STATE OF IDAHO)
County of KOOTENAI)ss
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CLERK, DISTRICT COURT
Deputy

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

NOLAN GARRETT, an individual,

Plaintiff,

vs.

DAM FINE BREWING, LLC, an Idaho limited liability company; BLACK LODGE BREWING, LLC, an Idaho limited liability company, JOSHUA CANTAMESSA and GINGER CANTAMESSA, husband and wife, and the marital community comprised thereof,

Defendants.

Case No. **CV28-19-2395**

MEMORANDUM DECISION AND ORDER GRANTING PLAINTIFF'S MOTION TO SEIZE COLLATERAL

I. INTRODUCTION

Before the Court is Plaintiff Nolan Garrett's (Garrett) Motion to Seize Collateral, filed on June 20, 2019. The collateral consists of brewing equipment, which is currently being held in storage by Defendants Josh and Ginger Cantamessa (the Cantamessas) on behalf of Defendant Dam Fine Brewing, LLC (Dam Fine). The Court heard oral arguments on the motion on August 13, 2019. However, it became apparent to this Court during oral arguments that the Cantamessas must be in default before Garrett is permitted to seize the collateral. Therefore, the additional issue of default must be decided. At the conclusion of the hearing, the Court requested both parties submit a single-issue brief discussing whether the Cantamessas defaulted, to be considered

before the Court decides Garrett's Motion to Seize Collateral. Both sides timely submitted briefs on August 27, 2019. The motion is now at issue.

After careful consideration of the relevant briefs, attachments, and exhibits, the Court finds that the Cantamessas defaulted on their payment obligation. Therefore, Garrett's Motion to Seize Collateral is granted.

II. STANDARD OF REVIEW

"This Court freely reviews matters of law." *SE/Z Const., L.L.C. v. Idaho State Univ.*, 140 Idaho 8, 12, 89 P.3d 848, 852 (2004) (citing *Martel v. Bulotti,* 138 Idaho 451, 453, 65 P.3d 192, 194 (2003)). "Interpreting contracts, determining a statute's meaning, and applying law to undisputed facts all constitute matters of law." *Id.*; *see Martel* at 453, 65 P.3d at 194.

III. ANALYSIS

It is undisputed that Garrett holds a perfected security interest in the collateral, and the Cantamessas are currently in possession of the collateral. Idaho Code (I.C.) § 28-9-609(a) allows the secured party to take possession of the collateral after default by the debtor. Therefore, the issue before the Court is whether the Cantamessas were in default such that Garrett would be entitled by statute to take possession of the collateral in which he holds a security interest.

On December 26, 2017, Garrett and the Cantamessas, on behalf of Dam Fine, executed a Membership Interest Purchase Agreement (Agreement) for the sale of Garrett's interest in Cloudburst Brewing, LLC d/b/a Downdraft Brewing Co., and a promissory note (Note) in which the Cantamessas promised to pay Garrett $250,000.00 over a five-year period. Compl., ¶¶ 3.1, 3.3, 3.4, Exs. A, B. The Note states that the Cantamessas shall pay said sum in monthly installments of $2,000.00 due on the first

day of each month, with the first payment due February 1, 2018. *Id.* at Ex. B. By signing the Note, the Cantamessas agreed to waive "presentment, demand, protest, notice of dishonor[,] and the notice of nonpayment." *Id.*

On March 29, 2019, after the execution of an addendum to the Agreement which lowered the Cantamessas' monthly payments, discussed in detail below, and after the Cantamessas failed to make the first three payments by the due dates agreed upon in the Addendum, Garrett sent the Cantamessas a Notice of Default. Decl. of Collette C. Leland in Supp. of Mot. for Ord. Auth. Pl. to Seize Collateral (Decl. of Colletee C. Leland), Ex. F. Then, Garrett initiated this action, asserting a claim for breach of contract, and seeking to seize the collateral and foreclose on his security interest.

A. Notice and Waiver of Notice

The Cantamessas first argue that Garrett's Notice of Default was premature, and thus failed to comply with the notice requirements of I.C. § 28-9-607. Defs.' Suppl. Br. Re: Mot. to Seize Collateral, 7. Before discussing whether the Notice of Default was premature, the Court will briefly discuss the Cantamessas' claim that there is a notice requirement. Within I.C. § 28-9-607, the only subsection that makes mention of notification is subsection (a)(1). I.C. § 28-9-607. Subsection (a)(1) states that after default, a secured party *may* notify an *account debtor*, or other person obligated on collateral, to make a payment. *Id.* (italics added). Under that subsection, notice from the secured party is not required, but is merely optional.[1] Aside from subsection (a)(1), the statute is devoid of any notice provision. Therefore, the Cantamessas' argument that Garrett failed to comply with the notice requirements of I.C. § 28-9-607 fails.

