERVICES.
10:00:02 1311.00 WAS TOTAL TO THEM, SAME DAY I ADVANCED
WITHHOLDING TAX - THAT WAS
10:01:16 1013.00 ON 1/15/10. NORTH IDAHO PROPANE APPROX
370.00 I JUST PAID THAT
10:01:55 RECENTLY WITHIN THE LAST TEN DAYS. TOTAL
ADVANCES IS 184,000 PLUS 1311.00
10:02:32 PLUS ANOTHER THOUSAND - 187,000 IS ABOUT THE
GRAND TOTAL, THESE WERE ALL
10:02:56 ADVANCED TO THE WHEEL FOR NECESSARY EXPENSES.
CORP HAD A LINE OF CREDIT AND
10:03:23 THAT WAS TIED TO JERRY BERRY AND THAT WAS MAXED
OUT. IT HAS STAYED RIGHT AT 5
10:03:57 THOUSAND DOLLARS. I ATTEMPTED TO GET A LINE OF
CREDIT AT WELLS FARGO, ADVISED
10:04:24 I COULDNT GET ONE, KARLETTA OBJECTED AND COULD
NOT GET IT. IF I WOULDNT HAVE
10:04:54 DONE THESE ADVANCES A TAX LIEN WOULD HAVE BEEN

10:05:15 FILES, SBA LOAN FORECLOSED ON
AND LOST THROUGH FORECLOSURE. COULD NOT SEE HOW
IT COULD BE PROFITABLE, IT
10:05:52 WAS BARELY PROFITABLE PRIOR TO JERRY'S DEATH.
THAT WAS WHY WE WANTED TO SELL
10:06:13 IT. IT TOOK ME SOME TIME TO FIGURE OUT THE FIXED
COSTS. JUST CLOSING IT WOULD
10:06:35 HAVE BEEN RECKLESS, FELT I HAD A OBLIGATION TO
DO WHAT I COULD TO KEEP IT
10:06:52 RUNNING. YES IF IT WAS PROFITABLE WE WOULD HAVE
GOTTEN A BETTER PRICE FOR
10:07:21 SELLING. I COULD NOT AVOID THESE ADVANCES. IT
BECAME APPARENT THAT THERE SO
10:07:51 MUCH FIXED COSTS JUST TO COVER THE BASIC COSTS -
HEAT ETC. THAT DIDNT EVEN
10:08:13 INCLUDE THE FOOD. ABOUT 7 THOUSAND AND 8 THOUSAND
FIXED COSTS EVEN IF ITS
10:08:33 CLOSED. IF IT MADE MORE THAN 7 THOUSAND A MONTH
IT WAS ADVANTAGOUS TO KEEP IT
10:09:00 OPEN. IN DEC IT GROSSED JUST OVER TEN THOUSAND.
YES WE WANTED TO GET THIS
10:09:22 PROPRTY LISTED AND SOLD. WHEN WE ENTERED INTO
THIS AGREEMENT IN THE VERY
10:09:40 FIRST PLACE WAS TO SELL IT, THAT IS WHAT WE WERE
ATTRACTED TO, IT WAS A
10:10:00 INVESTMENT, NO INTENTION TO MANAGE A RESTAURANT.
YES RESITANCE TO SELLING IT.
10:10:26 KARLETTA OBJECTED AND WANTED TO RUN IT HERSELF.
WE HAD A RESOLUTION TO SELL
10:10:56 IT AND THEN KARLETTA SUED US, WHEN ITS IN
LITIGATION CREATES A CLOUD ON
10:11:18 TITLE, NO ONE WILL BUY INTO THAT SITUATION.
DIDNT REALLY ABANDON THE IDEA,
10:11:52 TALKED TO FOLKS AND NOW ITS THREE YEARS LATER.
NO KARLETTA NEVER OFFERED TO
10:12:10 HELP WITH THE ADVANCES, I JUST RECENTLY ADVISED
HER ATTORNEY. SHE HAS MADE
10:12:38 ALL TYPES OF FBRICATIONS TOWARDS ME, ALL TYPES
OF ALLEGATIONS AGAINST MY
10:13:01 CHARACTER. EXHIBIT TT IS A COPY OF 2006 CORP TAX
RETURN FOR THE CAPTAINS
10:13:22 WHEEL. YES IT WAS PROFESSIONALLY PREPARED BY AN
ACCOUNTANT. DIFFICULTY ABOUT
10:14:28 TE 2006 RECORDS. YES FOUR K1 SCHEDULES. TO THE
BEST OF MY KNOWLEDGE THAT WAS
10:15:01 SENT TO KARLETTA BERRY. DIFFERENCE BETWEEN CASH

10:15:47 FLOW AND ACTUAL INCOME. LOTS
10:16:17 OF THINGS THAT ARE DEDUCTABLE. ORDINARY
10:16:46 EXPENSES, PLUS DEPRECIATION. EXHIBIT
10:17:22 UU IS NEXT - ANOTHER TAX RETURN FOR 2007,
10:17:42 PREPARED BY MS. BUCK. LOSS WAS
10:18:05 42,000 WHICH WAS TEN THOUSAND MORE LOSS THAN
10:18:26 2006. PAYROLL WAS ONLY 46
10:18:51 THOUSAND IN 2006 AND IN 2007 PAYROLL WAS OVER
10:19:17 100 THOUSAND, THAT IS WHAT
10:19:49 HAPPENS WHEN YOU PAY PEOPLE ON BOARD. I SUSPECT
10:20:11 ALL THE PAYROLL AND ALL THE
10:20:35 PROFIT HAD NOT BEEN REPORTED IN 2006. I CHANGED
10:20:55 THAT AND REQUIRED EVERYTHING
10:21:31 TO BE ON BOARD. I COULD HAVE BEEN HELD
10:21:48 RESPONSIBLE, NOT INTERESTED IN RUNNING
10:22:32 A ILLEGAL BUSINESS. EXHIBIT VV IS 2008 TAX
10:23:05 RETURN, LOSS 75 THOUSAND. EXHIBIT
10:23:31 WW IS COPY OF PRINT OUT OF PROFIT/LOSS FROM
10:24:04 QUICK BOOKS OPERATING SYSTEM THAT
10:24:33 WAS INITIATED AT CAPTAINS WHEEL AFTER I TOOK
10:25:00 OVER, THEY STARTED USING IT JAN
10:25:19 2007. EXHIBIT XX IS ANOTHER PROFIT/LOSS FOR
10:27:16 2008. EXHIBIT YY IS PROFIT LOSS
FOR 2009. EXHIBIT ZZ IS PROFIT/LOSS FOR THE
MONTH OF JAN WHEN WE CLOSED THE
BUSINESS. YES THIS REFLECTS THE NORMAL OPERATING
EXPENSES. EXCEPT IN 2007 LIQ
LICENSE IS NOT SHOWN AS I PAID IT DIRECTLY AND
ITS NOT SHOWN ON QUICK BOOKS.
MONNIE AND MARIE MAINTAINED THESE BOOKS. EXHIBIT
AAA - LETTER TO JERRY AND
KARLETTA FROM THE ACCOUNTANTS TALKING ABOUT
PROCEDURES AND ASSET SUMMARIES.
EQUITY IS SHOWN. MR. BERRY DID NOT TELL US THAT
THERE WAS A NEGATIVE STOCK
HOLDER AMOUNT BY 78,000 - UPSIDE DOWN ON THE
BOOKS. NEGATIVE FIGURE TO ALMOST
80 THOUSAND. JERRY SAID TO US THAT THIS WAS A
BREAK EVEN OPERATION, NOT TO
LOOK AT IT AS INCOME BUT TO LOOK AT IT AS A
INVESTMENT. I ONLY SEEN THIS
EXHIBIT IN THE LAST YEAR. WE REQUESTED DOCUMENTS
FROM PLAINTIFF AND FROM THE
ACCOUNTANT. IT WAS THEN POINTED OUT TO ME.
EXHIBIT CCC IS TAPE OF THE
MEETING.

10:27:56 **Add Ins: FINNEY, REX**
CX OF MICHAEL MCFARLAND

10:28:08 **Defendant: MCFARLAND, MICHAEL**
10/15/ MEETING - YES JERRY WAS CLOSE TO DEATH.
WHAT IS IN THE MINUTE BOOK IS

10:28:41 WHAT WE DID. JERRY WAS STILL ALIVE AND WAS
RUNNING IT. REVIEWS MY AFFIDAVIT

10:29:21 PAGE 6 PARA 8 - READS IT TO THE JURY PANEL.
REVIEWS EXHIBIT 77.WE WANTED IT I

10:31:37 WRITING, WE KNEW WE DID NOT KNOW HOW MUCH TIME
JERRY HAD. PURPOSE OF THE

10:32:21 10/15 MEETING WAS NOT TO DISCUSS THE SALE OF THE
BUSINESS. AFTER HE DIED HE

10:32:38 HELD A MEETING. JULY 2003 JERRY ANTICIPATED
SELLING IT FOR A FEW YEARS, HE

10:33:05 TALKED OF SELLING IT IN 2005 WHEN DAVID JOHNSTON
TESTIFIED ABOUT THAT. WE

10:33:23 TALKED ABOUT IT NUMEROUS TIMES IN 2006. HE
TURNED DOWN ONE PRETTY GOOD OFFER,

10:33:46 HE SAID HE HAD ANOTHER OFFER FOR 2.2 MILLION BUT
THE BUYER COULDNT COME UP

10:34:06 WITH THE MONEY. REGARDING CHANGING THE LOCKS -
THAT WAS NOT A INSTRUCTION

10:34:27 FROM JERRY. YES I BELIEVE ALL THESE EXPENSES
WERE REASONABLE AND NECESSARY

10:35:03 TO KEEP THE BUSINESS JUST AFLOAT. INCOME WAS NOT
SUFFICIENT TO COVER THE OVER

10:35:24 HEAD. OVER DRAWN BY 1500 - NEEDED TO PUT 1600
INTO THE ACCOUNT. I WOULD FIND

10:35:53 OUT EITHER BY A PHONE CALL OR E MAIL BY MARIE OR
MONNIE. THEY WOULD LET ME

10:36:19 KNOW. I WOULD FIND OUT THAT WAY AND NEARLY EVERY
MORNING I WOULD CHECK THE ON

10:36:43 LINE ACCOUNT. MONNIE, MARIE AND I DISUCSSED WHAT
WE COULD DO TO IMRPOVE

10:37:29 INCOME AND CUT DOWN OFF EXPENSES. CLOSE THE
DINING ROOM IN THE WINTER TO SAVE

10:37:52 COST ON HEATING, LITTLE THINGS WE LOOKED AT ALL
THE TIME. WE HAD GAS LINE

10:38:28 BROUGHT OVER TO THE CAPTAINS WHEEL, NATURAL GAS
CHEAPER THAN PROPANE, TALKED

10:38:46 ABOUT ADJUSTING HOURS TO BE OPEN ON BEST NIGHTS.
INITIALLY TRIED TO CUT BACK

10:39:15 HOURS, CLOSED ON MON AND TUESDAY - SLOWEST DAYS.
NO I NEVER REVIEWED EMPLOYEE

10:39:37 TIME CARDS, I HAVE SPENT THE EQUIV OF SEVERAL
DAYS THERE, SPENT HOURS THERE -
10:40:08 SOMETIMES 6 HOURS AT A TIME. YES WAS PRESENT
WHEN MARIE TESTIFIED. EMPLOYEES
10:40:38 PAID A PORTION IN CASH - THAT DOESNT MEAN IT
WASNT REPORTED AS PAY. TAXES
10:41:01 WERE WITHHELD. YES CONVIENCE PAID IN CASH,
UNFORT A CHECK MIGHT BOUNCE. A
10:41:46 RECORD WAS KEPT OF HOW MUCH WAS PAID TO EACH
EMPLOYEE. WITHHOLDING IS BASED
10:42:08 ON TOTAL AMOUNT, THAT IS PAID QUARTERLY.
WITHHOLDING WAS CALCULATED AND THEN
10:42:59 THE CHECK SENT OFF. NO ACCOUNTING ON EMPLOYEE
MEALS, THEY WERE ENTITLED TO A
10:43:33 MEAL IF THEY WORKED A FOUR HOUR SHIFT AND IT WAS
LIMITED TO WHAT THEY COULD
10:43:52 ORDER. RECORD WAS KEPT AND TOTALLED
PERIODICALLY. YES I HEARD THAT MY MEAL
10:44:21 TICKETS WERE TREATED, MARIES TESTIFIED TO THAT.
CORRECT I SAID IN MY
10:44:48 DEPOSITION THAT I DIDNT KNOW HOW MY MEALS WERE
CALCULATED, DIDNT KNOW UNTIL
10:45:06 MARIE SAID THAT. WHY WOULD IT BE IMPROPER, IT
WAS OVERHEAD. SAME WAY IT WAS
10:45:42 OVERHEAD WHEN JERRY AND KARLETTA ATE THERE FOR
FREE. IT WAS OVERHEAD. I HAVE
10:46:02 NO IDEA WHAT JERRY DID WITH HIS MEAL TICKETS. IT
WOULD BE NICE IF IT COULD BE
10:46:21 REOPENED IN THE SPRING. WE HAVE A GROUP CALLED
THE ANNUALS THAT COME EACH
10:46:52 YEAR. WE LEFT A SIGN SAYING CLOSED AND WE WOULD
BE RE OPENING IN THE SPRING.
10:47:35 LOOK FOR US TO OPEN APRIL 2010 IS WHAT THE SIGN
SAID. SIGN SAYS LOOK FOR US
10:48:32 TO REOPEN. I CANT FIGURE OUT EVERYTHING KARLETTA
IS DOING, SHE WANTS IT
10:48:55 TREATED AS A LOAN BUT SHE HASNT PAID BACK THE
LOAN. I WISH THIS COULD HAVE
10:49:19 BEEN A LOAN, I COULD HAVE CALLED IT DUE AND IT
WOULD HAVE BEEN OVER. YES I
10:49:41 HAVE SEEN THE COMPLAINT AND IT IS A SHOT GUN
APPROACH, ASKING FOR EVERYTHING
10:50:00 AND EVERYTHING UNDER THE SUN. THE WHOLE THING IS
ABSURD. NEVER ANY OFFER TO
10:50:17 PAY THE LOAN IF IT WAS A LOAN. YES I HAVE THE
DOC THAT KARLETTA PREPARED,

10:50:35 THERE WAS NO OFFER OF PAYMENT. WE ARE THREE
YEARS INTO IT, IF ITS A LOAN LETS
10:50:54 GET THIS PAID. THAT IS IF IT WAS A LOAN. YOUR
ASKING FOR A HYPATHETICAL
10:51:55 SITUATION HERE. CORRECT INCOME WAS NOT ENOUGH TO
COVER THE DEBT. YES WE
10:52:21 TALKED ABOUT METHODS OF BANKING. YES AWARE OF A
POSSIBLE SITUATION INVOLVING
10:52:54 EMPLOYEES POURING FOR TIPS, UNIVERSAL PROBLEM IN
ALL BARS - ITS A COMMON
10:53:19 PROBLEM. YES MONNIE AND I DID DISCUSS IT IN
CONNECTION TO ORDERING SPOUTS
10:53:53 THAT MEASURE CORRECT AMOUNT. TIP BOTTLE UP AND
IT ONLY POURS OUT THE RIGHT
10:54:13 AMOUNT AND THEN STOPS. MEASURED POURS RATHER
THAN OVER Poured SHOTS. NO I
10:54:40 NEVE CHECKED INTO THE AMOUNT OF FOOD WASTE, WE
USED AS MUCH AS WE COULD TO
10:54:58 AVOID WASTE. ULTIMATELY WE ENDED THE SALAD BAR.
IF WE HAD LEFTOVER PRIME RIB
10:55:28 THE MENU WOULD REFLECT FRENCH DIP SANDWICHES,
YES WE USED LEFT OVERS. MY
10:55:57 RANCH IS ABOUT 12 15 MINUTES AWAY.

10:56:32 **Add Ins: WHELAN, JOHN**
OBJ - SPECULATION

10:56:40 **Judge: Hosack, Charles**
OVERRULED

10:56:46 **Defendant: MCFARLAND, MICHAEL**
YES IT WOULD HAVE BEEN HELPFUL TO HAVE A OWNER
THERE BUT I WORK FULL TIME.
10:57:10 20-30 MILES FROM MY OFFICE, BY THE TIME I WOULD
GET OFF. I USUALLY START AT 7
10:57:29 30 AND PUT IN 12 HOUR DAYS AT THE OFFICE. NOT
REALLY ABLE TO GO UP AND DO
10:57:50 ANYTING MEANFUL AT 8 AT NIGHT. YES HAVE PUT IN
OVER 180 THOUSAND DOLLARS INTO
10:58:12 THE RESTAURANT. YES I DID INPUTING INTO THE
COMPUTER AND YES I HAVE SOME
10:58:59 RECEIPTS. HAVE COPY OF THE CHECK AND A PRINT OUT
FROM WELLS FARGO SHOWING THE
10:59:38 DEPOSIT. IF I WROTE A CHECK TO THE WHEEL - THEN
A RECEIPT FROM THE BANK
11:00:25 SHOWING THAT DEPOSIT AND THAT DATE. CASH WAS

11:01:28 FROM MY BUSINESS ALSO HAVE A
COUPLE MOBILES RENTED ON MY RANCH. CASH IS CASH.
11:02:08 I DIDNT SAY THAT. THE LOAN
AMOUNT OF TEN THOUSAND - 12/28/07 - I THINK THAT
11:04:15 IS FROM MY LINE OF CREDIT, I
THINK THAT IS WITH MY TAX RECORDS. THERE IS A
11:04:49 DEPOSIT RECORD SHOWING TEN
THOUSAND. IT WAS A TRANSFER FROM MY LINE OF
11:05:10 CREDIT, NO CHECK INVOLVED, WAS
DONE ELECTRONICALLY. 2/21 ENTRY - LOAN - CASH
11:05:59 WAS 300, FROM MY POCKET -
EITHER FROM OFFICE INCOME OR FROM RENTAL INCOME.
11:06:20 DONT HAVE RECEIPT, THAT
WOULD BE IN THE LIQ LICENSE FILE. CASH TO THE
11:07:04 ACCOUNTANT ENTRY - I DONT KNOW
SPECIFICALLY - ON MORE THAN ONE OCCASSION KAREN
11:07:33 WOULD ADVANCE MONEY IN THE FORM
OF CASH. THEY DONT TAKE DISCOVER, MY OTHER
11:07:56 CREDIT CARDS WERE MAXED OUT. EVEN
IT WAS PAID IN CASH IT WAS NOTED. CASH DID NOT
11:08:23 COME FROM THE RESAURANT. ATM
CASH REFUND ENTRY - I HAD LOANED 1 THOUSAND
11:08:46 DOLLARS CASH TO THE ATM MACHINE
SO IT COULD BE USED, MADE IT CLEAR IT WAS SHORT
TIME, ONCE THE AMOUNT WAS

11:09:52 **Stop recording**
(On Recess)

11:35:38 **Record**
MCFARLAND, MICHAEL

11:35:38
Recording Started:

11:35:44 **Judge: Hosack, Charles**
BRINGS JURY PANEL BACK FROM RECESS

11:36:01 **Add Ins: FINNEY, REX**
CONTINUES CX

11:36:08 **Defendant: MCFARLAND, MICHAEL**
SINCE INCOME HAS BEEN DEFICIENT, BAR TAKEN OUT
AND REPLACED WITH STAND UP
11:36:50 TABLES, ALLOWS MORE PEOPLE TO BE IN THE SAME
SPACE. THAT WAS DONE IN

11:37:17 ANTICIPATION OF BAYVIEW DAYS, WHICH IS OUR
LARGEST VOLUME OF THE WHOLE YEAR.

11:37:39 MONNIE AND MARIE WOULD HAVE DONE THE ACTUAL
PURCHASING. MARK STREATER IS A

11:38:07 CONTRACTOR, DONE ALOT OF WORK AT THE WHEEL, WORK
WAS COMPED TO HIM FOR MEALS.

11:38:28 I BELIEVE HE WAS INVOLVED IN THE CONSTRUCTION.
YES HE CAME IN ALOT. TO THE

11:39:00 BEST OF MY KNOWLEDGE HE HAS GOTTEN MEALS IN
TRADE FOR HIS WORK. HE HAS DONE

11:39:19 ALOT OF WORK THERE, HAS DONE EXTENSIVE WORK ON
DOCKS. DOCKS ON GRAVEL AND

11:39:47 BOARDS WOULD COME LOOSE. A NUMBER OF THE OLD
TABLES ARE IN THE DINING ROOM.

11:40:12 THE LAKESIDE DECK WAS ENCLOSED AND TURNED INTO
DINING - A NUMBER OF TABLES

11:40:32 AND CHAIRS WERE MOVED OUT THERE. A NUMBER OF
THEM WERE PUT OUT NEAR THE BBQ

11:40:58 AREA. DANCING AREA WAS TURNED INTO DINING AREA
WHEN DANCING WAS NOT INVOLVED.

11:41:26 READS E- MAIL TO THE JURY PANEL REGARDING FUNDS
NEEDED FROM MARIE.

11:43:13 ITS OBVIOUS WHY THE WHEEL HAS BEEN LOSING MONEY.
I DONT THINK PROPERTY TAXES

11:43:58 HAVE BEEN PAID. I NEVER SAID I ENTRUSTED ANYONE
WITH MAKING SURE THE TAXES

11:44:30 WERE PAID. THEY HAVE NOT BEEN PAID BECAUSE THERE
IS NO MONEY. I HAVE

11:44:50 MONITORED THE DEBTS AND OBLIGATIONS OF THE CORP.
THERE WAS A AGREEMENT

11:45:26 ENTERED TO MAKING PAYMENTS. PROP TAXES WERE IN
THE REARS EVEN WHEN JERRY WAS

11:45:49 ALIVE. PAYMENTS OF 620 A MONTH TO STAY CURRENT,
THAT INCLUDED BACK TAXES AND

11:46:10 CURRENT TAXES. ULITMATELY YES THERE COULD BE A
TAX SALE. I DONT THINK THE SB

11:46:36 LOAN WAS NEVER CURRENT AND IS NOT CURRENT NOW.
THE SMALL BUSINESS LOAN IS

11:46:55 PROBABLY A LIEN AGAINST THE PROPERTY. YES TAXES
ARE IMPORTANT AMONG OTHER

11:47:24 PLACES, ELECTRIC AND POWER EQUALLY AS IMPORTANT.
YES IT COULD GO INTO

11:47:46 FORECLOSURE - IT NEEDS TO BE SOLD. YES AT TIMES
THE SAME PERSON DID THE TILL

11:48:20 AND FILLED OUT THE DAILY SHEET AND DO THE DAY
END STUFF. COUNT AND DOUBLE

11:48:55 COUNTING. REFERS TO ORIGINAL DEPOSITION - PAGE
91. YES THIS IS ORIGINAL
11:49:54 DEPOSITION. PAGE 181 - READS ANSWER.
11:50:58 READS ANSWERS FROM DEPOSITIONS.
11:51:36 YES I KNOW MORE ABOUT THE SECURITY CAMERAS NOW.
YES INDICATED WE COULD SELL
11:52:07 THE PROPERTY DUE TO THE PENDING LAW SUIT.
LAWSUIT 2/14/07 WAS FILED. LAW SUIT
11:53:11 WAS FILED YES AND WE ISSUED STOCK TO MONNIE AND
MARIE, ALREADY DISCUSSED THIS
11:53:29 ISSUE. JERRY WANTED THEM TO HAVE SOME INTEREST
IN THE WHEEL. YES I ADVISED
11:54:15 KARLETTA OF THE FINANCIAL SITUATION OF THE
WHEEL. REGARDING MY STATEMENT
11:55:05 REGARDING SPLURGING MEANS ANY TYPE OF SPENDING
THAT WOULD NOT GENERATE A
11:55:29 RETURN. MONNIE OR MARIE WOULD WRITE THE
PAYCHECKS AND I WOULD SIGN THEM. MY
11:55:57 RECOLLECTION WAS THAT MONNIE AND MARIE WERE PAID
BY THE HOUR BUT NOT FOR ALL
11:56:16 THE HOURS THEY HAVE PUT IN. READS ANSWER FROM
DEPOSITION.
11:57:05 YES PROBLEM WITH GETTING BANK STATEMENTS SENT TO
THE WHEEL OR TO THE POST
11:57:38 OFFICE BOX. MONNIE OR MARIE WOULD PICK UP MAIL
FROM THE PO BOX. YES THEY
11:58:13 SHOULD HAVE BEEN SENT TO THE BUSINESS NOT TO
SHARE HOLDER. REFERS TO TAX
11:58:43 RETURN - 2007. EXHIBIT UU. VERIFIES GROSS
INCOME. 477,366.00 IS WHAT SHOWS ON
11:59:27 THE RETURN. YES INCREASE OF EMPLOYEE COST
104,058. YES. MY MEALS YES WERE
12:00:15 REASONABLE AND JUSTIFIED. YES I ATE FOR FREE
CONSIDERING I PUT THOUSANDS OF
12:00:38 DOLLARS INTO THE BUSINESS. WHY NOT INCLUDE MY
MEALS WITH THE EMPLOYEE MEALS,
12:01:00 ITS ABOVE BOARD IF A RECORD WAS KEPT. THE FOOD
WAS NOT TAKEN UNDER THE TABLE.
12:01:18 IN 2003 JERRY WAS MARRIED TO KARLETTA. YES
12:01:54 REGARDING DUTY OF LOYALTY
12:02:13 **Add Ins: WHELAN, JOHN**
OBJ
12:02:16 **Judge: Hosack, Charles**
OVER RULE OBJECTION.

12:02:22 **Defendant: MCFARLAND, MICHAEL**
DUTY OF LOYALTY. NUMEROUS DUTIES OWED TO CLIENTS
AS AN ATTORNEY. TO NUMEROUS

12:03:08 TO LIST. YES DUTY TO DEAL FAIRLY WITH ANYONE
WHETHER ATTORNEY OR NOT. YES

12:03:31 HAVE REVIEWED RULES OF PROFESSIONAL CONDUCT. YES
REVIEWED THE PREAMBLE. YES

12:03:52 TRUE HAVE REVIEWED THEM. YES REVIEWED RULE 1.8.
RULE BETWEEN BAR AND

12:05:07 ATTORNEYS - RULE IS ABOUT CURRENT CLIENT NOT
FORMER CLIENTS, INFORMED

12:05:25 CONSENT. RULE 1.9 REGARDING CONFIDENTIAL
INFORMATION.

12:05:53 **Add Ins: WHELAN, JOHN**
OBJ - AD NAUSEM

12:06:07 **Defendant: MCFARLAND, MICHAEL**
YES AWARE OF WHAT INFORMED CONSENT MEANS. IT IS
A AGREEMENT.

12:07:53 **Add Ins: WHELAN, JOHN**
OBJ - ALREADY COVERED EARLIER IN TRIAL.

12:08:29 **Judge: Hosack, Charles**
RE PHRASE QUESTION

12:08:40 **Defendant: MCFARLAND, MICHAEL**
YES WATCHED VIDEO DEPOSITION.

12:09:02 **Add Ins: WHELAN, JOHN**
OBJ - ALREADY COVERED

12:09:12 **Judge: Hosack, Charles**
OVER RULES OBJECTION

12:09:19 **Defendant: MCFARLAND, MICHAEL**
YES I WATCHED MY VIDEO DEPOSITION, RECALLS
ANSWER

12:10:04 **Add Ins: WHELAN, JOHN**
OBJECTION - ALREADY COVERED, SAME OBJECTION

12:10:20 **Judge: Hosack, Charles**
HAVENT WE COVERED THIS. OBJECTION OVERRULED.

12:10:42 **Defendant: MCFARLAND, MICHAEL**

12:11:17 **Judge: Hosack, Charles**
WE HAVE HAD A DAY AND HALF OF ALL THIS
CUMULATION - WE HAVE ALREADY COVERED

12:11:38 ALL THIS.

12:11:43 **Defendant: MCFARLAND, MICHAEL**
YES WE TALKED ABOUT THE NEW HIGHWAY COMING IN.
NO SHE DOES NOT HAVE REAL

12:12:05 PROPERTY FRONTING HIGHWAY 95, IT IS ON REMINGTON
RD. ACREAGE MIGHT FRONT IT

12:12:30 BUT THE MOBILE HOME IS NOT, HAS A REMINGTON RD.
ADDRESS.

12:13:13 **Add Ins: WHELAN, JOHN**
OBJECTION - ALREADY COVERED

12:13:22 **Judge: Hosack, Charles**
OBJECTION OVER RULED

12:13:29 **Defendant: MCFARLAND, MICHAEL**
YES JERRY KNEW I WAS NOT HIS LAWYER. YES MY
FAMILY OFTEN REFERS TO ME AS

12:14:00 THEIR LAWYER.

12:14:10 EXHIBIT 77 - REFERENCES MY STATEMENT OF THE
AFFIDAVIT.

12:15:24 CORRECT JERRY BERRY NEVER OWNED ALL THE STOCK IN
THE CORP. A PACKAGE OF WORDS

12:15:47 WERE USED. KINDA LIKE A QUICK CLAIM DEED,
CONVEYING INTEREST. PROPERTY

12:16:15 CONVEYED WAS CERT ONE AND TWO, THAT WAS IN THE
AGREEMENT. YES THERE WAS A

12:16:31 SHARE HOLDERS MEETING. STOCK CERT WERE
TRANSFERRED AT THAT MEETING. JERRY,

12:17:25 KAREN AND MYSELF - AT THE COMMENCMENT OF THAT
MEETING KARLETTA HAD NO

12:17:47 BEARING. THE STOCK WAS ASSIGNED TO JERRY BY THE
CAMBELLS. LIKE A CHECK

12:18:11 ENDORSED BUT NOT CASHED. OCT/15 MEETING IS WHERE
IT WAS CASHED.

12:18:34 PAUL DAUGHERTY WAS FORMER ATTORNEY, NO THERE WAS
NO CURRENT ATTORNEY.

12:19:08 YES THAT IS CORRECT, MR. MCGLAGHLIN TESTIMONY
HERE WAS NOT ACCURATE.

12:19:53 PAGE 53 LINE 20 OF DEPOSITION. READS ANSWER.
12:21:56 I DONT REMEBER THE NAMES OF THE JUDGMENT
CREDITORS. WHAT MCGLAGHLIN THINKS HE
12:22:42 HEARD IS SOMETHING I HAVE NO CONROL OVER.

12:23:01 **Add Ins: WHELAN, JOHN**
OBJECTION - SCOPE

12:23:08 **Judge: Hosack, Charles**
WHAT DOES THIS HAVE TO DO WITH

12:23:20 **Add Ins: FINNEY, REX**
IMPEACHMENT PURPOSES.

12:23:27 **Judge: Hosack, Charles**
FOR THE JURY TO DECIDE. OVER RULE OBJECTION.

12:23:42 **Defendant: MCFARLAND, MICHAEL**
WHEN I GOT THE MINUTE BOOK MOST OF THE FILL IN
THE BLANK DOCUMENTS HAD NO
12:25:05 BLANKS FILLED IT. NONE OF THE STANDARD STUFF WAS
DONE IN THE CORPORATE BOOK.
12:25:36 IT DOESNT REQUIRE A ATTORNEY BUT A CORPORATE
ATTORNEY WOULD HAVE THE
12:25:57 KNOWLEDGE OF KEEPING UP THE CORPORATE BOOK. DONT
THINK KARLETTA HAD KEYS TO

12:27:15 **Add Ins: WHELAN, JOHN**
BI LAWS ARE ALREADY IN EVIDENCE - WE CAN READ
THEM ALL DAY

12:27:31 **Defendant: MCFARLAND, MICHAEL**
YES THOSE PAYMENTS OF INTEREST WERE MADE TO
KAREN - TRUE.

12:27:50 I DIDNT FEEL OBLIGATED TO GIVE STOCK TO MONNIE
AND MARIE, THAT IS WHAT JERRY
12:28:17 WANTED. I DONT REMEMBER EXACTLY HOW JERRY
PHRASED IT, HE TALKED ABOUT ISSUING
12:28:43 STOCK. KARLETTA WAS VERY AGITATED ABOUT THE
IDEA. HE ALSO MENTIONED THE
12:29:27 POSSIBLITY OF PAYING THEM CASH. HE WANTED THEIR
CONTINUED SERVICE. WHEN STOCK
12:29:45 WAS ISSUED TO THEM I WAS AWARE THERE WAS
CONFLICT BETWEEN KARLETTA AND
12:30:07 MONNIE. NEITHER OF THEM LIKED EACH OTHER. JERRY
WANTED THEM TO HAVE A STAKE

12:30:53 IN THE BUSINESS.

12:31:00 **Add Ins: FINNEY, REX**
NOTHING FURTHER.

12:31:06 **Judge: Hosack, Charles**
RUNNING LATE. TAKE NOON RECESS. ANTICIPATE
DELIBERATION TOMORROW. DISMISSES

12:32:07 JURY PANEL.

12:32:17 **Stop recording**
(On Recess)

13:39:08
Recording Started:

13:39:08 **Record**
MCFARLAND, MICHAEL

13:39:09 **Judge: Hosack, Charles**
RESUME JURY TRIAL FROM LUNCH.

13:39:29 **Add Ins: FINNEY, REX**
CONTINUES CX OF MICHAEL MCFARLAND

13:39:52 **Defendant: MCFARLAND, MICHAEL**
READS MINUTES OF SPECIAL MEETING. EXHIBIT CCC -
TRANSCRIPT MADE FROM TAPE

13:40:14 PAGE 4 - READS REFERENCE OF THE PROCESS

13:40:50 EXHIBIT SS

13:40:57 **Add Ins: FINNEY, REX**

13:41:03 **Add Ins: WHELAN, JOHN**
RE DX

13:41:08 **Defendant: MCFARLAND, MICHAEL**
RESOLUTION - WAS NOT SIGNED OFF BY KARLETTA BUT
TRANSCRIPT INDICATES SHE

13:41:37 VOTED FOR IT THROUGH HER ATTORNEY

13:41:52 KARLETTA NEVER OBJECTED TO THE STOCK TO MARIE
AND MONNIE. YES THAT

13:42:21 TRANSACTION COULD BE UNDONE IF NEEDED. REQUIRES
A REFUND OF 100 DOLLARS AND

13:42:49 A RESOLUTION COULD BE DONE.

13:43:08 **Add Ins: FINNEY, REX**
OBJECTION - LEADING - STRIKE

13:43:19 **Judge: Hosack, Charles**
OBJECTION SUSTAINED.

13:43:30 **Add Ins: FINNEY, REX**
CX

13:43:35 **Defendant: MCFARLAND, MICHAEL**

13:43:51 **Add Ins: WHELAN, JOHN**
OBJ

13:43:54 **Judge: Hosack, Charles**
THIS IS RE RE CX - ENOUGH

13:44:05 **Add Ins: WHELAN, JOHN**
NOTHING FURTHER

13:44:10 **Add Ins: FINNEY, REX**
NOTHING FURTHER

13:44:16 **Add Ins: WHELAN, JOHN**
CALLS KARLETTA BERRY TO WITNESS STAND

13:45:02 **Plaintiff: BERRY, KARLETTA**
I HEARD TESTIMONY FROM MARIE AND MONNIE ABOUT
THE PROMISE OF MONEY FROM

13:45:30 JERRY. MY HUSBAND DID NOT TELL ME HE PROMISED
THEM 50 THOUSAND. NO I DID NOT

13:45:59 PAY THEM 50 THOUSAND UPON JERRYS DEATH. JERRY
TOLD ME HE WANTED THEM TO GET

13:46:29 10 THOUSAND UPON THE SALE OF THE RESTAURANT.
THERE WAS NOTHING IN WRITING

13:46:46 REGARDING STOCK OR THEM HAVING MONEY UPON THE
SALE. I OBJECT TO THEM HAVING

13:47:06 STOCK. WE DID NOT HAVE FINANCES READILY
AVAILABLE TO PURCHASE THE STOCK.

13:47:31 **Add Ins: WHELAN, JOHN**
NOTHING FURTHER

13:47:37 **Add Ins: FINNEY, REX**
CX

13:47:52 **Plaintiff: BERRY, KARLETTA**
WE MET MR. MCFARLAND AND ZIMMERMAN AT THE
CAPTAINS WHEEL.

13:48:39 **Add Ins: WHELAN, JOHN**
OBJECTION

13:48:44 **Judge: Hosack, Charles**
OVER RULED

13:48:53 **Plaintiff: BERRY, KARLETTA**
YES WE WOULD REGULARY MINGLE WITH THEM, HAD
MEALS TOGETHER, I ACCOMPAINED

13:49:20 JERRY SEVERAL TIMES TO THE RANCH AND TO THE
MANUFACTURED HOUSE. YES WE

13:49:42 INTERACTED. I OWN ACREAGE, REMINGTON ROAD IS ON
SIDE AND HIGHWAY 95 FRONTAGE

13:50:10 ON THE OTHER SIDE. YES HERB AND I HAD ISSUES IN
THE KITCHEN, HE LIKED TO DO

13:50:34 THINGS HIS WAY. ONE ISSUE, RE WAS REPACKAGING
PRODUCT AND I CAUGHT HIM

13:50:55 SUCKING AIR OUT OF THE BAG WITH A STRAW. JERRYS
WILL WAS DONE BY JERRY, NOT

13:51:24 PREPARED BY A ATTORNEY. I DIDNT GET INTO THE
BOOKS MUCH WITH JERRY, I DO

13:52:06 KNOW WHO ARE SUPPLIERS ARE, CERTAIN DUTIES OF
EMPLOYEES, KITCHEN PROCEDURES

13:52:29 THAT WERE FOLLOWED. SCHEDULING WAS DONE BY THE
MANAGERS BUT ITS NOT DIFFICULT

13:53:09 TO DO. THEY HAD A TIME SHEET THAT THEY WRITE
THEIR START TIMES AND STOP TIMES

13:53:37 AND HAD IT INTIALED BY A BARTENDER OR MANAGER,
WHO OVER WAS THERE AT THE

13:53:54 TIME. AT CLOSING THE ALC BOTTLES WERE LOCKED
AWAY IN A CLOSET. CHRISTMAS DAY

13:54:34 NO ALC SERVED. ELECTION DAY NO ALC SERVED UNTIL
POLLS ARE CLOSED. A BAR IS

13:54:59 NOT ALLOWED TO GIVE AWAY FREE ALC.

13:55:16 **Add Ins: FINNEY, REX**
NOTHING FURTHER

13:55:22 **Add Ins: WHELAN, JOHN**
NOTHING FURTHER

13:55:27 **Judge: Hosack, Charles**

EXCUSES WITNESS

- 13:55:35 **Add Ins: WHELAN, JOHN**
DEFENSE RESTS
- 13:55:51 **Judge: Hosack, Charles**
THAT COMPLETES THE EVIDENCE PORTION. DISMISS
JURY TO THE JURY PANEL ROOM
- 13:56:15 MOMENTARILY.
- 13:57:42 **Add Ins: FINNEY, REX**
MOVE TO AMEND FOR DAMAGES
- 13:57:55 **Add Ins: WHELAN, JOHN**
HE HAS NOT ESTABLISHED GROUNDS FOR PUNITIVE
DAMAGES. THERE IS NO EVIDENCE .
- 13:58:27 NO A CASE FOR PUNITIVE DAMAGES, COURT SHOULD
DENY MOTION.
- 13:58:43 **Judge: Hosack, Charles**
REVIEW IDAHO RULE BOOK REGARDING THIS ISSUE.
CLAIM FOR FUD DUTY AND
- 14:00:05 NEGLIGENCE. REFERS TO ONIEL VS VASSER. PUNITIVE
DAMAGES DOES NOT APPLY IN THIS
- 14:00:47 CASE, NOT WILLFULL. WE ARE DEALING WITH
NEGLIGENCE AND BREACH OF FUDICIARY
- 14:01:15 DUTY. NOT SUFFICENT FOR PUNITIVE DAMAGES SO I
WILL DENY THAT MOTION. NEED TO
- 14:02:09 START ON JURY INSTRUCTIONS.
- 14:02:22 **Add Ins: FINNEY, REX**
ONE MORE MOTION - MOVE FOR DIRECTIVE VERDICT.
AINSWORTH CASE IS VERY CLEAR.
- 14:02:59 IDHO CITE 22 - THERE HAS BEEN NO DISPUTE.
AINSWORTH CASE IS CLEAR AND IS ON
- 14:03:32 POINT. IDAHO 22645.
- 14:03:51 **Add Ins: WHELAN, JOHN**
THIS IS ABSURD. NICE THEORITCAL THEORY. DONT
UNDERSTAND HIS LOGIC. YES THERE
- 14:04:19 WAS A 25 MIN BANKRUPCY CONSULTATION. NOT ENOUGH
EVIDENCE.
- 14:05:04 **Judge: Hosack, Charles**
THERE ARE ISSUES OF FACT. WONT RULE AS A MATTER
OF TRUST. MOTION DENIED.

14:05:34 WE WILL EXCUSE JURY FOR THE EVENING AND WORK ON
OUR JURY INSTRUCTIONS. MY
14:05:52 THOUGHT IS TO HAVE JURY COME IN AT TEN. WE NEED
TO BE HERE AT 8 AND HAVE JURY
14:06:39 HERE AT TEN. WE WILL ADVISE THEM, THEY WILL BE
HERE FOR LUNCH, INSTRUCTIONS
14:07:53 TO BE GIVEN AND CLOSING ARGUMENTS AND GO INTO
DILBERATION AROUND NOON. JUROR
14:09:12 3 NEEDS TO BE DISMISSED FOR MILITARY DUTY AND I
WILL DISMISS JUROR NUMBER 3.
14:11:17 JUROR 3 TO BE ADDRESSED BY THE COURT.
14:11:43 **Stop recording**
(On Recess)
14:14:14
Recording Started:
14:14:14 **Record**
MCFARLAND, MICHAEL
14:17:51 **Stop recording**
(On Recess)

Court Minutes:

Session: HOSACK012610A
Session Date: 01/26/2010
Judge: Hosack, Charles
Reporter:

Division: Div1
Session Time: 08:37

Courtroom: local

Clerk(s): Burrington, Talisa

State Attorney(s):

Public Defender(s):

Prob. Officer(s):

Court interpreter(s):

Case ID: 0004

Case number: CV2007-2409
Plaintiff: BERRY, KARLETTA
Plaintiff Attorney:
Defendant: MCFARLAND, MICHAEL
Pers. Attorney: Walker, Glen
Co-Defendant(s):
State Attorney:
Public Defender:
Previous audio and annotations can be found in case: 0003
Additional audio and annotations can be found in case: 0005.

01/27/2010

10:07:54

Recording Started:

10:07:54

Case recalled

10:08:31

Judge: Hosack, Charles
JURY TRIAL - DAY SEVEN OF TRIAL. ALL PARTIES

PRESENT

- 10:09:12 **Add Ins: WHELAN, JOHN**
- 10:09:38 **Judge: Hosack, Charles**
HAVE BEEN WORKING ON JURY INSTRUCTIONS. WE HAVE
GONE OVER THOSE. COUNCIL HAS
- 10:10:10 COPIES. INSTRUCTIONS ARE NUMBERED. MAKE A RECORD
OF RECOMMENDATIONS.
- 10:10:58 **Add Ins: FINNEY, REX**
REFERENCE INSTRUCTIONS - USE OF SINGULAR AND
PLURALS , NOT HELD TO A TIGHT
- 10:11:42 STANDARD. THE USE OF THE LETTER S AT THE END OF
SOME WORDS.
- 10:12:08 **Judge: Hosack, Charles**
THAT IS CORRECT, DOES NOT MAKE ANY LEGAL
DIFFERENCE. I CANT CONTROL WHEN AN
- 10:12:36 ATTORNEY WANTS THE LETTER S AT THE END OF WORDS.
- 10:12:53 **Add Ins: FINNEY, REX**
REVISED JURY INSTRUCTIONS. OBJ TO BURDEN OF
PROOF. AINSWORTH CASE REFERENCE.
- 10:13:49 SECONDLY TORTE - BOTH ARE LIABLE. THREE -
RESTATEMENT OF TRUST. FOUR - DUTY
- 10:14:50 OF LOYALTY. FIVE - SECTION 205. SIX AUTHORITY
CAUSE OF ACTION. EIGHT HINES VS
- 10:16:36 BOWER CASE, CLIENTS INTEREST. NINE- FUDIC.
OBLIGATIONS TOWARDS FRIENDS. TEN -
- 10:17:27 ATTORNEY CLIENT RELATIONSHIP. ELLEVEN -
RELATIONSHIP AND MUST MAKE FULL
- 10:18:09 DISCLOSURE. TWELVE - USUALLY PAYMENT OF ATTY BUT
IS NOT NECESSARY.
- 10:18:54 **Judge: Hosack, Charles**
SLIPPERY SLOPE. FAIR ARGUMENT. COVERED BY STOCK
GIVEN.
- 10:19:40 **Add Ins: WHELAN, JOHN**
ACCEPTS INSTRUCTIONS AS PROPOSED.
- 10:19:50 **Judge: Hosack, Charles**
READY TO BRING JURY PANEL IN.
- 10:20:18 JURY PANEL PRESENT.

10:21:24 READS JURY INSTRUCTIONS TO JURY PANEL.

10:39:46 **Add Ins: FINNEY, REX**
CLOSING ARGUMENT

12:03:37 **Stop recording**
(On Recess)

12:42:26 **Record**
MCFARLAND, MICHAEL

12:42:26
Recording Started:

12:42:30 **Judge: Hosack, Charles**
JURY PANEL RESUMES - ALL PARTIES PRESENT

12:43:06 **Add Ins: FINNEY, REX**
RESUMES CLOSING ARGUMENT

13:22:04 **Add Ins: WHELAN, JOHN**
CLOSING ARGUMENT

14:35:34 **Stop recording**
(On Recess)

14:56:36
Recording Started:

14:56:36 **Record**
MCFARLAND, MICHAEL

14:56:39 **Judge: Hosack, Charles**
JURY RESUMES FROM RECESS. ALL PARTIES PRESENT.

14:57:10 **Add Ins: FINNEY, REX**
REBUTTAL FROM PLAINTIFF ATTORNEY

15:28:57 **Judge: Hosack, Charles**

15:29:34 **Other: clerk**
BALLIFFS OATHE GIVEN FOR DELIBERATION

15:30:04 **Judge: Hosack, Charles**
THE ALTERNATE JUROR IS JUROR 2.

15:32:02 GIVES JURY PANEL INSTRUCTIONS AND SPECIAL VERDICT AND EXHIBITS

15:33:42 **Stop recording**
(On Recess)

15:34:11
Recording Started:

15:34:11 **Record**
MCFARLAND, MICHAEL

15:34:16 **Add Ins: WHELAN, JOHN**
MOTION. FINNEY FLAT OUT LIED. HE IS BARRED FROM SEEKING CONSTRUCTIVE TRUST

15:34:43 **Judge: Hosack, Charles**
MOTION FOR REMEDY OF COURT. COURT WONT RULE AT THIS MOMENT.

15:35:16 **Add Ins: FINNEY, REX**
THAT WAS NOT A MISREPRESENTATION.

15:35:36 **Judge: Hosack, Charles**
WONT BE DECIDED UPON AT THIS TIME.

15:35:51 BE IN RECESS.

16:20:46 **Stop recording**
(On Recess)

Court Minutes:

Session: HOSACK012610A
Session Date: 01/26/2010
Judge: Hosack, Charles
Reporter:

Division: Div1
Session Time: 08:37

Courtroom: local

Clerk(s): Burrington, Talisa

State Attorney(s):

Public Defender(s):

Prob. Officer(s):

Court interpreter(s):

Case ID: 0005

Case number: CV2007-2409
Plaintiff: BERRY, KARLETTA
Plaintiff Attorney:
Defendant: MCFARLAND, MICHAEL
Pers. Attorney: Walker, Glen
Co-Defendant(s):
State Attorney:
Public Defender:
Previous audio and annotations can be found in case: 0004

01/28/2010

14:02:00

Case recalled

14:02:00

Recording Started:

14:02:08

Judge: Hosack, Charles
JURY TRIAL - DAY 8 - JURY HAS REACHED A VERDICT.
BRING JURY PANEL IN

14:03:22 **Other: CLERK**
READS VERDICT

14:06:20 **General:**

14:06:22 **Judge: Hosack, Charles**
NO POLLING. EXCUSES JURY PANEL. THANKS THEM FOR
THEIR SERVICE.

14:09:18 **Add Ins: WHELAN, JOHN**
MOTION FOR MIS TRIAL - REGARDING ATTORNEY
MISCONDUCT.

14:09:39 **Judge: Hosack, Charles**
I WILL NOT RULE ON THAT AT THIS TIME.

14:10:09 **Add Ins: WHELAN, JOHN**
COUNCIL IN HIS REBUTTAL SAID "WE CANT RECOVER
THE STOCK" FOR OBVIOUS

14:10:31 REASONS TO PUMP THEM UP. I HAVE TAKEN THIS UP
WITH THE BAR. WHAT A

14:10:58 INEXPERIENCED LAWYER.

14:11:05 **Judge: Hosack, Charles**
THAT NEEDS TO BE NOTICED UP. THERE MAY BE POST
TRIAL MOTIONS IN THE FUTURE.

14:12:21 ON THIS CASE EMAIL IS ALRIGHT.

14:14:24 **Add Ins: FINNEY, REX**
WE HAVE A JUDGMENT FOR THE COURT TO SIGN

14:14:44 **Judge: Hosack, Charles**
WE MIGHT AS WELL SCHEDULE A HEARING ON A
JUDGMENT AS WELL.

14:15:17 **Add Ins: WHELAN, JOHN**
I HAVE NOT SEEN THE JUDGMENT.

14:15:26 **Judge: Hosack, Charles**
I NEED SOME DIRECTION AS TO WHAT YOU TRYING TO
ACCOMPLISH.

14:15:58 I DONT KNOW HOW TO PROCEED, THIS IS COUNCILS
CASE. COPIES OF SPECIAL VERDICT

14:16:47 GIVEN IN COURT TO BOTH COUNCIL ATTORNEYS.

14:17:41 I HAVE NO IDEA WHAT THIS JUDGMENT IS. I WILL NOT

14:18:17 ENTER A INTERLOCKERARY
JUDGMENT. I HAVE NO CLUE WHAT THIS MEANS.

14:18:38 **Stop recording**

Court Minutes:

Session: HOSACK011910A
Session Date: 01/19/2010
Judge: Hosack, Charles
Reporter:

Division: Div1
Session Time: 08:23

Courtroom: local

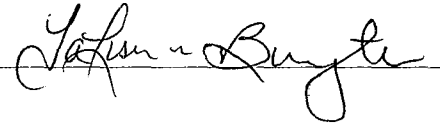
Clerk(s): Burrington, Talisa

State Attorney(s):

Public Defender(s):

Prob. Officer(s):

Court interpreter(s):



Case ID: 0002

Case number: CV2007-2409
Plaintiff: BERRY, KARLETTA GRACE
Plaintiff Attorney:
Defendant: MCFARLAND, MICHAEL
Pers. Attorney:
Co-Defendant(s):
State Attorney:
Public Defender:
Additional audio and annotations can be found in case: 0003.

01/19/2010

09:25:56

Recording Started:

09:25:56

Case called

09:26:03

Judge: Hosack, Charles
JURY TRIAL. CALLS ROLL.

09:41:59

EXPLAINS PROCESS OF VOIRE DIRE

09:45:56 INTRODUCES ALL PARTIES PRESENT. MR. REX FINNEY -
ATTORNEY FOR PLAINTIFF AND
09:46:38 MR. WHELAN PRESENT FOR MICHAEL MCFARLAND AND
KAREN ZIMMERMAN. EXPLAINS
09:47:18 BACKGROUND OF LAW SUIT.
09:47:30 DAY ONE OF JURY TRIAL
10:00:54 VOIRE DIRE

10:01:55 **Plaintiff Attorney:**
CLERK

10:02:04 **Other: CLERK**
VOIR DIRE OATH - WHOLE JURY PANEL

10:28:22 **Stop recording**
(Off Record)

10:47:34
Recording Started:

10:47:34 **Record**
MCFARLAND, MICHAEL

10:47:49 **Add Ins: ATTY, REX FIINEY - PLANT**
VOIR DIRE

10:56:39 **Add Ins: ATTY, JOHN WHELAN - DEF**
VOIR DIRE
11:03:20 CONTINUES VOIR DIRE
11:41:08 PASS FOR CAUSE

11:41:19 **Add Ins: ATTY, REX FIINEY - PLANT**
PASS FOR CAUSE

11:41:28 **Judge: Hosack, Charles**
EXPLAINS PROCESS OF PREEMP CHALLENGES

11:44:02 **Stop recording**
(On Recess)

12:04:43
Recording Started:

12:04:43 **Record**
MCFARLAND, MICHAEL

12:04:52 **Judge: Hosack, Charles**
RESUMES - CLERK TO CALL THREE MORE NAMES. VOIR
DIRE THOSE THREE NAMES WHICH
12:05:27 WILL COMPLETE PROCESS
12:27:10 COUNCIL TO APPROACH THE BENCH FOR FINAL JURY
SELECTION
12:29:59 ANNOUNCES FINAL PANEL. JURY IMPANELED. EXCUSES
REMAINDER OF PANEL.
12:37:20
12:44:54 **Other: CLERK**
TRY CAUSE OATHE
12:50:01 **Judge: Hosack, Charles**
BREAK FOR LUNCH
12:50:24 **Stop recording**
(Off Record)
12:51:35 **Record**
MCFARLAND, MICHAEL
12:51:35
Recording Started:
12:51:45 **Judge: Hosack, Charles**
NO COURT REPORTER PROVIDED ON THE RECORD.
12:52:35 NOT APPROVED BY THE SUPREME COURT
12:58:27 **Stop recording**
(Off Record)
14:07:56
Recording Started:
14:07:56 **Record**
MCFARLAND, MICHAEL
14:07:59 **Judge: Hosack, Charles**
BACK ON THE RECORD
14:09:39 READS INITIAL JURY INSTRUCTIONS
14:18:57 OPENING STATEMENT - EVIDENCE WILL SHOW WHERE
ATTY AND HIS FIANCE TRANSFERED
14:19:28 STOCK AT FAR LESS THAN MARKET VAKUE. HE ACTED AS
A ATTORNEY. CAPTAINS WHEEL
14:20:06 INCOR. OWN SEPERATE ENTITY, STARTED IN 1996 BY

14:20:39 PEOPLE THAT ARE NOT PRESENT
TODAY. A RESTAURANT WITH A BAR LAKEFRONTAGE, 21
14:21:06 BOAT SLIPS AND ALSO A PARKING
LOT ACROSS THE STREET. 1996 NORDSR TOM WERE HALF
14:21:31 OWNERS AND CAMBELLS OWNED OWN
HALF. CAMBELLS AND NORDSTROM STARTED THE COPR.
14:22:01 JUL 9 - 1997 THE BERRYS
MARRIED. JUNE 2000 THE BERRYS OWNED HALF OF THE
14:22:21 STOCK , OTHER HALF WAS OWNED
BY CAMBELLS. 2000 GOT INVOLVED IN A REASL ESTATE
14:22:47 DEAL IN WASH. THERE WERE
PROBLEMS. REAL ESTATE DEVELOPMENT FAILED. ONE OR
14:23:09 MONEY JUDGMENTS WERE ENTERED
AGAINST JERRY BUT NOT KARLETTA. MICHAEL
14:23:45 MCFARLAND IS ATTY, HE PRIMARILY DEALS
WITH BANKRUPTCIES, HIS OFFICE IS LOCATED DOWN
14:24:18 TOWN. JERRY BERRY GOT ACQUATIED
WITH MOCHAEL MCFARLAND AFTER THE JUDGMENTS WERE
14:24:46 ENTERED. 2001-2002 JERRY
BERRY WENT TO MCFARLAND TO SEE HOW CAPTAINS
14:25:08 WHEEL COULD BE PROTECTED FROM
JUDGMENTS ENTERED IN WASH. BERRY OWNED ONE HALF
14:25:41 OF THE STOCK AT THE TIME,
ATTY AND CLIENT DETERMINED THE STOCK WOULD BE
14:26:03 EXEMPT FROM BANKRUPCY LAWS. NO
PUBLIC RECORD OF BERRY OWNING THAT STOCK, NOT
14:26:38 PUBLIC RECORD. NO WAY FOR
JUDGMENT CREDITORS TO KNOW AND ATTACH THE STOCK.
14:27:06 JERRY AND MCFARLAND ALSO
DISCSSED PUTTING IT IN A TRUST SO IT WOULD NOT
14:27:31 BE ATTACHED BY CREDITORS. IN
2003 CAMBELL DECIDED TO SELL THEIR HALF TO JERRY
14:27:58 BUT JERRY NEEDED 1000,000 TO
PURCHASE THE STOCK, HE DIDNT HAVE THE MONEY. HE
14:28:20 DISCUSSED BUYING THE STOCK
WITH MCFARLAND AND MS. ZIMMERMAN. ZIMMERMAN WAS
14:28:41 A LICENSED REAL ESTATE AGENT,
MCFARLAND THOUGHT IT WAS A GOOD DEAL. WAS SOLD
14:29:05 AT A FRACTION OF THE VALUE.
07/2003 MCFARLAND GAVE A CERTIFIED CHECK FOR
14:29:28 40,000. A RECEIPT WAS
TRANSFERRED BETWEEN THE PARTIES. RECEIPT FOR
14:30:06 TRANSFER OF STOCK, NO OTHER
DOCUMENTS WERE EXCHANGED. JERRY HAD THE 40,000.
14:30:32 00 BUT NEEDED ANOTHER 60
GRAND. MS. ZIMMERMAN GOT A LOAN FOR 60 GRAND

14:30:51 AGAINST HER MOTHERS HOUSE IN
HAYDEN. A LAWYER AND HIS FIANCE HANDED OVER TO
BERRY TO BUY. BERRY AND AND
14:31:52 KARLETTA WERE NOW OWNERS, BERRY AND KARLETTA
OWNED 100 PERCENT OF THE STOCK
14:32:18 THEN THINGS CHANGED, MCFARLAND AND ZIMMERMAN
WERE REGULARS, AFTER THIS
14:32:45 TRANACTION THEY WENT IN THERE AND GOT FREE FOOD
AND FREE DRINK. BERRY KEPT
14:33:06 TRACK OF IT. ONCE JERRY OWNED THE STOCK, KAREN
HAD A LOAN PAYMENT, JERRY
14:33:34 BERRY GAVE HER THE MONEY TO PAY THE LOAN SO
JERRY WAS PAYING THE LOAN TO
14:33:56 ZIIMERMAN. JERRY BERRY GOT SICK WITH CANCER,
HEALTH WENT DOWN. WHILE IN THE
14:34:25 HOSPITAL MCFARLAND GAVE KARLETTA TWO AGREEMENTS.
FIRST SAID 50 PERCENT OF
14:34:58 STOCK WOULD BE GIVEN TO MCFARLAND AND ZIMMERMAN
IN EXCHANGE FOR THE 100,000.
14:35:26 OTHER AGREEMENT SAID A TRUST WOULD BE
ESTABLISHED AND THAT KARLETTA WOULD BE
14:35:51 I TRUST WITH 50 PERCENT STOCK. KARLETTA DID NOT
AGREE WITH EITHER AGREEMENT.
14:36:16 SHE CONSIDERED THE 100,000 A LOAN, SHE TYPED UP
HER OWN AGREEMENT FOR
14:36:41 EVERYONE TO SIGN. JERRY GETS OUT THE HOSPITAL,
ROUGH SHAPE. DRIVES TO
14:37:04 MCFARLAND AND ZIMMERMAN HOME AND BRINGS HIS LOAN
AGREEMENT. THEY SIGNED THE
14:37:34 AGREEMENT THAT STATED JERRY WAS SELLING ONE HALF
OF STOCK TO MCFARLAND AND
14:37:53 ZIMMERMAN. JERRY AND KARLETTA WERE DIRECTORS.
THEY HAD A MEETING, MINUTES
14:38:34 WERE TYPED UP, MINUTES WERE PRE DONE. MCFARLAND
AND ZIMMERMAN WERE ALSO
14:39:27 APPOINTED DIRECTORS. DIRECTOR MEET ING WAS NEXT,
BY LAWS WERE PRE DONE UP.
14:39:57 MCFARLAND DIDNT KNOW THERE WERE ALREADY BI LAWS
WHICH INDICATED THERE WERE
14:40:19 ONLY TWO DIRECTORS WHICH HAD ALREAY BEEN
POINTED. JERRY DIES AND A FEW DAYS
14:40:38 LATER MCFARLAND IS ON HER PORCH WITH TWO
DOCUMENTS. ONE SAYING MCFARLAND WAS
14:41:08 TO SIGN CHECKS AND ZIMMERMAN TO BE TREASURER.
OTHER DOCUMENT STATED MCFARLAND
14:41:37 AS PRESIDENT AND PROPERTY TO BE SOLD THROUGH

14:42:06 TREATY ROCK REALTY WHERE
14:42:06 ZIMMERMAN WAS A BROKER. KARLETTA DIDN SIGN ANY
14:42:26 DOCUMENT, SHE REFUSED TO SIGN
14:42:57 ANY DOCUMENTS. MCFARLAND AND ZIMMERMAN WERE MAD,
14:43:22 MCFARLAND GAVE NOTICE OF 2
14:44:29 DAY NOTICE. 11/18/06 - TWO WEEKS AFTER JERRY
14:45:03 BERRY DIED, SHE WENT TO A
14:45:34 THAT MEETING WITH A ATTY PRESENT. WORTH 1-2 TO
14:46:12 1.5 MILLION. CONFLICT OF
14:46:31 INTEREST. MCFARLAND TOLD THIS ATTY. THAT
14:46:59 JUDGMENT CREDITORS HAD CONTACTED HIM
14:47:35 ABOUT THE STOCK. KARLETTA WROTE A LETTER AND
14:48:06 BROUGHT IT TO THAT MEETING,
14:48:48 LETTER OF OBJECTION TO MEETING, SUPPOSED TO HAVE
14:49:24 TEN DAYS NOTICE. THEY HAD
14:50:23 TWO DAYS NOTICE TO THE MEETING. MCFARLAND
14:50:53 POSTPONED THE MEETING TO ANOTHER 10
14:51:40 DAYS OUT. AT THE NEXT MEETING CORPORATE DEBT WAS
14:52:28 DISCUSSED, THEY VOTED AS TWO
14:53:04 VOTES AND HER AS ONLY ONE AUTHORIZING THE SELL
14:53:32 OF THE PROP TO TREATY ROCK,
14:53:34 MCFARLAND AS PRESIDENT AND ZIMMERMAN AS
14:54:09 TREASURER. CALLED A NEXT MEETING FOR
NEW BI LAWS. KARLETTA WAS TOLD BY STAFF SHE
COULD NO LONGER BRING GUESTS INTO
EAT AND SIGN FOR HER FOOD. 2/5/07 MCFARLAND SENT
A LETTER TO ME REMOVING
KARLETTA AS A DIRECTOR. OVER HER OBJECTION THEY
VOTED TO REMOVE HER AS A
DIRECTOR. MCFARLAND HAS BREACHED, HE BOUGHT
STOCK AT FAR LESS THAN FAIR
MARKET VALUE, THERE WAS ONE MILLION IN EQUITY.
THEY ONLY PAID 100,000 FOR
THIS. MCFARLAND HAVE LET THEIR FRIENDS EAT THERE
FOR FREE, ONE FREE BOAT
SLIPS. THEY CREATED TWO NEW SHARES SOLD THEM FOR
ONE HUNDRED DOLLARS. AS OF
NOW THE RESTARUANT AND BAR ARE CLOSED, POSSIBLE
FORECLSURE, TAXES ARE
OWERDUE.

14:53:34 **Add Ins: ATTY, JOHN WHELAN - DEF**
OPENING STATEMENT. YES HE IS A BANKRUPTCY LAWYER
AND KAREN WORKS IN A HAIR
14:54:09 SALON. LAW SUIT PERTAINS TO A BUSINESS
TRANSACTION. JULY 2003 WAS WHEN IT

14:54:55 STARTED. TRANSACTION WAS COMPLETED OCT/2006 -
HAPPENED IN CLOSE PROX TO JERRY
14:55:34 BERRY DEATH. KARLETTA WAS 5TH WIFE AND WAS 30
YEARS YOUNGER. JERRY BERRY DID
14:56:06 NOT HAVE A GOOD WORKING RELATIONSHIP WITH HIS
WIFE. CAPTAINS WHEEL IS A
14:56:32 RESTAURANT AND A BAR. BEEN IN AFFECT FOR SOME
TIME, JERRY BERRY BOUGHT INTO
14:56:51 IT 2000. MCFARLAND AND ZIMMERMAN WERE REGULARS
THERE, FRIENDSHIP DEVELOPED.
14:57:16 JERRY OPERATED THE BUSINESS WITH CAMPBELLS. 2003
CAMPBELLS WANTED OUT, JERRY
14:57:49 DIDNT HAVE THE MONEY TO DO THAT. CAMBELLS BEGAN
TALKING TO TALERICO, WENDY
14:58:16 TALRICO. TALRICO WANTED TO BUY THAT STOCK BUT
THEY DIDNT HAVE THE MONEY
14:58:38 EITHER. JERRY DIDNT WANT THE TALERICOS AS HIS
PARTNERS. JERRY BERRY GOES TO
14:58:56 MIKE AND KAREN AND PROPOSE THEY BUY THE STOCK
AND THEY BECOME HIS SILENT
14:59:17 PARTNERS. JERRY WANTED TO RUN THE SHOW, HE TALK
TO MIKE AND KAREN. JERRY
14:59:47 WOULD RUN THE PLACE AND THEY WOULD BE SILENT
PARTNERS, THEY DIDNT HAVE
15:00:04 100,000 LAYING AROUND, THEY HAD 40,000.00 JERRY
GOES TO THE OFFICE TO GET THE
15:00:21 CHECK, RECEIPT SHOWS IT A LOAN FOR 40,000. -
LOAN TO BE PAID BACK, IF THEY
15:00:48 COULD COME UP WITH THE OTHER 60,000 THEY WOULD
DO THE SILENT PARTY THING.
15:01:12 KAREN GOT THE 60 THOUSAND, JERRY WEBT DOWN AND
GET CHECK AND RECEIPT.
15:01:46 REFERENCES THE 40000 AS A LOAN AND THE OTHER
RECIPTS SHOWS BUSINESS
15:02:18 TRANACTION. STOCK WAS HELD AS TREASURY STOCK.
JERRY MADE IT LOOK LIKE JERRY
15:03:05 BOUGHT IT AS HIS. CORP ALREADY HAD 4 DIRECTORS,
PAPERWORK SAID TWO BUT ALL
15:03:35 FOUR DIRECTORS SIGNED. JERRY TAKE OVER THE
PLACE, MCFARLAND AND KAREN WENT
15:04:09 DOWN THERE AND ATE FOR FREE, EVERYTHING FINE FOR
A NUMBER OF YEARS. ALL FINE
15:04:35 FOR TWO YEARS. UNTIL HE WAS DIAGNOSED WITH
CANCER. THERE WAS NO FORMAL
15:05:05 PAPERWORK IN PLACE SHOWING MIKE AND KAREN THEM
AS HALF OWNERS IN THE

15:05:39 BUSINESS, THEY APPROACH JERRY REGARDING THAT.
PERIODS OF TIME HE JERRY BERRY
15:06:12 WAS IN THE HOSPITAL. MIKE DRAFTED A AGREEMENT
STATING WHAT THE DEAL WAS SO IT
15:06:33 WAS IN WRITING, HE HAD TWO WEEKS TO LOOK OVER
THE DOCUMENT. 4TH OF JULY ALL
15:07:06 THREE PARTIES SIGN IT. KARLETTA WANTED IT TO BE
TREATED AS A LOAN AND NOT
15:08:49 OWNERS OF STOCK. BUSINESS WAS A LOSING DOCUMENT
WITH LOSING MONEY. JERRY
15:09:18 BERRY SIGNED A DOCUMENT. STOCK WAS ISSUED TO
MIKE AND KAREN 200 SHARES. STOCK
15:09:58 OF 200 TO KARLETTA AND JERRY RETAINED STOCK.
MAKE AND KAREN DENY ANY WRONG
15:10:31 DOING. JERRY CAME TO HIS OFFICE FOR A 15 MINUTE
REGARDING BANKRUPTCY LAW.
15:11:14 JERRY HAD CREDIT PROBLEMS AND FINANCIAL
PROBLEMS. MIKE NEVER REPRESENTED
15:11:36 JERRY BERRY FOR ANY FINANCIAL TRANSACTIONS. SO
NO BREECH OF CONTRACT. NUMBER
15:12:10 OF WITNESSES TODAY.

15:14:31 **Stop recording**
(On Recess)

15:36:02 **Record**
MCFARLAND, MICHAEL

15:36:02
Recording Started:

15:38:16 **Add Ins: ATTY, REX FIINEY - PLANT**
CALLS FIRST WITNESS

15:38:49 **Other: MCFARLAND, WITNESS MICHAEL**
SPELLS NAME. [REDACTED] DOB. 10714 MCFARLAND RD.
ATHOL IS WHERE I LIVE. YES
15:40:18 LICENSED TO PRACTICE LAW SINCE 1980, NEARLY 30
YEARS, FINISHED LAW SCHOOL IN
15:40:51 1977. ATTENDED GEORGE WASH UNIVERSITY. 1303 N.
6TH ST WAS MY OFFICE FOR TEN
15:41:28 YEARS. 421 CDA AVE IS CURRENT LOCATION OF
OFFICE. YES PROFESSIONAL
15:41:55 ASSOCIATION. NAME - PA. STANDS FOR POMPOUS ASS.
BUSINESS INCORPATED 2002.
15:42:56 CREATED INCORP FOR TAX BENEFITS. NO ONE ELSE

OWNS OWNERSHIP IN MY BUSINESS.
15:43:32 IT IS MY FULL TIME OCCUPATION, WORK CLOSE TO 60
HOURS OR MORE. PRIMARY FOCUS
15:43:59 IS IN BANKRUPTCY COURT. BEGAN BANKRUPTCY LAW IN
EARLY 1980'S. YES SPEAK AT
15:44:32 PUBLIC EVENTS ABOUT BANKRUPTCY. NO DONT DO ANY
TRUST AT MY OFFICE. YES DO
15:45:22 CORPORATE WORK AT MY OFFICE. ASSIST PEOPLE IN
SETTING UP CORP. FAIRLY SIMPLE.
15:45:46 NO DONT DRAFT BY LAWS. PL EXHIBIT 99 - YES
DOCUMENT AND YES THAT IS MY
15:49:52 SIGNATURE SHOWING MY NAME AS REGISTERED AGENT
FOR CAPTAINS WHEEL RESORT
15:50:22 INCORP. APPOINTED 12/7/2006. YES TRUE AND
ACCURATE.

15:51:06 **Judge: Hosack, Charles**
EXHIBIT 99 ADMITTED.

15:51:41 **Other: MCFARLAND, WITNESS MICHAEL**
YES I PRESUME I STILL AM, NEVER BEEN REMOVED.
15:52:20 HANDLE CHAPTER 7 AND 13 TYPES OF BANKRUPTCIES.
CHAPTER 7 IS LIQUIDDATION OR
15:52:55 STRAIGHT BANKRUPCY TO A TRUSTEE AND THAT PERSON
LIQUIDATES. THE TRUSTEE
15:53:45 TAKES POSSESSION OF EXEMPT PROPERTY WHO
CREDITORS CANT TOUCH. DESCRIPTION OF
15:54:28 EXEMPT PROPERTY. A CHAPTER 13 BANKRUPCY IS
DIFFERENT, ALL OR DEBT IS REPAYD
15:55:25 WITH 3-5 YEARS. EXPLAINS PROCESS OF CHAPTER 13.
YES PROTECTION UNDER
15:56:19 AUTOMATIC STAY. NO DONT MAINTAIN A PHONE LOG AT
MY OPFFICE, ONLY LOG OF
15:56:47 MESSAGES, MAINTAINED BY THE RECEPTIONIST, SHE IS
NOT THE FULL TIME. NO I DONT
15:58:05 TAKE NOTES ON EVERY SINGLE PHONE CALL. SOMETIMES
DO SOMETIMES DONT. KEEP
16:01:15 CONTACT INFORMATION ON CLIENTS. YES KNEW JERRY
BERRY - YES HE DIED. FROM
16:02:52 PANCREATIC CANCER. SUMMER 2006 JERRY HAD SOME
GOOD DAYS AND SOME BAD DAYS,
16:03:24 WAS DOING CHEMO FOR HIS CANCER.

16:06:18 **Judge: Hosack, Charles**
DISMISSES JURY PANEL FOR THE DAY. RESUME
TOMORROW AT 08 30 AM.

Court Minutes:

Session: HOSACK011910A
Session Date: 01/19/2010
Judge: Hosack, Charles
Reporter:

Division: Div1
Session Time: 08:23

Courtroom: local

Clerk(s): Burrington, Talisa

State Attorney(s):

Public Defender(s):

Prob. Officer(s):

Court interpreter(s):

Case ID: 0003

Case number: CV2007-2409
Plaintiff: BERRY, KARLETTA GRACE
Plaintiff Attorney:
Defendant: MCFARLAND, MICHAEL
Pers. Attorney:
Co-Defendant(s):
State Attorney:
Public Defender:
Previous audio and annotations can be found in case: 0002
Additional audio and annotations can be found in case: 0004.

01/20/2010

08:48:24

Recording Started:

08:48:24

Case recalled

08:48:33

Judge: Hosack, Charles
SECOND DAY JURY TRIAL. ALL PARTIES PRESENT.

BRINGS IN JURY PANEL.

08:50:41 **Add Ins: ATTY, REX FIINEY - PLANT**
RECALLS MR. MCFARLAND AS WITNESS

08:51:05 **Other: WITNESS, MICHAEL MCFARLAND -**
YES REGISTERED AGENT FOR MY OWN CORP. AND HAVE
BEEN REGISTERED FOR SOME IN

08:52:39 THE PAST. LGS IS AN INACTIVE CORP.

08:53:16 LGS IS STILL IN GOOD STANDING WITH SEC OF STATE
BUT IT IS INACTIVE. YES I

08:53:41 SAID MY OWN COMPANY. REGISTERED AGENT IS JUST A
WARM BODY WITH A PHYSICAL

08:54:25 ADDRESS. AGENT FOR SKYLER CONSTRUCTION. YES I
USE MY LAW FIRM ADDRESS FOR

08:54:58 AGENT PURPOSES, PHYSICAL ADDRESS WHERE YOU CAN
BE SERVED DURING BUSINESS

08:55:22 HOURS. YES I SAID HE HAD SOME GOOD AND BAD DAYS
IN 2006. I DIDNT SEE HIM ON

08:56:45 HIS BAD DAYS, I TYPICALLY SAW HIM ON HIS GOOD
DAYS. WHEN HE WAS IN THE

08:57:06 HOSPITAL I DIDNT SEE HIM. I DONT KNOW EXACTLY
WHEN HE WAS IN THE HOSPITAL.

08:57:24 YESI DROPPED OFF TWO DOCUMENTS TO KARLETTA,
WITHIN A COUPLE OF WEEKS PRIOR TO

08:57:47 JULY 4TH. I DONT REMEMBER THE CONVERSATION
EXACTLY. I WENT THERE AND DROPPED

08:58:35 THEM OFF WITH KARLETTA, DONT KNOW THE EXACT
DATE. TWO PROPOSED AGREEMENTS, I

08:59:04 WOULD REFER TO THEM AS DRAFTS, ALTERNATIVE
DRAFTS FOR JERRY TO COMPLETE THE

08:59:24 TRANSFER OF STOCK. ONE WAS STRAIGHT FORM THE
OTHER HAD A PROVISION THAT WE

08:59:57 WOULD SET UP A TRUST. I PREPARED THOSE
DOCUMENTS. IT WAS A DISCUSSION

09:00:25 DOCUMENT FOR JERRY TO DECIDE, WAS A DRAFT NOT A
FIRM AGREEMENT. IT WOULD HAVE

09:00:54 PROVIDED THAT KAREN AND I WOULD HAVE PROVIDED
AND SET UP A TRUST. KARLETTA

09:01:22 AND HER SON WERE TO BE BENFICIARIES BUT AGAIN A
TRUST WAS NEVER SET UP. THE

09:01:57 DRAFTS WOULD HAVE BEEN CREATED SOMETIME FEB
2006. YES WE REACHED AGREEMENT

09:02:44 IN 2003. 2003 AGREEMENT HAD NOTHING TO DO WITH
KARLETTA, ONLY HAD TO DO WITH

09:03:02 JERRY, MYSELF AND KAREN. BY THE TIME THE

09:03:32 AGREEMENT WAS PUT IN WRITING, JERRY
HAD ALREADY HAD CONCERNS AND HAD CONCERNS ABOUT
09:04:10 HIS SHARES. WHEN HE GOT
MARRIED HE REPRESENTED THAT IT WAS HIS MONEY. I
DONT KNOW WHEMN THEY GOT
09:04:42 MARRIED, NO IDEA ON THAT. FIRST MET JERRY BERRY
IN 2000, MET HIM AT THE
09:05:10 CAPTAINS WHEEL RESORT IN BAYVIEW. KARENS
COUSIN, LARRY PIERCE SAID HE REALLY
09:05:39 NEEDED TO MEET THIS GUY, THE THREE OF US WENT,
LARRY INTODUCED US TO JERRY
09:06:04 BERRY, A REALLY NICE PERSON. YES HE WAS PART
OWNER AT THAT TIME. YES WE
09:06:32 BECAME FRIENDS, CLOSE FRIENDS. WHEN I FIRST MET
JERRY I HAD NOT BEEN IN THERE
09:07:06 BEFORE. GRADUALLY WE SPENT MORE TIME WITH JERRY.
WE LEARNED THAT HE SET UP
09:07:43 MOBILE HOMES, WE HAD A DOUBLE WIDE THAT NEEDED
SET. KAREN CALLED HIM AND
09:08:08 INQUIRED ABOUT SETTING THE MOBILE HOME. AS A
RESULT OF THAT CONVERSATION, HE
09:08:31 CME OUT TO MY PROPERTY AND DID SOME WORK,
ARRANGED FOR SLAB AND SEPTIC
09:08:58 SYSTEM, THIS WAS ALL OVER A PERIOD OF TIME. HE
WAS THERE - THE RELATIONSHIP
09:09:21 DEVELOPED OVER TIME. I THINK HE GAVE ME HIS
BUSINESS CARD AT THE INITIAL
09:09:43 TIME. I DONT KNOW IF I EVER GAVE JERRY MY
BUSINESS CARD. YES THIS BUSINESS
09:10:26 CARD IS ONE OF MINE. I CANT TELL WHAT IS WRITTEN
ON THE BACK.

09:11:02 **Add Ins: ATTY, REX FIINEY - PLANT**
PLANTIFF EXHIBIT 102 TO BE ADMITTED

09:11:59 **Add Ins: ATTY, JOHN WHELAN - DEF**
OBJECTION

09:12:05 **Add Ins: ATTY, REX FIINEY - PLANT**
WILL LAY FOUNDATION

09:12:16 **Other: WITNESS, MICHAEL MCFARLAND -**
WE WERE FRIENDS AND YES WE DRANK. YES WE SPENT
TIME TOGETHER. WE LIKED THE
09:13:37 CAPTAINS WHEEL, IT WAS KIND OF OUR HANG OUT. WAS
TEN MINUTES FROM THE RANCH,

09:13:54 HE DID WORK FOR US, HE WOULD STOP BY JUST ABOUT
09:14:15 EVERY WEEKEND AND WE WOULD
09:14:44 HAVE SOME WINE AND CHAT, SOMETIMES FOR HOURS,
09:15:20 VARIOUS SUBJECTS. DONT RECALL
09:15:49 DICUSSING LEGAL MATTERS. NO - I NEVER GAVE HIM
09:16:12 LEGAL ADVICE. TALKED ABOUT DOT
09:16:36 PUTTING A ROAD THROUGH HIS PROPERTY, NEVER GAVE
09:16:58 HIM ADVISE. NO I NEVER TOLD
09:17:24 HIM HE NEEDED TO GET A APPRAISAL, NEVER TOLD
09:17:51 KARLETTA THAT. YES I AM A GOOD
09:18:47 DANCER AND SO IS KAREN. WE ALL ENJOYED DANCING
09:19:14 AT THE WHEEL, OFTEN DANCED
09:20:00 WITH JERRY AND KARLETTA. SOMETIMES WE WOULD SIT
09:21:20 AT THE SAME TABLE, WE DIDNT
09:21:40 DINE TOGETHER VERY OFTEN. YES I TRUSTED JERRY
09:23:19 BERRY OVER TIME, TRUST WAS
09:24:32 BUILT THROUGH THE WORK HE DID. THE WORK WAS DONE
09:25:02 CORRECTLY AND PRICE WAS
09:25:27 FAIR, HE WAS A MAN OF HIS WORD. CAPTAINS WHEEL
09:27:12 INC. IS A IDAHO CORP. IT
09:29:03 ORIGINAL BOOK - THE COURT HAS EXHIBITS. IT WAS
09:29:47 DELIVERED TO ME IN 2006 AND I
SIGNED A RECEIPT. I HAVE NO IDEA IF KARLETTA
EVER HAD THE ORGINAL BOOK. THE
ARTICLES OF INCORP WERE FILED 4/3/1996 FILED
WITH SEC OF STATE. NO RECORD IN
THE BOOK OF STOCK CERTIFICATES TO THE ORIGNAL
PARTIES, NORDSTROM AND
CAMPBELL. NO ONE SIGNED BUT SUSAN.
PL EXHIBIT 3 - ACCURATE COPY OF INCORP. - TRUE
AND ACCURATE. SECOND PAGE -
ARTICLE X - DIRECTORS - NUMBER OF ORIGINAL
DIRECTORS IS 4. READS FOLLOWING
SENTENCE. BILAWS PROVIDE FOR 2 DIRECTORS BUT
SIGNED B 4 DIRECTORS.

09:25:27 **Judge: Hosack, Charles**
EXHIBIT 3 ADMITTED

09:27:12 **Other: WITNESS, MICHAEL MCFARLAND -**
EXHIBIT 4 - MINUTES OF ORGANIZATIONAL MEETING.
DONT REMEMBER IT BEING IN THE
09:29:03 BOOK, THIRD PAGE SHOWS COPY OF CAMBELL
SIGNATURE. 4/15/1996 IS WHAT THIS
09:29:47 DOCUMENT SAYS. I REALLY HAVENT REVIEWED IT, I AM
NOT SURE IF I HAVE EVER SEEN

09:30:10 THIS, I WASNT THERE. YES I SEE THE PARA STATING
RESOLVED.

09:30:45 EXHIBIT 5 - DOCUMENT. COPY OF THE BI LAWS. THIS
APPEARS TO BE COPY PROVIDED

09:31:28 FROM YOUR OFFICE.

09:31:47 **Judge: Hosack, Charles**
EXHIBIT 5 ADMITTED AND NOT FOUR

09:34:17 **Other: WITNESS, MICHAEL MCFARLAND -**
TOTAL NUMBER OF SHARES IS 400.

09:34:41 ASSETS OWNED BY CAPTAINS. UNDER ACRE OF GROUND,
300 FEET OF WATERFRONT. BOAT

09:35:07 SLIPS. RESTAURANT BUILDING, OPEN DECK, DANCE
FLOOR, BAR, KITCHEN FACILITIES

09:35:26 AND OUTDOOR FACILITIES, LIQ LICENSE - HARD ALC.
FURNITURE AND EQUIPMENT. THE

09:35:59 PARKING LOT IS INCLUDED IN THAT UNDER OF ACRE OF
LAND. PARKING LOT ON ONE

09:36:27 SIDE AND REST ON THER SIDE. TWO SEPERATE
PROPERTIES, BOTH IN KOOTENAI COUNTY.

09:36:49 LAKE FRONTAGE- LAKE LEVEL CHANGES. AT HIGH WATER
NO BEACH AT ALL. LOW WATER

09:37:26 MOST BOATS ARE ON THE GRAVEL. YES THERE IS A
SAIL BOAT PARKED THERE RIGHT

09:37:47 NOW, 3 OR 4 SLIPS ARE STILL USABLE IN THE
WINTER. I DONT KNOW WHAT THE

09:38:33 ASSESSED VALUE IS, DONT EVER REMEMBER SEEING
ASSESSMENT. I WOULD IMAGINE IT

09:39:07 WOULD SHOW THAT THE CORP. OWNS THE PROPERTY.
INDIV OWN SHARES IN THE CORP.

