

STATE OF IDAHO)
County of KOOTENAI)^{SS}

FILED 9/7/2022

AT 11:45 O'Clock A. M
CLERK OF DISTRICT COURT


Deputy

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

COPPER BASIN CONSTRUCTION, INC.,)
)
 Plaintiff/Counterdefendant,)
 vs.)
)
 BEYOND GREEN, INC.,)
)
 Defendant/Counterclaimant.)
)
 _____)

Case No. **CV28-21-4981**

**MEMORANDUM DECISION AND
ORDER DENYING DEFENDANT'S
MOTION FOR SUMMARY
JUDGMENT**

I. PROCEDURAL HISTORY AND FACTUAL BACKGROUND.

This matter is before the Court on motion for summary judgment brought by defendant Copper Basin Construction, Inc. (Copper Basin) against plaintiff Beyond Green, Inc. (Beyond Green).

Both Copper Basin and Beyond Green are Idaho corporations. Ver. Compl. ¶ 1-2; Ans. and Counterclaim (Ans.) ¶ 3-4. Beyond Green owns approximately forty-four acres of real property in Post Falls, Idaho, for which it entered into a Purchase Agreement and Escrow Instructions (PSA) with Copper Basin on February 5, 2021. Ver. Compl. ¶¶ 4-5; Ans. ¶¶ 6-7. On February 5, 2021, Copper Basin deposited \$25,000 into escrow, and on May 4, 2021, Copper Basin deposited an additional \$75,000 for due diligence. Ver. Compl. ¶ 6; Ans. ¶ 8. The PSA contains a provision indicating that construction of Cecil Road may be a condition precedent to closing on the property pursuant to the PSA. Ver. Compl. ¶ 7; Ans. ¶ 9. On July 8, 2021, "Copper Basin learned that Beyond Green had entered into an agreement to sell adjacent

property to Harlan Douglass Properties, LLC Beyond Green [allegedly] requested that Copper Basin agree to modify the PSA to require that Copper Basin take responsibility for the construction of Cecil Road.” Ver. Compl. ¶ 9; Ans. ¶ 11. On July 26, 2021, at 2:19 p.m., Copper Basin sent an email to Beyond Green that Copper Basin intended to proceed with the purchase of the Property pursuant to the terms set forth in the PSA signed on February 5, 2021. Ver. Compl. ¶ 10; Ans. ¶ 11. A few hours later, on July 26, 2021, at 5:05 p.m., Beyond Green emailed Copper Basin, informing it that they were not moving forward with closing on the property. Ver. Compl. ¶ 10 [this is the second ¶ 10]; Ans. ¶ 12.

The next day, on July 27, 2021, Copper Basin filed a Complaint against Beyond Green for breach of contract. Copper Basin seeks an order of specific performance of the terms of the PSA against Beyond Green, as well as direct and consequential damages “estimated to exceed the sum of TEN MILLION DOLLARS (\$10,000,000,00)”, attorneys’ fees, and punitive damages pursuant to Idaho Code § 6-1604. Ver. Compl. 6, ¶¶ 1, 2.

On August 31, 2021, Beyond Green filed its Answer and Counterclaim. Beyond Green’s Counterclaim is for slander of title and abuse of process for filing a notice of lis pendens in the present action that contained property not subject to the PSA. Ans. 4-6, ¶¶ 27-36. Beyond Green demanded a jury trial. Ans. 6.

On September 23, 2021, Copper Basin filed its Answer to (Beyond Green’s) Counterclaim.

When Copper Basin filed its Notice of Lis Pendens on July 29, 2021, Copper Basin described the following property as being subject to the lis pendens:

/

/

A parcel of land being a portion of the West half of the Southeast Quarter and a portion of the East half of the Southwest Quarter of Section 24, Township 51 North, Range 5 West, Boise Meridian, City of Post Falls, Kootenai County, Idaho and more particularly described as follows:

Beginning at the Center Quarter corner of said Section 24 from which the South Quarter corner bears South 00°16'19" West a distance of 2622.05 feet;

thence along the North line of said Southeast Quarter, South 89°08'09" East a distance of 42.50 feet;

thence leaving said North line, South 00°16'19" West a distance of 2592.35 feet to the North Right-of-way of Prairie Avenue;

thence along said North Right-of-way of Prairie Avenue, North 88°45'03" West a distance of 42.51 feet to a point on the West line of said Southeast Quarter;

thence continuing along said North Right-of-way, North 00°16'19" East a distance of 25.01 feet;

thence continuing along said North Right-of-way, North 89°42'22" West a distance of 42.50 feet;

thence leaving said North Right-of-way, North 00°16'19" East a distance of 971.23 feet;

thence North 89°25'14" West a distance of 621.30 feet to a point on the East line of the West half of the Southeast Quarter of said Southwest Quarter;