[1] Additionally, the Cantamessas are not "account debtors." *See* I.C. § 28-9-102(3); *compare with* I.C. § 28-9-102(28)(A).

Even if Garrett was required to provide a notice of default to the Cantamessas, the Cantamessas agreed to waive "presentment, demand, protest, notice of dishonor[,] and the notice of nonpayment," as stated above. *See* Compl., Ex. B. Though the specific phrase "notice of default" is not included in this waiver, it logically falls within, or is equivalent to, "notice of nonpayment." Additionally, the Court notes that I.C. § 28-9-609(a) –the statute that permits Garrett to take possession of the collateral in which he holds a security interest after default– also does not contain a notice provision. Further, even if the Cantamessas did not specifically waive Garrett's obligation to provide a "notice of default," Garrett fulfilled that obligation by providing a Notice of Default to the Cantamessas on March 29, 2019. Decl. of Colletee C. Leland, Ex. F.

B. Default

Turning to the issue of default, it is undisputed that the Cantamessas failed to make the agreed-upon payments detailed in the Note for the months of September through December 2018. Compl., ¶ 3.9; Defs.' Suppl. Br. Re: Mot. to Seize Collateral, 4. On January 8, 2019, after four months of nonpayment, Garrett and the Cantamessas executed an Addendum to the Note. Compl., ¶ 3.10; Defs.' Suppl. Br. Re: Mot. to Seize Collateral, 4. The Addendum made the following modifications:

- The Buyer will not make payments on the Note from the period of September 2018 through December 2018;
- Interest will continue to accrue at the existing rate of 5% per annum;
- The Buyer anticipates a lump sum "catch up" payment of $8000, likely to be paid in January 2019, but no later than March 2019;
- For the period of January 2019 through June 2019, the Maker shall accept partial payments of $1000 per month ($6000) in total over the period; and
- Regular payments shall resume in July 2019.

Decl. of Collette C. Leland, Ex. C. The addendum also stated, "[a]ll other requirements, restrictions and obligations of the Agreement and associated Note remain unchanged

and in full effect." *Id.* The parties agree that payments made on the remaining balance, pursuant to the Addendum, are due on the first of each month, as required by the Note. *See generally* Defs.' Suppl. Br. Re: Mot. to Seize Collateral, 5 (the Cantamessas recognize that due dates under the Addendum are to be paid on the first of each month).

The Cantamessas argue that the Notice of Default they received from Garrett on March 29, 2019, was premature, as they were not in default at that time. Defs.' Suppl. Br. Re: Mot. to Seize Collateral, 6–7. The Cantamessas assert that the late payment they made on March 5, 2019, "cured the default for the monthly payments owed for January, February, and March," and thus they were no longer in default when they received the Notice of Default. *Id.* at 6.

Garrett asserts that the Cantamessas were in default the moment they failed to make the agreed-upon payment in January 2019. Pl.'s Mem. Re: Defs.' Default, 8–9 ("Under the terms of the Addendum, default occurred each time the Cantamessas failed to make a $1,000.00 payment on the first of each month..."). The Cantamessas continued to be in default when they failed to make the agreed-upon payment by February 1, 2019. *Id.* at 9. The Cantamessas continued to be in default when they failed to make the agreed-upon payment by March 1, 2019. *Id.*

The plain language of the Addendum states that the Cantamessas were required to make a payment in the amount of $1,000.00 in January 2019, and each month thereafter until July 2019. As stated above, because all other requirements and obligations of the Agreement remain in full effect, the monthly payments were due on the first of each month.[2] It is undisputed that the Cantamessas failed to make a

[2] This requirement was not likely applicable to the month of January 2019, as the Addendum was not executed until January 8, 2019. However, even the Cantamessas agree that they "were in default for

payment on the Note during the month of January 2019. Defs.' Suppl. Br. Re: Mot. to Seize Collateral, 5. It is further undisputed that the Cantamessas failed to make payments on the Note by February 1, 2019, and by March 1, 2019. *Id.* Based on this information alone, the Cantamessas failed to make payments on the Note by the first of each month, as required by the Addendum and Note, and were therefore in default.

