4-20-2012

Harris v. Bank of Commerce Clerk's Record v. 3 Dckt. 39204

Vol. 3 of 4

IN THE

SUPREME COURT

LAW CLERK

OF THE

STATE OF IDAHO

VOLUME III of III

DARRYL HARRIS and CHRISTINE HARRIS, husband and wife,

Plaintiff *and*

Appellant

vs.

THE BANK OF COMMERCE, an Idaho corporation,

Defendant *and*

Respondent

Appealed from the District Court of the Seventh *Judicial*

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

Hon. Dane H. Watkins, Jr., *District Judge*

Kipp Manwaring, MANWARING LAW OFFICE

381 Shoup Ave., Ste. 210, Idaho Falls, ID 83402

Attorney for Appellant

Brian Tucker, NELSON HALL PERRY TUCKER

PO Box 51630, Idaho Falls, ID 83405-1630

Attorney for Respondent

Filed this ____ *day of* ____, *20*____.

____ *Clerk*

____ *Deputy*

39204

IN THE SUPREME COURT OF THE STATE OF IDAHO

DARRYL HARRIS and CHRISTINE HARRIS, husband and wife,	)	
Plaintiffs/Appellants,	)	Case No. CV-2009-3488
vs.	)	Docket No. 39204-2011
THE BANK OF COMMERCE, an Idaho corporation,	)	VOLUME III of III
Defendant/Respondent	)	
and,	)	
DUANE L. YOST and LORI YOST, husband and wife; DUANE L. YOST as Trustee of the DUANE L. YOST TRUST, and JOHN DOES I-X,	)	
Defendant.	)	

* * * * * * * * * * * * * *

CLERK'S RECORD ON APPEAL

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Appeal from the District Court of the
Seventh Judicial District of the State of Idaho,
in and for the County of Bonneville

HONORABLE DANE H. WATKINS, JR., District Judge.

* * * * * * * * * * * * * *

Attorney for Appellant

Kipp Manwaring
MANWARING LAW OFFICE
381 Shoup Ave., Ste. 210
Idaho Falls, ID 83402

Attorney for Respondent

Brian Tucker
NELSON HALL PARRY TUCKER
PO Box 51630
Idaho Falls, ID 83405-1630

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Douglas R. Nelson - ISB# 1580
Brian T. Tucker - ISB# 5236
Wiley R. Dennert - ISB# 6216
NELSON HALL PARRY TUCKER, P.A.
490 Memorial Drive
P.O. Box 51630
Idaho Falls, ID 83405-1630
Telephone:(208) 522-3001
Facsimile: (208) 523-7254

Attorneys for The Bank of Commerce

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

DARRYL HARRIS and CHRISTINE HARRIS, husband and wife,

Plaintiffs,

v.

DUANE L. YOST and LORI YOST, husband and wife, DUANE L. YOST as Trustee of the DUANE L. YOST TRUST, THE BANK OF COMMERCE, an Idaho Corporation and JOHN DOES I-X,

Defendants.

Case No. CV-09-3488

MOTION TO AMEND ANSWER AND COUNTERCLAIM, CROSS CLAIM AND THIRD-PARTY CLAIM AND TO INCLUDE CLAIM FOR PUNITIVE DAMAGES

THE BANK OF COMMERCE, an Idaho corporation,

Counterclaimant/Cross-claimant/Third-Party Claimant,

v.

DARRYL HARRIS and CHRISTINE HARRIS, husband and wife,

Counterdefendants,

and

DUANE L. YOST and LORI YOST, husband and wife, DUANE L. YOST as Trustee of the DUANE L. YOST TRUST, JOHN DOES I-X,

Crossdefendants,

and

HAMPSHIRE HOLDINGS, LLC,

Third-Party Defendant.

COMES NOW the Counterclaimant/Crossclaimant/Third Party Claimant, The Bank of Commerce (the "Bank"), by and through its attorneys of record, Nelson Hall Parry Tucker, P.A., and moves the Court to grant leave to amend its Answer and Counterclaim, Cross Claim and Third-Party Claim. Pursuant to Idaho Code § 6-1604(2), the Bank also moves for leave to amend its Counterclaim to include a claim for punitive damages against Plaintiff/Counterdefenant Darryl Harris. A copy of the proposed Amended Answer and Counterclaim, Cross Claim and Third-Party Claim is attached hereto as Exhibit "A". This

motion is supported by the documents previously filed with the Court, the memorandum in support and affidavits filed herewith. Oral argument is requested.

WHEREFORE, the Bank asks the Court to grant leave to amend.

Dated this 27th day of January, 2011.

NELSON HALL PARRY TUCKER, P.A.

By: Douglas R. Nelson
Douglas R. Nelson

CERTIFICATE OF SERVICE

I hereby certify that I served a true copy of the foregoing document upon the following this 27th day of January, 2011, by hand delivery, mailing with the necessary postage affixed thereto, facsimile, or overnight mail.

Kipp L. Manwaring
MANWARING LAW OFFICE
381 Shoup Avenue, Suite 210
Idaho Falls, ID 83402

[ ] Mailing
[✓] Hand Delivery
[ ] Fax: 523-9109
[ ] Overnight Mail

Wiley R. Dennert

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Douglas R. Nelson - ISB# 1580
Brian T. Tucker - ISB# 5236
Wiley R. Dennert - ISB# 6216
NELSON HALL PARRY TUCKER, P.A.
490 Memorial Drive
P.O. Box 51630
Idaho Falls, ID 83405-1630
Telephone:(208) 522-3001
Facsimile: (208) 523-7254

Attorneys for The Bank of Commerce

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

DARRYL HARRIS and CHRISTINE HARRIS, husband and wife,

Plaintiffs,

v.

DUANE L. YOST and LORI YOST, husband and wife, DUANE L. YOST as Trustee of the DUANE L. YOST TRUST, THE BANK OF COMMERCE, an Idaho Corporation and JOHN DOES I-X,

Defendants.

Case No. CV-09-3488

AMENDED ANSWER AND COUNTERCLAIM, CROSS CLAIM AND THIRD-PARTY CLAIM

EXHIBIT
"A"

THE BANK OF COMMERCE, an Idaho corporation,

Counterclaimant/Cross-claimant/Third-Party Claimant,

v.

DARRYL HARRIS and CHRISTINE HARRIS, husband and wife,

Counterdefendants,

and

DUANE L. YOST and LORI YOST, husband and wife, DUANE L. YOST as Trustee of the DUANE L. YOST TRUST, JOHN DOES I-X,

Crossdefendants,

and

HAMPSHIRE HOLDINGS, LLC, an Idaho limited liability company, ROBERT PARKINSON CRANDALL, an individual, and FAMILY ASSET PROTECTION LEGAL SERVICES, P.L.L.C., an Idaho professional limited liability company,

Third-Party Defendants.

AMENDED ANSWER

COMES NOW Defendant Bank of Commerce (the "Bank") by and through its attorneys of record, Nelson Hall Parry Tucker, P.A., for its amended answer to Plaintiffs' Complaint admits, denies and alleges as follows:

FIRST DEFENSE

Plaintiffs' Complaint fails to state a claim on which relief can be granted.

SECOND DEFENSE

The Bank denies each and every allegation or averment of the Complaint not specifically admitted.

THIRD DEFENSE

The Bank answers the specific allegations of the Complaint as follows:

1. Admits paragraphs 1, 2, 4, 16, 17, 18, 19, 47, and 48.

2. Denies paragraphs 23, 24, 30, 39, 44, 49, 50, 51, 52, 56, 62 and 63.

3. With regards to paragraphs 3, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 20, 21, 26, 27, 28, 29, 31, 33, 34, 35, 36, 37, 38, 41, 42, 43, 46, 54, 55, 57, 59, 60 and 61, said paragraphs are allegations between the Plaintiffs and Defendants Duane L. Yost and Lori Yost, husband and wife, and/or Duane L. Yost as Trustee of the Duane L. Yost Trust, and therefore do not require an answer by the Bank. To the extent said paragraphs apply to the Bank, the Bank is without knowledge or information sufficient to form a belief as to the truth of the matters asserted in said paragraphs and, therefore, denies the same. Even if any or all of the allegations in said paragraphs were true, the Bank still has a priority lien position superior to any lien that the Plaintiffs may have.

4. With regards to paragraph 15, the Bank is without sufficient information whether it was "[u]pon the Yosts' direction and in reliance on Palmers's letter," and therefore denies the same. To the extent said portion of paragraph 15 were true, the Bank still has a priority lien position superior to any lien that the Plaintiffs may have. The Bank admits the remainder of paragraph 15.

5. Paragraphs 22, 25, 32, 40, 45, 53 and 58 are merely restatements of previous paragraphs and, therefore, do not require a response.

6. Furthermore, the Bank denies the Plaintiffs are entitled to costs and attorneys fees against the Bank.

AFFIRMATIVE DEFENSES

The Bank asserts the following affirmative defenses in response to the Complaint:

First Affirmative Defense

As and for a first affirmative defense, the Bank alleges Plaintiffs fail to state a claim upon which relief may be granted.

Second Affirmative Defense

As and for a second affirmative defense, the Bank alleges it is a bona fide lender and/or a bona fide purchaser.

Third Affirmative Defense

As and for a third affirmative defense, the Bank alleges estoppel in all its forms including, but not limited to, judicial estoppel, equitable estoppel, quasi-estoppel, promissory estoppel, etc.

Fourth Affirmative Defense

As and for a fourth affirmative defense, the Bank alleges waiver.

Fifth Affirmative Defense

As and for a fifth affirmative defense, the Bank alleges laches.

Sixth Affirmative Defense

As and for a sixth affirmative defense, the Bank alleges unclean hands.

Seventh Affirmative Defense

As and for a seventh affirmative defense, the Bank alleges assumption of the risk.

Eighth Affirmative Defense

As and for an eighth affirmative defense, the Bank alleges payment.

Ninth Affirmative Defense

As and for a ninth affirmative defense, the Bank alleges ratification.

Tenth Affirmative Defense

As and for a tenth affirmative defense, the Bank alleges unjust enrichment.

Eleventh Affirmative Defense

As and for an eleventh affirmative defense, the Bank alleges constructive trust.

Twelfth Affirmative Defense

As and for a twelfth affirmative defense, the Bank alleges part performance.

Thirteenth Affirmative Defense

As and for a thirteenth affirmative defense, the Bank alleges election of remedies.

ATTORNEY FEES AND COSTS

The Bank has been required to retain the services of attorneys to defend against the Complaint. The Bank therefore seeks its reasonable costs and attorneys fees incurred in the defense against the Complaint pursuant to Rule 54, I.R.C.P., and Idaho Code §§ 12-120, 12-121 and 12-123.

REQUEST FOR RELIEF

WHEREFORE, the Defendant respectfully requests relief as follows:

1. Dismissal of Plaintiffs' Complaint with prejudice;

2. Enter a Judgment in favor of the Bank and against Plaintiffs;

3. Award reasonable attorney fees and costs to the Bank; and

4. Grant the Bank such other and further relief as the Court deems just and proper.

AMENDED COUNTERCLAIM, CROSS CLAIM AND THIRD-PARTY CLAIM

COMES NOW the Counterclaimant/Crossclaimant/Third Party Claimant, The Bank of Commerce (the "Bank"), by and through its attorneys of record, Nelson Hall Parry Tucker, P.A., and for its complaint alleges as follows:

1. **Status of the Bank**. At all times mentioned herein, the Bank is an Idaho corporation with its principal place of business in Bonneville County, Idaho. The Bank is the beneficiary of a Deed of Trust sought to be judicially foreclosed in this matter.

2. **Status of the Other Parties**

A. Counterdefendants Darryl Harris and Christine Harris ("Harris" herein), are husband and wife and at all times relevant hereto were residents of Bonneville County, Idaho. Said Counterdefendants have or claim some interest in the real property described herein as Tract II by reason of a deed of trust granted by Duane Yost and Lori Yost, husband and wife to Idaho Title and Trust Co. an Idaho Corporation, as trustee for the benefit of Darryl Harris and Christine Harris, dated June 13, 2005, and recorded June 20, 2005, as Instrument No. 1189682 in the records of Bonneville County, State of Idaho.

B. Crossdefendants Duane L. Yost and Lori Yost ("Yost" herein), are husband and wife and at all times relevant hereto were residents of

Bonneville County, Idaho. Yost is the vested owner of the real property sought to be foreclosed in this matter and the makers of the notes, deeds of trust and other security documents sought to be foreclosed.

C. Crossdefendant Duane L. Yost as Trustee of the Duane L. Yost Trust ("Trust" herein) upon information and belief is a living trust created and registered in Bonneville County, Idaho.

D. Crossdefendants John Does 1-X, are persons or entities whose identities are not known that may have or claim an interest in the subject real property.

E. Third-Party Defendant Hampshire Holdings, LLC, is an Idaho limited liability company with its principal place of business in Idaho Falls, Idaho.

F. The above named Counterdefendants, Crossdefendants, and Third-Party Defendant Hampshire Holdings, LLC, and each of them, may claim some right, title, lien, or interest in the real property described below, but their interest, if any, in and to said real property, is junior, subordinate, and subsequent to the right and lien of the Bank.

G. Third-Party Defendant Robert Parkinson Crandall ("Crandall"), is an individual believed to reside in Bonneville County. Crandall is an attorney licensed to practice law in the state of Idaho, a certified public accountant, an Idaho notary public and an employee of Third-Party Defendant Family Asset Protection Legal Services, P.L.L.C. ("Family Asset Protection").

H. Family Asset Protection is an Idaho professional limited liability company, organized for the practice in the profession of law.

3. **Amounts Due and in Default**.

A. The Bank is the holder of a Promissory Note made by Duane Yost dated April 16, 2008, in the amount of $2,000,000.00 which is past due and fully matured. Said Note requires payments on demand and provides for an initial interest rate of 5.75% per annum and then beginning on April 17, 2008, a variable interest rate of 0.500% above the following index rate: the highest published Wall Street Journal prime. A true and correct copy of said Promissory Note is attached hereto as Exhibit "A". Yost is in default of said Note having not made timely and full payment. As of July 13, 2009 the principal and interest amount which is fully due and owing is approximately $1,250,155.18 plus a per diem interest accrual after July 13, 2009 at the per diem rate of approximately $188.37955.

B. The Bank is the holder of a Promissory Note made by Duane Yost dated November 21, 2008 in the amount of $1,000,000.00 with a maturity date of November 21, 2009. Said Note requires one balloon payment of $1,055,000.00 and provides for an initial interest rate of 5.5% per annum and then beginning on November 22, 2008, a variable interest rate of 0.500% above the following index rate: the highest published Wall Street Journal prime. A true and correct copy of said Promissory Note is attached hereto as Exhibit "B". Yost is in default of said Note due to the default provisions. As of July 13, 2009 the principal and interest amount owing is approximately $1,035,260.27 plus a per diem interest accrual after July 13, 2009 at the per diem rate of approximately $150.68493.

4. **Description of the Collateral**.

A. As security for the repayment of said Promissory Notes, together with interest, costs, and attorney's fees, the Crossdefendants, Yost, made, executed, and delivered to The Bank, that certain Deed of Trust executed on November 21, 2008, which was recorded on November 21, 2008, and re-recorded on December 17, 2008, in the real estate records of Bonneville County, Idaho, under Instrument Nos. 1317355 and 1319093, respectively, and attached hereto as Exhibit "C" and that certain Deed of Trust executed on December 24, 2008, which was recorded on December 30, 2008, in the real estate records of Bonneville County, Idaho, under Instrument No. 1319937, and attached hereto as Exhibit "D". Said Deeds of Trust are incorporated herein as though set forth in full covering the following described real property situated in Bonneville County, Idaho:

TRACT I

Beginning at a point that is South 89°55'28" West along the Section line 1326.98 feet from the North 1/4 Corner of Section 10, Township 1 North, Range 38 East of the Boise Meridian; running thence South 89°55'28" West along said Section line 1236.12 feet to the South Right-of-Way line of 65th South; thence along said South Right-of-Way line of 65th South and the East Right-of-Way line of 25th East the following three (3) courses; South 00°12'54" East 28.10 feet to a point of curve with a radius of 69.34 feet and a chord bearing South 44°18'28" West 98.29 feet; thence to the left along said curve 109.24 feet through a central angle of 90°16'00"; thence South 89°10'28" West 28.71 feet to the West line of said Section 10; thence South 00°19'04" East 1216.86 feet to the South line of the North ½ of the Northwest 1/4 of said Section 10, thence North 89°54'09" East along said South line 1327.87 feet; thence North 00°03'13" West 1312.06 feet to the POINT OF BEGINNING.

Excepting
That portion thereof conveyed to the State of Idaho by that deed recorded on May 8, 1950 in Book 70 of Deeds at Page 287 of

Official Records of Bonneville County, Idaho.

("Real Property Collateral" herein)

B. As security for the repayment of said Promissory Notes, together with interest, costs, and attorney's fees, the Third-Party Defendant Hampshire Holdings, LLC, made, executed, and delivered to The Bank, that certain Deed of Trust executed on November 21, 2008, and attached hereto as Exhibit "E". Said Deed of Trust is incorporated herein as though set forth in full covering the following described real property situated in Bonneville County, Idaho:

TRACT I

Beginning at a point that is South 89°55'28" West along the Section line 1326.98 feet from the North 1/4 Corner of Section 10, Township 1 North, Range 38 East of the Boise Meridian; running thence South 89°55'28" West along said Section line 1236.12 feet to the South Right-of-Way line of 65 th South; thence along said South Right-of-Way line of 65th South and the East Right-of-Way line of 25th East the following three (3) courses; South 00°12'54" East 28.10 feet to a point of curve with a radius of 69.34 feet and a chord bearing South 44°18'28" West 98.29 feet; thence to the left along said curt 109.24 feet through a central angle of 90°16'00"; thence South 89°10'28" West 28.71 feet to the West line of said Section 10; thence South 00°19'04" East 1216.86 feet to the South line of the North ½ of the Northwest 1/4 of said Section 10, thence North 89°54'09" East along said South line 1327.87 feet; thence North 00°03'13" West 1312.06 feet to the POINT OF BEGINNING.

That portion thereof conveyed to the State of Idaho by that deed recorded on May 8, 1950 in Book 70 of Deeds at Page 287 of Official Records of Bonneville County, Idaho.

TRACT II:

Lot 11 in Block 3 of Canterbury Park, Division No. 2, to the City of Idaho Falls, Idaho according to the official plat thereof,

recorded October 19,1992 as Instrument No. 837954 filed in Official Records of Bonneville County, Idaho

("Real Property Collateral" herein)

5. **Default and Acceleration**. The Bank is the owner and holder of said Notes and the beneficiary of said Deeds of Trust. The Crossdefendant Yost is in default due to his failure to make timely payment under said Promissory Notes and the other default provisions of said Promissory Notes, and The Bank declares all sums owing under said Notes, Deeds of Trust, and any related security documents, due and payable in full. In addition, the Bank has incurred expense for a title report preliminary to foreclosure, the full amount of which is presently unknown, but which The Bank is entitled to recover.

COUNT I
BREACH OF PROMISSORY NOTE

6. The Bank realleges the allegations contained in paragraphs 1-5 as though fully set forth herein and incorporates the same by reference.

7. As of July 13, 2009, there was due and owing to the Bank the unpaid principal and interest amount of approximately $2,285,415.45 plus additional pre judgment interest at the rate of approximately 5.5% per annum resulting in a per diem of approximately $339.06448 together with costs and attorney's fees accruing thereon.

8. Yost is in default of his payment obligation to the Bank, and the Bank has declared and does hereby declare all sums owing and immediately due and payable in full. The Bank has made demand upon the Defendant at least ten (10) days prior to filing suit in this matter but Yost has failed and/or refused to make any payments to the Bank.

9. The Bank is therefore entitled to judgment against Yost in the sum of approximately $2,285,415.45 together with accruing interest thereon from July 13, 2009 at the per diem rate of approximately $339.06448 until the date of judgment, plus accruing costs and attorney's fees.

COUNT II
BREACH OF GUARANTY AGREEMENT

10. The Bank realleges the allegations contained in paragraphs 1-9 as though fully set forth herein and incorporates the same by reference.

11. The Crossdefendants Duane Yost and Lori Yost and the Third-Party Defendant Hampshire Holdings, LLC, personally guaranteed up to $1,000,000 of the obligations of Duane Yost described above. A copy of said guarantees are attached hereto as Exhibit "F".

12. The Crossdefendant Duane Yost has defaulted on the obligations as described above.

13. The Bank has made demand on the Crossdefendant Duane Yost for payment but Duane Yost has failed to pay as required by the Promissory Notes.

14. The Bank has made demand on the Crossdefendants Duane Yost and Lori Yost and the Third-Party Defendant Hampshire Holdings, LLC, for payment based upon the guaranty but each of them has refused and continues to refuse to pay the Bank.

15. As the Guarantor, the Crossdefendants Duane Yost and Lori Yost and the Third-Party Defendant Hampshire Holdings, LLC, are obligated to the Bank in the principal amount of $1,000,000 plus additional pre judgment interest at the rate of approximately 5.5% per annum resulting in a per diem of $150.68493 together with costs and attorney's fees accruing thereon.

COUNT III
FORECLOSURE OF DEEDS OF TRUST

16. The Bank realleges the allegations contained in paragraphs 1-15 as though fully set forth herein and incorporates the same by reference.

17. The Deeds of Trust described above grant to the Bank a valid lien and security interest in and to all of the real property, improvements, fixtures, irrigation equipment, or water rights, or other property described therein. Said Deeds of Trust have never been satisfied or discharged and no other suit or action has been commenced to foreclose upon said Deeds of Trust or to collect the amounts owed on the aforesaid Promissory Notes.

18. By the terms of said Deeds of Trust, the real property, and any fixtures, improvements, irrigation equipment or water rights, should be declared as part of the Deeds of Trust and should be included in this foreclosure and in any sale hereinafter to be ordered as part of the security for the repayment of this loan.

19. **Use of Premises**. Said Real Property Collateral, as described in each separate tract, has at all times heretofore been used together as one lot or parcel for each tract and every part thereof is necessary for the best use and enjoyment of said Real Property Collateral and each tract cannot be sold in separate parcels without material injury to the parties thereto.

20. **Reasonable Value**. The Bank intends to determine the reasonable value of the property prior to entry of decree herein and to introduce evidence supporting such value. In the event that said reasonable value should be less than the amount of the judgment requested, plus accruing interest, costs, and fees, the Bank intends to apply to the Court for the entry of a deficiency judgment against Crossdefendants Yost, for any deficiency remaining after

application of the foreclosure sale proceeds to payment of the judgment herein, plus accruing interest, costs, and fees herein.

21. **No Other Action**. The Bank has no plain, speedy, or adequate remedy at law, and no other proceeding at law or equity has been commenced or is pending to collect said notes or any portion thereof or to foreclose these Deeds of Trust. That all conditions precedent to the initiation and prosecution of this suit on said Notes and the foreclosure of said Deeds of Trust have been satisfied.

22. **Attorney's Fees**. Under each and every count, the Bank has been forced to employ counsel to represent it in this action and has become obligated to pay its reasonable attorney's fees and costs for such service. The Bank is entitled to recover reasonable attorney's fees from the Crossdefendants by virtue of the attorney's fees provision contained in the Promissory Notes, Deeds of Trust, and other security documents herein above described as well as pursuant to Idaho Code § 12-120 and §12-121. The Bank alleges that $5,000.00 is a reasonable sum to be allowed as attorney's fees if this action is uncontested, plus such additional sums as the Court may adjudge as reasonable attorney's fees in the event of a contest, trial or appeal.

COUNT IV
BREACH OF CONTRACT/THIRD PARTY BENEFICIARY

23. The Bank realleges the allegations contained in paragraphs 1-22 as though fully set forth herein and incorporates the same by reference.

24. The Harrises agreed to sell the subject 40 acres to the Yosts.

25. The Bank was a known and intended third-party beneficiary of this agreement between the Harrises and the Yosts.

26. The Harrises are claiming that they did not transfer the said 40 acres to the Yosts.

27. To the extent the Court finds that the Harrises did not transfer the 40 acres to the Yosts, then the Harrises breached their agreement to transfer the 40 acres to the Yosts.

28. As a result, the Bank, as a third party to the agreement, has been damaged.

29. The Bank seeks damages in an amount to be proven at trial and/or for specific performance of the Harrises' agreement to transfer the 40 acres to the Yosts.

COUNT V
FRAUD/MISREPRESENTATION

30. The Bank realleges the allegations contained in paragraphs 1-29 as though fully set forth herein and incorporates the same by reference.

31. In order for Duane Yost to use Tract I of the Real Property Collateral, ("Tract I") as collateral for his renewal loan with the Bank, Darryl Harris executed a QuitClaim Deed on November 25, 2010 that purported to transfer Tract I to the Duane L. Yost Trust.

32. However, in order for the title company to issue title insurance for Tract I, a Corrected QuitClaim Deed was prepared which included a signature line for Christine Harris in addition to the signature line for Darryl Harris.

33. Without authority from his wife, Darryl Harris signed Christine Harris' name to the Corrected QuitClaim Deed on or about December 1, 2008.

34. Darryl Harris remained silent about the fact that he had signed Christine Harris' name to the Corrected Quitclaim Deed without her consent and his silence was a representation.

35. Therefore, Darryl Harris represented that Christine Harris signed the Corrected QuitClaim Deed.

36. Implied in this representation was the statement and/or representation that Christine Harris had consented to the transfer of Tract I to Duane Yost and Lori Yost pursuant to the Corrected QuitClaim Deed.

37. Such representation was false as Christine Harris had not signed the QuitClaim Deed nor had she authorized Darryl Harris to sign her name on the Corrected QuitClaim Deed.

38. This representation was material because Tract I was owned by Darryl Harris and Christine Harris as community property and the consent of both Darryl Harris and Christine Harris was necessary to transfer Tract I to Duane Yost and Lori Yost.

39. Darryl Harris knew that Christine Harris had not signed the Corrected QuitClaim Deed. Moreover, Darryl Harris knew he had signed Christine Harris' name on the Corrected QuitClaim Deed without first getting her authorization and therefore, he knew that his representation was false.

40. Darryl Harris intended that Crandall, the Yosts, the title company and the Bank would rely on his forgery of his wife's signature on the Corrected QuitClaim Deed.

41. In addition, Darryl Harris intended that the Yosts, the title company and the Bank would rely on his silent representation that Christine Harris had consented to the transfer of Tract I to the Yosts.

42. Furthermore, Darryl Harris knew that the Corrected QuitClaim Deed would be recorded with Bonneville County and that his forgery of his wife's signature would be relied on by the general public.

43. Duane Yost, Lori Yost, the title company and the Bank are members of the general public.

44. At no time during 2008, did Crandall, the Yosts, the title company or the Bank know that Darryl Harris had forged his wife's name on the Corrected QuitClaim Deed.

45. In fact, the Bank did not know about said forgery until it received Plaintiffs' 5th Supplmentary Response to the Defendants, the Bank of Commerce First Set of Interrogatories and Requests for Production of Documents on or about November 1, 2010.

46. Crandall, the Yosts, the title company and the Bank all relied on Darryl Harris' forgery of his wife's signature on the Corrected QuitClaim Deed.

A. Specifically, Crandall relied on said forgery when he notarized the Corrected QuitClaim Deed because he believed that Christine Harris had actually signed said deed.

B. Specifically, Duane and Lori Yost relied on said forgery as they believed that Tract I had been deeded and transferred to them and they believed that they could therefore use Tract I as collateral for various loans obtained by Duane Yost from the Bank.

C. Specifically, the title company relied on said forgery as it issued title insurance to the Bank.

D. Specifically, the Bank relied on said forgery as it renewed various loans to Duane Yost on the belief that Darryl Harris and Christine Harris had actually transferred Tract I to Duane Yost and Lori Yost and on the belief that the Yosts could provide Tract I as security for the renewal loans.

47. The Bank's reliance on the forgery was justifiable as neither Darryl Harris nor Christine Harris, despite their knowledge of the forgery, informed the Bank of the forgery until

on or about November 1, 2010.

48. In addition, the Bank's reliance on the forgery was justifiable because the Bank had a long business relationship with Darryl Harris and was not aware of any prior instance of Darryl Harris' dishonesty and therefore had no reason to suspect that Darryl Harris would ever forge his wife's signature.

49. If the Court declares the Corrected QuitClaim Deed to be invalid, then as a result of Darryl Harris' fraud and forgery the Bank has suffered injury because it gave value to Duane Yost by renewing his loans and extending the terms of his loans believing that its Deeds of Trust had secured Tract I as collateral for the renewal loans.

50. Specifically, the Bank's injury is the value of Tract I, plus other amounts to be proven at trial of this matter.

51. In addition, if the Court declares the Corrected QuitClaim Deed to be invalid, then as a result of Darryl Harris' fraud and forgery the Bank has suffered injury because rather than enter into the renewal loans with Duane Yost, the Bank could have used moneys on deposit with the Bank during the latter end of 2008 that were in accounts owned or controlled by Duane Yost as a setoff but because of the fraud and forgery, the Bank did not exercise its right to said setoff.

COUNT VI
CIVIL LIABILITY OF NOTARY PUBLIC AND EMPLOYER

52. The Bank realleges the allegations contained in paragraphs 1-51 as though fully set forth herein and incorporates the same by reference.

53. Crandall, individually and as an employee of Family Asset Protection, notarized the Corrected Quitclaim Deed which contains Darryl Harris' forgery of Christine Harris'

signature, despite the fact that Christine Harris did not appear before him and that she did not sign the Corrected Quitclaim Deed.

54. As a notary public, Crandall failed to require Christine Harris and Darryl Harris to personally appear before him prior to or at the time he notarized the Corrected Quitclaim Deed.

55. As a notary public, Crandall's failure to exercise the required degree of care in identifying the person who actually signed Christine Harris' name on the Corrected Quitclaim Deed constitutes official misconduct pursuant to Idaho Code § 51-112.

56. As a notary public, Crandall's failure to exercise the required degree of care in verifying who signed Christine Harris' name to the Corrected Quitclaim Deed at or before the time he notarized the Corrected Quitclaim Deed constitutes official misconduct pursuant to Idaho Code § 51-112.

57. As a notary public, Crandall should be held liable for all damages proximately caused by his official misconduct as set forth herein.

58. Pursuant to Idaho Code §51-118, Family Asset Protection, as Crandall's employer, should be jointly and severally liable with Crandall for all damages proximately caused by the official misconduct of Crandall, because Crandall was acting as a notary public within the scope of his employment when he notarized the Corrected Quitclaim Deed and because Family Asset Protection had actual knowledge of, or reasonably should have known of, Crandall's official misconduct.

COUNT VII
PROMISSORY ESTOPPEL

59. The Bank realleges the allegations contained in paragraphs 1-58 as though fully set forth herein and incorporates the same by reference.

60. By signing the Corrected Quitclaim Deed, Defendant Darryl Harris made the specific promise that he and his wife, Christine Harris, were transferring Tract I to Duane Yost in order for the Bank to obtain security in Tract I and to renew Duane Yost's loans with the Bank.

61. The Bank was a known third-party beneficiary to Darryl Harris' promise to transfer Tract I to Duane Yost.

62. The Bank relied on Darryl Harris' promise to transfer Tract I to Duane Yost.

63. To the extent the Corrected Quitclaim Deed is deemed void because of Darryl Harris' forgery of his wife's name on said deed, Darryl Harris breached his promise to transfer Tract I to Duane Yost.

64. The Bank has suffered substantial economic loss as a result of its reliance on Darryl Harris' promise to transfer Tract I to Duane Yost.

65. The Bank's loss was or should have been foreseeable by Darryl Harris when he forged his wife's name on the Corrected Quitclaim Deed.

66. It was reasonable for the Bank to rely on Darryl Harris' promise to transfer Tract I to Duane Yost as well as on his forgery of Christine Harris' name on the Corrected Quitclaim Deed.

67. As a result, the Bank has been damaged in an amount to be proven at trial.

COUNT VIII
PUNITIVE DAMAGES

68. The Bank realleges the allegations contained in paragraphs 1-67 as though fully set forth herein and incorporates the same by reference.

69. Defendant Darryl Harris' decision to forge Christine Harris' name on the Corrected Quitclaim Deed, without her written consent and in reckless disregard of the consequences to the Bank and to other third parties, was oppressive, malicious, outrageous, reckless and fraudulent. The Bank is entitled to an award of punitive damages against Defendant Darryl Harris, pursuant to I.C. § 6-1604.

REQUEST FOR RELIEF

WHEREFORE, the Bank prays for judgment as follows:

A. That the Bank have judgment against Yost in the sum of approximately $2,285,415.45 together with interest at the rate of approximately 5.5% per annum after July 13, 2009 at the per diem interest accrual of approximately $339.06448 for any sums advanced by the Bank or which the Bank becomes obligated or elects to advance for the payment of taxes, assessments, insurance premiums, mortgage insurance premiums, water charges, and other governmental charges, fines, assessed or charged against the property during the pendency of this action, including interest on such advance from the date of the advance; for the sum of $5,000.00 for attorney's fees if this action is uncontested, plus such additional sums as the Court may adjudge as reasonable in the event of contest, trial, or appeal; for the Bank's taxable costs and disbursements herein; and for interest on the entire amount of said judgment at the maximum rate allowed by law.

B. That the Bank's Deeds of Trust herein described be adjudged first and prior liens upon the Real Property Collateral superior to any right, title, claim, lien, or interest on the part of the named Counterdefendants, Crossclaimants, Third-Party Claimaint or any persons claiming by, through, or under said Counterdefendants, Crossclaimants or Third-Party Claimaint, except for Tract II upon which Counterdefendants Darryl Harris and Christine Harris, husband and wife, may have a first lien priority based upon the deed of trust described in paragraph 2.A. of this Counterclaim, Cross Claim and Third-Party Claim.

C. That the Court, in the decree, establish the reasonable value of the Real Property Collateral herein described according to proof.

D. That the Bank's Deeds of Trust described herein be foreclosed and said Real Property Collateral, together with improvements and water rights, however evidenced, be sold in one parcel in accordance with and in the manner provided by law; that the Bank be permitted to be a purchaser at the sale; that the net proceeds of said sale be applied first toward the payment of the costs of said sale and then toward the payment of the Bank's judgment; that the Bank have and retain a deficiency judgment against the Cross Defendants and Third-Party Defendant, in the event that the bid at the sale is less than the sum of the Bank's entire judgment, plus costs of sale.

E. That the decree provide that after the sale of said Real Property Collateral, all right, title, claim, lien, or interest in the above-named Counterdefendants, Crossdefendants, Third-Party Defendants, and every person claiming by, through, or under said Counterdefendants, Crossdefendants and Third-Party Defendants in or to said property, including the right of possession thereof from and after said sale, be forever barred and

foreclosed and that the purchaser at said sale be entitled to immediate possession of the premises as allowed by law subject only to such statutory right of redemption as the Counterdefendants, Crossdefendants and Third-Party Defendants may have by law.

F. In the event that the Bank is the purchaser at sale and possession of said premises is not surrendered to the Bank, that the Court issue a Writ of Assistance directed to the sheriff of Bonneville County, Idaho, to deliver possession of said premises to the Bank.

G. That the Bank be granted a judgment against Defendants Darryl Harris and Christine Harris for damages in an amount to be proven at trial and/or for specific performance of their agreement to sell the subject 40 acres to the Yosts.

H. That the Bank be granted a judgment against Defendant Robert Parkinson Crandall, an individual, and Family Asset Protection Legal Services, P.L.L.C., in an amount to be proven at trial.

I. That punitive damages be entered against Defendant Darryl Harris and in favor of the Bank.

J. That the Bank may have such other and further relief as the Court deems just and equitable.

Dated this _____ day of _____, 2011.

NELSON HALL PARRY TUCKER, P.A.

By: _____
Douglas R. Nelson

* This is an attempt to collect a debt, any information obtained will be used for that purpose.

CERTIFICATE OF SERVICE

I hereby certify that I served a true copy of the foregoing document upon the following this _____ day of _____, 2011, by hand delivery, mailing with the necessary postage affixed thereto, facsimile, or overnight mail.

Kipp L. Manwaring	[ ] Mailing
MANWARING LAW OFFICE	[ ] Hand Delivery
381 Shoup Avenue, Suite 210	[ ] Fax: 523-9109
Idaho Falls, ID 83402	[ ] Overnight Mail

Douglas R. Nelson

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Douglas R. Nelson - ISB# 1580
Brian T. Tucker - ISB# 5236
Wiley R. Dennert - ISB# 6216
NELSON HALL PARRY TUCKER, P.A.
490 Memorial Drive
P.O. Box 51630
Idaho Falls, ID 83405-1630
Telephone:(208) 522-3001
Facsimile: (208) 523-7254

Attorneys for The Bank of Commerce

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

DARRYL HARRIS and CHRISTINE HARRIS, husband and wife,

Plaintiffs,

v.

DUANE L. YOST and LORI YOST, husband and wife, DUANE L. YOST as Trustee of the DUANE L. YOST TRUST, THE BANK OF COMMERCE, an Idaho Corporation and JOHN DOES I-X,

Defendants.

Case No. CV-09-3488

MEMORANDUM IN SUPPORT OF MOTION TO AMEND ANSWER AND COUNTERCLAIM, CROSS CLAIM AND THIRD-PARTY CLAIM AND TO INCLUDE CLAIM FOR PUNITIVE DAMAGES

THE BANK OF COMMERCE, an Idaho corporation,

Counterclaimant/Cross-claimant/Third-Party Claimant,

v.

DARRYL HARRIS and CHRISTINE HARRIS, husband and wife,

Counterdefendants,

and

DUANE L. YOST and LORI YOST, husband and wife, DUANE L. YOST as Trustee of the DUANE L. YOST TRUST, JOHN DOES I-X,

Crossdefendants,

and

HAMPSHIRE HOLDINGS, LLC, an Idaho limited liability company,

Third-Party Defendant.

COMES NOW the Counterclaimant/Cross-claimant/Third Party Claimant, The Bank of Commerce (the "Bank"), by and through its attorneys of record, Nelson Hall Parry Tucker, P.A., and hereby submits its memorandum in support of its motion to amend the counterclaim to include a claim for punitive damages.

I. FACTUAL AND PROCEDURAL BACKGROUND

The general factual background regarding this matter is set forth in the Bank's Memorandum in Support of Second Motion for Summary Judgment. More specific facts

relating to the motion to amend and to add punitive damages are set forth as follows:

During his deposition, Darryl Harris ("Darryl") testified that he knew his wife, Christine Harris ("Christine") needed to sign the Corrected QuitClaim Deed:

> A. Based on what Duane said. Duane said the bank wants me to sign this new corrected deed.
>
> Q. Okay. And what was – what was the correction, then, to this second deed?
>
> A. My wife did not sign the first one.
>
> Q. Okay. And so you were aware that, at least according to Duane, there was some reason why your wife needed to sign this quitclaim deed?
>
> A. Yes, uh-huh.
>
> ...
>
> Q. So the main thing was just getting your wife's signature on there; is that right?
>
> A. Yes.

Darryl Harris Depo. Tr., p. 63, l. 17 to p. 64, l. 10.

In addition, Darryl knew the Bank would rely on the Corrected QuitClaim Deed:

> Q. And did you understand in this loan that -- Well, excuse me, in this transaction that the bank was obtaining title insurance on the west forty acres?
>
> A. Yes. That's what they were attempting to do.
>
> Q. Okay. So you knew that the corrected quitclaim deed would be relied on by both the bank and the title company to make sure that title really had been transferred to Duane and Lori Yost; is that right?
>
> A. Yes, yes.
>
> Q. And you also knew that the bank would rely on the corrected quitclaim deed in securing their loan with Duane Yost; is that right?

A. Yes.

Darryl Harris Depo. Tr., p. 68, ll. 2-17.

Finally, Darryl admitted to forgery:

Q. And you signed your name and you forged your wife's name?

A. Yes.

Darryl Harris Depo. Tr., p. 132, ll. 22-24.

The Bank was not aware that Darryl had forged Christine's name on the Corrected QuitClaim Deed until after receiving Plaintiffs' 5th Supplmentary Response to the Defendants, the Bank of Commerce First Set of Interrogatories and Requests for Production of Documents dated November 1, 2010, which was well after the discovery cutoff date (September 7, 2010)[1] and after the Bank had already filed its first Motion for Summary Judgment.

ARGUMENT

A. Amended Answer

Rule 15(a), I.R.C.P., allows a party to amend its answer upon leave of court. Furthermore, "leave shall be freely given when justice so requires." *Id.*

At the time the Bank filed its original Answer on July 15, 2009, it did not know that Darryl had forged his wife's name on the Corrected QuitClaim Deed. The Bank only learned about the forgery after the Harrises served the Bank with their 5th supplemental discovery responses on November 1, 2010. The proposed Amended Answer addresses the new revelation regarding forgery by including additional affirmative defenses.

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[1] *See* Order Setting Trial and Pretrial Conference dated March 19, 2010.

This Court should freely give the Bank leave to file the proposed Amended Answer.

B. Amended Counterclaim, Cross Claim and Third-Party Claim

Rule 15(a), I.R.C.P., allows a party to amend its complaint, cross claim and/or third-party claim upon leave of court. Furthermore, "leave shall be freely given when justice so requires." *Id.*

Rule 14(a), I.R.C.P., allows "a defendant to serve a summons and complaint upon a person not a party to the action who is or may be liable to such third-party plaintiff for all or a part of plaintiff's claim against the third-party plaintiff." If the third-party plaintiff seeks to file the third-party complaint more than 10 days after filing the original answer, it "must obtain leave on motion upon notice to all parties to the action." *Id.*

Pursuant to Rules 14(a) and 15(a), this Court should allow the Bank to amend its Counterclaim, Cross Claim and Third-Party Claim.

At the time the Bank filed its original Counterclaim, Cross Claim and Third Party Claim, it did not know anything about the forgery or the fact that Robert Crandall apparently notarized the Corrected QuitClaim Deed despite the fact that Christine never appeared before him nor acknowledged the signature on that deed as hers. In light of these new allegations, the Bank is requesting leave to include additional claims of breach of contract/third party beneficiary, fraud/misrepresentation, civil liability of notary public and employer, promissory estoppel and punitive damages. Besides the additional claims, the proposed Third-Party Claim seeks to add Robert Crandall and his employer, Family Asset Protection Legal Services, P.L.L.C., as an additional party to this matter.

Idaho Code § 51-118 provides that a "notary public shall be liable for all damages proximately caused by his official misconduct." Because of the new allegations regarding the

forgery and failure to properly notarize the deed, Robert Crandall may be liable to the Bank for his allegedly improper notarization.

Section 51-118 also provides that the "employer of a notary public shall be jointly and severally liable with such notary public for all damages proximately caused by the official misconduct of such notary public..." For this reason, the Bank should be allowed to amend its Third-Party Claim to also include a claim against Robert Crandall's employer, Family Asset Protection Legal Services, P.L.L.C.

C. Punitive Damages

The Bank is entitled to amend its complaint to include a claim for punitive damages because there is a reasonable likelihood that it will be able to prove sufficient facts at trial to establish an award of punitive damages. Under Idaho law a court must allow an amendment to the pleadings to state a prayer for punitive damages if "the moving party has established at such hearing a reasonable likelihood of proving facts at trial sufficient to support an award of punitive damages." *Kuntz v. Lamar Corporation*, 385 F.3d 1177, 1187 (9th Cir. 2004); *citing I.C.* § 6-1604(2). The moving party must show that "the defendant acted in a manner that was an extreme deviation from reasonable standards of conduct, that the act was performed . . . with an understanding of or disregard for its likely consequences, and that the defendant acted with an extremely harmful state of mind." *See, Gen. Auto Parts co. v. Genuine Parts Co.*, 132 Idaho 849, 979 P.2d 1207, 1210-11 (1999).

Conduct justifying punitive damages requires "an intersection of two factors: a bad act and a bad state of mind." *Linscott v. Rainier Nat. Life. Ins.*, 100 Idaho 854, 606 P.2d 958, 962 (1980). "The defendant must (1) act in a manner that was an extreme deviation from reasonable standards of conduct with an understanding of or disregard for its likely consequences, and must (2) act with

an extremely harmful state of mind, described variously as with malice, oppression, fraud, gross negligence, wantonness, deliberately, or willfully." *See, Adams v. Unites States of America*, 622 F.Supp.2d 996, 1006 (D. Idaho 2009).

In this case, Daryl acted with malice, oppression, fraud, gross negligence, wantonness, deliberately, or willfully, and in extreme deviation from reasonable standards of conduct when he knew that it was important for his wife to sign the Corrected QuitClaim Deed but forged her name without her consent.

There was no history or prior precedent that would make Darryl believe that it was okay to sign his wife's name. In fact, Darryl testified:

Q. Has Christine Harris ever given you permission to sign that document on her behalf?

A. No.

Q. Has she ever given you permission to sign your name on anything –

A. Not –

Q. – not just a legal document?

A. Not that I recall.

Darryl Harris Depo. Tr., p. 17, ll. 9-17.

Q. Have you ever asked her if you could sign her name on any document?

A. Not that I recall.

Q. Have you ever signed Christine's name to any type of document?

A. Yes.

Q. Okay. And what document was that?

A. That quitclaim deed of late 2008, and the date on it is what?

Q. Well, are you talking the corrected quitclaim deed? Is that what you're talking about?

A. Yes.

Q. Okay. And that would be approximately December 1st, 2008?

A. Yes.

Q. Okay. Have you ever signed her name on any other document?

A. I can't recall.

Q. Is it possible you've signed her name on another document before?

A. If there is, I do not recall it, so I'd have to answer no.

Darryl Harris Depo. Tr., p. 18, l. 19 to p. 19, l. 13.

Not only was there no past "course of dealing" which could have made Darryl believe he could forge his wife's name, she had not given him authorization to do so on the Corrected QuitClaim Deed.

A. Did she authorize you to sign her name on the corrected quitclaim deed?

Q. No.

Darryl Harris Depo. Tr., p. 70, ll. 9-11.

Moreover, Darryl acted with malice, oppression, fraud, gross negligence, wantonness, deliberately, or willfully, and in extreme deviation from reasonable standards of conduct when he failed to notify the Bank of his forgery for nearly two (2) years. Darryl forged his wife's name on the Corrected QuitClaim Deed on or about December 1, 2008. More than six (6) months later, Darryl and Christine filed their Complaint which commenced this action on June

12, 2009. The Complaint not only failed to mention the forgery, but actually alleged that both Darryl and Christine had signed the Corrected QuitClaim Deed. Following the filing of the Bank's Answer, Counterclaim, Cross Claim and Third Party Claim, the Harrises responded to the Counterclaim without mentioning the forgery or raising forgery as a defense. The Harrises responded numerous times to the Bank's discovery requests by serving their answers and responses, as well as supplemental answers and responses, on the Bank, again without mentioning the forgery. It was not until on or about November 1, 2010, that the Harrises sent their fifth supplemental discovery response in which they disclosed to the Bank, for the first time[2], that Darryl had signed Christine's name to the Corrected QuitClaim Deed without her consent. This disclosure of the forgery was not made until after the Bank had filed its first Motion for Summary Judgment.

It is unjustifiable for Darryl to have concealed his forgery for six (6) months prior to the commencement of this action as well as for nearly a year and a half after he had filed his Complaint. Darryl's lengthy delay in revealing the forgery is an indication of his extremely harmful state of mind. Only when faced with the very real possibility that the Bank would be granted its Motion for Summary Judgment,[3] did Darryl finally disclose his forgery to the Bank.

Daryl acted with malice, reckless disregard, gross negligence, wantonness and fraud when

---

[2] Darryl had previously made the argument to the Bank that the Corrected QuitClaim Deed was not valid. However, the basis for Darryl's argument prior to November 1, 2010, had always been because he claimed there was a failure of consideration to support the Corrected QuitClaim Deed. He had never previously indicated to the Bank that said deed was invalid because he himself had forged his wife's signature.

[3] At the hearing on the Harrises' Motion to Extend Time and Alternative Motion to Continue, heard on September 30, 2010, precisely the date when their response to the Bank's Motion for Summary Judgment would have been due, Judge St. Clair made statements that he thought it would be difficult to prevail against a bona fide lender for value. Of course Judge St. Clair's comments were only dicta, but it was informative as to what a district judge's initial impressions of the issues raised in the Bank's Motion for Summary Judgment were.

he deliberately and willfully forged his wife's name on the deed and when he did not inform the Bank about the forgery for nearly two (2) years. Therefore, the Bank should be granted leave to amend its Counterclaim to include a claim of punitive damages against Darryl.

CONCLUSION

In light of the foregoing, the Bank respectfully requests that this Court grant leave for the Bank to amend its answer to include additional affirmative defenses. In addition, the Third Party Claim should be allowed to be amended to include Robert Crandall and Family Asset Protection Legal Services, P.L.L.C., as third-party defendants. Finally, the Bank should be allowed to amend its Counterclaim to include the following claims against Darryl Harris: breach of contract/third party beneficiary, fraud/misrepresentation, promissory estoppel and punitive damages.

Dated this 27th day of January, 2011.

NELSON HALL PARRY TUCKER, P.A.

By: Douglas R. Nelson
Douglas R. Nelson

CERTIFICATE OF SERVICE

I hereby certify that I served a true copy of the foregoing document upon the following this 27th day of January, 2011, by hand delivery, mailing with the necessary postage affixed thereto, facsimile, or overnight mail.

Kipp L. Manwaring
MANWARING LAW OFFICE
381 Shoup Avenue, Suite 210
Idaho Falls, ID 83402

[ ] Mailing
[✓] Hand Delivery
[ ] Fax: 523-9109
[ ] Overnight Mail

Wiley R. Dennert

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Douglas R. Nelson - ISB# 1580
Brian T. Tucker - ISB# 5236
Wiley R. Dennert - ISB# 6216
NELSON HALL PARRY TUCKER, P.A.
490 Memorial Drive
P.O. Box 51630
Idaho Falls, ID 83405-1630
Telephone:(208) 522-3001
Facsimile: (208) 523-7254

Attorneys for The Bank of Commerce

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

DARRYL HARRIS and CHRISTINE HARRIS, husband and wife,

Plaintiffs,

v.

DUANE L. YOST and LORI YOST, husband and wife, DUANE L. YOST as Trustee of the DUANE L. YOST TRUST, THE BANK OF COMMERCE, an Idaho Corporation and JOHN DOES I-X,

Defendants.

Case No. CV-09-3488

OPPOSITION TO THE HARRISES' MOTION FOR SUMMARY JUDGMENT

511

THE BANK OF COMMERCE, an Idaho corporation,

Counterclaimant/Cross-claimant/Third-Party Claimant,

v.

DARRYL HARRIS and CHRISTINE HARRIS, husband and wife,

Counterdefendants,

and

DUANE L. YOST and LORI YOST, husband and wife, DUANE L. YOST as Trustee of the DUANE L. YOST TRUST, JOHN DOES I-X,

Crossdefendants,

and

HAMPSHIRE HOLDINGS, LLC,

Third-Party Defendant.

The Bank of Commerce ("Bank" herein) by and through its attorneys of record, hereby objects to and opposes the Plaintiffs' Motion for Summary Judgment. This Opposition is supported by all of the affidavits and documents supporting the Bank's Second Motion for Summary Judgment which have previously been filed. In addition, the Bank relies on the Second Affidavit of Duane L. Yost filed concurrently herewith.

I. FACTUAL AND PROCEDURAL BACKGROUND

The factual and procedural background is set forth in the Bank's Memorandum in Support of Second Motion for Summary Judgment.

II. LEGAL STANDARD FOR SUMMARY JUDGMENT

> Generally, when considering a motion for summary judgment, a court "liberally construes the record in a light most favorable to the party opposing the motion and draws all reasonable inferences and conclusions in that party's favor." *Brooks v. Logan,* 130 Idaho 574, 576, 944 P.2d 709, 711 (1997). However, where the evidentiary facts are undisputed and the trial court rather than a jury will be the trier of fact, "summary judgement is appropriate, despite the possibility of conflicting inferences because the court alone will be responsible for resolving the conflict between those inferences." *Riverside Development Co. v. Ritchie,* 103 Idaho 515, 519, 650 P.2d 657, 661 (1982). As long as the parties have filed cross-motions for summary judgment and no jury has been requested, the trial court may draw the inferences it would be allowed to draw from the evidence at trial. *See Williams v. Computer Resources, Inc.,* 123 Idaho 671, 673, 851 P.2d 967, 969 (1993).

Drew v. Sorensen, 133 Idaho 534, 537, 989 P.2d 276, 279 (1999).

III. ARGUMENT

The Harrises set forth the following theories in their Memorandum in Support of Plaintiffs' Motion for Summary Judgment: lack of consideration, failure of delivery and violation of I.C. § 32-912. Through these three theories, Darryl and Christine Harris (collectively, the "Harrises") are claiming that the Corrected Quitclaim Deed is void. However, the Corrected Quitclaim Deed is not void. Moreover, the Harrises should be estopped from claiming the Corrected Quitclaim Deed is void. Therefore, the Bank should be allowed to foreclose its Deeds of Trust and apply the proceeds of the sale of the real property to Duane Yost's indebtedness to the Bank.

A. Consideration

The Harrises claim that the Corrected Quitclaim Deed is void for lack of consideration because they argue the Yosts never paid them the $800,000 purchase price. However, the Harrises argument fails for several reasons.

1. Lack of Admissible Evidence.

The Harrises have not presented any admissible evidence to support their lack-of-consideration argument. The Harrises' statements regarding a lack of consideration are simply their opinions but are inadmissible to contradict the Corrected QuitClaim Deed's clear language. *See Bliss v. Bliss,* 127 Idaho 170, 898 P.2d 1081 (1995), (extrinsic evidence is not admissible to contradict the clear language of a quitclaim deed).

In *Hall v. Hall,* 116 Idaho 483, 888 P.2d 255 (1989), the Idaho Supreme Court reviewed the issue of whether parol evidence may be used to establish that a portion of real property transferred to a married couple was transferred as a gift when the deed stated that it was "For Value Received". The magistrate looked at parol evidence to determine that a portion of the property was in fact transferred as a gift and the district court affirmed. The Court of Appeals reversed and remanded, ruling that parol evidence could not be used to vary or amend the deed. The Supreme Court concurred with the Court of Appeals.

