STATE OF IDAHO)
County of KOOTENAI)ss

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CLERK OF DISTRICT COURT

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Deputy

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE

STATE OF IDAHO IN AND FOR THE COUNTY OF KOOTENAI

ROBERT WOLFORD,)
)
Plaintiff,)
vs.)
)
SHAWN MONTEE and HEATHER MONTEE, husband and wife; SHAWN MONTEE, INC., an Idaho corporation dba SHAWN MONTEE TIMBER COMPANY; and ABCO WOOD RECYCLING, LLC, an Idaho Limited Liability Company,)
)
Defendants.)

Case No. **CV 2014 4713**

MEMORANDUM DECISION AND ORDER 1) DENYING DEFENDANTS' MOTION TO CONTINUE SUMMARY JUDGMENT, 2) GRANTING PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT, 3) SEALING THE AFFIDAVIT OF SHAWN MONTEE AND 4) DENYING I.R.C.P. 35 EXAMINATION

I. PROCEDURAL HISTORY AND FACTUAL BACKGROUND.

This matter is before the Court on plaintiff's Motion for Summary Judgment filed August 15, 2014, following which, on September 2, 2014, defendants filed a Motion to Continue.

In January 2007, the plaintiff, Robert Wolford (Wolford), and the defendant Shawn Montee (Montee) entered into a loan agreement where Wolford agreed to loan money to Montee and his companies, the co-defendants Shawn Montee Inc. and Abco Wood Recycling, LLC. Affidavit of Robert Wolford in Support of Summary Judgment, p. 2, ¶ 2. Wolford is Montee's natural father. Affidavit of Shawn Montee in Opposition, p. 2, ¶ 3. According to Wolford, on May 12, 2009, after finding the payments Montee had made towards the balance owing on the loans Wolford advanced to Montee and his companies were, "sporadic and insufficient to repay back the balance which was

continually growing on the subject loan", Wolford and Montee executed a Promissory Note. Affidavit of Robert Wolford in Support of Summary Judgment, p. 2, ¶¶ 3, 4. That Note provides as follows:

> May 12th, 09
>
> Promise to Pay
>
> I Shawn T. Montee agree to pay Bobby Wolford the sum of $1.153mm dollars I owe him for a number of fragmented loans too [sic] me. In addition I agree to pay him $250K for a 90 day extention [sic] all due + payable by July 31st 09. This loan will be paid back by sale of the Tea Cup River Ranch ($4.8mm) or by the funds the U.S. Forest Service ($3.9mm) owes Shawn Montee Timber Co.
>
> /s/ Shawn Montee 5/12/09

Affidavit of Robert Wolford in Support of Plaintiff's Motion for Summary Judgment, Exhibit A (emphasis in original). That note was made by Montee on his own behalf, and makes no reference to any of the business entities owned or controlled by Montee. On July 31, 2009, a balance remained due and owing under the May 12, 2009, Note. Affidavit of Robert Wolford in Support of Summary Judgment, p. 3 ¶ 5; Affidavit of Shawn Montee in Opposition to Summary Judgment, p. 3 ¶ 5.

On February 16, 2010, a second Promissory note was executed by Montee in favor of Wolford, this time only on behalf of his companies Shawn Montee, LLC and Abco Wood Recycling, LLC, and not on behalf of Montee personally. Affidavit of Robert Wolford in Support of Summary Judgment, p. 3 ¶ 6. That Note provides:

> PROMISSORY NOTE
>
> Date: 2/16/2010 Principle: 1,283,641 w/ penalty Interest: 10%
>
> Borrower: Shawn Montee, Inc. & Abco Wood Recycling, LLC, PO Box 1329, Post Falls, ID 83877
>
> Lender: Bobby Wolford, 22014 W. Bostien Rd., Woodinville, WA 98072
>
> Promise to Pay. Shawn Montee, Inc. &/or Abco Wood Recycling, LLC (Borrower) promises to pay the 10% monthly interest on the above principle balance (starting January 2010) to Bobby Wolford (Lender), in lawful money of the United State of America.
>
> Payment Plan: TBD (between Shawn Montee & Bobby Wolford)
>
> Borrower: /s/ Shawn Montee
> Shawn Montee
> Shawn Montee, Inc. &
> Abco Wood Recycling, LLC
>
> Lender: _____
> Bobby Wolford