In addition to the monthly payments of $1,000.00, the Cantamessas were required to make a catch-up payment in the amount of $8,000.00 by January 2019, but no later than March 2019. The Cantamessas put forth that Dam Fine "continued to struggle with faulty equipment and struggled with receiving payment from its insurance company," as the reasons for failing to make the agreed-upon payments. Defs.' Opp. To Pl.'s Mot. for Order Auth. Pl. to Seize Collateral, 7. On March 5, 2019, the Cantamessas finally provided Garrett with a payment in the amount of $6,000.00. Defs.' Suppl. Br. Re: Mot. to Seize Collateral, 5; Decl. of Nolan Garrett in Supp. of Mot. for Order Auth. Pl. to Seize Collateral, ¶ 5. The Cantamessas argue that the $6,000.00 payment was not meant to go entirely toward the catch-up payment, but instead was broken down as follows: $3,000.00 was to be put toward the amount due for the months of January through March 2019, and only $3,000 went toward the catch-up payment, leaving $5,000.00 of the catch-up payment remaining outstanding. Defs.' Suppl. Br. Re: Mot. to Seize Collateral at 7–8. There is no evidence to support this allocation by Cantamessas.

Neither the Addendum, nor the Note, nor the Agreement allow for the Cantamessas to dictate how a late payment should be allocated. Within the first three bullet points contained in the Addendum, it makes clear that the Cantamessas did not

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missed payments on the first of January, February, and March 2019." Defs.' Suppl. Br. Re: Mot. to Seize Collateral, 5.

have to make monthly payments for the months of September through December 2018, but that an $8,000.00 catch-up payment for those four months is expected to be received by January 2019, though it will be accepted through March 2019. Following the explanation of the catch-up payments for the prior four months, the Addendum makes clear that the Cantamessas' monthly payments, beginning in January 2019, will be half of what they usually are. Garrett made this allowance after the Cantamessas explained that a monthly payment of $1,000.00 would allow them "to get caught up on other expenses, still provide [Garrett] with a payment, and make the place look more financially stable to lenders." Decl. of Nolan Garrett, Ex. A (email dated Dec. 2, 2018), filed June 20, 2019.

Moving in order of the bullet points in the Addendum, the catch-up payment that makes up for the four prior months of nonpayment comes first. Moving chronologically through the months of the year, the months of September through December 2018 have had outstanding amounts due and owing for the longest period of time. While the Addendum retroactively permitted the Cantamessas to miss the payments for each of those months, the outstanding amount still needed to be paid by the Cantamessas. The outstanding amount, totaling $8,000.00, was addressed specifically by the catch-up payment in the amount of $8,000.00. Therefore, logically, the $6,000.00 payment made by the Cantamessas on March 5, 2019, would be applied the amount that has been due and owing for the longest period of time. The Court agrees with Garrett's position, and finds that the $6,000.00 payment went toward the $8,000.00 catch-up payment, essentially serving as a late payment for September, October, and November 2018.

As mentioned above, the Cantamessas argue that the $6,000.00 payment was not meant to go entirely toward the catch-up payment, but instead was broken down as

follows: $3,000.00 was for the amount due for the months of January through March 2019, and only $3,000 was to go toward the catch-up payment, leaving $5,000.00 of the catch-up payment remaining outstanding. Defs.' Suppl. Br. Re: Mot. to Seize Collateral, at 7–8. After reviewing the evidence in the record, it is clear that the Cantamessas intended the $6,000.00 received from the insurance company to go toward the $8,000.00 catch-up payment. The idea put forth by counsel for the Cantamessas asserting that $3,000.00 was supposed to go toward the arrearage from January through March of 2019, while the remaining $3,000.00 was supposed to go toward the catch-up payment, is contrary to what is shown by the email exchanges between the parties. *See* Defs.' Opp'n to Pl.'s Mot. for Order Auth. Pl. to Seize Collateral, 7–8 (the first time the idea of allocating a portion of the $6,000.00 payment to January through March 2019 has been mentioned).