> The only pertinent language of the deed is as stated hereinabove. Where possible, the court should give effect to the intention of the parties to a deed. *Gardner v. Fliegel,* 92 Idaho 767, 450 P.2d 990 (1969). Where the language of a deed is plain and unambiguous the intention of the parties must be determined from the deed itself, and parol evidence is not admissible to show intent. *Id.* Oral and written statements are generally inadmissible to contradict or vary unambiguous terms contained in a deed.... Where, as here, the consideration clause clearly recites that the transfer was made "For Value Received," parol evidence is not admissible to contradict the deed by attempting to show the transfer was in part a "gift" rather than "for value."

Hall v. Hall, 116 Idaho 483, 484, 777 P.2d 255, 256 (1989) (footnote omitted).

The Corrected Quitclaim Deed is unambiguous. It simply states:

> **Darryl Harris and Christine Harris,** Husband and Wife, Grantors, of Idaho Falls, Idaho hereby RELEASES, and Forever QUITCLAIMS to **Duane Yost and Lori Yost,** Grantees, for good and valuable consideration the following

described tract of land...

Complaint, Exhibit "C" (bold in original).

The consideration clause clearly recites that the transfer was made "for good and valuable consideration". Therefore, parol evidence is not admissible to contradict the Corrected Quitclaim Deed by attempting to show that there was no agreed upon consideration and that said deed is void for lack of consideration.[1] To the extent any parol evidence is presented for this purpose, then the Bank objects thereto and moves to strike it on the basis that such evidence is not admissible to contradict the clear and unambiguous language of the Corrected Quitclaim Deed.

Therefore, any statements by the Harrises in which they claim there was no good and valuable consideration to support the validity of the Corrected Quitclaim Deed is not admissible.

2. Lack of Consideration v. Failure of Consideration

Although the Harrises claim that the Corrected Quitclaim Deed fails due to a lack of consideration, the uncontroverted evidence does not support either a lack of consideration or a failure of consideration.

The difference between a lack (or want) of consideration and a failure of consideration is important. At best, the Harrises can only show a failure of consideration. Therefore, the Corrected Quitclaim Deed may be voidable, but not void. A voidable deed does not affect the Bank's protected status as a bona fide lender.

i. Lack of Consideration

A lack of consideration is only applicable when there is no legally enforceable contract.

---

[1] This is not to say that parol evidence may or may not be admissible on the issue of whether there was a subsequent failure of consideration.

Put another way, an illusory promise is not sufficient to create a valid contract. However, the contract between Darryl and Duane to sell the Subject Property was a legally enforceable contract, supported by valid consideration.

'Want of consideration' is defined as follows: "In the general law of contracts, this term means a total lack of any valid consideration for a contract, while 'failure of consideration' is the neglect, refusal or failure of one of the parties to perform or furnish the consideration agreed on." Black's Law Dictionary 712 (abridged 6th ed. 1997).

Referring to an insurance policy, the Idaho Supreme Court has stated, "If the policy is truly illusory, the contract is void for lack of consideration..." *Vincent v. Safeco Ins. Co. of America,* 136 Idaho 107, 112, 29 P.3d 943, 948 (2001).

The Missouri Court of Appeals has explained:

> The phrase "illusory promise" means "words in promissory form that promise nothing. CORBIN ON CONTRACTS Section 5.28. An illusory promise is not a promise at all and cannot act as consideration; therefore no contract is formed. *Id.*
>
> The tendency of the law, however, is to uphold the contract by finding the promise was not illusory when it appears that the parties intended a contract. *Id.*
> ...

Magruder Quarry & Co., L.L.C. v. Briscoe, 83 S.W.3d 647, 650 (2002).

The purchase and sell agreement entered into between Darryl and Duane was supported by valuable consideration. Darryl agreed to sell the forty (40) acres of the Subject Property to Duane at $20,000.00 an acre for a total purchase price of $800,000.00. *See* 2nd Yost Aff., ¶ 4. The source of the $800,000.00 purchase price was not essential to the transaction. *Id.* at ¶ 5. What was essential was that Duane agreed to pay Darryl $800,000.00 for the Subject Property. *Id.*

Therefore, the purchase and sell agreement regarding the Subject Property was an enforceable contract supported by Duane's promise to pay a valuable consideration, specifically $800,000.00. The fact that Duane chose to pay the $800,000.00 by transferring that amount from his Trigon account into Darryl's Trigon account does not make the contract invalid from the beginning due to a lack of consideration as the Harrises now argue. At most, the Harrises' argument raises a question of whether there was a failure of consideration.

ii. Failure of Consideration

The dictionary defines 'failure of consideration' as follows:

> As applied to notes, contracts, conveyances, etc., this term does not necessarily mean a want of consideration, but implies that a consideration, originally existing and good, has since become worthless or has ceased to exist or been extinguished, partially or entirely. It means that sufficient consideration was contemplated by the parties at [the] time [the] contract was entered into, but either on account of some innate defect in the thing to be given or nonperformance in whole or in part of that which the promisee agreed to do or forbear nothing of value can be or is received by the promisee. Such consists of neglect, refusal, or failure of one of the parties to perform or furnish agreed-upon consideration.

Black's Law Dictionary 411 (abridged 6th ed. 1997).

The Idaho Court of Appeals has explained the difference between lack or want of consideration and failure of consideration as follows:

> The term "failure of consideration" includes instances where a proper contract was entered into when the agreement was made, but because of supervening events, the promised performance fails, rendering the contract unenforceable. *General Insurance Co. of America v. Carnicero Dynasty Corp.,* 545 P.2d 502 (Utah 1976); *Taliaferro v. Davis,* 216 Cal.App.2d 398, 31 Cal.Rptr. 164 (1963); 1 S. WILLISTON, WILLISTON ON CONTRACTS § 119A (W. Jaeger, 3d ed. 1957); 17 C.J.S. *Contracts* § 129 (1963). Failure of consideration generally refers to failure of performance of a contract. *Converse v. Zinke,* 635 P.2d 882 (Colo.1981); RESTATEMENT (SECOND) OF CONTRACTS § 237 comment a (1981) (hereinafter referred to as RESTATEMENT). "Failure" of consideration is to be distinguished from "want" or "lack" of consideration, which refers to instances where no consideration ever existed to support the contract,

> rendering the contract invalid from the beginning. *General Insurance Co. of America v. Carnicero Dynasty Corp., supra.*
>
> An examination of the lease and the "compromise agreement" is necessary to determine the merits of the parties' arguments. Under the lease, mutual promises to perform served as the consideration....

World Wide Lease, Inc. v. Woodworth, 111 Idaho 880, 884-85, 728 P.2d 769, 773-74 (Idaho Ct. App. 1986). *See also General Ins. Co. of America v. Carnicero Dynasty Corp.,* 545 P.2d 502 (Utah 1976) ("There is a distinction between lack of consideration and failure of consideration. Where consideration is lacking, there can be no contract. Where consideration fails, there was a contract when the agreement was made, but because of some supervening cause, the promised performance fails.").

In *Barrett v. Simmons,* 221 S.E.2d 25 (1975), the Georgia Supreme Court dealt with an argument very similar to one now being made by the Harrises. The *Barrett* Court stated:

> Barrett contends that the warranty deed from himself to Wills was without consideration and therefore was not a valid conveyance. He testified that he executed the deed in exchange for Simmons' promise to pay him $300,000 and to remove the Federal Land Bank liability within 30 days. He contends that neither promise was carried out.
>
> Code s 29-101 provides that a deed must be made on a valuable or good consideration. A promise to pay constitutes consideration. Failure to pay the consideration promised, although it constitutes a breach, does not render the conveyance invalid for lack of consideration. *Morris v. Johnson,* 219 Ga. 81(1), 132 S.E.2d 45 (1963); *Harry v. Griffin,* 210 Ga. 133(1), 78 S.E.2d 37 (1953); *Nathans v. Arkwright,* 66 Ga. 179(1a) (1880).

Barrett, 221 S.E.2d at 27. *See also Goodwin v. City of Dallas,* 496 S.W.2d 722, 723 (1973) ("A deed procured without consideration ... is, as between the parties thereto, voidable only and not void.")

The Harrises alleged in their Complaint the following: "During the months of September

and October 2007 the Harrises and the Yosts discussed a transaction where the Harrises agreed to sale and the Yosts agreed to purchase the subject property for the purchase price of $800,000.00." Complaint, ¶ 7. The Harrises have also alleged that the "Yosts breached their obligation by failing to pay the Harrises the purchase price of $800,000.00." *Id.* at ¶ 59.

Under the purchase and sale agreement, Darryl and Duane made mutual promises to perform which served as consideration. Duane promised to give Darryl $800,000.00 and Darryl promised to give Duane the forty (40) acres of Subject Property.

Moreover, the fact that the Harrises have obtained a money judgment against the Yosts for $800,000.00 of principal, plus interest, costs and attorney fees, is additional evidence to support the existence of a valid contract. *See* Judgment by Default executed by Judge Anderson on October 15, 2009. How else could the Harrises be entitled to an $800,000.00 judgment against the Yosts unless it was for breach of a valid contract?

If Duane failed to perform his promise, then at most a failure of consideration would exist[2] and the Corrected Quitclaim Deed would at most be voidable, not void.[3]

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[2] There is substantial evidence, much of it from Darryl himself, that the Harrises did in fact receive at least some of the $800,000.00 of consideration for the Subject Property. After the $800,000.00 was transferred from Duane's Trigon account into Darryl's Trigon account, Darryl made the following withdrawals from his Trigon account: $20,000.00 on October 8, 2007, $18,000.00 on October 16, 2007, $85,000.00 on December 13, 2007, $200,000.00 on July 14, 2008, and $40,000.00 on September 19, 2008. *See* Darryl Harris Depo. Tr. p. 38, l. 13 to p. 46 l. 6, Exhibit Nos. 34, 35 & 36. At least some of the $800,000.00 may have been withdrawn by Darryl after it was deposited on October 1, 2007. In addition, it was not hard for Darryl to withdraw money from his Trigon account until late 2008. *Id.* at p. 42, ll. 4-6. Therefore, from October 1, 2007, until late 2008, Darryl had access to the $800,000.00. That access had at least some value. Until late December 2008, Darryl had not heard of any Trigon checks bouncing. *Id.* at p. 88, ll. 5-13. Finally, the real reason the $800,000.00 was not included in the Harrises' claim that was filed with the federally-appointed receiver, Wayne Kline, is because Darryl objected to including the $800,000.00 and requested that the receiver remove it from their claim. *Id.* at p. 118, ll. 4-13.

[3] In their Memorandum in Support of Motion for Summary Judgment, the Harrises cite cases that stand for the proposition that a deed is void as a result of lack of consideration. However, none of those cases are on point because the purchase and sale agreement between Darryl and Duane was based on valid consideration, namely Duane's promise to pay Darryl $800,000.00.

3. Effect of Failure of Consideration on the Corrected Quitclaim Deed

Even if none of the $800,000.00 was paid to the Harrises, it does not change the outcome of the cross motions for summary judgment because the failure of consideration would not affect the Bank's protected status as a bona fide lender.

Corpus Juris Secundum provides insightful authority regarding the effect of consideration on a deed. "As a general rule, as between the parties, their heirs, or privies, a deed is good without consideration." 26A C.J.S. *Deeds* § 27 (2001). Moreover, "[a]s a general rule, a deed which is otherwise valid will not be invalidated by reason of a total or partial failure of consideration, and will nevertheless operate to convey title." *Id.* at § 32. Finally, "[w]hile a void deed passes no title, a voidable deed passes a defeasible title which may be set aside except when it is acquired by an innocent purchaser for value." *Id.* at § 148.

Courts have held that a bona fide purchaser is protected when the original grantor alleges a failure of consideration. The United States District Court for the District of Kansas has explained the effect of a failure of consideration on a bona fide purchaser for value, as follows:

> The problem with plaintiffs' argument is that it fails to take account of the protection offered by the law to a holder in due course of a negotiable instrument or, similarly, to a bona fide purchaser of real property. With regard to persons claiming such interests, the following rules are set forth in American Jurisprudence 2d, a treatise widely cited by Kansas courts:
>
> > In determining priority between the interest of a vendor [seller] of real estate and the interest of a person claiming through the purchaser, the general rules relating to bona fide purchasers prevail, so that an equitable interest of the vendor in the property may be cut off by a transfer by the purchaser of his or her legal interest to one who has all the requisites for protection as a bona fide purchaser. * * * However, the vendor's equitable interest will be given preference where the person claiming through the purchaser does not have the status of a bona fide purchaser for value without notice. Moreover, if the purchaser has no interest in

> the property, because of the invalidity of the deed, a subsequent purchaser from him or her is not entitled to protection as a bona fide purchaser. Legal interests of the vendor are protected as against the person claiming through the purchaser, under the general rule that a vendor can, as against persons having a superior legal interest, convey only such interest as he or she has.

77 Am.Jur.2d, *Vendor and Purchaser* § 417. While plaintiffs attempt to rely on the latter portion of this paragraph by arguing that the deed to the Freemans was invalid due to failure of consideration, the rules governing conveyances appear to hold otherwise:

> Failure of consideration does not render a deed void, nor does it render a subsequent conveyance by the grantor to another operative to pass any title. Indeed, even total failure of consideration does not necessarily entitle the grantor to cancellation of the deed, because a deed is valid and operative as between the parties and their privies, whether or not founded on a consideration. Thus, nonpayment of the promised price gives the grantor an implied equitable lien on the land, or creates a liability upon the purchaser which may be enforced in an action at law, but, in the absence of additional circumstances, such as fraud, justifying equitable relief, it does not entitle him to cancellation of the deed.

23 A. Jur.2d, *Deeds* § 95. Thus, the rule appears to be that failure of consideration at most makes a deed voidable, as opposed to void, and that "title may pass by the deed, and an innocent purchaser may be held entitled to retain it as against the original grantor." *Id. See also* 66 Am.Jur.2d, *Reformation of Instruments* § 65 (reformation of an instrument will be decreed by a court of equity as between the original parties, but relief will not be granted if it appears that the rights of bona fide purchasers or of subsequent encumbrancers or lienholders for present consideration will be prejudiced thereby); *Restatement (First) of Restitution* § 172, comment ("The question in such cases is which of two innocent persons should suffer a loss which must be borne by one of them. The principle which is applied by courts of equity is that they will not throw the loss upon a person who has innocently acquired title to property for value."). Similar rules generally protect holders in due course of negotiable instruments. *See K.S.A.* §§ 84-3-305, 84-3-306.

Messenger v. Sundell-Guy, 99-1216-WEB, 1999 WL 1253057 (D. Kan. Dec. 1, 1999). *See also* *First Interstate Bank of Sheridan v. First Wyoming Bank, N.A. Sheridan,* 762 P.2d 379 (Wyo.

1988) (failure[4] of consideration on the part of the original grantor would fail to annul the protections afforded the mortgagee bank under the bona fide purchaser doctrine); *Brown v. Johnson,* 11 So.2d 713, 717 (La. Ct. App. 1942), ("[T]he conveyance act executed by Jamerson to Johns was valid on its face, and neither lack of consideration for it nor equities that existed between those parties can be urged against Johnson, who was a bona fide purchaser for value.")

The Idaho Supreme Court has held that a voidable purchase will pass clear title to a bona fide purchaser. *See Swinehart v. Turner,* 44 Idaho 461, 259 P. 3 (1927) ("While a purchase by a representative at his own sale is voidable, a deed from him conveying the property to a bona fide purchaser for a valuable consideration will pass title, and after such a conveyance the original purchase will not be set aside.")

Numerous other courts have also held that a voidable deed does not preclude the protections provided to a bona fide purchaser. *Fallon v. Triangle Management Services, Inc.,* 169 Cal.App.3e 1103 (1985) (trustees who held a deed of trust secured by a voidable deed held a valid lien even though the deed was subsequently declared void where the trustees were bona fide encumbrancers for value without notice); *Martinez v. Affordable Hous. Network, Inc.,* 123 P.3d 1201, 1205 (Colo. 2005) (a deed voidable for fraud protects a subsequent purchaser if the subsequent purchaser took the property for value and without notice of any defect in title); *Lee v.*

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[4] The trial court used the term "failure of consideration." On the other hand, the Wyoming Supreme Court used the term "lack of consideration" throughout the decision. However, it is clear that what was at issue was really failure of consideration, specifically a breach of a promise to pay. Pursuant to the Agreement for Warranty Deed with Duncan, the Wagensens had the right to request a warranty deed on the property by payment of the sum of $500 per acre to Duncan. After a warranty deed on the 20-acre parcel was conveyed to the Wagensens and Mr. Wagensen conveyed his interest in the parcel to Mrs. Wagensen by recorded deed, Mrs. Wagensen obtained a $225,000 loan secured by a mortgage on the parcel. Thereafter, Mrs. Wagensen defaulted on both the Duncan Agreement for Warranty Deed and the $225,000 loan. The Wagensen's promise to pay the sum of $500 per acre to Duncan constituted consideration. Default on that promise would only be a failure of consideration, not a lack of consideration. *See Barrett, supra.*

Boyd, 16 So. 2d 30 (Miss. 1943) ("The relief of cancellation will not be granted against a bona fide purchaser for value and without notice for the fraud or other ground for cancellation. This rule applies irrespective of the grounds on which the rescission or cancellation is sought. From a purchaser for value without notice, a court of equity takes nothing away which the purchaser has honestly acquired.").

To the extent the Corrected Quitclaim Deed is voidable for failure of consideration, this Court should not set aside the Bank's Deeds of Trust nor its priorities thereunder because the Bank is a bona fide lender for value with no notice of the alleged fraud committed by Daren Palmer or Trigon.

B. Delivery

The Harrises are claiming that the Corrected Quitclaim Deed is void because it was not "delivered" and because delivery was conditional on full payment. However, the Harrises' argument is not supported by law or fact.

1. Law

The Idaho Supreme Court has held that delivery of a deed is absolute unless it is delivered to a third party for the purpose of acting as an escrow or if the deed contains language expressing a condition required for delivery. *See Whitney v. Dewey,* 10 Idaho 633, 80 P. 1117 (1905). The *Whitney* Court stated:

> It is a well-settled principle of law that a deed cannot be delivered by the grantor to the grantee therein named to be held by the grantee in escrow. If such thing be done, the result is that title vests at once in the grantee. The holder of an escrow must be a third party, who for such purpose becomes the agent of both the grantor and grantee.
>
> In 13 Cyclopedia, 564, the writer of the text says: "A deed cannot be delivered as an escrow to the grantee, and a delivery which purports to be such

will operate as an absolute one. This rule, however, applies only to those deeds which are upon their face complete contracts requiring nothing but delivery to make them perfect, and does not apply to those which upon their face import that something besides delivery is necessary to be done in order to make them complete." The writer cites many authorities in support of that text.

In 1 Devlin on Deeds, section 315, it is said: "A deed cannot be delivered to the grantee as an escrow. If it be delivered to him, it becomes an operative deed, freed from any condition not expressed in the deed itself, and it will vest the title in him, though this may be contrary to the intention of the parties. One of the grounds upon which this rule is based is that parol evidence is inadmissible to show that the deed was to take effect upon condition." The author thereupon proceeds to quote as a part of the text, and with approval, from the opinion of Harris, J., in *Lawton v. Sager,* 11 Barb. 349, in whose opinion the following language is used: "Whether a deed has been delivered or not is a question of fact, upon which, from the very nature of the case, parol evidence is admissible. But whether a deed, when delivered, shall take effect absolutely or only upon the performance of some condition unexpressed therein, cannot be determined by parol evidence. To allow a deed absolute upon its face to be avoided by such evidence would be a dangerous violation of a cardinal rule of evidence."

In *Braman v. Bingham,* 26 N. Y. 492, the Court of Appeals said: "The reason given for the rule excluding parol evidence of a conditional delivery to the grantee applies to all cases where the delivery is designed to give effect to the deed, in any event, without the further act of the grantor. 'When the words are contrary to the act, which is the delivery, the words are of none effect' (Co. Litt. 36a), 'because then a bare averment, without any writing, would make void every deed' (Cro. Eliz. 884)....

Whitney, at 651-52, 80 P. at 1121 (1905).

The written language of the Corrected Quitclaim Deed does not mention the delivery is conditional upon full payment of the $800,000.00. Moreover, there is no evidence that the Corrected Quitclaim Deed was delivered to a third party to be held in escrow and only delivered to Duane upon full payment of the $800,000.00.

2. Uncontroverted Facts

The uncontroverted facts do not support the Harrises claim that delivery was contingent upon the full payment of the $800,000.00.

First, the Complaint does not allege any conditional delivery. Instead, the Complaint alleges the following:

> 12. Relying upon the [Bank of America] bank letter, the Harrises agreed to complete their planned transaction and deliver a deed.
>
> ...
>
> 17. Subsequently, the Harrises' (sic) executed a corrected quitclaim deed conveying the subject property to the Yosts. That quitclaim deed was recorded December 2, 2008, as Instrument No. 1317892 in the Recorder's Office for Bonneville County, Idaho. A copy of that quitclaim deed is attached as Exhibit C and incorporated here by reference.

Second, the Harrises do not set forth any evidence to support the claim that Darryl's delivery of both the first Quitclaim Deed and the subsequent Corrected Quitclaim Deed was "unquestionably contingent on payment." The Harrises' only reference to the record is as follows: "Because he knew Yost urgently needed the corrected quitclaim deed, Harris signed his wife's name to that deed and left it with Robert Crandall to be notarized." Memorandum in Support of Motion for Summary Judgment, p. 4.

The uncontroverted evidence indicates that Darryl knew that the Corrected Quitclaim Deed was delivered to Duane through Robert Crandall. After Darryl had signed the first Quitclaim Deed, Duane gave Darryl the Corrected Quitclaim Deed and told Darryl to get it back to him as fast as he could. Darryl Harris Depo. Tr., p. 60, l. 21 to p. 62, l. 2. Darryl testified that Duane told him that the Bank wanted Darryl to sign the new Corrected Quitclaim Deed. *Id.* at p. 63, ll. 17-18. Darryl understood the purpose of a deed was to show the transfer of land from one person to another. *Id.* at p. 66, l. 24 to p. 67, l. 5. In addition, Darryl understood that a deed is recorded in the county recorder's office to put everyone on notice of who owns the property. *Id.* at p. 67, l. 6 to p. 68, l. 1. Darryl knew that the Bank was relying on the Corrected Quitclaim

Deed to make sure that title to the Subject Property had really been transferred to the Yosts and in order to secure its loan to Duane. *Id.* at p. 68, ll. 2-17. Darryl went to Robert Crandall's office and met Duane there. Duane gave Darryl the Corrected Quitclaim Deed and they both left. Darryl signed the Corrected Quitclaim Deed and then returned to Robert Crandall's office where he left it.[5] *Id.* at p. 75, ll. 11-20. Darryl admitted that he had transferred the Subject Property. *Id.* at p. 116, l. 22 to p. 117, l. 8. Finally, the Corrected Quitclaim Deed was recorded on Duane's behalf by Robert Crandall in Bonneville County on December 2, 2008. *See* Darryl Harris Depo. Tr., Exhibit 2, Corrected Quitclaim Deed.

There is no genuine issue of material fact concerning the delivery of the Corrected Quitclaim Deed as Darryl intended to and did in fact deliver said deed. Its delivery was not contingent on full payment of the $800,000.00.

C. Idaho Code § 32-912

The Harrises argue that because Darryl forged Christine's signature on the Corrected Quitclaim Deed, it is void under Idaho Code § 32-912. However, the Harrises should be estopped from claiming the Corrected Quitclaim Deed is void pursuant to § 32-912.

"Estoppel is a recognized exception to the spousal joinder requirement of I.C. § 32-912 where the conduct of the non-consenting spouse is consistent with the existence and validity of the disputed contract." *Lovelass v. Sword,* 140 Idaho 105, 108, 90 P.3d 330, 333 (2004).

> "While it is true that a contract to convey community real estate is void if not signed and acknowledged by both the husband and wife under this statute, this is not an inexorable rule," *Tew v. Manwaring,* 94 Idaho 50, 53, 480 P.2d 896, 899

[5] "While it is of course true that to be valid a deed must be delivered, such delivery does not have to be to the grantee personally. Code s 29-101. The Deed may be received by another authorized to do so by the grantee or may be received by a third person whose actions are later ratified by the grantee." *Barrett, supra,* 221 S.E.2d at 27.

> (1971), and "conduct from which acquiescence can be inferred may be sufficient to establish an estoppel." *Calvin v. Salmon River Sheep Ranch,* 104 Idaho 301, 305, 658 P.2d 972, 976 (1983). Further, a non-consenting spouse's "failure to participate in the negotiations is not determinative of the issue of estoppel." *Id.*

Id. at 109, 90 P.3d at 334.

> "[E]ven if an instrument lacks an acknowledgement of a spouse's signature, the spouse will be deemed to have waived the defect if his or her conduct is consistent with the existence and validity of the instrument." *Lowry v. Ireland Bank,* 116 Idaho 708, 711, 779 P.2d 22, 25 (Ct.App.1989) (*citing Tew,* 94 Idaho at 54, 480 P.2d at 900).

Id.

The Harrises argue that "the evidence shows Christine Harris engaged in no conduct suggesting acquiescence to the deed." However, this argument is not backed up by any citation to the record.

On the contrary, the uncontroverted evidence does show Christine acquiesced to the Corrected Quitclaim Deed.

Over the years, the Harrises have owned and sold several pieces of real property, including bare ground, houses and cabins. Christine Harris' Depo. Tr., p. 11, l. 11 to 24, l. 20. Christine knew that each time she and Darryl sold a piece of real property that she would have to sign a deed giving her interest to the buyer. *Id.* at p. 16, ll. 12-25; p. 18, ll. 11-17; p. 30, ll. 11-14. Christine claims Darryl told her in December 2008, that he had forged her name on the Corrected QuitClaim Deed. *Id.* at p. 54, ll. 1-9, 20 to p. 56, l. 9. More specifically, Darryl testified that he told Christine that he had signed her name on the deed about two weeks after he had done so. Darryl Harris Depo. Tr., p. 71, l. 21 to p. 72, l. 2. Prior to learning that Palmer and Trigon were a fraud, Darryl told Christine that he and Duane had agreed to transfer the Subject Property to the Yosts. Christine Harris Depo. Tr., p. 42, ll. 3-19. Also prior to learning about the fraud,

Christine learned that Duane had transferred $800,000.00 into Darryl's Trigon account. *Id.* at p. 44, ll. 6-17. Christine also admitted that Darryl probably told her what the purpose of the $800,000.00 was. *Id.* at p. 44, ll. 20-23. When Christine learned about the forgery, approximately two weeks after Darryl had signed her name to the Corrected QuitClaim Deed, she did not object to it but rather did nothing despite knowing that the forgery would be relied upon by others. Darryl Harris' Depo. Tr., p. 71, l. 21 to p. 73, l. 6; Christine Harris Depo. Tr., p. 57, ll. 12-16. In fact, Darryl's forgery did not even bother Christine at the time she learned about it. Christine Harris Depo. Tr., p. 56, ll. 12-17. Moreover, she did not tell anyone about the forgery. *Id.* Not only did Christine not get upset with Darryl, she was okay with the fact that he had signed her name because she trusted him. *Id.* at p. 58, ll. 11-24. If Duane had brought them the $800,000.00 in cash, Christine would not have objected to signing the deed to the forty (40) acres. *Id.* at p. 61, ll. 6-15. Because Christine believed that the $800,000.00 had been transferred into Darryl's Trigon account, she admitted she probably would not have objected to giving Duane the deed to the forty (40) acres and that she probably would have been okay with it. *Id.* at p. 61, l. 16 to p. 62, l. 10. As late as the date of her deposition on November 9, 2010, Christine was not planning on pressing any criminal charges against Darryl for forging her name. *Id.* at p. 56, l. 18 to p. 57, l. 3. Knowing of the forgery, the Harrises still filed their Complaint in which they allege that both Darryl and Christine signed the Corrected Quitclaim Deed. Although the Complaint was signed by the Harrises' attorney, they subsequently signed the Plaintiffs' Response to the Defendants, The Bank of Commerce First Set of Interrogatories and Requests for Production of Documents dated May 7, 2010 ("Discovery Response") before a notary public. *See* 4th Aff. of Wiley Dennert, Exhibit "B". In Answer to Interrogatory No. 1 of the Discovery Response,

Christine and Darryl state under oath that they "have knowledge of the facts and information contained in the Complaint." *See id.* at p. 2. Christine and Darryl have obtained a Judgment by Default against the Yosts in the amount of $800,000.00 plus interest, costs and attorney fees.

After Christine learned about the Corrected Quitclaim Deed, her conduct has been consistent with the existence and validity of the instrument. Christine's conduct infers acquiescence to the transfer of the forty (40) acres to the Yosts. Christine's conduct is sufficient to establish an estoppel. Therefore, Christine and Darryl should be estopped from claiming the Corrected Quitclaim Deed violates § 32-912, Idaho Code.[6]

IV. CONCLUSION

The purchase and sell agreement between Darryl and Duane is not void for lack of consideration because Duane's promise to pay $800,000.00 is valid consideration. The Bank is a bona fide lender for value. Therefore, to the extent there may be a failure of consideration, the Bank's Deeds of Trust encumbering the Subject Property are superior to any claims made by the Harrises.

The Harrises' claim that the deed was not delivered because it was conditioned on full payment of the $800,000 is not supported by law or the uncontroverted facts.

Furthermore, the Harrises should be estopped from claiming the Corrected Quitclaim Deed is void under § 32-912.

This Court should deny the Harrises' Motion for Summary Judgment and should grant the Bank summary judgment by dismissing the Harrises' complaint and entering an order allowing

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[6] In addition, for all of the reasons set forth in the Bank's Memorandum in Support of its Second Motion for Summary Judgment, the Harrises should be estopped from claiming the Corrected Quitclaim Deed is void pursuant to § 32-912.

the Bank to foreclose on the Subject Property and declaring that the Bank's priority rights are superior to all other claimed interests.

In addition, to the extent there is a deficiency following the foreclosure sale, then the Court should enter a deficiency judgment against the Yosts in an amount to be calculated using the Affidavit of Michael Morrison.

DATED this 10th day of February, 2011.

Douglas R. Nelson

CERTIFICATE OF SERVICE

I hereby certify that I served a true copy of the foregoing document upon the following this 10th day of February, 2011, by hand delivery, mailing with the necessary postage affixed thereto, facsimile, or overnight mail.

Kipp L. Manwaring
MANWARING LAW OFFICE
381 Shoup Avenue, Suite 210
Idaho Falls, ID 83402

[ ] Mailing
[✓] Hand Delivery
[ ] Fax: 523-9109
[ ] Overnight Mail

Wiley R. Dennert

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Douglas R. Nelson - ISB# 1580
Brian T. Tucker - ISB# 5236
Wiley R. Dennert - ISB# 6216
NELSON HALL PARRY TUCKER, P.A.
490 Memorial Drive
P.O. Box 51630
Idaho Falls, ID 83405-1630
Telephone:(208) 522-3001
Facsimile: (208) 523-7254

Attorneys for The Bank of Commerce

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

DARRYL HARRIS and CHRISTINE HARRIS, husband and wife,

Plaintiffs,

v.

DUANE L. YOST and LORI YOST, husband and wife, DUANE L. YOST as Trustee of the DUANE L. YOST TRUST, THE BANK OF COMMERCE, an Idaho Corporation and JOHN DOES I-X,

Defendants.

Case No. CV-09-3488

SECOND AFFIDAVIT OF DUANE L. YOST

THE BANK OF COMMERCE, an Idaho corporation,

Counterclaimant/Cross-claimant/Third-Party Claimant,

v.

DARRYL HARRIS and CHRISTINE HARRIS, husband and wife,

Counterdefendants,

and

DUANE L. YOST and LORI YOST, husband and wife, DUANE L. YOST as Trustee of the DUANE L. YOST TRUST, JOHN DOES I-X,

Crossdefendants,

and

HAMPSHIRE HOLDINGS, LLC,

Third-Party Defendant.

STATE OF IDAHO)
) ss.
County of Bonneville)

Duane L. Yost, after being first duly sworn upon oath, deposes and states as follows:

1. I am over the age of 18 years.

2. This affidavit is made on my own personal knowledge.

3. I am one of the defendants and crossdefendants in the above-entitled matter.

4. In the fall of 2007, Darryl Harris and I agreed that he would sell to me and I would buy from him the forty (40) acres that are the subject of this lawsuit (the "Subject Real Property").

5.12

We agreed that the purchase price for this transaction was $800,000.00. At the time we agreed to this transaction, land in that area was reportedly valued at or going for around $20,000.00 per acre. Therefore, the total purchase price was $800,000.00.[1]

5. The source of the $800,000.00 purchase price was not essential to the transaction; what was essential was that I agreed to pay Darryl Harris $800,000.00 for the Subject Real Property.

6. After we had agreed to the purchase and sale of the Subject Real Property, I chose to pay the $800,000.00 purchase price by transferring $800,000.00 from my account with Trigon Group, Inc., ("Trigon") to Darryl Harris' Trigon account. At the time of the transfer, Darryl Harris did not object to the transfer of the $800,000.00 into his Trigon account. Darryl Harris did not demand or require that the only method of paying the $800,000.00 be a transfer from my Trigon account to his Trigon account. What was important to the purchase and sale agreement was that the purchase price was $800,000.00, not the form of the $800,000.00. Although I could have paid the $800,000.00 purchase price through various forms, I chose to pay the purchase price by transferring $800,000.00 from my Trigon account to Darryl Harris' Trigon account.

DATED this 9th day of February, 2011.

Duane L. Yost

SUBSCRIBED AND SWORN to before me this 9th day of February, 2011.

DOUGLAS R. NELSON NOTARY PUBLIC STATE OF IDAHO

Notary Public
Residing at: Idaho Falls, Idaho
Commission expires: 4.29.2011

[1] Forty (40) acres times $20,000.00 per acre equals $800,000.00.

CERTIFICATE OF SERVICE

I hereby certify that I served a true copy of the foregoing document upon the following this 10th day of February, 2011, by hand delivery, mailing with the necessary postage affixed thereto, facsimile, or overnight mail.

Kipp L. Manwaring
MANWARING LAW OFFICE
381 Shoup Avenue, Suite 210
Idaho Falls, ID 83402

[ ] Mailing
[✓] Hand Delivery
[ ] Fax: 523-9109
[ ] Overnight Mail

Wiley R. Dennert

L:\DRN\0260.491\Affidavit - Yost.2.wpd

Douglas R. Nelson - ISB# 1580
Brian T. Tucker - ISB# 5236
Wiley R. Dennert - ISB# 6216
NELSON HALL PARRY TUCKER, P.A.
490 Memorial Drive
P.O. Box 51630
Idaho Falls, ID 83405-1630
Telephone:(208) 522-3001
Facsimile: (208) 523-7254

Attorneys for The Bank of Commerce

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

DARRYL HARRIS and CHRISTINE HARRIS, husband and wife,

Plaintiffs,

v.

DUANE L. YOST and LORI YOST, husband and wife, DUANE L. YOST as Trustee of the DUANE L. YOST TRUST, THE BANK OF COMMERCE, an Idaho Corporation and JOHN DOES I-X,

Defendants.

Case No. CV-09-3488

REPLY IN SUPPORT OF THE BANK'S SECOND MOTION FOR SUMMARY JUDGMENT

THE BANK OF COMMERCE, an Idaho corporation,

Counterclaimant/Cross-claimant/Third-Party Claimant,

v.

DARRYL HARRIS and CHRISTINE HARRIS, husband and wife,

Counterdefendants,

and

DUANE L. YOST and LORI YOST, husband and wife, DUANE L. YOST as Trustee of the DUANE L. YOST TRUST, JOHN DOES I-X,

Crossdefendants,

and

HAMPSHIRE HOLDINGS, LLC,

Third-Party Defendant.

The Bank of Commerce (the "Bank") by and through its attorneys of record, hereby replies to the Harrises' Response in Opposition to the Bank's Second Motion for Summary Judgment as follows:

I. ARGUMENT

Darryl and Christine Harris (collectively the "Harrises") argue that the Bank is not a bona fide encumbrancer because it had actual, constructive or inquiry notice.[1] Digging deeper into the

[1] *See* Harrises' Response in Opposition to Bank of Commerce's Second Motion for Summary Judgment, dated February 8, 2011, p. 2, referring to their previously filed Response in Opposition to Defendant, Bank of Commerce's Motion for Summary Judgment, dated November 18, 2010.

Harrises' argument, it appears that they are claiming the Bank knew or should have known that Duane Yost ("Duane") was heavily invested with Daren Palmer ("Palmer") in Trigon Group, Inc. ("Trigon"); that Trigon was struggling financially, and perhaps was failing; that although Duane listed the forty (40) acres of Subject Property on his April 2008 financial statement to the Bank, the Harrises had not deeded those forty (40) acres to the Duane as of July 2008; that as of November 7, 2008, the Harrises were the title owners of the Subject Property; and that the Bank should have compared Darryl's forgery of Christine's name on the Corrected Quitclaim Deed with other documents the Bank had with Christine's real signature.

However, none of these claims by the Harrises set forth any relevant facts to support their argument that the Bank is not a good faith encumbrancer. For the Bank to fail to be a good faith lender, it would have had to have actual or constructive notice of both of the following: First, that Duane had used money from his Trigon account to purchase the Subject Property from the Harrises. Second, that Palmer was a fraud and that Trigon was a Ponzi scheme, and therefore, the money transferred by Duane from his Trigon account into Darryl's Trigon account was of little or no value. The Bank did not know, nor should it have known, either of these.

The following is what the Bank knew:

1. In the latter end of 2008, as a result of the world economic down turn, the Bank made efforts with several of its customers to secure unsecured loans with collateral. In order to do so, many of the loans were rewritten with modified terms such as extended payoff dates, different interest rates, etc. Romrell Aff., ¶ 7.

2. Duane represented that he owned the Subject Property. Aff. of Counsel (Manwaring), Exhibit "B", Romrell Depo. Tr., p. 13, ll. 9-17.

3. In approximately September 2008, Harris and Steve Crandall informed the Bank the Subject Property belonged to Duane. Summers Aff., ¶ 10.

4. At that time, Darryl and Steve Crandall told the Bank that the documents for the transfer of the Subject Property to Duane may not have been completed correctly and that they were in the process of making sure that the Bonneville County records reflected that the Subject Property was in Duane's name. Summers Aff., ¶ 12.

5. When the Harrises signed a deed of trust, the security was not for the Subject Property, but for the adjacent 40 acres that were owned by them. Summers Aff., ¶¶ 5-14. More specifically, on November 24, 2008, the Harrises secured a loan from the Bank to their sons (which was used to pay the Harrises for their sons' purchase of Harris Publishing) by signing a deed of trust for the middle 40 acres, not for the Subject Property which was the west 40 acres. Darryl Harris Depo. Tr., p. 48, l. 23 to p. 50, l. 10; p. 65, l. 4 to 66, l. 10.

6. At some point it was determined that the Harrises had not yet formally deeded the Subject Property to the Yosts. Until just recently, the Bank believed that both of the Harrises had executed the Corrected QuitClaim Deed on December 1, 2008, deeding the Subject Property to the Yosts.[2] The Corrected QuitClaim Deed was notarized by Robert Crandall, indicating that both Darryl and Christine had personally appeared before him and acknowledged to him that they had executed the Corrected QuitClaim Deed. The Corrected QuitClaim Deed was recorded in Bonneville County as Instrument No. 1317892 on December 2, 2008. Romrell Aff., ¶ 10;

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[2] Tom Romrell denies that he learned about the forgery until after November 1, 2010. Second Romrell Aff., ¶¶ 5-7. Darryl claims that sometime after learning about the Ponzi scheme on January 2, 2009, and the time he met with his attorney to file the Complaint, he told Tom Romrell he had signed Christine's name to the Corrected Quitclaim Deed. This is not a material factual dispute because under either version, the Bank did not know about the forgery until well after the Corrected Quitclaim Deed was recorded on December 2, 2008; Duane's two Deeds of Trust were recorded on December 17, 2008, and December 30, 2008; and Palmer's fraud was exposed on or after January 2, 2009.

Second Aff. Romrell, ¶ 7; Corrected QuitClaim Deed.

7. Duane's two Deeds of Trust which provided the Subject Property as security for his renewal loan from the Bank were recorded on December 17, 2008, and December 30, 2008 ("Deeds of Trust"). Morrison Aff., ¶ 7.

8. Romrell had a meeting on December 8, 2011, with several of the Trigon investors. Those investors had represented that their accountants had done due diligence regarding Trigon. Additionally, those investors represented to Romrell that Trigon had been caught up in the economic downturn that was exposing other large financial institutions, such as Lehman Brothers. Aff. of Counsel (Manwaring), Exhibit "B", Romrell Depo. Tr., p. 18, l. 13 to p. 20, l. 2. These investors also represented that Trigon had eight to ten million dollars available to return to its investors.[3] *Id.*, at p. 20, ll. 3-13. Even the Harrises' accountant, Steve Crandall, was working to get some updated financial statements to the Bank about where Duane was sitting financially. *Id.* at p. 20, ll. 14-24.

9. Duane had other non-Trigon assets the Bank was looking at to determine whether Duane would be able to repay his loans to the Bank, including cars, machinery, cargo trailers, real property in the Shadow Ridge subdivision, real property in the Waterstone division in Jefferson County, airport hangars in Palm Springs, and a large boat on Lake Mead. *Id.* at p. 28, ll. 8-12; p. 54, l. 12 to p. 56, l. 18.

The following is what the Bank did not know:

1. Duane did not tell anyone at the Bank what money he had used to purchase the

[3] This information is not provided to prove the truth of the matter asserted, specifically that Trigon was truly only suffering from the economic downturn or that it actually had eight to ten million dollars to return to investors. Rather this evidence is provided to give foundation and understanding to the Bank's actions and beliefs, based on the representations that were made to the Bank about Trigon.

Subject Property, either before he signed the Deeds of Trust or prior to learning that Trigon had been fraudulent. More specifically, when Duane was in the process of obtaining the renewal loan, he did not mention to anyone at the Bank that the $800,000 that he had used in the Fall of 2007 to purchase the Subject Property was a transfer of $800,000 from his Trigon account to Darryl's Trigon account.[4] Yost Aff., ¶ 7; Summers Aff., ¶ 15; Romrell Aff., ¶ 17.

2. At all relevant times, the Bank did not know that Darryl had signed Christine's name on the Corrected QuitClaim Deed. Nor did the Bank know that the notary public, Robert Crandall, had notarized the Corrected QuitClaim Deed even though neither Darryl nor Christine appeared before him to acknowledge their purported signatures. Second Romrell Aff., ¶¶ 5-7; Darryl Harris Depo. Tr., p. 75, ll. 3-22. The Bank did not know that Darryl had told Christine that he had signed her name on the Corrected QuitClaim Deed because the Harrises failed to tell anyone else about the forgery. Christine Harris Depo. Tr., p.54, ll. 20-23; p. 55, l. 14 to p. 56, l. 17; Darryl Harris Depo. Tr., p. 71, l. 21 to p. 72, l. 2.

3. Before the January 12, 2009, telephone call from Yost to Tom Romrell ("Romrell"), the Bank had no idea that Palmer was dishonest nor that the Trigon investment scheme was a hoax. Following that telephone call, Romrell heard others refer to Trigon as a Ponzi scheme, but neither Romrell nor the Bank had any prior knowledge that Trigon was a Ponzi scheme. Romrell Aff., ¶ 15; Yost Aff., ¶ 6.

Other important information regarding the Bank's knowledge, or lack thereof, regarding Palmer and Trigon, is that the Bank did not have a close relationship to either Palmer or Trigon.

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[4] It is not common for a lender to ask a borrower where the borrower got the money to originally purchase the property that is subsequently being used as security for a loan.

The Bank has never made any loans to Palmer or Trigon. Romrell Aff., ¶ 12. Furthermore, the Bank has never held any accounts owned by Palmer or Trigon. *Id.* at ¶ 13.

Significantly, Darryl and the other investors felt they had no reason to doubt Palmer or Trigon. Darryl had his accountant check into Trigon and Palmer. Darryl and his accountant were satisfied that Palmer was legitimate. Darryl Harris Depo. Tr., p. 77, ll. 1-4; p. 78, l. 5 to p. 79, l. 12. Darryl trusted Palmer and thought he was a "financial trading market genius". *Id.* at p. 77, l. 11-18. Despite the very high rate of return that Palmer was paying investors, Darryl did not have any doubts that maybe Trigon was a little too good to be true. *Id.* at p. 77, l. 19 to p. 78, l. 4. Sometime in December 2008, Darryl had heard that Palmer or Trigon had written checks which had bounced. *Id.* at p. 88, ll. 5-13; p. 92, ll 3-10. Even when the Trigon and Palmer investments started to sour or not look like they were as good as they were during the last half of 2008, Darryl and the other investors thought it was all related to the downturn in the market because the stock market had taken huge hits. *Id.* at p. 81, l. 14 to p. 82, l. 11. None of the investors suspected that the losses were really because of Palmer's fraud. *Id.* Even when Darryl and some of the other investors met with Palmer on December 15, 2008, and were told by Palmer there was only perhaps fifteen percent (15%) of the value left in Trigon, Darryl believed it was because of the market downturn, not because of any fraud committed by Palmer. *Id.* On December 15, 2008, when he learned that Trigon had lost so much money, Darryl just accepted it because everybody was losing money in the stock market and in real estate values. *Id.* at p. 84, ll. 20-25. Darryl was completely shocked to learn on January 2, 2009, that Palmer and Trigon had been frauds. *Id.* at p. 84, l. 14 to p. 85, l. 3. As far as Darryl knows, everyone was surprised to learn of Palmer's fraud. *Id.*

Darryl testified that he does not have any information, facts or evidence that the Bank knew about Palmer's fraud before Darryl learned about it on January 2, 2009. Darryl Harris Depo. Tr., p. 92, ll. 21-24; p. 93, l. 24 to p. 94, l. 3.

If Darryl and all the other investors did not suspect Palmer of fraud until he confessed on January 2, 2009, there is no reason to believe that the Bank should have known of the fraud until on or after January 2, 2009. If the investors who had investigated Palmer and Trigon were fooled, then it is even less likely that the Bank, who had no loans or accounts with Palmer, would have been put on notice of the Ponzi scheme before Duane told Romrell about the fraud during their telephone conversation on January 12, 2009.

Recently, the Idaho Supreme Court discussed the lack-of-notice requirement for a purchaser to be a bona fide purchaser.

> "[W]hen one is purchasing land, the rule of *caveat emptor* applies and ... 'whatever is notice enough to excite the attention of a man of ordinary prudence and prompt him to further inquiry, amounts to notice of all such facts as a reasonable investigation would disclose.'" *Hunter v. Shields,* 131 Idaho 148, 153, 953 P.2d 588, 593 (1998) *(quoting Hill v. Fed. Land Bank,* 59 Idaho 136, 141, 80 P.2d 789, 791 (1938)). ...
>
> ...
>
> In order to claim the protection of being a BFP, a party "must show that at the time of the purchase he paid a valuable consideration and upon the belief and the validity of the vendor's claim of title without notice, actual or constructive, of any outstanding adverse rights of another." *Imig v. McDonald,* 77 Idaho 314, 318, 291 P.2d 852, 855 (1955).

Weitz v. Green, 148 Idaho 851, 858-59, 230 P.3d 743, 750-51 (2010).

When the Bank secured Duane's renewal loans with the Subject Property in November and December 2008, it had no notice, actual or constructive, that the Harrises would subsequently claim that the Corrected Quitclaim Deed was invalid because the $800,000.00 transferred from

Duane's Trigon account to Darryl's Trigon account was part of a fraudulent Ponzi scheme orchestrated by Palmer. Therefore, at the time the Deeds of Trust were signed and recorded, the Bank was without notice, actual or constructive, of any outstanding adverse rights of the Harrises in the Subject Property.[5]

The Harrises also appear to argue that the Bank should have known that Christine had not signed the Corrected QuitClaim Deed because the Bank had signature cards with Christine's real signature.[6] Therefore, the Harrises imply that the Bank should have known about Christine's claim that the Corrected Quitclaim Deed is invalid under Idaho Code § 32-912.

Courts have held that a person may rely on the representation made by a notary public. *See Immerman v. Ostertag,* 199 A.2d 869, 873 (1964) ("[Mortgagee] had a right to rely, and did in fact rely, upon [notary's] certification [that the mortgagors personally appeared before the notary and signed the loan documents] when making the loan."); *Ameriseal of North East Florida, Inc. v. Leiffer,* 673 So.2d 68, 69-70 (1996) ("Indeed, being able to rely on documents is the purpose of having them notarized.").

Romrell testified that "[t]he purpose of a signature card at the Bank is not to verify signatures on notarized documents." Second Romrell Aff., ¶ 8

The Harrises have not pointed to any authority to support their argument that the Bank

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[5] As the Harrises believed, at least until January 2, 2009, that they had been fully paid $800,000.00 for the Subject Property, they too were apparently without any notice they would subsequently claim an interest in those 40 acres.

[6] Despite this argument, there is no evidence that even if the Bank had compared Christine's signature on other documents at the Bank with the Corrected Quitclaim Deed it would have discovered the forgery. Such a discovery is mere speculation.

should have compared Christine's signature cards on file at the Bank with the purported signature of Christine on the Corrected QuitClaim Deed.

Instead, the Bank had the right to rely on the signatures on the Corrected QuitClaim Deed because the document had been notarized by Robert Crandall. Furthermore, even though Darryl told Christine sometime around the middle of December 2008, that he had forged her name on the Corrected QuitClaim Deed, neither Darryl nor Christine told anyone else, let alone anyone at the Bank, about the forgery. It is unbelievable that the Harrises are now claiming that the Bank should have known about the forgery back in December 2008. None of the facts support such a claim. Furthermore, the Harrises should be estopped from claiming that the Bank is not a bona fide lender because it had constructive or inquiry notice that Darryl had forged his wife's name on the Corrected QuitClaim Deed.

Because the Bank was a bona fide lender for value without notice of any adverse claims to the Subject Property, its Deeds of Trust should be foreclosed with the Bank taking the highest priority in that property and the proceeds from the sale of the property being applied first to Duane's obligations to the Bank.

II. CONCLUSION

The Bank is a bona fide lender for value. Therefore, the Bank's Deeds of Trust encumbering the Subject Property are superior to any claims made by the Harrises.

This Court should deny the Harrises' Motion for Summary Judgment and should grant the Bank summary judgment by dismissing the Harrises' Complaint and entering an order allowing the Bank to foreclose on the Subject Property and declaring that the Bank's priority rights are superior to all other claimed interests.

In addition, to the extent there is a deficiency following the foreclosure sale, then the Court should enter a deficiency judgment against the Yosts in an amount to be calculated using the Affidavit of Michael Morrison.

DATED this 17th day of February, 2011.

Douglas R. Nelson

CERTIFICATE OF SERVICE

I hereby certify that I served a true copy of the foregoing document upon the following this 17th day of February, 2011, by hand delivery, mailing with the necessary postage affixed thereto, facsimile, or overnight mail.

Kipp L. Manwaring
MANWARING LAW OFFICE
381 Shoup Avenue, Suite 210
Idaho Falls, ID 83402

[✓] Mailing
[ ] Hand Delivery
[✓] Fax: 523-9109
[ ] Overnight Mail

Wiley R. Dennert

L:\DRN\0260.491\Summary Judgment 2 - Reply.wpd

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

DARRYL HARRIS and CHRISTINE HARRISS, husband and wife, Plaintiffs, vs. DUANE L. YOST and LORI YOST, husband and wife, DUANE L. YOST as Trustee of the DUANE L. YOST TRUST, THE BANK OF COMMERCE, and Idaho Corporation and JOHN DOES 1-X, Defendants.	Case No. CV-09-3488 **MEMORANDUM DECISION AND ORDER RE: MOTIONS FOR SUMMARY JUDGMENT**

I. FACTUAL AND PROCEDURAL BACKGROUND

During September and October 2007, Darryl and Christine Harris entered into a real estate transaction with Duane and Lori Yost. The Harrises agreed to sell and the Yosts agreed to buy approximately forty acres of land (hereafter "Subject Property") for a purchase price of $800,000.00. When the Harrises and the Yosts were discussing the transaction, both parties believed there was money in their respective accounts with Trigon Group (hereafter "Trigon"), a company owned and operated by Daren Palmer. At the Yosts' direction, on or about October 1, 2007, Trigon transferred $800,000.00 from the Yosts' account to the Harrises' account.

The transaction between the Harrises and the Yosts related to a proposed joint venture wherein the Yosts would buy half of an eighty acre plot owned by the Harrises. The land would then be transferred to and developed by the proposed joint venture. Steve Crandall, Mr. Harris's accountant, organized Triad-Harris, LLC (hereafter "Triad-Harris") to be the development

company that would hold title to the land. The promoters of Triad-Harris never executed any formal written agreement.

In September 2008, Mr. Harris and Mr. Crandall informed Trent Summers, a manager and vice president of the Bank of Commerce (hereafter "Bank"), that the Subject Property was owned by Mr. Yost.

In November 2008, Mr. Yost was experiencing financial difficulties and had loans with the Bank that were due and owing. On November 21, 2008, the Yosts executed a deed of trust naming the Bank as beneficiary and identifying the Subject Property as security for a $1,000,000.00 renewal loan as well as any other debt owed by Mr. Yost to the Bank. Regarding the renewed loan, the Bank agreed to extend the maturity date one year, and Mr. Yost agreed to pay additional interest and loan processing fees and to provide collateral. The deed of trust to the Bank was recorded on November 21, 2008, and re-recorded on December 17, 2008, to correct an error in the legal description.

On November 25, 2008, Mr. Harris executed a quitclaim deed (hereafter "First Quitclaim Deed") purportedly transferring the Subject Property to the Duane L. Yost Trust. However, because the Subject Property was community property and Mrs. Harris hand not signed the First Quitclaim Deed, it was presumed to be invalid. On December 1, 2008, a second quitclaim deed (hereafter "Corrected Quitclaim Deed") was executed and contained both Mr. and Mrs. Harris's signatures. That deed was recorded on December 2, 2008, in Bonneville County.

The Harrises now claim that Mr. Harris forged his wife's signature on the Corrected Quitclaim Deed. Mr. Harris testified that Mr. Yost came to him in a state of panic because he needed the Corrected Quitclaim Deed to satisfy the Bank. Mr. Harris said he could not find his wife at the time, so he forged her signature. Mrs. Harris admits her husband told her about the

forgery sometime in December 2008, but she was okay with it because he "knew what he was doing" and she "trusted him." Mrs. Harris Deposition at 58. After Mr. Harris signed his name and his wife's name on the Corrected Quitclaim Deed, he gave it to Robert Crandall and instructed him to notarize it and give it to Mr. Yost. Robert Crandall notarized the Corrected Quitclaim Deed, indicating that both Mr. and Mrs. Harris had personally appeared before him and acknowledged to him that they executed the deed—when in fact Mrs. Crandall had not.