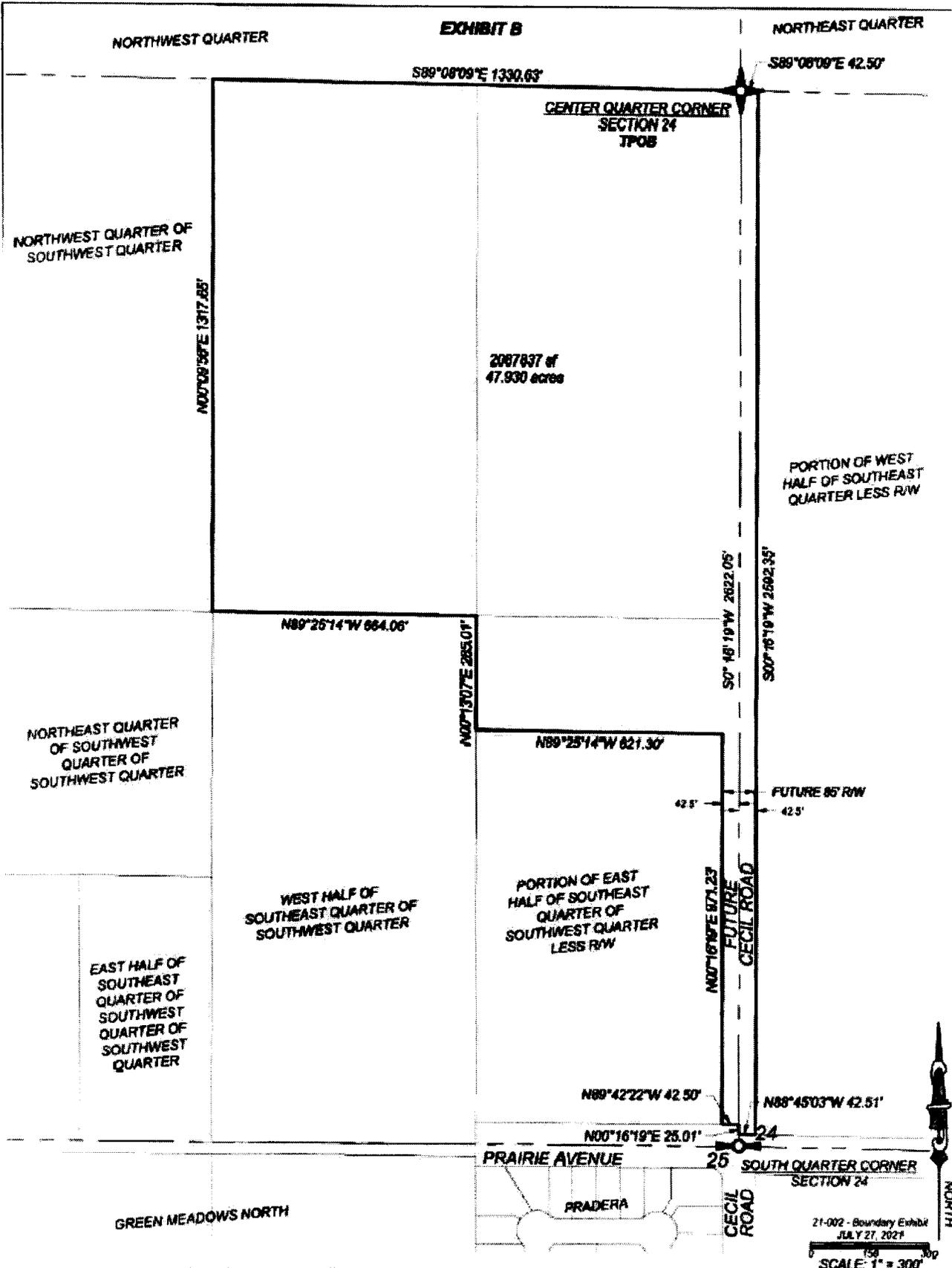
thence along said East line, North 00°13'07" East a distance of 285.01 feet to the Northeast corner of said West half of the Southeast Quarter of the Southwest Quarter;

thence along the North line of said West half of the Southeast Quarter of the Southwest Quarter, North 89°25'14" West a distance of 664.06 feet to the Northwest corner of said West half of the Southeast Quarter of the Southwest Quarter;

thence along the West line of the Northeast Quarter of said Southwest Quarter, North 00°09'56" East a distance of 1317.65 feet to the Northwest corner of said Northeast Quarter of the Southwest Quarter;

thence along the North line of said Northeast Quarter of the Southwest Quarter, South 89°08'09" East a distance of 1330.63 feet to the **True Point of Beginning**;

said parcel containing 47.93 acres of land, more or less.



Kronberg Decl. Ex. 2 [pages 18 and 19 of the document].

On February 8, 2022, Beyond Green filed a Release of Lis Pendens and amended Notice of Lis Pendens. It described the following property as being subject to the lis pendens:

A PARCEL OF LAND BEING A PORTION OF THE EAST HALF OF THE SOUTHWEST QUARTER OF SECTION 24, TOWNSHIP 51 NORTH, RANGE 5 WEST, BOISE MERIDIAN, KOOTENAI COUNTY, IDAHO. MORE PARTICULARLY BEING DESCRIBED AS FOLLOW.

COMMENCING AT THE SOUTH QUARTER CORNER OF SECTION 24 BEING A FOUND 1" IRON PIPE, TO WHICH THE CENTER OF SECTION 24 BEARS NORTH 01°01'19" EAST A DISTANCE OF 2621.91 FEET, THENCE ALONG SAID SECTION LINE NORTH 01°01'19" EAST A DISTANCE OF 1054.75 FEET TO THE TRUE POINT OF BEGINNING;

THENCE LEAVING SAID SECTION LINE NORTH 88°35'41" WEST A DISTANCE OF 664.40 FEET;

THENCE NORTH 00°58'01" EAST A DISTANCE OF 256.43 FEET;

THENCE NORTH 88°46'57" WEST A DISTANCE OF 663.39 FEET TO A FOUND 5/8" REBAR WITH YELLOW PLASTIC CAP MARKED LS 9367;

THENCE NORTH 00°54'24" EAST A DISTANCE OF 1317.73 FEET, TO THE NORTH LINE OF SAID SOUTHWEST QUARTER;

THENCE SOUTH 88°23'17" EAST A DISTANCE OF 1330.74 FEET TO SAID CENTER OF SECTION 24;

THENCE SOUTH 01°01'19" WEST, ALONG SAID SECTION LINE, A DISTANCE OF 1567.16 FEET TO THE TRUE POINT OF BEGINNING.

CONTAINING 44.002 ACRES MORE OR LESS.

Kronberg Decl. Ex. 4 [page 29 of the document].

On July 16, 2022, Copper Basin filed its Motion for Summary Judgment, and Memorandum in Support of Defendant's Motion for Summary Judgment and declarations of Chad Johnson, Chris Kronberg, and Gerald Dicker in support of its motion.

On August 23, 2022, Copper Basin filed its Objection and Memorandum in Opposition to Defendant's Motion for Summary Judgment and declarations of Greg Gervais, Paul W. Daugharty, and Steve White in support thereof.

On August 30, 2022, Beyond Green filed its Reply Memorandum in Support of Summary Judgment Motion.

The primary issues on motion for summary judgment is whether the PSA is enforceable against Beyond Green and whether the initial Notice of Lis Pendens filed by Copper Basin included property that was not subject to the PSA.

A hearing on the motion for summary judgment was held on September 6, 2022, at 1:30 P.M. The Court announced that it denied Beyond Green's Motion for Summary Judgment, and that it would issue a memorandum decision and order.

