

8-15-2014

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IN THE SUPREME COURT OF THE STATE OF IDAHO

PATRICIA MCKAY,

Plaintiff-Appellant,

vs.

THOMAS G. WALKER and COSHO
HUMPHREY, LLP, a limited liability
partnership,

Defendants-Respondents.

Supreme Court Case No. 42434

CLERK'S RECORD ON APPEAL

Appeal from the District Court of the Fourth Judicial District, in and for the County of Ada.

HONORABLE JASON D. SCOTT

ALLEN B. ELLIS

ATTORNEY FOR APPELLANT

BOISE, IDAHO

YVONNE A. DUNBAR

ATTORNEY FOR RESPONDENT

BOISE, IDAHO

Patricia McKay vs. Thomas G Walker, Cosho Humphrey, LLP

Date	Code	User		Judge
11/25/2009	NCOC	MCBIEHKJ	New Case Filed - Other Claims	Ronald J. Wilper
	COMP	MCBIEHKJ	Complaint Filed	Ronald J. Wilper
	SMFI	MCBIEHKJ	Summons Filed	Ronald J. Wilper
12/28/2009	ACKN	MCBIEHKJ	Acknowledgment Of Service 12/23/09	Ronald J. Wilper
1/29/2010	ANSW	CCBOURPT	Answer to Complaint and Demand for Jury Trial (Yvonne A Dunbar for Thomas G Walker and Cosho Humphrey LLP)	Ronald J. Wilper
2/2/2010	MISC	CCNELSRF	Note of Issue	Ronald J. Wilper
2/5/2010	NOTS	CCCHILER	Notice Of Service	Ronald J. Wilper
	RRTS	CCMASTLW	Response To Request For Trial Setting	Ronald J. Wilper
2/10/2010	NOTC	DCJOHNSI	Notice of Status Conf	Ronald J. Wilper
	HRSC	DCJOHNSI	Hearing Scheduled (Status 03/09/2010 04:30 PM)	Ronald J. Wilper
2/18/2010	NOTC	CCTOWNRD	Notice of Association of Counsel (Dinius for Plaintiff)	Ronald J. Wilper
	NOTS	CCTOWNRD	Notice Of Service	Ronald J. Wilper
3/9/2010	HRHD	DCJOHNSI	Hearing result for Status held on 03/09/2010 04:30 PM: Hearing Held	Ronald J. Wilper
3/17/2010	NOTS	CCLATICJ	Notice Of Service	Ronald J. Wilper
3/18/2010	NOTS	CCMCLILI	Notice Of Service	Ronald J. Wilper
3/26/2010	STIP	CCMCLILI	Stipulation for Scheduling & Planning	Ronald J. Wilper
4/2/2010	HRSC	DCABBOSM	Hearing Scheduled (Jury Trial 04/06/2011 09:00 AM) 5 days	Ronald J. Wilper
	HRSC	DCABBOSM	Hearing Scheduled (Civil Pretrial Conference 03/29/2011 03:00 PM)	Ronald J. Wilper
	ORDR	DCABBOSM	Order Setting Proceedings and Trial	Ronald J. Wilper
4/6/2010	MODQ	CCSULLJA	Motion To Disqualify an Alternate Judge	Ronald J. Wilper
4/7/2010	ORDR	DCJOHNSI	Order to Disqualify-Hurlbutt	Ronald J. Wilper
5/17/2010	NOTS	MCBIEHKJ	Notice Of Service	Ronald J. Wilper
7/29/2010	NOTS	CCSIMMSM	Notice Of Service	Ronald J. Wilper
8/9/2010	NODT	CCSWEECE	Notice Of Deposition Duces Tecum Of Thomas G Walker	Ronald J. Wilper
8/10/2010	NODT	CCSWEECE	Amended Notice Of Taking Deposition Duces Tecum Of Thomas G Walker	Ronald J. Wilper
10/26/2010	NOSV	CCBOYIDR	Notice Of Service	Ronald J. Wilper
11/30/2010	STIP	CCMASTLW	Stipulation to Amend Order Setting Proceedings and Trial	Ronald J. Wilper
12/1/2010	ORDR	DCJOHNSI	Order Amending Order Setting Trial and Proceedings	Ronald J. Wilper
12/7/2010	PLWI	CCDWONCP	Plaintiff's Expert Witness Disclosure	Ronald J. Wilper
12/21/2010	MOSJ	CCHOLMEE	Motion For Summary Judgment	Ronald J. Wilper

Patricia McKay vs. Thomas G Walker, Cosho Humphrey, LLP

Date	Code	User	Judge
12/21/2010	NOHG	CCHOLMEE	Notice Of Hearing Re Motion for Summary Judgment 2.3.11@3PM
	HRSC	CCHOLMEE	Hearing Scheduled (Motion for Summary Judgment 02/03/2011 03:00 PM)
1/6/2011	AFFD	CCGARDAL	Affidavit of Stanley Welsh in Support of Motion for Summary Judgment
	AFFD	CCGARDAL	Affidavit of Thomas Walker in Support of Motion for Summary Judgment
	AFCO	CCGARDAL	Affidavit Of Counsel in Support of Motion for Summary Judgment
	MEMO	CCGARDAL	Memorandum in Support of Motion for Summary Judgment
1/13/2011	NODT	CCSWEECE	Second Amended Notice Of Deposition Duces Tecum Of Thomas G Walker
1/20/2011	MEMO	CCNELSRF	Memorandum In Opposition to Motion for Summary Judgment
	AFFD	CCNELSRF	Affidavit of Bryan D. Smith
	AFFD	CCNELSRF	Second Affidavit of Allen B. Ellis
1/24/2011	AFFD	CCSWEECE	Affidavit Of Patricia McKay
1/28/2011	REPL	MCBIEHKJ	Reply in Support of Motion for Summary Judgment
	MOTN	MCBIEHKJ	Motion to Strike
	MEMO	MCBIEHKJ	Memorandum in Support of Motion to Strike
	MOTN	MCBIEHKJ	Motion to Shorten Time
2/3/2011	DCHH	DCJOHNSI	Hearing result for Motion for Summary Judgment held on 02/03/2011 03:00 PM: District Court Hearing Held Court Reporter: cromwell Number of Transcript Pages for this hearing estimated:50
2/18/2011	NOTD	CCWRIGRM	(5) Notice Of Taking Deposition
2/22/2011	ORDR	DCJOHNSI	Order Denying Motion for Summary Judgment
2/23/2011	MOTN	CCMASTLW	Motion for Continuance
	AFFD	CCMASTLW	3rd Affidavit of Allen Ellis
	MEMO	CCMASTLW	Memorandum in Support
2/24/2011	NOTH	CCWRIGRM	Notice Of Hearing (03/16/11 @ 3:00pm)
	HRSC	CCWRIGRM	Hearing Scheduled (Hearing Scheduled 03/16/2011 03:00 PM) Plaintiffs Motion to Continue
3/16/2011	DCHH	DCJOHNSI	Hearing result for Hearing Scheduled held on 03/16/2011 03:00 PM: District Court Hearing Held Court Reporter: cromwell Number of Transcript Pages for this hearing estimated: Plaintiffs Motion to Continue-50

Patricia McKay vs. Thomas G Walker, Cosho Humphrey, LLP

Date	Code	User	Judge
3/16/2011	HRSC	DCJOHNSI	Hearing Scheduled (Jury Trial 11/30/2011 09:00 AM)
	HRSC	DCJOHNSI	Hearing Scheduled (Pretrial Conference 11/22/2011 03:30 PM)
	HRSC	DCJOHNSI	Hearing Scheduled (Jury Trial 04/18/2012 09:00 AM)
	HRSC	DCJOHNSI	Hearing Scheduled (Pretrial Conference 04/10/2012 03:30 PM)
8/12/2011	NOTD	CCMASTLW	3rd Amended Notice Of Taking Deposition
8/25/2011	AMEN	CCWRIGRM	Fourth Amended Notice of Deposition
8/26/2011	STIP	CCNELSRF	Stipulation to Amend Order Setting Proceedings and Trial
8/29/2011	HRVC	DCJOHNSI	Hearing result for Jury Trial scheduled on 11/30/2011 09:00 AM: Hearing Vacated if not able to go to trial in nov, will reset to april 2012 as #1 set
	HRVC	DCJOHNSI	Hearing result for Pretrial Conference scheduled on 11/22/2011 03:30 PM: Hearing Vacated
	ORDR	DCJOHNSI	Order Resetting Trial
8/31/2011	AMEN	CCWRIGRM	First Amended Notice of Deposition
9/14/2011	NOTC	CCWRIGRM	Notice Vacating First Deposition of Patricia McKay
1/20/2012	MOTN	CCMASTLW	Motion to Extend Expert Witness Disclosure Deadline
	AFFD	CCMASTLW	2nd Affidavit of Patricia McKay
	AFFD	CCMASTLW	2nd Affidavit of Allen Ellis
	MEMO	CCMASTLW	Memorandum in Support of Motion for Trial Continuance
	NOHG	CCMASTLW	Notice Of Hearing
	HRSC	CCMASTLW	Hearing Scheduled (Hearing Scheduled 02/06/2012 11:00 AM) Mo/Cont Trial, Mo/Extend Expert Witness Disclosure
	MISC	CCWRIGRM	Defendants Supplemental Expert Witness Disclosure
1/23/2012	MOTN	CCSULLJA	Motion for Continuance
1/31/2012	AFFD	CCKHAMSA	Affidavit Of Yvonne A. Dunbar
	OBJC	CCKHAMSA	Defendant's Objection To Plaintiff's Motion To Extend Expert Witness Disclosure Deadline
	OBJC	CCKHAMSA	Defendant's Objection To Plaintiff's Motion For Trial Continuance
2/3/2012	RPLY	CCKINGAJ	Reply Brief in Support of Motion for Trial Continuance
	AFFD	CCKINGAJ	Fourth Affidavit of Allen B. Ellis

Patricia McKay vs. Thomas G Walker, Cosho Humphrey, LLP

Date	Code	User	Judge
2/6/2012	DCHH	DCJOHNSI	Hearing result for Hearing Scheduled scheduled on 02/06/2012 11:00 AM: District Court Hearing Held Court Reporter: Martorelli Number of Transcript Pages for this hearing estimated: Mo/Cont Trial, Mo/Extend Expert Witness Disclosure-50
2/9/2012	ORDR	DCJOHNSI	Order to Bifurcate
2/22/2012	STIP	CCKHAMSA	Stipulation To Vacate Trial
2/27/2012	ORDR	DCJOHNSI	Order to Vacate Trial
	HRVC	DCJOHNSI	Hearing result for Jury Trial scheduled on 04/18/2012 09:00 AM: Hearing Vacated #1 set (if not done in November 2011)
	HRVC	DCJOHNSI	Hearing result for Pretrial Conference scheduled on 04/10/2012 03:30 PM: Hearing Vacated
9/27/2012	ORDR	DCJOHNSI	Order for Status Report
10/2/2012	NOTC	CCTHIEKJ	Note of Issue
10/5/2012	NOTC	DCJOHNSI	Notice of Status Conf
	HRSC	DCJOHNSI	Hearing Scheduled (Status 10/30/2012 03:45 PM)
	NOTD	CCRANDJD	Notice Of Taking Deposition
10/9/2012	RSPN	CCHEATJL	Response To Plaintiff's Note Of Issue
10/24/2012	NOTC	DCJOHNSI	Notice Resetting Status Conf.
	CONT	DCJOHNSI	Continued (Status 11/13/2012 04:00 PM)
11/8/2012	AMEN	CCKINGAJ	First Amended Notice of Deposition Duces Tecum of Bryan Smith
11/13/2012	HRVC	DCJOHNSI	Hearing result for Status scheduled on 11/13/2012 04:00 PM: Hearing Vacated
11/14/2012	NOTC	DCJOHNSI	Notice Resetting Status Conf.
	HRSC	DCJOHNSI	Hearing Scheduled (Status 12/05/2012 04:15 PM)
11/21/2012	MOTN	CCDEREDL	Motion for a Protective Order
	AFFD	CCDEREDL	Affidavit of Allen B Ellis
	MEMO	CCDEREDL	Memorandum of Law in Support of Motion for a Protective Order
	NOHG	CCDEREDL	Notice Of Hearing (12-5-12 @ 4:15PM)
11/28/2012	OPPO	CCSULLJA	Opposition to Plaintiff's Motion for Protective Order
12/5/2012	DCHH	DCJOHNSI	Hearing result for Status scheduled on 12/05/2012 04:15 PM: District Court Hearing Held Court Reporter: cromwell Number of Transcript Pages for this hearing estimated:50

Patricia McKay vs. Thomas G Walker, Cosho Humphrey, LLP

Date	Code	User		Judge
12/27/2012	AMEN	CCRANDJD	Second Amended Notice of Deposition Duces Tecum of Bryan Smith	Ronald J. Wilper
1/18/2013	ORDR	DCJOHNSI	Order for Protective Order	Ronald J. Wilper
	NOTC	DCJOHNSI	Notice of Status Conf	Ronald J. Wilper
	HRSC	DCJOHNSI	Hearing Scheduled (Status 02/26/2013 03:45 PM)	Ronald J. Wilper
2/21/2013	MOTN	CCTHIEKJ	Defendants' Motion to Reconsider Court's Order Denying Defendants' Motion for Summary Judgment	Ronald J. Wilper
	AFSM	CCTHIEKJ	Affidavit of Robert A. Anderson In Support Of Defendants' Motion to Reconsider	Ronald J. Wilper
	MEMO	CCTHIEKJ	Memorandum in Support of Defendants' Motion to Reconsider Court's Order Denying Defendants' Motion for Summary Judgment	Ronald J. Wilper
	NOHG	CCTHIEKJ	Notice Of Hearing Re: Motion to Reconsider Court's Order Denying Defendants' Motion for Summary Judgment	Ronald J. Wilper
	HRSC	CCTHIEKJ	Hearing Scheduled (Motion 03/13/2013 03:00 PM) Motion to Reconsider Court's Order Denying Defendants' Motion for Summary Judgment	Ronald J. Wilper
2/27/2013	HRHD	DCJOHNSI	Hearing result for Status scheduled on 02/26/2013 03:45 PM: Hearing Held in chambers	Ronald J. Wilper
	HRSC	DCABBOSM	Hearing Scheduled (Jury Trial 01/22/2014 09:00 AM) 10 days	Ronald J. Wilper
	HRSC	DCABBOSM	Hearing Scheduled (Civil Pretrial Conference 01/14/2014 03:30 PM)	Ronald J. Wilper
	ORDR	DCABBOSM	Order Setting Proceedings and Trial	Ronald J. Wilper
3/7/2013	MOTN	CCDEREDL	Motion to Vacate Hearing	Ronald J. Wilper
	MEMO	CCDEREDL	Memorandum in Opposition to Motion for Reconsideration	Ronald J. Wilper
	AFFD	CCDEREDL	Fifth Affidavit of Allen B Ellis	Ronald J. Wilper
	NOHG	CCDEREDL	Notice Of Hearing (3-13-13 @ 3PM)	Ronald J. Wilper
3/12/2013	HRVC	DCJOHNSI	Hearing result for Motion scheduled on 03/13/2013 03:00 PM: Hearing Vacated Motion to Reconsider Court's Order Denying Defendants' Motion for Summary Judgment	Ronald J. Wilper
3/13/2013	STIP	CCOSBODK	Stipulation To Reset And Vacate Hearing Dates	Ronald J. Wilper
3/20/2013	NOTC	CCNELSRF	Notice of Change of Address (Ellis for Plaintiff)	Ronald J. Wilper
3/22/2013	HRSC	DCJOHNSI	Hearing Scheduled (Motion 04/03/2013 04:00 PM) to Reconsider	Ronald J. Wilper
3/27/2013	MEMO	MCBIEHKJ	Memorandum in Support of Motion to Reconsider Order Denying Motion for Summary Judgment	Ronald J. Wilper

Patricia McKay vs. Thomas G Walker, Cosho Humphrey, LLP

Date	Code	User		Judge
4/3/2013	DCHH	DCJOHNSI	Hearing result for Motion scheduled on 04/03/2013 04:00 PM: District Court Hearing Held Court Reporter: cromwell Number of Transcript Pages for this hearing estimated: to Reconsider-50	Ronald J. Wilper
4/25/2013	MEMO	DCJOHNSI	Memorandum Decision and Order Denying Motion to Reconsider	Ronald J. Wilper
5/7/2013	MOCT	CCOSBODK	Motion To Continue	Ronald J. Wilper
	MEMO	CCOSBODK	Memorandum In Support Of Motion	Ronald J. Wilper
	AFFD	CCOSBODK	Affidavit Of Allen B Ellis	Ronald J. Wilper
	NOHG	CCOSBODK	Notice Of Hearing Re Motion To Continue Hearing (6.12.13 @ 3pm)	Ronald J. Wilper
	HRSC	CCOSBODK	Hearing Scheduled (Motion 06/12/2013 03:00 PM) Motion To Continue	Ronald J. Wilper
6/5/2013	OBJT	CCMARTJD	Objection to Plaintiffs Motion to Continue Trial	Ronald J. Wilper
6/12/2013	DCHH	TCHOCA	Hearing result for Motion scheduled on 06/12/2013 03:00 PM: District Court Hearing Held Court Reporter: Nicole Julson Number of Transcript Pages for this hearing estimated: Motion To Continue/ less than 50	Ronald J. Wilper
	HRVC	TCHOCA	Hearing result for Civil Pretrial Conference scheduled on 01/14/2014 03:30 PM: Hearing Vacated	Ronald J. Wilper
	HRVC	TCHOCA	Hearing result for Jury Trial scheduled on 01/22/2014 09:00 AM: Hearing Vacated 10 days	Ronald J. Wilper
6/17/2013	ORDR	DCJOHNSI	Order Continuing Trial	Ronald J. Wilper
6/19/2013	MISC	DCJOHNSI	Amended Order to Continue Trial	Ronald J. Wilper
7/9/2013	HRSC	DCABBOSM	Hearing Scheduled (Jury Trial 09/03/2014 09:00 AM) 10 days	Ronald J. Wilper
	HRSC	DCABBOSM	Hearing Scheduled (Civil Pretrial Conference 08/26/2014 03:30 PM)	Ronald J. Wilper
	ORDR	DCABBOSM	Amended Order Setting Proceedings and Trial	Ronald J. Wilper
7/31/2013	MOTN	CCKINGAJ	Motion for Disqualification Without Cause (Ellis / Patricia)	Ronald J. Wilper
3/19/2014		CCCHILER	Notice of Reassignment	Jason D. Scott
5/22/2014	MOTN	CCSCOTDL	Defendants Second Motion to Reconsider Court's Order Denying Defendants Motion for Summary Judgment	Jason D. Scott
	MEMO	CCSCOTDL	Memorandum in Support of Defendants Second Motion to Reconsider Court's Order Denying Defendants Motion for Summary Judgment	Jason D. Scott
	AFFD	CCSCOTDL	Affidavit of Thomas Walker in Support of Defendants Second Motion to Reconsider	Jason D. Scott
6/5/2014	NOHG	CCMURPST	Notice Of Hearing (06/26/2014 3:30 pm)	Jason D. Scott

Patricia McKay vs. Thomas G Walker, Cosho Humphrey, LLP

Date	Code	User	Judge
6/5/2014	HRSC	CCMURPST	Hearing Scheduled (Motion 06/26/2014 03:30 AM) Second Motion to Reconsider Jason D. Scott
6/20/2014	MEMO	CCHOLMEE	Memorandum in Opposition to Motion to Reconsider Denial of Motion for Summary Judgment Jason D. Scott
6/24/2014	REPL	CCTHIEKJ	Reply in Support of Defendants' Second Motion to Reconsider Court's Order Denying Defendants' Motion for Summary Judgment Jason D. Scott
6/26/2014	DCHH	CCSTOKSN	Hearing result for Motion scheduled on 06/26/2014 03:30 PM: District Court Hearing Held Court Reporter: Cromwell Number of Transcript Pages for this hearing estimated: (<50) Second Motion to Reconsider Jason D. Scott
7/10/2014	BREF	CCMURPST	Supplemental Brief in Opposition for Reconsideration Jason D. Scott
	MISC	CCBOYIDR	Defendant's Supplemental Brief Jason D. Scott
7/23/2014	NOTC	CCSCOTDL	Notice of Deposition Duces Tecum of Patricia McKay Jason D. Scott
7/30/2014	DEOP	DCABBOSM	Memorandum Decision and Order Granting Defendants' Second Motion to Reconsider Jason D. Scott
	JDMT	DCABBOSM	Judgment Jason D. Scott
	CDIS	DCABBOSM	Civil Disposition entered for: Cosho Humphrey, LLP, Defendant; Walker, Thomas G, Defendant; McKay, Patricia, Plaintiff. Filing date: 7/30/2014 Jason D. Scott
	CDIS	CCSTOKSN	Civil Disposition entered for: Cosho Humphrey, LLP, Defendant; Walker, Thomas G, Defendant; McKay, Patricia, Plaintiff. Filing date: 7/30/2014 Jason D. Scott
	STAT	CCSTOKSN	STATUS CHANGED: Closed Jason D. Scott
7/31/2014	HRVC	CCSTOKSN	Hearing result for Civil Pretrial Conference scheduled on 08/26/2014 03:30 PM: Hearing Vacated Jason D. Scott
	HRVC	CCSTOKSN	Hearing result for Jury Trial scheduled on 09/03/2014 09:00 AM: Hearing Vacated 10 days Jason D. Scott
8/13/2014	MOTN	CCMCLAPM	Defendants Motion for Costs and Fees Jason D. Scott
	AFSM	CCMCLAPM	Affidavit of Counsel In Support Of Defendants Motion for Costs and Fees Jason D. Scott
	MEMO	CCMCLAPM	Memorandum In Support of Defendants Motion for Costs and Fees Jason D. Scott
8/15/2014	APSC	CCTHIEBJ	Appealed To The Supreme Court Jason D. Scott
	NOTA	CCTHIEBJ	NOTICE OF APPEAL Jason D. Scott
	MOTN	CCTHIEBJ	Plaintiff's Motion to Disallow Defendants' Claim for Costs and Fees Jason D. Scott
	MISC	CCTHIEBJ	Declaration of Allen B. Ellis Jason D. Scott
	MEMO	CCTHIEBJ	Memorandum in Support of Plaintiff's Motion to Disallow Defendants' Claim for Costs and Fees Jason D. Scott

Date: 9/23/2014

Fourth Judicial District Court - Ada County

User: CCTHIEBJ

Time: 12:11 PM

ROA Report

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Case: CV-OC-2009-22659 Current Judge: Jason D. Scott

Patricia McKay vs. Thomas G Walker, etal.

Patricia McKay vs. Thomas G Walker, Cosho Humphrey, LLP

Date	Code	User		Judge
8/27/2014	NOTH	CCGARCOS	Notice Of Hearing (9/16/2014 @ 4pm)	Jason D. Scott
8/28/2014	HRSC	CCSTOKSN	Hearing Scheduled (Motion 09/17/2014 03:30 PM)	Jason D. Scott
8/29/2014	RQST	CCMARTJD	Request for Additional Clerks Record	Jason D. Scott
9/2/2014	NOTC	CCSTOKSN	Amended Notice of Hearing (Costs and Fees) 9/17/14 @ 3:30 pm	Jason D. Scott
9/10/2014	NOTH	CCGARCOS	Second Amended Notice Of Hearing on Defendant's Motion for Costs and Fees 10/06/2014 @ 3pm	Jason D. Scott
	CONT	CCGARCOS	Continued (Motion 10/06/2014 03:00 PM) for Costs and Fees	Jason D. Scott
	AMEN	TCLAFFSD	Amended Notice of Hearing (10.6.14 at 3:00 PM) Plaintiff's Motion To Disallow Defendants' Claim for Costs & Fees	Jason D. Scott
9/23/2014	NOTC	CCTHIEBJ	Notice of Transcript Lodged - Supreme Court Docket No. 42434	Jason D. Scott

000009

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ISB No. 1626

Attorneys for Plaintiff

NO. _____
AM. _____ FILED P.M. 1:50

NOV 25 2009

J. DAVID NAVARRO, Clerk
By KATHY J. BIEHL
DEPUTY

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

Patricia McKay

Plaintiff,

v.

Thomas G. Walker and Cosho Humphrey,
LLP, a limited liability partnership,

Defendants.

CV 00 0922659
Case No.

COMPLAINT AND DEMAND
FOR JURY TRIAL

Comes now the plaintiff, Patricia McKay, through her attorneys of record, and complains and alleges against defendants Cosho Humphrey, LLP, and Thomas G. Walker as follows:

I

Defendant Cosho Humphrey, LLP, is a limited liability partnership duly organized and existing under the laws of the State of Idaho for the purpose of providing legal services to its clients.

COMPLAINT AND DEMAND FOR JURY TRIAL - 1

ORIGINAL 000010

II

At all times relevant, Thomas G. Walker was an attorney at law duly licensed by the State of Idaho and was acting within the course and scope of his employment, agency or partnership with defendant Cosho Humphrey, LLP.

III

At all times relevant, an attorney/client relationship existed between defendants, on the one hand, and plaintiff, on the other.

IV

In 2006, plaintiff retained defendants to represent her in a divorce action, to wit, McKay v. McKay, Ada County Case No. CV DR 0615200.

V

A major asset in the McKay community estate was certain real property acquired during the marriage, i.e., the Albrethsen property, which was immediately resold in 2006 to Status Corporation at a profit of approximately \$2,000,000, with a mortgage acquired to secure the balance of the purchase price (\$1,396,800) to be paid in 2008.

VI

In November, 2007, defendant Walker and other agents of defendant Cosho Humphrey negligently recommended that the plaintiff enter into a Property Settlement Agreement ("PSA") with her then-husband Darwin McKay which contemplated that plaintiff would receive a portion of the proceeds from the 2008 closing of the Status Corporation transaction as follows:

a. Darwin shall pay plaintiff \$800,000 in cash within five days of payment by Status Corporation;

b. If Status Corporation breaches the contract, Darwin may also be able to foreclose a mortgage on the Albrethsen property;

c. If the transaction with Status Corporation fails to close before March 30, 2008, Darwin shall pay plaintiff \$500,000 as soon as he able to;

d. If Status Corporation breaches the contract and Darwin cannot pay \$500,000 by April 30, 2008, he shall list the Albrethsen property for sale and pay plaintiff \$500,000 within five days of closing;

e. If Status Corporation breaches the contract and Darwin is not able to pay Patricia by September 30, 2008, he shall pay Patricia \$800,000 within five days of the receipt of any funds from the sale of either the Albrethsen property or the Home Farm property.

f. Additionally, Darwin is obligated to pay off the Personal Residence Debt (\$621,054) within thirty days of the closing of the Status Corporation transaction.

As a proximate result of defendants' negligent recommendation as alleged above, plaintiff executed the PSA, all to her damage in excess of the jurisdictional minimum of this Court as set forth more specifically below. The resultant Judgment with the ancillary PSA is attached hereto as Exhibit 1 and incorporated herein by reference.

VII

As a further proximate result of defendants' negligence, in November, 2008, following entry of the Judgment and Decree of Divorce, Lawyers Title Insurance Company paid Darwin \$1,288,019.10, to the exclusion of plaintiff, on the McKay community's interest as mortgagee in the Status Corporation mortgage. Notwithstanding the terms of the PSA, Darwin has refused to pay plaintiff any portion of those funds as required by that agreement. Plaintiff has instituted further COMPLAINT AND DEMAND FOR JURY TRIAL - 3

court proceedings to enforce her rights under the PSA without success. In the event her efforts to enforce her contract rights result in a money recovery, plaintiff will amend this complaint accordingly.

VIII

The recommendation of defendants that plaintiff execute the PSA was negligent in the following respects:

a. There is no legal description of the Albrethsen property in the PSA, an acknowledged document, rendering the recording of the PSA a futile act insofar as security for plaintiff is concerned and in violation of Idaho Code §32-918;

b. Likewise, there is no legal description of the real property (the Albrethsen property) which is the subject of the mortgage referenced in the PSA, nor an instrument number of the recorded mortgage, notwithstanding the recitation in the PSA that plaintiff has an interest in the sale proceeds of the Status Corporation transaction as the source of the payments to her.

c. Notwithstanding defendants' representations to plaintiff that recordation of the PSA would create a lien on the community's interest in real property, the PSA did not have such lien effect because (1) as referenced in the PSA, Darwin was mortgagee of the Albrethsen property and did not hold title to it, and (2) the PSA failed to identify the relevant mortgage information, i.e., legal description of the real property, instrument number of the recorded mortgage, and plaintiff's interest in the mortgage.

d. Although the PSA recites that plaintiff had an interest in a portion of the Status Corporation sales proceeds and references the mortgage, the PSA fails to provide a legal description of the subject real property, i.e., the Albrethsen property, and an instrument number of the recorded

mortgage, rendering the recordation of the PSA futile insofar as securing plaintiff's monetary entitlements arising from the PSA.

IX

As a further proximate result of defendants' alleged negligence in not securing her entitlement under the PSA by properly drafting the PSA, plaintiff has been damaged as follows: (1) failure to receive the \$800,000 as recited in the PSA; (2) failure of plaintiff's ex-husband to pay off her Personal Residence Debt (\$621,054) from the proceeds of the Status Corporation mortgage as required by the PSA, paragraph 2.1; and (3) plaintiff has incurred mitigation costs in the form of attorney fees in an effort to enforce her rights under the PSA.


X

Plaintiff has been required to retain the law firm of Ellis, Brown & Sheils, Chartered to prosecute this action and is entitled to recover sums as and for reasonable attorney's fees incurred herein.

Wherefore, plaintiff prays for relief as follows:

1. For compensatory damages in excess of the jurisdictional minimum of this Court'
2. For costs of suit and reasonable attorney fees;
3. For such other and further relief as the Court or Jury deem appropriate.


DATED This 25th day of November, 2009.



Allen B. Ellis
Attorney for plaintiff

DEMAND FOR JURY TRIAL

Plaintiff hereby demands a trial by jury in accordance with the provisions of Rule 38(b) of the Idaho Rules of Civil Procedure.


Allen B. Ellis

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Yvonne A. Dunbar – ISB No. 7200
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NO. _____ FILED _____ 27
A.M. _____ P.M. _____
JAN 29 2010
J. DAVID NAVARRO, Clerk
By P. BOURNE
DEPUTY

Attorneys for Defendants

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

PATRICIA MCKAY,

Plaintiff,

vs.

THOMAS G. WALKER and COSHO
HUMPHREY, LLP, a limited liability
partnership,

Defendants.

Case No. CV OC 0922659

ANSWER TO COMPLAINT AND
DEMAND FOR JURY TRIAL

Fee Category: I(1)(a)

Fee: \$58.00

COMES NOW, Defendants Thomas G. Walker and Cosho Humphrey, LLP
(hereinafter collectively referred to as "Defendants"), by and through their attorneys of
record, Anderson, Julian & Hull, LLP, answers Plaintiffs' Complaint at Law and Jury
demand ("Complaint") as follows:

FIRST DEFENSE

The Complaint fails to state a claim against these Defendants upon which relief
can be granted.

ORIGINAL

SECOND DEFENSE

1. These Defendants deny each and every allegation of the Complaint not herein expressly and specifically admitted.

2. These Defendants admit the allegations contained in Paragraphs I and II of the Plaintiff's Complaint.

3. With regard to the allegations contained in Paragraph III of the Plaintiff's Complaint, these Defendants only admit that they had an attorney-client relationship with the Plaintiff from August 17, 2006 through January 29, 2009.

4. With regard to the allegations contained in Paragraph IV of the Plaintiff's Complaint, these Defendants only admit that they were retained by Plaintiff on August 17, 2006 to represent her.

5. With regard to the allegations contained in Paragraph V of the Plaintiff's Complaint, these Defendants deny that the Albrethsen property was an asset of the McKay community estate. These Defendants are without sufficient knowledge to admit or deny the remaining allegations contained in Paragraph V of the Plaintiff's Complaint and, therefore, deny the same.

6. With regard to the allegations contained in Paragraph VI of the Plaintiff's Complaint, these Defendants only admit that they fully explained to the Plaintiff the risks, alternatives, and advantages of entering into the Property Settlement Agreement with her then-husband Darwin McKay; these Defendants did not "recommend" that the Plaintiff execute the Property Settlement Agreement. With regard to the allegations contained in Paragraph VI (a)-(f), these Defendants state that the Property Settlement Agreement speaks for itself and, therefore, these Defendants deny each and every

allegation in Paragraph VI (a)-(f) which are inconsistent with the express terms and language of the Property Settlement Agreement. These Defendants deny the remaining allegations contained in Paragraph VI.

7. With regard to the allegations contained in Paragraph VII of the Plaintiff's Complaint, these Defendants specifically deny that the Plaintiff and Darwin McKay had a "community interest as mortgagee in the Status Corporation mortgage". These Defendants deny the remaining allegations contained in Paragraph VII of the Plaintiff's Complaint.

8. With regard to the allegations contained in Paragraph VIII of the Plaintiff's Complaint, these Defendants admit that the Property Settlement Agreement did not contain a legal description of the Alberthsen property; however, these Defendants deny that such was legally required. These Defendant also deny that I.C. § 32-918 is applicable in the current action. These Defendants further specifically deny that the Plaintiff had a legal interest in the Albrethsen property or that she, along with Darwin McKay, held a community interest in the Albrethsen property. These Defendants deny the remaining allegations contained in Paragraph VIII, including subparagraphs (a)-(d) of the Plaintiff's Complaint.

9. These Defendants deny the allegations contained in Paragraphs IX and X of the Plaintiff's Complaint.

THIRD DEFENSE

The Plaintiff has waived, or by her conduct, is estopped from asserting, the causes of action contained in her Complaint.

FOURTH DEFENSE

The Plaintiff had, and continues to have, the ability and opportunity to mitigate the damages alleged with respect to the subject matter of this action, and has failed to mitigate said damages, if any were in fact incurred.

FIFTH DEFENSE

Plaintiff's alleged losses or injuries, if any, were caused by the intervening acts and omissions of other third persons, for whom these Defendants bear no responsibility.

SIXTH DEFENSE

Other third persons, not in these Defendants' control, were guilty of negligent, careless, reckless, or intentional misconduct at the time of and in connection with the matters and damages alleged, which misconduct on their part proximately caused and/or contributed to said events and the Plaintiff's resultant damages, if any.

SEVENTH DEFENSE

These Defendants are immune from suit under the doctrine of judgmental immunity.

EIGHTH DEFENSE

A portion or all of the Plaintiffs' claims are barred by I.C. § 5-219.

NINTH DEFENSE

These Answering Defendants reserve the right to assert any additional affirmative defenses and matters in avoidance that may be disclosed in the course of additional investigation and discovery, including without limitation, comparative negligence, statute of limitations, waiver/estoppel, superseding/intervening cause, negligence of a third-party not in these Answering Defendants' control and setoff.

DEMAND FOR JURY TRIAL

These Defendants demand a jury trial as to all issues.

WHEREFORE, these Defendants pray that the Plaintiff takes nothing by her Complaint; that the same be dismissed with prejudice; and that these Defendants be awarded their costs of suit and attorney's fees pursuant to Rule 54, Idaho Rules of Civil Procedure, I.C. § 12-121 and any other applicable statute or rule; and such other and further relief as the Court deems just.

DATED this 29th day of January, 2010.

ANDERSON, JULIAN & HULL LLP

By Yvonne A Dunbar

Robert A. Anderson
Yvonne A. Dunbar, Of the Firm
Attorneys for Defendants

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this 29th day of January, 2010, I served a true and correct copy of the foregoing by delivering the same to each of the following attorneys of record, by the method indicated below, addressed as follows:

Allen B. Ellis
ELLIS, BROWN & SHEILS,
CHARTERED
707 North 8th Street
P.O. Box 388
Boise, Idaho 83701-0388
Telephone: (208) 345-7832

[] U.S. Mail, postage prepaid
[] Hand-Delivered
[] Overnight Mail
[x] Facsimile (208) 345-9564

Yvonne A Dunbar

Robert A. Anderson
Yvonne A. Dunbar

Robert A. Anderson – ISB No. 2124
Yvonne A. Dunbar – ISB No. 7200
ANDERSON, JULIAN & HULL LLP
C. W. Moore Plaza
250 South Fifth Street, Suite 700
Post Office Box 7426
Boise, Idaho 83707-7426
Telephone: (208) 344-5800
Facsimile: (208) 344-5510

NO. _____
FILED _____
A.M. _____ P.M. _____

DEC 21 2010

J. DAVID NAVARRO, Clerk
By J. RANDALL
DEPUTY

Attorneys for Defendants

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

PATRICIA MCKAY,

Plaintiff,

vs.

THOMAS G. WALKER and COSHO
HUMPHREY, LLP, a limited liability
partnership,

Defendants.

Case No. CV OC 0922659

**DEFENDANTS' MOTION FOR
SUMMARY JUDGMENT**

COMES NOW the above-named Defendants, by and through their attorney of record, Anderson Julian & Hull LLP, and move this Court, pursuant to Rule 56 of the Idaho Rules of Civil Procedure, for entry of summary judgment in favor of said Defendants on the grounds that there are no genuine issues as to any material fact and that the Defendants are entitled to judgment as a matter of law as the Plaintiff cannot establish the requisite elements of her legal malpractice claim.

This Motion is based upon the documents and pleadings on file herein and upon the Memorandum and Affidavits in support which will be subsequently filed.

DATED this 21 day of December, 2010.

ANDERSON, JULIAN & HULL LLP

By Robert A. Anderson
Robert A. Anderson,
Yvonne A. Dunbar, Of the Firm
Attorneys for Defendants

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this 21 day of December, 2010, I served a true and correct copy of the foregoing DEFENDANTS' MOTION FOR SUMMARY JUDGMENT by delivering the same to each of the following attorneys of record, by the method indicated below, addressed as follows:

Allen B. Ellis
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Kevin E. Dinius
Michael J. Hanby II
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5680 E. Franklin Rd., Suite 130
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Facsimile: (208) 475-0101

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☐ Hand-Delivered
☐ Overnight Mail
☐ Facsimile

Attorneys for Plaintiff

Robert A. Anderson
Robert A. Anderson
Yvonne A. Dunbar

3. I filed a Stipulation for Substitution of Counsel on November 28, 2006 wherein Cosho Humphrey became the Plaintiff's counsel for record in her divorce action.

4. During the course of Cosho Humphrey's representation of the Plaintiff, I had regular contact with the Plaintiff via email, telephone, and office conferences. The Plaintiff was kept fully apprised of what transpired in her divorce proceeding against Mr. McKay. The Plaintiff also received prompt responses to any emails and telephone calls which we received.

5. During our representation of the Plaintiff, we propounded several sets of discovery upon Mr. McKay seeking information regarding, inter alia, his finances, property ownership, businesses, and real estate transactions. As a part of this discovery, we sought information regarding all real property purchased and sold by Mr. McKay during his marriage to the Plaintiff. We also requested all documents related to such purchases and sales. Due to Mr. McKay's failure to provide complete discovery responses, we filed at least three motions to compel.

6. On October 9, 2007, we filed a motion for partial summary judgment against Mr. McKay on behalf of the Plaintiff. In this motion, we sought a ruling invalidating the Prenuptial Agreement between the Plaintiff and Mr. McKay. We supported this motion with, inter alia, a memorandum and an executed affidavit of Patricia McKay. The motion was set for hearing on December 12, 2007.

7. After the motion for partial summary judgment was filed, I contacted Mr. McKay's counsel to ascertain whether Mr. McKay was willing to mediate the action. The Plaintiff and Mr. McKay ultimately agreed to mediation and such mediation was scheduled for Saturday, October 20, 2007 at 9:30 a.m.

8. Defendant Tom Walker and I attended the entire mediation as did the Plaintiff. The Plaintiff was actively involved in the mediation and settlement negotiations.

9. Throughout the mediation, Mr. Walker and I were available to the Plaintiff to discuss all aspects of the mediation. In fact, we had comprehensive discussions throughout the negotiation process with regard to the settlement proposals and we discussed the pros and cons of settling versus going to trial.

10. Towards the end of the mediation, there was some downtime when Judge McKee was meeting with Mr. McKay and his counsel. While Judge McKee met with Mr. McKay, there were times when Mr. Walker and/or I temporarily stepped out of the conference room and went to our respective offices. However, this did not occur until after we had fully discussed a particular round of settlement negotiations with the Plaintiff and fully addressed the concerns and/or questions she presented. Before leaving the conference room, Mr. Walker and I informed the Plaintiff that she could and should walk the few feet to our offices if she thought of any additional questions or concerns. Although, Mr. Walker and I temporarily stepped out of the conference room, we were present in the conference room each time Judge McKee returned to discuss the pending settlement negotiations.

11. At the mediation, neither Mr. Walker nor I pressured the Plaintiff to settle her divorce action. Instead, we fully discussed the pros and cons of settling versus going to trial and the pros and cons of accepting the settlement terms set forth in the handwritten settlement agreement which was drafted by Judge McKee ("Handwritten Agreement"). We also informed the Plaintiff that settling the case was optional, not mandatory and, if she did not agree with any proposed settlement, she was not obligated to accept the same. We further stated that we could end the mediation at any time if she was uncomfortable with the negotiations. Finally, we told the Plaintiff, if settlement was not reached, we would aggressively pursue the outstanding motion for summary judgment and would aggressively and competently try her case.

12. During the mediation, Judge McKee explained to the Plaintiff, Mr. Walker, and me that Mr. McKay was unwilling to provide any collateral or security for the payments required in the Handwritten Agreement.

13. Judge McKee presented the Plaintiff with a copy of the Handwritten Agreement and provided her time alone with her counsel (me and Mr. Walker) to review and discuss the same. Mr. Walker and I discussed each provision of the Handwritten Agreement with the Plaintiff. After we addressed all of the Plaintiff's questions, she represented she understood the terms of the Handwritten Agreement and she understood the implications of executing the Handwritten Agreement. The Plaintiff also informed us she understood that, although the terms of the Handwritten Agreement were to be incorporated in a final comprehensive settlement agreement, she was bound by the property distribution set forth in the Handwritten Agreement.

14. At the time she executed the Handwritten Agreement, the Plaintiff represented she was voluntarily executing it.

15. On April 15, 2008, I filed a Notice of Withdrawal as the Plaintiff's counsel of record.

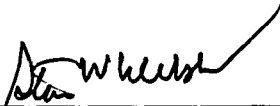
16. In late 2008, the Plaintiff contacted Cosho Humphrey as Mr. McKay had failed to pay monies due under the Property Settlement Agreement (which was incorporated into the trial court's November 29, 2007 Judgment). At the outset, the Plaintiff directed us to attempt to acquire the required payments through informal negotiations and without court intervention. Two to three months later, the Plaintiff requested that we begin preparing to pursue a motion for contempt against Mr. McKay. Accordingly, I began preparing the motion for contempt.

17. In late December 2008, the Plaintiff requested that Cosho Humphrey cease all work on her file until she directed us otherwise. We complied with this request.

18. On January 28, 2009, I received a letter from Scott Hess of Hawley Troxell requesting that I execute a substitution of counsel as the Plaintiff had retained him to represent her in her case against Mr. McKay. I executed the substitution of counsel as requested.

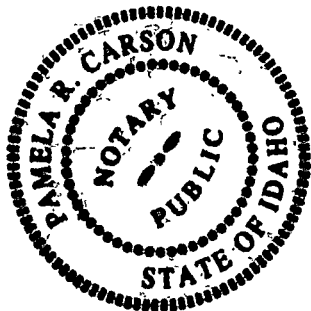
19. Enclosed as Exhibit "A" are true and correct copies of emails between me and the Plaintiff.

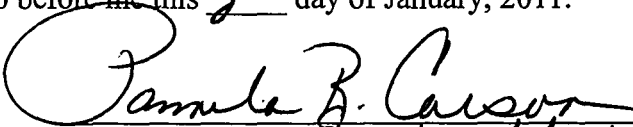
Further your Affiant saith not.



Stanley Welsh

SUBSCRIBED AND SWORN to before me this 5th day of January, 2011.





Notary Public for Caple Idaho
Residing at Caple
My commission expires: 3/31/2016

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this 6th day of January, 2011, I served a true and correct copy of the foregoing by delivering the same to each of the following attorneys of record, by the method indicated below, addressed as follows:

Allen B. Ellis
ELLIS, BROWN & SHEILS,
CHARTERED
707 North 8th Street
P.O. Box 388
Boise, Idaho 83701-0388
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Kevin E. Dinius
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☐ Facsimile

Attorneys for Plaintiff



Robert A. Anderson
Yvonne A. Dunbar

Exhibit A

From: Patricia McKay [<mailto:patmckay@clearwire.net>]

Sent: Wednesday, October 31, 2007 9:40 AM

To: Stanley W. Welsh; Thomas G. Walker

Subject: RE: Decree

I have reviewed and find many areas of concern.

I have also found the new business entity Darwin has set up with Jackie L. Grant, daughter of the late George Grant. Articles of Organization filed October 24, just a few days from the mediation talks. This is the person who Darwin probably sold some of the Murphy property to. I am tempted to call her but I think Darwin probably has told her not to talk with me or by me calling, she may not be honest with me. Jackie may be someone my attorney should call to find out information.

In the Agreement of Compromise and Settlement which was given to me prior to mediation, Item 2 reads: 'Full Disclosure. Each Party represents to the other that full disclosure of all community assets and community liabilities, of which he or she is aware, has been made.' Darwin did not do this. I do not believe he represented the true value of the properties. He did not disclose the new building he has had built and paid cash for in Yerrington which increased the property value there. He also did not disclose the value of the water rights he has obtained during marriage, ie from Albrethsen property and there may have been water rights on the Dansereau property (we'd have to check the purchase contract).

Along with the issue of him not disclosing information to us, all we have to do is review all the items we have requested through interrogatories and he never did provide them to us.

I have visited with Neil Salathe and Gene Thurston and they both feel Darwin has not been honest with disclosure and also feel I am not getting a fair settlement at all. I agree with them.

Before you and Tom start work on this I would like to visit with you. Bottom line is Darwin was not honest with the estimated net worth for the mediation talks nor did he 'fully disclose'.

COSHO HUMPHREY, LLP

COUNSELORS & ATTORNEYS AT LAW
PO Box 9518 83707-9518
800 Park Blvd., Suite 790
Boise, Idaho 83712

Telephone 208.344.7811
Firm fax 208.338.3290

DIRECT PHONE 208.639.5604
DIRECT FAX 208.639.5606

STANLEY W. WELSH
swelsh@cosholaw.com

November 1, 2007

VIA E-MAIL: patmckay@clearwire.net ✓KG

Patricia E. McKay
25 Horizon Drive
Boise, ID 83702

Re: Patricia E. McKay v. L. Darwin McKay
CH File No.: 19458-001
Case No.: CV DR 0615200

Dear Patty:

I know that you are getting advice from several other individuals. Those individuals are not paying your bills. I do not doubt that they mean well. I expect that they would not guaranty a result to you if there was no agreement now.

I did not think that there was any doubt in our meeting that you are well aware of the fact that we had much greater numbers than were being used for settlement purposes. A lot of that had to do with the risk of going forward. Obviously, the other side knew there was a risk because of everything that we had presented. You will recall that prior to our settlement meeting, there had never been any offer from Mr. McKay's attorney for any settlement. It had been the position of your husband that essentially everything was his except for the home.

I believe that there is an agreement and that the other side could sue you to enforce the agreement. However, someone may disagree and think that you can get out of the agreement. It has been my practice that if a client makes an agreement, I will not stay in the case if they are going to try to get out of the agreement that was made. That was the purpose of the comment that I made. It obviously was not because I am in any way angry or upset with you.

Settling cases is usually more difficult than simply going to trial.

I do want only the best for you and appreciate your comments about the good work that you think we have done in this matter. We are trying to get the best possible language for you in a final document.

Very truly yours,

Dictated by Mr. Welsh and mailed
without signature in his absence
to avoid delay

Stanley W. Welsh

SWW/rfl

19458-001 Doc#: 282291

FILE COPY

Stanley W. Welsh

From: Stanley W. Welsh
Sent: Monday, November 05, 2007 12:28 PM
To: 'Patricia McKay'; Thomas G. Walker
Subject: RE: McKay Update?

See below:

From: Patricia McKay [mailto:patmckay@clearwire.net]
Sent: Monday, November 05, 2007 12:25 PM
To: Stanley W. Welsh; Thomas G. Walker
Subject: McKay Update?

Thank you for your letter last week. I appreciated receiving it.

I do not know what's happening. The last time we visited you expressed you were going to try to meet with Darwin's attorneys to finalize everything instead of papers going back and forth. However, I do not know what approach you are going to be taking. I definitely do not want to have to claim the funds from Darwin, whether they are the funds he pays toward the home of \$640,000 +/- or the \$2,500.00 to me per month, or the \$800,000 or \$500,000 to be alimony as I do not want to have that tax burden. The judge wrote it as maintenance. You had expressed you are not buying any of the changes they made. //I believe the \$2500 was clearly to be maintenance. I do not know what you mean about buying any other changes. We are not agreeing to any material change from what was signed.

Darwin is taking advantage of what the Judge wrote in item 3) "Husband to assume and pay off (either directly or by payments to wife) the wife's credit card indebtedness as of this date on 6 credit cards, to be scheduled, to approximately total balance of \$75,000." My understand of the payments to wife means I receive the entire full amount due on the cards at signing of this settlement and I make the payments as I would not trust Darwin to make the payments now do I want him to have my credit card numbers. His name is not on any of my cards.//I think he has a right to pay off directly.

I did talk with Jackie Grant who Darwin started a new LLC with October 24th. I gave her my condolences for the loss of her husband. I also asked her if she had purchased property from Darwin. After several humms and haaaas, and pauses and mention of her having to look after her interests now that George was gone, she said, "Perhaps you should talk with Darwin about that." It was a dead give-a-way to me that indeed she had purchased the land. Stan, perhaps you could use this as a battering tool when is your discussions with Kim or John as I still feel Darwin had an obligation to be upfront to disclose everything and he did not. He and Jackie have probably decided to make closing after the signing of the divorce settlement. So be it. He is a liar and a theft in my eyes and others and I do not trust him at all.//I have dictated a letter to Miller on this.

When all is said and done I understand you'll be placing liens on his property. Can liens be placed on the properties that are owned by the various LLC?
 //We will record the judgment. It will be a lien against any real property owned by him. If he does not perform you can execute on any assets he owns. That would include the LLC interests.
 I received your invoice dated 10/25/07 for the amount of \$111,339.59. At the settlement talks I had asked you if \$100,000.00 would cover my attorney fees and you stated you thought it would.//I do not know if you spoke with Tom about this issue. I was present for no conversation like that on the Saturday. I would not have known how much we would have to do after settlement on these issues. Now Darwin and his counsel are dragging their feet and causing additional work on your part and attorneys fees for me. I do not feel this is fair for them to do. Darwin is very much aware I do not have any funds and he wants me to starve and by dragging this on. I know him very well.

Today is the 5th and I've not received the \$3,000.00 which was due to me on the 1st. //I just saw a fax of a check to you for November How am I to pay the mortgage? Darwin, no doubt, is hoping I'll pay the mortgage this month

11/5/2007

and he'll not have to. Or, he's hoping I'll not pay it and it will be late to affect my credit rating. The funds to pay the mortgages off need to come directly to me by the 1st of each month as indicated so I can make sure they are paid timely so as not to affect my credit rating.

Also, I received another invoice from Harris and Co. for \$1,590.61 of which Darwin was asked to pay by you sending him the invoice to his attorney several months ago. This is part of the fees due for preparation of 2005 taxes.//Send me the invoice.

When we had our mediation talks I was under the impression all was going to be settled by the end of October.//I am not sure where you got the impression. We did what we could do by then. We are pressing them to respond. I cannot understand why there isn't some sort of requirement by Judge McKee that all is signed within a reasonable period of time. Two weeks is not reasonable to me when all was agreed October 20 and we had a written agreement to them within two business days. Brooks and Miller are not paying fair and directing Darwin properly in my eyes.

//We can now ask the Judge arbitrate if you want to expedite the settlement. I assume from your comments that you do not want to try to get out of the settlement?

Thank you for listening. Perhaps things will happen this week.

Patty

11/5/2007

Stanley W. Welsh

From: Patricia McKay [patmckay@clearwire.net]
Sent: Wednesday, November 07, 2007 12:50 PM
To: Stanley W. Welsh
Subject: RE: Settlement issues

Between October 20 and November 5 I have charged \$167.72 for food and gas for the car. I am willing to pay these myself but he needs to pay off my cards completely. That was the deal. No payments over the next several months as they made as a change. If he needs to pay over time he can take draws on his own cards to pay mine off as I did to pay Donna's credit cards off.

Thank you.

From: Stanley W. Welsh [mailto:swelsh@CoshLaw.com]
Sent: Wednesday, November 07, 2007 12:08 PM
To: Patricia McKay; Thomas G. Walker
Subject: RE: Settlement issues

The deal should all be as of the time it was signed. That would include the credit cards. Did you just charge something he was to have paid after that date?

COBRA is not his option. Any employer with 20 or more employees has to comply with COBRA.

From: Patricia McKay [mailto:patmckay@clearwire.net]
Sent: Wednesday, November 07, 2007 9:47 AM
To: Stanley W. Welsh; Thomas G. Walker
Subject: Settlement issues

Thank you for a copy of the email you sent to opposing regarding resolving settlement by Friday.

I'm writing this to add to your thought process of dealing with the opposing counsels and Darwin.

I received the check for \$3,000.00 Darwin wrote out November 1. Since he wrote the check out November 1st I find it to be an indication he did not have any intentions of resolving or signing the settlement so as to give himself another month of not paying the mortgages of \$3,800.00 and \$2,500.00 maintenance to me, a total of \$6,300.00, a savings to him of \$3,800.00. Meantime, I'm having to draw on my credit cards to live and pay on the mortgages. Another indication Darwin does not want to pay the mortgages, and his counsel has not inquired, is that they have not requested balances due on the two mortgages so as to pay them on time.

I gave the debt balances on the credit cards, \$71,248.30, to opposing at the settlement talks. These balances have changed since I have had to draw on them to pay monthly expenses. Judge McKee wrote.... "approximately total balance of \$75,000.00." At the present time the balances are \$77,160.54. May the amount due at the signing of the final settlement be what Darwin is required to pay since Judge McKee wrote "approximately \$75,000.00"? Since these are not getting paid off by November 10 there will be substantial finance fees.

If we need to get Judge McKee involved again we need to have the COBRA insurance added which Tom Walker did but Kim Brooks took it out. I have called COBRA and they told me it is a State Law I am entitled to COBRA for 36 months however Darwin needs to send the information in to COBRA and the COBRA representatives send the sign-up forms to me.

Hope this information assists you in your visits with Kim Brooks and John Miller.

11/7/2007

Stanley W. Welsh

From: Patricia McKay [patmckay@clearwire.net]
Sent: Wednesday, November 07, 2007 10:02 AM
To: Stanley W. Welsh
Subject: RE:

If Kim answered "YES" to the questions you put before her below, she is not correct. Darwin has not done paid the mortgages nor has he done everything he agreed to do.

Thank you.

From: Stanley W. Welsh [mailto:swelsh@CoshLaw.com]
Sent: Wednesday, November 07, 2007 8:29 AM
To: Patricia McKay
Cc: Thomas G. Walker
Subject: FW:

From: Kimberly D. Brooks [mailto:kbrooks@kbrookslaw.com]
Sent: Wednesday, November 07, 2007 8:34 AM
To: Stanley W. Welsh
Subject: RE:

Yes.

BROOKS LAW, P.C.
Kimberly D. Brooks
THE LOCKMAN HOUSE
23 9th Avenue North
Nampa, Idaho 83687
Tel: (208) 442-7489
Fax: (208) 468-4030

From: Stanley W. Welsh [mailto:swelsh@CoshLaw.com]
Sent: Wednesday, November 07, 2007 7:02 AM
To: kbrooks@kbrookslaw.com; John Miller
Cc: Patricia McKay; Thomas G. Walker
Subject:

If we do not have the terms resolved by Friday, I believe the matter has to be submitted to Judge McKee to resolve. I assume your client is doing everything he agreed to do? Paying the home debt, etc?

Confidentiality Notice:

This email and any files transmitted with it are confidential and intended solely for the use of the individual or entity to which they are addressed. If you are not the intended recipient you are notified that disclosing, copying, distributing or taking any action in reliance on the contents of this information

11/7/2007

Cc: Thomas G. Walker

There were some complicated details to resolve. I know you are frustrated. I do not think you sending emails to the other attorney will help us to get this finalized.

You do not have a basis to ask him to pay your fees.

11/13/2007

000036CH01919

Stanley W. Welsh

From: Stanley W. Welsh
Sent: Friday, April 18, 2008 6:06 AM
To: 'Patricia McKay'
Cc: Thomas G. Walker
Subject: RE: Please do not close McKay files.

We will not close the file. Nothing was overlooked.

From: Patricia McKay [mailto:patmckay@clearwire.net]
Sent: Thursday, April 17, 2008 10:42 PM
To: Stanley W. Welsh
Subject: Please do not close McKay files.

Hello Stan,

I received your letter regarding closure of my case file and you asked me to notify you if I feel something may need to be done further.

I would prefer closure not happen at this time as Darwin has not followed the Divorce Decree in several areas.

1. The 2161 credit card has not been paid off.
2. The Status March final payment did not happen. I was notified of this by Rene Paige, Darwin's real estate agent, last Friday. I took notes as fast as I could of what she was telling me and something does not set right. She said she would give me the written proof of Status not closing on Monday but Monday came and went with no further word from her. If Status defaulted Darwin was to place the property on the market for sale and this has not been done as there are no signs on the property.
3. Rene told me Darwin does not have any money to pay me and he wants to sign over a \$300,000.00 note at 6+% over 15 years. This would be foolish for me to do however I did not indicate that to her – I just listened. I told her to have Darwin write down all scenarios and I would consider.
4. I was also told Darwin was investigating purchasing a lot at \$200,000.00 last fall. I do not know for fact if he did so but if he did then he did so to hide funds.

I do not feel I should do anything until the April 30th date passes to see if he does give me the \$500,000.00. If he does not then he has until September 30. If he does not give me the funds by September 30 then he'll need to give me the full \$800,000.00 plus 6% interest. In the meantime, he now has until 2012 to pay off my home. This financially cripples me. This is an issue I believe we all overlooked which gives me cause for concern because over the next five years I am unable to invest or purchase anything of value. This does not seem at all fair to me and again, as I said, I believe we all overlooked this fact.

Darwin may take the approach to pay me \$2,500.00 until forever since there is no deadline to pay me the \$800,000.00 should he not pay me the \$500,000.00 by September 30. Should this happen then I will be in touch with you as this definitely is not a fair decree for me.

Due to all of the above I would ask that you hold up on closing and discarding my data with your firm until we see what happens after the September 30, 2009 deadline.

I did enjoy working with you and your team. Life has settled down a bit for me and I'm enjoying being back at work with Global Travel again. They have me working on a very large group (about 160 plus people – an entire company) for a cruise on a new ship January 2009 and the company has asked that I travel with them. Exciting!

I have noticed Darwin has paid you the \$25,000 each month and I certainly hope that this month he paid the final payment to you. Thank you for your assistance in that matter.

Again, I appreciated your teamwork,

Thank you,

COSHO HUMPHREY, LLP

COUNSELORS & ATTORNEYS AT LAW
PO Box 9518 83707-9518
800 Park Blvd., Suite 790
Boise, Idaho 83712

STANLEY W. WELSH
swelsh@cosholaw.com

Telephone 208.344.7811
Firm Fax 208.338.3290
www.cosholaw.com

December 18, 2008

Patricia E. McKay
25 Horizon Drive
Boise, ID 83702

Re: Post Judgment - Patricia E. McKay v. L. Darwin McKay
CH File No.: 19458-002
Case No.: CV DR 0615200

Dear Patricia:

Enclosed for your review and file is the letter sent to Ms. Brooks today. I know that you are going to determine what assets you believe are in Nevada. I think that before we finalize any course of action, we need to know what all assets may be available to satisfy any judgments that you obtain.

Contact me if you have any questions.

Very truly yours,

Dictated by Mr. Welsh and mailed
without signature in his absence
to avoid delay

Stanley W. Welsh

SWW/rfl

COSHO HUMPHREY, LLP

COUNSELORS & ATTORNEYS AT LAW
PO Box 9518 83707-9518
800 Park Blvd., Suite 790
Boise, Idaho 83712

Telephone 208.344.7811
Firm fax 208.338.3290
www.cosholaw.com

STANLEY W. WELSH
swelsh@cosholaw.com

December 18, 2008

Via fax: 468-4030

Kimberly D. Brooks
Brooks Law, P.C.
23 9th Ave. North
Nampa, ID 83687

Re: Post Judgment - Patricia E. McKay v. L. Darwin McKay
CH File No.: 19458-002
Case No.: CV DR 0615200

Dear Kim:

I reviewed the letter that you sent to Tom Walker on April 23, 2008. Is that the offer that you were referring to in our phone conversation?

As you know, there is \$800,000 due. How does Darwin propose to pay that at this time? I do not see how the documents show that Darwin has \$300,000 due to him from Van Es. Are there other documents on this transaction?

I look forward to hearing from you at your earliest convenience to see if we can resolve this matter.

Very truly yours,

Dictated by Mr. Welsh and mailed
without signature in his absence
to avoid delay

Stanley W. Welsh

SWW/rfl
cc: Patricia E. McKay

19458-002 Doc.#: 404979

MCKAY 2790

000039

Stanley W. Welsh

From: Stanley W. Welsh
Sent: Monday, December 22, 2008 6:19 PM
To: Patricia McKay
Cc: Thomas G. Walker
Subject: RE:

If you have to ask whose interest we were looking out for you need another lawyer. You know that was the best agreement we could reached and was better than we and you believed we would have received from a judge.

From: Patricia McKay [mailto:patmckay@cablone.net]
Sent: Mon 12/22/2008 5:25 PM
To: Stanley W. Welsh
Subject: RE:

What do you mean "They would not agree to any security?" Stan, I was never told that and besides, who were you working for and looking after whose interests... Sounds like you were looking after Darwin's interest and not mine by not securing the liens. I'm sorry, but I'm not a happy camper. If a lien had been placed, as I was told they were, Lawyers would have picked up on it and at least asked you and I some questions and written me a check. We would not be going through all this now.

From: Stanley W. Welsh [mailto:swelsh@CoshLaw.com]
Sent: Monday, December 22, 2008 5:02 PM
To: Patricia McKay; Thomas G. Walker; Pam Carson
Subject: RE:

Tom has responded except with regards to the security question. They would not agree to any security. The only thing we could do was to record the judgment.

From: Patricia McKay [mailto:patmckay@cablone.net]
Sent: Monday, December 22, 2008 2:59 PM
To: Thomas G. Walker; Stanley W. Welsh; Pam Carson
Subject:

I sent the following to Stan this morning but understand he has been in court all day. Pam suggested I send my emails to the 3 of you. So here goes again. I am very curious if a conversation has occurred with Kim Brooks after her receiving your 'demand' letter.

Thank you for sending the second letter to Kim Brooks – very well done.

As you start your discussions with Kim Brooks, Darwin probably needs to be reminded of Item 17, Attorney Fees, of the Decree.

Also, Section 2.1 which we did not mention in the letter "..... Darwin shall pay off the full amount of Personal Residence Debt directly to the respective mortgage companies within thirty (30) days of the date the Status Real Estate Transaction closes, or within thirty days of receipt of any funds from the sale of either the Albrethsen property,"

What is your timeline?

When do you make the next step and what would that be? (I realize Tom is out of the office until Jan. 7)

When do you cease talking with Kim and filing contempt charges against Darwin?

At the end of the divorce proceedings I had asked for liens to be placed on Darwin's property here in Idaho. I understood from your office that "recording the Decree" in the various counties (Teton, Ada, Murphy/Owyhee) was the same as a Lien. I really do not fully understand why Lawyer did not find the Judgment if a lien was filed in Ada County. I am now concerned about Teton, Murphy, and Owyhee counties -- were liens filed there so we won't run into the same problem? Did your office fail to secure my interests in the Idaho properties Darwin owned?

One of the items Alliance Title gave me was a "Mortgage, Security Agreement and Fixture Filing which was recorded in Ada County 12/1/06 and mentions Darwin McKay as well as the \$1,396,800.00. I looked thoroughly through the Status file Darwin gave us and he did not include this. However, his signature is not on it. It appears Darwin knew about the insurance and knew he'd be able to collect if Status defaulted. Problem may be: though there are lines for Darwin to sign -- his signature does not appear.

I did understand the Decree not being filed in Nevada as we needed a Nevada attorney. To protect my interests in Nevada shall I work on obtaining an attorney and having them work on placing liens on those properties between now and the first of the year?

I feel we need to proceed the fastest and direct, hard approach toward Darwin as I cannot afford a huge attorney bill. Why can't we file "contempt charges" now as we also wait for Kim Brooks to reply?

I realize Tom will be gone until the 7th. Stan, will you be around working on this?

Thank you,
Patty

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!SIG:495030a4182721744316377!

19458.002

Pam Carson

From: Thomas G. Walker
Sent: Tuesday, December 23, 2008 7:16 AM
To: Stanley W. Welsh
Cc: Pam Carson
Subject: RE:

I agree. We did everything we could, including recording the judgment.

From: Stanley W. Welsh
Sent: Mon 12/22/2008 6:22 PM
To: Patricia McKay
Cc: Thomas G. Walker
Subject: RE:

In light of your other email, I am not sure you want us to proceed with this matter.

From: Patricia McKay [mailto:patmckay@cableone.net]
Sent: Mon 12/22/2008 5:21 PM
To: Stanley W. Welsh
Subject: RE:

Please see below

From: Stanley W. Welsh [mailto:swelsh@CoshLaw.com]
Sent: Monday, December 22, 2008 4:58 PM
To: Patricia McKay
Cc: Thomas G. Walker
Subject: RE:

We can file when you want. If you want to try to resolve, I would wait at least until after the holidays. We gave them the chance to resolve by issuing the demand letter. Please file as I feel we are wasting time and \$\$\$\$\$. Remember it took 6 weeks of debating and trying to come to a resolve after the settlement meeting October 20. Then I had to pay an additional \$20,000.00 which I am still paying on.

I do not know Kim's schedule. Kim is in her office until Christmas Eve Day and then in and out until January 5, then back to a regular schedule. I called her office and asked what her holiday schedule was without identifying myself. There is no reason for her not to have attempted to contact you.

You can work on the liens. I will work on the liens for Nevada. Your office was to have placed liens on all Idaho properties when I signed the Decree. Did your office secure my Decree by doing so?

I would like to try to find out as much as we can about all of his properties before we file. Don't attorneys have more pull than I about finding out what properties a person has? Should I try to contact the people whom he's buying the Murphy property from? I believe the Hulets?

Thank you,
Patty

From: Patricia McKay [mailto:patmckay@cableone.net]
Sent: Monday, December 22, 2008 7:40 AM
To: Stanley W. Welsh
Subject:

Thank you for sending the second letter to Kim Brooks – very well done.

As you start your discussions with Kim Brooks, Darwin probably needs to be reminded of Item 17, Attorney Fees, of the Decree.

Also, Section 2.1 which we did not mention in the letter "..... Darwin shall pay off the full amount of Personal Residence Debt directly to the respective mortgage companies within thirty (30) days of the date the Status Real Estate Transaction closes, or within thirty days of receipt of any funds from the sale of either the Albrethsen property,"

What is your timeline? When do you cease talking with Kim and filing contempt charges against Darwin? I feel we need to proceed the fastest and direct, hard approach toward Darwin as I cannot afford a huge attorney bill.

I realize Tom will be gone until the 7th. Stan, will you be around working on this? And do we know if Kim will be around during the holidays to work on this?

Should I work on filing liens on the Nevada properties? Or, would you folks prefer to work with the attorney in Reno, Gary Silverman?

Thank you,
Patty

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!SIG:49502fc5182726348334671!

Stanley W. Welsh

From: Stanley W. Welsh
Sent: Monday, December 22, 2008 4:58 PM
To: 'Patricia McKay'
Cc: Thomas G. Walker
Subject: RE:

We can file when you want. If you want to try to resolve, I would wait at least until after the holidays.

I do not know Kim's schedule.

You can work on the liens.

I would like to try to find out as much as we can about all of his properties before we file.

From: Patricia McKay [mailto:patmckay@cableone.net]
Sent: Monday, December 22, 2008 7:40 AM
To: Stanley W. Welsh
Subject:

Thank you for sending the second letter to Kim Brooks – very well done.

As you start your discussions with Kim Brooks, Darwin probably needs to be reminded of Item 17, Attorney Fees, of the Decree.

Also, Section 2.1 which we did not mention in the letter "..... Darwin shall pay off the full amount of Personal Residence Debt directly to the respective mortgage companies within thirty (30) days of the date the Status Real Estate Transaction closes, or within thirty days of receipt of any funds from the sale of either the Albrethsen property,"

What is your timeline? When do you cease talking with Kim and filing contempt charges against Darwin? I feel we need to proceed the fastest and direct, hard approach toward Darwin as I cannot afford a huge attorney bill.

I realize Tom will be gone until the 7th. Stan, will you be around working on this? And do we know if Kim will be around during the holidays to work on this?

Should I work on filing liens on the Nevada properties? Or, would you folks prefer to work with the attorney in Reno, Gary Silverman?

Thank you,
Patty
!SIG:494fa74f264832093919311!

Stanley W. Welsh

19458-002

From: Stanley W. Welsh
Sent: Saturday, December 27, 2008 7:52 AM
To: Patricia McKay
Subject: RE: McKay

Ok I will not do anything else until I hear from you.

From: Patricia McKay [mailto:patmckay@cableone.net]
Sent: Fri 12/26/2008 3:02 PM
To: Stanley W. Welsh
Subject: RE: McKay

Yes please, thank you.

From: Stanley W. Welsh [mailto:swelsh@CoshLaw.com]
Sent: Friday, December 26, 2008 1:33 PM
To: Patricia McKay
Subject: RE: McKay

I dictated a contempt affidavit after we spoke. Do you want me to hold on doing anything else?

From: Patricia McKay [mailto:patmckay@cableone.net]
Sent: Fri 12/26/2008 9:24 AM
To: Stanley W. Welsh
Subject: McKay

I am leaving town for a few days.

Please do not do anything on my case unless Kim Brooks calls to inform us they have a check waiting. The ball is in her park since we sent her the demand letter so there is no need for us to waste \$\$\$\$.

I definitely do not want the case re-opened as she requested.

I plan to be back in town January 5 but will be checking my email for notification Darwin and Kim have a check for us. People staying at my home will also be checking my mail.

Thank you.

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STANLEY W. WELSH
swelsh@cosholaw.com

January 8, 2009

VIA E-MAIL: ^{/fs}patmckay@cableone.net

Patricia E. McKay
25 Horizon Drive
Boise, ID 83702

Re: Post Judgment - Patricia E. McKay v. L. Darwin McKay
CH File No.: 19458-002
Case No.: CV DR 0615200

Dear Patricia:

Enclosed you will find the letter dated January 7, 2009 that I received from Ms. Brooks. Pursuant to your prior instruction, we are still holding on any action. I will let you know if I hear anything further from Ms. Brooks.

Very truly yours,

Dictated by Mr. Welsh and mailed
without signature in his absence
to avoid delay

Stanley W. Welsh

SWW/rfl
Enc.

FILE COPY
19458-002 Doc#: 409334

BROOKS LAW, P.C.

Attorneys

Kimberly D. Brooks
Tessa J. Bennett

The Lockman House
23 9th Avenue North
Nampa, Idaho 83687

Support Staff

Stephanie Kalala-Kasanda, Paralegal
Tina Tena, Office Manager

January 7, 2009

Stanley W. Welsh
COSH O HUMPHREY, LLP
800 Park Blyd, Ste 790
Boise, Idaho 83707-9578

VIA FACSIMILE:
338-3290.


Re: *McKay v. McKay*
Case No. CV DR 0615200

Dear Mr. Welsh:

In response to your letter dated December 18, 2008, Mr. McKay is scheduled to meet with me on Friday, January 9, 2009 to discuss payment options.

Very truly yours,

Brooks Law, P.C.



Kimberly D. Brooks

Enclosure
McKay 891

kept fully apprised of what transpired in her divorce proceeding against Mr. McKay. The Plaintiff also received prompt responses to any emails and telephone calls which we received.

3. Prior to the October 20, 2007 mediation, I discussed the mediation with the Plaintiff. I informed the Plaintiff that the mediation was voluntary and that she was not obligated to accept any settlement proposed by Mr. McKay. I also explained that we could end the mediation at any time.

4. I attended the entire October 20, 2007 mediation, which lasted approximately 9 hours. At the mediation, Mr. McKay and his counsel were placed in one conference room while the Plaintiff and her counsel (me and Stanley Welsh) sat in another conference room. The mediator, the Honorable Duff McKee, traveled between the two conference rooms to discuss the mediation and settlement proposals with the parties. The subject of the mediation was the distribution of the property acquired by one or both of them during their marriage

5. Throughout the mediation, Mr. Welsh and I were available to the Plaintiff to discuss all aspects of the mediation. In fact, we discussed each facet of the settlement negotiations with the Plaintiff, including the pros and cons of settling versus going to trial. We also answered numerous questions administered by the Plaintiff regarding Mr. McKay's settlement proposals.

6. The Plaintiff was an active part of the settlement negotiations. Not only did she discuss the negotiations with me and Mr. Welsh, she also discussed the negotiations with Judge McKee and presented Judge McKee with questions and comments regarding the settlement proposals.

7. There was downtime during the mediation when Judge McKee was meeting with Mr. McKay and his counsel. While Judge McKee met with Mr. McKay, there were times when

Mr. Welsh and/or I temporarily stepped out of the conference room and went to our respective offices. However, this did not occur until after we had fully discussed a particular round of settlement negotiations with the Plaintiff and fully addressed the concerns and/or questions she presented. Before leaving the conference room, Mr. Welsh and I informed the Plaintiff that she could and should walk the few feet to our offices if she thought of any additional questions or concerns. The Plaintiff came to my office on at least one such occasion. Although, Mr. Welsh and I temporarily stepped out of the conference room, we were present in the conference room each time Judge McKee returned to discuss the pending settlement negotiations.

8. During the mediation, Mr. Welsh and I informed the Plaintiff that settling the case was optional, not mandatory and, if she did not agree with any proposed settlement, she was not obligated to accept the same. We also informed her we could end the mediation at any time if she was uncomfortable with the negotiations. We further stated if settlement was not reached, we would aggressively pursue the outstanding motion for summary judgment and would happily try her case.

9. At the mediation, neither Mr. Welsh nor I pressured the Plaintiff to settle her divorce action. Instead, we fully discussed the pros and cons of settling versus going to trial and the pros and cons of accepting the settlement terms set forth in the handwritten settlement agreement which was drafted by Judge McKee ("Handwritten Agreement").

10. Judge McKee explained to the Plaintiff, Mr. Welsh, and me that Mr. McKay was unwilling to provide any collateral or security for his payment obligations under the Handwritten Agreement.

11. At the mediation, the Plaintiff, Mr. Welsh, and I also discussed the facts that Mr. McKay did not own the Albrethsen property and, instead, only held a mortgage on the property.

12. Judge McKee presented the Plaintiff with a copy of the Handwritten Agreement and provided her time alone with her counsel (me and Mr. Welsh) to review and discuss the same. Mr. Welsh and I discussed each provision of the Handwritten Agreement with the Plaintiff. After we addressed all of the Plaintiff's questions, she represented she understood the terms of the Handwritten Agreement and she understood the implications of executing the Handwritten Agreement. The Plaintiff also informed us she understood that, although the terms of the Handwritten Agreement were to be incorporated in a final comprehensive settlement agreement, she was bound by the property distribution set forth in the Handwritten Agreement.

13. At the time she executed the Handwritten Agreement, the Plaintiff represented she was voluntarily executing it.

14. I prepared a draft Property Settlement Agreement ("PSA") after the October 20, 2007 mediation. My office provided a copy of this draft to the Plaintiff and Mr. McKay's counsel on October 23, 2007. Negotiations ensued regarding the content of the PSA between my office and Mr. McKay's counsel. Throughout these negotiations, several drafts of the PSA were created.

15. The Plaintiff received at least four drafts of the PSA. She provided several comments to me regarding the PSA language and requested changes be made to the same. I addressed each of the Plaintiff's comments and shared her requested changes with Mr. McKay's counsel.

16. A final draft of the PSA was distributed by me to the Plaintiff and Mr. McKay's counsel on November 19, 2007. This final draft of the PSA was the result of the negotiations and agreements reached between Mr. McKay and the Plaintiff.

17. Although I requested, on behalf of the Plaintiff, that Mr. McKay provide collateral and/or security for his payment obligations under the PSA, I was informed by Mr. McKay's counsel that Mr. McKay was unwilling to do so.

18. Between October 22, 2007 and November 20, 2007, I had extensive conversations, via email, telephone, and office conference, with the Plaintiff regarding the PSA. My office promptly responded to all comments we received from the Plaintiff regarding the same.

19. On November 20, 2007, I met with the Plaintiff. I presented her with a hard copy of the final PSA (which I emailed to her on November 19, 2007). I provided the Plaintiff with time to review the PSA and we again discussed the content of the same. I informed the Plaintiff, if she was uncomfortable with any aspect of the PSA, we could invoke the arbitration provision contained in the Handwritten Agreement. I also informed the Plaintiff that both she and Mr. McKay were bound by the terms of Handwritten Agreement. In response, the Plaintiff represented that she understood and agreed with the PSA terms. At the time she executed the PSA, she informed me that she was voluntarily executing it.

20. After the trial court entered its Judgment incorporating the PSA on November 29, 2007, my office recorded the Judgment in several Idaho counties, including Ada, Murphy, Owyhee, and Teton. I asked the Plaintiff if there were additional counties where the Judgment should be recorded, however, she no additional counties.

21. I informed the Plaintiff that she would need to hire Nevada counsel to have the Judgment recorded in Nevada as neither Mr. Welsh nor I were licensed to practice in Nevada and we were unfamiliar with the requirements to record a judgment in Nevada. It was my understanding that the Plaintiff was going to contact Nevada counsel regarding the same.

22. The Plaintiff contacted me in September 2008 because Mr. McKay had not paid sums due under the PSA. At that time, the Plaintiff and I discussed whether to pursue a motion for contempt or to attempt to collect the sums without court involvement. Because the Plaintiff stated that she was worried Mr. McKay would stop making his monthly alimony payments if further court proceedings were initiated, she wanted to pursue the latter option. The Plaintiff was adamant that she did not want to pursue a motion for contempt. As such, we contacted Mr. McKay's counsel and secured a January 2009 meeting to discuss Mr. McKay's non-payment. A few months later the Plaintiff decided that she wanted to pursue a motion for contempt. As such, Mr. Welsh began work on the motion for contempt.


23. During Cosho Humphrey's representation of the Plaintiff, I informed the Plaintiff that the judgment ultimately received in her divorce action (whether via settlement or after trial) could be recorded in all the Idaho counties where Mr. McKay owned real property and that recording of the same would create a lien on these properties. I did not tell the Plaintiff that recording a judgment would create a lien on a mortgage. The Plaintiff did not tell me that she mistakenly believed that Mr. McKay's mortgage not constituted real property.

24. Enclosed as Exhibit "A" are true and correct copies of correspondence between me and the Plaintiff.

25. Enclosed as Exhibit "B" is a true and correct copy of excerpts from the transcript of the Deposition of Darwin McKay which I took on September 27, 2007 in the underlying suit.

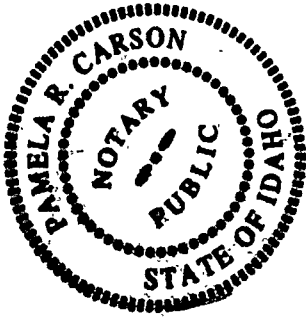
26. Enclosed as Exhibit "C" is a true and correct copy of the Reporter's Transcription of Proceedings for the July 16, 2009 Court Trial before Judge Reardon in *McKay v. McKay*, Case No. CV DR 2006-0015200, in the Magistrate Court of the Fourth Judicial District of the State of Idaho, in and for the County of Ada, which I received from the court reporter.

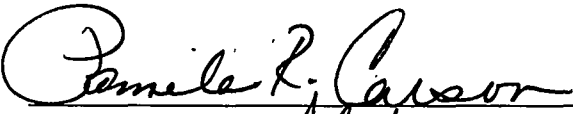
Further your Affiant saith not.



Thomas Walker

SUBSCRIBED AND SWORN to before me this 5th day of January, 2011.





Notary Public for Idaho
Residing at East Idaho
My commission expires: 3/31/2016

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this 6th day of January, 2011, I served a true and correct copy of the foregoing by delivering the same to each of the following attorneys of record, by the method indicated below, addressed as follows:

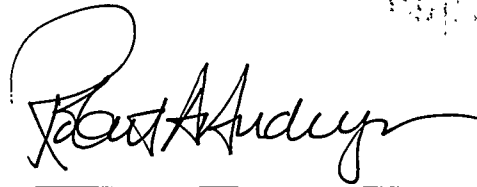
Allen B. Ellis
ELLIS, BROWN & SHEILS,
CHARTERED
707 North 8th Street
P.O. Box 388
Boise, Idaho 83701-0388
Telephone: (208) 345-7832
Facsimile: (208) 345-9564

☐ U.S. Mail, postage prepaid
☒ Hand-Delivered
☐ Overnight Mail
☐ Facsimile

Kevin E. Dinius
Michael J. Hanby II
DINIUS LAW
5680 E. Franklin Rd., Suite 130
Nampa, Idaho 83687
Telephone: (208) 475-0100
Facsimile: (208) 475-0101

☒ U.S. Mail, postage prepaid
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☐ Overnight Mail
☐ Facsimile

Attorneys for Plaintiff



Robert A. Anderson
Yvonne A. Dunbar

Exhibit A

Pam Carson

From: Thomas G. Walker
Sent: Thursday, October 18, 2007 11:26 AM
To: Patricia McKay
Cc: Stanley W. Welsh; Melissa Wolfe; Pam Carson
Subject: RE: McKay - Conversation w/Gene Thurston

Patty: Have you provided Gene with the latest version of the Community Property Financial Statement? If not, you should because we did not rely exclusively on the May 2007 Combined Financial Statement of the Companies. I will discuss your comments with Stan and we'll get back to you.

Thomas G. Walker
Cosho Humphrey, LLP
800 Park Blvd., Suite 790
PO Box 9518
Boise, ID 83707-9518
Direct phone: 208-639-5607
Direct fax: 208-639-5609
E-mail: twalker@cosholaw.com
Blog: www.ricolawblog.com
RICO web site: www.thomasgwalker.com

From: Patricia McKay [<mailto:patmckay@clearwire.net>]
Sent: Thursday, October 18, 2007 9:49 AM
To: Thomas G. Walker
Subject: McKay - Conversation w/Gene Thurston

I just visited with Gene Thurston on the phone about this Combined Balance Sheet of May 2007. His thoughts were, "something is not correct there because as of 2003 when I was working on all the financing and when the properties were valued at \$22,000/acre the net worth was \$11,000,000.00. 50% of that is yours Patty and technically I feel you are due blue sky too. Since Darwin sold the property for over \$100,000.00/acre the net should be at least half again the \$11,000,000.00."

I told Gene I may be lucky to walk away with the house and two million. He said, "No, don't do that – that would not be even close to fair. I'll tell you what, if you subpoena my records I'll show all I have and the values as of 2003 and then they should add the values of what he sold the land for. My records are very clear and precise."

Gene said it sounds like Darwin has omitted property and funds on the Balance Sheet assuming it is all his and none of it belongs to you or part of the settlement or even part of the business.

Gene and I ended our conversation with Gene saying, "Patty, this conversation never happened, but I will support you with the evidence, just have Tom subpoena me."

Tom, if things do not work out Saturday and Darwin is not forthright with the values, then I believe if we subpoena Gene's records and further take his deposition we could obtain a very similar financial review from him as Neil Salathe did. It would just be done under deposition and documents. Or, instead of doing a subpoena, take Gene's deposition asking him to bring all his documents.

Your thoughts please....

Melissa Wolfe

From: Thomas G. Walker
Sent: Monday, October 22, 2007 3:57 PM
To: Patricia McKay; Stanley W. Welsh
Cc: Melissa Wolfe; Pam Carson
Subject: RE: McKay Subpoena Replies to Come

We will not be able to enforce the subpoenas since a settlement has been reached.

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From: Patricia McKay [mailto:patmckay@clearwire.net]
Sent: Monday, October 22, 2007 3:59 PM
To: Thomas G. Walker; Stanley W. Welsh
Subject: McKay Subpoena Replies to Come

Heads up -

We recently sent subpoenas to Zions Bank and US Bank for Darwin's records. I would like to still receive the responses from the banks, especially Zions. I think it may be critical to know what he is doing since he may be requesting new banking or to find out why he is requesting loans from Zions. We have already made the requests and incurred that cost anyway.

Darwin used our home address as his address with Zions. I just received the notice the bank sent him notifying him a subpoena had been issued.

I question why he is using 25 Horizon Drive and not his business address or his own home address. Something is not right here. Perhaps we'll find out when Zions reply to Cosho.

Thank you.

10/23/2007

Pam Carson

From: Thomas G. Walker
Sent: Tuesday, October 23, 2007 10:46 AM
To: Patricia McKay
Cc: Stanley W. Welsh; Melissa Wolfe; Pam Carson
Subject: RE: McKay Settlement Agreement

I will change the payoff of the credit card debts to November 5th.

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From: Patricia McKay [mailto:patmckay@clearwire.net]
Sent: Tuesday, October 23, 2007 10:49 AM
To: Thomas G. Walker
Subject: RE: McKay Settlement Agreement

To avoid Darwin having to pay 18% interest on the credit card ending [REDACTED] at \$46,327.00 this amount must be received by Visa by November 10. If he is able to deposit those funds into my [REDACTED] account by November 1, I will be able to transfer those funds to the card within 5 business days to avoid the finance charges. (The bank requires 5 days to make sure the funds clear before I'm allowed to draw the funds out.) The same thing will apply to the Bank of America card 0232 of \$22,845.13. This card interest rate is 2.99% so I'm not as concerned about it.

I just know how Darwin procrastinates on paying so he should be required to pay the additional finance fees if I'm not able to pay the \$46,327.00 off by November 10.

Thank you.

From: Thomas G. Walker [mailto:twalker@CoshuLaw.com]
Sent: Tuesday, October 23, 2007 10:29 AM
To: Patricia McKay
Cc: Stanley W. Welsh; Melissa Wolfe; Pam Carson
Subject: RE: McKay Settlement Agreement

I will add a provision requiring The Turf Corporation to meet the requirements of COBRA. See below for further comments.

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From: Patricia McKay [mailto:patmckay@clearwire.net]
Sent: Tuesday, October 23, 2007 10:25 AM
To: Thomas G. Walker
Subject: RE: McKay Settlement Agreement

Health Insurance was not covered Saturday at all. I've been on the phone with Regence Blue Shield Health Insurance. I've learned it is the responsibility of the Employer to set me up on Cobra and they have 60 days to do so.

Perhaps something needs to be in the Agreement covering them setting me up on Cobra or offering this to me.

SEE Below for clarification.

From: Thomas G. Walker [mailto:twalker@CoshLaw.com]
Sent: Tuesday, October 23, 2007 9:43 AM
To: Patricia McKay
Cc: Stanley W. Welsh; Melissa Wolfe; Pam Carson
Subject: RE: McKay Settlement Agreement

Patty:

We have intentionally not characterized any of the payments to you from Darwin as alimony. Under this approach all of the payments you receive will be property equalization payments and not subject to income taxes. Darwin may protest this approach. We'll have to wait and see. If Darwin insists that a portion of the payments be characterized as alimony, he will get a deduction for the alimony payments and you will have to include the amount of the payments as ordinary income. Darwin will not be able to deduct any of the payments under the proposed Property Settlement Agreement. Under current law, so long as you are paying the mortgage interest payments, you will be entitled to the interest deductions.// So does this mean he can take the interest deduction even though his name is not on the principal residence as your next sentence reads? Darwin can't qualify to deduct the home mortgage interest payments because the Personal Residence is not his principal residence.// so, who will claim the interest payments? Perhaps because the house is in my name, if Darwin protests, we can use this as leverage. // Under no circumstances pursuant to current law will Darwin be able to qualify to take the mortgage interest deductions because you will own the house. You and you alone will be entitled to the mortgage interest deduction, unless you convert the residence to an investment property. Stan informed me that you did not terminate the tenancy of the renters. You need to check with your accountant to determine whether renting rooms in you home has any effect on your qualification to take the mortgage interest deduction. It would seem that, in any event, you have rental income reportable as ordinary income on your tax return, but you need to rely on your accountant for that advice.

If he really protests, perhaps we can say he can have this deduction in exchange for him giving me Palace Resorts which I gave back to him in the first opening offer Saturday. I really should have kept that. // See above.

I will add the vehicles and motor home. Sorry I forgot those items. I will also add the house construction folder.

I plan on sending the drafts to Kim and John early this afternoon. So please complete your final review by Noon.

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From: Patricia McKay [mailto:patmckay@clearwire.net]
Sent: Tuesday, October 23, 2007 9:38 AM
To: Thomas G. Walker
Subject: McKay Settlement Agreement

I remember several years ago we had a problem with the IRS due to who claimed or whatever the alimony regarding Darwin's divorce from Donna as in their decree I don't believe it was covered.

Can this be covered in the "Property Settlement Agreement"? Under Item 8 regarding the taxes I see Darwin pays for tax preparations for 2005, 2006, and 2007 and received any and all tax refunds. If the house is not paid off March/April 2008, is he able to take all the interest paid on his future taxes after 2007 since he is going to be paying the mortgage. I will be working some and will need some tax write-off perhaps. If I am able to take the tax write-off of the mortgage interest payments then this would be additional incentive for him paying off the house ASAP.

What tax ramifications am I going to have when I receive the \$800,000.00? Again, referring to Darwin's previous divorce, it was stipulated a certain way so that Donna did not have to pay taxes on the funds she received.

I'd prefer not to find myself stuck to pay taxes on that much money, if there is a way in whether it is stated as property settlement or alimony. Perhaps this needs to be covered in the Agreement so we do not have to converse later. All I'd need to do is show this Agreement to the CPA I'll be using.

The vehicle transfers were not covered in this Agreement. Darwin has the motorhome and I am to receive it. When he took it to the business to store he was to make sure it was winterized. He needs to return it to me in working condition throughout. If he did not winterize it then repairs will need to be made to the water system due to freezing and pipes breaking. Can we please include "return of the motorhome to Patricia in excellent working condition as it was when he stored it."

I also need to have the "House construction folder with receipts, etc." returned to me. They were given this as a reply to one of the interrogatories. I need to have this returned to have proof of the construction and improvements done on the home for when/if I sell the home.

This is all I could find at the present. I'll read it through again in a couple hours to see if anything else pops up.

Pam Carson

From: Thomas G. Walker
Sent: Wednesday, October 24, 2007 6:45 AM
To: Patricia McKay
Cc: Stanley W. Welsh; Melissa Wolfe; Pam Carson
Subject: RE: Refer to 2.1.2 McKay

Patty:

I don't understand your concern. If you have sold the residence there are no taxes or insurance attributable to the residence for which you could be liable. It would be entirely inappropriate to try to charge Darwin for taxes and insurance on a property that you no longer own.

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From: Patricia McKay [mailto:patmckay@clearwire.net]
Sent: Wednesday, October 24, 2007 6:43 AM
To: Thomas G. Walker
Subject: RE: Refer to 2.1.2 McKay

See Below - I wrote in exactly where I am referring to in 2.1.2

From: Thomas G. Walker [mailto:twalker@CoshuLaw.com]
Sent: Wednesday, October 24, 2007 6:27 AM
To: Patricia McKay
Cc: Stanley W. Welsh; Melissa Wolfe; Pam Carson
Subject: RE: Refer to 2.1.2 McKay

Patty: You have to read the entire applicable portion of paragraph 2.1. It reads as follows:

Notwithstanding the foregoing, Patricia shall have the right to sell the Personal Residence at any time: in which case, the Personal Residence Debt would likely be paid off out of the sale proceeds. If Patricia sells the Personal Residence, Darwin shall pay directly to Patricia as a property equalization payment the unpaid principal balance of the Personal Residence Debt, plus interest accruing at the same rates called for in the first and second loan documents as follows:

2.1.1 If the Status Real Estate Transaction closes, Darwin shall pay off the full amount of the Personal Residence Debt to Patricia, within five (5) days of the date the Status Real Estate Transaction closes.

Sent: Wednesday, October 24, 2007 6:24 AM
To: Thomas G. Walker
Subject: Refer to 2.1.2 McKay

I believe your answer to me is in 2.1 at the end of the paragraph which I do understand. I think I may have made reference to the wrong paragraph.

Can you please read 2.1.2 again. This is in reference to if Status fails to close March 30 Darwin pays principal and interest but taxes and insurance is omitted until. It says principal and accrued interest to Patricia on or before October 20, 2012. I still read it as him not having to pay the taxes and insurance.

Can you please check this out again?

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Pam Carson

From: Thomas G. Walker
Sent: Friday, October 26, 2007 9:57 AM
To: Patricia McKay
Cc: Stanley W. Welsh; Melissa Wolfe; Pam Carson
Subject: RE: McKay undisclosed item

There was no deadline on when the documents were to be signed. I provided the documents to Darwin's attorneys on Tuesday. We will follow up for a status report on their review today

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From: Patricia McKay [<mailto:patmckay@clearwire.net>]
Sent: Friday, October 26, 2007 9:59 AM
To: Thomas G. Walker
Subject: McKay undisclosed item

What's happening? Will we be signing the final official papers today? I thought it all had to be completed in 5 days.

Dusty from Yerrington called here last night looking for Darwin. I asked a few questions and learned he had built the new shop for Darwin in Yerrington – something Darwin did not disclose as property worth at least \$100,000.00. I suspect I'll continue to discover things like this as time goes on.

Pam Carson

From: Thomas G. Walker
Sent: Tuesday, October 30, 2007 2:45 PM
To: Melissa Wolfe
Cc: Stanley W. Welsh; Pam Carson
Subject: FW: McKay Two Building Lots

Mel: Please print for file and file in Pro Law.

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From: Patricia McKay [<mailto:patmckay@clearwire.net>]
Sent: Tuesday, October 30, 2007 1:54 PM
To: Thomas G. Walker
Subject: McKay Two Building Lots

Thoughts I'd send you my thoughts in case you may be on the phone with opposing counsels negotiating the Property Settlement Agreement. I have concerns about the 2 lots as explained below.

I do not believe there is any good reason for the delay in this signing, other than allowing Darwin additional time to renegotiate the Status deal prior to the signing of this property settlement.

I picked up the Status file from your office so I could review it for clarification of the two building lots.

In Counter Offer 1, Item 5, of Exhibit 124, it reads: As additional compensation for the procurement and execution of this contract Seller shall retain ownership of two buildable lots with free and clear title in Seller's name. Phase and lots to be identified by Seller within 3 days of Preliminary Plat Approval and Seller shall have first right selection of said lots. In this sentence "procurement and execution of this contract" refers to the Albrethsen deal Darwin put together.

In the Property Settlement, Item 1.8 is written in such a way that it sounds like I would loose the two building lots if the Status deal falls. If the deal falls Darwin pays me \$500,000.00 instead of \$800,000.00 but I should not loose the two building lots. Status or assigns will still be conveying these two building lots to our estate which in the property settlement come to me. The two building lots should perhaps be addressed separately in the property settlement?

The building lots will each be worth at least \$100,000.00 and probably more when all is developed a few years from now.

I believe Darwin is and/or will do all he can to get out of paying me the full \$800,000.00. When dividing \$5,000,000.00 by 30 acres the price is \$166,666.00 per acre that Status will walk away from. That's a lot of money for the 30 acres and I can see where Status just may walk away.

I do not want to loose the two lots.

Thank you.

Pam Carson

From: Patricia McKay [patmckay@clearwire.net]
Sent: Tuesday, October 30, 2007 3:26 PM
To: Melissa Wolfe
Subject: RE: McKay vs. McKay

I have all the items ready to go for the transfer meeting.

Darwin had already taken the entire notebook of Palace Resorts information to the office last year. I do not have anything.

From: Melissa Wolfe [mailto:mwolfe@CoshoLaw.com]
Sent: Tuesday, October 30, 2007 12:06 PM
To: Patricia McKay
Cc: Stanley W. Welsh
Subject: FW: McKay vs. McKay

Patty,

Attached is a copy of a letter Tom received from Mr. Miller. I will contact them now to see what changes if any they have to the proposed order.

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Pam Carson

From: Duff McKee [ddmckee@idacomm.net]
Sent: Friday, November 09, 2007 1:16 PM
To: Thomas G. Walker
Cc: Stanley W. Welsh; Melissa Wolfe; Pam Carson; kim@kbrookslaw.com; 'John Miller'
Subject: RE: McKay v. McKay

Counsel:

I would be happy to help.

I would suggest a telephone conference as soon as convenient to isolate and frame issues, and go from there on a procedure. I can be available anytime on Monday, 11/12 or anytime on Wednesday, 11/14 for a telephone conference, if one of you can set it up. My telephone equipment is stone-age, and I have no capability to arrange a conference call. (If these two early dates do not work, anytime during the Thanksgiving week of November 19 is available for a telephone conference.)

I suggest that Tom Walker coordinate this conference call, just to ensure that someone takes the beginning steps. I await your advice.

Duff McKee

From: Thomas G. Walker [mailto:twalker@CoshLaw.com]
Sent: Friday, November 09, 2007 11:55 AM
To: ddmckee@idacomm.net
Cc: Stanley W. Welsh; Melissa Wolfe; Pam Carson; patmckay@clearwire.net; kim@kbrookslaw.com; John Miller
Subject: McKay v. McKay
Importance: High

Judge McKee:

It appears we need your assistance in finalizing the documentation and implementation of the McKay's property settlement agreement. As you know the substance of the settlement was agreed to at the conclusion of the mediation session held on October 20th. I have attached the latest draft of a "comprehensive" Property Settlement Agreement. I provided the first draft of this document to Ms. Brooks and Mr. Miller on Tuesday, October 23rd. Ms. Brooks and Mr. Miller responded with suggested changes on October 30th. Stan and I then arranged for a telephone conference with Ms. Brooks and Mr. Miller to discuss proposed changes and to finalize the agreement. The conference call was held on October 31st. I incorporated the changes we discussed into the attached draft and provided a draft to Ms. Brooks and Mr. Miller on October 31st.

Although both Stan and I have followed up several times with Ms. Brooks and Mr. Miller, we have not been able to conclude the formal documentation and obtain a Stipulated Judgment and Decree and Property Settlement Agreement. We have been told that "Darwin has issues" with the draft, but we have not been told what those issues are. This matter has been pending for 20 days since the conclusion of the mediation session. As you know, Patty has on-going debt

11/9/2007

- obligations that Darwin agreed to service, but so far he has failed to pay those obligations.

You will recall that the parties and counsel agreed that you would arbitrate the terms and implementation of the settlement. On behalf of Patty, we are calling on you to do so. I am providing a copy of this email to Ms. Brooks and Mr. Miller.

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11/9/2007

00007CH02249

Pam Carson

From: Thomas G. Walker
Sent: Tuesday, November 13, 2007 7:31 AM
To: Stanley W. Welsh
Cc: Melissa Wolfe; Pam Carson
Subject: FW: McKay v. McKay

Stan: Do you want to respond to this message?

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From: Patricia McKay [<mailto:patmckay@clearwire.net>]
Sent: Tuesday, November 13, 2007 7:32 AM
To: Thomas G. Walker
Subject: RE: McKay v. McKay

My take is that Darwin is stalling for a reason....perhaps waiting to get his next years financial approval from Sterling Bank which is due November 15. Neil Salathe also thought he'd do that after Neil read the letter from Sterling (Neil has quite a background with banking policies and use to work for banks.) To get this finalized I think the meeting with the Judge may have to be set up and make it happen and not accept Kim/John saying they will sign as they did last week to get the meeting cancelled. Obviously that was another stall tactic. Let's not accept whatever Kim Brooks states. She lied about Darwin having paid the mortgage and other debts this month so as far as I'm concerned she has no ethics and has not been honest with us.

I did send an email to Kim Brooks stating she had told us "YES" that the mortgage and other debts Darwin agreed to pay this month had been paid, when in fact Darwin has not paid anything. Kim Brooks, as an attorney, has no business not being honest.

This past 4 weeks has cost me a bunch more money and I do not have it. Darwin should have to pay all costs I have incurred since 3-4 days after October 20th. I'm not happy with this delay and do not feel I should have to pay for the past 3 weeks of legal costs – these delays are due to Darwin delaying and he should have to pay.

Thank you.

From: Thomas G. Walker [<mailto:twalker@CoshuLaw.com>]
Sent: Tuesday, November 13, 2007 6:55 AM
To: kim@kbrookslaw.com; John Miller
Cc: kwescott@kbrookslaw.com; Stanley W. Welsh; Melissa Wolfe; Pam Carson; Patricia McKay
Subject: McKay v. McKay

Kim and/or John: What's the status?

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11/13/07

TO: Tom Walker
FR: Patricia McKay
DT: November 13, 2007

Attached is the most recent Bank of America credit card November statement. The balance is different from the amount showing on the Settlement Agreement. The Settlement balance should show \$22,903.42. I do not know if you also need to note the name on this account is Patricia E. Christensen. I will not be changing my name on this account.

As you know, I am very concerned the house payments and my credit cards get paid on time by Darwin so my credit rating does not reflect "late payments, etc.". Can we add to the Agreement a line stating something like...

Patricia will provide Darwin via fax and/or email the home mortgage statements and the two credit card statements within 5 days Patricia receives them each month. Darwin is to notify Patricia via email or mail notification he has made the respective payments in a timely manner.

I would also like to ask that the total of all the November payments be given to me in a check from Darwin so I can make the payments via bank transfers to enable payments are made on time for November.



Pam Carson

From: Thomas G. Walker
Sent: Tuesday, November 13, 2007 12:12 PM
To: Patricia McKay
Cc: Stanley W. Welsh; Melissa Wolfe; Pam Carson
Subject: McKay v. McKay

Patty:

We can't increase the amount of the Bank America card balance at this time. The difference in the amount showing on the statement and the Property Settlement Agreement is \$58.29, which are the finance charges. Under the Property Settlement Agreement, Darwin is responsible for the finance charges from and after October 20th, but not before. We do not need to identify the Bank of America credit card account name since the credit card account is identified as by the last four digits, i.e., [REDACTED]

I have made the additions you requested requiring Darwin to notify you that he has made the monthly deed of trust note and credit card payments on time. I think you can also track these payments on the Internet and I advise you to do so. We will work with Darwin's counsel regarding the November payments.

We have been exchanging comments and minor requests for changes with Darwin's counsel this morning. I am waiting for some additional language from them regarding the McKay Family assets. Then the Property Settlement Agreement should be in final form. As soon as I have it finalized, I will email the document to you and Darwin's counsel for final review prior to execution.

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Melissa Wolfe

From: Thomas G. Walker
Sent: Friday, November 16, 2007 12:15 PM
To: Patricia McKay
Cc: Stanley W. Welsh; Melissa Wolfe; Pam Carson
Subject: McKay v. McKay

Patty: I am writing to confirm the phone conversation that Stan and I had with you this morning regarding the status of the documentation of the settlement. As we told you, we were not able to agree upon definitive language with John Miller regarding the Status transaction. The difficulty is coming up with language that conforms to the mediated agreement and provides you with protection against manipulation of the deal by Darwin. As you know, we have made several different proposals over the past several weeks in drafts of the comprehensive Property Settlement Agreement, but so far Darwin has not agreed to our suggested language or provided us with any meaningful counter proposals. We have provided you with copies of our drafts. We have also discussed other alternatives with Kim and John, but those discussions have not resulted in acceptable language. John agreed to provide us with Darwin's written proposal for paragraph 1.9 either this afternoon or early Monday morning. If we don't reach an agreement by Monday, we will turn the matter over to Judge McKee. You have agreed that you want to continue with the settlement discussions, including submitting the dispute over the agreement's language to Judge McKee. We will keep you informed.

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11/19/2007

000077H01913

Pam Carson

From: Thomas G. Walker
Sent: Monday, November 19, 2007 6:26 AM
To: Melissa Wolfe
Subject: FW: McKay Thoughts
Attachments: Nov 18 2007.doc; Nov 2007 Est Fin Statement.xls

Please print message and attachment(s) for file and file both in Pro Law.

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From: Patricia McKay [<mailto:patmckay@clearwire.net>]
Sent: Monday, November 19, 2007 5:52 AM
To: Thomas G. Walker
Subject: McKay Thoughts

Good Morning Tom,

I see your lights are on so you might be there.

I have given much thought to the situation you folks are dealing with and how I might help with some insight.

I'm up for the day. I'd appreciate a call after you review the attached. Perhaps with some dialogue we can come up with an approach to whatever they submit, or not submit.

342-7627

Thank you.

Patty

Per my conversation with you Friday, you stated there is no way of knowing if in fact Darwin has conveyed to John Miller the truth about the requirements Sterling Bank has requested of him.

You also asked me Friday about the location of the two building lots. Darwin was not honest October 20 when he stated he will only receive the lots from the final 30 acres Status will be purchasing. Confirmation of where the lots are can be found on page 39 of Darwin's deposition taken last March. Stan asked Darwin "Where are the building lots?" Darwin's reply, "They will be part of that 40-acre development." And on lines 8-13 he specifies "one quarter mile east of the intersection of South Eagle Road and Lake Hazel Road" which was the Albrethsen land. This explains Darwin will not have to loose the two lots and therefore I should not loose them in the Settlement if the Status deal fails in March. As we know, the deed for this 40 acre section of the contract has already been conveyed to Status. Further, in the Settlement Agreement, it should be noted if Darwin receives the lots or funds from the lots in the future that these be mine. Since the lots were given to me and if they still exist after March 2008 they should still be given to me.

Due to the problems and lack of forthright information Darwin has not provided us via interrogatories, etc. the past year I do not believe Darwin has been honest with either of his attorney and therefore information to us via both his attorneys. I find it difficult to believe the bank will not allow Darwin to pay off the home, when the 5.1 million is obtained by Status in March, since paying 1.5 million (the home off and \$800,000 to me) still would enable the bank to receive 3.5 million toward the bank notes of 5.3 million (October 9, 2007 letter from Sterling Bank). The bank dealing with a possible buy-out should not have anything to do with the relationship Darwin has with the bank.

November 15 was the deadline for the short term extension of the Turf Company's operation's revolving line of credit. With this deadline Darwin was no doubt required to submit an updated financial statement. During the past year financial statements and other financial documents we requested through interrogatories was never submitted to us. I do not understand why we cannot request copies through Sterling Bank of this information. Since I am still noted as Guarantor on the notes I should be able to see the current financial statement he submitted. I am tempted to visit the bank today and inquire.

I would like to make the following suggestions:

1. We request to have a second settlement mediation visit with Judge McKee.
2. Prior to a secondary mediation visit we obtain a copy of the financial statement Darwin submitted to Sterling Bank November 15 for the renewal of his Line of Credit for the businesses. This financial statement should be presented to Judge McKee. October 20 we verbally accepted what Darwin expressed without any documentation from the bank and perhaps we should not have done so.

AND – OR

3. We request to have a meeting with the Sterling Bank representatives or take their deposition and to view the financial statement Darwin presented to Sterling. Since I am a guarantor on the loans I should be able to view this information either with my attorney or anyone else.

The updated financial statement should show the true net value Darwin should have provided us and to Judge McKee October 20th. I do not believe Darwin was honest when he expressed to Judge McKee the net worth was 2.5 million. Darwin did not provide us anything to substantiate the net worth. I have outlined on the attached Excel sheet what I believe to be on a current financial statement. (Not all items have been included. I have not entered the accounts receivables of the businesses which are probably about \$500,000.00.)

Perhaps in your conversation with John Miller this morning you could suggest we suspect Darwin has committed "fraud" since he did not disclose true and honest information of the following:

1. He expressed he would loose the 2 building lots. However, according to his March 2007 deposition he will not.
2. He did not include in the net value of the assets the water rights. Those alone are worth over \$2,000,000.00 and would not decline in this present market. (Darwin told me once that he did not disclose the water rights when he divorced Donna.)
3. He was not honest with the true net value of the estate.
4. We have been informed he sold property recently to Jackie Grant and have proof he set up an LLC with her.

I do not feel we should get hung-up on what Judge Hansen may do regarding the prenuptial. Tom did an incredible job on the Memorandum and the Statement of Facts and it is because of these items being presented to Miller/Brooks that they were not objectionable to mediation settlement talks. Also, during those talks Darwin started out only giving me the house and all contents yet we increased that substantially. Darwin knew then the net worth was far more than what he initially disclosed and this is why he did not submit written documentation of the net worth.

Now that a month has gone by I have incurred more attorney expenses along with the September/October invoice from Hooper Cornell of \$3,400.00 which I was not aware of. Because of these additional expenses I wish to pursue we try to obtain additional funds to cover these expenses. Darwin's game plan is to force me into financial problems.

[Vertical strip of text, mostly illegible due to heavy noise and horizontal banding artifacts]

Estimated Net Worth as of October 2007

Status Sale March 2008	5,100,000.00	
Five Acres where Turf Co. business is located including buildings \$40,000/Acre	200,000.00	This would be a low figure due to the buildings and being on Eagle Road
Yerrington Land - 323 Acres @ \$3,500/Acre includes buildings	1,130,500.00	Darwin did not disclose he had a new shop built on the property and paid cash for it - probably over \$100,000.00
Murphy Land 2700 Acres @ \$1,300/Acre and 3300 Acres @ \$1,500/Acre	8,460,000.00	Darwin's Deposition March 2007 pg. 39-40
Weiser Land 240 Acres @ \$2,000/Acre Includes buildings	480,000.00	Pleasure Turf
Two Building Lots	200,000.00	On Albrethsen land already deeded to Status per March 2007 deposition, page 39
Teton Reserve Lot	300,000.00	He did not disclose.
Equipment & Machinery	2,400,000.00	Feb 2006 Fin. Statement & he has purchased additional since.
Water Rights	2,000,000.00	Per financial statement Feb 2006
Water Rights	unk	On Albrethsen land he purchased but retained water rights when he sold to Status.
Total Property Value	15,170,500.00	
Less Sterling Bank Debt	-5,300,000.00	November 2007 Bank Letter
Total Estimated Net Worth	9,870,500.00	

Patricia McKay

From: Thomas G. Walker [twalker@CoshLaw.com]
Sent: Wednesday, October 01, 2008 06:46
To: Patricia McKay
Cc: Stanley W. Welsh; Melissa Wolfe; Pam Carson
Subject: RE: \$500,000.00 did not arrive

Patty: I did not receive word that the \$500,000 was received in our office yesterday. We can request that interest be paid monthly, but that is not a requirement of the settlement agreement. You may want to consider foreclosing on the general lien created by the judgment that we have recorded. If you want us to proceed with such a lawsuit, we will need a signed Legal Representation Agreement and a \$10,000 retainer. Let me know if you want to proceed with the lawsuit.

Thomas G. Walker
Cosh Humphrey, LLP
800 Park Blvd., Suite 790
PO Box 9518
Boise, ID 83707-9518
Direct phone: 208-639-5607
Direct fax: 208-639-5609
E-mail: twalker@coshlaw.com
Blog: www.ricolawblog.com

From: Patricia McKay [mailto:patmckay@cablone.net]
Sent: Wednesday, October 01, 2008 6:41 AM
To: Thomas G. Walker
Subject: \$500,000.00 did not arrive

Good Morning Tom,

The \$500,000.00 did not arrive yesterday and I was home all day to receive it so there are no excuses. However, could Kim Brooks or Darwin have delivered the \$500,000.00 to your office?

The Decree states we now go to \$800,000.00 plus 6% interest. Can we request that the interest be paid to me on a monthly basis effective today or does the interest have to be paid when he is able to pay the \$800,000.00?

What is the proper approach to take now?

Thank you,
Patty

!SIG:48e37696273019871577910!

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EXHIBIT 2

MCKAY 299

000083

Patricia McKay

From: Thomas G. Walker [twalker@CoshoLaw.com]
Sent: Tuesday, December 16, 2008 06:52
To: Patricia McKay
Cc: Stanley W. Welsh; Pam Carson
Subject: RE: Collection on Judgment

Patty: See comments in red below.

Thomas G. Walker
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800 Park Blvd., Suite 790
PO Box 9518
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Direct phone: 208-639-5607
Direct fax: 208-639-5609
E-mail: twalker@cosholaw.com
Blog: www.ricolawblog.com

From: Patricia McKay [mailto:patmckay@cablone.net]
Sent: Monday, December 15, 2008 8:28 PM
To: Thomas G. Walker
Subject: RE: Collection on Judgment

First, Stan will call Kim Brooks and see what he can find out. If you don't receive a satisfactory proposal as a result of Stan's conversation with Kim, the next step would likely be to file for contempt because Darwin failed to list the Albrethsen property as required by section 1.8.2 of the Property Settlement Agreement that was incorporated into the Judgment and Decree of divorce filed on November 29, 2007. Are you certain that Darwin did not list the Albrethsen property?

We cannot obtain a writ of execution at this time because section 1.8.3 makes Darwin's payment to you of \$800,000, plus interest at 6%, payable within five days of any funds from the sale of either the Albrethsen property, the Home Farm property or both (provided that payment of funds from the sale of the Home Farm may only be made to the extent allowed by the bank holding the line of credit for the Turf Corporation).

Once we can proceed with collection of your judgment, the following comments would apply.

I'd like to know more about what is going to happen with the "seizing procedure". Once we seize the properties do I have to sell the items to get my money? The sheriff would first seize and sell Darwin's tangible personal property (i.e., vehicles, equipment, furniture, etc.) at a public sheriff's sale, which is like an auction. Seizure can be accomplished in several different ways, including tagging an item indicating it has been seized by the sheriff, disabling a vehicle, sequestering or storing furniture, etc. Darwin's stock in various corporations, his member interests in limited liability companies and partner interests in partnerships can also be seized and sold at a sheriff's sale. Creditors with liens having a priority date prior to the date you recorded your Judgment and Decree will have to be paid first out of the proceeds. The list of items to seize could be endless, i.e. land, vehicles, office equipment, farm equipment, etc., personal furniture, etc. The more comprehensive the list, the more likely

Tom, you tell me what the best method is please. I don't know anything about seizing of property. I am willing to do whatever arm-twisting you suggest to hopefully make everything work. I do not want to risk loosing the \$800,000.00 he owes me. As noted above, Stan will call Kim and then we'll proceed from there.

Oh, I also talked with Gene Thurston late today and he told me that today, December 15, was the deadline for Darwin to pay \$1.6 million toward the Murphy property (possibly Hulet). Gene said Darwin had approached him a couple months ago asking if Gene knew of anyone who would loan him the funds.

If seizing some property and not all to make our point and/or a stiff letter or something filed with the courts of him being in contempt, whatever, plus the 6% interest being paid on a monthly basis immediately while whatever process in taking place, Tom, you be my guide.

I'll await your thoughts, thank you,
Patty

From: Thomas G. Walker [mailto:twalker@CoshoLaw.com]

Sent: Monday, December 15, 2008 4:04 PM

To: Patricia McKay

Cc: Stanley W. Welsh; Pam Carson

Subject: Collection on Judgment

Patty: We can designate certain items of personal property for the sheriff to levy on. Can you provide a list of personal property items that you would like seized. Once we start the collection procedures, I think we'll get Darwin's attention.

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!SIG:4947204c182724008096090!

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Patricia McKay

From: Patricia McKay [patmckay@cableone.net]
Sent: Thursday, December 18, 2008 4:01 PM
To: 'Thomas G. Walker'; 'Stanley W. Welsh'
Subject: Letter to Kim Brooks and Darwin

I'm sorry for the confusion in deciding what to do regarding the \$800,000.00. However, this is what I would like done.....

I would like a letter address to Darwin's attorney stating: (Of course please feel free to reword properly.)

Patricia has discovered through court records the Assignment of Mortgage and funds paid to Darwin via Lawyers Title Insurance. She also contacted Lawyers Title and verified Darwin was issued a check for funds exceeding the necessary amount of funds due her via paragraph 1.8.3. Darwin received these funds November 7, 2008 or shortly thereafter.

We request the \$800,000.00 plus 6% interest from October 1, 2007 due Patricia be paid immediately since these funds were due Patricia 5 days from his receipt of the funds. We also request proof of the date he was issued the check from Lawyers Title Insurance.

Tom and Stan - If you did not inform Kim Brooks of the Lawyer's Insurance check issued to Darwin, I'm sure Kim will be very surprised with the content of the letter I wish for you to send. She may even fire Darwin. If she doesn't fire Darwin then the two of them will approach us to make some sort of settlement instead of us approaching them for the settlement. Darwin was wrong in not paying me within 5 days of receiving the funds from Lawyers.

I will hold firm to receive the full amount and I wish to play very HARD BALL. I'm not interested in working out deals whereby I receive less than what I am due. I already lost two building lots.

The ace in our pockets will be Sterling Bank will call all notes due immediately if we place liens on his properties as there is a clause which does not allow subordinate liens on the properties. And, Darwin knows he'll never get another bank to represent him so he is probably sitting on the funds to make sure he has them to pay his monthly payments to the bank as well as employee payrolls, etc. Darwin will do anything to keep his farm as that means more to him than his children, his marriages, his employees, anyone.

Thank you.

Patricia McKay

From: Thomas G. Walker [twalker@CoshLaw.com]
Sent: Thursday, December 18, 2008 09:36
To: Patricia McKay
Cc: Stanley W. Welsh; Pam Carson
Subject: RE: Please file contempt charges

We cannot file a motion for contempt until we have gathered the facts outlined in the notes I provided you yesterday. Also, remember that I warned you yesterday that if we file a motion for contempt, Darwin may discontinue the \$2,500 per month alimony payments and may also cease making the monthly payments on your home. Gene Thurston told me yesterday that he also believed Darwin would cease making these payments if court action is undertaken. Consequently, we do not think it is in your best interests to file a motion for contempt unless and until settlement negotiations prove unsuccessful.

Thomas G. Walker
 Cosh Humphrey, LLP
 800 Park Blvd., Suite 790
 PO Box 9518
 Boise, ID 83707-9518
 Direct phone: 208-639-5607
 Direct fax: 208-639-5609
 E-mail: twalker@coshlaw.com
 Blog: www.ricolawblog.com

From: Patricia McKay [mailto:patmckay@comcast.net]
Sent: Thursday, December 18, 2008 9:22 AM
To: Thomas G. Walker
Subject: Please file contempt charges

I'd like to file contempt charges now and if they want to talk fine but if no charges are filed I think they'll waste my \$ with nothing but talk and no action. I thought that's why I'm working on finding all the documents for my October 8, 2007 Affidavit you gave me yesterday? Remember, Darwin didn't want to talk settlement until contempt charges had been filed. Settlement talks happened October 20, the Saturday before the Wednesday court date he was up for all the contempt charges.

Regarding the documents I'm looking for - I cannot find Darwin's two depositions dated September 7, 2007 and March 21, 2007. I did find the main book of exhibits. I'm looking for the "Bates Numbers" now.

Thank you.

From: Thomas G. Walker [mailto:twalker@CoshLaw.com]
Sent: Thursday, December 18, 2008 8:33 AM
To: Patricia McKay
Cc: Stanley W. Welsh; Pam Carson
Subject: RE: Tom Walker's Affidavit Oct 18 2007 filed in court

Notwithstanding the contents of your email below and the earlier email sent by you at about 7:48 a.m. this morning, I assume from our conversation yesterday that we are to try first to work out a settlement of your \$800,000, plus interest claim, before taking any court action. Is that

Patricia McKay

From: Thomas G. Walker [twalker@CoshLaw.com]
Sent: Monday, December 22, 2008 14:49
To: Patricia McKay
Cc: Stanley W. Welsh; Pam Carson
Subject: RE:

Patty:

Pam just told me you called about the email below. I have not had a chance to talk to Stan because he has been in court today. I believe he is scheduled to be in court out of town tomorrow. So, he may not have time to respond. I understand that you expressed concern that we did not include a deadline in the demand letter to Kim Brooks. Under the circumstances and considering the intervening holidays, I doubt that a deadline would prompt a quicker response from Darwin. I am confused by your recent anxiousness to confront Darwin with a court proceeding considering that you have repeatedly said that you did not want to drive him into bankruptcy, or cause Sterling Bank to call his loans. I believe your expression was that you "did not want to cut off your nose despite your face." We have also discussed the possibility that Darwin may discontinue the \$2,500 per month alimony payments and may also cease making the monthly payments on your home, if you undertake litigation against him. You know that Gene Thurston told me he also believed Darwin would cease making these payments if court action in undertaken by you. You have told me that you can't survive financially for several months without the monthly alimony and house payments. In fact, you said you are \$30,000 "in the hole" now.

Our discussions to date have left me of the opinion that a settlement was better than litigation. We have made demand upon Darwin to pay immediately. If he does not, or if he does not make an offer that you deem acceptable, then proceeding in court may be the best alternative.

I have also asked you to complete the timeline information that I emailed you on December 17th, but we have not yet received that information.

Thomas G. Walker
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800 Park Blvd., Suite 790
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E-mail: twalker@coshlaw.com
Blog: www.ricolawblog.com

From: Stanley W. Welsh
Sent: Monday, December 22, 2008 8:51 AM
To: Thomas G. Walker
Subject: Fwd:

MCKAY 306

000089

Begin forwarded message:

From: "Patricia McKay" <patmckay@cableone.net>
Date: December 22, 2008 7:39:42 AM MST
To: "Stanley W. Welsh" <swelsh@CoshLaw.com>

Thank you for sending the second letter to Kim Brooks – very well done.

As you start your discussions with Kim Brooks, Darwin probably needs to be reminded of Item 17, Attorney Fees, of the Decree.

Also, Section 2.1 which we did not mention in the letter "..... Darwin shall pay off the full amount of Personal Residence Debt directly to the respective mortgage companies within thirty (30) days of the date the Status Real Estate Transaction closes, or within thirty days of receipt of any funds from the sale of either the Albrethsen property,"

What is your timeline? When do you cease talking with Kim and filing contempt charges against Darwin? I feel we need to proceed the fastest and direct, hard approach toward Darwin as I cannot afford a high attorney bill.

I realize Tom will be gone until the 7th. Stan, will you be around working on this? And do we know if Kim will be around during the holidays to work on this?

Should I work on filing liens on the Nevada properties? Or, would you folks prefer to work with the attorney in Reno, Gary Silverman?

Thank you,
Patty

!SIG:494fa74f264832093919311!

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Exhibit B

DEPOSITION OF DARWIN MCKAY (VOLUME II) TAKEN 9-27-07

1 IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT
2 STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA
3 MAGISTRATE DIVISION
4
5 PATRICIA MCKAY,)
6 Plaintiff,)
7 VS.)No. CV DR 0615200
8 DARWIN MCKAY,)
9 Defendant.)
10 _____)
11
12
13 DEPOSITION OF DARWIN MCKAY
14 VOLUME II
15 SEPTEMBER 27, 2007
16 BOISE, IDAHO
17
18
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20
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24
25

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1 DEPOSITION OF DARWIN MCKAY
2
3 BE IT REMEMBERED that the deposition of DARWIN MCKAY
4 was taken by the attorney for the Plaintiff,
5 Patricia McKay, at the offices of Cosho, Humphrey, LLP,
6 800 Park Boulevard, Boise, Idaho, before Leda Waddle, a
7 Court Reporter (Idaho No. 758) and Notary Public in and
8 for the County of Ada, State of Idaho, on Thursday, the
9 27th of September, 2007, commencing at the hour of 9:06
10 a.m., in the above-entitled matter.
11
12 APPEARANCES:
13
14 For Plaintiff: COSHO, HUMPHREY, LLP
15 By: Thomas G. Walker
16 800 Park Boulevard, Ste. 790
17 Post Office Box 9518
18 Boise, Idaho 83712
19
20 For Defendant: BROOKS LAW, P.C.
21 By: Kimberly D. Brooks
22 23 9th Avenue North
23 Nampa, Idaho 83687
24
25

Page 116

1 APPEARANCES CONTINUED
2
3 For Defendant: MILLER & HARR
4 By: John Miller
5 1401 Shoreline Drive, Ste. 3
6 Boise, Idaho 83702
7
8
9 Also Present: Patricia McKay.
10
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1 EXAMINATION
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4 By: Mr. Walker 122
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7 32 Second Amended Notice of Taking 122
8 Deposition Duces Tecum
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10 34 Settlement Statement 122
11 35 Escrow Statement 122
12 36 Decree of Divorce, Darwin McKay 122
13 and Donna McKay
14 37 REMOVED FROM RECORD 122
15 38 Transactions for Business Money 122
16 Market Account Checking
17 39 Student Loan Payoff Information 122
18 40 Certificate of Assumed Business 122
19 Name
20 41 Articles of Organization, Limited 122
21 Liability Company
22 42 Annual Report Form 122
23 43 Annual Report Form 122
24 44 Certificate of Incorporation 122
25 45 Annual Report Form 122

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1 (Pages 115 to 118)

BURNHAM HABEL & ASSOCIATES, INC. (208) 345-5700

CH 2900

000092

DEPOSITION OF DARWIN MCKAY (VOLUME II) TAKEN 9-27-07

1 renovation work.
2 Quail Hollow, Black Rock in Coeur d'Alene, Idaho
3 Club in Sandpoint.
4 I think that's it.
5 Q. Okay.
6 A. Oh, one more, Palouse Ridge at WSU in Pullman.
7 Q. Okay. I notice that with respect to Teton that
8 you accepted a lot in partial payment for sod.
9 A. We did.
10 Q. Okay. And have you accepted any other property
11 with respect to any of these other golf course
12 developments?
13 A. No.
14 Q. That's the only one where you took an
15 exchange?
16 A. Yes.
17 Q. And your testimony is, is that with respect to
18 each one of these golf course renovations or
19 installations or whatever, they have all been profitable
20 for the business?
21 A. I think each one would have to stand on its own.
22 And I have not done a detailed accounting of each
23 project, you know, and segregated them out.
24 Q. But in general, your impression from your
25 earlier testimony, or the impression I took away, is that

Page 263

1 documents is that you sold the Albrethsen property
2 together with the other property that went with that
3 transaction, that you sold that at about \$130,000 an
4 acre, and you just said you sold it for \$75,000.
5 Am I mistaken?
6 A. No. No, that's what Eric Albrethsen was paid.
7 He was the man I bought it from.
8 Q. You paid him \$75,000; correct?
9 A. No. I'm sorry. I think it's \$70,000. I don't
10 have the documents.
11 Q. But it's in that ballpark; correct?
12 A. Yes.
13 Q. And the documents will show us.
14 But then you were able to turn around and sell
15 it in very short order?
16 A. I sold that one for \$120,000.
17 Q. Okay. \$120,000 an acre?
18 A. I did. And with two lots that come with it.
19 Q. When that land is sold, you got \$120,000 an acre
20 for the Albrethsen Farm, plus two lots from Status
21 Corporation?
22 A. It's actually not Status anymore.
23 Q. What is it called now?
24 A. Union Land.
25 Q. Okay.

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1 this was helping your bottom line?
2 A. It's definitely helping our bottom line. The
3 doors would be closed if it weren't for the golf course
4 business.
5 Q. What about the real estate sales business?
6 Those are generating a lot of cash now?
7 A. There's nothing right now.
8 Q. I'm talking about the sales of real estate that
9 you've made or the companies have made over the past
10 couple years, including the Albrethsen Farm.
11 A. Let's put it this way. We hope they come
12 through. Those payments are not made yet.
13 Q. Okay. Which payments are you referring to?
14 A. On the Albrethsen Farm.
15 Q. How much have you been paid thus far?
16 A. Enough to pay off the underlying.
17 Q. How much was that?
18 A. Was \$75,000 an acre to Eric Albrethsen.
19 Q. What was the total down payment?
20 A. I don't remember, three and a half million or
21 something like that. About 3.2 went to Eric Albrethsen.
22 I don't know all the numbers.
23 Q. How much is left to be paid, and when is it due?
24 A. There's about \$1.2 million left to go.
25 Q. Okay. My impression from looking at the

Page 264

1 And how many total acres, then, were sold at
2 \$120,000 an acre?
3 A. 40.86.
4 Q. Okay.
5 That's \$4.9 million gross.
6 Now, you also sold some other property, though,
7 at the same time; correct?
8 A. About --
9 Q. To the Union Land Corporation?
10 A. About 28 acres of the home farm.
11 Q. And did you sell that also for \$120,000?
12 A. \$130,000.
13 Q. So I'm trying to back into this number.
14 It seemed to me based upon the documents that
15 I've looked at earlier that The Turf Company was due a
16 payment in March of '08 of something on the order of
17 \$4 million.
18 You are saying it's 1.8?
19 A. That's for the Albrethsen Farm.
20 Q. What's the total payment due in March of '08?
21 A. I do not know as I sit here.
22 Q. Have you produced the documents to us that will
23 show that information?
24 A. I believe so.
25 Q. With regard to the High Desert Turf acquisition,

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38 (Pages 263 to 266)

BURNHAM HABEL & ASSOCIATES, INC. (208) 345-5700

CH 2937

000093

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383 308:25	480 306:3	583 195:11	71 120:10 245:10	82 120:25 305:17
39 118:17 232:25	485 240:22,23	5875 122:16	72 120:11 248:11	8206 230:9
3rd 143:24 144:13	49 119:7 186:7,14	589 232:25	248:11	83 121:3 306:25
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Exhibit C

IN THE MAGISTRATE COURT OF THE FOURTH JUDICIAL DISTRICT
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

PATRICIA MCKAY,

Plaintiff,

vs.

DARWIN MCKAY,

Defendant.

) Case No. CVDR 2006-0015200
)
)
)
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)
)
)

NO _____ FILED _____
A.M. _____ P.M. / -

NOV 13 2009

By J. DAVID NAVARRO Clerk
[Signature]
DEPUTY

REPORTER'S TRANSCRIPTION OF PROCEEDINGS

Court Trial held July 16, 2009, before
Hon. MICHAEL REARDON, Magistrate Court Judge

Transcribed by:
Susan M. Wolf, RPR
CSR No. 728

ORIGINAL

IN THE MAGISTRATE COURT OF THE FOURTH JUDICIAL DISTRICT
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

PATRICIA MCKAY,) Case No. CVDR 2006-0015200
Plaintiff,)
vs.)
DARWIN MCKAY,)
Defendant.)

REPORTER'S TRANSCRIPTION OF PROCEEDINGS

Court Trial held July 16, 2009, before
Hon. MICHAEL REARDON, Magistrate Court Judge

Transcribed by:
Susan M. Wolf, RPR
CSR No. 728

A P P E A R A N C E S

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I N D E X

<u>Witness</u>	<u>Examination By</u>	<u>Page</u>
MCKAY, Darwin	Examination by the Court	16
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E X H I B I T S

<u>Exhibit</u>	<u>Description</u>	<u>Mark/Admit</u>
Exh. No. 001	E-mail containing terms of agreement between the parties	

BOISE, IDAHO

Thursday, July 16, 2009, 9:11 a.m.

THE COURT: ...CR 2006-15200, Patricia McKay
vs. Darwin McKay. Mr. Hess is here with Ms. McKay;
Ms. Brooks is here for Mr. McKay. This was set for the
second day of trial. I understand that there's been a
resolution reached.

MS. BROOKS: There has, Your Honor.

MR. HESS: Yes, Your Honor.

THE COURT: Ms. Brooks?

MS. BROOKS: Thank you, Your Honor.

Ms. Patricia McKay agrees to dismiss her --
yes?

MR. HESS: I'm sorry.

I'm sorry, Your Honor.

(Conference between Counsel.)

MR. HESS: I'm sorry, Your Honor. We have --
we have what -- an e-mail that contains the terms, and I
thought maybe we could all just follow along with that.

THE COURT: Oh, sure. If you...

MS. BROOKS: Is that my copy?

MR. HESS: Uh-huh.

5

1 THE COURT: Should we have it marked as a
2 joint exhibit? Okay.

3

4 (Exhibit No. 1 marked.)

5

6 THE COURT: Do you all need a few more
7 minutes?

8 MS. BROOKS: Apparently, Your Honor.
9 MR. HESS: Yeah.
10 THE COURT: Okay.
11 MR. HESS: Sorry, Your Honor.
12 THE COURT: That's all right. Call us when
13 you're ready.
14 MS. BROOKS: Thank you.
15 MR. HESS: Thanks.

16

17 (Recess taken.)

18

19 THE COURT: We left off, Ms. Brooks?
20 MS. BROOKS: Yes, sir.
21 I -- I believe that the Judge got a copy of
22 the e-mail that's dated Wednesday, July 15th.
23 THE COURT: And is marked as Exhibit 1 --
24 MS. BROOKS: Thank you, Your Honor.
25 THE COURT: -- for purposes of reviewing the

6

1 proposed settlement.

2 MS. BROOKS: And we do believe that, as
3 listed, 1 through 9 will be the terms of the agreement.
4 However, No. 7 has a change. And No. 7 will be deleted
5 in its entirety and replaced with: Darwin will transfer
6 to Patty 14 weeks of the timeshare of -- at Palace
7 Resorts, to use at her expense. The transfer will
8 include Patricia contacting Darwin, or one of Darwin's
9 agents, to obtain the -- the transfer, and she will have
10 to pay, I believe, to Mr. McKay directly.
11 THE COURT: Is that 14 weeks period or 14
12 weeks --
13 MS. BROOKS: She can use up to 14 weeks in
14 any combination that she would like to.
15 THE COURT: Over what period of time?
16 MS. BROOKS: Yeah. I don't --
17 MR. MCKAY: And also given the availability.
18 This whole package is for sale, so.
19 MS. BROOKS: Can she do it within --
20 MR. HESS: Three years?
21 MRS. MCKAY: Yeah. Three years is fine.
22 MR. HESS: Yeah, three years.
23 MS. BROOKS: From today's date.
24 MR. HESS: Can we put in a provision that, to
25 the extent that there's documentation necessary, Darwin

7

1 would agree to -- Darwin or the company, because I
2 understand it's a company asset --
3 MS. BROOKS: Yes.
4 MR. HESS: -- would agree to sign whatever
5 documentation is necessary.
6 MS. BROOKS: Yes.
7 Your Honor, Darwin McKay, or his company, in
8 behalf -- on behalf of his company, agrees to facilitate
9 any paperwork necessary to insure that she is transferred
10 14 weeks.
11 MR. MCKAY: Okay. Is there -- is there still
12 a time frame we're dealing with?
13 MS. BROOKS: Yeah. It's -- it's three years.
14 MR. MCKAY: So, I'm -- I'm limited, I cannot
15 do anything with this for three years now?
16 MS. BROOKS: Well, you're going to have to
17 assign her the option to be able to take those 14 weeks.
18 MR. MCKAY: Out of that package?
19 MS. BROOKS: Correct.
20 MR. MCKAY: I'll see if I can do it.
21 MS. BROOKS: Your Honor, we also anticipate
22 paperwork coming forth setting forth these terms. And
23 Ms. McKay agrees that there shall be a covenant not to
24 enforce the original decree, but Mr. McKay agrees there
25 will be a stipulation to liquidation of a judgment -- the

8

1 judgment sought. And the judgment is in the amount -- I
2 believe it's set forth in this e-mail -- in the amount of
3 \$1,223,814.83.
4 We also anticipate that part of the
5 documentation coming forth will state that the Van Hess
6 transfer will be a property equalization, and the
7 mortgages and the cash payment will be set forth as
8 alimony in the non-merged integrated contract between the
9 two parties.
10 THE COURT: Okay. So, the -- the house
11 payments will be satisfaction of the requirement under
12 the decree --
13 MS. BROOKS: Correct.
14 THE COURT: -- for alimony?
15 MS. BROOKS: Yes.
16 MR. MCKAY: Yes.
17 THE COURT: And the other term was regarding
18 the Van Hess assignment was the satisfaction of --
19 MS. BROOKS: Well, under a term --
20 THE COURT: -- a judgment?
21 MS. BROOKS: Yes. Satisfaction of a judgment
22 characterized not as alimony but as a property
23 equalization payment.
24 THE COURT: Okay. All right. So, the -- the
25 \$1.2 million judgment is essentially an equalization that

1 had been arrived at by the original decree; right?

2 MS. BROOKS: Well, in the original decree,

3 they stated that both of the -- the first mortgage and

4 the second mortgage, so over 500,000 on the first

5 mortgage, 67,000 on the second mortgage, was couched as

6 alimony payments in the original decree.

7 THE COURT: Okay. Also that --

8 MS. BROOKS: So, we're just keeping that way.

9 THE COURT: -- okay. All right.

10 MS. BROOKS: Is that it?

11 MR. HESS: Just a couple of points,

12 Your Honor --

13 THE COURT: Go ahead.

14 MR. HESS: -- if I may?

15 In paragraph six it talks about the payments

16 and when those -- when -- well, when there will be a -- a

17 full pay off, and we reference paragraph five. I forgot

18 to bring the divorce decree, Your Honor. I don't recall

19 if it's actually paragraph five in that. I think the --

20 the understanding is whatever paragraph it is.

21 MS. BROOKS: The terms are set forth in the

22 decree --

23 MR. HESS: Yeah.

24 MS. BROOKS: -- because there's only

25 paragraph that --

1 THE COURT: Okay.

2 MR. HESS: Because there's a procedure that

3 is set forth with an accountant as to how that amount

4 will be determined.

5 Your Honor, I guess the procedural aspects of

6 this, as we discussed in the chambers, I guess what I

7 understood was that there was going to be a judgment as a

8 result of this proceeding -- proceedings, and that in

9 lieu of any enforcement of that judgment, the parties

10 agreed to substitute this agreement.

11 THE COURT: I understood Ms. Brooks to say

12 that Mr. McKay was stipulating that judgment enter on

13 Ms. McKay's behalf, so you would prevail on your -- your

14 motion for --

15 MR. HESS: Right.

16 THE COURT: -- a liquidated judgment. And I

17 understand, from this discussion, that you are proposing

18 an agreement on top of that, to satisfy the terms of that

19 judgment by entering into this agreement in lieu of

20 enforcing the judgment independently.

21 MR. HESS: That's -- that's correct,

22 Your Honor. That was my understanding, yes.

23 MS. BROOKS: I didn't follow that.

24 THE COURT: Yeah. I probably could have said

25 it better.

1 MR. MCKAY: I don't follow it either.

2 THE COURT: Essentially, the terms that you

3 are agreeing to today, which includes an agreement not to

4 execute on this judgment, sets forth the terms that --

5 that bind the parties from this point forward. So, I --

6 I would assume that your -- your proposed order would

7 include a judgment, and the covenant not to execute

8 provided that Mr. McKay complies with all these terms.

9 MS. BROOKS: Yes. And since it's not

10 supplanting the decree, then also a covenant not to

11 execute on the decree.

12 THE COURT: Not to execute on the property --

13 MS. BROOKS: Yes.

14 THE COURT: -- provisions of the decree --

15 MS. BROOKS: Yes.

16 THE COURT: -- right?

17 MR. HESS: Yeah.

18 MS. BROOKS: That's my understanding.

19 MR. HESS: That's correct, yeah.

20 THE COURT: Anything else?

21 MS. BROOKS: Yes, Your Honor.

22 Mrs. McKay also agrees that there can be

23 language stating that she will assist Mr. McKay in

24 refinancing the loan to obtain a lower rate

25 (unintelligible) the -- the first and second mortgage on

1 the house, if at all possible. We're not sure that

2 that's even going to be possible.

3 THE COURT: Okay.

4 MS. BROOKS: And that each party pays their

5 own attorney's fees and costs.

6 THE COURT: So, Ms. McKay agrees to cooperate

7 in Mr. McKay's efforts to refinance the loans, if -- if

8 that's possible; is that right, Mr. Hess, is that --

9 MR. HESS: That -- that's correct,

10 Your Honor.

11 THE COURT: Okay. Anything else?

12

13 (Conference between Counsel.)

14

15 MS. BROOKS: In regard to paragraph one --

16 THE COURT: Right.

17 MS. BROOKS: -- on this e-mail, Darwin agrees

18 that any payments received here on out, from today

19 forward, from the Van Hess contract, he will directly

20 give to Patricia, who will -- because I don't know how

21 long that paperwork's going to take --

22 MR. HESS: Right. That -- that --

23 MS. BROOKS: -- and so, he -- he -- so, it's

24 not in addition to. Whatever he receives from Van Hess,

25 he will give to Patricia.

13

1 THE COURT: Okay.

2 MR. HESS: Yeah. And I guess -- I guess the

3 way I would propose that is that the -- the \$2,500 per

4 month continue until that paperwork's finalized, with the

5 understanding that there will not be a double payment

6 received.

7 MS. BROOKS: Correct. Pardon me.

8 THE COURT: So, he would get credit for

9 any --

10 MR. HESS: Yeah.

11 THE COURT: -- payments made between now and

12 the time that the final paperwork is --

13 MR. HESS: That's right.

14 THE COURT: -- (unintelligible).

15 MR. HESS: That's right.

16 MS. BROOKS: Thank you.

17 MR. HESS: We just don't want there to be a

18 gap or -- or, you know, any delay.

19 MS. BROOKS: He's agreeable to that.

20 MR. HESS: Yeah. We want -- yeah.

21 THE COURT: Okay. Anything else?

22 MS. BROOKS: I don't believe so, do you?

23 MR. HESS: No. Nothing further, Your Honor.

24 THE COURT: All right.

25 Ms. McKay, Mr. McKay, if you would each

14

1 stand, raise your right hands, and face my clerk.

2

3 (Mr. and Mrs. McKay sworn.)

4

5 THE COURT: Go ahead and have seats.

6 Ms. McKay, you're the movant here, I'm going

7 to start with you. I gather that you have spent a fair

8 amount of time reviewing this e-mail that I've marked as

9 Exhibit 1 from -- well, it's entitled at the top

10 Stephanie Omsberg, but it's from Ms. Omsberg, to

11 Ms. Brooks, with a copy to Mr. Hess and a Tiffany Nelson.

12 Are we looking at the same e-mail?

13 MRS. MCKAY: Yeah, yes.

14 MR. HESS: Yes.

15 THE COURT: Okay. Now, do you think you've

16 had enough time to review that and talk it over with

17 Mr. Hess?

18 MRS. MCKAY: Yes, I do.

19 THE COURT: Do you understand all the terms

20 that it sets forth delineating the obligations between

21 you and Mr. McKay that will result in the settlement of

22 the matter that is currently --

23 MRS. MCKAY: Yes.

24 THE COURT: -- pending?

25 Do you have any questions about any of those

15

1 terms?

2 MRS. MCKAY: No.

3 THE COURT: Do you believe that these terms

4 will resolve the matter that is currently pending?

5 MRS. MCKAY: Yes, I do. As long as they're

6 all followed.

7 THE COURT: Okay. Is there anything -- are

8 there any terms that are set forth on this e-mail, other

9 than the ones that we've talked about changing, paragraph

10 seven and the additions with respect to refinancing and

11 bearing their own -- each bearing your own costs, are

12 there any terms that you don't agree to?

13 MRS. MCKAY: No.

14 THE COURT: Is there anything that you

15 believe is part of your agreement, in order to resolve

16 this case, that doesn't appear in -- within these terms?

17 MRS. MCKAY: No.

18 THE COURT: Do you believe this is a complete

19 statement of the agreement that you are making to resolve

20 this matter?

21 MRS. MCKAY: Yes. As long -- with the

22 additions that we've added.

23 THE COURT: That -- that we've talked about

24 here --

25 MRS. MCKAY: Yes.

16

1 THE COURT: -- in court?

2 MRS. MCKAY: Yes.

3 THE COURT: Are you willing to be bound by

4 the terms of this agreement?

5 MRS. MCKAY: Yes, I am.

6 THE COURT: And has anybody threatened you or

7 coerced you into getting you to agree? I -- I appreciate

8 that this process has its own sort of coercive nature to

9 it, but I mean has anybody threatened you or?

10 MRS. MCKAY: No.

11 THE COURT: Okay.

12 Mr. McKay, same kinds of questions. Have you

13 had enough time to review all the terms that are set

14 forth in this Exhibit 1?

15 MR. MCKAY: Yes.

16 THE COURT: And have you talked to Ms. Brooks

17 about all the terms as much as you believe that you need

18 to?

19 MR. MCKAY: I believe so. I -- I'm a little

20 hesitant, still, on this timeshare thing. My only

21 concern is -- is that -- first of all, I have to tell the

22 Court that the package is for sale. I've investigated

23 trying to sell it in subunits or smaller units; can't be

24 done, has to go as one full unit. So, when and if that

25 happens, how do I reserve 14 weeks, that's my question?

1 I'm not opposed to providing 14 weeks, in any
2 way, shape, or form, it's just that, when it goes, it
3 will go.

4 THE COURT: So, one of two things could
5 happen here. One is -- I mean, if -- if you -- if we --
6 if you enter this agreement and I sign an order adopting
7 these terms, whatever the value is of the timeshares is
8 almost certainly going to be reduced, because it's going
9 to be -- if you can sell it, subject to a reservation of
10 14 weeks to Ms. McKay, it's not going to be worth the
11 same as if you couldn't -- or if there wasn't the
12 reservation.

13 The other possibility is you're not going to
14 be able to sell it for 14 -- with --

15 MR. MCKAY: For --

16 THE COURT: -- with that reservation of
17 14 weeks for three years.

18 MR. MCKAY: -- that's right. So, what this
19 really needs to say is, is subject to availability.

20 THE COURT: Well, we may be talking about
21 different things. As I understood the agreement, or the
22 proposed agreement, is that you were agreeing to reserve
23 14 weeks of this timeshare to Ms. McKay, to be used at
24 her expense at some point within the next three years.

25 So, if -- if you enter this agreement, that

1 would be your obligation. And that would mean you would
2 either have to sell it subject to a reservation, which a
3 potential buyer would have to accept --

4 MR. MCKAY: Uh-huh.

5 THE COURT: -- of the 14 weeks, or you would
6 be obligated -- if you couldn't sell it with that
7 reservation, you would be obligated to keep it for three
8 years, or you might reach some agreement with Ms. McKay
9 to compensate her for the 14 weeks. I mean, that -- I'm
10 not suggesting that this -- that's part of the agreement.
11 But I mean, you all can make whatever agreements you want
12 to to modify this aft -- after it's entered, so long as
13 you both agree.

14 MR. MCKAY: I -- I just have a problem
15 with having to throw the timeshare into this whole thing,
16 because -- because it complicates it so much.

17 MR. HESS: Do you not agree with this, then?

18 MR. MCKAY: I'd do what I have to do to make
19 it work, but --

20 MS. BROOKS: Okay. But he's asking you, do
21 you agree with this?

22 THE COURT: No settlement makes everybody
23 happy. I mean, every -- the purpose of the settlement, I
24 suppose -- or -- the purpose of the settlement is to
25 resolve the case. In order to get to resolution,

1 everybody agrees to things that they might not want to do
2 otherwise.

3 So, I -- I'm not really asking if you want to
4 do this, I -- I'm asking if you agree to this term by way
5 of resolving the rest of the case. I guess I'm asking
6 two --

7 MR. MCKAY: I am not --

8 THE COURT: -- questions.

9 MR. MCKAY: -- totally familiar with all
10 their rules and regulations; I am somewhat familiar with
11 them, enough to know that I am quite limited in what I
12 can do with this thing.

13 THE COURT: Okay. But -- but is it fair that
14 the -- the two possibilities exist that I talked about
15 earlier; that you're either going to get to sell it
16 subject to a reservation of 14 weeks, or you're not going
17 to get to sell it subject to the reservation of 14 weeks,
18 and if that's the case, then you're going to have to
19 retain it for three years, or agree with Ms. McKay to
20 compensate her for the 14 weeks that she would be giving
21 up?

22 MR. MCKAY: Can it be cut to a two year time
23 frame?

24 THE COURT: Well, that was --

25 MR. MCKAY: Is that -- is that agreeable?

1 THE COURT: -- that was -- well, I don't --
2 that wasn't the agreement that I heard so far and that I
3 talked to Ms. McKay about, but...

4 MR. HESS: We -- we understood it was that
5 she had three years to -- to utilize the 14 weeks.

6 MS. BROOKS: She's not agreeing to two years.

7 MR. MCKAY: (Unintelligible) it go as the way
8 it is.

9 MS. BROOKS: Okay.

10 THE COURT: Okay. So, you -- you don't --
11 we've had a discussion about that particular term that's
12 a new paragraph seven, and I'm satisfied that you
13 understand that the -- what the effect of that paragraph
14 is.

15 I'm going to ask you once more, do you have
16 any questions about any of the other terms that are set
17 forth --

18 MR. MCKAY: No.

19 THE COURT: -- in the exhibit?

20 Are there any of these terms that you don't
21 believe are part of your agreement, that you don't
22 believe you've agreed to?

23 MR. MCKAY: I'm okay with it.

24 THE COURT: Is there anything -- are there
25 any terms that you believe are part of your agreement

1 that don't appear in this exhibit?
 2 MR. MCKAY: No.
 3 MS. BROOKS: That we haven't talked about.
 4 MR. MCKAY: Yeah.
 5 THE COURT: Noth -- nothing that you haven't
 6 talked about, there aren't any side deals --
 7 MR. MCKAY: No.
 8 THE COURT: -- that nobody has told me about?
 9 MR. MCKAY: There are no side deals.
 10 THE COURT: Okay. And are you willing to be
 11 bound by the terms of this settlement?
 12 MR. MCKAY: Yes.
 13 THE COURT: Has anybody, other than the sort
 14 of natural coercive element of the -- of the process in
 15 general, has anybody threatened you or otherwise coerced
 16 you into getting you to agree?
 17 MR. MCKAY: No.
 18 THE COURT: All right.
 19 Then, when I receive it, I will sign an order
 20 that incorporates these terms and conditions to the
 21 judgment that I will enter in favor of Ms. McKay, based
 22 upon the stipulation.
 23 Who's going to prepare it?
 24 MS. BROOKS: I think we're both going to
 25 prepare some of the documents.

1 MR. HESS: Yeah.
 2 THE COURT: Okay. So, you're -- you're going
 3 to collaborate on it.
 4 MS. BROOKS: We are.
 5 THE COURT: Can you get that done within
 6 14 days?
 7 MS. BROOKS: Are you --
 8 MR. HESS: Yes.
 9 MS. BROOKS: -- in town?
 10 MR. HESS: Yes.
 11 MS. BROOKS: Yes.
 12 MR. HESS: That should be fine, Your Honor.
 13 THE COURT: All right. Then I will look
 14 forward to seeing that, with both of your signatures on
 15 it approving it as to form and content.
 16 Is there anything else that we need to talk
 17 about?
 18 MR. HESS: No, Your Honor.
 19 MS. BROOKS: We'll withdraw all other pending
 20 motions. I think there was a -- a request for an extra
 21 day and -- but this should resolve all issues.
 22 THE COURT: And I don't know that we
 23 specifically talked about it, but do I take it, Mr. Hess,
 24 that you are also moving to dismiss the contempt charge
 25 that's --

1 MR. HESS: We -- we will dismiss the contempt
 2 charge --
 3 THE COURT: Okay.
 4 MR. HESS: -- yes.
 5 THE COURT: I'll do that --
 6 MR. HESS: Okay.
 7 THE COURT: -- if you move to.
 8 MR. HESS: Okay.
 9 THE COURT: I'll --
 10 MR. HESS: I'm learning, Your Honor.
 11 THE COURT: We all are. I'll enter an order
 12 dismissing the contempt charge as part of this global
 13 resolution.
 14 You know, you all have worked real hard on
 15 this, and I know it's been difficult for everyone. I
 16 appreciate the time that you've put into, that has saved
 17 us all a lot of time and, I expect, you all a lot of
 18 money as well. So, thank you for your efforts in
 19 cooperating and I'll look forward to getting the order.
 20 MS. BROOKS: Thank you, Your Honor.
 21 MR. HESS: Thank you, Your Honor.
 22
 23 (The proceedings concluded at 9:46 a.m.)
 24
 25

REPORTER'S CERTIFICATE

I, Susan M. Wolf, Registered Professional
 Reporter, a Notary Public in and for the State of Idaho,
 do hereby certify:

That the foregoing proceedings were
 transcribed by me in machine shorthand from audio
 recordings made at the time and place therein named, and
 thereafter the same was reduced to typewriting under my
 direct supervision; and

That the foregoing transcript contains a
 full, true, and verbatim record of the said proceedings,
 to the extent said audio recordings were audible and
 intelligible.

WITNESS my hand and seal this 12th day of
 November, 2009.

NOTARY PUBLIC in and for the State
 of Idaho; residing at Boise, Idaho

My commission expires 12-11-09
 CSR No. 728


REPORTER'S CERTIFICATE

I, Susan M. Wolf, Registered Professional Reporter, a Notary Public in and for the State of Idaho, do hereby certify:

That the foregoing proceedings were transcribed by me in machine shorthand from audio recordings made at the time and place therein named, and thereafter the same was reduced to typewriting under my direct supervision; and

That the foregoing transcript contains a full, true, and verbatim record of the said proceedings, to the extent said audio recordings were audible and intelligible.

WITNESS my hand and seal this 12th day of November, 2009.


NOTARY PUBLIC in and for the State
of Idaho; residing at Boise, Idaho

My commission expires 12-11-09

CSR No. 728

SUSAN M. WOLF
Notary Public
State of Idaho

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COSHO HUMPHREY, LLP

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twalker@cosholaw.com
www.ricolawblog.com

DIRECT PHONE 208.639.5607
CELL PHONE 208.869.1508
DIRECT FAX 208.639.5609

December 15, 2008

Patricia E. McKay Via email to: patmckay@cableone.net
25 Horizon Drive
Boise, ID 83702

Re: Post Judgment – Patricia E. McKay v. L. Darwin McKay
CH File No.: 19458-002
Case No.: CV DR 0615200

Dear Patty:

I have reviewed the various assignment forms and the judgment that Darwin obtained against Status Corporation on August 22, 2008. I also discussed this matter with Stan Welsh. As you know, you received a Judgment and Decree of Divorce against Darwin on November 20, 2007. We subsequently recorded the judgment in each county that you thought Darwin owned real and personal property. By virtue of Idaho Code § 10-1011, your judgment became a lien upon Darwin's real and personal property. Idaho Code § 10-1011 provides in relevant part as follows:

A transcript or abstract of any judgment or decree of any court of this state . . . the enforcement of which has not been stayed as provided by law, if rendered within this state, certified by the clerk having custody thereof, may be recorded with the recorder of any county of this state, who shall immediately record and docket the same as by law provided, and from the time of such recording, and not before, the judgment so recorded becomes a lien upon all real property of the judgment debtor in the county, not exempt from execution, owned by him at the time or acquired afterwards at any time prior to the expiration of the lien.

Idaho Code 11-101 provides in relevant part:

If [a judgment] be against the property of the judgment debtor, it must require the sheriff to satisfy the judgment, with interest, out of the personal property of such debtor, and if sufficient personal property can not be found, then out of his real property; or if the judgment be a lien upon real property, then out of the real property belonging to him on the day when the judgment was docketed, or at any time thereafter; or if the execution be issued to a county other than the one in which the judgment was recovered, on the day when the transcript of the docket was filed in the office of the recorder of such county, stating such day, or any time thereafter.

Regarding the assignment to Lawyers Title Insurance Corporation, I was able to determine that Darwin made a claim against a title insurance policy issued by Lawyers Title with regard to the Status Corporation transaction. I could not find out the exact amount of the insurance claim payment, but my perception is that it was more than the \$800,000 that Darwin owes you.

In any event, pursuant to Idaho Code § 10-1011, your judgment was recorded before any of the assignments that you provided me, including the one to Lawyers Title. Thus, the mortgage that Lawyers Title accepted from Darwin should be subject to the lien of your judgment.

We understand that you are reluctant to enforce your judgment to recover the past due \$800,000, plus interest, that Darwin owes you. However, it is possible that the longer you wait the less likely you will be able to recover on your judgment. For instance, Darwin apparently did not have any compunction against concealing the Lawyers Title payment from you. Considering his past acts, I think you can assume that he will continue to do anything he can to avoid paying you.

You also mentioned that you would consider agreeing to delay your enforcement action, if Darwin would commence making monthly interest payments of \$4,000. We can extend that offer through Darwin's counsel, Kimberly Brooks, if you want.

Let me know how you would like to proceed.

Very truly yours,

/s/

THOMAS G. WALKER

403518.doc

Patricia McKay

From: Thomas G. Walker [twalker@CoshLaw.com]
Sent: Monday, December 15, 2008 15:11
To: Patricia McKay
Cc: Stanley W. Welsh; Pam Carson
Subject: Lien on real property not personal
Follow Up Flag: Follow up
Flag Status: Red

Patty: My letter contains a technical error. The following sentence is incorrect: "By virtue of Idaho Code § 10-1011, your judgment became a lien upon Darwin's real and personal property." It should have read: "By virtue of Idaho Code § 10-1011, your judgment became a lien upon Darwin's real property." Although the judgment does not create a lien on his personal property, as noted in my letter, Idaho Code §11-101 requires the sheriff to first execute on personal property before he executes on real property.

Thomas G. Walker
Cosh Humphrey, LLP
800 Park Blvd., Suite 790
PO Box 9518
Boise, ID 83707-9518
Direct phone: 208-639-5607
Direct fax: 208-639-5609
E-mail: twalker@coshlaw.com
Blog: www.ricolawblog.com

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Any tax advice contained herein was not intended or written to be used, and cannot be used, by any other person (i) in promoting, marketing or recommending any transaction, plan or arrangement or (ii) for the purpose of avoiding penalties that may be imposed under federal tax law.

Patricia McKay

From: Thomas G. Walker [twalker@CoshLaw.com]
Sent: Monday, December 15, 2008 12:59
To: Patricia McKay
Cc: Pam Carson
Subject: RE:

Patty:

See my responses below. I will provide you with my thoughts later today or tomorrow morning.

Thomas G. Walker
Cosh Humphrey, LLP
800 Park Blvd., Suite 790
PO Box 9518
Boise, ID 83707-9518
Direct phone: 208-639-5607
Direct fax: 208-639-5609
E-mail: twalker@coshlaw.com
Blog: www.ricolawblog.com

From: Patricia McKay [mailto:patmckay@cablone.net]
Sent: Monday, December 15, 2008 12:36 PM
To: Thomas G. Walker
Subject:

Hello Tom,

I'm not sure if you have my current email address: patmckay@cablone.net Noted.

Thank you for visiting with me today. The phone number for Bob Rice of Lawyers Title is 389-9105 Ext. 3008. Address: 1087 W. River, #150, Boise, ID. I placed a call to him and left him a voice mail.

Your memory is very sharp! I reviewed the Falcon Butte in Murphy file. There is a Jay and Gertrude Hulet Living Trust listed.

I also reviewed the purchase contract when Darwin bought the Albrethsen Farm. The Turf Company, LLC was never listed - only L. Darwin McKay. I do not believe Sterling Bank ever knew about this transaction.

Section 2, 2.1 of the Decree, line 10: "Darwin shall pay off the full amount of Personal Residence Debt directly to the respective mortgage companies within thirty days of the date the Status Real Estate Transaction closes, or within 30 days of receipt of any funds from the sale of either the Albrethsen..... The sale to Status did not close. So, this provision is not applicable.

The balance on the home: \$551,240.65 and \$67,511.81 from most receipt statements, Total: \$ 618,752.46.

If you need any files I have please let me know and I can deliver them right away.

Thank you Tom.
!SIG:4946b1cf182722386712797!

*Darwin still
received "any funds"
from him selling
the Albrethsen farm.*

MCKAY 2736

000112

3. Enclosed as Exhibit "B" is a true and correct copy of the Judgment and Decree of Divorce with attachment (Property Settlement Agreement) as produced by the Plaintiff in the current action and as Bates labeled by my office as McKay217-McKay237.

4. Enclosed as Exhibit "C" is a true and correct copy of the Deposition of Bob Rice as produced by the Plaintiff in the current action and as Bates labeled by my office as McKay1-McKay20.

5. Enclosed as Exhibit "D" is a true and correct copy of the Verified Complaint for Foreclosure (without the attached exhibits) filed by Darwin McKay against Status Corporation as produced by the Plaintiff in the current action and as Bates labeled by my office as McKay1765-McKay1774.

6. Enclosed as Exhibit "E" is a true and correct copy of the August 19, 2008 Judgment received by Darwin McKay against Status Corporation as produced by the Plaintiff in the current action and as Bates labeled by my office as McKay1903-McKay1907

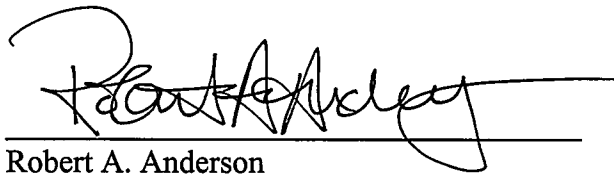
7. Enclosed as Exhibit "F" is a true and correct copy of the Motion for Contempt filed by Plaintiff, through attorney Scott Hess, as produced by the Plaintiff in the current action and as Bates labeled by my office as McKay962-McKay964.

8. Enclosed as Exhibit "G" is a true and correct copy of excerpts from the Report's Transcription of Proceedings for the July 9, 2009 Court Trial before Judge Reardon in *McKay v. McKay*, Case No. CV DR 2006-0015200, in the Magistrate Court of the Fourth Judicial District of the State of Idaho, in and for the County of Ada ("Underlying Action"), which my office received from the court reporter.

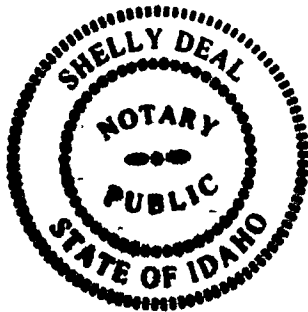
9. Enclosed as Exhibit "H" is a true and correct copy of the August 19, 2009 Judgment entered in the Underlying Action as produced by the Plaintiff in the current action and as Bates labeled by my office as McKay1334-McKay1336.

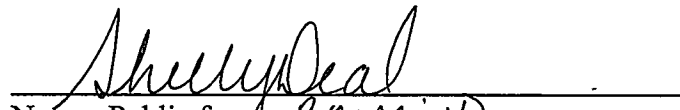
10. Enclosed as Exhibit "I" is a true and correct copy of the Order Settling All Claims filed in the Underlying Action as produced by the Plaintiff in the current action and as Bates labeled by my office as McKay156-McKay164.

Further your Affiant saith not.


Robert A. Anderson

SUBSCRIBED AND SWORN to before me this 6th day of January, 2011.




Notary Public for Bose ID
Residing at Bose ID
My commission expires: 2/20/2013

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this 16th day of January, 2011, I served a true and correct copy of the foregoing by delivering the same to each of the following attorneys of record, by the method indicated below, addressed as follows:

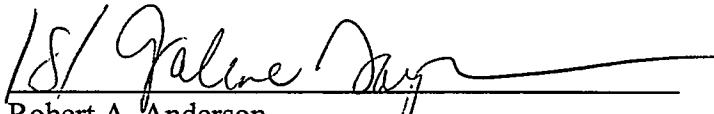
Allen B. Ellis
ELLIS, BROWN & SHEILS,
CHARTERED
707 North 8th Street
P.O. Box 388
Boise, Idaho 83701-0388
Telephone: (208) 345-7832
Facsimile: (208) 345-9564

☐ U.S. Mail, postage prepaid
☒ Hand-Delivered
☐ Overnight Mail
☐ Facsimile

Kevin E. Dinius
Michael J. Hanby II
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☐ U.S. Mail, postage prepaid
☒ Hand-Delivered
☐ Overnight Mail
☐ Facsimile

Attorneys for Plaintiff



Robert A. Anderson
Yvonne A. Dunbar

Exhibit A

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

PATRICIA McKAY,)
Plaintiff,)
vs.) Case No. CV OC 0922659
THOMAS G. WALKER and COSHO)
HUMPHREY, LLP, a limited) VOLUME I
liability partnership,) (Pages 1 through 147)
Defendants.)

DEPOSITION OF PATRICIA E. McKAY
TAKEN NOVEMBER 1, 2010

REPORTED BY:

SHERI FOOTE, CSR No. 90, RPR, CRR

Notary Public

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1 THE DEPOSITION OF PATRICIA E. McKAY,
2 VOLUME I, was taken on behalf of the Defendants
3 at the offices of Ellis Brown & Sheils,
4 Chartered, 707 North 8th Street, Boise, Idaho,
5 commencing at 9:02 a.m. on November 1, 2010,
6 before Sheri Foote, Certified Shorthand Reporter
7 and Notary Public within and for the State of
8 Idaho, in the above-entitled matter.
9 APPEARANCES:
10 For the Plaintiff:
11 Ellis Brown & Sheils, Chtd.
12 BY MR. ALLEN B. ELLIS
13 707 North Eighth Street
14 P.O. Box 388
15 Boise, Idaho 83701-0388
16 For the Defendants:
17 Anderson Julian & Hull, LLP
18 BY MR. ROBERT A. ANDERSON
19 250 South Fifth Street, Suite 700
20 P.O. Box 7426
21 Boise, Idaho 83707-7426
22
23 ALSO PRESENT: Thomas G. Walker
24
25

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<p>1 27 - E-Mail Chain, 11/16/07, Re: McKay 116</p> <p>2 Early Morning Thoughts on the Past</p> <p>3 Month</p> <p>4 28 - Letter From Stanley Welsh to 116</p> <p>5 Patricia McKay, 11/16/07, Re:</p> <p>6 Patricia E. McKay v. L. Darwin</p> <p>7 McKay</p> <p>8 29 - E-Mail From Thomas Walker to John 128</p> <p>9 Miller and Kimberly Brooks,</p> <p>10 11/19/07, Re: McKay, With</p> <p>11 Attachment</p> <p>12 30 - Letter From Thomas Walker to 129</p> <p>13 Kimberly Brooks and John Miller,</p> <p>14 11/20/07, Re: Patricia E. McKay v.</p> <p>15 L. Darwin McKay</p> <p>16 31 - E-Mail From Thomas Walker to John 129</p> <p>17 Miller and Kimberly Brooks,</p> <p>18 11/20/07, Re: McKay, With</p> <p>19 Attachments</p> <p>20 32 - E-Mail Chain, 12/3/07, Re: McKay 138</p> <p>21 v. McKay</p> <p>22</p> <p>23</p> <p>24</p> <p>25</p>	<p>1 answering. If I happen to step on the end of</p> <p>2 your answer because I'm asking another question,</p> <p>3 I apologize in advance. If I do that, just stop</p> <p>4 me and I will let you finish, because I want to</p> <p>5 allow you the opportunity to say whatever you</p> <p>6 think is necessary.</p> <p>7 And if you don't understand one of my</p> <p>8 questions or you need me to rephrase it or repeat</p> <p>9 it, please ask me to do so. Otherwise I'll</p> <p>10 assume that you did understand it and have</p> <p>11 answered truthfully and completely. Do you</p> <p>12 understand that?</p> <p>13 A. Okay, yes.</p> <p>14 Q. Do you understand you're also</p> <p>15 testifying under the penalty of perjury?</p> <p>16 A. Yes.</p> <p>17 Q. Okay. State your full name for the</p> <p>18 record, please.</p> <p>19 A. Patricia Eleanor McKay.</p> <p>20 Q. And how old are you, ma'am?</p> <p>21 A. 62.</p> <p>22 Q. And you said that you had been deposed</p> <p>23 a couple of times. What was the most recent</p> <p>24 deposition in which you were engaged?</p> <p>25 A. The divorce proceedings.</p>

2 (Pages 5 to 8)

1 Q. With Mr. McKay?

2 A. Yes.

3 Q. And other than that, have you ever been
4 deposed otherwise?

5 A. Yes, fighting for custody of my
6 daughter.

7 Q. And when was that deposition taken?

8 A. I believe in 1988.

9 Q. And to whom were you married at the
10 time?

11 A. I wasn't married to him. It was after
12 the divorce. I was fighting for custody for my
13 daughter about three years after my divorce from
14 Douglas Christensen.

15 Q. Any other times that you were deposed?

16 A. No.

17 Q. All right. You've brought a lawsuit,
18 as I mentioned earlier, against my clients. Can
19 you tell me why you believe they're responsible
20 for whatever situation you think you're in today?

21 A. Tom Walker told me that the divorce
22 decree created a judgment, was a judgment against
23 Darwin's real property, and Darwin received funds
24 which according to the decree should have been my
25 funds.

1 Q. Why should they have been your funds?

2 A. Because it was funds coming from the
3 sale of the Albrethsen property. And in the
4 divorce decree it stated any funds from the sale
5 of the Albrethsen property, Patricia would be
6 paid \$800,000 plus 6 percent interest and the
7 home will be paid off.

8 Q. We'll get into it in some more detail,
9 but didn't the divorce decree actually say that
10 upon receipt of any funds there was a trigger, so
11 to speak, of an obligation by Mr. McKay to pay
12 you some money?

13 MR. ELLIS: Objection, the document
14 speaks for itself and the question seeks a legal
15 conclusion.

16 Q. (BY MR. ANDERSON) What was your
17 understanding? Let me ask you this: Do you have
18 an understanding that the funds, any funds
19 received by Mr. McKay regarding the Albrethsen
20 property, were deemed to be yours in the
21 settlement decree or the PSA, as we'll call it,
22 property settlement agreement?

23 A. That they were to be --

24 MR. ELLIS: Objection to form.

25 Q. (BY MR. ANDERSON) That they were

1 yours.

2 MR. ELLIS: Calls for a legal
3 conclusion.

4 Q. (BY MR. ANDERSON) I'm just asking your
5 understanding.

6 A. Any funds that Darwin received from the
7 sale of the Albrethsen property, he was to pay me
8 \$800,000 plus 6 percent interest and the home
9 paid off.

10 Q. And as I understand it, he didn't pay
11 you any money when he received some money in
12 conjunction with that transaction; correct?

13 A. That's correct.

14 Q. And you filed a contempt action against
15 him?

16 A. Yes, I did.

17 Q. What is it that Mr. Walker did that
18 resulted in you having to file a contempt action?
19 I thought --

20 MR. ELLIS: Mr. Walker?

21 Q. (BY MR. ANDERSON) I'm sorry, let's
22 just start over. As I understand it, Mr. McKay
23 didn't pay you any funds when he received some
24 money in conjunction with the Albrethsen
25 transaction; correct?

1 A. No, he did not.

2 Q. Why is it that that was Mr. Walker's or
3 Cosho Humphrey's fault that Mr. McKay didn't pay
4 you?

5 A. The divorce did not -- the divorce
6 decree was not clear. The writing in the divorce
7 decree was not clear as to the security. There
8 was no security in the divorce decree for those
9 funds.

10 Q. What do you mean by "security"?

11 A. The divorce decree should have had the
12 legal description of the Albrethsen property or
13 any information on that mortgage note.

14 Q. Why would that have made Mr. McKay pay
15 you?

16 A. The funds probably would not have been
17 paid to me directly by Mr. McKay, they probably
18 would have come from the title company, because
19 it would have put the title company on notice of
20 what they paid out.

21 Q. Why would the title company have had to
22 pay you even if they were on notice?

23 A. Because it clearly states it would have
24 been a lien on the mortgage note.

25 Q. A lien on the mortgage note? What do

1 you mean by that?

2 A. Had the property, legal property
3 description been in the PSA, that would have put
4 the mortgage -- or the title company on notice
5 that there was funds due me from that piece of
6 property.

7 Q. What piece of property?

8 A. The Albrethsen property.

9 Q. Who owned the Albrethsen property?

10 A. Darwin and I owned the Albrethsen
11 property at the time of divorce.

12 Q. The property had been sold.

13 A. The property had been sold, yes.

14 Q. To whom?

15 A. To Status Corporation.

16 Q. Well, then, when you say "a lien on the
17 property," what do you mean if it's already been
18 sold?

19 A. There was a balance owing on the
20 property in the form of a mortgage.

21 Q. And the lien is good for what? Real
22 property?

23 A. Real property.

24 Q. But there was no real property;
25 correct? It was just a mortgage note?

1 A. The mortgage was regarded as real
2 property.

3 Q. By whom?

4 A. According to Tom Walker and what they
5 wrote in the divorce decree.

6 Q. So, you believe the divorce decree
7 indicates that a mortgage note was in existence
8 and that a lien could be placed against it?

9 A. Say that again, please.

10 MR. ANDERSON: Madam Court Reporter.
11 (Record read back.)

12 THE WITNESS: According to the divorce
13 decree, Tom Walker had expressed to me that the
14 judgment created a lien against Darwin's real
15 property, which included the mortgage.

16 Q. (BY MR. ANDERSON) Well, tell me about
17 that last part, "which included the mortgage."
18 Tell me where Mr. Walker told you that.

19 MR. ELLIS: You mean what geographical
20 location?

21 Q. (BY MR. ANDERSON) No, no, the timing
22 of Mr. Walker's comment. Or are you referring to
23 the property settlement agreement?

24 A. I'm referring to the property
25 settlement agreement. When I went in to sign the

1 property settlement agreement, Tom Walker had
2 written in the divorce decree that Mr. McKay had
3 a mortgage note on the balance owing on the
4 Albrethsen property. And I asked him --

5 Q. Go ahead.

6 A. -- "What's this mortgage note?" And
7 Tom said, expressed to me that he has to have a
8 mortgage note on the balance owing on this
9 property because he still is due approximately
10 \$1.4 million.

11 Q. Did he say anything else?

12 A. I don't recall.

13 Q. You told me that there was something
14 about a lien on a mortgage note, but you haven't
15 told me anything about that, so --

16 A. Tom Walker told me December 15 of 2008
17 after I had discovered the funds had been paid
18 out to Darwin, Tom Walker wrote to me and stated
19 that the PSA being recorded created a lien
20 against all of Darwin's real property.

21 Q. Did he tell you that a mortgage note
22 was real property? "Yes" or "no"?

23 MR. ELLIS: Asked and answered.

24 Q. (BY MR. ANDERSON) "Yes" or "no," in
25 this conversation? Or did he simply say, "It

1 creates a lien against real property"?

2 A. The PSA created a lien against all of
3 Darwin's real property.

4 Q. But Mr. Walker never told you that the
5 mortgage note constituted real property; correct?

6 A. I would have to say yes, he did.

7 Q. Well, tell me if he did or not. That's
8 what I'm asking.

9 MR. ELLIS: Objection, asked and
10 answered. She just did, Counsel.

11 Q. (BY MR. ANDERSON) And I'd like to know
12 the exact words that he used.

13 A. I cannot recall the exact words. This
14 was the end of November of 2007.

15 Q. You just said December 15, 2008. Now,
16 what are we doing?

17 A. You're asking --

18 MR. ELLIS: Objection. Off the record.
19 (Discussion held off the record.)

20 Q. (BY MR. ANDERSON) Let's continue. Can
21 you tell me when Mr. Walker told you that the
22 property settlement agreement constituted a
23 decree on a mortgage note?

24 MR. ELLIS: Objection as to clarity. A
25 decree on a mortgage note?

1 **Q. (BY MR. ANDERSON)** The property
2 settlement agreement, when did he tell you that
3 it constituted a lien on a mortgage note?

4 **MR. ELLIS:** Asked and answered. Go
5 ahead.

6 **THE WITNESS:** When did he tell me?

7 **Q. (BY MR. ANDERSON)** Yes.

8 **A.** December 15, 2008, he sent me an e-mail
9 stating that the property settlement agreement
10 being recorded was a lien against all of Darwin's
11 real property.

12 **Q.** Has anybody told you that that is
13 untrue?

14 **A.** No.

15 **Q.** So, why are you complaining about that
16 particular statement, that it constitutes a lien
17 on real property, if no one has told you that
18 that's untrue?

19 **A.** I guess I'm not understanding your
20 question.

21 **Q.** Are you complaining about the statement
22 by Mr. Walker in which he told you, as you
23 reported, that the property settlement agreement
24 being recorded constitutes a lien on real
25 property?

1 **MR. ELLIS:** Objection as to clarity.
2 Are you complaining?

3 **Q. (BY MR. ANDERSON)** Are you alleging
4 that that's a cause of action that you have
5 against Mr. Walker or his firm?

6 **A.** I am alleging that. I suspect since
7 the legal property description was not, nor was
8 the mortgage, identified in the property
9 settlement agreement --

10 **MR. ELLIS:** You have to complete your
11 sentence.

12 **THE WITNESS:** There was -- the clarity
13 in the property settlement -- there was not full
14 clarity in the property settlement agreement as
15 to the mortgage note.

16 **MR. ANDERSON:** Let's go back to my
17 question. Could you just read that alone.

18 (Record read back.)

19 **MR. ELLIS:** Objection as to clarity.

20 **Q. (BY MR. ANDERSON)** Let me make sure
21 it's clear. You've just told us that Mr. Walker
22 told you that if he recorded the property
23 settlement agreement it became a lien on real
24 property which might have been owned by
25 Mr. McKay. Am I correct so far?

1 **A.** Yes.

2 **Q.** And as I understand your testimony, no
3 one has told you that that is an incorrect
4 statement; is that also correct?

5 **A.** That's correct.

6 **Q.** So, why are you -- you keep mentioning
7 that Mr. Walker told you that, but if no one has
8 told you that it's incorrect, why are you
9 bringing it up?

10 **A.** If it created -- if the property
11 settlement agreement was written as accurately as
12 I was informed that it was at the time of the
13 divorce, then the funds would have been paid
14 directly to me by Lawyers Title, not through
15 Darwin. Lawyers Title would have found the
16 obligation that the property settlement agreement
17 stated and Lawyers Title would have contacted me.

18 **Q.** And done what?

19 **MR. ELLIS:** Excuse me.

20 **Q. (BY MR. ANDERSON)** They would have
21 contacted you and what else would have happened?

22 **A.** They would have contacted me to
23 question me about the funds and the checks
24 probably would have been written out to me.

25 **Q.** That's the basis of your lawsuit

1 against Mr. Walker and his firm?

2 **MR. ELLIS:** Objection as to the
3 sarcastic and argumentative and demeaning tone of
4 your question.

5 **MR. ANDERSON:** Not at all, Counsel.
6 But if you perceived it that way, I don't in any
7 way mean to be sarcastic.

8 **Q. (BY MR. ANDERSON)** I am asking you as
9 we sit here today at the outset of your
10 deposition if this supposition on your part that
11 Lawyers Title would have done something is the
12 basis of your lawsuit?

13 **A.** Yes, Lawyers Title expressed to me on
14 December 15 after they saw the divorce decree,
15 "Patricia, there's been a mistake made here. I
16 recommend you take all of these papers to your
17 attorney."

18 **Q.** And in that same conversation, which I
19 believe was with Mr. Rice --

20 **A.** Yes, Bob Rice.

21 **Q.** -- he told you that Lawyers Title had
22 failed to find the divorce decree; correct?

23 **A.** That is correct.

24 **Q.** So, your supposition is actually a
25 two-level supposition; isn't it? First, they had

1 to find the decree. And second, you suppose that
2 they would have called you after reviewing it;
3 would you agree?

4 MR. ELLIS: Agree to what, Counsel?
5 That that's her supposition?

6 Q. (BY MR. ANDERSON) That my reference to
7 a dual supposition is correct. They first have
8 to find it; correct?

9 A. That's correct.

10 Q. And Mr. Rice indicated to you that they
11 had failed to search for it; isn't that also
12 correct?

13 A. I do not recall that.

14 Q. You haven't put that in any reference,
15 any documents?

16 A. I do not recall. I believe I learned
17 along the way that -- I believe Bob told me at
18 the time that he was not aware we were even
19 divorced.

20 Q. Because they hadn't searched the
21 records; correct?

22 A. That's correct.

23 Q. And that would be a necessary first
24 step before you ever became involved; correct?

25 A. Yes.

1 Q. Now, you haven't brought an action
2 against Lawyers Title; have you?

3 A. No. I considered it.

4 Q. But you think that they did something
5 wrong by not searching for your divorce decree?

6 MR. ELLIS: Objection, asks for a legal
7 conclusion.

8 Q. (BY MR. ANDERSON) Do you think Lawyers
9 Title did something wrong by not searching for
10 the divorce decree?

11 MR. ELLIS: The same objection.

12 Q. (BY MR. ANDERSON) Unless he tells you
13 not to answer, he's just making a record.

14 A. Oh. No, they explained to me, Bob Rice
15 explained to me that the reason why -- he said,
16 "Even if we had done a search for the divorce
17 decree, it would not have shown up because the
18 legal description of the Albrethsen property was
19 not in the divorce decree."

20 Q. And was that also in this conversation
21 that you had with him?

22 A. Yes, on December 15, 2008.

23 Q. All right. Thank you.

24 MR. ELLIS: Gentlemen, I do have coffee
25 if you're interested.

1 MR. ANDERSON: Why don't we take just a
2 quick break.

3 (Recess held.)

4 Q. (BY MR. ANDERSON) I have to ask a
5 couple of questions at the outset. Have you ever
6 had any claims made against you regarding
7 veracity? For example, have you ever been
8 arrested?

9 A. Yes.

10 Q. For what?

11 A. Falsely accused of -- falsely accused
12 of grabbing a woman, a renter.

13 Q. Okay, some sort of an assault charge?

14 A. Yeah. And I did not -- go ahead.

15 Q. Please finish your thought.

16 A. I was innocent. We had to prove that I
17 was innocent, but at the time my attorney advised
18 me that it was going to cost \$1,500 to \$2,000 to
19 fight it. And Darwin and I didn't have the funds
20 to do so. And so, my attorney also advised,
21 "Well, if you just plead guilty, then you'll
22 probably just get a slap on your hands because
23 you've got a pristine record." So, I pleaded
24 guilty.

25 Q. But it was an assault charge?

1 A. Right.

2 Q. Are there any other arrests that have
3 been --

4 A. No.

5 Q. -- that you've been involved with?

6 A. No.

7 Q. Have there been any claims filed
8 against you in terms of a lawsuit?

9 A. No.

10 Q. Other than the divorce proceedings that
11 you had?

12 A. Not that I recall.

13 Q. All right. Are you currently employed?

14 A. No.

15 Q. At one point I thought I saw you were
16 working for Harmon Travel or some sort of a
17 travel agency.

18 A. Harmon Travel and Global Travel on a
19 temporary basis.

20 Q. And that has come to an end?

21 A. Nobody is traveling. Everybody is
22 doing everything through the Internet.

23 Q. A little bit of background is in order.
24 When did you meet Darwin McKay?

25 A. February of 1994.

1 Q. Before we get too much further into
2 your history, I'd like to mark as Exhibit
3 No. 1 —

4 (Exhibit 1 marked.)

5 Q. (BY MR. ANDERSON) Ms. McKay, Exhibit
6 No. 1 is a notice for your deposition and I'm
7 interested in the list of items that have been
8 set forth on pages 2 and 3. Did you have a
9 chance to review this before your deposition?

10 MR. ELLIS: Counsel, we've given you
11 everything, absolutely everything that she has.

12 MR. ANDERSON: And that's what I'm
13 trying to get at. Thank you.

14 Q. (BY MR. ANDERSON) Have you reviewed
15 this document?

16 A. Yes, I have.

17 Q. And are you aware of any documents
18 which have been requested but not yet turned over
19 to us?

20 A. No.

21 Q. All right.

22 MR. ELLIS: Is that an exhibit,
23 Counsel?

24 MR. ANDERSON: Exhibit No. 1.

25 MR. ELLIS: Thank you.

1 appropriate changes to this Agreement" on your
2 behalf?

3 A. Yes. Excuse me. Repeat that.

4 Q. On your behalf?

5 A. Did he what?

6 Q. I'm reading from the second to the last
7 paragraph, that he had had an opportunity to
8 request and make appropriate changes to this
9 agreement —

10 A. Yes.

11 Q. — on your behalf?

12 A. Yes.

13 Q. At the time you signed this agreement,
14 did you intend to be bound by it?

15 A. Yes.

16 Q. At the time this agreement was signed,
17 did you consider it to be binding?

18 A. Yes.

19 Q. All right. At some point it appears
20 that your relationship with Mr. McKay seemed to
21 wane and a divorce was contemplated; is that
22 correct?

23 A. Yes.

24 Q. Prior to that time, had you been made
25 aware in some fashion that he was involved with

1 (Exhibit 2 marked.)

2 Q. (BY MR. ANDERSON) Exhibit No. 2
3 coincidentally appears to have been Exhibit No. 2
4 in an earlier proceeding. I believe it was in
5 Darwin McKay's prior deposition in the underlying
6 matter. But do you recognize this particular
7 document as the prenuptial agreement into which
8 you entered on or about July 1, 1996?

9 A. Yes.

10 Q. How long had you known Mr. McKay prior
11 to signing this document?

12 A. From February of '94 to the date on
13 this document.

14 Q. All right. If I could have you turn to
15 page 2.

16 A. (Witness complied.)

17 Q. There are some paragraphs there. And
18 the second one indicates that you were
19 represented by an attorney and the fourth
20 paragraph indicates that Jim Bevis has reviewed
21 this document on your behalf. Are both of those
22 statements true?

23 A. Yes.

24 Q. And is it also true that your "counsel
25 has had opportunities to request and make

1 some sort of transaction involving the Albrethsen
2 property?

3 A. Yes.

4 Q. Can you just give us a narrative answer
5 regarding what you understood prior to the
6 divorce your husband's dealings regarding the
7 Albrethsen property were.

8 A. He told me that he was buying and
9 selling it to the Status Corporation. That was
10 approximately February of 2006.

11 Q. How did you understand the transaction
12 was to take place, if you had that knowledge?

13 A. He was going to purchase the property
14 from Eric Albrethsen and sell it to Status
15 Corporation in one transaction, basically
16 flipping the property, as long as he could get
17 Status Corporation to give him the entire amount
18 that he would be paying Eric Albrethsen for, i.e.
19 the downpayment.

20 Q. Did you understand that a downpayment
21 was received by Darwin McKay from the Status
22 Corporation?

23 A. Yes.

24 Q. And he paid that to Mr. Albrethsen?

25 A. Yes.

1 Q. And as a result, at one point he owned
2 the property to the extent that he was able to
3 transfer it to the Status Corporation; is that
4 your understanding?

5 A. Basically, yes. He owned the property
6 and flipped it in one day.

7 Q. So, he bought it and he sold it the
8 same day essentially?

9 A. Yes.

10 Q. All right. So, after he had sold it,
11 would you agree that he was no longer the owner
12 of the property?

13 A. That is correct.

14 Q. And as I understood it, his continuing
15 relationship with that transaction, not the
16 property but the transaction, was that Status
17 Corporation owed him a residual sum for which he
18 obtained a mortgage?

19 A. That is correct.

20 Q. All right. So, there was a mortgage
21 note in the amount of about \$1,396,000; is that
22 your understanding?

23 A. Yes.

24 Q. When did you find out about the
25 mortgage note?

1 A. I didn't find out about the mortgage
2 note until Tom Walker expressed it in the divorce
3 decree. He mentioned it. And I questioned him
4 about it and Tom expressed, "Yes, there's got to
5 be a mortgage note out there because he's still
6 due \$1.3 million on that property."

7 Q. At the time you were having that
8 discussion with Mr. Walker, you understood that
9 your husband did not own the Albrethsen property?

10 A. That is correct.

11 Q. What was it -- and you can be as brief
12 as possible -- that made you make the decision to
13 start divorce proceedings against your husband?

14 MR. ELLIS: I will object to that
15 question as not calculated to lead to the
16 discovery of admissible evidence. But Ms. McKay,
17 go ahead and answer to the best of your ability.

18 THE WITNESS: There were two pieces of
19 property which Darwin and I had sold and I knew I
20 had to sign some papers regarding those two
21 pieces of property. I asked Darwin what time
22 closing was and he told me, he said, "10:00, but
23 you don't have to be there." And from my
24 recollection, this is a community property state
25 and I knew that I would have to sign some papers.

1 I just agreed with him. I said, "Okay, okay,"
2 because he was yelling at me.

3 And about an hour after the closing
4 time, approximately 11:00 that morning, the title
5 company called me and asked me to go down and
6 sign some papers. And I asked them, "I don't
7 understand. My husband told me I did not have to
8 sign anything." And I said, "That's strange."

9 She said, the title agent said, "That's
10 strange, he brought in a quitclaim deed for you
11 to sign." I said, "Really? What is the address
12 of that quitclaim deed?" And she said, "It's
13 25 Horizon Drive," which happens to be our home.

14 And she said, "What is this?" And I
15 said, "Well, it happens to be our home." And she
16 said, "Oh, are you folks living together?" And I
17 said, "Yes." And then she said, "Well, are you
18 folks having marital problems?" And I said,
19 "Well, I guess we -- I didn't think we were, but
20 we are now."

21 I said, "That property, the home is
22 strictly in my name. And if I'm not mistaken, if
23 I sign a quitclaim deed, I would be giving him
24 the home free and clear, yet I get left with the
25 mortgage debt; is that not correct?" And she

1 said, "Yes." And I said, "Well, I'll be down to
2 pick up the papers but not to sign them."

3 MR. ELLIS: Excuse me. Do you remember
4 the original question, Pat?

5 THE WITNESS: What instigated the
6 divorce.

7 MR. ELLIS: All right.

8 Q. (BY MR. ANDERSON) Was there a piece of
9 property called the Carpenter property? I'm
10 trying to see if that might be -- you said that
11 you had two quitclaim deeds that were involved.
12 Do you remember which properties they involved?

13 A. No, I don't recall the names.

14 Q. Do you recall --

15 A. They were on -- there was two building
16 lots that were developed building lots, i.e. the
17 utilities and everything had been put in. It was
18 in a development on approximately Cloverdale --
19 between Cloverdale -- or off of Cloverdale,
20 between Victory and Lake Hazel.

21 Q. Okay.

22 A. I can't remember the name of that
23 subdivision.

24 Q. Do you recall signing a quitclaim deed
25 relative to the Albrethsen property?

1 A. I signed a statement via -- through my
2 counsel, Jim Bevis. However, Jim had also sent a
3 letter along with that.

4 Q. Right. And I don't mean to shorten
5 that, but let me make sure you understand my
6 question. The fact that you signed a quitclaim
7 deed was further indication to you that the
8 Albrethsen property itself had been sold by your
9 husband; correct? That he no longer owned it and
10 needed you to sign the quitclaim deed in order to
11 effectuate that transaction?

12 A. Okay, you're getting these two
13 transactions mixed up. We started out with why
14 the divorce started.

15 Q. I thought you answered that.

16 A. I did, but --

17 MR. ELLIS: Pat, why don't you let
18 Counsel ask the question and perhaps that will
19 assist you in understanding where he's headed.

20 Q. (BY MR. ANDERSON) Do you remember that
21 you signed a quitclaim deed relative to the
22 Albrethsen property transaction?

23 A. I did, with a letter stipulating that
24 my interest in the property was secured.

25 Q. I'm not trying to trick you. I

1 understand. But did you understand that by
2 signing a quitclaim deed, with all of the caveats
3 and whatever you and your attorney put on it,
4 that the property itself was being sold?

5 A. Yes.

6 Q. You mentioned that there was another
7 piece of property that your husband said you
8 didn't need to be involved with but the title
9 company said that you did in some fashion. Can
10 you just tell me how that concluded.

11 A. There was two pieces of property, two
12 building lots for homes.

13 Q. And he said, "I'm going to deal with
14 these, but you don't need to be involved"?

15 A. That's correct. And he was wrong in
16 that manner. He knew that I had to be involved.
17 He knew that I had to go down and sign those
18 papers. That's why he took in a quitclaim deed
19 of our personal residence and slipped it in there
20 with the papers, thinking, "Well, if I slip this
21 in there, she'll sign it and the house will be
22 mine free and clear." And I asked some
23 questions.

24 Q. I take it you didn't have a very high
25 opinion of him as a result?

1 A. Of this matter at that particular time,
2 no.

3 Q. With respect to that transaction, I
4 take it --

5 A. May I just clarify something?

6 Q. Sure.

7 A. At that time, that did not instigate
8 the divorce proceedings.

9 Q. I'm just trying to do kind of some
10 history here. Something did --

11 A. Yes.

12 Q. -- and you went to Mr. Bevis to start
13 those proceedings?

14 A. Yes, I did.

15 Q. Then he was somehow --

16 A. That was several months down the road.

17 Q. No problem.

18 MR. ELLIS: Counsel, I'm going to step
19 out a second and get a pot of coffee in here.

20 MR. ANDERSON: Sure.

21 (Discussion held off the record.)

22 MR. ANDERSON: Back on the record.

23 Q. (BY MR. ANDERSON) In keeping with our
24 development of a chronological history here, you
25 went to Mr. Bevis, but I understand that for some

1 reason he had to back out of your representation
2 and you ultimately ended up with Cosho Humphrey;
3 is that correct?

4 A. That is correct.

5 Q. And what was your intent with respect
6 to the divorce? I'm not asking for a legal
7 opinion, but just in general, what was it that
8 you wanted out of the divorce proceedings?

9 MR. ELLIS: You mean property?

10 Q. (BY MR. ANDERSON) Property, money,
11 corporal punishment, I don't know what. But did
12 you have a goal in mind when you approached Cosho
13 Humphrey in terms of what you wanted the divorce
14 to achieve?

15 A. Approximately 50 percent of the estate.

16 Q. And the estate consisted in your
17 opinion of what property or items?

18 A. Several pieces of property and the
19 business, the businesses.

20 Q. All right.

21 (Discussion held off the record.)

22 MR. ANDERSON: Back on the record.

23 (Record read back.)

24 Q. (BY MR. ANDERSON) Did you believe when
25 you were first starting to deal with Cosho

1 Humphrey that the Albrethsen property in some way
2 was part of the estate?

3 A. Yes.

4 Q. You understood it had already been sold
5 to Status Corporation?

6 A. That is correct.

7 Q. How could it be part of the estate in
8 your estimation?

9 A. At that time I was not aware that the
10 deed had been transferred.

11 Q. I thought you had signed a quitclaim
12 deed several months earlier.

13 A. I'm not a real estate person and --

14 Q. No problem, no problem.

15 A. I believe it was like a warranty deed
16 maybe. I --

17 Q. Okay. I'm just --

18 A. But I also signed a letter, a document
19 with Jim Bevis that went on to Forrest Goodrum,
20 the attorney handling the transaction.

21 Q. Regarding the proceeds of the sale?

22 A. Regarding the proceeds.

23 Q. So, if you were interested in the
24 proceeds, doesn't that indicate that you
25 understood the property had been sold but that

1 there still might be some settlement or funds
2 that needed to be transferred?

3 A. Yes.

4 Q. All right. So, back to my question.

5 With respect to what you considered to be the
6 estate, did you understand that the Albrethsen
7 property didn't fall within that because it had
8 been sold?

9 MR. ELLIS: Objection, calls for a
10 legal conclusion. Plus, she's already testified
11 respecting the mortgage.

12 THE WITNESS: I was not aware that the
13 deed had been transferred at that time.

14 Q. (BY MR. ANDERSON) Okay.

15 A. I had not --

16 Q. Fair enough. That's all you need to
17 say.

18 So, you engaged Cosho Humphrey and you
19 wanted to achieve this goal of a 50 percent share
20 in whatever constituted the estate, the marital
21 estate; correct?

22 A. Yes.

23 Q. All right. Now, in order to get to
24 that end, did you make suggestions to Cosho
25 Humphrey about various areas of inquiry?

1 A. I don't understand your question.

2 Q. Did you want Cosho Humphrey to try and
3 develop a good, clear understanding of
4 Mr. McKay's financial structure?

5 A. I believe that's the responsibility of
6 the divorce attorneys, yes.

7 Q. And do you understand that Cosho
8 Humphrey pursued various means of obtaining that
9 kind of information?

10 A. Repeat that question, please.

11 Q. Do you understand that Cosho Humphrey
12 pursued various means of obtaining that kind of
13 information?

14 A. I'm not sure that they did.

15 MR. ELLIS: Counsel, at some
16 appropriate point can we take about a five-minute
17 recess, at any time that's suitable to you?

18 MR. ANDERSON: This would be fine right
19 now.

20 (Recess held.)

21 Q. (BY MR. ANDERSON) Did you receive
22 various updates from Cosho Humphrey regarding the
23 steps they were taking to develop information
24 regarding the divorce claim you had filed against
25 Mr. McKay?

1 A. Yes.

2 Q. Did you understand that subpoenas were
3 issued by Cosho Humphrey to various financial
4 institutions to develop a better understanding of
5 Mr. McKay's financial situation?

6 A. Yes.

7 Q. Were you aware that subpoenas were
8 issued to the First Bank of the Northwest,
9 Sterling Savings Bank, KeyBank, Home Federal
10 Bank, Wells Fargo, Zions Bank, among others?

11 A. Yes.

12 Q. And were you aware that various amounts
13 of financial information were returned as a
14 result of those subpoenas?

15 A. Various amounts were returned?

16 Q. Various types of financial information?

17 A. Yes.

18 Q. Were you also aware that the law firm
19 Cosho Humphrey sent or propounded, as we say,
20 written questions to Mr. McKay asking him about
21 various properties that he owned?

22 A. Yes.

23 Q. And did you understand that Mr. McKay
24 was required under oath to answer those as
25 accurately and completely as possible?

1 A. Yes.

2 Q. Do you believe that Mr. McKay was
3 truthful in his answers that he provided
4 regarding the various properties that he owned?

5 A. I do not recall.

6 Q. All right. Do you recall if Mr. McKay
7 listed the mortgage note as a document involved
8 with the sale of the Albrethsen property when he
9 responded to the interrogatories propounded by
10 Cosho Humphrey?

11 A. I do not.

12 Q. Do you have any criticism of the manner
13 in which Cosho Humphrey went about developing
14 information for the divorce claim you have filed?