09:39:52 PRESUMING JERRY STOCK WAS ISSUED TO HIM IN
2000, THAT WAS 200 SHARES. 200

09:41:04 REPRESENTED HALF OF THE SHARES. YES I AM IN A
RELATIONSHIP WITH KAREN

09:41:23 ZIMMERMAN LOCATED AT THE END OF THE TABLE. MET
IN 1996 OR 1995, LISTENED TO

09:41:50 SOME MUSIC TOGETHER 1997 ON NEW YEARS EVE. WE
ARE ENGAGED TOGETHER. STROKE OF

09:42:16 Y2K GOT ENGAGED. YES WE LIVE TOGETHER SOMETIMES
IN HAYDEN SOMETIMES AT

09:42:50 RANCH. RESIDE TOGETHER SINCE WE GOT ENGAGED. WE
DONT SHARE BANKING OR

09:43:40 FINANCING TOGETHER, RECENTLY JUST OPENED A SMALL
VACATION ACCOUNT AND PUT

09:44:04 KARENS NAME ON IT, KINDA A SAVING ACCOUNT FOR

09:44:35 US. THE ONLY JOINT IS THE STOCK
AND THE TITLE TO THE OLDSMOBILE. REGARDING THE
09:45:01 STOCK - ITS 200 SHARES, STOCK
09:45:31 CERT NUMBER 4 ISSUED IN 2006. KAREN AND I OWE 50
PERCENT. JOINT TENANTS WITH
09:46:08 RIGHTS OF SURVIVORSHIP. THAT IS HOW MOST STOCK IS
ISSUED. UPON DEATH THE OTHER
09:46:49 PARTY IS THE SOLE OWNERSHIP, SET UP FOR PARTIES
WHO ARE NOT MARRIED. OWNED AS
09:47:33 TENANTS IN COMMON. PROTECTS THE OTHER PARTY IF
ONE DIES. ITS REALLY THING WE
09:48:03 HAVE ACQUIRED TOGETHER. WE PURCHASED FROM THE
CAMBELLS WITH THE ASSISTANCE OF
09:49:31 JERRY BERRY.
09:50:58 PL EXHIBIT 23 - DOCUMENT - READS FIRT PARAGRAPH
OF DOCUMENT. NO I DIDNT BUY
09:51:38 FROM JERRY, I BOUGHT FROM CAMBELLS THROUGH
JERRY. KAREN, MINE AND JERRY BERRY
SIGNATURE ON THIS DOCUMENT.

09:51:47 **Add Ins: ATTY, REX FIINEY - PLANT**
MOVE TO ADMIT

09:51:51 **Judge: Hosack, Charles**
EXHIBIT 23 ADMITTED

09:52:18 **Other: WITNESS, MICHAEL MCFARLAND -**
EXHIBIT 24 IS COPY OF DRAFT AGREEMENT - NOT
SIGNED. I THINK THIS WAS THE
09:53:54 SECOND DRAFT AGREEMENT, I TYPED IT UP. READS
INTRODUCTION LINE. AGREEMENT
09:54:43 WAS NOT DRAFTED UNTIL 2006 . PROPOSED DRAFT - WE
DIDNT DO IT THIS WAY BUT IF
09:55:29 SO WE HAD RECIEEVED 100 PERCENT OF STOCK AND SET
UP A TRUST FOR KARELETA AND
09:55:53 HR SON. READS PARA FROM PROPOSED AGREEMENT
REGARDING TRUST ACCOUNT. IF WE
09:57:33 TAKE IT IN TRUST WE WOULD HAVE ONLY BEEN THE
TRUSTEES. YES I TOOK THOSE
09:58:27 DOCUMENTS TO KARELLA

09:58:40 **Add Ins: ATTY, REX FIINEY - PLANT**
ADMIT 24

09:58:44 **Judge: Hosack, Charles**
ADMIT 24

09:59:53 **Other: WITNESS, MICHAEL MCFARLAND -**
STOCK ORIGINALLY IN JERRY NAME AND THAT WAS
10:00:34 CANCELLED AND A NEW CERT WAS
ISSUED TO JERRY BERRY AND KARLETTA BERRY, SHE
10:00:57 BECAME OWNERSHIP OF 200 SHARES
ALL BY HERSELF WHEN JERRY BERRY DIED. IT WAS
10:01:31 DISCUSSED AT THE MEETING ABOUT
THE JOINT SURVIVORSHIP. 10/15/2006 WAS THAT
10:02:06 MEETING, ALL 4 OF US MET AND HAD
A MEETING, NUMBER OF DOCUMENTS WERE DEALT WITH.
10:02:30 AT THAT MEETING HE INDICATED
HE WANTED KARLETTA ON THOSE AND SO WE DID NEW
10:03:07 STOCK CERT. THERE WAS A SET OF
MINUTES THAT I HAD BLANKS TO BE FILLED IN, I DID
10:04:18 THAT BEFORE THE MEETING. NO
I NEVER GENERATED A BILLING INVOICE FOR ME TO DO
10:04:44 THAT FROM MY OFFICE. I
STARTED A FILE AT ONE POINT TO KEEP TRACK OF MY
10:05:07 EXPENSES THAT I WAS PUTTING
INTO THE CAPTAINS WHEEL. COPYING WAS \$2.00. NO
10:05:35 THIS IS NOT A BILLING
STATEMENT, USED QUICK BOOKS TO KEEP TRACK OF MY
10:06:57 EXPENSES. NO RATE - NO
CHARGE. COPYING WAS OUT OF MY POCKET EXPENSES.
10:07:17 YES MAINTAINED THOSE RECORDS
AT MY OFFICE ON MY COMPUTER. THIS WAS NOT A
10:08:04 BILLING STATEMENT. I HAVE NEVER
EVER GIVEN JERRY BERRY LEGAL ADVISE, NEVER ACTED
10:08:24 AS ATTY FOR CAPTAINS WHEEL
RESORT INC. NEVER GIVEN KARLETTA LEGAL ADVISE.

10:08:57 **Add Ins: ATTY, REX FIINEY - PLANT**
REFER TO MM - DEF EXHIBIT

10:09:18 **Other: WITNESS, MICHAEL MCFARLAND -**
THESE ARE THE PAGES I WAS TALKING ABOUT - PRE
10:10:11 PREPARED MINUTES. YES THERE
BLANKS IN THEM. REFERS TO SECOND PAGE -
10:10:47 RESOLUTION, WITH HAND WRITTEN NOTE,
REGARDING JOINT TENANTS WITH RIGHT TO
10:11:10 SURVIVORSHIP. YES WE DID HAVE MEETINGS
A MY LAW OFFICE WITH JERRY BERRY. DONT REMEMBER
10:11:36 WHEN 2000 OR 2001. DONT
REMEMBER EXACTLY. JERRY HAD BEEN TALKING WITH
10:12:13 US, VISITED US REGULARLY, TOLD
US LOTS OF THINGS ABOUT HIS PERSONAL LIFE, HAD

TOLD OF SOME BAD BUSINESS
10:12:37 EXPERIENCES OVER IN SPOKANE AND SOME BAD
10:12:56 JUDGEMENTS OUT OF THERE, SAID HE
WANTED TO MEET WITH ME TO DISCUSS BANKRUPTCY, I
DONT DISCUSS BUSINESS IN A
10:13:20 SOCIAL SETTING. I TOLD HIM TO COME TO MY OFFICE,
DONT RECALL WHEN IT WAS AT
10:13:43 ALL, WAS JUST INITIAL BANKRUPCY CONSULTATION
WHICH I HAVE DONE HUNDREDS OF
10:14:10 TIME. 12/16/ I DID A SEARCH. 12/18 A DEPOSITION
WAS DONE. YES A RECEIPT THAT
10:15:14 I HAD OVERLOOKED, IN A FILE EACH TIME I WOULD
ADVANCE MONEY TO CAPTAIN WHEEL
10:15:46 DNE THROUGH WELLS FARGO AND WOULD KEEP THAT
RECEIPT. PAID FOR THE LIQ LICENSE
10:16:08 TO THE STATE. ORIGINAL RECEIPT FOR 60 THOUSAND
AND 40 THOUSAND WERE IN THAT
10:16:28 FILE. OK BACK THE MEETING WITH JERRY BERRY, YES
THAT WAS AT MY OFFICE. NO ONE
10:17:46 CAME WITH HIM. WOULD HAVE TAKEN PLACE IN MY
OFFICE, I DIDNT WRITE IT ON
10:18:22 CALENDAR. NOT REALLY CONFIDENTIAL, I DO THIS
WITH ALL SORTS OF PEOPLE, JUST A
10:18:49 ROUTINE CONSULTATION TO EXPLAIN THE PROCESS, NOT
CONFIDENTIAL. YES IF THEY
10:19:26 TOLD ME WHAT THEIR SPEFIC DEBTS WERE THAT WOULD
BE CONFIDENTIAL. NO I DIDNT
10:19:54 KEEP ANY NOTES FROM THAT MEETING. I ONLY TAKE
NOTES WHEN I AM STARTING A
10:20:26 FILE. DONT DO THAT IN INITIAL CONSULTATION. DONT
REMEMBER WHO THE SECRETARY
10:20:51 WAS AT THAT TIME, HAD A SERIES OF SCRETARIES
DURING THAT TIME. HE CAME TO SEE
10:21:16 ME ABOUT BANKRUPCY. HE HAD ALREADY TOLD ME HE
HAD DEBTS ARISING FROM THE
10:21:45 DEVELOPMENT PROJECT OVER IN SPOKANE. YES HE WAS
AWARE THAT I PRACTICED
10:22:09 BANKRUPCY LAW, WE TALKED ABOUT MANY THINGS. WE
WASNT SEEKING LEGAL ADVISE, HE
10:22:26 WAS SEEKING BANKRUPCY INFORMATION. INITIAL
CONSULTATION IS NOT WHERE I AM
10:23:10 HIRED AS THEIR ATTY. THEY TAKE PAPERWORK HOME
WITH THEM. INITIAL CONSULTATION
10:23:32 IS JUST INITIAL INFORMATION. I DONT REMEMBER
SPECIFICALLY WHAT WAS SAID AT
10:23:52 THAT MEETING IN MY OFFICE. DO HUNDREDS OF THEM

10:24:26 LIKE A BROKEN RECORD. JUDGMENT
AGAINST HIM, I DONT KNOW ANYTHING ABOUT SPECIFIC
10:24:48 DETAILS ABOUT JUDGMENT FROM
WASH. STATE. YES JUDGMENT CREDITORS ARE
10:25:27 DIFFERENT FROM CREDIT CARD JUDGMENTS.
EXPLAINS DIFFERENT TYPE OF CREDITORS. I DONT
10:26:17 EVER REMEMBER A CREDITOR
CALLING ME SPECIFICALLY ABOUT JERRY BERRY
10:26:43 JUDGMENTS, DONT EVER RECALL GETTING
A LETTER RE JERRY BERRY. I DOUBT JERRY TOLD ME
10:27:32 ABOUT HIS INCOME AT THE
MEETING AT MY OFFICE. DID NOT DISCUSS HIS
10:28:02 ASSESTS OR HIS STOCK AT CAPTAINS
WHEEL RESORT, WE HAD ALREADY KNOWN FROM
10:28:31 PREVIOUS CONVERSATION. YES HE DID
TELL US THAT HIS PROPERTY WAS PUT IN KARLETTA
10:29:39 NAME. WHEN HE CAME INTO MY
OFFICE, I AM GUESSING JERRY BERRY OWNED STOCK,
10:30:06 YES 200 SHARES AT THAT TIME.
KARLETTA WAS ADDED UNTIL 5 YEARS LATER ON THE
10:30:36 STOCKS. WHEN HE CAME IN FOR THE
MEETING, KAREN AND I HAD NO INTEREST IN THE
10:31:04 CAPTAINS WHEEL RESORT. DOUBT WE
DISCUSSED ANYTHING REGARDING VALUE OF THE STOCK
10:31:24 OR IF THERE WAS EQUITY, IT
WAS A BASIC EXPLANATION OF BANKRUPCY. THAT WAS
10:31:50 THE ONLY MEETING EVER IN MY
OFFICE. DOUBT WE DISCUSSED ASSESTS. DONT RECALL
10:32:38 TO DISCUSS ANYTHING ABOUT THE
CAPTAINS WHEEL RESORT AT THT MEETING AT MY
OFFICE.

10:33:26 **Judge: Hosack, Charles**
RECESS FOR BREAK.

10:33:39 **Stop recording**
(On Recess)

10:52:43
Recording Started:

10:52:43 **Record**
MCFARLAND, MICHAEL

10:52:55 **Judge: Hosack, Charles**
RESUME JURY TRIAL.

10:54:06 **Add Ins: ATTY, REX FIINEY - PLANT**
RECALLS MICHAEL MCFARLAND AS WITNESS

10:54:19 **Other: WITNESS, MICHAEL MCFARLAND -**
NOT SURE IF I EVER SAW LOAN DOCUMENTS ON THE
SMALL BUSINESS LOAN. WAS NOT
10:55:33 INVOLVED IN THAT. THAT WAS WHEN CAMBELLS AND
NORDSTROM SET IT UP. REVIEWED
10:56:10 SOME DOCS AFTER 2006. WAS NOT A MEMBER OF THE
BOARD UNTIL 4/15/ MEETING. NOT
10:56:54 SURE IF JERRY SHOWED US ANY PAPERWORK. 4/21/2001
- NO DONT RECALL PAUL
10:57:36 DOUGHERTY SENDING ME ANYTHING. NO OWNERSHIP ON
4/21/01 IN THE CAPTAINS WHEEL.
10:58:02 COULD DETERMINE EQUITY BY PROFITS AND DEBT AND
EQUITY, PRETTY BASIC. AT THAT
10:59:08 MEETING AT MY OFFICE - I DONT REALLY KNOW WHAT
JERRYS CONCERNS WERE ON THAT
10:59:34 PARTICULAR DAY, I CANT SEPERATE OUT WHAT WAS
SAID AT MY OFFICE, THE RANCH OR
10:59:56 AT THE CAPTAINS WHEEL. I JUST CANT DO THAT. I
CAN ONLY TELL YOU WE HAD A
11:00:18 MEETING AND WE DISCUSSED BANKRUPTCY. DETAILS OF
THE PROCESS. ITS A BASIC
11:00:47 PRESENTATION.
11:01:51 JOHN WHELAN IS MY ATTY

11:02:24 **Add Ins: ATTY, JOHN WHELAN - DEF**
OBJECTION - DEPOSITION

11:02:35 **Judge: Hosack, Charles**
OVER RULED

11:02:41 **Other: WITNESS, MICHAEL MCFARLAND -**
MY ATTORNEY EXERCISED HIS OPINION AT THE
DEPOSITION. MY ATTY ON MY BEHALF
11:03:45 POINTED OUT A NUMBER OF OBJECTIONS.
11:03:58 I DONT THINK I RECIEVED ANY CONFIDENTIAL
INFORMATION FROM JERRY BERRY. I DONT
11:04:33 KNOW WHEN WE DISCUSSED THAT THE STOCK WAS NOT
REGISTERED. DOUBT IT WAS AT MY
11:05:08 OFFICE. AT THAT MEETING IN MY OFFICE WE TALK
ABOUT WHAT IS EXEMPT AND WHAT IS
11:05:50 NOT EXEPMT. THAT WAS 8 OR 9 YEARS AGO. IF THERE
IS EQUITY IN STOCK IT IS NOT
11:06:30 EXEMPT. NOT GENERALLY EXEMPT. I WOULD HAVE

11:07:09 DISCUSSED THE DIFFERENT TYPES OF
CHAPTERS, THE DIFFERENCES BETWEEN THE CHAPTERS
AND DISCHARGE. I GIVE THEM A
11:07:41 QUESTIONNAIRE TO BRING ME BACK LATER. NO I NEVER
FILED A FILE FOR JERRY BERRY.
11:08:25 THERE ARE 2 FILES THAT I AM AWARE OF, ONE I
TALKED ABOUT FOR RECEIPTS AND
11:08:44 PROOF OF PAYMENTS. AND ONE OF COMPUTER EXPENSES.
JERRY BERRY CAME TO MY
11:09:14 OFFICE TO GET HIS OPTIONS RE BANKRUPCY. HE NEVER
WENT ANY FURTHER. THAT
11:09:48 MEETING PROBABLY LASTED ABOUT 20-30 MINUTES.

11:10:08 **Add Ins: ATTY, REX FIINEY - PLANT**
ASKING FOR LUNCH BREAK EARLY.

11:10:26 **Judge: Hosack, Charles**
GO FORWARD WITH DIRECT.

11:10:45 **Other: WITNESS, MICHAEL MCFARLAND -**
WE NEVER DISCUSSED THE SMALL BUSINESS LOAN. HE
WAS AT MY OFFICE TWO OTHER
11:11:33 TIMES IN 2003.
11:13:10 EXHIBIT A - RECEIPT FOR 40 THOUSAND DOLLARS
11:13:29 40 THOUSAND WAS FOR HIM TO ACQUIRE STOCK FOR US.
RECEIPT IS FROM A RECEIPT
11:14:06 BOOK KEPT IN OUR OFFICE. JERRY BERRY SIGNED FOR
IT ON THAT RECEIPT. ASIDE
11:14:32 FROM HIS SIGNATURE IT IS MY HAND WRITING. SAYS
IT IS FOR STOCK. YES HE WAS
11:14:58 GIVEN A COPY OF RCEIPT

11:15:04 **Add Ins: ATTY, REX FIINEY - PLANT**
ADMIT DEF A EXHIBIT

11:15:13 **Judge: Hosack, Charles**
ADMIT DEF EXHIBIT A

11:15:32 **Other: WITNESS, MICHAEL MCFARLAND -**
IT WAS FOR THE STOCK, TO HOLD IT UNTIL THE
REMAING 60 THOUSAND COULD BE CAME
11:15:54 UP. YES JERRY TOLD ME IT WAS A GOOD DEAL. YES I
THOUGHT IT WAS JUST A
11:16:20 FRACTION OF WHAT THE STOCK WAS WORTH, THOUGHT IT
WAS A EXCELLENT DEAL. NOT
11:16:48 SEEN ACTUAL DOCUMENTS. WAS AWARE FROM WHAT JERRY

TOLD US - SMALL BUSINESS

11:17:13 LOAN WAS OUT AND THOUGHT IT WAS PROBABLY WORTH
BETWEEN 750 TO ONE MILLION
11:17:36 DOLLARS. ROUGH ESTIMATE. WE HAD ALREADY
DISCUSSED THE 40 THOUSAND PORTION, HE
11:18:26 WANTED TO GET SOMETHING TO THE CAMBELLS AS SOON
AS POSSIBLE TO HOLD IT SO THE
11:18:44 CAMBELLS WOULD NOT SELL TO OTHER FOLKS THAT WERE
INTERESTED. HE WANTED TO
11:19:03 LOCK THIS IN. IT WAS A STOP GAP MEASURE, IT WAS
TO HOLD THE STOCK IN HOPES WE
11:19:18 COULD COME UN WITH REMAINDER, TO HOLD IT SO THEY
DIDNT SELL IT TO SOMEONE
11:19:38 ELSE. THE 40 THOUSAND WAS OWNED BY KAREN AND
MYSELF. IT HAS BEEN
11:20:05 CHARCTEREIZED AS A LOAN, IF WE COULDNT COME UP
WITH THE OTHER 60 THOUSAND IT
11:20:22 WOULD HAVE BEEN A LOAN. KAREN AND I DIDNT HAVE
100 THOUSAND, JERRY NEEDED THE
11:20:48 40 QUICKLY, SO THAT 40 COULD HAVE CONSIDERED A
ADVANCE, LOAN WHATEVER. CALL
11:21:10 IT WHAT YOU WILL WE DIDNT HAVE A DEAL FOR THE
STOCK. THERE WERE NO TERMS AT
11:21:31 THAT TIME, EITHER PUT WITH 60 FOR STOCK AND IF
WE COULDNT GET IT BACK. THE
11:22:04 STOCK WAS THE SECURITY. STOCK AS COLLATERAL.
IDEA WAS HASTILY DONE. SHORT
11:23:00 TERM MEASURE. THE 40 THOUSAND WAS COMBINED
BETWEEN KAREN AND I. DONT KNOW
11:23:56 WHAT ACCOUND IT CAME FROM.
11:25:43 EXHIBIT 10 - PLANTIFF - DOCUMENT SHOWING ACCOUNT
AT US BANK
11:26:45 YES MONEY WAS IN ACCOUNT, I WROTE A CHECK TO
JERRY BERRY. MOST OF THE 40
11:27:08 THOUSAND WAS KARENS, DONT KNOW THE EXACT AMOUNT.
DONT RECALL IF I HAD A
11:27:33 SAVINGS ACCOUNT. I TRUSTED JERRY AND IT HAD TO
BE DONE IN A HURRY. HE WAS
11:28:28 AFRAID THE OTHER COUPLE WOULD BUY THE CAMBELLS
OUT OR CUT A DEAL IN SOME WAY
11:28:47 TO GET ADDITIONAL TIME. IT LOCKED IT UP. AT THAT
TIME I DIDNT THINK ABOUT HIS
11:29:24 CREDITORS, I WAS THINKING ABOUT THE INVESTMENT.
HE TOOK IT PAUL DAUGHERTY WHO
11:29:47 ULTIMATELY GOT IT TO THE CAMBELLS, NOT SURE HOW
THAT TRANSACTION OCCURED. NO

11:30:11 IDEA IF PAUL DAUGHERTY WAS THE ATTY FOR THE
CAPTAINS WHEEL. I DONT KNOW IF
11:30:38 THE TABLE WAS OPEN WHEN HE GOT THE 40 OR IF
OPENED WHEN THE 60 GRAND WAS
11:31:02 GIVEN.
11:33:20 DEF EXHIBIT B - DOCUMENT - RECEIPT FROM JERRY
WHEN I GAVE HIM THE 60
11:34:16 THOUSAND. FROM A DIFFERENT RECEIPT BOOK,
PROBABLY RAN OUT OF THE OTHER BOOK.
11:34:43 IT WAS A CHECK. THE NUMBER REFERENCE NUMBER WAS
THE CHECK NUMBER. KAREN GOT
11:35:16 THE 60 THOUSAND LOAN. RECEIPT WAS MADE OUT AT MY
OFFICE. THE RECEIPT WAS
11:36:15 WRITTEN BY DELORES, SHE WAS A EMPLOYEE OF MINE.
I DONT BELIEVE KAREN WAS
11:36:38 THERE WHEN THE CHECK WAS GIVEN TO HIM. DONT
REMEMBER WHO GAVE IT TO HIM.
11:37:25 RECENTLY FOUND THIS RECIEPT FOR MY ATTY. AT MY
DEPOSITION I ANSWERED THAT I
11:37:49 DIDNT HAVE THIS RECEIPT

11:37:58 **Judge: Hosack, Charles**
EXHIBIT B ADMITTED

11:38:15 **Other: WITNESS, MICHAEL MCFARLAND -**
I REALLY DONT REMEMBER WHO WAS PRESENT WHEN THAT
CHECK WAS GIVEN. IT APPEARS
11:38:41 TO BE EXACTLY BE FOR 60 THOUSAND DOLLARS. KAREN
WILL EXPLAIN THE CONFUSION
11:39:23 ABOUT THE DIFFERENCE OF THE 800 HUNDRED DOLLARS.
THE 60 THOUSAND WAS MONEY
11:40:04 KAREN BORROWED FROM A BANK. YES SHE TOOK OUT A
LOAN ON HER MOTHERS HOUSE FOR
11:40:36 THE MONEY, IT IS THE HOUSE IN HAYDEN WHERE WE
RESIDE IN. SEEMS LIKE IT WAS
11:40:59 IDAHO INDEPENDANT BANK, WAS NOT PART OF THAT, WE
DISCUSSED REPAYMENT, I KNOW
11:41:19 IT WAS A INTEREST ONLY LOAN. YOU COULD SAY HE
OWED KAREN MONEY. WE TALKED
11:42:37 ABOUT THE LOAN WITH JERRY, HE KNEW WE WERE GOING
TO HAVE TO BORROW, SAID HE
11:42:59 WOULD COVER THE INTEREST AND THE ORIGINATION
FEE. SO YES HE STILL OWED THE
11:43:26 ORIG FEE WHICH WAS 820 SOMETHING DOLLARS. HE
MADE SOME OF THE INTEREST ONLY
11:43:49 LOAN. HE PAID HER FROM TIME TO TIME IN CASH.

11:44:24 KAREN WOULD TELL ME. SHE WOULD
USE THAT TO MAKE THE LOAN PAYMENT AT THE BANK.
HE DIDNT WANT HER TO PAY
11:44:45 ANYTHING OUT OF POCKET. NOT ONLY DID WE GET HALF
THE STOCK BUT HE GOT TO RUN
11:45:05 THE SHOW, WE WOULD BE SILENT PARTNERS, HE GOT TO
RUN EVERYTHING. WE WOULDNT
11:45:30 GET ANYTHING OUT OF IT UNTIL IT SOLD AND WE KNEW
THAT COULD BE AWHILE. HE
11:46:08 WANTED US SILENT PARTNERS. WE DIDNT WANT PART OF
MANAGEMENT. SEEMS LIKE I
11:47:11 MADE A PAYMENT OR TWO ON THE 60 GRAND. KAREN RE
FINANCED HER OWN PROPERTY AND
11:47:32 THE PRINICPAL WAS PAID BACK. I DIDNT BORROW ANY
OF THE 60 AND ON THE 40 MOST
11:47:58 OF THAT WAS HER MONEY. THIS WAS SOMETHING WE
WERE DOING JOINTLY, WE ARE
11:48:27 PLANNIG ON GETTING MARRIED - SHARING EVERYTHING.
WE HAVE NOT SET A DATE YET
11:48:48 AND THAT IS NOT A LEGAL REQUIREMENT. THE STOCK
WAS STILL IN THE CAMBELL NAME
11:49:37 BUT WAS SIGNED OVER ON THE BACK TO US UNTIL
10/2006 - THEY WERE NEVER SIGNED
11:50:02 TO JERRY BERRY. BACK OF EACH CERT APPOINTED PAUL
AUTHORIZED TO TRANSFER. I
11:50:27 NEVER TALKED TO PAUL DAUGHERTY ABOUT THIS AT ANY
TIME.
11:53:01 PL EXHBIT 17 AND 20 - DOCUMENTS
11:54:08 EXHIBIT 17 - RESOLUTION TO SPECIAL MEETING
DOCUMENT
11:55:25 SHE WAS NOMINATED AS TREASURER - KARLETTA AND AS
DIRECTOR, SHE WAS NOT
11:55:49 ELECTED - SHE WAS NOMINATED
11:55:57 PL EX 20 - STOCK PURCHASE AGREEMENT CAMPELL TO
BARRY

11:56:23 **Add Ins: ATTY, REX FIINEY - PLANT**
MOVE TO ADMIT 17 AND 20

11:56:30 **Judge: Hosack, Charles**
EXH 17 AND 20 ADMITTED

11:59:10 **Other: WITNESS, MICHAEL MCFARLAND -**
PL EXHIBIT 77 - COPY OF AFFIDAVIT - PAGE 3 PARA
6 - READS THIRD LINE -
12:00:40 ACKWARDLY WORDED AND MY FAILURE TO PROOF READ.

12:01:35 HE OWED US A DUTY TO CONVEY
THE STOCK TO US AS PROMISED. HE OWED US A
12:02:17 OBLIGATION, WE WERE TO GET ACTUAL
EQUITY. I DONT REMEMBER BEING CONCERNED ABOUT
12:02:46 HIS CREDITORS ATTACHING IT. I
KNEW THE CAMBELLS ONLY AS ACQUANTED. CAMBELLS
12:03:11 WANTED OUT. JERRY WANTED THIS
TO BE HIS DEAL, WE WERENT SUPPOSED TO TALK TO
THE CAMBELLS.

12:03:43 **Judge: Hosack, Charles**
RECESS FOR LUNCH.

12:04:35 NEED TO ADDRESS THE VIDEO.

12:05:00 **Add Ins: ATTY, JOHN WHELAN - DEF**
THE VIDEO DEPOSITION IS GOING TO COVER EXACTLY
12:05:42 WHAT WAS SAID EXACTLY HERE ALL
MORNING.

12:05:48 **Judge: Hosack, Charles**
YOUR NOT GOING ANYWHERE THRU LUNCH. ARTICULATE
12:06:10 YOUR OBJECTION. THE TWO OF YOU
STAY HERE AND FIGURE IT OUT. THERE IS NO EXCUSE
12:06:31 FOR COUNCIL TO HAVE THIS
DIFFICULTY DURING A JURY TRIAL. WHAT THE HELL
12:06:59 DONT YOU KNOW - WHAT OBJECTION.
THIS IS A LONG JURY TRIAL. THIS IS BEING
INCOMPTENT.

12:08:37 **Stop recording**
(Off Record)

13:13:08
Recording Started:

13:13:08 **Record**
MCFARLAND, MICHAEL

13:13:11 **Judge: Hosack, Charles**
RESUME JURY TRIAL AFTER LUNCH RECESS - JURY
13:14:31 PANEL RETURNS.
EXPLAINS WHAT A DEPOSITION IS TO THE JURY PANEL.

13:16:38 **Add Ins: ATTY, REX FIINEY - PLANT**
APPROACHES BENCH.

13:17:32 **Judge: Hosack, Charles**
DEPOSITION OF MICHAEL MCFARLAND PLAYED ON VIDEO

13:27:39 **Add Ins: ATTY, REX FIINEY - PLANT**
RE CALLS MICHAEL MCFARLAND AS WITNESS

13:28:10 **Other: WITNESS, MICHAEL MCFARLAND -**
YES WE WERE REGULARS AT THE WHEEL PRIOR TO
GIVING HIM THE 100 GRAND.

13:29:05 AFTER HE PURCHASED THE STOCK FROM CAMBELL I DONT
BELIEVE JERRY BERRY WAS THE

13:29:40 OWNER, HE WAS SUPPOSED TO BE HOLDING IT FOR US.

13:30:13 AFTER PURCHASING THE STOCK WE CONTINUED GOING TO
THE WHEEL, PRIOR TO THE

13:30:35 PURCHASE WE PAID FOR OUR DRINKS AND MEALS. AFTER
THAT, JERRY ADVISED US THAT

13:31:07 W DID NOT HAVE TO PAY FOR FOOD AND DRINKS. JERRY
NEVER MADE PAYMENTS ON THE

13:31:28 40 THOUSAND. I DONT KNOW WHAT RECORDS JERRY KEPT
REGARDING FOOD AND DRINK, WE

13:32:04 WERE THE ONLY SIGNINT FOR FOOD AND DRINK

13:32:35 **Add Ins: ATTY, REX FIINEY - PLANT**
EXHIBIT 87 TO WITNESS

13:32:45 **Other: WITNESS, MICHAEL MCFARLAND -**
MANILA ENVELOPE - EXHIBIT 87 - TOTALS - I HAVE
NO IDEA. I DID NOT KEEP TRACK

13:33:35 OF EXPENSES AS TO THE FREE FOOD AND DRINKS. I
DIDNT KEEP TRACK OF IT. YES I

13:34:05 DID LOOK AT THE PHOTO COPY OF FOOD AND DRINK
RECEIPTS.

13:34:38 **Add Ins: ATTY, JOHN WHELAN - DEF**
OBJECTION - FOUNDATION

13:34:47 **Judge: Hosack, Charles**
SUSTAIN OBJECTION

13:35:11 **Add Ins: ATTY, REX FIINEY - PLANT**
HANDS MCFARLAND THE STACK OF MEAL TICKETS TO
REVIEW

13:36:48 **Judge: Hosack, Charles**
YOU ATTORNEYS ARE STAYING HERE AFTER JURY LEAVES
AND YOU WILL GET THIS

13:37:07 TOGETHER WITH THE OBJECTIONS TO EXHIBITS

13:37:19 **Other: WITNESS, MICHAEL MCFARLAND -**
WE DID NOT PAY ANYTHING OTHER THAN TIPS. JERRY
13:37:41 CALLED IT A BENEFIT AS BEING A
OWNER. BENEFIT WOULD BE IN THE EYES OF THE
13:38:24 BEHOLDER. NO I DONT REMEMBER
PROVIDNG MONEY TO HELP AROUND WITH THE HELP,
JERRY NEVER ASKED FOR MONETARY
13:39:04 NEEDS TO HELP AROUND THE WHEEL.
13:39:39 YES WE HAD A MEETING IN 2006. STOCK WAS ISSUED.
13:42:31 PL EXH 28-33 -

13:43:08 **Add Ins: ATTY, REX FIINEY - PLANT**
EXHIBIT 28-33 TO BE ADMITTED - STIP AND DEF
EXHIBIT MM

13:43:37 **Other: WITNESS, MICHAEL MCFARLAND -**
PL EXH 28-33 ADMITTED AND DEF EXH MM ADMITTED
13:45:11 EXAMINES PL EXHBIT 28-33 - VARIOUS DOCUMENTS
13:45:28 I DONT REMEMBER HOW THE DATES AND TIMES WERE
SELECTED. BY AGREEMENT OF ALL
13:45:59 PARTIES.
13:46:04 EXHIBIT DEF MM - YES I PREPARED THESE DOCUMENTS.
2 30 WAS THE TIME. YES I HAD
13:47:11 PREPARED THE DRAFT EXHIBIT MM. I PREPARED THEM
IN ADVANCE WITH BLANK SPOTS TO
13:47:36 BE FILLED IN. A FEW BLANKS TO BE FILLED IN. WE
AGREED AT THE MEETING THAT
13:48:50 JERRY WAS OWED 77 THOUSAND, HE TOLD US THAT AND
WE DIDNT OPPOSE. PLUS THERE
13:49:29 WAS NEW INFORMATION ADDED. THE REPRINTED VERSION
SHOWED JERRY HAVING 200
13:50:01 SHARES OF STOCK AND ZIMMERMAN AND I 200 STOCKS
AND ALSO ADDING KARLETTA
13:50:26 ADDING HER TO JERRYS STOCK. THAT WAS A HAND
WRITTEN NOTE. I PRINTED THAT ON
13:50:56 THEIR AND EACH PARTY INITIALED IT THEM SELVES.
EXHIBIT 29 - I DONT KNOW WHEN
13:51:41 PAUL DAUGHTERY WAS THERE OR WHAT HE DID.
13:52:04 MR. DAUGHTERTY HAD THE MINUTE BOOK DELIVERED TO
MY OFFICE. I PREPARED THE
13:52:33 DOCUMENTS . THE CORP DOESNT HAVE TO HAVE A
ATTORNEY. EXHIBIT 32- SECOND PAGE.
13:53:23 ONLY PEOPLE AUTHORIZED TO SIGN CHECKS WERE JERRY
AND KARLETTA.

13:54:05 **Add Ins: ATTY, REX FIINEY - PLANT**

13:59:15 **Other: WITNESS, MICHAEL MCFARLAND -**
WE KAREN AND I WERE APPOINTED DIRECTORS, JERRY
WAS NOT IN GOOD SHAPE.

13:59:35 PHYSICALLY WOBBLY, LOST ALOT OF WEIGHT. HE WAS
ILL. MENTALLY VERY SHARP AS A

13:59:56 TACK.

14:00:20 HE WAS GRAND MARSHALL OF BAYVIEW PARADE ON THE
SAT NEAREST THE 4TH OF JULY.

14:00:47 WE WERE THERE FOR THAT. HE CAME TO OUR HOUSE ON
THE 4TH OF JULY. HIS BIRTHDAY

14:01:10 WAS LATE JULY, WE HAD A BIRTHDAY PARTY AT THE
WHEEL, KARLETTA GOT AND DANCED

14:01:36 WITH HIM, HAD LIVE MUSIC. HE HAD A GREAT TIME.
SAW HIM A FEW TIMES AFTER

14:01:57 THAT.

14:02:16 EXHIBIT 33 - BY LAWS, THEY WERE UNSIGNED

14:03:42 RESTAURANT CLOSED IN JAN THIS YEAR. YES
CONTINUED TO EAT THERE FOR FREE SINCE

14:04:05 JERRY DIED. I HAVE PUT OVER 200,000 DOLLARS INTO
THAT. IF A MEAL IS COMPED

14:04:38 YOU STILL DO A TICKET ON IT BUT THE MANAGER KEPT
TRACK OF THOSE. YES WE WOULD

14:04:59 HAVE A MEAL - DINNER TIME WOULD SOMETIMES ORDER
OYSTERS AND A MEAL AND OFTEN

14:05:40 WOULD GET A BOTTLE OF WINE WITH DINNER. NORMALLY
DRANK A BISTRO ROUGE, ABOUT

14:06:02 7 BUCKS A BOTTLE DROM THE SUPPLIER, NORMALLY
WINE IS ABOUT DOUBLE WHAT YOU

14:06:38 PAY FOR IT. NO IDEA HOW MUCH OYSTERS ARE AT THE
WHEEL, I DONT KEEP TRACK OF

14:07:02 PRICES AT THE WHEEL, NOT INVOLVED IN THAT
PROCESS. SINCE HIS DEATH YES I HAVE

14:07:21 BROUGHT MY SON KEVEN THERE FOR DINNER AND YES
HIS ENTIRE FAMILY. THEIR MEALS

14:07:52 WERE COMPED. USED TO HAVE A BUSINESS CARD FOR A
FREE DRINK AND WOULD HAND

14:08:28 THOSE OUT REGULARY TO BRING IN BUSINESS. I
NEVER PAID FOR ANYONE ELSE, WE

14:08:50 DID SOME TRADING WITH A BAD THAT MY DAUGHTER WAS
IN, ONE DRINK PER SET AND A

14:09:15 SMALL HAMBURGER AT NO CHARGE. SINCE JERRYS DEATH
-- SHE CAME IN WITH HER NEW

14:09:51 BOYFRIEND JUST A FEW WEEKS AFTER JERRYS DEATH I

14:10:14 TOLD THE STAFF SHE COULD
14:10:59 STILL EAT THERE BUT NOT FOR ANY ONE ELSE BUT
HERSELF AND HER SON. NO IDEA HOW
14:11:27 MANY MEALS SHE HAS SIGNED FOR SINCE JERRYS
DEATH, I WAS JUST TOLD ABOUT IT. I
14:11:53 DIDNT SEE IT. 27 BOAT SLIPS, 2 BOAT SLIPS ARE NO
CHARGE FOR PEOPLE THAT COME
14:12:12 IN OFF THE LAKE. YES WE HAVE DONE SOME TRADING
FOR WORK. ELECTRICIAN DID SOME
14:12:40 WORK FOR US AND I WAIVED CHARGE OF THAT SLIP.
ANOTHER SLIP A SAIL BOAT IS
14:13:01 THERE, MY DAUGHTER IS PART OWNER IN THAT BOAT.
YES THE BOAT WAS STILL THERE
14:13:31 FOR A FEW DAYS AGO. AVERAGE 700 DOLLARS FOR THE
SEASON RATE OF A SLIP. AT MY
14:13:55 DEPOSITION YES I WOULD HAVE SAID SOME OF THEM
WERE DOWN ON THE GRAVEL
14:14:25 EXCEPTION FOR THE ONES THAT ARE AT THE END. AT
THE TIME OF JERRYS DEATH I
14:14:44 BECAME AWARE THE WHEEL WAS NOT MAKING ENOUGH
MONEY, JERRY MADE THAT CLEAR. I
14:15:14 REALLY DIDNT HAVE ANY KNOWLEDGE UNTIL THE TIME
OF HIS DEATH. I THINK MOST
14:15:32 EVERYTHING HAD BEEN CURRENT. WHEN I BECAME AWARE
OF THE FINANCIAL SITUATION,
14:16:14 WE WERE OVERDRAWN TO ABOUT 500,000. PUT 8,000 IN
2006 - IT WAS AGREED THAT
14:16:38 WAS TO BE RE PAID AS A CREDITOR CLAIM. THERE IS
NOT ENOUGH CUSTOMERS TO MEET
14:17:03 THE OVERHEAD AT THAT RESTAURANT. I HAVE BEEN THE
ONE IN CHARGE, NOT IN
14:17:20 CONTROL. THE CUSTOMERS ARE IN CONTROL AND THEY
HAVE NOT BEEN COMING IN. YES
14:17:38 WORK FULL TIME AT MY LAW FIRM, NOT ENOUGH TIME
TO SPEND ENOUGH TIME OUT
14:18:04 THERE. YES I WOULD AGREE KARLETTA HAS NOT BEEN
IN CHARGE, WE TOOK HER THE
14:18:32 ACCONTS, SHE HAS NOT PROVIDED PAPERWROK AND
DOCUMENTS. BY THE TIME THIS
14:19:00 HAPPENED I WAS APPOINTED PRESIDENT BY MAJORITY
VOTE AND KAREN AS TREASURER BY
14:20:22 MAJORITY VOTE. SHE WAS NEVER APPOINTED SENIOR
EXHIBIT 34 AND 35 - DOCUMENTS REGARDING
14:21:42 RESOLUTION AND APPOINTING AND
AUTHORIZING TO WITHDRAW AND TAKE OVER BANK
ACCOUNTS. ONCE JERRY WAS DECEASED

14:22:39 W NEEDED TO GET ON THE ACCOUNTS RIGHT AWAY.
KARLETTA WAS GIVEN THE PAPERS. I
14:25:34 DELIVERED THEM. SHE HAD BEEN THROUGH ALOT.
EXHIBIT 36 - DOCUMENT, LETTER FROM
14:26:10 MCFARLAND REGARDING SPECIAL NOTICE FOR 11/18 -
READS LETTER

14:26:55 **Judge: Hosack, Charles**
EXHIBIT 34, 35 AND 36 ARE ADMITTED

14:30:01 **Stop recording**
(On Recess)

14:45:32 **Record**
MCFARLAND, MICHAEL

14:45:32
Recording Started:

14:45:35 **Add Ins: ATTY, JOHN WHELAN - DEF**
EXHIBITS - STIP 1-86 EXCEPT 37,44, AND 53 AND
DEF EXHIBIT A-QQ ARE ADMITTED
14:49:10 THROUGH STIP AND TRIPLE CCC AND TRIPLE EEE -
ADMITTED

14:52:56 **Judge: Hosack, Charles**
THOSE EXHIBITS ARE ADMITTED THROUGH STIP
14:53:08 JURY PANEL RETURNS

14:53:16 **Add Ins: ATTY, REX FIINEY - PLANT**
RECALLS MICHAEL MCFARLAND TO WITNESS STAND

14:53:38 **Other: WITNESS, MICHAEL MCFARLAND -**
I HAD LOTS OF REASONS NOT TO LET KARLETTA RUN
THE BUSINESS, JERRY TOLD KAREN
14:54:07 AND I SHE HAD NO BUSINESS SENSE, WERE TOLD BY
STAFF THAT THEY DIDNT GET ALONG
14:54:31 WITH THEM, SHE TOOK THE RECORDS, BECAME
SECRETIVE AFTER JERRY DIED. NUMEROUS
14:54:55 WITHDRAWLS AND NO EXPLANATION. SHE WANTED TO RUN
IT HERSELF WITH ANY
14:55:17 INTERFERENCE FROM US. I FELT I HAD NO CHOICE BUT
TO SELL IT WHILE THERE WAS
14:55:33 STILL A MARKET. LISTING AGENCY WAS TREATY ROCK.
YES KAREN IS A BROKER THERE
14:55:56 OR ASSOC BROKER WITH TREATY ROCK. 12/18 MEETING

14:56:23 - THAT MEETING DID NOT
PROCEED, TIME ISSUE UNDER THE BI LAWS . 12/18
SHE SHOWED UP AT THE HOUSE WITH
14:56:57 TOBY MCGLAGHLIN ACTING AS HER ATTORNEY. PRIOR TO
THAT WE TALKED BRIEFLY AND I
14:57:27 HAD SEEN HIS NOTES. IF WE TALKED ABOUT THE
CREDITORS WHICH I DONT RECALL I
14:58:18 WOULD HAVE SAID I HAVE NO IDEA IF I WAS
CONTACTED OR WHO THEY WERE. I DID NOT
14:59:00 TELL HIM I HAD A LETTER FROM A CREDITOR. I DOUBT
THE VALUE OF THE PROPERTY
14:59:40 WAS EXPRESSED.
15:00:38 EXHIBITS 38-41

15:00:47 **Judge: Hosack, Charles**
ADMITTED 38-41

15:01:01 **Other: WITNESS, MICHAEL MCFARLAND -**
EXHIBIT 38 - LETTER FROM KARLETTA - YES RECEIVED
IT. SHE WANTED TIME,
15:01:57 EXPRESSED SHE WOULD BE MAKING ALL THE DECISIONS
AND WE NEEDED TO BACK OFF.
15:02:14 EXHBIT 40 - RESOLUTION FROM KARLETTA. SHE WANTED
TO BE POINTED PRESIDENT AND
15:02:43 TREASURER, HER AND ONLY HER, WOULD HAVE PUT HER
IN CHARGE 100 PERCENT AND
15:03:01 ONLY HERSELF. EXHIBIT 39 - OBJECTION TO MEETING
ON TWO DAY NOTICE. EXHIBIT 41
15:03:30 LETTER FROM KARLETTA WANTING TO PARTICIPATE IN
THE BUSINESS, YES I HAVE SEEN
15:04:09 THIS WITH THE OTHER DOCUMENTS.
15:06:17 SHE WAS NEVER APPOINTED AS VICE PRESIDENT, SHE
APPOINTED HERSELF SENIO VICE
15:06:42 PRESIDENT. BUSINESS WAS DISOLVED TO SEC OF
STATE, THAT WAS ACCEPTED AND
15:07:25 APPROVED, IT WAS APPROVED. SEC OF STATE JUST
WANTED THEIR MONEY AND THEY RE
15:07:44 INSTATED. TRANSCRIPTS WERE PREPARED OF MEETING,
I TAPE RECORDED IT.
15:14:04 EXHIBIT 45 - TRANSCRIPT - ME SPEAKING
15:14:43 TALKED ABOUT THE SMALL BUSINESS LOAN
15:15:02 PARKING LOT ACROSS THE STREET WAS A SEPERATE
PAYMENT. 500.00 - THERE WAS A
15:15:23 LINE OF CREDIT FOR 5000 WITH WELLS FARGO WHICH
WAS MAXED OUT. NOT AWARE OF
15:15:51 ALL THE DEBTS. THERE WAS ABOUT 2500 IN THE

CHECKING ACCOUNT. MORTG PAYMENT
15:16:10 WAS 2800.00 A MONTH SO NOT EVEN ENOUGH TO MAKE
THE PAYMENT. THREE PEOPLE
15:17:35 WERE VOTING ON THE ISSUE, KAREN AND I VOTED FOR
IT, TWO AGAINST ONE - I WAS
15:17:57 PRSIDENT AND KARLETTA AS TREASURER. KARLETTA WAS
OUT VOTED, MAJORITY RULED.
15:18:24 IT ALSO SAID PROPERTY COULD BE LISTED WITH
TREATY ROCK REALTY. TWO VOTES IN
15:18:48 FAVOR OF LISTING, KARLETTA VOTED AGAINST IT.
ANOTHER ISSUE THAT I HAD PAID
15:19:12 OUT 8 THOUSAND IN LOAN TO CAPTAINS WHEEL. LOANS
TO BE REPAID AS CREDITORS
15:19:57 CLAIM, ALL THREE VOTED FOR THAT. SHE DID NOT
OPPOSE. I SPOKE TO HER SINCE
15:20:48 THAT MEETING, 10/24 MET WITH MARIE LOANED FIRST
5 THOUSAND AND ANOTHER THREE
15:22:23 THOUSAND AFTER JERRY DIED. 11/30/06 I HAVE BEEN
RESPONSIBLE, I TAKE SOME
15:23:05 ACTION BUT DONT WORK THERE AS FAR AS STAFF. I
WOULD PRESUME STAFF KEPT TRACK
15:23:37 OF MY FOOD AND DRINKS. MONTE AND MARIE HAVE BEEN
RUNNING THE BUSINESS. CASH
15:24:54 INTO CASH REGISTER AND THEN I DONT KNOW WHO DOES
WHAT FROM THERE, DEPENDS ON
15:25:17 HOW MANY PEOPLE ARE WORKING AND HOW BUSY IT IS
TO CLOSE OUT A SHIFT PLUS
15:25:37 THERE ARE TWO TILLS. VERY POSSIBLE THAT IT COULD
IT BE THE SAME PERSON DOING
15:26:15 ALL OF IT - FROM TILL TO SAFE, NOT SURE IF
SOMEONE COULD HAVE BEEN STEALING,
15:26:59 WAS SUGGESTED TO ME A COUPLE OF YEARS AGO. CANT
AFFORD TO HIRE PRIVATE
15:27:21 INVESTIGATORS. YES VIDEO COMPUTERS ASSOCIATED
WITH TILLS. I HAVE NOT
15:27:45 PERSONALLY VIEWED THE VIDEOS. NOV/2003 UNTIL IT
CLOSED MARIE STREET AND MONTE
15:28:12 CRIPE WERE PRIMARY MANAGERS. MONTE AND MARIE DID
THE LIONS SHARE. WE SOLD ONE
15:28:43 SHARE OF STOCK TO MONTE CRIPE AND ONE SHARE TO
MARIE STREETER, I BELIEVE IT
15:29:07 WAS FOR ONE HUNDRED. IT WAS A S CORPORATION, HAD
TO SELL THEM, COULD NOT GIVE
15:29:33 THOSE AWAY, WASNT MARKET VALUE BUT IN
RECOGINITION OF THEIR SERVICE. YES
15:30:34 ADVANTAGEOUS FOR VOTING PURPOSES ON THE BOARD.

15:31:04 JERRY WANTED TO GIVE THEM
STOCK. KARLETTA WAS TAKING 200 A WEEK FROM THE
CORP, JERRY AUTHORIZED THAT,
15:31:40 AFTER JERRY DIED I STOPPED IT - IT WAS UNDER THE
TABLE. THE BUSINESS HAD BEEN
15:32:16 STAYING AFLOT DUE TO PEOPLE BEING PAID UNDER THE
TABLE. YES I DID INTRUCT
15:32:54 MARIE OR MONTE TO STOP GIVING KARLETTA 200 A
WEEK. THE WHEEL WAS NOT ABLE TO
15:33:47 MEET THIER DEBTS DUE TO IMPROPER BUSINESS
PRACTICES. MONTE AND MARIE WERE
15:34:35 PAID BY CASH OR CHECK, ITS PRETTY MUCH HOURLY,
DONT REMEMBER WHAT THEY WERE
15:35:03 PAID. THEY WROTE THE CHECKS AND I SIGNED THEM. I
NEVER CONFIRMED PAYROLL,
15:35:36 MONTE AND MARIE KEPT TRACK OF THEIR HOURS, NO
TIME CLOCK, INVENTORIES WERE
15:36:02 DONE FROM TIME TO TIME. MONTE KEPT TRACK OF
KITCHEN OPERATION, HE WAS A
15:36:35 MANAGER FOR HAGADONE. NO MENU COSTING WAS NOT
DONE. DISCUSSED DOING SPECIALS
15:37:11 AND THE COSTS OF RUNNING SPECIALS. PREMIUM ALC
WERE FREE POURS. LAND TAXES
15:38:07 ARE NOT PAID CURRENT. TAXES WERE NOT CURRENT
WHEN I TOOK OVER. LAST TAX
15:38:32 PAYMENT WAS MADE IN 2009. CIT BUSINESS LOAN IS
NOT CURRENT. THERE WERE THINGS
15:40:49 OWING WHEN I TOOK OVER.I DONT KNOW IF PAUL
DAUGHERTY WAS HIS ATTORNEY WHEN I
15:41:14 GVE BERRY 100 THOUSAND. I HAD A ROUGH IDEA OF
THE VALUE OF THE CAPTAINS
15:42:04 WHEEL, WAS WORTH ALOT MORE THAN IT IS NOW. I WAS
AWARE OF A COUPLE OF OFFERS
15:42:24 TO JERRY AT THAT TIME. 1.2.IN 2005 1.5 IN 2006
AND ANOTHER OFFER OF 2.2. WE
15:43:09 WERE GOING INTO THE BUBBLE ABOUT THAT TIME.
SINCE FEB 2007 MAJORITY VOTE WE
15:43:40 REMOVED HER AS DIRECTOR AS I MENTIONED EARLIER.
WILL REFER TO DOCUMENT FOR
15:44:15 REASONS WHY WE REMOVED HER. SEVERAL CAUSES, BANK
STATEMENTS WERE ISSUES, SHE
15:44:56 HAD THEM SENT TO HER PRIVATE ADDRESS - THREE
TIMES, WE HAD NO ACCESS TO BANK
15:45:18 ACCOUNTS. WE VOTED - MAJORITY VOTE, THAT IS THE
WAY IT WORKS IN A CORP. GOT
15:46:10 MAJORITY VOTE BY JERRYS DEATH. SINCE GIVING

15:46:54 MARIE AND MONTE A SHARE WE HAVE
NOT HAD ANY MEETINGS.

15:54:35 YES THERE IS A COUNTER CLAIM AGAINST KARLETTA,
SHE OWES US 20 TO 30 THOUSAND

15:55:00 DOLLARS. YES SHE WASHED DISHES AT CAPTAINS
WHEEL.

15:55:30 **Add Ins: ATTY, REX FIINEY - PLANT**
NOTHING FURTHER

15:55:37 **Judge: Hosack, Charles**
EXCUSES MR. MCFARLAND AS WITNESS.

15:56:21 **Add Ins: ATTY, REX FIINEY - PLANT**

15:56:32 **Judge: Hosack, Charles**
WE HAVE STUFF TO ADDRESS AFTER JURY PANEL
LEAVES. RESUMES TOMORROW AT 08 30.

15:57:47 FOUNDATION ISSUES EXHIBIT 87 - RECALLS MR.
MCFARLAND. TO LOOK AT RECEIPTS.

15:59:12 WHAT IS THE SCHEDULE FOR PL WITNESSES.

15:59:38 **Add Ins: ATTY, REX FIINEY - PLANT**
TOBY MCGLAULIN - DETAILED MEMORANDUMS 0 MUCH
SHORTER THAN MR. MCFLARLAND.

16:00:16 PAUL DAUGHARTY WITNESS, DAVID NOONAN - APPRAISER
- JIMMY BLACK IS HIS

16:02:03 ASSISTANT - SCOTT ROBERTSON ON FRIDAY. THERESA
CLIFTON - TOMORROW - DAVEANA

16:04:56 HUFF - KARLETTA WANTS TO TESTIFY - DONE WITH
TESTIMONY FRI OR MON OR TUES.

16:06:05 **Add Ins: ATTY, JOHN WHELAN - DEF**
I NEED TWO DAYS TO PUT ON MY DEFENSE.

16:06:51 **Judge: Hosack, Charles**
WED EVIDENCE TO JURY. WE NEED TO SHOOT FOR TUES.
GET INSTRUCTIONS TO THEM ON

16:07:51 WED. IT WILL BE PUSHING THEM.

16:14:27 **Add Ins: ATTY, REX FIINEY - PLANT**
DAMAGES ARE ISSUE - EQUITY MINUS THE DEBT -
DIFFERENCE OF FAIR MARKET VALUE

16:14:56 OF PROPERTY VS WHAT HE PAID FOR. . WE ARE ASKING
FOR MONEY DAMAGES. we are

16:19:58 JURY TO DECIDE WHAT THAT FIGURE IS AND WILL BE.

16:20:21 **Judge: Hosack, Charles**
EXHIBIT 87 ISSUE

16:20:46 **Add Ins: ATTY, REX FIINEY - PLANT**
EXHIBIT 87 - SOME OF THESE ARE MY RECEIPTS FOR
FOOD, ONLY A FEW HAVE MORE

16:21:27 SIGN. THE REST HAVE MY NAME ON THEM, SOME NO
NAMES, SOME NOT EVEN DATES. WITH

16:21:51 THE EXCEPTION OF THE 5 THT HAVE MY SIGNATURE I
AM NOT SURE ABOUT THE OTHERS.

16:23:36 NOT RELEVANT. MOVE TO ADMIT EXHIBITS THAT THE
ONES HE CAN IDENTIFIES

16:24:58 **Judge: Hosack, Charles**
SET THOSE OUT AND MARK THEM 87A EXHIBIT.

16:26:57 **Stop recording**
(Off Record)

16:30:52
Recording Started:

16:30:52 **Record**
MCFARLAND, MICHAEL

16:30:54 **Judge: Hosack, Charles**
BACK ON RECORD. REVIEWED PL EXHIBIT 87 - FOOD
TICKETS FROM RESTAURANT, WE PUT

16:31:25 THE ONES HE IDENTIFED AND MARKED IT AS 87A AND
IT IS ADMITTED

16:35:51 **Stop recording**
(Off Record)

Court Minutes:

Session: HOSACK011910A
Session Date: 01/19/2010
Judge: Hosack, Charles
Reporter:

Division: Div1
Session Time: 08:23

Courtroom: local

Clerk(s): Burrington, Talisa

State Attorney(s):

Public Defender(s):

Prob. Officer(s):

Court interpreter(s):

Case ID: 0004

Case number: CV2007-2409
Plaintiff: BERRY, KARLETTA GRACE
Plaintiff Attorney:
Defendant: MCFARLAND, MICHAEL
Pers. Attorney:
Co-Defendant(s):
State Attorney:
Public Defender:
Previous audio and annotations can be found in case: 0003
Additional audio and annotations can be found in case: 0005.

01/21/2010

08:41:35

Case recalled

08:41:35

Recording Started:

08:41:45

Judge: Hosack, Charles
JURY TRIAL - DAY THREE - ALL PARTIES PRESENT

08:42:12 BRING IN JURY PANEL

08:45:08 **Add Ins: ATTY, REX FIINEY - PLANT**
RECALLS MICHAEL MCFARLAND AS WITNESS

08:45:35 **Other: MCFARLAND, MICHAEL**
YES I LOOKED AT THE MEAL TICKETS AND SOME OF
THOSE I IDENTIFIED.I DIDNT

08:47:53 ALWAYS SIGN THE MEAL TICKETS. I WOULDNT PAY BUT
WOULD TIP THE WAITRESS.

08:49:13 EXHIBIT 97 AND 98- RULES OF PROFESSIONAL
CONDUCT. RULES FROM STATE BAR THAT

08:49:48 ATTORNEYS HAVE TO FOLLOW, DONT OUTLINE CONDUCT
BETWEEN A ATTORNEY AND A

08:50:15 CLIENT. I AM AWARE OF RULES REGARDING CONFLICT
OF INTEREST. RULE 1.7 - 1.8

08:51:09 AND 1.9. EXHIBITS - I AM VERY AWARE OF THESE
RULES. 1.8 DEALS WITH CURRENT

08:54:03 CLIENTS. RULE 1.9 DEALS WITH MORE DUTIES OF
FORMAL CLIENTS. SOMETHINGS ARE

08:55:34 PROPER AND SOME THINGS ARE NOT. I DONT SEE THE
CONNECTION WITH JERRY BERRY. I

08:56:14 SUPPOSE WHILE HE WAS IN THE OFFICE GETTING
BANKRUPCY INFORMATION I COULD

08:56:38 CONSIDER HIM A CLIENT, HOWEVER HE NEVER FILLED
OUT ANY PAPERWORK REGARDING

08:57:00 HIS FINANCIAL INFORMATION. I WASNT HIS ATTORNEY,
THAT HAS BEEN MY POSITION

08:57:50 ALL ALONG LONG.

08:59:25 EXHIBIT 98 - I DONT KNOW IF THIS TRUE AND
ACCURATE - I WOULD HAVE TO COMPARE.

09:00:01 EXHIBIT 94 - LOOKS LIKE RULES OF PROFESSIONAL
CONDUCT. PAGE - I WOULD HAVE TO

09:00:34 COMPARE. TURNS TO PAGE 17 - RULE 1.9 - DUTIES TO
FORMER CLIENTS. PARAGRAPH C

09:01:47 - STATES A LAWYER WHO FORMERLY REPRESENTED A
CLIENT SHOULD NOT USE

09:02:12 INFORMATION TO A DISADVANTAGE TO A FORMER
CLIENT. THESE ARE RULES OF

09:03:21 PROFESSIONAL CONDUCT WHO ATTORNEYS ARE TO BEHAVE
PROFESSIONALLY.

09:03:41 **Add Ins: ATTY, REX FIINEY - PLANT**
MOVE TO ADMIT 94, 97 AND 98

09:04:00 **Add Ins: ATTY, JOHN WHELAN - DEF**

OBJECT - THESE ARE TECHNICAL RULES - RULES
BETWEEN BAR AND THE MEMBERS.

- 09:04:43 **Judge: Hosack, Charles**
REFERS TO HEARSAY RULE.
- 09:04:57 **Add Ins: ATTY, REX FIINEY - PLANT**
THESE ARE LAW. RE HEARSAY, THESE ARE PUBLIC
RECORD REPORTS.
- 09:05:24 **Judge: Hosack, Charles**
SUSTAIN OBJECTION.
- 09:05:44 **Other: MCFARLAND, MICHAEL**
READS RULE 1.8
- 09:05:51 **Add Ins: ATTY, JOHN WHELAN - DEF**
THAT IS NOT A QUESTION - OBJECT
- 09:06:01 **Judge: Hosack, Charles**
SUSTAIN. IN THE FORM OF A QUESTION.
- 09:06:17 **Other: MCFARLAND, MICHAEL**
RULE 1.8 - YES IN FRONT OF ME. I CANT TELL IF
ITS ACCURATE WITHOUT COMPARING
09:06:49 IF ITS GENUINE BUT IT APPEARS TO BE.
- 09:07:18 **Add Ins: ATTY, JOHN WHELAN - DEF**
OBJECT -
- 09:07:24 **Judge: Hosack, Charles**
OBJECTION OVER RULED
- 09:07:33 **Other: MCFARLAND, MICHAEL**
YES FOR CURRENT CLIENTS UNDER RULE 1.8 AND YES
DISCLOSURE TO CURRENT CLIENT.
09:08:21 RULE 1.8 - A1 - YES THAT IS ACCURATE. PARA A2 -
YES THAT IS ACCURATE TO
09:09:11 CURRENT CLIENTS. NO - ANY ONE CAN PREPARE
MINUTES OF MEETINGS. I WASNT JERRY
09:10:10 BERRY ATTY AT THE TIME OF THE TRANSACTION.
- 09:10:25 **Add Ins: ATTY, REX FIINEY - PLANT**
NOTHING FURTHER
- 09:10:31 **Add Ins: ATTY, JOHN WHELAN - DEF**

NOTHING FURTHER

- 09:11:22 **Add Ins: ATTY, REX FIINEY - PLANT**
CALLS NEXT WITNESS
- 09:11:32 **Other: CLERK**
OATHE GIVEN
- 09:13:24 **Other: MCLAUGHLIN, WITNESS - TOBY**
YES ATTORNEY OUT OF SANDPOINT. ATTENDED MEETINGS
WITH KARLETTA. PRIOR TO
- 09:14:10 MEETING - I WAS AWARE, PURPOSE OF MEETING WAS TO
ADDRESS LISTING OF THE
- 09:14:35 PROPERTY. I WENT TO MCFARLANDS HOUSE WITH
KARLETTA AND MET WITH HIM AND MS.
- 09:14:56 ZIMMERMAN, OFFICIAL MEETING DID NOT OCCUR. WE
HAD A BRIEF DISCUSSION, I
- 09:15:17 SUBMITTED OBJECTION AS WE WERE ONLY GIVEN TWO
DAY NOTICE AND REQUIRED 10 DAY
- 09:15:40 NOTICE. NOTICE OF A NEW MEETING WAS GIVEN ORALLY
TO MEET THE TEN DAY
- 09:16:13 REQUIREMENT. YES HE IS SEATED NEXT TO MR.
WHELAN.
- 09:16:41 **Add Ins: ATTY, JOHN WHELAN - DEF**
OBJECTION LEADING
- 09:16:47 **Judge: Hosack, Charles**
OVER RULED
- 09:16:53 **Other: MCLAUGHLIN, WITNESS - TOBY**
ONE OF THEM WAS SIGNED - STOCK AGREEMENT - THREE
OF THEM. THE NEXT VERSION
- 09:17:37 THAT WAS SIGNED REGARDED THE 50 PERCENT. MR.
MCFARLAND EXPLAINED THE
- 09:18:00 AGREEMENTS. 50 PERCENT WAS LEFT TO THE BERRYS.
HE EXPLAINED THAT HE PROVIDED
- 09:18:27 TE 100 THOUSAND TO MR. BERRY, NO DOCS WERE
SIGNED AT THAT TIME. THERE WERE
- 09:19:15 THREE DIFFERENT VERSIONS OF THE AGREEMENT. HE
DID MENTION THE JUDGMENT
- 09:19:46 CREDITORS, HE TOLD ME ABOUT IT - OUT OF
WASHINGTON. DISCUSSION WITH ME ABOUT
- 09:20:17 THE BANKRUPCY MEETING - I ASKED MR. MCFARLAND
ABOUT SPECIFIC CREDITORS AND HE
- 09:20:43 TOLD HE HAD A LETTER FROM ONE OF THE CREDITORS.

09:21:13 YES HE TOLD ME HE WAS THE
DIRECTOR AND TOLD ME HE WAS STEPPING DOWN AS THE
CORPORATE ATTORNEY. YES I
09:21:35 SUBMITTED A DOCUMENT CALLED RESOLUTION. WAS
ASKING FOR MS. BERRY TO BE
09:22:12 APPOINTED PRESIDENT AND DIRECTOR, MR. MCFARLAND
HAD THE BOOK IN HIS
09:22:34 POSSESSION. THERE WAS A CONFLICT ABOUT THE BI
LAWS, HIS BI LAWS WERE
09:22:53 DIFFERENT THAN THE ONES I HAD. I GAVE HIM A COPY
OF MINE, HE TOOK A COPY. MS.
09:23:14 BERRY ASKED TO SEE THE CORP. BOOK AND MR.
MCFARLAND REFUSED. YES I DID
09:23:34 DISCUSS WITH MR. MCFARLAND ABOUT VALUE OF
PROPERTY. HE TOLD ME INTENDED TO
09:24:04 LIST IT WITH A REAL ESTATE COMPANY 2.2 MILLION
DOLLARS TO BE LISTED WITH MS.
09:24:21 ZIMMERMAN COMPANY. HE SAID A PREVIOUS APPRAISAL
HAD BEEN DONE. HE DID
09:24:46 INDICATE THE TERMS OF THE LISTING, LISTING AGENT
AND BROKER WAS MS. ZIMMERMAN
09:25:03 AND 10 PERCENT COMMISSION - COMMERCIAL LISTING.
NEXT MEETING 11/29/2006 -
09:25:27 ALSO AT MR. MCFARLAND HOME, I WAS GIVEN NOTICE
PRIOR ORALLY AT PRIOR MEETING.
09:26:00 YES DISCUSSION PRIOR TO THE MEETING. NOT AWARE
OF AUDIO RECORDING OF 11/18
09:26:31 MEETING. YES THERE WAS AUDIO RECORDING OF THE
11/29/06 MEETING. YES HAVE
09:26:54 REVIEWED THE TRANSCRIPT OF THAT MEETING, YES
CORRECT AND TRUE. WE HAD A
09:27:24 DISCUSSION ABOUT THE CORP. BOOK. SAT IN THE
LIVING ROOM. HE SAID HE SENT THE
09:27:52 DOCS TO MR. FINNEY WHO WAS THE PRIMARY ATTY, I
WAS JUST FILLING IN. YES MR.
09:28:38 MCFARLAND SAID HE FILLED IN THE BLANKS ON THE
DOCS. I MADE A MEMORANDUM AFTER
09:29:26 THE FACT IN CASE I NEEDED TO TESTIFY. YES THERE
WAS A THIRD MEETING, SAME
09:29:54 PARTIES PRESENT. YES THERE WAS A AUDIO
RECORDING, SAME AS PREVIOUS. YES I
09:30:17 HAVE REVIEWED TRANSCRIPT OF THE THIRD MEETING IN
FEB. - IT IS ACCURATE.

09:30:51 **Add Ins: ATTY, REX FIINEY - PLANT**
NOTHING FURTHER

09:30:57 **Add Ins: ATTY, JOHN WHELAN - DEF**
CX

09:31:02 **Other: MCLAUGHLIN, WITNESS - TOBY**
YES I WAS JUST FILLING IN FOR MR. FINNEY - WAS
PAID BY MR. FINNEY FOR MY
09:31:36 TIME. YES I WILL BE BILLING MR. FINNEY FOR BEING
HERE TODAY, STANDARD HOURLY
09:32:04 RATE. YES MR. FINNEY HIRED ME NOT MS. BERRY. YES
I RECALL MY TESTIMONY ABOUT
09:33:26 MR. MCFARLAND. YES AWARE OF RULES OF
PROFESSIONAL CONDUCT. RULE 3.7 - AWARE
09:35:08 OF THAT. NOT ACTING AS A ADVOCATE FOR MS. BERRY
- RECALLING FACTS OF MEETING.
09:35:29 ADVOCATE/WITNESS RULE IS READ. I UNDERSTAND RULE
3.7 - I AM RELAYING THE
09:37:00 FACTS. YES PAID TO BE HERE TODAY. YES I SENT A
BILL TO MR. FINNEY FOR PRIOR
09:37:29 APPEARANCES AT MEETINGS. YES I TALKED TO MR.
FINNEY ABOUT MY TESTIMONY HERE
09:37:51 TODAY

09:37:55 **Add Ins: ATTY, JOHN WHELAN - DEF**
RULE TO STRIKE ALL HIS TESTIMONY TODAY

09:38:07 **Add Ins: ATTY, REX FINNEY - PLANT**
JUDGE HE IS NOT THE ATTORNEY IN THIS CASE. HE
ATTENDED MEETINGS AND STATED
09:38:37 FACTS

09:38:39 **Add Ins: ATTY, JOHN WHELAN - DEF**
THAT IS THE APPEARANCE - HE IS NOT A FACT
WITNESS TODAY. HE IS A ADVOCATE
09:38:58 BECAUSE HE FILLED IN FOR MR. FINNEY. ADVOCATING
A POSITION TODAY

09:39:12 **Judge: Hosack, Charles**
DENY MOTION TO STRIKE. CREDABILITY IS UP TO JURY
PANEL.

09:39:33 **Other: MCLAUGHLIN, WITNESS - TOBY**
NO I WAS NOT SUBPEONED TO BE HERE. CAME HERE
VOLUNTARILY ON MY OWN. MY
09:40:12 TESTIMONY IS PROOF OF THE AUDIO. YES MEMORANDUM
IS PROOF. I HAVE KNOWN MR
09:40:49 FINNEY FOR QUITE SOME TIME, WE ARE FRIENDS.

09:40:57 **Add Ins: ATTY, JOHN WHELAN - DEF**
NOTHING FURTHER

09:41:03 **Add Ins: ATTY, REX FIINEY - PLANT**
RE DX

09:41:09 **Other: MCLAUGHLIN, WITNESS - TOBY**
I AM NOT GIVING FALSE TESTIMONY. WORK FULL TIME
FOR MY LAW PRACTICE. I AM NOT

09:41:31 IN VIOLATION OF RULE 3.7. I HAVE NOT VIOLATED
ANY DOCUMENTS. I HAVE NO STAKE

09:42:02 IN THIS CASE. I HAVE WORK AT MY OFFICE IF I
WASNT HERE TODAY. MY FRIENDSHIP

09:42:30 HAS NOTHING TO DO WITH BEING HERE, I SIMPLY AM
RELAYING THE MEETINGS

09:42:47 **Add Ins: ATTY, REX FIINEY - PLANT**
NOTHING FURTHER

09:42:50 **Judge: Hosack, Charles**
EXCUSES WITNESS

09:43:09 **Add Ins: ATTY, REX FIINEY - PLANT**
CALLS NEXT WITNESS

09:43:32 **Stop recording**
(On Recess)

09:44:21
Recording Started:

09:44:21 **Record**
MCFARLAND, MICHAEL

09:44:25 **Judge: Hosack, Charles**
ISSUE WAS BROUGHT UP THIS MORNING BY ATTYS ABOUT
A LETTER REGARDING MR.

09:44:49 DAUGHETY

09:44:55 **Add Ins: ATTY, JOHN WHELAN - DEF**
HE HAS A LETTER IN HIS FILE THAT HE DISCUSSED
WITH MR. FINNEY. I HAVE NOT

09:45:13 SEEN THAT LETTER. IT WAS NOT DISCLOSED TO ME
PRIOR TO TRIAL. DISCOVERY WAS

09:45:31 SERVED IN 2007. QUESTION 10 - READS QUESTION 10
OF DISCOVERY. READS RESPONSE.

09:46:05 RECITES A LONG STATEMENT. SEEK TO EXCLUDE REF TO THIS LETTER

09:47:07 **Add Ins: ATTY, REX FIINEY - PLANT**
I DONT HAVE A PROBLEM WITH EXCLUDING THE LETTER. I WAS NOT EVER PRIVY TO

09:47:56 DIGGIG THRU MR. DAUGHERTY FILE. THERE HAS BEEN NO INTENTIONAL WITHHOLDING OF

09:48:44 EVIDENCE IN THIS CASE.

09:49:00 **Judge: Hosack, Charles**
ISSUE IS THE LETTER - EITHER ATTORNEYS HAVE SEEN THIS LETTER. GET A COPY OF

09:49:34 THIS LETTER SO EVERYONE CAN LOOK AT IT WHILE THE JURY IS OUT.

09:50:00 **Add Ins: ATTY, JOHN WHELAN - DEF**
READS THE LETTER REFERING ABOUT THE CIT LOAN. LETTER IS SHOWN TO MR. FINNEY

09:50:33 **Add Ins: ATTY, REX FIINEY - PLANT**
REVIEWS LETTER.

09:50:44 **Judge: Hosack, Charles**
REVIEWS LETTER.

09:51:30 **Add Ins: ATTY, JOHN WHELAN - DEF**
MR. FINNEY KNEW OF THIS LAST FRIDAY AND HE DIDNT DISCLOSE. HE WAS SETTING UP

09:51:51 MR. MCFARLAND. SHOULD BE BARRED FROM MAKING REFERENCE.

09:52:10 **Add Ins: ATTY, REX FIINEY - PLANT**
NOT TRYING TO TRICK ANYONE. THIS IS IMPEACHMENT EVIDENCE. DIRECT TESTIMONY

09:52:41 **Add Ins: ATTY, JOHN WHELAN - DEF**
HE SET HIM UP.

09:52:51 **Judge: Hosack, Charles**
I UNDERSTAND THAT. I DONT SEE A ABUSE OF DISCOVERY. IS NOT GROUNDS TO

09:53:36 EXCLUDE THE INQUIRY. FOR THE JURY TO DETERMINE. I WILL OVER RULE THE

09:54:08 OBJECTION - PROPER IMPEACHMENT.

09:54:46 **Stop recording**
(On Recess)

10:06:46 **Record**
MCFARLAND, MICHAEL

10:06:46
Recording Started:

10:06:49 **Judge: Hosack, Charles**
RESUME - BRING JURY PANEL IN

10:07:33 NEXT WITNESS

10:07:38 **Other: MCLAUGHLIN, WITNESS - TOBY**

10:07:46 **Other: CLERK**
OATHE GIVEN

10:07:58 **Other: DAUGHERTY, PAUL**
I AM ATTORNEY SINCE 1991. PRACTICE IN CDA,
IDAHO. BEEN THERE SINCE 1995. YES

10:08:32 FMILAR WITH CAPTAINS RESORT INC. YES I KNEW
JERRY BERRY. I PUT TOGETHER THE

10:09:06 STOCK AGREEMENT WHEN HE PURCHASED IT FROM THE
NORDSTROMS. YES HE WAS BUYING

10:09:26 THEIR 50 PERCENT INTEREST IN THE CORP. THE
NORDSTROMS COULD NEVER LOCATE

10:09:50 THEIR STOCK STATEMENTS SO THEY DID A AFFIDAVIT
ON THAT. NOTATION WAS MADE ON

10:10:10 THE RECORD THAT THERE WA RESOLUTION MADE TO
FACILITATE THAT. JERRY WAS JUST

10:10:37 ON HIS OWN. JIM AND JEAN CAMBELL WERE THE OTHER
OWNERS IN THAT CORP AT THAT

10:11:01 TIME. AT THE TIME THEY DID THIS, I DONT THINK
THERE WAS A CORP BOOK. IT MY

10:11:25 OFFICE THAT ORDERED A CORP. BOOK. YES I THE
ATTRONEY WHEN HE PURCHASED FROM

10:11:59 THE CAMBELLS.

10:12:14 **Add Ins: ATTY, JOHN WHELAN - DEF**
OBJECT - HEAR SAY

10:12:21 **Judge: Hosack, Charles**
REPHRASE

10:12:27 **Other: DAUGHERTY, PAUL**
YES I PREPARED THE STOCK PURCHASE AGREEMENT FOR
JERRY FROM THE CAMBELLS. NOT

10:12:49 SURE OF EXACT DATE. THINKS 2003. YES I REVIEWED
STOCK CERT 10 MIN AGO.

10:15:19 YES DEF EXHIBIT X - STOCK CERTIFICATES

10:16:01 FIRST PAGE TO SECOND PAGE - READS THE LANGUAGE.

10:18:31 I DIDNT KNOW HE WAS BUYING THE STOCK FOR
MCFARLAND AND ZIMMERMAN UNTIL THIS

10:18:54 LITIGATION. DONT WANT TO DISCUSS ANY FINANCIAL
PROBLEMS - CONFIDENTIAL ISSUES

10:19:58 - RULES OF CONDUCT.

10:20:09 **Add Ins: ATTY, REX FIINEY - PLANT**
YES SHE IS WAIVING ATTORNEY CLIENT PRIV RIGHT
NOW

10:20:33 **Other: DAUGHERTY, PAUL**
YES AT SOME POINT TIME WE DISCUSSED JUDGMENT
WITH CREDITORS. JERRY WANTED TO

10:21:02 KOW ABOUT BANKRUPTCY, I TOLD HIM I DONT DO
BANKRUPCY AND TOLD HIM TO TALK TO

10:21:22 A BANKRUPCY ATTORNEY, DID NOT REFER HIM TO
ANYONE. YES I FORWARDED LOAN

10:21:48 DOCUMENTS TO MR. MCFARLAND, JERRY REQUESTED THIS
- IT WAS 4/21/2001 WHEN HE

10:22:17 CAME OWNER IN CAPTAINS WHEEL. 02/2006 CORP BOOK
WAS TURNED OVER TO MR.

10:22:40 MCFARLAND, HE SIGNED RECEIPT AND I NO LONGER HAD
ANY FURTHER INVOLVMENT WITH

10:22:58 CPTAINS WHEEL. I WAS NEVER INSTRUCTED TO
TRANSFER STOCK TO MCFARLAND OR

10:23:59 **Add Ins: ATTY, REX FIINEY - PLANT**
NOTHING FURTHER

10:24:10 **Add Ins: ATTY, JOHN WHELAN - DEF**
NOTHING FURTHER

10:24:17 **Judge: Hosack, Charles**
EXCUSES WITNESS

10:25:58 **Other: CLERK**
OATHE GIVEN

10:26:08 **Other: NOONAN, DAVID**

REAL ESTATE APPRAISER. STATE CERTIFIED IN IDAHO.
ATTENDED CLASSES. YES DID
10:27:48 APPRAISAL - APPRAISED AT 1.3 MILLION DOLLARS - I
APPRAISED JUST THE REAL
10:28:35 PROPERTY. YES ADDITIONAL VALUE FOR REAL PROPERTY
- NOT A PER PROPERTY
10:29:01 APPRAISER. METHODOLGY - THREE DIFFERENT METHODS,
COST APPROACH - EXPLAINS.
10:29:33 NEXT MARKET APPROACH - EXPLAINS - PRIMARY VALUE
IS IN THE LAND - 2/3 OF
10:32:27 OVERALL VALUE - WATERFRONT PROP HAVE MORE VALUE
THAN IN THE IMPROVEMENT. 230
10:32:53 FEET OF FRONTAGE ON LAKE POND O REILLE. MOORING
SLIPS OUTSIDE OF RESTAURANT.
10:34:04 VERY DESIRABLE - THEY ARE PROTECTED - FAR SOUTH
SIDE. YES HAVE EXPERIENCE IN
10:36:18 APPRAISING BOAT SLIPS AND WATERFRONT. USE
COMPARABLE SALES. YES DID
10:37:57 APPRAISAL. YES WENT THROUGH DEPT OF LAND
REGARDING BOAT SLIPS. AREA OF SLIP
10:38:33 OUT TO LOW POINT OF WATER WHEN WATER IS DRAWN
DOWN - LEASED FROM STATE DEPT
10:39:09 OF LAND. STATE CONTROLS THAT. YES CAPTAINS WHEEL
WAS IN THAT SITUATION.
10:39:59 EXHIBIT 89 - YES THAT IS MY APPRAISAL REPORT.
WRITTEN REPORT. NO VALUE ON LIQ
10:41:11 LICENSE. APPRAISER FOR 35 YEARS. YES HAVE DONE
JOBS FOR GOVT ENTITIES, FOR
10:43:05 **Add Ins: ATTY, REX FIINEY - PLANT**
MOVE TO ADMIT EXH 89
10:43:14 **Add Ins: ATTY, JOHN WHELAN - DEF**
NO OBJ
10:43:18 **Judge: Hosack, Charles**
ADMIT EXHIBIT 89
10:43:38 **Add Ins: ATTY, REX FIINEY - PLANT**
NOTHING FURTHER
10:43:42 **Add Ins: ATTY, JOHN WHELAN - DEF**
CX
10:43:47 **Other: NOONAN, DAVID**
COST WAS 7500 FOR THE APPRAISAL. MR. FINNEY PAID

10:44:13 FOR THAT AND YES I WAS PAID
BY HIM. YES THE WATER FLUCTATES ON THE LAKE AND
EFFECTS THE BOAT SLIPS.

10:45:47 CAPTAINS WHEEL PAYS THE STATE ON A ANNUAL BASIS.
WE DIDNT PUT ANY MEASURABLE

10:46:12 VALUE ON THE LEASE. I THINK SOME OF THE SLIPS
ARE ON STATE LAND. I THINK ALL

10:48:30 OF THE BOAT SLIPS FLOAT ABOVE STATE LAND. ALL WE
WERE APPRAISING WAS THE

10:49:09 INCOME. REFERS TO PAGES ON HOW I CAME TO
CALCULATION. EXPLAINS PROCESS OF HOW

11:04:05 I CAME TO THIS AMOUNT.

11:05:18 I HAVE APPRAISED MARINAS. SOMETIMES JUST SLIPS -
SOME OF THE THEM HAVE

11:05:45 RESTAURANTS WITH THEM, HAVE DONE ABOUT 12 OF
THOSE IN THE LAST 35 YEARS, NONE

11:06:02 OF THEM WERE IN BAYVIEW. 7 OR 8 WERE ON LAKE
POND O REILLE. I DONT KNOW. USE

11:06:44 COMPARABLES IN MY CALCULATION - MARKET VALUE.

11:09:52 **Add Ins: ATTY, REX FIINEY - PLANT**
RE DX

11:09:58 **Other: NOONAN, DAVID**
THREE METHODS - INCOME APPROACH IS THE MOST USED
APPROACH. FRONT FOOTAGE

11:10:56 PRICE - YES - 4500 A FRONT FOOT. YES SOME
PROPERTIES HAVE MORE - SOME HAVE

11:11:33 LESS. WE JUST APPRAISED THE LAND AND IMPROVEMENT
- NOT THE BUSINESS.

11:16:00 **Add Ins: ATTY, JOHN WHELAN - DEF**
RE CX

11:16:04 **Other: NOONAN, DAVID**
I DONT VALUE BUSINESSES. WE DONT TAKE MANAGEMENT
INTO VALUE WHEN I DO

11:17:15 **Add Ins: ATTY, JOHN WHELAN - DEF**
REFER TO PAGE 112

11:17:23 **Other: NOONAN, DAVID**
YES IT SAYS THAT. YOU ARE MAKE THINGS UP. YES 1.
3 MILLION VALUE. YES YOU

11:18:02 WOULD HAVE TO SELL THAT. YOU ARE PLAYING CAT AND
MOUSE GAME WITH ME HERE.

11:19:35 **Add Ins: ATTY, JOHN WHELAN - DEF**
NOTHING FURTHER

11:19:46 **Add Ins: ATTY, REX FIINEY - PLANT**
RE DX

11:19:49 **Other: NOONAN, DAVID**
NO YOU DONT HAVE TO USE A REAL ESTATE AGENT TO
SELL PROPERTY IN IDAHO

11:20:09 **Add Ins: ATTY, REX FIINEY - PLANT**
NOTHING FURTHER

11:20:53 **Judge: Hosack, Charles**
EXCUSES WITNESS

11:20:59 NEXT WITNESS

11:21:06 **Other: CLERK**
OATHE GIVEN

11:21:17 **Other: ZIMMERMAN, KAREN**
STATES NAME AND SPELLS NAME. YES LICENSED REAL
ESTATE AGENT IN IDAHO, BROKER

11:21:51 FR TREATY ROCK REALTY, WAS THE PRIMARY AGENT.
EXPLAINS DIFFERENCE BETWEEN

11:22:12 AGENT AND BROKERS. STARTED IN EARLY 80'S.
STARTED AS A REALTOR - HAVE TO PUT

11:23:08 I SO MANY YEARS BEFORE YOU CAN BECOME A BROKER.
WENT TO REAL ESTATE SCHOOL.