On December 24, 2008, the Yosts executed another deed of trust naming the Bank as beneficiary and identifying the Subject Property as subject to that deed of trust. That deed of trust was recorded in Bonneville County on December 30, 2008.

On December 31, 2008, Mr. Palmer held a meeting with Mr. Crandall, David Taylor and Mr. Taylor's accountant. Mr. Palmer confessed to them that his Trigon investments were a fraud. Mr. Harris received that information on January 2, 2009.

On January 12, 2009, Thomas Romrell, the President and CEO of the Bank, received a telephone call from Mr. Yost. Mr. Yost stated that Mr. Palmer had admitted the Trigon investment scheme was a hoax and that the Department of Finance was investigating Mr. Palmer and Trigon. At that point, Mr. Yost and Mr. Harris were both aware that their Trigon accounts did not have the funds they previously believed existed.

On June 12, 2009, the Harrises filed a complaint seeking the return of the Subject Property or a Sherriff's sale of the Subject Property with the proceeds being paid to them first. In their complaint, the Harrises alleged that both Mr. and Mrs. Harris had executed the Corrected Quitclaim Deed.

On July 15, 2009, the Bank filed a counterclaim, cross claim, and third-party claim seeking foreclosure of its two deeds of trust and seeking an order declaring its priority rights in the property to be superior to all other claimed interests.

On October 7, 2009, the Harrises filed a motion for a default judgment. On October 16, 2009, this Court granted the Harrises' motion and entered a Judgment by Default against the Yosts and the Duane L. Yost Trust in the amount of $987,610.40.

On January 26, 2011, the Harrises filed a motion for summary judgment (hereafter "Harrises' Motion"). On January 27, 2011, the Bank filed its own motion for summary judgment (hereafter "Bank's Motion"). On February 10, 2011, the Bank filed a brief in opposition to the Harrises' Motion. On February 11, 2011, the Harrises filed a brief in opposition to the Bank's Motion. On February 17, 2011, the Bank filed a reply brief in support of its Motion. On February 18, 2011, the Harrises filed a reply brief in support of their Motion (hereafter "Harrises' Reply"). This Court heard oral argument on February 24, 2011.

II. STANDARD OF ADJUDICATION

A motion for summary judgment "shall 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 judgment as a matter of law." I.R.C.P. 56(c). *See Grover v. Smith*, 137 Idaho 247, 46 P.3d 1105; *Rockefeller v. Grabow*, 136 Idaho 637, 39 P.3d 577 (2002). The burden is, at all times, on the moving party to demonstrate the absence of a genuine issue of material fact. *Jordan v. Beeks*, 135 Idaho 586, 21 P.3d 908 (2001).

The United States Supreme Court, in *Celotex Corp. v. Catrett*, 477 U.S. 317, 106 S.Ct. 2548 (1986), stated:

> Of course, a party seeking summary judgment always bears the initial responsibility of informing the district court of the basis for its motion, and identifying those portions of "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any," which it believes demonstrate the absence of a genuine issue of material fact. But unlike the Court of Appeals, we find no express or implied requirement in Rule 56 that the moving party support its motion with affidavits or other similar materials *negating* the opponent's claim. On the contrary, Rule 56(c), which refers to "the affidavits, *if any*" (emphasis added), suggests the absence of such a requirement. And if there were any doubt about the meaning of Rule 56(c) in this regard, such doubt is clearly removed by Rules 56(a) and (b), which provide the claimants and defendants, respectively, may move for summary judgment "*with or without supporting affidavits*" (emphasis added). The import of these subsections is that, regardless of whether the moving party accompanies its summary judgment motion with affidavits, the motion may, and should, be granted so long as whatever is before the district court demonstrates that the standard for the entry of summary judgment, as set forth in Rule 56(c), is satisfied. One of the principal purposes of the summary judgment rule is to isolate and dispose of factually unsupported claims or defenses, and we think it should be interpreted in a way that allows it to accomplish this purpose.

Id. at 323, 106 S.Ct. at 2553 (alterations in original).

When assessing a motion for summary judgment, all controverted facts are to be liberally construed in favor of the non-moving party. *Dodge-Farrar v. American Cleaning Services, Co.*, 137 Idaho 838, 54 P.3d 954 (Ct. App. 2002). In ruling on a motion for summary judgment, a court is not permitted to weigh the evidence to resolve controverted factual issues. *Meyers v. Lott*, 133 Idaho 846, 993 P.2d 609 (2000). Liberal construction of the facts in favor of the non-moving party requires the court to draw all reasonable factual inferences in favor of the non-moving party. *Farnworth v. Ratliff*, 134 Idaho 237, 999 P.2d 892 (2000); *Madrid v. Roth*, 134 Idaho 802, 10 P.3d 751 (Ct. App. 2000).

If the action will be tried by the court without a jury, an exception to this rule applies. In *Riverside Development Co. v. Ritchie*, 103 Idaho 515, 519-20, 650 P.2d 657, 661-62 (1982), our Supreme Court held that summary judgment is appropriate despite the possibility of conflicting inferences if the evidentiary facts are not disputed and the trial court rather than a jury will be the

trier of facts. Moreover, in such a situation, the judge is not required to draw inferences in favor of the party opposing the motion for summary judgment. *Id.* "Conflicting evidentiary facts, however, must still be viewed in favor of the nonmoving party." *Banner Life Ins. Co. v. Mark Wallace Dixson Irrevocable Trust*, 147 Idaho 117, 124, 206 P.3d 481, 488 (2009).

The Idaho appellate courts have followed the United States Supreme Court's decision in *Celotex*, which stated:

> Summary judgment procedure is properly regarded not as a disfavored procedural shortcut, but rather as an integral part of the Federal Rules as a whole, which are designed "to secure the just, speedy and inexpensive determination of every action." ...Rule 56 must be construed with due regard not only for the rights of persons asserting claims and defenses that are adequately based in fact to have those claims and defenses tried to a jury, but also for the rights of persons opposing such claims and defenses to demonstrate in the manner provided by the Rule, prior to trial, that the claims and defenses have no factual basis.

Id. at 327, 106 S.Ct. at 2555 (citations omitted); *see Win of Michigan, Inc. v. Yreka United, Inc.*, 137 Idaho 747, 53 P.3d 330 (2002); *Thomson v. City of Lewiston*, 137 Idaho 473, 50 P.3d 488 (2002).

A party against whom a summary judgment is sought cannot merely rest on his pleadings but, when faced with affidavits or depositions supporting the motion, must come forward by way of affidavit, deposition, admissions or other documentation to establish the existence of material issues of fact, which preclude the issuance of summary judgment. *Anderson v. Hollingsworth*, 136 Idaho 800, 41 P.3d 228 (2001); *Baxter v. Craney*, 135 Idaho 166, 16 P.3d 263 (2000). The non-moving party's case, however, must be anchored in something more than speculation, and a mere scintilla of evidence is not enough to create a genuine issue of fact. *Wait v. Leavell Cattle, Inc.*, 136 Idaho 792, 41 P.3d 220 (2001).

The moving party is entitled to judgment when the non-moving party fails to make a sufficient showing as to the essential elements to which that party will bear the burden of proof

at trial. *Primary Health Network, Inc. v. State, Dept. of Admin.*, 137 Idaho 663, 52 P.3d 307 (2002). Facts in dispute cease to be "material" facts when the plaintiff fails to establish a prima facie case. *Post Falls Trailer Park v. Fredekind*, 131 Idaho 634, 962 P.2d 1018, (1998). In such a situation, there can be no genuine issue of material fact, since a complete failure of proof concerning an essential element of the non-moving party's case necessarily renders all other facts immaterial. *Id.*

III. DISCUSSION

Attempting to establish either their ownership of or a priority interest in the Subject Property, the Harrises' Complaint alleges the following theories: vendor's lien, equitable mortgage, lack of consideration, failure of consideration, mutual mistake, quiet title, deed as security, and foreclosure. The Bank argues that each of those theories fail against the Bank because the Bank is a bona fide lender for value, and as such, it has a superior interest in the Subject Property. Thus, the Bank seeks to foreclose its deeds of trust and apply the proceeds of the sale to Mr. Yost's indebtedness to the Bank.

The Harrises argue they are entitled to summary judgment because the Corrected Quitclaim Deed is void due to lack of consideration, failure of delivery, and violation of Idaho Code § 32-912. The Harrises argue the Bank is not a bona fide lender, and even if it is, the Bank has no interest in the Subject Property because the Corrected Quitclaim Deed is void.

This Court will not address the validity of the First Quitclaim Deed because neither party asserts it is valid. The Court will first address whether the Corrected Quitclaim Deeds is void. Second, the Court will address whether the Bank is a bona fide lender.

A. Validity of the Corrected Quitclaim Deed

1. Consideration

The Harrises claim there was "an absolute lack of consideration from Yost to the Harrises for either the first quitclaim deed or the corrected quitclaim deed," and as a result, "both quitclaim deeds are void." Harrises' Motion at 6. The Harrises assert that the only consideration that could have supported the agreement between them and Mr. Yost was actual payment, and that Mr. Yost's promise to pay, or assurance that he had paid, does not constitute consideration. The Harrises claim that parol evidence is admissible to prove the recital of consideration in the Corrected Quitclaim Deed is untrue. They also claim they were fraudulently induced into executing the deed.

The Bank argues that the Corrected Quitclaim Deed unambiguously recites that the transfer of the Subject Property was made for good and valuable consideration and that parol evidence is inadmissible to show otherwise. The Bank argues that even if parol evidence were admissible, the Harrises have not introduced any parol evidence that would prove a lack of consideration. The Bank concedes there may have been a *failure* of consideration but not a *lack* of consideration.

a. Parol Evidence

The Corrected Quitclaim Deed provides as follows: "**Darryl Harris and Christine Harris,** Husband and Wife, Grantors, of Idaho Falls, Idaho hereby RELEASES, and Forever QUITCLAIMS to **Duane Yost and Lori Yost,** Grantees, for good and valuable consideration the following described tract of land . . . ."

In *Hall v. Hall*, 116 Idaho 483, 888 P.2d 255 (1989), the Idaho Supreme Court stated,

> Where possible, the court should give effect to the intention of the parties to a deed. Where the language of a deed is plain and unambiguous the intention

> of the parties must be determined from the deed itself, and parol evidence is not admissible to show intent. Oral and written statements are generally inadmissible to contradict or vary unambiguous terms contained in a deed. . . . Where, as here, the consideration clause clearly recites that the transfer was made "For Value Received," parol evidence is not admissible to contradict the deed by attempting to show the transfer was in part a "gift" rather than "for value."

Id. at 484, 888 P.2d at 256. Our Supreme Court, however, has also stated that the parol evidence rule is inapplicable if the party challenging the instrument is not trying to vary the terms of the instrument, but rather trying to prove that a fact recited in the instrument is untrue. *See Treasure Valley Bank v. Butcher*, 117 Idaho 974, 793 P.2d 206 (1990).

> Initially we note that "[a] written instrument is presumptive evidence of a consideration." I.C. § 29-103; *see also W.L. Scott, Inc. v. Madras Aerotech, Inc.*, 103 Idaho 736, 653 P.2d 791 (1982). "Once this presumption arises, the party seeking to assert the affirmative defense of lack of consideration must establish that defense by a preponderance of the evidence." *Id.* at 741, 653 P.2d at 796. The presumption may be rebutted by any substantial evidence. It has been held, for example, "where a deed contains recitals of fact purporting to evidence receipt or acknowledgement of payment, such recitals may be challenged as untrue, and parol evidence is admissible for that purpose. The law uniformly allows the admission of parol evidence to prove that a recital of fact is untrue." *Vanoski v. Thomson*, 114 Idaho 381, 383, 757 P.2d 244, 246 (Ct. App. 1988).

McCandless v. Carpenter, 123 Idaho 386, 388-89, 848 P.2d 444, 446-47 (Ct. App. 1993).

This Court concludes parol evidence is admissible to prove that the recital of "good and valuable consideration" in the Corrected Quitclaim Deed is untrue.

b. Failure of Lack of Consideration

The Harrises claim that because no actual funds existed in Mr. Yost's Trigon account, no actual funds were transferred to Mr. Harris, and the Corrected Quitclaim Deed was therefore not supported by consideration.

The Bank asserts that the problem of insufficient or nonexistent funds in Mr. Yost's Trigon account, at best, may constitute a failure of consideration, but does not constitute a lack of consideration. Further, the Bank asserts that even if there was a failure of consideration, the

quitclaim deed would be voidable, not void, and the Bank would still take priority as a bona fide lender.

> The term "failure of consideration" includes instances where a proper contract was entered into when the agreement was made, but because of supervening events, the promised performance fails, rendering the contract unenforceable. Failure of consideration generally refers to failure of performance of a contract. "Failure" of consideration is to be distinguished from "want" or "lack" of consideration, which refers to instances where no consideration ever existed to support the contract, rendering the contract invalid from the beginning.

World Wide Lease, Inc. v. Woodworth, 111 Idaho 880, 884-85, 728 P.2d 769, 783-84 (Ct. App. 1986) (internal citations omitted).

"[A]n accord and satisfaction must be founded on a proper consideration, consisting of some benefit to the creditor or detriment to the debtor which would support a simple contract." 1 C.J.S. Accord and Satisfaction § 11 Consideration.

> Consideration for an accord and satisfaction exists . . . where something substantial which the debtor is not bound by law to do is done by him or her, or where he or she abstains, at the request of the creditor, from doing something which he or she has a right to do. It may consist in the performance of an act, or even the giving of a promise. The delivery of specific property, of whatever value, is sufficient consideration, as is the substitution of a certainty for an uncertainty, the acknowledgment of a disputed right or title asserted by the creditor, or the waiver or abandonment of a claim being made in good faith against the other party, giving security for a debt or doubtful claim, or promissory notes for the amount of an open account.

Id. at § 12 Consideration—What Constitutes Consideration (footnotes omitted).

In this case, as evidenced by the behavior of the parties, Mr. Yost promised to pay $800,000.00 to Mr. Harris, and Mr. Harris agreed to transfer the Subject Property to Mr. Yost. Prior to the agreement, Mr. Yost had no legal or contractual duty to pay $800,000.00 to Mr. Harris, and Mr. Harris had no legal or contractual duty to transfer property to Mr. Yost. The Harrises' quarterly account statement from Trigon in December 2007 reflects an $800,000.00 transfer from Mr. Yost on October 1, 2007. Regardless of whether those funds were actually

accessible at that time, the right to withdraw—or attempt to withdraw—those funds transferred from Mr. Yost to Mr. Harris. In exchange, Mr. Harris executed the Corrected Quitclaim Deed.

When Mr. Harris transferred the Subject Property to Mr. Yost, both men believed that the $800,000.00 existed and had been transferred to the Harrises. There is substantial evidence that the Harrises received, or had access to, at least some of the $800,000.00. The Harrises made the following withdrawals from his Trigon account subsequent to October 1, 2007, the date when Mr. Yost transferred the money to Mr. Harris' Trigon account: $20,000.00 on October 8, 2007; $18,000.00 on October 16, 2007; $85,000.00 on December 13, 2007; $200,000.00 on July 14, 2008; and $40,000.00 on September 19, 2008.

It is possible that some of the money the Harrises withdrew after October 1, 2007, came from Mr. Yost's $800,000.00 transfer into the Harrises' Trigon account. Even if that is untrue, it appears that the Harrises had access to the money and could have withdrawn some or all of it up until the fall of 2008. Mr. Harris stated that he had no knowledge of any Trigon checks bouncing until late December 2008. Even if Mr. Yost's Trigon account was empty when he made the transfer, that deficiency is only relevant to his ability to perform on his promise to pay; it has noting to do with consideration.

The Harrises would like to construe the purchase and sell agreement as some kind of unilateral agreement wherein the land transfer would only become effective, or maintain its effectiveness, if the money transfer from Mr. Yost was valid and continued to be valid indefinitely. Such a proposition would require unconventional application of contract law principles. The Harrises supplement their argument by alleging they were fraudulently induced into the agreement.[1] Mr. Yost and Mr. Harris both believed the funds existed at the time of

[1] Fraud in the inducement is a defect, which if proved would render the deed voidable, meaning the deed could not be set aside as against a bona fide purchaser. *See Blaise v. Ratliff*, 672 S.W.2d 683 (Mo. App. 1984). Fraud in the

transfer, and they carried that belief until the end of December 2008. The fraud of Mr. Palmer is only tangentially related to the purchase and sell agreement. Mr. Palmer had nothing to do with the agreement between the Harrises and the Yosts. Under no construction of the facts can this Court conclude the Yosts fraudulently induced the Harrises into executing the Corrected Quitclaim Deed.

It would be improper for this Court to conclude the contract is void simply because the party who promises to pay, and who *attempts to pay in good faith*, later discovers that his funds were insufficient—regardless of the reason for the deficiency. In such a situation, the Harrises would retain their right to payment and enforcement of the contract, but the contract would not be void. Thus, this Court concludes based upon the facts and authority discussed above the Corrected Quitclaim Deed was not void due to a lack of consideration in the purchase and sell agreement.

The evidence before this Court is insufficient to draw any conclusion regarding the actual value of Mr. Yost's attempt to transfer $800,000.00. While that question may be relevant to the *failure* of consideration issue, this Court need not address the issue in light of its conclusion below regarding the Bank's status as a bona fide lender.

2. Delivery

The Harrises claim that title to the Subject Property never passed to Mr. Yost because delivery of the deed was "unquestionably conditional on payment," and Mr. Harris "agreed to sign and deliver the corrected quitclaim deed only upon the assurance of funding." Harrises' Motion at 11-12.

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factum (i.e., fraud of such a nature that the grantor does not realized the document her or she is signing is a deed) would render the deed void. *See Nixon v. Nixon*, 132 S.E.2d 590 (N.C. 1963). To the extent the Harrises allege fraud in the factum, there is no evidence to support such a claim.

> A deed "does not take effect as a deed until delivery with intent that it shall operate. The intent with which it is delivered is important. This restricts or enlarges the effect of the instrument." *Bowers v. Cottrell*, 15 Idaho 221, 228, 96 P. 936, 938 (1908) (internal quotations omitted). In addition, "[e]ven where the grantee is in possession of the deed, though that may raise a presumption of delivery, still it may be shown by parol evidence that a deed in possession of the grantee was not delivered." *Id.* (internal quotations omitted). The "controlling element in the question of delivery" is the intention of the grantor and grantee. *Id.* "The question of delivery is one of intention, and the rule is that a delivery is complete when there is an intention manifested on the part of the grantor to make the instrument his deed." *Id.* (internal quotations omitted). "[T]he real test of the delivery of a deed is this: Did the grantor by his acts or words, or both, intend to divest himself of title? If so, the deed is delivered. *Estate of Skvorak*, 140 Idaho 16, 21, 89 P.3d 856, 861 (2004).

Barmore v. Perrone, 145 Idaho 340, 344-45, 179 P.3d 303, 307-08 (2008).

In this Case, the Yosts are in possession of the Corrected Quitclaim Deed, and there is a presumption of delivery. Regarding Mr. Harris's intent to deliver the deed, the question is not simply whether Mr. Harris intended a conditional delivery. The question, rather, is whether Mr. Harris manifested such intent by his acts and words. Although there is evidence that Mr. Harris wanted to be paid in full—which is highly typical—there is no evidence of words or conduct by Mr. Harris that would lead anyone to question the immediate effectiveness and validity of the deed at the time Mr. Harris executed it and delivered it to Mr. Yost.

Furthermore, the Harrises concede that Mr. Yost provided "assurance of available funds to complete the transaction." Harrises' Reply at 3. By virtue of the fact that Mr. Harris executed the deed and gave it to Mr. Yost, it is apparent that Mr. Harris relied on Mr. Yost's assurance of adequate funds. The Harrises, however, believe that Mr. Yost's assurance was "fraudulent" and the fraud negates Mr. Harrises' intent to deliver.

As stated above, Mr. Yost was not the perpetrator of fraud. There is no evidence that Mr. Yost transferred the $800,000.00 in bad faith. When Mr. Harris delivered the deed, both he and Mr. Yost believed the funds existed. Even if the funds did not exist at that time, it was the fraud

of a third party that undermined Mr. Yost's source of funding. Mr. Palmer's fraudulent scheme was not exposed until approximately one year after Mr. Yost transferred the funds and one month after Mr. Harris executed the Corrected Quitclaim Deed.

The Harrises have not presented any evidence to rebut the presumption of delivery regarding the Corrected Quitclaim Deed.

3. § 32-912

The Harrises argue that because Mr. Harris forged his wife's signature on the Corrected Quitclaim Deed, that deed is void under Idaho Code § 32-912.

The Bank asserts the Harrises should be estopped from claiming the Corrected Quitclaim Deed is void under § 32-912.

Section 32-912 sets out the general rule that the conveyance of community real property is void without the written consent of both spouses. *See* § 32-912.

"Estoppel is a recognized exception to the spousal joinder requirement of I.C. § 32-912 where the conduct of the non-consenting spouse is consistent with the existence and validity of the disputed contract." *Lovelass v. Sword*, 140 Idaho 105, 108, 90 P.3d 330, 333 (2004).

> "While it is true that a contract to convey community real estate is void if not signed and acknowledged by both the husband and wife under this statute, this is not an inexorable rule," *Tew v. Manwaring*, 94 Idaho 50, 53, 480 P.2d 896, 899 (1971), and "conduct from which acquiescence can be inferred may be sufficient to establish an estoppel." *Calvin v. Salmon River Sheep Ranch*, 104 Idaho 301, 305, 658 P.2d 972, 976 (1983). Further, a non-consenting spouse's "failure to participate in the negotiations is not determinative of the issue of estoppel." *Id.*
>
> . . . .
>
> "[E]ven if an instrument lacks an acknowledgement of a spouse's signature, the spouse will be deemed to have waived the defect if his or her conduct is consistent with the existence and validity of the instrument." *Lowry v. Ireland Bank*, 116 Idaho 708, 711, 779 P.2d 22, 25 (Ct. App. 1989) (citing *Tew*, 94 Idaho at 54, 480 P.2d at 900).

Id. at 109, 90 P.3d at 334.

Mrs. Harris stated she knew that her signature was required on any deed that transferred property in which she had a community interest. Mrs. Harris admits her husband told her in December 2008, that he had forged her signature on the Corrected Quitclaim Deed. Mr. Harris also testified that he told his wife, approximately two weeks after signing the Corrected Quitclaim Deed, that he had forged her signature. When Mrs. Harris learned of the forgery, she was not bothered by it, stating she trusted her husband and was okay with the fact that he forged her signature. Christine Harris Deposition at 58. Although there is some doubt about the extent of Mrs. Harris's knowledge regarding the purpose of the transaction with Mr. Yost, she unquestionably had some knowledge of it, and she knew that Mr. Yost had transferred $800,000.00 into the Harrises' Trigon account. The fact that Mrs. Harris did not participate in negotiating the transaction does not negate the evidence of her acquiescence to it.

In June 2009, the Harrises filed their complaint and other pleadings in this action, which allege that they both signed the Corrected Quitclaim Deed. The only conduct by Mrs. Harris that has been inconsistent with the existence and validity of the Corrected Quitclaim Deed has arisen recently as the Harrises have sought to use the forgery as a means of defeating the Bank's interest by voiding the Corrected Quitclaim Deed.

The Harrises should be estopped from invalidating the Corrected Quitclaim Deed based on the forgery of Mrs. Harris's name by Mr. Harris.

B. Bona Fide Lender

The Bank asserts it is a bona fide lender for value, and its status as such gives it priority over any interest the Harrises may have in the Subject Property.

The Harrises assert the Bank had notice that Mr. Yost paid for the Subject Property with Trigon funds and that Trigon was having problems. Based on the Bank's alleged knowledge of those facts, the Harrises assert the Bank cannot be a bona fide lender.

Idaho Code § 55-812 provides, "Every conveyance of real property . . . is void as against any subsequent purchaser or mortgagee of the same property, or any part thereof, in good faith and for a valuable consideration, whose conveyance is first duly recorded."

Regarding a buyer's status as a bona fide purchaser, the Idaho Supreme Court recently stated,

> In order to claim the protection of being a BFP, a party "must show that at the time of the purchase he paid a valuable consideration and upon the belief and the validity of the vendor's claim of title without notice, actual or constructive, of any outstanding adverse rights of another." *Imig v. McDonald*, 77 Idaho 314, 318, 291 P.2d 852, 855 (1995).

Weitz v. Green, 148 Idaho 851, 859, 230 P.3d 743, 751 (2010).

> "[W]hen one is purchasing land, the rule of *caveat emptor* applies and ... 'whatever is notice enough to excite the attention of a man of ordinary prudence and prompt him to further inquiry, amounts to notice of all such facts as a reasonable investigation would disclose.'" *Hunter v. Shields*, 131 Idaho 148, 153, 953 P.2d 588, 593 (1998) (quoting *Hill v. Fed. Land Bank*, 59 Idaho 136, 141, 80 P.2d 789, 791 (1938)).

Id. at 858-59, 230 P.3d at 750-51. Regarding an encumbrancer's status as a bona fide purchaser, the Idaho Court of Appeals stated,

> A bona fide purchaser is one who takes real property by paying valuable consideration and in good faith, i.e., without knowing of adverse claims. I.C. § 55-606; § 55-812. The theory behind the rule is to protect innocent purchasers and to allow them to obtain and convey unsullied interests. Generally, a person must take property through a "conveyance" in order to be afforded the protective status of a bona fide purchaser. Although a mortgage is a lien, it is also considered a conveyance, which includes "every instrument in writing by which an estate or interest in real property is created, alienated, *mortgaged,* or encumbered, or by which the title to any real property may be affected, except wills." I.C. § 55-813 (emphasis added). A mortgagee may become a bona fide purchaser. I.C. § 55-606; *Imig v. McDonald,* 77 Idaho 314, 291 P.2d 852 (1955) (defining a bona fide

purchaser as one who takes for value, upon the belief of the validity of the vendor's claim of title, and without notice of adverse claims); *Spencer v. Steward,* 37 Idaho 610, 218 P. 369 (1923) (mortgagee, with first recorded interest and without notice of adverse claim, may take as a bona fide purchaser); *See also,* 59 C.J.S. *Mortgages* § 232 (1949); 55 AM.JUR.2d *Mortgages* § 324 (1971). Further, even though a mortgage is considered a lien:

> The *analogy* of the mortgage as passing title is universally retained to the extent that the mortgagee may be recognized as a bona fide purchaser for value without notice, provided there are present the elements of valuable consideration, good faith and want of notice.

(Emphasis added.) THOMPSON ON REAL PROPERTY, § 4778 at 501-02 (1963) *citing Spencer, supra.*

Sun Valley Land and Minerals, Inc. v. Burt, 123 Idaho 862, 866, 853 P.2d 607, 611 (Ct. App. 1993).

The Harrises do not allege the Bank took its deeds of trust in bad faith or without valuable consideration. The Harrises do, however, contend the bank had actual notice, constructive notice, or inquiry notice sufficient to create a material question of fact regarding the Bank's status as a bona fide lender.

At the outset of this discussion, this Court notes that the notice, whether actual, constructive, or inquiry, must be notice of the "outstanding adverse rights of another." *Imig*, 77 Idaho at 318, 291 P.2d at 855. In other words, the Bank's claim of being a bona fide lender will fail if it had notice of defects in the Corrected Quitclaim Deed. Having concluded the Corrected Quitclaim Deed was not void, this Court notes that it would have been impossible for the Bank to have known or discovered through reasonable inquiry that the deed was void. However, if the Bank knew or reasonably should have discovered that the Corrected Quitclaim Deed was voidable due to a failure of consideration, then the Bank would not qualify as a bona fide lender regarding its deeds of trust.

In this Court's view, the Harrises' argument regarding notice is undermined by the uncontested fact that in September 2008, Mr. Harris and Mr. Crandal told the Bank that the Subject Property belonged to Duane Yost. Further, Mr. Harris and Mr. Crandal told the Bank they were in the process of making sure the Bonneville County records correctly reflected Mr. Yost's ownership of the Subject Property. When the Bank saw the Corrected Quitclaim Deed in early December 2008, it had little, if any, reason to suspect that anything was amiss with the deed.

The Bank recorded its first deed of trust on November 21, 2008, and its second deed of trust on December 30, 2008. Regardless of whether the Bank knew that Mr. Yost had paid for the Subject Property with Trigon funds and regardless of how much the Bank knew—if it knew anything—regarding Trigon's financial difficulties, there is no evidence that anyone other than Mr. Palmer knew Trigon was a fraud until December 31, 2008. The Harrises argue that the Bank should have suspected that Trigon was engaging is suspicious behavior, but the Harrises have not presented any evidence that would suggest the Bank could have discovered that Trigon was engaged in fraudulent behavior. Thus, when the Bank recorded its deeds of trust, it did not have notice of any kind that Trigon was a fraud. Mr. Harris testified that prior to learning that Trigon was a fraud, he believed the diminishing value of his Trigon account was due to the downturn in the market. Thus, when the Bank's deeds of trust were recorded, the Harrises may have known that the value of the $800,000.00 transfer from Mr. Yost had decreased in value, but even they did not have notice of their adverse claim because they did not have reason to believe the consideration from Mr. Yost had failed. The Harrises, as parties to the agreement with the Yosts and as investors with Trigon, certainly had more knowledge of the pertinent facts than the Bank would have had.

This Court concludes that the Bank did not have notice of any adverse claim to the Subject Property when it took its deeds of trust. As a result, the Bank qualifies for the protections afforded to a bona fide lender, and any issue regarding a failure of consideration is moot. *See* 59A C.J.S. Mortgages § 842 ("It has been held that a bona fide purchaser may be protected even though a mortgage or trust deed is invalid for want or failure of consideration . . . .").

IV. CONCLUSION

The Harrises' Motion for Summary Judgment is DENIED.

The Bank's Motion for Summary Judgment is GRANTED.

IT IS SO ORDERED.

DATED this 31 day of March 2011.

DANE H. WATKINS, JR.
District Judge

CERTIFICATE OF SERVICE

I hereby certify that on this 1st day of ~~March~~ April 2011, I did send a true and correct copy of the foregoing document upon the parties listed below by mailing, with the correct postage thereon; by causing the same to be placed in the respective courthouse mailbox; or by causing the same to be hand-delivered.

Brian T. Tucker
NELSON HALL PARRY TUCKER
P.O. Box 51630
Idaho Falls, ID 83405-1630

Kipp L. Manwaring
MANWARING LAW OFFICE
381 Shoup Avenue, Suite 210
Idaho Falls, ID 83402

RONALD LONGMORE
Clerk of the District Court
Bonneville County, Idaho

By _____
Deputy Clerk

MANWARING LAW OFFICE, P.A.
Kipp L. Manwaring ~ *ISB 3817*
381 Shoup Avenue, Suite 210
Idaho Falls, Idaho 83402
Telephone: (208) 782-2300
Facsimile: (208) 523-9109

Attorney for the Plaintiffs

IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT
STATE OF IDAHO, COUNTY OF BONNEVILLE

DARRYL HARRIS and CHRISTINE HARRIS, husband and wife, Plaintiffs, vs. DUANE L. YOST and LORI YOST, husband and wife, DUANE L. YOST as Trustee of the DUANE L. YOST TRUST, THE BANK OF COMMERCE, an Idaho Corporation and JOHN DOES I-X, Defendants.	Case No. CV-09-3488 MOTION FOR RECONSIDERATION

In accordance with I.R.C.P. 11(a)(2)(B), the Plaintiffs move this court to reconsider its memorandum decision denying the Plaintiffs' motion for summary judgment and granting Defendant, Bank of Commerce's, motion for summary judgment.

This motion is based upon the pleadings of record, the additional affidavit of Wayne Klein filed simultaneously with this motion, and the Plaintiffs' memorandum in support of their motion for reconsideration.

Oral argument is requested.

Dated this 28 day of April 2011.

Kipp Manwaring
Kipp L. Manwaring
Attorney for the Plaintiffs

5465-A

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on the 20 day of April 2011, a true and correct copy of the foregoing document was served upon the person or persons named below, in the manner indicated.

DOCUMENT SERVED: MOTION FOR RECONSIDERATION

PARTIES SERVED:

Douglas R. Nelson
Nelson Hall Parry Tucker
PO Box 51630
Idaho Falls, Idaho 83405-1630
MAILED

Alicia Lambert
Legal Assistant

MANWARING LAW OFFICE, P.A.
Kipp L. Manwaring ~ *ISB 3817*
381 Shoup Avenue, Suite 210
Idaho Falls, Idaho 83402
Telephone: (208) 782-2300
Facsimile: (208) 523-9109

Attorney for the Plaintiffs

IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT
STATE OF IDAHO, COUNTY OF BONNEVILLE

DARRYL HARRIS and CHRISTINE HARRIS, husband and wife,	)	
Plaintiffs,	)	Case No. CV-09-3488
vs.	)	
DUANE L. YOST and LORI YOST, husband and wife, DUANE L. YOST as Trustee of the DUANE L. YOST TRUST, THE BANK OF COMMERCE, an Idaho Corporation and JOHN DOES I-X,	)	AFFIDAVIT OF WAYNE KLEIN
Defendants.	)	

STATE OF UTAH)
ss.
County of Salt Lake)

WAYNE KLEIN, being first duly sworn under oath, deposes and states as follows:

1. I am eighteen years of age or older and have personal knowledge of the facts and information contained in this affidavit.

2. I am a licensed attorney in the state of Idaho (inactive) and the state of Utah. I am the court appointed receiver in that certain action styled, Securities and Exchange Commission v. Daren Palmer and Trigon Group, Inc., United States District Court for the District of Idaho, Civil No. 09-75-S-EJL.

3. As the court appointed receiver, my responsibility was to review all records of Palmer and Trigon to identify and trace investment payments received, disbursement payments made, accounting and use of all funds held or controlled by Palmer, Trigon and Duane Yost.

4. I have reviewed and am familiar with all records delivered to me pertaining to actual and purported transactions involving Palmer, Trigon, Yost and Darryl Harris.

5. Attached as Exhibit A and incorporated here by reference is a true and correct copy of a Trigon quarterly account statement for Darryl Harris I have reviewed and examined as part of my duties as receiver.

6. The account statement reflects Trigon's credits given to Harris, not actual funds received from Harris.

7. In my analysis of Trigon's records, including bank account records, and the records of Yost companies involved with Trigon, I have found no indication that $800,000 in actual funds, or any portion of said amount, were ever transferred by Yost to Trigon as suggested by the account statement.

8. Similarly, I have found no indications of payment of $800,000 by Yost to Harris. It is my understanding that Yost made arrangements so that Harris would receive investment credits, but no cash. Due to Palmer's fraud, the account statements are not accurate reflections of funds held by Trigon; the amounts represented to investors as their investment balances were fictitious. As a result, the vast majority of investment credits listed on investor account statements were merely paper representations and did not represent actual tangible assets held by Trigon.

9. Based on my discussions with Duane Yost, and my review of financial and other records, it is my conclusion that the property transaction between Yost and Harris was structured by Yost so that Yost would transfer $800,000 of investment credits Yost supposedly had with Trigon to Harris. Thus, Yost's expressed intent was that his investment balance with Trigon would be reduced by $800,000 and Harris' investment balance with Trigon would be increased by $800,000. But, there were no actual money transfers.

10. From my review of Trigon's records, the account statements created by Trigon are not reliable indicators of actual money transfers. In many instances there were bookkeeping entries that were not matched by actual money transfers. This occurred frequently with investors who dealt through Yost. The attached account statement falls within the described category as unreliable.

11. Receivership records based on examination of Trigon's records, show that Harris received substantially less in distributions from Trigon than the amounts of money he invested. In other words, Harris is a net loss investor with Trigon.

12. In my opinion the Trigon and Yost entities were operating as Ponzi schemes.

Dated this 15th day of April 2011.

Wayne Klein

Wayne Klein

SUBSCRIBED AND SWORN TO before me this 15th day of April 2011.

[Seal]

Notary Public
STEPHANIE LYNN PHILLIPS
299 South Main, Suite 1300
Salt Lake City, Utah 84111
My Commission Expires
December 5, 2011
State of Utah

Stephanie Lynn Phillips

Notary Public for Utah
Residing at:
My Commission Expires:

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on the 28th day of April 2011, a true and correct copy of the foregoing document was served upon the person or persons named below, in the manner indicated.

DOCUMENT SERVED: AFFIDAVIT OF WAYNE KLEIN

PARTIES SERVED:

Douglas R. Nelson
Nelson Hall Parry Tucker
PO Box 51630
Idaho Falls, Idaho 83405-1630
MAILED

Alicia Lambert

Alicia Lambert
Legal Assistant

Trigon Group, Inc

1075 S. Utah Ave. Suite 325
Idaho Falls, Idaho 83402
(208) 524-4496

Account No.	Date	Page
K2-1107	30-Sep-07	1 of 1

To:
Darryl Harris
3232 E. 65th S.
Idaho Falls, ID 83406

Summary Account Quarterly Statement
Regulated / Non-segragated funds - $

Account of: Darryl Harris (Regular)

Date	Bought	Sold	Security	Trade Price	Amount
Summary account balance					$1,732,543.77
			*** Account Summary***		
Period Return					$110,684.00
Funds added 8/8/07					$60,000.00
Ending Account Balance					
Total Equity					
Total Account Value					$1,903,227.77
Transfer received from Yost Group Effective October 1, 2007					$800,000.00
Funds Received 10/16/07					$10,000.00

EXHIBIT A

573 001029

Douglas R. Nelson - ISB# 1580
Brian T. Tucker - ISB# 5236
Wiley R. Dennert - ISB# 6216
NELSON HALL PARRY TUCKER, P.A.
490 Memorial Drive
P.O. Box 51630
Idaho Falls, ID 83405-1630
Telephone:(208) 522-3001
Facsimile: (208) 523-7254

Attorneys for The Bank of Commerce

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

DARRYL HARRIS and CHRISTINE HARRIS, husband and wife,

Plaintiffs,

v.

DUANE L. YOST and LORI YOST, husband and wife, DUANE L. YOST as Trustee of the DUANE L. YOST TRUST, THE BANK OF COMMERCE, an Idaho Corporation and JOHN DOES I-X,

Defendants.

Case No. CV-09-3488

OPPOSITION TO MOTION FOR RECONSIDERATION

THE BANK OF COMMERCE, an Idaho corporation,

Counterclaimant/Cross-claimant/Third-Party Claimant,

v.

DARRYL HARRIS and CHRISTINE HARRIS, husband and wife,

Counterdefendants,

and

DUANE L. YOST and LORI YOST, husband and wife, DUANE L. YOST as Trustee of the DUANE L. YOST TRUST, JOHN DOES I-X,

Crossdefendants,

and

HAMPSHIRE HOLDINGS, LLC,

Third-Party Defendant.

COMES NOW Defendant/Counterclaimant/Cross-claimant/Third-Party Claimant The Bank of Commerce (the "Bank"), through counsel of record, and objects to and opposes the Motion for Reconsideration filed by Darryl Harris ("Darryl") and Christine Harris ("Christine") (collectively the "Harrises"). The Harrises' Motion for Reconsideration does not provide any new insights, but simply rehashes their previous arguments. Their Motion for Reconsideration is brought and pursued unreasonably, frivolously and without foundation. Because the Court correctly granted the Bank summary judgment, the Court should now deny the Harrises' Motion for Reconsideration. The Bank

responds to the Motion for Reconsideration as follows:

I. AUTHORITY AND ARGUMENT

A. Lack of Consideration

In an effort to show that no consideration was actually paid from Duane Yost ("Yost") to them, the Harrises have submitted the Affidavit of Wayne Klein. However, Mr. Klein's testimony is irrelevant because, at most, it would support a failure of consideration, but still does nothing to show a lack of consideration.

The agreement between Darryl and Yost was that Yost agreed to pay $800,000 to Darryl in exchange for the Subject Real Property. Whether Yost actually paid the $800,000 or not does not change the outcome of this case.

This Court correctly determined that "[e]ven if Mr. Yost's Trigon account was empty when he made the transfer [of the $800,000], that deficiency is only relevant to his ability to perform on his promise to pay; it has nothing to do with consideration." Memorandum Decision, p. 11.

Prior to the transaction, Yost had no obligation to give the Harrises $800,000. However, because of their agreement, the Harrises were obligated to transfer the Subject Real Property to the Yosts and the Yosts were obligated to give $800,000 to the Harrises. When the $800,000 of "investment credit" was transferred from Yost to Darryl, the parties believed Yost had performed his part of the bargain. The Harrises subsequently performed their part of the bargain when they transferred the Subject Real Property to the Yosts. Only later, after discovering Daren Palmer's fraud, did the parties learn that the "vast majority of investment credits listed on investor account statements were merely paper representations and did not represent actual tangible assets held by Trigon." *See* Klein Aff., ¶ 8. This revelation may have given rise to a failure of consideration, but not a lack of consideration. Yost was still obligated to pay the Harrises $800,000. In fact, the

Harrises sued the Yosts and obtained a judgment against them in the amount of $800,000 plus interest and costs. It would not be legal or ethical for the Harrises to have requested and obtained a judgment for the $800,000, if the Yosts were not legally obligated to pay the $800,000 to the Harrises in exchange for the transfer of the Subject Real Property.

Because the Yosts were legally obligated to pay the Harrises $800,000, their failure to actually do so, at most, resulted in a failure of consideration. Failure of consideration could only make the Corrected Quitclaim Deed voidable, not void. "Where a deed is only voidable, the defense of bona fide purchaser is available." *First Interstate Bank of Sheridan v. First Wyoming Bank, N.A. Sheridan*, 762 P.2d 379, 382 (Wyo. 1988). Therefore, this Court correctly determined that "the Bank qualifies for the protections afforded to a bona fide lender, and any issue regarding the failure of consideration is moot." Memorandum Decision, p. 19.

B. Delivery of Deed

The Harrises argue that the Court made inconsistent findings regarding the delivery of the Corrected Quitclaim Deed. However, the Court did not state, as the Harrises contend, that "there is no evidence of words or conduct *manifesting Mr. Harris' intent* concerning delivery of the deed." Memo. in Support of Mot. for Reconsideration, p. 5 (emphasis added).

In fact, all of the evidence, even when construed in favor of the Harrises, shows that Darryl's words and conduct manifested an intent to deliver the Corrected Quitclaim Deed. The following are the uncontroverted facts relating to Darryl's manifested words and conduct. After Darryl had signed the first Quitclaim Deed, he delivered it to Yost. Because of mistakes on the first Quitclaim Deed, Yost subsequently gave Darryl the Corrected Quitclaim Deed and told Darryl to get it back to him as fast as he could. Darryl Harris Depo. Tr., p. 60, l. 21 to p. 62, l. 2. Darryl testified that Yost told him that the Bank wanted Darryl to sign the new Corrected Quitclaim Deed. *Id.* at p. 63, ll. 17-18.

Darryl understood the purpose of a deed was to show the transfer of land from one person to another. *Id.* at p. 66, l. 24 to p. 67, l. 5. In addition, Darryl understood that a deed is recorded in the county recorder's office to put everyone on notice of who owns the property. *Id.* at p. 67, l. 6 to p. 68, l. 1. Darryl knew that the Bank was relying on the Corrected Quitclaim Deed to make sure that title to the Subject Real Property had really been transferred to the Yosts and in order to secure its loan to Yost. *Id.* at p. 68, ll. 2-17. Darryl went to Robert Crandall's office and met Yost there. Yost gave Darryl the Corrected Quitclaim Deed and they both left. Darryl signed the Corrected Quitclaim Deed and then returned it to Robert Crandall's office. *Id.* at p. 75, ll. 11-20. Darryl admitted that he had transferred the Subject Real Property. *Id.* at p. 116, l. 22 to p. 117, l. 8. Finally, the Corrected Quitclaim Deed was recorded by Robert Crandall in Bonneville County on December 2, 2008. *See* Darryl Harris Depo. Tr., Exhibit 2, Corrected Quitclaim Deed. Furthermore, there is no evidence that Darryl intended for Robert Crandall, or anyone else, to hold the Corrected Quitclaim Deed in escrow until the Harrises had actually received the full $800,000 payment. In fact, Darryl believed he had already received the $800,000. Leaving the signed Corrected Quitclaim Deed at Robert Crandall's office was an act manifesting Darry's intent to deliver.

In Idaho, "the real test of the delivery of a deed is this: Did the grantor by his acts or words, or both, intend to divest himself of title? If so, the deed is delivered. *Barmore v. Perrone,* 145 Idaho 340, 345, 179 P.3d 303, 308 (2008). Idaho law regarding delivery does not include the subjective and silent desires of the grantor. Under all reasonably possible interpretations of the evidence, Darryl manifested his intention to deliver the Corrected Quitclaim Deed when he signed it and left it at Robert Crandall's office.

Consistent with that determination, and supported by all of the evidence, is what the Court actually stated: "[T]here is no evidence of words or conduct by Mr. Harris that would lead anyone

to question the immediate effectiveness and validity of the deed at the time Mr. Harris executed it and delivered it to Mr. Yost." Memorandum Decision, p. 13.

In other words, all of the evidence regarding Darryl's words and actions reasonably manifest his intent to deliver the Corrected Quitclaim Deed, and no evidence shows that Darryl's words or actions manifested a conditional deliver.

Therefore, the Court should deny the Harrises' Motion for Reconsideration.

C. I.C. § 32-912

1. Christine's Acquiescence and Failure to Object *After* She Learned about the Forgery

The Harrises argue that this Court erred when it relied upon "testimony concerning Christine Harris' understanding of the execution of the deed well after the fact and not before." *See* Memorandum in Support of Motion for Reconsideration, p. 6. The Harrises support their argument by erroneously claiming that "[f]or estoppel to apply as *Lovelass v. Sword,* 140 Idaho 105, 109, 90 P.3d 330, 334 (2004) instructs, there must be conduct on the part of the non-signing spouse before or at the time of the transaction to establish both notice of the transaction and acquiescence in the transaction." *Id.*

However, the Harrises' argument is not valid because *Lovelass* does not provide any authority for their argument. In fact, *Loveless* does not hold or in any way instruct that the conduct by the non-signing spouse must be before or at the time of the transaction. On the contrary, the *Loveless* Court held that Mrs. Loveless was not estopped from asserting § 32-912 because she was unaware of and did not consent to the improvements made by the Swords during the three (3) years *after* Mr. Loveless and the Swords entered into the oral agreement to purchase the house in August 1997. The Supreme Court emphasized that to overcome the evidence that Mrs. Sword thought the payments were for rent and not for the purchase of the property "one must infer that Mrs. Loveless knew of the

improvements to the property." It is important to recognize that those improvements occurred during the three (3) years *after* the oral agreement was entered into. Because there was no evidence that Mrs. Loveless ever knew about the improvements, there was no evidence that she ever acquiesced in the agreement to purchase the property. The implication is that if Mrs. Sword had been aware of the improvements as they occurred over the three (3) years following the oral agreement between her husband and the Lovelesses, then her failure to object, while at the same time benefitting from the Lovelesses' monthly payments, would have indicated her acquiescence to the agreement. As a result of her acquiescence, she would have been estopped from denying the agreement to sell the house and real property to the Lovelesses.

The term "acquiescence" includes the recognition of an existing transaction, which by necessity involves action occurring after the transaction. Specifically, "acquiescence" is defined as follows:

> Conduct recognizing the existence of a transaction, and intended, in some extent at least, to carry the transaction, or permit it to be carried, into effect. It is some act, not deliberately intended to ratify a former transaction known to be voidable, but recognizing the transaction as existing, and intended, in some extent at least, to carry it into effect, and to obtain or claim the benefits resulting from it, and thus differs from "confirmation," which implies a deliberate act, intended to renew and ratify a transaction known to be voidable. Passive compliance or satisfaction; distinguished from avowed consent on the one hand, and, on the other, from opposition or open discontent. Conduct from which assent may be reasonably inferred. Equivalent to assent inferred from silence with knowleddge or from encouragement and presupposes knowledge and assent. Imports tacit consent, concurrence, acceptance and assent. A silent appearance of consent. Failure to make any objections. Submission to an act of which one had knowledge. Exists where a person knows or ought to know that he is entitled to enforce his right or to impeach a transaction, and neglects to do so for such a length of time as would imply that he intended to waive or abandon his right.

Black's Law Dictionary 24 (6th ed. 1990) (case citations omitted).

In *Grice v. Woodworth,* 10 Idaho 459, 80 P.912 (1904), the Idaho Supreme Court held that a wife was estopped from asserting the statutes (similar to § 32-912) that required both husband and wife to execute and acknowledge the conveyance of community property because she had failed to object *following* the agreement between the husband and the purchaser of the property. In that case, "*after* [the purchaser] had so entered into the possession the [wife] was informed of the improvements made thereon, and knew that said improvements had been made and possession taken by the [purchaser] under the belief that he was the owner of said premises, and to all of which said [wife] made no objection." *Id.* at 464, 80 P. at 913 (emphasis added). In his dissent, Justice Ailshie raised issues similar to those now made by the Harrises. For example, Justice Ailshie argued that the acts and declarations of the wife, by which she was estopped from asserting her rights, took place long after the purchaser had paid the purchase price. In his dissent, Justice Ailshie lamented that "[t]he majority have told the good wives of this state that they must talk [meaning object and complain] or be estopped." *Id.* at 475, 80 P. at 917.

On the other hand, the *Grice* majority held:

> Courts of equity will not permit the statute of frauds or the statute in regard to conveyance of married women to be a shield to protect fraud, and those statutes were not enacted to encourage frauds and cheats.... Because of the facts of this case, the principle that governs is more in the nature of an estoppel or waiver on the part of [the wife], and not the broad principle of abandonment, as suggested by the provisions of section 3041, Rev. St., above quoted. While the provisions of the sections above quoted were made for the protection of married women, they were not intended to operate as a shield to relieve them against a fraudulent transaction, such as the one under consideration, and she is estopped by her own acts from interposing the provision of said sections as a valid defense to this action....

Id. at 468, 80 P. at 915.

On rehearing, the majority stated:

> Now, what was the duty of [the wife] when she visited the premises in dispute, and found them occupied by [the purchaser] and his family, making valuable and lasting

> improvements upon the house in good faith, believing they were the owners thereof? ...
>
> ...
>
> ... If [the wife] desired to deal fairly with the [purchasers] when she returned from Moscow, and found them in possession of her property, upon which she had filed a homestead declaration (if she did not know they were occupying the property under a claim of purchase prior to that time), she should have then said to them: "You are improving property, upon which I have filed my homestead declaration. I have never consented to the sale of it, and still desire to claim it as my home." This would have been good faith and reasonable diligence. Equity does not permit her to remain silent as to her claims, and by her conversation encourage appellants to continue their payments and improvements on the property,...

Id. at 470-72, 80 P. at 916. Of course, it is the majority opinion in *Grice* that is the law of this state.

Under Idaho law, this Court is not bound to only consider what action and inaction Christine took before and at the time Darryl forged her name on the Corrected Quitclaim Deed in determining whether she should be estopped from asserting § 32-912. Rather this Court may properly consider Christine's acquiescence and her failure to object after Darryl told her he had forged her name on the Corrected Quitclaim Deed.

2. Christine's Silence and Other Actions

The Harrises also imply that because mere silence is not sufficient to invoke estoppel, the Court should not have considered Christine's silence as another factor for applying estoppel. However, Idaho appellate courts have held that silence, coupled with other circumstances, can support estoppel.

The Harrises cite only one sentence from *Joplin v. Kitchens,* 87 Idaho 530, 394 P.2d 313 (1964). However, to understand the role that silence can play in estoppel, a more extensive citation is helpful. The Idaho Supreme Court stated:

> Mere silence of itself will not raise an estoppel. To make the silence of a party operate as an estoppel the circumstances must have been such as to render it his

duty to speak, and there must also have been an opportunity to speak.

> It is essential that the one claimed to be estopped should have had knowledge of the facts, and that the adverse party should have been ignorant of the truth, and have been misled into doing that which he would not have done but for such silence. Silence will not support an estoppel unless the person claiming an estoppel justifiably relied on the silence to his prejudice, and such conduct in reliance must be intended or reasonably anticipated by the one who remained silent.

Id. at 535, 394 P.2d at 315 (1964).

In *KTVB, Inc., v. Boise City,* 94 Idaho 279 (1971), the Idaho Supreme Court stated:

> Appellants contend that a mere acquiescence where there is no duty to speak does not raise an estoppel, and further that there was no duty to speak in this instance. Appellants cite 31 C.J.S. *Estoppel* § 114, pp. 593-594 in support of this contention. However, it is there said that,
>
> > "Where nonaction or passivity is relied on to create an estoppel, it must appear that the party to be estopped was under a duty to act under the circumstances, or, as is sometimes declared, *was bound in equity and good conscience actively to evidence his intention not to be bound by the transaction."* (Emphasis added)
>
> In the Idaho case of *Neer v. McFarland,* plaintiff asserted certain slots were contemplated in the foundation defendant was building as part performance of a contract between plaintiff and defendant. This Court held plaintiff was estopped from asserting the slots were contemplated by the parties, because plaintiff acquiesced in defendant's construction of the foundation without the slots when he had ample opportunity to tell defendant of the alleged error. The only duty to speak was the duty imposed by the requirements of good conscience and equity. There may be an equitable duty to speak, if subsequent maintenance of a position inconsistent with that acquiesced in would lead to unconscionable results....

KTVB, Inc. v. Boise City, 94 Idaho 279, 284, 486 P.2d 992, 997 (1971) (emphasis in original) (footnote omitted).

Christine was bound by the requirements of good conscience and equity to inform Yost and the Bank that Darryl had forged her name on the Corrected Quitclaim Deed. It would be unconscionable for Darryl to have forged the Corrected Quitclaim Deed and to have told Christine that he had done so, and to allow Christine to fail to inform anyone about the forgery, especially Yost

and the Bank, and then to allow Christine to raise the protection of Idaho Code § 32-912 nearly two (2) years after she learned of the forgery and after she had brought suit and obtained a judgment against the Yosts for $800,000 plus interest and costs.

Under the doctrines of estoppel, including, but not limited to, quasi estoppel and judicial estoppel, Christine should be estopped from now arguing that the Corrected Quitclaim Deed is void under § 32-912. Again, in *KTVB, Inc. v. Boise City,* the Idaho Supreme Court stated:

> "The doctrine classified as quasi estoppel has its basis in election, ratification, affirmance, acquiescence, or acceptance of benefits; and the principle precludes a party from asserting, to another's disadvantage, a right inconsistent with a position previously taken by him. The doctrine applies where it would be unconscionable to allow a person to maintain a position inconsistent with one in which he acquiesced, or of which he accepted a benefit."