15 A. Yes, I do.

16 Q. Can you tell me what criticism you
17 have.

18 A. They did not identify the mortgage note
19 nor the piece of property, nor did they secure my
20 interest of properties and the dollar amount that
21 I was to receive in the divorce decree.

22 Q. I will allow you, I hope, to develop
23 everything you want to tell me as we go through
24 the day here and whenever else we have to ask
25 questions and get answers, but right now I'm

1 trying to focus you in on one particular aspect
2 of this whole process, and that is: During the
3 information gathering stage, I'm trying to find
4 out if you have any criticism of Cosho Humphrey?

5 A. I do not recall.

6 Q. Well, this is my chance to find out
7 from you these facts. So, if you don't recall,
8 does that mean that as you sit here today under
9 oath —

10 A. Are you referring —

11 Q. Let me finish. Does that mean that you
12 cannot tell me any criticisms that you have with
13 respect to Cosho Humphrey's efforts to gather
14 information about Mr. McKay's financial status?

15 A. You're referring to the time during the
16 divorce proceedings?

17 Q. Yes. And if I can give you a little
18 bit of guidance, you recall that there was a
19 motion for summary judgment filed on your behalf?

20 A. Which summary judgment?

21 Q. Let's back up a step. Did you
22 understand that the biggest hurdle you had to
23 achieving a 50 percent share of what you
24 considered to be the marital estate was the
25 prenuptial agreement you had signed back in 1996?

1 A. Yes.

2 Q. All right. You understood that there
3 were no guarantees that the judge would determine
4 that in some fashion the prenuptial agreement had
5 been abandoned by the parties; is that correct?

6 A. I was very confident that the prenup
7 was null and void and would be deemed so if a
8 judge had ruled on that.

9 Q. That's a good answer, but I need you to
10 listen to my question. Now, she's going to read
11 it back for us.

12 (Record read back.)

13 THE WITNESS: I did not understand
14 that.

15 Q. (BY MR. ANDERSON) You thought it was
16 guaranteed that it would be thrown out?

17 A. I was very confident it was going to be
18 thrown out.

19 Q. That's not my question. Did anybody
20 from Cosho Humphrey guarantee you that you were
21 going to win relative to getting the judge to
22 rule that the prenuptial agreement had been
23 abandoned?

24 A. Tom Walker and Stan Welsh had both
25 expressed to me, "We've got them." Those were

1 the words that Stan would always say, "We've got
2 them. We've got them." I was very confident
3 that the prenup was null and void, and so was Tom
4 Walker and Stan Welsh.

5 Q. But you understood that the court had
6 to rule that way?

7 A. No, I did not understand that the court
8 had to rule on that.

9 Q. You thought it just went away?

10 A. I understood that the prenup went away
11 if we settled out of court.

12 Q. That's not my question. And let's
13 stick to the question; okay? You understood as
14 you were moving forward in the divorce proceeding
15 that in order for you to recover 50 percent of
16 the marital property, the prenuptial agreement
17 was a hurdle that you had to get over; correct?

18 A. Yes.

19 Q. And —

20 MR. ELLIS: May I say something? In
21 most instances, Pat, in most instances, Counsel
22 is not trying to trap you. So, just go ahead and
23 answer to the best of your ability; okay?

24 THE WITNESS: Okay.

25 Q. (BY MR. ANDERSON) I never try to trap

1 anybody. The facts are the facts. That's all I
2 deal with; okay?

3 A. Okay.

4 Q. If you think one of my questions is
5 somehow Machiavellian, just say, "Wait a minute,
6 don't do that," and I'll be glad to try and
7 rephrase it. I told you that at the beginning.
8 I'm just here to get information; all right?

9 A. All right.

10 Q. And the information I want right now is
11 your understanding as you went forward in the
12 divorce proceeding that it wasn't automatic that
13 you got 50 percent. You had to do some things;
14 right?

15 A. Correct.

16 Q. One of them was you had to get the
17 judge to rule that the prenuptial agreement was
18 null and void?

19 A. Yes.

20 Q. And that wasn't guaranteed and nobody
21 from Cosho Humphrey told you that it was
22 guaranteed; correct?

23 A. That's correct.

24 Q. All right. So, in order to get the
25 prenuptial agreement taken care of, you needed to

1 they refer to the Albrethsen property; is that
2 correct?

3 A. Yes.

4 Q. And the transaction that had occurred?

5 A. Yes.

6 Q. And did you understand that this
7 information had been obtained by virtue of
8 questions Cosho Humphrey asked in interrogatories
9 to which Mr. McKay responded?

10 A. Yes, as well as information that I gave
11 them.

12 Q. What kind of information did you give
13 them?

14 A. A lot. We would have to go through the
15 entire document. I worked very, very hard on
16 this divorce case.

17 Q. I've seen a lot of charts and such.

18 A. Yes.

19 Q. Did you also go to the extent of going
20 to courthouses to try and find information about
21 property that Darwin McKay was involved with?

22 A. Not during the divorce proceedings, no,
23 I did not.

24 Q. Did you provide any of the information
25 in paragraphs 173 through 180 or was that all

1 file a motion; you understood that?

2 A. Yes.

3 Q. And you understood that that was in the
4 form of a summary judgment?

5 A. Yes.

6 Q. And you prepared an affidavit for that
7 summary judgment; correct?

8 A. Yes.

9 Q. All right. And in that affidavit, you
10 discussed the Albrethsen property; didn't you?

11 MR. ANDERSON: Let's mark it as the
12 next exhibit.

13 (Exhibit 3 marked.)

14 Q. (BY MR. ANDERSON) And I'd like you to
15 turn to page 38.

16 MR. ANDERSON: Off the record, please.

17 (Discussion held off the record.)

18 Q. (BY MR. ANDERSON) Exhibit No. 3 has
19 been marked for your deposition. Is this the
20 first affidavit you can recall signing for the
21 underlying divorce claim?

22 A. I don't know that it was the first
23 affidavit. It was one of the affidavits, yes.

24 Q. And on page 38, as I referenced
25 earlier, there are paragraphs 173 through 180 and

1 developed by Cosho Humphrey in the underlying
2 agreement?

3 A. I believe the majority of this was
4 provided through the sales contract between
5 Darwin and Status Corporation. However, the item
6 No. 176, I know that I provided that.

7 Q. And 176 references — oh, okay, a
8 financial net worth?

9 A. Financial statement, yes. And that net
10 worth, I believe that that is an incorrect amount
11 of money. I think the financial statement at the
12 time stated \$24 million something.

13 MR. ELLIS: Counsel, if you want to
14 pull that out, it's fine with me.

15 MR. ANDERSON: I just want to show her.

16 Q. (BY MR. ANDERSON) In the underlying
17 divorce action, do you recall that Cosho Humphrey
18 diligently pursued Mr. McKay in terms of
19 requiring him to answer the questions that had
20 been submitted in the form of interrogatories and
21 requests for production of documents and requests
22 for admissions?

23 A. Yes, they did.

24 Q. Do you recall that they filed up to and
25 perhaps more, three motions to compel?

1 A. Yes.

2 Q. And you understood that those were
3 motions that were filed because Mr. McKay was not
4 responding and they were getting the judge
5 involved to force him to respond?

6 A. Yes.

7 Q. All right. And on the day that one of
8 those motions was going to be heard, March 7,
9 2007, Mr. McKay finally responded with some
10 information. Do you recall all of those
11 circumstances? Does that ring a bell?

12 A. March of 2007?

13 Q. March 7, 2007.

14 A. That was his -- the taking of his first
15 deposition.

16 Q. No, it wasn't. I think his deposition
17 was on March 21, 2007. But that's not my
18 question. Do you remember that on March 7, 2007,
19 Mr. McKay finally responded with some information
20 in order not to face a motion to compel?

21 MR. ELLIS: Counsel, perhaps you can
22 show her the document and it will refresh her
23 recollection.

24 MR. ANDERSON: Sure.

25 THE WITNESS: May I ask if that was

1 Darwin's first deposition or the second?

2 MR. ELLIS: Pat --

3 THE WITNESS: No, I'll have to answer
4 the question "No."

5 MR. ELLIS: Okay.

6 Q. (BY MR. ANDERSON) Do you remember
7 reviewing Mr. McKay's answers to interrogatories
8 prepared by Ann Shepard, his attorney, dated
9 March 7, 2007? And I'm going to show you a
10 document that has a date for Mr. McKay's
11 signature.

12 A. I'm sure I reviewed it.

13 Q. And in those interrogatories, Cosho
14 Humphrey had requested in interrogatory No. 19
15 information about real property in which the
16 parties had an ownership interest and a variety
17 of different subparts. Do you remember that
18 question being asked?

19 A. I'm sure it was asked, yes.

20 Q. And I'm going to ask you to look at
21 page 14 and 15 of those responses. Do you recall
22 this information about the Albrethsen farm being
23 provided by Mr. McKay? (Handing.)

24 A. (Reviewing document.) It appears it
25 was.

1 MR. ELLIS: Do you want it back?

2 Q. (BY MR. ANDERSON) One more question:
3 Do you see on the list of documents that
4 Mr. McKay listed relative to the Albrethsen
5 transaction any reference to a "mortgage note"?

6 A. I'm scanning this quickly and I do
7 not -- I do not see reference to a "mortgage
8 note."

9 Q. There's a list of documents --

10 A. Oh, I missed that.

11 Q. -- on the next page, page 15.

12 A. Well, I just turned the page. So, what
13 is your question?

14 MR. ELLIS: Does it reference a
15 "mortgage" or a "mortgage note"?

16 THE WITNESS: I don't see the word
17 "mortgage" on any of this.

18 Q. (BY MR. ANDERSON) Okay.

19 A. I do not recall seeing any of that
20 during the divorce proceedings.

21 MR. ELLIS: Counsel, are you through
22 with this?

23 MR. ANDERSON: I am. Thank you very
24 much. You saved several trees.

25 Q. (BY MR. ANDERSON) Had there been any

1 settlement overtures, settlement offers from
2 Mr. McKay prior to the filing of the motion for
3 summary judgment?

4 A. I don't understand your question.

5 Q. I'm trying to work through the
6 proceedings that were involved with your divorce
7 action against Darwin McKay. You understand
8 that?

9 A. Yes.

10 Q. We've gotten up to the point where you
11 filed an affidavit in support of a motion for
12 summary judgment to try and overcome the
13 prenuptial agreement. Are you with me?

14 A. Yes.

15 Q. All right. Up to that point in time,
16 approximately October of 2007, had there been any
17 settlement offers from Mr. McKay to try and
18 resolve the case short of going to trial?

19 A. No.

20 Q. Did you understand that trial had been
21 set for January of 2008?

22 A. Yes.

23 Q. So, with the trial date looming, what
24 did you contemplate was going to happen?

25 A. We were going to trial.

1 Q. Did you understand that Mr. Welsh of
2 Cosho Humphrey suggested to the other side that
3 they may want to try and settle the case rather
4 than go to trial?

5 A. No, I'm not aware of that at all.

6 Q. All right.

7 MR. ANDERSON: Let's mark this as the
8 next exhibit, please.

9 (Exhibit 4 marked.)

10 Q. (BY MR. ANDERSON) In that first
11 paragraph on this October 10, 2007, letter from
12 Mr. Welsh to Mr. McKay's attorneys, it talks
13 about the motions that have been filed and his
14 belief that they could result in a ruling in your
15 favor. Do you see that?

16 A. Yes.

17 Q. And as an alternative to proceeding
18 with the motion, did you see that he had
19 suggested mediation?

20 A. Yes.

21 Q. And you're copied; correct?

22 A. Yes, but I don't recall receiving this.

23 Q. Are you saying that you did not receive
24 it?

25 A. I said I do not recall receiving this.

1 Q. But my question is a little bit more
2 direct than that. I want to make sure that
3 you're not testifying that this was never sent to
4 you, as opposed to, "I just don't recall it and I
5 may have gotten it." Is it the latter?

6 A. The latter.

7 Q. Did you speak with Mr. Welsh about
8 mediation prior to it getting set up? In other
9 words, did you agree to this concept?

10 A. I probably spoke with Tom Walker, not
11 Stan Welsh.

12 Q. In your discussions with Mr. Walker,
13 did you have any questions about mediation, if
14 you can recall?

15 A. I do not recall.

16 Q. Generally do you have a recollection
17 that there was going to be an attempt to resolve
18 the case short of a hearing and short of trial?

19 A. Yes, mediation came very, very quickly.

20 Q. And what do you mean by that?

21 A. Within a week of the scheduled
22 mediation, to my — mediation, it states on this
23 letter the 24th, but mediation was the 20th.

24 Q. So, on October the 10th Mr. Welsh
25 suggested mediation in Exhibit No. 4.

1 MR. ANDERSON: Mark this, please.

2 (Exhibit 5 marked.)

3 Q. (BY MR. ANDERSON) And now we've marked
4 Exhibit No. 5, which is an October 18, 2007,
5 e-mail from Mr. Walker to yourself. Do you
6 recall receiving this e-mail?

7 A. I do not recall receiving it.

8 Obviously I received it.

9 Q. Because you obviously generated the
10 e-mail below discussing —

11 A. Yes.

12 Q. — the concept of mediation and what it
13 might involve; correct?

14 A. Yes.

15 Q. You wanted to know if Mr. McKee, who it
16 looks as though he was being selected as the
17 mediator, was going to make a pronouncement
18 regarding the prenuptial agreement; correct?

19 A. Correct.

20 Q. And Mr. Walker explained to you that it
21 would be a process of negotiations as opposed to
22 him ruling in some fashion?

23 A. Correct.

24 Q. Had you ever been through a mediation
25 before that for any purpose?

1 A. No.

2 Q. Had you ever been through any kind of a
3 negotiation with anybody over anything prior to
4 October of 2007?

5 A. No.

6 Q. For example, a contract? Had you ever
7 negotiated a contract with anybody in any of the
8 business dealings that you had had?

9 A. Yes.

10 Q. And in those negotiations, you had a
11 position and the other side had a position?

12 A. Yes.

13 Q. And as you worked towards an agreement,
14 do you recall having to compromise some of your
15 positions?

16 A. Yes.

17 Q. Do you recall that it was not uncommon
18 for the other side to not agree with some of the
19 positions you wanted to take?

20 A. Yes.

21 Q. And as a result, in order to get to a
22 final agreed-upon document such as a contract,
23 you had to give and the other side had to give a
24 little?

25 A. Yes.

1 Q. So, you understood the process of what
2 was going to happen here?

3 A. Yes.

4 Q. Do you recall receiving a draft
5 agreement from Mr. Walker that he had sometimes
6 used as a way to memorialize what was agreed to
7 in a mediation?

8 A. Yes.

9 Q. Okay.

10 A. Around November 19th -- 13th.

11 (Exhibits 6 and 7 marked.)

12 Q. (BY MR. ANDERSON) Exhibit No. 7
13 appears to be a cover e-mail for a document
14 entitled "Draft Agreement of Compromise and
15 Settlement" and Exhibit No. 6 as far as I can
16 tell is that draft. Do you recall receiving
17 either of these documents?

18 A. (Reviewing documents.) I do not recall
19 receiving this document.

20 Q. Did you understand that if you engaged
21 in the mediation process that a written agreement
22 would be the result?

23 A. Yes.

24 Q. Where both parties would have to agree
25 on what they agreed to?

1 A. Right.

2 Q. All right. As you were getting ready
3 for the mediation, do you recall receiving advice
4 from others regarding how you should present your
5 case and your position?

6 A. No.

7 (Exhibit 8 marked.)

8 Q. (BY MR. ANDERSON) Exhibit No. 8 is an
9 October 18, 2007, e-mail that I believe was
10 written two days before the actual mediation. Do
11 you recall the mediation was on October 20, 2007?

12 A. Yes.

13 Q. And in this e-mail on the front of
14 Exhibit No. 8, it appears that you're talking to
15 a Gene Thurston and he's giving you advice on
16 what you should take in terms of positions
17 relative to the value of the estate and other
18 items; is that correct?

19 A. It appears so, yes.

20 Q. What was the purpose of going to other
21 individuals besides your attorneys?

22 A. I don't recall that I went to
23 individuals. I'm aware that there were
24 individuals in my life who were concerned about
25 my welfare and the outcome of the divorce.

1 Q. Who would fall into that category of
2 people --

3 A. Gene Thurston was one of them.

4 MR. ELLIS: Patty, let him finish.

5 Q. (BY MR. ANDERSON) Let me finish and it
6 might help with --

7 A. I'm sorry.

8 Q. Is there a category of individuals to
9 whom you could have gone for advice relative to
10 the position you wanted to take in mediation?

11 A. Clarify "category."

12 Q. Group.

13 A. Group?

14 MR. ELLIS: You just want the names of
15 people?

16 MR. ANDERSON: Yes.

17 Q. (BY MR. ANDERSON) Who else was out
18 there besides Mr. Thurston that you could have
19 gone to for advice about the mediation and the
20 position that you wanted to take?

21 A. Who else? Gene would have been one of
22 them. Neil Salathe was another. I don't recall
23 anyone else at this time.

24 Q. Were you talking to any other
25 attorneys, friends that might be attorneys or any

1 attorney at this time trying to get perhaps some
2 feedback or just some friendly advice?

3 A. No. No.

4 Q. Did you have attorneys that you could
5 go to if you thought that you needed to get some
6 sort of a second opinion?

7 A. I suppose I could have hired another
8 attorney, but I had confidence in the attorneys I
9 had.

10 Q. And was Mr. Bevis still doing anything
11 for you?

12 A. No.

13 Q. Were you utilizing the services of
14 another attorney for any particular reason other
15 than Cosho Humphrey on the divorce action?

16 A. No.

17 Q. All right.

18 MR. ELLIS: Counsel, I have a telephone
19 call. We'll take about three minutes at your
20 convenience.

21 MR. ANDERSON: No, this is a great
22 time. I've got to take care of a little matter.

23 (Recess held.)

24 Q. (BY MR. ANDERSON) All right. Now, you
25 went to Cosho Humphrey's office for the

1 mediation; is that correct?

2 A. Yes.

3 Q. And as I understand it, it was on a
4 Saturday?

5 A. Yes.

6 Q. Did you select Saturday or was that
7 just something that came up?

8 A. I was told to be there Saturday.

9 Q. All right. And prior to the mediation,
10 did you have any questions of either Tom Walker
11 or Stan Welsh relative to what might happen or
12 just the process that you were going to go
13 through or anything else about mediation?

14 A. I do not recall.

15 Q. As you sit here today, can you testify
16 under oath that Cosho Humphrey – and when I say
17 "Cosho Humphrey," I mean Mr. Walker and/or
18 Mr. Welsh or anybody else; okay? I'm trying to
19 be as inclusive as possible.

20 A. (Witness nodding head.)

21 Q. Would you agree that you do not have
22 any criticism of Cosho Humphrey in terms of
23 setting up the mediation or in preparing you for
24 the start of the mediation?

25 A. I agree.

1 Q. All right. So, you get into the
2 mediation. And if you could, can you tell me
3 what you recall about the events that happened?
4 First of all, maybe just to help you out, can you
5 tell me where you were located within the office?

6 A. Judge McKee was to my left. To my
7 right was I believe Tom Walker.

8 Q. All right.

9 A. Across the table was I believe Kim
10 Brooks. Darwin McKay was next to her.

11 Q. Keep going. I'm listening.

12 A. I do not recall if Stan Welsh was in
13 that office or not. And that's all.

14 Q. And it was a joint meeting that you're
15 describing for us?

16 A. At the time at the beginning of the
17 meeting, yes.

18 Q. And how long did that joint session
19 take?

20 A. A half hour maybe, an estimate.

21 Q. And that was Judge McKee?

22 A. Yeah, he was quite lengthy in the very
23 beginning.

24 Q. And he explained to you the process
25 that you would be engaging in?

1 A. Yes.

2 Q. And did you understand that it would be
3 a back and forth process where offers would be
4 made, discussed, and responses would be
5 formulated?

6 A. Yes.

7 Q. And can you tell me about what time you
8 started?

9 A. I believe 8:00 in the morning.

10 Q. All right. And did you have a
11 particular room that you went to after the joint
12 session?

13 A. Yes, it was a small office. It wasn't
14 Tom's office and it wasn't Stan Welsh's office.
15 It was somebody else's office.

16 Q. Okay. And did you meet with Mr. Walker
17 and/or Mr. Welsh during the morning after the
18 joint session broke up?

19 A. The only time Stan Welsh and Tom Walker
20 were there with me was when the judge was there
21 with me.

22 Q. Let's take it through the morning and
23 then I'll get into the afternoon. And I guess I
24 should ask you at the outset: How long did the
25 entire mediation last?

1 A. I don't recall. I believe until around
2 3:00 in the afternoon.

3 Q. And you might correct me if I'm wrong,
4 but did –

5 A. It may have been about 4:00, because I
6 remember being home late in the afternoon.

7 Q. Do you recall Mr. McKee or Judge
8 McKee's bill being for approximately nine hours?
9 I might be wrong on that, but –

10 A. I do not recall the bill.

11 Q. All right.

12 A. I do recall Stan Welsh, Stan's bill was
13 around seven or seven and a half and Tom's was
14 seven or seven and a half. One of them was
15 seven, one was seven and a half.

16 Q. Sometimes attorneys don't bill for the
17 entire length of a mediation and I'm trying to
18 ask you: Do you remember from start to finish
19 how long the mediation lasted?

20 A. Approximately seven hours.

21 Q. And in that period of time, you've
22 described the opening session. After that did
23 you all break up into separate rooms?

24 A. After that Tom, Stan, and I went into
25 another office and I definitely remember

1 expressing to both Stan and Tom that the judge
2 had not reviewed the abandonment of the --

3 Q. The what?

4 A. The abandonment, this -- the judge had
5 not reviewed Exhibit No. 3.

6 Q. The affidavit?

7 A. The affidavit.

8 Q. And I presume the motion that went with
9 it?

10 A. Yes.

11 MR. ELLIS: Could you please remember,
12 listen to Counsel's question and only answer his
13 question.

14 THE WITNESS: Okay.

15 Q. (BY MR. ANDERSON) All right. So, you
16 had some discussions with your attorneys
17 regarding your dismay over Judge McKee's level of
18 preparation?

19 A. Correct.

20 Q. Now, did you start the negotiations in
21 terms of reaching an agreement or did you wait
22 for an offer to come from Darwin McKay?

23 A. I do not recall.

24 Q. Do you recall at times that you would
25 be presented with various points that they were

1 A. No, my door was always closed.

2 Q. And why was that?

3 A. I don't know.

4 Q. Well --

5 A. I suspect so I couldn't slip out or
6 look in the -- Darwin and the opposing counsel
7 was in the conference room which was all glass.

8 Q. Do you recall Mr. Welsh and Mr. Walker
9 indicating to you that if you wanted to discuss
10 anything while you were waiting for a response
11 from the other side that you were free to come
12 down to either one of their offices?

13 A. I don't recall that.

14 Q. You're not a shy person; are you?

15 A. I -- it depends on the circumstance.

16 Q. Let me just ask a hypothetical. Let's
17 assume that your house was in line of sight of
18 your attorney's office and you saw their light
19 come on at 6:00 in the morning. You would not
20 hesitate to send them an e-mail if you wanted to
21 communicate with them; right?

22 A. That did happen and they all did the
23 same thing.

24 MR. ELLIS: Excuse me, answer the
25 question.

1 asking you to agree to so that the case could be
2 resolved short of either the hearing on the
3 motion for summary judgment or the actual trial?

4 A. Yes.

5 Q. And how would those be presented to
6 you? Would Judge McKee come back into the room?

7 A. Yes.

8 Q. And when Judge McKee would come back
9 into the room, would you have your attorneys
10 present?

11 A. Then my attorneys came back into the
12 room. They were only present when Judge McKee
13 was there.

14 Q. And are you saying that that's the case
15 even in the morning?

16 A. Yes.

17 Q. Now, this is a Saturday at a law
18 office. Was there anybody else around?

19 A. Not that I know of.

20 Q. And where was your office or the
21 location that you were in after the joint session
22 relative to Mr. Walker or Mr. Welsh's office?

23 A. Down the hallway, probably about
24 30 feet.

25 Q. And your door was open?

1 THE WITNESS: Yes.

2 Q. (BY MR. ANDERSON) You wouldn't
3 hesitate one iota; would you?

4 A. No, I did not.

5 Q. If you wanted to talk to somebody, you
6 made sure you got to talk; right?

7 A. Yes.

8 Q. And when you're sitting in the Cosho
9 Humphrey office on October 20, 2007, for this
10 mediation, if you wanted to talk about something,
11 you would have marched down the hallway to either
12 Mr. Welsh's or Mr. Walker's office; correct?
13 Nothing stopped you; is that correct?

14 A. In fact, I did go down there one time
15 and they were not there.

16 Q. Nothing stopped you from going back
17 down there; correct?

18 A. That's correct.

19 Q. You had every opportunity in the world
20 to talk about anything you wanted during that
21 mediation; correct?

22 MR. ELLIS: Counsel, objection,
23 argumentative. Come on, save it for the jury.

24 THE WITNESS: Yes.

25 Q. (BY MR. ANDERSON) All right. So, I'm

1 just trying to understand. When you say, "I was
2 left alone except when Judge McKee was there,"
3 are you saying that that was a bad thing?

4 A. Is it a bad thing to be left alone?

5 Q. I'm just saying: Did that affect your
6 case in an adverse way in any way?

7 A. Perhaps it could have. If you look
8 back on it, I think that my attorneys could have
9 stayed there with me and said, "Let's talk about
10 these options that they're giving us."

11 Q. Well, you had that opportunity when
12 they were in the room with you; didn't you?

13 A. Well, the judge was sitting right there
14 and everything we said -- my attorneys, I did not
15 feel at that time were looking after my best
16 interests in saying, "Wait a minute, Patty, let's
17 think about this, this, and this." My attorneys
18 did not have a list presented to me about all of
19 the values of the properties, et cetera. I was
20 on my own.

21 Q. Well, you had filled out an affidavit
22 relative to the list --

23 A. I filled out the affidavit.

24 Q. Let me finish. You don't get to talk
25 when I talk and I don't get to talk when you

1 talk. That's just the rule.

2 A. Okay.

3 Q. You knew all about the values of the
4 properties because you had included it in your
5 affidavit; hadn't you?

6 A. I don't recall so, no.

7 Q. Well, we just looked at one of the
8 pages regarding the Albrethsen farm and there was
9 a variety of information including financial
10 information; correct?

11 A. Excuse me, but this affidavit was to
12 deem the prenuptial null and void. It does not
13 include all of the values of the property at the
14 time of the divorce.

15 Q. Let's go back to my original question.
16 Can you tell me in any way how your claim against
17 Darwin McKay was adversely affected by what you
18 claim to be periods during which you had no
19 attorney sitting with you during the mediation?

20 A. Repeat the question.

21 (Record read back.)

22 THE WITNESS: The settlement of the
23 divorce could have been differently -- I --

24 MR. ELLIS: Counsel, excuse me.

25 THE WITNESS: None of this is relevant.

1 MR. ELLIS: Well, Patricia, I want you
2 to be honest with Mr. Anderson here. Did your
3 perception that you were left alone more than you
4 should have been adversely impact any aspect of
5 the settlement?

6 THE WITNESS: Yes, I believe it did.

7 Q. (BY MR. ANDERSON) Can you relate for
8 me each and every component of the settlement
9 that you think resulted from the fact that there
10 were times when you did not have an attorney
11 sitting with you during the mediation?

12 A. I feel my attorneys should have covered
13 with me every piece of property and estate that
14 we had, to include health insurance, looking
15 after my best interests after the divorce was
16 settled.

17 MR. ELLIS: Counsel, could we go off
18 the record?

19 MR. ANDERSON: Sure.

20 (Discussion held off the record.)

21 MR. ANDERSON: Back on the record.

22 Q. (BY MR. ANDERSON) Isn't it accurate
23 that you would have to speculate that because
24 there were periods that you sat alone during the
25 mediation your property settlement with Darwin

1 McKay was less than what you expected it to be?

2 A. No, I trusted my attorneys would do the
3 proper thing in looking after my best interests
4 and all of the properties involved and --

5 Q. How was -- I'm sorry.

6 A. And whether it happened to be my health
7 insurance, to the transfer of vehicles, to the
8 value of all of the properties that we owned, and
9 to write up a divorce decree at the end properly.

10 Q. And sitting with you would have changed
11 all of that?

12 A. I have no idea.

13 Q. Then you're speculating?

14 A. They're the attorneys. I hired them to
15 do a job for me.

16 Q. Are you speculating, then?

17 A. I expect I could be speculating. You
18 pay somebody to do a job, you expect them to do
19 the right job for you.

20 Q. Did you bring up any of these issues
21 during the mediation? Let's start with health
22 insurance. Did you ask about that?

23 A. I cannot recall that. I do not recall
24 the issues that were brought up during those very
25 tense moments. I do recall that we would be

1 there all day and possibly the next day, if we
2 had to be, in settlement. The very last time
3 that Judge McKee came in, he came in and said,
4 "Well, we'd better wrap it up because opposing
5 counsel is packing up to leave. So, this is our
6 last session."

7 Q. And at that point in time what were
8 your options as you understood it?

9 A. That I had to -- we had to agree on the
10 final settlement, the -- what we had come to
11 agree on.

12 Q. Well, you understood that mediation was
13 voluntary?

14 A. Yes.

15 Q. It wasn't mandated that you reach an
16 agreement; did you understand that?

17 A. I did understand that. However, my
18 attorney Stan Welsh told me, "We better settle
19 out of court and settle this because the money is
20 going to be all gone by January."

21 MR. ELLIS: Can we take a brief recess,
22 Counsel?

23 MR. ANDERSON: Sure.

24 (Recess held.)

25 (Record read back.)

1 Q. (BY MR. ANDERSON) Did your attorneys
2 indicate to you that you had an option during the
3 mediation and that was to either settle that day
4 or proceed to trial?

5 A. Yes.

6 Q. All right. And at any time did either
7 Stan Welsh or Tom Walker tell you that that
8 option was no longer available?

9 A. No.

10 Q. All right. So, at the end of the day
11 when Judge McKee came in and said, "They're
12 packing up. If you want to settle, you've got to
13 do it now," you understood that you still had the
14 option of getting up, walking out, and telling
15 your attorneys to proceed to trial?

16 A. Yes.

17 Q. In fact, let me just -- we'll mark
18 this.

19 (Exhibit 9 marked.)

20 Q. (BY MR. ANDERSON) Exhibit No. 9 is an
21 e-mail string that includes an early morning
22 e-mail from Stan Welsh to yourself at 7:40 in the
23 morning. It's down there at the bottom of the
24 first page. It was in response to your e-mail on
25 the second page in which you thought that perhaps

1 you had "made a terrible mistake," to use your
2 term, in terms of settling. I'm not going to go
3 into the details right now, but Mr. Welsh wrote
4 to you and said in the second paragraph: "You
5 will recall that I said if you do not like the
6 deal, then we could end the session and proceed
7 since we believed we had a good case."

8 Do you see that?

9 A. Yes.

10 Q. You understood that he was indicating
11 that you could proceed to trial?

12 A. Yes.

13 Q. And are you aware of any e-mail or
14 letter or communication of any type in which you
15 got back to Mr. Welsh and said: "I disagree.
16 You never told me what you set forth in that
17 second paragraph"?

18 A. No.

19 MR. ELLIS: I'm sorry, that was Exhibit
20 No. --

21 MR. ANDERSON: 9.

22 MR. ELLIS: Thank you.

23 (Exhibit 10 marked.)

24 Q. (BY MR. ANDERSON) This is an e-mail
25 string on October 19, 2007, the day before the

1 mediation. In it at the bottom of the first page
2 Tom Walker told you to bring a book because there
3 would "likely be a lot of down time between
4 caucus sessions with Judge McKee."

5 A. Yes.

6 Q. So, you understood that there would be
7 various parts of the mediation, and that would be
8 a joint session, sessions with the judge,
9 discussions with your counsel over what was being
10 presented; correct?

11 A. Yes.

12 Q. All right. Now, when Judge McKee would
13 come back in, can you tell me what you recall of
14 how the day went in terms of negotiations? What
15 points were made first? What did you object to?
16 What did you offer?

17 A. No, I can't. I was -- at the beginning
18 of the session it was made clear by opposing
19 counsel that the estate was worth around
20 approximately \$4 million, I do not recall. But I
21 had the amount \$2 million in my mind of what I
22 wanted out of the divorce at that time. During
23 the proceedings we had reached that \$2 million
24 amount.

25 Q. Tell me how you had reached it.

1 A. Well, going back and forth. Darwin was
2 to pay off the house, which was approximately
3 \$620,000. He was going to give me \$100,000 cash
4 plus 6 percent interest.

5 (Cell phone vibrating.)

6 THE WITNESS: I left mine in the car
7 (indicating cell phone.)

8 Q. (BY MR. ANDERSON) It's my ankle
9 bracelet.

10 A. He was to pay \$100,000 toward the
11 attorneys' fees. I can't recall the exact
12 numbers, but we had basically reached that
13 \$2 million amount.

14 Q. All right. And in order to reach that
15 amount, had there been various offers passed back
16 and forth?

17 A. Yes.

18 Q. And had you discussed each and every
19 one of those offers with your counsel?

20 A. In front of Judge McKee, yes.

21 Q. Are you saying that when Judge McKee
22 would leave the room, you all wouldn't discuss
23 your position further?

24 A. That's correct.

25 Q. In mediations, it often occurs that the

1 mediator will come in, tell you what the other
2 side has come up with, and then step out of the
3 room so that you can discuss matters with your
4 counsel. Do you recall that happening in this
5 case?

6 A. No.

7 Q. Are you sure?

8 A. I do not recall. That may have
9 happened a couple of times.

10 Q. Okay.

11 A. I do not recall.

12 Q. And do you recall discussing your
13 response to the offer that had just come in in
14 front of Judge McKee?

15 A. Yes.

16 Q. All right. Were there times when you
17 wanted to discuss it more?

18 MR. ELLIS: Objection as to clarity.

19 Q. (BY MR. ANDERSON) Let me rephrase.
20 Were there times before Judge McKee was sent back
21 to the other side with whatever response you all
22 had come up with that you felt like you needed to
23 discuss a portion --

24 A. I do not recall.

25 Q. Let me finish. -- a portion of the

1 response in greater detail?

2 A. I do not recall.

3 Q. In other words, you couldn't testify at
4 trial that that occurred?

5 A. No.

6 Q. Is that correct?

7 A. I do not recall.

8 Q. All right. At the end of the day there
9 were various terms agreed to between the parties;
10 is that accurate?

11 A. Yes.

12 Q. All right.

13 (Exhibit 11 marked.)

14 Q. (BY MR. ANDERSON) Exhibit No. 11 is a
15 set of handwritten notes by Judge McKee laying
16 out the various points that I understand were
17 agreed to between you and Darwin McKay. Did you
18 review this handwritten document before signing
19 it?

20 A. Yes.

21 Q. Did you have any questions regarding
22 it?

23 A. Yes.

24 Q. Did you ask those questions of your
25 counsel?

1 A. Yes.

2 Q. Did you receive answers?

3 A. Yes.

4 Q. To your satisfaction?

5 A. Yes.

6 Q. So, you signed this agreement
7 voluntarily?

8 A. Yes.

9 Q. And you understood that you didn't need
10 to, it wasn't required of you to do that?

11 A. That's correct.

12 Q. At the time that this agreement was
13 being hammered out, did you have some concerns,
14 some anxiety that the Court might not agree with
15 the motion that had been filed relative to
16 voiding the prenuptial agreement?

17 A. Did I have anxiety?

18 Q. Right, that there was a level of
19 uncertainty associated with it, let me put it
20 that way?

21 A. That the Court would not agree with the
22 abandonment of the prenup?

23 Q. Yes.

24 A. No.

25 Q. So, that didn't factor into you

1 agreeing to this settlement?

2 A. No.

3 Q. All right. At that time, at the time
4 the settlement was placed in front of you or had
5 been worked out, were you worried that even if
6 the prenuptial agreement was deemed abandoned,
7 that the values of the properties or the
8 encumbrances on the various properties might not
9 be as favorable as you anticipated?

10 A. That's correct.

11 Q. And at the time you were entering into
12 this agreement, were you concerned that if you
13 went to trial, your husband might spend some of
14 the money that he still had available?

15 A. That's correct.

16 Q. And that's something you were concerned
17 about without having to be told it by any —

18 A. Yes.

19 Q. — attorney; correct?

20 A. Yes.

21 MR. ELLIS: Pat, let Mr. Anderson
22 finish his question. It makes it easier.

23 Q. (BY MR. ANDERSON) In addition to him
24 squandering money between October 20th and the
25 January of 2008 trial date, were you also

1 framework in more complete detail?

2 A. Yes.

3 MR. ELLIS: Counsel, do you have the
4 original Exhibit No. 11?

5 MR. ANDERSON: She does.

6 MR. ELLIS: I notice some handwriting
7 on yours that I don't have. That's your personal
8 notes?

9 MR. ANDERSON: Right.

10 MR. ELLIS: Okay.

11 MR. ANDERSON: I write all over my
12 stuff.

13 Q. (BY MR. ANDERSON) Let's go back to
14 Exhibit No. 9. It was introduced a moment ago.
15 You wrote on the second page an e-mail at 6:44 in
16 the morning and you say: "I feel I've just made
17 a terrible mistake." And you say down in the
18 first paragraph: "I feel we should have added
19 everything up before we signed." What were you
20 referring to?

21 A. All of the properties.

22 Q. Well, you had dealt with Mr. Thurston
23 and Mr. Salathe regarding financial issues;
24 hadn't you?

25 A. No.

1 concerned that he might file for bankruptcy?

2 A. Yes.

3 Q. In fact, had he threatened to file
4 bankruptcy?

5 A. I do not recall.

6 Q. Had he threatened that you would not
7 ever receive anything from him?

8 A. Yes.

9 Q. And was that a concern that you had
10 hanging over you as you were trying to decide
11 whether or not to settle on October 20, 2007, or
12 proceed to trial?

13 A. Yes.

14 Q. And as a result of those various
15 uncertainties and concerns that you had, is it
16 accurate to state that you determined that
17 settlement was an appropriate course of action to
18 take?

19 A. Yes.

20 Q. All right. And were you satisfied with
21 the framework of that settlement as set forth in
22 Exhibit No. 11?

23 A. Yes.

24 Q. Did you understand that a written
25 agreement would be prepared that laid out this

1 Q. We saw a reference to Mr. Thurston.
2 Was that not in relation to any of the
3 properties?

4 A. No.

5 Q. Okay.

6 A. It may have been, yes. I do not know.
7 I don't recall.

8 Q. Which one is it here? Tell me what —

9 A. I do not recall.

10 Q. So, when you say: "We should have
11 added up all of the properties," are you saying
12 that when you went into the mediation, you didn't
13 have an idea of what you thought the marital
14 estate was worth?

15 A. That's correct.

16 Q. Where did you come up with the
17 \$4 million, \$4.5 million you mentioned a moment
18 ago?

19 A. That was expressed to all of us at the
20 time we went into the mediation with Judge McKee.

21 Q. By whom?

22 A. Judge — by Kim Brooks, Darwin's
23 attorney.

24 Q. She said that it was 4.5?

25 A. Yes, it was roughly. I didn't say 4.5.

1 Estimated 4.5.

2 Q. And you didn't have any idea what the
3 properties were worth?

4 A. At that time -- the economy had been
5 tanking. You have to understand in November of
6 '07, the economy was tanking big time and
7 depreciation of values of properties were going
8 down very, very fast.

9 Q. So, it would be hard for anybody to
10 accurately determine on any given day what
11 various properties were worth?

12 A. Perhaps, yes.

13 Q. But you say: "I think we should have
14 added everything up before we signed." I'm just
15 trying to figure out if you're criticizing Cosho
16 Humphrey?

17 A. No, I'm not.

18 Q. All right. The second paragraph says:
19 "Because no land was given to me as
20 collateral" -- I'll stop there. Did you
21 understand that your attorneys had tried to get
22 you some security for the amounts Darwin McKay
23 said he would pay you, but that he had absolutely
24 refused to do so?

25 A. No, I did not know that.

1 Q. Well, when you wrote this the next
2 morning, you obviously understood that no land
3 had been given as collateral.

4 A. Correct.

5 Q. And you were part of the negotiations;
6 correct?

7 A. That's correct.

8 Q. So, you understood as a result of the
9 negotiations Darwin McKay refused to give you any
10 collateral for the obligations he assumed under
11 this agreement; is that correct?

12 A. I was told by my attorneys that the
13 divorce decree is a judgment against -- a lien
14 against all of Darwin's property, real property.

15 Q. Okay, let's leave that to the side. I
16 have your statement right here, I promise. But
17 in terms of the negotiations with Darwin McKay --
18 let's go back to Exhibit No. 11, the handwritten
19 notes from Judge McKee -- you understood that he
20 was going to pay you \$800,000 out of some
21 proceeds if the Status deal closed; correct?

22 A. Correct.

23 Q. All right. He used the term
24 "completed" in March of 2008.

25 MR. ELLIS: Counsel, where is that in

1 the --

2 MR. ANDERSON: Paragraph 6, page 2.

3 MR. ELLIS: Thank you.

4 MR. ANDERSON: You bet.

5 Q. (BY MR. ANDERSON) So, he had obligated
6 himself to pay you \$800,000 out of the proceeds.
7 Did you understand at that point in time that you
8 did not have a direct interest in those proceeds
9 directly from Status?

10 MR. ELLIS: If -- go ahead.

11 Q. (BY MR. ANDERSON) That it was your
12 husband, soon to be ex-husband, who would have to
13 pay you once Status paid him?

14 A. It was my understanding from any funds
15 from the sale of the Status Corporation, any
16 sales from the Albrethsen property. It was my
17 understanding that any funds, if Status did not
18 close, that I would still receive funds.

19 Q. From Darwin McKay; correct?

20 A. That's correct.

21 Q. Was it also clear to you that nowhere
22 in the agreement you reached with Darwin McKay
23 that he granted you an interest in Status's
24 payment?

25 MR. ELLIS: Objection, the PSA speaks

1 for itself.

2 THE WITNESS: The divorce decree is a
3 lien against Darwin's real property.

4 Q. (BY MR. ANDERSON) Ma'am, I'm just
5 trying to ask you your understanding at the time
6 of the settlement, October 20, 2007. Did you
7 understand that the only way you would be paid is
8 if Darwin paid you, and that he had not agreed to
9 allow Status to pay you?

10 MR. ELLIS: Objection, asked and
11 answered.

12 THE WITNESS: It's my understanding
13 that the way the divorce decree was going to be
14 written up, that the divorce decree, once
15 recorded, would be a lien against all Darwin's
16 real property, which would include everything,
17 that I didn't need to worry about what you're
18 trying to zero me in on here. The divorce decree
19 states in several areas, any funds from the sale
20 of the Status Corporation.

21 Q. (BY MR. ANDERSON) And I'm just trying
22 to make sure I understand what you knew at the
23 time. With respect to those funds, any funds,
24 I'll use your term, "any funds," you understood
25 that Darwin had to pay them once he got them and

1 that he would not agree to allow you to have an
2 interest in Status paying them to you? That's
3 all I'm asking. You understood the mechanism by
4 which the funds would flow and that was from
5 Darwin; correct?

6 A. Any funds?

7 Q. Right.

8 A. No, I did not know how the funds were
9 going to come about.

10 Q. But you knew that Status didn't pay
11 them directly to you, you knew that Darwin had to
12 pay them? That's all I'm asking.

13 MR. ELLIS: Objection, asked and
14 answered. She said she doesn't know.

15 MR. ANDERSON: Well, I don't know if
16 that's exactly been the answer.

17 THE WITNESS: No, in any land
18 transaction, the divorce decree was -- it was
19 recorded. Everybody would know that Darwin owes
20 me X number of dollars from, as written in the
21 divorce decree, whether it be a title company or
22 Darwin or an attorney or anyone.

23 MR. ANDERSON: I'm going to have her
24 read back my question.

25 (Record read back.)

1 MR. ELLIS: The same objection.

2 THE WITNESS: As with any transaction
3 that goes through a title company, the title is
4 on -- the title company is on notice through a
5 divorce decree, according to my attorneys, that
6 the divorce decree once it was recorded would be
7 a lien on Darwin's real property, which any funds
8 from Status Corporation would be real property.

9 Q. (BY MR. ANDERSON) You know, no
10 offense, I know you have a mantra that you want
11 to tell me about why you think this case is such
12 as it is, but I have a question that I have
13 pending. And frankly, you telling me what you
14 think liens do and what title companies do is
15 irrelevant.

16 I'm going to have her repeat the
17 question one more time. Please listen and see if
18 you can answer. And if you could, just leave
19 out -- I've got it in my head what your position
20 is in this case, but right now I'm asking you
21 some specific questions.

22 MR. ANDERSON: Please reread that same
23 question.

24 (Record read back.)

25 MR. ELLIS: Asked and answered.

1 THE WITNESS: Asked and answered.

2 Q. (BY MR. ANDERSON) You don't get to
3 tell me that; okay? And I'll take this to the
4 judge if you take that position because this is a
5 very important question.

6 MR. ELLIS: Counsel, I'll object on the
7 basis it calls for a legal conclusion.

8 MR. ANDERSON: No, it doesn't. It's
9 her understanding as she sat there at the end of
10 the mediation.

11 THE WITNESS: Yes.

12 Q. (BY MR. ANDERSON) You understood that?

13 A. I understood that Status would not be
14 paying me directly.

15 Q. All right. Now, is it your position in
16 this lawsuit that between October 20th and the
17 execution of the property settlement agreement,
18 or the PSA as we've shortened it to, you did not
19 have any communications with Cosho Humphrey
20 relative to the process of developing the
21 document you actually signed?

22 A. I had very little communication with
23 them.

24 Q. What communication do you recall?

25 A. They were having a difficult time

1 writing it up because Darwin was changing his
2 mind and those various things.

3 Q. Do you recall receiving drafts of
4 various agreements along the way in that month
5 period?

6 A. The first draft I received was around I
7 think the 18th of November.

8 Q. Which would be two days before you
9 actually executed it?

10 A. No, I think it was executed around the
11 20th; wasn't it?

12 Q. 18 -- I said two days later.

13 A. Well, between the 20th and the 27th,
14 whenever it was recorded. I don't recall the
15 exact date that I signed it. It may have been
16 around the 13th of November I received the --
17 I've got it written down someplace.

18 Q. What do you have written down?

19 A. That I received the first draft, when I
20 received the first draft. It was around the
21 13th, I think, of -- it was about three weeks
22 after the -- after the mediation.

23 Q. Was that the first time you had had any
24 communication after the mediation?

25 A. No, I think I recall asking him,

1 "What's happening?"

2 Q. Did you receive replies?

3 A. Yes, they expressed they were having a
4 difficult time with the wording of the divorce
5 decree.

6 Q. I was trying to save some time to see
7 if maybe you recall this, but I guess we're going
8 to have to go through this. All right, the
9 mediation was on a Saturday, October 20, 2007.
10 Do you recall when you first received notice that
11 Cosho Humphrey was working on the development of
12 a formal document regarding that settlement?

13 A. No.

14 (Exhibit 12 marked.)

15 Q. (BY MR. ANDERSON) Exhibit No. 12 is a
16 document dated October 22, 2007. It was sent to
17 you from Tom Walker. Did that indicate to you
18 that they were already working on a draft?

19 A. Yes, October 22nd was Monday. They
20 were consistent at working on the draft
21 throughout the next several weeks.

22 Q. And you were kept advised of that?

23 A. I was kept advised that they were
24 working on it, but I did not know the --

25 Q. What it included?

1 A. Yes.

2 Q. -- on a draft?

3 A. Yes.

4 THE COURT REPORTER: Please wait till
5 he's done with the question before you answer.

6 THE WITNESS: Yes.

7 MR. ANDERSON: Put in four yes's.

8 MR. ELLIS: Sorry, Sheri.

9 (Exhibit 14 marked.)

10 Q. (BY MR. ANDERSON) This is an e-mail
11 from Tom Walker to Darwin's attorneys. I don't
12 know if you've ever seen this. But did you
13 understand that by Tuesday the 23rd of October
14 they were providing a draft?

15 A. Yes.

16 (Exhibit 15 marked.)

17 Q. (BY MR. ANDERSON) This e-mail string
18 appears to start on Tuesday, October 23rd, on the
19 second and third pages where you were asking some
20 questions about tax consequences. Do you see
21 that?

22 A. Yes.

23 Q. And do you recall receiving a response
24 from Tom Walker that same day?

25 A. Yes.

1 A. Pardon me?

2 Q. You didn't know what was going on with
3 it?

4 A. I knew they were working on it. I knew
5 they were having difficulties with the wording,
6 that's all.

7 Q. Were you providing input?

8 A. You can't provide input if you don't
9 know what the wording is.

10 (Exhibit 13 marked.)

11 Q. (BY MR. ANDERSON) Exhibit No. 13 is an
12 e-mail from the same day that we mentioned in the
13 last exhibit, Monday, October 22nd, and it looks
14 like you responded about credit cards and
15 provided information to Mr. Walker so that it
16 could go into the draft. Would you agree?

17 A. Yes.

18 Q. In fact, you said I faxed you stuff and
19 he said I haven't even received anything from
20 you. And I presume you all got that worked out?

21 A. Yes.

22 Q. Would you agree that Cosho Humphrey
23 was --

24 A. Yes.

25 Q. -- working diligently --

1 Q. Were you satisfied with his response?

2 A. According to this e-mail, yes.

3 (Exhibit 16 marked.)

4 Q. (BY MR. ANDERSON) Exhibit No. 16 is an
5 October 23, 2007, cover e-mail and draft property
6 settlement agreement from Mr. Walker to Kimberly
7 Brooks. And do you see your name on the "cc"
8 line?

9 A. Yes.

10 Q. This is two working days after the
11 mediation; would you agree?

12 A. Yes.

13 Q. Would you also agree that you received
14 the initial draft for review?

15 A. According to this, yes.

16 Q. Do you recall this?

17 A. No, I do not.

18 Q. Are you saying it didn't happen?

19 A. No, I'm not saying that.

20 Q. All right. So, given this, does this
21 refresh your memory in some way that perhaps you
22 were kept in the loop on almost a daily basis
23 regarding the efforts --

24 A. Yes.

25 MR. ELLIS: Excuse me, Pat, you have to

1 let him finish.

2 Q. (BY MR. ANDERSON) -- regarding the
3 efforts of Cosho Humphrey to work out the formal
4 agreement with Darwin McKay?

5 A. Yes.

6 Q. Now, in this particular document
7 there's a paragraph 1.8 of the draft which talks
8 about payments and such. And I presume if you
9 had received this you would have reviewed it;
10 correct?

11 A. Yes.

12 Q. You were quite interested in how all of
13 this was going to come out; correct?

14 A. Yes.

15 Q. And did you understand that your
16 attorneys were making efforts to incorporate
17 protections for you regarding the Status
18 transaction or the Albrethsen transaction?

19 A. Yes.

20 Q. They were attempting to incorporate
21 provisions that protected you from Darwin McKay
22 changing the terms of that agreement so that if
23 it did close, you would get your funds; correct?

24 A. Correct.

25 Q. And do you see anywhere in here that

1 personal property." Do you see that at the very
2 top?

3 A. Yes.

4 Q. And do you recall that Mr. Walker wrote
5 you either that day or the next day and said that
6 the reference to personal property was incorrect
7 and it was just on real property that a lien
8 would be created?

9 MR. ELLIS: Off the record.

10 (Discussion held off the record.)

11 (Record read back.)

12 THE WITNESS: No.

13 Q. (BY MR. ANDERSON) And can you tell me
14 what you meant by: "Can I place a lien with the
15 title company"?

16 A. A lien on all Darwin's property.

17 Q. Real property?

18 A. Real property.

19 Q. All right. And Mr. Walker responded
20 with a means for doing that; correct?

21 A. Yes, he states: "Our plan is to record
22 the Judgment and Decree of Divorce, which then
23 becomes a lien on all of Darwin's real and
24 personal property."

25 Q. So, let's just focus on real property.

1 the basic concept that we discussed from the
2 handwritten notes from the day of the mediation
3 had been changed? And what I'm asking is this:
4 Do you see in here anything that indicates that
5 anyone other than Darwin McKay was supposed to
6 pay you money when certain events happened?

7 A. No.

8 Q. All right. In other words, you
9 understood that that was the underlying premise
10 of the settlement; correct?

11 A. Yes.

12 (Discussion held off the record.)

13 (Exhibit 17 marked.)

14 Q. (BY MR. ANDERSON) All right. Exhibit
15 No. 17 is an e-mail string from October 23rd and
16 it's a follow-on from the previous e-mail which
17 provided you with a copy of the first draft of
18 the formal property settlement agreement. You
19 respond there in the middle of the first page:
20 "All looks good, Tom." And then you say: "Can I
21 place a lien with the title company on the Status
22 Corp closure so the \$800,000 are paid to me by
23 them?" And he said: "Our plan is to record the
24 Judgment and Decree of Divorce, which then
25 becomes a lien on all of Darwin's real and

1 Were you satisfied with Mr. Walker's response?

2 A. Yes.

3 Q. All right. And has anyone told you
4 that a lien was not created relative to any real
5 property actually owned by Darwin McKay by virtue
6 of recording the final property settlement
7 agreement?

8 A. No.

9 Q. You then say, in essence, that the
10 \$800,000 should be paid to you by them. And I'm
11 curious, who do you mean by "them"?

12 A. I state: "However, can I place a
13 lien" --

14 MR. ELLIS: Excuse me, you don't have
15 to read. Just try to respond to his question.

16 THE WITNESS: Okay.

17 Q. (BY MR. ANDERSON) This might be a
18 little disjointed. Let me read the sentence.
19 You write on October 23rd: "Can I place a lien
20 with the title company on the Status Corp closure
21 so the \$800,000 are paid to me by them?" And who
22 was "them"?

23 A. The title company.

24 Q. What title company were you referring
25 to?

1 A. Whatever title company would be used
2 for the closing of the property.

3 Q. Now, that was not part of the
4 negotiations on October 20, 2007; is that
5 correct? We've established that, I believe.

6 A. Correct.

7 Q. You understood that Status was not
8 going to pay you directly. And that's why I went
9 through that whole exercise, because I wanted to
10 make sure where you were coming from.

11 A. I understood that.

12 Q. So, perhaps were you making a
13 suggestion that the terms of the agreed-to
14 settlement be changed?

15 A. I probably was, yes.

16 Q. And Mr. Walker came back and told you
17 that he had a way to use the divorce decree,
18 which incorporates the property settlement
19 agreement, as I understand it, so that a lien
20 could be created that would apply to all real
21 property?

22 A. That's correct.

23 Q. All right.

24 A. That's what it states, the recording of
25 the decree.

1 (Exhibit 18 marked.)

2 Q. (BY MR. ANDERSON) Exhibit No. 18 is a
3 continuation of that e-mail string and as you see
4 at the bottom of page 1, there's the e-mail from
5 Tom Walker to you and it talks about the lien.
6 Are you with me so far?

7 A. Yes.

8 Q. All right. And above that your reply
9 states: "Okay, I understand." Is that accurate
10 in terms of your position on October 23, 2007?

11 A. Yes.

12 Q. All right. You understood that nobody
13 was going to try and change the terms of the
14 agreement you had reached on October 20, 2007?

15 A. Correct.

16 Q. All right.

17 MR. ANDERSON: And I'll put this on the
18 record: Given the fact that we're going to break
19 here in a bit, I'm going to skip a couple of
20 documents just to touch on some points.

21 MR. ELLIS: Okay.

22 MR. ANDERSON: And then I just don't
23 want to surprise you later if I go back and run
24 through them.

25 MR. ELLIS: That's fine.

1 MR. ANDERSON: All right.

2 (Exhibit 19 marked.)

3 Q. (BY MR. ANDERSON) On October 24th,
4 three working days after the mediation was
5 concluded, you wrote to Tom Walker at 7:05 in the
6 morning and you say: "I forgot to ask about the
7 two building lots in paragraph 1.5." And I
8 presume if we go back to Exhibit No. 16 -- and I
9 presumed wrong. That particular version does not
10 refer to the two lots. By October 24th, do you
11 recall if you had received an additional draft?

12 A. No.

13 Q. Do you know what paragraph 1.5 you were
14 referring to?

15 A. It must be regarding the two building
16 lots.

17 Q. What was your understanding of the two
18 lots? What knowledge did you have of them as the
19 mediation was underway on October 20th?

20 A. Darwin was to receive two building lots
21 from the sale of the contract -- or the sale of
22 the Albrethsen property.

23 Q. In paragraph 6 of Judge McKee's
24 handwritten notes marked as Exhibit No. 11, it
25 says: "If Status (Union Development) real estate

1 transaction is completed in March of 2008,
2 husband will pay wife \$800,000 out of proceeds
3 and convey the two designated reserved lots to be
4 created under said deal."

5 A. Correct.

6 Q. Did you realize on October 20, 2007,
7 that those lots did not exist?

8 A. I do not recall.

9 Q. Well, again, I mentioned Judge McKee's
10 notes and it says: "To be created."

11 A. Yes.

12 Q. Did you understand that --

13 A. They hadn't been plotted yet.

14 Q. So, if the transaction had been
15 completed, there was I take it a plan for Status
16 to actually develop the land and plot or plat the
17 area so that lots could be created?

18 A. Yes.

19 Q. And once that occurred, there were two
20 that you were supposed to receive?

21 A. Yes.

22 Q. Did you understand that those two lots
23 or the existence of those two lots were
24 contingent upon those various steps occurring?

25 A. Yes.

1 Q. And you were just concerned in your
2 e-mail of October 24 that once Status closed --
3 no, if Status didn't close and the land was sold
4 to somebody else, it didn't matter whatever
5 happened with the new developer, you would get
6 some lots out of it?

7 A. Yes.

8 Q. And Mr. Walker replied that that was
9 not part of the settlement; is that correct?

10 A. That "was not part of the mediated
11 settlement."

12 Q. Right. I just wanted to make sure that
13 you understood you were requesting your attorneys
14 to add additional provisions to the settlement
15 that had already been reached; would you agree?

16 A. Yes.

17 Q. And Darwin never guaranteed you that a
18 subdivision would be created; is that accurate?

19 A. No.

20 Q. It's not accurate? Or you agree?

21 A. Status already had the deed to the
22 property.

23 MR. ELLIS: Excuse me, could you read
24 that question back. And listen to the question
25 and answer it if you can.

1 (Record read back.)

2 MR. ANDERSON: Let me repeat the
3 question.

4 Q. (BY MR. ANDERSON) In the settlement
5 negotiations on October 20, 2007, Darwin McKay
6 never specifically promised you two lots;
7 correct? It's paragraph 6 on the handwritten
8 notes, Exhibit No. 11.

9 A. (Reviewing document.) It's my
10 understanding by this that I would receive the
11 two building lots.

12 Q. If certain things happened; correct?

13 A. No.

14 Q. All right.

15 A. It states --

16 Q. Hold on. Let me get my Exhibit No. 11
17 out so I can track with you. All right, go
18 ahead.

19 A. It states: "If Status real estate
20 transaction is completed in March of 2008,
21 husband will pay wife \$800,000 out of proceeds
22 and convey the two designated reserved lots to be
23 created under said deal."

24 Q. Doesn't that indicate to you that one,
25 the deal has to be completed and two, the

1 property has to be platted?

2 A. Yes. However, this refers to the
3 Albrethsen deal. And the Albrethsen deal had
4 been completed. The deed had transferred.

5 Q. But the transaction hadn't been
6 completed as of October of 2007; had it?

7 A. No, it had not.

8 Q. There were still some monies to be
9 paid?

10 A. Correct.

11 Q. And there's an "if" at the front of
12 that paragraph; isn't there?

13 A. That's referring to the entire 75
14 acres.

15 Q. But in October of 2007 those lots did
16 not exist anywhere on this planet; is that
17 correct?

18 A. That's correct.

19 Q. And certain things had to take place
20 before they ever came into being?

21 A. Yes.

22 Q. And your husband, Darwin McKay, never
23 promised you that all of those things would
24 happen in this agreement; correct?

25 A. Correct.

1 (Exhibit 20 marked.)

2 Q. (BY MR. ANDERSON) This is an
3 October 30, 2007, e-mail from yourself to both
4 Tom Walker and Stan Welsh and you say: "I have
5 just learned some incredible disturbing news of
6 which you are not going to appreciate." And then
7 I find nothing else in any of the documents that
8 explains what that was. Do you recall what it
9 was?

10 A. No, I don't.

11 Q. Do you recall having meetings with Tom
12 Walker and Stan Welsh in the period between
13 October 20th and the signing of the final
14 property settlement agreement?

15 A. No.

16 (Exhibit 21 marked.)

17 Q. (BY MR. ANDERSON) Exhibit No. 21 is a
18 November of 2007 letter from Stan Welsh to you
19 sent via e-mail, and in the second paragraph he
20 references a meeting. Do you see that?

21 A. Yes.

22 Q. Does that refresh your memory that
23 perhaps you were having meetings with your
24 attorneys during this period of time, during the
25 period of time between the mediation and the

1 final execution of the PSA?

2 A. I do not recall a meeting in person.

3 Q. In the third paragraph Mr. Welsh says:

4 "It has been my practice that if a client makes
5 an agreement, I will not stay in the case if they
6 are going to try and get out of the agreement
7 that was made." Do you remember that comment
8 being made to you?

9 A. In this letter, yes. I recall
10 receiving this letter.

11 Q. Did you understand that perhaps you
12 were giving the impression to Mr. Welsh and
13 Mr. Walker that you were trying to change the
14 terms of what had been agreed to on October 20,
15 2007?

16 A. No.

17 Q. Were you trying to change the terms?

18 A. I had some concerns about the wording
19 of the decree.

20 Q. Do you remember that as time drug on,
21 Stan Welsh and Tom Walker indicated to Darwin
22 McKay's attorneys that if they did not agree on
23 the terms to be used, that they were going to go
24 back to Judge McKee and have him decide it for
25 them?

1 A. Yes.

2 Q. Did you think that that was a good
3 thing on their part?

4 A. Yes.

5 Q. Did you understand that as a result of
6 that threat, there was a final agreement
7 ultimately agreed to by Darwin McKay?

8 A. Yes.

9 Q. And would you agree that now that I've
10 shown you these various documents, you had been
11 provided each and every draft and had been
12 provided the opportunity to comment on each and
13 every draft of the agreement?

14 A. No.

15 Q. Which --

16 A. I don't --

17 Q. Let me finish. Which ones had you not
18 been allowed to comment on?

19 A. All of them except the one that you
20 showed me here.

21 Q. I'm not sure I follow.

22 A. You asked me about each and every
23 draft. The only draft I received was this one --

24 MR. ELLIS: The exhibit number?

25 THE WITNESS: Exhibit No. 16.

1 Q. (BY MR. ANDERSON) Okay. And what's
2 the date of that? October 22nd?

3 A. 23rd.

4 Q. October 23rd. All right. So, are you
5 taking the position that you don't recall any
6 other drafts being provided to you between
7 October 23rd and the date of signing the final
8 version?

9 A. There was one other draft that I
10 received in November, I think around the 13th.

11 Q. All right.

12 (Exhibit 22 marked.)

13 Q. (BY MR. ANDERSON) Exhibit No. 22 is a
14 November 9th e-mail that you sent to Tom Walker
15 and Stan Welsh. And you say: "I received the
16 e-mail you sent to Judge McKee along with the
17 revised Property Settlement Agreement. This is
18 the first time I've seen this revised edition."

19 A. Correct.

20 Q. And you made some comments; correct?

21 A. Yes.

22 Q. All right. Did you feel that you had
23 an adequate opportunity to review that document?

24 A. Yes.

25 Q. Do you feel that you had an adequate

1 opportunity to express any concerns that you had?

2 A. Yes.

3 Q. And did you feel that you had expressed
4 those concerns to your counsel?

5 A. Yes, in this document.

6 Q. All right. And did they respond?

7 A. Yes.

8 (Exhibit 23 marked.)

9 Q. (BY MR. ANDERSON) This is a
10 November 12, 2007, e-mail from Tom Walker to you
11 which responds in the body of your November 11,
12 2007, e-mail to the comments you make in that
13 particular e-mail. Do you recall receiving it?

14 A. Yes.

15 Q. And do you see at various points that
16 Mr. Walker indicates that he's going to convey
17 your concerns and conditions and comments on to
18 Darwin's counsel?

19 A. Yes.

20 Q. And did you understand that that was
21 all that they could do because they could not
22 force Darwin to agree to exactly what you wanted?

23 A. Correct.

24 Q. And that the option to do so would be
25 to allow Judge McKee to rule on any disputes that

1 the parties couldn't resolve amongst themselves?

2 A. Yes.

3 Q. And you understood that they had
4 already activated that safety valve by contacting
5 Judge McKee?

6 A. Yes.

7 Q. So, you understood that it was an
8 option that you had available to you if you
9 didn't like the terms that were being proposed?

10 A. Yes.

11 Q. All right.

12 (Exhibit 24 marked.)

13 Q. (BY MR. ANDERSON) Exhibit No. 24 is a
14 November 11, 2007, e-mail you sent to I think
15 it's Neil Salathe.

16 A. Yes.

17 Q. And we got this from your file. It's
18 obviously not something you sent to Tom Walker or
19 Stan Welsh; correct?

20 A. Yes.

21 Q. Did you consider Mr. Salathe to be
22 someone that you could seek counsel with
23 regarding the terms of the settlement?

24 A. Yes.

25 Q. And you indicate in there that you

1 wanted him to review an attached e-mail you
2 wanted to send to Stan Welsh; correct?

3 A. Yes.

4 Q. And it says: "Please focus on the
5 paragraphs regarding the \$800,000 or \$500,000."
6 And you say: "It appears to me that they have
7 written the agreement so Darwin can basically get
8 around paying me any of these funds and I'm very
9 concerned about this." Did I read that
10 accurately?

11 A. Yes.

12 Q. What was it that you felt allowed
13 Darwin to get around paying you any of the funds?

14 A. There didn't seem to be any security in
15 the decree for those funds for me.

16 Q. What security had you required on
17 October 20, 2007, prior to agreeing to settle
18 with Darwin McKay?

19 A. I was uncomfortable with the fact that
20 there was no collateral and I just had to accept
21 the words from my attorneys that, "Once the
22 divorce decree is recorded, then the divorce
23 decree puts a lien on all Darwin's property."

24 Q. Let me ask you this: In terms of that
25 lien being placed on all of his property, what

1 did you understand it would be used for?

2 A. Security for everything in the divorce
3 decree.

4 Q. And I'm not asking you as an attorney
5 or a real estate professional, but let's assume
6 that a lien was created on the real property.
7 How did you understand that would help you?

8 MR. ELLIS: Asked and answered.

9 Q. (BY MR. ANDERSON) You get to answer.

10 A. The divorce decree was a judgment
11 against all of Darwin's real and -- real
12 property.

13 Q. And once it's recorded it becomes a
14 lien on the property. But what did you
15 understand to be the next step? How would that
16 lien ever come to your aid?

17 MR. ELLIS: Objection to the extent it
18 calls for a legal conclusion.

19 THE WITNESS: Correct.

20 Q. (BY MR. ANDERSON) I'm just trying to
21 figure out why you keep telling me that it
22 created a lien. How did you understand that that
23 was beneficial to you?

24 MR. ELLIS: Asked and answered, calls
25 for a legal conclusion.

1 THE WITNESS: I guess even back then I
2 realized that if I learned anything of Darwin
3 spending the money or receiving any funds, that I
4 knew I would be back with legal counsel to assist
5 me.

6 Q. (BY MR. ANDERSON) So, in other words,
7 you understood the lien would be beneficial if
8 Darwin breached the terms of the property
9 settlement agreement?

10 A. Yes.

11 Q. If he refused to pay you, in other
12 words?

13 A. Yes.

14 Q. That was a mechanism or a tool that you
15 had to come after him if he did not follow the
16 original terms regarding payment; correct?

17 A. Correct, yes.

18 Q. Okay, that wasn't so hard. All right.
19 (Exhibit 25 marked.)

20 MR. ANDERSON: Let's mark these next.
21 (Exhibits 26, 27, and 28 marked.)

22 Q. (BY MR. ANDERSON) Before we start this
23 series, did you understand based upon comments
24 made at the mediation by Darwin McKay's counsel
25 or from any other source that one of the reasons

1 that Mr. McKay was not willing to grant you any
2 security in any property was that it was
3 encumbered by bank loans and other debt?

4 A. Yes.

5 Q. Now, Exhibit No. 25 is an e-mail string
6 starting on November 15, 2007, and you wrote it
7 at 3:35 in the morning --

8 MR. WALKER: No, that's p.m.

9 Q. (BY MR. ANDERSON) 3:35 p.m. I
10 apologize.

11 A. It would have been unlikely.

12 MR. ELLIS: He's thrown off by your
13 earlier e-mails, very early.

14 Q. (BY MR. ANDERSON) There was an e-mail
15 I believe you received sometime on November 15th
16 that says: "We are going to try to work out the
17 final language on the Status Corporation issue
18 tomorrow morning. Will you be available to sign
19 if we get it done?" Do you see that?

20 A. Yes.

21 Q. And then you wrote: "It would be nice
22 to have a couple hours notice."

23 A. Yes.

24 Q. Were you chiding Cosho Humphrey at that
25 time in terms of notice or something along that

1 insist you read that, but I think he's looking
2 for an answer as opposed to a recitation of what
3 the document says.

4 Q. (BY MR. ANDERSON) I'm just trying to
5 understand your mindset.

6 A. My mindset was that if the Status deal
7 did not go through and closed in March of 2008,
8 Darwin then owed me \$500,000 instead of \$800,000.

9 Q. Did you -- sorry.

10 A. I obviously -- so, therefore I would
11 lose \$300,000.

12 Q. Do you recall that as the drafts were
13 passed back and forth, that your attorneys
14 suggested a means to incentivize Darwin McKay to
15 pay \$500,000 at an earlier point in time, by
16 March of 2008?

17 A. No, I don't recall that.

18 Q. Did you understand that if he didn't
19 pay the \$500,000 by March of 2008, he would then
20 owe \$800,000 at 6 percent interest?

21 A. That was the incentive right there.

22 Q. Right, that he could get out of it for
23 a cheaper amount, a less expensive amount if he
24 paid sooner?

25 A. Yes.

1 line? I mean, did you mean that in a sarcastic
2 way?

3 A. No, not at all. And you'll read the
4 next sentence, it says: "Thank you for all your
5 work."

6 Q. Okay, fair enough. On November 15th at
7 7:54 p.m. you also wrote in Exhibit No. 26 an
8 e-mail to Tom Walker, and in the second paragraph
9 you say: "I have tried to be quiet these past
10 couple of weeks." Then you say that you want
11 them to go the extra mile for you. And then in
12 the fourth full paragraph you talk about changing
13 the terms to get something called Palace Resorts,
14 which I understood was some sort of a time share,
15 and in the third paragraph you talk about the
16 Status deal. So, can you just tell me what you
17 recall about this period of time, November 15,
18 2007?

19 MR. ELLIS: Objection as to clarity.

20 Q. (BY MR. ANDERSON) What were you trying
21 to express to your attorneys at this time?

22 A. It's self-explanatory. The paragraph
23 reads: "Therefore, I would like to suggest
24 that" --

25 MR. ELLIS: Excuse me, and Counsel can

1 Q. And you agreed to that; didn't you?

2 A. Yes, I did.

3 Q. You thought that that was a good idea;
4 didn't you?

5 A. Yes, it -- yes.

6 Q. If he paid?

7 A. If he paid.

8 Q. You would have your money; right?

9 A. Right.

10 Q. So, your attorneys were doing a good
11 job for you; right?

12 A. Yes.

13 Q. In the fourth paragraph, the big one on
14 the front page of Exhibit No. 26, you say: "If
15 the Status deal falls through, then why can I not
16 have one half of the 30 acres in return?" How
17 did you think you had a potential for obtaining
18 any of the property?

19 A. I do not know.

20 Q. You were just kind of tossing out
21 ideas?

22 A. Yes, I was tossing out ideas.

23 Q. You understood the property had already
24 been sold?

25 A. Not the 30 acres.

1 Q. And the 30 acres are the farm home?

2 A. The 30 acres was the home farm.

3 Q. The home farm?

4 A. That he still owns, yes.

5 Q. But that was the one that was indebted
6 to the bank and the bank had certain conditions
7 on how any proceeds could be spent?

8 A. That is correct.

9 Q. Let's go to Exhibit No. 28. This would
10 be Stan Welsh's reply to you. We do have a 2:43
11 in the morning. Exhibit No. 27, can you go to
12 the second page of Exhibit No. 27.

13 A. (Witness complied.)

14 Q. And in your first paragraph you say:
15 "No place in the Status February 21, 2006,
16 contract does it say if they do not complete the
17 deal March of 2008 that Darwin will not receive
18 the two lots."

19 Was it your impression that if Status
20 didn't follow through and pay everything that it
21 owed that Darwin still got the two lots?

22 A. Absolutely.

23 Q. And you read that from the Status
24 agreement or the sale agreement?

25 A. No, everyone knew that the deed had

1 already transferred. Where the two building lots
2 were to be was on the Albrethsen property.

3 Q. But if Status didn't carry through and
4 pay off the remainder of what it owed, it
5 wouldn't get the opportunity to develop the land;
6 correct?

7 A. That's not correct.

8 Q. Well, if they defaulted --

9 A. They defaulted on the entire deal.

10 They didn't default on the Albrethsen portion.
11 The Albrethsen deed had already been transferred
12 to Status. They already had it free and clear.

13 Q. Have you ever filed an action against
14 Status for not developing the property so you
15 could get two lots?

16 A. No.

17 Q. Well, isn't that what you're saying,
18 that Status owes you two lots?

19 A. According to this, yes.

20 Q. Well, why -- okay.

21 A. I don't know who owns the property now.

22 Q. All right. The last page, the top
23 paragraph, this is where you said: "I was left
24 by myself every time Judge McKee was not with
25 us." And you said: "We could have been

1 reviewing what the overall estate worth was."

2 How do you think you all having a
3 better understanding of the worth of the estate
4 would have changed Darwin's bottom line?

5 A. I don't know. This is too long ago.

6 Q. So, in other words, it may not have?

7 A. It may not have.

8 Q. And then in Exhibit No. 28, Mr. Welsh
9 replied to all of these e-mails we've just looked
10 at. Did you understand that you got as much time
11 as you wanted, as he says in his second
12 paragraph?

13 A. Yes.

14 Q. And therefore you could have reviewed
15 the final agreement any number of hours or days
16 or whatever time you wanted to take?

17 A. Yes.

18 Q. And in the last paragraph on that first
19 page he says: "You state that you have tried to
20 keep quiet the last couple of weeks." And he
21 says: "You know that you have also provided
22 substantial input over the last several weeks."
23 You're not denying that; are you?

24 A. No.

25 Q. And in fact, if anybody reviewed the

1 couple inches of documents that went back and
2 forth between October 20th and November 16th, it
3 might not support the argument that you had tried
4 to keep quiet; would it?

5 A. Probably not.

6 Q. Okay.

7 A. I believe at the time I was -- I felt
8 like I was out of the loop because I was not --
9 was not involved in the wording of the decree.

10 Q. Well, if you were provided with each
11 draft --

12 A. No, I was not provided with each draft.

13 Q. If you're provided a draft, which we
14 know that you were, and you had an opportunity to
15 comment to your attorneys on that wording and
16 then they replied, "We will pass these along to
17 the other side," isn't that the process that you
18 wanted to engage in?

19 A. That is, but you're stating to me that
20 I was provided a draft of each copy and you are
21 wrong, Mr. Anderson.

22 Q. Can you tell me one copy you didn't get
23 to review?

24 A. All of the e-mails between -- the
25 e-mails that were actually being passed between

1 Tom Walker and Kim Brooks to come up with the
2 wording that was -- that the PSA's ended up with.

3 Q. Well, it ended up with certain language
4 based on an evolution of various drafts; right?

5 A. Various drafts that I did not see.

6 Q. When you say you didn't see them --

7 A. I did not see --

8 Q. Let me finish my question, please. Are
9 you saying you didn't -- can you tell me one
10 draft you didn't see?

11 A. No, I can't.

12 Q. Well, then, why are you saying it?

13 MR. ELLIS: Counsel, just an objection.
14 That's unfair. If she didn't get them, how can
15 she recount to you what she didn't see?

16 MR. ANDERSON: That's exactly my point,
17 Counselor. Thank you.

18 Q. (BY MR. ANDERSON) You're making an
19 allegation that there's drafts that you did not
20 ever see. We've produced everything in this
21 case. You can go to Kim Brooks and subpoena her
22 records. I don't know if you've done that or
23 not. You can go to Mr. Miller and subpoena his
24 records. Have you done that?

25 A. No.

1 Q. Then as you sit here today, can you
2 tell me that there's any draft of the property
3 settlement --

4 A. I do not recall.

5 Q. You've got to wait. You have to wait.
6 Is there any draft you can say, "Aha, I was never
7 provided an opportunity to comment on the
8 language of a particular draft"?

9 A. I do not recall.

10 Q. Okay.

11 MR. ELLIS: You've chased it to the
12 ground, Counsel.

13 MR. ANDERSON: Thanks.

14 Q. (BY MR. ANDERSON) In the last page of
15 Mr. Welsh's November 16, 2007, letter he
16 basically disputes your contention that you were
17 left alone and left adrift and didn't have any
18 guidance during the mediation. You've read that;
19 haven't you?

20 A. (Reviewing document.) I have read
21 this, yes.

22 Q. And he wrote: "You know full well that
23 we reviewed" --

24 MR. ELLIS: I'm sorry, Counsel, where
25 are you?

1 Q. (BY MR. ANDERSON) The last full
2 paragraph there at the bottom. It says: "Now
3 you state that we could have done a better job of
4 negotiating on October 20th." In other words,
5 Mr. Welsh thought you were accusing him of not
6 negotiating well. Did you understand that was
7 something that somebody could gather from your
8 comments?

9 A. Yes.

10 Q. And he responds; doesn't he?

11 A. Yes.

12 Q. He says: "We discussed every proposal
13 from them and every proposal that you made in
14 extensive detail." Do you see that?

15 A. Yes.

16 Q. Did you ever write back to him and say:
17 "You're wrong, Mr. Welsh, we did not"?

18 A. No.

19 Q. He says: "You had all of the time you
20 wanted." Did you ever write back to him and say:
21 "That is incorrect"?

22 A. No.

23 Q. He says: "We reviewed" -- and he's
24 talking about the overall estate worth. "We
25 reviewed that in detail and we had extensive

1 documentation on your position of the estate
2 worth." Do you recall disputing that?

3 A. No.

4 Q. Do you recall disputing anything that
5 Mr. Welsh said in this paragraph?

6 A. No.

7 Q. All right. I'm going to skip some
8 stuff here.

9 (Exhibit 29 marked.)

10 Q. (BY MR. ANDERSON) Exhibit No. 29 is an
11 e-mail from Tom Walker to Mr. McKay's attorneys
12 and you're copied. Do you see that?

13 A. (Reviewing document.)

14 Q. Go ahead and take a look at it if you
15 need to.

16 A. (Witness complied.)

17 Q. My first question -- and feel free to
18 look at the whole thing, but on the front page it
19 says that you're copied; correct?

20 A. Yes.

21 Q. And it says at the bottom of that
22 little intro paragraph that: "I am providing a
23 copy to Patty for her review." Do you see that?

24 A. Yes.

25 Q. Do you recall receiving a copy for your

1 review?

2 A. Yes.

3 MR. ELLIS: Excuse me, Counsel, is it
4 your representation that this is the final draft?

5 MR. ANDERSON: I don't know.

6 MR. ELLIS: Okay.

7 THE WITNESS: It appears --

8 MR. ANDERSON: As I sit here right now,
9 it may be. We've got means of checking that.

10 Q. (BY MR. ANDERSON) In any event, do you
11 recall requesting any changes from this language?

12 A. No.

13 (Exhibits 30 and 31 marked.)

14 (Discussion held off the record.)

15 Q. (BY MR. ANDERSON) Okay, on
16 November 20, 2007, Mr. Walker wrote to
17 Mr. McKay's counsel and said that you had signed
18 the stipulation and property settlement
19 agreement. That's Exhibit No. 30. And then
20 Exhibit No. 31 is an e-mail from Mr. Walker to
21 counsel attaching what appears to be the same
22 letter as well as the stipulation for entry of
23 judgment and decree of divorce which you had
24 signed and the property settlement agreement that
25 was merged into the judgment and decree of

1 divorce.

2 A. Yes.

3 Q. Do you follow all of that?

4 A. Yes.

5 Q. All right. Do you recall at the end of
6 this process whereby the October 20, 2007,
7 mediation agreement was transformed into a
8 written formal agreement, that you had any
9 concerns or -- let's leave it at concerns, that
10 you had not had an opportunity to fully evaluate
11 what you were about to sign?

12 A. Yes.

13 Q. Did you express that to either
14 Mr. Walker or Mr. Welsh?

15 A. Yes, Mr. Walker.

16 Q. And when did that take place?

17 A. In his office when I signed this.

18 Q. What did you say?

19 A. I had some questions regarding the
20 mortgage note and I also had some questions, the
21 fact that Darwin could not -- could not put the
22 property up for sale because he didn't have
23 the -- he didn't own it.

24 Q. Tell me what discussion transpired
25 between you and Mr. Walker regarding the mortgage

1 note.

2 A. It wasn't much of a discussion because
3 he had to go into another meeting and he just
4 told me to read through the entire document and
5 sign it, which I did. And he just -- he assured
6 me that everything would be fine, that once it's
7 recorded, then it would be a lien against
8 Darwin's property and whether -- whether the
9 paragraph regarding him selling the Albrethsen
10 property was there or not, it didn't matter.

11 Q. Do you remember my question? I said:
12 What was the substance of the conversation?

13 A. I just got through telling you what it
14 was.

15 Q. No, you told me there wasn't much of
16 one. And so, I'm going to ask you to go back
17 because presumably you brought up something, but
18 you haven't told me what it was. That's the part
19 of the conversation I'm particularly interested
20 in. So, if we can go back to square one, can you
21 please tell me what conversation you recall with
22 Mr. Walker relative to the mortgage note, as you
23 call it, issue.

24 A. I did tell you. I said, "In the event
25 of a breach, Darwin" --

1 MR. ELLIS: Excuse me.

2 Q. (BY MR. ANDERSON) If you're referring
3 to a particular paragraph, direct us there and
4 we'll look at it.

5 A. Okay, paragraph 1.8.

6 Q. You're on page 4?

7 A. Page 4.

8 Q. Of Exhibit No. 31. All right. Now,
9 what part of 1.8 are you looking at?

10 A. The very last sentence.

11 Q. Of that first paragraph?

12 A. Yes.

13 Q. And it says: "In the event of breach,
14 Darwin may also be able to foreclose a mortgage
15 on that portion of the land referred to prior to
16 the sale to Status Corporation as 'Albrethsen's
17 Farm.'"

18 So, tell me what -- I mean, was this
19 the first time you had seen the term
20 "mortgage" --

21 A. Yes.

22 Q. -- in this agreement?

23 A. Yes.

24 Q. Wasn't it in the document that you had
25 received on November the 19th for review?

1 A. It may have been, yes.
 2 Q. So, tell me what question you had, if
 3 it was a question, relative to this —
 4 A. "Tell me about the mortgage note."
 5 Q. And what did Mr. Walker say in
 6 response?
 7 A. "Darwin must have a mortgage on it
 8 because he's still due \$1.4 million."
 9 Q. So, is that the totality of the
 10 conversation regarding the mortgage note?
 11 A. Yes, and I said, "So, am I secure in
 12 that?" And he said, "Yes, the whole — once this
 13 is recorded, then the mortgage note, this is part
 14 of his real property. That's why I put that in
 15 there."
 16 Q. Now, you're under oath; remember?
 17 A. That's why Tom Walker put this in
 18 there.
 19 Q. No, I'm telling you, you're under oath,
 20 remember that?
 21 A. Yes.
 22 Q. So, are you telling me as you sit here
 23 answering my question that Tom Walker told you
 24 that the mortgage note was real property?
 25 A. No, but a mortgage is real property.

1 Q. So, you assumed that?
 2 A. Yes.
 3 Q. All right. And if you remember, I'm
 4 only — don't talk, please, while I'm trying to
 5 get this out because I might not be able to get
 6 it all out. Then I'll let you talk all you want,
 7 I promise.
 8 What I'm trying to figure out from you
 9 is what you can testify to about what Mr. Walker
 10 or Mr. Welsh said to you; okay?
 11 A. Regarding this?
 12 Q. Well, regarding this whole transaction
 13 and this whole representation. But for right now
 14 we're talking about paragraph 1.8. And I see a
 15 sentence that says: "Darwin may also be able to
 16 foreclose a mortgage." Now, what did you ask
 17 specifically about that sentence, if that's
 18 indeed what you're trying to impart to us?
 19 A. I expressed interest in seeing the
 20 mortgage. I said, "What's this mortgage?"
 21 Q. What did he say?
 22 A. "Darwin must have a mortgage on that
 23 property because he's still due about
 24 \$1.4 million on it."
 25 Q. And if he foreclosed on a mortgage,

1 that might result in some funds being received by
 2 Mr. McKay; correct?
 3 A. I don't recall him saying that, but
 4 that's what he's insinuating to me, yes.
 5 Q. And if Mr. McKay then received some
 6 funds, he had an obligation to pay you?
 7 A. Yes.
 8 Q. All right. So, are you saying that
 9 it's a bad thing —
 10 A. No.
 11 Q. You've got to wait. — for Mr. Walker
 12 to have included that language in 1.8?
 13 A. Actually, I — as I recall, I
 14 complimented him on putting that in there and
 15 picking up on that.
 16 Q. He didn't say that if Darwin forecloses
 17 on a mortgage that you automatically get your
 18 money, though; did he?
 19 A. No.
 20 Q. You understood that if Darwin
 21 foreclosed on a mortgage note, he still had a
 22 separate obligation to pay you some of it?
 23 A. Yes.
 24 Q. And if he didn't pay you some of it,
 25 did you understand that you had the tool of

1 filing a contempt action against him?
 2 A. Correct.
 3 Q. And neither Mr. Walker nor Mr. Welsh
 4 ever told you that any other framework of
 5 recovering against your husband existed; correct?
 6 MR. ELLIS: Objection, asked and
 7 answered.
 8 THE WITNESS: That is correct.
 9 Q. (BY MR. ANDERSON) All right. Did you
 10 ask any other questions?
 11 A. Yes, I expressed that they wrote in
 12 here on 1.8.2, page 4: "He," meaning Darwin, "He
 13 shall" — "If Status Corporation breaches and
 14 Darwin cannot pay the \$500,000 by April 30th, he
 15 shall list the Albrethsen property that was
 16 included in the Status Corporation Real Estate
 17 Transaction for sale and shall pay Patricia by
 18 cash, certified check of wire transfer \$500,000
 19 within five days" —
 20 THE COURT REPORTER: Please read that
 21 more slowly.
 22 MR. ELLIS: Come on, Patty. You don't
 23 have to read it. Just answer the question.
 24 THE WITNESS: I'm sorry. I expressed
 25 to Tom Walker that Darwin didn't own the

1 Albrethsen property. The deed had already been
 2 transferred. So, how could he list it for sale?
 3 Q. (BY MR. ANDERSON) What did Mr. Walker
 4 say?
 5 A. I don't recall. I don't recall.
 6 Q. Did you refuse to sign the agreement
 7 because it had that language in it?
 8 A. No.
 9 Q. Did you ask any other questions?
 10 A. Not that I recall.
 11 Q. All right. So, you had a full
 12 opportunity to review it and formulate any
 13 questions that you felt were appropriate?
 14 A. Yes.
 15 Q. And you were able to ask those
 16 questions and receive responses?
 17 A. Yes.
 18 Q. And those responses were satisfactory
 19 to you to the point that you agreed to sign the
 20 document?
 21 A. The way he answered the questions, yes.
 22 Q. And do you recall how he answered the
 23 questions?
 24 A. No, I do not.
 25 Q. All right.

1 (Exhibit 32 marked.)
 2 Q. (BY MR. ANDERSON) Exhibit No. 32 is a
 3 December 3, 2007, exchange of e-mails between you
 4 and Mr. Welsh or his office. And did you realize
 5 that the decree of divorce was being recorded in
 6 three counties, Ada, Owyhee, and Teton, along
 7 with the property settlement agreement?
 8 A. Yes.
 9 Q. And they ask if you thought they should
 10 record in any other counties, and did you ever
 11 respond?
 12 A. Yes.
 13 Q. How did you respond?
 14 A. That it needed to be recorded in Lyon
 15 County, Nevada.
 16 Q. And did you receive a response from
 17 Cosho Humphrey regarding that request or comment?
 18 A. Yes.
 19 Q. What was that?
 20 A. "We do not work in Nevada. You can do
 21 that."
 22 Q. Well, you could hire an attorney to do
 23 that.
 24 A. No, I didn't.
 25 Q. Because it required an attorney?

1 A. No.
 2 Q. You went ahead and did it?
 3 A. Yes.
 4 Q. So, the property settlement agreement
 5 was filed in Lyon County as well?
 6 A. Yes.
 7 Q. All right. Were there any other
 8 counties that you thought they should have
 9 recorded it in?
 10 A. No.
 11 Q. Do you recall Mr. Welsh indicating to
 12 you – well, let me do this in chronological
 13 order. When the due dates for payment occurred,
 14 did your husband, your ex-husband, pay you any
 15 money under the terms of the property settlement
 16 agreement?
 17 MR. ELLIS: With respect to the Status
 18 proceeds?
 19 MR. ANDERSON: Yes.
 20 Q. (BY MR. ANDERSON) Either the \$500,000
 21 or the \$800,000.
 22 A. No, he did not.
 23 Q. And did you consult with Cosho Humphrey
 24 when those payments were not made?
 25 A. Yes.

1 Q. And did they indicate to you that they
 2 would be willing to file a contempt motion to
 3 force your husband, your ex-husband, to follow
 4 the terms of the property settlement agreement?
 5 A. You're referring to December of when?
 6 Q. 2008.
 7 A. Yes, they did.
 8 Q. And somewhere I read that you disputed
 9 that the Cosho Humphrey firm had ever engaged in
 10 any work relative to a contempt motion. Do you
 11 recall that they actually did do some work before
 12 you stopped them?
 13 A. Yes.
 14 Q. All right. They had actually prepared
 15 an affidavit for you, but you instructed them not
 16 to do anything with it; correct?
 17 A. I instructed them not to do anything
 18 prior to them preparing the affidavit.
 19 Q. All right. Well, when you were working
 20 with counsel from Cosho Humphrey in terms of the
 21 property settlement agreement and its terms, did
 22 you ever contemplate that Darwin McKay would
 23 receive money from a title company because it had
 24 made a mistake and placed two parties in a first
 25 position relative to the Albrethsen farm? Was

1 that a thought that you had at that time?

2 A. At what time? I don't know what time
3 you're talking about. Are you talking about
4 before the divorce was -- during the divorce
5 proceedings? You're talking about December of
6 '08?

7 Q. When the property settlement agreement
8 was being finalized, did you ever think that
9 Mr. McKay would somehow receive funds via payment
10 directly from a title company because it had made
11 a mistake in terms of putting two parties in a
12 first position?

13 A. At the time that the property
14 settlement agreement was being made, no.

15 Q. And you didn't know that that could
16 even occur until you actually found out that it
17 had occurred?

18 A. That's correct.

19 Q. Let's wrap up for the day by me asking
20 you: After Mr. McKay failed to follow the terms
21 of the property settlement agreement and pay you
22 any money, you retained new counsel and filed a
23 contempt motion; is that correct?

24 A. That's correct.

25 Q. And that actually went to trial?

1 A. Yes.

2 Q. And did the judge rule on your contempt
3 motion?

4 A. We settled out of court.

5 Q. All right. And in filing the contempt
6 motion, were you seeking to enforce the property
7 settlement agreement that you had signed on
8 November 20, 2007?

9 A. Yes.

10 Q. All right. And you settled out of
11 court for what we'll call the new property
12 settlement agreement; correct?

13 A. Yes.

14 Q. And is it accurate to state that you
15 have also agreed not to enforce certain portions
16 of that agreement if Mr. McKay continues to make
17 certain payments?

18 A. That is correct.

19 Q. So, if you could, can you tell me how
20 you have been harmed by the actions of Cosho
21 Humphrey as opposed to the failure of Mr. McKay
22 to follow the terms of the original property
23 settlement agreement?

24 A. I have not received the \$800,000 cash
25 plus the 6 percent interest since October of

1 2008.

2 Q. If I could stop you right there, isn't
3 that due to the fact that Mr. McKay decided not
4 to pay you?

5 A. That is correct.

6 Q. And why is it, then, that you blame his
7 decision not to pay you on Cosho Humphrey?

8 A. Because the divorce decree was a
9 judgment against Darwin's real property and the
10 payment Darwin received was on the mortgage,
11 which was mentioned in the divorce decree. The
12 mortgage was on the Albrethsen property.

13 Q. I have to tell you, I heard what you
14 said, but I have no idea what you said. I don't
15 follow it. Let me just see if I can ask you
16 again. Mr. McKay refused to pay you when he
17 received some money; correct?

18 A. Correct.

19 Q. Cosho Humphrey had nothing to do with
20 him making that decision; correct?

21 A. No.

22 Q. I mean, they didn't conspire with him,
23 they didn't advise him in any respect. He made
24 that decision on his own, correct, not to pay
25 you?

1 A. The divorce --

2 Q. Just answer that question.

3 MR. ELLIS: Excuse me. Patricia, we're
4 going to be here for another five hours unless
5 you listen to his question and answer his
6 question.

7 Q. (BY MR. ANDERSON) Cosho Humphrey had
8 nothing to do with Darwin McKay refusing to pay
9 you when he got some proceeds from the title
10 company; is that correct?

11 A. I --

12 Q. It's just a "yes" or "no."

13 A. Repeat the question.

14 Q. Certainly. Would you agree that Cosho
15 Humphrey had nothing to do with Darwin McKay
16 refusing to pay you when he received some funds
17 from the title company?

18 A. No.

19 Q. Okay, tell me exactly what actions they
20 had relative to that decision by Darwin McKay, if
21 any.

22 A. Darwin McKay would not have gotten that
23 money. The divorce decree was a lien against
24 that property, the mortgage note.

25 Q. You said two things, "a lien against

1 that property, the mortgage note."

2 A. The property settlement agreement was a
3 judgment against Darwin's real property.

4 Q. Okay.

5 A. It was a judgment against the mortgage.

6 MR. ELLIS: Patty, did Cosho Humphrey
7 have anything to do with Darwin's decision not to
8 pay you money?

9 THE WITNESS: No.

10 Q. (BY MR. ANDERSON) Okay.

11 A. I'm sorry.

12 MR. ANDERSON: Let's stop for the day
13 right there. Thank you. We'll reschedule.

14 (Deposition adjourned at 12:52 p.m.)

15 (Signature requested.)
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2	2 3:9 23:18 25:8 26:1,2,3,15 76:21 76:23 77:13 87:2 121:10 136:12 20 4:11 5:7 6:14,18	23rd 95:13,18 98:15 100:19 111:3,4,7 24 5:4,5,18 48:12 105:2 113:12,13 24th 54:23 103:3	4 43:17 15:10 53:9 54:25 64:5 76:20 84:17,17,24,25 85:1 132:6,7 133:8 134:24 136:12 40 74:22 43 121:10 44 83:15 46 3:11	7 73:3,9 4:1 49:8,13 49:18 50:9 57:11 57:12 74:22 103:5 118:7 700 2:19 707 2:4,13 74 4:7 7426 2:20 75 4:9 107:13 79 4:10	
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250 South Fifth Street, Suite 700
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Boise, Idaho 83707-7426
Telephone: (208) 344-5800
Facsimile: (208) 344-5510

Attorneys for Defendants

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

PATRICIA MCKAY,

Plaintiff,

vs.

THOMAS G. WALKER and COSHO
HUMPHREY, LLP, a limited liability
partnership,

Defendants.

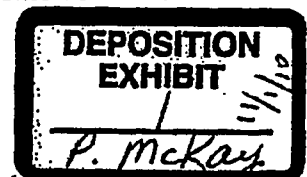
Case No. CV OC 0922659

**NOTICE OF DEPOSITION
DUCES TECUM OF PLAINTIFF
PATRICIA MCKAY**

TO: THE ABOVE-ENTITLED PLAINTIFF and her attorneys of record:

YOU WILL PLEASE TAKE NOTICE that Defendants will take testimony on oral examination of Patricia McKay before a court reporter and notary public with the firm of M & M Court Reporting Service, Inc., commencing on Monday, November 1, 2010, at 9 o'clock a.m., and continuing thereafter from day to day until such time as the taking of the deposition may be adjourned, at the offices of ELLIS, BROWN & SHEILS, CHARTERED, 707 North 8th Street, Boise, Idaho 83701, at which time and place you are notified to appear and take such part in the examination as you may deem proper. This deposition shall be taken pursuant to the Idaho Rules of Civil Procedure.

NOTICE OF DEPOSITION DUCES TECUM OF PLAINTIFF PATRICIA MCKAY - 1



You are further notified that Defendants request the deponent to bring with her to the deposition the originals or true and correct copies of the following to the extent such documents were not already produced during the discovery process in this matter:

1. Any and all statements obtained from persons with knowledge of the allegations contained in your Complaint.

2. Copies of any and all communication between you and/or your representatives and the Defendants.

3. Copies of any and all documents related to the settlement of the Motion for Contempt including, but not limited, copies of all pleadings filed in the Motion for Contempt¹ action and copies of any and all communication between you and/or your counsel and Darwin McKay and/or Mr. McKay's counsel.

4. Copies of any and all communication between you and/or your representatives and Darwin McKay from January 2007 to the present.

5. Copies of any and all payments received by you or your agents from Darwin McKay or his agents from November 29, 2007 to the present.

6. Copies of any and all payments made by Darwin McKay on your behalf from November 29, 2007 to the present.

7. Copies of any and all communication between you and Scott Hess and/or any other employee or representative of Holland & Hart, LLP regarding the matters at issue in your Complaint and/or regarding the Motion for Contempt.

8. Each and every record, document or other item of physical evidence in the possession, custody or control of Plaintiff, not previously produced to the Defendants in the

¹ The phrase "Motion for Contempt" shall refer to the Motion for Contempt filed by the Plaintiff against Darwin McKay on January 30, 2009 in the underlying action.

current action that in any way pertains to Plaintiff's claims in this matter of which Plaintiff intends to introduce as an exhibit at the trial herein.

9. Copies of any and all documents requested in the Defendants' First Set of Discovery Requests to Plaintiff which you have not yet produced to the Defendants in the current action.

DATED this 13th day of August, 2010.

ANDERSON, JULIAN & HULL LLP

By Yvonne A. Dunbar
Robert A. Anderson,
Yvonne A. Dunbar, Of the Firm
Attorneys for Defendants

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this 3rd day of August, 2010, I served a true and correct copy of the foregoing by delivering the same to each of the following attorneys of record, by the method indicated below, addressed as follows:

Allen B. Ellis
ELLIS, BROWN & SHEILS,
CHARTERED
707 North 8th Street
P.O. Box 388
Boise, Idaho 83701-0388
Telephone: (208) 345-7832
Facsimile: (208) 345-9564

☐ U.S. Mail, postage prepaid
☐ Hand-Delivered
☐ Overnight Mail
☒ Facsimile

Kevin E. Dinius
Michael J. Hanby II
DINIUS LAW
5680 E. Franklin Rd., Suite 130
Nampa, Idaho 83687
Telephone: (208) 475-0100
Facsimile: (208) 475-0101

☐ U.S. Mail, postage prepaid
☐ Hand-Delivered
☐ Overnight Mail
☒ Facsimile

Attorneys for Plaintiff

M&M Court Reporting Service
421 West Franklin Street
P.O.Box 2636
Boise, Idaho 83707-2636
Telephone: (208) 345-9611
Facsimile: (208) 345-8800

☐ U.S. Mail, postage prepaid
☐ Hand-Delivered
☐ Overnight Mail
☒ Facsimile

Yvonne A. Dunbar
Robert A. Anderson
Yvonne A. Dunbar

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PRE-NUPTIAL AGREEMENT

THIS AGREEMENT, made and entered into this 15th day of July, 1996, between DARWIN MCKAY (hereinafter "Prospective Husband") and PATRICIA CHRISTENSEN (hereinafter "Prospective Wife").

W I T N E S S E T H:

WHEREAS, the parties contemplate marriage under the laws of the State of Idaho; and

WHEREAS, in consideration of the marriage contract between them and in order to promote a long-lasting and harmonious marriage, the parties now desire to define their respective property rights in the event of a dissolution of their marriage or their entry into a legal separation; and

WHEREAS, each party has consented and agreed that after their marriage, the other party shall have the sole and absolute control of his or her assets, property and estate, whenever acquired, and may freely dispose of the same by gift, sale, testamentary disposition or otherwise, free of any claim to or rights in the same of the other, except as may be otherwise provided for by this Agreement; and

PRE-NUPTIAL AGREEMENT - 1



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WHEREAS, each party has made full disclosure to the other party of his or her present separate property interests and sources of income, including all assets and liabilities (but excluding as liabilities any current normal bills and charges and accrued income or property taxes) of any significance, schedules of which are attached hereto as Schedule A for Prospective Husband and Schedule B for Prospective Wife, both of which Schedules are incorporated herein by reference; and

WHEREAS, each party has been represented by an attorney of his or her own choosing, or has been advised of and fully understands his or her right to consult with an attorney of his or her choosing and each party having therefore sought and obtained whatever legal advice each wished in connection with each provision of this Agreement; and

WHEREAS, the Pre-Nuptial Agreement has been prepared by Penland Munther Boardman, Chartered, and Penland Munther Boardman, Chartered, has represented only Prospective Husband; and

WHEREAS, the Pre-Nuptial Agreement has been reviewed by James A. Bevis, attorney for the Prospective Wife, and said counsel has had opportunities to request and make appropriate changes to this Agreement on behalf of his client;

NOW, THEREFORE, in consideration of the above recitals and of the mutual promises and agreements contained herein, and in

PRE-NUPTIAL AGREEMENT - 2

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consideration of the marriage contemplated by the parties, the parties agree as follows:

1.00 Full Disclosure. Each party hereby declares that he or she has made a full disclosure to the other party of his or her present separate property interests, sources of income and liabilities, as above recited and as set forth on the attached schedules. Each party hereby acknowledges that he or she has ascertained and weighed all of the facts, conditions and circumstances, whether past, present or future, likely to influence the judgment of each herein; that all matters set forth herein have been fully and satisfactorily explained to each party; that each party has given due consideration to the matters set forth herein and clearly understands and consents to all of the provisions hereof; and that each is entering into this Agreement freely and voluntarily, with full knowledge of all pertinent facts and after consultation with and advice from, or the right to do so, an attorney of his or her own choice.

2.00 Release of Marital Rights of Prospective Wife. Prospective Wife hereby waives, releases and renounces, under the laws of any jurisdiction that may be applicable, all right and interest, statutory or otherwise, including, but not limited to, dower, widow's allowance, statutory allowance, intestate succession, right of election to take against the will of the Prospec-

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tive Husband, quasi-community property rights, homestead allowance, exempt property, family allowance and all other rights of any nature whatsoever in the property or estate of Prospective Husband which she might acquire as the wife, widow, heir at law or next of kin of Prospective Husband, in his property, owned by him at the time of this marriage, or acquired by him in an individual capacity thereafter, or as may be devised or inherited by him or his share of any community property acquired thereafter, and in his estate upon his death.

3.00 Release of Marital Rights of Prospective Husband.

Prospective Husband hereby waives, releases and renounces, under the laws of any jurisdiction that may be applicable, all right and interest, statutory or otherwise, including, but not limited to, courtesy, widower's allowance, statutory allowance, intestate succession, right of election to take against the will of Prospective Wife, quasi-community property rights, homestead allowance, exempt property, family allowance and all other rights of any nature whatsoever in the property or estate of Prospective Wife, which he might acquire as the husband, widower, heir at law or next of kin of Prospective Wife, in her property, owned by her at the time of this marriage, or acquired by her in an individual capacity thereafter, or as may be devised or inherited by her or as may be devised or inherited by him or her share of any

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community property acquired thereafter, and in her estate upon her death.

4.00 Separate Property. Each party shall separately retain all rights and have complete control of his or her own property which is listed in Schedules A & B respectively. Each party shall also retain all rights and have complete individual control over all rents, issues, profits and increases on said property as listed in Schedules A & B.

It is understood that all wages, earnings or other income now or hereafter earned or acquired by each of the parties shall be the separate property of the prospective spouse who earns or acquires said wages, earnings or other income, subject to the provisions of Section 4.01. Each party shall have the absolute and unrestricted right to enjoy, manage, dispose of or otherwise deal with such separate property at all times during his or her lifetime and upon his or her death, free from any claims that may be made by the other party by reason of their marriage, and with the same effect as if no marriage had taken place. The parties specifically agree that the rents, issues, profits, capital gains or other earnings or increases on their separate property or proceeds from any disposition thereof constitute the separate property of the person owning such property and that such property and its rents, issues, profits, capital gains or

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other earnings or increases or proceeds are not community property. The foregoing shall apply to all property now owned by either of the parties any property which may be inherited or devised to them and to all property which may hereafter be separately acquired by either of them, in any manner whatsoever.

4.01 Community Fund. The parties agree that they will maintain a community fund for the purpose of sharing household expenses and meeting other expenses or accumulating assets. It is understood that only those separate funds placed in the community fund or assets purchased from the proceeds of said community fund shall become the community property of the parties. Any assets acquired on a joint credit card will be community property. Nothing herein prevents the parties from agreeing in writing that an asset is community property. All other property of the parties shall remain the separate property of the parties as designated in Section 4.00.

4.02 Community Property. The parties agree that those items listed in Schedule C, which have already been acquired, will be considered community property.

4.03 Income Taxes. It is hereby agreed the parties may file their income taxes with the state and federal governments either jointly or separately, whichever is most advantageous to the individual party. Should the parties file jointly, the

amount of income tax due or returned shall be prorated by the parties according to each party's respective income.

5.00 Waiver of Right to Act as Fiduciary. Each party waives and renounces the right to act as personal representative, guardian, conservator or trustee of the estate of the other party; provided, however, that neither party shall be disqualified by this waiver to serve and act as personal representative, guardian, conservator or trustee of the other's estate if so designated or nominated by the other.

6.00 Transfers Between the Parties. Notwithstanding the provisions of this Agreement, either party shall have the right to transfer or convey to the other any property or interest therein which may be lawfully conveyed or transferred during his or her lifetime, or by will or otherwise upon death, and neither party intends for this Agreement to limit or restrict in any way the right and power to receive any such transfer or conveyance from the other.

7.00 Necessary Documents. Each party shall, upon the request of the other, execute, acknowledge and deliver any additional instruments that may be reasonably required to carry out the intention of this Agreement, including such instrument as may be required by the laws of any jurisdiction, now in effect or hereafter enacted, which may affect the property rights of the

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parties as between themselves or others, and if either party desires to sell, mortgage or in any way deal with his or her property, or any part thereof, the other agrees to join in said deed, mortgage or agreement without any consideration other than the covenants herein referred to.

8.00 Effective Date. This Agreement shall take effect only when and if the marriage now contemplated by the parties in fact takes place.

9.00 Entire Agreement. This Agreement contains the entire understanding of the parties and no representations or promises have been made except as contained herein. This Agreement may not be terminated, amended or supplemented except by an instrument in writing expressly referring to this Agreement and signed by both parties.

10.00 Binding Effect This Agreement shall bind and inure to the benefit of the parties and their respective legal representatives, successors, heirs, grantees and assigns.

11.00 Severability. If any provision of this Agreement or any right waived or retained by it shall for any reason be invalid or unenforceable, the other portions of this Agreement shall nevertheless continue in full force and effect.

12.00 Controlling Law. This Agreement has been executed in the State of Idaho and its provisions shall be construed and

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enforced in accordance with the laws of that State even though one or both of the parties may now be or hereafter become domiciled in another jurisdiction.

PRE-NUPTIAL AGREEMENT - 9

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IN WITNESS WHEREOF, the parties have executed and acknowledged this Agreement the day and year first above written.

Patricia Christensen
PATRICIA CHRISTENSEN,
Prospective Wife

Darwin McKay
DARWIN MCKAY,
Prospective Husband

STATE OF IDAHO)
County of Ada) ss.

On this 1st day of July, 1996, before me,
Kristine Wallace, the undersigned, a Notary Public
in and for the State of Idaho, personally appeared PATRICIA
CHRISTENSEN and DARWIN MCKAY, known to me to be the persons whose
names are subscribed to the within instrument, and acknowledged
to me that they executed the same.

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

Kristine Wallace
NOTARY PUBLIC FOR IDAHO
Residing at: One Idaho
My Commission Expires: 2/9/99

(SEAL)

PRE-NUPTIAL AGREEMENT - 10

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What's the A/P & A/R of TC?

SCHEDULE "A"

Separate Property of Prospective Husband

What had he paid as of July 1, 1996? not these amounts

ASSETS

Lease Purchase Equipment 1996

	Value	Total Lease Payout
1 - 1990 Kenworth Day Cab Tractor SN	22,000.00	29,260.00
✓ 1 - 1990 Kenworth Day Cab Tractor SN	22,000.00	29,260.00
✓ 1 - 1994 Turf Vacuum	8,000.00	10,640.00
✓ 1 Northwest Rototiller	8,000.00	10,640.00
✓ 1 Gasboy Fuel Management System	8,200.00	10,906.00
✓ 4 Western Irrigation Wheel Lines	15,600.00	20,748.00
✓ 1 - 1986 Volvo White Truck	16,000.00	21,280.00
✓ 1 - 1984 Volvo White Truck ✓	12,000.00	15,960.00
✓ 3 Utility Flatbed Trailers 27 ft.	10,500.00	13,965.00
✓ 1 Spyder Forklift	12,000.00	15,960.00
✓ 1 Care Field Forklift	14,000.00	18,620.00
✓ 2 Spyder Forklifts	15,000.00	19,950.00
✓ 1 Komatsu Yard Forklift	4,000.00	5,320.00
✓ 1 - 1989 John Deere Tractor Model 2350 w/Loader	14,750.00	19,617.00
✓ 2 New Spyder Forklifts	54,000.00	71,820.00
✓ 1 Ford F150 Pickup, Ford Motor Lease Nominal Value (subject to fair market buyout at end of term)		236,050.00

✓ Farm Land Owned or Under Contract

✓ 40 Acres SW1/4 of SW1/4, T3N, R1E, B.M., known as Home Farm

210,000.00
240,000.00

Donna owns 40 Acres of this

40 acres SW1/4 of SE1/4, T3N, R1E, B.M., known as Hiatt Farm

Sold

240,000.00

0.00

+ + + + + + + + + + + + + + + + +
 22,000.00
 22,000.00
 8,000.00
 8,000.00
 8,200.00
 15,600.00
 16,000.00
 12,000.00
 10,500.00
 12,000.00
 14,000.00
 15,000.00
 4,000.00
 14,750.00
 54,000.00
 236,050.00

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A. ? He had not paid for these - all leases.

12. Liabilities \$ 1,039,613.00

Douglas

Equipment

1 - 113,300.00
2 - 15,733.00
3 - 210,350.00
4 - 211,595.00

5 - 21,390.00
6 - 34,300.00
7 - 213.00

7 - 19,755.00
628.00
3,412.00
27,180.00
8 - 3,006.00
62,387.00

9 - 12,230.00
13,760.00
206.00
472.00
1,009.00

Bedg. - 10 - 79,400.00

185,558.00

@ 15,000' each
The 2 '95 2nd p/m
were being leased.
He turned one in
1/6 2

83

0.00 *
0.00 *
113,300.00 +
15,733.00 +
210,350.00 +
211,595.00 +
21,390.00 +
34,300.00 +
7,213.00 +
19,755.00 +
628.00 +
3,412.00 +
27,180.00 +
3,006.00 +
62,387.00 +
12,230.00 +
13,760.00 +
206.00 +
472.00 +
1,009.00 +
79,400.00 +
837,326.00 *

SCHEDULE "A" - (CONTINUED)

LIABILITIES

| | |
|------------------------------------|------------|
| Ford Motor Credit - Ford Tractor | 4,146.00 |
| Associates - Walking Floor Flatbed | 8,400.00 |
| M&I Leasing - Various Farm Items | 2,200.00 |
| Key Bank Capitol Note | 75,000.00 |
| Key Bank Term Note | 325,000.00 |
| Washington Federal - Donna's House | 140,000.00 |
| TCM Joint Venture | 4,867.00 |
| Charles Hiatt - Hiatt Farm | 95,000.00 |
| D. J. McKay | 100,000.00 |
| Key Bank Farm Operating Line | 285,000.00 |

1,039,613.00

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ASSETS - SCHEDULE A

01/17/96

THE TURF COMPANY EQUIPMENT LIST AS OF 12/31/96

| QTY | DESCRIPTION | VALUE |
|-----------------------|--|--------------|
| FARM EQUIPMENT | | |
| 1 | IH MODEL 886 TRACTOR W/CAB & DUALS | 12,000.00 |
| 1 | IH MODEL 1068 TRACTOR W/DUALS 326101720039257 | 8,000.00 |
| 1 | IH MODEL 806 TRACTOR W/NEW TA & ENGINE | 5,500.00 |
| 1 | IH MODEL 544 HYDRO TRACTOR UP14917 (NEW ENGINE) | 4,200.00 |
| 1 | SCHAFFER 10' OFFSET DISC #77-10780 | 2,500.00 |
| 1 | WHITE 253 20' TANDEM DISC | 2,000.00 |
| 1 | KING 13' CHISEL PLOW W/GAUGE WHEELS | 1,500.00 |
| 1 | ACE 12' GROUND HOG W/3 PT | 2,400.00 |
| 1 | NORTHWEST 12' ROTOTILLER #RB1445.C.RB3237 | 3,000.00 |
| 1 | 3PT DITCHER MODEL 600W | 500.00 |
| 1 | 4 SECTION STEEL HARROW W/3PT MELROW CARRIER | 400.00 |
| 1 | SPIKE TOOTH HARROW 15' 3 SECTION | 350.00 |
| 1 | OLD OLIVER GRAIN DRILL #54-2324 | 350.00 |
| 1 | EZ FLOW SPREADER | 40.00 |
| 1 | EVERSMAN MODEL 4512 LAND PLANE 12'X45' #10022 | 2,400.00 |
| 1 | 18' TRIPLE K | 1,600.00 |
| 8 | PORTABLE MOTOROLA HT90 RADIOS @400.00 ea. | 3,200.00 |
| 1 | 100 GALLON FUEL TANK W/PUMP | 200.00 |
| 1 | 500 GALLON FUEL TANK W/STAND | 200.00 |
| 1 | 280 GALLON FUEL TANK W/STAND | 150.00 |
| 1 | HARLEY ROCK PICKER | 5,000.00 |
| 1 | HOMIE BUILT HYDRAULIC WOOD SPLITTER | 200.00 |
| 1 | HYDRAULIC DUMP MACHINERY TRAILER | 2,500.00 |
| 1 | 3PT HYDRAULIC CHERRY PICKER CRANE | 600.00 |
| 1 | 7" X 41' GRAIN AUGER W/3PH 3 PHASE MOTOR | 1,400.00 |
| 1 | 5" X 20' GRAIN AUGER W/MOTOR 1.5 HP, 100 VOLT | 150.00 |
| 1 | AUGER MOTOR 1HP, 110 VOLT | 75.00 |
| 1 | EDWARD'S TRACTOR MOUNT FORKLIFT #TF881140 | 300.00 |
| 1 | MOTOROLA BASE UNIT | 450.00 |
| 1 | MC MODEL 675 GRAIN DRYER | 8,000.00 |
| 1 | STAINLESS STEEL SPREADER UNIT, WALK BEHIND | 150.00 |
| 1 | DUAL FRONT LOADER | 1,200.00 |
| 1 | OLIVER 55 TRACTOR S.N. 22979-518 | 1,500.00 |
| 1 | 3PT BOX SCRAPER | 250.00 |
| 1 | CORRUGATION W/MARKERS | 250.00 |
| 1 | SCOOPMOBILE FRONT-END LOADER | 7,000.00 |
| 1 | HARLEY ROCK WINDROWER | 6,500.00 |
| 1 | MELROE SPRAY COUPE MODEL 220 SPRAYER 2206188-87 | 12,000.00 |
| 1 | TERRA-GATOR II FERTILIZER SPREADER #68381 UNIT 714 | 9,000.00 |
| 1 | PORTABLE SCALES | 3,815.00 |
| 1 | TERRA-GATOR II FERTILIZER SPREADER-PAUL IDAHO | 2,500.00 |
| TOTAL FARM EQUIPMENT | | \$113,330.00 |

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OFFICE EQUIPMENT (MERIDIAN & RENO)

| | | |
|----|--|----------|
| 28 | STEEL DESKS @ 50.00 ea. (6 Meridian, 2 Reno) | 400.00 |
| 4 | 2-DRAWER FILE CABINET @ 55.00 ea. | 220.00 |
| 2 | 4-DRAWER FILE CABINET (2 Meridian, 1 Reno) | 240.00 |
| 1 | 4-DRAWER FIRE PROOF LEGAL SIZE FILE CABINET | 100.00 |
| 1 | CANON COPIER W/STAND | 700.00 |
| 2 | WOOD STORAGE CABINETS | 225.00 |
| 2 | OFFICE COMBINATION A/C & HEATING UNITS | 1,200.00 |
| 8 | PHONES & SWITCHING EQUIPMENT | 2,400.00 |
| 2 | DISPLAY TABLES @ 50.00 ea. | 100.00 |
| 2 | WALL MAPS, LAMINATED @ 30.00 ea. | 90.00 |
| 1 | WOOD BOOKCASE | 10.00 |
| 2 | CALCULATORS @ 30.00 ea. | 210.00 |
| 1 | 3 DRAWER FILE CABINET | 60.00 |
| 6 | SWIVEL CHAIRS @ 30.00 ea. | 180.00 |
| 1 | SECRETARY TABLE | 30.00 |
| 2 | WOODEN OCC. CHAIRS @ 10.00 ea. | 20.00 |
| 1 | VERSALINK FOR FAX HOOK UP | 250.00 |
| 2 | FAX MACHINES | 700.00 |
| 1 | EPSON PRINTER | 300.00 |
| 1 | HP INK JET LASER PRINTER | 300.00 |
| 1 | PANASONIC PRINTER | 100.00 |
| 4 | 5 DRAWER FRONT OPENING FILE CABINET | 200.00 |
| 2 | OFFICE DIVIDERS | 50.00 |
| | MISC. COMPUTER SOFTWARE | 800.00 |
| 4 | VACUUM CLEANER | 50.00 |
| 2 | COMPAQ 486 DESKTOP COMPUTER | 1,735.00 |
| 1 | SBS 486-85 COMPUTER | 1,486.00 |
| 1 | XEROX 620 MEMORYWRITER TYPEWRITER | 290.00 |
| 4 | AIR CONDITIONER | 382.00 |
| 4 | TRADE SHOW DISPLAY EQUIPMENT | 800.00 |
| 2 | WOOD DESKS W/SIDE UNITS @ 200.00 ea. | 600.00 |
| 4 | METAL SIDE OPENING FILE CABINET | 200.00 |
| 4 | STORAGE CABINET 4 DRAWER, 4 DOOR | 300.00 |
| 9 | BROWN OFFICE CHAIRS | 75.00 |
| 4 | TIME CLOCK | 350.00 |
| 1 | SMALL REFRIGERATOR | 100.00 |
| 4 | MICROWAVE OVEN | 75.00 |
| 1 | PICNIC TABLE W/ BENCHES | 75.00 |
| 12 | SMALL WOODEN CABINETS (Break Room) | 60.00 |
| 3 | PLASTIC PORTABLE FILE CARRIERS | 70.00 |
| 2 | EASEL | 50.00 |
| 1 | SCALES & SEED SALES BINS | 150.00 |

TOTAL OFFICE EQUIPMENT

\$15,733.00

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SOD EQUIPMENT

| | | |
|---|---|-----------|
| 1 | PALLET TRAILER | 450.00 |
| 4 | 6' SOD ROLLER | 700.00 |
| 1 | FORD MODEL 4610 TRACTOR | 9,000.00 |
| 2 | 6' WATER FILLED ROLLER @250.00 ea. | 500.00 |
| 1 | 1980 MF 245 DIESEL TRACTOR | |
| | W/MODEL 3A314898 SOD HARVESTER | 22,000.00 |
| 1 | JACOBSEN SELF PROPELLED | |
| | 7 GANG MOWER #F10-1623 WH | 1,000.00 |
| 5 | SPYDER FORKLIFTS | 50,000.00 |
| 1 | FORKLIFT TRAILER | 500.00 |
| 1 | JACOBSEN SELF PROPELLED 7 GANG MOWER, RED | 3,000.00 |
| 1 | PRINCETON MODEL 180 SELF PROPELLED TURF CUTTER | 2,000.00 |
| 1 | ACE 100 GALLON SPRAYER W/BOOMS, 3 PT | 800.00 |
| 1 | HOME BUILT PIPE HAULING TRAILER | 500.00 |
| 1 | BRILLION TURF SEEDER MODEL SST-144-01, 12' WIDTH | 2,500.00 |
| 1 | INTERNATIONAL FLAIL MOWER #70 | 450.00 |
| 1 | MOTT VERTICAL CUT MOWER | 500.00 |
| 1 | HUSTLER ROTARY MOWER 72" WIDTH | 2,500.00 |
| 1 | TURF NET LAYING UNIT 17' WIDE | 1,200.00 |
| 1 | MASSEY FERGUSON 2-45 TRACTOR W/TURF TIRES | 6,300.00 |
| 1 | DYNA PAK LR 90 ROLLER | 7,500.00 |
| 1 | REEFER UNITS | 7,400.00 |
| 1 | 1980 MF 245 DIESEL TR. #9A304859 W/BROWER A3A HAR | 18,000.00 |
| 1 | WORTHINGTON ROTARY MOWER S.N. 233 | 2,000.00 |
| 1 | GREAT PLAINS OVERSEEDER, 72" WIDE #5421 | 4,000.00 |
| 2 | RADIO FOR HARVESTER #1 & 2 | 800.00 |
| 1 | JACOBSEN PTO POWERED 72" SWEEPER | 2,000.00 |
| 1 | GOLF CART W/CHARGER | 250.00 |
| 1 | PERKINS 4 CYLINDER DIESEL ENGINE FOR MOWER | 2,500.00 |
| 1 | SHOP MADE HYDROSTATIC ROTARY MOWER | 30,500.00 |
| 1 | JAW-TYPE ROCK CRUSHER | 1,500.00 |
| 1 | REVERSE TINE TILLER | 2,400.00 |
| 1 | NUNES MOWER ROTARY | 9,500.00 |
| 1 | BROWER 7 GANG PTO REEL MOWER | 5,000.00 |
| 1 | BROWER 5 GANG PTO REEL MOWER (MADE FROM PARTS) | 2,000.00 |
| 1 | HYSTER FORKLIFT PROPANE POWERED RENO | 2,800.00 |
| 1 | 1994 HONDA 4 X 2 FOURWHEELER MODEL 300 cc | 3,000.00 |
| 1 | 185 cc HONDA THREE WHEELER | 650.00 |
| 1 | 200 cc HONDA THREE WHEELER | 650.00 |
| 1 | HESTON STACKHAND | 4,000.00 |
| 1 | SPYDER FORKLIFT | |

TOTAL SOD EQUIPMENT

\$210,350.00

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VEHICLES

| | | |
|---|--|-----------|
| 1 | 1973 LUFKIN 40' FLATBED TRAILER | 2,500.00 |
| 1 | 1979 CHEVY LUV PICKUP #CLN14982813714, YELLOW | 700.00 |
| 1 | 1995 FORD 1/2 TON PICKUP #1FTDF15489NB41845 RENO | 15,000.00 |
| 4 | 1995 FORD 1/2 TON PICKUP #1FTDF15Y19NA79399 | 15,000.00 |
| + | 1984 GMC 2 1/2 TON TRUCK #1GDDG7DIF2EY504852 | 9,345.00 |
| 1 | 1977 CHEVY LUV PICKUP, WHITE #CLN1488209761 | 400.00 |
| 1 | DODGE RAMPAGE #1B74W14E8CS239088 | 1,500.00 |
| A | 16' PULL TRAILER W/HARSH HOIST, SIDES
& ROLLOVER TARP #ID008244 | 5,000.00 |
| 4 | 15' GOLITE TRAVEL TRAILER S.N. 15110507BX | 1,000.00 |
| 1 | 1987 FORD RANGER PICKUP #1FTBR0A1HUB37871 | 2,000.00 |
| 1 | 1970 FORD 2 TON TRK. # C70EVJ63959 | 1,000.00 |
| 1 | 1982 V.W. PICKUP #1VKS017XCVO58718 | 1,800.00 |
| 1 | 1977 PETERBILT CABOVER #88544P | 14,500.00 |
| + | 1977 ALLOY 42' FLATBED #77190 | 6,500.00 |
| + | 1980 TRANSCRAFT TRAILER, 36' FLAT DECK #TC16238 | 4,000.00 |
| 4 | SHOP BUILT 2 AXLE SEMI DOLLY | 4,200.00 |
| A | 1990 PETERBILT CONVENTIONAL TRUCK #D259390GL | 40,000.00 |
| 4 | SINGLE AXLE DOLLY | 1,200.00 |
| 2 | 26' SINGLE AXLE PULL UTILITY TRAILERS #689002,689003 | 8,000.00 |
| 4 | 40' SEMI TRAILER TO BE MODIFIED #G69225-9031 | 1,000.00 |
| 4 | 1982 DODGE 1/2 TON 4-WD PICKUP #239088 | 3,000.00 |
| 1 | 1962 IH PICKUP FROM SALVAGE FIXED UP #3B294344A | 600.00 |
| 4 | 1973 IH 3 AXLE CONVENTIONAL TRACTOR #43747CYB15201 | 7,500.00 |
| + | 1977 TRAILMOBILE FLATBED TRAILER 42' #P50345 | 4,500.00 |
| + | 1967 BROWN FLATBED TRAILER 40' #S673610 | 2,500.00 |
| + | 1971 BROWN FLATBED TRAILER 36' #S715323 | 2,000.00 |
| + | LIGHTWEIGHT TRAILER TO CARRY HUSTLER MOWER | 250.00 |
| 1 | 1980 UTILITY REEFER TRAILER 42' | 3,000.00 |
| 1 | TRANSMISSION 15 SPEED SALV. WRECKED 77 IH | 1,000.00 |
| 1 | REAR-ENDS PLUS HOUSING SALV. WRECKED 77 IH | 2,000.00 |
| 4 | TRANSMISSION 10 SD. SALV. FROM 1984 WHITE TRUCK | 1,000.00 |
| 2 | REAR-END SALV. FROM 1984 WHITE TRUCK | 2,000.00 |
| 4 | 26' TANDEM AXLE FLAT BED DELIVERY TRAILER #55917 | 2,600.00 |
| 1 | 1984 VOLVO WHITE 3 AXLE TRACTOR #G3EU068288 | 16,500.00 |
| 4 | 1986 VOLVO WHITE 3 AXLE TRACTOR CONVENTIONAL | 18,000.00 |
| 4 | 5TH WHEEL LIFTING HOIST CALLAHAN | 6,500.00 |
| 1 | 1977 MACK 3 AXLE TRACTOR #WL786LST34274 | 4,000.00 |

TOTAL VEHICLES

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\$211,595.00

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SHOP EQUIPMENT

| | | |
|---|--|----------|
| ✓ | AIR COMPRESSOR | 1,000.00 |
| ✓ | JENNY STEAM CLEANER, PRESSURE WASHER | 1,200.00 |
| ✓ | METAL CUTTING BANDSAW | 600.00 |
| ✓ | OXY ACETYLENE WELDER & TANK | 300.00 |
| ✓ | NEW LINCOLN AC-DC 250 W/ CARRIER | 1,000.00 |
| ✓ | H.D. 1/2" DRILL | 100.00 |
| ✓ | MILWAUKEE SAWZALL | 125.00 |
| ✓ | DRILL PRESS, 15" FLOOR MODEL | 500.00 |
| ✓ | FLOOR GRINDER | 100.00 |
| ✓ | SHOP PRESS | 200.00 |
| ✓ | PARTS WASHER | 200.00 |
| ✓ | SHOP VACUUM | 150.00 |
| ✓ | HAND GRINDER | 85.00 |
| ✓ | GAS FURNACE | 250.00 |
| ✓ | WELDING TABLE & VISE | 200.00 |
| ✓ | METAL RACK | 100.00 |
| ✓ | LINCOLN INDUSTRIAL WIRE FEED WELDER COMPLETE | 2,500.00 |
| ✓ | FLOOR JACK STOW | 300.00 |
| ✓ | AIR IMPACT. 1" | 200.00 |
| ✓ | 4" GRINDER | 50.00 |
| ✓ | FREQUENCY STABILIZER. | 300.00 |
| ✓ | TRANSMISSION JACK | 350.00 |
| ✓ | 600\$ TORQUE WRENCH | 600.00 |
| ✓ | HYDRAULIC HOSE PRESS | 400.00 |
| ✓ | ENGINE STAND | 150.00 |
| ✓ | CATERPILLAR ENGINE ADJUSTING TOOLS | 600.00 |
| ✓ | PORTABLE WELDER | 930.00 |
| ✓ | 2 TON FLOOR JACK | 100.00 |
| ✓ | PALLET JACK | 250.00 |
| ✓ | WASTE OIL BURNER | 750.00 |
| ✓ | 250 GALLON WASTE OIL TANKS | 400.00 |
| ✓ | SILVER EAGLE PRESSURE WASHER | 2,000.00 |
| ✓ | AIR ARC | 200.00 |
| ✓ | TOOL BOX AND TOOLS | 1,500.00 |
| ✓ | BULK OIL TANKS | 600.00 |
| ✓ | AIR GREASER | 100.00 |
| ✓ | BULK OIL HAND PUMPS | 150.00 |
| ✓ | MISC. SHOP MANUALS | 400.00 |
| ✓ | DRILL PRESS VISE | 100.00 |
| ✓ | AIR CONDITIONER | 500.00 |
| ✓ | SHOP FLOOR HEAVY DUTY GRINDER | 300.00 |
| ✓ | BOTTLE JACKS | 350.00 |
| ✓ | CHOP SAW | 200.00 |
| ✓ | JACK STANDS | 300.00 |
| ✓ | EXHAUST FAN | 600.00 |

TOTAL SHOP EQUIPMENT

\$21,390.00

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IRRIGATION EQUIPMENT

TCM-BURNETT-HOME FARM-ALL. THSEN: WHEELINES

| | | |
|-------|-------------------------------------|-------------|
| 1240' | 1" WHEELINE COMPLETE TELESCOPE | \$ 3,600.00 |
| 1260' | 1" WHEELINE COMPLETE TELESCOPE | 3,600.00 |
| 1040' | 1" WHEELINE COMPLETE TELESCOPE | 3,600.00 |
| 1080' | 1" WHEELINE COMPLETE TELESCOPE | 3,200.00 |
| 1080' | 1" WHEELINE COMPLETE TELESCOPE | 3,200.00 |
| 1240' | 1" WHEELINE COMPLETE TELESCOPE | 3,600.00 |
| 920' | 1" WHEELINE COMPLETE TELESCOPE | 2,700.00 |
| 1220' | 1" WHEELINE COMPLETE TELESCOPIC | 3,500.00 |
| 1080' | 1" WHEELINE COMPLETE TELESCOPIC | 3,200.00 |
| 720' | 1" WHEELINE COMPLETE HOSE CONNECTOR | 2,000.00 |
| 760' | 1" WHEELINE COMPLETE HOSE CONNECTOR | 2,100.00 |
| | | \$34,300.00 |

HOME FARM: HANDLINES

| | | |
|-----|-----------------------------------|------------|
| 143 | 3X40" H & L CENTER RISER | 6,149.00 |
| 3 | 3X20" H & L END RISER | 85.00 |
| 1 | 3" RL END PLUG | 27.00 |
| 4 | 6" RL END PLUGS | 40.00 |
| 4 | 4" H&L END PLUGS | 24.00 |
| 5 | 3" H&L END PLUGS | 38.00 |
| 8 | 4X3 UNIVERSAL VALVE OPENER | 520.00 |
| 6 | 4X3 RAIN FOR RENT VALVE OPENERS | 150.00 |
| 2 | 4X3X3 UNIVERSAL VALVE OPENERS | 60.00 |
| 1 | 4X3X3 UNIVERSAL VALVE OPENERS | 30.00 |
| 6 | 4" FLUSHING END PLUGS (WHEELINES) | 90.00 |
| | | \$7,213.00 |

TCM-BURNETT-HOME FARM-STIRLING-ALBRETHSEN: MAINLINE

| | | |
|-------|-----------------------|----------|
| 350' | 8X50 MAINLINE RL W/V | 998.00 |
| 960' | 8X40 MAINLINE RL W/V | 2,736.00 |
| 560' | 8X40 MAINLINE RL W/OV | 1,596.00 |
| 280' | 8X20 MAINLINE W/V | 798.00 |
| 150' | 8X30 MAINLINE W/OV | 428.00 |
| 90' | 8X30 ANGLED MAINLINE | 256.00 |
| 15' | 8X15 MAINLINE RL | 43.00 |
| 10 T. | 8X10 MAINLINE RL | 29.00 |
| 1800' | 6X50 MAINLINE RL | 4,230.00 |
| 300' | 6X50 MAINLINE H & L | 705.00 |
| 500' | 6X50 MAINLINE RL | 1,175.00 |
| 280' | 6X20 MAINLINE RL | 658.00 |
| 150' | 4X50 MAINLINE RL | 172.00 |
| 250' | 4X50 MAINLINE H&L | 288.00 |
| 10' | 4X10 MAINLINE H&L | 12.00 |
| 5' | 4X5 MAINLINE H&L | 6.00 |

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TCM-BURNETT-HOME FARM-STIRLING-ALBRETHSEN: MAIN LINE(CONT)

| | | |
|-------|----------------------------|-----------------|
| 660' | 3X30 MAINLINE W/OV | 825.00 |
| 300' | 6X10 MAINLINE RINGLOCK W/V | 1,800.00 |
| 1000' | 8" PVC BURIED ON MCKAY H-2 | <u>3,000.00</u> |
| | \$ | 19,755.00 |

SIPHON TUBE INVENTORY

| | | |
|-----|---------------------|--------------|
| 100 | 3/4" SIPHON TUBE | 100.00 |
| 400 | 1" SIPHON TUBE | 400.00 |
| 83 | 1 1/4" SIPHON TUBE | 83.00 |
| 3 | 1 1/2" SIPHON TUBE | 3.00 |
| 7 | 2" SIPHON TUBE | 7.00 |
| 5 | 3" SIPHON TUBE | 5.00 |
| 6 | CONCRETE DITCH TINS | <u>30.00</u> |
| | | \$628.00 |

GATED PIPE INVENTORY *Sold*

| | | |
|-----|-------------------------------------|--------------|
| 270 | 10x30 - 30" SPACING @ 2.50 | 675.00 |
| 810 | 8x30 - 30" SPACING - PLASTIC @ 1.50 | 1,215.00 |
| 300 | 6x30 - 30" SPACING @ 1.65 | 495.00 |
| 390 | 8x30 - 30" SPACING - ALUM. @ 2.05 | 799.00 |
| 1 | 10" - 90 DEGREE ELBOW | 40.00 |
| 1 | 8" END PLUG | 17.00 |
| 2 | 6" END PLUG | 16.00 |
| 3 | 8" 90 DEGREE ELBOWS | 90.00 |
| 1 | 6" 90 DEGREE ELBOW | 20.00 |
| 1 | 3" TEE | <u>45.00</u> |
| | | \$3,412.00 |

FARM PUMPS

| | | |
|-------|--|---------------|
| 20 HP | SUBMERSIBLE PUMP-PANEL-TIMER-HOOK-UP | 3,000.00 |
| 15 HP | CENTRIFUGAL PUMP-PANEL-TIMER-HOOK-UP | 1,000.00 |
| 30 HP | SUBMERSIBLE PUMP-PANEL-TIMER-HOOK-UP | 3,500.00 |
| 30 HP | CENTRIFUGAL PUMP-PANEL-TIMER-HOOK-UP | 2,000.00 |
| 25 HP | MOTOR SHAFT-TURBINE PUMP MOTOR & SHAFT | 1,000.00 |
| 15 HP | CORNELL CENTRIFUGAL PUMP-PANEL-SUCTION | 680.00 |
| 25 HP | SUBMERSIBLE PUMP-PANEL-TIMER | 3,500.00 |
| 25 HP | SUBMERSIBLE PUMP-PANEL-TIMER | 3,500.00 |
| 25 HP | SUBMERSIBLE PUMP-PANEL-PLACED BY | |
| | BOISE RANCH GOLF | 4,500.00 |
| 1 | 3 PHASE RECTIFIER 25-60 HP | 3,000.00 |
| 1 | HONDA INJECTION PUMP 5.5 HP | 750.00 |
| 1 | BUBBLE SCREEN | <u>750.00</u> |
| | | \$27,180.00 |

*Jim
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HOME FARM: MISC. PARTS

| | | |
|----|-------------------------|-------------------|
| 1 | 6" RL END TEE | 45.00 |
| 1 | 6" RL 45 DEGREE ELBOW | 28.00 |
| 1 | 6" H&L 90 DEGREE ELBOW | 28.00 |
| 1 | 6" H&L 45 DEGREE ELBOW | 28.00 |
| 1 | 5" H&L 90 DEGREE ELBOW | 20.00 |
| 3 | 4" H&L 90 DEGREE ELBOWS | 54.00 |
| 3 | 8x6 RL X RL ADAPTERS | 90.00 |
| 2 | 6x6 RL X H&L ADAPTERS | 40.00 |
| 1 | 6x5 RL X H&L ADAPTERS | 25.00 |
| 1 | 6x4 RL X RL ADAPTERS | 28.00 |
| 1 | 6x4 RL X H&L ADAPTERS | 28.00 |
| 4 | 8" H&L END TEES | 104.00 |
| 3 | 8" H&L LINE TEES | 78.00 |
| 2 | 6" BUTTERFLY VALVES | 90.00 |
| 1 | 6" CAST IRON GATE VALVE | 70.00 |
| 3 | 6" Y TEES | 45.00 |
| 1 | 6x8 RL X RL ADAPTERS | 25.00 |
| 1 | 6" CHECK VALVE | 65.00 |
| 1 | 8x8 RL X RL ADAPTERS | 20.00 |
| 24 | 6" HALF WHEELS | 360.00 |
| 1 | 8" BUTTERFLY VALVE | 100.00 |
| 2 | 2" GATE VALVES | 20.00 |
| 1 | 3" GATE VALVE | 15.00 |
| 1 | 4" GATE VALVE | 20.00 |
| 4 | 10' 3" FLEX HOSE | 80.00 |
| 1 | CLEMONS SAND SEPARATOR | 1,500.00 |
| | | <u>\$3,006.00</u> |

HOME FARM: SOLID SET EQUIPMENT

| | | |
|-----|-----------------------------|--------------------|
| 872 | 3 X 40 END RISER WARRENTON | 34,008.00 |
| 400 | 8x40 H&L END RISER | 16,000.00 |
| 320 | 8x40 DL END RISER | 12,000.00 |
| 10 | 6x20 DL END RISER | 284.00 |
| 13 | 3" DL END PLUGS | 98.00 |
| 13 | 3" H&L END PLUGS | 97.00 |
| 25 | 4x3 UNIVERSAL VALVE OPENERS | 800.00 |
| | | <u>\$62,387.00</u> |

HOME FARM: MAINLINE (ALL FIELDS)

| | | |
|------|-----------------------|----------|
| 650 | 8x50 RL MAINLINE W/V | 1,853.00 |
| 50 | 8x50 RL MAINLINE W/OV | 143.00 |
| 60 | 8x30 RL MAINLINE W/OV | 171.00 |
| 15 | 8x15 RL MAINLINE W/OV | 43.00 |
| 400 | 8x50 RL MAINLINE W/V | 940.00 |
| 480 | 8x40 RL MAINLINE W/V | 1,128.00 |
| 560 | 8x40 RL MAINLINE W/OV | 1,316.00 |
| 1440 | 8x30 H&L CARRIER LINE | 3,384.00 |
| 390 | 8x30 RL MAINLINE W/OV | 916.00 |

HOME FARM: MAINLINE (ALL FIELDS) (CONT)

| | | |
|------|-----------------------|--------------------|
| 1500 | 4x30 RL MAINLINE W/V | 1,950.00 |
| 30 | 4x30 RL MAINLINE W/V | 39.00 |
| 40 | 4x20 RL MAINLINE W/V | 52.00 |
| 10 | 4x10 RL MAINLINE W/OV | 13.00 |
| 100 | 6x10 RL MAINLINE W/V | 235.00 |
| 20 | 6x20 RL MAINLINE W/V | 47.00 |
| | | <u>\$12,236.00</u> |

CALDWELL FARM (ALL FIELDS)

| | | |
|-----|--------------------------------|--------------------|
| 160 | 3x40 H&L CENTER RISERS @ 43.00 | 6,880.00 |
| 65 | 3x40 H&L END RISERS | 3,250.00 |
| 90 | 3x40 DL END RISERS | 3,375.00 |
| 8 | 3x20 H&L END RISERS | 227.00 |
| 1 | 3x20 DL END RISER | 28.00 |
| | | <u>\$13,760.00</u> |

| | | |
|----|------------------|-----------------|
| 1 | 6" END PLUG | 10.00 |
| 3 | 4" RL END PLUGS | 24.00 |
| 20 | 3" H&L END PLUGS | 150.00 |
| 3 | 3" DL END PLUGS | 22.00 |
| | | <u>\$206.00</u> |

| | | |
|----|-----------------------------|-----------------|
| 15 | 3x3 UNIVERSAL VALVE OPENERS | 412.00 |
| 2 | 4x4 UNIVERSAL VALVE OPENERS | 60.00 |
| | | <u>\$472.00</u> |

CALDWELL FARM: MISC PARTS

| | | |
|---|-----------------------------|-------------------|
| 1 | 6x4 RL REDUCER | 40.00 |
| 1 | 4" 45 DEGREE ELBOW | 40.00 |
| 1 | 6" RL 90 DEGREE ELBOW | 30.00 |
| 1 | 6" H&L TEE | 45.00 |
| 4 | 3" RL 90 DEGREE ELBOWS | 160.00 |
| 4 | 4x20 FLEX HOSE | 240.00 |
| 2 | 6" COMPLETE WHEELS | 60.00 |
| 1 | 4x20 WHEELLINE TUBE & WHEEL | 60.00 |
| 2 | 3" H&L 30 DEGREE ELBOWS | 20.00 |
| 2 | 5" RL 45 DEGREE ELBOWS | 55.00 |
| 1 | 6x5 RL ADAPTER | 25.00 |
| 1 | 5x4 RL ADAPTER | 28.00 |
| 2 | 4" RL 90 DEGREE ELBOWS | 36.00 |
| 1 | 4x40 TORQUE TUBE | 60.00 |
| 1 | 4" H&L TEE | 20.00 |
| 2 | 5" BUTTERFLY VALVES | 90.00 |
| | | <u>\$1,009.00</u> |

IRRIGATION GRAND TOTAL \$185,558.00

BUILDINGS

✓ YORK STEEL BUILDING, INSULATED, PAINTED W/OFFICE
AREA, RESTROOM. LIGHTED AND WIRED FOR 3 PHASE,
2000 SQ. FT.

25,000.00

✓ SHOP OVERHEAD DOOR

3,800.00

✓ MIRACLE SPAN LUMBER & STEEL BUILDING, INSULATED,
PAINTED WITH OFFICE AREA, LIGHTED & WIRED FOR
3 PHASE. 2400 SQ. FT.

30,600.00

✓ ROOMS FINISHED & WIRED @ \$4000.00 ea.

20,000.00

TOTAL BUILDINGS

\$79,400.00

*Sign
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SCHEDULE "C"

Community Property

ASSETS

76 Horizon Drive
Boise, Idaho

209,000.00

LIABILITIES

Loan secured by Deed of Trust
on 76 Horizon Drive
Boise, Idaho

167,000.00

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SCHEDULE "B"

Separate Property of Prospective Wife

ASSETS

| | |
|--|--------------|
| Home at 733 North 14th | \$150,000.00 |
| 1991 Ford Explorer | 15,000.00 |
| Dining - Oak Dining buffet and tables | 5,000.00 |
| Dining (6) chairs | 1,000.00 |
| Lenox china set/8 | 5,000.00 |
| Crystal & Sterling silver | 5,000.00 |
| Stereo and TV | 1,500.00 |
| Bedroom set | 1,000.00 |
| Antique furniture | 5,000.00 |
| All items in home at 733 N. 14th (below) | 10,000.00 |
| 3 bedroom sets, microwave, washer, | |
| dryer, freezer, refrigerator | |
| Mink coat | 5,000.00 |
| Round brilliant cut diamond necklace | 5,000.00 |
| Pearl necklace | 1,000.00 |
| Diamond ring | 5,000.00 |
| Wedding ring/band set | 7,000.00 |
| Misc. garage items | 1,000.00 |
| IRA-Dean Wittr | 30,000.00 |
| etups | 2,500.00 |
| 0.00 * Harmon Travel | 2,000.00 |
| 150,000.00 + | |
| 15,000.00 + | |
| 5,000.00 + rtgage | 90,000.00 |
| 5,000.00 + loan | 6,000.00 |
| 5,000.00 + | |
| 1,000.00 + | |
| 1,000.00 + | |
| 1,500.00 + | |
| 5,000.00 + | |
| 10,000.00 + | |
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| 1,000.00 + | |
| 7,000.00 + | |
| 32,500.00 + | |
| 2,000.00 + | |
| 90,000.00 - | |
| 6,000.00 - REEMENT - 13 | |
| 161,000.00 * | |

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NO. _____
AM. _____ FILED 4

OCT 09 2007

J. DAVID NAVARRO, Clerk
By L. ARIES
DEPUTY

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Attorneys for Plaintiff Patricia McKay

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

MAGISTRATE DIVISION

★ ★ ★ ★ ★

PATRICIA McKay,

Plaintiff,

v.

DARWIN McKay,

Defendant.

Case No. CV DR 0615200

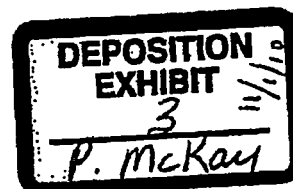
PATRICIA'S AFFIDAVIT DATED
OCTOBER 8, 2007 IN SUPPORT OF HER
MOTION FOR PARTIAL SUMMARY
JUDGMENT REGARDING
ABANDONMENT AND/OR MUTUAL
RESCISSION OF THE PRE-NUPTIAL
AGREEMENT

STATE OF IDAHO)
) ss.
COUNTY OF ADA)

Patricia E. McKay, Being first duly sworn upon oath, deposes and says:

1. I am the Plaintiff in the above-entitled matter and make this Affidavit based upon my own personal knowledge.

PATRICIA'S AFFIDAVIT IN SUPPORT OF
MOTION FOR PARTIAL SUMMARY JUDGMENT
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Page 1

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2. From and after October 1997 I was the custodian of records of the regularly conducted activity of our businesses and real estate investments, including The Turf Company, a proprietorship, The Turf Company, LLC, The Turf Corporation, Turfco Transportation, Inc., Pleasure Turf, LLC, and Turf Corporation of Nevada, Inc. The business records referred to in this affidavit and attached hereto were made at or near the time by, or from information transmitted by, a person with knowledge, and were kept in the course of regularly conducted business and investment activities, and it was the regular practice of our business and investment activities to make such memoranda, reports, records, or data compilations. In addition, I have prepared summaries and compilations of certain of these business and investment records and these summaries and compilations are referred to in this affidavit and attached as exhibits. I certify that the business and investment records and the summaries and compilations are true and correct to the best of my knowledge and belief.

THE MARRIAGE PRE-NUPTIAL AGREEMENT

3. Darwin and I met through mutual friends in February of 1995 and became engaged in May of 1996.

4. Darwin asked me to sign a prenuptial agreement a few weeks prior to the planned wedding.¹

¹ See also Transcript of the Deposition of L. Darwin McKay dated September 27, 2007 ("Darwin's September 27, 2007 depo.") at 127:16-21.

5. Darwin's attorney, Forrest Goodrum ("Mr. Goodrum"), prepared a draft Pre-Nuptial Agreement.²

6. I was presented with a draft of the Pre-Nuptial Agreement on July 1, 1996, one day before we were scheduled to leave for the Bahamas to be married.³

7. I was not provided with a draft of the proposed Pre-Nuptial Agreement prior to July 1, 1996.⁴

8. Darwin and I met with Mr. Goodrum on July 1, 1996.⁵

9. I asked attorney, James Bevis, to review the draft Pre-Nuptial Agreement.

10. Darwin and I signed the Pre-Nuptial Agreement on July 1, 1996 ("Pre-Nuptial Agreement").⁶

11. Schedule A attached to the Pre-Nuptial Agreement purports to describe Darwin's separate property and debts;⁷ however, as noted in paragraphs 213-218 below, all of Darwin's property and debts were not correctly listed.⁸

12. Schedule B attached to the Pre-Nuptial Agreement describes all of my separate property and debts as of July 1, 1996.⁹

² See also Darwin's September 27, 2007 depo. at 128:7-9.

³ See also Darwin's September 27, 2007 depo. at 127:7-23.

⁴ *Id.*

⁵ See also Darwin's September 27, 2007 depo. at 127:24-25; 128: 1-6.

⁶ Pre-Nuptial Agreement Deposition Exhibit 33 (Bates Nos. PL00001-PL00023) attached hereto.

⁷ Darwin's September 27, 2007 depo. at 132-139 and Deposition Exhibit 33, Schedule A (Bates Nos. PL00010-PL00021).

⁸ See paragraphs 25-28 below; Darwin's September 27, 2007 depo. At 132-139.

⁹ Deposition Exhibit 33, Schedule B (Bates No. PL00022).

13. Schedule C attached to the Pre-Nuptial Agreement describes the property and debts that we agreed would be community property from and after July 1, 1996.¹⁰ This property consisted of a personal residence located at 76 Horizon Drive, Boise, Idaho that we agreed to purchase on May 13, 1996, nearly two months before our marriage on July 6, 1996.¹¹ Darwin and I closed on the purchase of this home on June 19, 1996. I contributed \$27,383.66 to the down payment. However, as noted in paragraphs 132-134 below, we stripped out our contributed equity through several refinancing loans and invested those funds in our businesses.¹²

14. I was not provided with any documentation supporting the "values" of the property owned and the debts owed by Darwin as of July 1, 1996.

15. I conducted an analysis of relevant records and prepared a schedule of our assets and liabilities as of July 6, 1996, the date of marriage, from the schedules attached to the Pre-Nuptial Agreement. This analysis reports that I had a net worth of \$161,000 and Darwin had a net worth of \$199,847.¹³ However, as noted in paragraphs 213 below, Darwin overstated the

¹⁰ Deposition Exhibit 33, Schedule C (Bates No. PL00023).

¹¹ Deposition Exhibit 33, Schedule C (Bates No. PL00023).

¹² References to the "Business", "business", "Businesses", "businesses", "The Turf Company", the "Company", include all related entities, e.g. The Turf Company, a proprietorship, The Turf Company, LLC, The Turf Corporation, Turfco Transportation, Inc., Pleasure Turf, LLC, and Turflands, LLC. See Organization Chart attached as Deposition Exhibit 77.

¹³ Exhibit A attached hereto.

number of acres in the Home Farm at 40 acres, which should have been 35.31 acres because 4.69 acres were awarded to Donna McKay in a 1994 divorce.¹⁴ This reduced his asset values by \$28,140. Also, Darwin understated the value of his liabilities by \$9,762.17 for pre-marital credit card debt and \$14,524.92 for his son's college loans, further reducing his net worth.¹⁵ In addition, Darwin failed to report a \$45,000 liability associated with a vehicle commonly referred to as the Smithmobile.¹⁶ Thus, Darwin's net worth as of July 6, 1996, was only \$107,419.91.¹⁷

16. Mr. Goodrum advised us that we each needed to maintain separate personal checking accounts.¹⁸

17. Mr. Goodrum also explained that Darwin and I should establish a joint checking account into which we would each deposit funds to pay our personal community expenses.

18. Our joint checking account was established at U.S. Bank on June 26, 1996.

19. Mr. Goodrum also advised us that we should not commingle our separate assets and funds unless we wanted to transmute our assets and funds into community property.¹⁹

20. As of July 1, 1996, I already had a personal checking account established at First Security Bank under the name of Patricia E. Christensen, with a balance of \$4,344.63.²⁰

21. As of July 1, 1996, Darwin did not have a personal checking account.

¹⁴ See Stipulated Judgment and Decree of Divorce entered on December 27, 1994 in the case of Darwin McKay vs. Donna McKay, Ada County Case No CV-94-00261(Bates Nos. PL00026 – PL00037) attached to Patricia's Rule 44(d) Request for Judicial Notice of the record of other proceedings in an Idaho Court; Darwin's September 27, 2007 depo. at 132-139 and Deposition Exhibit No. 36 (Bates Nos. PL 00026- PL00037).

¹⁵ See paragraphs 24-26 below and footnote references therein.

¹⁶ See also Darwin's September 27, 2007 depo. at 132-139.

¹⁷ See Exhibit A (Bates No. 431-432) attached hereto.

¹⁸ See also Darwin's September 27, 2007 depo. at 154:11-16.

¹⁹ See also Darwin's September 27, 2007 depo. at 156:1-5.

²⁰ Exhibit B (Bates No. PL00038).

22. Prior to July 1, 1996, and thereafter until sometime during 2006, Darwin used various checking accounts belonging to The Turf Company at Key Bank, Zions Bank, Wells Fargo Bank, and Sterling Bank to pay his personal expenses and the expenses of the community. I could not access any of The Turf Company's computerized accounting records for the period July 1996 through December 1997 because The Turf Company was then using a now obsolete version of an accounting program known as "One-Write". Since January 1998, The Turf Company's accounting has been kept on QuickBooks. Consequently, exhibits of records that are available date back to 1998.

23. Darwin did not set up a separate personal checking account until on or about September 1, 2004, when he received an installment inheritance distribution from the estate of his father, D. J. McKay.²¹

24. Despite having opened a separate personal checking account at First Bank of the Northwest, Darwin continued to pay personal and community expenses with draws from The Turf Corporation.

25. During December 1996,²² I discovered that not all of Darwin's premarital debts were disclosed on Schedule A.²³ In particular, Darwin had failed to disclose that he owed \$9,762.17 on three credit cards he was required to pay pursuant to the Stipulated Judgment and

²¹ Exhibit C hereto containing an accounting of receipts and disbursements of Darwin's inheritance.

²² See facts below regarding Patricia's contributions of labor to the businesses commencing at paragraph 51.

²³ See also Darwin's September 27, 2007 depo. at 132-139.

Decree of Divorce entered on December 27, 1994 in the case of Darwin McKay vs. Donna McKay, Case No CV-94-00261.²⁴

26. In addition, Darwin failed to disclose that he had incurred liability for three loans in the combined amount of \$14,524.92 attributable to his son's college education, which he asked me to pay.²⁵

27. Darwin also failed to disclose a debt on the so-called Smithmobile in the approximate amount of \$40,000.

28. As noted in my reconciliation of the assets and liabilities that we each had as of the date of marriage, my net worth was \$161,000 and Darwin's was only \$107,419.91.²⁶ So, I actually brought more net asset value to the marriage than Darwin.

THE BUSINESSES

29. Prior to the marriage and through December 31, 1999, the turf business was operated as a proprietorship known as The Turf Company. From and after the early fall of 1996, this proprietorship was owned and operated by Darwin and me.²⁷

30. On May 12, 1999, a Certificate of Assumed Business Name was filed for The

²⁴ See also, paragraph 4(a) of the Stipulated Judgment and Decree of Divorce entered on December 27, 1994 in the case of Darwin McKay vs. Donna McKay, Ada County Case No CV-94-00261(Bates Nos. PL00026 – PL00037) attached to Patricia's Rule 44(d) Request for Judicial Notice of the record of other proceedings in an Idaho Court.

²⁵ See also, paragraph 4(b) (Bates No. PL00029) of the Stipulated Judgment and Decree of Divorce entered on December 27, 1994 in the case of Darwin McKay vs. Donna McKay, Ada County Case No CV-94-00261(Bates Nos. PL00026 – PL00037) attached to Patricia's Rule 44(d) Request for Judicial Notice of the record of other proceedings in an Idaho Court; see also Deposition Exhibit 39 to Darwin's September 27, 2007 depo. at 132-139.

²⁶ Exhibit A (Bates Nos. 431-432) attached hereto.

²⁷ See also, Schedule F, Form 1040, for 1996, 1997, 1998 and 1999, attached hereto as Exhibits D-1 through D-4 (Bates Nos. 433-440).

Turf Company listing Darwin and me as the individuals doing business under the assumed name.²⁸

31. Although The Turf Company, LLC was formed and the Articles of Organization were filed with the Secretary of State on July 3, 1996,²⁹ no business was actually conducted by the limited liability company until January 1, 2000.³⁰

32. The Articles of Organization for The Turf Company, LLC listed Darwin as the registered agent. The Articles also listed The Turf Corporation as the manager of The Turf Company, LLC.³¹

33. The Turf Company, LLC actually commenced doing business with the transfer of real property effective January 1, 2000. Thereafter, The Turf Company, LLC leased the real property to The Turf Corporation for use in the corporation's business.³²

34. The Annual Reports for The Turf Company, LLC filed with the Idaho Secretary of State and signed by Darwin listed Darwin as President and me as Secretary for 1996 through

²⁸ See also, Certificate of Assumed Business Name for The Turf Company dated May 12, 1999 attached hereto as Deposition Exhibit 40 (Bates No. PL00051); see also, Darwin's September 27, 2007 depo. at 172-173.

²⁹ See also, Articles of Organization for The Turf Company, LLC dated July 3, 1996 attached hereto as Deposition Exhibit 41 (Bates No. 00052).

³⁰ See also, Form 1065 for 2000 through 2005, attached hereto as Exhibits 83 through 87 (Bates Nos. 380-389).

³¹ Deposition Exhibit 41 attached hereto.

³² See also, Form 1065 for 2000 filed by The Turf Company setting forth the assets conveyed into the limited liability company attached as Deposition Exhibit 21; see also Transferor's Statement Under Regs. § 1.351-3(a) accompanying Patricia and Darwin's Form 1040 for 2000, attached hereto as Exhibit K (Bates Nos. 454-455).

2005.³³ During 2006, Darwin arbitrarily removed me from the Annual Report filed with the Idaho Secretary of State without my knowledge or consent.³⁴

35. The Articles of Incorporation for The Turf Corporation were filed on July 3, 1996.³⁵

36. Although The Turf Corporation was formed and the Articles of Incorporation were filed with the Secretary of State on July 3, 1996, no business was actually conducted by the corporation until January 1, 2000.³⁶ As stated in the Transferor's Statement under Regs. § 1.351-3(a), Darwin and I transferred the operating assets of The Turf Company, a proprietorship, to The Turf Corporation having an asset fair market value of \$167,807, less the fair market value of the proprietorship's liabilities of \$51,643, resulting in a fair market equity value of \$116,164.³⁷

37. The Annual Reports for The Turf Corporation filed with the Idaho Secretary of State and signed by Darwin listed Darwin as President and me as Secretary for 1996 through 2005.³⁸ During 2006, Darwin arbitrarily removed me from the Annual Report filed with the Idaho Secretary of State without my knowledge or consent.³⁹

³³ See also, Annual Reports for The Turf Company for 1996-2005, attached hereto as Deposition Exhibit 42 (Bates Nos. PL00053 - PL00061).

³⁴ See Annual Report Form for The Turf Company for 2006 attached hereto as Deposition Exhibit 43 (Bates No. PL00062).

³⁵ See also, Articles of Incorporation for The Turf Corporation dated July 3, 1996 attached hereto as Deposition Exhibit 44 (Bates Nos. PL00063 - PL00066).

³⁶ See also, Transferor's Statement Under Regs. § 1.351-3(a) accompanying Patricia and Darwin's Form 1040 for 2000, attached hereto as Exhibit K (Bates Nos. 454-455).

³⁷ *Id.*

³⁸ See Annual Reports for The Turf Corporation for 1996-2005, attached hereto as Deposition Exhibit 45 (Bates Nos. PL00067 - PL00075).

³⁹ See Annual Report Form for The Turf Corporation for 1996 attached hereto as Exhibit 46 (Bates No. PL00076).

38. The Articles of Incorporation for Turfco Transportation, Inc were filed on July 3, 1996.⁴⁰

39. Although Turfco Transportation, Inc. and the Articles of Incorporation were filed with the Secretary of State on July 3, 1996, no business was actually conducted by the corporation until January 1, 2000.⁴¹ As stated in the Transferor's Statement under Regs. § 1.351-3(a), Darwin and I transferred the trucking assets of The Turf Company, a proprietorship, to Turfco Transportation, Inc. having an asset fair market value of \$30,832, less the fair market value of the proprietorship's liabilities of \$0, resulting in a fair market equity value of \$30,832.⁴²

40. The Annual Reports for Turfco Transportation, Inc. filed with the Idaho Secretary of State and signed by Darwin listed Darwin as President and me as Secretary for 1996 through 2005.⁴³ During 2006, Darwin arbitrarily removed me from the Annual Report filed with the Idaho Secretary of State without my knowledge or consent.⁴⁴

41. On November 13, 2000, Articles of Organization were filed for Pleasure Turf, L.L.C. I was listed as the registered agent.⁴⁵

⁴⁰ See Articles of Incorporation for Turfco Transportation, Inc. dated July 3, 1996 attached hereto as Deposition Exhibit 47 (Bates Nos. PL00077 – PL00079).

⁴¹ See Transferor's Statement Under Regs. § 1.351-3(a) accompanying Patricia and Darwin's Form 1040 for 2000, attached hereto as Exhibit K (Bates Nos. 454-455).

⁴² *Id.*

⁴³ See Annual Reports for Turfco Transportation, Inc. for 1996-2005, attached hereto as Deposition Exhibit 47 (Bates Nos. PL00080 – PL00088).

⁴⁴ See Annual Report Forms for Turfco Transportation, Inc. for 2006 attached hereto as Deposition Exhibit 47 (Bates No. PL00089).

⁴⁵ See Articles of Organization for Pleasure Turf, L.L.C. dated November 13, 2000 attached hereto as Deposition Exhibit 48 (Bates No. PL00090).

42. The Articles of Organization for Pleasure Turf, L.L.C. reported that it was a member managed limited liability company. I signed the Articles as secretary and Darwin signed as president.⁴⁶

43. The Turf Corporation of Nevada, Inc. was organized on August 23, 2000, for the purpose of acquiring the assets and business of High Desert Turf in Yerington, NV. This corporation conducts its business as High Desert Turf.⁴⁷

44. The Articles of Organization for Turflands, LLC was filed with the Idaho Secretary of State on August 11, 2006.⁴⁸

45. An organization chart of our businesses is attached to this affidavit as Deposition Exhibit 77.⁴⁹

MANAGEMENT OF THE BUSINESSES

46. Shortly after our marriage on July 6, 1996, Darwin and I commenced sharing management of The Turf Company, a proprietorship.⁵⁰

47. Commencing on January 1, 2000, when The Turf Corporation, Inc. undertook operations of the turf business, Darwin and I shared management of The Turf Corporation.⁵¹

⁴⁶ *Id.*

⁴⁷ See Articles of Incorporation for The Turf Company of Nevada dated August 23, 2000 attached hereto as Deposition Exhibit 49 (Bates Nos. PL00092 – PL00094).

⁴⁸ See Articles of Organization for Turflands dated August 11, 2006 attached hereto as Deposition Exhibit 50 (Bates No. PL00091).

⁴⁹ See also Darwin's September 27, 2007 depo. at 282-284.

⁵⁰ See also, Affidavit of Neil Salathe, dated October 3, 2007 at ¶¶ 34-35; see also Darwin's September 27, 2007 depo. at 144-146.

⁵¹ See also, Affidavit of Neil Salathe, dated October 3, 2007 at ¶¶ 34-35.

48. I served as Secretary of The Turf Company, LLC and The Turf Corporation and Darwin served as president from 1996 through 2005.⁵² During 2006, Darwin arbitrarily removed me from the Annual Reports filed with the Idaho Secretary of State without my knowledge or consent.⁵³

49. Throughout the years, I developed and implemented many innovative plans to run the businesses more efficiently.⁵⁴

50. For example, I developed and implemented (a) field charts for The Turf Corporation's Boise operation and High Desert Turf, (b) Excel flow charts for recording of semi-truck mileages for preparation of quarterly IFTA and various State fuel/road taxes, (c) office procedure manuals, (d) company employee manual, (e) various business forms that greatly improved financial and operational controls within the businesses, (f) magnetic wall boards for scheduling of deliveries, and (g) a system for scheduling repair of equipment and wall charts for the mechanics.⁵⁵

MY CONTRIBUTIONS OF LABOR TO THE BUSINESSES

51. Within a month of our marriage on July 6, 1996, Darwin and I discussed the possibility that the bookkeeper for The Turf Company may be embezzling money from the business. I suggested that Darwin and I review the records after hours when the bookkeeper was gone. We reviewed invoices each night for several nights and discovered 20 percent of the

⁵² See references in footnotes 32-42, above.

⁵³ See references in footnotes 37 and 42 above.

⁵⁴ See also, Affidavit of K. Eugene Thurston, dated August 16, 2007 at ¶¶ 12-15; see also, Affidavit of Neil Salathe, dated October 3, 2007 at ¶¶ 26-28; see also, Job Description attached hereto as Deposition Exhibit 51 (Bates Nos. PL00095 – PL 00098); see also Darwin's September 27, 2007 depo. at 191:13-17.

⁵⁵ *Id.*

invoices during the previous 12 months were missing, along with the funds. There was no way of knowing how much money was actually missing since the invoices were gone.

52. During September 1996 Darwin approached the bookkeeper and asked where she kept the invoices. She became quite belligerent and quit. I assisted Darwin in finding another bookkeeper, Judy Burns, who was hired mid-October 1996.

53. On September 30, 1997, Judy Burns resigned her position as the bookkeeper for The Turf Company to return to her previous job with the State of Idaho.

54. When Judy Burns resigned Darwin told me that the business could not afford to hire a bookkeeper and it would be helpful if I would work with him in the businesses. He told me that we could make more money if I worked with him.

55. Prior to July 1996 and ending March 1998, I continued to work on a commission basis as a travel agent for Harmon Travel.

56. Since The Turf Company was struggling financially during 1997, Darwin and I decided to put off hiring a full time bookkeeper.

57. Therefore, I took bookkeeping classes at Boise State University that included instruction in using QuickBooks.

58. In October 1997, I began working at The Turf Company as a bookkeeper.

59. Darwin and I decided that I would work at Harmon Travel in the mornings and then at The Turf Company starting shortly after noon and working on into the night so I could learn all facets of the business and handle bookkeeping and administration.

60. Darwin and I decided that we would make a decision in the spring of 1998 whether I would work full time in the business or go back to work full time at Harmon Travel.

61. I never returned to work full time as a travel agent after March 1998. Rather I worked tirelessly for the next nine years with Darwin to build our businesses and real estate holdings together.

62. I did not receive a paycheck as compensation for my work during 1996, 1997, 1998, 1999, or 2000.⁵⁶

63. On my 50th birthday, March 26, 1998, Darwin was getting a table down from an upper ledge at the business for a surprise birthday party for me. The steel pallet fell with Darwin on it, 12 feet to the cement floor. Darwin's ankle was crushed, his head cut, and collar bone broken. I rushed him to the hospital with another injured person. Darwin was in surgery for six to seven hours. The surgeon removed bone from below the knee in an attempt to rebuild the ankle and placed seven or eight pins through his leg to try to save the ankle. Darwin was in a wheelchair for a couple months and could not drive at all. Thus, he required my full time attention. Due to his accident, I left Harmon Travel permanently to co-manage, own and operate the businesses and real estate investments with Darwin.

64. From the day I began work at The Turf Company, October 1, 1997, I handled the bookkeeping, bank account reconciliations, accounts payables and receivables, invoicing,

⁵⁶ See Exhibit E attached hereto for an accounting of Net Take-Home Pay for Darwin and Patricia during the years 1999 through 2006; Darwin's September 27, 2007 depo. At 191-195.

payroll, front office phones, order taking, sales and distribution of trucking for the businesses.⁵⁷

65. Because Darwin and I were working 14 to 16 hours a day, six and one-half days a week, I set up a kitchen in The Turf Company's office so I could prepare our meals on the business premises.⁵⁸

66. I received my first paycheck for my work in the turf business from The Turf Corporation on January 15, 2001.⁵⁹

67. Darwin and I purchased the Yano Farm in Weiser, Idaho and High Desert Turf in Yerington, Nevada in September of 2000.⁶⁰ I then began handling all the accounting for The Turf Corporation, which had taken over the Boise operations and High Desert Turf, LLC. Each company did practically the same dollar volume. Due to the amount of paperwork and confidentiality, I moved into a windowless eight foot by eight foot room that could be locked. This small room was my office until I came up with a plan to have an office built above Darwin's office during the Spring and Summer of 2001.

68. During 1998 and through 2004, the work load was incredible. Darwin and I would arrive at the office very early each morning around 6:00 a.m. and would work until after

⁵⁷ See Affidavit of K. Eugene Thurston, CPA dated August 16, 2007 at ¶ 13; Affidavit of Neil Salathe, dated October 3, 2007 at ¶ 28; see also Administrative Assistant to CEO Job Description attached hereto as Deposition Exhibit 51 (Bates Nos. PL00095 – PL 00098).

⁵⁸ See also Transcript of Darwin's deposition taken on March 21, 2007 ("Darwin's March 21, 2007 depo.") at pgs. 84 and 85.

⁵⁹ See also, Exhibit E attached hereto for an accounting of Net Take-Home Pay for Darwin and Patricia during the years 1999 through 2006.

⁶⁰ See paragraphs 148-197 below regarding the details of these purchases and related financing.

10:00 p.m. to get everything done. This work schedule persisted until we hired Debbie Mason on July 15, 2002 as a bookkeeper.

69. Darwin's expertise was in growing sod, but he was not a proficient manager. In fact, he was very careless in financial management and was a poor personnel manager.⁶¹ Fortunately for the businesses, my skills were in financial and personnel management.⁶² So, Darwin and I proved to be a successful team in building a very successful business enterprise and real estate investment portfolio.⁶³

70. In March of 2001, Darwin agreed to become involved with Jeff Kern in a business known as Southwest Greens, an artificial turf business to be operated by Mr. Kern in Dallas, Texas. The results of the business operations were reported on our Form 1040, Schedule C, commencing in 2001. I handled the accounting for this business.⁶⁴

71. Right away we started losing money in the Southwest Greens venture.⁶⁵ By January of 2003 I became adamant that the relationship with Mr. Kern be terminated.⁶⁶

⁶¹ Darwin's incompetence in financial matter is confirmed by his reckless investment of more than \$200,000 in Nevada Granite Industries, Inc., d.b.a., Granite Transformations, a business started by his son, Brian. See transcript of deposition of Brian McKay taken on August 17, 2007 at 38 - 47; see also additional facts below at ¶¶ 82-91 regarding Nevada Granite Industries, Inc.

⁶² See also Affidavit of Neil Salathe, dated October 3, 2007 at ¶¶ 21-29; see also, Affidavit of K. Eugene Thurston, CPA, dated August 16, 2007, at ¶ 13.

⁶³ See also Affidavit of K. Eugene Thurston dated August 16, 2007 at ¶¶ 12 through 15; see also Affidavit of Neil Salathe, dated October 3, 2007 at ¶ 21-29.

⁶⁴ See Patricia and Darwin's Form 1040, Schedule C, for 2001, 2002 and 2003 attached hereto as Exhibits F1-F3 (Bates Nos. 441-449).

⁶⁵ See also Darwin's September 27, 2007 depo. at 196-201.

⁶⁶ See also Darwin's September 27, 2007 depo. at 200-201.

Southwest Greens had consumed approximately \$150,000 of our funds and there was no end in sight.⁶⁷

72. Against my advice, Darwin had never entered into a written agreement with Mr. Kern. Due to the added expense of Southwest Greens, Darwin and I had numerous tense conversations, during which I stressed to Darwin that we needed to relieve ourselves of the financial burden of Southwest Greens. During the summer of 2003 I insisted that the relationship with Mr. Kern be terminated because we could not afford the continuing drain on our financial resources, which were very limited because in December of 2002 Wells Fargo Bank called all of our notes due and refused to extend the line of credit.⁶⁸

73. On February 8, 2005, Darwin and I received a notice from the Internal Revenue Serviced that their 2002 tax returns were being audited, in particular that portion of the return dealing with Southwest Greens. The IRS set up a deficiency of \$75,867.00.⁶⁹ I spent two to three months preparing for the audit and was able to reduce the proposed tax deficiency to approximately \$3,000.00.⁷⁰

74. In January 2003 Darwin hired Michael Vasil to be The Turf Company's business manager, without my knowledge or consent. Darwin's careless decision proved to be a disaster. Not only did Darwin agree to pay Mr. Vasil far more than his credentials and experience

⁶⁷ See Darwin's September 27, 2007 depo. at 198-199.

⁶⁸ See also Affidavit of K. Eugene Thurston dated August 16, 2007 at ¶¶ 7 through 10.

⁶⁹ See Deposition Exhibit 52 (Bates Nos. PL00293 – PL0000302 attached hereto).

⁷⁰ See also Darwin's September 27, 2007 depo. at 201-202.

warranted, Mr. Vasil undertook to make improvident changes with regard to the financial controls that I had implemented.

75. Vasil was able to entice Darwin into giving him over \$22,000.00 in community funds for Vasil to invest in various properties.⁷¹ I was not happy about these investments and despite my repeated requests, Darwin refused to obtain a written contract with Vasil that required proof of the investments Vasil was allegedly making with our money.⁷²

76. Darwin and I belonged to a group of business men and women, known as The Excell Group, who shared their business experiences and advice. I sought the group's advice and they recommended that I hire a private investigator to have Vasil checked out. I did so and soon discovered that Vasil had a history as a con artist, who had taken well over one million dollars from various people in the Treasure Valley.⁷³

77. I shared this information with Darwin, but he refused to believe me until I provided him with written proof.

78. By June of 2003 I had finally convinced Darwin that Vasil was not performing his primary task of seeking out a new banking relationship to replace Wells Fargo Bank.⁷⁴

79. After much cajoling by me Darwin finally agreed with me and Vasil was fired in June 2003.

⁷¹ See also Darwin's September 27, 2007 depo. at 202-205; see also, statement signed by Vasil confirming his receipt of the McKay's money attached hereto as Deposition Exhibit 53 (Bates No. PL00124).

⁷² Darwin's September 27, 2007 depo. at 202-205.

⁷³ *Id.*

⁷⁴ *Id.*

80. I was also able to gather proof of Vasil's theft of our community funds. Vasil was subsequently sentenced to 18 months in jail for grand theft.⁷⁵

81. From March 1998 until November 2005, and except for Vasil's short-term interference, I managed the banking and financial documents for the turf business and related business ventures.⁷⁶

82. During late 2004, Brian McKay, Darwin's son, approached Darwin to help him start a franchise business operating under the trade name Granite Transformations.⁷⁷

83. Although I was opposed to this venture because Brian had not demonstrated that he was capable of running a business, Darwin committed to make an investment in a new corporation to be known as Nevada Granite Industries, Inc.⁷⁸

84. Brian attempted to put together a business plan, but even Darwin could tell it was woefully inadequate. Darwin asked me to rework the business plan, which I did.⁷⁹

85. Darwin and Brian excluded me from the management of Nevada Granite Industries.⁸⁰

⁷⁵ See Judgment of Conviction in The State of Idaho v. Michael George Vasil, Ada County Case No. H0400870 filed on August 4, 2005, Deposition Exhibit No. 54 (Bates Nos. PL00125 – PL 00130) attached to Patricia's Rule 44(d) Request for Judicial Notice of the record of other proceedings in an Idaho Court.

⁷⁶ See Administrative Assistant to CEO Job Description attached as Deposition Exhibit 51 (Bates Nos. PL00095 – PL 00098).

⁷⁷ See also, Transcript of Deposition of Brian McKay taken on August 17, 2007 at pp. 17 – 21; Darwin's September 27, 2007 depo. at 212-217.

⁷⁸ See also, Transcript of Deposition of Brian McKay taken on August 17, 2007 at pp. 17 – 21; Darwin's September 27, 2007 depo. at 212-217.

⁷⁹ See also Darwin's September 27, 2007 depo. at 217.

⁸⁰ See also, Transcript of Deposition of Brian McKay taken on August 17, 2007 at pp. 50 - 58; Darwin's September 27, 2007 depo. at 217.

86. During his deposition, Brian had to admit to being an abject failure as a businessman, which confirmed my advice that Darwin ignored.⁸¹

87. It is quite telling that Brian thought I was "a pain in the ass" and so he also ignored my advice.⁸² The operating results of Nevada Granite Industries would likely have been very different had Brian and Darwin heeded my advice and not excluded me from the management of Nevada Granite Industries. They certainly needed me to impose some financial discipline.

88. Obviously Darwin did not control Brian's undisciplined mismanagement of Nevada Granite Industries that led to a total loss of the investor's money of \$443,250, including \$87,000 Darwin states he invested from this separate property inheritance account. In addition, the \$90,642.07 of the Albrethsen farm sale proceeds, which were community funds, that Darwin loaned to Nevada Granite Industries is lost.⁸³

89. Darwin also loaned Nevada Granite Industries \$22,000 (source of funds unknown at this time) on February 7, 2007.⁸⁴

90. The foregoing is not the extent of Brian and Darwin's mismanagement of Nevada Granite Industries. Brian testified that it would take a capital injection of \$250,000 to pay off current and past due accounts payable. So, the total losses attributable to the Nevada Granite Industries disaster equal more than \$890,000.⁸⁵

⁸¹ See also Transcript of Deposition of Brian McKay taken on August 17, 2007 at pp. 72 and 73.

⁸² See also, Transcript of Deposition of Brian McKay taken on August 17, 2007 at 51.

⁸³ See also, Transcript of Deposition of Brian McKay taken on August 17, 2007 at pp. 72 - 73.

⁸⁴ See also, Transcript of Deposition of Brian McKay taken on August 17, 2007 at p. 44.

⁸⁵ See also, Transcript of Deposition of Brian McKay taken on August 17, 2007 at pp. 72 and 73.

91. The Nevada Granite Industries' episode provides substantial proof that Darwin lacks the financial management skills necessary to have turned around his near bankrupt condition that existed in 1996 without my management expertise and discipline.

PATRICIA'S CONTRIBUTIONS OF CASH TO THE BUSINESSES

92. During December 1996, approximately six months into the marriage, Darwin asked me to pay off \$24,287.09 of his pre-marital debt consisting of credit card debt of \$9,762.17 and his son's college loans in the amount of \$14,524.92.⁸⁶ Darwin was required to pay these obligations by the Stipulated Judgment and Decree of Divorce entered in his divorce from Donna.⁸⁷ I paid these debts because Darwin informed me that neither he nor the business could afford to pay them.

93. During our initial discussion about the credit card and college loan debts, I suggested to Darwin that he could obtain new credit cards and transfer the debt to them. Darwin then informed me that he could not obtain any credit cards because his credit was so bad. - Darwin's creditworthiness did not improve over time as indicated by his credit score of only 574 as of March 12, 2004.⁸⁸

⁸⁶ See also, Transcript of Deposition of Brian McKay taken on August 17, 2007 at 58: 3-13 and Deposition Exhibits 14 and 15 thereto.

⁸⁷ See also Stipulated Judgment and Decree of Divorce entered on December 27, 1994 in the case of Darwin McKay vs. Donna McKay, Ada County Case No CV-94-00261(Bates Nos. PL00026 – PL00037) attached to Patricia's Rule 44(d) Request for Judicial Notice of the record of other proceedings in an Idaho Court.

⁸⁸ See also, TransUnion Consumer Credit Score of 574 dated March 12, 2004 (Deposition Exhibit 55 at Bates No. PL00131); letter from AT&T Universal Business Card dated March 18, 1999 (Deposition Exhibit 55 at Bates No. PL00132), the Bank One Visa Platinum credit card (Deposition Exhibit 55 at Bates No. PL00134), and the Independent Business MBNA Platinum Plus MasterCard credit card (Deposition Exhibit 55 at Bates No. PL00133), attached hereto; as confirmed by Darwin's September 27, 2007 depo. at 205-206.

94. I agreed to take out three credit cards in my name alone to pay off the pre-marriage credit card debt because Darwin told me that he did not have to pay Donna any alimony after December 31, 1996 so he would give the monthly amount of \$3,150.00 to payoff the credit cards to which the balances were transferred within four to five months.⁸⁹ I therefore agreed.

95. I paid off the credit cards by balance transfers during April and May, 1997.

96. During the next six months my credit cards did not get paid off and I was only able to make the minimum payments because Darwin did not provide me with the \$3,150.00 per month as he had agreed.

97. In the meanwhile, unbeknownst to me, Darwin continued to pay Donna \$3,000.00 to \$4,500.00 extra each month in addition to his \$1,400.00 monthly alimony obligation.⁹⁰

98. I learned of these payments during the Spring of 1997 when I was informed of the payments to Donna by Judy Burns, the bookkeeper for The Turf Company.

99. Darwin continued to make monthly payments in addition to the required alimony to Donna until about March, 1998, despite my persistent objections.

100. Not only had Darwin breached his agreement with me that he would provide the monthly amounts necessary to pay off the transferred balances credit card debt over four to five months, the diversion of funds to Donna worked a tremendous hardship on the business as the business was not able to keep up with its accounts payable obligations.

⁸⁹ Darwin misrepresented his alimony obligations to me. Under the Stipulated Judgment and Decree of Divorce entered on December 27, 1994, Darwin was required to pay Donna \$3,150.00 per month until December 31, 1996. At that time the alimony amount was to be reduced to \$1,400.00 per month. See Stipulated Judgment and Decree of Divorce at ¶ 6.

⁹⁰ Darwin's September 27, 2007 depo. at 162-163.

101. Because of the cash flow problems being experienced by The Turf Company, on October 14, 1997, the first month I worked full time in the business, I contributed \$7,500.00 of my separate property funds to cover The Turf Company's payroll.⁹¹ I made this contribution based upon Darwin's continuing representations to me that we were 50/50 owners of the business.⁹²

102. I continued throughout the marriage to support the businesses and real estate investments because Darwin repeatedly represented to me that we owned the businesses and real estate on an equal, "50/50", basis. So, I was willing to use my resources, despite the contrary advice of Forrest Goodrum and Neil Salathe, to help build the businesses and real estate portfolio for our mutual benefit. This was in accord with our agreement that anything we worked on together and accumulated during our marriage would be community property owned equally by each of us.

103. It is particularly noteworthy that Darwin testified under oath in open court on February 5, 2001 during the trial of *McKay v. Boise Project Board of Control*, Ada County Case No. CV OC 9902599, that he and I owned turf businesses together. His testimony was as follows:

Q And how are you employed?

A Self-employed.

Q In what business?

A Turfgrass, sod production.

Q And what is the name of your company?

⁹¹ See Deposition Exhibit 56 (Bates No. PL00140) attached hereto; Darwin's September 27, 2007 depo. at 218.

⁹² See also Darwin's September 27, 2007 depo. at 308-312; Affidavit of Neil Salathe, dated October 3, 2007 at ¶¶ 34 and 35 Affidavit of K. Eugene Thurston dated August 16 2007 at ¶ 12.

A The Turf company.

Q Is the Turf Company a corporation?

A It is now. It was not at that time.

Q And in 1997 The Turf Company was a dba?

A It was

Q Who are the current shareholders of The Turf Company?

A Patricia and myself.⁹³

MY CONTRIBUTIONS OF CREDIT TO THE BUSINESSES

104. On January 15, 1998 our community home located at 76 Horizon Drive was refinanced to obtain additional funds for the business.⁹⁴ We obtained \$30,000.00 and contributed it to The Turf Company.⁹⁵

105. Our tax returns reflect that Darwin and I owned The Turf Company, LLC as 50/50 owners, up until the eve of the filing of divorce.⁹⁶

106. During his deposition taken August 22, 2007, Dave Stewart, CPA, testified truthfully that each year that he prepared the tax returns for The Turf Company, LLC he met with Darwin and me and went over the returns, including the Schedules K-1 that reported to the Internal Revenue Service, under penalties of perjury, that Darwin and I each owned 50 percent of the capital and profits of The Turf Company, LLC. Mr. Stewart also testified that Darwin did not request that Mr. Stewart make any changes to these tax returns.⁹⁷ I relied on these tax returns as documenting our agreement that we owned the businesses and real estate on a 50/50 basis.

⁹³ Transcript of Trial in *McKay v. Boise Project Board of Control*, Ada County Case No. CV OC 9902599, 34: 9 – 20. See Certification of Stacy A. Heinz, CSR No. 683 dated September 13, 2007 attached as Deposition Exhibit 57 (Bates Nos. PL00318 – PL 00320); see also Darwin's September 27, 2007 depo. at 219-220.

⁹⁴ See Deposition Exhibit 58 (Bates No. PL00142) attached hereto; Darwin's September 27, 2007 depo. at 156-158.

⁹⁵ *Id.*

⁹⁶ See tax returns for years 2000 through 2005 attached hereto as Deposition Exhibits 21 through 25.

⁹⁷ Transcript of the Deposition Dave Stewart dated August 22, 2007 at pp. 58 – 61; Deposition Exhibits 21 - 25.

107. Mr. Stewart also testified that he prepared Statements of Financial Condition for us. As with the tax returns, Darwin and I met with Mr. Stewart each year and reviewed these Statements. Darwin did not request that Mr. Stewart make any changes to these Statements of Financial Condition and I relied on these Statements as documenting our agreement that we owned the businesses and real estate on a 50/50 basis.⁹⁸

108. Each of our Statements of Financial Condition for years ended December 31, 2002 through December 31, 2004 contains the following representation:

L. Darwin and Patricia E. McKay are the sole owners of *companies* engaged in the growing, harvesting, marketing and transport of premium turfgrass sod. [Emphasis added.]⁹⁹

109. However, without any justification, Darwin required Mr. Stewart to change our Statement of Financial Condition for the year ended December 31, 2005 to reflect that Darwin owned 100 percent of the member interests in The Turf Company, LLC.¹⁰⁰

110. During March of 2001, Darwin and I decided to change banks from Key Bank to Zion's Bank. Darwin and I both signed the Zion's Bank loan documents.¹⁰¹

111. During December 2002, Darwin learned from Eric Rumble, a Wells Fargo Special Accounts Department representative, that management of Wells Fargo Bank, which was then

⁹⁸ Transcript of the Deposition Dave Stewart dated August 22, 2007 at pp. 58 – 68; Deposition Exhibits 26 – 28 attached hereto.

⁹⁹ See Deposition Exhibit 26 at Note D on page 4, Deposition Exhibit 27 at Note D on page 6, Deposition Exhibit 27 at Note D on page 6, and Deposition Exhibit 28 at Note D on page 7.

¹⁰⁰ Transcript of the Deposition Dave Stewart dated August 22, 2007 at pp. 67 – 68; Deposition Exhibit 29 attached hereto.

¹⁰¹ See Deposition Exhibit No. 60 (Bates Nos. PL00161 – PL00164) attached hereto; Darwin's September 27, 2007 depo. at 230-231.

McKays' principal bank, wanted to terminate its banking relationship with The Turf Corporation and our related entities.¹⁰²

112. We were given a couple of reasons for Wells Fargo's decision not to continue a lending relationship with us: (1) the businesses had failed to maintain the financial ratios required by the loan agreements, and (2) Wells Fargo Bank's management had decided to reduce its agricultural lending exposure.¹⁰³

113. Despite my constant efforts to maintain fiscal discipline in our businesses, I was not always able to persuade Darwin to follow my advice. Darwin allowed The Turf Corporation to violate its financial ratio loan covenants. Consequently, Eric Rumble informed us that Wells Fargo was calling all of our loans as due and payable.

114. It took two years for us to find another bank. We moved our accounts from Wells Fargo to Sterling Bank in January of 2005.

115. During the spring of 2003 I met with K. Eugene Thurston, CPA in Dave Stewart's office. At the time, Dave Stewart was the CPA for our businesses.¹⁰⁴ At the time I was meeting with Mr. Stewart to inform him not to give any information to Mr. Vasil regarding any business financial affairs without Darwin or me present.

¹⁰² See also Darwin's September 27, 2007 depo. at 253-254.

¹⁰³ See also, Affidavit of K. Eugene Thurston dated August 16, 2007 at ¶¶ 7 and 8.

¹⁰⁴ See also, Affidavit of K. Eugene Thurston, dated August 16, 2007 at ¶¶ 3 and 4.

116. When I learned of Mr. Thurston's professional expertise in assisting businesses with financial problems, I asked him to review the financial records for our businesses to see if he could assist us in finding a new banking relationship.¹⁰⁵

117. Mr. Thurston worked as a consultant for us from the summer of 2003 until January 2005 when Sterling Bank agreed to become our principal bank.¹⁰⁶

118. During these two years, 2003 and 2004, Wells Fargo refused to assist us with any line of credit funds.¹⁰⁷

119. Therefore, during January of 2003, Darwin and I refinanced our community residence again and borrowed \$60,000 on a "home line of credit", which we invested in the businesses. We had planned to use the equity in our home to finance a remodeling project for our 50-year old home. Despite our agreement, Darwin instructed our bookkeeper to book the \$60,000.00 contribution as a "Capital Investment" and not a loan, so the funds could not be repaid to the community without adverse tax consequences.

120. Between May 1999 and September 2003 we contributed additional community funds to the businesses totaling \$236,250.00.¹⁰⁸

121. Also during 2003 and 2004 I maxed out all nine of my credit cards to fund the needs of our businesses and real estate investments. Darwin paid \$71,628.72 of these charges with a portion of his inheritance. However, unlike the funds contributed to The Turf Corporation

¹⁰⁵ See also, Affidavit of K. Eugene Thurston, dated August 16, 2007 at ¶ 4.

¹⁰⁶ See also, Affidavit of K. Eugene Thurston, dated August 16, 2007 at ¶ 6.

¹⁰⁷ See also, Affidavit of K. Eugene Thurston, dated August 16, 2007 at ¶ 10.

¹⁰⁸ See Deposition Exhibit No. 59 (Bates Nos. PL00147 – PL00156) attached hereto.

from our home equity line of credit, Darwin had the bookkeeper book the \$71,628.72 as a loan so he could later repay himself.

122. Specifically, from 2003 through 2004, I was personally liable for nine (9) credit cards that were used extensively to operate our businesses and support real estate acquisitions and operations.¹⁰⁹

123. Between 1997 and 2006 more than \$864,000.00 was charged on my credit cards to pay our business and real estate expenses.¹¹⁰ During 2003 and 2004, when our businesses did not have a line of credit from Wells Fargo Bank, over \$330,585.00 was charged on my credit cards to keep the businesses and real estate investments afloat because the cash flow from business sales was needed to cover the businesses' payroll and necessary expenses.¹¹¹

124. Our businesses would not have survived without the funds obtained through my credit.¹¹²

125. As I noted above, Darwin was not able to obtain credit cards or loans because of his own poor credit history.¹¹³ For example, a credit report from TransUnion Consumer Credit dated March 12, 2004 shows Darwin's credit score to be 574.¹¹⁴

¹⁰⁹ See also spreadsheet prepared by me documenting these transactions attached hereto as Exhibit G (Bates Nos. PL 165- PL 166).

¹¹⁰ *Id.*

¹¹¹ *Id.*

¹¹² See also Affidavit of Neil Salathe dated October 3, 2007 at ¶ 22.

¹¹³ See paragraphs 92 and 93 above and footnote references thereto.

¹¹⁴ See also, TransUnion Consumer Credit Score of 574 dated March 12, 2004 (Deposition Exhibit 55 at Bates No. PL00131); letter from AT&T Universal Business Card dated March 18, 1999 (Deposition Exhibit 55 at Bates No. PL00132), the Bank One Visa Platinum credit card (Deposition Exhibit 55 at Bates No. PL00134), and the Independent Business MBNA Platinum Plus MasterCard credit card (Deposition Exhibit 55 at Bates No. PL00133), attached hereto; as confirmed by Darwin's September 27, 2007 depo. at 205-206.

126. Because cash flow continued to be extremely tight, on August 3, 2004 we obtained a short term loan with the assistance of K. Eugene Thurston from Charley Wood for \$325,000.00.¹¹⁵

127. In April 2005, Darwin and I refinanced our Boise home again, receiving an additional \$29,300.00 which went toward home expenses. \$10,000 of this went into Darwin's personal account to reimburse him for \$10,000 he had contributed to the home funds from his inheritance.

**MY CONTRIBUTIONS OF CASH, CREDIT AND
LABOR TO OUR OTHER COMMUNITY PROPERTY**

128. By agreeing to file our tax returns as Married Individuals Filing Jointly, I contributed the amounts I would have otherwise received in federal and state income tax refunds for 1996 and 1997 had I filed as a Married Individual Filing Separately and reported my income from employment by Harmon Travel.

129. Up until April 1998, my paychecks from Harmon Travel were used to fund community expenses.

130. In order to purchase our present community residence at 25 Horizon Drive, Darwin told me that I would have to sell my separate property rental home at 733 North 14th, Boise, ID. At the time I sold my rental property, on June 17, 1999 to R. Gay Milligan and Sheila K. Milligan-Trounson, I thought the equity from 76 Horizon Drive would also all be applied toward the down payment of 25 Horizon Drive. It wasn't until loan papers were being

¹¹⁵ See also Affidavit of K. Eugene Thurston, CPA, dated August 16, 2007 at ¶ 11.

drawn up for the closing that Darwin informed me additional funds were needed for our businesses. The cash-out equity financing of the home at 76 Horizon Drive of \$92,138.74 was disbursed as follows: \$30,301.80 was used to pay off the Key Bank home line of credit loan, which had been contributed to the businesses in January 1998; the balance of \$61,851.94 was disbursed to us and deposited in our community checking account. Darwin then drew a check on the community's account of \$20,000.00 payable to The Turf Company.¹¹⁶

131. To recap, when I sold my rental home at 733 North 14th, all of my equity of \$43,062.84 was invested in 25 Horizon Drive. At the time 25 Horizon Drive was purchased, the only equity in the community home was the \$43,062.84 in net sale proceeds from the sale of my rental property. The purchase of the residence at 25 Horizon Drive closed on June 28, 1999.

132. After the purchase of our community residence at 25 Horizon Drive on June 28, 1999, real estate prices in the North End of Boise where the residence is located rose rapidly. As the home increased in value Darwin and I refinanced the home several times between 2000 and 2005 to remodel the home and contribute additional funds in the amount of \$274,450 to our businesses and real estate investments. This amount is in addition to the \$30,000.00 we contributed during January 1998 and \$6,000.00 we contributed during the spring of 1999. The businesses have not paid us back either the principal of \$311,450 or interest.¹¹⁷

133. The additional financial burden of the ever increasing home loans, the proceeds of which were contributed to the businesses has been substantial over the years. At present the

¹¹⁶ See Deposition Exhibit 62 (Bates Nos. PL00187 – PL00189).

¹¹⁷ See Accounting of Investment of Home Loans in Businesses attached hereto as Exhibit H (Bates Nos. PL 450).

home loan payments exceed \$3,700.00 per month. We had been repaying these loans with compensation from our employment.¹¹⁸

134. The funds contributed by us to our businesses and real estate investments as described above were not recorded as loans but rather capital investment since Darwin did not want the business financial records to show additional debt because this would hinder finding new bank financing, especially during the years of 2003 and 2004 after Wells Fargo Bank had called all the business notes due.

135. In December of 2000, Darwin and I bought a home in Gold Canyon, Arizona. I painted all the walls, made valances for all the windows, bedroom drapes and bedspreads to match, installed about 1,500 feet of tile on the patio and front walkway and made the home into a real showplace. We allowed customers and employees to use the home. The house was on the golf course and was a very relaxing place to visit.

136. During September 2003, community funds in the amount of \$7,000.00 were used to purchase a truck and 5th wheel trailer for use in our businesses.¹¹⁹

137. On March 1, 2004, Darwin wrote a check drawn on the community bank account to the State of Idaho in the amount of \$2,348.50 to license the businesses' local semi-trucks.¹²⁰

138. In November of 2005, I began work on a comprehensive remodeling project of our home located at 25 Horizon Drive consisting of moving the kitchen from one location of the

¹¹⁸ See Deposition Exhibit 63 (Bates Nos. PL00190 – PL0191) attached hereto. The monthly payments on the first and second loans vary each month because the interest rate is adjusted on the second loan on a monthly basis.

¹¹⁹ See copy of check no. 6868 drawn on the community checking account attached as Exhibit Z (Bates No. PL 00456).

¹²⁰ See copy of check no. 7111 drawn on the community checking account attached as Exhibit Z (Bates No. PL 00456).

home to another. During the project I managed all the construction and worked along side of the contractors.¹²¹

139. This project was undertaken by me pursuant to my agreement with Darwin to work full time on the remodeling of our community residence during the winter of 2005-2006 while the turf business was slow. Also, we had hired a business manager in June 2005 to assist with the businesses. Our agreement was that I would return to working in the businesses in the spring of 2006.