11:23:38 UNIV OF IDAHO. TAKE STATE EXAM AND NATIONAL
EXAM. YES REQUIRED ADDITIONAL

11:24:21 CLASSES, EVERY SO MANY YEARS REQUIRED CONT
EDUCATION.

11:24:43 **Add Ins: ATTY, JOHN WHELAN - DEF**
OBJ - RELEVANCE

11:24:49 **Judge: Hosack, Charles**
OVER RULED - FOUNDATION

11:24:59 **Other: ZIMMERMAN, KAREN**
LICENSED SINCE 1982. YES 40,000 WAS GIVEN, DONT
REMEMBER HOW MUCH WAS MINE

11:25:58 AND HOW MUCH WAS HIS. YES IT WAS IN MY ACCOUNT,
DONT REMEMBER HOW MUCH WAS IN

11:26:20 THE ACCOUNT. YES LATER THERE WAS 60 THOUSAND

11:26:51 GIVEN TO JERRY BERRY. I BORROWED
11:27:25 THAT MONEY, YES IT WAS MINE. LOAN AGAINST MY
11:27:47 MOTHERS HOUSE - I AM EXUCOTR OF
11:29:23 THE ESTATE AND I PUT 30 THOUSAND OF MY OWN
11:30:36 MONEY. BANK SUGGESTED I DO IT THAT
11:31:16 WAY. I WASN T THERE WHEN THE MONEY WAS GIVEN. I
11:32:50 WENT OVER PAPERWORK LAST
11:33:16 WEEK. THE 800 SOMETHING WAS THE LOAN COST. JERRY
11:33:51 SAID HE WOULD HELP
11:34:11 LOOKS AT EXHBIT 92 - DEPOSITION. I DONT REMEMBER
11:34:35 WHO ACTUALLY PHYSICALLY GAVE
11:34:48 JERRY BERRY THE MONEY. PAGE 17 - LINE 1. READS
11:34:56 DEPOSITION FROM EXHIBIT. I
11:35:22 WOULD INCORRECT ABOUT EARILER STATEMENT ABOUT
11:35:43 THE 823.50 - JERRY GAVE THAT
11:36:20 BACK TO ME FOR LOAN COSTS. IDAHO INDEP BANK IS
11:36:53 WHERE I GOT THE LOAN. TREATY
11:37:21 ROCK - NOT A ACTIVE REALTOR THERE, WANTED TO
11:37:49 LIST IT THERE BECAUSE I WORKED
11:38:08 THERE. HAVE TO DISCLOSE YOU HAVE A INTEREST IN
11:38:34 THE PROPERTY.

11:34:35 **Add Ins: ATTY, JOHN WHELAN - DEF**
OBJ - OVER AND OVER

11:34:48 **Add Ins: ATTY, REX FIINEY - PLANT**
WILL MOVE ON

11:34:56 **Other: ZIMMERMAN, KAREN**
WITHIN A MONTH I STARTED MAKING THE LOAN PAYMENT
- PROB SEPT 2003. YES I
11:35:22 THINK JERRY GAVE ME A CHECK FOR AROUND 300 TO
11:35:43 COVER THE INTEREST. YES HE GAVE
11:36:20 823.50 FOR THE LOAN ORIGATION FEE. TERMS WERE
11:36:53 MONTHLY PAYMENTS - INTEREST
11:37:21 ONLY, HE PAID ME IN CASH - NO IDEA WHEN HE GAVE
11:37:49 IT TO AND WHEN I PAID IT.
11:38:08 CANT SAY IF HE PAID ME IN OCT, NO IDEA EXACTLY.
11:38:34 AFTER HE GOT SICK I DONT
11:37:21 THINK HE PAID AT ALL. I THINK JERRY GAVE US A
11:37:49 SNOW BLOWER IN LIEU OF MONEY
11:38:08 AND ALSO A WOOD STOVE WHICH WAS CRACKED. NO WE
11:38:34 HAD NO FORMAL WRITTEN
11:38:08 AGREEMENT BETWEEN JERRY AND I AS FAR AS
11:38:34 REPAYMENT OF THE LOAN. JERRY WAS OUR
AGENT TO PURCHASE THE STOCK. WE HAD TO PUSH

11:39:04 JERRY TO TRANSFER THE STOCK, HE
DIDNT DO IT FOR AWHILE. CANT REMEMBER WHEN THE
LAST INTEREST PAYMENT WAS
11:39:24 MADE. I HAVE NO RECORDS OF PAYMENTS TO BANK.
SEEMS LIKE KARLETTA DID DELIVER
11:39:50 A PAYMENT ONCE TO HAYDEN. I DONT THE STOCK WAS
TRANSFERRED UNTIL 2006.
11:40:25 7/4/2006 WAS WHEN WE DID THE PAPERWORK. MEETING
IN OCT 2006 WAS WHEN I WAS
11:40:46 APPOINTED TO DIRECTOR AND TREASURER AND VICE
PRINICPAL.
11:41:34 I AM NOT GOOD WITH DATES. AS TRESURER DID
BANKING, WAS ABLE TO VOTE ON BOARD
11:42:30 OF DIRECTORS. MICHAEL DREW UP THE RESOLUTIONS.
MICHAEL HAS DONE THAT, I DONT
11:43:40 KOW HOW TO DO THAT.

11:43:47 **Add Ins: ATTY, JOHN WHELAN - DEF**
OBJECT

11:43:54 **Add Ins: ATTY, REX FIINEY - PLANT**
I WILL WITHDRAW THE QUESTION. I DONT REMEMBER
DATES - DONT REMEMBER WHEN I
11:44:58 WAS APPOINTED SECRETARY. SIGNED CHECKS, DONT
REMEMBER HOW MANY. YES IT WAS MY
11:45:35 IDEA TO LIST WITH TREATY ROCK REALTY. YES I HAVE
BEEN AT ALL THE MEETINGS.
11:46:09 11/8/06 - DONT REMEMBER WHY WE HAD THE MEETING.
EXHIBIT 34 - I THINK I
11:48:12 REMEMBER THIS - RESOLUTION DELIVERED TO
KARLETTA. YES MY NAME IS ON THIS
11:48:53 DOCUMENT, WE PROB DISCUSSED IT - I DONT RECALL.
WE NEEDED TO BE ON THE
11:49:18 CHECKING ACCOUNT BECAUSE WE WERE OWNERS. EXHIBIT
35 - RESOLUTION - TYPED AND
11:49:41 PREPARED TO KARLETTA BERRY.

11:50:46 **Add Ins: ATTY, JOHN WHELAN - DEF**
OBJECTION - ALREADY COVERED THIS - GOING NO
WHERE TODAY

11:51:02 **Judge: Hosack, Charles**
OVER RULED

11:51:13 **Other: ZIMMERMAN, KAREN**
READS THE DOCUMENT

11:53:28 I HAVE BEEN SECRETARY IN OTHER AREAS OF MY LIFE.
OUR MEETINGS WERE RECORDED,
11:54:13 MICHAEL TYPED UP THE MINUTES. NOT SURE OF WHAT
MY DUTIES WERE AS TRESURER.
11:54:47 CAPTAINS WHEEL MAINTAINED THE BOOKS FOR THE
WHEEL. GOT THEM A COMPUTER OUT
11:55:18 THERE TO DO THAT. WE DID ISSUE STOCK TO MARIE
STREATER AND MONTE CRIPP. MONTE
11:56:06 CRIPP DIDNT LIKE KARLETTA. I DONT THINK ANYONE
LIKED HER. MARIE WAS IN CHARGE
11:56:36 OF MONTE. THOSE SHARES WERE SOLD FOR 100 EACH, I
DIDNT PREPARE THE DOCUMENTS,
11:57:06 I DONT KNOW WHERE THAT MONEY WENT OR WHERE IT
WAS DEPOSITED. I DONT REMEMBER
11:57:41 SGNING A RESOLUTION REGARDING GIVING THEM THAT
STOCK. I DONT WORK AT THE
11:58:04 WHEEL, I WORK AT A HAIR SALON. IM AWARE OF WHAT
GOES ON THERE.

11:58:38 **Add Ins: ATTY, REX FIINEY - PLANT**
NOTHING FURTHER

11:58:51 **Add Ins: ATTY, JOHN WHELAN - DEF**
WILL CALL HER LATER

11:58:59 **Judge: Hosack, Charles**
DISMISS WITNESS - NOON RECESS. RELEASE JURY FOR
LUNCH

11:59:58 **Stop recording**
(On Recess)

13:06:14 **Record**
MCFARLAND, MICHAEL

13:06:14
Recording Started:

13:06:20 **Judge: Hosack, Charles**
BACK ON THE RECORD - RESUMES FROM LUNCH. BRING
IN JURY PANEL

13:06:59 **Other: CLERK**
WITNESS OATHE GIVEN

13:07:18 **Other: CLIFTON, THERESA**

STATES NAME - SPELLS NAME - YES EMPLOYED AT
CAPTAINS WHEEL - SUMMER 2004.

13:08:34 WAITRESS. IDENTIFIES MR. MCFARLAND SEATED AT THE
TABLE. WAITED ON HIM AND HIS

13:09:29 WIFE. YES I DO KNOW JERRYS WIFE. WORKED THERE.
WE WERE ALL LIKE FAMILY AT THE

13:10:04 WHEEL. SHE WAS THERE QUITE FREQUENTLY - DAILY.
OWNED IT WITH JERRY. MY

13:10:46 DIRECT SUPERVISOR WAS JERRY AND MARIE. JERRY
TOLD ME TO TAKE GOOD CARE OF MR.

13:11:13 MCFARLAND BECAUSE HE WAS HIS ATTORNEY, THEY
WOULD COME IN ONCE A WEEK, THEY

13:11:34 WERE A GOOD DANCING COUPLE. WOULD GO IN AROUND
11 AND GET OFF AT SIX,

13:11:57 WEEKENDS WOULD GO IN AT THREE AND WORK TILL
CLOSING. CALLED IN LOTS OF TIME

13:12:14 ON MY DAYS OFF. THEY CAME IN ON FRIDAYS FOR
PRIME RIB AND YES THEY WOULD

13:12:37 DRINK WINE. THEY WOULD ORDER A CARAFE. I WOULD
WRITE DOWN THEIR ORDER - GICE

13:13:14 IT TO THE COOK AND THEN WOULD PRESENT IT TO THEM
FOR SIGNATURE, SOMETIMES

13:13:39 THEY DIDNT SIGN AND I WOULD JUST KEEP THE
TICKET. YES THEY WERE GOOD TIPPERS.

13:14:01 **Add Ins: ATTY, REX FIINEY - PLANT**
NOTHING FURTHER

13:14:07 **Add Ins: ATTY, JOHN WHELAN - DEF**
CX

13:14:13 **Other: CLIFTON, THERESA**
YES I WAS TOLD TO TAKE GOOD CARE OF THEM BECAUSE
HE WAS HIS ATTORNEY. NO I

13:14:45 NEVER SAW ANY LEGAL PAPERWORK GET PREPARED.
JERRY TOLD ME THAT MCFARLAND WAS

13:15:15 HS ATTORNEY. THAT IS WHAT I WAS TOLD. YES MR.
FINNEY TRACKED ME DOWN FOR

13:16:08 TODAY. A LITTLE BEFORE SUMMER AND INTO THE
WINTER MONTHS. NO I NEVER SAW ANY

13:16:44 CORPORATE PAPERS. JERRY TOLD ME THAT MCFARLAND
WAS HIS ATTORNEY. NO I DIDNT

13:17:20 ASK THEM AND VERIFY THAT FACT, NOT MY BUSINESS.

13:17:41 **Add Ins: ATTY, JOHN WHELAN - DEF**
NOTHING FURTHER

13:17:48 **Add Ins: ATTY, REX FIINEY - PLANT**
NOTHING FURTHER

13:17:52 **Judge: Hosack, Charles**
EXCUSES WITNESS

13:17:59 NEXT WITNESS

13:18:05 **Other: CLERK**
OATHE GIVEN

13:18:36 **Other: BERRY, KARLETTA**
SPELLS AND STATES NAME. I WAS JERRY BERRYS
FOURTH WIFE. 07/1997 WAS OUR

13:19:14 MARRIAGE AT THE HITCHING POST, WE STARTED MAY
1996 MOVED IN WITH HIM EARLY

13:19:33 SEPT 1996. RESIDED AT HIS HOUSE ON REMINGTON
ROAD, HE OWNED THAT HOUSE, HE

13:19:52 TRANSFERRED THAT HOUSE TO ME. YES JERRY IS DEAD.
I AM THE PERSONAL REP OF HIS

13:20:09 ESTATE. I WORKED PART TIME AT A ATHOL HOTEL WHEN
I MET JERRY, CLEANED ROOMS.

13:20:44 JERRY SAID I DIDNT NEED TO WORK, SON GOT OLDER
AND I GOT A PART TIME JOB WITH

13:21:01 A PET STORE. PRIOR TO THE WHEEL HE WORKED FOR A
MOBILE HOME COMPANY. YES HE

13:21:28 WAS A CONTRACTOR FOR YEARS AND YEARS, HAD A
LICENSE OUT OF CALIF. HE GOT

13:21:47 INVOLVED WITH A COMPANY THAT HELPED YOU WITH
LAND IF YOU PURCHASED THE DESIGN

13:22:06 FROM THEM. THE DEVELOPER DIDNT GET THE WATER IN
AND THE COMPANY JERRY WAS

13:22:31 DEALING IT DIDNT GET THE WATER IN. JERRY HAD TO
STOP. THE HOME WAS UP TOWARDS

13:23:01 FIVE MILE, I WAS MARRIED TO HIM AT THAT TIME.
HIS ESTATE WAS LEFT ENTIRLY TO

13:23:24 ME, YES ON FILE WITH KOOTENAI COUNTY. HE HAD
BEEN INTERESTED BETTY S IN

13:23:56 ATHOL. MADE A TRIP TO CALIF TO GET PRIVATE
FINANCING, WE HEARD SHE SOLD IT

13:24:14 BEFORE WE GOT BACK. YES WE LOVED TO DANCE,
DANCED EVERY WEEKEND. WOULD GO

13:24:34 DOWN TO BAYVIEW, ONE OF THE WAITRESSES MENTIONED
TO US THAT ONE OF THE

13:24:49 PARTNERS WAS LOOKING FOR A BUYER. YES WE
DISCUSSED IT, HE OWNED A STEAK HOUSE

13:25:09 IN CALIF. HE ENJOYED IT AND WANTED TO GET BACK

INTO RESTAURANT BUSINESS.
13:25:36 NORDSTROM SHARES WERE PURCHASED IN 2000. JIM AND
JEAN CAMBELL WERE RUNNING IT
13:25:59 AND JERRY WAS DOING MAINT. AND WORK ON THE
OUTSIDE. YES AT A LATER DATE I
13:26:24 HELPED WITH MAINTENANCE. THANKSGIVING DAY WAS
SPENT REPOLSTERING THE BAR. I
13:26:55 PAINTED THE BOARDS AT HOME AND HE CAME AND PUT
THEM UP. HELPED PUT IN A NEW
13:27:17 DANCE FLOOR. WINTER 2002-2003 MR. CAMBELL HAD A
HEART CONDITION AND NEEDED TO
13:27:53 GET RID OF STRESS SO THEY DECIDED TO RETIRE. YES
WE WERE SEEKING A LOAN,
13:28:16 JERRY WAS TURNED DOWN DUE TO HIS CREDIT SCORE.
PUT THE HOUSE IN MY NAME BUT
13:28:37 STILL DIDNT HELP DUE TO OUR DEBT - INCOME RATIO.
YES GOT A LOAN FROM
13:28:56 MCFARLAND AND ZIMMERMAN, JERRY GAVE THEM THE
MONEY FOR THEIR SHARES AND JIM
13:29:14 GOT TO RETIRE. I BELIEVE I WAS A DIRECTOR. I WAS
APPOINTED DIRECTOR BY JIM
13:29:42 AND JEAN CAMBELL.
13:30:30 EXHIBIT 17 - DOCUMENT, YES THIS APPOINTED ME
DIRECTOR. I WAS NOT PRESENT AT
13:30:52 RESOLUTION. I DO REMEMBER BEING IN MR. DOUGHERTY
OFFICE, THIS MIGHT HAVE BEEN
13:31:26 WHY. I DONT REMEMBER JIM RUNNING IT AFTER HE
SOLD HIS SHARES, BUT NOT
13:31:53 RUNNING. HE MAY HAVE BEEN THERE SHOWING JERRY
THE ROPES. JERRY AND THE
13:32:15 MANAGERS DID THE DAY TO DAY RUNNING. TILLS WERE
LOCKED IN THE LIQUOR
13:32:43 CABINET. JERR WOULD GO IN THE MORNING TO SET
THINGS UP AND GET THE TILLS
13:33:01 READY. YES HE CONTINUED TO DO MAINTENANCE, JERRY
WAS THERE EVERY DAY FROM 7
13:33:20 MORNING TILL 3 OR 4 IN THE AFTERNOON SOMETIMES
LATER. YES WE GAVE MS.
13:33:57 ZIMMERMAN MONEY EACH MONTH TO MAKE HER LOAN
PAYMENT. JUNE/2006 PAYMENTS
13:34:29 STOPPED. JULY 4TH THE PAPERWORK WAS DONE AND WE
FELT THEY COULD MAKE THEIR
13:34:54 OWN LOAN PAYMENT. YES RECORDS WERE KEPT
REGARDING FREE FOOD AND DRINK
13:35:20 **Add Ins: ATTY, JOHN WHELAN - DEF**

OBJECT - HEAR SAY

13:35:29 **Add Ins: ATTY, REX FINNEY - PLANT**
A COUPLE OWNS A BUSINESS - NECESSARY
INFORMATION.

13:35:57 **Judge: Hosack, Charles**
REPHRASE THE QUESTION MR FINNEY

13:36:11 **Other: BERRY, KARLETTA**
YES RECORDS WERE KEPT JERRY CONSIDERED IT AS
INTEREST PAYMENTS TOWARD THE
13:36:59 LOAN.
13:37:06 YES HAVE SEEN EXHIBIT 87 - IT WAS KEPT IN MANILA
ENVELOPE IN THE OFFICE,
13:37:29 EVERY YEAR IT WAS TOTALLED UP FOR TAX PURPOSES.
MARIE STREATER WAS HIRED FOR
13:37:54 BEHIND THE BAR. MONNIE CRIP STARTED IN 2002.
THEY ANSWERED TO JERRY. STARTING
13:38:52 IN 2003 I WOULD PERIODICALLY WOULD HELP IN THE
KITCHEN, CLEAR TABLES, WHAT
13:39:09 EWEY WAS NEEDED. MADE SALADS, DID PREP WORK, WAS
EVEN COOK SOME TIMES, DID
13:39:30 LOTS OF DISHES. MY RELATIONSHIP WAS GOOD WITH
THE MANAGERS. I WAS TREATED
13:39:58 LIKE A SECOND CLASS CITIZEN BY MARIE AND MONTEE,
NOT GOOD. AFTER JERRY DIED
13:40:26 IF I CAME IN THERE - THEY WOULD NOT TALK TO ME.
RELATIONSHIP WAS NOT GOOD,
13:40:55 ESPCIALY WITH MONTEE. YES MCFARLAND WAS AWARE
OF THAT SITUATION. YES I RAN
13:41:17 ERRANDS FOR THE RESTAURANT, WOULD GET GROCERIES,
RUN TO THE BANK, GO PAY
13:41:34 BILLS. YES I WAS AT THE RESTAURANT IN 2000, WE
WOULD GO DANCING THERE EVERY
13:42:01 WEEKEND WHEN JIM AND JUDY OWNED IT. OWNED MY OWN
ESPRESSO STAND AFTER THE PET
13:42:23 STORE. 2003 WINTER I STARTED WORKING IN THERE IF
NEEDED. 2005 I WORKED IN
13:43:09 THE KITCHEN AND INTO 2006 UNTIL JERRY WAS NOT
ABLE TO FUNCTION, TOOK JERRY
13:43:34 TO ALL HIS APPTS. HE WAS DIAGNOSED 11/2005, HE
WORKED AROUND HIS CHEMO UNTIL
13:43:57 06/06 UNTIL HE COULDNT DO IT, DIDNT HAVE THE
STAMINA, LOST ALOT OF WEIGHT AND
13:44:30 GOT WEAK. HE STARTED TREATMENT IN 11/2005,

13:44:59 TREATMENT MADE HIM VERY ILL, SORES
13:45:26 IN HIS MOUTH. ALSO CHEMO COCKTAIL, HAD A PORT
13:46:06 IMPLANTED SO A NEEDLE WOULD BE
13:46:33 PUT IN THRU A GASKET, PILLS AND IV INFUSIONS.
13:47:08 HAD TO DISCONTINUE SOME
13:47:29 TREATMENTS BUT CONT SOME. HE HAD A TREATMENT IN
13:47:53 OCT AND THEN A DOCTOR APPT
13:48:27 ANDHAD BECOME JAUNDICED. I TOOK HIM TO ALL OF
13:49:22 HIS APPTS. TO THE DOCTORS. YES
13:49:47 HE WAS IN AND OUT OF THE HOSPITAL SEVERAL TIMES.
13:50:18 YES HE WENT INTO THE
13:50:45 HOSPITAL MIDDLE OF JUNE, I WAS THERE EVERY DAY
13:51:03 WITH HIM - BUT NOT AT NIGHT.
13:51:26 HE WAS ADMITTED, CHEMO TOXICITY REACTION. HE WAS
13:52:01 UNSTABLE, MOODY, WAS
13:52:22 DEHYDRATED. COULD NOT EAT. IN THE HOSPITAL .
13:52:41 VERY UNSTABLE MOOD WHILE IN THE
13:53:11 HOSPITAL, THAT WAS THE 17TH THROUGH THE 22ND. HE
13:53:55 WAS VERY LOOPY. I DONT
13:54:15 REMEMBER MCFARLAND OR ZIMMERMAN BEING THERE. YES
13:54:34 THE FIRST TWO PROPOSED
13:54:53 AGREEMENTS WERE BROUGHT TO THE HOUSE IN 06/2006.
13:55:15 MCFARLAND SAID JERRY NEEDED
TO PICK ONE OF THEM AND SIGN IT, I TOLD HIM WE
NEEDED SOME TIME. MCFARLAND
SAID NO WE DONT HAVE THAT TYPE OF TIME. I
BROUGHT JERRY HOME THE NEXT DAY. I
DRAFTED A THIRD ONE WITH JERRYS ASSISTANCE. I
GAVE HIM THE PROPOSED
AGREEMENTS THE MORNING OF THE 26TH AFTER RESTING
FOR THE WEEKEND. THE
PROPOSED STOCK AGREEMENT WAS SIGNED JULY 4TH.
SAID HE WAS GOING TO MCFARLAND
RANCH, I WAS CONCERNED ABOUT HIS DRIVING
ABILITY. RESTAURANT IS 8 MILES AWAY
FROM MY HOME ONE WAY. YES BAYVIEW DAYS
CELEBRATION - JERRY WAS MASTER OF
CEREMONY, GOT TO SIT IN THE BACK OF A
CONVERTABLE AND HE GOT TO WAVE TO
PEOPLE, HE STAYED IN THE CAR TILL PARADE WAS
DONE, I DROVE HIM THERE - AFTER
THAT WE MADE A SHORT APPEARANCE AT THE WHEEL, HE
WAS TIRED AND I TOOK HIM
HOME, THE NEXT DAY HE STAYED HOME. HE WAS
SLEEPING IN BED, THROUGH THAT DAY
AN INTO THE FOLLOWING DAY, STARTED FEELING

13:55:36 BETTER ON MONDAY. ON THE 4TH HE
13:55:55 SAID HE WAS GOING TO THE RANCH, NOTHING WAS SAID
ABOUT GOING TO HAYDEN. NO IT
13:56:19 IS NOT ACCURATE THAT WE DID NOT DISCUSS THINGS.
TIME WAS AROUND EARLY
13:56:44 AFTERNOON AND HE WAS HOME BY 3 30. HE HAD
IMPROVED, THEY HAD RELEASED FROM
13:57:12 THE HOSPITAL. ON 4TH OF JULY HE WAS STILL TIRED
BUT TRYING TO PUT ON A GOOD
13:57:46 FRNT, HE WASNT VERY STEADY ON HIS FEET. THAT
SUMMER, HE WAS VERY ILL, HE
13:58:04 DIDNT HAVE THE STAMINA TO GO TO THE WHEEL ALL
THE TIME. THE GIRLS FROM THE
13:58:24 RESTAURANT WOULD CALL HIM AND UPATE HIM. ON 4TH
OF JULY HE SHOWED ME THE ONE
14:01:57 HE HAD SIGNED. I HAD A STATEMENT SHOWING WHAT
THE CIT LOAN WAS AND THERE WAS
14:02:49 15 THOUSAND OWING ON THE PARKING LOT. THE
CABELLS GAVE US A BOX OF STUFF
14:03:17 PERTAINING TO THE RESTUARANT, THE BY LAWS IN
THERE. PRIOR TO HIS DEATH I
14:03:47 DIDNT GO THROUGH THOSE PAPERS.I WOULD SEE
MCFARLAND AND ZIMMERMAN AT THE
14:04:09 RESTAURANT. 2001 IS WHEN I GOT TO KNOW THEM,
THEY WERE GOOD DANCERS, JERRY
14:04:39 LIKED TO COMPETE WITH THEM. EVENTUALLY WE BECAME
FRIENDS AT THE BAR, IF WE
14:04:58 WERE THERE HAVING DINNER WE WOULD VISIT WITH
THEM AND SOMETIMES SIT WITH
14:05:41 THEM. OCT 15TH MEETING JERRY TOLD ME THEY WANTED
US TO COME TO THE RANCH AND
14:06:04 GO THROUGH THE CORP BOOK. I HAD NOT SEEN ANY
MINUTES PRIOR GOING TO THE
14:06:32 RANCH. I DROVE US TO THE RANCH, HIS HEALTH WAS
SHAKY. NOT FEELING EXTREMLY
14:07:05 WELL. KAREN AND MICHAEL WERE THERE WHEN WE GOT
THERE. SOME CONVERSATION
14:07:27 BEFORE THE MEETING STARTED. MICHAEL HANDED US
MINUTES THAT HE HAD TYPED UP
14:08:09 BEFORE HAND. VERY INFORMAL MEETING. NO HE DID
NOT ASK US IF WE HAD BI LAWS,
14:08:28 HE HAD BI LAWS THAT HE HAD PUT INTO THE BOOK,
SAID HE FOUND THEM ON THE
14:09:24 INTERNET. HE WROTE THE BI LAWS IN HIMSELF, THERE
WAS NO ACTUAL NOMINATIONS,
HE WOULD SAY HOW ABOUT THIS.....

14:12:37 **Stop recording**
(On Recess)

14:31:14 **Record**
MCFARLAND, MICHAEL

14:31:14
Recording Started:

14:31:16 **Judge: Hosack, Charles**
RESUME JURY TRIAL. JURY PANEL RETURNS.

14:31:30 **Add Ins: ATTY, REX FIINEY - PLANT**
RECALLS KARLETTA AS A WITNESS

14:31:42 **Other: BERRY, KARLETTA**
EXHIBIT 29, 32 AND DEF EXHIBIT MM - DOCUMENTS.
YES HAVE REVIEWED THE

14:32:39 DOCUMENTS. MR MCFARLAND DID ALL THE PRINTING.
REFERENCE 77 THOUSAND OWING TO

14:33:24 JERRY - YES. THE 77 THOUSAND, 17 WAS FROM SALE
OF OUR LIMO TRUCK, 60 WAS

14:34:03 SECOND MORT HE TOOK OUT IN 2000. NO DID NOT
REVIEW MIN PRIOR TO GOING TO

14:34:52 RANCH. I DONT REMEMBER RECIEVING COPIES THAT
DAY. NOV 4TH IS WHEN MY HUSBAND

14:36:01 PASSED. NOV 12TH THERE WAS A MEMORIAL/WAKE PARTY
AT THE WHEEL. I BRIEFLY

14:36:24 SPOKE TO MCFARLAND AT THAT TIME. THE NEXT
EVENING MCFARLAND WAS ON MY PORCH,

14:36:43 AOUND 4PM. WAS GETTING DARK. HE SAID HE HAD SOME
PAPERS FOR ME. A RESOLUTION

14:37:17 APPOINTING HIMSELF AS PRESIDENT AND ZIMMERMAN AS
TREASURER AND RESOLUTION

14:37:33 ALLOWING PRES TO LIST PROPERTY WITH TREATY ROCK
REALTY. HE WANTED ME TO SIGN

14:37:53 THE PAPERS. I HAVE A GARAGE DOOR OPENER, CAME
OUT OF GARAGE AND HE SAID SIGN

14:38:14 THEM, I SAID NO NOT WITHOUT READING THEM FIRST.
THERE HAD BEEN NO PRIOR

14:38:30 DISCUSSION ABOUT THIS. HE SAID OK, DIDNT LOOK
HAPPY. I DIDNT WANT TO SPEAK

14:38:56 WIT HIM ANYMORE, I CONTACTED YOU AS ATTY AND HAD
YOU TEL HIM NOT TO CONTACT

14:39:13 ME ANYMORE WITHOUT GOING THROUGH ATTY. YES THERE
WAS A MEETING 10/18, KAREN

14:39:50 AN MICHAEL AND MR. MCGLAUGHLIN WENT WITH ME.
MCFARLAND DID MAKE COMMENTS
14:40:15 ABOUT BEING CORPORATE ATTY. HE SAID HE NO LONGER
FELT COMFORTABLE BEING THE
14:40:32 CORP ATTY. I WAS SITTING AT THE SAME TABLE WITH
MR. MCGHLAIGN. MCFARLAND WAS
14:41:00 AGITATED AND UPSET. YES I WANTING TO OPERATE THE
WHEEL.
14:44:16 YES I WAS AT 11/29 MEETING. YES THERE WAS A VOTE
TAKEN ABOUT BEING WHO WAS TO
14:45:40 BE PRESIDENT. I VOTED FOR MYSELF AND NO ONE
ELSE. I WAS NOT ALLOWED IN ANY
14:46:29 MANAGEMENT DECISIONS AFTER THAT. I BROUGHT A
GUEST IN THE THIRD WEEK OF DEC
14:47:00 2006, DONT REMEMBER WHO WAITED ON ME, MARIE OR
MONTEE WAS THERE. I BROUGHT A
14:47:27 FAMILY FRIEND, HE AND MY MOTHER CAME TO VISIT
ME. HAD NOT SEEN HIM 5 YEARS
14:47:55 PRIOR TO THAT, HE FIXED A PATCH ON MY ROOF AND I
TOOK HIM TO DINNER, WE WERE
14:48:32 NOT BOYFRIEND/GIRLFRIEND AT THAT TIME BUT WE ARE
NOW. I THEN WAS VERBALLY
14:48:56 NOTIFIED THAT I WAS NOT ALLOWED TO BRING ANYONE
IN FOR FREE FOOD ANYMORE
14:49:16 OTHER THAN MYSELF AND MY SON. I WAS IN FOR NEW
YEARS EVE AND ATE IN THERE.
14:50:11 YES SIGNED FOR MY OWN MEAL. I DONT HAVE A KEY TO
THE OUTSIDE DOORS. JERRY HAD
14:51:17 THE KEY AND THEN THE DOOR LOCKS WERE CHANGED. I
WAS NEVER CONSULTED ABOUT THE
14:51:34 LOCKS BEING CHANGED. THERE IS ALSO A SECURITY
SYSTEM ON THE DOORS THAT I WAS
14:51:55 NOT ALLOWED THE PASSWORD.
14:53:50 EXHIBIT 49 AND 51 - DOCUMENTS. YES I DID SOME
CORP. DOCUMENTS. I WAS TO
14:54:19 PREPARE PAPERS FOR TAX PREPARATION FOR THE
ACCOUNTANT. THOSE DOCUMENTS WERE
14:54:41 TURNED OVER TO ATTY AND ATTY TURNED THEM OVER TO
DEF. NO THOSE RECORDS WERE
14:54:58 NOT MANIPULATED IN ANY WAY. THIRD PARAGRAPH
TALKS ABOUT BANK STATEMENTS- DONT
14:55:34 REMEMBER HOW LONG THE BANK STATEMENTS WERE
COMING TO THE HOUSE BEFORE THE DEF
14:55:49 PUT THEMSELVES ON THE ACCOUNT AND TOOK OVER. I
WAS TOLD TO DELIVER TO MARIE
14:56:12 OR MONNIE. ANY MAIL I HAD WAS HAND DELIVERED TO

14:56:36 THEM, YES I HAD A RIGHT TO
OPEN THE DOCUMENTS AND YES I DID OPEN THE
DOCUMENTS. I OPENED THE DOCUMENTS
14:57:00 TO SEE THE BALANCE BECAUSE NO ONE WAS TELLING ME
ANYTHING. I NEVER HAD A POST
14:57:23 OFFICE KEY. COSTCO CARD WAS IN MY NAME AND
JERRYS - NEVER IN THE CORP NAME.

14:57:57 **Add Ins: ATTY, JOHN WHELAN - DEF**
OBJECTION - RELEVANCE

14:58:06 **Add Ins: ATTY, REX FIINEY - PLANT**
THEY GAVE REASONS WHY SHE WAS REMOVED AS
DIRECTOR - ALLEGATIONS THAT SHE WAS
14:58:32 EMBEZZLING MONEY - DEFEND HERSELF

14:58:41 **Judge: Hosack, Charles**
OVER RULED

14:58:46 **Other: BERRY, KARLETTA**
YES YOU AND I MET TO DISCUSS THESE ISSUES. WE
HAD A PROCEDURE WHEN GOING TO
15:00:12 BANK. I NEVER HAD A KEY TO THE OUTSIDE DOORS OF
THE RESTAURANT, I WAS ALWAYS
15:00:40 WITH JERRY. NO NONE OF THAT MONEY WAS PUT TO MY
OWN USE. YES I RECEIVED 200 A
15:01:07 WEEK AFTER JERRY DIED, THAT STATEMENT WAS MADE
IN THE HOSPITAL BY JERRY. THE
15:01:40 PAYMENT WAS DISCONTINUED 12/2006, ONE OF THE
MANAGERS WOULD HAND IT TO ME.
15:02:11 MONEY WAS PUT INTO ENVELOPES WITH INDIV MONEY
FOR EMPLOYEES. YES ATTENDED
15:02:40 MEETING FEB 2006. EXHIBIT 55 - REFERENCE TO
MEETING. MEETING WAS AT
15:04:56 CLOVERLIEF DRIVE, WENT WITH MR. MCGLAUGHLIN AND
KAREN AND MIKE WERE THERE.
15:05:24 MEETING WAS ABOUT REMOVING ME AS A DIRECTOR.
EXHIBIT 52 WAS GIVEN TO THEM -
15:05:54 THAT WAS MY OBJECTION. NO VALID REASON TO REOMVE
ME AS A DIRECTOR. I DID NOT
15:06:14 GET TO VOTE ON THAT. THAT WAS THE LAST CORP
MEETING I WENT TO. I STILL OWN 50
15:06:34 PERCENT OF THE CORP. HAVE NOT BEEN NOTIFIED OF
ANY ANNUAL MEETING. I WAS NOT
15:06:55 NOTIFIED THAT THEY WERE ISSUING STOCK TO MONTE
AND MARIE AND I AM NOT IN

15:07:20 AGREEMENT. JUST RECENTLY FOUND OUT ABOUT THAT
ISSUANCE. NOT EVEN A MONTH AGO.

15:07:42 YES JERRY DID TELL ME THAT MCFARLAND WAS HIS
ATTY.

15:08:28 **Add Ins: ATTY, JOHN WHELAN - DEF**
OBJECT - HEARSAY

15:08:38 **Add Ins: ATTY, REX FIINEY - PLANT**
THIS IS A ITEM OF PERSONAL HISTORY AND PARA 24.
AFFIDAVIT OF MCFARLAND HE WAS

15:09:08 REFERRED TO AS JERRY BERRY ATTY. ALSO RULE 804.
MR. BERRY IS NOT AVAILABLE.

15:09:52 **Judge: Hosack, Charles**
OVER RULE

15:10:09 **Add Ins: ATTY, JOHN WHELAN - DEF**
803 EXCLUDES THESE TYPE OF STATEMENTS. READS
803.

15:11:08 **Judge: Hosack, Charles**
OVER RULE THE OBJECTION.

15:11:38 **Other: BERRY, KARLETTA**
YES I HAVE ASKED FOR ADVICE FROM MR. MCFARLAND.

15:11:56 **Add Ins: ATTY, JOHN WHELAN - DEF**
OBJECTION

15:12:00 **Judge: Hosack, Charles**
OVER RULED

15:12:04 **Other: BERRY, KARLETTA**
I PERSONALLY ASKED HIM ABOUT THE HIGHWAY
PROJECT. EMINENT DOMAIN, HE SAID

15:12:28 THE WOULD HAVE TO PAY ME FOR FAIR MARKET VALUE,
I SHOULD GET MY OWN APPRAISAL

15:12:47 DONE ALSO. THAT CONVERSATION WAS IN PERSON, WE
WERE AT THE RESTAURANT AT A

15:13:11 TABLE. THAT WAS END OF 2004. YES I ASKED FOR
ADDITIONAL ADVISE, JERRY WAS AT

15:13:40 THE HOSPITAL AND I CALLED MCFARLAND ABOUT HOW TO
GO TO ABOUT BECOMING JERRY

15:14:05 POWER OF ATTORNEY, HE ADVISED ME HOW TO DO IT
WITH PAPERWORK. MCFARLAND EVEN

15:14:31 OFFERED TO BE THE POWER OF ATTORNEY. YES I WAS
LEASIG A ESPRESSO STAND, A
15:15:08 LADY AND I HAD A VERBAL AGREEMENT WHAT SHE WOULD
SELL TO ME FOR, THE WRITTEN
15:15:32 AGREEMENT HAD A DIFFERENT AMOUNT. WE GOT THE
MONEY TOGETHER AND SHE SAID NO,
15:15:49 SHE WANTED WHAT WAS IN THE WRITTEN AGREEMENT,
MCFARLAND ADVISED HIM ON THAT
15:16:14 ISSUE. THERE WERE NO OTHER TIMES I SOUGHT LEGAL
ADVICE. YES I HAVE OPINION ON
15:17:10 MY VALUE OF STOCK.

15:17:29 **Add Ins: ATTY, JOHN WHELAN - DEF**
OBJECTION

15:17:51 **Judge: Hosack, Charles**
THATS FINE - FOUNDATION

15:17:59 **Other: BERRY, KARLETTA**
I OWN 200 SHARES IN THE CORP. COMMUNITY
PROPERTY, ACQUIRED IT WHILE I WAS
15:18:21 MARRIED. THAT STOCK WAS HELD AS JOINT AND
SEVERAL AND MY NAME WAS PUT ON
15:18:56 THERE. MR. MCFARLAND WROTE THAT CLAUSE IN.

15:19:32 **Add Ins: ATTY, JOHN WHELAN - DEF**
OBJ - LACK OF FOUNDATION

15:19:41 **Judge: Hosack, Charles**
FOUNDATION LAID

15:20:05 **Add Ins: ATTY, JOHN WHELAN - DEF**
NO FOUNDATION - RELEVANCE

15:20:13 **Judge: Hosack, Charles**
OVER RULED.

15:20:31 **Other: BERRY, KARLETTA**
MY STOCK SHOULD BE WORTH A MIN OF \$500.000. THAT
IS BASED ON APPRAISAL. YES I
15:21:42 AM AWARE CORP IS BEHIND ON BILLS.
15:24:54 EXHIBIT 78 - DOCUMENT. NO I DO NOT HAVE 23,000
AVAILABLE. I HAVE 11 DOLLARS
15:25:22 IN MY PURSE. NO THE LOAN WOULD NOT BE 11 PERCENT
INTEREST. JERRY MADE
15:26:03 INTEREST PAYMENTS AND THEY HAVE HAD SOLE CONTROL

15:26:21 OVER THE RESTAURANT SINCE
2006. YES I WOULD HAVE WORKED THERE AND BEEN
15:26:48 THERE EVERY DAY. NO I DO NOT
KNOW ABOUT A CHAPTER 11 BANKRUPTCY. NO I DO NOT
15:27:09 AGREE THAT JERRY BOUGHT THAT
STOCK FOR 50 THOUSAND, I BELIEVE IT WAS 90
15:28:19 THOUSAND. SBA IS THE SMALL
BUSINESS LOAN. YES MCFARLAND SAID THAT LOAN IS
15:28:38 BEHIND BY 2400.00, THIS IS THE
FIRST I HAVE HEARD OF IT FROM MCFARLAND.

15:31:02 **Add Ins: ATTY, REX FIINEY - PLANT**
ADMIT 101 - BUSINESS CARD

15:31:15 **Judge: Hosack, Charles**
ADMIT EXHIBIT 101

15:31:24 **Other: BERRY, KARLETTA**
IT IS A BUSINESS CARD, SAYING CAPTAINS WHEEL.
HOSTESS SAYS JERRY AND

15:32:40 **Add Ins: ATTY, REX FIINEY - PLANT**
EXHIBIT 102 - BUSINESS CARD OF MCFARLAND - IT
WAS IN HIS WALLET

15:35:23 **Judge: Hosack, Charles**
RECESS FOR THE DAY - RESUME AT 08 30 IN THE
15:35:48 MORNING AND WE WILL WRAP UP THE
SAME TIME TOMORROW. DISMISS JURY PANEL FOR THE
DAY.

15:48:13 **Stop recording**
(Off Record)

Court Minutes:

Session: HOSACK011910A
Session Date: 01/19/2010
Judge: Hosack, Charles
Reporter:

Division: Div1
Session Time: 08:23

Courtroom: local

Clerk(s): Burrington, Talisa

State Attorney(s):

Public Defender(s):

Prob. Officer(s):

Court interpreter(s):

Case ID: 0005

Case number: CV2007-2409

Plaintiff: BERRY, KARLETTA GRACE

Plaintiff Attorney:

Defendant: MCFARLAND, MICHAEL

Pers. Attorney:

Co-Defendant(s):

State Attorney:

Public Defender:

Previous audio and annotations can be found in case: 0004

Additional audio and annotations can be found in case: 0006.

01/22/2010

08:38:09

Recording Started:

08:38:09

Case recalled

08:38:23

Judge: Hosack, Charles

DAY FOUR - JURY TRIAL. ALL PARTIES PRESENT.

BRING IN THE JURY PANEL

- 08:39:54 **Add Ins: ATTY, REX FIINEY - PLANT**
CALLS WITNESS - DEVENA HUFF
- 08:42:49 **Other: CLERK**
OATHE GIVEN
- 08:43:05 **Other: HUFF, DEVEANA**
STATES NAME. WS EMPLOYEE AT CAPTAINS WHEEL -
KITCHEN MANAGER. YES I KNOW
- 08:43:28 KARLETTA BERRY, SHE WAS MY BOSS 2005-2008. YES
SHE HELPED ME OUT, KITCHEN
- 08:43:54 WORK. FRIENDS FOR 30 YEARS. NO PROBLEM IF SHE
WOULD HAVE WORKED THERE AFTER
- 08:44:25 JERRY DIED. YES THE KITCHEN STAFF GOT ALONG WITH
HER. I WORK AT RALPHS COFFEE
- 08:44:57 HOUSE 40 HOURS AND THE WHEEL IS CLOSED. I QUIT
IN 2008. YES I SAW HER
- 08:45:36 **Add Ins: ATTY, REX FIINEY - PLANT**
NOTHING FURTHER
- 08:45:42 **Add Ins: ATTY, JOHN WHELAN - DEF**
NOTHING FURTHER
- 08:45:46 **Judge: Hosack, Charles**
EXCUSES WITNESS
- 08:45:52 **Add Ins: ATTY, REX FIINEY - PLANT**
NEXT WITNESS
- 08:45:59 **Other: CLERK**
OATHE GIVEN
- 08:46:31 **Other: CARPENTER, DOROTHY**
SPELLS NAME - STATES NAME. YES WORKED AT THE
CAPTAINS WHEEL. TWO YEARS AGO
- 08:47:11 BARTENDER AND COOK. YES I WAS WORKING THERE WHEN
JERRY PASSED AWAY, I WAS A
- 08:47:27 BARTENDER AT THAT POINT. JERRY DIED AND TWO DAYS
LATER I SAW MCFARLAND, MID
- 08:48:01 MORNING HE CAME IN. HE WENT IN THE OFFICE WITH
MONNIE AND MARIE, DOOR WAS
- 08:48:28 CLOSED AND I WAS TOLD NOT TO DISTURB THEM.
SHORTLY AFTER THE DOOR LOCKS WERE

08:48:58 CHANGED, CHANGED THE LOCKS SO KARLETTA COULD NOT
GET IN THE OFFICE. I THINK
08:49:27 IT WAS THE NEXT DAY. YES I KNEW JERRY AND
KARLETTA. JERRY LOVED KARLETTA. I
08:49:48 GOT ALONG GREAT WITH KARLETTA. YES I NOTIFIED
KARLETTA ABOUT THE MEETING
08:50:23 MCFARLAND HAD. I WAS LAID OFF A FEW MONTHS AFTER
THAT MEETING. YES I SAW
08:50:45 KARLETTA AND MONNIE TOGETHER, HE TREATED HER
DISRESPECTFUL. YES I SAW MONNIE
08:51:07 REMOVE A CASE OF WINE FROM THE WHEEL.

08:51:24 **Add Ins: ATTY, JOHN WHELAN - DEF**
NOTHING FURTHER

08:51:29 **Add Ins: ATTY, REX FIINEY - PLANT**
NOTHING FURTHER

08:51:34 **Judge: Hosack, Charles**
EXCUSES WITNESS

08:51:39 **Add Ins: ATTY, REX FIINEY - PLANT**
NEXT WITNESS

08:51:45 **Other: CARPENTER, DOROTHY**

08:51:53 **Other: CLERK**
OATHE GIVEN

08:52:36 **Other: ROBERTSON, SCOTT**
STATES NAME - SPELLS NAME. YES I WORKED AT THE
WHEEL 2006 - 2007, ABOUT TEN
08:52:57 MONTHS. I WAS A CHEF AT NIGHT. WORKED IN
RESTAURANTS 30 YEARS. THEY PAID ME
08:53:21 12.00 A HOUR, 8 BUCKS ON MY PAYCHECK AND THE
REST IN CASH. YES IDENTIFIES
08:53:47 MCFARLAND AND ZIMMERMAN SEATED AT THE TABLE. YES
THEY CAME INTO THE WHEEL.
08:54:09 THEY WOULD COME IN FOR DINNER. AS I RECALL IT
WAS ALWAYS A ORDER OF OYSTERS,
08:54:40 THAT WAS HIS FAVORITE. IT WAS LIKE MCFARLAND WAS
HERE SO GET THE OYSTERS OUT.
08:55:10 MONNIE AND MARIE WERE MY BOSSES. STAFF GOT A
SHIFT MEAL WHATEVER THEY WANTED.
08:55:37 WHEN I GOT HIRED I THOUGHT MARIE WAS THE OWNER.

08:56:05 THEY WERE ALWAYS THERE. WHEN
I WAS THERE I WAS IN CHARGE OF THE KITCHEN, IT
08:56:27 WAS MY KITCHEN, I STAYED IN
THE KITCHEN. COOL, FUN PLACE TO WORK. I DRANK
BEERS WHILE I WAS WORKING. I
08:56:50 GOT A DUI LEAVING THE WHEEL TWO DAYS AFTER MY
BIRTHDAY.

08:57:09 **Add Ins: ATTY, JOHN WHELAN - DEF**
CX

08:57:13 **Other: ROBERTSON, SCOTT**
YES FINNEY REPRESENTED ME ON MY DUI

08:57:46 **Add Ins: ATTY, JOHN WHELAN - DEF**
NOTHING FURTHER

08:57:51 **Add Ins: ATTY, REX FIINEY - PLANT**
NOTHING FURTHER

08:57:55 **Judge: Hosack, Charles**
EXCUSES WITNESS

08:58:01 **Add Ins: ATTY, REX FIINEY - PLANT**
RECALLS KARLETTE BERRY TO WITNESS STAND

08:58:22 **Other: WITNESS, KARLETTA BERRY -**
JUNE 17 TO JUNE 21 IS WHEN HE WAS IN THE
HOSPITAL. MCFARLAND BROUGHT THOSE
08:58:48 DOCS ON THE 20TH. YES JERRY WAS STILL IN THE
HOSPITAL. I THINK IT WAS JAN 4

08:59:14 2010 IS WHEN CAPTAINS WHEEL CLOSED. YES I WENT
DOWN THERE TO MAKE SURE IT WAS
08:59:33 SECURED, COULD NOT GET IN, WAS LOCKED UP. THE
MAINT DOES NOT APPEAR TO BE
08:59:58 KEPT UP. BAD SHAPE. SLIPS WILL HAVE TO BE
REPLACED. GUTTER DOWN, DECK IN BAD
09:00:20 SHAPE. PROPERTY WAS NOT KEPT UP. BACK BBQ DECK
HAD STUFF ON IT. OUTSIDE
09:00:50 REFRIG FILTHY AND HAD ITEMS IN IT. YES I TOOK
PHOTOGRAPHS APPROX 5TH OR 6TH.
09:01:32 THE PHOTOS ARE DATED.

09:02:14 **Add Ins: ATTY, JOHN WHELAN - DEF**
OBJECT TO THOSE PHOTOS, NOT SUBMITTED TIMELY

09:02:32 **Add Ins: ATTY, REX FIINEY - PLANT**
OK.

09:02:40 **Other: WITNESS, KARLETTA BERRY -**
YES THESE ARE THE ONES I TOOK, ABOUT A WEEK
AFTER THE PLACE CLOSED. ACCURATE
09:03:03 PICTURES THAT I TOOK. THERE WAS ONE SAILBOAT IN
THE SLIPS AND A LITTLE CANOE
09:03:27 ON THE DOCK AND A KIDS PADDLE WHEEL ON DRY LAND.
YES THERE WAS TRASH ON THE
09:03:48 PREMISES. EXHIBIT 93 - YES - PHOTO OF THE
SAILBOAT THAT IS STILL MOORED

09:04:54 **Add Ins: ATTY, JOHN WHELAN - DEF**
OBJ - FOUNDATION

09:05:02 **Judge: Hosack, Charles**
LAY FOUNDATION
09:05:09 SUSTAIN

09:05:13 **Other: WITNESS, KARLETTA BERRY -**
THE SAILBOAT WAS MOORED THERE BEFORE JERRY
PASSED AWAY. IT IS MCFARLANDS
09:05:41 DAUGHTERS SAILBOAT.

09:06:06 **Judge: Hosack, Charles**
EXHIBIT 93 ADMITTED.

09:06:20 **Other: WITNESS, KARLETTA BERRY -**
YES THIS WAS TAKEN THE SAME DAY

09:06:37 **Add Ins: ATTY, JOHN WHELAN - DEF**
OBJECT TO 103

09:06:49 **Judge: Hosack, Charles**
RESERVE RULING UNTIL LATER

09:07:02 **Other: WITNESS, KARLETTA BERRY -**
I GRADUATED EARLY AT AGE OF 17 . HAD A CHILD AT
17. YES THE HOME WAS PUT IN
09:07:38 MY NAME. I HAVE A MORTGAGE ON THE HOME, THERE
WAS A FIRST AND A SECOND
09:07:58 MORTGAGE WHEN IT WAS TRANSFERRED TO ME. FILED
LAWSUIT 2/14/07. MEETING ON
09:08:27 2/15/07 WITH MCFARLAND - HE WASNT HAPPY ABOUT IT
- THE LAWSUIT. I DID MAKE

09:08:55 CALLS TO MCFARLAND FOR JERRY, JERRY WANTED TO
SPEAK TO HIM OR HE WOULD BE LAT
09:09:11 FOR A MEETING. THERE WERE TIME SHEETS AT THE
WHEEL THAT EMPLOYEES WROTE IN
09:09:35 THE TIMES. THEY WERE PAID HOURLY. AT ONE TIME
JERRY AND I DISCUSSED GIVING
09:10:03 MARIE AND MONNIE STOCK BUT WE DECIDED TO JUST
GIVE THEM MONEY WHEN THE
09:10:25 RESTAURNT SOLD. THE SECOND MORTGAGE WAS TAKEN
OUT ON THE HOME WHEN WE FIRST
09:10:48 BOGHT INTO THE WHEEL IN 2000. YES THE EMPLOYEE
NOTIFIED ME ABOUT THE CLOSED
09:11:18 DOOR MEETING, THERE WAS NOTHING I COULD DO. IT
WAS TWO DAYS LATER AFTER MY
09:11:36 HUSBAND PASSED AWAY. YES I HAD A KEY TO THE
OFFICE BUT NOT TO THE FRONT DOOR.
09:11:55 THE CREDIT LINE FOR THE BANK WAS TAKEN OUT BY
JIM CAMBELL, I THINK HE IS
09:12:21 STILL ON IT. DONT KNOW IF JERRY WAS EVER ADDED
TO IT. THE SMALL BUSINESS LOAN
09:12:40 - JERRYS NAME WAS ON THAT - THE CIT LOAN. I
THINK THEY DO LEIN ON REAL
09:13:09 PROPERTY, ITS A LOAN. YES THERE WAS A SPECIAL
WINE KEPT AT THE REST JUST FOR
09:13:31 MCFARLAND, IT WAS NOT ON THE MENU. YES JERRY DID
WORK AT MCFARLANDS HOME. IN
09:14:28 THE APPRAISAL THERE IS A LETTER FROM THE STATE
SAYING THEY WERE GOING TO DROP
09:14:47 THE LEASE AS IT WAS A SMALL PORTION THAT THE
SLIPS OCCUPIED. YES I HAVE SEEN
09:15:15 LETTERS WITH MCFARLAND LAW FIRM NAME ON IT - AT
MY HOUSE. IN JUNE 2006 HE
09:15:37 WENT ON A CLEANING SPREE IN OUR OFFICE AT THE
HOUSE, I TRIED TO SEE WHAT IT
09:16:09 WAS HE GOT RID OF. THAT WAS A FEW DAYS BEFORE HE
WENT INTO THE HOSPITAL. I
09:16:43 HAVE SURVIVOR BENEFITS FOR MYSELF AND MY SON AT
THIS POINT. YES I HAD A LIST
09:17:10 OF HIS DAILY MEDICATIONS THAT JERRY TOOK, NOT
THE CHEMO PILLS. YES I GAVE
09:18:23 MEDICATIONS TO JERRY. I MAINTAINED A LIST AND
TOOK IT WITH US TO HIS MEDICAL
09:18:42 APPTS. SUMMER FALL 2006.
09:18:59 **Add Ins: ATTY, JOHN WHELAN - DEF**
OBJECT - LACK OF FOUNDATION

09:19:11 **Judge: Hosack, Charles**
OVERRULED OBJECTION.

09:19:23 **Other: WITNESS, KARLETTA BERRY -**
YES I KEPT A LIST. KEPT A LIST FOR THE DOCTORS
AND THE HOSPITAL, YES EXACT

09:19:49 DOSAGES -

09:20:12 **Add Ins: ATTY, JOHN WHELAN - DEF**
OBJECTION

09:20:16 **Judge: Hosack, Charles**
OVER RULED

09:20:20 **Other: WITNESS, KARLETTA BERRY -**
READS LIST OF MEDICATIONS THAT JERRY TOOK.

09:21:27 YES I HAND DELIVERED TWO PAYMENTS TO ZIMMERMAN
WHEN JERRY WAS ON HIS IV DRIP.

09:21:46 I DELIVERED THOSE PAYMENTS TO HER HOUSE,IT WAS
CASH. AFTER JERRY DEATH I DID

09:22:20 NOT HEAR FROM MCFARLAND.

09:22:29 **Add Ins: ATTY, JOHN WHELAN - DEF**
CX

09:27:03 **Other: WITNESS, KARLETTA BERRY -**
YES EXHIBIT A - MY HUSBANDS SIG, EXH B- HUSBANDS
SIG. EXHIBIT J - STOCK

09:27:55 PURCHASE - YES MY HUSBANDS SIGNATURE - EXHIBIT
L - YES IT MY SIG AND MY

09:28:20 HUSBANDS. EXHIBIT M - YES THAT IS MY SIGNATURE.
EXHIBIT O - YES THAT IS

09:30:18 HUSBANDS SIG. EXHIBIT MM - YES HAS INITIALS,
MINE AND MY HUSBANDS. YES I

09:31:58 FILED LAW SUIT 2/14/07 - NO SIGNIF. YES YOU
SUBMITTED WRITTEN QUESTIONS TO

09:32:32 ME. I DONT RECALL IF QUESTIONS WERE SUBMITTED TO
MCFARLAND. YES I REMEMBER

09:33:30 **Add Ins: ATTY, REX FIINEY - PLANT**
OBJECTION - RELEVANCE

09:33:40 **Judge: Hosack, Charles**
SUSTAIN OBJECTION

09:33:48 **Other: WITNESS, KARLETTA BERRY -**

09:34:11 YES THERE ARE NUMEROUS ALLEGATIONS. DID NOT
SUBMIT A BAR ALLEGATION, I HAVE
09:34:44 NOT REPORTED IT TO THE STATE BAR ASSOC. NO I DID
NOT CORRESPOND WITH THEM
09:35:21 AFTE THE LAW SUIT WAS FILED. NO I DID NOT ASK
FOR RESTAURANT INFORMATION
09:35:44 AFTER THE LAWSUIT WAS FILED. YES I AM DISPUTING
HOW THE TRANSACTION OF THE
09:36:08 100 THOUSAND TOOK PLACE. IT WAS DAN AND WENDY
TELERICO THAT ALSO WANTED TO
09:36:38 BUY THE STOCK, THEY MADE JIM MAD AND JIM TOLD
THEM NO. YES I HAVE
09:36:58 EXPERIENCING WORKING IN THE RESTAURANT, WORKED
AS A TEENAGER FOR TWO YEARS,
09:37:29 DIHWASHER AND PREP. YES TAKING OVER THE
MANAGEMENT OF THE WHEEL WOULD HAVE
09:37:51 BEEN A NEW EXPERIENCE. NO I WAS NOT A DOG
GROOMER AND YES I CLEANED ROOMS
09:38:33 PART TIME. I WAS SELF EMPLOYED WITH MY ESPRESSO
STAND. I HAD IT FOR A YEAR,
09:38:56 BEFORE AT THE MOTEL BEFORE THE ESPRESSO STAND.
SINCE THEN I WORKED AT THE
09:39:20 CAPTAINS WHEEL. I FILLED OUT A TIME SHEET WHEN I
WORKED THERE. HAVE SOME FROM
09:39:43 2005. WHEN I MARRIED JERRY BERRY I DID NOT OWN
ANY LAND, HAD MY OWN BANK
09:40:13 ACCOUNT, ON MY OWN COULD NOT HAVE BOUGHT THE
STOCK. THE STOCK PURCHASED FROM
09:40:38 NORDSTROM, JERRY TOOK OUT A SECOND MORTGAGE TO
PURCHASE THE STOCK. YES HE PUT
09:40:56 THAT IN MY NAME, WE WERE LOOKING INTO
REFINANCING TO BUY CAMBELL STOCK, HIS
09:41:23 CRDIT SCORE WAS LOWER THAN MINE SO HE PUT IT
INTO MY NAME. YES I REMEMBER YOU
TAKING MY DEPOSITION
09:41:53 **Add Ins: ATTY, REX FIINEY - PLANT**
I DO NOT HAVE A COPY OF THE DEPOSITION THAT
WHELAN DID.
09:42:49 **Other: WITNESS, KARLETTA BERRY -**
YES I DO RCALL THE DEPOSITION SAYING I WAS NOT
AT THE MEETINGS WITH MCFARLAND
09:43:20 **Add Ins: ATTY, JOHN WHELAN - DEF**
READS FROM THE DEPOSITION

09:43:32 **Judge: Hosack, Charles**
SHE NEEDS A COPY OF THE DEPOSITION TO FOLLOW
ALONG WITH

09:43:51 **Add Ins: ATTY, JOHN WHELAN - DEF**
PROVIDES COPY OF THE DEPOSITION TO KARLETTA.

09:44:10 **Other: WITNESS, KARLETTA BERRY -**
READS ALONG WITH DEPOSITION.

09:47:03 **Add Ins: ATTY, REX FIINEY - PLANT**
OBJECTION

09:47:10 **Judge: Hosack, Charles**
OBJECTION SUSTAINED

09:47:23 **Other: WITNESS, KARLETTA BERRY -**
YES HE HAD A ATTY IN WASH REGARDING THE SPEC
HOUSE. DONT RECALL THE OTHER

09:47:47 ATTY NAME, ONE WAS BYRON POWELL. . MY
CONVERSATIONS WITH MCFARLAND WERE

09:48:52 VERBAL - PHONE AND IN PERSON. I DID DELIVER
PAPERWORK TO MCFARLAND ONCE AT

09:49:35 HIS OFFICE.

09:50:04 **Add Ins: ATTY, REX FIINEY - PLANT**
THIS IS NOT IMPEACHMENT

09:50:11 **Judge: Hosack, Charles**
OVER RULED

09:50:20 **Add Ins: ATTY, JOHN WHELAN - DEF**
CX

09:50:24 **Other: WITNESS, KARLETTA BERRY -**
YES SOUGHT ADVISE FROM MCFARLAND ABOUT THE
ESPRESSO STAND. JERRY INTRODUCED

09:53:35 MCFARLAND AS HIS ATTY. YES I WAS PRESENT WHEN
THE STOCK WAS OFFERED TO

09:53:56 MCFARLAND AND ZIMMERMAN. MIKE AND KAREN WANTED
THE STOCK ISSUED TO THEM.

09:55:20 JERRY WAS VERY ILL AT THAT MEETING 10/15TH
MEETING. YES HE WAS ABLE TO SPEAK

09:58:00 AT THAT MEETING AND INTERACT YES. MY NAME WAS
ADDED TO THE STOCK BEFORE THE

09:59:12 OCTOBER MEETING. YES I KNOW MR. MCGLAUGHLIN WAS

10:01:45 FILLING IN FOR MR. FINNEY, I
PAID A PORTION OF THAT. I KNOW MR. FINNEY ALSO
10:02:53 PAID HIM. I WAS NOT ALLOWED TO
ASSIST THEM IN THE CORPORATION. I SPOKE TO THE
10:03:17 MANAGERS ON A COUPLE OF ISSUES
AND THEY SAID THEY WOULD TAKE IT UP WITH
10:03:34 MCFARLAND. STAFF TOLD ME THEY ONLY
HAD TO LISTEN TO MIKE. I ALREADY TOLD YOU THAT
JERRY WANTED STOCK ISSUED TO

10:06:18 **Add Ins: ATTY, JOHN WHELAN - DEF**
NOTHING FURTHER

10:06:25 **Judge: Hosack, Charles**
TAKE MORNING BREAK. EXCUSES JURY PANEL.

10:07:12 **Stop recording**
(On Recess)

Court Minutes:

Session: HOSACK011910A
Session Date: 01/19/2010
Judge: Hosack, Charles
Reporter:

Division: Div1
Session Time: 08:23

Courtroom: local

Clerk(s): Burrington, Talisa

State Attorney(s):

Public Defender(s):

Prob. Officer(s):

Court interpreter(s):

Case ID: 0006

Case number: CV2007-2409

Plaintiff: BERRY, KARLETTA GRACE

Plaintiff Attorney:

Defendant: MCFARLAND, MICHAEL

Pers. Attorney:

Co-Defendant(s):

State Attorney:

Public Defender:

Previous audio and annotations can be found in case: 0005

Additional audio and annotations can be found in case: 0007.

01/22/2010

10:38:37

Recording Started:

10:38:37

Case recalled

10:39:09

Stop recording
(Off Record)

Court Minutes:

Session: HOSACK011910A
Session Date: 01/19/2010
Judge: Hosack, Charles
Reporter:

Division: Div1
Session Time: 08:23

Courtroom: local

Clerk(s): Burrington, Talisa

State Attorney(s):

Public Defender(s):

Prob. Officer(s):

Court interpreter(s):

Case ID: 0007

Case number: CV2007-2409
Plaintiff: BERRY, KARLETTA GRACE
Plaintiff Attorney:
Defendant: MCFARLAND, MICHAEL
Pers. Attorney:
Co-Defendant(s):
State Attorney:
Public Defender:
Previous audio and annotations can be found in case: 0006
Additional audio and annotations can be found in case: 0008.

01/22/2010

10:40:40

Recording Started:

10:40:40

Case recalled

10:40:56

Stop recording
(On Recess)

10:53:21 Recording Started:

10:53:21 **Record**
MCFARLAND, MICHAEL

10:53:26 **Add Ins: ATTY, JOHN WHELAN - DEF**
THERE ARE ISSUES WE NEED TO ADDRESS PAGES 59-74

10:53:56 **Judge: Hosack, Charles**
JURY PANEL IS NOT PRESENT - PAGE 58-5 TO 58-11

10:54:28 **Add Ins: ATTY, JOHN WHELAN - DEF**
HE WANTS TO READ 5-11

10:54:37 **Judge: Hosack, Charles**
FINE

10:54:45 **Add Ins: ATTY, JOHN WHELAN - DEF**
I DID NOT READ FROM PAGE 59

10:54:54 **Judge: Hosack, Charles**
THAT IS RELEVANT - OK

10:55:02 **Add Ins: ATTY, JOHN WHELAN - DEF**
59 OR LINE 60

10:55:25 **Judge: Hosack, Charles**
THAT IS PERMISSABLE

10:55:32 **Add Ins: ATTY, JOHN WHELAN - DEF**
60-16-25

10:55:41 **Judge: Hosack, Charles**
I WILL ALLOW THAT TO BE RAD

10:56:28 **Add Ins: ATTY, JOHN WHELAN - DEF**
PAGE 60-61

10:56:41 **Judge: Hosack, Charles**
NO WILL NOT ALLOW

10:57:20 **Add Ins: ATTY, REX FIINEY - PLANT**
62-67 - HE WANTS TO READ THAT

10:57:38 **Judge: Hosack, Charles**

11:00:10 62-67 - SUSTAIN THE OBJECTION, JUST KINDA
DEPENDS. NO - LIKE I SAID SUSTAIN
THE OBJECTION

11:00:18 **Add Ins: ATTY, REX FIINEY - PLANT**
PAGE 67 - CERTAIN LINES?

11:00:33 **Judge: Hosack, Charles**
LINE 11-17 - I WILL ALLOW THAT PAGE 67

11:01:05 **Add Ins: ATTY, REX FIINEY - PLANT**
PAGE 68 3-12?

11:01:19 **Judge: Hosack, Charles**
I WILL ALLOW THAT

11:01:42 **Add Ins: ATTY, JOHN WHELAN - DEF**
69-5

11:01:57 **Judge: Hosack, Charles**
SAME RULING. I DONT THINK SO. OBJ SUSTAINED

11:02:25 **Add Ins: ATTY, JOHN WHELAN - DEF**
73-4-11?

11:02:38 **Judge: Hosack, Charles**
NO

11:03:03 **Add Ins: ATTY, JOHN WHELAN - DEF**
HE WANTS PAGE 74 STARTING AT LINE 5 -13

11:03:35 **Judge: Hosack, Charles**
5-13 ARE PERMISSABLE

11:04:26 **Add Ins: ATTY, REX FIINEY - PLANT**
74 25-LINE 7 ON PAGE 75?

11:04:50 **Judge: Hosack, Charles**
THAT IS NOT ANY DIFFERENT, WILL NOT RE READ
THAT.

11:05:47 **Add Ins: ATTY, REX FIINEY - PLANT**
SPECIFIC LINES ON 63-67, PAGE 63 LINE 5-9

11:06:48 **Judge: Hosack, Charles**
I WILL ALLOW

11:06:55 **Add Ins: ATTY, REX FIINEY - PLANT**
15-20

11:07:05 **Judge: Hosack, Charles**
NO NOTHING NEW

11:07:11 **Add Ins: ATTY, REX FIINEY - PLANT**
PAGE 64 LINE 5 - 9

11:07:26 **Judge: Hosack, Charles**
OK CAN READ THAT IN

11:07:57 **General:**
Time stamp

11:08:02 **Add Ins: ATTY, REX FIINEY - PLANT**
PAGE 65 THROUGH 13

11:08:12 **Judge: Hosack, Charles**
NO NEED TO REREAD

11:08:31 **Add Ins: ATTY, REX FIINEY - PLANT**
PAGE 66 10-21

11:08:45 **Judge: Hosack, Charles**
NO NOT NECESSARY

11:09:13

11:09:58 BRING IN JURY PANEL

11:10:58 JURY PRESENT

11:11:12 RECALLS KARLETTA TO WITNESS STAND

11:11:25 **Add Ins: ATTY, REX FIINEY - PLANT**
RE DX

11:11:29 **Other:**

11:11:43 **Other: BERRY, KARLETTA**
PAGE 58 DEPOS - LINE 5 READS ANSWER

11:12:23 **Add Ins: ATTY, JOHN WHELAN - DEF**
REQUEST 12-14 READ ALSO

11:12:40 **Other: BERRY, KARLETTA**
PAGE 59 DEPOS - READS ANSWER

11:12:52 **Add Ins: ATTY, JOHN WHELAN - DEF**
WHAT PROOF

11:13:05 **Add Ins: ATTY, REX FIINEY - PLANT**
PAGE 59 DEPO THROUGH PAGE 60 LINE 7

11:13:33 **Other: BERRY, KARLETTA**
READS DEPOS - ANSWERS

11:13:56 **Add Ins: ATTY, REX FIINEY - PLANT**
PAGE 60

11:14:02 **Other: BERRY, KARLETTA**
READS DEPOS - ANSWER

11:14:26 **Add Ins: ATTY, JOHN WHELAN - DEF**
PAGE 25

11:14:36 **Other: BERRY, KARLETTA**
ANSWER - DEPOS

11:14:49 **Add Ins: ATTY, REX FIINEY - PLANT**
PAGE 61 LINE 16

11:14:58 **Other: BERRY, KARLETTA**
READS ANSWER - LINE 17 DEPOS

11:15:26 **Add Ins: ATTY, JOHN WHELAN - DEF**
LINE 20 DEPOS

11:15:52 **Add Ins: ATTY, REX FIINEY - PLANT**
PAGE 67 LINE 11-

11:17:20 **Judge: Hosack, Charles**
NO WILL NOT ALLOW

11:17:29 **Add Ins: ATTY, REX FIINEY - PLANT**
PAGE 68 3-12

11:17:46 **Other: BERRY, KARLETTA**
READS ANSWER FROM DEPOS

11:18:16 **Add Ins: ATTY, JOHN WHELAN - DEF**
LINE 13

11:18:27 **Other: BERRY, KARLETTA**

ANSWER - DEPOS

- 11:18:39 **Add Ins: ATTY, REX FIINEY - PLANT**
PAGE 74 - LINE 5
- 11:18:52 **Other: BERRY, KARLETTA**
READS ANSWER
- 11:19:17 **Add Ins: ATTY, JOHN WHELAN - DEF**
LINE 14 READS
- 11:19:48 **Add Ins: ATTY, REX FIINEY - PLANT**
THOSE WERE ALL THE THINGS IDENTIFIED
- 11:20:01 RE DX
- 11:20:04 **Other: BERRY, KARLETTA**
YES I RECOGNIZE JERRYS SIGNATURE - ARE THERE ARE
DIFFERENCES
- 11:20:27 **Add Ins: ATTY, JOHN WHELAN - DEF**
OBJ - SHE IS NOT A WRITING EXPERT
- 11:20:38 **Judge: Hosack, Charles**
LET THE ANSWER STAND - SHE SAW SOME DIFFERENCES
- 11:20:56 **Other: BERRY, KARLETTA**
HIS TYPICAL SIG BEFORE HE WAS ILL. 2006 IS HARD
TO READ, VERY SHAKY VERY
- 11:21:19 WOBBLY SIGNATURE. 10/15/06 - VERY SHAKY AND
WOBBLY SIGNATURE.
- 11:21:47 2/15/07 MEETING WAS TO REMOVE ME AS DIRECTOR -
THAT IS WHY I FILED LAWSUIT.
- 11:22:17 I AM NOT SURE IF I AM FILING A COMPLAINT WITH
BAR ASSOC.
- 11:22:33 YES I DID CRY AT MY DEPOSITION.
- 11:22:47 **Add Ins: ATTY, JOHN WHELAN - DEF**
OBJ
- 11:22:50 **Judge: Hosack, Charles**
OVER RULED
- 11:22:56 **Other: BERRY, KARLETTA**
NO I DO NOT HAVE A GOOD UNDERSTANDING OF ALL
LEGAL THEORIES
- 11:23:26 IF I MANAGED THE WHEEL I WOULD NOT HAVE ALLOWED

11:23:50 EMPLOYEES TO DRINK ON THE
JOB.

11:23:55 **Add Ins: ATTY, JOHN WHELAN - DEF**
OBJ

11:24:01 **Judge: Hosack, Charles**
DONT FOLLOW THE CONNECTION OUTSIDE THE SCOPE.

11:24:16 **Other: BERRY, KARLETTA**
YES MOSTLY I UNDERSTOOD THE WAY CASH WAS HANDLED
AND THAT PROCESS - YES

11:25:11 YES JERRYS CREDIT SCORE WAS LOWER THAN MINE
BECAUSE OF THE WASH JUDGMENT

11:25:35 CREDITORS

11:25:39 YES LAWYERS FROM WASH REP JERRY

11:26:06 YES

11:26:17 **Add Ins: ATTY, JOHN WHELAN - DEF**
OBJ

11:26:20 **Judge: Hosack, Charles**
OVER RULED

11:26:25 **Other: BERRY, KARLETTA**
YES THOSE JUDGEMENT WERE ENTERED BEFORE HE WENT
TO SEE MCFARLAND

11:26:41 JERRY DID NOT INITAITE THAT MEETING

11:27:09 10/15/06 MEETING - YES I BELIEVED HE WAS
OPERATING AS CORPORATE ATTORNEY.

11:27:39 ABOUT 19 DAYS LATER JERRY DIED. 10/15/ MEETING
HE WAS VERY ILL AND I DID NOT

11:28:03 GET INVOLVED BECAUSE I DIDNT WANT TO ADD STRESS
TO JERRY.

11:28:20 **Add Ins: ATTY, JOHN WHELAN - DEF**
OBJ - LEADING

11:28:25 **Judge: Hosack, Charles**
SUSTAINED

11:28:32 **Other: BERRY, KARLETTA**
PRIOR TO 10/15 MEETING I HAD NOT REVIEWED THE
STOCK CERT. MCFARLAND HAD THE

11:28:59 CORPORATE BOOKS.

11:29:09 10/15 MEETING - I DID NOT ASK TO BE REMOVED AS

SEC.
11:29:27 AFTER HIS DEATH I ASKED TO BE PRESIDENT AND
TREASURER
11:29:41 I NEVER ASKED TO BE REMOVED AS DIRECTOR.
11:29:53 NO EXTRA MONEY
11:30:03

11:30:16 **Add Ins: ATTY, REX FIINEY - PLANT**
NOTHING FURTHER

11:30:22 **Add Ins: ATTY, JOHN WHELAN - DEF**
RE RE CX

11:30:28 **Other: BERRY, KARLETTA**
FEB MEETING - 2007

11:30:46 **Add Ins: ATTY, JOHN WHELAN - DEF**
NOTHING FURTHER

11:30:58 **Judge: Hosack, Charles**
EXCUSES KARLETTA BERRY AS WITNESS

11:31:13 **Add Ins: ATTY, REX FIINEY - PLANT**
NO OTHER WITNESSES AT THE MOMENT

11:31:35 **Judge: Hosack, Charles**
TAKE OUR NOON BREAK. EXCUSE JURY PANEL TO SPEAK
TO COUNCIL AND WE WILL LET
11:32:12 JUR PANEL KNOW WHERE WE ARE WITH THE DAY.

11:33:06 **Add Ins: ATTY, REX FIINEY - PLANT**
RESTS

11:33:15 **Add Ins: ATTY, JOHN WHELAN - DEF**
MOTIONS TO ADDRESS
11:33:32 MOTION - 20 MINUTES AND WE HAVE A WHOLE BUNCH OF
WITNESSES AT 1 PM

11:34:58 **Judge: Hosack, Charles**
HAVE THEM COME BACK AT 1PM
11:35:06

11:35:47 **Add Ins: ATTY, REX FIINEY - PLANT**
PLANTIFF REST. THIS OTHER WITNESS IS FROM
ARIZONA AND SHE WOULD HAVE TO FLY
11:36:22 IN SO WE MAY NOT CALL HER - RESERVE THE RIGHT TO

REOPEN.

11:36:45 **Judge: Hosack, Charles**
REMAINS PENDING. PLAINTIFF RESTS.

11:37:09 **Add Ins: ATTY, JOHN WHELAN - DEF**
RULE 58 - READS RULE. WORDING IN PLAINTIFF
COMPLAINT SEEKING ACTION AGAINST

11:38:22 DIRECTORS OF CORP. NOTHING OFFERED TO ESTABLISH
THAT. NO WRITTEN DOC HAS BEEN

11:38:53 GIVEN TO CORP. PLAINTIFF ACTION FAILS DUE TO LACK
OF WRITTEN NOTICE. NO

11:39:20 WRITTEN NOTICE. REFERENCES JUDGE VERBY CASE.
WORDING IN COMPLAINT FAILS. THAT

11:40:08 FAILS.NEXT ONE IS QUIT TITLE TO STOP. DOESNT
PERTAIN TO STOCK. SIXTH CAUSE OF

11:40:57 ACTION. WE ARE PREPARED TO PUT ON OUR
ACCOUNTING. THAT STANDS. NEXT ONE, GOOD

11:41:43 FAITH AND DEALING, PLAINTIFF SAID THERE IS NO
CONTRACT, SHOULD NOT BE UPHELD.

11:42:08 GOOD FAITH ISSUE HAS NOT BEEN DEALT WITH.
AGREEMENT WAS REACHED IN 2003 WASNT

11:43:04 FINALIZED UNTIL 2006. IF TRANSACTION WAS
CHALLENGABLE WOULD HAVE TO GO BACK

11:43:36 TO 2003. THEREFOR NO EVIDENCE 2003 WAS NOT
CHALLENGED. EX POST FACTO LAW.

11:44:54 PLAINTIFF CLAIMS MCFARLAND IS SHACKLED FOR LIFE
AS JERRY BERRY ATTORNEY -

11:45:24 ABSURD. REFERENCES RULES OF CONDUCT. HE WAS NOT
HIRED - NO EVIDENCE. SHE

11:45:54 KEEPS SAYING JERRY SAID....SHE HAS NOTHING TO
SHOW HE DID ATTORNEY WORK FOR

11:46:27 TH CAPTAINS WHEEL. MR. DAUGHERTY SAID HE WAS THE
ATTORNEY FOR THE CAPTAINS

11:46:52 WHEEL. FAILS FOR LACK OF PROOF. SHE ONLY HAS
STATEMENTS OF HER SAYING WHAT

11:47:19 HER HUSBAND TOLD HER. SHE MAKES THAT ARGUMENT
BECAUSE ITS CONVIENT. DEAL WAS

11:47:54 ENTERED 2003 WITH JERRY BERRY. HE MET WITH HIM
FOR A HALF HOUR IN 2001 AND

11:48:17 THERE WAS NO CHARGE. CLAIM OF LACK OF CAPACITY -
NO PROOF. NO INDICATION MR.

11:48:51 BERRY EVER LACKED CAPACITY ESPECIALLY IN 2003.
NO EVIDENCE TO SUPPORT CLAIM.

11:49:34 ACTION LACK OF CONSIDERATION - FAILS. MIKE AND
KAREN SUPPLIED 100 THOUSAND.

11:50:00 THERE WAS A CONTRACT BETWEEN THE PARTIES. HER
11:50:31 ARGUMENT IS THEY SHOULD HAVE
JUST GIVEN HIM THE MONEY, JERRY BERRY BENEFITED
FROM THIS TRANSACTION.
11:51:11 MOTION FOR DIRECTIVE VERDICT. MR. BERRY
BENEFITED, WAS NOT UNFAIR, HE
11:51:48 SUGGESTED THIS TRANSACTION. PRIVATE CAUSE OF
ACTION RE PROFESSIONAL RULES OF
11:52:12 CONDUCT.
11:52:19 **Judge: Hosack, Charles**
THERE ARE 8 CAUSES OF ACTION
11:52:35 **Add Ins: ATTY, JOHN WHELAN - DEF**
THAT IS CORRECT. SHE TRIES TO REACH OUT AND GRAB
A RULE AND USE THAT AS LAW.
11:53:03 INFORMED CONSENT HAS NOT BEEN PURSUED, NOTHING
HAS BEEN FILED. SHE DID NOT
11:53:37 PURSUE. THE MALPRACTICE/NEGLIANCE - COMPLETE
FAILURE OF PROOF. CLAIM OF
11:54:14 BREACH - HE WAS NOT PADDING HIS OWN POCKET. THAT
CLAIMS FAILS FOR ANY
11:54:37 EVIDENCE. LEAVES THE BREACH OF FUD ACTION -
EVIDENCE DIDNT ESTABLISH SUCH
11:55:09 RELAIOSHIP. MIKE AND KAREN TOOK THE RISK, THEY
PUT IN THE MONEY AND JERRY
11:55:36 BERRY GOT TO RUN THE SHOW. THIS IS ALMOST
ENTRAPMENT - CRIMINAL. ACTION
11:56:01 FAILS. HE WAS NOT HIS LAWYER SO THAT IS NOT THE
CASE. FALURE OF PROOF. ASKING
11:56:38
11:56:44 **Add Ins: ATTY, REX FIINEY - PLANT**
FIRST ISSUE - JUDGE VERBY ALREADY RULED, THIS IS
A ISSUE FOR THE JURY . THIS
11:57:11 IS NOT A DIRECTIVE ACTION.
11:57:33 **Judge: Hosack, Charles**
HOW IS THIS DIRECTIVE ACTION. WHY IS THIS A
DIRECTIVE ACTION. OK WE HAVE
11:58:28 AGREEMENT - THIS IS NOT A DIRECTIVE ACTION. 2 50
PERCENT SHARE HOLDERS. THIS
11:59:05 DIRETIVE CLAIM BAFFLES ME. DIFFICULT ISSUE.
11:59:32 **Add Ins: ATTY, REX FIINEY - PLANT**
THIS IS A DIRECT ACTION NOT A DIRETIVE ACTION.

11:59:53 **Add Ins: ATTY, JOHN WHELAN - DEF**
CLAIMS AGAINST DIRECTORS FAIL.

12:00:09 **Judge: Hosack, Charles**
WE ARE NOT DISMISSING CLAIMS HERE.

12:00:23 **Add Ins: ATTY, JOHN WHELAN - DEF**
MCCAN CASE - REFERENCE CASE.

12:00:32 **Judge: Hosack, Charles**
I AM NOT DISMISSING CLAIMS AGAINST DIRECTORS,
THEY CAN BE SUED FOR THAT.

12:01:29 **Add Ins: ATTY, REX FIINEY - PLANT**
QUIT TITLE STOCK - SIXTH CAUSE OF ACTION - DIST
COURT HAS INHERENT

12:02:58 DETERMINATION OF STOCK OWNERSHIP. COURT HAS
AUTHORITY.

12:03:56 **Judge: Hosack, Charles**
YOUR MAKING OWNERSHIP OF STOCK

12:04:07 **Add Ins: ATTY, REX FIINEY - PLANT**
ACCOUNTING TO SURVIVE. ASKING FOR FULL
ACCOUNTING SINCE THEY REMOVED HER AS A

12:04:37 DIRECTOR, ASKING FOR COURT TO ORDER THAT.

12:05:01 **Judge: Hosack, Charles**
THIS IS A JURY TRIAL. WHAT AUTHORITY DO YOU HAVE
TO ORDER.

12:05:39 DISMISS CLAIM FOR ACCOUNTING. COURT IS NOT A
PARA LEGAL. THE ATTORNEY

12:06:08 PRESENTS THE CASE, IF THE ATTORNEY DOES NOT
PRESENT THE EVIDENCE, THE COURT

12:06:24 WILL NOT DO THAT FOR YOU.

12:06:32 **Add Ins: ATTY, REX FIINEY - PLANT**
BREACH - GOOD FAITH. WE ARE SUING ON THE
PURCHASE AND SALE AGREEMENT - IT WAS

12:07:14 NOT DONE IN GOOD FAITH . BINDING CONTRACT. I
AGREE - FOUR SHOULD BE

12:07:47 DISMISSED.