II. STANDARD OF REVIEW

Idaho Rule of Civil Procedure 56 governs motions for summary judgment. According to that Rule, summary judgment must be granted "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." I.R.C.P. 56(a). A party asserting that there is no genuine dispute as to any material fact or a party asserting that a genuine dispute exists, must support that assertion by "citing to particular parts of materials in the record" or "showing that the materials cited do not establish the absence or presence of a genuine dispute, or that an adverse party cannot produce admissible evidence to support the fact." *Id.*

If a party fails to properly support an assertion of fact or fails to properly address another party's assertion of fact as required by Rule 56(c), the court may:

- (1) give an opportunity to properly support or address the fact;
- (2) consider the fact undisputed for purposes of the motion;
- (3) grant summary judgment if the motion and supporting materials, including the facts considered undisputed, show that the movant is entitled to it; or
- (4) issue any other appropriate order.

Id. 56(e).

The burden of proof is on the moving party to demonstrate the absence of a genuine issue of material fact. *Rouse v. Household Fin. Corp.*, 144 Idaho 68, 70, 156 P.3d 569, 571 (2007) (citing *Evans v. Griswold*, 129 Idaho 902, 905, 935 P.2d 165, 168

(1997)). “Such an absence of evidence may be established either by an affirmative showing with the moving party’s own evidence or by a review of all the nonmoving party’s evidence and the contention that such proof of an element is lacking.” *Heath v. Honker’s Mini-Mart, Inc.*, 134 Idaho 711, 712, 8 P.3d 1254, 1255 (Ct. App. 2000) (citing *Dunnick v. Elder*, 126 Idaho 308, 311, 882 P.2d 475, 478 (Ct. App. 1994)). “A material fact is one upon which the outcome of the case may be different.” *Peterson v. Romine*, 131 Idaho 537, 540, 960 P.2d 1266, 1269 (1998).

Once the moving party meets their burden of establishing the absence of a genuine issue of material fact, the burden shifts to the non-moving party to provide specific facts showing there is a genuine issue for trial. *Kiebert v. Goss*, 144 Idaho 225, 228, 159 P.3d 862, 864 (2007) (citing *Hei v. Holzer*, 139 Idaho 81, 85, 73 P.3d 94, 98 (2003)). To do so, the non-moving party “must come forward with evidence by way of affidavit or otherwise that contradicts the evidence submitted by the moving party, and that establishes the existence of a material issue of disputed fact.” *Chandler v. Hayden*, 147 Idaho 765, 769, 215 P.3d 485, 489 (2009) (citing *Kiebert v. Goss*, 144 Idaho 225, 228, 159 P.3d 862, 865 (2007)). “Circumstantial evidence can create a genuine issue of material fact. . . . However, the non-moving party may not rest on a mere scintilla of evidence.” *Shea v. Kevic Corp.*, 156 Idaho 540, 545, 328 P.3d 520, 525 (2014) (quoting *Park West Homes, LLC v. Bamson*, 154 Idaho 678, 682, 302 P.3d 18, 22 (2013)).

In determining whether material issues of fact exist, all allegations of fact in the record and all reasonable inferences from the record are construed in the light most favorable to the party opposing the motion. *City of Kellogg v. Mission Mountain Interests Ltd., Co.*, 135 Idaho 239, 240, 16 P.3d 915, 919 (2000). When a jury is to be the finder of fact, summary judgment is not proper if conflicting inferences could be drawn from the record and reasonable people might reach different conclusions. *State*

Dep't of Fin. v. Res. Serv. Co., Inc., 130 Idaho 877, 880, 950 P.2d 249, 252 (1997).

Edmondson v. Shearer Lumber Prod., 139 Idaho 172, 176, 75 P.3d 733, 737 (2003).

III. ANALYSIS

Beyond Green moves for summary judgment on Copper Basin's breach of contract claim and all other claims related to that breach of contract claim, because:

the Agreement lacks essential terms necessary for an enforceable contract. Rather, the Agreement leaves those essential terms to be determined by future negotiations. Specifically, and contrary to the allegations of Copper Basin, the Agreement does not specify which party will pay for and/or build Cecil Road, a condition precedent to the closing of the sale.

Mem. in Supp. of Def.'s Mot. for Summ. J. (Mem. in Supp. of Mot. for Summ. J.) 2.

Beyond Green also moves for summary judgment on one element of its counterclaims:

In response to Copper Basin's Complaint, [Beyond Green] has filed two counterclaims, slander of title and abuse of process. These counterclaims are based on the fact that Copper basin recorded a *Notice of Lis Pendens* on or about July 29, 2021, that wrongfully incorporated [Beyond Green] property that is not the subject of the Agreement. [Beyond Green] is seeking summary judgment as to the inclusion in the *Notice of Lis Pendens* [Beyond Green] property that is not the subject of the Agreement.

Id. (italics in original). Beyond Green argues, first, that the PSA is unenforceable because it leaves critical terms to be negotiated in the future and is an agreement to agree, and, second, that the lis pendens recorded on July 29, 2021, included property that was not the subject of the PSA. The Court addresses each argument in turn.

A. Genuine Issues of Material Fact Exist as to Enforceability of the Purchase Agreement, and Summary Judgment Is Denied on that Ground.

Beyond Green argues first that the PSA is unenforceable because it "leaves critical terms to be negotiated in the future" and is an "agreement to agree". Mem. in Supp. of Mot. for Summ. J. 5, 7. Specifically, it argues:

By its own plain language, the Agreement at issue in this case has necessary terms that are left for future negotiation and the Agreement is therefore unenforceable. The necessary terms include an agreement on the construction of Cecil Road:

Provided, further, the parties hereto must agree upon the following: (1) party or entity responsible for construction of Cecil Road; (2) allocation of cost and expense; and (3) Cecil Road development plan and schedule.

The Agreement specifically states that construction of Cecil Road is a condition precedent to the closing of the sale. The Agreement leaves for future negotiations who will be responsible for construction of Cecil Road, who will pay for the construction of Cecil Road, and the creation of the development plan and schedule for construction of Cecil Road. Obviously, because these critical terms are left for future negotiations, there is no meeting of the minds as to those terms and the Agreement is unenforceable.

Id. at 6-7 (internal citations omitted). It further argues:

[*Spokane Structures v. Equitable Investments, LLC*, 148 Idaho 604 (2005); *Maroun v. Wyreless Systems, Inc.*, 141 Idaho at 614; and *Dale's Service Co., Inc. v. Jones*, 96 Idaho 662 (1975)], as well as the clear language of the Agreement itself, make obvious that the Agreement left essential terms to be negotiated in the future, creating an unenforceable agreement to agree. No meeting of the minds or mutuality of agreement existed as to the "(1) party or entity responsible for Cecil Road; (2) allocation of cost and expense; and (3) Cecil Road development plan and schedule." No doubt exists that these are material terms, as the Agreement itself states that they are conditions precedent to Copper Basin closing on the sale. As a matter of law, the Agreement is unenforceable, and the Complaint should be dismissed.