140. Darwin used my absence from the business to facilitate his plan to engage in real estate transactions, including the purchase and sale of the Albrethsen Farm, without revealing them to me.¹²²

141. Unfortunately for me, my plans to return to the businesses were derailed by my doctor's discovery of a grapefruit-sized tumor on my ovary. Surgery was performed 10 days later followed by a six-month recovery period.

142. The combination of Darwin's unfaithfulness with his attempts to exclude me from our businesses and real estate investments and his implementation of a plan to cheat me out of my fair share of our property sent me into an emotional crisis.

143. The stress of these events injured my health and inhibited my healing process.

144. Although I filed for divorce on August 21, 2006, I discovered that Darwin had

¹²¹ See Deposition Exhibit 64 (Bates No. PL00192) attached hereto.

¹²² See also ¶¶ 148-197 herein describing the various real estate transactions.

been planning for a divorce for months before August 21st. This plan is revealed in his own handwritten notes, Deposition Exhibit 92, that I discovered.¹²³

145. In these notes dating back to 2004 and in his deposition testimony, Darwin admitted that he was concealing his plans from me.¹²⁴

146. In addition, Darwin had retained Ann Shepard as his divorce counsel as early as July 21, 2006 as evidenced by a check in the amount of \$2,500.00 for Ms. Shepard's retainer.¹²⁵

147. My review of the banking records produced by Darwin reveal he hired Barbara Jacobson, a private investigator in February 2007, presumably in a futile effort to discovery some "dirt" on me.¹²⁶ I later learned that the thrust of her investigation was into an alleged affair between me and a man in Washington State more than 25 years ago. Darwin paid Ms. Jacobson additional fees on July 16, 2007.¹²⁷

OUR ACQUISITIONS AND SALES OF REAL PROPERTY

148. On November 2, 1999, Darwin and I purchased the Dansereau Farm in Boise, Idaho consisting of 40 acres for approximately \$6,000 per acre.

149. I located the opportunity to purchase the Dansereau Farm. Darwin resisted purchasing the property but relented following my explanation of the tremendous opportunity this property presented to our businesses and real estate investments. As it turned out the

¹²³ See Exhibit 92 attached hereto; Darwin's September 27, 2007 depo. at pp. 310 - 313.

¹²⁴ Darwin's September 27, 2007 depo. at 312: 11 - 20.

¹²⁵ See also Exhibit J (Bates No. PL451) attached hereto.

¹²⁶ See also check payable to Jacobson Investigations, Exhibit J (Bates No. PL452) attached hereto.

¹²⁷ See also check register entry to Jacobson Investigations, Exhibit J (Bates No. PL. 453) attached hereto.

acquisition of the Dansereau Farm provided us with the critical asset that allowed us to avoid a foreclosure by Wells Fargo.

150. On September 11, 2000, we agreed to purchase the Yano Farm in Weiser, Idaho.¹²⁸

151. On September 15, 2000, we agreed to purchase High Desert Turf of Nevada in Yerington, Nevada.¹²⁹

152. On September 15, 2000, Darwin and I signed loan documents with Zion's Bank to provide the financing for the purchases of the Yano Farm and High Desert Turf.¹³⁰

153. During March 2001, we purchased, optioned and leased a total of 377 acres from Joseph E. and Laurel D. Roderick and Douglas R. and S. JoAnn Roderick (living trusts).¹³¹

154. On or about May, 2003, Darwin sold 20 acres of the Dansereau Farm without my approval to Skyline Development for approximately \$20,000 per acre. The net sale proceeds were paid to Wells Fargo Bank since Wells Fargo Bank had called all the notes due and payable in full.

155. In April 2005 Darwin showed me a condominium complex in Reno. We decided to sell the Phoenix home and buy the Reno condo so we would have a place of our own to stay since I was providing management and administrative assistance to the Reno operation.¹³²

¹²⁸ See also Darwin's September 27, 2007 depo. at 184-186.

¹²⁹ See Deposition Exhibit No. 66 (Bates Nos. PL00196 – PL00216) attached hereto; see also Darwin's September 27, 2007 depo. at 239-241.

¹³⁰ See Deposition Exhibit No. 60 (PL00161 – PL00164) attached hereto.

¹³¹ See Deposition Exhibit No. 65 (Bates Nos. PL00193 – PL00194) attached hereto.

¹³² See also Deposition Exhibit 67 (Bates No. PL00217) and Deposition Exhibit No. 68 (Bates No. PL00218)

156. In approximately February 2006 we sold the remaining 20 acres of the Dansereau Farm for \$100,000.00 per acre for a net profit of approximately \$1,800,000.00.

157. On April 18, 2005, the Phoenix home was sold within three days of its listing for the full asking price of \$315,000.00 resulting in a profit of approximately \$179,080.

158. A 1031 tax deferred exchange was implemented and \$139,060.62 was invested as the down payment on the purchase of Condominium Unit, Lot 1404, Fleur De Lis Phase I, Washoe County, NV, bearing a common address of 9900 Wilbur May Parkway #1402, Reno, NV 89521 (the "Reno Condo").¹³³

159. The proceeds of a note secured by a deed of trust that I signed alone in the amount of \$352,482.75 was used to pay the balance of the purchase price. The record title to the Reno condominium was placed in my name only because Darwin's credit rating was not acceptable to the mortgage company.¹³⁴

160. The remaining balance in the 1031 exchange account of \$40,000.00 was to be invested in a home building lot purchased from Skyline Development at cost. Skyline Development had agreed to our advantageous purchase of two building lots as part of the contract for their purchase of the first 20 acres of Dansereau property.¹³⁵

161. From March 2005 until October 2005 I traveled to Reno often, spending about 50 percent of my time there managing and administering the High Desert Turf business.

¹³³ See Exhibit X, Statement of Exchange.

¹³⁴ See Deposition Exhibit 68 (Bates No. PL00218)

¹³⁵ See Exhibit W, Letter from Skyline Development.

162. During June 2005, Darwin hired Robert K. Johnson to be The Turf Company's business manager.

163. In March 2006, Darwin and I met with Mr. Johnson regarding the purchase and sale of real property and other significant decisions affecting our businesses and real estate developments.

164. A portion of the discussion during the March meeting involved the sale of 20 acres of the Dansereau Farm for a profit of \$1.8 million. I wanted a portion of the profits to be applied to our personal residence debt since Darwin had told me in previous years that when the Dansereau Farm sold our home loans would be paid off.

165. The disposition of the remaining 20 acres of Dansereau Farm was closed on March 15, 2006 for total consideration of \$2,058,761.00. A cash payment of \$1,503,761.00 was received on March 15, 2006 and \$555,000 in value was received in a section 1031 tax deferred exchange of a portion of the Roderick farm.¹³⁶ We realized a gain of \$1,864,132 on this transaction.¹³⁷ Although a cash payment of more than \$1,500,000 was received and taken control of by Darwin, he did not apply any of the cash proceeds to reduce the debt on our personal residence as he had agreed to do.

166. When Skyline Development purchased the Dansereau Property it agreed to allow us to purchase two home building lots at Skyline's cost, which was approximately \$40,000.00 per lot.

¹³⁶ See Draft 2006 Form 1040 prepared for Darwin at Form 8824, Bates Nos. 0001199 and 0001200 attached as Exhibit L.

¹³⁷ *Id.*

167. As noted above, when the Phoenix home was sold \$40,000.00 of the profit was held in the 1031 exchange account to purchase one of the lots in the Skyline Development.

168. Darwin and I had many discussions of what to do with the two lots. Darwin suggested that since I enjoyed designing homes that I be the general contractor and build two homes and sell them. Another suggestion was that we give a lot to each of our respective children, Brian McKay and Beth Marshall.

169. The lots more than doubled in value in less than a year.

170. Without my knowledge or consent and contrary to our discussions, Darwin sold one of the lots. Darwin used a portion of the sale proceeds from this first lot to pay for the second lot and the 1031 funds from the Phoenix house sale were not used, which resulted in an income tax liability on the \$40,000 in gain from the sale of the Phoenix property.

171. At the time the second lot was scheduled to close, the title company required my signature on the closing papers even though title to the lot was vested in The Turf Company, LLC. By this time it was apparent to me that Darwin was scheming to wrongfully treat these funds as his separate property.

172. When Darwin went to the title company to sign the closing papers for the lot sales, he provided the title company with a quitclaim deed for me to sign for the residence at 25 Horizon Drive. Title to the residence was in my name only because the mortgage lenders would not make the loan to Darwin and me together because of Darwin's poor credit.

173. On January 31, 2006, Darwin entered into an agreement with Eric Albrethsen to purchase 40.86 acres of real property at a price of \$75,000 per acre.¹³⁸

174. Darwin and Eric entered into a formal written agreement on February 13, 2006.¹³⁹ Closing was originally scheduled to occur on March 27, 2006.¹⁴⁰

175. The contract required a \$10,000 earnest money deposit.¹⁴¹

176. On February 23, 2006, Darwin submitted a financial statement to from First Bank of the Northwest showing our net worth at \$20,556,109.00.¹⁴²

177. On February 24, 2006, Darwin and Albrethsen agreed to an extension of the closing date to April 3, 2006.¹⁴³

178. In order to obtain funds to pay the earnest money, Darwin took out an unsecured loan with First Bank of the Northwest in the amount of \$30,000 on February 23, 2006.¹⁴⁴

179. Darwin paid the \$10,000 earnest money payment to Albrethsen from the loan proceeds on February 23, 2006.¹⁴⁵

180. On March 24, 2006, Darwin issued a cashier's check to Eric Albrethsen in the amount of \$25,000 for the additional earnest money.¹⁴⁶

¹³⁸ See Exhibit M (Bates No 5252) attached hereto.

¹³⁹ See Exhibit No. N (Bates Nos. 5253-5257) attached hereto.

¹⁴⁰ See Exhibit N (Bates No. 5254) attached hereto.

¹⁴¹ See Exhibit N (Bates No. 5253) attached hereto.

¹⁴² Darwin's March 21, 2007 at pg. 13 and Deposition Exhibit I; Darwin's September 27, 2007 depo. at 248 and Deposition Exhibit 72 (Bates Nos. PL00234 – PL 00236).

¹⁴³ See Exhibit No. O (Bates No 5258) attached hereto.

¹⁴⁴ See Exhibit No. P (Bates Nos. 5263-5264 attached hereto).

¹⁴⁵ See Exhibit No. N (Bates No. 5257) attached hereto.

¹⁴⁶ See Exhibit Q, (Bates No. 5260) attached hereto.

181. The \$5,000 in additional earnest money was provided by The Turf Company, LLC.

182. The loan was taken out and the proceeds were disbursed during our marriage.

183. During the process of acquiring the 40.86 acres from Albrethsen, Darwin was in negotiations with Status Corporation of Idaho ("Status Corp.") regarding a simultaneous sale of the property to Status Corp. for approximately \$130,000 per acre. Darwin went to great lengths and expended a great deal of community effort and labor in order to "flip" the property.

184. Additionally, as part of the real estate transaction with Status Corp., Darwin also sold 30 acres owned by The Turf Company, LLC for approximately \$120,000 per acre.¹⁴⁷ As noted elsewhere in this affidavit, The Turf Company, LLC is owned equally by Darwin and me.

185. The original purchase and sale agreement between Darwin and Status Corp was entered into on February 16, 2006.¹⁴⁸

186. Thereafter, the parties to the transaction exchanged multiple offers, counteroffers and addendums before finally agreeing on the final terms of the sale.¹⁴⁹

187. Simultaneously with the purchase of the Albrethsen property from Eric Albrethsen on April 3, 2006, Darwin closed on the sale of the property to the Status Corp. for \$8,821,800.¹⁵⁰

188. We both signed Warranty Deeds to Status Corp.¹⁵¹

¹⁴⁷ See Exhibit No. R (Bates Nos. 5281-5305) attached hereto.

¹⁴⁸ See Exhibit No. R (Bates Nos. 5281-5305) attached hereto.

¹⁴⁹ See Exhibit No. R (Bates Nos. 5281-5305) attached hereto.

¹⁵⁰ See Exhibit No. V (Bates Nos. 5352-5353) attached hereto.

¹⁵¹ See Exhibit No. S attached hereto.

189. I specifically asserted my rights in the sale proceeds and my attorney, James A. Bevis confirmed in a letter that I was not waiving any community interest in the sale proceeds.¹⁵²

190. Darwin took possession of the \$3,750,000 in proceeds. We are scheduled to receive the remaining funds in the amount of \$5,071,800 on or before March 30, 2008.¹⁵³

191. Darwin has maintained complete control over the \$3,750,000 received from Status Corp. and has refused to share any of it with me.

192. Further, Darwin has taken the position that all of the proceeds from the sale of the Albrethsen property and The Turf Company, LLC's property to Status Corp. are his sole and separate property because he obtained the loan for the earnest money in his name only.¹⁵⁴

193. Darwin tried to close the sale of Albrethsen Farm and The Turf Company's 30 acres without my signature. However, the title company required my signature and the entire transaction was then disclosed to me.

194. My position is that the sale proceeds are community property because (1) the Albrethsen property was acquired during marriage and The Turf Company, LLC's property was transmuted to community property during marriage, (2) the \$30,000 in loan proceeds were community because the loan was taken out during our marriage, and (3) I did not waive and/or transfer her interest in the subject properties or debt.¹⁵⁵

¹⁵² See Exhibits T (Bates No. 5279) and U (Bates No. Pl. 419-423) and attached hereto, May 25, 2006 letter from James A. Bevis written upon my instructions response from Skip Sperry.

¹⁵³ See Exhibit No. V (Bates No. 5352) attached hereto.

¹⁵⁴ Darwin's September 27, 2007 depo. at 263-266 and 295-296.

¹⁵⁵ See Exhibit No. T (Bates No. 5279) attached hereto for letter from James A. Bevis dated May 25, 2006 and Exhibit No. U response thereto.

195. On May 9, 2007, The Turf Company, LLC acquired fee simple title to Lot 16, Block 2, Red Fox Amended Phase I for Teton Reserve Planned Unit Development in partial consideration for the sale of approximately 1,574,500 square feet (37+/- acres) turf for the Teton Reserve Golf Course. The deed from Teton Valley Golf Associates, LP, an Idaho limited partnership, to The Turf Company, an Idaho limited liability company, was recorded May 9, 2007 as Instrument number 187452.¹⁵⁶

196. Based upon my conversations during April 2007 with Michael McCarthy, an attorney and a principal of Teton Valley Golf Associates, LP, I have determined that the fair market value of Lot 16 as of April 2007 was not less than \$400,000.

197. On August 28, 2007 the Reno Condominium located at 9900 Wilbur May Parkway #1402, Reno, NV was sold. Through counsel, Darwin agreed to retain the net sales proceeds in an escrow account pending resolution of the property issues in this case. Contrary to that agreement, Darwin has appropriated the net sale proceeds to his own use and benefit.¹⁵⁷

¹⁵⁶ See Deposition Exhibit No. 76 (Bates No. PL00292) attached hereto.

¹⁵⁷ See Deposition Exhibit No. 81 (Bates Nos. PL00303 – PL00317) attached hereto.

**DARWIN'S REPRESENTATIONS AND ADMISSIONS
REGARDING MY CONTRIBUTIONS**

198. Shortly after our marriage on July 6, 1996, Darwin informed me that we could make more money if we worked together because we would eliminate overhead and payroll costs associated with the employees I would replace.

199. At or about the same time as the previous representation was made to me, Darwin informed me that The Turf Company was a 50/50 business from then on since we were married and I should contribute all I could to the business.¹⁵⁸

200. Commencing in the fall of 1997, Darwin encouraged me to leave my position with Harmon Travel. Darwin made statements like: "We can make more money if you work for the business and not the travel industry."

201. Darwin also told me that "This is our business and our retirement."

202. When The Turf Company, LLC became operational on January 1, 2000, Darwin told me "You and I are the 'LLC', therefore, we need to sign quitclaim deeds for everything to go into the LLC."

203. From and after 2000 through 2004, a period of five reporting years, The Turf Company, LLC issued Schedules K-1 to Darwin and me reporting 50/50 percent ownership of capital and profits.¹⁵⁹

¹⁵⁸ Affidavit of Neil Salathe, dated October 3, 2007 at ¶¶ 34 and 35; Darwin's September 27, 2007 depo. at 151.

¹⁵⁹ See Deposition Exhibits 83 – 87 attached hereto.

204. Late in 2003, Darwin wrote a document entitled "History of The Turf Company".¹⁶⁰ This document was prepared by Darwin for K. Eugene Thurston to use in his efforts to obtain a new banking relationship for us.

205. Darwin's "History of The Turf Company" contains the following acknowledgments and admissions by Darwin regarding my contributions to the success of the business:

In 1996 I married Patricia Christensen, an experienced and accomplished travel agent with Harmon Travel in Boise. Spring, 1998, Patricia joined me in the operation of The Turf Company, bringing a wealth of experience in office management and dealing with tough issues in a swift manner.¹⁶¹

In 2001 Boise Capital Youth Soccer, a semi-pro training club for teenagers approached Patricia and myself about assisting with development of some permanent fields. They were interested in purchasing ground if possible and have us seed and irrigate, then maintain the turf for their play and usage. These discussions soon developed into a sale potential for 20 acres of our production fields at a very good pricing of \$20,000 per acre. We then developed a planting and maintenance agreement which requires us to prepare, plant and grow the turf. Capital Youth Soccer can play on the field while it is developing root strength. Then we can harvest half of the field leaving them the other half while we prepare and reseed the first half. Once the field is again ready for play we can harvest the second half and reseed. The bottom line is we have sold the land at development pricing yet we continue to produce on the land with a ten-year written agreement. Capital Youth Soccer has first class fields always - with no expense of seeding and growing or maintenance cost. This is a win/win situation for both entities.¹⁶²

The business opportunities of The Turf Company and High Desert Turf are not limited to turf grass sod production and marketing alone. A goodly portion of our

¹⁶⁰ See Deposition Exhibit 73 (Bates Nos. PL00241 - PL00268) attached hereto.

¹⁶¹ See, Deposition Exhibit 73 (Bates Nos. 0241-0268) for The History of the Turf Company at pg. 1 (Bates No. PL00241) attached hereto.

¹⁶² /d. at pg. 3 (Bates No. PL00243).

business potential comes in the purchase of land for turf production in areas adjacent to urban areas. Step two is to produce turf grass which theoretically should support interest and principle payments. During this time we clean up the land and make it appear very attractive. As development approaches we sell the land at development prices and again purchase low cost land outward from development and repeat the cycle. During the past 10 years we have purchased two 40-acre parcels of land. The most recent purchase was four years ago. We currently have sold or have under option a total of 60 acres, all of it selling for three to 10 times the price we purchased it for. Fourty (sic) acres of land was optioned for sale to Skyline Development 18 months ago for \$22,000 per acres (sic). Twenty acres was (sic) sold to Boise Capital Soccer one year ago for \$20,000 per acre. Land values have continued to rise very rapidly in this area, much faster than we could have anticipated. We continue to retain ownership of 55 acres not committed with values reaching \$35,000 or more per acre. (My parents, who own 160 acres adjacent to our land, recently sold 150 acres at a selling price of \$40,000.00 per acre.)¹⁶³

* * *

Over the past years, as company activity has grown, we have continued to operate our management, sales, and accounting offices out of the same cramped and crowded quarters – all in one office. This past summer Patricia took responsibility as our construction manager to create a new sales office and separate accounting office upstairs away from the general public and traffic. This cost was minimal with the building already in place. All we needed to do was install a ceiling/floor and a few walls. She then attended a few auctions for discounted furniture and equipment. The results are very rewarding based on the new look our company has projected to our customers. Why, we even have a new farm kitty called “Turfcat” to put a smile on customer’s faces and have children enjoy.¹⁶⁴

206. Darwin admitted in his March 21, 2007 deposition that I “. . . did work long hours. Many times there 6:00 or 7:00 in the morning, and not leaving until on some occasions 10:00 or 11 o’clock at night.”¹⁶⁵

¹⁶³ *Id.* at pg. 4 (Bates No. PL00244).

¹⁶⁴ *Id.* at pg. 6 (Bates No. PL00246).

¹⁶⁵ Darwin’s March 21, 2007 depo. at pp. 84 and 85.

207. By Memorandum dated January 18, 2006, Darwin wrote that I "... would end her involvement in all company operations on December 31, 2005."¹⁶⁶ This memorandum was prepared without my knowledge or consent. Notably, however, Darwin once again recognized my ownership interest in the businesses and her "valuable contributions" to them.¹⁶⁷

**DARWIN ATTEMPTS TO RENEGE ON HIS REPRESENTATIONS
AND ADMISSIONS REGARDING MY CONTRIBUTIONS**

208. On March 13, 2006, Darwin told me to get a job, that I had no retirement, and I did not have any interest in any of our businesses or real estate investments. He also informed me that he did not want me to return to the business after the remodeling of our community residence was completed.

209. Darwin had found another woman, Leah Bachtel, and seeks in this divorce proceeding to deprive me of my fair share of the successful businesses and real estate portfolio that we built together. I found love notes from Ms. Bachtel, which revealed Darwin's unfaithfulness.¹⁶⁸

210. In addition, I found handwritten notes by Darwin expressing his plan to conceal his relationship with Leah from me so as to hold the marriage together for four to six months while he completed his deceitful plans to cheat me out of my fair share of the businesses and real estate investments that we had built together during marriage.¹⁶⁹

¹⁶⁶ See Deposition Exhibit 74 (Bates No. PL00275) attached hereto.

¹⁶⁷ See Deposition Exhibit 74 (Bates No. PL00275).

¹⁶⁸ See Deposition Exhibit 93; see also, Darwin's March 21, 2007 at pgs. 106 – 109.

¹⁶⁹ See Deposition Exhibit 92 attached hereto,

211. During the spring of 2006, Darwin instructed Dave Stewart, our CPA, to change the 2005 taxes to include a Schedule C reporting him as the sole owner of The Turf Company, LLC instead of filing Schedules K-1 as we had done the five previous years.

212. Darwin did not share his instructions to Mr. Stewart with me to change the tax reporting.¹⁷⁰ I only found out about the change in tax reporting by asking questions when I went in to sign the final tax papers during the summer of 2006. I therefore refused to sign the 2005 tax returns because they falsely reported the ownership of The Turf Company.

**DARWIN'S MISREPRESENTATIONS ON "SCHEDULE A" REGARDING THE
IDENTITY AND VALUE OF HIS SEPARATE PROPERTY ASSETS AND LIABILITIES**

213. As I have previously testified above, shortly after I began working full time at The Turf Company in October 1997, and while familiarizing myself with the business, I discovered that approximately five acres of the forty acres identified as "Home Farm", had been awarded to Darwin's ex-wife, Donna, in the Stipulated Judgment and Decree of Divorce entered on December 27, 1994 in the case of Darwin McKay vs. Donna McKay, Case No CV-94-00261.¹⁷¹ I also found that the "values" of the Lease Purchase Equipment had not been totally paid out as indicated on the Pre-Nuptial schedules.

214. In addition, I discovered while making the lease payments on the equipment that the value of the equipment identified on Schedule A as "Lease Purchase Equipment" was grossly overstated.

¹⁷⁰ Transcript of Deposition of David Stewart dated August 22, 2007 at 69.

¹⁷¹ See also, Deposition Exhibit 36 at paragraph 7 of the Stipulated Judgment and Decree of Divorce entered on December 27, 1994 in the case of Darwin McKay vs. Donna McKay, Ada County Case No CV-94-00261(Bates Nos. PL00026 – PL00037) attached to Patricia's Rule 44(d) Request for Judicial Notice of the record of other proceedings in an Idaho Court.

215. As noted above, Darwin did not disclose on Schedule A to the Pre-Nuptial Agreement the credit card debt the Stipulated Judgment and Decree of Divorce required him to pay.¹⁷² This debt equaled at least \$9,762.17 as of July 1, 1996.¹⁷³

216. In addition, Darwin did not disclose on Schedule A to the Pre-Nuptial Agreement Brain McKay's college loan debt the Stipulated Judgment and Decree of Divorce required him to pay.¹⁷⁴ This debt consisted of two loans owed to Gonzaga University that equaled at least \$14,524.92 as of July 1, 1996.¹⁷⁵

217. Darwin did not disclose a \$40,000 debt associated with the so-called Smithmobile.

218. Importantly, Darwin did not disclose on Schedule A his obligation to pay his ex-wife, Donna, alimony for a period of 14 years in the amount of \$1,400.00 for the 14-year period, plus \$1,750.00 for the first two years.¹⁷⁶ In this regard the Stipulated Judgment and Decree of Divorce states: If defendant does not re-marry, die or enter into a relationship characteristic of marriage, the total alimony award to the defendant shall be \$277,200.00."¹⁷⁷

¹⁷² See paragraphs 11-25 above and footnote references thereto.

¹⁷³ See paragraph 25 above and footnote reference thereto.

¹⁷⁴ See paragraphs 15 and 25 above and footnote references thereto.

¹⁷⁵ *Id.*

¹⁷⁶ See, Deposition Exhibit 36 at paragraph 6 of the Stipulated Judgment and Decree of Divorce entered on December 27, 1994 in the case of Darwin McKay vs. Donna McKay, Ada County Case No CV-94-00261(Bates Nos. PL00026 – PL00037) attached to Patricia's Rule 44(d) Request for Judicial Notice of the record of other proceedings in an Idaho Court; Darwin's September 27, 2007 depo. at 135-136.

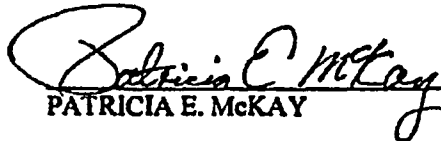
¹⁷⁷ *Id.*

COMMINGLY OF ASSETS AND FUNDS

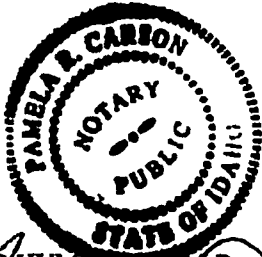
219. Notwithstanding Mr. Goodrum's advice of July 1, 1996 and Neil Salathe's advice during his two and one-half years of work for us, Darwin and I commingled our separate property with our community property as is detailed in my testimony above.¹⁷⁸


220. I performed an analysis of some of our transactions and prepared a Flow Chart summarizing the commingling that has occurred between 1996 and 2005. That Flow Chart is attached as Exhibit Y.¹⁷⁹

DATED: October 9, 2007.

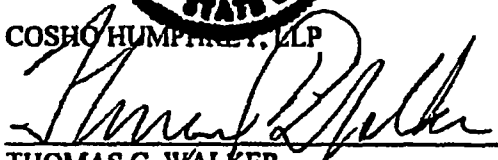

PATRICIA E. MCKAY

SUBSCRIBED AND SWORN To before me this 8th October 2007.




Notary Public for Idaho
Residing at Bose, Idaho
My Commission Expires: 3/31/2010

COSHO HUMPHREY, LLP


THOMAS G. WALKER
Attorneys for Plaintiff

¹⁷⁸ Darwin's September 27, 2007 depo at 139-151.

¹⁷⁹ See Exhibit Y, Flow Chart prepared by me from the parties' records (Bates Nos. PL 424 – PL 430).

CERTIFICATE OF SERVICE

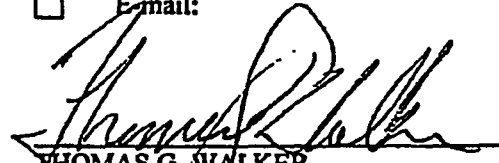
I HEREBY CERTIFY that on the 9th day of October 2007 a true and correct copy of the foregoing document was served upon:

Kimberly D. Brooks
Brooks Law, P.C.
23 9th Ave. North
Nampa, ID 83687

☒ U.S. Mail
☐ Hand Delivery
☐ Overnight Courier
☐ Facsimile
☐ E-mail:

John Miller
Miller & Harr
Attorneys at Law
1401 Shoreline Drive, Suite 3
Boise, Idaho 83702

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STANLEY W. WELSH

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October 10, 2007

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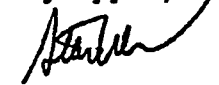
Re: Patricia E. McKay v. L. Darwin McKay
CH File No.: 19458-001
Case No.: CV DR 0615200

Dear Kim and John:

As you know, we recently filed three motions and supporting documentation on behalf of Patty McKay: (1) Motion for Partial Summary Judgment, (2) Renewed Motion for an Award of Costs and Attorney Fees pursuant to Idaho Code §§ 32-704(3) and 32-705, and (3) Motion for Contempt. We believe the evidence and law we have provided in support of Patty's positions are adequate to obtain orders and judgments in Patty's favor on all issues, except valuation of the assets and liabilities, which is left to an agreed upon settlement or determination at trial. Consequently, we think it is more likely than not that Judge Hansen will find and conclude that all of the property is community property, except that which Darwin can trace to his inheritance.

Considering the foregoing, we suggest that we engage Senior Judge Ron Shilling to act as a mediator in this matter. Patty's Renewed Motion for an Award of Costs and Attorney Fees pursuant to Idaho Code §§ 32-704(3) and 32-705, and Motion for Contempt are set for hearing on October 24, 2007. Thus, we would like to have a mediation session before October 24th. If your client is willing to participate in a mediation session, we may be able to settle most if not all of the issues and save the parties the time and expense of continuing this litigation. Please call or write and let us know what Darwin's position is on engaging in mediation with a goal of settling this case as soon as possible.

Very truly yours,



STANLEY W. WELSH

cc: Patricia E. McKay
276343.doc



CH01960

000251

Pam Carson

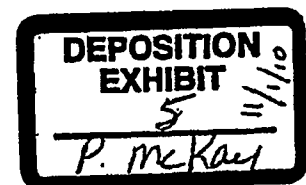
From: Thomas G. Walker
Sent: Thursday, October 18, 2007 9:09 AM
To: Patricia McKay
Cc: Stanley W. Welsh; Melissa Wolfe; Pam Carson
Subject: RE: McKay Saturday quick question.

Based on my experience with Judge McKee, he will give each side his view of the strengths and weaknesses of each party's case. I think he will tell us whether our theories of the case have merit. As we told you yesterday, we probably will not engage in direct negotiations with Darwin and his counsel. Typically the negotiations will be conducted through Judge McKee. This process has been an effective settlement vehicle in the past.

Thomas G. Walker
Coshu Humphrey, LLP
800 Park Blvd., Suite 790
PO Box 9518
Boise, ID 83707-9518
Direct phone: 208-639-5607
Direct fax: 208-639-5609
E-mail: twalker@cosholaw.com
Blog: www.ricolawblog.com
RICO web site: www.thomasgwalker.com

From: Patricia McKay [<mailto:patmckay@clearwire.net>]
Sent: Thursday, October 18, 2007 9:10 AM
To: Thomas G. Walker
Subject: McKay Saturday quick question.

Saturday - Will Judge McKee express if the prenuptial is valid or not valid prior to settlement discussions?



CH 2642

000252

Stanley W. Welsh (ISB No. 1964)
Thomas G. Walker (ISB No. 1856)
Cosho Humphrey, LLP
800 Park Blvd., Suite 790
P. O. Box 9518
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Direct Facsimile: (208) 639-5609
E-mail: swelsh@cosholaw.com; twalker@cosholaw.com

Attorneys for Plaintiff Patricia McKay

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF

THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

MAGISTRATE DIVISION

★ ★ ★ ★ ★

PATRICIA E. McKAY,

Plaintiff,

v.

L. DARWIN McKAY,

Defendant.

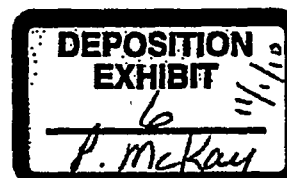
Case No. CV DR 0615200

**AGREEMENT OF COMPROMISE AND
SETTLEMENT**

***THIS DOCUMENT SHALL NOT BE FILED
WITH THE COURT***

This Agreement of Compromise and Settlement ("Agreement") is made and entered into this 20th day of October 2007 by and between Patricia E. McKay, Plaintiff ("Patricia"), and L. Darwin McKay, Defendant ("Darwin"). Patricia and Darwin are sometimes individually referred to as a "Party" or collectively referred to as the "Parties". This Agreement is binding and enforceable upon the terms stated herein, notwithstanding the fact that additional documentation is required to carry out the terms of this Agreement.

AGREEMENT OF COMPROMISE AND SETTLEMENT
278358



Page 1

CH 2624

000253

1. **Community Property.** The Parties have attached a Community Property Financial Statement that they agree sets forth the Parties' community property and the agreed-upon values for their community property.

2. **Full Disclosure.** Each Party represents to the other that full disclosure of all community assets and community liabilities, of which he or she is aware, has been made.

3. **Allocation of Property to Patricia.** Darwin agrees to transfer by good and sufficient deed, bill of sale, assignment and/or other necessary document of conveyance all of his right, title and interest in and to the property set forth in the column entitled "To Patricia" to Patricia as her sole and separate property, and does hereby forever waive any and all rights thereto.

4. **Allocation of Property to Darwin.** Patricia agrees to transfer by good and sufficient deed, bill of sale, assignment and/or other necessary document of conveyance all of her right, title and interest in and to the property set forth in the column entitled "To Darwin" to Darwin as his sole and separate property, and does hereby forever waive any and all rights thereto.

5. **Payment by Darwin.** Darwin shall pay to Patricia, on or before March 31, 2008, the sum of _____ (\$_____.00) as an equalization payment ("Equalization Payment").

6. **Collateral.** In order to secure payment of the Equalization Payment and Darwin's other obligations hereunder, Darwin shall grant to Patricia by good and sufficient mortgage, deed of trust, security agreement, collateral assignment and/or other necessary document of security a collateral security interest in and to each and every item of property set forth in the column entitled "To Darwin". Patricia's counsel will prepare the collateral security documents. Darwin and his counsel shall have five (5) business days from the date the collateral security documents are presented to Darwin's counsel to review and request commercially reasonable changes in said collateral security documents. Darwin shall deliver fully executed collateral security documents in recordable form within ten (10) business days from the date the execution originals of the

collateral security documents are presented to Darwin's counsel. Darwin consents to the recording and/or filing of the collateral security documents as may be necessary to perfect Patricia's security interest in the collateral.

7. **Support Payments from Darwin to Patricia.** Commencing on November 1, 2007 and continuing until the Equalization Payment is paid in full, Darwin shall pay Patricia on or before the first day of each consecutive month the sum of _____ (\$_____).

8. **Disposition of Property.** Subject to the provisions of this Agreement and the collateral security interests granted by Darwin to Patricia, each of the Parties hereto may in any way dispose of his or her property of whatever nature, real or personal; and the Parties hereto, each for himself and herself, respectively, and for the respective heirs, legal representatives, executors and administrators and assigns, hereby waives any right of election which he or she may have or hereafter acquire regarding the estate of the other, or any right to take against any last will and testament of the other, whether heretofore or hereafter executed, or as may now or hereafter be provided for in any law of the State of Idaho or any other state or territory of the United States or any foreign country, and hereby renounces and releases all interest, right or claim that he or she now has or might otherwise have against the other, under or by virtue of the laws of any state or country.

9. **Fair and Equitable Division.** The Parties agree that the division of community property and Equalization Payment provided for in this Agreement is fair and equitable.

10. **Payment of Debts by Darwin and Release of Patricia from all Debts.**

10.1. Commencing November 1, 2007 Darwin shall timely make all payments on the first and second deed of trust notes encumbering the Parties' community residence located at 25 Horizon Dr., Boise Idaho.

10.2. On or before November 1, 2007, Darwin shall pay Patricia's attorney fees and costs owed to Cosho Humphrey, LLP.¹

¹ As of October 15, 2007, fees and costs owed to Cosho Humphrey equaled \$96,006.03.

10.3. On or before December 1, 2007, Darwin shall payoff Patricia's credit card debt.²

10.4. On or before December 31, 2007, Darwin shall obtain at his sole cost and expense releases of Patricia from all liability from all debts whether such debts are owed to banks, vendors, and/or other creditors for whom Patricia may have liability for any reason, including but not limited to Patricia's execution of notes, personal guarantees or collateral security documents that she delivered during the Parties' marriage.

10.5. On or before March 31, 2008, Darwin shall pay off the first and second deed of trust notes encumbering the residence located at 25 Horizon Drive, Boise, Idaho granted to Patricia so that she will have and hold said property free and clear of all encumbrances.

11. **Payment of Accounting Fees and Income Taxes by Darwin.** Darwin shall pay for the preparation of state and federal income tax returns for the Parties for 2005 and 2006. The Parties agree to file said tax returns under the filing status resulting in the lowest state and federal income taxes. The Parties agree to cooperate with the accountant as necessary to complete the filing of such returns. Darwin shall pay all state and federal income taxes, interest and penalties, if any.

12. **Separate Property / Income After Execution of Agreement.** The Parties hereto stipulate and agree that from and after the date of the signing of this Agreement, any and all property or income acquired or earned by either Party hereto shall be the separate property of the party who has acquired or earned it and the other party shall have no claim thereon. The parties agree that any income earned by either party after the date of the signing of this Agreement shall be the separate property of the party earning the income, and any income on separate property shall be separate property from and after the date of the signing of this Agreement.

13. **Debts after Execution of Agreement.** The Parties agree that from and after the date of the signing of this Agreement, any debts incurred by either party hereto shall be the

² As of September 30, 2007, the credit card debt equaled approximately \$75,000.00.

separate debt of the Party incurring the debt and shall not be a community debt. The Parties hereto agree not to incur any debt for which the other Party may be liable.

14. Mutual Release of Claims. For good and valuable consideration passing between the Parties, the receipt and sufficiency of which is acknowledged by each Party, the Parties each for themselves and for their heirs, representatives, agents, employees, successors, executors, administrators, subrogees and assigns, release the other Party and his heirs, representatives, agents, employees, successors, executors, administrators, subrogees and assigns, and each Party shall release, indemnify and hold harmless the other Party from any and all claims, liabilities or obligations arising out of or in any way connected with their marriage, including but not limited to all claims set forth in or comprehended by that certain litigation identified in the caption above. The term claims shall include any and all claims and counterclaims, whether known or unknown, a Party may have against the other Party as a result of their marriage and the litigation identified above.

15. Entry of Decree of Divorce. The Parties agree that five (5) days from the execution of this Agreement of Compromise and Settlement, they will execute a stipulation for entry of a Decree of Divorce to be filed with the Court.

16. No Undue Influence. The Parties agree that they have entered into this Agreement without undue influence or fraud or coercion or misrepresentation or for any other like cause.

17. Further Performance. The Parties agree to execute all additional documents and take such further steps as shall be required to effectuate and carry out the performance of this Agreement.

18. Amendments. This Agreement may not be amended, modified, altered or changed in any respect whatsoever, except by further agreement in writing duly executed by the Parties.

19. Time of Performance. Time of performance is of the essence of this Agreement.

20. Advice of Counsel. The Parties stipulate that they have been represented by counsel and are familiar with the terms, conditions and effect of this Agreement.

21. Attorney Fees. In the event of any controversy, claim, or action being made, filed, or instituted between the parties to this Agreement or any of the other documents related hereto, or arising from the breach of any provision hereof, the prevailing party will be entitled to receive from the other party all costs, damages, and expenses, including reasonable attorney's and paralegal's fees incurred by the prevailing party, whether or not such controversy or claim is litigated or prosecuted to judgment. Court costs and attorney and paralegal fees include those incurred as a result of bankruptcy, or on appeal.

22. Mediation Expense. Darwin shall pay one-half and Patricia shall pay one-half of all fees and expenses of mediation.

23. No Merger in Decree. This Agreement shall NOT be merged with any decree or judgment, except as the Court may approve. If the Court approves this Agreement, it will continue as a separate agreement and may be separately enforced by either Party hereto.

24. Binding Agreement. This agreement is binding upon the heirs, successors and assigns of the parties hereto.

25. Dismissal. Upon execution of the implementing documents and payment of the Equalization Payment as provided above, this lawsuit shall be dismissed with prejudice and without any award of costs or attorney fees to any Party, except as provided in the attached Community Property Financial Statement.

26. Free and Voluntary Act. Each Party further acknowledges: (a) that settlement of his or her claims alleged against the other in this litigation and the execution and delivery of this Agreement and release by him or her, are by his or her free and voluntary act; and (b) that no promise, agreement, statement or representation not expressed herein has been agreed to or relied upon.

27. Choice of Law. This Agreement shall be interpreted in accordance with the laws and statutes of the State of Idaho.

28. **Notices.** Any notice required or permitted to be given under this Agreement and release shall be deemed given if sent to a Party by certified mail, return receipt requested, to the address set forth in paragraph 1 or to such other address as the Parties shall from time to time notify the others.

29. **Partial Invalidity.** In the event any portion of this Agreement shall be determined invalid, void or otherwise unenforceable, the remaining provisions shall remain in full force and effect, and shall in no way be affected, impaired or invalidated. It is understood that the remaining provisions shall be construed in a manner most closely approximating the intention of the Parties.

30. **Execution of Counterparts.** Duplicate copies of this Agreement may be signed by one or more of the Parties and their counsel and copies of this Agreement signed, collectively, by all Parties and their counsel shall be considered as a single, fully executed original document.

31. **Waiver.** Failure of a Party, or any of them, to exercise his rights upon any default of the other Party shall not be construed as the waiver of the right to insist upon full performance of all the terms and conditions of this settlement agreement and release, or of the right to exercise any other right contained in this settlement agreement and release.

32. **Time.** Time is declared to be of the essence to this Agreement.

33. **Warranty.** THE UNDERSIGNED PARTIES INDIVIDUALLY AND THROUGH THEIR COUNSEL REPRESENT AND WARRANT THAT THEY HAVE READ THE FOREGOING SETTLEMENT AGREEMENT AND MUTUAL RELEASE AND THAT THEY FULLY UNDERSTAND THE TERMS AND CONDITIONS SET FORTH HEREIN.

IN WITNESS WHEREOF, the Parties and their respective counsel have executed this Agreement on the date set forth above.

PATRICIA E. McKAY

Approved as to form and content:

COSHO HUMPHREY, LLP

By _____
Stanley W. Welsh
Attorneys for Patricia E. McKay

L. DARWIN MCKAY

Approved as to form and content:

BROOKS LAW, P.C.

By _____
Kimberly D. Brooks
Attorneys for L. Darwin McKay

MILLER & HARR

By _____
John A. Miller
Attorneys for L. Darwin McKay

STATE OF IDAHO)
) ss.
County of Ada)

On October 20, 2007, before me, the undersigned, a notary public in and for said county and state, personally appeared Patricia E. McKay, known to me to be the person whose name is subscribed to the within instrument and acknowledged to me that she executed the same.

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

NOTARY PUBLIC FOR IDAHO

Residing at _____

Commission Expires _____

STATE OF IDAHO)
) ss.
County of Ada)

On October 20, 2007, before me, the undersigned, a notary public in and for said county and state, personally appeared L. Darwin McKay, known to me to be the person whose name is subscribed to the within instrument and acknowledged to me that he executed the same.

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

NOTARY PUBLIC FOR IDAHO

Residing at _____

Commission Expires _____

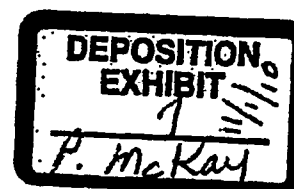
Pam Carson

From: Thomas G. Walker
Sent: Thursday, October 18, 2007 9:11 AM
To: Patricia McKay
Cc: Stanley W. Welsh; Melissa Wolfe; Pam Carson
Subject: McKay
Attachments: 278358.doc; 277869.xls

Importance: High

Patty: Attached is a draft Agreement of Compromise and Settlement and a revised Community Property Financial Statement.

Thomas G. Walker
Coshu Humphrey, LLP
800 Park Blvd., Suite 790
PO Box 9518
Boise, ID 83707-9518
Direct phone: 208-639-5607
Direct fax: 208-639-5609
E-mail: twalker@cosholaw.com
Blog: www.ricolawblog.com
RICO web site: www.thomasgwalker.com



Pam Carson

From: Thomas G. Walker
Sent: Thursday, October 18, 2007 10:53 AM
To: Stanley W. Welsh
Cc: Melissa Wolfe; Pam Carson
Subject: FW: McKay - Conversation w/Gene Thurston

Stan: See below. Let's discuss.

Thomas G. Walker
Coshu Humphrey, LLP
800 Park Blvd., Suite 790
PO Box 9518
Boise, ID 83707-9518
Direct phone: 208-639-5607
Direct fax: 208-639-5609
E-mail: twalker@cosholaw.com
Blog: www.ricolawblog.com
RICO web site: www.thomasgwalker.com

From: Patricia McKay [<mailto:patmckay@clearwire.net>]
Sent: Thursday, October 18, 2007 9:49 AM
To: Thomas G. Walker
Subject: McKay - Conversation w/Gene Thurston

I just visited with Gene Thurston on the phone about this Combined Balance Sheet of May 2007. His thoughts were, "something is not correct there because as of 2003 when I was working on all the financing and when the properties were valued at \$22,000/acre the net worth was \$11,000,000.00. 50% of that is yours Patty and technically I feel you are due blue sky too. Since Darwin sold the property for over \$100,000.00/acre the net should be at least half again the \$11,000,000.00."

I told Gene I may be lucky to walk away with the house and two million. He said, "No, don't do that – that would not be even close to fair. I'll tell you what, if you subpoena my records I'll show all I have and the values as of 2003 and then they should add the values of what he sold the land for. My records are very clear and precise."

Gene said it sounds like Darwin has omitted property and funds on the Balance Sheet assuming it is all his and none of it belongs to you or part of the settlement or even part of the business.

Gene and I ended our conversation with Gene saying, "Patty, this conversation never happened, but I will support you with the evidence, just have Tom subpoena me."

Tom, if things do not work out Saturday and Darwin is not forthright with the values, then I believe if we subpoena Gene's records and further take his deposition we could obtain a very similar financial review from him as Neil Salathe did. It would just be done under deposition and documents. Or, instead of doing a subpoena, take Gene's deposition asking him to bring all his documents.

Your thoughts please....



Stanley W. Welsh

From: Stanley W. Welsh
Sent: Sunday, October 21, 2007 10:21 AM
To: Patricia McKay
Cc: Thomas G. Walker
Subject: RE: McKay Settlement

Patty, I know you will make the best of this transition.

Many years ago my then senior partner told me that a bad settlement is better than a good trial. I know you know first hand what can happen in the trial process. Your last experience was to obtain a great result at trial and then the Supreme Court took away the award.

If your soon to ex does not find someone new to manage his money, he probably will find a way to lose most of what he has within a short time.

From: Patricia McKay [mailto:patmckay@dearwire.net]
Sent: Sun 10/21/2007 9:10 AM
To: Stanley W. Welsh
Subject: RE: McKay Settlement

Thank you Stan for your prompt reply. In fact, for all the prompt replies throughout this case. I appreciate your concern and what you will do to protect what we obtained. No, I did not hear the 2.5 figure but I can understand it with all the spending he has done over the past couple years. As much as he has given to his son and x-wife, he will probably continue and which may do both his business and his son's business in.

I need to adjust to this new phase of life I'm entering. I've always been a survivor. I will be looking for some work, preferably part time if you hear of anyone needing someone - I am excellent in an office and you know by now a few of my business abilities. The sermon today on Hour of Power by Robert Schular is "Walking in Your Own Shoes" and was directed to me at this time in my life.

Thank you again.

From: Stanley W. Welsh [mailto:swelsh@CoshLaw.com]
Sent: Sunday, October 21, 2007 7:40 AM
To: Patricia McKay; Thomas G. Walker
Subject: RE: McKay Settlement

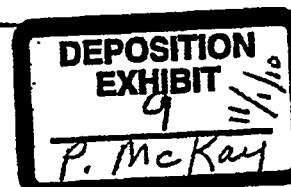
Darwin claimed that his total net worth was 2.5 million. I do not think he said 4.5. We will write up the document in the form of a judgment. We will provide for as much security as we can. We will also try to limit his ability to just change the deal with Stratus.

You will recall that I said if you do not like the deal, then we could end the session and proceed since we believed we had a good case. Regardless, you would have the risk of what this market does.

I understood that you did not think you could sell the Palace Resorts.

From: Patricia McKay [mailto:patmckay@dearwire.net]

10/22/2007



CH01944

000264

Sent: Sun 10/21/2007 6:44 AM
To: Stanley W. Welsh; Thomas G. Walker
Subject: FW: McKay Settlement

Hello Stan and Tom,

I have not been to sleep at all and I feel I have just made a terrible mistake. I do not feel Darwin was fair in the negotiations at all and I guess I really need to place the blame on myself. I am writing this because I do not know what you can do about where I stand in all this other than you'll probably tell me I have to accept it all. I feel we should have added everything up before we signed. Here are some of my concerns and perhaps you can have those covered in the written agreement you'll be preparing.

Because no land was given to me as collateral and Darwin has full control over it and the Status deal he can cancel the deal with Status and have it rewritten. In doing so he can tell us the deal fell through and he would only have to pay me the \$500,000.00 and I would loose the 2 lots. This will then bring the total settlement to me down to \$ 1,478,500.00.00. This is not even close to 50% of the 4.5 million they expressed and as we all agreed, we felt Darwin was not accurate with stating the net worth.

I do not feel Judge McGee even read the documents we sent him as he was not aware of several items that were brought up and he would have been had he read the Statement of Facts. I also feel he rushed us by expressing to us when he came back before our last session with him and expressed, "They are packing up to go over there." From that point on I felt very rushed and was thinking clearly.

Since you'll be writing up the final settlement contract and there are a few things I've thought about that need to be covered in it. Mainly, the mortgage Darwin will be paying needs to specify that it is what we both have known to be the mortgage during our marriage to include taxes and insurance.

I would also like to have them return the original education and employment history documents Darwin removed from the home as well as the construction file folder which has the building receipts in it as I'll need those in the future should I sell the home.

Again, I was wrong in not adding up the final settlement. I was also wrong in not talking the Palace Resorts as I probably could have done something with that.

Thank you.

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10/22/2007

other person (i) in promoting, marketing or recommending any transaction, plan or arrangement or (ii) for the purpose of avoiding penalties that may be imposed under federal tax law.

10/22/2007

CH01946

000266

Pam Carson

From: Thomas G. Walker
Sent: Friday, October 19, 2007 7:51 AM
To: Stanley W. Welsh; Melissa Wolfe; Pam Carson
Subject: FW: McKay

FYI.

Thomas G. Walker
Coshu Humphrey, LLP
800 Park Blvd., Suite 790
PO Box 9518
Boise, ID 83707-9518
Direct phone: 208-639-5607
Direct fax: 208-639-5609
E-mail: twalker@cosholaw.com
Blog: www.ricolawblog.com
RICO web site: www.thomasgwalker.com

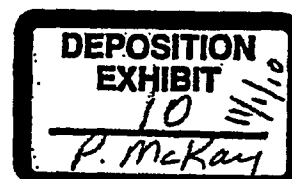
From: Patricia McKay [<mailto:patmckay@clearwire.net>]
Sent: Friday, October 19, 2007 7:49 AM
To: Thomas G. Walker
Subject: RE: McKay

Thank you for all the hard work and patience you, Stan, and your staff have shown toward me. I can only pray that Judge McKee has read and understood all in the Memorandum as well as the Statement of Facts and has compassion. See you at 9:30.

From: Thomas G. Walker [<mailto:twalker@cosholaw.com>]
Sent: Friday, October 19, 2007 7:26 AM
To: Patricia McKay
Cc: Stanley W. Welsh; Melissa Wolfe; Pam Carson
Subject: McKay

Patty: Bring a book or something to read tomorrow. There will likely be a lot of down time between caucus sessions with Judge McKee. See you at 9:30 a.m. at the front door of our building.

Thomas G. Walker
Coshu Humphrey, LLP
800 Park Blvd., Suite 790
PO Box 9518
Boise, ID 83707-9518
Direct phone: 208-639-5607
Direct fax: 208-639-5609
E-mail: twalker@cosholaw.com
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RICO web site: www.thomasgwalker.com



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McKay v McKay

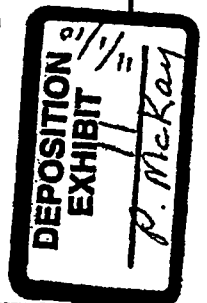
10/20/07

Parties agree to following terms in full satisfaction of property settlement issues:

1) Wife will receive home of parties, free and clear of all encumbrances, and all furnishings and contents therein. Husband to make all payments on 1st and 2^d mortgages, and to arrange for release of same, upon settlement of Statens (or Union Development) real estate deal (March of 2008) or within 60 months thereafter if the deal fails.

2) Wife to receive Box Office Production stock, her automobile and parties motor home.

3) Husband to assume and pay off (either directly or by payments to wife) the wife's credit card indebtedness as of this date on 6 credit cards, to be scheduled, of approx total balance of \$75,000.



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4) Husband to pay Wife \$2500 per month for maintenance, until ~~the State does not happen~~ ^{either of the payments (1st to occur) in paragraph 6 below} is made. All liability for maintenance to then end.

5) Husband to pay wife \$100,000 in 4 monthly installments of \$25,000 each, in Jan. Feb. Mar. and April of 2008.

6) If States (Union Development) real estate transaction is completed in March of 2008, Husband will pay Wife \$800,000 out of proceeds, and ^{convey} ~~transfer~~ the 2 designated reserved lots to be created under said deal. If the deal falls, Husband will pay Wife \$500,000, within 6 months.

7) Husband to file (or amend) income tax returns for parties, for tax years ~~2005~~ 2005, 2006 and

393

Patricia May, Stacey
Julie Miller
Dennis McKay
Attorney for Defendant

Kimberly D. Brady
Attorney for Defendant

(through date of divorce)

2007, Wife will cooperate with any information or documentation, and with joint filing through date of divorce. Husband to keep any refund or pay over tax due

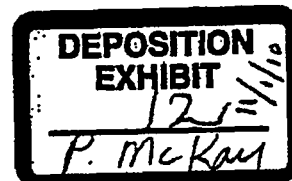
8) Parties, through counsel, to incorporate these terms into a comprehensive property settlement agreement. Parties agree that any dispute over the terms thereof or otherwise over the implementation of this agreement will be submitted to Judge McKee for binding arbitration. This agreement to arbitrate is to ensure that a binding agreement results from these proceedings - and does not survive the execution of the final settlement agreement by all parties.

Pam Carson

From: Thomas G. Walker
Sent: Monday, October 22, 2007 8:22 AM
To: Patricia McKay
Cc: Stanley W. Welsh; Melissa Wolfe; Pam Carson
Subject: McKay

Patty: We're working on the Judgment and Decree of Divorce and Property Settlement. Please fax or email me your most current credit card statements for the cards that Darwin will be paying off. If you can download the statements and unbilled activity from the credit cards' web sites that would be best. Also, fax or email me the most recent first and second mortgage statements, or if you can download the most recent information from the lenders' web sites that would be good too.

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E-mail: twalker@cosholaw.com
Blog: www.ricolawblog.com
RICO web site: www.thomasgwalker.com



Pam Carson

From: Thomas G. Walker
Sent: Monday, October 22, 2007 9:57 AM
To: Patricia McKay
Cc: Melissa Wolfe; Pam Carson
Subject: RE: McKay CrCards and Mortgages

I haven't yet received any faxes from you this morning.

Thomas G. Walker
Coshu Humphrey, LLP
800 Park Blvd., Suite 790
PO Box 9518
Boise, ID 83707-9518
Direct phone: 208-639-5607
Direct fax: 208-639-5609
E-mail: twalker@cosholaw.com
Blog: www.ricolawblog.com
RICO web site: www.thomasgwalker.com

From: Patricia McKay [<mailto:patmckay@clearwire.net>]
Sent: Monday, October 22, 2007 9:44 AM
To: Thomas G. Walker
Subject: McKay CrCards and Mortgages

I have three credit cards with balances:

| | |
|------------------------|--------------|
| Chase Visa ending 2116 | \$ 48,327.00 |
| Chase Visa ending 0853 | \$ 2,076.17 |
| Bank America 0232 | \$ 22,845.13 |

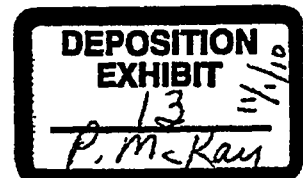
Mortgage on home is with World Savings \$ 556,324.34
Second mortgage is Countrywide \$ 67,490.49 This is at 10.625% interest, daily interest rate of 0.02911% 20 days in October would be \$393.00.

Do you calculate the amount due for October through the 20th or for the entire month since Darwin may not get it paid until November 1st? If he does not get it paid until November 1 then the monthly interest payment for October would be \$609.03 plus the \$67,490.49. I am faxing you the Countrywide statement for last month to show the interest rate.

I have faxed you the above credit card statements (3) which I took off the Internet this morning as you requested. The World Savings statement is the most current for the next payment due.

I receive the World Savings monthly statement around the 15th of each month for the next month. What is the best way for Darwin to receive this notice in the future and for me to know for sure when he makes the payment. It is critical to me that I know the payment has been made so as to protect my credit rating.

Thank you Tom for all the hard work you've done for me. I have enjoyed working with you.

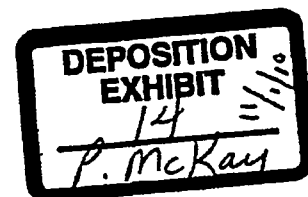


Pam Carson

From: Thomas G. Walker
Sent: Tuesday, October 23, 2007 7:24 AM
To: Kimberly Brooks (kim@kbrookslaw.com); johnmiller@boiselaw.net
Cc: Stanley W. Welsh; Melissa Wolfe; Pam Carson
Subject: McKay v. McKay

Kim and John: We plan on providing you with drafts of the following documents later today:
Stipulation for Entry of Judgment and Decree of Divorce, Judgment and Decree of Divorce, and
Property Settlement Agreement.

Thomas G. Walker
Coshu Humphrey, LLP
800 Park Blvd., Suite 790
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Direct fax: 208-639-5609
E-mail: twalker@cosholaw.com
Blog: www.ricolawblog.com
RICO web site: www.thomasgwalker.com



Pam Carson

From: Thomas G. Walker
Sent: Tuesday, October 23, 2007 10:29 AM
To: Patricia McKay
Cc: Stanley W. Welsh; Melissa Wolfe; Pam Carson
Subject: RE: McKay Settlement Agreement

I will add a provision requiring The Turf Corporation to meet the requirements of COBRA. See below for further comments.

Thomas G. Walker
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Direct phone: 208-639-5607
Direct fax: 208-639-5609
E-mail: twalker@coshlaw.com
Blog: www.nicolawblog.com
RICO web site: www.thomasgwalker.com

From: Patricia McKay [mailto:patmckay@clearwire.net]
Sent: Tuesday, October 23, 2007 10:25 AM
To: Thomas G. Walker
Subject: RE: McKay Settlement Agreement

Health Insurance was not covered Saturday at all. I've been on the phone with Regence Blue Shield Health Insurance. I've learned it is the responsibility of the Employer to set me up on Cobra and they have 60 days to do so.

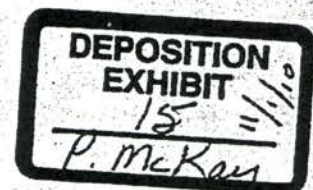
Perhaps something needs to be in the Agreement covering them setting me up on Cobra or offering this to me.

SEE Below for clarification.

From: Thomas G. Walker [mailto:twalker@CoshLaw.com]
Sent: Tuesday, October 23, 2007 9:43 AM
To: Patricia McKay
Cc: Stanley W. Welsh; Melissa Wolfe; Pam Carson
Subject: RE: McKay Settlement Agreement

Patty:

We have intentionally not characterized any of the payments to you from Darwin as alimony. Under this approach all of the payments you receive will be property equalization payments and not subject to income taxes. Darwin may protest this approach. We'll have to wait and see. If Darwin insists that a portion of the payments be characterized as alimony, he will get a deduction for the alimony payments and you will have to include the amount of the payments as ordinary income. Darwin will not be able to deduct any of the payments under the proposed Property Settlement Agreement. Under current law, so long as you are paying the mortgage interest payments, you will be entitled to



CH 2659

000275

the interest deductions.// So does this mean he can take the interest deduction even though his name is not on the principal residence as your next sentence reads? Darwin can't qualify to deduct the home mortgage interest payments because the Personal Residence is not his principal residence.// so, who will claim the interest payments? Perhaps because the house is in my name, if Darwin protests, we can use this as leverage. // Under no circumstances pursuant to current law will Darwin be able to qualify to take the mortgage interest deductions because you will own the house. You and you alone will be entitled to the mortgage interest deduction, unless you convert the residence to an investment property. Stan informed me that you did not terminate the tenancy of the renters. You need to check with your accountant to determine whether renting rooms in your home has any effect on your qualification to take the mortgage interest deduction. It would seem that, in any event, you have rental income reportable as ordinary income on your tax return, but you need to rely on your accountant for that advice.

If he really protests, perhaps we can say he can have this deduction in exchange for him giving me Palace Resorts which I gave back to him in the first opening offer Saturday. I really should have kept that. // See above.

I will add the vehicles and motor home. Sorry I forgot those items. I will also add the house construction folder.

I plan on sending the drafts to Kim and John early this afternoon. So please complete your final review by Noon.

Thomas G. Walker
Cosh Humphrey, LLP
800 Park Blvd., Suite 790
PO Box 9518
Boise, ID 83707-9518
Direct phone: 208-639-5607
Direct fax: 208-639-5609
E-mail: twalker@coshlaw.com
Blog: www.ricolawblog.com
RICO web site: www.thomasowalker.com

From: Patricia McKay [mailto:patmckay@clearwire.net]
Sent: Tuesday, October 23, 2007 9:38 AM
To: Thomas G. Walker
Subject: McKay Settlement Agreement

I remember several years ago we had a problem with the IRS due to who claimed or whatever the alimony regarding Darwin's divorce from Donna as in their decree I don't believe it was covered.

Can this be covered in the "Property Settlement Agreement"? Under Item 8 regarding the taxes I see Darwin pays for tax preparations for 2005, 2006, and 2007 and received any and all tax refunds. If the house is not paid off March/April 2008, is he able to take all the interest paid on his future taxes after 2007 since he is going to be paying the mortgage. I will be working some and will need some tax write-off perhaps. If I am able to take the tax write-off of the mortgage interest payments then this would be additional incentive for him paying off the house ASAP.

What tax ramifications am I going to have when I receive the \$800,000.00? Again, referring to Darwin's previous divorce, it was stipulated a certain way so that Donna did not have to pay taxes on the funds she received.

I'd prefer not to find myself stuck to pay taxes on that much money, if there is a way in whether it is stated as property settlement or alimony. Perhaps this needs to be covered in the Agreement so we do not have to converse later. All I'd need to do is show this Agreement to the CPA I'll be using.

The vehicle transfers were not covered in this Agreement. Darwin has the motorhome and I am to receive it. When he took it to the business to store he was to make sure it was winterized. He needs to return it to me in working condition throughout. If he did not winterize it then repairs will need to be made to the water system due to freezing and pipes breaking. Can we please include "return of the motorhome to Patricia in excellent working condition as it was when he stored it."

I also need to have the "House construction folder with receipts, etc." returned to me. They were given this as a reply to one of the interrogatories. I need to have this returned to have proof of the construction and improvements done on the home for when/if I sell the home.

This is all I could find at the present. I'll read it through again in a couple hours to see if anything else pops up.

Thank you.

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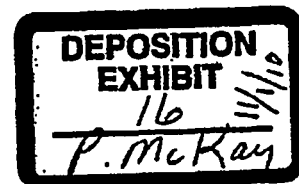
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Pam Carson

From: Thomas G. Walker
Sent: Tuesday, October 23, 2007 12:49 PM
To: Kimberly Brooks (kim@kbrookslaw.com); johnmiller@boiselaw.net
Cc: Stanley W. Welsh; Melissa Wolfe; Pam Carson; Patricia McKay
Subject: McKay v. McKay
Attachments: 279217.doc; 279198.doc; 279194_2.doc

Kim and John: Attached are drafts of the following documents: Stipulation for Entry of Judgment and Decree of Divorce, Judgment and Decree of Divorce, and Property Settlement Agreement.

Thomas G. Walker
Coshö Humphrey, LLP
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Boise, ID 83707-9518
Direct phone: 208-639-5607
Direct fax: 208-639-5609
E-mail: twalker@cosholaw.com
Blog: www.ricolawblog.com
RICO web site: www.thomasgwalker.com



Stanley W. Welsh (ISB No. 1964)
Thomas G. Walker (ISB No. 1856)
Cosho Humphrey, LLP
800 Park Blvd., Suite 790
P. O. Box 9518
Boise, Idaho 83707-9518
Direct Phone: (208) 639-5607
Cell phones: (208) 869-1508
Direct Facsimile: (208) 639-5609
E-mail: swelsh@cosholaw.com; twalker@cosholaw.com

Attorneys for Plaintiff Patricia McKay

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF

THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

MAGISTRATE DIVISION

★ ★ ★ ★ ★

PATRICIA McKAY,

Plaintiff,

v.

DARWIN McKAY,

Defendant.

Case No. CV DR 0615200

**STIPULATION FOR ENTRY OF
JUDGMENT AND DECREE OF
DIVORCE**

Plaintiff Patricia E. McKay ("Patricia"), by and through her counsel, Stanley W. Welsh of Cosho Humphrey, LLP, and L. Darwin McKay ("Darwin"), by and through his counsel, Kimberly D. Brooks of Brooks Law, P.C. and John A. Miller of Miller and Harr, do hereby stipulate that the Judgment and Decree of Divorce, including the incorporated Property Settlement Agreement submitted herewith may be entered by the Court.

Dated: October __, 2007.

PATRICIA E. McKAY

Approved:

COSHO HUMPHREY, LLP

By _____
Stanley W. Welsh
Attorneys for Patricia E. McKay

Dated: October __, 2007.

L. DARWIN McKAY

Approved:

BROOKS LAW, P.C.

By _____
Kimberly D. Brooks
Attorneys for L. Darwin McKay

MILLER & HARR

By _____
John A. Miller
Attorneys for L. Darwin McKay

Stanley W. Welsh (ISB No. 1964)
Thomas G. Walker (ISB No. 1856)
Cosho Humphrey, LLP
800 Park Blvd., Suite 790
P. O. Box 9518
Boise, Idaho 83707-9518
Direct Phone: (208) 639-5607
Cell phone: (208) 869-1508
Direct Facsimile: (208) 639-5609
E-mail: swelsh@cosholaw.com; twalker@cosholaw.com

Attorneys for Plaintiff Patricia McKay

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA
MAGISTRATE DIVISION

★ ★ ★ ★ ★

PATRICIA McKAY,

Plaintiff,

v.

DARWIN McKAY,

Defendant.

Case No. CV DR 0615200

JUDGMENT AND DECREE OF
DIVORCE

Based upon the Stipulation of the parties, IT IS HEREBY ORDERED ADJUDGED
AND DECREED as follows:

1. **DIVORCE**: The Plaintiff ("Patricia") and the Defendant ("Darwin") were married on July 6, 1996 in Nassau, Island of the Bahamas. Patricia and Darwin are granted a divorce from one another on the grounds of irreconcilable differences. Each is restored to the status of a single person.

JUDGMENT AND DECREE OF DIVORCE
279198

Page 1

CH 2671

000281

2. **PROPERTY SETTLEMENT AGREEMENT:** The Property Settlement Agreement dated October 20, 2007 attached hereto as Exhibit A is approved by this Court and is merged with and incorporated into this Judgment and Decree of Divorce.

DATED: October __, 2007.

MAGISTRATE

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the __ day of October 2007 a true and correct copy of the foregoing Judgment and Decree of Divorce was served upon:

Stanley W. Welsh
Cosho Humphrey, LLP
800 Park Blvd., Suite 790
Boise, ID 83712
P.O. Box 9518
Boise, ID 83707-9518

☐ U.S. Mail
☐ Hand Delivery
☐ Overnight Courier
☐ Facsimile
☐ E-mail:

Kimberly D. Brooks
Brooks Law, P.C.
23 9th Ave. North
Nampa, ID 83687

☐ U.S. Mail
☐ Hand Delivery
☐ Overnight Courier
☐ Facsimile
☐ E-mail:

John A. Miller
Miller & Harr
Attorneys at Law
1401 Shoreline Drive, Suite 3
Boise, Idaho 83702

☐ U.S. Mail
☐ Hand Delivery
☐ Overnight Courier
☐ Facsimile
☐ E-mail:

Exhibit A

Stanley W. Welsh (ISB No. 1964)
Thomas G. Walker (ISB No. 1856)
Coshu Humphrey, LLP
800 Park Blvd., Suite 790
P. O. Box 9518
Boise, Idaho 83707-9518
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Cell phone: (208) 869-1508
Direct Facsimile: (208) 639-5609
E-mail: swelsh@cosholaw.com; twalker@cosholaw.com

Attorneys for Plaintiff Patricia McKay

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF

THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

MAGISTRATE DIVISION

★ ★ ★ ★ ★

PATRICIA E. McKAY,

Plaintiff,

v.

L. DARWIN McKAY,

Defendant.

Case No. CV DR 0615200

**PROPERTY SETTLEMENT
AGREEMENT INCORPORATED AND
MERGED WITH AND INTO
JUDGMENT AND DECREE OF
DIVORCE**

This Property Settlement Agreement ("Agreement") is made and entered into this 20th day of October 2007 by and between Patricia E. McKay, Plaintiff ("Patricia" or "Plaintiff"), and L. Darwin McKay, Defendant ("Darwin" or "Defendant"). Patricia and Darwin are sometimes individually referred to as a "Party" or collectively referred to as the "Parties". This Agreement

is binding and enforceable upon the terms stated herein, notwithstanding the fact that additional documentation is required to carry out the terms of this Agreement.

1. Community Property. The Parties agree to the following settlement of their community property:

1.1. Subject to the provisions of paragraph 2.1 below, Patricia shall receive the personal residence located at 25 Horizon Drive, Boise, Idaho and all personal property and furniture contained therein ("Personal Residence") free and clear of all encumbrances. Darwin shall transfer to Patricia as her sole and separate property by good and sufficient quit claim deed and quit claim bill of sale all of his right, title and interest in and to the Personal Residence, including all personal property and furniture.

1.2. Patricia shall receive the Box Office Productions stock free and clear of all encumbrances. Darwin shall transfer to Patricia as her sole and separate property by good and sufficient assignment separate from stock certificate all of his right, title and interest in and to the Box Office Productions stock.

1.3. Patricia shall receive her IRA account. Darwin shall transfer to Patricia as her sole and separate property by good and sufficient assignment all of his right, title and interest in and to Patricia's IRA account.

1.4. Patricia shall receive the vehicle in her possession and the motor home. Darwin shall transfer to Patricia as her sole and separate property by good and sufficient bill of

sale and endorcement on the respective Certificates of Title all of his right, title and interest in and Patricia's vehicle and the motorhome.

1.5. Darwin will return the Personal Residence construction folder and its contents to Patricia for her tax records.

1.6. Darwin will cause The Turf Corporation, or affiliates, to provide Patricia with her rights under COBRA.

1.7. Darwin shall pay to Patricia \$100,000.00 in four equal consecutive monthly installments of \$25,000.00 each commencing on January 2, 2008 and thereafter on or before the 2nd day of February, March and April, 2008. The Parties acknowledge that the \$100,000.00 amount was based upon a portion of Patricia's attorneys' fees and litigation expenses. In accordance with Idaho Code § 32-704(3) said payments shall be paid by Darwin directly to Cosho Humphrey, LLP, who may enforce this portion of the Judgment in its own name; provided, however, Patricia may pay Cosho Humphrey, LLP prior to any such installment in which case, the payment or payments shall be paid to Patricia.

1.8. Darwin shall pay Patricia \$800,000.00, in immediately available funds, within five (5) days of the date the Status Corporation, or assigns, real estate transaction closes ("Status Real Estate Transaction"). The Parties acknowledge that the Status Real Estate Transaction is scheduled to close on or before March 30, 2008. Darwin shall diligently pursue the closing and shall not do anything to interfere with or delay the closing. Darwin shall not renegotiate any of the terms or conditions of the the Real Estate Purchase and Sale Agreement

and Receipt for Earnest Money dated February 21, 2006, as modified and amended by Addenda numbered 1 through 6 (collectively referred to as the "Purchase and Sale Agreement), or accept any changes thereto, without Patricia's express written consent, which consent may only be given after she has had not less than five (5) business days to consider any changed terms or conditions. In addition to the \$800,000.00 payment described above, Darwin shall convey to Patricia the two (2) lots included in the consideration being paid by Status Corporation, or assigns, as part of the Status Real Estate Transaction. If the Status Real Estate Transaction fails to close on or before March 30, 2008, Darwin shall diligently pursue all available legal and equitable remedies to enforce the terms and conditions of Purchase and Sale Agreement or recover damages. If Darwin's good faith efforts to enforce all available legal and equitable remedies fail, Darwin shall pay Patricia \$500,000.00 in immediately available funds on or before September 30, 2008.

2. Community Debts. The Parties agree to the following settlement of their community debts:

2.1. Commencing on November 1, 2007 and continuing thereafter as provided in this paragraph, Darwin shall pay Patricia as property equalization payments an amount equal to the respective monthly payments of principal, interest, property taxes and insurance required by the first and second priority debts encumbering the Personal Residence ("Personal Residence Debt"). The payments required under this paragraph shall terminate when Darwin pays off the Personal Residence Debt. Darwin shall payoff the Personal Residence Debt within five (5) days of the date the Status Real Estate Transaction closes. If the Status Real Estate Transaction fails

to close on or before March 30, 2008, Darwin shall diligently pursue all available legal and equitable remedies to enforce the terms and conditions of Purchase and Sale Agreement or recover damages. If Darwin's good faith efforts to enforce all available legal and equitable remedies fail, Darwin shall continue to timely pay the monthly payments provided for herein until the Personal Residence Debt is fully paid, but in any event, Darwin shall payoff the Personal Residence Debt on or before October 20, 2012. Notwithstanding the foregoing, Patricia shall have the right to sell the Personal Residence at any time; in which case, the Personal Residence Debt would likely be paid off out of the sale proceeds. If Patricia sells the Personal Residence, Darwin shall pay directly to Patricia as a property equalization payment the unpaid principal balance of the Personal Residence Debt, plus interest accruing at the same rates called for in the first and second loan documents as follows:

2.1.1. If the Status Real Estate Transaction closes, Darwin shall pay off the full amount of the Personal Residence Debt to Patricia, within five (5) days of the date the Status Real Estate Transaction closes.

2.1.2. If the Status Real Estate Transaction fails to close on or before March 30, 2008, Darwin shall diligently pursue all available legal and equitable remedies to enforce the terms and conditions of Purchase and Sale Agreement or recover damages. If Darwin's good faith efforts to enforce all available legal and equitable remedies fail, Darwin shall continue to timely pay to Patricia monthly property equalization payments equal to the principal and interest that would have been due under the loan documents evidencing the

Personal Residence Debt until the amount is fully paid, but in any event, Darwin shall pay all such principal and accrued interest to Patricia on or before October 20, 2012.

2.2. On or before November 5, 2007 Darwin shall pay to Patricia as property equalization payments the following credit card debt amounts:

| | |
|---------------------------------------|------------------|
| 2.2.1. Chase Visa ending in 2116 | \$46,327.00 |
| 2.2.2. Chase Visa ending in 0853 | 2,076.17 |
| 2.2.3. Bank of America ending in 0232 | <u>22,845.13</u> |
| | \$71,248.30 |

3. Additional Payments from Darwin to Patricia. Commencing on November 1, 2007 and continuing until the Status Real Estate Transaction closes, Darwin shall, on or before the first day of each consecutive month, pay Patricia the sum of \$2,500.00.

4. Full Disclosure. Each Party represents to the other that full disclosure of all community assets and community liabilities, of which he or she is aware, has been made.

5. Allocation of Property to Darwin. Except as expressly provided herein, Patricia agrees to transfer by good and sufficient quit claim deed, quit claim bill of sale, quit claim assignment and/or other necessary quit claim document of conveyance all of her right, title and interest to Darwin in and to all of the community property, as his sole and separate property.

6. Disposition of Property. Subject to the provisions of this Agreement, each of the Parties hereto may dispose of his or her property of whatever nature, real or personal; and the Parties hereto, each for himself and herself, respectively, and for the respective heirs, legal representatives, executors and administrators and assigns, hereby waives any right of election which he or she may have or hereafter acquire regarding the estate of the other, or any right to

take against any last will and testament of the other, whether heretofore or hereafter executed, or as may now or hereafter be provided for in any law of the State of Idaho or any other state or territory of the United States or any foreign country, and hereby renounces and releases all interest, right or claim that he or she now has or might otherwise have against the other, under or by virtue of the laws of any state or country.

7. **Release of Patricia from all Debts and Personal Guarantees.** On or before December 1, 2007, Darwin shall obtain at his sole cost and expense written releases of Patricia from liability for all debts whether such debts are owed to banks, vendors, and/or other creditors for whom Patricia may have liability for any reason, including but not limited to Patricia's execution of notes, personal guarantees or collateral security documents that she delivered during the Parties' marriage.

8. **Payment of Accounting Fees and Income Taxes by Darwin.** Darwin shall pay for the preparation of state and federal income tax returns and/or amended returns for the Parties for 2005, 2006 and 2007. The Parties agree to file said tax returns under the filing status resulting in the lowest state and federal income taxes. The Parties agree to cooperate with the accountant as necessary to complete the filing of such returns. Darwin shall pay all state and federal income taxes, interest and penalties, if any, for all years prior to January 1, 2008 and Darwin shall be entitled to all tax refunds, if any.

9. **Separate Property / Income After Execution of Agreement.** The Parties hereto stipulate and agree that from and after the date of the signing of this Agreement, any and all

property or income acquired or earned by either Party hereto shall be the separate property of the Party who has acquired or earned it, any income on separate property shall be separate property and the other Party shall have no claim on any separate property income or earnings.

10. Debts after Execution of Agreement. The Parties agree that from and after the date of the signing of this Agreement, any debts incurred by either Party hereto shall be the separate debt of the Party incurring the debt and shall not be a community debt. The Parties hereto agree not to incur any debt for which the other Party may be liable.

11. Mutual Release of Claims. For good and valuable consideration passing between the Parties, the receipt and sufficiency of which is acknowledged by each Party, the Parties each for themselves and for their heirs, representatives, agents, employees, successors, executors, administrators, subrogees and assigns, release the other Party and his or her heirs, representatives, agents, employees, successors, executors, administrators, subrogees and assigns, and each Party shall release, indemnify and hold harmless the other Party from any and all claims, liabilities or obligations arising out of or in any way connected with their marriage, including but not limited to all claims set forth in or comprehended by that certain litigation identified in the caption above. The term claims shall include any and all claims and counterclaims, whether known or unknown, a Party may have against the other Party as a result of their marriage and the litigation identified above.

12. Entry of Decree of Divorce. The Parties agree that on or before five (5) business days from the execution of this Property Settlement Agreement, they will execute a stipulation for entry of a Judgment and Decree of Divorce to be filed with the Court.

13. Merger with and into Judgment and Decree. This Agreement shall be merged with and into the Judgment and Decree of Divorce.

14. No Undue Influence. The Parties agree that they have entered into this Agreement without undue influence or fraud or coercion or misrepresentation or for any other like cause.

15. Further Performance. The Parties agree to execute all additional documents and take such further steps as shall be required to effectuate and carry out the performance of this Agreement.

16. Amendments. This Agreement may not be amended, modified, altered or changed in any respect whatsoever, except by further agreement in writing duly executed by the Parties.

17. Cooperative Effort. The parties acknowledge that this Agreement is the result of a cooperative effort between them and their independent counsel, and that in the event of any dispute over the meaning or effect of any provision herein, the rule of interpretation of ambiguous terms against the drafting party shall have no application.

18. Advice of Counsel. The Parties stipulate that they have been represented by counsel and are familiar with the terms, conditions and effect of this Agreement.

19. **Attorney Fees.** In the event of any controversy, claim, or action being made, filed, or instituted between the parties to this Agreement or any of the other documents related hereto, or arising from the breach of any provision hereof, the prevailing party will be entitled to receive from the other party all costs, damages, and expenses, including reasonable attorney's and paralegal's fees incurred by the prevailing party, whether or not such controversy or claim is litigated or prosecuted to judgment. Court costs and attorney and paralegal fees include those incurred as a result of bankruptcy, or on appeal.

20. **Mediation Expense.** Darwin shall pay one-half and Patricia shall pay one-half of all fees and expenses of mediation.

21. **Binding Agreement.** This Agreement is binding upon the heirs, successors and assigns of the Parties.

22. **Free and Voluntary Act.** Each Party further acknowledges: (a) that settlement of his or her claims alleged against the other in this litigation and the execution and delivery of this Agreement and release by him or her, are by his or her free and voluntary act; and (b) that no promise, agreement, statement or representation not expressed herein has been agreed to or relied upon.

23. **Choice of Law.** This Agreement shall be interpreted in accordance with the laws and statutes of the State of Idaho.

24. **Notices.** All notices and demands required or permitted under this Agreement shall be in writing, containing the information required by this Agreement to be communicated to

any person, personally delivered to such person or sent by certified mail, postage prepaid, or by reputable overnight air courier service (e.g., Federal Express or United Parcel Service) to such person at the last known address of such person. The earlier of the date of personal delivery or two business days following the date of mailing or the date of delivery to the air courier thereof, as the case may be, shall be deemed the date of receipt of notice, unless proof of untimely delivery or non-delivery is provided by the addressee. The sender shall bear the risk of untimely delivery and non-delivery.

25. Partial Invalidity. In the event any portion of this Agreement shall be determined invalid, void or otherwise unenforceable, the remaining provisions shall remain in full force and effect, and shall in no way be affected, impaired or invalidated. It is understood that the remaining provisions shall be construed in a manner most closely approximating the intention of the Parties.

26. Execution of Counterparts. Duplicate copies of this Agreement may be signed by one or more of the Parties and their counsel and copies of this Agreement signed, collectively, by all Parties and their counsel shall be considered as a single, fully executed original document.

27. Waiver. Failure of a Party, or any of them, to exercise his or her rights upon any default of the other Party shall not be construed as the waiver of the right to insist upon full performance of all the terms and conditions of this Agreement, or of the right to exercise any other right contained in this Agreement.

28. Time is of the essence of this Agreement and each and all of its provisions in which performance is a factor.

29. **Warranty.** THE UNDERSIGNED PARTIES INDIVIDUALLY AND THROUGH THEIR COUNSEL REPRESENT AND WARRANT THAT THEY HAVE READ THE FOREGOING AGREEMENT AND THAT THEY FULLY UNDERSTAND THE TERMS AND CONDITIONS SET FORTH HEREIN.

The remainder of this page was intentionally left blank

IN WITNESS WHEREOF, the Parties and their respective counsel have executed this Agreement on the date set forth above.

PATRICIA E. McKAY

Approved as to form and content:

COSHO HUMPHREY, LLP

By _____
Stanley W. Welsh
Attorneys for Patricia E. McKay

L. DARWIN McKAY

Approved as to form and content:

BROOKS LAW, P.C.

By _____
Kimberly D. Brooks
Attorneys for L. Darwin McKay

MILLER & HARR

By _____
John A. Miller
Attorneys for L. Darwin McKay

STATE OF IDAHO)
) ss.
County of Ada)

On October __, 2007, before me, the undersigned, a notary public in and for said county and state, personally appeared Patricia E. McKay, known to me to be the person whose name is subscribed to the within instrument and acknowledged to me that she executed the same.

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

NOTARY PUBLIC FOR IDAHO

Residing at _____

Commission Expires _____

STATE OF IDAHO)
) ss.
County of Ada)

On October __, 2007, before me, the undersigned, a notary public in and for said county and state, personally appeared L. Darwin McKay, known to me to be the person whose name is subscribed to the within instrument and acknowledged to me that he executed the same.

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

NOTARY PUBLIC FOR IDAHO

Residing at _____

Commission Expires _____

Pam Carson

From: Thomas G. Walker
Sent: Tuesday, October 23, 2007 4:21 PM
To: Patricia McKay
Cc: Stanley W. Welsh; Melissa Wolfe; Pam Carson
Subject: RE: McKay v. McKay

Our plan is to record the Judgment and Decree of Divorce, which then becomes a lien on all of Darwin's real and personal property. We don't want to emphasize this aspect of the settlement. So, we don't want to say anything until after the judge signs the Judgment and Decree.

From: Patricia McKay [mailto:patmckay@clearwire.net]
Sent: Tue 10/23/2007 4:15 PM
To: Thomas G. Walker
Subject: RE: McKay v. McKay

All looks good Tom. However, can I place a lien with the title company on the Status Corp closure so the \$800,000.00 are paid to me by them? This is what we had to do when property sold that Donna had so the funds would come to us instead of thru Donna.

Thank you.

From: Thomas G. Walker [mailto:twalker@cosholaw.com]
Sent: Tuesday, October 23, 2007 12:49 PM
To: kim@kbrookslaw.com; johnmiller@boislaw.net
Cc: Stanley W. Welsh; Melissa Wolfe; Pam Carson; Patricia McKay
Subject: McKay v. McKay

Kim and John: Attached are drafts of the following documents: Stipulation for Entry of Judgment and Decree of Divorce, Judgment and Decree of Divorce, and Property Settlement Agreement.

Thomas G. Walker
Cosh Humphrey, LLP
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PO Box 9518
Boise, ID 83707-9518
Direct phone: 208-639-5607
Direct fax: 208-639-5609
E-mail: twalker@cosholaw.com
Blog: www.ricolawblog.com
RICO web site: www.thomasgwalker.com



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Any tax advice contained herein was not intended or written to be used, and cannot be used, by any other person (i) in promoting, marketing or recommending any transaction, plan or arrangement or (ii) for the purpose of avoiding penalties that may be imposed under federal tax law.

Pam Carson

From: Thomas G. Walker
Sent: Wednesday, October 24, 2007 5:36 AM
To: Patricia McKay
Cc: Stanley W. Welsh; Melissa Wolfe; Pam Carson
Subject: RE: McKay v. McKay

Patty: Paragraph 2.1.2 only applies if the residence is sold and the mortgage debts are paid off out of the sale proceeds. Consequently, you would not be paying any real property taxes or insurance on the sold property.

Thomas G. Walker
Coshu Humphrey, LLP
800 Park Blvd., Suite 790
PO Box 9518
Boise, ID 83707-9518
Direct phone: 208-639-5607
Direct fax: 208-639-5609
E-mail: twalker@cosholaw.com
Blog: www.ricolawblog.com
RICO web site: www.thomasgwalker.com

From: Patricia McKay [mailto:patmckay@clearwire.net]
Sent: Tuesday, October 23, 2007 8:07 PM
To: Thomas G. Walker
Subject: RE: McKay v. McKay

Ok, I understand.

I have a problem with Item 2 Community Debts. 2.1 Darwin shall pay Patricia as property equalization payments an amount equal to the respective monthly payments of principal, interest, property taxes and insurance required..... (this is fine) However, under 2.1.2. it states on the fifth line, "Darwin shall continue to timely pay Patricia monthly property equalization payments equal to the principal and interest that would have been due under the loan documents" the property taxes and insurance required is missing. It would only be fair he continues to pay the taxes and insurance since payment to me would be reduced by \$300,000.00. By him having to continue to pay the property taxes and insurance will give him incentive to pay off the home, otherwise, he has incentive not to close the deal with Status as he retains \$300,000.00 plus the 2 lots and doesn't have to pay the taxes and insurance. He also has a good deal because the mortgage is fixed at 7%. There are no incentives for him to pay the mortgage off early. Besides, he is getting the tax refunds for 2005, 2006, and 2007.

Thank you.

From: Thomas G. Walker [mailto:twalker@CoshuLaw.com]
Sent: Tuesday, October 23, 2007 4:21 PM
To: Patricia McKay
Cc: Stanley W. Welsh; Melissa Wolfe; Pam Carson
Subject: RE: McKay v. McKay



Our plan is to record the Judgment and Decree of Divorce, which then becomes a lien on all of Darwin's real and personal property. We don't want to emphasize this aspect of the settlement. So, we don't want to say anything until after the judge signs the Judgment and Decree.

From: Patricia McKay [mailto:patmckay@clearwire.net]
Sent: Tue 10/23/2007 4:15 PM
To: Thomas G. Walker
Subject: RE: McKay v. McKay

All looks good Tom. However, can I place a lien with the title company on the Status Corp closure so the \$800,000.00 are paid to me by them? This is what we had to do when property sold that Donna had so the funds would come to us instead of thru Donna.

Thank you.

From: Thomas G. Walker [mailto:twalker@Cosholaw.com]
Sent: Tuesday, October 23, 2007 12:49 PM
To: kim@kbbrookslaw.com; johnmiller@boiselaw.net
Cc: Stanley W. Welsh; Melissa Wolfe; Pam Carson; Patricia McKay
Subject: McKay v. McKay

Kim and John: Attached are drafts of the following documents: Stipulation for Entry of Judgment and Decree of Divorce, Judgment and Decree of Divorce, and Property Settlement Agreement.

Thomas G. Walker
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RICO web site: www.thomasgwalker.com

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Pam Carson

From: Thomas G. Walker
Sent: Wednesday, October 24, 2007 7:03 AM
To: Patricia McKay
Cc: Stanley W. Welsh; Melissa Wolfe; Pam Carson
Subject: RE: 2 Building lots

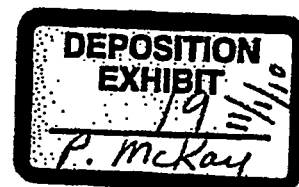
Such an addition was not part of the mediated settlement.

Thomas G. Walker
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Blog: www.ricolawblog.com
RICO web site: www.thomasgwalker.com

From: Patricia McKay [<mailto:patmckay@clearwire.net>]
Sent: Wednesday, October 24, 2007 7:05 AM
To: Thomas G. Walker
Subject: 2 Building lots

Sorry, I forgot to ask about the 2 building lots in paragraph 1.5. Can we cover those in case Status does not close by adding a sentence.....

"Should Status not close and Darwin sells the land to another developer he is to obtain two lots with the new purchase contract. These two lots will be offered to Patricia by the developer when property has been plotted. The developer is to give Patricia first choice of the available lots."



Pam Carson

From: Thomas G. Walker
Sent: Tuesday, October 30, 2007 2:43 PM
To: Melissa Wolfe
Cc: Pam Carson
Subject: FW: Patty McKay 342-7627 ASAP please

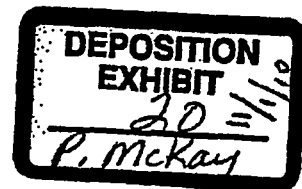
Please print for file and file in Pro Law.

Thomas G. Walker
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Direct fax: 208-639-5609
E-mail: twalker@cosholaw.com
Blog: www.ricolawblog.com
RICO web site: www.thomasgwalker.com

From: Patricia McKay (<mailto:patmckay@clearwire.net>)
Sent: Tuesday, October 30, 2007 2:18 PM
To: Stanley W. Welsh; Thomas G. Walker
Subject: Patty McKay 342-7627 ASAP please

I have just learned some incredible disturbing news of which you are not going to appreciate. Please call me ASAP preferable as a conference call so I can talk with both of you.

Thankyou.



COSHO HUMPHREY, LLP

COUNSELORS & ATTORNEYS AT LAW

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DIRECT FAX 208.639.5608

STANLEY W. WELSH
swelsh@cosholaw.com

November 1, 2007

VIA E-MAIL: patmckay@clearwire.net ✓/K9

Patricia E. McKay
25 Horizon Drive
Boise, ID 83702

Re: Patricia E. McKay v. L. Darwin McKay
CH File No.: 19458-001
Case No.: CV DR 0615200

Dear Patty:

I know that you are getting advice from several other individuals. Those individuals are not paying your bills. I do not doubt that they mean well. I expect that they would not guaranty a result to you if there was no agreement now.

I did not think that there was any doubt in our meeting that you are well aware of the fact that we had much greater numbers than were being used for settlement purposes. A lot of that had to do with the risk of going forward. Obviously, the other side knew there was a risk because of everything that we had presented. You will recall that prior to our settlement meeting, there had never been any offer from Mr. McKay's attorney for any settlement. It had been the position of your husband that essentially everything was his except for the home.

I believe that there is an agreement and that the other side could sue you to enforce the agreement. However, someone may disagree and think that you can get out of the agreement. It has been my practice that if a client makes an agreement, I will not stay in the case if they are going to try to get out of the agreement that was made. That was the purpose of the comment that I made. It obviously was not because I am in any way angry or upset with you.

Settling cases is usually more difficult than simply going to trial.

I do want only the best for you and appreciate your comments about the good work that you think we have done in this matter. We are trying to get the best possible language for you in a final document.

Very truly yours,

Dictated by Mr. Welsh and mailed
without signature in his absence
to avoid delay

Stanley W. Welsh

SWW/rfl

19458-001 Doc#: 282291



FILE COPY

CH01935

000305

Stanley W. Welsh

From: Stanley W. Welsh
Sent: Saturday, November 10, 2007 7:42 AM
To: Patricia McKay; Thomas G. Walker
Subject: RE: McKay Settlement Revisions

Patty, See below for my comments:

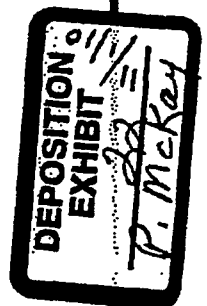
From: Patricia McKay [mailto:patmckay@clearwire.net]
Sent: Fri 11/9/2007 7:37 PM
To: Thomas G. Walker; Stanley W. Welsh
Subject: McKay Settlement Revisions

I received the e-mail you sent to Judge McKee along with the revised Property Settlement Agreement with the changes made from the original. This is the first time I've seen this revised edition.

I have a problem the following objections:

- 1.1 I do not want Darwin to have Power of Attorney on my home. There is no reason for him to have this for the "benefit of Darwin to allow him access to information regarding both the 1st and 2nd mortgage." I know Darwin very well as he has always taken the approach, "Since I am paying the bills it belongs to me." This is how he handled the Reno condominium even though it was strictly in my name. If he wants Power of Attorney for the purpose of making the payments, the invoices come to me in plenty of time for me to forward to him for payment. I know Darwin very well and he will use this home as collateral for whatever. The house is already in my name only so why should another quitclaim deed be necessary? I asked for the deed so there is never a question by some title company when you sell the property. He will not have a power of attorney on your home.///
- 1.4 The motorhome should be delivered to me prior to signing this agreement. Why should he have until December 1 to deliver it to me? I do not see a problem with the December 1 date. I expect he wants to make sure there is an agreement before he delivers. Do you really want more money spent debating this issue? He already has the use of the vehicles I still hold the titles to so why should he hold on to the motorhome? The motorhome should be returned to me in working condition. He has had it for the past 14 months and should have taken care of it so the water system has not frozen and been damaged. I do not know if he took precautions by having it winterized last year or if he has done so this year. If he has not then by waiting until December the entire system could be damaged and he should have it repaired. There is no reason why the transfer of any/all belongings cannot be done prior to the signing of this Settlement. I do not want him to have control over my items nor is there any reason for him to hold these items since they belong to me. There is no reason to cause additional attorney fees by transferring titles, etc. at a later date other than the date of signing, therefore, all vehicles and personal property items should be delivered to their respective owners prior to signing date. After all, Darwin's had the past three weeks to do so.
- 1.5 The Personal Residence construction folder and its contents should be returned to me at the signing of these papers. There is no reason for Darwin to retain this folder - not even for any tax reasons. They told us October 20 they would get the folder to us. Darwin said he did not know where it was. The way Darwin wants it I'll not receive the folder until summer/fall 2008 which is when he'll do his 2007 taxes. By then the folder will be lost either by Brooks, Miller, or Darwin. I do not see why you cannot both have a copy.//
- 1.10 At the mediation talks October 20, the house and all contents were given to me. Now he wants the bookcase and cabinet in the tool room. Gosh, that's fine but what about the items I requested to be

11/12/2007



CH01926

000306

returned to me that were mine prior to our marriage. I did not receive an Oak 3 1/2 foot by 6 foot dining room table which he took to the Reno business nor did I receive two blue velvet Drexall Heritage chairs, nor some of my personal items from the Reno condominium (specifically my sewing items which cannot be replaced). He claims he does not know where the furniture is. How is he going to compensate me for items he lost or were stolen?//I am not sure about the value of these items. Let me know if you want to have me argue these issues. It will certainly delay a resolution.

2.2 At the mediation talks it was agreed the credit cards would be paid off. "Paid off" to me means just that - paid in full, not over a six-month period of time. Due to the delay over the past three weeks the Bank of America credit card ending 0232 is now at \$22,803.42. If we must accept that he pay the credit cards off over time then we need to be more specific that all interest charges by the respective credit card companies be paid by Darwin at whatever interest rate the credit card companies charge. There should also be fee, such as \$250.00 per month or \$500.00 per month due to me if he is late in making the payments as this will affect my credit rating, FICO scores.//I agree that he has to be responsible for all interest and charges. I do not think it is reasonable to ask for a monthly payment to you.

8. It is my understanding "alimony" I will have to claim and pay taxes on whereas "maintenance" I do not pay taxes. Item 4 as Judge McKee wrote states maintenance. I do not want to pay taxes on the alimony.//Our statute Idaho Code Section 32-704 uses the word maintenance. The Internal Revenue Code Section uses the word alimony. The two words mean the same. I believe the intent was that these payments would be taxable to you.

Tom, perhaps you can enlighten me on the tax issues as to what will be best for me. I'll accept your advise.

I'm sorry if I'm making suggestions to this settlement at this date but this is the first time I've seen the revised sent to opposing.

Thank you.

11/12/2007

CH01927

000307

Pam Carson

From: Thomas G. Walker
Sent: Monday, November 12, 2007 7:38 AM
To: Patricia McKay
Cc: Stanley W. Welsh; Melissa Wolfe; Pam Carson
Subject: RE: Settlement Problems

Patty: Please see comments below.

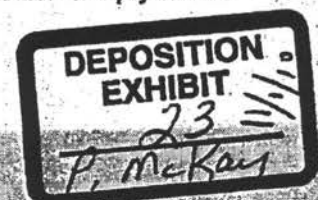
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Direct fax: 208-639-5609
E-mail: twalker@coshulaw.com
Blog: www.nicolawblog.com
RICO web site: www.thomasowalker.com

From: Patricia McKay [mailto:patmckay@clearwire.net]
Sent: Sunday, November 11, 2007 10:47 PM
To: Thomas G. Walker
Subject: Settlement Problems

Last Friday when I received copy of the email sent to Judge McKee I opened the Settlement Agreement that was also forwarded to him. This was the first time I had seen this draft copy.

I have some concerns about this Agreement.

1. I do not want Darwin to have Power of Attorney for my home. Stan has already address this and has expressed this will not happen.
2. Though Stan feels it should be all right for Darwin to deliver the motorhome to me between now and December 1, I do not like this approach. I strongly feel all vehicles should be in the possession of the respective owners and the construction file folder should be delivered to me at the time I sign the agreement. // We will discuss your concerns with Miller and Brooks regarding the motor home and vehicles. We have located the construction binder that you delivered to our office. Apparently, Darwin's counsel never picked it up. We will ask Miller and Brooks whether Darwin wants to pay to have the documents in the binder copied. Darwin and his attorney have already expressed to us they do not know where the construction file folder is though it was delivered to them along with replies to interrogatories I answered. This is a large folder with probably a couple hundred pieces of paper ranging from invoices to plans, folder being about 3 inches thick. If they do not know where they put the file, how will Darwin be able to find it a year from now when he does his 2007 taxes. How will the file be found then? Right now Kim Brooks should have it in her possession along with all the other data we sent to her in reply to the interrogatories.



CH 2757

The motorhome has a dead battery the last time I saw it, about six months ago. The cab door had been left open. I do not know if Darwin had it winterized last winter as he was to have done to protect the water system from freezing. It is to be delivered to me in working condition throughout, just as it was when he took it into his possession a year ago, fall 2006. His approach is to deliver it after signing so I will have no recourse - this is not fair to me. Also, since the mediation was October 20th, I arranged and paid for covered parking for it for the month of November. This is not proper that my belongings not be delivered to me prior to signing. If one were to purchase a car, would you leave the car for anyone to drive it, abuse it, and/or damage it? Darwin leaves the keys in the motorhome and no one knows the condition of it. Besides, there is no reason whatsoever he has not been able to deliver it to me during these past three weeks so why does he need another three weeks? There is no guarantee Darwin will deliver the vehicle to me "before or by December 1st" as he never has followed through with legal commitments or time schedules during the past year as you are fully aware of. Therefore, before I sign any car titles over to Darwin, the motorhome is to be delivered to me. // We will convey your conditions to Darwin's counsel. He has had the vehicles I have held the titles to during the past years.

3. Darwin has furniture belonging to me he now claims he does not know where they are; two Drexell Heritage velvet chairs and a 3 X 5 foot oak dining table. I know the table went to the Reno office for use there. Darwin also has my personal sewing items for my sewing machine of 45 years of which cannot be replaced and he does not know where these items are. Stan, I understand should you argue these issues it may cause delay in a resolution. However, Darwin has been aware of these items for several months now yet he has not offered any solutions or other furniture to me to compensate me for his negligence and care of my property. There should not be any serious argument about this as all I am asking is that you state to Brooks/Miller, "In the best interest of both our clients, we feel it is best all respective properties, vehicles, furniture, files, etc. be in the possession of the respective owners prior to signing the settlement agreement. If items are not to be found then compensation for these missing items should be made. // We will pass your comments on to Darwin's counsel.
4. Item 7 - Release of Patricia from all Debts and Personal Guarantees. I would like to have written proof provided to me from the banks, vendors, etc. // We will add such a requirement to the agreement.

The major change I saw in the most recent agreement is regarding the Status Property Purchase and Sale agreement and is that, ".... if Darwin chooses not to pursue legal and equitable remedies to enforce the terms and conditions of the Purchase and Sale Agreement, he shall assign all of his right, title and interest in and to the same to Patricia, if she elects to pursue them....." Does this mean I also receive the land? // If Darwin chooses not to pursue Status, under the proposed agreement, you will have the right to do so. If you prevail, you will receive the full \$800,000 and the two lots. Status should also be required to pay your costs and fees if you are the prevailing party. Even if you do not prevail, you will receive the \$500,000 payment from Darwin on September 30, 2008, but the court could require you to pay the costs and fees incurred by Status. Or, does this mean I get to go after Status and pay the legal bills but Darwin gets all the profits? Darwin is also allowing an extension of time for the closure of the Status property until September 30, 2008. // I don't know why you concluded that Darwin would allow an extension of time. Darwin can only do so, if you give him your written consent. It further states "If enforcement of the terms and conditions of Purchase and Sale Agreement is still pending on September 30, 2008, Darwin shall pay Patricia \$500,000.00 in immediately available funds on September 30, 2008." The way this is written, whether the Purchase and Sale Agreement stays open with Status or defaults, Darwin does not have to give me the \$500,000.00 until he has "available funds" which we all know he will never have "available funds". Yes Stan, I know you'll say he has to continue to pay me \$2,500.00 per month until he does pay the \$500,000.00 but paying \$2,500.00 per month until I'm dead is better for him as he can invest the \$500,000.00 and make more money than giving it to me. I in the meantime will have nothing to invest for retirement. Darwin is totally in

the control seat here and I have no collateral at all. // The term "Immediately available funds" is the equivalent of cash. It means that the funds will be immediately available to you on September 30, 2008. This term is often used because it is typically not practical to deliver cash. Rather such a commitment is met by a wire transfer or a certified check.

Nowhere does it state in Judge McKee's handwritten notes of the mediation of October 20th, "immediate available funds". He wrote, "If the deal fails, Husband will pay wife \$500,000.00 within 6 months. Every place the words "immediate available funds" are written in this settlement agreement they need to be eliminated. // See above.

This \$500,000.00 is a major issue in this settlement agreement and I feel it is critical it be written without any loopholes. You can best believe Darwin is working all the angles to get out of paying me \$500,000.00. As I've mentioned above, it is very clear how he can get away with only paying me \$2,500.00 per month forever and I have no funds to invest for retirement. This is not right, nor fair and not something I can agree to nor is it what Judge McKee wrote. We all know how Darwin has spent over a million dollars on various items during the past year. He will continue to do so. He should begin now saving funds to pay the \$500,000.00 to me in case Status defaults but instead he is buying more land to hide the funds. // I have not seen any evidence that Darwin is buying more land to hide the funds. What are you referring to?

If this new agreement idea was discussed in a conference call with Brooks and Miller, I should have been included in this decision. Another way to look at this: The above underlined "immediately available funds" appears can be funds not related to the sale of the property at all and the funds may not be "available" until after September 30, 2008 and I'd have to accept whenever, if ever, Darwin gives me these funds. This being the case, it is best financially for Darwin to give me \$2,500.00 per month forever until I die or he dies, whichever comes first, but either way you look at it I will be the loser. I do not believe this is fair. The way this settlement it is to Darwin's best interest to tell Status not to pay until after September 30, 2008 so he doesn't have to pay me the \$300,000.00 or give me the two lots. I know Darwin very well and this is how he thinks and is laughing at his opponents. Darwin is a liar and a cheater! // See above.

I'm aware my last sentence was rather strong. Let's not forget Darwin did not pay his obligations to Donna and her debts as he was legally responsible for in 1994. Instead he asked me to pay them! Darwin does not know how to handle money nor does he plan for the funds necessary for the "rainy day" and "when times financially get tough". My uncomfortable feelings come with not having any collateral built into this settlement agreement.

As the saying goes, "It's better done 'right' than 'soon'. // We are doing our best to get this matter concluded.

Thank you.

Patricia

Pam Carson

From: Thomas G. Walker
Sent: Monday, November 12, 2007 7:39 AM
To: Patricia McKay
Cc: Stanley W. Welsh; Melissa Wolfe; Pam Carson
Subject: RE: Status Deal

Patty: Please below.

Thomas G. Walker
Cosho Humphrey, LLP
800 Park Blvd., Suite 790
PO Box 9518
Boise, ID 83707-9518
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Direct fax: 208-639-5609
E-mail: twalker@cosholaw.com
Blog: www.ricolawblog.com
RICO web site: www.thomasgwalker.com

From: Patricia McKay [<mailto:patmckay@cleanwire.net>]
Sent: Monday, November 12, 2007 6:57 AM
To: Thomas G. Walker
Subject: Status Deal

Am I reading 1.9 correctly that if the Status deal is still active after September 30, 2008 and are successful after that date, no matter when they are successful that the full \$800,000.00 will still be given to me plus the two lots? // That is the intent of the language we have included in the proposed agreement. That Darwin will give me \$500,000.00 of the \$800,000.00 on September 30, 2008? // Correct.

This appears to be a major change that you and Stan may have agreed to in the conference. Therefore, the \$300,000.00 and the 2 lots will come to me perhaps a couple years down the road when Status does make the final payment? // That's the intent.

If so, you two did a very good job.... Thank you.

Patricia

CH-2760

000311

Patricia McKay

From: Patricia McKay [patmckay@clearwire.net]
Sent: Sunday, November 11, 2007 6:02 AM
To: 'jpl@joistpocketliner.com'
Subject: Settlement Agreement

My
cell:
559-7583

Hello Neil,

I think I am being bambozzled?

As I mentioned to you in our meeting, Stan does not want to make any changes to the agreement as per the mediation talks of October 20. However, Friday, I received a copy of the new agreement which has been given to opposing for finalization in which it includes many new changes opposing have made. I believe Stan and Brooks and Miller (not sure if Tom was involved) may have had a conference call to decide on these changes but I was not given a copy before they forwarded it on to Brooks. I received a copy via them copying me of an email they were sending to Judge McKee with the new agreement. I was rather surprised at some of the changes and sent Stan an email with questions but felt I got the "brushoff" by his reply.

I have been up since 2 AM writing the attached. I will edit it down so as not to be so strong against Stan and his representation. But then again, maybe I should leave as is.

The purpose of me writing you is to ask you to read this attached email I wish to send to Stan. Please focus on the paragraphs regarding the \$800,000.00 or \$500,000.00 from the sale of the property to Status. It appears to me they have written the agreement so Darwin can basically get around paying me any of these funds and I am very concerned about this.

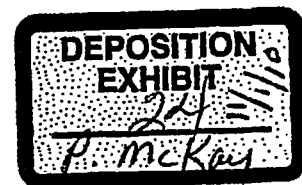
I would appreciate your thoughts on this and perhaps set up a meeting with Tom and/or Stan regarding this. I realize you do not have a copy of the agreement Judge McKee wrote up of the mediation talk results. I will deliver a copy of the hand written notes of Judge McKee as well as a copy of the most recent agreement to you this morning and place on your doorstep mat or mailbox, if your mailbox is attached to your house by your front door.

Stan is pushing for a signing on Monday but I am not comfortable.

I should be home all day today. Home: 342-7627 or Cell: 559-7583

Thank you.

Patty



MCKAY 315

Stanley W. Welsh

From: Thomas G. Walker
Sent: Friday, November 16, 2007 5:35 AM
To: Stanley W. Welsh
Subject: FW: McKay

FYI.

Thomas G. Walker
Coshu Humphrey, LLP
800 Park Blvd., Suite 790
PO Box 9518
Boise, ID 83707-9518
Direct phone: 208-639-5607
Direct fax: 208-639-5609
E-mail: twalker@cosholaw.com
Blog: www.ricolawblog.com
RICO web site: www.thomasgwalker.com

-----Original Message-----

From: PatMcKay@clearwire.net [mailto:PatMcKay@clearwire.net]
Sent: Thursday, November 15, 2007 3:35 PM
To: Thomas G. Walker
Subject: Re: McKay

It would nice to have a couple hours notice. Please call me on my cell 559-7583.

Thank you for all your work. Patty

Quoting "Thomas G. Walker" <twalker@CoshuLaw.com>:

>
>
> Patty: We are going to try to work out the final language on the
> Status Corporation issue tomorrow morning. Will you be available to
> sign if we get it done? We would like to be able to call you so you
> can run over to our office. Let me know.

>
> Thomas G. Walker
>
> Coshu Humphrey, LLP
>
> 800 Park Blvd., Suite 790
>
> PO Box 9518
>
> Boise, ID 83707-9518
>
> Direct phone: 208-639-5607
>
> Direct fax: 208-639-5609
>
> E-mail: mailto:twalker@cosholaw.com
>
> Blog: <http://www.ricolawblog.com>
>



> RICO web site: <http://www.thomasgwalker.com>
>
> *****
> *****
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> used, and cannot be used, by any other person (i) in promoting,
> marketing or recommending any transaction, plan or arrangement or
> (ii) for the purpose of avoiding penalties that may be imposed under
> federal tax law.
>

Melissa Wolfe

From: Thomas G. Walker
Sent: Friday, November 16, 2007 5:38 AM
To: Stanley W. Welsh
Cc: Melissa Wolfe; Pam Carson
Subject: FW: McKay Final Negotiations

FYI.

Thomas G. Walker
Cosh Humphrey, LLP
800 Park Blvd., Suite 790
PO Box 9518
Boise, ID 83707-9518
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From: Patricia McKay [mailto:patmckay@clearwire.net]
Sent: Thursday, November 15, 2007 7:54 PM
To: Thomas G. Walker
Subject: McKay Final Negotiations

As the weeks have past by since October 20th, it is apparent Darwin is trying to do anything he possibly can to delay and/or change the agreement to his benefit. I know how Darwin thinks and how he operates.

I have tried to be quiet these past couple weeks but please, I've hired the best attorneys in town and I'd like you to really go the extra mile for me now.

You mentioned you will be going into talks tomorrow regarding the Status deal. This is the big ticket item in which I may lose as much, if not more, than \$500,000.00 and all to Darwin's gain. I do not think this is fair at all and you can best believe Darwin will do everything within his power (under the table) to keep this from me.

Therefore, I would like to suggest that a clause be entered that if the Status deal does not go through that in place of me losing the 2 lots and the \$300,000.00 Darwin should return to me Palace Resorts. This is the only item you have to negotiate on since he is unwilling to give any land since he needs it as collateral with the banks. However, if the Status deal falls through then why can I not have one half of the 30 acres in return? Darwin said that the acreage was only worth \$30,000.00 so 15 acres would be worth \$450,000.00 which is less than \$500,000.00. I strongly feel that I am the one to lose even with accepting Palace Resorts which is worth probably about \$50,000.00. Darwin will in turn receive the land back and he will also receive the two lots from Status when they do the development of the lands they already have purchased (60 acres). Here again, there is no reason why I should have to give up the two lots if the Status deal falls. If it falls, Darwin gets his 30 acres back and I should receive the two lots he will obtain which will be worth at least \$100,000.00 per lot. There is not reason why I should lose the two lots as they are not connected with the final payoff March 30 - they are included in the entire contract of February, 2006 so whether Status pays March 30 or walk the McKay estate still obtains two lots. This is very clear in the February 21, 2006 contract.

I realize you may say that I agreed to all on October 20th but I also was under the impression all was going to be resolved within a week of October 20th. This past month has been very stressful to me and has cost me

11/16/2007



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thousands of dollars more due to the increased attorney expenses Darwin has caused my attorneys to charge due to the additional work. These additional expenses he has caused me to incur will have to come out of my settlement and that has been one of his goals over the past 4 weeks. No fair again. October 20th I feel the attorneys and Judge McKee should have placed a deadline on the final written settlement when all was to be finally signed and all this completed. This has not been fair to me as I do not have the funds for these expenses.

Stan, I understand what you expressed to me about not making any changes after October 20. But wait a minute here....look what I am about to loose.... \$500,000.00 and I would think that with all opposing has been trying to change and has succeeded I am asking you to go to bat and do some countering instead of just giving in. This divorce has cost way over \$100,000.00 and I should be able to have some final discussions and inputs into the final decisions -- why am I not being included? Good grief I cannot even get the motorhome delivered prior to signing but he gets to have all his items. Again, not fair, and I'd like you to really put on your debating gloves.

Darwin and his attorneys have not been honest this past month to include Kim Brooks informing us that the mortgages had been paid when in fact they had not. I will be calling World Savings tomorrow morning to verify if the mortgage payment was made today.

Thank you.

11/16/2007

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Stanley W. Welsh

From: Thomas G. Walker
Sent: Friday, November 16, 2007 5:41 AM
To: Stanley W. Welsh
Cc: Melissa Wolfe; Pam Carson
Subject: FW: McKay early morning thoughts on the past month.

FYI.

Thomas G. Walker
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Blog: www.ricolawblog.com
RICO web site: www.thomasgwalker.com

From: Patricia McKay [mailto:patmckay@clearwire.net]
Sent: Friday, November 16, 2007 2:43 AM
To: Thomas G. Walker
Subject: McKay early morning thoughts on the past month.

Since I cannot sleep I feel I should let you folks know my thoughts as they pertain to your last mediation talks with opposing. Here are my final comments:

1. Again, in reference to the Status deal - No place in the Status February 21, 2006 contract does it say if they do not complete the deal March 2008 that Darwin will not receive the two lots. If Status does not pay March 2008 Darwin still obtains the two lots since Status holds free and clear 60 acres of - which the two lots will be given. I should not have to loose the two lots in September.
2. I just reviewed my invoice of October 24, from Coshu Humphrey and it was \$111,339.59 however I noticed the time for Welsh and Walker for October 20 was not on this. Before entering your talks today I would like you to add up what I owe Coshu Humphrey as of today. The dollars added since the \$111,339.59 are the dollars Darwin has caused me to incur due to the delay over the past month. This is not fair and these dollar amounts should be part of your negotiations today.
3. The Palace Resorts item should be mine if I have to loose the \$300,000.00 in September. But again, I should not have to loose the two lots.
4. Darwin was to have given me all my personal belongings several weeks before October 20 but he did not and I am to accept that - this is not fair. He still has two blue velvet Drexal Heritage chairs and an Oak dining room table which I know for a fact is at the Reno business office as it was taken there to use. He also has personal sewing items which are 35 years old and cannot be replaced. This is not fair.
5. At the October 20 meeting I was given all contents in the house yet now I'm told that when Darwin drops off the motorhome by December 1 I am to give him a bookshelf and cabinet in the tool room. Seems he can continue to pick up items but I cannot have items returned to me.

11/16/2007



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Perhaps we could have done a better job negotiating on October 20. I was left by myself every time Judge McKee was not with us. During this time we could have been reviewing what the overall estate worth was as I do not believe Darwin was honest in expressing it was only worth 2.5 million. During the initial discussion with Judge McKee at the conference table he said we would go around the room and each of us would be able to make comments but then Kim Brooks wanted a break and the general conference never convened. I was placed in an office and left there only to have meetings with you and the Judge. There never was a time when the 3 of us seriously debated the overall settlement during the times Judge McKee was with opposing. Was I charged for the entire day by both attorneys? While Judge McKee was with us I'm sure Darwin was debating issues with his attorneys - they didn't leave him alone - they continued their negotiations with him. I feel I may not have been treated fairly on that day.

So now it's time for the final negotiations and I wouldn't be surprised if Darwin will be present with one of the attorneys during these final talks today. But I feel I am not going to be able to express my feelings. I am having to accept whatever is decided upon.

Please go get 'em! Darwin told my sister last January that he was not going to give me a dime in a divorce and he's trying his best to use up in attorney fees what I will have.

Please do your best today. I'll be on my cell phone 559-7583.

11/16/2007

CH00810

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COSHO HUMPHREY, LLP

COUNSELORS & ATTORNEYS AT LAW
PO Box 9518 83707-9518
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DIRECT PHONE 208.639.5604
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STANLEY W. WELSH
swelsh@cosholaw.com

Telephone 208.344.7811
Firm fax 208.338.3290

November 16, 2007

Via e-mail: patmckay@clearwire.net

Patricia E. McKay
25 Horizon Drive
Boise, ID 83702

Re: Patricia E. McKay v. L. Darwin McKay
CH File No.: 19458-001
Case No.: CV DR 0615200

Dear Patty:

I have reviewed your last several e-mails. The last e-mails were sent at 7:54 p.m. yesterday and 2:43 a.m. today. In one of your e-mails you addressed a question to me but neither of the e-mails were addressed to me. I will respond to all of your comments:

Your e-mail of yesterday said that it would be nice for you to have a couple of hours notice before you actually sign. You can take whatever time you want. We will simply let you know if the other side agrees. We will certainly try not to interrupt your schedule.

You have provided a variety of reasons why you think this matter is delayed. In my experience, a person delays because they are not sure they want the deal. If Darwin thought he had a great deal, I think that he would have signed this immediately.

I am sure that Mr. McKay is trying to do anything that he can to change the agreement. The agreement terms are complicated and we are trying to include every term that we can to protect your interest. Mr. McKay is also dealing with two separate law firms and I do not know whether those two law firms are able to communicate on a daily basis.

You state that you have tried to keep quiet the last couple of weeks. You know that you have also provided substantial input over the last several weeks. You state that you have hired the best attorneys in town and you want us to go the extra mile for you. Throughout this case, we have responded to phone calls, e-mails, and other communications with very little delay. I think that there has never been a day that phone calls have not been returned or e-mails have not been responded to within a very short period of time. This is all despite the fact that we are not being paid. Your concerns these last several weeks have been about you paying your bills. I do not recall you commenting one time about our bill being paid. We can discuss Palace Resorts. They proposed that you take the Palace Resorts as part of the deal. You stated that you did not want it because it had no value and may cost you money. That was your decision. I perhaps put

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too much weight on your knowledge. You had indicated that you did have a great deal of knowledge because you were intimately involved in all aspects of this community over this marriage.

There have been increased attorney fees. Some of the additional attorney fees have been for responding to numerous e-mail communications from you. I do not know how many total e-mails we have received from you since October 20th. You obviously have the right to provide any input you can and we have responded to each and every communication from you.

Apparently you are critical of us and of Judge McKee for not placing some deadline. What if there was a deadline? If you want to stop all communication on this and not sign the document, please let me know immediately.

You can have all of the input you want into these documents. You have been included and you have provided input on all documents. You state that the divorce has cost over \$100,000. We are owed over \$100,000.

You state that they have changed the deal and continue to negotiate. Now you want us to change the negotiation and ask for Palace Resorts and additional fees that you have incurred. We will propose what you want proposed but this is obviously going to result in additional delays.

Now you state that we could have done a better job of negotiating on October 20th. You state that you were left alone. We discussed every proposal from them and every proposal that you made in extensive detail. You had all of the time you wanted. You state that we could have reviewed the overall estate worth. You know full well that we reviewed that in detail and we had extensive documentation on your position of the estate worth. It does not matter what he stated. The issue is whether or not you settle this case. I told you several times at the end of the day that you could just stop the negotiation then and not settle. It was you who insisted that we stay late on Saturday to finish the discussion and reach an agreement. Now you state that you were not treated fairly. My initial reaction to that comment was to file a motion to withdraw. I am not sure that I can do that at this moment. We have no idea what was being discussed by Darwin and his attorneys.

You do not have to accept whatever is decided. Again, please notify us immediately if you want us to continue to try to resolve this matter or if you want to cease all discussions.

Very truly yours,

Dictated by Mr. Welsh and mailed
without signature in his absence
to avoid delay

Stanley W. Welsh

SWW/rfl

Pam Carson

From: Thomas G. Walker
Sent: Monday, November 19, 2007 12:31 PM
To: 'John Miller'; kim@kbrookslaw.com
Cc: Stanley W. Welsh; Melissa Wolfe; kwescott@kbrookslaw.com; Patricia McKay
Subject: McKay
Attachments: 286998_2.DOC

Importance: High

John and Kim: Attached is the revised Property Settlement Agreement containing the language suggested by John and accepted by Darwin regarding the Status Real Estate Transaction. I have also changed such other provisions as I thought necessary to incorporate John's suggested changes into the agreement. I am providing a copy to Patty for her review.

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Exhibit A

Stanley W. Welsh (ISB No. 1964)
Thomas G. Walker (ISB No. 1856)
Cosho Humphrey, LLP
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E-mail: swelsh@cosholaw.com; twalker@cosholaw.com

Attorneys for Plaintiff Patricia McKay

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF

THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

MAGISTRATE DIVISION

★ ★ ★ ★ ★

PATRICIA E. McKAY,

Plaintiff,

v.

L. DARWIN McKAY,

Defendant.

Case No. CV DR 0615200

**PROPERTY SETTLEMENT
AGREEMENT INCORPORATED AND
MERGED WITH AND INTO
JUDGMENT AND DECREE OF
DIVORCE**

This Property Settlement Agreement ("Agreement") is made and entered into this 20th day of October 2007 by and between Patricia E. McKay, Plaintiff ("Patricia" or "Plaintiff"), and L. Darwin McKay, Defendant ("Darwin" or "Defendant"). Patricia and Darwin are sometimes

individually referred to as a "Party" or collectively referred to as the "Parties". This Agreement is binding and enforceable upon the terms stated herein, notwithstanding the fact that additional documentation is required to carry out the terms of this Agreement.

1. Community Property. The Parties agree to the following settlement of their community property:

1.1. Subject to the provisions of paragraph 2.1 below, Patricia shall receive the personal residence located at 25 Horizon Drive, Boise, Idaho ("Personal Residence") free and clear of all encumbrances. Patricia shall furthermore receive all personal property and furniture contained therein. Patricia shall execute such written consent as may be required by the lenders to allow Darwin access to information regarding the 1st and 2nd deed of trust notes. Darwin shall transfer to Patricia as her sole and separate property by good and sufficient quit claim deed and quit claim bill of sale all of his right, title and interest in and to the Personal Residence, including all personal property and furniture.

1.2. Patricia shall receive the Box Office Productions stock. Darwin shall transfer to Patricia as her sole and separate property by good and sufficient assignment separate from stock certificate all of his right, title and interest in and to the Box Office Productions stock. Patricia shall cause the assignment form to be delivered to Darwin through counsel as soon as possible for Darwin's execution and delivery to Patricia through her counsel.

1.3. Patricia shall receive her IRA account.

1.4. Patricia shall receive the 1995 Mercedes S-500 vehicle in her possession and the 1980's motor home, currently located at the farm. Darwin shall deliver the motorhome to Patricia on or before December 1, 2007. Darwin shall transfer to Patricia as her sole and separate property by good and sufficient bill of sale and endorsement on the respective Certificates of Title all of his right, title and interest in and Patricia's 1995 Mercedes S-500 and the 1980's motorhome. Patricia shall cause the assignments forms to be delivered to Darwin through counsel as soon as possible for Darwin's execution and delivery to Patricia through her counsel.

1.5. Darwin may at his expense have the contents of the Personal Residence construction folder copied if necessary for preparation of the amended tax returns for 2005 and 2006 and for the 2007 tax return. Patricia shall retain the original of the Personal Residence construction folder.

1.6. Darwin shall pay to Patricia \$100,000.00 in four equal consecutive monthly installments of \$25,000.00 on or before January 15, 2008 and on or before the 15th day of February, March and April, 2008. The Parties acknowledge that the \$100,000.00 amount was based upon a portion of Patricia's attorneys' fees and litigation expenses. In accordance with Idaho Code § 32-704(3) said payments shall be paid by Darwin directly to Cosho Humphrey, LLP, who may enforce this portion of the Judgment in its own name; provided, however, Patricia may pay Cosho Humphrey, LLP prior to any such installment in which case, the payment or payments shall be paid directly to Patricia by Cosho Humphrey, LLP.

1.7. Darwin shall pay Patricia \$800,000, in cash, by wire transfer or certified check, within five (5) days of payment by the Status Corporation, or its assigns, ("Status Real Estate Transaction"). In addition, Darwin shall convey all his right, title and interest to Patricia in and to the two (2) lots to be conveyed by Status Corporation, or its assigns, to Darwin as part of the Status Corporation Real Estate Transaction. The parties acknowledge that the Status Real Estate Transaction is scheduled to close on or before March 30, 2008. Darwin shall diligently pursue the closing and shall not do anything to interfere with or delay the closing.

1.8. The parties acknowledge that if Status Corporation or its assigns breaches the Purchase and Sale Agreement, Darwin will have title to that portion of the land that had been referred to prior to the sale to Status Corporation as the "Home Farm." In the event of breach, Darwin may also be able to foreclose a mortgage on that portion of the land referred to prior to the sale to Status Corporation as "Albrethsen's Farm."

1.8.1. If the Status Real Estate Transaction fails to close on or before March 30, 2008, Darwin shall pay Patricia \$500,000 as soon as he is able to do without violating the lending terms and conditions of the bank holding the line of credit for the Turf Corporation.

1.8.2. Provided further that if Status Corporation or it assigns breaches the Purchase and Sale Agreement and Darwin cannot pay \$500,000 by April 30, 2008, he shall list the Albrethsen property that was included in the Status Corporation Real Estate Transaction for sale and shall pay Patricia by cash, certified check or wire transfer \$500,000 within five (5) days of receipt or closing on a sale.

1.8.3. Provided further that if following a breach, Darwin is not able to pay Patricia \$500,000 by September 30, 2008, he shall pay Patricia \$800,000 plus interest at the rate of 6% payable within five (5) days of any funds from the sale of either the Albrethsen property funds, the Home Farm property or both (provided that payment of funds from the sale of the Home Farm may only be made to the extent allowed by the bank holding the line of credit for the Turf Corporation) by cash, certified check, or by wire transfer.

1.9. Darwin shall be awarded the 2000 XJ8L Jaguar vehicle; 1973 5th wheel camp trailer; 1990 Ford pick-up truck; and 1994 Chrysler LHS. Darwin shall furthermore be entitled to pick up his separate property birch cabinet and birch bookcase located in the tool room of the Personal Residence. Upon delivery of the motorhome to Patricia, Darwin shall pick up the empty bookcase and cabinet. Darwin shall be awarded all separate and community property interests (if any) in the following:

- a. The Turf Corporation;
- b. The Turf Company of Nevada, Inc.;
- c. Pleasure Turf, LLC;
- d. The Turf Company, LLC;
- e. Turfland, LLC;
- f. Notes Receivables for Turf Company;
- g. Investment in Nevada Granite Industries;
- h. Palace Resorts Time Share;

- i. Proceeds from sale of Albrethsen;
- j. Personal effects and furnishings in Darwin's possession; and
- k. McKay family investments and interests.

2. Community Debts. The Parties agree to the following settlement of their community debts:

2.1. Commencing November 2007 and continuing thereafter as provided in this paragraph, Darwin shall pay Patricia's 1st and 2nd deed of trust note payments, including property taxes and insurance, as required by the lender(s), encumbering the Personal Residence ("Personal Residence Debt") as and for maintenance or alimony for Patricia. Darwin shall timely pay both 1st and 2nd deed of trust note payments directly to the respective mortgage companies. Patricia will provide Darwin via fax or email the 1st and 2nd deed of trust note monthly statements within five days of when Patricia receives them. Each month Darwin shall notify Patricia via fax or email that he has made the respective 1st and 2nd deed of trust note monthly payments in a timely manner. The payments required under this paragraph shall terminate when Darwin pays off the Personal Residence Debt. Darwin shall pay off the full amount of Personal Residence Debt directly to the respective mortgage companies within thirty (30) days of the date the Status Real Estate Transaction closes, or within thirty (30) days of receipt of any funds from the sale of either the Albrethsen property, the Home Farm property or both (provided that payment of funds from the sale of the Home Farm may only be made to the extent allowed by the bank holding the line of credit for the Turf Corporation), but in any event, Darwin shall payoff the Personal Residence

Debt on or before October 20, 2012. Notwithstanding the foregoing, Patricia shall have the right to sell the Personal Residence at any time; in which case, the Personal Residence Debt would likely be paid off out of the sale proceeds. If Patricia sells the Personal Residence, Darwin shall pay directly to Patricia as a property equalization payment the unpaid principal balance of the Personal Residence Debt, plus interest accruing at the respective rates called for in the first and second loan documents, in monthly installments to and including payment in full of the Personal Residence Debt. The Parties agree that Kevin Crane, CPA, or if Mr. Crane cannot serve, such other accountant as the Parties shall designate, will provide the appropriate calculations of the remaining balance and accruing interest and Darwin shall execute and deliver a promissory note to Patricia setting forth his payment obligations. Any such promissory note shall include a right of prepayment. As of October 20, 2007, the unpaid principal balance of the 1st deed of trust note (World Savings Loan No. [REDACTED]) is \$556,324.34 and interest is accruing from and after October 20, 2007 at the rate provided in the 1st deed of trust note. As of October 20, 2007, the unpaid principal balance of the 2nd deed of trust note (Countrywide Loan No. [REDACTED]) is \$67,490.49 and interest is accruing from and after October 20, 2007 at the variable rate provided in the 2nd deed of trust note. Darwin shall pay each of these notes, including interest accruing from and after October 20, 2007 until each note is paid in full.

2.2 Darwin shall pay off the two Chase Visa credit cards and Bank of America credit card as property equalization payments as follows:

| | |
|---------------------------|-------------|
| Chase Visa ending in 2116 | \$46,327.00 |
|---------------------------|-------------|

| | |
|--------------------------------|------------------|
| Chase Visa ending in 0853 | 2,076.17 |
| Bank of America ending in 0232 | <u>22,845.13</u> |
| | \$71,248.30 |

Darwin shall pay the \$71,248.30, plus interest as follows:

| | |
|----------------|---|
| November 2007: | \$14,249.66, plus interest on the unpaid balance attributable to the \$71,248.30; |
| December 2007: | \$14,249.66, plus interest on the unpaid balance attributable to the \$71,248.30; |
| January 2008: | \$14,249.66, plus interest on the unpaid balance attributable to the \$71,248.30; |
| February 2008: | \$14,249.66, plus interest on the unpaid balance attributable to the \$71,248.30; |
| March 2008 | \$14,249.66, plus interest on the unpaid balance attributable to the \$71,248.30; |

Darwin shall pay all payments listed above in a timely manner such that no late fees are incurred. The November 2007 payment shall pay the Chase Visa ending in 0853 in full and shall then apply \$6,086.75 to the Chase Visa ending in 2116 and \$6,086.75 to the Bank of America ending in 0232. Each month Darwin shall notify Patricia via fax or email that he has made the respective credit card payments in a timely manner.

Patricia shall be responsible for all charges, interest, finance charges, and fees attributable to charges made by her after October 20, 2007. Patricia shall be responsible for all other credit card debt in her name alone or charged by Patricia without Darwin's knowledge.

2.3 Mediation Expense. Darwin shall pay one-half and Patricia shall pay one-half of all fees and expenses of mediation.

3. **Alimony/ Maintenance Payments from Darwin to Patricia.** Commencing November 2007 and continuing until Patricia is paid \$800,000.00 or \$500,000.00 as provided above, Darwin shall pay Patricia each month the sum of \$2,500.00 as and for alimony/maintenance. All liability for alimony shall cease upon payment of the \$800,000.00 or \$500,000.00 as provided above.

4. **Full Disclosure.** Each Party represents to the other that full disclosure of all community assets and community liabilities, of which he or she is aware, has been made.

5. **Allocation of Property to Darwin.** Except as expressly provided herein, Patricia agrees to transfer by good and sufficient quit claim deed, quit claim bill of sale, quit claim assignment and/or other necessary quit claim document of conveyance all of her right, title and interest to Darwin in and to all of the community property awarded to Darwin herein, as his sole and separate property. Patricia shall return the notebook containing all of the Palace Resorts Information, including but not limited to Palace Premier Certificates; Palace Premier Golf Passes; Premier Gold Membership; and Palace Premier / RCI Certificates. Patricia shall specifically sign over title to the 1994 Chrysler; 1990 Ford Pick-up and 1973 5th Wheel Camp Trailer. Darwin shall cause said transfers to be delivered to Patricia through counsel as soon as possible, except for the 1990 pickup, for which title is in Patricia's possession and shall be produced as soon as possible. Patricia shall further sign the Palace Premier Change of Ownership, which shall be delivered to Patricia through counsel.

6. Disposition of Property. Subject to the provisions of this Agreement, each of the Parties hereto may dispose of his or her property of whatever nature, real or personal; and the Parties hereto, each for himself and herself, respectively, and for the respective heirs, legal representatives, executors and administrators and assigns, hereby waive any right of election which he or she may have or hereafter acquire regarding the estate of the other, or any right to take against any last will and testament of the other, whether heretofore or hereafter executed, or as may now or hereafter be provided for in any law of the State of Idaho or any other state or territory of the United States or any foreign country, and hereby renounces and releases all interest, right or claim that he or she now has or might otherwise have against the other, under or by virtue of the laws of any state or country, and each Party shall sign any document necessary to release his or her interest to the other Party or any other document necessary to transfer any title or release any interest necessary to carry out the intent of this paragraph.

7. Release of Patricia from all Debts and Personal Guarantees. On or before December 1, 2007, Darwin shall obtain at his sole cost and expense written releases of Patricia from liability for all debts whether such debts are owed to banks, vendors, and/or other creditors for whom Patricia may have liability for any reason, including but not limited to Patricia's execution of notes, personal guarantees or collateral security documents that she delivered during the Parties' marriage. Darwin shall provide Patricia with a true, correct and complete copy of each such release on or before December 1, 2007.

8. Payment of Accounting Fees and Income Taxes by Darwin. Darwin shall pay for the preparation of state and federal income tax returns and/or amended returns for the Parties for 2005, 2006 and 2007. The Parties agree to file said tax returns under the filing status resulting in the lowest state and federal income taxes. The Parties agree to cooperate with Kevin Crane, or any other accountant as Darwin deems necessary to complete the filing of such returns. Darwin shall pay all state and federal income taxes, interest and penalties, if any, for all years prior to January 1, 2008 and Darwin shall be entitled to all tax refunds, if any. Patricia shall be entitled to claim the interest paid on the deed of trust notes encumbering the Personal Residence and Darwin shall claim the monies paid towards the deed of trust note payments as alimony to Patricia. Darwin shall further claim all \$2,500.00 payments to Patricia pursuant to paragraph 3 herein as alimony.

9. Separate Property / Income After Execution of Agreement. The Parties hereto stipulate and agree that from and after the date of this Agreement, any and all property or income acquired or earned by either Party hereto shall be the separate property of the Party who has acquired or earned it, any income on separate property shall be separate property and the other Party shall have no claim on any separate property income or earnings. Beginning tax year 2008 and all years thereon, the parties shall each file separately. Neither party shall include in their income any income earned by the other after December 31, 2007. Nor shall either party claim a credit or deduction for expenditures made by the other after December 31, 2007. Any tax

liability arising from income after December 31, 2007 shall be paid and assumed according to their respective separate returns.

10. Debts after Execution of Agreement. The Parties agree that from and after October 20, 2007, any debts incurred by either Party hereto shall be the separate debt of the Party incurring the debt and shall not be a community debt. The Parties hereto agree not to incur any debt for which the other Party may be liable.

11. Mutual Release of Claims. For good and valuable consideration passing between the Parties, the receipt and sufficiency of which is acknowledged by each Party, the Parties each for themselves and for their heirs, representatives, agents, employees, successors, executors, administrators, subrogees and assigns, release the other Party and his or her heirs, representatives, agents, employees, successors, executors, administrators, subrogees and assigns, and each Party shall release, indemnify and hold harmless the other Party from any and all claims, liabilities or obligations arising out of or in any way connected with their marriage, including but not limited to all claims set forth in or comprehended by that certain litigation identified in the caption above. The term claims shall include any and all claims and counterclaims, whether known or unknown, a Party may have against the other Party as a result of their marriage and the litigation identified above.

12. Entry of Decree of Divorce. The Parties agree that on or before five (5) business days from the execution of this Property Settlement Agreement, they will execute a stipulation for entry of a Judgment and Decree of Divorce to be filed with the Court.

11. **Merger with and into Judgment and Decree.** Except for paragraphs regarding alimony, this Agreement shall be merged with and into the Judgment and Decree of Divorce. With respect to alimony, the payment provisions herein shall be deemed integrated contracts between the Parties with no jurisdiction conferred upon this Court to modify.

12. **No Undue Influence.** The Parties agree that they have entered into this Agreement without undue influence or fraud or coercion or misrepresentation or for any other like cause.

13. **Further Performance.** The Parties agree to execute all additional documents within 14 days of presentation of each such document and take such further steps as shall be required to effectuate and carry out the performance of this Agreement.

14. **Amendments.** This Agreement may not be amended, modified, altered or changed in any respect whatsoever, except by further agreement in writing duly executed by the Parties.

15. **Cooperative Effort.** The parties acknowledge that this Agreement is the result of a cooperative effort between them and their independent counsel, and that in the event of any dispute over the meaning or effect of any provision herein, the rule of interpretation of ambiguous terms against the drafting party shall have no application.

16. **Advice of Counsel.** The Parties stipulate that they have been represented by counsel and are familiar with the terms, conditions and effect of this Agreement.

17. Attorney Fees. In the event of any controversy, claim, or action being made, filed, or instituted between the parties to this Agreement or any of the other documents related hereto, or arising from the breach of any provision hereof, the prevailing party will be entitled to receive from the other party all costs, damages, and expenses, including reasonable attorney's and paralegal's fees incurred by the prevailing party, whether or not such controversy or claim is litigated or prosecuted to judgment. Court costs and attorney and paralegal fees include those incurred as a result of bankruptcy, or on appeal.

18. Binding Agreement. This Agreement is binding upon the heirs, successors and assigns of the Parties.

19. Free and Voluntary Act. Each Party further acknowledges: (a) that settlement of his or her claims alleged against the other in this litigation and the execution and delivery of this Agreement and release by him or her, are by his or her free and voluntary act; and (b) that no promise, agreement, statement or representation not expressed herein has been agreed to or relied upon.

20. Choice of Law. This Agreement shall be interpreted in accordance with the laws and statutes of the State of Idaho.

21. Notices. All notices and demands required or permitted under this Agreement shall be in writing, containing the information required by this Agreement to be communicated to any person, personally delivered to such person or sent by certified mail, postage prepaid, or by reputable overnight air courier service (e.g., Federal Express or United Parcel Service) to such

person at the last known address of such person. The earlier of the date of personal delivery or two business days following the date of mailing or the date of delivery to the air courier thereof, as the case may be, shall be deemed the date of receipt of notice, unless proof of untimely delivery or non-delivery is provided by the addressee. The sender shall bear the risk of untimely delivery and non-delivery.

22. Partial Invalidity. In the event any portion of this Agreement shall be determined invalid, void or otherwise unenforceable, the remaining provisions shall remain in full force and effect, and shall in no way be affected, impaired or invalidated. It is understood that the remaining provisions shall be construed in a manner most closely approximating the intention of the Parties.

23. Execution of Counterparts. Duplicate copies of this Agreement may be signed by one or more of the Parties and their counsel and copies of this Agreement signed, collectively, by all Parties and their counsel shall be considered as a single, fully executed original document.

24. Waiver. Failure of a Party, or any of them, to exercise his or her rights upon any default of the other Party shall not be construed as the waiver of the right to insist upon full performance of all the terms and conditions of this Agreement, or of the right to exercise any other right contained in this Agreement.

25. Time. Time is of the essence of this Agreement and each and all of its provisions in which performance is a factor.

26. Warranty. THE UNDERSIGNED PARTIES INDIVIDUALLY AND THROUGH THEIR COUNSEL REPRESENT AND WARRANT THAT THEY HAVE READ THE FOREGOING AGREEMENT AND THAT THEY FULLY UNDERSTAND THE TERMS AND CONDITIONS SET FORTH HEREIN.

The remainder of this page was intentionally left blank

IN WITNESS WHEREOF, the Parties and their respective counsel have executed this Agreement on the date set forth above.

Approved as to form and content:

COSHO HUMPHREY, LLP

PATRICIA E. McKAY

By _____
Stanley W. Welsh
Attorneys for Patricia E. McKay

L. DARWIN McKAY

Approved as to form and content:

BROOKS LAW, P.C.

By _____
Kimberly D. Brooks
Attorneys for L. Darwin McKay

MILLER & HARR

By _____
John A. Miller
Attorneys for L. Darwin McKay

STATE OF IDAHO)
) ss.
County of Ada)

On November __, 2007, before me, the undersigned, a notary public in and for said county and state, personally appeared Patricia E. McKay, known to me to be the person whose name is subscribed to the within instrument and acknowledged to me that she executed the same.

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

NOTARY PUBLIC FOR IDAHO

Residing at _____

Commission Expires _____

STATE OF IDAHO)
) ss.
County of Ada)

On November __, 2007, before me, the undersigned, a notary public in and for said county and state, personally appeared L. Darwin McKay, known to me to be the person whose name is subscribed to the within instrument and acknowledged to me that he executed the same.

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

NOTARY PUBLIC FOR IDAHO

Residing at _____

Commission Expires _____

COSHO HUMPHREY, LLP

COUNSELORS & ATTORNEYS AT LAW

PO Box 9518 83707-9518

800 Park Blvd., Suite 790

Boise, Idaho 83712

Telephone 208.344.7811

Firm fax 208.338.3290

DIRECT PHONE 208.639.5507
CELL PHONE 208.869.1508
DIRECT FAX 208.639.5609

THOMAS G. WALKER

twalker@cosholaw.com
www.cicelawblog.com
www.thomasgwalker.com

November 20, 2007

Kimberly D. Brooks
Brooks Law, P.C.
23 9th Ave. North
Nampa, ID 83687

Via email to: kim@kbrookslaw.com

John A. Miller
Miller & Harr
1401 Shoreline Dr. Suite #3
Boise, ID 83702

Via email to: johnmiller@boiselaw.net

Re: Patricia E. McKay v. L. Darwin McKay
CH File No.: 19458-001
Case No.: CV DR 0615200

Dear Kim and John:

Patty and Stan have signed the Stipulation and Property Settlement Agreement. Attached is a copy of those documents and the Judgment and Decree of Divorce. Patty has also signed off on the Certificates of Title to the vehicles to be retained by Darwin. I have the Certificates of Title for the Mercedes and the motor home that Darwin needs to sign. I also have a billing from the Idaho State Tax Commission in the amount of \$1,360.97, dated November 9, 2007 and a billing from Harris & Company, P.A. The taxes and accounting bill are Darwin's responsibility under the Property Settlement Agreement. I also have the Palace Premier Ownership Change Request that Patty has signed. She does not have the binder referred to in the agreement. She recalls Darwin taking it from the residence some time ago.

I would like to have the foregoing documents delivered to John's office this morning so he and Darwin can sign the Stipulation and Property Settlement Agreement. Hopefully, John will be able to obtain Kim's signature and return the fully executed Stipulation, Property Settlement Agreement and Judgment and Decree of Divorce to me for filing with the Court today. Please give me a call and let me know whether I can have our runner take the foregoing documents to John's office.

Very truly yours,


THOMAS G. WALKER

cc: Patricia E. McKay
287629.doc



CH01313

000340

Pam Carson

From: Thomas G. Walker
Sent: Tuesday, November 20, 2007 9:41 AM
To: 'John Miller'; kim@kbrookslaw.com
Cc: Stanley W. Welsh; Melissa Wolfe; Pam Carson; kwescott@kbrookslaw.com; Patricia McKay
Subject: McKay
Attachments: Correspondence from Thomas Walker.pdf; McKay v McKay.pdf
Importance: High

John and Kim: See attached letter and Stipulation for Entry of Judgment and Decree of Divorce, Judgment and Decree and Property Settlement Agreement. Patty and Stan have signed the Stipulation and Property Settlement Agreement. As noted in my transmittal letter, I would like to have the foregoing documents delivered to John's office this morning so he and Darwin can sign the Stipulation and Property Settlement Agreement. Hopefully, John will be able to obtain Kim's signature and return the fully executed Stipulation, Property Settlement Agreement and Judgment and Decree of Divorce to me for filing with the Court today. Please give me a call and let me know whether I can have our runner take the foregoing documents to John's office.

Thomas G. Walker
Coshu Humphrey, LLP
800 Park Blvd., Suite 790
PO Box 9518
Boise, ID 83707-9518
Direct phone: 208-639-5607
Direct fax: 208-639-5609
E-mail: twalker@cosholaw.com
Blog: www.ricolawblog.com
RICO web site: www.thomasgwalker.com



COSHO HUMPHREY, LLP

THOMAS G. WALKER

twalker@coshohum.com
www.coshohum.com
www.thomasgwalker.com

COUNSELORS & ATTORNEYS AT LAW

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Boise, Idaho 83712

Telephone 208.344.7811
Firm fax 208.338.3290

DIRECT PHONE 208.639.5607
CELL PHONE 208.669.1508
DIRECT FAX 208.639.5609

November 20, 2007

Kimberly D. Brooks
Brooks Law, P.C.
23 9th Ave. North
Nampa, ID 83687

Via email to: kim@kbrooksllaw.com

John A. Miller
Miller & Harr
1401 Shoreline Dr. Suite #3
Boise, ID 83702

Via email to: johnmiller@boiselaw.net

Re: Patricia E. McKay v. L. Darwin McKay
CH File No.: 19458-001
Case No.: CV DR 0615200

Dear Kim and John:

Patty and Stan have signed the Stipulation and Property Settlement Agreement. Attached is a copy of those documents and the Judgment and Decree of Divorce. Patty has also signed off on the Certificates of Title to the vehicles to be retained by Darwin. I have the Certificates of Title for the Mercedes and the motor home that Darwin needs to sign. I also have a billing from the Idaho State Tax Commission in the amount of \$1,360.97, dated November 9, 2007 and a billing from Harris & Company, P.A. The taxes and accounting bill are Darwin's responsibility under the Property Settlement Agreement. I also have the Palace Premier Ownership Change Request that Patty has signed. She does not have the binder referred to in the agreement. She recalls Darwin taking it from the residence some time ago.

I would like to have the foregoing documents delivered to John's office this morning so he and Darwin can sign the Stipulation and Property Settlement Agreement. Hopefully, John will be able to obtain Kim's signature and return the fully executed Stipulation, Property Settlement Agreement and Judgment and Decree of Divorce to me for filing with the Court today. Please give me a call and let me know whether I can have our runner take the foregoing documents to John's office.

Very truly yours,



THOMAS G. WALKER

cc: Patricia E. McKay
267829.600

CH 2800

000342

Stanley W. Welsh (ISB No. 1964)
Thomas G. Walker (ISB No. 1856)
Cosho Humphrey, LLP
800 Park Blvd., Suite 790
P. O. Box 9518
Boise, Idaho 83707-9518
Direct Phone: (208) 639-5607
Cell phone: (208) 869-1508
Direct Facsimile: (208) 639-5609
E-mail: swelsh@cosholaw.com; twalker@cosholaw.com

Attorneys for Plaintiff Patricia McKay

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF

THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

MAGISTRATE DIVISION

★ ★ ★ ★ ★

PATRICIA McKay,

Plaintiff,

v.

DARWIN McKay,

Defendant.

Case No. CV DR 0615200

**STIPULATION FOR ENTRY OF
JUDGMENT AND DECREE OF
DIVORCE**


Plaintiff Patricia E. McKay ("Patricia"), by and through her counsel, Stanley W. Welsh of Cosho Humphrey, LLP, and L. Darwin McKay ("Darwin"), by and through his counsel, Kimberly D. Brooks of Brooks Law, P.C. and John A. Miller of Miller and Harr, do hereby stipulate that the Judgment and Decree of Divorce, including the incorporated Property Settlement Agreement submitted herewith may be entered by the Court.

Dated: November 20, 2007.


PATRICIA E. McKAY

Approved:

COSHO HUMPHREY, LLP

By 
Stanley W. Welsh
Attorneys for Patricia E. McKay

Dated: November __, 2007.

L. DARWIN McKAY

Approved:

BROOKS LAW, P.C.

By _____
Kimberly D. Brooks
Attorneys for L. Darwin McKay

MILLER & HARR

By _____
John A. Miller
Attorneys for L. Darwin McKay

Stanley W. Welsh (ISB No. 1964)
Thomas G. Walker (ISB No. 1856)
Cosho Humphrey, LLP
800 Park Blvd., Suite 790
P. O. Box 9518
Boise, Idaho 83707-9518
Direct Phone: (208) 639-5607
Cell phone: (208) 869-1508
Direct Facsimile: (208) 639-5609
E-mail: swelsh@cosholaw.com; twalker@cosholaw.com

Attorneys for Plaintiff Patricia McKay

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

MAGISTRATE DIVISION

★ ★ ★ ★ ★

PATRICIA McKAY,

Plaintiff,

v.

DARWIN McKAY,

Defendant.

Case No. CV DR 0615200

JUDGMENT AND DECREE OF
DIVORCE

Based upon the Stipulation of the parties, IT IS HEREBY ORDERED ADJUDGED
AND DECREED as follows:

1. **DIVORCE**: The Plaintiff ("Patricia") and the Defendant ("Darwin") were
married on July 6, 1996 in Nassau, Island of the Bahamas. Patricia and Darwin are granted a
divorce from one another on the grounds of irreconcilable differences. Each is restored to the
status of a single person.

JUDGMENT AND DECREE OF DIVORCE
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Page 1

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000345

2. **PROPERTY SETTLEMENT AGREEMENT:** Except for paragraphs in the Property Settlement Agreement dated October 20, 2007 regarding alimony, the Property Settlement Agreement shall be merged with and into the Judgment and Decree of Divorce. With respect to alimony, the payment provisions therein shall be deemed integrated contracts between the Parties with no jurisdiction conferred upon this Court to modify. The Property Settlement Agreement dated October 20, 2007 attached hereto as Exhibit A is approved by this Court and, except as noted above, is merged with and incorporated into this Judgment and Decree of Divorce.

DATED: November __, 2007.

MAGISTRATE

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the ___ day of November 2007 a true and correct copy of the foregoing Judgment and Decree of Divorce was served upon:

Stanley W. Welsh
Coshu Humphrey, LLP
800 Park Blvd., Suite 790
Boise, ID 83712
P.O. Box 9518
Boise, ID 83707-9518

☐ U.S. Mail
☐ Hand Delivery
☐ Overnight Courier
☐ Facsimile
☐ E-mail:

Kimberly D. Brooks
Brooks Law, P.C.
23 9th Ave. North
Nampa, ID 83687

☐ U.S. Mail
☐ Hand Delivery
☐ Overnight Courier
☐ Facsimile
☐ E-mail:

John A. Miller
Miller & Harr
Attorneys at Law
1401 Shoreline Drive, Suite 3
Boise, Idaho 83702

☐ U.S. Mail
☐ Hand Delivery
☐ Overnight Courier
☐ Facsimile
☐ E-mail:

Exhibit A

Stanley W. Welsh (ISB No. 1964)
Thomas G. Walker (ISB No. 1856)
Cosho Humphrey, LLP
800 Park Blvd., Suite 790
P. O. Box 9518
Boise, Idaho 83707-9518
Direct Phone: (208) 639-5607
Cell phone: (208) 869-1508
Direct Facsimile: (208) 639-5609
E-mail: swelsh@cosholaw.com; twalker@cosholaw.com

Attorneys for Plaintiff Patricia McKay

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF

THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

MAGISTRATE DIVISION

★ ★ ★ ★ ★

PATRICIA E. McKAY,

Plaintiff,

v.

L. DARWIN McKAY,

Defendant.

Case No. CV DR 0615200

**PROPERTY SETTLEMENT
AGREEMENT INCORPORATED AND
MERGED WITH AND INTO
JUDGMENT AND DECREE OF
DIVORCE**

This Property Settlement Agreement ("Agreement") is made and entered into this 20th day of October 2007 by and between Patricia E. McKay, Plaintiff ("Patricia" or "Plaintiff"), and L. Darwin McKay, Defendant ("Darwin" or "Defendant"). Patricia and Darwin are sometimes

individually referred to as a "Party" or collectively referred to as the "Parties". This Agreement is binding and enforceable upon the terms stated herein, notwithstanding the fact that additional documentation is required to carry out the terms of this Agreement.

1. Community Property. The Parties agree to the following settlement of their community property:

1.1. Subject to the provisions of paragraph 2.1 below, Patricia shall receive the personal residence located at 25 Horizon Drive, Boise, Idaho ("Personal Residence") free and clear of all encumbrances. Patricia shall furthermore receive all personal property and furniture contained therein. Patricia shall execute such written consent as may be required by the lenders to allow Darwin access to information regarding the 1st and 2nd deed of trust notes. Darwin shall transfer to Patricia as her sole and separate property by good and sufficient quit claim deed and quit claim bill of sale all of his right, title and interest in and to the Personal Residence, including all personal property and furniture.

1.2. Patricia shall receive the Box Office Productions stock. Darwin shall transfer to Patricia as her sole and separate property by good and sufficient assignment separate from stock certificate all of his right, title and interest in and to the Box Office Productions stock. Patricia shall cause the assignment form to be delivered to Darwin through counsel as soon as possible for Darwin's execution and delivery to Patricia through her counsel.

1.3. Patricia shall receive her IRA account.

1.4. Patricia shall receive the 1995 Mercedes S-500 vehicle in her possession and the 1980's motor home, currently located at the farm. Darwin shall deliver the motorhome to Patricia on or before December 1, 2007. Darwin shall transfer to Patricia as her sole and separate property by good and sufficient bill of sale and endorsement on the respective Certificates of Title all of his right, title and interest in and Patricia's 1995 Mercedes S-500 and the 1980's motorhome. Patricia shall cause the assignments forms to be delivered to Darwin through counsel as soon as possible for Darwin's execution and delivery to Patricia through her counsel.

1.5. Darwin may at his expense have the contents of the Personal Residence construction folder copied if necessary for preparation of the amended tax returns for 2005 and 2006 and for the 2007 tax return. Patricia shall retain the original of the Personal Residence construction folder.

1.6. Darwin shall pay to Patricia \$100,000.00 in four equal consecutive monthly installments of \$25,000.00 on or before January 15, 2008 and on or before the 15th day of February, March and April, 2008. The Parties acknowledge that the \$100,000.00 amount was based upon a portion of Patricia's attorneys' fees and litigation expenses. In accordance with Idaho Code § 32-704(3) said payments shall be paid by Darwin directly to Cosho Humphrey, LLP, who may enforce this portion of the Judgment in its own name; provided, however, Patricia may pay Cosho Humphrey, LLP prior to any such installment in which case, the payment or payments shall be paid directly to Patricia by Cosho Humphrey, LLP.

1.7. Darwin shall pay Patricia \$800,000 in cash, by wire transfer or certified check, within five (5) days of payment by the Status Corporation, or its assigns, ("Status Real Estate Transaction"). In addition, Darwin shall convey all his right, title and interest to Patricia in and to the two (2) lots to be conveyed by Status Corporation, or its assigns, to Darwin as part of the Status Corporation Real Estate Transaction. The parties acknowledge that the Status Real Estate Transaction is scheduled to close on or before March 30, 2008. Darwin shall diligently pursue the closing and shall not do anything to interfere with or delay the closing.

1.8. The parties acknowledge that if Status Corporation or its assigns breaches the Purchase and Sale Agreement, Darwin will have title to that portion of the land that had been referred to prior to the sale to Status Corporation as the "Home Farm." In the event of breach, Darwin may also be able to foreclose a mortgage on that portion of the land referred to prior to the sale to Status Corporation as "Albrethsen's Farm."

1.8.1. If the Status Real Estate Transaction fails to close on or before March 30, 2008, Darwin shall pay Patricia \$500,000 as soon as he is able to do without violating the lending terms and conditions of the bank holding the line of credit for the Turf Corporation.

1.8.2. Provided further that if Status Corporation or it assigns breaches the Purchase and Sale Agreement and Darwin cannot pay \$500,000 by April 30, 2008, he shall list the Albrethsen property that was included in the Status Corporation Real Estate Transaction for sale and shall pay Patricia by cash, certified check or wire transfer \$500,000 within five (5) days of receipt or closing on a sale.

1.8.3. Provided further that if following a breach, Darwin is not able to pay Patricia \$500,000 by September 30, 2008, he shall pay Patricia \$800,000 plus interest at the rate of 6% payable within five (5) days of any funds from the sale of either the Albrethsen property funds, the Home Farm property or both (provided that payment of funds from the sale of the Home Farm may only be made to the extent allowed by the bank holding the line of credit for the Turf Corporation) by cash, certified check, or by wire transfer.

1.9. Darwin shall be awarded the 2000 XJ8L Jaguar vehicle; 1973 5th wheel camp trailer; 1990 Ford pick-up truck; and 1994 Chrysler LHS. Darwin shall furthermore be entitled to pick up his separate property birch cabinet and birch bookcase located in the tool room of the Personal Residence. Upon delivery of the motorhome to Patricia, Darwin shall pick up the empty bookcase and cabinet. Darwin shall be awarded all separate and community property interests (if any) in the following:

- a. The Turf Corporation;
- b. The Turf Company of Nevada, Inc.;
- c. Pleasure Turf, LLC;
- d. The Turf Company, LLC;
- e. Turfand, LLC;
- f. Notes Receivables for Turf Company;
- g. Investment in Nevada Granite Industries;
- h. Palace Resorts Time Share;

- i. Proceeds from sale of Albrethsen;
- j. Personal effects and furnishings in Darwin's possession; and
- k. McKay family investments and interests.

2. **Community Debts.** The Parties agree to the following settlement of their community debts:

2.1. Commencing November 2007 and continuing thereafter as provided in this paragraph, Darwin shall pay Patricia's 1st and 2nd deed of trust note payments, including property taxes and insurance, as required by the lender(s), encumbering the Personal Residence ("Personal Residence Debt") as and for maintenance or alimony for Patricia. Darwin shall timely pay both 1st and 2nd deed of trust note payments directly to the respective mortgage companies. Patricia will provide Darwin via fax or email the 1st and 2nd deed of trust note monthly statements within five days of when Patricia receives them. Each month Darwin shall notify Patricia via fax or email that he has made the respective 1st and 2nd deed of trust note monthly payments in a timely manner. The payments required under this paragraph shall terminate when Darwin pays off the Personal Residence Debt. Darwin shall pay off the full amount of Personal Residence Debt directly to the respective mortgage companies within thirty (30) days of the date the Status Real Estate Transaction closes, or within thirty (30) days of receipt of any funds from the sale of either the Albrethsen property, the Home Farm property or both (provided that payment of funds from the sale of the Home Farm may only be made to the extent allowed by the bank holding the line of credit for the Turf Corporation), but in any event, Darwin shall payoff the Personal Residence

Debt on or before October 20, 2012. Notwithstanding the foregoing, Patricia shall have the right to sell the Personal Residence at any time; in which case, the Personal Residence Debt would likely be paid off out of the sale proceeds. If Patricia sells the Personal Residence, Darwin shall pay directly to Patricia as a property equalization payment the unpaid principal balance of the Personal Residence Debt, plus interest accruing at the respective rates called for in the first and second loan documents, in monthly installments to and including payment in full of the Personal Residence Debt. The Parties agree that Kevin Crane, CPA, or if Mr. Crane cannot serve, such other accountant as the Parties shall designate, will provide the appropriate calculations of the remaining balance and accruing interest and Darwin shall execute and deliver a promissory note to Patricia setting forth his payment obligations. Any such promissory note shall include a right of prepayment. As of October 20, 2007, the unpaid principal balance of the 1st deed of trust note (World Savings Loan No. [REDACTED] is \$556,324.34 and interest is accruing from and after October 20, 2007 at the rate provided in the 1st deed of trust note. As of October 20, 2007, the unpaid principal balance of the 2nd deed of trust note (Countrywide Loan No. [REDACTED] is \$67,490.49 and interest is accruing from and after October 20, 2007 at the variable rate provided in the 2nd deed of trust note. Darwin shall pay each of these notes, including interest accruing from and after October 20, 2007 until each note is paid in full.

2.2 Darwin shall pay off the two Chase Visa credit cards and Bank of America credit card as property equalization payments as follows:

| | |
|---------------------------|-------------|
| Chase Visa ending in 2116 | \$46,327.00 |
|---------------------------|-------------|

Chase Visa ending in 0853 2,076.17

Bank of America ending in 0232 22,845.13

\$71,248.30

Darwin shall pay the \$71,248.30, plus interest as follows:

| | |
|----------------|---|
| November 2007: | \$14,249.66, plus interest on the unpaid balance attributable to the \$71,248.30; |
| December 2007: | \$14,249.66, plus interest on the unpaid balance attributable to the \$71,248.30; |
| January 2008: | \$14,249.66, plus interest on the unpaid balance attributable to the \$71,248.30; |
| February 2008: | \$14,249.66, plus interest on the unpaid balance attributable to the \$71,248.30; |
| March 2008 | \$14,249.66, plus interest on the unpaid balance attributable to the \$71,248.30; |

Darwin shall pay all payments listed above in a timely manner such that no late fees are incurred. The November 2007 payment shall pay the Chase Visa ending in 0853 in full and shall then apply \$6,086.75 to the Chase Visa ending in 2116 and \$6,086.75 to the Bank of America ending in 0232. Each month Darwin shall notify Patricia via fax or email that he has made the respective credit card payments in a timely manner.

Patricia shall be responsible for all charges, interest, finance charges, and fees attributable to charges made by her after October 20, 2007. Patricia shall be responsible for all other credit card debt in her name alone or charged by Patricia without Darwin's knowledge.

2.3 Mediation Expense. Darwin shall pay one-half and Patricia shall pay one-half of all fees and expenses of mediation.

3. **Alimony/ Maintenance Payments from Darwin to Patricia.** Commencing November 2007 and continuing until Patricia is paid \$800,000.00 or \$500,000.00 as provided above, Darwin shall pay Patricia each month the sum of \$2,500.00 as and for alimony/maintenance. All liability for alimony shall cease upon payment of the \$800,000.00 or \$500,000.00 as provided above.

4. **Full Disclosure.** Each Party represents to the other that full disclosure of all community assets and community liabilities, of which he or she is aware, has been made.

5. **Allocation of Property to Darwin.** Except as expressly provided herein, Patricia agrees to transfer by good and sufficient quit claim deed, quit claim bill of sale, quit claim assignment and/or other necessary quit claim document of conveyance all of her right, title and interest to Darwin in and to all of the community property awarded to Darwin herein, as his sole and separate property. Patricia shall return the notebook containing all of the Palace Resorts Information, including but not limited to Palace Premier Certificates; Palace Premier Golf Passes; Premier Gold Membership; and Palace Premier / RCI Certificates. Patricia shall specifically sign over title to the 1994 Chrysler, 1990 Ford Pick-up and 1973 5th Wheel Camp Trailer. Darwin shall cause said transfers to be delivered to Patricia through counsel as soon as possible, except for the 1990 pickup, for which title is in Patricia's possession and shall be produced as soon as possible. Patricia shall further sign the Palace Premier Change of Ownership, which shall be delivered to Patricia through counsel.

6. Disposition of Property. Subject to the provisions of this Agreement, each of the Parties hereto may dispose of his or her property of whatever nature, real or personal; and the Parties hereto, each for himself and herself, respectively, and for the respective heirs, legal representatives, executors and administrators and assigns, hereby waive any right of election which he or she may have or hereafter acquire regarding the estate of the other, or any right to take against any last will and testament of the other, whether heretofore or hereafter executed, or as may now or hereafter be provided for in any law of the State of Idaho or any other state or territory of the United States or any foreign country, and hereby renounces and releases all interest, right or claim that he or she now has or might otherwise have against the other, under or by virtue of the laws of any state or country, and each Party shall sign any document necessary to release his or her interest to the other Party or any other document necessary to transfer any title or release any interest necessary to carry out the intent of this paragraph.

7. Release of Patricia from all Debts and Personal Guarantees. On or before December 1, 2007, Darwin shall obtain at his sole cost and expense written releases of Patricia from liability for all debts whether such debts are owed to banks, vendors, and/or other creditors for whom Patricia may have liability for any reason, including but not limited to Patricia's execution of notes, personal guarantees or collateral security documents that she delivered during the Parties' marriage. Darwin shall provide Patricia with a true, correct and complete copy of each such release on or before December 1, 2007.

8. **Payment of Accounting Fees and Income Taxes by Darwin.** Darwin shall pay for the preparation of state and federal income tax returns and/or amended returns for the Parties for 2005, 2006 and 2007. The Parties agree to file said tax returns under the filing status resulting in the lowest state and federal income taxes. The Parties agree to cooperate with Kevin Crane, or any other accountant as Darwin deems necessary to complete the filing of such returns. Darwin shall pay all state and federal income taxes, interest and penalties, if any, for all years prior to January 1, 2008 and Darwin shall be entitled to all tax refunds, if any. Patricia shall be entitled to claim the interest paid on the deed of trust notes encumbering the Personal Residence and Darwin shall claim the monies paid towards the deed of trust note payments as alimony to Patricia. Darwin shall further claim all \$2,500.00 payments to Patricia pursuant to paragraph 3 herein as alimony.

9. **Separate Property / Income After Execution of Agreement.** The Parties hereto stipulate and agree that from and after the date of this Agreement, any and all property or income acquired or earned by either Party hereto shall be the separate property of the Party who has acquired or earned it, any income on separate property shall be separate property and the other Party shall have no claim on any separate property income or earnings. Beginning tax year 2008 and all years thereon, the parties shall each file separately. Neither party shall include in their income any income earned by the other after December 31, 2007. Nor shall either party claim a credit or deduction for expenditures made by the other after December 31, 2007. Any tax

liability arising from income after December 31, 2007 shall be paid and assumed according to their respective separate returns.

10. Debts after Execution of Agreement. The Parties agree that from and after October 20, 2007, any debts incurred by either Party hereto shall be the separate debt of the Party incurring the debt and shall not be a community debt. The Parties hereto agree not to incur any debt for which the other Party may be liable.

11. Mutual Release of Claims. For good and valuable consideration passing between the Parties, the receipt and sufficiency of which is acknowledged by each Party, the Parties each for themselves and for their heirs, representatives, agents, employees, successors, executors, administrators, subrogees and assigns, release the other Party and his or her heirs, representatives, agents, employees, successors, executors, administrators, subrogees and assigns, and each Party shall release, indemnify and hold harmless the other Party from any and all claims, liabilities or obligations arising out of or in any way connected with their marriage, including but not limited to all claims set forth in or comprehended by that certain litigation identified in the caption above. The term claims shall include any and all claims and counterclaims, whether known or unknown, a Party may have against the other Party as a result of their marriage and the litigation identified above.

12. Entry of Decree of Divorce. The Parties agree that on or before five (5) business days from the execution of this Property Settlement Agreement, they will execute a stipulation for entry of a Judgment and Decree of Divorce to be filed with the Court.

11. **Merger with and into Judgment and Decree.** Except for paragraphs regarding alimony, this Agreement shall be merged with and into the Judgment and Decree of Divorce. With respect to alimony, the payment provisions herein shall be deemed integrated contracts between the Parties with no jurisdiction conferred upon this Court to modify.

12. **No Undue Influence.** The Parties agree that they have entered into this Agreement without undue influence or fraud or coercion or misrepresentation or for any other like cause.

13. **Further Performance.** The Parties agree to execute all additional documents within 14 days of presentation of each such document and take such further steps as shall be required to effectuate and carry out the performance of this Agreement.

14. **Amendments.** This Agreement may not be amended, modified, altered or changed in any respect whatsoever, except by further agreement in writing duly executed by the Parties.

15. **Cooperative Effort.** The parties acknowledge that this Agreement is the result of a cooperative effort between them and their independent counsel, and that in the event of any dispute over the meaning or effect of any provision herein, the rule of interpretation of ambiguous terms against the drafting party shall have no application.

16. **Advice of Counsel.** The Parties stipulate that they have been represented by counsel and are familiar with the terms, conditions and effect of this Agreement.

17. **Attorney Fees.** In the event of any controversy, claim, or action being made, filed, or instituted between the parties to this Agreement or any of the other documents related hereto, or arising from the breach of any provision hereof, the prevailing party will be entitled to receive from the other party all costs, damages, and expenses, including reasonable attorney's and paralegal's fees incurred by the prevailing party, whether or not such controversy or claim is litigated or prosecuted to judgment. Court costs and attorney and paralegal fees include those incurred as a result of bankruptcy, or on appeal.

18. **Binding Agreement.** This Agreement is binding upon the heirs, successors and assigns of the Parties.

19. **Free and Voluntary Act.** Each Party further acknowledges: (a) that settlement of his or her claims alleged against the other in this litigation and the execution and delivery of this Agreement and release by him or her, are by his or her free and voluntary act; and (b) that no promise, agreement, statement or representation not expressed herein has been agreed to or relied upon.

20. **Choice of Law.** This Agreement shall be interpreted in accordance with the laws and statutes of the State of Idaho.

21. **Notices.** All notices and demands required or permitted under this Agreement shall be in writing, containing the information required by this Agreement to be communicated to any person, personally delivered to such person or sent by certified mail, postage prepaid, or by reputable overnight air courier service (e.g., Federal Express or United Parcel Service) to such

person at the last known address of such person. The earlier of the date of personal delivery or two business days following the date of mailing or the date of delivery to the air courier thereof, as the case may be, shall be deemed the date of receipt of notice, unless proof of untimely delivery or non-delivery is provided by the addressee. The sender shall bear the risk of untimely delivery and non-delivery.

22. **Partial Invalidity.** In the event any portion of this Agreement shall be determined invalid, void or otherwise unenforceable, the remaining provisions shall remain in full force and effect, and shall in no way be affected, impaired or invalidated. It is understood that the remaining provisions shall be construed in a manner most closely approximating the intention of the Parties.

23. **Execution of Counterparts.** Duplicate copies of this Agreement may be signed by one or more of the Parties and their counsel and copies of this Agreement signed, collectively, by all Parties and their counsel shall be considered as a single, fully executed original document.

24. **Waiver.** Failure of a Party, or any of them, to exercise his or her rights upon any default of the other Party shall not be construed as the waiver of the right to insist upon full performance of all the terms and conditions of this Agreement, or of the right to exercise any other right contained in this Agreement.

25. **Time.** Time is of the essence of this Agreement and each and all of its provisions in which performance is a factor.

26. **Warranty.** THE UNDERSIGNED PARTIES INDIVIDUALLY AND THROUGH THEIR COUNSEL REPRESENT AND WARRANT THAT THEY HAVE READ THE FOREGOING AGREEMENT AND THAT THEY FULLY UNDERSTAND THE TERMS AND CONDITIONS SET FORTH HEREIN.

The remainder of this page was intentionally left blank

IN WITNESS WHEREOF, the Parties and their respective counsel have executed this Agreement on the date set forth above.


PATRICIA E. McKAY

Approved as to form and content:

COSHO HUMPHREY, LLP

By 
Stanley W. Welsh
Attorneys for Patricia E. McKay

L. DARWIN McKAY

Approved as to form and content:

BROOKS LAW, P.C.

By _____
Kimberly D. Brooks
Attorneys for L. Darwin McKay

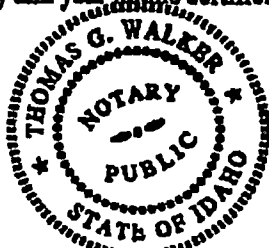
MILLER & HARR

By _____
John A. Miller
Attorneys for L. Darwin McKay

STATE OF IDAHO)
) ss.
County of Ada)

On November 10, 2007, before me, the undersigned, a notary public in and for said county and state, personally appeared Patricia E. McKay, known to me to be the person whose name is subscribed to the within instrument and acknowledged to me that she executed the same.

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



Thomas G. Walker
NOTARY PUBLIC FOR IDAHO
Residing at 801 SE
Commission Expires 3/20/1

STATE OF IDAHO)
) ss.
County of Ada)

On November __, 2007, before me, the undersigned, a notary public in and for said county and state, personally appeared L. Darwin McKay, known to me to be the person whose name is subscribed to the within instrument and acknowledged to me that he executed the same.

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

NOTARY PUBLIC FOR IDAHO
Residing at _____
Commission Expires _____

Pam Carson

From: Stanley W. Welsh
Sent: Monday, December 03, 2007 12:37 PM
To: Pam Carson; 'Patricia McKay'
Cc: Thomas G. Walker; Melissa Wolfe
Subject: RE: McKay v. McKay

Patty, Let us know if you think we should record any other counties.

From: Pam Carson
Sent: Monday, December 03, 2007 12:37 PM
To: Patricia McKay
Cc: Thomas G. Walker; Stanley W. Welsh; Melissa Wolfe
Subject: McKay v. McKay

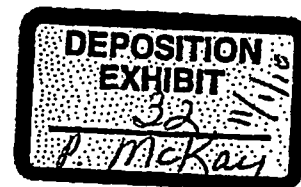
Patty:

Attached is the Judgment and Decree of Divorce entered November 29, 2007. We will be obtaining three certified copies of the Decree with attached Exhibit A (Property Settlement Agreement) for recording in Ada County, Owyhee County and Teton County. If you have any questions, please advise.

Pamela R. Carson

Paralegal
Coshu Humphrey, LLP
800 Park Blvd., Suite 790
P.O. Box 9518
Boise, Idaho 83707-9518
Firm Phone: (208) 344-7811
Direct Phone: (208) 639-5630
Direct Fax: (208) 639-5631
email: pcarson@coshulaw.com

12/3/2007



CH00795

000366

Exhibit B

ORIGINAL

COPY

NOV 29 2007
AM 8:49 PM

NOV 29 2007
J. DAVID NAVARRO, Clerk
By J. EARLE
DEPUTY

Stanley W. Welsh (ISB No. 1964)
Thomas G. Walker (ISB No. 1856)
Cosho Humphrey, LLP
800 Park Blvd., Suite 790
P. O. Box 9518
Boise, Idaho 83707-9518
Direct Phone: (208) 639-5607
Cell phone: (208) 869-1508
Direct Facsimile: (208) 639-5609
E-mail: swelsh@cosholaw.com; twalker@cosholaw.com

Attorneys for Plaintiff Patricia McKay

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

MAGISTRATE DIVISION

★ ★ ★ ★ ★

PATRICIA McKAY,

Plaintiff,

v.

DARWIN McKAY,

Defendant.

Case No. CV DR 0615200

JUDGMENT AND DECREE OF
DIVORCE

Based upon the Stipulation of the parties, IT IS HEREBY ORDERED ADJUDGED
AND DECREED as follows:

1. **DIVORCE**: The Plaintiff ("Patricia") and the Defendant ("Darwin") were
married on July 6, 1996 in Nassau, Island of the Bahamas. Patricia and Darwin are granted a
divorce from one another on the grounds of irreconcilable differences. Each is restored to the
status of a single person.

JUDGMENT AND DECREE OF DIVORCE
279198.doc

Page 1

MCKAY 217

000368

2. **PROPERTY SETTLEMENT AGREEMENT:** Except for paragraphs in the Property Settlement Agreement dated October 20, 2007 regarding alimony, the Property Settlement Agreement shall be merged with and into the Judgment and Decree of Divorce. With respect to alimony, the payment provisions therein shall be deemed integrated contracts between the Parties with no jurisdiction conferred upon this Court to modify. The Property Settlement Agreement dated October 20, 2007 attached hereto as Exhibit A is approved by this Court and, except as noted above, is merged with and incorporated into this Judgment and Decree of Divorce.

DATED: November 26 2007.



MAGISTRATE

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 24th day of November 2007 a true and correct copy of the foregoing Judgment and Decree of Divorce was served upon:

Stanley W. Welsh
Coshu Humphrey, LLP
800 Park Blvd., Suite 790
Boise, ID 83712
P.O. Box 9518
Boise, ID 83707-9518

☒ U.S. Mail
☒ Hand Delivery
☐ Overnight Courier
☐ Facsimile
☐ E-mail:

Kimberly D. Brooks
Brooks Law, P.C.
23 9th Ave. North
Nampa, ID 83687

☒ U.S. Mail
☐ Hand Delivery
☐ Overnight Courier
☐ Facsimile
☐ E-mail:

John A. Miller
Miller & Harr
Attorneys at Law
1401 Shoreline Drive, Suite 3
Boise, Idaho 83702

☒ U.S. Mail
☐ Hand Delivery
☐ Overnight Courier
☐ Facsimile
☐ E-mail:

7-6-07

Exhibit A

Stanley W. Welsh (ISB No. 1964)
Thomas G. Walker (ISB No. 1856)
Cosho Humphrey, LLP
800 Park Blvd., Suite 790
P. O. Box 9518
Boise, Idaho 83707-9518
Direct Phone: (208) 639-5607
Cell phone: (208) 869-1508
Direct Facsimile: (208) 639-5609
E-mail: swelsh@cosholaw.com; twalker@cosholaw.com

Attorneys for Plaintiff Patricia McKay

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

MAGISTRATE DIVISION

★ ★ ★ ★ ★

PATRICIA E. McKAY,

Plaintiff,

v.

L. DARWIN McKAY,

Defendant.

Case No. CV DR 0615200

**PROPERTY SETTLEMENT
AGREEMENT INCORPORATED AND
MERGED WITH AND INTO
JUDGMENT AND DECREE OF
DIVORCE**

This Property Settlement Agreement ("Agreement") is made and entered into this 20th day of October 2007 by and between Patricia E. McKay, Plaintiff ("Patricia" or "Plaintiff"), and L. Darwin McKay, Defendant ("Darwin" or "Defendant"). Patricia and Darwin are sometimes

individually referred to as a "Party" or collectively referred to as the "Parties". This Agreement is binding and enforceable upon the terms stated herein, notwithstanding the fact that additional documentation is required to carry out the terms of this Agreement.

1. **Community Property.** The Parties agree to the following settlement of their community property:

1.1. Subject to the provisions of paragraph 2.1 below, Patricia shall receive the personal residence located at 25 Horizon Drive, Boise, Idaho ("Personal Residence") free and clear of all encumbrances. Patricia shall furthermore receive all personal property and furniture contained therein. Patricia shall execute such written consent as may be required by the lenders to allow Darwin access to information regarding the 1st and 2nd deed of trust notes. Darwin shall transfer to Patricia as her sole and separate property by good and sufficient quit claim deed and quit claim bill of sale all of his right, title and interest in and to the Personal Residence, including all personal property and furniture.

1.2. Patricia shall receive the Box Office Productions stock. Darwin shall transfer to Patricia as her sole and separate property by good and sufficient assignment separate from stock certificate all of his right, title and interest in and to the Box Office Productions stock. Patricia shall cause the assignment form to be delivered to Darwin through counsel as soon as possible for Darwin's execution and delivery to Patricia through her counsel.

1.3. Patricia shall receive her IRA account.

1.4. Patricia shall receive the 1995 Mercedes S-500 vehicle in her possession and the 1980's motor home, currently located at the farm. Darwin shall deliver the motorhome to Patricia on or before December 1, 2007. Darwin shall transfer to Patricia as her sole and separate property by good and sufficient bill of sale and endorsement on the respective Certificates of Title all of his right, title and interest in and Patricia's 1995 Mercedes S-500 and the 1980's motorhome. Patricia shall cause the assignments forms to be delivered to Darwin through counsel as soon as possible for Darwin's execution and delivery to Patricia through her counsel.

1.5. Darwin may at his expense have the contents of the Personal Residence construction folder copied if necessary for preparation of the amended tax returns for 2005 and 2006 and for the 2007 tax return. Patricia shall retain the original of the Personal Residence construction folder.

1.6. Darwin shall pay to Patricia \$100,000.00 in four equal consecutive monthly installments of \$25,000.00 on or before January 15, 2008 and on or before the 15th day of February, March and April, 2008. The Parties acknowledge that the \$100,000.00 amount was based upon a portion of Patricia's attorneys' fees and litigation expenses. In accordance with Idaho Code § 32-704(3) said payments shall be paid by Darwin directly to Cosho Humphrey, LLP, who may enforce this portion of the Judgment in its own name; provided, however, Patricia may pay Cosho Humphrey, LLP prior to any such installment in which case, the payment or payments shall be paid directly to Patricia by Cosho Humphrey, LLP.

1.7. Darwin shall pay Patricia \$800,000 in cash, by wire transfer or certified check, within five (5) days of payment by the Status Corporation, or its assigns, ("Status Real Estate Transaction"). In addition, Darwin shall convey all his right, title and interest to Patricia in and to the two (2) lots to be conveyed by Status Corporation, or its assigns, to Darwin as part of the Status Corporation Real Estate Transaction. The parties acknowledge that the Status Real Estate Transaction is scheduled to close on or before March 30, 2008. Darwin shall diligently pursue the closing and shall not do anything to interfere with or delay the closing.

1.8. The parties acknowledge that if Status Corporation or its assigns breaches the Purchase and Sale Agreement, Darwin will have title to that portion of the land that had been referred to prior to the sale to Status Corporation as the "Home Farm." In the event of breach, Darwin may also be able to foreclose a mortgage on that portion of the land referred to prior to the sale to Status Corporation as "Albrethsen's Farm."

1.8.1. If the Status Real Estate Transaction fails to close on or before March 30, 2008, Darwin shall pay Patricia \$500,000 as soon as he is able to do without violating the lending terms and conditions of the bank holding the line of credit for the Turf Corporation.

1.8.2. Provided further that if Status Corporation or it assigns breaches the Purchase and Sale Agreement and Darwin cannot pay \$500,000 by April 30, 2008, he shall list the Albrethsen property that was included in the Status Corporation Real Estate Transaction for sale and shall pay Patricia by cash, certified check or wire transfer \$500,000 within five (5) days of receipt or closing on a sale.

1.8.3. Provided further that if following a breach, Darwin is not able to pay Patricia \$500,000 by September 30, 2008, he shall pay Patricia \$800,000 plus interest at the rate of 6% payable within five (5) days of any funds from the sale of either the Albrethsen property funds, the Home Farm property or both (provided that payment of funds from the sale of the Home Farm may only be made to the extent allowed by the bank holding the line of credit for the Turf Corporation) by cash, certified check, or by wire transfer.

1.9. Darwin shall be awarded the 2000 XJ8L Jaguar vehicle; 1973 5th wheel camp trailer; 1990 Ford pick-up truck; and 1994 Chrysler LHS. Darwin shall furthermore be entitled to pick up his separate property birch cabinet and birch bookcase located in the tool room of the Personal Residence. Upon delivery of the motorhome to Patricia, Darwin shall pick up the empty bookcase and cabinet. Darwin shall be awarded all separate and community property interests (if any) in the following:

- a. The Turf Corporation;
- b. The Turf Company of Nevada, Inc.;
- c. Pleasure Turf, LLC;
- d. The Turf Company, LLC;
- e. Turfland, LLC;
- f. Notes Receivables for Turf Company;
- g. Investment in Nevada Granite Industries;
- h. Palace Resorts Time Share;

No date as to when all was to be paid to me if this would be \$800,000.

*This was after I
was paid in full.*

- i. Proceeds from sale of Albrethsen;
- j. Personal effects and furnishings in Darwin's possession; and
- k. McKay family investments and interests.

2. **Community Debts.** The Parties agree to the following settlement of their community debts:

2.1. Commencing November 2007 and continuing thereafter as provided in this paragraph, Darwin shall pay Patricia's 1st and 2nd deed of trust note payments, including property taxes and insurance, as required by the lender(s), encumbering the Personal Residence ("Personal Residence Debt") as and for maintenance or alimony for Patricia. Darwin shall timely pay both 1st and 2nd deed of trust note payments directly to the respective mortgage companies. Patricia will provide Darwin via fax or email the 1st and 2nd deed of trust note monthly statements within five days of when Patricia receives them. Each month Darwin shall notify Patricia via fax or email that he has made the respective 1st and 2nd deed of trust note monthly payments in a timely manner. The payments required under this paragraph shall terminate when Darwin pays off the Personal Residence Debt. Darwin shall pay off the full amount of Personal Residence Debt directly to the respective mortgage companies within thirty (30) days of the date the Status Real Estate Transaction closes, or within thirty (30) days of receipt of any funds from the sale of either the Albrethsen property, the Home Farm property or both (provided that payment of funds from the sale of the Home Farm may only be made to the extent allowed by the bank holding the line of credit for the Turf Corporation), but in any event, Darwin shall payoff the Personal Residence

Debt on or before October 20, 2012. Notwithstanding the foregoing, Patricia shall have the right to sell the Personal Residence at any time; in which case, the Personal Residence Debt would likely be paid off out of the sale proceeds. If Patricia sells the Personal Residence, Darwin shall pay directly to Patricia as a property equalization payment the unpaid principal balance of the Personal Residence Debt, plus interest accruing at the respective rates called for in the first and second loan documents, in monthly installments to and including payment in full of the Personal Residence Debt. The Parties agree that Kevin Crane, CPA, or if Mr. Crane cannot serve, such other accountant as the Parties shall designate, will provide the appropriate calculations of the remaining balance and accruing interest and Darwin shall execute and deliver a promissory note to Patricia setting forth his payment obligations. Any such promissory note shall include a right of prepayment. As of October 20, 2007, the unpaid principal balance of the 1st deed of trust note (World Savings Loan No. [REDACTED] is \$556,324.34 and interest is accruing from and after October 20, 2007 at the rate provided in the 1st deed of trust note. As of October 20, 2007, the unpaid principal balance of the 2nd deed of trust note (Countrywide Loan No. [REDACTED] is \$67,490.49 and interest is accruing from and after October 20, 2007 at the variable rate provided in the 2nd deed of trust note. Darwin shall pay each of these notes, including interest accruing from and after October 20, 2007 until each note is paid in full.

2.2 Darwin shall pay off the two Chase Visa credit cards and Bank of America credit card as property equalization payments as follows:

| | |
|---------------------------|-------------|
| Chase Visa ending in 2116 | \$46,327.00 |
|---------------------------|-------------|

Chase Visa ending in 0853 2,076.17

Bank of America ending in 0232 22,845.13

\$71,248.30

Darwin shall pay the \$71,248.30, plus interest as follows:

| | |
|----------------|---|
| November 2007: | \$14,249.66, plus interest on the unpaid balance attributable to the \$71,248.30; |
| December 2007: | \$14,249.66, plus interest on the unpaid balance attributable to the \$71,248.30; |
| January 2008: | \$14,249.66, plus interest on the unpaid balance attributable to the \$71,248.30; |
| February 2008: | \$14,249.66, plus interest on the unpaid balance attributable to the \$71,248.30; |
| March 2008 | \$14,249.66, plus interest on the unpaid balance attributable to the \$71,248.30; |

Darwin shall pay all payments listed above in a timely manner such that no late fees are incurred. The November 2007 payment shall pay the Chase Visa ending in 0853 in full and shall then apply \$6,086.75 to the Chase Visa ending in 2116 and \$6,086.75 to the Bank of America ending in 0232. Each month Darwin shall notify Patricia via fax or email that he has made the respective credit card payments in a timely manner.

Patricia shall be responsible for all charges, interest, finance charges, and fees attributable to charges made by her after October 20, 2007. Patricia shall be responsible for all other credit card debt in her name alone or charged by Patricia without Darwin's knowledge.

2.3 Mediation Expense. Darwin shall pay one-half and Patricia shall pay one-half of all fees and expenses of mediation.

3. **Alimony/ Maintenance Payments from Darwin to Patricia.** Commencing November 2007 and continuing until Patricia is paid \$800,000.00 or \$500,000.00 as provided above, Darwin shall pay Patricia each month the sum of \$2,500.00 as and for alimony/maintenance. All liability for alimony shall cease upon payment of the \$800,000.00 or \$500,000.00 as provided above.

4. **Full Disclosure.** Each Party represents to the other that full disclosure of all community assets and community liabilities, of which he or she is aware, has been made.

5. **Allocation of Property to Darwin.** Except as expressly provided herein, Patricia agrees to transfer by good and sufficient quit claim deed, quit claim bill of sale, quit claim assignment and/or other necessary quit claim document of conveyance all of her right, title and interest to Darwin in and to all of the community property awarded to Darwin herein, as his sole and separate property. Patricia shall return the notebook containing all of the Palace Resorts Information, including but not limited to Palace Premier Certificates; Palace Premier Golf Passes; Premier Gold Membership; and Palace Premier / RCI Certificates. Patricia shall specifically sign over title to the 1994 Chrysler; 1990 Ford Pick-up and 1973 5th Wheel Camp Trailer. Darwin shall cause said transfers to be delivered to Patricia through counsel as soon as possible, except for the 1990 pickup, for which title is in Patricia's possession and shall be produced as soon as possible. Patricia shall further sign the Palace Premier Change of Ownership, which shall be delivered to Patricia through counsel.

6. **Disposition of Property.** Subject to the provisions of this Agreement, each of the Parties hereto may dispose of his or her property of whatever nature, real or personal; and the Parties hereto, each for himself and herself, respectively, and for the respective heirs, legal representatives, executors and administrators and assigns, hereby waive any right of election which he or she may have or hereafter acquire regarding the estate of the other, or any right to take against any last will and testament of the other, whether heretofore or hereafter executed, or as may now or hereafter be provided for in any law of the State of Idaho or any other state or territory of the United States or any foreign country, and hereby renounces and releases all interest, right or claim that he or she now has or might otherwise have against the other, under or by virtue of the laws of any state or country, and each Party shall sign any document necessary to release his or her interest to the other Party or any other document necessary to transfer any title or release any interest necessary to carry out the intent of this paragraph.

7. **Release of Patricia from all Debts and Personal Guarantees.** On or before December 1, 2007, Darwin shall obtain at his sole cost and expense written releases of Patricia from liability for all debts whether such debts are owed to banks, vendors, and/or other creditors for whom Patricia may have liability for any reason, including but not limited to Patricia's execution of notes, personal guarantees or collateral security documents that she delivered during the Parties' marriage. Darwin shall provide Patricia with a true, correct and complete copy of each such release on or before December 1, 2007.

8. **Payment of Accounting Fees and Income Taxes by Darwin.** Darwin shall pay for the preparation of state and federal income tax returns and/or amended returns for the Parties for 2005, 2006 and 2007. The Parties agree to file said tax returns under the filing status resulting in the lowest state and federal income taxes. The Parties agree to cooperate with Kevin Crane, or any other accountant as Darwin deems necessary to complete the filing of such returns. Darwin shall pay all state and federal income taxes, interest and penalties, if any, for all years prior to January 1, 2008 and Darwin shall be entitled to all tax refunds, if any. Patricia shall be entitled to claim the interest paid on the deed of trust notes encumbering the Personal Residence and Darwin shall claim the monies paid towards the deed of trust note payments as alimony to Patricia. Darwin shall further claim all \$2,500.00 payments to Patricia pursuant to paragraph 3 herein as alimony.

9. **Separate Property / Income After Execution of Agreement.** The Parties hereto stipulate and agree that from and after the date of this Agreement, any and all property or income acquired or earned by either Party hereto shall be the separate property of the Party who has acquired or earned it, any income on separate property shall be separate property and the other Party shall have no claim on any separate property income or earnings. Beginning tax year 2008 and all years thereon, the parties shall each file separately. Neither party shall include in their income any income earned by the other after December 31, 2007. Nor shall either party claim a credit or deduction for expenditures made by the other after December 31, 2007. Any tax

liability arising from income after December 31, 2007 shall be paid and assumed according to their respective separate returns.

10. **Debts after Execution of Agreement.** The Parties agree that from and after October 20, 2007, any debts incurred by either Party hereto shall be the separate debt of the Party incurring the debt and shall not be a community debt. The Parties hereto agree not to incur any debt for which the other Party may be liable.

11. **Mutual Release of Claims.** For good and valuable consideration passing between the Parties, the receipt and sufficiency of which is acknowledged by each Party, the Parties each for themselves and for their heirs, representatives, agents, employees, successors, executors, administrators, subrogees and assigns, release the other Party and his or her heirs, representatives, agents, employees, successors, executors, administrators, subrogees and assigns, and each Party shall release, indemnify and hold harmless the other Party from any and all claims, liabilities or obligations arising out of or in any way connected with their marriage, including but not limited to all claims set forth in or comprehended by that certain litigation identified in the caption above. The term claims shall include any and all claims and counterclaims, whether known or unknown, a Party may have against the other Party as a result of their marriage and the litigation identified above.

12. **Entry of Decree of Divorce.** The Parties agree that on or before five (5) business days from the execution of this Property Settlement Agreement, they will execute a stipulation for entry of a Judgment and Decree of Divorce to be filed with the Court.

11. **Merger with and into Judgment and Decree.** Except for paragraphs regarding alimony, this Agreement shall be merged with and into the Judgment and Decree of Divorce. With respect to alimony, the payment provisions herein shall be deemed integrated contracts between the Parties with no jurisdiction conferred upon this Court to modify.

12. **No Undue Influence.** The Parties agree that they have entered into this Agreement without undue influence or fraud or coercion or misrepresentation or for any other like cause.

13. **Further Performance.** The Parties agree to execute all additional documents within 14 days of presentation of each such document and take such further steps as shall be required to effectuate and carry out the performance of this Agreement.

14. **Amendments.** This Agreement may not be amended, modified, altered or changed in any respect whatsoever, except by further agreement in writing duly executed by the Parties.

15. **Cooperative Effort.** The parties acknowledge that this Agreement is the result of a cooperative effort between them and their independent counsel, and that in the event of any dispute over the meaning or effect of any provision herein, the rule of interpretation of ambiguous terms against the drafting party shall have no application.

16. **Advice of Counsel.** The Parties stipulate that they have been represented by counsel and are familiar with the terms, conditions and effect of this Agreement.

17. **Attorney Fees.** In the event of any controversy, claim, or action being made, filed, or instituted between the parties to this Agreement or any of the other documents related hereto, or arising from the breach of any provision hereof, the prevailing party will be entitled to receive from the other party all costs, damages, and expenses, including reasonable attorney's and paralegal's fees incurred by the prevailing party, whether or not such controversy or claim is litigated or prosecuted to judgment. Court costs and attorney and paralegal fees include those incurred as a result of bankruptcy, or on appeal.

18. **Binding Agreement.** This Agreement is binding upon the heirs, successors and assigns of the Parties.

19. **Free and Voluntary Act.** Each Party further acknowledges: (a) that settlement of his or her claims alleged against the other in this litigation and the execution and delivery of this Agreement and release by him or her, are by his or her free and voluntary act; and (b) that no promise, agreement, statement or representation not expressed herein has been agreed to or relied upon.

20. **Choice of Law.** This Agreement shall be interpreted in accordance with the laws and statutes of the State of Idaho.

21. **Notices.** All notices and demands required or permitted under this Agreement shall be in writing, containing the information required by this Agreement to be communicated to any person, personally delivered to such person or sent by certified mail, postage prepaid, or by reputable overnight air courier service (e.g., Federal Express or United Parcel Service) to such

22. **Partial Invalidity.** In the event any portion of this Agreement shall be determined invalid, void or otherwise unenforceable, the remaining provisions shall remain in full force and effect, and shall in no way be affected, impaired or invalidated. It is understood that the remaining provisions shall be construed in a manner most closely approximating the intention of the Parties.

23. **Execution of Counterparts.** Duplicate copies of this Agreement may be signed by one or more of the Parties and their counsel and copies of this Agreement signed, collectively, by all Parties and their counsel shall be considered as a single, fully executed original document.

24. **Waiver.** Failure of a Party, or any of them, to exercise his or her rights upon any default of the other Party shall not be construed as the waiver of the right to insist upon full performance of all the terms and conditions of this Agreement, or of the right to exercise any other right contained in this Agreement.

25. **Time.** Time is of the essence of this Agreement and each and all of its provisions in which performance is a factor.

26. **Warranty.** THE UNDERSIGNED PARTIES INDIVIDUALLY AND THROUGH THEIR COUNSEL REPRESENT AND WARRANT THAT THEY HAVE READ THE FOREGOING AGREEMENT AND THAT THEY FULLY UNDERSTAND THE TERMS AND CONDITIONS SET FORTH HEREIN.

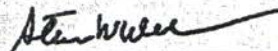
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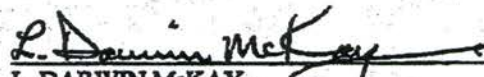
IN WITNESS WHEREOF, the Parties and their respective counsel have executed this Agreement on the date set forth above.


PATRICIA E. MCKAY

Approved as to form and content:

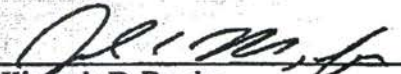
COSHO HUMPHREY, LLP

By 
Stanley W. Welsh
Attorneys for Patricia E. McKay


L. DARWIN MCKAY

Approved as to form and content:

BROOKS LAW, P.C.