12:07:55 **Judge: Hosack, Charles**
7TH CAUSE IS WITHDRAWN - FAIR DEALING

12:08:12 **Add Ins: ATTY, REX FIINEY - PLANT**
CLAIM 5 -

12:08:23 **Judge: Hosack, Charles**
THAT IS MORE OF A REMEMDY. IT TRAILS THE OTHER
DETERMINATION.

12:09:22 **Add Ins: ATTY, REX FIINEY - PLANT**
BACH VS. MILLER CASE. THERE WAS A JURY VERDICT.
144-142. LACK OF CAPACITY.

12:10:12 SUFFICIENT EVIDENCE. HE WAS DILLUSIONAL PRIOR TO
SIGNING. THAT IS THE SECOND

12:10:37 CAUSE OF ACTION. UNDUE INFLUENCE - CONSTRUCTIVE
FRAUD. UNDUE INFLUENCE BY

12:11:38 ATTORNEY. 25 CAUSES OF ACTION FROM 2006,
RETRIEVED OUT OF WEST LAW. SELF

12:12:21 DEALING WITH CLIENT. UNDUE INFLUENCE SHOULD NOT
BE DISMISSED.

12:13:02 LACK OF CONSIDERATION - WITHDRAW THAT ONE. CLAIM
IS NOT SUPPORTED.

12:13:52 NO WAY COURT CAN DISMISS BREACH OF FUD DUTY -
ADEQUATE EVIDENCE HAS BEEN

12:14:15 SUBMITTED. O'NEIL VS VASSER CASE. JURY SHOULD BE
ALLOWED TO MAKE THAT

12:14:42 DETERMINATION. PAYMENT OF A ATTORNEY IS NOT
NECESARY, GIVEN FOOD, GIVEN

12:15:53 STOCK. ATT/CLIENT RELATIONSHIP CAN BE
ESTABLISHED. REFERENCES THE DEPOSITION.

12:16:15 THERE IS ATTY/CLIENT RELATIONSHIP. AINSWORTH
CASE 22 IDAHO 645. A CASE ABOUT

12:17:28 REAL ESTATE. VERY OLD CASE. TAYLOR VS. MALE
CASE. MAYO CASE 142 IDAHO 253.

12:19:17 ATTORNEY MALPRACTICE - SUBMIT TO JURY.

12:19:52 HE WAS ACTING AS A ATTORNEY FOR JERRY BERRY -
HE GAVE LEGAL ADVICE TO

12:20:29 KARLETTA AND WAS THE ATTORNEY FOR CAPTAINS WHEEL
- THERE IS EVIDENCE FOR EACH

12:20:43 OF THOSE.

12:21:17 WE ARE SUING AS A RESULT OF CONTRACT. THE
CONTRACT IS MCFARLAND AN ZIMMERMAN

12:22:26 CONTRACT. EXHIBIT 23 IS THE CONTRACT AND OR THE
LOAN.

12:23:08 **Judge: Hosack, Charles**
PROBLEM WITH THIS. WHICH ARE YOU SUING ON?

12:23:50 **Add Ins: ATTY, REX FIINEY - PLANT**
WE WANT MONEY DAMAGES OVER THE STOCK PURCHASE
AGREEMENT. ALL DAMAGES FAIR

12:24:37 MARKET VALUE - DEF PURCHASED 50 PERCENT OF THE
STOCK FROM HIS CLIENT -

12:26:03 **Judge: Hosack, Charles**
STOCK PURCHASE AGREEMENT SAID JERRY BERRY IS 50
PERCENT AND MCFARLAND AND

12:26:24 ZIMMERMAN 50 PERCENT.

12:26:33 **Add Ins: ATTY, REX FIINEY - PLANT**
HE BENEFITED TO THE DETRIMENT OF HIS CLIENT.

12:26:52 **Judge: Hosack, Charles**
THAT STOCK PURCHASE SAID 50 PERCENT.

12:27:10 **Add Ins: ATTY, REX FIINEY - PLANT**
HE GOT A VERY GOOD DEAL TO THE DETRIMENT OF HIS
CLIENT.

12:27:36 **Judge: Hosack, Charles**
WHERE IS THE DAMAGE TO JERRY BERRY? A GOOD DEAL
OR A BAD DEAL HAS NOTHING TO

12:27:56 DO WITH IT.

12:28:11 **Add Ins: ATTY, REX FIINEY - PLANT**
HE BOUGHT FOR LESS THAN FAIR MARKET VALUE, HE
PUT HIS FINACIAL INTEREST AHEAD

12:28:32 OF JERRY BERRY.

12:29:02 JERRY BERRY GETS THE DIFFERENCE BETWEEN FAIR
MARKET VALUE AND PURCHASED PRICE

12:29:30 OF THE STOCK MINUS WHAT THE ATTORNEY PAID. ITS A
BREACH OF DUTY. SHE IS

12:30:20 ENTITLED TO THE DIFFERENCE. JURY TO GIVE MONEY
DAMAGES.

12:31:43 **Judge: Hosack, Charles**
I ACT LIKE YOUR PARA LEGAL. MAKE COPIES FOR YOU
- STAPLE FOR YOU - MY

12:32:12 PATIENCE IS THIN. I CANT BELIEVE HOW YOU HAVE
OPERATED IN THIS TRIAL, YOU ARE

12:32:37 OBVIOUSLY NOT A TRIAL LAWYER, I HAVE HAD IT.

12:33:05 **Add Ins: ATTY, REX FIINEY - PLANT**
CONSTRUCTIVE TRUST IS A REMEDY.

12:33:41 **Add Ins: ATTY, JOHN WHELAN - DEF**
YOUVE GOT THE BENEFIT OF THE EVIDENCE. MIKE SAYS
HE IS NOT THE LAWYER,
12:34:36 KARLETTA SAYS HE IS THE LAWYER BECAUSE KARLETTA
SAID HE IS. YOUVE GOT A HE
12:35:12 SAID/SHE SAID STORY. EVIDENCE FAILS TO SHOW
MCFARLAND IS THE ATTORNEY. THE
12:36:11 JURY WONT BE ABLE TO SORT THIS OUT. THERE IS NO
CASING, NO EVIDENCE THAT MIKE
12:36:31 WAS HIS ATTORNEY. NONE. THIS WHOLE HOUSE OF
CARDS FAILS TO SHOW EVIDENCE.

12:37:13 **Judge: Hosack, Charles**
BREACH OF FUD DUTY IS ISSUE. BACH VS. MILLER - I
WILL GO READ IT. QUESTION OF
12:38:03 FACT AS FAR AS MCFARLAND AS ATTY. STILL
STRUGGLING WITH REMEDY. I AM MUMBLING
12:38:37 AND NO POINT DOING THAT ON RECORD. CAUSE 1, 7
WITHDRAWN AND SOME OF THESE
12:39:09 OTHERS WILL BECOME CUMMULATIVE.

12:41:13 **Stop recording**
(On Recess)

13:05:47 **Record**
MCFARLAND, MICHAEL

13:05:47
Recording Started:

13:05:52 **Judge: Hosack, Charles**
RESUME FROM LUNCH. ALL PARTIES PRESENT. BRING
JURY PANEL IN.
13:06:53 OVER NOON RECESS DISCUSSED VARIOUS LEGAL
MATTERS. PROCEED WITH DEFENSE

13:07:47 **Add Ins: ATTY, JOHN WHELAN - DEF**
CALLS WITNESS

13:07:55 **Other: CLERK**
OATHE GIVEN

13:09:00 **Other: CRIP, MONNIE**
STATES NAME - SPELLS NAME. YES CO MANAGER WITH
MARIE AT THE CAPTAINS WHEEL.
13:10:17 WORKED THERE SINCE 02 AS A WAITRESS AND WORKED

13:10:51 MY WAY UP TO MANAGER. MANAGER
13:11:21 IN 2006. VERY FAMILIAR WITH JERRY BERRY,
KARLETTA AND MCFARLAND AND
13:11:46 ZIMMERMAN. MCFARLAND WAS CAPTAIN OF THE CAPTAINS
WHEEL. MCFARLAND TOLD ME HE
13:12:06 WAS A SILENT PARTNER. JIM AND JEAN OWNED IT WHEN
I FIRST STARTED, CAMBELLS
13:12:32 WANTED TO SELL, I DIDNT PARTICIPATE IN THAT. I
MANAGED THE RESTAURANT. DID
13:12:51 NOT KNOW HOW MUCH THE CAMBELLS OWNED OR JERRY
BERRY, WE DIDNT TALK ABOUT
13:13:22 THAT. YES I WORKED THERE A BIT THIS YEAR. IN
RESTAURANT BUSINESS OVER 30
13:13:47 YEARS. I WAS REFERENCED AS ONE OF JERRYS GIRLS,
AT ONE TIME ONLY FEMALES
13:13:47 WORKED THERE ARE WE WERE ALL REFERENCED AS
JERRYS GIRLS. YES HAD A
13:14:24 CONVERSATION, IN THE DIINING ROOM OF 06, WHEN HE
WAS VERY ILL HE TOLD MARIE
13:14:51 AND I.

13:14:57 **Add Ins: ATTY, REX FIINEY - PLANT
OBJ**

13:15:04 **Add Ins: ATTY, JOHN WHELAN - DEF
DEAD MANS STATUE - NOTHING TO DO WITH DEAD MANS
STATUE**

13:15:30 **Add Ins: ATTY, REX FIINEY - PLANT
HEAR SAY - OBJECTION**

13:15:59 **Judge: Hosack, Charles
OVER RULE OBJECTION**

13:16:21 **Other: CRIP, MONNIE**
JERRY TOOK MARIE AND INTO THE DINING ROOM AND
SAID HE WAS GOING TO BEAT THIS
13:16:47 BUT IF HE DIDNT MICHAEL WOULD BE TAKING CARE OF
THE BUSINESS AND KARLETTA
13:17:04 WOULD NOT, HE SAID MCFARLAND WAS HIS SILENT
PARTNER. THIS WAS VERY CLOSE TO
13:17:23 THE END. HE PASSED IN NOVEMBER. I JUST REMEMBER
IT WAS CHILLY, MIGHT HAVE
13:18:08 BEEN LATE SUMMER. HE SAID HE WANTED TO TAKE
CARE OF HIS GIRLS AND HE
13:18:39 ARRANGED MARIE AND I TO HAVE A SUM OF MONEY AND

MICHAEL WOULD TAKE CARE OF
13:19:00 EVERYTHING, HE REFERED TO MICHAEL AS HIS SILENT
PARTNER. MCFARLAND ALWAYS
13:19:27 SIGNED FOR HIS DINNERS AND WE WERE TOLD BY JERRY
TO PUT THEM IN THE SAFE AND
13:19:43 HE WOULD TAKE CARE OF THEM. JERRY NEVER
EXPLAINED WHY MCFARLAND NEVER PAID
13:20:09 FOR HIS MEALS. WE HAD ISSUES WITH KARLETTA,
STAFF WOULD COME TO MARIE AND I
13:20:39 AND WE WOULD GO TO JERRY. THEY ALL GOT ALONG OK.
SOME PEOPLE LIKED HER AND
13:21:16 SOME PEOPLE DID NOT LIKE HER. AFTER JERRY PASSED
AWAY MCFARLAND DID HIS BEST.
13:21:44 UPON HIS DEATH WE HAD A MEETING WITH MCFARLAND,
HE ASKED ABOUT NUMBER OF
13:22:11 EMPLOYEES AND EVERYONE HAD TO BE ABOVE BOARD AND
ON THE BOOKS. YES SOME
13:22:36 EMPLOYEES WERE BEING PAID CHECK AND CASH WHILE
JERRY WAS ALIVE. THERE WERE
13:23:12 SEVERAL PEOPLE WHO WERE NOT ON THE BOOKS.
MCFARLAND CHANGED THAT, FROM THE
13:23:38 TIME OF OUR MEETING FORWARD EVERYONE HAD TO BE
ON THE BOOKS. THAT INCREASED
13:23:58 OUR EXPENSES, MORE TAXES. THERE WERE 14 FAMILIES
THAT LIVED ON THE HILL AND
13:24:27 THAT CLOSED AND THEN HE BUILT A PARKING LOT AND
HE CLOSED THE OTHER MOLBILE
13:24:59 HOME - BOB HOLLAND DID ALL THIS. LOCALS MOVED
AND THEY STOPPED COMING. I
13:25:31 KNOW THAT MICHAEL PUT IN AT LEAST 175 THOUSAND
DOLLARS, TAXES AND OPERATING
13:26:00 EXPENSES. HE GAVE THE RESTAURANT CONTINOUS FEEDS
OF MONEY, EVERY MONTH THERE
13:26:28 WAS A SHORT FALL. MCFARLAND MADE THE DIFFERENCE.
MARIE ADVISED HIM OF THE
13:26:48 SHORT FALL, MARIE ORDERED ALL THE FOOD AND
SUPPLIES. MCFARLAND WAS NOT THERE
13:27:10 EVERY DAY, HE WOULD USUALLY COME OUT ON THE
WEEKENDS BUT WE WOULD TALK TO HIM
13:27:29 OR E MAIL HIM EVERY DAY ABOUT THE DAY TO DAY
OPERATION. I WENT THROUGH THE
13:28:11 BOOKS WITH MARIE, FAMILIAR WITH THE RECORDS.
SHORT FALLS WERE REASONABLE AND
13:28:41 NECESSARY. YES RECALL CONVERSATION WITH JERRY
BERRY AND HE SAID KARLETTA
13:29:23 WOULD NOT BE RUNNING THE BUSINESS, SHE FAILED AT

13:29:41 HER COFFEE STAND AND SHE
WOULD NOT BE RUNNING THE RESTAURANT. SHE DID THE
DISHES AND MADE PIZZAS.

13:30:16 KARLETTA WAS GOOD IN THE KITCHEN BUT NOT GOOD
OUTSIDE THE KITCHEN. WE GAVE

13:30:56 JERRY 30 THOUSAND DOLLARS IN 05 AND I HAD SOME
DIFFICULTIES ASKED FOR IT

13:31:26 BACK, HE ASKED TO KEEP 10 THOUSAND AND I SAID OK
AND WE DREW UP PAPERS AND HE

13:31:58 PUT IT IN WRITING THAT KARLETTA WOULD TAKE CARE
OF THE 10,000. YES JERRY SAID

13:32:46 SHE WAS PAID ON A WEEKLY BASIS. THIS WAS AFTER
JERRYS DEATH. MCFARLAND AND

13:33:10 ZIMMERMAN WERE NOT PAID WEEKLY. IT WAS PAID CASH
TO KARLETTA EACH WEEK - THAT

13:33:31 WENT UNTIL MCFARLAND SAID TO STOP, HE SAID SHE
WASNT A EMPLOYEE AND STOP

13:33:54 PAYING HER. KARLETTA GOT ALL THE RECORDS AND
TOOK THEM HOME. MCFARLAND ASKED

13:34:13 FOR THEM TO BE RETURNED AND SHE DID. THIS
HAPPENED SHORTLY AFTER JERRY DIED.

13:34:56 MIKE AND KAREN DIDNT IGNORE THE BUSINESS, THEY
CONTINUALLY GAVE MONEY AND WE

13:35:23 HAD MEETINGS TO CREATE MORE REVENUE. I HAD NO
IDEA IF THIS RESTAURANT TURNED

13:35:56 A PROFIT.

13:37:40 JERRY NEVER DISCUSSED WITH ME ABOUT NOT PUTTING
ALL THE INCOME ON THE BOOKS

13:38:08 **Add Ins: ATTY, REX FIINEY - PLANT
CX**

13:38:13 **Other: CRIP, MONNIE**
YES THEY DID ISSUE ME ONE SHARE OF STOCK. IN
2006 WE HAD A GOOD YEAR, SUMMERS

13:38:40 WERE ALWAYS STRONG AT THE RESTAURANT. TOWARDS
THE END OF SUMMER JERRY STOPPED

13:39:38 COMING BY. KARLETTA AND I WOULD HAVE SOME WORDS,
THAT HAPPENS IN RESTAURANTS.

13:40:08 JERRY TOLD US ME AND MARIE THAT HE WOULD GIVE US
EACH 50 THOUSAND DOLLARS, WE

13:40:59 TOLD HIM THAT NOT NECESSARY. WE HAD A BIRTHDAY
PARTY FOR HIM IN JULY. I THINK

13:41:35 THE LAST CHECK HE SIGNED WAS IN AUGUST. YES WE
REPORTED TO JERRY PRIOR TO

13:42:01 AUGUST. JERRY DID EVERYTHING, THE BOOKS, THE

13:42:34 PAYROLL, THE REPAIRS, WE WROTE
DOWN OUR HOURS. NO - NO ONE WROTE THEIR OWN PAY
CHECKS. NO JERRY DID NOT
13:43:19 MONITOR THE SHOTS OF ALC THAT WERE POURED. YES I
KNOW WHAT MENU COSTING IS,
13:43:57 EXPLAINS PROCESS. I DONT KNOW HOW JERRY DID IT
OR IF HE DID. JERRY KEPT CLOSE
13:44:24 TRACK OF ITEMS ON THE MENU. YES JERRY WAS AWARE
OF MENU PRICES. IF SOMEONE
13:44:56 PAID CASH, IT WAS RANG INTO THE TILL AND THEN
PUT IT IN A BAG. YES HE ALLOWED
13:45:24 THE SAME PERSON TO DO THE TILL AND DO THE END OF
NIGHT. NO NOT AWARE OF ANY
13:45:55 EMPLOYEE THEFT OF CASH OR GOODS. I AM NOT AWARE
OF MCFARLAND CHECKING TIME
13:46:27 CARDS. YES MCFARLAND WOULD COME IN ON THE
WEEKENDS AND WE WOULD SIT DOWN AND
13:46:46 DISCUSS HOW THE WEEK WENT AND THEY WOULD STAY
THE EVENING. MCFARLAND MEAL
13:47:07 TICKETS WENT INTO A FILE. YES JERRY PASSED
11/4/2006. MCFARLAND MEALS WERE
13:48:13 TOTALLED AT THE END OF THE MONTH, HE WOULD COME
IN ON THE WEEKENDS BUT RARELY
13:48:43 DURING THE WEEK. MICHAEL LIKED HIS OYSTERS AND
KAREN USUALLY HAD A CAESAR
13:49:08 SALAD.
13:49:13 **Add Ins: ATTY, JOHN WHELAN - DEF**
OBJECT
13:49:20 **Judge: Hosack, Charles**
ITS ON SCOPE
13:49:31 **Add Ins: ATTY, JOHN WHELAN - DEF**
OBJECTION - RELEVANCE
13:49:41 **Add Ins: ATTY, REX FIINEY - PLANT**
WITHDRAWN
13:49:53 **Other: CRIP, MONNIE**
WE HAD A MEETING JAN 07 WITH MCFARLAND ABOUT NOT
PAYING ANYONE UNDER THE
13:50:21 TABLE. I DID NOT DO PAYROLL, DONT RECALL SCOTT
BEING PAID UNDER THE TABLE.
13:51:12 **Add Ins: ATTY, JOHN WHELAN - DEF**

OBJECTION

- 13:51:24 **Judge: Hosack, Charles**
RE TRY A QUESTION
- 13:51:32 **Other: CRIP, MONNIE**
I DIDNT DO PAYROLL. YES THERE IS JDS AND THE
BUTTON HOOK. ONLY OPEN IN THE
- 13:52:57 SUMMER. MCFARLAND DID NOT REVIEW TIME CARDS. WE
WOULD DISCUSS THE MENU WITH
- 13:53:51 HIM AND UPCOMING BANDS.
- 13:54:10 **Add Ins: ATTY, JOHN WHELAN - DEF**
OBJECTION - RELEVANCE
- 13:54:22 **Add Ins: ATTY, REX FIINEY - PLANT**
TRYING TO FIGURE OUT WHAT HE DID.
- 13:54:37 **Other: CRIP, MONNIE**
YES I LOANED JERRY BERRY MONEY, YES THERE WAS A
PROMISORY NOTE FROM THE
- 13:55:06 CAPTAINS WHEEL TO ME. YES WE DID TALK - A FEW
MINUTES AGO OUT IN THE PARKING
- 13:56:10 LOT. SUPBEONA WAS FAXED TO ME AT WORK, NO ONE
HAND DELIVERED IT.
- 13:56:42 **Add Ins: ATTY, REX FIINEY - PLANT**
NOTHING FURTHER
- 13:56:49 **Add Ins: ATTY, JOHN WHELAN - DEF**
RE DX
- 13:57:23 **Add Ins: ATTY, REX FIINEY - PLANT**
OBJECT - SCOPE
- 13:57:36 **Judge: Hosack, Charles**
GO AHEAD
- 13:57:43 **Other: CRIP, MONNIE**
HE COMPLAINED OF STOMACH AILMENTS IN SEPT - OCT
- 13:58:57 **Add Ins: ATTY, JOHN WHELAN - DEF**
NOTHING FURTHER
- 13:59:03 **Judge: Hosack, Charles**
EXCUSES WITNESS

13:59:25 **Add Ins: ATTY, JOHN WHELAN - DEF**
CALLS NEXT WITNESS

13:59:38 **Other: CLERK**
OATHE GIVEN

14:00:00 **Other: JOHNSTON, DAVE**
SPELLS NAME - STATES NAME. ATTORNEY - IN IDAHO
SINCE 1988. YES KNEW JERRY

14:01:27 BERRY, WAS A PATRON THERE. HAVE A HOME IN CDA.
2002 UNTIL JUST RECENTLY. A

14:01:58 RESTAURANT THAT SERVES ALC. LEGAL ADVICE TO
JERRY - YES AND NO. JERRY WAS

14:02:35 OUTSIDE DOING IMPROVEMENTS TO THE BUILDING, HAD
A CONVERSATION ABOUT THE

14:02:58 IMPROVEMENTS, HE INDICATED TO ME HE HAD A OFFER
FROM SOMEONE TO PURCHASE, WE

14:03:20 TALKED ABOUT IT ON A PERSONAL LEVEL. HE ASKED
IF I DID ANY PRIVATE WORK, I

14:03:55 SAID I DID FOR FAMILY AND FRIENDS AS LONG AS IT
DIDNT INVOLVE LITIGATION. HE

14:04:17 ASKED IF I WOULD ASSIST HIM THE SALE. IT WAS MAY
OR JUNE. I DONT THINK HE WAS

14:05:02 DIAGNOSED WITH CANCER AT THAT POINT.

14:05:21 **Add Ins: ATTY, JOHN WHELAN - DEF**
NOTHING FURTHER

14:05:28 **Add Ins: ATTY, REX FIINEY - PLANT**
CX

14:05:32 **Other: JOHNSTON, DAVE**
I THINK IT WAS 1.1 MILLION AND THE BUYERS MAX
OFFER WAS 1.2. HE DIDNT SAY HE

14:06:20 WAS GOING TO SELL IT HE JUST SAID HE GOT A
OFFER. I AM NOT A REAL ESTATE

14:06:50 EXPERT, I TOLD HIM THAT WAS IN LINE WITH OTHER
SIMILIAR PROPERTIES. NO I

14:07:30 NEVER MET WITH MR. BERRY IN MY LAW OFFICE. YES
SOMETIMES DO LEGAL WORK FOR

14:08:01 FRIENDS AND YES I CHARGE THEM.

14:08:23 **Add Ins: ATTY, REX FIINEY - PLANT**
NOTHING FURTHER

14:08:39 **Judge: Hosack, Charles**

EXCUSES WITNESS

- 14:08:47 **Add Ins: ATTY, JOHN WHELAN - DEF**
- 14:10:02 **Other: CLERK**
OATHE GIVEN
- 14:10:31 **Other: MEREDITH, DEE**
WORKED FOR MCFARLAND OFFICE - THE LAW OFFICE.
ONE PERSON OFFICE, DID HIS
- 14:11:21 BOOKS, FULL TIME JOB. 8-5 MON THRU FRIDAY. UNTIL
2006. EXHIBIT B - YES
- 14:12:21 RECEIPT THAT I WROTE OUT. AUG 2003. A RECEIPT
FOR MONEY GIVEN TO JERRY BERRY.
- 14:12:56 IT SAYS CAPTAIN WHEEL - I WROTE THAT SO I KNEW
WHAT IT WAS FOR, I SET UP A
- 14:13:52 FILE NAMED CAPTAINS WHEEL, MCFARLAND WOULD HAND
ME ITEMS. MR. BERRY CAME IN,
- 14:14:48 MR. MCFARLAND TOLD ME I NEEDED TO WRITE A
RECEIPT AND I TOOK IT INTO HIS
- 14:15:15 OFFICE AND HAD JERRY SIGN IT. YES I SAW A CHECK
FOR 60 THOUSAND. MR. BERRY
- 14:15:46 LOOKED AT THE RECIPT AS HE SIGNED IT. HE DID NOT
QUESTION ANYTHING THAT
- 14:16:07 WAS WRITTEN ON THE RECEIPT. YES I WAS FAMILIAR
WITH MCFARLAND CLIENTS, JERRY
- 14:16:42 BERRY WAS NOT A CLIENT AND I HAD NEVER SEEN HIM
THERE BEFORE. YES I WORKED
- 14:17:00 THERE REGULARLY. YES I WAS FAMILIAR WITH FILES,
THERE WAS NO FILE NAMED JERRY
- 14:17:40 BERRY, NO FILE FOR KARLETTA BERRY.
- 14:18:04 **Add Ins: ATTY, JOHN WHELAN - DEF**
NOTHING FURTHER
- 14:18:13 **Add Ins: ATTY, REX FIINEY - PLANT**
CX
- 14:18:21 **Other: MEREDITH, DEE**
I WASNT THERE ALL THE TIME, I DID LEAVE FOR THE
BANK. NO I WAS NOT AWARE OF A
- 14:18:46 MEETING IN 2001 OR 2002. NO I DONT REMEMBER
GETTING LOAN DOCUMENTS ON JERRY
- 14:19:24 BERRY. YES I DID OPEN THE MAIL AS IT CAME IN.
OPENED MAIL EVERYDAY AND GOT

14:19:43 THE FAXES. I WROTE THOSE WORD ON THE RECEIPT.
FILE WAS KEPT IN THE FILE
14:20:28 CABINET. YES THAT IS WHERE CLIENT FILES ARE
KEPT. PRIOR TO SEEING HIM I HAD
14:21:18 TALKED TO MR. BERRY ON THE PHONE. HE WOULD CALL
AND ASK IF MCFARLAND WAS
14:21:39 AVAILABLE, IF HE WASNT THERE I WOULD LEAVE A
MESSAGE.

14:22:17 **Stop recording**
(On Recess)

14:34:28 **Record**
MCFARLAND, MICHAEL

14:34:28
Recording Started:

14:34:31 **Add Ins: ATTY, JOHN WHELAN - DEF**
NEXT WITNESS

14:34:39 **Other: CLERK**
OATHE GIVEN

14:35:16 **Other: STREATER, MARIE**
SPELLS NAME - STATES NAME - YES FAMILIAR WITH
JERRY BERRY. WORKED FOR HIM.
14:36:02 STARTED IN 2003 AND JUST RECENTLY ENDED THERE.
WORKED AT CAPTAINS WHEEL IN
14:36:26 BAYVIEW IDAHO. WAITRESSED AND BAR TENDED. WHEN
JERRY GOT SICK I TOOK OVER
14:36:58 MANAGEMENT WITH MONNIE. WE SHARED SIMILIAR
DUTIES. WORKED FULL TIME THE
14:38:25 ENTIRE TIME I WAS THERE. WE WOULD WRITE DOWN
DAILY SALES ONTO FORMATTED SHEET
14:38:46 AS FAR AS FOOD - ALC - MISC. STRATED DOING THAT
DUTY IN 2006, PROBABLY AFTER
14:39:18 HE DIED. JERRY AND KARLETTA KEPT THE BOOKS P
UNTIL THEN. THE BOOKS - THERE
14:39:49 WERE CATAGORIES. THE CASH WAS PUT ON THE
RECONCILE SHEET, THAT IS EACH DAY.
14:40:20 WENT INTO A FILE AND AT END OF MONTH WE PUT IT
ALL TOGETHER AND PUT IN A BOX.
14:40:37 THAT WAS FOR KEEPING TRACK OF REVENUE. THERE
ALSO WAS FILES, ONE FOR FOOD,
14:41:05 FOR ALC, AND END OF YEAR IT WAS TOTALLED. YES HE

PASSED 11/2006. YES AFTER HE
14:41:30 PASSED THERE WERE SOME CHANGES. WE SAT AND
TALKED WITH MCFARLAND AND HE
14:41:59 EXPLAINED THAT EVERYONE HAD TO BE ON THE BOOKS.
JERRY KEPT THE BOOKS AND I
14:42:19 DONT KNOW HOW HE DID HIS BOOKS. YES I KEPT
ACCURATE RECORDS. MCFARLAND GOT US
14:42:44 QUICK BOOKS ON THE COMPUTER, IT WORKED.
14:43:46 2003 - WE HAD A DISCUSSION IN BACK ROOM ABOUT
GUEST CHECKS, HE EXPLAINED TO
14:44:26 ME THAT WHEN A GUEST CHECK CAME IN WITH MIKE OR
KARENS NAME ON IT WE WERE TO
14:44:46 PUT IT ASIDE. IN 06 HE HAD A CONVERSATION IN THE
DINING ROOM, HE SAT DOWN
14:45:06 WITH US AND HE WAS GOING TO BEAT THE CANCER BUT
IF HE HADNT HE WOULD PAY US
14:45:46 50 THOUSAND IF WE STAYED UNTIL THE END AND DIDNT
QUIT. I FIGURED THEY WERE
14:46:09 SILENT PARTNERS. JERRY TOLD ME TO PUT THE
TICKETS IN THE BAG FOR MCFARLAND
14:47:03 AND ZIMMERMAN. AFTER THAT THEY DIDNT PAY FOR THE
MEALS. IT WAS RIGHT AFTER
14:47:27 THE CAMBELLS SOLD. YES RIGHT AFTER CAMBELLS SOLD
WE STARTED NOT CHARGING THEM
14:48:11 MEALS. YES I KNOW KARLETTA, SHE WORKED THERE ON
AND OFF. SHE DID DISHES, DID
14:48:30 THE SALAD BAR, SHE WORKED A FULL SHIFT, SHE WAS
IN AND OUT FOR THE FIRST FEW
14:48:51 YEARS. AS HER SON GOT OLDER KARLI HELPED OUT,
SHE WOULD BUY THINGS, SHE WOULD
14:49:16 GO TO THE BANK, SHE HELPED OUT WHEN SHE COULD.
TYPICAL SHIFT 6-8 HOURS. SHE
14:49:38 WOULD STOP IN AND ASK IF WE NEEDED ANYTHING.
PROBABLY 25-40 HOURS A WEEK. WE
14:50:13 WRE ALL TOGETHER. YES HER AND MONNIE HAD A
CONFRONTATION, THINGS WERE SAID
14:50:45 BETWEEN HER AND MONNIE. A CUSTOMER CAME AND TOLD
US THEY GOT INTO IT, WE WENT
14:51:15 ABOUT OUR BUSINESS AND DIDNT TALK ABOUT IT
ANYMORE. IN 2007 A MAN CAME IN BOB
14:51:49 HOLLAND AND BOUGHT UP ALL THE TRAILER PARKS AND
EVICTED PEOPLE, AFFECTED OUR
14:52:08 BUSINESS, IT WAS A SEASONAL BUSINESS. APRIL
THROUGH SEPT WAS BUSY THEN THE
14:52:31 ECONOMY CHANGED AND IT STARTED SPIRALING, WE HAD
TO ASK MICHAEL FOR MONEY TO

14:53:02 STAY AFLOAT, PROBABLY AROUND 175 THOUSAND DOLLARS. YES IT IS CLOSED.

14:53:23 **Add Ins: ATTY, JOHN WHELAN - DEF**
NOTHING FURTHER

14:53:30 **Add Ins: ATTY, REX FIINEY - PLANT**
CX

14:53:34 **Other: STREATER, MARIE**
MONNIE AND I BOTH PAID EMPLOYEES. IN 07 WE HAD THAT MEETING WITH MCFARLAND. I

14:54:12 DONT RECALL SCOTT ROBERTSON AND DONT REMEMBER PAYING HIM UNDER THE TABLE IN

14:54:41 TH SUMMER OF 07. WE WOULD WRITE CASH OR CHECK NEXT TO THE NAME. I CALL THE

14:55:29 NUMBERS IN, PUT IT IN QUICK BOOKS. WHEN WE PAY THE EMPLOYEES SOMETIMES IT IS

14:56:12 A CHECK OR CASH. YES THERE WAS TRADE WORK DONE, DOCK WORK, BARRELS UNDER THE

14:56:50 DOCKS, ELECTRICIANS, YARD MAINTENANCE, GENERAL MAINTENANCE WAS DONE IN TRADE.

14:57:36 WE KEPT CARDS IN A BOX FOR THOSE PEOPLE AND AT THE END OF THE YEAR IT WAS

14:58:08 TOTALLED. YES WE KEPT MONTHLY SALE SHEET. WOULD BE SENT TO THE ACCOUNTANT. WE

14:59:06 HAD A EMPLOYEE LIST WHAT THEY COULD EAT AND THEY WERE ALLOWED A SHIFT MEAL

14:59:30 AND A END OF SHIFT DRINK. MCFARLAND AND ZIMMERMAN CHECKS WERE PUT IN A STACK

14:59:52 AND AT END OF WEEK IT WAS ADDED. I STARTED YEAR END CALCULATIONS. MCFARLAND

15:00:56 MEALS WERE NOT TOTALLED, THEY AR STILL AT THE OFFICE AND WOULD BE PUT IN THE

15:01:20 STACK WITH EMPLOYEE FOOD TICKETS. IN 2007 THEY WOULD COME IF WE HAD A BAND,

15:01:57 DINNER AND WINE. IN 2009 THERE WASNT ALOT, THEY WOULD COME OUTONCE A MONTH.

15:02:19 WE KEPT IN CONTACT BY E MAIL OR PHONE. CANT RECALL EXACTLY HOW MANY TIMES

15:02:41 THEY CAME OUT. YES HE WOULD COME OUT WHEN HE COULD. MOST OF THE TIME I WOULD

15:03:05 BE TOWN AND STOP BY HIS OFFICE. MONNIE TOOK ANOTHER POSITION IN 2008. MONNIE

15:03:46 WOULD COME OUT OR I WOULD CALL MICHAEL TELLING HIM WE NEEDED MONEY TO PAY FOR

15:04:07 TAXES, THE MORTGAGE OR IF SOMETHING BROKE DOWN.
15:04:30 IN MARCH LARGE CHUNK WAS
NEEDED FOR ELECTRICIAN. YES THERE WAS PORTION
CONTROL, STAFFED THE FLOOR,
15:05:05 THEY WERE A MINIMUM OF 2 HOURS AND THEN WE COULD
SEND THEM HOME. TOWARDS THE
15:05:25 END WE LAID OFF MORE AND MORE PEOPLE UNTIL THERE
WAS ONLY A FEW PEOPLE LEFT.
15:05:49 YS BOB HOLLAND EVICTED THREE TRAILER PARKS SO
ALL THOSE FAMILIES LEFT. 2006
15:06:49 JERRY WAS KEEPING THE BOOKS. JERRY WAS A
STUBBORN MAN, IN APRIL HE COMPLAINED
15:07:22 ABOUT AILMENTS - HE WAS ALWAYS THERE, AUG OR
SEPT I HAD TO DRIVE HIM HOME. HE
15:08:00 WAS A VERY KIND, LOVING, GENEROUS MAN. WHEN HE
STARTED GETTING SICK WE
15:08:27 STARTED HELPING MORE TO TAKE THE BURDEN OFF
JERRY AND KARLETTA. WE FLEW ALONG
15:09:07 BY THE SEAT OF OUR PANTS AND DO WHAT WAS NEEDED.
END OF 2006 THE RESTAURANT
15:09:30 WAS DOING OK., THE COMMUNITY LOVED JERRY, WE DID
A FUND RAISER AND A SHARING
15:09:49 TREE TO HELP PAY FOR HIS TREATMENTS. 4TH OF JULY
WE HAD A BIG PARTY. I THINK
15:11:09 WE TALKED TO MCFARLAND AFTER JERRY DIED. I DONT
RECALL THE EXACT TIME JERRY
15:11:58 STOPPED COMING IN, HE TRIED HIS BEST TO STAY
UNTIL THE END. HE WAS PUT IN THE
15:12:25 CIRCLE OF LIFE AT KOOTENAI. HE WENT HOME TO DIE.

15:13:06 **Add Ins: ATTY, REX FIINEY - PLANT**
NOTHING FURTHER

15:13:11 **Judge: Hosack, Charles**
EXCUSES WITNESS
15:13:42 WE WILL RECESS FOR THE DAY. EVENING RECESS.
RESUME MONDAY AT 08 30 IN THE
15:14:09 MORNING. DISMISS JURY PANEL.
15:14:48 SCHEDULING?

15:15:03 **Add Ins: ATTY, JOHN WHELAN - DEF**
ANOTHER WITNESS ON MONDAY,

15:15:20 **Judge: Hosack, Charles**
EVIDENCE ON TUES. THIS MEASURE OF DAMAGES IS A
ISSUE IN MY MIND. STRUGGLING

15:16:07 WITH IT. WILL WORK ON IT THIS WEEKEND AND READ
THOSE CASES. . STOCK IS STOCK.

15:23:09 **Stop recording**

Court Minutes:

Session: HOSACK011910A
Session Date: 01/19/2010
Judge: Hosack, Charles
Reporter:

Division: Div1
Session Time: 08:23

Courtroom: local

Clerk(s): Burrington, Talisa

State Attorney(s):

Public Defender(s):

Prob. Officer(s):

Court interpreter(s):

Case ID: 0008

Case number: CV2007-2409
Plaintiff: BERRY, KARLETTA GRACE
Plaintiff Attorney:
Defendant: MCFARLAND, MICHAEL
Pers. Attorney:
Co-Defendant(s):
State Attorney:
Public Defender:
Previous audio and annotations can be found in case: 0007

01/25/2010

08:38:54

Case recalled

08:38:54

Recording Started:

08:39:02

Judge: Hosack, Charles
DAY FIVE JURY TRIAL. ALL PARTIES PRESENT. WILL
RECAP - FIRST CAUSE OF ACTION

08:40:02 - WITHDRAWN - 2ND CAUSE - LACK OF CAPACITY, UNDO
INFLUENCE - GRANTED

08:40:52 INTERWINE. THIRD CAUSE OF ACTION - BREECH -
DENIED. FIFTH - DENIED. FOURTH -

08:41:46 GRANTED. ISSUES OF THE ILLNESS ARE RELEVANT.
110-734 - CITES RULING. UNDO

08:43:34 INFLUENCE IS NOT THERE, ITS JUST NOT HERE. STAND
ALONE. 6TH CAUSE OF ACTION -

08:45:00 QUITE TITLE - DEALS WITH REAL PROPERTY, GRANT.
7TH ACTION WAS WITHDRAWN AND

08:45:36 8TH CAUSE - CONSTRUCTIVE TRUSH - DENIED. GOT
PLANTIFF BRIEF. PRINTED IT OFF

08:46:38 THS MORNING. REGARDING THE ACCOUNTING ISSUE -
CONSTRUCTIVE TRUST COULD BE

08:47:41 POSSIBLE REMEMDY, THERE ARE OFF SETS CLAIMED BY
MCFARLAND. THIS IS NOT WELL

08:49:15 FORMED IN THE COURTS MIND. I UNDERSTAND THE
DIFFICULTY OF THIS CASE. DAMAGE

08:49:56 ISSUE IS STILL FOGGY IN THE COURTS MIND.

08:51:02 **Add Ins: ATTY, JOHN WHELAN - DEF**
THERE IS ADDITIONAL ISSUE - BREACH OF DUTY, NO
EVIDENCE THAT JERRY BERRY

08:51:32 COULD HAVE BOUGHT THE CAMBELL STOCK. THE ISSUE
OF DAMAGES, IF JERRY COULDNT

08:51:58 HAVE PURCHASED THE CAMBELL STOCK, THERE IS NO
DAMAGES.

08:52:32 **Judge: Hosack, Charles**
I NEED TO HAVE SOME IDEA OF WHAT I AM THINKING
ABOUT.

08:53:06 **Add Ins: ATTY, REX FIINEY - PLANT**
ON THE FOURTH CAUSE USES THE WORD UNDO
INFLUENCE, PARA 53 READS. 5TH CAUSE IS

08:53:45 NEGLIGENCE AND 4TH IS INTENTIONAL BREACH OF FUD
DUTY.

08:54:12 **Judge: Hosack, Charles**
UNDO INFLUENCE - BON JOVI VS JAMISON CASE. I
DONT SEE UNDO INFLUENCE IN OUR

08:55:40 CASE. NOT INDEP CAUSE OF ACTION. HIS FREE WILL
WAS NOT SUBSTITUED. WE ARE NOT

08:56:51 A JURY INSTRUCTIONS POINT NOW. BRING IN THE JURY
PANEL.

08:57:07 JURY PANEL BROUGHT IN AND SEATED.

08:57:58 **Add Ins: ATTY, JOHN WHELAN - DEF**
CALLS WITNESS

08:58:08 **Other: CLERK**
OATHE GIVEN

08:59:14 **Other: HUSELAND, HERB**
STATES NAME - SPELLS NAME. YES FAMILIAR WITH
JERRY BERRY. HE PURCHASED HALF

08:59:57 INSTREST FROM THE NORDSTROMS. YES ALOT OF
DEALINGS WITH THE CAPTAINS WHEEL,

09:00:32 IT WAS OWNED BY A PRIVATE OWNER. JIM CABELL WAS
WORKING IN THE KITCHEN, I

09:00:57 TALKED THEM INTO BUYING IT, I HANDLED THE LOAN,
IN THE MORTG BUSINESS.

09:01:17 CAMPBELLS AND NORDSTROMS OWNED IT, JERRY BERRY
BOUGHT OUT THE NORDSTROMS, HE

09:01:36 OPERATED IT WITH THE CABELLS. YES I CREATED THE
SBA LOAN, THAT LOAN WAS FOR

09:02:17 395,000 WAS THE PURCHASE PRICE, DONT REMEMBER
THE AMOUNT FOR THE LOAN. THAT

09:02:46 WAS IN 1996. YES I FREQUENTED THE CAPTAINS
WHEEL, BECAME FRIENDS WITH JERRY

09:03:12 BERRY. JERRY WAS VERY FRIENDLY, VERY GREGARIOUS
GUY. JERRY VISITED WITH

09:03:37 EVERYONE, PERENIAL HOST, THE PERFECT HOST. WE
DEVELOPED A FRIENDSHIP OVER

09:04:03 TIME AND INTERACTED WITH EACH OTHER. HE REPLACED
A LARGE WINDOW FOR ME IN THE

09:04:22 MOBILE HOME. HE CONSIDERED ME A INSIDER BECAUSE
I PUT THE DEAL TOGETHER, I

09:04:48 KNEW WHEN CABELLS WANTED TO SELL THE BUSINESS.

09:05:03 **Add Ins: ATTY, REX FIINEY - PLANT**
OBJECT- FOUNDATION

09:05:10 **Judge: Hosack, Charles**
SUSTAIN OBJECTION

09:05:20 **Add Ins: ATTY, JOHN WHELAN - DEF**
DX

09:05:23 **Other: HUSELAND, HERB**
REMEMBER WHEN THE CABELLS WANTED OUT - JIM WAS
IN POOR HEALTH, HEART

09:05:44 PROBLEMS. THEY WERE GOOD FRIENDS. SURE I KNEW

09:06:05 THEY WANTED OUT - THEY
DISCUSSED IT WITH ME.

09:06:12 **Add Ins: ATTY, REX FIINEY - PLANT
OBJ - HEARSAY**

09:06:23 **Judge: Hosack, Charles
OVER RULE OBJECTION**

09:06:30 **Other: HUSELAND, HERB**
IT WAS DISCUSSED OPENLY ABOUT THE TALERICOS
WANTING TO BUY. I KNEW THE

09:07:08 CAMBELLS AND THE TALERICOS. AT THE LAST MINUTE
DAN TALERICO TRIED TO PINCH A

09:07:33 LITTLE TO HARD AND CAMBELLS DECIDED NOT TO
PROCEED WITH THEM. CAMBELL WAS THE

09:07:55 CEO, JERRY WAS THE SILENT GUY. JERRY WANTED TO
RUN THE SHOW AND HAVE THE

09:08:23 OTHER PARTY SILENT. JERRY WANTED TO RUN THE SHOW
AND SO DID THE TALERICOS. NO

09:08:46 I NEVER HAD CONVERSATIONS WITH JERRY BERRY
REGARDING HIS DEALINGS WITH

09:09:07 MCFARLAND AND ZIMMERMAN. YES WE DID HAVE A
CONVERSATION ABOUT THE BUY OUT OF

09:09:29 STOCK. THAT CONVERSATION WAS 2004. BETWEEN
MYSELF AND JERRY BERRY, WE WERE

09:09:56 BACK IN THE KITCHEN. RALPH JONES MADE A REMARK
TO ME, HE TOLD ME THAT HE

09:10:27 THOUGHT MCFARLAND WAS JERRY'S NEW PARTNER,
EXPLAINED HOW HE CAME IN AND NEVER

09:10:42 PAID FOR MEALS. I ASKED JERRY ABOUT IT AND JERRY
SAID, YOU KNOW HERB YOUR THE

09:11:07 ONLY PERSON KNOWS THIS. I LIVE WITHIN A BLOCK
AND A HALF FROM THE WHEEL. ITS

09:12:07 NOT JUST A BAR OR RESTAURANT, ITS A GATHERING
PLACE FOR THE NEIGHBORHOOD. NO

09:12:29 I HAVE NEVER KNOWN MCFARLAND TO DISCUSS LEGAL
BUSINESS, IN FACT HE HAS

09:12:51 COMMENTS STATING ALC AND BUSINESS DONT DO WELL
TOGETHER. MCFARLAND AND

09:13:14 ZIMMERMAN WOULD BE THERE IF THERE WAS MUSIC,
BOTH BUSY PEOPLE WITH THEIR

09:13:31 BUSINESSES. AT ONE TIME I WORKED IN THE KITCHEN
WITH KARLETTA. IT WAS

09:13:51 DIFFICULT SITUATION FOR HER TO WORK THERE, A LOT
OF FRICTION, SHE WAS THE

09:14:09 OWNERS WIFE YET WORKED UNDER KITCHEN MANAGEMENT.
YES I WAS PRESENT FOR JERRY
09:14:27 BRRY BIRTHDAY PARTY, BIG FOOD SPREAD, HAD A
BAND. EVERYONE LOVED JERRY. OH
09:14:52 YES I KNOW THE TERMS JERRYS GIRLS. MANAGEMENT -
THEY WERE TREATED LIKE
09:15:12 DAUGHTERS OF JERRYS. HIS BIRTHDAY PARTY WAS
OUTSIDE THAT DAY, HE HAD SO MANY
09:15:31 WELL WISHERS THERE THAT DAY. HIS INTERACTIONS
SEEMED APPROPRIATE THAT DAY,
09:15:59 COULD STILL LAUGH AND JOKE. HIS FAVORITE
EXPRESSION WAS HU DI KA. NO IDEA
09:16:31 WHAT IT MEANT. YES WENT TO CAPTAINS WHEEL AFTER
JERRY DIED.

09:16:53 **Add Ins: ATTY, REX FIINEY - PLANT**
OBJECTION

09:16:59 **Judge: Hosack, Charles**
REPHRASE

09:17:07 **Add Ins: ATTY, JOHN WHELAN - DEF**
DX

09:17:11 **Other: HUSELAND, HERB**
YES CONTINUED TO GO THERE AFTER JERRY DIED.

09:17:29 **Add Ins: ATTY, REX FIINEY - PLANT**
OBJECT - NOT A EXPERT

09:17:40 **Judge: Hosack, Charles**
SUSTAIN OBJECTION

09:17:47 **Other: HUSELAND, HERB**
YES ALWAYS GOT DECENT SERVICE EVEN AFTER JERRY
PASSED AWAY. EVERYTHING WAS
09:18:15 GOOD. KITCHEN SEEMS IMPROVED IN THE LAST YEAR OR
TWO. NO I NEVER HAD ANY
09:18:47 DIRECT CONVERSATION ABOUT PEOPLE GETTING PAID
UNDER THE TABLE.

09:19:03 **Add Ins: ATTY, REX FIINEY - PLANT**
CX

09:19:08 **Other: HUSELAND, HERB**
NO I HAVE NOT BEEN IN THIS COURTROOM BEFORE

09:19:43 THIS. NO I DID NOT HAVE ANY
CONVERSATION ABOUT THIS CASE. YES AWARE OF
09:20:14 BAYVIEW BLOG SITE. MY LATEST BLOG
COMMENT WAS MUMS THE WORD, REGARDS TO THIS
09:20:59 TRIAL. YES I AM SOPHICATED
REGARDING SOME THINGS. YES I WORKED THERE, YES I
09:21:21 BROKERED THE SBA LOAN, WAS A
MORTGAGE BROKER. IT WAS A FIRST POSITION LOAN.
09:21:57 YES 1996. DONT RECALL THE
INTEREST RATE. PURCHASE PRICE WAS AROUND
09:22:26 390,000. I WAS NOT THE CLOSING
AGENT, I ONLY PUT THE LOAN TOGETHER, IT WAS
09:22:45 INDEPENDENT ESCROW COMPANY THAT
CLOSED IT. YES RECALLS CONVERSATION WIT JERRY
REGARDING A PARTNER. USED IT
09:23:14 LOOSELY, IT WAS A 50 50 OWNERSHIP. YES THE
WHEEL WAS A COMMUNITY GATHERING
09:23:44 PLACE. ALOT OF THE COMMUNITY IS GONE. SOME
PEOPLE USED TO COME FROM SPOKANE,
09:24:10 ITS A RESORT TOWN. BOATS THERE AND SUMMER HOMES.
ZIMMERMAN AND MCFARLAND WERE
09:24:34 THERE FREQUENTLY, NOT SURE OF EXACT DATES, DIDNT
TAKE NOTES. YES WOULD SEE
09:25:00 MCFARLAND THERE BEFORE IT RECENTLY CLOSED, DONT
KNOW WHEN. I BECAME AWARE OF
09:25:44 TIS TRIAL SEVERAL MONTHS AGO. KNEW IT A CONTEST
OVER PARTNERSHIP.

09:26:08 **Add Ins: ATTY, REX FIINEY - PLANT**
NOTHING FURTHER

09:26:14 **Add Ins: ATTY, JOHN WHELAN - DEF**
NOTHING FURTHER

09:26:18 **Judge: Hosack, Charles**

09:26:19 EXCUSES WITNESS

09:26:43 **Add Ins: ATTY, JOHN WHELAN - DEF**
CALLS NEXT WITNESS
09:26:59 DX

09:27:02 **Other: ZIMMERMAN, KAREN**
STATES NAME, SPELLS NAME. YES STARTED GOING TO
WHEEL IN 2000-2001. YES WOULD
09:27:37 GO WITH MCFARLAND. QUITE OFTEN WE WOULD GO.

AFTER JERRY DIED MIKE WOULD GO
09:28:23 THERE BY HIMSELF TO TAKE CARE OF BUSINESS. YES
WE DEVELOPED A RELATIONSHIP
09:28:45 WITH JERRY BERRY. WE HAD A MOBILE HOME THAT
NEEDED SET, I CALLED HIM AND HE
09:29:08 GOT IT READY FOR WINTER AND HE SET IT THE
FOLLOWING SPRING. BETWEEN 2000-2003
09:29:32 WE WOULD GO OUT THERE FOR DINNER AND DRINKS.
WOULD STAY FOR DANCING ALWAYS.
09:29:53 WOULD GET THERE AROUND 8 AND STAY TILL THE BAND
STOPPED. WOULD HAVE DINNER
09:30:15 AND WINE AND WOULD STAY FOR DANCING. DURING THIS
THREE YEAR PERIOD, YES WE
09:30:52 HAD DINNER WITH JERRY, DONT RECALL HOW MANY
TIMES, HE WAS ALWAYS RUNNING
09:31:10 AROUND AND VISITING WITH PEOPLE. YES I BELIEVE
HE DID SIT DOWN WITH US AND
09:31:31 HAVE DINNER, DONT KNOW HOW MANY TIMES, MAYBE A
DOZEN. KARLETTA WAS NOT THERE
09:32:01 VERY OFTEN. MAYBE DINNER WITH KARLETTA AND JERRY
4 TIMES TOGETHER. IT WAS
09:32:37 MORE THEY WOULD JUST STOP BY THE TABLE. RARE TO
HAVE DINNER WITH THEM. WHEN
09:32:55 WE DID WE WOULD TALK ABOUT JERRYS LIMO AND BOAT
STUFF. KARLETTA DIDNT TALK
09:33:14 MUCH. I HAVE KNOWN MCFARLAND PROB 15 YEARS,
AROUND 1995 OR 1996. YES WE SPEND
09:33:44 TIME TOGETHER. NO I HAVE NEVER KNOWN MIKE TO
GIVE LEGAL ADVISE, ABSOLUTELY
09:34:13 NEVER WHEN HAVING ALC. WE WENT TO THE WHEEL TO
HAVE DINNER, DRINKS AND
09:34:29 SOCIALIZE. DONT RECALL THAT MCFARLAND EVER GAVE
LEGAL ADVISE TO JERRY BERRY.
09:35:01 NOT AWARE OF LEGAL ADVICE GIVEN TO KARLETTA. NOT
AWARE OF ANY CONVERSATION OF
09:35:30 A EMPLOYEE GIVING ALC TO A MINOR. FROM 2003
UNTIL HE PASSED AWAY, WE HAD
09:36:12 DINNER WITH JERRY A FEW TIMES, HE WAS ALWAYS
RUNNING AROUND BEING A HOST.
09:36:39 MAYBE 4-5 TIMES. DONT REALLY RECALL. DINNER
INFREQUENTLY IN THE FIRST PERIOD,
09:37:18 AFTER SECOND PERIOD OF TIME 2003 TO CURRENT,
DONT RECALL. NEVER RECALL
09:37:46 MCFARLAND EVER GIVING LEGAL ADVISE TO JERRY
BERRY OR TO ANYONE. NOT AWARE OF
09:38:14 ANY LEGAL ADVICE GIVEN TO KARLETTA. I HAVE NO

09:38:45 KNOWLEDGE ABOUT ALC TO A MINOR
AT ALL. I DONT RECALL THERE EVER A CONVERSATION
09:39:23 ABOUT THE STATE TAKING LAND
FOR THE ROAD. DONT KNOW ANYTHING ABOUT THE STATE
09:40:08 AND THE ROAD ISSUE. YES HE
HAS A RANCH IN ATHOL, NOT AWARE OF IT BEING
09:40:36 AFFECTED. YES WAS INVOLVED IN
REAL ESTATE BUT NOT ACTIVE NOW. YES WE DID TALK
09:41:00 ABOUT SELLING THE BUSINESS
AND LISTING IT WITH TREATY ROCK, THAT WAS WHERE
09:41:25 I WORKED. YES LEVEL OF TRUST
WTH TREATY ROCK, THEY ARE PROFESSIONAL AND
09:41:51 TRUSTING. HONEST PEOPLE. WE NEVER
DID LIST THE PROPERTY, NEVER OBTAINED A LISTING,
09:42:19 NEVER ATTEMPTED TO GET A
LISTING. IT WAS ONLY MY SUGGESTION TO LIST WITH
09:42:36 TREATY ROCK. YES APPRAISAL
WAS DONE. YES TYPICALLY IF A BUSINESS IS BOUGHT
09:43:07 THERE IS COMMISSION,
COMMISSION IS NEGOTABLE, ALWAYS HAS BEEN THERE.
09:43:39 SOMETIMES VERY LOW, THEY ARE
DIFFICULT TO SELL. YES JERRY BERRY APPROACHED US
09:44:11 ABOUT ACQUIRING THE STOCK.
WE DIDNT THINK OF IT, WE KNEW IT WAS FOR SALE,
09:44:38 JERRY CAME TO US AND
APPROACHED US ABOUT BECOMING PARTNERS. YES HE
09:45:01 DID TELL US THAT HE DIDNT WANT
THE TALERICOS INVOLVED, HE WOULD TALK ABOUT IT.
09:45:18 YES THE CAMBELLS WERE TRYING
TO GET OUT. AT ONE POINT THE TALERICOS WERE SO
09:45:39 CONFIDENT THAT IT WOULD GO
THROUGH THAT TALERICO WIFE WAS TAKING MONEY AT
09:45:57 THE TILL. THAT UPSET HIM. HE
WANTED TO RUN IT HIMSELF. HE SAID HE WANTED US
09:46:48 TO BE HIS SILENT PARTNER, HE
WANTED US TO BUY THE CAMBELL STOCK. HE WANTED TO
09:47:05 RUN IT HIS WAY, TO BE THE
HOST AND WE WERE TO BE SILENT PARTNERS.
09:47:35 BACKGROUND IN REAL ESTATE AND
COSMOTOLGY. EX HUSBAND AND I OWNED A LOGGING
09:48:06 COMPANY. YES MCFARLAND AND I ARE
ENGAGED AND WE DONT HAVE A DATE SET. YES EXHIBIT
09:48:38 A IS A RECEIPT. WE HAD 40
THOSAND BETWEEN THE TWO OF US, WE TOLD JERRY
09:48:56 THAT, HE WAS GOING TO SEE IF HE
COULD SECURE THE STOCKS WITH THAT IN HOPES WE

09:49:22 COULD GET THE REST, IF IT DIDNT
09:49:22 SECURE IT WE WERE TO GET OUR MONEY BACK.
09:49:39 CAMBELLS WANTED A 100 THOUSAND,
09:49:39 JERRY SUGGESTED IT. THERE WAS NO NEGOTIATION
09:49:58 INVOLVED IN THE RPICE OF THE
09:49:58 STOC. CAMBELLS WANTED 100 SO THAT IS WHAT WE
09:50:22 CAME UP WITH. YES WE HAD
09:50:22 DISCUSSIONS ABOUT US BEING THE SILENT PARTNERS,
09:50:43 WOULD HAVE CONVERSATIONS AT
09:50:43 THE WHEEL AND OUT AT THE RANCH, JERRY BERRY
09:51:16 WOULD STOP BY THE RANCH -
09:51:16 2000-2003 PROBABLY MORE THAN 2 DOZEN TIMES OF
09:51:40 HIM BEING OUT THERE. HE WAS OUT
09:51:40 THERE ALOT WORKING ON THE MOBILE HOME AND
09:52:06 SETTING IT. HE WAS OUT THERE
09:52:06 FREQUENTLY, TALK AND DISCUSSION. YES I WAS AWARE
09:52:52 OF THE PROBLEMS BETWEEN
09:52:52 TALERICOS AND JERRY BERRY. WE DIDNT WANT TO
09:53:23 PARTICIPATE IN THE MANAGEMENT,
09:53:23 JERRY WAS TO TAKE CARE OF ALL OF THAT. WE WERE
09:53:42 JUST TO GET THE MONEY AND BE
09:53:42 SILENT PARTNERS. YES OBTAINED A LOAN FOR THE
09:54:11 BALANCE AMOUNT. I WENT TO A BANK
09:54:11 AND GOT A LOAN AND AS QUICKLY AS POSSIBLE. JERRY
09:54:40 SAID IT WAS URGENT SO
09:54:40 SOMEONE ELSE DIDNT GET THE DEAL. THIS WAS JERRYS
09:55:02 DREAM, TO BE OUT FRONT AND
09:55:02 RUN IT ALL. WE DID NOT OPPOSE THAT. MICHAEL AND
09:55:56 I BOTH HAD FULL TIME JOBS. I
09:55:56 AM NOT A LAWYER. I AM A HAIR DRESSER. WE GAVE
09:57:05 HIM THE INITIAL 40 THOUSAND AS
09:57:05 A DOWN PAYMENT, YES WE WERE TO GET THAT BACK IF
09:57:36 IT DIDNT GO THROUGH. THE
09:57:36 LOAN TOOK A COUPLE OF WEEKS, DONT REMEMBER
09:58:05 EXACTLY HOW LONG. I DONT RECALL
09:58:05 EVE GIVING JERRY BERRY THE ACTUAL CHECKS. THAT
09:58:25 WAS DONE BETWEEN MICHAEL AND
09:58:25 JERRY BERRY. AFTER JERRY BERRY DIED WE KNEW HAD
09:58:58 TO TAKE OVER AS MANAGERS, YES
09:58:58 CONCERN, WE HAVE NO RESTAURANT MANAGEMENT
09:59:21 EXPERIENCE. WE BOTH WORK FULL TIME
09:59:21 JOBS ON OUR OWN. AFTER CAMBELL STOCK WAS
09:59:53 PURCASHED IT WAS NOT IMMEDIATELY PUT
09:59:53 IN OUR NAMES, HE AGREED TO DOING THAT. PERIOD OF
10:00:12 TIME PASSED AND HE WAS BUSY,
10:00:12 I KEPT REMINDING HI M OF THE PAPERWORK, I WAS

10:00:32 CONCERNED, HAD 100 OUT THERE
10:00:51 FLOATING AROUND. THERE WAS NO WRITTEN AGREEMENT,
10:01:18 IT WAS FOR HIM TO PURCHASE
10:01:47 TH STOCK FOR US. AFTER HE GOT DIAGNOSED WE KNEW
10:02:10 IT HAD TO GET DONE, VERY
10:02:39 APPARENT AND URGENT. YES EVENTUALLY A STOCK
10:03:21 PURCHASE WAS DRAWN UP, IT DIDNT
10:03:37 CREATE A NEW DEAL IT ONLY FINALIZED THE INITIAL
10:03:56 AGREEMENT. IT WAS SIGNED IN
10:04:28 MY PRESENCE. THERE WAS NO NEW TERMS THAT WE
10:04:51 AGREED ON BACK IN 2003. YES JERRY
10:05:12 BERRY SIGNED IT IN MY PRESENCE, WE ALL SIGNED
10:05:36 IT. WE WERE AT THE RANCH AND HE
10:06:22 SAID HE WOULD COME AND SIGN IT, I THINK IT WAS
10:06:52 IN HIS POSSESSION, IT GOT
10:07:32 LATER AND LATER AND WE WENT TO HAYDEN, HE AGREED
10:07:55 TO SIGN IT AND HE DROVE TO
10:08:38 HAYDEN. HE SEEMED FINE AND WAS COHERENT, NEVER
10:09:01 SAID HE HAD A HARD TIME
10:12:17 DRIVING, SAID HE UNDERSTOOD IT. THAT VISIT
10:12:40 LASTED MAYBE 45 MIN TO A HOUR. I
10:13:14 WAS THERE THE WHOLE TIME AND SO WAS MCFARLAND.
10:13:43 WE DID NOT SHARE A BEVERAGE AT
THAT MEETING, NO ALC WAS DRANK. HE HAD ANOTHER
DOCUMENT WITH HIM THAT
KARLETTA DREW UP MAKING IT A LOAN. THIS WAS
NEVER A LOAN, AGREEMENT TO
PURCHASE THE STOCK. I WOULDNT TAKE OUT A LOAN
WITH OUT SOMETHING BACK, STOCK
WAS EXPECTED. NEVER CONSIDERED A LOAN. I FELT
DISGUSTED WHEN I SAW THE
PAPERWORK SHE DREW UP, SHE HAD NOTHING TO DO
WITH IT. IT WAS SIGNED ON 4 JULY
2006. YES RECALLS AUG 2003 - BETWEEN THAT TIME
IT WAS NEVER DISCUSSED BY ANY
BODY DURING THOSE THREE YEARS THAT THIS WAS
CONSIDERED A LOAN , NEVER EVER.
NOT ONCE. IT WAS A STOCK PURCHASE. THERE WAS
NEVER ANY DISCUSSION ABOUT IT
BEING A LOAN. JERRY SAID WHEN WE SIGNED IT, HE
REFERRED TO KARLETTA AND SAID
WHAT IS SHE DOING WITH THIS, SHE WAS NEVER PART
OF THE DEAL. THREE YEARS HAD
PASSED. YES JERRY WANTED TO MAKE THE INTEREST
PAYMENTS SO IT DIDNT COST ME
MONEY. JERRY SAID IN TWO OR THREE WE COULD SELL

IT AND EVERYONE WOULD MAKE
10:14:12 SOME MONEY ON IT. JERRY THOUGHT THE 100 PRICE
WAS GOOD. PRIOR TO DOING THIS
10:14:37 WE HAD NEVER SEEN ANY PROFIT OR LOSS STATEMENT,
WE DIDNT KNOW ABOUT DEBT,
10:14:59 JERRY TOLD US THAT THERE WAS DEBT. YES THE SBO
LOAN IS STILL IN EXISTANCE,
10:15:18 LOAN IS STILL THERE, THREE - 400 EACH MONTH. YES
DUE NEXT MONTH. YES
10:16:13 FRICTION, KARLETTA WANTED TO RUN THE PLACE. YES
RECALLS THE CORPORATE MEETING.
10:16:42 HER NAME WAS ADDED TO JERRYS STOCK. YES KARLETTA
SIGNED THE PAPERWORK ON HER
10:17:16 OWN FREE WILL. HE AUTHROIZED IT AND NEVER
OBJECTED TO IT. 8/15/06 MEETING - I
10:17:54 WAS THERE, MIKE , KARLETTA AND JERRY BERRY. IT
WAS NEVER RBOUGHT UP THAT THIS
10:18:19 WAS A LOAN. NO NEW DOCS WERE DRAWN UP BETWEEN
THE 4TH OF JULY MEET ING AND
10:19:11 THE AUG MEETING. YES JERRY DIED, I KNEW IT WOULD
BE SCARY BECAUSE JERRY TOOK
10:19:36 CARE OF EVERYTHING. WE COULDNT RUN IT THE WAY
JERRY HAD RUN IT SUCH AS
10:20:04 PEOPLE GETTING PAID UNDER THE TABLE. FROM THAT
TIME ON, EVERYTHING HAD TO BE
10:20:21 ABOVE BOARD. NO MORE UNDER THE TABLE PAYMENTS.
APPARENTLY EMPLOYEES WERE
10:21:00 ENTITLED TO A MEAL. CORRECT WE DID NOT PAY FOR
OUR MEALS, JERRY TOLD US THAT,
10:21:22 PART OF A PRIVILEGE OF BEING A OWNER THERE.
JERRY AND KARLETTA DID NOT PAY
10:21:43 FOR THEIR MEALS. KARLETTA WANTED TO RUN THE
BUSINESS AND WE FELT SHE WAS NOT
10:22:17 CAPABLE OF DOING THAT. THERE WAS A FEW THOUSAND
DOLLARS THAT WERE NOT
10:22:36 ACCOUNTED FOR. YES THERE WAS A ATM MACHINE AT
THE WHEEL. YES THERE FUNDS
10:23:04 MISSING FROM THE ATM FROM WHEN KARLETTA DID THE
BANKING. YES WE APPROACHED
10:23:29 HER. SHE OFFERED NO EXPLANATION. YES WE VOTED TO
SUSPEND HER AS THE DIRECTOR.
10:23:54 YES SHE TOOK FINANCIAL RECORDS FROM THE
BUSINESS. SHE WENT IN THREE TIMES SO
10:24:22 THE BANK STATEMENTS WENT TO HER HOUSE AND NOT TO
THE BUSINESS. WE SUSPENDED
10:24:48 HER AS DIRECTOR WITH CAUSE.

10:25:06 **Judge: Hosack, Charles**
RECESS FOR MORING RECESS

10:25:19 **Stop recording**
(On Recess)

10:25:55 **Record**
MCFARLAND, MICHAEL

10:25:55
Recording Started:

10:26:02 **Judge: Hosack, Charles**
JUROR 11 - INDICATED SHE WORKS WITH MONTEE CRIPE
AND SHE AWARE OF MONTEE

10:26:40 CRIPE.

10:26:45 **Stop recording**
(On Recess)

10:45:35
Recording Started:

10:45:35 **Record**
MCFARLAND, MICHAEL

10:45:41 **Add Ins: ATTY, JOHN WHELAN - DEF**
I DONT SEE A ISSUE WITH JUROR 11 ISSUE

10:45:55 **Add Ins: ATTY, REX FIINEY - PLANT**
NEED SOME CLARFICATION

10:46:07 **Judge: Hosack, Charles**
WILL ADDRESS IT THE LUNCH RECESS AND COUNCIL CAN
QUESTION

10:46:48 **Add Ins: ATTY, REX FIINEY - PLANT**
THE PERSON SEATED IN THE COURTROOM IS MONNIE
HUSBAND

10:47:08 **Judge: Hosack, Charles**
I AM NOT EXCLUDING PEOPLE FROM THE COURT ROOM.
THIS IS A OPEN COURTROOM.

10:47:30 BRING JURY PANEL IN

10:48:39 **Add Ins: ATTY, JOHN WHELAN - DEF**

CONTINUES DX OF KAREN ZIMMERMAN

- 10:48:56 **Other: ZIMMERMAN, KAREN**
WE NEVER DENIED HER ANY INFORMATION. KARLETTA
NEVER ASKED ABOUT HOW THE
- 10:49:24 BUSINESS WAS GOING. YES I REMEMBER SEEING MR.
10:49:57 MCGLAUGHLIN AT THE MEETING, I
WAS THERE THE ENTIRE TIME AT THAT MEETING. MR.
10:50:21 MCFARLAND NEVER SAID HE WAS
THE CORPORATE LAWYER FOR THE CAPTAINS WHEEL. MR.
10:50:46 MCFARLAND NEVER SAID HE WAS
ANYONES LAWYER. MCFARLAND HAS NEVER SAID HE WAS
10:51:26 JERRY BERRYS LAWYER. TO MY
KNOWLEDGE HE HAS NEVER DONE ANYTHING REGARDING
10:51:53 LEGAL ADVICE WITH CAPTAINS
WHEEL OR JERRY BERRY OR KARLETTA. MR. DOUGHTERY
WAS THE CORPORATE LAWYER.
- 10:52:14 **Add Ins: ATTY, JOHN WHELAN - DEF**
NOTHING FURTHER
- 10:52:20 **Add Ins: ATTY, REX FIINEY - PLANT**
CX
- 10:52:24 **Other: ZIMMERMAN, KAREN**
MR. MCFARLAND WAS NOT JERRY BERRY ATTORNEY. IT
HAD BEEN SO LONG AGO, THE
- 10:53:24 CHECK WAS FOR 60,000. 823.50 WAS FOR A LOAN FEE.
10:54:44 REFERS TO DEPOSITION - PAGE 17. LINE 7. YES THAT
IS JUST I SAID I THOUGHT
- 10:55:19 HAPPENED. THATS NOT HOW IT TURNED OUT. I DONT
KNOW HOW MANY TIMES I SAID I
- 10:55:46 CANT RECALL. PAGE 11 LINE 16 ANSWER. LICENSED AS
A BROKER - I WAS THEN BECAME
- 10:56:39 A ASSOC BROKER. PAGE 50 - ANDWER. THOSE TWO
BANKS SO CLOSE TOGETHER. DONT
- 10:58:14 REMEMBER SORRY. PAGE 9. ANDWER. YES I STILL
THINK MY MEMORY IS GOOD.
- 10:58:52 **Add Ins: ATTY, JOHN WHELAN - DEF**
OBJECTION
- 10:58:58 **Judge: Hosack, Charles**
OVER RULED
- 10:59:04 **Other: ZIMMERMAN, KAREN**

NOT SURE - DONT KNOW WHAT YEAR ALLEN DIED, THINK
2005. I WAS BROKER FOR ABOUT
15 MONTHS.

10:59:33

10:59:43 PAGE 16 LINE 20 ANSWER.

11:00:18 PAGE 17 LINE 19. ANSWER

11:01:03 PAGE 36 - LINE 20 - ANSWER

11:01:49 PAGE 37 - LINE 12 - ANSWER

11:02:07 PAGE 38 - LINE 18 - ANSER

11:02:54 PAGE 44 - LINE 13 - ANSWER

11:03:38 PAGE 45 - LINE 19 - ANSWER

11:05:50 JERRY DIED AND WE DIDNT GET ANY MORE MONEY. NO
ONE OWES ME ON THE LOAN AS I

11:06:32 NEVER GAVE ANYONE A LOAN.

11:06:39 **Judge: Hosack, Charles**

11:06:42 **Other: ZIMMERMAN, KAREN**

THEY WERE OUR STOCKS AND HE DIDNT TRANSFER IT
INTO OUR NAME, SHOULD HAVE BEEN

11:07:08 DONE. DONT KNOW WHY HE DIDNT.

11:07:23 JERRY BERRY SAID PAUL DAUGHTERTY WAS THE
CORPORATE ATTY. IT TOOK SO LONG TO

11:07:46 GET IT DONE BECAUSE JERRY DIDNT DO IT.

11:08:30 THOSE RECEIPTS WERE KEPT AT MICHAELS OFFICE.

11:08:56 THE LAWSUIT CAME UP AND WE DIDNT LIST IT. I AM A
ESTICIAN BY TRADE. WERE

11:09:43 GOVERNED BY THE STATE. YES THERE ARE ETHICS
BEING A BROKER. YES YOU CAN LIST

11:10:05 YOUR OWN HOUSE AND TO DISCLOSE TO THE BUYER. THE
BUYERS WOULD BE INFORMED ON

11:10:49 THE SALES AGREEMENT. EVERYTHING IS DISCLOSED.
YES I THOUGHT THE 100 THOUSAND

11:11:12 WAS A GOOD DEAL. I DO NOT KNOW REAL ESTATE IN
BAYVIEW. HAVE NOT BEEN ACTIVE

11:11:48 IN REAL ESTATE FOR SEVERAL YEARS. I DO REFERALS
WITH BROKER AND OWNER OF

11:12:10 TREATY ROCK. YES IN 2003 JERRY ASKED US TO BE
PARTNERS.

11:12:44 **Add Ins: ATTY, JOHN WHELAN - DEF
OBJ**

11:12:49 **Judge: Hosack, Charles**
SUSTAINED.

11:12:57 **Other: ZIMMERMAN, KAREN**
YES WE HAD A MOBILE HOME TO BE SET. I SAY WE
WITH EVERYTHING, WE ARE
11:13:24 PARTNERS. YES HAVE INTEREST IN THE MOBILE HOME.
WE ARE PARTNERS IN LIFE. YES
11:13:55 W WOULD GET WINE, SOMETIMES BY THE GLASS
SOMETIMES A BOTTLE.

11:14:18 **Add Ins: ATTY, JOHN WHELAN - DEF**
OBJ - RELEVANCE

11:14:23 **Judge: Hosack, Charles**
OVER RULED

11:14:30 **Other: ZIMMERMAN, KAREN**
I DONT RECALL. PAGE 37 DEPOSITION - ANSWER LINE
7
11:15:56 MICHAEL DOESNT GIVE OUT LEGAL ADVICE WHEN WERE
OUT. IF ASKED HE IS TOLD TO GO
11:16:18 TO THE OFFICE AND MAKE A APPT. I DONT KNOW WHEN
IT WAS THAT JERRY TOLD US
11:17:06 ABOUT THE MONEY JUDGEMENTS.
11:17:14 JERRY TOLD US THAT THE 100 THOUSAND WAS A GOOD
DEAL, HE SAID HE THOUGHT IT
11:17:39 WAS WORTH AROUND 800 THOUSAND. WE DIDNT LOOK AT
THE BOOKS. WE THOUGHT IT WAS
11:18:11 A GOOD DEAL. YES PROPERTY ON THE LAKE IS ALWAYS
A BETTER DEAL THAN PROPERTY
11:18:31 NOT ON THE LAKE. EXHIBIT 46 - ITS THE MINUTES,
YES MY SIGNATURE AS SECRETARY
11:20:41 AD DIRECTOR.
11:21:40 MICHAEL ASKED KARLETTA FOR BANK ACCOUNT
STATEMENTS. 02/2007 SHE WAS NOT
11:22:35 COOPERATING AND WANTED TO RUN THE BUSINESS. WE
REMOVED HER. MICHAEL AND I
11:23:15 TALKED ABOUT WHAT WAS GOING ON AT THE RESTAURANT
AFTER JERRY DIED. WE WOULD
11:23:38 GO UP THERE ON THE WEEKENDS AND TALK WITH
MANAGEMENT ABOUT HOW MUCH MONEY IT
11:23:57 WAS LOSING. NO NEVER REVIEWED TIME CARDS. NEVER
REVIEWED SECURITY CAMERAS.
11:24:41 BEING PAID IN CASH OK BUT NOT UNDER THE TABLE.
JERRY TOOK ADVANTAGE OF THE
11:25:26 TAX BREAKS AND ADVANTAGES. I DONT RECALL
MCFARLAND REFERING TO JERRY BERRY AS
11:26:32 A FORMER CLIENT.

11:26:41 **Add Ins: ATTY, JOHN WHELAN - DEF**
RE DX

11:26:45 **Other: ZIMMERMAN, KAREN**
THE 60 THOUSAND LOAN, JERRY SAID HE WOULD PAY
THE INTEREST PORTION.

11:27:10 **Add Ins: ATTY, REX FIINEY - PLANT**

11:27:22 **Judge: Hosack, Charles**
EXCUSES WITNESS

11:27:40 **Add Ins: ATTY, JOHN WHELAN - DEF**
CALLS MICHAEL MCFARLAND AS WITNESS

11:27:55 **Other: MCFARLAND, MICHAEL**
STATES NAME - SPELLS NAME. LAWYER SINCE 1980.
WENT TO SCHOOL IN WASHINGTON

11:28:36 DC. UNDERGRADUATE UNIV OF IDAHO WHILE IN THE
SERVICE. ENLISTED 165 ACTIVE

11:28:58 TILL 1970 AND RESERVE UNTIL 1976. FLEW
HELICOPTERS IN VIET NAM. WAS FLIGHT

11:29:21 INSTRUCTOR. THEN HELICOP PILOT WITH GUARDS. YES
FLEW 2600 HOURS OF COMBAT

11:29:45 MISSIONS. YES 34 YEARS OLD WHEN I STARTED
PRACTICING LAW. REVIEWS RULES OF

11:30:13 PROFESSIONAL CONDUCT. VERY COMPREHENSIVE SET OF
RULES. GOVERNED BY THE BAR

11:31:08 ASSOC. BAR CONDUCTS HEARINGS OR TAKES ACTION
THROUGH A COMPLAINT PROCESS. CAN

11:32:05 RESULT IN SANCTION, PUBLIC REPREMAND ALL THE WAY
TO BEING DIS BARRED. YES

11:32:38 THERE IS A TRIBUNAL.

11:32:54 **Add Ins: ATTY, JOHN WHELAN - DEF**
RE DX

11:33:01 **Other: MCFARLAND, MICHAEL**
EXPLAINS THE PROCESS OF FILING A COMPLAINT WITH
THE STATE BAR ASSOC.

11:34:16 PROBABLY NOT HAVE TO BE A CLIENT TO FILE A
COMPLAINT. REALLY DONT KNOW. HAVE

11:34:57 NEVER HAD A COMPLAINT FILED AGAINST ME. YES ALSO
MEMBERS ARE SUPPOSED TO

11:35:22 POLICE THE BAR. YES SELF POLICING ITS OWN

MEMBERS. HAS BEEN THAT WAY EVER
11:36:15 SINCE I STARTED PRACTICING IN 1980.
11:38:14 RULES OF PROFESSIONAL CONDUCT ARE GUIDELINES FOR
BEHAVIOR. YES LOTS OF BOOKS
11:39:19 ARE REQUIRED AS A LAWYER. YES REQUIRED TO PASS A
TEST REGARDING RULES OF
11:39:59 PROFESSIONAL ETHICS. TWO DAY TESTS, DIFFERENT
PORTIONS OF THE TEST. NATIONAL
11:40:29 AND IDAHO RULES. IDAHO PORTION IS A ESSAY
PORTION. TOOK BAR EXAM 1980. IDAHO
11:42:05 PORTION IS ALL DAY TEST. CIVIL RULES BOOK GOVERN
HOW CIVIL CASES ARE HANDLED.
11:43:00 THAT ALSO CONTAINS THE RULES OF EVIDENCE.
RECALLS THE RULES THAT MR. FINNEY
11:43:33 ASKED ABOUT. RULES 1.7, RULES 1.8. JERRY BERRY
WAS NOT MY CLIENT, HE WAS IN
11:44:32 MY OFFICE GETTING BANKRUPCY INFORMATION. I
SUPPOSE IN THE PRIVACY OF MY
11:45:06 OFFICE THERE MAY BE REMOTELY A POTENTIAL CLIENT
UNTIL HE DECLINED TO MOVE
11:46:01 FORWARD. FORMER CLIENT AT THE MOST. THERE IS A
ATTY CLIENT PRIVILEGE. THERE
11:47:18 IS A EXPECTATION OF PRIVACY. SOMETHING SAID IN
A PUBLIC SETTING WITH PEOPLE
11:47:43 AROUND, IT WOULD NOT BE EXPECTED THAT THE PERSON
WOULD NOT PASS IT ALONG. A
11:48:11 BIT MORE REFINED AS A ATTORNEY, THERE ARE
EHTICAL RULES. TALKS ABOUT RULES
11:50:39 OF BANKRUPTCY FRAUD.
11:51:20 YES I USE A CLIENT INFORMATION SHEET FOR THE
PEOPLE I DONT KNOW. DURING THAT
11:51:41 MEETING WITH JERRY BERRY, IT WAS VERY BRIEF AND
IT WAS NINE YEARS AGO. WE
11:52:14 WERE ALREADY AWARE OF HIS PROBLEMS IN WASH. HE
TOLD BOTH KAREN AND I STUFF.
11:52:41 HE WASNT TELLING US ANYTHING IN COFIDENCE. HE
WAS TALKING TO US AS A FRIEND.
11:53:03 JERRY BERRY DIDNT HIRE ME TO DO A BANKRUPCY. HE
DID NOT. I DONT KNOW IF JERRY
11:54:40 CALLED BEFORE OUR MEETING AT THE OFFICE. HE MAY
HAVE CALLED ME AT THE OFFICE
11:55:02 BEFORE THAT TO INQUIRE ABOUT THE 100 THOUSAND
DOLLARS. PROBABLY ON THE PHONE
11:55:34 DILY REGARDING THAT ISSUE. EXHIBIT A - IS A
RECEIPT THAT WAS WRITTEN FOR THE
11:56:05 40 THOUSAND. I GRABBED THE RECIPT BOOK AND WROTE

11:56:41 IT OUT. JERRY SIGNED IT AND
11:58:12 DATED IT WITH THE CHECK IN HAND. IT WASNT A DOWN
11:58:30 PAYMENT, PERHAPS EARNEST
11:59:09 MONEY. ESSENTIALLY FUNDS GIVEN TO JERRY TO HOLD
12:00:14 THE STOCK AND NOT GIVE IT TO
12:00:45 ANYONE ELSE. LIKE A DEPOSIT, REFUNDABLE, LIKE
12:01:13 EARNEST MONEY. IF WE COULD NOT
12:01:40 COME UP WITH THE REST WE WOULD GET THE 40
12:02:17 THOUSAND BACK.
12:03:16 EQUITY IN PROPERTY BETWEEN THE TWO OF US. KAREN
12:03:40 MADE THE APPLICATION PROCESS,
12:05:08 WE HAD NO IDEA IF WE COULD GET IT. KAREN IS NOT
12:05:40 MY WIFE, SHE IS NOT A ATTY
12:05:59 AND IS NOT BOUND BY THE RULES OF ETHICS. SO HE
12:06:23 GOT THE CHECK LEFT MY OFFICE
AND WENT TO MR. DAUGHERTY OFFICE. 7/25/2003 WAS
THE DATE I WROTE THE RECEIPT.
YES I AM AWARE OF THE HIGHWAY 95 PROJECT. NEVER
GAVE KARLETTA ADVICE
REGARDING THAT MATTER. IT HAD NOT BEEN
DETERMINED AT THE TIME WHERE THAT ROAD
WOULD EVEN BE. STATE HAD NOT DETERMINED WHERE
THE ROAD WOULD BE. PRIOR TO
2003 I RARELY DID CRIMINAL LAW. THE ISSUE OF ALC
WITH A MINOR AT THE WHEEL, I
REMEMBER JERRY BERRY TELLING ME THERE HAD BEEN A
STING OPERATION AT THE WHEEL
WITH THE STATE, SOMEONE SERVED A MINOR AND
SOMEONE WAS CITED, I THINK HE GOT
SUSPENDED FOR A WEEK FOR SERVING ALC. HE JUST
TOLD ME ABOUT IT.

12:06:48 **Stop recording**
(On Recess)

13:06:37 **Record**
MCFARLAND, MICHAEL

13:06:37
Recording Started:

13:06:49 **Judge: Hosack, Charles**
ISSUE OF WITNESS, SHE IS HER AND WAITING.
13:09:17 WE HAVE PLANTIFF WITNESS WHO FLEW IN TODAY SO WE
ARE GOING TO TAKE HER
13:09:41 TESTIMONY RIGHT NOW AND THEN GET BACK TO

DEFENSE.