Id. at 9.

Copper Basin responds:

Beyond Green argues paragraph 6.1.1 (e) in the PSA establishes that there has been no meeting of the minds and the PSA is unenforceable. [Copper Basin] disagrees. The contingencies in the PSA are conditions precedent for the benefit of [Copper Basin] and were [sic] fully negotiated by the parties. They were necessary because [Copper Basin] was buying the Property for development and the improvement to Cecil Road was required for development of the Property [Copper Basin] was buying and remaining [sic] property being sold or developed by Beyond Green. In fact, all of the documents referencing the subject [sic] Property and Inland Northwest Tech Park and the City of Post Falls, Idaho identified Cecil Road. There simply is no viable argument that Beyond Green was not responsible for the improvements to Cecil Road.

The undisputed facts establish that Beyond Green acknowledged its responsibility for the construction of Cecil Road and agreed that [Copper Basin] would assist in constructing Cecil Road subject to reimbursement by Beyond Green. It should be noted that even the draft Road Construction Agreements

prepared by Jeff Bornholdt on behalf of Beyond Green provided in pertinent part that:

“WHEREAS, in connection with the Sale Contract, Seller agreed to construct certain improvements to the public roadway known as Cecil Road on the Property...” (Emphasis Added [in brief]).

For purposed [sic] of summary judgment there exists at a minimum genuine issues of material fact as to the Cecil Road improvements.

The crux of Beyond Green’s argument on summary judgment is “because the parties left material terms of the Agreement to be negotiated in the future, the Agreement is an unenforceable agreement to agree.” However, PSA [sic] clearly and unequivocally proves that the conditions precedent an/or [sic] contingency items in paragraph 6.1 **“are for Buyer’s benefit only and may be approved or disapproved, in whole or in part, by Buyer in writing.”** (Emphasis Added [in brief]). Simply put, [Copper Basin’s] obligation to perform is tied to the condition precedent. Beyond Green’s obligations under the PSA are not contingent.

Beyond Green cites numerous cases including *Spokane Structures, Inc. v. Equitable Investments, LLC*, 148 Idaho 616 (2010) in support of the argument that the contingencies in paragraph 6.1 of the PSA create an agreement to agree. It is respectfully submitted that the cases cited by Beyond Green are distinguishable from the undisputed facts of this case. Again, the condition precedent set forth in paragraph 6.1 is for the sole benefit of [Copper Basin]. Furthermore, there is no dispute that the [sic] Cecil Road was to be dedicated to the City of Post Falls, Idaho as a part of the development of the Property and property sold by Beyond Green to Harlan Douglas.

...
The PSA in this case clearly provided that the provisions of paragraph 6.1 are for the benefit of [Copper Basin]. There can be no real dispute about that fact nor that Beyond Green freely exercised its contractual right to grant [Copper Basin] this contractual right. . . . It is respectfully submitted that [Copper Basin] has not caused the failure of any condition precedent. To the contrary, [Copper Basin] has made reasonable efforts to work with Beyond Green is [sic] resolving [Copper Basin]’s conditions precedent to the extent within [Copper Basin]’s control. The undisputed facts in this case establish [Copper Basin]’s efforts. Beyond Green on the other hand has not acted in good faith or made reasonable efforts to ensure performance under the PSA. It would be improper to allow Beyond Green to avoid performance of the PSA under the circumstances of this case. The PSA is not an agreement to agree, the parties negotiated the same and [Copper Basin] is entitled to performance.

...
[Copper Basin] respectfully argues in the alternative that is [sic] the PSA is ambiguous then the motion for summary judgment must necessarily be denied. Finally, Beyond Green drafted the PSA and any ambiguities must necessarily be resolved against Beyond Green as the drafter of the PSA.

Mem. in Opp’n to Mot. for Summ. J. 4-8 (internal citations omitted) (bold in original).

Beyond Green replies:

The parol evidence rule excludes consideration of evidence extrinsic to the Agreement. . . . Copper Basin has not identified any evidence in support of an argument that the Agreement is not intended to be a final statement of the parties' agreement.

Moreover, . . . [t]he Agreement contains a merger clause. It is found at paragraph 9.1 [Exhibit 1 to the Declaration of Chris Kronberg at 7] and states as follows:

9.1 Oral and Written Agreements. This Agreement represents the entire Agreement between the Parties hereto and supersedes any prior or contemporaneous negotiations, representations, agreements, and understandings, whether written or oral, between the Parties hereto pertaining to the subject matter hereof. [sic], and none shall be used to interpret or construe this Agreement. Any changes to this Agreement shall be in writing and shall be executed by both Buyer and Seller. . . .

Plainly, the Agreement is an integrated contract and complete statement of the parties' intent, the meaning of which must be determined from the Agreement's language and not through use of extrinsic evidence. Copper Basin has made no argument to contest the fact that the Agreement is an integrated contract and a complete statement of the parties' intent.

The parties' complete statement of their intent to negotiate the terms of an agreement for the construction of Cecil Road is found at paragraph 6.1.1(e) of the Agreement. No need for the Court to consider evidence extrinsic to the Agreement exists.

. . . .

No ambiguity exists as to the intent of the parties in relation to paragraph 6.1.1(e) of the Agreement. . . . Copper Basin has made no argument that the Agreement is ambiguous, thereby allowing consideration of extrinsic evidence to construe its terms. Copper Basin has failed to argue, let alone demonstrate, that the language of paragraph 6.1.1(e) of the Agreement is patently or latently ambiguous. Parol evidence, such as that attached to the declarations of Steve White and Greg Gervais, may not be considered in determining the intent of a contract unless it is ambiguous. . . .

The intent of the parties to the Agreement is plain – they intended to negotiate a critical and material element of the Agreement in the future, rendering the Agreement unenforceable. The language of paragraph 6.1.1(e) is clear. Copper Basin has made no argument or demonstration that the Agreement is ambiguous, so consideration of the extrinsic evidence Copper Basin has injected into the record is inappropriate.

. . . .