By 
Kimberly D. Brooks
Attorneys for L. Darwin McKay

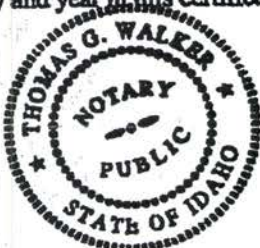
MILLER & HARR

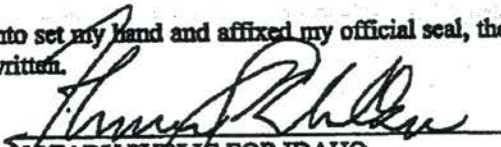
By 
John A. Miller
Attorneys for L. Darwin McKay

STATE OF IDAHO)
) ss.
County of Ada)

On November 22 2007, before me, the undersigned, a notary public in and for said county and state, personally appeared Patricia E. McKay, known to me to be the person whose name is subscribed to the within instrument and acknowledged to me that she executed the same.

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




NOTARY PUBLIC FOR IDAHO
Residing at Boise
Commission Expires 3/20/11

STATE OF IDAHO)
) ss.
County of Ada)

On November 29 2007, before me, the undersigned, a notary public in and for said county and state, personally appeared L. Darwin McKay, known to me to be the person whose name is subscribed to the within instrument and acknowledged to me that he executed the same.

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



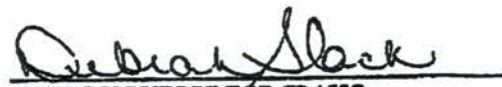

NOTARY PUBLIC FOR IDAHO
Residing at Boise
Commission Expires 9-14-12

Exhibit C

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

PATRICIA MCKAY,

Plaintiff,

vs.

DARWIN MCKAY,

Defendant.

)
) Case No. CV DR 0615299
)
)
)
)
)
)
)
)

DEPOSITION OF BOB RICE

June 8, 2009

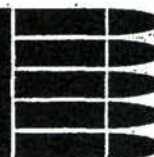
Boise, Idaho

Reported By:

Susan L. Sims, CSR No. 739

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MCKAY 1

DEPOSITION OF BOB RICE

BE IT REMEMBERED that the deposition of BOB RICE was taken by the attorney for the Plaintiff at the offices of Holland & Hart, located at 101 S. Capitol Blvd., Suite 1400, Boise, Idaho, before Susan L. Sims, a Court Reporter (Idaho Certified Shorthand Reporter No. 739) and Notary Public in and for the County of Ada, State of Idaho, on Monday, the 8th day of June, 2009, commencing at the hour of 9:35 a.m. in the above-entitled matter.

APPEARANCES:

For the Plaintiff:

HOLLAND & HART, LLP
By: Scott D. Hess, Esq.
Stephanie Omsberg, Esq.
101 S. Capitol Blvd., Suite 1400
Boise, ID 83701
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sdhess@hollandhart.com

For the Defendant:

BROOKS LAW, PC
By: Kimberly D. Brooks, Esq.
23 9th Avenue North
Nampa, ID 83687
Telephone: (208)442-7489
Facsimile: (208)468-4030
kim@kbrookslaw.com

Also present: Patricia McKay

1 PROCEEDINGS
2
3 BOB RICE,
4 a witness having been first duly sworn to tell the
5 truth, the whole truth and nothing but the truth,
6 testified as follows:
7
8 EXAMINATION
9 BY MR. HESS:
10 Q Would you state your full name for the
11 record.
12 A Robert E. Rice.
13 Q And, Mr. Rice, how are you currently
14 employed?
15 A I'm employed by Westcore Land Title
16 Insurance Company.
17 Q And how long have you been so
18 employed?
19 A Since February of 2009.
20 Q And where were you employed prior to
21 your current employment?
22 A Prior to the current employment, I
23 was with LandAmerica Financial Group primarily;
24 however, LandAmerica was purchased by – or the
25 subsidiaries I work for were purchased by

Page 4

1 Fidelity National Financial Group in, I think,
2 December of 2008.
3 MS. BROOKS: Scott, before we get into
4 the meat and potatoes, can we agree to reserve
5 objections for trial?
6 MR. HESS: Oh, sure. That's fine.
7 MS. BROOKS: Great.
8 Q (BY MR. HESS) So you indicated that
9 you worked for subsidiaries of LandAmerica
10 Financial Group?
11 A Primarily the underwriting
12 subsidiaries, which would be Commonwealth Land
13 Title Insurance Company.
14 Q Okay.
15 A And Lawyers Title Insurance
16 Corporation.
17 Q And was that employment here in Boise?
18 A Yes.
19 Q And what was your position with the
20 subsidiaries of LandAmerica Financial Group?
21 A At the time that I left, I was state
22 counsel.
23 Q Estate counsel?
24 A State counsel, s-t-a-t-e.
25 Q For the state of Idaho?

Page 5

1 A For Idaho, Utah, Wyoming and Montana.
2 Q And how long did you have that
3 position?
4 A Five years, roughly. Well, from 2005
5 to 2009. So for almost five years.
6 Q Generally, what were the job
7 requirements or job duties associated with that
8 employment?
9 A Primarily, it was title insurance
10 underwriting.
11 Q Okay. We're here as part of a lawsuit
12 that's pending between Patricia McKay and Darwin
13 McKay.
14 A Uh-huh.
15 Q Do you recall a transaction involving
16 Darwin McKay?
17 A Yes.
18 Q Since you left the employment of
19 LandAmerica Financial Group, have you had any
20 involvement with regard to Darwin McKay or
21 Patricia McKay?
22 A No.
23 Q Have you had the opportunity to review
24 any documents –
25 A No.

Page 6

1 Q – regarding that transaction?
2 A No.
3 Q What I'd like to do is I have a
4 binder. And this is a binder of all – we did a
5 request for production to LandAmerica –
6 A Okay.
7 Q – requesting all documentation
8 relating to the transaction.
9 A Uh-huh.
10 Q And all of that documentation is in
11 the binder. I would have gotten it to you
12 sooner, but we just got it late on Friday.
13 A That's fine.
14 Q So that's a bit unfortunate. You're
15 certainly free to look through everything. We've
16 tried to tab it so that it will be easier to
17 refer to in the deposition. There is, I will
18 indicate, there's an e-mail under tab No. 8 that
19 seems to be a summary of what was involved. Do
20 you see that e-mail?
21 A Yes.
22 Q And I'd like you to review the e-mail,
23 but do you recall preparing this e-mail?
24 A No, I don't.
25 Q The e-mail is directed to Dwight

Page 7

1 (Pages 4 to 7)

Bob Rice

June 8, 2009

McKay v. McKay

1 Bickel. Who is Mr. Bickel?
 2 A Dwight Bickel is - was regional
 3 counsel for LandAmerica Financial Group.
 4 Q And where was he located?
 5 A Seattle, Washington.
 6 Q Is that who you reported to?
 7 A Yes.
 8 Q There's another name on this e-mail
 9 that received the cc, addressed to Kelly Mann?
 10 A Uh-huh.
 11 Q At that time, November of 2006, what
 12 was Kelly Mann's position?
 13 A Kelly Mann was the manager of the
 14 Transnation Title & Escrow branch here in Boise.
 15 Q Okay.
 16 A I'll back up for a minute. The time
 17 this e-mail was written, LandAmerica Financial
 18 Group had three title insurance underwriters -
 19 Lawyers, Commonwealth and then Transnation Title
 20 Insurance Company. But they were merged -
 21 Transnation was merged into Lawyers sometime in
 22 2007, I believe.
 23 Q Okay. There's another name listed
 24 there, Jack, is it Leaverton?
 25 A Leaverton.

Page 8

1 Q Leaverton.
 2 A Uh-huh.
 3 Q And who was Mr. Leaverton?
 4 A At this time, Jack Leaverton was state
 5 counsel, the position I had when I terminated my
 6 employment with LandAmerica. Jack Leaverton
 7 retired in October of 2008.
 8 Q Okay. Why don't you take a minute to
 9 review this e-mail.
 10 A Okay.
 11 Q Now, after having reviewed that e-mail
 12 dated November 21, 2006, does that assist at all
 13 in refreshing your recollection regarding this
 14 transaction?
 15 A Yes.
 16 Q Okay.
 17 A Yes.
 18 Q After that review, what can you
 19 recall, I guess, besides what's in this e-mail or
 20 to supplement what's in the e-mail? Explain to
 21 me your recollection of what happened here.
 22 A My recollection, and this is basically
 23 derived from this e-mail, is that the escrow
 24 officer at the time - and I can't remember who
 25 the escrow officer was - didn't adequately

Page 9

1 document a significant disbursement to - I think it
 2 was to -
 3 Q To B, I think it says?
 4 A To B and then he gave it to A.
 5 Anyway, the disbursement as made by the escrow
 6 officer, there wasn't sufficient escrow
 7 instructions in the file to support her disbursement
 8 of those funds.
 9 Q And so what was the result of that?
 10 What was the consequence?
 11 A The consequence of that was I think
 12 the E, who fronted the money, Bingo Investments,
 13 it was my opinion at that time that we possibly
 14 would have some - "we" being Transnation Title &
 15 Escrow - would have some liability to Bingo
 16 Investments because of our disbursement of those
 17 funds without adequate instructions.
 18 Q Was it your understanding, based upon
 19 this e-mail, that Bingo Investments, as a result
 20 of fronting that money, anticipated having a
 21 first position with regard to the subject
 22 property?
 23 A Could you ask or read back the
 24 question.
 25 (Record read by reporter.)

Page 10

1 THE WITNESS: I don't know what Bingo
 2 Investments anticipated.
 3 Q (BY MR. HESS) Okay. Let's look at
 4 this e-mail, down towards the bottom. In fact,
 5 the final full paragraph.
 6 A Uh-huh.
 7 Q It says the first transaction was A to
 8 B to C?
 9 A Uh-huh.
 10 Q Do you see that?
 11 A Yep.
 12 Q So if we go up above where the
 13 entities are identified, that would indicate that
 14 the first transaction was from the original owner
 15 to Darwin McKay?
 16 A Uh-huh.
 17 Q Then from Darwin McKay to Status Corp.
 18 A Correct.
 19 Q Is that correct? And if you look at
 20 the next two sentences, one says, "The Escrow
 21 Officer dispersed (sic) that money" - and I
 22 think the money is referring to the prior
 23 paragraph of \$3.2 million, "to B who gave it to A
 24 to complete B's purchase from A."
 25 A Correct.

Page 11

2 (Pages 8 to 11)

1 Q Okay. So the money went to Darwin
2 McKay, who then gave it to the original owner of
3 the property?
4 A Correct.
5 Q Okay. And an owner's policy was
6 issued to Mr. McKay, to B?
7 A Based on -- it appears that's the case
8 based on this e-mail.
9 Q What does that mean, an owner's
10 policy?
11 A It means that an owner's policy of
12 title insurance was issued by Transnation Title
13 Insurance Company to Darwin McKay.
14 Q Okay. And would that owner's policy
15 provide -- well, do you know what you were
16 insuring, what Transnation was insuring with
17 regard to that policy?
18 A Well, they were insuring basically
19 Darwin's ownership of the property.
20 Q Okay.
21 A In a nutshell.
22 Q Now, the next says, "Allegedly, as a
23 part of this transaction B," which is Darwin,
24 "was supposed to then transfer the property to
25 C," which was Status, "and take back an owner

Page 12

1 in the precarious position as insuring two
2 separate loans, both in first position.
3 Q Okay.
4 A We did that based on an indemnity from
5 a gentleman named Patrick McCourt.
6 Q Yes. Who was Patrick McCourt?
7 A He was, I want to say the principal,
8 possibly the principal or a principal of Bingo
9 Investments.
10 Q And to the best of your recollection,
11 did Mr. McCourt execute the indemnity agreement?
12 A He did execute an indemnity agreement,
13 yes.
14 Q And do you recall that when the title
15 company, and I don't remember exactly, could have
16 been Transnation, but when the title company made
17 a call on the indemnity agreement, he indicated
18 an inability to satisfy?
19 A Correct.
20 Q So what was the result of that
21 decision by Mr. McCourt?
22 A The result of Mr. McCourt's decision
23 or failure to indemnify the Transnation?
24 Q Yes.
25 A Well, I don't know if -- I wouldn't

Page 14

1 carry note." Do you see that?
2 A Yes.
3 Q Do you recall that that's what
4 occurred?
5 A I have no recollection.
6 Q Okay. Ultimately, do you know what
7 happened with regard to this transaction?
8 A Yes.
9 Q Okay.
10 A But not in great detail.
11 Q All right.
12 A My recollection of what happened
13 was -- and I do not recall at what point Darwin
14 transferred the property to Status Corp.
15 Q Okay.
16 A But I'm sure there's a deed within
17 these documents that will provide that
18 information. I do recall that Transnation
19 insured both the owner carry back from Status to
20 Darwin. They issued a lender's policy of title
21 insurance to Darwin insuring his loan in first
22 position. And then also they insured a loan from
23 Bingo to -- I believe it's BTC.
24 Q Uh-huh.
25 A In first position as well. So we were

Page 13

1 say it was a result of that having -- or him
2 refusing to comply with the indemnity. But
3 Darwin McKay did make a claim on his title
4 insurance policy, I believe it was Darwin. I'm a
5 little fuzzy, because I didn't handle claims.
6 But the end result was Lawyers Title Insurance
7 Company purchased Darwin McKay's note.
8 Q Okay.
9 A From Mr. McKay.
10 Q Okay. And did that then result in
11 Bingo Investments having the first position with
12 regard to the property?
13 A No. And I hesitated mainly because
14 you still have the same situation where you
15 had -- Darwin's note would still be in first
16 position and Bingo would be in second. The
17 difference is when Lawyers owns that note,
18 they're not going to foreclose or seek to enforce
19 its priority.
20 Q Okay.
21 A So for all practical purposes, Bingo
22 would be in first at that time. But legally,
23 they probably would not be.
24 Q Okay. So I guess to summarize, if I
25 understand what you're testifying to, the title

Page 15

3 (Pages 12 to 15)

1 company, Transnation or Lawyers Title, issued
2 title insurance to two separate - well, an
3 individual, Darwin McKay, and an entity, Bingo,
4 on the same piece of property guaranteeing that
5 both of those, the individual and the entity,
6 would be in first position?

7 A That the loans those individuals or
8 that entity made would be in first position.

9 Q Okay. And then do you recall that the
10 loan that Darwin McKay had with Status
11 Corporation went into default?

12 A I have no knowledge of that.

13 Q Okay.

14 A I could presume it did, but I don't
15 know.

16 Q Okay. Would you look at what's under
17 tab 33.

18 A Uh-huh.

19 Q And tab 33 is a verified complaint
20 filed by L. Darwin McKay, Turf Company, LLC,
21 Hulet Farm Management Limited Partnership as the
22 plaintiffs against Status Corporation, another
23 LLC, which I guess just to shorten it I'll call
24 the Hazel Lake, LLC, against Bingo and against
25 Wells Fargo Foothill, Inc. Do you see the

Page 16

1 verified complaint?

2 A Yes, I do.

3 Q And Count One is entitled
4 "Foreclosure." And it sets forth certain of the
5 underlying facts. Would you review Count One,
6 which is paragraphs 1 through 12 of the
7 complaint?

8 A Okay.

9 Q Okay. And is this the allegations
10 that are contained in paragraphs 1 through 12?
11 Does that again refresh your recollection a bit
12 as to what occurred?

13 A No, I - no, it does not. No.

14 Q Okay. What I was trying to get at is
15 you indicated that there was at some point a
16 payment made by the title company to Darwin?

17 A Correct.

18 Q Okay. And do you know why that
19 payment was made?

20 A Not directly, but I can infer why it
21 was made.

22 Q Okay.

23 A My understanding was that Darwin filed
24 a claim on his lender's title insurance policy -
25 let me back up.

Page 17

1 I'm not sure who filed a claim on
2 whose lender's policy, but a claim obviously was
3 filed either by Darwin or by - I believe it's
4 Bingo. And the ultimate result of that was
5 Lawyers needed to remedy the situation by
6 basically purchasing one of the loans to protect
7 the other one.

8 Q Okay. Now, correct me if I'm wrong,
9 but if a title insurance company issues two
10 policies of insurance on the same piece of
11 property and grants first position to each of the
12 individuals -

13 A Right.

14 Q - there's no problem with that,
15 unless there's a default? I guess what I'm
16 getting at, does there not have to be some event
17 that would trigger a claim?

18 A That is correct.

19 Q Okay. So this complaint in paragraph
20 6 - not paragraph 6. Well, paragraph 5 of the
21 complaint, which is tab No. 33, paragraph 5
22 indicates that Status Corp. delivered a
23 promissory note to Darwin McKay in the amount of
24 \$1.396 million.

25 A Uh-huh.

Page 18

1 Q And is it your understanding that's
2 the promissory note that was subject to the title
3 insurance?

4 A A note is not subject to title
5 insurance.

6 Q Okay.

7 A The mortgage or deed of trust that
8 secures that note would be the insured mortgage
9 under a lender's title insurance policy.

10 Q Okay. I did misspeak. Let's go to
11 paragraph 6.

12 Paragraph 6 indicates that Status
13 Corporation delivered to Darwin McKay the
14 mortgage?

15 A Correct.

16 Q And so that would be the mortgage that
17 you were just referring to?

18 A That is correct.

19 Q That would be the mortgage that was
20 insured by the title company?

21 A Yes.

22 Q And then paragraph 7 of the complaint
23 indicates that Status Corp. has made no payments
24 on the balance due; is that correct?

25 A I have no independent knowledge if

Page 19

4 (Pages 16 to 19)

1 that's true or not true. ~~AMERICA FINANCIAL~~

2 Q I'm just indicating that that's what

3 the complaint says.

4 A Yes, that's what the complaint says.

5 Q Paragraph 8 indicates that Status

6 Corp. owes Darwin McKay the sum of \$1.204 million

7 plus a per diem interest rate or per diem

8 interest amount?

9 A That's what the complaint alleges,

10 yes.

11 Q Then paragraph 12 indicates that "The

12 following additional Defendants claim, or may

13 claim an interest in the real property." And one

14 of those defendants is identified as Bingo

15 Investments.

16 A Correct.

17 Q And the documentation referred is

18 attached under tab 33. Do you recall this

19 complaint? Was a copy of this complaint provided

20 to you?

21 A I don't recall.

22 Q Okay. Would you look at document

23 under tab 34. This is a letter dated July 24,

24 2008 to Transnation Title from Avatar Financial

25 Group.

Page 20

1 A Okay.

2 Q Do you recall that document?

3 A Never seen it before.

4 Q Okay. Would you agree that this

5 document in the second paragraph indicates that

6 Transnation issued a title policy to Bingo, and

7 at least according to this letter, the title

8 policy reflected that Bingo's mortgage was a

9 first lien position?

10 A Correct.

11 Q Would you turn to the next document,

12 document under tab 35. This is a letter dated

13 July 24, 2008 to Bill Reetz, R-e-e-t-z, at

14 Transnation from Lynn Darling.

15 A Uh-huh.

16 Q Have you seen this document before?

17 A No.

18 Q Who is Lynn Darling?

19 A Lynn Darling is the -- I don't know

20 her exact title, but she's the title manager at

21 Transnation Title & Escrow.

22 Q Located here in Boise?

23 A Yeah. Do you want me to go over all

24 the entities involved here?

25 Q Yeah, sure.

Page 21

1 A Because a lot of names are similar.

2 Q That would be very helpful.

3 A Transnation Title & Escrow, Inc. is

4 the actual corporation that runs the title

5 insurance agency in Boise and Canyon County. And

6 that entity is now simply referred to as

7 Fidelity. It's been rebranded. But Lynn Darling

8 works for that corporation, as does Kelly Mann.

9 They're managers of that entity.

10 Q Okay.

11 A And that entity is wholly owned -- was

12 wholly owned at the time of all this stuff by

13 LandAmerica Financial Group.

14 Q Okay.

15 A And they're now owned by one of the

16 Fidelity entities. I don't know which one.

17 Q Okay.

18 A And then Transnation Title Insurance

19 Company was the actual insurer who insured these

20 title insurance policies.

21 Q Okay.

22 A So Lynn Darling was the title manager

23 for Transnation Title & Escrow.

24 Q Okay. This letter -- and I should ask

25 you, Bill Reetz, what was his position?

Page 22

1 A Bill Reetz was the claim center

2 manager in Seattle, Washington. And they handled

3 claims for all the LandAmerica brands.

4 Q Okay. Do you recall having any

5 conversation with Mr. Reetz regarding this claim?

6 A Yes.

7 Q Do you have specific recollection of

8 any particular conversation?

9 A The only -- and I don't remember the

10 specifics of the conversation, but I remember the

11 result of the conversation, Mr. Reetz sent me

12 basically the documents through which Transnation

13 Title Insurance Company purchased the loan from

14 Darwin McKay.

15 Q Okay. If we look at the document

16 under tab 35, the second sentence says, "We have

17 issued to Forrest Goodrum, our insured Lender,

18 Darwin McKay's attorney, a Litigation Guarantee,

19 on a property that due to a closing error, also

20 has another mortgage that is in an insured first

21 mortgage position."

22 A Uh-huh.

23 Q Would it be accurate to say that that

24 one sentence pretty much sets forth what the

25 problem was, there was first position issued to

Page 23

5 (Pages 20 to 23)

1 two different people on one piece of property?
 2 A Yes.
 3 Q Okay.
 4 A Basically, yeah. Yes, that's a fair
 5 statement.
 6 Q Would you look at the document under
 7 tab -- well, okay, let me strike that.
 8 If you look the document under tab 34,
 9 does this appear to be a claim? In fact, I'm
 10 looking at the last paragraph. And it says,
 11 "Your prompt response acknowledging this claim."
 12 A I would refer to this as a notice of
 13 claim by an insured.
 14 Q Okay. And that was by Avatar, who
 15 apparently is the successor of Bingo?
 16 A I would -- that's what it looks like
 17 to me based on this letter, yes.
 18 Q Would you look at the document under
 19 tab 36. This is a letter dated July 25th, 2008
 20 from Munther Goodrum Sperry to Lynn Darling.
 21 A Uh-huh.
 22 MS. BROOKS: Excuse me.
 23 (Break taken from 10:07 a.m. to 10:11 a.m.)
 24 MR. HESS: Let's go back on the
 25 record.

Page 24

1 Q (BY MR. HESS) We were talking about
 2 the document under tab 36. And I understand
 3 you've had the chance to review that?
 4 A Yes.
 5 Q Does that appear to be a letter in the
 6 nature of a claim by the law firm that was
 7 representing Darwin McKay?
 8 A It could be characterized as a notice
 9 of claim. If I received this letter in my
 10 position, I probably would forward it to our
 11 claim center to let them make the determination
 12 of whether or not they determined it was a claim
 13 or not.
 14 Q Okay. Looking at the second
 15 paragraph, the last sentence of the second
 16 paragraph says, "Your company has outstanding two
 17 separate policies which insure the first lien
 18 position of two different mortgages on the same
 19 property."
 20 A Correct.
 21 Q And then the next sentence in the next
 22 paragraph says, "I request that you advise me
 23 what position your company intends to take in
 24 this matter."
 25 A Correct.

Page 25

1 Q Although it doesn't use the word
 2 claim, it comes very close to basically saying
 3 you've got a problem, tell me what you're going
 4 to do?
 5 A I believe that statement's correct.
 6 Q Okay. Let's look at the document
 7 under tab 38. This is a letter from LandAmerica.
 8 Well, the heading says LandAmerica Lawyers Title
 9 dated November 3rd, 2008. And it's addressed to
 10 Forrest Goodrum and it's sent by William H.
 11 Reetz, correct?
 12 A Correct.
 13 Q And it does show that you received a
 14 copy of this correspondence.
 15 A That is correct.
 16 Q Could you take a minute and review the
 17 document under tab 38.
 18 A Okay.
 19 Q Okay. And do you recall this
 20 correspondence, receiving a copy of this
 21 correspondence?
 22 A Yes.
 23 Q Okay. Describe for me generally what
 24 is happening as reflected in this correspondence?
 25 A Basically, what is happening is

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1 Lawyers Title Insurance Corporation made the
 2 decision to purchase Darwin McKay's note to
 3 resolve these claims or -- claim or claims,
 4 however you want to characterize them. And these
 5 are the terms upon which we're settling the
 6 lawsuit.
 7 Q Okay.
 8 A Or settling the claim, I should say.
 9 I misspoke.
 10 Q It indicates that Lawyers Title, and
 11 correct me if that's the wrong entity, Lawyers
 12 Title will send to Mr. Goodrum the sum of
 13 \$1,288,019.10?
 14 A That's correct.
 15 Q And the second paragraph indicates
 16 that "The funds represent consideration to be
 17 paid to L. Darwin McKay for the assignment of a
 18 certain promissory note and mortgage (described
 19 more fully below) by McKay to Lawyers Title
 20 Insurance Corporation," and it continues with the
 21 description of Lawyers Title?
 22 A Correct.
 23 Q At the bottom of the first page of the
 24 letter under tab 38, there are four different
 25 things that it appears must be complied with

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6 (Pages 24 to 27)

1 before those funds can be disbursed?
 2 A Correct.
 3 Q The first requirement is that the
 4 original note that was dated November 28th, 2006,
 5 in the amount of \$1,396,800 that was entered into
 6 between Status Corporation of Idaho, as maker,
 7 and Darwin McKay, as payee, must be endorsed to
 8 the order of Lawyers Title. Is that what that
 9 states?
 10 A That's what that states, yes.
 11 Q So that would indicate that before
 12 Mr. McKay can receive the funds, he must endorse
 13 over the promissory note to the order of Lawyers
 14 Title?
 15 A Correct.
 16 Q Okay. Second paragraph indicates that
 17 he must provide the original mortgage, security
 18 agreement and fixture filing also dated
 19 November 28th, 2006, that secured repayment of
 20 the note?
 21 A Correct.
 22 Q The third paragraph on page 2 of that
 23 November 3, 2008 letter states that Mr. McKay
 24 must provide a fully executed assignment of
 25 mortgage, security agreement and fixture filing

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1 without recourse, all of my right, title and
 2 interest in and to the Note to Lawyers Title
 3 Insurance Company, a Nebraska corporation and
 4 successor by merger to Transnation Title
 5 Insurance Company." Did I read that correctly?
 6 A Yes.
 7 Q So this document would accomplish one
 8 of the requirements that was set forth in the
 9 correspondence?
 10 A That is correct.
 11 Q Would you look at the document under
 12 tab 41. This appears to be a letter dated
 13 October 10, 2008. There's only one page -- we
 14 only have one page of this document. I'm not
 15 sure why we don't have the remainder, but that's
 16 what was provided to us.
 17 A Okay.
 18 Q It appears that this is the document
 19 where the attorney for Darwin McKay sets forth
 20 the financial demand surrounding the claim?
 21 A Uh-huh.
 22 Q Does that appear accurate?
 23 A That would appear accurate.
 24 Q Would you look at the document under
 25 tab 47?

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1 signed by Mr. McKay; is that correct?
 2 A Correct.
 3 Q So that would indicate that in
 4 exchange for the funds, Mr. McKay is assigning
 5 the mortgage, security agreement and fixture
 6 filing interest that he had with regard to the
 7 subject property; is that correct?
 8 A Correct.
 9 Q And the fourth paragraph indicates
 10 that a release must be obtained from Hulet Farm
 11 Management Limited Partnership?
 12 A Correct.
 13 Q Would you look at the document under
 14 tab 39?
 15 A Yes.
 16 Q Do you recall receiving a copy of the
 17 affidavit of loss note and endorsement and
 18 transfer of note?
 19 A Yes.
 20 Q And this document, does it appear that
 21 this document is signed by Mr. McKay?
 22 A It would appear so.
 23 Q And paragraph 4 states, "For good and
 24 valuable consideration, the receipt of which is
 25 hereby acknowledged, I endorse and transfer

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1 A Okay.
 2 Q And this appears to be a letter dated
 3 November 7, 2008 from you on behalf of Lawyers
 4 Title Insurance Corporation to Forrest Goodrum?
 5 A Correct.
 6 Q And what is the substance?
 7 A The substance of this letter is to
 8 acknowledge that I had received the documentation
 9 referenced by Mr. Reetz in his November 3rd
 10 letter that's Exhibit 44. I had received the
 11 documentation or the equivalent that satisfied
 12 our concerns. And that I was authorizing
 13 Mr. Goodrum to disburse the money he had in his
 14 trust account to Mr. McKay.
 15 Q Okay. So based upon this review of
 16 documentation, is it your understanding that the
 17 property that was subject to this dispute was
 18 owned by an individual and an entity that in the
 19 very first e-mail we looked at was called A,
 20 before any of these transactions occurred?
 21 A Yeah, I think it was owned by farmer
 22 Joe, who's, yeah, party A.
 23 Q Do you remember the name Albrason?
 24 A No.
 25 Q Okay. So it was owned by individual

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7 (Pages 28 to 31)

| | |
|--|--|
| <p>1 A. It's purchased by Darwin McKay.</p> <p>2 A Uh-huh.</p> <p>3 Q Correct?</p> <p>4 A That's my understanding, yes.</p> <p>5 Q It is then sold by Darwin McKay to</p> <p>6 Status Corporation, correct?</p> <p>7 A That is my understanding, yes.</p> <p>8 Q Darwin McKay, however, takes back a</p> <p>9 mortgage -</p> <p>10 A Correct.</p> <p>11 Q - on the property to secure the</p> <p>12 ongoing or the required additional payment?</p> <p>13 A Correct.</p> <p>14 Q There is a default in the payment by</p> <p>15 Status Corporation and a lawsuit is - a</p> <p>16 foreclosure action is begun?</p> <p>17 A Correct.</p> <p>18 Q It is determined that two different -</p> <p>19 that title policies had been issued to two</p> <p>20 different individuals or entities guaranteeing</p> <p>21 those individuals or entities first position on</p> <p>22 the property?</p> <p>23 A Correct.</p> <p>24 Q And those two, one of those</p> <p>25 individuals was Darwin McKay, the other</p> | <p>1 as Deposition Exhibit 1. And this is a judgment</p> <p>2 and decree of divorce that incorporates a</p> <p>3 property settlement agreement.</p> <p>4 A Okay.</p> <p>5 Q And this is a judgment and decree of</p> <p>6 divorce that was entered into between Patricia</p> <p>7 McKay as plaintiff and Darwin McKay as defendant.</p> <p>8 Do you see that?</p> <p>9 A Yes.</p> <p>10 Q Have you ever seen this document</p> <p>11 before?</p> <p>12 A I possibly have. I don't know for</p> <p>13 sure. At one point, Patricia McKay came to my</p> <p>14 office while I was still at LandAmerica and</p> <p>15 showed me a myriad of documents. And I believe</p> <p>16 this may have been one of them.</p> <p>17 Q At any time prior to November 7, 2008,</p> <p>18 which is the date you approved the disbursement,</p> <p>19 have you seen this judgment and decree of</p> <p>20 divorce?</p> <p>21 A No.</p> <p>22 Q As part of the underwriting process,</p> <p>23 prior to issuing a policy of title insurance, if</p> <p>24 a parcel of property was owned by either Patricia</p> <p>25 McKay or Darwin McKay at the time the</p> |
| <p>1 individual was Bingo?</p> <p>2 A Correct.</p> <p>3 Q The title insurance company made a</p> <p>4 decision to essentially purchase Darwin McKay's</p> <p>5 interest in the property represented by his</p> <p>6 mortgage so that they could insure that Bingo</p> <p>7 actually had the first position?</p> <p>8 A Yeah. Yes, Lawyers made the decision</p> <p>9 to purchase the note and deed of trust held by</p> <p>10 Darwin McKay.</p> <p>11 Q And in exchange for that purchase,</p> <p>12 Darwin McKay was paid the sum of - well,</p> <p>13 whatever it was, \$1.28 million or approximately?</p> <p>14 A That is correct.</p> <p>15 Q Whatever that dollar amount was?</p> <p>16 A Yes, that is correct.</p> <p>17 MR. HESS: Okay. Could I have this</p> <p>18 marked as Exhibit 1.</p> <p>19 (Deposition Exhibit No. 1 was marked.)</p> <p>20 Q (BY MR. HESS) Now, Mr. Rice, again</p> <p>21 looking at Exhibit 47, you approved a</p> <p>22 disbursement of funds on November 7, 2008; is</p> <p>23 that correct?</p> <p>24 A That is correct.</p> <p>25 Q I'm showing you what I've had marked</p> | <p>1 underwriting is performed, would this document</p> <p>2 have been located?</p> <p>3 A Only if it would have been recorded</p> <p>4 with the county recorder.</p> <p>5 Q Okay. Let's assume this document is,</p> <p>6 in fact, recorded.</p> <p>7 A Okay.</p> <p>8 Q Would it then be located?</p> <p>9 A It should be located, yes.</p> <p>10 Q Do you know, was a full title search</p> <p>11 done at any time prior to November 7, 2008 in</p> <p>12 order to support the payment that was being made</p> <p>13 to Darwin McKay?</p> <p>14 A When Lawyers purchased the note and</p> <p>15 deed of trust?</p> <p>16 Q Yes.</p> <p>17 A Or the note and mortgage, I have no -</p> <p>18 I do not know.</p> <p>19 Q Now, you indicated that you had a</p> <p>20 conversation with Patricia McKay at sometime</p> <p>21 apparently after November 7, 2008?</p> <p>22 A I don't recall when it was but, yes, I</p> <p>23 did have a conversation with her.</p> <p>24 Q Okay. Do you recall the substance of</p> <p>25 that conversation?</p> |

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Page 33

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1 A Vaguely. What I recall now after
2 seeing this judgment and decree of divorce, I
3 think she made me aware of this documentation.
4 And specifically I believe there's a provision in
5 here where she was entitled to money, and I don't
6 recall if it was from property or the note or
7 something of that nature.

8 So she showed this to me. And I
9 informed her that, you know, my knowledge of the
10 transaction was limited to the very front end and
11 then just having Darwin provide me with the
12 documentations pursuant to the terms that they
13 had negotiated with our claims counsel.

14 Q Okay.

15 A And I think I also said, and I believe
16 this now, the actual real property records and
17 kind of the chain of events there gives us a very
18 good idea or description of the chain of events
19 and what happened.

20 Q Okay.

21 A And that's basically my recollection
22 of what happened, of my conversation with
23 Patricia.

24 Q Okay. Have you had conversation with
25 anyone else since that time, since your

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1 conversation with Patricia McKay regarding this
2 issue? I guess I ought to say this issue has to
3 do with the impact of the judgment and decree of
4 divorce on the Darwin McKay Status transaction,
5 Darwin McKay Status Lawyers Title transaction.

6 A No, I have not. Well, other than with
7 your law firm.

8 Q Right.

9 A Setting up the deposition.

10 MR. HESS: Can we take a break for a
11 minute.

12 MS. BROOKS: Sure.

13 (Break taken from 10:29 a.m. to 10:33 a.m.)

14 MR. HESS: What I would like to do is
15 mark the binder as Exhibit 2.

16 (Deposition Exhibit No. 2 was marked.)

17 Q (BY MR. HESS) Mr. Rice, I'm not going
18 to paw through the documents to ask you this
19 question, but I'm going to ask you to accept an
20 assumption that I'm making or an understanding
21 that I'm making.

22 A Okay.

23 Q It's my understanding that as part of
24 the transaction between Darwin McKay and Status
25 Corporation, that included the mortgage, that

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1 Darwin McKay also was entitled to receive two
2 lots from a proposed subdivision. Do you have
3 any recollection of that?

4 A None.

5 Q Okay.

6 A None.

7 Q Well, I will represent that to you.

8 A Okay.

9 Q Who has the -- as a result of this
10 transaction where Lawyers Title has taken an
11 assignment of all of Darwin McKay's interest, who
12 has the entitlement to those two lots?

13 A Well, based on the documents -- well,
14 Lawyers Title just received Darwin's interest in
15 the mortgage and note. So two security -- a
16 security instrument. So basically they are
17 just -- at this point, Lawyers Title Insurance
18 Corporation is just a note holder and a secured
19 party pursuant to that note.

20 So who owns those two lots, I would
21 have no idea. And I don't even know if those two
22 lots were pledged as security for the note that
23 Lawyers is now the holder of.

24 Q Okay. Would you look at tab 14.

25 A Yes.

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1 Q And it's, oh, the first few pages are
2 the memorandum of contract.

3 A Okay.

4 Q And it's Exhibit A to the memorandum
5 of contract. But I think it's five pages in, the
6 actual real property purchase and sale agreement
7 exists.

8 A Okay.

9 Q This appears to be the real property
10 purchase and sale agreement that was entered into
11 between Status Corporation and Darwin McKay dated
12 November 28, 2006.

13 A It would appear to be, yes.

14 Q Okay. And if you look under paragraph
15 1.3.1, it's entitled "Conveyance of Lots." Do
16 you see that?

17 A I see it, yes.

18 Q Okay. And that paragraph does
19 indicate that "At the time of conveyance Buyer
20 shall provide to Seller ALTA Owners' Policies for
21 the fair market value of the lots."

22 A Yes, it does do that, uh-huh.

23 Q And if you look at paragraph 1.4, it
24 says note and mortgage. And it says, All amounts
25 due under the Promissory Note shall be secured by

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9 (Pages 36 to 39)

1 a first purchase money Mortgage on Parcel 1,
2 substantially in the form attached hereto as
3 Exhibit 1.4(b), the mortgage. Do you see that?
4 A I see that, yes.
5 Q Is it your understanding that that
6 mortgage is the mortgage that was assigned to
7 Lawyers Title?
8 A I don't know. Can I ask a question?
9 Q Sure.
10 A Where in here is the title insurance
11 policy that Transnation issued to Darwin McKay,
12 the lenders policy?
13 Q I don't believe the policies were in
14 here.
15 A Okay.
16 Q Okay, so --
17 A Let me back up. And the reason I ask
18 for that was if I could see the property
19 description on that policy, I would know what
20 Lawyers acquired.
21 Q Okay. And so the bottom line is the
22 real estate transaction contemplates that Darwin
23 McKay will receive two lots of his choice. And
24 you don't know as a result of the subsequent
25 transactions, the transactions that occurred

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1 after November 28, 2006, after the date of the
2 real estate purchase and sale agreement, you
3 don't know what's happened to the issue with
4 regard to those two lots?
5 A No, no. I don't even know if these
6 two lots are the same two lots that were the
7 subject of the complaint, the mortgage
8 foreclosure complaint that was filed by Forrest
9 Goodrum.
10 Q And there's also, you may or may not
11 beware of this, in the judgment decree of
12 divorce, Darwin McKay was obligated to transfer
13 those two lots to Patricia. Okay?
14 A Okay. I didn't know that.
15 MR. HESS: That's all the questions I
16 have.
17 MS. BROOKS: Okay. No questions.
18 MR. HESS: We've agreed that exhibit
19 No. 1 will actually be attached to the
20 transcript. We are not attaching Exhibit 2 since
21 we already all have it and it's not necessary.
22 (The deposition concluded at 10:41 a.m.)
23 (Signature was requested.)
24
25

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1 VERIFICATION
2 STATE OF _____)
3) ss.
4 COUNTY OF _____)
5 I, BOB RICE, being first duly sworn on my oath,
6 depose and say:
7 That I am the witness named in the foregoing
8 deposition taken the 8th day of June, 2009, consisting
9 of pages numbered 1 to 43, inclusive; that I have read
10 the said deposition and know the contents thereof;
11 that the questions contained therein were propounded
12 to me; that the answers to said questions were given
13 by me, and that the answers as contained therein (or
14 corrected by me therein) are true and correct.
15
16 Corrections made: Yes _____ No _____
17
18 BOB RICE
19 Subscribed and sworn to before me this _____ day
20 of _____, 2009, at _____, Idaho.
21
22 Notary Public for Idaho
23 Residing at _____, Idaho.
24 My Commission Expires: _____
25 REPORTER'S CERTIFICATE

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1 STATE OF IDAHO)
2) ss.
3 COUNTY OF ADA)
4 I, Susan L. Sims, Certified Shorthand Reporter
5 and Notary Public in and for the State of Idaho, do
6 hereby certify:
7 That prior to being examined, the witness named
8 in the foregoing deposition was by me duly sworn to
9 testify to the truth, the whole truth and nothing but
10 the truth;
11 That said deposition was taken down by me in
12 shorthand at the time and place therein named and
13 thereafter reduced to typewriting under my direction,
14 and that the foregoing transcript contains a full,
15 true and verbatim record of said deposition.
16 I further certify that I have no interest in the
17 event of the action.
18 WITNESS my hand and seal this 19th day of June,
19 2009.
20
21 SUSAN L. SIMS
22 CSR and Notary Public in
23 and for the State of Idaho.
24 My commission expires: October 21, 2010
25

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10 (Pages 40 to 43)

1 STATE OF IDAHO)
2) SS.
3 COUNTY OF ADA)

4 I, Susan L. Sims, Certified Shorthand Reporter
5 and Notary Public in and for the State of Idaho, do
6 hereby certify:

7 That prior to being examined, the witness named
8 in the foregoing deposition was by me duly sworn to
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15 true and verbatim record of said deposition.

16 I further certify that I have no interest in the
17 event of the action.

18 WITNESS my hand and seal this 19th day of June,
19 2009.



20
21
22 SUSAN L. SIMS
23 and Notary Public in
24 for the State of Idaho.

24 My commission expires: October 21, 2010

25

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Bob Rice

June 8, 2009

McKay v. McKay

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Associated Reporting Inc.
208.343.4004

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000409

Exhibit D

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Attorneys for Plaintiffs

COPY

JUL 18 2008

J. DAVID NAVARRO, Clerk
By J. RANDALL
DEPUTY

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

L. DARWIN MCKAY, TURF COMPANY,
LLC, an Idaho Limited Liability company, and
HULET FARM MANAGEMENT
LIMITED PARTNERSHIP, an Idaho
Limited Partnership,

Plaintiffs,

vs.

STATUS CORPORATION OF IDAHO, an
Idaho corporation, L208-1 1D Hazel Lake,
LLC, d/b/a BTCX, LLC, a Washington
Limited Liability Company, BINGO
INVESTMENTS, LLC, WELLS FARGO
FOOTHILL, INC., a California Corporation
as administrative agent for the lenders pursuant
to the Loan and Security Agreement,

Defendants.

CASE NO. CV 06 0813374

VERIFIED COMPLAINT

Fee Category: A-1
Filing Fee: \$88.00

COMES NOW, L. Darwin McKay (McKay) Hulet Farm Management Limited
Partnership (Hulet) and Turf Company, LLC (Turf Company), the above-named Plaintiffs, and
for cause of action against the Defendants, COMPLAIN AND ALLEGE as follows:

COMPLAINT FOR MORTGAGE FORECLOSURE - 1

PLTF00393

MCKAY 1765

COUNT ONE
FORECLOSURE

1. Plaintiff McKay resides in Ada County, Idaho.
2. Plaintiff Turf Company is a valid and existing Idaho limited liability company with its principal place of business in Ada County, Idaho.
3. Plaintiff Hulet is a valid and existing Idaho limited partnership with its principal place of business in Canyon County, Idaho.
4. That at all times herein mentioned, Defendant Status Corp. was and now is a corporation duly organized and existing under the laws of the State of Idaho and is transacting business in Ada County, Idaho.
5. That on or about the 28th day of November 2006, Defendant Status Corp. did execute and deliver to Plaintiff McKay a Promissory Note, a copy of which is attached hereto as Exhibit "A" and is, by this reference, incorporated herein as if set forth in full, in the face amount of \$1,396,800.00, due and payable March 30, 2008. That said Promissory Note is subject to interest thereon after the due date at the rate of 10% per annum.
6. That on or about the 28th day of November 2006, Defendants Status Corp. executed and delivered to Plaintiff McKay herein a Mortgage securing the payment of the principal and interest of the above-described Promissory Note. Said Mortgage was recorded November 30, 2006, as Instrument No. 106187071, records of Ada County, State of Idaho, and the property subject to said mortgage is more particularly described as follows, to-wit:

A parcel of land being a portion of the South half of the Southwest quarter of Section 33, Township 3 North, Range 1 East, Boise Meridian, Ada County, Idaho, more particularly described as follows:

Commencing at the Southwest corner of Section 33, Township 3 North, Range 1 East, Boise Meridian; thence North 89°42'48" East, 1,669.75 feet along the South line of the South half of the Southwest quarter of said Section 33 to a point on the approximate centerline of Ten Mile Creek, the REAL POINT OF BEGINNING of this description;

Along said approximate centerline as follows: thence North 12°08'30" West, 389.70 feet to a point; thence North 45°13'00" West, 744.00 feet to a point; thence North 08°58'00" West, 431.53 feet to a point on the North line of the South half of said Southwest quarter; thence leaving said approximate centerline North 89°54'26" East, 1,661.37 feet along said North line to the Northeast corner of said South half (cs 1/16 corner); thence South 00°05'31" West, 1,329.12 feet to the Southeast corner of said South half (South quarter corner); thence South 89°42'48" West, 981.95 feet along the South line of said South half to the REAL POINT OF BEGINNING of this description.

A copy of said Mortgage is attached hereto as Exhibit "B" and is, by this reference, incorporated herein as if set forth in full.

7. That Defendants Status Corp. has/have made no payments on the balance due and owing of said note; that demand has been made for payment of said balance owing pursuant to the terms thereof, which demand has been refused.

8. That the sum now due and owing by Defendants Status Corp. to Plaintiff McKay is the sum of \$1,204,140.00, together with accruing interest in the amount of \$334.48 per diem from March 31, 2008, until the date judgment is entered.

9. That by reason of the foregoing, Defendants Status Corp. is indebted to Plaintiff in the said sum of \$1,204,140.00, plus accruing interest; reasonable attorney fees, plus the costs of

COMPLAINT FOR MORTGAGE FORECLOSURE - 3

PLTF00395

MCKAY 1767

000413

this action, and the further sum of \$3,280.00 as and for the cost of the foreclosure report, together with statutory interest after the date of Judgment.

10. Plaintiff McKay has no adequate remedy at law.

11. Plaintiff Hulet is a party to this action by reason of a certain collateral Assignment of Mortgage and Security Agreement recorded June 19, 2008, as Instrument No. 108071680, records of Ada County, Idaho. A true copy of said Assignment is attached as Exhibit "C" and incorporated herein.

12. The following Defendants claim, or may claim some interest in the real property that is the subject of this action, but the interest of said Defendants are inferior and subordinate to the interest of Plaintiff being foreclosed herein;

- a) L208-1 1D Hazel Lake, LLC, formerly known as BTC, LLC, a Washington Limited Liability Company;
- b) Bingo Investments, LLC; and
- c) Wells Fargo Foothill, Inc., a California Corporation as administrative agent for the lenders pursuant to the Loan and Security Agreement.

COUNT TWO

SLANDER OF TITLE

13. Plaintiffs reiterates and incorporates paragraphs 1 through 12 herein by reference.

14. On or about November 28, 2006, McKay, Turf Company and Status Corp. entered into a certain Contract of Purchase and Sale (the Agreement) which provided, in pertinent part, that Status Corporation would purchase and Turf Company would sell in accordance with the terms of the Agreement, certain real property identified as Parcel 2 in the Agreement (Parcel 2).

COMPLAINT FOR MORTGAGE FORECLOSURE - 4

PLTF00398
MCKAY 1768

15. Parcel 2 is more particularly described as follows:

A parcel of land situated in a portion of the South half of the Southwest quarter of the Southwest quarter of Section 33, Township 3 North, Range 1 East, Boise Meridian, Ada County, Idaho, as shown on Record of Survey No. 4531, recorded February 2, 1999 as Instrument No. 99010162 for L. Darwin McKay as Parcel A described as follows:

Beginning at the Southwest corner of Section 33; thence North 00°00'00" East 1338.06 feet to a 5/8 inch rebar marking the South 1/16 corner common to Sections 32 and 33, thence Along the Northerly line of said South half of the Southwest quarter North 89°54'18" East 992.43 feet to a point marking the centerline of the Ten Mile Creek; thence Along said centerline the following courses: South 58°58'00" East 431.55 feet to a point; thence South 45°13'00" East 744.00 feet to a point; thence South 12°08'30" East 389.70 feet to a 1/2 inch rebar; thence Leaving said centerline and along the Southerly line of the said Southwest quarter; South 89°42'48" West 1669.75 feet to the POINT OF BEGINNING.

EXCEPTING THEREFROM the following described land as shown as Parcel B on said Record of Survey.

Beginning at the Southwest corner of Section 33, thence Along the Westerly line of the said Southwest quarter North 00°00'00" East 326.06 feet to an 1/2 inch rebar; thence South 48°49'33" East 170.96 feet to a 1/2 inch rebar; thence North 89°42'48" East 139.97 feet to a 1/2 inch rebar; thence North 00°00'00" East 128.01 feet to a 1/2 inch rebar; thence North 89°42'48" East 449.84 feet to a 1/2 inch rebar; thence South 00°00'00" East 340.87 feet to a 1/2 inch rebar; thence Along the Southerly line of the said Southwest quarter South 89°42'48" West 718.50 feet to the POINT OF BEGINNING.

16. On November 30, 2006, the parties caused to be recorded a certain memorandum of Contract as Instrument No. 0600042290, records of Ada County, Idaho (Memorandum of Contract), a true copy of which is attached as Exhibit "D" and incorporated herein.

17. A true copy of the Agreement is attached to the Memorandum of Contract (Exhibit "D") and also incorporated herein by reference.

18. Under Section 4.2 of the Agreement, Closing on Parcel 2 was scheduled to take place on March 30, 2008, which was a Sunday. By letter dated March 18, 2008, Plaintiffs placed Defendant Status Corp. on notice that time was of the essence for closing on Monday, March 31, 2008, the next following business day. A true copy of the Notice letter is attached as Exhibit "E" and incorporated herein (the Notice Letter).

19. Plaintiffs appeared for closing in accordance with the Notice letter. Defendant Status Corp. failed to appear, thereby breaching the terms of the Agreement.

20. By letter dated June 9, 2008 (the Second Notice Letter), Plaintiffs notified Defendant Status Corp. in pertinent part:

"You have breached the Agreement between the parties and you are hereby notified that your breach results in a cancellation of all obligations of the Turf Company, LLC, to sell Parcel 2 to you in accordance with the terms of the Agreement."

A true copy of the Second Notice Letter is attached as Exhibit "F" and incorporated herein.

21. The Second Notice Letter also made the following demand:

"As you are aware, a Memorandum of Contract respecting the Agreement between the parties has been recorded in the Ada County Idaho, Recorder's Office on December 21, 2006, as Document No. 106188146. As a result of your failure to perform under the terms of the Agreement, this recording constitutes a slander of the title of the Turf Company, LLC, to Parcel 2. To cure this slander of title aforesaid, demand is hereby made that you execute and return the enclosed Release of All Liens and Claims to the undersigned."

22. Defendant Status Corp. has failed and refused to execute and return the Release of all Liens and Claims as demanded by Plaintiffs or otherwise act to release or cancel the recorded

Memorandum of Contract. This failure and refusal constitutes a slander of the title of Parcel 2 and has caused damages to be suffered by Turf Company consisting of attorney's fees incurred to cure such slander of title and other damages in an amount to be proved at trial.

COUNT THREE

ATTORNEYS FEES

23. Plaintiffs reiterate and incorporate paragraphs 1 through 22 herein by reference.

24. By reason of the acts and omissions of the Defendant, Status Corp., as aforesaid Plaintiffs have been compelled to retain the services of Munther Goodrum Sperry, Chtd., to bring this action and have incurred attorney fees. If this matter is uncontested, Plaintiffs are entitled to recover reasonable attorney fees of \$5,000.00 plus all costs. If the matter is contested, Plaintiffs are entitled to recover all costs and reasonable attorney fees pursuant to Idaho Code §§ 12-120, 12-121, I.R.C.P. 54 (d)(1) and I.R.C.P. 54(e)(1).

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs demand judgment against the Defendants as follows:

1. That the Plaintiff McKay have Judgment against Defendant Status Corp. for the principal sum of \$1,204,140.00, together with interest accruing thereon at a rate of \$334.48 per diem from March 31, 2008, until the date judgment is entered; together with the further sum of \$3,280.00 as and for the cost of a mortgage foreclosure report as a cost of this foreclosure suit; Plaintiffs McKay's costs and disbursements herein; and general relief.

2. That Plaintiffs' Mortgage be declared to be a valid and existing lien, subject only to the lien for taxes levied and assessed against said premises, and that Plaintiffs' Mortgage

COMPLAINT FOR MORTGAGE FORECLOSURE - 7

PLTF00399

MCKAY 1771

herein be foreclosed, and that Defendant Status Corp., either as tenant, encumbrancer, mortgagee, purchaser or otherwise, be barred and foreclosed of all right, title or claim upon or in said premises and every and each part thereof.

3. That the usual decree be made for the sale of said premises described in Paragraph 5 of this Complaint by the Sheriff of Ada County, Idaho, according to the laws of the State of Idaho and the practice of this Court; that the proceeds of said sale be applied to the payment of taxes assessed against said property, and thereafter to said sums found due to Plaintiffs under the Promissory Note and Mortgage; and that Plaintiffs have Judgment and execution against Defendant Status Corp. for any deficiency which may remain after applying all proceeds from the sale of the real property described herein; and that in the event all sums due and owing to Plaintiffs have been paid from the proceeds of the sale of said real property, that the overage, if any, be paid to Defendant.

4. That Plaintiffs or any other person may become a purchaser at the sale of said real property, that Plaintiffs be allowed to make a credit bid at the sale in an amount not exceeding the judgment, including accruing interest, costs and attorney's fees, and the Sheriff shall execute a deed to said purchaser to the said real property according to law; that the purchaser be let into the possession of said premises upon the production of the Sheriff's Deed therefore; and that title of said purchaser of the real property be quieted against any and all claims of each and every Defendant, and against each and every other person claiming by, through or under them, or any of them.

COMPLAINT FOR MORTGAGE FORECLOSURE - 8

PLTF00400
MCKAY 1772

000418

5. Declaring that the Memorandum of Contract is invalid and of no force and effect as it pertains to Parcel 2 and ordering the cancellation of the Memorandum of Contract from the public record.

6. Awarding damages against Status Corp. in favor of Plaintiff Turf Company, LLC, for Slander of Title.

7. Awarding reasonable attorney fees and costs to Plaintiffs against Defendant Status Corp. and any contesting Defendant pursuant to Idaho Code §§ 12-120, 12-121, I.R.C.P. 54(d)(1) and I.R.C.P. 54(e)(1);

8. For such further relief as the Court shall deem just and equitable under the facts presented.

DATED this 18th day of July 2008.

MUNTHE GOODRUM SPERRY, CHARTERED


Forrest R. Goodrum
Attorneys for Plaintiff

VERIFICATION

STATE OF IDAHO)
 : ss.
County of Ada)

L. Darwin McKay, being first duly sworn upon oath, deposes and says:

That your Affiant is an individual and member of Plaintiff Turf Company, LLC., and as such, is personally familiar with the matters stated herein.

That your Affiant has read the foregoing Verified Complaint, knows the contents thereof, and based upon his own personal knowledge and belief, believes the same to be true and correct.

DATED this 13th day of July 2008.

L. Darwin McKay
L. Darwin McKay

STATE OF IDAHO)
 : ss.
County of Ada)

On this 13th day of July 2008, before me a Notary Public in and for said state, personally appeared L. Darwin McKay personally known to me to be the person whose name is subscribed to the within instrument, and acknowledged to me that he executed the same.



Lorraine M. Gustafson
NOTARY PUBLIC FOR IDAHO
Residing at: Boise, Idaho
My Commission Expires: 2-13-2011

COMPLAINT FOR MORTGAGE FORECLOSURE - 10

PLTF00402
MCKAY 1774

Exhibit E

certified

Forrest R. Goodrum (ISB No. 4451)
MUNTHE GOODRUM SPERRY, CHARTERED
The Mallard Building, Suite 350
1161 West River Street
Boise, Idaho 83702
Telephone: (208) 344-4566
Facsimile: (208) 344-9836
Email: fgoodrum@mgslaw.com
Attorneys for Plaintiff

ADA COUNTY RECORDER J. DAVID NAVARRO
BOISE IDAHO 08/22/08 09:12 AM
DEPUTY Bonnie Gerbiling
RECORDED-REQUEST OF
Forrest Goodrum Sperry

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AUG 19 2008

J. DAVID NAVARRO, Clerk
By MAREN OLSON
DEPUTY

AMOUNT 15.08 5

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IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

L. DARWIN MCKAY, TURF COMPANY,
LLC, an Idaho Limited Liability company, and
HULET FARM MANAGEMENT
LIMITED PARTNERSHIP, an Idaho
Limited Partnership,

Plaintiffs,

vs.

STATUS CORPORATION OF IDAHO, an
Idaho corporation, L208-1 ID Hazel Lake,
LLC, f/k/a BTCX, LLC, a Washington
Limited Liability Company, BINGO
INVESTMENTS, LLC, WELLS FARGO
FOOTHILL, INC., a California Corporation
as administrative agent for the lenders pursuant
to the Loan and Security Agreement,

Defendants.

CASE NO. CV OC 0813374

JUDGMENT AGAINST DEFENDANTS
STATUS CORPORATION OF IDAHO,
L208-1 ID Hazel Lake, LLC, f/k/a BTCX,
LLC, and WELLS FARGO FOOTHILL,
INC.

Defendants Status Corporation of Idaho, L208-1 ID Hazel Lake, LLC, f/k/a BTCX, LLC,
and Wells Fargo Foothill, Inc., having been regularly served with process and not having
answered within the time allowed therefore by law, and default having been entered,

JUDGMENT-PAGE 1

EXHIBIT A



PLTF00651

MCKAY 1903

NOW, THEREFORE, upon application of Plaintiff's counsel that Defendant Status Corporation is indebted to Plaintiff in the amounts set forth in said Affidavit of Computation; and it further appearing from the Affidavit in Support of Plaintiff's Application for Entry of Default that Defendants Status Corporation of Idaho, L208-1 ID Hazel Lake, LLC, f/k/a BTCS, LLC, and Wells Fargo Foothill, Inc., are not infants or incompetent persons and are not now in the active military service of the United States of America.

IT IS HEREBY ORDERED, ADJUDGED, AND DECREED as follows:

1. Plaintiff McKay is awarded judgment against Defendant Status Corporation of Idaho in the sum of \$1,257,457.30 (plus prejudgment interest of \$334.48 from 8/12/08 until the date judgment is entered) together with interest thereon at the legal rate of 7.625% from the date hereof until this judgment is fully satisfied; and

2. Turf Company, LLC, is awarded judgment against Defendant Status Corporation of Idaho, declaring that the Memorandum of Contract recorded as Instrument No. 0600042290, records of Ada County, Idaho, is of no force and effect as it pertains to Parcel 2 and it is hereby ordered that said Memorandum of Contract be cancelled from the public record.

Parcel 2 is more particularly described as follows:

A parcel of land situated in a portion of the South half of the Southwest quarter of the Southwest quarter of Section 33, Township 3 North, Range 1 East, Boise Meridian, Ada County, Idaho, as shown on Record of Survey No. 4531, recorded February 2, 1999 as Instrument No. 99010162 for L. Darwin McKay as Parcel A described as follows:

Beginning at the Southwest corner of Section 33; thence North 00°00'00" East 1338.06 feet to a 5/8 inch rebar marking the South 1/16 corner common to Sections 32 and 33, thence Along the Northerly line of said South half of the Southwest quarter North 89° 54'18" East 992.43 feet to a point marking the centerline of the Ten Mile Creek; thence Along said centerline the following courses: South 58°58'00" East 431.55 feet to a point; thence

JUDGMENT-PAGE 2

PLTF00652

MCKAY 1904

000423

South 45°13'00" East 744.00 feet to a point; thence
South 12°08'30" East 389.70 feet to a ½ inch rebar; thence
Leaving said centerline and along the Southerly line of the said
Southwest quarter;
South 89°42'48" West 1669.75 feet to the POINT OF
BEGINNING.

EXCEPTING THEREFROM the following described land as
shown as Parcel B on said Record of Survey.

Beginning at the Southwest corner of Section 33, thence
Along the Westerly line of the said Southwest quarter
North 00°00'00" East 326.06 feet to an ½ inch rebar; thence
South 48°49'33" East 170.96 feet to a ½ inch rebar; thence
North 89°42'48" East 139.97 feet to a ½ inch rebar; thence
North 00°00'00" East 128.01 feet to a ½ inch rebar; thence
North 89°42'48" East 449.84 feet to a ½ inch rebar; thence
South 00°00'00" East 340.87 feet to a ½ inch rebar; thence
Along the Southerly line of the said Southwest quarter
South 89°42'48" West 718.50 feet to the POINT OF BEGINNING.

3. Plaintiff McKay is awarded judgment against Defendants Status Corporation of Idaho, L208-1 ID Hazel Lake, LLC, d/b/a BTCX, LLC, and Wells Fargo Foothill, Inc., declaring that Plaintiff McKay's mortgage is a valid and existing lien on Parcel 1 subject to the lien for taxes levied and assessed against said premises, that Plaintiff McKay's Mortgage be foreclosed, that Defendant Status Corporation of Idaho, either as tenant, encumbrances, mortgagee, purchaser or otherwise be barred and foreclosed of all right title or claim upon or in said premises and every part thereof, that the interests of Defendants L208-1 ID Hazel Lake, LLC, formerly known as BTCX, LLC, and Wells Fargo Foothills, Inc., are inferior and subordinate to the interest of Plaintiff McKay being foreclosed herein.

Parcel 1 is more particularly described as follows:

A parcel of land being a portion of the South half of the Southwest quarter of Section 33, Township 3 North, Range 1 East, Boise Meridian, Ada County, Idaho, more particularly described as follows:

JUDGMENT - PAGE 3

PLTF00653

MCKAY 1905

000424

Commencing at the Southwest corner of Section 33, Township 3 North, Range 1 East, Boise Meridian; thence North 89°42'48" East, 1,669.75 feet along the South line of the South half of the Southwest quarter of said Section 33 to a point on the approximate centerline of Ten Mile Creek, the REAL POINT OF BEGINNING of this description; Along said approximate centerline as follows: thence North 12° 08'30" West, 389.70 feet to a point; thence North 45° 13'00" West, 744.00 feet to a point; thence North 08°58'00" West, 431.53 feet to a point on the North line of the South half of said Southwest quarter; thence leaving said approximate centerline North 89°54'26" East, 1,661.37 feet along said North line to the Northeast corner of said South half (cs 1/16 corner); thence South 00° 05'31" West, 1,329.12 feet to the Southeast corner of said South half (South quarter corner); thence South 89°42'48" West, 981.95 feet along the South line of said South half to the REAL POINT OF BEGINNING of this description.

DATED this 19th day of August 2008.

151 TIMOTHY HANSEN
District Court Judge

JUDGMENT - PAGE 4



PLTF00854

MCKAY 1906

000425

CLERK'S CERTIFICATE OF SERVICE

I, the undersigned, certify that on the 19 day of August 2008, caused a true and correct copy of the foregoing to be forwarded with all required charges prepaid, by the method(s) indicated below, in accordance with the Rules of Civil Procedure, to the following person(s):

Forrest R. Goodrum
Munther Goodrum Sperry, Chtd.
1161 W. River Street, Suite 350
Boise, ID 83702

Via U.S. Mail ☒
Via Hand Delivery ☐
Via Facsimile ☐
Via Overnight Mail ☐

Status Corporation of Idaho
1059 E. Iron Eagle Drive, Suite B
Eagle, ID 83616

Via U.S. Mail ☒
Via Hand Delivery ☐
Via Facsimile ☐
Via Overnight Mail ☐

L208-1 ID Hazel Lake, LLC f/k/a BTCX, LLC
1059 E. Iron Eagle Drive, Suite B
Eagle, ID 83616

Via U.S. Mail ☒
Via Hand Delivery ☐
Via Facsimile ☐
Via Overnight Mail ☐

Wells Fargo Foothill, Inc.
c/o Corporation Service Company
1401 Shoreline Drive, Suite 2,
Boise, ID 83702

Via U.S. Mail ☒
Via Hand Delivery ☐
Via Facsimile ☐
Via Overnight Mail ☐

Derrick J. O'Neill
Trout Jones Gledhill Fohrman, P.A.
P. O. Box 1097
Boise, Idaho 83701-1097
Attorneys for Bingo Investments, LLC
doneill@idlaw.com

Via U.S. Mail ☒
Via Hand Delivery ☐
Via Facsimile ☐
Via Overnight Mail ☐

15/
Clerk

WILLIAMSON
CLERK

JUDGMENT - PAGE 4

PLTF00655

MCKAY 1907

000426

Exhibit F

JAN 30 2009

Scott D. Hess, ISB #2897
HOLLAND & HART LLP
 Suite 1400, U.S. Bank Plaza
 101 South Capitol Boulevard
 P.O. Box 2527
 Boise, Idaho 83701-2527
 Telephone: (208) 342-5000
 Facsimile: (208) 343-8869
sdhess@hollandhart.com

RECOPY

★★★★★★

Filing Fee: \$76.00

000428

1. Finding the Defendant in contempt of court for violation of the Decree of Divorce entered November 28, 2007;

2. Imposing sanctions against the Defendant for being in contempt pursuant to Idaho Code § 7-610;

3. Requiring the Defendant to pay all attorneys' fees and costs incurred by the Plaintiff in bringing this motion pursuant to the Decree of Divorce, Idaho Code §§ 32-704, 12-120 and 12-1212; and

4. For such other and further relief as the Court deems just.

This motion is based upon the Affidavits of Patricia McKay, filed concurrently herewith.

DATED this 30th day of January 2009.

HOLLAND & HART LLP

By 

Scott D. Hess, of the firm
Attorneys for Plaintiff Patricia McKay

MOTION FOR CONTEMPT - 2

MCKAY 963

000429

CERTIFICATE OF SERVICE

I hereby certify that on this 30th day of January 2009, I caused to be served a true and correct copy of the foregoing by the method indicated below, and addressed to the following:

Kimberly Brooks
Brooks Law, P.C.
23 9th Avenue North
Nampa, ID 83687

☒ U.S. Mail
☐ Hand Delivered
☐ Overnight Mail
☒ Telecopy (Fax)

John A. Miller
Miller & Harr
Attorneys at Law
1401 Shoreline Drive, Suite 3
Boise, Idaho 83702

☒ U.S. Mail
☐ Hand Delivered
☐ Overnight Mail
☒ Telecopy (Fax)


for HOLLAND & HART LLP

4432131_1.DOC

MOTION FOR CONTEMPT - 3

MCKAY 964

000430

Exhibit G

SEP 10 2010

J. DAVID NAVARRO, Clerk
DEPUTY NIXON

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT
IN THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

PATRICIA McKAY,

Plaintiff,

vs.

DARWIN McKAY,

Defendant.

Case No.
CVDR-2006-15200

BEFORE THE HONORABLE MICHAEL J. REARDON
JUDGE OF THE MAGISTRATE COURT
(Sitting without a Jury)

Boise, Idaho
July 9, 2009

TRANSCRIPT OF AUDIOTAPED PROCEEDINGS

RE: MOTIONS



Court Reporting, LLC
Lori A. Pulsifer, CSR, CCR, RDR, CRR
Licensed in Idaho, Washington & Utah
776 East Riverside Drive
Suite 200
Eagle, Idaho 83616
www.qnacourtreporting.com
E-mail: realtimesqna@msn.com
Telephone: 208.484.6309

(COPY)

CASE NO. CVDR-2006-15200

000432

APPEARANCES**FOR THE PLAINTIFF:**

Mr. Scott D. Hess
Attorney at Law
HOLLAND & HART LLP
101 South Capitol Boulevard, Suite 1400
Boise, Idaho 83701-2527

FOR THE DEFENDANT:

Ms. Kimberly D. Brooks
Attorney at Law
BROOKS LAW P.C.
The Lockman House
23 9th Avenue North
Nampa, Idaho 83687

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1 A. I do recall reviewing those loan documents.
 2 And I do recall reviewing the loan covenants.
 3 Q. But as you testified today, do you know whether
 4 or not that if Mr. McKay would have made a payment,
 5 would that have violated the lending terms of the
 6 bank?
 7 A. Payment with the proceeds from the Albrethsen
 8 Farm sale would not have violated the loan covenants set
 9 forth in the documents that I reviewed.
 10 Q. What documents did you review to be able to
 11 make that conclusion?
 12 A. Well, I reviewed basically all of the documents
 13 that Mr. McKay and these various entities and Mrs. McKay
 14 entered into over the course of their ten-year
 15 marriage.
 16 Q. Did you review any documents as recent as 2007,
 17 late 2006?
 18 A. Yes.
 19 Q. And did you ever talk to any representative of
 20 the bank that holds the line of credit for the Turf
 21 Corporation?
 22 A. I may have, but I don't specifically recall.
 23 Q. So you are basing your opinion today and your
 24 testimony that the payment would not have violated the
 25 lending terms based upon your own analysis of the

Page 199

1 lending documents?
 2 A. Correct.
 3 Q. Not from any statement or conversation with a
 4 representative of the bank?
 5 A. As I said, I don't recall having a conversation
 6 with representatives of the bank, but I could have.
 7 MS. BROOKS: Nothing further.
 8 THE COURT: Anything on that?
 9 REDIRECT EXAMINATION
 10 BY MR. HESS:
 11 Q. You indicated -- I believe you are indicating
 12 in your testimony that your understanding and review of
 13 the loan documents indicated that a payment from the
 14 Albrethsen property would not violate the loan
 15 covenants?
 16 A. Correct.
 17 Q. Do I understand that correctly?
 18 A. Yes, you do.
 19 Q. All right. Do you have the same conclusion
 20 with regard to a payment had it been made with regard to
 21 the sale of the Home Farm?
 22 A. I think a payment, we would have had to have
 23 the consent of the bank to receive proceeds from the
 24 sale of the Home Farm, because it was collateralized.
 25 Q. So there is a -- with regard to the objections

Page 200

1 the bank may have, there was a difference whether it was
 2 a payment on the sale of the Albrethsen property versus
 3 the sale of the Home Farm?
 4 A. Correct.
 5 MR. HESS: Nothing further.
 6 THE COURT: Anything else?
 7 RECROSS-EXAMINATION
 8 BY MS. BROOKS:
 9 Q. Are you aware of any of the debt ratios that
 10 the Turf Company held at the time that Mr. McKay
 11 received funds from the title company?
 12 A. I recall seeing the loan covenants and the
 13 ratio requirements. I don't recall what they were at
 14 this moment.
 15 Q. And you don't recall what the ratios of the
 16 actual -- not the term covenants, but what were the
 17 actual ratios of the Turf Company at the time that the
 18 payment from the title company was received?
 19 A. I didn't follow the question.
 20 Q. The loan requires a certain ratio of debt;
 21 correct?
 22 A. That is debt to equity or loan to value. There
 23 were several different ratios.
 24 Q. And so you reviewed in the loan documents what
 25 the bank required those ratios to be; right?

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1 A. Correct.
 2 Q. But you don't know what the Turf Company's
 3 ratios actually were?
 4 A. Well, I did at the time. I did the analysis
 5 and determined that it would not breach the loan
 6 covenants.
 7 Q. And that was based on documentation that
 8 Patricia gave to you?
 9 A. Well -- and that it was produced by Mr. McKay
 10 during discovery.
 11 Q. During the divorce proceedings?
 12 A. Yes, ma'am.
 13 Q. Which was a full year prior to Mr. McKay
 14 receiving the proceeds from the title company?
 15 A. The divorce decree was entered in late 2007,
 16 and I believe he received the proceeds approximately a
 17 year later; that's correct.
 18 MS. BROOKS: Thank you. Nothing further.
 19 THE COURT: Anything else, Mr. Hess?
 20 MR. HESS: Nothing further.
 21 THE COURT: Can Mr. Walker be excused?
 22 MS. BROOKS: Yes.
 23 THE WITNESS: Thank you, Your Honor.
 24 THE COURT: You are free to go.
 25 Mr. Hess.

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1 MR. HESS: Yes, Your Honor. We call Patricia
2 McKay.
3 MS. BROOKS: Your Honor, as we go into the
4 (inaudible), I have been in contact with my witnesses,
5 and I have unavailability, witnesses that are
6 unavailable to testify tomorrow. I'm not sure what to
7 do about that.
8 I have one witness that's here that is going to
9 be out until 2:15 tomorrow afternoon. And my other
10 two — my expert witnesses have problems for tomorrow.
11 THE COURT: How about next Thursday?
12 MS. BROOKS: I will try.
13 THE COURT: Are your witnesses here?
14 MS. BROOKS: One is.
15 THE COURT: Can we take them out of order?
16 MS. BROOKS: I wouldn't be able to finish her
17 by 5:00.
18 THE COURT: Is the one that you are going to
19 have the most trouble with here? Well —
20 MS. BROOKS: The trial next Thursday I don't
21 think will go very long. Maybe we could start it at
22 like 10:00.
23 THE COURT: Oh, okay.
24 MS. BROOKS: Would that be possible?
25 THE COURT: How about 10:30?

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1 MR. HESS: Okay.
2 MS. BROOKS: Perhaps that's not the best thing
3 to do, then.
4 THE COURT: Why?
5 MS. BROOKS: May I come up?
6 THE COURT: Sure, you may. You can approach as
7 well, if you'd like.
8 That's next Thursday is the problem; right?
9 MS. BROOKS: The 16th?
10 THE COURT: Yeah. And tomorrow we have
11 issues — if we took your witness now, how long would it
12 take, do you expect?
13 MS. BROOKS: I expect — about two and a half
14 hours, two hours.
15 THE COURT: Oh.
16 MS. BROOKS: And I need to call my two experts,
17 because they were having issues. They were going to try
18 and work on them.
19 THE COURT: Issues for tomorrow?
20 MS. BROOKS: Yes.
21 THE COURT: Well, I caught a break next
22 Thursday and that's why I've got the day open. I've got
23 a second set scheduled for the 24th.
24 MS. BROOKS: Your Honor, we have to pay these
25 witnesses to be here, the two. Mr. McKay has to pay

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1 them each time.
2 Could you please have a first set? No?
3 THE COURT: Yeah, you can have a first set next
4 Thursday, but beyond that, I don't have a first set
5 available until December.
6 MS. BROOKS: Oh, God.
7 THE COURT: Yeah, exactly.
8 MS. BROOKS: Your Honor, could we take Thursday
9 and —
10 THE COURT: The 16th?
11 MS. BROOKS: Yeah. Just kind of with the
12 understanding that I may have an issue. I don't want to
13 lose the date, but at the same time I don't want to
14 leave the court astray either.
15 THE COURT: I'll set it for the 16th at 10:30.
16 And if the other matter doesn't resolve, then — I mean,
17 I don't know what — the 24th is the only second set I
18 have available until we get to the third week in
19 September.
20 Now, if you like, I'll set it for 16th. And I
21 will tell you that on the 24th, that that case involves
22 Matt Stoppello and Sheppard, who are generally pretty
23 reasonable folks. And I would guess that there is a is
24 pretty good chance that that case is going to resolve.
25 If you want to set it for the 16th and between

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1 now and then, either/or both of you talk to
2 Mr. Stoppello and Ms. Sheppard and see if their case is
3 resolved, you can move it to the 24th and you can have a
4 first set then.
5 MS. BROOKS: We're just going to try to work
6 out the 16th.
7 THE COURT: Okay. 16th. All right.
8 Your direct, Ms. McKay, Mr. Hess, will that
9 take more than 45 minutes?
10 MR. HESS: I think it may, Your Honor. You
11 know, I don't want to waste 45 minutes, but in light of
12 what's occurred today, it may make some sense to give me
13 a little time to talk to her, and we could probably
14 shorten it down come the 16th. I'll do it either way
15 you want.
16 THE COURT: Well, I'm not interested in
17 breaking partly through, because my experience is that
18 just adds 20 minutes to somebody's testimony to review
19 it.
20 And if we do it on the 16th, Ms. Brooks, are we
21 going to start — what time are we going to start? I
22 said 10:30. Is that what you are talking about or —
23 MS. BROOKS: We're going to talk to the judge
24 and try to get it resolved so 10:00.
25 UNIDENTIFIED SPEAKER: Even before that date, I

Page 206

1 would say 10:00.

2 THE COURT: Okay. Let's start at 10:00 on the
3 16th. I would encourage everyone to streamline their
4 questioning, because if we don't get it that day, it's a
5 long time before we get another date.

6 MS. BROOKS: Your Honor?

7 THE COURT: Yes.

8 MS. BROOKS: If I'm able to completely resolve
9 it prior to, may we notify the Court and maybe start at
10 9:00?

11 THE COURT: Yes.

12 MS. BROOKS: Thank you.

13 THE COURT: Just keep in touch with Mr. Hess.

14 MS. BROOKS: We'll do.

15 THE COURT: So we'll tentatively start at 10:00
16 unless we hear from you, but if we hear from you, we'll
17 start at 9:00.

18 MS. BROOKS: Thank you.

19 THE COURT: Can we talk about anything else?

20 MS. BROOKS: I don't believe so.

21 Your Honor, because I didn't label my exhibits
22 as exhibits, would you like me to go ahead and submit
23 that with the exhibits.

24 THE COURT: That would be helpful.

25 MS. BROOKS: Great. Thank you.

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1 THE COURT: I have to say, I don't think I've
2 ever listened to an entire day of testimony, six
3 witnesses, and all of them lawyers. And I hope I never
4 do it again.

5 We'll be in recess.

6 (Whereupon, the foregoing audiotaped
7 proceedings were adjourned.)

8 * * *

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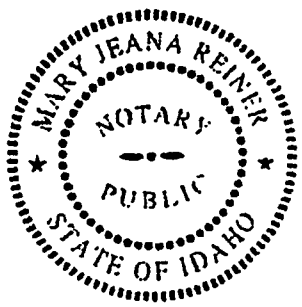
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CERTIFICATE OF TRANSCRIPTION

The undersigned does hereby certify that she
correctly and accurately transcribed and typed, to the
best of her skill and ability, the above proceedings
from the digital recording of the interview held in the
above-entitled case.

DATE AND CERTIFIED this 10th day of *Sept.* 2010.



Jeana Reiner
Jeana Reiner, Transcriber

Exhibit H

40 _____ FILED
A.M. _____ P.M.

J. DAVID NAVARRO, Clerk
By ELAINE TOWN
DEPUTY

**IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA
MAGISTRATE DIVISION**

Defendant.

MCKAY 1334

Upon consideration thereof, including consideration of the testimony of witnesses presented at the hearing on July 16, 2009 and the arguments of counsel;

It is hereby ORDERED, ADJUDGED AND DECREED that Judgment be entered in favor of Plaintiff, Patricia McKay, and against Defendant, Darwin McKay in the amount of \$1,223,814.83 together with interest thereon from the date of this Judgment at the statutory rate.

IT IS SO ORDERED.

DATED this 17 day of August 2009.

MICHAEL J. REARDON

By _____
Honorable Michael Reardon

JUDGMENT - 2

MCKAY 1335

000442

CERTIFICATE OF SERVICE

I hereby certify that on this 19 day of August 2009, I caused to be served a true and correct copy of the foregoing by the method indicated below, and addressed to the following:

Kimberly Brooks
Brooks Law, P.C.
23 9th Avenue North
Nampa, ID 83687

☒ U.S. Mail
☐ Hand Delivered
☐ Overnight Mail
☐ Telecopy (Fax)

Scott D. Hess
HOLLAND & HART LLP
Suite 1400, U.S. Bank Plaza
101 South Capitol Boulevard
P.O. Box 2527
Boise, Idaho 83701-2527

☒ U.S. Mail
☐ Hand Delivered
☐ Overnight Mail
☐ Telecopy (Fax)

J. DAVID NAVARRO

BLAINE TOWN

Clerk of the Court

SEAL

4564544_2.DOC

JUDGMENT - 3

MCKAY 1336

000443

Exhibit I

BROOKS LAW, P.C.
KIMBERLY D. BROOKS - ISB #5968
TESSA J. BENNETT - ISB #7424
The Lockman House
23 9th Avenue North
Nampa, ID 83687
Telephone: (208) 442-7489
Facsimile: (208) 468-4030
Email: kim@kbrooksllaw.com

ATTORNEYS FOR DEFENDANT

COPY

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AM.

NOV 23 2009

J. DAVID NAVARRO, Clerk
By ELAINE TOWN
DEPUTY

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

| | | |
|-----------------|---|-----------------------------------|
| PATRICIA McKAY, |) | CASE NO. CV DR 0615200 |
| |) | |
| Plaintiff, |) | |
| |) | |
| vs. |) | ORDER REGARDING SETTLEMENT OF ALL |
| |) | CLAIMS |
| DARWIN McKAY, |) | |
| |) | |
| Defendant. |) | |
| |) | |

THIS MATTER, having come before the Court on the 15th day of July, 2009, Defendant DARWIN McKAY with his attorney of record, Kim Brooks; Plaintiff PATRICIA McKAY appearing with her attorney of record, Scott D. Hess; the parties having reached an agreement and placing their stipulation on the record in open Court; the Court finding good cause therein, IT IS HEREBY ORDERED as follows:

ORDER REGARDING SETTLEMENT OF ALL CLAIMS - PAGE 1

Bm.

MCKAY 156

000445

1. COVENANT NOT TO ENFORCE DECREE: Plaintiff, PATRICIA McKAY, agrees to dismiss her claims contained in her Motion to liquidate Judgment filed 1/30/09 and Motion for Contempt filed 1/30/09 in their entirety in exchange for the terms of settlement/agreement outlined below. Both parties hereby covenant and agree not to attempt to enforce any term of that Judgment and Decree of Divorce filed 11/29/07. This Order regarding settlement of all claims supplants all unfulfilled financial provisions of the Judgment and Decree filed 11/29/07, specifically paragraphs 1.7 through and including paragraph 1.8.3. DARWIN McKAY's monthly obligation to Plaintiff, PATRICIA McKAY in the amount of twenty five hundred dollars (\$2500.00), shall cease as of July 15, 2009. Other than as listed in this Settlement Agreement, Defendant DARWIN McKAY shall have no further financial obligations to Plaintiff, PATRICIA McKAY.

2. TERMS OF SETTLEMENT/ AGREEMENT:

a. Van Es: Defendant, DARWIN McKAY, shall transfer and convey all interest in that certain note known as the "Van Es Receivable" to Plaintiff PATRICIA McKAY. Defendant DARWIN McKAY shall make all efforts to secure a first position insurance policy. As of date of transfer (9/15/09), Defendant

3m

DARWIN MCKAY represents that one hundred sixty three (163) payments of two thousand six hundred eighty three dollars and eight cents (\$2,683.08), totaling four hundred thirty-seven thousand three hundred forty-two dollars and four cents (\$437,342.04) remain due upon the note transferred. The Van Es note shall not be alimony to Plaintiff;

b. CASH: Defendant, DARWIN MCKAY shall make a cash payment of thirty seven thousand two hundred ninety dollars and twenty six cents (\$37,290.26) to Plaintiff PATRICIA MCKAY with the first payment of eighteen thousand six hundred forty five dollars and thirteen cents (\$18,645.13) payable no later than 9/15/09 and the second payment of eighteen thousand six hundred forty five dollars and thirteen cents (\$18,645.13) payable no later than 9/15/10;

c. PAYMENT: Defendant, DARWIN MCKAY shall make a cash payment to Plaintiff PATRICIA MCKAY in the amount of one hundred thousand dollars (\$100,000.00) payable no later than 8/1/12;

d. MORTGAGES: Defendant DARWIN MCKAY shall continue to pay the first mortgage, including property taxes and insurance, attached to Plaintiff PATRICIA MCKAY'S residence in the approximate amount of five hundred fifty six

ORDER REGARDING SETTLEMENT OF ALL CLAIMS - PAGE 3

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MCKAY 158

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thousand three hundred twenty four dollars and thirty four cents (\$556,324.34). Defendant DARWIN MCKAY shall continue to pay the second mortgage attached to Plaintiff PATRICIA MCKAY'S residence in the approximate amount of sixty seven thousand four hundred ninety dollars and forty nine cents (\$67,490.49).

Said obligations shall be the "Personal Residence Debt." Said payments shall be made no later than the due date set forth on the mortgage statements. Defendant DARWIN MCKAY shall pay both first and second mortgages in full no later than 8/1/14. If Plaintiff PATRICIA MCKAY sells said residence, payments shall continue directly to Plaintiff PATRICIA MCKAY pursuant to the terms herein. Plaintiff Patricia McKay agrees to cooperate in Mr. McKay's efforts, if any, to refinance the mortgage loan(s). Notwithstanding the foregoing, Patricia shall have the right to sell the Personal Residence at any time; in which case, the Personal Residence Debt would likely be paid off out of the sale proceeds. If Patricia sells the Personal Residence, Darwin shall pay directly to Patricia the unpaid principal balance of the Personal Residence Debt, plus interest accruing at the respective rates called for in the first and second loan documents, in monthly installments to and including payment in full no later than 8/1/2014 of the Personal Residence Debt. The parties agree that Kevin Crane,

ORDER REGARDING SETTLEMENT OF ALL CLAIMS - PAGE 4

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MCKAY 159

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CPA, or if Mr. Crane cannot serve, such other accountant as the parties shall designate, will provide the appropriate calculations of the remaining balance and accruing interest and Darwin shall execute and deliver a promissory note to Patricia setting forth his payment obligations. Any such promissory note shall include a right of prepayment.

e. ALIMONY: All payments herein, whether to the mortgage companies or Plaintiff PATRICIA McKAY directly, shall be considered and deemed as alimony paid by Defendant DARWIN McKAY. The transfer of the Van Es receivable shall not be considered as alimony to Plaintiff PATRICIA McKAY;

f. TIME SHARE: Defendant DARWIN McKAY shall offer Plaintiff PATRICIA McKAY the option of exercising up to fourteen (14) weeks of a time share with Palace Resorts at Plaintiff PATRICIA McKAY'S expense of approximately \$1500.00 to \$1600.00 per week. Said 14 weeks may be used in any combination, Patricia shall make her request(s) in writing and Darwin shall respond to Patricia's request(s) in writing within five days, via e-mail or US postal Service. Patricia shall pre-pay with verified funds prior to final reservations with Palace Resorts. Whatever rate is offered to Defendant DARWIN McKAY shall be paid by Plaintiff PATRICIA McKAY.

ORDER REGARDING SETTLEMENT OF ALL CLAIMS - PAGE 5

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MCKAY 160

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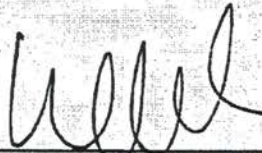
Defendant DARWIN McKAY, individually and/or on behalf of his company, whichever is applicable agrees to facilitate any paperwork necessary to insure that Plaintiff PATRICIA McKAY is transferred fourteen (14) weeks. Plaintiff PATRICIA McKAY shall have three (3) years to complete her fourteen (14) weeks, no later than July 16, 2012. Plaintiff PATRICIA McKAY shall have the right to engage in a conference call with an employee of Defendant DARWIN McKAY's company and a representative from Palace Resort Timeshares for the purpose of determining the amount due upon Plaintiff PATRICIA McKAY's request to utilize the timeshare.

3. COVENANT NOT TO EXECUTE: The terms outlined above contain the entire agreement of the parties and each party stipulates and agrees that said terms may be reduced to a judgment in the amount of \$1,223,814.83, which has been entered as of August 19, 2009. Plaintiff PATRICIA McKAY hereby covenants not to execute upon the August 19, 2009 Judgment as long as Defendant DARWIN McKAY is not in default of the Order herein. Upon default, Plaintiff PATRICIA McKAY may execute upon the Judgment entered August 19, 2009 to the extent it has not been satisfied as of the date of the breach.

DM

4. ATTORNEYS FEES/ COSTS: Each party shall bear their own attorneys fees and costs in this matter.

IT IS SO ORDERED this 23 day of November, 2009.


MICHAEL J. REARDON
Magistrate Judge

COPY

ORDER REGARDING SETTLEMENT OF ALL CLAIMS - PAGE 7

Om

MCKAY 162

000451

Approved as to Form and Content:

Darwin McKay

Kim Brooks
Attorney for Defendant

Approved as to Form and Content:

Patricia McKay
Patricia McKay

SCOTT D. HESS
Attorney for Plaintiff

ORDER REGARDING SETTLEMENT OF ALL CLAIMS - PAGE 8

gm
MCKAY 163

000452

CERTIFICATE OF SERVICE

I hereby certify that on this 24 day of November, 2009, I caused a true and accurate copy of the foregoing document to be served upon the following as indicated below:

Scott D. Hess
HOLLAND & HART, LLP
101 South Capitol Blvd., Ste. 1400
P.O. Box 2527
Boise, Idaho 83701-2527
Facsimile: (208) 343-8869

☒ Hand Delivery
☒ U.S. Mail
☐ Overnight Courier
☐ Facsimile Transmission

Kimberly D. Brooks
Brooks Law, P.C.
The Lockman House
23 9th Avenue North
Nampa, Idaho 83686
FAX: 468-4030

☒ Hand Delivery
☒ U.S. Mail
☐ Overnight Courier
☐ Facsimile Transmission

J. DAVID NAVARRO
Elaine Zown
Deputy Clerk

ORDER REGARDING SETTLEMENT OF ALL CLAIMS - PAGE 9

MCKAY 164

000453

Robert A. Anderson – ISB No. 2124
Yvonne A. Dunbar – ISB No. 7200
ANDERSON, JULIAN & HULL LLP
C. W. Moore Plaza
250 South Fifth Street, Suite 700
Post Office Box 7426
Boise, Idaho 83707-7426
Telephone: (208) 344-5800
Facsimile: (208) 344-5510

Attorneys for Defendants

NO. _____ FILED _____
A.M. _____ P.M. _____

JAN 06 2011

J. DAVID NAVARRO, Clerk
By A. GARDEN
DEPUTY

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

PATRICIA MCKAY,

Plaintiff,

vs.

THOMAS G. WALKER and COSHO
HUMPHREY, LLP, a limited liability
partnership,

Defendants.

Case No. CV OC 0922659

**MEMORANDUM IN SUPPORT OF
DEFENDANTS' MOTION FOR
SUMMARY JUDGMENT**

COMES NOW the above-named Defendants, by and through their attorney of record, Robert A. Anderson, of the firm of Anderson, Julian & Hull LLP, and hereby submits this Memorandum in Support of its Motion for Summary Judgment ("Motion"):

I. INTRODUCTION

In her Complaint, the Plaintiff asserts a claim for attorney malpractice against the Defendants. As is set forth in further detail below, the Plaintiff's claim fails as a matter of law, and the Defendants are entitled to summary judgment, because she cannot establish that the Defendants breached any duty owed to her or that any alleged breach was the proximate cause her alleged damages. Additionally, the Plaintiff's claim fails because the Plaintiff does not have a valid claim for damages.

ORIGINAL

II. UNDISPUTED STATEMENT OF FACTS

McKay Divorce

1. The Plaintiff and Darwin McKay ("Mr. McKay") executed a Prenuptial Agreement on or about July 1, 1996. *See* Affidavit of Counsel in Support of Defendants' Motion for Summary Judgment ("Counsel Aff."), filed concurrently herewith, Ex. A, at p. 26:1-9, Ex. 2.

2. On or about August 21, 2006, the Plaintiff filed for divorce from Mr. McKay in Case No. CV DR 0615200 in the Magistrate Court of the Fourth Judicial District of the State of Idaho, in and for the County of Ada (hereinafter "Underlying Action").

3. In November 2006, the Plaintiff retained the Defendants to represent her in her previously filed divorce action against Mr. McKay. *See* Affidavit of Stanley Welsh in Support of Defendants' Motion for Summary Judgment ("Welsh Aff."), filed concurrently herewith, ¶¶ 2-3.

4. Subsequently, the Defendants served several sets of discovery upon Mr. McKay seeking information regarding, inter alia, his finances, property ownership, businesses, and real estate transactions. *See id.*, ¶ 5. The Defendants further filed at least three motions to compel against Mr. McKay due to his failure to provide complete responses to the discovery served in the underlying action. *See id.*

5. On October 9, 2007, the Defendants filed a motion for partial summary judgment against Mr. McKay on behalf of the Plaintiff. *See id.*, ¶ 6. In this motion, the Defendants sought a ruling invalidating the Prenuptial Agreement between the Plaintiff and Mr. McKay. *See id.* This motion was supported by, inter alia, a memorandum and an executed affidavit of Patricia McKay. *See id.*; *See* Counsel Aff., Ex. A, at 26:1-9; Ex. 3. The motion was set for hearing on December 12, 2007. *See* Welsh Aff., ¶ 6.

6. After the motion for partial summary judgment was filed, the Plaintiff and Mr. McKay agreed to mediate the Underlying Action. *See id.*, ¶ 7. The mediation was scheduled for and did occur on Saturday, October 20, 2007 beginning at 9:30 a.m. *See id.*

7. Defendant Tom Walker and Stanley Welsh, a partner at Defendant Cosho Humphrey, represented the Plaintiff at the mediation. *See id.*, ¶8; Affidavit of Thomas Walker in

Support of Defendants' Motion for Summary Judgment ("Walker Aff."), filed concurrently herewith, ¶ 4. The Plaintiff also attended the mediation which lasted approximately 9 hours. *See id.*, ¶ 4.

8. Throughout the mediation, the Plaintiff and Mr. McKay negotiated the distribution of the property acquired by one or both of them during their marriage. *See id.* The Plaintiff was actively involved in the negotiations. *See id.*, ¶ 6; Welsh Aff., ¶ 8; Counsel Aff., Ex. A at p. 86:5-7.

9. During the mediation, Messrs. Walker and Welsh informed the Plaintiff that settlement was not required or necessary and that, if she chose to end the mediation, they would aggressively pursue the motion for summary judgment and would try her case in January 2008. *See Walker Aff.*, ¶ 8; Welsh Aff., ¶ 11; Counsel Aff., Ex. A, at 74:1-16.

10. Throughout the mediation, Messrs. Walker and Welsh were available to the Plaintiff to answer questions and to discuss the negotiations. *See Walker Aff.*, ¶ 7; Welsh Aff., ¶ 10; Counsel Aff., Ex. A, at 79:21-80:5.

11. At the October 20, 2007 mediation, the Plaintiff and Mr. McKay entered into a handwritten settlement agreement which was drafted by the mediator, Judge Duff McKee (hereinafter "Handwritten Agreement"). *See Counsel Aff.*, Ex. A, at 79:14-20, Ex.11. The Plaintiff was an active part of the negotiations which lead to the creation of the Handwritten Agreement and she voluntarily entered into the Handwritten Agreement. *See id.*, Ex. A, at 80:6-11; 86:5-7. Prior to executing the Handwritten Agreement, the Plaintiff had questions about it which she discussed with the Defendants. *See id.*, Ex. A, at 79:21-80:5. According to the Plaintiff, the Defendants answered all of her questions to her satisfaction. *See id.* Messrs. Walker and Welsh also informed the Plaintiff, if she was uncomfortable with the terms of the Handwritten Agreement, she could decline to execute it and they could end the mediation. *See Welsh Aff.*, ¶ 11; Walker Aff., ¶ 8. At the time of execution, the Plaintiff reviewed the Handwritten Agreement and was satisfied with the framework of it. *See Counsel Aff.*, Ex. A, at 82:20-23.

12. As testified by the Plaintiff, she chose to settle with Mr. McKay due to the following independent concerns she had on October 20, 2007: (1) even if the prenuptial agreement was ruled abandoned by the trial court, the values and encumbrances on the properties at issue in the Underlying Action would not be as favorable to her as she anticipated; (2) Mr. McKay might spend the money he had available before the case went to trial in January 2008; and (3) Mr. McKay might file for bankruptcy prior to the January 2008 trial date. *See id.*, Ex. A, at 81:3-82:19.

13. The Plaintiff executed the Handwritten Agreement even though she was fully aware that (1) Mr. McKay no longer owned the Albrethsen property¹; (2) she was not receiving an interest of any kind in the Albrethsen property; (3) Mr. McKay was not providing any land as collateral; and (4) Mr. McKay was not willing to provide any security in any property as his real property was encumbered by bank loans and other debt. *See id.*, Ex. A, at 86:1-4, 116:22-117:4; Welsh Aff., ¶ 12; Walker Aff., ¶¶ 10, 11.

14. The Handwritten Agreement was intended to resolve all of the property distribution issues between the Plaintiff and Mr. McKay. *See Counsel Aff.*, Ex. A at Ex. 11.

15. Per the Handwritten Agreement, the Plaintiff agreed to the following provisions:

1) Wife will receive home of parties, free and clear of all encumbrances and all furnishings and contents therein. Husband to mail all payments on 1st and 2nd mortgages, and to arrange for release of same, upon settlement of Status (or Union Development) real estate deal (March of 2008) or within 60 months thereafter if the deal fails.

6) If Status (Union Development) real estate transaction is completed in March of 2008, Husband will pay wife \$800,000 ... of proceeds, and convey the 2 designated reserved lots to be created under said deal. If the deal falls, Husband will pay wife \$500,000 within 6 months.

Id.

¹ As is explained in Paragraphs 27-28, the "Albrethsen property" is real property which was purchased and sold by Mr. McKay during his marriage to the Plaintiff. As a part of the sale, Mr. McKay held a mortgage. As stated below in Paragraph 22, per the Property Settlement Agreement, which was incorporated into the Judgment and Decree of Divorce between the Plaintiff and Mr. McKay, payment of this mortgage or Mr. McKay's receipt of proceeds from the sale of the Albrethsen property constituted triggering events for when certain of Mr. McKay's payment obligations to the Plaintiff became due.

16. Per the Handwritten Agreement, the Defendants, on behalf of the Plaintiff, prepared a draft property settlement agreement which was based upon the agreed-upon provisions set forth in the Handwritten Agreement. *See* Walker Aff., ¶ 14. On October 23, 2007, the Defendants forwarded this draft to the Plaintiff and Mr. McKay's counsel. *See id.*; Counsel Aff., Ex. A at Ex. 16.

17. The Plaintiff provided input regarding the various drafts of the property settlement agreement which were prepared by the Defendants and/or edited by Mr. McKay's counsel. *See* Counsel Aff., Ex. A at Exs. 15, 17-19, 21-23, 26-28; Welsh Aff., Ex. A; Walker Aff., ¶¶ 15, 18-19 and Ex. A.

18. The Plaintiff was provided with a copy of the final Property Settlement Agreement (hereinafter "PSA") on or about November 19, 2007. *See* Counsel Aff., Ex. A at Ex. 29; Walker Aff., ¶ 14. The PSA incorporated the terms of the Handwritten Agreement. *See* Counsel Aff., Ex. A at Exs. 11, 29. The Plaintiff had a full opportunity to review the PSA and to formulate and ask any questions she had with regard to the same. *See* Counsel Aff., Ex. A at 137: 11-21. The Plaintiff received answers to her questions and was satisfied with the answers she received. *See id.*

19. On November 20, 2007, the Plaintiff voluntarily executed the PSA. *See* Counsel Aff., Ex. A at 137: 11-14; Walker Aff., ¶ 19.

20. The PSA was incorporated as Exhibit "A" of the Stipulation for Judgment and Decree of Divorce which was filed on November 28, 2007. *See* Counsel Aff., Ex. B.

21. On November 29, 2007, the trial court executed the Judgment and Decree of Divorce which incorporated the PSA as Exhibit "A". *See id.*

22. According to the PSA, the parties agreed that Mr. McKay would pay the Plaintiff certain sums if certain triggering events occurred. Specifically, the PSA set forth the following:

1.7. Darwin shall pay Patricia \$800,000 in cash...within five (5) days of payment by the Status Corporation, or its assigns, ("Status Real Estate Transaction"). In addition, Darwin shall convey all his right, title and interest to Patricia in and to the two (2) lots to be conveyed by Status Corporation, or its assigns, to Darwin as part of the Status Corporation Real Estate Transaction...

...

1.8.1. If the Status Real Estate Transaction fails to close on or before March 30, 2008, Darwin shall pay Patricia \$500,000 as soon as he is able to...

1.8.2. Provided further that if Status Corporation or it assigns breaches the Purchase and Sale Agreement and Darwin cannot pay \$500,000 by April 30, 2008, he shall...pay Patricia ...\$500,000 within five (5) days of receipt or closing on a sale.

1.8.3. Provided further that if following a breach, Darwin is not able to pay Patricia \$500,000 by September 30, 2008, he shall pay Patricia \$800,000 plus interest at the rate of 6% payable within five (5) days of any funds from the sale of either the Albrethsen property funds, the Home Farm property or both...

23. The Defendants recorded a complete copy of the Judgment and Decree of Divorce (including the PSA) in the following Idaho counties: Ada, Murphy, Owyhee, and Teton. *See* Walker Aff., ¶ 20. The Defendants informed the Plaintiff of these recordings and requested whether the Judgment and Decree of Divorce should be recorded in any other Idaho county. *See* Counsel Aff., Ex. A at p. 138:2-12 and Ex. 32. The Plaintiff did not provide the Defendants with the identity of any other Idaho county. *See id.* at p. 138:2-139:10; Walker Aff., ¶ 20.

24. Because the Defendants were not licensed to practice law in Nevada and were unfamiliar with the recording requirements in Nevada, the Defendants advised the Plaintiff to retain a Nevada attorney to record the Judgment and Decree of Divorce in any Nevada counties where Mr. McKay owned property. *See* Counsel Aff., Ex. A at p. 138:2-139:10; Walker Aff., ¶ 21. The Plaintiff recorded the Judgment and Decree of Divorce in Lyon County, Nevada. *See* Counsel Aff., Ex. A at p. 138:2-139:10.

25. During Cosho Humphrey's representation of the Plaintiff, the Defendants explained that any judgment received, whether via settlement or trial, could be recorded in the counties where Mr. McKay owned real property and the recording of the same would act as a lien against such real property. *See* Walker Aff., Ex. A and ¶ 23; Counsel Aff., Ex. 18; Welsh Aff., Ex. A. Messrs. Walker and Welsh never told the Plaintiff that recording the judgment would act as a lien against a mortgage held by Mr. McKay or that a mortgage constitutes real property. *See* Walker Aff., ¶ 23; Counsel Aff., Ex. A at 133:22-134:2.

26. On April 15, 2008, the Defendants filed a Notice of Withdrawal as the Plaintiff's counsel of record. *See* Welsh Aff., ¶ 15.

Albrethsen Transaction

27. Prior to the divorce between the Plaintiff and Mr. McKay, Mr. McKay purchased and sold real property commonly known as the "Albrethsen property". *See* Counsel Aff., Ex. A at Ex. 3, ¶¶ 173, 183, 185-187; Counsel Aff., Ex. D.

28. Mr. McKay sold the Albrethsen property to Status Corporation in exchange for a down payment and a mortgage of \$1,396,800. *See* Counsel Aff., Ex. D at ¶ 5.

29. At some unknown time, Mr. McKay obtained title insurance for the aforementioned mortgage. *See* Counsel Aff., Ex. C at 12:11-19, 19:12-21.

30. As a part of the transaction between Mr. McKay and the Status Corporation, the Status Corporation also agreed to provide Mr. McKay with two lots of his choice once the Albrethsen property was platted for a subdivision. *See* Walker Aff., Ex. B at 265:18-266:8; Counsel Aff., Ex. B at ¶ 1.7.

31. According to Mr. McKay, Status Corporation did not pay him monies due under the mortgage. *See* Counsel Aff., Ex. D. As such, on July 18, 2008, Mr. McKay filed a Verified Complaint for Foreclosure against Status Corporation. *See id.*

32. As a result of his suit against Status Corporation, on August 19, 2008, Mr. McKay secured a Judgment for \$1,257,457.30 plus pre-judgment and post-judgment interest. *See* Counsel Aff., Ex. E.

33. Due to the title company securing first position to Mr. McKay and another entity, in November 2008, the title company paid Mr. McKay \$1,288,019.10 and Mr. McKay assigned the Judgment he received against Status Corporation to the title company. *See* Counsel Aff., Ex. C at 33:3-16.

34. As admitted by the Plaintiff, the title insurance company did not perform a search of any index prior to paying Mr. McKay the proceeds of his title insurance. *See* Counsel Aff., Ex. A at 20:18-21:22.

Post Divorce Proceedings

35. In September 2008, the Plaintiff contacted the Defendants regarding Mr. McKay's failure to pay monies as set forth in Paragraphs 1.7 and 1.8 of the PSA. *See* Walker Aff., ¶ 22; Welsh Aff., ¶16.

36. The Defendants advised the Plaintiff that Mr. McKay's failure to comply with the PSA requirements provided her with a basis to file a motion for contempt against him. *See* Walker Aff., ¶ 22. Per the Plaintiff's request, the Defendants did not pursue a motion for contempt; instead, the Defendants contacted Mr. McKay's counsel in an effort to resolve the non-payment issues. *See id.*; Walker Aff., Ex. A; Welsh Aff., Ex. A. The Defendants also secured a meeting with Mr. McKay's counsel for January 2009. *See id.*

37. At the Plaintiff's subsequent request to pursue a motion for contempt, the Defendants began preparing a motion for contempt. *See id.*; Welsh Aff., ¶ 16.

38. On December 27, 2008, the Plaintiff requested that the Defendants stop working on her case, including stopping their work on the motion for contempt. *See* Welsh Aff., ¶ 17 and Ex. A. The Defendants complied with this request. *See id.*, ¶ 17.

39. At some unknown time, the Plaintiff retained Scott Hess of Hawley Troxell to represent her in a contempt action against Mr. McKay. *See id.*, ¶18. The Defendants became aware of this representation at the end of January 2009 when they received a draft Substitution of Counsel from Mr. Hess. *See id.* The Defendants executed the Substitution of Counsel as requested. *See id.*

40. On or about January 30, 2009, the Plaintiff, through Mr. Hess, filed a Motion for Contempt against Mr. McKay. *See* Counsel Aff., Ex. F.

41. The Motion for Contempt trial began on July 9, 2009. *See id.*, Ex. G. On July 9, 2009, the Plaintiff, through Mr. Hess, called several witnesses, including Defendant Walker. *See id.* The trial was not completed on July 9, 2009 and was, instead, continued to July 16, 2009. *See id.*; Walker Aff. Ex. C. The Plaintiff was expected to testify on the July 16, 2009 trial date. *See* Counsel Aff., Ex. G.

42. At some point between July 9, 2009 and July 16, 2009, the Plaintiff entered into a new settlement agreement with Mr. McKay. *See Walker Aff., Ex. C.* This new settlement agreement was intended to replace the PSA. *See id.*; Counsel Aff., Ex. I.

43. On July 16, 2009, the court questioned the Plaintiff regarding the new settlement agreement. *See Walker Aff., Ex. C* at 14:6-16:11. The Plaintiff informed that court that she voluntarily entered into the new settlement agreement and that she agreed with each of terms of the new settlement agreement. *See id.*

44. The new settlement agreement was memorialized in an Order Regarding Settlement of All Claims which was executed by the Plaintiff and approved and entered by the trial court. *See Counsel Aff., Ex. I.* Pursuant to the Order Regarding Settlement of All Claims, the Plaintiff agreed to dismiss the motion for contempt claims; “agree[d] not to attempt to enforce any term of that Judgment and Decree of Divorce filed 11/29/07.”; and agree[d] that the Order Regarding Settlement of All Claims “supplants all unfulfilled financial provisions of the Judgment and Decree filed 11/29/07, specifically paragraphs 1.7 through and including paragraph 1.8.2.” *See id.*, at ¶ 1.

45. As a part of the Order Regarding Settlement of All Claims, the Plaintiff agreed to waive any attorney fees which she could have collected from Mr. McKay in the contempt proceedings. *See id.*, at ¶ 4.

46. On August 19, 2009, the trial court also entered Judgment. *See Counsel Aff., Ex. H.* Per the Order Regarding Settlement of All Claims, the Plaintiff agreed “not to execute the August 19, 2009 Judgment as long as Defendant DARWIN MCKAY is not in default of the Order herein.” *See Counsel Aff., Ex. I* at ¶ 3.

III. ARGUMENT

A. Standard of Review.

Summary judgment is appropriate where “the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.” Idaho R. Civ. Proc. 56.

Generally, in determining whether there is a genuine issue as to any material fact, a court must construe facts in favor of the non-moving party. *Pratt v. State Tax Commission*, 920 P.2d 400, 128 Idaho 883 (1996). However, when “the defendant moves for summary judgment on the basis that no genuine issue of material fact exists with regard to an element of the plaintiff’s case, the plaintiff must establish the existence of an issue of fact regarding that element.” *Zimmerman v. Volkswagen of America, Inc.*, 920 P.2d 67, 70, 128 Idaho 851 (1996) *reh’g denied*. The non-moving party’s failure to establish an essential element of its case “renders all other facts immaterial” and “requires the entry of summary judgment”. *Jarman v. Hale*, 122 Idaho 952, 842 P.2d 288 (Ct. App. 1992) (internal citations omitted).

To withstand a motion for summary judgment, “[t]he plaintiff must do more than present a scintilla of evidence, and merely raising the ‘slightest doubt’ as to the facts is not sufficient to create a genuine issue.” *Id*; *Edwards v. Conchemco, Inc.*, 111 Idaho 851, 853 (Ct. App. 1986). Furthermore, “the party opposing the motion may not merely rest on the allegations contained in the pleadings; rather, evidence by way of affidavit or deposition must be produced to contradict the assertions of the moving party.” *Ambrose v. Buhl Joint School District No. 412*, 126 Idaho 581, 584 (Ct. App. 1995) *quoting Podolan v. Idaho Legal Aid Services, Inc.*, 123 Idaho 937 (1993).

B. The Plaintiff’s Attorney Malpractice Claim Fails as a Matter of Law.

The Plaintiff claims that the Defendants committed legal malpractice in their representation of her. Under Idaho law, to establish a claim for legal malpractice against the Defendants, the Plaintiff must prove that: (1) an attorney-client relationship existed; (2) the Defendants had a duty to the Plaintiff; (3) the Defendants breached the duty it owed to the Plaintiff; and (4) the Defendants’ failure to perform the duty was the proximate cause of the damages suffered by the Plaintiff. *See e.g. Marias v. Marano*, 120 Idaho 11, 13, 813 P.2d 350 (1991). The Plaintiff must also establish that she would have had “some chance of success” in the underlying action but for the Defendants’ actions. *See e.g. Lamb v. Manweiler*, 129 Idaho 269, 272, 923 P.2d 976, 979 (1996).

As is explained in further detail below, the Plaintiff's claims fail as she cannot establish (1) any duty which was breached by the Defendants; (2) that any alleged breach was the proximate cause her alleged damages; and (3) a valid claim for damages. Additionally, the Plaintiff cannot establish that she would have had some chance of success of obtaining money from her ex-husband, but for the Defendants' alleged malpractice.

1. The Defendants Did Not Breach any Legal Duty Owed to the Plaintiff.

Whether the Defendants owed the Plaintiff any duties is a question of law. *Harrigfeld v. Hancock*, 140 Idaho 134, 138, 90 P.3d 884, 888 (2004). Generally, Idaho courts require that "an attorney [] act with that degree of care, skill, diligence and knowledge commonly possessed and exercised by a reasonable, careful and prudent lawyer." *See Sun Valley Potatoes v. Rosholt*, 133 Idaho 1, 5 (1999). The Idaho Rules of Professional Conduct require, inter alia, that an attorney act with competence, diligence, and zeal and that an attorney communicate with its client. *See* Idaho R. Prof. Conduct 1.1, 1.3, 1.4. "A lawyer is not bound, however, to press for every advantage that might be realized for a client." *See* Idaho R. Prof. Conduct 1.3, comment 1.

In her Complaint, the Plaintiff alleges that the Defendants breached a duty owed to her by: (1) recommending that she enter into the PSA; (2) drafting the PSA in such a way that it did not contain a legal description of the Albrethsen property, did not contain an instrument number for the mortgage Mr. McKay held on the Albrethsen property, did not specifically identify her interest in the mortgage note held by Mr. McKay, and did not provide a collateral security interest; and (3) providing inaccurate legal advice with regard to the affect of a judgment lien. As is explained in further detail below, the Plaintiff cannot establish any of the breaches she alleges.

a. The Defendants did not Breach any Duty by Allegedly Recommending that Plaintiff Execute the PSA.

The Plaintiff claims that the Defendants breached some unidentified duty owed to the Plaintiff by allegedly recommending that she execute the PSA. Because the Plaintiff has not

identified what duty she was owed which were allegedly breached by the Insured, her claim fails as a matter of law.

The Plaintiff's claim also fails as the Defendants did not breach any duty owed to her by allegedly recommending that she execute the PSA. To establish such a breach, the Plaintiff must present evidence that the Defendants' alleged recommendation was incompetent. *See e.g. Ziegelheim v. Apollo*, 607 A.2d 1298, 1306 (N.J. 1992) ("attorneys who pursue reasonable strategies in handling their cases and who render reasonable advice to their clients cannot be held liable for the failure of their strategies or for any unprofitable outcomes that result because their clients took their advice. The law demands that attorneys handle their cases with knowledge, skill, and diligence, but it does not demand that they be perfect or infallible, and it does not demand that they always secure optimum outcomes for their clients"). There exists no evidence to support such a finding. Additionally, contrary to the Plaintiff's allegation, the Plaintiff admittedly executed the PSA only after she had reviewed the same and agreed to the terms contained therein. *See Counsel Aff.*, Ex. A at 137: 11-14; *Walker Aff.*, ¶ 19.

Importantly, before any draft of the PSA was even created, the Plaintiff had already obligated herself to certain settlement conditions. *See Counsel Aff.*, Ex. A at Ex. 11. These conditions were outlined in the hand-written agreement drafted by the mediator, the Honorable Duff McKee, which was then executed by the Plaintiff, Mr. McKay, the parties' counsel, and the mediator at the October 20, 2007 mediation. *See id.* The Plaintiff admittedly participated in the negotiations which were the basis for the hand-written agreement. *See Counsel Aff.*, Ex. A, at 80:6-11; 86:5-7; *Walker Aff.* ¶ 6; *Welsh Aff.*, ¶ 8. During this negotiation stage, the Defendants also discussed with the Plaintiff the pros and cons of settling versus the pros and cons of going to trial. *See Walker Aff.*, ¶¶ 5, 7; *Welsh Aff.*, ¶ 9. The Defendants also answered all of the Plaintiff's questions regarding the settlement negotiations and hand-written agreement to the Plaintiff's satisfaction. *See id.*; *Counsel Aff.*, Ex. A, at 79:21-80:5.

Prior to executing the hand-written agreement, the Plaintiff was aware that it was binding. *See Counsel Aff.*, Ex. A at 27:16-18. She also read, understood, and voluntarily agreed

to the terms contained therein. *See id.* at 80:6-11, 82:20-23, 86:5-7; Welsh Aff., ¶14; Walker Aff., ¶13. The Plaintiff admitted that she was satisfied with the framework of the handwritten agreement prior to signing the same. *See* Counsel Aff., Ex. A, at 82:20-23. The Plaintiff was further aware and agreed that the terms contained in the hand-written agreement would be incorporated into a final settlement agreement between her and Mr. McKay and that, if the parties could not agree upon the terms of this final settlement agreement, the PSA, such terms would be arbitrated before Judge McKee. *See id.*, Ex. A at 82:24-83:2 and Ex. 11.

Before the Plaintiff executed the hand-written agreement, the Plaintiff was advised by the Defendants that settlement was not required and that they would prosecute her case at trial if she was uncomfortable with the settlement agreement. *See* Welsh Aff., ¶ 11; Walker Aff., ¶¶ 8, 11; Counsel Aff., Ex. A at 80:9-11. However, as the Plaintiff explained in her deposition, she voluntarily settled based upon concerns she had if the case proceeded to trial. *See* Counsel Aff., Ex. A, at 81:3-82:19.

Within three days of the mediation, the Defendants provided the Plaintiff with an initial draft of the PSA. *See id.*, Ex. A at Ex. 16; Walker Aff., ¶ 14. Thereafter, the Defendants provided the Plaintiff with at least three additional drafts of the PSA. *See* Walker Aff., ¶15. Upon receipt of such drafts, the Plaintiff provided substantial input regarding the language contained therein. *See* Counsel Aff., Ex. A at Exs. 15, 17-19, 21-23, 26-28; Welsh Aff., Ex. A; Walker Aff., ¶¶ 15, 18-19 and Ex. A. Importantly, the Defendants did not blindly or incompetently recommend that the Plaintiff execute the PSA. Instead, prior to her execution of the PSA, the Defendants informed the Plaintiff that, if she was uncomfortable with the language contained therein, they would invoke the arbitration provision contained in the hand-written settlement agreement on her behalf. *See* Walker Aff., ¶ 19. Rather than invoking the provision, the Plaintiff voluntarily executed the PSA. *See id.*; Counsel Aff., Ex. A at 137: 11-14. As admitted by the Plaintiff, before she signed the PSA, she personally read, understood, and voluntarily agreed to the terms contained therein. *See id.* Importantly, had the Plaintiff opted to

arbitrate the PSA language, pursuant to the hand-written agreement, any arbitrated PSA would have been binding upon her. *See* Counsel Aff., Ex. A at Ex. 11.

As the aforementioned undisputed facts establish, the Defendants did not negligently recommend that the Plaintiff settle her case, execute the hand-written agreement, or execute the PSA. Instead, the Defendants advised the Plaintiff of her options. *See* Counsel Aff., Ex. A, at 79:21-80:5. *See* Walker Aff., ¶¶ 5, 7; Welsh Aff., ¶ 9. The Plaintiff only executed the PSA after she provided substantial input regarding the terms contained therein, thoroughly reviewed the PSA, and voluntarily agreed to all terms contained therein. *See* Walker Aff., ¶ 19; Counsel Aff., Ex. A at 137: 11-14. Accordingly, there exists no question of fact regarding the Defendants competent representation of the Plaintiff during the settlement negotiations.

b. The Defendants Did Not Breach Any Duty in Drafting the PSA.

At the outset, it is noteworthy to mention that the language contained in the PSA was the result of extended negotiations between the Plaintiff and Mr. McKay and the PSA language only includes terms which were mutually acceptable by both parties. *See* Counsel Aff., Ex. A at Ex. 11; Counsel Aff., Ex. B; Walker Aff., ¶ 16. While the Defendants proposed certain language which was favorable to the Plaintiff, this language was subject to review and acceptance by Mr. McKay and his counsel. *See id.* It is axiomatic that the Defendants, as non-parties to the PSA, did not have the authority to include language which was unacceptable to either the Plaintiff or Mr. McKay. As such, the Plaintiff's allegation that the Defendants negligently drafted the settlement negotiations fails as a matter of law. Likewise, the Plaintiff's claims fail because, as she admitted, she read, understood, and voluntarily agreed to the PSA, as written and negotiated by herself and Mr. McKay, prior to executing the same. *See* Walker Aff., ¶¶ 6, 15, 18, 19; Counsel Aff., Ex. A at 86:5-7, 137: 11-14; Welsh Aff., ¶ 8. Furthermore, an attorney cannot be held liable because he was "not successful in persuading an opposing party to accept certain terms". *See e.g. Ziegelheim*, 607 A.2d at 1306.

i. The Defendants Had No Duty to Include the Property Description or Mortgage Instrument Number in the PSA or to Specify the Plaintiff's Alleged Interest in the Mortgage in the PSA.

In her Complaint, the Plaintiff alleges that the Defendants had a duty to include a property description for the Albrethsen property in the PSA and a duty to include the mortgage instrument number for the mortgage Mr. McKay held on the Albrethsen property in the PSA. In her Complaint, it appears the Plaintiff is alleging that this duty arises under both I.C. § 32-918 and/or the common law. Contrary to such allegations, the Defendants had no legal duty to include a property description and/or a mortgage instrument number in the PSA.

First, I.C. § 32-918 did not create such a duty. In fact, I.C. § 32-198 does not even apply. The pertinent text of I.C. §32-918 reads as follows:

(1) When such contract [a marriage settlement] is acknowledged or proved, it must be recorded in the office of the recorder of every county in which any real estate may be situated which is granted or affected by such contract.

(2) (a) A summary of the contract may be recorded in lieu of the contract, under this chapter or the laws of this state, if the requirements of this section are substantially met.

(b) A summary of the contract shall be signed and acknowledged by all parties to the original contract. The summary of the contract shall clearly state:

...

(iv) A description of the interest or interests in real property created by the contract; and

(v) The legal description of the property.

...

(emphasis added). A plain reading of I.C. § 32-918 establishes that it only applies where real property or interests in the same are granted or created by the marriage settlement.

In the current action, a plain reading of the PSA establishes that it did not create, grant, or affect any legal interest with regard to the Albrethsen property or with regard to the mortgage attached to the Albrethsen property. *See* Counsel Aff., Ex. B. The very terms of the PSA confirmed that any interest in the mortgage remained the sole property of Mr. McKay. *See id.* Also, Mr. McKay did not hold any interest in the property at the time of mediation because he had previously transferred title to the mortgagee. *See id.*, Ex. A at 29:10-13; Walker Aff., ¶ 11. Therefore, there was no real property interest to address in the PSA. As such, I.C. § 32-918

does not require that the PSA contain either a legal description of the Albrethsen property or a mortgage instrument number for the mortgage Mr. McKay held on the Albrethsen property.

Similarly, there is no common law duty in Idaho obligating the Defendants to include such information in the PSA. There exists no Idaho case law requiring the inclusion of such information in a document which does not create or otherwise modify a party's interests in real property or in a mortgage note associated with the real property.

For these reasons, the Defendants did not have a legal duty to ensure that a property description and/or mortgage instrument number was contained in the PSA.² Accordingly, the failure for such to be included in the PSA should not constitute negligence on the part of the Defendants.

Likewise, the Defendants did not have a legal duty to include the language in the PSA which specifically identified the Plaintiff's alleged interest in the Albrethsen mortgage. Such a claim lacks merit as neither the parties' negotiations nor the PSA provided the Plaintiff with an interest in the mortgage note held by Mr. McKay. *See* Counsel Aff., Ex. A at Ex. 11; Ex. B (pursuant to the plain terms of the PSA, the proceeds from the mortgage note are Mr. McKay's separate property). Instead, the PSA only provided that Mr. McKay's receipt of proceeds under the mortgage note *triggered* his duty to pay certain sums to the Plaintiff. *See id.*, Ex. B at ¶¶ 1.7-1.8.3. Prior to executing the hand-written agreement and the PSA, the Plaintiff was aware that the PSA did not obligate the Albrethsen mortgagee to pay her directly and that she was not being paid any sums pursuant to the mortgage note. *See* Counsel Aff., Ex. A at 86:5-20, 91:13-14. The Plaintiff further understood that, per the parties' agreement, Mr. McKay's receipt of mortgage note proceeds triggered his obligation to pay her certain sums. *See id.* at 86:5-20, 91:13-14; 135:16-23.

² Importantly, even if such a duty existed, it was impossible for the Defendants to comply with this duty. The content of the PSA was a direct result of the negotiations between the Plaintiff and Mr. McKay. While the Defendants could advise the Plaintiff about language which was in her best interests to include, the Defendants could not include language in the PSA which was not approved by both the Plaintiff and Mr. McKay.

Of additional importance is the fact that, because the PSA did not assign or transfer any interest in the Albrethsen property or mortgage note, the enforceability of the PSA did not require the inclusion of the legal description of the Albrethsen property, the instrument number of the recorded mortgage or the Plaintiff's alleged interest in the mortgage. *See id.*, Ex. B. The PSA clearly set forth Mr. McKay's obligations to pay the Plaintiff certain sums. *See id.* Any failure of Mr. McKay to pay the Plaintiff sums due under the PSA was enforceable through a motion for contempt in civil court, a step which Plaintiff ultimately availed herself of.

ii. The Defendants Had No Duty to Include a Collateral Security Interest in the PSA.

Contrary to the Plaintiff's allegations, the Defendants had no legal duty to include a collateral security interest in the PSA as the Defendants had no duty and, in fact, had no authority to include language in the PSA which was not approved by both Mr. McKay and the Plaintiff. As previously explained, the PSA was the product of negotiations between Mr. McKay and the Plaintiff and was based upon the hand-written agreement which was executed by both Mr. McKay and the Plaintiff. *See* Counsel Aff., Ex. A at Ex. 11; Counsel Aff., Ex. B; Walker Aff. at ¶¶ 14, 16. At mediation and before entering the hand-written agreement, the Plaintiff was aware that no collateral security interest was being offered by Mr. McKay. *See* Counsel Aff., Ex. A, at 86:1-4, 116:22-117:4; Welsh Aff., ¶ 12; Walker Aff., ¶¶ 10, 11. The Plaintiff was further aware that Mr. McKay was unwilling to provide any security in any property as his property was encumbered by bank loans and other debt. *See id.* With this knowledge, the Plaintiff still voluntarily executed the binding hand-written agreement and the PSA. *See* Counsel Aff., Ex. A at 137: 11-14; Counsel Aff., Ex. B; Walker Aff., ¶ 19.

c. Defendants Did Not Breach Any Duty by Providing Inaccurate Legal Advice.

In her Complaint, the Plaintiff asserts that the Defendants provided her with inaccurate information regarding the effect of recording the PSA because they allegedly informed her that recording the PSA would create a lien against the mortgage note held by Mr. McKay. To the contrary, the Defendants correctly explained the law as set forth in I.C. § 10-1110. As the

Plaintiff testified, the Defendants informed her that recording the PSA provided her with a lien against any real property Mr. McKay owned. *See* Walker Aff., ¶ 23 and Ex. A; Counsel Aff., Ex. A at 17:8-11, 130:24-131:10 and Ex. 18; Welsh Aff., Ex. A. At her deposition, the Plaintiff admitted that the Defendants did not inform her that the mortgage constituted real property; instead, she simply mistakenly assumed such to be the case. *See* Counsel Aff., Ex. A at 133:22-134:2. The Plaintiff did not inform the Defendants of this assumption. *See id.*; Walker Aff., ¶23.

Based upon the aforementioned; there exists no genuine issue of fact regarding whether the Defendants violated any legal duty owed to the Plaintiff. To the contrary, the undisputed facts establish that the Defendants did not breach any duty. Accordingly, the Plaintiff's attorney malpractice claims should fail as a matter of law.

2. The Defendants' Alleged Breaches Are Not the Proximate Cause of the Plaintiff's Damages.

Idaho courts have routinely held, "[e]ven when an attorney is negligent, that breach of duty may not be a proximate cause of the resulting damage to the client." *City of McCall v. Buxton*, 146 Idaho 656, 662-63 (Idaho 2009) (citing *Marias v. Marano*, 120 Idaho 11, 13 (1991)). "Proximate cause consists of two factors, cause in fact and legal responsibility...without proximate cause there is no liability for negligence." *Marias*, 120 Idaho at 13. Proximate cause will exist where the Insured's breach was "a substantial factor in bringing about the injury, loss or damage. It is not a proximate cause if the injury, loss or damage likely would have occurred anyway." IDJI 2.30.1. "There may be one or more proximate causes of an injury." IDJI 2.30.2.

To establish her attorney malpractice claim, the Plaintiff must prove that the alleged breaches she attributes to the Insured were a proximate cause of her failure to receive payment of the sums set forth in the PSA. As explained below, the Plaintiff cannot make such a showing.

a. The Defendants' Alleged Malpractice was Not a Proximate Cause of the Title Company's Actions.

First, the title company would have paid Mr. McKay whether or not the aforementioned missing information (Albrethsen property description, record number for the Albrethsen

mortgage, and language mistakenly stating that the Plaintiff had an interest in the mortgage) was included in the PSA. According to the Plaintiff, had such language been included, the title company would have been aware of her alleged interest in the mortgage and would have paid the title insurance proceeds to her directly. Contrary to this argument, as the Plaintiff is aware, the title insurance was unaware of the PSA and did not search any indexes prior to paying the title insurance proceeds to Mr. McKay. *See* Counsel Aff., Ex. A at 20:18-21:22; Ex. C at 34:17-21. As such, even if the missing language was included, the title insurance company would not have become aware of the PSA or the Plaintiff's purported interest in the mortgage note.

Additionally, even had the title insurance company performed an index search and located the PSA, there exists no law in Idaho which would have required the title insurance company to pay monies to the Plaintiff. As previously explained, the PSA did not provide the Plaintiff with any interest in the Albrethsen property or the mortgage note held by Mr. McKay. *See id.*, Ex. B. Additionally, as the Plaintiff was aware, the PSA did not provide her with any secured collateral interest in the Albrethsen property or otherwise. *See id.*; Counsel Aff., Ex. A, at 86:1-4, 116:22-117:4; Welsh Aff., ¶ 12; Walker Aff., ¶¶ 10, 11

b. The Defendants' Alleged Malpractice was Not a Proximate Cause of Mr. McKay's Failure to Pay the Plaintiff.

Next, even if the Defendants had incorrectly informed the Plaintiff regarding the effect of recording the PSA (which they did not), such an alleged breach was not a proximate cause of Mr. McKay's failure to pay the Plaintiff sums due under the PSA. As the statutory scheme sets forth, recording a judgment provides an avenue for a plaintiff to recover the sums due under a judgment; it does not somehow automatically require a defendant to pay a judgment. *See e.g.* I.C. § 10-1110. Pursuant to I.C. § 10-1110, any judgment entered in Idaho can be recorded in any county where the party against whom the judgment was entered owns property. The judgment then becomes a lien on the property in that particular county. I.C. § 10-1110. If the judgment is not satisfied, then the party who records the judgment may take steps towards enforcing the judgment, which include foreclosing the lien. *Id.*

For these reasons, there exists no genuine issue of fact regarding whether the Defendants' alleged breaches were a proximate cause of the damages the Plaintiff allegedly incurred as a result of not receiving sum due and owing to her under the PSA.

c. The Plaintiff's Alleged Damages Were the Result of a Intervening or Superseding Cause.

Notably, even if it could be said that the Defendants' alleged breaches were a proximate cause of the Plaintiff's asserted damages, the Plaintiff's attorney malpractice claim must still fail as the Plaintiff's alleged damages were caused by an intervening or superseding cause. An intervening or superseding cause involves "an act of a third person or other force which by its intervention prevents the actor from being liable for harm to another which his antecedent negligence is a substantial factor in bringing about." *See e.g. Mico Mobile Sales & Leasing v. Skyline Corp.*, 97 Idaho 408, 546 P.2d 54 (1975) (citations omitted). In determining whether an intervening act was a superseding cause of harm to another, Idaho state courts consider the following guidelines:

- (a) the fact that its intervention brings about harm different in kind from that which would otherwise have resulted from the actor's negligence;
- (b) the fact that its operation or the consequences thereof appear after the event to be extraordinary rather than normal in view of the circumstances existing at the time of its operation;
- (c) the fact that the intervening force is operating independently of any situation created by the actor's negligence, or, on the other hand, is or is not a normal result of such a situation;
- (d) the fact that the operation of the intervening force is due to a third person's act or to his failure to act;
- (e) the fact that the intervening force is due to an act of a third person which is wrongful toward the other and as such subjects the third person to liability to him;
- (f) the degree of culpability of a wrongful act of a third person which sets the intervening force in motion.

See e.g. id. (citations omitted).

In the current action, Mr. McKay's intentional default under the terms of the PSA constitutes a superseding and intervening action. It is axiomatic that the PSA was a valid and

enforceable document which required Mr. McKay to pay the Plaintiff certain sums upon his receipt of proceeds from the sale of the Albrethsen transaction. *See* Counsel Aff., Ex. B. Such proceeds include the sums Mr. McKay could have received under the Albrethsen mortgage note and the title insurance proceeds he received. *See id.* However, despite the unambiguous nature of the PSA, Mr. McKay intentionally did not pay the sums he owed the Plaintiff after he received the title insurance proceeds. *See id.*, Ex. A at 11:21-12:1, 143:2-5, 143:13-18. As the Plaintiff admitted, in doing so, Mr. McKay's default is not attributable to the Defendants as Mr. McKay was not acting at the direction of the Defendants when he breached his obligations under the PSA. *See id.* at 143:6-9. Furthermore, Mr. McKay's PSA default (failure to make payments due under the PSA) was not a foreseeable result or consequence of any failure to include the Albrethsen property description or the mortgage instrument number in the PSA. For these reasons, there exists no genuine issue of material fact regarding the existence of a superseding and intervening cause which precludes Plaintiff's recovery against the Defendants.

3. The Plaintiff's Claims are Barred Because She Has No Legally Cognizable Damages.

The Plaintiff is not entitled to recover the damages she alleges. In Idaho, the measure of damages available to a Plaintiff in an attorney malpractice action "is the difference between the client's actual recovery and the recovery which should have been obtained but for the attorney's malpractice". *See e.g. Sohn v. Foley*, 125 Idaho 168, 172 (Ct. App. 1994).

In her Complaint, the Plaintiff claims that, as a result of the Insured's alleged negligence, she suffered the following damages: (1) a failure to receive \$800,000 as recited in the PSA; (2) a failure to receive the benefit of Mr. McKay "pay[ing] off her personal residence debt (\$621,054) from the proceeds of the Status Corporation mortgage as required by the PSA"; and (3) the mitigation costs, including attorney fees, she incurred in her attempt to enforce her rights under the PSA. However, as explained below, the Plaintiff is not entitled to recover any of these damages.

First, there is no difference between what the Plaintiff could have actually recovered had she prosecuted a contempt action against Mr. McKay for his failure to comply with the PSA and the recovery the Plaintiff could have obtained but for the Defendants' alleged malpractice. For the Plaintiff to recover any of the damages she requests, she must establish that the Defendants' alleged negligence somehow precluded her from recovering the aforementioned sums. *See e.g. Sohn*, 125 Idaho at 172. Such is not the case. The PSA was an unambiguous, valid, and legally enforceable agreement between Mr. McKay and the Plaintiff. *See Counsel Aff.*, Ex. B. Even without the information which the Plaintiff claims should have been contained in the PSA, the Plaintiff was entitled to collect all of the aforementioned sums requested by the Plaintiff. *See id.* The alleged negligence on the part of the Defendants simply does not affect the amounts which the Plaintiff could have collected from Mr. McKay in a contempt action.

Recovery of the Plaintiff's requested damages is also barred as the Plaintiff failed to mitigate her damages. *See e.g. IDJI 9.14* ("A person who has been damaged must exercise ordinary care to minimize the damage and prevent further damage. Any loss that results from a failure to exercise such care cannot be recovered."). Pursuant to the PSA, the Plaintiff was entitled to receive the damages she alleges against the Defendants from Mr. McKay. *See Counsel Aff.*, Ex. B. This includes recovery of any costs and attorney fees the Plaintiff incurred in attempting to enforce her rights under the PSA. While the Plaintiff initially filed a contempt action against Mr. McKay to collect these sums, she failed to fully prosecute the same. *See Counsel Aff.*, Ex. F; *Walker Aff.*, Ex. C. Instead, the Plaintiff voluntarily agreed to enter into a second settlement agreement. *See Walker Aff.*, Ex. C; *Counsel Aff.*, Ex. I. In doing so, the Plaintiff waived her right to collect any sums which Mr. McKay was obligated to pay under the PSA, including fees and costs she incurred in the contempt action. *See Counsel Aff.*, Ex. I at ¶ 4. By voluntarily waiving her right to obtain such sums which the PSA legally obligated Mr. McKay to pay, the Plaintiff failed to mitigate the damages she alleges against the Defendants. *See e.g. IDJI 9.14* (the Plaintiff has a duty to mitigate her damages). As this waiver and failure

to mitigate encompass all of the damages the Plaintiff is attempting to collect against the Insured, the Plaintiff is now barred and estopped from collecting the same from the Defendants.

4. The Plaintiff's Claims are Barred Because She Cannot Establish That, but for the Defendants' Alleged Breaches, She Would have Obtained the Payments Required under the PSA.

Finally, the Plaintiff's attorney malpractice claim fails because she cannot establish that she would have had "some chance of success" in the underlying action but for the Defendants' actions. *See e.g. Lamb v. Manweiler*, 129 Idaho 269, 272, 923 P.2d 976, 979 (1996). More specifically, the Plaintiff's claim fails because she cannot prove that she would have had some chance of success of obtaining the money due under the PSA, but for the Defendants' alleged malpractice. As explained above, there simply exists no evidence to support such a claim. First, there exists no evidence to support a finding that Mr. McKay would have complied with the PSA and paid the Plaintiff the sums due under Paragraphs 17-1.8.3 had the PSA been drafted as suggested by the Plaintiff in her Complaint. Likewise, there is no evidence available to support an assertion that, had the PSA been drafted as suggested by the Plaintiff, the title company would have paid its insurance proceeds directly to the Plaintiff. To the contrary, the evidence establishes that the title company was unaware of the PSA at the time it paid the insurance proceeds and that it did not search any indexes prior to paying the proceeds to Mr. McKay. As such, even if the missing language was included, the title insurance company would not have become aware of the PSA or the Plaintiff's purported interest in the mortgage note.

IV. CONCLUSION

As there exist no genuine issues of material fact regarding the non-existence of breaches of duty, causation, or legally cognizable damages, the Defendants respectfully request that this Court grant their Motion in its entirety and enter summary judgment in favor of the Defendants.

DATED this 6th day of January, 2011.

ANDERSON, JULIAN & HULL LLP

By: 

Robert A. Anderson

Yvonne A. Dunbar, Of the Firm

Attorneys for Defendants

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this 6 day of January, 2011, I served a true and correct copy of the foregoing by delivering the same to each of the following attorneys of record, by the method indicated below, addressed as follows:

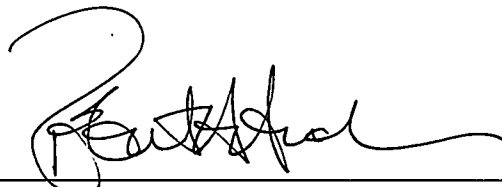
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| [] | U.S. Mail, postage prepaid |
| [X] | Hand-Delivered |
| [] | Overnight Mail |
| [] | Facsimile |

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IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

| | | |
|---------------------------------------|---|---------------------------|
| Patricia McKay |) | |
| |) | Case No. CV OC 0922659 |
| Plaintiff, |) | |
| |) | MEMORANDUM IN OPPOSITION |
| v. |) | TO DEFENDANTS' MOTION FOR |
| |) | SUMMARY JUDGMENT |
| Thomas G. Walker and Cosho Humphrey, |) | |
| LLP, a limited liability partnership, |) | |
| |) | |
| Defendants. |) | |
| _____ |) | |

PORTIONS OF DEFENDANTS' "UNDISPUTED STATEMENT
OF FACTS" ARE NOT ACCURATE

1. False assertion that plaintiff was "aware" that "she was not receiving an interest of any kind in the Albrethsen property"(undisputed fact, para. 13): First, defendants have three versions of the property settlement agreement attached to the Anderson affidavit. The actual Property

MEMORANDUM IN OPPOSITION TO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT - 1

ORIGINAL

Settlement Agreement (“Agreement”) is attached to the affidavit of Allen B. Ellis as Exhibit 1.

Secondly, the Agreement, unlike one of the bogus agreements accompanying the Anderson affidavit, makes it very clear that the \$800,000 to be paid to plaintiff wife was to come from the payoff by Status Corporation of the mortgage involved in its purchase of the Albrethsen property.

- a. “In the event of breach [by Status], Darwin may also be able to foreclose a mortgage on that portion of the land referred to prior to the sale to Status Corporation as “Albrethsen’s Farm” (para 1.8 of the Agreement).
- b. “Darwin shall pay Patricia \$800,000 in cash by wire transfer or certified check within five (5) days of payment by the Status Corporation, or its assigns” (para. 1.7).

Exhibit 1 to Ellis Affidavit

That is, the Agreement made it explicitly clear that the \$800,000 owed by Mr. McKay under the Agreement was to come from the sale proceeds of the Albrethsen property which was secured by a mortgage. Unfortunately, defendants failed to put anything in place to protect against Mr. McKay’s default in remitting to plaintiff McKay her portion of the Status’ sale proceeds.

Plaintiff wife was not made aware of the mortgage until it was first referenced in the last draft of the Agreement which was ultimately executed (Exhibit 1). As testified by plaintiff in her deposition:

THE WITNESS: According to the divorce decree, Tom Walker had expressed to me that the judgment created a lien against Darwin’s real property, which included the mortgage.

Q. (BY MR. ANDERSON) Well, tell me about that last part, “which included the mortgage.” Tell me where Mr. Walker told you that.

MR. ELLIS: You mean what geographical location?

Q. (BY MR. ANDERSON) No, no the timing of Mr. Walker’s comment. Or are you referring to the property settlement agreement?

A. I'm referring to the property settlement agreement. When I went in to sign the property settlement agreement, Tom Walker had written in the divorce decree that Mr. McKay had a mortgage note on the balance owing on the Albrethsen property. And I asked him --

Q. Go ahead.

A. --"What's this mortgage note?" And Tom said, expressed to me that he has to have a mortgage note on the balance owing on this property because he still is due approximately 1.4 million.

Q. Did he say anything else?

A. I don't recall.

Q. You told me that there was something about a lien on a mortgage note, but you haven't told me anything about that, so --

A. Tom Walker told me December 15 of 2008 after I discovered the funds had been paid out to Darwin, Tom Walker wrote to me and stated that the PSA being recorded created a lien against all of Darwin's real property.

Exhibit 3 to Ellis affidavit, p 14, L 12- p 15, L 20

However, defendants were aware of the mortgage as early as March, 2007, seven months prior to execution of the Agreement. See post-settlement memorandum by Mr. McKay's attorney; Exhibit 4, p. 5.

Patricia McKay and her counsel were fully aware of the provisions of the Status Contract, as the contract was provided to Patricia March 07, 2007 in discovery seven months prior to the entry of the Decree. (Bates #02121, specifically #02134 wherein it specifically states, "Title Insurance was issued for this property on 6 April 2006 in the name of L. Darwin McKay, a married man as his sole and separate property.").

2. False assertion that "Mr. McKay was not willing to provide any security in any property as his real property was encumbered by bank loans and other debt" (undisputed fact, para. 13). As noted above, Mr. McKay was the mortgagee on a mortgage acquired during the marriage. Defendants' "undisputed fact" erroneously recites that Mr. McKay had no interest in real property which he could

offer as security to plaintiff. In fact, as mortgagee (holder of an interest in real property) to the Albrethsen property, Mr. McKay was in a position to provide security for his debt to plaintiff.

As testified by plaintiff in her deposition: “I didn’t find out about the mortgage note until Tom Walker expressed it in the divorce decree. . . . And I questioned him about it and Tom expressed, “Yes, there’s got to be a mortgage note out there because he’s still due \$1.3 million on [the Status] property.” (Exhibit 3 to Ellis affidavit, p. 30, Ll. 1-6).

Unfortunately, defendants failed to secure for plaintiff an interest in the Albrethsen mortgage, or, alternatively, advise her that she was in an unsecured position. Rather, they advised her that by recording the judgment of divorce the mortgage automatically became “subject to the lien of [plaintiff’s] judgment”. See Exhibit 2 to Ellis affidavit, p. 2.

3. The defendants informed the plaintiff that the Agreement had been recorded (undisputed fact, para. 23); however, they erroneously advised her that, by this recording, her judgment against Mr. McKay “became a lien upon Darwin’s real and personal property”. See Exhibit 2 to the Ellis affidavit. Clearly, defendants believed that merely recording the divorce decree (with the Agreement attached) would protect plaintiff. It did not do so.

4. False assertion that “Messrs. Walker and Welsh never told the plaintiff that recording the judgment would act as a lien against a mortgage held by Mr. McKay or that a mortgage constitutes real property” (Walker affidavit, p. 6, para. 23). As corroborated by plaintiff’s affidavit, Mr. Walker actually advised plaintiff as follows:

In any event, pursuant to Idaho Code §10-1011, your judgment was recorded before any of the assignments that you provided me, including the one to Lawyers Title. *Thus, the mortgage that Lawyers Title accepted from Darwin should be subject to the lien of your judgment* (emphasis added).

Exhibit 2 to Ellis affidavit, p. 2 (Walker letter to plaintiff dated December 15, 2008)

Notwithstanding Mr. Walker's advice, Mr. McKay received \$1,288,019.10, in November, 2008, free and clear of any lien claim by plaintiff and in breach of the Agreement requiring he pay \$800,000 of the proceeds to her. See defendants' "Undisputed Statement of Facts", para. 33.

ARGUMENT

Preliminary note: As presently constituted, defendants' arguments are, in essence two-fold: (1) Mr. McKay would not have given plaintiff the security that defendants erroneously represented to plaintiff that she had; and (2) that the statute governing the recordation of marriage settlements (I.C. § 32-918) would not give plaintiff the protection that she claims. As noted below, these arguments present genuine issues of material fact and summary judgment is not appropriate.

However, defendants' motion fails to consider a third scenario. As set forth in plaintiff's affidavit, she obviously would not have signed the Agreement had she known it failed to give her security for Mr. McKay's obligations under the Agreement. With this knowledge and in the event Mr. McKay would not have acceded to her reasonable request for security, the matter would have gone to trial. Recording a lis pendens would forestall disbursement of the Status sale proceeds. At trial, the McKay marital estate would be distributed in accordance with the community property laws of the State of Idaho or in accordance with the pre-nuptial agreement, which defendants contend had been abandoned.

IN ADVISING PLAINTIFF THE RECORDED AGREEMENT SUBJECTED THE STATUS MORTGAGE TO THE "LIEN OF HER JUDGMENT", DEFENDANT WALKER BREACHED A LEGAL DUTY OWED TO THE PLAINTIFF

In his affidavit, defendant Walker states: "I did not tell the plaintiff that recording a judgment would create a lien on a mortgage". See Walker affidavit, para. 23. Yet plaintiff testified in her deposition as follows:

Q. So, you believe the divorce decree indicates that a mortgage note

was in existence and that a lien could be placed against it?

A. According to the divorce decree, Tom Walker has expressed to me that the judgment created a lien against Darwin's real property which included the mortgage.

Exhibit 3 to Ellis affidavit, p. 14, Ll. 6-15.

In Exhibit 2, a December 15, 2008, letter to plaintiff, Mr. Walker reiterated his erroneous belief that the divorce judgment was a lien on the mortgage.

In any event, pursuant to Idaho Code §10-1011, your judgment was recorded before any of the assignments that you provided me, including the one to Lawyers Title. *Thus, the mortgage that Lawyers Title accepted from Darwin should be subject to the lien of your judgment*

Exhibit 2, p. 2 (emphasis added).

Defendants are simply wrong by asserting that they "correctly explained the law" to plaintiff (Defendants' brief, p. 18). Defendants now apparently concede the Agreement provided no security to plaintiff as a creditor in the Agreement.

According to plaintiff's expert, Bryan D. Smith, failure to advise plaintiff that she had no secured position in the Agreement was an omission which fell below the standard of care. It would follow, as Mr. Smith notes, that an *affirmative* representation to plaintiff that she had a secured position vis-a-vis the mortgage proceeds, e.g., Exhibit 2, would be a more egregious departure from the standard of care. Mr Smith opines

Protections which, if agreeable to Mr. McKay, should have been undertaken to secure plaintiff's status as a creditor in the Property Settlement Agreement.

1. Provided a legal description of the Albrethsen Property in the PSA;
2. Provided an explanation that the Albrethsen Property was subject to a closing scheduled for March 30, 2008 and that Mr.

McKay would pay Mrs. McKay \$800,000 from the proceeds he received on this sale

3. Included an explanation that Mr. McKay further would pay Mrs. McKay from the proceeds he received on the sale in an amount to pay in full the balance of Mrs. McKay's mortgage on her personal residence;
4. Identifying in the PSA the then existing balance and further identified where notice could be sent to obtain the balance owed on that mortgage;
5. Identifying in the PSA Mr. McKay's mortgage and referenced Mr. McKay's recorded mortgage on the Albrethsen Property by the county document identification number on the recorded mortgage;
6. Following the procedures set forth in Idaho Code Section 32-918 and summarizing Mrs. McKay's interest thus making it even easier for a third party to take notice of Mrs. McKay's interest;
7. Sending the closing agent on the Albrethsen Property the relevant documents informing the closing agent of Mrs. McKay's interest in the sale provided Mr. Walker knew the name of the closing agent.

Smith affidavit, pp. 2, 3.

Expert Smith further opines, in the event Mr. McKay would not agree to secure his obligations in the Agreement, defendants had a duty to inform plaintiff of that fact. Smith affidavit, pp. 4, 5. Failure to do so breached the applicable standard of care.

As plaintiff McKay testifies in her affidavit, had she been aware she was not in a secured position, she would not have entered into the Agreement.

Had I been made aware that the Agreement would not give me a secured status or that recordation of the Agreement would not constitute a lien on the mortgage, I would not have executed the Agreement. I would have continued to demand that Mr. McKay give me a secured status in the Agreement. Failing that security, I would have proceeded to trial.

Plaintiff's affidavit, p. 2.

THERE IS NO EVIDENCE CONTRADICTING PLAINTIFF'S ASSERTION THAT SHE WOULD NOT HAVE SIGNED THE AGREEMENT HAD SHE BEEN ADVISED THAT IT PLACED HER IN AN UNSECURED POSITION AS RESPECTS HER HUSBAND'S OBLIGATIONS UNDER THE AGREEMENT

Proximate causation exists as a matter of law: In the complaint, plaintiff alleges "[n]otwithstanding defendants' representations to plaintiff that recordation of the PSA would create a lien on the community's interest in real property, the PSA did not have such lien effect" (Complaint, para. VIII(c)).

Defendants' "representations" to this effect are undisputed, i.e., Exhibit 2, p. 2: "the mortgage should be subject to the lien of your judgment". It must be conceded that a mortgagee, such as Mr. McKay, does have an interest in real property. See *Ogden v. Griffith*, ___ Idaho ___, 236 P.3d 1239 (2010), holding that an agreement involving the creation of a deed of trust is governed by the statute of frauds which requires that agreements dealing with an "interest in real property" be in writing. Idaho Code §9-503.

Plaintiff testifies in her affidavit she would not have signed the Agreement had her unsecured position been disclosed to her or had she *not* been advised that recordation of the Agreement put her in a secured position.

At the very least, proximate cause issues presents genuine issues of material fact not amenable to summary adjudication. In *Millsaps v. Kaufold*, 653 S.E.2d 344 (Ga. App. 2007), plaintiff wife alleged that her attorney failed to take steps to protect various assets of the community estate. The trial court entered summary judgment for defendant attorney, holding that there was insufficient evidence of proximate causation. The appellate court reversed, holding that a genuine issue of material fact existed:

. . . Kaufold [defendant attorney] argues that Millsaps [plaintiff wife] cannot show that the outcome of her divorce action would have been different but for Kaufold's errors since there is evidence, including the former husband's affidavit, that former husband would not have entered into any settlement agreement other than that which resolved the divorce action. . . . While evidence that an ex-husband would not have entered into a different settlement may have precluded a showing of damages in the fraud action in *Hopkinson* [*Hopkinson v. Labovitz*, 589 S.E.2d 255 (2003)], under the facts of the instant case, such evidence simply creates a genuine issue of material fact as to whether the outcome of the underlying divorce action would have been different but for the attorney's alleged errors in failing to protect various assets.

Here Millsap's showing that Kaufold's alleged errors proximately caused damage to her is not based on mere speculation or conjecture, but is based on evidence sufficient to create a jury issue to survive summary judgment.

Id., 653 S.E.2d at 346..

In *Reed v. Mitchell & Timbanard*, 903 P.2d 621 (Ariz. App. 1995), defendant attorneys allegedly failed to list all plaintiff/wife's security in the decree or, alternatively, failed to execute security documents as attachments to the decree. Defendant attorneys argued that it is speculation whether the court would have signed such a judgment. In reversing the entry of summary judgment, the appellate court observed that "[a]t most, the defendants' arguments raise questions of fact regarding whether Reed [plaintiff wife] has actually suffered a loss as the result of the defendants' alleged negligence and her possible contributory negligence or failure to mitigate her damages. *Id.*, 903 P.2d 626.

Summary of proximate causation analysis. As in *Reed and Millsaps*, the existence and amount of plaintiff's damages present factual issues not appropriately resolved in summary judgment proceedings. In her affidavit, plaintiff testified she would not have executed the Agreement had she been made aware of her unsecured status. In the context of her refusal to execute the Agreement

(Exhibit 1), the jury will be charged with determining whether the evidence supports one of three scenarios: (1) plaintiff's husband would have given her the secured status she expected and deserved; (2) her husband would not have agreed to secure her interest, and the marital estate would be distributed in accordance with the community property laws of the State of Idaho; or (3) plaintiff's husband would not have agreed to secure her interest, and the marital estate would be distributed in accordance with the pre-nuptial agreement.

BECAUSE MR. MCKAY'S DEFAULT WAS THE VERY EVIL WHICH PLAINTIFF'S
SECURED STATUS WAS INTENDED TO PREVENT, HIS DEFAULT DOES NOT
CONSTITUTE A SUPERSEDING OR INTERVENING CAUSE

Defendants' "superseding cause" argument fails for two independent reasons: (1) the injury which plaintiff encountered, i.e., Mr. McKay's default, was the very injury which plaintiff's secured status was intended to prevent; and (2) the viability of the doctrine of superseding cause as a defense does not rest upon the innocence of the defendant in initiating that cause, i.e., that defendants did not instigate Mr. McKay's default is a red herring.

The prerequisites to a cause being a "superseding" cause are set forth in *Mico Mobile Sales v. Skyline Corp.*, 97 Idaho 408, 546 P.2d 54 (1975) cited at page 20 of defendants' brief. One element is "the fact that its intervention brings about harm different in kind from that which would otherwise have resulted from the actor's negligence". *Id.*, 97 Idaho at 412. In the case at bench, the purported "superseding cause", i.e. Mr. McKay's default, is the same adverse event concerning which defendants' alleged conduct failed to insulate her. Moreover, defendant's must concede Mr. McKay's potential default was a foreseeable event, i.e., defendants' recorded the decree and Agreement and advised the plaintiff that lien was created (Exhibit 2, p. 2).

In *Sharp v. W. H. Moore, Inc.*, 118 Idaho 297, 796 P.2d 506 (1990), an employee who was raped in an office building brought a negligence action against the security contractor, among others.

In responding to the assertion that the criminal conduct was a superseding cause, the Supreme Court observed as follows:

Defendants also argue that the occurrence of criminal activity is an intervening, superseding force that breaks the chain of causation potentially binding defendants to liability. While this is a superficially pleasing statement of a general rule, it has no applicability under the circumstances of this case. *Here the precise hazard to be guarded against was criminal activity.*

Id., 118 Idahc at 302 (emphasis added)

Likewise here: “the precise hazard to be guarded against” was Mr. McKay’s default which hazard would have been neutralized had plaintiff been placed in a secured position OR had the absence of that security been made known to her before she signed the Agreement.

GIVEN MR. MCKAY’S IMPECUNIOUS CONDITION, DEFENDANTS FAILURE
TO SECURE PLAINTIFF’S INTEREST IN THE MORTGAGE PROCEEDS
HAS CAUSED HER FINANCIAL LOSS

It is undisputed that Mr. McKay was paid \$4,921,800 in the Status transaction, i.e. he was owed another \$3.9 million but that money was never paid because Status declared bankruptcy.

Darwin was to receive \$4,921,800.00 for Parcel 1 (Albrethsen). Status paid \$3,250,000.00 up front, which Darwin paid to Eric Albrethsen for the initial purchase price. The balance of the entire purchase price was to be paid by Status in two interim payments of \$275,000 and \$250,000 and the balance of \$5,046,800.00 was to be paid at closing on or before March 30, 2008. Status made one interim payment of \$275,000 and Darwin therefore took a mortgage in the amount of \$1,396,800.00 which Land America Transnation Title Company mistakenly insured two first mortgages. One of the insured first mortgages was to Darwin McKay for \$1,396,800.00. Darwin McKay was thus paid a total of \$4,921,800.00 for his interest in parcel 1 (Albrethsen) which was awarded to Darwin as his sole and separate property pursuant to page 6 of the Decree. *The remaining \$3.9 million, which Patricia McKay was to be paid from, will likely never come to fruition as Status has filed for bankruptcy protection.*

Exhibit 4 to Ellis Affidavit, page 5, 6 (emphasis added).

The highlighted portion of the above quote also underscores in what fashion plaintiff has been financially injured by the failure to secure her position.

Darwin McKay's actions post-divorce constitute self-inflicted poverty.

It is further anticipated that Darwin will plead poverty to the Court. In essence Darwin wants the Court to look only at his current economic situation, and the financial status of his business entities and the condition of the current real estate market to make a determination as to whether the Motion to Liquidate the Agreement should be granted. The current economic state of Darwin and his business entities arise from actions that Darwin took during the pendency of the divorce and subsequent to the divorce for which Patricia has no responsibility. Darwin's action during the pendency of the divorce and subsequent to the divorce are the events that precipitate his now alleged inability to pay. The actions that Darwin took include, but are not limited to, taking out an additional \$780,000.00 line of credit with Great Basin Bank; taking out a \$100,000 line of credit with Zion Bank; numerous investments in Granite Transformations; and a \$240,000.00 personal loan with Sterling Bank.

Exhibit 5 to Ellis Affidavit, page 9.

Given Mr. McKay's conduct post-divorce, plaintiff has suffered real financial loss as an unsecured creditor in the Agreement.

THE EXTENT OF PLAINTIFFS' DAMAGES ARISING FROM HER STATUS
AS AN UNSECURED CREDITOR PRESENTS GENUINE ISSUES OF FACT
NOT AMENABLE TO SUMMARY ADJUDICATION

Plaintiff's post-decree efforts to collect her monetary entitlement under the Agreement may be viewed as mitigation efforts. Whether plaintiff has acted reasonably in this regard presents factual issues for jury consideration. See IDJI 932 and *Davis v. First Interstate Bank*, 115 Idaho 169, 170, 765 P.2d 680 (1988).

CONCLUSION

Contrary to defendants' "Undisputed Statement of Facts" (paragraph 25), defendant Walker did advise plaintiff that the Status "mortgage . . . should be subject to the lien of [her] judgment".

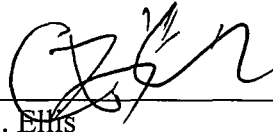
See Exhibit 2. Plaintiff would not have executed the Agreement had she been made aware that her status as creditor in the Agreement was unsecured. See plaintiff's affidavit.

Absent settlement, plaintiff, according to her affidavit testimony, would have proceeded to trial, with a lis pendens in place to prevent Mr. McKay from dissipating the Status sale proceeds.

Plaintiff has suffered a financial loss due to her status as an unsecured creditor in the Agreement and Mr. McKay's impoverished condition. His default was the contingency which her secured status was intended to deflect. Hence, that default does not constitute a superseding cause neutralizing the impact of defendants' negligence.

Whether plaintiff's post-decree conduct was reasonable raises mitigation issues not amenable to summary adjudication.

Dated this 20th day of January, 2011.




Allen B. Ellis
Attorney for Plaintiff

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 20th day of January, 2011, I caused to be served a true and correct copy of the foregoing by the method indicated below, and addressed to the following:

Robert A. Anderson
Yvonne A. Dunbar
ANDERSON, JULIAN & HULL, LLP
250 South Fifth Street, Suite 700
P.O. Box 7426
Boise, Idaho 83707

____ U.S. Mail
 X Hand Delivery
____ Overnight Mail
____ Facsimile at
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Allen B. Ellis

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KEVIN E. DINIUS
DINIUS & ASSOCIATES, PLLC
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Nampa, Idaho 83687
(208) 475-0100 (Telephone)
(208) 475-0101

Attorneys for Plaintiff

NO. _____
A.M. _____ FILED P.M. *304*

JAN 20 2011

CHRISTOPHER D. RICH, Clerk
By LARA AMES
DEPUTY

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

| | | |
|---------------------------------------|---|-----------------------------|
| Patricia McKay |) | |
| |) | Case No. CV OC 0922659 |
| Plaintiff, |) | |
| |) | AFFIDAVIT OF BRYAN D. SMITH |
| v. |) | |
| |) | |
| Thomas G. Walker and Cosho Humphrey, |) | |
| LLP, a limited liability partnership, |) | |
| |) | |
| Defendants. |) | |
| _____ | | |

STATE OF IDAHO)
)ss.
County of Ada)

I, Bryan D. Smith, being first duly sworn, depose and state as follows:

1. I make this affidavit upon my own personal knowledge and am competent to

AFFIDAVIT OF BRYAN D. SMITH - 1

ORIGINAL

testify to the matters set forth herein. I hold the opinions set forth herein with a reasonable degree of legal certainty.

2. Qualifications: I obtained a Juris Doctorate degree from the McGeorge School of Law, at the University of Pacific, in 1989 and have been actively practicing law since then. I am licensed to practice law in the Courts of Idaho, the United States District Court for the District of Idaho, and the United States Court of Appeals for the Ninth Circuit. I have also been licensed to practice law in the Courts of Idaho and the United States Eastern District of California. A substantial portion of my practice has been devoted to civil litigation and I have represented both husbands and wives in numerous divorce cases. I charge \$185 per hour for my services as an expert, which is the same rate that I generally charge in my practice. I have not been an expert before.

3. Documents reviewed:

- a. Draft complaint;
- b. October 28, 2009 letter from Allen B. Ellis to Thomas G. Walker;
- c. November 2, 2009 letter from Thomas G. Walker to Allen B. Ellis;
- d. November 4, 2009 letter from Allen B. Ellis to Thomas G. Walker;
- e. November 5, 2009 letter from Thomas G. Walker to Allen B. Ellis;
- f. November 5, 2009 email from Allen B. Ellis to Thomas G. Walker;
- g. November 5, 2009 letter from Thomas G. Walker to Allen B. Ellis;
- h. November 17, 2009 letter from Allen B. Ellis to Bryan D. Smith;
- i. November 29, 2007 Judgment and Decree of Divorce with attached
- j. Property Settlement Agreement; and
- k. July 1, 1996 Pre-Nuptial Agreement.
- l. December 15, 2008, letter from Mr. Walker to plaintiff.

4. Factual background: From my review of the above-documents, I understand that while Mr. and Mrs. McKay were married, but before they were divorced, Mr. McKay acquired real property that he immediately sold for a profit of about \$2 million. This property is known as the "Albrethsen Property." The closing on the "Albrethsen Property" was scheduled for March 30, 2008—about four months after the court entered the Judgment and Decree of Divorce with an attached Property Settlement Agreement (PSA) on November 29, 2007. The PSA contemplates that Mr. McKay would pay \$800,000 of the proceeds from the Albrethsen Property sale to Mrs. McKay. The PSA further contemplates that Mr. McKay would use proceeds from the Albrethsen Property sale to pay off in full the mortgage on Mrs. McKay's personal residence. The PSA was recorded in the county where the Albrethsen Property was located.

As it turned out, Mr. McKay discovered that a mortgage he held was not in first position; accordingly, the title company paid him at least \$1,288,091.10. However, Mr. McKay did not pay Mrs. McKay the \$800,000 from the proceeds as contemplated in the PSA nor did he use any of the proceeds to pay the balance of Mrs. McKay's personal residence in the amount of \$488,019.10. And the title company paying Mr. McKay apparently did not take any steps to pay Mrs. McKay although Mr. Walker informed Mrs. McKay that the Judgment and Decree of Divorce, including the attached PSA, would be a lien in each county in which it was recorded on real property that she thought Mr. McKay owned.

5. Issue presented: These facts raise the question of whether Mrs. McKay's lawyer, Thomas G. Walker, bears any responsibility for Mrs. McKay's failing to receive the \$1,288,091.10 as the PSA contemplates. Specifically, did Mr. Walker's conduct in the way he prepared the PSA or in advising Mrs. McKay in connection with the PSA fall below the standard of care resulting in damages to Mrs. McKay?

6. Protections which, if agreeable to Mr. McKay, should have been undertaken to secure plaintiff's status as a creditor in the Property Settlement Agreement.

1. Provided a legal description of the Albrethsen Property in the PSA;
2. Provided an explanation that the Albrethsen Property was subject to a closing scheduled for March 30, 2008 and that Mr. McKay would pay Mrs. McKay \$800,000 from the proceeds he received on this sale
3. Included an explanation that Mr. McKay further would pay Mrs. McKay from the proceeds he received on the sale in an amount to pay in full the balance of Mrs. McKay's mortgage on her personal residence;
4. Identifying in the PSA the then existing balance and further identified where notice could be sent to obtain the balance owed on that mortgage;
5. Identifying in the PSA Mr. McKay's mortgage and referenced Mr. McKay's recorded mortgage on the Albrethsen Property by the county document identification number on the recorded mortgage;
6. Following the procedures set forth in Idaho Code Section 32-918 and summarizing Mrs. McKay's interest thus making it even easier for a third party to take notice of Mrs. McKay's interest;
7. Sending the closing agent on the Albrethsen Property the relevant documents informing the closing agent of Mrs. McKay's interest in the sale provided Mr. Walker knew the name of the closing agent.

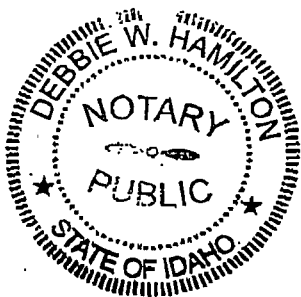
7. Standard of care to be observed in the event Mr. McKay would not agree to provide plaintiff with a secured position with respect to the Property Settlement Agreement: If Mr. McKay had rejected Mr. Walker's structuring the PSA as identified in paragraph (6) above, then Mr. Walker

should have informed Mrs. McKay that without structuring the PSA in accordance with paragraph (5), Mrs. McKay would not be protected and, therefore, risked not being paid when Mr. McKay received the Albrethsen sales proceeds. At that point a lis pendens should have been recorded making a public record of plaintiff's interest in the mortgage. According to Exhibit 2 to the Ellis affidavit in these summary judgment proceedings, not only did Mr. Walker fail to advise Mrs. McKay that she lacked a secured position, Mr. Walker erroneously advised her that the divorce judgment, which incorporated the PSA, constituted a lien on the mortgage proceeds.

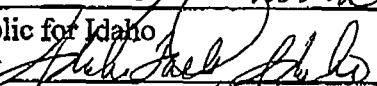
8. Conclusion: Based upon the acts and omissions of Mr. Walker, as set forth in paragraphs (6) and (7), above, Mr. Walker failed to conform to the standard of care applicable to Idaho attorneys practicing law in the first decade of the twenty-first century.


Bryan D. Smith

SUBSCRIBED AND SWORN To before me this 20th day of January, 2011.




Notary Public for Idaho

Residing at 

Commission Expires: 09/01/11

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 30 day of January, 2011, I caused to be served a true and correct copy of the foregoing by the method indicated below, and addressed to the following:

Robert A. Anderson
Yvonne A. Dunbar
ANDERSON, JULIAN & HULL, LLP
250 South Fifth Street, Suite 700
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Boise, Idaho 83707

☐ U.S. Mail
☐ Hand Delivery
☐ Overnight Mail
☒ Facsimile at
344-5510



Allen B. Ellis

JAN 20 2011

CHRISTOPHER D. RICH, Clerk
By LARA AMES
DEPUTY

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Attorneys for Plaintiff

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE

STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

| | | |
|---------------------------------------|---|------------------------|
| Patricia McKay |) | |
| |) | Case No. CV OC 0922659 |
| Plaintiff, |) | |
| |) | SECOND AFFIDAVIT OF |
| v. |) | ALLEN B. ELLIS |
| |) | |
| Thomas G. Walker and Cosho Humphrey, |) | |
| LLP, a limited liability partnership, |) | |
| |) | |
| Defendants. |) | |
| |) | |

STATE OF IDAHO)
)ss.
 County of Ada)

I, Allen B. Ellis, being first duly sworn, depose and state as follows:

1. I am the attorney for the plaintiff in the herein matter and make this affidavit upon


SECOND AFFIDAVIT OF ALLEN B. ELLIS - 1

ORIGINAL
 0922659

my own personal knowledge and am competent to testify to the matters contained here.

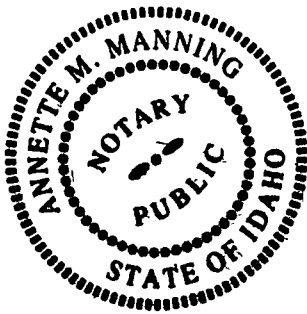
2. Attached hereto as an exhibits are true and correct copies of the following:

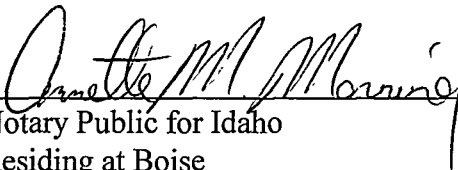
| <u>Document</u> | <u>Exhibit No.</u> |
|--|--------------------|
| Judgment and Decree of Divorce and Property Settlement Agreement | 1 |
| Walker letter to plaintiff dated December 15, 2008 | 2 |
| Excerpts of Patricia McKay deposition dated November 1, 2008 | 3 |
| Pre-Trial Memorandum of Facts/History of Case dated July 1, 2009 | 4 |
| Pre-Trial Brief dated July 2, 2009 | 5 |



Allen B. Ellis
Attorney for Plaintiff

SUBSCRIBED AND SWORN To before me this 20th day of January, 2011.





Notary Public for Idaho
Residing at Boise
Commission Expires: 01/05/12

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 20th day of January, 2011, I caused to be served a true and correct copy of the foregoing by the method indicated below, and addressed to the following:

Robert A. Anderson
Yvonne A. Dunbar
ANDERSON, JULIAN & HULL, LLP
250 South Fifth Street, Suite 700
P.O. Box 7426
Boise, Idaho 83707

☐ U.S. Mail
☒ Hand Delivery
☐ Overnight Mail
☐ Facsimile at
344-5510



Allen B. Ellis

ORIGINAL

COPY
NO. 8:49
AM. FILED
P.M.

NOV 29 2007

J. DAVID NAVARRO, Clerk
By J. EARLE
DEPUTY

Stanley W. Welsh (ISB No. 1964)
Thomas G. Walker (ISB No. 1856)
Cosho Humphrey, LLP
800 Park Blvd., Suite 790
P. O. Box 9518
Boise, Idaho 83707-9518
Direct Phone: (208) 639-5607
Cell phone: (208) 869-1508
Direct Facsimile: (208) 639-5609
E-mail: swelsh@cosholaw.com; twalker@cosholaw.com

ADA COUNTY RECORDER J. DAVID NAVARRO AMOUNT 63.00 21
BOISE IDAHO 12/04/07 03:53 PM
DEPUTY Lisa Irby
RECORDED - REQUEST OF
Cosho Humphrey
107161154

Attorneys for Plaintiff Patricia McKay

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF

THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

MAGISTRATE DIVISION

★ ★ ★ ★ ★

PATRICIA McKAY,

Plaintiff,

v.

DARWIN McKAY,

Defendant.

Case No. CV DR 0615200

JUDGMENT AND DECREE OF
DIVORCE

Based upon the Stipulation of the parties, IT IS HEREBY ORDERED ADJUDGED
AND DECREED as follows:

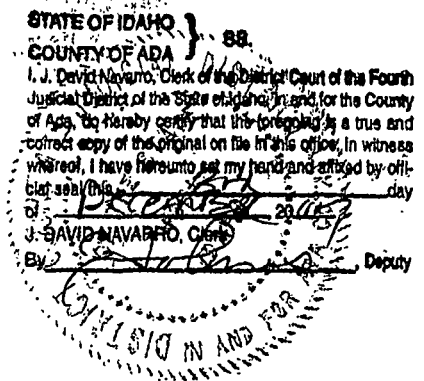
1. **DIVORCE**: The Plaintiff ("Patricia") and the Defendant ("Darwin") were married on July 6, 1996 in Nassau, Island of the Bahamas. Patricia and Darwin are granted a divorce from one another on the grounds of irreconcilable differences. Each is restored to the status of a single person.

2. **PROPERTY SETTLEMENT AGREEMENT:** Except for paragraphs in the Property Settlement Agreement dated October 20, 2007 regarding alimony, the Property Settlement Agreement shall be merged with and into the Judgment and Decree of Divorce. With respect to alimony, the payment provisions therein shall be deemed integrated contracts between the Parties with no jurisdiction conferred upon this Court to modify. The Property Settlement Agreement dated October 20, 2007 attached hereto as Exhibit A is approved by this Court and, except as noted above, is merged with and incorporated into this Judgment and Decree of Divorce.

DATED: November 29th 2007.



MAGISTRATE



CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 29th day of November 2007 a true and correct copy of the foregoing Judgment and Decree of Divorce was served upon:

Stanley W. Welsh
Coshu Humphrey, LLP
800 Park Blvd., Suite 790
Boise, ID 83712
P.O. Box 9518
Boise, ID 83707-9518

☒ U.S. Mail
☒ Hand Delivery
☐ Overnight Courier
☐ Facsimile
☐ E-mail:

Kimberly D. Brooks
Brooks Law, P.C.
23 9th Ave. North
Nampa, ID 83687

☒ U.S. Mail
☐ Hand Delivery
☐ Overnight Courier
☐ Facsimile
☐ E-mail:

John A. Miller
Miller & Harr
Attorneys at Law
1401 Shoreline Drive, Suite 3
Boise, Idaho 83702

☒ U.S. Mail
☐ Hand Delivery
☐ Overnight Courier
☐ Facsimile
☐ E-mail:



Exhibit A

**Stanley W. Welsh (ISB No. 1964)
Thomas G. Walker (ISB No. 1856)
Cosho Humphrey, LLP
800 Park Blvd., Suite 790
P. O. Box 9518
Boise, Idaho 83707-9518
Direct Phone: (208) 639-5607
Cell phone: (208) 869-1508
Direct Facsimile: (208) 639-5609
E-mail: swelsh@cosholaw.com; twalker@cosholaw.com**

Attorneys for Plaintiff Patricia McKay

**IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA
MAGISTRATE DIVISION**

★ ★ ★ ★ ★

PATRICIA E. McKAY,

Plaintiff,

v.

L. DARWIN McKAY,

Defendant.

Case No. CV DR 0615200

**PROPERTY SETTLEMENT
AGREEMENT INCORPORATED AND
MERGED WITH AND INTO
JUDGMENT AND DECREE OF
DIVORCE**

This Property Settlement Agreement ("Agreement") is made and entered into this 20th day of October 2007 by and between Patricia E. McKay, Plaintiff ("Patricia" or "Plaintiff"), and L. Darwin McKay, Defendant ("Darwin" or "Defendant"). Patricia and Darwin are sometimes

individually referred to as a "Party" or collectively referred to as the "Parties". This Agreement is binding and enforceable upon the terms stated herein, notwithstanding the fact that additional documentation is required to carry out the terms of this Agreement.

1. Community Property. The Parties agree to the following settlement of their community property:

1.1. Subject to the provisions of paragraph 2.1 below, Patricia shall receive the personal residence located at 25 Horizon Drive, Boise, Idaho ("Personal Residence") free and clear of all encumbrances. Patricia shall furthermore receive all personal property and furniture contained therein. Patricia shall execute such written consent as may be required by the lenders to allow Darwin access to information regarding the 1st and 2nd deed of trust notes. Darwin shall transfer to Patricia as her sole and separate property by good and sufficient quit claim deed and quit claim bill of sale all of his right, title and interest in and to the Personal Residence, including all personal property and furniture.

1.2. Patricia shall receive the Box Office Productions stock. Darwin shall transfer to Patricia as her sole and separate property by good and sufficient assignment separate from stock certificate all of his right, title and interest in and to the Box Office Productions stock. Patricia shall cause the assignment form to be delivered to Darwin through counsel as soon as possible for Darwin's execution and delivery to Patricia through her counsel.

1.3. Patricia shall receive her IRA account.

1.4. Patricia shall receive the 1995 Mercedes S-500 vehicle in her possession and the 1980's motor home, currently located at the farm. Darwin shall deliver the motorhome to Patricia on or before December 1, 2007. Darwin shall transfer to Patricia as her sole and separate property by good and sufficient bill of sale and endorsement on the respective Certificates of Title all of his right, title and interest in and Patricia's 1995 Mercedes S-500 and the 1980's motorhome. Patricia shall cause the assignments forms to be delivered to Darwin through counsel as soon as possible for Darwin's execution and delivery to Patricia through her counsel.

1.5. Darwin may at his expense have the contents of the Personal Residence construction folder copied if necessary for preparation of the amended tax returns for 2005 and 2006 and for the 2007 tax return. Patricia shall retain the original of the Personal Residence construction folder.

1.6. Darwin shall pay to Patricia \$100,000.00 in four equal consecutive monthly installments of \$25,000.00 on or before January 15, 2008 and on or before the 15th day of February, March and April, 2008. The Parties acknowledge that the \$100,000.00 amount was based upon a portion of Patricia's attorneys' fees and litigation expenses. In accordance with Idaho Code § 32-704(3) said payments shall be paid by Darwin directly to Cosho Humphrey, LLP, who may enforce this portion of the Judgment in its own name; provided, however, Patricia may pay Cosho Humphrey, LLP prior to any such installment in which case, the payment or payments shall be paid directly to Patricia by Cosho Humphrey, LLP.

1.7. Darwin shall pay Patricia \$800,000 in cash, by wire transfer or certified check, within five (5) days of payment by the Status Corporation, or its assigns, ("Status Real Estate Transaction"). In addition, Darwin shall convey all his right, title and interest to Patricia in and to the two (2) lots to be conveyed by Status Corporation, or its assigns, to Darwin as part of the Status Corporation Real Estate Transaction. The parties acknowledge that the Status Real Estate Transaction is scheduled to close on or before March 30, 2008. Darwin shall diligently pursue the closing and shall not do anything to interfere with or delay the closing.

1.8. The parties acknowledge that if Status Corporation or its assigns breaches the Purchase and Sale Agreement, Darwin will have title to that portion of the land that had been referred to prior to the sale to Status Corporation as the "Home Farm." In the event of breach, Darwin may also be able to foreclose a mortgage on that portion of the land referred to prior to the sale to Status Corporation as "Albrethsen's Farm."

1.8.1. If the Status Real Estate Transaction fails to close on or before March 30, 2008, Darwin shall pay Patricia \$500,000 as soon as he is able to do without violating the lending terms and conditions of the bank holding the line of credit for the Turf Corporation.

1.8.2. Provided further that if Status Corporation or it assigns breaches the Purchase and Sale Agreement and Darwin cannot pay \$500,000 by April 30, 2008, he shall list the Albrethsen property that was included in the Status Corporation Real Estate Transaction for sale and shall pay Patricia by cash, certified check or wire transfer \$500,000 within five (5) days of receipt or closing on a sale.

1.8.3. Provided further that if following a breach, Darwin is not able to pay Patricia \$500,000 by September 30, 2008, he shall pay Patricia \$800,000 plus interest at the rate of 6% payable within five (5) days of any funds from the sale of either the Albrethsen property funds, the Home Farm property or both (provided that payment of funds from the sale of the Home Farm may only be made to the extent allowed by the bank holding the line of credit for the Turf Corporation) by cash, certified check, or by wire transfer.

1.9. Darwin shall be awarded the 2000 XJ8L Jaguar vehicle; 1973 5th wheel camp trailer; 1990 Ford pick-up truck; and 1994 Chrysler LHS. Darwin shall furthermore be entitled to pick up his separate property birch cabinet and birch bookcase located in the tool room of the Personal Residence. Upon delivery of the motorhome to Patricia, Darwin shall pick up the empty bookcase and cabinet. Darwin shall be awarded all separate and community property interests (if any) in the following:

- a. The Turf Corporation;
- b. The Turf Company of Nevada, Inc.;
- c. Pleasure Turf, LLC;
- d. The Turf Company, LLC;
- e. Turfland, LLC;
- f. Notes Receivables for Turf Company;
- g. Investment in Nevada Granite Industries;
- h. Palace Resorts Time Share;

- i. Proceeds from sale of Albrethsen;
- j. Personal effects and furnishings in Darwin's possession; and
- k. McKay family investments and interests.

2. Community Debts. The Parties agree to the following settlement of their community debts:

2.1. Commencing November 2007 and continuing thereafter as provided in this paragraph, Darwin shall pay Patricia's 1st and 2nd deed of trust note payments, including property taxes and insurance, as required by the lender(s), encumbering the Personal Residence ("Personal Residence Debt") as and for maintenance or alimony for Patricia. Darwin shall timely pay both 1st and 2nd deed of trust note payments directly to the respective mortgage companies. Patricia will provide Darwin via fax or email the 1st and 2nd deed of trust note monthly statements within five days of when Patricia receives them. Each month Darwin shall notify Patricia via fax or email that he has made the respective 1st and 2nd deed of trust note monthly payments in a timely manner. The payments required under this paragraph shall terminate when Darwin pays off the Personal Residence Debt. Darwin shall pay off the full amount of Personal Residence Debt directly to the respective mortgage companies within thirty (30) days of the date the Status Real Estate Transaction closes, or within thirty (30) days of receipt of any funds from the sale of either the Albrethsen property, the Home Farm property or both (provided that payment of funds from the sale of the Home Farm may only be made to the extent allowed by the bank holding the line of credit for the Turf Corporation), but in any event, Darwin shall payoff the Personal Residence

Debt on or before October 20, 2012. Notwithstanding the foregoing, Patricia shall have the right to sell the Personal Residence at any time; in which case, the Personal Residence Debt would likely be paid off out of the sale proceeds. If Patricia sells the Personal Residence, Darwin shall pay directly to Patricia as a property equalization payment the unpaid principal balance of the Personal Residence Debt, plus interest accruing at the respective rates called for in the first and second loan documents, in monthly installments to and including payment in full of the Personal Residence Debt. The Parties agree that Kevin Crane, CPA, or if Mr. Crane cannot serve, such other accountant as the Parties shall designate, will provide the appropriate calculations of the remaining balance and accruing interest and Darwin shall execute and deliver a promissory note to Patricia setting forth his payment obligations. Any such promissory note shall include a right of prepayment. As of October 20, 2007, the unpaid principal balance of the 1st deed of trust note (World Savings Loan No. [REDACTED] is \$556,324.34 and interest is accruing from and after October 20, 2007 at the rate provided in the 1st deed of trust note. As of October 20, 2007, the unpaid principal balance of the 2nd deed of trust note (Countrywide Loan No. [REDACTED] is \$67,490.49 and interest is accruing from and after October 20, 2007 at the variable rate provided in the 2nd deed of trust note. Darwin shall pay each of these notes, including interest accruing from and after October 20, 2007 until each note is paid in full.

2.2 Darwin shall pay off the two Chase Visa credit cards and Bank of America credit card as property equalization payments as follows:

| | |
|---------------------------|-------------|
| Chase Visa ending in 2116 | \$46,327.00 |
|---------------------------|-------------|

Chase Visa ending in 0853 2,076.17

Bank of America ending in 0232 22,845.13

\$71,248.30

Darwin shall pay the \$71,248.30, plus interest as follows:

| | |
|----------------|---|
| November 2007: | \$14,249.66, plus interest on the unpaid balance attributable to the \$71,248.30; |
| December 2007: | \$14,249.66, plus interest on the unpaid balance attributable to the \$71,248.30; |
| January 2008: | \$14,249.66, plus interest on the unpaid balance attributable to the \$71,248.30; |
| February 2008: | \$14,249.66, plus interest on the unpaid balance attributable to the \$71,248.30; |
| March 2008 | \$14,249.66, plus interest on the unpaid balance attributable to the \$71,248.30; |

Darwin shall pay all payments listed above in a timely manner such that no late fees are incurred. The November 2007 payment shall pay the Chase Visa ending in 0853 in full and shall then apply \$6,086.75 to the Chase Visa ending in 2116 and \$6,086.75 to the Bank of America ending in 0232. Each month Darwin shall notify Patricia via fax or email that he has made the respective credit card payments in a timely manner.

Patricia shall be responsible for all charges, interest, finance charges, and fees attributable to charges made by her after October 20, 2007. Patricia shall be responsible for all other credit card debt in her name alone or charged by Patricia without Darwin's knowledge.

2.3 Mediation Expense. Darwin shall pay one-half and Patricia shall pay one-half of all fees and expenses of mediation.

3. **Alimony/ Maintenance Payments from Darwin to Patricia.** Commencing November 2007 and continuing until Patricia is paid \$800,000.00 or \$500,000.00 as provided above, Darwin shall pay Patricia each month the sum of \$2,500.00 as and for alimony/maintenance. All liability for alimony shall cease upon payment of the \$800,000.00 or \$500,000.00 as provided above.

4. **Full Disclosure.** Each Party represents to the other that full disclosure of all community assets and community liabilities, of which he or she is aware, has been made.

5. **Allocation of Property to Darwin.** Except as expressly provided herein, Patricia agrees to transfer by good and sufficient quit claim deed, quit claim bill of sale, quit claim assignment and/or other necessary quit claim document of conveyance all of her right, title and interest to Darwin in and to all of the community property awarded to Darwin herein, as his sole and separate property. Patricia shall return the notebook containing all of the Palace Resorts Information, including but not limited to Palace Premier Certificates; Palace Premier Golf Passes; Premier Gold Membership; and Palace Premier / RCI Certificates. Patricia shall specifically sign over title to the 1994 Chrysler; 1990 Ford Pick-up and 1973 5th Wheel Camp Trailer. Darwin shall cause said transfers to be delivered to Patricia through counsel as soon as possible, except for the 1990 pickup, for which title is in Patricia's possession and shall be produced as soon as possible. Patricia shall further sign the Palace Premier Change of Ownership, which shall be delivered to Patricia through counsel.

6. **Disposition of Property.** Subject to the provisions of this Agreement, each of the Parties hereto may dispose of his or her property of whatever nature, real or personal; and the Parties hereto, each for himself and herself, respectively, and for the respective heirs, legal representatives, executors and administrators and assigns, hereby waive any right of election which he or she may have or hereafter acquire regarding the estate of the other, or any right to take against any last will and testament of the other, whether heretofore or hereafter executed, or as may now or hereafter be provided for in any law of the State of Idaho or any other state or territory of the United States or any foreign country, and hereby renounces and releases all interest, right or claim that he or she now has or might otherwise have against the other, under or by virtue of the laws of any state or country, and each Party shall sign any document necessary to release his or her interest to the other Party or any other document necessary to transfer any title or release any interest necessary to carry out the intent of this paragraph.

7. **Release of Patricia from all Debts and Personal Guarantees.** On or before December 1, 2007, Darwin shall obtain at his sole cost and expense written releases of Patricia from liability for all debts whether such debts are owed to banks, vendors, and/or other creditors for whom Patricia may have liability for any reason, including but not limited to Patricia's execution of notes, personal guarantees or collateral security documents that she delivered during the Parties' marriage. Darwin shall provide Patricia with a true, correct and complete copy of each such release on or before December 1, 2007.

8. **Payment of Accounting Fees and Income Taxes by Darwin.** Darwin shall pay for the preparation of state and federal income tax returns and/or amended returns for the Parties for 2005, 2006 and 2007. The Parties agree to file said tax returns under the filing status resulting in the lowest state and federal income taxes. The Parties agree to cooperate with Kevin Crane, or any other accountant as Darwin deems necessary to complete the filing of such returns. Darwin shall pay all state and federal income taxes, interest and penalties, if any, for all years prior to January 1, 2008 and Darwin shall be entitled to all tax refunds, if any. Patricia shall be entitled to claim the interest paid on the deed of trust notes encumbering the Personal Residence and Darwin shall claim the monies paid towards the deed of trust note payments as alimony to Patricia. Darwin shall further claim all \$2,500.00 payments to Patricia pursuant to paragraph 3 herein as alimony.

9. **Separate Property / Income After Execution of Agreement.** The Parties hereto stipulate and agree that from and after the date of this Agreement, any and all property or income acquired or earned by either Party hereto shall be the separate property of the Party who has acquired or earned it, any income on separate property shall be separate property and the other Party shall have no claim on any separate property income or earnings. Beginning tax year 2008 and all years thereon, the parties shall each file separately. Neither party shall include in their income any income earned by the other after December 31, 2007. Nor shall either party claim a credit or deduction for expenditures made by the other after December 31, 2007. Any tax

liability arising from income after December 31, 2007 shall be paid and assumed according to their respective separate returns.

10. Debts after Execution of Agreement. The Parties agree that from and after October 20, 2007, any debts incurred by either Party hereto shall be the separate debt of the Party incurring the debt and shall not be a community debt. The Parties hereto agree not to incur any debt for which the other Party may be liable.

11. Mutual Release of Claims. For good and valuable consideration passing between the Parties, the receipt and sufficiency of which is acknowledged by each Party, the Parties each for themselves and for their heirs, representatives, agents, employees, successors, executors, administrators, subrogees and assigns, release the other Party and his or her heirs, representatives, agents, employees, successors, executors, administrators, subrogees and assigns, and each Party shall release, indemnify and hold harmless the other Party from any and all claims, liabilities or obligations arising out of or in any way connected with their marriage, including but not limited to all claims set forth in or comprehended by that certain litigation identified in the caption above. The term claims shall include any and all claims and counterclaims, whether known or unknown, a Party may have against the other Party as a result of their marriage and the litigation identified above.

12. Entry of Decree of Divorce. The Parties agree that on or before five (5) business days from the execution of this Property Settlement Agreement, they will execute a stipulation for entry of a Judgment and Decree of Divorce to be filed with the Court.

11. Merger with and into Judgment and Decree. Except for paragraphs regarding alimony, this Agreement shall be merged with and into the Judgment and Decree of Divorce. With respect to alimony, the payment provisions herein shall be deemed integrated contracts between the Parties with no jurisdiction conferred upon this Court to modify.

12. No Undue Influence. The Parties agree that they have entered into this Agreement without undue influence or fraud or coercion or misrepresentation or for any other like cause.

13. Further Performance. The Parties agree to execute all additional documents within 14 days of presentation of each such document and take such further steps as shall be required to effectuate and carry out the performance of this Agreement.

14. Amendments. This Agreement may not be amended, modified, altered or changed in any respect whatsoever, except by further agreement in writing duly executed by the Parties.

15. Cooperative Effort. The parties acknowledge that this Agreement is the result of a cooperative effort between them and their independent counsel, and that in the event of any dispute over the meaning or effect of any provision herein, the rule of interpretation of ambiguous terms against the drafting party shall have no application.

16. Advice of Counsel. The Parties stipulate that they have been represented by counsel and are familiar with the terms, conditions and effect of this Agreement.

17. **Attorney Fees.** In the event of any controversy, claim, or action being made, filed, or instituted between the parties to this Agreement or any of the other documents related hereto, or arising from the breach of any provision hereof, the prevailing party will be entitled to receive from the other party all costs, damages, and expenses, including reasonable attorney's and paralegal's fees incurred by the prevailing party, whether or not such controversy or claim is litigated or prosecuted to judgment. Court costs and attorney and paralegal fees include those incurred as a result of bankruptcy, or on appeal.

18. **Binding Agreement.** This Agreement is binding upon the heirs, successors and assigns of the Parties.

19. **Free and Voluntary Act.** Each Party further acknowledges: (a) that settlement of his or her claims alleged against the other in this litigation and the execution and delivery of this Agreement and release by him or her, are by his or her free and voluntary act; and (b) that no promise, agreement, statement or representation not expressed herein has been agreed to or relied upon.

20. **Choice of Law.** This Agreement shall be interpreted in accordance with the laws and statutes of the State of Idaho.

21. **Notices.** All notices and demands required or permitted under this Agreement shall be in writing, containing the information required by this Agreement to be communicated to any person, personally delivered to such person or sent by certified mail, postage prepaid, or by reputable overnight air courier service (*e.g.*, Federal Express or United Parcel Service) to such

person at the last known address of such person. The earlier of the date of personal delivery or two business days following the date of mailing or the date of delivery to the air courier thereof, as the case may be, shall be deemed the date of receipt of notice, unless proof of untimely delivery or non-delivery is provided by the addressee. The sender shall bear the risk of untimely delivery and non-delivery.

22. Partial Invalidity. In the event any portion of this Agreement shall be determined invalid, void or otherwise unenforceable, the remaining provisions shall remain in full force and effect, and shall in no way be affected, impaired or invalidated. It is understood that the remaining provisions shall be construed in a manner most closely approximating the intention of the Parties.

23. Execution of Counterparts. Duplicate copies of this Agreement may be signed by one or more of the Parties and their counsel and copies of this Agreement signed, collectively, by all Parties and their counsel shall be considered as a single, fully executed original document.

24. Waiver. Failure of a Party, or any of them, to exercise his or her rights upon any default of the other Party shall not be construed as the waiver of the right to insist upon full performance of all the terms and conditions of this Agreement, or of the right to exercise any other right contained in this Agreement.

25. Time. Time is of the essence of this Agreement and each and all of its provisions in which performance is a factor.

26. **Warranty.** THE UNDERSIGNED PARTIES INDIVIDUALLY AND THROUGH THEIR COUNSEL REPRESENT AND WARRANT THAT THEY HAVE READ THE FOREGOING AGREEMENT AND THAT THEY FULLY UNDERSTAND THE TERMS AND CONDITIONS SET FORTH HEREIN.

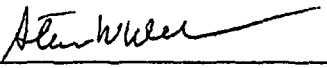
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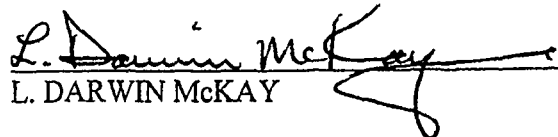
IN WITNESS WHEREOF, the Parties and their respective counsel have executed this Agreement on the date set forth above.


PATRICIA E. McKAY

Approved as to form and content:

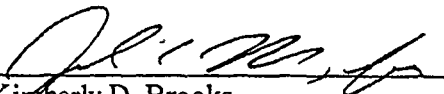
COSHO HUMPHREY, LLP

By 
Stanley W. Welsh
Attorneys for Patricia E. McKay

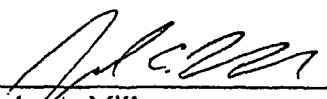

L. DARWIN McKAY

Approved as to form and content:

BROOKS LAW, P.C.

By 
Kimberly D. Brooks
Attorneys for L. Darwin McKay

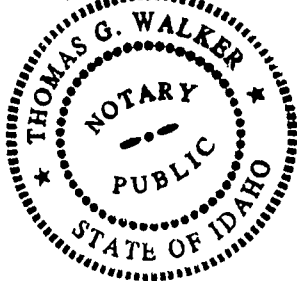
MILLER & HARR

By 
John A. Miller
Attorneys for L. Darwin McKay

STATE OF IDAHO)
) ss.
County of Ada)

On November 20, 2007, before me, the undersigned, a notary public in and for said county and state, personally appeared Patricia E. McKay, known to me to be the person whose name is subscribed to the within instrument and acknowledged to me that she executed the same.

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

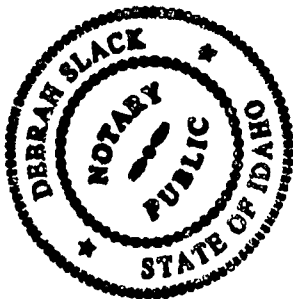


Thomas G. Walker
NOTARY PUBLIC FOR IDAHO
Residing at Borise
Commission Expires 3/20/12

STATE OF IDAHO)
) ss.
County of Ada)

On November 20, 2007, before me, the undersigned, a notary public in and for said county and state, personally appeared L. Darwin McKay, known to me to be the person whose name is subscribed to the within instrument and acknowledged to me that he executed the same.

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



Debrah Slack
NOTARY PUBLIC FOR IDAHO
Residing at Borise
Commission Expires 4-14-12

COSHO HUMPHREY, LLP

COUNSELORS & ATTORNEYS AT LAW

PO Box 9518 83707-9518
800 Park Blvd., Suite 790
Boise, Idaho 83712

Telephone 208.344.7811
Firm fax 208.338.3290

THOMAS G. WALKER

twalker@cosholaw.com
www.cosholawblog.com

| | |
|--------------|--------------|
| DIRECT PHONE | 208.639.5607 |
| CELL PHONE | 208.869.1508 |
| DIRECT FAX | 208.639.5609 |

December 15, 2008

Patricia E. McKay Via email to: patmckay@cableone.net
25 Horizon Drive
Boise, ID 83702

Re: Post Judgment – Patricia E. McKay v. L. Darwin McKay
 CH File No.: 19458-002
 Case No.: CV DR 0615200

Dear Patty:

I have reviewed the various assignment forms and the judgment that Darwin obtained against Status Corporation on August 22, 2008. I also discussed this matter with Stan Welsh. As you know, you received a Judgment and Decree of Divorce against Darwin on November 20, 2007. We subsequently recorded the judgment in each county that you thought Darwin owned real and personal property. By virtue of Idaho Code § 10-1011, your judgment became a lien upon Darwin's real and personal property. Idaho Code § 10-1011 provides in relevant part as follows:

A transcript or abstract of any judgment or decree of any court of this state . . . the enforcement of which has not been stayed as provided by law, if rendered within this state, certified by the clerk having custody thereof, may be recorded with the recorder of any county of this state, who shall immediately record and docket the same as by law provided, and from the time of such recording, and not before, the judgment so recorded becomes a lien upon all real property of the judgment debtor in the county, not exempt from execution, owned by him at the time or acquired afterwards at any time prior to the expiration of the lien.

Idaho Code 11-101 provides in relevant part:

If [a judgment] be against the property of the judgment debtor, it must require the sheriff to satisfy the judgment, with interest, out of the personal property of such debtor, and if sufficient personal property can not be found, then out of his real property; or if the judgment be a lien upon real property, then out of the real property belonging to him on the day when the judgment was docketed, or at any time thereafter; or if the execution be issued to a county other than the one in which the judgment was recovered, on the day when the transcript of the docket was filed in the office of the recorder of such county, stating such day, or any time thereafter.

Regarding the assignment to Lawyers Title Insurance Corporation, I was able to determine that Darwin made a claim against a title insurance policy issued by Lawyers Title with regard to the Status Corporation transaction. I could not find out the exact amount of the insurance claim payment, but my perception is that it was more than the \$800,000 that Darwin owes you.