13:10:00 **Add Ins: ATTY, REX FIINEY - PLANT**
CALLS NEXT WITNESS

13:10:13 **Other: CLERK**
OATHE GIVEN

13:11:15 **Other: CANO, SHARILYN**
SPELLS NAME - STATES NAME -LIVES IN MEDFORD OR.
DIRECTOR OF HEAD START. YES

13:11:37 JERRY BERRY IS MY FATHER. NO LOST TOUCH WITH MY
DAD WHEN I WAS 15 AND GOT IN

13:12:11 TOUCH WITH ME WHEN HE MARRIED KARLETTA. LOST
TOUCH DUE TO PARENTS DIVORCE AND

13:12:30 BAGGAGE WITH THAT. HE TOLD ME IN 2005 HE HAD
CANCER, TOLD ME IN THE CHRISTMAS

13:12:54 CARD. YES AFTER THAT I SPOKE TO HIM EVERY DAY,
YES CAME UP ON A TRIP IN 2006,

13:13:17 HE REALLY WANTED US TO COME SEE THE WHEEL, WE
CAME IN SEPT AND THEN IN OCT.

13:13:37 2006 UNTIL HE PASSED. IN THE SUMMER MY DAD WAS
TALKING ABOUT HOW IT WAS HARD

13:14:01 T GO TO THE WHEEL, THE CHEMO WAS REALLY TAKING
IT OUT OF HIM. KARLETTA WAS

13:14:23 GOING TO THE WHEEL AND SHE REALLY WAS NEEDED AT
HOME WITH HIM. MY SON WAS A

13:14:42 CHEF IN SEATTLE AND SO WE TALKED ABOUT THAT AND
MY SON GETTING FINANCING. MY

13:15:05 DAD WAS GOING TO DO PRIVATE LOAN TO MY SON BUT
WE HAD TO COME UP WITH THE

13:15:31 MONEY TO PAY OFF HIS ATTORNEY, ATTORNEY WAS MIKE
MCFARLAND, MANY TIMES HE

13:15:53 SAID THIS, HE REFERRED TO HIM AS HIS ATTORNEY.
HE TOLD ME THAT I WAS NOT IN

13:16:21 HIS WILL AND NEEDED TO TAKE CARE OF KARLI AND
DALE. STEP MOM IS 12 YEARS

13:16:44 YOUNGER THAN ME. HE NEEDED TO TAKE CARE OF HER.
WE TALKED ABOUT A LOT OF

13:16:59 THINGS, HE WAS ALWAYS WORRIED ABOUT THE WHEEL.
HE SAID KARLI WOULD HAVE THE

13:17:34 WHEEL, THAT WAS VERY IMPORTANT TO HIM AND SHE
AND DALE WOULD BE OK. HE SAID

13:17:51 HE HAD IT ALL SET UP - WITH HIS ATTORNEY SO
KARLY WOULD HAVE EVERYTHING AND

13:18:18 KEPT SAYING HIS ATTORNEY WOULD TAKE CARE OF

13:18:42 KARLY. WE STAYED FOR A FEW DAYS
AFTER THE DEATH. WE TALKED EVERY DAY, IT WAS
ROUGH FOR HER.

13:19:24 **Add Ins: ATTY, JOHN WHELAN - DEF**
OBJ HEAR SAY

13:19:30 **Judge: Hosack, Charles**
RE STATE THE QUESTION

13:19:41 **Other: CANO, SHARILYN**
YES I WAS EXPECTING THAT KARLY WOULD BE RUNNING
THE WHEEL. WHEN I WAS THERE

13:19:57 WE WENT TO DINNER EVERYNIGHT AT THE WHEEL IN
SEPT.

13:20:42 IDENTIFIES MR. MCFARLAND, MY DADS ATTORNEY.

13:21:02 YES THE LAST NIGHT HE DANCED WITH KARLY, HE TOLD
ME THAT HIS ATTORNEY WOULD

13:21:24 BE COMING TO DINNER. INTRODUCED AS MY DADS
ATTORNEY.

13:21:50 **Add Ins: ATTY, JOHN WHELAN - DEF**
CX

13:21:57 **Other: CANO, SHARILYN**
YES I PAID MY WAY UP HERE. NO AGREEMENT BETWEEN
FINNEY AND MYSELF TO COMP FOR

13:22:23 AIRLINE TICKET. CORRECT NO CONNECTION FROM AGE
15 ON UNTIL HE MARRIED KARLY.

13:22:54 WE HAD ACTUALLY CONNECTED THROUGH MY GRAMMA. HE
MARRIED KARLY AND WE STARTED

13:23:13 R BUILDING THE RELATIONSHIP. AGE DIFFERENCE IS
FINE. YES CAME UP IN 2EP 2006,

13:24:02 FOUND OUT ABOUT IT IN CHRISTMAS CARD. I HAVE SIX
CHILDREN AND GRAND CHILDREN,

13:24:40 A DAUGHTER DIED IN FEB. VERY BUSY LIFE. WE
STAYED AT THE ATHOL MOTEL. YES

13:26:27 MCFARLAND WAS THERE, WE WERE THERE HAVING DINNER
SEPT 2006. HE WAS A LOT

13:26:55 THINNER AND YOU COULD TELL HE WASNT FEELING
WELL. . I USE THE TERM ATTORNEY

13:27:44 BUT I THINK MY DAD REFERRED TO HIM AS LAWYER,
HIS LAWYER. INTRODUCED

13:28:26 MCFARLAND AS HIS LAWYER. WHEN I TALKED TO HIM
ABOUT MY SONS RUNNING THE PLACE

13:29:00 THE LOAN TO HIS ATTY WOULD HAVE TO BE PAID OFF.

13:29:32 HE USED THE WORD EITHER
LAWYER OR ATTORNEY, YES LATER SAW HIM AND WAS
13:30:22 INTRODUCED TO HIM. HE ONLY
INTRODUCED US TO MAKE MCFARLAND. YES HAD DINNER
13:30:52 THERE EVERY DAY I WAS THERE.
HE SAID TONIGHT MIKE WILL BE AT THE DINNER SO
13:31:18 YOU CAN MEET HIM, HE SAID HIS
LAWYER, HE WAS INTRODUCED AS EITHER HIS LAWYER
13:31:46 OR HIS ATTORNEY. NO I DID NOT
CROSS EXAM HIM ON THAT POINT. YES MY FATHER WAS
13:32:34 SICK. I DONT KNOW WHAT THE
RULES ARE WITH ATTORNEYS AS FAR AS
13:33:00 REPRESENTATION. I NEVER SAW ANY BILLS FOR
LEGAL WORK DONE. WHEN WE STARTED TALKING ABOUT
13:33:34 THE WHEEL HE MENTIONED HIS
ATTY.
13:33:58 I HAVE ANOTHER DAD IN MY LIFE AS WELL SO NO ,
NOT SURPRISED I WASNT LEFT
13:34:23 ANYTHING IN THE WILL. HE SAID NICE TO MEET YOU
OR SOMETHING LIKE THAT. YES I
13:35:03 AM FLYING HOME TONIGHT, BEEN AWAKE FROM WORK ALL
LAST WEEK DUE TO A DEATH IN
13:35:33 THE FAMILY. YES THERE WAS A LADY WITH MCFARLAND
AT DINNER BUT I DONT KNOW
13:35:55 WHAT HER NAME IS, HE INTRODUCED HER - JUST CANT
REMEMBER THE NAME.

13:36:15 **Add Ins: ATTY, JOHN WHELAN - DEF**
NOTHING FURTHER

13:36:21 **Add Ins: ATTY, REX FIINEY - PLANT**
NOTHING FURTHER

13:36:25 **Judge: Hosack, Charles**
EXCUSES WITNESS

13:36:31 PLANTIFF REST. RECALL DEFENSE WITNESS, MIKE
MCFARLAND AS WITNESS.

13:37:06 **Add Ins: ATTY, JOHN WHELAN - DEF**
DX

13:37:09 **Other: MCFARLAND, MICHAEL**
YES I WAS INTRODUCED TO THAT YOUNG LADY, I DONT
REMEMBER HOW I WAS
13:37:34 INTRODUCED. DONT THINK HE WOULD HAVE SAID THIS
IS MY PARTNER AND NO I WOULD

13:37:51 HAVE NOT CORRECTED HIM. HAPPENS DOZENS OF TIMES,
13:38:17 NATURE OF THE BUSINESS, NATU
13:39:01 NATURE OF PEOPLE. PEOPLE SEEM TO DO THAT,
13:40:52 HAPPENS ALL THE TIME IN SOCIAL
13:41:45 SETTINGS. PEOPLE JUST DO THAT. PAUL DAUGHERTY
13:42:35 MAY HAVE FAXED SOMETHING TO MY
13:44:04 OFFICE AT JERRY BERRY REQUEST. NEVER ACTED AS
13:45:12 HIS LAWYER. I DO NOT KNOW WHO
13:46:23 DRAFTED HIS WILL, NO SUCH TALK ABOUT HIS WILL.
13:46:45 NONE WHAT SO EVER.
13:47:48 EXHIBIT 77 - AFFIDAVIT AND ATTACHMENTS. PARA 6 -
13:48:41 THIRD SENTENCE. ISSUE IN
13:49:20 THIS CASE. READS PARA 6 TO JURY PANEL. THIS IS
13:51:52 THE STOCK PURCHASE AGREEMENT.
13:52:20 YES THIS WAS JERRY'S IDEA. REFER TO 40 THOUSAND
13:53:36 DEBT. ACKNOWLEDGMENT. YES IF
13:54:19 WE COULDN'T COME UP WITH THE OTHER 60 THOUSAND
13:55:04 THE 40 THOUSAND WOULD BE
13:55:26 RETURNED. EXHIBIT B - RECEIPT FOR THE 60
13:55:50 THOUSAND FILLED OUT AND SIGNED BY
13:56:17 JERRY BERRY, SIGNED FOR IN MY PRESENCE. I DON'T
13:57:03 KNOW IF I SPECIFICALLY SAW DEE
13:57:06 PREPARE IT. YES I HAD MORE THAN ONE RECEIPT BOOK
IN MY DESK. YES DEE HAD A
RECEIPT BOOK IN HER DESK. DEE KNEW IT WAS FOR
THE CAPTAIN'S WHEEL. YES MR.
BERRY UNDERSTOOD ENGLISH LANGUAGE, YES HIS
SIGNATURE IS ON IT. HE HAD NO
QUESTIONS PRIOR TO SIGNING FOR THE MONEY. YES
THE 60 THOUSAND WAS SUPPLIED TO
MR. BERRY TO ACQUIRE THE CAMPBELL STOCK. THE 40
THOUSAND WAS PART OF THE
PURCHASE PRICE. THEN KARLETTA DREW UP PAPERWORK
- ALL PARTIES REJECTED
KARLETTA'S DEAL, SHE WAS NEVER PART OF THE DEAL,
NEVER PART OF THE DISCUSSION,
KARLETTA WAS NEVER PART OF THAT. WE KNEW JERRY,
WE TRUSTED HIM, NEW HE WAS
GOOD WITH PEOPLE. KARLETTA HAD NO KNOWLEDGE OF
BUSINESS, IF WE WOULD HAVE
KNOWN SHE WAS TO BECOME INVOLVED WE WOULD NOT
GOTTEN INVOLVED. WAS SHE
JEALOUS

13:57:06 **Add Ins: ATTY, REX FIENEY - PLANT
OBJECTION - SPECULATION**

13:57:18 **Other: MCFARLAND, MICHAEL**
JERRY STARTED COMING TO RANCH 2001. HE NEVER
BROUGHT HER, WE NEVER MET HER.
13:57:46 HE TALKED OF HER OCCASSIONALLY. WE MET HER 2002-
2003. KNEW HIM FOR SOME TIME
13:58:13 BFORE WE EVER MET HER. JERRY WAS 70 IN 2007 AND
I WAS 62 YEARS OLD. AGE
13:58:44 DIFFERENCE BETWEEN HIM AND KARLETTA - SHE WAS
TO YOUNG. HE SAID HE COULD
13:59:22 TALK TO US ABOUT STUFF. KARLETTA COULD CALL AND
HE SAID HE WOULD BE RIGHT
13:59:41 HOME BUT WOULD STAY FOR HOURS. I THINK SHE MAY
HAVE FELT NOT INVOLVED IN
14:00:35 CONVERSATIONS, SHE FELT OUT. WE DINED WITH JERRY
AND HIS FRIEND STEVE
14:01:53 ANDERSON AND KARLETTA WAS THERE. REMEMBER ONE
INSTANCE RIGHT AFTER HIS
14:02:21 BIRTHDAY, HAD DINNER WITH HIM AND OTHER PEOPLE.
NEVER PROCESSED ANYTHING FOR
14:03:15 JERRY BERRY - THE CAPTAINS WHEEL OR KARLETTA
BERRY. OFFICER OF THE COURT IS
14:03:40 REFERENCED AS ATTORNEYS, TO SEE THAT COURT IS
FOLLOWED AND RULES UPHELD.
14:04:14 REFERENCE 1.8.3 - RULE OF CONDUCT. YES FAMILIAR
WITH THAT RULE. IF SOMEONE
14:05:33 VIOLATES A RULE I AM BOUND TO REPORT THEM. YES
AWARE OF RULE 1.8.4. RULES ARE
14:06:13 LOFTY. WE ARE MEMBERS OF A BRANCH OF
GOVERNMENT. FAMILIAR WITH 1.8 RULE.
14:09:36 RULE 1.8 AND RULE 1.9 DONT APPLY HERE. DID
NOTHING UNETHICAL OR WRONG.
14:10:23 LAWYERS CAN DO BUSINESS WITH CLIENTS - JUST HAVE
TO HAVE INFORMED CONSENT.
14:11:08 GIVES DEFINITION OF INFORMED CONSENT. GIVES
EXAMPLE OF INFORMED CONSENT.
14:13:41 RATIONALE BEHIND INFORMED CONSENT EXPLAINED.
14:14:34 YES JERRY BERRY SIGNED EXHIBIT A AND B. NOTHING
I DID WITH JERRY WAS AGAINST
14:15:24 THE LAW OR THE RULES OF ETHIC, NO VIOLATION. YES
HE TOLD US THAT HE WAS
14:16:02 UNABLE TO PURCHASE THE CAMPBELL STOCK ON HIS
OWN.
14:17:08 THE RULES ARE HIGHLY TECHNICAL AND COMPLEX. RULE
1.8.
14:20:16 CORPORATE KIT IS SOMETHING PURCHASED FOR A CORP.
CERTAIN PRE PRINTED FORMS IN

14:20:45 IT. CORPORATE SEAL AND PREPRINTED MINUTES AND
LOGS, FORMS NEEDED FOR
14:21:10 MEETINGS. MINUTE BOOK. ANYONE COULD GO THROUGH A
CORPORATE KIT. IT ACQUIRED
14:21:51 ONE THROUGH PAUL DAUGHTERY OFFICE 2000. 2006 I
RECIEVED POSSESSION FROM
14:22:22 DAUGHTERY OFFICE. JERRY ASKED DOUGHERTY OFFICE
TO SEND IT OVER SO I COULD
14:22:46 TAKE A LOOK AT IT. IT WASNT GETTING DONE AND IT
NEEDED DONE. GETTING THAT
14:23:25 AGREEMENT PUT IN WRITING , WE HAD BEEN AFTER HIM
CONSISTENTLY AND WE HAD
14:23:45 NOTHING IN WRITING WITH 100 THOUSAND FLOATING
AROUND OUT THERE. YES RECEIVED
14:24:15 IT AND REVIEWED THE CORPORATE KIT. DIDNT APPEAR
ANY ORGANIZED AT ALL. BI LAWS
14:24:46 NOT FILL OUT. MOST OF IT WAS BLANK. YES THERE
WERE STOCK CERT IN THE BOOK,
14:25:19 THREE ISSUED. CERT 1, 2, AND 3 - THE REST WERE
THERE BUT BLANK AND NOT FILLED
14:25:43 OUT. 1 WAS 100 SHARES MADE TO JEAN CAMPBELL.
CERT2 - 100 SHARES MADE TO
14:26:23 JAMES CAMELL AND CERT 3 - 200 SHARES ISSUED TO
JERRY BERRY. 02/2006 GOT THE
14:27:01 CERT KIT. AND YES THOSE CERTIFICATES WERE IN THE
BOOK. CERTIFICATES WERE
14:28:01 ENDORSED ON THE BACK, LIKE A CHECK. HAS TO BE
ENDORSED BEFORE IT CAN BE RE
14:28:28 ISSUED. SIGNED OFF, AUTHORIZED PAUL DAUGHERTY TO
TRANSFER IT. MR. DAUGHERTY
14:29:21 DID NOT TRANSFER. THEY WERE SITTING IN THE
MINUTE BOOK. THOSE TWO CERT WERE
14:30:05 RE ISSUED TO MYSELF AND KAREN ZIMMERMAN, THEY
WERE NEVER ISSUED TO JERRY
14:30:29 BERRY. STOCK WAS ISSUED FROM THE RESOLUTION.
STOCK CERT WERE PREPARED AND
14:31:28 SIGNED AT THAT MEETING. JERRY BERRY NEVER SAID
WHY DAUGHERTY DIDNT FOLLOW
14:31:54 THROUGH. CERT 5 MADE OUT TO JERRY BERRY AND
KARLETTA FOR 200 SHARES. 10/15/06
14:32:52 MEETING, THE SHARES WERE SIGNED FROM CAMELLS TO
MYSELF AND ZIMMERMAN. YES
14:33:26 THERE WAS A SET OF BI LAWS. THERE WERE STOCK BI
LAWS IN THE BOOK - THAT IS
14:34:31 EXHBIT D. SECOND SET IS WHAT I AM REFERING TO.
14:37:24 WE NEEDED TO GET SOMEONE APPOINTED CHAIRMAN

14:38:07 SINCE JERRY BERRY DIED. NOTICE
WA SENT OUT ABOUT SHARE HOLDERS MEETING.
14:38:31 MCGLAUGHLIN TOLD ME THERE WAS
ANOTHER COPY OF THE BI LAWS, THE ORIGINALS
14:38:55 REQUIRED A 10 DAY NOTICE OF ANY
MEETING. SO THEY CAME AND OBJECTED DUE TO THE
TEN DAY NOTICE.

14:39:24 **Stop recording**
(On Recess)

14:57:13 **Record**
MCFARLAND, MICHAEL

14:57:13
Recording Started:

14:57:16 **Judge: Hosack, Charles**
RESUMES JURY PANEL. BRINGS JURY PANEL BACK INTO
COURTROOM.

14:57:36 **Add Ins: ATTY, JOHN WHELAN - DEF**
RESUMES CX OF MICHAEL MCFARLAND

14:57:59 **Other: MCFARLAND, MICHAEL**
CORPORATE MEETING AFTER JERRY BERRY DIED. HERD
14:59:22 TESTIMONY OF MCGLAUGHLIN. NO I
DONT AGREE THAT I WAS THE CORPORATE LAWYER. HE
14:59:44 SAID I WAS STEPPING DOWN, I
NEVER STEPPED UP AS CORPORATE ATTY. EXPLAINS
WHAT A CORPORATE ATTORNEY IS.
15:00:11 NORMALLY SOME TYPE OF AGREEMENT, USUALLY IN
WRITING.
15:03:59 THE MEETING WAS ACTUALLY THE THIRD TIME WE GOT
TOGETHER AT THE HAYDEN HOUSE.
15:04:20 11/29/ AND THEN ANOTHER ONE 2/15/07. KARELETTA
WAS TERMINATED FOR CAUSE.
15:04:57 PRIMAY CAUSE WAS UNAUTHORIZED REMOVAL OF
DOCUMENTS AND UNAUTHROZIED TRANSFER
15:05:22 OF BANK ACCOUNT STATEMENTS, SHE WAS NOT
AUTHORIZED. WAS NOT ABLE TO WORK
15:06:06 COOERATIVLEY. KAREN WAS ELECTED AS TRESURER AND
I COULDNT EITHER. VERY
15:06:38 DIFFICULT TO RUN A BUSINESS THIS WAY, THOUSANDS
OF DOLLARS TAKEN OUT WITHOUT
15:06:55 ANY EXPLANATION AND BANK ACCOUNT WAS OVER DRAWN,

15:07:16 AND WE COULDN'T GET THE
RECORDS. WHEN JERRY DIED IT LEFT VACANCIES AND
IT NEEDED TO BE DEALT WITH.
15:08:13 EXHIBIT P IS THE MINUTES OF THE MEETING. YES
KARLETTA WAS THERE WITH COUNCIL.
15:08:41 WE VOTED FOR CORPORATE OFFICERS.
15:22:07 HE GOT 100 PERCENT CONTROL OF THE BUSINESS
WITHOUT USING HIS MONEY. HE DIDN'T
15:22:26 HAVE TO ANSWER TO ANYONE, HE RAN THE SHOW. SOLE
PERSON IN CHARGE. HE WAS THE
15:22:58 HOST AND COULD REPRESENT HIMSELF TO THE
COMMUNITY AS OWNER. HIS ONLY
15:23:19 OBLIGATION WAS THE 300.00 A MONTH TO KAREN FOR
INTEREST. I DON'T KNOW WHEN
15:23:38 THEY STOPPED. ANOTHER PAYMENT OR TWO AFTER HE
WAS DIAGNOSED, BUT HE WAS WAY
15:24:21 BEHIND AT THAT POINT. DEF EXHIBIT A - RECEIPT.
GOES THROUGH ALL EXHIBITS.
15:37:33 THE ACCOUNT WAS OVER DRAWN. HE TOLD THOSE GIRLS
THEY WOULD EACH GET 50
15:37:56 THOUSAND DOLLARS. I DIDN'T KNOW ABOUT SPECIFIC
AMOUNT. MARIE STAYED TILL THE
15:38:26 END AND MONNIE LEFT ABOUT A YEAR AGO BECAUSE WE
COULDN'T CONT TO KEEP TWO
15:38:55 MANAGERS. WE GAVE EACH OF THEM ONE SHARE OF
STOCK, NO BENEFIT TO ME TO DO
15:39:26 THAT. ONLY IF THEY WOULD VOTE ON OUR SIDE.. I
DON'T THINK I NOTICED UP FOR THE
15:39:54 MEETING FOR THAT TO TAKE PLACE,
15:50:19 REVIEWS THE REST OF THE DEF EXHIBITS.

15:58:37 **Judge: Hosack, Charles**
STILL ISSUES TO ADDRESS. DISMISS JURY FOR THE
EVENING.

16:01:52 **Stop recording**
(On Recess)

16:05:02 **Record**
MCFARLAND, MICHAEL

16:05:02
Recording Started:

16:05:21 **Other: 11, JUROR**
I RECOGNIZED MONNIE CRIP, DON'T KNOW HER.

16:05:57 RECOGNIZE HER FROM LACROSSE REHAB.
SHE WORKS IN THE PAYCHECK DEPT. THERE IS NO
16:06:44 PROBLEM. WE WORK AT THE SAME
COMPANY.

16:07:27 **Add Ins: ATTY, JOHN WHELAN - DEF**
IM FINE WITH IT

16:07:34 **Add Ins: ATTY, REX FIINEY - PLANT**
IM FINE IT

16:07:40 **Judge: Hosack, Charles**
THAT FINE.

16:10:56 EXHIBIT SS - RULE 1006 COMPLIED WITH - LOOK AT
IT IN THE MORNING. TT THRU ZZ

16:25:34 **Stop recording**
(Off Record)

FACTS ALLEGED BY PLAINTIFFS

2. The attorney client relationship between Jerry Lee Roy Berry and Michael McFarland and Michael McFarland, P.A. existed at the relevant time, or a fiduciary duty was assumed.

3. The attorney client relationship between the Captain's Wheel Resort, Inc. and Michael McFarland and Michael B. McFarland, P.A. existed at the relevant time, or a fiduciary duty was assumed.

4. The attorney client relationship between Karletta Grace Berry and Michael McFarland and Michael McFarland, P.A. existed at the relevant time, or a fiduciary duty was assumed.

5. McFarland and his fiancé, Zimmerman made a loan in the amount of \$100,000.00 to Jerry Berry in 2003 while Jerry was married to Karletta Berry.

6. The loan was initiated in two installments.

7. The first \$40,000.00 was delivered to Jerry from Michael McFarland on 7/25/03. The exchange took place at McFarland's law office. A receipt (Defs' Ex. A) from McFarland's law office was completed to document the transfer of money. Aside from the signature on the bottom of Ex. A, the remainder is McFarland's printing and it provides that the reason "for" the receipt is "Advance (partial) on loan to be secured by stock".

8. A second installment in the amount of \$60,000.00 was delivered to Jerry from McFarland at his law office on 8/4/03. McFarland's secretary at the time, Delores Meredith, completed a receipt (Defs' Ex. B) which Jerry Berry signed. Delores printed the words in the "for" line of the receipt to read "Captain's Wheel (property-business)" so that she would know what file to put the receipt into. She chose the words and was not directed by Berry or McFarland which words to put on the receipt. The receipt was kept in a file located in file cabinet behind her desk in the law office.

9. Prior to the loan from McFarland and Zimmerman to Berry, Berry already owned ½ of the outstanding stock (200 shares) in the Captain's Wheel Resort, Inc.

10. Jerry Lee Roy Berry used the \$100,000.00 borrowed from McFarland and Zimmerman to purchase the other 50% (200 shares) of the outstanding stock in the Captain's Wheel Resort, Inc. from James & Jean Campbell.

11. The transaction between Berry and Campbell in 2003 was handled by Paul Daugherty, attorney for the Captain's Wheel Resort, Inc.

12. A corporate Resolution (Pls' Ex 17) was made on August 7, 2003 approving the transfer of the Shares from the Campbell to Berry and:

a. Appointing Jerry Berry Director, President and Treasurer.

b. Appointing Karletta Grace Berry as Director and Secretary.

13. For what appears to be oversight, the actual stock certificates representing the 200 shares of the Campbell's were not transferred to Berry at the time. Paul Daugherty was authorized in writing to transfer the shares.¹

14. From July 25, 2003 until July 4, 2006 the transaction was treated as a loan.

15. Starting with the month of September 2003 Berry made a payment to Karen Zimmerman to cover the interest on her loan in the amount of \$60,000.00 against her mother's home. The payment was interest only and was originally \$301.00. The payment amount varied over time. All of the other payments from the Berry to Zimmerman were made by cash given to Zimmerman, except a snow-blower and a wood fireplace were traded to Zimmerman in lieu of two of the payments. Karletta Berry personally delivered two cash payments to Zimmerman in early summer 2006 just before the Stock Purchase and Sale Agreement (Pls' Ex. 23)

¹ McFarland and Zimmerman have argued that the stock was never purchased by Jerry Berry because the certificates were not put into his name and that the stock was not put into Jerry's name was because it was the Defendants' stock. (see Plaintiff's Ex. No. 77) Despite this argument, McFarland and Zimmerman signed a stock purchase and sale agreement with Jerry Lee Roy Berry. (See Plaintiff Exhibit 23).

was signed between Berry as seller and McFarland and Zimmerman as buyers.

16. After making the loan in 2003 Zimmerman and McFarland were also allowed to use the Captain's Wheel Resort free of charge as a term of the loan. Jerry Berry kept Zimmerman and McFarland's drink and meal tickets separate from the employee meal tickets and kept track of the totals.

17. Zimmerman was reimbursed the loan origination fee of \$823.50 on 9/29/03 which she incurred in taking out the loan of \$60,000.00 on her mother's home. (Plaintiff's Exhibit 15).

18. Jerry Berry was diagnosed with pancreatic cancer in November 2005.

19. Jerry Berry discharged Paul Daugherty as the attorney for the Captain's Wheel Resort, Inc. and the corporate book was transferred to McFarland's law office on February 21, 2006. (See Defs' Ex. QQ). McFarland has held the corporate book since that time.

20. Jerry Lee Roy Berry was in the hospital from June 17, 2006 until June 21, 2006 for chemo toxicity from his cancer treatments.

21. On June 20, 2001, McFarland hand delivered two versions of a proposed stock purchase and sale agreements (Pls' Exs. 23 & 24) to Karletta at her home while Jerry was in the

hospital. Both proposed agreements read as if they were "executed" on August 9, 2003.²

22. On July 4, 2006 Jerry met with McFarland and Zimmerman and signed the Stock Purchase and Sale Agreement (Pls' Ex. 23) transferring 200 shares (1/2 the outstanding stock) of stock in the Captain's Wheel Resort, Inc. to them. Jerry's shaky signature show the signs of his poor health and condition.

23. On July 4, 2006 the value of the real property (with improvements) owned by the Captain's Wheel Resort, Inc. was \$1,300,000.00 and this figure does not include any value for the personal property or the liquor license.

24. McFarland explained in the Affidavit of Michael B. McFarland (Pls Ex. 77) at page 3, paragraph 6 that "[t]he stock purchase agreement was Jerry's idea and it was designed to swap equity in the corporation for the debt owed to us".

25. On October 15, 2006 both a shareholders and directors meetings were held at Mr. McFarland's ranch.³

26. Before either meeting had occurred on October 15, 2006, Michael McFarland (as attorney for the corporation and Jerry and Karletta Berry) had already created minutes for both

² McFarland admits that these agreements were not even created until some time after February 2006 when he got the corporate record book from Paul Daugherty.

³ If the Defendants' theory that Jerry Berry "never owned all of the stock" set forth in the Affidavit of Michael McFarland (Pls' Ex 77) was accurate, how could a shareholders meeting be held?)

the shareholders' meeting and the directors' meeting. Only a few blanks were left to be filled in.

27. After the meetings on October 15, 2006 the pages from the minutes with the blanks filled in with McFarland's printing were retyped and inserted into the minutes. (See Defs' Ex. M & O) The pages of the minutes with the hand writing filling in the blanks is Defendants' Exhibit MM.

28. Pre-typed into the minutes of the October 15, 2006 shareholders' meeting was the appointment of Michael McFarland and Karen Zimmerman as directors. These appointments were in addition to the current board comprised of Jerry and Karletta Berry.

29. At the October 15, 2006 Directors Meeting McFarland placed Jerry's shares into a joint tenancy with rights of survivorship for Jerry and Karletta.

30. Before the October 15, 2006 meeting Karletta was already the Vice President. (See Pls' Ex. 26).

31. At the October 15, 2006 meeting the following was done in regard to the corporate officers:

- a. Jerry remained President.
- b. Jerry remained Treasurer.
- c. Karletta remained Vice-President, but Zimmerman and McFarland were added on as additional Vice Presidents.
- d. Zimmerman took over for Karletta Berry as Secretary.
- e. McFarland was appointed chairman of the board.

32. Jerry Berry died on November 4, 2006 (19 days after the shareholders' and directors' meetings).

33. Just shortly after Jerry died, the locks at the Captain's wheel were changed and Karletta was not given a key.

34. On November 13, 2006 (9 days after Jerry's death) when Karletta Berry arrived home near the end of the day, McFarland was waiting at her house with two proposed resolutions (Pls' Exs. 34 & 35) which he had prepared. The resolutions proposed to:

- a. Appoint McFarland President
- b. Appoint Zimmerman Treasurer
- c. Add Zimmerman and McFarland onto the bank accounts.
- d. List the "corporations business and real property (which constitute all of the assets of the corporation) for sale with Treaty Rock Realty" where Zimmerman was broker or associate broker.

35. Karletta would not sign the proposed resolutions on November 13, 2006.

36. By November 16, 2009 McFarland became tired of waiting for Karletta to sign the resolutions and he called a special meeting to pass the resolutions on November 18, with just two days notice.

37. Due to lack of proper notice the corporate meeting for November 18, 2006 was delayed until November 29, 2006.

38. At the November 29, 2006 meeting the terms of both of the proposed resolutions (Ex 34 & 35) passed with Zimmerman and

McFarland voting in favor and Karletta voting against. (See Pls' Ex 36) .

39. Because McFarland had placed himself and Zimmerman onto board of directors just before Jerry Berry died, McFarland and Zimmerman had the votes to control the Board of Directors. This is due to majority rules in a vote.

40. On November 29, 2006 after becoming aware of the true corporate Bylaws (Pls' Ex 5) McFarland became concerned about the "coin toss provision in the event of deadlock". (See Pls Ex 43 second paragraph) .

41. At this time deadlock was inevitable at the next annual shareholders meetin(to be held on April 15, 2007 per the true bylaws) when it came time to vote for the new Board of Directors. Under the true Bylaws a "coin toss" to be conducted by the corporate counsel would decide who was going to be the newly elected Board.

42. By November 29, 2006 McFarland and Zimmerman excluded Karletta from management or involvement with operations of the Captain's Wheel Resort, Inc. business and left day to day operations in the hands of Monnie and Marie without much, if any supervision.

43. The CIT small business loan was paid current on 11/29/06. (See Defs' Ex CCC, Transcript of 11/29/06 meeting) .

44. Pursuant to Jerry Berry's wishes, his widow Karletta was suppose to receive \$200.00 per week from the Captain's Wheel Resort. In December 2006 Michael McFarland informed the management to stop paying Karletta this \$200.00.

45. In December 2006 Michael McFarland informed the management that Karletta could not sign for her guests meals. At the same time McFarland retained that privilege.

46. After being served with a Notice of Meeting setting a meeting to remove Karletta as a Director, Karletta filed this case on February 14, 2007

47. Despite the lawsuit, on February 15, 2007 McFarland and Zimmerman held a Directors meeting and removed Karletta as a Director for cause. (See Pls' Exs. 55 & 56) The grounds for cause were questionable at best.

48. On February 17, 2007, (without input from Karletta) McFarland and Zimmerman decided issued one (1) share of stock to Monnie⁴ and one (1) share of stock to Marie (Plaintiffs Exs. 60 & 61). Threat of deadlock of shareholders was eliminated and a coin toss would not be required.

49. McFarland and Zimmerman have not held any annual meetings for the shareholders' or directors since issuing the stock to Monnie and Marie.

⁴ In the transcript of the November 29 meeting, Defendants' "CCC" McFarland acknowledges on page 7 that he knows that Karletta "would have a problem issuing stock to Monnie Cripe".

50. McFarland has been responsible for oversight of running the restaurant, bar and boat slip rentals. According to McFarland he has not allowed Karletta to be involved because she had an espresso stand fail in the past⁵ and because the staff would have quit⁶.

51. According to Marie, Mr. McFarland has handled his management responsibility by coming to the Captain's Wheel Resort on the weekends when bands were playing and he and Zimmerman would dance and have dinner and drinks⁷. At times McFarland and Zimmerman came in weekly. More recently McFarland and Zimmerman have not come in as often.

52. In terms of managing the Resort, McFarland claims to have signed checks and a few other things, but has not been able to properly oversee the management of the restaurant because he works about 60 hours per week at his law office and he did not have the time.

53. The Captain's Wheel was closed by McFarland on January 4, 2010.

54. McFarland claims to have loaned the corporation extensive amounts of money, and explains that the December 2009 bills are unpaid in the amount of \$10,000.00, that the SBA loan

⁵ McFarland is aware of this because Jerry sought his legal advice when a dispute at the espresso came to head.

⁶ Both the kitchen staff and McFarland's own witnesses confirmed this was not true.

⁷ According to Marie Streeter's testimony McFarland and Zimmerman's free meals are now accounted for as a business expense and are included with the employee meals.

(which is a lien on the real property) is in arrears to the tune of \$7,000.00 and the fixed costs for the Captain's wheel are \$6,000.00 per month even with the restaurant closed. (See Pls' Ex. 78). Under McFarland's control, the corporation does not have money to pay the corporate bills as they come due.

55. Up until October 24, 2006 Mike McFarland did not provide any money to help run the Captain's Wheel.

56. McFarland is not entitled to an offset any money he claims to have put into the Captain's Wheel Resort, Inc.. Any loss was caused by lack of employee oversight which is a breach McFarland's fiduciary duties.

57. McFarland's lack of oversight over the staff at the resort was a recipe for disaster and a breach.

FIDUCIARY DUTY IN GENERAL

58. A fiduciary relationship is one of confidence imposing great duties. It contemplates fair dealing and good faith, rather than legal obligation as the obligation of the transaction. It recognizes the disparity in bargaining power and that negotiations with a fiduciary will not be at arms length.

59. A party can prevail on a breach of fiduciary duty claim by showing either that the party was damaged and/or the fiduciary benefited from a transaction.

60. In this case the Plaintiffs were damages and the Defendants benefited.

FIDUCIARY DUTY BY ATTORNEY

61. The law imposes fiduciary obligations on the parties when the parties are partners, attorney and client, or close friends. Gray v. Tri-Way Const. Services, Inc., 210 P.3d 63, 71 (Idaho, 2009).

62. Lawyers have an overriding duty of zealous representation of a client's interest and an obligation to put their clients' interests ahead of their own. Heinze v. Bauer, 145 Idaho 232, 238, 178 P.3d 597, 603 (Idaho, 2008)

63. The relationship of client and attorney is one of trust, binding an attorney to the utmost good faith in fair dealing with his client, and obligating the attorney to discharge that trust with complete fairness, honor, honesty, loyalty, and fidelity. Blough v. Wellman, 132 Idaho 424, 426, 974 P.2d 70, 72 (Idaho, 1999).

64. The confidence reposed in the attorney by the client is so carefully guarded by the law that it places the burden of proving the entire fairness of a pecuniary transactions between the attorney and the client upon the attorney. Ainsworth, et al. v. Harding, 22 Idaho 645, 128 P. 92

65. For a breach or violation of an attorney's professional duties, the client may hold the attorney liable or

accountable. Blough v. Wellman, 132 Idaho 424, 426, 974 P.2d 70, 72 (Idaho,1999)

66. A person or corporation may recover damages from an attorney for breach of fiduciary duty even though there is no attorney-client relationship between them, if it is shown that the defendant assumed a fiduciary duty to the plaintiff.

Taylor v. Maile 142 Idaho 253, 259, 127 P.3d 156, 162 (2005).

ZIMMERMAN'S LIABILITY FOR MCFARLAND'S BREACH OF ATTORNEY DUTY

67. In this case Zimmerman has been instrumental to the transaction between herself, McFarland and Jerry Berry and is equally liable for McFarland breach of duty imposed due to his attorney-client relationship with the Plaintiffs. She put up part of the loan and the stock is held by Zimmerman and McFarland as joint tenants with rights of survivorship.

68. The Idaho Supreme Court in Todd v. Sullivan Const. LLC, 146 Idaho 118, 125, 191 P.3d 196, 203 (Idaho,2008) again approved the rule of law as:

The law seems to be well settled that, where several people actively participate in any manner in the commission of a tort, not only the actual actor or assailant is liable but all others who aid, abet, counsel or encourage the wrongdoer by words, gestures, looks or signs are equally liable with him to the injured person.

69. Idaho code 6-803(5) provides:

A party shall be jointly and severally liable for the fault of another person or entity or for payment of the proportionate share of another party where they

were acting in concert or when a person was acting as an agent or servant of another party. As used in this section, "acting in concert" means pursuing a common plan or design which results in the commission of an intentional or reckless tortious act.

FIDUCIARY DUTY OF THE CORPORATE DIRECTORS

70. A director of a corporation has a fiduciary responsibility to both the corporation and to shareholders. As fiduciaries, corporate directors are bound to exercise the utmost good faith in managing the corporation Steelman v. Mallory, 110 Idaho 510.

DAMAGES FOR BREACH OF FIDUCIARY DUTY

71. In Pickering v. El Jay Equipment Co., Inc. 108 Idaho 512, 517, 700 P.2d 134, 139 (Idaho App., 1985) it was stated that:

The measure of damages in an action for breach of fiduciary duty is the same as the measure of damages in an action for breach of trust. (*internal citation omitted*). "If the trustee commits a breach of trust, he is chargeable with any profit which would have accrued to the trust estate if he had not committed such breach of trust." RESTATEMENT (SECOND) OF TRUSTS § 205 comment i (1959) (hereinafter referred to as "Restatement"). On the other hand, "if the trustee commits a breach of trust and if a loss is incurred, the trustee may not be chargeable with the amount of the loss if it would have occurred in the absence of a breach of trust." Restatement § 205 comment f.

72. Under the Restatement (Third) of Trusts, P.I.R. § 205 (1992) titled "Trustee's Liability In Case Of Breach Of Trust" (underlining added): (Copy Attached)

A trustee who commits a breach of trust is ... (b) chargeable with the amount required to restore the values of the trust estate and trust distributions to what they would have been if the trust had been properly administered.

In addition, the trustee is subject to such liability as necessary to prevent the trustee from benefiting personally from the breach of trust (see § 206).

73. Under the Restatement (Third) of Trusts, P.I.R. § 206 (1992), titled "Liability For Breach Of Duty Of Loyalty", the rule stated in § 205 is applicable where the trustee in breach of trust sells trust property to himself individually, or otherwise violates his duty of loyalty. (Copy Attached)

74. Comment a to the Restatement (Third) of Trusts, P.I.R. § 206 (1992) § 206 provides that (underlining added):

The trustee is under a duty to the beneficiary to administer the trust solely in the interest of the beneficiary. If the trustee commits a breach of his duty of loyalty he is chargeable with any loss or depreciation in value of the trust property resulting from the breach of duty, or any profit made by him through the breach of duty, or any profit which would have accrued to the trust estate if there had been no breach of duty...

75. Comment b to the Restatement (Third) of Trusts, P.I.R. § 206 (1992) § 206 provides that (underlining added):

If the trustee in breach of trust sells trust property to himself individually, and the price paid by him was less than the value of the property at the time when the trustee purchased it, the beneficiary can compel him to pay the difference.

76. In the present case McFarland and Zimmerman loaned \$100,000.00 to Jerry Berry in 2003.

77. Interest and other charges were paid from the Berry's to McFarland and Zimmerman in the form of cash, goods and services from the time of the loan in 2003 until the loan was swapped for equity in the corporation on July 4, 2006. Unrestricted free food and drink was provided to McFarland and Zimmerman at the Captain's Wheel Resort without charge from inception of the loan.

78. On July 4, 2006 McFarland and Zimmerman entered into a stock purchase agreement with Jerry to exchange the debt of \$100,000.00 for 200 shares of stock in the Captain's Wheel Resort, Inc.

79. Starting with the month of July 2006 payments to Zimmerman were discontinued because the loan had been traded for stock.

80. July 4, 2006 is the date of the breach of duty by McFarland as attorney.

81. McFarland's own sworn affidavit characterized the 2006 stock purchase agreement as "Jerry's idea and it was designed to swap equity in the corporation for the debt owed to us". (Pls' Ex 77).

82. McFarland's testimony at trial when asked "how do you determine if stock in the Captain's Wheel Resort, has equity" confirms that the equity in the Captain's Wheel Resort, Inc. is calculated by subtracting the debts of the corporation; from the

value of the assets of the corporation to arrive at the equity figure.

83. The Resolution (Plaintiff's Exhibit 34) where McFarland sought to list the property with Treaty Rock Realty at the price of \$2,200,000.00 acknowledges that the corporation's business and real property are "all of the assets of the corporation".

84. Defendants' Exhibit "CCC", the transcript of the November 29, 2006 Special Board Meeting established the corporate debts at that time to be: (1) the CIT small business loan at \$220,000.00, (2) the Wells Fargo line of credit in the amount of \$4,900.00 and (3) acknowledges the \$500.00 per month for the parking lot across the street.

85. On July 4, 2006, the fair market value of the real property owned by the Captain's Wheel Resort, Inc. was \$1,300,000.00.

86. On July 4, 2006, the debts of the Captain's Wheel Resort, Inc. totaled less than \$300,000.00.

87. The Plaintiff's testimony at trial established the debts of the Captain's Wheel Resort, Inc. as of July 4, 2006 were:

- a. \$242,000.00 for the CIT small business loan,
- b. \$15,000.00 for the debt on the parking lot, and
- c. \$5,000.00 for the Wells Fargo line of credit.

88. The total corporate debt was \$262,000.00 on July 4, 2006.

89. The Plaintiff testified that at the time of the breach of McFarland's duty, her stock was valued at \$500,000.00. The Plaintiff's stock is the same type and quantity as the stock purchased by McFarland and Zimmerman.

90. On July 4, 2006 the net value of the stock in the Captain's Wheel Resort is arrived at by taking the fair market value of the corporation's assets and subtracting the corporations debts.

91. The fair market value of all of the stock in the Captain's Wheel Resort Inc. on July 4, 2006 is calculated as follows (FMV = fair market value):

July 4, 2006 FMV of Assets	\$1,300,000.00
(less) Debts of Corporation	<u>\$262,000.00</u>
Value/equity in 400 shares stock	\$1,048,000.00

92. 200 shares of the stock (1/2 of the outstanding shares) is valued at 1/2 of the value of all of the stock.

93. The value of 200 shares on July 24, 2006 was \$524,000.00 ($\$1,048,000.00 \div 2 = \$524,000.00$).

94. The fair market value of the stock purchased from Berry by the Defendants is \$524,000.00.

95. McFarland and Zimmerman traded \$100,000.00 in debt for \$524,000.00 in equity in stock on July 4, 2006. This was a breach of fiduciary duty created by the attorney client

relationship and with McFarland's inside knowledge that would not have been available if this were an arms length transaction.

96. McFarland and Zimmerman benefited in the amount of \$400,000.00 to \$424,000.00 as a result of purchasing stock from Jerry. This is one component to the Plaintiffs' damages. (Restatement (Third) of Trusts, § 205)⁸ and (comment b, Restatement (Third) of Trusts, § 206) (...the price paid by [fiduciary/attorney] was less than the value of the property at the time when the [fiduciary/attorney] purchased it, the beneficiary can compel him to pay the difference.) The benefit calculation is as follows:

FMV of stock purchased by fiduciary	\$524,000.00
Less price paid	\$100,000.00
Benefit to Fiduciary/Attorney	<u>\$424,000.00</u>

97. The other components of the Plaintiffs' damages are
- a. The amount required to restore the values of the trust estate to what they would have been if the trust had been properly administered. (Restatement (Third) of Trusts, § 205)
 - b. any profit which would have accrued to the trust estate if there had been no breach of duty (Restatement (Third) of Trusts, § 205)
 - c. any loss or depreciation in value of the trust property resulting from the breach of duty. (Restatement (Third) of Trusts, § 206)
 - d. any profit which would have accrued to the trust estate if there had been no breach of duty. (Restatement (Third) of Trusts, § 206)

⁸ In addition the trustee is subject to such liability as necessary to prevent the trustee from benefiting personally from breach of trust.

98. Damages must be proven with reasonable certainty.

99. Reasonable certainty requires neither absolute assurance nor mathematical exactitude; rather, the evidence need only be sufficient to remove the existence of damages from the realm of speculation. Todd v. Sullivan Const. LLC, 146 Idaho 118, 122, 191 P.3d 196, 200 (Idaho,2008).

100. Generally speaking Plaintiffs are entitled to recover as damages the amount of money that will reasonably and fairly compensate the Plaintiffs for any damages proved to be proximately caused by the breach of duty of the defendants.

Under the facts of this case the jury should consider:

- a. The difference between the price Michael McFarland and Karen Zimmerman paid for the stock of the Captain's Wheel Resort, Inc and the actual value of the stock purchased.
- b. The amount necessary to make the Plaintiffs whole for the Defendants' mis-management of the Captain's Wheel Resort, Inc. including:
 - i. Arrears on the CIT small business loan (Exhibit 78)
 - ii. Unpaid real property taxes (Exhibit 78)
 - iii. 941 back tax (exhibit 78)
 - iv. Sales & Use back tax (Exhibit 78)
 - v. Business debts (exhibit 78)
 - vi. The amount of monthly fixed costs while the Captain's Wheel Resort is closed from January 4, 2010 until the restaurant can be re-opened at the beginning of summer.
- c. Reasonable value of goods and services received by the Defendants from the Captain's Wheel Resort which were not paid for;
- d. Reasonable value of goods and services given away from the Captain's Wheel Resort, Inc. by the Defendants;
- e. Any other specific item based upon the evidence.

f. Any incidental or consequential damage suffered by the Plaintiffs that is within the foreseeable chain of proximate causation.

REMEDIES

101. Upon a finding of breach of fiduciary duty, the Plaintiffs are entitled to both legal and/or equitable remedies.

102. The District Court is free to fashion an equitable remedy as it sees fit. O'Connor v. Harger Const., Inc., 145 Idaho 904.

103. If an attorney enters into an attorney client relationship with a client in regard to certain property, that attorney can never thereafter, buy the opposing title to the property, without holding it in trust for the client.

Ainsworth, v. Harding, 22 Idaho 645, 128 P. 92

104. A constructive trust takes effect at the time of the wrongful act, and traces funds gained by the act until the rightful recovery is made. Andre v. Morrow 106 Idaho 455, 463, 680 P.2d 1355, 1363 (Idaho,1984)

105. A constructive trust, or as frequently called an involuntary trust, is a fiction of equity, devised to the end that the equitable remedies available against a conventional fiduciary may be available under the same name and processes against one who through fraud or mistake or by any means ex maleficio acquires property of another. Taylor v. Maile 142 Idaho 253, 261, 127 P.3d 156, 164 (Idaho,2005).

106. A constructive trust may be imposed in practically any case where there is a wrongful acquisition or detention of property to which another is entitled. Chinchurreta v. Evergreen Management, Inc. 117 Idaho 591, 593, 790 P.2d 372, 374 (Idaho App.,1989)

107. Constructive trusts are raised by equity for the purpose of working out right and justice, where there was no intention of the party to create such a relation, and often directly contrary to the intention of the one holding the legal title..... If one party obtains the legal title to property, not only by fraud or by violation of confidence or of fiduciary relations, but in any other unconscientious manner, so that he cannot equitably retain the property which really belongs to another, equity carries out its theory of a double ownership, equitable and legal, by impressing a constructive trust upon the property in favor of the one who is in good conscience entitled to it, and who is considered in equity as the beneficial owner. Hanger v. Hess, 49 Idaho 325, 328, 288 P. 160, 161 (1930)

DATED this 24 day of January, 2010.



REX A. FINNEY
Attorney at Law

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was delivered as indicated, this 24 day of January, 2010, and was addressed as follows:

J.P. WHELAN P.C.

Attorney at law

213 N. 4th Street

Coeur d'Alene, Idaho 83814

(Via Facsimile: (208) 664-2240)

(and via e-mail: jpwhelanattorney@yahoo.com)

Judge Hosack

(Via e-mail: cw.hosack@gmail.com)



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REST 3d TRUSTS-PIR § 205
Restatement (Third) of Trusts, P.I.R. § 205 (1992)

Restatement of the Law — Trusts
Restatement (Third) of Trusts: Prudent Investor Rule
May 18, 1990

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Appendix
Chapter 7. The Administration Of The Trust
Topic 4. Remedies Of The Beneficiary And Liabilities Of The Trustee

§ 205. Trustee's Liability In Case Of Breach Of Trust

[Link to Case Citations](#)

[Note: Volume 3 of the Restatement Third of Trusts, covering §§ 70 to 92, was published in 2007. Since Volume 3 republished in its Chapter 17 the prudent-investor principles originally set forth by the American Law Institute in the single volume on the Prudent Investor Rule published in 1992, the citations to the Rule can now be found in the Trusts Third Volume 3 sections, and will no longer appear below. The 1992 volume is now out of print. Access REST-TRUST for the most current material].

A trustee who commits a breach of trust is

**(a) accountable for any profit accruing to the trust through the breach of trust;
or**

(b) chargeable with the amount required to restore the values of the trust estate and trust distributions to what they would have been if the trust had been properly administered.

In addition, the trustee is subject to such liability as necessary to prevent the trustee from benefiting personally from the breach of trust (see § 206).

See Reporter's Note.

Comment:

a. Alternatives available to the beneficiaries. If a trustee commits a breach of trust, the beneficiaries may affirm the transaction and accept the results of the trustee's improper

conduct. In such a case the trustee is accountable for any profits accruing to the trust as a result of the breach.

If the breach of trust causes a loss, including any failure to realize income, capital gain, or appreciation that would have resulted from proper administration, the beneficiaries may surcharge the trustee for the amount necessary to compensate fully for the consequences of the breach. Thus, the recovery for an improper investment by a trustee would ordinarily be the difference between (1) the value of the investment and its income and other product at the time of surcharge and (2) the amount of the funds expended in making the investment, increased (or decreased) by the amount of the total return (or negative total return) that would have accrued to the trust and its beneficiaries if the funds had been properly invested. Similarly, if a breach of trust involved accepting too low a price in an otherwise proper sale of trust property, the trustee's liability would be the amount by which the sale price was inadequate and a compounded return on that amount to the date of surcharge. In most cases appropriate return rates might be based on total return experience (positive or negative) for other investments of the trust in question, or possibly that of portfolios of other trusts having comparable objectives and circumstances. See generally § 211, Comment e, and Reporter's Note thereto. On total return, see § 227, Comment e. In some cases, especially involving breaches of short duration, it may be appropriate simply to charge the trustee with interest rather than looking to total return. See § 209, Comment b, and § 211.

The beneficiaries' decision to accept or to hold the trustee liable for the results of a breach of trust ordinarily does not relieve the trustee of the duty thereafter to administer the trust properly (requiring, for example, that the trustee dispose of the improper investment and reinvest the proceeds). Nor does it preclude a court from granting other remedies available for fiduciary misconduct, such as denial of fees or removal from office (see § 107), when appropriate to the circumstances involved. On the further possibility of recovering gains realized by the trustee personally from a breach of trust involving violation of the duty of loyalty, see § 206.

For elaboration and application of the rule of this Section as it relates to specific types of breaches, see §§ 208 through 211.

On the treatment of multiple breaches, see § 213.

b. Where beneficiary under incapacity. Where the beneficiary has the option of choosing among several remedies but he is under an incapacity, as for example if he is an infant, the court will enforce that remedy which in its opinion is the most advantageous to him and most conducive to effectuating the purposes of the trust. Thus, if the trustee has purchased with trust funds property which it was his duty not to purchase and the property has fallen in value, the court will reject the purchase and compel the trustee to replace the purchase price. On the other hand, if the property has risen in value, the court will order that the property be sold and that with the proceeds proper trust investments be made. As to the situation where there are several beneficiaries, see § 214.

Comment on Clause (a):

c. Loss or depreciation. If as a result of his breach of trust, trust property is destroyed or lost, the trustee is chargeable with the value of the property so destroyed or lost. If as a result of his breach of trust property depreciates in value, the trustee is chargeable with the amount of such depreciation.

Illustrations:

1. A is trustee of \$10,000 in cash. As a result of his negligence the money is stolen. A is liable for \$10,000.
2. A is trustee of a claim which he can collect in full. He negligently fails to take steps to collect the claim with the result that it is barred by the Statute of Limitations. A is liable for the amount of the claim.
3. A is trustee of a claim against B for \$1000. B is solvent and A can collect the claim in full. A negligently fails to take steps to collect the claim until B becomes insolvent with the result that he is able to collect only \$400 of the money owed by B. A is liable for \$600.
4. A is trustee of a mortgage for \$10,000. When the mortgage matures, A negligently fails to foreclose the mortgage, although it is evident that the value of the property is only slightly in excess of the amount of the mortgage and owing to a change in the character of the neighborhood is likely to depreciate. A subsequently forecloses the mortgage and the land is sold for \$6000. A is liable for \$4000.
5. A is trustee of \$10,000 in cash. He deposits the money in a bank which he knows or has reason to know is insolvent. The bank fails and A recovers only \$4000 from the bank. A is liable for the loss.
6. A is trustee of a house. In breach of trust he fails to insure it against fire. The house burns. A is liable for the loss.
7. A is trustee of a house. In breach of trust he fails to keep the roof in repair with the result that the ceilings are badly damaged by water. A is liable for the damage.

d. Sale for less than value. If the trustee is authorized to sell trust property, but in breach of trust he sells it for less than he should receive, he is liable for the value of the property at the time of the sale less the amount which he received. If the breach of trust consists only in selling it for too little, he is not chargeable with the amount of any subsequent increase in value of the property under the rule stated in Clause (c), as he would be if he were not authorized to sell the property. See § 208.

Illustration:

8. A is trustee for B of Blackacre. By the terms of the trust he is directed to sell Blackacre. He sells Blackacre for \$10,000, although if he had not been negligent he could have sold it for \$12,000. A is liable for \$2000. Although Blackacre subsequently becomes worth \$15,000, A is not liable for more than \$2000.

e. Purchase for more than value. If the trustee is authorized to purchase property for the trust, but in breach of trust he pays more than he should pay, he is chargeable with the amount he paid in excess of its value. If the breach of trust consists only in purchasing it at too high a price, he is not chargeable with a subsequent depreciation in value of the

property as he would be if he were not authorized to purchase the property. See § 210.

Illustration:

9. A is trustee for B of \$100,000. By the terms of the trust he is directed to invest the money in land. He purchases Blackacre for \$25,000, although if he had not been negligent he could have purchased it for \$15,000, its fair value. A is liable for \$10,000. Although Blackacre subsequently becomes worth less than \$15,000 A is not liable for more than \$10,000.

f. Loss not resulting from breach of trust. As is stated in Clause (a), a trustee is liable for a loss resulting from a breach of trust. A question may arise, therefore, as to the causal connection between the breach of trust and the loss. If the trustee commits a breach of trust and if a loss is incurred, the trustee may not be chargeable with the amount of the loss if it would have occurred in the absence of a breach of trust.

Where a trustee has committed a breach of trust in failing to earmark a trust investment, he is not necessarily liable for a loss resulting from the making of the investment. See § 179, Comment d. He is not liable where the loss did not result from the failure to earmark, except in a situation where as a matter of policy an absolute liability is imposed upon the trustee in order to deter him from committing such a breach of trust. The trustee is liable for the loss where he has taken securities in his own name in order that he may subsequently be in a position where he may claim the securities as his own if they go up in value and claim that they are held by him as trustee if they go down in value. He is liable for the loss even though he had no such purpose in mind, as long as his failure to earmark puts him in a position where it would be easy for him to make similar claims. On the other hand, if there is no danger that such claims could successfully be made, the breach of trust involved in the merely technical failure to earmark the investment does not render the trustee liable for a loss resulting from the investment.

If a breach of trust consists only in investing too large an amount in a single security or type of security, the trustee is liable only for such loss as results from the investment of the excess beyond the amount which it would have been proper so to invest. See § 227, Comment g.

If a trustee lends on mortgage more than the proper proportion of the value of the property, but the loan is otherwise proper, the trustee is liable only for the loss of the excess.

On the other hand, where the trustee purchases for the trust, property owned by him individually, and the property depreciates in value, it is immaterial that the trustee could properly have purchased similar property from a third person and that in such a case he would not have been liable for the loss. In order to deter self-dealing by the trustee, he is chargeable with any loss which results. See § 206, Comment d.

As to the liability of the trustee where he has failed to comply with the terms of the trust and has incurred a loss, but a loss would have occurred even though he had complied

with the terms of the trust, see § 212.

As to the question of the liability for a loss where there is a subsequent gain, see § 213.

g. Power of the court to excuse breaches of trust. By the Uniform Trusts Act, § 19, it is provided that “A court of competent jurisdiction may, for cause shown and upon notice to the beneficiaries, relieve a trustee from any or all of the duties and restrictions which would otherwise be placed upon him by this Act, or wholly or partly excuse a trustee who has acted honestly and reasonably from liability for violations of the provisions of this Act.”

This is similar to the English Trustee Act, 1925, § 61, which provides that if it appears to the court that a trustee is personally liable for any breach of trust, “but has acted honestly and reasonably, and ought fairly to be excused for the breach of trust and for omitting to obtain the directions of the court in the matter in which he committed such breach, then the court may relieve him either wholly or partly from personal liability for the same.”

In the absence of a statute it would seem that a court of equity may have power to excuse the trustee in whole or in part from liability where he has acted honestly and reasonably and ought fairly to be excused.

Comment on Clause (b):

h. Profits. The trustee is chargeable with any profit made by him through the improper disposition or use of trust property. Thus, if the trustee makes an unauthorized investment with trust money which results in a profit, he is accountable for the profit. See § 210.

Illustration:

10. A is trustee for B of \$100,000. In breach of trust he invests \$10,000 in speculative shares of stock which he later sells for \$20,000. He is accountable for \$20,000.

As to the question of the liability for a gain where there is a subsequent loss, see § 213.

Comment on Clause (c):

i. Failure to make a profit. If the trustee commits a breach of trust, he is chargeable with any profit which would have accrued to the trust estate if he had not committed such breach of trust. This rule is applicable where the trustee in breach of trust sells or otherwise disposes of trust property which it was his duty to retain (see § 208), and where the trustee in breach of trust fails to purchase property which it was his duty to purchase for the trust (see § 211).

This rule is applicable to income as well as principal. Thus, if the trustee in breach of trust fails to make the trust property productive he is liable for the amount of income which he would have received if he had not committed the breach of trust (see § 207).

Comment:

j. Cross reference. As to the extent of the trustee's liability for breach of his duty of

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REST 3d TRUSTS-PIR § 206
Restatement (Third) of Trusts, P.I.R. § 206 (1992)

Restatement of the Law — Trusts
Restatement (Third) of Trusts: Prudent Investor Rule
May 18, 1990
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Appendix
Chapter 7. The Administration Of The Trust
Topic 4. Remedies Of The Beneficiary And Liabilities Of The Trustee

§ 206. Liability For Breach Of Duty Of Loyalty
[Link to Case Citations](#)

[Note: Volume 3 of the Restatement Third of Trusts, covering §§ 70 to 92, was published in 2007. Since Volume 3 republished in its Chapter 17 the prudent-investor principles originally set forth by the American Law Institute in the single volume on the Prudent Investor Rule published in 1992, the citations to the Rule can now be found in the Trusts Third Volume 3 sections, and will no longer appear below. The 1992 volume is now out of print. Access REST-TRUST for the most current material].
[Unchanged]

The rule stated in § 205 is applicable where the trustee in breach of trust sells trust property to himself individually, or sells his individual property to himself as trustee, or otherwise violates his duty of loyalty.

Comment:

a. Duty of loyalty. The trustee is under a duty to the beneficiary to administer the trust solely in the interest of the beneficiary. See § 170. The nature and extent of this duty of loyalty are dealt with in the Comments to § 170. The present Section deals with the extent of the liability of the trustee for violating this duty.

This Section is an application of the general rule stated in § 205. If the trustee commits a breach of his duty of loyalty he is chargeable with any loss or depreciation in value of the trust property resulting from the breach of duty, or any profit made by him through the breach of duty, or any profit which would have accrued to the trust estate if there had been no breach of duty.

b. Sale of trust property to the trustee individually. The trustee violates his duty to the beneficiary if he sells trust property to himself individually or if he has a personal interest in the purchase of such a substantial nature that it might affect his judgment in making the sale. See § 170, Comments b-d.

If the trustee in breach of trust sells trust property to himself individually, and the price paid by him was less than the value of the property at the time when the trustee purchased it, the beneficiary can compel him to pay the difference; or, at his option, the beneficiary can set aside the sale and compel the trustee to reconvey the property and account for any income which he has received therefrom, in which case the trustee will be entitled to receive from the trust estate the amount which he paid for the property and income thereon actually received by the trust estate, if any; or he can compel the trustee to offer the property for sale and if it is sold for more than the amount which the trustee paid for it, compel him to account for the excess.

If the trustee has resold the property at a profit, the beneficiary can compel him to account for the profit.

Similarly, the trustee is liable where he does not purchase the property individually, but has such an interest in the purchase that he violates his duty of loyalty in making the sale. As to when the sale is in breach of his duty of loyalty, see § 170, Comment c.

c. Sale of trustee's individual property to himself as trustee. The trustee violates his duty to the beneficiary if he sells to himself as trustee his individual property or property in which he has a personal interest of such a substantial nature that it might affect his judgment. See § 170, Comments h, i.

If the trustee in breach of trust sells his individual property to himself as trustee, and the price paid by him as trustee was more than the value of the property at the time of the sale, the beneficiary can compel him to repay the difference; or, at his option, the beneficiary can set aside the purchase and compel the trustee to repay the amount of the purchase price with interest thereon, in which case the trustee will be entitled to receive from the trust estate the property and any income thereon actually received by the trust estate.

d. Same--Where loss incurred. If the trustee sells his individual property to himself as trustee and the property subsequently depreciates in value, the trustee is chargeable with the amount of the depreciation even though he sold the property at a fair value and even though had he purchased it from a third person it would have been a proper trust investment.

Illustration:

1. A is trustee for B of \$100,000. By the terms of the trust he is directed to invest in railroad bonds. With \$5000 of the trust money he purchases five bonds of the X Railroad Company from himself individually. At the time of the purchase the bonds are selling in the market at par. The bonds subsequently depreciate and are sold for \$4000. A is liable for \$1000.

e. Same--Where profit results. If the trustee in breach of trust sells his individual property to himself as trustee, he is chargeable with any profit which he makes thereby.

If the trustee purchases property from a third person for the purpose of reselling it to himself as trustee and does so resell it, he is chargeable with the excess, if any, of the amount which he received from the trust over the amount which he paid for the property.

Illustration:

2. A is trustee for B of \$100,000. By the terms of the trust he is directed to purchase land. He purchases Blackacre with \$70,000 of his individual property for the purpose of reselling it to the trust. Subsequently he sells it to the trust for \$100,000. He is chargeable with \$30,000.

f. If the property purchased by the trustee individually for the purpose of resale to himself as trustee was at the time of the resale worth less than he paid for it, the beneficiary may charge the trustee with the excess, if any, of the amount for which he sold it to himself as trustee over the value at the time of such sale.

Illustration:

3. The facts are as stated in Illustration 2, except that at the time of the resale Blackacre was worth \$60,000. A is chargeable with \$40,000.

g. If the trustee did not acquire the property for the purpose of reselling it to himself as trustee but does sell it to himself as trustee, he is chargeable with the excess, if any, of the amount which he received from the trust over the value of the property at the time when he sold it to himself as trustee.

Illustration:

4. A is trustee for B of \$100,000. In 1925 A purchases certain shares of stock for himself with \$5000 of his own funds, not intending to resell them to himself as trustee. In 1930 when the shares are worth \$8000, A sells them to himself as trustee for \$10,000. A is chargeable with \$2000, not \$5000.

h. Purchase by trustee individually of an interest in the subject matter of the trust. If the trustee purchases for himself individually an interest in the subject matter of the trust of such a character that the effect of permitting him to purchase the interest for himself might be to subject him to a temptation not to act solely in the interest of the beneficiary in the administration of the trust (see § 170, Comment j), the beneficiary can charge him as constructive trustee of the interest so purchased and can compel him to account for any profit which he makes thereby.

If the trust estate includes a lease of land or of a building, and the trustee renews the lease for himself individually, the beneficiary can charge him as constructive trustee of the new lease, in which case the trustee is entitled to reimbursement for what he paid for the lease. If the trustee sells the lease at a profit, he is accountable for the profit.

If the trustee purchases for himself an encumbrance upon the trust property, the beneficiary can charge him as constructive trustee of the encumbrance, and can compel him to account for any profit which he makes from the purchase. If he purchases the

encumbrance for less than its face value, he cannot enforce it against the trust estate for its full face value, but he is entitled only to receive the amount which he paid for it with interest thereon.

Illustration:

5. A devises Blackacre to B in trust. Blackacre is subject to a first mortgage for \$10,000 and a second mortgage for \$5000. B purchases for himself the second mortgage, paying \$3000 therefor. On the foreclosure of the first mortgage the land is sold for \$16,000. B is entitled only to \$3000 and interest thereon out of the proceeds of the sale.

i. Purchase by trustee individually of property which it is his duty to purchase for the trust. If the trustee purchases for himself individually property which it is his duty to purchase for the trust (see § 170, Comment k), the beneficiary can charge him as constructive trustee of the property so purchased and compel him to hold the property subject to the trust, or, if he has sold it at a profit, to account for the profit.

Illustration:

6. A, the owner of a retail jewelry business, bequeaths all his property to B in trust for C. At the time of A's death the business is carried on in a store leased by A. By the terms of the trust B is directed to purchase the store and to continue to carry on the business there. B accepts the trust. B purchases the store for himself. B can be compelled to hold the store in trust for C, on being reimbursed out of the trust estate for the amount which he paid therefor.

j. Use of trust property for trustee's own purposes. If the trustee in violation of his duty to the beneficiary (see § 170, Comment l) uses trust property for his own purposes and makes a profit thereby, he is accountable for the profit so made. Thus, if he uses trust money in his business, or if he lends trust money to himself and re-lends it to others at a rate of interest higher than that which he pays to the trust estate, he is chargeable with the profit so made.

Illustrations:

7. A is trustee for B of \$100,000. In breach of trust he uses \$10,000 of the trust money in his business as a retail merchant, thereby making a profit of ten per cent. thereon. He is accountable for such profit.

8. A bequeaths \$100,000 to B in trust. B lends on mortgage a part of the money to himself. B invests the money so borrowed and makes a profit thereby. B is accountable for the profit so made.

k. Bonus, commission, or other compensation. If the trustee in violation of his duty to the beneficiary (see § 170, Comment o) receives for himself from a third person any bonus or commission or other compensation for acts done by him in connection with the administration of the trust, he is accountable for the amount so received.

Illustrations:

9. A is trustee of Blackacre. By the terms of the trust he is directed to sell Blackacre. A sells Blackacre to B for \$10,000, and B pays A a bonus of \$500. The beneficiary affirms the sale. A is chargeable with \$500 as well as with the proceeds of the sale.

10. A is trustee of Blackacre. A insures a house on Blackacre with an insurance company of which A is an agent. A receives from the company as compensation for placing the insurance a share of the premium. A is chargeable with the commission which he receives from the company for placing the insurance on the house.

l. Competition with the beneficiary. If the trustee in breach of his duty of loyalty to the beneficiary (see § 170, Comment p) enters into competition with the interest of the beneficiary, causing a loss to the trust estate, he is chargeable with the loss, even though the trustee personally makes no profit from such competition; and if he makes a profit thereby, he is accountable for the profit.

Illustrations:

11. A bequeaths his business as yacht broker to B in trust for C and directs him to carry on the business. This business is a highly competitive one. B establishes nearby a business as yacht broker on his own account, with the result that the business which he holds in trust suffers a loss, although B himself makes no profit. B is liable to C for the loss.

12. A transfers Blackacre and a sum of money to B in trust for C and directs him to develop oil wells on Blackacre. B purchases adjoining land for himself and opens oil wells thereon which deplete the oil from the wells on Blackacre. B can be compelled to hold the adjoining land and any profit which he makes upon a constructive trust for C, on being reimbursed out of the trust estate for his expenditures.

Research References

1. Digest System Key Numbers
Trusts 173.

2. A.L.R. Annotation
Right of trustee of land having interest therein to purchase on his own behalf in association with foreclosure by third-party lienor, in absence of express trust provision. 30 ALR4th 732.

Enforceability of contractual right, in which fiduciary has interest, to purchase property of estate or trust. 6 ALR4th 786.

Validity and construction of trust provision authorizing trustee to purchase trust property. 39 ALR3d 836.

Conclusiveness of allowance of account of trustee or personal representative as respects self-dealing in assets of estate. 1 ALR2d 1060.

Rights and duties of executor, administrator, or testamentary trustee in respect of property antecedently pledged to him by decedent. 154 ALR 203.

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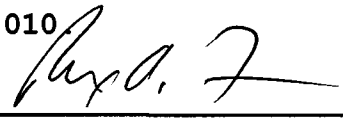
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IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE
 STATE OF IDAHO, IN AND FOR THE COUNTY OF KOOTENAI

KARLETTA GRACE BERRY, a	)	Case No. CV-2007-2409
widow, KARLETTA GRACE BERRY,)	
Personal Representative of	)	PLAINTIFFS SUPPLEMENTAL.
the Estate of Jerry Lee Roy	)	REQUESTED JURY INSTRUCTIONS
Berry, CAPTAIN'S WHEEL	)	and REQUESTED FORM OF
RESORT, INC., an Idaho	)	SPECIAL VERDICT(S)
Corporation,)	
)	
Plaintiffs,)	
)	
v.)	
)	
MICHAEL B. MCFARLAND,)	
MICHAEL B. MCFARLAND, P.A.,)	
and KAREN ZIMMERMAN,)	
)	
Defendants.)	

COME NOW, the Plaintiffs, by and through counsel, REX
 A. FINNEY, Finney Finney & Finney, P.A., and submits the
 Plaintiffs' SUPPLEMENTAL Requested Jury Instructions and
 proposed verdict.

DATED this 26 day of January, 2010



 REX A. FINNEY
 Attorney for Plaintiffs

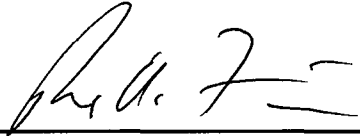
CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was served as indicated, this 26 day of January, 2010, and was addressed as follows:

J.P. WHELAN P.C.
Attorney at law
Hand delivery

The Honorable Charles Hosack
Chamber's Copy
(Via e-mail: cw.hosack@gmail.com)

AND (Via e-mail jpwhelanattorney@yahoo.com)



Evidence may be either direct or circumstantial. Direct evidence is evidence that directly proves a fact. Circumstantial evidence is evidence that indirectly proves the fact, by proving one or more facts from which the fact at issue may be inferred.

The law makes no distinction between direct and circumstantial evidence as to the degree of proof required; each is accepted as a reasonable method of proof and each is respected for such convincing force as it may carry.

_____ GIVEN
_____ REFUSED
_____ MODIFIED
_____ COVERED
_____ OTHER

IDJI 1.24.2

PLAINTIFFS' PROPOSED INSTRUCTION NO. _____

Whether an attorney-client relationship exists is a question for the trier of fact.

_____ GIVEN
_____ REFUSED
_____ MODIFIED
_____ COVERED
_____ OTHER

O'Neil v. Vasseur, 118 Idaho 257, 262, 796 P.2d 134, 139 (Idaho App., 1990)

PLAINTIFFS' PROPOSED INSTRUCTION NO. _____

The attorney-client relationship may be established not only by a technical business association between an attorney and client, but also through informal personal relationships which engender trust and confidence by one in another.

_____ GIVEN
_____ REFUSED
_____ MODIFIED
_____ COVERED
_____ OTHER

Cause of Action 1 (2006) § 5

PLAINTIFFS' PROPOSED INSTRUCTION NO. _____

Usually the payment of a fee or retainer is evidence of an attorney-client relationship, but it is not necessary.

_____ GIVEN
_____ REFUSED
_____ MODIFIED
_____ COVERED
_____ OTHER

Stuart v. State, 118 Idaho 932, 934, 801 P.2d 1283, 1285 (Idaho,1990)

PLAINTIFFS' PROPOSED INSTRUCTION NO. _____

An attorney-client relationship can be established when the attorney is sought for assistance in matters pertinent to his profession.

_____ GIVEN
_____ REFUSED
_____ MODIFIED
_____ COVERED
_____ OTHER

Stuart v. State, 118 Idaho 932, 934, 801 P.2d 1283, 1285
(Idaho, 1990)

PLAINTIFFS' PROPOSED INSTRUCTION NO. _____

Where attorney-client relationship exists, attorney's actions in name of friendship are bound by rule that attorney must make full disclosure when engaging in business transaction with client.

_____ GIVEN
_____ REFUSED
_____ MODIFIED
_____ COVERED
_____ OTHER

In re May, 538 P.2d 787, (Idaho,1975)

PLAINTIFFS' PROPOSED INSTRUCTION NO. _____

The relationship between an attorney and client is a fiduciary relationship of the highest character, binding the attorney with the strictest accountability and fidelity to his client's interests.

_____ GIVEN
_____ REFUSED
_____ MODIFIED
_____ COVERED
_____ OTHER

In re Carter, 86 P.2d 162

PLAINTIFFS' PROPOSED INSTRUCTION NO. _____

Attorneys owe fundamental duties to their clients. Among the most important of these duties are the duties of zealous representation and loyalty.

_____ GIVEN
_____ REFUSED
_____ MODIFIED
_____ COVERED
_____ OTHER

Heinze v. Bauer, 145 Idaho 232, 238, 178 P.3d 597, 603
(Idaho, 2008)

PLAINTIFFS' PROPOSED INSTRUCTION NO. _____

Lawyers have an overriding duty of zealous representation of a client's interest and an obligation to put their clients' interests ahead of their own.

_____ GIVEN
_____ REFUSED
_____ MODIFIED
_____ COVERED
_____ OTHER

Heinze v. Bauer, 145 Idaho 232, 238, 178 P.3d 597, 603
(Idaho, 2008)

PLAINTIFFS' PROPOSED INSTRUCTION NO. _____

As a matter of law, an attorney owes his client a duty to use and exercise reasonable care, skill, discretion, and judgment in the representation.

_____ GIVEN
_____ REFUSED
_____ MODIFIED
_____ COVERED
_____ OTHER

Sun Valley Potatoes, Inc. v. Rosholt, Robertson & Tucker, 133 Idaho 1, 4, 981 P.2d 236, 239 (Idaho, 1999)

PLAINTIFFS' PROPOSED INSTRUCTION NO. _____

The relationship of client and attorney is one of trust, binding an attorney to the utmost good faith in fair dealing with his client, and obligating the attorney to discharge that trust with complete fairness, honor, honesty, loyalty, and fidelity.

_____ GIVEN
_____ REFUSED
_____ MODIFIED
_____ COVERED
_____ OTHER

Blough v. Wellman, 132 Idaho 424, 426, 974 P.2d 70, 72 (Idaho,1999)

Beal v. Mars Larsen Ranch Corp., Inc., 586 P.2d 1378 (Idaho,1978)

Benting v. Spanbauer, 58 Idaho 44, 69 P.2d 983 (1937)

PLAINTIFFS' PROPOSED INSTRUCTION NO. _____

If an attorney enters into an attorney-client relationship with a client in regard to certain property, the attorney is not allowed to buy the opposing title to the property, without holding it in trust for the client.

_____ GIVEN
_____ REFUSED
_____ MODIFIED
_____ COVERED
_____ OTHER

Ainsworth, et al. v. Harding, 22 Idaho 645, 128 P. 92
Idaho Rules of Professional Conduct 1.7, 1.8

PLAINTIFFS' PROPOSED INSTRUCTION NO. _____

The confidence reposed in the attorney by the client is so carefully guarded by the law that it places the burden of proving the entire fairness of a pecuniary transactions between the attorney and the client upon the attorney.

_____ GIVEN
_____ REFUSED
_____ MODIFIED
_____ COVERED
_____ OTHER

Ainsworth, et al. v. Harding, 22 Idaho 645, 128 P. 92

PLAINTIFFS' PROPOSED INSTRUCTION NO. _____

The law imposes fiduciary obligations on the parties when the parties are partners, attorney and client, or close friends.

_____ GIVEN
_____ REFUSED
_____ MODIFIED
_____ COVERED
_____ OTHER

Gray v. Tri-Way Const. Services, Inc., 210 P.3d 63, 71 (Idaho, 2009)

PLAINTIFFS' PROPOSED INSTRUCTION NO. _____

For a breach or violation of an attorney's professional duties, the client may hold the attorney liable or accountable.

_____ GIVEN
_____ REFUSED
_____ MODIFIED
_____ COVERED
_____ OTHER

Blough v. Wellman, 132 Idaho 424, 426, 974 P.2d 70, 72
(Idaho, 1999)

PLAINTIFFS' PROPOSED INSTRUCTION NO. _____

A director of a corporation has a fiduciary responsibility
to both the corporation and to the corporations shareholders.

_____ GIVEN
_____ REFUSED
_____ MODIFIED
_____ COVERED
_____ OTHER

Steelman v. Mallory, 110 Idaho 510

PLAINTIFFS' PROPOSED INSTRUCTION NO. _____

As fiduciaries, corporate directors are bound to exercise
the utmost good faith in managing the corporation.

_____ GIVEN
_____ REFUSED
_____ MODIFIED
_____ COVERED
_____ OTHER

Steelman v. Mallory, 110 Idaho 510

PLAINTIFFS' PROPOSED INSTRUCTION NO. _____

A person or corporation may recover damages from an attorney for breach of fiduciary duty even though there is no attorney-client relationship between them, if it is shown that the defendant assumed a fiduciary duty to the plaintiff.

_____ GIVEN
_____ REFUSED
_____ MODIFIED
_____ COVERED
_____ OTHER

Taylor v. Maile 142 Idaho 253, 259, 127 P.3d 156, 162 (Idaho,2005)

PLAINTIFFS' PROPOSED INSTRUCTION NO. _____

Breach of fiduciary duty and attorney malpractice are
"torts" and can be based upon intentional reckless or negligent
acts.

_____ GIVEN
_____ REFUSED
_____ MODIFIED
_____ COVERED
_____ OTHER

PLAINTIFFS' PROPOSED INSTRUCTION NO. _____

Where several people actively participate in any manner in the commission of a tort, not only the actual actor or assailant is liable but all others who aid, abet, counsel or encourage the wrongdoer by words, gestures, looks or signs are equally liable with him to the injured person.

_____ GIVEN
_____ REFUSED
_____ MODIFIED
_____ COVERED
_____ OTHER

Todd v. Sullivan Const. LLC 146 Idaho 118, 125, 191 P.3d 196, 203 (Idaho, 2008)

PLAINTIFFS' PROPOSED INSTRUCTION NO. _____

A party shall be jointly and severally liable for the fault of another person where they were acting in concert or when a person was acting as an agent or servant of another party. As used in this section, "acting in concert" means pursuing a common plan or design which results in the commission of an intentional or reckless tortious act.

_____ GIVEN
_____ REFUSED
_____ MODIFIED
_____ COVERED
_____ OTHER

Idaho Code § 6-803(5)

Horner v. Sani-Top, Inc. 143 Idaho 230, 235, 141 P.3d 1099,
1104 (Idaho, 2006)

PLAINTIFFS' PROPOSED INSTRUCTION NO. _____

On the Plaintiffs' claim of breach of fiduciary duty against the Defendant Directors of the Captain's Wheel Resort, Inc. the Plaintiffs have the burden of proof on each of the following propositions:

- (1) the existence of a fiduciary duty between the Plaintiffs and Defendants;
- (2) breach of the fiduciary duty by the Defendant directors;
- (3) the breach of the duty either caused injury to the Plaintiffs or benefited the Defendants.

You will be asked the following question on the jury verdict form:

Are the Plaintiffs entitled to recover damages from the Defendants on their claim of breach of fiduciary duty by directors of the Captain's Wheel Resort, Inc.?

ANSWER: YES _____ NO _____

If you find a breach of fiduciary duty by directors of the Captain's Wheel Resort, Inc. answer if it was intentional, reckless, or negligent?

ANSWER: INTENTIONAL _____
RECKLESS _____
NEGLIGENT _____

_____ GIVEN
_____ REFUSED
_____ MODIFIED
_____ COVERED
_____ OTHER

IDJI 1.41.2 - Charging instruction, plaintiffs case, verdict on special interrogatories

PLAINTIFFS' PROPOSED INSTRUCTION NO. _____

On Plaintiffs' claim of breach of fiduciary duty by attorney, the Plaintiffs have the burden of proof on each of the following propositions:

- (1) the existence of an attorney-client relationship between the Plaintiff and the attorney defendant;
- (2) a transaction between the attorney and the client;
- (3) a breach of the fiduciary duty, and;
- (4) the breach of the duty either caused injury to the Plaintiff or benefited the attorney.

You will be asked the following question on the jury verdict form:

Are the Plaintiff entitled to recover damages from the Defendants on their claim of breach of fiduciary duty by attorney?

ANSWER: YES _____ NO _____

If you find a breach of fiduciary duty by attorney, answer if it was intentional, reckless, or negligent?

ANSWER: INTENTIONAL _____
RECKLESS _____
NEGLIGENT _____

_____ GIVEN
_____ REFUSED
_____ MODIFIED
_____ COVERED
_____ OTHER

IDJI 1.41.2 - Charging instruction, plaintiffs case, verdict on special interrogatories

PLAINTIFFS' PROPOSED INSTRUCTION NO. ____

On Plaintiffs' claim for attorney malpractice against the Defendants, the Plaintiffs have the burden of proof on each of the following propositions:

1. the creation of an attorney-client relationship;
2. the existence of a duty on the part of the lawyer;
3. the breach of the duty or the standard of care by the lawyer; and
4. that the failure to perform the duty was a proximate cause of the damages suffered by the client.

You will be asked the following question on the jury verdict form: Are the Plaintiffs entitled to recover damages from the Defendants on their claim of attorney malpractice?

ANSWER: YES _____ No _____

If you find attorney malpractice, answer if it was intentional, reckless, or negligent?

ANSWER: INTENTIONAL _____
 RECKLESS _____
 NEGLIGENT _____

_____ GIVEN
 _____ REFUSED
 _____ MODIFIED
 _____ COVERED
 _____ OTHER

Spur Products Corp. v. Stoel Rives, LLP, 142 Idaho 41, 44-45, 122 P.3d 300, 303-304 (Idaho,2005)

PLAINTIFFS' PROPOSED INSTRUCTION NO. _____

The term property includes within its definition, stock in a corporation.