A brief review of the emails exchanged between parties is necessary. On November 27, 2018, Garrett stated to Josh Cantamessa, "I'll stand by for the insurance claim to get resolved and for payments to get caught up. Do you think December 15th is a reasonable date to expect?" Decl. of Nolan Garrett in Supp. of Mot. for Order Auth. Pl. to Seize Collateral, Ex. A. On December 2, 2018, Josh Cantamessa stated to Garrett, "I can't guarantee that we will have the insurance money by the 15th..." *Id.* On December 8, 2018, Garrett stated to Josh Cantamessa, "I'm good with getting caught up on the current payments when the insurance pays out then doing $1k/mo for January – June." *Id.* On December 20, 2018, Garrett stated, "[p]lease find an Excel spreadsheet attached that should represent the new amortization table based on our discussion below. It is predicated upon insurance making the catch-up payment sometime in January, with no payments received for September— December (4 months)." Decl. of Nolan Garrett in Supp. of Response to Def. Black Lodge Brewing,

LLC's Mot. to Dismiss, Ex. A. On February 3, 2019, Garrett stated to the Cantamessas, "[p]lease make the January payment ASAP, February on time and thereafter, and please also send me an update on the insurance coverage payment that should get us 'caught up' per our recent agreement." Suppl. Decl. of Collette C. Leland in Supp. of Reply Re: Mot. for Order Auth. Pl. to Seize Collateral (Suppl. Decl. of Collette C. Leland), 31 (quotations in original); Defs.' Answer and Counterclaims, Ex. F. That same day, Josh Cantamessa responded with, "[w]e're still working on getting the insurance company to pay out our claim." *Id.* On February 7, 2019, Josh Cantamessa stated to Garrett, "[w]e have finally gotten our claim approved with the insurance company. We should have it sorted within the next week. We'll get you caught up as soon as we receive the payment." *Id.* at 32; Defs.' Answer and Counterclaims, Ex. F. On February 22, 2019, Josh Cantamessa stated to Garrett, "[w]e were able to get the insurance stuff sorted out. Should have you caught up next week." *Id.* at 30 (email exchange between Garrett and Josh Cantamessa). On February 27, 2019, Garrett asked Ginger Cantamessa, "[w]hen will the catchup payment be processed?" *Id.* at 28 (email exchange between Garrett and Ginger Cantamessa). Ginger responded, "[w]e have confirmation that the insurance check went out today. It was a bit of a battle, but we should have your payment out to you by early next week." *Id.* On March 5, 2019, Josh Cantamessa stated to Garrett, "[w]e received part of our insurance settlement. Ginger will be sending you a check for $6000 today. We should have you caught up with the rest in a few days." Decl. of Nolan Garrett in Supp. of Mot. for Order Auth. Pl. to Seize Collateral, Ex. C.

At no point in time during the email communications with one another do the Cantamessas indicate that the $6,000.00 payment is meant to be split in half, with

$3,000.00 going toward the arrearage from January, February, and March 2019. Rather, the entirety of the email communications related to the insurance payment indicates that the $6,000.00 payment would be put toward the $8,000.00 catch-up payment.

Even if the Cantamessas have the right to, after the fact (and contrary to the evidence as just set forth), dictate how late payments should be allocated (the Court above found they do not have the right under either the Addendum or the Agreement), given their argument as to how the $6,000.00 payment was to be allocated, the Cantamessas are still in default by not making the payments for January, February and March, 2019, on time. If, as the Cantamessas argue, $3,000.00 of the $6,000.00 payment made on March 5, 2019, was to be applied to the $1,000.00 per month payments for January, February and March of 2019, the fact that the $6,000.00 payment was made on March 5, 2019, does not cure the default on the Agreement which by its terms occurred on January 1, 2019, again on February 1, 2019, and again on March 1, 2019, when the $1,000.00 per month payment was in fact not made. That March 5, 2019, payment, allocated as the Cantamessas argue, does not cure those three defaults under the terms of the Agreement. The Cantamessas apparently recognize that fact when their attorney writes, "[a]rguably, the Cantamessas were in default for missed payments on the first of January, February, and March 2019." Defs.' Suppl. Br. Re: Mot. to Seize Collateral, 5. There is no "arguably" about the Cantamessas being in default on January 1, February 1, and March 1, 2019. The Cantamessas were in default on those dates. They are still in default on those dates.