In any event, pursuant to Idaho Code § 10-1011, your judgment was recorded before any of the assignments that you provided me, including the one to Lawyers Title. Thus, the mortgage that Lawyers Title accepted from Darwin should be subject to the lien of your judgment.

We understand that you are reluctant to enforce your judgment to recover the past due \$800,000, plus interest, that Darwin owes you. However, it is possible that the longer you wait the less likely you will be able to recover on your judgment. For instance, Darwin apparently did not have any compunction against concealing the Lawyers Title payment from you. Considering his past acts, I think you can assume that he will continue to do anything he can to avoid paying you.

You also mentioned that you would consider agreeing to delay your enforcement action, if Darwin would commence making monthly interest payments of \$4,000. We can extend that offer through Darwin's counsel, Kimberly Brooks, if you want.

Let me know how you would like to proceed.

Very truly yours,

/s/

THOMAS G. WALKER

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

PATRICIA McKAY,)

Plaintiff,)

vs.) Case No. CV OC 0922659

THOMAS G. WALKER and COSHO)

HUMPHREY, LLP, a limited) VOLUME I

liability partnership,) (Pages 1 through 147)

Defendants.)

DEPOSITION OF PATRICIA E. McKAY
TAKEN NOVEMBER 1, 2010

REPORTED BY:

SHERI FOOTE, CSR No. 90, RPR, CRR

Notary Public

THE DEPOSITION OF PATRICIA E. McKAY,

VOLUME I, was taken on behalf of the Defendants

at the offices of Ellis Brown & Sheils,

Chartered, 707 North 8th Street, Boise, Idaho,

commencing at 9:02 a.m. on November 1, 2010,

before Sheri Foote, Certified Shorthand Reporter

and Notary Public within and for the State of

Idaho, in the above-entitled matter.

APPEARANCES:

For the Plaintiff:

Ellis Brown & Sheils, Chtd.

BY MR. ALLEN B. ELLIS

707 North Eighth Street

P.O. Box 388

Boise, Idaho 83701-0388

For the Defendants:

Anderson Julian & Hull, LLP

BY MR. ROBERT A. ANDERSON

250 South Fifth Street, Suite 700

P.O. Box 7426

Boise, Idaho 83707-7426

ALSO PRESENT: Thomas G. Walker

1 you mean by that?

2 A. Had the property, legal property
3 description been in the PSA, that would have put
4 the mortgage ~~of~~ ^{rather} the title company on notice
5 that there ~~was~~ ^{were} funds due me from that piece of
6 property.

7 Q. What piece of property?

8 A. The Albrethsen property.

9 Q. Who owned the Albrethsen property?

10 A. Darwin and I owned the Albrethsen
11 property at the time of divorce.

12 Q. The property had been sold.

13 A. The property had been sold, yes.

14 Q. To whom?

15 A. To Status Corporation.

16 Q. Well, then, when you say "a lien on the
17 property," what do you mean if it's already been
18 sold?

19 A. There was a balance owing on the
20 property in the form of a mortgage.

21 Q. And the lien is good for what? Real
22 property?

23 A. Real property.

24 Q. But there was no real property;
25 correct? It was just a mortgage note?

1 A. The mortgage was regarded as real
2 property.

3 Q. By whom?

4 A. According to Tom Walker and what they
5 wrote in the divorce decree.

6 Q. So, you believe the divorce decree
7 indicates that a mortgage note was in existence
8 and that a lien could be placed against it?

9 A. Say that again, please.

10 MR. ANDERSON: Madam Court Reporter.
11 (Record read back.)

12 THE WITNESS: According to the divorce
13 decree, Tom Walker had expressed to me that the
14 judgment created a lien against Darwin's real
15 property, which included the mortgage.

16 Q. (BY MR. ANDERSON) Well, tell me about
17 that last part, "which included the mortgage."
18 Tell me where Mr. Walker told you that.

19 MR. ELLIS: You mean what geographical
20 location?

21 Q. (BY MR. ANDERSON) No, no, the timing
22 of Mr. Walker's comment. Or are you referring to
23 the property settlement agreement?

24 A. I'm referring to the property
25 settlement agreement. When I went in to sign the

1 property settlement agreement, Tom Walker had
2 written in the divorce decree that Mr. McKay had
3 a mortgage note on the balance owing on the
4 Albrethsen property. And I asked him --

5 Q. Go ahead.

6 A. -- "What's this mortgage note?" And
7 Tom said, expressed to me that he has to have a
8 mortgage note on the balance owing on this
9 property because he still is due approximately
10 \$1.4 million.

11 Q. Did he say anything else?

12 A. I don't recall.

13 Q. You told me that there was something
14 about a lien on a mortgage note, but you haven't
15 told me anything about that, so --

16 A. Tom Walker told me December 15 of 2008
17 after I had discovered the funds had been paid
18 out to Darwin, Tom Walker wrote to me and stated
19 that the PSA being recorded created a lien
20 against all of Darwin's real property.

21 Q. Did he tell you that a mortgage note
22 was real property? "Yes" or "no"?

23 MR. ELLIS: Asked and answered.

24 Q. (BY MR. ANDERSON) "Yes" or "no," in
25 this conversation? Or did he simply say, "It

1 creates a lien against real property"?

2 A. The PSA created a lien against all of ~
3 Darwin's real property.

4 Q. But Mr. Walker never told you that the
5 mortgage note constituted real property; correct?

6 A. I would have to say yes, he did.

7 Q. Well, tell me if he did or not. That's
8 what I'm asking.

9 MR. ELLIS: Objection, asked and
10 answered. She just did, Counsel.

11 Q. (BY MR. ANDERSON) And I'd like to know
12 the exact words that he used.

13 A. I cannot recall the exact words. This
14 was the end of November of 2007.

15 Q. You just said December 15, 2008. Now,
16 what are we doing?

17 A. You're asking --

18 MR. ELLIS: Objection. Off the record.
19 (Discussion held off the record.)

20 Q. (BY MR. ANDERSON) Let's continue. Can
21 you tell me when Mr. Walker told you that the
22 property settlement agreement constituted a
23 decree on a mortgage note?

24 MR. ELLIS: Objection as to clarity. A
25 decree on a mortgage note?

1 Q. And as a result, at one point he owned
2 the property to the extent that he was able to
3 transfer it to the Status Corporation; is that
4 your understanding?

5 A. Basically, yes. He owned the property
6 and flipped it in one day.

7 Q. So, he bought it and he sold it the
8 same day essentially?

9 A. Yes.

10 Q. All right. So, after he had sold it,
11 would you agree that he was no longer the owner
12 of the property?

13 A. That is correct.

14 Q. And as I understood it, his continuing
15 relationship with that transaction, not the
16 property but the transaction, was that Status
17 Corporation owed him a residual sum for which he
18 obtained a mortgage?

19 A. That is correct.

20 Q. All right. So, there was a mortgage
21 note in the amount of about \$1,396,000; is that
22 your understanding?

23 A. Yes.

24 Q. When did you find out about the
25 mortgage note?

1 A. I didn't find out about the mortgage
2 note until Tom Walker expressed it in the divorce
3 decree. He mentioned it. And I questioned him
4 about it and Tom expressed, "Yes, there's got to
5 be a mortgage note out there because he's still
6 due \$1.3 million on that property."

7 Q. At the time you were having that
8 discussion with Mr. Walker, you understood that
9 your husband did not own the Albrethsen property?

10 A. That is correct.

11 Q. What was it -- and you can be as brief
12 as possible -- that made you make the decision to
13 start divorce proceedings against your husband?

14 MR. ELLIS: I will object to that
15 question as not calculated to lead to the
16 discovery of admissible evidence. But Ms. McKay,
17 go ahead and answer to the best of your ability.

18 THE WITNESS: There were two pieces of
19 property which Darwin and I had sold and I knew I
20 had to sign some papers regarding those two
21 pieces of property. I asked Darwin what time
22 closing was and he told me, he said, "10:00, but
23 you don't have to be there." And from my
24 recollection, this is a community property state
25 and I knew that I would have to sign some papers.

BROOKS LAW, P.C.
KIMBERLY D. BROOKS - ISB #5968
TESSA J. BENNETT - ISB #7424
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Nampa, ID 83687
Telephone: (208) 442-7489
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Email: Kim@kbrookslaw.com

Attorneys for Defendant

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

| | | |
|-----------------|---|-------------------------|
| PATRICIA MCKAY, |) | Case No. CV DR 0615200 |
| |) | |
| Plaintiff, |) | PRE-TRIAL MEMORANDUM OF |
| |) | FACTS/ HISTORY OF CASE |
| vs. |) | |
| |) | |
| DARWIN MCKAY, |) | |
| |) | |
| Defendant. |) | |
| |) | |

COMES NOW, Defendant, DARWIN MCKAY, by and through his attorney of record and submits his Pre-Trial Memorandum of Facts/ History of Case to assist the Court at Trial July 09, 2009 in this matter.

SUBJECT PROPERTY:

Two parcels of land are the subject of this litigation and the sale contemplated between Defendant Darwin McKay and Status Corporation. Parcel 1 is referred to as "Albrethsen" and Parcel 2 is referred to as "Home Farm". Attached hereto as Exhibit "B" is a

drawing created by Richard W. Mollerup which describes the subject properties according to the legal description of each property. Attached as Exhibit C is a timeline of ownership for the two properties.

1. Albrethsen: Parcel 1 was purchased by Mr. McKay from Eric Albrethsen pursuant to a Real Estate Purchase and Sale Agreement dated February 13, 2006. (Bates Stamp 02306). The sale closed April 06, 2006 and title was conveyed by Warranty Deed recorded on the same date. The initial purchase price of Parcel 1 Darwin McKay paid from Eric Albrethsen as of April 06, 2006 was \$75,000 an acre for a total of \$3,051,000.00. Patricia McKay executed a Warranty Deed as of May 05, 2006 quitclaiming all of her interest in parcel 1 as of May 05, 2006. (Bates Stamp 02378). Darwin McKay then entered into a Real Estate Purchase and Sale Agreement with Status Corporation dated November 28, 2006 which included Parcels 1 and 2 for a total sales price of \$8,821,800.00. Parcel 2, as further detailed below, was included in this total price as well. Of the \$8,821,800.00 total sales price, \$4,921,800.00 was allocated to Parcel 1. Darwin and Patricia McKay were divorced as of November 29, 2007, a full year following the sale of the two parcels to Status. Page 6, paragraph 1.9(i) of the Judgment and Decree assigns the proceeds from sale of Albrethsen, also known as Parcel 1, to Darwin McKay as his

sole and separate property. Thus, \$4,921,800.00 from the Real Estate Purchase and Sale Agreement is Darwin McKay's sole and separate property.

2. Home Farm: Parcel 2 has been in Darwin McKay's family for years. Darwin purchased the 40 acres known as "Home Farm" in 1971, and was in fact listed in the pre-nuptial agreement between the parties dated July 01, 1996. Page 11 of the pre-nuptial agreement lists the "Farm land owned or under contract, 40 acres...known as Home Farm" as the separate property of prospective husband. (Bates Stamp 02201).
3. Future Sale of Albrethsen: On November 30, 2006, one year prior to entry of Judgment and Decree, a Warranty Deed was recorded conveying parcel 1 (Albrethsen) to Status Corporation. Again, Patricia McKay executed the warranty deed for the purpose of quitclaiming any interest she had in the property. (Bates Stamp 02378) A year later, the Judgment and Decree was entered, which required Darwin to list the Albrethsen property for sale upon Status Corp.'s default. As Darwin had already transferred ownership interest in Parcel 1 (Albrethsen) as of November 30, 2006, Paragraph 1.8.2 was impossible. Darwin owned only Parcel 2 (Home Farm) and did not own title to Parcel 1 (Albrethsen). Darwin owned a lien in the form of a second mortgage on Parcel 1. There was also a first mortgage on Parcel 1 owned by a Wells Fargo entity called

Avatar. Darwin's real estate attorney, Forrest Goodrum negotiated an insurance policy in the Status Contract of 11/29/06 which insured Darwin's mortgage in first position. Therefore, the time frame of paragraph 1.8.2 of the Judgment and Decree was also impossible. While Darwin had the right to foreclose the mortgage on Albrethsen, it was necessary for Darwin to take judicial action, which he timely pursued and obtained a judgment as of August 19, 2008. (Bates Stamp 02115) Once Darwin obtained judgment against Status, the property could have been sold at a Sheriff's sale. However, pursuant to Idaho Statute, a sheriff's deed is not issued to the successful bidder until the expiration of a one-year redemption period. Therefore the earliest Darwin could have acquired title to parcel 1 (Albrethsen) is sometime in the fall of 2009. That is, Darwin could have obtained title if there had not been two (2) first position mortgages. In the normal method of foreclosure, for Darwin to foreclose on his Parcel 1 mortgage, Darwin would have had to pay the underlying mortgage of \$3,750,000.00. Since the Title Company made a mistake, they ended up purchasing Darwin's mortgage, so there was never a foreclosure. Regardless, Darwin could not have abided by the time line of paragraph 1.8.2 or 1.8.3 of the Decree, as it was not possible to obtain title to Albrethsen to sell by September 30, 2008. Due to the title company's

error in issuing two first mortgage policies, the title company obtained Darwin's interest in Albrethsen and two (2) first mortgages still exist at this time. No one is sure who owns title to Albrethsen, as Status filed bankruptcy and the title is still in flux. (See deposition of Bob rice, page 38, lines 13-23). Patricia McKay and her counsel were fully aware of the provisions of the Status Contract, as the contract was provided to Patricia March 07, 2007 in discovery seven months prior to entry of the Decree. (Bates #02121, specifically #02134 wherein it specifically states, "Title Insurance was issued for this property on 6 April 2006 in the name of L. Darwin McKay, a married man as his sole and separate property.")

4. Albrethsen funds: Pursuant to the Decree, page 6, paragraph 1.9(i), Darwin is awarded all proceeds from the sale of Albrethsen. There is only one Albrethsen property and that is parcel 1 which is included in the Real Estate Purchase and Sale Agreement with Status. Darwin was to receive \$4,921,800.00 for Parcel 1 (Albrethsen). Status paid \$3,250,000.00 up front, which Darwin paid to Eric Albrethsen for the initial purchase price. The balance of the entire purchase price was to be paid by Status in two interim payments of \$275,000 and \$250,000 and the balance of \$5,046,800.00 was to be paid at closing on or before March 30,

2008. Status made one interim payment of \$275,000 and Darwin therefore took a mortgage in the amount of \$1,396,800.00 which Land America Transnation Title company mistakenly insured two first mortgages. One of the insured first mortgages was to Darwin McKay for \$1,396,800.00. Darwin McKay was thus paid a total of \$4,921,800.00 for his interest in parcel 1 (Albrethsen) which was awarded to Darwin as his sole and separate property pursuant to page 6 of the Decree. The remaining \$3.9 million, which Patricia McKay was to be paid from, will likely never come to fruition as Status has filed for bankruptcy protection.

5. Future Sale of Home Farm: (Parcel 2) was at all times Darwin McKay's sole and separate property from the pre-nuptial agreement. However, parcel 2 could not be sold at this time in the real estate market, as land sales have fallen so drastically. Sterling Bank holds the Home Farm as security in funding for Turf Company. The Purchase Sale Agreement with Status valued the Home Farm at \$130,000 an acre. A recent appraisal ordered by Sterling Bank to verify its security position appraised the Home Farm at \$35,000 an acre. Home Farm has continued to fall in value. The land fell short of providing adequate security for Sterling Bank and Turf Company had to pay extra funds of over \$40,000.00 in December 2008 to reduce the debt load of the company to qualify for a

continuing line of credit. The property is 100% secured by Sterling Bank. Pursuant to the Appraisal ordered by Sterling Savings Bank dated 9/20/08 (Bates Stamp #02400) the value of the land has decreased by at least \$95,000 an acre. It is unlikely that the land could be sold at all in this deflated market.

6. Payments to Patricia McKay: Darwin McKay has paid at least an equal division of the marital estate at the time of entry of decree. The following are payments to Patricia from Darwin:

| | | |
|---------|---|--------------------|
| a. | attorneys fees and cash: | \$100,000.00 |
| b. | Patricia's credit cards: | \$ 71,248.30 |
| c. | 21 months maintenance:
(with no scheduled ending date) | \$ 52,500.00 |
| d. | 1 st mortgage: | \$556,324.34 |
| e. | 2 nd mortgage: | \$ 67,490.49 |
| f. | property tax: | \$ 7,301.23 |
| g. | <u>Homeowners insurance:</u> | <u>\$ 1,575.00</u> |
| Total : | | \$856,439.36 |

Had the status deal come to fruition with another \$3,900,000.00 so that Darwin could pay off Patricia's house mortgage of over \$500,000.00, Patricia's second mortgage of over \$67,000.00 and give Patricia another \$500,000.00, both parties would have been in a good financial position. As it is, Darwin

McKay does not cash flow on a monthly basis. Both parties took a chance on a deal closing; the deal failed and Patricia needs to absorb some loss as well. Each party took a business risk and the gamble fell through. To require Darwin to pay Patricia from funds he never received, would result in a windfall to Patricia; and would bankrupt Darwin.

7. Breakdown of obligations:

1.7: Darwin shall pay Patricia \$800,000 in cash, by wire transfer or certified check, within five (5) days of payment by the Status Corporation, or its assigns, ("Status Real Estate Transaction")

* Darwin never received payment from Status Corporation nor any of its assigns. Status Corporation never assigned its rights or interest in Land America Title Company.

In addition, Darwin shall convey all his right, title and interest to Patricia in and to the two (2) lots to be conveyed by Status Corporation, or its assigns, to Darwin as part of the Status Corporation Real Estate Transaction.

*The two lots never came to fruition, as the platting process was stopped. There was an initial drawing of the proposed lots, but no platt was ever recorded. No lots exist.

1.8: Paragraph 1.8 does not require Darwin to do anything; it is simply a factual paragraph.

1.8.1: If the Status Real Estate Transaction fails to close on or before March 30, 2008, Darwin shall pay Patricia \$500,000 as soon as is able to do so without violating the lending terms and conditions of the bank holding the line of credit for the Turf Corporation.

*The Status Real Estate Transaction failed to close before March 30, 2008 and Darwin was not able to pay Patricia any amount of money without violating the loan covenants of the bank. Therefore, the analysis moves on to the next paragraph.

1.8.2: Provided further that if Status Corporation or it (SIC) assigns breaches the Purchase Sale Agreement and Darwin cannot pay \$500,000 by April 30, 2008, he shall list the Albrethsen property that was included in the Status Corporation Real Estate Transaction for sale and shall pay Patricia by cash, certified check or (SIC) wire transfer \$500,000.00 within five (5) days of receipt or closing on a sale.

*Darwin was not able to pay Patricia \$500,000 by April 30, 2008 and for the reasons listed above, was not able to list the Albrethsen property for sale. Therefore, the analysis moves on to the next paragraph.

1.8.3: Provided further, that if following a breach, Darwin is not able to pay Patricia \$500,000 by September 30, 2008, he shall

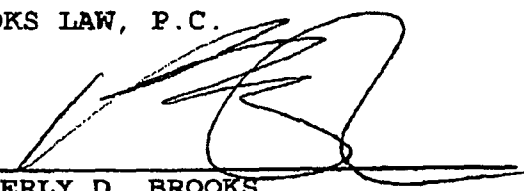
pay Patricia \$800,000 plus interest at the rate of 6% payable within five (5) days of any funds from the sale of either the Albrethsen property funds, the Home Farm property or both (provided that payment of funds from the sale of the Home Farm may only be made to the extent allowed by the bank holding the line of credit for the Turf Corporation) by cash, certified check, or by wire transfer.

*For reasons listed above, Darwin could not pay Patricia \$500,00.00 by September 30, 2008. The paragraph of 1.8.3 does not require Darwin to sell the Home Farm, only to pay out Patricia if it does sell, at some future unspecified date. For reasons listed above, Darwin cannot sell the Albrethsen property. Darwin cannot sell the Home Farm at this point in this economy as Sterling Bank holds the entire property for collateral on the lines of credit.

8. Conclusion: Neither party contemplated that Status would default and file bankruptcy. Each party took a chance that the \$3,250,000.00 would be paid out and Patricia would gain \$500,000.00 in cash and a home free and clear of all encumbrances. It is all Darwin can do at this time to keep up with the \$2500.00 monthly maintenance and mortgage payments on Patricia's home. As neither party contemplated a total breach by Status, there is no ending date for Patricia's maintenance nor is there a reasonable time line for payments on the mortgages for Patricia's home.

DATED this ____ day of July, 2009.

BROOKS LAW, P.C.

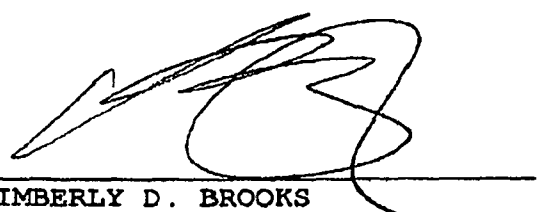

KIMBERLY D. BROOKS
Attorney for Defendant

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 1st day of July, 2009, I caused a true and correct copy of the foregoing document to be served by the method indicated below, and addressed to the following:

SCOTT HESS
Holland & Hart, LLP
101 S. Capitol Blvd.
Suite 1400
P.O. Box 2527
Boise, ID 83701
208-343-8869

____ Hand Delivery
____ U.S. Mail
____ Overnight Courier
X Facsimile Transmission


KIMBERLY D. BROOKS

Scott D. Hess, ISB #2897
HOLLAND & HART LLP
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Facsimile: (208) 343-8869
sdhess@hollandhart.com

Attorneys for Plaintiff Patricia McKay

**IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA
MAGISTRATE DIVISION**

★ ★ ★ ★ ★ ★ ★

| | | |
|-----------------|---|------------------------|
| PATRICIA MCKAY, |) | Case No. CV DR 0615200 |
| |) | |
| Plaintiff, |) | |
| |) | PRETRIAL BRIEF |
| vs. |) | |
| |) | |
| DARWIN MCKAY, |) | |
| |) | |
| Defendant. |) | |
| |) | |
| |) | |
| |) | |
| |) | |

COMES NOW Plaintiff, Patricia McKay, by and through her attorneys of record,
Holland & Hart LLP, and submits this Pretrial Brief.

PRETRIAL BRIEF - 1

SUMMARY OF FACTS

On November 28, 2007, the Court filed the Judgment and Decree of Divorce in the Divorce proceeding between Patricia McKay (hereinafter "Patricia") and Darwin McKay (hereinafter "Darwin") as Darwin. The Property Settlement Agreement that had been signed by both Patricia and Darwin was merged into the Judgment and Decree of Divorce. Darwin McKay has actual personal knowledge of the Judgment and Decree of Divorce and the terms and requirements of the property settlement incorporated and merged into the Judgment and Decree of Divorce.

Prior to the Divorce, Darwin or entities he controlled arranged for the purchase of real property designated as the Albrethsen property. At the same time that the purchase of the Albrethsen property was arranged by Darwin, he had also arranged to sell the Albrethsen property to Status Corporation. However, Darwin did not have the funds in order to consummate the transaction for the purchase of the Albrethsen property, and therefore required that Status Corporation pay to him \$3,000,000 that he could provide to the seller of the Albrethsen property. In exchange, Status Corporation demanded receipt of the Deed to the Albrethsen property. Status Corporation also bought adjoining land designated between the parties as the "Home Farm."

Pursuant to Paragraph 1.7 of the Property Settlement Agreement, Darwin agreed as follows:

"Darwin shall pay Patricia \$800,000 in cash, by wire transfer or certified check, within five (5) days of payment by the Status Corporation, or its assigns, ("Status Real Estate Transaction"). In addition, Darwin shall convey all his right, title and interest to Patricia in and to the two (2) lots to be conveyed by Status Corporation, or its assigns, to Darwin as part of the Status Corporation Real Estate Transaction. The parties acknowledge

that the Status Real Estate Transaction is scheduled to close on or before March 30, 2008. Darwin shall diligently pursue the closing and shall not do anything to interfere with or delay the closing.”

Pursuant to Paragraph 1.8 of the Property Settlement Agreement, Darwin agreed as follows:

“The parties acknowledge that if Status Corporation or its assigns breaches the Purchase and Sale Agreement, Darwin will have title to that portion of the land that had been referred to prior to the sale to Status Corporation as the “Home Farm”. In the event of breach, Darwin may also be able to foreclose a mortgage on that portion of the land referred to prior to the sale to Status Corporation as “Albrethsen’s Farm.”

On or about December 12, 2008, Patricia reviewed Court documents at the Ada County Courthouse and discovered for the first time that Darwin had been awarded a Judgment dated August 19, 2008, in a separate lawsuit to which she had no notice, for the balance owed him from Status Corporation since Status Corporation had defaulted on the purchase of the Albrethsen property.

Included within the Court documents referenced above, was a copy of the Mortgage Note which Darwin had secured from Status Corporation, dated November 28, 2006, in the amount of \$1,396,800. Darwin did not disclose this Mortgage Note during the course of the Divorce Proceedings.

The Mortgage Note was created at the request of Darwin since he was still owed \$1,396,800 upon the sale of the Albrethsen property to Status Corporation after Status Corporation had paid Darwin \$3,000,000 in order to allow him to purchase the Albrethsen property.

Status Corporation defaulted on their financing arrangements with Darwin regarding the purchase of the Albrethsen property and the Home Farm they were purchasing from Darwin and such default resulted in the Entry of Judgment.

Lawyers Title Insurance Corporation assured first position on the property to both Darwin (or entities which he fully controlled) and to another entity. Subsequent to the Default Judgment entered against Status Corporation, Darwin assigned that Judgment to Lawyers Title Insurance Company.

As a result of their Title Guarantee, Lawyers Title Insurance Corporation paid certain sums of money to Darwin McKay in exchange for the Assignment of Judgment. On or about December 12, 2008, Patricia was advised that a payment had been made by Lawyers Title to Darwin, but I was not told the amount.

The amount paid to Darwin McKay from Lawyers Title was approximately \$1,300,000 as that was the amount that remained owing to Darwin by Status Corporation as a result of the property transaction.

ARGUMENT

A. THE PROPERTY SETTLEMENT ENTERED INTO BY THE PARTIES WAS NOT A BUSINESS TRANSACTION BY WHICH THE PARTIES ALLOCATED RISK.

The language of the Divorce Decree and Settlement Agreement (hereinafter "Agreement") clearly demonstrates that the parties intended the terms of this Agreement to be final, binding and not subject to modification. The Agreement states: "This Agreement is binding and enforceable upon the terms stated herein, notwithstanding the fact that additional documentation is required to carry out the terms of this Agreement." Agreement, p. 1. Additionally, the Agreement provides for a mutual release of all claims arising out of the divorce

which also demonstrates the complete and binding nature of the Agreement. That provision reads:

11. Mutual Release of Claims. For good and valuable consideration passing between the Parties, the receipt and sufficiency of which is acknowledged by each Party, the Parties each for themselves and for their heirs, representatives, agents, employees, successors, executors, administrators, subrogees, and assigns, release the other Party and his or her heirs, representatives, agents, employees, successors, executors, administrators, subrogees, and assigns, and each Party shall release, indemnify and hold harmless the other Party from any and all claims, liabilities, or obligations arising out of or in any way connected with their marriage, including but not limited to all claims set forth in or comprehended by that certain litigation identified in the caption above. The term claims shall include any and all claims and counterclaims, whether known or unknown, a Party may have against the other Party as a result of their marriage and the litigation identified above.

Agreement, p. 12.

The intent of the parties is clear from the above cited sections that this Agreement be binding and not subject to further modification or adjudication. Both Patricia and Darwin intended that this Agreement be a final, binding resolution to the marriage that that the property was to be disposed of pursuant to this Agreement.

Additionally, it is established law in Idaho that divisions of property in a divorce decree, if not appealed by the parties, "are final, res judicata, and no jurisdiction exists to modify the property provisions...." *Fix v. Fix*, 125 Idaho 372, 376, 870 P.2d 1331, 1335 (Idaho App. 1993) (quoting *Ross v. Ross*, 117 Idaho 548, 552, 789 P.2d 1139, 1143 (Idaho 1990)); see *McBride v. McBride*, 112 Idaho 959, 961, 739 P.2d 258, 269 (1987); *Lowe v. Lowe*, 92 Idaho 208, 210, 440 P.2d 141, 143 (1968). Darwin did not appeal the property division in the Agreement entered into by the parties and ordered by the Court.

It is anticipated that Darwin will argue that he is not financially able to complete performance under the Agreement or that the parties assumed risk regarding the sale of the Status property and its affect on the distribution of property. Any such argument by Darwin is an attempt to reopen the property settlement provided in the Agreement and therefore in contradiction to the well established law in Idaho regarding the finality of these decisions and the clear intentions of the parties evidence in the Agreement. The Court is precluded from reopening the property division of the McKay divorce and Darwin is bound by the terms of the decree he entered into at the time of divorce. Any suggestion by Darwin that by entering into the Agreement that Patricia was assuming the risk of non-payment is absurd and patently false. An agreement regarding dissolution of marriage and the division of marital assets is not a business transaction whereby the parties anticipate a level of risk and that risk is allocated among the parties by that contract.

Patricia did not approach the settlement of property among the divorcing parties as a business transaction such as investing in a business or buying stock in a company. Instead, she read and understood the Agreement as the plain and unambiguous terms suggested, as a resolution of issues pertaining to property owned by the marital community and providing for a division of the existing property and property rights. No risk taking was anticipated in distributing assets and property interests already possessed by the parties and any attempt to characterize this contract as "on par" with a business transaction only demonstrates the caddy and unsympathetic attitude of Darwin that has precipitated the need for this action.

B. ANY SUGGESTION THAT THE PARTIES BOTH BORE THE RISK OF THE PROPERTY SETTLEMENT AGREEMENT IS ABSURD BECAUSE DARWIN MCKAY TOOK ABSOLUTELY NO RISK.

As stated previously, it is anticipated that Darwin will attempt to persuade the Court that both parties took the risk that the Albrethsen Property transaction with Status Corporation would fail or that the real estate market would affect the allocation of property between the parties. In addition to the fact that this assertion attempts to go beyond the four corners of the Agreement and it is further unsupported by the fact that Darwin in fact bore absolutely no risk pursuant to the Agreement. Not only did Darwin bear no risk in this transaction, he used all of the money for his personal gain, business gain and now alleges that there is nothing left to fulfill his obligations under the Agreement to Patricia. If the contract was indeed intended for both parties to bear risk it would have been drafted differently.

Additionally, all of the interest and obligations arising out of the marriage would have been left in both parties names and both parties should have been allowed to participate in the managing of those interest so that each would be responsible for the outcome of those "risks." No such actions were taken in the Agreement. Instead, Patricia quitclaimed all of her interest in the real property and businesses owned by and/or managed during the marriage to Darwin. In exchange for the interest and the relinquishment thereof to Darwin, Patricia was to be paid certain sums of money pursuant to the process outlined in the Agreement. Patricia in no way was able to control how the property was subsequently managed, how finances stemming from the interest or the business entities were spent. Instead, Patricia waited for the payment due to her pursuant to the Agreement while Darwin took it upon himself to mismanage the business affairs and his personal affairs so that he now claims to be unable to uphold his obligations under the Agreement.

In essence, Darwin attempts to persuade this Court that he should have both the benefit of gaining the interest to all real property and business entities that were part of the marital community or managed by the marital community without having any concurrent obligation to fulfill the promises he made in exchange for those benefits. Such distribution is not what the Agreement contemplated nor is it the "risk" that Patricia willingly or knowingly took when entering into that Agreement.

C. WHILE THE PROCEEDS FROM THE SALE OF THE ALBRETHSEN PROPERTY MAY BE DARWIN MCKAY'S SEPARATE PROPERTY, IT DOES NOT RELIEVE THE OBLIGATION TO PAY DESIGNATED FUNDS TO PATRICIA MCKAY.

The Agreement does not create separate and distinct categories whereby characterizing property as separate property precludes payment of obligations from those funds. The divorce decree obligates Darwin to pay Patricia a specified sum of money from the proceeds of the sale of the Albrethsen property. The Agreement then states that proceeds from the sale of the Albrethsen property is Darwin's separate property. Patricia anticipates that Darwin will assert that he is permitted to keep the funds from the sale of the Albrethsen Property as his separate property and that those funds do not need to be used to fulfill his monetary obligations to the Patricia. While it may be true that any proceeds from the sale of the Albrethsen Property is to be characterized as Darwin's separate property, that characterization does not relieve him of his monetary obligations. The Agreement does not state that the monetary obligation to Patricia must be paid out of community property because presumably there is no community property once the distribution of assets was approved by the Court. This division of property does not preclude the use of those funds to fulfill the concurrent promises to pay sums to Patricia. Instead the provision contemplates that the proceeds from the sale become Darwin's separate property

and from that separate property he is to pay the obligations to Patricia. Therefore, any other reading of the Agreement and attempt to use characterizations of separate property as precluding the use of those funds to fulfill other obligations in the Agreement would render those obligations ineffective and unnecessary.

D. DARWIN TOOK ACTION AFFECTING THE PROPERTY AVAILABLE TO COMPLETE THE TERMS OF THE PROPERTY SETTLEMENT DURING THE PENDENCY OF THE DIVORCE AND SUBSEQUENT TO THE DIVORCE.

It is further anticipated that Darwin will plead poverty to the Court. In essence Darwin wants the Court to look only at his current economic situation, and the financial status of his business entities and the condition of the current real estate market to make a determination as to whether the Motion to Liquidate the Agreement should be granted. The current economic state of Darwin and his business entities arise from actions that Darwin took during the pendency of the divorce and subsequent to the divorce for which Patricia has no responsibility. Darwin's action during the pendency of the divorce and subsequent to the divorce are the events that precipitate his now alleged inability to pay. The actions that Darwin took include, but are not limited to, taking out an additional \$780,000.00 line of credit with Great Basin Bank; taking out a \$100,000.00 line of credit with Zion Bank; numerous investments in Granite Transformations; and a \$240,000.00 personal loan with Sterling Bank.

It is incredible that Darwin would assert poverty and that the parties risk in the Agreement when Darwin has, by his own actions, increased his person and business debts with no input from Patricia. Darwin now wishes to place the risk of his own lavish spending and poor business decisions on Patricia when those actions were in no way allowed, recommended or agreed to by her. The Court should not allow Darwin to cloud the issues before the Court and

shift the risk of Darwin's own conduct onto Patricia. Again, Darwin wants all of the benefits of the Agreement, but now wants the Court to bail him out of his obligations to Patricia under that same Agreement. Patricia in no way bears the responsibility or risk for Darwin's conduct.

E. THE LEGAL CONCEPT OF IMPOSSIBILITY DOES NOT APPLY TO THE FACTS OF THIS CASE.

Additionally, Patricia believes that Darwin will assert that it was and currently is impossible for him to fulfill his obligation to Patricia under the Agreement. Impossibility is proven by showing that a contingency occurred, the nonoccurrence of which was a basic assumption of the Agreement, and that the contingency made performance of the contract impossible. *Kessler v. Tortoise Dev., Inc.*, 130 Idaho 105, 108, 937 P.2d 417, 420 (1997); *Haessly v. Safeco Title Ins. Co.*, 121 Idaho 463, 465, 825 P.2d 1119, 1121 (1992). It is not sufficient to show that the performance simply became more difficult or more expensive than anticipated-it must have been made impossible. *Id.*

The fulfillment of Darwin's obligation to Patricia was not and is not impossible. First, at the time of finalization of the Agreement, Darwin had the financial ability to make the obligated payment to Patricia, but chose not to. Second, the Agreement provided for numerous avenues of payment by Darwin, but Darwin chose not to fulfill his obligation to Patricia. Third, Patricia contends that one of the avenues provided for in the Agreement expressly occurred, the exchange of Darwin's interest in the Albrethsen Property for approximately \$1,300,000.00 out of which the obligation to pay Patricia should have been fulfilled. The instances where Darwin should but chose not to make payment to Patricia demonstrate that performance of the contract between the parties was not impossible. Additionally, the contention that Darwin is not financially able to fulfill his obligation at this time is not relevant and does not support the assertion of

impossibility. Even assuming *arguendo* that Darwin does not have the financial ability to make full payment to Patricia, he had the ability when he received the \$1.3 million payment. Moreover, upon the entry of judgment against Darwin, it will be up to Patricia to collect on that Judgment.

CONCLUSION

In summary, Defendant cannot attempt to now reopen the Agreement to change the terms and meaning of the Agreement. Patricia has fulfilled her obligations under the Agreement by signing all of her interest in the marital community to Darwin as prescribed, but Darwin has yet to perform his obligations under the Agreement. In no way did Patricia agree to bear the risk regarding any business transactions occurring after the marriage. Darwin had the fund and ability to pay Patricia but chose to violate the terms of the agreement. He is still obligated under the Agreement to pay Patricia the remaining sums owed and cannot demonstrate any reason why he can or should not do so.

The Court is thus requested to simply confirm and enforce the Decree and Judgment previously entered.

DATED this 2nd day of July 2009.

HOLLAND & HART LLP

By Kate RM for
Scott D. Hess, of the firm
Attorneys for Patricia Patricia McKay

CERTIFICATE OF SERVICE

I hereby certify that on this 2nd day of July 2009, I caused to be served a true and correct copy of the foregoing by the method indicated below, and addressed to the following:

Kimberly Brooks
Brooks Law, P.C.
23 9th Avenue North
Nampa, ID 83687

| | |
|-------------------------------------|----------------|
| <input checked="" type="checkbox"/> | U.S. Mail |
| <input type="checkbox"/> | Hand Delivered |
| <input type="checkbox"/> | Overnight Mail |
| <input checked="" type="checkbox"/> | Telecopy (Fax) |


for HOLLAND & HART LLP

4555438_1.DOC

NO. _____ FILED _____
A.M. _____ P.M. *210*

JAN 24 2011

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Attorneys for Plaintiff

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE

STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

| | | |
|---------------------------------------|---|-----------------------------|
| Patricia McKay |) | |
| |) | Case No. CV OC 0922659 |
| Plaintiff, |) | |
| |) | AFFIDAVIT OF PATRICIA MCKAY |
| v. |) | |
| |) | |
| Thomas G. Walker and Cosho Humphrey, |) | |
| LLP, a limited liability partnership, |) | |
| |) | |
| Defendants. |) | |
| _____ |) | |

STATE OF IDAHO)
)ss.
County of Ada)

I am the plaintiff in the herein action and make this affidavit upon my own personal knowledge and am competent to testify to the matters contained herein.

As I testified in my deposition in this matter, I signed the Property Settlement Agreement

AFFIDAVIT OF PATRICIA MCKAY - 1

ORIGINAL

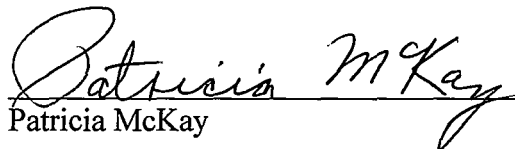
("Agreement"; Exhibit 1 to the Ellis affidavit) in the belief that Darwin McKay's obligations to me in the Agreement would be secured by the recordation of the decree and Agreement. I held this belief at the time of settlement based upon the statement of my attorney Thomas Walker that the recorded judgment of divorce would be a lien on the mortgage held by Mr. McKay on the Status Corporation obligation of approximately \$1.4 million.

Mr. Walker represented to me on several occasions, both before and after execution of the Agreement, that my position in the Agreement was secured, including in a letter to me dated December 15, 2008 (Exhibit 2 to the affidavit of Allen B. Ellis), to wit:

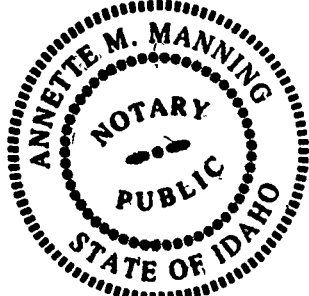
In any event, pursuant to Idaho Code §10-1011, your judgment was recorded before any of the assignments that you provided me, including the one to Lawyers Title. Thus, the mortgage that Lawyers Title accepted from Darwin should be subject to the lien of your judgment.

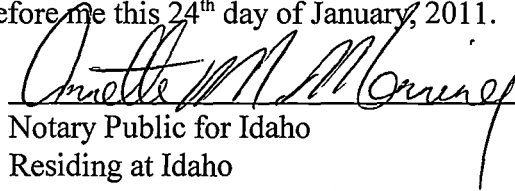
Exhibit 2, p. 2.

Had I been made aware that the Agreement would not give me a secured status or that recordation of the Agreement would not constitute a lien on the mortgage, I would not have executed the Agreement. I would either have continued to demand that Mr. McKay give me a secured status in the Agreement. Failing that security, I would have proceeded to trial.


Patricia McKay

SUBSCRIBED AND SWORN To before me this 24th day of January, 2011.




Notary Public for Idaho
Residing at Idaho
Commission Expires: 1/5/12

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 24th day of January, 2011, I caused to be served a true and correct copy of the foregoing by the method indicated below, and addressed to the following:

Robert A. Anderson
Yvonne A. Dunbar
ANDERSON, JULIAN & HULL, LLP
250 South Fifth Street, Suite 700
P.O. Box 7426
Boise, Idaho 83707

____ U.S. Mail
____ Hand Delivery
____ Overnight Mail
 X Facsimile at
344-5510



Allen B. Ellis

ORIGINALNO. 9:15 FILED PM

JAN 28 2011

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CHRISTOPHER D. RICH, Clerk
 By KATHY BIEHL
 Deputy

Attorneys for Defendants

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT
 OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

PATRICIA MCKAY,

Plaintiff,

vs.

THOMAS G. WALKER and COSHO
 HUMPHREY, LLP, a limited liability
 partnership,

Defendants.

Case No. CV OC 0922659

**REPLY IN SUPPORT OF
 DEFENDANTS' MOTION FOR
 SUMMARY JUDGMENT**

COMES NOW the above-named Defendants, by and through their attorney of record, Robert A. Anderson, of the firm of Anderson, Julian & Hull LLP, and hereby submits this Reply in Support of its Motion for Summary Judgment ("Motion"):

I. INTRODUCTION

In her opposition, the Plaintiff attempts to conceal her lack of legal and factual support by asserting an attorney malpractice claim which is not actionable and which is premised on inadmissible and irrelevant facts. As is explained in further detail below, despite the Plaintiff's cloaking efforts, her asserted attorney malpractice claim fails as a matter of law. First, in support of her claim, the Plaintiff ignores the fact that she legally settled her divorce action before the Defendants allegedly committed any malpractice. As such, the Defendants could not have

caused the damages alleged by the Plaintiff. Likewise, because the Plaintiff also waived her right to try her divorce case before the Defendants' alleged malpractice, the Plaintiff cannot establish that she would have had some chance of success but for the Defendants' alleged negligence. For these reasons as well as those set forth below, the Defendants request that the Court grant their Motion in its entirety.

II. ARGUMENT

A. The Plaintiff has Failed to Present Admissible and Relevant Evidence to Contradict the Defendants' Undisputed Statement of Facts.

At the outset, it is noteworthy to mention that the Plaintiff does not dispute the Defendants' Undisputed Statement of Facts Paragraphs 1-12, 13(1) and (3), 14-24, 26. The Plaintiff also does not dispute any of the paragraphs contained in the Affidavit of Stanley Welsh in Support of Defendants' Motion for Summary Judgment ("Welsh Aff.") or paragraphs 1-22, 24-26 of the Affidavit of Thomas Walker in Support of Defendants' Motion for Summary Judgment ("Walker Aff.").

In the first several pages of the Plaintiff's opposition, she alleges that a few of the statements contained in the Defendants' Undisputed Statement of Facts are inaccurate and she attempts to provide evidence of the same. However, as is explained below, the Plaintiff failed to provide sufficient admissible and relevant evidence to create a genuine issue of material fact regarding any of the Defendants' Undisputed Statement of Facts.

First, on pages 1-3 of her opposition, the Plaintiff claims the Defendants falsely asserted that, at the time she executed the Handwritten Agreement, she was aware she was not receiving an interest in the Albrethsen property. The Plaintiff, however, fails to support this claim with any admissible or relevant evidence. The Plaintiff attempts to distract the Court from her lack of evidence by citing irrelevant and inadmissible evidence. First, the Plaintiff sets forth an argument regarding the content of the PSA¹ and provides information regarding when she and

¹ It is noteworthy to mention that the argument made by the Plaintiff regarding the content of the PSA is directly contrary to the plain meaning of the terms contained therein. A review of PSA paragraphs 1.7 and 1.8 establishes that the PSA did not provide that any payment

the Defendants allegedly learned about Mr. McKay's mortgage. Such information is irrelevant to the Defendants' undisputed statement of fact because the PSA was created after the Plaintiff had executed the Handwritten Agreement and because she allegedly learned about the mortgage after she executed the PSA. See Affidavit of Counsel in Support of Motion for Summary Judgment ("Counsel Aff."), Ex. A at Ex. 11 and Ex. B. Accordingly, neither alleged fact addresses the Plaintiff's knowledge prior to her entering the Handwritten Agreement. Additionally, the Plaintiff's citation to Exhibit 4 to the Second Affidavit of Allen B. Ellis is futile. As explained in the Defendants' Motion to Strike, Exhibit 4 is inadmissible hearsay. Even if it were admissible, it pertains to the mortgage which was not addressed in the Handwritten Agreement and, is therefore, irrelevant to the Plaintiff's knowledge prior to executing the same.

Next, on pages 3-4 of her opposition, the Plaintiff claims that the Defendants falsely asserted that the Plaintiff was aware, prior to executing the Handwritten Agreement, that Mr. McKay was unwilling to provide security in any property due to encumbrances upon the same. The Plaintiff again fails to support her assertion with any admissible or relevant evidence. The Plaintiff instead cites to Exhibits 2 and 4 of the Second Affidavit of Allen B. Ellis. Exhibit 2 lacks relevance to the Defendants' undisputed statement of fact as it is a letter dated December 15, 2008, over a year after the Plaintiff's October 20, 2007 execution of the Handwritten Agreement and her November 20, 2007 execution of the PSA. Exhibit 4 is inadmissible as it is unsubstantiated, lacks foundation, and is replete with hearsay. For these reasons, the Plaintiff failed to support her assertion that the Defendants' undisputed factual statement was false. More

by Mr. McKay must be paid from any payments he received under the mortgage note; instead, his receipt of payments under the mortgage note and/or from the proceeds of his sale of the Albrethsen property simply triggered his duty to make certain payments to the Plaintiff. Under the PSA, Mr. McKay could utilize any monies available to him to fulfill his payment obligations to the Plaintiff. Additionally, contrary to the Plaintiff's argument on page 2, a plain reading of the PSA establishes that it did not assign her any "portion of the Status sale proceeds".

It is also worth mentioning that the PSA attached as Exhibit 1 of the Second Affidavit of Allen B. Allen is identical to the PSA attached as Exhibit B of the Counsel Affidated and as cited in the Defendants' opening brief.

importantly, Plaintiff's assertion also fails because it is contrary to her deposition testimony wherein she admits that, before executing the Handwritten Agreement, she understood "one of the reasons that Mr. McKay was not willing to grant [her] any security in any property was that it was encumbered by bank loans and other debt". Counsel Aff., Ex. A at 116:22-117:4. Notably, a plaintiff cannot create a genuine issue of material fact by setting forth testimony which directly contradicts her earlier sworn deposition testimony. *See e.g. Tolmie Farms v. Stauffer Chem. Co.*, 124 Idaho 607, 610 (1993).

On opposition page 4, the Plaintiff also asserts that the Defendants falsely stated that they never informed her that recording a judgment would act as a lien against Mr. McKay's mortgage or that the mortgage constituted real property. However, the Plaintiff does not support this contention with any admissible or relevant evidence. Instead, the Plaintiff cites Exhibit 2 of the Affidavit of Allen B. Ellis, which is the irrelevant December 15, 2008 letter of Mr. Walker. The Plaintiff's assertion does not create a genuine issue of material fact because it is contrary to her deposition testimony wherein she admitted that, while the Defendants told her that a judgment would act as a lien against real property, they did not tell her that a mortgage was real property. *See id.*, Ex. A at 133:9-134:2.

Finally, on page 5 of her opposition, the Plaintiff argues that the Defendants erroneously informed her that judgment against Mr. McKay became a lien upon Mr. McKay's real and personal property. In support of this assertion the Plaintiff provides an irrelevant document which was later corrected by the Defendants. The document referenced by the Plaintiff (Exhibit 2 to the Second Affidavit of Allen B. Ellis) is a December 15, 2008 letter from Tom Walker which was drafted more than a year after the Plaintiff's November 20, 2007 PSA execution. While Mr. Walker did state in that letter that the judgment would become a lien on Mr. McKay's real and personal property, such a statement was inadvertent and was promptly corrected via a December 15, 2008 email to Plaintiff. *See Walker Aff. Ex. A*, Bates label McKay310. In the December 15, 2008 email, Mr. Walker wrote:

My letter contains a technical error. The following sentence is incorrect: "By virtue of Idaho Code § 10-10 11, your judgment became a lien upon Darwin's real and personal property." It should have read: "By virtue of Idaho Code § 10-1011, your judgment became a lien upon Darwin's real property." Although the judgment does not create a lien on his personal property, as noted in my letter, Idaho Code §11-101 requires the sheriff to first execute on personal property before he executes on real property.

See id. Because Exhibit 2 is irrelevant and was promptly corrected, the Plaintiff has failed to establish a genuine issue of material fact or to establish that the Defendants committed malpractice by advising her that a judgment lien applies to personal property.

B. The Plaintiff's Attorney Malpractice Claim Fails as a Matter of Law.

In her opposition, the Plaintiff narrows her attorney malpractice claim to one issue²: whether the Defendants breached a duty owed to her by allegedly improperly informing her that she had security for the payments due to her under the PSA. In support of her claim, the Plaintiff asserts that (1) the Defendants informed her that a judgment lien applied to real property and a mortgage constituted real property and (2) she would not have executed the PSA but for the Defendants' breach. As explained in further detail below, this claim fails as a matter of law.

1. The Plaintiff Failed to Prove the "Some Chance of Success" Factor of an Attorney Malpractice Claim.

As set forth in the Defendants' opening brief, to prevail on an attorney malpractice claim, the Plaintiff must establish that she would have had "some chance of success" in the underlying action but for the Defendants' actions. *See e.g. Lamb v. Manweiler*, 129 Idaho 269, 272, 923 P.2d 976, 979 (1996). Interestingly, in her opposition brief, the Plaintiff did not argue that she would have had some chance of success but for the Defendants' alleged failure to provide accurate legal advice regarding her secured status. In fact, the Plaintiff's opposition brief does not even mention this necessary element of an attorney malpractice claim. As such, the Plaintiff has effectively conceded the non-existence of this element.

In her opposition, the Plaintiff only stated that, had she known her interests in the PSA were not secured, she would have proceeded to trial. In doing so, the Plaintiff failed to create a

² By narrowing her attorney malpractice claim and by failing to address the issues set forth in the Argument Section of the Defendants' Memorandum in Support of Motion for Summary Judgment, the Plaintiff has abandoned those issues/claims.

genuine issue of material fact. It is axiomatic that the Plaintiff failed to present any evidence that going to trial would have put her in a better position than the PSA had. There simply is no evidence to support a finding that a trial court would have awarded her some security for any assets it awarded to her. Notably, any recorded court award would have received the same protection as the recorded PSA under I.C. § 10-1110 (the judgment lien statutory scheme).

Next, the Plaintiff's attorney malpractice claim ignores the fact that, before the Defendants' alleged malpractice occurred, she had already agreed to settlement terms which did not provide her with security and she was precluded from trying her divorce action. The undisputed evidence establishes that the Plaintiff voluntarily settled and, thereby, waived her right to try her divorce action on October 20, 2007, the date when she executed the Handwritten Agreement. *See* Counsel Aff., Ex. A at Ex. 11. The Handwritten Agreement was a "full satisfaction of property settlement issues" between the Plaintiff and Mr. McKay and it did not include any security. *See id.* Per the Handwritten Agreement, the parties agreed to enter into a comprehensive PSA and this comprehensive agreement was to incorporate the settlement terms contained in the Handwritten Agreement. *See id.* If the parties could not agree upon the terms of the PSA, their only recourse was "binding arbitration" before the mediator. *See id.* The parties had no right to pursue trial. *See id.* As the record contains no evidence to support a finding that the Plaintiff would have received security if she had pursued arbitration in lieu of executing the PSA, the Plaintiff cannot establish that she would have had "some chance of success" if she would have refused to execute the PSA.

For these reasons, the Plaintiff has failed to establish the required "some chance of success" prong or any genuine issue of material fact regarding the same. Accordingly, the Plaintiff's attorney malpractice claim fails as a matter of law. *See e.g. Lamb v. Manweiler*, 129 Idaho 269, 272, 923 P.2d 976, 979 (1996).

2. The Undisputed Evidence Establishes that the Defendants Did not Breach Any Duty Owed to the Plaintiff.

In her Opposition, the Plaintiff asserts that the Defendants allegedly informed her that she had a secured interest in the PSA because the recorded PSA created a lien against the mortgage held by Mr. McKay. The Plaintiff has failed to present any relevant evidence to support this claim.

First, the Plaintiff improperly offered as evidence Exhibit 2 of the Second Affidavit of Allen B. Ellis. As previously explained, this letter is irrelevant because it was drafted after the Plaintiff entered into the PSA. As such, this letter should be disregarded by the Court.

Next, the Plaintiff offers a partial quote from her deposition which is taken out of context. The quote offered by the Plaintiff suggests that Mr. Walker “expressed” to her that a judgment lien attached to the mortgage because a mortgage is real property. However, contrary to such an assertion, the Plaintiff specifically admitted in her deposition that Mr. Walker did not inform her that Mr. Darwin’s mortgage note was real property; instead, she simply assumed that the mortgage was real property.³ See Counsel Aff., Ex. A at 133:9-134:2.

As set forth in the Defendants’ opening brief, the uncontested evidence establishes that the Defendants only informed the Plaintiff that a recorded judgment creates a lien on real property and that the Defendants did not inform the Plaintiff that a mortgage note was real property. Accordingly, there exists no genuine issue of material fact regarding whether the Defendants violated any legal duty owed to the Plaintiff and the Plaintiff’s claim fails as a matter of law.

3. The Undisputed Evidence Establishes that the Defendants’ Actions Did not Cause the Plaintiff to Settle Without Security.

The undisputed evidence proves that, even if the Defendants had informed the Plaintiff that the PSA provided her with security (which they did not), such an alleged breach did not cause the Plaintiff to settle and forgo trial.

³ Importantly, in her opposition, the Plaintiff does not dispute that she never informed the Defendants that she believed a mortgage constituted real property.

The Plaintiff settled her divorce action without security and waived her right to trial before the Defendants allegedly provided her with incorrect legal advice. *See* Counsel Aff., Ex. A at Ex. 11. The Plaintiff settled her action at the October 20, 2007 mediation when she executed the Handwritten Agreement. *See id.* Per the Plaintiff's allegations, the allegedly incorrect legal advice was provided during the PSA negotiations which began no earlier than October 23, 2007 when the Defendants emailed the Plaintiff and Mr. McKay's counsel the initial draft of the PSA. *See* Counsel Aff. Ex. A at Ex. 14.

In her opposition, the Plaintiff does not dispute that the mediator informed her that Mr. McKay refused to provide her with collateral or security. The Plaintiff also does not dispute that the Handwritten Agreement did not provide her with any collateral or security. Furthermore, the Plaintiff does not dispute that she voluntarily entered into the Handwritten Agreement.

Finally, it is indisputable that, by executing the Handwritten Agreement on October 20, 2007, the Plaintiff relinquished her right to proceed with trial. *See id.*, Ex. A at Ex. 11. If the Plaintiff disagreed with the terms of the PSA, she was required to submit the issue to binding arbitration before the mediator. *See id.*

For these reasons, there exists no genuine issue of material fact and the indisputable evidence establishes that the Defendants' alleged breach was not the proximate cause of the Plaintiffs' claimed injuries.

4. Mr. McKay's Actions Were a Subsequent and Intervening Cause.

Mr. McKay's intentional failure to pay the Plaintiff sums due under the PSA was a subsequent and intervening cause. Contrary to the Plaintiff's assertion, Mr. McKay's intentional default was not a foreseeable result of the Plaintiff entering into the PSA and foregoing trial.

Likewise, in contrast to the Plaintiff's argument, Mr. McKay's intentional default "brings about a harm different in kind from that which would otherwise have resulted from" the Defendants' alleged incorrect legal advice. As was correctly explained by the Defendants, the recorded PSA provided the Plaintiff with a judgment lien which the Plaintiff could have executed. The anticipated harm under I.C. § 10-1110 (the judgment lien statute) is that a

plaintiff will not be able to execute a judgment; not that a defendant will intentionally default under a judgment.

For these reasons, the indisputable evidence establishes that Mr. McKay's intentional default was a superseding and intervening cause of the Plaintiff's alleged damages.

5. The Plaintiff Did Not Suffer any Recoverable Damages.

In her Opposition, the Plaintiff does not refute that she voluntarily waived her right to collect monies due under the PSA or attorney fees resulting from her prosecution of her motion for contempt when she entered into the second settlement agreement.

Instead, the Plaintiff asserts that she has suffered "real financial loss as an unsecured creditor in the [PSA]" because Mr. McKay has allegedly engaged in "self-inflicted poverty". The Plaintiff's contentions fail to support an argument for damages. First, the Plaintiff has failed to produce any admissible evidence to support her claim of "self-inflicted poverty" on the part Mr. McKay. As explained in the Defendants' Motion to Strike, the documents cited by the Plaintiff are inadmissible under Rule 56(e). These documents (Exhibits 4 and 5 to the Second Affidavit of Allen B. Ellis) are unsubstantiated legal briefs which constitute inadmissible hearsay.

Additionally, the Plaintiff's assertions fail because the Plaintiff has not provided any evidence to establish that Mr. McKay was unable to pay her the sums due under the PSA or that he has failed to pay the sums due under the second settlement agreement. Importantly, the Plaintiff does not even assert that Mr. McKay has failed to make payments due to her under the second settlement agreement. The Plaintiff's damage assertions further fail because the Plaintiff failed to identify any aspects of her "real financial loss". Accordingly, the Plaintiff's contention that she has suffered "real financial loss" is nothing more than speculation. As the Plaintiff did not present anything more than mere speculation, she failed to create a genuine issue of material fact regarding her lack of recoverable damages. *See e.g. John W. Brown Props. v. Blaine County*, 138 Idaho 171, 174 (2002).

III. CONCLUSION

For the aforementioned reasons, the Defendants respectfully request that this Court grant their Motion in its entirety and enter summary judgment in favor of the Defendants.

DATED this 21st day of January, 2011.

ANDERSON, JULIAN & HULL LLP

By: 

Robert A. Anderson

Yvonne A. Dunbar, Of the Firm

Attorneys for Defendants

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this 21st day of January, 2011, I served a true and correct copy of the foregoing by delivering the same to each of the following attorneys of record, by the method indicated below, addressed as follows:

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Attorneys for Plaintiff


Robert A. Anderson

Yvonne A. Dunbar

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A.M. 9:15 P.M.

JAN 28 2011

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CHRISTOPHER D. RICH, Clerk
 By KATHY E. EHL
 Deputy

Attorneys for Defendants

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT
 OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

PATRICIA MCKAY,

Plaintiff,

vs.

THOMAS G. WALKER and COSHO
 HUMPHREY, LLP, a limited liability
 partnership,

Defendants.

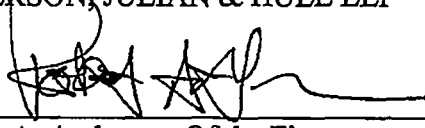
Case No. CV OC 0922659

MOTION TO STRIKE

COMES NOW the above-named Defendants, by and through their counsel of record, Anderson, Julian & Hull LLP, and hereby moves this Court for an order granting this Motion to Strike portions of the Second Affidavit of Allen B. Ellis and the Affidavit of Bryan D. Smith filed by Plaintiff in response to Defendants' Motion for Summary Judgment. This motion is supported by the record in this action and the memorandum filed concurrently herewith.

DATED this 28 day of January, 2011.

ANDERSON, JULIAN & HULL LLP

By: 
 Robert A. Anderson, Of the Firm
 Attorneys for Defendants

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this 27th day of January, 2011, I served a true and correct copy of the foregoing by delivering the same to each of the following attorneys of record, by the method indicated below, addressed as follows:

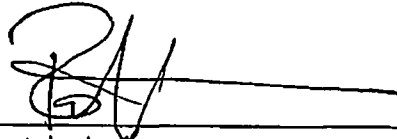
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NO. 945 FILED
 A.M. P.M.

JAN 28 2011

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 Deputy

Attorneys for Defendants

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT
 OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

PATRICIA MCKAY,

Plaintiff,

vs.

THOMAS G. WALKER and COSHO
 HUMPHREY, LLP, a limited liability
 partnership,

Defendants.

Case No. CV OC 0922659

**MEMORANDUM IN SUPPORT OF
 DEFENDANTS' MOTION TO
 STRIKE**

COMES NOW the above-named Defendants, by and through their counsel of record, Anderson, Julian & Hull LLP, and hereby submits this memorandum in support of their Motion to Strike ("Motion") as follows:

I. BACKGROUND

On January 6, 2011, the Defendants filed a motion for summary judgment. The Plaintiff responded to this motion for summary judgment on January 20 and 24, 2010. In addition to providing her responsive brief, the Plaintiff also filed, inter alia, the Second Affidavit of Allen B. Ellis ("Ellis Affidavit") and the Affidavit of Bryan D. Smith ("Smith Affidavit"). As is explained in further detail below, the Ellis Affidavit and the Smith Affidavit contain inadmissible testimony, including testimony outside of the particular affiant's personal knowledge, hearsay,

testimony lacking foundation, and speculative testimony. Because these Affidavits contain such inadmissible testimony, the Defendants respectfully request that the Court strike and disregard the inadmissible portions and any reference to such portions when ruling on the Defendants' summary judgment motion.

II. ARGUMENT

A. Standard of Review

Rule 56(e), Idaho Rules of Civil Procedure addresses the proper form of affidavits which are submitted in opposition to a summary judgment motion. Rule 56(e) provides, in pertinent part:

Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein.

(emphasis added). The admissibility of the evidence contained in an affidavit is a threshold question to be answered by the Court before it determines whether the evidence presented by the party opposing summary judgment is sufficient to create a genuine issue for trial. *Carnell v. Barker Mgmt., Inc.* 137 Idaho 322, 327 (2002).

When applying Rule 56(e), the Idaho Supreme Court has consistently held that affidavits which contain inadmissible evidence cannot be considered when ruling on a motion for summary judgment. See e.g. *Mallonee v. The Idaho Dept. of Correction*, 139 Idaho 615, 623 (2004); *Sammis v. Magnetek, Inc.*, 130 Idaho 342, 351-51, (1997); *Matthews v. New York Life Ins. Co.*, 92 Idaho 372, 376 (1968). The rule and the opinions of the Supreme Court have required evidence offered by affidavit be limited to evidence which complies with the rules of evidence and be admissible as if the declarant was present in court. See *id.* For that reason, affidavits attaching exhibits which fail to establish the declarant's personal knowledge of the events described in the attachment are not admissible and are properly stricken from the record in

summary judgment proceedings. *See* I.R.E. 602; *Cates v. Albertson's Inc.*, 126 Idaho 1030, 1033-34, 895 P2d. 223, 226-27 (1995). Likewise, affidavits containing speculative testimony are not admissible. *See e.g. State v. Turner*, 136 Idaho 629, 633, 38 P.3d 1285, 1289 (Ct. App. 2001). Furthermore, affidavits which simply contain inadmissible hearsay are properly stricken. *See e.g. I.R.E. 802.*

In Idaho, hearsay evidence is any "statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." *I.R.E. 801(c)*. Hearsay evidence is generally excluded as untrustworthy. *See e.g. I.R.E. 802.*

To the extent the aforementioned Affidavits suffer from these types of inadmissible testimony, the Court should strike the same.

B. The Inadmissible Portions of the Second Affidavit of Allen B. Ellis Should Be Stricken from the Record.

Portions of Paragraph 2 of the Ellis Affidavit and the exhibits attached thereto should be stricken from the record. In Paragraph 2, Mr. Ellis attaches several exhibits including, inter alia, exhibits 4 and 5, the "Pre-Trial Memorandum of Facts/History of Case dated July 1, 2009" and the "Pre-Trial Brief dated July 2, 2009" (hereinafter collectively referred to as "Exhibits"). These Exhibits are unsubstantiated legal briefs drafted by an attorney; they are not sworn statements made under oath. A review of these Exhibits establishes that they contain hearsay and speculation rather than any proven or sworn facts.

Importantly, as Mr. Ellis did not draft these Exhibits, he does not have personal knowledge of them and, therefore, cannot verify the contents contained therein. The Ellis Affidavit also fails to provide any foundation to support the admission of these Exhibits through Mr. Ellis' testimony.

These Exhibits constitute hearsay as the Plaintiff is attempting to utilize them for the truth of the matter asserted therein. To extent the Exhibits mention documents and/or testimony, they constitute double hearsay. Because the Exhibits were not drafted by the Defendants, they do not fall within any of the hearsay exceptions.

Accordingly, the above-referenced portion of Paragraph 2 as well as the aforementioned attached Exhibits should be stricken from the Second Affidavit of Allen B. Ellis and any reference thereto should be disregarded by this Court.

C. The Inadmissible Portions of the Affidavit of Bryan D. Smith Should Be Stricken from the Record.

Paragraph 4 and the last two sentences of Paragraph 7 of the Smith Affidavit should be stricken from the record and disregarded on summary judgment. In these offending portions of his affidavit, Mr. Smith attempts to set forth alleged "facts" for which he has no personal knowledge and he has not provided any proper foundation. These recited "facts" are not based upon Mr. Smith review of any sworn statements. In fact, as Mr. Smith testified in Paragraph 2 of his affidavit, he did not review any sworn factual statements, such as depositions and affidavits. As such, Paragraph 4 of the Smith Affidavit constitutes impermissible hearsay which should be stricken and disregarded by this Court.

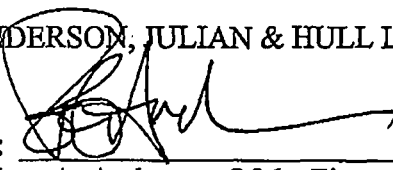
The last two sentences of Paragraph 7 of the Smith Affidavit should also be stricken from the record as they are based upon his review of an irrelevant document, Exhibit 2 to the Ellis Affidavit. As argued by the Plaintiff, the malpractice allegedly committed by the Defendants occurred prior to her November 20, 2007 execution of the PSA. Exhibit 2 of the Ellis Affidavit is a December 12, 2008 letter. Because this letter was drafted more than a year after the Plaintiff executed the PSA, it is irrelevant to the current action and any reference to it or statements based upon it should be stricken and disregarded.

IV. CONCLUSION

Based upon the aforementioned reasons, the Ellis Affidavit and Smith Affidavit contain inadmissible testimony which should be properly stricken from the record. As such, the Defendants respectfully request that the Court grant their Motion in its entirety, strike from the record and disregard Exhibits 4 and 5 of the Ellis Affidavit and Paragraph 4 and the last two sentences of Paragraph 7 of the Smith Affidavit, and any reference thereto.

DATED this 27th day of January, 2011.

ANDERSON, JULIAN & HULL LLP

By: 
Robert A. Anderson, Of the Firm
Attorneys for Defendants

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this 27th day of January, 2011, I served a true and correct copy of the foregoing by delivering the same to each of the following attorneys of record, by the method indicated below, addressed as follows:

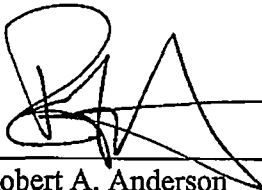
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Attorneys for Plaintiff



Robert A. Anderson
Yvonne A. Dunbar

FEB 22 2011

CHRISTOPHER D. RICH, Clerk
By INGA JOHNSON
DEPUTY

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

PATRICIA MCKAY,

Case No. CVOC 09 22659

Plaintiff,

ORDER DENYING DEFENDANTS'
MOTION FOR SUMMARY
JUDGMENT

vs.

THOMAS G. WALKER and COSHO
HUMPHREY, LLP, a limited liability
Partnership,

Defendant.

This matter came before the Court on Defendants Thomas G. Walker (Walker) and Cosho Humphrey, LLP's, (Cosho) Motion for Summary Judgment. The Court heard oral argument on the Motion on Thursday, February 3, 2011. Allen Ellis appeared for Plaintiff Patricia McKay (McKay), and Robert Anderson and Yvonne Dunbar appeared for the Defendants. The Court took the motion fully under advisement at that time. This Order now denies the Defendants' Motion for Summary Judgment.

FACTUAL BACKGROUND

In 2006, plaintiff Patricia McKay retained defendants Cosho Humphrey and, specifically, Tom Walker, to represent her in her divorce from her husband Darwin McKay. In the fall of 2007, Mrs. McKay, through her attorneys, filed a Motion for Partial Summary Judgment against Darwin specifically attempting to negate the impact of a pre-nuptial agreement. In response to that motion,

1 the McKays and their respective counsel participated in an October 20, 2007 mediation conducted by
2 the Honorable Duff McKee in an attempt to resolve their property distribution differences. The
3 parties entered into a handwritten agreement at the conclusion of the mediation. This agreement was
4 ultimately memorialized as the Property Settlement Agreement (PSA) on November 20, 2007.

5 For a month following the mediation, but before the PSA was executed, the McKays and
6 their attorneys discussed the PSA. The PSA provision relevant to this matter involves \$800,000.00
7 that Mr. McKay was to pay Mrs. McKay upon the full payment of a mortgage he held on a certain
8 piece of land known as the Albrethsen Property. Mr. McKay bought and sold the Albrethsen property
9 while he was married to Mrs. McKay and at the time the PSA was entered into, he still held a
10 mortgage on it. The PSA stated that the sale of that property, and thus, Mr. McKay's receipt of all
11 monies due under the mortgage he held on it, was a triggering event for him to pay two things: 1)
12 \$800,000.00 to Mrs. McKay, and 2) to pay off the mortgage on the marital home, which Mrs. McKay
13 kept in the divorce. On October 23, 2007, Mrs. McKay made the following specific inquiry of her
14 attorney concerning that provision:

15 Mrs. McKay: Can I place a lien on the [Albrethsen Mortgage] closure so that the
16 \$800,000.00 are paid to me by them?

17 Mr. Walker: Our plan is to record the judgment and lien of divorce, which then
18 becomes a lien on all of Darwin's real and personal property.

19 In 2008, Mrs. McKay contacted Mr. Walker and informed him that her former husband had
20 received the money due him under the Albrethsen mortgage, but she had not been paid the
21 \$800,000.00 nor had the mortgage on their marital home been paid. Mr. Walker informed Mrs.
22 McKay that a Motion for Contempt could be filed against Darwin for his failure to comply with a
23 Court Order. Mr. Walker and his partner Mr. Welsh contacted Mr. McKay's attorney and discussed
24 options with Mrs. McKay. Eventually, they began to draw up the Motion for Contempt.
25
26

1 In January 2009, Mr. Walker was contacted by attorney Scott Hess who informed Walker that
2 he (Hess) now represented Mrs. McKay. Mr. Walker then executed a substitution of counsel. Mr.
3 Hess represented Mrs. McKay in the Motion for Contempt. That issue was resolved in a July 2009
4 settlement between the McKays.

5 Mrs. McKay brought this action against the defendants in November 2009, alleging
6 negligence in the form of attorney malpractice. In short, Mrs. McKay asserts that Walker incorrectly
7 told her that because he had filed the McKay's divorce agreement in all the counties in which Mr.
8 McKay owned property, Mrs. McKay had a lien on the Albrethsen property mortgage held by Mr.
9 McKay. Additionally, she asserts that Mr. Walker failed to properly describe the Albrethsen property
10 in the PSA, which allowed Mr. McKay to get away with not paying her the money he received from
11 that mortgage.

12 SUMMARY JUDGMENT STANDARD

13 Idaho Rule of Civil Procedure 56(c) provides that summary judgment is "rendered
14 forthwith if the pleadings, depositions, and admissions on file, together with the affidavits, if any,
15 show that there is no genuine issue as to any material fact and that the moving party is entitled to
16 a judgment as a matter of law." *See also First Sec. Bank of Idaho, N.A. v. Murphy*, 131 Idaho
17 787, 790, 964 P.2d 654, 657 (1998). Put another way, summary judgment is proper only in the
18 absence of a genuine issue of material fact. *Munson v. State, Dep't of Hwys*, 96 Idaho 529, 531,
19 531 P.2d 1174, 1176 (1975). An adverse party may not simply rely upon mere allegations in the
20 pleadings, but must set forth in affidavits specific facts showing there is a genuine issue for trial.
21 I.R.C.P. 56(e); *see Rhodehouse v. Stutts*, 125 Idaho 208, 211, 868 P.2d 1224, 1227 (1994). The
22 affidavits either supporting or opposing the motion must set forth facts that would be admissible
23 in evidence and show that the affiant is competent to testify. *Id.*

1 To withstand a motion for summary judgment, the non-moving party's case must be
2 anchored in something more than speculation; a mere scintilla of evidence is not enough to create
3 a genuine issue of material fact. *Zimmerman v. Volkswagon of America, Inc.*, 128 Idaho 851, 854,
4 920 P.2d 67, 69 (1996). The district court must liberally construe the record in favor of the party
5 opposing the motion for summary judgment, drawing all reasonable inferences and conclusions
6 supported by the record in favor of that party. *Lamb v. Manweiler*, 129 Idaho 269, 272, 923 P.2d
7 976, 979 (1996). If reasonable people could reach different conclusions or draw conflicting
8 inferences from the evidence, the motion should be denied. *Friel v. Boise City Housing*
9 *Authority*, 126 Idaho 484, 486, 887 P.2d 29, 30 (1994).

10 LEGAL MALPRACTICE

11 The elements of a legal malpractice action are: (1) the existence of an attorney-client
12 relationship; (2) the existence of a duty on the part of the lawyer; (3) the breach of the duty or to
13 perform to the standard of care by the lawyer; and (4) the failure to perform the duty or meet the
14 standard of care must be a proximate cause of the injuries suffered by the client. *Johnson v. Jones*,
15 103 Idaho 702, 706, 652 P.2d 650, 654 (1982). Proximate cause consists of two factors, cause-in-
16 fact and legal responsibility. *Munson*, 96 Idaho at 531, 531 P.2d at 1176. Without proximate cause
17 there is no liability for negligence. *Lundy v. Hazen*, 90 Idaho 323, 328, 411 P.2d 768, 771 (1966);
18 *see also Marias v. Marano*, 120 Idaho 11, 13, 813 P.2d 350, 352 (1991).

19 In Idaho, an attorney does not have the duty to push for every advantage that might be
20 realized for his client. IDAHO R. PROF. CONDUCT 1.3, *cmt.* 1. However, "all courts acknowledge the
21 standard of care with which all attorneys must comply and that is: they are held to that degree of
22 care, skill, diligence and knowledge commonly possessed and exercised by a reasonable, careful
23 and prudent lawyer." *Sun Valley Potatoes v. Rosholt, Robertson & Tucker*, 133 Idaho 1, 5, 981
24 P.2d 236, 239 (1999). The plaintiff bears the burden of proving that the attorney has been negligent
25 or has failed to act with proper skill, as well as the burden of showing that the defendant's
26

1 negligence was the proximate cause of the plaintiff's damages. *Lamb v. Manweiler*, 129 Idaho 269,
2 272, 923 P.2d 976, 979 (1996).

3 Proximate cause analysis often considers whether a superseding or intervening cause is
4 involved. A superseding cause is an act by a third person which by its intervention prevents an
5 initial actor from being liable for harm to another which his antecedent negligence is a substantial
6 factor in bringing about. *Mico Mobile Sales v. Skyline Corp.*, 97 Idaho 408, 411-12, 546 P.2d 54,
7 57-8 (1975). The Idaho Supreme Court has provided the following guidelines in determining the
8 existence of a superseding cause:

9 (a) the fact that its intervention brings about harm different in kind from that which would
10 otherwise have resulted from the actor's negligence;

11 (b) the fact that its operation or the consequences thereof appear after the event to be
12 extraordinary rather than normal in view of the circumstances existing at the time of its
13 operation;

14 (c) the fact that the intervening force is operating independently of any situation created by
15 the actor's negligence, or, on the other hand, is or is not a normal result of such a situation;

16 (d) the fact that the operation of the intervening force is due to a third person's act or to his
17 failure to act;

18 (e) the fact that the intervening force is due to an act of a third person which is wrongful
19 toward the other and as such subjects the third person to liability to him;

20 (f) the degree of culpability of a wrongful act of a third person which sets the intervening
21 force in motion. *Id.*

22 In a legal malpractice action, the plaintiff must also establish that she would have had
23 "some chance of success" in the underlying action before she would be entitled to recover from the
24 attorney. *Lamb*, 129 Idaho at 272, 923 P.2d at 979.

25 MOTION FOR SUMMARY JUDGMENT

26 Mrs. McKay alleges that Mr. Walker and, thus, Cosho Humphrey, failed to perform within
the standard of care of an Idaho attorney and that their alleged failure is the proximate cause of the
damages she has allegedly suffered. She asserts that Mr. Walker could have better drafted the PSA

1 so that her former husband did not have the ability to fail to pay and that, had she understood that
2 the PSA as executed did not protect her against that possibility, she would not have agreed to it.

3 Conversely, the defendants assert that, other than the existence of the attorney-client
4 relationship, Mrs. McKay cannot establish any of the elements of an attorney malpractice claim.

5 In considering the defendants' motion for summary judgment, this Court analyzes whether
6 the record contains genuine issues as to any material fact regarding the satisfaction of the elements
7 of a legal malpractice action. The case is set for a jury trial, so, accordingly, this Court liberally
8 construes the facts in favor of and draws all reasonable factual inferences in favor of Mrs. McKay,
9 the non-moving party.
10

11 No one disputes that an attorney-client relationship existed between the parties; therefore, no
12 genuine issues of material fact exist as to the first element of attorney malpractice.

13 As to the second element, existence of a duty, Mr. Walker did not have a duty to push for
14 every advantage that might be realized for his client. However, he did have a duty to act within that
15 degree of care, skill, diligence, and knowledge commonly possessed and exercised by a reasonable,
16 careful, and prudent lawyer. Thus, he did have a duty to correctly state the law to her so that she
17 could make informed decisions, indicating that the second element of malpractice exists. Whether
18 he breached that standard of care is the third inquiry.
19

20 In arguing whether Mr. Walker breached a duty, the parties each point to a December 2008
21 correspondence between Mr. Walker and Mrs. McKay. In the December 15, 2008 letter, Mr. Walker
22 misstates the law as to whether or not filing the divorce decree and accompanying PSA in numerous
23 Idaho counties created a lien on a mortgage held by Mr. McKay. Mr. Walker corrected himself in an
24 email sent the following day. The Court finds the parties' emphasis on this correspondence to be
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1 misplaced. This attorney malpractice action asks whether a breach of duty occurred when Mrs.
2 McKay was counseled by her attorneys about the creation of and entering into the PSA. The
3 relevant time frame for that inquiry is 2006 until November 20, 2007 when she actually signed the
4 PSA.

5 An October 23, 2007 email exchange shows that Mrs. McKay specifically asked Mr. Walker
6 if the PSA could be structured so that the Albrethsen Mortgage pay-out would be paid to her instead
7 of Mr. McKay. Even though the filing of the PSA did not have such an effect, Mr. Walker
8 responded that the filing of the PSA in Idaho counties where Mr. McKay owned property would
9 create a lien on all Mr. McKay's real and personal property in those counties; a statement which
10 intimated that Mrs. McKay would have a lien on the mortgage, and, thus, a secured interest. This
11 was an incorrect statement of the law made during the relevant time frame to this attorney
12 malpractice action. The record also contains the expert witness opinion of Idaho attorney Bryan D.
13 Smith in which Mr. Smith opines that Mr. Walker breached the standard of care in Idaho when he
14 led Mrs. McKay to believe that she had a secured interest in the Albrethsen property mortgage.
15

16 At the same time, the record also includes Mrs. McKay's November 2010 deposition
17 testimony in which she admits that Mr. Walker did not tell her that a mortgage was real property but
18 that, instead, she assumed a mortgage was real property. Regardless, because the record includes the
19 October 23, 2007 email in which Mr. Walker states the direct opposite, this Court finds that genuine
20 issues of material fact exist as to whether Mr. Walker breached the standard of care of attorneys in
21 Idaho when he incorrectly stated the law to Mrs. McKay, thus leading her to believe that she would
22 have a secured interest in her husband's mortgage on the Albrethsen Property.
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1 Despite the genuine issues of material fact surrounding the breach of duty element, the
2 Court's inquiry continues, as summary judgment may still be appropriate if the Court does not find
3 that the record includes evidence that Mr. Walker's alleged breach of duty was the proximate cause
4 of Mrs. McKay's injuries.

5 Mrs. McKay asserts that had she known her interest in the mortgage was not secure, she
6 would not have entered into the PSA. However, even drawing all reasonable factual inferences in
7 her favor, the record must show more than her mere allegations that Mr. Walker's alleged legal
8 misguidance was the proximate cause of her failure to receive the sums contemplated in the PSA.
9

10 The defendants argue that their alleged breach of the standard of care cannot be a proximate
11 cause of Mrs. McKay's injuries (1) because no matter how the PSA was written, the title company
12 which made the lump sum mortgage payment to Mr. McKay was under no duty to pay Mrs. McKay,
13 (2) because Mr. McKay is the individual responsible for not paying Mrs. McKay and the defendants
14 are in no way responsible for Mr. McKay's actions, and (3) because, even if the defendants' alleged
15 breaches of the standard of care were the proximate cause of Mrs. McKay's damages, Mr. McKay's
16 failure to pay constitutes an intervening or superseding cause.
17

18 Taking up the last scenario first, the Court finds that Mr. McKay's failure to pay was not a
19 superseding and intervening cause. Mr. McKay's failure to pay was the very injury against which
20 Mrs. McKay had hoped she was insured. Additionally, the idea that Mr. McKay might not pay Mrs.
21 McKay was a foreseeable harm; in fact, avoiding such harm is often why a person seeks advice and
22 counsel of an attorney in an instance such as this.

23 Considering the second scenario, it is true that the defendants are not responsible for Mr.
24 McKay's actions or inactions. However, in considering whether their alleged breach was the
25
26

1 proximate cause of Mrs. McKay's alleged injury, the record includes the affidavit opinion of expert
2 attorney Bryan Smith who proposes numerous safe guards which, had they been placed in the PSA,
3 would have better protected against Mr. McKay's failure to pay. The Court recognizes that an
4 attorney is not bound to press for every possible advantage that might be realized for his client.
5 However, when drawing all reasonable factual inferences in favor of Mrs. McKay, genuine issues of
6 material fact remain concerning whether the way in which Mr. Walker drafted the PSA coupled
7 with the way in which he explained the effect of its execution to Mrs. McKay was the proximate
8 cause of her injury.
9

10 Finally, the Court must evaluate whether Mrs. McKay has established that she would have
11 had "some chance of success" in the underlying action. The record includes Mrs. McKay's
12 deposition testimony that, at the time of the PSA creation, negotiation, and settlement, she was
13 concerned about the possible loss in value of some of their properties and that her former husband
14 might squander some of the money he still had available. *Patricia McKay Deposition* at p. 81. Mrs.
15 McKay's testimony that she was worried about Mr. McKay's finances during the time leading up to
16 the PSA indicates that, had she understood she was not secured in the money promised her in the
17 PSA, she would have pushed for a different outcome in efforts to secure success in this "underlying
18 action." The defendants rebut that Mrs. McKay has all together failed to establish that she would
19 have had any chance of success in the underlying action. However, considering her deposition
20 testimony and when drawing all reasonable factual inferences in her favor, the Court finds that
21 genuine issues of material fact exist concerning whether she might have had some chance of success
22 in the underlying action.
23
24
25
26

SUMMARY

After thorough review of the record, and when drawing all reasonable factual inferences in favor of Mrs. McKay, the Court finds that genuine issues of material fact remain regarding elements three and four of an attorney malpractice claim: breach of duty or breach of the standard of care, and whether that breach was the proximate cause of Mrs. McKay's alleged injury. Additionally, genuine issues of material fact remain regarding whether Mrs. McKay has established that, had the alleged malpractice not occurred, she would have had some chance of success in the underlying action. These issues are more properly determined during trial than by summary judgment. Therefore, the defendants' motion for summary judgment is DENIED.

IT IS SO ORDERED.

Dated this 18th day of February, 2011.



Ronald J. Wilper
DISTRICT JUDGE

CERTIFICATE OF MAILING

I, HEREBY CERTIFY that on the 22 day of February, 2011 I caused a true and correct copy of the foregoing ORDER DENYING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT to be served by the method indicated below, and addressed to the following:

Allen B. Ellis
ELLIS BROWN & SHEILS
707 N 8th St
PO Box 388
Boise, ID 83701
Tel: (208) 345-7832
Fax: (208) 345-9564

☒ U.S. Mail, Postage Prepaid
☐ Hand Delivered
☐ Overnight Mail
☐ Facsimile

Robert A. Anderson
ANDERSON JULIAN & HULL, LLP
250 S 5th St, Ste 700
PO Box 7426
Boise, ID 83707-7426
Tel: (208) 344-5800
Fax: (208) 344-5510

☒ U.S. Mail, Postage Prepaid
☐ Hand Delivered
☐ Overnight Mail
☐ Facsimile

CHRISTOPHER D. RICH
Clerk of the District Court
Ada County, Idaho

By INGA JOHNSON
Deputy Clerk

ALLEN B. ELLIS
ELLIS, BROWN & SHEILS, CHARTERED
Attorneys-at-Law
707 North 8th Street
P.O. Box 388
Boise, Idaho 83701-0388
(208) 345-7832 (Telephone)
(208) 345-9564 (Facsimile)
ISB No. 1626

KEVIN E. DINIUS
DINIUS & ASSOCIATES, PLLC
5680 E. Franklin Road, Ste 130
Nampa, Idaho 83687
(208) 475-0100 (Telephone)
(208) 475-0101

Attorneys for Plaintiff

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

Patricia McKay)
)
Plaintiff,)
)
v.)
)
Thomas G. Walker and Cosho Humphrey,)
LLP, a limited liability partnership,)
)
Defendants.)
_____)

Case No. CV OC 0922659

SECOND AFFIDAVIT
OF PATRICIA MCKAY

STATE OF IDAHO)
)ss.
County of Ada)

I am the plaintiff in the herein action and make this affidavit upon my own personal knowledge and am competent to testify to the matters contained herein.

2. On November 29, 2007, a decree of divorce was entered as respects my marriage to
SECOND AFFIDAVIT OF PATRICIA MCKAY - 1

NO. _____
A.M. _____ P.M. 340
JAN 20 2012
CHRISTOPHER D. RICH, Clerk
By CHRISTINE SWEET
DEPUTY

ORIGINAL 83

Darwin McKay. See Exhibit 1 hereto. In 2008, Darwin failed to make a \$800,000 payment, plus interest, required by the aforesaid decree and accompanying property settlement agreement and failed to pay off the two deeds of trust on the personal residence awarded plaintiff. These payments were required to be made within days of Darwin's receipt of the sales proceeds as mortgagee of real property known as the Albrethson property. Darwin received these proceeds on approximately November 7, 2008. (Exhibit No. 3)

3. As a result of Darwin's aforesaid breach, I retained new counsel and commenced proceedings against Darwin in an attempt to enforce the agreement. Ultimately, fearful that Darwin would seek bankruptcy protection, I entered into an agreement with Darwin which is formalized in the Order Regarding Settlement of All Claims ("Order") and is attached hereto as Exhibit 2, entered November 29, 2009.

4. Darwin's financial obligation under the Order (Exhibit 2) are as follows:

a. Darwin shall transfer to plaintiff a note known as the "Van Es Receivable" which pays monthly payments of \$2683.08 for 163 months for a total of \$437,342.04 (paragraph 2(a).

b. Darwin shall make a cash payment of \$37,290.26 in two installments (paragraph 2(b).

c. Darwin shall make a cash payment of \$100,000 no later than August 2012. (paragraph 2(c).

d. Darwin shall continue to pay the first and second deeds of trust on Patricia's residence, having balances of \$556,324.34 and \$67,490.49, respectively, with payment in full no later than August 1, 2014.

5. In January 2012, Darwin advised me that it was unlikely that he would make the aforesaid \$100,000 payment which will come due on August 1, 2012.

6. Since the onset of Darwin's obligation to pay the monthly obligations on the two deeds of trust on the personal residence, he has made interest payments only and the outstanding balances are greater at this time than at the entry of the divorce decree, presently \$573,553.10 and \$67,493.94, respectively. Because Darwin has failed to reduce the principal owed on these two obligations during the four years since the decree of divorce, there appears to be a great likelihood that the principal debt will never be reduced much less eliminated by August 14, 2014, as required by the Order.

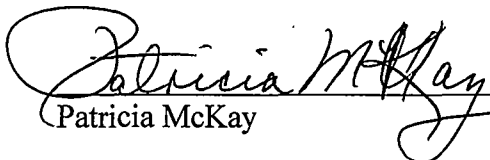
7. The complaint alleges that in failing to provide me a secured position in the Albrethsen mortgage proceeds (\$1.2 million+) from which, as recited in the property settlement agreement (Exhibit 1) the \$800,000 plus 6% interest payment to plaintiff and additionally the two deeds of trust debts were to be paid, defendants committed professional negligence.

8. The Order entered pursuant to stipulation was an attempt to mitigate my damages by accepting an assignment of the Van Es Receivable, two small cash payments and a \$100,000 cash payment (balance now due in August 2012), and Darwin's continued service of the two deeds of trust indebtedness.

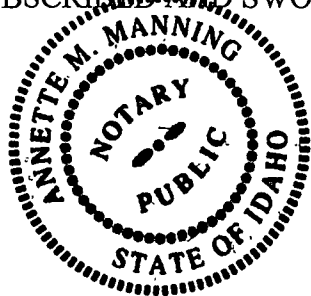
9. Although Darwin's payment of the \$100,000 in August, 2012, and payoff of the indebtedness on the personal residence (\$641,027.04) in 2014 appears problematic, it cannot be stated with absolute certainty at the time of the April 18, 2012, trial that plaintiff's damages will not be mitigated by these future payments.

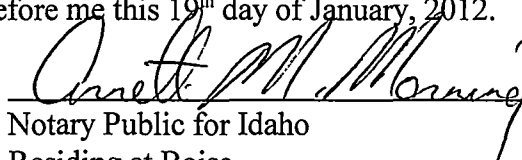
10. Until the facts underlying the litigation have become fully developed, i.e., whether

Darwin complies with his obligations under the Order, mitigation evidence remains uncertain, rendering trial of this matter in April of this year premature.


Patricia McKay

SUBSCRIBED AND SWORN To before me this 19th day of January, 2012.



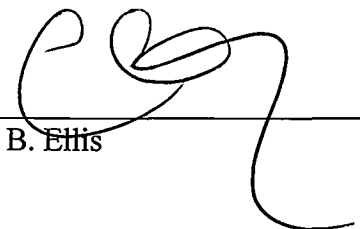

Notary Public for Idaho
Residing at Boise
Commission Expires: 01/05/18

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 20th day of January, 2012, I caused to be served a true and correct copy of the foregoing by the method indicated below, and addressed to the following:

Robert A. Anderson
Yvonne A. Dunbar
ANDERSON, JULIAN & HULL, LLP
250 South Fifth Street, Suite 700
P.O. Box 7426
Boise, Idaho 83707

☐ U.S. Mail
☐ Hand Delivery
☐ Overnight Mail
☒ Facsimile at
344-5510


Allen B. Ellis

ORIGINAL

COPY
NOV 29 2007
J. DAVID NAVARRO, Clerk
By J. EARLE
DEPUTY

Stanley W. Welsh (ISB No. 1964)
Thomas G. Walker (ISB No. 1856)
Coshoh Humphrey, LLP
800 Park Blvd., Suite 790
P. O. Box 9518
Boise, Idaho 83707-9518

Direct Phone: (208) 639-5607

Cell phone: (208) 869-1508

Direct Facsimile: (208) 639-5609

E-mail: swelsh@coshohlaw.com; twalker@coshohlaw.com

ADA COUNTY RECORDER J. DAVID NAVARRO AMOUNT 63.00 21
BOISE IDAHO 12/04/07 03:53 PM
DEPUTY Lisa Iby
RECORDED - REQUEST OF
Coshoh Humphrey
107161154

Attorneys for Plaintiff Patricia McKay

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF

THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

MAGISTRATE DIVISION

★ ★ ★ ★ ★

PATRICIA McKay,

Plaintiff,

v.

DARWIN McKay,

Defendant.

Case No. CV DR 0615200

JUDGMENT AND DECREE OF
DIVORCE

Based upon the Stipulation of the parties, IT IS HEREBY ORDERED ADJUDGED
AND DECREED as follows:

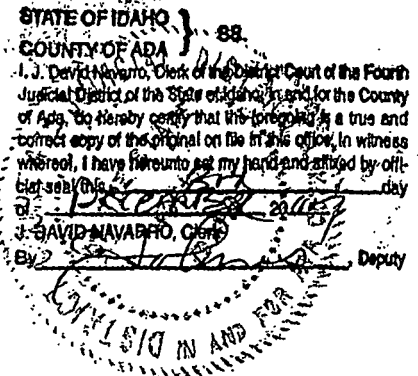
1. **DIVORCE**: The Plaintiff ("Patricia") and the Defendant ("Darwin") were married on July 6, 1996 in Nassau, Island of the Bahamas. Patricia and Darwin are granted a divorce from one another on the grounds of irreconcilable differences. Each is restored to the status of a single person.

2. PROPERTY SETTLEMENT AGREEMENT: Except for paragraphs in the Property Settlement Agreement dated October 20, 2007 regarding alimony, the Property Settlement Agreement shall be merged with and into the Judgment and Decree of Divorce. With respect to alimony, the payment provisions therein shall be deemed integrated contracts between the Parties with no jurisdiction conferred upon this Court to modify. The Property Settlement Agreement dated October 20, 2007 attached hereto as Exhibit A is approved by this Court and, except as noted above, is merged with and incorporated into this Judgment and Decree of Divorce.

DATED: November 28th 2007.



MAGISTRATE



CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 24th day of November 2007 a true and correct copy of the foregoing Judgment and Decree of Divorce was served upon:

Stanley W. Welsh
Cosho Humphrey, LLP
800 Park Blvd., Suite 790
Boise, ID 83712
P.O. Box 9518
Boise, ID 83707-9518

☒ U.S. Mail
☒ Hand Delivery
☐ Overnight Courier
☐ Facsimile
☐ E-mail:

Kimberly D. Brooks
Brooks Law, P.C.
23 9th Ave. North
Nampa, ID 83687

☒ U.S. Mail
☐ Hand Delivery
☐ Overnight Courier
☐ Facsimile
☐ E-mail:

John A. Miller
Miller & Harr
Attorneys at Law
1401 Shoreline Drive, Suite 3
Boise, Idaho 83702

☒ U.S. Mail
☐ Hand Delivery
☐ Overnight Courier
☐ Facsimile
☐ E-mail:



Exhibit A

Stanley W. Welsh (ISB No. 1964)
Thomas G. Walker (ISB No. 1856)
Cosho Humphrey, LLP
800 Park Blvd., Suite 790
P. O. Box 9518
Boise, Idaho 83707-9518
Direct Phone: (208) 639-5607
Cell phone: (208) 869-1508
Direct Facsimile: (208) 639-5609
E-mail: swelsh@cosholaw.com; twalker@cosholaw.com

Attorneys for Plaintiff Patricia McKay

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF

THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

MAGISTRATE DIVISION

★ ★ ★ ★ ★

PATRICIA E. McKAY,

Plaintiff,

v.

L. DARWIN McKAY,

Defendant.

Case No. CV DR 0615200

**PROPERTY SETTLEMENT
AGREEMENT INCORPORATED AND
MERGED WITH AND INTO
JUDGMENT AND DECREE OF
DIVORCE**

This Property Settlement Agreement ("Agreement") is made and entered into this 20th day of October 2007 by and between Patricia E. McKay, Plaintiff ("Patricia" or "Plaintiff"), and L. Darwin McKay, Defendant ("Darwin" or "Defendant"). Patricia and Darwin are sometimes

individually referred to as a "Party" or collectively referred to as the "Parties". This Agreement is binding and enforceable upon the terms stated herein, notwithstanding the fact that additional documentation is required to carry out the terms of this Agreement.

1. Community Property. The Parties agree to the following settlement of their community property:

1.1. Subject to the provisions of paragraph 2.1 below, Patricia shall receive the personal residence located at 25 Horizon Drive, Boise, Idaho ("Personal Residence") free and clear of all encumbrances. Patricia shall furthermore receive all personal property and furniture contained therein. Patricia shall execute such written consent as may be required by the lenders to allow Darwin access to information regarding the 1st and 2nd deed of trust notes. Darwin shall transfer to Patricia as her sole and separate property by good and sufficient quit claim deed and quit claim bill of sale all of his right, title and interest in and to the Personal Residence, including all personal property and furniture.

1.2. Patricia shall receive the Box Office Productions stock. Darwin shall transfer to Patricia as her sole and separate property by good and sufficient assignment separate from stock certificate all of his right, title and interest in and to the Box Office Productions stock. Patricia shall cause the assignment form to be delivered to Darwin through counsel as soon as possible for Darwin's execution and delivery to Patricia through her counsel.

1.3. Patricia shall receive her IRA account.

1.4. Patricia shall receive the 1995 Mercedes S-500 vehicle in her possession and the 1980's motor home, currently located at the farm. Darwin shall deliver the motorhome to Patricia on or before December 1, 2007. Darwin shall transfer to Patricia as her sole and separate property by good and sufficient bill of sale and endorsement on the respective Certificates of Title all of his right, title and interest in and Patricia's 1995 Mercedes S-500 and the 1980's motorhome. Patricia shall cause the assignments forms to be delivered to Darwin through counsel as soon as possible for Darwin's execution and delivery to Patricia through her counsel.

1.5. Darwin may at his expense have the contents of the Personal Residence construction folder copied if necessary for preparation of the amended tax returns for 2005 and 2006 and for the 2007 tax return. Patricia shall retain the original of the Personal Residence construction folder.

1.6. Darwin shall pay to Patricia \$100,000.00 in four equal consecutive monthly installments of \$25,000.00 on or before January 15, 2008 and on or before the 15th day of February, March and April, 2008. The Parties acknowledge that the \$100,000.00 amount was based upon a portion of Patricia's attorneys' fees and litigation expenses. In accordance with Idaho Code § 32-704(3) said payments shall be paid by Darwin directly to Cosho Humphrey, LLP, who may enforce this portion of the Judgment in its own name; provided, however, Patricia may pay Cosho Humphrey, LLP prior to any such installment in which case, the payment or payments shall be paid directly to Patricia by Cosho Humphrey, LLP.

1.7. Darwin shall pay Patricia \$800,000 in cash, by wire transfer or certified check, within five (5) days of payment by the Status Corporation, or its assigns, ("Status Real Estate Transaction"). In addition, Darwin shall convey all his right, title and interest to Patricia in and to the two (2) lots to be conveyed by Status Corporation, or its assigns, to Darwin as part of the Status Corporation Real Estate Transaction. The parties acknowledge that the Status Real Estate Transaction is scheduled to close on or before March 30, 2008. Darwin shall diligently pursue the closing and shall not do anything to interfere with or delay the closing.

1.8. The parties acknowledge that if Status Corporation or its assigns breaches the Purchase and Sale Agreement, Darwin will have title to that portion of the land that had been referred to prior to the sale to Status Corporation as the "Home Farm." In the event of breach, Darwin may also be able to foreclose a mortgage on that portion of the land referred to prior to the sale to Status Corporation as "Albrethsen's Farm."

1.8.1. If the Status Real Estate Transaction fails to close on or before March 30, 2008, Darwin shall pay Patricia \$500,000 as soon as he is able to do without violating the lending terms and conditions of the bank holding the line of credit for the Turf Corporation.

1.8.2. Provided further that if Status Corporation or it assigns breaches the Purchase and Sale Agreement and Darwin cannot pay \$500,000 by April 30, 2008, he shall list the Albrethsen property that was included in the Status Corporation Real Estate Transaction for sale and shall pay Patricia by cash, certified check or wire transfer \$500,000 within five (5) days of receipt or closing on a sale.

1.8.3. Provided further that if following a breach, Darwin is not able to pay Patricia \$500,000 by September 30, 2008, he shall pay Patricia \$800,000 plus interest at the rate of 6% payable within five (5) days of any funds from the sale of either the Albrethsen property funds, the Home Farm property or both (provided that payment of funds from the sale of the Home Farm may only be made to the extent allowed by the bank holding the line of credit for the Turf Corporation) by cash, certified check, or by wire transfer.

1.9. Darwin shall be awarded the 2000 XJ8L Jaguar vehicle; 1973 5th wheel camp trailer; 1990 Ford pick-up truck; and 1994 Chrysler LHS. Darwin shall furthermore be entitled to pick up his separate property birch cabinet and birch bookcase located in the tool room of the Personal Residence. Upon delivery of the motorhome to Patricia, Darwin shall pick up the empty bookcase and cabinet. Darwin shall be awarded all separate and community property interests (if any) in the following:

- a. The Turf Corporation;
- b. The Turf Company of Nevada, Inc.;
- c. Pleasure Turf, LLC;
- d. The Turf Company, LLC;
- e. Turfland, LLC;
- f. Notes Receivables for Turf Company;
- g. Investment in Nevada Granite Industries;
- h. Palace Resorts Time Share;

- i. Proceeds from sale of Albrethsen;
- j. Personal effects and furnishings in Darwin's possession; and
- k. McKay family investments and interests.

2. **Community Debts.** The Parties agree to the following settlement of their community debts:

2.1. Commencing November 2007 and continuing thereafter as provided in this paragraph, Darwin shall pay Patricia's 1st and 2nd deed of trust note payments, including property taxes and insurance, as required by the lender(s), encumbering the Personal Residence ("Personal Residence Debt") as and for maintenance or alimony for Patricia. Darwin shall timely pay both 1st and 2nd deed of trust note payments directly to the respective mortgage companies. Patricia will provide Darwin via fax or email the 1st and 2nd deed of trust note monthly statements within five days of when Patricia receives them. Each month Darwin shall notify Patricia via fax or email that he has made the respective 1st and 2nd deed of trust note monthly payments in a timely manner. The payments required under this paragraph shall terminate when Darwin pays off the Personal Residence Debt. Darwin shall pay off the full amount of Personal Residence Debt directly to the respective mortgage companies within thirty (30) days of the date the Status Real Estate Transaction closes, or within thirty (30) days of receipt of any funds from the sale of either the Albrethsen property, the Home Farm property or both (provided that payment of funds from the sale of the Home Farm may only be made to the extent allowed by the bank holding the line of credit for the Turf Corporation), but in any event, Darwin shall payoff the Personal Residence

Debt on or before October 20, 2012. Notwithstanding the foregoing, Patricia shall have the right to sell the Personal Residence at any time; in which case, the Personal Residence Debt would likely be paid off out of the sale proceeds. If Patricia sells the Personal Residence, Darwin shall pay directly to Patricia as a property equalization payment the unpaid principal balance of the Personal Residence Debt, plus interest accruing at the respective rates called for in the first and second loan documents, in monthly installments to and including payment in full of the Personal Residence Debt. The Parties agree that Kevin Crane, CPA, or if Mr. Crane cannot serve, such other accountant as the Parties shall designate, will provide the appropriate calculations of the remaining balance and accruing interest and Darwin shall execute and deliver a promissory note to Patricia setting forth his payment obligations. Any such promissory note shall include a right of prepayment. As of October 20, 2007, the unpaid principal balance of the 1st deed of trust note (World Savings Loan No. [REDACTED] is \$556,324.34 and interest is accruing from and after October 20, 2007 at the rate provided in the 1st deed of trust note. As of October 20, 2007, the unpaid principal balance of the 2nd deed of trust note (Countrywide Loan No. [REDACTED] is \$67,490.49 and interest is accruing from and after October 20, 2007 at the variable rate provided in the 2nd deed of trust note. Darwin shall pay each of these notes, including interest accruing from and after October 20, 2007 until each note is paid in full.

2.2 Darwin shall pay off the two Chase Visa credit cards and Bank of America credit card as property equalization payments as follows:

| | |
|---------------------------|-------------|
| Chase Visa ending in 2116 | \$46,327.00 |
|---------------------------|-------------|

Chase Visa ending in 0853 2,076.17

Bank of America ending in 0232 22,845.13

\$71,248.30

Darwin shall pay the \$71,248.30, plus interest as follows:

| | |
|----------------|---|
| November 2007: | \$14,249.66, plus interest on the unpaid balance attributable to the \$71,248.30; |
| December 2007: | \$14,249.66, plus interest on the unpaid balance attributable to the \$71,248.30; |
| January 2008: | \$14,249.66, plus interest on the unpaid balance attributable to the \$71,248.30; |
| February 2008: | \$14,249.66, plus interest on the unpaid balance attributable to the \$71,248.30; |
| March 2008 | \$14,249.66, plus interest on the unpaid balance attributable to the \$71,248.30; |

Darwin shall pay all payments listed above in a timely manner such that no late fees are incurred. The November 2007 payment shall pay the Chase Visa ending in 0853 in full and shall then apply \$6,086.75 to the Chase Visa ending in 2116 and \$6,086.75 to the Bank of America ending in 0232. Each month Darwin shall notify Patricia via fax or email that he has made the respective credit card payments in a timely manner.

Patricia shall be responsible for all charges, interest, finance charges, and fees attributable to charges made by her after October 20, 2007. Patricia shall be responsible for all other credit card debt in her name alone or charged by Patricia without Darwin's knowledge.

2.3 Mediation Expense. Darwin shall pay one-half and Patricia shall pay one-half of all fees and expenses of mediation.

3. **Alimony/ Maintenance Payments from Darwin to Patricia.** Commencing November 2007 and continuing until Patricia is paid \$800,000.00 or \$500,000.00 as provided above, Darwin shall pay Patricia each month the sum of \$2,500.00 as and for alimony/maintenance. All liability for alimony shall cease upon payment of the \$800,000.00 or \$500,000.00 as provided above.

4. **Full Disclosure.** Each Party represents to the other that full disclosure of all community assets and community liabilities, of which he or she is aware, has been made.

5. **Allocation of Property to Darwin.** Except as expressly provided herein, Patricia agrees to transfer by good and sufficient quit claim deed, quit claim bill of sale, quit claim assignment and/or other necessary quit claim document of conveyance all of her right, title and interest to Darwin in and to all of the community property awarded to Darwin herein, as his sole and separate property. Patricia shall return the notebook containing all of the Palace Resorts Information, including but not limited to Palace Premier Certificates; Palace Premier Golf Passes; Premier Gold Membership; and Palace Premier / RCI Certificates. Patricia shall specifically sign over title to the 1994 Chrysler; 1990 Ford Pick-up and 1973 5th Wheel Camp Trailer. Darwin shall cause said transfers to be delivered to Patricia through counsel as soon as possible, except for the 1990 pickup, for which title is in Patricia's possession and shall be produced as soon as possible. Patricia shall further sign the Palace Premier Change of Ownership, which shall be delivered to Patricia through counsel.

6. **Disposition of Property.** Subject to the provisions of this Agreement, each of the Parties hereto may dispose of his or her property of whatever nature, real or personal; and the Parties hereto, each for himself and herself, respectively, and for the respective heirs, legal representatives, executors and administrators and assigns, hereby waive any right of election which he or she may have or hereafter acquire regarding the estate of the other, or any right to take against any last will and testament of the other, whether heretofore or hereafter executed, or as may now or hereafter be provided for in any law of the State of Idaho or any other state or territory of the United States or any foreign country, and hereby renounces and releases all interest, right or claim that he or she now has or might otherwise have against the other, under or by virtue of the laws of any state or country, and each Party shall sign any document necessary to release his or her interest to the other Party or any other document necessary to transfer any title or release any interest necessary to carry out the intent of this paragraph.

7. **Release of Patricia from all Debts and Personal Guarantees.** On or before December 1, 2007, Darwin shall obtain at his sole cost and expense written releases of Patricia from liability for all debts whether such debts are owed to banks, vendors, and/or other creditors for whom Patricia may have liability for any reason, including but not limited to Patricia's execution of notes, personal guarantees or collateral security documents that she delivered during the Parties' marriage. Darwin shall provide Patricia with a true, correct and complete copy of each such release on or before December 1, 2007.

8. **Payment of Accounting Fees and Income Taxes by Darwin.** Darwin shall pay for the preparation of state and federal income tax returns and/or amended returns for the Parties for 2005, 2006 and 2007. The Parties agree to file said tax returns under the filing status resulting in the lowest state and federal income taxes. The Parties agree to cooperate with Kevin Crane, or any other accountant as Darwin deems necessary to complete the filing of such returns. Darwin shall pay all state and federal income taxes, interest and penalties, if any, for all years prior to January 1, 2008 and Darwin shall be entitled to all tax refunds, if any. Patricia shall be entitled to claim the interest paid on the deed of trust notes encumbering the Personal Residence and Darwin shall claim the monies paid towards the deed of trust note payments as alimony to Patricia. Darwin shall further claim all \$2,500.00 payments to Patricia pursuant to paragraph 3 herein as alimony.

9. **Separate Property / Income After Execution of Agreement.** The Parties hereto stipulate and agree that from and after the date of this Agreement, any and all property or income acquired or earned by either Party hereto shall be the separate property of the Party who has acquired or earned it, any income on separate property shall be separate property and the other Party shall have no claim on any separate property income or earnings. Beginning tax year 2008 and all years thereon, the parties shall each file separately. Neither party shall include in their income any income earned by the other after December 31, 2007. Nor shall either party claim a credit or deduction for expenditures made by the other after December 31, 2007. Any tax

liability arising from income after December 31, 2007 shall be paid and assumed according to their respective separate returns.

10. Debts after Execution of Agreement. The Parties agree that from and after October 20, 2007, any debts incurred by either Party hereto shall be the separate debt of the Party incurring the debt and shall not be a community debt. The Parties hereto agree not to incur any debt for which the other Party may be liable.

11. Mutual Release of Claims. For good and valuable consideration passing between the Parties, the receipt and sufficiency of which is acknowledged by each Party, the Parties each for themselves and for their heirs, representatives, agents, employees, successors, executors, administrators, subrogees and assigns, release the other Party and his or her heirs, representatives, agents, employees, successors, executors, administrators, subrogees and assigns, and each Party shall release, indemnify and hold harmless the other Party from any and all claims, liabilities or obligations arising out of or in any way connected with their marriage, including but not limited to all claims set forth in or comprehended by that certain litigation identified in the caption above. The term claims shall include any and all claims and counterclaims, whether known or unknown, a Party may have against the other Party as a result of their marriage and the litigation identified above.

12. Entry of Decree of Divorce. The Parties agree that on or before five (5) business days from the execution of this Property Settlement Agreement, they will execute a stipulation for entry of a Judgment and Decree of Divorce to be filed with the Court.

11. **Merger with and into Judgment and Decree.** Except for paragraphs regarding alimony, this Agreement shall be merged with and into the Judgment and Decree of Divorce. With respect to alimony, the payment provisions herein shall be deemed integrated contracts between the Parties with no jurisdiction conferred upon this Court to modify.

12. **No Undue Influence.** The Parties agree that they have entered into this Agreement without undue influence or fraud or coercion or misrepresentation or for any other like cause.

13. **Further Performance.** The Parties agree to execute all additional documents within 14 days of presentation of each such document and take such further steps as shall be required to effectuate and carry out the performance of this Agreement.

14. **Amendments.** This Agreement may not be amended, modified, altered or changed in any respect whatsoever, except by further agreement in writing duly executed by the Parties.

15. **Cooperative Effort.** The parties acknowledge that this Agreement is the result of a cooperative effort between them and their independent counsel, and that in the event of any dispute over the meaning or effect of any provision herein, the rule of interpretation of ambiguous terms against the drafting party shall have no application.

16. **Advice of Counsel.** The Parties stipulate that they have been represented by counsel and are familiar with the terms, conditions and effect of this Agreement.

17. **Attorney Fees.** In the event of any controversy, claim, or action being made, filed, or instituted between the parties to this Agreement or any of the other documents related hereto, or arising from the breach of any provision hereof, the prevailing party will be entitled to receive from the other party all costs, damages, and expenses, including reasonable attorney's and paralegal's fees incurred by the prevailing party, whether or not such controversy or claim is litigated or prosecuted to judgment. Court costs and attorney and paralegal fees include those incurred as a result of bankruptcy, or on appeal.

18. **Binding Agreement.** This Agreement is binding upon the heirs, successors and assigns of the Parties.

19. **Free and Voluntary Act.** Each Party further acknowledges: (a) that settlement of his or her claims alleged against the other in this litigation and the execution and delivery of this Agreement and release by him or her, are by his or her free and voluntary act; and (b) that no promise, agreement, statement or representation not expressed herein has been agreed to or relied upon.

20. **Choice of Law.** This Agreement shall be interpreted in accordance with the laws and statutes of the State of Idaho.

21. **Notices.** All notices and demands required or permitted under this Agreement shall be in writing, containing the information required by this Agreement to be communicated to any person, personally delivered to such person or sent by certified mail, postage prepaid, or by reputable overnight air courier service (*e.g.*, Federal Express or United Parcel Service) to such

person at the last known address of such person. The earlier of the date of personal delivery or two business days following the date of mailing or the date of delivery to the air courier thereof, as the case may be, shall be deemed the date of receipt of notice, unless proof of untimely delivery or non-delivery is provided by the addressee. The sender shall bear the risk of untimely delivery and non-delivery.

22. Partial Invalidity. In the event any portion of this Agreement shall be determined invalid, void or otherwise unenforceable, the remaining provisions shall remain in full force and effect, and shall in no way be affected, impaired or invalidated. It is understood that the remaining provisions shall be construed in a manner most closely approximating the intention of the Parties.

23. Execution of Counterparts. Duplicate copies of this Agreement may be signed by one or more of the Parties and their counsel and copies of this Agreement signed, collectively, by all Parties and their counsel shall be considered as a single, fully executed original document.

24. Waiver. Failure of a Party, or any of them, to exercise his or her rights upon any default of the other Party shall not be construed as the waiver of the right to insist upon full performance of all the terms and conditions of this Agreement, or of the right to exercise any other right contained in this Agreement.

25. Time. Time is of the essence of this Agreement and each and all of its provisions in which performance is a factor.

26. **Warranty.** THE UNDERSIGNED PARTIES INDIVIDUALLY AND THROUGH THEIR COUNSEL REPRESENT AND WARRANT THAT THEY HAVE READ THE FOREGOING AGREEMENT AND THAT THEY FULLY UNDERSTAND THE TERMS AND CONDITIONS SET FORTH HEREIN.

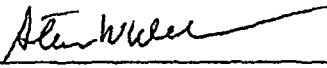
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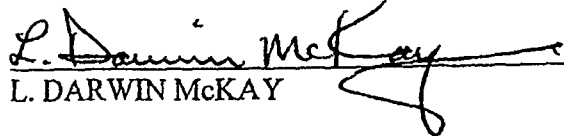
IN WITNESS WHEREOF, the Parties and their respective counsel have executed this Agreement on the date set forth above.


PATRICIA E. MCKAY

Approved as to form and content:

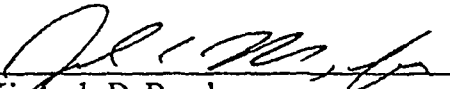
COSHO HUMPHREY, LLP

By 
Stanley W. Welsh
Attorneys for Patricia E. McKay



L. DARWIN MCKAY

Approved as to form and content:

BROOKS LAW, P.C.

By 
Kimberly D. Brooks
Attorneys for L. Darwin McKay

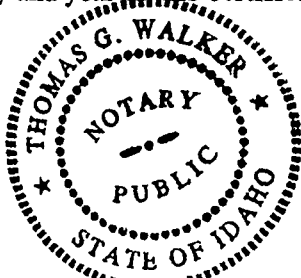
MILLER & HARR

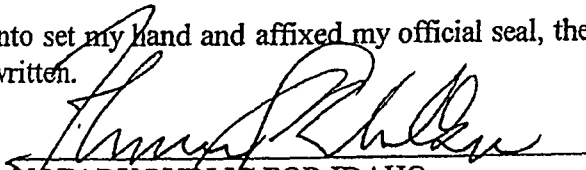
By 
John A. Miller
Attorneys for L. Darwin McKay

STATE OF IDAHO)
) ss.
County of Ada)

On November 20, 2007, before me, the undersigned, a notary public in and for said county and state, personally appeared Patricia E. McKay, known to me to be the person whose name is subscribed to the within instrument and acknowledged to me that she executed the same.

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

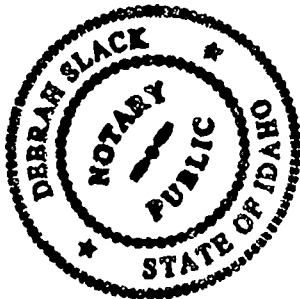




NOTARY PUBLIC FOR IDAHO
Residing at Boise
Commission Expires 3/20/11

STATE OF IDAHO)
) ss.
County of Ada)

On November 20, 2007, before me, the undersigned, a notary public in and for said county and state, personally appeared L. Darwin McKay, known to me to be the person whose name is subscribed to the within instrument and acknowledged to me that he executed the same.

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




NOTARY PUBLIC FOR IDAHO
Residing at Boise
Commission Expires 4-14-12

BROOKS LAW, P.C.
KIMBERLY D. BROOKS - ISB #5968
TESSA J. BENNETT - ISB #7424
The Lockman House
23 9th Avenue North
Nampa, ID 83687
Telephone: (208) 442-7489
Facsimile: (208) 468-4030
Email: kim@kbrookslaw.com

ATTORNEYS FOR DEFENDANT

COPY

NOV 23 2009
FILED 4:55 PM
AM.

NOV 23 2009

J. DAVID NAVARRO, Clerk
By ELAINE TOWN
REPORT

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF

THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

| | | |
|-----------------|---|-----------------------------------|
| PATRICIA McKAY, |) | CASE NO. CV DR 0615200 |
| |) | |
| Plaintiff, |) | |
| |) | |
| vs. |) | ORDER REGARDING SETTLEMENT OF ALL |
| |) | CLAIMS |
| DARWIN McKAY, |) | |
| |) | |
| Defendant. |) | |
| |) | |

THIS MATTER, having come before the Court on the 15th day of July, 2009, Defendant DARWIN McKAY with his attorney of record, Kim Brooks; Plaintiff PATRICIA McKAY appearing with her attorney of record, Scott D. Hess; the parties having reached an agreement and placing their stipulation on the record in open Court; the Court finding good cause therein, IT IS HEREBY ORDERED as follows:

ORDER REGARDING SETTLEMENT OF ALL CLAIMS - PAGE 1

Bm

1. COVENANT NOT TO ENFORCE DECREE: Plaintiff, PATRICIA McKAY, agrees to dismiss her claims contained in her Motion to liquidate Judgment filed 1/30/09 and Motion for Contempt filed 1/30/09 in their entirety in exchange for the terms of settlement/agreement outlined below. Both parties hereby covenant and agree not to attempt to enforce any term of that Judgment and Decree of Divorce filed 11/29/07. This Order regarding settlement of all claims supplants all unfulfilled financial provisions of the Judgment and Decree filed 11/29/07, specifically paragraphs 1.7 through and including paragraph 1.8.3. DARWIN McKAY's monthly obligation to Plaintiff, PATRICIA McKAY in the amount of twenty five hundred dollars (\$2500.00), shall cease as of July 15, 2009. Other than as listed in this Settlement Agreement, Defendant DARWIN McKAY shall have no further financial obligations to Plaintiff, PATRICIA McKAY.

2. TERMS OF SETTLEMENT/ AGREEMENT:

a. Van Es: Defendant, DARWIN McKAY, shall transfer and convey all interest in that certain note known as the "Van Es Receivable" to Plaintiff PATRICIA McKAY. Defendant DARWIN McKAY shall make all efforts to secure a first position insurance policy. As of date of transfer (9/15/09), Defendant

3m

DARWIN MCKAY represents that one hundred sixty three (163) payments of two thousand six hundred eighty three dollars and eight cents (\$2,683.08), totaling four hundred thirty-seven thousand three hundred forty-two dollars and four cents (\$437,342.04) remain due upon the note transferred. The Van Es note shall not be alimony to Plaintiff;

b. CASH: Defendant, DARWIN MCKAY shall make a cash payment of thirty seven thousand two hundred ninety dollars and twenty six cents (\$37,290.26) to Plaintiff PATRICIA MCKAY with the first payment of eighteen thousand six hundred forty five dollars and thirteen cents (\$18,645.13) payable no later than 9/15/09 and the second payment of eighteen thousand six hundred forty five dollars and thirteen cents (\$18,645.13) payable no later than 9/15/10;

c. PAYMENT: Defendant, DARWIN MCKAY shall make a cash payment to Plaintiff PATRICIA MCKAY in the amount of one hundred thousand dollars (\$100,000.00) payable no later than 8/1/12;

d. MORTGAGES: Defendant DARWIN MCKAY shall continue to pay the first mortgage, including property taxes and insurance, attached to Plaintiff PATRICIA MCKAY'S residence in the approximate amount of five hundred fifty six

3m

thousand three hundred twenty four dollars and thirty four cents (\$556,324.34). Defendant DARWIN MCKAY shall continue to pay the second mortgage attached to Plaintiff PATRICIA MCKAY'S residence in the approximate amount of sixty seven thousand four hundred ninety dollars and forty nine cents (\$67,490.49).

Said obligations shall be the "Personal Residence Debt." Said payments shall be made no later than the due date set forth on the mortgage statements. Defendant DARWIN MCKAY shall pay both first and second mortgages in full no later than 8/1/14. If Plaintiff PATRICIA MCKAY sells said residence, payments shall continue directly to Plaintiff PATRICIA MCKAY pursuant to the terms herein. Plaintiff Patricia McKay agrees to cooperate in Mr. McKay's efforts, if any, to refinance the mortgage loan(s). Notwithstanding the foregoing, Patricia shall have the right to sell the Personal Residence at any time; in which case, the Personal Residence Debt would likely be paid off out of the sale proceeds. If Patricia sells the Personal Residence, Darwin shall pay directly to Patricia the unpaid principal balance of the Personal Residence Debt, plus interest accruing at the respective rates called for in the first and second loan documents, in monthly installments to and including payment in full no later than 8/1/2014 of the Personal Residence Debt. The parties agree that Kevin Crane,

BM

CPA, or if Mr. Crane cannot serve, such other accountant as the parties shall designate, will provide the appropriate calculations of the remaining balance and accruing interest and Darwin shall execute and deliver a promissory note to Patricia setting forth his payment obligations. Any such promissory note shall include a right of prepayment.

e. ALIMONY: All payments herein, whether to the mortgage companies or Plaintiff PATRICIA McKAY directly, shall be considered and deemed as alimony paid by Defendant DARWIN McKAY. The transfer of the Van Es receivable shall not be considered as alimony to Plaintiff PATRICIA McKAY;

f. TIME SHARE: Defendant DARWIN McKAY shall offer Plaintiff PATRICIA McKAY the option of exercising up to fourteen (14) weeks of a time share with Palace Resorts at Plaintiff PATRICIA McKAY'S expense of approximately \$1500.00 to \$1600.00 per week. Said 14 weeks may be used in any combination, Patricia shall make her request(s) in writing and Darwin shall respond to Patricia's request(s) in writing within five days, via e-mail or US postal Service. Patricia shall pre-pay with verified funds prior to final reservations with Palace Resorts. Whatever rate is offered to Defendant DARWIN McKAY shall be paid by Plaintiff PATRICIA McKAY.

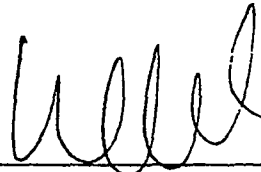
GM

Defendant DARWIN McKAY, individually and/or on behalf of his company, whichever is applicable agrees to facilitate any paperwork necessary to insure that Plaintiff PATRICIA McKAY is transferred fourteen (14) weeks. Plaintiff PATRICIA McKAY shall have three (3) years to complete her fourteen (14) weeks, no later than July 16, 2012. Plaintiff PATRICIA McKAY shall have the right to engage in a conference call with an employee of Defendant DARWIN McKAY's company and a representative from Palace Resort Timeshares for the purpose of determining the amount due upon Plaintiff PATRICIA McKAY's request to utilize the timeshare.

3. COVENANT NOT TO EXECUTE: The terms outlined above contain the entire agreement of the parties and each party stipulates and agrees that said terms may be reduced to a judgment in the amount of \$1,223,814.83, which has been entered as of August 19, 2009. Plaintiff PATRICIA McKAY hereby covenants not to execute upon the August 19, 2009 Judgment as long as Defendant DARWIN McKAY is not in default of the Order herein. Upon default, Plaintiff PATRICIA McKAY may execute upon the Judgment entered August 19, 2009 to the extent it has not been satisfied as of the date of the breach.

4. ATTORNEYS FEES/ COSTS: Each party shall bear their own attorneys fees and costs in this matter.

IT IS SO ORDERED this 23 day of November, 2009.



MICHAEL J. REARDON
Magistrate Judge

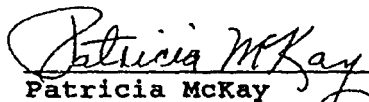
COPY

Approved as to Form and Content:


Darwin McKay

Kim Brooks
Attorney for Defendant

Approved as to Form and Content:



Patricia McKay



SCOTT D. HESS
Attorney for Plaintiff



CERTIFICATE OF SERVICE

I hereby certify that on this 24 day of November, 2009, I caused a true and accurate copy of the foregoing document to be served upon the following as indicated below:

Scott D. Hess
HOLLAND & HART, LLP
101 South Capitol Blvd., Ste. 1400
P.O. Box 2527
Boise, Idaho 83701-2527
Facsimile: (208) 343-8869

☒ Hand Delivery
☒ U.S. Mail
☐ Overnight Courier
☐ Facsimile Transmission

Kimberly D. Brooks
Brooks Law, P.C.
The Lockman House
23 9th Avenue North
Nampa, Idaho 83686
FAX: 468-4030

☒ Hand Delivery
☒ U.S. Mail
☐ Overnight Courier
☐ Facsimile Transmission

J. DAVID NAVARRO

Elinor Zow
Deputy Clerk

2/27/08

ADA COUNTY RECORDER J. DAVID NAVARRO
BOISE IDAHO 11/12/08 03:16PM
DEPUTY Bonnie B. Oberbillig
RECORDED-REQUEST OF
LANDAMERICA TRANSACTION W

AMOUNT 3.00 1

108123415

AFTER RECORDING MAIL TO:

LAWYERS TITLE INSURANCE CORPORATION
1200 Sixth Avenue, Suite 1900
Seattle, WA 98101

Re: C155848

ASSIGNMENT OF MORTGAGE

KNOW ALL MEN BY THESE PRESENTS: L. DARWIN MCKAY, for value received does hereby grant, bargain, sell, assign, transfer and set over unto LAWYERS TITLE INSURANCE CORPORATION, a Nebraska corporation, that certain Mortgage, Security Agreement and Fixture Filing bearing date the 24th day of November, 2006, made and executed by STATUS CORPORATION OF IDAHO, an Idaho corporation, mortgagor to secure payment of the sum of ONE MILLION THREE HUNDRED NINETY SIX THOUSAND EIGHT HUNDRED AND NO/100 DOLLARS (\$1,396,800.00) and interest, and recorded in the office of the Auditor of Ada County, State of Idaho under Instrument No. 106187071 on the 30th day of November, 2006, together with the note thereby secured and the money due and to grow thereon, with the interest.

L. Darwin McKay
L. DARWIN MCKAY

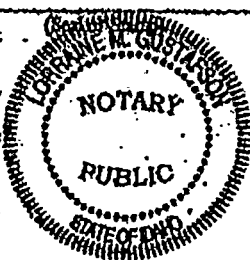
STATE OF IDAHO

COUNTY OF

I certify that I know or have satisfactory evidence that L. Darwin McKay is the person who appeared before me, and said person acknowledged that he signed this instrument and acknowledged it to be his free and voluntary act for the uses and purposes mentioned in this instrument.

Dated: 11/7/08

Loekaine M. Gustafson
Loekaine M. GUSTAFSON
Notary Public
My appointment expires: 2-1-2013



ALLEN B. ELLIS
ELLIS, BROWN & SHEILS, CHARTERED
Attorneys-at-Law
707 North 8th Street
P.O. Box 388
Boise, Idaho 83701-0388
(208) 345-7832 (Telephone)
(208) 345-9564 (Facsimile)
ISB No. 1626

Attorneys for Plaintiff

NO. _____
A.M. _____ FILED 340 P.M.

JAN 20 2012

CHRISTOPHER D. RICH, Clerk
By CHRISTINE SWEET
DEPUTY

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE

STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

| | | |
|---------------------------------------|---|------------------------|
| Patricia McKay |) | |
| |) | Case No. CV OC 0922659 |
| Plaintiff, |) | |
| |) | SECOND AFFIDAVIT |
| v. |) | OF ALLEN B. ELLIS |
| |) | |
| Thomas G. Walker and Cosho Humphrey, |) | |
| LLP, a limited liability partnership, |) | |
| |) | |
| Defendants. |) | |
| _____ |) | |

STATE OF IDAHO)
)ss.
County of Ada)

I, Allen B. Ellis, being first duly sworn, depose and state as follows:


1. I am the attorney for the plaintiff in the herein matter and make this affidavit upon my own personal knowledge and am competent to testify to the matters contained here.
2. In preparing for the April, 18, 2012, in this matter, I overlooked the fact that the face

SECOND AFFIDAVIT OF ALLEN B. ELLIS - 1

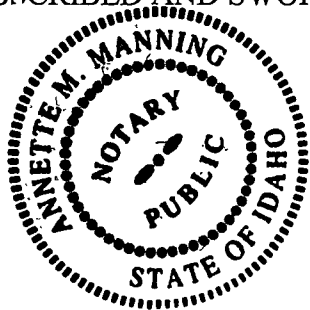
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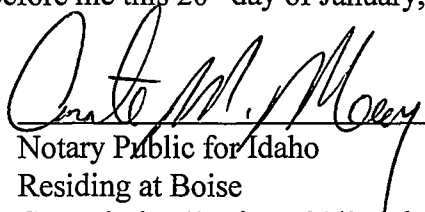
amount of the promissory note accepted by plaintiff from her ex-husband, Darwin McKay, in an effort to mitigate her damages, is not the proper amount to calculate the mitigative impact of this note on plaintiff's damages. Rather, the note, in the amount of \$437,342.04 payable over a thirteen year term must be reduced to present value.

In order to make a proper record for the plaintiff's mitigation efforts, testimony of an accounting expert is required in order to provide the jury with the present value of this note.


Allen B. Ellis
Attorney for Plaintiff

SUBSCRIBED AND SWORN To before me this 20th day of January, 2012.




Notary Public for Idaho
Residing at Boise
Commission Expires: 01/05/18

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 20th day of January, 2012, I caused to be served a true and correct copy of the foregoing by the method indicated below, and addressed to the following:

Robert A. Anderson
Yvonne A. Dunbar
ANDERSON, JULIAN & HULL, LLP
250 South Fifth Street, Suite 700
P.O. Box 7426
Boise, Idaho 83707

____ U.S. Mail
 X Hand Delivery
____ Overnight Mail
____ Facsimile at
 344-5510


Allen B. Ellis

NO
AM FILED PM 14 30

CHRISTOPHER D. RICH, Clerk
By SAYTHARA KHAM-ONE
DEPUTY

Attorneys for Defendants

PATRICIA MCKAY.

Case No. CV OC 0922659

VS.

**AFFIDAVIT OF YVONNE A.
DUNBAR**

THOMAS G. WALKER and COSHO HUMPHREY, LLP, a limited liability partnership,

Defendants.

STATE OF IDAHO)
) ss.
County of Ada)

COMES NOW, Yvonne A. Dunbar, of the firm Anderson, Julian, and Hull, LLP,
attorneys of record for the Defendants, and hereby attests under oath as follows:

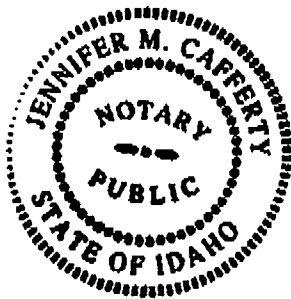
1. I am one of the attorneys of record for the Defendants and attest to the following matters based upon my own personal knowledge.
2. Enclosed as Exhibit "A" is a true and correct copy of the first page of the Plaintiff's Response to Defendants' First Set of Discovery Requests, the Plaintiff's Answer to

Defendants' Interrogatory No. 7, and the Plaintiff's Verification Page, which my office received on March 17, 2010.

Further your Affiant saith not.

Yvonne A Dunbar
Yvonne A. Dunbar

SUBSCRIBED AND SWORN to before me this 30th day of January, 2012.



Jennifer Cafferty
Notary Public for Idaho
Residing at Boise, Id
My commission expires: 10/24/12

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this 30th day of January, 2012, I served a true and correct copy of the foregoing by delivering the same to each of the following attorneys of record, by the method indicated below, addressed as follows:

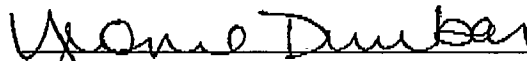
Allen B. Ellis
ELLIS, BROWN & SHEILS,
CHARTERED
707 North 8th Street
P.O. Box 388
Boise, Idaho 83701-0388
Telephone: (208) 345-7832
Facsimile: (208) 345-9564

☐ U.S. Mail, postage prepaid
☐ Hand-Delivered
☐ Overnight Mail
☒ Facsimile

Kevin E. Dinius
Michael J. Hanby II
DINIUS LAW
5680 E. Franklin Rd., Suite 130
Nampa, Idaho 83687
Telephone: (208) 475-0100
Facsimile: (208) 475-0101

☐ U.S. Mail, postage prepaid
☐ Hand-Delivered
☐ Overnight Mail
☒ Facsimile

Attorneys for Plaintiff


Robert A. Anderson
Yvonne A. Dunbar

03/17/2010 WED 13:51 FAX 3459564

0003/024

ORIGINAL

ALLEN B. ELLIS
ELLIS, BROWN & SHEILS, CHARTERED
Attorneys-at-Law
707 North 8th Street
P.O. Box 388
Boise, Idaho 83701-0388
(208) 345-7832 (Telephone)
(208) 345-9564 (Facsimile)
ISB No. 1626

Attorneys for Plaintiff

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

| | | |
|---------------------------------------|---|-------------------------|
| Patricia McKay |) | |
| |) | Case No. CV OC 0922659 |
| Plaintiff, |) | |
| |) | PLAINTIFF'S RESPONSE TO |
| v. |) | DEFENDANTS' FIRST SET |
| |) | OF DISCOVERY REQUESTS |
| Thomas G. Walker and Cosho Humphrey, |) | |
| LLP, a limited liability partnership, |) | |
| |) | |
| Defendants. |) | |

Comes now plaintiff, Patricia McKay and responds to defendants' First Set of Discovery
Requests dated February 5, 2010, as follows:

REQUEST FOR ADMISSION NO. 1: Admit the Defendants did not act negligently.

RESPONSE TO REQUEST FOR ADMISSION NO. 1: Objection. This request calls for a
legal conclusion.

REQUEST FOR ADMISSION NO. 2: Admit the Defendants are not liable for your alleged
damages.

RESPONSE TO REQUEST FOR ADMISSION NO. 2: Objection. This request calls for a

PLAINTIFF'S RESPONSE TO DEFENDANTS' FIRST SET OF DISCOVERY REQUESTS - 1



03/17/2010 WED 13:52 FAX 3459564

0008/024

INTERROGATORY NO. 7: Please set forth in detail a full and complete itemization of all special and/or general damages claimed by you in this action.

ANSWER TO INTERROGATORY NO. 7: By virtue of the Property Settlement Agreement ("PSA"), Darwin was required to pay plaintiff \$800,000 and pay off her residential mortgages within 30 days of closing the Status real estate transaction (Albrethsen property). After Darwin failed to pay these sale proceeds to the plaintiff, she was concerned that he would declare bankruptcy and thereby erase the \$800,000 debt. For that reason, plaintiff agreed to accept an assignment of the Van Es note (\$437,342.04 payable over thirteen years), \$100,000 payable no later than August 1, 2012, and \$37,645.13, the last installment of which is due this year. This total, \$574,684.08 if fully paid, is \$225,315.92 less than the \$800,000. The actual differential is much greater because the \$100,000 and \$437,342.04 must be reduced to present value. As under the PSA, the Order Regarding Settlement of All Claims requires Darwin to pay off the personal residence debt.

The PSA provided that Darwin was to pay off the personal residence debt (\$623,814.83) from the sale of the Albrethsen property, but the language of the Agreement failed to give plaintiff the opportunity to obtain a security interest (\$800,000 + \$623,814.83) in the Albrethson sale proceeds. In the event Darwin defaults on the personal residence debt, this constitutes an additional element of damage (unless plaintiff is able to recover this debt from Darwin).

Had the PSA contained a legal description of the Albrethsen property and had it recited that plaintiff had an interest in the Status mortgage (which mortgage is referenced at paragraph 1.8 of the PSA), Darwin would not have been able to deprive plaintiff of the mortgage proceeds paid to him by the title company. See Idaho Code §32-918

Darwin has failed to convey to plaintiff two building lots referenced in paragraph 1.7 of the PSA. Plaintiff now understands that these building lots did not exist. Defendants failed to confirm

PLAINTIFF'S RESPONSE TO DEFENDANTS' FIRST SET OF DISCOVERY REQUESTS - 6

03/17/2010 WED 13:52 FAX 3459564

009/024

their existence.

INTERROGATORY NO. 8: Please identify each communication you had with the Defendants, whether initiated by you or the Defendants, including, but not limited to, identifying as to each alleged communication, whether each such communication was written or oral and, if oral, whether it was over the phone or in person, the location of each such communication, the content of each such communication, the date of each such communication, and any and all witnesses to each such communication.

ANSWER TO INTERROGATORY NO. 8: This interrogatory is objected to as overly-broad and ambiguous.

INTERROGATORY NO. 9: Please identify each and every fact supporting the allegation in Paragraph V of the Complaint that the Albrethsen property was "[a] major asset in the McKay community estate".

ANSWER TO INTERROGATORY NO. 9: The Albrethson property which was acquired and sold during the marriage and had a profit of \$2,000,000. Its community status is corroborated by the Property Settlement Agreement which contemplated that plaintiff receive a substantial portion of the Albrethsen proceeds.

INTERROGATORY NO. 10: Please identify each and every fact supporting the allegation in Paragraph VI of the Complaint that "defendant Walker and other agents of defendant Cosho Humphrey negligently recommended that the plaintiff enter into a Property Settlement Agreement ("PSA") with her then-husband Darwin McKay" including specifically identifying each such recommendation which was made to you by "defendant Walker and other agents of defendant Cosho Humphrey" and as to each such recommendation, the content of each recommendation, the date each recommendation was made, and the individual who made each such recommendation.

PLAINTIFF'S RESPONSE TO DEFENDANTS' FIRST SET OF DISCOVERY REQUESTS - 7

000625

Fax Confirmation Report

Date/Time : JAN-30-2012 05:32PM MON
 Fax Number : 2083445510
 Fax Name : Anderson, Julian & Hull
 Model Name : Phaser 3635MFP

Total Pages Scanned: 8

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Abbreviations:

| | | | |
|-------------------|---------------------|---------------|--------------------------|
| HS: Host Send | PL: Polled Local | CP: Completed | TS: Terminated by System |
| HR: Host Receive | PR: Polled Remote | FA: Fail | TU: Terminated by User |
| MS: Mailbox Save | WS: Waiting To Send | RP: Report | G3: Group3 |
| MP: Mailbox Print | EC: Error Correct | | |


ANDERSON, JULIAN & HULL LLP
 ATTORNEYS AND COUNSELORS AT LAW

Robert A. Anderson
 Brian K. Julian
 Alan K. Hull
 Chris H. Hansen
 Phillip J. Collier
 Michael P. Stefanie
 Amy G. White
 Mark D. Schatzman

Matthew O. Pappas
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e-mail: jrdavis@ajhllp.com
 Web Site: www.ajhllp.com
 Web Address: LITIGATION IS PRACTICE IN
 Idaho, AZ, CO, ID, NV, OR, WA, and WY.

Terry B. Anderson
 (of counsel)

FACSIMILE COVER SHEET

CONFIDENTIALITY NOTICE - This facsimile transmission (and/or the documents accompanying it) may contain confidential information belonging to the sender which is protected by the attorney-client privilege. The information is intended only for the use of the individual or entity named below. If you are not the intended recipient, you are hereby notified that any disclosure, copying, distribution or the taking of any action in reliance on the contents of this information is strictly prohibited. If you have received this transmission in error, please immediately notify us by telephone to arrange for return of the documents.

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From: Jennifer Cafferty-Davis - Paralegal

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| To: | Clerk of the Court - Ada County
Allen B. Ellis
Kevin E. Dinius | Fax No.: | 287-7529
345-9564
475-0101 |
|------------|--|-----------------|----------------------------------|

Document(s) Being Transmitted 1 Affidavit of Yvonne A. Dunbar

Date January 30, 2012

Original to Be Sent Via Regular Mail Yes No ☒

This message consists of 8 page(s), including this cover page. Please check to see if you received the correct number of pages; if not, kindly contact us immediately either by return facsimile or by telephone.

File No. 1603-079 **File Name:** McKay v. Walker, et al

Comments

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2/6/12
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NO. _____
A.M. _____ P.M. 2:58

FEB 03 2012

CHRISTOPHER D. RICH, Clerk
By STEPHANIE VIDAK
DEPUTY

ALLEN B. ELLIS
ELLIS, BROWN & SHEILS, CHARTERED
Attorneys-at-Law
707 North 8th Street
P.O. Box 388
Boise, Idaho 83701-0388
(208) 345-7832 (Telephone)
(208) 345-9564 (Facsimile)
ISB No. 1626

Attorneys for Plaintiff

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

| | | |
|---------------------------------------|---|------------------------|
| Patricia McKay |) | |
| |) | Case No. CV OC 0922659 |
| Plaintiff, |) | |
| |) | FOURTH AFFIDAVIT OF |
| v. |) | ALLEN B. ELLIS |
| |) | |
| Thomas G. Walker and Cosho Humphrey, |) | |
| LLP, a limited liability partnership, |) | |
| |) | |
| Defendants. |) | |
| _____ |) | |

STATE OF IDAHO)
)ss.
County of Ada)

I, Allen B. Ellis, being first duly sworn, depose and state as follows:

1. I am the attorney for the plaintiff in the herein matter and make this affidavit upon my own personal knowledge and am competent to testify to the matters contained here.
2. Attached hereto as exhibits are true and correct copies of the following:

FOURTH AFFIDAVIT OF ALLEN B. ELLIS - 1

ORIGINAL

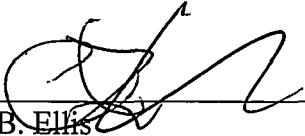
Document

Exhibit No.

Affidavit of Lost Note and Endorsement and Transfer of
Note dated October 7, 2008 1

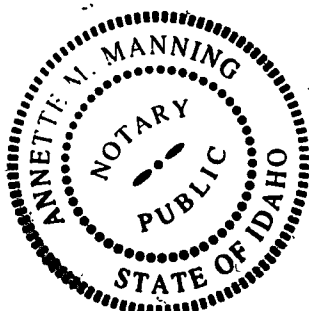
Motion for Contempt (Ada Case No. CV DR 06-15200) dated
January 30, 2009 2

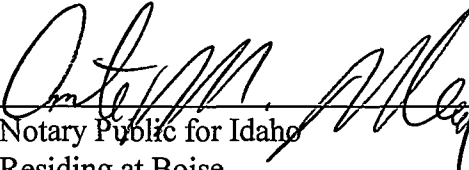
Pre-Trial Brief (Ada Case No. CV DR 06-15200) dated
July 2, 2009 2



Allen B. Ellis
Attorney for Plaintiff

SUBSCRIBED AND SWORN To before me this 3rd day of February, 2012.






Notary Public for Idaho
Residing at Boise
Commission Expires: 01/05/18

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 3rd day of February, 2012, I caused to be served a true and correct copy of the foregoing by the method indicated below, and addressed to the following:

Robert A. Anderson
Yvonne A. Dunbar
ANDERSON, JULIAN & HULL, LLP
250 South Fifth Street, Suite 700
P.O. Box 7426
Boise, Idaho 83707

____ U.S. Mail
☒ Hand Delivery
____ Overnight Mail
____ Facsimile at
344-5510



Allen B. Ellis

**AFFIDAVIT OF LOST NOTE AND ENDORSEMENT
AND TRANSFER OF NOTE**

STATE OF IDAHO)
)ss.
COUNTY OF ADA)

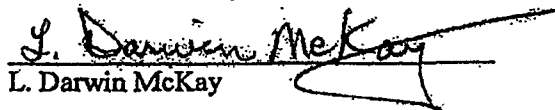
I, L. Darwin McKay, being first duly sworn upon oath herein depose and state as follows:

1. I am the payee and holder of a promissory note made by Status Corporation of Idaho, an Idaho corporation, as borrower, to L. Darwin McKay his successors and assigns, as lender, dated November 28, 2006, in the amount of ONE MILLION THREE HUNDRED NINETY-SIX THOUSAND EIGHT HUNDRED DOLLARS (\$1,396,800). A true copy of said Note is appended hereto as Exhibit A ("the Note"). The amount due and owing on the Note is set forth in the accompanying Assignment of Judgment.

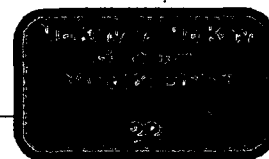
2. The Note has not previously been endorsed or transferred to any other party.

3. I have made a diligent search for the original Note and have determined that the original has been lost or destroyed.

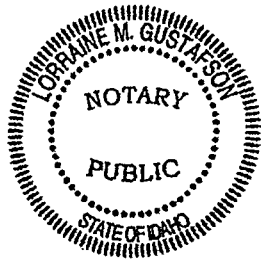
4. For good and valuable consideration, the receipt of which is hereby acknowledged, I endorse and transfer, without recourse, all of my right, title and interest in and to the Note to Lawyer's Title Insurance Corporation, a Nebraska corporation and successor by merger to Transnation Title Insurance Company.


L. Darwin McKay

AFFIDAVIT OF LOST NOTE AND ENDORSEMENT AND TRANSFER OF NOTE -
Page 1



Subscribed and sworn to before me this 7th day of October 2008.



Lorraine M. Gustafson
Notary Public for Idaho
Residing in Boise, Idaho
My Commission Expires: 2-1-2013

JAN 30 2009

EXHIBIT 2

1. Finding the Defendant in contempt of court for violation of the Decree of Divorce entered November 28, 2007;

2. Imposing sanctions against the Defendant for being in contempt pursuant to Idaho Code § 7-610;

3. Requiring the Defendant to pay all attorneys' fees and costs incurred by the Plaintiff in bringing this motion pursuant to the Decree of Divorce, Idaho Code §§ 32-704, 12-120 and 12-1212; and

4. For such other and further relief as the Court deems just.

This motion is based upon the Affidavits of Patricia McKay, filed concurrently herewith.

DATED this 30th day of January 2009.

HOLLAND & HART LLP

By 

Scott D. Hess, of the firm
Attorneys for Plaintiff Patricia McKay

Scott D. Hess, ISB #2897
HOLLAND & HART LLP
Suite 1400, U.S. Bank Plaza
101 South Capitol Boulevard
P.O. Box 2527
Boise, Idaho 83701-2527
Telephone: (208) 342-5000
Facsimile: (208) 343-8869
sdhess@hollandhart.com

Attorneys for Plaintiff Patricia McKay

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA
MAGISTRATE DIVISION

★ ★ ★ ★ ★ ★

| | | |
|-----------------|---|------------------------|
| PATRICIA MCKAY, |) | Case No. CV DR 0615200 |
| |) | |
| Plaintiff, |) | |
| |) | |
| vs. |) | PRETRIAL BRIEF |
| |) | |
| DARWIN MCKAY, |) | |
| |) | |
| Defendant. |) | |
| |) | |
| |) | |
| |) | |
| |) | |
| |) | |

COMES NOW Plaintiff, Patricia McKay, by and through her attorneys of record,
Holland & Hart LLP, and submits this Pretrial Brief.

PRETRIAL BRIEF - 1

000634

EXHIBIT 3

and from that separate property he is to pay the obligations to Patricia. Therefore, any other reading of the Agreement and attempt to use characterizations of separate property as precluding the use of those funds to fulfill other obligations in the Agreement would render those obligations ineffective and unnecessary.

D. DARWIN TOOK ACTION AFFECTING THE PROPERTY AVAILABLE TO COMPLETE THE TERMS OF THE PROPERTY SETTLEMENT DURING THE PENDENCY OF THE DIVORCE AND SUBSEQUENT TO THE DIVORCE.

It is further anticipated that Darwin will plead poverty to the Court. In essence Darwin wants the Court to look only at his current economic situation, and the financial status of his business entities and the condition of the current real estate market to make a determination as to whether the Motion to Liquidate the Agreement should be granted. The current economic state of Darwin and his business entities arise from actions that Darwin took during the pendency of the divorce and subsequent to the divorce for which Patricia has no responsibility. Darwin's action during the pendency of the divorce and subsequent to the divorce are the events that precipitate his now alleged inability to pay. The actions that Darwin took include, but are not limited to, taking out an additional \$780,000.00 line of credit with Great Basin Bank; taking out a \$100,000.00 line of credit with Zion Bank; numerous investments in Granite Transformations; and a \$240,000.00 personal loan with Sterling Bank.

It is incredible that Darwin would assert poverty and that the parties risk in the Agreement when Darwin has, by his own actions, increased his person and business debts with no input from Patricia. Darwin now wishes to place the risk of his own lavish spending and poor business decisions on Patricia when those actions were in no way allowed, recommended or agreed to by her. The Court should not allow Darwin to cloud the issues before the Court and

CERTIFICATE OF SERVICE

I hereby certify that on this 2nd day of July 2009, I caused to be served a true and correct copy of the foregoing by the method indicated below, and addressed to the following:

Kimberly Brooks
Brooks Law, P.C.
23 9th Avenue North
Nampa, ID 83687

| | |
|-------------------------------------|----------------|
| <input checked="" type="checkbox"/> | U.S. Mail |
| <input type="checkbox"/> | Hand Delivered |
| <input type="checkbox"/> | Overnight Mail |
| <input checked="" type="checkbox"/> | Telecopy (Fax) |

Kate R M
for HOLLAND & HART LLP

4555438_1.DOC

ALLEN B. ELLIS
ELLIS, BROWN & SHEILS, CHARTERED
Attorneys-at-Law
707 North 8th Street
P.O. Box 388
Boise, Idaho 83701-0388
(208) 345-7832 (Telephone)
(208) 345-9564 (Facsimile)
ISB No. 1626

Attorneys for Plaintiff

NO. _____
A.M. _____ P.M. 3:39
NOV 21 2012
CHRISTOPHER D. RICH, Clerk
By STEPHANIE VIDAK
DEPUTY

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

| | | |
|---------------------------------------|---|-----------------------------|
| Patricia McKay |) | |
| |) | Case No. CV OC 0922659 |
| Plaintiff, |) | |
| |) | AFFIDAVIT OF ALLEN B. ELLIS |
| v. |) | |
| |) | |
| Thomas G. Walker and Cosho Humphrey, |) | |
| LLP, a limited liability partnership, |) | |
| |) | |
| Defendants. |) | |
| _____ |) | |

STATE OF IDAHO)
)ss.
County of Ada)

I, Allen B. Ellis, being first duly sworn, depose and state as follows:

1. I am the attorney for the plaintiff in the herein matter and make this affidavit upon my own personal knowledge and am competent to testify to the matters contained here.
2. Opposing counsel has noticed the deposition of plaintiff's expert, Bryan D. Smith
3. Mr. Smith bills for his travel time both ways.

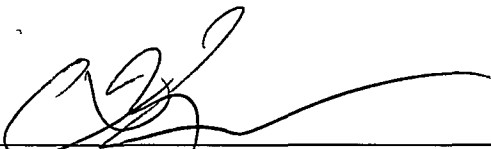
AFFIDAVIT OF ALLEN B. ELLIS - 1

ORIGINAL 000637

4. My client does not have the resources to pay for this expense. Defense counsel has declined to pay this expense or the expense of Mr. Smith's travel.

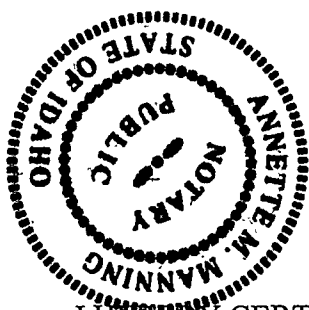
5. In the interests of efficiency and justice, plaintiff seeks an order that Mr. Smith's deposition be taken in Idaho Falls at a mutually convenient date and time.

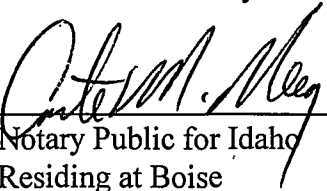
6. Defense counsel advises that the Boise situs is desired in order that his clients may observe Mr. Smith's demeanor as a witness. A viable option would be a video deposition or a conventional deposition with a videocast.



Allen B. Ellis
Attorney for Plaintiff

SUBSCRIBED AND SWORN To before me this 20th day of November, 2012.





Notary Public for Idaho
Residing at Boise
Commission Expires: 01/05/18

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 20th day of November, 2012, I caused to be served a true and correct copy of the foregoing by the method indicated below, and addressed to the following:

Robert A. Anderson
Yvonne A. Dunbar
ANDERSON, JULIAN & HULL, LLP
250 South Fifth Street, Suite 700
P.O. Box 7426
Boise, Idaho 83707

____ U.S. Mail
____ Hand Delivery
____ Overnight Mail
 X Facsimile at
344-5510



Allen B. Ellis

ORIGINAL

Robert A. Anderson – ISB No. 2124
Yvonne A. Dunbar – ISB No. 7200
ANDERSON, JULIAN & HULL LLP
C. W. Moore Plaza
250 South Fifth Street, Suite 700
Post Office Box 7426
Boise, Idaho 83707-7426
Telephone: (208) 344-5800
Facsimile: (208) 344-5510

Attorneys for Defendants

FILED
AM 400

FEB 21 2013

CHRISTOPHER D. RICH, Clerk
By KATHY BIEHL
Bepz

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

PATRICIA MCKAY,

Plaintiff,

vs.

THOMAS G. WALKER and COSHO
HUMPHREY, LLP, a limited liability
partnership,

Defendants.

Case No. CV OC 0922659

**DEFENDANTS' MOTION TO
RECONSIDER COURT'S ORDER
DENYING DEFENDANTS'
MOTION FOR SUMMARY
JUDGMENT**

COMES NOW the above-named Defendants, by and through their attorney of record, Anderson, Julian & Hull LLP, pursuant to Idaho Rule of Civil Procedure 11 hereby moves this Court for reconsideration of its *Order Denying Defendants' Motion for Summary Judgment*. The basis for this Motion is the misinterpretation of key facts which led to the Court's decision that a genuine issue of material fact exists.

This motion is supported by the documents and pleadings on file herein and upon the Memorandum and Affidavit in support which are filed contemporaneously herewith.

DATED this 21st day of February, 2013.

ANDERSON, JULIAN & HULL LLP

By: 

Robert A. Anderson

Yvonne A. Dunbar, of the Firm

Attorneys for Defendants

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this 21st day of February, 2013, I served a true and correct copy of the foregoing by delivering the same to each of the following attorneys of record, by the method indicated below, addressed as follows:

Allen B. Ellis
ELLIS, BROWN & SHEILS, CHARTERED
707 North 8th Street
P.O. Box 388
Boise, Idaho 83701-0388
Telephone: (208) 345-7832
Facsimile: (208) 345-9564

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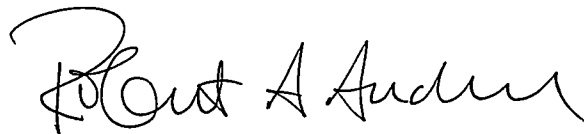
U.S. Mail, postage prepaid
Hand-Delivered
Overnight Mail
Facsimile
Email

Kevin E. Dinius
Michael J. Hanby II
DINIUS LAW
5680 E. Franklin Rd., Suite 130
Nampa, Idaho 83687
Telephone: (208) 475-0100
Facsimile: (208) 475-0101

| |
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| <input type="checkbox"/> |
| <input type="checkbox"/> |
| <input type="checkbox"/> |

U.S. Mail, postage prepaid
Hand-Delivered
Overnight Mail
Facsimile
Email

Attorneys for Plaintiff



Robert A. Anderson

Yvonne A. Dunbar

Robert A. Anderson – ISB No. 2124
Yvonne A. Dunbar – ISB No. 7200
ANDERSON, JULIAN & HULL LLP
C. W. Moore Plaza
250 South Fifth Street, Suite 700
Post Office Box 7426
Boise, Idaho 83707-7426
Telephone: (208) 344-5800
Facsimile: (208) 344-5510

FEB 21 2013

CHRISTOPHER D. RICH, Clerk
By KATHY BIEHL
Deputy

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

**AFFIDAVIT OF ROBERT A.
ANDERSON IN SUPPORT OF
DEFENDANTS' MOTION TO
RECONSIDER**

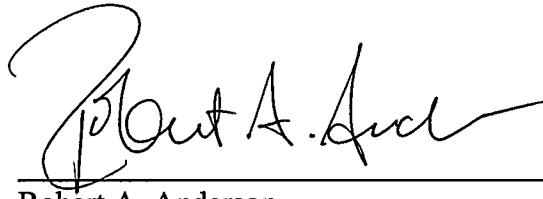
**AFFIDAVIT OF ROBERT A. ANDERSON IN SUPPORT OF DEFENDANTS' MOTION TO
RECONSIDER - PAGE 1**

3. Enclosed as Exhibit "B" is a true and correct copy of excerpts from the Deposition of Darwin McKay taken in the underlying action on March 21, 2007.

4. Enclosed as Exhibit "C" are true and correct copies of the *Amended Affidavit of Patricia McKay in Support of Motion for Contempt of Darwin McKay and to Liquidate Judgment* filed on January 30, 2009 in the underlying action and Exhibit C to that affidavit.

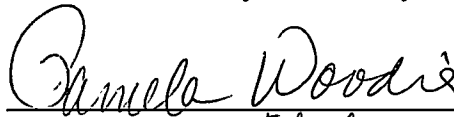
5. Enclosed as Exhibit "D" is a true and correct copy of the November 28, 2006 Real Estate Purchase and Sale Agreement between Darwin McKay and Status Corporation of Idaho.

Further your Affiant saith not.



Robert A. Anderson

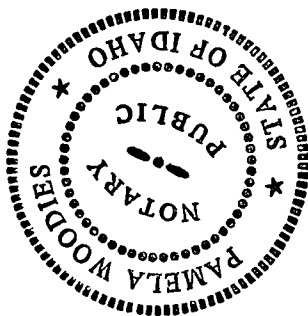
SUBSCRIBED AND SWORN to before me this 21st day of February, 2013.



Notary Public for Idaho

Residing at Boise, Idaho

My commission expires: 2/25/2016



CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this 21st day of February, 2013, I served a true and correct copy of the foregoing by delivering the same to each of the following attorneys of record, by the method indicated below, addressed as follows:

Allen B. Ellis
ELLIS, BROWN & SHEILS,
CHARTERED
707 North 8th Street
P.O. Box 388
Boise, Idaho 83701-0388
Telephone: (208) 345-7832
Facsimile: (208) 345-9564

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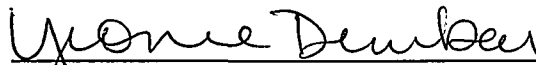
U.S. Mail, postage prepaid
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Kevin E. Dinius
Michael J. Hanby II
DINIUS LAW
5680 E. Franklin Rd., Suite 130
Nampa, Idaho 83687
Telephone: (208) 475-0100
Facsimile: (208) 475-0101

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U.S. Mail, postage prepaid
Hand-Delivered
Overnight Mail
Facsimile
Email

Attorneys for Plaintiff



Robert A. Anderson
Yvonne A. Dunbar

EXHIBIT “A”

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

| | |
|------------------------------------|-----------------|
| PATRICIA MCKAY, |) |
| Plaintiff, |) |
| vs. |) Case No. |
| THOMAS G. WALKER, and COSHO |) CV OC 0922659 |
| HUMPHREY, LLP, a limited liability |) |
| partnership, |) |
| Defendants. |) |
| _____ |) |

DEPOSITION OF BRYAN D. SMITH

January 17, 2013

REPORTED BY:

DIANA L. DURLAND, CSR No. 637

Notary Public

THE DEPOSITION OF BRYAN D. SMITH was taken on behalf of the Defendants at the offices of Anderson, Julian & Hull, LLP, 250 South Fifth Street, Suite 700, Boise, Idaho, commencing at 1:25 p.m. on January 17, 2013, before Diana L. Durland, Certified Shorthand Reporter and Notary Public within and for the State of Idaho, in the above-entitled matter.

A P P E A R A N C E S

For the Plaintiff:

Ellis, Brown & Sheils, Chartered

By: ALLEN B. ELLIS

707 North Eighth Street

Post Office Box 388

Boise, Idaho, 83701-0388

For the Defendants:

Anderson, Julian & Hull, LLP

By: ROBERT A. ANDERSON

250 South Fifth Street, Suite 700

Post Office Box 7426

Boise, Idaho, 83707-7426

Also Present: Thomas G. Walker

Patricia McKay

I N D E X

| TESTIMONY OF BRYAN D. SMITH | PAGE |
|-----------------------------|------|
| Examination by Mr. Anderson | 4 |

E X H I B I T S

| | MARKED |
|--|--------|
| 33. Second Amended Notice of Deposition Duces
Tecum of Bryan Smith | 4 |
| 34. McKay vs. Walker Expert Binder Index
Produced by Bryan D. Smith | 5 |
| 35. Idaho Code Section 32-918 | 23 |
| 36. Idaho Code Section 10-1110 | 46 |
| 37. Invoices Submitted to Allen B. Ellis from
Bryan D. Smith, Marked Collectively | 48 |
| 38. Letter to Bryan Smith from Allen B. Ellis,
dated 11/17/09, with Related Attachments,
Marked Collectively | 81 |
| 39. LandAmerica Transnation Warranty Deed,
Escrow No. 0600042290 | 86 |
| 40. Plaintiff's Expert Witness Disclosure | 105 |
| 41. Affidavit of Bryan D. Smith | 105 |

BRYAN D. SMITH,
having been first duly sworn to tell the truth relating
to said cause, testified as follows:

EXAMINATION

BY MR. ANDERSON:

Q. Mr. Smith, could you state your full name for
the record, please?

A. Full name Bryan, B-r-y-a-n, Dale Smith.

Q. And I understand that you've been retained to
present some expert opinions in the case entitled PS
McKay versus we'll call it Cosho Humphrey and Tom
Walker; is that correct?

A. Yes.

Q. In terms of the work that you've done on this
case and in preparation for your deposition, were you
provided a copy of the notice for your deposition?

A. Yes, I believe I was.

(Exhibit 33 marked.)

Q. (BY MR. ANDERSON) We've marked as Exhibit 33
the second amended notice for your deposition. Is that
the document that you were provided for review?

A. You know, I believe I received this, or my
staff did. I'm not sure that I actually knew this was a
duces tecum deposition. But I did bring most of the
documents I reviewed. There may be another file that I

1 have.

2 **Q. All right. Let's see what you have. Do you**

3 **have some materials with you today?**

4 A. I do. I took the underlying documents and put

5 them in a binder. Do you want me to read them off, what

6 I've got?

7 **Q. Would you just read the table of contents --**

8 **why don't we just make a copy of that so we don't need**

9 **to include the verbiage in the record but we'll have the**

10 **substance.**

11 MR. ANDERSON: I'll make a copy of this real

12 quick.

13 (Recess taken.)

14 (Exhibit 34 marked.)

15 **Q. (BY MR. ANDERSON) Mr. Smith, we've marked as**

16 **Exhibit 34 the title page or index from your notebook.**

17 **If you could, could you first tell me if all 15**

18 **designated items are in the notebook?**

19 A. Yes.

20 **Q. And there are some slash marks through about**

21 **half of the numbered documents. What do they mean?**

22 A. I have no idea.

23 **Q. I take it somebody put this together for you?**

24 A. No. I had somebody put the index together, but

25 I believe those are my slash marks, and I don't know why

Page 5

1 I put them on there.

2 **Q. Let's go back to Exhibit 33. Being a lawyer,**

3 **you understand the significance of a notice duces tecum**

4 **for a deposition?**

5 A. Well, I know it requires you to bring

6 documents.

7 **Q. You've deposed experts before in the line of**

8 **work that you do as a lawyer?**

9 A. Yes.

10 **Q. And you understand that in order to fully**

11 **ascertain what the opinions of an expert are, it is**

12 **important to have their entire file in front of them for**

13 **review and scrutiny; would you agree?**

14 A. Can be.

15 **Q. Did you have any discussions with counsel for**

16 **Ms. McKay, Mr. Ellis, regarding the documents you needed**

17 **to bring?**

18 A. I don't think he and I talked about documents I

19 was supposed to bring. I just assumed you wanted me to

20 bring the documents that I relied on.

21 **Q. Among others. You assumed partially correct.**

22 **Let's go through 33 and see what you did bring. Number**

23 **one talks about your entire file involving, but not**

24 **limited to, photographs, recordings, statements,**

25 **records, emails, documents you may have relied on such**

Page 6

1 as reports, text, articles, treatises. And any other

2 materials you may have prepared or reviewed.

3 **Is it accurate to state that Exhibit 34, the**

4 **list of 15 items, comprises everything that you have**

5 **reviewed, prepared or considered in the formulation of**

6 **your opinions?**

7 A. I have some additional documents I have here.

8 **Q. What do you have in addition?**

9 A. I printed off a copy of Idaho Code Section

10 10-1110.

11 **Q. All right.**

12 A. I printed off a copy of Idaho Code Section

13 32-918.

14 **Q. All right.**

15 A. I have an email from Thomas Walker to

16 Patricia McKay dated October 23, 2007. Then there's a

17 couple more emails that go with that. It's on one page.

18 **Q. When did you receive that?**

19 A. I think -- I know I received this one

20 yesterday, but I think I may have received it before

21 yesterday. But I couldn't find it.

22 **Q. How long before yesterday?**

23 A. I don't recall.

24 **Q. A couple of weeks?**

25 A. I don't recall all the stuff I've gotten.

Page 7

1 **Q. It's not referred to in your affidavit or**

2 **report; is it?**

3 A. This email?

4 **Q. Yes, sir.**

5 A. That's correct.

6 **Q. Would that be because you did not have that**

7 **email at the time you formulated your opinions in either**

8 **the report or the affidavit?**

9 A. I think what happened is I got the substance of

10 the email through the pleadings and through the judge's

11 decision. And I assumed I had a copy of it. And I told

12 Mr. Ellis that I wanted to actually see the email. I

13 thought I understood what it said from the pleadings I

14 read, so I asked him for a copy of it yesterday.

15 **Q. Which pleadings are you referring to?**

16 A. I don't recall. I'd have to take a look at

17 them. I believe it was either the court's ruling on

18 summary judgment or the other pleadings in support or

19 opposition of summary judgment.

20 It became clear that there was some

21 communication between Mr. Walker and Mrs. McKay, and so

22 I wanted to see the actual email.

23 **Q. You picked that up by reading the judge's**

24 **opinion?**

25 A. Again, I told you, I don't recall if it was his

Page 8

1 opinion or the briefing in support of or in opposition
2 of summary judgment where I picked that up.

3 **Q. Have you reviewed that briefing in the last**
4 **couple of days?**

5 A. No. I've reviewed it, not in-depth. I've
6 scanned it.

7 **Q. Is it accurate to state that you did not rely**
8 **on the October 23, 2007, email in the formulation of**
9 **your opinions in this case?**

10 MR. ELLIS: Objection; asked and answered. He
11 testified it was referred to in the --

12 MR. ANDERSON: Counsel, you just get to object.

13 MR. ELLIS: I get to lead you down the road a
14 little bit.

15 **Q. (BY MR. ANDERSON) Your opinions in either your**
16 **report or affidavit were of record by the time the judge**
17 **issued his order; correct?**

18 A. I don't know -- I can't tell you right now as I
19 sit here exactly when the judge issued his order. What
20 I can tell you is I relied on the substance of the
21 material discussed in the email. This is what I
22 understood the facts to be when I issued my expert
23 opinion.

24 **Q. You understood what to be the facts?**

25 A. The email says, "Our plan is to record the

Page 9

1 Judgment and Decree of Divorce, which then becomes a
2 lien on all of Darwin's real and personal property. We
3 don't want to emphasize this aspect of settlement. So
4 we don't want to say anything until after the judge
5 signs the Judgment and Decree."

6 There's also a letter dated December 15, 2008,
7 where it's a letter from Mr. Walker to Mrs. McKay in
8 which Mr. Walker says essentially the same thing, except
9 I don't think there's a reference to personal
10 property.

11 **Q. And you understood that Mr. Walker corrected**
12 **the personal property reference to exclude it to say**
13 **that was not correct?**

14 A. I think Mr. Ellis told me that at some point.
15 Since this doesn't really involve personal property --

16 **Q. It would be irrelevant to look at personal**
17 **property, and therefore really doesn't matter for the**
18 **substance of this case. Is that what you're saying?**

19 A. Possibly.

20 **Q. Okay. I want to know what the parameters of**
21 **your opinions are. As I understand it, personal**
22 **property doesn't have anything to do with this case. It**
23 **would be the real property that is the crux of that**
24 **email that you looked at?**

25 MR. ELLIS: Objection. Clarity.

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1 **Q. (BY MR. ANDERSON) Is that correct?**

2 A. I don't know what your understanding is. You
3 just told me what your understanding was.

4 **Q. Then you do know what my understanding is. I'm**
5 **asking you about if that's your understanding?**

6 A. My understanding is this case deals with a
7 mortgage and deals with real property and deals with a
8 property settlement agreement.

9 **Q. I'm trying to start the process of trying to**
10 **figure out the basis of your opinions and exactly what**
11 **they are. At this point in time, I want to make sure**
12 **that the reference to personal property in that email,**
13 **if indeed it was corrected later, is really irrelevant**
14 **to any of the issues that you see in the case. Would**
15 **you agree?**

16 A. I did not -- I will tell you that telling
17 Mrs. McKay, by Mr. Walker, that there is -- that by
18 recording the judgment and decree of divorce that would
19 become a lien on Darwin's personal property is just not
20 true.

21 **Q. Let's assume that it was corrected after that.**

22 A. Okay.

23 **Q. In the context of this case, you don't see**
24 **personal property as being a relevant issue; do you? I**
25 **think you just rattled off real property, mortgage,**

Page 11

1 **property settlement agreement. Those are the key**
2 **issues?**

3 A. Those are the key issues.

4 **Q. Personal property is not one of the issues.**
5 **I'm trying to make sure I don't need to drill you on**
6 **that particular aspect of it if we don't have to.**

7 A. To me it becomes an issue only to the extent
8 that Mr. Walker misunderstood or -- apparently
9 misunderstood what the recording of the judgment decree
10 of divorce would do with respect to personal property.
11 And, of course, you know my opinion on the real
12 property.

13 **Q. We'll get to that. You do agree that the**
14 **statement, if it did not include the reference to**
15 **personal property, would be correct. That by recording**
16 **the property settlement agreement, it would constitute a**
17 **lien on real property owned by Mr. McKay; correct?**

18 MR. ELLIS: Answer that question, but I'd like
19 to take a recess that might speed things up.

20 WITNESS: You have to repeat your question.

21 MR. ELLIS: Sorry.

22 **Q. (BY MR. ANDERSON) Let's leave personal**
23 **property out of that statement by Mr. Walker. The rest**
24 **of it's true; isn't it?**

25 A. That the plan was to record judgment and decree

Page 12

1 of divorce which then becomes a lien on all of Darwin's
 2 really property? It could have if it was done
 3 correctly.
 4 MR. ANDERSON: Okay. You need to take a break?
 5 MR. ELLIS: No, counsel. Your question was --
 6 you said if the property agreement was recorded, and I
 7 think what you meant was the judgment with the property
 8 agreement attached.
 9 MR. ANDERSON: I did.
 10 WITNESS: Do you want me to go over the rest of
 11 the documents?
 12 **Q. (BY MR. ANDERSON) I do.**
 13 A. I have this email. Then Mr. Ellis sent me a
 14 copy of Mrs. McKay's deposition, which I scanned. I
 15 didn't read it thoroughly.
 16 **Q. When did you get it?**
 17 A. His cover letter is dated September 20, 2012.
 18 **Q. And by scanning as opposed to reading, what**
 19 **does that mean?**
 20 A. That means that I thumbed through the pages and
 21 looked for things that were relevant. I didn't read
 22 every word on the page.
 23 **Q. What did you look for?**
 24 A. I don't recall anything that would have jumped
 25 out on the me.

Page 13

1 **Q. Did you make any notes?**
 2 A. No.
 3 **Q. Did you highlight anything?**
 4 A. Let's see. No. I did not highlight anything.
 5 **Q. Did you put any tabs on it to identify portions**
 6 **that you thought might be of some relevance?**
 7 A. This is a Post-it note that looks like it came
 8 from my office, because I use Post-it notes. And I
 9 think I just marked this one page.
 10 **Q. What page is that, sir?**
 11 A. That would be page 12.
 12 **Q. Is there anything on page 12 that you thought**
 13 **was significant?**
 14 A. This page 12, I think, just simply identifies
 15 testimony from Mrs. McKay about what she understood
 16 happened.
 17 **Q. I guess one explanation would be that that's as**
 18 **far as you got in the depo when you were reading it?**
 19 A. No.
 20 **Q. You don't remember reading through all of**
 21 **the -- or scanning the whole thing?**
 22 A. I remember this part, because it talked about
 23 what it says in the deposition.
 24 **Q. This part?**
 25 A. Any funds that Darwin received from the sale of

Page 14

1 the Albrethsen property he was to pay to me. And that
 2 what she understood was supposed to happen. And a lot
 3 of the other deposition -- I can't remember exactly what
 4 it was, but it didn't appear to be relevant to my
 5 opinions.
 6 **Q. Okay. So you've looked through it to the**
 7 **extent you feel is necessary with respect to the**
 8 **formulation of your opinions in this matter?**
 9 A. Yes.
 10 **Q. Now what else do we have in that stack?**
 11 A. I have a copy of the Notice of Deposition Duces
 12 Tecum.
 13 **Q. Exhibit 33?**
 14 A. No. This one was dated October 5, 2012.
 15 **Q. When we tried to get your deposition the first**
 16 **time?**
 17 A. I don't know what you did before.
 18 **Q. It would be the first depo notice that we sent**
 19 **out.**
 20 A. Okay.
 21 **Q. 33 is the second amended, so maybe we had a**
 22 **first amended. Maybe we've tried since October. But it**
 23 **does request a number of documents, doesn't it, the one**
 24 **you have in your file? I would venture that there's 11**
 25 **requests?**

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1 A. Yes.
 2 **Q. The last one ends with billing statements?**
 3 A. Yeah, it does say billing statements.
 4 **Q. So does Exhibit 33. Have we reached the bottom**
 5 **of your pile, or have you brought billing statements?**
 6 A. I did not bring the billing statements, because
 7 they are in another file.
 8 **Q. Okay. Why don't --**
 9 A. I'm trying to answer your question. I'm
 10 looking. Yes. 33 does say billing statements
 11 evidencing your work.
 12 **Q. I would suspect that the paragraphs in the**
 13 **second amended notice are exactly the same as in the**
 14 **notice that you've had since October. Let's do this,**
 15 **why don't we take a break? If you could call your**
 16 **office and have them fax over your billing statements,**
 17 **then we can work on those whenever they show up. Would**
 18 **that be okay?**
 19 A. That would be fine.
 20 **Q. Is there anything else, that you know of,**
 21 **related to this case that has not been provided in the**
 22 **pile in front of you or is contained at your office in**
 23 **your billing file?**
 24 A. There are, I think, some -- I think there are
 25 some emails or cover letters between me and Mr. Ellis,

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1 because I have a correspondence file.
2 **Q. Why don't we just have you provide those to**
3 **Mr. Ellis and he can give them to me. I don't know if**
4 **they would generate any questions.**
5 MR. ELLIS: If they do, we can arrange to have
6 him redeposed.
7 MR. ANDERSON: If necessary. That's fine with
8 me.
9 WITNESS: Let me have my staff send the billing
10 statements to you.
11 MR. ELLIS: Off the record.
12 (Discussion held off the record.)
13 WITNESS: You asked me what additional
14 documents I have. I have a copy of my affidavit, but
15 that's also in the binder. I have a copy of a letter
16 dated December 15, 2008, from Mr. Walker to Mrs. McKay.
17 I have a letter dated November 5, 2009, from Mr. Ellis.
18 No, it's from Mr. Walker to Mr. Ellis.
19 **Q. (BY MR. ANDERSON) Would these be letters that**
20 **you referenced in your report?**
21 A. I don't know if I relied on these or not. I'm
22 just telling you what documents I have.
23 **Q. Did you say November 5th?**
24 A. November 5, 2009.
25 **Q. Right. You reference seven pieces of**

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1 correspondence in both your -- in your affidavit
2 including the December 15, 2008, letter. If those are
3 in that stack, maybe you can read off the dates.
4 A. November 5, 2009.
5 **Q. Okay.**
6 A. Then there's an email from Mr. Ellis to
7 Mr. Walker dated November 5, 2009.
8 **Q. Okay.**
9 A. Then I've got another copy of this November 5,
10 2009, letter. I don't think it's another copy, it's
11 just another letter. Looks to me like there are emails
12 between Mr. Ellis and Mr. Walker. So November 5, 2009,
13 it looks like they sent emails and letters to each other
14 on the same day. Looks like Mr. Walker may have sent
15 two. There's a letter dated November 4, 2009, from
16 Mr. Brown (sic) to Mr. Walker.
17 MR. ELLIS: Mr. who?
18 WITNESS: I'm sorry, Mr. Ellis. I was looking
19 up and read Brown. Sorry.
20 **Q. (BY MR. ANDERSON) That's November 4, 2009?**
21 A. Yes. Then there's a letter dated November 2nd,
22 2009, from Mr. Ellis to Mr. Walker. There's a letter
23 dated October 28, 2009, from Mr. Ellis to Mr. Walker.
24 That's it.
25 **Q. Did you have a November 17, 2009, letter from**

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1 **Mr. Ellis to you?**
2 A. That, I think, may be one of those cover
3 letters. I don't know -- it's in a different file.
4 It's in a correspondence file.
5 **Q. All right. Any other documents that you are**
6 **aware of that you have created or reviewed relative to**
7 **your work on this case?**
8 A. No.
9 **Q. Do you recall generally when you were first**
10 **retained?**
11 A. I'd have to look at my billings to tell you
12 that. So the answer is no, I can't, unless I have those
13 to refresh my memory.
14 **Q. Why don't we wait for those to show up and we**
15 **can revisit that area. Have you ever spoken with**
16 **Patricia McKay about this case?**
17 A. No. I met her for the first time and spoke to
18 her for the first time today.
19 **Q. Did you speak with her in terms of any**
20 **substance or just general salutations?**
21 A. I did not discuss any substance with her.
22 **Q. Have you spoken with anyone involved in the**
23 **case in the course of work that you've done other than**
24 **Mr. Ellis?**
25 MR. ELLIS: Objection as to clarity. Which

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1 case?
2 MR. ANDERSON: This case. He's retained --
3 MR. ELLIS: Sorry.
4 MR. ANDERSON: -- in the case Patricia McKay
5 has brought against the Cosho Humphrey law firm.
6 WITNESS: I have a partner. He knows I have
7 the case. Like partners talk in terms of, what is your
8 case about? But I haven't spoken to anybody else about
9 it.
10 **Q. (BY MR. ANDERSON) Have you spoken with any**
11 **other attorneys in Idaho to vet or peer review your**
12 **opinions that you've provided in your expert disclosure**
13 **or affidavit?**
14 A. I have not spoken to any other attorneys about
15 the case or about my opinions in the case, other than my
16 partner.
17 **Q. Who is your partner?**
18 A. BJ Driscoll.
19 **Q. Did he offer any substance or was he more of --**
20 **maybe you should describe for me what the discussions**
21 **were about?**
22 A. He just knows what the case is about. Not much
23 more than that, really.
24 **Q. This case has continued for a period of time**
25 **due to a variety of factors. It looks like your initial**

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| | |
|--|---|
| <p>1 report or opinion has a fax date of December 7, 2010, at
 2 the top. And your affidavit, filed with respect to the
 3 motion for summary judgment which was filed, dated
 4 January 20, 2011.</p> <p>5 Since January 2011, have you read anything,
 6 reviewed anything, or developed any new opinions,
 7 regarding this case other than those which are set forth
 8 in your affidavit or expert disclosure?</p> <p>9 A. I've relied on and considered the documentation
 10 we've talked about. I can't tell you the dates I did
 11 that. So in terms of what I read since that time or
 12 considered, the documents are the documents.</p> <p>13 Q. That would include the deposition of
 14 Mrs. McKay?</p> <p>15 A. As I described it to you, yes.</p> <p>16 Q. Right. Did any of the documents that you've
 17 reviewed since January of 2011 alter, change, modify or
 18 cause you to withdraw any of the opinions set forth in
 19 your expert disclosure or affidavit?</p> <p>20 A. No.</p> <p>21 Q. Would it be safe to say that the totality of
 22 the opinions you plan to offer in this case are
 23 contained within those two documents?</p> <p>24 A. I've actually -- how do I explain this? When
 25 you look at my expert report, there's obviously some</p> <p style="text-align: right;">Page 21</p> | <p>1 Q. (BY MR. ANDERSON) That's my question. I'm
 2 just trying to explore what you're saying.</p> <p>3 A. What I said was, my opinion is that the
 4 property settlement agreement did, in fact, create an
 5 interest in real property for purposes of Section
 6 32-918.</p> <p>7 Q. How is that different than the question I just
 8 asked you?</p> <p>9 A. You asked if it created a lien.</p> <p>10 Q. Okay. Isn't that what 32-918 states?</p> <p>11 A. 32-918 says there needs to be a description of
 12 the interest or interests in real property created by
 13 the contract.</p> <p>14 Q. Under what section, sir?</p> <p>15 A. 32-918(2)(a)(iv).
 16 (Exhibit 35 marked.)</p> <p>17 Q. (BY MR. ANDERSON) Exhibit 35 is a copy of
 18 32-918; correct?</p> <p>19 A. Yes. I want to make sure I don't lose these
 20 exhibits. I want to keep them straight. Yes, I'm
 21 familiar with Exhibit 35.</p> <p>22 Q. And that's the operative statute with respect
 23 to the recording of the property settlement agreement?</p> <p>24 A. I don't know what you mean by "operative."</p> <p>25 Q. Does this statute speak to the effect of</p> <p style="text-align: right;">Page 23</p> |
| <p>1 additional explanation for the opinions I have. I do
 2 believe I have one additional opinion that may not be
 3 contained in there as clear as it needed to be, even
 4 though it's in there. And I can clarify it today.</p> <p>5 Q. What is that?</p> <p>6 A. What is that opinion?</p> <p>7 Q. Yes, sir.</p> <p>8 A. The expert that you have -- I don't recall the
 9 fellow's name.</p> <p>10 Q. Scott Ludwig?</p> <p>11 A. Yeah. He says that the property settlement
 12 agreement did not create an interest in property for
 13 purposes of Idaho Code Section 32-918. In my expert
 14 report, I can read exactly what I said, but I said
 15 something to the effect that I would have followed the
 16 formalities of 32-918.</p> <p>17 And I'm of the opinion that the property
 18 settlement agreement did create an interest in real
 19 property. And that may not have been as clear in my
 20 report, but it's still my opinion.</p> <p>21 Q. Let me make sure I understand. Are you saying
 22 that the property settlement agreement created by Cosho
 23 Humphrey did create a lien on Mr. McKay's real property?</p> <p>24 A. That's not what I said.</p> <p>25 MR. ELLIS: Objection.</p> <p style="text-align: right;">Page 22</p> | <p>1 recording a divorce decree with an attached property
 2 settlement agreement?</p> <p>3 A. I don't think of it that way. It doesn't talk
 4 about a divorce decree. It talks about summary.</p> <p>5 Q. In Section 2?</p> <p>6 A. Yes.</p> <p>7 Q. With respect to any of the opinions you have in
 8 this case, are you distinguishing between Section 2 and
 9 Section 1 of 32-918?</p> <p>10 A. I distinguish between Section 1 and Section 2.</p> <p>11 Q. How do you distinguish between the two?</p> <p>12 A. Section 1 talks about the property settlement
 13 agreement itself being the document, and Section 2 talks
 14 about a summary of it.</p> <p>15 Q. They're different entities; correct?</p> <p>16 A. I wouldn't describe them as entities. I would
 17 describe them as different documents.</p> <p>18 Q. That's fine. And Section 1 deals with the
 19 property settlement agreement itself and says that it
 20 can be recorded; is that correct?</p> <p>21 A. You want me to read it?</p> <p>22 Q. I'm just asking for your understanding. We can
 23 all read it. I need to know how you understand it?</p> <p>24 A. I understand Section 1 of 32-918 to discuss a
 25 property settlement agreement, a contract.</p> <p style="text-align: right;">Page 24</p> |

1 **Q. Okay.**
2 A. And that it can be recorded.
3 **Q. All right. And if one does not want to record**
4 **the actual contract or the actual property settlement**
5 **agreement, then Section 2 comes into play; doesn't it?**
6 A. If you want to record a summary.
7 **Q. So in essence there are two ways to go about**
8 **dealing with a property settlement agreement after it**
9 **has been agreed to by the two parties under 32-918;**
10 **would you agree?**
11 A. There are two ways to record: One is the
12 actual document and two is the summary.
13 **Q. With respect to the first avenue, it says you**
14 **can simply record the contract and that is sufficient**
15 **under 32-918; isn't it?**
16 A. That's part of it.
17 **Q. What is the part I'm leaving out?**
18 A. It must be recorded in the office of the
19 recorder of every county in which any real estate may be
20 situated which is granted or affected by the contract.
21 **Q. Once it's recorded, once the contract or**
22 **property settlement agreement is recorded, isn't that**
23 **when Idaho Code Section 10-1110 comes into play?**
24 A. No. It depends. Let's put it that way.
25 **Q. How do you see Section 10-1110 working in**
Page 25

1 conjunction with recording the divorce decree and
2 attached property settlement agreement? Do they work in
3 conjunction with each other?
4 A. They're two different code sections. Section
5 10-110 (sic) addresses the recordation of a transcript
6 or an abstract of any judgment or decree. Section
7 32-918 has nothing to do with transcripts or abstracting
8 any judgment.
9 **Q. So is it your opinion that Section 10-1110 has**
10 **no relevance to this particular case?**
11 A. No.
12 **Q. It does have some relevance?**
13 A. Yes.
14 **Q. What relevance?**
15 A. By recording properly or abstracting or
16 recording a judgment, by operation of law it can place a
17 lien on real property.
18 **Q. Would you agree that by recording the property**
19 **settlement agreement attached to a divorce decree in the**
20 **office of the recorder of every county in which any real**
21 **estate may be situated constitutes a lien on that real**
22 **property under section 10-1110?**
23 A. I'm sorry. Could you say that again?
24 (Record read by court reporter.)
25 WITNESS: Are you assuming that the property
Page 26

1 settlement agreement is attached to a decree?
2 **Q. (BY MR. ANDERSON) Yes.**
3 A. Yes, it could. But you'd have to give
4 notice -- there would have to be sufficient notice to
5 satisfy due process in terms of tying the property to --
6 like in this case, it would have to be sufficient notice
7 tying that property to this particular transaction.
8 **Q. Where do you get that requirement? Let me make**
9 **sure I understand. You say we have to have sufficient**
10 **notice of tying the property to the property settlement**
11 **agreement?**
12 A. I may not have said that very articulately.
13 What I'm saying is in this particular case, just
14 recording the property settlement agreement would not
15 give notice to the title company or third parties that
16 Mrs. McKay had an interest in the Albrethsen property.
17 Because it wasn't described sufficiently to do that.
18 **Q. We're just talking statutes right now.**
19 A. I understand that.
20 **Q. Let's talk about them as opposed to notice to a**
21 **title company of the Albrethsen property. I will get**
22 **there. I promise.**
23 A. I'm sure you will.
24 **Q. For right now I'm just trying to talk about**
25 **your understanding of how these code sections may come**
Page 27

1 into play with respect to this case.
2 Is there a statute, that you're aware of, that
3 says in order to have a lien created on real property in
4 a county where someone has real property, there are
5 certain requirements that must be met in terms of what
6 is being recorded in that county?
7 A. What kind of lien?
8 **Q. Lien on real property.**
9 A. Created by what?
10 **Q. Property settlement agreement.**
11 A. Then you look at 32-918.
12 **Q. All right. I'm looking at it?**
13 A. The summary says you have to have the names of
14 the parties of the original contract.
15 **Q. That's if you file a summary; right?**
16 A. Right.
17 **Q. Does 32-918 provide any kind of requirements**
18 **for what needs to be in the contract if one chooses to**
19 **file the contract as opposed to a summary?**
20 A. I think you need -- the names of the parties of
21 the original contract need to be in there.
22 MR. ANDERSON: Could you read back my question,
23 please?
24 (Record read by court reporter.)
25 WITNESS: I think that the contract needs to
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1 include, at a minimum, the things that are in the
2 summary.

3 **Q. (BY MR. ANDERSON)** I've got your answer. Now
4 I'll have her read back the question to see what your
5 answer to my question is.

6 (Record read by court reporter.)

7 **Q. (BY MR. ANDERSON)** Yes or no?

8 A. I suppose you could record anything you want
9 to.

10 **Q.** That's not the question. The question is, does
11 it have any requirements listed for what needs to be in
12 the contract if one chooses to go Subsection A versus B?
13 Yes or no?

14 A. I don't see it that way. I don't see that as a
15 yes or no question. Can I explain why?

16 **Q.** You can explain anything you want with counsel
17 asking the questions. I'm trying to figure out how you
18 interpret statutes.

19 The question before you is: In 32-918,
20 Subsection A, does it list out any requirements for what
21 needs to be in the contract if one chooses to record the
22 contract as opposed to a summary?

23 MR. ELLIS: Counsel, A is the summary section.
24 You mean one?

25 **Q. (BY MR. ANDERSON)** Of course I meant one.

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1 MR. ELLIS: You said "A".

2 MR. ANDERSON: I may have misspoke.

3 **Q. (BY MR. ANDERSON)** 32-918, Section 1, deals
4 with recording a contract in the office of the recorder.
5 Subsection 2 talks about a summary. I apologize for
6 mixing those up. Maybe that was the confusion in terms
7 of your answer.

8 Does Subsection 1 list out anything that needs
9 to be in the contract before it's recorded?

10 A. Section 1 does not have any prerequisites.

11 **Q.** Section 2 does, though; right?

12 A. Can I finish? I doesn't have any prerequisites
13 as to what is required to be in the contract before you
14 can record it. Although, if you don't put sufficient
15 information in there, you're not giving anybody -- it's
16 possible you could have given inadequate notice to
17 accomplish what you're trying to do.

18 **Q.** All right.

19 A. And I think the summary provision of 32-918
20 identifies what you have to have at a minimum to give
21 notice. That's why they call it a summary.

22 **Q.** Now Section 2 of 32-918 does not make reference
23 to any of the requirements it lists as being required in
24 Section 1; does it?

25 A. It does not reference Section 1.

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1 **Q.** All right. Now, we were talking about the
2 general work that you've done on this case. And one of
3 the things -- I think we got off on this particular
4 aspect, because you mentioned the opinions of
5 Scott Ludwig, the expert that we've retained. Do you
6 have those in front of you, sir?

7 A. Yes.

8 **Q.** What do you have, sir?

9 A. I have January 14, 2012. I think this is what
10 his opinions are. It's a letter to Mr. Anderson. I'm
11 assuming that's you.

12 **Q.** It is. This is in your notebook?

13 A. Yes.

14 **Q.** You reference that as item 14 on the index?

15 A. Yes. It actually says Defendant's Supplemental
16 Expert Witness Disclosure, and that is one of the
17 documents in that.

18 **Q.** Before I get to that, you said that item 15 is
19 an August 7, 2012, correspondence from Allen Ellis. Can
20 you show me a copy of that?

21 With respect to the documents that were
22 provided to you in August of 2012, did they play a role
23 in any of the opinions you had authored back in late
24 2010 and early 2011?

25 A. What documents?

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1 **Q.** The various briefs and affidavits referenced in
2 the August 7, 2012, letter from Mr. Ellis to you?

3 A. I relied on and considered them.

4 **Q.** In what way?

5 A. Well, do you want me to go through each one?

6 MR. ELLIS: I'll object to the question as
7 vague. Too open-ended, too broad.

8 **Q. (BY MR. ANDERSON)** I'm trying to find out what
9 impact they had, if any, on the opinions you'd
10 formulated a year and a half earlier?

11 A. The problem is your question says, did any of
12 the documents I relied on impact my opinions? If you
13 show me a document, I can tell you what I gleaned out of
14 it. I've got a binder of documents I've considered and
15 other documents. I've read these documents. But for me
16 to tell you, without you going to one particular
17 document, from memory, how each one affected my opinion,
18 I'm unable to do that.

19 **Q.** Let me try it a different way. You reviewed
20 the briefing from the summary judgment proceedings in
21 this matter about a year and a half after you had issued
22 your opinions. Would you agree?

23 A. If that's what the timeline is.

24 **Q.** Just for the record, you issued your expert
25 report in, I believe, late 2010?

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1 MR. ELLIS: Pearl Harbor Day.
2 **Q. (BY MR. ANDERSON) December 7, 2010. And your**
3 **affidavit, which is essentially a recapitulation of your**
4 **expert disclosure, was dated January 20, 2011. So**
5 **that's the beginning of 2011. If we go through the mid**
6 **part of 2012, that's a year and a half later.**
7 **What I'm asking is: Once you were able to see**
8 **the briefing from the summary judgment proceedings in**
9 **this matter, did you change any of your opinions?**
10 A. No.
11 **Q. So can we conclude from that, that whatever you**
12 **gleaned from these briefs and affidavits and whatever**
13 **documents were attached, none of them rose to the level**
14 **that they would cause you to change or modify any of**
15 **your opinions?**
16 MR. ELLIS: Asked and answered.
17 WITNESS: I did not change any of my opinions
18 based on briefing.
19 **Q. (BY MR. ANDERSON) Or any of the other**
20 **materials contained in the August 7, 2012, letter from**
21 **Mr. Ellis?**
22 A. Correct.
23 **Q. Okay. All right. Tell me a little bit about**
24 **your general practice in Idaho Falls?**
25 A. I have myself and -- did you know Steve McGrath

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1 by any chance?
2 **Q. I did.**
3 A. Steve and I were partners for about ten years.
4 Then he wised up, retired, moved to Swan Valley and
5 fishes all day.
6 **Q. Smart man.**
7 A. Yeah. Since Steve left -- I met Steve in 1996.
8 **Q. When did you get out of law school?**
9 A. 1989.
10 **Q. I think you went to McGeorge?**
11 A. I did.
12 **Q. Did you come directly to Idaho Falls?**
13 A. I did not.
14 **Q. Where did you go?**
15 A. I practiced in Stockton, California, for five
16 years.
17 **Q. That's why you have a California license?**
18 A. Correct.
19 **Q. Do you keep it current?**
20 A. I'm not sure what the status is. I pay a fee
21 every year, but it's not active. I think I'm in
22 inactive status but I'm still current. That's what that
23 is.
24 **Q. If you go inactive, you'd have to take the Bar**
25 **exam again?**

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1 A. Exactly. And I don't have to do the CLE
2 requirements. And I don't want to take the Bar exam
3 again.
4 **Q. After about five years, that would make it**
5 **1994?**
6 A. Correct.
7 **Q. You came to Idaho?**
8 A. Yeah. In '94 I met Steve. I built my house in
9 '96. I moved to Idaho Falls in 1994, having practiced
10 for five years. I was at -- is this what you want to
11 know, what I did?
12 **Q. Yes.**
13 A. In Stockton I did a lot of insurance defense
14 work. Med mal defense. Professional liability defense.
15 **Q. Did you work for a firm?**
16 A. I did.
17 **Q. What was the name?**
18 A. Diehl, Steinheimer, Riggio, Haydel & Mordaunt.
19 **Q. Is it still there?**
20 A. I think the firm disbanded about two or three
21 years after I left, as a lot of firms have a tendency to
22 do. But those attorneys are still around.
23 **Q. Who did you work with primarily?**
24 A. Diehl, Steinheimer and Mordaunt. I worked with
25 the main partners.

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1 **Q. Did you try any cases?**
2 A. I did.
3 **Q. In those first five years?**
4 A. I did. There was a shortage of associates at
5 the time. So I was very busy for five years. Then I
6 moved to Idaho in 1994.
7 **Q. What connection did you have with Idaho Falls,**
8 **if any?**
9 A. My wife is from Ammon, and she wanted to move
10 back to Idaho. And she prevailed upon me. So moved
11 back in '94. I was [REDACTED] in [REDACTED] [REDACTED] And I had --
12 I started working with Steve, at a general civil
13 practice. Which at the time consisted of some insurance
14 defense work. Many business clients, real estate
15 transactions. And then I began doing divorce work.
16 **Q. Approximately which year?**
17 A. That would have been 1994. '95 maybe.
18 **Q. Okay.**
19 A. That continued -- I probably did divorce work
20 for another eight or nine years, I think. Maybe ten
21 years. And then my practice slowly changed. I do less
22 insurance defense. I do very little now, if any. I've
23 represented several institutional clients.
24 **Q. Which insurance carriers did you work with?**
25 A. At what time?