_____ GIVEN
_____ REFUSED
_____ MODIFIED
_____ COVERED
_____ OTHER

PLAINTIFFS' PROPOSED INSTRUCTION NO. _____

As used in these instructions, the term "person" includes a "corporation" and a "professional association".

_____ GIVEN
_____ REFUSED
_____ MODIFIED
_____ COVERED
_____ OTHER

PLAINTIFFS' PROPOSED INSTRUCTION NO. _____

A person owing a fiduciary duty who breaches that duty is chargeable with the amount required to restore the value of the property to what it would have been if the property had been properly administered by the person owing the fiduciary duty.

- _____ GIVEN
- _____ REFUSED
- _____ MODIFIED
- _____ COVERED
- _____ OTHER

Restatement (Third) of Trusts, P.I.R. § 205 (1992)

PLAINTIFFS' PROPOSED INSTRUCTION NO. _____

A person who commits a breach of fiduciary duty is subject to such liability as necessary to prevent the person owing the fiduciary duty from benefiting personally from the breach of fiduciary duty.

_____ GIVEN
_____ REFUSED
_____ MODIFIED
_____ COVERED
_____ OTHER

Restatement (Third) of Trusts, P.I.R. § 205 (1992)

PLAINTIFFS' PROPOSED INSTRUCTION NO. _____

Duty of Loyalty: A person with a fiduciary duty must administer property solely in the interest of the person he owes a fiduciary duty to.

If a fiduciary duty of loyalty is breached, the person owing the fiduciary duty is chargeable with:

- (1) any loss or depreciation in value of the property resulting from the breach of duty;
- (2) any profit which would have accrued to the person owed the fiduciary duty if there had been no breach of duty.

_____ GIVEN
_____ REFUSED
_____ MODIFIED
_____ COVERED
_____ OTHER

Restatement (Third) of Trusts, § 206 (1992), comment a

PLAINTIFFS' PROPOSED INSTRUCTION NO. _____

A person owing a fiduciary duty, breaches that duty if he buys property from the person he owes a fiduciary duty to, or if he has a personal interest in the purchase of such a substantial nature that it might affect his judgment in buying from the person he owes a fiduciary duty to.

If the person owing a fiduciary duty, in breach of that duty purchases property from the person he owes a fiduciary duty to, and the price paid by person owing the fiduciary duty is less than the value of the property at that time, the person owed a fiduciary duty can compel the person breaching the fiduciary duty to pay him the difference between the fair market value and the price paid.

_____ GIVEN
_____ REFUSED
_____ MODIFIED
_____ COVERED
_____ OTHER

Restatement (Third) of Trusts, P.I.R. § 206 (1992), comment b

PLAINTIFFS' REQUESTED INSTRUCTION NO. _____

When I use the term "value" or the phrase "fair market value" or "actual cash value" in these instructions as to any item of property, I mean the amount of money that a willing buyer would pay and a willing seller would accept for the item in question in an open marketplace, in the item's condition as it existed immediately prior to the occurrence in question.

_____ GIVEN
_____ REFUSED
_____ MODIFIED
_____ COVERED
_____ OTHER

IDJI 9.12 - "Value" or "fair market value" defined

PLAINTIFFS' PROPOSED INSTRUCTION NO. ____

In determining the fair market value of property, you may consider not only the opinions of the various witnesses who testified as to market value, but also all other evidence in the case which may aid in determining market value, such as location of the property, the surroundings and general environment, any peculiar suitability of the property for particular uses, and the reasonable probabilities as to future potential uses, if any, for which the property is or would be suitable or physically adaptable, all as shown by the evidence in the case to have existed on July 4, 2006.

_____ GIVEN
_____ REFUSED
_____ MODIFIED
_____ COVERED
_____ OTHER

IDJI 7.07 - Fair market value - factors to be considered

PLAINTIFFS' PROPOSED INSTRUCTION NO. _____

If the jury decides the Plaintiffs are entitled to recover from the Defendants on the claim for breach of fiduciary duty as directors of the Captains Wheel Resort, Inc., the jury must determine the amount of money that will reasonably and fairly compensate the Plaintiffs for any damages proved to be proximately caused by the Defendants' breach of fiduciary duty.

The elements of damage the jury may consider are:

1. The difference between the fair market value of the shares of stock issued to Monnie Cripe and Marie Streeter and the actual amount paid for that stock.
2. any loss or depreciation in value of the property resulting from the breach of duty;
3. any profit which would have accrued to the person owed the fiduciary duty if there had been no breach of duty.
4. The amount necessary to make the Plaintiffs whole for the Defendants' mis-management of the Captain's Wheel Resort, Inc.;
5. Reasonable value of goods and services received by the Defendants from the Captain's Wheel Resort, Inc. which were not paid for;
6. Reasonable value of goods and services given away from the Captain's Wheel Resort, Inc. by the Defendants;
7. Any other specific item based upon the evidence.
8. Any incidental or consequential damage suffered by the Plaintiff that is within the foreseeable chain of proximate causation.

_____ GIVEN
_____ REFUSED
_____ MODIFIED
_____ COVERED
_____ OTHER

IDJI 9.01 - Damage instruction for injuries to plaintiff - general case

PLAINTIFFS' PROPOSED INSTRUCTION NO. ____

If the jury decides the Plaintiffs are entitled to recover from the Defendants on the claim for breach of fiduciary duty by attorney, the jury must determine the amount of money that will reasonably and fairly compensate the Plaintiffs for any damages proved to be proximately caused by the Defendants breach of fiduciary duty by attorney.

The elements of damage the jury may consider are:

1. The difference between the price Michael McFarland and Karen Zimmerman paid for the stock of the Captain's Wheel Resort, Inc and the actual value of the stock purchased.

2. The difference between the fair market value of the shares of stock issued to Monnie Cripe and Marie Streeter and the actual amount paid for that stock.

3. any loss or depreciation in value of the property resulting from the breach of duty;

4. any profit which would have accrued to the person owed the fiduciary duty if there had been no breach of duty.

5. The amount necessary to make the Plaintiffs whole for the Defendants' mis-management of the Captain's Wheel Resort, Inc.;

6. Reasonable value of goods and services received by the Defendants from the Captain's Wheel Resort, Inc. which were not paid for;

7. Reasonable value of goods and services given away from the Captain's Wheel Resort, Inc. by the Defendants;

8. Any other specific item based upon the evidence.

9. Any incidental or consequential damage suffered by the Plaintiff that is within the foreseeable chain of proximate causation.

Whether the Plaintiffs have proved any of these elements is for the jury to decide.

____ GIVEN
____ REFUSED
____ MODIFIED
____ COVERED
____ OTHER

IDJI 9.01 - Damage instruction for injuries to plaintiff - general case

PLAINTIFFS' PROPOSED INSTRUCTION NO. _____

If the jury decides the Plaintiffs are entitled to recover from the Defendants for Attorney Malpractice, the jury must determine the amount of money that will reasonably and fairly compensate the Plaintiffs for any damages proved to be proximately caused by the Attorney Malpractice.

The elements of damage the jury may consider are:

1. The difference between the price Michael McFarland and Karen Zimmerman paid for the stock of the Captain's Wheel Resort, Inc and the actual value of the stock purchased.

2. The difference between the fair market value of the shares of stock issued to Monnie Cripe and Marie Streeter and the actual amount paid for that stock.

3. any loss or depreciation in value of the property resulting from the breach of duty;

4. any profit which would have accrued to the person owed the fiduciary duty if there had been no breach of duty.

5. The amount necessary to make the Plaintiffs whole for the Defendants' mis-management of the Captain's Wheel Resort, Inc.;

6. Reasonable value of goods and services received by the Defendants from the Captain's Wheel Resort, Inc. which were not paid for;

7. Reasonable value of goods and services given away from the Captain's Wheel Resort, Inc. by the Defendants;

8. Any other specific item based upon the evidence.

9. Any incidental or consequential damage suffered by the Plaintiff that is within the foreseeable chain of proximate causation.

Whether the Plaintiffs have proved any of these elements is for the jury to decide.

_____ GIVEN
_____ REFUSED
_____ MODIFIED
_____ COVERED
_____ OTHER

IDJI 9.01 - Damage instruction for injuries to plaintiff - general case

PLAINTIFFS' PROPOSED INSTRUCTION NO. _____

The usual measure of damages in an action for breach of fiduciary duty by a corporate director is the profit which the director received and which the corporation was deprived of by the transaction.

_____ GIVEN
_____ REFUSED
_____ MODIFIED
_____ COVERED
_____ OTHER

Steelman v. Mallory, 110 Idaho 510

PLAINTIFFS' PROPOSED INSTRUCTION NO. _____

If the jury decides the Plaintiffs are entitled to recover from the Defendants for Attorney Malpractice, the jury must determine the amount of money that will reasonably and fairly compensate the Plaintiffs for any damages proved to be proximately caused by the Attorney Malpractice.

The elements of damage the jury may consider are:

1. The difference between the price Michael McFarland and Karen Zimmerman paid for the stock of the Captain's Wheel Resort, Inc and the actual value of the stock purchased.

2. The difference between the fair market value of the shares of stock issued to Monnie Cripe and Marie Streeter and the actual amount paid for that stock.

3. any loss or depreciation in value of the property resulting from the breach of duty;

4. any profit which would have accrued to the person owed the fiduciary duty if there had been no breach of duty.

5. The amount necessary to make the Plaintiffs whole for the Defendants' mis-management of the Captain's Wheel Resort, Inc.;

6. Reasonable value of goods and services received by the Defendants from the Captain's Wheel Resort, Inc. which were not paid for;

7. Reasonable value of goods and services given away from the Captain's Wheel Resort, Inc. by the Defendants;

8. Any other specific item based upon the evidence.

9. Any incidental or consequential damage suffered by the Plaintiff that is within the foreseeable chain of proximate causation.

Whether the Plaintiffs have proved any of these elements is for the jury to decide.

- _____ GIVEN
- _____ REFUSED
- _____ MODIFIED
- _____ COVERED
- _____ OTHER

IDJI 9.01 - Damage instruction for injuries to plaintiff - general case

PLAINTIFFS' PROPOSED INSTRUCTION NO. _____

The usual measure of damages in an action for breach of fiduciary duty by a corporate director is the profit which the director received and which the corporation was deprived of by the transaction.

_____ GIVEN
_____ REFUSED
_____ MODIFIED
_____ COVERED
_____ OTHER

Steelman v. Mallory, 110 Idaho 510

PLAINTIFFS' PROPOSED INSTRUCTION NO. _____

If a grantor is unduly influenced, he does not have the requisite intent to transfer property. The transfer is voidable.

_____ GIVEN
_____ REFUSED
_____ MODIFIED
_____ COVERED
_____ OTHER

Krebs v. Krebs 114 Idaho 571, 575-576, 759 P.2d 77, 81 -
82 (Idaho App., 1988)

To establish undue influence, the party must prove each of the following propositions:

- (1) a grantor who is subject to influence;
- (2) an opportunity to exert undue influence;
- (3) a disposition to exert undue influence;
- (4) a result indicating undue influence

Undue influence must usually be inferred from circumstantial evidence. Factors to be considered include the age and physical and mental condition of the grantor, whether he or she received disinterested advice in the transaction, the providence or improvidence of the decision, the amount or adequacy of consideration for any contract made, distress of the person influenced, his or her predisposition to make the transfer in question, the extent of the transfer in relation to his or her whole worth, failure to provide for one's children in the event of a transfer, active solicitation by the grantee, and the relationship of the parties.

If the parties to the transaction occupied a confidential or fiduciary relationship, and the transfer is to the fiduciary, a rebuttable presumption of undue influence arises, which the proponent of the transaction must refute.

_____ GIVEN
_____ REFUSED
_____ MODIFIED
_____ COVERED
_____ OTHER

Krebs v. Krebs 114 Idaho 571, 575-576, 759 P.2d 77, 81 - 82 (Idaho App., 1988)

PLAINTIFFS' REQUESTED INSTRUCTION NO. ____

When I use the expression "proximate cause," I mean a cause that, in natural or probable sequence, produced the injury, the loss or the damage complained of. It need not be the only cause. It is sufficient if it is a substantial factor in bringing about the injury, loss or damage. It is not a proximate cause if the injury, loss or damage likely would have occurred anyway.

There may be one or more proximate causes of an injury. When the conduct of two or more persons or entities contributes concurrently as substantial factors in bringing about an injury, the conduct of each may be a proximate cause of the injury regardless of the extent to which each contributes to the injury.

_____ GIVEN
_____ REFUSED
_____ MODIFIED
_____ COVERED
_____ OTHER

IDJI 2.30.2 - Proximate cause - "substantial factor," without "but for" test.

INSTRUCTION NO. _____

In this case, you will be given a special verdict form to use in returning your verdict. This form consists of a series of questions that you are to answer. I will read the verdict form to you now.

Question No. 1. Are the Plaintiffs entitled to recover damages from the Defendants on their claim of BREACH OF FIDUCIARY DUTY BY DEFENDANTS AS DIRECTORS OF THE CAPTAIN'S WHEEL RESORT, INC.? ANSWER:

YES _____ No _____

If so, how much: \$ _____.

Question No. 2. Are the Plaintiffs entitled to recover damages from the Defendants on their claim of BREACH OF FIDUCIARY DUTY BY ATTORNEY?

ANSWER: YES _____ No _____

If so, how much: \$ _____.

Question No. 3. Are the Plaintiffs entitled to recover damages from the Defendants on their claim of ATTORNEY MALPRACTICE?

ANSWER: YES _____ No _____

If so, how much: \$ _____.

Question No. 4. Do you find undue influence when Jerry Berry entered into the Stock Purchase and Sale Agreement with Michael McFarland and Karen Zimmerman?

ANSWER: YES _____ No _____

- _____ GIVEN
- _____ REFUSED
- _____ MODIFIED
- _____ COVERED
- _____ OTHER

PLAINTIFFS' PROPOSED INSTRUCTION NO. _____

If you find that Defendants' acts which proximately caused injury to the Plaintiffs were an extreme deviation from reasonable standards of conduct and that these acts were performed by the defendant with malice, fraud, oppression, wantonness or gross negligence, you may, in addition to any compensatory damages to which you find the plaintiff entitled, award to plaintiff an amount which will punish the defendant and deter the defendant and others from engaging in similar conduct in the future.

_____ GIVEN
_____ REFUSED
_____ MODIFIED
_____ COVERED
_____ OTHER

IDJI 9.20 - Punitive damages

PLAINTIFFS' PROPOSED INSTRUCTION NO. _____

Punitive damages are not a matter of right, but may be awarded in the jury's sound discretion, which is to be exercised without passion or prejudice. The law provides no mathematical formula by which such damages are to be calculated, other than any award of punitive damages must bear a reasonable relation to the actual harm done, to the cause thereof, to the conduct of the defendant, and to the primary objective of deterrence.

_____ GIVEN
_____ REFUSED
_____ MODIFIED
_____ COVERED
_____ OTHER

Comments:

See Robinson v. State Farm Insurance, 137 Idaho 173, 45 P.3d 829 (2002).

PLAINTIFFS' PROPOSED INSTRUCTION NO. _____

You have been permitted to hear evidence pertaining to defendant's wealth and financial condition. This evidence was admitted for your consideration only with reference to the question of punitive damages in light of all other evidence before you if you determine that such an award should be made in this case.

Punitive damages are not a matter of right, but may be awarded in the jury's sound discretion, which is to be exercised without passion or prejudice. The law provides no mathematical formula by which such damages are to be calculated, other than any award of punitive damages must bear a reasonable relation to the actual harm done, to the cause thereof, to the conduct of the defendant, and to the primary objective of deterrence.

- _____ GIVEN
- _____ REFUSED
- _____ MODIFIED
- _____ COVERED
- _____ OTHER

IDJI 9.20.5 - Punitive damages - consideration of defendant's wealth
Robinson v. State Farm Insurance, 137 Idaho 173, 45 P.3d 829 (2002).

QUESTION # 1: We the jury find that entry into the STOCK PURCHASE AND SALE AGREEMENT between *JERRY LEE ROY BERRY* as "Seller" and *KAREN M. ZIMMERMAN* and *MICHAEL B. MCFARLAND* as "Buyers" on July 4, 2006 was a Breach of Fiduciary Duty owed to *JERRY LEE ROY BERRY* as a result of the attorney client relationship between *JERRY LEE ROY BERRY* and *MICHAEL B. MCFARLAND*.

_____ YES _____ NO

Question # 2: If your answer to question # 1 is NO, do not answer question # 2 or Question No. 3, skip to question # 4.

If your answer to Question #1 was "NO", skip to Question #5.

QUESTION #2: We the jury find that *MICHAEL B. MCFARLAND* and *KAREN ZIMMERMAN* are entitled to recover a loan in the amount of \$100,000.00 from the ESTATE OF *JERRY LEE ROY BERRY*.

_____ YES: the Defendants are entitled to recover the loan of \$100,000.00.

_____ NO: the Defendants are not entitled to recover \$100,000.00 because the loan was a breach of fiduciciary duty owed by an attorney.

If your answer to Question #2 was "NO", skip to Question #5.

QUESTION #3: Are the Defendants entitled to recover interest on the \$100,000.00 loaned to *JERRY LEE ROY BERRY*?

_____ YES _____ NO

If your answer to Question #3 was "NO", skip to Question #5.

QUESTION #4: If the Defendants are entitled to recover the \$100,000.00 amount of the loan, and your answer to Question # 3 was "yes" what rate of interest are they entitled to receive and from what date?

Interest rate _____ Date interest starts _____

QUESTION #5: Was the \$_____ claimed to be advanced to the CAPTAIN'S WHEEL RESORT INC. by MCFARLAND and claimed as a charge against the CAPTAIN'S WHEEL RESORT INC. by MCFARLAND made as a cause of MCFARLAND's breach of his fiduciary duty as Director by failing to exercise he utmost good faith in managing he CAPTAIN'S WHEEL RESORT, INC?

_____ YES, the charge made by MCFARLAND against the Captain's Wheel Resort was made as a result of his breach of fiduciary duty owed to the Captain's Wheel Resort as director and he is not entitled to recover the amount.

_____ NO, the charge made by McFarland against the Captain's Wheel Resort was not made as a result of a breach of fiduciary duty and McFarland is entitled to recover the amount he is charging against the CAPTAIN'S WHEEL RESORT INC.

If your answer to Question #5 is NO, How much is MCFARLAND entitled to recover? \$_____.

- _____ GIVEN
- _____ REFUSED
- _____ MODIFIED
- _____ COVERED
- _____ OTHER

IF the jury decides the Plaintiffs KARLETTA GRACE BERRY and KARLETTA GRACE BERRY, Personal Representative of the Estate of Jerry Lee Roy Berry, are entitled to recover money damages from the Defendants on the claim for breach of fiduciary duty by MICHAEL B. MCFARLAND and MICHAEL B. MCFARLAND, P.A. as attorney for JERRY LEE ROY BERRY:

THEN the jury must determine the amount of money that will reasonably and fairly compensate the Plaintiffs for any damages proved to be proximately caused by the Defendants breach of fiduciary duty by attorney.

The elements of damage the jury may consider are:

1. The difference between the price Michael McFarland and Karen Zimmerman paid for the stock of the Captain's Wheel Resort, Inc and the actual value of the stock purchased.
2. Any other specific item based upon the evidence.
3. Any incidental or consequential damage suffered by the Plaintiff that is within the foreseeable chain of proximate causation.

Whether the Plaintiffs have proved any of these elements is for the jury to decide.

Restatement (Third) of Trusts, P.I.R. § 205 & §206 (1992)

_____ GIVEN
_____ REFUSED
_____ MODIFIED
_____ COVERED
_____ OTHER

PLAINTIFFS' PROPOSED INSTRUCTION NO. _____

IF the jury decides the Plaintiffs KARLETTA GRACE BERRY and KARLETTA GRACE BERRY, Personal representative of the Estate of Jerry Lee Roy Berry, are entitled to recover money damages from the Defendants on the claim for breach of fiduciary duty by MICHAEL B. MCFARLAND and KAREN ZIMMERMAN, as DIRECTORS of THE CAPTAIN'S WHEEL RESORT, INC.

THEN the jury must determine the amount of money that will reasonably and fairly compensate the Plaintiffs for any damages proved to be proximately caused by the Defendants breach of fiduciary duty owed as DIRECTORS of THE CAPTAIN'S WHEEL RESORT, INC.

The elements of damage the jury may consider are:

1. ONE HALF ($\frac{1}{2}$) of the difference between the fair market value of the shares of stock issued to Monnie Cripe and Marie Streeter and the actual amount received by the CAPTAIN'S WHEEL RESORT.

2. ONE HALF ($\frac{1}{2}$) of any loss or depreciation in value of the property resulting from the breach of duty;

3. ONE HALF of any profit which would have accrued to the person owed the fiduciary duty if there had been no breach of duty.

4. ONE HALF ($\frac{1}{2}$) of the amount of the charge made by MCFARLAND against the CAPTAIN'S WHEEL RESORT, INC. for money he advanced to the CAPTAIN'S WHEEL RESORT, INC. because the advance of money was caused by a breach of MCFARLAND'S fiduciary duty by failing to exercise he utmost good faith in managing he CAPTAIN'S WHEEL RESORT, INC.

5. ONE HALF ($\frac{1}{2}$) of the amount necessary to make the Plaintiffs whole for the Defendants' mis-management of the Captain's Wheel Resort, Inc.;

6. Any other specific item based upon the evidence.

7. Any incidental or consequential damage suffered by the Plaintiff that is within the foreseeable chain of proximate causation.

Whether the Plaintiffs have proved any of these elements is for the jury to decide.

_____ GIVEN
_____ REFUSED
_____ MODIFIED
_____ COVERED
_____ OTHER

IDJI 9.01 - Damage instruction for injuries to plaintiff - general case

FILED 1/28/10 AT 2:00 P.M.
STATE OF IDAHO, COUNTY OF KOOTENAI SS
CLERK OF THE DISTRICT COURT
BY [Signature] DEPUTY TMB

FIRST JUDICIAL DISTRICT COURT, STATE OF IDAHO
IN AND FOR THE COUNTY OF KOOTENAI
324 W. GARDEN AVENUE
COEUR D'ALENE, IDAHO 83814

KARLETTA GRACE BERRY, widow,)
KARLETTA GRACE BERRY, Personal)
Representative of the Estate of Jerry)
Lee Roy Berry,)

Case No: CV-2007-0002409

Plaintiffs,)

JURY INSTRUCTIONS GIVEN

vs.)

MICHAEL B MCFARLAND, MICHAEL B.)
MCFARLAND, P.A., and KAREN)
ZIMMERMAN,)

Defendant.)

Attached hereto are the jury instructions given on the trial of the above captioned matter, as Instruction No. 1 through .

Copies have been given to counsel of record.

DATED this 27 day of January, 2010.

[Signature]
CHARLES W. HOSACK
DISTRICT JUDGE

INSTRUCTION NO. 1

These instructions explain your duties as jurors and define the law that applies to this case. It is your duty to determine the facts, to apply the law set forth in these instructions to those facts, and in this way to decide the case. Your decision should be based upon a rational and objective assessment of the evidence. It should not be based on sympathy or prejudice.

It is my duty to instruct you on the points of law necessary to decide the case, and it is your duty to follow the law as I instruct. You must consider these instructions as a whole, not picking out one and disregarding others. The order in which these instructions are given or the manner in which they are numbered has no significance as to the importance of any of them. If you do not understand an instruction, you may send a note to me through the bailiff, and I will try to clarify or explain the point further.

In determining the facts, you may consider only the evidence admitted in this trial. This evidence consists of the testimony of the witnesses, the exhibits admitted into evidence, and any stipulated or admitted facts. While the arguments and remarks of the attorneys may help you understand the evidence and apply the instructions, what they say is not evidence. If an attorney's argument or remark has no basis in the evidence, you should disregard it.

The production of evidence in court is governed by rule of law. At times during the trial, I sustained an objection to a question without permitting the witness to answer it, or to an offered exhibit without receiving it into evidence. My rulings are legal matters, and are solely my responsibility. You must not speculate as to the reason for any objection, which was made, or my ruling thereon, and in reaching your decision you may not consider such a question or exhibit or speculate as to what the answer or exhibit would have shown. Remember, a question is not evidence and should be considered only as it gives meaning to the answer.

There may be occasions where an objection will be made after an answer was given or the remark was made, and in my ruling on the objection may instruct that the answer or remark be stricken, or directed that you disregard the answer or remark and dismiss it from your minds. In your deliberations, you must not consider such answer or remark, but must treat it as though you had never heard it.

The law does not require you to believe all of the evidence admitted in the course of the trial. As the sole judges of the facts, you must determine what evidence you believe and what weight you attach to it. In so doing, you bring with you to this courtroom all of the experience and background of your lives. There is no magical formula for evaluating testimony. In your everyday affairs, you determine for yourselves whom you believe, what you believe and how much weight you attach to what you are told. The considerations you use in making the more important decisions in your everyday dealings are the same considerations you should apply in your deliberations in this case.

INSTRUCTION NO. 2

The claims of the Plaintiffs are as follows:

Jerry Lee Roy Berry died on November 4, 2006. Karletta Grace Berry is Jerry Lee Roy Berry's surviving widow.

Jerry Lee Roy Berry and Karletta Berry were husband and wife and the owners of the Captain's Wheel Resort, Inc., an Idaho Corporation.

The Captain's Wheel Resort, owns land on Lake Pend O Reille where it operates a bar and restaurant together with a dock with boat slips, and a parking lot across the street.

Michael B. McFarland and Karen Zimmerman are engaged to be married.

Plaintiffs claim that Michael B. McFarland and his law firm Michael B. McFarland, P.A. were the attorney for the Plaintiffs and among other things were providing legal advise on how to protect the Plaintiffs stock in the Captain's Wheel Resort, Inc. from judgment creditors of Jerry Lee Roy Berry and advised regarding a possible bankruptcy.

Plaintiffs claim defendant breached various duties arising out of 2006 business transaction involving ownership of stock in the Captains Wheel Resort. Jerry Lee Roy Berry transferred stock in the Captain's Wheel Resort, Inc. to Michael McFarland and Karen Zimmerman.

Plaintiffs claim that it was a breach of the duties owed to the plaintiffs when McFarland and Zimmerman obtained the shares of stock in the Captains Wheel Resort, Inc. at less than fair market value.

The Plaintiffs are asking for money damages against the defendants Michael B. McFarland, Michael B. McFarland, P.A. and Karen Zimmerman.

Defendants, Michael McFarland, Karen Zimmerman and the law firm Michael B. McFarland, P.A. deny any wrong doing or breach of any duties owed plaintiffs regarding the business transaction between Karen Zimmerman and Michael McFarland on the one hand and Jerry Berry on the other. Michael McFarland further denies Plaintiffs claim that he acted as the attorney for Jerry Berry, Karletta Berry or the Captains Wheel Resort, Inc.

INSTRUCTION NO. 3

Any statement by me identifying a claim of a party is not evidence in this case. I have advised you of the claims of the parties merely to acquaint you with the issues to be decided.

INSTRUCTION NO. 4

When I say that a party has the burden of proof on a proposition, or use the expression "if you find" or "if you decide," I mean you must be persuaded that the proposition is more probably true than not true.

INSTRUCTION NO. 5

During your deliberations, you will be entitled to have with you my instructions concerning the law that applies to this case, the exhibits that have been admitted into evidence and any notes taken by you in the course of the trial proceedings.

If you take notes during the trial, be careful that your attention is not thereby diverted from the witness or his testimony; and you must keep your notes to yourself and not show them to other persons or jurors until the jury deliberations at the end of the trial.

INSTRUCTION NO. 6

There are certain things you must not do during this trial:

1. You must not associate in any way with the parties, any of the attorneys or their employees, or any of the witnesses.
2. You must not discuss the case with anyone, or permit anyone to discuss the case with you. If anyone attempts to discuss the case with you, or to influence your decision in the case, you must report it to me promptly.
3. You must not discuss the case with other jurors until you retire to the jury room to deliberate at the close of the entire case.
4. You must not make up your mind until you have heard all of the testimony and have received my instructions as to the law that applies to the case.
5. You must not contact anyone in an attempt to discuss or gain a greater understanding of the case.
6. You must not go to the place where any alleged event occurred.

INSTRUCTION NO. 7

When I use the expression “proximate cause,” I mean a cause that, in natural or probable sequence, produced the injury, the loss or the damage complained of. It need not be the only cause. It is sufficient if it is a substantial factor in bringing about the injury, loss or damage.

There may be one or more proximate causes of an injury. When the breach of duty by two or more persons or entities contributes concurrently as substantial factors in bringing about an injury, the conduct of each may be a proximate cause of the injury regardless of the extent to which each contributes to the injury, loss or damage.

INSTRUCTION NO. 8

On Plaintiffs' claim of breach of fiduciary duty regarding the Stock Purchase Agreement by attorney against the Defendants, the Plaintiffs have the burden of proof on each of the following propositions:

- (1) The existence of an attorney-client relationship between the Plaintiffs and Michael McFarland.
- (2) A transaction between the attorney and the clients.
- (3) A breach of the fiduciary duty.
- (4) The breach of the duty proximately caused injury to the Plaintiffs or benefited the Defendants.

Whether the Plaintiff has proved any of these propositions is for the jury to decide.

INSTRUCTION NO. 8a

The relationship of client and attorney is a fiduciary relationship of trust, binding an attorney to the utmost good faith in fair dealing with his client, and obligating the attorney to discharge that trust with complete fairness, honor, honesty, loyalty and fidelity.

INSTRUCTION NO. 86

As a matter of law, an attorney owes his clients a duty to use and exercise reasonable care, skill, discretion, and judgment in the representation.

INSTRUCTION NO. 9

On the Plaintiffs claim of breach of fiduciary duty regarding the Stock Purchase Agreement by defendants, even though there is no attorney client relationship between them, the Plaintiffs have the burden of proof on each of the following propositions:

- (1). The existence of the fiduciary duty;
- (2). A transaction between the Defendant and the Plaintiff;
- (3) A breach of the fiduciary duty;
- (4) The breach of the duty proximately caused damage to the Plaintiffs

Whether the Plaintiff has proved any of these elements is for the jury to decide.

INSTRUCTION NO. 9A

A person may recover damages from an attorney for breach of fiduciary duty even though there is no attorney-client relationship between them, if it is shown that the defendant assumed a fiduciary duty to the plaintiff.

INSTRUCTION NO. 98

A fiduciary relationship does not depend upon some technical relation created by or defined in law, but it exists in cases where there has been a special confidence imposed in another who, in equity and good conscience, is bound to act in good faith and with due regard to the interest of one reposing the confidence.

INSTRUCTION NO. 10

On the Plaintiffs claim of breach of fiduciary duty against the Defendants as Directors of the Captains' Wheel Resort, Inc. Defendants have made money advances to the corporation while acting as directors. Plaintiff claims that a portion of the advances were made in breach of the fiduciary duty defendants as directors owed to the Plaintiff as stockholder. The Plaintiffs have the burden of proof on each of the following Propositions:

- (1) The existence of a fiduciary duty between the Plaintiffs and Defendants;
 - (2) breach of the fiduciary duty by the Defendants;
 - (3) what advances were made, if any, were made in the breach of the fiduciary duty.
- Whether the Plaintiff has proved any of these propositions is for the jury to decide.

INSTRUCTION NO. 10A

A director of a corporation has a fiduciary responsibility to both the corporation
and to shareholders.

INSTRUCTION NO. 10B

As fiduciaries, corporate directors are bound to exercise the utmost good faith in managing the corporation. Under the business judgment rule, directors meet any duty imposed as long as their acts are performed in good faith.

INSTRUCTION NUMBER 11

If the jury decides the Plaintiffs are entitled to recover from the Defendants on the claim for breach of fiduciary duty, the jury must determine the amount of money that will reasonably and fairly compensate the Plaintiffs for any damages proved to be proximately caused by the Defendants breach of fiduciary duty in converting the loan to the Stock Purchase Agreement.

The elements of damage the jury may consider are:

1. The difference between the price Michael McFarland and Karen Zimmerman paid for the stock of the Captain's Wheel Resort, Inc and the actual value of the stock purchased.

Whether the Plaintiffs have proved any of these elements is for the jury to decide.

INSTRUCTION NO. 12

If you find the Plaintiff has proven that Defendants breached their fiduciary duty as directors of the corporation owed to Plaintiff as a stockholder, the jury must determine the amount of any damage proximately caused by that breach.

The elements of damage the jury may consider are:

(1). The amount of any advance which the jury finds to be monies advanced to the corporation in breach of the Defendants fiduciary duty to the stockholders.

Whether the Plaintiffs have proved any of these elements is for the jury to decide.

INSTRUCTION NO. 13

In this case you will be given a special verdict form to use in returning your verdict. This form consists of a series of questions that you are to answer. I will now read the Special Verdict form to you, it reads as follow:

"We the jury, in the above entitled action, find the following Special Verdict on the questions as follows:

No. 1 Was there any breach of duty regarding the Stock Purchase Agreement by defendant Michael McFarland as the attorney for the plaintiff which was the proximate cause of damages to plaintiff?

Yes _____ No _____

No. 2 Was there any breach of fiduciary duty regarding the Stock Purchase Agreement owed by defendants to plaintiffs, even though there was no attorney-client relationship between them, which was the proximate cause of damages to plaintiffs?

Yes _____ No _____

If you answered "yes" to either Question No. 1 or Question No. 2, then answer No. 3.

If you answered "no" to both No. 1 and No. 2 go to question No. 4

No. 3 If you have found the defendants breach of fiduciary duty proximately caused Jerry Berry to enter into the Stock Purchase Agreement, you must determine the amount of damages.

a) We find the difference between the price defendants paid for the stock and the actual value of the stock: \$ _____

Please answer Question No. 4

No. 4 Did defendants breach any fiduciary duty which was owed to plaintiff by defendants as directors of the corporation?

Yes _____ No _____

If you answered "no" to Question No. 4, sign the verdict.

If you answered "yes" then answer No. 5.

No. 5 a) What amount of defendants claim for money advances to the corporation, if any, cannot be received by defendants because of their breach of

fiduciary duty as Directors? \$ _____.

b) Was the issuance of one share of stock to Marie Streater and one share of stock to Monnie Cripe a breach of defendants fiduciary duty as a Director to the plaintiff?

Yes _____

No _____"

There is a space for the date and signature lines for the presiding officer and the other jurors. If the verdict of the jury is unanimous, only the presiding officer should sign. If the verdict of jury is not unanimous, each of the jurors agreeing to the verdict should sign.

INSTRUCTION NO. 14

In instructing you on the subject of damages, I do not express any opinion as to whether plaintiff is or is not entitled to damages.

INSTRUCTION NO. 17

I have given you the rules of law that apply to this case. I have instructed you regarding matters that you may consider in weighing the evidence to determine the facts. In a few minutes counsel will present their closing arguments to you and then you will retire to the jury room for your deliberations.

Each of you has an equally important voice in the jury deliberations. Therefore, the attitude and conduct of jurors at the beginning of the deliberations are important. At the outset of deliberations, it is rarely productive for a juror to make an emphatic expression of opinion on the case or to state how he or she intends to vote. When one does that at the beginning, one's sense of pride may be aroused and there may be reluctance to change that position, even if shown that it is wrong. Remember that you are not partisans or advocates, but you are judges. For you, as for me, there can be no triumph except in the ascertainment and declaration of the truth.

In the course of your deliberations, do not hesitate to reexamine your own views and change your opinion if convinced it is erroneous. But do not surrender your honest conviction as to the weight or effect of evidence solely because of the opinion of your fellow jurors, or for the mere purpose of returning a verdict.

Consult with one another. Consider each other's views. Deliberate with the objective of reaching an agreement, if you can do so without disturbing your individual judgment. Each of you must decide this case for yourself; but you should do so only after a discussion and consideration of the case with your fellow jurors.

INSTRUCTION NO. 18

In deciding this case, you may not delegate any of your decisions to another or decide any question by chance, such as by the flip of a coin or drawing of straws. If money damages are to be awarded or percentages of fault are to be assigned, you may not agree in advance to average the sum of each individual juror's estimate as the method of determining the amount of the damage award or percentage of negligence.

INSTRUCTION NO. 19

If it becomes necessary during your deliberations to communicate with me, you may send a note signed by one or more of you to the bailiff. You should not try to communicate with me by any means other than such a note.

During your deliberations, you are not to reveal to anyone how the jury stands on any of the questions before you, numerically or otherwise, unless requested to do so by me.

INSTRUCTION NO. 20

On retiring to the jury room, select one of your number as a foreman, who will preside over your deliberations. It is that person's duty to see that your discussion is orderly, and that each and every juror has the chance to express himself or herself upon each question.

An appropriate form of verdict will be submitted to you with any instructions. Follow the directions on the verdict form, and answer all of the questions required of you by the instructions on the verdict form.

A verdict may be reached by three-fourths of your number, or nine of you. As soon as nine or more of you shall have agreed upon each of the required questions in the verdict, you should fill it out as instructed, and have it signed.

If your verdict is unanimous, your foreman alone will sign it; but if nine or more, but less than the entire jury, agree, then those so agreeing will sign the verdict.

As soon as you have completed and signed the verdicts, you will notify the bailiff, who will then return you into open court.

STATE OF IDAHO
COUNTY OF KOOTENAI
FILED: 1/28/10
AT 2:00 PM

FIRST JUDICIAL DISTRICT COURT, STATE OF IDAHO
IN AND FOR THE COUNTY OF KOOTENAI
324 W. GARDEN AVENUE
COEUR D'ALENE, IDAHO 83814

CLERK, DISTRICT COURT
[Signature]
DEPUTY
FruB

KARLETTA GRACE BERRY, widow,
KARLETTA GRACE BERRY, Personal
Representative of the Estate of Jerry
Lee Roy Berry,

Case No: CV-2007-0002409

Plaintiffs,

vs.

SPECIAL VERDICT

MICHAEL B MCFARLAND, MICHAEL B.
MCFARLAND, P.A., and KAREN
ZIMMERMAN,

Defendant.

We the jury, in the above entitled action, find the following Special Verdict on the questions as follows:

No. 1 Was there any breach of duty regarding the Stock Purchase Agreement by defendant Michael McFarland as the attorney for the plaintiff which was the proximate cause of damages to plaintiff?

Yes

No

No. 2 Was there any breach of fiduciary duty regarding the Stock Purchase Agreement owed by defendants to plaintiffs, even though there was no attorney-client relationship between them, which was the proximate cause of damages to plaintiffs?

Yes

No

If you answered "yes" to either Question No. 1 or Question No. 2, then answer No. 3. If you answered "no" to both No. 1 and No. 2 go to question No. 4

No. 3 If you have found the defendants breach of fiduciary duty proximately caused Jerry Berry to enter into the Stock Purchase Agreement, you must determine the amount of damages.

a) We find the difference between the price defendants paid for the stock and

the actual value of the stock: \$ 380,500.00

Please answer Question No. 4.

No. 4 Did defendants breach any fiduciary duty which was owed to plaintiff by defendants as directors of the corporation?

Yes No

If you answered "no" to Question No. 4, sign the verdict.
If you answered "yes" then answer No. 5.

No. 5 a) What amount of defendants claim for money advances to the corporation, if any, cannot be received by defendants because of their breach of fiduciary duty as Directors? \$ 176,300.18

b) Was the issuance of one share of stock to Marie Streater and one share of stock to Monnie Cripe a breach of defendants fiduciary duty as a Director to the plaintiff?

Yes No

Richard Williams (JUROR #9)

Presiding Juror

Juror

Juror

Juror

Juror

Juror

Juror

Juror

Juror

Juror

Juror

Juror

DATED this 28th day of January, 2010.

SPECIAL VERDICT CV07-2409

2

*Copies given in court
to Rex Finney
& John Wheelan
Yule & Burt
11/28/10*

REX A. FINNEY
FINNEY FINNEY & FINNEY, P.A.
Attorneys at Law
Old Power House Building
120 East Lake Street, Suite 317
Sandpoint, Idaho 83864
Phone: (208) 263-7712
Fax: (208) 263-8211
ISB No. 6313

STATE OF IDAHO }
COUNTY OF KOOTENAI } SS
FILED

2010 MAR 18 AM 11:50

CLERK DISTRICT COURT
DEPUTY

Paul Chung
2010

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF KOOTENAI

KARLETTA GRACE BERRY, a widow,	)	Case No. CV-2007-0002409
KARLETTA GRACE BERRY, Personal)	
Representative of the Estate	)	MOTION FOR ENTRY OF FINDINGS
of Jerry Lee Roy Berry,	)	CONCLUSIONS, FINAL ORDER
CAPTAIN'S WHEEL RESORT, INC.,	)	AND JUDGMENT
an Idaho Corporation,)	
)	
Plaintiff,)	
)	
v.)	
)	
MICHAEL B. MCFARLAND, MICHAEL)	
B. MCFARLAND, P.A., and KAREN)	
ZIMMERMAN,)	
)	
Defendants.)	
)	

COMES NOW, the plaintiffs, by and through counsel, REX A. FINNEY, and based upon Rule 58(a) and the Special Verdict entered on January 28, 2010 by the unanimous Jury, move the Court to enter findings, conclusions, a final order and judgment as follows:

1. There was a breach of fiduciary duty regarding the Stock Purchase Agreement by defendant Michael McFarland as the attorney for the plaintiff which was the proximate cause of damages to the Plaintiff. (Special Verdict Question No. 1).

2. There was a breach of fiduciary duty regarding the Stock Purchase Agreement, even though there was no attorney-client relationship between them, owed by the defendants to plaintiffs which was the proximate cause of damages to the Plaintiffs. (Special Verdict Question No. 2).

3. The defendants' breach of fiduciary duty proximately caused Jerry Berry to enter into the Stock Purchase Agreement. (Special Verdict Question No. 3).

4. The difference between the price the defendants paid the plaintiff for the stock and the actual value of the stock purchased is the sum of \$380,500.00, being the amount of damages to Plaintiff. (Special Verdict Question No. 3(a)).

5. The plaintiff, Karletta Grace Berry, is awarded a money judgment in the amount of \$380,500.00 against the defendants, Michael B. McFarland, Karen M. Zimmerman, and Michael B. McFarland, P.A. (Special Verdict Question No. 3(a)).


6. The defendants breached a fiduciary duty owed to plaintiff by defendants as directors of the corporation. (Special Verdict Question No. 4).

7. As a result of the defendants' breach of fiduciary duty as directors, the defendants are not entitled to receive \$176,300.18 they advanced to the corporation. (Special Verdict Question No. 5(a)).

8. The issuance of one share of stock to Marie Streater and one share of stock to Monnie Cripe was a breach of defendants' fiduciary duty as directors owed to the plaintiffs. (Special Verdict Question No. 5(b)).

9. The issuance of one share of stock to Marie Streater and one share of stock to Monnie Cripe are rescinded, set aside, and voided.

DATED this 18 day of March, 2010.

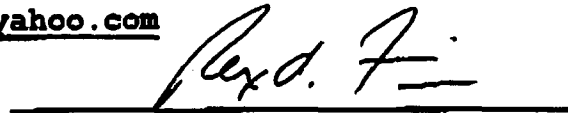


 REX A. FINNEY
 Attorney at Law

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was delivered via facsimile AND e-mail, this 18 day of March, 2010, and was addressed as follows:

J. P. WHELAN P.C.
 Attorney at law
 213 N. 4th Street
 Coeur d'Alene, Idaho 83814
 RF (Fax No.: (208) 664-2240)
 RF and via e-mail: jpwhelanattorney@yahoo.com

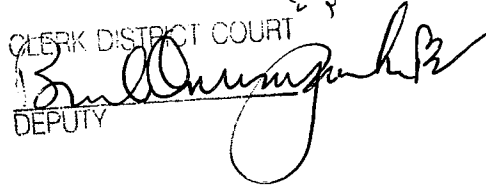


REX A. FINNEY
FINNEY FINNEY & FINNEY, P.A.
Attorneys at Law
Old Power House Building
120 East Lake Street, Suite 317
Sandpoint, Idaho 83864
Phone: (208) 263-7712
Fax: (208) 263-8211
ISB No. 6313

STATE OF IDAHO }
COUNTY OF KOOTENAI } SS
FILED

2010 MAR 18 AM 11:50

CLERK DISTRICT COURT
DEPUTY




IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF KOOTENAI

KARLETTA GRACE BERRY, a widow,	)	Case No. CV-2007-2409
KARLETTA GRACE BERRY, Personal)	
Representative of the Estate	)	NOTICE OF HEARING RE: <i>OK</i>
of Jerry Lee Roy Berry,	)	PLAINTIFFS' MOTION FOR ENTRY
CAPTAIN'S WHEEL RESORT, INC.,	)	OF FINDINGS, CONCLUSIONS,
an Idaho Corporation,	)	FINAL ORDER AND JUDGMENT
)	
Plaintiffs,	)	(April 5, 2010 at 3:00 p.m.)
)	
v.)	
)	
MICHAEL B. MCFARLAND, MICHAEL)	
B. MCFARLAND, P.A., and KAREN)	
ZIMMERMAN,)	
)	
Defendants.)	

NOTICE IS HEREBY GIVEN that the Plaintiffs' Motion For
Entry of Findings, Conclusions, Final Order and Judgment shall
come for hearing before the Honorable CHARLES W. HOSACK on April
5, 2010 at the hour of 3:00 p.m., or as soon thereafter as
counsel may be heard, in a courtroom of the Kootenai County
Courthouse, located in Coeur d'Alene, Idaho.

DATED this 18 day of March, 2010.



REX A. FINNEY
Attorney At Law

CERTIFICATE OF SERVICE

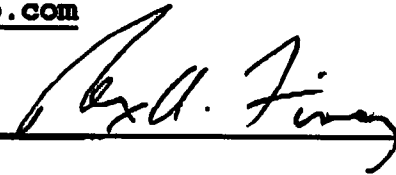
I hereby certify that a true and correct copy of the foregoing was served by facsimile AND e-mail, this 18 day of March, 2010, and was delivered as follows:

J.P. WHELAN P.C.
Attorney at law
213 N. 4th Street
Coeur d'Alene, Idaho 83814

RF[x]Via Facsimile: (208) 664-2240

RF[x]and via e-mail: jpwhelanattorney@yahoo.com

By: _____



STATE OF IDAHO
COUNTY OF KOOTENAI } SS
FILED: #433

2010 MAR 25 PM 2:01

CLERK DISTRICT COURT

DEPUTY

John P. Whelan, P.C.
Attorney at Law
213 N. 4th Street
Coeur d' Alene, Idaho 83814
Telephone: (208) 664-5891
Facsimile: (208) 664-2240
ISB No. 6083

**IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE STATE OF
IDAHO, IN AND FOR THE COUNTY OF KOOTENAI**

**KARLETTA GRACE BERRY, a widow,
KARLETTA GRACE BERRY, Personal
Representative of the Estate of Jerry
Lee Roy Berry, CAPTAIN'S WHEEL
RESORT, INC., an Idaho Corporation,**

Plaintiffs,

vs.

**MICHAEL B. MCFARLAND, MICHAEL B.
MCFARLAND, P.A., and KAREN
ZIMMERMAN,**

Defendants.

Case No. CV-07-2409

**AFFIDAVIT OF JESSICA TVRDY IN
SUPPORT OF OPPOSITION TO
PLAINTIFFS' MOTION FOR FINDINGS,
CONCLUSIONS, FINAL ORDER AND
JUDGMENT**

Hearing Date: April 5, 2010

Time: 3:00 p.m.

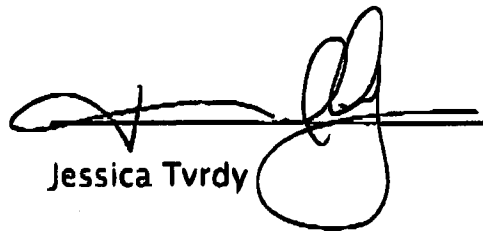
Judge: Charles Hosack

STATE OF IDAHO)
) ss.
County of Kootenai)

Jessica Tvrdy, being first duly sworn, deposes and says:

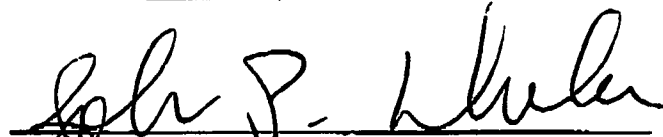
1. I am the paralegal for attorney John P. Whelan. I have personal knowledge of the following facts and could competently testify.
2. I obtained a copy of the audio CD for the closing arguments which were heard January 26, 2010 by contacting the Records Department at the Kootenai County Courthouse. I transcribed portions of the rebuttal closing argument of Plaintiffs' attorney, Rex Finney.
3. A true and correct copy of portions of the rebuttal closing argument of Mr. Finney is attached hereto as Exhibit A.
4. On page 1, paragraph 3, 3rd to last sentence, Mr. Finney stated: "There is no blank on that verdict the judge read to you that says you can give the stock back to Karletta".

DATED this 25 day of March, 2010.

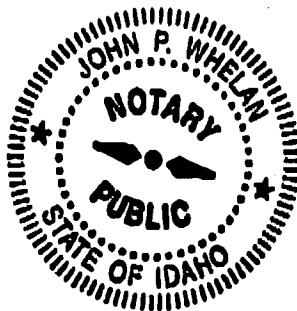


 Jessica Tvrdy

SUBSCRIBED AND SWORN before me this 25 day of March, 2010.



 Notary Public in and for the State of Idaho
 Residing at: Worley
 My Comm. Expires: 2/19/14



McFarland Partial Transcript

Beginning of rebuttal closing: 3:49:34

Start time: 3:57:17

Now, Mr. McFarland testified yesterday about how bad this business is. It's basically a black hole. But then when asked, why don't you just give it back? He said, he won't give it back, because Karletta filed a frivolous suit against him [inaudible] to the effect that, used the shotgun approach, and it has made him very upset. Now, it is a bad day, when a lawyer is mad some person sought help in the legal system. That's lawyers, more than anyone, should appreciate, that every individual, every person, has the right to seek assistance from the courts when they feel that they have been wronged.

Now in this case, the summary of the story is that in 2001, Jerry came in, and you know you've got to picture this, you have two guys who drink and they meet and they talk about, "hey I got judgment creditors and I don't want them to take my stuff". He goes to a guy whose got the power to freeze up judgment creditors, they can't take your stuff if you are in bankruptcy. You may have to repay over time but you get protection. Now, if he goes to a man looking for protection, and now this man has taken advantage of Mr. Berry's widow, it's not as blurry as Mr. Whelan would have you think.

Now, let's see here. Okay, here we go. You saw this video. Mr. McFarland said on the video and he now acknowledges it, Jerry Berry came to my office to seek protection of the stock in the Captain's Wheel from judgment creditors. Here's his affidavit, once again contradicting himself, paragraph 8, page 6, I deny I was advising Jerry and Karletta Berry on how to protect the stock in the Captain's Wheel from creditors. You can't have it every way. If you pick a story, you better stick to it. In this case, it has gone every way. I mean, I wasn't his lawyer, okay maybe I was his lawyer, in here he's not his lawyer, in deposition he is his lawyer, back in court he is not his lawyer until the video was played and then he was. Its hit every single direction possible. Now, Mr. Whelan says don't look at Exhibit A. Well you have to look at Exhibit A. Exhibit A is the only document that was filled out by one of the parties. Exhibit B, the one he wants you to rely on, Delores Meredith said she put the name, she filled in the line, put Captain's Wheel Resort Property/Business so she would know what file to put it in. Mike McFarland, he's been to George Washington University in Washington D.C., he wrote in no uncertain terms, loan to be secured with stock as collateral. He didn't write, loan for now and if we give you another \$60,000 we get the stock. Loan to be secured with stock as collateral. It can't be any more clear. His affidavit verifies that as well. Most of the testimony of Mr. McFarland was explaining why the written documents don't mean what they say and then in fact, after he issued some extra shares of stock, the last thing he does in an attempt to rehabilitate himself is to oh its no big deal we could take those back and if Karletta objects, its not a big deal to take that stock back. It seems kind of weird that you would issue it, wait three years and then when it comes out in court, your testimony is we can take that back easily. He didn't ask if she wanted to issue it. Now, Mr. Whelan also says, a little misleading, he says, Karletta gets it all. There is no blank on that verdict the judge read to you that says you can give the stock back to Karletta. That's not the way it works. It just sounded good though at the moment.

End time: 4:01:30

Exhibit
A

Start time: 4:04:46

Now, nobody is saying Mike and Karen shouldn't get their \$100,000.00. We are just saying it should be what Mike has called it. Mike the lawyer wrote this exhibit A. He called it a loan. Mike the lawyer wrote the affidavit of Mike McFarland, Exhibit 77. He called it, the stock purchase agreement, he says we didn't get Jerry to sign it basically. The stock purchase agreement was Jerry's idea and it was designed to swap equity in the corporation for the debt owed to us. Now, he didn't say in his affidavit that it was to memorialize our agreement from 2003. Why would a lawyer make a deal like that, that's a one page agreement, could have been handwritten. It surely doesn't make any sense if he owned the stock he could have easily had Jerry sign something that said he owned the stock, not wait until right at the very end and not swap it for debt owed to him, as his own statement says. If anyone should be held to what their written statements say it is an attorney. Now, you didn't see Karletta Berry trying to explain all the things that she had done that were inconsistent with her testimony. In fact, all they had on her was under intense questioning by a powerful man she froze up a little bit and didn't say she knew what undue influence was or certain things and then pointed out in her deposition that was read in, she did in fact tell them about the little things. She talked about the espresso stand. She talked about calling for advice regarding the highway. Mike McFarland said she doesn't even own land that fronts Highway 95. In fact, she did. Who do you believe? There's some smoke and mirrors here. They are saying there is nothing in writing that would even suggest that Mike McFarland is the attorney. Well, why would he draft a trust agreement. If someone is not your lawyer, now do lawyers voluntarily draft up trust agreements and bring it to a person. It doesn't make any sense. If you weren't his lawyer, you wouldn't be drafting a trust agreement. If you weren't his lawyer, Paul Daugharty probably would have stayed involved in this transaction. It's clear. It's not like this. It's not like this. He said he was his lawyer and it is time to believe him. He said it right here on the stand that yeah I was his lawyer, but only on one deal. He still won't admit that he was his lawyer on the trust agreement. Now their new thing is oh, Jerry Berry had a will and Mike didn't draft it. Well, let's think about it. What did Jerry Berry have to leave. He had already deeded the house over. What was his other big asset? The stock. 200 shares of stock. And what lawyer is it that helped him to create a joint tenancy with right to survivorship. That would be Mr. McFarland. It is in his own writing. He created Jerry's estate plan for him. He can go ahead and say he didn't do his will but he did something better. You don't even have to bring that to the probate court. His own testimony is, that is why I asked him to explain joint tenancy with right of survivorship. So the jury would understand and he explained it quite well. The minute one of the two people passes away, the other one owns it all as a matter of law. It doesn't take any probate action, doesn't take court approval. That's how he handles his own affairs. So to say that he didn't draft. What was Jerry going to leave in the will? The chairs, the tables? Not the Wheel. The Wheel was already handled by the lawyer. This was turned into joint tenancy at the hand of a lawyer. Now, Cheryl Lynn(?) has no reason to make things up. She had a death in the family, she couldn't make it here the first week. Here she comes out and what did she say? Her son was thinking about purchasing the restaurant. She said dad told us that he had to pay his lawyer off \$100,000.00. If the best thing they can level against Cheryl Canno is she used the word lawyer and attorney. Last time I checked those mean the same thing. She works with attorneys cause she is involved in head start or something. Since she works with attorneys often she uses that word. It's not a big deal to accidentally say lawyer when you

mean attorney. Look at the instructions, do they say lawyer? No they say attorney but we all know that lawyer is attorney, yes. It is clear, lawyer is attorney. Actions speak louder than words. Now Mr. McFarland was handed Exhibit 86. It's not admitted. And there was a big stack of tickets. Judge rightfully got mad at me for having to give those to him. But only a little few of them had his signature on them. But they were kept separate. They were not treated, that was back in '03-'04 when this was interest on the loan. He was paid interest in the form of money given to Karen and all you can eat, all you can drink, all you can party at the Captain's Wheel for years. Sure he continued getting greased up after he got Jerry to sign the stock purchase and sale agreement but that doesn't mean it wasn't interest before and even by the Defendants own statements, under their theory, Karletta should still owe that interest payment. If things were all done back in '03, why did everything actually change when the documents were signed? There has been no letter. He filed a counterclaim asking for money damages. I haven't heard any mention those at all to the jury. Now, Herb Huseland he did say the word partner remember. But then what did he say? He said he is using it loosely and he sounded like a pretty complex dude, like this guy knows what he is doing. But what he really is is the baby blog that works in the salad bar. I mean, he worked in the salad bar. He is not this person that he initially gave the impression of. This is the guy that was working at the salad bar that now runs a blog on the internet. Bob Holland. You heard about Bob Holland came in and wrecked everything and that is why the business went bad. Well, last time I checked the testimony was Bob came in and then they made almost \$500,000.00 in revenue in 2007. They said that revenue was cut in their own exhibit. Bob Holland came in. It didn't make any difference, there is still \$500,000.00. Just rather than being real careful with that \$500,000.00 it was like a party at the Wheel. The cooks were drinking. I mean, who knows what was going on in there. Mike doesn't he wasn't there except for when there was a band. Now, once again I just ask you, try to remember who is the one trying to explain that the written things he wrote don't really mean what they say. It is not Karletta Berry here. Karen Zimmerman said she had a great memory. That she never heard Mike referred to as anyone's attorney in public or Jerry's attorney. Mike admits it, everyone else remembers it. She was there, she doesn't remember it. Now, Toby McLaughlin. Don't get confused by the issues here. Toby is not sitting here asking anybody questions. He was a witness. That is all he ever was. You can believe in theory that you can't have a witness, how could a person ever prove anything. It is what it is. Mr. McFarland initially indicated there was an audio recording in his deposition. That is not the case. When asked on his deposition if Mr. McLaughlin was lying, he said, what he thinks. Now he never said yeah he is lying at that point. He is just saying it is on an audio recording and it is available to play. Now that wasn't accurate either. So, you have to really keep in mind who was accurate and who wasn't accurate. Mr. Whelan sounds pretty convincing. Johnston, he didn't say me and my partner are selling, he just said I got an offer what do you think about it. He also said yeah there are times I don't charge clients too. According to him he charges friends, and kind of laughed about it, but maybe not his family. Well, this case, this book, does have stuff in it drafted by a lawyer, for the benefit of Jerry Berry. It is not my word against Mr. Whelan's word. It is something for the jury to decide. I'm sure we both, probably both think we know what we are talking about and probably both think we are smart but that's not the case. The jury is the one who is sitting there. Sees the reaction, sees the eyes, sees the body movements, sees the nervousness when people walk in the room. It is something that only a jury can do. It's not for lawyers. We can only try to do the best we can to present our cases. Now, there's a big discussion about Karletta didn't throw a fit on

October 15, 2006. Let's go back. She had already talked to Jerry on July 4, 2006 and Jerry went with the stock purchase, excuse me, loan agreement, which is consistent with the only thing written by Mike McFarland to Mr. McFarland's cabin. Now Jerry is just speared into this life. He already signed the darn agreement that Karletta didn't want him to sign and now you think Karletta is going to spend the last little bit of time she has fighting with her husband. She was there to take care of him. You heard from Cheryl Lynn. You heard from the other people. They loved each other. Jerry loved Karletta. He didn't want her excluded. It can't be any more clear. What we have here is some lawyer is hiding behind something that is present. They, Mr. Whelan, wants you to look at Exhibit B. The one that is not written by anybody. The one that was written by some lady who worked in the law office. She wrote the words on it so she would know what file to put it in. Seems a bit suspicious to me that there would be a file in that law office but, I'm not even going to recite it to you. I know you are going to end up reading Mr. McFarland's affidavit. Look it over. He can't find a message, a note, anything. There's some stuff he didn't bring in. Is it fair to say they don't have all items I have? What happened to the file that he told Toby McLaughlin about? What happened to the letter from the judgment creditor that he had in his file. Surely, he has it. We don't have it. Karletta saw something with his name on it at the house, she didn't know what it was. But there was a point there just around the time the deal got signed, Jerry went on some sort of a cleaning mission and he was throwing stuff away. Who knows what went on to make Jerry throw stuff away out of the office. Seems kind of weird to get rid of stuff right after you make a backdated agreement.

End time: 4:17:30

Rebuttal closing ends at: 4:21:05

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 25 day of March, 2010, I caused to be served a true and correct copy of the foregoing by the method indicated below, and addressed as indicated below:

Rex A. Finney
Finney, Finney & Finney
120 East Lake Street, Suite 317
Sandpoint, ID 83865

- U.S. Mail, Postage Prepaid
 Hand Delivered
 Overnight Mail
 Facsimile to: (208) 263-8211


John P. Whelan

STATE OF IDAHO }
COUNTY OF KOOTENAI } SS
FILED #493

2010 MAR 25 PM 2:00

CLERK DISTRICT COURT

DEPUTY

John P. Whelan, P.C.
Attorney at Law
213 N. 4th Street
Coeur d' Alene, Idaho 83814
Telephone: (208) 664-5891
Facsimile: (208) 664-2240
ISB No. 6083

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE STATE OF
IDAHO, IN AND FOR THE COUNTY OF KOOTENAI

KARLETTA GRACE BERRY, a widow,
KARLETTA GRACE BERRY, Personal
Representative of the Estate of Jerry
Lee Roy Berry, CAPTAIN'S WHEEL
RESORT, INC., an Idaho Corporation,

Plaintiffs,

vs.

MICHAEL B. MCFARLAND, MICHAEL B.
MCFARLAND, P.A., and KAREN
ZIMMERMAN,

Defendants.

Case No. CV-07-2409

OPPOSITION TO PLAINTIFFS MOTION
FOR FINDINGS, CONCLUSIONS, FINAL
ORDER AND JUDGMENT

Hearing Date: April 5, 2010

Time: 3:00 p.m.

Judge: Charles Hosack

Defendants, Michael B. McFarland, Michael B. McFarland, P.A. and Karen
Zimmerman, submit the following opposition to Plaintiffs' Motion for Entry of
Findings, Conclusions, Final Order and Judgment as follows:

Plaintiffs' motion to the Court to enter the findings made by the jury at

the trial of the above-entitled matter tried during the period January 19 to 28, 2010 was not accompanied by any memorandum or brief in support of the motion. Defendants are, therefore, uncertain as to what Plaintiffs propose.

In *addition* to the money damages "awarded" by the jury, Plaintiffs apparently seek to receive the remedy of rescission of the two shares of stock issued to Marie Streater and Monnie Cripe via Plaintiffs' Motion for Entry of Findings, Conclusions, Final Order and Judgment. However, Plaintiffs cannot receive the damages awarded Plaintiff for the breach of fiduciary duties *as directors* while also seeking to rescind the shares of stock that gave rise to the breach of duty.¹ Plaintiffs cannot obtain both remedies.

An election of remedies was made through Plaintiffs' counsel's representation to the jury during closing argument that the stock issued to Marie Streater and Monnie Cripe could not be recovered.²

The jury verdict denied Michael McFarland the recovery of the \$170,000.00 advanced to the Captain's Wheel because he and Karen Zimmerman issued the stock to Marie Streater and Monnie Cripe. Plaintiffs cannot obtain a double recovery on that issue by preventing the recovery of the advancements as well as rescission of the two shares of stock that caused the jury to deny Michael McFarland the recovery of his advancements.

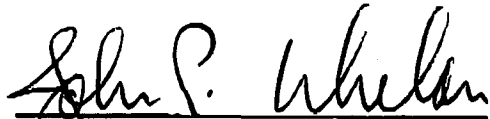
¹ As the Court may recall, Defendant Michael McFarland advanced approximately \$178,000 to the corporation to keep the Captain's Wheel Resort afloat. Plaintiff, Karletta Berry, agreed at a corporate meeting that Michael McFarland should be reimbursed the initial \$8,000.00 that he advanced. The jury denied the recovery of all but \$8,000 of the money advanced on the ground that Defendants had breached the fiduciary duties owed to Karletta Berry as directors. The only clear evidence of any breach of fiduciary duty by Defendants took the form of the issuance of stock by Michael McFarland and Karen Zimmerman to Marie Streater and Monnie Cripe.

² See affidavit of Jessica Tvrdy regarding transcription of closing argument.

DATED: 3/25/10

Respectfully Submitted,

JOHN P. WHELAN, P.C.

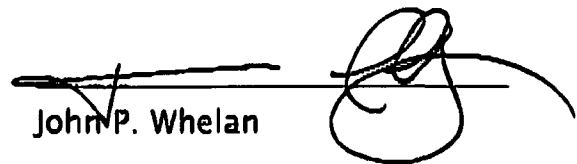

John P. Whelan
John P. Whelan

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 25 day of March, 2010, I caused to be served a true and correct copy of the foregoing by the method indicated below, and addressed as indicated below:

Rex A. Finney
Finney, Finney & Finney
120 East Lake Street, Suite 317
Sandpoint, ID 83865

- U.S. Mail, Postage Prepaid
- Hand Delivered
- Overnight Mail
- Facsimile to: (208) 263-8211


John P. Whelan

Court Minutes:

Session: HOSACK040510P
Session Date: 04/05/2010
Judge: Hosack, Charles
Reporter: Schaller, Joann

Division: DIST
Session Time: 14:06

Courtroom: Courtroom8

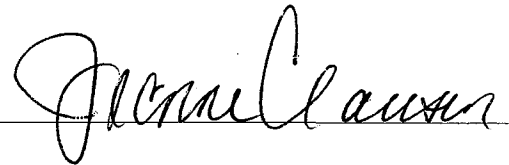
Clerk(s): Clausen, Jeanne

State Attorney(s):

Public Defender(s):

Prob. Officer(s):

Court interpreter(s):



Case ID: 0001

Case number: CV2007-2409
Plaintiff: Berry, Karletta
Plaintiff Attorney:
Defendant: McFarland, Michael
Pers. Attorney:
Co-Defendant(s):
State Attorney:
Public Defender:

04/05/2010

15:07:24

Recording Started:

15:07:24

Case called

15:07:27

Judge: Hosack, Charles
Calls case - counsel all present; motion by pltf
for judgment on pleadings

15:07:55

and hrng on money judgment; has reviewed all
motions

15:08:07

Add Ins: Finney, Rex

ask court to enter final judgment with special
verdict pursuant to Rule 58;
15:08:28 appropriate time to enter the money judgment and
all relief sought in the
15:08:52 motion

15:08:55 **Judge: Hosack, Charles**
proposed judgment

15:09:04 **Add Ins: Finney, Rex**
presents the paperwork to Judge; tracks with
paragraphs of motion

15:10:24 **Judge: Hosack, Charles**
What Mr. Finney handed to court is same verbage
as motion itself

15:10:49 **Add Ins: Finney, Rex**
that's correct

15:11:18 **Judge: Hosack, Charles**
proposed final judgment

15:11:26 **Add Ins: Finney, Rex**
correct

15:11:42 **Judge: Hosack, Charles**
If this judgment were to be entered then
parties would remain 50/50 owners
15:11:59 of corporation; but judgment would be final; any
other claim for relief

15:12:35 **Add Ins: Finney, Rex**
granting damages as to 50% of stock purchased by
Mr. McFarland; enter
15:12:59 judgment in amount of damages

15:13:23 **Judge: Hosack, Charles**
Money damages would be fixed as of appraisal of
July 2006

15:14:28 **Add Ins: Finney, Rex**
actual damages comes from special verdict

15:14:47 **Judge: Hosack, Charles**
when was that breach found to have occurred

15:14:57 **Add Ins: Finney, Rex**
7/4/06

15:15:05 **Add Ins: Whelan, John P.**
Don't have copy of special verdict and not sure
if that is what special

15:15:18 verdict said; no basis for this motion was
stated and no accompanied memo and

15:15:39 affd was submitted with motion - so at a loss
here

15:16:57 **Judge: Hosack, Charles**
Price paid for stock is fixed by exhibit #23

15:17:48 **Add Ins: Finney, Rex**
purchase price for stock was \$100,000

15:17:59 **Judge: Hosack, Charles**
Wasn't the stock purchase agreement entered into
approx 7/06

15:18:44 **Add Ins: Finney, Rex**
correct and purchase price was \$100,000

15:19:00 appraised value of land owned by corp was
\$1,000,000

15:19:35 **Judge: Hosack, Charles**
\$380,000 is what special verdict states; the
various other claims would be

15:21:06 dismissed or replaced by and incorporated into
this final judgment and there

15:21:26 would be no further proceedings

15:21:32 **Add Ins: Finney, Rex**
correct

15:21:35 **Judge: Hosack, Charles**
what would be next step for owners of corp

15:21:47 **Add Ins: Finney, Rex**
loan secured by real property is in default -
nothing in this action;

15:22:07 foreclosures; leave parties at where they are
at; pltf & deft would have 1/2

15:22:34 stock

15:22:36 **Judge: Hosack, Charles**
2 50% owners of corp and that would be a dead
lock; business wouldn't go
15:22:57 anywhere and has huge debt and would have to be
sold

15:23:17 **Add Ins: Finney, Rex**
a lot of matters for tax liens;
15:23:43 \$200,000 is owned on CIT loan which has begun
foreclosure process

15:24:05 **Judge: Hosack, Charles**
Go to a sale & it sells for a certain amount;
than the corp shareholders
15:25:13 would split the \$1,000,000 how this judgment
would fit in - there would be
15:25:53 damages \$380,500 owed by defts to pltf; take out
\$380,500 of \$500,000 that
15:26:21 would be going to deft and give that amount to
pltf; there would actually be
15:27:08 a net of some amount going to the defts

15:28:01 **Add Ins: Whelan, John P.**
At a loss for not having special verdict; no
space regarding rescission of any
15:28:27 stock; take exception to any finding; proposed
findings #1 isn't consistent
15:28:58 with #2; #8 on special finding form - obj on
grounds be presented a copy of
15:30:03 the paperwork; findings and conclusions stop at
#8; at a loss as to what
15:31:05 direction Mr. Finney wants to go

15:31:14 **Add Ins: Finney, Rex**
motion has a para #9 - one court does have
before it doesn't have paragraph
15:31:40 #9

15:32:38 **Add Ins: Whelan, John P.**
Could Mr. Finney articulate what he is trying to
accomplish today - needs so
15:33:04 guidance

15:33:10 **Judge: Hosack, Charles**
one share of stock to Marie Streeter - small
issue

15:33:52 **Add Ins: Whelan, John P.**
Item #9 was given to Jury; inconsistent with
damages; all of advancements
15:34:43 after \$800,000 wouldn't be returned to debt;
pltf aren't seeking any
15:35:30 rescision; two sided damage awarded; 2nd part
isn't collectable; rescision
15:35:57 isn't warranted; 1 & 2 are in conflict; if court
finds those to be entered
15:36:31 than they are inconsistent

15:36:41 **Judge: Hosack, Charles**
jury did find yes as to both 1 & 2

15:36:57 **Add Ins: Finney, Rex**
fiduciary

15:37:19 **Judge: Hosack, Charles**
Jones V. Runft

15:38:20 **Add Ins: Whelan, John P.**
there is an inconsistent with special verdict

15:39:47 **Judge: Hosack, Charles**
will have to regroup and handicapped by not
having a court reporter transcrip
15:40:25 and passage of time; whatever I do has to make
some sense to me; breach of
15:40:59 fiduciary duty and it is based on stock purchase
agreement; stock purchase
15:41:18 agreement has been rescinded and converting back
into a loan

15:41:57 **Add Ins: Whelan, John P.**
rescision of stock purchase agreement than Mr.
McFarland and Ms. Zimmerman
15:42:16 would be awarded \$100,000

15:42:39 **Judge: Hosack, Charles**
Having trouble with is that the remedy that the
jury awarded (theory that
15:43:16 this was a \$100,000 loan) stock purchase
agreement didn't adequately reflect
15:43:35 the \$100,000 loan; none of theories atty are
using don't fit the facts; don't
15:44:00 have a clue what I'm going to do. will take this

under advisement

- 15:44:26 **Add Ins: Whelan, John P.**
additional briefing
- 15:44:34 **Judge: Hosack, Charles**
no obj to it, but attys have to know what court
is thinking; can't really
- 15:45:03 even express the questions I have; taken under
advisement; quite sure what
- 15:45:20 I'm going to do; may call for further hearings
and briefins when I have
- 15:45:37 further ideas of how I'm going to proceed
- 15:45:49 **Stop recording**
-

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ISB No. 6313

STATE OF IDAHO
COUNTY OF KOOTENAI } SS
FILED:

2010 APR -7 PM 3:30
CLERK DISTRICT COURT
[Signature]
DEPUTY

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF KOOTENAI

KARLETTA GRACE BERRY, a widow,	)	Case No. CV-2007-2409
KARLETTA GRACE BERRY, Personal)	
Representative of the Estate	)	PLAINTIFFS' BRIEF AFTER
of Jerry Lee Roy Berry,	)	HEARING ON 4/5/10
CAPTAIN'S WHEEL RESORT, INC.,)	
an Idaho Corporation,)	
)	
✓ Plaintiffs,)	
)	
v.)	
)	
MICHAEL B. MCFARLAND, MICHAEL)	
B. MCFARLAND, P.A., and KAREN)	
ZIMMERMAN,)	
)	
Defendants.)	
)	

BASED UPON the Plaintiffs' Motion For Entry of Findings,
Conclusions, Final Order and Judgment having come on for hearing
on April 5, 2010 and the court having taken the matter under
advisement, the above named Plaintiffs, by and through counsel,
and hereby submits this brief to assist the Court:

1. The Captain's Wheel Resort, Inc. is an Idaho corporation that had a total of 400 shares of stock outstanding at the time the events in this case commenced.

2. McFarland, the attorney, and his fiancé, Zimmerman, the Broker, made a loan in the amount of \$100,000.00 to Jerry Berry in 2003 while Jerry was married to Karletta Berry.

3. The loan was completed in two installments.

4. The first \$40,000.00 was delivered to Jerry from McFarland on 7/25/03 at McFarland's law office. A second installment in the amount of \$60,000.00 was delivered to Jerry from McFarland at his law office on 8/4/03.

5. Jerry Berry already owned $\frac{1}{2}$ of the stock (200 shares) in the corporation at the time McFarland and Zimmerman loaned the \$100,000.00 to Jerry Berry.

6. Berry used the \$100,000.00 borrowed from the defendants to purchase the remaining 50% (200 shares) of the outstanding stock in the corporation from the Campbells in 2003 (see Plaintiff's Exhibits 17 and 20). At this time the plaintiff owned all of the stock in the corporation.

7. On July 4, 2006 Jerry Berry and the Defendants entered into the Stock Purchase and Sale Agreement (Pls' Ex. 23) transferring 200 shares (1/2 the outstanding stock) of stock in the corporation to McFarland and Zimmerman. The Stock Purchase and Sale Agreement was back dated and read as if it was

"executed" on August 9, 2003. This agreement is the basis for the breach of fiduciary duty.

8. McFarland explained in the Affidavit of Michael B. McFarland (Pls Ex. 77) at page 3, paragraph 6 that "[t]he stock purchase agreement was Jerry's idea and it was designed to swap equity in the corporation for the debt owed to us".

9. On November 29, 2006 McFarland and Zimmerman took over as the only two directors of the corporation and excluded Karletta from management or involvement with operations of the corporation.

10. Management was left to the two bartenders, Monnie & Marie.

11. In terms of managing the corporation as director, McFarland was not able to oversee the management of the restaurant because he works about 60 hours per week at his law office and he did not have the time.

12. On February 17, 2007, (without input from Karletta) McFarland and Zimmerman decided issued one (1) share of stock to Monnie¹ and one (1) share of stock to Marie (Plaintiffs Exs. 60 & 61). Threat of deadlock of shareholders was eliminated and a coin toss under the Bylaws would not be required.

¹ In the transcript of the November 29 meeting, Defendants' "CCC" McFarland acknowledges on page 7 that he knows that Karletta "would have a problem issuing stock to Monnie Cripe".

13. McFarland claims to have loaned the corporation extensive amounts of money. The jury concluded that McFarland was not entitled to recover \$176,300.18 because of his breach of fiduciary duty as director. The jury did allow McFarland to recover \$8,000.00 he loaned to the corporation.

14. A fiduciary relationship is one of confidence imposing great duties and it recognizes the disparity in bargaining power and that negotiations with a fiduciary are not at arms length.

15. A party can prevail on a breach of fiduciary duty claim by showing either that the party was damaged and/or the fiduciary benefited from a transaction.

16. In this case the Plaintiffs were damaged and the Defendants benefited.

JURY INSTRUCTIONS

17. In this case the jury was instructed regarding Plaintiff's claims for:

- a. Breach of Fiduciary duty regarding the stock purchase agreement by attorney (See Instruction No. 8, 8A, 8B);
- b. Breach of fiduciary duty regarding the stock purchase agreement by defendants, even if there was not an attorney client relationship (See Instruction No. 9, 9A and 9B);

c. Breach of fiduciary duty by Defendants as Directors of the corporation regarding money advances to the corporation (See Instruction No. 10, 10A & 10B).

18. Jury Instruction No. 11 (this is the damage instruction on the claims for breach of fiduciary duty by attorney, and for breach of fiduciary duty even if no attorney client privilege was found) provided that the damages the jury may consider if the Plaintiff is entitled to recover from the Defendants on the claim for breach of fiduciary duty for converting the loan to the stock purchase and sale agreement was the difference between the price Michael McFarland and Karen Zimmerman paid for the stock of the Captain's Wheel Resort, Inc and the actual value of the stock purchased.

19. Jury Instruction No. 12 (this is the damage instruction for the breach of fiduciary duty by the directors of the corporation regarding money damages) provided that if the Defendants breached their fiduciary duty as directors of the corporation owed to Plaintiff as a stockholder, the jury could determine the damages as the amount of any advances which the jury finds to be monies advanced to the corporation in breach of the Defendants fiduciary duty to the stockholders.

20. No jury instruction was given regarding money damages (legal relief) for breach of fiduciary duty regarding the issuance of stock to Monnie and Marie by the Defendants.

21. The Jury found a breach of fiduciary duty regarding the stock purchase agreement and found the plaintiff's damages to be \$380,500.00.

22. One can determine how the jury computed the damage amount of \$380,500.00 with reference to the evidence.

23. The Jury found that on July 4, 2006, the fair market value of the real property and assets of the corporation was \$1,300,000.00.

24. The jury found the debts of the corporation as of July 4, 2006 to total \$339,000.00 which are comprised of :

- a. \$242,000.00 for the CIT small business loan,
- b. \$15,000.00 for the debt on the parking lot, and
- c. \$5,000.00 for the Wells Fargo line of credit
- d. \$77,000.00 debt to Jerry Berry (See Defendant's Exhibit O, 4th page).

25. The jury determined the net value of the stock in the corporation on July 4, 2006 by subtracting the corporation's debts from the fair market value of the corporation's assets.

26. The fair market value of all of the stock in the Captain's Wheel Resort Inc. on July 4, 2006 is calculated as follows (FMV = fair market value):

July 4, 2006 FMV of Assets	\$1,300,000.00
(less) Debts of Corporation	<u>\$339,000.00</u>
Value/equity in 400 shares stock	\$961,000.00

27. The value of the 200 shares of stock the Defendants purchased from Jerry Berry in breach of fiduciary duty on July

4, 2006, as determined by the jury, was \$480,500.00 (\$961,000.00 ÷ 2 = \$480,500.00).

28. McFarland and Zimmerman traded \$100,000.00 in debt for \$480,500.00 in equity in stock on July 4, 2006. This was a breach of fiduciary duty created by the attorney client relationship and the fiduciary relationship under the Jones v. Runft standard.² The damage calculation is as follows:

Value of 200 shares of stock purchased by defendants	\$480,500.00
Amount paid by Defendants for 200 shares of stock	<u>\$100,000.00</u>
Difference (damages)	\$380,500.00

29. McFarland and Zimmerman benefited in the amount of \$380,500.00 as a result of the stock purchase and sale agreement to the detriment of the Plaintiff. \$380,500.00 is the difference between the price paid for the stock and the actual value (comment b, Restatement (Third) of Trusts, § 206) (...if the price paid by [fiduciary/attorney] was less than the value of the property at the time when the [fiduciary/attorney] purchased it, the beneficiary can compel him to pay the difference).

SPECIAL VERDICT AND REMEDIES

30. In this case, a special verdict was entered which:

² A fiduciary relationship does not depend upon some technical relation created by or defined in law, but it exists in cases where there has been a special confidence imposed in another who, in equity and good conscience, is bound to act in good faith and with due regard to the interest of one reposing the confidence. Jones v. Runft, Leroy, Coffin & Matthews, Chartered 125 Idaho 607, 614, 873 P.2d 861, 868 (Idaho, 1994).

- a. Found damages in the amount of \$380,000.00 for breach of fiduciary duty resulting from the Stock Purchase and Sale Agreement;
- b. Determined that the Defendants' claim for money advances to the corporation in the amount of \$176,300.18 can not be recovered by the defendants because of their breach of fiduciary duty as directors.
- c. Found that the issuance of one share of stock to Marie Streeter and one share of stock to Monnie Cripe was a breach of fiduciary duty as directors.

31. Idaho Rule of Civil Procedure 58(a) (2) provides that upon a special verdict or general verdict accompanied by answers to interrogatories, the court shall approve the form and sign the judgment and the judgment shall be entered by the judge or clerk.

32. For breach of the breach of fiduciary duty resulting from the stock purchase and sale agreement, the Plaintiff is entitled to a money judgment in the sum of \$380,500.00 against the Defendants. The Defendants have not stated any specific objection to this request.

33. For breach of fiduciary duty by Defendants as directors, the Court should adjudge that the Defendants are not

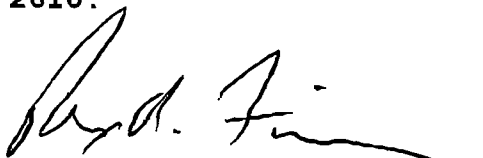
entitled to recover \$176,300.18 advanced to the corporation. The Defendants have not objected to this request.

34. The Court should set aside the 2 shares of stock issued to Monnie and Marie in violation of the Defendants' fiduciary duty as directors of the corporation. This request is objected to by the defendants in the Opposition To Plaintiffs' Motion For Entry of Findings, Conclusions, Final Order and Judgment.

35. The Court should enter the Finding, Conclusions, Final Order and Judgment attached hereto which is consistent with the Juries' Special Verdict in accordance with Rule 58.

36. Upon entry of the Finding, Conclusions, Final Order and Judgment the Defendants retain ownership of 200 shares of stock in the corporation.

DATED this 7 day of April, 2010.

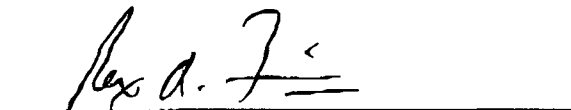


REX A. FINNEY
Attorney at Law

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was delivered as indicated, this 7 day of April, 2010, and was addressed as follows:

J.P. WHELAN P.C.
Attorney at law
213 N. 4th Street
Coeur d'Alene, Idaho 83814
(Via Facsimile: (208) 664-2240)



REX A. FINNEY
FINNEY FINNEY & FINNEY, P.A.
Attorneys at Law
Old Power House Building
120 East Lake Street, Suite 317
Sandpoint, Idaho 83864
Phone: (208) 263-7712
Fax: (208) 263-8211
ISB No. 6313

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF KOOTENAI

KARLETTA GRACE BERRY, a widow,	)	Case No. CV-2007-0002409
KARLETTA GRACE BERRY, Personal)	
Representative of the Estate	)	FINDINGS, CONCLUSIONS, FINAL
of Jerry Lee Roy Berry,	)	ORDER AND JUDGMENT
CAPTAIN'S WHEEL RESORT, INC.,)	
an Idaho Corporation,)	
)	
Plaintiff,)	
)	
v.)	
)	
MICHAEL B. MCFARLAND, MICHAEL)	
B. MCFARLAND, P.A., and KAREN)	
ZIMMERMAN,)	
)	
Defendants.)	
)	

BASED UPON the Plaintiffs' Motion For Entry of Findings,
Conclusions, Final Order and Judgment having come on matter came
on for Hearing on April 5, 2010;

AND WHEREAS the Jury entered a Special Verdict on January
28, 2010:

NOW THEREFORE, IT IS HEREBY ORDERED, ADJUDGED AND DECREED
THAT:

1. There was a breach of fiduciary duty regarding the Stock Purchase Agreement by defendant Michael McFarland as the attorney for the plaintiff which was the proximate cause of damages to the Plaintiff. (Special Verdict Question No. 1).

2. There was a breach of fiduciary duty regarding the Stock Purchase Agreement, even though there was no attorney-client relationship between them, owed by the defendants to plaintiffs which was the proximate cause of damages to the Plaintiffs. (Special Verdict Question No. 2).

3. The defendants' breach of fiduciary duty proximately caused Jerry Berry to enter into the Stock Purchase Agreement. (Special Verdict Question No. 3).