Id. at 281, 486 P.2d at 994 (*quoting Clontz v. Fortner,* 88 Idaho 355, 364-65, 399 P.2d 949, 954 (1965). KTVB had participated in the bid process in the hopes of receiving cable television franchises by the participating cities. After a lengthy bidding process, KTVB was not granted the franchise. Only then did KTVB raise the issue that the bidding process had been conducted illegally. The Court stated:

> While appellants may not have been required to forego bidding on the franchise in order to raise the objections to the franchise that they now make, it is clear from *Godoy* that they at least were required to make some objection to the various deficiencies which they now claim existed in the bidding and granting processes, rather than to intimate full approval by their acquiescent conduct while harboring serious reservations about the processes.
>
> The requirements for proper application of quasi estoppel are, then, that the person against whom it is sought to be applied has previously taken an inconsistent position, with knowledge of the facts and his rights, to the detriment of the person seeking application of the doctrine. It is therefore, incumbent upon this Court to consider the appellants' assertions of irregularity of the procedure and illegality of the franchise in light of appellants' previous position in the award process.
>
> Appellants' prior conduct can only be characterized as full acquiescence in the bidding and award process they now challenge. Appellants' participation in the

> bidding and award process, guided consistently by competent legal counsel, was clearly aimed at securing the franchise, within the framework of the process they now challenge, for their proposed joint venture. It seems clear that it is only the end result of the process, and not the process itself, which prompts appellants' allegations of illegality at this time. No protest was made by appellants when the several city governments banded together to form the Treasure Valley Cable Television Committee to investigate the award of a franchise and recommend a franchisee, nor was any objection lodged against the prospect of the various cities granting franchises....

Id. at 282, 486 P.2d at 995. Finally, the Idaho Supreme Court stated that "the essence of the proper application of the doctrine of quasi estoppel is the focus of the Court's attention upon the specific facts and circumstances of the case at bar." *Id.*

Over the years, the Harrises have owned and sold several pieces of real property, including bare ground, houses and cabins. Christine Harris' Depo. Tr., p. 11, l. 11 to 24, l. 20. Christine knew that each time she and Darryl sold a piece of real property that she would have to sign a deed giving her interest to the buyer. *Id.* at p. 16, ll. 12-25; p. 18, ll. 11-17; p. 30, ll. 11-14. Christine claims Darryl told her in December 2008, that he had forged her name on the Corrected QuitClaim Deed. *Id.* at p. 54, ll. 1-9, 20 to p. 56, l. 9. More specifically, Darryl testified that he told Christine that he had signed her name on the deed about two weeks after he had done so. Darryl Harris Depo. Tr., p. 71, l. 21 to p. 72, l. 2. Prior to learning that Palmer and Trigon were a fraud, Darryl told Christine that he and Yost had agreed to transfer the Subject Real Property to the Yosts. Christine Harris Depo. Tr., p. 42, ll. 3-19. Also prior to learning about the fraud, Christine learned that Yost had transferred $800,000.00 into Darryl's Trigon account. *Id.* at p. 44, ll. 6-17. Christine also admitted that Darryl probably told her what the purpose of the $800,000.00 was. *Id.* at p. 44, ll. 20-23. When Christine learned about the forgery, approximately two weeks after Darryl had signed her name to the Corrected QuitClaim Deed, she did not object to it but rather did nothing despite knowing that the forgery would be relied upon by others. Darryl Harris' Depo. Tr., p. 71, l. 21 to p. 73, l. 6;

Christine Harris Depo. Tr., p. 57, ll. 12-16. In fact, Darryl's forgery did not even bother Christine at the time she learned about it. Christine Harris Depo. Tr., p. 56, ll. 12-17. Moreover, she did not tell anyone about the forgery. *Id.* Not only did Christine not get upset with Darryl, she was okay with the fact that he had signed her name because she trusted him. *Id.* at p. 58, ll. 11-24. If Yost had brought them the $800,000.00 in cash, Christine would not have objected to signing the deed to the forty (40) acres. *Id.* at p. 61, ll. 6-15. Because Christine believed that the $800,000.00 had been transferred into Darryl's Trigon account, she admitted she probably would not have objected to giving Yost the deed to the forty (40) acres and that she probably would have been okay with it. *Id.* at p. 61, l. 16 to p. 62, l. 10. As late as the date of her deposition on November 9, 2010, Christine was not planning on pressing any criminal charges against Darryl for forging her name. *Id.* at p. 56, l. 18 to p. 57, l. 3. Despite knowing of the forgery, the Harrises filed their Complaint in which they allege that both Darryl and Christine signed the Corrected Quitclaim Deed. Although the Complaint was signed by the Harrises' attorney, they subsequently signed the Plaintiffs' Response to the Defendants, The Bank of Commerce First Set of Interrogatories and Requests for Production of Documents dated May 7, 2010 ("Discovery Response") before a notary public. *See* 4th Aff. of Wiley Dennert, Exhibit "B". In Answer to Interrogatory No. 1 of the Discovery Response, Christine and Darryl stated under oath that they "have knowledge of the facts and information contained in the Complaint." *See id.* at p. 2. On October 15, 2009, Christine and Darryl then obtained a Judgment by Default against the Yosts in the amount of $800,000.00 plus interest, costs and attorney fees. Christine did not raise the issue of the forgery until November 2010, nearly two (2) years after she learned about the forgery and more than one (1) year after she had obtained the judgment against the Yosts.

After Christine learned about the Corrected Quitclaim Deed, her conduct has been consistent with the existence and validity of the instrument as well as her acquiescence to the transfer of the forty (40) acres to the Yosts.

In addition, the Bank did not know about the forgery and relied on Christine's acquiescence to the transfer of the Subject Real Property to the Yosts. Darryl told Christine about the forgery on or about December 15, 2008.[1] Thereafter, believing that the Corrected Quitclaim Deed was properly signed by both of the Harrises, the Bank had its first Deed of Trust "re-recorded to correct an error on the legal description on December 17, 2008 as Instrument No. 1319093 in the Recorder's Office for Bonneville County, Idaho." *See* Complaint, ¶18. Later, still believing that the Harrises had finalized the transfer of the forty (40) acres to the Yosts, the Bank had the Yosts sign the second Deed of Trust and the Bank recorded it in the Bonneville County Recorder's Office on December 30, 2008. *See id.* at ¶ 19. Thomas Romrell, the president and CEO of the Bank testified, "If the Bank had learned in December 2008 that Darryl Harris had forged his wife's name on the Corrected Quitclaim Deed, the Bank would have immediately requested that a second Corrected Quitclaim Deed be signed by both Darryl Harris and Christine Harris. *See* Second Romrell Aff. at ¶ 9. Christine did not raise the issue of Darryl's forgery until November 2010, after she had already commenced this action, acknowledged the facts contained in the Complaint and obtained a judgment against the Yosts for $800,000 plus interest and costs. Thus, Christine's acquiescence in the entire transaction gained some advantage for her (the $800,000 judgment plus interests and costs). Moreover, her acquiescence in the transaction and her failure to notify anyone about the forgery has produced a disadvantage to the Bank (the recording of both of the Deeds of Trust while not knowing

[1] Darryl signed the Corrected Quitclaim Deed on December 1, 2011. He testified that he told Christine about the forgery about two weeks later.

that Darryl had forged Christine's name and the inability to now obtain a second corrected quitclaim deed signed by both Darryl and Christine).

Christine's conduct and acquiescence is more than sufficient to establish an estoppel.

II. CONCLUSION

This Court should deny the Harrises' Motion for Reconsideration.

DATED this 26 day of May, 2011.

Brian T. Tucker

CERTIFICATE OF SERVICE

I hereby certify that I served a true copy of the foregoing document upon the following this 26 day of May, 2011, by hand delivery, mailing with the necessary postage affixed thereto, facsimile, or overnight mail.

Kipp L. Manwaring	[ ] Mailing
MANWARING LAW OFFICE	[ ] Hand Delivery
381 Shoup Avenue, Suite 210	[X] Fax: 523-9109
Idaho Falls, ID 83402	[ ] Overnight Mail

Brian T. Tucker

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Douglas R. Nelson - ISB# 1580
Brian T. Tucker - ISB# 5236
Wiley R. Dennert - ISB# 6216
NELSON HALL PARRY TUCKER, P.A.
490 Memorial Drive
P.O. Box 51630
Idaho Falls, ID 83405-1630
Telephone:(208) 522-3001
Facsimile: (208) 523-7254

Attorneys for The Bank of Commerce

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

DARRYL HARRIS and CHRISTINE HARRIS, husband and wife,

Plaintiffs,

v.

DUANE L. YOST and LORI YOST, husband and wife, DUANE L. YOST as Trustee of the DUANE L. YOST TRUST, THE BANK OF COMMERCE, an Idaho Corporation and JOHN DOES I-X,

Defendants.

Case No. CV-09-3488

AMENDED ANSWER AND COUNTERCLAIM, CROSS CLAIM AND THIRD-PARTY CLAIM

Cross-Claim
3rd Party Claim

THE BANK OF COMMERCE, an Idaho corporation,

Counterclaimant/Cross-claimant/Third-Party Claimant,

v.

DARRYL HARRIS and CHRISTINE HARRIS, husband and wife,

Counterdefendants,

and

DUANE L. YOST and LORI YOST, husband and wife, DUANE L. YOST as Trustee of the DUANE L. YOST TRUST, JOHN DOES I-X,

Crossdefendants,

and

HAMPSHIRE HOLDINGS, LLC, an Idaho limited liability company, ROBERT PARKINSON CRANDALL, an individual, and FAMILY ASSET PROTECTION LEGAL SERVICES, P.L.L.C., an Idaho professional limited liability company,

Third-Party Defendants.

AMENDED ANSWER

COMES NOW Defendant Bank of Commerce (the "Bank") by and through its attorneys of record, Nelson Hall Parry Tucker, P.A., for its amended answer to Plaintiffs' Complaint admits, denies and alleges as follows:

FIRST DEFENSE

Plaintiffs' Complaint fails to state a claim on which relief can be granted.

SECOND DEFENSE

The Bank denies each and every allegation or averment of the Complaint not specifically admitted.

THIRD DEFENSE

The Bank answers the specific allegations of the Complaint as follows:

1. Admits paragraphs 1, 2, 4, 16, 17, 18, 19, 47, and 48.

2. Denies paragraphs 23, 24, 30, 39, 44, 49, 50, 51, 52, 56, 62 and 63.

3. With regards to paragraphs 3, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 20, 21, 26, 27, 28, 29, 31, 33, 34, 35, 36, 37, 38, 41, 42, 43, 46, 54, 55, 57, 59, 60 and 61, said paragraphs are allegations between the Plaintiffs and Defendants Duane L. Yost and Lori Yost, husband and wife, and/or Duane L. Yost as Trustee of the Duane L. Yost Trust, and therefore do not require an answer by the Bank. To the extent said paragraphs apply to the Bank, the Bank is without knowledge or information sufficient to form a belief as to the truth of the matters asserted in said paragraphs and, therefore, denies the same. Even if any or all of the allegations in said paragraphs were true, the Bank still has a priority lien position superior to any lien that the Plaintiffs may have.

4. With regards to paragraph 15, the Bank is without sufficient information whether it was "[u]pon the Yosts' direction and in reliance on Palmers's letter," and therefore denies the same. To the extent said portion of paragraph 15 were true, the Bank still has a priority lien position superior to any lien that the Plaintiffs may have. The Bank admits the remainder of paragraph 15.

5. Paragraphs 22, 25, 32, 40, 45, 53 and 58 are merely restatements of previous paragraphs and, therefore, do not require a response.

6. Furthermore, the Bank denies the Plaintiffs are entitled to costs and attorneys fees against the Bank.

AFFIRMATIVE DEFENSES

The Bank asserts the following affirmative defenses in response to the Complaint:

First Affirmative Defense

As and for a first affirmative defense, the Bank alleges Plaintiffs fail to state a claim upon which relief may be granted.

Second Affirmative Defense

As and for a second affirmative defense, the Bank alleges it is a bona fide lender and/or a bona fide purchaser.

Third Affirmative Defense

As and for a third affirmative defense, the Bank alleges estoppel in all its forms including, but not limited to, judicial estoppel, equitable estoppel, quasi-estoppel, promissory estoppel, etc.

Fourth Affirmative Defense

As and for a fourth affirmative defense, the Bank alleges waiver.

Fifth Affirmative Defense

As and for a fifth affirmative defense, the Bank alleges laches.

Sixth Affirmative Defense

As and for a sixth affirmative defense, the Bank alleges unclean hands.

Seventh Affirmative Defense

As and for a seventh affirmative defense, the Bank alleges assumption of the risk.

Eighth Affirmative Defense

As and for an eighth affirmative defense, the Bank alleges payment.

Ninth Affirmative Defense

As and for a ninth affirmative defense, the Bank alleges ratification.

Tenth Affirmative Defense

As and for a tenth affirmative defense, the Bank alleges unjust enrichment.

Eleventh Affirmative Defense

As and for an eleventh affirmative defense, the Bank alleges constructive trust.

Twelfth Affirmative Defense

As and for a twelfth affirmative defense, the Bank alleges part performance.

Thirteenth Affirmative Defense

As and for a thirteenth affirmative defense, the Bank alleges election of remedies.

ATTORNEY FEES AND COSTS

The Bank has been required to retain the services of attorneys to defend against the Complaint. The Bank therefore seeks its reasonable costs and attorneys fees incurred in the defense against the Complaint pursuant to Rule 54, I.R.C.P., and Idaho Code §§ 12-120, 12-121 and 12-123.

REQUEST FOR RELIEF

WHEREFORE, the Defendant respectfully requests relief as follows:

1. Dismissal of Plaintiffs' Complaint with prejudice;

2. Enter a Judgment in favor of the Bank and against Plaintiffs;

3. Award reasonable attorney fees and costs to the Bank; and

4. Grant the Bank such other and further relief as the Court deems just and proper.

AMENDED COUNTERCLAIM, CROSS CLAIM AND THIRD-PARTY CLAIM

COMES NOW the Counterclaimant/Crossclaimant/Third Party Claimant, The Bank of Commerce (the "Bank"), by and through its attorneys of record, Nelson Hall Parry Tucker, P.A., and for its complaint alleges as follows:

1. **Status of the Bank**. At all times mentioned herein, the Bank is an Idaho corporation with its principal place of business in Bonneville County, Idaho. The Bank is the beneficiary of a Deed of Trust sought to be judicially foreclosed in this matter.

2. **Status of the Other Parties**

A. Counterdefendants Darryl Harris and Christine Harris ("Harris" herein), are husband and wife and at all times relevant hereto were residents of Bonneville County, Idaho. Said Counterdefendants have or claim some interest in the real property described herein as Tract II by reason of a deed of trust granted by Duane Yost and Lori Yost, husband and wife to Idaho Title and Trust Co. an Idaho Corporation, as trustee for the benefit of Darryl Harris and Christine Harris, dated June 13, 2005, and recorded June 20, 2005, as Instrument No. 1189682 in the records of Bonneville County, State of Idaho.

B. Crossdefendants Duane L. Yost and Lori Yost ("Yost" herein), are husband and wife and at all times relevant hereto were residents of

Bonneville County, Idaho. Yost is the vested owner of the real property sought to be foreclosed in this matter and the makers of the notes, deeds of trust and other security documents sought to be foreclosed.

C. Crossdefendant Duane L. Yost as Trustee of the Duane L. Yost Trust ("Trust" herein) upon information and belief is a living trust created and registered in Bonneville County, Idaho.

D. Crossdefendants John Does 1-X, are persons or entities whose identities are not known that may have or claim an interest in the subject real property.

E. Third-Party Defendant Hampshire Holdings, LLC, is an Idaho limited liability company with its principal place of business in Idaho Falls, Idaho.

F. The above named Counterdefendants, Crossdefendants, and Third-Party Defendant Hampshire Holdings, LLC, and each of them, may claim some right, title, lien, or interest in the real property described below, but their interest, if any, in and to said real property, is junior, subordinate, and subsequent to the right and lien of the Bank.

G. Third-Party Defendant Robert Parkinson Crandall ("Crandall"), is an individual believed to reside in Bonneville County. Crandall is an attorney licensed to practice law in the state of Idaho, a certified public accountant, an Idaho notary public and an employee of Third-Party Defendant Family Asset Protection Legal Services, P.L.L.C. ("Family Asset Protection").

H. Family Asset Protection is an Idaho professional limited liability company, organized for the practice in the profession of law.

3. **Amounts Due and in Default**.

A. The Bank is the holder of a Promissory Note made by Duane Yost dated April 16, 2008, in the amount of $2,000,000.00 which is past due and fully matured. Said Note requires payments on demand and provides for an initial interest rate of 5.75% per annum and then beginning on April 17, 2008, a variable interest rate of 0.500% above the following index rate: the highest published Wall Street Journal prime. A true and correct copy of said Promissory Note is attached hereto as Exhibit "A". Yost is in default of said Note having not made timely and full payment. As of July 13, 2009 the principal and interest amount which is fully due and owing is approximately $1,250,155.18 plus a per diem interest accrual after July 13, 2009 at the per diem rate of approximately $188.37955.

B. The Bank is the holder of a Promissory Note made by Duane Yost dated November 21, 2008 in the amount of $1,000,000.00 with a maturity date of November 21, 2009. Said Note requires one balloon payment of $1,055,000.00 and provides for an initial interest rate of 5.5% per annum and then beginning on November 22, 2008, a variable interest rate of 0.500% above the following index rate: the highest published Wall Street Journal prime. A true and correct copy of said Promissory Note is attached hereto as Exhibit "B". Yost is in default of said Note due to the default provisions. As of July 13, 2009 the principal and interest amount owing is approximately $1,035,260.27 plus a per diem interest accrual after July 13, 2009 at the per diem rate of approximately $150.68493.

4. **Description of the Collateral**.

A. As security for the repayment of said Promissory Notes, together with interest, costs, and attorney's fees, the Crossdefendants, Yost, made, executed, and delivered to The Bank, that certain Deed of Trust executed on November 21, 2008, which was recorded on November 21, 2008, and re-recorded on December 17, 2008, in the real estate records of Bonneville County, Idaho, under Instrument Nos. 1317355 and 1319093, respectively, and attached hereto as Exhibit "C" and that certain Deed of Trust executed on December 24, 2008, which was recorded on December 30, 2008, in the real estate records of Bonneville County, Idaho, under Instrument No. 1319937, and attached hereto as Exhibit "D". Said Deeds of Trust are incorporated herein as though set forth in full covering the following described real property situated in Bonneville County, Idaho:

TRACT I

Beginning at a point that is South 89°55'28" West along the Section line 1326.98 feet from the North 1/4 Corner of Section 10, Township 1 North, Range 38 East of the Boise Meridian; running thence South 89°55'28" West along said Section line 1236.12 feet to the South Right-of-Way line of 65th South; thence along said South Right-of-Way line of 65th South and the East Right-of-Way line of 25th East the following three (3) courses; South 00°12'54" East 28.10 feet to a point of curve with a radius of 69.34 feet and a chord bearing South 44°18'28" West 98.29 feet; thence to the left along said curve 109.24 feet through a central angle of 90°16'00"; thence South 89°10'28" West 28.71 feet to the West line of said Section 10; thence South 00°19'04" East 1216.86 feet to the South line of the North ½ of the Northwest 1/4 of said Section 10, thence North 89°54'09" East along said South line 1327.87 feet; thence North 00°03'13" West 1312.06 feet to the POINT OF BEGINNING.

Excepting
That portion thereof conveyed to the State of Idaho by that deed recorded on May 8, 1950 in Book 70 of Deeds at Page 287 of

Official Records of Bonneville County, Idaho.

("Real Property Collateral" herein)

B. As security for the repayment of said Promissory Notes, together with interest, costs, and attorney's fees, the Third-Party Defendant Hampshire Holdings, LLC, made, executed, and delivered to The Bank, that certain Deed of Trust executed on November 21, 2008, and attached hereto as Exhibit "E". Said Deed of Trust is incorporated herein as though set forth in full covering the following described real property situated in Bonneville County, Idaho:

TRACT I

Beginning at a point that is South 89°55'28" West along the Section line 1326.98 feet from the North 1/4 Corner of Section 10, Township 1 North, Range 38 East of the Boise Meridian; running thence South 89°55'28" West along said Section line 1236.12 feet to the South Right-of-Way line of 65 th South; thence along said South Right-of-Way line of 65 th South and the East Right-of-Way line of 25th East the following three (3) courses; South 00°12'54" East 28.10 feet to a point of curve with a radius of 69.34 feet and a chord bearing South 44°18'28" West 98.29 feet; thence to the left along said curt 109.24 feet through a central angle of 90°16'00"; thence South 89°10'28" West 28.71 feet to the West line of said Section 10; thence South 00°19'04" East 1216.86 feet to the South line of the North ½ of the Northwest 1/4 of said Section 10, thence North 89°54'09" East along said South line 1327.87 feet; thence North 00°03'13" West 1312.06 feet to the POINT OF BEGINNING.

That portion thereof conveyed to the State of Idaho by that deed recorded on May 8, 1950 in Book 70 of Deeds at Page 287 of Official Records of Bonneville County, Idaho.

TRACT II:

Lot 11 in Block 3 of Canterbury Park, Division No. 2, to the City of Idaho Falls, Idaho according to the official plat thereof,

recorded October 19,1992 as Instrument No. 837954 filed in Official Records of Bonneville County, Idaho

("Real Property Collateral" herein)

5. **Default and Acceleration**. The Bank is the owner and holder of said Notes and the beneficiary of said Deeds of Trust. The Crossdefendant Yost is in default due to his failure to make timely payment under said Promissory Notes and the other default provisions of said Promissory Notes, and The Bank declares all sums owing under said Notes, Deeds of Trust, and any related security documents, due and payable in full. In addition, the Bank has incurred expense for a title report preliminary to foreclosure, the full amount of which is presently unknown, but which The Bank is entitled to recover.

COUNT I
BREACH OF PROMISSORY NOTE

6. The Bank realleges the allegations contained in paragraphs 1-5 as though fully set forth herein and incorporates the same by reference.

7. As of July 13, 2009, there was due and owing to the Bank the unpaid principal and interest amount of approximately $2,285,415.45 plus additional pre judgment interest at the rate of approximately 5.5% per annum resulting in a per diem of approximately $339.06448 together with costs and attorney's fees accruing thereon.

8. Yost is in default of his payment obligation to the Bank, and the Bank has declared and does hereby declare all sums owing and immediately due and payable in full. The Bank has made demand upon the Defendant at least ten (10) days prior to filing suit in this matter but Yost has failed and/or refused to make any payments to the Bank.

9. The Bank is therefore entitled to judgment against Yost in the sum of approximately $2,285,415.45 together with accruing interest thereon from July 13, 2009 at the per diem rate of approximately $339.06448 until the date of judgment, plus accruing costs and attorney's fees.

COUNT II
BREACH OF GUARANTY AGREEMENT

10. The Bank realleges the allegations contained in paragraphs 1-9 as though fully set forth herein and incorporates the same by reference.

11. The Crossdefendants Duane Yost and Lori Yost and the Third-Party Defendant Hampshire Holdings, LLC, personally guaranteed up to $1,000,000 of the obligations of Duane Yost described above. A copy of said guarantees are attached hereto as Exhibit "F".

12. The Crossdefendant Duane Yost has defaulted on the obligations as described above.

13. The Bank has made demand on the Crossdefendant Duane Yost for payment but Duane Yost has failed to pay as required by the Promissory Notes.

14. The Bank has made demand on the Crossdefendants Duane Yost and Lori Yost and the Third-Party Defendant Hampshire Holdings, LLC, for payment based upon the guaranty but each of them has refused and continues to refuse to pay the Bank.

15. As the Guarantor, the Crossdefendants Duane Yost and Lori Yost and the Third-Party Defendant Hampshire Holdings, LLC, are obligated to the Bank in the principal amount of $1,000,000 plus additional pre judgment interest at the rate of approximately 5.5% per annum resulting in a per diem of $150.68493 together with costs and attorney's fees accruing thereon.

COUNT III
FORECLOSURE OF DEEDS OF TRUST

16. The Bank realleges the allegations contained in paragraphs 1-15 as though fully set forth herein and incorporates the same by reference.

17. The Deeds of Trust described above grant to the Bank a valid lien and security interest in and to all of the real property, improvements, fixtures, irrigation equipment, or water rights, or other property described therein. Said Deeds of Trust have never been satisfied or discharged and no other suit or action has been commenced to foreclose upon said Deeds of Trust or to collect the amounts owed on the aforesaid Promissory Notes.

18. By the terms of said Deeds of Trust, the real property, and any fixtures, improvements, irrigation equipment or water rights, should be declared as part of the Deeds of Trust and should be included in this foreclosure and in any sale hereinafter to be ordered as part of the security for the repayment of this loan.

19. **Use of Premises**. Said Real Property Collateral, as described in each separate tract, has at all times heretofore been used together as one lot or parcel for each tract and every part thereof is necessary for the best use and enjoyment of said Real Property Collateral and each tract cannot be sold in separate parcels without material injury to the parties thereto.

20. **Reasonable Value**. The Bank intends to determine the reasonable value of the property prior to entry of decree herein and to introduce evidence supporting such value. In the event that said reasonable value should be less than the amount of the judgment requested, plus accruing interest, costs, and fees, the Bank intends to apply to the Court for the entry of a deficiency judgment against Crossdefendants Yost, for any deficiency remaining after

application of the foreclosure sale proceeds to payment of the judgment herein, plus accruing interest, costs, and fees herein.

21. **No Other Action**. The Bank has no plain, speedy, or adequate remedy at law, and no other proceeding at law or equity has been commenced or is pending to collect said notes or any portion thereof or to foreclose these Deeds of Trust. That all conditions precedent to the initiation and prosecution of this suit on said Notes and the foreclosure of said Deeds of Trust have been satisfied.

22. **Attorney's Fees**. Under each and every count, the Bank has been forced to employ counsel to represent it in this action and has become obligated to pay its reasonable attorney's fees and costs for such service. The Bank is entitled to recover reasonable attorney's fees from the Crossdefendants by virtue of the attorney's fees provision contained in the Promissory Notes, Deeds of Trust, and other security documents herein above described as well as pursuant to Idaho Code § 12-120 and §12-121. The Bank alleges that $5,000.00 is a reasonable sum to be allowed as attorney's fees if this action is uncontested, plus such additional sums as the Court may adjudge as reasonable attorney's fees in the event of a contest, trial or appeal.

COUNT IV
BREACH OF CONTRACT/THIRD PARTY BENEFICIARY

23. The Bank realleges the allegations contained in paragraphs 1-22 as though fully set forth herein and incorporates the same by reference.

24. The Harrises agreed to sell the subject 40 acres to the Yosts.

25. The Bank was a known and intended third-party beneficiary of this agreement between the Harrises and the Yosts.

26. The Harrises are claiming that they did not transfer the said 40 acres to the Yosts.

27. To the extent the Court finds that the Harrises did not transfer the 40 acres to the Yosts, then the Harrises breached their agreement to transfer the 40 acres to the Yosts.

28. As a result, the Bank, as a third party to the agreement, has been damaged.

29. The Bank seeks damages in an amount to be proven at trial and/or for specific performance of the Harrises' agreement to transfer the 40 acres to the Yosts.

COUNT V
FRAUD/MISREPRESENTATION

30. The Bank realleges the allegations contained in paragraphs 1-29 as though fully set forth herein and incorporates the same by reference.

31. In order for Duane Yost to use Tract I of the Real Property Collateral, ("Tract I") as collateral for his renewal loan with the Bank, Darryl Harris executed a QuitClaim Deed on November 25, 2010 that purported to transfer Tract I to the Duane L. Yost Trust.

32. However, in order for the title company to issue title insurance for Tract I, a Corrected QuitClaim Deed was prepared which included a signature line for Christine Harris in addition to the signature line for Darryl Harris.

33. Without authority from his wife, Darryl Harris signed Christine Harris' name to the Corrected QuitClaim Deed on or about December 1, 2008.

34. Darryl Harris remained silent about the fact that he had signed Christine Harris' name to the Corrected Quitclaim Deed without her consent and his silence was a representation.

35. Therefore, Darryl Harris represented that Christine Harris signed the Corrected QuitClaim Deed.

36. Implied in this representation was the statement and/or representation that Christine Harris had consented to the transfer of Tract I to Duane Yost and Lori Yost pursuant to the Corrected QuitClaim Deed.

37. Such representation was false as Christine Harris had not signed the QuitClaim Deed nor had she authorized Darryl Harris to sign her name on the Corrected QuitClaim Deed.

38. This representation was material because Tract I was owned by Darryl Harris and Christine Harris as community property and the consent of both Darryl Harris and Christine Harris was necessary to transfer Tract I to Duane Yost and Lori Yost.

39. Darryl Harris knew that Christine Harris had not signed the Corrected QuitClaim Deed. Moreover, Darryl Harris knew he had signed Christine Harris' name on the Corrected QuitClaim Deed without first getting her authorization and therefore, he knew that his representation was false.

40. Darryl Harris intended that Crandall, the Yosts, the title company and the Bank would rely on his forgery of his wife's signature on the Corrected QuitClaim Deed.

41. In addition, Darryl Harris intended that the Yosts, the title company and the Bank would rely on his silent representation that Christine Harris had consented to the transfer of Tract I to the Yosts.

42. Furthermore, Darryl Harris knew that the Corrected QuitClaim Deed would be recorded with Bonneville County and that his forgery of his wife's signature would be relied on by the general public.

43. Duane Yost, Lori Yost, the title company and the Bank are members of the general public.

44. At no time during 2008, did Crandall, the Yosts, the title company or the Bank know that Darryl Harris had forged his wife's name on the Corrected QuitClaim Deed.

45. In fact, the Bank did not know about said forgery until it received Plaintiffs' 5th Supplmentary Response to the Defendants, the Bank of Commerce First Set of Interrogatories and Requests for Production of Documents on or about November 1, 2010.

46. Crandall, the Yosts, the title company and the Bank all relied on Darryl Harris' forgery of his wife's signature on the Corrected QuitClaim Deed.

A. Specifically, Crandall relied on said forgery when he notarized the Corrected QuitClaim Deed because he believed that Christine Harris had actually signed said deed.

B. Specifically, Duane and Lori Yost relied on said forgery as they believed that Tract I had been deeded and transferred to them and they believed that they could therefore use Tract I as collateral for various loans obtained by Duane Yost from the Bank.

C. Specifically, the title company relied on said forgery as it issued title insurance to the Bank.

D. Specifically, the Bank relied on said forgery as it renewed various loans to Duane Yost on the belief that Darryl Harris and Christine Harris had actually transferred Tract I to Duane Yost and Lori Yost and on the belief that the Yosts could provide Tract I as security for the renewal loans.

47. The Bank's reliance on the forgery was justifiable as neither Darryl Harris nor Christine Harris, despite their knowledge of the forgery, informed the Bank of the forgery until

on or about November 1, 2010.

48. In addition, the Bank's reliance on the forgery was justifiable because the Bank had a long business relationship with Darryl Harris and was not aware of any prior instance of Darryl Harris' dishonesty and therefore had no reason to suspect that Darryl Harris would ever forge his wife's signature.

49. If the Court declares the Corrected QuitClaim Deed to be invalid, then as a result of Darryl Harris' fraud and forgery the Bank has suffered injury because it gave value to Duane Yost by renewing his loans and extending the terms of his loans believing that its Deeds of Trust had secured Tract I as collateral for the renewal loans.

50. Specifically, the Bank's injury is the value of Tract I, plus other amounts to be proven at trial of this matter.

51. In addition, if the Court declares the Corrected QuitClaim Deed to be invalid, then as a result of Darryl Harris' fraud and forgery the Bank has suffered injury because rather than enter into the renewal loans with Duane Yost, the Bank could have used moneys on deposit with the Bank during the latter end of 2008 that were in accounts owned or controlled by Duane Yost as a setoff but because of the fraud and forgery, the Bank did not exercise its right to said setoff.

COUNT VI
CIVIL LIABILITY OF NOTARY PUBLIC AND EMPLOYER

52. The Bank realleges the allegations contained in paragraphs 1-51 as though fully set forth herein and incorporates the same by reference.

53. Crandall, individually and as an employee of Family Asset Protection, notarized the Corrected Quitclaim Deed which contains Darryl Harris' forgery of Christine Harris'

signature, despite the fact that Christine Harris did not appear before him and that she did not sign the Corrected Quitclaim Deed.

54. As a notary public, Crandall failed to require Christine Harris and Darryl Harris to personally appear before him prior to or at the time he notarized the Corrected Quitclaim Deed.

55. As a notary public, Crandall's failure to exercise the required degree of care in identifying the person who actually signed Christine Harris' name on the Corrected Quitclaim Deed constitutes official misconduct pursuant to Idaho Code § 51-112.

56. As a notary public, Crandall's failure to exercise the required degree of care in verifying who signed Christine Harris' name to the Corrected Quitclaim Deed at or before the time he notarized the Corrected Quitclaim Deed constitutes official misconduct pursuant to Idaho Code § 51-112.

57. As a notary public, Crandall should be held liable for all damages proximately caused by his official misconduct as set forth herein.

58. Pursuant to Idaho Code §51-118, Family Asset Protection, as Crandall's employer, should be jointly and severally liable with Crandall for all damages proximately caused by the official misconduct of Crandall, because Crandall was acting as a notary public within the scope of his employment when he notarized the Corrected Quitclaim Deed and because Family Asset Protection had actual knowledge of, or reasonably should have known of, Crandall's official misconduct.

COUNT VII
PROMISSORY ESTOPPEL

59. The Bank realleges the allegations contained in paragraphs 1-58 as though fully set forth herein and incorporates the same by reference.

60. By signing the Corrected Quitclaim Deed, Defendant Darryl Harris made the specific promise that he and his wife, Christine Harris, were transferring Tract I to Duane Yost in order for the Bank to obtain security in Tract I and to renew Duane Yost's loans with the Bank.

61. The Bank was a known third-party beneficiary to Darryl Harris' promise to transfer Tract I to Duane Yost.

62. The Bank relied on Darryl Harris' promise to transfer Tract I to Duane Yost.

63. To the extent the Corrected Quitclaim Deed is deemed void because of Darryl Harris' forgery of his wife's name on said deed, Darryl Harris breached his promise to transfer Tract I to Duane Yost.

64. The Bank has suffered substantial economic loss as a result of its reliance on Darryl Harris' promise to transfer Tract I to Duane Yost.

65. The Bank's loss was or should have been foreseeable by Darryl Harris when he forged his wife's name on the Corrected Quitclaim Deed.

66. It was reasonable for the Bank to rely on Darryl Harris' promise to transfer Tract I to Duane Yost as well as on his forgery of Christine Harris' name on the Corrected Quitclaim Deed.

67. As a result, the Bank has been damaged in an amount to be proven at trial.

COUNT VIII
PUNITIVE DAMAGES

68. The Bank realleges the allegations contained in paragraphs 1-67 as though fully set forth herein and incorporates the same by reference.

69. Defendant Darryl Harris' decision to forge Christine Harris' name on the Corrected Quitclaim Deed, without her written consent and in reckless disregard of the consequences to the Bank and to other third parties, was oppressive, malicious, outrageous, reckless and fraudulent. The Bank is entitled to an award of punitive damages against Defendant Darryl Harris, pursuant to I.C. § 6-1604.

REQUEST FOR RELIEF

WHEREFORE, the Bank prays for judgment as follows:

A. That the Bank have judgment against Yost in the sum of approximately $2,285,415.45 together with interest at the rate of approximately 5.5% per annum after July 13, 2009 at the per diem interest accrual of approximately $339.06448 for any sums advanced by the Bank or which the Bank becomes obligated or elects to advance for the payment of taxes, assessments, insurance premiums, mortgage insurance premiums, water charges, and other governmental charges, fines, assessed or charged against the property during the pendency of this action, including interest on such advance from the date of the advance; for the sum of $5,000.00 for attorney's fees if this action is uncontested, plus such additional sums as the Court may adjudge as reasonable in the event of contest, trial, or appeal; for the Bank's taxable costs and disbursements herein; and for interest on the entire amount of said judgment at the maximum rate allowed by law.

B. That the Bank's Deeds of Trust herein described be adjudged first and prior liens upon the Real Property Collateral superior to any right, title, claim, lien, or interest on the part of the named Counterdefendants, Crossclaimants, Third-Party Claimaint or any persons claiming by, through, or under said Counterdefendants, Crossclaimants or Third-Party Claimaint, except for Tract II upon which Counterdefendants Darryl Harris and Christine Harris, husband and wife, may have a first lien priority based upon the deed of trust described in paragraph 2.A. of this Counterclaim, Cross Claim and Third-Party Claim.

C. That the Court, in the decree, establish the reasonable value of the Real Property Collateral herein described according to proof.

D. That the Bank's Deeds of Trust described herein be foreclosed and said Real Property Collateral, together with improvements and water rights, however evidenced, be sold in one parcel in accordance with and in the manner provided by law; that the Bank be permitted to be a purchaser at the sale; that the net proceeds of said sale be applied first toward the payment of the costs of said sale and then toward the payment of the Bank's judgment; that the Bank have and retain a deficiency judgment against the Cross Defendants and Third-Party Defendant, in the event that the bid at the sale is less than the sum of the Bank's entire judgment, plus costs of sale.

E. That the decree provide that after the sale of said Real Property Collateral, all right, title, claim, lien, or interest in the above-named Counterdefendants, Crossdefendants, Third-Party Defendants, and every person claiming by, through, or under said Counterdefendants, Crossdefendants and Third-Party Defendants in or to said property, including the right of possession thereof from and after said sale, be forever barred and

foreclosed and that the purchaser at said sale be entitled to immediate possession of the premises as allowed by law subject only to such statutory right of redemption as the Counterdefendants, Crossdefendants and Third-Party Defendants may have by law.

F. In the event that the Bank is the purchaser at sale and possession of said premises is not surrendered to the Bank, that the Court issue a Writ of Assistance directed to the sheriff of Bonneville County, Idaho, to deliver possession of said premises to the Bank.

G. That the Bank be granted a judgment against Defendants Darryl Harris and Christine Harris for damages in an amount to be proven at trial and/or for specific performance of their agreement to sell the subject 40 acres to the Yosts.

H. That the Bank be granted a judgment against Defendant Robert Parkinson Crandall, an individual, and Family Asset Protection Legal Services, P.L.L.C., in an amount to be proven at trial.

I. That punitive damages be entered against Defendant Darryl Harris and in favor of the Bank.

J. That the Bank may have such other and further relief as the Court deems just and equitable.

Dated this 2 day of June, 2011.

NELSON HALL PARRY TUCKER, P.A.

By: _____
Brian T. Tucker

* This is an attempt to collect a debt, any information obtained will be used for that purpose.

CERTIFICATE OF SERVICE

I hereby certify that I served a true copy of the foregoing document upon the following this 2 day of June, 2011, by hand delivery, mailing with the necessary postage affixed thereto, facsimile, or overnight mail.

Kipp L. Manwaring	[ ] Mailing
MANWARING LAW OFFICE	[✓] Hand Delivery
381 Shoup Avenue, Suite 210	[ ] Fax: 523-9109
Idaho Falls, ID 83402	[ ] Overnight Mail

Brian T. Tucker

L:\DRN\0260.491\Answer & Counterclaim - Amended - Revised.wpd

Exhibit "A"

DUANE YOST P.O. BOX 2095 IDAHO FALLS, ID 83403 BORROWER'S NAME AND ADDRESS "I" includes each borrower above, jointly and severally.	THE Y OF COMMERCE-ADMINISTRATION 3 ITH 25TH EAST, P.O. 1887 I .LLS, ID 83403 LENDER'S NAME AND ADDRESS "You" means the lender, its successors and assigns.	Loan Num 2107052793 Date 04-1 Maturity Date 04-16-2009 Loan Amount $ 2,000,000.00 Renewal Of PROCESSOR MICHELLE WALKER

For value received, I promise to pay to you, or your order, at your address listed above the PRINCIPAL sum of TWO MILLION AND NO/100 Dollars $2,000,000.00

☐ **Single Advance:** I will receive all of this principal sum on _____. No additional advances are contemplated under this note.

☒ **Multiple Advance:** The principal sum shown above is the maximum amount of principal I can borrow under this note. On 04-16-2008 I will receive the amount of $ _____ and future principal advances are contemplated.

Conditions: The conditions for future advances are UPON REQUEST OF CUSTOMER AND APPROVAL OF LOAN OFFICER.

☒ **Open End Credit:** You and I agree that I may borrow up to the maximum amount of principal more than one time. This feature is subject to all other conditions and expires on 04-16-2009.

☐ **Closed End Credit:** You and I agree that I may borrow up to the maximum only one time (and subject to all other conditions).

INTEREST: I agree to pay interest on the outstanding principal balance from 04-16-2008 at the rate of 5.750 % per year until 04-17-2008.

☒ **Variable Rate:** This rate may then change as stated below.

☒ **Index Rate:** The future rate will be 0.500 PERCENT ABOVE the following index rate: HIGHEST PUBLISHED WALL STREET JOURNAL PRIME RATE SEE "LIMITATIONS" BELOW

. THE RESULT OF THIS CALCULATION WILL BE ROUNDED TO THE NEAREST 0.001

☐ **No Index:** The future rate will not be subject to any internal or external index. It will be entirely in your control.

☒ **Frequency and Timing:** The rate on this note may change as often as EVERY DAY BEGINNING 04-17-2008.
A change in the interest rate will take effect ON THE SAME DAY.

☒ **Limitations:** During the term of this loan, the applicable annual interest rate will not be more than 18.000 % or less than 5.500 %. The rate may not change more than _____ % each _____.

Effect of Variable Rate: A change in the interest rate will have the following effect on the payments:

☐ The amount of each scheduled payment will change. ☒ The amount of the final payment will change.

☐ _____.

ACCRUAL METHOD: Interest will be calculated on a ACTUAL/365 basis.

POST MATURITY RATE: I agree to pay interest on the unpaid balance of this note owing after maturity, and until paid in full, as stated below:

☒ on the same fixed or variable rate basis in effect before maturity (as indicated above).

☐ at a rate equal to _____.

☐ LATE CHARGE: If a payment is made more than _____ days after it is due, I agree to pay a late charge of _____.

☒ ADDITIONAL CHARGES: In addition to interest, I agree to pay the following charges which ☐ are ☒ are not included in the principal amount above: LOAN DOC FEE $1,000.00 PAID IN CASH.

PAYMENTS: I agree to pay this note as follows:

ON DEMAND, BUT IF NO DEMAND IS MADE THEN INTEREST ON THE AMOUNT OF CREDIT OUTSTANDING DUE AT MATURITY AND PRINCIPAL DUE ON 04-16-2009.

ADDITIONAL TERMS:

☒ SECURITY: This note is separately secured by (describe separate document by type and date):
STATEMENT LOAN

(This section is for your internal use. Failure to list a separate security document does not mean the agreement will not secure this note.)

PURPOSE: The purpose of this loan is BUSINESS; INVESTMENT PURPOSES.

SIGNATURES: I AGREE TO THE TERMS OF THIS NOTE (INCLUDING THOSE ON PAGE 2). I have received a copy on today's date.

Signature for Lender

THOMAS J. ROMRELL, PRESIDENT

DUANE YOST

UNIVERSAL NOTE

DEFINITIONS: As used on page 1, [illegible] this loan. "I," "me" or "my" means each Borrower who signs this note and each other [illegible] or legal entity (including guarantors, endorsers, and sureties) [illegible]ises to pay this note (together referred to as "us"). "You" or "your" [illegible] the Lender and its successors and assigns.

APPLICABLE LAW: [illegible]he law of the state in which you are located will govern this note. Any term of this note which is contrary to applicable law will not be effective, unless the law permits you and me to agree to such a variation. If any provision of this agreement cannot be enforced according to its terms, this fact will not affect the enforceability of the remainder of this agreement. No modification of this agreement may be made without your express written consent. Time is of the essence in this agreement.

COMMISSIONS OR OTHER REMUNERATION: I understand and agree that any insurance premiums paid to insurance companies as part of this note will involve money retained by you or paid back to you as commissions or other remuneration.

In addition, I understand and agree that some other payments to third parties as part of this note may also involve money retained by you or paid back to you as commissions or other remuneration.

PAYMENTS: Each payment I make on this note will first reduce the amount I owe you for charges which are neither interest nor principal. The remainder of each payment will then reduce accrued unpaid interest, and then unpaid principal. If you and I agree to a different application of payments, we will describe our agreement on this note. I may prepay a part of, or the entire balance of this loan without penalty, unless we specify to the contrary on this note. Any partial prepayment will not excuse or reduce any later scheduled payment until this note is paid in full (unless, when I make the prepayment, you and I agree in writing to the contrary).

INTEREST: Interest accrues on the principal remaining unpaid from time to time, until paid in full. If I receive the principal in more than one advance, each advance will start to earn interest only when I receive the advance. The interest rate in effect on this note at any given time will apply to the entire principal advanced at that time. Notwithstanding anything to the contrary, I do not agree to pay and you do not intend to charge any rate of interest that is higher than the maximum rate of interest you could charge under applicable law for the extension of credit that is agreed to here (either before or after maturity). If any notice of interest accrual is sent and is in error, we mutually agree to correct it, and if you actually collect more interest than allowed by law and this agreement, you agree to refund it to me.

INDEX RATE: The index will serve only as a device for setting the rate on this note. You do not guarantee by selecting this index, or the margin, that the rate on this note will be the same rate you charge on any other loans or class of loans to me or other borrowers.

ACCRUAL METHOD: The amount of interest that I will pay on this loan will be calculated using the interest rate and accrual method stated on page 1 of this note. For the purpose of interest calculation, the accrual method will determine the number of days in a "year." If no accrual method is stated, then you may use any reasonable accrual method for calculating interest.

POST MATURITY RATE: For purposes of deciding when the "Post Maturity Rate" (shown on page 1) applies, the term "maturity" means the date of the last scheduled payment indicated on page 1 of this note or the date you accelerate payment on the note, whichever is earlier.

SINGLE ADVANCE LOANS: If this is a single advance loan, you and I expect that you will make only one advance of principal. However, you may add other amounts to the principal if you make any payments described in the "PAYMENTS BY LENDER" paragraph below.

MULTIPLE ADVANCE LOANS: If this is a multiple advance loan, you and I expect that you will make more than one advance of principal. If this is closed end credit, repaying a part of the principal will not entitle me to additional credit.

PAYMENTS BY LENDER: If you are authorized to pay, on my behalf, charges I am obligated to pay (such as property insurance premiums), then you may treat those payments made by you as advances and add them to the unpaid principal under this note, or you may demand immediate payment of the charges.

SET-OFF: I agree that you may set off any amount due and payable under this note against any right I have to receive money from you.

"Right to receive money from you" means:

(1) any deposit account balance I have with you;

(2) any money owed to me on an item presented to you or in your possession for collection or exchange; and

(3) any repurchase agreement or other nondeposit obligation.

"Any amount due and payable under this note" means the total amount of which you are entitled to demand payment under the terms of this note at the time you set off. This total includes any balance the due date for which you properly accelerate under this note.

If my right to receive money from you is also owned by someone who has not agreed to pay this note, your right of set-off will apply to my interest in the obligation and to any other amounts I could withdraw on my sole request or endorsement. Your right of set-off does not apply to an account or other obligation where my rights are only as a representative. It also does not apply to any Individual Retirement Account or other tax-deferred retirement account.

You will not be liable for the dishonor of any check when the dishonor occurs because you set off this debt against any of my accounts. I agree exercise of your right of set-off.

REAL [illegible]TE OR RESIDENCE SECURITY: If this note is secured by r[illegible] estat[illegible] residence that is personal property, the existence of a defa[illegible] an[illegible]emedies for such a default will be determined by applicat[illegible] law[illegible]e terms of any separate instrument creating the secur[illegible] interest and, to the extent not prohibited by law and not contrary to t[illegible] terms of the separate security instrument, by the "Default" a[illegible] "Remedies" paragraphs herein.

DEFAULT: I will be in default if any one or more of the following occur: (1 fail to make a payment on time or in the amount due; (2) I fail to keep t[illegible] property insured, if required; (3) I fail to pay, or keep any promise, on a[illegible] debt or agreement I have with you; (4) any other creditor of mine attempts collect any debt I owe him through court proceedings; (5) I die, am declar[illegible] incompetent, make an assignment for the benefit of creditors, or becor[illegible] insolvent (either because my liabilities exceed my assets or I am unable pay my debts as they become due); (6) I make any written statement provide any financial information that is untrue or inaccurate at the time it w[illegible] provided; (7) I do or fail to do something which causes you to believe that y[illegible] will have difficulty collecting the amount I owe you; (8) any collateral securi[illegible] this note is used in a manner or for a purpose which threatens confiscation a legal authority; (9) I change my name or assume an additional nar[illegible] without first notifying you before making such a change; (10) I fail to pla[illegible] cultivate and harvest crops in due season if I am a producer of crops; (11) a[illegible] loan proceeds are used for a purpose that will contribute to excessive erosi[illegible] of highly erodible land or to the conversion of wetlands to produce agricultural commodity, as further explained in 7 C.F.R. Part 1940, Subpa[illegible] G, Exhibit M.

REMEDIES: If I am in default on this note you have, but are not limited t[illegible] the following remedies:

(1) You may demand immediate payment of all I owe you under th[illegible] note (principal, accrued unpaid interest and other accrued charge[illegible]

(2) You may set off this debt against any right I have to the payme[illegible] of money from you, subject to the terms of the "Set-Of[illegible] paragraph herein.

(3) You may demand security, additional security, or additional parti[illegible] to be obligated to pay this note as a condition for not using a[illegible] other remedy.

(4) You may refuse to make advances to me or allow purchases [illegible] credit by me.

(5) You may use any remedy you have under state or federal law.

By selecting any one or more of these remedies you do not give up yo[illegible] right to later use any other remedy. By waiving your right to declare[illegible] event to be a default, you do not waive your right to later consider th[illegible] event as a default if it continues or happens again.

COLLECTION COSTS AND ATTORNEY'S FEES: I agree to pay all costs[illegible] collection, replevin or any other or similar type of cost if I am in defau[illegible] In addition, if you hire an attorney to collect this note, I also agree to p[illegible] any fee you incur with such attorney plus court costs (except whe[illegible] prohibited by law). To the extent permitted by the United Stat[illegible] Bankruptcy Code, I also agree to pay the reasonable attorney's fees a[illegible] costs you incur to collect this debt as awarded by any court exercisi[illegible] jurisdiction under the Bankruptcy Code.

WAIVER: I give up my rights to require you to do certain things. I will n[illegible] require you to:

(1) demand payment of amounts due (presentment);

(2) obtain official certification of nonpayment (protest); or

(3) give notice that amounts due have not been paid (notice [illegible] dishonor).

I waive any defenses I have based on suretyship or impairment [illegible] collateral.

OBLIGATIONS INDEPENDENT: I understand that I must pay this no[illegible] even if someone else has also agreed to pay it (by, for example, signir[illegible] this form or a separate guarantee or endorsement). You may sue n[illegible] alone, or anyone else who is obligated on this note, or any number of [illegible] together; to collect this note. You may do so without any notice that has not been paid (notice of dishonor). You may without notice releas[illegible] any party to this agreement without releasing any other party. If you gi[illegible] up any of your rights, with or without notice, it will not affect my duty pay this note. Any extension of new credit to any of us, or renewal this note by all or less than all of us will not release me from my duty pay it. (Of course, you are entitled to only one payment in full.) I agr[illegible] that you may at your option extend this note or the debt represented b[illegible] this note, or any portion of the note or debt, from time to time witho[illegible] limit or notice and for any term without affecting my liability for payme[illegible] of the note. I will not assign my obligation under this agreement witho[illegible] your prior written approval.

FINANCIAL INFORMATION: I agree to provide you, upon request, ar[illegible] financial statement or information you may deem necessary. I warra[illegible] that the financial statements and information I provide to you are or w[illegible] be accurate, correct and complete.

NOTICE: Unless otherwise required by law, any notice to me shall b[illegible] given by delivering it or by mailing it by first class mail addressed to m[illegible] at my last known address. My current address is on page 1. I agree [illegible] inform you in writing of any change in my address. I will give any notic[illegible] to you by mailing it first class to your address stated on page 1 of th[illegible] agreement, or to any other address that you have designated.

PAYMENT BY CHECK: If any payment on this note is made with a chec[illegible] that is dishonored, I agree to pay you a $20.00 fee.

DATE OF TRANSACTION	PRINCIPAL ADVANCE	BORROWER'S INITIALS (not required)	PRINCIPAL PAYMENTS	PRINCIPAL BALANCE	INTEREST RATE	INTEREST PAYMENTS	INTEREST PAID THROUGH:
	$		$	$	%	$	
	$		$	$	%	$	
	$		$	$	%	$	
	$		$	$	%	$	
	$		$	$	%	$	
	$		$	$	%	$	
	$		$	$	%	$	
	$		$	$	%	$	
	$		$	$	%	$	
	$		$	$	%	$	
	$		$	$	%	$	

DUANE YOST P.O. BOX 2095 IDAHO FALLS, ID 83403 BORROWER'S NAME AND ADDRESS "I" includes each borrower above, jointly and severally.	TH[redacted]NK OF COMMERCE-ADMINISTRATION [redacted]OUTH 25TH EAST, P.O. 1887 [redacted]O FALLS, ID 83403 LENDER'S NAME AND ADDRESS "You" means the lender, its successors and assigns.	Line of Credit [redacted] 1010705293 Date 04-16-2008 Max. Credit Amt. 2,000,000.00 Loan Ref. No.

You have extended to me a line of credit in the AMOUNT of TWO MILLION AND NO/100 $ 2,000,000.00.

You will make loans to me from time to time until 5:00 P.m. on 04-16-2009. Although the line of credit expires on that date, I will remain obligated to perform all my duties under this agreement so long as I owe you any money advanced according to the terms of this agreement, as evidenced by any note or notes I have signed promising to repay these amounts.

This line of credit is an agreement between you and me. It is not intended that any third party receive any benefit from this agreement, whether by direct payment, reliance for future payment or in any other manner. This agreement is not a letter of credit.