Next, the counsel for the Cantamessas writes, "However, on March 5, 2019, the Cantamessas made a payment totaling $6,000, which Mr. Garrett accepted without protest." *Id.* No legal citation is given by the Cantamessas' counsel for the legal

significance of Garratt's acceptance without protest. Nor is there any legal citation given by the Cantamessas' counsel for the claim, "Having cured the default for the monthly payments owed for January, February, and March, the Cantamessas were not in default." *Id.* at 6. No legal argument is given by Cantamessas' counsel for this assertion. Such assertions are actually contrary to Idaho law. In *Bochert v. Hecla Mining Company*, 109 Idaho 482, 708 P.2d 887 (1985), the Idaho Supreme Court interpreted the rights of a buyer who fails to make timely payment when the contract was silent on the issue of a right to cure default. Bochert bought a house on contract from Hecla Mining Company and then defaulted on the contract. Hecla sought to foreclose. Bochert sued claiming he had a right to notice and an opportunity to cure the default. The district judge granted Hecla's motion for summary judgment and Bochert appealed. The Idaho Supreme Court affirmed, and on the issue of a right to cure, that Court held:

> The contract makes no provision for the vendee to cure any default. We note that Hecla Mining informed Borchert, in May 1981 and before, of Hecla Mining's intent to repossess the property. That repossession did not occur until June 1981. We find nothing in our statutes or in the common law requiring a seller to provide an opportunity to cure a default. As stated by the Court in *Prairie Dev. Co., Ltd. v. Leiberg,* 15 Idaho 379, at 394, 98 P. 616, at 621 (1908):
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> > "We are not aware of any authorities which hold that where time is made of the essence of a contract, and payments are not made in accordance with such contract, that the other party is required to serve notice upon such defaulter of the intention to declare such contract forfeited unless the payments be made in accordance therewith, and that a reasonable time must be given for complying with said contract."
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> *Accord Papesh v. Wagnon,* 29 Idaho 93, 157 P. 775 (1916).
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> Borchert relies heavily upon *Rush v. Anestos,* 104 Idaho 630, 661 P.2d 1229 (1983). There the Court held in dicta that, if a real estate contract does not specifically set the time for curing default, a reasonable time will be allowed. *Rush* is distinguishable from the instant case, since in *Rush* the escrow instructions required the seller to provide formal notice of default and granted the vendee an opportunity to cure the default.

109 Idaho at 484, 708 P.2d at 889. Since the Cantamessas have no legal right to cure a default under the Agreement or the Addendum, once the Cantamessas are in default, they remain in default. Garrett's acceptance of part of what was due does not change the fact that the payment was made *late*. Garrett's acceptance of that late payment does nothing to change the legal consequence that the Cantamessas were in default by failing to timely make $1,000.00 payments on January 1, February 1, and on March 1, 2019. And the Notice of Default given by Garratt to the Cantamessas on March 29, 2019, was not premature. The Cantamessas are still in default on these three payments to this day. Because the Cantamessas missed payments, even if the Cantamessas caught up on all their missed payments, they are still in default, and they will always be in default.

Additionally, as to the other half of the Cantamessas' apportionment argument (that the other $3,000.00 of the $6,000.00 payment made on March 5, 2019, was to be applied to the $8,000.00 catch-up payment which was due no later than the end of March 2019), the Cantamessas are also in default on the catch-up payment in the Addendum as they only paid $3,000.00 toward that obligation, not the entire $8,000.00. As of the end of the day on March 31, 2019, Cantamessas were in default on the $8,000.00 catch-up payment. Again, even if they somehow made a late payment in full, the Cantamessas would remain in default because they failed to make timely payment.

Finally, this Court will discuss the Cantamessas' argument that, "Mr. Garrett's demand for payment in full on March 29, 2019 was premature." Defs.' Suppl. Br. Re: Mot. to Seize Collateral, 4. First, as to the $1,000.00 payment due on January 1, 2019, February 1, 2019, and March 1, 2019, the Notice of Default given March 29, 2019, was clearly not premature. Second, as to the remainder of the catch-up payment, the notice

of default was *sent* prematurely on March 29, 2019, as the Cantamessas had until the end of March 2019 to make the full $8,000.00 payment. However, Garrett's Notice of Default gave the Cantamessas until April 1, 2019, to pay both the outstanding $5,000.00, and the $1,000.00 payment for the month of April. Decl. of Collette C. Leland in Supp. of Mot. for Ord. Auth. Pl. to Seize Collateral, Ex. F. With that language, the notice of default was not premature. Third, even if it was premature, nowhere does counsel for the Cantamessas explain the legal significance or consequence of a premature notice of default. This Court finds there is no legal significance or consequence of a premature notice of default for two reasons. Cantamessas are not entitled to notice under the Agreement or the Addendum. More importantly, Cantamessas did not make the rest of the catch-up payment and were thus also in default as it relates to the catch-up payment.