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1 **Q. From '94 through 2003?**
2 A. I can't recall exactly who they were. Like
3 Aetna, Allied. I did some title policy work for a
4 couple of carriers. I've also developed a business
5 litigation practice. So my business clients will
6 sometimes find themselves in litigation, and I will then
7 tend to the defense. I've been fairly successful being
8 able to retain that defense, instead of it being shipped
9 off to somebody. That's what my insurance defense is
10 limited to now, really.
11 I do some personal injury work. I do quite a
12 bit of collection and judgment work. A lot of it.
13 **Q. Since what general timeframe has that been a**
14 **bigger practice?**
15 A. About the last seven or eight years. I
16 represent two collections agencies in southeast Idaho.
17 **Q. In the past five years, can you give me a**
18 **breakdown, as close as you can, in terms of percentages**
19 **for the different types cases that you handle?**
20 A. That would be really hard for me to do. It
21 just would be a guess. Business litigation is probably
22 50 percent of my work. Collection work is probably
23 about 10 to 15 percent of what I do. But in that 10 to
24 15 percent, we do an awful lot of it. And through that
25 process, I've become very educated on how to collect a

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1 judgment and how judgments operate and how title
2 companies respond to judgments. So business litigation
3 and collection. I do some bad faith work. That's
4 probably ten percent of my practice.
5 **Q. So what side of the V?**
6 A. Both.
7 **Q. Who have you represented as an insurance**
8 **company?**
9 A. BlueShield of Idaho. I tried a bad faith trial
10 probably in 2004 maybe, 2005.
11 **Q. Was that for Regence?**
12 A. Yes. At the time Jeff Brudie was general
13 counsel. Do you know Jeff?
14 **Q. I do. Did you work with Terry Anderson?**
15 A. She sat through trial for two weeks.
16 **Q. That's my wife.**
17 A. That is funny.
18 MR. ELLIS: Why?
19 WITNESS: Because I didn't know you guys were
20 married. Terry sat through my trial. Ask her about the
21 Brown trial over in Rigby. I'm sure you will, now.
22 **Q. (BY MR. ANDERSON) I know about it. Remember**
23 **the old adage, don't ask a question unless you already**
24 **know the answer?**
25 A. You knew the answer. Were you married then to

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1 her?
2 **Q. We've been married 22 years.**
3 A. Do you remember her spending time in Rigby?
4 **Q. I do.**
5 A. That was my trial.
6 MR. ELLIS: Small state we live in.
7 **Q. (BY MR. ANDERSON) Have you done any since**
8 **then? Bad faith cases? Have you defended any bad faith**
9 **cases?**
10 A. I think I had another one for BlueShield that I
11 was in, but it didn't go to trial. I don't remember
12 what happened to it.
13 **Q. So that's a smaller percentage?**
14 A. I do bad faith work myself on the plaintiff's
15 side.
16 **Q. Does that round out the list?**
17 A. I do some personal injury. Not the soft-tissue
18 injury things but wrongful death cases. Substantial
19 personal injury cases.
20 **Q. And do you do any divorce work still?**
21 A. Anymore I will only do a divorce case if it is
22 one of my business litigation clients whose -- I
23 represent numerous doctors in Idaho Falls, and so, for
24 example, I represent all the emergency room doctors at
25 EIRMC. When one of them comes to you and says he's

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1 getting divorced and wants you to do it, you reluctantly
2 do it. It's not a primary part of my practice any more.
3 **Q. Has that been the case since approximately 2003**
4 **and 2004?**
5 A. That sounds about right.
6 **Q. That fits with your earlier testimony. You**
7 **said you have gained some appreciation for how title**
8 **companies respond to judgments?**
9 A. Yes.
10 **Q. What have you learned in that respect?**
11 A. Well it's hard for me to tell you everything
12 I've learned. I can tell you how I've learned what I've
13 learned. Up to 2008 before the mini depression hit, I
14 would get calls probably five to ten a month from title
15 companies for judgments I had recorded wanting payoffs.
16 **Q. So the title company would call you regarding**
17 **judgments you had filed in your collection process?**
18 A. They're not filed, they're recorded or
19 abstracted.
20 **Q. Recorded. Okay.**
21 A. They would call for payoffs. Or on occasion
22 they would be paid off completely where we had not filed
23 the satisfaction.
24 **Q. Would those be judgments dealing with a**
25 **particular piece of property that was the subject of the**

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1 litigation that you'd brought?

2 A. No. As counsel for the collection agencies, I

3 represent -- we obtain judgments, and then we abstract

4 them. By virtue of the abstraction and Idaho Code

5 Section 10-110 (sic), that operates as a matter of law

6 to place liens on people's real property.

7 **Q. You keep saying 10-110. Isn't there an**

8 **additional one in there?**

9 A. 10-1110 I'm sorry.

10 **Q. I wanted to make sure we're talking about the**

11 **same thing. Go ahead. I apologize for interrupting.**

12 A. I don't know where I was.

13 **Q. You said by virtue of 10-1110, you would record**

14 **or abstract a judgment that you, in your collection**

15 **process, had obtained against some debt; correct?**

16 A. Right. By operation of law, that puts a lien

17 on any property that they own in the county. Or if they

18 try to buy a piece of property, our judgment would be in

19 first position.

20 **Q. Would you file a lis pendens against the party**

21 **against whom you've obtained the judgment?**

22 A. In the collection practice, no.

23 **Q. Have you ever filed a lis pendens?**

24 A. I have.

25 **Q. Several times?**

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1 A. More than once.

2 **Q. How many times?**

3 A. I couldn't tell you.

4 **Q. Less than ten?**

5 A. Oh, more than ten.

6 **Q. I haven't filed that many myself. So I'm just**

7 **inquiring as a civil practitioner.**

8 A. It's more than ten, but I'd be speculating to

9 how many I've done in 20 years of practices.

10 **Q. Between ten and 20?**

11 A. It could be more, but it's certainly between

12 ten and 20.

13 **Q. Are there any requirements for filing a lis**

14 **pendens?**

15 A. I'd have to open up the code. I think it's

16 5-550 or something. I'd have to look at it to tell you.

17 **Q. Okay.**

18 A. I think the code section also deals with when

19 you file a lis pendens.

20 **Q. In other words, there are certain prerequisites**

21 **or requirements before one can file a lis pendens.**

22 **Would you agree?**

23 A. Are you talking about statute?

24 **Q. I'm just saying you just can't decide one day**

25 **to file a lis pendens against somebody because you want**

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1 to?

2 A. That's correct.

3 **Q. You have to have certain steps that have taken**

4 **place prior to filing it; correct?**

5 A. I don't know what you mean by "steps."

6 **Q. Do you need to satisfy certain requirements**

7 **before you file a lis pendens?**

8 MR. ELLIS: Counsel, I'll object as to clarity.

9 Are you asking does he have to firmly do something, or

10 would certain conditions exist before one can do

11 something?

12 **Q. (MR. ANDERSON) That's a good point. Do**

13 **certain conditions have to exist before one can file a**

14 **lis pendens?**

15 A. Yes.

16 **Q. What kind of conditions?**

17 A. I have to look at the code section. Off the

18 top of my head from memory, there needs to be litigation

19 pending that is affecting either ownership or possession

20 of the property.

21 **Q. Okay.**

22 A. Would you please be sure to ask your wife if

23 she remembers me quoting Bob Dylan in my closing

24 argument to the Brown case?

25 **Q. I will. I'm sure she'll be thrilled?**

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1 A. The quote was, "You don't need to be a

2 weatherman to know which way the wind blows." She

3 thought that was funny.

4 **Q. Have you spoken with Bob Rice about this case?**

5 A. No. Who is Bob Rice? To make sure I haven't

6 spoken to him. Who is he?

7 **Q. He is a gentleman who is also a lawyer here in**

8 **Boise. Just wondered.**

9 **When was the last time you prepared a property**

10 **settlement agreement?**

11 A. That's been a long time ago. I'd say before

12 2004 or 2005.

13 **Q. You listed a number of -- I think they've been**

14 **described as protections or steps that you think should**

15 **have been followed with respect to the recordation of**

16 **the property settlement agreement in this matter, the**

17 **creation and recordation of it. Did you develop any of**

18 **those items through research or review of treatises or**

19 **journals or anything like that?**

20 A. The statutes and my practice.

21 **Q. Anything else that you drew from in terms of**

22 **coming up with those seven or eight items that you**

23 **listed in your expert disclosure or affidavit?**

24 A. Just the case law, statutes and my practice.

25 **Q. What case law did you rely on?**

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1 A. I didn't rely on anything specifically. My
2 practice.

3 **Q. Hold on. You mentioned case law, so I have to**
4 **ask you about it. You say nothing in particular. Is**
5 **that not a basis, then, if there was no particular case**
6 **that you drew from?**

7 A. I don't know what you mean by that. What I
8 meant was my practice hopefully is consistent with case
9 law.

10 **Q. Did you check case law to see if any court had**
11 **said these are recommended steps that an attorney should**
12 **take with respect to either the preparation or**
13 **recordation of a property settlement agreement along**
14 **with a divorce decree?**

15 A. Yeah. The considerations that I set forth in
16 my condition, I have not looked -- I don't believe
17 there's any case law that says this is what you should
18 do.

19 **Q. Okay. That's what I'm after. I'm trying to**
20 **see if you went outside of your own practice for support**
21 **or ideas for your opinions in this case. So no case law**
22 **that you can point me to. You said statutes. What**
23 **statutes did you rely on?**

24 A. For example, 10-1110, 32-918.

25 **Q. Why don't we mark 10-1110.**

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1 (Exhibit 36 marked.)

2 **Q. (BY MR. ANDERSON) Other than Exhibits 35 and**
3 **36, the two statutes you've referenced, are there any**
4 **others that you felt were pertinent to the issues**
5 **involved in this case and in your opinions?**

6 A. There may be, but those are the only two that
7 come to mind right now.

8 **Q. You know the way these depositions work, if**
9 **something does pop up as we're talking, even if it's off**
10 **point, please feel free to let me know if you think of**
11 **any other statute that you think is applicable.**

12 A. Certainly.

13 MR. ANDERSON: Let's take a break.
14 (Recess taken.)

15 **Q. (BY MR. ANDERSON) Back on the record. Have**
16 **you ever had a case where you attempted to use a**
17 **recorded divorce decree to execute on a mortgage note?**

18 A. Can you say that again, please?

19 **Q. Have you ever had a case where you recorded a**
20 **divorce decree with an attached property settlement**
21 **agreement to execute on a mortgage note?**

22 MR. ELLIS: I'll object. The question is
23 unclear. Go ahead and answer it, if you can, Bryan.

24 WITNESS: To execute on a mortgage note? No.
25 I've never done that.

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1 MR. ELLIS: Counsel, for the record, you mean a
2 mortgage note or a mortgage? You mean a promissory note
3 or a mortgage?

4 MR. ANDERSON: Promissory note emerging from a
5 mortgage.

6 WITNESS: I have not ever used a divorce decree
7 to execute on a promissory note.

8 **Q. (BY MR. ANDERSON) Have you ever argued that**
9 **recording a divorce decree with a property settlement**
10 **agreement attached creates a lien in a mortgage or a**
11 **promissory note emerging from the mortgage?**

12 A. No, I don't think so.

13 **Q. Okay. Let me ask you about your invoices. We**
14 **just got those. It looks like you've prepared two**
15 **invoices in this matter. One in June of 2010 and one in**
16 **December of 2010?**

17 A. I don't think so. For some reason my secretary
18 sent over seven pages and then she sent me a separate
19 email with one. I don't know why she did it that way.
20 Those are my billings.

21 **Q. There's multiple months in here?**

22 A. I assume that's correct.

23 **Q. I'll have you look at these before we mark**
24 **them. Would you check this pile? Does it consist of**
25 **all of the billings that you have submitted in this**

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1 matter?

2 A. You know, I think so.

3 **Q. So if we go to the first one, would it be**
4 **accurate to state that you were retained sometime in**
5 **March of 2010?**

6 A. Where is the first one at?

7 **Q. The June 1, 2010 --**

8 A. Oh, yes.

9 **Q. We're going to combine these together and**
10 **probably should mark that stack as Exhibit 37.**
11 (Exhibit 37 marked.)

12 **Q. (BY MR. ANDERSON) Is June 1, 2010, the first**
13 **invoice you submitted?**

14 A. I think so.

15 **Q. That has the date of March 26, 2010, on it; is**
16 **that correct?**

17 A. Yes.

18 **Q. Would that be around the time that you were**
19 **first retained?**

20 A. I think so.

21 **Q. It looks like you did some review of materials**
22 **and preparation of an expert report in March and May of**
23 **2010; is that accurate?**

24 A. Yes.

25 **Q. Do you have an earlier draft of your expert**

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1 report?
2 A. No, I don't.
3 **Q. Would it be back at your office?**
4 MR. ELLIS: Objection. Assumes facts not in
5 evidence.
6 WITNESS: I don't even know if -- in terms of
7 draft of the expert report, I'm sure I didn't have it in
8 the form it is now in the first effort, but I don't
9 think I kept copies of any changes I made when I was
10 drafting it.
11 **Q. (BY MR. ANDERSON) The second invoice is dated**
12 **December 2nd, 2010, in Exhibit 37?**
13 A. Yes.
14 **Q. It looks like you had a telephone call with**
15 **Mr. Ellis, and then you received an email from him. And**
16 **then a couple of days later you received an email, and**
17 **on the same day reviewed 32-918 and sent Mr. Ellis an**
18 **email. Would those emails be the ones that you have in**
19 **a different file that you haven't produced yet?**
20 A. I don't know if it's those, but that's the kind
21 of email it was. These are identified.
22 **Q. Did Mr. Ellis raise Idaho Code 32-918 with you**
23 **in November of 2010 for your consideration?**
24 A. I don't recall if he raised it or I raised an
25 issue. I don't recall.

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1 **Q. Those emails may shed some light on that;**
2 **correct?**
3 A. I don't think so. You can have them. I think
4 the emails were for the most part just --
5 **Q. Let's not speculate?**
6 A. I just have to see what they are.
7 **Q. As we know from the record, the expert**
8 **disclosure has a date of December 7, 2010, on it as well**
9 **as a fax header of that same date. It looks like that**
10 **occurred without any reference being included on a bill.**
11 **Do you know why your expert disclosure isn't referenced**
12 **on a bill? For example, I don't see a bill for any time**
13 **in December of 2010 when the expert disclosure came out?**
14 A. I may have just -- it would not be unlike me to
15 forget to record my time. Maybe I didn't record it.
16 **Q. Then the next invoice is dated January 31,**
17 **2011?**
18 A. January 31, yes.
19 **Q. Looks like you got the December 15, 2008,**
20 **letter. And you executed -- let me ask. The last line**
21 **says, "execute and forward affidavit." Did you prepare**
22 **your affidavit for the summary judgment proceedings, or**
23 **did Mr. Ellis and he sent it to you for execution?**
24 A. I believe that Mr. Ellis prepared it, and I
25 obviously reviewed it.

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1 **Q. Okay. Do you recall if you made any changes?**
2 A. I don't recall.
3 **Q. After the affidavit was prepared, it looks like**
4 **the next substantive work you did was review**
5 **Mr. Ludwig's expert witness disclosure. Would that be**
6 **accurate?**
7 A. It appears so.
8 **Q. That's on your March 2nd, 2012, invoice. Then**
9 **you've prepared for your deposition and billed on**
10 **October 4, 2012, for that work. Is that accurate?**
11 A. I'm sorry?
12 **Q. On October 4, 2012, the last bill we have, it**
13 **looks like you reviewed some documents and prepared for**
14 **the depo for three hours on September 19. The following**
15 **day you met with Mr. Ellis and you researched and**
16 **considered some issues after the meeting.**
17 A. Yes.
18 **Q. Where did you meet Mr. Ellis?**
19 A. I think he was in Idaho Falls on a hearing. He
20 stopped in my office. At least that was my impression.
21 I don't know what he was doing. He was in town and
22 stopped and met with me in Idaho Falls.
23 **Q. After you considered some issues raised in that**
24 **almost six-hour meeting --**
25 A. It was not a six-hour meeting.

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1 **Q. I see. You met with him and then researched**
2 **and considered some issues after the meeting? I see.**
3 A. Yes.
4 **Q. We call that block billing in the world of the**
5 **defense lawyers.**
6 A. Insurance defense. Now you know why I no
7 longer do insurance defense work.
8 **Q. Do you remember how long you met with**
9 **Mr. Ellis?**
10 A. I think it was about an hour.
11 **Q. So for almost five hours you researched and**
12 **considered something. What was it that you were**
13 **contemplating after this meeting with Mr. Ellis?**
14 A. I don't recall exactly. I think I was
15 continuing to read the documents to make sure I
16 understood them. And I did look up something. As I sit
17 here now, I can't recall what it was.
18 **Q. Did you change any of your opinions in either**
19 **your affidavit or expert disclosure as a result of this**
20 **almost five hours of contemplative work after meeting**
21 **with Mr. Ellis?**
22 A. No.
23 **Q. And up until today, nothing in between; would**
24 **that be accurate?**
25 A. What do you mean "nothing in between"?

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1 **Q. No work that you have billed for?**
2 A. I think in the last couple of days I have some
3 time reading things. But those are all my billings, I
4 believe.
5 **Q. If you could, based on the time you put into**
6 **the case, could you just give me your general**
7 **understanding of the divorce proceedings as they**
8 **progressed?**
9 MR. ELLIS: I'll object to the question as
10 unduly broad and asking for a narrative-type response as
11 well as being ambiguous.
12 MR. ANDERSON: Being what?
13 MR. ELLIS: Ambiguous.
14 MR. ANDERSON: I thought you said hideous.
15 MR. ELLIS: That didn't cross my mind.
16 **Q. (BY MR. ANDERSON) Let me put it this way: You**
17 **understood that at some point in time there was a**
18 **property settlement agreement agreed to by Mrs. McKay;**
19 **correct?**
20 A. Yeah. I think it was November 20, 2008 or
21 2009, that it was signed.
22 **Q. Do you remember any of the milestones of the**
23 **divorce proceedings that led up to that property**
24 **settlement agreement being agreed to?**
25 MR. ELLIS: Objection as to clarity.

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1 "Milestones."
2 **Q. (BY MR. ANDERSON) High points of the**
3 **litigation. You understood Mrs. McKay had sued**
4 **Mr. McKay?**
5 A. For divorce.
6 **Q. For divorce.**
7 A. I did understand that.
8 **Q. Have you prepared any kind of a timeline**
9 **relative to the events in the underlying divorce action?**
10 A. You know, I think I did prepare a timeline that
11 had five entries in it. And I meant to grab that today,
12 and I didn't grab it. I wish I had grabbed it so I
13 could look at my timeline.
14 **Q. It's in a separate file?**
15 A. Actually, it's on my desk. I think. I think
16 when I was grabbing these files I just didn't grab my
17 timeline.
18 **Q. Can you include that with the correspondence**
19 **you are going to send to Mr. Ellis?**
20 A. I'd be happy to do that.
21 **Q. And the timeline would deal with events in the**
22 **underlying divorce?**
23 A. I think the timeline included when the divorce
24 was filed.
25 **Q. Okay.**

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1 A. I think there was a summary judgment filed, and
2 it was pending at the time of mediation. My timeline
3 includes the date of mediation. I think it was October
4 20. You can help me whether it was 2008 or 2009 or --
5 2007. Okay. 2007 is when the judgment of decree of
6 divorce was entered. Now it's coming back to me.
7 Because March 30, 2008, was the closing.
8 **Q. Counsel has just showed you a three ring binder**
9 **with some --**
10 A. He showed me the judgment and decree of divorce
11 to get my bearings straight on what year it was. It was
12 2007. My timeline included, from memory, November 20,
13 2007, I believe is when the property settlement
14 agreement was signed.
15 There's that one email I think it was October
16 23, 2007, and I think the mediation took place on
17 Saturday, October 20, 2007.
18 **Q. Do you know any of the particulars, for example**
19 **what happened during the mediation? Offers?**
20 **Counteroffers? Anything of interest to you?**
21 A. Obviously I wasn't present. And I read your
22 brief and in support of motion for summary judgment and
23 your opposing brief or your reply. That's what it was.
24 The information was in there. I do have some
25 understanding as to some things that happened based on

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1 your recitation of how things happened.
2 **Q. And would it be accurate to state that you do**
3 **not have an understanding of what happened during the**
4 **mediation from Mrs. McKay directly or her deposition**
5 **testimony?**
6 A. I don't have a specific understanding of what
7 happened at the mediation.
8 **Q. Did you understand that an agreement, a**
9 **handwritten agreement, was created at the conclusion of**
10 **the mediation reflecting the general parameters of the**
11 **settlement that was reached on October 20, 2007?**
12 A. I don't recall that. But now that you mention
13 that, that may have been what happened. That typically
14 happens in mediations. It wouldn't surprise me.
15 **Q. Did you understand that as a result of the**
16 **mediation there was no agreement reached relative to**
17 **payments to Mrs. McKay, other than Mr. McKay being the**
18 **one who would pay her money?**
19 A. I don't know what you mean by that.
20 **Q. Let me rephrase it. Did you understand that**
21 **the mediation resulted in the agreement that only**
22 **Mr. McKay was obligated to pay Mrs. McKay certain sums**
23 **of money at certain points in time?**
24 A. I don't recall that. I don't know about that.
25 **Q. Do you have any evidence to the contrary?**

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1 A. I don't have any to the contrary.
2 **Q. Did you understand that as a result of the**
3 **mediation there was no collateral provided to Mrs. McKay**
4 **as security for any of the obligations Mr. McKay assumed**
5 **under the agreement?**
6 A. What I understand is, based on my reading, and
7 whether it's accurate or not I don't know. It's based
8 on what I think you put in your brief. Is that he did
9 not want to provide any security.
10 **Q. Did you understand that Mrs. McKay understood**
11 **that there was no security or collateral as a result of**
12 **the settlement at mediation on October 20, 2007?**
13 A. That's a difficult question in the sense that I
14 think, from what I understood, she understood she wasn't
15 getting a security agreement or some sort of interest --
16 a security interest. But from talking to her attorney,
17 she thought that she was going to get security in the
18 sense that she would be paid when the Albrethsen closing
19 took place.
20 **Q. Let's leave that second part out. All I'm**
21 **trying to do is make sure I understand what you know.**
22 **With respect to security such as collateral and some**
23 **property or something like that if Mr. McKay didn't pay,**
24 **you understood that none of that was agreed to by**
25 **Mr. McKay at the conclusion of the mediation?**

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1 A. My understanding, based on reading the
2 documents, is that Mr. McKay would not provide any
3 security for his obligations.
4 **Q. You've been through mediations involving**
5 **parties that are divorcing; haven't you?**
6 A. Yes.
7 **Q. And you understand that sometimes those are**
8 **difficult negotiations and sometimes each side doesn't**
9 **get what they want?**
10 A. I understand that in mediation, rarely do both
11 sides get what they want.
12 **Q. You understand that at the end of the day if**
13 **there's an agreement reached, that both parties have to**
14 **agree to those terms?**
15 A. I don't know if they have to agree to the terms
16 they've agreed to. I think they are contractually
17 obligated to follow the terms they agree to.
18 **Q. Did you have any idea of what Patricia McKay**
19 **wanted out of the divorce proceedings as she was**
20 **entering into that process?**
21 A. Not particularly.
22 **Q. Did you understand that the prenuptial**
23 **agreement that she had signed back in 1996 posed a**
24 **problem to her receiving 50 percent of the marital**
25 **estate?**

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1 MR. ELLIS: Objection as to clarity.
2 MR. ANDERSON: Did I not enunciate well?
3 MR. ELLIS: The problem is problematical.
4 **Q. (BY MR. ANDERSON) I'll tell you that**
5 **Mrs. McKay has told us under oath that she wanted 50**
6 **percent of the marital estate. And she has always**
7 **begrudgingly admitted that the prenuptial agreement**
8 **posed somewhat of a problem. Did you understand that**
9 **was the case confronting Cosho Humphrey when they took**
10 **her representation on?**
11 A. I did understand there was a prenuptial
12 agreement. And I think that the summary judgment may
13 have dealt with that issue. I'm not sure.
14 **Q. By "dealt with that issue," what do you mean?**
15 A. I mean there was a summary agreement filed
16 before the mediation. I didn't see that. I think it
17 was filed by Mr. McKay. I think. For some reason,
18 having not seen it, I just assumed that dealt -- that he
19 raised the prenuptial agreement as a defense. That's
20 what I assume, but I don't know that.
21 **Q. Do you know if Mr. McKay had offered to engage**
22 **in any settlement negotiations prior to the filing of**
23 **this motion for summary judgment?**
24 A. I don't know.
25 **Q. Do you know whether or not after the filing of**

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1 **the summary judgment he became interested in mediation?**
2 A. I don't know what his interest was. I just
3 believed the sequence of events was there a summary
4 judgment filed. I thought Mr. McKay filed it. Maybe
5 that's not the case. And then subsequently there was a
6 mediation held on a Saturday.
7 **Q. Is it accurate to state that you do not have**
8 **any opinions with respect to the mechanics of that**
9 **mediation?**
10 A. I don't have any opinions as to the mechanics
11 of the mediation.
12 **Q. Is it also accurate to state that you do not**
13 **have any opinions with respect to the manner in which**
14 **Cosho Humphrey handled the divorce up to the point of**
15 **the preparation of the property settlement agreement?**
16 A. Other than the representations that were made
17 by Mr. Walker that the divorce decree would create a
18 lien in personal and real property as it was. That
19 representation. Besides that and how it was structured,
20 that would be accurate.
21 **Q. Let's take up to October 23, 2007.**
22 A. The date of the email?
23 **Q. Yes, sir.**
24 A. Okay.
25 **Q. That's the email you just referred to in your**

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1 last answer?
2 A. Yes.
3 **Q. Let's take up to that point in time. Do you**
4 **have any opinions with respect to the actions or**
5 **inactions of Cosho Humphrey up to that email?**
6 A. Only to the extent if Mr. Walker told
7 Mrs. McKay at the mediation the same thing that was in
8 the email, then I would have a problem with that.
9 **Q. But you don't have any information as you sit**
10 **here today that that was the case; correct?**
11 A. My assumption was that it was, but I don't know
12 that.
13 **Q. I'm going to have her read back the question.**
14 **(Record read by court reporter.)**
15 WITNESS: What I'm trying to say is we're
16 starting to cut things pretty fine in terms of what
17 happened when and where. I was thinking, based on my
18 review -- and I could be wrong. But I was thinking it
19 could have happened at the mediation, that Mrs. McKay
20 wanted to know if she would have security in terms of
21 being paid when the sale took place or closed on the
22 Albrethsen property.
23 I can't recall if I've seen that or if that's
24 something I imagined. But to the extent that Mr. Walker
25 told Mrs. McKay at mediation the same thing, if he did,

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1 that was contained in the email, then I would have a
2 problem with that. Otherwise I don't have a problem
3 with how the mediation was conducted, because I don't
4 know how it was conducted.
5 **Q. (BY MR. ANDERSON) We'd already established you**
6 **didn't have that basis of knowledge. I had moved to**
7 **just the general handling of the divorce up to the time**
8 **period that the property settlement agreement was being**
9 **created. Let's say up to October 23, 2007, do you have**
10 **any opinions with respect to the actions or inactions of**
11 **Cosho Humphrey up to that time period?**
12 A. Up to --
13 **Q. October 23, 2007?**
14 A. Only if Mr. Walker told Mrs. McKay the same
15 thing that is contained in the email.
16 **Q. You've deposed experts before; haven't you?**
17 A. I have.
18 **Q. Have you ever reminded an expert that opinions**
19 **should be based upon factual information?**
20 A. These may be facts that exist that I don't
21 know.
22 **Q. I think another term for that would be**
23 **speculation; correct?**
24 A. No. What I don't want to see happen is if
25 Mr. Walker told Mrs. McKay the same thing at the

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1 mediation that is contained in the October 23 email,
2 then I would have a problem with that. I don't know if
3 he did or not. But if he did, I would have a problem
4 with that. I'm trying to leave that open as an issue
5 for me in the event those facts turn out to be true.
6 But I don't know what happened because I wasn't there.
7 **Q. So you can't state to a reasonable degree of**
8 **probability that that occurred?**
9 A. I can't say whether that happened or not.
10 **Q. Did you understand that as a result of the**
11 **mediation, Mrs. McKay understood that she would not be**
12 **getting money directly from Status Corporation?**
13 A. At what point in time?
14 **Q. At any point in time?**
15 MR. ELLIS: What time did she become aware of
16 that?
17 MR. ANDERSON: That's not my question.
18 (Record read by court reporter.)
19 WITNESS: You're asking me what she understood
20 and what she thought? I'm not certain what she
21 understood and thought. I understand that she
22 thought -- my understanding is that she understood that
23 the settlement agreement required -- is his name Darwin?
24 **Q. (BY MR. ANDERSON) Yes.**
25 A. Required Darwin to pay her. She was concerned

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1 that Darwin wouldn't do it. So she talked to Mr. Walker
2 about it, how can I be protected on this issue, and
3 that's when he told her by filing or recording this
4 decree that she would be paid.
5 What she thought at that point, whether the
6 money would be coming as a result of the closing from
7 the title company to her or from Darwin to her, I don't
8 know.
9 **Q. Tell me where Mr. Walker said that she would be**
10 **paid by virtue of filing the divorce decree with the**
11 **attached property settlement agreement. You've changed**
12 **the verbs from created a lien to paid. I'd like you to**
13 **show me where is that found.**
14 MR. ANDERSON: Counsel, you can't show him
15 stuff. That's not the way it works.
16 MR. ELLIS: He's not an encyclopedia.
17 MR. ANDERSON: He is an expert, and he is under
18 oath, and you do not get to communicate with a witness
19 when the question is pending. That is inappropriate. I
20 don't care if he's a novel or an encyclopedia.
21 MR. ELLIS: I was trying to expedite
22 proceedings.
23 MR. ANDERSON: No, you're not. You're trying
24 to help out this witness. There's a question pending.
25 Please don't communicate or assist the witness in any

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1 way.
 2 MR. ELLIS: This is not a memory test, Counsel.
 3 MR. ANDERSON: But it is an obligation that you
 4 have to let the witness answer and not with your help.
 5 MR. ELLIS: I concur.
 6 MR. ANDERSON: Thank you.
 7 WITNESS: What I'm looking for is a couple of
 8 things. One, that email.
 9 MR. ANDERSON: It's Exhibit 17.
 10 **Q. (BY MR. ANDERSON) Why don't you take a look at**
 11 **Exhibit 17?**
 12 MR. ELLIS: Can I find Exhibit 17 or the
 13 October 23 email? I've got it here.
 14 MR. ANDERSON: Can you find it for yourself or
 15 him?
 16 MR. ELLIS: He's looking for something. I'm
 17 trying to assist.
 18 MR. ANDERSON: Exhibit 17 is in front of him.
 19 We have the notebook. That's all I'm saying.
 20 WITNESS: Okay. I'm looking at Exhibit 17.
 21 And on October 23, 2007, at 4:15 p.m., Mrs. McKay sends
 22 an email to Mr. Walker. She says, "All looks good, Tom.
 23 However, can I place a lien with the title company on
 24 the Status Corp. closure so the \$800,000 are paid to me
 25 by them?"

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1 **Q. (BY MR. ANDERSON) My question dealt with**
 2 **Mr. Walker.**
 3 A. I'm not finished. "This is what we had to do
 4 when property sold that Donna had so the funds would
 5 come to us instead of through Donna."
 6 He then responds and says, "Our plan is to
 7 record the judgment and decree of divorce, which then
 8 becomes a lien on all of Darwin's real and personal
 9 property."
 10 When I read those two emails together, what I
 11 see is, I see Mr. Walker telling her our plan is to get
 12 this lien so that you will be paid through a third
 13 party. Now he doesn't use those words paid, but in
 14 response to her email, that's essentially what he is
 15 telling her.
 16 **Q. (BY MR. ANDERSON) What third party?**
 17 A. She says in her email, "Can I place a lien with
 18 the title company on the Status Corp. closure so the
 19 \$800,000 are paid to me by them?"
 20 **Q. What title company was involved?**
 21 A. I don't know. I don't know the name of the
 22 title company. There was a closing scheduled for March
 23 30, 2008.
 24 **Q. What closing was scheduled for that date? What**
 25 **particular piece of property was closing?**

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1 A. I understood that the Albrethsen property was
 2 closing.
 3 **Q. Albrethsen.**
 4 A. I think it's a tough name to say. Albrethsen.
 5 **Q. It's A-l-b-r-e-t-h-s-e-n.**
 6 A. Then it seems to me there was another letter
 7 afterwards where there was another discussion between
 8 Mr. Walker and Mrs. McKay. There's this letter dated
 9 December 15, 2008.
 10 **Q. Do you remember the court's ruling with respect**
 11 **to the operative period that he felt was important in**
 12 **terms of this case?**
 13 A. Yeah. I believe that in the court's
 14 decision -- I believe the court's operative period was
 15 up through November 20, 2007.
 16 **Q. Okay. And the December 15, 2008, letter he**
 17 **considered but then disregarded, because it was outside**
 18 **of the period that he felt was relevant; would you**
 19 **agree?**
 20 A. Yeah. But then what he did was he said, we
 21 don't need to consider that letter, because we have this
 22 October 23, 2007, email.
 23 **Q. You just referred to the December 15, 2008,**
 24 **letter. I wanted to make sure that you and I both were**
 25 **in agreement that the court has determined that that is**

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1 irrelevant to the issues in this case?
 2 A. Your question to me was --
 3 **Q. Let's not parse what my question was. I want**
 4 **to move on here. Would you agree that the December 15,**
 5 **2008, letter is outside of the window that the court was**
 6 **considering relative to whether or not any legal**
 7 **malpractice had occurred?**
 8 MR. ELLIS: Objection, argumentative. And I'll
 9 leave it at that. Go ahead, you can answer.
 10 WITNESS: I just know what the court said in
 11 the order of summary judgment. I don't think it's
 12 irrelevant.
 13 **Q. (BY MR. ANDERSON) And since you understand**
 14 **what the court said, you know that the court, in**
 15 **essence, said this is outside of the period that I'm**
 16 **going to consider?**
 17 MR. ELLIS: Objection. Misstates the record
 18 and calls for speculation as to what the judge thought.
 19 WITNESS: What has happened here in the last
 20 five minutes is you asked me what Mrs. McKay was
 21 thinking at a given point in time about getting paid.
 22 And so I went to the email and I explained that, and I
 23 tried to go to this letter, and now you tell me the
 24 letter is irrelevant according to the court. What the
 25 court said was simple. He said, look, the December 15,

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1 2008, letter came a long time after November 20 when the
2 agreement was signed. He says, but we've got the
3 October 23, 2007, email that shows the same thing. It
4 shows what Mr. Walker was thinking.
5 And this is consistent. This letter is
6 consistent with his belief that he spells out in the
7 October 23, 2007, email. I'm sure those things had an
8 effect on what Mrs. McKay thought at those various
9 times.
10 **Q. (BY MR. ANDERSON) My question, sir, was in**
11 **response to your statement that Mr. Walker said by**
12 **recording the divorce decree and property settlement**
13 **agreement, you will get paid. I said, wait a minute you**
14 **changed the verb there from create a lien to you will**
15 **get paid.**
16 **My question was: Please find for me any**
17 **document where Mr. Walker said by recording the divorce**
18 **decree and property settlement agreement you will be**
19 **paid.**
20 A. And I go back to the October 23 email. She
21 says, "All looks good, Tom. However --" now this was
22 after she got the attached drafts. "However, can I
23 place a lien with the title company on the Status Corp.
24 closure so the \$800,000 are paid --" there's the word
25 "paid" -- "to me by them?"

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1 What she is saying is, I don't trust this guy,
2 and I'd like to know if we can place a lien so I can
3 make sure the title company will pay me when this
4 closing takes place.
5 And what he says is, "Our plan is to record the
6 judgment and decree of divorce which then becomes a lien
7 on all of Darwin's real and personal property."
8 **Q. All right.**
9 A. Let me finish. I'm answering your question.
10 He doesn't use the word paid. But you read those two
11 together, knowing what a lien is, meaning you're afraid
12 you're not going to get paid so you place a lien on
13 somebody's property to secure payment, I can see how she
14 can understand from that that he is telling her, this is
15 how we'll make sure that you get paid from the title
16 company.
17 **Q. Maybe I misunderstand you. I heard you to say**
18 **that Mr. Walker had told her that she would get paid.**
19 **Is it accurate to state that Mr. Walker has never told**
20 **Mrs. McKay that she would be paid?**
21 MR. ELLIS: Objection. There's no way this
22 client would have any idea what Mr. Walker said or did
23 not say.
24 MR. ANDERSON: This client? You mean this
25 expert?

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1 MR. ELLIS: This expert. I'm sorry.
2 MR. ANDERSON: This expert has reviewed this
3 case to the extent that he feels is necessary.
4 **Q. (BY MR. ANDERSON) Are you aware of any**
5 **information, any document, any testimony, where**
6 **Mr. Walker guaranteed Mrs. McKay that she would be paid?**
7 MR. ELLIS: Now you changed the question,
8 Counsel. Same objection. Speculation. There's never
9 any assertion of guarantee in this case.
10 MR. ANDERSON: Leave out guarantee.
11 **Q. (BY MR. ANDERSON) Have you ever seen any**
12 **statement by Mr. Walker that she would be paid? I'm**
13 **using your words too?**
14 A. When I use -- I've already explained this to
15 you twice. He didn't use the word paid. But in
16 response to her email where she says I want to be paid
17 by the title company, he says, This is our plan to
18 record this lien -- this judgment and decree of divorce.
19 And he created in her the understanding, oh, that's how
20 I'll get paid, because I have a lien. That's what I
21 believe happened.
22 **Q. From her perspective?**
23 A. I think from a reasonable person's perspective
24 if they ask their lawyer, how can I get paid from the
25 title company? Can I place a lien with the title

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1 company? She says, can I place a lien with the title
2 company so that I can get paid by? And he says, yeah,
3 we can place a lien on the title company. He didn't
4 complete the sentence by saying, you'll get paid by
5 them. But I think it's pretty well understood that
6 that's what she was asking and he was saying you'd have
7 a lien, leaving her to believe that she would be paid by
8 the title company.
9 **Q. What is your understanding of the properties**
10 **that were involved at the time the divorce mediation and**
11 **property settlement agreement were being either**
12 **conducted or prepared? What properties was Mr. McKay**
13 **dealing with at that time?**
14 A. I don't know.
15 MR. ELLIS: Objection as to clarity.
16 WITNESS: I don't know what the properties were
17 or how big they were. I just know about the sale of
18 this one entity and the closing that was supposed to be
19 taking place.
20 **Q. (BY MR. ANDERSON) You're referring to the**
21 **Albrethsen property?**
22 A. Yes.
23 **Q. The Albrethsen farm?**
24 A. We can call it that.
25 **Q. What do you know about the Albrethsen farm?**

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1 **What's the history that you can give us?**
2 A. I don't know the history of the farm.
3 MR. ELLIS: Objection. Calls for speculation.
4 Not calculated to lead to the discovery of admissible
5 evidence.
6 **Q. (BY MR. ANDERSON) Were there any other**
7 **properties that were closing on March 30, 2008? Strike**
8 **that. Let me withdraw that question.**
9 **On March 30, 2008, is it your testimony, and**
10 **the basis that you've approached your opinions with,**
11 **that the Albrethsen transaction was closing on that**
12 **date?**
13 A. My understanding is that there was a payment
14 due of approximately \$1.2 to \$1.3 million.
15 **Q. If there's a payment due, what does the title**
16 **company to have do with the situation?**
17 A. Well, I don't know specifically, because I
18 didn't ask the title company.
19 **Q. I just want your specific knowledge as to what**
20 **you know, if anything, about a title company being**
21 **involved with a payment due on March 30, 2008, regarding**
22 **the Albrethsen property. Do you know anything about a**
23 **title company's involvement with that payment?**
24 A. Here is what I know. I know there was a title
25 company and a closing scheduled.

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1 **Q. Closing of what?**
2 A. Of sale of the Albrethsen property.
3 **Q. What does a closing mean in your context?**
4 MR. ELLIS: Counsel, I will object to this line
5 of questioning. All you're doing is trying to harass
6 this witness.
7 MR. ANDERSON: Au contraire, Mr. Ellis. This,
8 I think, is fairly relevant as you will. And if you
9 feel like you're being harassed, I apologize. I'm not
10 raising my voice or yelling at you. I'm just asking you
11 a series of questions to understand the factual basis
12 for the opinions that you're giving against my client.
13 **Q. (BY MR. ANDERSON) Right now I'm interested in**
14 **your understanding of what was going to happen on March**
15 **30, 2008, relative to any properties that Mr. McKay was**
16 **involved with?**
17 A. The understanding that I have, based on what
18 I've read, is that the title company would be receiving
19 the money and that --
20 **Q. What money?**
21 A. Well, the \$800,000. I thought it was \$1.2
22 million total. It was supposed to be \$800,000 paid and
23 then her mortgage was supposed to be paid on her house
24 for another \$300,000 or \$400,000. So I thought it was
25 \$1.2 or \$1.3 million.

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1 **Q. Who was going to pay the money?**
2 A. I thought it was Status Corp. or whoever it was
3 who bought the property.
4 **Q. What is a closing? You've done real estate**
5 **transactions, I believe you testified. What does**
6 **closing mean in real estate parlance?**
7 A. Well, I'm not a real estate parlance expert in
8 terms of what definitions are. I can tell you what my
9 experience is. Closings, you show up to sign the
10 papers. The buyer will come in and sign. The seller
11 then comes in and signs. Now they call that a closing.
12 But then it's also the case that closings --
13 that doesn't necessarily mean the closing is over.
14 Sometimes it's a long-term escrow and it's not closed
15 until all the money is paid.
16 **Q. Typically at the closing, is that when the**
17 **deeds transfer?**
18 A. They can. Depends on how the transaction is
19 structured. It's usually where the documents are
20 signed. But it may be a long-term escrow. So until all
21 of the terms and conditions are satisfied, it's not
22 technically closed.
23 But I think they refer to the signing as a
24 closing. I think of a closing -- that's part of it.
25 But until the deal is done, it's not closed.

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1 **Q. Okay. But typically if someone said there's a**
2 **closing on a certain date, that would be the date that**
3 **people go in and sign documents and either conclude the**
4 **deal or at least set up an escrow so that certain things**
5 **can be paid at certain points in the future?**
6 A. The escrow can be set up before the closing.
7 **Q. Is it typical that the deed is transferred at a**
8 **closing?**
9 A. It depends on what kind of transaction it is.
10 **Q. Let's say it's a purchase of acreage that**
11 **somebody wants to develop?**
12 A. My point is, it depends on whether or not
13 there's a deed of trust involved or a mortgage involved
14 or whether it's owner financing or a cash deal. It just
15 depends.
16 **Q. Did you understand that on March 30, 2008, the**
17 **deed was going to be transferred for the Albrethsen**
18 **property, and that's why they were calling it a closing?**
19 A. My understanding was the money was going to be
20 paid to the title company for the distribution.
21 **Q. Money from Status was going to be paid to what**
22 **title company?**
23 A. I don't know the name of the company.
24 **Q. Then what was the title company going to do**
25 **with the money?**

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1 A. I didn't talk to the title company, and I
2 haven't seen any depositions of the title company
3 people. Typically what happens is they get the money,
4 and then they send it out or however they are supposed
5 to do it pursuant to the escrow instructions.
6 That's one thing they'll do. Another thing
7 they'll do is they'll do a date down and see if there
8 are any liens on the property between the time of the
9 initial closing to the time they get the money to see if
10 anything's been affected.
11 **Q. Would the parties have agreed upon the use of a**
12 **title company for paying money into the title company**
13 **and then that money being transferred to Mr. McKay**
14 **typically? Is that some sort of a document that would**
15 **be created?**
16 MR. ELLIS: Are you talking generally speaking
17 Counsel, or in this particular instance?
18 **Q. (BY MR. ANDERSON) In this particular instance,**
19 **are you familiar with any kind of a set of instructions**
20 **where that was going to occur?**
21 A. I have not seen closing instructions.
22 **Q. As far as you understand, Mr. McKay, in March**
23 **of 2008, was dealing only with the Albrethsen property?**
24 A. I don't know what he was dealing with.
25 **Q. Do you know of any other property other than**

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1 the Albrethsen farm that Mr. McKay was dealing with in
2 2008, March of 2008?
3 A. I don't know of all the properties he was
4 dealing with. I know he owned the Albrethsen property,
5 and I know there was a closing scheduled for March 30.
6 **Q. So he held the deed to the Albrethsen property**
7 **up to March 30, 2008, is your understanding?**
8 A. I understood he had a mortgage.
9 **Q. Then what is your understanding as to the deed?**
10 **Who held the deed to the Albrethsen property on March**
11 **30, 2008?**
12 A. It could have very well been the buyer or the
13 Status Corp.
14 **Q. If Mr. McKay had transferred the deed, he would**
15 **not be the owner of the Albrethsen property; would he?**
16 A. He would have a mortgage on it. That's what I
17 understood he had.
18 **Q. He would have a mortgage interest; correct?**
19 A. Mortgage interest.
20 **Q. But that means he's not the owner; correct?**
21 A. He has an interest in the property, but he has
22 an interest by virtue of his mortgage and not by virtue
23 of the deed.
24 **Q. If he had transferred the deed, it would not be**
25 **his real property; correct?**

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1 A. The underlying fee?
2 **Q. Yes.**
3 A. That's correct.
4 **Q. Okay. And if he's not the owner of that real**
5 **property, then it would not be affected by the recording**
6 **of a property settlement agreement and divorce decree;**
7 **would it?**
8 A. That's not true.
9 **Q. Why not?**
10 A. As you've explained already, Darwin claimed
11 that he had -- the Albrethsen property was his separate
12 property by virtue of the prenuptial agreement. Then
13 what happened -- I think in the divorce case he took the
14 position that the Albrethsen property was his separate
15 property by virtue of the prenuptial agreement. Then he
16 settled this case. If I can find the settlement.
17 **Q. What document are you looking for?**
18 A. I'm looking for the settlement agreement, if
19 somebody has a copy.
20 **Q. Let's see if it's an exhibit here?**
21 MR. ELLIS: Here it is.
22 WITNESS: Do you want me to go on?
23 MR. ANDERSON: No. Just one second.
24 **Q. (BY MR. ANDERSON) Exhibit 31 is a November 20,**
25 **2007, email from Tom Walker to Mr. McKay's counsel. I**

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1 want to make sure that we have the -- we have the
2 property settlement agreement that is merged with and
3 into the judgment of the decree of divorce.
4 A. What exhibit is that?
5 **Q. 31.**
6 MR. ANDERSON: If counsel wants to check, I
7 want to make sure this is the right one so that we have
8 it for questioning in later depositions.
9 **Q. (BY MR. ANDERSON) You were looking for the**
10 **settlement document, I think you said?**
11 A. The PSA.
12 **Q. Why don't you check Exhibit 31 and see if**
13 **that's what you understand to be the final version?**
14 MR. ELLIS: Exhibit 31 is an email.
15 MR. ANDERSON: There's an Exhibit A attached to
16 that that I believe was filed with the court. We could
17 also go this route.
18 MR. ELLIS: No. This is an -- that's a
19 stipulation. This is a proper settlement agreement.
20 WITNESS: Is this it here?
21 MR. ELLIS: I don't know. There's a number of
22 iterations of this agreement.
23 WITNESS: How about you determine what the
24 agreement was, and I'll see whatever that is.
25 MR. ELLIS: Here is a signed agreement.

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1 (Exhibit 38 marked.)
2 **Q. (BY MR. ANDERSON)** Attached to Exhibit 38 is a
3 property settlement agreement that is signed by all
4 parties.
5 A. Okay.
6 **Q.** It was the one provided to you by Mr. Ellis as
7 the document you should use when formulating your
8 opinions. The cover letter is dated November 17, 2009,
9 and it's from Mr. Ellis to you.
10 A. Okay.
11 **Q.** So with that in mind, I think you were going to
12 tell us something about the settlement. What were you
13 going to tell us?
14 A. To go back to where we were, you were saying
15 that once Darwin conveyed the deed to the buyer of the
16 Albrethsen property, he no longer owned it. And I can't
17 remember the exact language you used, but it was
18 something to the effect that he didn't have an interest
19 in it. I can't remember what you said.
20 **Q.** It was not his real property?
21 A. It was not.
22 **Q.** You agreed with me for that?
23 A. What I said was he had a mortgage.
24 **Q.** Okay. But you still agree that it was not his
25 real property. He may have had a mortgage interest, but

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1 it was not his real property; agreed?
2 A. What that means is that he no longer had a fee
3 interest in the underlying fee. He had a mortgage
4 interest in the underlying fee.
5 **Q.** Would you agree that it was no longer his real
6 property?
7 A. I don't use those kinds of terms to describe
8 ownership. No longer his, no longer hers. I explained
9 to you what my understanding is of the state of the
10 title at the time that you've described.
11 What I was saying to you was, he had made this
12 assertion that there was a prenuptial agreement. Which
13 meant that the mortgage was his and his alone, and that
14 Mrs. McKay had no interest in it. By virtue of the
15 prenuptial agreement, it was separate property.
16 However, when they signed the PSA on page
17 two --
18 **Q.** I'm on page two.
19 A. It says "Community Property," heading number
20 one. "The parties agree to the following settlement of
21 their community property."
22 If you go back down, you go down to 1.7 and
23 1.8, those are discussed as Albrethsen's farm and the
24 mortgage. So what he just did was is he said it was his
25 separate property, and now he is agreeing that it's

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1 community property.
2 You go back to 32-918, he just changed the
3 nature of the property by virtue of the PSA. It went
4 from a separate property interest, arguably, from his
5 position, to a community property interest.
6 **Q.** Okay.
7 A. Giving Mrs. McKay an interest in the property.
8 So what he just did was he changed the nature of the
9 property from separate to community. And by agreeing
10 to -- which means that on 1.7 and 1.8, there was an
11 interest in real property created by virtue of this PSA.
12 She then owned an interest in his mortgage.
13 **Q.** By virtue of what language?
14 A. He transmuted it.
15 **Q.** By virtue of what language? Show me the exact
16 language you're referring to.
17 MR. ELLIS: Asked and answered.
18 WITNESS: He claimed that it was a separate
19 property. By the time -- when I say "a separate
20 property," he was talking about the mortgage on the
21 Albrethsen property.
22 By the time he got done signing this PSA, he is
23 now saying it's community property. He has transmuted
24 the nature of it, arguably, if it was in fact, as he
25 said it was, his separate property.

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1 So what happened was, when he transmuted it,
2 this PSA then created an interest in the real property
3 in the mortgage.
4 **Q. (BY MR. ANDERSON)** Which is it? Created an
5 interest in property or the mortgage?
6 A. I'm treating them synonymously in this case.
7 **Q.** You're calling a mortgage real property?
8 A. Yes. It's a property interest.
9 **Q.** Are you calling a mortgage real property?
10 MR. ELLIS: Asked and answered.
11 WITNESS: I'm saying it's an interest in real
12 property.
13 **Q. (BY MR. ANDERSON)** But is it real property
14 under the laws of Idaho? Is it deemed real property?
15 A. I'm deeming it as an interest in real property.
16 That's what I'm saying it is.
17 **Q.** Do you have any statutes that would support
18 your conclusion that a mortgage interest can be deemed
19 real property?
20 A. What I'm saying is that -- let's back up. A
21 mortgage is required to be in writing by the statute.
22 You can't really have an oral mortgage. And it creates
23 a lien on property, which is an interest in property.
24 **Q.** The mortgage creates a lien on property?
25 A. Correct.

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1 **Q. What is your basis for that statement?**
2 A. It's the basis -- my understanding for that is
3 just my practice, my experience.
4 **Q. Any particular statute other than your**
5 **practice?**
6 A. No. No statute.
7 **Q. Is that what 10-1110 refers to?**
8 A. No. That refers to a judgment or decree being
9 recorded.
10 **Q. So you're saying a mortgage creates a lien on**
11 **real property?**
12 A. It's a property interest.
13 **Q. But there's no statute that supports that?**
14 MR. ELLIS: Asked and answered.
15 **Q. (BY MR. ANDERSON) Is that correct?**
16 A. You already asked me. I told you I'm not aware
17 of a statute.
18 **Q. Is there case law that supports that?**
19 A. Interestingly enough, there's no case law
20 either way.
21 **Q. So the answer is no?**
22 A. The answer is there's no case law in Idaho to
23 explain that.
24 **Q. Is it your position that a mortgagee has a**
25 **legal interest in real property after the deed is**

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1 conveyed?
2 A. My position is that Darwin had an interest in
3 the Albrethsen property by virtue of the mortgage,
4 notwithstanding the fact that there was a deed.
5 **Q. "Notwithstanding the fact that there was a**
6 **deed." What does that mean?**
7 A. Presumably a deed from him to the purchaser.
8 **Q. Have you seen that deed?**
9 A. I may have, but I don't recall.
10 **Q. Let's take a look at it.**
11 **(Exhibit 39 marked.)**
12 **Q. (BY MR. ANDERSON) Exhibit 39, is a warranty**
13 **deed from both Patricia McKay and Darwin McKay. Have**
14 **you ever seen that document?**
15 A. I don't think I have seen this.
16 **Q. Did you understand that both PS and**
17 **Darwin McKay had transferred their legal interest in the**
18 **real property known as the Albrethsen property as of**
19 **November 30, 2006?**
20 A. Since I haven't seen the deed, I didn't have an
21 understanding. I have one now. I have an understanding
22 of what this does and why they did it.
23 **Q. Would you agree that as of November 30, 2006,**
24 **when this warranty deed was recorded, that neither**
25 **Darwin nor PS had any equitable interest in the**

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1 Albrethsen property itself?
2 A. Depends on what you mean by "equitable
3 interest."
4 **Q. Let me change that to legal interest. Would**
5 **you agree that after transfer of the title of the**
6 **Albrethsen property to Status Corporation, Darwin and**
7 **Patricia McKay no longer had any legal interest in the**
8 **Albrethsen property?**
9 MR. ELLIS: Objection as to clarity.
10 WITNESS: The way I would say it is they no
11 longer had legal title.
12 **Q. (BY MR. ANDERSON) So you're agreeing with my**
13 **question?**
14 A. No.
15 **Q. What legal interest did they have in the**
16 **property itself?**
17 A. It depends on how you define legal interest.
18 **Q. How are you defining it?**
19 A. I'm concerned about how you're asking me the
20 question. There's the technical phrase legal interest,
21 and then there's the vernacular version of legal
22 interest. He still had a legal interest in the sense
23 that he had a mortgage interest in the property.
24 **Q. Mortgage interest is different than legal**
25 **interest in the property; isn't it? Mr. Expert, isn't**

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1 that true?
2 MR. ELLIS: The sarcasm is unwarranted,
3 Counsel.
4 WITNESS: Depends on how the court interprets
5 that. My point is this. That's why I wanted to be more
6 precise and say he no longer had legal title. I think
7 that's what you're getting at, in any event.
8 **Q. (BY MR. ANDERSON) Is it your position that a**
9 **mortgagee has a legal interest in real property after**
10 **the deed is conveyed?**
11 A. Didn't you already ask me that?
12 **Q. It's in context now.**
13 A. Could you say it one more time?
14 **Q. Is it your position that a mortgagee has a**
15 **legal interest in real property after the deed is**
16 **conveyed?**
17 A. I think what I said before, and I'll stick by
18 that, it's the same answer. It's that after Darwin and
19 Mrs. McKay, apparently when she signed this warranty
20 deed, conveyed legal title to the purchaser, Darwin
21 continued to have a mortgage interest in the property.
22 **Q. What is a mortgage interest in the property?**
23 **Tell me what you mean by those words grouped together.**
24 A. What I mean by that is he had, by virtue of the
25 mortgage that he had, an interest in the property by

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1 virtue of that.

2 **Q. What interest did he have in the property?**

3 **Isn't a mortgage a separate contract? Somebody owes**

4 **money?**

5 A. It is.

6 **Q. What interest does the mortgage create in the**

7 **property?**

8 A. He had a lien on the property to secure

9 payment.

10 MR. ELLIS: Counsel, at your convenience could

11 we take a five-minute break?

12 MR. ANDERSON: Sure. Let me just look at this.

13 **Q. (BY MR. ANDERSON) Is it your position that by**

14 **recording the divorce decree in the attached property**

15 **settlement agreement, that there was a lien created on**

16 **the mortgage held by Darwin McKay regarding the**

17 **Albrethsen property?**

18 A. No. There was not one because of an

19 insufficient property description.

20 **Q. Are you saying that, using your term, if there**

21 **had been a sufficient property description recording the**

22 **property settlement agreement and divorce decree, a lien**

23 **would have been created in the mortgage held by**

24 **Darwin McKay?**

25 A. At least arguably, there would have been.

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1 **Q. Arguably based on what basis?**

2 A. Based on a mortgage interest being an interest

3 in real property.

4 **Q. How does that work? Tell me what you mean. He**

5 **has a mortgage from Status Corp.?**

6 A. Correct.

7 **Q. That they're supposed to pay him some money.**

8 **Status Corp. owns the property. They have the deed;**

9 **correct?**

10 A. Yes.

11 **Q. What lean on the mortgage is created? Tell me**

12 **where that comes into being?**

13 A. It comes into being by operation of law, by

14 virtue of 10-1110.

15 **Q. That refers to liens upon real property. Are**

16 **you equating a mortgage to real property?**

17 A. What I told you is it was an interest in real

18 property. So, for example, let's suppose I would have

19 had a judgment against Darwin. You could execute on

20 that mortgage and then have a sale and take it from him.

21 **Q. The mortgage?**

22 A. Correct.

23 **Q. Not the real property, though?**

24 A. Not the underlying fee. But his mortgage

25 interest on the property.

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1 **Q. All right. So if Bank of America obtains a**

2 **judgment -- let's say a plaintiff obtains a judgment**

3 **against Bank of America and records that judgment in**

4 **every county in Idaho, does that recording of the**

5 **judgment mean a lien is created on every mortgage which**

6 **is held by Bank of America in the State of Idaho?**

7 A. I'm sorry. Say that again.

8 **Q. If plaintiff gets a judgment against Bank of**

9 **America and records it, does that mean it gets a lien**

10 **against every mortgage that Bank of America holds in the**

11 **State of Idaho?**

12 A. I'm not sure what the answer to that question

13 would be. In the sense that Bank of America holds deeds

14 of trusts and mortgages. But what I can tell you is

15 that had Mr. Walker taken that position with the title

16 company, the title company before the funds were paid to

17 the title company, the title company would not have paid

18 the \$1.2 or \$1.3 million, however much it was, without

19 first either getting an agreement from the parties or

20 interpleading the money with the court.

21 **Q. Did Mrs. McKay have an interest in the**

22 **mortgage?**

23 A. Yes.

24 **Q. How so?**

25 A. This is the third time I've told you.

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1 **Q. Is this the transmutation argument?**

2 A. That's correct.

3 **Q. Let's take a break in a second. But before we**

4 **go, I'd like you to move -- first of all, can you**

5 **identify any particular paragraph that creates the**

6 **transmutation in the property settlement agreement? Can**

7 **you narrow it down that far?**

8 A. Where's --

9 **Q. It's in Exhibit 38?**

10 A. They did not use the word transmute.

11 **Q. Just narrow it down to a particular paragraph**

12 **for me so I can kind of see what you're talking about?**

13 A. Page two, the language that says, "The parties

14 agree to the following settlement of the community

15 property."

16 So what they're doing is for items 1.1 through

17 1.9, they're treating all of those as community

18 property.

19 **Q. Okay.**

20 A. Compare that to what Mr. McKay, Darwin, was

21 arguing with respect to the prenuptial agreement. He

22 said that the Albrethsen property was his separate

23 property. In fact, the deed you just showed me says

24 that he was dealing with that property as his sole and

25 separate property.

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| | |
|--|---|
| <p>1 Q. Okay.</p> <p>2 A. I'm not done.</p> <p>3 Q. Keep going.</p> <p>4 A. So what happens is you start off with that, and</p> <p>5 then you look at these other paragraphs. 1.7 and 1.8,</p> <p>6 and it talks about this Albrethsen mortgage and</p> <p>7 addresses that property interest.</p> <p>8 Q. In paragraph 1.8?</p> <p>9 A. You've got to read 1.7 and 1.8 together.</p> <p>10 They're talking about the Albrethsen farm.</p> <p>11 Q. Where in 1.7? I see the Status Corp. I don't</p> <p>12 see Albrethsen?</p> <p>13 A. I told you, 1.7 and 1.8. Do you see it in 1.8?</p> <p>14 "In the event of breach, Darwin may also be able to</p> <p>15 foreclose a mortgage on that portion of the land</p> <p>16 referred to prior to the sale to Status Corporation as</p> <p>17 "Albrethsen's Farm."</p> <p>18 Q. That doesn't give any right to Mrs. McKay to</p> <p>19 proceeds from that mortgage; does it?</p> <p>20 A. I'm telling you --</p> <p>21 Q. Answer my question, please.</p> <p>22 A. Say it again.</p> <p>23 Q. The sentence you just read, "In the event of a</p> <p>24 breach, Darwin may also be able to foreclose a mortgage</p> <p>25 on that portion of the land referred to prior to the</p> <p style="text-align: right;">Page 93</p> | <p>1 Once he gets money from Status, he's got so much time to</p> <p>2 pay Mrs. McKay?</p> <p>3 A. I'm still trying to answer your first question.</p> <p>4 You just stopped me. I want to continue reading this.</p> <p>5 You've asked a different question.</p> <p>6 Q. Fine. Go ahead. Do whatever you want. We'll</p> <p>7 get to my question.</p> <p>8 A. "The parties acknowledge that the Status Real</p> <p>9 Estate Transaction is scheduled to close on or before</p> <p>10 March 30, 2008." That meant, because of the closing on</p> <p>11 March 30, that whatever interest Mr. McKay was going to</p> <p>12 receive from that, he transmuted it. Because he said it</p> <p>13 was a separate property, and now what he does is he says</p> <p>14 that the money he is going to receive, based on this</p> <p>15 closing, are now community property.</p> <p>16 Q. Where does it say that?</p> <p>17 A. Flip over to page -- like I told you, turn to</p> <p>18 page two. "The parties agree to the following</p> <p>19 settlement of their community property." He is</p> <p>20 acknowledging now that the \$800,000 to be received in</p> <p>21 the closing by virtue of the mortgage is now community</p> <p>22 property.</p> <p>23 Q. So if he didn't want to do that, there would</p> <p>24 have to be something pretty specific that would take it</p> <p>25 out of -- the transmutation?</p> <p style="text-align: right;">Page 95</p> |
| <p>1 sale to Status Corp. as the Albrethsen farm. There is</p> <p>2 nothing in that language that creates a right for</p> <p>3 Mrs. McKay to receive money directly from that mortgage;</p> <p>4 does it?</p> <p>5 MR. ELLIS: Objection. Argumentative.</p> <p>6 WITNESS: There's nothing in the PSA in and of</p> <p>7 itself as drafted that gives Mrs. McKay the right to</p> <p>8 receive money from the title company when the mortgage</p> <p>9 is satisfied.</p> <p>10 Q. (BY MR. ANDERSON) Now 1.8 starts with a</p> <p>11 sentence that says, "The parties acknowledge that if</p> <p>12 Status Corporation or its assigns breaches the purchase</p> <p>13 and sale agreement, Darwin will have title to the</p> <p>14 portion of the land that had been referred to prior to</p> <p>15 the sale to Status Corporation as the "Home Farm."?"</p> <p>16 Do you know what the Home Farm is?</p> <p>17 A. I do not.</p> <p>18 Q. So where is it that this transmutation occurs?</p> <p>19 Are we down to 1.8?</p> <p>20 A. We're looking at 1.7 and 1.8. "Darwin shall</p> <p>21 pay Patricia \$800,000 in cash, by wire transfer or</p> <p>22 certified check, with five days of payment by the Status</p> <p>23 Corporation, or its assigns." Then you've got "Status</p> <p>24 Real Estate Transaction."</p> <p>25 Q. Let me interrupt. That's a trigger; isn't it?</p> <p style="text-align: right;">Page 94</p> | <p>1 A. No. Not something specific.</p> <p>2 Q. If there was something specific that was</p> <p>3 contrary to what you came up with, that would be fairly</p> <p>4 important; right?</p> <p>5 MR. ELLIS: Objection as to clarity.</p> <p>6 WITNESS: All they had to say was, the parties</p> <p>7 agree to the following settlement of property. Instead</p> <p>8 they refer to it as community property. Where before</p> <p>9 this settlement agreement was signed by Mr. McKay -- his</p> <p>10 position was that it was in fact separate property.</p> <p>11 He's now treating -- the money is being paid by</p> <p>12 virtue of the mortgage and the closing on the 30th as</p> <p>13 community property.</p> <p>14 Q. (BY MR. ANDERSON) You said that transmutation</p> <p>15 argument runs through 1.9; correct?</p> <p>16 A. What I said was this: Go to page two. That</p> <p>17 the property they identify on page two and page three</p> <p>18 and page four and page five, that's all community</p> <p>19 property. That's what I said.</p> <p>20 Q. That runs through Section 2 up to community</p> <p>21 debts, and that would be through 1.9, the top of page</p> <p>22 six; right? All of that is in the transmutation column?</p> <p>23 A. Yes.</p> <p>24 Q. Look at 1.9. We'll take a break in a second.</p> <p>25 1.9 talks about some things that are going to be awarded</p> <p style="text-align: right;">Page 96</p> |

1 to Darwin. Do you see that?

2 A. Yes.

3 Q. It says he gets a Jaguar, and camp trailer and

4 a truck. He gets his -- he gets separate property, a

5 birch cabinet and a bookcase. Then he gets a motorhome.

6 He has to deliver a motorhome.

7 Take a look at page five. Right there there's

8 a column A through H, but there's a sentence above it.

9 Do you see that? It says, "Darwin shall be awarded all

10 separate and community property interest, if any, in the

11 following:" Do you see that?

12 A. Yes.

13 Q. Turn to the top of the next page. Read into

14 the record what it says?

15 A. "Proceeds from sale of Albrethsen."

16 Q. So that's his money; right?

17 A. I wasn't the one who drafted this.

18 Q. That kind of takes it out of the transmutation

19 column; doesn't it?

20 A. No, it does not.

21 Q. How come?

22 A. I've explained it to you. The same reason. He

23 said initially that the Albrethsen property was his

24 separate property. Then he says that the Albrethsen

25 property is community property.

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1 Q. Are you disagreeing that this agreement gave

2 Mr. McKay all of the proceeds from the Albrethsen

3 property as his own money? Do you disagree with that?

4 A. I'm saying I understand what the language of

5 this says.

6 Q. So you don't disagree with that? Because

7 that's what the language says.

8 A. I understand the language says what it says.

9 Q. How come you can't say it?

10 A. Do you want me to read the language? I will.

11 "Darwin shall be awarded all separate and community

12 property interest if any in the following:" The

13 "proceeds from sale from Albrethsen." That's what it

14 says. It also says that the Albrethsen property is

15 community property.

16 MR. ANDERSON: Let's take a break.

17 (Recess taken.)

18 Q. (BY MR. ANDERSON) Let's go to Exhibit 17. I

19 know this may sound redundant, but have you ever asked

20 Mrs. McKay what she meant by the language she used in

21 her October 23, 2007, email to Tom Walker?

22 A. No.

23 Q. Do you know if by use of the language that she

24 was referring to, she was referring to a lien on

25 Darwin McKay's real property?

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1 MR. ELLIS: Objection. Calls for speculation.

2 WITNESS: I don't know exactly what she was

3 referring to. I can tell you what I understand the

4 email to mean when I read it.

5 Q. (BY MR. ANDERSON) I'm going to ask the

6 questions here. We'll probably let you get that out at

7 some point. I want to make sure I understand your

8 general understanding of this email.

9 And again, I'll ask you: Do you know if she

10 was referring to a lien on real property by virtue of

11 the language that she used?

12 MR. ELLIS: Same objection.

13 WITNESS: I have not spoken to her, so I do not

14 know what she intended.

15 Q. (BY MR. ANDERSON) If she intended for it to

16 refer only to real property, would that mean that she

17 was not inquiring about a lien on the Albrethsen

18 mortgage payout?

19 A. I'm sorry.

20 MR. ELLIS: Objection. Vague.

21 WITNESS: I don't understand that question. I

22 look at it and read it, and it looks to me like what she

23 says is what she says. She is saying, look, I'm afraid

24 he is not going to pay me. Can I get a lien on the

25 \$800,000 at the title company?

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1 Q. (BY MR. ANDERSON) Let's go back to my

2 question, if we could. If she is referring only to real

3 property, that would exclude the mortgage on the

4 Albrethsen property; correct? Because that doesn't

5 involve real property any more?

6 MR. ELLIS: Objection; asked and answered.

7 WITNESS: You'll have to ask her what she

8 intended by that.

9 Q. (BY MR. ANDERSON) Let me read you what she

10 intended. You ready? Page 99 of her deposition.

11 Question by Mr. Anderson: "Can you tell me

12 what you meant by 'can I place a lien with the title

13 company'?"

14 Answer: "A lien on all of Darwin's property."

15 Question: "Real property?"

16 Answer: "Real property."

17 Let's assume she meant what she said and she

18 wanted a lien on real property. Does that necessarily

19 exclude a lien on the mortgage that Mr. McKay had

20 regarding the Albrethsen property just by virtue of how

21 those terms work in the world of real estate?

22 A. Terms for Mrs. McKay or terms for a lawyer? I

23 think what she is saying to you in her response to her

24 deposition is she wants to get paid the money. The

25 \$800,000 is coming to the title company. I don't know

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1 if she is a trained lawyer or what her paralegal
 2 experience is. I don't know what that is exactly.
 3 That's what I read it to be.
 4 You said, "real property." I don't know what
 5 she knows by that, if she distinguishes between
 6 equitable interest, remainder interest. I have no
 7 idea.
 8 **Q. Let's assume for purposes of this next question**
 9 **that there is no title company involved with the**
 10 **mortgage payment. But there is a title company involved**
 11 **with closing on a different piece of property. Not the**
 12 **Albrethsen property. Are you with me?**
 13 A. When you say that, you're talking about -- does
 14 Darwin have a mortgage on that property?
 15 **Q. Which property?**
 16 A. This other different piece of property?
 17 **Q. We'll call it the Farm Home property.**
 18 A. Okay.
 19 **Q. The one you don't know about.**
 20 A. Okay.
 21 **Q. The Farm Home property, I'll represent to you,**
 22 **Darwin had the deed still. He owned it.**
 23 A. Okay.
 24 **Q. So if there was no title company involved with**
 25 **the payment due under the Albrethsen property and**

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1 **Mrs. McKay was interested in placing a lien on a title**
 2 **company and the only title company involved was with the**
 3 **Farm Home closing, would that indicate to you that she**
 4 **was not asking to have a lien placed on the mortgage?**
 5 MR. ELLIS: Objection. Calls for speculation.
 6 It's also lacking clarity. You're talking about putting
 7 a lien on a title company?
 8 WITNESS: I don't know how to answer that
 9 question. I really don't. I don't even understand your
 10 question, really.
 11 MR. ANDERSON: Let's have it read back.
 12 (Record read by court reporter.)
 13 WITNESS: You'd have to ask her what that
 14 indicates to her. I don't know what she was intending
 15 by that.
 16 **Q. (BY MR. ANDERSON) I did. Let's go back to her**
 17 **deposition.**
 18 A. Okay.
 19 **Q. Page 100, line 17. Actually, line 18. Let me**
 20 **read the sentence: "You write on October 23rd, 'can I**
 21 **place a lien with the title company on the Status Corp.**
 22 **closure so the \$800,000 are paid to me by them?' Who is**
 23 **them?"**
 24 Answer: "The title company."
 25 Question: "What title company are you

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1 referring to?"
 2 Answer: "Whatever title company would be used
 3 for the closing of the property."
 4 That's at the top of 101. Now, if the only
 5 title company which was going to be involved with a
 6 closing was dealing with the Home Farm property, would
 7 it be accurate to conclude that Mrs. McKay was not
 8 referring to the mortgage related to the Albrethsen
 9 property?
 10 MR. ELLIS: Objection. Calls for speculation.
 11 Lacking clarity.
 12 **Q. (BY MR. ANDERSON) I want you to use those**
 13 **facts. I can ask a hypothetical.**
 14 A. I know you can. I'm really trying to
 15 understand the question. Could you read that back?
 16 **Q. Let me see if I can help. Let's assume there's**
 17 **two pieces of property: Home Farm, which Mr. McKay**
 18 **still holds title to, holds the deed?**
 19 A. He has a fee interest?
 20 **Q. Yes. And the Albrethsen property, which he and**
 21 **his then wife had transferred title back in 2006?**
 22 A. And he still retained the mortgage?
 23 **Q. He has a mortgage.**
 24 A. Okay.
 25 **Q. On March 30, 2008, there's going to be a**

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1 closing on the Home Farm where moneys are to be paid,
 2 deed is to be transferred. A title company is involved.
 3 A. Yes.
 4 **Q. Also assume that with respect to the mortgage**
 5 **and the promissory note, there's no title company.**
 6 **There's just an obligation to pay.**
 7 A. Okay.
 8 **Q. Assume those are the facts. And then take a**
 9 **look at Exhibit 17. When Ms. McKay says, I want to**
 10 **place a lien with the title company, doesn't that**
 11 **necessarily refer to the Home Farm property and not the**
 12 **Albrethsen mortgage?**
 13 MR. ELLIS: Same objection.
 14 WITNESS: If those turn out to be the facts,
 15 there was no closing on the Albrethsen property, then
 16 there would be no closing on the Albrethsen property
 17 through a title company, because you just said there
 18 wasn't one.
 19 **Q. (BY MR. ANDERSON) And by virtue of that**
 20 **conclusion then, it would be incorrect to assume that**
 21 **when she asked if she could place a lien with the title**
 22 **company, she was referring to the Albrethsen mortgage**
 23 **payout; correct?**
 24 MR. ELLIS: Same objection.
 25 WITNESS: Well, if there's only one title

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1 company on a closing and it's not the Albrethsen
 2 property, then there would not be \$800,000 paid to the
 3 title company on the Albrethsen closing.
 4 **Q. (BY MR. ANDERSON)** Thank you. Let's go to your
 5 opinions. Your expert disclosure.
 6 (Exhibits 40 and 41 marked.)
 7 **Q. (BY MR. ANDERSON)** If you could, I want you to
 8 compare these so that maybe we can simplify the
 9 questioning. Would it be accurate to state that other
 10 than a couple of stylistic changes, you refer to the
 11 same documents that you've reviewed with the caveat that
 12 in your affidavit you add the December 15, 2008, letter
 13 from Mr. Walker to Ms. McKay? But then you pick up and
 14 basically it's a cut-and-paste operation from your
 15 expert disclosure to the affidavit up to the point,
 16 let's say, paragraph six of your affidavit and the
 17 analysis portion of your report?
 18 A. Put it this way: If I see a difference, I
 19 notice one, I'll be sure and point it out. Otherwise
 20 they should be consistent.
 21 **Q.** Let's start with your affidavit, if we could.
 22 Actually not, because I want to -- I apologize. Sorry.
 23 With respect to your expert disclosure, as you know,
 24 this is the way we understand what you're going to
 25 testify about, and Mr. Ellis is always good about laying

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1 out the opinions of his experts.
 2 I want to ask you about the top paragraph on --
 3 there's a four of six up in the upper right-hand corner.
 4 Do you see that?
 5 A. Yes.
 6 **Q.** On the page that starts with "Dear Mr. Ellis"?
 7 A. Yes.
 8 **Q.** I'm on Exhibit 40. You say you have asked that
 9 I review the McKay versus Walker matter and render an
 10 opinion whether the conduct of Mr. Walker fell below the
 11 standard of care. Do you see that?
 12 A. Yes.
 13 **Q.** Then there are some specific words, and I want
 14 to make sure that those words define the scope of your
 15 expert opinions that you've been asked to give. Those
 16 words are: "Putting third parties on notice that
 17 Patricia McKay had an interest by virtue of a settlement
 18 in a certain mortgage held in the name of Darwin McKay"?
 19 A. What is your question?
 20 **Q.** Is that the focus -- is it accurate to state
 21 that that is the focus of your expert opinions according
 22 to the disclosure?
 23 A. There's also the issue -- I don't know what you
 24 mean by "the focus." That is an issue in the case, but
 25 it's also the case whether the third party should have

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1 been put on notice by virtue of recording the decree.
 2 Then there's also the issue of whether it was
 3 below the standard of care to tell Mrs. McKay that she
 4 had a lien. When she asked about the \$800,000, that she
 5 would have a lien when she did not.
 6 **Q.** Okay. Let's go through it and see what we
 7 have. Would it be accurate to state that the initial
 8 opinion that you were offering was whether or not
 9 Mr. Walker met the standard of care in putting third
 10 parties on notice, that Ms. McKay had some sort of an
 11 interest in a mortgage held by Darwin McKay?
 12 A. I think that generally encapsulates it.
 13 **Q.** Can you tell me what interest Mrs. McKay had in
 14 the mortgage by virtue of the settlement agreement?
 15 Please pull out exhibit --
 16 A. Are you looking for something for me?
 17 **Q.** Exhibit 38, where we had a copy of the property
 18 settlement agreement. I would like you to show me where
 19 it establishes that Patricia McKay had an interest in
 20 Darwin McKay's Albrethsen property mortgage.
 21 MR. ELLIS: Asked and answered.
 22 WITNESS: I've gone over this. Arguably she
 23 had an interest in the mortgage by virtue of what I've
 24 identified as the transmutation of Mr. McKay's separate
 25 property interest.

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1 **Q. (BY MR. ANDERSON)** That's not in your report;
 2 is it?
 3 A. No.
 4 **Q.** Where did that opinion come up? Or when did it
 5 come up?
 6 A. I can't tell you the exact day I came up with
 7 that.
 8 **Q.** Recently?
 9 A. It's something I've been looking at. I don't
 10 know.
 11 **Q.** What is transmutation? What does that term
 12 mean?
 13 A. I can tell you what I understand it to mean.
 14 **Q.** You're the guy I'm asking, so that's fair.
 15 A. It changes the nature of property by virtue of
 16 an agreement. So property can be separate property, and
 17 it can be transmuted. I can change it through
 18 agreement, the nature of the property.
 19 **Q.** Do parties have to intend for that to occur for
 20 it to be effective, or is it kind of a "gotcha" thing?
 21 A. Well, there's express intent; there's implied
 22 intent. So what I can tell you is that I do not
 23 understand why Mr. McKay would say this is my separate
 24 property and then in the settlement agreement refer to
 25 the \$800,000 proceeds that were coming by virtue of the

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1 mortgage, as I understand it, to be community property.
 2 That was totally inconsistent with what he said earlier
 3 was his position in the case. So it looked to me like
 4 he was conceding that point.
 5 **Q. Paragraphs 1.1 through 1.9 created an interest**
 6 **in the mortgage for Patricia McKay? Is that your**
 7 **opinion in this case?**
 8 A. I didn't say 1.1 to 1.9.
 9 **Q. That's the community property section.**
 10 A. I said all the property they identified in that
 11 section they're treating as community property. Now if
 12 they were treating it as separate property before that
 13 point, now they're treating it as community property,
 14 that seems to me to fit the definition of an agreement
 15 to transmute property from a character of separate to
 16 community.
 17 **Q. Did Mrs. McKay understand that she was not**
 18 **going to get paid directly by Status Corp.?**
 19 MR. ELLIS: Objection. Calls for speculation.
 20 WITNESS: You asked that question before, and I
 21 said at what point in time? Because I believe at a
 22 certain point in time she believed she had a lien and
 23 would be paid by virtue of the lien.
 24 **Q. (BY MR. ANDERSON) Lien on what?**
 25 A. On the mortgage.

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1 **Q. What lien on the mortgage? Where did that come**
 2 **from?**
 3 A. Mr. McKay. Darwin had a lien on -- the lien on
 4 the property by virtue of the mortgage.
 5 **Q. How does one have a lien on the property by**
 6 **virtue of a mortgage? Are there any prerequisites?**
 7 MR. ELLIS: Asked and answered.
 8 WITNESS: Arguably you can get one from Idaho
 9 Code Section 10-1110.
 10 **Q. (BY MR. ANDERSON) Which language of that**
 11 **section?**
 12 A. It says, "A transcript or abstract of any
 13 judgment or decree of any court" -- then it goes on and
 14 has some language that is not relevant -- "may be
 15 recorded with the court of any county of the state" --
 16 and then it says the judgment so recorded becomes a lien
 17 upon all real property owned by the judgment debtor.
 18 **Q. How does that apply to a mortgage?**
 19 A. You and I have -- we already answered this.
 20 You asked me is mortgage real property? We had that
 21 long discussion. We've been over this. You really
 22 asked me the same question again.
 23 **Q. Yeah, but you still have to answer it. You**
 24 **don't get to not answer.**
 25 A. Same answer I had before.

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1 **Q. Instead of arguing with me, why don't we get to**
 2 **it?**
 3 A. One can argue easily that by virtue of
 4 recording a divorce decree, it places a lien on all real
 5 property. Not just real property, but if you have an
 6 interest in real property.
 7 **Q. What interest in real property did the mortgage**
 8 **create?**
 9 A. What interest in real property -- it created a
 10 lien.
 11 **Q. Are there any prerequisites before such a lien**
 12 **can be created?**
 13 A. I'm not --
 14 **Q. Do you have to have the right of possession of**
 15 **the property before you have a lien arising out of a**
 16 **mortgage?**
 17 MR. ELLIS: Objection as to clarity.
 18 WITNESS: I don't know what you mean by "right
 19 of possession."
 20 **Q. (BY MR. ANDERSON) That's not a term you're**
 21 **familiar with?**
 22 A. It is. But I'm not familiar with the context
 23 in the way you're asking the question.
 24 **Q. Do you understand the difference between a**
 25 **legal interest and equitable interest in property?**

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1 A. I do.
 2 **Q. What is it?**
 3 A. I think there's more than one definition. The
 4 definition I'm comfortable with and most understand is
 5 you may have a legal interest by virtue of holding legal
 6 title to property. You may have an equitable interest
 7 by -- you don't necessarily own title, but you have --
 8 you have an interest in the property.
 9 **Q. If you've conveyed title, can you have an**
 10 **equitable interest as a mortgagee?**
 11 A. If you've conveyed title, can you have an
 12 equitable interest as a mortgagee?
 13 **Q. Yes, sir.**
 14 A. That is possible.
 15 **Q. Under what circumstances?**
 16 A. Part of that may depend on how the Supreme
 17 Court of Idaho interprets a mortgage.
 18 **Q. Typically if the mortgagee has conveyed the**
 19 **deed, would you agree that he or she no longer has an**
 20 **equitable interest?**
 21 A. "Typically" meaning where typically -- where,
 22 in Idaho?
 23 **Q. Yes.**
 24 A. I would tell you that there's no Idaho case
 25 that explains that issue.

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1 **Q. What is your position on it?**
2 A. My position is that in this case it really
3 doesn't, to a large extent, matter. So, for example, if
4 there is an equitable interest, then obviously the
5 recorded decree will attach to it. If there's not, then
6 if Mr. Walker had sent notice to the title company, the
7 title company wouldn't have argued over it. They would
8 have interpleaded the money or they wouldn't have
9 disbursed the money to Mr. McKay.
10 **Q. Which title company?**
11 A. I don't know the name of the title company.
12 We've been over this. I'm assuming there was a -- the
13 title company would receive the payment for the \$1.2
14 million or whatever that number was.
15 **Q. On the Albrethsen mortgage?**
16 A. Yes.
17 **Q. That's your assumption and the basis for your**
18 **opinions in this case?**
19 A. That's correct.
20 **Q. Do you understand that there are very limited**
21 **circumstances where a mortgagee can have an equitable**
22 **interest in property?**
23 A. When you say there are limited circumstances,
24 you can ask me about those, and I can render my opinion.
25 **Q. Let me ask this: Would you agree under Idaho**

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1 **law that any equitable interest ceases at the time title**
2 **is transferred and the deed is conveyed to the buyer?**
3 A. I'm not aware of an Idaho case that says that.
4 **Q. If somebody asked you that question, with your**
5 **real estate expert hat on, how would you answer?**
6 A. I would tell you that that's still an open
7 question in the state at least. But arguably there's
8 still an equitable interest in the property. But what
9 is not an open question is how the title company would
10 have responded.
11 **Q. Are there cases on transmutation that you**
12 **looked at for your new opinion?**
13 A. There were no cases I looked at.
14 **Q. Where does it come from? Are there cases out**
15 **there that maybe you didn't look at and maybe you know**
16 **about?**
17 A. There could be cases out there that I don't
18 know about.
19 **Q. If it's not from case law, is it something that**
20 **is a statutory creation, this transmutation argument?**
21 A. I think there may be a statute on
22 transmutation. The overall concept of transmutation is
23 where the parties agree to transmute the nature, to
24 recharacterize the nature of a property.
25 **Q. Would somebody looking at this property**

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1 **settlement agreement, attached to the divorce decree,**
2 **understand there's this transmutation that's occurred?**
3 MR. ELLIS: Objection. Calls for speculation.
4 WITNESS: Who?
5 **Q. (BY MR. ANDERSON) A title company. Let's say**
6 **a title company gets this property settlement agreement.**
7 **Is it your thought that, based on your analysis, that**
8 **they would go, oh, there's been a transmutation, I**
9 **better call Mrs. McKay and talk to her about her**
10 **interest? Or would they go to 1.9 and say, oh,**
11 **Mr. McKay gets all the proceeds. End of story. Which**
12 **one do you think is more likely than not?**
13 A. Depends.
14 **Q. Let's just say --**
15 A. Let me answer. If Mr. Walker sends notice to
16 the title company --
17 **Q. What kind of notice are you referring to?**
18 A. You want me to finish answering the first
19 question or do you want me to stop and answer your next
20 question?
21 **Q. I just wondered what kind of notice?**
22 A. I just want to know how you want to do it.
23 Because you interrupted me. I can finish answering the
24 first question, or if you'd like I'll stop and go to the
25 second one.

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1 **Q. Do whatever you want.**
2 A. You're the one asking the questions, you need
3 to direct me.
4 **Q. I just directed you to do whatever you want,**
5 **sir.**
6 A. Then I'll wait until you ask me the question.
7 **Q. What kind of notice are you saying that**
8 **Mr. Walker needed to provide to a title company that**
9 **would have given -- what are you saying the notice**
10 **should give? Let me ask you that.**
11 A. I'm saying that if Mr. Walker had sent -- this
12 assumes that the title company was going to receive the
13 money and disburse it.
14 **Q. The Albrethsen mortgage money?**
15 A. Yes. The mortgage money.
16 **Q. Okay. Thank you.**
17 A. If Mr. Walker had sent the title company a
18 letter -- when you say notice, it wouldn't take too
19 much. In other words, if he said, look, by virtue of
20 the property settlement agreement, I'm enclosing --
21 Mrs. McKay claims an interest in this property or in the
22 proceeds and also in the mortgage and the proceeds. And
23 also after having recorded the decree, he could have
24 also told the title company the same thing saying we're
25 claiming -- that by operation of law, we have liened

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| | |
|--|---|
| <p>1 Mr. McKay's interest in that mortgage. And so we insist
2 that you pay Mrs. McKay out of those proceeds pursuant
3 to the PSA.</p> <p>4 In my opinion, as a practical matter, the title
5 company would not have paid the money to Mr. McKay
6 without either getting an agreement by the parties, or
7 the title company would have interpleaded the money with
8 the court.</p> <p>9 Q. If the property settlement agreement gave the
10 proceeds to Mr. McKay, how could Mr. Walker have
11 represented in good faith to a title company that
12 Mrs. McKay had an interest in those proceeds?</p> <p>13 MR. ELLIS: Asked and answered.</p> <p>14 WITNESS: Mr. Walker had already told -- he had
15 already concluded that he thought there was a lien that
16 was created by virtue of recording the decree of
17 divorce.</p> <p>18 Q. (BY MR. ANDERSON) In what, real property;
19 right?</p> <p>20 A. By virtue of the October 23rd email.</p> <p>21 Q. Real property; right?</p> <p>22 A. Whatever he said in that email.</p> <p>23 Q. Read it. It says real property.</p> <p>24 A. I believe that email says real property and
25 personal property.</p> <p style="text-align: right;">Page 117</p> | <p>1 Q. Are you speculating then?</p> <p>2 A. No. Based on my experience dealing with title
3 companies with these judgments that I have, they're a
4 skittish group. So what I would tell you is, especially
5 with the kinds of numbers we're using in this case, that
6 the title company, more probable than not, would not
7 have paid the money to Mr. McKay if it had known that
8 Mrs. McKay's lawyer was making a claim to those proceeds
9 by virtue of the PSA or recorded decree.</p> <p>10 Q. The claim under the PSA would be based on the
11 transmutation argument?</p> <p>12 A. Yes.</p> <p>13 Q. You're saying Mr. Walker should have come up
14 with that theory?</p> <p>15 A. I'm saying that --</p> <p>16 Q. Yes or no. Is that now part of your opinions?</p> <p>17 A. What I'm saying is that he should have done
18 that, yeah. He should have given notice to the title
19 company of her interest.</p> <p>20 I believe there's two interests that are there.
21 One is the recorded decree, and the other one is the
22 nature of that property got changed in the PSA. See,
23 part of the problem is he didn't describe the property
24 either.</p> <p>25 Q. We'll get to that. Let's go to Exhibit 38.</p> <p style="text-align: right;">Page 119</p> |
| <p>1 Q. We've agreed that personal property is not
2 relevant in this action. I'm just focusing on real
3 property to try and minimize the time we're going to be
4 here.</p> <p>5 A. My point is: Had he told them that, I do not
6 believe the title company would have paid the money to
7 Mr. McKay. That's why all he needed was at least -- if
8 he would have made those arguments to them, I don't
9 believe they would have paid the money.</p> <p>10 Q. You understood that Mrs. McKay did not have an
11 interest in that mortgage by virtue of the property
12 settlement agreement; right?</p> <p>13 MR. ELLIS: Objection, asked and answered.</p> <p>14 WITNESS: I already answered that question. I
15 told you that's not what I think.</p> <p>16 Q. (BY MR. ANDERSON) If the PSA said the proceeds
17 goes to Mr. McKay, how could she have an interest in it?</p> <p>18 A. Because the property settlement agreement also
19 identifies property that is community property that I
20 believe Mr. McKay at one time said was separate
21 property. So that would allow Mr. Walker to tell the
22 title company we're taking this position.</p> <p>23 Q. How do you know what a title company would have
24 done?</p> <p>25 A. I don't know with personal knowledge.</p> <p style="text-align: right;">Page 118</p> | <p>1 A. Okay.</p> <p>2 Q. You said you relied on correspondence provided
3 to you by Mr. Ellis?</p> <p>4 A. Is there a particular piece of correspondence
5 you're --</p> <p>6 Q. There is. I'm trying to set the stage. In
7 your expert disclosure you say, "I've reviewed relevant
8 portions" --</p> <p>9 A. I'm sorry. I'm on Exhibit 38.</p> <p>10 Q. I'm multi-tasking. Exhibit 40 is your expert
11 disclosure in which you reference a variety of
12 documents. And in Exhibit 38 those documents are
13 included.</p> <p>14 I'd like you to turn to the fourth page of the
15 exhibit which is the -- let's go to the November 4,
16 2009, letter from Mr. Ellis to Mr. Walker. Do you see
17 that?</p> <p>18 A. Yes.</p> <p>19 Q. It starts out, "Thank you for your letter of
20 November 2nd, 2009"?</p> <p>21 A. This is from Mr. Walker to Mr. Ellis?</p> <p>22 Q. No. Mr. Ellis to Mr. Walker.</p> <p>23 A. Got it.</p> <p>24 Q. You're familiar with the term judicial
25 admission --</p> <p style="text-align: right;">Page 120</p> |

1 A. Yes.
2 **Q. -- when a lawyer for a party makes a statement**
3 **on behalf of that party; aren't you?**
4 A. Yeah, I do know that lawyers make statements on
5 behalf of parties.
6 **Q. In the last paragraph of that letter from**
7 **Mr. Ellis he says something about the terms of the**
8 **settlement. Do you see that?**
9 A. Are you looking at the third paragraph?
10 **Q. The last paragraph of the November 4, 2009,**
11 **letter. Do you see that?**
12 A. Yes.
13 **Q. Please read into the record what Mr. Ellis**
14 **wrote in that first sentence?**
15 A. "Ms. McKay is not critical of the substantive
16 terms of the settlement, she is critical of the failure
17 of the settlement and its recordation to secure the
18 receipt of her portion of the community estate, as
19 promised."
20 **Q. With respect to the first part of substantive**
21 **terms of the settlement, would that be your**
22 **transmutation argument?**
23 A. You'd have to ask Mr. Ellis what he meant when
24 he said "substantive terms."
25 **Q. We may at some point.**

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1 **Back to your opinions. Have you ever worked**
2 **for a title company?**
3 A. No.
4 **Q. You've only dealt with title companies by**
5 **calling them -- I think you said they called you in**
6 **terms of some judgments that you had recorded on behalf**
7 **of some of your collection clients?**
8 A. I've also sued title companies for bad faith.
9 I have one currently pending. I've also done closings
10 at title companies. I've assisted clients through the
11 transactions with title companies. No, I have never
12 worked for a title company. I've represented title
13 companies.
14 **Q. Which title companies have you represented?**
15 A. I think there was -- this is going back to
16 1996. There was two of them. Right after I moved here.
17 Defending one. I think it was Chicago, and one of its
18 subsidiaries.
19 **Q. Did it have anything to do with somebody giving**
20 **them notice of competing claims on some sort of asset?**
21 A. It kind of did.
22 **Q. Okay. With respect to -- are you holding**
23 **yourself out as an expert on title companies and how**
24 **they respond?**
25 A. No. What I'm saying as a practical matter,

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1 it's my opinion that had the title company known that
2 Mrs. McKay was asserting an interest to funds that were
3 going into the closing, this \$1.8 million, as a
4 practical matter the title company would have, in all
5 likelihood, on a more-probable-than-not basis, they
6 wouldn't have paid it to Mr. McKay. They would have
7 interpleaded that money with the court.
8 **Q. Did you talk to any title companies about these**
9 **particular facts to see if anybody supported your view?**
10 A. No, I didn't need to.
11 **Q. Because you just know?**
12 A. The reason I know that is because my experience
13 in dealing with title companies, when they get the
14 judgments that I deal with, they want to make sure
15 they're paying the right people.
16 These are typically small documents between
17 \$1,000 and maybe \$5,000 up to \$10,000. Sometimes we
18 have of -- well, my experience is they're really, really
19 particular, making sure they don't pay the wrong person.
20 They ask for, for example, [REDACTED] Security
21 numbers, identification if you have a judgment against
22 John Jones or John Smith. So title companies are very
23 particular, because they don't want to ignore a lien.
24 So what I see happening in this case is had the
25 title company gotten that information from Mr. Walker,

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1 that Mrs. McKay was claiming an interest in these
2 proceeds for the reasons I've described, that the title
3 company in this situation would have said, okay, who are
4 we going to believe? Is it Darwin's money, or is it
5 Mrs. McKay's money?
6 And unless they were willing to gamble \$1.3
7 million on issues that aren't completely resolved by the
8 Idaho Supreme Court, had I been their counsel, I would
9 have said, you don't need to gamble on this. Put the
10 money in the court and let those guys fight over it. I
11 think that's probably what would have happened.
12 **Q. Title companies are pretty meticulous when it**
13 **comes to these kinds of issues?**
14 A. Not meticulous. That's not what I said. If
15 they were meticulous they wouldn't have missed
16 Mr. McKay's lien in the first place, or McKay's mortgage
17 in the first place. They miss stuff all the time.
18 **Q. Lawyers Title missed it?**
19 A. Correct.
20 **Q. Did Lawyers Title search any of the county**
21 **records --**
22 A. I don't know.
23 **Q. Let me finish. To determine whether or not**
24 **there was any kind of a recorded judgment or divorce**
25 **decree out there that might bear on the properties in**

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| | |
|---|--|
| <p>1 question?</p> <p>2 MR. ELLIS: Objection. Calls for speculation.</p> <p>3 WITNESS: I don't know what they did. But</p> <p>4 because they will sometimes -- I'm not going to say</p> <p>5 often. But I've seen it happen many times. Where their</p> <p>6 search yields nothing, and yet they just miss stuff.</p> <p>7 That's why I believe the standard of care would</p> <p>8 have required Mr. Walker, in this particular case,</p> <p>9 knowing there was a closing, to send the title company</p> <p>10 notice of her interest so they wouldn't have missed</p> <p>11 it.</p> <p>12 Q. Closing on the Albrethsen property?</p> <p>13 A. Closing on the property that Mr. McKay had the</p> <p>14 mortgage on. Because that's what it was being paid by.</p> <p>15 Q. That's Albrethsen?</p> <p>16 A. That's what you're saying. If that's what it</p> <p>17 is, that's what it is.</p> <p>18 Q. In fact, if you go to your expert disclosure,</p> <p>19 under your analysis section, number four -- just for the</p> <p>20 record, you have three items listed. And then you have</p> <p>21 four items listed. In your affidavit you kind of lump</p> <p>22 those together and just do one through seven.</p> <p>23 A. Okay.</p> <p>24 Q. For ease of identification, in the second set</p> <p>25 of items you say Mr. Walker should have considered,</p> <p style="text-align: right;">Page 125</p> | <p>1 virtue of the decree that was recorded in Idaho Code</p> <p>2 Section 10-1110. We're claiming a lien on that. And we</p> <p>3 insist that you pay Mrs. McKay the money.</p> <p>4 When I told you before, I didn't draft the</p> <p>5 letter out for you. But that's more how I'd say it.</p> <p>6 Q. I don't mean to beat a dead horse, but how</p> <p>7 could Mr. Walker have said that when the property</p> <p>8 settlement agreement says all of those proceeds only go</p> <p>9 to Mr. McKay?</p> <p>10 MR. ELLIS: Asked and answered.</p> <p>11 WITNESS: The settlement agreement also says</p> <p>12 that it's community property. And I've already answered</p> <p>13 this several times.</p> <p>14 Q. (BY MR. ANDERSON) Even though it says it goes</p> <p>15 to Mr. McKay, you're saying it's transmuted into some</p> <p>16 sort of an interest for Mrs. McKay?</p> <p>17 A. I've already explained that to you. And I am</p> <p>18 certain -- I'm also of the opinion that had he told that</p> <p>19 to the title company, and if they were holding the money</p> <p>20 on the closing, that they would not have paid it to</p> <p>21 Mr. McKay without considering her claim.</p> <p>22 Q. Was it still community property on March 30,</p> <p>23 2008?</p> <p>24 A. Was what?</p> <p>25 Q. The proceeds from the Albrethsen mortgage?</p> <p style="text-align: right;">Page 127</p> |
| <p>1 number four says, "Sending the closing agent on the</p> <p>2 Albrethsen property the relevant documents informing the</p> <p>3 closing agent of Mrs. McKay's interest in the sale</p> <p>4 provided Mr. Walker knew the name of the closing agent."</p> <p>5 Is that generally what you've been talking</p> <p>6 about?</p> <p>7 A. Yes. That's what I've generally been talking</p> <p>8 about.</p> <p>9 Q. Is there anything more to that than what you've</p> <p>10 told me in the last couple of minutes in terms of your</p> <p>11 testimony?</p> <p>12 A. I don't know what you mean by "more to that."</p> <p>13 Q. Are there other aspects of that particular</p> <p>14 section of your opinions that we haven't touched on?</p> <p>15 A. On number four, I don't think so.</p> <p>16 Q. In your earlier answer, I wrote down that you</p> <p>17 said Mr. Walker should have told the title company that</p> <p>18 he had liened the mortgage. I think I got it down</p> <p>19 right. Did you mean to say that?</p> <p>20 A. Well, that may have been a shorthand term or</p> <p>21 phrase the way you wrote it down. The way I would have</p> <p>22 told them is, I would have said, by virtue of the PSA,</p> <p>23 for the reasons I've described in this deposition today,</p> <p>24 we are claiming an interest in the money to be paid on</p> <p>25 the Albrethsen closing by virtue of the PSA and by</p> <p style="text-align: right;">Page 126</p> | <p>1 A. On one hand, it doesn't really even matter.</p> <p>2 Q. Why?</p> <p>3 A. Because the issue here is what would the title</p> <p>4 company have done had Mr. Walker put it on notice? If</p> <p>5 he had put them on notice that they were making that</p> <p>6 claim that she had an interest, how you ultimately</p> <p>7 characterize that money, whether it was community or</p> <p>8 separate is irrelevant. Because the title company would</p> <p>9 have interpleaded the money, at which point the court</p> <p>10 would have said, I don't care what the interest of the</p> <p>11 property is, Mr. McKay owes it under the property</p> <p>12 settlement agreement, and we're going to pay it to her.</p> <p>13 Q. The court would have said that? That's your</p> <p>14 conclusion?</p> <p>15 A. Well, that's what the contract says.</p> <p>16 Q. The contract says Mr. McKay gets it. It</p> <p>17 doesn't say Mrs. McKay shares it. Isn't that accurate,</p> <p>18 sir?</p> <p>19 A. The contract says what it says.</p> <p>20 Q. This is where you won't answer the question.</p> <p>21 Isn't it accurate that it doesn't say Mrs. McKay gets</p> <p>22 the proceeds of the Albrethsen property. It says</p> <p>23 Mr. McKay does. But by virtue of receiving those funds,</p> <p>24 there's a trigger that makes him responsible to pay her</p> <p>25 some money?</p> <p style="text-align: right;">Page 128</p> |

1 A. That is exactly why, if the court had had the
2 money interpleaded, the court would have required
3 Mr. McKay to pay the money to Mrs. McKay. Because he
4 had agreed to do that.

5 **Q. That's down the road after the title company**
6 **won't pay the money after getting the notice and such**
7 **that you've described; right?**

8 MR. ELLIS: Objection as to clarity.

9 WITNESS: Yeah. Certainly that would follow
10 the title company interpleading the money. What the
11 court would do with that. It's pretty clear that once
12 somebody with authority was going to make a decision on
13 where this money was going to go, Mr. McKay wasn't going
14 to abscond with the money. And I'm assuming the court
15 has authority to make that kind of order.

16 **Q. (BY MR. ANDERSON) Let's go back to your expert**
17 **disclosure. In the factual background section, a couple**
18 **of sentences down you say, "The closing on the**
19 **Albrethsen property was scheduled for March 30, 2008."**

20 A. Yes.

21 **Q. Tell me what you meant by that. First of all,**
22 **let me back up. Can you tell me where you got that**
23 **information?**

24 A. Seems like from this correspondence between
25 Mr. Ellis and Mr. Walker.

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1 **Q. Can you identify -- we only have a couple**
2 **there. Why don't you look through them and see if it's**
3 **one you can point me to.**

4 MR. ELLIS: Are you looking for a
5 correspondence other than what --

6 WITNESS: Here we go. This is one of -- it may
7 be in more places. A November 4, 2009, letter. "The
8 agreement made it clear that the \$800,000 to be paid PS
9 would be from the sale of the Albrethsen property."

10 **Q. (BY MR. ANDERSON) That's Mr. Ellis speaking or**
11 **writing, I guess?**

12 A. Yes.

13 **Q. And did you drill into that to make sure that**
14 **that's what the agreement said?**

15 A. The agreement said that?

16 **Q. Did you explore the agreement itself to see if**
17 **that was indeed what it says?**

18 A. Well, to me that would be exalting form over
19 substance. If that's what the parties were doing, if
20 that's where the money was coming from, that's what I
21 wanted to know. I understood the money was coming on
22 the sale of the Albrethsen property, and there would be
23 roughly \$1.2 million on that sale.

24 **Q. That's why you called it a closing?**

25 A. I think it's been referred to by several people

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1 as a closing.

2 **Q. But you referred to it as a closing. Is that**
3 **why you used that term?**

4 A. I referred to it as a closing because that
5 describes what -- the PSA uses the word closing, March
6 30, 2008.

7 **Q. For the Albrethsen property? Can you find me**
8 **that?**

9 A. As I understand it, that was the Albrethsen
10 property. Whether the PSA says that or not, I don't
11 know. I've already told you, if the closing is on some
12 piece of property not related to the mortgage, then my
13 opinions would be different.

14 **Q. Your opinions would be incorrect; wouldn't**
15 **they?**

16 A. Well, I'd have to see what it was. I've always
17 assumed that the money paid -- the \$1.2 million on the
18 closing for March 30, 2008, on the Albrethsen property
19 was the Albrethsen property and the one Mr. McKay had a
20 mortgage on.

21 **Q. That's why you wrote later in the first**
22 **paragraph under factual background, the PS contemplates**
23 **that Mr. McKay would pay \$800,000 from the sale of the**
24 **Albrethsen property to Mrs. McKay; is that correct?**

25 A. What's the reason? I wrote that because that's

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1 what I understood the facts to be.

2 **Q. Down near the bottom you say, "The title**
3 **company paying Mr. McKay apparently did not take any**
4 **steps to pay Mrs. McKay."**

5 A. Where are you reading? You said "the bottom."

6 **Q. The second paragraph, about halfway through it.**
7 **It says "And the title company."**

8 A. I'm sorry when you say -- second paragraph
9 after the factual background?

10 **Q. Last paragraph. There's no page number, so I**
11 **can't help you.**

12 A. Okay.

13 **Q. I want to set this up so I can ask you a**
14 **question.**

15 A. I read that sentence.

16 **Q. You appear to be saying that the title company**
17 **did not pay Mrs. McKay. Are you saying directly?**

18 A. Well, the title company did not pay Mrs. McKay
19 directly, that's true.

20 **Q. And you're saying, "Although Mr. Walker**
21 **informed Mrs. McKay that the judgment and decree of**
22 **divorce, including the attached PSA, would be a lien in**
23 **each county in which it was recorded on real property**
24 **that she thought Mr. McKay owned."**

25 **You didn't say would be a lien on the mortgage**

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| | |
|---|---|
| <p>1 in your recitation of the facts there; right?</p> <p>2 A. I did not use the word mortgage, that's</p> <p>3 correct.</p> <p>4 Q. That's because Mr. Walker didn't tell her that;</p> <p>5 correct?</p> <p>6 A. No. When I used the word real property, what I</p> <p>7 meant by that was the mortgage. But you and I have had</p> <p>8 this discussion already. Because I'm treating the</p> <p>9 mortgage as an interest in real property.</p> <p>10 Q. And you think there's a statute that allows a</p> <p>11 lien on a mortgage, because that mortgage may have</p> <p>12 originally stemmed from a piece of real property?</p> <p>13 MR. ELLIS: Objection as to clarity.</p> <p>14 WITNESS: I'm not sure what you mean. What</p> <p>15 I've said is that by virtue of Idaho Code Section</p> <p>16 10-1110, you record the divorce decree in the county,</p> <p>17 and so recorded becomes a lien upon all real property.</p> <p>18 I've explained to you that the mortgage is an interest</p> <p>19 in real property. That's what it is.</p> <p>20 Q. (BY MR. ANDERSON) Let's go to your analysis</p> <p>21 section. And at the top you say, "Specifically, did</p> <p>22 Mr. Walker's conduct in the way he prepared the PSA or</p> <p>23 in advising Mrs. McKay in connection with the PSA fall</p> <p>24 below the standard of care resulting in damages to</p> <p>25 Mrs. McKay?"</p> <p style="text-align: right;">Page 133</p> | <p>1 telling you is this: Had Mr. Walker --</p> <p>2 Q. I'm not interested --</p> <p>3 A. You're not interested in my answer?</p> <p>4 Q. I'm not. I'm telling you that your expert</p> <p>5 opinion doesn't include any reference to damages</p> <p>6 suffered by Mrs. McKay; is that accurate?</p> <p>7 MR. ELLIS: Objection. That misstates this</p> <p>8 exhibit.</p> <p>9 Q. (BY MR. ANDERSON) You don't outline any</p> <p>10 damages that she suffered; correct?</p> <p>11 MR. ELLIS: Counsel, are you talking</p> <p>12 quantitatively or a causation standpoint?</p> <p>13 MR. ANDERSON: Quantitatively.</p> <p>14 WITNESS: So what is the question?</p> <p>15 (Record read by court reporter.)</p> <p>16 WITNESS: I do not say with some economic</p> <p>17 analysis what she would have received. What I'm saying</p> <p>18 is that the title company would have interpleaded the</p> <p>19 funds into the court. And then once those funds were</p> <p>20 there, the finder of fact in this case could decide what</p> <p>21 would happen at that point.</p> <p>22 I'm of the opinion that the judge, had the</p> <p>23 court received those funds, would have disbursed the</p> <p>24 money pursuant to the PSA.</p> <p>25 Q. (BY MR. ANDERSON) I think I know your answer.</p> <p style="text-align: right;">Page 135</p> |
| <p>1 Are you disagreeing with Mr. Ellis that when he</p> <p>2 said Mrs. McKay doesn't take issue with the manner in</p> <p>3 which the property settlement agreement was prepared</p> <p>4 substantively?</p> <p>5 A. You're going to have to ask Mr. Ellis what he</p> <p>6 meant by that. When I read that, I interpret that, and</p> <p>7 understand it to mean, in terms of the deal she got, the</p> <p>8 substantive terms, \$800,000 cash, paying for the house,</p> <p>9 she didn't have a problem with that. That's what I</p> <p>10 understand him to mean when he talks about substantive</p> <p>11 terms.</p> <p>12 Q. You say whether or not he fell below the</p> <p>13 standard of care resulting in damages to Mrs. McKay, are</p> <p>14 you offering opinions as to damages in this case? If</p> <p>15 so, we're going to be here for quite a while?</p> <p>16 MR. ELLIS: Fine.</p> <p>17 WITNESS: I will tell you what my opinion is,</p> <p>18 and you can determine whether or not that's an opinion</p> <p>19 as to damages.</p> <p>20 Q. (BY MR. ANDERSON) You haven't included any</p> <p>21 opinion regarding damages in your expert report or your</p> <p>22 affidavit; is that correct?</p> <p>23 A. Well --</p> <p>24 Q. I'm going to hold you to that.</p> <p>25 A. You can do whatever you want to. What I'm</p> <p style="text-align: right;">Page 134</p> | <p>1 But you're not speculating as to what the title company</p> <p>2 would have done. You're actually saying this to a</p> <p>3 reasonable degree of probability that you know a title</p> <p>4 company would have interpled the funds; is that</p> <p>5 accurate? Am I hearing you correctly?</p> <p>6 MR. ELLIS: Asked and answered.</p> <p>7 WITNESS: What I'm saying is on a</p> <p>8 more-probable-than-not basis, if Mr. Walker had made an</p> <p>9 argument to the title company, as I've outlined today,</p> <p>10 that the title company would not have wanted to run the</p> <p>11 risk of a \$1.3 million mistake, and they would have</p> <p>12 interpleaded the money with the court. That's on a</p> <p>13 more-probable-than-not basis based on my experience with</p> <p>14 title companies and what they do.</p> <p>15 Or let me back up. Or they wouldn't have</p> <p>16 disbursed the money at all until they figured out what</p> <p>17 to do with it. But they would not have paid it without</p> <p>18 contacting Mrs. McKay. And maybe they would have</p> <p>19 instructed her to go file something with the court, but</p> <p>20 they wouldn't have paid it out if there were competing</p> <p>21 claims to the money.</p> <p>22 Q. (BY MR. ANDERSON) You've just given us two</p> <p>23 possibilities.</p> <p>24 A. There may be more.</p> <p>25 Q. When you testified that something is more</p> <p style="text-align: right;">Page 136</p> |

1 probable than not and you offer various possibilities of
 2 what may have happened, all the possibilities were more
 3 probable than not? I just need to understand.
 4 A. This is really not difficult. What the title
 5 company wouldn't do, if Mr. Walker was making a claim
 6 for the money on behalf of his client, is do what it
 7 did.
 8 Now how it would have acted differently? There
 9 are different things it could have done, and on a
 10 more-probable-than-not basis it would have done one of
 11 those, would be to interplead the money with the court.
 12 It would have said, look, we're going to hold this money
 13 until you guys come to a resolution.
 14 Then it depends, maybe Mr. McKay at that point
 15 threatens to sue the title company for converting his
 16 money. Then they may have said, okay, we're going to
 17 interplead it or they may have said, I want one of the
 18 parties to go file this and get an order from the court
 19 telling us what to do. What they wouldn't have done on
 20 a more-probable-than-not basis is pay Mr. McKay without
 21 taking one of those steps.
 22 **Q. Is that your understanding of what happened,**
 23 **they did pay Mr. McKay on March 30, 2008?**
 24 A. My understanding is -- I don't know what day
 25 they paid him. My understanding is the proceeds went

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1 through the title company before they went to Mr. McKay.
 2 **Q. What proceeds? From Status to the title**
 3 **company to Mr. McKay?**
 4 A. Yes, that's how I understand it.
 5 **Q. And you think that would have been around March**
 6 **30, 2008?**
 7 A. Well, the operative date for me is after
 8 November 20 or -- it would be after the date the decree
 9 was entered. I think it was like the same day or the
 10 next day or within a couple of days.
 11 **Q. But in order for all of this to hang together**
 12 **in terms of your more-probable-than-not conclusions,**
 13 **Status Corp. would have had to pay the title company,**
 14 **and then the title company would have had to pay**
 15 **Mr. McKay. That's one of the underlying foundations of**
 16 **your opinions?**
 17 A. You're saying the money -- the foundation of my
 18 opinion is the money went from Status to the title
 19 company --
 20 **Q. To Mr. McKay?**
 21 A. As opposed to Status and directly to Mr. McKay?
 22 **Q. Right. Because you've interjected the title**
 23 **company into this. I wanted to make sure I understood**
 24 **the groundwork for your opinions.**
 25 A. That's what I understand happened.

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1 **Q. Okay. Thanks. Let's go back to your expert**
 2 **disclosure. We're still under the analysis section.**
 3 A. Let me back up on that last answer. That was
 4 the problem I was having with what you said. Not
 5 necessarily. Because what would have happened is -- now
 6 that I remember the facts, because we've been through a
 7 lot of questions, it was the title company who paid
 8 Mr. McKay. And so since the title company paid
 9 Mr. McKay, the money necessarily had to come from the
 10 title company.
 11 **Q. What happened to Status?**
 12 A. You tell me what happened to Status.
 13 **Q. That's not the way it works.**
 14 A. I'd have to think about that. That's an
 15 interesting question. Because the money did come from
 16 the title company to Mr. McKay. Therefore that is --
 17 the money did -- the source of the funds was in fact the
 18 title company and not Status.
 19 I think Status -- I think what happened was the
 20 title company found there was a mistake, that Mr. McKay
 21 wasn't in first position. Typically what happens is the
 22 title company pays Mr. McKay and then gives an
 23 assignment of his claims. And the title company then
 24 goes and tries to work it out with Status and hope they
 25 pay the money.

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1 **Q. I thought Mrs. McKay had the interest in the**
 2 **mortgage that you've been telling me was created by the**
 3 **property settlement agreement?**
 4 A. I'm sorry. I may have misspoke. I'm a little
 5 tired. What I'm trying to get at is: The money did
 6 come from the title company. It did not come from
 7 Status. Because the title company missed some sort of
 8 interest that compromised the mortgage that Mr. McKay
 9 had. So that's where the money came from.
 10 **Q. But all day you've been telling us that**
 11 **Mrs. McKay had an interest in the mortgage?**
 12 A. She did. That's what I'm saying.
 13 **Q. Let me finish.**
 14 A. Okay.
 15 **Q. Is it an underlying foundation for your**
 16 **opinions about Mr. Walker that the mortgage was actually**
 17 **honored by Status?**
 18 A. I don't know what you mean by "honored."
 19 **Q. Paid.**
 20 A. The title company paid -- what was it, \$1.2
 21 million to Mr. McKay? I'm assuming what happens is
 22 Mr. McKay then assigned his interest to the title
 23 company. But they paid the money.
 24 Had the title company known about Mrs. McKay's
 25 asserted interest, on a more-probable-than-not basis

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1 they wouldn't have paid him without running the risk
2 that she would make a claim against them.

3 **Q. What would Mr. Walker have done in your new**
4 **setting here, your new scenario?**

5 A. This isn't a new setting.

6 **Q. Sure, it is. You've eliminated Status in terms**
7 **of paying the mortgage. Now you have some title company**
8 **paying it for some other reason?**

9 MR. ELLIS: Counsel, you're being argumentative
10 and very transparent.

11 MR. ANDERSON: Really? Wow.

12 **Q. (BY MR. ANDERSON) These aren't new facts?**

13 A. No.

14 **Q. What happened to Status?**

15 A. These are the same operative facts. I'd
16 forgotten -- it's in my report. I'd forgotten that what
17 happened here is that Status didn't pay the money. I
18 don't even know if Status defaulted. What happened was
19 the title company missed some sort of interest that put
20 Mr. McKay -- he didn't have a mortgage or he wasn't in
21 first position. There was some issue. I don't know
22 what it is. It really doesn't matter.

23 The title company then came in paid on the
24 policy, because Mr. McKay was astute enough to get a
25 title policy. So the title company paid Mr. McKay

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1 directly.

2 **Q. So Mr. Walker should have known about that**
3 **title company's payout?**

4 A. No. If he would have sent it to the title
5 company, this notice I've talked about --

6 **Q. The Status closing?**

7 A. Right.

8 **Q. On the mortgage?**

9 A. Right. Those people handling the closing,
10 they're also -- and I'm not sure what their names are.
11 But those people would have been put on notice, and they
12 would have also told -- was it Lawyers Title, or whoever
13 the title company was, hey, we have this person claiming
14 interest in it.

15 The point is, had the title company known about
16 the interest, in my opinion the title company wouldn't
17 have paid Mr. McKay as it did.

18 **Q. You've now thrown in two title companies. If**
19 **I'm following you correctly.**

20 A. I can't remember the name of it. Whatever the
21 name turns out to be.

22 **Q. I understand that. Let's call it title company**
23 **one was going to handle, under your scenario, the**
24 **payment by Status to Mr. McKay under the mortgage.**
25 **You're saying that Mr. Walker should have given**

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1 that title company number one notice of Mrs. McKay's
2 purported interest, and title company number one, if I
3 understand correctly, was not the title company that
4 actually paid Mr. McKay. Am I following you?

5 A. No. You're being a little sarcastic.

6 **Q. No. I'm asking: Is there a different title**
7 **company? Title company number two out there?**

8 A. There's the local title company, and they have
9 underwriters. They're also called title companies.
10 They're insurance companies. Maybe I haven't been as
11 specific as I need to be distinguishing between the two.

12 But with rules of agency, how those companies
13 interact and the practicality is, title company one gets
14 notice they're not going to let title company two pay
15 out \$1.3 million because of indemnity arrangements they
16 may have or negligence claims or breach of contract
17 claims. So those guys are pretty much on the same page,
18 is what I'm telling you.

19 **Q. You're holding that opinion to the level of**
20 **more probable than not? That title company one would**
21 **have informed title company two about something**
22 **Mr. Walker should have said?**

23 A. What I'm telling you is: I don't know if they
24 would have used yellow paper or white paper or email or
25 a telephone call, how they would have done it. But in

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1 my opinion, on a more-probable-than-not basis, the title
2 company -- what do you want to call it? Title company
3 one who was acting as the agent for the title company
4 two? Or title company two would not have paid the money
5 to Mr. McKay had they known that there was an asserted
6 interest by Mrs. McKay.

7 **Q. Okay.**

8 **(Discussion held off the record.)**

9 **(Recess taken.)**

10 **Q. (BY MR. ANDERSON) You have a series of points**
11 **broken out in your expert disclosure. And you're saying**
12 **with respect to the first three --**

13 A. Where are you reading from?

14 **Q. Under Analysis on page five of six with the fax**
15 **header. You say, "To protect Mrs. McKay, Mr. Walker**
16 **should have done the following in the PSA: Provided a**
17 **legal description of the Albrethsen property in the**
18 **PSA." Why was that necessary?**

19 A. What I really mean by that is there needs to be
20 an adequate legal description of the Albrethsen
21 property.

22 **Q. To what end?**

23 A. I'm trying to tell you. So that there's no
24 confusion as to which mortgage we're talking about.
25 There's no confusion as to which property we're talking

Page 144

1 about. More particularly, so when he sends copies of
 2 these to the title company, that the title company will
 3 know with particularity which property we're talking
 4 about.

5 **Q. So Mr. Walker should have sent the property**
 6 **settle agreement and the divorce decree directly to the**
 7 **title company handling what you understand to be the**
 8 **payment of the Albrethsen mortgage money?**

9 A. Well, there's a title insurance company -- some
 10 may call it the title company. There's the local
 11 office; some people call that the title company. I've
 12 used them interchangeably.

13 But I have said in my report that he was to
 14 send that. I also would have sent an explanation
 15 explaining why I claimed an interest on behalf of
 16 Mrs. McKay.

17 **Q. That's different than a legal description of**
 18 **the property. That's in addition to?**

19 A. If you took a look at number four, the bottom,
 20 "Sending the closing agent on the Albrethsen property
 21 the relevant documents informing the closing agent of
 22 Mrs. McKay's interest in the sale provided" -- I've
 23 already explained that.

24 **Q. Number two says, "Provided an explanation that**
 25 **the Albrethsen property was subject to a closing**

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1 scheduled for March 30, 2008, and that Mr. McKay would
 2 pay Mrs. McKay \$800,000 from the proceeds he received on
 3 this sale."

4 That is directly out of -- well, where did you
 5 get that first part, that there was a closing on the
 6 Albrethsen property on March 30, 2008?

7 A. If you look at the property settlement
 8 agreement --

9 **Q. Page four, 1.7?**

10 A. Yes. "Darwin shall pay Patricia \$800,000 in
 11 cash, by wife transfer or certified check, within five
 12 days of payment by Status Corporation or its assigns,
 13 ('Status Real Estate Transaction')."

14 Then it says down further, "The parties
 15 acknowledge that the Status real estate transaction is
 16 scheduled to close on or before March 30, 2008."

17 **Q. You're assuming that the Status real estate**
 18 **transaction scheduled to close on or before March 30,**
 19 **2008, was the payment under the mortgage for the**
 20 **Albrethsen property; correct?**

21 A. Well, ultimately it became the title company
 22 that paid that.

23 **Q. That's not my question. I was asking you, are**
 24 **you assuming the reference to "Status Real Estate**
 25 **Transaction scheduled to close on or before March 30,**

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1 2008," references the mortgage came out of the
 2 Albrethsen property?

3 A. Say that again.

4 **Q. I know it's getting late.**

5 A. It is getting late.

6 **Q. Are you assuming that the Status real estate**
 7 **transaction referenced in 1.7 of the PSA that was**
 8 **scheduled to close on or before March 30, 2008, referred**
 9 **to the payment under the mortgage that had been related**
 10 **to the Albrethsen property?**

11 A. Yes.

12 **Q. Now, three under Analysis is, "Included an**
 13 **explanation that Mr. McKay further would pay Mrs. McKay**
 14 **from the proceeds he received on the sale in an amount**
 15 **to pay in full the balance" the mortgage on her personal**
 16 **residence. I might have paraphrased a little of that.**
 17 **That's another part of the PSA; right?**

18 A. Right.

19 **Q. That was already in the property settlement**
 20 **agreement; wasn't it? You're saying that should have**
 21 **been added to whatever Mr. Walker should have written to**
 22 **the closing agent for the Albrethsen mortgage payment?**

23 A. No. Well, I would have done that as well.

24 **Q. With respect to the next section, you've got**
 25 **four items. But you phrase this a little differently.**

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1 You say, "In my opinion, the standard of care
 2 required that Mr. Walker should have these things."
 3 Referring to, I believe, to one through three above.

4 Then you say, "As additional protection, he
 5 should have considered the following:" You don't say
 6 that these fall below the standard of care, they just
 7 appear to be considerations that you are recommending.
 8 Am I reading that incorrectly?

9 A. Yes, you are.

10 **Q. You're being pejorative in terms of what**
 11 **Mr. Walker didn't do? Are you saying these fall below**
 12 **the standard of care even though you don't say that?**

13 A. Well, what I'm saying is that -- let's take,
 14 for example, number four.

15 **Q. We've gone over four. I'm just saying -- you**
 16 **say he should have considered the following. I'm asking**
 17 **you as an expert, are you saying in your opinion, if he**
 18 **didn't consider those, does that fall below the standard**
 19 **of care? And I'm asking that, because you don't say**
 20 **that.**

21 A. Let's take number four. I know you think we're
 22 over that, but I want to address that in the context of
 23 your new question.

24 In my opinion, the standard of care required
 25 him to protect Mrs. McKay. And she was fearful that

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| | |
|--|---|
| <p>1 Mr. McKay would get the money and run, and apparently
2 she was fearful for good reason.</p> <p>3 In my opinion, the standard of care required
4 him to take all steps that are reasonable that he could
5 have done to protect her interest. One of those steps
6 is step four. I believe the standard of care required
7 him to send the closing agent, on the Albrethsen
8 property, the relevant documents and inform the closing
9 agent of Mrs. McKay's interest in the sale. That's my
10 opinion.</p> <p>11 Q. Okay.</p> <p>12 A. That's what I would have done.</p> <p>13 Q. Let's go to number one in that section of four
14 items. You say, "Identifying in the PSA the then
15 existing balance and further identified where notice
16 could be sent to obtain the balance owed on that
17 mortgage." Are you referring to the mortgage you
18 referenced in number three above?</p> <p>19 A. Yes.</p> <p>20 Q. The mortgage on the personal residence?</p> <p>21 A. No. I'm sorry, yes.</p> <p>22 Q. Number two, "Identifying in the PSA Mr. McKay's
23 mortgage and referenced Mr. McKay's recorded mortgage on
24 the Albrethsen property by the county document
25 identification number on the recorded mortgage." What</p> <p style="text-align: right;">Page 149</p> | <p>1 forth in Idaho Code Section 32-918 and summarizing
2 Mrs. McKay's interest thus making it even easier for a
3 third party to take notice of Mrs. McKay's interest."</p> <p>4 That would involve the discussion you and I had
5 about whether or not Section 1 of 32-918 actually
6 requires the legal description and other items?</p> <p>7 A. Yeah. What my response there says, "Following
8 the procedure set forth in Idaho Code Section 32-918 and
9 summarizing Mrs. McKay's interest."</p> <p>10 Q. So you're saying Mr. Walker should have ignored
11 Section 1 of 32-918 where he recorded the divorce decree
12 and property settlement agreement in the various
13 counties in which Mr. McKay had real property and gone
14 directly to number two?</p> <p>15 A. That's not what I said.</p> <p>16 Q. It says, "Summarize Ms. McKay's interest." I
17 thought that was number two.</p> <p>18 A. Take a look. It says, "Following the
19 procedures set forth in Idaho Code Section 32-918 and
20 summarizing Mrs. McKay's interest thus making it even
21 easier."</p> <p>22 In other words, the object here, Mr. Anderson,
23 is to make it as easy on the title company as it
24 possibly can, or third parties, to find her interest.
25 So you could record under item one. You could also do a</p> <p style="text-align: right;">Page 151</p> |
| <p>1 does all of that mean?</p> <p>2 A. What I'm saying is that every recorded document
3 has a number. And so the mortgage had a particular
4 number on it when it was recorded. That is exactly what
5 I'm talking about.</p> <p>6 Q. Are you assuming that once the divorce decree
7 and PSA are recorded in a county, then they're there for
8 title companies to search and locate? Or does all of
9 your suggestions involve sending this information
10 directly to the title company involved with the closing
11 on the Albrethsen mortgage payment?</p> <p>12 A. Both.</p> <p>13 Q. In order for Mrs. McKay to be protected under
14 your scenario, the title company would have had to
15 search the county records?</p> <p>16 A. Do a date-down. I mentioned that earlier.</p> <p>17 Q. Is it your understanding in this case, one way
18 or another, whether any title company searched any
19 records regarding this property settlement agreement?</p> <p>20 A. You asked this question already, and I said I
21 didn't know what the title company did. I also said
22 sometimes they'll miss things. For a \$1.3 million
23 transaction, had I been Mr. Walker, I would have sent
24 the title company copies with instructions.</p> <p>25 Q. Number three, "Following the procedure set</p> <p style="text-align: right;">Page 150</p> | <p>1 summary under item two. You could also send them a copy
2 of that so they have an actual copy of it.</p> <p>3 Q. All right. Number four we talked about it to
4 the point that you don't have anything else to say about
5 it?</p> <p>6 A. Depending on what question you ask me, I might.</p> <p>7 Q. You say that if your recommendations would have
8 been followed, Mrs. McKay would have received a
9 perfected involuntary judgment lien on the mortgage
10 payment due on the Albrethsen property." Did I read
11 that top paragraph on six of six correctly?</p> <p>12 A. Where are you at?</p> <p>13 Q. Right here (indicating). "She would have
14 received a perfected involuntary judgment lien."</p> <p>15 A. Yeah, you read that correctly.</p> <p>16 Q. Where did you get that phrase?</p> <p>17 A. What phrase? Involuntary judgment lien?</p> <p>18 Q. "A perfected involuntary judgment lien." Is
19 that a creature of statute or common law? Where is that
20 from?</p> <p>21 A. Understand Idaho Code 10-1110, she arguably
22 would have received a judgment lien. Because it wasn't
23 voluntary, it wasn't signed by Mr. McKay. That makes it
24 involuntary. And that lien is perfected by following
25 the Statute 10-1110.</p> <p style="text-align: right;">Page 152</p> |

1 Q. And again, you believe she would have gotten
2 the lien under 10-1110 because of your belief that you
3 can get a lien in a mortgage because there's some sort
4 of a property interest involved?

5 A. Arguably that's the case. Because the Idaho
6 Supreme Court never decided whether -- the scope and
7 extent and nature of a mortgage. They've never said
8 that it is not an interest in property.

9 But again, ultimately, for practical purposes,
10 if the Supreme Court came out and said, it's not an
11 interest in the property, it's something else, then
12 obviously you couldn't make that claim. But Idaho has
13 not resolved that issue. So arguably Mr. Walker could
14 have raised that with the title company as I've
15 suggested.

16 MR. ELLIS: Counsel we're approaching
17 6 o'clock. We have four minutes left. And I advise you
18 simply if you have any questions you want to ask today,
19 that we will present Mr. Smith again at your
20 convenience. But it's late, and we have fog coming in,
21 and he has to leave tonight.

22 Q. (BY MR. ANDERSON) In the next paragraph you
23 end with the statement, "There is nothing in the
24 recorded PSA that connects Mrs. McKay right to be paid
25 \$800,000 and payment in full on her personal residence

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1 from any proceeds paid Mr. McKay from the Albrethsen
2 property sale as the parties contemplated."

3 What was the basis of that statement on your
4 part? Is that 1.7 again?

5 A. Yeah. As I understand the facts, the parties
6 contemplated that Mr. McKay would be paid approximately
7 \$1.2 million for a property that was sold by virtue of
8 the sale. And that he had a mortgage to secure that
9 payment. That's what the parties contemplated would
10 happen.

11 What I'm saying is that there's nothing in the
12 PSA that ties that specific mortgage to the PSA.

13 Q. There's nothing in the PSA that says Mr. McKay
14 had to use any particular dollars to satisfy his
15 obligations; does it?

16 A. I believe the PSA -- what it contemplates is
17 that he would pay her when -- he would pay her when he
18 got paid. But he wasn't willing to give a security
19 interest.

20 Q. It doesn't say he has to pay her with the
21 dollars that he somehow received?

22 A. I'm sure Mrs. McKay would take the \$1.2 million
23 even if it came from the title company.

24 MR. ANDERSON: Would you read back my question.
25 (Record read by court reporter.)

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1 WITNESS: I don't know what you mean by that.
2 Dollars are fungible, so they don't have to be the same
3 dollars. He was going to get \$1.2 million. Then he was
4 going to pay her. Whether those are the same dollars or
5 not, it doesn't address that issue.

6 Q. (BY MR. ANDERSON) Have you handled a divorce
7 appeal in the Supreme Court?

8 A. No. Not a divorce appeal.

9 Q. Can you just give me a few of the individuals
10 against whom you've handled divorce cases? Opposing
11 counsel?

12 A. You mean who the opposing counsel is?

13 Q. Yes.

14 A. Mark Weinpel, W-e-i-n-p-e-l. Lance Nalder.
15 Ron Swafford. I'm sure there's others, but those are
16 the three that come to mind. I know there's more than
17 that.

18 MR. ANDERSON: All right. I guess you guys are
19 leaving.

20 MR. ELLIS: Just for the record, it's now
21 6 o'clock. Mr. Smith came in on a private plane. The
22 pilot informed him that he has to leave here by 6:30.
23 Wheels off the ground by 6:30. We'll recess and
24 reschedule this deposition at counsel's convenience. We
25 will provide you those documents that we've identified

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1 in the course of this deposition that you've asked for.

2 MR. ANDERSON: Okay.

3 (Discussion held off the record.)

4 MR. ELLIS: We'll waive signature.

5 (The deposition adjourned at 6:01 p.m.)

6 (Signature waived.)

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1 REPORTER'S CERTIFICATE

2 I, DIANA L. DURLAND, CSR No. 637, Certified
3 Shorthand Reporter, certify:

4 That the foregoing proceedings were taken
5 before me at the time and place therein set forth, at
6 which time the witness was put under oath by me;

7 That the testimony and all objections made were
8 recorded stenographically by me and were thereafter
9 transcribed by me or under my direction;

10 That the foregoing is a true and correct
11 transcript of all testimony given, to the best of my
12 ability;

13 I further certify that I am not a relative or
14 employee of any attorney or of any of the parties, nor
15 financially interested in the action.

16 IN WITNESS WHEREOF, I set my hand and seal this
17 25th day of January, 2013.

18
19
20 _____
21 DIANA L. DURLAND, CSR No. 637

22 Notary Public

23 Boise, Idaho

24
25 My Commission Expires 12-16-16

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Attorneys for Defendants

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

PATRICIA MCKAY,

Plaintiff,

vs.

THOMAS G. WALKER and COSHO
HUMPHREY, LLP, a limited liability
partnership,

Defendants.

Case No. CV OC 0922659

**SECOND AMENDED NOTICE OF
DEPOSITION DUCES TECUM OF
BRYAN SMITH**

TO: THE ABOVE-ENTITLED PLAINTIFF AND HER ATTORNEY OF RECORD

YOU WILL PLEASE TAKE NOTICE that Defendants will take testimony on oral examination of **BRYAN SMITH** before a court reporter and notary public with the firm of McCorkle Court Reporters Inc., commencing on the 17th day of January, 2013, at 9:00 a.m., and continuing thereafter from day to day until such time as the taking of the deposition may be adjourned, at **Anderson, Julian & Hull, C.W. Moore Plaza, 250 South Fifth Street, Suite 700,**

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| Date | |
| Name | 1-17-13 |
| 00639 | Smith |
| M & M Court Reporting | |

Boise, Idaho 83701, Telephone: (208) 344-5800, at which time and place you are notified to appear and take such part in the examination as you may deem proper.

You are further notified that Defendants request the deponent to bring with him to the deposition the originals or true and correct copies of the following:

REQUEST NO. 1: Your entire file related to the above captioned matter, including, but not limited to, complete and legible copies of all photographs, recordings, statements, records, documents, files, e-mails, memoranda, treatises, articles, texts, abstracts, reports, studies, research, notes, correspondence, and/or other items of evidence prepared or reviewed by you regarding the above captioned matter.

REQUEST NO. 2: All documents and writings that you have reviewed in this matter, including, but not limited to, correspondence, deposition transcripts or summaries, notes, photographs, videos, and such other information provided to you by Plaintiff, or her attorneys, or through any other source, including, but not limited to, witnesses or expert witnesses. This request includes all historical data or documents prepared or reviewed by you regarding the above captioned matter.

REQUEST NO. 3: Any documents, writings, photographs, videos, or the like, which you relied upon to support any testimony, opinions, conclusions, or findings that you have made in this matter.

REQUEST NO. 4: Any documents, calculations, worksheets, writings, photographs, videos, or the like, which you have prepared or reviewed and in any way relate to the above referenced matter.

REQUEST NO. 5: If you are relying on any journals, treatises, texts, or other written materials to support any of the conclusions or opinions you are offering, please provide a copy of each such publication.

REQUEST NO. 6: Any documents, videos, photographs, exhibits, summaries, or demonstrative evidence, or the like, which you may use as exhibits at the trial of this matter.

REQUEST NO. 7: Any and all reports, correspondence, or other written documents (whether they are drafts or final products) prepared by you or at your direction or request in this matter pertaining to the formulation of your opinions or your review of any issue in this action.

REQUEST NO. 8: A list of all court cases, arbitrations, mediations, and instances within the past five years wherein you were retained as an expert witness, including, but not limited to, the case name, number, and location and forum of the case.

REQUEST NO. 9: A copy of any and all contracts, agreements, or other document between you and the Plaintiff or her attorneys.

REQUEST NO. 10: A copy of your fee agreement or arrangement for expert witness services in this matter.

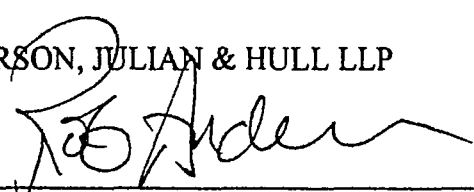
REQUEST NO. 11: All billing statements evidencing your work on this case.

This deposition shall be taken pursuant to the Idaho Rules of Civil Procedure.

DATED this 26th day of December, 2012.

ANDERSON, JULIAN & HULL LLP

By


Robert A. Anderson, Of the Firm
Yvonne A. Dunbar
Attorneys for Defendants

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this 26th day of December, 2012, I served a true and correct copy of the foregoing **SECOND AMENDED NOTICE OF DEPOSITION DUCES TECUM OF BRYAN SMITH**, by delivering the same to each of the following attorneys of record, by the method indicated below, addressed as follows:

Allen B. Ellis
ELLIS, BROWN & SHEILS, CHARTERED
707 North 8th Street
P.O. Box 388
Boise, Idaho 83701-0388
Telephone: (208) 345-7832
Facsimile: (208) 345-9564

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Robert A. Anderson

McKay vs. Walker

EXPERT BINDER INDEX

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- ~~2.~~ Answer to Complaint and Demand for Jury Trial
- ~~3.~~ Memorandum in Support of Defendants' Motion for Summary Judgment
- ~~4.~~ Second Affidavit of Allen B. Ellis
5. Memorandum in Opposition to Defendants' Motion for Summary Judgment
6. Reply in Support of Defendants' Motion for Summary Judgment
7. Affidavit of Stanley Welsh in Support of Defendants' Motion for Summary Judgment
8. Affidavit of Thomas Walker in Support of Defendants' Motion for Summary Judgment
9. Affidavit of Counsel in Support of Defendants' Motion for Summary Judgment
- ~~10.~~ Affidavit of Patricia McKay
- ~~11.~~ Affidavit of Bryan D. Smith
- ~~12.~~ Order Denying Defendants' Motion for Summary Judgment
- ~~13.~~ Plaintiff's Expert Witness Disclosure
- ~~14.~~ Defendants' Supplemental Expert Witness Disclosure
15. August 7, 2012 correspondence from Allen B. Ellis

| | |
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Idaho Statutes

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TITLE 32 DOMESTIC RELATIONS

CHAPTER 9 HUSBAND AND WIFE -- SEPARATE AND COMMUNITY PROPERTY

32-918. MARRIAGE SETTLEMENTS -- RECORD. (1) When such contract is acknowledged or proved, it must be recorded in the office of the recorder of every county in which any real estate may be situated which is granted or affected by such contract.

(2) (a) A summary of the contract may be recorded in lieu of the contract, under this chapter or the laws of this state, if the requirements of this section are substantially met.

(b) A summary of the contract shall be signed and acknowledged by all parties to the original contract. The summary of the contract shall clearly state:

- (i) The names of the parties to the original contract;
- (ii) The complete mailing address of all parties;
- (iii) The title and date of the contract;
- (iv) A description of the interest or interests in real property created by the contract; and
- (v) The legal description of the property.

(c) Other elements of the contract may be stated in the summary.

(3) If the requirements of this section are met, the summary of the contract may be recorded under the provisions of this chapter and, as to the contents of the summary only, it shall have the same force and effect as if the original contract had been recorded, and constructive notice shall be deemed to be given concerning the contents of the summary and the existence of the contract to any subsequent purchasers, mortgagees, or other persons or entities that acquire an interest in the real property.

History:

[(32-918) 1867, p. 65, sec. 17; R.S., sec. 2510; reen. R.C. & C.L., sec. 2691; C.S., sec. 4672; I.C.A., sec. 31-919; am. 2005, ch. 124, sec. 1, p. 408.]

How current is this law?

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TITLE 10 ISSUES, TRIAL AND JUDGMENT IN CIVIL ACTIONS

CHAPTER 11 MANNER OF GIVING AND ENTERING JUDGMENT -- LIEN AND SATISFACTION

10-1110. FILING TRANSCRIPT OF JUDGMENTS -- LIEN ACQUIRED. A transcript or abstract of any judgment or decree of any court of this state or any court of the United States the enforcement of which has not been stayed as provided by law, if rendered within this state, certified by the clerk having custody thereof, may be recorded with the recorder of any county of this state, who shall immediately record and docket the same as by law provided, and from the time of such recording, and not before, the judgment so recorded becomes a lien upon all real property of the judgment debtor in the county, not exempt from execution, owned by him at the time or acquired afterwards at any time prior to the expiration of the lien; provided that where a transcript or abstract is recorded of any judgment or decree of divorce or separate maintenance making provision for installment or periodic payment of sums for maintenance of children or alimony or allowance for wife's support, such judgment or decree shall be a lien only in an amount for payments so provided, delinquent or not made when due. The lien resulting from recording of a judgment other than for support of a child continues five (5) years from the date of the judgment, unless the judgment be previously satisfied, or unless the enforcement of the judgment be stayed upon an appeal as provided by law. A lien arising from the delinquency of a payment due under a judgment for support of a child issued by an Idaho court continues until five (5) years after the death or emancipation of the last child for whom support is owed under the judgment unless the underlying judgment is renewed, is previously satisfied or the enforcement of the judgment is stayed upon an appeal as provided by law. The transcript or abstract above mentioned shall contain the title of the court and cause and number of action, names of judgment creditors and debtors, time of entry and amount of judgment.

History:

[(10-1110) C.S., sec. 6902B, as added by 1929, ch. 51, sec. 3, p. 70; I.C.A., sec. 7-1110; am. 1955, ch. 45, sec. 1, p. 63; am. 1963, ch. 209, sec. 1, p. 598; am. 1995, ch. 264, sec. 2, p. 847; am. 1998, ch. 68, sec. 1, p. 261; am. 2011, ch. 104, sec. 2, p. 267.]

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| | M & M Court Reporting |

000695

Smith, Driscoll & Associates, PLLC

414 Shoup Avenue
P.O. Box 50731
Idaho Falls, ID 83405
TIN: 82-0518512
(208) 524-0731

Invoice submitted to:

Allen B. Ellis, Esq.
Ellis, Brown & Sheils, Chtd.
707 North 8th Street
P. O. Box 388
Boise *D 83701

June 01, 2010

In Reference To: McKay

Account #

Professional Services

| | <u>Hours</u> | <u>Amount</u> |
|---|--------------|-------------------|
| 3/26/2010 BDS Review file materials; telephone conference with Allen Ellis; | 0.75 | 138.75 |
| 5/8/2010 BDS Review file materials and preparation of expert report; | 4.50 | 832.50 |
| 5/10/2010 BDS Review file materials and preparation of expert report; | 2.00 | 370.00 |
| For professional services rendered | 7.25 | \$1,341.25 |
| Balance due | | \$1,341.25 |

User Summary

| <u>Name</u> | <u>Hours</u> | <u>Rate</u> | <u>Amount</u> |
|-------------------------|--------------|-------------|---------------|
| Bryan D. Smith, Partner | 7.25 | 185.00 | \$1,341.25 |

Exh. No. 37
Date 1-17-13
Name [Signature]
M & M Court Reporting

Smith, Driscoll & Associates, PLLC

414 Shoup Avenue
P.O. Box 50731
Idaho Falls, ID 83405
TIN: 82-0518512
(208) 524-0731

Invoice submitted to:

Allen B. Ellis, Esq.
Ellis, Brown & Sheils, Chtd.
707 North 8th Street
P. O. Box 388
Boise ID 83701

December 02, 2010

In Reference To: McKay

Professional Services

| | <u>Hours</u> | <u>Amount</u> |
|---|--------------|----------------|
| 11/8/2010 BDS Telephone conference with Allen Ellis; receipt and review of email from Allen Ellis; | 0.25 | 46.25 |
| 11/11/2010 BDS Receipt and review of email received 11/9/2010 from Allen Ellis; review I.C. 32-918; email to Allen Ellis; | 0.15 | 27.75 |
| For professional services rendered | 0.40 | \$74.00 |
| Previous balance | | \$1,341.25 |
| 6/17/2010 Payment - thank you. Check No. 5976 | | (\$1,341.25) |
| Total payments and adjustments | | (\$1,341.25) |
| Balance due | | \$74.00 |

User Summary

| <u>Name</u> | <u>Hours</u> | <u>Rate</u> | <u>Amount</u> |
|-------------------------|--------------|-------------|---------------|
| Bryan D. Smith, Partner | 0.40 | 185.00 | \$74.00 |

Smith, Driscoll & Associates, PLLC

414 Shoup Avenue
P.O. Box 50731
Idaho Falls, ID 83405
TIN: 82-0518512
(208) 524-0731

Invoice submitted to:

Allen B. Ellis, Esq.
Ellis, Brown & Sheils, Chtd.
707 North 8th Street
P. O. Box 388
Boise ID 83701

January 31, 2011

In Reference To: McKay

Professional Services

| | <u>Hours</u> | <u>Amount</u> |
|--|--------------|---------------|
| 1/19/2011 BDS Receipt and review of affidavit and letter from Thomas Walker to Patricia McKay dated December 15, 2008 received 1/19/2011 from Allen Ellis; execute and forward affidavit; telephone conference with Allen Ellis; | 0.50 | 92.50 |

For professional services rendered

| | |
|------|---------|
| 0.50 | \$92.50 |
|------|---------|

Additional Charges :

12/24/2010 Long Distance Telephone Charges

| <u>Qty/Price</u> | |
|------------------|------|
| 1 | 1.15 |
| 1.15 | |

Total costs

| |
|--------|
| \$1.15 |
|--------|

Total amount of this bill

| |
|---------|
| \$93.65 |
|---------|

Previous balance

| |
|---------|
| \$74.00 |
|---------|

12/14/2010 Payment - thank you. Check No. 14344

| |
|-----------|
| (\$74.00) |
|-----------|

Total payments and adjustments

| |
|-----------|
| (\$74.00) |
|-----------|

Balance due

| |
|----------------|
| \$93.65 |
|----------------|

User Summary

| <u>Name</u> | <u>Hours</u> | <u>Rate</u> | <u>Amount</u> |
|-------------------------|--------------|-------------|---------------|
| Bryan D. Smith, Partner | 0.50 | 185.00 | \$92.50 |

Smith, Driscoll & Associates, PLLC

414 Shoup Avenue
P.O. Box 50731
Idaho Falls, ID 83405
TIN: 82-0518512
(208) 524-0731

Invoice submitted to:

Allen B. Ellis, Esq.
Ellis, Brown & Sheils, Chtd.
707 North 8th Street
P. O. Box 388
Boise ID 83701

August 01, 2011

In Reference To: McKay



Amount

Previous balance

\$93.65

2/7/2011 Payment - thank you. Check No. 14498

(\$93.65)

Total payments and adjustments

(\$93.65)

Balance due

\$0.00

Smith, Driscoll & Associates, PLLC

414 Shoup Avenue
P.O. Box 50731
Idaho Falls, ID 83405
TIN: 82-0518512
(208) 524-0731

Invoice submitted to:

Allen B. Ellis, Esq.
Ellis, Brown & Sheils, Chtd.
707 North 8th Street
P. O. Box 388
Boise ID 83701

March 02, 2012

In Reference To: McKay



Professional Services

| | <u>Hours</u> | <u>Amount</u> |
|---|--------------|----------------|
| 2/10/2012 BDS Receipt and review of email, letter and defendants' supplemental expert witness disclosure received 2/10/2012 from Allen Ellis; | 0.25 | 46.25 |
| For professional services rendered | 0.25 | \$46.25 |
| Balance due | | \$46.25 |

| User Summary | | <u>Hours</u> | <u>Rate</u> | <u>Amount</u> |
|-------------------------|--|--------------|-------------|---------------|
| <u>Name</u> | | | | |
| Bryan D. Smith, Partner | | 0.25 | 185.00 | \$46.25 |

Smith, Driscoll & Associates, PLLC

414 Shoup Avenue
P.O. Box 50731
Idaho Falls, ID 83405
TIN: 82-0518512
(208) 524-0731

Invoice submitted to:

Allen B. Ellis, Esq.
Ellis, Brown & Sheils, Chtd.
707 North 8th Street
P. O. Box 388
Boise ID 83701

April 02, 2012

In Reference To: McKay



| | <u>Amount</u> |
|---|----------------------|
| Previous balance | \$46.25 |
| 3/9/2012 Payment - thank you. Check No. 15401 | <u>(\$46.25)</u> |
| Total payments and adjustments | <u>(\$46.25)</u> |
| Balance due | <u>\$0.00</u> |

Smith, Driscoll & Associates, PLLC

414 Shoup Avenue
P.O. Box 50731
Idaho Falls, ID 83405
TIN: 82-0518512
(208) 524-0731

Invoice submitted to:

Allen B. Ellis, Esq.
Ellis, Brown & Sheils, Chtd.
707 North 8th Street
P. O. Box 388
Boise ID 83701

October 04, 2012

In Reference To: McKay



Professional Services

| | <u>Hours</u> | <u>Amount</u> |
|--|--------------|-------------------|
| 9/19/2012 BDS Review documents; prepare for deposition; | 3.00 | 645.00 |
| 9/20/2012 BDS Meet with Allen Ellis; research and consideration of issues after meeting; | 5.80 | 1,247.00 |
| For professional services rendered | 8.80 | \$1,892.00 |
| Balance due | | \$1,892.00 |

User Summary

| <u>Name</u> | <u>Hours</u> | <u>Rate</u> | <u>Amount</u> |
|-------------------------|--------------|-------------|---------------|
| Bryan D. Smith, Partner | 8.80 | 215.00 | \$1,892.00 |

LAW OFFICE
ELLIS, BROWN & SHEILS, CHARTERED

707 North 8th Street
P.O. Box 388
Boise, Idaho 83701
(208) 345-7832 (Telephone)
(208) 345-9564 (Facsimile)

ALLEN B. ELLIS*
STEPHEN C. BROWN
MAX M. SHEILS, JR.

(AEllis@ebslaw.com)
(SBrown@ebslaw.com)
(MSheils@ebslaw.com)

*Also Admitted in California

November 17, 2009

Via Email

Mr. Bryan Smith
Smith Driscoll
414 Shoup Ave.
Idaho Falls, Idaho 83405-0731

Re: McKay v. Walker et al
EBS No. 1886.1

Dear Bryan:

As per our conversation Tuesday, I am attaching the following documents pertaining to the above-captioned matter: (1) Draft complaint; (2) recent correspondence between myself and the prospective defendant; (3) the underlying divorce decree with attached Property Settlement Agreement; and (4) pre-nuptial agreement.

In the waning moments of the McKay marriage, the husband acquired real property which he immediately flipped for a \$2M profit. That community income is the main focus of the controversy. The husband had sold the property pre-divorce and retained a mortgage for the balance of the purchase price which came due a few months after the divorce. He was not in first position, contrary to the title company's assurance; accordingly, the title company paid him off and the wife got nothing. According to the Property Settlement Agreement, the final payment on the property was the source of the wife's equalizing payment.

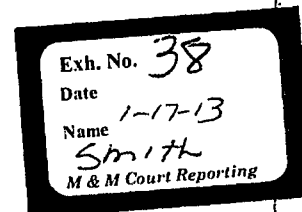
It is undisputed that the wife's attorney was aware of the mortgage because it was alluded to (but not identified) in the Property Settlement Agreement as the source of her \$800,000 payment. The judgment (and PSA) was recorded but neither the mortgage or the property to which it was subject was identified therein.

Thanks for agreeing to take a look at this matter.

Very truly yours,

Allen B. Ellis

ABE:am
Attachments



ELLIS, BROWN & SHEILS, CHARTERED

Attorneys-at-Law
707 North 8th Street
P.O. Box 388
Boise, Idaho 83701-0388
(208) 345-7832 (Telephone)
(208) 345-9564 (Facsimile)

FACSIMILE TRANSMISSION SHEET

File No: 1886.1

Please deliver the following pages to:

NAME: Robert A. Anderson, Yvonne A. Dunbar

COMPANY: Anderson, Julian & Hull, LLP

ADDRESS:

DATE: January 13, 2011

FAX #: 344-5510

FROM: Allen B. Ellis

TOTAL NUMBER OF PAGES (INCLUDING THIS PAGE): 2

ORIGINAL/COPY: ☒ WILL NOT FOLLOW ☐ WILL FOLLOW BY MAIL
☐ WILL FOLLOW VIA OVERNIGHT MAIL ☐ WILL BE HAND DELIVERED

COMMENTS: McKay v. Walker - Letter to Bryan Smith

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10/30/09

LAW OFFICE
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Boise, Idaho 83701
(208) 345-7832 (Telephone)
(208) 345-9564 (Facsimile)

ALLEN B. ELLIS*
STEPHEN C. BROWN
MAX M. SHEILS, JR.

(AEllis@ebslaw.com)
(SBrown@ebslaw.com)
(MSheils@ebslaw.com)

*Also Admitted in California

October 28, 2009

Confidential

Mr. Thomas G. Walker
Coshu Humphrey
P.O. Box 9518
Boise, Idaho 83707

Re: McKay v. McKay
EBS No. 1886.1

Dear Mr. Walker:

I represent Patricia McKay with respect to her ex-husband's failure to pay her the proceeds he received from the sale of the Albrethsen property ("Status real estate transaction") in the amount of \$1,288,091.10. As you may recall, Mr. McKay received the final payment, not from the buyer Status, but from Lawyer's Title applicable insurance policy. The question is whether the settlement agreement, which you advised Ms. McKay to sign, should have been structured differently to protect her entitlement. You advised Ms. McKay that the recorded divorce judgment would be sufficient protection as to the payment of proceeds from the Status real estate transaction. In my view, this advice and your failure to adequately protect Ms. McKay constituted attorney error.

First, there is no legal description of the Albrethsen property in the recorded judgment/property settlement agreement. That is, it is problematical that a title company should be put on notice of any title issues.

Secondly, the settlement agreement recites that the \$800,000 is to be paid to Ms. McKay at the time "of payment by the Status Corporation". There is nothing in the recorded agreement which connects this payment to the Albrethson property. Rather, merely the timing of that payment was to coincide with some payment by the buyer Status arising out of some unidentified transaction. Even assuming a legal description was included in the recorded/judgment/agreement, there was nothing to put the world on notice that Ms. McKay's

Mr. Thomas G. Walker
October 28, 2009
Page 2

\$800,000 and payoff on the "Personal Residence Debt" was to be paid from the final installment of the Status Corporation payment for the Albrethsen property.

Thirdly, it is not clear what protection is afforded Ms. McKay by section 1.8 of the agreement which recites that "Darwin may also be able to foreclose a mortgage on that portion of the land referred to prior to the sale to Status Corporation as "Albrethsen's Farm."

Fourth, the recitation (section 1.8) that Darwin will have title to the "Home Farm" is simply incorrect. Title to that property is held by Turf Corporation and, in any event, that property is encumbered. See paragraph 1.8.3. More to the point, it fails to advance Ms. McKay's secured position.

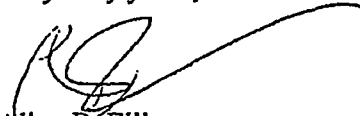
Fifth, you were aware that Darwin held a mortgage on the Albrethsen property and that title was in the name of Status Corporation. Hence a recorded judgment against Darwin would provide Ms. McKay with no security.

Sixth, an interest which Darwin did hold in Idaho real property was the mortgage on the Albrethsen property. This interest was intended to be the source of the \$800,000 payment as well as payment of the Personal Residence Debt (see page 6 of Property Settlement Agreement). A public record should have been made of Ms. McKay's interest in that recorded mortgage. Such record would have put Lawyer's Title on notice, and Ms. McKay would have received her \$800,000 and \$488,019.10 of the policy proceeds to apply toward the Personal Residence Debt at the time of Lawyer's Title payout to Darwin.

The mortgage is referenced in the Property Settlement Agreement and its existence was confirmable by the public record (recorded 11/30/06).

Please provide me within ten days any facts or law which undermine my above characterization of your conduct as attorney error. Also, given your proficiency in real estate matters, please advise whether, in your view, Darwin's assignment of his mortgage to Lawyer's Title was burdened with the recorded judgment/settlement agreement.

Very truly yours,



Allen B. Ellis

ABE:am

COSHO HUMPHREY, LLP

COUNSELORS & ATTORNEYS AT LAW

PO Box 9518 83707-9518
800 Park Blvd., Suite 790
Boise, Idaho 83712

Telephone 208.344.7811
Firm fax 208.338.3290

RECEIVED

NOV 03 2009

Ellis, Brown & Sheils, Chartered

THOMAS G. WALKER

twalker@cosholaw.com
www.ricolawblog.com

DIRECT PHONE 208.639.5607
CELL PHONE 208.869.1508
DIRECT FAX 208.639.5609

November 2, 2009

Via email to: AEllis@ebslaw.com

and

First Class Mail

Allen B. Ellis, Esq. ---
Ellis, Brown & Sheils, Chtd.
707 North 8th St.
P.O. Box 388
Boise, ID 83701

Re: McKay v. McKay
CH File No. 19458-001 and 002

Dear Allen:

I am responding to your letter dated October 28, 2009 regarding McKay v. McKay. The Judgment and Decree of Divorce and Property Settlement Agreement were the products of a Mediated Settlement Agreement facilitated by Judge D. Duff McKee following an all day mediation session.

The form, content and structure of the Property Settlement Agreement were defined and limited by the terms of the mediated settlement and the protracted and difficult negotiations that followed mediation. Mrs. McKay signed the Mediated Settlement Agreement and the Property Settlement Agreement after having been fully, completely and accurately informed of the risks of proceeding to trial and of risks associated with the negotiated terms of the settlement.

Although we were prepared to go to trial, Mrs. McKay chose to settle instead. Her decision was based upon the considerable challenge she faced in the lawsuit because she signed a Prenuptial Agreement before she married Mr. McKay. There was a substantial risk that she would have received a great deal less in value if the case went to trial. The possibility that the terms and conditions of the Prenuptial Agreement would be enforced by the Court made her remedies under the Judgment and Decree of Divorce an attractive alternative to proceeding to trial.

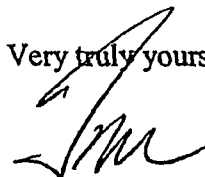
When Mrs. McKay informed us that Mr. McKay had breached the terms and conditions of the Judgment and Decree we advised her to execute on the Judgment and prosecute Mr. McKay for contempt. Mrs. McKay delayed in taking action against Mr. McKay because she

feared he would quit making the monthly alimony payments and the payments on the two notes secured by deeds of trust on the personal residence she received as a result of the settlement.

Once Mrs. McKay decided to proceed against Mr. McKay, we undertook negotiations with Mr. McKay's lawyers to obtain fulfillment of his obligations under the Judgment and Decree. Before we were able to complete our work, Mrs. McKay terminated our representation without explanation. We found this curious because of our firm's expertise and experience in prosecuting divorce related contempt. The contempt remedy provided Mrs. McKay with significant leverage in obtaining Mr. McKay's compliance with the Judgment and Decree. We are aware that Mrs. McKay reached some resolution of her claims against Mr. McKay following a trial that took place last July. We have not, however, been informed of the substance of that settlement.

In conclusion, any claims against me or our firm by Mrs. McKay arising out of the property settlement with Mr. McKay would not be well grounded in fact or supported by applicable law.

Very truly yours,



THOMAS G. WALKER

11/15/09

LAW OFFICE
ELLIS, BROWN & SHEILS, CHARTERED
707 North 8th Street
P.O. Box 388
Boise, Idaho 83701
(208) 345-7832 (Telephone)
(208) 345-9564 (Facsimile)

ALLEN B. ELLIS*
STEPHEN C. BROWN
MAX M. SHEILS, JR.

(AEllis@ebslaw.com)
(SBrown@ebslaw.com)
(MSheils@ebslaw.com)

*Also Admitted in California

November 4, 2009

CONFIDENTIAL

Mr. Thomas G. Walker
Cosho Humphrey
P.O. Box 9518
Boise, Idaho 83707

Re: McKay v. McKay
EBS No. 1886.1

Dear Tom:


Thank you for your letter of November 2, 2009.

By letter and email dated December 15, 2008, you advised Ms. McKay that the judgment would become a lien on Darwin's real property. Darwin held no title to real property. As suggested by the mortgage referenced in the settlement agreement, Status Corporation held title to the Albrethsen property and Darwin's company held title to the Home Farm.

Darwin did hold an interest in real property as a result of the mortgage referenced in the settlement agreement. The information to be contained in recorded divorce settlements is set forth in Idaho Code section 32-918. The settlement agreement failed to identify the real property subject to the mortgage and the instrument number of the recorded mortgage as well as Ms. McKay's interest therein. The agreement made it clear that the \$800,000 to be paid Patricia would be from the sale of the Albrethsen property. If Darwin's attorney had rejected a recitation in the agreement that Patricia held an interest in the mortgage, that position would certainly be a red flag that Darwin might go south with the money.

Ms. McKay is not critical of the substantive terms of the settlement. She is critical of the failure of the settlement and its recordation to secure the receipt of her portion of the community estate, as promised.

Very truly yours,


Allen B. Ellis

ABE:am

COSHO HUMPHREY, LLP

COUNSELORS & ATTORNEYS AT LAW

PO Box 9518-83707-9518

800 Park Blvd., Suite 790

Boise, Idaho 83712

Telephone 208.344.7811

Firm fax 208.338.3290

DIRECT PHONE 208.639.5607

CELL PHONE 208.869.1508

DIRECT FAX 208.639.5609

THOMAS G. WALKER

twalker@cosholaw.com

www.ricelawblog.com

November 5, 2009

Via email to: AEllis@ebslaw.com

and

First Class Mail

Allen B. Ellis, Esq.
Ellis, Brown & Sheils, Chtd.
707 North 8th St.
P.O. Box 388
Boise, ID 83701

Re: McKay v. McKay
CH File No. 19458-001 and 002

Dear Allen:

I am responding to your letter dated November 4, 2009 regarding McKay v. McKay. I informed Mrs. McKay that under Idaho Code § 10-1011 the Judgment and Decree of Divorce, including the attached Property Settlement Agreement, ("Judgment") would be a lien in each county in which it was recorded on real property that she thought Darwin owned. The foregoing is an accurate statement of the law in Idaho. In accordance with Mrs. McKay's instructions, we recorded the Judgment in Ada, Owyhee and Teton counties in Idaho. Mrs. McKay told me that she also recorded the Judgment in certain counties in Nevada.

I also informed Mrs. McKay that upon execution of her judgment and under Idaho Code § 11-101 the sheriff must first satisfy the judgment, with interest, out of Darwin's personal property, and if sufficient personal property could not be found, then out of his real property. This is also an accurate statement of the law in Idaho.

Your reference to Idaho Code § 32-918 is misplaced because we recorded the entire Property Settlement Agreement. The conditions you refer to in your letter only apply if a summary of a marriage settlement agreement is recorded. See I.C. § 32-918(2) and (3).

Importantly, what damage has Mrs. McKay suffered as a consequence of anything we did or failed to do? Unless Mrs. McKay abandoned or altered the terms and conditions of the Property Settlement Agreement subsequent to the termination of our representation, Mr. McKay is still obligated, under the conditions of paragraph 1.8.3, to pay Mrs. McKay \$800,000, plus interest from and after September 30, 2008 at the above-market interest rate of 6% per annum. In addition, Mr. McKay is obligated to pay Mrs. McKay \$2,500 per month as alimony and make

COPY TO client email
ON 11-5-09

000711 MCKAY 1455

the monthly payments on the notes secured by the first and second deeds of trust encumbering the residence. As Mrs. McKay knows, despite our best efforts, Mr. McKay would not agree to a fixed maturity date for payment of the amounts identified in paragraph 1.8 of the Property Settlement Agreement, and he would not agree to give Mrs. McKay a collateral security interest in any specific asset.

Throughout our representation of Mrs. McKay and prior to her execution of the Mediated Settlement Agreement, we advised Mrs. McKay that her choices were to go to trial or settle on the best terms she could get from Mr. McKay. She chose to settle. While some lawyers may be reluctant to go to trial, the lawyers in our firm are not so inclined. In fact, it is unlikely that any other firm in the state of Idaho has tried more divorce cases over the last 35 years than Cosho Humphrey.


In conclusion, Mrs. McKay had full and complete knowledge of the risks attendant to any agreement with Mr. McKay that required future performance. The evidence developed in the divorce case supported a finding that Mrs. McKay had superior knowledge regarding Mr. McKay's character, assets, liabilities and business practices. In fact, she informed us many times that she did not trust Mr. McKay. Notwithstanding her knowledge that Mr. McKay would not grant her a collateral security interest in any specific asset, including the mortgages he held, she chose to settle with him in accordance with the terms and conditions set forth in the Mediated Settlement Agreement and Property Settlement Agreement and accept the risk that Mr. McKay would not perform.

Very truly yours,

/s/

THOMAS G. WALKER

Annette Manning

 **From:** Allen Ellis
Sent: Thursday, November 05, 2009 1:37 PM
To: Thomas G. Walker
Subject: RE: McKay v. McKay

Tom:


With respect to the whether a judgment constitutes a lien on real property or on an interest in real property, a lien is created only if a party's interest in the property is identified and only if the property itself is identified. The McKay judgment failed to do either.

Your reference to §32-918 implies that the summary of a settlement has to be more thorough than the settlement itself. That makes no sense.

I concur that whatever Ms. McKay is able to recover from Darwin is credit to any claim she makes against you.

Regards,

Allen Ellis
208 345 7832

 **From:** Thomas G. Walker [mailto:twalker@CoshoLaw.com]
Sent: Thursday, November 05, 2009 9:21 AM
To: Allen Ellis
Cc: Pam Carson
Subject: McKay v. McKay

Allen: Please see my attached response to your letter dated November 4, 2009.

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COSHO HUMPHREY, LLP

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Boise, Idaho 83712

Telephone 208.344.7811
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CELL PHONE 208.869.1508
DIRECT FAX 208.639.5609

THOMAS G. WALKER

twalker@cosholaw.com
www.ricelawblog.com

November 5, 2009

Via email to: AEllis@ebslaw.com
and
First Class Mail

Allen B. Ellis, Esq.
Ellis, Brown & Sheils, Chtd.
707 North 8th St.
P.O. Box 388
Boise, ID 83701

Re: McKay v. McKay
CH File No. 19458-001 and 002

Dear Allen:

I am responding to your email received at 1:37 p.m. today. Regarding the lien created by recording a judgment, the statute is clear that a recorded judgment is a lien on *all* of the judgment debtor's real property located in the county in which the judgment is recorded, to wit:

... the judgment so recorded becomes a lien upon *all* real property of the judgment debtor in the county, not exempt from execution, owned by him at the time or acquired afterwards at any time prior to the expiration of the lien. (Emphasis added.)

I.C. § 10-1110.

Regarding Idaho Code § 32-918(1), it is likewise quite clear:

When such contract is acknowledged or proved, it must be recorded in the office of the recorder of every county in which any real estate may be situated which is granted or affected by such contract.

I.C. § 32-918(1).

There is no requirement in subsection (1) that a legal description be included in the marriage settlement agreement.

Allen B. Ellis, Esq.
November 5, 2009
Page 2

COSHO HUMPHREY, LLP

In any event, you have stated that Mr. McKay did not, and does not now, own any real property. Although that issue was contested by Mrs. McKay during the divorce proceeding, whether he had any real property is beside the point. The fact that Mrs. McKay chose to settle with Mr. McKay knowing that he refused to grant her a collateral security interest in any specific asset is conclusive of that issue. If she did not want the deal documented in the Mediated Settlement Agreement, she could have gone to trial.

Very truly yours,

/s/

THOMAS G. WALKER

510348.doc

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COPY
NO. 8:49
FILED
AM PM

NOV 29 2007

J. DAVID NAVARRO, Clerk
By J. EARLE
DEPUTY

Stanley W. Welsh (ISB No. 1964)
Thomas G. Walker (ISB No. 1856)
Cosho Humphrey, LLP
800 Park Blvd., Suite 790
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Attorneys for Plaintiff Patricia McKay

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF

THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

MAGISTRATE DIVISION

★ ★ ★ ★ ★

PATRICIA McKAY,

Plaintiff,

v.

DARWIN McKAY,

Defendant.

Case No. CV DR 0615200

JUDGMENT AND DECREE OF
DIVORCE

Based upon the Stipulation of the parties, IT IS HEREBY ORDERED ADJUDGED
AND DECREED as follows:

1. **DIVORCE**: The Plaintiff ("Patricia") and the Defendant ("Darwin") were
married on July 6, 1996 in Nassau, Island of the Bahamas. Patricia and Darwin are granted a
divorce from one another on the grounds of irreconcilable differences. Each is restored to the
status of a single person.

JUDGMENT AND DECREE OF DIVORCE
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Page 1

000710 MCKAY 1466

2. **PROPERTY SETTLEMENT AGREEMENT:** Except for paragraphs in the Property Settlement Agreement dated October 20, 2007 regarding alimony, the Property Settlement Agreement shall be merged with and into the Judgment and Decree of Divorce. With respect to alimony, the payment provisions therein shall be deemed integrated contracts between the Parties with no jurisdiction conferred upon this Court to modify. The Property Settlement Agreement dated October 20, 2007 attached hereto as Exhibit A is approved by this Court and, except as noted above, is merged with and incorporated into this Judgment and Decree of Divorce.

DATED: November 28, 2007.



MAGISTRATE

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 24th day of November 2007 a true and correct copy of the foregoing Judgment and Decree of Divorce was served upon:

Stanley W. Welsh
Cosho Humphrey, LLP
800 Park Blvd., Suite 790
Boise, ID 83712
P.O. Box 9518
Boise, ID 83707-9518

☒ U.S. Mail
☒ Hand Delivery
☐ Overnight Courier
☐ Facsimile
☐ E-mail:

Kimberly D. Brooks
Brooks Law, P.C.
23 9th Ave. North
Nampa, ID 83687

☒ U.S. Mail
☐ Hand Delivery
☐ Overnight Courier
☐ Facsimile
☐ E-mail:

John A. Miller
Miller & Harr
Attorneys at Law
1401 Shoreline Drive, Suite 3
Boise, Idaho 83702

☒ U.S. Mail
☐ Hand Delivery
☐ Overnight Courier
☐ Facsimile
☐ E-mail:



Exhibit A

**Stanley W. Welsh (ISB No. 1964)
Thomas G. Walker (ISB No. 1856)
Coshu Humphrey, LLP
800 Park Blvd., Suite 790
P. O. Box 9518
Boise, Idaho 83707-9518
Direct Phone: (208) 639-5607
Cell phone: (208) 869-1508
Direct Facsimile: (208) 639-5609
E-mail: swelsh@cosholaw.com; twalker@cosholaw.com**

Attorneys for Plaintiff Patricia McKay

**IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA**

MAGISTRATE DIVISION

★ ★ ★ ★ ★

PATRICIA E. McKAY,

Plaintiff,

v.

L. DARWIN McKAY,

Defendant.

Case No. CV DR 0615200

**PROPERTY SETTLEMENT
AGREEMENT INCORPORATED AND
MERGED WITH AND INTO
JUDGMENT AND DECREE OF
DIVORCE**

This Property Settlement Agreement ("Agreement") is made and entered into this 20th day of October 2007 by and between Patricia E. McKay, Plaintiff ("Patricia" or "Plaintiff"), and L. Darwin McKay, Defendant ("Darwin" or "Defendant"). Patricia and Darwin are sometimes

individually referred to as a "Party" or collectively referred to as the "Parties". This Agreement is binding and enforceable upon the terms stated herein, notwithstanding the fact that additional documentation is required to carry out the terms of this Agreement.

1. **Community Property.** The Parties agree to the following settlement of their community property:

1.1. Subject to the provisions of paragraph 2.1 below, Patricia shall receive the personal residence located at 25 Horizon Drive, Boise, Idaho ("Personal Residence") free and clear of all encumbrances. Patricia shall furthermore receive all personal property and furniture contained therein. Patricia shall execute such written consent as may be required by the lenders to allow Darwin access to information regarding the 1st and 2nd deed of trust notes. Darwin shall transfer to Patricia as her sole and separate property by good and sufficient quit claim deed and quit claim bill of sale all of his right, title and interest in and to the Personal Residence, including all personal property and furniture.

1.2. Patricia shall receive the Box Office Productions stock. Darwin shall transfer to Patricia as her sole and separate property by good and sufficient assignment separate from stock certificate all of his right, title and interest in and to the Box Office Productions stock. Patricia shall cause the assignment form to be delivered to Darwin through counsel as soon as possible for Darwin's execution and delivery to Patricia through her counsel.

1.3. Patricia shall receive her IRA account.

1.4. Patricia shall receive the 1995 Mercedes S-500 vehicle in her possession and the 1980's motor home, currently located at the farm. Darwin shall deliver the motorhome to Patricia on or before December 1, 2007. Darwin shall transfer to Patricia as her sole and separate property by good and sufficient bill of sale and endorsement on the respective Certificates of Title all of his right, title and interest in and Patricia's 1995 Mercedes S-500 and the 1980's motorhome. Patricia shall cause the assignments forms to be delivered to Darwin through counsel as soon as possible for Darwin's execution and delivery to Patricia through her counsel.

1.5. Darwin may at his expense have the contents of the Personal Residence construction folder copied if necessary for preparation of the amended tax returns for 2005 and 2006 and for the 2007 tax return. Patricia shall retain the original of the Personal Residence construction folder.

1.6. Darwin shall pay to Patricia \$100,000.00 in four equal consecutive monthly installments of \$25,000.00 on or before January 15, 2008 and on or before the 15th day of February, March and April, 2008. The Parties acknowledge that the \$100,000.00 amount was based upon a portion of Patricia's attorneys' fees and litigation expenses. In accordance with Idaho Code § 32-704(3) said payments shall be paid by Darwin directly to Cosho Humphrey, LLP, who may enforce this portion of the Judgment in its own name; provided, however, Patricia may pay Cosho Humphrey, LLP prior to any such installment in which case, the payment or payments shall be paid directly to Patricia by Cosho Humphrey, LLP.

1.7. Darwin shall pay Patricia \$800,000 in cash, by wire transfer or certified check, within five (5) days of payment by the Status Corporation, or its assigns, ("Status Real Estate Transaction"). In addition, Darwin shall convey all his right, title and interest to Patricia in and to the two (2) lots to be conveyed by Status Corporation, or its assigns, to Darwin as part of the Status Corporation Real Estate Transaction. The parties acknowledge that the Status Real Estate Transaction is scheduled to close on or before March 30, 2008. Darwin shall diligently pursue the closing and shall not do anything to interfere with or delay the closing.

1.8. The parties acknowledge that if Status Corporation or its assigns breaches the Purchase and Sale Agreement, Darwin will have title to that portion of the land that had been referred to prior to the sale to Status Corporation as the "Home Farm." In the event of breach, Darwin may also be able to foreclose a mortgage on that portion of the land referred to prior to the sale to Status Corporation as "Albrethsen's Farm."

1.8.1. If the Status Real Estate Transaction fails to close on or before March 30, 2008, Darwin shall pay Patricia \$500,000 as soon as he is able to do without violating the lending terms and conditions of the bank holding the line of credit for the Turf Corporation.

1.8.2. Provided further that if Status Corporation or it assigns breaches the Purchase and Sale Agreement and Darwin cannot pay \$500,000 by April 30, 2008, he shall list the Albrethsen property that was included in the Status Corporation Real Estate Transaction for sale and shall pay Patricia by cash, certified check or wire transfer \$500,000 within five (5) days of receipt or closing on a sale.

1.8.3. Provided further that if following a breach, Darwin is not able to pay Patricia \$500,000 by September 30, 2008, he shall pay Patricia \$800,000 plus interest at the rate of 6% payable within five (5) days of any funds from the sale of either the Albrethsen property funds, the Home Farm property or both (provided that payment of funds from the sale of the Home Farm may only be made to the extent allowed by the bank holding the line of credit for the Turf Corporation) by cash, certified check, or by wire transfer.

1.9. Darwin shall be awarded the 2000 XJ8L Jaguar vehicle; 1973 5th wheel camp trailer; 1990 Ford pick-up truck; and 1994 Chrysler LHS. Darwin shall furthermore be entitled to pick up his separate property birch cabinet and birch bookcase located in the tool room of the Personal Residence. Upon delivery of the motorhome to Patricia, Darwin shall pick up the empty bookcase and cabinet. Darwin shall be awarded all separate and community property interests (if any) in the following:

- a. The Turf Corporation;
- b. The Turf Company of Nevada, Inc.;
- c. Pleasure Turf, LLC;
- d. The Turf Company, LLC;
- e. Turfland, LLC;
- f. Notes Receivables for Turf Company;
- g. Investment in Nevada Granite Industries;
- h. Palace Resorts Time Share;

No date as to when all was to be paid to me if this would be \$800,000.

*This was after I
was paid in full.*

- i. Proceeds from sale of Albrethsen;
- j. Personal effects and furnishings in Darwin's possession; and
- k. McKay family investments and interests.

2. Community Debts. The Parties agree to the following settlement of their community debts:

2.1. Commencing November 2007 and continuing thereafter as provided in this paragraph, Darwin shall pay Patricia's 1st and 2nd deed of trust note payments, including property taxes and insurance, as required by the lender(s), encumbering the Personal Residence ("Personal Residence Debt") as and for maintenance or alimony for Patricia. Darwin shall timely pay both 1st and 2nd deed of trust note payments directly to the respective mortgage companies. Patricia will provide Darwin via fax or email the 1st and 2nd deed of trust note monthly statements within five days of when Patricia receives them. Each month Darwin shall notify Patricia via fax or email that he has made the respective 1st and 2nd deed of trust note monthly payments in a timely manner. The payments required under this paragraph shall terminate when Darwin pays off the Personal Residence Debt. Darwin shall pay off the full amount of Personal Residence Debt directly to the respective mortgage companies within thirty (30) days of the date the Status Real Estate Transaction closes, or within thirty (30) days of receipt of any funds from the sale of either the Albrethsen property, the Home Farm property or both (provided that payment of funds from the sale of the Home Farm may only be made to the extent allowed by the bank holding the line of credit for the Turf Corporation), but in any event, Darwin shall payoff the Personal Residence

Debt on or before October 20, 2012. Notwithstanding the foregoing, Patricia shall have the right to sell the Personal Residence at any time; in which case, the Personal Residence Debt would likely be paid off out of the sale proceeds. If Patricia sells the Personal Residence, Darwin shall pay directly to Patricia as a property equalization payment the unpaid principal balance of the Personal Residence Debt, plus interest accruing at the respective rates called for in the first and second loan documents, in monthly installments to and including payment in full of the Personal Residence Debt. The Parties agree that Kevin Crane, CPA, or if Mr. Crane cannot serve, such other accountant as the Parties shall designate, will provide the appropriate calculations of the remaining balance and accruing interest and Darwin shall execute and deliver a promissory note to Patricia setting forth his payment obligations. Any such promissory note shall include a right of prepayment. As of October 20, 2007, the unpaid principal balance of the 1st deed of trust note (World Savings Loan No. [REDACTED]) is \$556,324.34 and interest is accruing from and after October 20, 2007 at the rate provided in the 1st deed of trust note. As of October 20, 2007, the unpaid principal balance of the 2nd deed of trust note (Countrywide Loan No. [REDACTED]) is \$67,490.49 and interest is accruing from and after October 20, 2007 at the variable rate provided in the 2nd deed of trust note. Darwin shall pay each of these notes, including interest accruing from and after October 20, 2007 until each note is paid in full.

2.2 Darwin shall pay off the two Chase Visa credit cards and Bank of America credit card as property equalization payments as follows:

| | |
|---------------------------|-------------|
| Chase Visa ending in 2116 | \$46,327.00 |
|---------------------------|-------------|

Chase Visa ending in 0853 2,076.17

Bank of America ending in 0232 22,845.13

\$71,248.30

Darwin shall pay the \$71,248.30, plus interest as follows:

| | |
|----------------|---|
| November 2007: | \$14,249.66, plus interest on the unpaid balance attributable to the \$71,248.30; |
| December 2007: | \$14,249.66, plus interest on the unpaid balance attributable to the \$71,248.30; |
| January 2008: | \$14,249.66, plus interest on the unpaid balance attributable to the \$71,248.30; |
| February 2008: | \$14,249.66, plus interest on the unpaid balance attributable to the \$71,248.30; |
| March 2008 | \$14,249.66, plus interest on the unpaid balance attributable to the \$71,248.30; |

Darwin shall pay all payments listed above in a timely manner such that no late fees are incurred. The November 2007 payment shall pay the Chase Visa ending in 0853 in full and shall then apply \$6,086.75 to the Chase Visa ending in 2116 and \$6,086.75 to the Bank of America ending in 0232. Each month Darwin shall notify Patricia via fax or email that he has made the respective credit card payments in a timely manner.

Patricia shall be responsible for all charges, interest, finance charges, and fees attributable to charges made by her after October 20, 2007. Patricia shall be responsible for all other credit card debt in her name alone or charged by Patricia without Darwin's knowledge.

2.3 Mediation Expense. Darwin shall pay one-half and Patricia shall pay one-half of all fees and expenses of mediation.

3. **Alimony/ Maintenance Payments from Darwin to Patricia.** Commencing November 2007 and continuing until Patricia is paid \$800,000.00 or \$500,000.00 as provided above, Darwin shall pay Patricia each month the sum of \$2,500.00 as and for alimony/maintenance. All liability for alimony shall cease upon payment of the \$800,000.00 or \$500,000.00 as provided above.

4. **Full Disclosure.** Each Party represents to the other that full disclosure of all community assets and community liabilities, of which he or she is aware, has been made.

5. **Allocation of Property to Darwin.** Except as expressly provided herein, Patricia agrees to transfer by good and sufficient quit claim deed, quit claim bill of sale, quit claim assignment and/or other necessary quit claim document of conveyance all of her right, title and interest to Darwin in and to all of the community property awarded to Darwin herein, as his sole and separate property. Patricia shall return the notebook containing all of the Palace Resorts Information, including but not limited to Palace Premier Certificates; Palace Premier Golf Passes; Premier Gold Membership; and Palace Premier / RCI Certificates. Patricia shall specifically sign over title to the 1994 Chrysler; 1990 Ford Pick-up and 1973 5th Wheel Camp Trailer. Darwin shall cause said transfers to be delivered to Patricia through counsel as soon as possible, except for the 1990 pickup, for which title is in Patricia's possession and shall be produced as soon as possible. Patricia shall further sign the Palace Premier Change of Ownership, which shall be delivered to Patricia through counsel.

6. **Disposition of Property.** Subject to the provisions of this Agreement, each of the Parties hereto may dispose of his or her property of whatever nature, real or personal; and the Parties hereto, each for himself and herself, respectively, and for the respective heirs, legal representatives, executors and administrators and assigns, hereby waive any right of election which he or she may have or hereafter acquire regarding the estate of the other, or any right to take against any last will and testament of the other, whether heretofore or hereafter executed, or as may now or hereafter be provided for in any law of the State of Idaho or any other state or territory of the United States or any foreign country, and hereby renounces and releases all interest, right or claim that he or she now has or might otherwise have against the other, under or by virtue of the laws of any state or country, and each Party shall sign any document necessary to release his or her interest to the other Party or any other document necessary to transfer any title or release any interest necessary to carry out the intent of this paragraph.

7. **Release of Patricia from all Debts and Personal Guarantees.** On or before December 1, 2007, Darwin shall obtain at his sole cost and expense written releases of Patricia from liability for all debts whether such debts are owed to banks, vendors, and/or other creditors for whom Patricia may have liability for any reason, including but not limited to Patricia's execution of notes, personal guarantees or collateral security documents that she delivered during the Parties' marriage. Darwin shall provide Patricia with a true, correct and complete copy of each such release on or before December 1, 2007.

8. **Payment of Accounting Fees and Income Taxes by Darwin.** Darwin shall pay for the preparation of state and federal income tax returns and/or amended returns for the Parties for 2005, 2006 and 2007. The Parties agree to file said tax returns under the filing status resulting in the lowest state and federal income taxes. The Parties agree to cooperate with Kevin Crane, or any other accountant as Darwin deems necessary to complete the filing of such returns. Darwin shall pay all state and federal income taxes, interest and penalties, if any, for all years prior to January 1, 2008 and Darwin shall be entitled to all tax refunds, if any. Patricia shall be entitled to claim the interest paid on the deed of trust notes encumbering the Personal Residence and Darwin shall claim the monies paid towards the deed of trust note payments as alimony to Patricia. Darwin shall further claim all \$2,500.00 payments to Patricia pursuant to paragraph 3 herein as alimony.

9. **Separate Property / Income After Execution of Agreement.** The Parties hereto stipulate and agree that from and after the date of this Agreement, any and all property or income acquired or earned by either Party hereto shall be the separate property of the Party who has acquired or earned it, any income on separate property shall be separate property and the other Party shall have no claim on any separate property income or earnings. Beginning tax year 2008 and all years thereon, the parties shall each file separately. Neither party shall include in their income any income earned by the other after December 31, 2007. Nor shall either party claim a credit or deduction for expenditures made by the other after December 31, 2007. Any tax

liability arising from income after December 31, 2007 shall be paid and assumed according to their respective separate returns.

10. Debts after Execution of Agreement. The Parties agree that from and after October 20, 2007, any debts incurred by either Party hereto shall be the separate debt of the Party incurring the debt and shall not be a community debt. The Parties hereto agree not to incur any debt for which the other Party may be liable.

11. Mutual Release of Claims. For good and valuable consideration passing between the Parties, the receipt and sufficiency of which is acknowledged by each Party, the Parties each for themselves and for their heirs, representatives, agents, employees, successors, executors, administrators, subrogees and assigns, release the other Party and his or her heirs, representatives, agents, employees, successors, executors, administrators, subrogees and assigns, and each Party shall release, indemnify and hold harmless the other Party from any and all claims, liabilities or obligations arising out of or in any way connected with their marriage, including but not limited to all claims set forth in or comprehended by that certain litigation identified in the caption above. The term claims shall include any and all claims and counterclaims, whether known or unknown, a Party may have against the other Party as a result of their marriage and the litigation identified above.

12. Entry of Decree of Divorce. The Parties agree that on or before five (5) business days from the execution of this Property Settlement Agreement, they will execute a stipulation for entry of a Judgment and Decree of Divorce to be filed with the Court.

11. **Merger with and into Judgment and Decree.** Except for paragraphs regarding alimony, this Agreement shall be merged with and into the Judgment and Decree of Divorce. With respect to alimony, the payment provisions herein shall be deemed integrated contracts between the Parties with no jurisdiction conferred upon this Court to modify.

12. **No Undue Influence.** The Parties agree that they have entered into this Agreement without undue influence or fraud or coercion or misrepresentation or for any other like cause.

13. **Further Performance.** The Parties agree to execute all additional documents within 14 days of presentation of each such document and take such further steps as shall be required to effectuate and carry out the performance of this Agreement.

14. **Amendments.** This Agreement may not be amended, modified, altered or changed in any respect whatsoever, except by further agreement in writing duly executed by the Parties.

15. **Cooperative Effort.** The parties acknowledge that this Agreement is the result of a cooperative effort between them and their independent counsel, and that in the event of any dispute over the meaning or effect of any provision herein, the rule of interpretation of ambiguous terms against the drafting party shall have no application.

16. **Advice of Counsel.** The Parties stipulate that they have been represented by counsel and are familiar with the terms, conditions and effect of this Agreement.

17. **Attorney Fees.** In the event of any controversy, claim, or action being made, filed, or instituted between the parties to this Agreement or any of the other documents related hereto, or arising from the breach of any provision hereof, the prevailing party will be entitled to receive from the other party all costs, damages, and expenses, including reasonable attorney's and paralegal's fees incurred by the prevailing party, whether or not such controversy or claim is litigated or prosecuted to judgment. Court costs and attorney and paralegal fees include those incurred as a result of bankruptcy, or on appeal.

18. **Binding Agreement.** This Agreement is binding upon the heirs, successors and assigns of the Parties.

19. **Free and Voluntary Act.** Each Party further acknowledges: (a) that settlement of his or her claims alleged against the other in this litigation and the execution and delivery of this Agreement and release by him or her, are by his or her free and voluntary act; and (b) that no promise, agreement, statement or representation not expressed herein has been agreed to or relied upon.

20. **Choice of Law.** This Agreement shall be interpreted in accordance with the laws and statutes of the State of Idaho.

21. **Notices.** All notices and demands required or permitted under this Agreement shall be in writing, containing the information required by this Agreement to be communicated to any person, personally delivered to such person or sent by certified mail, postage prepaid, or by reputable overnight air courier service (e.g., Federal Express or United Parcel Service) to such

person at the last known address of such person. The earlier of the date of personal delivery or two business days following the date of mailing or the date of delivery to the air courier thereof, as the case may be, shall be deemed the date of receipt of notice, unless proof of untimely delivery or non-delivery is provided by the addressee. The sender shall bear the risk of untimely delivery and non-delivery.

22. Partial Invalidity. In the event any portion of this Agreement shall be determined invalid, void or otherwise unenforceable, the remaining provisions shall remain in full force and effect, and shall in no way be affected, impaired or invalidated. It is understood that the remaining provisions shall be construed in a manner most closely approximating the intention of the Parties.

23. Execution of Counterparts. Duplicate copies of this Agreement may be signed by one or more of the Parties and their counsel and copies of this Agreement signed, collectively, by all Parties and their counsel shall be considered as a single, fully executed original document.

24. Waiver. Failure of a Party, or any of them, to exercise his or her rights upon any default of the other Party shall not be construed as the waiver of the right to insist upon full performance of all the terms and conditions of this Agreement, or of the right to exercise any other right contained in this Agreement.

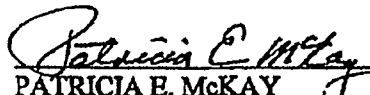
25. Time. Time is of the essence of this Agreement and each and all of its provisions in which performance is a factor.

26. **Warranty.** THE UNDERSIGNED PARTIES INDIVIDUALLY AND THROUGH THEIR COUNSEL REPRESENT AND WARRANT THAT THEY HAVE READ THE FOREGOING AGREEMENT AND THAT THEY FULLY UNDERSTAND THE TERMS AND CONDITIONS SET FORTH HEREIN.

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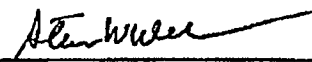
IN WITNESS WHEREOF, the Parties and their respective counsel have executed this

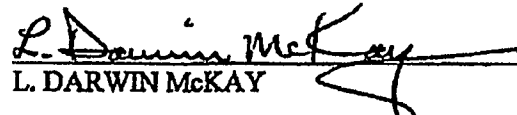
Agreement on the date set forth above.


PATRICIA E. MCKAY

Approved as to form and content:

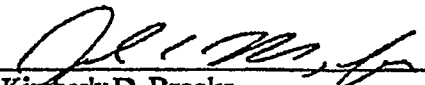
COSHO HUMPHREY, LLP

By 
Stanley W. Welsh
Attorneys for Patricia E. McKay

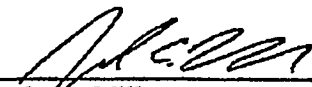

L. DARWIN MCKAY

Approved as to form and content:

BROOKS LAW, P.C.

By 
Kimberly D. Brooks
Attorneys for L. Darwin McKay

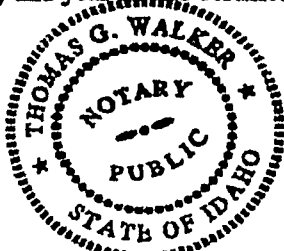
MILLER & HARR

By 
John A. Miller
Attorneys for L. Darwin McKay

STATE OF IDAHO)
) ss.
County of Ada)

On November 20 2007, before me, the undersigned, a notary public in and for said county and state, personally appeared Patricia E. McKay, known to me to be the person whose name is subscribed to the within instrument and acknowledged to me that she executed the same.

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

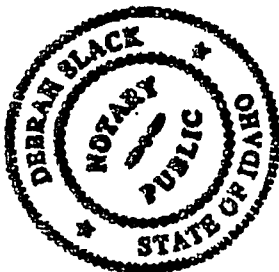


Thomas G. Walker
NOTARY PUBLIC FOR IDAHO
Residing at Borise
Commission Expires 3/20/11

STATE OF IDAHO)
) ss.
County of Ada)

On November 20 2007, before me, the undersigned, a notary public in and for said county and state, personally appeared L. Darwin McKay, known to me to be the person whose name is subscribed to the within instrument and acknowledged to me that he executed the same.

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



Debra Slack
NOTARY PUBLIC FOR IDAHO
Residing at Borise
Commission Expires 4-14-12

PRE-NUPTIAL AGREEMENT

THIS AGREEMENT, made and entered into this 15th day of July, 1996, between DARWIN MCKAY (hereinafter "Prospective Husband") and PATRICIA CHRISTENSEN (hereinafter "Prospective Wife").

W I T N E S S E T H:

WHEREAS, the parties contemplate marriage under the laws of the State of Idaho; and

WHEREAS, in consideration of the marriage contract between them and in order to promote a long-lasting and harmonious marriage, the parties now desire to define their respective property rights in the event of a dissolution of their marriage or their entry into a legal separation; and

WHEREAS, each party has consented and agreed that after their marriage, the other party shall have the sole and absolute control of his or her assets, property and estate, whenever acquired, and may freely dispose of the same by gift, sale, testamentary disposition or otherwise, free of any claim to or rights in the same of the other, except as may be otherwise provided for by this Agreement; and

WHEREAS, each party has made full disclosure to the other party of his or her present separate property interests and sources of income, including all assets and liabilities (but excluding as liabilities any current normal bills and charges and accrued income or property taxes) of any significance, schedules of which are attached hereto as Schedule A for Prospective Husband and Schedule B for Prospective Wife, both of which Schedules are incorporated herein by reference; and

WHEREAS, each party has been represented by an attorney of his or her own choosing, or has been advised of and fully understands his or her right to consult with an attorney of his or her choosing and each party having therefore sought and obtained whatever legal advice each wished in connection with each provision of this Agreement; and

WHEREAS, the Pre-Nuptial Agreement has been prepared by Penland Munther Boardman, Chartered, and Penland Munther Boardman, Chartered, has represented only Prospective Husband; and

WHEREAS, the Pre-Nuptial Agreement has been reviewed by James A. Bevis, attorney for the Prospective Wife, and said counsel has had opportunities to request and make appropriate changes to this Agreement on behalf of his client;

NOW, THEREFORE, in consideration of the above recitals and of the mutual promises and agreements contained herein, and in

consideration of the marriage contemplated by the parties, the parties agree as follows:

1.00 Full Disclosure. Each party hereby declares that he or she has made a full disclosure to the other party of his or her present separate property interests, sources of income and liabilities, as above recited and as set forth on the attached schedules. Each party hereby acknowledges that he or she has ascertained and weighed all of the facts, conditions and circumstances; whether past, present or future, likely to influence the judgment of each herein; that all matters set forth herein have been fully and satisfactorily explained to each party; that each party has given due consideration to the matters set forth herein and clearly understands and consents to all of the provisions hereof; and that each is entering into this Agreement freely and voluntarily, with full knowledge of all pertinent facts and after consultation with and advice from, or the right to do so, an attorney of his or her own choice.

2.00 Release of Marital Rights of Prospective Wife. Prospective Wife hereby waives, releases and renounces, under the laws of any jurisdiction that may be applicable, all right and interest, statutory or otherwise, including, but not limited to, dower, widow's allowance, statutory allowance, intestate succession, right of election to take against the will of the Prospec-

tive Husband, quasi-community property rights, homestead allowance, exempt property, family allowance and all other rights of any nature whatsoever in the property or estate of Prospective Husband which she might acquire as the wife, widow, heir at law or next of kin of Prospective Husband, in his property, owned by him at the time of this marriage, or acquired by him in an individual capacity thereafter, or as may be devised or inherited by him or his share of any community property acquired thereafter, and in his estate upon his death.

3.00 Release of Marital Rights of Prospective Husband.

Prospective Husband hereby waives, releases and renounces, under the laws of any jurisdiction that may be applicable, all right and interest, statutory or otherwise, including, but not limited to, courtesy, widower's allowance, statutory allowance, intestate succession, right of election to take against the will of Prospective Wife, quasi-community property rights, homestead allowance, exempt property, family allowance and all other rights of any nature whatsoever in the property or estate of Prospective Wife, which he might acquire as the husband, widower, heir at law or next of kin of Prospective Wife, in her property, owned by her at the time of this marriage, or acquired by her in an individual capacity thereafter, or as may be devised or inherited by her or as may be devised or inherited by him or her share of any

community property acquired thereafter, and in her estate upon her death.