1. **AMOUNT:** This line of credit is:

☒ OBLIGATORY: You may not refuse to make a loan to me under this line of credit unless one of the following occurs:
a. I have borrowed the maximum amount available to me;
b. This line of credit has expired;
c. I have defaulted on the note (or notes) which show my indebtedness under this line of credit;
d. I have violated any term of this line of credit or any note or other agreement entered into in connection with this line of credit;
e. I HAVE FILED BANKRUPTCY.

☐ DISCRETIONARY: You may refuse to make a loan to me under this line of credit once the aggregate outstanding advances equal or exceed $.

Subject to the obligatory or discretionary limitations above, this line of credit is:

☒ OPEN-END (Business or Agricultural only): I may borrow up to the maximum amount of principal more than one time.

☐ CLOSED-END: I may borrow up to the maximum only one time.

2. **PROMISSORY NOTE:** I will repay any advances made according to this line of credit agreement as set out in the promissory note, I signed on 04-16-2008, or any note(s) I sign at a later time which represent advances under this agreement. The note(s) set(s) out the terms relating to maturity, interest rate, repayment and advances. If indicated on the promissory note, the advances will be made as follows: UPON REQUEST OF CUSTOMER AND APPROVAL OF LOAN OFFICER.

3. **RELATED DOCUMENTS:** I have signed the following documents in connection with this line of credit and note(s) entered into in accordance with this line of credit:

☐ security agreement dated ☐
☐ mortgage dated ☐
☐ guaranty dated ☐

4. **REMEDIES:** If I am in default on the note(s) you may:
a. take any action as provided in the related documents;
b. without notice to me, terminate this line of credit.
By selecting any of these remedies you do not give up your right to later use any other remedy. By deciding not to use any remedy should I default, you do not waive your right to later consider the event a default, if it happens again.

5. **COSTS AND FEES:** If you hire an attorney to enforce this agreement I will pay your reasonable attorney's fees, where permitted by law. I will also pay your court costs and costs of collection, where permitted by law.

6. **COVENANTS:** For as long as this line of credit is in effect or I owe you money for advances made in accordance with the line of credit, I will do the following:
a. maintain books and records of my operations relating to the need for this line of credit;
b. permit you or any of your representatives to inspect and/or copy these records;
c. provide to you any documentation requested by you which support the reason for making any advance under this line of credit;
d. permit you to make any advance payable to the seller (or seller and me) of any items being purchased with that advance;
e.

7. **NOTICES:** All notices or other correspondence with me should be sent to my address stated above. The notice or correspondence shall be effective when deposited in the mail, first class, or delivered to me in person.

8. **MISCELLANEOUS:** This line of credit may not be changed except by a written agreement signed by you and me. The law of the state in which you are located will govern this agreement. Any term of this agreement which is contrary to applicable law will not be effective, unless the law permits you and me to agree to such a variation.

FOR THE LENDER

THOMAS J. ROMRELL
Title PRESIDENT

SIGNATURES: I AGREE TO THE TERMS OF THIS LINE OF CREDIT. I HAVE RECEIVED A COPY ON TODAY'S DATE.

DUANE YOST

Exhibit "B"

DUANE YOST 3777 HAMPSHIRE CT. IDAHO FALLS, ID 83404 BORROWER'S NAME AND ADDRESS "I" includes each borrower above, jointly and severally.	THE [redacted] OF COMMERCE-ADMINISTRATION 3[redacted] TH 25TH EAST, P.O. 1887 ID[redacted]LLS, ID 83403 LENDER'S NAME AND ADDRESS "You" means the lender, its successors and assigns.	Loan Numb[redacted] 10805495 Date 11-2[redacted] Maturity Date 11-21-2009 Loan Amount $ 1,000,000.00 Renewal Of PROCESSOR SUMMER SORENSON

For value received, I promise to pay to you, or your order, at your address listed above the **PRINCIPAL** sum of ONE MILLION AND NO/100 Dollars $ 1,000,000.00

☒ **Single Advance:** I will receive all of this principal sum on 11-21-2008. No additional advances are contemplated under this note.

☐ **Multiple Advance:** The principal sum shown above is the maximum amount of principal I can borrow under this note. On _____ I will receive the amount of $ _____ and future principal advances are contemplated.

Conditions: The conditions for future advances are _____

☐ **Open End Credit:** You and I agree that I may borrow up to the maximum principal sum more than one time. This feature is subject to all other conditions and expires on _____.

☐ **Closed End Credit:** You and I agree that I may borrow (subject to all other conditions) up to the maximum principal sum only one time.

INTEREST: I agree to pay interest on the outstanding principal balance from 11-21-2008 at the rate of 5.500% per year until 11-22-2008.

☒ **Variable Rate:** This rate may then change as stated below.

☒ **Index Rate:** The future rate will be 0.500 PERCENT ABOVE the following index rate: HIGHEST PUBLISHED WALL STREET JOURNAL PRIME RATE

. THE RESULT OF THIS CALCULATION WILL BE ROUNDED TO THE NEAREST 0.001

☐ **No Index:** The future rate will not be subject to any internal or external index. It will be entirely in your control.

☒ **Frequency and Timing:** The rate on this note may change as often as EVERY DAY BEGINNING 11-22-2008.
A change in the interest rate will take effect ON THE SAME DAY.

☒ **Limitations:** During the term of this loan, the applicable annual interest rate will not be more than 18.000% or less than 5.500 %. The rate may not change more than _____% each _____.

Effect of Variable Rate: A change in the interest rate will have the following effect on the payments:

☐ The amount of each scheduled payment will change. ☒ The amount of the final payment will change.

☐ _____.

ACCRUAL METHOD: Interest will be calculated on a ACTUAL/365 basis.

POST MATURITY RATE: I agree to pay interest on the unpaid balance of this note owing after maturity, and until paid in full, as stated below:

☒ on the same fixed or variable rate basis in effect before maturity (as indicated above).

☐ at a rate equal to _____.

☐ **LATE CHARGE:** If a payment is made more than _____ days after it is due, I agree to pay a late charge of _____.

☒ **ADDITIONAL CHARGES:** In addition to interest, I agree to pay the following charges which ☐ are ☒ are not included in the principal amount above: OFFICIALS $117.00; TITLE POLICY $3,669.00; UCC $100.00; LOAN DOC FEE $450.00; LOAN ORIGINATION FEE $1550.00 PAID IN CASH.

PAYMENTS: I agree to pay this note as follows:

1 PAYMENT OF $1,055,000.00 ON 11-21-2009. THIS IS A VARIABLE RATE LOAN AND THE FINAL PAYMENT AMOUNT MAY CHANGE.

PURPOSE: The purpose of this loan is BUSINESS; REFINANCE EXISTING LOAN.

ADDITIONAL TERMS:

SECURITY INTEREST: I give you a security interest in all of the Property ...
interest, now or in the future, wherever the Property is or will be located, and all proceeds and products of the Property. "Property" includes a parts, accessori... epairs, replacements, improvements, and accessions to the ... perty; any original evidence of title or ownership; and a obligations th... ort the payment or performance of the Property. "Pro... includes anything acquired upon the sale, lease, license exchange, o... sposition of the Property; any rights and claims arising ... Property; and any collections and distributions on account c the Property.

[X] **Accounts and Other Rights to Payment:** All rights to payment, whether or not earned by performance, including, but not limited to, payment fc property or services sold, leased, rented, licensed, or assigned. This includes any rights and interests (including all liens) which I have by law c agreement against any account debtor or obligor.

[X] **Inventory:** All inventory held for ultimate sale or lease, or which has been or will be supplied under contracts of service, or which are ra materials, work in process, or materials used or consumed in my business.

[X] **Equipment:** All equipment including, but not limited to, machinery, vehicles, furniture, fixtures, manufacturing equipment, farm machinery an equipment, shop equipment, office and record keeping equipment, parts, and tools. The Property includes any equipment described in a list c schedule I give to you, but such a list is not necessary to create a valid security interest in all of my equipment.

[X] **Instruments and Chattel Paper:** All instruments, including negotiable instruments and promissory notes and any other writings or records th evidence the right to payment of a monetary obligation, and tangible and electronic chattel paper.

[X] **General Intangibles:** All general intangibles including, but not limited to, tax refunds, patents and applications for patents, copyright trademarks, trade secrets, goodwill, trade names, customer lists, permits and franchises, payment intangibles, computer programs and a supporting information provided in connection with a transaction relating to computer programs, and the right to use my name.

[X] **Documents:** All documents of title including, but not limited to, bills of lading, dock warrants and receipts, and warehouse receipts.

[X] **Farm Products and Supplies:** All farm products including, but not limited to, all poultry and livestock and their young, along with their produce products, and replacements; all crops, annual or perennial, and all products of the crops; and all feed, seed, fertilizer, medicines, and othe supplies used or produced in my farming operations.

[X] **Government Payments and Programs:** All payments, accounts, general intangibles, and benefits including, but not limited to, payments in kin deficiency payments, letters of entitlement, warehouse receipts, storage payments, emergency assistance and diversion payments, productio flexibility contracts, and conservation reserve payments under any preexisting, current, or future federal or state government program.

[X] **Investment Property:** All investment property including, but not limited to, certificated securities, uncertificated securities, securitie entitlements, securities accounts, commodity contracts, commodity accounts, and financial assets.

[X] **Deposit Accounts:** All deposit accounts including, but not limited to, demand, time, savings, passbook, and similar accounts.

[X] **Specific Property Description:** The Property includes, but is not limited by, the following:

2006 CARVER 46 VOYAGER GRAND SALON SN# CDRC4049B606

VOLVO D6 EVC, 370 HP, DIESEL

VOLVO D6 EVC, 370 HP, DIESEL

ONAN 13.5 KW, DIESEL

PERSONAL AND ENTITY GUARANTEES DATED 11/21/2008 AND DEEDS OF TRUST DATED 11/21/2008

If applicable, enter real estate description and record owner information: LOT 11 IN BLOCK 3 OF CANTERBURY PARK, DIVISION NO. 2, TO THE CITY OF IDAH FALLS, IDAHO ACCORDING TO THE OFFICIAL PLAT THEREOF, RECORDED OCTOBER 19, 1992 AS INSTRUMENT NO. 837954 FILED IN OFFICIAL RECORDS OF BONNEVILLE COUNTY, IDAHO. AND SEE EXHIBIT "A" WHICH IS ATTACHED HERETO AND MADE A PART HEREOF.

The Property will be used for a ☐ personal [X] business ☐ agricultural ☐ ______________ purpose

Borrower/Owner State of organization/registration (if applicable) ID

ADDITIONAL TERMS OF THE SECURITY AGREEMENT

GENERALLY - This agreement secures this note and any other debt I have with you, now or later. However, it will not secure other debts if you fail with respect to such other debts, to make any required disclosure about this security agreement or if you fail to give any required notice of the right of rescission. If property described in this agreement is located in another state, this agreement may also, in some circumstances, be governed by the law of the state in which the Property is located.

NAME AND LOCATION - My name indicated on page 1 is my exact legal name. If I am an individual, my address is my principal residence. If I am not an individual, my address is the location of my chief executive offices or sole place of business. If I am an entity organized and registered under state law, my address is located in the state in which I am registered, unless otherwise indicated on page 2. I will provide verification of registration and location upon your request. I will provide you with at least 30 days notice prior to any change in my name, address, or state of organization or registration.

OWNERSHIP AND DUTIES TOWARD PROPERTY - I represent that I own all of the Property, or to the extent this is a purchase money security interest I will acquire ownership of the Property with the proceeds of the loan. I will defend it against any other claim. Your claim to the Property is ahead of the claims of any other creditor. I agree to do whatever you require to protect your security interest and to keep your claim in the Property ahead of the claims of other creditors. I will not do anything to harm your position. I will not use the Property for a purpose that will violate any laws or subject the Property to forfeiture or seizure.

I will keep books, records and accounts about the Property and my business in general. I will let you examine these records at any reasonable time. I will prepare any report or accounting you request, which deals with the Property.

I will keep the Property in my possession and will keep it in good repair and use it only for the purpose(s) described on page 1 of this agreement. I will not change this specified use without your express written permission. I represent that I am the original owner of the Property and, if I am not, that I have provided you with a list of prior owners of the Property.

I will keep the Property at my address listed on page 1 of this agreement, unless we agree I may keep it at another location. If the Property is to be used in another state, I will give you a list of those states. I will not try to sell the Property unless it is inventory or I receive your written permission to do so. If I sell the Property I will have the payment made payable to the order of you and me.

You may demand immediate payment of the debt(s) if the debtor is not a natural person and without your prior written consent; (1) a beneficial interest in the debtor is sold or transferred; or (2) there is a change in either the identity or number of members of a partnership, or (3) there is a change in ownership of more than 25 percent of the voting stock of a corporation.

I will pay all taxes and charges on the Property as they become due. You have the right of reasonable access in order to inspect the Property. I will immediately inform you of any loss or damage to the Property.

If I fail to perform any of my duties under this security agreement, or any mortgage, deed of trust, lien or other security interest, you may without notice to me perform the duties or cause them to be performed. Your right to perform for me shall not create an obligation to perform and your failure to perform will not preclude you from exercising any of your other rights under the law or this security agreement.

PURCHASE MONEY SECURITY INTEREST - For the sole purpose c determining the extent of a purchase money security interest arisin under this security agreement: (a) payments on any nonpurchase mone loan also secured by this agreement will not be deemed to apply to th Purchase Money Loan, and (b) payments on the Purchase Money Loa will be deemed to apply first to the nonpurchase money portion of th loan, if any, and then to the purchase money obligations in the order i which the items of collateral were acquired or if acquired at the sam time, in the order selected by you. No security interest will be terminate by application of this formula. "Purchase Money Loan" means any loa the proceeds of which, in whole or in part, are used to acquire an collateral securing the loan and all extensions, renewals, consolidation and refinancing of such loan.

PAYMENTS BY LENDER - You are authorized to pay, on my behal charges I am or may become obligated to pay to preserve or protect th secured property (such as property insurance premiums). You may tre those payments as advances and add them to the unpaid principal unde the note secured by this agreement or you may demand immediat payment of the amount advanced.

INSURANCE - I agree to buy insurance on the Property against the risk and for the amounts you require and to furnish you continuing proof c coverage. I will have the insurance company name you as loss payee o any such policy. You may require added security if you agree th insurance proceeds may be used to repair or replace the Property. I wi buy insurance from a firm licensed to do business in the state of Idah The firm will be reasonably acceptable to you. The insurance will la until the Property is released from this agreement. If I fail to buy c maintain the insurance (or fail to name you as loss payee) you ma purchase it yourself.

WARRANTIES AND REPRESENTATIONS - If this agreement include accounts, I will not settle any account for less than its full value withou your written permission. I will collect all accounts until you tell m otherwise. I will keep the proceeds from all the accounts and any good which are returned to me or which I take back in trust for you. I will n mix them with any other property of mine. I will deliver them to you your request. If you ask me to pay you the full price on any returne items or items retaken by myself, I will do so. You may exercise m rights with respect to obligations of any account debtors, or oth persons obligated on the Property, to pay or perform, and you ma enforce any security interest that secures such obligations.

If this agreement covers inventory, I will not dispose of it except in m ordinary course of business at the fair market value for the Property, or a minimum price established between you and me.

Any person who signs within this box does so to give you a security interest in the Property described on this page. This person does no promise to pay the note. "I" as used in this security agreement wil include the borrower and any person who signs within this box.

Date ______________

Signed ______________________________

If this agreement covers farm products [illegible] provide you, at your request, a written list of the buyers, commission merchants or selling agents to or through whom I may sell my farm products in addition to those parties named on this written list, I authorize you to notify at your sole discretion any additional parties regarding your [illegible] interest in my farm products. I remain subject to all applicable [illegible]s for selling my farm products in violation of my agreement with you and the Food Security Act. In this paragraph the terms farm products, buyers, commission merchants and selling agents have the meanings given to them in the Federal Food Security Act of 1985.

If this agreement covers chattel paper or instruments, either as original collateral or proceeds of the Property, I will note your interest on the face of the chattel paper or instruments.

REMEDIES - I will be in default on this security agreement if I am in default on any note this agreement secures or if I fail to keep any promise contained in the terms of this agreement. If I default, you have all of the rights and remedies provided in the note and under the Uniform Commercial Code. You may require me to make the secured property available to you at a place which is reasonably convenient. You may take possession of the secured property and sell it as provided by law. The proceeds will be applied first to your expenses and then to the debt. I agree that 10 days written notice sent to my last known address by first class mail will be reasonable notice under the Uniform Commercial Code. My current address is on page 1.

PERFECTION OF SECURITY INTEREST - I authorize you to file a financing statement covering the Property. I will comply with, facilitate, and otherwise assist you in connection with obtaining possession of or control over the Property for purposes of perfecting your security interest under the Uniform Commercial Code.

ADDITIONAL TERMS OF THE NOTE

DEFINITIONS - As used on pages 1 and 2, "☒" means the terms that apply to this loan. "I," "me" or "my" means each Borrower who signs this note and each other person or legal entity (including guarantors, endorsers, and sureties) who agrees to pay this note (together referred to as "us"). "You" or "your" means the Lender and its successors and assigns.

APPLICABLE LAW - The law of the state of Idaho will govern this agreement. Any term of this agreement which is contrary to applicable law will not be effective, unless the law permits you and me to agree to such a variation. If any provision of this agreement cannot be enforced according to its terms, this fact will not affect the enforceability of the remainder of this agreement. No modification of this agreement may be made without your express written consent. Time is of the essence in this agreement.

PAYMENTS - Each payment I make on this note will first reduce the amount I owe you for charges which are neither interest nor principal. The remainder of each payment will then reduce accrued unpaid interest, and then unpaid principal. If you and I agree to a different application of payments, we will describe our agreement on this note. I may prepay a part of, or the entire balance of this loan without penalty, unless we specify to the contrary on this note. Any partial prepayment will not excuse or reduce any later scheduled payment until this note is paid in full (unless, when I make the prepayment, you and I agree in writing to the contrary).

INTEREST - Interest accrues on the principal remaining unpaid from time to time, until paid in full. If I receive the principal in more than one advance, each advance will start to earn interest only when I receive the advance. The interest rate in effect on this note at any given time will apply to the entire principal sum outstanding at that time. Notwithstanding anything to the contrary, I do not agree to pay and you do not intend to charge any rate of interest that is higher than the maximum rate of interest you could charge under applicable law for the extension of credit that is agreed to in this note (either before or after maturity). If any notice of interest accrual is sent and is in error, we mutually agree to correct it, and if you actually collect more interest than allowed by law and this agreement, you agree to refund it to me.

INDEX RATE - The index will serve only as a device for setting the interest rate on this note. You do not guarantee by selecting this index, or the margin, that the interest rate on this note will be the same rate you charge on any other loans or class of loans you make to me or other borrowers.

POST MATURITY RATE - For purposes of deciding when the "Post Maturity Rate" (shown on page 1) applies, the term "maturity" means the date of the last scheduled payment indicated on page 1 of this note or the date you accelerate payment on the note, whichever is earlier.

SINGLE ADVANCE LOANS - If this is a single advance loan, you and I expect that you will make only one advance of principal. However, you may add other amounts to the principal if you make any payments described in the "PAYMENTS BY LENDER" paragraph on page 2.

MULTIPLE ADVANCE LOANS - If this is a multiple advance loan, you and I expect that you will make more than one advance of principal. If this is closed end credit, repaying a part of the principal will not entitle me to additional credit.

SET-OFF - I agree that you may set off any amount due and payable under this note against any right I have to receive money from you.

"Right to receive money from you" means:

(1) any deposit account balance I have with you;

(2) any money owed to me on an item presented to you or in your possession for collection or exchange; and

(3) any repurchase agreement or other nondeposit obligation.

[illegible] amount of which you [illegible] entitled to demand payment under the terms of this note at the time you set off. This total includes any balance the due date for which you properly accelerate under [illegible]ote.

If my right to receive money from you is [illegible] owned by someone who has not agreed to pay this note, your right of set-off will apply to my interest in the obligation and to any other [illegible]nts I could withdraw on my sole request or endorsement. Your right of set-off does not apply to an account or other obligation where my rights are only as a representative. It also does not apply to any Individual Retirement Account or other tax-deferred retirement account.

You will not be liable for the dishonor of any check when the dishonor occurs because you set off this debt against any of my accounts. I agree to hold you harmless from any such claims arising as a result of your exercise of your right to set-off.

DEFAULT - I will be in default if any one or more of the following occur: (1) I fail to make a payment on time or in the amount due; (2) I fail to keep the Property insured, if required; (3) I fail to pay, or keep any promise, on any debt or agreement I have with you; (4) any other creditor of mine attempts to collect any debt I owe him through court proceedings; (5) I die, am declared incompetent, make an assignment for the benefit of creditors, or become insolvent (either because my liabilities exceed my assets or I am unable to pay my debts as they become due); (6) I make any written statement or provide any financial information that is untrue or inaccurate at the time it was provided; (7) I do or fail to do something which causes you to believe you will have difficulty collecting the amount I owe you; (8) any collateral securing this note is used in a manner or for a purpose which threatens confiscation by a legal authority; (9) I change my name or assume an additional name without first notifying you before making such a change; (10) I fail to plant, cultivate and harvest crops in due season; (11) any loan proceeds are used for a purpose that will contribute to excessive erosion of highly erodible land or to the conversion of wetlands to produce an agricultural commodity, as further explained in 7 C.F.R. Part 1940, Subpart G, Exhibit M.

REMEDIES - If I am in default on this note you have, but are not limited to, the following remedies:

(1) You may demand immediate payment of all I owe you under this note (principal, accrued unpaid interest and other accrued unpaid charges).

(2) You may set off this debt against any right I have to the payment of money from you, subject to the terms of the "SET-OFF" paragraph herein.

(3) You may demand security, additional security, or additional parties to be obligated to pay this note as a condition for not using any other remedy.

(4) You may refuse to make advances to me or allow purchases on credit by me.

(5) You may use any remedy you have under state or federal law.

(6) You may make use of any remedy given to you in any agreement securing this note.

By selecting any one or more of these remedies you do not give up your right to use later any other remedy. By waiving your right to declare an event to be a default, you do not waive your right to consider later the event a default if it continues or happens again.

COLLECTION COSTS AND ATTORNEY'S FEES - I agree to pay all costs of collection, replevin or any other or similar type of cost if I am in default. In addition, if you hire an attorney to collect this note, I also agree to pay any fee you incur with such attorney plus court costs (except where prohibited by law). To the extent permitted by the United States Bankruptcy Code, I also agree to pay the reasonable attorney's fees and costs you incur to collect this debt as awarded by any court exercising jurisdiction under the Bankruptcy Code.

WAIVER - I give up my rights to require you to do certain things. I will not require you to:

(1) demand payment of amounts due (presentment);

(2) obtain official certification of nonpayment (protest); or

(3) give notice that amounts due have not been paid (notice of dishonor).

I waive any defenses I have based on suretyship or impairment of collateral.

OBLIGATIONS INDEPENDENT - I understand that I must pay this note even if someone else has also agreed to pay it (by, for example, signing this form or a separate guarantee or endorsement). You may sue me alone, or anyone else who is obligated on this note, or any number of us together, to collect this note. You may without notice release any party to this agreement without releasing any other party. If you give up any of your rights, with or without notice, it will not affect my duty to pay this note. Any extension of new credit to any of us, or renewal of this note by all or less than all of us will not release me from my duty to pay it. (Of course, you are entitled to only one payment in full.) I agree that you may at your option extend this note or the debt represented by this note, or any portion of the note or debt, from time to time without limit or notice and for any term without affecting my liability for payment of the note. I will not assign my obligation under this agreement without your prior written approval.

FINANCIAL INFORMATION - I agree to provide you, upon request, any financial statement or information you may deem necessary. I warrant that the financial statements and information I provide to you are or will be accurate, correct and complete.

PAYMENT BY CHECK - If any payment on this note is made with a check that is dishonored, I agree to pay you a $20.00 fee.

SIGNATURES: I AGREE TO THE TERMS OF THIS NOTE (INCLUDING THOSE ON PAGES 1 AND 2). I have received a copy on today's date.

DUANE YDST

SIGNATURE FOR LENDER: _____

THOMAS J. ROMRELL PRESIDENT

ACKNOWLEDGMENT: STATE OF IDAHO, _____ County ss:

On this _____ day of _____ before me _____, a Notary Public in and for said county and state, personally appeared _____, known or identified to me (or proved on the oath of _____), to be the person(s) who executed this instrument, and acknowledged to me that executed the same.

In Witness whereof I have set my hand and affixed my seal the day and year first above written.

_____

Notary Public residing at:

(The Borrower's signature should be notarized when a secured interest is taken in a motor vehicle.)

LEGAL DESCRIPTION
EXHIBIT 'A'

TRACT I:

Beginning at a point that is South 89°55'28" West along the Section line 1326.98 feet from the North ¼ Corner of Section 10, Township 1 North, Range 38 East of the Boise Meridian; running thence South 89°55'28" West along said Section line 1236.12 feet to the South Right-of-Way line of 65th South; thence along said South Right-of-Way line of 65th South and the East Right-of-Way line of 25th East the following three (3) courses; South 00°12'54" East 28.10 feet to a point of curve with a radius of 69.34 feet and a chord bearing South 44°18'28" West 98.29 feet; thence to the left along said curve 109.24 feet through a central angle of 90°16'00"; thence South 89°10'28" West 28.71 feet to the West line of said Section 10; thence South 00°19'04" East 1213.86 feet to the South line of the North ½ of the Northwest ¼ of said Section 10, thence North 89°54'09" East along said South line 1327.87 feet; thence North 00°03'13" West 1312.06 feet to the POINT OF BEGINNING.

That portion thereof conveyed to the State of Idaho by that deed recorded on March 8, 1950 in Book 70 of Deeds at Page 287 of Official Records of Bonneville County, Idaho.

PZY

Exhibit "C"

Recording Requested By:
THE BANK OF COMMERCE-ADMINISTRATION
3113 SOUTH 25TH EAST, P.O. 1887 IDAHO FALLS, ID 83403
Return To:
THE BANK OF COMMERCE-ADMINISTRATION
3113 SOUTH 25TH EAST, P.O. 1887
IDAHO FALLS, ID 83403

Instrume[illegible]1317355
IDAHO FALLS, BONNEVILLE, IDAHO
2008-11-21 05:01:00 PM No. of Pages: 15
Recorded for: ALLIANCE TITLE - IDAHO FA
RONALD LONGMORE Fee:45.00
Ex-Officio Recorder Deputy SSolis
Index To: DEED OF TRUST
Electronically Recorded by Simplifile

RE-RECORD TO CORRECT LEGAL

Instrument # 1319093
IDAHO FALLS, BONNEVILLE, IDAHO
2008-12-17 01:44:00 PM No. of Pages: 15
Recorded for: ALLIANCE TITLE - IDAHO FA
RONALD LONGMORE Fee:45.00
Ex-Officio Recorder Deputy SJacobs
Index To: DEED OF TRUST
Electronically Recorded by Simplifile

Prepared By:
THE BANK OF COMMERCE-ADMINISTRATION
3113 SOUTH 25TH EAST, P.O. 1887
IDAHO FALLS, ID 83403

State of Idaho — Space Above This Line For Recording Data

REAL ESTATE DEED OF TRUST
(With Future Advance Clause)

1. DATE AND PARTIES. The date of this Deed of Trust (Security Instrument) is 11-21-2008. The parties and their addresses are:

GRANTOR:
DUANE YOST AND LORI YOST, HUSBAND AND WIFE
3777 HAMPSHIRE CT.
IDAHO FALLS, ID 83404

☐ Refer to the Addendum which is attached and incorporated herein for additional Grantors.

TRUSTEE:
ALLIANCE TITLE AND ESCROW CORP.
1070 RIVERWALK DR., STE. 100
IDAHO FALLS, ID 83402

LENDER:
THE BANK OF COMMERCE-ADMINISTRATION
3113 SOUTH 25TH EAST, P.O. 1887
IDAHO FALLS, ID 83403

50.50 8 60 20

Alliance Title & Escrow Corp.
1070 Riverwalk Dr., Ste. 100
P.O. Box 50842
[illegible]

1317355

EXHIBIT
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2. **CONVEYANCE.** For good and valuable consideration, the receipt and sufficiency of which is acknowledged, and to secure the Secured Debt (hereafter defined), Grantor irrevocably grants, bargains, sells and conveys to Trustee, in trust for the benefit of Lender, with power of sale, the following described property:

SEE EXHIBIT "A" WHICH IS ATTACHED HERETO AND MADE A PART HEREOF.

The property is located in BONNEVILLE (County) at _____

TBD BAREGROUND (Address)

IDAHO FALLS (City), Idaho 83404 (Zip Code)

Together with all rights, easements, appurtenances, royalties, mineral rights, oil and gas rights, crops, timber, all diversion payments or third party payments made to crop producers, and all existing and future improvements, structures, fixtures, and replacements that may now, or at any time in the future, be part of the real estate described above (all referred to as "Property"). The term Property also includes, but is not limited to, any and all water wells, water, ditches, reservoirs, reservoir sites and dams located on the real estate and all riparian and water rights associated with the Property, however established.

3. **MAXIMUM OBLIGATION LIMIT.** The total principal amount of the Secured Debt (hereafter defined) secured by this Deed of Trust at any one time shall not exceed $ 1,000,000.00. This limitation of amount does not include interest, loan charges, commitment fees, brokerage commissions, attorneys' fees and other charges validly made pursuant to this Deed of Trust and does not apply to advances for interest accrued on such advances) made under the terms of this Deed of Trust to protect Lender's security and to perform any of the covenants contained in this Deed of Trust. Future advances are contemplated and, along with other future obligations, are secured by this Deed of Trust even though all or part may not yet be advanced. Nothing in this Deed of Trust, however, shall constitute a commitment to make additional or future loans or advances in any amount. Any such commitment would need to be agreed to in a separate writing.

4. **SECURED DEBT DEFINED.** The term "Secured Debt" includes, but is not limited to, the following:

   A. The promissory note(s), contract(s), guaranty(ies) or other evidence of debt described below and all extensions, renewals, modifications or substitutions (Evidence of Debt) *(e.g., borrower's name, note amount, interest rate, maturity date)*:

   NOTE DATED 11/21/2008 FOR DUANE YOST IN THE AMOUNT OF $1,000,000.00. LOAN WILL MATURE ON 11/21/2009.

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B. All future advances from Lender to Grantor or other future obligations of Grantor to Lender under any promissory note, contract, guaranty, or other evidence of debt existing now or executed after this Deed of Trust whether or not this Deed of Trust is specifically referred to in the evidence of debt.

C. All obligations Grantor owes to Lender, which now exist or may later arise, to the extent not prohibited by law, including, but not limited to, liabilities for overdrafts relating to any deposit account agreement between Grantor and Lender.

D. All additional sums advanced and expenses incurred by Lender for insuring, preserving or otherwise protecting the Property and its value and any other sums advanced and expenses incurred by Lender under the terms of this Deed of Trust, plus interest at the highest rate in effect, from time to time, as provided in the Evidence of Debt.

E. Grantor's performance under the terms of any instrument evidencing a debt by Grantor to Lender and any Deed of Trust securing, guarantying, or otherwise relating to the debt.

If more than one person signs this Deed of Trust as Grantor, each Grantor agrees that this Deed of Trust will secure all future advances and future obligations described above that are given to or incurred by any one or more Grantor, or any one or more Grantor and others. This Deed of Trust will not secure any other debt if Lender fails, with respect to such other debt, to make any required disclosure about this Deed of Trust or if Lender fails to give any required notice of the right of rescission.

5. **PAYMENTS.** Grantor agrees to make all payments on the Secured Debt when due and in accordance with the terms of the Evidence of Debt or this Deed of Trust. If any note evidencing the Secured Debt contains a variable rate feature, Grantor acknowledges that the interest rate, payment terms, or balance due on the loan may be indexed, adjusted, renewed or renegotiated.

6. **WARRANTY OF TITLE.** Grantor covenants that Grantor is lawfully seized of the estate conveyed by this Deed of Trust and has the right to irrevocably grant, convey and sell to Trustee, in trust, with power of sale, the Property and warrants that the Property is unencumbered, except for encumbrances of record.

7. **CLAIMS AGAINST TITLE.** Grantor will pay all taxes, assessments, liens, encumbrances, lease payments, ground rents, utilities, and other charges relating to the Property when due. Lender may require Grantor to provide to Lender copies of all notices that such amounts are due and the receipts evidencing Grantor's payment. Grantor will defend title to the Property against any claims that would impair the lien of this Deed of Trust. Grantor agrees to assign to Lender, as requested by Lender, any rights, claims or defenses which Grantor may have against parties who supply labor or materials to improve or maintain the Property.

8. **PRIOR SECURITY INTERESTS.** With regard to any other mortgage, deed of trust, security agreement or other lien document that created a prior security interest or encumbrance on the Property and that may have priority over this Deed of Trust, Grantor agrees:

A. To make all payments when due and to perform or comply with all covenants.

B. To promptly deliver to Lender any notices that Grantor receives from the holder.

C. Not to make or permit any modification or extension of, and not to request or accept any future advances under any note or agreement secured by, the other mortgage, deed of trust or security agreement unless Lender consents in writing.

9. **DUE ON SALE OR ENCUMBRANCE.** Lender may, at its option, declare the entire balance of the Secured Debt to be immediately due and payable upon the creation of any lien, encumbrance, transfer, or sale, or contract for any of these on the Property. However, if the Property includes Grantor's residence, this section shall be subject to the restrictions imposed by federal law (12 C.F.R. 591), as applicable. For the purposes of this section, the term "Property" also includes any interest to all or any part of the Property. This

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covenant shall run with the Property and shall remain in effect until the Secured Debt is paid in full and this Deed of Trust is released.

10. **TRANSFER OF AN INTEREST IN THE GRANTOR.** Lender may demand immediate payment of the debt(s) if Grantor is not a natural person and fails to obtain Lender's prior written consent before organizing, merging into, or consolidating with an entity; acquiring all or substantially all of the assets of another; materially changing the legal structure, management, ownership or financial condition; or effecting or entering into a domestication, conversion or interest exchange.

11. **ENTITY WARRANTIES AND REPRESENTATIONS.** If Grantor is an entity other than a natural person (such as a corporation or other organization), Grantor makes to Lender the following warranties and representations which shall be continuing as long as the Secured Debt remains outstanding:
    A. Grantor is an entity which is duly organized and validly existing in the Grantor's state of incorporation (or organization). Grantor is in good standing in all states in which Grantor transacts business. Grantor has the power and authority to own the Property and to carry on its business as now being conducted and, as applicable, is qualified to do so in each state in which Grantor operates.
    B. The execution, delivery and performance of this Deed of Trust by Grantor and the obligation evidenced by the Evidence of Debt are within the power of Grantor, have been duly authorized, have received all necessary governmental approval, and will not violate any provision of law, or order of court or governmental agency.
    C. Other than disclosed in writing Grantor has not changed its name within the last ten years and has not used any other trade or fictitious name. Without Lender's prior written consent, Grantor does not and will not use any other name and will preserve its existing name, trade *names* and franchises until the Secured Debt is satisfied.

12. **PROPERTY CONDITION, ALTERATIONS AND INSPECTION.** Grantor will keep the Property in good condition and make all repairs that are reasonably necessary. Grantor will give Lender prompt notice of any loss or damage to the Property. Grantor will keep the Property free of noxious weeds and grasses. Grantor will not initiate, join in or consent to any change in any private restrictive covenant, zoning ordinance or other public or private restriction limiting or defining the uses which may be made of the Property or any part of the Property, without Lender's prior written consent. Grantor will notify Lender of all demands, proceedings, claims, and actions against Grantor or any other owner made under law or regulation regarding use, ownership and occupancy of the Property. Grantor will comply with all legal requirements and restrictions, whether public or private, with respect to the use of the Property. Grantor also agrees that the nature of the occupancy and use will not change without Lender's prior written consent.
    No portion of the Property will be removed, demolished or materially altered without Lender's prior written consent except that Grantor has the right to remove items of personal property comprising a part of the Property that become worn or obsolete, provided that such personal property is replaced with other personal property at least equal in value to the replaced personal property, free from any title retention device, security agreement or other encumbrance. Such replacement of personal property will be deemed subject to the security interest created by this Deed of Trust. Grantor shall not partition or subdivide the Property without Lender's prior written consent. Lender or Lender's agents may, at Lender's option, enter the Property at any reasonable time for the purpose of inspecting the Property. Any inspection of the Property shall be entirely for Lender's benefit and Grantor will in no way rely on Lender's inspection.

13. **AUTHORITY TO PERFORM.** If Grantor fails to perform any of Grantor's duties under this Deed of Trust, or any other mortgage, deed of trust, security agreement or other lien

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document that has priority over this Deed of Trust, Lender may, without notice, perform the duties or cause them to be performed. Grantor appoints Lender as attorney in fact to sign Grantor's name or pay any amount necessary for performance. If any construction on the Property is discontinued or not carried on in a reasonable manner, Lender may do whatever is necessary to protect Lender's security interest in the Property. This may include completing the construction.

Lender's right to perform for Grantor shall not create an obligation to perform, and Lender's failure to perform will not preclude Lender from exercising any of Lender's other rights under the law or this Deed of Trust. Any amounts paid by Lender for insuring, preserving or otherwise protecting the Property and Lender's security interest will be due on demand and will bear interest from the date of the payment until paid in full at the interest rate in effect from time to time according to the terms of the Evidence of Debt.

14. **ASSIGNMENT OF LEASES AND RENTS.** Grantor absolutely, unconditionally, irrevocably and immediately assigns, grants, bargains and conveys to Lender all the right, title and interest in the following (Property).
    A. Existing or future leases, subleases, licenses, guaranties and any other written or verbal agreements for the use and occupancy of the Property, including but not limited to, any extensions, renewals, modifications or replacements (Leases).
    B. Rents, issues and profits, including but not limited to, security deposits, minimum rents, percentage rents, additional rents, common area maintenance charges, parking charges, real estate taxes, other applicable taxes, insurance premium contributions, liquidated damages following default, cancellation premiums, "loss of rents" insurance, guest receipts, revenues, royalties, proceeds, bonuses, accounts, contract rights, general intangibles, and all rights and claims which Grantor may have that in any way pertain to or are on account of the use or occupancy of the whole or any part of the Property (Rents).

In the event any item listed as Leases or Rents is determined to be personal property, this Assignment will also be regarded as a security agreement.

Grantor will promptly provide Lender with copies of the Leases and will certify these Leases are true and correct copies. The existing Leases will be provided on execution of the Assignment, and all future Leases and any other information with respect to these Leases will be provided immediately after they are executed. Lender grants Grantor a revocable license to collect, receive, enjoy and use the Rents as long as Grantor is not in default. Grantor's default automatically and immediately revokes this license. Grantor will not collect in advance any Rents due in future lease periods, unless Grantor first obtains Lender's written consent. Amounts collected will be applied at Lender's discretion to the Secured Debts, the costs of managing, protecting and preserving the Property, and other necessary expenses. Upon default, Grantor will receive any Rents in trust for Lender and Grantor will not commingle the Rents with any other funds. When Lender so directs, Grantor will endorse and deliver any payments of Rents from the Property to Lender. Grantor agrees that Lender will not be considered to be a mortgagee-in-possession by executing this Security Instrument or by collecting or receiving payments on the Secured Debts, but only may become a mortgagee-in-possession after Grantor's license to collect, receive, enjoy and use the Rents is revoked by Lender or automatically revoked on Grantor's default, and Lender takes actual possession of the Property. Consequently, until Lender takes actual possession of the Property, Lender is not obligated to perform or discharge any obligation of Grantor under the Leases, appear in or defend any action or proceeding relating to the Rents, the Leases or the Property, or be liable in any way for any injury or damage to any person or property sustained in or about the Property. Grantor agrees that this Security Instrument is immediately effective between Grantor and Lender and effective as to third parties on the recording of this Assignment.

As long as this Assignment is in effect, Grantor warrants and represents that no default

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exists under the Leases, and the parties subject to the Leases have not violated any applicable law on leases, licenses and landlords and tenants. Grantor, at its sole cost and expense, will keep, observe and perform, and require all other parties to the Leases to comply with the Leases and any applicable law. If Grantor or any party to the Lease defaults or fails to observe any applicable law, Grantor will promptly notify Lender. If Grantor neglects or refuses to enforce compliance with the terms of the Leases, then Lender may, at Lender's option, enforce compliance.

Grantor will not sublet, modify, extend, cancel, or otherwise alter the Leases, or accept the surrender of the Property covered by the Leases (unless the Leases so require) without Lender's consent. Grantor will not assign, compromise, subordinate or encumber the Leases and Rents without Lender's prior written consent. Lender does not assume or become liable for the Property's maintenance, depreciation, or other losses or damages when Lender acts to manage, protect or preserve the Property, except for losses and damages due to Lender's gross negligence or intentional torts. Otherwise, Grantor will indemnify Lender and hold Lender harmless for all liability, loss or damage that Lender may incur when Lender opts to exercise any of its remedies against any party obligated under the Leases.

15. **CONDOMINIUMS; PLANNED UNIT DEVELOPMENTS.** If the Property includes a unit in a condominium or a planned unit development, Grantor will perform all of Grantor's duties under the covenants, by-laws, or regulations of the condominium or planned unit development.

16. **DEFAULT.** Grantor will be in default if any of the following occur:
    A. Any party obligated on the Secured Debt fails to make payment when due;
    B. A breach of any term or covenant in this Deed of Trust, any prior mortgage or any construction loan agreement, security agreement or any other document evidencing, guarantying, securing or otherwise relating to the Secured Debt;
    C. The making or furnishing of any verbal or written representation, statement or warranty to Lender that is false or incorrect in any material respect by Grantor or any person or entity obligated on the Secured Debt;
    D. The death, dissolution, or insolvency of, appointment of a receiver for, or application of any debtor relief law to, Grantor or any person or entity obligated on the Secured Debt;
    E. A good faith belief by Lender at any time that Lender is insecure with respect to any person or entity obligated on the Secured Debt or that the prospect of any payment is impaired or the value of the Property is impaired;
    F. A material adverse change in Grantor's business including ownership, management, and financial conditions, which Lender in its opinion believes impairs the value of the Property or repayment of the Secured Debt; or
    G. Any loan proceeds are used for a purpose that will contribute to excessive erosion of highly erodible land or to the conversion of wetlands to produce an agricultural commodity, as further explained in 7 C.F.R. Part 1940, Subpart G, Exhibit M.

17. **REMEDIES ON DEFAULT.** In some instances, federal and state law will require Lender to provide Grantor with notice of the right to cure, mediation notices or other notices and may establish time schedules for foreclosure actions. Subject to these limitations, if any, Lender may accelerate the Secured Debt and foreclose this Deed of Trust in a manner provided by law if this Grantor is in default.

At the option of Lender, all or any part of the agreed fees and charges, accrued interest and principal shall become immediately due and payable, after giving notice if required by law, upon the occurrence of a default or anytime thereafter. In addition, Lender shall be entitled to all the remedies provided by law, the Evidence of Debt, other evidences of debt, this Deed of Trust and any related documents, including without limitation, the power to sell the Property.

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If there is a default, Trustee shall, in addition to any other permitted remedy, at the request of Lender, advertise and sell the Property as a whole or in separate parcels at public auction to the highest bidder for cash and convey absolute title free and clear of all right, title and interest of Grantor at such time and place as Trustee designates. Trustee shall give notice of sale including the time, terms and place of sale and a description of the property to be sold as required by the applicable law in effect at the time of the proposed sale.

Upon sale of the Property and to the extent not prohibited by law, Trustee shall make and deliver a deed to the Property sold which conveys absolute title to the purchaser, and after first paying all fees, charges and costs, shall pay to Lender all moneys advanced for repairs, taxes, insurance, liens, assessments and prior encumbrances and interest thereon, and the principal and interest on the Secured Debt, paying the surplus, if any, to Grantor. Lender may purchase the Property. The recitals in any deed of conveyance shall be prima facie evidence of the facts set forth therein.

All remedies are distinct, cumulative and not exclusive, and Lender is entitled to all remedies provided at law or equity, whether expressly set forth or not. The acceptance by Lender of any sum in payment or partial payment on the Secured Debt after the balance is due or is accelerated or after foreclosure proceedings are filed shall not constitute a waiver of Lender's right to require full and complete cure of any existing default. By not exercising any remedy on Grantor's default, Lender does not waive Lender's right to later consider the event a default if it continues or happens again.

18. **EXPENSES; ADVANCES ON COVENANTS; ATTORNEYS' FEES; COLLECTION COSTS.** Except when prohibited by law, Grantor agrees to pay all of Lender's expenses if Grantor breaches any covenant in this Deed of Trust. Grantor will also pay on demand all of Lender's expenses incurred in collecting, insuring, preserving or protecting the Property or in any inventories, audits, inspections or other examination by Lender in respect to the Property. Grantor agrees to pay all costs and expenses incurred by Lender in enforcing or protecting Lender's rights and remedies under this Deed of Trust, including, but not limited to, attorneys' fees, court costs, and other legal expenses. Once the Secured Debt is fully and finally paid, Lender agrees to release this Deed of Trust and Grantor agrees to pay for any recordation costs. All such amounts are due on demand and will bear interest from the time of the advance at the highest rate in effect, from time to time, as provided in the Evidence of Debt and as permitted by law.

19. **ENVIRONMENTAL LAWS AND HAZARDOUS SUBSTANCES.** As used in this section, (1) "Environmental Law" means, without limitation, the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA, 42 U.S.C. 9601 et seq.), all other federal, state and local laws, regulations, ordinances, court orders, attorney general opinions or interpretive letters concerning the public health, safety, welfare, environment or a hazardous substance; and (2) "Hazardous Substance" means any toxic, radioactive or hazardous material, waste, pollutant or contaminant which has characteristics which render the substance dangerous or potentially dangerous to the public health, safety, welfare or environment. The term includes, without limitation, any substances defined as "hazardous material," "toxic substances," "hazardous waste" or "hazardous substance" under any Environmental Law. Grantor represents, warrants and agrees that, except as previously disclosed and acknowledged in writing:
    A. No Hazardous Substance has been, is, or will be located, transported, manufactured, treated, refined, or handled by any person on, under or about the Property, except in the ordinary course of business and in strict compliance with all applicable Environmental Law.
    B. Grantor has not and will not cause, contribute to, or permit the release of any Hazardous Substance on the Property.

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C. Grantor will immediately notify Lender if (1) a release or threatened release of Hazardous Substance occurs on, under or about the Property or migrates or threatens to migrate from nearby property; or (2) there is a violation of any Environmental Law concerning the Property. In such an event, Grantor will take all necessary remedial action in accordance with Environmental Law.

D. Grantor has no knowledge of or reason to believe there is any pending or threatened investigation, claim, or proceeding of any kind relating to (1) any Hazardous Substance located on, under or about the Property; or (2) any violation by Grantor or any tenant of any Environmental Law. Grantor will immediately notify Lender in writing as soon as Grantor has reason to believe there is any such pending or threatened investigation, claim, or proceeding. In such an event, Lender has the right, but not the obligation, to participate in any such proceeding including the right to receive copies of any documents relating to such proceedings.

E. Grantor and every tenant have been, are and shall remain in full compliance with any applicable Environmental Law.

F. There are no underground storage tanks, private dumps or open wells located on or under the Property and no such tank, dump or well will be added unless Lender first consents in writing.

G. Grantor will regularly inspect the Property, monitor the activities and operations on the Property, and confirm that all permits, licenses or approvals required by any applicable Environmental Law are obtained and complied with.

H. Grantor will permit, or cause any tenant to permit, Lender or Lender's agent to enter and inspect the Property and review all records at any reasonable time to determine (1) the existence, location and nature of any Hazardous Substance on, under or about the Property; (2) the existence, location, nature, and magnitude of any Hazardous Substance that has been released on, under or about the Property; or (3) whether or not Grantor and any tenant are in compliance with applicable Environmental Law.

I. Upon Lender's request and at any time, Grantor agrees, at Grantor's expense, to engage a qualified environmental engineer to prepare an environmental audit of the Property and to submit the results of such audit to Lender. The choice of the environmental engineer who will perform such audit is subject to Lender's approval.

J. Lender has the right, but not the obligation, to perform any of Grantor's obligations under this section at Grantor's expense.

K. As a consequence of any breach of any representation, warranty or promise made in this section, (1) Grantor will indemnify and hold Lender and Lender's successors or assigns harmless from and against all losses, claims, demands, liabilities, damages, cleanup, response and remediation costs, penalties and expenses, including without limitation all costs of litigation and attorneys' fees, which Lender and Lender's successors or assigns may sustain; and (2) at Lender's discretion, Lender may release this Deed of Trust and in return Grantor will provide Lender with collateral of at least equal value to the Property secured by this Deed of Trust without prejudice to any of Lender's rights under this Deed of Trust.

L. Notwithstanding any of the language contained in this Deed of Trust to the contrary, the terms of this section shall survive any foreclosure or satisfaction of this Deed of Trust regardless of any passage of title to Lender or any disposition by Lender of any or all of the Property. Any claims and defenses to the contrary are hereby waived.

20. **CONDEMNATION.** Grantor will give Lender prompt notice of any action, real or threatened, by private or public entities to purchase or take any or all of the Property, including any easements, through condemnation, eminent domain, or any other means. Grantor further agrees to notify Lender of any proceedings instituted for the establishment

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of any sewer, water, conservation, ditch, drainage, or other district relating to or binding upon the Property or any part of it. Grantor authorizes Lender to intervene in Grantor's name in any of the above described actions or claims and to collect and receive all sums resulting from the action or claim. Grantor assigns to Lender the proceeds of any award or claim for damages connected with a condemnation or other taking of all or any part of the Property. Such proceeds shall be considered payments and will be applied as provided in this Deed of Trust. This assignment of proceeds is subject to the terms of any prior mortgage, deed of trust, security agreement or other lien document.

21. INSURANCE. Grantor agrees to maintain insurance as follows:

A. Grantor shall keep the Property insured against loss by fire, theft and other hazards and risks reasonably associated with the Property due to its type and location. Other hazards and risks may include, for example, coverage against loss due to floods or flooding. This insurance shall be maintained in the amounts and for the periods that Lender requires. What Lender requires pursuant to the preceding three sentences can change during the term of the Secured Debt. The insurance carrier providing the insurance shall be chosen by Grantor subject to Lender's approval, which shall not be unreasonably withheld. If Grantor fails to maintain the coverage described above, Lender may, at Lender's option, obtain coverage to protect Lender's rights in the Property according to the terms of this Deed of Trust.

All insurance policies and renewals shall be acceptable to Lender and shall include a standard "mortgage clause" and, where applicable, "lender loss payee clause." Grantor shall immediately notify Lender of cancellation or termination of the insurance. Lender shall have the right to hold the policies and renewals. If Lender requires, Grantor shall immediately give to Lender all receipts of paid premiums and renewal notices. Upon loss, Grantor shall give immediate notice to the insurance carrier and Lender. Lender may make proof of loss if not made immediately by Grantor.

Unless Lender and Grantor otherwise agree in writing, insurance proceeds shall be applied to restoration or repair of the Property damaged if the restoration or repair is economically feasible and Lender's security is not lessened. If the restoration or repair is not economically feasible or Lender's security would be lessened, the insurance proceeds shall be applied to the Secured Debt, whether or not then due, with any excess paid to Grantor. If Grantor abandons the Property, or does not answer within 30 days a notice from Lender that the insurance carrier has offered to settle a claim, then Lender may collect the insurance proceeds. Lender may use the proceeds to repair or restore the Property or to pay the Secured Debt whether or not then due. The 30-day period will begin when the notice is given.

Unless Lender and Grantor otherwise agree in writing, any application of proceeds to principal shall not extend or postpone the due date of scheduled payments or change the amount of the payments. If the Property is acquired by Lender, Grantor's right to any insurance policies and proceeds resulting from damage to the Property before the acquisition shall pass to Lender to the extent of the Secured Debt immediately before the acquisition.

B. Grantor agrees to maintain comprehensive general liability insurance naming Lender as an additional insured in an amount acceptable to Lender, insuring against claims arising from any accident or occurrence in or on the Property.

C. Grantor agrees to maintain rental loss or business interruption insurance, as required by Lender, in an amount equal to at least coverage of one year's debt service, and required escrow account deposits (if agreed to separately in writing), under a form of policy acceptable to Lender.

22. **NO ESCROW FOR TAXES AND INSURANCE.** Unless otherwise provided in a separate agreement, Grantor will not be required to pay to Lender funds for taxes and insurance in escrow.

23. **FINANCIAL REPORTS AND ADDITIONAL DOCUMENTS.** Grantor will provide to Lender upon request, any financial statement or information Lender may deem necessary. Grantor warrants that all financial statements and information Grantor provides to Lender are, or will be, accurate, correct, and complete. Grantor agrees to sign, deliver, and file as Lender may reasonably request any additional documents or certifications that Lender may consider necessary to perfect, continue, and preserve Grantor's obligations under this Deed of Trust and Lender's lien status on the Property. If Grantor fails to do so, Lender may sign, deliver, and file such documents or certificates in Grantor's name and Grantor hereby irrevocably appoints Lender or Lender's agent as attorney in fact to do the things necessary to comply with this section.

24. **JOINT AND INDIVIDUAL LIABILITY; CO-SIGNERS; SUCCESSORS AND ASSIGNS BOUND.** All duties under this Deed of Trust are joint and individual. If Grantor signs this Deed of Trust but does not sign the Evidence of Debt, Grantor does so only to mortgage Grantor's interest in the Property to secure payment of the Secured Debt and Grantor does not agree to be personally liable on the Secured Debt. Grantor agrees that Lender and any party to this Deed of Trust may extend, modify or make any change in the terms of this Deed of Trust or the Evidence of Debt without Grantor's consent. Such a change will not release Grantor from the terms of this Deed of Trust. The duties and benefits of this Deed of Trust shall bind and benefit the successors and assigns of Grantor and Lender.

    If this Deed of Trust secures a guaranty between Lender and Grantor and does not directly secure the obligation which is guaranteed, Grantor agrees to waive any rights that may prevent Lender from bringing any action or claim against Grantor or any party indebted under the obligation including, but not limited to, anti-deficiency or one-action laws.