4. The difference between the price the defendants paid the plaintiff for the stock and the actual value of the stock purchased is the sum of \$380,500.00, being the amount of damages to Plaintiff. (Special Verdict Question No. 3(a)).

5. The plaintiff, Karletta Grace Berry, is awarded a money judgment in the amount of \$380,500.00 against the defendants, Michael B. McFarland, Karen M. Zimmerman, and Michael B. McFarland, P.A. (Special Verdict Question No. 3(a)).

6. The defendants breached a fiduciary duty owed to plaintiff by defendants as directors of the corporation.

(Special Verdict Question No. 4).

7. As a result of the defendants' breach of fiduciary duty as directors, the defendants are not entitled to receive \$176,300.18 they advanced to the corporation. (Special Verdict Question No. 5(a)).

8. The issuance of one share of stock to Marie Streater and one share of stock to Monnie Cripe was a breach of defendants' fiduciary duty as directors owed to the plaintiffs. (Special Verdict Question No. 5(b)).

9. The issuance of one share of stock to Marie Streater and one share of stock to Monnie Cripe are rescinded, set aside, and voided.

DATED this _____ day of April, 2010.

CHARLES W. HOSACK
DISTRICT JUDGE

CLERK'S RULE 77 (d) CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy, with the clerk's filing stamp thereon showing the date of filing, of the JUDGMENT was served as indicated below, this _____ day of April, 2010, and was addressed as follows:

Rex A. Finney
Finney Finney & Finney, P.A.
Attorneys at Law
Old Power House Building
120 East Lake Street, Suite 317
Sandpoint, Idaho 83864

U.S. Mail
 Hand Delivery
 fax: 208-263-8211

J.P. WHELAN P.C.
Attorney at law
213 N. 4th Street
Coeur d'Alene, Idaho 83814

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 Hand Delivery
 fax: 208-664-2240

By: _____
Clerk of the Court

STATE OF IDAHO }
County of Kootenai } ss
FILED 4-16-10
At 3:25 o'clock P.M.
CLERK OF THE DISTRICT COURT
[Signature]
Deputy

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE
STATE OF IDAHO IN AND FOR THE COUNTY OF KOOTENAI

**KARLETTA GRACE BERRY, a widow,
KARLETTA GRACE BERRY, Personal
Representative of the Estate of Jerry Lee
Roy Berry, CAPTAIN'S WHEEL
RESORT, INC., an Idaho Corporation,**

Plaintiffs,

vs.

**MICHAEL B. MCFARLAND, MICHAEL
B. MCFARLAND, P.A., and KAREN
ZIMMERMAN,**

Defendants.

CASE NO. CV-07-2409

**MEMORANDUM OPINION ON
MOTION FOR ENTRY OF
JUDGMENT**

PROCEDURAL POSTURE

This matter is before the Court on the Plaintiffs' Motion for Entry of Judgment. At the conclusion of the jury trial, following the jury returning the Special Verdict, Plaintiffs submitted a proposed judgment for entry by the Court. Upon inquiry from the Court, Plaintiffs attorney stated that the proposed judgment was intended to be a partial judgment, and further proceedings could be anticipated. The Court indicated it would not enter a partial judgment without some explanation as to what issues the Plaintiffs were

reserving for presentation at some later date. Plaintiffs filed a Motion for Entry of Judgment, and the hearing has been held on Plaintiffs motion. At the hearing, Plaintiffs counsel indicated that the proposed judgment presented at the hearing was intended to be entered as a final judgment.

DISCUSSION

The form of the proposed final judgment which was submitted by Plaintiffs at the hearing did not vary in any substantive way from the earlier presented proposed partial judgment, other than the blank for the amount of the damage award has been filled in on the proposed final judgment. The proposed final judgment sets the monetary award of damages at \$380,500.00.

The proposed final judgment is consistent with the special verdict entered by the jury. The jury found a breach of fiduciary duty regarding the Stock Purchase Agreement owed by the defendants to plaintiffs which was the proximate cause of damages in the amount of \$380,500.00. The jury further found that the defendants' claimed offset for the money advances made to the corporation by the defendants while serving as directors in the amount of \$176,300.18 was barred by the defendants' breach of fiduciary duty.

The proposed final judgment would leave the plaintiffs and the defendants as equal shareholders in the corporation. The final judgment would affirm the Stock Purchase Agreement, but essentially change the purchase price from \$100,000 to \$480,500. The breach of duty is as of the July 2006 entry into the Stock Purchase Agreement, as the only evidence as to value of the corporate assets is as of July 2006.

The proposed final judgment is consistent with the special verdict, but only makes sense if it is in fact a final judgment. There were many issues, claims and theories presented during trial. A final judgment renders those other issues moot.

There are many questions that would remain unless there is an entry of a final judgment. There were claims for rescission. One might ask why Jerry Berry, if he owned 100% of the corporation, would be selling 50% of his stock in the corporation in July 2006. One might wonder just who it was, as of July 2006, who was going to pay Jerry Berry \$485,500 for a 50% interest in the corporation and the opportunity to partner with Karlotta Berry in the continued operation of the business. Karlotta's testimony was that the original agreement between Jerry Berry and the defendants was a loan, which was transformed into a Stock Purchase Agreement through a breach of fiduciary duty. There was a claim for rescission by Plaintiffs, but the final judgment for money damages moots that claim. Claims for an accounting are also moot. With equal ownership in the corporation between the plaintiffs and the defendants, if deadlock is not an absolute certainty, the potential for deadlock is reasonable probability, but no longer an issue to be adjudicated in this case, as both parties agree that the final judgment should leave the parties as they are.

The Court is willing to enter the final judgment, but the Court needs to make clear that this is a final judgment, resolving this case. Further litigation, if not inevitable, is certainly highly likely, but additional claims, that may or may not have been raised in this case, will now be litigated at a future date in a new proceeding.

Normally, entry of a judgment following a jury verdict is a final judgment and no 54 (b) certificate would be necessary. However, because of the history of this particular

case, counsel may later argue that the Plaintiffs' proposed judgment did not in fact adjudicate all issues raised in the case, and that the judgment is only partial in nature. Even though the parties may believe the judgment to be final, an appellate court might wonder just what the trial court could have been up to, and find that given the absence of a Rule 54 (b) certificate, and given the many raised, but unresolved issues in the case, the judgment was not intended to be final.

To resolve any possible ambiguity, the Court has determined that it should issue a Rule 54(b) certificate with regard to the Plaintiffs proposed judgment. If the Court is entering a final judgment, the certificate is superfluous. But if an argument that this judgment did not resolve all claims of the parties is to be raised at a later date, it is certainly the position of this Court that the judgment entered herein nonetheless should be certified as final. There is no reason for delay, and this Court has unequivocally determined that this is a judgment that should be certified as final, from which an appeal can be taken. Without finality to this judgment, all issues presumably resolved by the jury verdict will remain a moving target. The parties will have no base line from which issues can be defined and resolved in any subsequent litigation.

DATED this 16 day of April, 2010.



Charles W. Hosack, Senior District Judge

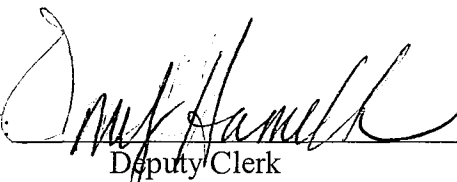
Clerk's Certificate of Mailing

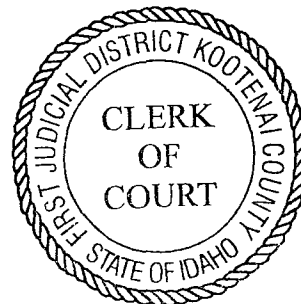
I hereby certify that on the 16 day of April, 2010, that a true and correct copy of the foregoing was mailed/delivered by regular U.S. Mail, postage prepaid, Interoffice Mail, Hand Delivered or Faxed to:

Rex A. Finney
Finney Finney & Finney, P.A.
Fax: 208-263-8211

J.P. Whelan P.C.
Attorney at Law
Fax: 208-263-8211

DANIEL J. ENGLISH
CLERK OF THE DISTRICT COURT

BY: 
Deputy Clerk



REX A. FINNEY
 FINNEY FINNEY & FINNEY, P.A.
 Attorneys at Law
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 120 East Lake Street, Suite 317
 Sandpoint, Idaho 83864
 Phone: (208) 263-7712
 Fax: (208) 263-8211
 ISB No. 6313

STATE OF IDAHO
 COUNTY OF KOOTENAI } SS
 FILED:

2010 APR 16 PM 3:28

CLERK DISTRICT COURT

DEPUTY

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE
 STATE OF IDAHO, IN AND FOR THE COUNTY OF KOOTENAI

KARLETTA GRACE BERRY, a widow,	)	Case No. CV-2007-2409
KARLETTA GRACE BERRY, Personal)	
Representative of the Estate)	
of Jerry Lee Roy Berry,	)	JUDGMENT
CAPTAIN'S WHEEL RESORT, INC.,)	
an Idaho Corporation,)	
)	
Plaintiff,)	
v.)	
)	
MICHAEL B. MCFARLAND, MICHAEL)	
B. MCFARLAND, P.A., and KAREN)	
ZIMMERMAN,)	
)	
Defendant.)	
)	

WHEREAS the above entitled matter came on for Jury Trial on
 January 19, 2010:

AND WHEREAS the Jury entered a Special Verdict on January
 28, 2010 finding:

- a) a breach of fiduciary duty regarding the Stock Purchase Agreement by defendant Michael McFarland as the attorney for the plaintiff which was the proximate cause of damages to the plaintiff;

- b) a breach of fiduciary duty regarding the Stock Purchase Agreement owed by the defendants to plaintiffs which was the proximate cause of damage to plaintiffs, and;
- c) damages to be the amount of \$380,500.00

NOW THEREFORE, BASED UPON the Jury's Special Verdict it is hereby ORDERED, ADJUDGED and DECREED that Judgment is entered in favor of the Plaintiff, KARLETTA GRACE BERRY, and against the Defendants, MICHAEL B. MCFARLAND, MICHAEL B. MCFARLAND, P.A., and KAREN ZIMMERMAN, in the sum of THREE HUNDRED EIGHTY THOUSAND FIVE HUNDRED DOLLARS (\$380,500.00), together with interest thereon pursuant to statute.

DATED this 16 day of April, 2010.



Charles W. Hosack
District Judge

RULE 54(b) CERTIFICATE

With respect to the issues determined by the above judgment or order it is hereby CERTIFIED, in accordance with Rule 54(b), I.R.C.P., that the court has determined that there is no just reason for delay of the entry of a final judgment and that the court has and does hereby direct that the above judgment or order shall be a final judgment upon which execution may issue and an appeal may be taken as provided by the Idaho Appellate Rules.

DATED this 16 day of April, 2010.



Charles W. Hosack
District Judge

CLERK'S RULE 77(d) CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy, with the clerk's filing stamp thereon showing the date of filing, of the JUDGMENT was served as indicated below, this 16 day of April, 2010, and was addressed as follows:

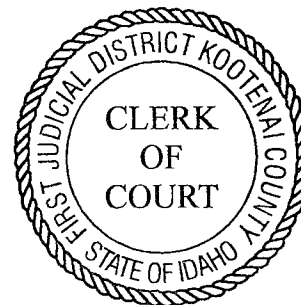
Rex A. Finney
Finney Finney & Finney, P.A.
Attorneys at Law
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120 East Lake Street, Suite 317
Sandpoint, Idaho 83864

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J.P. Whelan P.C.
Attorney at Law
213 N. 4th Street
Coeur d'Alene, Idaho 83814

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 Hand Delivery
 fax: 208-664-2240

By: *Miss Hamell*
Clerk of the Court



STATE OF IDAHO
COUNTY OF KOOTENAI } SS
FILED #082

2010 APR 29 PM 2:55

CLEK DISTRICT COURT
DEPUTY *[Signature]*

John P. Whelan, P.C.
Attorney at Law
213 N. 4th Street
Coeur d' Alene, Idaho 83814
Telephone: (208) 664-5891
Facsimile: (208) 664-2240
ISB No. 6083

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF KOOTENAI

KARLETTA GRACE BERRY, a widow,
KARLETTA GRACE BERRY, Personal
Representative of the Estate of Jerry
Lee Roy Berry, CAPTAIN'S WHEEL
RESORT, INC., an Idaho Corporation,

Plaintiffs,

vs.

MICHAEL B. MCFARLAND, MICHAEL B.
MCFARLAND, P.A., and KAREN
ZIMMERMAN,

Defendants.

Case No. CV-07-2409

AFFIDAVIT OF JESSICA TVRDY IN
SUPPORT OF DEFENDANTS' POST TRIAL
MOTIONS

Hearing Date:

Time:

Judge: Charles Hosack

STATE OF IDAHO)
) ss.
County of Kootenai)

Jessica Tvrdy, being first duly sworn, deposes and says:

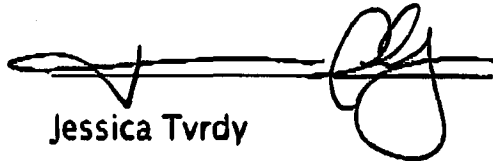
1. I am the paralegal for attorney John P. Whelan. I have personal

knowledge of the following facts and could competently testify.

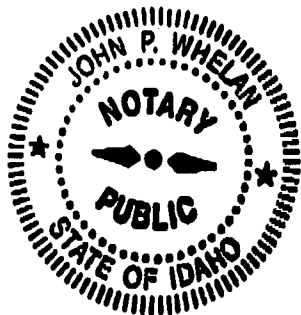
2. I obtained a copy of the audio CD for the closing arguments which were heard January 26, 2010 by contacting the Records Department at the Kootenai County Courthouse. I transcribed portions of the rebuttal closing argument of Plaintiffs' attorney, Rex Finney.

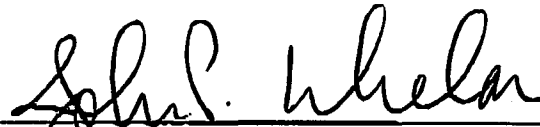
3. A true and correct copy of portions of the rebuttal closing argument of Mr. Finney is attached hereto as Exhibit A.

DATED this 29 day of April, 2010.


Jessica Tvrdy

SUBSCRIBED AND SWORN before me this 29 day of April, 2010.




Notary Public in and for the State of Idaho
Residing at: Worley
My Comm. Expires: 2/19/14

McFarland Partial Transcript

Beginning of rebuttal closing: 3:49:34

Start time: 3:57:17

Now, Mr. McFarland testified yesterday about how bad this business is. It's basically a black hole. But then when asked, why don't you just give it back? He said, he won't give it back, because Karletta filed a frivolous suit against him [inaudible] to the effect that, used the shotgun approach, and it has made him very upset. Now, it is a bad day, when a lawyer is mad some person sought help in the legal system. That's lawyers, more than anyone, should appreciate, that every individual, every person, has the right to seek assistance from the courts when they feel that they have been wronged.

Now in this case, the summary of the story is that in 2001, Jerry came in, and you know you've got to picture this, you have two guys who drink and they meet and they talk about, "hey I got judgment creditors and I don't want them to take my stuff". He goes to a guy whose got the power to freeze up judgment creditors, they can't take your stuff if you are in bankruptcy. You may have to repay over time but you get protection. Now, if he goes to a man looking for protection, and now this man has taken advantage of Mr. Berry's widow, it's not as blurry as Mr. Whelan would have you think. (Emphasis Added).

Now, let's see here. Okay, here we go. You saw this video. Mr. McFarland said on the video and he now acknowledges it, Jerry Berry came to my office to seek protection of the stock in the Captain's Wheel from judgment creditors. Here's his affidavit, once again contradicting himself, paragraph 8, page 6, I deny I was advising Jerry and Karletta Berry on how to protect the stock in the Captain's Wheel from creditors. You can't have it every way. If you pick a story, you better stick to it. In this case, it has gone every way. I mean, I wasn't his lawyer, okay maybe I was his lawyer, in here he's not his lawyer, in deposition he is his lawyer, back in court he is not his lawyer until the video was played and then he was. Its hit every single direction possible. Now, Mr. Whelan says don't look at Exhibit A. Well you have to look at Exhibit A. Exhibit A is the only document that was filled out by one of the parties. Exhibit B, the one he wants you to rely on, Delores Meredith said she put the name, she filled in the line, put Captain's Wheel Resort Property/Business so she would know what file to put it in. Mike McFarland, he's been to George Washington University in Washington D.C., he wrote in no uncertain terms, loan to be secured with stock as collateral. He didn't write, loan for now and if we give you another \$60,000 we get the stock. Loan to be secured with stock as collateral. It can't be any more clear. His affidavit verifies that as well. Most of the testimony of Mr. McFarland was explaining why the written documents don't mean what they say and then in fact, after he issued some extra shares of stock, the last thing he does in an attempt to rehabilitate himself is to oh its no big deal we could take those back and if Karletta objects, its not a big deal to take that stock back. It seems kind of weird that you would issue it, wait three years and then when it comes out in court, your testimony is we can take that back easily. He didn't ask if she wanted to issue it. Now, Mr. Whelan also says, a little misleading, he says, Karletta gets it all. There is no blank on that verdict the judge read to you that says you can give the stock back to Karletta. That's not the way it works. It just sounded good though at the moment. (Emphasis Added).

End time: 4:01:30

Exhibit
A

Start time: 4:04:46

Now, nobody is saying Mike and Karen shouldn't get their \$100,000.00. We are just saying it should be what Mike has called it. Mike the lawyer wrote this exhibit A. He called it a loan. Mike the lawyer wrote the affidavit of Mike McFarland, Exhibit 77. He called it, the stock purchase agreement, he says we didn't get Jerry to sign it basically. The stock purchase agreement was Jerry's idea and it was designed to swap equity in the corporation for the debt owed to us. Now, he didn't say in his affidavit that it was to memorialize our agreement from 2003. Why would a lawyer make a deal like that, that's a one page agreement, could have been handwritten. It surely doesn't make any sense if he owned the stock he could have easily had Jerry sign something that said he owned the stock, not wait until right at the very end and not swap it for debt owed to him, as his own statement says. If anyone should be held to what their written statements say it is an attorney. Now, you didn't see Karletta Berry trying to explain all the things that she had done that were inconsistent with her testimony. In fact, all they had on her was under intense questioning by a powerful man she froze up a little bit and didn't say she knew what undue influence was or certain things and then pointed out in her deposition that was read in, she did in fact tell them about the little things. She talked about the espresso stand. She talked about calling for advice regarding the highway. Mike McFarland said she doesn't even own land that fronts Highway 95. In fact, she did. Who do you believe? There's some smoke and mirrors here. They are saying there is nothing in writing that would even suggest that Mike McFarland is the attorney. Well, why would he draft a trust agreement. If someone is not your lawyer, now do lawyers voluntarily draft up trust agreements and bring it to a person. It doesn't make any sense. If you weren't his lawyer, you wouldn't be drafting a trust agreement. If you weren't his lawyer, Paul Daugharty probably would have stayed involved in this transaction. It's clear. It's not like this. It's not like this. He said he was his lawyer and it is time to believe him. He said it right here on the stand that yeah I was his lawyer, but only on one deal. He still won't admit that he was his lawyer on the trust agreement. Now their new thing is oh, Jerry Berry had a will and Mike didn't draft it. Well, let's think about it. What did Jerry Berry have to leave. He had already deeded the house over. What was his other big asset? The stock. 200 shares of stock. And what lawyer is it that helped him to create a joint tenancy with right to survivorship. That would be Mr. McFarland. It is in his own writing. He created Jerry's estate plan for him. He can go ahead and say he didn't do his will but he did something better. You don't even have to bring that to the probate court. His own testimony is, that is why I asked him to explain joint tenancy with right of survivorship. So the jury would understand and he explained it quite well. The minute one of the two people passes away, the other one owns it all as a matter of law. It doesn't take any probate action, doesn't take court approval. That's how he handles his own affairs. So to say that he didn't draft. What was Jerry going to leave in the will? The chairs, the tables? Not the Wheel. The Wheel was already handled by the lawyer. This was turned into joint tenancy at the hand of a lawyer. Now, Cheryl Lynn(?) has no reason to make things up. She had a death in the family, she couldn't make it here the first week. Here she comes out and what did she say? Her son was thinking about purchasing the restaurant. She said dad told us that he had to pay his lawyer off \$100,000.00. If the best thing they can level against Cheryl Canno is she used the word lawyer and attorney. Last time I checked those mean the same thing. She works with attorneys cause she is involved in head start or something. Since she works with attorneys often she uses that word. It's not a big deal to accidentally say lawyer when you

mean attorney. Look at the Instructions, do they say lawyer? No they say attorney but we all know that lawyer is attorney, yes. It is clear, lawyer is attorney. Actions speak louder than words. Now Mr. McFarland was handed Exhibit 86. It's not admitted. And there was a big stack of tickets. Judge rightfully got mad at me for having to give those to him. But only a little few of them had his signature on them. But they were kept separate. They were not treated, that was back in '03-'04 when this was interest on the loan. He was paid interest in the form of money given to Karen and all you can eat, all you can drink, all you can party at the Captain's Wheel for years. Sure he continued getting greased up after he got Jerry to sign the stock purchase and sale agreement but that doesn't mean it wasn't interest before and even by the Defendants own statements, under their theory, Karletta should still owe that interest payment. If things were all done back in '03, why did everything actually change when the documents were signed? There has been no letter. He filed a counterclaim asking for money damages. I haven't heard any mention those at all to the jury. Now, Herb Huseland he did say the word partner remember. But then what did he say? He said he is using it loosely and he sounded like a pretty complex dude, like this guy knows what he is doing. But what he really is is the baby blog that works in the salad bar. I mean, he worked in the salad bar. He is not this person that he initially gave the impression of. This is the guy that was working at the salad bar that now runs a blog on the Internet. Bob Holland. You heard about Bob Holland came in and wrecked everything and that is why the business went bad. Well, last time I checked the testimony was Bob came in and then they made almost \$500,000.00 in revenue in 2007. They said that revenue was cut in their own exhibit. Bob Holland came in. It didn't make any difference, there is still \$500,000.00. Just rather than being real careful with that \$500,000.00 it was like a party at the Wheel. The cooks were drinking. I mean, who knows what was going on in there. Mike doesn't he wasn't there except for when there was a band. Now, once again I just ask you, try to remember who is the one trying to explain that the written things he wrote don't really mean what they say. It is not Karletta Berry here. Karen Zimmerman said she had a great memory. That she never heard Mike referred to as anyone's attorney in public or Jerry's attorney. Mike admits it, everyone else remembers it. She was there, she doesn't remember it. Now, Toby McLaughlin. Don't get confused by the issues here. Toby is not sitting here asking anybody questions. He was a witness. That is all he ever was. You can believe in theory that you can't have a witness, how could a person ever prove anything. It is what it is. Mr. McFarland initially indicated there was an audio recording in his deposition. That is not the case. When asked on his deposition if Mr. McLaughlin was lying, he said, what he thinks. Now he never said yeah he is lying at that point. He is just saying it is on an audio recording and it is available to play. Now that wasn't accurate either. So, you have to really keep in mind who was accurate and who wasn't accurate. Mr. Whelan sounds pretty convincing. Johnston, he didn't say me and my partner are selling, he just said I got an offer what do you think about it. He also said yeah there are times I don't charge clients too. According to him he charges friends, and kind of laughed about it, but maybe not his family. Well, this case, this book, does have stuff in it drafted by a lawyer, for the benefit of Jerry Berry. It is not my word against Mr. Whelan's word. It is something for the jury to decide. I'm sure we both, probably both think we know what we are talking about and probably both think we are smart but that's not the case. The jury is the one who is sitting there. Sees the reaction, sees the eyes, sees the body movements, sees the nervousness when people walk in the room. It is something that only a jury can do. It's not for lawyers. We can only try to do the best we can to present our cases. Now, there's a big discussion about Karletta didn't throw a fit on

October 15, 2006. Let's go back. She had already talked to Jerry on July 4, 2006 and Jerry went with the stock purchase, excuse me, loan agreement, which is consistent with the only thing written by Mike McFarland to Mr. McFarland's cabin. Now Jerry is just speared into this life. He already signed the darn agreement that Karletta didn't want him to sign and now you think Karletta is going to spend the last little bit of time she has fighting with her husband. She was there to take care of him. You heard from Cheryl Lynn. You heard from the other people. They loved each other. Jerry loved Karletta. He didn't want her excluded. It can't be any more clear. What we have here is some lawyer is hiding behind something that is present. They, Mr. Whelan, wants you to look at Exhibit B. The one that is not written by anybody. The one that was written by some lady who worked in the law office. She wrote the words on it so she would know what file to put it in. Seems a bit suspicious to me that there would be a file in that law office but, I'm not even going to recite it to you. I know you are going to end up reading Mr. McFarland's affidavit. Look it over. He can't find a message, a note, anything. There's some stuff he didn't bring in. Is it fair to say they don't have all items I have? What happened to the file that he told Toby McLaughlin about? What happened to the letter from the judgment creditor that he had in his file. Surely, he has it. We don't have it. Karletta saw something with his name on it at the house, she didn't know what it was. But there was a point there just around the time the deal got signed, Jerry went on some sort of a cleaning mission and he was throwing stuff away. Who knows what went on to make Jerry throw stuff away out of the office. Seems kind of weird to get rid of stuff right after you make a backdated agreement.

End time: 4:17:30

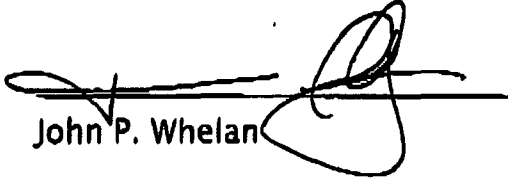
Rebuttal closing ends at: 4:21:05

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 29TH day of April, 2010, I caused to be served a true and correct copy of the foregoing by the method indicated below, and addressed as indicated below:

Rex A. Finney
Finney, Finney & Finney
120 East Lake Street, Suite 317
Sandpoint, ID 83865

- () U.S. Mail, Postage Prepaid
- () Hand Delivered
- () Overnight Mail
- () Facsimile to: (208) 263-8211


John P. Whelan

STATE OF IDAHO } SS
COUNTY OF KOOTENAI }
FILED: #982

2010 APR 29 PM 2:55

CLERK DISTRICT COURT
John P. Whelan
DEPUTY

John P. Whelan, P.C.
Attorney at Law
213 N. 4th Street
Coeur d' Alene, Idaho 83814
Telephone: (208) 664-5891
Facsimile: (208) 664-2240
ISB No. 6083

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE STATE OF
IDAHO, IN AND FOR THE COUNTY OF KOOTENAI

KARLETTA GRACE BERRY, a widow,
KARLETTA GRACE BERRY, Personal
Representative of the Estate of Jerry
Lee Roy Berry, CAPTAIN'S WHEEL
RESORT, INC., an Idaho Corporation,

Plaintiffs,

vs.

MICHAEL B. MCFARLAND, MICHAEL B.
MCFARLAND, P.A., and KAREN
ZIMMERMAN,

Defendants.

Case No. CV-07-2409

AFFIDAVIT OF JOHN P. WHELAN IN
SUPPORT OF DEFENDANTS' POST TRIAL
MOTIONS

Hearing Date:

Time:

Judge: Charles Hosack

STATE OF IDAHO)
) ss.
County of Kootenai)

John P. Whelan, being first duly sworn, deposes and says:

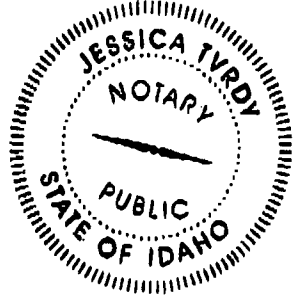
1. I am the attorney for Defendants in this action. I have personal knowledge of the following facts and could competently testify. The above-entitled matter was tried January 19, 2010 to January 28, 2010.

2. A true and correct copy of the Special Verdict in the above-entitled action is attached hereto as Exhibit A.

Dated: 4-29-10

John P. Whelan
John P. Whelan

Subscribed and sworn before me this 2 day of April, 2010.



[Signature]
Notary Public in and for the State of Idaho
Residing at: Post Falls
My Comm. Expires: 12/29/11

STAMP: 1/28/10
COUNTY OF KOOTENAI
FILED: 1/28/10
AT 2:00 P.M.

CLERK, DISTRICT COURT
[Signature]
DEPUTY

FIRST JUDICIAL DISTRICT COURT, STATE OF IDAHO
IN AND FOR THE COUNTY OF KOOTENAI
324 W. GARDEN AVENUE
COEUR D'ALENE, IDAHO 83814

KARLETTA GRACE BERRY, widow,)
KARLETTA GRACE BERRY, Personal)
Representative of the Estate of Jerry)
Lee Roy Berry,)

Case No: CV-2007-0002409

Plaintiffs,)

vs.)

SPECIAL VERDICT

MICHAEL B MCFARLAND, MICHAEL B.)
MCFARLAND, P.A., and KAREN)
ZIMMERMAN,)

Defendant.)

We the jury, in the above entitled action, find the following Special Verdict on the questions as follows:

No. 1 Was there any breach of duty regarding the Stock Purchase Agreement by defendant Michael McFarland as the attorney for the plaintiff which was the proximate cause of damages to plaintiff?

Yes _____

No _____

No. 2 Was there any breach of fiduciary duty regarding the Stock Purchase Agreement owed by defendants to plaintiffs, even though there was no attorney-client relationship between them, which was the proximate cause of damages to plaintiffs?

Yes _____

No _____

If you answered "yes" to either Question No. 1 or Question No. 2, then answer No. 3.
If you answered "no" to both No. 1 and No. 2 go to question No. 4

No. 3 If you have found the defendants breach of fiduciary duty proximately caused Jerry Berry to enter into the Stock Purchase Agreement, you must determine the amount of damages.

a) We find the difference between the price defendants paid for the stock and

the actual value of the stock: \$ 380,500.00

Please answer Question No. 4.

No. 4 Did defendants breach any fiduciary duty which was owed to plaintiff by defendants as directors of the corporation?

Yes ✓ No _____

If you answered "no" to Question No. 4, sign the verdict.
If you answered "yes" then answer No. 5.

No. 5 a) What amount of defendants claim for money advances to the corporation, if any, cannot be received by defendants because of their breach of fiduciary duty as Directors? \$ 176,300.18

b) Was the issuance of one share of stock to Marie Streater and one share of stock to Monnie Cripe a breach of defendants fiduciary duty as a Director to the plaintiff?

Yes ✓ No _____

Richard [Signature] (Juror #9)

Presiding Juror

Juror

Juror

Juror

Juror

Juror

Juror

Juror

Juror

Juror

Juror

Juror

DATED this 28th day of January, 2010.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 29th day of April, 2010, I caused to be served a true and correct copy of the foregoing by the method indicated below, and addressed as indicated below:

Rex A. Finney
Finney, Finney & Finney
120 East Lake Street, Suite 317
Sandpoint, ID 83865

- U.S. Mail, Postage Prepaid
- Hand Delivered
- Overnight Mail
- Facsimile to: (208) 263-8211


John P. Whelan

STATE OF IDAHO
COUNTY OF KOOTENAI } SS
FILED:

2010 APR 29 PM 2:55 #982

CLERK DISTRICT COURT
DEPUTY *[Signature]*

John P. Whelan, P.C.
Attorney at Law
213 N. 4th Street
Coeur d' Alene, Idaho 83814
Telephone: (208) 664-5891
Facsimile: (208) 664-2240
ISB No. 6083

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE STATE OF
IDAHO, IN AND FOR THE COUNTY OF KOOTENAI

KARLETTA GRACE BERRY, a widow,
KARLETTA GRACE BERRY, Personal
Representative of the Estate of Jerry
Lee Roy Berry, CAPTAIN'S WHEEL
RESORT, INC., an Idaho Corporation,

Plaintiffs,

vs.

MICHAEL B. MCFARLAND, MICHAEL
B. MCFARLAND, P.A., and KAREN
ZIMMERMAN,

Defendants.

Case No. CV-07-2409

MOTION FOR NEW TRIAL

Hearing Date:

Time:

Judge: Charles Hosack

COMES NOW the Defendants, Michael B. McFarland, Michael B. McFarland, P.A. and Karen Zimmerman, by and through their counsel of record, John P. Whelan, and hereby moves this Court for a new trial. This motion is made pursuant to I.R.C.P. Rule 59(a) on the grounds that the trial of the above-entitled matter was tainted by attorney misconduct and irregularity in the

proceedings such that Defendants were prevented from having a fair trial. Furthermore, excessive damages resulted from the influence of passion or prejudice. Lastly, the findings of the jury are not supported by substantial and competent evidence.

Defendants request oral argument.

DATED this 29 day of April, 2010.

JOHN P. WHELAN, P.C.

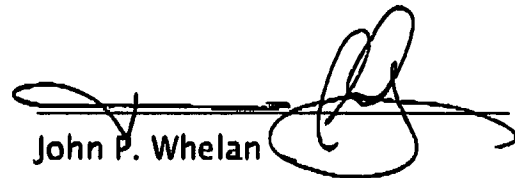
By: John P. Whelan
John P. Whelan
Attorney for Defendants

CERTIFICATE OF SERVICE

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John P. Whelan

STATE OF IDAHO } SS
COUNTY OF KOOTENAI }
FILED: #982

2010 APR 29 PM 2:55

CLERK DISTRICT COURT

DEPUTY

John P. Whelan, P.C.
Attorney at Law
213 N. 4th Street
Coeur d' Alene, Idaho 83814
Telephone: (208) 664-5891
Facsimile: (208) 664-2240
ISB No. 6083

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE STATE OF
IDAHO, IN AND FOR THE COUNTY OF KOOTENAI

KARLETTA GRACE BERRY, a widow,
KARLETTA GRACE BERRY, Personal
Representative of the Estate of Jerry
Lee Roy Berry, CAPTAIN'S WHEEL
RESORT, INC., an Idaho Corporation,

Plaintiffs,

vs.

MICHAEL B. MCFARLAND, MICHAEL
B. MCFARLAND, P.A., and KAREN
ZIMMERMAN,

Defendants.

Case No. CV-07-2409

MOTION FOR REMITTITUR

Hearing Date:

Time:

Judge: Charles Hosack

COMES NOW the Defendants, Michael B. McFarland, Michael B. McFarland, P.A. and Karen Zimmerman, by and through their counsel of record, John P. Whelan, and hereby move this Court for remittitur. This motion is made pursuant to I.C. 6-807 and I.R.C.P. Rule 59.1 on the grounds that the jury's award of damages in the Special Verdict filed 1-28-10 is not supported by

MOTION FOR REMITTITUR- 1

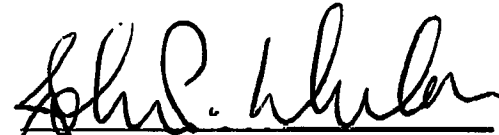
substantial and competent evidence.

Defendants request oral argument.

DATED this 29 day of April, 2010.

JOHN P. WHELAN, P.C.

By:



John P. Whelan

Attorney for Defendants

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 29TH day of April, 2010, I caused to be served a true and correct copy of the foregoing by the method indicated below, and addressed as indicated below:

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John P. Whelan

STATE OF IDAHO
COUNTY OF KOOTENAI } SS
FILED: #982

2010 APR 29 PM 2:54

CLERK DISTRICT COURT

DEPUTY

John P. Whelan, P.C.
Attorney at Law
213 N. 4th Street
Coeur d' Alene, Idaho 83814
Telephone: (208) 664-5891
Facsimile: (208) 664-2240
ISB No. 6083

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE STATE OF
IDAHO, IN AND FOR THE COUNTY OF KOOTENAI

KARLETTA GRACE BERRY, a widow,
KARLETTA GRACE BERRY, Personal
Representative of the Estate of Jerry
Lee Roy Berry, CAPTAIN'S WHEEL
RESORT, INC., an Idaho Corporation,

Plaintiffs,

vs.

MICHAEL B. MCFARLAND, MICHAEL
B. MCFARLAND, P.A., and KAREN
ZIMMERMAN,

Defendants.

Case No. CV-07-2409

MOTION FOR JUDGMENT
NOTWITHSTANDING THE VERDICT

Hearing Date:

Time:

Judge: Charles Hosack

COME NOW the Defendants, Michael B. McFarland, Michael B. McFarland,
P.A. and Karen Zimmerman, by and through their counsel of record, John P.
Whelan, and hereby move this Court for judgment notwithstanding the verdict.
This motion is made pursuant to I.R.C.P. Rule 50(b) on the grounds that the
jury's findings and award of damages to Plaintiff are not supported by

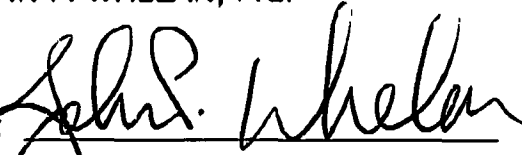
MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT- 1

substantial and competent evidence but rather resulted from passion and prejudice.

Defendants request oral argument.

DATED this 29 day of April, 2010.

JOHN P. WHELAN, P.C.

BY: 

John P. Whelan

Attorney for Defendants

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 29TH day of April, 2010, I caused to be served a true and correct copy of the foregoing by the method indicated below, and addressed as indicated below:

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120 East Lake Street, Suite 317
Sandpoint, ID 83865

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- Facsimile to: (208) 263-8211


John P. Whelan

REX A. FINNEY
FINNEY FINNEY & FINNEY, P.A.
Attorneys at Law
Old Power House Building
120 East Lake Street, Suite 317
Sandpoint, Idaho 83864
Phone: (208) 263-7712
Fax: (208) 263-8211
ISB No. 6313

STATE OF IDAHO }
COUNTY OF KOOTENAI } SS
FILED

2010 APR 30 PM 4:30

CLERK DISTRICT COURT

DEPUTY

[Handwritten signature]

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF KOOTENAI

KARLETTA GRACE BERRY, a widow,	)	Case No. CV-2007-2409
KARLETTA GRACE BERRY, Personal)	
Representative of the Estate	)	PLAINTIFFS' MEMORANDUM OF
of Jerry Lee Roy Berry,	)	ATTORNEY FEES AND COSTS
CAPTAIN'S WHEEL RESORT, INC.,)	
an Idaho Corporation,	)	I.R.C.P. 54
)	
Plaintiffs,)	
)	
v.)	
)	
MICHAEL B. MCFARLAND, MICHAEL)	
B. MCFARLAND, P.A., and KAREN)	
ZIMMERMAN,)	
)	
Defendants.)	
)	

STATE OF IDAHO)
: ss.
COUNTY OF BONNER)

COMES NOW, REX A. FINNEY, Attorney for the Plaintiff,
KARLETTA GRACE BERRY, a widow, after being first duly sworn
under oath, and submits this Memorandum Of Attorney Fees And

Costs which said Plaintiff claims against the Defendants and states as follows:

1. I am the attorney for the Plaintiffs.
2. That all costs claimed below have been reasonable and necessarily incurred in this action.
3. That the attorney fees claimed against the Defendant is the amount of ONE HUNDRED FIFTY TWO THOUSAND DOLLARS (\$152,000.00) based upon a contingent fee of forty percent (40%) percent of any judgment ($40\% * \$380,500.00 = \$152,000.00$) or recovery, up to and through trial. The fee does not include fees in the event of an appeal.
4. In this case I proposed attorney fees to be calculated by the hour, but my client declined such an agreement based upon her inability to pay hourly fees.
5. Plaintiff, Karletta Grace Berry is a widow, is not employed and lacks liquid assets to pay hourly attorney fees.
6. The attorney fees of \$152,000.00 claimed herein are reasonable based upon (a) the time and labor required, (b) The novelty and difficulty of the questions, (c) the skill required to perform the legal services, (d) the prevailing charge for like work, (e) the circumstances of the case, (f) the amount involved and the results obtained, and (g) the undesirability of taking a breach of fiduciary case against an attorney.

7. This case was novel and difficult, and was an undesirable case.

8. Based on the results obtained by Rex A. Finney as attorney for Plaintiff, the attorney fees claimed are reasonable.

9. That I am a licensed attorney within the State of Idaho and that I would normally charge an hourly rate from \$175.00 to \$200.00 per hour which is a reasonable rate for my time based upon existing standards for comparable services. This arrangement is utilized when my client can afford to pay attorney fees and costs out of her pocket. In this case my client could not afford an hourly fee.

10. To the best of my knowledge and belief, the following items (attorney fees and costs) are correct and in compliance with the Idaho Rules of Civil Procedure 54(d)(1) and (5), and 54(e)(1) and (5):

<u>Date</u>	<u>Description</u>	<u>Time</u>
11/08/06	O/C Karlie	4.750
11/13/06	T/C Karlie	0.500
11/14/06	Letter to Michael McFarland and Karen Zimmerman; O/C Karlie; T/C Karlie	3.25
11/15/06	T/C Mike McFarland	0.125
11/16/06	T/C Mike McFarland; Research; Rec & Rev fax from Michael McFarland	3.750
11/17/06	T/C Atty McLaughlin; T/C Karlie; O/C Karlie; Rec & Rev telephone msg from Karlie; T/C Atty Bistline	2.500
11/18/06	Research; O/C Karlie and Atty McLaughlin; Preparation; To Coeur d'Alene for special meeting	6.500
11/20/06	T/C Karlie; T/C Mike McFarland's office	0.500

11/21/06	O/C Karlie and research; Fax to Michael McFarland and Karen Zimmerman	3.250
11/22/06	Letter to Karlie,	0.250
11/27/06	T/C Karlie	0.250
11/28/06	T/C Karlie	0.250
11/29/06	T/C Karlie and Atty McLaughlin; T/Cs Mike McFarland; T/C Karlie; Rec & Rev e-mail and attachments from Mike McFarland; T/C Atty McLaughlin; Drafting; Research	7.750
11/30/06	Drafting; E-mail to Atty McLaughlin; Rec & Rev e-mails from Atty McLaughlin; T/C Atty McLaughlin	1.750
12/01/06	T/C Karlie	0.250
12/06/06	Rec & Rev telephone msgs from Karlie	0.125
12/07/06	O/C Karlie	2.500
12/11/06	T/C Karlie; E-mail to Mike McFarland; T/C Mike	0.750
12/18/06	T/C Karlie	0.250
12/20/06	T/C Karlie	0.250
12/21/06	Drafting; O/C Karlie; Research	5.750
12/27/06	T/C Karlie	0.250
01/03/07	Letter to Atty McLaughlin	0.125
01/05/07	T/C Mark @ Wells Fargo	0.250
01/12/07	T/C Karlie	0.250
01/16/07	T/C Karlie	0.500
01/18/07	T/C Karlie	0.250
01/24/07	T/C Karlie; T/C Mike McFarland	0.625
01/29/07	Rec & Rev e-mail and attachment from Mike McFarland	0.250
02/05/07	Rec & Rev e-mail and attachment from Mike McFarland; Rec & Rev telephone msg from Mike	0.250
02/06/07	T/C Mike McFarland; Rec & Rev fax from Mike	0.500
02/08/07	T/C Mike McFarland; T/C Karlie	0.375
02/09/07	Rec & Rev telephone msg from Mike McFarland	0.125
02/13/07	T/C Karlie	0.500
02/14/07	O/C Karlie; Faxes to Michael McFarland and Karen Zimmerman; File Complaint; T/C Karlie; T/C Atty McLaughlin; O/C Atty McLaughlin	7.125
02/16/07	Review corporate records; T/C Karlie	2.750
02/20/07	Rec & Rev letter and enclosure from Atty McLaughlin	
02/21/07	T/C Karlie; Research; T/C Lynn Taylor; Letter to Lynn Taylor	0.500

02/27/07	Rec & Rev Correspondence and Affidavits of Service from Taylor Investigations	0.250
02/28/07	Rec & Rev telephone msg from Karlie; T/C Karlie	0.550
03/06/07	Rec & Rev correspondence from Atty McLaughlin; Letter to Atty McLaughlin	0.125
03/13/07	T/C Atty Whelan	0.333
03/16/07	Rec & Rev letter from Atty Whelan	0.125
03/22/07	Rec & Rev telephone msg from Atty Whelan	0.125
03/23/07	Rec & Rev Stipulation for Change of Venue; Fax to Atty Whelan; Sign and file stipulation	0.250
03/30/07	T/C Atty Whelan	0.125
04/03/07	Rec & Rev signed Order Granting Change of Venue; Letter to Karlie; Fax to Atty Whelan	0.250
04/16/07	Rec & Rev Answer; Counterclaim; Demand for Jury Trial; Letter to Karlie	0.625
04/18/07	O/C Matt and Karlie	2.500
04/20/07	Rec & Rev telephone msg from Atty Daugherty	n/c
04/23/07	T/C msg Atty Daugherty	n/c
05/01/07	T/C Karlie; T/C msg Atty Daugherty	0.250
05/03/07	T/C Karlie	0.250
05/14/07	T/C Atty Daugherty; Research; Rec & Rev Notice of Scheduling Conference	0.625
05/21/07	Rec & Rev Order Assigning District Judge	0.250
05/31/07	Rec & Rev Motion to Disqualify Judge; Drafting; Fax to Kootenai County Clerk	1.000
06/04/07	T/C Karlie	0.250
06/07/07	Rec & Rev Order Assigning District Judge; Rec & Rev Order to Disqualify	0.250
06/11/07	Letter to Karlie	0.125
06/21/07	Rec & Rev Notice of Service and Interrogatories, Requests for Production and Requests for Admissions to Plaintiffs	0.425
06/22/07	Letter to Karlie	0.125
07/09/07	O/C Gary Spade	0.125
07/20/07	Drafting; Fax to Atty Whelan; Fax to Kootenai County Clerk; Letter to Karlie	0.875
07/25/07	Rec & Rev Scheduling Order	0.125
08/01/07	Rec & Rev Scheduling Form	0.125
08/07/07	Rec & Rev fax from Atty Whelan; Draft Scheduling Form; Fax to Kootenai County Clerk	0.375
08/09/07	O/C Scott Robertson	0.500

08/10/07	O/C Karlie and Matt	2.250
08/20/07	T/C Karlie	0.250
08/22/07	O/C Karlie	0.500
09/13/07	Rec & Rev Affidavit of John P. Whelan and Motion to Compel	0.500
09/17/07	Letter to Karlie	0.125
10/10/07	T/C Atty Whelan	0.250
10/11/07	T/C Cherie @ Judge Verby's	0.125
10/12/07	Attend Hearing; Rec & Rev fax from Atty Whelan; Rec & Rev notes from Karlie	0.875
10/25/07	T/C Mary Cusack; Drafting; O/C Karlie	6.000
10/26/07	Drafting; Letter to Atty Whelan	5.750
11/01/07	Rec & Rev signed Order Granting Motion to Compel	0.125
11/05/07	Fax to Kootenai County Clerk	0.125
11/13/07	T/C Mary Cusack	0.500
11/19/07	Rec & Rev Notice of Deposition	0.125
12/13/07	T/C Karlie	0.500
12/28/07	O/C Karlie; Deposition of Karlie	7.000
12/20/07	T/C Karlie	0.250
02/12/08	Rec & Rev letter and transcript from Court Reporter; Letter to Karlie	0.500
02/19/08	Rec & Rev fax from Atty Whelan	0.125
02/20/08	O/C Karlie	0.250
02/22/08	Fax to Atty Whelan	0.125
02/28/08	T/C Atty Whelan; Rec & Rev fax and attachments from Atty Whelan; T/C Karlie	0.500
03/04/08	Rec & Rev fax from Atty Whelan	0.125
03/17/08	Rec & Rev letter and enclosures from M&M Court Reporting	0.125
03/27/08	Rec & Rev Motion to Dismiss and supporting documents from Atty Whelan	0.500
04/09/08	T/C Atty Whelan; T/Cs Karlie	0.375
04/10/08	Drafting; E-mail to Atty McLaughlin; O/C Karlie; Fax to Kootenai County Clerk	2.250
04/11/08	Rec & Rev Notice of Hearing and Motion to Strike; Rec & Rev signed Affidavit of Toby McLaughlin; Faxes to Kootenai County Clerk; Drafting; Preparation; Attend Court	2.875
04/25/08	T/C Karlie	0.250
04/28/08	Rec & Rev letter and enclosures from Atty Whelan	0.375
04/30/08	Drafting; Fax to Kootenai County Clerk; T/C	1.375

	Karlie	
05/01/08	Rec & Rev Motion to Strike	0.125
05/05/08	Rec & Rev correspondence from Atty McLaughlin	0.125
05/07/08	Letter to Karlie	0.250
05/08/08	T/C Karlie	0.125
05/21/08	Rec & Rev telephone msg from Dora Garth	0.125
06/03/08	Rec & Rev telephone msg from Dora Garth	0.125
06/11/08	Letter to Karlie; Rec & Rev Memorandum Decision and Order	0.750
07/14/08	T/C Karlie	0.250
08/26/08	Rec & Rev fax from Atty Whelan; Letter to Atty Whelan; Letter to Karlie	0.35
09/26/08	T/C Tasha Smith	0.125
02/06/09	Letter to Karlie; Fax to Atty Whelan; Letter to Judge Verby; Drafting; Fax to Kootenai County Clerk	0.625
02/09/09	T/C Karlie	0.125
02/17/09	Rec & Rev Request for Trial Setting	0.125
04/01/09	Rec & Rev Notice of Hearing	0.125
04/02/09	T/C Linda @ Judge Verby's	0.125
04/09/09	Rec & Rev fax from Atty McFarland	0.125
04/10/10	Attend Status Conference	0.500
05/19/09	Rec & Rev Notice of Trial; Letter to Karlie	0.250
09/04/09	Research; E-mail to Atty Powell	0.375
09/05/09	T/C Dora Garth; Research; Letter to Appraisal Associates	0.375
09/08/09	T/C Byron Powell's office	0.125
10/01/09	Rec & Rev letter from Appraisal Associates	0.125
10/02/09	Letters to Appraisal Associates	0.250
10/05/09	T/C Appraisal Associates	0.125
10/16/09	Rec & Rev e-mails and attachments from Appraisal Associates; Drafting; Letter to Kootenai County Clerk; Letter to Judge Verby; E-mail to Atty Whelan; Research	1.375
12/07/09	Drafting; Faxes to Kootenai County Clerk; E- mail to Atty Whelan	2.875
12/08/09	Rec & Rev e-mail from Naegeli Reporting; Rec & Rev e-mail from Atty Whelan; E-mail to Atty Whelan; Drafting; Fax to Kootenai County Clerk; Rec & Rev e-mail from Karlie	1.625
12/09/09	Rec & Rev fax and attachments from Atty Whelan	0.250
12/10/09	Rec & Rev telephone msg from Naegeli Reporting	0.125
12/14/09	Rec & Rev e-mail and attachment from Naegeli Reporting; Rec & Rev fax from Atty Whelan; T/C	0.500

msg Atty Whelan

12/15/09	T/Cs Naegeli Reporting; Letter to Atty Whelan; E-mail to Atty Whelan; E-mail to Karlie; T/C Atty Whelan; Rec & Rev e-mails and attachments from Naegeli Reporting; T/C Atty Daugherty; Drafting; Fax to Kootenai County Clerk; Rec & Rev fax from Atty Whelan	1.625
12/16/09	Drafting; Fax to Kootenai County Clerk; T/C Atty Bistline; T/C Atty McLaughlin; E-mails to Naegeli Reporting; Rec & Rev e-mails and attachments from Naegeli Reporting; Rec & Rev telephone msg from Atty Bistline; E-mail to Atty Daugherty; Rec & Rev Affidavit of John P. Whelan in Support of the Opposition	1.625
12/17/09	Rec & Rev Opposition of Defendants to Plaintiffs' Motion to Amend Complaint for Punitive Damages	0.250
12/18/09	Preparation; Deposition of Mike McFarland; Rec & Rev letter from Atty Whelan	5.125
12/21/09	T/C Naegeli Reporting; Preparation; Deposition of Karen Zimmerman; T/C Atty Daugherty; Rec & Rev fax from Atty Daugherty	6.375
12/22/09	Rec & Rev e-mails and attachments from Naegeli Reporting; T/C msg Atty Whelan; T/C Naegeli Reporting; Fax to Atty Whelan; E-mail to Atty Whelan; Drafting; Fax to Kootenai County Clerk	1.875
12/23/09	Attend Hearing; Preparation; Deposition of Mike McFarland (part 2)	5.750
12/28/09	Rec & Rev correspondence from Naegeli Reporting	n/c
12/29/09	T/C Naegeli Reporting	0.125
12/30/09	T/C Naegeli Reporting; Rec & Rev e-mail from Naegeli Reporting; Rec & Rev fax and attachment from Atty Whelan	0.500
12/31/09	Rec & Rev signed Order Regarding Amendment For Punitive Damages; Drafting; Fax to Kootenai County Clerk; T/C msg Atty Whelan; T/C msg Marie; Fax to Atty Whelan; E-mail to Atty Whelan	1.375
01/04/10	Rec & Rev Defendants' Statement of Witnesses	0.125
01/05/10	Drafting; Fax to Kootenai County Clerk; Rec & Rev fax from Atty Whelan; Rec & Rev Defendants' Exhibit List; Rec & Rev telephone msg from Marie	0.625
01/08/10	T/C Marie	0.125

01/13/10	T/C Kootenai County Clerk	0.125
01/14/10	Rec & Rev e-mail from Karlie; E-mail to Karlie	0.250
01/07/10	Rec & Rev fax from Bonner County District Court; Rec & Rev telephone msg from Trial Court Administrator; E-mail to Judge Hosack; Rec & Rev e-mail from Atty Whelan	0.500
01/11/10	Rec & Rev e-mails from Karlie; Rec & Rev e-mail and attachment from Naegeli Reporting; T/C Judge Hosack	0.500
01/12/10	T/C Judge Hosack and Atty Whelan; T/C Naegeli Reporting; T/C Kootenai County Clerk; Rec & Rev e-mail from Appraisal Associates; E-mail to Appraisal Associates; Rec & Rev e-mail from Naegeli Reporting; Rec & Rev Defendants Second Supplemental Statement of Witness; Rec & Rev fax from Sand Ida Services; E-mail to Karlie	1.750
01/14/10	Rec & Rev fax and attachments from Atty Whelan; Rec & Rev Defendants Third Supplemental Statement of Witnesses; Rec & Rev correspondence from Naegeli Reporting	0.500
01/15/10	Rec & Rev Motion in Limine; Drafting; Faxes to Kootenai County Clerk; Letter to Atty Whelan; Conference call with Judge Hosack and Atty Whelan's office; O/C Scott Robertson; prepare for trial	8.500
01/16/10	Prepare for Trial	8.000
01/18/10	Prepare for Trial	10.000
01/19/10	Prepare and attend Trial E-mail to Sharilyn Cano; Drafting; Fax to Kootenai County Clerk; Rec & Rev e-mail from Karlie	12.000
01/20/10	Rec & Rev e-mail from Karlie; Rec & Rev e-mail from Sharilyn Cano	0.375
01/21/10	Preparation; Attend Trial	12.000
01/22/10	Preparation; Attend Trial	12.000
01/23/10	Preparation; Attend Trial	12.000
01/24/10	Preparation; Attend Trial	12.000
01/25/10	Preparation; Attend Trial	12.000
01/26/10	Preparation; Attend Trial	12.000
01/27/10	Wait for verdict	8.000
01/28/10	Wait for and receive verdict, work on relief requested	8.000
01/29/10	E-mail to Atty Dullea; Rec & Rev e-mail from Atty Dullea; E-mail to Karlie; E-mail to Atty Elsaesser; Rec & Rev fax and attachment from Karlie	0.625

01/31/10	Rec & Rev e-mail from Atty Elsaesser; E-mail to Karlie; Rec & Rev e-mail from Karlie	0.375
02/03/10	Rec & Rev letter from Idaho State Bar	0.125
02/01/10	Rec & Rev e-mail from Atty Elsaesser; E-mail to Atty Elsaesser	0.250
02/02/10	E-mail to STI; Rec & Rev e-mail from STI; Rec & Rev e-mail and attachments from Pioneer Title	0.500
02/03/10	Rec & Rev documents from Pioneer Title	1.500
02/08/10	T/C Karlie	0.500
02/04/10	E-mail to Pioneer Title; Rec & Rev e-mail from Pioneer Title; T/C Pioneer Title	0.375
02/05/10	T/C Atty Waite	0.250
02/08/10	E-mail to Karlie; Rec & Rev correspondence from Atty McLaughlin	0.125
02/09/10	Rec & Rev fax from Atty Whelan	0.125
02/11/10	Drafting; Fax to Atty Whelan; Rec & Rev e-mail from Atty Whelan; Rec & Rev e-mail from Judge Hosack	0.625
02/26/10	E-mail to Atty Elsaesser	0.125
03/01/10	T/C Karlie	0.250
03/03/10	Drafting; T/C Kootenai County Clerk	0.375
03/04/10	Rec & Rev correspondence from Atty McLaughlin	n/c
03/08/10	T/C Karlie; T/C Kootenai County Clerk	0.250
03/09/10	T/C Kootenai County Clerk	0.125
03/11/10	Rec & Rev e-mail from Karlie; E-mail to Karlie	0.250
03/15/10	Rec & Rev e-mail from Karlie	0.125
03/16/10	Rec & Rev e-mail from Karlie; E-mail to Karlie; Rec & Rev fax from Karlie	0.375
03/17/10	Rec & Rev e-mails from Karlie; T/C Tony Zeleszko; E-mail to Tony; E-mail to Karlie Rec & Rev e-mail from Tony	0.875
03/18/10	Drafting; Fax to Kootenai County Clerk; E-mail to Atty Whelan; E-mail to Karlie	0.625
03/22/10	Rec & Rev e-mail from Karlie; E-mail to Karlie; E-mail to Mr. Wetzel	0.375
03/25/10	Rec & Rev Opposition to Plaintiffs Motion for Findings, Conclusions, Final Order and Judgment; T/C Marie	0.375
04/05/10	Rec & Rev correspondence from Atty Daugherty; Attend Hearing	2.000
04/07/10	T/C Kootenai County Clerk; Drafting; Fax to Kootenai County Clerk; Rec & Rev fax from Atty Whelan	2.500
04/08/10	T/C Atty Whelan; Fax to Atty Whelan	0.250

04/09/10	T/C Kootenai County Clerk	0.125
04/12/10	T/C Tony Zeleszko	0.125
04/16/10	Rec & Rev Memorandum Opinion on Motion for Entry of Judgment and Judgment	0.250
04/18/10	Rec'd recorded Judgment	n/c
04/22/10	Rec & Rev telephone msg from Kootenai County Clerk	0.125
04/23/10	Rec & Rev e-mail from Karlie; E-mail to Karlie; E-mail to Tony Zeleszko; Rec & Rev e-mails from Tony	0.500
04/26/10	T/C Atty Whelan	0.125
04/29/10	Rec & Rev Motion for New Trial, Affidavit Jessica Trzdy, Affidavit of John P. Whelan, Motion for Remittitur and Motion for Judgment Notwithstanding the Verdict	0.750
04/30/10	Rec & Rev Memorandum in Support of Defendants' Post Trial Motions; Drafting; fax to Kootenai County Clerk	5.500
Total Hours		296.033

11. The Plaintiff's attorney has invested a significant amount of time in addition to the amount set forth above.

12. The Plaintiff is the prevailing party. And claims costs against the Defendants, as follows:

COSTS CLAIMED AS A MATTER OF RIGHT Rule 54(d) (1) (a) (c) and Rule 30 (b) (4) (g) :

a)	12/20/06 filing Fee (Complaint)	\$ 88.00
b)	Service of Process upon Defendants	\$ 95.50
c)	Filing Fee (Change Venue)	\$ 9.30
d)	Expert Witness Fee: Noonan (appraisal)	\$2,000.00
e)	Nageli Court Reporting (Depo-McFarland)	\$2,226.43
f)	Nageli Court Reporting (Depo-Zimmerman)	\$ 806.25
g)	Nageli Court Reporting (Depo-McFarland)	<u>\$1,147.50</u>
	TOTAL COST AS MATTER OF RIGHT	\$6,372.78

DISCRETIONARY COSTS CLAIMED (I.R.C.P. 54(d) (1) (D) & 37 (C)

1.	Westaw computer research	\$ 75.00
2.	Appraisal Associates (Noonan) fees over 2,000.00	\$5,850.00
3.	Pioneer Title (charge for Title report)	\$ 300.00

4. Postage (1/12/10)	\$ 9.80
Total DISCRETIONARY COSTS	\$6,234.80

The TOTAL Attorney Fees and Cost claimed by the Plaintiff Karletta Grace Berry against the Defendants is \$164,607.58

BASIS OF CLAIM FOR ATTORNEY FEES

Aside from the basis and reasons for the attorney fees set forth above the claimed attorney fees and cost are based upon and claimed pursuant to are:

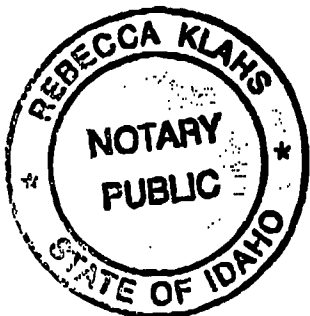
1. I.R.C.P. 54(e)(1), Plaintiff is the prevailing party.
2. Idaho Code § 12-120
3. Idaho Code § 12-121
4. Idaho Code § 12-123
5. I.R.C.P. 54(e)(1)
6. I.R.C.P. 11
7. The case was defended frivolously, unreasonably, and/or without foundation.


DATED this 30th day of April, 2010.



 REX A. FINNEY
 Attorney for Plaintiffs

SUBSCRIBED AND SWORN TO before me this 30th day of April, 2010.



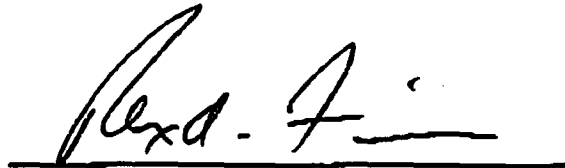


 Notary Public-State of Idaho
 Residing at: Sandpoint
 My Commission Expires: 12/14/2011

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was served Via Facsimile, this 30 day of April, 2010 and was addressed to:

J. P. Whelan
Attorney at Law
213 N. 4th Street
Coeur d'Alene, ID 83814
(Fax No.: (208) 664-2240)



Alex. Finney

REX A. FINNEY
FINNEY FINNEY & FINNEY, P.A.
Attorneys at Law
Old Power House Building
120 East Lake Street, Suite 317
Sandpoint, Idaho 83864
Phone: (208) 263-7712
Fax: (208) 263-8211
ISB No. 6313

STATE OF IDAHO }
 COUNTY OF KOOTENAI } SS
 FILED:

2010 APR 30 PM 2:35

CLERK DISTRICT COURT
[Signature]
 DEPUTY

**IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE
 STATE OF IDAHO, IN AND FOR THE COUNTY OF KOOTENAI**

KARLETTA GRACE BERRY, a widow,	)	Case No. CV-2007-0002409
KARLETTA GRACE BERRY, Personal)	
Representative of the Estate	)	MOTION FOR PRE-JUDGMENT
of Jerry Lee Roy Berry,	)	INTEREST FROM DATE OF BREACH
CAPTAIN'S WHEEL RESORT, INC.,	)	OF FIDUCIARY DUTY (July 4,
an Idaho Corporation,	)	2006) UNTIL ENTRY OF JUDGMENT
	)	(April 16, 2010)
Plaintiff,)	
)	
v.)	
)	
MICHAEL B. MCFARLAND, MICHAEL)	
B. MCFARLAND, P.A., and KAREN)	
ZIMMERMAN,)	
)	
Defendants.)	
)	

COMES NOW, REX A. FINNEY, attorney for the Plaintiff,
Karletta Grace Berry and moves the Court to award a supplemental
judgment in Plaintiff's favor for pre-judgment interest at the
rate of 12% per annum pursuant to Idaho Code § 28-22-104, from
July 4, 2006, the date the Jury found the breach of fiduciary

duty by the Defendants, until the date the Court entered the Judgment on April 16, 2010. The damages caused to the Plaintiff by the Defendants on July 4, 2006 were in the amount of \$380,500.00.

Interest accrues in the amount of \$45,660.00 per year. The daily interest rate is \$125.00 per day.

Total interest due from the Defendants to Plaintiff is the amount of \$172,625.00, which is 1381 days at \$125.00 per day; the days are calculated. as follows;

July 4, 2006 through December 31, 2006 -	180 days
Jan 1, 2007 through Dec 31, 2007 -	365 days
Jan 1, 2008 through Dec 31, 2008 -	365 days
Jan 1, 2009 through Dec 31, 2009	365 days
Jan 1, 2010 through April 16, 2010 -	<u>106 days</u>
TOTAL DAYS JULY 4, 2006 THROUGH APRIL 16, 2010	<u>1,381.00 DAYS</u>

Wherefore the court is requested to enter a supplemental judgment for pre-judgment interest in the amount of \$172,625.00 in the Plaintiff's favor and against the Defendants.

DATED this 30 day of April, 2010.

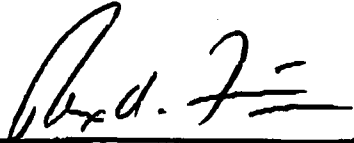


REX A. FINNEY
 Attorney at Law

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was delivered via facsimile, this 30 day of April, 2010, and was addressed as follows:

J.P. WHELAN P.C.
Attorney at law
213 N. 4th Street
Coeur d'Alene, Idaho 83814
(Fax No.: (208) 664-2240)



John P. Whelan, P.C.
Attorney at Law
213 N. 4th Street
Coeur d' Alene, Idaho 83814
Telephone: (208) 664-5891
Facsimile: (208) 664-2240
ISB No. 6083

2010 APR 30 PM 1:56

CLERK DISTRICT COURT

DEPUTY

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE STATE OF
IDAHO, IN AND FOR THE COUNTY OF KOOTENAI

KARLETTA GRACE BERRY, a widow,
KARLETTA GRACE BERRY, Personal
Representative of the Estate of Jerry
Lee Roy Berry, CAPTAIN'S WHEEL
RESORT, INC., an Idaho Corporation,

Plaintiffs,

vs.

MICHAEL B. MCFARLAND, MICHAEL B.
MCFARLAND, P.A., and KAREN
ZIMMERMAN,

Defendants.

Case No. CV-07-2409

MEMORANDUM IN SUPPORT OF
DEFENDANTS' POST TRIAL MOTIONS

Date:

Time:

Judge: Charles Hosack

Defendants, Michael B. McFarland, Michael B. McFarland, P.A. and Karen Zimmerman, submit the following memorandum in support of their post trial motions:

STATEMENT OF CASE

The above-entitled matter was tried before a jury during the week of January 19th. The eight day trial raised issues of breach of fiduciary duty on the part of

Defendants as, alternatively, an attorney, friend and corporate director. Throughout the trial, Plaintiff's counsel repeatedly insisted that Plaintiff was seeking rescission of a stock purchase agreement or damages in the alternative.

The evidence offered at trial centered around a stock purchase agreement Defendants had reached with Jerry Berry, who died of cancer four months after signing the stock purchase agreement with Defendants. Plaintiff urged the jury to accept the notion that the stock purchase agreement was really a loan of \$100,000.00 that Defendants wrongfully converted to a stock purchase agreement that resulted in Defendants acquiring a 50% ownership interest in The Captain's Wheel Resort, Inc.

Plaintiff, Karletta Berry, the widow of Jerry Berry, sought to establish at trial that Michael McFarland's alleged role as Jerry Berry's attorney was utilized to persuade Berry to part with 50% of the stock of the corporation.

The only evidence offered by Plaintiff in support of her theory that Defendant McFarland was Berry's attorney took the form of unsupported hearsay statements of various people claiming to have overheard Berry state that McFarland was his attorney, together with evidence that McFarland met with Berry for one-half hour in 2000 or 2001 to discuss bankruptcy law.

ISSUES

1. By offering the testimony of Toby McLaughlin did Plaintiff's counsel engage in attorney misconduct or irregularity in the proceedings?
2. Is the jury's award of \$380,500.00 as the *difference between the value of the stock and the price paid for it* supported by substantial and competent evidence?
3. Is the jury's denial of the recovery of the \$176,300.18 advanced by McFarland supported by substantial and competent evidence?
4. Is the finding that McFarland breached the fiduciary duties owed to

Berry as Berry's attorney supported by substantial and competent evidence?

5. Is the finding that McFarland breached a fiduciary duty owed to Berry outside the attorney-client relationship supported by substantial and competent evidence?
6. Did the evidence support the finding that Defendant Karen Zimmerman also engaged in a breach of fiduciary duty as Berry's attorney?
7. Did the evidence support the finding that Defendant Karen Zimmerman also engaged in a breach of fiduciary duty regarding the Stock Purchase Agreement even though there was no attorney-client relationship between herself and Berry?
8. Did Plaintiff wrongfully appeal to the passions and emotions of the jury by offering Berry's daughter as a witness?
9. Did Plaintiff's counsel wrongfully attempt to stir the emotions and passions of the jury in his protracted "closing statement"?
10. By essentially stating to the jury during closing that there was no line on the special verdict for the jury to award the stock at issue back to Plaintiff, did Plaintiff's counsel engage in misconduct justifying a new trial?
11. Is a judgment notwithstanding the verdict in favor of Defendants warranted by the facts and circumstances?
12. Is a new trial warranted?
13. In the alternative to a new trial, is remittitur appropriate?

TESTIMONY OF TOBY McLAUGHLIN

The testimony at trial established that Plaintiff's counsel, Rex Finney, paid his friend Toby McLaughlin to appear at several board meetings of the Captain's

Wheel Resort, Inc.—and then paid him to offer favorable testimony at the trial of the matter. Mr. McLaughlin was not merely a "fact witness".

Mr. McLaughlin opined about Michael McFarland's role as the attorney for the Captain's Wheel Resort, Inc. He did not merely relay what he saw or what he heard. He, in essence, offered his expert opinion that, since Michael McFarland had the corporate records and had drafted documentation for various corporate meetings, Michael McFarland had acted as the corporate attorney for the corporation and Jerry Lee Roy Berry.

On cross-examination, it was established that Plaintiff's counsel and Toby McLaughlin were close friends; that McLaughlin was paid by Finney to attend corporate meetings *for Finney*, and, that Mr. McLaughlin was paid by Finney to offer testimony at the trial of this matter. Finney was using his friend McLaughlin to do what Finney could not do: be a witness and advocate at the same time.

Defendants objected to the testimony and moved to strike the testimony pursuant to Idaho Rules of Professional Conduct Rule 3.7. The objection was overruled and the motion to strike was denied.

Both McLaughlin and Mr. Finney were guilty of misconduct in offering McLaughlin's testimony. As stated in the *commentary* on Rule 3.7 "[t]he tribunal has proper objection when the trier of fact may be confused or misled by a lawyer serving as both an advocate and a witness. The opposing party has proper objection where the combination of roles may prejudice that party's rights in the litigation. A witness is required to testify on the basis of personal knowledge, while an advocate is expected to explain and comment on evidence given by others."

In the matter at hand, Finney had his friend attend board meetings for *Finney*. Finney, himself, would have been barred from testifying so Finney had his friend attend board meetings and then offer testimony "to explain and comment on evidence given by others" (in this case McFarland). A judgment may be

reversed on the ground of misconduct if the misconduct had a "prevailing influence" on the jury. *Johannsen v. Utterbeck*, 146 Idaho 423, 196 P.3d 341 (2008).

Mr. McLaughlin's testimony should have been stricken, and the offering of the testimony tainted the trial.

STOCK VALUE

No testimony whatsoever was offered on the issue of *the value of the stock at issue*. The only evidence that Plaintiff offered was her appraiser's opinion of the value of the land owned by the Captain's Wheel Resort, Inc., together with some testimony about the debts of the entity. The special verdict of the jury found that "the actual value of the stock: \$380,500.00," and Plaintiff was awarded this amount as damages for breach of fiduciary duty.

Although the value of the land may have a bearing on the value of the stock of the Captain's Wheel Resort, Inc., there was no substantial or credible evidence to support the \$380,500.00 awarded by the jury to Plaintiff for breach of fiduciary duty. The award of economic damages must be based upon proof, not speculation or conjecture. *Horner v. Sani-Top, inc.*, 143 Idaho 230, 237, 141 P.3d 1099, 1106 (2006).

McFARLAND'S ADVANCES

Michael McFarland established through his testimony that he had advanced \$176,300.18 to keep the doors of the Captain's Wheel Restaurant and Tavern open. He stated in his testimony that he advanced the monthly payment on the SBA loan for the corporation, paid for unpaid labor costs and other expenses of the corporation over a three year period. No substantial or credible evidence was offered by Plaintiff to rebut the testimony regarding the advances made by McFarland. Instead, the Plaintiff attempted to establish that McFarland was a busy

man who had to hire managers to operate the restaurant and tavern. Plaintiff attempted to establish further that McFarland left much of the hands on operation to the managers.

Absolutely no evidence was offered by Plaintiff to quantify any claimed loss to the corporation occasioned by McFarland's lackadaisical approach to the operation of the restaurant and tavern.

Nevertheless, the jury denied Mr. McFarland the recovery of any of the advances he made for the corporation after the corporate meeting where Karletta Berry herself authorized Mr. McFarland to make advances for the benefit of the corporation.¹ In reliance on the representation, Mr. McFarland advanced another \$176,300.18 on behalf of the corporation (he initially advanced \$8,000.00 that was approved by Karletta Berry). The jury denied him any recovery on the ground that he, and Ms. Zimmerman, as directors, had violated the fiduciary duties owed to Karletta Berry as a shareholder.

It is abundantly clear that the jury, in an emotional upheaval, simply decided to deny McFarland any recovery whatsoever—even though the evidence did not support the \$176,300.18 figure which the jury denied to return to McFarland. The finding is the product of passion and emotion and is simply not supported by the evidence: the \$176,300.18 figure was simply pulled from a hat, so to speak, to be the damages for breach of fiduciary duty by Defendants as directors. McFarland testified that the two shares of stock issued to Marie Streater and Monnie Cripe could have been rescinded. The testimony was not controverted. Yet, Michael McFarland was denied repayment of even the SBA loan payments he made to keep the corporations real property out of foreclosure.

¹ As the Court may recall, Karletta Berry and her attorney Toby McLaughlin specifically ratified an initial advancement by Michael McFarland in the amount of \$8,000.00. Ms. Berry also authorized additional advancements as may be necessary—and she agreed McFarland would be repaid those advancements.

McFARLAND AS BERRY'S ATTORNEY

Based on the alleged hearsay statements of Jerry Berry, the jury found that Michael McFarland was Jerry Berry's attorney even though none of the traditional indicia of an attorney-client relationship was present in the evidence. McFarland had but a single one-half hour appointment with Berry in 2000 or 2001 where McFarland discussed general bankruptcy law with Berry. No other legal consultations between Berry and McFarland were established. There was no "work product" performed by McFarland; there was no billing statements, documents, briefs, court appearances or anything that would normally establish an attorney-client relationship. No witness ever heard McFarland give Berry legal advice, not even Karletta Berry.

Yet the jury found McFarland to be Berry's lawyer.

In fact, it was undisputed that Berry had lawyers he consulted for legal advice (such as David C. Johnston, Paul Daugherty and several attorneys in Washington). The very will pursuant to which Karletta Berry was appointed representative of the estate of Jerry Berry was drafted by an attorney other than McFarland. The jury's finding that McFarland was an attorney/fiduciary is unsupported by substantial and competent evidence. *Quick v. Crane, 111 Idaho 759, 763, 727 P.2d 1187, 1191(1986)*.

McFARLAND AS THE NON-ATTORNEY FIDUCIARY

At best, the evidence established that McFarland and Berry were close friends who drank together on occasion. There was no evidence offered to establish that McFarland was, in fact, a close confidant and fiduciary of Berry. There was no evidence that Berry sought out McFarland's advice to help him, Berry, make decisions. They did not have the close, personal relationship akin to a trustee dealing with a beneficiary or a wife dealing with her husband.

No evidence suggested that McFarland occupied a position of trust and

confidence vis-a-vis Berry. McFarland and Berry were simply drinking buddies who occasionally dined together as well. An attorney should not be straddled for life with a forced fiduciary duty simply because he occasionally dines and drinks with a person.

The substantial and competent evidence does not support the jury's finding that McFarland occupied a non-attorney fiduciary relationship with Berry.

KAREN ZIMMERMAN

Defendant, Karen Zimmerman, was also found to have violated a non-attorney, non-director fiduciary duty owed to Berry. Absolutely no evidence supports the finding that Karen Zimmerman should be held liable for the alleged breaches of fiduciary duty attributed to Michael McFarland. No competent evidence supports the \$380,500.00 damages assessed to Ms. Zimmerman for the alleged acts and omissions of Michael McFarland. Clearly, Karen Zimmerman is not an attorney and she, as a matter of law, cannot create an attorney-client relationship between herself and Jerry Berry.

KAREN ZIMMERMAN AS A NON-ATTORNEY FIDUCIARY

No where in the record did Plaintiff even attempt to establish that Karen Zimmerman also occupied a non-attorney fiduciary relationship vis-a-vis Jerry Berry. At best, the record merely established that Ms. Zimmerman was present when McFarland and Berry would drink and/or dine together on occasion. No evidence established that Ms. Zimmerman was Berry's close confidant or that she occupied a fiduciary position of any sort vis-a-vis Berry. Liability was imposed on Zimmerman for the alleged acts of McFarland simply because she was a party to the stock purchase agreement. No evidence established that Zimmerman too was a fiduciary of Jerry Berry outside her role as corporate director.

No substantial and competent evidence supports the \$380,500.00 damages assessed by the jury against Karen Zimmerman.

THE TESTIMONY OF CHERYL CANNO, JERRY BERRY'S DAUGHTER

Plaintiff called Cheryl Canno, the daughter of Jerry Berry as her last witness. Ms. Canno offered hearsay statements that her father acknowledged that Michael McFarland was his lawyer. She then broke down in tears as Plaintiff's counsel developed her testimony. The witness was obviously placed on the stand to appeal to the jury's passion and emotions—causing the jury to feel sorry for the Plaintiff as the widow of Jerry Berry and disdain towards the "evil" lawyer.

PLAINTIFF'S CLOSING

Plaintiff's counsel engaged in a three-hour harangue in an effort to appeal to the passion and emotions of the jury. The objective was clear: make Michael McFarland out to be a bad, oyster-eating lawyer who preys upon the innocent.

A portion of Rex Finney's closing has been transcribed to illustrate the approach taken in an effort to demean Michael McFarland.²

"Most of the testimony of Mr. McFarland was explaining why the written documents don't mean what they say and then in fact, after he issued some extra shares of stock, the last thing he does in an attempt to rehabilitate himself is to oh its no big deal we could take those back and if Karletta objects, its not a big deal to take that stock back. It seems kind weird that you would issue it, wait three years and then when it comes out in court, your testimony is we can take that back easily. He didn't ask if she wanted to issue it. Now, Mr. Whelan also says, a little misleading, he says, Karletta gets it all. There is no blank on that verdict the judge read to you that says you can give the stock back to Karletta. That's not the way it works. It just sounded good though at the moment." (Emphasis added—Rebuttal of Finney—end time 4:01:30).

Counsel rarely argued the facts in his closing. He sought instead to deliver rhetorical questions to the jury about why Michael McFarland would be preparing

² See accompanying affidavit of Jessica Tvrdy.

documents if he was not Jerry Berry's attorney.

The rhetorical questions were designed to dehumanize Michael McFarland and make him out to be the evil lawyer that all members of the public loath.

As just recited, Mr. Finney exclaimed to the jury during rebuttal that there was not a line on the special verdict form for the return of the stock at issue in the case. Mr. Finney intentionally misled the jury into believing that Plaintiff could not recover the stock that had been issued to McFarland and Zimmerman—when, in fact, Plaintiff was seeking rescission of the stock issued by counsel's own admission.

The statement was nothing other than an outright lie to the jury. A lie designed to mislead the jury into believing that Plaintiff could only recover money damages. Consequently, the jury essentially awarded Plaintiff \$380,500.00 in damages plus the \$176,300.18 that McFarland had advanced but for which he was denied reimbursement. The jury verdict was the product of passion and emotion—which Plaintiff's counsel developed through the course of his three hour character assassination of Michael McFarland.³

JUDGMENT NOT WITHSTANDING THE VERDICT OR A NEW TRIAL

Michael McFarland and Karen Zimmerman would urge the court to grant them judgment in their favor notwithstanding the jury's verdict. A judgment notwithstanding the verdict is appropriate when a jury verdict is not supported by substantial and competent evidence. Judgment notwithstanding the verdict is appropriate where the substantial evidence does not support the verdict. *White v. Mock*, 140 Idaho 882, 104 P. 3d 356 (2004).

³ Please see McFarland Partial Transcript attached to the Affidavit of Jessica Tvrdy—pg. 1, paragraph 2, last sentence for example where Plaintiff's counsel states: "Now, if he goes to a man looking for protection, and now this man has taken advantage of Mr. Berry's widow, it's not as blurry as Mr. Whelan would have you think."

REMITTITUR

The award to Plaintiff \$380,500.00 as damages for breach of fiduciary duty is not supported by the evidence as no direct evidence of the value of the stock was offered by Plaintiff. Michael McFarland was also denied the return of \$176,300.18 he advanced on behalf of the corporate entity. Remittitur is appropriate pursuant to I.R.C.P. Rule 59.1 and I.C. 6-807.

NEW TRIAL

For the reasons asserted herein, Defendants would urge the Court to grant them a new trial on the grounds that the trial of this matter was tainted by attorney misconduct and the jury's disdain for lawyers. Karen Zimmerman certainly was not Jerry Berry's fiduciary, yet \$380,500.00 in damages was assessed against her for breach of (non-director) fiduciary duty. Defendants would also suggest that no substantial and competent evidence supports the jury's findings that Michael McFarland was Jerry Berry's attorney and non-attorney fiduciary.

In lieu of a new trial, Defendants would agree to the entry of a new and different judgment as follows: The "stock purchase agreement" is hereby rescinded and Plaintiffs, Karletta Berry and the Estate of Jerry Berry are ordered to make restitution to Defendants of the \$100,000.00 paid for the stock plus interest at 12% from the date of the loan. The Captain's Wheel Resort, Inc. is hereby ordered to also rescind and cancel the two shares of stock issued to Marie Streater and Monnie Cripe. Furthermore, the Captain's Wheel Resort, Inc. is ordered to make restitution to Michael McFarland for any advancements made on the payment of the entity's SBA loan and operating expenses.

A new trial may be appropriate for a multitude of reasons including irregularity in the proceeding such that Defendants are denied a fair trial; excessive damages; insufficiency of evidence to support the verdict (I.R.C.P. Rule 59(a)).

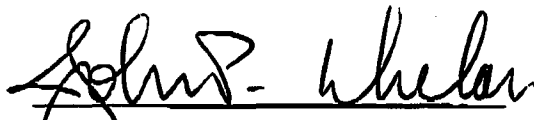
A trial judge may grant a new trial based on insufficiency of evidence to

justify the verdict if, after making his or her own assessment of the credibility of the witnesses and weighing the evidence, the judge determining that the verdict is not in accordance with the clear weight of the evidence. *Johannsen v. Uttberbeck*, 146 Idaho 423, 196 P.3d 341 (2008).

DATED: 4/30/10

Respectfully Submitted,

JOHN P. WHELAN, P.C.




John P. Whelan

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 30 day of April, 2010, I caused to be served a true and correct copy of the foregoing by the method indicated below, and addressed as indicated below:

Rex A. Finney
Finney, Finney & Finney
120 East Lake Street, Suite 317
Sandpoint, ID 83865

- U.S. Mail, Postage Prepaid
- Hand Delivered
- Overnight Mail
- Facsimile to: (208) 263-8211



John P. Whelan

John P. Whelan, P.C.
Attorney at Law
213 N. 4th Street
Coeur d' Alene, Idaho 83814
Telephone: (208) 664-5891
Facsimile: (208) 664-2240
ISB No. 6083

STATE OF IDAHO }
COUNTY OF KOOTENAI } SS
FILED:
#527 US
2010 MAY -3 PM 1:39

CLERK DISTRICT COURT
Linda Sheddlock
DEPUTY

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE STATE OF
IDAHO, IN AND FOR THE COUNTY OF KOOTENAI

KARLETTA GRACE BERRY, a widow,
KARLETTA GRACE BERRY, Personal
Representative of the Estate of Jerry
Lee Roy Berry, CAPTAIN'S WHEEL
RESORT, INC., an Idaho Corporation,

Plaintiffs,

vs.

MICHAEL B. MCFARLAND, MICHAEL B.
MCFARLAND, P.A., and KAREN
ZIMMERMAN,

Defendants.