4.00 Separate Property. Each party shall separately retain all rights and have complete control of his or her own property which is listed in Schedules A & B respectively. Each party shall also retain all rights and have complete individual control over all rents, issues, profits and increases on said property as listed in Schedules A & B.

It is understood that all wages, earnings or other income now or hereafter earned or acquired by each of the parties shall be the separate property of the prospective spouse who earns or acquires said wages, earnings or other income, subject to the provisions of Section 4.01. Each party shall have the absolute and unrestricted right to enjoy, manage, dispose of or otherwise deal with such separate property at all times during his or her lifetime and upon his or her death, free from any claims that may be made by the other party by reason of their marriage, and with the same effect as if no marriage had taken place. The parties specifically agree that the rents, issues, profits, capital gains or other earnings or increases on their separate property or proceeds from any disposition thereof constitute the separate property of the person owning such property and that such property and its rents, issues, profits, capital gains or

other earnings or increases or proceeds are not community property. The foregoing shall apply to all property now owned by either of the parties any property which may be inherited or devised to them and to all property which may hereafter be separately acquired by either of them, in any manner whatsoever.

4.01 Community Fund. The parties agree that they will maintain a community fund for the purpose of sharing household expenses and meeting other expenses or accumulating assets. It is understood that only those separate funds placed in the community fund or assets purchased from the proceeds of said community fund shall become the community property of the parties. Any assets acquired on a joint credit card will be community property. Nothing herein prevents the parties from agreeing in writing that an asset is community property. All other property of the parties shall remain the separate property of the parties as designated in Section 4.00.

4.02 Community Property. The parties agree that those items listed in Schedule C, which have already been acquired, will be considered community property.

4.03 Income Taxes. It is hereby agreed the parties may file their income taxes with the state and federal governments either jointly or separately, whichever is most advantageous to the individual party. Should the parties file jointly, the

amount of income tax due or returned shall be prorated by the parties according to each party's respective income.

5.00 Waiver of Right to Act as Fiduciary. Each party waives and renounces the right to act as personal representative, guardian, conservator or trustee of the estate of the other party; provided, however, that neither party shall be disqualified by this waiver to serve and act as personal representative, guardian, conservator or trustee of the other's estate if so designated or nominated by the other.

6.00 Transfers Between the Parties. Notwithstanding the provisions of this Agreement, either party shall have the right to transfer or convey to the other any property or interest therein which may be lawfully conveyed or transferred during his or her lifetime, or by will or otherwise upon death, and neither party intends for this Agreement to limit or restrict in any way the right and power to receive any such transfer or conveyance from the other.

7.00 Necessary Documents. Each party shall, upon the request of the other, execute, acknowledge and deliver any additional instruments that may be reasonably required to carry out the intention of this Agreement, including such instrument as may be required by the laws of any jurisdiction, now in effect or hereafter enacted, which may affect the property rights of the

parties as between themselves or others, and if either party desires to sell, mortgage or in any way deal with his or her property, or any part thereof, the other agrees to join in said deed, mortgage or agreement without any consideration other than the covenants herein referred to.

8.00 Effective Date. This Agreement shall take effect only when and if the marriage now contemplated by the parties in fact takes place.

9.00 Entire Agreement. This Agreement contains the entire understanding of the parties and no representations or promises have been made except as contained herein. This Agreement may not be terminated, amended or supplemented except by an instrument in writing expressly referring to this Agreement and signed by both parties.

10.00 Binding Effect This Agreement shall bind and inure to the benefit of the parties and their respective legal representatives, successors, heirs, grantees and assigns.

11.00 Severability. If any provision of this Agreement or any right waived or retained by it shall for any reason be invalid or unenforceable, the other portions of this Agreement shall nevertheless continue in full force and effect.

12.00 Controlling Law. This Agreement has been executed in the State of Idaho and its provisions shall be construed and

enforced in accordance with the laws of that State even though one or both of the parties may now be or hereafter become domiciled in another jurisdiction.

IN WITNESS WHEREOF, the parties have executed and acknowledged this Agreement the day and year first above written.

Patricia Christensen
PATRICIA CHRISTENSEN,
Prospective Wife

Darwin McKay
DARWIN MCKAY,
Prospective Husband

STATE OF IDAHO)
County of Ada) ss.

On this 1st day of July, 1996, before me, Kristine L. Wallace, the undersigned, a Notary Public in and for the State of Idaho, personally appeared PATRICIA CHRISTENSEN and DARWIN MCKAY, known to me to be the persons whose names are subscribed to the within instrument, and acknowledged to me that they executed the same.

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

Kristine L. Wallace
NOTARY PUBLIC FOR IDAHO
Residing at: Boise, Idaho
My Commission Expires: 2/9/99

(SEAL)

SCHEDULE "A"

Separate Property of Prospective Husband

ASSETS

Lease Purchase Equipment 1996

| | <u>Value</u> | <u>Total Lease Payout</u> |
|---|--------------|---------------------------|
| 1 - 1990 Kenworth Day Cab Tractor
SN _____ | 22,000.00 | 29,260.00 |
| 1 - 1990 Kenworth Day Cab Tractor
SN _____ | 22,000.00 | 29,260.00 |
| 1 - 1994 Turf Vacuum | 8,000.00 | 10,640.00 |
| 1 Northwest Rototiller | 8,000.00 | 10,640.00 |
| 1 Gasboy Fuel Management System | 8,200.00 | 10,906.00 |
| 4 Western Irrigation Wheel Lines | 15,600.00 | 20,748.00 |
| 1 - 1986 Volvo White Truck | 16,000.00 | 21,280.00 |
| 1 - 1984 Volvo White Truck | 12,000.00 | 15,960.00 |
| 3 Utility Flatbed Trailers 27 ft. | 10,500.00 | 13,965.00 |
| 1 Spyder Forklift | 12,000.00 | 15,960.00 |
| 1 Care Field Forklift | 14,000.00 | 18,620.00 |
| 2 Spyder Forklifts | 15,000.00 | 19,950.00 |
| 1 Komatsu Yard Forklift | 4,000.00 | 5,320.00 |
| 1 - 1989 John Deere Tractor
Model 2350 w/Loader | 14,750.00 | 19,617.00 |
| 2 New Spyder Forklifts | 54,000.00 | 71,820.00 |
| 1 Ford F150 Pickup, Ford Motor Lease
Nominal Value (subject to fair market buyout
at end of term) | | |

Farm Land Owned or Under Contract

40 Acres SW1/4 of SW1/4, T3N, R1E, B.M.,
known as Home Farm 240,000.00

40 acres SW1/4 of SE1/4, T3N, R1E, B.M.,
known as Hiatt Farm 240,000.00

SCHEDULE "A" - (CONTINUED)

LIABILITIES

| | |
|------------------------------------|------------|
| Ford Motor Credit - Ford Tractor | 4,146.00 |
| Associates - Walking Floor Flatbed | 8,400.00 |
| M&I Leasing - Various Farm Items | 2,200.00 |
| Key Bank Capitol Note | 75,000.00 |
| Key Bank Term Note | 325,000.00 |
| Washington Federal - Donna's House | 140,000.00 |
| TCM Joint Venture | 4,867.00 |
| Charles Hiatt - Hiatt Farm | 95,000.00 |
| D. J. McKay | 100,000.00 |
| Key Bank Farm Operating Line | 285,000.00 |

ASSETS - SCHEDULE A

01/17/86

THE TURF COMPANY EQUIPMENT LIST AS OF 12/31/95

| QTY | DESCRIPTION | VALUE |
|-----------------------|--|-----------|
| <u>FARM EQUIPMENT</u> | | |
| 1 | IH MODEL 886 TRACTOR W/CAB & DUALS | 12,000.00 |
| 1 | IH MODEL 1066 TRACTOR W/DUALS 326101720039257 | 8,000.00 |
| 1 | IH MODEL 806 TRACTOR W/NEW TA & ENGINE | 5,500.00 |
| 1 | IH MODEL 544 HYDRO TRACTOR UP14917 (NEW ENGINE) | 4,200.00 |
| 1 | SCHAFER 10' OFFSET DISC #77-10780 | 2,500.00 |
| 1 | WHITE 253 20' TANDEM DISC | 2,000.00 |
| 1 | KING 13' CHISEL PLOW W/GAUGE WHEELS | 1,500.00 |
| 1 | ACE 12' GROUND HOG W/3 PT | 2,400.00 |
| 1 | NORTHWEST 12' ROTOTILLER #RB1445.C.R93237 | 3,000.00 |
| 1 | 3PT DITCHER MODEL 600W | 500.00 |
| 1 | 4 SECTION STEEL HARROW W/3PT MELROW CARRIER | 400.00 |
| 1 | SPIKE TOOTH HARROW 15' 3 SECTION | 350.00 |
| 1 | OLD OLIVER GRAIN DRILL #81-2324 | 350.00 |
| 1 | EZ FLOW SPREADER | 40.00 |
| 1 | EVERSMAN MODEL 4512 LAND PLANE 12'X45' #10022 | 2,400.00 |
| 1 | 18' TRIPLE K | 1,600.00 |
| 8 | PORTABLE MOTOROLA HT50 RADIOS @400.00 ea. | 3,200.00 |
| 1 | 100 GALLON FUEL TANK W/PUMP | 200.00 |
| 1 | 500 GALLON FUEL TANK W/STAND | 200.00 |
| 1 | 280 GALLON FUEL TANK W/STAND | 150.00 |
| 1 | HARLEY ROCK PICKER | 5,000.00 |
| 1 | HOMIE BUILT HYDRAULIC WOOD SPLITTER | 200.00 |
| 1 | HYDRAULIC DUMP MACHINERY TRAILER | 2,500.00 |
| 1 | 3PT HYDRAULIC CHERRY PICKER CRANE | 600.00 |
| 1 | 7" X 41' GRAIN AUGER W/5HP 3 PHASE MOTOR | 1,400.00 |
| 1 | 5" X 20' GRAIN AUGER W/MOTOR 1.5 HP, 100 VOLT | 150.00 |
| 1 | AUGER MOTOR 1HP, 110 VOLT | 75.00 |
| 1 | EDWARD'S TRACTOR MOUNT FORKLIFT #TF661140 | 300.00 |
| 1 | MOTOROLA BASE UNIT | 450.00 |
| 1 | MC MODEL 675 GRAIN DRYER | 8,000.00 |
| 1 | STAINLESS STEEL SPREADER UNIT, WALK BEHIND | 150.00 |
| 1 | DUAL FRONT LOADER | 1,200.00 |
| 1 | OLIVER 55 TRACTOR S.N. 22979-519 | 1,500.00 |
| 1 | 3PT BOX SCRAPER | 250.00 |
| 1 | CORRUGATION W/MARKERS | 250.00 |
| 1 | SCOOPMOBILE FRONT-END LOADER | 7,000.00 |
| 1 | HARLEY ROCK WINDROWER | 6,500.00 |
| 1 | MELROE SPRAY COUPE MODEL 220 SPRAYER 2206188-87 | 12,000.00 |
| 1 | TERRA-GATOR II FERTILIZER SPREADER #68381 UNIT 714 | 9,000.00 |
| 1 | PORTABLE SCALES | 3,815.00 |
| 1 | TERRA-GATOR II FERTILIZER SPREADER-PAUL IDAHO | 2,500.00 |

TOTAL FARM EQUIPMENT

\$113,330.00

OFFICE EQUIPMENT (MERIDIAN & RENO)

| | | |
|---|---|----------|
| 8 | STEEL DESKS @ 50.00 ea.(6 Meridian, 2 Reno) | 400.00 |
| 4 | 2-DRAWER FILE CABINET @ 55.00 ea. | 220.00 |
| 3 | 4-DRAWER FILE CABINET (2 Meridian, 1 Reno) | 240.00 |
| 1 | 4-DRAWER FIRE PROOF LEGAL SIZE FILE CABINET | 100.00 |
| 1 | CANON COPIER W/STAND | 700.00 |
| 2 | WOOD STORAGE CABINETS | 225.00 |
| 2 | OFFICE COMBINATION A/C & HEATING UNITS | 1,200.00 |
| 8 | PHONES & SWITCHING EQUIPMENT | 2,400.00 |
| 2 | DISPLAY TABLES @ 50.00 ea. | 100.00 |
| 3 | WALL MAPS, LAMINATED @30.00 ea. | 90.00 |
| 1 | WOOD BOOKCASE | 10.00 |
| 8 | CALCULATORS @30.00 ea. | 210.00 |
| 1 | 3 DRAWER FILE CABINET | 60.00 |
| 6 | SWIVEL CHAIRS @ 30.00 ea. | 180.00 |
| 1 | SECRETARY TABLE | 30.00 |
| 2 | WOODEN OCC. CHAIRS @ 10.00 ea. | 20.00 |
| 1 | VERSALINK FOR FAX HOOK UP | 250.00 |
| 2 | FAX MACHINES | 700.00 |
| 1 | EPSON PRINTER | 300.00 |
| 1 | HP INK JET LASER PRINTER | 300.00 |
| 1 | PANASONIC PRINTER | 100.00 |
| 1 | 5 DRAWER FRONT OPENING FILE CABINET | 200.00 |
| 2 | OFFICE DIVIDERS | 50.00 |
| | MISC. COMPUTER SOFTWARE | 800.00 |
| 1 | VACUUM CLEANER | 50.00 |
| 2 | COMPAQ 486 DESKTOP COMPUTER | 1,735.00 |
| 1 | SES 486-66 COMPUTER | 1,486.00 |
| 1 | XEROX 620 MEMORYWRITER TYPEWRITER | 290.00 |
| 1 | AIR CONDITIONER | 382.00 |
| 1 | TRADE SHOW DISPLAY EQUIPMENT | 800.00 |
| 3 | WOOD DESKS W/SIDE UNITS @ 200.00 ea. | 600.00 |
| 1 | METAL SIDE OPENING FILE CABINET | 200.00 |
| 1 | STORAGE CABINET 4 DRAWER, 4 DOOR | 300.00 |
| 3 | BROWN OFFICE CHAIRS | 75.00 |
| 1 | TIME CLOCK | 350.00 |
| 1 | SMALL REFRIGERATOR | 100.00 |
| 1 | MICROWAVE OVEN | 75.00 |
| 1 | PICNIC TABLE W/ BENCHES | 75.00 |
| 2 | SMALL WOODEN CABINETS (Break Room) | 60.00 |
| 3 | PLASTIC PORTABLE FILE CARRIERS | 70.00 |
| 2 | EASEL | 50.00 |
| | SCALES & SEED SALES BINS | 150.00 |

TOTAL OFFICE EQUIPMENT

\$15,733.00

SOD EQUIPMENT

| | | |
|---|--|-----------|
| 1 | PALLET TRAILER | 450.00 |
| 1 | 6' SOD ROLLER | 700.00 |
| 1 | FORD MODEL 4610 TRACTOR | 9,000.00 |
| 2 | 6' WATER FILLED ROLLER @250.00 ea | 500.00 |
| 1 | 1980 MF 245 DIESEL TRACTOR
W/MODEL 3A314896 SOD HARVESTER | 22,000.00 |
| 1 | JACOBSEN SELF PROPELLED
7 GANG MOWER #F10-1623 WH | 1,000.00 |
| 5 | SPYDER FORKLIFTS | 50,000.00 |
| 1 | FORKLIFT TRAILER | 500.00 |
| 1 | JACOBSEN SELF PROPELLED 7 GANG MOWER, RED | 3,000.00 |
| 1 | PRINCETON MODEL 130 SELF PROPELLED TURF CUTTER | 2,000.00 |
| 1 | ACE 100 GALLON SPRAYER W/BOOMS, 3 PT | 800.00 |
| 1 | HOME BUILT PIPE HAULING TRAILER | 500.00 |
| 1 | BRILLION TURF SEEDER MODEL SST-144-01, 12' WIDTH | 2,500.00 |
| 1 | INTERNATIONAL FLAIL MOWER #70 | 450.00 |
| 1 | MOTT VERTICAL CUT MOWER | 500.00 |
| 1 | HUSTLER ROTARY MOWER 72" WIDTH | 2,500.00 |
| 1 | TURF NET LAYING UNIT 17' WIDE | 1,200.00 |
| 1 | MASSEY FERGUSON 2-45 TRACTOR W/TURF TIRES | 6,300.00 |
| 1 | DYNA PAK LR 90 ROLLER | 7,500.00 |
| 3 | REEFER UNITS | 7,400.00 |
| 1 | 1980 MF 245 DIESEL TR. #9A304359 W/BROWER A3A HAR | 18,000.00 |
| 1 | WORTHINGTON ROTARY MOWER S.N. 233 | 2,000.00 |
| 1 | GREAT PLAINS OVERSEEDER, 72" WIDE #5421 | 4,000.00 |
| 2 | RADIO FOR HARVESTER #1 & 2 | 800.00 |
| 1 | JACOBSEN PTO POWERED 72" SWEEPER | 2,000.00 |
| 1 | GOLF CART W/CHARGER | 250.00 |
| 2 | PERKINS 4 CYLINDER DIESEL ENGINE FOR MOWER | 2,500.00 |
| 1 | SHOP MADE HYDROSTATIC ROTARY MOWER | 30,500.00 |
| 1 | JAW-TYPE ROCK CRUSHER | 1,500.00 |
| 1 | REVERSE TINE TILLER | 2,400.00 |
| 1 | NUNES MOWER ROTARY | 9,500.00 |
| 1 | BROWER 7 GANG PTO REEL MOWER | 5,000.00 |
| 1 | BROWER 5 GANG PTO REEL MOWER (MADE FROM PARTS) | 2,000.00 |
| 1 | HYSTER FORKLIFT PROPANE POWERED RENO | 2,800.00 |
| 1 | 1994 HONDA 4 X 2 FOURWHEELER MODEL 300 cc | 3,000.00 |
| 1 | 185 cc HONDA THREE WHEELER | 650.00 |
| 1 | 200 cc HONDA THREE WHEELER | 650.00 |
| 1 | HESTON STACKHAND | 4,000.00 |
| 1 | SPYDER FORKLIFT | |

TOTAL SOD EQUIPMENT

\$210,350.00

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VEHICLES

| | | |
|---|---|-----------|
| 1 | 1970 LUFKIN 40' FLATBED TRAILER | 2,500.00 |
| 1 | 1979 CHEVY LUV PICKUP #CLN14982613714, YELLOW | 700.00 |
| 1 | 1995 FORD 1/2 TON PICKUP #1FTDF1548SNB41845 RENO | 15,000.00 |
| 1 | 1995 FORD 1/2 TON PICKUP #1FTDF15Y1SNA79399 | 15,000.00 |
| 1 | 1984 GMC 2 1/2 TON TRUCK #1GDG7DIF2EY504852 | 9,345.00 |
| 1 | 1977 CHEVY LUV PICKUP, WHITE #CLN1468209761 | 400.00 |
| 1 | DODGE RAMPAGE #1B74W14E8CS239088 | 1,500.00 |
| 1 | 16' PULL TRAILER W/HARSH HOIST, SIDES
& ROLLOVER TARP # ID006244 | 5,000.00 |
| 1 | 15' GOLITE TRAVEL TRAILER S.N. 15110507BX | 1,000.00 |
| 1 | 1987 FORD RANGER PICKUP #1FTBR0A4HUB37671 | 2,000.00 |
| 1 | 1970 FORD 2 TON TRK. # C70EVJ63959 | 1,000.00 |
| 1 | 1982 V.W. PICKUP #1VIX8017XCV056716 | 1,800.00 |
| 1 | 1977 PETERBILT CABOVER #88544P | 14,500.00 |
| 1 | 1977 ALLOY 42' FLATBED #77190 | 6,500.00 |
| 1 | 1980 TRANSCRAFT TRAILER, 36' FLAT DECK #TC16238 | 4,000.00 |
| 1 | SHOP BUILT 2 AXLE SEMI DOLLY | 4,200.00 |
| 1 | 1990 PETERBILT CONVENTIONAL TRUCK #D2S93S0GL | 40,000.00 |
| 1 | SINGLE AXLE DOLLY | 1,200.00 |
| 2 | 26' SINGLE AXLE PULL UTILITY TRAILERS #689002, 689003 | 8,000.00 |
| 1 | 40' SEMI TRAILER TO BE MODIFIED #G69225-9031 | 1,000.00 |
| 1 | 1982 DODGE 1/2 TON 4-WD PICKUP #239088 | 3,000.00 |
| 1 | 1962 IH PICKUP FROM SALVAGE FIXED UP #SB294344A | 600.00 |
| 1 | 1973 IH 3 AXLE CONVENTIONAL TRACTOR #43747CYB15201 | 7,500.00 |
| 1 | 1977 TRAILMOBILE FLATBED TRAILER 42' #P50345 | 4,500.00 |
| 1 | 1967 BROWN FLATBED TRAILER 40' #S673610 | 2,500.00 |
| 1 | 1971 BROWN FLATBED TRAILER 36' #S715323 | 2,000.00 |
| 1 | LIGHTWEIGHT TRAILER TO CARRY HUSTLER MOWER | 250.00 |
| 1 | 1980 UTILITY REEFER TRAILER 42' | 3,000.00 |
| 1 | TRANSMISSION 15 SPEED SALV. WRECKED 77 IH | 1,000.00 |
| 1 | REAR-ENDS PLUS HOUSING SALV. WRECKED 77 IH | 2,000.00 |
| 1 | TRANSMISSION 10 SD. SALV. FROM 1984 WHITE TRUCK | 1,000.00 |
| 2 | REAR-END SALV. FROM 1984 WHITE TRUCK | 2,000.00 |
| 1 | 26' TANDEM AXLE FLAT BED DELIVERY TRAILER #55917 | 2,600.00 |
| 1 | 1984 VOLVO WHITE 3 AXLE TRACTOR #G3EUC68288 | 16,500.00 |
| 1 | 1988 VOLVO WHITE 3 AXLE TRACTOR CONVENTIONAL | 18,000.00 |
| 1 | 5TH WHEEL LIFTING HOIST CALLAHAN | 6,500.00 |
| 1 | 1977 MACK 3 AXLE TRACTOR #WL786LST34274 | 4,000.00 |

TOTAL VEHICLES

4

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SHOP EQUIPMENT

| | | |
|----|--|----------|
| 1 | AIR COMPRESSOR | 1,000.00 |
| 1 | JENNY STEAM CLEANER, PRESSURE WASHER | 1,200.00 |
| 1 | METAL CUTTING BANDSAW | 500.00 |
| 1 | OXY ACETYLENE WELDER & TANK | 300.00 |
| 1 | NEW LINCOLN AC-DC 250 W/ CARRIER | 1,000.00 |
| 1 | H.D. 1/2" DRILL | 100.00 |
| 1 | MILWAUKEE SAWZALL | 125.00 |
| 1 | DRILL PRESS, 15" FLOOR MODEL | 500.00 |
| 1 | FLOOR GRINDER | 100.00 |
| 1 | SHOP PRESS | 200.00 |
| 1 | PARTS WASHER | 200.00 |
| 1 | SHOP VACUUM | 150.00 |
| 2 | HAND GRINDER | 85.00 |
| 1 | GAS FURNACE | 250.00 |
| 1 | WELDING TABLE & VISE | 200.00 |
| 1 | METAL RACK | 100.00 |
| 1 | LINCOLN INDUSTRIAL WIRE FEED WELDER COMPLETE | 2,500.00 |
| 1 | FLOOR JACK STOW | 300.00 |
| 1 | AIR IMPACT. 1" | 200.00 |
| 2 | 4" GRINDER | 50.00 |
| 1 | FREQUENCY STABILIZER | 300.00 |
| 1 | TRANSMISSION JACK | 350.00 |
| 1 | 600# TORQUE WRENCH | 600.00 |
| 1 | HYDRAULIC HOSE PRESS | 400.00 |
| 1 | ENGINE STAND | 150.00 |
| 1 | CATERPILLAR ENGINE ADJUSTING TOOLS | 600.00 |
| 1 | PORTABLE WELDER | 930.00 |
| 1 | 2 TON FLOOR JACK | 100.00 |
| 1 | PALLET JACK | 250.00 |
| 1 | WASTE OIL BURNER | 750.00 |
| 2 | 250 GALLON WASTE OIL TANKS | 400.00 |
| 1 | SILVER EAGLE PRESSURE WASHER | 2,000.00 |
| 1 | AIR ARC | 200.00 |
| 2 | TOOL BOX AND TOOLS | 1,500.00 |
| 1 | BULK OIL TANKS | 600.00 |
| 1 | AIR GREASER | 100.00 |
| 4 | BULK OIL HAND PUMPS | 150.00 |
| | MISC. SHOP MANUALS | 400.00 |
| 1 | DRILL PRESS VISE | 100.00 |
| 1 | AIR CONDITIONER | 500.00 |
| 1 | SHOP FLOOR HEAVY DUTY GRINDER | 300.00 |
| 8 | BOTTLE JACKS | 350.00 |
| 1 | CHOP SAW | 200.00 |
| 10 | JACK STANDS | 300.00 |
| 1 | EXHAUST FAN | 800.00 |

TOTAL SHOP EQUIPMENT

\$21,350.00

IRRIGATION EQUIPMENT

TCM-BURNETT-HOME FARM-ALBRETHSEN: WHEEL LINES

| | | |
|-------|---------------------------------------|-----------------|
| 1240' | 7' WHEEL LINE COMPLETE TELESCOPE | \$ 3,600.00 |
| 1260' | 7' WHEEL LINE COMPLETE TELESCOPE | 3,600.00 |
| 1040' | 6' WHEEL LINE COMPLETE TELESCOPE | 3,600.00 |
| 1080' | 6' WHEEL LINE COMPLETE TELESCOPE | 3,200.00 |
| 1080' | 6' WHEEL LINE COMPLETE TELESCOPE | 3,200.00 |
| 1240' | 6' WHEEL LINE COMPLETE TELESCOPE | 3,600.00 |
| 920' | 6' WHEEL LINE COMPLETE TELESCOPE | 2,700.00 |
| 1220' | 6' WHEEL LINE COMPLETE TELESCOPIC | 3,500.00 |
| 1080' | 6' WHEEL LINE COMPLETE TELESCOPIC | 3,200.00 |
| 720' | 6' WHEEL LINE COMPLETE HOSE CONNECTOR | 2,000.00 |
| 760' | 6' WHEEL LINE COMPLETE HOSE CONNECTOR | <u>2,100.00</u> |
| | | \$34,300.00 |

HOME FARM: HAND LINES

| | | |
|-----|-------------------------------------|--------------|
| 1-3 | 3X40' H & L CENTER RISER | 6,149.00 |
| 3 | 3X20' H & L END RISER | 85.00 |
| 1 | 8" RL END PLUG | 27.00 |
| 4 | 6" RL END PLUGS | 40.00 |
| 4 | 4" H&L END PLUGS | 24.00 |
| 5 | 3" H&L END PLUGS | 38.00 |
| 8 | 4X3 UNIVERSAL VALVE OPENER | 520.00 |
| 6 | 4X3 RAIN FOR RENT VALVE OPENERS | 150.00 |
| 2 | 4X3X3 UNIVERSAL VALVE OPENERS | 60.00 |
| 1 | 4X3X3 UNIVERSAL VALVE OPENERS | 30.00 |
| 6 | 4" FLUSHING END PLUGS (WHEEL LINES) | <u>90.00</u> |
| | | \$7,213.00 |

TCM-BURNETT-HOME FARM-STIRLING-ALBRETHSEN: MAINLINE

| | | |
|-------|-----------------------|----------|
| 350' | 8X50 MAINLINE RL W/V | 998.00 |
| 960' | 8X40 MAINLINE RL W/V | 2,736.00 |
| 560' | 8X40 MAINLINE RL W/OV | 1,596.00 |
| 280' | 8X20 MAINLINE W/V | 798.00 |
| 150' | 8X30 MAINLINE W/OV | 428.00 |
| 90' | 8X30 ANGLED MAINLINE | 256.00 |
| 15' | 8X15 MAINLINE RL | 43.00 |
| 10 T. | 8X10 MAINLINE RL | 29.00 |
| 1800' | 6X50 MAINLINE RL | 4,230.00 |
| 300' | 6X50 MAINLINE H & L | 705.00 |
| 500' | 6X50 MAINLINE RL | 1,175.00 |
| 280' | 6X20 MAINLINE RL | 658.00 |
| 150' | 4X50 MAINLINE RL | 172.00 |
| 250' | 4X50 MAINLINE H&L | 238.00 |
| 10' | 4X10 MAINLINE H&L | 12.00 |
| 5' | 4X5 MAINLINE H&L | 6.00 |

TCM-BURNETT-HOME FARM-STIRLING-ALBRETHSEN: MAIN LINE(CONT)

| | | |
|-------|----------------------------|-----------------|
| 660' | 5X30 MAINLINE W/OV | 825.00 |
| 300' | 6X10 MAINLINE RINGLOCK W/V | 1,800.00 |
| 1000' | 8" PVC BURIED ON MCKAY H-2 | <u>3,000.00</u> |
| | | \$ 19,755.00 |

SIPHON TUBE INVENTORY

| | | |
|-----|---------------------|--------------|
| 100 | 3/4" SIPHON TUBE | 100.00 |
| 400 | 1" SIPHON TUBE | 400.00 |
| 83 | 1 1/4" SIPHON TUBE | 83.00 |
| 3 | 1 1/2" SIPHON TUBE | 3.00 |
| 7 | 2" SIPHON TUBE | 7.00 |
| 5 | 3" SIPHON TUBE | 5.00 |
| 6 | CONCRETE DITCH TINS | <u>30.00</u> |
| | | \$628.00 |

GATED PIPE INVENTORY

| | | |
|-----|-------------------------------------|--------------|
| 270 | 10x30 - 30" SPACING @ 2.50 | 675.00 |
| 810 | 8x30 - 30" SPACING - PLASTIC @ 1.50 | 1,215.00 |
| 300 | 6x30 - 30" SPACING @ 1.65 | 495.00 |
| 390 | 8x30 - 30" SPACING - ALUM. @ 2.05 | 799.00 |
| 1 | 10" - 90 DEGREE ELBOW | 40.00 |
| 1 | 8" END PLUG | 17.00 |
| 2 | 6" END PLUG | 16.00 |
| 3 | 8" 90 DEGREE ELBOWS | 90.00 |
| 1 | 6" 90 DEGREE ELBOW | 20.00 |
| 1 | 8" TEE | <u>45.00</u> |
| | | \$3,412.00 |

FARM PUMPS

| | | |
|-------|--|---------------|
| 20 HP | SUBMERSIBLE PUMP-PANEL-TIMER-HOOK-UP | 3,000.00 |
| 15 HP | CENTRIFUGAL PUMP-PANEL-TIMER-HOOK-UP | 1,000.00 |
| 30 HP | SUBMERSIBLE PUMP-PANEL-TIMER-HOOK-UP | 3,500.00 |
| 30 HP | CENTRIFUGAL PUMP-PANEL-TIMER-HOOK-UP | 2,000.00 |
| 25 HP | MOTOR SHAFT-TURBINE PUMP MOTOR & SHAFT | 1,000.00 |
| 15 HP | CORNELL CENTRIFUGAL PUMP-PANEL-SUCTION | 680.00 |
| 25 HP | SUBMERSIBLE PUMP-PANEL-TIMER | 3,500.00 |
| 25 HP | SUBMERSIBLE PUMP-PANEL-TIMER | 3,500.00 |
| 25 HP | SUBMERSIBLE PUMP-PANEL-PLACED BY | |
| | BOISE RANCH GOLF | 4,500.00 |
| 1 | 3 PHASE RECTIFIER 25-60 HP | 3,000.00 |
| 1 | HONDA INJECTION PUMP 5.5 HP | 750.00 |
| 1 | BUBBLE SCREEN | <u>750.00</u> |
| | | \$27,180.00 |

HOME FARM: MES PARTS

| | | |
|----|-------------------------|-----------------|
| 1 | 6" RL END TEE | 45.00 |
| 1 | 6" RL 45 DEGREE ELBOW | 28.00 |
| 1 | 6" H&L 90 DEGREE ELBOW | 28.00 |
| 1 | 6" H&L 45 DEGREE ELBOW | 28.00 |
| 1 | 5" H&L 90 DEGREE ELBOW | 20.00 |
| 3 | 4" H&L 90 DEGREE ELBOWS | 54.00 |
| 3 | 8x6 RL X RL ADAPTERS | 90.00 |
| 2 | 6x6 RL X H&L ADAPTERS | 40.00 |
| 1 | 6x5 RL X H&L ADAPTERS | 25.00 |
| 1 | 6x4 RL X RL ADAPTERS | 28.00 |
| 1 | 6x4 RL X H&L ADAPTERS | 28.00 |
| 4 | 3" H&L END TEES | 104.00 |
| 3 | 3" H&L LINE TEES | 78.00 |
| 2 | 6" BUTTERFLY VALVES | 90.00 |
| 1 | 6" CAST IRON GATE VALVE | 70.00 |
| 3 | 6" Y TEES | 45.00 |
| 1 | 6x8 RL X RL ADAPTER | 25.00 |
| 1 | 6" CHECK VALVE | 65.00 |
| 1 | 8x8 RL X RL ADAPTERS | 20.00 |
| 24 | 6" HALF WHEELS | 360.00 |
| 1 | 8" BUTTERFLY VALVE | 100.00 |
| 2 | 2" GATE VALVES | 20.00 |
| 1 | 3" GATE VALVE | 15.00 |
| 1 | 4" GATE VALVE | 20.00 |
| 4 | 10' 3" FLEX HOSE | 80.00 |
| 1 | CLEMONS SAND SEPARATOR | <u>1,500.00</u> |
| | | \$ 3,006.00 |

HOME FARM: SOLID SET EQUIPMENT

| | | |
|-----|-----------------------------|---------------|
| 872 | 3 X 40 END RISER WARRENTON | 34,008.00 |
| 400 | 3x40 H&L END RISER | 16,000.00 |
| 320 | 3x40 DL END RISER | 12,000.00 |
| 10 | 3x20 DL END RISER | 284.00 |
| 13 | 3" DL END PLUGS | 98.00 |
| 13 | 3" H&L END PLUGS | 97.00 |
| 25 | 4x3 UNIVERSAL VALVE OPENERS | <u>800.00</u> |
| | | \$62,387.00 |

HOME FARM: MAINLINE (ALL FIELDS)

| | | |
|------|-----------------------|----------|
| 650 | 8x50 RL MAINLINE W/V | 1,853.00 |
| 50 | 8x50 RL MAINLINE W/OV | 143.00 |
| 60 | 8x30 RL MAINLINE W/OV | 171.00 |
| 15 | 8x15 RL MAINLINE W/OV | 43.00 |
| 400 | 6x30 RL MAINLINE W/V | 940.00 |
| 480 | 6x40 RL MAINLINE W/V | 1,128.00 |
| 560 | 6x40 RL MAINLINE W/OV | 1,316.00 |
| 1440 | 6x30 H&L CARRIER LINE | 3,384.00 |
| 390 | 6x30 RL MAINLINE W/OV | 916.00 |

HOME FARM: MAIN (ALL FIELDS) (CONT)

| | | |
|------|-----------------------|--------------|
| 1500 | 4x50 RL MAINLINE W/V | 1,950.00 |
| 30 | 4x30 RL MAINLINE W/V | 39.00 |
| 40 | 4x20 RL MAINLINE W/V | 52.00 |
| 10 | 4x10 RL MAINLINE W/OV | 13.00 |
| 100 | 6x10 RL MAINLINE W/V | 235.00 |
| 20 | 6x20 RL MAINLINE W/V | <u>47.00</u> |
| | | \$12,230.00 |

CALDWELL FARM (ALL FIELDS)

| | | |
|-----|--------------------------------|--------------|
| 160 | 3x40 H&L CENTER RISERS @ 43.00 | 6,880.00 |
| 65 | 3x40 H&L END RISERS | 3,250.00 |
| 90 | 3x40 DL END RISERS | 3,375.00 |
| 8 | 3x20 H&L END RISERS | 227.00 |
| 1 | 3x20 DL END RISER | <u>28.00</u> |
| | | \$13,760.00 |

| | | |
|----|------------------|--------------|
| 1 | 6" END PLUG | 10.00 |
| 3 | 4" RL END PLUGS | 24.00 |
| 20 | 3" H&L END PLUGS | 150.00 |
| 3 | 3" DL END PLUGS | <u>22.00</u> |
| | | \$206.00 |

| | | |
|----|-----------------------------|--------------|
| 15 | 4x3 UNIVERSAL VALVE OPENERS | 412.00 |
| 2 | 4x4 UNIVERSAL VALVE OPENERS | <u>60.00</u> |
| | | \$472.00 |

CALDWELL FARM: MISC PARTS

| | | |
|---|-----------------------------|--------------|
| 1 | 6x4 RL REDUCER | 40.00 |
| 1 | 4" 45 DEGREE ELBOW | 40.00 |
| 1 | 6" RL 90 DEGREE ELBOW | 30.00 |
| 1 | 6" H&L TEE | 45.00 |
| 4 | 8" RL 90 DEGREE ELBOWS | 160.00 |
| 4 | 4x20 FLEX HOSE | 240.00 |
| 2 | 6' COMPLETE WHEELS | 60.00 |
| 1 | 4x20 WHEELLINE TUBE & WHEEL | 60.00 |
| 2 | 3" H&L 30 DEGREE ELBOWS | 20.00 |
| 2 | 6" RL 45 DEGREE ELBOWS | 55.00 |
| 1 | 6x5 RL ADAPTER | 25.00 |
| 1 | 5x4 RL ADAPTER | 28.00 |
| 2 | 4" RL 90 DEGREE ELBOWS | 36.00 |
| 1 | 4x40 TORQUE TUBE | 60.00 |
| 1 | 4" H&L TEE | 20.00 |
| 2 | 6" BUTTERFLY VALVES | <u>90.00</u> |
| | | \$1,009.00 |

IRRIGATION GRAND TOTAL \$185,558.00

BUILDINGS

| | | |
|-----------------|--|-------------|
| 1 | YORK STEEL BUILDING, INSULATED, PAINTED W/OFFICE AREA, RESTROOM. LIGHTED AND WIRED FOR 3 PHASE, 2000 SQ. FT. | 25,000.00 |
| 1 | SHOP OVERHEAD DOOR | 3,800.00 |
| 1 | MIRACLE SPAN LUMBER & STEEL BUILDING, INSULATED, PAINTED WITH OFFICE AREA, LIGHTED & WIRED FOR 3 PHASE. 2400 SQ. FT. | 30,600.00 |
| 5 | ROOMS FINISHED & WIRED @ \$4000.00 ea. | 20,000.00 |
| TOTAL BUILDINGS | | \$79,400.00 |

SCHEDULE "A"

Separate Property of Prospective Husband

ASSETS

Lease Purchase Equipment 1996

| | <u>Value</u> | <u>Total Lease Payout</u> |
|---|--------------|---------------------------|
| 1 - 1990 Kenworth Day Cab Tractor
SN _____ | 22,000.00 | 29,260.00 |
| 1 - 1990 Kenworth Day Cab Tractor
SN _____ | 22,000.00 | 29,260.00 |
| 1 - 1994 Turf Vacuum | 8,000.00 | 10,640.00 |
| 1 Northwest Rototiller | 8,000.00 | 10,640.00 |
| 1 Gasboy Fuel Management System | 8,200.00 | 10,906.00 |
| 4 Western Irrigation Wheel Lines | 15,600.00 | 20,748.00 |
| 1 - 1986 Volvo White Truck | 16,000.00 | 21,280.00 |
| 1 - 1984 Volvo White Truck | 12,000.00 | 15,960.00 |
| 3 Utility Flatbed Trailers 27 ft. | 10,500.00 | 13,965.00 |
| 1 Spyder Forklift | 12,000.00 | 15,960.00 |
| 1 Care Field Forklift | 14,000.00 | 18,620.00 |
| 2 Spyder Forklifts | 15,000.00 | 19,950.00 |
| 1 Komatsu Yard Forklift | 4,000.00 | 5,320.00 |
| 1 - 1989 John Deere Tractor
Model 2350 w/Loader | 14,750.00 | 19,617.00 |
| 2 New Spyder Forklifts | 54,000.00 | 71,820.00 |
| 1 Ford F150 Pickup, Ford Motor Lease
Nominal Value (subject to fair market buyout
at end of term) | | |

Farm Land Owned or Under Contract

| | |
|---|------------|
| 40 Acres SW1/4 of SW1/4, T3N, R1E, B.M.,
known as Home Farm | 240,000.00 |
| 40 acres SW1/4 of SE1/4, T3N, R1E, B.M.,
known as Hiatt Farm | 240,000.00 |

SCHEDULE "A" - (CONTINUED)

LIABILITIES

| | |
|------------------------------------|------------|
| Ford Motor Credit - Ford Tractor | 4,146.00 |
| Associates - Walking Floor Flatbed | 8,400.00 |
| M&I Leasing - Various Farm Items | 2,200.00 |
| Key Bank Capitol Note | 75,000.00 |
| Key Bank Term Note | 325,000.00 |
| Washington Federal - Donna's House | 140,000.00 |
| TCM Joint Venture | 4,867.00 |
| Charles Hiatt - Hiatt Farm | 95,000.00 |
| D. J. McKay | 100,000.00 |
| Key Bank Farm Operating Line | 285,000.00 |

SCHEDULE "B"

Separate Property of Prospective Wife

ASSETS

| | |
|--|--------------|
| Home at 733 North 14th | \$150,000.00 |
| 1991 Ford Explorer | 15,000.00 |
| Dining - Oak Dining buffet and tables | 5,000.00 |
| Dining (6) chairs | 1,000.00 |
| Lenox china set/8 | 5,000.00 |
| Crystal & Sterling silver | 5,000.00 |
| Stereo and TV | 1,500.00 |
| Bedroom set | 1,000.00 |
| Antique furniture | 5,000.00 |
| All items in home at 733 N. 14th (below) | 10,000.00 |
| 3 bedroom sets, microwave, washer,
dryer, freezer, refrigerator | |
| Mink coat | 5,000.00 |
| Round brilliant cut diamond necklace | 5,000.00 |
| Pearl necklace | 1,000.00 |
| Diamond ring | 5,000.00 |
| Wedding ring/band set | 7,000.00 |
| Misc. garage items | 1,000.00 |
| IRA-Dean Witter | 30,000.00 |
| Two computer setups | 2,500.00 |
| Keogh plan via Harmon Travel | 2,000.00 |

LIABILITIES

| | |
|----------------------|-----------|
| 733 N. 14th mortgage | 90,000.00 |
| First Security loan | 6,000.00 |

SCHEDULE "C"

Community Property

ASSETS

| | |
|----------------------------------|------------|
| 76 Horizon Drive
Boise, Idaho | 209,000.00 |
|----------------------------------|------------|

LIABILITIES

| | |
|--|------------|
| Loan secured by Deed of Trust
on 76 Horizon Drive
Boise, Idaho | 167,000.00 |
|--|------------|



LandAmerica
Transnation

ADA COUNTY REC'D J. DAVID NAVARRO
BOISE IDAHO 11/30/06 10:02 AM
DEPUTY Vicki Allen
RECORDED - REQUEST OF
Transnation Title

AMOUNT 9.00 3



Escrow No. 0600042290 CMH

WARRANTY DEED

FOR VALUE RECEIVED

L. DARWIN MCKAY, a married man as his sole and separate property

GRANTOR(s), does(do) hereby GRANT, BARGAIN, SELL AND CONVEY unto: STATUS CORPORATION OF IDAHO, an Idaho Corporation

GRANTEES(s), whose current address is: 4301 E Garrity Blvd #102, Nampa ID 83687
the following described real property in Ada County, State of Idaho,
more particularly described as follows, to wit:
SEE EXHIBIT "A" ATTACHED

| | |
|-----------------------|---------|
| Exh. No. | 39 |
| Date | 1-17-15 |
| Name | Smith |
| M & M Court Reporting | |

TO HAVE AND TO HOLD the said premises, with their appurtenances unto the said heirs and assigns forever. And the said Grantor(s) does(do) hereby covenant to and with the said Grantee(s), that Grantor(s) is/are the owner(s) in fee simple of said premises; that said premises are free from all encumbrances EXCEPT those to which this conveyance is expressly made subject and those made, suffered or done by the Grantee(s); and subject to reservations, restrictions, dedications, easements, rights of way and agreements, (if any) of record, and general taxes and assessments, (including irrigation and utility assessments, if any) for the current year, which are not yet due and payable, and that Grantor(s) will warrant and defend the same from all lawful claims whatsoever.

Date: May 5, 2006

L. Darwin McKay
L. Darwin McKay

Patricia McKay
Patricia McKay joins in this conveyance for the purpose of complying with I.C.S 32-912 and to release and quitclaim to Grantee any interest she now has or hereafter acquires in the above referenced property.

Notary Acknowledgment - see page 2

000763

H 4682

WARRANTY DEED - NOTARY ACKNOWLEDGMENT(S):

State of Idaho, County of Ada, ss.

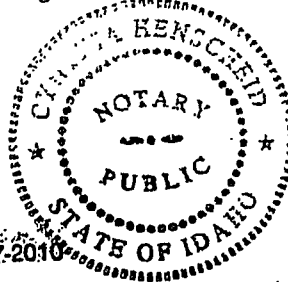
On this 28 day of November in the year of 2006, before me, the undersigned, a Notary Public in and for said State, personally appeared L. Darwin McKay known or identified to me to be the person(s) whose name(s) is/are subscribed to the within instrument, and acknowledged to me that he/she/they executed the same.

[Signature]
Notary Public

Residing at: Boise, Idaho

My commission expires: 10/07/2010

Residing in: Boise, Idaho
Commission expires: 10-07-2010



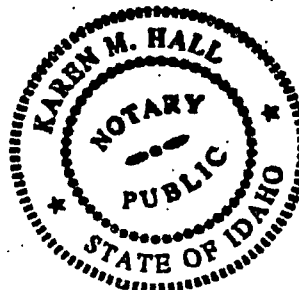
State of Idaho, County of ADA, ss.

On this 25th day of May in the year of 2006, before me, the undersigned, a Notary Public in and for said State, personally appeared Patricia McKay known or identified to me to be the person(s) whose name(s) is/are subscribed to the within instrument, and acknowledged to me that he/she/they executed the same.

[Signature]
Notary Public

Residing at: Boise, Idaho

My commission expires: 6/3/2012



LEGAL DESCRIPTION (continued)

EXHIBIT "A"

A parcel of land being a portion of the South half of the Southwest quarter of Section 33, Township 3 North, Range 1 East, Boise Meridian, Ada County, Idaho, more particularly described as follows:

Commencing at the Southwest corner of Section 33, Township 3 North, Range 1 East, Boise Meridian; thence
North $89^{\circ}42'48''$ East, 1,669.75 feet along the South line of the South half of the Southwest quarter of said Section 33 to a point on the approximate centerline of Ten Mile Creek; the REAL POINT OF BEGINNING of this description;
along said approximate centerline as follows: thence
North $12^{\circ}08'30''$ West, 389.70 feet to a point; thence
North $45^{\circ}13'00''$ West, 744.00 feet to a point; thence
North $08^{\circ}58'00''$ West, 431.53 feet to a point on the North line of the South half of said Southwest quarter; thence
leaving said approximate centerline
North $89^{\circ}54'26''$ East, 1,661.37 feet along said North line to the Northeast corner of said South half (CS 1/16 corner); thence
South $00^{\circ}05'31''$ West, 1,329.12 feet to the Southeast corner of said South half (South quarter corner); thence
South $89^{\circ}42'48''$ West, 981.95 feet along the South line of said South half to the REAL POINT OF BEGINNING of this description.

ALLEN B. ELLIS
 ELLIS, BROWN & SHEILS, CHARTERED
 Attorneys-at-Law
 707 North 8th Street
 P.O. Box 388
 Boise, Idaho 83701-0388
 (208) 345-7832 (Telephone)
 (208) 345-9564 (Facsimile)
 ISB No. 1626

Attorneys for Plaintiff

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE
 STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

| | | |
|---------------------------------------|---|------------------------|
| Patricia McKay |) | |
| |) | Case No. CV OC 0922659 |
| Plaintiff, |) | |
| |) | PLAINTIFF'S EXPERT |
| v. |) | WITNESS DISCLOSURE |
| |) | |
| Thomas G. Walker and Cosho Humphrey, |) | |
| LLP, a limited liability partnership, |) | |
| |) | |
| Defendants. |) | |

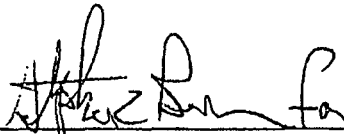
Comes now the plaintiff, through its attorney of record, and in compliance with Stipulation for Scheduling and Planning submits the following information with respect to its expert witness.

1. Expert: Bryan D. Smith, Smith Discoll, 414 Shoup Ave, Idaho Falls, ID 83405, (208)524-0731.
2. Opinion: See Exhibit 1.
3. Publications: none.
4. Compensation: \$185/hour.
5. Expert witness history: none.

PLAINTIFF'S EXPERT WITNESS DISCLOSURE - 1

| | |
|-----------------------|------------------|
| Exh. No. | 40 |
| Date | |
| Name | 1-17-13
Smith |
| M & M Court Reporting | |

DATED This 7th day of December, 2010.



Allen B. Ellis
Attorney for plaintiff

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 7th day of December, 2010, I caused to be served a true and correct copy of the foregoing by the method indicated below, and addressed to the following:

Robert A. Anderson
Yvonne A. Dunbar
ANDERSON, JULIAN & HULL, LLP
250 South Fifth Street, Suite 700
P.O. Box 7426
Boise, Idaho 83707

____ U.S. Mail
____ Hand Delivery
____ Overnight Mail
 X Facsimile at
344-5510



Allen B. Ellis

Dear Mr. Ellis:

You have asked that I review the *McKay v. Walker* matter and render an opinion whether the conduct of attorney, Thomas G. Walker, fell below the standard of care in putting third parties on notice that Patricia McKay had an interest by virtue of a settlement agreement in a certain mortgage held in the name of Darwin McKay.

DOCUMENTS REVIEWED

I have reviewed relevant portions of the following documents:

1. Draft complaint;
2. October 28, 2009 letter from Allen B. Ellis to Thomas G. Walker;
3. November 2, 2009 letter from Thomas G. Walker to Allen B. Ellis;
4. November 4, 2009 letter from Allen B. Ellis to Thomas G. Walker;
5. November 5, 2009 letter from Thomas G. Walker to Allen B. Ellis;
6. November 5, 2009 email from Allen B. Ellis to Thomas G. Walker;
7. November 5, 2009 letter from Thomas G. Walker to Allen B. Ellis;
8. November 17, 2009 letter from Allen B. Ellis to Bryan D. Smith;
9. November 29, 2007 Judgment and Decree of Divorce with attached 10. Property Settlement Agreement; and
10. July 1, 1996 Pre-Nuptial Agreement.

FACTUAL BACKGROUND

From my review of the above-documents, I understand that while Mr. and Mrs. McKay were married, but before they were divorced, Mr. McKay acquired real property that he immediately sold for a profit of about \$2 million. This property is known as the "Albrethsen Property." The closing on the "Albrethsen Property" was scheduled for March 30, 2008—about four months after the court entered the Judgment and Decree of Divorce with an attached Property Settlement Agreement (PSA) on November 29, 2007. The PSA contemplates that Mr. McKay would pay \$800,000 of the proceeds from the Albrethsen Property sale to Mrs. McKay. The PSA further contemplates that Mr. McKay would use proceeds from the Albrethsen Property sale to pay off in full the mortgage on Mrs. McKay's personal residence. The PSA was recorded in the county where the Albrethsen Property was located.

As it turned out, Mr. McKay discovered that a mortgage he held was not in first position; accordingly, the title company paid him at least \$1,288,091.10. However, Mr. McKay did not pay Mrs. McKay the \$800,000 from the proceeds as contemplated in the PSA nor did he use any of the proceeds to pay the balance of Mrs. McKay's personal residence in the amount of \$488,019.10. And the title company paying Mr. McKay apparently did not take any steps to pay Mrs. McKay although Mr. Walker informed Mrs. McKay that the Judgment and Decree of Divorce, including the attached PSA, would be a lien in each county in which it was recorded on real property that she thought Mr. McKay owned.

ANALYSIS

These facts raise the question of whether Mrs. McKay's lawyer, Thomas G. Walker, bears any responsibility for Mrs. McKay's failing to receive the \$1,288,091.10 as the PSA contemplates. Specifically, did Mr. Walker's conduct in the way he prepared the PSA or in advising Mrs. McKay in connection with the PSA fall below the standard of care resulting in damages to Mrs. McKay?

Mr. Walker should have been concerned that Mr. McKay would receive payment on the sale of the Albrethsen Property closing and not pay Mrs. McKay as the PSA contemplated. Accordingly, Mr. Walker owed Mrs. McKay a duty of care to structure the PSA in a way so that Mrs. McKay would receive her share of the proceeds from the Albrethsen Property sale. In my opinion, Mr. Walker's conduct fell below the standard of care for an attorney who has undertaken this duty. To protect Mrs. McKay, Mr. Walker should have done the following in the PSA:

1. Provided a legal description of the Albrethsen Property in the PSA;
2. Provided an explanation that the Albrethsen Property was subject to a closing scheduled for March 30, 2008 and that Mr. McKay would pay Mrs. McKay \$800,000 from the proceeds he received on this sale; and
3. Included an explanation that Mr. McKay further would pay Mrs. McKay from the proceeds he received on the sale in an amount to pay in full the balance of Mrs. McKay's mortgage on her personal residence.

In my opinion, the standard of care required that Mr. Walker should have done these things. As additional protection, he should have considered the following:

1. Identifying in the PSA the then existing balance and further identified where notice could be sent to obtain the balance owed on that mortgage;
2. Identifying in the PSA Mr. McKay's mortgage and referenced Mr. McKay's recorded mortgage on the Albrethsen Property by the county document identification number on the recorded mortgage;
3. Following the procedures set forth in Idaho Code Section 32-918 and summarizing Mrs. McKay's interest thus making it even easier for a third party to take notice of Mrs. McKay's interest; and
4. Sending the closing agent on the Albrethsen Property the relevant documents informing the closing agent of Mrs. McKay's interest in the sale provided Mr. Walker knew the name of the closing agent.

Mr. Walker claims that Mr. McKay would not agree to give Mrs. McKay a collateral security interest in any specific asset. However, structuring the PSA within the standard of care as identified above would not have given Mrs. McKay a "collateral security interest" in any specific asset. To the contrary, she would have received a perfected involuntary judgment lien on the \$1,288,091.10 that Mr. McKay subsequently received. If Mr. McKay had rejected Mr. Walker's structuring the PSA within the standard of care as identified above, then Mr. Walker should have informed Mrs. McKay that without structuring the PSA as he proposed Mrs. McKay would not be protected and therefore may not be paid when Mr. McKay received payment on the Albrethsen Property sale.

Importantly, structuring the PSA within the standard of care would have put third parties on notice of Mrs. McKay's interest in the proceeds and would have specifically put Lawyer's Title on notice of Mrs. McKay's interest. As is, the recorded PSA does not provide enough information to put a third party on notice of Mrs. McKay's interest. There is no legal description of the Albrethsen Property in the recorded PSA, and there is nothing in the recorded PSA that connects Mrs. McKay's right to be paid \$800,000 and payment in full on her personal residence from any proceeds paid Mr. McKay from the Albrethsen Property sale as the parties contemplated.

Finally, Mr. Walker appears to claim that the PSA technically put a lien in each county where the PSA was recorded. However, whether or not the PSA technically placed such a lien is really not the issue. The issue is whether the PSA provided notice that Mrs. McKay was claiming an interest in the Albrethsen Property sale proceeds. Here, the title company did not pay Mrs. McKay the proceeds because it did not have notice of her interest. It is reasonable to expect that Mrs. McKay hired Mr. Walker to prepare the paperwork so that she would get paid.

QUALIFICATIONS

I obtained a Juris Doctorate degree from the McGeorge School of Law, at the University of Pacific, in 1989 and have been actively practicing law since then. I am licensed to practice law in the Courts of Idaho, the United States District Court for the District of Idaho, and the United States Court of Appeals for the Ninth Circuit. I have also been licensed to practice law in the Courts of Idaho and the United States Eastern District of California. A substantial portion of my practice has been devoted to civil litigation and I have represented both husbands and wives in numerous divorce cases. I charge \$185 per hour for my services as an expert, which is the same rate that I generally charge in my practice. I have not been an expert before.

Sincerely,

Bryan D. Smith

ALLEN B. ELLIS
ELLIS, BROWN & SHEILS, CHARTERED
Attorneys-at-Law
707 North 8th Street
P.O. Box 388
Boise, Idaho 83701-0388
(208) 345-7832 (Telephone)
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ISB No. 1626

KEVIN E. DINIUS
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5680 E. Franklin Road, Ste 130
Nampa, Idaho 83687
(208) 475-0100 (Telephone)
(208) 475-0101

Attorneys for Plaintiff

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

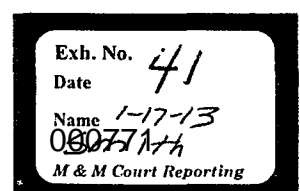
| | | |
|---------------------------------------|---|-----------------------------|
| Patricia McKay |) | |
| |) | Case No. CV OC 0922659 |
| Plaintiff, |) | |
| |) | AFFIDAVIT OF BRYAN D. SMITH |
| v. |) | |
| |) | |
| Thomas G. Walker and Cosho Humphrey, |) | |
| LLP, a limited liability partnership, |) | |
| |) | |
| Defendants. |) | |
| |) | |

STATE OF IDAHO)
)ss.
County of Ada)

I, Bryan D. Smith, being first duly sworn, depose and state as follows:

1. I make this affidavit upon my own personal knowledge and am competent to

AFFIDAVIT OF BRYAN D. SMITH - 1



testify to the matters set forth herein. I hold the opinions set forth herein with a reasonable degree of legal certainty.

2. Qualifications: I obtained a Juris Doctorate degree from the McGeorge School of Law, at the University of Pacific, in 1989 and have been actively practicing law since then. I am licensed to practice law in the Courts of Idaho, the United States District Court for the District of Idaho, and the United States Court of Appeals for the Ninth Circuit. I have also been licensed to practice law in the Courts of Idaho and the United States Eastern District of California. A substantial portion of my practice has been devoted to civil litigation and I have represented both husbands and wives in numerous divorce cases. I charge \$185 per hour for my services as an expert, which is the same rate that I generally charge in my practice. I have not been an expert before.

3. Documents reviewed:

- a. Draft complaint;
- b. October 28, 2009 letter from Allen B. Ellis to Thomas G. Walker;
- c. November 2, 2009 letter from Thomas G. Walker to Allen B. Ellis;
- d. November 4, 2009 letter from Allen B. Ellis to Thomas G. Walker;
- e. November 5, 2009 letter from Thomas G. Walker to Allen B. Ellis;
- f. November 5, 2009 email from Allen B. Ellis to Thomas G. Walker;
- g. November 5, 2009 letter from Thomas G. Walker to Allen B. Ellis;
- h. November 17, 2009 letter from Allen B. Ellis to Bryan D. Smith;
- I. November 29, 2007 Judgment and Decree of Divorce with attached
- j. Property Settlement Agreement; and
- k. July 1, 1996 Pre-Nuptial Agreement.
- l. December 15, 2008, letter from Mr. Walker to plaintiff.

4. Factual background: From my review of the above-documents, I understand that while Mr. and Mrs. McKay were married, but before they were divorced, Mr. McKay acquired real property that he immediately sold for a profit of about \$2 million. This property is known as the "Albrethsen Property." The closing on the "Albrethsen Property" was scheduled for March 30, 2008—about four months after the court entered the Judgment and Decree of Divorce with an attached Property Settlement Agreement (PSA) on November 29, 2007. The PSA contemplates that Mr. McKay would pay \$800,000 of the proceeds from the Albrethsen Property sale to Mrs. McKay. The PSA further contemplates that Mr. McKay would use proceeds from the Albrethsen Property sale to pay off in full the mortgage on Mrs. McKay's personal residence. The PSA was recorded in the county where the Albrethsen Property was located.

As it turned out, Mr. McKay discovered that a mortgage he held was not in first position; accordingly, the title company paid him at least \$1,288,091.10. However, Mr. McKay did not pay Mrs. McKay the \$800,000 from the proceeds as contemplated in the PSA nor did he use any of the proceeds to pay the balance of Mrs. McKay's personal residence in the amount of \$488,019.10. And the title company paying Mr. McKay apparently did not take any steps to pay Mrs. McKay although Mr. Walker informed Mrs. McKay that the Judgment and Decree of Divorce, including the attached PSA, would be a lien in each county in which it was recorded on real property that she thought Mr. McKay owned.

5. Issue presented: These facts raise the question of whether Mrs. McKay's lawyer, Thomas G. Walker, bears any responsibility for Mrs. McKay's failing to receive the \$1,288,091.10 as the PSA contemplates. Specifically, did Mr. Walker's conduct in the way he prepared the PSA or in advising Mrs. McKay in connection with the PSA fall below the standard of care resulting in damages to Mrs. McKay?

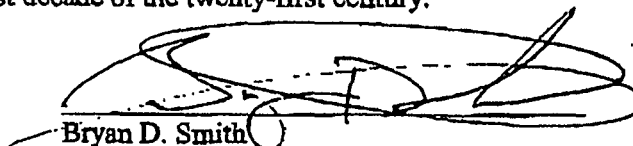
6. Protections which, if agreeable to Mr. McKay, should have been undertaken to secure plaintiff's status as a creditor in the Property Settlement Agreement.

1. Provided a legal description of the Albrethsen Property in the PSA;
2. Provided an explanation that the Albrethsen Property was subject to a closing scheduled for March 30, 2008 and that Mr. McKay would pay Mrs. McKay \$800,000 from the proceeds he received on this sale
3. Included an explanation that Mr. McKay further would pay Mrs. McKay from the proceeds he received on the sale in an amount to pay in full the balance of Mrs. McKay's mortgage on her personal residence;
4. Identifying in the PSA the then existing balance and further identified where notice could be sent to obtain the balance owed on that mortgage;
5. Identifying in the PSA Mr. McKay's mortgage and referenced Mr. McKay's recorded mortgage on the Albrethsen Property by the county document identification number on the recorded mortgage;
6. Following the procedures set forth in Idaho Code Section 32-918 and summarizing Mrs. McKay's interest thus making it even easier for a third party to take notice of Mrs. McKay's interest;
7. Sending the closing agent on the Albrethsen Property the relevant documents informing the closing agent of Mrs. McKay's interest in the sale provided Mr. Walker knew the name of the closing agent.

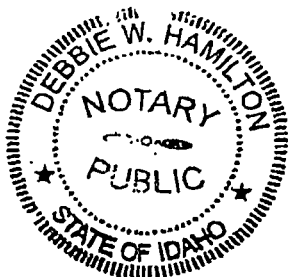
7. Standard of care to be observed in the event Mr. McKay would not agree to provide plaintiff with a secured position with respect to the Property Settlement Agreement: If Mr. McKay had rejected Mr. Walker's structuring the PSA as identified in paragraph (6) above, then Mr. Walker

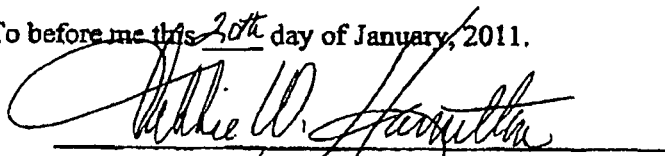
should have informed Mrs. McKay that without structuring the PSA in accordance with paragraph (5), Mrs. McKay would not be protected and, therefore, risked not being paid when Mr. McKay received the Albrethsen sales proceeds. At that point a lis pendens should have been recorded making a public record of plaintiff's interest in the mortgage. According to Exhibit 2 to the Ellis affidavit in these summary judgment proceedings, not only did Mr. Walker fail to advise Mrs. McKay that she lacked a secured position, Mr. Walker erroneously advised her that the divorce judgment, which incorporated the PSA, constituted a lien on the mortgage proceeds.

8. Conclusion: Based upon the acts and omissions of Mr. Walker, as set forth in paragraphs (6) and (7), above, Mr. Walker failed to conform to the standard of care applicable to Idaho attorneys practicing law in the first decade of the twenty-first century.


Bryan D. Smith

SUBSCRIBED AND SWORN To before me this 20th day of January, 2011.



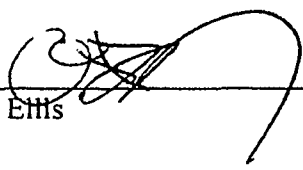

Notary Public for Idaho
Residing at 1111 1st St. N.
Commission Expires: 09/11/11

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 20 day of January, 2011, I caused to be served a true and correct copy of the foregoing by the method indicated below, and addressed to the following:

Robert A. Anderson
Yvonne A. Dunbar
ANDERSON, JULIAN & HULL, LLP
250 South Fifth Street, Suite 700
P.O. Box 7426
Boise, Idaho 83707

☐ U.S. Mail
☐ Hand Delivery
☐ Overnight Mail
☒ Facsimile at
344-5510



Allen B. Ellis

EXHIBIT “B”

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT
STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

PATRICIA MCKAY,

Plaintiff,

v.

DARWIN MCKAY,

Defendant.

No. CV DR 0615200

DEPOSITION OF DARWIN MCKAY

MARCH 21, 2007

BOISE, IDAHO

BURNHAM, HABEL & ASSOCIATES, INC.
Certified Shorthand Reporters

ORIGINAL

Reported By
Leda Waddle

Post Office Box 835
Boise, Idaho 83701

(208) 345-5700 • FAX 345-6374 • 1-800-867-5701

DEPOSITION OF DARWIN McKAY TAKEN 3-21-07

SHEET 3 PAGE 17

1 Q. How much is it?
2 I didn't run all the math. What is the amount
3 you are owed, then, net?
4 A. They did forward some funds over and above the
5 amount to pay off the underlying, the underlying being
6 Eric Albrethsen, to the tune of around \$100,000. Out of
7 that, I paid First Bank and used some in the business.
8 Q. When you say used in the business, what
9 business?
10 A. The Turf Farms.
11 Q. When you use the word Turf Farms, are you
12 referring to any specific business or businesses?
13 A. It would be -- actually, let me rephrase that
14 statement. The additional I used to invest in my son's
15 business in Reno.
16 Q. Okay.
17 A. And pay off the bank note that they had.
18 I'm sorry. I did not use any of those funds in
19 my businesses.
20 Q. And what business of your son's did you invest
21 in?
22 A. Granite Transformations.
23 Q. Are you owed about a million seven still, then,
24 net? Is that roughly where the net number is on this
25 sale?

17

PAGE 18

1 A. I don't know the numbers.
2 Q. When are you --
3 A. That sounds reasonable.
4 Q. You've made a profit of about \$45,000 an acre, I
5 think, if you paid --
6 A. Yeah, 75 to 120.
7 Q. Right.
8 MS. SHEPARD: That's 45. I can do that math.
9 MR. WELSH: So \$45,000 an acre, and you had just
10 over 40 acres, I think you told me. Actually, almost 41.
11 So a million eight or million nine net?
12 A. That sounds reasonable.
13 Q. Okay.
14 When are you owed the balance of the roughly
15 million eight or million seven, whatever that would be?
16 A. It's actually owed a year from this month.
17 Q. Are you receiving interest on that money?
18 A. I don't recall that that's in the contract.
19 Q. Tell me more about what you invested with your
20 son?
21 A. It's a business that does Granite countertops
22 and other applications of Granite, countertops in banks,
23 restaurants, et cetera, et cetera.
24 Q. What is the name of the business?
25 A. Called Granite Transformations.

18

PAGE 19

1 Q. What is your son's name?
2 A. Brian McKay.
3 Q. Does he own all of the interest in Granite
4 Transformations?
5 A. No. He does not.
6 Q. Who are the owners of that?
7 A. Another investor, Darrel Adams.
8 Q. Anyone else own any interest in that business?
9 A. Scott Adams.
10 Q. Anyone else?
11 A. Myself.
12 Q. What interest do you own?
13 A. Plus or minus 37 percent. My son is 25
14 percent.
15 Q. When did you acquire ownership interest in the
16 Granite Transformations business?
17 A. At the time it was initially formed.
18 Q. When was that?
19 A. In January of 2005.
20 Q. Do you know what type of entity that it is,
21 whether it's a corporation?
22 A. Whether it's a C or an S, I'm not sure.
23 Q. Did you use the entire \$70,000 to put into
24 Granite Transformations.
25 I think you said you repaid the \$30,000 to the

19

PAGE 20

1 bank out of the \$100,000, and then you used the balance
2 on Granite Transformations.
3 A. Actually, I used \$91,000 to pay off the bank
4 loan.
5 Q. You told me you borrowed \$30,000 for earnest
6 money.
7 A. Uh-huh.
8 Q. There was more money owed to the bank?
9 A. No.
10 Q. If you borrowed \$30,000, which bank are we
11 talking about? First Bank?
12 MS. SHEPARD: I think he was talking about the
13 bank loan for the Transformation Company.
14 MR. WELSH: Okay.
15 MS. SHEPARD: That's what he did, was paid a
16 loan for them.
17 THE WITNESS: Sorry.
18 MR. WELSH: Let me make it clear.
19 That's okay.
20 Q. (BY MR. WELSH) Earlier you told me you received
21 a payment for \$100,000 for an amount you were owed.
22 A. Actually, more than a hundred.
23 Q. How much?
24 A. I think it was \$130,000 or \$140,000, without
25 consulting the records.

20

DEPOSITION OF DARWIN McKAY TAKEN 3-21-07

SHEET 5 PAGE 33

1 A. Well, it would be the payment of the amount
2 owing on the Albretsen property.
3 Q. Okay.
4 A. Which is above and beyond the payment to the
5 underlying.
6 Q. Okay.
7 A. I designated it to go to a 1031 Fund.
8 Q. Okay. That's my question.
9 So it relates to the sale for the transaction
10 with the Status Corporation?
11 A. Yes. It does.
12 Q. Okay.
13 So when you made that transaction in the spring
14 of 2006, you would have had a time limit to designate new
15 property. You understand that?
16 A. Six months.
17 Q. Okay.
18 And you did that? You met that six-month
19 requirement?
20 A. Well, I did it with the re-negotiation that was
21 done in November of 2006, is the time that I designated
22 the new property location.
23 Q. Okay.
24 A. When they failed to make their September
25 payment, everything went into default. It took a

33

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1 complete re-negotiation and a closing, as it would, as
2 you would call it. And therefore, at that point in time
3 I had opportunity to designate another property
4 opportunity and set aside funds in a 1031 Exchange
5 Fund.
6 Q. How much of the funds have you designated for
7 the 1031?
8 Is it all of the profit, part of the profit, or
9 do you know?
10 A. I'm not understanding you a hundred percent.
11 Q. Well, when you do an exchange, you'll designate
12 how much of this profit you are going to exchange into
13 new property.
14 A. Uh-huh.
15 Q. How much of the profit did you designate to go
16 to the new property?
17 A. \$157,000 in the exchange.
18 Q. Okay. So the balance of the profit, then,
19 you'll pay taxes on?
20 A. I will be paying taxes. And I've paid brokerage
21 fees and all kinds of other things.
22 Q. Did you receive an opinion letter from some
23 attorney or accountant on this 1031 exchange
24 transaction?
25 A. No. I did not.

34

PAGE 35

1 Q. Did you talk to some accountant or some lawyer
2 about this exchange?
3 A. Yes. I did.
4 Q. Who?
5 A. Forrest Goodrum.
6 Q. And did some accountant review the transaction
7 for you as well?
8 A. Yes.
9 Q. Who?
10 A. I do not have his name here with me. He's in a
11 Meridian accounting firm, Roberts & Company.
12 What's the question?
13 MS. SHEPARD: We wondered if we had the exchange
14 documents. Is that something that we have yet?
15 MR. WELSH: I don't recall seeing the exchange
16 documents yet. I just don't recall seeing any of them.
17 MS. SHEPARD: I'll make a note.
18 MR. WELSH: We'll get a letter to you.
19 THE WITNESS: They weren't even in the request
20 for interrogatories.
21 MS. SHEPARD: Well, I know, but that would be a
22 document that would be certainly relevant.
23 THE WITNESS: Uh-huh.
24 MS. SHEPARD: So we need to get it.
25 THE WITNESS: I understand.

35

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1 MR. WELSH: Okay. No problem.
2 MS. SHEPARD: I may have it even.
3 MR. WELSH: Fair enough.
4 MS. SHEPARD: But I don't think I do, but I
5 might.
6 Q. (BY MR. WELSH) You said that you expect Sun
7 (sic) Corporation to be in default of the obligation?
8 A. Status.
9 Q. Not Sun Corporation, Status Corporation.
10 A. I think we are counting the chickens before they
11 are hatched to make that statement right now.
12 Q. I thought you said that, "I'm not counting on
13 anything."
14 I thought you said you think or you believe they
15 are going to be in default.
16 A. Twice they have been. I don't know if the third
17 time will be the charm or not.
18 Q. No one has told you one way or the other as of
19 today's date?
20 A. No one has told me anything.
21 Q. What is the due date of the payment?
22 A. March 27.
23 Q. And how much is due on that date?
24 A. \$250,000.
25 Q. And of the \$250,000 that is due, if you receive

36

1 VERIFICATION

2 STATE OF IDAHO }
3 COUNTY OF ADA } ss:

4
5 I, DARWIN MCKAY, being first duly sworn on my
6 oath depose and say:

7 That I am the witness named in the foregoing
8 deposition taken the 21st day of March, 2007, consisting
9 of pages numbered 1 through 113, inclusive; that I have
10 read the said deposition and know the
11 contents thereof; that the questions contained
12 therein were propounded to me; the answers as
13 contained therein (or as corrected by me therein)
14 are true and correct.

15
16 Darwin McKay
17 DARWIN MCKAY

18 Subscribed and sworn to before me this 9th day
19 of May, 2007, at Boise, Idaho.



21 Moni M. McMillin
22 Notary Public for Idaho
23 Residing at Boise, Idaho.
24 My Commission Expires: 3/24/11

REPORTER'S CERTIFICATE

STATE OF IDAHO)
) ss.
COUNTY OF ADA)

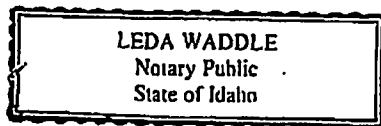
I, LEDA WADDLE, CSR, (Idaho No. 758) and
Notary Public in and for the State of Idaho, do hereby
certify:

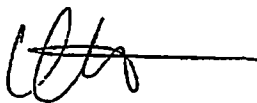
That prior to being examined, the witness named
in the foregoing deposition was by me duly sworn to
testify to the truth, the whole truth, and nothing but
the truth.

That said deposition was taken down by me in
shorthand at the time and place therein named and
thereafter reduced to typewriting under my direction,
and that the foregoing transcript contains a full,
true, and verbatim record of said deposition.

I further certify that I have no interest in
the event of the action.

WITNESS my hand and seal this 3rd day of
April, 2007.




LEDA WADDLE
Idaho CSR No. 758,
Notary Public in and for the
State of Idaho.

My Commission Expires December 14, 2011.

EXHIBIT “C”

2. On November 28, 2007, the Court filed the Judgment and Decree of Divorce in the Divorce proceeding between Patricia McKay ("Patricia") as Plaintiff and Darwin McKay ("Darwin") as Defendant. A true, correct and authentic copy of said Judgment and Decree of Divorce is attached hereto as Exhibit "A." The Property Settlement Agreement (hereinafter "Property Settlement Agreement") that had been signed by both Plaintiff and Defendant was merged into the Judgment and Decree of Divorce and is included within Exhibit "A." Defendant Darwin McKay has actual personal knowledge of the Judgment and Decree of Divorce and the terms and requirements of the property settlement incorporated and merged into the Judgment and Decree of Divorce.

3. Prior to the Divorce, Darwin or entities he controlled arranged for the purchase of real property designated as the Albrethsen property. At the same time that the purchase of the Albrethsen property was arranged by Darwin, he had also arranged to sell the Albrethsen property to Status Corporation. However, Darwin did not have the funds in order to consummate the transaction for the purchase of the Albrethsen property, and therefore required that Status Corporation pay to him \$3,000,000 that he could provide to the seller of the Albrethsen property. In exchange, Status Corporation demanded receipt of the Deed to the Albrethsen property. Status Corporation also bought adjoining land designated between the parties as the "Home Farm."

4. Pursuant to Paragraph 1.7 of the Property Settlement Agreement, Darwin agreed as follows:

"Darwin shall pay Patricia \$800,000 in cash, by wire transfer or certified check, within five (5) days of payment by the Status Corporation, or its assigns, ("Status Real Estate Transaction"). In addition, Darwin shall convey all his right, title and interest to Patricia in and to the two (2) lots to be conveyed by Status Corporation, or its assigns, to Darwin as part of the Status

**AFFIDAVIT OF PATRICIA MCKAY IN SUPPORT OF MOTION FOR CONTEMPT OF
DARWIN MCKAY AND TO LIQUIDATE JUDGMENT - 2**

Corporation Real Estate Transaction. The parties acknowledge that the Status Real Estate Transaction is scheduled to close on or before March 30, 2008. Darwin shall diligently pursue the closing and shall not do anything to interfere with or delay the closing."

5. Pursuant to Paragraph 1.8 of the Property Settlement Agreement, Darwin agreed as follows:

"The parties acknowledge that if Status Corporation or its assigns breaches the Purchase and Sale Agreement, Darwin will have title to that portion of the land that had been referred to prior to the sale to Status Corporation as the "Home Farm". In the event of breach, Darwin may also be able to foreclose a mortgage on that portion of the land referred to prior to the sale to Status Corporation as "Albrethsen's Farm."

6. On or about December 12, 2008, I reviewed Court documents at the Ada County Courthouse and discovered for the first time that Defendant Darwin McKay had been awarded a Judgment dated August 19, 2008, in a separate lawsuit to which I had no notice, for the balance owed him from Status Corporation since Status Corporation had defaulted on the purchase of the Albrethsen property. A true, correct and authentic copy of the Entry of Default is attached hereto as Exhibit "B."

7. Included within the Court documents referenced above, was a copy of the Mortgage Note which Defendant Darwin McKay had secured from Status Corporation, dated November 28, 2006, in the amount of \$1,396,800. A true, correct and authentic copy of this Mortgage Note is attached hereto as Exhibit "C." Darwin did not disclose this Mortgage Note during the course of the Divorce Proceedings.

8. Upon information and belief, it is now my understanding that the Mortgage Note (Exhibit "C") was created at the request of Darwin McKay since he was still owed \$1,396,800 upon the sale of the Albrethsen property to Status Corporation after Status Corporation had paid Darwin McKay \$3,000,000 in order to allow him to purchase the Albrethsen property.

AFFIDAVIT OF PATRICIA MCKAY IN SUPPORT OF MOTION FOR CONTEMPT OF DARWIN MCKAY AND TO LIQUIDATE JUDGMENT - 3

9. Upon information and belief, Status Corporation defaulted on their financing arrangements with Darwin McKay regarding the purchase of the Albrethsen property and the Home Farm they were purchasing from Defendant and such default resulted in the Entry of Judgment (Exhibit "B").

10. It is my understanding Lawyers Title Insurance Corporation assured first position on the property to both Darwin McKay (or entities which he fully controlled) and to another entity with which I am not familiar. Subsequent to the Default Judgment entered against Status Corporation, Darwin McKay assigned that Judgment to Lawyers Title Insurance Company. A true, correct and authentic copy of the Assignment is attached hereto as Exhibit "D."

11. It is my understanding that as a result of their Title Guarantee, Lawyers Title Insurance Corporation paid certain sums of money to Darwin McKay in exchange for the Assignment of Judgment. On or about December 12, 2008, I was advised that a payment had been made by Lawyers Title to Darwin, but I was not told the amount.

12. Upon information and belief, the amount paid to Darwin McKay from Lawyers Title was approximately \$1,300,000 as that was the amount that remained owing to Darwin by Status Corporation as a result of the property transaction.

COUNT I

13. Defendant Darwin McKay has violated Paragraph 1.7 of the Property Settlement Agreement as incorporated into the Judgment and Decree of Divorce by failing to make payment to me of "\$800,000 in cash by wire transfer or certified check within five (5) days of payment by the Status Corporation, or its assigns, ("Status Real Estate Transaction")..."

**AFFIDAVIT OF PATRICIA MCKAY IN SUPPORT OF MOTION FOR CONTEMPT OF
DARWIN MCKAY AND TO LIQUIDATE JUDGMENT - 4**

COUNT II

14. Defendant Darwin McKay has violated Paragraph 1.7 of the Property Settlement Agreement as incorporated into the Judgment and Decree of Divorce by failing to convey to me "all his right, title and interest to ... in and to the two (2) lots to be conveyed by Status Corporation, or its assigns, to Darwin as part of the Status Real Estate Transaction."

COUNT III

15. Defendant Darwin McKay has violated Paragraph 1.7 of the Property Settlement Agreement as incorporated into the Judgment and Decree of Divorce by failing to "diligently pursue the closing and shall not do anything to interfere with or delay the closing."

COUNT IV

16. Defendant Darwin McKay has violated Paragraph 1.8.1 of the Property Settlement Agreement as incorporated into the Judgment and Decree of Divorce by failing to pay to me \$500,000 in the event the Status Real Estate Transaction fails to close on or before March 30, 2008. This provision of the Property Settlement Agreement indicates that payment must be made as long as it can occur without "violating the lending terms and conditions of the bank holding the line of credit". Upon information and belief, Darwin McKay did not disclose to Sterling Bank, the bank which held the line of credit, the details of the Status Real Estate Transaction.

COUNT V

17. Defendant Darwin McKay has violated Paragraph 1.8.2 of the Property Settlement Agreement as incorporated into the Judgment and Decree of Divorce by failing to list the Albrethsen property for sale and, upon sale, paying Patricia \$500,000 within five (5) days of receipt or closing on the sale.

**AFFIDAVIT OF PATRICIA MCKAY IN SUPPORT OF MOTION FOR CONTEMPT OF
DARWIN MCKAY AND TO LIQUIDATE JUDGMENT - 5**

COUNT VI

18. Defendant Darwin McKay has violated Paragraph 1.8.3 of the Property Settlement Agreement as incorporated into the Judgment and Decree of Divorce by failing to pay to Patricia "\$800,000 plus interest at the rate of 6% payable within five (5) days of any funds from the sale of either the Albrethsen property funds, the Home property or both...." Since Darwin obtained Judgment against Status Corporation as a result of the default of Status Corporation, Darwin received, upon information and belief, a Judgment having a value of approximately \$1,300,000. Since Lawyers Title had guaranteed first position to two entities, and Lawyers Title subsequently determined to pay Darwin under their Title Policy, Darwin assigned his Judgment against Status Corporation to Lawyers Title. In exchange, upon information and belief, Darwin received approximately \$1,300,000 from the Status Real Estate Transaction.

COUNT VII

19. As indicated in the Property Settlement Agreement as incorporated into the Judgment and Decree of Divorce, the funds regarding the Status Real Estate Transaction and specifically the Albrethsen property were to be paid to Patricia. Thus Darwin had an obligation to disclose to Lawyers Title the existence of the Judgment and Decree of Divorce and the obligations imposed upon him by the Property Settlement Agreement as incorporated into the Judgment and Decree of Divorce. Darwin's failure to do so violated the terms of the Divorce Decree.

COUNT VIII

20. Pursuant to Paragraph 2.1 of the Property Settlement Agreement as incorporated into the Judgment and Decree of Divorce, Darwin was obligated to "pay off the full amount of

**AFFIDAVIT OF PATRICIA MCKAY IN SUPPORT OF MOTION FOR CONTEMPT OF
DARWIN MCKAY AND TO LIQUIDATE JUDGMENT - 6**

personal residence debt directly to the respective mortgage companies within thirty (30) days of the date of the Status Real Estate Transaction closes, or within thirty (30) days of receipt of any funds from either the sale of the Albrethsen property funds, the Home Farm property or both...." Darwin's failure to do so violated the terms of the Divorce Decree.

COUNT IX

21. Upon his receipt of funds from Lawyers Title, as reflected above, Darwin did not pay off the personal residence debt as required by Paragraph 2.1 of the Property Settlement Agreement as incorporated into the Judgment and Decree of Divorce. Darwin's failure to do so violated the terms of the Divorce Decree.

COUNT X

22. Pursuant to Paragraph 2.1 of the Property Settlement Agreement as incorporated into the Judgment and Decree of Divorce, Darwin was obligated to "timely pay both the 1st and 2nd deed of trust note payments directly to the respective mortgage companies." Darwin was further obligated to notify me via fax or email that he had made the monthly payments in a timely manner. The first and second mortgage notes are in my name, making Darwin's obligation very important to me. The payment on the first mortgage is due on the 15th of each month. However, the payment has actually been paid between three and sixteen days after the due date for the past thirteen months. Moreover, I have not been notified by Darwin, by fax or email, that the payments have been made.

I request that the Court hold Darwin in contempt due to his violations of the Judgment and Decree of Divorce as detailed above. I further request that the Court enter a judgment against Darwin liquidating the amount due to me under the terms of the Judgment and Decree of

**AFFIDAVIT OF PATRICIA MCKAY IN SUPPORT OF MOTION FOR CONTEMPT OF
DARWIN MCKAY AND TO LIQUIDATE JUDGMENT - 7**

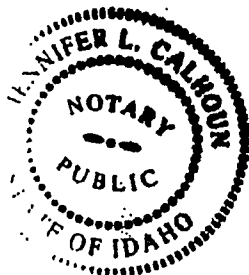
Divorce, to include the \$800,000 and the amounts necessary to pay off the first and second mortgages on my personal residence.

In addition, due to the surreptitious manner in which Darwin has handled these matters, including his failure to disclose the existence of the Judgment and Decree of Divorce and obligations contained therein to Lawyers Title or to any of the attorneys representing Status Corporation, I believe Darwin is simply hiding assets or moving those assets beyond the jurisdiction of this Court. I am aware that Darwin has purchased real property in Reno, Nevada and in Owyhee County, Idaho subsequent to the date the Judgment and Decree of Divorce was entered. I therefore request that the Court enter an Order requiring Darwin to fully account for all funds received as a result of the Status Corporation transaction, and an Order requiring that Darwin maintain the status quo with regard to all assets in his possession or under his control pending further Order of the Court.

DATED this 30th day of January 2009.

By Patricia E. McKay
PATRICIA MCKAY

SUBSCRIBED and SWORN to before me this 30th day of January, 2009.



Jennifer L. Calhoun
Notary Public for Idaho
Residing at: Bonne, ID
My Commission Expires: 7/9/2014

**AFFIDAVIT OF PATRICIA MCKAY IN SUPPORT OF MOTION FOR CONTEMPT OF
DARWIN MCKAY AND TO LIQUIDATE JUDGMENT - 8**

CERTIFICATE OF SERVICE

I hereby certify that on this 30th day of January 2009, I caused to be served a true and correct copy of the foregoing by the method indicated below, and addressed to the following:

Kimberly Brooks
Brooks Law, P.C.
23 9th Avenue North
Nampa, ID 83687

| | |
|-------------------------------------|----------------|
| <input checked="" type="checkbox"/> | U.S. Mail |
| <input type="checkbox"/> | Hand Delivered |
| <input type="checkbox"/> | Overnight Mail |
| <input checked="" type="checkbox"/> | Telecopy (Fax) |

John A. Miller
Miller & Harr
Attorneys at Law
1401 Shoreline Drive, Suite 3
Boise, Idaho 83702

| | |
|-------------------------------------|----------------|
| <input checked="" type="checkbox"/> | U.S. Mail |
| <input type="checkbox"/> | Hand Delivered |
| <input type="checkbox"/> | Overnight Mail |
| <input checked="" type="checkbox"/> | Telecopy (Fax) |


for HOLLAND & HART LLP

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**AFFIDAVIT OF PATRICIA MCKAY IN SUPPORT OF MOTION FOR CONTEMPT OF
DARWIN MCKAY AND TO LIQUIDATE JUDGMENT - 9**

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- EXHIBIT C-

MORTGAGE

THIS MORTGAGE, (the "Mortgage") effective as of November 28, 2006, by Status Corporation of Idaho, an Idaho Corporation, whose address 1509 E. Iron Eagle Drive, Suite B, Eagle, Idaho 83616, as grantor (the "Borrower"), and L. Darwin McKay, its, successor and assign, whose address is 610 S. Eagle Road, Meridian, Idaho 83642, as beneficiary (the "Lender").

RECITALS

A. Borrower is indebted to Lender in the sum of One Million, Three Hundred Ninety-Six Thousand, Eight Hundred Dollars (\$1,396,800.00), which indebtedness is evidenced and represented by that certain Note of even date from Borrower to Lender, with final payment due and payable on March 30, 2008 (the Note together with all substitutions, consolidations, modifications, replacements, restatements, increases, renewals, and extensions thereof, in whole or in part, shall collectively be referred to as the "Note").

B. Lender, as a condition precedent to the extension of credit and the making of the loan evidenced by the Note, has required that Borrower provide Lender with security for the repayment of the indebtedness evidenced by the Note as well as for the performance, observance and discharge by Borrower of various covenants, conditions and agreements made by Borrower to, with, in favor of, and for the benefit of, Lender with respect to such indebtedness and security.

1. Grants of Security.

1.1 Property Granted. In consideration of and in order to secure the repayment of the indebtedness evidenced and represented by the Note, together with interest, as well as the payment of all sums advanced pursuant to this Mortgage to protect and preserve the Property and the lien and security interest created hereby and all other sums of money secured hereby, as provided below; and to secure the observance, performance and discharge by Borrower of all covenants, conditions and agreements set forth in the Note, this Mortgage and in all other documents and instruments executed and delivered by Borrower to and in favor of Lender for the purpose of further securing the repayment of the indebtedness evidenced and represented by the Note (all of the forgoing obligations are referred to as the "Secured Obligations"), Borrower grants, bargains, sells, aliens, remises, releases, conveys, assigns, transfers, pledges, delivers, sets over, hypothecates, warrants, and confirms to Lender, with power of sale, as beneficiary hereunder, subject to the terms and conditions of this Mortgage, all estate, right, title and interest which Borrower now has or may later acquire in and to the following described properties, rights and interests and all replacements of, substitutions for, and additions thereto (all of which are referred to below as the "Property"):

1.1.1 Real Property. The real property in Ada County, Idaho, described in *Exhibit A* attached hereto and made a part hereof (the "Real Property").

1.1.2 Improvements. All buildings, structures and other improvements of any kind, nature or description now or hereafter erected, constructed, placed or located upon the Real Property (the "Improvements").

1.1.3 Appurtenances. All tenements, hereditaments, strips and gores of land, rights-of-way, easements, privileges and other appurtenances now or hereafter belonging or in any way appertaining to the Real Property, including, without limitation, all right, title and interest of the Borrower in any after-acquired right, title, interest, remainder or reversion, in and to the beds of any ways, streets, avenues, roads, alleys, passages and public places, open or proposed, in front of, running through, adjoining or adjacent to the Real Property; to the extent owned by Borrower, all minerals, royalties, gas rights, water, water rights, water stock, flowers, shrubs, lawn plants, crops, trees, timber and other emblements now or hereafter located on, under, or above all or any part of the Real Property (the "Appurtenances").

1.1.4 Leases and Rents. All leases and other agreements affecting the use, enjoyment or occupancy of all or any part of the Real Property or the Improvements heretofore or hereafter entered into whether before or after the filing by or against Borrower of any petition for relief under 11 U.S.C. § 101, et seq. (the "Bankruptcy Code"), as the same may be amended from time to time (the "Leases") and all right, title and interest of Borrower, its successors and assigns therein and thereunder, including, without limitation, cash or securities deposited thereunder to secure the performance by the lessees of their obligations thereunder and all rents, additional rents, revenues, issues and profits (including all oil and gas or other mineral royalties and bonuses) from the Real Property and the Improvements whether paid or accruing before or after the filing by or against Borrower of any petition for relief under the Bankruptcy Code (the "Rents") and all proceeds from the sale or other disposition of the Leases and the right to receive and apply the Rents to the payment of the Secured Obligations (defined below).

1.1.5 Condemnation Awards. Any and all awards, payments or settlements, including interest thereon, and the right to receive the same, as a result of (a) the exercise of the right of eminent domain, (b) the alteration of the grade of any street, and (c) any other injury, damage or casualty to, taking of, or decrease in the value of, the Property, to the extent of all amounts that may be secured by this Mortgage at the date of any such award or payment, including but not limited to Reasonable Attorneys' Fees (as defined below), costs, and disbursements incurred by Lender in connection with the collection of such award or payment.

1.1.6 Fixtures and Personal Property. All machinery, equipment, fixtures (including, but not limited to all heating, air conditioning, plumbing, lighting, communications and elevator fixtures) and other property of every kind and nature whatsoever owned by Borrower, or in which Borrower has or shall have an interest, now or hereafter located upon the Real Property or the Improvements, or appurtenant thereto, and used in connection with the present or future operation and occupancy of the Real Property and the Improvements and all building equipment, materials and supplies of any nature whatsoever owned by Borrower, or in which Borrower has or shall have an interest, now or hereafter located upon the Real Property and the Improvements, or appurtenant thereto, or used in connection with the present or future operation and occupancy of the Real Property and the Improvements (together referred to as the "Fixtures and Personal Property," which

term expressly excludes any toxic waste or substance deemed hazardous under federal, regional, state, or local laws).

1.1.7 **Agreements.** All agreements, contracts, certificates, instruments, franchises, permits, licenses, plans, specifications and other documents, now or hereafter entered into, and all rights therein and thereto, respecting or pertaining to the use, occupation, construction, management or operation of the Real Property and any part thereof and any improvements or respecting any business or activity conducted on the Real Property and any part thereof and all right, title and interest of Borrower therein and thereunder, including, without limitation, the right to receive and collect any sums payable to Borrower thereunder.

1.2 **Assignment of Leases and Rents.** Borrower absolutely and unconditionally assigns to Lender all of Borrower's right, title and interest in and to all current and future Leases and Rents; it being intended by Borrower that this assignment constitutes a present, absolute assignment and not an assignment for additional security only. Nevertheless, subject to the terms of this Mortgage, Lender grants to Borrower a revocable license to collect and receive the Rents. Borrower shall hold a portion of the Rents sufficient to discharge all current sums due on the Note, for use in the payment of such sums.

2. **Borrower Covenants.** Borrower covenants and agrees as follows:

2.1 **Payment of Principal and Interest.** Borrower shall pay the Note, in accordance with the terms of the Note, promptly at the times, at the place and in the manner that said principal and interest shall become due, and to promptly and punctually pay all other sums required to be paid by Borrower pursuant to the terms of the Note, this Mortgage, the Assignment of Leases, Rents and Profits (the "Assignment") and all other documents and instruments executed as further evidence of, as additional security for, or executed in connection with, the indebtedness evidenced by the Note and secured by this Mortgage are collectively referred to as the "Loan Documents."

2.2 **Performance of Other Obligations.** Borrower shall perform, comply with, and abide by each and every one of the covenants, agreements and conditions contained and set forth in the Note, this Mortgage, and the other Loan Documents and shall comply with all laws, ordinances, rules, regulations and orders of any governmental authorities having jurisdiction over the Property that now or hereafter affect the Property or requires any alterations or improvements to be made thereon, and shall perform all of its obligations under any covenant, condition, restriction or agreement of record affecting the Property and shall insure that at all times the Property constitutes one or more legal lots capable of being conveyed without violation of any subdivision or platting laws, ordinances, rules or regulations, or other laws relating to the division or separation of real property.

2.3 **Payment of Taxes, Assessments and Other Charges.** Borrower shall pay all taxes, assessments, and other charges that are or may be hereafter levied or assessed upon or against the Property, when the same shall become due and payable according to law, before the same become delinquent, and before any interest or penalty shall attach thereto. Borrower shall deliver official receipts evidencing the payment of the same to Lender not later than thirty (30) days following

payment. Borrower shall have the right to contest, in good faith, the proposed assessment of ad valorem taxes or special assessments by governmental authorities having jurisdiction over the Property.

2.4 **Payment of Liens, Charges and Encumbrances.** Borrower shall pay and discharge from time to time when the same shall become due all lawful claims and demands of mechanics, materialmen, laborers and others which, if unpaid, might result in, or permit the creation of, a lien, charge or encumbrance upon the Property or any part thereof, or on the rents, issues, income, revenues, profits and proceeds arising therefrom and, in general, to do or cause to be done everything necessary so that the lien of this Mortgage shall be fully preserved, at the cost of Borrower, without expense to Lender. Borrower shall have the right to contest, in good faith and in accordance with applicable laws and procedures, mechanics' and materialmen's liens filed against the Property.

2.5 **Payment of Junior Encumbrances.** Borrower shall not permit default or delinquency under any lien, imposition, charge or encumbrance against the Property, even though junior and inferior to the lien of this Mortgage.

2.6 **Insurance.**

2.6.1 Borrower shall obtain and maintain, or cause to be maintained, insurance for Borrower and the Property providing at least the following coverages:

(a) **Liability Insurance.** Comprehensive general liability insurance, including bodily injury, death and property damage liability insurance, against any and all claims, including all legal liability to the extent insurable and imposed upon Lender and all court costs and attorneys' fees and expenses, arising out of or connected with the possession, use, leasing, operation, maintenance or condition of the Property in such amounts as are generally available at commercially reasonable premiums and are generally required by institutional lenders for properties comparable to the Property but in no event for an aggregate limit of less than \$2,000,000.00.

(b) **Other Insurance.** Such other insurance with respect to the Property against loss or damage of the kinds from time to time customarily insured against and in such amounts as are generally available at commercially reasonable premiums and are generally required by institutional lenders for properties comparable to the Property.

2.6.2 All insurance provided for in Subsection 2.6 shall be obtained under valid and enforceable policies (the "Policies" or in the singular, the "Policy"). All insurers providing insurance required by this Mortgage shall be authorized to issue insurance in the state in which the Property is located. The Policy referred to in Paragraph (a) above shall name Lender as an additional named insured. All Policies described in Subsection 2.6 shall contain (i) a provision that such policies shall not be canceled or terminated, nor shall they expire, without at least thirty (30) days' prior written notice; and (ii) include effective waivers by the insurer of all claims for Insurance Premiums (defined below) against any loss payees, additional insureds and named insureds (other than Borrower).

2.6.3 Borrower shall comply with all insurance requirements and shall not bring or keep or permit to be brought or kept any article upon any of the Property or cause or permit any condition to exist thereon that would be prohibited by an insurance requirement, or would invalidate the insurance coverage required hereunder to be maintained by Borrower on or with respect to any part of the Property pursuant to this Section.

2.6.4 The insurance coverage required under Subsection 2.6 may be effected under a blanket policy or policies covering the Property and other properties and assets not constituting a part of the security hereunder.

2.7 Condemnation. Borrower shall promptly give Lender notice of the actual or threatened commencement of any condemnation or eminent domain proceeding and shall deliver to Lender copies of any and all papers served in connection with such proceedings. Lender may participate in any such proceedings to the extent permitted by law. Upon an Event of Default, Borrower shall deliver to Lender all instruments requested by it to permit such participation. Borrower shall, at its expense, diligently prosecute any such proceedings, and shall consult with Lender, its attorneys and experts, and cooperate with them in the carrying on or defense of any such proceedings. Notwithstanding any taking by any public or quasi-public authority through eminent domain or otherwise (including, but not limited to any transfer made in lieu of or in anticipation of the exercise of such taking), Borrower shall continue to pay the Secured Obligations at the time and in the manner provided for its payment in the Note and in this Mortgage and the Secured Obligations shall not be reduced until any award or payment therefor shall have been actually received and applied by Lender, after the deduction of expenses of collection, to the reduction or discharge of such obligations. Lender shall not be limited to the interest paid on the award by the condemning authority but shall be entitled to receive out of the award interest at the rate or rates provided herein or in the Note. If the Property is sold, through foreclosure or otherwise, prior to the receipt by Lender of the award or payment, Lender shall have the right, whether or not a deficiency judgment on the Note shall have been sought, recovered or denied, to receive the award or payment, or a portion thereof sufficient to pay the Secured Obligations.

2.8 Compliance with Laws. Borrower shall observe, abide by, and comply with all statutes, ordinances, laws, orders, requirements or decrees relating to the Property enacted, promulgated or issued by any federal, state, county or local governmental authority or any agency or subdivision thereof having jurisdiction over Borrower or the Property. Borrower shall observe and comply with all conditions and requirements necessary to preserve and extend any and all rights, licenses, permits (including, but not limited to, zoning, variances, special exceptions and nonconforming uses), privileges, franchises and concessions that are applicable to the Property or that have been granted to or contracted for by Borrower in connection with any existing, presently contemplated or future use of the Property.

3. Representations and Warranties. Borrower represents and warrants to Lender that:

3.1 Warranty of Title. Borrower has good title to the Property and has the right to mortgage, grant, bargain, sell, pledge, assign, warrant, transfer and convey the same and that Borrower possesses fee simple absolute estate in the Real Property and the Improvements and that it owns the Property free and clear of all liens, encumbrances and charges whatsoever except for real property taxes for years subsequent to 2005 (which are not yet due and payable) and those matters set forth in the Lender's Policy of Title Insurance insuring the first priority lien of this Mortgage (the "Permitted Exceptions"). Borrower shall forever warrant, defend and preserve the title and the validity and priority of the lien of this Mortgage and shall forever warrant and defend the same to Lender against the claims of all persons whomsoever.

3.2 Taxes. Borrower has filed all federal, state, county, municipal, and city income and other tax returns required to have been filed by it and have paid all taxes and related liabilities which have become due pursuant to such returns or pursuant to any assessments received by it. Borrower does not know of any basis for any additional assessment in respect of any such taxes and related liabilities for prior years.

4. Further Assurances.

4.1 Inspection by Lender. Lender, and/or its agents, shall have the right and shall be permitted, but shall not be required, at all reasonable times, to enter upon and inspect the Property to insure compliance with the covenants, agreements, and conditions set forth in this Mortgage.

4.2 Execution of Additional Documents. Borrower shall, at the cost of Borrower, execute, acknowledge and deliver all and every such further acts, deeds, conveyances, mortgages, assignments, notices of assignments, transfers, assurances and other instruments, including security agreements and financing statements, as Lender shall from time to time require for the purpose of better assuring, conveying, assigning, transferring and confirming unto Lender the Property and rights hereby encumbered, created, conveyed, assigned or intended now or hereafter so to be encumbered, created, conveyed or assigned or that Borrower may now be or may hereafter become bound to encumber, create, convey, or assign to Lender, or for the purpose of carrying out the intention or facilitating the performance of the terms of this Mortgage, or for filing, registering, or recording this Mortgage, and to pay all filing, registration, or recording fees and all taxes, costs and other expenses, including Reasonable Attorneys' Fees, incident to the preparation, execution, acknowledgment, delivery, and recordation of any of the same.

5. Default. The occurrence of any one or more of the following events shall constitute an "Event of Default":

5.1 Failure to make any payment of (i) interest or principal when due, (ii) any other amount of the Secured Obligations when due, or (iii) the entire amount of the Secured Obligations on or before the Maturity Date.

5.2 If any representation or warranty of Borrower or any Guarantor, or any member, general partner, principal or beneficial owner of any of the foregoing, made herein, or in any other Loan Document, or in any guaranty, or in any certificate, report, financial statement or other instrument or document furnished to Lender shall have been false in any material respect when made.

5.3 If Borrower or any Guarantor shall make an assignment for the benefit of creditors or if Borrower shall generally not be paying its debts as they become due.

5.4 If (i) Borrower or any Guarantor shall commence any case, proceeding or other action (A) under any existing or future law of any jurisdiction, domestic or foreign, relating to bankruptcy, insolvency, reorganization, conservatorship or relief of debtors, seeking to have an order for relief entered with respect to it, or seeking to adjudicate it a bankrupt or insolvent, or seeking reorganization, arrangement, adjustment, winding-up, liquidation, dissolution, composition or other relief with respect to it or its debts, or (B) seeking appointment of a receiver, trustee, custodian, conservator or other similar official for it or for all or any substantial part of its assets, or the Borrower or any Guarantor shall make a general assignment for the benefit of its creditors; or (ii) there shall be commenced against Borrower or any Guarantor any case, proceeding or other action of a nature referred to in clause (i) above which (A) results in the entry of an order for relief or any such adjudication or appointment or (B) remains undismissed, undischarged or unbonded for a period of sixty (60) days; or (iii) there shall be commenced against the Borrower or any Guarantor any case, proceeding or other action seeking issuance of a warrant of attachment, execution, distraint or similar process against all or any substantial part of its assets which results in the entry of any order for any such relief which shall not have been vacated, discharged, or stayed or bonded pending appeal within sixty (60) days from the entry thereof; or (iv) the Borrower or any Guarantor shall take any action in furtherance of, or indicating its consent to, approval of, or acquiescence in, any of the acts set forth in clause (i), (ii), or (iii) above; or (v) the Borrower or any Guarantor shall generally not, or shall be unable to, or shall admit in writing its inability to, pay its debts as they become due;

5.5 Except for the specific defaults set forth in this Section, any other default under any Loan Document by Borrower, which default is not cured within thirty (30) days after written notice from Lender to Borrower; provided that if such default cannot reasonably be cured within such thirty (30) day period and Borrower shall have commenced to cure such default within such thirty (30) day period and thereafter diligently and expeditiously proceeds to cure the same, such thirty (30) day period shall be extended for so long as it shall require Borrower in the exercise of due diligence to cure such default, it being agreed that no such extension shall be for a period in excess of one hundred twenty (120) days, unless, only in the case of cures that require construction or remedial work, such cure cannot with diligence be completed within such one hundred twenty (120) day period, in which case such period shall be extended for an additional one hundred twenty (120) days.

6. Rights and Remedies.

6.1 Remedies. Upon the occurrence of any Event of Default, Lender may take such action, without notice or demand, as it deems advisable to protect and enforce its rights against Borrower and in and to the Property, including, but not limited to the following actions, each of

MEMORANDUM OF CONTRACT

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(17) For the purchase price and on the terms and conditions contained in that certain Real Estate Purchase and Sale Agreement by and between L. DARWIN MCKAY and THE TURF COMPANY, LLC, as Seller, and STATUS CORPORATION OF IDAHO, as Buyer, dated the 28 day of November, 2006, which Real Estate Purchase and Sale Agreement is attached hereto as Exhibit A and incorporated into this Memorandum of Contract by this reference, L. DARWIN MCKAY and THE TURF COMPANY, LLC have agreed to sell the real property described on Exhibit B hereto to STATUS CORPORATION OF IDAHO or assigns who has agreed to purchase the same.

Take notice that certain terms and conditions of Exhibit A survive the closing of Title.

IN WITNESS WHEREOF, the parties hereto have executed this Memorandum of Contract this 28 day of November, 2006.

BUYER:

STATUS CORPORATION OF IDAHO

Name: Ken Angles

Its: President

SELLER:

L. DARWIN MCKAY

L. Darwin McKay

THE TURF COMPANY, LLC

By: _____

Name: _____

Its: _____

MEMORANDUM OF CONTRACT - 1

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EXHIBIT “D”

REAL ESTATE PURCHASE AND SALE AGREEMENT

This Agreement is made effective as of the 28 day of November, 2006, between Status Corporation of Idaho, an Idaho corporation ("Buyer"), L. Darwin McKay, and Turf Company, LLC, an Idaho limited liability company (collectively, "Seller").

The parties agree as follows:

1. PURCHASE AND SALE OF PROPERTY.

1.1 Property. Subject to the terms and conditions of this Agreement, the Seller shall sell to the Buyer and the Buyer shall purchase from the Seller the following real property and other assets (the "Property"):

1.1.1 Real Property. The real property described in the attached *Schedule 1.1.1*, together with all buildings, fixtures, and other improvements located on such real property (the "Real Property"), also commonly referred to as:

3880 E. Lake Hazel Road, ("Parcel 1");
6100 S. Eagle Road, ("Parcel 2").

1.1.2 Ground water rights related to Parcel 2 shall not be conveyed to Buyer.

1.2 Purchase Price Amount. The purchase price for the Property is Eight Million Eight Hundred Twenty One Thousand Eight Hundred Dollars (\$8,821,800.00) (the "Purchase Price"). The Purchase Price is allocated to the Real Property as follows:

Parcel 1: \$4,921,800;
Parcel 2: \$3,900,000 (subject to adjustment as described in Section 1.3.2).

1.3 Purchase Price Payment. The Purchase Price shall be paid as follows:

\$3,250,000 was paid and has been applied to Parcel 1 Purchase Price;
\$275,000 shall be paid November 17, 2006 and applied to Parcel 1 Purchase Price;
\$250,000 shall be paid on March 30, 2007 and applied to Parcel 1 Purchase Price;
Balance of Purchase Price for Parcels 1 and 2 \$5,046,800 shall be paid March 30, 2008.

1.3.1 Conveyance of Lots. As additional consideration for the conveyance of the property, Buyer shall convey to Seller two lots of Seller's choice identified on the proposed subdivision plat in the attached *Exhibit 1.3.1*. Seller shall identify the lots within 10 business days after Buyer delivers to Seller a copy of the approved preliminary plat of the proposed subdivision. Buyer's obligation to convey these two lots shall be recorded as an encumbrance upon the title to the Real Property by the recording of a Memorandum of Contract and shall be subject to no prior encumbrances or liens. At the time of conveyance Buyer shall provide to Seller ALTA Owners'

REAL ESTATE PURCHASE AND SALE AGREEMENT - 1
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Policies for the fair market value of the lots, insuring that the Seller is the owner of the lots subject only to exceptions: (i) for real property taxes for the current year which are not then due or payable (ii) liens, encumbrances and conditions accepted in writing by Seller.

1.3.2 The Purchase Price shall be adjusted upon receipt of a final survey establishing the exact amount of acres contained within the portion of Parcel 2 conveyed to Buyer. Seller shall retain a strip of land in the approximate area identified on *Exhibit 1.3.2* hereto, adjacent to Eagle Road consisting of a strip of land along South Eagle Road which is approximately 1,039 feet along said frontage and 274 feet deep. The amount of the Purchase Price allocated to Parcel 2 shall be adjusted to reflect a Purchase Price of \$130,000 per acre. The current Purchase Price is based upon an assumption of conveyance of approximately 28.7 acres.

1.4 Note and Mortgage. At the time of closing on Parcel 1, Buyer shall execute and deliver to Seller a Promissory Note for the balance of the Purchase Price Amount on Parcel 1, substantially in the form attached as *Exhibit 1.4(a)* (The Promissory Note). All amounts due under the Promissory Note shall be secured by a first purchase money Mortgage on Parcel 1, substantially in the form attached as *Exhibit 1.4(b)* (The Mortgage). At the time of closing, Buyer shall provide to Seller an ALTA lender's policy, title insurance policy insuring the first lien priority of the Mortgage.

1.5 Allocation of Purchase Price. The Purchase Price shall be allocated for federal and state tax purposes by the Buyer and the Seller in accordance with *Schedule 1.5* attached. The Buyer and Seller shall each complete and file form 8594 in accordance with Internal Revenue Code Section 1060 and the corresponding rules and regulations reflecting the allocation set forth on *Schedule 1.5* attached.

1.6 Conveyance of Title.

1.6.1 Real Property. Title to the Real Property shall be conveyed by Warranty Deeds in the form attached as *Exhibits 1.6.1*. Title to the Real Property shall be marketable and insurable and shall be free and clear of all liens, encumbrances, and restrictions, exclusive of (i) real property taxes for the current year which are not due and payable on or before Closing, and (ii) liens, encumbrances, and conditions accepted in writing by the Buyer on or before Closing. Parcel 1 shall be conveyed to Buyer on November 17, 2006 and Parcel 2 shall be conveyed to Buyer on March 30, 2008. Seller's obligation to convey Parcel 2 shall be recorded as an encumbrance upon the title to Parcel 2 by the recording of a memorandum of contract and subject to no prior encumbrances or liens, except as shown on the Title Commitment for Parcel 2.

1.6.2 Other Property. Seller shall continue to own and have the right to remove all irrigation equipment on both Parcels and all landscaping stone on Parcel 2.

1.7 Title Insurance.

1.7.1 Commitments. Commitments for title insurance for Parcel 1 and Parcel 2 have been provided to the Buyer and are attached as *Exhibits 1.7.a* and *1.7.b* (The Title Commitments). Buyer agrees that all conditions of title and exceptions reflected on the title

commitments are acceptable to Buyer provided, however, that the Deed of Trust in favor of Sterling Bank reflected as exception number 18 of Exhibit 1.7.b shall be released at the time of closing on Parcel 2 and paid by Sellers proceeds.

1.7.2 Policy. At Closing, the Seller shall purchase ALTA Owner's Policies of title insurance (current version) ("Policy") satisfying the following specifications:

a. Insured and Amount. The Policies shall name the Buyer as the insured in the amount allocated to the Real Property on Schedule 1.5.

b. Special Exceptions. The Policy shall insure the Buyer as the owner of the Real Property, subject only to the following special exceptions: (i) real property taxes for the current year which are not due and payable on or before Closing, and (ii) liens, encumbrances, and conditions which are shown on the Title Commitments or which have been accepted in writing by the Buyer on or before Closing.

1.8 Possession. The Seller shall deliver actual possession of Parcel 1 to the Buyer on November 17, 2006, subject to Seller's interest under the Agricultural Lease reference in Section 1.8.1 and possession of Parcel 2 on March 30, 2008.

1.8.1 Agricultural Lease. The Seller shall retain the right to grow sod on Parcel 1 through September 30, 2007, pursuant to the Agricultural Lease attached hereto as *Exhibit 1.8.1*.

1.9 Prorated Items. The following items shall be prorated as of Closing: (i) taxes and water assessments using the last assessments available prior to Closing; (ii) rents; (iii) insurance premiums for insurance purchased by Seller and retained by the Buyer; (iv) interest and reserves on liens, encumbrances, and obligations, if any, expressly assumed in writing by the Buyer; and (v) utilities.

1.10 Assumption of Obligations. The Seller acknowledges that the Buyer may or may not, at the option of Buyer, assume or take the Property subject to certain debts, obligations, or liabilities. Any and all debts, obligations and liabilities, contingent or otherwise, which are not expressly assumed or taken subject to in writing by the Buyer on or before Closing are not assumed or taken subject to by the Buyer, shall not be deemed included in the Closing, and are retained by the Seller.

2. REPRESENTATIONS, WARRANTIES, AND COVENANTS OF THE SELLER.

The Seller represents and warrants to, and covenants with, the Buyer as follows:

2.1 Authority of the Seller. The execution, delivery, and consummation of this Agreement by the Seller has been duly approved in accordance with applicable law and any documents or instruments governing the Seller. The execution, delivery, and consummation of this Agreement by the Seller will not, with the passage of time, the giving of notice, or otherwise, cause the Seller to be in violation or breach of any law, regulation, contract, agreement, or other restriction

to or by which the Seller or the Property is subject or bound. If the Seller is a corporation, the Seller, at Closing, shall provide to the Buyer (i) a certificate from the State of Idaho dated not more than 45 days prior to Closing indicating that the Seller is in good standing and qualified to do business in Idaho, and (ii) resolutions of the board of directors of the Seller authorizing and approving this Agreement and the transactions contemplated by this Agreement. If the Seller is a partnership, the Seller, at Closing, shall provide to the Buyer resolutions of the partners of the Seller authorizing and approving this Agreement and the transactions contemplated by this Agreement.

2.2 Consents. Except as disclosed in writing to the Buyer prior to the Closing, no approval or consent of any person, firm, or other entity is required to be obtained by the Seller to permit the Seller to consummate the transactions contemplated by this Agreement.

2.3 Tax Returns and Audits. The Seller has filed all income, sales, excise, withholding, franchise, and other tax returns and reports of every nature required to be filed by the Seller accurately reflecting any and all taxes owing to any federal, state, or local taxing authority. There are no nonassessed tax deficiencies existing, proposed, or threatened against the Seller as a result of the operation of its business. There are no outstanding agreements or waivers extending the statutory period of limitation applicable to any tax return of the Seller. No examination or audit of any tax return of the Seller is proposed, threatened, or currently in progress.

2.4 Property Ownership. The Seller owns and possesses all right, title, and interest in and to the Property free and clear of all covenants, conditions, easements, liens, and encumbrances except as shown on the Title Commitments.

2.5 Material Misstatement or Omissions. No representation or warranty made by the Seller in this Agreement or in any document or agreement furnished in connection with this Agreement contains or will contain any untrue statement of material fact, or omits or will omit to state a material fact necessary to make the statements not misleading.

2.6 Compliance with Laws. To the best of Seller's actual knowledge, Seller has complied in all material respects with all laws, regulations, and orders affecting the Property and is not in default under or in violation of any provision of any federal, state, local or provincial order, rule, regulation or law.

2.7 Broker Fees. Except as disclosed in writing to the Buyer prior to Closing, the Seller is not obligated to pay any fee or commission to any broker, finder, or intermediary for or on account of the transaction contemplated by this Agreement.

2.8 Conduct Pending Closing. From the effective date of this Agreement to Closing, the Seller shall (i) maintain the Property in good repair, (ii) continue to operate the Property in the manner previously operated by the Seller, (iii) not enter into any contracts or purchase orders relating to the Property, other than in the ordinary course of operating the Property, and (iv) perform all acts necessary to insure that the representations, warranties, and covenants of the Seller shall be true, complete, and accurate in all respects on and as of the date of closing to the same force and effect as if made at Closing.

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3. CONDITIONS PRECEDENT TO CLOSING.

3.1 Conditions Precedent to Obligations of the Buyer. The obligations of the Buyer under this Agreement are, at Buyer's option, subject to the satisfaction of the following conditions:

3.1.1 Representations and Warranties True. The representations and warranties of the Seller are true, complete, and accurate as of the date of this Agreement and as of the date of Closing as if made as of such date.

3.1.2 Covenants Performed. The Seller has performed all obligations, covenants and agreements to be performed prior to Closing as set forth in this Agreement.

3.1.3 Title Policy. The Title Company is prepared to issue policies in accordance with the provisions of Section 1.7.

3.1.4 Execution and Delivery of Documents. The Seller (and others where required) shall have executed and delivered to the Closing Agent the following:

- a. The Warranty Deeds; and
- b. The Memorandum of Contract.

3.1.5 Public Record Searches. The Buyer shall have received tax lien and litigation searches, fictitious business statement filings, notices, or other similar documents that Buyer may require in order to reflect, perfect, or protect the interests of the Buyer in the Property and to fully consummate all of the transactions contemplated under this Agreement.

3.1.6 Waiver of Conditions. Buyer may waive, as a condition precedent to Closing, compliance with the conditions set forth above. However, waiver of compliance for purposes of Closing shall not waive or diminish any right of Buyer to recover damages or enforce other available rights by reason of noncompliance by the Seller with any representation, warranty, or covenant of the Seller set forth in this Agreement.

3.2 Conditions Precedent to Obligations of the Seller. The obligations of the Seller under this Agreement are, at Seller's option, subject to the satisfaction of the following conditions:

3.2.1 Closing of Parcel 1.

3.2.1.1 Execution of Delivery of Documents. The Buyer (and others where required) shall have executed and delivered to the Closing Agent the following:

- a. The Promissory Note;
- b. The Mortgage;

c. The Memorandum of Contract required under Section 1.3.1; and

d. The Agricultural Lease required under Section 1.8.1.

3.2.1.2 Lenders Policy. The Title Company is prepared to issue a Lender's Policy in accordance with the provisions of Section 1.4.

3.2.1.3 Payments. The Buyer shall have delivered to the Closing Agent and authorized the payment to Seller of all payments required under Section 1.3

3.2.2 Closing of Parcel 2.

3.2.2.1 Execution and Delivery of Documents. The Buyer shall have executed and delivered to the Closing Agent warranty deeds for the two (2) lots to be conveyed to Seller pursuant to Section 1.3.1.

3.2.2.2 Title Insurance. The Title Company is prepared to issue title policies for the two lots in accordance with Section 1.3.1.

3.2.2.3 Payments. The Buyer shall have delivered to the Closing Agent and authorized the payment to Seller of all remaining payments due to Seller under the terms of this Agreement and the Promissory Note.

4. CLOSING.

4.1 Closing Agent. The Closing Agent for this Agreement shall be Lisa Volken Land America Title ("Closing Agent"). Buyer and the Seller shall each pay one-half of the Closing Agent's Closing Fees at Closing.

4.2 Time, Date and Place of Closing. Closing shall be effective November 17, 2006 on Parcel 1 and March 30, 2008 on Parcel 2.

4.3 Closing Agent Instructions. Buyer and Seller shall execute and deliver to the Closing Agent instructions on the form generally provided by the Closing Agent with such modifications as are reasonably made by the Buyer.

5. GENERAL PROVISIONS.

5.1 Notices. All notices, claims, requests and other communications ("Notices") under this Agreement (i) shall be in writing, and (ii) shall be addressed or delivered to the relevant address set forth below or at such other address as shall be given in writing by a party to the other. Notices complying with the provisions of this Section shall be deemed to have been delivered (i) upon the date of delivery if delivered in person, or (ii) on the date of the postmark on the return receipt if

deposited in the United States Mail, with postage prepaid for certified or registered mail, return receipt requested.

5.2 **Attorney Fees and Costs.** The Parties agree that if a party is in default under this Agreement, then such party shall pay to the other party (a) reasonable attorney fees and other costs and expenses incurred by the other party after default and referral to an attorney, (b) reasonable attorney fees and other costs and expenses incurred by the other party in any settlement negotiations, and (c) reasonable attorney fees and other costs and expenses incurred by the other party in preparing for and prosecuting any suit or action ("Collection Costs"). Collection Costs shall be immediately due and payable.

5.3 **Governing Law, Jurisdiction, and Venue.** This Agreement shall be construed and interpreted in accordance with the laws of the State of Idaho. The parties agree that the courts of Idaho shall have exclusive jurisdiction and agree that Ada County is the proper venue.

5.4 **Time of the Essence.** Time is of the essence with respect to the obligations to be performed under this Agreement.

5.5 **Rights Cumulative.** Except as expressly provided in this Agreement, and to the extent permitted by law, any remedies described in this Agreement are cumulative and not alternative to any other remedies available at law or in equity.

5.6 **Nonwaiver of Remedies.** The failure or neglect of a party to enforce any remedy available by reason of the failure of the other party to observe or perform a term or condition set forth in this Agreement shall not constitute a waiver of such term or condition. A waiver by a party (i) shall not affect any term or condition other than the one specified in such waiver, and (ii) shall waive a specified term or condition only for the time and in a manner specifically stated in the waiver.

5.7 **Successors and Assigns.** Subject to any express provisions in this Agreement regarding restrictions on transfers or assignments, this Agreement shall be binding upon and inure to the benefit of the parties and their respective successors, assigns, heirs, and personal representatives.

5.8 **Entire Agreement.** All Schedules and Exhibits to this Agreement constitute a part of this Agreement. This Agreement, together with the accompanying Schedules and Exhibits, constitutes the entire agreement among the parties and supersedes all prior memoranda, correspondence, conversations and negotiations.

5.9 **Severability.** The invalidity of any portion of this Agreement, as determined by a court of competent jurisdiction, shall not affect the validity of any other portion of this Agreement.

5.10 **Counterparts.** This Agreement may be executed in one or more counterparts, each of which shall be deemed to be an original, but all of which together shall constitute one and the same instrument.

REAL ESTATE PURCHASE AND SALE AGREEMENT - 7
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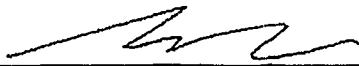
5.11 Survival of Representations, Warranties, and Covenants. All representations, warranties, and covenants of the Seller set forth in this Agreement shall survive the Closing and shall survive the recording of the Warranty Deeds.

5.12 Tax Deferred Exchange. Buyer hereby acknowledges that it is the intention of the Seller to effect an IRC 1031 Tax deferred exchange, which will neither delay the closing nor cause additional expense or liability to the Buyer. Buyer further acknowledges that Seller's rights and obligations under this agreement may be assigned to OREXCO ("Old Republic Exchange Facilitator Company"), a Qualified Intermediary, to facilitate the exchange. Buyer agrees to cooperate with the Seller and OREXCO in a manner necessary to enable Seller to complete the exchange.

6. SIGNATURES.

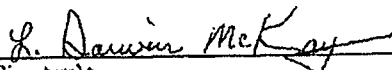
Dated: Nov. 28th, 2006

STATUS CORPORATION OF IDAHO,
an Idaho corporation


(Signature)
Kerry Angelos
(Print or Type Name)
1059 W. Iron Eagle, #300
(Street # and Name)
Eagle, ID 83616
(City, State and Zip)

Dated: 11/28/06, 2006

L. DARWIN MCKAY


(Signature)
L. Darwin McKay
(Print or Type Name)
6100 S. Eagle Rd.
(Street # and Name)
Meridian, Idaho 83642
(City, State and Zip)

Dated: Nov 28/06, 2006

TURF COMPANY, LLC
an Idaho limited liability company

By L. Darwin McKay, member
(Signature)

L. Darwin McKay
(Print or Type Name)

6100 S. Eagle Rd.
(Street # and Name)

Meridian Idaho 83642
(City, State and Zip)

REAL ESTATE PURCHASE AND SALE AGREEMENT - 9
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Schedule 1.1.1
Real Property Descriptions

PARCEL 1

A parcel of land being a portion of the South half of the Southwest quarter of Section 33, Township 3 North, Range 1 East, Boise Meridian, Ada County, Idaho, more particularly described as follows:

Commencing at the Southwest corner of Section 33, Township 3 North, Range 1 East, Boise Meridian; thence
North 89°42'48" East, 1,669.75 feet along the South line of the South half of the Southwest quarter of said Section 33 to a point on the approximate centerline of Ten Mile Creek, the REAL POINT OF BEGINNING of this description;
along said approximate centerline as follows: thence
North 12°08'30" West, 389.70 feet to a point; thence
North 45°13'00" West, 744.00 feet to a point; thence
North 08°58'00" West, 431.53 feet to a point on the North line of the South half of said Southwest quarter; thence
leaving said approximate centerline
North 89°54'26" East, 1,661.37 feet along said North line to the Northeast corner of said South half (CS 1/16 corner); thence
South 00°05'31" West, 1,329.12 feet to the Southeast corner of said South half (South quarter corner); thence
South 89°42'48" West, 981.95 feet along the South line of said South half to the REAL POINT OF BEGINNING of this description.

PARCEL 2

A parcel of land situated in a portion of the South half of the Southwest quarter of the Southwest quarter of Section 33, Township 3 North, Range 1 East, Boise Meridian, Ada County, Idaho, as shown on Record of Survey No. 4531, recorded February 2, 1999 as Instrument No. 99010162 for L. Darwin McKay as Parcel A described as follows:

Beginning at the Southwest corner of Section 33; thence
North 00°00'00" East 1338.06 feet to a 5/8 inch rebar marking the South 1/16 corner common to
Sections 32 and 33; thence
along the Northerly line of said South half of the Southwest quarter
North 89°54'18" East 992.43 feet to a point marking the centerline of the Ten Mile Creek; thence
along said centerline the following courses:
South 58°58'00" East 431.55 feet to a point; thence
South 45°13'00" East 744.00 feet to a point; thence
South 12°08'30" East 389.70 feet to a 1/2 inch rebar; thence
leaving said centerline and along the Southerly line of the said Southwest quarter;
South 89°42'48" West 1669.75 feet to the POINT OF BEGINNING.

EXCEPTING THEREFROM the following described land as shown as Parcel B on said Record
of Survey.

Beginning at the Southwest corner of Section 33, thence
along the Westerly line of the said Southwest quarter
North 00°00'00" East 326.06 feet to a 1/2 inch rebar; thence
South 48°49'33" East 170.96 feet to a 1/2 inch rebar; thence
North 89°42'48" East 139.97 feet to a 1/2 inch rebar; thence
North 00°00'00" East 128.01 feet to a 1/2 inch rebar; thence
North 89°42'48" East 449.84 feet to a 1/2 inch rebar; thence
South 00°00'00" East 340.87 feet to a 1/2 inch rebar; thence
along the Southerly line of the said Southwest quarter
South 89°42'48" West 718.50 feet to the POINT OF BEGINNING.

Exhibit 1.3.1
Proposed Subdivision Plat

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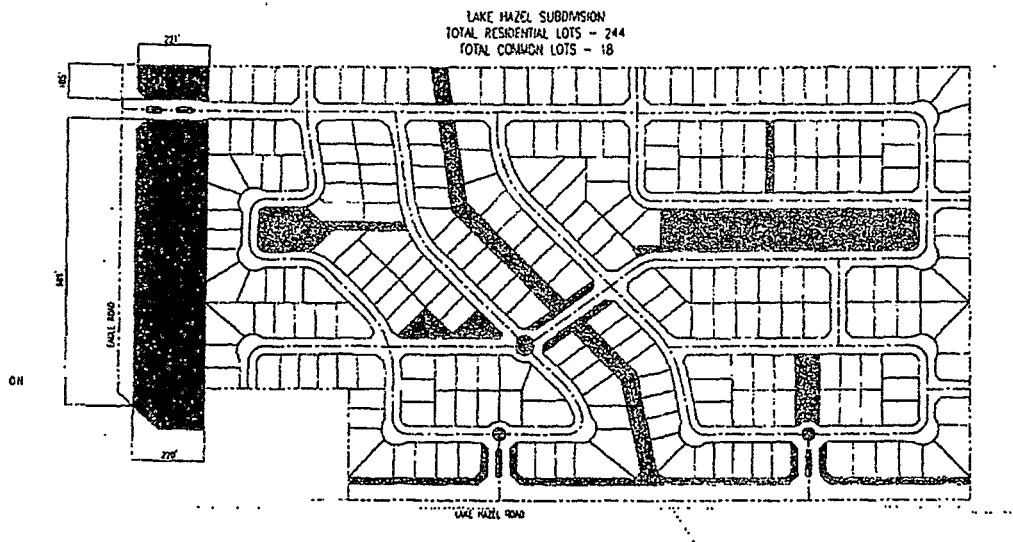
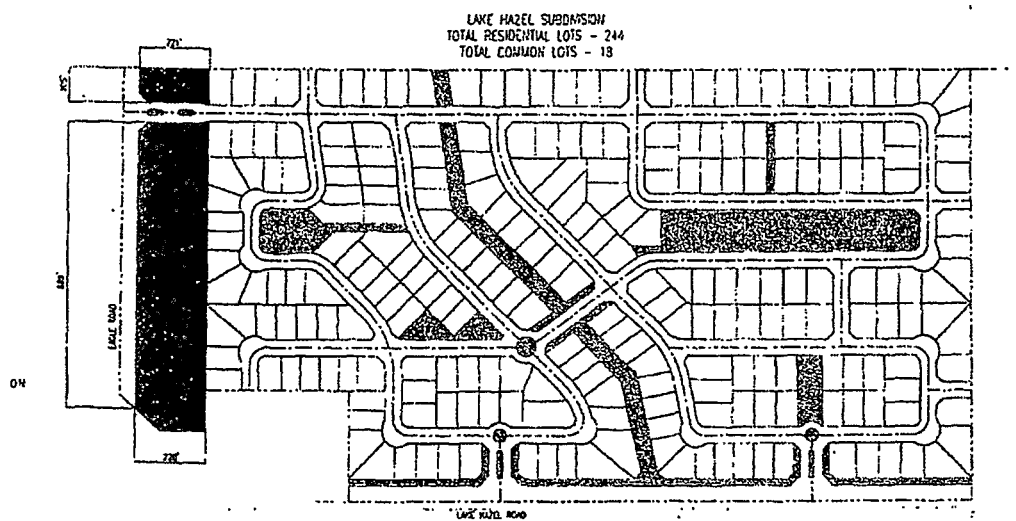


Exhibit 1.3.2
Property Retained by Seller

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ORIGINAL

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Yvonne A. Dunbar – ISB No. 7200
ANDERSON, JULIAN & HULL LLP
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Post Office Box 7426
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Facsimile: (208) 344-5510

Attorneys for Defendants

NO. _____ FILED _____
AM _____ RM 400

FEB 21 2013

CHRISTOPHER D. RICH, Clerk
By KATHY BIEHL
Replay

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

PATRICIA MCKAY,

Plaintiff,

vs.

THOMAS G. WALKER and COSHO
HUMPHREY, LLP, a limited liability
partnership,

Defendants.

Case No. CV OC 0922659

**MEMORANDUM IN SUPPORT OF
DEFENDANTS' MOTION TO
RECONSIDER COURT'S ORDER
DENYING DEFENDANTS'
MOTION FOR SUMMARY
JUDGMENT**

COMES NOW the above-named Defendants, by and through their attorney of record, Anderson, Julian & Hull LLP, and hereby submits this memorandum in support of their *Motion to Reconsider the Court's Order Denying Defendants' Motion for Summary Judgment* ("Motion to Reconsider"):

I. INTRODUCTION

The Defendants moved for summary judgment on January 6, 2011 wherein the Defendants argued the Plaintiff's claim failed as a matter of law because she could not establish

(1) the Defendants breached any duties owed to her; (2) the alleged breach was the proximate cause of her alleged damages; or (3) she suffered actual damages recoverable under the law. The Court heard argument on the Defendants' motion on February 3, 2011 and entered its written decision denying summary judgment on February 22, 2011. In its written decision, entitled *Order Denying Defendants' Motion for Summary Judgment* ("Order"), the Court found there was a genuine issue of fact regarding "whether the Defendants breached the standard of care in Idaho when [Mr. Walker allegedly] incorrectly stated the law to Mrs. McKay, thus leading her to believe that she would have a secured interest in her husband's mortgage on the Albrethsen property." *See Order*, p. 7.

The Defendants respectfully assert the Court's finding was made in error as the conclusion was based upon an October 23, 2007 email exchange, which we believe this Court inadvertently misinterpreted. Contrary to the Court's decision, the October 23, 2007 email exchange was not addressing the Albrethsen property, which had closed prior to October 2007, or the mortgage on that property. Instead, the October 23, 2007 email pertained to the sale of the Home Farm property by Darwin McKay to Status Corporation, which transaction was expected to close in March 2008. As the email pertained to the Home Farm property, Mr. Walker's email was a correct statement of law. Accordingly, Mr. Walker's email cannot be the basis of a determination that the Defendants breached a duty of care and it cannot be the grounds for denying summary judgment to the Defendants.

Due to the aforementioned errors, the Defendants file this timely *Motion to Reconsider* and respectfully request that the Court reconsider its *Order* and grant the Defendants summary judgment.

II. ARGUMENT

A. Standard of Review.

Rule 11(a)(2)(B), Idaho Rules of Civil Procedure, allows a party to move for reconsideration of an interlocutory order no later than fourteen days from the entry of final judgment. “A decision of whether to grant or deny a motion for reconsideration made pursuant to Idaho Rule of Civil Procedure 11(a)(2)(B) is left to the sound discretion of the trial court.” *Commercial Ventures, Inc. v. Rex M. & Lynn Lea Family Trust*, 145 Idaho 208, 212 (2008). When a party files a motion for reconsideration, there is no requirement for the party to provide the Court with either newly decided case law or new evidence. *Johnson v. Lambros*, 143 Idaho 468, 472-73 (Ct. App. 2006). The purpose of a motion for reconsideration is to allow the Court to “obtain a full and complete presentation of all available facts, so that the truth may be ascertained, and justice done, as nearly as may be.” *Coeur d’Alene Mining Co. v. First Nat’l Bank*, 118 Idaho 812, 823 (1990). Even though no new facts are required when filing a motion for reconsideration, the burden is on the party seeking reconsideration to bring to the Court’s attention any new facts or reasons why the Court’s previous decision should be reconsidered. *See Coeur d’Alene Mining Co.*, 118 Idaho at 823; *Johnson*, 143 Idaho at 472-73. A motion for reconsideration may be filed at any time before entry of final judgment. Idaho R. Civ. Proc. 11(a)(2)(B).

B. The Record and All Reasonable Inferences Establish the Defendants Did Not Breach Any Duty Owed to the Plaintiff.

1. The Court’s Interpretation of the October 23, 2007 Email Exchange was Incorrect.

Under Idaho law, when reviewing a summary judgment motion, a court is entitled to draw all reasonable inferences in favor of the non-moving party. The inferences drawn by the trial court must be reasonably supported by the record. *See e.g. J.R. Simplot Co. v. Bosen*, 144

Idaho 611, 621 (2006) (interferences not supported by the record are unreasonable). Where the inferences are not supported by the record, the trial court errs in drawing the same. *See e.g. id.*; *see also P.O. Ventures, Inc. v. Loucks Family Irrevocable Trust*, 144 Idaho 233, 237 (2007) (on appeal, the Idaho Supreme Court “reviews the inferences drawn by the district judge to determine whether the record reasonably supports those inferences”) (citing *Intermountain Forest Mgmt., Inc. v. Louisiana Pac. Corp.*, 136 Idaho 233, 235 (2001)).

In the current action, the Defendants respectfully submit the Court erred in inferring that the October 23, 2007 email pertained to the Albrethsen property, rather than the Home Farm Property. *See Order*, p. 7. This error is not harmless as the improper inference, which is not supported by the record, was the basis of its finding the existence of a question of fact regarding whether the Defendants breached a standard of care owed to the Plaintiff.

The October 23, 2007 email exchange at issue reads as follows:

Mrs. McKay: “All looks good Tom. However, can I place a lien with the title company on the Status Corp closure so the \$800,000.00 are paid to me by them? This is what we had to do when property sold that Donna had so the funds would come to us instead of thru Donna.”

Mr. Walker: “Our plan is to record the Judgment and Decree of Divorce, which then becomes a lien on all of Darwin's real and personal property. We don't want to emphasize this aspect of the settlement. So, we don't want to say anything until after the judge signs the Judgment and Decree.”

See Affidavit of Counsel in Support of Motion for Summary Judgment (“Counsel Aff.”), filed Jan. 6, 2011, Ex. A (Patricia McKay deposition) at Ex. 17.

In her above-email, the Plaintiff specifically asked Mr. Walker whether she could place a “lien with the title company on the Status Corp closure”. *See id.* At her deposition, the Plaintiff explained the purpose of her question as follows:

Q. (BY MR. ANDERSON) And can you tell me what you meant by: "Can I place a lien with the title company"?

A. A lien on all Darwin's property.

Q. Real property?

A. Real property.

Q. All right. And Mr. Walker responded with a means for doing that; correct?

A. Yes, he states: "Our plan is to record the Judgment and Decree of Divorce, which then becomes a lien on all of Darwin's real and personal property."

Q. So, let's just focus on real property. Were you satisfied with Mr. Walker's response?

A. Yes.

Q. All right. And has anyone told you that a lien was not created relative to any real property actually owned by Darwin McKay by virtue of recording the final property settlement agreement?

A. No.

Q. You then say, in essence, that the \$800,000 should be paid to you by them. And I'm curious, who do you mean by "them"?

A. I state: "However, can I place a lien" --

...

Q. (BY MR. ANDERSON) This might be a little disjointed. Let me read the sentence. You write on October 23rd: "Can I place a lien with the title company on the Status Corp closure so the \$800,000 are paid to me by them?" And who was "them"?

A. The title company.

Q. What title company were you referring to?

A. *Whatever title company would be used for the closing of the property.*

See id., 99:13-101:2 (emphasis added).

When reviewing the aforementioned email exchange and Plaintiff's deposition testimony, it becomes clear that the Plaintiff's question was solely focused on whether a lien could be placed on the real property being purchased by Status Corporation which was scheduled to close at some time in the future. Despite this fact, the Plaintiff's expert witness, Bryan Smith, and this Court mistakenly interpreted the email as referring to the Albrethsen property, which had closed almost 11 months prior to the October 23, 2007 email exchange.

In his affidavit filed in opposition to the Defendants' summary judgment motion, Mr. Smith mistakenly assumed the property at issue in the October 23, 2007 email was the Albrethsen property, which had already closed, rather than the Home Farm property, which was scheduled to close in March 2008. This mistaken assumption was the basis for all of Mr. Smith's opinions¹ which were utilized by this Court in support of its denial of summary judgment to the Defendants.

It appears Mr. Smith's mistaken assumption mislead this Court into incorrectly replacing the phrase "with the title company on the Status Corp closure" with "on the Albrethsen Mortgage closure". See Order, p. 2. Doing so was error as it is contrary to the facts and would cause an

¹ Mr. Smith testified at his deposition that his opinions are based upon the mistaken assumption that a closing would occur with regard to the Albrethsen Property on March 30, 2008 and that his opinions would be different if he learned his assumption was incorrect. Specifically, Mr. Smith testified:

Q. But you referred to it as a closing. Is that why you used that term?

A. I referred to it as a closing because that describes what -- the PSA uses the word closing, March 30, 2008.

Q. For the Albrethsen property? Can you find me that?

A. As I understand it, that was the Albrethsen property. Whether the PSA says that or not, I don't know. I've already told you, if the closing is on some piece of property not related to the mortgage, then my opinions would be different.

See Affidavit of Robert A. Anderson in Support of Defendants' Motion to Reconsider ("Anderson Aff."), filed concurrently herewith, Ex. A (Bryan Smith Deposition) at 131:2-13.

unreasonable and absurd result. Therefore, the Court's inference was contrary to established Idaho law which allows the Court to draw only reasonable inferences. *See e.g. Bosen*, 144 Idaho at 621.

The settlement between the Plaintiff and Darwin McKay ("Darwin"), the Plaintiff's ex-husband, involved, inter alia, two pieces of real property: the Albrethsen property and the Home Farm Property. The Property Settlement Agreement ("PSA") reads, in pertinent part, as follows:

1.7. Darwin shall pay Patricia \$800,000 in cash...within five (5) days of payment by the Status Corporation, or its assigns, ("Status Real Estate Transaction"). In addition, Darwin shall convey all his right, title and interest to Patricia in and to the two (2) lots to be conveyed by Status Corporation, or its assigns, to Darwin as part of the Status Corporation Real Estate Transaction. The parties acknowledge that the Status Real Estate Transaction is scheduled to close on or before March 30, 2008.

1.8. The parties acknowledge that if Status Corporation or its assigns breaches the Purchase and Sale Agreement, Darwin will have title to that portion of the land that had been referred to prior to the sale to Status Corporation as the "Home Farm." In the event of breach, Darwin may also be able to foreclose a mortgage on that portion of the land referred to prior to the sale to Status Corporation as "Albrethsen's Farm."

1.8.1. If the Status Real Estate Transaction fails to close on or before March 30, 2008, Darwin shall pay Patricia \$500,000 as soon as he is able to...

1.8.2. Provided further that if Status Corporation or it assigns breaches the Purchase and Sale Agreement and Darwin cannot pay \$500,000 by April 30, 2008, he shall...pay Patricia ...\$500,000 within five (5) days of receipt or closing on a sale.

1.8.3. Provided further that if following a breach, Darwin is not able to pay Patricia \$500,000 by September 30, 2008, he shall pay Patricia \$800,000 plus interest at the rate of 6% payable within five (5) days of any funds from the sale of either the Albrethsen property funds, the Home Farm property or both...

See Counsel Aff., Ex. B.

At the time of the October 2007 settlement negotiations and when the PSA was entered into, of the two properties addressed in PSA Paragraphs 1.7 and 1.8 supra, Darwin only had an ownership interest in the Home Farm Property. *See id.*, ¶ 1.8. This fact is emphasized by the

statement in Paragraph 1.8 where the parties acknowledged, if Status Corporation defaulted, Darwin would only have title to the Home Farm property. *See id.* As stated in the PSA, the sale of the Home Farm property was expected to close on or before March 30, 2008. *See id.*, ¶ 1.7.

At all times relevant hereto, Darwin did not have an ownership interest in the Albrethsen property². In fact, he previously sold it to Status Corporation and the closing occurred and the title was transferred to Status Corporation in November 2006. *See Anderson Aff.*, Ex. A at Ex. 39 (Warranty Deed); Ex. B (Darwin 3/21/07 Deposition) at 33:24-34:2. At all times during the October 2007 settlement negotiations, Darwin only held a mortgage³ which was secured by the Albrethsen property. *See Anderson Aff.*, Ex. C at Ex. C (Mortgage Note); *Counsel Aff.*, Ex. B at ¶ 1.8. No closing related to the Albrethsen property was expected to occur or even could occur after the PSA was executed. Likewise, no title company would be involved with the Albrethsen property sale at any time after November 2006 as the title transferred to Status Corporation no later than November 30, 2006 when the Warranty Deed, executed by Darwin and the Plaintiff, was recorded. *See Anderson Aff.*, Ex. A at Ex. 39 (Warranty Deed). The only activity left to occur related to the Albrethsen property was for Status Corporation to make mortgage payments to Darwin with the final payment to be made no later than March 30, 2008. *See Anderson Aff.*, Ex. C at Ex. C; Ex. B at 18:14-16; Ex. D. As is common knowledge, title companies do not act

² The Plaintiff was well aware Darwin did not own the Albrethsen Property before the October 23, 2007 email exchange as she previously executed the Warranty Deed transferring title of the Albrethsen Property to the Status Corporation. *See Counsel Aff.*, Ex. A (Patricia McKay Deposition) at Ex. (Patricia McKay Amended Affidavit), ¶ 188; *Anderson Aff.*, Ex. A at Ex. 39 (Warranty Deed). Additionally, in Paragraph 1.8 of the PSA, the Plaintiff acknowledged that Darwin only held title to the Home Farm Property and that he only held a mortgage secured by the Albrethsen Property. *See Counsel Aff.*, Ex. B, ¶ 1.8.

³ Darwin is the only mortgagee. Neither the mortgage nor the PSA grant the Plaintiff any interest in the mortgage. *See Anderson Aff.*, Ex. C (Patricia McKay Amended Affidavit) at Ex. C (Mortgage Note).

as middlemen when mortgage payments are made. As established by Darwin's mortgage, no title company was involved in Status Corporation's payments to Darwin; instead, the payments were to be made directly to Darwin without any intermediary. *See id.*

Simply put, the Albrethsen property could not have been the subject of the October 23, 2007 email exchange because (1) the property already closed the previous year and there was no post-October 2007 closure; (2) as Plaintiff was fully aware, Darwin did not own the Albrethsen property in October 2007; and (2) there was no title company with whom a lien could be placed. Instead, the record clearly establishes the subject of the October 23, 2007 email exchange was the Home Farm property. Because the closure of the Home Farm property was anticipated to occur in the future (March 2008) and the anticipated closure was addressed in the PSA, the only reasonable interpretation of the above email exchange is that the closure referred to therein was the closure of the Home Farm property. *See Anderson Aff.*, Ex. D; *Counsel Aff.*, Ex. B.

Accordingly, the Defendants respectfully assert the Court's decision was based upon an unreasonable and improper inference, thereby requiring reconsideration of the Court's *Order*.

2. Walker's October 23, 2007 Email was an Accurate Description of the Law.

Idaho Code section 10-1110 provides that the recording of a judgment

A transcript or abstract of any judgment...if rendered within this state, certified by the clerk having custody thereof, may be recorded...and from the time of such recording...the judgment so recorded becomes a lien upon all real property of the judgment debtor in the county...owned by him at the time or acquired afterwards at any time prior to the expiration of the lien; provided that where a transcript or abstract is recorded of any judgment or decree of divorce or separate maintenance making provision for installment or periodic payment of sums for maintenance of children or alimony or allowance for wife's support, such judgment or decree shall be a lien only in an amount for payments so provided, delinquent or not made when due...

Idaho Code § 10-1110.

Per I.C. § 10-1110, the recording of the *Judgment and Decree of Divorce* created a lien on any real property owned, at least in part, by Darwin. At the time the parties entered in the PSA, the parties understood Darwin held an ownership interest in the Home Farm property. As you know, the PSA specifically stated Darwin would retain title to the Home Farm property if Status Corporation defaulted on the loan. *See Counsel Aff.*, Ex. B at ¶ 1.8. Based upon such information, Mr. Walker's statement that the recorded *Judgment and Decree of Divorce* "becomes a lien on all of the Darwin's real...property," including the Home Farm property, accurately explained Idaho law. As such, the October 23, 2007 email exchange cannot be the basis of the Court's finding the existence of a genuine issue of material fact regarding whether the Defendants breached any standard of care owed to the Plaintiff.

Because the sole basis of the Court's finding of a genuine issue of material fact was that the October 23, 2007 email exchange allegedly contained an inaccurate description of the law and this finding was improper, the Defendants respectfully request this Court reconsider its *Order* and enter summary judgment in favor of the Defendants.

3. Bryan Smith's Opinions Should be Disregarded as They Not Supported by the Record.

In its *Order*, the Court appears to have relied on Mr. Smith's affidavit in support of its determination that questions of fact existed regarding the existence of a breach and causation. As Mr. Smith admitted, all of Mr. Smith's opinions are based upon the improper assumption that the closing of the Albrethsen property would occur at some time after the PSA was executed and that the property referenced in the October 23, 2007 email exchange was the Albrethsen property. *See Smith Affidavit; Anderson Aff.*, Ex. A (Bryan Smith Deposition) at 131:2-13. It cannot be overemphasized that these assumptions are not supported by any facts and are contrary

to the record.⁴ For these reasons, Mr. Smith's opinions do not assist the trier of fact and should, therefore, be disregarded. See e.g. *Jones v. Crawford*, 147 Idaho 11, 17, 205 P.3d 660, 666 (2009); *Ryan v. Beisner*, 123 Idaho 42, 46, 844 P.2d 24, 28 (Ct. App. 1992); *McGlinchy v. Shell Chem. Co.*, 845 F.2d 802 (9th Cir. 1988). Further, the Defendants respectfully assert that Mr. Smith's opinions cannot be the basis of a denial of summary judgment as they are not substantiated by the record.

III. CONCLUSION

For the aforementioned reasons, the Defendants respectfully request that this Court grant their *Motion to Reconsider* in its entirety and enter summary judgment in favor of the Defendants.

DATED this 21st day of February, 2013.

ANDERSON, JULIAN & HULL LLP

By: 

Robert A. Anderson

Yvonne A. Dunbar, of the Firm

Attorneys for Defendants

⁴ Specifically, Mr. Smith's opinion that Mr. Walker allegedly lead the Plaintiff to believe she had a security interest in the Albrethsen mortgage was based upon his unsubstantiated assumption that the October 23, 2007 email referred to the Albrethsen property. Likewise, the proposed safeguards enumerated in Mr. Smith's opinion were based upon his inaccurate assumption that the Albrethsen property was scheduled to close at some time after the PSA was executed. See *Anderson Aff.*, Ex. A (Bryan Smith Deposition) at 131:2-13. Given that there is no factual support for Mr. Smith's opinions, his opinions cannot assist the trier of fact and should, therefore, be disregarded on summary judgment.

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this 21st day of February, 2013, I served a true and correct copy of the foregoing by delivering the same to each of the following attorneys of record, by the method indicated below, addressed as follows:

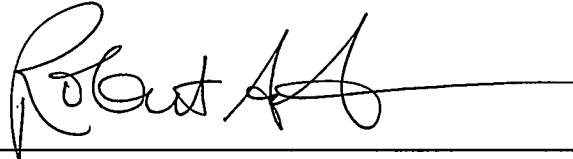
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| <input type="checkbox"/> | Hand-Delivered |
| <input type="checkbox"/> | Overnight Mail |
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| <input type="checkbox"/> | Email |

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ISB No. 1626

NO. _____ FILED _____
A.M. _____ P.M. 302

MAR 07 2013

CHRISTOPHER D. RICH, Clerk
By JERI HEATON
DEPUTY

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ISB No. 5974

Attorneys for Plaintiff

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

| | | |
|---------------------------------------|---|-------------------------------|
| Patricia McKay |) | |
| |) | Case No. CV OC 0922659 |
| Plaintiff, |) | |
| |) | MEMORANDUM IN OPPOSITION |
| v. |) | TO MOTION FOR RECONSIDERATION |
| |) | |
| Thomas G. Walker and Cosho Humphrey, |) | |
| LLP, a limited liability partnership, |) | |
| |) | |
| Defendants. |) | |
| _____ |) | |

MOTION UNTIMELY

In this reprise of a summary judgment motion, defendants invoke the assistance of an additional affidavit without complying with the notice requirements of Rule 56©, I.R.C.P. That is, the motion and memorandum were received by the office of plaintiff's counsel on February 26th, but posted in the U.S. Mail on February 21st. See Exhibit 1 to Fifth Affidavit of counsel. Under Rule

ORIGINAL

56(c), the motion must be served “at least 28 days before the time fixed for hearing”. The March 13th hearing date does not comply with the Rule. By treating this motion as a Rule 7 motion, defendants have allowed plaintiff just eight days to marshal an opposition brief and affidavits.

Defendants will seek refuge in the argument that the Rule 11 motion for reconsideration is timely. Defendants miss the point. Rule 56(c) requires 28 days notice of hearing and at least fourteen days for the respondent to formulate responsive briefing and affidavits.

Based upon the foregoing, plaintiff requests that the present hearing date be vacated. It is preposterous that defendants can finesse the requirements of Rule 56 by labeling this motion a “motion for reconsideration”.

SUMMARY OF ARGUMENT

Defendants’ argue that there was no “post October 2007 closure” at the time Mr. Walker wrote his October, 23, 2007 email. This is not correct. At that time, the Status mortgage in favor of Darwin had not yet been satisfied. As defendant Walker advised plaintiff in his December 2008, letter to plaintiff “ . . . [T]he mortgage that Lawyers Title accepted from Darwin should be subject to the lien of your judgment” (Exhibit 2, Second Ellis affidavit). In reliance on the representation that she was in a secured position, plaintiff entered into the property settlement agreement.

THE DISTRICT COURT CORRECTLY CONCLUDED THAT THERE WAS A QUESTION OF FACT WHETHER DEFENDANT WALKER CORRECTLY ADVISED PLAINTIFF THAT SHE HAD A SECURED INTEREST.

As the district court opined:

An October 23, 2007 email exchange shows that Mrs. McKay specifically asked Mr. Walker if the PSA could be structured so that the Albrethsen Mortgage pay-out would be paid to her instead of Mr. McKay. Even though the filing of the PSA did not have such an effect, Mr. Walker responded that the filing of the PSA in Idaho counties where Mr. McKay owned property would create a lien on all

Mr. McKay's real and personal property in those counties; a statement which intimated that Mrs. McKay would have a lien on the mortgage, and, thus, a secured interest. This was an incorrect statement of the law made during the relevant time frame to this attorney malpractice action. The record also contains the expert witness opinion of Idaho attorney Bryan D. Smith in which Mr. Smith opines that Mr. Walker breached the standard of care in Idaho when he led Mrs. McKay to believe that she had a secured interest in the Albrethsen property mortgage.

Order Denying Defendants' Motion for Summary Judgment, p. 7.

Just before plaintiff Patricia McKay signed the November 2007, property settlement agreement (Exhibit 1 to Second Ellis affidavit), defendant Walker assured her that the decree of a divorce would become "a lien on all Darwin's real and personal property". As reflected in the Affidavit of Patricia McKay filed January 24, 2011, she believed that this "lien" gave her a security interest in the mortgage proceeds related to the Albrethson property. Her belief in this regard was corroborated by Mr. Walker in his December 2008 letter to plaintiff:

In any event, pursuant to Idaho Code §10-1011, your judgment was recorded before any of the assignments that you provided me, including the one to Lawyers Title. *Thus, the mortgage that Lawyers Title accepted from Darwin should be subject to the lien of your judgment* (emphasis added).

Exhibit 2 to Second Ellis affidavit

DEFENDANTS SEEK TO CREATE AN AMBIGUITY WHERE NONE EXISTS
AS RESPECT'S DEFENDANT WALKER'S ADVICE TO PLAINTIFF
AND HER REASONABLE RELIANCE THEREON

Paragraph 1.8 and 1.8.3 of the Property Settlement Agreement recites:

1.8 The parties acknowledge that if Status Corporation or its assigns breaches the Purchase and Sale Agreement, Darwin will have title to that portion of the land that had been referred to prior to the sale to Status Corporation as the "Home Farm." *In the event of breach, Darwin may also be able to foreclose a mortgage on that portion of the land referred to prior to the sale to Status Corporation as "Albrethsen's Farm."*

1.8.3 Provided further that if following a breach, Darwin is not able to pay Patricia \$500,000 by September 30, 2008, he shall pay Patricia \$800,000 plus interest at the rate of 6% payable within five days of any funds from the sale of either the Albrethsen property funds, the Home Farm property or both (provided that payment of funds from the sale of the Home Farm may only be made to the extent allowed by the bank holding the line of credit for the Turf Corporation) by cash, certified check, or by wire transfer.

Exhibit 1 to Second Affidavit of Allen B. Ellis, pp. 4, 5. (emphasis added)

Thus, in the October 23, 2007, email upon which defendants place such great reliance, “Status Corp. closure” refers to Status’ compliance with the terms of the mortgage. Whether “closure” has reference to sale of the Home Farm or satisfaction of the mortgage, plaintiff was reasonably led to believe that she was secured by reason of defendants’ handling of her divorce. Again, see Mr. Walker’s assurance in this regard by his December 2008, letter quoted above (Exhibit 2).

Defendant argues that the Albrethson probably had already closed. Therefore, argue defendants, “closure” must refer to the Home Property. The difficulty with this argument is that Status had also not yet completed the Albrethson sale and “in the event of breach Darwin may also be able to foreclose a mortgage on that portion of the land referred to prior to the sale to Status Corporation as “Albrethsen’s Farm.” (Exhibit 1 to Second Ellis affidavit, p. 4 of Property Settlement Agreement).

Plaintiff testified in her deposition that she believed that she had a security interest in the Status mortgage:

Q. And what did Mr. Walker say in response?

A. Darwin must have a mortgage on it because he’s still due \$1.4 million.”

Q. So, is that the totality of the conversation regarding the mortgage note?

A. Yes, and I said, “So, am I secure in that?”“ And he said, “Yes, the whole – once this is recorded, then the mortgage note, this is part of

his real property. That's why I put that in there."

Exhibit 2 to Fifth Affidavit of Allen B. Ellis.

CONTRARY TO DEFENDANTS' ASSERTION, "CLOSURE" HAD NOT YET
OCCURRED WITH RESPECT TO THE ALBRETHSEN PROPERTY
GIVEN DARWIN'S OPTION TO "FORECLOSE A MORTGAGE" THEREON

Defendants argue that the only real property which could be the subject of the October 23, 2007, letter was the Home Property. Counsel fails to recognize, unlike Mr Walker recognizes, in his December 2007 letter, that the Status mortgage held by Darwin constitutes an interest in real property.

As our Supreme Court has noted:

Because a deed of trust is an interest in real property, it falls under the terms of I.C. § 9-503. *See* BLACK'S LAW DICTIONARY 445 (8th Ed. 2004) ("[D]eed of trust. A deed conveying title to real property to a trustee as security until the grantor repays a loan.").

Ogden v. Griffith, 149 Idaho 489, 493, 236 P.3d 1249 (2010).

Also, according to Black's Law Dictionary respecting mortgages:

Mortgage: A conveyance of title to property that is given as security for the payment of a debt or the performance of a duty and that will become void upon payment or performance according to the stipulated terms

Id., p. 1026.

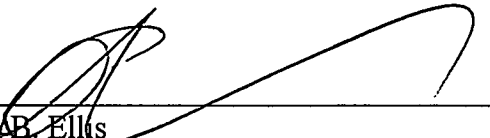
Thus, at the time of the Property Settlement Darwin had a real property interest in the Status mortgage which mortgagee was referenced in the Property Settlement Agreement. That is, the real property referenced in Mr. Walker's October 27, 2007, email included the mortgage. This fact is corroborated by Mr. Walker's letter of December 2008, that "the mortgage that Lawyer's Title accepted from Darwin should be subject to the lien of your judgment". Exhibit 2 to Second Ellis affidavit.

CONCLUSION

Defendants' argue that there was no "post October 2007 closure" at the time Mr. Walker wrote his October, 23, 2007 email. This is not correct. At that time, the Status mortgage in favor of Darwin had not yet been satisfied. As defendant Walker advised plaintiff in his December 2008, letter to plaintiff " . . . [T]he mortgage that Lawyers Title accepted from Darwin should be subject to the lien of your judgment" (Exhibit 2, Second Ellis affidavit). In reliance on the representation that she was in a secured position, plaintiff entered into the property settlement agreement.

Plaintiff respectfully requests that the herein motion be denied and the matter proceed to trial on the merits.

DATED This 6th day of March, 2013.


Allen B. Ellis
Attorney for plaintiff

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 6th day of March, 2013, I caused to be served a true and correct copy of the foregoing by the method indicated below, and addressed to the following:

Robert A. Anderson
Yvonne A. Dunbar
ANDERSON, JULIAN & HULL, LLP
250 South Fifth Street, Suite 700
P.O. Box 7426
Boise, Idaho 83707

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____ Overnight Mail
 X Facsimile at
344-5510


Allen B. Ellis

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(208) 475-0101

Attorneys for Plaintiff

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

| | | |
|---------------------------------------|---|------------------------|
| Patricia McKay |) | |
| |) | Case No. CV OC 0922659 |
| Plaintiff, |) | |
| |) | FIFTH AFFIDAVIT OF |
| v. |) | ALLEN B. ELLIS |
| |) | |
| Thomas G. Walker and Cosho Humphrey, |) | |
| LLP, a limited liability partnership, |) | |
| |) | |
| Defendants. |) | |
| _____ |) | |

STATE OF IDAHO)
)ss.
County of Ada)

I, Allen B. Ellis, being first duly sworn, depose and state as follows:

1. I am the attorney for the plaintiff in the herein matter and make this affidavit upon my own personal knowledge and am competent to testify to the matters contained here.

FIFTH AFFIDAVIT OF ALLEN B. ELLIS - 1

NO. _____
FILED _____
A.M. _____ P.M. 362

MAR 07 2013

CHRISTOPHER D. RICH, Clerk
By JERI HEATON
DEPUTY

ORIGINAL 000837


2. Attached hereto as exhibits are true and correct copies of the following:

Document

Exhibit No.

Excerpt of Memorandum in Support of Defendants' Motion to Reconsider
Court's Order Denying Defendants' Motion for Summary Judgment 1

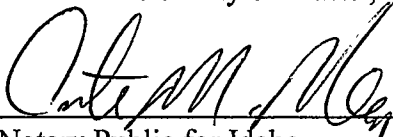
Excerpt of Patricia McKay deposition taken November 1, 2010 2



Allen B. Ellis
Attorney for Plaintiff

SUBSCRIBED AND SWORN To before me this 6th day of March, 2013.





Notary Public for Idaho
Residing at Boise
Commission Expires: 01/05/18

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 6th day of March, 2013, I caused to be served a true and correct copy of the foregoing by the method indicated below, and addressed to the following:

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☒ Facsimile at
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Allen B. Ellis

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Yvonne A. Dunbar – ISB No. 7200
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RECEIVED

FEB 26 2013

Ellis, Brown & Sheils, Chartered

Attorneys for Defendants

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

PATRICIA MCKAY,

Plaintiff,

vs.

THOMAS G. WALKER and COSHO
HUMPHREY, LLP, a limited liability
partnership,

Defendants.

Case No. CV OC 0922659

**MEMORANDUM IN SUPPORT OF
DEFENDANTS' MOTION TO
RECONSIDER COURT'S ORDER
DENYING DEFENDANTS'
MOTION FOR SUMMARY
JUDGMENT**

COMES NOW the above-named Defendants, by and through their attorney of record, Anderson, Julian & Hull LLP, and hereby submits this memorandum in support of their *Motion to Reconsider the Court's Order Denying Defendants' Motion for Summary Judgment* ("Motion to Reconsider"):

I. INTRODUCTION

The Defendants moved for summary judgment on January 6, 2011 wherein the Defendants argued the Plaintiff's claim failed as a matter of law because she could not establish

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this 21st day of February, 2013, I served a true and correct copy of the foregoing by delivering the same to each of the following attorneys of record, by the method indicated below, addressed as follows:

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707 North 8th Street
P.O. Box 388
Boise, Idaho 83701-0388
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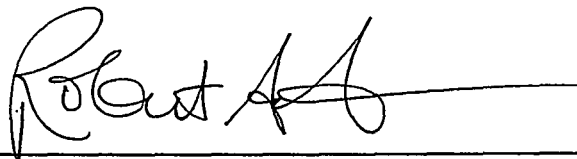
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U.S. Mail, postage prepaid
Hand-Delivered
Overnight Mail
Facsimile
Email

Attorneys for Plaintiff



Robert A. Anderson
Yvonne A. Dunbar

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

COPY

PATRICIA McKAY,)
Plaintiff,)
vs.) Case No. CV OC 0922659
THOMAS G. WALKER and COSHO)
HUMPHREY, LLP, a limited) VOLUME I
liability partnership,) (Pages 1 through 147)
Defendants.)
_____) Per request
exhibits not provided

DEPOSITION OF PATRICIA E. McKAY
TAKEN NOVEMBER 1, 2010

REPORTED BY:

SHERI FOOTE, CSR No. 90, SFR, ORR
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■ SPOKANE, WA
509-455-4515

■ HAILEY, ID
208-578-1049

000842

EXHIBIT 2

v.idahocourtreporting.com

1 A. It may have been, yes.

2 Q. So, tell me what question you had, if
3 it was a question, relative to this --

4 A. "Tell me about the mortgage note."

5 Q. And what did Mr. Walker say in
6 response?

7 A. "Darwin must have a mortgage on it
8 because he's still due \$1.4 million."

9 Q. So, is that the totality of the
10 conversation regarding the mortgage note?

11 A. Yes, and I said, "So, am I secure in
12 that?" And he said, "Yes, the whole -- once this
13 is recorded, then the mortgage note, this is part
14 of his real property. That's why I put that in
15 there."

16 Q. Now, you're under oath; remember?

17 A. That's why Tom Walker put this in
18 there.

19 Q. No, I'm telling you, you're under oath,
20 remember that?

21 A. Yes.

22 Q. So, are you telling me as you sit here
23 answering my question that Tom Walker told you
24 that the mortgage note was real property?

25 A. No, but a mortgage is real property.

Page 134

1 Q. So, you assumed that?

2 A. Yes.

3 Q. All right. And if you remember, I'm
4 only -- don't talk, please, while I'm trying to
5 get this out because I might not be able to get
6 it all out. Then I'll let you talk all you want,
7 I promise.

8 What I'm trying to figure out from you
9 is what you can testify to about what Mr. Walker
10 or Mr. Welsh said to you; okay?

11 A. Regarding this?

12 Q. Well, regarding this whole transaction
13 and this whole representation. But for right now
14 we're talking about paragraph 1.8. And I see a
15 sentence that says: "Darwin may also be able to
16 foreclose a mortgage." Now, what did you ask
17 specifically about that sentence, if that's
18 indeed what you're trying to impart to us?

19 A. I expressed interest in seeing the
20 mortgage. I said, "What's this mortgage?"

21 Q. What did he say?

22 A. "Darwin must have a mortgage on that
23 property because he's still due about
24 \$1.4 million on it."

25 Q. And if he foreclosed on a mortgage,

1 that might result in some funds being received by
2 Mr. McKay; correct?

3 A. I don't recall him saying that, but
4 that's what he's insinuating to me, yes.

5 Q. And if Mr. McKay then received some
6 funds, he had an obligation to pay you?

7 A. Yes.

8 Q. All right. So, are you saying that
9 it's a bad thing --

10 A. No.

11 Q. You've got to wait. -- for Mr. Walker
12 to have included that language in 1.8?

13 A. Actually, I -- as I recall, I
14 complimented him on putting that in there and
15 picking up on that.

16 Q. He didn't say that if Darwin forecloses
17 on a mortgage that you automatically get your
18 money, though; did he?

19 A. No.

20 Q. You understood that if Darwin
21 foreclosed on a mortgage note, he still had a
22 separate obligation to pay you some of it?

23 A. Yes.

24 Q. And if he didn't pay you some of it,
25 did you understand that you had the tool of

Page 136

1 filing a contempt action against him?

2 A. Correct.

3 Q. And neither Mr. Walker nor Mr. Welsh
4 ever told you that any other framework of
5 recovering against your husband existed; correct?

6 MR. ELLIS: Objection, asked and
7 answered.

8 THE WITNESS: That is correct.

9 Q. (BY MR. ANDERSON) All right. Did you
10 ask any other questions?

11 A. Yes, I expressed that they wrote in
12 here on 1.8.2, page 4: "He," meaning Darwin, "He
13 shall" -- "If Status Corporation breaches and
14 Darwin cannot pay the \$500,000 by April 30th, he
15 shall list the Albrethsen property that was
16 included in the Status Corporation Real Estate
17 Transaction for sale and shall pay Patricia by
18 cash, certified check or wire transfer \$500,000
19 within five days" --

20 THE COURT REPORTER: Please read that
21 more slowly.

22 MR. ELLIS: Come on, Patty. You don't
23 have to read it. Just answer the question.

24 THE WITNESS: I'm sorry. I expressed
25 to Tom Walker that Darwin didn't own the

REPORTER'S CERTIFICATE

I, SHERI FOOTE, CSR No. 90, Certified
Shorthand Reporter, certify:

That the foregoing proceedings were taken
before me at the time and place therein set
forth, at which time the witness was put under
oath by me;

That the testimony and all objections made
were recorded stenographically by me and
transcribed by me or under my direction;

That the foregoing is a true and correct
record of all testimony given, to the best of my
ability;

I further certify that I am not a relative
or employee of any attorney or party, nor am I
financially interested in the action.

IN WITNESS WHEREOF, I set my hand and seal
this 5th day of November, 2010.

Sheri Foote

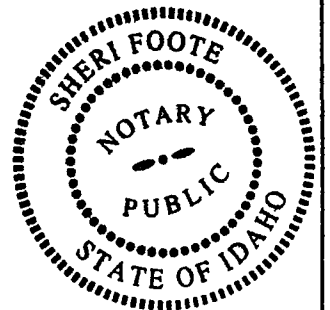
SHERI FOOTE, CSR, RPR, CRR

Notary Public

P.O. Box 2636

Boise, Idaho 83701-2636

My commission expires January 17, 2016



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A.M. _____

MAR 27 2013

CHRISTOPHER D. RICH, Clerk
By KATHY BIEHL
Deputy

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Attorneys for Defendants

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

PATRICIA MCKAY,

Plaintiff,

vs.

THOMAS G. WALKER and COSHO
HUMPHREY, LLP, a limited liability
partnership,

Defendants.

Case No. CV OC 0922659

**MEMORANDUM IN SUPPORT OF
DEFENDANTS' MOTION TO
RECONSIDER COURT'S ORDER
DENYING DEFENDANTS'
MOTION FOR SUMMARY
JUDGMENT**

COMES NOW the above-named Defendants, by and through their attorneys of record, Anderson, Julian & Hull LLP, and hereby submits this memorandum in support of their *Motion to Reconsider the Court's Order Denying Defendants' Motion for Summary Judgment* ("Motion to Reconsider"):

42

I. ARGUMENT

A. The Hearing was Timely.

At the outset of her opposition brief, the Plaintiff asserts the originally scheduled hearing was untimely. Such an argument is contrary to the Idaho Rules of Civil Procedure. The briefing schedule set forth in Rule 56 only applies to motions for summary judgment. Motions to reconsider are not even mentioned in that rule. Rather, motions to reconsider are governed by Rules 7(b)(3) and 11(a)(2)(B). Rule 7(b)(3) states that a motion must be filed and served no later than 14 days prior to the hearing. The Defendants served their motion via U.S. Mail¹ on February 21, 2013 with a Notice of Hearing setting the hearing for March 13, 2013, 20 days after the motion was filed and served. As such, the hearing was timely scheduled.

Despite this fact, the Defendants agreed to move the hearing date to allow the Plaintiff additional time to respond to the *Motion to Reconsider*. The Plaintiff, however, did not utilize the additional time which resulted from the Defendants agreement to reschedule the hearing. The failure of the Plaintiff to file any supplemental briefing or affidavits leads the Defendants to wonder why the Plaintiff fought the hearing date initially.

B. The Record and All Reasonable Inferences Establish the Defendants Did Not Breach Any Duty Owed to the Plaintiff.

As explained in the Defendants' opening brief, it appears the Court's summary judgment decision was based upon the misinterpretation of the October 23, 2007 email exchange wherein Mr. Walker informed the Plaintiff that recording the *Judgment* and the PSA would create a lien on the real property scheduled to close on March 30, 2008. See e.g. *Affidavit of Robert A.*

¹ The Plaintiff claims she did not receive the Defendants' *Motion to Reconsider* until five days after it was mailed. This was likely due to the fact that Plaintiff's counsel failed to inform the Defendants that he moved office locations prior to the filing of the Defendants' *Motion*. Had Plaintiff's counsel properly done so, the Plaintiff would have received the *Motion to Reconsider* within one to two days after it was mailed. Regardless, the Plaintiff still received the *Motion* more than 14 days prior to the originally scheduled hearing date.

Anderson in Support of Defendants' Motion to Reconsider ("Anderson Aff."), Ex. D at ¶1.6.1; PSA. In support of its decision, the Court misinterpreted that email as addressing the Albrethsen property, when the subject was actually the Home Farm Property. *See Order Denying Defendants' Motion for Summary Judgment ("Order")*. It is axiomatic that the Albrethsen property sale closed no later than November 28, 2006 when the mortgage and promissory note were entered. *See e.g. Anderson Aff.*, Ex. D at ¶1.4. The Home Farm property sale was the sale scheduled to close on or before March 30, 2008. *See Anderson Aff.*, Ex. D at ¶ 1.6.1.

In an effort to have the Court ignore this fact, the Plaintiff argues that the Albrethsen property sale had not yet closed because Status Corporation had not made all payments due under the Promissory Note. To accept this position would be to find, as a matter of law, that all sales of real property involving warranty deeds do not close until mortgages are paid in full. This is simply not the case. When a homeowner purchases a home through financing provided by Bank of America, the sale closes at the time the closing papers are executed even though there exists a fifteen-to-thirty-year mortgage which has not been paid in full. The Plaintiff's position also ignores the fact that, on November 30, 2006, a warranty deed executed by Darwin and the Plaintiff in favor of Status Corporation was recorded. *Anderson Aff.*, Ex. A at Ex. 39 (Warranty Deed). The execution and recording of the warranty deed resulted in a complete transfer of any and all interests in the real property to Status Corporation. *See Anderson Aff.*, Ex. D at ¶1.6. By definition, a warranty deed² is a complete transfer of interest in the subject real property. *See e.g. Idaho Trust Co. v. Eastman*, 43 Idaho 142 (1926) ("the record of a warranty deed, duly

² The Plaintiff seems to suggest the execution and recording of the warranty deed did not result in a complete transfer of interest because a deed of trust does not necessarily result in a complete transfer of interest. As this Court is aware a warranty deed and a deed of trust are separate and distinct legal documents. A deed of trust "resembles a mortgage" while a warranty deed "guarantees the grantor's good, clear title." *See BLACK'S LAW DICTIONARY* 445 (9th Ed. 2009). The current action involves a warranty deed, not a deed of trust.

executed, acknowledged, and recorded, makes a prima facie case of an absolute transfer in this state”); BLACK'S LAW DICTIONARY (9th ed. 2009) (a warranty deed is “A deed containing one or more covenants of title; esp., a deed that expressly guarantees the grantor's good, clear title...”).

The Plaintiff also attempts to have this Court ignore indisputable facts by improperly referencing a December 2008 letter, by ignoring key terms of the PSA, and by misquoting deposition testimony. The Plaintiff's reliance on the December 2008 letter is improper. As this Court already ruled, that letter is irrelevant to the current action because it was written over a year after the Plaintiff executed the PSA. *See e.g. Order*, pp. 6-7. Accordingly, it cannot be the basis of the Plaintiff's claims against the Defendants, including a claim that the Defendants breached a duty owed to the Plaintiff. The Plaintiff simply could not have relied on that letter when she executed the PSA. As such, there is no causal connection between the December 2008 letter and the Plaintiff's alleged damages.

Next, the Plaintiff's interpretation of the PSA is flawed. The PSA makes clear that the Home Farm Property was set to close on March 30, 2008 and that Darwin only held a mortgage on the Albrethsen Property. *See Counsel Aff.*, Ex. B at ¶ 1.8. Additionally, pursuant to the PSA, the Plaintiff agreed that the mortgage and any proceeds arising from the mortgage were Darwin's sole and separate property. *See id.* at ¶ 1.9 (awarding Darwin the “Proceeds from the sale of Albrethsen” as his sole and separate property). As such, the Plaintiff voluntarily released any potential interests she may have had in the mortgage. *See id.*

Finally, the Plaintiff attempts to mislead the Court by quoting only a portion of her deposition testimony which she recanted a few lines down. The pertinent testimony is as follows:

Q. Of Exhibit No. 31. All right. Now, what part of 1.8 are you looking at?

A. The very last sentence.

Q. Of that first paragraph?

A. Yes.

Q. And it says: "In the event of breach, Darwin may also be able to foreclose a mortgage on that portion of the land referred to prior to the sale to Status Corporation as 'Albrethsen's Farm.'" So, tell me what -- I mean, was this the first time you had seen the term "mortgage" --

A. Yes.

Q. -- in this agreement?

A. Yes.

Q. Wasn't it in the document that you had received on November the 19th for review?

A. It may have been, yes.

Q. So, tell me what question you had, if it was a question, relative to this -

A. "Tell me about the mortgage note."

Q. And what did Mr. Walker say in response?

A. "Darwin must have a mortgage on it because he's still due \$1.4 million."

Q. So, is that the totality of the conversation regarding the mortgage note?

A. Yes, and I said, "So, am I secure in that?" And he said, "Yes, the whole -- once this is recorded, then the mortgage note, this is part of his real property. That's why I put that in there."

Q. Now, you're under oath; remember?

A. That's why Tom Walker put this in there.

Q. No, I'm telling you, you're under oath, remember that?

A. Yes.

Q. So, are you telling me as you sit here answering my question that Tom Walker told you that the mortgage note was real property?

A. No, but a mortgage is real property.

Q. So, you assumed that?

A. Yes.

See Counsel Aff., Ex. A at 132:8-134:2 (emphasis added).

As this testimony clearly establishes, the Defendants never informed the Plaintiff or lead her to believe the mortgage was real property or that recording the *Judgment* would result in a lien on the mortgage. Instead, she made the assumption that the mortgage was real property on her own. She never shared this mistaken assumption with the Defendants. *See Affidavit of Thomas Walker in Support of Defendants' Motion for Summary Judgment*, ¶23.

Because the undisputed evidence establishes that the Defendants never made statements to the Plaintiff that the Albrethsen Property mortgage was real property or that a lien could be placed on the mortgage, the Defendants did not breach any duty owed to the Plaintiff. The Court's finding to the contrary was based upon the misinterpretation of an October 23, 2007 email. The indisputable facts clearly establish that the email addressed the Home Farm Property, not the Albrethsen Property as was incorrectly inferred by the Court.

As no genuine issue of material fact exists with regard to the fact that the Defendants did not breach any duty owed, the Defendants are entitled to summary judgment.

II. CONCLUSION

For the aforementioned reasons, the Defendants respectfully request that this Court grant their *Motion to Reconsider* in its entirety and enter summary judgment in favor of the Defendants.

DATED this 27th day of March, 2013.

ANDERSON, JULIAN & HULL LLP

By: Yvonne Dunbar
Robert A. Anderson
Yvonne A. Dunbar, of the Firm
Attorneys for Defendants

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this 27th day of March, 2013, I served a true and correct copy of the foregoing by delivering the same to each of the following attorneys of record, by the method indicated below, addressed as follows:

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Attorneys for Plaintiff

Yvonne Dunbar
Robert A. Anderson
Yvonne A. Dunbar

APR 25 2013

CHRISTOPHER D. RICH, Clerk
By INGA JOHNSON
DEPUTY

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

PATRICA MCKAY,

Plaintiff,

vs.

THOMAS G. WALKER and COSHO
HUMPHREY, LLP, a limited liability
Partnership,

Defendants.

Case No. CV-OC-2009-22659

MEMORANDUM DECISION AND ORDER
DENYING DEFENDANTS' MOTION TO
RECONSIDER

This matter came before the Court on Defendant's Motion to Reconsider. The Court heard oral argument on April 3, 2013. Robert Anderson argued on behalf of the Defendants and Allen Ellis argued on behalf of the Plaintiffs. At the conclusion of oral argument, the Court took the matter under advisement.

BACKGROUND AND PROCEDURAL HISTORY

In 2006, plaintiff Patricia McKay retained defendants Cosho Humphrey and, specifically, Tom Walker, to represent her in her divorce from her husband Darwin McKay. In the fall of 2007, Mrs. McKay, through her attorneys, filed a Motion for Partial Summary Judgment against Darwin specifically attempting to negate the impact of a pre-nuptial agreement. In response to that motion, the McKays and their respective counsel participated in an October 20, 2007 mediation conducted by the Honorable Duff McKee in an attempt to reach a property distribution agreement.

At the conclusion of the mediation, the parties entered into a handwritten agreement that was ultimately memorialized as the Property Settlement Agreement (PSA) on November 20, 2007. The PSA required Mr. McKay (1) pay Mrs. McKay \$800,000 in cash, (2) convey two subdivision lots to her, and (3) pay off the mortgage on the marital home (which was awarded to Mrs. McKay). These three requirements were to be satisfied within five days after the completion of a real estate transaction between Mr. McKay and Status Corporation, which would put Mr. McKay in a position to satisfy the terms of the PSA. The key terms of the Agreement between Mr. McKay and Status Corporation, executed on November 28, 2006, were as follows:

1. Mr. McKay would convey two real estate parcels to Status Corporation: the Albrethsen property would be conveyed immediately and the Home Farm property would be conveyed in March, 2008.
2. Status would pay a total of \$8,821,800 for the two parcels: \$4,921,800 for Albrethsen and \$3,900,000 for Home Farm.
3. \$3,925,000 of the Albrethsen purchase price would be paid, or had already been paid, when the Agreement was executed. Between the date of the Agreement and March 30, 2008, Status would make some additional payments for the Albrethsen parcel. Mr. McKay would have a mortgage on the Albrethsen parcel until the full purchase price for that parcel was paid.
4. On March 30, 2008, Status would pay the remaining balance of the purchase price for both parcels (\$5,046,800). Mr. McKay would transfer title to the Home Farm property to Status and release his mortgage against Albrethsen.
5. Status would convey two lots in a subdivision it was developing to Mr. McKay as additional consideration. Mr. McKay would identify which two lots he wanted after the preliminary plat was approved.

Affidavit of Robert A. Anderson In Support of Defendants' Motion to Reconsider, Exhibit D, pages 1-3.

1 On October 23, 2007, three days after the PSA was drafted, but before it was executed,
2 Mrs. McKay made the following specific inquiry of her attorney regarding the \$800,000
3 payment:

4 Mrs. McKay: All looks good Tom. However, can I place a lien on the Status Corp closure
5 so that the \$800,000.00 are paid to me by them? This is what he had to do
6 when property sold that Donna had so the funds would come to us instead
of thru Donna.¹

7 Mr. Walker: Our plan is to record the judgment and decree of divorce, which then
8 becomes a lien on all of Darwin's real and personal property. We don't
9 want to emphasize this aspect of the settlement. So, we don't want to say
anything until the judge signs the Judgment and Decree.

10 In 2008, Mrs. McKay contacted Mr. Walker and informed him that her former husband
11 had received the money due him under the Albrethsen mortgage, but she had not been paid the
12 \$800,000.00 nor had the mortgage on their marital home been paid. Mr. Walker informed Mrs.
13 McKay that a Motion for Contempt could be filed against Darwin for his failure to comply with
14 a Court Order. Mr. Walker and his partner Mr. Welsh contacted Mr. McKay's attorney and
15 discussed options with Mrs. McKay. Eventually, they began to draw up the Motion for
16 Contempt.

17 In January 2009, Mr. Walker was contacted by attorney Scott Hess who informed Walker
18 that he (Hess) now represented Mrs. McKay. Mr. Walker then executed a substitution of counsel.
19 Mr. Hess represented Mrs. McKay in the Motion for Contempt. That issue was resolved in a July
20 2009 settlement between the McKays.

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22
23
24 ¹ In the Order Denying Defendants' Motion for Summary Judgment, the Court used the words "Albrethsen
25 Mortgage" instead of "Status Corp closure" when quoting this e-mail exchange. As discussed more fully below,
Defendants argue that it was unreasonable for the Court to infer that Mrs. McKay was referring to the Albrethsen
Mortgage when she asked Mr. Walker about the Status Corp closure.

1 Mrs. McKay brought this action against the defendants in November 2009, alleging
2 negligence in the form of attorney malpractice. In short, Mrs. McKay claims that Walker
3 incorrectly told her that because he had filed the McKay's divorce agreement in all the counties
4 in which Mr. McKay owned property, Mrs. McKay had a lien on the Albrethsen mortgage held
5 by Mr. McKay. Additionally, she asserts that Mr. Walker failed to properly describe the
6 Albrethsen property in the PSA, which allowed Mr. McKay to obtain the payoff proceeds free
7 and clear.

8 In January 2011, the Defendants moved for summary judgment on the attorney
9 malpractice claim. The Court denied the Motion on February 6, 2011, holding that the October
10 23, 2007 e-mail exchange created a genuine issue of material fact regarding (1) whether
11 Defendant breached his duty of care, and (2) whether such breach was a proximate cause (cause
12 in fact and legal responsibility) of Plaintiff's damages. The Court's analysis of that October 23,
13 2007 e-mail exchange is reproduced here:
14

15 An October 23, 2007 email exchange shows that Mrs. McKay specifically asked
16 Mr. Walker if the PSA could be structured so that the Albrethsen Mortgage pay-
17 out would be paid to her instead of Mr. McKay. Even though the filing of the PSA
18 did not have such an effect, Mr. Walker responded that the filing of the PSA in
19 Idaho counties where Mr. McKay owned property would create a lien on all Mr.
20 McKay's real and personal property in those counties; a statement which
21 intimated that Mrs. McKay would have a lien on the mortgage, and, thus, a
22 secured interest. This was an incorrect statement of the law made during the
23 relevant time frame to this attorney malpractice action. The record also contains
24 the expert witness opinion of Idaho attorney Bryan D. Smith in which Mr. Smith
25 opines that Mr. Walker breached the standard of care in Idaho when he led Mrs.
26 McKay to believe that she had a secured interest in the Albrethsen property
mortgage.

Order Denying Defendants' Motion for Summary Judgment at 7.

MOTION TO RECONSIDER

Defendant filed this Motion to Reconsider on February 21, 2013, arguing that the Court drew an unreasonable inference from the phrase "Status Corp Closure" in the October 23, 2007 e-mail exchange and issued an erroneous ruling as a result. For the reasons stated below, the Court disagrees and the Motion to Reconsider is therefore DENIED.

APPLICABLE LAW

The Motion to Reconsider is brought under Idaho Rule of Civil Procedure 11(a)(2)(B):

A motion for reconsideration of any interlocutory orders of the trial court may be made at any time before the entry of final judgment but not later than fourteen (14) days after the entry of the final judgment.

"A rehearing or reconsideration in the trial court usually involves new or additional facts, and a more comprehensive presentation of both law and fact. Indeed, the chief virtue of a reconsideration is to obtain a full and complete presentation of all available facts, so that the truth may be ascertained, and justice done, as nearly as may be." *Coeur d'Alene Mining Co. v. First Nat'l Bank*, 118 Idaho 812, 823, 800 P.2d 1026, 1037 (1990) (quoting *J.I. Case Co. v. McDonald*, 76 Idaho 223, 229, 280 P.2d 1070, 1073 (1955)). "The trial court must consider new evidence that bears on the correctness of an interlocutory order if requested to do so by a timely motion under Rule 11(a)(2)(B)." *PHH Mortg. Services Corp. v. Perreira*, 146 Idaho 631, 635, 200 P.3d 1180, 1184 (2009).

When considering a motion to reconsider an interlocutory order, "the trial court should take into account any new facts presented by the moving party that bear on the correctness of the [that] order." *Johnson v. North Idaho College*, 153 Idaho 58, 62, 278 P.3d 928, 932 (2012) (quoting *Coeur d'Alene Mining Co. v. First Nat'l Bank*, 118 Idaho 812, 823, 800 P.2d 1026, 1037 (1990)). The moving party has the burden to bring the court's attention to new facts. *Id.*

1 The trial court does not have to search the record to determine if there is any new information
2 that might change the facts deemed to be established. *Id.* However, neither Rule 11(a)(2)(B) nor
3 *Coeur d'Alene Mining Co.* explicitly state that new facts are needed. *Johnson v. North Idaho*
4 *College*, 153 Idaho at 62, 278 P.2d at 932. "A motion for reconsideration is a motion which
5 allows the court – when new law is applied to previously presented facts, when new facts are
6 applied to previously presented law, or any combination thereof – to reconsider the correctness
7 of an interlocutory order." *Id.*

8 The trial court's decision on a motion for reconsideration will be reviewed on appeal for
9 abuse of discretion. *Commercial Ventures, Inc., v. Rex M. & Lynn Lea Family Trust*, 145 Idaho
10 208, 212 (2008). The trial court acts within its discretion if it (1) correctly perceives the issue as
11 discretionary; (2) acts within the outer boundaries of its discretion and consistent with applicable
12 legal principles; and (3) reaches its decision through an exercise of reason. *Justad v. Ward*, 147
13 Idaho 509, 511 (2009).

14 15 **DEFENDANTS' ARGUMENTS IN SUPPORT OF THE MOTION**

16 Defendants first argue that the Court drew an unreasonable inference from the October
17 23, 2007 e-mail exchange between Mrs. McKay and Mr. Walker. While the Court is permitted to
18 draw inferences in favor of the non-moving party on a moving for summary judgment, those
19 inferences must be reasonably supported by the record. *J.R. Simplot Co. v. Bosen*, 144 Idaho 611,
20 621 (2006).

21
22 In this case, Defendants argue that the Court unreasonably inferred that Mrs. McKay was
23 referring to the Albrethsen property instead of the Home Farm property when she e-mailed Mr.
24 Walker on October 23, 2007. Mrs. McKay stated in her deposition that in this e-mail, she was
25 asking Mr. Walker if there was a way to make sure that the \$800,000 would be paid to her by

1 whichever title company would be used "for the closing of the property." Anderson Aff. Exhibit
2 A (Patricia McKay Deposition at 99:13 – 101:2). Since Mr. McKay transferred the title to the
3 Albrethsen property in November 2006, it had already "closed." Therefore, Mrs. McKay must
4 have been referring to the Home Farm Property, which was not expected to close until March 30,
5 2008. Since Status Corporation's payments on the Albrethsen mortgage were paid to Mr. McKay
6 directly without any title company's involvement, no title company would have been in a
7 position to pay her \$800,000 of the mortgage payoff proceeds.

8 Second, Defendants argue that since Mrs. McKay was referring to the Home Farm
9 property, Mr. Walker correctly explained the relevant law. Under Idaho Code § 10-1110, the
10 recording of the Judgment and Decree and divorce created a lien against the Home Farm
11 Property because Mr. McKay owned it when the Judgment was recorded.

12 Lastly, Defendants argue that since Mrs. McKay was referring to the Home Farm
13 property, the Court should disregard the opinions of the Plaintiff's expert witness, Bryan Smith.
14 As Mr. Smith admitted, all of his opinions were based on the erroneous assumption that the
15 closing of the Albrethsen property would occur sometime after the PSA was executed.
16

17 **PLAINTIFF'S ARGUMENTS IN OPPOSITION**

18 Plaintiff argues that the Court reasonably inferred that Mrs. McKay could have been
19 referring to Status' compliance with the terms of the Albrethsen mortgage when she asked Mr.
20 Walker about the "Status Corp closure." Since there was a mortgage outstanding on the
21 Albrethsen property when the PSA was executed, the Albrethsen sale had not been completed
22 (i.e. it had not yet "closed"). Mr. McKay's ability to foreclose on the Albrethsen mortgage in the
23
24
25

1 event that Status failed to make the March 30, 2008 payment is further evidence that the
2 Albrethsen property had not "closed" when the PSA was executed.

3 **DEFENDANTS' MOTION IS DENIED BECAUSE THEIR INTERPRETATION OF "STATUS CORP**
4 **CLOSURE" IS NOT THE ONLY REASONABLE ONE.**

5 The Defendants' arguments rest on the assumption that Mrs. McKay was not referring to
6 the Albrethsen mortgage payoff in her October 23, 2007 e-mail because Mr. McKay had already
7 transferred the title by this date. While this could be true, it is not the only reasonable
8 interpretation given the complexity of the Status Agreement. The Status Agreement stated that
9 on before March 30, 2008, Status Corporation would pay Mr. McKay roughly \$5 million, with
10 part of the proceeds being used to pay off the Albrethsen mortgage and the remainder being used
11 to purchase Home Farm. Since both payments were due on the same date pursuant to one all-
12 encompassing Agreement, it is unclear which payment Mrs. McKay was referring to when she
13 spoke of the "Status Corp closure." It is also possible that Mrs. McKay, a lay person, used the
14 word "closure" where a person with more experience in real estate transactions, an attorney for
15 example, would have used a more precise term such as "mortgage" or "payoff."

16
17 The Defendants also assume that Mrs. McKay was not referring to the mortgage payoff
18 because no title company was acting as an intermediary in that part of the transaction. Again, this
19 inference is plausible, but it is not the only reasonable one given the complexity of the Status
20 Agreement. The parties do not dispute that had Status Corporation made the full required
21 payment on March 30, 2008, a title company would have facilitated the closing of Home Farm.
22 Being aware that a title company would somehow be involved, Mrs. McKay may have
23 incorrectly assumed that the title company was handling both the mortgage payoff and the
24

1 transfer of Home Farm. The Defendants have not demonstrated exactly what Mrs. McKay's
2 understanding was in this regard.

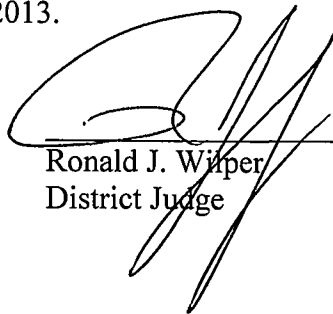
3 In light of these genuine issues of material fact, it was proper for the Court to deny the
4 Defendants' Motion for Summary Judgment. Accordingly, in an exercise of discretion, the Court
5 will DENY the Defendants' Motion to Reconsider.

6
7 **CONCLUSION**

8 Given the foregoing, Defendants' Motion to Reconsider is DENIED.

9 IT IS SO ORDERED.

10 Dated this 25th day of April 2013.

11
12 
13 Ronald J. Wilper
14 District Judge
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CERTIFICATE OF MAILING

I, HEREBY CERTIFY that on the 25 day of April, 2013 I caused a true and correct copy of the foregoing MEMORANDUM DECISION AND ORDER ON DEFENDANTS SAINT ALPHONSUS REGIONAL MEDICAL CENTER, INC., SAINT ALPHONSUS HEALTH SYSTEM, INC. AND TRINITY HEALTH CORPORATION'S MOTION FOR SUMMARY JUDGMENT to be served by the method indicated below, and addressed to the following:

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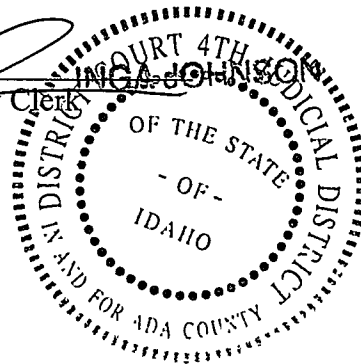
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☐ Facsimile (208) 475-0101

CHRISTOPHER D. RICH
Clerk of the District Court

By _____

Deputy Clerk



ALLEN B. ELLIS
ELLIS LAW, PLLC
12639 W. Explorer Drive, Suite 140
Boise, Idaho 83713
208/345-7832 (Tel)
208/345-9564 (Fax)
ISB No. 1626

KEVIN E. DINIUS
DINIUS & ASSOCIATES, PLLC
5680 E. Franklin Road, Ste 130
Nampa, Idaho 83687
(208) 475-0100 (Telephone)
(208) 475-0101
ISB No. 5974

Attorneys for Plaintiff

NO. _____
FILED _____
A.M. _____ P.M. 4:01

MAY 07 2013

CHRISTOPHER D. RICH, Clerk
By DAYSHA OSBORN
DEPUTY

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

| | | |
|---------------------------------------|---|-----------------------------|
| Patricia McKay |) | |
| |) | Case No. CV OC 0922659 |
| Plaintiff, |) | |
| |) | AFFIDAVIT OF ALLEN B. ELLIS |
| v. |) | |
| |) | |
| Thomas G. Walker and Cosho Humphrey, |) | |
| LLP, a limited liability partnership, |) | |
| |) | |
| Defendants. |) | |
| _____ |) | |

STATE OF IDAHO)
)ss.
County of Ada)

I, Allen B. Ellis, being first duly sworn, depose and state as follows:

1. I am the attorney for the plaintiff in the herein matter and make this affidavit upon my own personal knowledge and am competent to testify to the matters contained here.

AFFIDAVIT OF ALLEN B. ELLIS - 1

ORIGINAL 000862

2. Attached hereto as Exhibit 1 is a true and correct copy of Order Regarding Settlement of All Claims by the Honorable Michael J. Reardon filed November 23, 2009.


3. As set forth in paragraph 2(d) of Exhibit 1, plaintiff's ex-husband, Darwin McKay "shall pay both first and second mortgages in full no later than 8/1/14". Those mortgages carry a balance of \$556,324 and \$67,490, respectively. See paragraph 2(d), p. 4 of Exhibit 1.

4. Darwin McKay is presently in Chapter 7 bankruptcy proceedings. See Exhibit 2, attached hereto.

5. As the Court is aware, plaintiff's alleged damages in this matter include the unpaid mortgage debt identified in paragraph (3) above. Whether plaintiff's ex-husband does or does not satisfy these mortgages in 2014 will have a significant impact on plaintiff's alleged damages. The ability and intention of plaintiff's ex-husband to satisfy this mortgage debt is rendered problematic by its inclusion in his bankruptcy schedules (Chapter 7). See Exhibit 3 attached hereto.