25. **APPLICABLE LAW; SEVERABILITY; INTERPRETATION.** This Deed of Trust is governed by the laws of the jurisdiction in which Lender is located, except to the extent otherwise required by the laws of the jurisdiction where the Property is located. This Deed of Trust is complete and fully integrated. This Deed of Trust may not be amended or modified by oral agreement. Any section or clause in this Deed of Trust, attachments, or any agreement related to the Secured Debt that conflicts with applicable law will not be effective, unless that law expressly or impliedly permits the variations by written agreement. If any section or clause of this Deed of Trust cannot be enforced according to its terms, that section or clause will be severed and will not affect the enforceability of the remainder of this Deed of Trust. Whenever used, the singular shall include the plural and the plural the singular. The captions and headings of the sections of this Deed of Trust are for convenience only and are not to be used to interpret or define the terms of this Deed of Trust. Time is of the essence in this Deed of Trust.

26. **SUCCESSOR TRUSTEE.** Lender, at Lender's option, may from time to time remove Trustee and appoint a successor trustee by an instrument recorded in the county in which this Deed of Trust is recorded. The successor trustee, without conveyance of the Property, shall succeed to all the title, power and duties conferred upon the Trustee by this Deed of Trust and applicable law.

27. **NOTICE.** Unless otherwise required by law, any notice shall be given by delivering it or by mailing it by first class mail to the appropriate party's address on page 1 of this Deed of Trust, or to any other address designated in writing. Notice to one grantor will be deemed to be notice to all grantors.

28. **WAIVERS.** Except to the extent prohibited by law, Grantor waives all rights to homestead exemption, appraisement or the marshalling of liens and assets relating to the Property.

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29. DECLARATION. Grantor declares that the Property is either located within an incorporated city or village or that the Property is not more than forty (40) acres in area regardless of its use or location, or not more than eighty (80) acres in area and not principally used for the agricultural production of crops, livestock, dairy or aquatic goods.

30. U.C.C. PROVISIONS. If checked, the following are applicable to, but do not limit, this Deed of Trust:

- ☐ **Construction Loan.** This Deed of Trust secures an obligation incurred for the construction of an improvement on the Property.
- ☐ **Fixture Filing.** Grantor grants to Lender a security interest in all goods that Grantor owns now or in the future and that are or will become fixtures related to the Property.
- ☐ **Crops; Timber; Minerals; Rents, Issues and Profits.** Grantor grants to Lender a security interest in all crops, timber and minerals located on the Property as well as all rents, issues and profits of them including, but not limited to, all Conservation Reserve Program (CRP) and Payment in Kind (PIK) payments and similar governmental programs (all of which shall also be included in the term "Property").
- ☐ **Personal Property.** Grantor grants to Lender a security interest in all personal property located on or connected with the Property. This security interest includes all farm products, inventory, equipment, accounts, documents, instruments, chattel paper, general intangibles, and all other items of personal property Grantor owns now or in the future and that are used or useful in the construction, ownership, operation, management, or maintenance of the Property. The term "personal property" specifically excludes that property described as "household goods" secured in connection with a "consumer" loan as those terms are defined in applicable federal regulations governing unfair and deceptive credit practices.
- ☐ **Filing As Financing Statement.** Grantor agrees and acknowledges that this Deed of Trust also suffices as a financing statement and as such, may be filed of record as a financing statement for purposes of Article 9 of the Uniform Commercial Code. A carbon, photographic, image or other reproduction of this Deed of Trust is sufficient as a financing statement.

31. OTHER TERMS. If checked, the following are applicable to this Deed of Trust:

- ☐ **Line of Credit.** The Secured Debt includes a revolving line of credit provision. Although the Secured Debt may be reduced to a zero balance, this Deed of Trust will remain in effect until released.
- ☐ **Separate Assignment.** The Grantor has executed or will execute a separate assignment of leases and rents. If the separate assignment of leases and rents is properly executed and recorded, then the separate assignment will supersede this Security Instrument's "Assignment of Leases and Rents" section.

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☐ Additional Terms.

SIGNATURES: By signing below, Grantor agrees to the terms and covenants contained in this Deed Trust attachments. Grantor also acknowledges receipt of a copy of this Deed of Trust on the date stated above on Page 1.

☐ Actual authority was granted to the parties signing below by resolution signed and dated _____

Entity Name: _____

Duane Yost 11/21/08
(Signature) (Date)
DUANE YOST

Lori Yost 11/21/08
(Signature) (Date)
LORI YOST

_____ _____
(Signature) (Date)

_____ _____
(Signature) (Date)

☐ Refer to the Addendum which is attached and incorporated herein for additional Grantors, signatures and acknowledgments.

ACKNOWLEDGMENT:

(Individual)

STATE OF IDAHO, COUNTY OF Bannock } ss.
On this 21ST day of NOVEMBER, 2008, before me,
a Notary Public, personally appeared DUANE YOST; LORI YOST, HUSBAND AND WIFE,
known or identified to me
(or proved to me on the oath of), to
be the person(s) whose name is subscribed to the within instrument, and
acknowledged to me that she/he/they executed the same.
My commission expires:
July 16, 2010

Summer Sorenson
(Notary Public)

SUMMER SORENSON NOTARY PUBLIC STATE OF IDAHO

(Business or Entity Acknowledgment)

STATE OF , COUNTY OF } ss.
On this day of , before me,
a Notary Public, personally appeared ,
known or identified to me
(or proved to me on the oath of), to
be the person(s) whose name is subscribed to the within instrument, and
acknowledged to me that she/he/they executed the same.
My commission expires:

(Notary Public)

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REQUEST FOR RECONVEYANCE
(Not to be completed until paid in full)

TO TRUSTEE:

The undersigned is the holder of the note or notes secured by this Deed of Trust. Said note or notes, together with all other indebtedness secured by this Deed of Trust, have been paid in full. You are hereby directed to cancel this Deed of Trust, which is delivered hereby, and to reconvey, without warranty, all the estate now held by you under this Deed of Trust to the person or persons legally entitled thereto.

(Authorized Bank Signature) Date

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LEGAL DESCRIPTION
EXHIBIT 'A'

TRACT I:

Beginning at a point that is South 89°55'28" West along the Section line 1326.98 feet from the North ¼ Corner of Section 10, Township 1 North, Range 38 East of the Boise Meridian; running thence South 89°55'28" West along said Section line 1236.12 feet to the South Right-of-Way line of 65th South; thence along said South Right-of-Way line of 65th South and the East Right-of-Way line of 25th East the following three (3) courses; South 00°12'54" East 28.10 feet to a point of curve with a radius of 69.34 feet and a chord bearing South 44°18'23" West 98.29 feet; thence to the left along said curve 109.24 feet through a central angle of 90°16'00"; thence South 89°10'28" West 28.71 feet to the West line of said Section 10; thence South 00°19'04" East 1213.86 feet to the South line of the North ½ of the Northwest ¼ of said Section 10, thence North 89°54'09" East along said South line 1327.87 feet; thence North 00°03'13" West 1312.66 feet to the POINT OF BEGINNING.

Excepting:
That portion thereof conveyed to the State of Idaho by that deed recorded on March 8, 1950 in Book 70 of Deeds at Page 287 of Official Records of Bonneville County, Idaho.

DZJ Jay

DZJ Jay

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Exhibit "D"

Recording Requested By:
THE BANK OF COMMERCE-ADMINISTRATION
3113 SOUTH 25TH EAST, P.O. 1887 IDAHO FALLS, ID 83403
Return To:
THE BANK OF COMMERCE-ADMINISTRATION
3113 SOUTH 25TH EAST, P.O. 1887
IDAHO FALLS, ID 83403

Instrument # 1319937
IDAHO FALLS, BONNEVILLE, IDAHO
2008-12-30 03:12:00 PM No. of Pages: 15
Recorded for: ALLIANCE TITLE - IDAHO FA
RONALD LONGMORE Fee:45.00
Ex-Officio Recorder Deputy RAVERY
Index To: DEED OF TRUST
Electronically Recorded by Simplifile

Prepared By:
THE BANK OF COMMERCE-ADMINISTRATION
3113 SOUTH 25TH EAST, P.O. 1887
IDAHO FALLS, ID 83403

State of Idaho — Space Above This Line For Recording Data

REAL ESTATE DEED OF TRUST
(With Future Advance Clause)

1. DATE AND PARTIES. The date of this Deed of Trust (Security Instrument) is 12-24-2008 . The parties and their addresses are:

GRANTOR:
DUANE YOST AND LORI YOST, HUSBAND AND WIFE
3777 HAMPSHIRE CT.
IDAHO FALLS, ID 83404

☐ Refer to the Addendum which is attached and incorporated herein for additional Grantors.

TRUSTEE:
ALLIANCE TITLE AND ESCROW CORP.
1070 RIVERWALK DR. STE. 100
IDAHO FALLS, ID 83402

LENDER:
THE BANK OF COMMERCE-ADMINISTRATION
3113 SOUTH 25TH EAST, P.O. 1887
IDAHO FALLS, ID 83403

Alliance Title & Escrow Corp.
1070 Riverwalk Dr., Ste. 100
P.O. Box 50642
Idaho Falls, ID 83405-0642

38358 20185 PM

EXHIBIT
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2. **CONVEYANCE.** For good and valuable consideration, the receipt and sufficiency of which is acknowledged, and to secure the Secured Debt (hereafter defined), Grantor irrevocably grants, bargains, sells and conveys to Trustee, in trust for the benefit of Lender, with power of sale, the following described property:

SEE ATTACHED EXHIBIT "A" WHICH IS ATTACHED HERETO AND MADE A PART HEREOF.

The property is located in BONNEVILLE (County) at _____

TBD BAREGROUND (Address),

IDAHO FALLS (City), Idaho 83404 (Zip Code)

Together with all rights, easements, appurtenances, royalties, mineral rights, oil and gas rights, crops, timber, all diversion payments or third party payments made to crop producers, and all existing and future improvements, structures, fixtures, and replacements that may now, or at any time in the future, be part of the real estate described above (all referred to as "Property"). The term Property also includes, but is not limited to, any and all water wells, water, ditches, reservoirs, reservoir sites and dams located on the real estate and all riparian and water rights associated with the Property, however established.

3. **MAXIMUM OBLIGATION LIMIT.** The total principal amount of the Secured Debt (hereafter defined) secured by this Deed of Trust at any one time shall not exceed $ 2,000,000.00 . This limitation of amount does not include interest, loan charges, commitment fees, brokerage commissions, attorneys' fees and other charges validly made pursuant to this Deed of Trust and does not apply to advances (or interest accrued on such advances) made under the terms of this Deed of Trust to protect Lender's security and to perform any of the covenants contained in this Deed of Trust. Future advances are contemplated and, along with other future obligations, are secured by this Deed of Trust even though all or part may not yet be advanced. Nothing in this Deed of Trust, however, shall constitute a commitment to make additional or future loans or advances in any amount. Any such commitment would need to be agreed to in a separate writing.

4. **SECURED DEBT DEFINED.** The term "Secured Debt" includes, but is not limited to, the following:

   A. The promissory note(s), contract(s), guaranty(ies) or other evidence of debt described below and all extensions, renewals, modifications or substitutions (Evidence of Debt) *(e.g., borrower's name, note amount, interest rate, maturity date)*:

   NOTE DATED 04/16/08 FOR DUANE YOST IN THE AMOUNT OF $2,000,000.00. LOAN WILL MATURE ON 04/16/09.

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B. All future advances from Lender to Grantor or other future obligations of Grantor to Lender under any promissory note, contract, guaranty, or other evidence of debt existing now or executed after this Deed of Trust whether or not this Deed of Trust is specifically referred to in the evidence of debt.

C. All obligations Grantor owes to Lender, which now exist or may later arise, to the extent not prohibited by law, including, but not limited to, liabilities for overdrafts relating to any deposit account agreement between Grantor and Lender.

D. All additional sums advanced and expenses incurred by Lender for insuring, preserving or otherwise protecting the Property and its value and any other sums advanced and expenses incurred by Lender under the terms of this Deed of Trust, plus interest at the highest rate in effect, from time to time, as provided in the Evidence of Debt.

E. Grantor's performance under the terms of any instrument evidencing a debt by Grantor to Lender and any Deed of Trust securing, guarantying, or otherwise relating to the debt.

If more than one person signs this Deed of Trust as Grantor, each Grantor agrees that this Deed of Trust will secure all future advances and future obligations described above that are given to or incurred by any one or more Grantor, or any one or more Grantor and others. This Deed of Trust will not secure any other debt if Lender fails, with respect to such other debt, to make any required disclosure about this Deed of Trust or if Lender fails to give any required notice of the right of rescission.

5. **PAYMENTS.** Grantor agrees to make all payments on the Secured Debt when due and in accordance with the terms of the Evidence of Debt or this Deed of Trust. If any note evidencing the Secured Debt contains a variable rate feature, Grantor acknowledges that the interest rate, payment terms, or balance due on the loan may be indexed, adjusted, renewed or renegotiated.

6. **WARRANTY OF TITLE.** Grantor covenants that Grantor is lawfully seized of the estate conveyed by this Deed of Trust and has the right to irrevocably grant, convey and sell to Trustee, in trust, with power of sale, the Property and warrants that the Property is unencumbered, except for encumbrances of record.

7. **CLAIMS AGAINST TITLE.** Grantor will pay all taxes, assessments, liens, encumbrances, lease payments, ground rents, utilities, and other charges relating to the Property when due. Lender may require Grantor to provide to Lender copies of all notices that such amounts are due and the receipts evidencing Grantor's payment. Grantor will defend title to the Property against any claims that would impair the lien of this Deed of Trust. Grantor agrees to assign to Lender, as requested by Lender, any rights, claims or defenses which Grantor may have against parties who supply labor or materials to improve or maintain the Property.

8. **PRIOR SECURITY INTERESTS.** With regard to any other mortgage, deed of trust, security agreement or other lien document that created a prior security interest or encumbrance on the Property and that may have priority over this Deed of Trust, Grantor agrees:

A. To make all payments when due and to perform or comply with all covenants.

B. To promptly deliver to Lender any notices that Grantor receives from the holder.

C. Not to make or permit any modification or extension of, and not to request or accept any future advances under any note or agreement secured by, the other mortgage, deed of trust or security agreement unless Lender consents in writing.

9. **DUE ON SALE OR ENCUMBRANCE.** Lender may, at its option, declare the entire balance of the Secured Debt to be immediately due and payable upon the creation of any lien, encumbrance, transfer, or sale, or contract for any of these on the Property. However, if the Property includes Grantor's residence, this section shall be subject to the restrictions imposed by federal law (12 C.F.R. 591), as applicable. For the purposes of this section, the term "Property" also includes any interest to all or any part of the Property. This

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covenant shall run with the Property and shall remain in effect until the Secured Debt is paid in full and this Deed of Trust is released.

10. **TRANSFER OF AN INTEREST IN THE GRANTOR.** Lender may demand immediate payment of the debt(s) if Grantor is not a natural person and fails to obtain Lender's prior written consent before organizing, merging into, or consolidating with an entity; acquiring all or substantially all of the assets of another; materially changing the legal structure, management, ownership or financial condition; or effecting or entering into a domestication, conversion or interest exchange.

11. **ENTITY WARRANTIES AND REPRESENTATIONS.** If Grantor is an entity other than a natural person (such as a corporation or other organization), Grantor makes to Lender the following warranties and representations which shall be continuing as long as the Secured Debt remains outstanding:
    A. Grantor is an entity which is duly organized and validly existing in the Grantor's state of incorporation (or organization). Grantor is in good standing in all states in which Grantor transacts business. Grantor has the power and authority to own the Property and to carry on its business as now being conducted and, as applicable, is qualified to do so in each state in which Grantor operates.
    B. The execution, delivery and performance of this Deed of Trust by Grantor and the obligation evidenced by the Evidence of Debt are within the power of Grantor, have been duly authorized, have received all necessary governmental approval, and will not violate any provision of law, or order of court or governmental agency.
    C. Other than disclosed in writing Grantor has not changed its name within the last ten years and has not used any other trade or fictitious name. Without Lender's prior written consent, Grantor does not and will not use any other name and will preserve its existing name, trade names and franchises until the Secured Debt is satisfied.

12. **PROPERTY CONDITION, ALTERATIONS AND INSPECTION.** Grantor will keep the Property in good condition and make all repairs that are reasonably necessary. Grantor will give Lender prompt notice of any loss or damage to the Property. Grantor will keep the Property free of noxious weeds and grasses. Grantor will not initiate, join in or consent to any change in any private restrictive covenant, zoning ordinance or other public or private restriction limiting or defining the uses which may be made of the Property or any part of the Property, without Lender's prior written consent. Grantor will notify Lender of all demands, proceedings, claims, and actions against Grantor or any other owner made under law or regulation regarding use, ownership and occupancy of the Property. Grantor will comply with all legal requirements and restrictions, whether public or private, with respect to the use of the Property. Grantor also agrees that the nature of the occupancy and use will not change without Lender's prior written consent.
    No portion of the Property will be removed, demolished or materially altered without Lender's prior written consent except that Grantor has the right to remove items of personal property comprising a part of the Property that become worn or obsolete, provided that such personal property is replaced with other personal property at least equal in value to the replaced personal property, free from any title retention device, security agreement or other encumbrance. Such replacement of personal property will be deemed subject to the security interest created by this Deed of Trust. Grantor shall not partition or subdivide the Property without Lender's prior written consent. Lender or Lender's agents may, at Lender's option, enter the Property at any reasonable time for the purpose of inspecting the Property. Any inspection of the Property shall be entirely for Lender's benefit and Grantor will in no way rely on Lender's inspection.

13. **AUTHORITY TO PERFORM.** If Grantor fails to perform any of Grantor's duties under this Deed of Trust, or any other mortgage, deed of trust, security agreement or other lien

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document that has priority over this Deed of Trust, Lender may, without notice, perform the duties or cause them to be performed. Grantor appoints Lender as attorney in fact to sign Grantor's name or pay any amount necessary for performance. If any construction on the Property is discontinued or not carried on in a reasonable manner, Lender may do whatever is necessary to protect Lender's security interest in the Property. This may include completing the construction.

Lender's right to perform for Grantor shall not create an obligation to perform, and Lender's failure to perform will not preclude Lender from exercising any of Lender's other rights under the law or this Deed of Trust. Any amounts paid by Lender for insuring, preserving or otherwise protecting the Property and Lender's security interest will be due on demand and will bear interest from the date of the payment until paid in full at the interest rate in effect from time to time according to the terms of the Evidence of Debt.

14. **ASSIGNMENT OF LEASES AND RENTS.** Grantor absolutely, unconditionally, irrevocably and immediately assigns, grants, bargains and conveys to Lender all the right, title and interest in the following (Property).

A. Existing or future leases, subleases, licenses, guaranties and any other written or verbal agreements for the use and occupancy of the Property, including but not limited to, any extensions, renewals, modifications or replacements (Leases).

B. Rents, issues and profits, including but not limited to, security deposits, minimum rents, percentage rents, additional rents, common area maintenance charges, parking charges, real estate taxes, other applicable taxes, insurance premium contributions, liquidated damages following default, cancellation premiums, "loss of rents" insurance, guest receipts, revenues, royalties, proceeds, bonuses, accounts, contract rights, general intangibles, and all rights and claims which Grantor may have that in any way pertain to or are on account of the use or occupancy of the whole or any part of the Property (Rents).

In the event any item listed as Leases or Rents is determined to be personal property, this Assignment will also be regarded as a security agreement.

Grantor will promptly provide Lender with copies of the Leases and will certify these Leases are true and correct copies. The existing Leases will be provided on execution of the Assignment, and all future Leases and any other information with respect to these Leases will be provided immediately after they are executed. Lender grants Grantor a revocable license to collect, receive, enjoy and use the Rents as long as Grantor is not in default. Grantor's default automatically and immediately revokes this license. Grantor will not collect in advance any Rents due in future lease periods, unless Grantor first obtains Lender's written consent. Amounts collected will be applied at Lender's discretion to the Secured Debts, the costs of managing, protecting and preserving the Property, and other necessary expenses. Upon default, Grantor will receive any Rents in trust for Lender and Grantor will not commingle the Rents with any other funds. When Lender so directs, Grantor will endorse and deliver any payments of Rents from the Property to Lender.

Grantor agrees that Lender will not be considered to be a mortgagee-in-possession by executing this Security Instrument or by collecting or receiving payments on the Secured Debts, but only may become a mortgagee-in-possession after Grantor's license to collect, receive, enjoy and use the Rents is revoked by Lender or automatically revoked on Grantor's default, and Lender takes actual possession of the Property. Consequently, until Lender takes actual possession of the Property, Lender is not obligated to perform or discharge any obligation of Grantor under the Leases, appear in or defend any action or proceeding relating to the Rents, the Leases or the Property, or be liable in any way for any injury or damage to any person or property sustained in or about the Property.

Grantor agrees that this Security Instrument is immediately effective between Grantor and Lender and effective as to third parties on the recording of this Assignment.

As long as this Assignment is in effect, Grantor warrants and represents that no default

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exists under the Leases, and the parties subject to the Leases have not violated any applicable law on leases, licenses and landlords and tenants. Grantor, at its sole cost and expense, will keep, observe and perform, and require all other parties to the Leases to comply with the Leases and any applicable law. If Grantor or any party to the Lease defaults or fails to observe any applicable law, Grantor will promptly notify Lender. If Grantor neglects or refuses to enforce compliance with the terms of the Leases, then Lender may, at Lender's option, enforce compliance.

Grantor will not sublet, modify, extend, cancel, or otherwise alter the Leases, or accept the surrender of the Property covered by the Leases (unless the Leases so require) without Lender's consent. Grantor will not assign, compromise, subordinate or encumber the Leases and Rents without Lender's prior written consent. Lender does not assume or become liable for the Property's maintenance, depreciation, or other losses or damages when Lender acts to manage, protect or preserve the Property, except for losses and damages due to Lender's gross negligence or intentional torts. Otherwise, Grantor will indemnify Lender and hold Lender harmless for all liability, loss or damage that Lender may incur when Lender opts to exercise any of its remedies against any party obligated under the Leases.

15. **CONDOMINIUMS; PLANNED UNIT DEVELOPMENTS.** If the Property includes a unit in a condominium or a planned unit development, Grantor will perform all of Grantor's duties under the covenants, by-laws, or regulations of the condominium or planned unit development.

16. **DEFAULT.** Grantor will be in default if any of the following occur:
    - A. Any party obligated on the Secured Debt fails to make payment when due;
    - B. A breach of any term or covenant in this Deed of Trust, any prior mortgage or any construction loan agreement, security agreement or any other document evidencing, guarantying, securing or otherwise relating to the Secured Debt;
    - C. The making or furnishing of any verbal or written representation, statement or warranty to Lender that is false or incorrect in any material respect by Grantor or any person or entity obligated on the Secured Debt;
    - D. The death, dissolution, or insolvency of, appointment of a receiver for, or application of any debtor relief law to, Grantor or any person or entity obligated on the Secured Debt;
    - E. A good faith belief by Lender at any time that Lender is insecure with respect to any person or entity obligated on the Secured Debt or that the prospect of any payment is impaired or the value of the Property is impaired;
    - F. A material adverse change in Grantor's business including ownership, management, and financial conditions, which Lender in its opinion believes impairs the value of the Property or repayment of the Secured Debt; or
    - G. Any loan proceeds are used for a purpose that will contribute to excessive erosion of highly erodible land or to the conversion of wetlands to produce an agricultural commodity, as further explained in 7 C.F.R. Part 1940, Subpart G, Exhibit M.

17. **REMEDIES ON DEFAULT.** In some instances, federal and state law will require Lender to provide Grantor with notice of the right to cure, mediation notices or other notices and may establish time schedules for foreclosure actions. Subject to these limitations, if any, Lender may accelerate the Secured Debt and foreclose this Deed of Trust in a manner provided by law if this Grantor is in default.

    At the option of Lender, all or any part of the agreed fees and charges, accrued interest and principal shall become immediately due and payable, after giving notice if required by law, upon the occurrence of a default or anytime thereafter. In addition, Lender shall be entitled to all the remedies provided by law, the Evidence of Debt, other evidences of debt, this Deed of Trust and any related documents, including without limitation, the power to sell the Property.

If there is a default, Trustee shall, in addition to any other permitted remedy, at the request of Lender, advertise and sell the Property as a whole or in separate parcels at public auction to the highest bidder for cash and convey absolute title free and clear of all right, title and interest of Grantor at such time and place as Trustee designates. Trustee shall give notice of sale including the time, terms and place of sale and a description of the property to be sold as required by the applicable law in effect at the time of the proposed sale.

Upon sale of the Property and to the extent not prohibited by law, Trustee shall make and deliver a deed to the Property sold which conveys absolute title to the purchaser, and after first paying all fees, charges and costs, shall pay to Lender all moneys advanced for repairs, taxes, insurance, liens, assessments and prior encumbrances and interest thereon, and the principal and interest on the Secured Debt, paying the surplus, if any, to Grantor. Lender may purchase the Property. The recitals in any deed of conveyance shall be prima facie evidence of the facts set forth therein.

All remedies are distinct, cumulative and not exclusive, and Lender is entitled to all remedies provided at law or equity, whether expressly set forth or not. The acceptance by Lender of any sum in payment or partial payment on the Secured Debt after the balance is due or is accelerated or after foreclosure proceedings are filed shall not constitute a waiver of Lender's right to require full and complete cure of any existing default. By not exercising any remedy on Grantor's default, Lender does not waive Lender's right to later consider the event a default if it continues or happens again.

18. **EXPENSES; ADVANCES ON COVENANTS; ATTORNEYS' FEES; COLLECTION COSTS.** Except when prohibited by law, Grantor agrees to pay all of Lender's expenses if Grantor breaches any covenant in this Deed of Trust. Grantor will also pay on demand all of Lender's expenses incurred in collecting, insuring, preserving or protecting the Property or in any inventories, audits, inspections or other examination by Lender in respect to the Property. Grantor agrees to pay all costs and expenses incurred by Lender in enforcing or protecting Lender's rights and remedies under this Deed of Trust, including, but not limited to, attorneys' fees, court costs, and other legal expenses. Once the Secured Debt is fully and finally paid, Lender agrees to release this Deed of Trust and Grantor agrees to pay for any recordation costs. All such amounts are due on demand and will bear interest from the time of the advance at the highest rate in effect, from time to time, as provided in the Evidence of Debt and as permitted by law.

19. **ENVIRONMENTAL LAWS AND HAZARDOUS SUBSTANCES.** As used in this section, (1) "Environmental Law" means, without limitation, the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA, 42 U.S.C. 9601 et seq.), all other federal, state and local laws, regulations, ordinances, court orders, attorney general opinions or interpretive letters concerning the public health, safety, welfare, environment or a hazardous substance; and (2) "Hazardous Substance" means any toxic, radioactive or hazardous material, waste, pollutant or contaminant which has characteristics which render the substance dangerous or potentially dangerous to the public health, safety, welfare or environment. The term includes, without limitation, any substances defined as "hazardous material," "toxic substances," "hazardous waste" or "hazardous substance" under any Environmental Law. Grantor represents, warrants and agrees that, except as previously disclosed and acknowledged in writing:

    A. No Hazardous Substance has been, is, or will be located, transported, manufactured, treated, refined, or handled by any person on, under or about the Property, except in the ordinary course of business and in strict compliance with all applicable Environmental Law.

    B. Grantor has not and will not cause, contribute to, or permit the release of any Hazardous Substance on the Property.

C. Grantor will immediately notify Lender if (1) a release or threatened release of Hazardous Substance occurs on, under or about the Property or migrates or threatens to migrate from nearby property; or (2) there is a violation of any Environmental Law concerning the Property. In such an event, Grantor will take all necessary remedial action in accordance with Environmental Law.

D. Grantor has no knowledge of or reason to believe there is any pending or threatened investigation, claim, or proceeding of any kind relating to (1) any Hazardous Substance located on, under or about the Property; or (2) any violation by Grantor or any tenant of any Environmental Law. Grantor will immediately notify Lender in writing as soon as Grantor has reason to believe there is any such pending or threatened investigation, claim, or proceeding. In such an event, Lender has the right, but not the obligation, to participate in any such proceeding including the right to receive copies of any documents relating to such proceedings.

E. Grantor and every tenant have been, are and shall remain in full compliance with any applicable Environmental Law.

F. There are no underground storage tanks, private dumps or open wells located on or under the Property and no such tank, dump or well will be added unless Lender first consents in writing.

G. Grantor will regularly inspect the Property, monitor the activities and operations on the Property, and confirm that all permits, licenses or approvals required by any applicable Environmental Law are obtained and complied with.

H. Grantor will permit, or cause any tenant to permit, Lender or Lender's agent to enter and inspect the Property and review all records at any reasonable time to determine (1) the existence, location and nature of any Hazardous Substance on, under or about the Property; (2) the existence, location, nature, and magnitude of any Hazardous Substance that has been released on, under or about the Property; or (3) whether or not Grantor and any tenant are in compliance with applicable Environmental Law.

I. Upon Lender's request and at any time, Grantor agrees, at Grantor's expense, to engage a qualified environmental engineer to prepare an environmental audit of the Property and to submit the results of such audit to Lender. The choice of the environmental engineer who will perform such audit is subject to Lender's approval.

J. Lender has the right, but not the obligation, to perform any of Grantor's obligations under this section at Grantor's expense.

K. As a consequence of any breach of any representation, warranty or promise made in this section, (1) Grantor will indemnify and hold Lender and Lender's successors or assigns harmless from and against all losses, claims, demands, liabilities, damages, cleanup, response and remediation costs, penalties and expenses, including without limitation all costs of litigation and attorneys' fees, which Lender and Lender's successors or assigns may sustain; and (2) at Lender's discretion, Lender may release this Deed of Trust and in return Grantor will provide Lender with collateral of at least equal value to the Property secured by this Deed of Trust without prejudice to any of Lender's rights under this Deed of Trust.

L. Notwithstanding any of the language contained in this Deed of Trust to the contrary, the terms of this section shall survive any foreclosure or satisfaction of this Deed of Trust regardless of any passage of title to Lender or any disposition by Lender of any or all of the Property. Any claims and defenses to the contrary are hereby waived.

20. **CONDEMNATION.** Grantor will give Lender prompt notice of any action, real or threatened, by private or public entities to purchase or take any or all of the Property, including any easements, through condemnation, eminent domain, or any other means. Grantor further agrees to notify Lender of any proceedings instituted for the establishment

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of any sewer, water, conservation, ditch, drainage, or other district relating to or binding upon the Property or any part of it. Grantor authorizes Lender to intervene in Grantor's name in any of the above described actions or claims and to collect and receive all sums resulting from the action or claim. Grantor assigns to Lender the proceeds of any award or claim for damages connected with a condemnation or other taking of all or any part of the Property. Such proceeds shall be considered payments and will be applied as provided in this Deed of Trust. This assignment of proceeds is subject to the terms of any prior mortgage, deed of trust, security agreement or other lien document.

21. **INSURANCE.** Grantor agrees to maintain insurance as follows:

A. Grantor shall keep the Property insured against loss by fire, theft and other hazards and risks reasonably associated with the Property due to its type and location. Other hazards and risks may include, for example, coverage against loss due to floods or flooding. This insurance shall be maintained in the amounts and for the periods that Lender requires. What Lender requires pursuant to the preceding three sentences can change during the term of the Secured Debt. The insurance carrier providing the insurance shall be chosen by Grantor subject to Lender's approval, which shall not be unreasonably withheld. If Grantor fails to maintain the coverage described above, Lender may, at Lender's option, obtain coverage to protect Lender's rights in the Property according to the terms of this Deed of Trust.

All insurance policies and renewals shall be acceptable to Lender and shall include a standard "mortgage clause" and, where applicable, "lender loss payee clause." Grantor shall immediately notify Lender of cancellation or termination of the insurance. Lender shall have the right to hold the policies and renewals. If Lender requires, Grantor shall immediately give to Lender all receipts of paid premiums and renewal notices. Upon loss, Grantor shall give immediate notice to the insurance carrier and Lender. Lender may make proof of loss if not made immediately by Grantor.

Unless Lender and Grantor otherwise agree in writing, insurance proceeds shall be applied to restoration or repair of the Property damaged if the restoration or repair is economically feasible and Lender's security is not lessened. If the restoration or repair is not economically feasible or Lender's security would be lessened, the insurance proceeds shall be applied to the Secured Debt, whether or not then due, with any excess paid to Grantor. If Grantor abandons the Property, or does not answer within 30 days a notice from Lender that the insurance carrier has offered to settle a claim, then Lender may collect the insurance proceeds. Lender may use the proceeds to repair or restore the Property or to pay the Secured Debt whether or not then due. The 30-day period will begin when the notice is given.

Unless Lender and Grantor otherwise agree in writing, any application of proceed to principal shall not extend or postpone the due date of scheduled payments or change the amount of the payments. If the Property is acquired by Lender, Grantor's right to any insurance policies and proceeds resulting from damage to the Property before the acquisition shall pass to Lender to the extent of the Secured Debt immediately before the acquisition.

B. Grantor agrees to maintain comprehensive general liability insurance naming Lender as an additional insured in an amount acceptable to Lender, insuring against claims arising from any accident or occurrence in or on the Property.

C. Grantor agrees to maintain rental loss or business interruption insurance, as required by Lender, in an amount equal to at least coverage of one year's debt service, and required escrow account deposits (if agreed to separately in writing), under a form of policy acceptable to Lender.

22. **NO ESCROW FOR TAXES AND INSURANCE.** Unless otherwise provided in a separate agreement, Grantor will not be required to pay to Lender funds for taxes and insurance in escrow.
23. **FINANCIAL REPORTS AND ADDITIONAL DOCUMENTS.** Grantor will provide to Lender upon request, any financial statement or information Lender may deem necessary. Grantor warrants that all financial statements and information Grantor provides to Lender are, or will be, accurate, correct, and complete. Grantor agrees to sign, deliver, and file as Lender may reasonably request any additional documents or certifications that Lender may consider necessary to perfect, continue, and preserve Grantor's obligations under this Deed of Trust and Lender's lien status on the Property. If Grantor fails to do so, Lender may sign, deliver, and file such documents or certificates in Grantor's name and Grantor hereby irrevocably appoints Lender or Lender's agent as attorney in fact to do the things necessary to comply with this section.
24. **JOINT AND INDIVIDUAL LIABILITY; CO-SIGNERS; SUCCESSORS AND ASSIGNS BOUND.** All duties under this Deed of Trust are joint and individual. If Grantor signs this Deed of Trust but does not sign the Evidence of Debt, Grantor does so only to mortgage Grantor's interest in the Property to secure payment of the Secured Debt and Grantor does not agree to be personally liable on the Secured Debt. Grantor agrees that Lender and any party to this Deed of Trust may extend, modify or make any change in the terms of this Deed of Trust or the Evidence of Debt without Grantor's consent. Such a change will not release Grantor from the terms of this Deed of Trust. The duties and benefits of this Deed of Trust shall bind and benefit the successors and assigns of Grantor and Lender.

    If this Deed of Trust secures a guaranty between Lender and Grantor and does not directly secure the obligation which is guarantied, Grantor agrees to waive any rights that may prevent Lender from bringing any action or claim against Grantor or any party indebted under the obligation including, but not limited to, anti-deficiency or one-action laws.
25. **APPLICABLE LAW; SEVERABILITY; INTERPRETATION.** This Deed of Trust is governed by the laws of the jurisdiction in which Lender is located, except to the extent otherwise required by the laws of the jurisdiction where the Property is located. This Deed of Trust is complete and fully integrated. This Deed of Trust may not be amended or modified by oral agreement. Any section or clause in this Deed of Trust, attachments, or any agreement related to the Secured Debt that conflicts with applicable law will not be effective, unless that law expressly or impliedly permits the variations by written agreement. If any section or clause of this Deed of Trust cannot be enforced according to its terms, that section or clause will be severed and will not affect the enforceability of the remainder of this Deed of Trust. Whenever used, the singular shall include the plural and the plural the singular. The captions and headings of the sections of this Deed of Trust are for convenience only and are not to be used to interpret or define the terms of this Deed of Trust. Time is of the essence in this Deed of Trust.
26. **SUCCESSOR TRUSTEE.** Lender, at Lender's option, may from time to time remove Trustee and appoint a successor trustee by an instrument recorded in the county in which this Deed of Trust is recorded. The successor trustee, without conveyance of the Property, shall succeed to all the title, power and duties conferred upon the Trustee by this Deed of Trust and applicable law.
27. **NOTICE.** Unless otherwise required by law, any notice shall be given by delivering it or by mailing it by first class mail to the appropriate party's address on page 1 of this Deed of Trust, or to any other address designated in writing. Notice to one grantor will be deemed to be notice to all grantors.
28. **WAIVERS.** Except to the extent prohibited by law, Grantor waives all rights to homestead exemption, appraisement or the marshalling of liens and assets relating to the Property.

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29. **DECLARATION.** Grantor declares that the Property is either located within an incorporated city or village or that the Property is not more than forty (40) acres in area regardless of its use or location, or not more than eighty (80) acres in area and not principally used for the agricultural production of crops, livestock, dairy or aquatic goods.
30. **U.C.C. PROVISIONS.** If checked, the following are applicable to, but do not limit, this Deed of Trust:
    - ☐ **Construction Loan.** This Deed of Trust secures an obligation incurred for the construction of an improvement on the Property.
    - ☐ **Fixture Filing.** Grantor grants to Lender a security interest in all goods that Grantor owns now or in the future and that are or will become fixtures related to the Property.
    - ☐ **Crops; Timber; Minerals; Rents, Issues and Profits.** Grantor grants to Lender a security interest in all crops, timber and minerals located on the Property as well as all rents, issues and profits of them including, but not limited to, all Conservation Reserve Program (CRP) and Payment in Kind (PIK) payments and similar governmental programs (all of which shall also be included in the term "Property").
    - ☐ **Personal Property.** Grantor grants to Lender a security interest in all personal property located on or connected with the Property. This security interest includes all farm products, inventory, equipment, accounts, documents, instruments, chattel paper, general intangibles, and all other items of personal property Grantor owns now or in the future and that are used or useful in the construction, ownership, operation, management, or maintenance of the Property. The term "personal property" specifically excludes that property described as "household goods" secured in connection with a "consumer" loan as those terms are defined in applicable federal regulations governing unfair and deceptive credit practices.
    - ☐ **Filing As Financing Statement.** Grantor agrees and acknowledges that this Deed of Trust also suffices as a financing statement and as such, may be filed of record as a financing statement for purposes of Article 9 of the Uniform Commercial Code. A carbon, photographic, image or other reproduction of this Deed of Trust is sufficient as a financing statement.
31. **OTHER TERMS.** If checked, the following are applicable to this Deed of Trust:
    - ☐ **Line of Credit.** The Secured Debt includes a revolving line of credit provision. Although the Secured Debt may be reduced to a zero balance, this Deed of Trust will remain in effect until released.
    - ☐ **Separate Assignment.** The Grantor has executed or will execute a separate assignment of leases and rents. If the separate assignment of leases and rents is properly executed and recorded, then the separate assignment will supersede this Security Instrument's "Assignment of Leases and Rents" section.

☐ Additional Terms.

SIGNATURES: By signing below, Grantor agrees to the terms and covenants contained in this Deed Trust attachments. Grantor also acknowledges receipt of a copy of this Deed of Trust on the date stated above on Page 1.

☐ Actual authority was granted to the parties signing below by resolution signed and dated _____

Entity Name: _____

Duane J Yost 12/24/08
(Signature) (Date)
DUANE YOST

Lori Yost 12/24/08
(Signature) (Date)
LORI YOST

_____ _____
(Signature) (Date)

_____ _____
(Signature) (Date)

☐ Refer to the Addendum which is attached and incorporated herein for additional Grantors, signatures and acknowledgments.

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ACKNOWLEDGMENT:

(Individual)

STATE OF IDAHO, COUNTY OF Bonneville) ss.
On this 24TH day of DECEMBER, 2008, before me,
a Notary Public, personally appeared DUANE YOST; LORI YOST, HUSBAND AND WIFE,
known or identified to me
(or proved to me on the oath of), to
be the person(s) whose name is subscribed to the within instrument, and
acknowledged to me that she/he/they executed the same.
My commission expires: April 7, 2009

Rebecca Judy
(Notary Public)

REBECCA JUDY NOTARY PUBLIC STATE OF IDAHO

(Business or Entity Acknowledgment)

STATE OF , COUNTY OF) ss.
On this day of , before me,
a Notary Public, personally appeared ,
known or identified to me
(or proved to me on the oath of), to
be the person(s) whose name is subscribed to the within instrument, and
acknowledged to me that she/he/they executed the same.
My commission expires:

(Notary Public)

REQUEST FOR RECONVEYANCE
(Not to be completed until paid in full)

TO TRUSTEE:
The undersigned is the holder of the note or notes secured by this Deed of Trust. Said note or notes, together with all other indebtedness secured by this Deed of Trust, have been paid in full. You are hereby directed to cancel this Deed of Trust, which is delivered hereby, and to reconvey, without warranty, all the estate now held by you under this Deed of Trust to the person or persons legally entitled thereto.

(Authorized Bank Signature) Date

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LEGAL DESCRIPTION
EXHIBIT 'A'

TRACT I:

Beginning at a point that is South 89°55'28" West along the Section line 1326.98 feet from the North ¼ Corner of Section 10, Township 1 North, Range 38 East of the Boise Meridian; running thence South 89°55'28" West along said Section line 1236.12 feet to the South Right-of-Way line of 65th South; thence along said South Right-of-Way line of 65th South and the East Right-of-Way line of 25th East the following three (3) courses; South 00°12'54" East 28.10 feet to a point of curve with a radius of 69.34 feet and a chord bearing South 44°18'28" West 98.29 feet; thence to the left along said curve 109.24 feet through a central angle of 90°16'00"; thence South 89°10'28" West 28.71 feet to the West line of said Section 10; thence South 00°19'04" East 1213.86 feet to the South line of the North ½ of the Northwest ¼ of said Section 10, thence North 89°54'09" East along said South line 1327.87 feet; thence North 00°03'13" West 1312.06 feet to the POINT OF BEGINNING.

Excepting
That portion thereof conveyed to the State of Idaho by that deed recorded on March 8, 1950 in Book 70 of Deeds at Page 287 of Official Records of Bonneville County, Idaho.

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Exhibit "E"

Recording Requested By:
THE BANK OF COMMERCE-ADMINISTR
3113 SOUTH 25TH EAST, P.O. 1887 ALLS, ID 83403
Return To:
THE BANK OF COMMERCE-ADMINISTRATION
3113 SOUTH 25TH EAST, P.O. 1887
IDAHO FALLS, ID 83403

Prepared By:
THE BANK OF COMMERCE-ADMINISTRATION
3113 SOUTH 25TH EAST, P.O. 1887
IDAHO FALLS, ID 83403

State of Idaho — Space Above This Line For Recording Data

REAL ESTATE DEED OF TRUST
(With Future Advance Clause)

1. **DATE AND PARTIES.** The date of this Deed of Trust (Security Instrument) is 11-21-2008 . The parties and their addresses are:

GRANTOR:
HAMPSHIRE HOLDINGS, LLC, AN IDAHO LIMITED LIABILITY COMPANY
3777 HAMPSHIRE CT.
IDAHO FALLS, ID 83404

☐ Refer to the Addendum which is attached and incorporated herein for additional Grantors.

TRUSTEE:
ALLIANCE TITLE AND ESCROW CORP.
1070 RIVERWALK DR., STE. 100
IDAHO FALLS, ID 83402

LENDER:
THE BANK OF COMMERCE-ADMINISTRATION
3113 SOUTH 25TH EAST, P.O. 1887
IDAHO FALLS, ID 83403

DZJ Jay

2. **CONVEYANCE.** For good and valuable consideration, the receipt and sufficiency of which is acknowledged, and to secure the Secured Debt (hereafter defined), Grantor irrevocably grants, bargains, sells and conveys to Trustee, in trust for the benefit of Lender, with power of sale, the following described property:

LOT 11 IN BLOCK 3 OF CANTERBURY PARK, DIVISION NO. 2, TO THE CITY OF IDAHO FALLS, IDAHO ACCORDING TO THE OFFICIAL PLAT THEREOF, RECORDED OCTOBER 19, 1992 AS INSTRUMENT NO. 837954 FILED IN OFFICIAL RECORDS OF BONNEVILLE COUNTY, IDAHO.

The property is located in BONNEVILLE (County) at _____

3777 HAMPSHIRE CT. (Address),

IDAHO FALLS (City), Idaho 83404 (Zip Code)

Together with all rights, easements, appurtenances, royalties, mineral rights, oil and gas rights, crops, timber, all diversion payments or third party payments made to crop producers, and all existing and future improvements, structures, fixtures, and replacements that may now, or at any time in the future, be part of the real estate described above (all referred to as "Property"). The term Property also includes, but is not limited to, any and all water wells, water, ditches, reservoirs, reservoir sites and dams located on the real estate and all riparian and water rights associated with the Property, however established.

3. **MAXIMUM OBLIGATION LIMIT.** The total principal amount of the Secured Debt (hereafter defined) secured by this Deed of Trust at any one time shall not exceed $ 1,000,000.00. This limitation of amount does not include interest, loan charges, commitment fees, brokerage commissions, attorneys' fees and other charges validly made pursuant to this Deed of Trust and does not apply to advances (or interest accrued on such advances) made under the terms of this Deed of Trust to protect Lender's security and to perform any of the covenants contained in this Deed of Trust. Future advances are contemplated and, along with other future obligations, are secured by this Deed of Trust even though all or part may not yet be advanced. Nothing in this Deed of Trust, however, shall constitute a commitment to make additional or future loans or advances in any amount. Any such commitment would need to be agreed to in a separate writing.

4. **SECURED DEBT DEFINED.** The term "Secured Debt" includes, but is not limited to, the following:

   A. The promissory note(s), contract(s), guaranty(ies) or other evidence of debt described below and all extensions, renewals, modifications or substitutions (Evidence of Debt) *(e.g., borrower's name, note amount, interest rate, maturity date):*

      NOTE DATED 11/21/2008 FOR DUANE YOST IN THE AMOUNT OF $1,000,000.00. LOAN WILL MATURE ON 11/21/2009.

B. All future advances from Lender to Grantor or other future obligations of Grantor to Lender under any promissory note, contract, guaranty, or other evidence of debt existing now or executed after this Deed of Trust whether or not this Deed of Trust is specifically referred to in the evidence of debt.

C. All obligations Grantor owes to Lender, which now exist or may later arise, to the extent not prohibited by law, including, but not limited to, liabilities for overdrafts relating to any deposit account agreement between Grantor and Lender.

D. All additional sums advanced and expenses incurred by Lender for insuring, preserving or otherwise protecting the Property and its value and any other sums advanced and expenses incurred by Lender under the terms of this Deed of Trust, plus interest at the highest rate in effect, from time to time, as provided in the Evidence of Debt.

E. Grantor's performance under the terms of any instrument evidencing a debt by Grantor to Lender and any Deed of Trust securing, guarantying, or otherwise relating to the debt.

If more than one person signs this Deed of Trust as Grantor, each Grantor agrees that this Deed of Trust will secure all future advances and future obligations described above that are given to or incurred by any one or more Grantor, or any one or more Grantor and others. This Deed of Trust will not secure any other debt if Lender fails, with respect to such other debt, to make any required disclosure about this Deed of Trust or if Lender fails to give any required notice of the right of rescission.

5. **PAYMENTS.** Grantor agrees to make all payments on the Secured Debt when due and in accordance with the terms of the Evidence of Debt or this Deed of Trust. If any note evidencing the Secured Debt contains a variable rate feature, Grantor acknowledges that the interest rate, payment terms, or balance due on the loan may be indexed, adjusted, renewed or renegotiated.

6. **WARRANTY OF TITLE.** Grantor covenants that Grantor is lawfully seized of the estate conveyed by this Deed of Trust and has the right to irrevocably grant, convey and sell to Trustee, in trust, with power of sale, the Property and warrants that the Property is unencumbered, except for encumbrances of record.

7. **CLAIMS AGAINST TITLE.** Grantor will pay all taxes, assessments, liens, encumbrances, lease payments, ground rents, utilities, and other charges relating to the Property when due. Lender may require Grantor to provide to Lender copies of all notices that such amounts are due and the receipts evidencing Grantor's payment. Grantor will defend title to the Property against any claims that would impair the lien of this Deed of Trust. Grantor agrees to assign to Lender, as requested by Lender, any rights, claims or defenses which Grantor may have against parties who supply labor or materials to improve or maintain the Property.

8. **PRIOR SECURITY INTERESTS.** With regard to any other mortgage, deed of trust, security agreement or other lien document that created a prior security interest or encumbrance on the Property and that may have priority over this Deed of Trust, Grantor agrees:

A. To make all payments when due and to perform or comply with all covenants.

B. To promptly deliver to Lender any notices that Grantor receives from the holder.

C. Not to make or permit any modification or extension of, and not to request or accept any future advances under any note or agreement secured by, the other mortgage, deed of trust or security agreement unless Lender consents in writing.

9. **DUE ON SALE OR ENCUMBRANCE.** Lender may, at its option, declare the entire balance of the Secured Debt to be immediately due and payable upon the creation of any lien, encumbrance, transfer, or sale, or contract for any of these on the Property. However, if the Property includes Grantor's residence, this section shall be subject to the restrictions imposed by federal law (12 C.F.R. 591), as applicable. For the purposes of this section, the term "Property" also includes any interest to all or any part of the Property. This

covenant shall run with the Property and shall remain in effect until the Secured Debt is paid in full and this Deed of Trust is released.

10. **TRANSFER OF AN INTEREST IN THE GRANTOR.** Lender may demand immediate payment of the debt(s) if Grantor is not a natural person and fails to obtain Lender's prior written consent before organizing, merging into, or consolidating with an entity; acquiring all or substantially all of the assets of another; materially changing the legal structure, management, ownership or financial condition; or effecting or entering into a domestication, conversion or interest exchange.
11. **ENTITY WARRANTIES AND REPRESENTATIONS.** If Grantor is an entity other than a natural person (such as a corporation or other organization), Grantor makes to Lender the following warranties and representations which shall be continuing as long as the Secured Debt remains outstanding:
    A. Grantor is an entity which is duly organized and validly existing in the Grantor's state of incorporation (or organization). Grantor is in good standing in all states in which Grantor transacts business. Grantor has the power and authority to own the Property and to carry on its business as now being conducted and, as applicable, is qualified to do so in each state in which Grantor operates.
    B. The execution, delivery and performance of this Deed of Trust by Grantor and the obligation evidenced by the Evidence of Debt are within the power of Grantor, have been duly authorized, have received all necessary governmental approval, and will not violate any provision of law, or order of court or governmental agency.
    C. Other than disclosed in writing Grantor has not changed its name within the last ten years and has not used any other trade or fictitious name. Without Lender's prior written consent, Grantor does not and will not use any other name and will preserve its existing name, trade names and franchises until the Secured Debt is satisfied.
12. **PROPERTY CONDITION, ALTERATIONS AND INSPECTION.** Grantor will keep the Property in good condition and make all repairs that are reasonably necessary. Grantor will give Lender prompt notice of any loss or damage to the Property. Grantor will keep the Property free of noxious weeds and grasses. Grantor will not initiate, join in or consent to any change in any private restrictive covenant, zoning ordinance or other public or private restriction limiting or defining the uses which may be made of the Property or any part of the Property, without Lender's prior written consent. Grantor will notify Lender of all demands, proceedings, claims, and actions against Grantor or any other owner made under law or regulation regarding use, ownership and occupancy of the Property. Grantor will comply with all legal requirements and restrictions, whether public or private, with respect to the use of the Property. Grantor also agrees that the nature of the occupancy and use will not change without Lender's prior written consent.
    No portion of the Property will be removed, demolished or materially altered without Lender's prior written consent except that Grantor has the right to remove items of personal property comprising a part of the Property that become worn or obsolete, provided that such personal property is replaced with other personal property at least equal in value to the replaced personal property, free from any title retention device, security agreement or other encumbrance. Such replacement of personal property will be deemed subject to the security interest created by this Deed of Trust. Grantor shall not partition or subdivide the Property without Lender's prior written consent. Lender or Lender's agents may, at Lender's option, enter the Property at any reasonable time for the purpose of inspecting the Property. Any inspection of the Property shall be entirely for Lender's benefit and Grantor will in no way rely on Lender's inspection.
13. **AUTHORITY TO PERFORM.** If Grantor fails to perform any of Grantor's duties under this Deed of Trust, or any other mortgage, deed of trust, security agreement or other lien

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document that has priority over this Deed of Trust, Lender may, without notice, perform the duties or cause them to be performed. Grantor appoints Lender as attorney in fact to sign Grantor's name or pay any amount necessary for performance. If any construction on the Property is discontinued or not carried on in a reasonable manner, Lender may do whatever is necessary to protect Lender's security interest in the Property. This may include completing the construction.

Lender's right to perform for Grantor shall not create an obligation to perform, and Lender's failure to perform will not preclude Lender from exercising any of Lender's other rights under the law or this Deed of Trust. Any amounts paid by Lender for insuring, preserving or otherwise protecting the Property and Lender's security interest will be due on demand and will bear interest from the date of the payment until paid in full at the interest rate in effect from time to time according to the terms of the Evidence of Debt.

14. **ASSIGNMENT OF LEASES AND RENTS.** Grantor absolutely, unconditionally, irrevocably and immediately assigns, grants, bargains and conveys to Lender all the right, title and interest in the following (Property).

A. Existing or future leases, subleases, licenses, guaranties and any other written or verbal agreements for the use and occupancy of the Property, including but not limited to, any extensions, renewals, modifications or replacements (Leases).

B. Rents, issues and profits, including but not limited to, security deposits, minimum rents, percentage rents, additional rents, common area maintenance charges, parking charges, real estate taxes, other applicable taxes, insurance premium contributions, liquidated damages following default, cancellation premiums, "loss of rents" insurance, guest receipts, revenues, royalties, proceeds, bonuses, accounts, contract rights, general intangibles, and all rights and claims which Grantor may have that in any way pertain to or are on account of the use or occupancy of the whole or any part of the Property (Rents).

In the event any item listed as Leases or Rents is determined to be personal property, this Assignment will also be regarded as a security agreement.