Copper Basin relies heavily on the claim that construction of Cecil Road was a contingency or condition precedent for Copper Basin's benefit. However, Copper Basin fails to connect that claim to an interpretation of paragraph 6.1.1(e) that changes its clear meaning. Regardless of whether the construction of Cecil Road was to benefit Copper Basin, paragraph 6.1.1(e) clearly states that the parties would negotiate the responsibility for constructing Cecil Road in the future. Paragraph 6.1.1(e) is an unambiguous "agreement to agree" and therefore the Agreement is unenforceable.

Copper Basin provides no analysis and cites no case law in support of its argument. Rather, Copper Basin merely asserts that the case law cited by

[Beyond Green] is distinguishable. Yet Copper Basin fails to distinguish a single case cited by [Beyond Green].

Each of the cases cited by [Beyond Green] involved a material contract term that the parties left unresolved or for future negotiation, as the parties did in this case, rendering the contracts at issue unenforceable. In *Spokane Structures, Inc. v. Equitable Investments, LLC*, the unresolved contract term involved the plans and specifications of the work to be performed, as well as the price for the work. In *Maroun v. Wyreless Systems, Inc.*, the parties failed to include in their contract the milestones on which an equity interest would be based. In *Dale's Service Co., Inc. v. Jones*, the parties' contract failed to include the amount of fill the defendant subcontractor was to provide, making the contract unenforceable. All those cases are on point with the issue in this case – the parties left a material term of an agreement unresolved or for future negotiation, rendering the contracts unenforceable.

The Agreement suffers the same affliction as the contracts in the cited cases. The Agreement reflects a lack of agreement on the construction of Cecil Road because the parties, by the clear language of the Agreement, left that issue to be negotiated in the future. The Agreement is unenforceable.

.....
Copper Basin's assertion that [Beyond Green] had the responsibility to build Cecil Road is contradicted by the language of the Agreement, as well as the language in the draft "Development Agreement/Road Construction Agreement" attached as Exhibit O to the White Declaration. Nowhere in the Agreement does it state that [Beyond Green] is responsible for construction of Cecil Road. In fact, that is the very point of paragraph 6.1.1(e) of the Agreement – the parties were to come to an agreement in the future on the construction of Cecil Road. . . .

The Agreement does not place the responsibility for constructing Cecil Road on [Beyond Green] because the plain language of the Agreement states that the parties will negotiate that responsibility in the future. The Agreement is therefore unenforceable.

Reply Mem. in Supp. of Summ. J. Mot. [Reply Mem. in Supp. of Mot. for Summ. J.] 5-9.

The Idaho Court of Appeals has held:

A contract will be enforced if it is "complete, definite and certain in all its material terms, or contains provisions which are capable in themselves of being reduced to certainty. *Giacobbi Square v. PEK Corp.*, 105 Idaho 346, 348, 670 P.2d 51, 53 (1983) (emphasis omitted [in original]). To meet this standard the contract must embody a distinct understanding of the parties, showing a meeting of the minds as to all necessary terms of the contract. The obligations of the parties must be identified so that the adequacy of performance can be ascertained. If terms necessary to a contract are left for future negotiation, the contract cannot be enforced.

Dursteler v. Dusteler, 108 Idaho 230, 233-34, 697 P.2d 1244, 1247-48 (Ct. App. 1985)

(internal citations omitted). The Idaho Supreme Court has held:

Generally, an agreement to agree is unenforceable, as its terms are so indefinite that it fails to show a mutual intent to create an enforceable obligation No enforceable contract comes into being when the parties leave a material term for future negotiations, creating a mere agreement to agree.

In re University Place/Idaho Water Center Project, 146 Idaho 527, 533, 199 P.3d 102, 108 (2008) (quoting *Maroun v. Wyreless Systems, Inc.*, 141 Idaho 604, 614, 114 P.3d 974, 984 (2005)) (internal citations omitted).

If a written contract is unambiguous and complete on its face, with no fraud or mistake being alleged, extrinsic evidence of prior, contemporaneous, or future negotiations or conversations are not admissible to contradict, vary, alter, add to, or detract from the terms of the contract. *Howard v. Perry*, 141 Idaho 139, 141, 106 P.3d 465, 467 (2005). A written contract is complete on its face and integrated when it contains a merger clause. *Kimbrough v. Reed*, 130 Idaho 512, 515, 943 P.2d 1232, 1235 (1997); *Howard*, 141 Idaho 139, 142, 106 P.3d 465, 468.

Here, the PSA is complete on its face because it contains a merger clause, as Beyond Green accurately recited in its reply. Therefore, the parol evidence rule bars the Court from considering extrinsic evidence when interpreting whether the clause in question created either a condition precedent or an agreement to agree unless it finds the clause in question to be ambiguous. *Howard*, 141 Idaho at 141, 106 P.3d at 467; *Kimbrough*, 130 Idaho at 515, 943 P.2d at 1235; *Cannon v. Perry*, 144 Idaho 728, 731 (2007).

Ambiguity may be found where the language of a contract:

“is subject to conflicting interpretations.” *Marek v. Lawrence*, 153 Idaho 50, 53, 278 P.3d 920, 923 (2012). “However, ambiguity is not present merely because the parties present different interpretations to the court.” *Jasso v. Camas Cnty.*,

151 Idaho 790, 798, 264 P.3d 897, 905 (2011). “To determine whether a[n] instrument is ambiguous, it must be reviewed as a whole.” *Neider v. Shaw*, 138 Idaho 503, 508, 65 P.3d 525, 530 (2003).

Hoch v. Vance, 155 Idaho 636, 639, 315 P.3d 824, 827 (2013). Where the intention of the drafters is unclear, the determination is a “question[] of fact with reference to the surrounding facts and circumstances.” *Porter v. Bassett*, 146 Idaho 399, 404-05, 195 P.3d 1212, 1217-18 (2008) (quoting *Read v. Harvey*, 141 Idaho 497, 500, 112 P.3d 785, 788 (2005)) (internal quotation omitted).

[C]onflicting interpretations may arise when a phrase lends itself, without contortion, to a number of inconsistent meanings . . . [Also,] inconsistencies in an [instrument] may throw such a shadow of ambiguity over [it] as to warrant the introduction of parol evidence as an aid to discovering the intention of the parties.