Case No. CV-07-2409

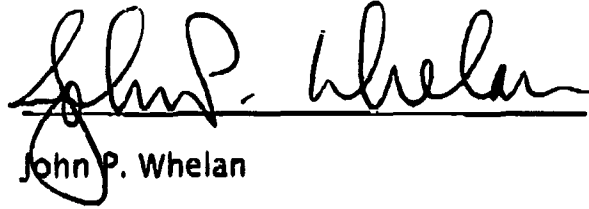
NOTICE OF HEARING

Date: May 19, 2010
Time: 2:00 p.m.
Judge: Charles Hosack
Location: Kootenai County Courthouse
324 W. Garden Ave.
Coeur d' Alene, ID 83814

TO ALL PARTIES AND THEIR ATTORNEY OF RECORD:

PLEASE TAKE NOTICE that on the date of May 19, 2010 at 2:00 p.m. before
the Honorable Charles Hosack, Defendants will have their Motion for Judgment
Notwithstanding the Verdict, Motion for Remittitur and Motion for New Trial heard
by the Court.

Dated this 3rd day of May, 2010.

A handwritten signature in black ink, appearing to read "John P. Whelan", is written over a solid horizontal line. The signature is fluid and cursive.

John P. Whelan

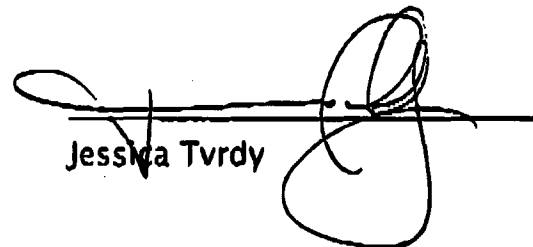
Attorney for Defendants

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 3rd day of May, 2010, I caused to be served a true and correct copy of the foregoing by the method indicated below, and addressed as indicated below:

Rex A. Finney
Finney, Finney & Finney
120 East Lake Street, Suite 317
Sandpoint, ID 83865

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Jessica Tvrdy

REX A. FINNEY
FINNEY FINNEY & FINNEY, P.A.
Attorneys at Law
Old Power House Building
120 East Lake Street, Suite 317
Sandpoint, Idaho 83864
Phone: (208) 263-7712
Fax: (208) 263-8211
ISB No. 6313

STATE OF IDAHO }
COUNTY OF KOOTENAI } SS
FILED } #275
2010 MAY -5 PM 3:05

CLERK DISTRICT COURT
Cham Reed
DEPUTY

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF KOOTENAI

KARLETTA GRACE BERRY, a widow,) Case No. CV-2007-0002409
KARLETTA GRACE BERRY, Personal)
Representative of the Estate) NOTICE OF HEARING RE:
of Jerry Lee Roy Berry,) PLAINTIFF'S MOTION FOR PRE-
CAPTAIN'S WHEEL RESORT, INC.,) JUDGMENT INTEREST FROM DATE OF
an Idaho Corporation,) BREACH OF FIDUCIARY DUTY (July
Plaintiff,) 4, 2006) UNTIL ENTRY OF
JUDGMENT (April 16, 2010)
)
v.)
)
MICHAEL B. MCFARLAND, MICHAEL)
B. MCFARLAND, P.A., and KAREN)
ZIMMERMAN,)
Defendants.)
)

NOTICE IS HEREBY GIVEN that the Plaintiffs' Motion for Pre-
Judgment Interest shall come for hearing before the Honorable
Charles W. Hosack, on May 19, 2010 at 2:00 p.m., or as soon
thereafter as counsel may be heard, in a courtroom of the
Kootenai County Courthouse, 324 W. Garden Avenue, Coeur d'Alene,
Idaho.

DATED this 5 day of May, 2010.

Rex A. Finney

REX A. FINNEY
Attorney at Law

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was delivered via facsimile, this 5 day of May, 2010, and was addressed as follows:

J.P. WHELAN P.C.
Attorney at law
213 N. 4th Street
Coeur d'Alene, Idaho 83814
(Fax No.: (208) 664-2240)

Rex A. Finney

STATE OF IDAHO } SS
COUNTY OF KOOTENAI }
FILED } 829

2010 MAY 12 PM 4:40

CLERK DISTRICT COURT

Sherry J. Upman
DEPUTY

John P. Whelan, P.C.
Attorney at Law
213 N. 4th Street
Coeur d' Alene, Idaho 83814
Telephone: (208) 664-5891
Facsimile: (208) 664-2240
ISB No. 6083

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE STATE OF
IDAHO, IN AND FOR THE COUNTY OF KOOTENAI

KARLETTA GRACE BERRY, a widow,
KARLETTA GRACE BERRY, Personal
Representative of the Estate of Jerry
Lee Roy Berry, CAPTAIN'S WHEEL
RESORT, INC., an Idaho Corporation,

Plaintiffs,

vs.

MICHAEL B. MCFARLAND, MICHAEL
B. MCFARLAND, P.A., and KAREN
ZIMMERMAN,

Defendants.

Case No. CV-07-2409

MOTION TO DISALLOW COSTS AND
ATTORNEYS FEES

Hearing Date:

Time:

Judge: Charles Hosack

COMES NOW, the Defendants, Michael B. McFarland, Michael B. McFarland, P.A. and Karen Zimmerman, by and through their attorney of record, John P. Whelan, P.C., object to the costs and attorney fees claimed by Plaintiff, Karletta Grace Berry in Plaintiffs' Memorandum of Costs and Attorney Fees on the grounds that the memorandum of costs and attorney fees cites no specific

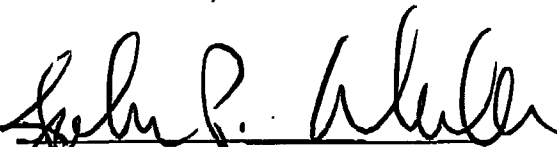
MOTION TO DISALLOW COSTS AND ATTORNEYS FEES- 1

basis or argument in support of the request for costs and attorney fees. Furthermore, the claimed attorney fees are clearly excessive and there is no valid basis for an award of attorney fees and costs. Additionally, the claimed costs are excessive and without documentary support. Accordingly, Defendants, object to Defendants' memorandum of costs and attorney fees in its entirety.

Defendants request oral argument on this motion.

DATED this 12 day of May, 2010.

JOHN P. WHELAN, P.C.

By: 
John P. Whelan

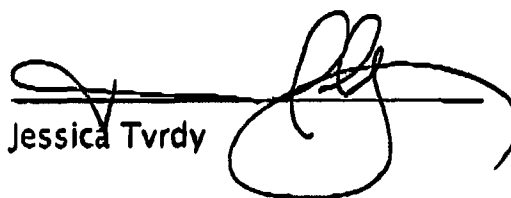
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 12TH day of May, 2010, I caused to be served a true and correct copy of the foregoing by the method indicated below, and addressed as indicated below:

Rex A. Finney
Finney, Finney & Finney
120 East Lake Street, Suite 317
Sandpoint, ID 83865

- U.S. Mail, Postage Prepaid
- Hand Delivered
- Overnight Mail
- Facsimile to: (208) 263-8211

Jessica Tvrdy

A handwritten signature in black ink, appearing to read 'Jessica Tvrdy', written over a horizontal line. The signature is stylized with loops and a long horizontal stroke.

STATE OF IDAHO } SS
COUNTY OF KOOTENAI }
FILED } 828

2010 MAY 12 PM 4:40

CLERK DISTRICT COURT

Sherry Bluffs
DEPUTY

John P. Whelan, P.C.
Attorney at Law
213 N. 4th Street
Coeur d' Alene, Idaho 83814
Telephone: (208) 664-5891
Facsimile: (208) 664-2240
ISB No. 6083

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE STATE OF
IDAHO, IN AND FOR THE COUNTY OF KOOTENAI

KARLETTA GRACE BERRY, a widow,
KARLETTA GRACE BERRY, Personal
Representative of the Estate of Jerry
Lee Roy Berry, CAPTAIN'S WHEEL
RESORT, INC., an Idaho Corporation,

Plaintiffs,

vs.

MICHAEL B. MCFARLAND, MICHAEL B.
MCFARLAND, P.A., and KAREN
ZIMMERMAN,

Defendants.

Case No. CV-07-2409

OPPOSITION TO PLAINTIFFS' MOTION
FOR PRE-JUDGMENT INTEREST FROM
DATE OF BREACH OF FIDUCIARY DUTY
UNTIL ENTRY OF JUDGMENT

Hearing Date: May 19, 2010

Time: 2:00 p.m.

Judge: Charles Hosack

Defendants, Michael B. McFarland, Michael B. McFarland, P.A. and Karen
Zimmerman, submit the following opposition to Plaintiff's Motion for Pre-
Judgment Interest From Date of Breach of Fiduciary Duty Until Entry of
Judgment as follows:

OPPOSITION TO PLAINTIFFS' MOTION FOR PRE-JUDGMENT INTEREST FROM DATE OF BREACH OF
FIDUCIARY DUTY UNTIL ENTRY OF JUDGMENT-1

Plaintiffs request that the Court award prejudgment interest without stating a basis for the award. The request violates I.R.C.P. Rule 7(b)(1) in that: "An application to the Court for an order...shall state with particularity the grounds therefore including the number of the applicable civil rule, if, any..."

Plaintiff and her counsel have demonstrated a history of requesting Court orders without offering briefs in support of the requests or even supplying the rule of procedure or statutory authority for the request.¹

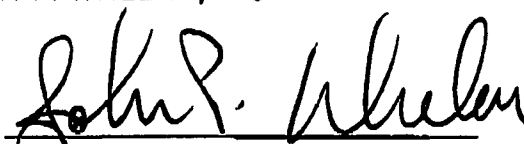
The statute cited by Plaintiffs in the "Motion for Pre-Judgment Interest" (I.C. 28-22-104) merely recites that the default rate of interest is twelve percent (12%). The statute does not supply the basis for Plaintiffs' request for pre-judgment interest.

Furthermore, the jury did not find that Defendants breached a fiduciary duty on any particular date, contrary to Plaintiffs' representation.

Plaintiffs' motion is therefore frivolous and should be denied in its entirety.

DATED this 12 day of May, 2010.

JOHN P. WHELAN, P.C.

By: 
John R. Whelan

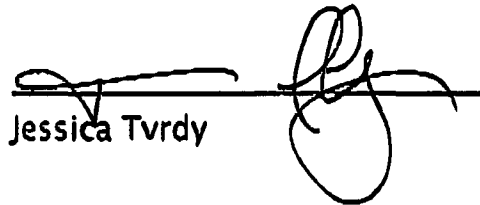
¹ See e.g. "Plaintiff's Memorandum of Attorney Fees and Costs".

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 12th day of May, 2010, I caused to be served a true and correct copy of the foregoing by the method indicated below, and addressed as indicated below:

Rex A. Finney
Finney, Finney & Finney
120 East Lake Street, Suite 317
Sandpoint, ID 83865

- () U.S. Mail, Postage Prepaid
- () Hand Delivered
- () Overnight Mail
- () Facsimile to: (208) 263-8211


Jessica Tvrdy

REX A. FINNEY
FINNEY FINNEY & FINNEY, P.A.
Attorneys at Law
Old Power House Building
120 East Lake Street, Suite 317
Sandpoint, Idaho 83864
Phone: (208) 263-7712
Fax: (208) 263-8211
ISB No. 6313

STATE OF IDAHO }
COUNTY OF KOOTENAI } SS
FILED }
#734 vs.
2010 MAY 26 PM 1:41

CLERK DISTRICT COURT
Sam Crump
DEPUTY

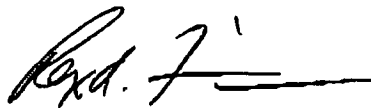
IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF KOOTENAI

KARLETTA GRACE BERRY, a widow,	)	Case No. CV-2007-0002409
KARLETTA GRACE BERRY, Personal)	
Representative of the Estate	)	NOTICE OF HEARING RE:
of Jerry Lee Roy Berry,	)	PLAINTIFF'S MOTION FOR PRE-
CAPTAIN'S WHEEL RESORT, INC.,	)	JUDGMENT INTEREST FROM DATE OF
an Idaho Corporation,	)	BREACH OF FIDUCIARY DUTY (July
	)	4, 2006) UNTIL ENTRY OF
Plaintiff,	)	JUDGMENT (April 16, 2010)
)	
v.)	
)	
MICHAEL B. MCFARLAND, MICHAEL)	
B. MCFARLAND, P.A., and KAREN)	
ZIMMERMAN,)	
)	
Defendants.)	
)	

OK

NOTICE IS HEREBY GIVEN that the Plaintiffs' Motion for Pre-Judgment Interest shall come for hearing before the Honorable Charles W. Hosack, on June 2, 2010 at 11:00 a.m., or as soon thereafter as counsel may be heard, in a courtroom of the Kootenai County Courthouse, 324 W. Garden Avenue, Coeur d'Alene, Idaho.

DATED this 26 day of May, 2010.

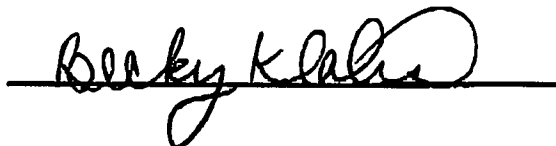


REX A. FINNEY
Attorney at Law

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was delivered via facsimile, this 26th day of May, 2010, and was addressed as follows:

J.P. WHELAN P.C.
Attorney at law
213 N. 4th Street
Coeur d'Alene, Idaho 83814
(Fax No.: (208) 664-2240)



STATE OF IDAHO }
COUNTY OF KOOTENAI } SS
FILED:
#623 US
2010 MAY 26 AM 10:54

John P. Whelan, P.C.
Attorney at Law
213 N. 4th Street
Coeur d' Alene, Idaho 83814
Telephone: (208) 664-5891
Facsimile: (208) 664-2240
ISB No. 6083

CLERK DISTRICT COURT
[Signature]
DEPUTY

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF KOOTENAI

KARLETTA GRACE BERRY, a widow,
KARLETTA GRACE BERRY, Personal
Representative of the Estate of Jerry
Lee Roy Berry, CAPTAIN'S WHEEL
RESORT, INC., an Idaho Corporation,

Plaintiffs,

vs.

MICHAEL B. MCFARLAND, MICHAEL B.
MCFARLAND, P.A., and KAREN
ZIMMERMAN,

Defendants.

Case No. CV-07-2409

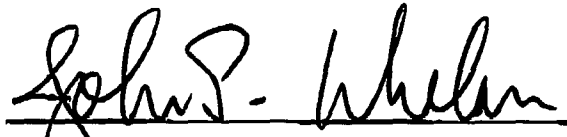
AMENDED NOTICE OF HEARING

Date: June 2, 2010 *OK*
Time: 11:00 a.m.
Judge: Charles Hosack
Location: Kootenai County Courthouse
324 W. Garden Ave.
Coeur d' Alene, ID 83814

TO ALL PARTIES AND THEIR ATTORNEY OF RECORD:

PLEASE TAKE NOTICE that on the date of June 2, 2010 at 11:00 a.m. before the Honorable Charles Hosack, Defendants will have their Motion for Judgment Notwithstanding the Verdict, Motion for Remittitur and Motion for New Trial heard by the Court.

Dated this 26 day of May, 2010.

A handwritten signature in black ink, appearing to read "John P. Whelan", written over a horizontal line.

John P. Whelan

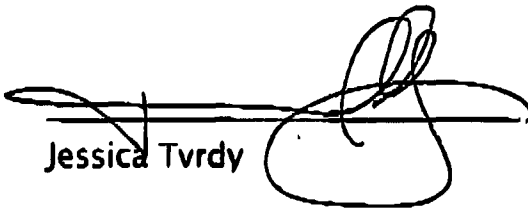
Attorney for Defendants

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 26TH day of May, 2010, I caused to be served a true and correct copy of the foregoing by the method indicated below, and addressed as indicated below:

Rex A. Finney
Finney, Finney & Finney
120 East Lake Street, Suite 317
Sandpoint, ID 83865

- () U.S. Mail, Postage Prepaid
- () Hand Delivered
- () Overnight Mail
- Facsimile to: (208) 263-8211


Jessica Tvrdy

Court Minutes:

Session: HOSACK060210A
Session Date: 06/02/2010
Judge: Hosack, Charles
Reporter:

Division: DIST
Session Time: 10:56

Courtroom: Courtroom3

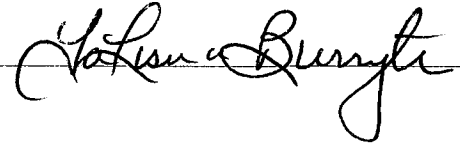
Clerk(s): Burrington, Talisa

State Attorney(s):

Public Defender(s):

Prob. Officer(s):

Court interpreter(s):



Case ID: 0001

Case number: CV2007-2409
Plaintiff: BERRY, KARLETTA
Plaintiff Attorney: Finney, Rex
Defendant: MCFARLAND, MICHAEL
Pers. Attorney: Whelan, J. P.
Co-Defendant(s):
State Attorney:
Public Defender:

06/02/2010

11:02:46

Recording Started:

11:02:46

Case called

11:02:54

Judge: Hosack, Charles
MOTION HEARING. ALL PARTIES PRESENT. JOHN
WHEELEN PRESENT FOR MR. MCFARLAND

11:03:19

AND MR. FINNEY PRESENT FOR MS. BERRY.

11:03:40

SERIES OF POST TRIAL JUDGMENTS. MOTION FOR A NEW
TRIAL. MOTION FOR A

11:03:59

REMITTUER.

11:04:41 **Pers. Attorney: Whelan, J. P.**

11:05:09 **Judge: Hosack, Charles**
WE HAVE NO COURT REPORTER TODAY - NON AVAILABLE
TODAY. PROCEED TODAY WITHOUT

11:05:35 ONE.

11:05:53 **Pers. Attorney: Whelan, J. P.**
I WILL GO FIRST. MOTION FOR JOV, MOTION FOR A
NEW TRIAL AND REMITTUER.

11:07:10 HOPEFULLY COURT LOOKED AT AFFIDAVIT - I
SUBMITTED ONE WITH SPECIAL VERDICT.

11:07:40 MY ASSISTANT SUBMITTED TWO. CLOSING ARGUMENT ON
LAST TRIAL IS ISSUE. THERE

11:08:09 ARE 13 ISSUES. WILL FOLLOW THE BRIEF AND
HIGHLIGHT ISSUES. FIRST ISSUE TONY

11:08:42 MCGLAUGHLIN TESTIMONY - WE OBJECTED, HE WAS A CO
COUNCIL ON THIS CASE, HE WAS

11:08:59 PAID BY REX FINNEY TO TESTIFY, THAT TYPE OF
CONDUCT IS ATTORNEY MIS CONDUCT,

11:09:25 W HAVE RULES TO FOLLOW AS ATTORNEY. HE WAS
WEARING TWO HATS. RULES OF ETHICS

11:09:56 ON THIS ISSUE. CONFUSION OCCURED WITH HIS
TESTIMONY. WE OBJECTED TO HIS

11:10:58 TESTIMONY - FINE LINE BETWEEN ADVOCATE OR
WITNESS, HE WAS A HIRED GUY BY MR.

11:11:24 FINNEY. CONSTANT COMMUNICATION BETWEEN THE TWO
OF THEM. HE ASSUMED ROLE AS

11:11:51 CO- COUNCIL. STARTED A ROAD FOR A JURY VERDICT
THAT WAS SWAYED. CONDUCT OF

11:12:31 MR. FINNEY WAS IRREPHENSABLE. WERE HERE TODAY
WITHOUT A BRIEF OBJECTING FROM

11:13:00 HIM. HIS THREE HOUR CLOSING ARGUMENT - COMMENTS
MADE IN THAT CLOSING, HE TOOK

11:13:27 PERSONAL SHOTS AT ME AND DEMONIZED MR. MCFARLAND
AND THE JURY BOUGHT IN TO

11:13:50 IT. WE FOUND PEOPLE ON THE JURY OPENINGLY
ADMITTING TO HATING LAWYERS.

11:14:38 VERDICT WAS UNSUPPORTED BY THE EVIDENCE. AWARD
OF \$380,000.00 - THERE IS NOT

11:15:16 SHRED OF EVIDENCE ABOUT THE VALUE OF THE STOCK.
REAL ESTATE APPRAISER

11:15:43 TESTIFIED ABOUT THE VALUE OF THE STOCK. NO
DIRECT PROOF OF THE VALUE OF THE

11:16:07 STOCK. THEN WE HAVE THE MCFARLAND ADVANCES, JURY

DENIED MCFARLAND THE
11:16:31 ADVANCES THAT HE ADVANCED TO THE CORPORATION.
PARTIES REACHED AGREEMENT ON
11:17:00 THIS ISSUE AND THEY JURY DENIED HIM THOSE
ADVANCEMENTS. JURY AWARDED HER
11:17:29 ANOTHER 178,000. WITH NO SUPPORTING EVIDENCE ON
THE SPECIAL VERDICT. SPECIAL
11:17:48 VERDICT IS A ISSUE. THE JUDGMENT THAT WAS
ENTERED 4/19 - READS JUDGMENT, SUB
11:18:19 PARA A. THAT IS NOT WHAT THE JURY FOUND. WHAT
THE JURY FOUND ON THE SPECIAL
11:18:45 VEDICT, WAS THERE BREACH OF DUTY? JURY WAS GIVEN
A NEGLIGENT INSTRUCTION,
11:19:12 THERE IS A SPECIAL VERDICT PROBLEM WITH THE WAY
IT READS. HEARSAY ABOUT
11:19:38 MCFARLAND BEING JERRY BERRYS LAWYER, IT WAS ALL
BASED ON HEARSAY WHAT PEOPLE
11:20:04 HARD - NO EVIDENCE OF HIM BEING HIS ATTORNEY, NO
BILLING STATEMENTS, NO
11:20:23 COURT APPEARANCES. JERRY BERRY HAD TWO ATTORNEYS
HE USED REGULARLY IN
11:20:43 WASHINGTO, NEVER THE LESS THE JURY FOUND
MCFARLAND TO BE JERRY BERRY
11:21:04 ATTORNEY. NO PROOF OF CLIENT ATTORNEY
RELATIONSHIP. I POINT TO MCFARLAND
11:21:49 TESTIMONY TO SUPPORT MY POINT ON THIS ISSUE.
WHAT WAS GIVEN WAS HEAR SAY,
11:22:20 UNSUPPORTED BY THE EVIDENCE AND A NEW TRIAL
SHOULD BE GRANTED. INDICATED IN
11:22:48 MYBRIEF THAT THE JURY IN A EMOTIONAL UP HEAVAL
DENIED MY CLIENT ANYTHING. THE
11:23:15 THREE HOUR CLOSING WAS INTENDED TO DEMONIZE MY
CLIENT, WE LISTENED TO THAT
11:23:38 FOR THREE HOURS. MR. FINNEY OUT RIGHT LIED TO
THE JURY AND TAINED THE JURY.
11:24:15 HE APPEALED TO THE PASSION OF THE JURY. READS
PORTION OF TRANSCRIPT OF MR.
11:24:39 FINNEY CLOSING ARGUMENT TO JURY. HIS COMMENTS
REVOKED EMOTIONS FROM THE JURY.
11:25:19 HE CALLED ME A LIAR. FLAT OUT LIE TO THE JURY
ABOUT THE STOCKS. HE JUST HAD
11:25:57 CREATIVE THEORIES THROUGH OUT THE TRIAL. HE SAID
WE COULD NOT RECIND THE
11:26:27 STOCK - OUT RIGHT LIE TO THE JURY. THIS
STATEMENT WAS MADE TO EVOKE EMOTIONS
11:26:48 FROM THE JURY, THEY KNEE JERKED AND CAME WITH A

11:27:31 VERDICT QUICKLY. CITES THE
SEELY CASE, THAT CASE IS MIS USED IN REGARDS TO
FUDICARY DUTY. SEELY CASE
11:27:58 INVOLVED A LAWYER, NOT THE CASE IN THIS CASE.
COMPLETE FAILURE OF PROOF OF
11:28:26 FACT. MR BERRY AND MCFARLAND WERE FRIENDS, HAD
DINNER AND DRINKS TOGETHER
11:28:57 AND THE JURY FINDS THAT MCFARLAND IS HIS
ATTORNEY, NO EVIDENCE SUPPORTING
11:29:24 THAT. JURY IN EMOTIONAL UPHEAVAL, THEY FOUND HE
WAS IN FUDICIARY POSITION -
11:30:03 NOTHING TO SUPPORT THAT. THEN WE HAVE KAREN
ZIMMERMAN, SHE GOT HIT WITH THE
11:30:17 SAME DAMAGES, SHE IS NOT A LAWYER AND NEVER HAS
BEEN, SHE WAS JUST A PARTY TO
11:30:34 THE STOCK AGREEMENT AND THAT SHE WAS PRESENT
WHEN PARTIES HAD DINNER AND
11:30:54 BECAUSE OF THAT SHE WAS HIT WITH A JOINT AND
SEVERAL 380,000 JUDGMENT -
11:31:12 NOTHING TO SUPPORT THAT. NO FINDING SHE ENGAGED
IN ANY TYPE OF CONSPIRACY.
11:31:38 THEN THE ISSUE OF HER BEING IN A FIDUCIARY DUTY
- NOTHING TO SUPOORT THAT,
11:31:57 THE JURY JUST WANTED HER TO SUFFER BEAUSE SHE
WAS THE GIRLFRIEND. TESTIMONY
11:32:25 OF SHERYL CONNELL - HER TESTIMONY ABOUT
MCFARLAND BEING HER DADS ATTORNEY,
11:32:52 SHE THEN BROKE DOWN IN FRONT OF ALL THE JURY FOR
TEN MIN OF TESTIMONEY, SHE
11:33:12 CREATED A PICTURE THAT THE EVIL LAWYER WAS
TAKING ADVANTAGE OF THE STEP
11:33:37 MOTHER, IT WAS CHOREGRAPHED. MCFARLAND WAS MADE
OUT TO BE THE EVIL LAWYER
11:33:57 THAT WE ALL DESPISE. FINDINGS WERE MADE ON
EMOTION AND PASSION NOT ON
11:34:18 EVIDENCE. MCFLARLAND WAS MADE OUT TO BE THE
OYSTER EATING BAD LAWYER. ASKING
11:34:46 FOR A NEW TRIAL. JUDGMENT IS UNSUPPORTED AND WE
AREA ASKING THAT NO JUDGMENT
11:35:17 BE AWARDED. NEW TRIAL IS APPROPRIATE, WE WERE
DENIED A FAIR TRIAL. THIS TRIAL
11:35:40 WENT SIDEWAYS, HAVE IDENTIFIED SOME ISSUES
TODAY. ISSUANCE OF STOCK IS ISSUE.
11:36:16 ASK FOR JOV - REMITTUER OR LET US RE TRY THIS
CASE.

11:36:57 **Judge: Hosack, Charles**
REGARDING SPECIAL VERDICT FORM - STOCK TO BE PUT
ASIDE FOR THE MINUTE. HEART
11:37:49 OF THE ISSUE IS BREACH OF FUDICARY DUTY.

11:38:20 **Pers. Attorney: Whelan, J. P.**
YES THAT IS CORRECT

11:38:26 **Judge: Hosack, Charles**
IN REGARDS TO THE ADVANCES - THAT WOULD MEAN
MCFARLAND WOULD BE 50 PERCENT
11:38:48 OWNER AND CREDIT FOR THE ADVANCES, IS THAT
CORRECT?

11:39:06 **Pers. Attorney: Whelan, J. P.**
YES IN CORPORATE MEETING IT WAS AGREED HE MADE
ADVANCES AND HE WOULD BE
11:39:27 REPAID OR CREDITIED. ADVANCES WERE MADE BY MY
CLIENT.

11:39:50 **Plaintiff Attorney: Finney, Rex**
IN RESPONSE TO THE MOTIONS WHEELAN HAS MADE.
FIST THING HE SAID JUDGMENT WAS
11:40:46 ENTERED 4/19, HIS MOTIONS SHOULD BE DENIED DUE
TO BEING UNTIMELY. OBJECT TO
11:41:21 THE AFFIDAVIT - WHELAN IS SAYING LAWYERS CANT BE
WITNESSES, THERE IS A WAY TO
11:41:46 RECREATE AND THAT IS TO GET TRANSCRIPT. THAT
PROCEDURE HAS NOT BEEN SUBMITTED
11:42:36 CORRECTLY BY MR WHEELAN TODAY.

11:43:08 **Judge: Hosack, Charles**
WE HAD NO COURT REPORTER - THAT WAS A DIS
SERVICE IN MY OPINION, IT WAS TRIED
11:43:34 OUT AT THE JAIL WITH A UNCERTAIN SOUND SYSTEM.
MR FINNEY RECITED THE RULE.
11:44:01 STRIKE THE AFFIDAVITS MOTION TO STRIKE IS
GRANTED.

11:44:34 **Plaintiff Attorney: Finney, Rex**
NEXT TESTIMONY OF TONY MCGLAHLIN - WHELAN IS
AYING IT SHOULDN'T BE ALLOWED AT
11:44:59 TRIAL. MR. MCGLALIHN HAS NEVER BEEN A ATTORNEY
IN THIS CASE AND NEVER HAS
11:45:17 BEEN. YES I KNOWN HIM FOR SIGNIFICANT AMOUNT OF
TIME, WE DONT WORK TOGETHER,

11:45:54 W DIDNT GO TO LAW SCHOOL TOGETHER. MR MCFALAND
DID CALL SPECIAL MEETINGS,
11:46:24 LAST MINUTE MEETINGS. MCGLAUGHLIN WAS THERE AT A
SPECIAL MEETING AND DID
11:46:49 ATTEND. HE HAS NO BENEFIT FROM HIM TESTIMONY..
RULE 3.1.7 HAS NO MERIT, NO
11:47:30 PROHIBIT FROM HIS TESTIMONY, IT WAS PURELY FACTS
ABOUT THE MEETING. NO
11:48:10 GROUNDS ON THIS ISSUE FOR A NEW TRIAL. MY
RECOLLECTION DAY ONE TRIAL
11:48:54 MCFARLAND STARTED OUT SAYING HE HAS NEVER BERRY
ATTORNEY AND ONE THE THIRD
11:49:13 DAY HE SAID HE MIGHT HAVE CONSIDERED BERRY
ATTORNEY. NEXT ISSUE BACK IN 2001
11:49:41 BERRY ASKED MCFARLAND ABOUT CREDITORS AND
MCFARLAND TOLD HIM TO SCHEDULE A
11:50:00 MEETING IN MCFARLAND OFFICE, THEY SCHEDULED A
MEETING - THEY HAD A MEETING
11:50:31 REGARDING BANK RUPTCY AND IF THE STOCK WOULD BE
EXEMPT IN THE BANKRUPCY.
11:50:58 MCFARLAND HAD LOOKED AT THE CIT BUSINESS DOCS
AND ADVISED BERRY THERE WAS
11:51:30 EQUITY IN THE STOCK. MCFARLAND OWN TESTIMONY -
HE STATED BERRY BOUGHT THE
11:52:04 STOCK FROM CABELLS AND THE 100,000 WAS A
FRACTION OF THE TRUE VALUE -
11:52:28 MCFARLAND SAID THIS. SECOND VERSION OF THE STOCK
AGREEMENT THERE WAS LANGUAGE
11:52:54 THAT CREATED A TRUST FOR MS BERRY AND HER SON
AND MCFARLAND WAS THE TRUSTEE.
11:53:22 WE DO AND DID ESTABLISH THERE WAS A CLIENT
ATTORNEY RELATIONSHIP. MCFARLAND
11:54:09 DENNIED EVER HAVING A FILE, HIS SECRETARY
TESTIFIED THERE WAS A FILE AND IT
11:54:29 DID EXIST ON THE CAPTAINS WHEEL. THERE WAS A
RELATIONSHIP ESTABLISHED, THERE
11:54:59 ARE CASES

11:55:09 **Pers. Attorney: Whelan, J. P.**
OBJECT TO NOT TALKING ABOUT CASES.

11:55:22 **Judge: Hosack, Charles**
LACK OF AUTHORITY - CONT TO PROCEED.

11:55:41 **Plaintiff Attorney: Finney, Rex**
ATTORNEY CLIENT RELATIONSHIP WAS ESTABLISHED.

11:56:09 NOW THE STOCK ISSUE. MCFARLAND
TESTIFIED ABOUT THE VALUE OF THE STOCK. I TOLD
THE JURY THE STOCK COULD BE AS
11:56:36 LOW IN THE 400,000 RANGE UP TO THE 600,000
RANGE.

11:57:07 **Judge: Hosack, Charles**
RUN THROUGH THAT AGAIN. YOU SAY THE JUDGMENT IS
SUPPORTED BY WHAT FIGURES

11:57:29 **Plaintiff Attorney: Finney, Rex**
PLAINTIFFS BRIEF AFTER HEARING PARA 23. READS
PARA 23 - PAGE 6 OF THE BRIEF.

11:58:45 **Judge: Hosack, Charles**
YES THAT ANSWERS THE QUESTION - PAGE 6 AND 7 OF
BRIEF.

11:59:05 **Pers. Attorney: Whelan, J. P.**
JURY PICKED UP ONE DEBT THAT I MISSED. THE
JUDGMENT IS SUPPORTED BY EVIDENCE.

11:59:38 ADDITIONALLY KARLETTA GAVE HER ESTIMATION VALUE
OF THE STOCK. IN THIS CASE

12:00:50 THERE IS SUFFICIENT EVIDENCE TO THE VALUE OF THE
STOCK.

12:01:24 **Judge: Hosack, Charles**
ONLY EVIDENCE OF THE VALUE OF THE STOCK WAS
APPRAISAL OF REAL PROPERTY MINUS
12:01:43 THE DEBT. WHAT EVIDENCE IS THERE THAT 50 PERCENT
IS THERE. WHAT EVIDENCE IS
12:03:03 THERE THAT THE VALUE INCREASED, OWNER CAN
TESTIFY BUT WHAT CREDITABILITY IS
12:03:23 THERE TO BACK IT

12:03:28 **Plaintiff Attorney: Finney, Rex**
IT BEGINS WITH MCFARLAND TESTIFIED ABOUT THE
VALUE.

12:03:48 **Judge: Hosack, Charles**
BUT THAT IS NOT THE FAIR MARKET VALUE. AMOUNT
PAID WAS 100,000. NO EVIDENCE
12:04:23 TO SUPPORT THAT IS NOW VALUED IN THE 400,000
RANGE.

12:04:43 **Plaintiff Attorney: Finney, Rex**

12:05:49 PRICE PAID AND FAIR MARKET VALUE. THE
TRANSACTION WAS CALCULATED - LAKE FRONT
PROPERTY AT THAT TIME HAD WENT UP SIGNIFANCTLY.
12:06:27 THERE IS NO CONFLICTING
EVIDENCE FROM WHELAN.

12:07:00 **Judge: Hosack, Charles**
WHY WOULD HE SELL STOCK THAT WAS WORTH 400,000
FOR 100,000?

12:07:33 **Plaintiff Attorney: Finney, Rex**
JUDGMENT WAS BASED ON A STOCK PURCHASE AGREEMENT
- PURCHASE PRICE WAS 100,000
12:07:57 BUT AWARDED 380,000. THE DIFFERENCE IS THE
DAMAGES.

12:08:38 **Judge: Hosack, Charles**
WHAT YOUR DOING IS REFORMING THE CONTRACT AND
YOU HAVENT REFORMED THE
12:08:58 CONTRACT. I UNDERSTAND THE ARGUMENT ABOUT TAKING
ADVANTAGE OF THE SICK MAN
12:09:26 WHO DIED OF CANCER. ISSUE IS JUDGMENT AND THE
PURCHASE PRICE OF THE STOCK.

12:10:09 **Plaintiff Attorney: Finney, Rex**
YES PURCHASED AT 100,000 BUT THERE WAS A BREACH
OF FUDICIARY DUTY. PRICE PAID
12:11:33 BY THE FUDICIARY WAS DIFFERENT THAN THE VALUE.

12:12:02 **Judge: Hosack, Charles**
WHAT THE JURY FOUND IT WAS A LOAN AGREEMENT. HE
THEN MORPHED THIS INTO A
12:12:32 PURCHASE STOCK AGREEMENT. IF THAT IS TRUE SHE IS
THE 100 PERCENT OWNER AND
12:13:13 OWES HIM 100,000.

12:13:29 **Plaintiff Attorney: Finney, Rex**
WE SHOWED DAMAGES.

12:13:39 **Judge: Hosack, Charles**
WHELAN SAYS THERE IS NO ELECTION OF REMEDIES. I
WILL WAIT TO SEE THE CASE YOU
12:14:14 CITE. - THERE IS NO SUCH CASE.

12:14:33 **Plaintiff Attorney: Finney, Rex**
FAIRNESS PLAYS INTO THIS.

12:14:47 **Judge: Hosack, Charles**
JURY SAID HE DIDNT GET HIS 166,000. BACK -
FIGURE MAY BE WRONG. THE SPECIAL
12:15:30 VERDICT FORM WAS SOMETHING I DIDNT TAKE ANY PRIDE
IN HIM. I AM NOT BLAMING THE
12:15:57 JURY, THEY FOUND IT WAS A LOAN - AND TAKING OVER
THE RESTUARNT WAS A BREACH
12:16:29 OF FUDICIARY DUTY TO MS BERRY. STOCK PURCHASE
AGREEMENT DATED 8/9/03 AS A
12:17:02 PURCHASE PRICE OF 100,000 AND NOW I AM BEING
ASKED TO AWARD A DIFFERENT
12:17:22 FIGURE AND NOW NOW REFORMING THE CONTRACT AND
AWARD DAMAGES, I JUST DONT SEE
12:17:49 HOW I CAN GET THERE. THEY ARE RECINDING THE
STOCK PURCHASE AGREEMNENT.
12:18:41 EXPRESS TERM OF THE AGREEMENT. I DRAFTED UP THE
SPECIAL VERDICT AND IT WAS
12:19:01 HARD, I DIDNT UNDERSTAND - DONT KNOW WHAT TO DO.

12:19:21 **Plaintiff Attorney: Finney, Rex**
WE ARE SAYING HE GOT A GOOD DEAL AND NOW ITS
12:19:37 TIME TO PAY THE DIFFERENCE. DONT
KNOW WHAT MORE I CAN SAY. JUDGMENT IS CORRECT -
REFERENCES THE BRIEFING.
12:20:29 MCFARLAND WAS THE FUDICIARY - HE TOOK ADVANTAGE.
THERE ARE SOME FAIRNESS
12:21:02 ISSUES HERE, TAXES ARE STILL UNPAID - MORTGAGE
IS UNPAID. MS. ZIMMERMAN WENT
12:21:28 INTO THIS AS A GOOD REAL ESTATE DEAL. NOW MY
PARTY LOSES IT ALL. SHE IS
12:22:01 LOCKED OUT. THIS PLACE WILL BE FOORECLOSED DUE
TO THE DEF. TERRIBLE TO THINK
12:22:32 COURT WOULD GIVE HER BACK A PLACE THAT IS
FORECLOSED AND SHE OWES MCFARLAND
12:22:58 100,000. THAT IS NOT FAIR. EVERYTHING IS UNPAID
- NO POWER. CANT BELIEVE THAT
12:23:25 IS EVEN A OPTION TO DISCUSS RIGHT NOW. REAL
TRAVESTY OF JUSTICE IF THAT
12:23:55 HAPPENS TODAY.

12:24:05 **Judge: Hosack, Charles**
WHO KNOWS IF THE VALUE IS UP OR DOWN - DEPENDS
ON WHAT POSITION YOUR IN - IF
12:24:26 YOUR A BUYER OR A SELLER.. IN 2006 MS BERRY
WOULD HAVE HAD TO STEP IN AND RUN
12:25:00 THE RESTAURANT AND PAY BACK MCFARLAND. I

12:25:20 UNDERSTAND YOUR ARGUMENT BUT THERE
IS NOTHING IN THE RECORD. RIGHT NOW VALUE IS LOW
AND PLACE - YES I UNDERSTAND
12:25:53 THAT.

12:25:56 **Plaintiff Attorney: Finney, Rex**
MCFARLAND TESTIFIED THE DEBTS ARE IN DEFAULT AND
UNPAID. WAS A SECURED ASSET
12:26:23 - BUSINESS IS CLOSED. TAXES ARE UNPAID - THAT IS
ON THE RECORD. THAT WAS HIS
12:26:47 TESTIMONY.

12:26:59 **Judge: Hosack, Charles**

12:27:15 **Plaintiff Attorney: Finney, Rex**
WE HAVE MATHEMATICAL EVIDENCE TO SUPPORT THIS.
NOW MCFARLAND ADVANCES - THIS
12:27:50 WAS HIS ATTEMPT TO GET A BIG SET OFF FROM THE
JUDGMENT. CALCULATED ATTEMPT ON
12:28:20 HIS PART. MCFARLAND WAS CLOE FRIENDS AND
ATTORNEY - THERE WAS TOTAL TRUST
12:30:33 FROM BERRY, HE TALKED ABOUT DEBTORS AND PROBLEMS
WITH THE COFFEE STAND. DEF
12:31:09 AGREED WITH THE JURY INSTRUCTIONS AND THE
VERDICT FORMS. NOW THEY ARE SAYING
12:31:32 THEY OBJECT, THEY AGREED AT THE TIME. NOT IN A
POSITION TO QUESTION THE
12:32:01 VERDICT FORMS. REFERENCES BRIEF DATED 1/24/09
PARA 67 PAGE 14 - CITES CASE.
12:33:30 WE HAVE A FUDICARY WHO GOT A GOOD DEAL AT THE
EXPENSE WHO WAS OWED FUDICARY
12:33:54 DUTY. MS ZIMMERMAN ACTIVELY PARTICIPATED IN THIS
DEAL, SHE PUT UP THE MONEY
12:34:25 AND IS EQUALLY LIABLE. SHE WAS IN ON THE DEAL -
SHE IS ON THE DAMAGES. SAYING
12:35:26 SHE IS NOT A ATTORNEY IS NOT A POINT TO ARGUE,
SHE WAS PART OF THE DEAL.
12:36:56 CLEAR ABOUT THE SHARES OF STOCKS. CLOSING
ARGUMENT - I DIDNT LIE - IT WAS
12:37:18 TWO SHARES OF STOCK THAT WERE ISSUED. MY CLOSING
ARGUMENT WITH THROUGH
12:37:53 EXHIBIT AND EXHIBITS, MY ARGUMENT WAS ENTIRELY
PROPERLY. ASKING THAT COURT
12:38:13 DENY THE MOTIONS AND NOT AWARD A NEW TRIAL.
COURT HAS MADE THE JUDGMENT

12:39:00 FINAL. ADDITIONAL TRIAL IS NOT GOING TO HELP
ANYONE - ASKING FOR NO
12:39:39 REMITTUER. NOT FAIR NOT EQUITABLE. LEAVE THE
JUDGMENT - IT WAS CERTIFIED.
12:40:01 THIS WOULD BE A GREAT CASE FOR THE SUPREME
COURT,. ASKING FOR THE CASE TO
12:40:19 REMAIN AS IT STANDS. THE MAIN ASSET OF THE CORP
IS THE LAND THAT THIS PLACE
12:41:59 SETS ON. MCFARLAND WILL NOT PUT OUT ANY MORE
MONEY AND MY CLIENT HAS NO MONEY
12:42:19 TO PUT OUT.

12:43:10 **Judge: Hosack, Charles**
SO YOUR SAYING WE HAVE A FINAL JUDGMNENT, THEY
ARE 50 50 OWNERS - SO THEY
12:43:28 SELL THE ASSETS, SAY THEY GET A MILLION DOLLARS
SO 500 EACH AND THEN CARLOTTA
12:43:48 WOULD GET 400 AND SOMETHING AND THEN HE GETS HIS
PLUS THE 100,000

12:44:21 **Pers. Attorney: Whelan, J. P.**
REBUTTAL
12:44:28 TAKE NOTE OF THE TAPE OF THE CLSOING ARGUMENT.
MY RECOLLECTION IF QUITE
12:44:54 DIFFERENT. WE HAVE ARGUED WHY OUR RELIEF IS
CORRECT. NO GOOD HARD EVIDENCE ON
12:45:32 THE VALUES OTHER THAN THE PURCHASE. SUBMIT.

12:45:45 **Judge: Hosack, Charles**
IN LIGHT OF ARGUMENTS HERE, WHERE WE GO FROM
HERE GIVEN THE STATUS OF THE
12:46:26 CASE. WE HAVE ATTORNEY FEES.

12:46:56 **Plaintiff Attorney: Finney, Rex**
PRE JUDGMENT INTEREST ISSUE - GO BACK IN TIME.
8/9/03 PURCHASE AGREEMENT BUT
12:47:27 IT WAS SIGNED AT A DIFFERENT TIME. IT WAS DONE
JULY 2006. STOCK WAS WORTH
12:47:59 385,000.00 FUDICIARY DUTY ISSUE, DAMAGES SET OUT
AND LIQUIDATED. TOOK COURT
12:48:29 TIME TO GET DATE AND VERDICT. ITS JUST PRE
CALCULATED INTEREST FROM THAT
12:48:51 DATE. INTEREST ACCRUED.

12:49:13 **Pers. Attorney: Whelan, J. P.**
I NEVER GOT A BRIEF IN SUPPORT OF THIS MOTION.

12:49:33 AT A LOSS HERE. NEVER SEEN A
CASE WHERE THIS EXISTS ON A TORTE. HAD NO IDEA
WHAT MOTION WAS ABOUT, WE
12:49:59 DONT HAVE THAT, LEFT TO SPECULATE WHY THEY THINK
THEY ARE ENTITLED TO
12:50:21 INTEREST NOT PRE JUDGMENT INTERST, THERE IS
GROUNDS. MOTION SHOULD BE DENIED.

12:50:52 **Plaintiff Attorney: Finney, Rex**
WERE NOT SUING FOR A CONTRACT - SUING FOR A
TORTE. FOCUS SOLEY ON THE TORTE.
12:51:23 SEEKING REMIDIAL DAMAGES.

12:51:44 **Judge: Hosack, Charles**
WHAT ABOUT ATTORNEY FEES

12:51:53 **Plaintiff Attorney: Finney, Rex**
THAT WAS NOT NOTED FOR TODAY.

12:52:08 **Judge: Hosack, Charles**
ALRIGHT I WILL TRY AND GET SOMETHING OUT AS
QUICKLY AS I CAN. IN RECESS.

12:52:52 **Stop recording**

STATE OF IDAHO
COUNTY OF KOOTENAI
FILED: 9

2010 JUN 10 PM 3:38

CLERK DISTRICT COURT

DEPUTY *Michael B. McFarland*

**IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE
STATE OF IDAHO IN AND FOR THE COUNTY OF KOOTENAI**

Karletta Grace Berry, et al,

Plaintiffs,

vs.

Michael B. McFarland, et al

Defendants.

Case No. CV-07-2409

**MEMORANDUM OPINION ON
POST TRIAL MOTIONS AND
ORDER GRANTING NEW
TRIAL**

This matter is before the Court on various post trial motions. The defendants have moved for judgment notwithstanding the verdict and, alternatively, for a new trial. The plaintiffs have moved for an award of prejudgment interest from the date of July 4, 2006 breach of fiduciary duty until entry of judgment on April 16, 2010.

The jury returned a special verdict following an 8 day jury trial, finding that defendants had breached a fiduciary duty regarding the Stock Purchase Agreement, and awarding \$380,500 in damages for the difference between the price paid by defendants for 50% of the stock in the

Memorandum Opinion and Order on Post Trial Motions- 1

corporation and the actual value of the stock. The jury also found that defendants were barred from recovering the sum of \$176,300.18 advanced as directors of the corporation.

Final judgment has been entered in favor of the plaintiffs and against defendants in the sum of \$380,500 as money damages for the breach of fiduciary duty. The effect of the judgment is to enforce the sale of 50% of the stock pursuant to the terms of the Stock Purchase Agreement entered into between Jerry Berry as the Seller and McFarland and Zimmerman as the Buyers. (Exhibit23).

At the time the case was submitted to the jury, there was no determination as to whether plaintiffs had made any election of remedies. The plaintiffs were pursuing both the remedy of rescission and of money damages. After the return of the special verdict, plaintiffs have pursued the claim for money damages. At the time the jury returned its verdict, plaintiff submitted a proposed judgment for money damages. Upon inquiry from the Court, plaintiffs' counsel advised that the proposed judgment was not intended to be a final judgment, and further proceedings would be anticipated. The Court indicated it would not be entering any interlocutory judgment without further guidance as to what supplemental proceedings might be contemplated. Plaintiffs noticed up a motion for entry of judgment and at the hearing submitted a proposed final judgment, which has been entered by the Court.

At trial, innumerable theories and claims were advanced by plaintiffs. During the trial, the Court had great difficulty sorting through the plaintiffs' claims. One thing that was clear was that the plaintiff was seeking inconsistent remedies, because the plaintiff was seeking to either rescind the Stock Purchase Agreement or to recover money damages. The election of remedies doctrine therefor applied. *Jenkins v. Barsalou*, 145 Idaho 202, 206 (2008). Plaintiffs have

Memorandum Opinion and Order on Post Trial Motions- 2

maintained that it was up to plaintiffs as to when and how to make any election, and that they were entitled to elect the money judgment remedy, once the jury returned its special verdict.

The parties never asked the Court to make any decision regarding an election of remedies, and although the Court was puzzled over how to handle the issue, the Court never brought the matter up on its own motion. Indeed, even after the return of the special verdict, the Court anticipated that further proceedings, at least regarding the election of remedies and the equitable issues pending in the case, would need to be addressed, perhaps even on the Court's own motion. However, the entry of the final judgment for money damages presumably is an election of remedies by the plaintiffs and resolves the case at the trial level.

The final judgment is based upon the Stock Purchase Agreement sale of 50% of the stock from Jerry Berry to McFarland and Zimmerman, but adjusts the purchase price from the expressly stated \$100,000 to \$480,500. The plaintiffs also seek prejudgment interest from the July 4, 2006, date of the Stock Purchase Agreement, even though the Agreement is actually dated August 9, 2003. The July 4 date is based upon the testimony at trial that the Stock Purchase Agreement was actually drawn up and executed by the parties on or about July 4. The uncontroverted evidence at trial was from defendants (since Jerry Berry had passed) to the effect that the August 9, 2003 date reflected the actual date of the agreement, and was not some typographical error. Money damages have been awarded pursuant to a Stock Purchase Agreement, but express material terms (date and purchase price) are changed for purposes of the money damage award.

The difficulty with this case lies in the disconnect between the final judgment and any articulable legal theory supporting the result. Plaintiffs argue a comment from the Restatement of Trusts to the effect that a fiduciary can be liable to a beneficiary of a trust if the fiduciary sells an

Memorandum Opinion and Order on Post Trial Motions- 3

asset for less than market value. Indeed, if a banker managing investment property for a trust for minors sells property to himself for less than market value, the beneficiaries have a valid claim. However, the Court finds that rule of law to be inapplicable to the facts of this case. While the jury did find a breach of fiduciary duty, the relationship here is not that of an investment banker managing trust property for beneficiaries of a trust. Instead, there is an arms length bona fide purchase and sale agreement between competent parties.

Plaintiffs was asserting theories of fraud and undue influence. The Court dismissed those claims as unsupported by any evidence. Plaintiffs' counsel can hardly be faulted for proof problems, since Jerry Berry had passed and there was no trial testimony to contradict defendants' testimony regarding the Stock Purchase Agreement. During trial, plaintiffs' counsel conceded that the Stock Purchase Agreement was valid. The final judgment is based upon the validity of the sale of a 50% interest in the corporation pursuant to the Stock Purchase Agreement. It is just that the money damages are then based upon a date and a purchase price different from what is set forth in the express terms of the Agreement. At the hearing on post trial motions, plaintiffs' counsel argued that the claim for money damages was not even based upon contract, but was a tort claim for breach of fiduciary duty.

It is the opinion of this Court that the special verdict does contain answers by the jury that provide clear guidance as to what the jury found. Essentially, the jury concluded that the true agreement between the parties was not a sale and purchase agreement, but was a loan.

The basic claim of the plaintiffs at trial was that the original deal between Jerry Berry and Mike McFarland was indeed a loan. There was certainly evidence to support that claim. According to the plaintiffs, in the summer of 2003 Jerry Berry's partner was selling his 50% interest in the corporation for \$100,000 and was looking for a buyer. Berry, as the other 50%

Memorandum Opinion and Order on Post Trial Motions- 4

owner in the corporation, was worried over who his new partner might be and wanted to buy the other 50%. Berry did not have the money. McFarland was willing to provide the \$100,000. It was McFarland's position that this was a purchase of the 50% interest that was for sale. At trial, it was plaintiffs' position that the \$100,000 was a loan to Jerry Berry so that Jerry Berry could buy the 50% interest that was for sale. Although plaintiffs did not dispute that Jerry Berry entered into the Stock Purchase Agreement in July 2006, the plaintiffs' theory was that McFarland used his superior bargaining power as an attorney and confidant of Jerry Berry to wrongfully induce Berry to convert what had been a loan agreement into a purchase and sale. Therefor the August 9, 2003 date was an entry by McFarland which in effect wrongfully backdated the date of the Stock Purchase Agreement from July 4, 2006, to the August 9, 2003, date, which the jury had found to be the date of the original loan agreement.

The jury verdict tracks the plaintiffs' theory of the case. The jury awarded damages based upon a finding that McFarland wrongfully induced the entry of the parties into a Stock Purchase Agreement in July 2006, when the "true" agreement was a loan transaction done in August 2003. The damages are 50% of the value the jury set for the stock of the corporation as of the July 2006 date, which was when the jury found that McFarland had induced Jerry Berry to convert the loan agreement of the parties into the Stock Purchase Agreement, less the \$100,000 amount for the "loan" from McFarland.

In hindsight, the Court realizes that it submitted a special verdict to the jury that permits exactly the result plaintiffs have obtained in their final judgment, based upon the legal theory that a breach of fiduciary duty can be the proximate cause of a party being wrongfully induced to enter into a contract of sale. In other words, Jerry Berry was wrongfully induced to enter into the Stock Purchase Agreement by McFarland's breach of fiduciary duty. Arguably, this is a legal

Memorandum Opinion and Order on Post Trial Motions- 5

theory that permits reformation of the express terms of a written contract under a negligence standard. The Court is of the impression that this is a new rule of law, as the Court is unaware of any legal precedent. The case of Jones v. Runft, 125 Idaho 607, 613-614 (1994), which the Court had in mind in terms of a breach of fiduciary duty, and which may be somewhat analogous, certainly does not provide controlling authority for this result. However, at this point, this is the law of the case.

GRANT OF JUDGMENT NOV, OR, GRANT OF NEW TRIAL

Assuming that the special verdict is appropriate under Idaho law, there are legal barriers to the entry of the money judgment. In equity, the only fair result is to return the parties to the status quo that the jury found, which is that of a loan agreement. The award of money damages is based upon a version of the Stock Purchase Agreement which differs from the express terms of the Agreement and to which no one has testified ever existed. The equitable remedy of rescinding the Stock Purchase Agreement and reinstating the loan agreement is at least consistent with what the jury found, and avoids an award of money damages for which there is insufficient evidence in the record and which is speculative in its amount.

There is insufficient evidence to support the award of damages. There was no testimony as to the value of 50% of the stock of the corporation, and the jury's computation of value, while mathematically derived from evidence in the record about the corporation's assets and liabilities, is speculative as to the market value of 50% of the corporate stock as of July 2006.

There is insufficient evidence to show that Jerry Berry was wrongfully induced by any breach of fiduciary duty owed Berry by McFarland in connection with the Berry's decision to

Memorandum Opinion and Order on Post Trial Motions- 6

enter into the Stock Purchase Agreement. There is no evidence of any potential buyer for 50% of the corporate stock in July 2006, much less of one willing to pay a purchase price in the range of \$480,500.

ELECTION OF REMEDIES

The Court is not able to find case law which appears controlling authority for this case as to when and how an election of remedies is to be made. It is the Court's view that, following the jury verdict, and prior to the entry of a final judgment, the Court could have made a decision under its equitable powers to enforce rescission as the appropriate remedy, notwithstanding the plaintiffs' request for entry of a money judgment. As far as this Court is aware, it is operating in uncharted territory, but the Court holds that it retains the power to elect an equitable remedy upon post trial motions.

For the reasons stated above, the Court concludes that the equitable remedy of rescission is the appropriate choice of remedy. To enforce a money judgment is to act upon an agreement which all parties agree never existed. Assuming the law does permit the jury to in affect reform the Stock Purchase Agreement based upon a finding of breach of fiduciary duty, then the appropriate remedy would be to restore the status quo of the original loan agreement.

Rescission would restore 100% ownership of the stock to plaintiffs, subject to the obligation to pay back the \$100,000 loan. The jury's finding of the defendants' breach of fiduciary duty as directors, barring defendants' recovery of advances made, would not be disturbed.

If there were no final judgment, the Court could simply elect the equitable remedy of rescission and enter judgment accordingly. However, because this is before the Court on a

motion for judgment nov, the Court will not set aside the existing judgment and enter its own judgment, but will address the award of the equitable remedy in the order granting the motion for a new trial.

INSUFFICIENCY OF EVIDENCE SUPPORTING DAMAGES AWARD

Under Rule 59 (a)(6), the Court may grant a new trial when it finds the verdict against the clear weight of the evidence and that the ends of justice would be served by vacating the verdict and that a retrial would produce a different result. *Carlson v Stanger* (Ct App. 2008). In weighing the evidence, the Court finds that the amount of money damages is speculative and contrary to the weight of the evidence.

There was no evidence of value as to 50% of the stock in the closely held corporation as of the July 2006 date. The only evidence was testimony by a real estate appraiser as to an appraisal of the real property. The appraiser made very clear he was not testifying as to the value of the business or the corporation. There was no testimony as to the value of 50% of the stock in the corporation owning the business. Karlotta Berry was not an owner and is not a signator to the Stock Purchase Agreement. Jerry Berry of course did not testify. However, the express term of the purchase price as set forth in the Agreement of \$100,000 is in evidence. There is no evidence that would explain why Jerry Berry, as an owner of 100% of the stock, would have sold 50% in 2006 for \$100,000 if he had believed the 50% interest had a market value of 4 or 5 times that value. In 2003, an arms length transaction had established the purchase price of 50% of the stock at \$100,000. There was absolutely no evidence of any market for 50% of the stock of the corporation at the price of \$480,500 as of any date, much less as of July 2006. A mathematical computation of dividing the appraised value of the real property, less business debts, by 2 is

Memorandum Opinion and Order on Post Trial Motions- 8

purely speculative as to what 50% of the stock in a closely held corporation would be worth on the open market.

There was no evidence of any market for 50% of the corporation's stock in 2006. There was no evidence of any potential buyer of 50% of the stock in the corporation (which would have placed the new owner in equal ownership with Karlotta Berry upon the passing of Jerry Berry).

The form of the jury verdict submitted to the jury did not provide the jury with the option of restoring the 2003 loan agreement which the jury had found to be the true agreement of the parties. The jury entered a monetary award because the form of the special verdict gave the jury no other option. The Court is firmly convinced that the verdict would have been different, had the jury been aware of the full range of remedies available.

INSUFFICIENT EVIDENCE TO SUPPORT FINDING OF BREACH OF FIDUCIARY DUTY

The Court finds that the evidence fails to support the jury verdict regarding the breach of fiduciary duty. Assuming a breach of fiduciary duty can be the proximate cause of wrongfully causing a 100% owner of the stock in a corporation to enter into a contract of sale for 50% of the stock, there still needs to be a showing of an appropriation by the wrongdoer of a business opportunity reasonably available to the 100% owner to sell one half of his ownership interest to a third party at some materially different price. Plaintiffs introduced no proof that there was any opportunity for Jerry Berry to sell this 50% interest to any third party in July 2006, even assuming Jerry Berry was interested in making such a sale. Nor do plaintiffs advance any evidence as to why Jerry Berry, if he was a 100% owner of the corporation, would want to sell 50% to some third party in 2006. Again, the jury essentially found that the agreement was more

Memorandum Opinion and Order on Post Trial Motions- 9

equitably regarded as a loan, rather than a Stock Purchase Agreement, but was required by the form of the special verdict to award money damages as if the Stock Purchase Agreement was the valid agreement, freely entered into between competent parties.

The effect of the judgment for money damages based upon the jury verdict is to enforce a written agreement which has been reformed to incorporate material terms contrary to the express language of the written agreement. There is insufficient evidence in the record to reform the written terms of the Stock Purchase Agreement as a valid and enforceable contract, when the jury's actual finding was that the agreement between the parties was not a purchase and sale but a loan.

ORDER GRANTING MOTION FOR NEW TRIAL

Because the granting of the motion for judgment nov would have the effect of dismissing the plaintiffs' case, the motion for judgment nov is denied. The Court concludes that it is appropriate to grant the defendants' motion for new trial, but conditionally, depending upon whether there is an acceptance by the parties of the equitable remedy of restoring the status quo of the loan agreement. Upon such acceptance, judgment would then enter awarding 100% of the stock to the plaintiffs, subject to a loan of August 9, 2003 of \$100,000 at the statutory interest rate until the date of judgment, with the principal and interest then bearing interest at the interest rate for judgments, thereby mooting the grant of a new trial. Either party may reject the condition or file a notice of appeal as provided in Rule 59.1. If both parties accept the condition, the parties are to submit a proposed amended judgment for entry by the Court. Upon running of the appeal period, unless both parties have filed an acceptance of the condition of the equitable remedy set forth above, or either party has filed a notice of appeal, the final judgment is hereby vacated and a new trial is hereby ordered.

Memorandum Opinion and Order on Post Trial Motions- 10

The motion for new trial is hereby conditionally granted.

Dated: June 10, 2010

A handwritten signature in cursive script, appearing to read "C. W. Hosack, Sr.", written above a horizontal line.

Hon. Charles W. Hosack, Sr. District Judge

CERTIFICATE OF DELIVERY

I hereby certify that on the 10 day of June, 2010, copies of the foregoing were sent by facsimile to:

Plaintiff Attorney Rex A. Finney (208) 263-8211

Defense Counsel John P. Whelan (208) 664-2240

DANIEL J. ENGLISH

CLERK OF THE DISTRICT COURT

By :


Deputy Clerk

REX A. FINNEY
 FINNEY FINNEY & FINNEY, P.A.
 Attorneys at Law
 Old Power House Building
 120 East Lake Street, Suite 317
 Sandpoint, Idaho 83864
 Phone: (208) 263-7712
 Fax: (208) 263-8211
 ISB No. 6313

STATE OF IDAHO
 COUNTY OF KOOTENAI } SS
 FILED:
 # 31131
 2010 JUL 19 PM 1:58

CLERK DISTRICT COURT
Brian J. Beebe
 DEPUTY

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE
 STATE OF IDAHO, IN AND FOR THE COUNTY OF KOOTENAI

KARLETTA GRACE BERRY, a widow,	)	Case No. CV-2007-2409
KARLETTA GRACE BERRY, Personal)	
Representative of the Estate	)	NOTICE OF APPEAL
of Jerry Lee Roy Berry,)	
CAPTAIN'S WHEEL RESORT, INC.,	)	I.A.R. 17
an Idaho Corporation,)	
	)	Category: L4
Plaintiffs/Appellants,	)	Fee: \$101.00
)	
v.)	
)	
MICHAEL B. MCFARLAND, MICHAEL)	
B. MCFARLAND, P.A., and KAREN)	
ZIMMERMAN,)	
)	
Defendants/Respondents.)	
)	

TO: THE ABOVE NAMED RESPONDENTS, MICHAEL B. MCFARLAND, MICHAEL
 B. MCFARLAND, P.A., and KAREN ZIMMERMAN.

NOTICE IS HEREBY GIVEN THAT:

1. The above named Appellants appeal against the above
 named Respondents to the Idaho Supreme Court from the Memorandum
 Opinion On Post Trial Motions And Order Granting New Trial,

entered in the above entitled action on the 10th day of June, 2010, the Honorable Charles W. Hosack, presiding.

2. That the parties have a right to appeal to the Idaho Supreme Court, and the judgments or orders described in paragraph 1 above are appealable orders under and pursuant to Rule 11(a)(1) or Rule 11(a)(2), I.A.R.

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

- (a) Whether the District Court erred in failing to allow the Plaintiffs to amend to seek punitive damages and in failing to instruct the jury on punitive damages?
- (b) Whether the District Court erred in ordering the remedy of rescission pursuant to Rule 59.1?
- (c) Whether the District Court erred in finding that rescission was available and would restore the parties to the status quo?
- (d) Whether the District Court erred in the grant of a new trial?
- (e) Whether the District Court erred in finding insufficient evidence supporting the damages award?
- (f) Whether the District Court erred in finding insufficient evidence to support finding of breach of fiduciary duty?
- (g) Whether the District Court erred in failing to award pre-judgment interest to the Plaintiffs?
- (h) whether the District Court erred in its analysis of election of remedies?
- (i) Whether the District Court erred in entering the Memorandum Opinion and Order on Post Trial Motions?

- (j) Whether the District Court erred in evidentiary rulings?
- (k) Whether the District Court erred in failing to give requested jury instructions?

4. (a) Is a reporter's transcript requested? YES

(b) The Appellants request the preparation of the following portions of the reporter's transcript:

1) Jury Trial commencing January 19, 2010 and continuing until the verdict was read and the jurors were excused.

2) All hearings on post trial motions.

3) Hearing on Motion For Entry of Findings, Conclusions, Final Order and Judgment held April 5, 2010.

3) Hearing on Plaintiffs' and Defendants' Post Trial Motions held June 2, 2010.

5. The Appellants request the following documents to be included in the clerk's record in addition to those automatically included under Rule 28, I.A.R.:

All filings in the case.

6. I certify:

(a) That a copy of this notice of appeal has been served on the reporter: JOANN SCHALLER

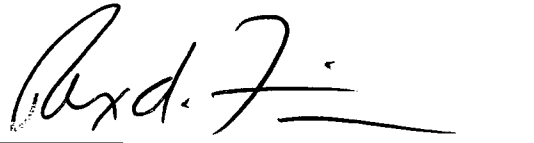
(b) That the estimated fee for preparation of the reporter's transcript of shall be paid in a timely manner to the reporter.

(c) That the estimated fee for preparation of the clerk's record of shall be paid in a timely manner to the Kootenai County Clerk.

(d) That the appellate filing fee has been paid in the amount of \$101.00.

(e) That service has been made upon all parties required to be served pursuant to Rule 20.

Dated this 19 day of July, 2010.



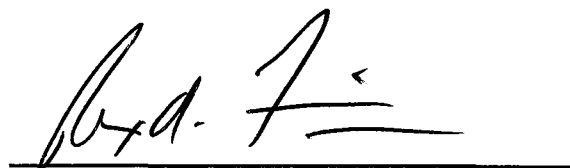
REX A. FINNEY
Finney Finney & Finney, P.A.
Attorney For Appellants

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was served by deposit in First Class, U.S. Mail, postage prepaid, this 19 day of July, 2010 and was addressed to:

J. P. Whelan
Attorney at Law
213 N. 4th Street
Coeur d'Alene, ID 83814
(and by Hand Delivery to J.P. Whelan)

JoAnn Schaller
Court Reporter
P.O. Box 9000
Coeur d'Alene, Idaho 83816-9000



REX A. FINNEY
FINNEY FINNEY & FINNEY, P.A.
Attorneys at Law
Old Power House Building
120 East Lake Street, Suite 317
Sandpoint, Idaho 83864
Phone: (208) 263-7712
Fax: (208) 263-8211
ISB No. 6313

STATE OF IDAHO
COUNTY OF KOOTENAI
FILED: JSS

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2010 JUL 20 PM 4:47

CLERK DISTRICT COURT
[Signature]
DEPUTY

Attorney for Appellants/Plaintiffs: KARLETTA
GRACE BERRY, a widow, KARLETTA GRACE BERRY,
Personal Representative of the Estate of
Jerry Lee Roy Berry, CAPTAIN'S WHEEL RESORT,
INC., an Idaho Corporation

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF KOOTENAI

KARLETTA GRACE BERRY, a widow,	)	Case No. CV-2007-2409
KARLETTA GRACE BERRY, Personal)	
Representative of the Estate)	
of Jerry Lee Roy Berry,	)	AMENDED NOTICE OF APPEAL
CAPTAIN'S WHEEL RESORT, INC.,)	
an Idaho Corporation,	)	I.A.R. 17
)	
Plaintiffs/Appellants,	)	Category: L4
	)	Fee: PAID (7/19/2010,
v.	)	Check No. 16895)
)	
MICHAEL B. MCFARLAND, MICHAEL	)	Confirmation No. 011079
B. MCFARLAND, P.A., and KAREN	)	For credit card payment of
ZIMMERMAN,	)	\$200 estimated transcript fee
	)	and \$100 estimated clerk's
Defendants/Respondents.	)	record fee
)	

TO: THE ABOVE NAMED RESPONDENTS, MICHAEL B. MCFARLAND, MICHAEL
B. MCFARLAND, P.A., KAREN ZIMMERMAN AND YOUR ATTORNEY, JP
WHELAN, 213 N. 4TH COEUR D'ALENE, ID 83814 AND THE CLERK OF THE
ABOVE ENTITLED COURT:

NOTICE IS HEREBY GIVEN THAT:

1. The above named Appellants appeal against the above named Respondents to the Idaho Supreme Court from the Memorandum Opinion On Post Trial Motions And Order Granting New Trial, entered in the above entitled action on the 10th day of June, 2010, the Honorable Charles W. Hosack, presiding.

2. That the parties have a right to appeal to the Idaho Supreme Court, and the judgments or orders described in paragraph 1 above are appealable orders under and pursuant to Rule 11(a)(5) ~~11(a)(1)~~ or Rule 11(a)(6) ~~11(a)(2)~~, I.A.R.

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

- (a) Whether the District Court erred in failing to allow the Plaintiffs to amend to seek punitive damages and in failing to instruct the jury on punitive damages?
- (b) Whether the District Court erred in ordering the remedy of rescission pursuant to Rule 59.1?
- (c) Whether the District Court erred in finding that rescission was available and would restore the parties to the status quo?
- (d) Whether the District Court erred in the grant of a new trial?
- (e) Whether the District Court erred in finding insufficient evidence supporting the damages award?
- (f) Whether the District Court erred in finding insufficient evidence to support finding of breach of fiduciary duty?

- (g) Whether the District Court erred in failing to award pre-judgment interest to the Plaintiffs?
 - (h) Whether the District Court erred in its analysis of election of remedies?
 - (i) Whether the District Court erred in entering the Memorandum Opinion and Order on Post Trial Motions?
 - (j) Whether the District Court erred in evidentiary rulings?
 - (k) Whether the District Court erred in failing to give requested jury instructions?
4. (a) Is a reporter's transcript requested? YES
- (b) The Appellants request the preparation of the

standard transcript in an electronic format and hard copy to include the following portions of the reporter's transcript:

- 1) Jury Trial commencing January 19, 2010 and continuing until the verdict was read and the jurors were excused.
- 2) All hearings on post trial motions.
- 3) Hearing on Motion For Entry of Findings, Conclusions, Final Order and Judgment held April 5, 2010.
- 4) Hearing on Plaintiffs' and Defendants' Post Trial Motions held June 2, 2010.

5. The Appellants request the following documents to be included in the clerk's record in addition to those automatically included under Rule 28, I.A.R.: All filings in the case.

6. Exhibits: The Appellants request that all of the Plaintiffs Exhibits and all of the Defendants' Exhibits offered or admitted in trial or hearing be copied and sent to the Supreme Court.

7. An order has not been entered sealing all or any part of the record or transcript.

8. I, Rex A. Finney, Attorney for Appellants, KARLETTA GRACE BERRY, a widow, KARLETTA GRACE BERRY, Personal Representative of the Estate of Jerry Lee Roy Berry, CAPTAIN'S WHEEL RESORT, INC., an Idaho Corporation certify:

(a) That the trial and some of the subsequent proceedings were held without a court reporter, and were electronically recorded.

(b) A copy of this notice of appeal has been served on the reporter: JOANN SCHALLER

(c) A copy of this notice of appeal has been served on the Trial Court Administrator, Karlene Behringer, as the trial was electronically recorded without a reporter.

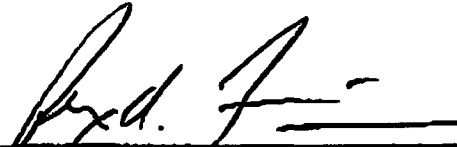
(d) That the estimated fee for preparation of the reporter's transcript ~~of shall be paid in a timely manner to the reporter~~ in the amount of \$200.00 has been paid.

(e) That the estimated fee for preparation of the clerk's record ~~of shall be paid in a timely manner to the Keetenai County Clerk~~ in the amount of \$100.00 has been paid.

(f) That the appellate filing fee has been paid in the amount of \$101.00.

(g) That service has been made upon all parties required to be served pursuant to Rule 20.

Dated this 20 day of July, 2010.



REX A. FINNEY
Finney Finney & Finney, P.A.
Attorney For Appellants

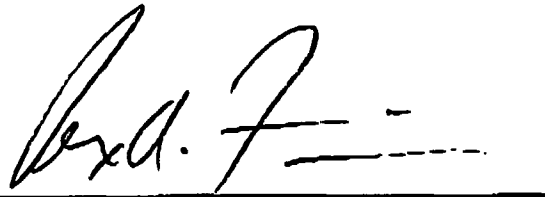
CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was served by deposit in First Class, U.S. Mail, postage prepaid, (and by fax as indicated below) this 20 day of July, 2010 and was addressed to:

J. P. Whelan
Attorney at Law
213 N. 4th Street
Coeur d'Alene, ID 83814
(And by fax: 208-664-2240)

JoAnn Schaller
Court Reporter
P.O. Box 9000
Coeur d'Alene, Idaho 83816-9000

Karlene Behringer
500 Government Way, Ste. 600
Coeur d'Alene, ID 83814
(And by fax (208)-446-1224)



A handwritten signature in cursive script, appearing to read "J. P. Whelan", is written over a horizontal line.

STATE OF IDAHO }
COUNTY OF KOOTENAI } SS
FILED:

2010 AUG -9 AM 8:54
CLERK DISTRICT COURT
Debra [Signature]
DEPUTY

MICHAEL B. McFARLAND, P.A.
Attorney at Law
421 Coeur d'Alene Avenue, Suite 1L
Coeur d'Alene, Idaho 83814
Phone: (208) 664-0479
Fax: (208) 664-3172
I.S.B. # 2224

**IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF KOOTENAI**

KARLETTA GRACE BERRY, a widow,)
KARLETTA GRACE BERRY, Personal)
Representative of the Estate of Jerry)
Lee Roy Berry, CAPTAIN'S WHEEL)
RESORT, INC., an Idaho Corporation,)

CASE NO. CV 07 - 2409

Plaintiffs,)

**NOTICE OF SUBSTITUTION
OF COUNSEL**

vs.)

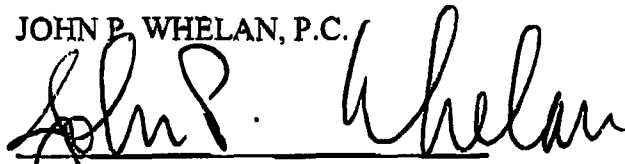
MICHAEL B. MCFARLAND, MICHAEL)
B. MCFARLAND, P.A., and KAREN)
ZIMMERMAN,)
Defendants.)

NOTICE IS HEREBY GIVEN that, in accordance with Rule 11(b)(1), Idaho Rules of Civil Procedure, and Rule 45, Idaho Appellate Rules, JOHN P. WHELAN, P.C., Attorney at Law, is hereby withdrawing as Attorney of Record for the Defendants herein, and MICHAEL B. McFARLAND, P.A., Attorney at Law, 421 Coeur d'Alene Avenue, Suite 1L, Coeur d'Alene, Idaho 83814, is hereby substituting as attorney of record for Karen Zimmerman and as attorney *pro se* for Michael B. McFarland and Michael B. McFarland, P.A.

You are hereby notified that any process to be served on Plaintiff herein shall be served on Michael B. McFarland, P.A. at the address indicated.

DATED this 9th day of August, 2010.

JOHN P. WHELAN, P.C.



Withdrawing Attorney

MICHAEL B. McFARLAND, P.A.



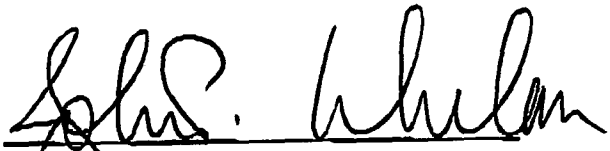
New Attorney of Record

CERTIFICATE OF SERVICE

I hereby certify that on the 9 day of August, 2010, I caused to be served a true and correct copy of the foregoing Notice of Substitution of Counsel by the method indicated below, and addressed as indicated below:

Rex A Finney
Finney, Finney & Finney
120 East Lake Street, Suite 317
Sandpoint, ID 83865

- U.S. Mail, Postage Prepaid
- Hand Delivered
- Overnight Mail
- Facsimile to: (208) 263-8211




John P. Whelan

In the Supreme Court of the State of Idaho

STATE OF IDAHO
COUNTY OF KOOTENAI } SS
FILED

2010 NOV 29 AM 8:12

CLERK DISTRICT COURT

DEPUTY

KARLETTA GRACE BERRY, a widow,)
KARLETTA GRACE BERRY, personal)
representative of the ESTATE OF JERRY)
LEE ROY BERRY, CAPTAIN'S WHEEL)
RESORT, an Idaho corporation,)
)
Plaintiff-Appellant,)
)
v.)
)
MICHAEL B. McFARLAND, MICHAEL B.)
McFARLAND, P.A., and KAREN)
ZIMMERMAN,)
)
Defendants-Respondents.)

ORDER GRANTING COURT
REPORTER'S MOTION FOR
EXTENSION OF TIME

Supreme Court Docket No. 37951-2010
Kootenai County District Court No.
2007-2409

Ref. No. 10-542

A COURT REPORTER'S MOTION FOR EXTENSION OF TIME TO LODGE TRANSCRIPT was filed with this Court on November 18, 2010, by Court Reporter Valerie E. Larson requesting an extension of time until February 14, 2011, to prepare and lodge the transcript due in the above entitled appeal. Therefore, good cause appearing;

IT HEREBY IS ORDERED that the COURT REPORTER'S MOTION FOR EXTENSION OF TIME be, and hereby is, GRANTED and the transcript in the above entitled appeal shall be prepared and lodged with the district court ON OR BEFORE FEBRUARY 14, 2011.

DATED this 22 day of November 2010.

By Order of the Supreme Court


Stephen W. Kenyon, Clerk

cc: Counsel of Record
District Court Clerk
Court Reporter Valerie E. Larson
TCA Karlene Behringer
District Judge Charles W. Hosack

STATE OF IDAHO
COUNTY OF KOOTENAI
FILED: *file* *JSS*

REX A. FINNEY
FINNEY FINNEY & FINNEY, P.A.
Attorneys at Law
Old Power House Building
120 East Lake Street, Suite 317
Sandpoint, Idaho 83864
Phone: (208) 263-7712
Fax: (208) 263-8211
ISB No. 6313

2011 MAY -5 AM 9:11

CLERK DISTRICT COURT
Debra Dyer
DEPUTY

Attorney for Appellants/Plaintiffs: KARLETTA GRACE BERRY, a widow, KARLETTA GRACE BERRY, Personal Representative of the Estate of Jerry Lee Roy Berry, CAPTAIN'S WHEEL RESORT, INC., an Idaho Corporation

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF KOOTENAI

KARLETTA GRACE BERRY, a widow,	)	Case No. CV-2007-2409
KARLETTA GRACE BERRY, Personal)	
Representative of the Estate	)	REQUEST FOR CLERK'S RECORD TO
of Jerry Lee Roy Berry,	)	BE IN ELECTRONIC FORMAT
CAPTAIN'S WHEEL RESORT, INC.,)	
an Idaho Corporation,)	
)	
Plaintiffs/Appellants,)	
)	
v.)	
)	
MICHAEL B. MCFARLAND, MICHAEL)	
B. MCFARLAND, P.A., and KAREN)	
ZIMMERMAN,)	
)	
Defendants/Respondents.)	
)	

COMES NOW, REX A. FINNEY, attorney for the Appellants in the above matter and hereby requests and moves as follows:

- 1. The Appellants filed a Notice of Appeal in the above matter on July 19, 2010.**

2. The Appellants filed an Amended Notice of Appeal in the above matter on July 20, 2010.

3. In the Notice of Appeal and the Amended Notice of Appeal the Appellants requested that the Clerk's record be prepared and include all filings in the case in addition to those automatically included under Rule 28, I.A.R.

4. The Appellants request that the Clerk's record be in electronic format.

DATED this 5 day of May, 2011.



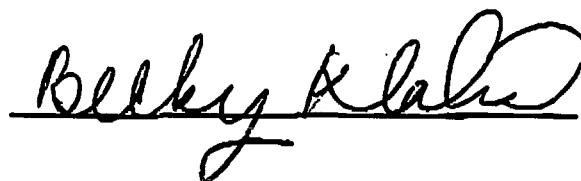
REX A. FINNEY
Finney Finney & Finney, P.A.
Attorney For Appellants

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was served by ~~deposit in First Class, U.S. Mail, postage prepaid, (and by fax as indicated below)~~ this 5th day of May, 2011 and was addressed to:

Michael B. McFarland
Attorney at Law
421 Coeur d'Alene Avenue, Suite 1L
Coeur d'Alene, ID 83814
(And by fax: (208) 664-3172)

Karlene Behringer
500 Government Way, Ste. 600
Coeur d'Alene, ID 83814
(And by fax (208) 446-1224)



In the Supreme Court of the State of Idaho

STATE OF IDAHO
COUNTY OF KOOTENAI SS

2011 FEB 22 AM 10:50

CLERK DISTRICT COURT
Blair Brulec
DEPUTY

KARLETTA GRACE BERRY, a widow,
KARLETTA GRACE BERRY, personal
representative of the ESTATE OF JERRY
LEE ROY BERRY, CAPTAIN'S WHEEL
RESORT, an Idaho corporation,

Plaintiff-Appellant,

v.

MICHAEL B. McFARLAND, MICHAEL B.
McFARLAND, P.A., and KAREN
ZIMMERMAN,

Defendants-Respondents.

ORDER GRANTING COURT
REPORTER'S MOTION FOR
EXTENSION OF TIME

Supreme Court Docket No. 37951-2010
Kootenai County District Court No.
2007-2409

Ref. No. 11-99

A COURT REPORTER'S MOTION FOR EXTENSION OF TIME TO LODGE TRANSCRIPT was filed with this Court on February 15, 2011, by Court Reporter Valerie E. Larson requesting an extension of time until April 15, 2011, to prepare and lodge the transcript due in the above entitled appeal. Therefore, good cause appearing;

IT HEREBY IS ORDERED that the COURT REPORTER'S MOTION FOR EXTENSION OF TIME be, and hereby is, GRANTED and the transcript in the above entitled appeal shall be prepared and lodged with the district court ON OR BEFORE APRIL 15, 2011.

DATED this 17th day of February 2011.

By Order of the Supreme Court

Stephen Kenyon
Stephen W. Kenyon, Clerk

cc: Counsel of Record
District Court Clerk
Court Reporter Valerie E. Larson
TCA Karlene Behringer
District Court Judge

IN THE SUPREME COURT OF THE STATE OF IDAHO

KARLETTA GRACE BERRY, a widow)
 KARLETTA GRACE BERRY, Personal)
 Representative of the Estate of Jerry)
 Lee Roy Berry, CAPTAIN'S WHEEL)
 RESORT, INC. an Idaho Corporation)
)
 PLAINTIFF / APPELLANTS,)
 VS.)
)
 METROPOLITAN PROPERTY and)
 CASUALTY INSURANCE COMPANY,)
 Aand METLIFE AUTO & HOME,)
)
 DEFENDANTS / RESPONDENTS.)
 _____)

SUPREME COURT NO.
37951-2010

CLERK'S CERTIFICATE

I, Clifford T. Hayes, Clerk of District Court of the First Judicial District of the State of Idaho, in and for the County of Kootenai, do hereby that I have personally served or mailed, by United States mail, one copy of the Clerk's Record to each of the Attorneys of Record in this cause as follows:

REX A. FINNEY
120 E Lake St. Ste. 317
Sandpoint, ID 83864

MICHAEL B. McFARLAND
P.O. Box 1798
Coeur d'Alene, ID 83816

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said Court at Kootenai, Idaho this 27th day of July, 2011.

CLIFFORD T. HAYES
Clerk of District Court

By: 
Deputy Clerk

IN THE SUPREME COURT OF THE STATE OF IDAHO

KARLETTA GRACE BERRY, a widow)
 KARLETTA GRACE BERRY, Personal)
 Representative of the Estate of Jerry)
 Lee Roy Berry, CAPTAIN'S WHEEL)
 RESORT, INC. an Idaho Corporation)
)
 PLAINTIFF / APPELLANTS,)
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 METROPOLITAN PROPERTY and)
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SUPREME COURT NO.
37951-2010

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CLIFFORD T. HAYES
Clerk of District Court

By: 
Deputy Clerk