In conclusion, as of the date of the March 29, 2019, Notice of Default, the amount remaining outstanding totaled $5,000.00; $2,000.00 remained unpaid on the catch-up payment and $3,000.00 remained unpaid for the months of January through March of 2019. Regarding only the missed payments due on the first of January, February, and March, the Cantamessas were in default when they received the Notice of Default, and thus the Notice of Default was not premature.[3] Pursuant to I.C. § 28-9-607, the Court finds that because the Cantamessas were in default, Garrett may seize the collateral in which he holds a security interest.

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[3] Additionally, the Court notes that Garrett's Notice of Default gave the Cantamessas until April 1, 2019, to pay both the outstanding $5,000.00, and the $1,000.00 payment for the month of April. Decl. of Collette C. Leland in Supp. of Mot. for Ord. Auth. Pl. to Seize Collateral, Ex. F. The Cantamessas failed to make any such payment, and were thus also in default as it relates to the catch-up payment.

C. Waiver of Default

The Cantamessas argue:

> On March 12, 2019, Mr. Garrett acknowledged receipt of the $6,000 payment and inquired about the remaining $5,000 payment. (Ex. A, p. 2 of 6 to Supp. Decl. of Leland, filed August 9, 2019). On March 13, 2019, Ms. Cantamessa informed Mr. Garrett that they hoped to pay the remaining $5,000 by the following week. (Ex. A, pp. 1 of 6 t0 Supp. Decl. of Leland, filed August 9, 2019). Mr. Garrett responded that he would "*remain patient.*" (Ex. A, pp. 2 of 6 to Supp. Decl. of Leland, filed August 9, 2019). Mr. Garrett unequivocally waived default and extended the payment deadline. "*When no specific time for performance is established by contract, the law implies that performance must occur in a reasonable time.*["] McFarland v. Joint Sch.Dist. No. 365 in Elmore & Owyhee Ctys., 108 Idaho 519, 521-22, 700 P.2d 141, 143-44 (Idaho Ct. App. 1985). In McFarland, the creditor told the debtor in a meeting that they would wait for payment until the other party received a document, which never actually came. Id. The Court determined that this was enough to alter the payment terms and resulted in the payment due date being extended indefinitely. Id.
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> Like McFarland, Mr. Garrett altered the payment due date by stating he would remain patient. (Ex. A, pp. 1, 2 of 6 to Supp. Decl. of Leland, filed August 9, 2019). By not indicating a new payment date, Mr. Garrett extended the deadline indefinitely. McFarland, 108 Idaho at 522. The remaining $5,000 payment was due at the earliest on March 31, 2019 and based on Mr. Garrett's promise to remain patient, payment was not due until sometime after. Requiring only four days for the Cantamessas to remit payment prior to filing suit was not reasonable. McFarland, 108 Idaho at 522.

Defs.' Suppl. Br. Re: Mot. to Seize Collateral, 6. In making this argument, counsel for Cantamessas wholly ignores the facts of *McFarland*. Once the facts of *McFarland* are understood, the arguments made by counsel for Cantamessas are frivolous.

The facts of *McFarland,* as related by the Idaho Supreme Court, are as follows:

> The installment contract relates to land where an old, unused school building once was located. Prior to execution of the contract, the school district sold salvage rights for building materials to a third party who, in turn, assigned them to the McFarlands. The school district then contracted to sell the property itself to the McFarlands. The total sale price was $15,000. The buyers made a down payment of $1,000 and were to pay the balance of $14,000 approximately ten weeks later. The contract provided that "time is of the essence." The contract further provided that if the buyers defaulted the seller would have the right, after fifteen days' notice, to declare a forfeiture and to retain all sums paid by the purchasers.

> After signing the contract the buyers decided to reconstruct part of the building rather than to demolish it entirely. They tore down portions of the building and began to remodel the remainder. Meanwhile, the deadline for the $14,000 installment passed without payment. Ten months later the buyers received a notice of default. The buyers then made, and the seller accepted, a partial payment of $5,000. Nearly three more months elapsed without further payment, and a second notice of default was sent to the buyers. No payment was made. Following a meeting between Mr. McFarland and school officials, a third and final notice of forfeiture was sent to the buyers. Again, no payment was made. The seller declared a forfeiture. This lawsuit followed.

108 Idaho at 520-21, 700 P.2d at 142-43.

> The district court ruled that the buyers, Fred and Drena McFarland, did not make timely payments and that the resultant forfeiture did not constitute a penalty for which the seller, Joint School District No. 365, would be required to pay restitution. On appeal, the buyers contend that the seller waived any right to demand timely payment on the contract or, alternatively, that the parties orally modified the contract to extend the time for payment. The buyers also challenge the ruling that no restitution is required. We affirm the judgment insofar as it allows forfeiture; but for reasons explained below, we remand the issue of restitution for further consideration.