Marek v. Lawrence, 153 Idaho 50, 53-54, 278 P.3d 920, 923-24 (2012) (quoting *Porter v. Bassett*, 146 Idaho 399, 404–05, 195 P.3d 1212, 1217-18 (2008)) (internal quotations omitted). “An unambiguous contract will be given its plain meaning, which is based on the words of the contract.” *Dengler v. Hazel Blessinger Family Trust*, 141 Idaho 123, 128, 106 P.3d 449, 454 (2005) (internal citations omitted). However, where a contract is found to be ambiguous, the Court “must determine the meaning of the contract by reference to the parties’ intent at the time the instrument was drafted.

Bondy v. Levy, 119 Idaho 961, 965, 812 P.2d 268, 272 (1991) (citing *Thomas v. Campbell*, 107 Idaho 398, 690 P.2d 333(1984)).

[T]he parties’ intent is to be determined by looking at the contract as a whole, the language used in the document, the circumstances under which it was made, the objective and purpose of the particular provision, and any construction placed upon it by the contracting parties as shown by their conduct or dealings.

J.R. Simplot v. Bosen, 144 Idaho 611, 614, 167 P.3d 748, 751 (2006). “If the parties’ intent cannot be determined from a contract’s plain language, interpretation of the contract is a question of fact,” *Weisel v. Beaver Springs Owners Ass’n, Inc.*, 152 Idaho

519, 528, 272 P.3d 491, 500 (2012), and summary judgment is not proper. *Currie v. Walkinshaw*, 113 Idaho 586, 591, 746 P.2d 1045, 1050 (Ct. App. 1987).

There are two kinds of ambiguity—patent and latent. A patent ambiguity “is evident from the face of the instrument.” *Cool v. Mountainview Landowners Co-Operative Ass’n, Inc.*, 139 Idaho 770, 773, 86 P.3d 484, 487 (2004) (citing *Estate of Kirk* at 824, 907 P.2d at 801). “A latent ambiguity is not evident on the face of the instrument alone, but becomes apparent when applying the instrument to the facts as they exist.” *Cool v. Mountainview Landowners Co-Operative Ass’n, Inc.*, 139 Idaho 770, 773, 86 P.3d 484, 487 (2004) (citing *Estate of Kirk* at 824, 907 P.2d at 801). The Idaho Supreme Court held in *Dengler*:

A condition precedent is an event not certain to occur, but which must occur, before performance under a contract becomes due. *Steiner v. Ziegler Tamura Ltd., Co.*, 138 Idaho 238, 242, 61 P.3d 595, 599 (2002). A condition precedent may be expressed in the parties’ agreement. *Id.* When there is a failure of a condition precedent through no fault of the parties, no liability or duty to perform arises under the contract. *Id.* Where a party is the cause of the failure of a condition precedent, he cannot take advantage of the failure. *Fish v. Fleishman*, 87 Idaho 126, 133, 391 P.2d 344, 348 (1964) Where a party has control over the happening of a condition precedent he must make a reasonable effort to cause the condition to happen. *Schlueter v. Nelson*, 74 Idaho 396, 399, 263 P.2d 386, 387 (1953)

141 Idaho at 128, 106 P.3d at 454 (internal citations omitted). A few years before it decided *Dengler*, the Idaho Supreme Court held:

A condition precedent is distinguishable from a promise or covenant in that a condition creates no right or duty of performance in itself and its non-occurrence does not constitute a breach of the contract. “A promise in a contract creates a legal duty in the promisor and a right in the promise; the fact or event constituting a condition creates no right or duty and is merely a limiting or modifying fact.” A covenant is a duty under the contract, the breach of which gives a right to enforce the contract. As a general rule, conditions precedent are not favored by the courts.

Steiner v. Ziegler Tamura Ltd., Co., 138 Idaho 238, 242, 61 P.3d 595, 599 (2002) (internal citations omitted) (quoting *World Wide Lease, Inc. v. Woodworth*, 111 Idaho

880, 887-88, 728 P.2d 769, 776-77 (Ct. App. 1986). Whether a contract includes a condition precedent is a question of fact. 111 Idaho at 888, 728 P.2d at 777.

Here, the plain language of the PSA states in relevant portion:

6.1 Contingency Items. **Buyer's obligation to close the escrow** created hereunder and purchase the Property is subject to the following contingency items. Buyer shall have one hundred and twenty (120) days from the date of this Agreement to satisfy these contingency items in the order of priority determined by Buyer and to Buyer's satisfaction in its sole discretion, and **Seller shall reasonably cooperate** with Buyer in doing so as provided below. If Buyer shall not deliver its written disapproval of the following contingency items within said one hundred and twenty (20) [sic] days, the contingency items shall be deemed approved and the Deposit shall be nonrefundable but applicable against the Purchase Price. . . .

6.1.1 Seller Information. . . .

(e) The parties hereto acknowledge and agree that **the construction of Cecil Road is a condition precedent to Buyer's duty to close this sale.** As such, **Buyer's approval of the development and construction of Cecil Road shall be required as a condition precedent or subsequent to Buyer's obligations** hereunder. Provided, further, the parties hereto must agree upon the following: (1) party or entity responsible for construction of Cecil Road; (2) allocation of cost and expense; and (3) Cecil Road development plan and schedule. This includes the development of Cecil Road North and the be [sic] constructed to the northern boundary of the Property.

. . . .

(h) Seller agrees to deliver to Buyer the information requested above in (a) through (e), inclusive, within ten (10) days of the execution of this Agreement.

. . . .

6.2 Approval/Disapproval. The contingency items in paragraph 6.1 are for Buyer's benefit only and may be approved or disapproved, in whole or in part, by Buyer in writing. ***If not disapproved in writing by Buyer before one hundred and twenty (120) days*** or the additional thirty (30) day extension, if requested, ***from the date of this Agreement***, or upon Buyer's earlier written disapproval of any of the above contingency items, ***all contingency items shall be deemed approved by Buyer and this Agreement and the escrow created pursuant to this Agreement shall proceed to close.*** If the contingency items are so approved by Buyer, Escrow, without further instruction, shall release Buyer's Deposit to Seller which shall be non-refundable (pursuant to section 3 above) but shall apply to the purchase price upon close of escrow. If escrow does not close for any reason, other than Seller's default, then the Deposit shall be retained in full by Seller as full and liquidated damages.

Ver. Compl. Ex. C at 3-5 (italics and bold added, and underline in original).