Affidavit of Robert Wolford in Support of Plaintiff's Motion for Summary Judgment, Exhibit B. Wolford states, "After executing the Second Note, the Defendants made a few payments towards the debt owed on the loan and pursuant to First Note and Second Note." Affidavit of Robert Wolford in Support of Plaintiff's Motion for Summary Judgment, p. 4 ¶ 7. Wolford has set forth an accounting for those payments and accrued interest on the debt. *Id.,* Exhibit C. According to Wolford, no payments have been made towards the loan since September 30, 2012. *Id.*, p. 4, ¶ 7. According to Wolford, "As of July 31, 2014 and after deducting all payments received and just offsets, there is now due and owing on the loan from the Defendants the unpaid principal balance of $1,233,641.00, unpaid accrued interest in the sum of $417,584.67, and the unpaid loan extension fee in the amount of $250,000.00." *Id.*, p. 4, ¶ 10; Exhibit C.

On June 11, 2014, Wolford filed his "Complaint for Money Due" and initiated the instant action seeking the money due and owing by the defendants. On July 7, 2014, defendants filed their "Answer and Affirmative Defenses." No party has demanded a jury trial.

As mentioned above, on August 15, 2014, Wolford moved for summary judgment, seeking the same. The motion is supported by the "Affidavit of Robert Wolford in Support of Plaintiff's Motion for Summary Judgment".

On September 2, 2014, the defendants filed a motion to continue the motion for summary judgment, pursuant to I.R.C.P. 56(f). That motion was accompanied by the "Affidavit in Support of Motion to Continue". On September 4, 2014, defendants also filed a "Memorandum in Opposition to Motion for Summary Judgment" and an "Affidavit of Shawn Montee in Opposition to Motion for Summary Judgment". At no point in Montee's affidavit does Montee dispute that it is his signature that appears on the two

notes or that Montee and his entities are in default on those notes. Instead, Montee, at length discusses why the notes were entered into, gifts that were given by Montee to his father, Wolford, since the notes were executed, and odd behaviors alleged by Wolford in the last four months. Affidavit of Shawn Montee in Opposition to Motion for Summary Judgment, pp. 1-5, ¶¶ 3-15.

On September 10, 2014, Wolford filed his "Reply Memorandum in Support of Plaintiff's Motion for Summary Judgment" and "Plaintiff's Objection to Defendants' Motion to Continue Summary Judgment Hearing".

On September 15, 2014, two days before oral argument, defendants filed "Motion for Examination Pursuant to I.R.C.P. 35(a)."

Oral argument was held on all of these motions on September 17, 2014.

At the beginning of oral argument on September 17, 2014, the Court heard arguments regarding defendants' Motion to Continue Summary Judgment. At the conclusion of that argument, the Court denied defendants' Motion to Continue Summary Judgment. The reasons for that ruling were briefly made on the record. For the benefit of the parties and for purposes of appellate review, are set forth below in more detailed fashion.

Also at the beginning of oral argument on September 17, 2014, the Court heard arguments on Elizabeth Alvord's Motion to Redact/Seal. The Court found Alvord, a non-party to this lawsuit, is allowed to make such a motion under Idaho Court Administrative Rule 32(i), and that the factors in subsections (1) and (2) of I.C.A.R. 32(i) were met, and arguably, so were subsections (3), (4) and (5). Accordingly, the Court granted the Motion to Seal, at oral argument, setting forth its reasons why. In addition to the reasons stated on the record on September 17, 2014, the Court also finds Alvord's interest in privacy is outweighed by any public disclosure of Montee's

Affidavit. The Court ordered all the "Affidavit of Shawn Montee in Opposition to Motion for Summary Judgment" sealed, but the Court has reviewed such, but finds most of the affidavit completely irrelevant to the issues presented in this lawsuit and in Wolford's Motion for Summary Judgment. The sealed affidavit shall be available for any appeal of this Court's decision.

Finally, at the beginning of oral argument on September 17, 2014, this Court denied defendants' "Motion for Examination Pursuant to I.R.C.P. 35(a)" for reasons were set forth on the record which will not be repeated in this memorandum decision.

The Court then heard oral argument on plaintiff's Motion for Summary Judgment, following which the Court took Wolford's Motion for Summary Judgment under advisement. For the reasons set forth below, the Court grants the Motion for Summary Judgment.