108 Idaho at 520, 700 P.2d at 142. On the issue of waiver of right to demand payment, the Idaho Supreme Court held:

> We first consider the buyers' contention that the seller waived all right to demand timely payment on the contract. The buyers postulate such waiver upon the seller's inaction for ten months after the first default and upon the seller's subsequent acceptance of the $5,000 partial payment. We disagree. It is well settled that:
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> > [w]here a contract for sale of real estate makes time of the essence, and provides for a forfeiture of the vendee's rights for failure on his part to make payments at certain times, a continued course of conduct on the part of the vendor in failing to declare a forfeiture, thereby leading the vendee to believe that the vendor waives a strict compliance with the terms of the contract, works a waiver of the vendor's right to declare a forfeiture, *unless and until he gives the vendee reasonable notice of his intention to do so, and a reasonable opportunity to make the delinquent payments.* (Emphasis added.)
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> *Sullivan v. Burcaw,* 35 Idaho 755, 763, 208 P. 841, 843 (1922).
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> In this case, it is undisputed that after ten months of inaction the seller demonstrated a clear intention to enforce its right to declare a forfeiture. It sent the buyers a notice of default. After the payment of

> $5,000, second and third notices of default were sent. This sequence of events shows that the seller repeatedly notified the buyers of its intent to enforce the forfeiture provision of the contract. To be sure, the seller extended the time for payment; but it is clear, as a matter of law, that the seller did not waive all right to demand timely payment.

108 Idaho at 521, 700 P.2d at 143. *McFarland* clearly shows that Garrett did not waive his right to demand timely payment. The Idaho Supreme Court then turned its attention to the next two issues. The Cantamessas focused on the first, and ignored the second. The first issue the Idaho Supreme Court discussed is as follows:

> The next question is whether the extended time for payment had expired when the seller issued the third and final notice of default. The buyers contend that the meeting between Mr. McFarland and school officials produced an oral agreement fixing a new date for paying the balance of the contract and that the deadline had not passed when the final notice was sent. However, three school officials who attended the meeting testified that the new deadline was conditioned upon McFarland's procurement of a "letter of guarantee" from another party. No such letter was obtained. Upon this conflicting evidence the trial judge found that the parties did not mutually agree upon a discrete deadline but that the time for payment was extended indefinitely. This finding is not clearly erroneous and, therefore, it will not be disturbed. I.R.C.P. 52(a).

Id. The second issue is as follows:

> The trial judge then ruled that the buyers did not pay the balance of the contract within a "reasonable time" and that the seller's last notice of default was proper. We agree. When no specific time for performance is established by contract, the law implies that performance must occur in a reasonable time. *Obray v. Mitchell,* 98 Idaho 533, 567 P.2d 1284 (1977). The buyers had approximately five months after the $5,000 payment, and nearly one month after the meeting with the school officials, to make the final payment before the last notice of default. We hold, as did the trial judge, that these were reasonable periods and that payment was past due when the final notice of default was sent.

108 Idaho at 521-22, 700 P.2d at 143-44. Thus, even in *McFarland*, as in the instant case, the buyers were in default. *McFarland* **does not** stand for the proposition that when the seller's statement that they will "remain patient", the seller thereby indefinitely extends the new payment due date, and that is exactly what counsel for the

Cantamessas argues: "Like McFarland, Mr. Garrett altered the payment due date by stating he would remain patient. (Ex. A, pp. 1, 2 of 6 to Supp. Decl. of Leland, filed August 9, 2019). By not indicating a new payment date, Mr. Garrett extended the deadline indefinitely." Defs.' Suppl. Br. Re: Mot. to Seize Collateral, 6. The present case is not at all "like *McFarland*". When Garrett responded on March 13, 2019, stating that he would "remain patient", the agreed upon deadline of March 31, 2019, **had not yet passed**. So when Garrett gave that response (that he will "remain patient") on March 13, 2019, he was simply stating he will remain patient, acknowledging the Cantamessas still had fifteen more days to pay the remainder of the catch-up payment. This Court finds there has been no waiver of default by Garrett's statement that he would "remain patient." Since the deadline for the catch-up payment had not yet passed, there is simply no way to construe Garratt's statement that he will "remain patient" as one creating a new deadline or an indefinite deadline.