The Court finds there is no ambiguity in the above-quoted language, either latent or patent. Paragraph 6.1.1(e) states that “the construction of Cecil Road is a condition precedent or subsequent to Buyer’s duty to close.” Then, paragraph 6.2 states that if Copper Basin did not disapprove of the contingencies in writing within 120 days of the signing of the agreement, the contingency items would be deemed approved and the escrow would proceed to close. While ordinarily this may create an ambiguity, the language of paragraph 6.1.1(e) allows the agreement regarding the construction of Cecil Road to be either a condition precedent or subsequent to Copper Basin’s duty to close. Paragraph 6.2 makes it clear that the parties agreed to close on June 5, 2021—120 days after the parties signed the PSA on February 5, 2021. Thus, the Court finds that, in this particular instance, there is no ambiguity surrounding the meaning of the terms of the contract, and extrinsic evidence will not be reviewed in interpreting it.

The Court finds that the language is not “so indefinite that it fails to show a mutual intent to create an enforceable obligation” such to create an unenforceable agreement to agree. *Maroun v. Wyreless Systems, Inc.*, 141 Idaho 604, 614, 114 P.3d 974, 984 (2005). The language in the PSA makes clear that the contingency is for the buyer’s (Copper Basin) benefit. Moreover, as Copper Basin pointed out in its response brief, there is no language in the PSA indicating that Beyond Green had any contingencies affecting its duty to close. Rather, the contingencies apply solely to the buyer, Copper Basin. It cannot be said that the above-quoted language is “so indefinite that it fails to show a mutual intent to create an enforceable obligation” for two reasons. First, paragraph 6.1.1(e) indicates the agreement to construct Cecil Road is either a condition precedent or subsequent. Second, paragraph 6.2 indicates that the parties agree to close whether or not the condition is met. If it were an agreement to agree, there would be terms making it clear that the seller has no obligation to close if the

contingency of agreeing upon the construction of Cecil Road is not met. That is simply not the case. It is clear that the contingency only applied to the seller's obligation to close, and only the buyer may disapprove of the contingency or even enforce the contingency as a means of rescinding the contract. Since the language only applies to the buyer, there is no "mutual" intent to create an unenforceable agreement to agree.

For similar reasons, Beyond Green, as the seller, may not use paragraph 6.1.1(e) as a means to rescind the contract because it only affects the buyer's—Copper Basin's—ability to rescind the contract based on the contingency. Moreover, Copper Basin only had until June 5, 2021, to rescind on the basis of paragraph 6.1.1(e) absent Copper Basin's written request for an extension or disapproval. There is no evidence on the record that Copper Basin submitted a written request for an extension or that Copper Basin disapproved of the contingencies in writing. Nevertheless, Copper Basin is willing to proceed with the closing and is not the party seeking to use the existence of a condition precedent to avoid performance. The Court finds that, as a matter of law, the plain language of the PSA did not create an unenforceable agreement to agree, nor did it create a condition precedent entitling Beyond Green to nonperformance.

Accordingly, summary judgment on this issue is denied.

B. Genuine Issues of Material Fact Exist as to Whether the July 29, 2021, Notice of Lis Pendens Included Property Not Subject to the PSA, and Summary Judgment Is Denied on this Ground.

Beyond Green next argues:

By simply comparing the acreage and shape of the property identified in the Complaint and the second lis pendens filed on February 8, 2022, with the acreage and shape of the property identified in the first lis pendens recorded on July 29, 2021, it is clear that the first lis pendens improperly included property that was not the subject of the Agreement. By filing the second lis pendens, Copper Basin has admitted as much. The Agreement attached to the Complaint asserts that the Property consists of about forty-four (44) acres of property, as does the second lis pendens. The first lis pendens covers 47.93 acres. The shape of the property in Exhibit B to the Agreement is significantly different from

the shape of the property identified in the first lis pendens. Obviously, Copper Basin recognized that its first lis pendens was incorrect, and therefore filed the second lis pendens.

The Property to be sold to Copper Basin consists of two parcels, Parcel No. P-0000-024-5330 and Parcel No. P-0000-024-5000, which combined are 44.001 acres. As Exhibit 1 to the *Declaration of Chad Johnson* makes clear, the property described in the first lis pendens includes about 3.912 acres that extend beyond the Property and includes other property that was not subject to the Agreement. That other property was also owned by [Beyond Green] and was to be sold to Harlan Douglas.

No genuine issue of fact exists as to whether the July 27 [sic], 2021, *Notice of Lis Pendens* recorded by Copper Basin includes property that is not the subject of the Agreement. [Beyond Green] therefore respectfully requests that the Court grant summary judgment as to whether the July 27 [sic], 2021, *Notice of Lis Pendens* included property that was not the subject of the Agreement.

Mem. in Supp. of Mot. for Summ. J. 9-10 (italics in original).

Copper Basin responds:

The Lis Pendens originally filed by [Copper Basin] included both the 44 acres and the area identified as Cecil Road. There is no dispute, and the record before the Court establishes, that Cecil Road was to provide access to the Property being purchased by [Copper Basin] and that pursuant to the agreements with the City of Post Falls, Idaho would be built and dedicated for public use.

[Copper Basin] takes issue with the assertion that the original Lis Pendens was improper. In fact, the argument of Beyond Green, through counsel, that in releasing the original Lis Pendens and recording the Lis Pendens on February 8, 2022, [Copper Basin] admitted that the original Lis Pendens was improper is both patently false and misleading. As set forth in the Declaration of Paul W. Daugharty, on or about January 7, 2022, Beyond Green sent an email through Mr. Kronberg explaining that in order for the construction of Cecil Road to occur Ross Point Water District needed to acquire a couple of acres from Beyond Green for a water tower and well site. In an effort to facilitate the construction of Cecil Road the original Lis Pendens was released and another recorded.

The recording of the Lis Pendens was not improper. Additionally, there is no dispute that Cecil Road was designated to service the Property being purchased by [Copper Basin] from Beyond Green. At a minimum, for purposes of summary judgment material issue of fact exist and the motion as pled should be denied.

Objection and Mem. in Opp'n to Def.'s Mot. for Summ. J. (Opp'n to Mot. for Summ. J.)

8-9 (internal citations omitted).

Beyond Green replies:

In paragraph thirty (30) of the White Declaration, Copper Basin admits that the lis pendens Copper Basin recorded on July 29, 2021, concerned property that was not the subject of this litigation:

The Lis Pendens recorded by [Copper Basin] included both the Property and the property that has always been acknowledged and agreed to be required for the development of Cecil Road.