II. STANDARD OF REVIEW.

"Summary judgment is appropriate if the pleadings, affidavits, and discovery documents on file with the court . . . demonstrate no material issue of fact such that the moving party is entitled to a judgment as a matter of law." *Brewer v. Washington RSA No. 8 Ltd. Partnership,* 145 Idaho 735, 738 184 P.3d 860, 863 (2008) (quoting *Badell v. Beeks,* 115 Idaho 101, 102, 765 P.2d 126, 127 (1988) (citing I.R.C.P. 56(c)). The burden of proof is on the moving party to demonstrate the absence of a genuine issue of material fact. *Rouse v. Household Finance 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)). "Once the moving party establishes 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)); *Samuel v. Hepworth, Nungester & Lezamiz, Inc.,* 134 Idaho 84, 87, 996 P.2d 303, 306 (2000). In construing the facts, the court must draw all reasonable factual inferences in favor of the non-moving party. *Mackay v. Four Rivers Packing Co.,* 145 Idaho 408, 410, 179 P.3d 1064, 1066 (2008). If reasonable people can reach different conclusions as to the facts, then the motion must be denied. *Ashby v. Hubbard*, 100 Idaho 67, 593 P.2d 402 (1979).

The non-moving party's case must be anchored in something more than speculation; a mere scintilla of evidence is not enough to create a genuine issue. *Zimmerman v. Volkswagon of America, Inc.*, 128 Idaho 851, 854, 920 P.2d 67, 69 (1996). The non-moving party may not simply rely upon mere allegations in the pleadings, but must set forth in affidavits specific facts showing there is a genuine issue for trial. I.R.C.P. 56(e); *see Rhodehouse v. Stutts*, 125 Idaho 208, 211, 868 P.2d 1224, 1227 (1994). "[I]f the nonmoving party fails to provide a sufficient showing to establish the essential elements of his or her case, judgment shall be granted to the moving party." *Porter v. Bassett*, 146 Idaho 399, 403, 195 P.3d 1212, 1216 (2008) (citing *Atwood v. Smith,* 143 Idaho 110, 113, 138 P.3d 310, 313 (2006)).

If an action is being tried without a jury, "[t]he trial court as the trier of fact is entitled to arrive at the most probable inferences based upon the undisputed evidence properly before it and grant the summary judgment despite the possibility of conflicting inferences." *P.O. Ventures, Inc. v. Loucks Family Irrevocable Trust*, 144 Idaho 233, 237, 159 P.3d 870, 874 (2007) (citing *Intermountain Forest Management v. Louisiana Pacific Corp.*, 136 Idaho 233, 235, 31 P.3d 921, 923 (2001)). The fact finder is responsible for resolution of conflicts between the possible inferences. *Id.* (citing *Cameron v. Neal*, 130 Idaho 898, 900, 950 P.2d 1237, 1239 (1997)). If the Idaho

Supreme Court reviews the decision of a judge serving as fact finder, it "[e]xercises free review over the entire record that was before the district judge to determine whether either side was entitled to judgment as a matter of law and reviews the inferences drawn by the district judge to determine whether the record reasonably supports those inferences." *Id.* (citing *Intermountain Forest Management*, 136 Idaho at 236, 31 P.3d at 924).

Moreover, pursuant to Idaho Rule of Civil Procedure 56(f)

> Should it appear from the affidavits of a party opposing the motion that the party cannot for reasons stated present by affidavit facts essential to justify the party's opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

I.R.C.P. 56(f). "The decision to grant or deny a Rule 56(f) continuance is within the sound discretion of the trial court." *Boise Mode, LLC v. Donahoe Pace & Partners Ltd.*, 154 Idaho 99, 103, 294 P.3d 1111, 1115 (2013) (quoting *Taylor v. AIA Services Corp.,* 151 Idaho 552, 572, 261 P.3d 829, 849 (2011) (citing *Carnell v. Barker Mgmt.,* 137 Idaho 322, 329, 48 P.3d 651, 658 (2002)).