D. Acceleration

Lastly, and briefly, the Court will address the apparent quandary both parties are facing as it relates to the acceleration clause contained in the Note. The Cantamessas argue that until ninety days had passed without payment, giving Garrett the right to invoke the acceleration clause present in the Note, they were not yet in default. Defs.' Opp. to Pl.'s Mot. for Order Auth. Pl. to Seize Collateral, 8. Garrett argues that he had the right to invoke the acceleration clause on March 29, 2019, as is stated in the Notice of Default, followed by the assertion that "the right of acceleration actually accrued on March 1, 2019." Pl.'s Mem. Re: Defs.' Default, 7. Neither party is correct.

The Court agrees with Garrett that acceleration and default are two separate issues, relative to this action. According to the Note, acceleration will occur when the Cantamessas fail to make "any payments due under [the] note within ninety (90) days

of the payment due date," thereby making the Note fully payable upon demand by Garrett. Compl., Ex. B. As defined by Black's Law Dictionary, an acceleration clause is "[a] loan agreement provision that requires the debtor to pay off the balance sooner than the due date if some specified event occurs, such as failure to pay an installment..." Black's Law Dictionary, *acceleration clause*, 11 (7th ed. 1999).

The Addendum specifically permitted the Cantamessas to essentially miss the payments for the months of September through December of 2018. Because the Addendum specifically permitted nonpayment during those months, Garrett was not permitted to invoke the acceleration clause based on nonpayment during those months. Therefore, Garrett's assertion that his right to accelerate payment on the Note on March 1, 2019, was in error.[4]

Additionally, Garrett's assertion that his right to accelerate payment on the Note on March 29, 2019, as stated in the Notice of Default, was in error. The Cantamessas made a payment on March 5, 2019, which went towards the catch-up payment. As discussed above, the catch-up payment was expected in January 2019, but would be accepted no later than March 2019. Therefore, the Cantamessas made a payment due under the Note within ninety days of the due date, and thus the acceleration clause could not be invoked. Even if the Cantamessas had not made the $6,000.00 payment on March 5, 2019, Garrett still would not have been permitted to invoke the acceleration clause on March 29, 2019. January 1, 2019, to March 29, 2019, totals 88 days. Garrett would have been permitted to invoke the acceleration clause on April 1, 2019, as ninety

[4] Garrett's rationale for his right to accelerate accruing on March 1, 2019, is that the $6,000.00 payment essentially brought the Cantamessas current through November 2018, leaving an outstanding balance for December 2018, January 2019, and February 2019 – ninety days of nonpayment. However, the Cantamessas were specifically permitted to skip payments through December 2018. Thus, December 2018 cannot be counted as 31 days of nonpayment as it relates to acceleration.

days of nonpayment would have occurred by that point. However, because the Cantamessas did indeed make a payment on March 5, 2019, with no subsequent payments made thereafter, the earliest Garrett could have invoked the acceleration clause was around June 4, 2019, after ninety days of nonpayment had occurred.

Separately, according to the Note, default occurs when there is a sum remaining unpaid after the agreed upon date (or accelerated date, if that circumstance arises) on which is was due and owing (the sum remaining unpaid is then charged a higher interest rate). Compl., Ex. B; Defs.' Suppl. Br. Re: Mot. to Seize Collateral, 4. As defined by Black's Law Dictionary, default is "[t]he omission or failure to perform a legal or contractual duty; esp., the failure to pay a debt when due." Black's Law Dictionary, *default*, 428 (7th ed. 1999). As discussed above, the Cantamessas failed to make the $1,000.00 payments due on January 1, February 1, and March 1 of 2019, as required by the Addendum. Therefore, by failing to pay the amounts owed when due, the Cantamessas were in default for those months.

IV. CONCLUSION

Based on the above, Plaintiff's Motion to Seize Collateral is granted.

IT IS HEREBY ORDERED Plaintiff's Motion to Seize Collateral is GRANTED.

Entered this 12th day of September, 2019.

John T. Mitchell, District Judge

Certificate of Service

I certify that on the 12th day of September, 2019, a true copy of the foregoing was mailed postage prepaid or was sent by interoffice mail, email or facsimile to each of the following:

Collette Leland
250 Northwest Blvd, Ste 206
Coeur d'Alene, ID 83814
ccl@winstoncashatt.com

Ryan Yahne
522 W. Riverside, Ste 700
Spokane, WA 99201
ryan@pyklawyers.com

By Jeanne Clausen, Secretary