Grantor will promptly provide Lender with copies of the Leases and will certify these Leases are true and correct copies. The existing Leases will be provided on execution of the Assignment, and all future Leases and any other information with respect to these Leases will be provided immediately after they are executed. Lender grants Grantor a revocable license to collect, receive, enjoy and use the Rents as long as Grantor is not in default. Grantor's default automatically and immediately revokes this license. Grantor will not collect in advance any Rents due in future lease periods, unless Grantor first obtains Lender's written consent. Amounts collected will be applied at Lender's discretion to the Secured Debts, the costs of managing, protecting and preserving the Property, and other necessary expenses. Upon default, Grantor will receive any Rents in trust for Lender and Grantor will not commingle the Rents with any other funds. When Lender so directs, Grantor will endorse and deliver any payments of Rents from the Property to Lender. Grantor agrees that Lender will not be considered to be a mortgagee-in-possession by executing this Security Instrument or by collecting or receiving payments on the Secured Debts, but only may become a mortgagee-in-possession after Grantor's license to collect, receive, enjoy and use the Rents is revoked by Lender or automatically revoked on Grantor's default, and Lender takes actual possession of the Property. Consequently, until Lender takes actual possession of the Property, Lender is not obligated to perform or discharge any obligation of Grantor under the Leases, appear in or defend any action or proceeding relating to the Rents, the Leases or the Property, or be liable in any way for any injury or damage to any person or property sustained in or about the Property. Grantor agrees that this Security Instrument is immediately effective between Grantor and Lender and effective as to third parties on the recording of this Assignment.

As long as this Assignment is in effect, Grantor warrants and represents that no default

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exists under the Leases, and the parties subject to the Leases have not violated any applicable law on leases, licenses and landlords and tenants. Grantor, at its sole cost and expense, will keep, observe and perform, and require all other parties to the Leases to comply with the Leases and any applicable law. If Grantor or any party to the Lease defaults or fails to observe any applicable law, Grantor will promptly notify Lender. If Grantor neglects or refuses to enforce compliance with the terms of the Leases, then Lender may, at Lender's option, enforce compliance.

Grantor will not sublet, modify, extend, cancel, or otherwise alter the Leases, or accept the surrender of the Property covered by the Leases (unless the Leases so require) without Lender's consent. Grantor will not assign, compromise, subordinate or encumber the Leases and Rents without Lender's prior written consent. Lender does not assume or become liable for the Property's maintenance, depreciation, or other losses or damages when Lender acts to manage, protect or preserve the Property, except for losses and damages due to Lender's gross negligence or intentional torts. Otherwise, Grantor will indemnify Lender and hold Lender harmless for all liability, loss or damage that Lender may incur when Lender opts to exercise any of its remedies against any party obligated under the Leases.

15. **CONDOMINIUMS; PLANNED UNIT DEVELOPMENTS.** If the Property includes a unit in a condominium or a planned unit development, Grantor will perform all of Grantor's duties under the covenants, by-laws, or regulations of the condominium or planned unit development.

16. **DEFAULT.** Grantor will be in default if any of the following occur:
    A. Any party obligated on the Secured Debt fails to make payment when due;
    B. A breach of any term or covenant in this Deed of Trust, any prior mortgage or any construction loan agreement, security agreement or any other document evidencing, guarantying, securing or otherwise relating to the Secured Debt;
    C. The making or furnishing of any verbal or written representation, statement or warranty to Lender that is false or incorrect in any material respect by Grantor or any person or entity obligated on the Secured Debt;
    D. The death, dissolution, or insolvency of, appointment of a receiver for, or application of any debtor relief law to, Grantor or any person or entity obligated on the Secured Debt;
    E. A good faith belief by Lender at any time that Lender is insecure with respect to any person or entity obligated on the Secured Debt or that the prospect of any payment is impaired or the value of the Property is impaired;
    F. A material adverse change in Grantor's business including ownership, management, and financial conditions, which Lender in its opinion believes impairs the value of the Property or repayment of the Secured Debt; or
    G. Any loan proceeds are used for a purpose that will contribute to excessive erosion of highly erodible land or to the conversion of wetlands to produce an agricultural commodity, as further explained in 7 C.F.R. Part 1940, Subpart G, Exhibit M.

17. **REMEDIES ON DEFAULT.** In some instances, federal and state law will require Lender to provide Grantor with notice of the right to cure, mediation notices or other notices and may establish time schedules for foreclosure actions. Subject to these limitations, if any, Lender may accelerate the Secured Debt and foreclose this Deed of Trust in a manner provided by law if this Grantor is in default.

    At the option of Lender, all or any part of the agreed fees and charges, accrued interest and principal shall become immediately due and payable, after giving notice if required by law, upon the occurrence of a default or anytime thereafter. In addition, Lender shall be entitled to all the remedies provided by law, the Evidence of Debt, other evidences of debt, this Deed of Trust and any related documents, including without limitation, the power to sell the Property.

If there is a default, Trustee shall, in addition to any other permitted remedy, at the request of Lender, advertise and sell the Property as a whole or in separate parcels at public auction to the highest bidder for cash and convey absolute title free and clear of all right, title and interest of Grantor at such time and place as Trustee designates. Trustee shall give notice of sale including the time, terms and place of sale and a description of the property to be sold as required by the applicable law in effect at the time of the proposed sale.

Upon sale of the Property and to the extent not prohibited by law, Trustee shall make and deliver a deed to the Property sold which conveys absolute title to the purchaser, and after first paying all fees, charges and costs, shall pay to Lender all moneys advanced for repairs, taxes, insurance, liens, assessments and prior encumbrances and interest thereon, and the principal and interest on the Secured Debt, paying the surplus, if any, to Grantor. Lender may purchase the Property. The recitals in any deed of conveyance shall be prima facie evidence of the facts set forth therein.

All remedies are distinct, cumulative and not exclusive, and Lender is entitled to all remedies provided at law or equity, whether expressly set forth or not. The acceptance by Lender of any sum in payment or partial payment on the Secured Debt after the balance is due or is accelerated or after foreclosure proceedings are filed shall not constitute a waiver of Lender's right to require full and complete cure of any existing default. By not exercising any remedy on Grantor's default, Lender does not waive Lender's right to later consider the event a default if it continues or happens again.

18. **EXPENSES; ADVANCES ON COVENANTS; ATTORNEYS' FEES; COLLECTION COSTS.** Except when prohibited by law, Grantor agrees to pay all of Lender's expenses if Grantor breaches any covenant in this Deed of Trust. Grantor will also pay on demand all of Lender's expenses incurred in collecting, insuring, preserving or protecting the Property or in any inventories, audits, inspections or other examination by Lender in respect to the Property. Grantor agrees to pay all costs and expenses incurred by Lender in enforcing or protecting Lender's rights and remedies under this Deed of Trust, including, but not limited to, attorneys' fees, court costs, and other legal expenses. Once the Secured Debt is fully and finally paid, Lender agrees to release this Deed of Trust and Grantor agrees to pay for any recordation costs. All such amounts are due on demand and will bear interest from the time of the advance at the highest rate in effect, from time to time, as provided in the Evidence of Debt and as permitted by law.

19. **ENVIRONMENTAL LAWS AND HAZARDOUS SUBSTANCES.** As used in this section, (1) "Environmental Law" means, without limitation, the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA, 42 U.S.C. 9601 et seq.), all other federal, state and local laws, regulations, ordinances, court orders, attorney general opinions or interpretive letters concerning the public health, safety, welfare, environment or a hazardous substance; and (2) "Hazardous Substance" means any toxic, radioactive or hazardous material, waste, pollutant or contaminant which has characteristics which render the substance dangerous or potentially dangerous to the public health, safety, welfare or environment. The term includes, without limitation, any substances defined as "hazardous material," "toxic substances," "hazardous waste" or "hazardous substance" under any Environmental Law. Grantor represents, warrants and agrees that, except as previously disclosed and acknowledged in writing:

    A. No Hazardous Substance has been, is, or will be located, transported, manufactured, treated, refined, or handled by any person on, under or about the Property, except in the ordinary course of business and in strict compliance with all applicable Environmental Law.

    B. Grantor has not and will not cause, contribute to, or permit the release of any Hazardous Substance on the Property.

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C. Grantor will immediately notify Lender if (1) a release or threatened release of Hazardous Substance occurs on, under or about the Property or migrates or threatens to migrate from nearby property; or (2) there is a violation of any Environmental Law concerning the Property. In such an event, Grantor will take all necessary remedial action in accordance with Environmental Law.

D. Grantor has no knowledge of or reason to believe there is any pending or threatened investigation, claim, or proceeding of any kind relating to (1) any Hazardous Substance located on, under or about the Property; or (2) any violation by Grantor or any tenant of any Environmental Law. Grantor will immediately notify Lender in writing as soon as Grantor has reason to believe there is any such pending or threatened investigation, claim, or proceeding. In such an event, Lender has the right, but not the obligation, to participate in any such proceeding including the right to receive copies of any documents relating to such proceedings.

E. Grantor and every tenant have been, are and shall remain in full compliance with any applicable Environmental Law.

F. There are no underground storage tanks, private dumps or open wells located on or under the Property and no such tank, dump or well will be added unless Lender first consents in writing.

G. Grantor will regularly inspect the Property, monitor the activities and operations on the Property, and confirm that all permits, licenses or approvals required by any applicable Environmental Law are obtained and complied with.

H. Grantor will permit, or cause any tenant to permit, Lender or Lender's agent to enter and inspect the Property and review all records at any reasonable time to determine (1) the existence, location and nature of any Hazardous Substance on, under or about the Property; (2) the existence, location, nature, and magnitude of any Hazardous Substance that has been released on, under or about the Property; or (3) whether or not Grantor and any tenant are in compliance with applicable Environmental Law.

I. Upon Lender's request and at any time, Grantor agrees, at Grantor's expense, to engage a qualified environmental engineer to prepare an environmental audit of the Property and to submit the results of such audit to Lender. The choice of the environmental engineer who will perform such audit is subject to Lender's approval.

J. Lender has the right, but not the obligation, to perform any of Grantor's obligations under this section at Grantor's expense.

K. As a consequence of any breach of any representation, warranty or promise made in this section, (1) Grantor will indemnify and hold Lender and Lender's successors or assigns harmless from and against all losses, claims, demands, liabilities, damages, cleanup, response and remediation costs, penalties and expenses, including without limitation all costs of litigation and attorneys' fees, which Lender and Lender's successors or assigns may sustain; and (2) at Lender's discretion, Lender may release this Deed of Trust and in return Grantor will provide Lender with collateral of at least equal value to the Property secured by this Deed of Trust without prejudice to any of Lender's rights under this Deed of Trust.

L. Notwithstanding any of the language contained in this Deed of Trust to the contrary, the terms of this section shall survive any foreclosure or satisfaction of this Deed of Trust regardless of any passage of title to Lender or any disposition by Lender of any or all of the Property. Any claims and defenses to the contrary are hereby waived.

20. CONDEMNATION. Grantor will give Lender prompt notice of any action, real or threatened, by private or public entities to purchase or take any or all of the Property, including any easements, through condemnation, eminent domain, or any other means. Grantor further agrees to notify Lender of any proceedings instituted for the establishment

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of any sewer, water, conservation, ditch, drainage, or other district relating to or binding upon the Property or any part of it. Grantor authorizes Lender to intervene in Grantor's name in any of the above described actions or claims and to collect and receive all sums resulting from the action or claim. Grantor assigns to Lender the proceeds of any award or claim for damages connected with a condemnation or other taking of all or any part of the Property. Such proceeds shall be considered payments and will be applied as provided in this Deed of Trust. This assignment of proceeds is subject to the terms of any prior mortgage, deed of trust, security agreement or other lien document.

21. **INSURANCE.** Grantor agrees to maintain insurance as follows:

A. Grantor shall keep the Property insured against loss by fire, theft and other hazards and risks reasonably associated with the Property due to its type and location. Other hazards and risks may include, for example, coverage against loss due to floods or flooding. This insurance shall be maintained in the amounts and for the periods that Lender requires. What Lender requires pursuant to the preceding three sentences can change during the term of the Secured Debt. The insurance carrier providing the insurance shall be chosen by Grantor subject to Lender's approval, which shall not be unreasonably withheld. If Grantor fails to maintain the coverage described above, Lender may, at Lender's option, obtain coverage to protect Lender's rights in the Property according to the terms of this Deed of Trust.

All insurance policies and renewals shall be acceptable to Lender and shall include a standard "mortgage clause" and, where applicable, "lender loss payee clause." Grantor shall immediately notify Lender of cancellation or termination of the insurance. Lender shall have the right to hold the policies and renewals. If Lender requires, Grantor shall immediately give to Lender all receipts of paid premiums and renewal notices. Upon loss, Grantor shall give immediate notice to the insurance carrier and Lender. Lender may make proof of loss if not made immediately by Grantor.

Unless Lender and Grantor otherwise agree in writing, insurance proceeds shall be applied to restoration or repair of the Property damaged if the restoration or repair is economically feasible and Lender's security is not lessened. If the restoration or repair is not economically feasible or Lender's security would be lessened, the insurance proceeds shall be applied to the Secured Debt, whether or not then due, with any excess paid to Grantor. If Grantor abandons the Property, or does not answer within 30 days a notice from Lender that the insurance carrier has offered to settle a claim, then Lender may collect the insurance proceeds. Lender may use the proceeds to repair or restore the Property or to pay the Secured Debt whether or not then due. The 30-day period will begin when the notice is given.

Unless Lender and Grantor otherwise agree in writing, any application of proceed to principal shall not extend or postpone the due date of scheduled payments or change the amount of the payments. If the Property is acquired by Lender, Grantor's right to any insurance policies and proceeds resulting from damage to the Property before the acquisition shall pass to Lender to the extent of the Secured Debt immediately before the acquisition.

B. Grantor agrees to maintain comprehensive general liability insurance naming Lender as an additional insured in an amount acceptable to Lender, insuring against claims arising from any accident or occurrence in or on the Property.

C. Grantor agrees to maintain rental loss or business interruption insurance, as required by Lender, in an amount equal to at least coverage of one year's debt service, and required escrow account deposits (if agreed to separately in writing), under a form of policy acceptable to Lender.

22. **NO ESCROW FOR TAXES AND INSURANCE.** Unless otherwise provided in a separate agreement, Grantor will not be required to pay to Lender funds for taxes and insurance in escrow.
23. **FINANCIAL REPORTS AND ADDITIONAL DOCUMENTS.** Grantor will provide to Lender upon request, any financial statement or information Lender may deem necessary. Grantor warrants that all financial statements and information Grantor provides to Lender are, or will be, accurate, correct, and complete. Grantor agrees to sign, deliver, and file as Lender may reasonably request any additional documents or certifications that Lender may consider necessary to perfect, continue, and preserve Grantor's obligations under this Deed of Trust and Lender's lien status on the Property. If Grantor fails to do so, Lender may sign, deliver, and file such documents or certificates in Grantor's name and Grantor hereby irrevocably appoints Lender or Lender's agent as attorney in fact to do the things necessary to comply with this section.
24. **JOINT AND INDIVIDUAL LIABILITY; CO-SIGNERS; SUCCESSORS AND ASSIGNS BOUND.** All duties under this Deed of Trust are joint and individual. If Grantor signs this Deed of Trust but does not sign the Evidence of Debt, Grantor does so only to mortgage Grantor's interest in the Property to secure payment of the Secured Debt and Grantor does not agree to be personally liable on the Secured Debt. Grantor agrees that Lender and any party to this Deed of Trust may extend, modify or make any change in the terms of this Deed of Trust or the Evidence of Debt without Grantor's consent. Such a change will not release Grantor from the terms of this Deed of Trust. The duties and benefits of this Deed of Trust shall bind and benefit the successors and assigns of Grantor and Lender.
    If this Deed of Trust secures a guaranty between Lender and Grantor and does not directly secure the obligation which is guarantied, Grantor agrees to waive any rights that may prevent Lender from bringing any action or claim against Grantor or any party indebted under the obligation including, but not limited to, anti-deficiency or one-action laws.
25. **APPLICABLE LAW; SEVERABILITY; INTERPRETATION.** This Deed of Trust is governed by the laws of the jurisdiction in which Lender is located, except to the extent otherwise required by the laws of the jurisdiction where the Property is located. This Deed of Trust is complete and fully integrated. This Deed of Trust may not be amended or modified by oral agreement. Any section or clause in this Deed of Trust, attachments, or any agreement related to the Secured Debt that conflicts with applicable law will not be effective, unless that law expressly or impliedly permits the variations by written agreement. If any section or clause of this Deed of Trust cannot be enforced according to its terms, that section or clause will be severed and will not affect the enforceability of the remainder of this Deed of Trust. Whenever used, the singular shall include the plural and the plural the singular. The captions and headings of the sections of this Deed of Trust are for convenience only and are not to be used to interpret or define the terms of this Deed of Trust. Time is of the essence in this Deed of Trust.
26. **SUCCESSOR TRUSTEE.** Lender, at Lender's option, may from time to time remove Trustee and appoint a successor trustee by an instrument recorded in the county in which this Deed of Trust is recorded. The successor trustee, without conveyance of the Property, shall succeed to all the title, power and duties conferred upon the Trustee by this Deed of Trust and applicable law.
27. **NOTICE.** Unless otherwise required by law, any notice shall be given by delivering it or by mailing it by first class mail to the appropriate party's address on page 1 of this Deed of Trust, or to any other address designated in writing. Notice to one grantor will be deemed to be notice to all grantors.
28. **WAIVERS.** Except to the extent prohibited by law, Grantor waives all rights to homestead exemption, appraisement or the marshalling of liens and assets relating to the Property.

29. **DECLARATION.** Grantor declares that the Property is either located within an incorporated city or village or that the Property is not more than forty (40) acres in area regardless of its use or location, or not more than eighty (80) acres in area and not principally used for the agricultural production of crops, livestock, dairy or aquatic goods.

30. **U.C.C. PROVISIONS.** If checked, the following are applicable to, but do not limit, this Deed of Trust:

☐ **Construction Loan.** This Deed of Trust secures an obligation incurred for the construction of an improvement on the Property.

☒ **Fixture Filing.** Grantor grants to Lender a security interest in all goods that Grantor owns now or in the future and that are or will become fixtures related to the Property.

☒ **Crops; Timber; Minerals; Rents, Issues and Profits.** Grantor grants to Lender a security interest in all crops, timber and minerals located on the Property as well as all rents, issues and profits of them including, but not limited to, all Conservation Reserve Program (CRP) and Payment in Kind (PIK) payments and similar governmental programs (all of which shall also be included in the term "Property").

☒ **Personal Property.** Grantor grants to Lender a security interest in all personal property located on or connected with the Property. This security interest includes all farm products, inventory, equipment, accounts, documents, instruments, chattel paper, general intangibles, and all other items of personal property Grantor owns now or in the future and that are used or useful in the construction, ownership, operation, management, or maintenance of the Property. The term "personal property" specifically excludes that property described as "household goods" secured in connection with a "consumer" loan as those terms are defined in applicable federal regulations governing unfair and deceptive credit practices.

☒ **Filing As Financing Statement.** Grantor agrees and acknowledges that this Deed of Trust also suffices as a financing statement and as such, may be filed of record as a financing statement for purposes of Article 9 of the Uniform Commercial Code. A carbon, photographic, image or other reproduction of this Deed of Trust is sufficient as a financing statement.

31. **OTHER TERMS.** If checked, the following are applicable to this Deed of Trust:

☐ **Line of Credit.** The Secured Debt includes a revolving line of credit provision. Although the Secured Debt may be reduced to a zero balance, this Deed of Trust will remain in effect until released.

☐ **Separate Assignment.** The Grantor has executed or will execute a separate assignment of leases and rents. If the separate assignment of leases and rents is properly executed and recorded, then the separate assignment will supersede this Security Instrument's "Assignment of Leases and Rents" section.

☐ Additional Terms.

SIGNATURES: By signing below, Grantor agrees to the terms and covenants contained in this Deed Trust attachments. Grantor also acknowledges receipt of a copy of this Deed of Trust on the date stated above on Page 1.

☐ Actual authority was granted to the parties signing below by resolution signed and dated _____

Entity Name: HAMPSHIRE HOLDINGS, LLC

Duane Z Yost 11/21/08
(Signature) (Date)
DUANE YOST, MANAGING MEMBER

Lori A. Yost 11/21/08
(Signature) (Date)
LORI YOST, INDIVIDUALLY

Duane Z Yost 11/21/08
(Signature) (Date)
DUANE YOST, INDIVIDUALLY

Lori A. Yost 11/21/08
(Signature) (Date)

☐ Refer to the Addendum which is attached and incorporated herein for additional Grantors, signatures and acknowledgments.

ACKNOWLEDGMENT:

STATE OF Idaho, COUNTY OF Bonneville } ss.
On this 21st day of November 2008, before me,
(Individual) a Notary Public, personally appeared Duane Yost & Lori Yost
, known or identified to me
(or proved to me on the oath of), to be the person(s) whose name is subscribed to the within instrument, and acknowledged to me that she/he/they executed the same.
My commission expires:
July 16, 2010

Summer Sorenson
(Notary Public)

SUMMER SORENSON NOTARY PUBLIC STATE OF IDAHO

STATE OF IDAHO
COUNTY OF BONNEVILLE
On this 21 day of November 2008, before me, a Notary Public in and for said State, personally appeared Duane Yost known to me to be the Managing Member respectively, of the L.L.C. that executed the within instrument or the person(s) who executed the instrument in behalf of said L.L.C., and acknowledge to me that such Corporation executed the same.

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

SUMMER SORENSON NOTARY PUBLIC STATE OF IDAHO

Summer Sorenson
Notary Public
Residing at Idaho Falls
My commission Expires July 16, 2010

REQUEST FOR RECONVEYANCE
(Not to be completed until paid in full)

TO TRUSTEE:
The undersigned is the holder of the note or notes secured by this Deed of Trust. Said note or notes, together with all other indebtedness secured by this Deed of Trust, have been paid in full. You are hereby directed to cancel this Deed of Trust, which is delivered hereby, and to reconvey, without warranty, all the estate now held by you under this Deed of Trust to the person or persons legally entitled thereto.

(Authorized Bank Signature) Date

Order No.: 3030819992AM

LEGAL DESCRIPTION
EXHIBIT 'A'

TRACT I:

Beginning at a point that is South 89°55'28" West along the Section line 1326.98 feet from the North ¼ Corner of Section 10, Township 1 North, Range 38 East of the Boise Meridian; running thence South 89°55'28" West along said Section line 1236.12 feet to the South Right-of-Way line of 65th South; thence along said South Right-of-Way line of 65th South and the East Right-of-Way line of 25th East the following three (3) courses; South 00°12'54" East 28.10 feet to a point of curve with a radius of 69.34 feet and a chord bearing South 44°18'28" West 98.29 feet; thence to the left along said curve 109.24 feet through a central angle of 90°16'00"; thence South 89°10'28" West 28.71 feet to the West line of said Section 10; thence South 00°19'04" East 1213.86 feet to the South line of the North ½ of the Northwest ¼ of said Section 10, thence North 89°54'09" East along said South line 1327.87 feet; thence North 00°03'13" West 1312.06 feet to the POINT OF BEGINNING.

That portion thereof conveyed to the State of Idaho by that deed recorded on March 8, 1950 in Book 70 of Deeds at Page 287 of Official Records of Bonneville County, Idaho.

TRACT II:

Lot 11 in Block 3 of Canterbury Park, Division No. 2, to the City of Idaho Falls, Idaho according to the official plat thereof, recorded October 19, 1992 as Instrument No. 837954 filed in Official Records of Bonneville County, Idaho.

Exhibit "F"

GUARANTY

IDAHO FALLS (City) ID (State)

NOVEMBER 21, 2008

For good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, and to induce THE BANK OF COMMERCE-ADMINISTRATION (herein, with its participants, successors and assigns, called "Lender"), at its option, at any time or from time to time to make loans or extend other accommodations to or for the account of DUANE YOST (herein called "Borrower") or to engage in any other transactions with Borrower, the Undersigned hereby absolutely and unconditionally guarantees to Lender the full and prompt payment when due, whether at maturity or earlier by reason of acceleration or otherwise, of the debts, liabilities and obligations described as follows:

A. If this ☐ is checked, the Undersigned guarantees to Lender the payment and performance of the debt, liability or obligation of Borrower to Lender evidenced by or arising out of the following: _____ and any extensions, renewals or replacements thereof (hereinafter referred to as the "Indebtedness").

B. If this ☒ is checked, the Undersigned guarantees to Lender the payment and performance of each and every debt, liability and obligation of every type and description which Borrower may now or at any time hereafter owe to Lender (whether such debt, liability or obligation now exists or is hereafter created or incurred, and whether it is or may be direct or indirect, due or to become due, absolute or contingent, primary or secondary, liquidated or unliquidated, or joint, several, or joint and several; all such debts, liabilities and obligations being hereinafter collectively referred to as the "Indebtedness"). Without limitation, this guaranty includes the following described debt(s): NOTE DATED 11/21/2008 FOR DUANE YOST IN THE AMOUNT OF $1,000,000.00.

The Undersigned further acknowledges and agrees with Lender that:

1. No act or thing need occur to establish the liability of the Undersigned hereunder, and no act or thing, except full payment and discharge of all indebtedness, shall in any way exonerate the Undersigned or modify, reduce, limit or release the liability of the Undersigned hereunder.

2. This is an absolute, unconditional and continuing guaranty of payment of the Indebtedness and shall continue to be in force and be binding upon the Undersigned, whether or not all Indebtedness is paid in full, until this guaranty is revoked by written notice actually received by the Lender, and such revocation shall not be effective as to Indebtedness existing or committed for at the time of actual receipt of such notice by the Lender, or as to any renewals, extensions and refinancings thereof. If there be more than one Undersigned, such revocation shall be effective only as to the one so revoking. The death or incompetence of the Undersigned shall not revoke this guaranty, except upon actual receipt of written notice thereof by Lender and then only as to the decedent or the incompetent and only prospectively, as to future transactions, as herein set forth.

3. If the Undersigned shall be dissolved, shall die, or shall be or become insolvent (however defined) or revoke this guaranty, then the Lender shall have the right to declare immediately due and payable, and the Undersigned will forthwith pay to the Lender, the full amount of all Indebtedness, whether due and payable or unmatured. If the Undersigned voluntarily commences or there is commenced involuntarily against the Undersigned a case under the United States Bankruptcy Code, the full amount of all Indebtedness, whether due and payable or unmatured, shall be immediately due and payable without demand or notice thereof.

4. The liability of the Undersigned hereunder shall be limited to a principal amount of $ 1,000,000.00 (if unlimited or if no amount is stated, the Undersigned shall be liable for all Indebtedness, without any limitation as to amount), plus accrued interest thereon and all other costs, fees, and expenses agreed to be paid under all agreements evidencing the Indebtedness and securing the payment of the Indebtedness, and all attorneys' fees, collection costs and enforcement expenses referable thereto. Indebtedness may be created and continued in any amount, whether or not in excess of such principal amount, without affecting or impairing the liability of the Undersigned hereunder. The Lender may apply any sums received by or available to Lender on account of the Indebtedness from Borrower or any other person (except the Undersigned), from their properties, out of any collateral security or from any other source to payment of the excess. Such application of receipts shall not reduce, affect or impair the liability of the Undersigned hereunder. If the liability of the Undersigned is limited to a stated amount pursuant to this paragraph 4, any payment made by the Undersigned under this guaranty shall be effective to reduce or discharge such liability only if accompanied by a written transmittal document, received by the Lender, advising the Lender that such payment is made under this guaranty for such purpose.

5. The Undersigned will pay or reimburse Lender for all costs and expenses (including reasonable attorneys' fees and legal expenses) incurred by Lender in connection with the protection, defense or enforcement of this guaranty in any litigation or bankruptcy or insolvency proceedings.

This guaranty includes the additional provisions on page 2, all of which are made a part hereof.

This guaranty is ☒ unsecured; ☐ secured by a mortgage or security agreement dated _____; ☐ secured by _____.

IN WITNESS WHEREOF, this guaranty has been duly executed by the Undersigned the day and year first above written.

Duane Z. Yost
DUANE YOST

LORI YOST Lori D Yost

"Undersigned" shall refer to all persons who sign this guaranty, severally and jointly.

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6. Whether or not any existing relationship between the Undersigned and Borrower has been changed or ended and whether or not this guaranty has been revoked, Lender may, but shall not be obligated to, enter into transactions resulting in the creation or continuance of Indebtedness, without any consent or approval by the Undersigned and without any notice to the Undersigned. The liability of the Undersigned shall not be affected or impaired by any of the following acts or things (which Lender is expressly authorized to do, omit or suffer from time to time, both before and after revocation of this guaranty, without notice to or approval by the Undersigned): (i) any acceptance of collateral security, guarantors, accommodation parties or sureties for any or all Indebtedness; (ii) any one or more extensions or renewals of Indebtedness (whether or not for longer than the original period) or any modification of the interest rates, maturities or other contractual terms applicable to any Indebtedness; (iii) any waiver, adjustment, forbearance, compromise or indulgence granted to Borrower, any delay or lack of diligence in the enforcement of Indebtedness, or any failure to institute proceedings, file a claim, give any required notices or otherwise protect any Indebtedness; (iv) any full or partial release of, settlement with, or agreement not to sue, Borrower or any other guarantor or other person liable in respect of any Indebtedness; (v) any discharge of any evidence of Indebtedness or the acceptance of any instrument in renewal thereof or substitution therefor; (vi) any failure to obtain collateral security (including rights of setoff) for Indebtedness, or to see to the proper or sufficient creation and perfection thereof, or to establish the priority thereof, or to protect, insure, or enforce any collateral security; or any release, modification, substitution, discharge, impairment, deterioration, waste, or loss of any collateral security; (vii) any foreclosure or enforcement of any collateral security; (viii) any transfer of any Indebtedness or any evidence thereof; (ix) any order of application of any payments or credits upon Indebtedness; (x) any election by the Lender under §1111(b)(2) of the United States Bankruptcy Code.

7. The Undersigned waives any and all defenses, claims and discharges of Borrower, or any other obligor, pertaining to Indebtedness, except the defense of discharge by payment in full. Without limiting the generality of the foregoing, the Undersigned will not assert, plead or enforce against Lender any defense of waiver, release, statute of limitations, res judicata, statute of frauds, fraud, incapacity, minority, usury, illegality or unenforceability which may be available to Borrower or any other person liable in respect of any Indebtedness, or any setoff available against Lender to Borrower or any such other person, whether or not on account of a related transaction. The Undersigned expressly agrees that the Undersigned shall be and remain liable, to the fullest extent permitted by applicable law, for any deficiency remaining after foreclosure of any mortgage or security interest securing Indebtedness, whether or not the liability of Borrower or any other obligor for such deficiency is discharged pursuant to statute or judicial decision. The Undersigned shall remain obligated, to the fullest extent permitted by law, to pay such amounts as though the Borrower's obligations had not been discharged.

8. The Undersigned further agrees that the Undersigned shall be and remain obligated to pay Indebtedness even though any other person obligated to pay Indebtedness, including Borrower, has such obligation discharged in bankruptcy or otherwise discharged by law. "Indebtedness" shall include post-bankruptcy petition interest and attorneys' fees and any other amounts which Borrower is discharged from paying or which do not otherwise accrue to Indebtedness due to Borrower's discharge, and the Undersigned shall remain obligated to pay such amounts as though Borrower's obligations had not been discharged.

9. If any payment applied by Lender to Indebtedness is thereafter set aside, recovered, rescinded or required to be returned for any reason (including, without limitation, the bankruptcy, insolvency or reorganization of Borrower or any other obligor), the Indebtedness to which such payment was applied shall for the purposes of this guaranty be deemed to have continued in existence, notwithstanding such application, and this guaranty shall be enforceable as to such Indebtedness as fully as if such application had never been made.

10. Until the obligations of the Borrower to Lender have been paid in full, the Undersigned waives any claim, remedy or other right which the Undersigned may now have or hereafter acquire against Borrower or any other person obligated to pay Indebtedness arising out of the creation or performance of the Undersigned's obligation under this guaranty, including, without limitation, any right of subrogation, contribution, reimbursement, indemnification, exoneration, and any right to participate in any claim or remedy the Undersigned may have against the Borrower, collateral, or other party obligated for Borrower's debts, whether or not such claim, remedy or right arises in equity, or under contract, statute or common law.

11. The Undersigned waives presentment, demand for payment, notice of dishonor or nonpayment, and protest of any instrument evidencing Indebtedness. Lender shall not be required first to resort for payment of the Indebtedness to Borrower or other persons or their properties, or first to enforce, realize upon or exhaust any collateral security for Indebtedness, before enforcing this guaranty.

12. The liability of the Undersigned under this guaranty is in addition to and shall be cumulative with all other liabilities of the Undersigned to Lender as guarantor or otherwise, without any limitation as to amount, unless the instrument or agreement evidencing or creating such other liability specifically provides to the contrary.

13. This guaranty shall be enforceable against each person signing this guaranty, even if only one person signs and regardless of any failure of other persons to sign this guaranty. If there be more than one signer, all agreements and promises herein shall be construed to be, and are hereby declared to be, joint and several in each of every particular and shall be fully binding upon and enforceable against either, any or all the Undersigned. This guaranty shall be effective upon delivery to Lender, without further act, condition or acceptance by Lender, shall be binding upon the Undersigned and the heirs, representatives, successors and assigns of the Undersigned and shall inure to the benefit of Lender and its participants, successors and assigns. Any invalidity or unenforceability of any provision or application of this guaranty shall not affect other lawful provisions and application hereof, and to this end the provisions of this guaranty are declared to be severable. Except as authorized by the terms herein, this guaranty may not be waived, modified, amended, terminated, released or otherwise changed except by a writing signed by the Undersigned and Lender. This guaranty shall be governed by the laws of the State in which it is executed. The Undersigned waives notice of Lender's acceptance hereof.

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GUARANTOR NAME AND ADDRESS

HAMPSHIRE HOLDINGS, LLC
3777 HAMPSHIRE CT.
IDAHO FALLS, ID 83404

LENDER NAME AND ADDRESS

ANK OF COMMERCE-ADMINISTRATION
.3 SOUTH 25TH EAST, P.O. 1887
.DAHO FALLS, ID 83403

Number _____

Amount 1,000,0

Date NOVEMBER 21, 2008

GUARANTY

DATE. The date of this Guaranty is 11-21-2008.

For good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, and to induce Lender (with its participants, successors and assigns), at its option, at any time or from time to time to make loans or extend other accommodations to or for the account of DUANE YOST (Borrower) or to engage in any other transactions with Borrower, the Guarantor hereby absolutely and unconditionally guarantees to the Lender the full and prompt payment when due, whether at maturity or earlier by reason of acceleration or otherwise, of the debts, liabilities and obligations described as follows:

INDEBTEDNESS.

☐ **Specific Debts.** The Guarantor guarantees to Lender the payment and performance of the debt, liability or obligation of Borrower to Lender evidenced by or arising out of the following: _____ and any extensions, renewals or replacements thereof (Indebtedness).

☒ **All Debts.** Except as this Guaranty may otherwise provide, the Guarantor guarantees to Lender the payment and performance of each and every debt, liability and obligation of every type and description which Borrower may now or at any time hereafter owe to Lender (whether such debt, liability or obligation now exists or is hereafter created or incurred, and whether it is or may be direct or indirect, due or to become due, absolute or contingent, primary or secondary, liquidated or unliquidated, or joint, several, or joint and several; all such debts, liabilities and obligations (Indebtedness)). Without limitation, this Guaranty includes the following described debt(s):

NOTE DATED 11/21/2008 FOR DUANE YOST IN THE AMOUNT OF $1,000,000.00

Exclusions.

☐ Guarantor will be liable for $_____ of the principal amount of the Indebtedness outstanding at default and for all of the accrued interest, and the expenses of collection, enforcement or protection of Lender's rights and remedies under this Guaranty, including reasonable attorneys' fees.

☐ Guarantor's liability will not exceed _____ % of the Indebtedness outstanding at default and all of the accrued interest, and the expenses of collection, enforcement or protection of Lender's rights and remedies under this Guaranty, including reasonable attorneys' fees.

☐ Indebtedness Excludes:

SECURITY.

☒ the Guaranty is unsecured.

☐ secured by _____

IL only ☐ **CONFESSION OF JUDGMENT.** If Guarantor defaults, it authorizes any attorney to appear in a court of record and confess judgment against it in favor of Lender. The confession of judgment may be without process and for any amount due on this Guaranty including collection costs and reasonable attorneys' fees.

PA only ☐ **WARRANT OF AUTHORITY TO CONFESS JUDGMENT. Upon default, in addition to all other remedies and rights available to Lender, by signing below Guarantor irrevocably authorizes the prothonotary, clerk, or any attorney to appear in any court of record having jurisdiction over this matter and to confess judgment against Guarantor at any time without stay of execution. Guarantor waives notice, service of process and process. Guarantor agrees and understands that judgment may be confessed against Guarantor for any unpaid principal, accrued interest and accrued charges due on this Note, plus collection costs and reasonable attorneys' fees up to 15 percent of the judgment. The exercise of the power to confess judgment will not exhaust this warrant of authority to confess judgment and may be done as often as Lender elects. Guarantor further understands that Guarantor's property may be seized without prior notice to satisfy the debt owed. Guarantor knowingly, intentionally, and voluntarily waives any and all constitutional rights Guarantor has to pre-deprivation notice and hearing under federal and state laws and fully understands the consequences of this waiver.**

By signing immediately below, Guarantor agrees to the terms of the WARRANT OF AUTHORITY TO CONFESS JUDGMENT section.

SIGNATURES. By signing under seal, Guarantor agrees to the terms contained in this Guaranty (including those on page 2). Guarantor also acknowledges receipt of a copy of this Guaranty.

GUARANTOR:

HAMPSHIRE HOLDINGS, LLC
Entity Name (Seal)

Duane L Yost
Name, Title DUANE YOST, MANAGING MEMBER (Seal)

Name, Title (Seal)

SRJ

The Guarantor further acknowledges and agrees with Lender that:

1. No notice or thing need occur to establish the liability of the Guarantor hereunder, and no act or thing, except full payment and discharge of all Indebtedness, shall in any way exonerate the Guarantor or modify, reduce, limit or release the liability of the Guarantor hereunder.

2. This is an absolute, unconditional and continuing Guaranty of payment of the Indebtedness and will continue to be enforceable against the Guarantor, whether or not all Indebtedness is paid in full, until this Guaranty is revoked by written notice actually received by the Lender. Any revocation shall not be effective as to any Indebtedness existing or committed to at the time of actual receipt of notice by the Lender, or as to any renewals, extensions and refinancings thereof.

The Guarantor represents and warrants to the Lender that the Guarantor has a direct and substantial economic interest in Borrower and expects to derive substantial benefits therefrom and from any loans and financial accommodations resulting from the creation of Indebtedness guaranteed hereby, and that this Guaranty is given for a business purpose. The Guarantor agrees to rely exclusively on its right to revoke this Guaranty prospectively as to future transactions by written notice actually received by Lender if at any time the benefits then being received by the Guarantor in connection with this Guaranty are not sufficient to warrant its continuance as a Guarantor as to future Indebtedness. Accordingly, the Lender may rely conclusively on a continuing warranty, hereby made, that the Guarantor continues to be benefited by this Guaranty and that the Lender has no duty to inquire into or confirm the receipt of any benefits, and that this Guaranty will be enforceable without regard to the receipt, nature or value of any such benefits.

3. If the Guarantor is dissolved or becomes insolvent, however defined, or revokes this Guaranty, then the Lender has the right to declare the full amount of all Indebtedness immediately due and payable, and the Guarantor will forthwith pay the Lender. If the Guarantor voluntarily commences or there is commenced involuntarily against the Guarantor a case under the United States Bankruptcy Code, the full amount of all Indebtedness, whether due and payable or unmatured, will become immediately due and payable without demand or notice thereof.

4. The Guarantor will be liable for all Indebtedness, without any limitation as to amount, plus accrued interest thereon and all other costs, fees, and expenses agreed to be paid under all agreements evidencing the Indebtedness and securing the payment of the Indebtedness, and all attorneys' fees, collection costs and enforcement expenses referable thereto. Indebtedness may be created and continued in any amount, whether or not in excess of such principal amount, without affecting or impairing the liability of the Guarantor hereunder. The Lender may apply any sums received by or available to the Lender on account of the Indebtedness from Borrower or any other person (except the Guarantor), from their properties, out of any collateral security or from any other source to payment of the excess. Such application of receipts will not reduce, affect or impair the liability of the Guarantor hereunder. If the liability of the Guarantor is limited pursuant to this paragraph 4, any payment made by the Guarantor under this Guaranty will be effective to reduce or discharge its liability only if accompanied by a written transmittal document, received by the Lender, advising that such payment is made under this Guaranty for that purpose.

5. The Guarantor will pay or reimburse the Lender for all costs and expenses (including reasonable attorneys' fees and legal expenses) incurred by the Lender in connection with the protection, defense or enforcement of this Guaranty in any litigation or bankruptcy or insolvency proceedings.

6. Whether or not any existing relationship between the Guarantor and Borrower has been changed or ended and whether or not this Guaranty has been revoked, the Lender may, but shall not be obligated to, enter into transactions resulting in the creation or continuance of Indebtedness, without any consent or approval by the Guarantor and without any notice to the Guarantor. The liability of the Guarantor will not be affected or impaired by any of the following acts or things (which the Lender is expressly authorized to do, omit or suffer from time to time, both before and after revocation of this Guaranty, without notice to or approval by the Guarantor): (i) any acceptance of collateral security, Guarantors, accommodation parties or sureties for any or all Indebtedness; (ii) any one or more extensions or renewals of Indebtedness (whether or not for longer than the original period) or any modification of the interest rates, maturities or other contractual terms applicable to any Indebtedness; (iii) any waiver, adjustment, forbearance, compromise or indulgence granted to Borrower, any delay or lack of diligence in the enforcement of Indebtedness, or any failure to institute proceedings, file a claim, give any required notices or otherwise protect any Indebtedness; (iv) any full or partial release of, settlement with, or agreement not to sue, Borrower or any other Guarantor or other person liable in respect of any Indebtedness; (v) any discharge of any evidence of Indebtedness or the acceptance of any instrument in renewal thereof or substitution therefor; (vi) any failure to obtain collateral security (including rights of setoff) for Indebtedness, or to see to the proper or sufficient creation and perfection thereof, or to establish the priority thereof, or to protect, insure, or enforce any collateral security; or any release, modification, substitution, discharge, impairment, deterioration, waste, or loss of any collateral security; (vii) any foreclosure or enforcement of any collateral security; (viii) any transfer of any Indebtedness or any evidence thereof; (ix) any order of application of any payments or credits upon Indebtedness; (x) any election by the Lender under §1111(b)(2) of the United States Bankruptcy Code.

7. The Guarantor waives any and all defenses, claims and discharges of Borrower, or any other obligor, pertaining to Indebtedness, except the defense of discharge by payment in full. Without limiting the generality of the foregoing, the Guarantor will not assert, plead or enforce against the Lender any defense of waiver, release, estoppel, statute of limitations, res judicata, statutes of frauds, fraud, forgery, incapacity, minority, usury, illegality or unenforceability which may be available to Borrower or any person liable in respect of any Indebtedness, or any setoff available against the Lender to Borrower or any such other person, whether or not on account of a related transaction. The Guarantor expressly agrees that the Guarantor will be liable, to the fullest extent permitted by applicable law, for any deficiency remaining after foreclosure of any mortgage or security interest securing Indebtedness, whether or not the liability of Borrower or any other obligor for such deficiency is discharged pursuant to statute or judicial decision. The Guarantor shall remain obligated, to the fullest extent permitted by law, to pay such amounts as though Borrower's obligations had not been discharged.

8. The Guarantor further agree(s) that Guarantor will be obligated to pay Indebtedness even though any other person obligated to pay Indebtedness, including Borrower, has such obligation discharged in bankruptcy or otherwise discharged by law. "Indebtedness" shall include post-bankruptcy petition interest and attorneys' fees and any other amounts which Borrower is discharged from paying or which do not accrue to Indebtedness due to Borrower's discharge, and Guarantor will be obligated to pay such amounts as fully as if Borrower's obligations had not been discharged.

9. If any payment applied by the Lender to Indebtedness is thereafter set aside, recovered, rescinded or required to be returned for any reason (including, without limitation, the bankruptcy, insolvency or reorganization of Borrower or any other obligor), the Indebtedness to which such payment was applied will for the purposes of this Guaranty be deemed to have continued in existence, notwithstanding such application, and this Guaranty will be enforceable as to such Indebtedness as fully as if such application had never been made.

10. Until the obligations of the Borrower to Lender have been paid in full, the Guarantor waive(s) any claim, remedy or other right which the Guarantor may now have or hereafter acquire against Borrower or any other person obligated to pay Indebtedness arising out of the creation or performance of the Guarantor's obligation under this Guaranty, including, without limitation, any right of subrogation, contribution, reimbursement, indemnification, exoneration or any right to participate in any claim or remedy the Guarantor may have against the Borrower, collateral, or other party obligated for Borrower's debt, whether or not such claim, remedy, or right arises in equity, or under contract, statute or common law.

11. The Guarantor waives presentment, demand for payment, notice of dishonor or nonpayment, and protest of any instrument evidencing Indebtedness. The Lender will not be required first to resort for payment of the Indebtedness to Borrower or other persons or their properties, or first to enforce, realize upon or exhaust any collateral security for Indebtedness, before enforcing this Guaranty.

12. The liability of the Guarantor under this Guaranty is in addition to and is cumulative with all other liabilities of the Guarantor to the Lender as Guarantor or otherwise, without any limitation as to amount, unless the instrument or agreement evidencing or creating such other liability specifically provides to the contrary.

13. To induce Lender to enter into the Loan, Guarantor makes these representations and warranties for as long as Guaranty is in effect. Guarantor is duly organized, validly existing and in good standing under the laws in the jurisdiction where Guarantor was organized and is duly qualified, validly existing and in good standing in all jurisdictions in which Guarantor operates or Guarantor owns or leases property. Guarantor has the power and authority to enter into this transaction and to carry on Guarantor's business or activity as now conducted. The execution, delivery and performance of this Guaranty and the obligation evidenced by this Guaranty are within Guarantor's duly authorized powers; have received all necessary governmental approval; will not violate any provision of law or order of court or governmental agency; and will not violate any agreement to which Guarantor is a party or to which Guarantor is or any of Guarantor's property is subject. Other than previously disclosed in writing to Lender, Guarantor has not changed Guarantor's name or principal place of business within the last ten years and has not used any other trade or fictitious name. Without Lender's prior written consent, Guarantor does not and will not use any other name and will preserve Guarantor's existing name, trade names and franchises. Guarantor owns or leases all property that Guarantor needs to conduct Guarantor's business and activities. All of Guarantor's property is free and clear of all liens, security interests, encumbrances and other adverse claims and interests, except those Lender previously agreed to in writing. Guarantor is not violating any laws, regulations, rules, orders, judgments or decrees applicable to Guarantor or Guarantor's property, except for those that Guarantor is challenging in good faith through proper proceedings after providing adequate reserves to fully pay the claim and its challenge should Guarantor lose.

14. This Guaranty is effective upon delivery to the Lender, without further act, condition or acceptance by the Lender. It will be binding upon the Guarantor and the successors and assigns of the Guarantor and will inure to the benefit of the Lender and its participants, successors and assigns. If there be more than one Guarantor, all agreements and promises herein shall be construed to be, and are hereby declared to be, joint and several in each and every particular and shall be fully binding upon and enforceable against either, any or all the Guarantors. Any invalidity or unenforceability of any provision or application of this Guaranty will not affect other lawful provisions and application hereof, and to this end the provisions of this Guaranty are declared to be severable. Except as allowed by the terms herein, this Guaranty may not be waived, modified, amended, terminated, released or otherwise changed except by a writing signed by the Guarantor and the Lender. This Guaranty shall be governed by the laws of the State in which it is executed. The Guarantor waives notice of the Lender's acceptance hereof.

Douglas R. Nelson - ISB# 1580
Brian T. Tucker - ISB# 5236
Wiley R. Dennert - ISB# 6216
NELSON HALL PARRY TUCKER, P.A.
490 Memorial Drive
P.O. Box 51630
Idaho Falls, ID 83405-1630
Telephone:(208) 522-3001
Facsimile: (208) 523-7254

Attorneys for The Bank of Commerce

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

DARRYL HARRIS and CHRISTINE HARRIS, husband and wife,

Plaintiffs,

v.

DUANE L. YOST and LORI YOST, husband and wife, DUANE L. YOST as Trustee of the DUANE L. YOST TRUST, THE BANK OF COMMERCE, an Idaho Corporation and JOHN DOES I-X,

Defendants.

Case No. CV-09-3488

JUDGMENT ON HARRISES' AND THE BANK OF COMMERCE'S MOTIONS FOR SUMMARY JUDGMENT, DECREE OF FORECLOSURE, AND ORDER OF SALE

671-A

THE BANK OF COMMERCE, an Idaho corporation,

Counterclaimant/Cross-claimant/Third-Party Claimant,

v.

DARRYL HARRIS and CHRISTINE HARRIS, husband and wife,

Counterdefendants,

and

DUANE L. YOST and LORI YOST, husband and wife, DUANE L. YOST as Trustee of the DUANE L. YOST TRUST, JOHN DOES I-X,

Crossdefendants,

and

HAMPSHIRE HOLDINGS, LLC,

Third-Party Defendant.

This matter came on before the Court on Harrises' and The Bank of Commerce's Motion for Summary Judgment and based on the Court's Order on Motions for Summary Judgment dated March 31, 2011, and for good cause appearing therefore;

IT IS HEREBY ORDERED:

1. That The Bank of Commerce have an in rem judgment against Duane L. Yost and Lori Yost, husband and wife, ("Yosts" herein) in the sum of $1,501,399.44; detailed as follows:

a. On the Promissory Note dated April 16, 2008, judgment in the principal and interest amount of $802,976.06 as of September 16, 2010, plus a per diem interest accrual from September 16, 2010 to April 28, 2011 at the per diem rate of $101.13794. (224

L611-B

days X $101.13794 = $22,654.90). Thus the total amount of the Judgment relating to the April 16, 2008 note is $825,630.96.

b. On the Promissory Note dated November 21, 2008, judgment in the principal and interest amount of $638,007.50 as of March 31, 2010, plus a per diem interest accrual from March 31, 2010 to April 28, 2011 at the per diem rate of $96.083929. (393 days X $96.083929 = $37,760.98). Thus the total amount of the Judgment relating to the March 31, 2010 note is $675,768.48.

2. That Yosts' Deed of Trust to the Bank of Commerce dated November 21, 2008, and recorded November 21, 2008 and re-recorded on December 17, 2008, in the records of Bonneville County, State of Idaho as Instrument Nos. 1317355 and 1319093, is adjudged a first and prior lien upon the mortgaged property superior to any right, title, claim or interest on the part of the Yosts or Darryl and Christine Harris ("Harris" herein) or any persons claiming by, through, or under said Yosts or Harris, or any other third-party.

3. That Yosts' Deed of Trust to the Bank of Commerce dated December 24, 2008, and recorded December 30, 2008 in the records of Bonneville County, State of Idaho as Instrument No. 1319937, is adjudged a first and prior lien upon the mortgaged property superior to any right, title, claim or interest on the part of the named Yosts or Harris or any persons claiming by, through, or under said Yosts or Harris.

4. Said Deeds of Trust cover the following described real property situated in Bonneville County, Idaho:

TRACT I

Beginning at a point that is South 89°55'28" West along the Section line 1326.98 feet from the North ¼ Corner of Section 10, Township 1 North, Range 38 East of the Boise Meridian; running thence South 89°55'28" West along said Section line 1236.12 feet to the South Right-of-Way line of 65th South; thence along said South Right-of-Way line of 65th South and the East Right-of-Way line of 25th East the following three (3) courses; South 00°12'54" East 28.10 feet to a point of curve with a radius of 69.34 feet and a chord bearing South 44°18'28" West 98.29 feet; thence to the left along said curve 109.24 feet through a central angle of 90°16'00"; thence South 89°10'28" West 28.71 feet to the West line of said Section 10; thence South 00°19'04" East 1216.86 feet to the South line of the North ½ of the Northwest ¼ of

said Section 10, thence North 89°54'09" East along said South line 1327.87 feet; thence North 00°03'13" West 1312.06 feet to the POINT OF BEGINNING.

Excepting
That portion thereof conveyed to the State of Idaho by that deed recorded on May 8, 1950 in Book 70 of Deeds at Page 287 of Official Records of Bonneville County, Idaho.

("Real Property Collateral" herein)

5. That the Court, hereby retains jurisdiction and reserves the final determination of a deficiency judgment against the above named Yosts, the issue of the value of the Mortgaged Property and hereby orders that following the sale of the Mortgaged Property, The Bank of Commerce may establish the reasonable value of the Mortgaged Property herein described according to proof and determine the amount of any deficiency.

6. That the Bank of Commerce's Deeds of Trust described herein are foreclosed and said real property, together with water rights, however evidenced, be sold in one (1) parcel in accordance with and in the manner provided by law; that the Bank of Commerce is permitted to be a purchaser at sale; that the net proceeds of said sale shall be applied first toward the payment of the costs of said sale and then toward the payment of the Bank of Commerce's Judgement; that the Bank of Commerce has and shall retain a right to apply for a Deficiency Judgement against Yosts, and each of them, jointly and severally, in the event that bid at sale or fair market value of the foreclosed real property is less than the sum of the Bank of Commerce's entire Judgement, plus costs of sale.

7. That after the sale of said Mortgaged Property, all right, title, claim, lien, or interest in the above-named Yosts and Harris, and of every person claiming by, through, or under said Yosts or Harris, in or to said property, including the right of possession thereof from and after said sale, shall be forever barred and foreclosed and that the purchaser at said sale shall be entitled to immediate possession of the premises as allowed by law subject only to such statutory right of redemption as said Yosts may have by law.

8. That in the event the Bank of Commerce is the purchaser at sale and possession of said premises is not surrendered to the Bank of Commerce, a Writ of Assistance shall be issued

directing the sheriff of Bonneville County, Idaho, to deliver possession of said premises to the Bank of Commerce.

DATED this 6 day of June, 2011.

JUDGE

CLERK'S CERTIFICATE OF SERVICE

I hereby certify that I served a true copy of the foregoing document upon the following this 7 day of June, 2010, by hand delivery, mailing with the necessary postage affixed thereto, facsimile, or overnight mail.