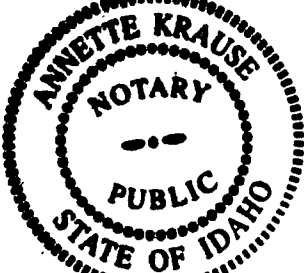
6. Trial in this matter is set for January 22, 2014. Because of the pending deadline set forth in paragraphs (3) and (5) above, plaintiff's damage picture will have not fully evolved by the trial date.

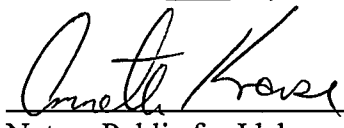
7. In order for the damage picture to crystalize, trial in this matter should be continued to a date subsequent to August 14, 2014.



Allen B. Ellis
Attorney for Plaintiff

SUBSCRIBED AND SWORN To before me this 7th day of May, 2013.





Annette Krause
Notary Public for Idaho
Residing at Boise
Commission Expires: 01/05/18

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 7th day of May, 2013, I caused to be served a true and correct copy of the foregoing by the method indicated below, and addressed to the following:

Robert A. Anderson
Yvonne A. Dunbar
ANDERSON, JULIAN & HULL, LLP
250 South Fifth Street, Suite 700
P.O. Box 7426
Boise, Idaho 83707

☐ U.S. Mail
☐ Hand Delivery
☐ Overnight Mail
☒ Facsimile at
344-5510



Allen B. Ellis

BROOKS LAW, P.C.
KIMBERLY D. BROOKS - ISB #5968
TESSA J. BENNETT - ISB #7424
The Lockman House
23 9th Avenue North
Nampa, ID 83687
Telephone: (208) 442-7489
Facsimile: (208) 468-4030
Email: kim@kbrookslaw.com

ATTORNEYS FOR DEFENDANT

COPY

NO. _____
FILED _____
A.M. _____ P.M. 4:55

NOV 23 2009

J. DAVID NAVARRO, Clerk
By ELAINE TOWN
REPORT

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

| | | |
|-----------------|---|-----------------------------------|
| PATRICIA MCKAY, |) | CASE NO. CV DR 0615200 |
| |) | |
| Plaintiff, |) | |
| |) | |
| vs. |) | ORDER REGARDING SETTLEMENT OF ALL |
| |) | CLAIMS |
| DARWIN MCKAY, |) | |
| |) | |
| Defendant. |) | |
| |) | |

THIS MATTER, having come before the Court on the 15th day of July, 2009, Defendant DARWIN MCKAY with his attorney of record, Kim Brooks; Plaintiff PATRICIA MCKAY appearing with her attorney of record, Scott D. Hess; the parties having reached an agreement and placing their stipulation on the record in open Court; the Court finding good cause therein, IT IS HEREBY ORDERED as follows:

ORDER REGARDING SETTLEMENT OF ALL CLAIMS - PAGE 1

Bm

1. COVENANT NOT TO ENFORCE DECREE: Plaintiff, PATRICIA McKAY, agrees to dismiss her claims contained in her Motion to liquidate Judgment filed 1/30/09 and Motion for Contempt filed 1/30/09 in their entirety in exchange for the terms of settlement/agreement outlined below. Both parties hereby covenant and agree not to attempt to enforce any term of that Judgment and Decree of Divorce filed 11/29/07. This Order regarding settlement of all claims supplants all unfulfilled financial provisions of the Judgment and Decree filed 11/29/07, specifically paragraphs 1.7 through and including paragraph 1.8.3. DARWIN McKAY's monthly obligation to Plaintiff, PATRICIA McKAY in the amount of twenty five hundred dollars (\$2500.00), shall cease as of July 15, 2009. Other than as listed in this Settlement Agreement, Defendant DARWIN McKAY shall have no further financial obligations to Plaintiff, PATRICIA McKAY.

2. TERMS OF SETTLEMENT/ AGREEMENT:

a. Van Es: Defendant, DARWIN McKAY, shall transfer and convey all interest in that certain note known as the "Van Es Receivable" to Plaintiff PATRICIA McKAY. Defendant DARWIN McKAY shall make all efforts to secure a first position insurance policy. As of date of transfer (9/15/09), Defendant

3m

DARWIN MCKAY represents that one hundred sixty three (163) payments of two thousand six hundred eighty three dollars and eight cents (\$2,683.08), totaling four hundred thirty-seven thousand three hundred forty-two dollars and four cents (\$437,342.04) remain due upon the note transferred. The Van Es note shall not be alimony to Plaintiff;

b. CASH: Defendant, DARWIN MCKAY shall make a cash payment of thirty seven thousand two hundred ninety dollars and twenty six cents (\$37,290.26) to Plaintiff PATRICIA MCKAY with the first payment of eighteen thousand six hundred forty five dollars and thirteen cents (\$18,645.13) payable no later than 9/15/09 and the second payment of eighteen thousand six hundred forty five dollars and thirteen cents (\$18,645.13) payable no later than 9/15/10;

c. PAYMENT: Defendant, DARWIN MCKAY shall make a cash payment to Plaintiff PATRICIA MCKAY in the amount of one hundred thousand dollars (\$100,000.00) payable no later than 8/1/12;

d. MORTGAGES: Defendant DARWIN MCKAY shall continue to pay the first mortgage, including property taxes and insurance, attached to Plaintiff PATRICIA MCKAY'S residence in the approximate amount of five hundred fifty six

Jm

thousand three hundred twenty four dollars and thirty four cents (\$556,324.34). Defendant DARWIN McKAY shall continue to pay the second mortgage attached to Plaintiff PATRICIA McKAY'S residence in the approximate amount of sixty seven thousand four hundred ninety dollars and forty nine cents (\$67,490.49).

Said obligations shall be the "Personal Residence Debt." Said payments shall be made no later than the due date set forth on the mortgage statements. Defendant DARWIN McKAY shall pay both first and second mortgages in full no later than 8/1/14. If Plaintiff PATRICIA McKAY sells said residence, payments shall continue directly to Plaintiff PATRICIA McKAY pursuant to the terms herein. Plaintiff Patricia McKay agrees to cooperate in Mr. McKay's efforts, if any, to refinance the mortgage loan(s). Notwithstanding the foregoing, Patricia shall have the right to sell the Personal Residence at any time; in which case, the Personal Residence Debt would likely be paid off out of the sale proceeds. If Patricia sells the Personal Residence, Darwin shall pay directly to Patricia the unpaid principal balance of the Personal Residence Debt, plus interest accruing at the respective rates called for in the first and second loan documents, in monthly installments to and including payment in full no later than 8/1/2014 of the Personal Residence Debt. The parties agree that Kevin Crane,

811

CPA, or if Mr. Crane cannot serve, such other accountant as the parties shall designate, will provide the appropriate calculations of the remaining balance and accruing interest and Darwin shall execute and deliver a promissory note to Patricia setting forth his payment obligations. Any such promissory note shall include a right of prepayment.

e. ALIMONY: All payments herein, whether to the mortgage companies or Plaintiff PATRICIA McKAY directly, shall be considered and deemed as alimony paid by Defendant DARWIN McKAY. The transfer of the Van Es receivable shall not be considered as alimony to Plaintiff PATRICIA McKAY;

f. TIME SHARE: Defendant DARWIN McKAY shall offer Plaintiff PATRICIA McKAY the option of exercising up to fourteen (14) weeks of a time share with Palace Resorts at Plaintiff PATRICIA McKAY'S expense of approximately \$1500.00 to \$1600.00 per week. Said 14 weeks may be used in any combination, Patricia shall make her request(s) in writing and Darwin shall respond to Patricia's request(s) in writing within five days, via e-mail or US postal Service. Patricia shall pre-pay with verified funds prior to final reservations with Palace Resorts. Whatever rate is offered to Defendant DARWIN McKAY shall be paid by Plaintiff PATRICIA McKAY.

Defendant DARWIN McKAY, individually and/or on behalf of his company, whichever is applicable agrees to facilitate any paperwork necessary to insure that Plaintiff PATRICIA McKAY is transferred fourteen (14) weeks. Plaintiff PATRICIA McKAY shall have three (3) years to complete her fourteen (14) weeks, no later than July 16, 2012. Plaintiff PATRICIA McKAY shall have the right to engage in a conference call with an employee of Defendant DARWIN McKAY's company and a representative from Palace Resort Timeshares for the purpose of determining the amount due upon Plaintiff PATRICIA McKAY's request to utilize the timeshare.

3. COVENANT NOT TO EXECUTE: The terms outlined above contain the entire agreement of the parties and each party stipulates and agrees that said terms may be reduced to a judgment in the amount of \$1,223,814.83, which has been entered as of August 19, 2009. Plaintiff PATRICIA McKAY hereby covenants not to execute upon the August 19, 2009 Judgment as long as Defendant DARWIN McKAY is not in default of the Order herein. Upon default, Plaintiff PATRICIA McKAY may execute upon the Judgment entered August 19, 2009 to the extent it has not been satisfied as of the date of the breach.

4. ATTORNEYS FEES/ COSTS: Each party shall bear their own attorneys fees and costs in this matter.

IT IS SO ORDERED this 23 day of November, 2009.

 **COPY**

MICHAEL J. REARDON
Magistrate Judge

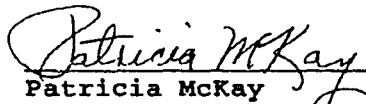


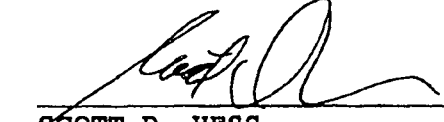
Approved as to Form and Content:

Darwin McKay

Kim Brooks
Attorney for Defendant

Approved as to Form and Content:


Patricia McKay


SCOTT D. HESS
Attorney for Plaintiff



CERTIFICATE OF SERVICE

I hereby certify that on this 24 day of November, 2009, I caused a true and accurate copy of the foregoing document to be served upon the following as indicated below:

Scott D. Hess
HOLLAND & HART, LLP
101 South Capitol Blvd., Ste. 1400
P.O. Box 2527
Boise, Idaho 83701-2527
Facsimile: (208) 343-8869

☐ Hand Delivery
☒ U.S. Mail
☐ Overnight Courier
☐ Facsimile Transmission

Kimberly D. Brooks
Brooks Law, P.C.
The Lockman House
23 9th Avenue North
Nampa, Idaho 83686
FAX: 468-4030

☐ Hand Delivery
☒ U.S. Mail
☐ Overnight Courier
☐ Facsimile Transmission

J. DAVID NAVARRO
Elaine Zow
Deputy Clerk

UNITED STATES BANKRUPTCY COURT**DISTRICT OF IDAHO****IN RE****LAWRENCE DARWIN MCKAY,****Debtor.**

)

)

)

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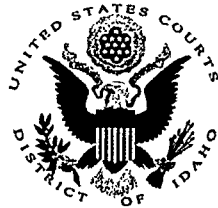
)

Case No. 12-00902-TLM**Chapter 11****ORDER CONVERTING CASE**

Based on the Memorandum of Decision entered this date and good cause appearing,

IT IS HEREBY ORDERED that the § 1112(b) Motion filed by the Carmella Adams Trust and Darrell Adams, individually and as the trustee of that trust, Doc. No. 70, is GRANTED, and the above captioned case is CONVERTED to chapter 7.

DATED: January 4, 2013



TERRY L. MYERS
CHIEF U. S. BANKRUPTCY JUDGE

ORDER CONVERTING CASE - 1

**United States Bankruptcy Court
District of Idaho**

In re Lawrence Darwin McKay

Debtor(s)

Case No. 12-00902

Chapter 7

AMENDMENT COVER SHEET

Amendment(s) to the following petition, list(s), schedule(s) or statement(s) are transmitted herewith:
Schedules A-F, per LBR 1019.1

NOTICE OF AMENDMENT(S) TO AFFECTED PARTIES

Pursuant to Federal Rule of Bankruptcy Procedure 1009(a), I certify that notice of the filing of the amendment(s) listed above has been given this date to any and all entities affected by the amendment as follows:

Date: February 6, 2013

/s/ D. Blair Clark

D. Blair Clark Idaho 1367, Oregon 05030

Attorney for Debtor(s)

Law Offices of D. Blair Clark PLLC

1513 Tyrell Lane, Suite 130

Boise, ID 83706

(208) 475-2050 Fax:(208) 475-2055

dbc@dbclarklaw.com

**United States Bankruptcy Court
District of Idaho**

In re Lawrence Darwin McKay

Debtor

Case No. 12-00902Chapter 7

SUMMARY OF SCHEDULES - AMENDED-LBR 1019.1

Indicate as to each schedule whether that schedule is attached and state the number of pages in each. Report the totals from Schedules A, B, D, E, F, I, and J in the boxes provided. Add the amounts from Schedules A and B to determine the total amount of the debtor's assets. Add the amounts of all claims from Schedules D, E, and F to determine the total amount of the debtor's liabilities. Individual debtors must also complete the "Statistical Summary of Certain Liabilities and Related Data" if they file a case under chapter 7, 11, or 13.

| NAME OF SCHEDULE | ATTACHED
(YES/NO) | NO. OF
SHEETS | ASSETS | LIABILITIES | OTHER |
|--|----------------------|------------------|------------|--------------|-----------|
| A - Real Property | Yes | 1 | 445,300.09 | | |
| B - Personal Property | Yes | 5 | 8,627.00 | | |
| C - Property Claimed as Exempt | Yes | 2 | | | |
| D - Creditors Holding Secured Claims | Yes | 1 | | 451,636.28 | |
| E - Creditors Holding Unsecured
Priority Claims (Total of Claims on Schedule E) | Yes | 3 | | 635,953.89 | |
| F - Creditors Holding Unsecured
Nonpriority Claims | Yes | 8 | | 4,132,101.14 | |
| G - Executory Contracts and
Unexpired Leases | Yes | 1 | | | |
| H - Codebtors | Yes | 1 | | | |
| I - Current Income of Individual
Debtor(s) | Yes | 1 | | | 11,744.08 |
| J - Current Expenditures of Individual
Debtor(s) | Yes | 2 | | | 8,682.02 |
| Total Number of Sheets of ALL Schedules | | 25 | | | |
| Total Assets | | | 453,927.09 | | |
| Total Liabilities | | | | 5,219,691.31 | |

United States Bankruptcy Court
District of Idaho

In re Lawrence Darwin McKay

Debtor

Case No. 12-00902Chapter 7

STATISTICAL SUMMARY OF CERTAIN LIABILITIES AND RELATED DATA (28 U.S.C. § 159)

If you are an individual debtor whose debts are primarily consumer debts, as defined in § 101(8) of the Bankruptcy Code (11 U.S.C. § 101(8)), filing a case under chapter 7, 11 or 13, you must report all information requested below.

- ☐ Check this box if you are an individual debtor whose debts are NOT primarily consumer debts. You are not required to report any information here.

This information is for statistical purposes only under 28 U.S.C. § 159.

Summarize the following types of liabilities, as reported in the Schedules, and total them.

| Type of Liability | Amount |
|---|--------|
| Domestic Support Obligations (from Schedule E) | |
| Taxes and Certain Other Debts Owed to Governmental Units (from Schedule E) | |
| Claims for Death or Personal Injury While Debtor Was Intoxicated (from Schedule E) (whether disputed or undisputed) | |
| Student Loan Obligations (from Schedule F) | |
| Domestic Support, Separation Agreement, and Divorce Decree Obligations Not Reported on Schedule E | |
| Obligations to Pension or Profit-Sharing, and Other Similar Obligations (from Schedule F) | |
| TOTAL | |

State the following:

| | |
|--|--|
| Average Income (from Schedule I, Line 16) | |
| Average Expenses (from Schedule J, Line 18) | |
| Current Monthly Income (from Form 22A Line 12; OR, Form 22B Line 11; OR, Form 22C Line 20) | |

State the following:

| | | |
|--|--|--|
| 1. Total from Schedule D, "UNSECURED PORTION, IF ANY" column | | |
| 2. Total from Schedule E, "AMOUNT ENTITLED TO PRIORITY" column | | |
| 3. Total from Schedule E, "AMOUNT NOT ENTITLED TO PRIORITY, IF ANY" column | | |
| 4. Total from Schedule F | | |
| 5. Total of non-priority unsecured debt (sum of 1, 3, and 4) | | |

B6A (Official Form 6A) (12/07)

In re Lawrence Darwin McKayCase No. 12-00902

Debtor

SCHEDULE A - REAL PROPERTY - AMENDED-LBR 1019.1

Except as directed below, list all real property in which the debtor has any legal, equitable, or future interest, including all property owned as a cotenant, community property, or in which the debtor has a life estate. Include any property in which the debtor holds rights and powers exercisable for the debtor's own benefit. If the debtor is married, state whether husband, wife, both, or the marital community own the property by placing an "H," "W," "J," or "C" in the column labeled "Husband, Wife, Joint, or Community." If the debtor holds no interest in real property, write "None" under "Description and Location of Property."

Do not include interests in executory contracts and unexpired leases on this schedule. List them in Schedule G - Executory Contracts and Unexpired Leases.

If an entity claims to have a lien or hold a secured interest in any property, state the amount of the secured claim. See Schedule D. If no entity claims to hold a secured interest in the property, write "None" in the column labeled "Amount of Secured Claim." If the debtor is an individual or if a joint petition is filed, state the amount of any exemption claimed in the property only in Schedule C - Property Claimed as Exempt.

| Description and Location of Property | Nature of Debtor's Interest in Property | Husband, Wife, Joint, or Community | Current Value of Debtor's Interest in Property, without Deducting any Secured Claim or Exemption | Amount of Secured Claim |
|--|---|------------------------------------|--|-------------------------|
| 4329 Clearwood Drive, Sparks, NV. OWNED BY SON AND DEBTOR AS JOINT TENANTS; CLAIM 16 FILED AS SECURED CLAIM IN THIS CASE | Unknown | - | 445,300.09 | 445,300.09 |

Sub-Total > **445,300.09** (Total of this page)Total > **445,300.09**

(Report also on Summary of Schedules)

0 continuation sheets attached to the Schedule of Real Property

B6B (Official Form 6B) (12/07)

In re Lawrence Darwin McKayCase No. 12-00902

Debtor

SCHEDULE B - PERSONAL PROPERTY - AMENDED-LBR 1019.1

Except as directed below, list all personal property of the debtor of whatever kind. If the debtor has no property in one or more of the categories, place an "x" in the appropriate position in the column labeled "None." If additional space is needed in any category, attach a separate sheet properly identified with the case name, case number, and the number of the category. If the debtor is married, state whether husband, wife, both, or the marital community own the property by placing an "H," "W," "J," or "C" in the column labeled "Husband, Wife, Joint, or Community." If the debtor is an individual or a joint petition is filed, state the amount of any exemptions claimed only in Schedule C - Property Claimed as Exempt.

Do not list interests in executory contracts and unexpired leases on this schedule. List them in Schedule G - Executory Contracts and Unexpired Leases.

If the property is being held for the debtor by someone else, state that person's name and address under "Description and Location of Property." If the property is being held for a minor child, simply state the child's initials and the name and address of the child's parent or guardian, such as "A.B., a minor child, by John Doe, guardian." Do not disclose the child's name. See, 11 U.S.C. §112 and Fed. R. Bankr. P. 1007(m).

| Type of Property | N
O
N
E | Description and Location of Property | Husband,
Wife,
Joint, or
Community | Current Value of
Debtor's Interest in Property,
without Deducting any
Secured Claim or Exemption |
|--|------------------|--|---|---|
| 1. Cash on hand | X | | | |
| 2. Checking, savings or other financial accounts, certificates of deposit, or shares in banks, savings and loan, thrift, building and loan, and homestead associations, or credit unions, brokerage houses, or cooperatives. | | US Bank Checking account ending in: 0109 | - | 18.00 |
| | | Bank of the Cascades Checking account ending in: 4106 ****HAS NEGATIVE BALANCE OF \$487.35**** | - | 0.00 |
| 3. Security deposits with public utilities, telephone companies, landlords, and others. | X | | | |
| 4. Household goods and furnishings, including audio, video, and computer equipment. | | See attached list of property | - | 1,409.00 |
| 5. Books, pictures and other art objects, antiques, stamp, coin, record, tape, compact disc, and other collections or collectibles. | X | | | |
| 6. Wearing apparel. | | Everyday clothing | - | 350.00 |
| 7. Furs and jewelry. | | Wedding ring | - | 150.00 |
| 8. Firearms and sports, photographic, and other hobby equipment. | | 12 gauge shotgun | - | 150.00 |
| 9. Interests in insurance policies. Name insurance company of each policy and itemize surrender or refund value of each. | | Term Life Insurance policy required by bank for business loan. Zero cash value to debtor | - | 0.00 |
| 10. Annuities. Itemize and name each issuer. | X | | | |

Sub-Total > 2,077.00
(Total of this page)

3 continuation sheets attached to the Schedule of Personal Property

B6B (Official Form 6B) (12/07) - Cont.

In re Lawrence Darwin McKayCase No. 12-00902

Debtor

SCHEDULE B - PERSONAL PROPERTY - AMENDED-LBR 1019.1

(Continuation Sheet)

| Type of Property | NON E | Description and Location of Property | Husband, Wife, Joint, or Community | Current Value of Debtor's Interest in Property, without Deducting any Secured Claim or Exemption |
|---|-------|---|------------------------------------|--|
| 11. Interests in an education IRA as defined in 26 U.S.C. § 530(b)(1) or under a qualified State tuition plan as defined in 26 U.S.C. § 529(b)(1). Give particulars. (File separately the record(s) of any such interest(s). 11 U.S.C. § 521(c).) | X | | | |
| 12. Interests in IRA, ERISA, Keogh, or other pension or profit sharing plans. Give particulars. | X | | | |
| 13. Stock and interests in incorporated and unincorporated businesses. Itemize. | | 100% ownership of THE TURF COMPANY OF NEVADA. Zero cash value. See attached Rule 2015.3 report. | - | 0.00 |
| | | 100% ownership of THE TURF CORPORATION which has a d/b/a of The Turf Company (Idaho). See attached Rule 2015.3 report and financial statements attached. There is no anticipated value after payment of current balances of claims of Sterling Savings and Nevada State Bank, and Patricia McKay alimony payment. | - | 0.00 |
| | | 100% ownership of AM HAUL SERVICES, LLC. Idaho company but also registered as a foreign entity in North Dakota. The assets consist of two water trailers and "Pup" Trailer (worth about \$46,000 but owed \$53,500 to lenders). Zero cash value to debtor | - | 0.00 |
| | | 2.88% of ENSYC TECHNOLOGIES, LLC. Company filed for bankruptcy in 2012. | - | 0.00 |
| 14. Interests in partnerships or joint ventures. Itemize. | X | | | |
| 15. Government and corporate bonds and other negotiable and nonnegotiable instruments. | X | | | |
| 16. Accounts receivable. | | Shareholder Loans to Am Haul over the last 1.5 years. "Value" below is face value, not market value. Loan is uncollectible. Face amount is \$60,000 | - | Unknown |
| 17. Alimony, maintenance, support, and property settlements to which the debtor is or may be entitled. Give particulars. | X | | | |

Sub-Total > 0.00
(Total of this page)

Sheet 1 of 3 continuation sheets attached
to the Schedule of Personal Property

In re Lawrence Darwin McKayCase No. 12-00902

Debtor

SCHEDULE B - PERSONAL PROPERTY - AMENDED-LBR 1019.1

(Continuation Sheet)

| Type of Property | N
O
N
E | Description and Location of Property | Husband,
Wife,
Joint, or
Community | Current Value of
Debtor's Interest in Property,
without Deducting any
Secured Claim or Exemption |
|---|------------------|---|---|---|
| 18. Other liquidated debts owed to debtor including tax refunds. Give particulars. | X | | | |
| 19. Equitable or future interests, life estates, and rights or powers exercisable for the benefit of the debtor other than those listed in Schedule A - Real Property. | X | | | |
| 20. Contingent and noncontingent interests in estate of a decedent, death benefit plan, life insurance policy, or trust. | X | | | |
| 21. Other contingent and unliquidated claims of every nature, including tax refunds, counterclaims of the debtor, and rights to setoff claims. Give estimated value of each. | X | | | |
| 22. Patents, copyrights, and other intellectual property. Give particulars. | | Shadowmaster = type of grass used by companies. Zero cash value | - | 0.00 |
| | | Endura Turf - type of grass used by companies. Zero cash value | - | 0.00 |
| | | 4EVR Blue - type of grass used by companies. Zero cash value | - | 0.00 |
| | | Registered trademark for Xerlawn - type of grass used by companies. Zero cash value | - | 0.00 |
| 23. Licenses, franchises, and other general intangibles. Give particulars. | X | | | |
| 24. Customer lists or other compilations containing personally identifiable information (as defined in 11 U.S.C. § 101(41A)) provided to the debtor by individuals in connection with obtaining a product or service from the debtor primarily for personal, family, or household purposes. | X | | | |
| 25. Automobiles, trucks, trailers, and other vehicles and accessories. | | 2000 Jaquar with 120k miles in good condition | - | 6,500.00 |
| 26. Boats, motors, and accessories. | X | | | |

Sub-Total > 6,500.00
(Total of this page)

Sheet 2 of 3 continuation sheets attached
to the Schedule of Personal Property

In re Lawrence Darwin McKayCase No. 12-00902

Debtor

SCHEDULE B - PERSONAL PROPERTY - AMENDED-LBR 1019.1
(Continuation Sheet)

| Type of Property | N
O
N
E | Description and Location of Property | Husband,
Wife,
Joint, or
Community | Current Value of
Debtor's Interest in Property,
without Deducting any
Secured Claim or Exemption |
|--|------------------|--|---|---|
| 27. Aircraft and accessories. | X | | | |
| 28. Office equipment, furnishings, and supplies. | X | | | |
| 29. Machinery, fixtures, equipment, and supplies used in business. | X | | | |
| 30. Inventory. | X | | | |
| 31. Animals. | Cat | | - | 50.00 |
| 32. Crops - growing or harvested. Give particulars. | X | | | |
| 33. Farming equipment and implements. | X | | | |
| 34. Farm supplies, chemicals, and feed. | X | | | |
| 35. Other personal property of any kind not already listed. Itemize. | | 1/6 ownership of McKay Family Property Trust. It owns the current house located at 5875 S. Eagle Road, Meridian, Idaho. House worth approximately \$185,000 according to Ada County Assessor. Other members include Debtor's siblings. Debtor is caretaker of house as condition of living there | - | 0.00 |

Sub-Total > 50.00
 (Total of this page)
 Total > 8,627.00

(Report also on Summary of Schedules)

Sheet 3 of 3 continuation sheets attached
to the Schedule of Personal Property

IN RE:

L. Darwin McKay

Case No. _____

ATTACHMENT TO SCHEDULE B - HOME FURNISHINGS

| QUANTITY | VALUE | QUANTITY | VALUE |
|-----------|---------------------------------|----------|--------------------|
| <u>15</u> | DISHES/CUPS | <u>1</u> | DESK |
| <u>6</u> | GLASSES | <u>1</u> | DESK CHAIR |
| | COOK UTENSILS | <u>1</u> | BICYCLE |
| <u>6</u> | POTS/PANS | <u>1</u> | VCR |
| <u>1</u> | TOASTER | <u>3</u> | VCR TAPES |
| | COFFEE POT | | CD PLAYER/STEREO |
| <u>1</u> | CROCK POT | | HOME COMPUTER |
| | BLENDER | | VANITY |
| | MIXER | <u>2</u> | LAMPS |
| | ELECTRIC KNIFE | | HOPE CHEST |
| | ELECTRIC CAN OPENER | | KITCHEN TABLE |
| | MICROWAVE | | KITCHEN CHAIRS |
| | STOVE | <u>1</u> | DINING ROOM TABLE |
| | DISHWASHER | <u>4</u> | DINING ROOM CHAIRS |
| | FOOD PROCESSOR | | FIGURINES |
| | SILVERWARE | <u>1</u> | FILE CABINETS |
| | CHINA SET | | TYPEWRITER |
| | CRYSTAL SET | | LAWNMOWER |
| <u>1</u> | CANDY DISHES | <u>1</u> | WEEDEATER |
| | BREADBOX | | GARDEN TOOLS |
| | CANISTER SET | <u>4</u> | GUNS |
| | FAN | <u>1</u> | VACUUM |
| | TUPPERWARE | <u>2</u> | SUITCASES |
| | BUFFET | | IRON |
| | HUTCH | | IRONING BOARD |
| | REFRIGERATOR | | ENTERTAINMENT CTR |
| | WASHER | | AIR COND/SWAMP CLR |
| | DRYER | | ROLLAWAY BED |
| | FREEZER | | PLAYPEN |
| <u>2</u> | BEDS | <u>2</u> | RUGS |
| <u>1</u> | NIGHT STANDS | | BABY SWING |
| <u>1</u> | DRESSER | | TOY BOX (TOYS) |
| | END TABLES | <u>1</u> | CAMERA |
| <u>1</u> | COUCH | | AQUARIUM |
| | RECLINER | | HIGH CHAIR |
| <u>1</u> | COFFEE TABLE | | BASSINET |
| <u>4</u> | LOVESEAT | | CRIB & MATTRESS |
| | CHAIRS | <u>2</u> | PORTABLE HEATER |
| | ROCKING CHAIR | <u>2</u> | MISC. HAND TOOLS |
| <u>1</u> | TELEVISION | | NIC NACS |
| <u>2</u> | CLOCK | <u>1</u> | RADIO/STEREO |
| | STAND | | SEWING MACHINE |
| | ANY PERSONAL EFFECTS NOT LISTED | | |

- 199

E 9:10

#1639 Total

B6C (Official Form 6C) (4/10)

In re Lawrence Darwin McKayCase No. 12-00902

Debtor

SCHEDULE C - PROPERTY CLAIMED AS EXEMPT - AMENDED-LBR 1019.1Debtor claims the exemptions to which debtor is entitled under:
(Check one box)☐ Check if debtor claims a homestead exemption that exceeds \$146,450. (Amount subject to adjustment on 4/1/13, and every three years thereafter with respect to cases commenced on or after the date of adjustment.)

- ☐ 11 U.S.C. § 522(b)(2)
☒ 11 U.S.C. § 522(b)(3)

| Description of Property | Specify Law Providing Each Exemption | Value of Claimed Exemption | Current Value of Property Without Deducting Exemption |
|---|--------------------------------------|----------------------------|---|
| Checking, Savings, or Other Financial Accounts, Certificates of Deposit | | | |
| US Bank Checking account ending in: 0109 | Idaho Code § 11-207 | 75% | 18.00 |
| Bank of the Cascades Checking account ending in: 4106 *****HAS NEGATIVE BALANCE OF \$487.35***** | Idaho Code § 11-207 | 75% | 0.00 |
| Household Goods and Furnishings | | | |
| See attached list of property | Idaho Code § 11-605(1) (a)(b) or (c) | 1,409.00 | 1,409.00 |
| Wearing Apparel | | | |
| Everyday clothing | Idaho Code § 11-605(1) (a)(b) or (c) | 350.00 | 350.00 |
| Furs and Jewelry | | | |
| Wedding ring | Idaho Code § 11-605(2) | 150.00 | 150.00 |
| Firearms and Sports, Photographic and Other Hobby Equipment | | | |
| 12 gauge shotgun | Idaho Code § 11-605(8) | 150.00 | 150.00 |
| Interests in Insurance Policies | | | |
| Term Life insurance policy required by bank for business loan. Zero cash value to debtor | Idaho Code §§ 41-1833(1), 41-1930 | 100% | 0.00 |
| Accounts Receivable | | | |
| Shareholder Loans to Am Haul over the last 1.5 years. "Value" below is face value, not market value. Loan is uncollectible. Face amount is \$60,000 | Idaho Code § 11-207 | 0%--EXEMPTION WITHDRAWN | Unknown |
| Automobiles, Trucks, Trailers, and Other Vehicles | | | |
| 2000 Jaquar with 120k miles in good condition | Idaho Code § 11-605(3) | 100% | 6,500.00 |
| Animals | | | |
| Cat | Idaho Code § 11-605(1) (a)(b) or (c) | 50.00 | 50.00 |

| | | |
|--------|----------|----------|
| Total: | 2,286.31 | 8,627.00 |
|--------|----------|----------|

0 continuation sheets attached to Schedule of Property Claimed as Exempt

IN RE: L. Darwin McKay

Case No. _____

ATTACHMENT TO SCHEDULE B - HOME FURNISHINGS

| QUANTITY | | VALUE | QUANTITY | | VALUE |
|-----------|---------------------------------|------------|----------|--------------------|------------|
| <u>15</u> | DISHES/CUPS | <u>15</u> | <u>1</u> | DESK | <u>100</u> |
| <u>6</u> | GLASSES | <u>4</u> | <u>1</u> | DESK CHAIR | <u>20</u> |
| | COOK UTENSILS | | <u>1</u> | BICYCLE | <u>50</u> |
| <u>6</u> | POTS/PANS | <u>30</u> | <u>1</u> | VCR | <u>25</u> |
| <u>1</u> | TOASTER | <u>5</u> | <u>3</u> | VCR TAPES | <u>15</u> |
| | COFFEE POT | | | CD PLAYER/STEREO | |
| <u>1</u> | CROCK POT | <u>10</u> | | HOME COMPUTER | |
| | BLENDER | | | VANITY | |
| | MIXER | | <u>2</u> | LAMPS | <u>30</u> |
| | ELECTRIC KNIFE | | | HOPE CHEST | |
| | ELECTRIC CAN OPENER | | | KITCHEN TABLE | |
| | MICROWAVE | | | KITCHEN CHAIRS | |
| | STOVE | | <u>1</u> | DINING ROOM TABLE | <u>200</u> |
| | DISHWASHER | | <u>4</u> | DINING ROOM CHAIRS | <u>110</u> |
| | FOOD PROCESSOR | | | FIGURINES | |
| | SILVERWARE | | <u>1</u> | FILE CABINETS | <u>60</u> |
| | CHINA SET | | | TYPEWRITER | |
| | CRYSTAL SET | | | LAWNMOWER | |
| <u>1</u> | CANDY DISHES | <u>15</u> | <u>1</u> | WEEDEATER | <u>50</u> |
| | BREADBOX | | | GARDEN TOOLS | |
| | CANISTER SET | | <u>4</u> | GUNS | <u>150</u> |
| | FAN | | <u>1</u> | VACUUM | <u>30</u> |
| | TUPPERWARE | | <u>2</u> | SUITCASES | <u>20</u> |
| | BUFFET | | | IRON | |
| | HUTCH | | | IRONING BOARD | |
| | REFRIGERATOR | | | ENTERTAINMENT CTR | |
| | WASHER | | | AIR COND/SWAMP CLR | |
| | DRYER | | | ROLLAWAY BED | |
| | FREEZER | | | PLAYPEN | |
| <u>2</u> | BEDS | <u>200</u> | <u>2</u> | RUGS | <u>25</u> |
| <u>1</u> | NIGHT STANDS | <u>25</u> | | BABY SWING | |
| <u>1</u> | DRESSER | <u>60</u> | | TOY BOX (TOYS) | |
| | END TABLES | | <u>1</u> | CAMERA | <u>30</u> |
| <u>1</u> | COUCH | <u>130</u> | | AQUARIUM | |
| | RECLINER | | | HIGH CHAIR | |
| <u>1</u> | COFFEE TABLE | <u>20</u> | | BASSINET | |
| <u>4</u> | LOVESEAT | | | CRIB & MATTRESS | |
| | CHAIRS | <u>50</u> | <u>2</u> | PORTABLE HEATER | <u>30</u> |
| | ROCKING CHAIR | | <u>2</u> | MISC. HAND TOOLS | <u>30</u> |
| <u>1</u> | TELEVISION | <u>75</u> | <u>1</u> | NIC NACS | |
| <u>2</u> | CLOCK | <u>60</u> | | RADIO/STEREO | <u>5</u> |
| | STAND | | | SEWING MACHINE | |
| | ANY PERSONAL EFFECTS NOT LISTED | | | | |

1,499

1,410

\$1639 Total

B6D (Official Form 6D) (12/07)

In re **Lawrence Darwin McKay**Case No. **12-00902**

Debtor

SCHEDULE D - CREDITORS HOLDING SECURED CLAIMS - AMENDED-LBR 1019.1

State the name, mailing address, including zip code, and last four digits of any account number of all entities holding claims secured by property of the debtor as of the date of filing of the petition. The complete account number of any account the debtor has with the creditor is useful to the trustee and the creditor and may be provided if the debtor chooses to do so. List creditors holding all types of secured interests such as judgment liens, garnishments, statutory liens, mortgages, deeds of trust, and other security interests.

List creditors in alphabetical order to the extent practicable. If a minor child is a creditor, the child's initials and the name and address of the child's parent or guardian, such as "A.B., a minor child, by John Doe, guardian." Do not disclose the child's name. See, 11 U.S.C. §112 and Fed. R. Bankr. P. 1007(m). If all secured creditors will not fit on this page, use the continuation sheet provided.

If any entity other than a spouse in a joint case may be jointly liable on a claim, place an "X" in the column labeled "Codebtor", include the entity on the appropriate schedule of creditors, and complete Schedule H - Codebtors. If a joint petition is filed, state whether the husband, wife, both of them, or the marital community may be liable on each claim by placing an "H", "W", "J", or "C" in the column labeled "Husband, Wife, Joint, or Community".

If the claim is contingent, place an "X" in the column labeled "Contingent". If the claim is unliquidated, place an "X" in the column labeled "Unliquidated". If the claim is disputed, place an "X" in the column labeled "Disputed". (You may need to place an "X" in more than one of these three columns.)

Total the columns labeled "Amount of Claim Without Deducting Value of Collateral" and "Unsecured Portion, if Any" in the boxes labeled "Total(s)" on the last sheet of the completed schedule. Report the total from the column labeled "Amount of Claim" also on the Summary of Schedules and, if the debtor is an individual with primarily consumer debts, report the total from the column labeled "Unsecured Portion" on the Statistical Summary of Certain Liabilities and Related Data.

☐ Check this box if debtor has no creditors holding secured claims to report on this Schedule D.

| CREDITOR'S NAME
AND MAILING ADDRESS
INCLUDING ZIP CODE,
AND ACCOUNT NUMBER
(See instructions above.) | C
O
D
E
B
T
O
R | Husband, Wife, Joint, or Community | C
O
N
T
I
N
G
E
N
T | U
N
L
I
Q
U
I
D
A
T
E
D | D
I
S
P
U
T
E
D | AMOUNT OF
CLAIM
WITHOUT
DEDUCTING
VALUE OF
COLLATERAL | UNSECURED
PORTION, IF
ANY |
|--|--------------------------------------|---|--|--|--------------------------------------|--|---------------------------------|
| | | DATE CLAIM WAS INCURRED,
NATURE OF LIEN, AND
DESCRIPTION AND VALUE
OF PROPERTY
SUBJECT TO LIEN | | | | | |
| Account No. [REDACTED] | | 2010 | | | | | |
| Mountain West (GLACIER) Bank
802 W. Bannock Street
Suite 1100
Boise, ID 83702 | | Vehicle Loan. CLAIM 2; DOCKET 43

2000 Jaquar with 120k miles in good
condition | | | | | |
| | | Value \$ 6,500.00 | | | | 6,336.19 | 0.00 |
| Account No. [REDACTED] | | Opened 2/01/08 Last Active 4/08/09 | | | | | |
| Wells Fargo Hm Mortgage
8480 Stagecoach Cir
Frederick, MD 21701 | X | 4329 Clearwood Drive, Sparks, NV.
OWNED BY SON AND DEBTOR AS
JOINT TENANTS; CLAIM 16 FILED AS
SECURED CLAIM IN THIS CASE | | X | X | | |
| | | Value \$ 445,300.09 | | | | 445,300.09 | 0.00 |
| Account No. | | | | | | | |
| | | | | | | | |
| | | Value \$ | | | | | |
| Account No. | | | | | | | |
| | | | | | | | |
| | | Value \$ | | | | | |
| Subtotal
(Total of this page) | | | | | | 451,636.28 | 0.00 |
| Total
(Report on Summary of Schedules) | | | | | | 451,636.28 | 0.00 |

0 continuation sheets attached

In re **Lawrence Darwin McKay**

Case No. **12-00902**

Debtor

AMENDED-LBR 1019.1

SCHEDULE E - CREDITORS HOLDING UNSECURED PRIORITY CLAIMS

A complete list of claims entitled to priority, listed separately by type of priority, is to be set forth on the sheets provided. Only holders of unsecured claims entitled to priority should be listed in this schedule. In the boxes provided on the attached sheets, state the name, mailing address, including zip code, and last four digits of the account number, if any, of all entities holding priority claims against the debtor or the property of the debtor, as of the date of the filing of the petition. Use a separate continuation sheet for each type of priority and label each with the type of priority.

The complete account number of any account the debtor has with the creditor is useful to the trustee and the creditor and may be provided if the debtor chooses to do so. If a minor child is a creditor, state the child's initials and the name and address of the child's parent or guardian, such as "A.B., a minor child, by John Doe, guardian." Do not disclose the child's name. See, 11 U.S.C. § 112 and Fed. R. Bankr. P. 1007(m).

If any entity other than a spouse in a joint case may be jointly liable on a claim, place an "X" in the column labeled "Codebtor," include the entity on the appropriate schedule of creditors, and complete Schedule H-Codebtors. If a joint petition is filed, state whether the husband, wife, both of them, or the marital community may be liable on each claim by placing an "H," "W," "J," or "C" in the column labeled "Husband, Wife, Joint, or Community." If the claim is contingent, place an "X" in the column labeled "Contingent." If the claim is unliquidated, place an "X" in the column labeled "Unliquidated." If the claim is disputed, place an "X" in the column labeled "Disputed." (You may need to place an "X" in more than one of these three columns.)

Report the total of claims listed on each sheet in the box labeled "Subtotals" on each sheet. Report the total of all claims listed on this Schedule E in the box labeled "Total" on the last sheet of the completed schedule. Report this total also on the Summary of Schedules.

Report the total of amounts entitled to priority listed on each sheet in the box labeled "Subtotals" on each sheet. Report the total of all amounts entitled to priority listed on this Schedule E in the box labeled "Totals" on the last sheet of the completed schedule. Individual debtors with primarily consumer debts report this total also on the Statistical Summary of Certain Liabilities and Related Data.

Report the total of amounts not entitled to priority listed on each sheet in the box labeled "Subtotals" on each sheet. Report the total of all amounts not entitled to priority listed on this Schedule E in the box labeled "Totals" on the last sheet of the completed schedule. Individual debtors with primarily consumer debts report this total also on the Statistical Summary of Certain Liabilities and Related Data.

☐ Check this box if debtor has no creditors holding unsecured priority claims to report on this Schedule E.

TYPES OF PRIORITY CLAIMS (Check the appropriate box(es) below if claims in that category are listed on the attached sheets)

☒ **Domestic support obligations**

Claims for domestic support that are owed to or recoverable by a spouse, former spouse, or child of the debtor, or the parent, legal guardian, or responsible relative of such a child, or a governmental unit to whom such a domestic support claim has been assigned to the extent provided in 11 U.S.C. § 507(a)(1).

☐ **Extensions of credit in an involuntary case**

Claims arising in the ordinary course of the debtor's business or financial affairs after the commencement of the case but before the earlier of the appointment of a trustee or the order for relief. 11 U.S.C. § 507(a)(3).

☐ **Wages, salaries, and commissions**

Wages, salaries, and commissions, including vacation, severance, and sick leave pay owing to employees and commissions owing to qualifying independent sales representatives up to \$11,725* per person earned within 180 days immediately preceding the filing of the original petition, or the cessation of business, whichever occurred first, to the extent provided in 11 U.S.C. § 507(a)(4).

☐ **Contributions to employee benefit plans**

Money owed to employee benefit plans for services rendered within 180 days immediately preceding the filing of the original petition, or the cessation of business, whichever occurred first, to the extent provided in 11 U.S.C. § 507(a)(5).

☐ **Certain farmers and fishermen**

Claims of certain farmers and fishermen, up to \$5,775* per farmer or fisherman, against the debtor, as provided in 11 U.S.C. § 507(a)(6).

☐ **Deposits by individuals**

Claims of individuals up to \$2,600* for deposits for the purchase, lease, or rental of property or services for personal, family, or household use, that were not delivered or provided. 11 U.S.C. § 507(a)(7).

☒ **Taxes and certain other debts owed to governmental units**

Taxes, customs duties, and penalties owing to federal, state, and local governmental units as set forth in 11 U.S.C. § 507(a)(8).

☐ **Commitments to maintain the capital of an insured depository institution**

Claims based on commitments to the FDIC, RTC, Director of the Office of Thrift Supervision, Comptroller of the Currency, or Board of Governors of the Federal Reserve System, or their predecessors or successors, to maintain the capital of an insured depository institution. 11 U.S.C. § 507(a)(9).

☐ **Claims for death or personal injury while debtor was intoxicated**

Claims for death or personal injury resulting from the operation of a motor vehicle or vessel while the debtor was intoxicated from using alcohol, a drug, or another substance. 11 U.S.C. § 507(a)(10).

* Amount subject to adjustment on 4/01/13, and every three years thereafter with respect to cases commenced on or after the date of adjustment.

In re Lawrence Darwin McKayCase No. 12-00902

Debtor

AMENDED-LBR 1019.1
SCHEDULE E - CREDITORS HOLDING UNSECURED PRIORITY CLAIMS
 (Continuation Sheet)

Domestic Support Obligations

TYPE OF PRIORITY

| CREDITOR'S NAME,
AND MAILING ADDRESS
INCLUDING ZIP CODE,
AND ACCOUNT NUMBER
(See instructions.) | C
O
D
E
B
O
R
R | H
W
J
C | Husband, Wife, Joint, or Community | D
I
S
P
U
T
E
D | U
N
L
I
Q
U
I
D
A
T
E
D | C
O
N
T
I
N
G
E
N
T | AMOUNT
OF CLAIM | AMOUNT NOT
ENTITLED TO
PRIORITY, IF ANY |
|---|--------------------------------------|------------------|------------------------------------|--------------------------------------|--|--|--------------------|---|
| | | | | | | | | AMOUNT
ENTITLED TO
PRIORITY |
| Account No. | | | 2009 to current | | | | | |
| Patricia McKay
25 Horizon Drive
Boise, ID 83702 | | | Alimony | | | | | 0.00 |
| | | | | | | | 627,494.94 | 627,494.94 |
| Account No. | | | | | | | | |
| | | | | | | | | |
| Account No. | | | | | | | | |
| | | | | | | | | |
| Account No. | | | | | | | | |
| | | | | | | | | |
| Account No. | | | | | | | | |
| | | | | | | | | |
| Subtotal | | | | | | | | 0.00 |
| Sheet 1 of 2 continuation sheets attached to
Schedule of Creditors Holding Unsecured Priority Claims | | | | | | (Total of this page) | 627,494.94 | 627,494.94 |

B6E (Official Form 6E) (4/10) - Cont.

In re Lawrence Darwin McKay

Case No. 12-00902

Debtor

AMENDED-LBR 1019.1
SCHEDULE E - CREDITORS HOLDING UNSECURED PRIORITY CLAIMS
 (Continuation Sheet)

**Taxes and Certain Other Debts
Owed to Governmental Units**

TYPE OF PRIORITY

| CREDITOR'S NAME,
AND MAILING ADDRESS
INCLUDING ZIP CODE,
AND ACCOUNT NUMBER
(See instructions.) | C
O
D
E
B
O
R | H
U
S
B
A
N
D
,
W
I
F
E
,
J
O
I
N
T
,
O
R
C
O
M
M
U
N
I
T
Y | DATE CLAIM WAS INCURRED
AND CONSIDERATION FOR CLAIM | C
O
N
T
I
N
G
E
N
T | U
N
L
I
Q
U
I
T
E
D | D
I
S
P
U
T
E
D | AMOUNT
OF CLAIM | AMOUNT NOT
ENTITLED TO
PRIORITY, IF ANY |
|---|---------------------------------|--|--|--|--|--------------------------------------|--------------------|---|
| | | | | | | | | AMOUNT
ENTITLED TO
PRIORITY |
| Account No. | | | Listed for Notice Purposes Only | | | | | |
| Ada County Treasurer
200 W. Front St.
PO Box 2868
Boise, ID 83701 | | - | | | | | 0.00 | |
| | | | | | | | 0.00 | 0.00 |
| Account No. | | | CLAIM 5 | | | | | |
| Idaho State Tax Commission
PO Box 36
Boise, ID 83720 | | - | | | | | 300.00 | |
| | | | | | | | 2,340.84 | 2,040.84 |
| Account No. | | | CLAIM 13. | | | | | |
| Internal Revenue Service
PO BOX 7346
Philadelphia, PA 19114 | | - | | | | | 0.00 | |
| | | | | | | | 2,500.00 | 2,500.00 |
| Account No. | | | Representing:
Internal Revenue Service | | | | Notice Only | |
| Internal Revenue Service
550 W. Fort St.
Boise, ID 83724 | | - | | | | | | |
| | | | | | | | | |
| Account No. CLAIM 11 | | | Sales and Use Tax from Nevada Granite | | | | | |
| State of Nevada
Department of Taxation
4600 Kietzke Lane Bldg L
Reno, NV 89502 | X | - | | | X | X | X | 318.16 |
| | | | | | | | 3,618.11 | 3,299.95 |
| Subtotal | | | | | | | 618.16 | |
| (Total of this page) | | | | | | | 8,458.95 | 7,840.79 |
| Total | | | | | | | 618.16 | |
| (Report on Summary of Schedules) | | | | | | | 635,953.89 | 635,335.73 |

Sheet 2 of 2 continuation sheets attached to
Schedule of Creditors Holding Unsecured Priority Claims

In re Lawrence Darwin McKayCase No. 12-00902

Debtor

AMENDED-LBR 1019.1**SCHEDULE F - CREDITORS HOLDING UNSECURED NONPRIORITY CLAIMS**

State the name, mailing address, including zip code, and last four digits of any account number, of all entities holding unsecured claims without priority against the debtor or the property of the debtor, as of the date of filing of the petition. The complete account number of any account the debtor has with the creditor is useful to the trustee and the creditor and may be provided if the debtor chooses to do so. If a minor child is a creditor, state the child's initials and the name and address of the child's parent or guardian, such as "A.B., a minor child, by John Doe, guardian." Do not disclose the child's name. See, 11 U.S.C. §112 and Fed. R. Bankr. P. 1007(m). Do not include claims listed in Schedules D and E. If all creditors will not fit on this page, use the continuation sheet provided.

If any entity other than a spouse in a joint case may be jointly liable on a claim, place an "X" in the column labeled "Codebtor." include the entity on the appropriate schedule of creditors, and complete Schedule H - Codebtors. If a joint petition is filed, state whether the husband, wife, both of them, or the marital community may be liable on each claim by placing an "H," "W," "J," or "C" in the column labeled "Husband, Wife, Joint, or Community."

If the claim is contingent, place an "X" in the column labeled "Contingent." If the claim is unliquidated, place an "X" in the column labeled "Unliquidated." If the claim is disputed, place an "X" in the column labeled "Disputed." (You may need to place an "X" in more than one of these three columns.)

Report the total of all claims listed on this schedule in the box labeled "Total" on the last sheet of the completed schedule. Report this total also on the Summary of Schedules and, if the debtor is an individual with primarily consumer debts, report this total also on the Statistical Summary of Certain Liabilities and Related Data.

☐ Check this box if debtor has no creditors holding unsecured claims to report on this Schedule F.

| CREDITOR'S NAME,
MAILING ADDRESS
INCLUDING ZIP CODE,
AND ACCOUNT NUMBER
(See instructions above.) | CODEBTOR
H
W
J
C | Husband, Wife, Joint, or Community

DATE CLAIM WAS INCURRED AND
CONSIDERATION FOR CLAIM. IF CLAIM
IS SUBJECT TO SETOFF, SO STATE. | CONTINGENT | UNLIQUIDATED | DISPUTED | AMOUNT OF CLAIM |
|---|------------------------------|---|------------|--------------|----------|-----------------|
| | | | | | | |
| Account No. [REDACTED]

Bank of America
PO Box 515504
Los Angeles, CA 90051-6804 | X - | Assigned debt through Divorce Decree.
Ex-wife is person listed on mortgage at 25
Horizon Drive, Boise, ID. FACE AMOUNT OF
DEBT \$67,511.81. NOT SHOWN IN TOTAL
BECAUSE DUPLICATED IN PRIORITY FOR
PATRICIA MCKAY | | | | Unknown |
| Account No. [REDACTED]

Bus. & Prof, Collectors
816 S Center St
Reno, NV 89501 | X - | Opened 8/04/11 Last Active 11/01/11
Collection Truckee Meadows Water Authority | | | | 61.00 |
| Account No. [REDACTED]

Capital One CLAIM 9
PO Box 60024
City Of Industry, CA 91716-0024 | - | Credit card purchases - personal | | | | 2,905.04 |
| Account No. [REDACTED]

Capitol One
PO Box 85520
Richmond, VA 23285 | - | 9/30/06
Credit card purchases | | | | 1,917.00 |
| Subtotal
(Total of this page) | | | | | | 4,883.04 |

7 continuation sheets attached

B6F (Official Form 6F) (12/07) - Cont.

In re Lawrence Darwin McKayCase No. 12-00902

Debtor

AMENDED-LBR 1019.1
SCHEDULE F - CREDITORS HOLDING UNSECURED NONPRIORITY CLAIMS
 (Continuation Sheet)

| CREDITOR'S NAME,
MAILING ADDRESS
INCLUDING ZIP CODE,
AND ACCOUNT NUMBER
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| | | | DATE CLAIM WAS INCURRED AND
CONSIDERATION FOR CLAIM. IF CLAIM
IS SUBJECT TO SETOFF, SO STATE. | | | | |
| Account No. [REDACTED]
Capitol One [REDACTED]
PO Box 85520
Richmond, VA 23285 | | X - | 3/11/07
Credit card purchases - used for Granite Industries | | | | 24,817.42 |
| Account No. [REDACTED]
Chase
PO Box 15298
Wilmington, DE 19850 | | - | 11/02/05
Credit Card - used for court fees in lawsuits | | | | 13,000.00 |
| Account No. CLAIM 7
Darrell D. Adams
c/o John Murtha, Atty
PO Box 2311
Reno, NV 89505 | | - | Business Expense from Granite Industries | | | | 429,856.88 |
| Account No.
Woodburn and Wedge
6100 Neil Road, Ste. 500
PO Box 2311
Reno, NV 89505 | | | Representing:
Darrell D. Adams | | | | Notice Only |
| Account No.
Foothills at Wingfield HOA
c/o Assoc Management Inc
5955 Tyrone Rd, Ste 1
Reno, NV 89502 | | - | HOA Dues re Sparks, NV | | | | Unknown |

Sheet no. 1 of 7 sheets attached to Schedule of
 Creditors Holding Unsecured Nonpriority Claims

Subtotal
 (Total of this page)

467,674.30

B6F (Official Form 6F) (12/07) - Cont.

In re Lawrence Darwin McKay

Case No. 12-00902

Debtor

AMENDED-LBR 1019.1
SCHEDULE F - CREDITORS HOLDING UNSECURED NONPRIORITY CLAIMS
(Continuation Sheet)

| CREDITOR'S NAME,
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| Account No. | | | | | | | | |
| Fuller Jenkins
c/o Jen Floyd
9190 Double Diamond Parkway
Reno, NV 89521 | | | | Representing:
Foothills at Wingfield HOA | | | | Notice Only |
| Account No. | | | | | | | | |
| GE Captial Finance
P.O. Box 1928
Tempe, AZ 85280-1928 | | X | - | Business expense - forklift for Nevada Granite Industries | | | | 22,480.95 |
| Account No. | | | | | | | | |
| Kenneth G. Schlvoe
1942 Lexington Ave North
Suite 1
Saint Paul, MN 55113 | | | | Representing:
GE Captial Finance | | | | Notice Only |
| Account No. | | | | | | | | |
| Givens Pursley
601 Bannock St.
Boise, ID 83701 | | | - | 5/9/2011
Attorney fees - for business land lawsuit | | | | 14,413.50 |
| Account No. | | | | | | | | |
| Hulet Farm Management
c/o Mike Ihli
643 S. School Ave
Kuna, ID 83634 | | | - | Business Expense - last installment from Turf field - couldn't fulfill | | | | 134,081.25 |

Sheet no. 2 of 7 sheets attached to Schedule of Creditors Holding Unsecured Nonpriority Claims

Subtotal
(Total of this page)

170,975.70

B6F (Official Form 6F) (12/07) - Cont.

In re **Lawrence Darwin McKay**Case No. **12-00902**

Debtor

AMENDED-LBR 1019.1
SCHEDULE F - CREDITORS HOLDING UNSECURED NONPRIORITY CLAIMS
 (Continuation Sheet)

| CREDITOR'S NAME,
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INCLUDING ZIP CODE,
AND ACCOUNT NUMBER
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| Account No. _____

Cosho Humphrey LLP
Attn: David M. Penny
PO BOX 9518
Boise, ID 83707-9518 | | | Representing:
Hulet Farm Management | | | | | Notice Only |
| Account No. [REDACTED]

Idaho Power
Processing Center
PO Box 34966
Seattle, WA 98124-1966 | | | 8/23/11
Business Utility Expense - power at Hulet Farm property | | | | | 56,967.53 |
| Account No. [REDACTED]

ING FCU
PO Box 5099
Boise, ID 83705 | | | 9/15/98
Installment Sales Contract. NOTE: SHOWS ON CREDIT REPORT. DEBTOR DISPUTES ANY DEBT OWING | | | | | 10,170.00 |
| Account No. [REDACTED]

ING FCU
4416 Guard Street
Boise, ID 83705 | | | 9/01/98
Installment Sales Contract. NOTE: SHOWS ON CREDIT REPORT. DEBTOR DISPUTES ANY DEBT OWING | X | X | X | | 7,136.00 |
| Account No. [REDACTED]

Irrigation Farm
14010 FNB Parkway, Suite 400
Omaha, NE 68154-5206 | | | Business Expense - Pivot from turf farm at Hulet Farms. Pivot has been returned and resold. Amount is deficiency | | | | | 32,515.59 |
| Subtotal
(Total of this page) | | | | | | | | 106,789.12 |

Sheet no. 3 of 7 sheets attached to Schedule of
Creditors Holding Unsecured Nonpriority Claims

In re **Lawrence Darwin McKay**Case No. **12-00902**

Debtor

AMENDED-LBR 1019.1
SCHEDULE F - CREDITORS HOLDING UNSECURED NONPRIORITY CLAIMS
 (Continuation Sheet)

| CREDITOR'S NAME,
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INCLUDING ZIP CODE,
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| Account No. | | | | | | | |
| Jennifer J. Taylor
8712 W. Dodge Road
Suite 400
Omaha, NE 68114 | | | Representing:
Irrigation Finance Solutions | | | | Notice Only |
| Account No. [REDACTED] | | | 6/7/2010
Attorney fees - Nevada business lawsuit | | | | |
| Law Office of John F. Kirsch
432 Court Street
Reno, NV 89501 | | - | | | | | 15,479.25 |
| Account No. | | | Business Expense - water rights | | | | |
| LeMoyne Appraisal, LLC
PO Box 5225
Twin Falls, ID 83303 | | - | | | | | 7,226.86 |
| Account No. | | | Representing:
LeMoyne Appraisal, LLC | | | | |
| Robertson & Slette, PLLC
134 Third Ave East
Twin Falls, ID 83303-1906 | | | | | | | Notice Only |
| Account No. [REDACTED] | | | Business Expense - former lease | | | | |
| Mately Properties, LLC
961 Mately Ln #120
Reno, NV 89502 | | X - | | | | | 265,180.90 |
| Subtotal
(Total of this page) | | | | | | | 287,887.01 |

Sheet no. 4 of 7 sheets attached to Schedule of
 Creditors Holding Unsecured Nonpriority Claims

In re Lawrence Darwin McKayCase No. 12-00902

Debtor

AMENDED-LBR 1019.1
SCHEDULE F - CREDITORS HOLDING UNSECURED NONPRIORITY CLAIMS
 (Continuation Sheet)

| CREDITOR'S NAME,
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INCLUDING ZIP CODE,
AND ACCOUNT NUMBER
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CONSIDERATION FOR CLAIM. IF CLAIM
IS SUBJECT TO SETOFF, SO STATE. | | | | |
| Account No. | | | | | | | |
| 961 Matley Properties LLC
c/o JONES & SWARTZ
PO Box 7808
Boise, ID 83707-7808 | | | Representing:
Matley Properties, LLC | | | | Notice Only |
| Account No. | | | | | | | |
| Hardy Law Group
96 & 98 Winter Street
Reno, NV 89503 | | | Representing:
Matley Properties, LLC | | | | Notice Only |
| Account No. | | | | | | | |
| Kimball D. Gourley, Attorney
Trout Jones Gledhill et al
PO Box 1097
Boise, ID 83701 | | | Representing:
Matley Properties, LLC | | | | Notice Only |
| Account No. [REDACTED] | | | | | | | |
| Munther Goodrum, Chartered
1161 West River Street, Suit
Boise, ID 83702 | | - | Attorney fees - business | | | | 7,078.95 |
| Account No. | | | | | | | |
| Nevada State Bank
PO Box 990
Las Vegas, NV 89125-0990 | | - | 2004
Guaranty on loans on The Turf Co. of Nevada.
After water rights sale, amount owing is appx.
\$86,000 | | | | 86,000.00 |
| Sheet no. <u>5</u> of <u>7</u> sheets attached to Schedule of
Creditors Holding Unsecured Nonpriority Claims | | | | | | | Subtotal
(Total of this page) |
| | | | | | | | 93,078.95 |

In re Lawrence Darwin McKayCase No. 12-00902

Debtor

AMENDED-LBR 1019.1
SCHEDULE F - CREDITORS HOLDING UNSECURED NONPRIORITY CLAIMS
 (Continuation Sheet)

| CREDITOR'S NAME,
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| Account No. [REDACTED]

Ringert Law
PO Box 2773
Boise, ID 83701 | | | Attorney fees for water rights | | | | 9,448.00 |
| Account No.

SPF Water Engineering, LLC
300 E. Mallard Dr. Suite 350
Boise, ID 83706 | | | 8/3/2008
Business Expense for The Turf Company | | | | 1,059.00 |
| Account No.

SPF Water Engineering, LLC
300 E. Mallard Dr. Suite 350
Boise, ID 83706 | | | 6/29/2008
Business Expense for Owyhee Acres LLC | | | | 5,174.86 |
| Account No. [REDACTED]

Sterling Sav
111 N. Wall St
Spokane, WA 99201 | | | 2004, 2008; See Claim.
Guaranty of obligations of The Turf Co., LLC et
al. Payment from sale of water rights not
credited from claim. Current amount est.
owing | | | | 2,800,000.00 |
| Account No.

Christopher Varallo
422 W. Riverside Ave. #1100
Spokane, WA 99201-0302 | | | Representing:
Sterling Savings Bank | | | | Notice Only |
| Sheet no. <u>6</u> of <u>7</u> sheets attached to Schedule of
Creditors Holding Unsecured Nonpriority Claims | | | | | | | Subtotal
(Total of this page) 2,815,681.86 |

In re Lawrence Darwin McKayCase No. 12-00902

Debtor

AMENDED-LBR 1019.1
SCHEDULE F - CREDITORS HOLDING UNSECURED NONPRIORITY CLAIMS
 (Continuation Sheet)

| CREDITOR'S NAME,
MAILING ADDRESS
INCLUDING ZIP CODE,
AND ACCOUNT NUMBER
(See instructions above.) | C
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| Account No. CLAIM 3 | | | Business Expense | | | |
| Truckee Meadows Bus. Park
310 Coney Island Drive
Sparks, NV 89431 | | - | | | | 85,133.30 |
| Account No. | | | | | | |
| Meuleman Mollerup LLP
755 W Front St. Suite 200
Boise, ID 83702 | | | Representing:
Truckee Meadows Bus. Park | | | Notice Only |
| Account No. [REDACTED] | | | | | | |
| Wachovia Mortgage Corp
PO Box 96001
Charlotte, NC 28296 | X | - | Assigned debt through Divorce Decree.
Ex-wife is person listed on mortgage at 25
Horizon Drive, Boise, ID. FACE AMOUNT
\$570,236.89. NOT SHOWN IN TOTAL
BECAUSE DUPLICATED IN PRIORITY FOR
PATRICIA MCKAY | | | Unknown |
| Account No. [REDACTED] | | | | | | |
| Zions First National Bank
2460 S 3270 W
Salt Lake City, UT 84119 | | - | Opened 6/09/09 Last Active 2/26/10
Unsecured loan for purchase of stock in Ensync
Technologies. Debtor knows almost nothing
about stock and believes it has no value.
CLAIM 15 | | | 99,997.86 |
| Account No. | | | | | | |
| | | | | | | |
| Sheet no. <u>7</u> of <u>7</u> sheets attached to Schedule of
Creditors Holding Unsecured Nonpriority Claims | | | | | | Subtotal
(Total of this page) |
| | | | | | | 185,131.16 |
| | | | | | | Total
(Report on Summary of Schedules) |
| | | | | | | 4,132,101.14 |

B8 (Form 8) (12/08)

**United States Bankruptcy Court
District of Idaho**In re Lawrence Darwin McKay

Debtor(s)

Case No. 12-00902Chapter 7**CHAPTER 7 INDIVIDUAL DEBTOR'S STATEMENT OF INTENTION**

PART A - Debts secured by property of the estate. (Part A must be fully completed for **EACH** debt which is secured by property of the estate. Attach additional pages if necessary.)

| | |
|--|--|
| Property No. 1 | |
| Creditor's Name:
Mountain West (GLACIER) Bank | Describe Property Securing Debt:
2000 Jaquar with 120k miles in good condition |
| Property will be (check one):
<input type="checkbox"/> Surrendered <input checked="" type="checkbox"/> Retained | |
| If retaining the property, I intend to (check at least one):
<input type="checkbox"/> Redeem the property
<input checked="" type="checkbox"/> Reaffirm the debt
<input type="checkbox"/> Other. Explain _____ (for example, avoid lien using 11 U.S.C. § 522(f)). | |
| Property is (check one):
<input checked="" type="checkbox"/> Claimed as Exempt <input type="checkbox"/> Not claimed as exempt | |

| | |
|---|---|
| Property No. 2 | |
| Creditor's Name:
Wells Fargo Hm Mortgage | Describe Property Securing Debt:
4329 Clearwood Drive, Sparks, NV. OWNED BY SON AND DEBTOR AS JOINT TENANTS; CLAIM 16 FILED AS SECURED CLAIM IN THIS CASE |
| Property will be (check one):
<input checked="" type="checkbox"/> Surrendered <input type="checkbox"/> Retained | |
| If retaining the property, I intend to (check at least one):
<input type="checkbox"/> Redeem the property
<input type="checkbox"/> Reaffirm the debt
<input type="checkbox"/> Other. Explain _____ (for example, avoid lien using 11 U.S.C. § 522(f)). | |
| Property is (check one):
<input type="checkbox"/> Claimed as Exempt <input checked="" type="checkbox"/> Not claimed as exempt | |

PART B - Personal property subject to unexpired leases. (All three columns of Part B must be completed for each unexpired lease. Attach additional pages if necessary.)

| | | |
|---------------------------------|----------------------------------|---|
| Property No. 1 | | |
| Lessor's Name:
-NONE- | Describe Leased Property: | Lease will be Assumed pursuant to 11 U.S.C. § 365(p)(2):
<input type="checkbox"/> YES <input type="checkbox"/> NO |

B8 (Form 8) (12/08)

Page 2

I declare under penalty of perjury that the above indicates my intention as to any property of my estate securing a debt and/or personal property subject to an unexpired lease.

Date February 6, 2013Signature /s/ Lawrence Darwin McKayLawrence Darwin McKay

Debtor

**United States Bankruptcy Court
District of Idaho**

In re Lawrence Darwin McKay

Debtor(s)

Case No. 12-00902Chapter 7

**AMENDED
DECLARATION CONCERNING DEBTOR'S SCHEDULES**

DECLARATION UNDER PENALTY OF PERJURY BY INDIVIDUAL DEBTOR

I declare under penalty of perjury that I have read the foregoing document(s), consisting of 24 page(s), and that they are true and correct to the best of my knowledge, information, and belief.

Date February 6, 2013

Signature /s/ Lawrence Darwin McKay
Lawrence Darwin McKay
Debtor

Penalty for making a false statement or concealing property: Fine of up to \$500,000 or imprisonment for up to 5 years or both.
18 U.S.C. §§ 152 and 3571.

ORIGINAL

Robert A. Anderson – ISB No. 2124
Yvonne A. Dunbar – ISB No. 7200
ANDERSON, JULIAN & HULL LLP
C. W. Moore Plaza
250 South Fifth Street, Suite 700
Post Office Box 7426
Boise, Idaho 83707-7426
Telephone: (208) 344-5800
Facsimile: (208) 344-5510

Attorneys for Defendants

NO. _____ FILED _____
A.M. _____ P.M. 4

MAY 22 2014

CHRISTOPHER D. RICH, Clerk
By PATRICK McLAUGHLIN
DEPUTY

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

PATRICIA MCKAY,

Plaintiff,

vs.

THOMAS G. WALKER and COSHO
HUMPHREY, LLP, a limited liability
partnership,

Defendants.

Case No. CV OC 0922659

**DEFENDANTS' SECOND MOTION
TO RECONSIDER COURT'S
ORDER DENYING DEFENDANTS'
MOTION FOR SUMMARY
JUDGMENT**

COMES NOW the above-named Defendants, by and through their attorney of record, Anderson, Julian & Hull LLP, pursuant to Idaho Rule of Civil Procedure 11 hereby moves this Court for reconsideration of its *Order Denying Defendants' Motion for Summary Judgment* and its *Memorandum Decision & Order*. The basis for this Motion is the misinterpretation of key facts which led to the Court's decision that a genuine issue of material fact exists.

This motion is supported by the documents and pleadings on file herein and upon the Memorandum and Affidavit of Thomas Walker in support which are filed contemporaneously herewith.

DATED this 22nd day of May, 2014.

ANDERSON, JULIAN & HULL LLP

By: Yvonne Dunbar
Robert A. Anderson
Yvonne A. Dunbar, of the Firm
Attorneys for Defendants

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this 22nd day of May, 2014, I served a true and correct copy of the foregoing by delivering the same to each of the following attorneys of record, by the method indicated below, addressed as follows:

Allen B. Ellis
ELLIS LAW, PLLC
12639 W. Explorer Drive, Ste. 140
Boise, Idaho 83713
Telephone: (208) 345-7832
aellis@aellislaw.com

| | |
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| <input type="checkbox"/> | U.S. Mail, postage prepaid |
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| <input type="checkbox"/> | Email |

Kevin E. Dinius
Michael J. Hanby II
DINIUS LAW
5680 E. Franklin Rd., Suite 130
Nampa, Idaho 83687
Telephone: (208) 475-0100

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| <input type="checkbox"/> | Email |

Attorneys for Plaintiff

Yvonne Dunbar
Robert A. Anderson
Yvonne A. Dunbar

ORIGINAL

Robert A. Anderson – ISB No. 2124
Yvonne A. Dunbar – ISB No. 7200
ANDERSON, JULIAN & HULL LLP
C. W. Moore Plaza
250 South Fifth Street, Suite 700
Post Office Box 7426
Boise, Idaho 83707-7426
Telephone: (208) 344-5800
Facsimile: (208) 344-5510

Attorneys for Defendants

NO. _____ FILED _____
A.M. _____ P.M. 4

MAY 22 2014

CHRISTOPHER D. RICH, Clerk
By PATRICK McLAUGHLIN
DEPUTY

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

PATRICIA MCKAY,

Plaintiff,

vs.

THOMAS G. WALKER and COSHO
HUMPHREY, LLP, a limited liability
partnership,

Defendants.

Case No. CV OC 0922659

**MEMORANDUM IN SUPPORT OF
DEFENDANTS' SECOND MOTION
TO RECONSIDER COURT'S
ORDER DENYING DEFENDANTS'
MOTION FOR SUMMARY
JUDGMENT**

COMES NOW the above-named Defendants, by and through their attorneys of record, Anderson, Julian & Hull LLP, and hereby submit this memorandum in support of their *Second Motion to Reconsider the Court's Order Denying Defendants' Motion for Summary Judgment* ("Second Motion to Reconsider"):

I. INTRODUCTION

The Defendants moved for summary judgment on January 6, 2011 wherein the Defendants argued the Plaintiff's claim failed as a matter of law because she could not establish

(1) the Defendants breached any duties owed to her; (2) the alleged breach was the proximate cause of her alleged damages; or (3) she suffered actual damages recoverable under the law. The Court heard argument on the Defendants' motion on February 3, 2011 and entered its written decision denying summary judgment on February 22, 2011. In its written decision, entitled *Order Denying Defendants' Motion for Summary Judgment* ("Order"), the Court found there was a genuine issue of fact regarding "whether the Defendants breached the standard of care in Idaho when [Mr. Walker allegedly] incorrectly stated the law to Mrs. McKay, thus leading her to believe that she would have a secured interest in her husband's mortgage on the Albrethsen property." See *Order*, p. 7. The basis for the Court's decision was an October 23, 2007 email exchange to which the Court inadvertently applied an unreasonable interpretation. Specifically, the Court changed the language in the Plaintiff's October 23, 2007 email to the Defendants to read "Albrethsen property mortgage" rather than "Status Corp closure". The Court did this even though the Plaintiff did not mention the October 23, 2007 email on summary judgment and did not argue that the mortgage, rather than the Home Farm Property closure, was the subject of October 23, 2007.

The Defendants then filed a *Motion to Reconsider* wherein they respectfully asserted the Court's finding was made in error as the conclusion was based upon the October 23, 2007 email exchange, which they argued the Court inadvertently misinterpreted to refer to a different piece of property. Contrary to the Court's decision, the October 23, 2007 email exchange was not addressing the Albrethsen property, which had closed prior to October 2007, or the mortgage on that property. Instead, the October 23, 2007 email pertained to the sale of the Home Farm property by Darwin McKay to Status Corporation, which transaction was expected to close in the future on or about March 30, 2008. As the email pertained to the Home Farm property, Mr.

Walker's email was a correct statement of law. Accordingly, the Defendants argued Mr. Walker's email could not be the basis of a determination that the Defendants breached a duty of care and it could not be the grounds for denying summary judgment to the Defendants.

The Court heard argument on the Defendants' *Motion to Reconsider* and thereafter denied it. *See generally Memorandum Decision & Order* (hereinafter referred to as "*Reconsider Order*"). In doing so, the Court ruled that a reasonable interpretation of the October 23, 2007 email exchange was that the Plaintiff was referring to the Albrethsen mortgage payoff and the Plaintiff could have "used the word 'closure' where a person with more experience in real estate transactions...would have used a more precise term such as 'mortgage' or 'payoff'". *See id.*, p. 6. The Court further held the Plaintiff "may have incorrectly assumed that the title company was handling both the mortgage payoff and the transfer of Home Farm." *See id.*, pp. 6-7. The Court then held "the Defendants have not demonstrated exactly what Mrs. McKay's understanding was in this record." *See id.*, p. 7.

It is the Defendants' position that, respectfully, the Court's rulings in the *Order* and *Reconsider Order* were in error. First, those rulings appear to be based upon speculation rather than the record. Importantly, the Plaintiff has never argued that she did not understand the word "closure"; that she was referring to the Albrethsen mortgage rather than the closing of the Home Farm property sale; or that she assumed the title company was handling the mortgage payoff. Moreover, it appears the Court incorrectly placed the burden of proof on the Defendants when it held the Defendants had not established the Plaintiff's understanding of the October 23, 2007 email exchange. Under Idaho law, the Plaintiff, not the Defendants, has the burden of proving her claims.

For these reasons and those stated below, the Defendants have now filed a *Second Motion to Reconsider*. As explained herein, it is the Defendants' position that the Court erred in its prior rulings and summary judgment should be entered in their favor because: (1) the Court drew an unreasonable inference as to the Plaintiff's intention when she wrote "Status Corp Closure" in her October 23, 2007 email; (2) the Plaintiff's intention in drafting the October 23, 2007 email is irrelevant as the focal inquiry is how Mr. Walker interpreted her email and whether his interpretation was reasonable; (3) given Mr. Walker's reasonable interpretation of the Plaintiff's October 23, 2007 email, his email in response was a correct statement of law; (4) the October 23, 2007 email from Mr. Walker was not a proximate cause of the Plaintiff's damages; and (5) Mr. Smith's opinions should be disregarded as they are not supported by the facts.

For these reasons, the Defendants respectfully request that the Court reconsider its *Order* and its *Reconsider Order* and grant the Defendants summary judgment.

II. ARGUMENT

A. Standard of Review.

Rule 11(a)(2)(B), Idaho Rules of Civil Procedure, allows a party to move for reconsideration of an interlocutory order no later than fourteen days from the entry of final judgment. "A decision of whether to grant or deny a motion for reconsideration made pursuant to Idaho Rule of Civil Procedure 11(a)(2)(B) is left to the sound discretion of the trial court." *Commercial Ventures, Inc. v. Rex M. & Lynn Lea Family Trust*, 145 Idaho 208, 212 (2008). When a party files a motion for reconsideration, there is no requirement for the party to provide the Court with either newly decided case law or new evidence. *Johnson v. Lambros*, 143 Idaho 468, 472-73 (Ct. App. 2006). The purpose of a motion for reconsideration is to allow the Court to "obtain a full and complete presentation of all available facts, so that the truth may be

ascertained, and justice done, as nearly as may be.” *Coeur d'Alene Mining Co. v. First Nat'l Bank*, 118 Idaho 812, 823 (1990). Even though no new facts are required when filing a motion for reconsideration, the burden is on the party seeking reconsideration to bring to the Court’s attention any new facts or reasons why the Court’s previous decision should be reconsidered. *See Coeur d'Alene Mining Co.*, 118 Idaho at 823; *Johnson*, 143 Idaho at 472-73. A motion for reconsideration may be filed at any time before entry of final judgment. Idaho R. Civ. Proc. 11(a)(2)(B).

B. The Record and All Reasonable Inferences Establish the Defendants Did Not Breach Any Duty Owed to the Plaintiff.

1. The Court’s Interpretation of the October 23, 2007 Email Exchange was Incorrect.

Under Idaho law, when reviewing a summary judgment motion, a court is entitled to draw all reasonable inferences in favor of the non-moving party. The inferences drawn by the trial court must be reasonably supported by the record. *See e.g. J.R. Simplot Co. v. Bosen*, 144 Idaho 611, 621 (2006) (inferences not supported by the record are unreasonable). Where the inferences are not supported by the record, the trial court errs in drawing the same. *See e.g. id.*; *see also P.O. Ventures, Inc. v. Loucks Family Irrevocable Trust*, 144 Idaho 233, 237 (2007) (on appeal, the Idaho Supreme Court “reviews the inferences drawn by the district judge to determine whether the record reasonably supports those inferences”) (citing *Intermountain Forest Mgmt., Inc. v. Louisiana Pac. Corp.*, 136 Idaho 233, 235 (2001)).

a. The Court’s Drew an Unreasonable Inference as to the Plaintiff’s Intention when she Wrote “Status Corp Closure”.

In the current action, the Defendants respectfully submit the Court erred in inferring that the October 23, 2007 email pertained to the Albrethsen Property mortgage, rather than the closing of the Home Farm Property sale. *See Order*, p. 7; *Reconsider Order*, pp. 6-7. This error was not harmless as the improper inference, which is not supported by the record nor ever

asserted by Plaintiff, was the basis of the Court's finding the existence of a question of fact regarding whether the Defendants breached a standard of care owed to the Plaintiff.

On October 23, 2007, Mr. Walker emailed the Plaintiff a draft Property Settlement Agreement ("PSA") for the Plaintiff's review. *See Affidavit of Counsel in Support of Motion for Summary Judgment ("Counsel Aff.")*, filed Jan. 6, 2011, Ex. A (Patricia McKay deposition) at Ex. 17 (Bates labeled CH2668-CH2687). The draft PSA identified the March 30, 2008 closing of the "Status Real Estate Transaction" as an event triggering certain payments by Mr. McKay to the Plaintiff. *See id.* As was understood by the Plaintiff and the Defendants, the closing of the "Status Real Estate Transaction" referred to the closing of the sale of the Home Farm Property from Mr. McKay to Status Corporation, which was scheduled to close on March 30, 2008. *See Affidavit of Thomas Walker in Support of Defendants' Second Motion to Reconsider ("Walker Reconsider Aff.")*, filed concurrently herewith, at ¶¶4-6. At that time, the Plaintiff and Defendants had discussed utilizing that closing (the closing of the Home Farm Property) as a triggering event. *See id.*, ¶4. They had not discussed utilizing any other event, such as the payment of the Albrethsen mortgage, as a trigger for payments by Mr. McKay. *See id.*, ¶11.

In response to the Plaintiff's review of the draft Property Settlement Agreement, the Plaintiff and Mr. Walker engaged in the following October 23, 2007 email exchange:

Mrs. McKay: "All looks good Tom. However, can I place a lien with the title company on the Status Corp closure so the \$800,000.00 are paid to me by them? This is what we had to do when property sold that Donna had so the funds would come to us instead of thru Donna."

Mr. Walker: "Our plan is to record the Judgment and Decree of Divorce, which then becomes a lien on all of Darwin's real...property. We don't want to emphasize this aspect of the settlement. So, we don't want to say anything until after the judge signs the Judgment and Decree."

See Counsel Aff., Ex. A (Patricia McKay deposition) at Ex. 17.

In her above-email, the Plaintiff specifically asked Mr. Walker whether she could place a “lien with the title company on the Status Corp closure”. *See id.* Contrary to the holding of the Court in this matter, the only reasonable interpretation of the Plaintiff’s email was that she was referring to the closing of the Home Farm Property (Parcel 2 in the Memorandum of Contract between Mr. McKay and Status Corporation). A review of the record establishes, in her email, the Plaintiff was discussing the draft PSA’s reference to the closing of the “Status Real Estate Transaction”. *See id.*, Ex. A. at Ex. 16-17; *Walker Reconsider Aff.*, ¶¶2, 5. Prior to the distribution of the draft PSA, the Plaintiff and Mr. Walker discussed the real estate transactions between Mr. McKay and Status Corporation. *See Walker Reconsider Aff.*, ¶6. Through these discussions and the Plaintiff’s review of the various agreements between Mr. McKay and Status Corporation, including the Memorandum of Contract, the Plaintiff was aware that the only property owned by Mr. McKay in October 2007, the sale of which was scheduled to close on March 30, 2008, was the Home Farm Property. *Id.*; *Affidavit of Robert A. Anderson in Support of Defendants’ Motion to Reconsider* (“*Anderson Aff.*”), filed Feb. 21, 2013, Ex. D (*Memorandum of Contract*). Prior to October 23, 2007, the Plaintiff and Defendants had specifically discussed utilizing that closing (the Home Farm Property closing) as a triggering event. *See Walker Reconsider Aff.*, ¶4. As such, it was understood by the Plaintiff and the Defendants that the draft PSA’s reference to the Status Real Estate Transaction closing referred to the March 2008 closing of the Home Farm Property. *See Walker Reconsider Aff.*, ¶¶2-7.

The Plaintiff’s testimony and legal arguments in this matter also support a finding that the only rational interpretation of the Plaintiff’s October 23, 2007 email was that she was referring to the Home Farm Property sale. First, at her deposition, the Plaintiff explained the purpose of her question as follows:

Q. (BY MR. ANDERSON) And can you tell me what you meant by: "Can I place a lien with the title company"?

A. A lien on all Darwin's property.

Q. Real property?

A. Real property.

Q. All right. And Mr. Walker responded with a means for doing that; correct?

A. Yes, he states: "Our plan is to record the Judgment and Decree of Divorce, which then becomes a lien on all of Darwin's real and personal property."

Q. So, let's just focus on real property. Were you satisfied with Mr. Walker's response?

A. Yes.

Q. All right. And has anyone told you that a lien was not created relative to any real property actually owned by Darwin McKay by virtue of recording the final property settlement agreement?

A. No.

Q. You then say, in essence, that the \$800,000 should be paid to you by them. And I'm curious, who do you mean by "them"?

A. I state: "However, can I place a lien" --

...

Q. (BY MR. ANDERSON) This might be a little disjointed. Let me read the sentence. You write on October 23rd: "Can I place a lien with the title company on the Status Corp closure so the \$800,000 are paid to me by them?" And who was "them"?

A. The title company.

Q. What title company were you referring to?

A. *Whatever title company would be used for the closing of the property.*

See Counsel Aff., Ex. A (Patricia McKay depo), 99:13-101:2 (emphasis added). Again, Plaintiff was aware that only the Home Farm Property was scheduled to close on March 30, 2008.

Later, on summary judgment, the Plaintiff represented to the Court that she did not become aware of the mortgage note on the Albrethsen Property until November 2007 when she was presented with the final draft of the PSA. *See Memorandum in Opposition to Defendant's Motion for Summary Judgment*, p. 2 (stating "Plaintiff wife was not made aware of the mortgage until it was first referenced in the last draft of the Agreement which was ultimately executed"); *Affidavit of Thomas Walker in Support of Defendants' Motion for Summary Judgment* ("Walker MSJ Aff."), Jan. 6, 2011, ¶16 (final draft of the PSA was forwarded to the Plaintiff on November 19, 2007). Since, by the Plaintiff's own representation, she was not aware of the mortgage until November 19, 2007, she could not have been referring to the "Albrethsen Property mortgage" in her October 23, 2007 email when she discussed the "Status Corp closure" as was found by this Court in its *Order*.

Based upon such facts, the only reasonable interpretation of the Plaintiff's October 23, 2007 email was that she was referring to the closing of the Home Farm Property. It is unreasonable to infer that she was referring to the Albrethsen Property mortgage when the draft PSA did not mention a mortgage; the Plaintiff was aware the Albrethsen Property sale had previously closed in November 2006, almost 11 months prior to the October 23, 2007 email exchange; title had transferred to Status Corporation at the time of the November 2006 closing; and the title company would not be further involved regarding the Albrethsen Property sale. *See Counsel Aff.*, filed Jan. 6, 2011, Ex. A (Patricia McKay depo) at Ex. 16; *Walker Reconsider Aff.*, ¶¶6, 8.

Based upon the foregoing, the Defendants respectfully assert that the Court incorrectly replaced the phrase "with the title company on the Status Corp closure" with "on the Albrethsen Mortgage closure". *See Order*, p. 2. Doing so was error as it is contrary to the facts and would

cause an unreasonable and absurd result. Therefore, the Court's inference was contrary to established Idaho law which allows the Court to draw only reasonable inferences. *See e.g. Bosen*, 144 Idaho at 621. As such, the Defendants respectfully request that the Court reconsider its prior decisions in this matter.

b. The Focal Question is Mr. Walker's Interpretation of Plaintiff's October 23, 2007 Email, Not the Plaintiff's Intention.

The Defendants further contend that the Court erred in considering the Plaintiff's intention in her October 23, 2007 email as the focal issue is how Mr. Walker interpreted her email and whether that interpretation was reasonable.

To establish her claim of professional malpractice, the Plaintiff must prove that the Insureds breached a duty owed to her. In the current matter, on summary judgment, the Court held (even though the Plaintiff did not make such an argument) that a question of fact existed regarding whether Mr. Walker breached a duty owed to her when he allegedly made an inaccurate statement of law in the October 23, 2007 email exchange. The Court supported its ruling by finding that the Plaintiff may have been referring to the Albrethsen Property mortgage in her October 23, 2007 email. *See Order*. However, the focal question is what advice or statements of law were provided by the Defendants to the Plaintiff. Therefore, the relevant issues are how Mr. Walker interpreted the Plaintiff's October 23, 2007 email when he responded to her and whether his interpretation was reasonable or lacked rationale and fell below Mr. Walker's standard of care.

When Mr. Walker reviewed the Plaintiff's email, he interpreted it as the Plaintiff discussing the Home Farm property, not the Albrethsen property. *See Walker Reconsider Aff.*, ¶¶3, 7. He, therefore, was responding to the Plaintiff by explaining that a lien could be created on the Home Farm property; he was not providing any statement as to whether a lien could be

placed on the Albrethsen mortgage. *See id.* ¶9. Mr. Walker's interpretation of the Plaintiff's email was reasonable under the circumstances and was not a deviation from his standard of care.

As explained above, the Plaintiff and Mr. Walker previously discussed Status Corporation's purchase of two properties (the Albrethsen Property and the Home Farm Property) from Mr. McKay. *See Walker Reconsider Aff.*, ¶¶4, 6. Pursuant to the Memorandum of Contract, recorded on December 1, 2006, which was reviewed by the Plaintiff, the Albrethsen Property (Parcel 1) closed in November 2006. *See Anderson Aff.*, Ex. D; *Walker Reconsider Aff.*, ¶6. At that time, the title to that property transferred to Status Corporation and Mr. McKay simply held a mortgage related to the monies still owing on the sale of the Albrethsen Property. *See Anderson Aff.*, Ex. D. The Home Farm Property sale, however, was not scheduled to close until March 30, 2008, at which time the title would be transferred to Status Corporation. *See id.* Because the sale of the Home Farm Property had not yet closed and title was not yet transferred, the Plaintiff and Mr. Walker discussed utilizing the closing of that sale as an event which triggered certain payments by Mr. McKay to the Plaintiff. *See Walker Reconsider Aff.*, ¶¶4-5.

When Mr. Walker prepared the initial draft of the PSA, which was forwarded to the Plaintiff on October 23, 2007, he included as a triggering event the March 30, 2008 closing of the sale of the "Status Real Estate Transaction". *See id.*, ¶¶4-5. That triggering event referred to the March 30, 2008 closing of the Home Farm Property sale. *See id.* Mr. Walker was under the impression that the Plaintiff understood that was the focus as they had previously discussed the same. *See id.* As such, when Mr. Walker received the Plaintiff's email regarding her review of the draft PSA, he reasonably understood that she was referring to the anticipated closing of the Home Farm Property sale when she stated "can I place a lien with the title company on the Status Corp closure". *See id.*, ¶¶4-5, 7. Mr. Walker's interpretation was reasonable given their prior

discussions, the terms of the Memorandum of Contract, and the fact that the only real property sale between Mr. McKay and Status Corporation which was scheduled to close on March 30, 2008 was the Home Farm Property sale. *See Anderson Aff.*, Ex. D; *Walker Reconsider Aff.*, ¶¶4-7.

Mr. Walker did not believe and had no reason to believe that the Plaintiff was referring or could have been referring to the Albrethsen Property mortgage in her October 23, 2007 email. *See Walker Reconsider Aff.*, ¶¶3, 8. Indeed, the Plaintiff has never even taken that position. It also would have been unreasonable for Mr. Walker to assume the Plaintiff was referring to the Albrethsen Property. *See id.* As Mr. Walker and the Plaintiff had previously discussed, the closing of the Albrethsen Property sale had previously occurred. *See id.*, ¶8. Accordingly, there was no anticipated future “closure” nor anticipated future title company involvement. *See id.* Additionally, as the Plaintiff was aware, the title to the Albrethsen Property had already transferred from Mr. McKay to Status Corporation. *See id.* Moreover, neither the draft PSA nor the Plaintiff’s email mentioned Mr. McKay’s mortgage on the Albrethsen Property. *See Counsel Aff.*, Ex. A (Patricia McKay depo) at Ex. 16, 17. Instead, both documents referenced only the anticipated future March 30, 2008 closing of a real estate sale. *See id.* Only one sale fit that description – the Home Farm Property sale.

Under such circumstances, Mr. Walker reasonably interpreted the Plaintiff’s email as referring to the Home Farm Property sale, rather than the Albrethsen Property mortgage. Based upon his interpretation of the Plaintiff’s October 23, 2007 email, Mr. Walker’s response wherein he stated that a lien could be placed on Mr. McKay’s real property (i.e. the Home Farm Property) comported with his applicable standard of care and, as is explained below, is a correct statement of law.

It should be noted that the Plaintiff has offered no expert testimony to support a finding that Mr. Walker's interpretation of the October 23, 2007 email was unreasonable or that Mr. Walker breached any duty owed to the Plaintiff in his interpretation of the email. Due to this failure, the Plaintiff is barred from establishing that a breach occurred. *See e.g. Samuel v. Hepworth, Nungester & Lezamiz, Inc.*, 134 Idaho 84, 89 (2000) (holding expert testimony is necessary in a legal malpractice claim to establish, inter alia, a breach of a duty).

For these reasons, the Defendants assert no duty owed to the Plaintiff was breached through the October 23, 2007 email exchange. Accordingly, the Defendants respectfully request that the Court reconsider its prior decisions and grant summary judgment to the Defendants.

2. Based upon His Understanding of Plaintiff's October 23, 2007 Email, Mr. Walker's October 23, 2007 Email Response was an Accurate Description of the Law.

As stated above, Mr. Walker acted reasonably and without negligence when he reviewed the Plaintiff's October 23, 2007 email and rationally interpreted it as referring to the closing of the Home Farm property. Given that Mr. Walker reasonably believed the Plaintiff was referring to the closing of the Home Farm property sale when she requested whether a lien could be placed on the "Status Corp closure", Mr. Walker's response indicating that a lien could be placed on Mr. McKay's real property, i.e. the Home Farm Property, was an accurate statement of the law. As such, Mr. Walker and the Defendants did not breach any duty owed to the Plaintiff when Mr. Walker sent his October 23, 2007 email to the Plaintiff.

Idaho Code section 10-1110 provides that the recording of a judgment

A transcript or abstract of any judgment...if rendered within this state, certified by the clerk having custody thereof, may be recorded...and from the time of such recording...the judgment so recorded becomes a lien upon all real property of the judgment debtor in the county...owned by him at the time or acquired afterwards at any time prior to the expiration of the lien; provided that where a transcript or abstract is recorded of any judgment or decree of divorce or separate maintenance making provision for installment or periodic payment of sums for maintenance of children or alimony or allowance for wife's support, such judgment or decree shall

be a lien only in an amount for payments so provided, delinquent or not made when due...

Idaho Code § 10-1110.

Per I.C. § 10-1110, the recording of the *Judgment and Decree of Divorce* created a lien on any real property owned, at least in part, by Mr. McKay. At the time the parties in the divorce action entered in the PSA, the parties understood Mr. McKay held an ownership interest in the Home Farm property. As you know, the PSA specifically stated Mr. McKay would retain title to the Home Farm property if Status Corporation defaulted on the loan. *See Counsel Aff.*, Ex. B at ¶ 1.8. Based upon such information, Mr. Walker's statement that the recorded *Judgment and Decree of Divorce* "becomes a lien on all of the Darwin's real...property," including the Home Farm property, accurately explained Idaho law. As such, the October 23, 2007 email exchange cannot be the basis of the Court's finding the existence of a genuine issue of material fact regarding whether the Defendants breached any standard of care owed to the Plaintiff.

Because the sole basis of the Court's finding of a genuine issue of material fact was that the October 23, 2007 email exchange allegedly contained an inaccurate description of the law and this finding was improper, the Defendants respectfully request this Court reconsider its *Order* and enter summary judgment in favor of the Defendants.

C. The October 23, 2007 Email was Not a Proximate Cause of the Plaintiff's Alleged Damages

In the alternative, the Defendants argue, even if the October 23, 2007 email contained an incorrect statement of law and incorrectly led the Plaintiff to believe she would have a secured interest in the Albrethsen mortgage once the Judgment was recorded, the email was not a proximate cause of the Plaintiff's damages.

The Plaintiff contends she was damaged because she did not have a secured interest in the Albrethsen mortgage. Conveniently, the Plaintiff claims she would not have executed the

PSA had she known she was not going to receive a secured interest in the Albrethsen Property mortgage and that she only executed the PSA based upon the October 23, 2007 email exchange. However, the October 23, 2007 email was sent after the Plaintiff was already legally obligated, through the October 20, 2007 handwritten mediation agreement, to a settlement with Mr. McKay wherein she was not going to receive any secured interest in property of any type, including the mortgage. *See* Counsel Aff., Ex. A (Patricia McKay Depo.) at Ex. 11 (Handwritten Agreement).

It is the Defendants' position that the relevant time period for causation purposes is limited to all times before the Plaintiff executed the handwritten mediation agreement on October 20, 2007. *See id.* This is because the Plaintiff was legally bound to settle her divorce action when she executed the handwritten settlement agreement, the terms of which were enforceable prior to the execution of the final PSA. *See id.*, ¶ 8. Per that agreement, the parties were required to enter into a more comprehensive settlement agreement and, if they did not, their only recourse was to arbitrate the final settlement terms. *See id.* (stating "Parties, through counsel, to incorporate these terms into a comprehensive property settlement agreement. Parties agree that any dispute over the terms thereof or otherwise over the interpretation of this [handwritten] agreement will be submitted to Judge McKee for binding arbitration"). That means, if the Plaintiff refused to execute the PSA because she did not receive a secured interest in the Albrethsen mortgage, her only recourse was to arbitrate the final settlement terms before the mediator. *See id.*

The Plaintiff has failed to provide any expert testimony regarding the likelihood that she could have obtained a secured interest in the Albrethsen mortgage had she chosen to arbitrate the settlement terms. In failing to present such testimony, the Plaintiff has failed to meet her burden of establishing the necessary causation. Idaho law is clear, in order for a plaintiff to prevail on a

legal malpractice claim, the plaintiff must establish she would have had “some chance of success” in the underlying action but for the attorney’s alleged actions. *See e.g. Lamb v. Manweiler*, 129 Idaho 269, 272, 923 P.2d 976, 979 (1996). Proof of the same can only occur through expert testimony. *See e.g. Samuel v. Hepworth, Nungester & Lezamiz, Inc.*, 134 Idaho 84, 89 (2000) (holding “[a] plaintiff must normally produce expert evidence of negligence and causation of damages to establish a prima facie case of legal malpractice” as “the factors involved ordinarily are not within the knowledge or experience of laymen composing the jury”).

Not only has the Plaintiff failed to present pertinent expert testimony on the subject, but the record establishes that the Plaintiff would not have prevailed in obtaining a security interest in the Albrethsen Property or the mortgage had she proceeded to arbitration rather than executing the PSA. The handwritten settlement agreement did not provide the Plaintiff with any security, meaning security was not a part of the mediated settlement terms. *See Counsel Aff., Ex. A* (Patricia McKay Depo.) at Ex. 11 (Handwritten Agreement). Additionally, the arbitrator was precluded from awarding the Plaintiff with a security interest in the Albrethsen mortgage or property because Mr. McKay no longer had an ownership interest in the Albrethsen property and Idaho law did not provide an avenue for the Plaintiff to have received a secured interest in a mortgage. *See Anderson Aff., Ex. D*. Consequently, the Plaintiff would not have had any chance of success had she chosen to arbitrate the settlement rather than executing the PSA.

For these reasons, the Plaintiff cannot establish that her receipt of Mr. Walker’s October 23, 2007 email was a proximate cause of her purported damages claimed in this matter specifically. The Plaintiff cannot establish she would have received a security interest in the Albrethsen Property had she arbitrated the settlement terms. Because the Plaintiff cannot

establish all of the elements of legal malpractice, the Defendants respectfully request that this Court reconsider its earlier decisions and grant summary judgment in favor of the Defendants.

D. Plaintiff's Claims Fail Because She Has Not Presented Any Admissible Expert Testimony on the Issues of Breach and Causation¹

On summary judgment, the Plaintiff relied on the expert testimony of Bryan Smith in support of her claims that the Defendants breached a duty owed to her and that such breach was the proximate cause of her damages. In its *Order* and *Reconsider Order*, the Court also appears to have relied on Mr. Smith's affidavit in support of its determination that questions of fact existed regarding the existence of a breach and causation.

The Defendants maintain, however, that Mr. Smith's opinions should be disregarded on summary judgment because they are not supported by the facts in this matter. Instead, Mr. Smith's opinions are based upon the improper assumption that the closing of the Albrethsen property would occur at some time after the PSA was executed and that the property referenced in the October 23, 2007 email exchange was the Albrethsen property. *See Smith Affidavit; Anderson Aff.*, Ex. A (Bryan Smith Deposition) at 131:2-13. It cannot be overemphasized that these assumptions are not supported by any facts and are contrary to the record.

Specifically, Mr. Smith's opinion that Mr. Walker allegedly lead the Plaintiff to believe she had a security interest in the Albrethsen mortgage was based upon his unsubstantiated assumption that the October 23, 2007 email referred to the Albrethsen property. As explained above, such an interpretation is not reasonable. It also ignores the focal inquiries; that is, how Mr. Walker interpreted the Plaintiff's email and whether that interpretation is reasonable. It is axiomatic that Mr. Walker reasonably interpreted the Plaintiff's email as referring to sale of the

¹ It should be noted that the Defendants made this argument in their original *Motion to Reconsider*. However, it does not appear that the Court ruled on this issue in its *Reconsider Order*.

Home Farm Property as that was the only real property sale which was scheduled to close on March 30, 2008. Likewise, the proposed safeguards enumerated in Mr. Smith's opinion were based upon his inaccurate assumption that the Albrethsen property was scheduled to close at some time after the PSA was executed. *See Anderson Aff.*, Ex. A (Bryan Smith Deposition) at 131:2-13. However, the record clearly establishes that the sale of the Albrethsen property occurred before the parties mediated the divorce action on October 20, 2007 and before the October 23, 2007 email exchange. *See Anderson Aff.*, Ex. D.


Given that there is no factual support for Mr. Smith's opinions, his opinions cannot assist the trier of fact and should, therefore, be disregarded on summary judgment. *See e.g. Jones v. Crawforth*, 147 Idaho 11, 17, 205 P.3d 660, 666 (2009); *Ryan v. Beisner*, 123 Idaho 42, 46, 844 P.2d 24, 28 (Ct. App. 1992); *McGlinchy v. Shell Chem. Co.*, 845 F.2d 802 (9th Cir. 1988). Further, the Defendants respectfully assert that Mr. Smith's opinions cannot be the basis of a denial of summary judgment as they are not substantiated by the record.

III. CONCLUSION

For the aforementioned reasons, the Defendants respectfully request that this Court grant their *Motion to Reconsider* in its entirety and enter summary judgment in favor of the Defendants.

DATED this 22nd day of May, 2014.

ANDERSON, JULIAN & HULL LLP

By: 
Robert A. Anderson
Yvonne A. Dunbar, of the Firm
Attorneys for Defendants

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this 22nd day of May, 2014, I served a true and correct copy of the foregoing by delivering the same to each of the following attorneys of record, by the method indicated below, addressed as follows:

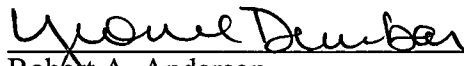
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| <input type="checkbox"/> | Overnight Mail |
| <input checked="" type="checkbox"/> | Facsimile (208) 345-9564 |
| <input type="checkbox"/> | Email |

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Attorneys for Plaintiff



Robert A. Anderson
Yvonne A. Dunbar

All looks good Tom. However, can I place a lien with the title company on the Status Corp closure so the \$800,000.00 are paid to me by them? This is what we had to do when property sold that Donna had so the funds would come to us instead of thru Donna.

3. When I received the Plaintiff's email, I reasonably understood she was referring to the Home Farm property. It would have been unreasonable for me to believe she was referring to any other property.

4. The Home Farm property was the only property sale between Darwin McKay and Status Corporation which was scheduled to close at a time later than October 23, 2007. Prior to October 23, 2007, the Plaintiff and I discussed that the sale of the Home Farm property was scheduled to close in March 2008. We also discussed utilizing that closing as a triggering event for Mr. McKay to make certain payments to the Plaintiff.

5. Additionally, the draft of the Property Settlement Agreement, which was the subject of the Plaintiff's email, identified the anticipated March 2008 closing of the "Status Real Estate Transaction" as a triggering event for Mr. McKay to pay certain sums of money. At that time, the reference to the March 2008 closing of the "Status Real Estate Transaction" in the Property Settlement Agreement was understood by me and the Plaintiff to refer to the Home Farm Property closing.

6. Prior to October 23, 2007, the Plaintiff and I discussed the real estate transactions between Mr. McKay and Status Corporation, which involved the sales of two separate parcels of land, the Home Farm Property and the Albrethsen Property. The Plaintiff reviewed the various agreements between Mr. McKay and Status Corporation, including the purchase and sale agreement with all addenda, the Memorandum of Contract recorded on December 1, 2006, the promissory note, and the mortgage. As such, the Plaintiff was familiar with the terms of the real

property sale. Specifically, the Plaintiff was aware that the sale involved two separate closing dates. Through her review of the pertinent documents and our discussions, the Plaintiff knew the Albrethsen Property sale was complete as it had closed in November 2006. She also knew the Status Corporation, not Mr. McKay, held title to the Albrethsen Property. The Plaintiff further knew that the Home Farm property sale was not yet completed, was scheduled to close in March 2008, and, therefore, title for that property had not yet transferred.

7. Through our discussions and based upon the fact that only the Home Farm Property was scheduled to close in the future, I reasonably understood that, through her October 23, 2007 email, the Plaintiff was requesting whether she could place a lien on the Home Farm Property so certain settlement monies which were due upon the closing of the Home Farm property would be transferred directly to her, rather than her waiting for Mr. McKay to receive the funds and make a payment to her.

8. It would have been unreasonable for me to believe the Plaintiff was referring to the Albrethsen property in her October 23, 2007 email. The sale of Albrethsen property had already closed in November 2006. Prior to October 23, 2007, the Plaintiff and I had discussed that the sale of the Albrethsen property had already closed; the sale was completed; and Mr. McKay no longer held title to it.

9. Based upon my reasonable understanding of the Plaintiff's email, on October 23, 2007, I responded to her, in pertinent part, as follows:

Our plan is to record the Judgment and Decree of Divorce, which then becomes a lien on all of Darwin's real...property. We don't want to emphasize this aspect of the settlement. So, we don't want to say anything until after the judge signs the Judgment and Decree.

In my email, I was referring to any real property owned by Mr. McKay, which included the Home Farm Property. As the Plaintiff knew through our prior discussions, Mr. McKay was not the legal owner of the Albrethsen Property after title was transferred in November 2006.

10. My statement regarding the ability to place a judgment lien on real property owned by Mr. McKay, including the Home Farm Property, was an accurate statement of law.

11. It should be noted, later drafts of the Property Settlement Agreement specifically referred to the Home Farm Property (rather than Status Real Estate Transaction) closing as a triggering event and also added a second triggering event involving the payment of the mortgage Mr. McKay held on the Albrethsen Property. Adding the payment of the mortgage as an additional triggering event was not discussed until after October 23, 2007.

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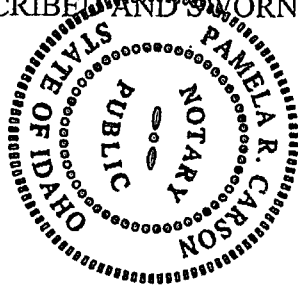
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Further your Affiant saith not.

Thomas Walker
Thomas Walker

SUBSCRIBED AND SWORN to before me this 22nd day of May, 2014.



Pamela R. Carson
Notary Public for Idaho
Residing at Boise Idaho
My commission expires: 3/31/2016

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this 22nd day of May, 2014, I served a true and correct copy of the foregoing by delivering the same to each of the following attorneys of record, by the method indicated below, addressed as follows:

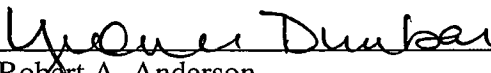
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| | |
|-------------------------------------|----------------------------|
| <input type="checkbox"/> | U.S. Mail, postage prepaid |
| <input type="checkbox"/> | Hand-Delivered |
| <input type="checkbox"/> | Overnight Mail |
| <input checked="" type="checkbox"/> | Facsimile (208) 345-9564 |
| <input type="checkbox"/> | Email |

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|-------------------------------------|----------------------------|
| <input type="checkbox"/> | U.S. Mail, postage prepaid |
| <input type="checkbox"/> | Hand-Delivered |
| <input type="checkbox"/> | Overnight Mail |
| <input checked="" type="checkbox"/> | Facsimile (208) 475-0101 |
| <input type="checkbox"/> | Email |

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JUN 20 2014

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JUN 20 2014

CHRISTOPHER D. RICH, Clerk
By ELYSHIA HOLMES
DEPUTY

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

| | | |
|---------------------------------------|---|------------------------------|
| Patricia McKay |) | |
| |) | Case No. CV OC 0922659 |
| Plaintiff, |) | |
| |) | MEMORANDUM IN OPPOSITION |
| v. |) | TO MOTION TO RECONSIDER |
| |) | DENIAL OF MOTION FOR SUMMARY |
| Thomas G. Walker and Cosho Humphrey, |) | JUDGMENT |
| LLP, a limited liability partnership, |) | |
| |) | |
| Defendants. |) | |
| |) | |

BACKGROUND

Preliminary note: A recurring aspect of the opposition brief is defendants' failure to understand that the ex-husband's mortgage on the Albrethsen property, owned by buyer Status

MEMORANDUM IN OPPOSITION TO MOTION TO RECONSIDER
DENIAL OF MOTION FOR SUMMARY JUDGMENT - 1

ORIGINAL 0928

Corporation, was an interest in real property which was vulnerable to being liened by a recorded marital settlement agreement. As alleged in the Complaint, had the agreement been properly drafted and recorded, it would have secured plaintiff's interest in the Albrethsen mortgage proceeds.

Factual basis of claim: In this legal malpractice action, plaintiff wife alleges that defendant attorney negligently failed to secure her monetary entitlement under a Property Settlement Agreement ("PSA") executed in November 2007 with her then husband, Darwin McKay. Under the PSA, Darwin was to pay plaintiff wife "\$800,000 in cash" within five days of a transaction entitled "the Status Real Estate Transaction", scheduled to close on March 30, 2008.

1.7 Darwin shall pay Patricia \$800,000 in cash, by wire transfer or certified check within five (5) days of payment by the Status Corporation, or its assigns . . . The parties acknowledge that the Status Real Estate Transaction is scheduled to close on or before March 30, 2008. . . .

1.8 The parties acknowledge that if Status Corporation or its assigns breaches the Purchase and Sale Agreement, Darwin will have title to that portion of the land that had been referred to prior to the sale to Status Corporations as the "Home Farm". In the event of breach Darwin may also be able to foreclose a mortgage on that portion of the land referred to prior to the sale to Status Corporation as "Albrethsen's Farm".

Property Settlement Agreement, (Exhibit 1 to Ellis affidavit (1/20/2011)).

Upon the payoff of the Albrethsen mortgage, which was part of the "Status Real Estate Transaction, plaintiff's ex-husband absconded with the money, failing to pay her \$800,000 as required by the parties' PSA.

Negligence of defendants: The alleged negligence of defendant attorney is the failure to draft a Property Settlement Agreement which, when recorded, creates "a lien on all of 'ex-husband's

real property” to protect her portion of the Albrethesen mortgage proceeds. See defendant Walker’s email set forth below. The transaction contemplated two separate events: (1) payoff of the Albrethesen mortgage; and (2) closing the Home Farm sale. See Memorandum Decision and Order, p. 8 (Wilper, J). Had there been proper drafting and recordation of the divorce settlement (PSA), a portion of the mortgage proceeds would have been paid to plaintiff.

Flawed basis of defendants’ second motion for reconsideration: Defendants mistakenly perceive that their alleged liability is based on an email sent 30 days before the PSA was executed. In that email, defendant Walker advises plaintiff that recordation of PSA will secure her interest in the PSA. It is true that email articulates the standard for defendants’ conduct. However, the actual negligence is the failure to construct a PSA which will accomplish what the email describes, i.e., give plaintiff a secured position. Defendants also fail to recognize that the ex-husband’s status as a mortgagee conferred upon him lienable real property rights to the same extent as the outright ownership of real property.

The October 23, 2007, email exchange is as follows:

Mrs. McKay: All looks good Tom. However, can I place a lien of the Status Corp closure so that the \$800,000 are paid to me by them? This is what he had to do when property sold that Donna had so the funds would come to us instead of thru Donna.

Mr. Walker: Our plan is to record the judgment and decree of divorce, which then becomes a lien on all of Darwin’s real and personal property. We don’t want to emphasize this aspect of the settlement. So, we don’t want to say anything until the judge signs the Judgment and Decree.

Exhibit 17, Affidavit of Counsel dated January 6, 2011.

MEMORANDUM IN OPPOSITION TO MOTION TO RECONSIDER
DENIAL OF MOTION FOR SUMMARY JUDGMENT - 3

Defendant skewed argument based upon this email exchange is as follows:

Contrary to the Court's decision, the October 23, 2007 email exchange was not addressing the Albrethsen property, which had closed prior to October 2007, or the mortgage on that property. Instead, the October 23, 2007 email pertained to the sale of the Home Farm property by Darwin McKay to Status Corporation, which transaction was expected to close in the future on or about March 30, 2008. As the email pertained to the Home Farm property, Mr. Walker's email was a correct statement of law. Accordingly, the Defendants argued Mr. Walker's email could not be the basis of a determination that the Defendants breached a duty of care and it could not be the grounds for denying summary judgment to the Defendants.

Defendants' brief, pp. 2, 3.

Defendants' argument must fail for two reasons:

(1) Defendants' negligence is based upon his failure to *draft and record a PSA* that would put the world on notice of Ms. McKay's interest in the proceeds of the Albrethsen mortgage proceeds. The October email (Exhibit 17) simply corroborates his duty to construct a PSA which secured plaintiff's interest in the subject real property proceeds.

(2) Although the Albrethsen transaction had closed with a consummated mortgage document, the payout, secured by the mortgage, was due to occur four months after execution of the PSA. The husband's interest in the mortgage was a real property interest and the payout was just as vulnerable to being liened as the Home Farm property which was set to close at that same time.

As noted by Judge Wilper in his last decision:

The Status Agreement stated that on or before March 30, 2008, Status Corporation would pay Mr. McKay roughly \$5 million, with part of the proceeds being used to pay off the Albrethsen mortgage and the remainder being used to purchase Home Farm. Since both payments

were due on the same date pursuant to one all-encompassing Agreement, it is unclear which payment Mrs. McKay was referring to when spoke of the "Status Corp. closure". It is also possible that Mrs. McKay, a lay person, used the word "closure" where a person with more experience in real estate transactions, an attorney for example, would have used a more precise term such as "mortgage" or "payoff".

Memorandum Decision and Order, p.8.

Although plaintiff concurs with the above comments of the Honorable Ronald J. Wilper, the malpractice is based on the failure to draft and record a PSA that would protect plaintiff's interests. The malpractice is *not* the representations set forth in the October 23, 2008, email from Mr. Walker. However, that email corroborates the duty owed by defendants as to their drafting a PSA which would create the requisite public notice to create a lien securing plaintiff's financial entitlement.

STANDARD OF REVIEW

Summary judgment standard is applicable: In this motion for reconsideration of a summary judgment decision, the Court is governed by the same legal standards applicable to summary judgment. *Marek v. Lawrence*, 153 Idaho 50, 278 P.3d 920, 923 (2012). That is, in the event a material issue of fact exists, the motion for reconsideration must be denied. *Baxter v. Craney*, 135 Idaho 166, 170, 16 P. 263, 267 (2000).

Contrary to defendant's assertion, the Court is *not* endowed with discretionary authority in its reconsideration of a summary judgment order: Were the rule otherwise, the reviewing standard set forth in Rule 56(c) I.R.C.P. would be rendered meaningless. That is, on a reconsideration motion, the trial court cannot substitute its discretionary authority in place of the well-defined summary judgment standard, i.e., whether there is a "genuine issue as to any material fact" (Rule

56(c)).

As the Supreme Court has noted: "For an appeal reconsidering a summary judgment motion, this Court will review whether the district court acted within the legal standards applicable to summary judgment". *Marek v. Lawrence*, 153 Idaho at 53. Based upon this authority, defendants are simply incorrect that the Court has discretionary authority.

DEFENDANTS' LIABILITY IS BASED UPON THEIR FAILURE
TO DRAFT AND RECORD A PSA WHICH WOULD PROTECT
PLAINTIFF'S INTERESTS SET FORTH IN THE PSA

Alleged malpractice: Paragraph VIII of the Complaint alleges:

The recommendation of defendants that plaintiff execute the PSA was negligent in the following respects:

- a. There is no legal description of the Albrethsen property in the PSA, an acknowledged document, rendering the recording of the PSA a futile act insofar as security for plaintiff is concerned and in violation of Idaho Code §32-918;
- b. Likewise, there is no legal description of the real property (the Albrethsen property) which is the subject of the mortgage referenced in the PSA, nor an instrument number of the recorded mortgage, notwithstanding the recitation in the PSA that plaintiff has an interest in the sale proceeds of the Status Corporation transaction as the source of the payments to her.
- c. Notwithstanding defendants' representations to plaintiff that recordation of the PSA would create a lien on the community's interest in real property, the PSA did not have such lien effect because (1) as referenced in the PSA, Darwin was mortgagee of the Albrethsen property and did not hold title to it, and (2) the PSA failed to identify the relevant mortgage information, i.e., legal description of the real property, instrument number of the recorded mortgage, and plaintiff's interest in the mortgage.
- d. Although the PSA recites that plaintiff had an interest in a portion

of the Status Corporation sales proceeds and references the mortgage, the PSA fails to provide a legal description of the subject real property, i.e., the Albrethsen property, and an instrument number of the recorded mortgage, rendering the recordation of the PSA futile insofar as securing plaintiff's monetary entitlements arising from the PSA.

Idaho law recognizes executory interests as lienable: It is undisputed that a party's interest in an executory contract, such as an unsatisfied promissory note secured by a mortgage, is subject to being liened. The Idaho Court of Appeals has held (and affirmed by the Supreme Court):

[A] vendee's interest in a contract is an interest in real property within the meaning of I.C. § 10-1110, against which a recorded judgment does impose a lien if the contract has been duly recorded
Or where, as here a "notice" of the contract—containing the names of the contracting parties and a legal description of the property—has been recorded

Fulton v. Duro, 107 Idaho 240, 242, 687 P.2d 1367 (Ct. App. 1984), *aff'd*, 108 Idaho 392, 700 P.2d 14 (1985). The Court went on to conclude:

We conclude that a vendee's interest under an executory contract to purchase real property—where the contract or a notice containing the names of the contracting parties and the description of the property is recorded—is included within the meaning of "all real property of the judgment debtor" against which a recorded judgment imposed a lien under I.C. § 10-1110.

107 Idaho at 245, quoted in *Van Berkem v. Mountain Home Development Co.*, 132 Idaho 639, 642, 977 P.2d 901 (1999).

Whether in the case of a vendee or, as here, Darwin McKay as vendor/mortgagee, a debtor's interest in an executory land transaction, here a promissory note and mortgage, is an interest in real property which is subject to being liened.

MEMORANDUM IN OPPOSITION TO MOTION TO RECONSIDER
DENIAL OF MOTION FOR SUMMARY JUDGMENT - 7

Several months after the mortgage became due, because of title problems, Lawyer's Title issued a check to husband Darwin McKay which constituted the mortgage payoff on the Alberthesen farm, i.e., \$1.2 million. Plaintiff wife received nothing. As confirmed by defendant Walker in a December 2008, letter to plaintiff:

Regarding the assignment to Lawyer's Title Insurance Corporation, I was able to determine that Darwin made a claim against a title insurance policy issued by Lawyers Title with regard to the Status Corporation transaction. I could not find out the exact amount of the insurance claim payment, but my perception is that it was more than the \$800,000 that Darwin owes you.

Exhibit 2 to Ellis affidavit, p. 2.

The complaint alleges that defendant Walker was negligent in not protecting plaintiff's entitlement under the PSA. The above letter reflects the result of that negligence. Defendants fixate on the October 23, 2007, email, sent a month before the PSA was executed. This email is evidence corroborating what the PSA *should* have accomplished. In and of itself, the Walker's email is not evidence of negligence, i.e., "[o]ur plan is to record the judgment and decree of divorce [to which the PSA is attached] which becomes a lien on *all* of Darwin's real and personal property". See Exhibit 17 to Exhibit A to Anderson affidavit (1/6/2011 (bracketed material explanatory; emphasis added). Mr. Walker's articulation of a "plan" was in response to plaintiff's email inquiring whether a "lien" can be placed on the Status transaction. *Id.*

Basis of defendants' motion for summary judgment: Respecting plaintiff's October 23rd email inquiring whether a lien could be placed on the Status Corp "closure", defendants argue the Mr. Walker's response of that same date was intended to reference only the Home Farm property.

They base their argument on the fact that the Albrethsen sale had already closed, ignoring the fact that the Albrethsen mortgage payoff was also scheduled for March 30, 2008. Therefore, opine defendants, Mr. Walker could not have breached a duty of care to plaintiff (defendants' brief, p. 3).

In addition to the *non sequitur* aspects of this conclusion, defendants are not correct for other reasons:

- (1) Apart from any representations to plaintiff/client, defendant Walker negligently advised her to sign the PSA which was not recordation-ready and would not protect her interest in the Albrethsen mortgage;
- (2) As mortgagee of the Albrethsen mortgage, Darwin *did* have an interest in this real property which, according to Mr. Walker, would be liened by the recorded judgment and decree. See October 23rd email (Exhibit 17 to Exhibit A).
- (3) As quoted below by Judge Wilper, the Status "closure" involved both the purchase and sale of the Home Farm and the payoff of the Albrethsen mortgage on March 30, 2008.

PLAINTIFF'S EXPERT CORRECTLY OPINED THAT FAILURE TO PROPERLY
DRAFT AND RECORD THE PSA PREVENTED PLAINTIFF FROM BEING SECURED
BY THE MORTGAGE PROCEEDS PAYABLE AFTER EXECUTION OF THE PSA.

At page 4 of the affidavit of Bryan Smith, he set forth those steps which should have been undertaken by defendant Walker in order to secure plaintiff as a creditor in the Property Settlement Agreement:

1. Provided a legal description of the Albrethsen Property in the PSA;
2. Provided an explanation that the Albrethsen Property was subject to a closing scheduled for March 30, 2008 and that Mr. McKay would pay Mrs. McKay \$800,000 from the proceeds he received on this sale.

3. Included an explanation that Mr. McKay further would pay Mrs. McKay from the proceeds he received on the sale in an amount to pay in full the balance of Mrs. McKay's mortgage on her personal residence;
4. Identifying in the PSA the then existing balance and further identified where notice could be sent to obtain the balance owed on that mortgage;
5. Identifying in the PSA Mr. McKay's mortgage and referenced Mr. McKay's recorded mortgage on the Albrethsen Property by the county document identification number on the recorded mortgage;
6. Following the procedures set forth in Idaho Code Section 32-918 and summarizing Mrs. McKay's interest thus making it even easier for a third party to take notice of Mrs. McKay's interest;
7. Sending the closing agent on the Albrethsen Property the relevant documents informing the closing agent of Mrs. McKay's interest in the sale provided Mr. Walker knew the name of the closing agent.

Defendants erroneously argue that, as a matter of law, the Albrethesen mortgage proceeds were not subject to being liened by recordation of a properly drafted PSA. According to Idaho law and the testimony of plaintiff's expert, Bryan Smith, defendants are wrong.

CONCLUSION

Defendants argue that the Albrethsen mortgage was created prior to the execution of the PSA and therefore could not afford security. This argument misperceives a mortgage interest as not being a real property interest.

First, Walker's liability is based upon his recommendation that she sign the PSA which afforded her no security. That fact alone affords a basis for liability.

Secondly, a mortgage is an interest in real property and can be liened. The Status mortgage had a prospective payoff in March 2008, four months after the PSA was executed.

Thirdly, in common parlance, both the Home Farm and the Albrethsen property were scheduled to "close" on March 30, 2008, per (1) the terms of the purchase and sale agreement (Home Farm) and (2) the deadline for payoff on the mortgage indebtedness (Albrethsen).

Mr. Walker's October 23rd email was an affirmative response to the following query by plaintiff concerning the "Status Corp. closure": "Can I place a lien with the title company on the Status corp. closure so the \$800,000 are paid to me by them?" (Exhibit 17 to Exhibit A). Defendant Walker's response, i.e., "the judgment . . . becomes a lien" emphasizes the lienable nature of the mortgage proceeds. His actual negligence was the drafting and recordation of a PSA which failed to accomplish this result.


As opined by the Honorable Ronald J. Wilper in response to defendants' last motion for reconsideration, "closure" can have multiple meanings, including

The Status Agreement stated that on or before March 30, 2008, Status Corporation would pay Mr. McKay roughly \$5 million, with part of the proceeds being used to pay off the Albrethsen mortgage and the remainder being used to purchase Home Farm. Since both payments were due on the same date pursuant to one all-encompassing Agreement, it is unclear which payment Mrs. McKay was referring to when spoke of the "Status Corp. closure". It is also possible that Mrs. McKay, a lay person, used the word "closure" where a person with more experience in real estate transactions, an attorney for example, would have used a more precise term such as "mortgage" or "payoff".

Memorandum Decision and Order, p.8.

Defendants' second motion for reconsideration of the summary judgment denial should also be denied.

DATED This 19 day of June, 2014.



Allen B. Ellis
Attorney for Plaintiff

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 19 day of June, 2014, I caused to be served a true and correct copy of the foregoing by the method indicated below, and addressed to the following:

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FILED _____
A.M. _____ P.M. 4:00

JUN 24 2014

CHRISTOPHER D. RICH, Clerk
By KATRINA THIESSEN
DEPUTY

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

PATRICIA MCKAY,

Plaintiff,

vs.

THOMAS G. WALKER and COSHO
HUMPHREY, LLP, a limited liability
partnership,

Defendants.

Case No. CV OC 0922659

**REPLY IN SUPPORT OF
DEFENDANTS' SECOND MOTION
TO RECONSIDER COURT'S
ORDER DENYING DEFENDANTS'
MOTION FOR SUMMARY
JUDGMENT**

I. ARGUMENT

A. Plaintiff Concedes the Court's Error, Thus Mandating Reconsideration of the Court's Prior Denial of Summary Judgment

A review of the Court's *Order Denying Defendants' Motion for Summary Judgment* ("Order") establishes that the Court's sole basis for denying the Defendants' summary judgment motion was its inaccurate interpretation of the October 23, 2007 email exchange. Interestingly, in the original summary judgment briefing and at the oral argument, the Plaintiff did not address that email exchange. Instead, in reviewing the record (which included the email exchange as an

exhibit to the Plaintiff's deposition), the Court found the email exchange and utilized it as the sole support for its denial of the summary judgment motion. Due to the Court's inaccurate interpretation of that email exchange and specifically, the Court's flawed replacement of the phrase "Status Corp closure" with "Albrethsen Property mortgage", the Defendants have sought reconsideration of the Court's Order. In doing so, the Defendants have argued that the email exchange cannot be the basis of a negligence finding and, therefore, the Court's *Order* was error.

In her memorandum opposing the Defendants' *Second Motion to Reconsider*, the Plaintiff explicitly concedes that the October 23, 2007 email exchange is not evidence of negligence. *See Memorandum in Opposition to Motion to Reconsider Denial of Motion for Summary Judgment ("Opposition")*, p. 5 ("The malpractice is *not* the representations set forth in the October 23, 2007[7], email from Mr. Walker.") In making that concession, the Plaintiff has also effectively conceded that the Court's reliance on the non-negligent email exchange was error. As the email exchange was the Court's sole basis for denying summary judgment and due to the concession of the Plaintiff that the email exchange does not constitute negligence, the Defendants maintain that there is no reason to find Court's initial denial of their summary judgment motion was correct.

Even if the Plaintiff had not acknowledged the Court's error in relying on the October 23, 2007 email exchange, the record establishes that the Court drew an unreasonable conclusion when it determined that a question of fact existed regarding whether the Defendants were negligent in drafting their October 23, 2007 email to the Plaintiff. First, as explained in the Defendants' opening brief, the Court improperly focused on the Plaintiff's intention when sending her October 23, 2007 email. The proper focus should have been whether the Defendants breached a duty when they interpreted and responded to the Plaintiff's October 23, 2007 email. No breach existed if the Defendants' reasonably interpreted the Plaintiff's email. The undisputed

record establishes that the Defendants interpreted the October 23, 2007 email as referring to the Home Farm Property closure rather than the Albrethsen Property mortgage payment. The Plaintiff does not dispute that such an interpretation was reasonable. As the Defendants' interpretation was reasonable and it is undisputed that the Defendants' response that a judgment lien could be placed on the Home Farm Property was an accurate statement of law, the Defendants' interpretation and email response were reasonable; the Defendants did not act negligently; and the October 23, 2007 email exchange cannot be the basis of the denial of summary judgment.

Next, even if the Court were correct in focusing on the Plaintiff's intention when sending her email, the Court erred in finding that a question of fact existed regarding the Plaintiff's interpretation. Importantly, the Plaintiff has never testified or even argued that she did not understand the word "closure"; that she was referring to the Albrethsen mortgage rather than the closing of the Home Farm property sale; or that she assumed the title company was handling the payoff of the Albrethsen mortgage. Instead, the Court speculated that the Plaintiff could have been referring to the Albrethsen mortgage when drafting her October 23, 2007 email. Such speculation is not sufficient to withstand summary judgment and cannot be the basis of a finding of a question of fact or for denying the Defendants' summary judgment.

Finally, it is undisputed that the October 23, 2007 email exchange was not a proximate cause of the Plaintiff's damages. Notably, the Plaintiff has not argued otherwise.

For these reasons, the Court erred when it found there existed a question of fact as to whether the Defendants breached their standard of care when they participated in the October 23, 2007 email exchange.

B. Plaintiff's Arguments of Negligence are Not Supported by the Law or Facts

The Plaintiff spends a majority of her Opposition brief repeating arguments which were previously disregarded by the Court rather than focusing on the matter at issue; that is, whether the Court erred in finding that a question of fact existed regarding whether the Defendants acted negligently in drafting an October 23, 2007 email, to which it applied an unreasonable interpretation. The Plaintiff's Opposition is premised on the contention that the Defendants are liable because the Property Settlement Agreement ("PSA") did not provide the Plaintiff with a secured interest in the Albrethsen Property mortgage note. That argument, of course, is not supported by the law and facts in the current matter and is not the standard by which the Defendants are to be judged.

1. The Defendants Cannot Be Held Liable for Not Including a Security Interest in the PSA.

The Defendants cannot be held liable because the PSA did not include a security interest. First, prior to the drafting or execution of the PSA, the Plaintiff was already voluntarily obligated to binding settlement terms contained in the handwritten settlement agreement which did not include a security interest. *See See* Affidavit of Counsel in Support of Defendants' Motion for Summary Judgment ("Counsel Aff."), Jan. 6, 2011, Ex. A at Ex. 11.

The language contained in the PSA was the result of extended negotiations between the Plaintiff and Mr. McKay and the PSA language only included terms which were mutually acceptable by both parties. *See* Counsel Aff., Ex. A at Ex. 11; Counsel Aff., Ex. B; Affidavit of Thomas Walker in Support of Defendants' Motion for Summary Judgment ("Walker Aff."), Jan. 6, 2011, ¶ 16. While the Defendants proposed certain language which was favorable to the Plaintiff, this language was subject to review and acceptance by Mr. McKay and his counsel. *See id.* It is axiomatic that the Defendants, as non-parties to the PSA, did not have the authority

to include language which was unacceptable to either the Plaintiff or Mr. McKay. As such, the Plaintiff's allegation that the Defendants negligently drafted the settlement document fails as a matter of law. Likewise, the Plaintiff's claims fail because, as she admitted, she read, understood, and voluntarily agreed to the PSA, as written and negotiated by herself and Mr. McKay, prior to executing the same. *See* Walker Aff., ¶¶ 6, 15, 18, 19; Counsel Aff., Ex. A at 86:5-7, 137: 11-14; Affidavit of Stanley Welsh in Support of Defendants' Motion for Summary Judgment ("Welsh Aff."), Jan. 6, 2011, ¶ 8. At mediation and before entering the hand-written agreement, the Plaintiff was aware that no collateral security interest was being offered by Mr. McKay. *See* Counsel Aff., Ex. A, at 86:1-4, 116:22-117:4; Welsh Aff., ¶ 12; Walker Aff., ¶¶ 10, 11. The Plaintiff was further aware that Mr. McKay was unwilling to provide any security in any property as his property was encumbered by bank loans and other debt. *See id.* Furthermore, an attorney cannot be held liable because he was "not successful in persuading an opposing party to accept certain terms". *See e.g. Ziegelheim v. Apollo*, 607 A.2d 1298, 1306 (N.J. 1992).

Likewise, the Defendants were not negligent, as a matter of law, in failing to draft the PSA in such a manner that "it would put the world on notice of Ms. McKay's interest in the proceeds of the Albrethsen mortgage proceeds." Such a claim lacks merit as neither the parties' negotiations nor the PSA provided the Plaintiff with an interest in the mortgage note held by Mr. McKay. *See* Counsel Aff., Ex. A at Ex. 11; Ex. B (pursuant to the plain terms of the PSA, the proceeds from the mortgage note are Mr. McKay's separate property). In fact, the very terms of the PSA, which were negotiated and voluntarily agreed to by the Plaintiff, confirmed that any interest in the Albrethsen property mortgage remained the sole and separate property of Mr. McKay. *See id.* Prior to executing the hand-written agreement and the PSA, the Plaintiff was

aware that the PSA did not obligate the Albrethsen mortgagee to pay her directly and that she was not being paid any sums pursuant to the mortgage note. *See* Counsel Aff., Ex. A at 86:5-20, 91:13-14. The Plaintiff further understood that, per the parties' agreement, Mr. McKay's receipt of mortgage note proceeds only triggered his obligation to pay her certain sums. *See id.* at 86:5-20, 91:13-14; 135:16-23; Ex. B at ¶¶ 1.7-1.8.3.

Because the Defendants had no duty to include a security interest in the PSA, the Defendants were not negligent in drafting the PSA.

2. A Mortgage and Promissory Note Are Not Liable Under I.C. § 10-1110

The Plaintiff incorrectly argues that the existence of a mortgage creates a lienable interest against the mortgagee. In support of her argument, the Plaintiff cites *Fulton v. Duro*, 107 Idaho 240, 242-43 (Ct. App. 1984) *aff'd*, 108 Idaho 392, 700 P.2d 14 (1985), which is readily distinguishable and inapplicable. In *Fulton*, the court found that I.C. § 10-1110, which allows a recorded judgment to become a lien upon "all real property of the judgment debtor" applied to the real property interests held by a purchaser/vendee of an executory purchase and sale agreement. In so ruling, the court ruled that the phrase "real property" "includes land, possessory rights to land, and that which is appurtenant to land, *see* I.C. § 55-101, and is 'coextensive with lands, tenements and hereditaments, possessory rights and claims.'" *See id.* (citing I.C. § 73-114). Because the executory contract bestowed the real property purchaser with possessory rights to the land and because "a vendee under an installment land sale contract 'is treated as the equitable owner of the land, and ordinarily possesses all of the rights of ownership,'" the court found that a lien could be recorded against the vendee/purchaser's rights to the real property at issue. *See id.* (citing *Rush v. Anestos*, 104 Idaho 630, 634 (1983))

Here, *Fulton* is not applicable because the current matter does not involve the filing of a judgment lien against the party with possessory rights to the real property at issue (the

Albrethsen property). Instead, the Plaintiff is arguing that she could have placed a lien on whatever rights Mr. McKay held in the Albrethsen property as a result of his position as a mortgagee of the property. Importantly, unlike in *Fulton*, Mr. McKay, as the seller, held no possessory rights to and was not the equitable owner of the Albrethsen property. Prior to the mediation and settlement negotiations in the underlying matter, Mr. McKay and the Plaintiff executed a warranty deed in favor of Status Corporation. See Affidavit of Robert A. Anderson in Support of Defendants' Motion to Reconsider ("Anderson Aff."), Feb. 21, 2013, Ex. A at Ex. 39 (Warranty Deed). The execution and recording of the warranty deed resulted in a complete transfer of any and all interests in the real property to Status Corporation. See Anderson Aff., Ex. D at ¶1.6. By definition, a warranty deed is a complete transfer of interest in the subject real property. See e.g. *Idaho Trust Co. v. Eastman*, 43 Idaho 142 (1926) ("the record of a warranty deed, duly executed, acknowledged, and recorded, makes a prima facie case of an absolute transfer in this state"); BLACK'S LAW DICTIONARY (9th ed. 2009) (a warranty deed is "A deed containing one or more covenants of title; esp., a deed that expressly guarantees the grantor's good, clear title..."). Accordingly, at all relevant times, Status Corporation, as the purchaser, held all possessory rights to and was the equitable owner of the Albrethsen Property. While *Fulton* would have allowed the Plaintiff to place an I.C. §10-1110 lien against Status Corporation, neither I.C. §10-1110 nor *Fulton* created an avenue for a lien to be placed against Mr. McKay, whom, as the former seller and current mortgagee, held no legal interest in the real property.

Notably, to hold otherwise would mean that a plaintiff who obtains a judgment against a large mortgage company, such as Wells Fargo, would be able to file a judgment lien against every property in the State of Idaho (and the United States for that matter) regarding which Wells

Fargo holds a mortgage note. Such a result would be absurd and would not comply with the requirements set forth in I.C. § 10-1110 as it is axiomatic that Wells Fargo, as the mortgagee, does not hold any possessory or ownership rights in such properties. Similarly, Mr. McKay did not hold any possessory or ownership rights in the Albrethsen Property the execution and November 30, 2006 recording of the Warranty Deed. *See* Anderson Aff., Ex. A at Ex. 39 (Warranty Deed).

3. Bryan Smith's Opinions Should be Disregarded as They Not Supported by the Record.

As candidly admitted in his deposition, all of Mr. Smith's opinions regarding the alleged existence of a breach and causation are based upon the improper assumption that the closing of the Albrethsen property would occur at some time after the PSA was executed and that the property referenced in the October 23, 2007 email exchange was the Albrethsen property. *See* Smith Affidavit; Anderson Aff., Ex. A (Bryan Smith Deposition) at 131:2-13. It cannot be overemphasized that these assumptions are not supported by any facts and are contrary to the record.¹ For these reasons, Mr. Smith's opinions do not assist the trier of fact and should, therefore, be disregarded. *See e.g. Jones v. Crawford*, 147 Idaho 11, 17, 205 P.3d 660, 666 (2009); *Ryan v. Beisner*, 123 Idaho 42, 46, 844 P.2d 24, 28 (Ct. App. 1992); *McGlinchy v. Shell Chem. Co.*, 845 F.2d 802 (9th Cir. 1988). Further, the Defendants respectfully assert that Mr. Smith's opinions cannot be the basis of a denial of summary judgment as they are not substantiated by the record.

¹ Specifically, Mr. Smith's opinion that Mr. Walker allegedly lead the Plaintiff to believe she had a security interest in the Albrethsen mortgage was based upon his unsubstantiated assumption that the October 23, 2007 email referred to the Albrethsen property. Likewise, the proposed safeguards enumerated in Mr. Smith's opinion were based upon his inaccurate assumption that the Albrethsen property was scheduled to close at some time after the PSA was executed. *See* Anderson Aff., Ex. A (Bryan Smith Deposition) at 131:2-13. Given that there is no factual support for Mr. Smith's opinions, his opinions cannot assist the trier of fact and should, therefore, be disregarded on summary judgment.

II. CONCLUSION

For the aforementioned reasons, the Defendants respectfully request that this Court grant their *Motion to Reconsider* in its entirety and enter summary judgment in favor of the Defendants.

DATED this 24th day of June, 2014.

ANDERSON, JULIAN & HULL LLP

By: Yvonne Dunbar
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CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this 24th day of June, 2014, I served a true and correct copy of the foregoing by delivering the same to each of the following attorneys of record, by the method indicated below, addressed as follows:

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By KATRINA THIESSEN
DEPUTY

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

PATRICIA MCKAY,

Plaintiff,

vs.

THOMAS G. WALKER and COSHO
HUMPHREY, LLP, a limited liability
partnership,

Defendants.

Case No. CV OC 0922659

**DEFENDANTS'
SUPPLEMENTAL BRIEF**

I. INTRODUCTION

At the June 26, 2014 hearing, the Court provided the parties two weeks or until July 10, 2014 to provide supplemental briefing on the sole issue of whether a security interest in the Albrethsen Property mortgage and/or the Albrethsen Property could have arisen under the operation of law even if Mr. McKay refused to provide collateral. The Defendants submit this brief in compliance with the Court's verbal ruling.

JPB

As is explained herein, no Idaho statute or common law rule provides a method by which a third party creditor can receive a security interest in a real property mortgage or in the mortgaged real property solely based upon the vendor's status as a mortgagee, where title to the property previously transferred to the vendee/purchaser. As such, the Plaintiffs' claims of legal malpractice against the Defendants fail as a matter of law.

II. ARGUMENT

As explained in the Defendants' prior briefing, the Plaintiff's legal malpractice claims rest on the flawed opinions of her expert witness, Bryan Smith. Mr. Smith opined that the Defendants should have drafted the Property Settlement Agreement ("PSA") to include specific information regarding the Albrethsen Property and the Albrethsen Property mortgage, such as the legal description of the real property and the mortgage instrument number. His opinions were based upon the faulty premise that the inclusion of such information would have caused the recording of the PSA to become a lien on the Albrethsen Property or the Albrethsen Property mortgage. Mr. Smith's opinions were also based upon the incorrect assumption that the Albrethsen Property sale had not already closed and, instead, was going to close on March 30, 2008.

As is explained in further detail below, Mr. Smith's opinions and, subsequently, the Plaintiff's claims fail because, as a matter of law, the recording of PSA could not have created a lien on the Albrethsen Property or the Albrethsen Property mortgage under any circumstances. In fact, absent Mr. McKay's express agreement, there was no legal avenue available to the Defendants to create security for the Plaintiff in either the Albrethsen Property or the Albrethsen Property mortgage.

A. The Recording Process Set Forth in I.C. § 32-918 Would Not have Provided Any Security to the Plaintiff

The Plaintiff and Mr. Smith suggest that a lien would have been created in the Albrethsen Property or the Albrethsen Property mortgage had the Defendant followed the procedure set forth in I.C. § 32-918 for recording a contract summary. They are incorrect.

First, I.C. § 32-918 does not create a security interest or lienable right; rather, the statute provides an avenue by which a summary of a marriage settlement contract can be recorded in lieu of recording the entire contract (which necessarily includes numerous provisions which are unrelated to real property). So long as the summary complies with I.C. § 32-918, the recording of the summary will have the same force and effect of recording the entire contract under I.C. 10-1110. *See* I.C. § 32-918(3), 32-919.

Next, the provisions I.C. § 32-918(2) were not applicable when the PSA was recorded.

The pertinent text of I.C. §32-918 reads as follows:

(1) When such contract [a marriage settlement] is acknowledged or proved, it must be recorded in the office of the recorder of every county in which any real estate may be situated which is granted or affected by such contract.

(2) (a) A summary of the contract may be recorded in lieu of the contract, under this chapter or the laws of this state, if the requirements of this section are substantially met.

(b) A summary of the contract shall be signed and acknowledged by all parties to the original contract. The summary of the contract shall clearly state:

...

(iv) A description of the interest or interests in real property created by the contract; and

(v) The legal description of the property.

...

(emphasis added). A plain reading of I.C. § 32-918(2) establishes that it only applies where (1) the marriage settlement contract is not recorded; and (2) real property or interests in the real property are granted or created by the marriage settlement contract. Here, neither condition is met. First, the entire PSA was recorded; therefore, recording a summary was unnecessary. *See*

Walker Aff., ¶ 20. Next, a plain reading of the PSA establishes that the PSA did not create, grant, or affect any legal interest in the Albrethsen property or the mortgage attached to the Albrethsen property. *See* Counsel Aff., Ex. B. In fact, the very terms of the PSA confirmed that any interest in the mortgage remained the sole property of Mr. McKay. *See id.*, ¶1.9.i. Additionally, the facts establish that the PSA could not have granted nor affected any interests in the Albrethsen Property as both the Plaintiff and Mr. McKay deeded all of their previously-held interests in the real property to a third party, the Status Corporation, one year prior to the marriage settlement and November 20, 2007 execution of the PSA. *See Affidavit of Robert A. Anderson in Support of Defendants' Motion to Reconsider ("Anderson Aff.")*, Feb. 21, 2013, Ex. A at Ex. 39 (Warranty Deed recorded on November 30, 2006).

For these reasons, I.C. § 32-918 is inapplicable and could not have provided the Plaintiff with a secured interest in the Albrethsen property or the Albrethsen property mortgage under any circumstances.

B. Mr. McKay's Interests in the Mortgage and Promissory Note were Not Liable Under I.C. § 10-1110 or Common Law

Pursuant to I.C. § 10-1110, any judgment entered in Idaho can be recorded in any county where the party against whom the judgment was entered owns property. "[T]he judgment so recorded becomes a lien upon all real property of the judgment debtor in the county... owned by him at the time or acquired afterwards at any time prior to the expiration of the lien" I.C. § 10-1110. Idaho courts have interpreted "real property of the judgment debtor" to "include[] land, possessory rights to land, and that which is appurtenant to land, *see* I.C. § 55-101, and is 'coextensive with lands, tenements and hereditaments, possessory rights and claims.'" *See e.g. Fulton v. Duro*, 107 Idaho 240, 242-43 (Ct. App. 1984) *aff'd*, 108 Idaho 392 (1985) (citing I.C. § 73-114).

When addressing whether a vendor's interest in purchase money (i.e. a mortgage) was subject to a judgment lien, the Idaho Supreme Court adopted the following majority rule:

a judgment lien against a vendor after the making of the contract of sale, but prior to making and delivery of the deed, extends to all of the vendor's interest remaining in the land and binds the land to the extent of the unpaid purchase price.

First Sec. Bank of Idaho, Nat. Ass'n v. Rogers, 91 Idaho 654, 657 (1967) (internal citations omitted). Pursuant to that rule, the vendor's interest is not lienable if the deed was delivered or title was transferred before judgment was entered against the vendor. *See id.*; *see also Estates of Somers v. Clearwater Power Co.*, 107 Idaho 29 (1984).

In *Estates of Somers*, 107 Idaho at 30-31, the Idaho Supreme Court applied the majority rule and held that a vendor possessed no interest in real property which could be levied under I.C. § 8-539 because the vendor did not hold legal title to the property when the judgment was entered against it. Instead, the vendor, at most, had a vendor's lien (an equitable mortgage) which was "not a specific and absolute charge on the realty but a mere equitable right to resort to it (i.e. the property) on the failure of payment by the vendee." *See Estates of Somers*, 107 Idaho at 30 (internal citations omitted).

The majority rule set forth in *Rogers*, 91 Idaho at 657, and the Court's holding in *Estates of Somers*, 107 Idaho at 30-31, can and has been logically extended in support of the proposition that an I.C. § 10-1110 lien cannot be created against a vendor/mortgagee who does not possess legal title to the real property at the time judgment is entered. In *Fulton*, 107 Idaho at 245, the Idaho Court of Appeals cited *Estates of Somers* for the proposition that a "purchaser under an executory contract to purchase realty has no interest to which the [I.C. § 10-1110] lien of a judgment can attach, where he assigns his interest *prior* to the rendition of a judgment against him."

In the current matter, it is axiomatic that both Mr. McKay and the Plaintiff assigned their interest in the Albrethsen Property before the PSA was negotiated and signed and the Judgment was entered in the underlying matter. The PSA negotiations occurred in October and November 2007 with the PSA being executed on November 20, 2007. *See Counsel Aff.*, Ex. B. The Judgment enforcing the PSA was entered on November 29, 2007. *See id.* Prior to that time and on or about May 5, 2006, Mr. McKay and the Plaintiff executed a warranty deed in favor of Status Corporation. *See Anderson Aff.*, Ex. A at Ex. 39 (Warranty Deed). The warranty deed was delivered to Status Corporation on or about November 17, 2006 and was recorded on November 30, 2006. *See id.* The execution and recording of the warranty deed resulted in a complete transfer of any and all interests in the real property to Status Corporation. *See Anderson Aff.*, Ex. D at ¶1.6 (Real Estate Purchase and Sale Agreement) (stating that title conveyed by the warranty deed “shall be marketable and insurable and shall be free and clear of all liens, encumbrances, and restrictions, exclusive of” property taxes and liens accepted by Status Corporation prior to the November 17, 2006 closing and conveyance of the Albrethsen Property). By definition, a warranty deed is a complete transfer of interest in the subject real property. *See e.g. Idaho Trust Co. v. Eastman*, 43 Idaho 142 (1926) (“the record of a warranty deed, duly executed, acknowledged, and recorded, makes a prima facie case of an absolute transfer in this state”); BLACK’S LAW DICTIONARY (9th ed. 2009) (a warranty deed is “A deed containing one or more covenants of title; esp., a deed that expressly guarantees the grantor’s good, clear title...”).

Because all interests in the Albrethsen Property were transferred to Status Corporation no later than November 30, 2006, Mr. McKay held no interests in the Albrethsen Property which could be liened or levied at the time of the PSA negotiations or when the Judgment was entered.


See Estates of Somers, 107 Idaho at 30-31. Thus, at all relevant times, there was no legal avenue available to the Defendants whereby security could be granted to Mrs. McKay in the real property or mortgage absent an express agreement by Mr. McKay. It is undisputed that Mr. McKay would not grant any such security. Accordingly, the Plaintiff's claims fail as a matter of law.

III. CONCLUSION

For the aforementioned reasons, the Defendants respectfully request that this Court grant their *Motion to Reconsider* in its entirety and enter summary judgment in favor of the Defendants.

DATED this 10th day of July, 2014.

ANDERSON, JULIAN & HULL LLP

By: 
Robert A. Anderson
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Attorneys for Defendants

CERTIFICATE OF MAILING

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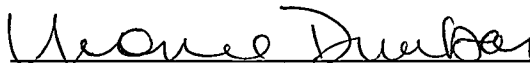
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By: JUDITH ABBOTT
DEPUTY

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

PATRICIA MCKAY,

Plaintiff,

vs.

THOMAS G. WALKER and COSHO
HUMPHREY, LLP, a limited liability
partnership,

Defendants.

Case No. CV-OC-2009-22659

MEMORANDUM DECISION AND
ORDER GRANTING DEFENDANTS'
SECOND MOTION TO RECONSIDER

Defendants Thomas J. Walker and Cosho Humphrey, LLP have moved a second time for reconsideration of the denial of their motion for summary judgment against Plaintiff Patricia McKay's legal-malpractice claim. The motion was argued on June 26, 2014. The Court granted the parties permission to file simultaneous post-hearing briefs by July 10, 2014, at which point the motion was officially under advisement. Having considered those briefs, as well as the entire record, the Court determines that Walker and Cosho Humphrey are entitled to summary judgment.

I.

BACKGROUND

A. Factual Background

In 2007, McKay was in the process of getting divorced from Darwin McKay, who is referenced throughout this decision simply as McKay's ex-husband. Walker and Cosho

Humphrey represented her in the divorce litigation. The McKays had entered into a prenuptial agreement (Counsel Aff. filed Jan. 6, 2011, Ex. A at Ex. 2), and one of the issues being litigated was the prenuptial agreement's enforceability.

On October 20, 2007, at the conclusion of a mediation held in the divorce litigation, a settlement was reached and documented in a three-page handwritten agreement ("Handwritten Agreement").¹ It required McKay's ex-husband to pay her \$800,000 of the anticipated proceeds of a pending real-estate transaction with Status Corporation if that transaction closed in March 2008. (Handwritten Agreement § 6.) If the transaction instead failed to close, his payment obligation would drop to \$500,000. (Id.) The transaction involved two parcels: (i) the Home Farm, which was scheduled to be sold to Status Corporation in March 2008 for nearly \$4 million; and (ii) the Albrethsen property, which the McKays had deeded to Status Corporation in 2006, subject to a mortgage loan in favor of McKay's ex-husband, the balance of which came due in March 2008. (Anderson Aff. filed Feb. 21, 2013, Ex. A at Ex. 39; id. Ex. D.)

The Handwritten Agreement contemplated the subsequent preparation of a comprehensive property settlement agreement. (Handwritten Agreement § 8.) It provided for submitting any disputes about the terms of the property settlement agreement to the mediator, D. Duff McKee, for binding arbitration. (Id.) The stated reason for the arbitration requirement was "to ensure that a binding agreement results from these proceedings" (Id.)

The Handwritten Agreement grants McKay no collateral for the \$800,000/\$500,000 payment obligation. Walker attests that he tried to get collateral, but McKee told him, his partner

¹ The Handwritten Agreement is in the record as Exhibit 11 to Exhibit A to the Affidavit of Counsel in Support of Defendants' Motion for Summary Judgment filed on January 6, 2011.

Stanley Welsh, and McKay that McKay's ex-husband was unwilling to provide any collateral. (Walker Aff. filed Jan. 6, 2011, ¶ 10.) Welsh concurs in that account of what happened during the mediation. (Welsh Aff. filed Jan. 6, 2011, ¶ 12.) Indeed, McKay knew at the time that she was not granted collateral; an e-mail she sent Walker and Welsh the next day expressed the concern that "no land was given to me as collateral" and that her ex-husband had control over the Status Corporation transaction and might manipulate it to ensure he owed her only \$500,000, not \$800,000. (Counsel Aff. filed Jan. 6, 2011, Ex. A at Ex. 9.)

Another two days later, on October 23, 2007, McKay e-mailed Walker, asking whether she could "place a lien with the title company on the Status Corp closure so the \$800,000 are paid to me by them." (Id. Ex. A at Ex. 17.) Walker responded that the plan was to create a lien on her ex-husband's property by recording the divorce decree after the property settlement agreement is finalized. (Id.) This, according to Walker, was the best he could do for McKay. He says he tried to get collateral provisions put into the property settlement agreement, despite their absence from the Handwritten Agreement, but McKay's ex-husband continued refusing to provide collateral. (Walker Aff. filed Jan. 6, 2011, ¶ 17.)

The property settlement agreement—formally entitled "Property Settlement Agreement Incorporated and Merged with and into Judgment and Decree of Divorce," or "PSA" for short—was finalized, signed, and incorporated into a divorce decree in November 2007.² It reflected the \$800,000/\$500,000 payment obligation set forth in the Handwritten Agreement. In particular, it required McKay's ex-husband to pay her \$800,000 within five days of payment by Status

² The PSA is in the record as Exhibit B to the Affidavit of Counsel in Support of Defendants' Motion for Summary Judgment filed on January 6, 2011.

Corporation, but it reduced his payment obligation to \$500,000 if the Status Corporation transaction did not close by March 30, 2008. (PSA §§ 1.7, 1.8.1.) The PSA provides that if Status Corporation fails to perform the transaction, McKay's ex-husband will own the Home Farm and may be entitled to foreclose his mortgage on the Albrethsen property. (PSA § 1.8.) In other words, it awards any lingering interest in those two properties to McKay's ex-husband. Indeed, it expressly makes "[p]roceeds from the sale of Albrethsen property"—a phrase easily broad enough to encompass the balance of the mortgage loan due in March 2008 on the 2006 sale of the Albrethsen property—her ex-husband's separate property. (PSA § 1.9(i).) The PSA does not set forth the legal description of either of those properties or the instrument number of McKay's ex-husband's mortgage on the Albrethsen property.

Status Corporation failed to pay the mortgage on the Albrethsen property. (Counsel Aff. filed Jan. 6, 2011, Ex. D ¶¶ 5-6.) As a result, McKay's ex-husband sued Status Corporation. (Id.) In August 2008, he received a judgment for more than \$1.2 million against Status Corporation based on the mortgage loan. (Id. Ex. E.) Status Corporation did not pay McKay's ex-husband the judgment amount. Instead, because a title company had mistakenly insured the first-priority position of multiple Albrethsen property lienholders, including McKay's ex-husband, it paid him the judgment amount in return for an assignment of the judgment. (Id. Ex. C at 33:3-16.)

McKay's ex-husband did not use any of those proceeds to pay his debt to McKay under the PSA. She eventually filed a motion to hold him in contempt of the divorce decree and reached a settlement with him. (Id. Exs. F, I.) McKay contends, however, that she has fared less well under the settlement than she would have fared had her ex-husband's \$800,000/\$500,000 payment obligation under the PSA been backed by a security interest in the mortgage he held on

the Albrethsen property. Had she held such a security interest, she says his \$800,000/\$500,000 payment obligation would have been satisfied by the title company when it cashed out his interest in the mortgage.

B. Procedural Background

On November 25, 2009, McKay sued Walker and Cosho Humphrey for legal malpractice. Her complaint is quite clear that the alleged malpractice lies in the PSA's content; recording the PSA, as written, did not have the effect under I.C. § 32-918 of creating a security interest in McKay's favor in her ex-husband's mortgage on the Albrethsen property. (Compl. filed Nov. 25, 2009, ¶ VIII.) More specifically, the pleaded theory of liability is that the PSA failed to create that security interest because it did not contain the legal description of the Albrethsen property and the instrument number of McKay's ex-husband's mortgage. (Id.)

Walker and Cosho Humphrey moved for summary judgment on January 6, 2011. They contended, among other things, that McKay's ex-husband would not and did not agree to grant her a security interest in his mortgage on the Albrethsen property, so including a legal description of the Albrethsen property and the instrument number of the mortgage in the PSA would not have created a security interest in the mortgage anyway. (Mem. Supp. Defs.' Mot. Summ. J. filed Jan. 6, 2011, at 15-16.) Consequently, they argued they had no duty to include those items in the PSA, as well as that the "failure" to include those items in the PSA did not proximately cause McKay's non-collection of the \$800,000/\$500,000 payment obligation her ex-husband owed under the PSA. (Id. at 16-23.)

In response, McKay appeared to broaden her theory of liability. In addition to contending the PSA was inadequately drafted, McKay contended Walker had misinformed her about the

effect of signing the PSA. According to her affidavit testimony, Walker told her the PSA granted her a security interest in the mortgage and she would not have signed the PSA had she known it did not actually do so. (McKay Aff. filed Jan. 24, 2011.) Instead, she says she would have kept pressing her ex-husband to grant her collateral in the PSA and, had he refused, would have taken the divorce case to trial. (Id.) Portions of McKay's deposition testimony, however, seemingly conflict with her affidavit testimony, most notably her unqualified answer of "[y]es" to this question: "did you understand based upon comments made at the mediation by Darwin McKay's counsel or from any other source that one of the reasons that Mr. McKay was unwilling to grant you any security in any property was that it was encumbered by bank loans and other debt?" (Counsel Aff. filed Jan. 6, 2011, Ex. A at 116:22 - 117:4.)

In any event, McKay's affidavit testimony formed the factual basis for her response to Walker's and Cosho Humphrey's argument on the issue of causation. She argued that causation was a jury question because a jury, after hearing her testimony about what she would have done had she known the PSA did not grant her a security interest in the mortgage, could decide what would have happened next. (Mem. Opp'n Defs.' Mot. Summ. J. filed Jan. 20, 2011, at 8-10.) McKay noted three possibilities: (i) her ex-husband could have given in and granted her the security interest; (ii) he could have held firm, in which case the marital estate might have been distributed in accordance with Idaho's community property laws; or (iii) he could have held firm, in which case the marital estate might have been distributed in accordance with a prenuptial agreement. (Id. at 10.) She did not, however, offer or identify any evidence that her ex-husband would have given in and granted her the security interest. Moreover, she did not offer or identify any evidence as to which of the two hypothetical marital estate distribution scenarios was more

likely had her ex-husband held firm, nor did she offer or identify any evidence of the amount of her likely distribution under either hypothetical scenario compared to the real-life outcome achieved by signing the PSA.

On February 22, 2011, the Court (acting through the previously assigned judge) issued a decision denying Walker's and Cosho Humphrey's motion for summary judgment. The denial of summary judgment was premised on a piece of evidence that had gone unmentioned in both sides' briefing: an e-mail exchange between McKay and Walker on October 23, 2007—after the Handwritten Agreement was made but before the PSA was signed. In that exchange, McKay asked Walker, “[C]an I place a lien with the title company on the Status Corp closure so the \$800,000.00 are paid to me by them?” (Counsel Aff. filed Jan. 6, 2011, Ex. A at Ex. 17.) Walker responded, in part, “Our plan is to record the Judgment and Decree of Divorce, which then becomes a lien on all of Darwin's real and personal property.” (Id.)

Walker erred in mentioning personal property in his response. As discussed later in this decision, recording the divorce decree created a lien only on McKay's ex-husband's real property. The error in Walker's e-mail, however, is not the basis for McKay's claims. (Mem. Opp'n [Second] Mot. Reconsider filed June 20, 2011, at 2-5, 8, 11.)

In any event, the Court interpreted McKay's reference in the e-mail exchange to “the Status Corp closure” as a reference to the scheduled payoff of the Albrethsen mortgage. (Order Denying Defs.' Mot. Summ. J. entered Feb. 22, 2011, at 2.) Based on that interpretation, the Court concluded that Walker's response mistakenly intimated that McKay would receive a security interest in the Albrethsen mortgage—which itself is personal property rather than real property—once the divorce decree had been recorded. (Id. at 7.)

In other words, the Court held that Walker's answer to McKay's e-mail might constitute a breach of the standard of care. (Id.) Further, the Court held that McKay had established a genuine issue of material fact on the issue of causation, in that the record was unclear as to how the divorce litigation might have turned out had McKay refused to sign the PSA. (Id. at 9.) That is not the malpractice theory McKay pleaded; again, her pleaded malpractice theory is based on the PSA's content, not on advice contained in the e-mail. (Compl. Filed Nov. 25, 2009, ¶ VIII.)

On February 21, 2013, Walker and Cosho Humphrey moved for reconsideration of the denial of summary judgment. They contended the Court had wrongly interpreted McKay's e-mail of October 23, 2007. The e-mail's reference to "the Status Corp closure" did not, they argued, mean Status Corporation's scheduled payoff of her ex-husband's mortgage on the Albrethsen property; instead, it meant Status Corporation's scheduled purchase of the Home Farm from her ex-husband. (Mem. Supp. [First] Mot. Reconsider filed Feb. 21, 2013, at 2.)

On April 25, 2013, the Court denied the motion to reconsider, finding it unclear from the record whether McKay was referring in her e-mail to the scheduled payoff of her ex-husband's mortgage on the Albrethsen property. (Mem. Decision & Order filed Apr. 25, 2013, at 8-9.)

On May 22, 2014, after reassignment of this case following the previously assigned judge's retirement, Walker and Cosho Humphrey filed a second motion to reconsider. This time, they argued, among other things, that McKay could not possibly have been referring to the scheduled payoff of the mortgage on the Albrethsen property in that e-mail and that, in any event, Walker understood the e-mail differently and his understanding is what matters. (Mem. Supp. Defs.' Second Mot. Reconsider filed May 22, 2014, at 5-14.) She also argued that any malpractice embodied by Walker's response to McKay's e-mail could not possibly have been a

proximate cause of her damages; the e-mail exchange occurred after the Handwritten Agreement was signed, and the Handwritten Agreement did not provide for collateral or for a mechanism by which McKay realistically could have expected to obtain collateral. (Id. at 14-17.)

McKay's response to the second motion to reconsider endeavors to draw the Court's focus away from the e-mail exchange on which the Court's two prior decisions had focused. Indeed, despite that McKay was on the winning side of those decisions, she repeatedly emphasized that the alleged malpractice is not embodied in the e-mail exchange; instead, it is the failure to draft the PSA in a way that, when recorded, would create a security interest in her ex-husband's mortgage on the Albrethsen property. (Mem. Opp'n [Second] Mot. Reconsider filed June 20, 2014, at 2-5, 8, 11.) This is one representative passage: "Defendants mistakenly perceive that their alleged liability is based on an email sent 30 days before the PSA was executed. . . . However, the actual negligence is the failure to construct a PSA which will . . . give plaintiff a secured position." (Id. at 3.) This is another: "[T]he malpractice is based on the failure to draft and record a PSA that would protect plaintiff's interests. The malpractice is *not* the representations set forth in the October 23, 200[7] e-mail from Mr. Walker." (Id. at 5 (emphasis in original).) McKay's counsel continued with that theme during the hearing on the second motion to reconsider. He stated unequivocally during the hearing that nothing in the e-mail exchange constitutes malpractice.

Consequently, the Court perceives McKay to be asking that summary judgment still be denied to Walker and Cosho Humphrey, but on a different analysis than the Court previously articulated. McKay, of course, need not pursue the malpractice theory suggested in the Court's prior decisions. The Court respects her decision to stick to the one she pleaded.

At the conclusion of the hearing on the second motion to reconsider, the Court permitted simultaneous post-hearing briefs on a point that is critical to McKay's malpractice theory: whether including in the PSA a legal description of the Albrethsen property and the instrument number of the mortgage McKay's ex-husband held on the Albrethsen property would, once the PSA was recorded in the appropriate county, have created a security interest in the mortgage by operation of law, even if her ex-husband would not grant one consensually. The parties have now filed, and the Court has reviewed, those briefs. The motion therefore is ready for decision.

As an aside, the Court notes that the proceedings have been delayed a number of times while McKay continued trying to collect the money owed by her ex-husband, thus better liquidating the damages she claims against Walker and Cosho Humphrey. Those delays account for why judgment has yet to be entered in this case, despite its November 2009 filing date.

II.

LEGAL STANDARD

A party may seek reconsideration of an interlocutory order. I.R.C.P. 11(a)(2)(B). New evidence and new arguments are permitted, but neither is required, as revisiting failed arguments also is permitted. *Arregui v. Gallegos-Main*, 153 Idaho 801, 808, 291 P.3d 1000, 1007 (2012). When the order at issue is one denying summary judgment, reconsideration is not appropriate unless the movant is entitled to summary judgment according to the usual summary-judgment standard. *Marek v. Lawrence*, 153 Idaho 50, 53, 278 P.3d 920, 923 (2012).

Summary judgment is proper "if the pleadings, depositions, and admissions on file, together with the affidavits, if any, show there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." I.R.C.P. 56(c). Accordingly, the

movant must prove the absence of a genuine issue of material fact. *E.g., Boise Mode, LLC v. Donahoe Pace & Partners Ltd.*, 154 Idaho 99, 103-04, 294 P.3d 1111, 1115-16 (2013). If the movant so proves, the burden shifts to the nonmovant to prove the opposite: the existence of a genuine issue of material fact. *Id.* at 104, 294 P.3d at 1116.

To meet that ultimate burden, the nonmovant “may not rest upon mere allegations in the pleadings, but must set forth by affidavit specific facts showing there is a genuine issue for trial.” *Id.* (quotation marks omitted). The record must be construed in the light most favorable to the nonmovant, with all reasonable inferences drawn in the nonmovant’s favor. *Id.* Nevertheless, “[a] mere scintilla of evidence or only slight doubt as to the facts is not sufficient” to avoid summary judgment. *AED, Inc. v. KDC Invs., LLC*, 155 Idaho 159, 163, 307 P.3d 176, 180 (2013). The nonmovant’s failure to prove the existence of a genuine issue of material fact “will result in an order granting summary judgment.” *Sprinkler Irrigation Co. v. John Deere Ins. Co.*, 139 Idaho 691, 698, 85 P.3d 667, 675 (2004).

III.

ANALYSIS

A claim for legal malpractice has four elements: (1) an attorney-client relationship; (2) a duty owed by the lawyer; (3) a breach of the lawyer’s duty; and (4) the lawyer’s breach of duty proximately caused damage to the client. *E.g., Soignier v. Fletcher*, 151 Idaho 322, 324, 256 P.3d 730, 732 (2011). McKay’s malpractice theory is discussed above. It can be fairly described, on an element-by-element basis, as follows: (1) Walker and Cosho Humphrey represented her in her divorce litigation; (2) they owed her a duty with respect to the proper drafting of the PSA executed in settlement of the divorce litigation; (3) they breached that duty by not drafting the

PSA in a way that would, upon recordation of the divorce decree into which the PSA was incorporated, create a security interest in her favor in her ex-husband's mortgage on the Albrethsen property; and (4) the breach of duty caused her not to share in the Albrethsen mortgage proceeds received by her ex-husband from his title company.

For the reasons explained below, the Court finds the evidence lacking with respect to the third and fourth elements, breach of duty and proximate causation.

A. Breach of Duty

The parties agree that recording the PSA (or a memorandum of the PSA) in the county in which the Albrethsen property is located did not have the effect of creating a security interest in McKay's favor in her ex-husband's mortgage on the Albrethsen property. They dispute whether its failure to have that effect means Walker and Cosho Humphrey breached a duty to McKay.

Security interests typically arise consensually. The prototypical security interest is created when one party, owing a debt to another party, expressly grants collateral for the debt to the other party. The McKays, if mutually willing, could have structured their divorce settlement in a way that granted McKay a security interest in her ex-husband's mortgage on the Albrethsen property as collateral for the \$800,000/\$500,000 payment obligation the PSA imposed on him. The evidence is clear, however, that they did not do so. The Handwritten Agreement granted McKay no collateral for her ex-husband's payment obligations. (Counsel Aff. filed Jan. 6, 2011, Ex. A at Ex. 11.) Walker and Welsh both attested that they were rebuffed each time they sought collateral for McKay's ex-husband's payment obligations. (Walker Aff. filed Jan. 6, 2011, ¶¶ 10, 17; Welsh Aff. filed Jan. 6, 2011, ¶ 12.) McKay's deposition testimony (Counsel Aff. filed Jan. 6,

2011, Ex. A at 116:22 - 117:4) and e-mails (id. Ex. A at Exs. 9, 17) show that she understood there was no consensual grant of collateral.

Accordingly, Walker and Cosho Humphrey cannot be faulted for the fact that the PSA does not contain an express grant to McKay of a security interest in her ex-husband's mortgage on the Albrethsen property. In other words, they did not commit a breach of duty by "failing" to include in the PSA security provisions to which McKay and her ex-husband never agreed.

Since McKay's ex-husband never agreed to grant her collateral, the only other way a security interest could have arisen from the McKays' divorce settlement is by operation of law. In fact, McKay did receive a certain kind of security interest by operation of law as a result of the divorce settlement. The PSA was incorporated into the divorce decree. Thus, the payments the PSA required McKay's ex-husband to make were also required by the divorce decree. Walker and Cosho Humphrey recorded the divorce decree in several counties. (Walker Aff. filed Jan. 6, 2011, ¶ 20.) By doing so, they ensured that McKay obtained a judgment lien in her ex-husband's real property in the counties of recordation, *see* I.C. § 10-1110, despite that her ex-husband never agreed to grant her a security interest in his real property.

McKay's ex-husband's mortgage on the Albrethsen property was not, however, "real property" within the meaning of section 10-1110. "Real property" is defined for that purpose by I.C. § 55-101. The definition of "real property" in section 55-101 is simply not broad enough to encompass a mortgage. Every kind of property that does not qualify as "real property" is personal property. I.C. § 55-102. McKay's ex-husband's mortgage on the Albrethsen property was personal property. Accordingly, recording the divorce decree, which incorporated the PSA, did not give McKay a judgment lien on the mortgage.

McKay suggests, however, that recording the PSA could have given her a judgment lien on the mortgage had the PSA been drafted differently. Specifically, she argues that, upon the divorce decree's recordation, she would have received a judgment lien on the mortgage if the mortgage's instrument number and the Albrethsen property's legal description had been included in the PSA. The Court was skeptical of this proposition at the time of the hearing on the motion at hand. McKay's counsel expressed the concern during the hearing that he had not put McKay's best foot forward on this key point. That is why the Court allowed post-hearing briefing. Having reviewed the parties' post-hearing briefing, the Court is not persuaded that Walker and Cosho Humphrey, by including these items in the PSA, could have obtained for McKay a security interest that her ex-husband was unwilling to grant consensually.

McKay's argument is based on I.C. § 32-918. That statute provides for the recording of contracts in settlement of divorce cases in "every county in which any real estate may be situated which is granted or affected by such contract." I.C. § 32-918(1). Recordation constitutes constructive notice of the contract to "subsequent purchasers, mortgagees, or other persons or entities that acquire an interest in the real property." I.C. § 32-918(3). McKay contends that adding the Albrethsen property's legal description and her ex-husband's mortgage instrument number to the PSA would have given the world constructive notice of her supposed interest in the proceeds of the mortgage.

The problem with her argument, however, is that her ex-husband did not agree to grant her an interest in the mortgage or its proceeds. The PSA is absolutely clear that the proceeds of the Albrethsen property's sale were her ex-husband's separate property. (PSA § 1.9(i).) The mortgage was part of the proceeds of the Albrethsen property's sale. The extent and timing of her

ex-husband's \$800,000/\$500,000 payment obligation under the PSA was tied to the outcome of the Status Corporation transaction, which had given rise to the mortgage. But that tie did not give her a lienable interest in the proceeds of the mortgage—even if Walker and Cosho Humphrey had included the legal description and the instrument number in the PSA—because the proceeds of the mortgage were specified as her ex-husband's separate property in the PSA, as well as because her ex-husband did not grant her a consensual security interest in the mortgage. McKay says support for her argument can be found in *First Security Bank v. Rogers*, 91 Idaho 654, 429 P.2d 386 (1967), on which her post-hearing brief focused. The Court disagrees. That case discusses the doctrine of equitable conversion, which has no application here, especially given that the PSA did not grant McKay an interest in the mortgage.

Walker and Cosho Humphrey did not breach a duty to McKay by not including the Albrethsen property's legal description and McKay's ex-husband's mortgage instrument number in the PSA. Had they done so, McKay still would not have obtained a security interest in the mortgage proceeds, given the other terms of the PSA. McKay's ex-husband would not agree to grant her any security interest, in the mortgage or otherwise. No amount of slick drafting by Walker and Cosho Humphrey could have, in effect, overcome McKay's ex-husband's unwillingness to grant her a security interest in the mortgage.³

³ The alleged breach of duty, again, has to do with the drafting of the PSA, not with the advice rendered in connection with reaching a divorce settlement. Thus, while McKay's briefing at times criticizes Walker and Cosho Humphrey for allegedly giving her a mistaken impression about the extent to which her ex-husband's payment obligations under the PSA were secured, any shortcoming in the advice she received in that regard is not the basis for her claim. And, even if it were the basis for her claim, McKay has not shown a causal relationship between any allegedly erroneous advice and her claimed damages. That topic is addressed in this decision's next subsection.

B. Proximate Causation

“Even when an attorney is negligent, that breach of duty may not be a proximate cause of the resulting damage to the client.” *City of McCall v. Buxton*, 146 Idaho 656, 661-62, 201 P.3d 629, 635-36 (2009). “Without proximate cause there is no liability for negligence.” *Marias v. Marano*, 120 Idaho 11, 13, 813 P.2d 350, 352 (1991) (upholding a jury’s rejection of a claim for legal malpractice—even though the lawyer admitted breaching the standard of care—because the client failed to prove causation). Consequently, even assuming *arguendo* that Walker and Cosho Humphrey breached a duty to McKay by not including the Albrethsen property’s legal description and her ex-husband’s mortgage instrument number in the PSA, McKay’s claim would be unfit for trial without evidence of a causal relationship between that breach and the damages she claims. She has not offered the requisite evidence.

“[T]he crucial causation inquiry is *what would have happened* if the defendant attorney had not been negligent.” *Viner v. Sweet*, 70 P.3d 1046, 1052 (Cal. 2003) (emphasis in original). In other words, the plaintiff “must show that but for the alleged malpractice, it is more likely than not that the plaintiff would have obtained a more favorable result.” *Id.* at 1054; *see also Smith v. Preston Gates Ellis, LLP*, 147 P.3d 600, 602 (Wash. Ct. App. 2006) (“The plaintiff must demonstrate that ‘but for’ the attorney’s negligence he would have obtained a better result.”); *Gibbons v. Ludlow*, 304 P.3d 239, 245 (Colo. 2013) (“In cases involving an alleged unfavorable transaction, a plaintiff must show that he would have obtained a more favorable result in the underlying transaction but for the professional’s negligence.”) (broker-malpractice case relying on legal-malpractice principles); *Johnson v. Jones*, 103 Idaho 702, 707, 652 P.2d 650, 655 (1982) (granting summary judgment to a lawyer because the client failed to offer evidence that the

client's outcome would have been better if the lawyer had not committed the alleged breach of the standard of care).

Here, the task is to determine what would have happened had Walker and Cosho Humphrey included the Albrethsen property's legal description and the mortgage instrument number in the PSA. The answer is that nothing would have been different. As discussed above, including those items in the PSA—without changing the deal's material terms, most importantly the absence from the deal of a consensually granted security interest—would not have resulted in McKay's receiving a security interest in the mortgage. The evidence therefore does not support the conclusion that, but for those items' absence from the PSA, McKay would have shared in the proceeds her ex-husband received from the title company when it accepted an assignment of his interest in the judgment he obtained based on the mortgage. Thus, even if a duty had been breached in the way she alleges, she has not offered any evidence that the breach caused the damages she is trying to collect.

Moreover, even if McKay's claim were recast into a claim that Walker and Cosho Humphrey misled her into believing the PSA granted her a security interest in the mortgage, evidence of causation still could not be found in this record. In that scenario, proving causation would require evidence of what would have happened had McKay realized before signing the PSA that it did not grant her a security interest in the mortgage (assuming, for the sake of argument, that Walker and Cosho Humphrey led her to believe otherwise). *See* R. Mallen & L. Smith, *Legal Malpractice* § 23:5 (2006 ed.) ("Proof of causation requires analysis of the consequences of proper advice. Thus, the client needs to prove what should have been achieved had the 'proper' advice been given."). Presented with a PSA she knew did not grant her the

desired security interest, McKay would have had two options (other than simply signing the PSA anyway): (i) she could have pressed her ex-husband to revise the PSA to grant her a security interest in the mortgage (or to otherwise sweeten the deal in some fashion); or (ii) she could have tried to walk away from the deal and litigate the divorce case. She has not offered evidence that either option would have led to a better outcome than her actual outcome.

First, there is no evidence that her ex-husband would have granted her the security interest (or otherwise sweetened the deal) had she pressed the issue. Presenting that sort of evidence is her burden. R. Mallen & L. Smith, *Legal Malpractice* § 23:5 (2006 ed.) (“If the alleged error is the failure to obtain or advise of a provision, . . . the client must prove that the other party would have agreed. It is not sufficient to show that the other party ‘might have’ agreed.”).

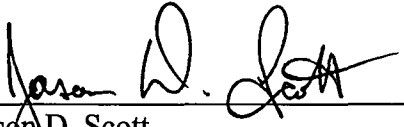
Second, had she tried to walk away from the deal, the Handwritten Agreement would have blocked her path back to divorce court. It did not provide for security of any kind, and it required the parties to submit any disputes about the deal terms to D. Duff McKee for arbitration. There is no evidence that McKee, acting as arbiter, would have ordered McKay’s ex-husband to grant her a security interest in the mortgage as part of the PSA. The subject of security was broached during the mediation, and McKay’s ex-husband refused to grant her any. (Walker Aff. filed Jan. 6, 2011, ¶ 10; Welsh Aff. filed Jan. 6, 2011, ¶ 12.) Since the parties discussed the subject of security in their negotiations, security—or the lack thereof—is a material term of the parties’ agreement. *See Chapin v. Linden*, 144 Idaho 393, 397, 162 P.3d 772, 776 (2007). It is inconceivable that McKee would have ordered the inclusion in the PSA of a material term like security, despite the discussion of that subject during the mediation and the execution of the Handwritten Agreement without a security provision.

For these reasons, McKay has not offered evidence sufficient to support a verdict in her favor on the issue of proximate causation, as well as on the issue of breach of duty. Summary judgment in favor of Walker and Cosho Humphrey therefore is appropriate, despite its previously having been denied.

Accordingly,

IT IS ORDERED that the Court's prior orders denying summary judgment to Walker and Cosho Humphrey are reconsidered. Summary judgment is granted to them.

Dated this 30th day of July 2014.



Jason D. Scott
DISTRICT JUDGE

CERTIFICATE OF MAILING

I hereby certify that on this 30th day of July 2014, I mailed (served) a true and correct copy of the within instrument to:

Robert A. Anderson
ANDERSON JULIAN & HULL, LLP
250 S 5th St, Ste 700
PO Box 7426
Boise, ID 83707-7426
Fax: (208) 344-5510

☐ U.S. Mail, Postage Prepaid
☐ Hand Delivered
☐ Electronic Mail
☒ Facsimile

Allen B. Ellis
ATTORNEY AT LAW
12639 W Explorer Dr, Ste 140
Boise, ID 83713
Fax: (208) 345-9564

☐ U.S. Mail, Postage Prepaid
☐ Hand Delivered
☐ Electronic Mail
☒ Facsimile

Kevin E. Dinius
DINIUS & ASSOCIATES, PLLC
5680 E Franklin Rd, Ste 130
Nampa, ID 83687
Fax: (208) 475-0101

☐ U.S. Mail, Postage Prepaid
☐ Hand Delivered
☐ Electronic Mail
☒ Facsimile

CHRISTOPHER D. RICH
Clerk of the District Court

By: 
Deputy Court Clerk

NO. _____
AM 11:07 PM _____

JUL 30 2014

CHRISTOPHER D. FICH, Clerk
BRYAN ABBOTT
DEPUTY CLERK

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF IDAHO

THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

PATRICIA MCKAY,

Plaintiff,

vs.

THOMAS G. WALKER and COSHO
HUMPHREY, LLP, a limited liability
partnership,

Defendants.

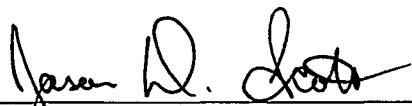
Case No. CV-OC-2009-22659

JUDGMENT

JUDGMENT IS ENTERED AS FOLLOWS:

Plaintiff Patricia McKay is awarded no relief against Defendants Thomas G. Walker and Cosho Humphrey, LLP. Her complaint is dismissed with prejudice.

Dated this 30th day of July 2014.



Jason D. Scott
DISTRICT JUDGE

CERTIFICATE OF MAILING

I hereby certify that on this 30th day of July 2014, I mailed (served) a true and correct copy of the within instrument to:

Robert A. Anderson
Yvonne A. Dunbar
ANDERSON JULIAN & HULL, LLP
250 S 5th St, Ste 700
PO Box 7426
Boise, ID 83707-7426

() U.S. Mail, Postage Prepaid
() Hand Delivered
() Electronic Mail
☒ Facsimile

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CHRISTOPHER D. RICH
Clerk of the District Court

By: 
Deputy Court Clerk

ALLEN B. ELLIS
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12639 W. Explorer Drive, Suite 140
Boise, Idaho 83713
208/345-7832 (Tel)
208/345-9564 (Fax)
ISB No. 1626

AUG 15 2014

CHRISTOPHER D. RICH, Clerk
By **PATRICK McLAUGHLIN**
DEPUTY

Attorney for Plaintiff/Appellant

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

| | | |
|---------------------------------------|---|------------------------|
| Patricia McKay |) | |
| |) | Case No. CV OC 0922659 |
| Plaintiff/Appellant, |) | |
| |) | NOTICE OF APPEAL |
| v. |) | |
| |) | |
| Thomas G. Walker and Cosho Humphrey, |) | |
| LLP, a limited liability partnership, |) | |
| |) | |
| Defendants/Respondents. |) | |
| _____ |) | |

TO: THE ABOVE-NAMED RESPONDENTS, THEIR ATTORNEYS OF RECORD,
AND THE CLERK OF THE ABOVE-ENTITLED COURT:

NOTICE IS HEREBY GIVEN THAT:

1. The above-named plaintiff/appellant, Patricia McKay, appeals against the above-named respondents, to the Idaho Supreme Court from the Memorandum Decision and Order Granting Defendants' Second Motion to Reconsider entered July 30, 2014, and Judgment entered July 30, 2014, the Honorable Jason D. Scott presiding.

2. The appellant has a right to appeal to the Idaho Supreme Court, and the Order and

NOTICE OF APPEAL - 1

ORIGINAL
000979

Judgment identified in paragraph 1 above is appealable under and pursuant to Rule 11(a)(1), I.A.R.

3. A preliminary statement of the issues on appeal which the appellant intends to assert in the appeal is as follows: Whether the district court committed an error of law in concluding that plaintiff/appellant failed to present sufficient evidence of (a) defendants' breach of duty and (b) the existence of proximate causation.

4. There has been no order entered sealing all or any portion of the record.

5. The appellant requests the preparation of the following portions of the reporter's transcript in hard copy: those motion hearings held on February 3, 2011, April 3, 2013, and June 26, 2014.

6. The appellant requests inclusion of those portions of the clerk's record automatically included under Rule 28, Idaho Appellate Rules, as well as the following portions of the record with attached exhibits, if any.

- (a) Affidavit of Stanley Welsh filed January 6, 2011;
- (b) Affidavit of Thomas Walker filed January 6, 2011;
- (c) Affidavit of Counsel filed January 6, 2011;
- (d) Affidavit of Bryan D. Smith filed January 20, 2011;
- (e) Second Affidavit of Allen Ellis dated January 20, 2011.
- (f) Affidavit of Patricia McKay filed January 24, 2011;
- (g) Order Denying Defendants' Motion for Summary Judgment filed February 22, 2011;
- (h) Second Affidavit of Patricia McKay dated January 20, 2012;
- (i) Second Affidavit of Allen Ellis dated January 20, 2012;

- (j) Affidavit of Yvonne A. Dunbar dated January 31, 2012;
- (k) Fourth Affidavit of Allen B. Ellis dated February 3, 2012;
- (l) Affidavit of Allen B. Ellis dated November 21, 2012;
- (m) Affidavit of Robert A. Anderson dated February 21, 2013;
- (n) Fifth Affidavit of Allen B. Ellis dated March 7, 2013;
- (o) Memorandum Decision and Order Denying Defendants' Motion to Reconsider;
- (p) Affidavit of Allen B. Ellis dated May 7, 2013;
- (q) Affidavit of Thomas Walker dated May 22, 2013;

7. I certify:

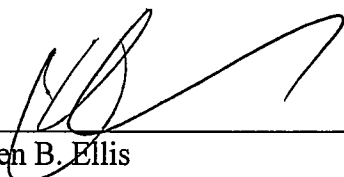
(a) That a copy of this notice of appeal has been served on the reporter of whom transcripts have been requested as named below at the address set out below:

Dianne Cromwell
Ada County Courthouse
200 W. Front Street
Boise, ID 83702

- (b) That the reporter will invoice the estimated fee for preparation of the reporter's transcript at which point it will be immediately paid.
- (c) That the estimated fee for preparation of the clerk's record has been paid.
- (d) That the appellate filing fee has been paid.
- (e) That service has been made upon all parties required to be served pursuant to Rule

20, I.A.R.

Dated this 15th day of August, 2014.



Allen B. Ellis
Attorney for plaintiff/appellant

CERTIFICATE OF SERVICE

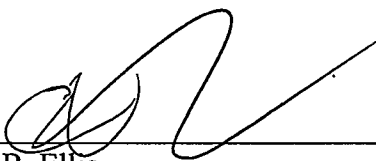
I HEREBY CERTIFY that on the 15th day of August, 2014, I caused to be served a true and correct copy of the foregoing by the method indicated below, and addressed to the following:

Robert A. Anderson
Yvonne A. Dunbar
ANDERSON, JULIAN & HULL, LLP
250 South Fifth Street, Suite 700
P.O. Box 7426
Boise, Idaho 83707

____ U.S. Mail
 X Hand Delivery
____ Overnight Mail
____ Facsimile at
 344-5510

Dianne Cromwell, Court Reporter
Ada County Courthouse
200 W. Front Street
Boise, ID 83702

____ U.S. Mail
 X Hand Delivery
____ Overnight Mail
____ Facsimile at



Allen B. Ellis

ORIGINAL

Robert A. Anderson – ISB No. 2124
Yvonne A. Dunbar – ISB No. 7200
ANDERSON, JULIAN & HULL LLP
C. W. Moore Plaza
250 South Fifth Street, Suite 700
Post Office Box 7426
Boise, Idaho 83707-7426
Telephone: (208) 344-5800
Facsimile: (208) 344-5510

Attorneys for Defendants/Respondents

NO. _____ FILED _____
A.M. _____ P.M. _____
AUG 29 2014
CHRISTOPHER D. RICH, Clerk
By STACEY LAFFERTY
DEPUTY

IN THE DISTRICT COURT OF THE
FOURTH JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR
THE COUNTY OF ADA

PATRICIA MCKAY,

Plaintiff/Appellant,

vs.

**THOMAS G. WALKER and COSHO
HUMPHREY, LLP**, a limited liability
partnership,

Defendants/Respondents.

DC Case No. CV OC 0922659

SUPREME COURT NO. 42434

**DEFENDANTS/RESPONDENTS'
REQUEST FOR ADDITIONAL
CLERK'S RECORD**

TO: THE ABOVE-NAMED PLAINTIFF/APPELLANT, HER ATTORNEYS OF
RECORD, AND THE CLERK OF THE ABOVE-ENTITLED COURT:

NOTICE IS HEREBY GIVEN that the Defendants/Respondents in the above-
entitled proceeding hereby request, pursuant to Rule 19, I.A.R., the inclusion of the
following material in the Clerk's Record in addition to that required to be included by the
I.A.R. and Plaintiff/Appellant's Notice of Appeal:

**DEFENDANTS/RESPONDENTS' REQUEST
FOR ADDITIONAL CLERK'S RECORD - 1**

000983

| <u>FILED DATE</u> | <u>DOCUMENT</u> |
|-------------------|--|
| 12/21/2010 | Defendant's Motion for Summary Judgment |
| 01/06/2011 | Memorandum in Support of Motion for Summary Judgment |
| 01/20/2011 | Memorandum in Opposition to Motion for Summary Judgment |
| 01/28/2011 | Reply in Support of Motion for Summary Judgment |
| 01/28/2011 | Motion to Strike |
| 01/28/2011 | Memorandum in Support of Motion to Strike |
| 02/21/2013 | Defendants' Motion to Reconsider the Court's Order Denying Defendants' Motion for Summary Judgment |
| 02/21/2013 | Memorandum in Support of Defendants' Motion to Reconsider the Court's Order Denying Defendants' Motion for Summary Judgment |
| 03/07/2013 | Memorandum in Opposition to Motion for Reconsideration |
| 03/27/2013 | Memorandum in Support of Motion to Reconsider Order Denying Motion for Summary Judgment |
| 05/22/2014 | Defendants' Second Motion to Reconsider the Court's Order Denying Defendants' Motion for Summary Judgment |
| 05/22/2014 | Memorandum in Support of Defendants' Second Motion to Reconsider the Court's Order Denying Defendants' Motion for Summary Judgment |
| 05/22/2014 | Affidavit of Thomas Walker in Support of Defendants' Second Motion to Reconsider the Court's Order Denying Defendants' Motion for Summary Judgment |
| 06/20/2014 | Memorandum in Opposition to Motion to Reconsider Denial of Motion for Summary Judgment |
| 06/24/2014 | Reply in Support of Defendants' Second Motion to Reconsider the Court's Order Denying Defendants' Motion for Summary Judgment |
| 07/10/2014 | Defendants' Supplemental Brief |
| 07/30/2014 | Memorandum Decision and Order Granting Defendants' Second Motion to Reconsider |

I certify that a copy of this Request was served upon the Clerk of the District Court and upon all parties required to be served pursuant to I.A.R. 20.

DATED this 29th day of August, 2014.

ANDERSON, JULIAN & HULL LLP

By Yvonne A. Dunbar
Robert A. Anderson,
Yvonne A. Dunbar, Of the Firm
Attorneys for Defendants/
Respondents

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this 29th day of August, 2014, I served a true and correct copy of the foregoing **DEFENDANTS/RESPONDENTS' REQUEST FOR ADDITIONAL CLERK'S RECORD** by delivering the same to each of the following attorneys of record, by the method indicated below, addressed as follows:

Allen B. Ellis
ELLIS LAW, PLLC
12639 W Explorer Drive, Suite 140
Boise, Idaho 83713
Telephone: (208) 345-7832
Facsimile: (208) 345-9564

| | |
|-------------------------------------|----------------------------|
| <input type="checkbox"/> | U.S. Mail, postage prepaid |
| <input type="checkbox"/> | Hand-Delivered |
| <input type="checkbox"/> | Overnight Mail |
| <input checked="" type="checkbox"/> | Facsimile |
| <input type="checkbox"/> | Email |

Kevin E. Dinius
Michael J. Hanby II
DINIUS & ASSOCIATES, PLLC
5680 E. Franklin Rd., Suite 130
Nampa, Idaho 83687
Telephone: (208) 475-0100
Facsimile: (208) 475-0101

| | |
|-------------------------------------|----------------------------|
| <input type="checkbox"/> | U.S. Mail, postage prepaid |
| <input type="checkbox"/> | Hand-Delivered |
| <input type="checkbox"/> | Overnight Mail |
| <input checked="" type="checkbox"/> | Facsimile |
| <input type="checkbox"/> | Email |

Attorneys for Plaintiff/Appellant

Dianne Cromwell
Court Reporter
Ada County Courthouse
200 West Front Street
Boise, Idaho 83702

| | |
|-------------------------------------|----------------------------|
| <input type="checkbox"/> | U.S. Mail, postage prepaid |
| <input checked="" type="checkbox"/> | Hand-Delivered |
| <input type="checkbox"/> | Overnight Mail |
| <input type="checkbox"/> | Facsimile |
| <input type="checkbox"/> | Email |

Yvonne A. Dunbar
Robert A. Anderson
Yvonne A. Dunbar

NO. _____
A.M. 8:00 FILED P.M. _____

SEP 23 2014

CHRISTOPHER D. RICH, Clerk
By BRADLEY J. THIES
DEPUTY

Stephen W. Kenyon
Clerk of Supreme Court
451 W State Street
Boise, Idaho 83720

In re: McKay v. Walker and Cosho Humphrey, Docket No. 42434

Notice is hereby given that on Friday, September 19, 2014, I lodged a transcript of 101 pages in length for the above-referenced appeal with the district court clerk of Ada County in the Fourth Judicial District.

The following files were lodged:

Proceeding 02/03/2011, Proceeding 04/03/2013 and Proceeding
06/26/2014

David Cromwell
Tucker & Associates

cc: sctfilings@idcourts.net
PDF format of completed files emailed to Supreme Court

000986

BT

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

PATRICIA MCKAY,

Plaintiff-Appellant,

vs.

THOMAS G. WALKER and COSHO
HUMPHREY, LLP, a limited liability
partnership,

Defendants-Respondents.

Supreme Court Case No. 42434

CERTIFICATE OF EXHIBITS

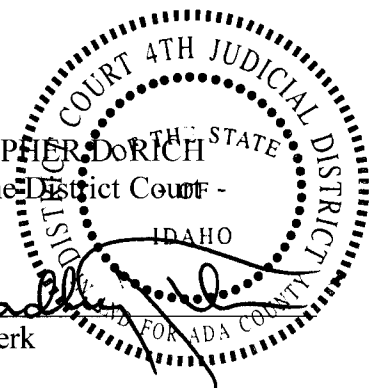
I, CHRISTOPHER D. RICH, Clerk of the District Court of the Fourth Judicial District of
the State of Idaho in and for the County of Ada, do hereby certify:

There were no exhibits offered for identification or admitted into evidence during the
course of this action.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of the said
Court this 23rd day of September, 2014.

CHRISTOPHER D. RICH
Clerk of the District Court -

By 
Deputy Clerk



CERTIFICATE OF EXHIBITS

000987

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

PATRICIA MCKAY,

Plaintiff-Appellant,

vs.

THOMAS G. WALKER and COSHO
HUMPHREY, LLP, a limited liability
partnership,

Defendants-Respondents.

Supreme Court Case No. 42434

CERTIFICATE OF SERVICE

I, CHRISTOPHER D. RICH, the undersigned authority, do hereby certify that I have
personally served or mailed, by either United States Mail or Interdepartmental Mail, one copy of
the following:

CLERK'S RECORD AND REPORTER'S TRANSCRIPT

to each of the Attorneys of Record in this cause as follows:

ALLEN B. ELLIS

ATTORNEY FOR APPELLANT

BOISE, IDAHO

YVONNE A. DUNBAR

ATTORNEY FOR RESPONDENT

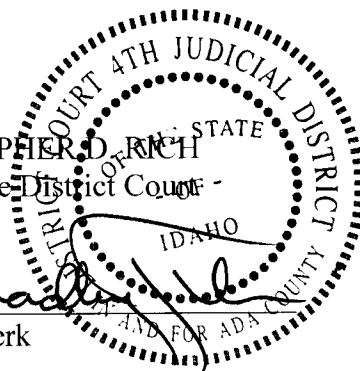
BOISE, IDAHO

Date of Service: _____

SEP 26 2014

CHRISTOPHER D. RICH
Clerk of the District Court -

By Bradley H. H.
Deputy Clerk



CERTIFICATE OF SERVICE

000988

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

PATRICIA MCKAY,

Plaintiff-Appellant,

vs.

THOMAS G. WALKER and COSHO
HUMPHREY, LLP, a limited liability
partnership,

Defendants-Respondents.

Supreme Court Case No. 42434

CERTIFICATE TO RECORD

I, CHRISTOPHER D. RICH, Clerk of the District Court of the Fourth Judicial District of the State of Idaho, in and for the County of Ada, do hereby certify that the above and foregoing record in the above-entitled cause was compiled under my direction and is a true and correct record of the pleadings and documents that are automatically required under Rule 28 of the Idaho Appellate Rules, as well as those requested by Counsel.

I FURTHER CERTIFY, that the Notice of Appeal was filed in the District Court on the 15th day of August, 2014.

CHRISTOPHER D. RICH
Clerk of the District Court
- OF -
IDAHO
By Bradley J. [Signature]
Deputy Clerk
DISTRICT COURT 4TH JUDICIAL DISTRICT
OF THE STATE OF IDAHO
IN AND FOR ADA COUNTY

CERTIFICATE TO RECORD

000989