Greg Gervais makes the same admission in paragraph eleven of the *Declaration of Greg Gervais in Opposition to Defendant's Motion for Summary Judgment* ("The Lis Pendens was recorded against the Property and Cecil Road because Cecil Road was part of the agreement and necessary for the development of the property purchased by [Copper Basin]"). A similar admission is made in the *Declaration of Paul W. Daugharty in Opposition to Defendant's Motion for Summary Judgment*, wherein he admits that [Beyond Green] asked Copper Basin to replace the July 27 [sic], 2021, lis pendens with one that applied to only the forty-four (44) acres addressed in the Agreement. Copper Basin further admits that the "Property" that is the subject of this litigation consists of forty-four (44) acres. In contrast, the lis pendens recorded by Copper Basin on July 29, 2021, included approximately 47 acres. No question exists that the lis pendens recorded July 29, 2021, wrongfully included property that was not the subject of the Agreement and not the subject of this litigation.

. . . The current litigation could only affect the title to or possession of the forty-four (44) acres that are the subject of the Agreement. Copper Basin seeks specific performance of the Agreement, which if successfully prosecuted, would have absolutely no impact on the three additional acres covered by the lis pendens Copper Basin recorded on July 29, 2021.

Copper Basin has provided no legal authority for including more property in the lis pendens than is the subject of this litigation or the Agreement. Nor has Copper Basin argued that the title to or possession of the three superfluous acres described in the July 29, 2021, lis pendens would be affected by this litigation. The reason Copper Basin has failed to do so is that title to or possession of those three superfluous acres will not be affected by this litigation, regardless of the outcome.

Reply Mem. in Supp. of Mot. for Summ. J. 9-10 (*italics in original*).

Neither party has cited to any legal authority on this issue. Although not explicitly mentioned in its brief, it appears to the Court that Beyond Green wishes the Court to determine as a matter of law that the property described in the first notice of lis pendens included property that was not subject to the PSA, such that Beyond Green may prevail on its counterclaims of slander of title and abuse of process. This Court cannot make such a finding as a matter of law.

As an initial matter, the Court would like to point out a misstatement of the law in Beyond Green's reply brief. Beyond Green states that Copper Basin violated I.C. § 5-505. Reply Mem. in Supp. of Mot. for Summ. J. 2.

Idaho Code § 5-505 provides, in relevant part:

In an action affecting the title or the right of possession of real property, the plaintiff at the time of filing the complaint, . . . or at any time afterward, may file for record with the recorder of the county in which the property . . . is situated, a notice of the pendency of the action, containing the names of the parties, the object of the action or defense, and a description of the property in the county affected thereby. From the time of filing such notice for record only shall a purchaser or incumbrancer of the property affected thereby be deemed to have constructive notice of the pendency of the action

I.C. § 5-505. The purpose of I.C. § 5-505 is merely to give "constructive notice of the pendency of the action". I.C. § 5-505. "The filing of a lis pendens may highlight a possible legal problem affecting the property, thereby inducing an extra measure of caution by potential purchasers or lenders until the litigation is concluded, but this does not mean that any underlying legal rights have been altered." I.C. ANN. § 5-505 (Supp. 2010) (citing *Jerry J. Joseph C.L.U. Ins. Assocs. V. Vaught*, 117 Idaho 555, 789 P.2d 1146 (Ct. App. 1990).

A lis pendens does not create a lien; it's [sic] purpose is simply to give notice of the pendency of a lawsuit affecting the title or the right to possession of real property to subsequent purchasers or encumbrancers of the property who have not [sic] actual knowledge of the action or of the claim upon which it is based.

Id. (Supp. 2022) (citing *Benz v. D.L. Evans bank*, 152 Idaho 215, 268 P.3d 1167 (2012).

Thus, it follows that Idaho Code § 5-505 cannot be "violated," as alleged by Beyond Green.

The Court finds that, on the face of the language of the two notices of lis pendens, described above in detail, the properties described in the two notices are clearly different. However, genuine issues of material fact exist as to whether the discrepancy merely included the future Cecil Road, which was part of the PSA. The

PSA does not provide a description of the property in question—Exhibit A to the PSA merely states “Final Legal Description of the Property to be provided by Escrow Holder and approved by Buyer.” Compl. Ex. C at 9. Exhibit B to the PSA is illegible. Although it purports to contain a map of the property, and paragraph 1 of the PSA indicates that it depicts the future location of Cecil Avenue, the quality is too poor for the Court to determine at this stage whether the property included in the July 29, 2021, notice of lis pendens is the same as the property subject to the present litigation.

The Court disagrees with Beyond Green’s evident assumption that Cecil Road is not subject to either the present litigation or the PSA. The PSA clearly includes the future Cecil Road as being subject to the agreement, and it is reasonable for Copper Basin to include it in its notice of lis pendens because if someone else were to purchase that portion of the property, Copper Basin and Beyond Green would no longer have the legal right to construct Cecil Road on that property.

Moreover, the PSA explicitly mentions that the property will be subject to a reciprocal easement agreement, most likely pertaining to the future Cecil Road. The map attached to the July 29, 2021, clearly marks the additional property as “future Cecil Road”. However, since the PSA does not provide a legible map or description of where the future Cecil Road was to be constructed, it is simply not clear to the Court at this stage whether the additional property was subject to the PSA.

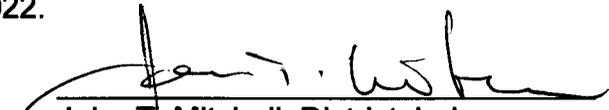
Accordingly, the Court also denies summary judgment on this issue.

IV. CONCLUSION AND ORDER.

For the foregoing reasons, defendant Beyond Green’s Motion for Summary Judgment must be denied.

IT IS HEREBY ORDERED defendant Beyond Green’s Motion for Summary Judgment is **DENIED**.

Entered this 7th day of September, 2022.


John T. Mitchell, District Judge

||Certificate of Service

I certify that on the 7th day of September, 2022, a true copy of the foregoing was mailed postage prepaid or was sent by interoffice mail or facsimile to each of the following:

<u>Lawyer</u>	<u>email</u>	<u>Lawyer</u>	<u>email</u>
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Jeanne Clausen, Deputy Clerk