Brian T. Tucker NELSON HALL PARRY TUCKER P.O. Box 51630 Idaho Falls, ID 83405-1630	☒ Mailing ☐ Fax ☐ Hand Delivery ☐ Overnight Mail
Kipp L. Manwaring MANWARING LAW OFFICE 381 Shoup Avenue, Suite 210 Idaho Falls, ID 83402	☒ Mailing ☐ Fax ☐ Hand Delivery ☐ Overnight Mail
Duane Yost 3777 Hampshire Court Idaho Falls, ID 83401	☒ Mailing ☐ Fax ☐ Hand Delivery ☐ Overnight Mail

CLERK OF THE COURT

By: _____
Deputy Clerk

L:\DRN\0260.491\MSJ - Judgment.wpd

671-E

AFFIDAVIT OF SERVICE ON AN INDIVIDUAL

BONNEVILLE COUNTY

STATE OF IDAHO)
)ss. 11 JUN 16 PM 4:12
County of Bonneville)

Case No. 093488

I, Sharon Nelson, (Process Server) do solemnly swear (or affirm) that the testimony I shall give in the matter at issue shall be the truth, the whole truth, and nothing but the truth.

1. I am over the age of 18 years and am not a party to this action.

2. I served a copy of the Letter - Amended Summons - Amended Answer & Counterclaim Cross Claim & 3rd party Claim. (Name of Document(s) Served)

in this action on Family Asset protection Legal Services PLLC (Party Served) on 6-15-11 (Date of Service)

by delivery to Robert Crandall Reg agent (Name of Person Who Received Process)

at 3456 E 17th N 140 Idaho Falls Id (Address of Service)

(Check only one of the following):

X personally.

____ said address being the usual dwelling or place of abode of said party. The person who received such process then was over the age of 18 and then resided at such address.

____ who is agent authorized by law or by appointment to receive service of process for said party.

3. Fee charged for this service: $_____.

DATED: 6-15-11

Sharon Nelson
(Signature)

SUBSCRIBED AND SWORN to before me this 15 day of Jun, 11.

(SEAL)

Gail Park
Notary Public for the State of Idaho
Residing at: Shelley Idaho
Commission Expires: 10-21-11

672

AFFIDAVIT OF SERVICE ON AN INDIVIDUAL

STATE OF IDAHO)
)ss.
County of Bonneville)

BONNEVILLE COUNTY
11 JUN 16 P 4:12

Case No 09-3485

I, Shawn Nelson, do solemnly swear (or affirm) that the testimony
(Process Server)
I shall give in the matter at issue shall be the truth, the whole truth, and nothing but the truth.

1. I am over the age of 18 years and am not a party to this action.

2. I served a copy of the Letter, Amended Summons - Green, Answer, Counterclaim, Cross Claim - & 3rd party Claim
(Name of Document(s) Served)
in this action on Robert Crandall on 6
(Party Served) (Date of Service)
by delivery to Robert Crandall
(Name of Person Who Received Process)
at 3456 E 17th St Idaho Falls, Id
(Address of Service)

(Check only one of the following):

X personally.

____ said address being the usual dwelling or place of abode of said party. The person who received such process then was over the age of 18 and then resided at such address.

____ who is agent authorized by law or by appointment to receive service of process for said party.

3. Fee charged for this service: $_____.

DATED: 6-15-11

Shawn Nelson
(Signature)

SUBSCRIBED AND SWORN to before me this 15th day of June, 11.

(SEAL)

Gail Park
Notary Public for the State of Idaho
Residing at: Shelley, Idaho
Commission Expires: 10-21-11

373

MANWARING LAW OFFICE, P.A.
Kipp L. Manwaring ~ *ISB 3817*
381 Shoup Avenue, Suite 210
Idaho Falls, Idaho 83402
Telephone: (208) 782-2300
Facsimile: (208) 523-9109

Attorney for the Plaintiffs

IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT
STATE OF IDAHO, COUNTY OF BONNEVILLE

DARRYL HARRIS and CHRISTINE HARRIS, husband and wife, Plaintiffs, vs. DUANE L. YOST and LORI YOST, husband and wife, DUANE L. YOST as Trustee of the DUANE L. YOST TRUST, THE BANK OF COMMERCE, an Idaho Corporation and JOHN DOES I-X, Defendants.	Case No. CV-09-3488 MOTION TO ALTER OR AMEND

In accordance with I.R.C.P. 59(e) and 60(b), the Harrises move the court for its order altering or amending its judgment entered June 7, 2011. This motion is based upon the pleadings of record.

Judgment was entered in favor of the Bank of Commerce for a certain monetary amount with authorization for judgment of foreclosure of the Bank's deeds of trust. Judgment was improperly entered prior to the court making its final determination on the partial summary judgment issue of whether the Bank was a bona fide encumbrancer.

If the court finds there are genuine issues of material fact preventing partial summary judgment on the issue of whether the Bank was a bona fide encumbrancer, then the judgment must be set aside pending trial.

673-A

If the court determines there are no genuine issues of material fact prevent partial summary judgment, the court must further determine the Harrises' claim for vendor's lien and equitable mortgage and establish a priority for purposes of foreclosure and redemption. The current judgment fails to identify the Harrises' remaining claims for vendor's lien and equitable mortgage. Judgment has been entered in favor of the Harrises and against the Yosts for a monetary amount. The Harrises are entitled to satisfy that judgment against any lien they have on the subject real property as a junior lien holder. The Harrises are also entitled to rights as redemptioners.

Furthermore, the Bank did not provide a verified affidavit setting forth the amounts in support of its judgment. In its Amended Answer and Counterclaim, the Bank alleges two notes in the total amount of $3,000,000 plus interest secured by two deeds of trust. However, the judgment is for a lesser amount. There is no way of determining whether the Bank has correctly applied payments the Yosts have made to come up with the balance. The Bank must supply such information. In his deposition, Tom Romrell identified payments applicable to the notes, including sales of other collateral. The Harrises believe the Bank must engage in marshalling of the Yosts assets forming any part of its collateral in order to determine the amount for judgment of foreclosure against the subject property.

Oral argument is requested.

Dated this 16th day of June 2011.

Kipp Manwaring

Kipp L. Manwaring
Attorney for the Plaintiffs

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on the 16th day of June 2011, a true and correct copy of the foregoing document was served upon the person or persons named below, in the manner indicated.

DOCUMENT SERVED: MOTION TO ALTER OR AMEND

PARTIES SERVED:

Douglas R. Nelson
Nelson Hall Parry Tucker
PO Box 51630
Idaho Falls, Idaho 83405-1630
MAILED

Alicia Lambert

Alicia Lambert
Legal Assistant

Douglas R. Nelson - ISB# 1580
Brian T. Tucker - ISB# 5236
Wiley R. Dennert - ISB# 6216
NELSON HALL PARRY TUCKER, P.A.
490 Memorial Drive
P.O. Box 51630
Idaho Falls, ID 83405-1630
Telephone:(208) 522-3001
Facsimile: (208) 523-7254

Attorneys for The Bank of Commerce

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

DARRYL HARRIS and CHRISTINE HARRIS, husband and wife,

Plaintiffs,

v.

DUANE L. YOST and LORI YOST, husband and wife, DUANE L. YOST as Trustee of the DUANE L. YOST TRUST, THE BANK OF COMMERCE, an Idaho Corporation and JOHN DOES I-X,

Defendants.

Case No. CV-09-3488

OPPOSITION TO MOTION TO ALTER OR AMEND

THE BANK OF COMMERCE, an Idaho corporation,

Counterclaimant/Cross-claimant/Third-Party Claimant,

v.

DARRYL HARRIS and CHRISTINE HARRIS, husband and wife,

Counterdefendants,

and

DUANE L. YOST and LORI YOST, husband and wife, DUANE L. YOST as Trustee of the DUANE L. YOST TRUST, JOHN DOES I-X,

Crossdefendants,

and

HAMPSHIRE HOLDINGS, LLC,

Third-Party Defendant.

COMES NOW Defendant/Counterclaimant/Cross-claimant/Third-Party Claimant The Bank of Commerce (the "Bank"), through counsel of record, and objects to and opposes the Motion to Alter or Amend filed by Darryl Harris and Christine Harris (collectively the "Harrises"), as follows:

1. The Court did make its final determination on the summary judgment issue regarding the Bank's status as a bona fide encumbrancer and determined there were no genuine issues of material fact on this issue. Thus the Court properly granted the Bank a full summary judgment.

2. The Harrises chose to obtain a default money judgment against the Yosts. Therefore,

they have elected their remedy and are not entitled to now obtain a judicial lien against the subject real property using the theories of a vendor's lien or an equitable mortgage. If there is a surplus after the property is sold and the proceeds are applied to the Yosts' loans with the Bank, then the Harrises can use their judgment to execute on those proceeds.[1]

3. The Bank did provide an affidavit setting forth the amounts in support of its judgment. Specifically, the Bank filed the Affidavit of Michael Morrison on September 16, 2010. Mr. Morrison's affidavit declares that all collateral, other than the subject Real Property Collateral, has been liquidated and applied to the loans. Thereafter, Mr. Morrison's affidavit states the remaining principal and interest that is due on the loans plus the per diem rate of interest due thereafter. As all of the Yosts' other collateral has been liquidated and applied to the loans, there are no other assets to marshall.

The Court should deny the Harrises' Motion to Alter or Amend.

DATED this 29 day of June, 2011.

Brian T. Tucker

[1] However, it is very unlikely that there will be any surplus following the sale of the property and application of the proceeds to the Bank's loans, because the Yosts owe well over $1,440,983.56 ($802,976.06 + $638,007.50), which is the amount of combined principal and interest set forth in the Affidavit of Michael Morrison, plus a substantial amount of accrued per diem interest. *See* Affidavit of Michael Morrison, ¶¶ 5-6. The accrued per diem interest is approximately $72,643.64 as of June 29, 2011. As such, the amount the Yosts owe the Bank is at least $1,513,627.20. Darryl Harris agreed to sell the subject 40 acres to Duane Yost for $800,000, which was $20,000 per acre. *See* Darryl Harris Aff., p. 33, ll. 18-23. Darryl Harris testified that the property was later appraised for either $15,000 per acre or $17,000 per acre. *Id.* at 54, ll. 4-8. Therefore, the 40 acres was later worth between $600,000 and $680,000 which is well below the amount the Yosts owe the Bank.

CERTIFICATE OF SERVICE

I hereby certify that I served a true copy of the foregoing document upon the following this 29 day of June, 2011, by hand delivery, mailing with the necessary postage affixed thereto, facsimile, or overnight mail.

Kipp L. Manwaring
MANWARING LAW OFFICE
381 Shoup Avenue, Suite 210
Idaho Falls, ID 83402

[X] Mailing
[ ] Hand Delivery
[X] Fax: 523-9109
[ ] Overnight Mail

Brian T. Tucker

L:\DRN\0260.491\Opposition to Motion to Alter or Amend.wpd

IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT
STATE OF IDAHO, BONNEVILLE COUNTY

DARRYL HARRIS and CHRISTINE HARRIS, husband and wife,	)	
Plaintiffs,	)	Case No. CV-09-3488
vs.	)	**AMENDED JUDGMENT AND DECREE OF FORECLOSURE**
DUANE L. YOST and LORI YOST, husband and wife, DUANE L. YOST as Trustee of the DUANE L. YOST TRUST, THE BANK OF COMMERCE, an Idaho corporation, and JOHN DOES 1-X,	)	
Defendants.	)	

On July 6, 2011 this action came before the court for hearing the Harrises' motion to alter or amend. After considering the arguments of counsel, the court determined it would amend its judgment entered June 6, 2011. Therefore;

IT IS HEREBY ORDERED that the Harrises' motion to alter or amend is granted and amended judgment of foreclosure is entered as follows.

IT IS HEREBY ORDERED that the Harrises' motion for reconsideration is denied.

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that:

1. The Bank of Commerce have judgment of foreclosure against the Defendants, Duane L. Yost and Lori Yost, and the Duane L. Yost Trust (the Yosts) and all interest the Yosts may have in the real property described below is foreclosed as decreed in this judgment.

2. Subject to the senior priority of the Bank of Commerce, the Harrises have judgment of foreclosure against the Yosts and all interest the Yosts may have in the real property described below is foreclosed as decreed in this judgment.

3. This judgment of foreclosure applies to the following real property: see Exhibit A attached and incorporated here by reference.

4. In accordance with the Second Affidavit of Thomas J. Romrell filed with the court, the Bank of Commerce is entitled to judgment of foreclosure of its deed of trust as follows:

a. Principal amount of $1,501,399.44;

b. On the Promissory Note dated April 16, 2008, judgment in the principal and interest amount of $802,976.06 as of September 16, 2010, plus a per diem interest accrual from September 16, 2010 to April 28, 2011 at the per diem rate of $101,13794. (224 days X $101.13794 = $22,654.90). Thus the total amount of the Judgment relating to the April 16, 2008 note is $825,630.96.

c. On the Promissory Note dated November 21, 2008, judgment in the principal and interest amount of $638,007.50 as of March 31, 2010, plus a per diem interest accrual from March 31, 2010 to April 28, 2011 at the per diem rate of $96,083929. (393 days X $96.083929 = $37,760.98). Thus the total amount of the Judgment relating to the March 31, 2010 note is $675,768,48.

d. Post judgment interest at the rate of 5.250% per annum beginning at the date this judgment is entered until this judgment is satisfied;

e. Post judgment interest accrues at the per diem rate of $215.95.

5. In accordance with the default judgment and summary judgment previously entered, the Harrises' legal and equitable interests are junior to the Bank of Commerce's deeds of trust interest. The Harrises are entitled to judgment of foreclosure as follows:

a. Default judgment amount of $987,610.40;

b. Post judgment interest at the rate of 5.625% per annum beginning at 15 October 2009 until judgment is satisfied;

c. Post judgment interest accrues at the per diem rate of $152.20.

6. The real property described in paragraph 3 above be sold at public auction by the Sheriff of Bonneville County, Idaho, in the manner prescribed by the law and according to the rules and practice of this Court, and the Sheriff, after the time allowed by law for redemption has expired, shall execute the deed to the purchaser or purchasers of the real property at said sale, and the parties to this action may become purchasers at said sale.

7. From the proceeds of that sale the Sheriff of Bonneville County shall retain his fees and expenses incurred on said sale and shall then pay out the proceeds in accordance with the provisions of this judgment.

8. The Defendant, the Yosts, and their known and unknown heirs or devisees, and the unknown owners, claimants, and parties in interest claiming all or any part of the real property described above, and each of them, and all persons claiming or to claim from and under them or any of them, and all persons having liens subject to the deeds of trust held by the Bank

of Commerce, by judgment or decree or otherwise upon the subject real property, or any part or parcel thereof, and their heirs, personal representatives, and all persons claiming to have acquired any estate or interest in or to said lands or premises, BE AND HEREBY ARE FOREVER BARRED AND FORECLOSED of and from all right, title, claim and interest in and to said real property and in and to every part or parcel thereof, except for such rights of redemption as they may have to the extent that such rights of redemption have not otherwise been duly waived, and that said persons, and each of them, be and they hereby are enjoined and restrained from removing or destroying any of the buildings, the improvements or appurtenances on such subject real property or otherwise damaging the lands or premises prior to redemption from such sale.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the purchaser or purchasers of the real property at the foreclosure sale be let into immediate possession, and that any of the parties to this action who may be in possession of said premises or any part thereof or any appurtenant water or similar rights, or any person who, since the commencement of this action, has come into possession of the subject property or any portion thereof or any appurtenant water or similar rights, shall immediately deliver possession to such purchaser or purchasers upon the production of a Sheriff's Certificate of Sale or Deed for such real property or any part thereof.

IT IS FURTHER ORDERED that jurisdiction of this action is hereby expressly reserved and retained for the purpose of making such further orders as may be necessary in order to carry this Judgment and Decree of Foreclosure into effect and to correct any mathematical error, to grant any accrued credits, or for the purpose of making such further orders as may be necessary or desirable.

IT IS FURTHER ORDERED that an Order for Sheriff's Sale may issue in accordance with this Amended Judgment.

DATED this 8 day of August 2011.

Dane Watkins, District Judge

RULE 54(b) CERTIFICATE

With respect to the issues determined by the above judgment 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 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 12 day of August 2011.

Dane Watkins, District Judge

NOTICE OF ENTRY

I HEREBY CERTIFY that I am a Clerk in the above entitled Court and that I mailed a true copy of the foregoing documents on the 12 day of August 2011, to the following of record and/or parties:

DOCUMENT SERVED: AMENDED JUDGMENT AND DECREE OF FORECLOSURE

PARTIES SERVED:

Manwaring Law Office, P.A.
Kipp L. Manwaring
381 Shoup Avenue, Suite 210
Idaho Falls, Idaho 83402
MAILED

Douglas R. Nelson
Nelson Hall Parry Tucker
PO Box 51630
Idaho Falls, Idaho 83405-1630
MAILED

RONALD LONGMORE
CLERK OF THE DISTRICT COURT

BY: Lettie Mumford
Deputy Clerk

EXHIBIT "A"

TRACT I

Beginning at a point that is South 89°55'28" West along the Section line 1326.98 feet from the North ¼ Corner of Section 10, Township 1 North, Range 38 East of the Boise Meridian; running thence South 89°55'28" West along said Section line 1236.12 feet to the South Right-of-Way line of 65th South; thence along said South Right-of-Way line of 65th South and the East Right-of-Way line of 25th East the following three (3) courses; South 00°12'54" East 28.10 feet to a point of curve with a radius of 69.34 feet and a chord bearing South 44°18'28" West 98.29 feet; thence to the left along said curve 109.24 feet through a central angle of 90°16'00"; thence South 89°10'28" West 28.71 feet to the West line of said Section 10; thence South 00°19'04" East 1216.86 feet to the South line of the North ½ of the Northwest ¼ of said Section 10, thence North 89°54'09" East along said South line 1327.87 feet; thence North 00°03'13" West 1312.06 feet to the POINT OF BEGINNING.

Excepting
That portion thereof conveyed to the State of Idaho by that deed recorded on May 8, 1950 in Book 70 of Deeds at Page 287 of Official Records of Bonneville County, Idaho.

8/29 Warnings

MANWARING LAW OFFICE, P.A.
Kipp L. Manwaring ~ *ISB 3817*
381 Shoup Avenue, Suite 210
Idaho Falls, Idaho 83402
Telephone: (208) 782-2300
Facsimile: (208) 523-9109

Attorney for the Plaintiffs

IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT
STATE OF IDAHO, COUNTY OF BONNEVILLE

DARRYL HARRIS and CHRISTINE HARRIS, husband and wife, Plaintiffs, vs. DUANE L. YOST and LORI YOST, husband and wife, DUANE L. YOST as Trustee of the DUANE L. YOST TRUST, THE BANK OF COMMERCE, an Idaho Corporation and JOHN DOES I-X, Defendants.	Case No. CV-09-3488 NOTICE OF NO OBJECTION

The Harrises hereby give notice to court and counsel that they have no objection to the Bank of Commerce's motion and memorandum for costs and fees where such costs and fees are sought entirely against the Yosts and not the Harrises.

The Harrises do not intend to appear at any hearing or otherwise file any further pleadings concerning the Bank's motion for costs and fees.

Dated this 29th day of August 2011.

Kipp Manwaring
Kipp L. Manwaring
Attorney for the Plaintiffs

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on the 29th day of August 2011, a true and correct copy of the foregoing document was served upon the person or persons named below, in the manner indicated.

DOCUMENT SERVED: NOTICE OF NO OBJECTION

PARTIES SERVED:

Douglas R. Nelson
Nelson Hall Parry Tucker
PO Box 51630
Idaho Falls, Idaho 83405-1630
MAILED

Alicia Lambert
Legal Assistant

Douglas R. Nelson - ISB# 1580
Brian T. Tucker - ISB# 5236
Wiley R. Dennert - ISB# 6216
NELSON HALL PARRY TUCKER, P.A.
490 Memorial Drive
P.O. Box 51630
Idaho Falls, ID 83405-1630
Telephone:(208) 522-3001
Facsimile: (208) 523-7254

Attorneys for The Bank of Commerce

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

DARRYL HARRIS and CHRISTINE HARRIS, husband and wife,

Plaintiffs,

v.

DUANE L. YOST and LORI YOST, husband and wife, DUANE L. YOST as Trustee of the DUANE L. YOST TRUST, THE BANK OF COMMERCE, an Idaho Corporation and JOHN DOES I-X,

Defendants.

Case No. CV-09-3488

ORDER AND JUDGMENT FOR ATTORNEY'S FEES AND COSTS

THE BANK OF COMMERCE, an Idaho corporation,

Counterclaimant/Cross-claimant/Third-Party Claimant,

v.

DARRYL HARRIS and CHRISTINE HARRIS, husband and wife,

Counterdefendants,

and

DUANE L. YOST and LORI YOST, husband and wife, DUANE L. YOST as Trustee of the DUANE L. YOST TRUST, JOHN DOES I-X,

Crossdefendants,

and

HAMPSHIRE HOLDINGS, LLC,

Third-Party Defendant.

The Motion for Attorney's Fees and Costs was filed on August 26, 2011 along with the Affidavit of Brian T. Tucker in support of Motion for Attorney's Fees and Costs and the Memorandum of Attorney's Fees and Costs. The Defendants having not filed an objection and it appearing from the Motion, Affidavit, and Memorandum that the requested fees and costs are reasonable and necessarily expended, IT IS HEREBY ORDERED that the Plaintiff be awarded attorney's fees and costs in the amount of $75,335.56 and that Plaintiff have a judgment for its attorney's fees and costs in the amount of $75,335.56.

DATED this 1 day of ~~July,~~ Sept 2011.

JUDGE

CLERK'S CERTIFICATE OF SERVICE

I hereby certify that I served a true copy of the foregoing document upon the following this 10 day of ~~August~~ Sept, 2011, by hand delivery, mailing with the necessary postage affixed thereto, facsimile, or overnight mail.

Brian T. Tucker
NELSON HALL PARRY TUCKER
P.O. Box 51630
Idaho Falls, ID 83405-1630

☑ Mailing
☐ Fax
☐ Hand Delivery
☐ Overnight Mail

Kipp L. Manwaring
MANWARING LAW OFFICE
381 Shoup Avenue, Suite 210
Idaho Falls, ID 83402

☑ Mailing
☐ Fax
☐ Hand Delivery
☐ Overnight Mail

Duane & Lori Yost
3777 Hampshire Court
Idaho Falls, ID 83401

☑ Mailing
☐ Fax
☐ Hand Delivery
☐ Overnight Mail

CLERK OF THE COURT

By: Lettie Mensch
Deputy Clerk

L:\DRN\0260.491\attorneys.fees - order.judgment.wpd

MANWARING LAW OFFICE, P.A.
Kipp L. Manwaring ~ *ISB 3817*
381 Shoup Avenue, Suite 210
Idaho Falls, Idaho 83402
Telephone: (208) 782-2300
Facsimile: (208) 523-9109

Attorney for the Appellants

IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT
STATE OF IDAHO, COUNTY OF BONNEVILLE

DARRYL HARRIS and CHRISTINE HARRIS, husband and wife, Plaintiffs, vs. DUANE L. YOST and LORI YOST, husband and wife, DUANE L. YOST as Trustee of the DUANE L. YOST TRUST, THE BANK OF COMMERCE, an Idaho Corporation and JOHN DOES I-X, Defendants.	Case No. CV-09-3488 NOTICE OF APPEAL Fee Category: T Fee: $101.00

TO: THE ABOVE NAMED RESPONDENT, BANK OF COMMERCE, AND ITS ATTORNEY OF RECORD, DOUGLAS NELSON:

NOTICE IS HEREBY GIVEN THAT:

1. The above named appellants, Darryl Harris and Christine Harris, appeal against the above named respondent, Bank of Commerce, to the Idaho Supreme Court from the Amended Judgment and Decree of Foreclosure entered in the above action on August 12, 2011, and the prior summary judgments, decisions, and orders entered June 7, 2011 and April 1, 2011, Honorable Dane H. Watkins, Jr., District Judge, presiding.

2. The Appellants have a right to appeal to the Idaho Supreme Court and the judgment described in paragraph 1 above is an appealable order under and pursuant to Rule 11(a)(1), I.A.R.

3. The preliminary issues on appeal are:

Did the district court err as a matter of law in granting summary judgment on the Appellants' claim that a quitclaim deed was invalid for lack of consideration?

Did the district court err as a matter of law in granting summary judgment finding the Appellants delivered the quitclaim deed?

Did the district court err as a matter of law in granting summary judgment determining the Appellant, Christine Harris, was estopped from using the protections of I.C. § 32-912?

Did the district court err as a matter of law in granting summary judgment finding no genuine issues of material fact exist pertaining to the Respondent's claim of being a bona fide encumbrancer for value?

4. No order has issued sealing all or any portion of the record.

5. A reporter's transcript is requested and the estimated fee of $455.00 has been paid.

6. 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.

a. The Appellants' Complaint and Reply to Counterclaim.
b. The Appellants' Memorandum in Support of Motion for Partial Summary Judgment
c. The Appellants' Memorandum in Response in Opposition to Motion for Summary Judgment.
d. The Appellants' Affidavit of Wayne Klein.
e. The Appellants' Affidavit of Counsel, Kipp Manwaring.
f. The Appellants' Augmented Affidavit of Counsel, Kipp Manwaring
g. Deposition of Duane Yost.
h. Deposition of Thomas Romrell.
i. Deposition of Darryl Harris.
j. Deposition of Christine Harris.
k. Deposition of Robert Crandall.
l. Deposition of Stephen Crandall.

7. I certify that:

a. A copy of this notice of appeal has been served on the reporter.

b. The clerk of the district court has been paid the estimated fee of $455.00 for preparation of the clerk's record.

c. The filing fee has been paid.

d. Service has been made upon all parties required to be served.

Dated this 14th day of September 2011.

Kipp L. Manwaring
Attorney for the Appellants

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on the 14th day of September 2011, a true and correct copy of the foregoing document was served upon the person or persons named below, in the manner indicated.

DOCUMENT SERVED: NOTICE OF APPEAL

PARTIES SERVED:

Douglas R. Nelson
Nelson Hall Parry Tucker
PO Box 51630
Idaho Falls, Idaho 83405-1630
MAILED

Alicia Lambert
Legal Assistant

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

DARRYL HARRIS and CHRISTINE HARRIS, husband and wife, Plaintiffs/Appellants, vs. THE BANK OF COMMERCE, an Idaho corporation, Defendant/Respondent and, DUANE L. YOST and LORI YOST, husband and wife; DUANE L. YOST as Trustee of the DUANE L. YOST TRUST, and JOHN DOES I-X, Defendant.	Case No. CV-2009-3488 Docket No. 39204 **CLERK'S CERTIFICATE OF APPEAL**

Appeal from: Seventh Judicial District, Bonneville County

Honorable Dane H. Watkins, Jr., District Judge, presiding.

Case number from Court: CV-2009-3488

Order or Judgment appealed from: Amended Judgment and Decree of Foreclosure, entered August 12, 2011, and the prior summary judgments, decision, and orders entered June 7, 2011 and April 1, 2011.

Attorney for Appellant:	Kipp Manwaring, 381 Shoup Ave., Ste. 210 Idaho Falls, ID 83402
Attorney for Respondent:	Douglas Nelson, PO Box 51630 Idaho Falls, ID 83405-1630
Appealed by:	Darryl Harris and Christine Harris
Appealed against:	The Bank of Commerce
Notice of Appeal Filed:	September 16, 2011
Appellate Fee Paid:	Yes
Was District Court Reporter's Transcript requested?	Yes, but no specific request made.

691

If so, name of reporter: Karen Konvalinka

Dated: September 19, 2011

RONALD LONGMORE
Clerk of the District Court

7TH JUDICIAL DISTRICT COUNTY OF BONNEVILLE STATE OF IDAHO DISTRICT COURT

By _____
Deputy Clerk

Douglas R. Nelson - ISB# 1580
Brian T. Tucker - ISB# 5236
Wiley R. Dennert - ISB# 6216
NELSON HALL PARRY TUCKER, P.A.
490 Memorial Drive
P.O. Box 51630
Idaho Falls, ID 83405-1630
Telephone:(208) 522-3001
Facsimile: (208) 523-7254

Attorneys for The Bank of Commerce

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

DARRYL HARRIS and CHRISTINE HARRIS, husband and wife,

Plaintiffs,

v.

DUANE L. YOST and LORI YOST, husband and wife, DUANE L. YOST as Trustee of the DUANE L. YOST TRUST, THE BANK OF COMMERCE, an Idaho Corporation and JOHN DOES I-X,

Defendants.

Case No. CV-09-3488

AMENDED ORDER AND JUDGMENT FOR ATTORNEY'S FEES AND COSTS

THE BANK OF COMMERCE, an Idaho corporation,

Counterclaimant/Cross-claimant/Third-Party Claimant,

v.

DARRYL HARRIS and CHRISTINE HARRIS, husband and wife,

Counterdefendants,

and

DUANE L. YOST and LORI YOST, husband and wife, DUANE L. YOST as Trustee of the DUANE L. YOST TRUST, JOHN DOES I-X,

Crossdefendants,

and

HAMPSHIRE HOLDINGS, LLC,

Third-Party Defendant.

The Motion for Attorney's Fees and Costs was filed by the Bank of Commerce on August 26, 2011, along with the Affidavit of Brian T. Tucker in support of Motion for Attorney's Fees and Costs and the Memorandum of Attorney's Fees and Costs. There was no objection filed by any of the other parties and it appearing from the Motion, Affidavit, and Memorandum that the requested fees and costs are reasonable and necessarily expended, IT IS HEREBY ORDERED that the Bank of Commerce be awarded attorney's fees and costs in the amount of $75,335.56 and that such judgment be a supplement and addition to the amount due found in the Amended Judgment and Decree of Foreclosure and Order of Sale previously entered by the Court on August 12, 2011.

DATED this 23 day of September, 2011.

JUDGE

APPROVED AS TO FORM & CONTENT:

KIPP L. MANWARING

CLERK'S CERTIFICATE OF SERVICE

I hereby certify that I served a true copy of the foregoing document upon the following this 23 day of September, 2011, by hand delivery, mailing with the necessary postage affixed thereto, facsimile, or overnight mail.

Brian T. Tucker
NELSON HALL PARRY TUCKER
P.O. Box 51630
Idaho Falls, ID 83405-1630

☑ Mailing
☐ Fax
☐ Hand Delivery
☐ Overnight Mail

Kipp L. Manwaring
MANWARING LAW OFFICE
381 Shoup Avenue, Suite 210
Idaho Falls, ID 83402

☑ Mailing
☐ Fax
☐ Hand Delivery
☐ Overnight Mail

Duane & Lori Yost
3777 Hampshire Court
Idaho Falls, ID 83401

☐ Mailing
☐ Fax
☐ Hand Delivery
☐ Overnight Mail

CLERK OF THE COURT

By: _____
Deputy Clerk

L:\DRN\0260.491\attorneys.fees - order.judgment.AMENDED.wpd

Douglas R. Nelson - ISB# 1580
Brian T. Tucker - ISB# 5236
Wiley R. Dennert - ISB# 6216
NELSON HALL PARRY TUCKER, P.A.
490 Memorial Drive
P.O. Box 51630
Idaho Falls, ID 83405-1630
Telephone:(208) 522-3001
Facsimile: (208) 523-7254

Attorneys for The Bank of Commerce

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

DARRYL HARRIS and CHRISTINE HARRIS, husband and wife,

Plaintiffs,

v.

DUANE L. YOST and LORI YOST, husband and wife, DUANE L. YOST as Trustee of the DUANE L. YOST TRUST, THE BANK OF COMMERCE, an Idaho Corporation and JOHN DOES I-X,

Defendants.

Case No. CV-09-3488

REQUEST FOR ADDITIONS TO CLERK'S RECORD

THE BANK OF COMMERCE, an Idaho corporation,

Counterclaimant/Cross-claimant/Third-Party Claimant,

v.

DARRYL HARRIS and CHRISTINE HARRIS, husband and wife,

Counterdefendants,

and

DUANE L. YOST and LORI YOST, husband and wife, DUANE L. YOST as Trustee of the DUANE L. YOST TRUST, JOHN DOES I-X,

Crossdefendants,

and

HAMPSHIRE HOLDINGS, LLC,

Third-Party Defendant.

COMES NOW Respondent The Bank of Commerce (the "Bank"), through counsel of record, and requests that the following documents be added to the Clerk's record for purposes of the appeal:

1. Affidavit of Counsel signed by Kipp Manwaring, filed on October 9, 2009;

2. Judgment by Default, dated October 16, 2009;

3. Stipulation Waiving Service, Consenting to Entry of Judgment of Foreclosure, and Waiver of Redemption Rights by Duane L. Yost and Lori Yost, Husband and

Wife, and Duane L. Yost as Trustee of the Duane L. Yost Trust and Hampshire Holdings, LLC, filed on April 27, 2010;

4. Affidavit of Thomas J. Romrell, filed on September 16, 2010;

5. Affidavit of Trent L. Summers, filed on September 16, 2010;

6. Affidavit of Duane L. Yost, filed on September 16, 2010;

7. Affidavit of Michael Morrison, filed on September 16, 2010;

8. Fourth Affidavit of Wiley R. Dennert, filed on September 16, 2010;

9. Second Motion for Summary Judgment, filed on January 27, 2011;

10. Memorandum in Support of Second Motion for Summary Judgment, filed on January 27, 2011;

11. Second Affidavit of Thomas J. Romrell, filed on January 27, 2011;

12. Affidavit of Douglas R. Nelson, filed on January 27, 2011;

13. Motion to Amend Counterclaim, Cross Claim and Third-party Claim and to Include Claim for Punitive Damages, filed on January 27, 2011;

14. Memorandum in Support of Motion to Amend Counterclaim Claim to Include Claim for Punitive Damages, filed on January 27, 2011;

15. Opposition to the Harrises' Motion for Summary Judgment, filed on February 10, 2011;

16. Second Affidavit of Duane L. Yost, filed on February 10, 2011;

17. Reply in Support of the Bank's Second Motion for Summary Judgment, filed on February 17, 2011;

18. Opposition to Motion for Reconsideration, filed May 26, 2011;

19. Affidavit of Service on Family Asset Protection Legal Services, PLLC, filed on

June 16, 2011;

20. Affidavit of Service on Robert Crandall, filed on June 16, 2011;

21. Opposition to Motion to Alter or Amend, filed on June 29, 2011; and

22. Notice of No Objection, filed on August 30, 2011.

DATED this 27 day of September, 2011.

Brian T. Tucker

CERTIFICATE OF SERVICE

I hereby certify that I served a true copy of the foregoing document upon the following this 27 day of September, 2011, by hand delivery, mailing with the necessary postage affixed thereto, facsimile, or overnight mail.

Kipp L. Manwaring
MANWARING LAW OFFICE
381 Shoup Avenue, Suite 210
Idaho Falls, ID 83402

[ ] Mailing
[ ] Hand Delivery
[X] Fax: 523-9109
[ ] Overnight Mail

Brian T. Tucker

L:\DRN\0260.491\Appeal\Request for Additional Clerk's Record.wpd

9/14
Watkins

MANWARING LAW OFFICE, P.A.
Kipp L. Manwaring ~ *ISB 3817*
381 Shoup Avenue, Suite 210
Idaho Falls, Idaho 83402
Telephone: (208) 782-2300
Facsimile: (208) 523-9109

Attorney for the Appellants

IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT
STATE OF IDAHO, COUNTY OF BONNEVILLE

DARRYL HARRIS and CHRISTINE HARRIS, husband and wife, Plaintiffs, vs. DUANE L. YOST and LORI YOST, husband and wife, DUANE L. YOST as Trustee of the DUANE L. YOST TRUST, THE BANK OF COMMERCE, an Idaho Corporation and JOHN DOES I-X, Defendants.	Case No. CV-09-3488 **AMENDED** NOTICE OF APPEAL

TO: THE ABOVE NAMED RESPONDENT, BANK OF COMMERCE, AND ITS ATTORNEY OF RECORD, DOUGLAS NELSON:

NOTICE IS HEREBY GIVEN THAT:

1. The above named appellants, Darryl Harris and Christine Harris, appeal against the above named respondent, Bank of Commerce, to the Idaho Supreme Court from the Amended Judgment and Decree of Foreclosure entered in the above action on August 12, 2011, and the prior summary judgments, decisions, and orders entered June 7, 2011 and April 1, 2011, Honorable Dane H. Watkins, Jr., District Judge, presiding.

2. The Appellants have a right to appeal to the Idaho Supreme Court and the judgment described in paragraph 1 above is an appealable order under and pursuant to Rule 11(a)(1), I.A.R.

3. The preliminary issues on appeal are:

Did the district court err as a matter of law in granting summary judgment on the Appellants' claim that a quitclaim deed was invalid for lack of consideration?

Did the district court err as a matter of law in granting summary judgment finding the Appellants delivered the quitclaim deed?

Did the district court err as a matter of law in granting summary judgment determining the Appellant, Christine Harris, was estopped from using the protections of I.C. § 32-912?

Did the district court err as a matter of law in granting summary judgment finding no genuine issues of material fact exist pertaining to the Respondent's claim of being a bona fide encumbrancer for value?

4. No order has issued sealing all or any portion of the record.

5. A standard reporter's transcript in both hard copy and electronic format is requested of the following hearings:

   a. Hearing held February 24, 2011 on cross motions for summary judgment; Karen Konvalinka reporting.

   b. Hearing held June 2, 2011 on the Plaintiffs' motion to reconsider; Karen Konvalinka reporting.

6. 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.

   c. The Appellants' Complaint and Reply to Counterclaim.

   d. The Appellants' Memorandum in Support of Motion for Partial Summary Judgment

   e. The Appellants' Memorandum in Response in Opposition to Motion for Summary Judgment.

   f. The Appellants' Affidavit of Wayne Klein.

   g. The Appellants' Affidavit of Counsel, Kipp Manwaring.

   h. The Appellants' Augmented Affidavit of Counsel, Kipp Manwaring

   i. Deposition of Duane Yost.

   j. Deposition of Thomas Romrell.

   k. Deposition of Darryl Harris.

l. Deposition of Christine Harris.

m. Deposition of Robert Crandall.

n. Deposition of Stephen Crandall.

7. I certify that:

a. A copy of this notice of appeal has been served on the reporter, Karen Konvalinka.

b. The clerk of the district court has been paid the estimated fee for preparation of the clerk's record.

c. The filing fee has been paid.

d. Service has been made upon all parties required to be served.

Dated this 12 day of October 2011.

Kipp L. Manwaring
Attorney for the Appellants

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on the 12th day of October 2011, a true and correct copy of the foregoing document was served upon the person or persons named below, in the manner indicated.

DOCUMENT SERVED: **AMENDED** NOTICE OF APPEAL

PARTIES SERVED:

Douglas R. Nelson
Nelson Hall Parry Tucker
PO Box 51630
Idaho Falls, Idaho 83405-1630
MAILED

Karen Konvalinka
Court Reporter
Bonneville County Courthouse
605 North Capital Avenue
Idaho Falls, Idaho 83402
MAILED

Alicia Lambert
Legal Assistant

9114 Watkins

MANWARING LAW OFFICE, P.A.
Kipp L. Manwaring ~ *ISB 3817*
381 Shoup Avenue, Suite 210
Idaho Falls, Idaho 83402
Telephone: (208) 782-2300
Facsimile: (208) 523-9109

Attorney for the Appellants

IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT
STATE OF IDAHO, COUNTY OF BONNEVILLE

DARRYL HARRIS and CHRISTINE HARRIS, husband and wife, Plaintiffs, vs. DUANE L. YOST and LORI YOST, husband and wife, DUANE L. YOST as Trustee of the DUANE L. YOST TRUST, THE BANK OF COMMERCE, an Idaho Corporation and JOHN DOES I-X, Defendants.	Case No. CV-09-3488 MOTION TO STAY EXECUTION OF JUDGMENT

In accordance with I.R.C.P. 62(a) and I.A.R. 13(b)(10), (14), the Harrises move the court for its order staying execution of the Amended Judgment of Foreclosure pending the Harrises' appeal. This motion is based upon the pleadings of record.

The district court has discretion to determine whether stay of execution should be granted, including the amount of security, if any, required for the stay.

As the court is aware, this action involves competing claims of title and title interest to property currently held by the Yosts. The Amended Judgment of Foreclosure is not merely a money judgment. Rather, it is a judgment affecting respective rights of the Harrises and the Bank of Commerce to the same parcel of property.

One of the main issues on appeal is whether the quitclaim deed to the Yosts was valid. If the appellate court rules in favor of the Harrises, the action will either be remanded for judgment quieting title in the Harrises' name or trial on issues of fact. The

land was the Harrises' real property that was part of a planned venture for development. Both the Harrises and the Bank are the resulting victims of Darren Palmer's fraud as now confirmed through his federal criminal conviction.

Furthermore, any purchaser at the sheriff's sale – which purchaser likely will be the Bank – receives only possession of the property subject to rights of redemption. Moreover, title to the property will retain through the appeal process and any subsequent proceedings cloud of interest preventing the Bank or purchaser other than the Harrises from conveying clear title. See *Radermacher v. Eckert*, 63 Idaho 531, 540, 123 P.2d 426 (1942), quoting, *Kremer v. Schutz,* 82 Kan. 175, 107 P. 780.

Due to the nature of the title issues together with the claims of the Harrises, the Harrises believe no bond or security should be required.

Oral argument is requested.

Dated this 24th day of October 2011.

Kipp L. Manwaring
Attorney for the Appellants

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on the 24th day of October 2011, a true and correct copy of the foregoing document was served upon the person or persons named below, in the manner indicated.

DOCUMENT SERVED: MOTION TO STAY EXECUTION OF JUDGMENT

PARTIES SERVED:

Douglas R. Nelson
Nelson Hall Parry Tucker
PO Box 51630
Idaho Falls, Idaho 83405-1630
MAILED

Karen Konvalinka
Court Reporter
Bonneville County Courthouse
605 North Capital Avenue
Idaho Falls, Idaho 83402
MAILED

A Lambert

Alicia Lambert
Legal Assistant

9/A Harris

BONN COUNTY
IDAHO
2011 DEC -2 AM 9:21

MANWARING LAW OFFICE, P.A.
Kipp L. Manwaring ~ *ISB 3817*
381 Shoup Avenue, Suite 210
Idaho Falls, Idaho 83402
Telephone: (208) 782-2300
Facsimile: (208) 523-9109

Attorney for the Appellants

IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT
STATE OF IDAHO, COUNTY OF BONNEVILLE

DARRYL HARRIS and CHRISTINE HARRIS, husband and wife,	)	
Plaintiffs,	)	Case No. CV-09-3488
vs.	)	
DUANE L. YOST and LORI YOST, husband and wife, DUANE L. YOST as Trustee of the DUANE L. YOST TRUST, THE BANK OF COMMERCE, an Idaho Corporation and JOHN DOES I-X,	)	NOTICE OF POSTING SECURITY
Defendants.	)	

NOTICE IS HEREBY GIVEN to court and counsel that on this date the Plaintiffs have posted with the clerk of the district court cash bond and security in the amount of $30,000.00.

Said bond and security is posted in accordance with the court's order granting stay of execution of the amended judgment of foreclosure during the period of the pending appeal.

Dated this 2nd day of December 2011.

Kipp L. Manwaring
Attorney for the Appellants

707

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on the 2nd day of December 2011, a true and correct copy of the foregoing document was served upon the person or persons named below, in the manner indicated.

DOCUMENT SERVED: NOTICE OF POSTING SECURITY

PARTIES SERVED:

Douglas R. Nelson
Nelson Hall Parry Tucker
PO Box 51630
Idaho Falls, Idaho 83405-1630
COURTHOUSE BOX

Kipp L. Manwaring

IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT
STATE OF IDAHO, COUNTY OF BONNEVILLE

DARRYL HARRIS and CHRISTINE HARRIS, husband and wife,	)	
Plaintiffs,	)	Case No. CV-09-3488
vs.	)	
DUANE L. YOST and LORI YOST, husband and wife, DUANE L. YOST as Trustee of the DUANE L. YOST TRUST, THE BANK OF COMMERCE, an Idaho Corporation and JOHN DOES I-X,	)	ORDER GRANTING MOTION TO STAY EXECUTION
Defendants.	)	

On November 21, 2011 this action came before the court for hearing the Plaintiffs' motion to stay execution of the amended judgment of foreclosure pending appeal. A sheriff's sale was scheduled for December 6, 2011. After considering the arguments of counsel, the court in its discretion determined stay of execution of the judgment should be granted conditioned upon the posting of bond. Therefore;

IT IS HEREBY ORDERED that execution of the amended judgment of foreclosure entered 8th day of August 2011, is stayed pending the outcome of the appeal filed by the Plaintiffs.

IT IS FURTHER ORDERED that stay of execution is conditioned upon the Plaintiffs filing with the clerk of the court bond in the amount of $30,000.00 on or before December 5, 2011.

IT IS FURTHER ORDERED that the parties may file motions with the court to reconsider the amount of bond subsequent to the filing of bond.

Dated this 2 day of December 2011.

Dane H. Watkins, Jr.
District Judge

709

NOTICE OF ENTRY

I HEREBY CERTIFY that I am a Clerk in the above entitled Court and that I mailed a true copy of the foregoing documents on the 6 day of December 2011, to the following of record and/or parties:

DOCUMENT SERVED: ORDER GRANTING MOTION TO STAY EXECUTION

PARTIES SERVED:

Manwaring Law Office, P.A.
Kipp L. Manwaring
381 Shoup Avenue, Suite 210
Idaho Falls, Idaho 83402
MAILED

Douglas R. Nelson
Nelson Hall Parry Tucker
PO Box 51630
Idaho Falls, Idaho 83405-1630
MAILED

RONALD LONGMORE
CLERK OF THE DISTRICT COURT
BY: _____
Deputy Clerk

710

0207 Watkins

Douglas R. Nelson - ISB# 1580
Brian T. Tucker - ISB# 5236
Wiley R. Dennert - ISB# 6216
NELSON HALL PARRY TUCKER, P.A.
490 Memorial Drive
P.O. Box 51630
Idaho Falls, ID 83405-1630
Telephone:(208) 522-3001
Facsimile: (208) 523-7254

Attorneys for The Bank of Commerce

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

DARRYL HARRIS and CHRISTINE HARRIS, husband and wife,

Plaintiffs,

v.

DUANE L. YOST and LORI YOST, husband and wife, DUANE L. YOST as Trustee of the DUANE L. YOST TRUST, THE BANK OF COMMERCE, an Idaho Corporation and JOHN DOES I-X,

Defendants.

Case No. CV-09-3488

OBJECTION TO INCLUSION OF EXHIBIT BOOK FOR DEPOSITIONS IN CLERK'S RECORD

THE BANK OF COMMERCE, an Idaho corporation,

Counterclaimant/Cross-claimant/Third-Party Claimant,

v.

DARRYL HARRIS and CHRISTINE HARRIS, husband and wife,

Counterdefendants,

and

DUANE L. YOST and LORI YOST, husband and wife, DUANE L. YOST as Trustee of the DUANE L. YOST TRUST, JOHN DOES I-X,

Crossdefendants,

and

HAMPSHIRE HOLDINGS, LLC,

Third-Party Defendant.

COMES NOW Respondent The Bank of Commerce (the "Bank"), through counsel of record, and objects, in part, to the Appellants' Motion to Correct with Additions to Record and specifically to the inclusion of the following to the Clerk's record for purposes of the appeal:

1. The Exhibit Book for Depositions.

The basis for this Objection is similar to the Bank's previous Objection to Inclusion of Deposition Transcripts in Clerk's Record, filed on September 27, 2011. The exhibits in the Exhibit Book for Depositions, by themselves, were not filed with the trial court, published

during any hearing before the trial court, submitted as exhibits in any hearing nor made part of the trial court's record. Therefore, the Exhibit Book for Depositions should not be included in the clerk's record for appeal, except to the extent that portions of some of these deposition exhibits were attached to affidavits and filed with the trial court prior to the filing of the Notice of Appeal.[1]

DATED this 2 day of ~~January~~ Feb., 2012.

Brian T. Tucker

CERTIFICATE OF SERVICE

I hereby certify that I served a true copy of the foregoing document upon the following this 2 day of ~~January~~ Feb., 2012, by hand delivery, mailing with the necessary postage affixed thereto, facsimile, or overnight mail.

Kipp L. Manwaring	[ ] Mailing
MANWARING LAW OFFICE	[ ] Hand Delivery
381 Shoup Avenue, Suite 210	[✓] Fax: 523-9109
Idaho Falls, ID 83402	[ ] Overnight Mail

Brian T. Tucker

L:\DRN\0260.491\Appeal\Objection to Inclusion of Exhibit Book for Depositions.wpd

---

[1] For example, the Affidavit of Douglas R. Nelson dated January 27, 2011, provides:

> 7. Attached hereto as Exhibit "B" is a true and correct copy of *selected portions* of the transcript of the Deposition of Darryl Harris taken in this case, with non-relevant and inadmissible portions removed or redacted. Also included as Exhibit "B" are true and correct, *relevant portions of selected exhibits* to the Deposition of Darryl Harris.

(Emphasis added.) Only selected portions of the deposition transcripts and selected portions of the exhibits were presented to the trial court for its consideration. Therefore, only what was available to the trial court should be added to the clerk's record for consideration on appeal by the Supreme Court.

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

DARRYL HARRIS and CHRISTINE HARRIS, husband and wife, Plaintiffs, vs. DUANE L. YOST and LORI YOST, husband and wife, DUANE L. YOST as Trustee of the DUANE L. YOST TRUST, THE BANK OF COMMERCE, an Idaho Corporation and JOHN DOES I-X, Defendants.	Case No. CV-2009-3488 AMENDED MINUTE ENTRY
THE BANK OF COMMERCE, an Idaho Corporation, Counterclaimant/Cross-claimant/ Third-Party Claimant, vs. DARRYL HARRIS and CHRISTINE HARRIS, husband and wife, Counterdefendants, and DUANE L. YOST and LORI YOST, husband and wife, DUANE L. YOST as Trustee of the DUANE L. YOST TRUST, JOHN DOES I-X, Counterdefendants, and HAMPSHIRE HOLDINGS, LLC, Third-Party Defendant.	

February 9, 2012, at 8:30 A.M., an objection to the appellate record came on for hearing before the Honorable Dane H. Watkins, Jr., District Judge, sitting in open court at Idaho Falls, Idaho.

Ms. Karen Konvalinka, Court Reporter, and Ms. Lettie Messick, Deputy Court Clerk, were present.

Mr. Kipp Manwaring appeared on behalf of the plaintiffs. Mr. **Brian Tucker** appeared on behalf of the defendants.

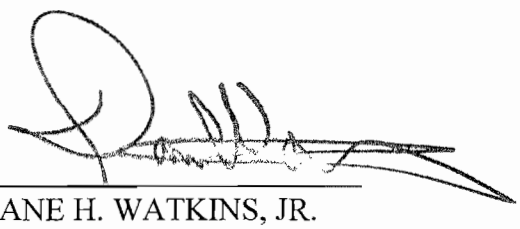
Mr. Manwaring presented argument supporting the objection to the record. Mr. Manwaring requested an exhibit book be provided.

The Court noted the Court did not receive a deposition exhibit book.

Mr. Manwaring requested the Affidavit of Doug Nelson be included in the record.

The Court will include the pleadings requested and the Affidavit of Doug Nelson.

Court was thus adjourned.



DANE H. WATKINS, JR.
District Judge

c: Kipp Manwaring
Douglas Nelson

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

DARRYL HARRIS and CHRISTINE HARRIS, husband and wife, Plaintiffs/Appellants, vs. THE BANK OF COMMERCE, an Idaho corporation, Defendant/Respondent and, DUANE L. YOST and LORI YOST, husband and wife; DUANE L. YOST as Trustee of the DUANE L. YOST TRUST, and JOHN DOES I-X, Defendant.	Case No. CV-2009-3488 Docket No. 39204-2011 **CLERK'S CERTIFICATION OF EXHIBITS**

STATE OF IDAHO)
)
County of Bonneville)

I, Ronald Longmore, Clerk of the District Court of the Seventh Judicial District of the State of Idaho, in and for the County of Bonneville, do hereby certify that the foregoing Exhibits were marked for identification and offered in evidence, admitted, and used and considered by the Court in its determination:

please see attached sheets (0 pages).

NO EXHIBITS

And I further certify that all of said Exhibits are on file in my office and are part of this record on Appeal in this cause, and are hereby transmitted to the Supreme Court.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of the District Court this 23rd day of December, 2011.

RONALD LONGMORE
Clerk of the District Court

By _____
Deputy Clerk

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

DARRYL HARRIS and CHRISTINE HARRIS, husband and wife, Plaintiffs/Appellants, vs. THE BANK OF COMMERCE, an Idaho corporation, Defendant/Respondent and, DUANE L. YOST and LORI YOST, husband and wife; DUANE L. YOST as Trustee of the DUANE L. YOST TRUST, and JOHN DOES I-X, Defendant.	)	Case No. CV-2009-3488 Docket No. 39204-2011 **CLERK'S CERTIFICATE**

STATE OF IDAHO)
)
County of Bonneville)

I, Ronald Longmore, Clerk of the District Court of the Seventh Judicial District, of the State of Idaho, in and for the County of Bonneville, do hereby certify that the above and foregoing Record in the above-entitled cause was compiled and bound under my direction and is a true, correct and complete Record of the pleadings and documents as are automatically required under Rule 28 of the Idaho Appellate Rules.

I do further certify that no exhibits were either offered or admitted in the above-entitled cause, that the Clerk's Record will be duly lodged with the Clerk of the Supreme Court, as required by Rule 31 of the

Idaho Appellate Rules.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of the District Court at Idaho Falls, Idaho, this 23rd day of December, 2011.

RONALD LONGMORE
Clerk of the District Court

By: _____
Deputy Clerk

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

DARRYL HARRIS and CHRISTINE HARRIS, husband and wife, Plaintiffs/Appellants, vs. THE BANK OF COMMERCE, an Idaho corporation, Defendant/Respondent and, DUANE L. YOST and LORI YOST, husband and wife; DUANE L. YOST as Trustee of the DUANE L. YOST TRUST, and JOHN DOES I-X, Defendant.	Case No. CV-2009-3488 Docket No. 39204-2011 **CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on the 11 day of January 2012, I served a copy of the Reporter's Transcript (if requested) and the Clerk's Record in the Appeal to the Supreme Court in the above entitled cause upon the following attorneys:

Kipp Manwaring
MANWARING LAW OFFICE
381 Shoup Ave., Ste. 210
Idaho Falls, ID 83402

Brian Tucker
NELSON HALL PARRY TUCKER
PO Box 51630
Idaho Falls, ID 83405-1630

by depositing a copy of each thereof in the United States mail, postage prepaid, in an envelope addressed

TCD

to said attorneys at the foregoing address, which is the last address of said attorneys known to me.

RONALD LONGMORE
Clerk of the District Court

By: _____
Deputy Clerk