III. ANALYSIS.

A. Defendants' Motion to Continue Pursuant to I.R.C.P. 56(f) is Denied.

Defendants cited I.R.C.P. 56(f) as the basis for their Motion to Continue Hering on Plaintiff's Motion for Summary Judgment. Motion to Continue, p. 1. "Rule 56(c) mandates the entry of summary judgment, *after adequate time for discovery* and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Jenkins v. Boise Cascade Corp.*, 141 Idaho 233, 239, 108 P.3d 380, 386 (2005) (citing *Celotex Corp. v. Catrett,* 477 U.S. 317, 322–23, 106 S.Ct. 2548,

2552, 91 L.Ed.2d 265, 273 (1986) (emphasis in *Jenkins*)). Pursuant to I.R.C.P. 56(f), a party opposing summary judgment may request additional time to respond to a pending motion. I.R.C.P. 56(f). However, in order for the court to grant such a motion, the party seeking the continuance must specifically set forth what additional discovery is necessary and why such discovery is pertinent to rebut the pending motion for summary judgment. *Id.*

In *Jenkins*, the attorney for Jenkins filed a motion to vacate the hearing on summary judgment under the basis that he was not prepared to respond in the time permitted. In support of his motion, their attorney filed an affidavit which stated "the Jenkins had served written discovery and notices of depositions, that he believed the discovery would produce additional documents and testimony supporting the Jenkins' theories, and that he required the opportunity to use the responses and testimony in additional discovery in order to thoroughly respond to summary judgment." *Id.* The district court denied the Jenkins' motion to vacate, finding that the affidavit submitted by their attorney failed to set for specific information about what additional discovery was necessary and why it was relevant to respond to the issues presented on summary judgment. Affirming the decision of the district court, the Idaho Supreme Court stated:

> [T]he Jenkins' attorney's affidavit stated that additional written discovery and depositions were pending, but did not specify what discovery was needed to respond to Boise Cascade's motion and did not set forth how the evidence he expected to gather through further discovery would be relevant to preclude summary judgment. Although the affidavit states that the issues were too complex and the documents too numerous for the attorney to make an adequate response in fourteen days, he does not articulate why the issues were too complex for him to be prepared within fourteen days to present evidence through his own witnesses to create a genuine issue of material fact in a case that had been pending for more than a year. The district court recognized it had the discretion to deny the motion, articulated the reasons for so doing and exercised reason in making the decision. There was no abuse of discretion in denying the motion to vacate.

Id.

In this case, the attorney for the defendants attests in pertinent part as follows:

> 3. Defendants seek a continuance pursuant to Idaho Rule of Civil Procedure 56(f) because without additional discovery, Defendants are unable to adequately respond and/or oppose Defendant's [sic] pending motion.
> 4. Defendants require the depositions of Plaintiff, ROBERT WOLFORD and Nellie Jacobsen. Ms. Jacobsen was at all times material hereto the office manager/bookkeeper for Mr. Wolford.
> 5. Defendants need to depose the above-named individuals in order to prepare and respond to Plaintiff's Motion for Summary Judgment.
> 6. Discovery is still ongoing by both parties and further parties may need to be disposed.
> 7. I make this Affidavit in good faith and represent to this Court that the above-stated discovery is both necessary and essential to Defendant's opposition to the pending Motion for Summary Judgment. In the interest of justice, I would ask that this Court grant the request for a continuance until such time as the discovery can be reasonably completed.

Affidavit in Support of Motion to Continue, p. 2 (capitalization in original).

Wolford objects to the Motion to Continue on the basis that "the two parties who have principal knowledge about the nature of this loan are Mr. Wolford and Mr. Montee [and] all issues related to this loan have been sufficiently addressed in [the] Affidavits" of Robert Wolford and Shawn Montee. Plaintiff's Objection to Defendants' Motion to Continue Summary Judgment, p. 2. Moreover, Wolford notes that the defendants have also filed an opposition to the pending Motion for Summary Judgment. *Id.*

Applying the facts in *Jenkins* to the present case, the Court finds the affidavit of defendants' counsel fails to state specific facts demonstrating *why* the depositions of Robert Wolford and Nellie Jacobsen are needed to respond to Wolford's motion for summary judgment, and fails to set forth *how* such evidence would be *relevant* to summary judgment. While completely failing to tell this Court why depositions would lead to admissible evidence in his affidavit, it is clear from defendants' arguments that the defendants feel the family and past business relationship between the parties is

relevant, that the reasons why the parties entered into these notes are relevant, and Wolford's current mental health is relevant. This Court is at a complete loss to understand why any of these issues are relevant to the issues before the Court: a) did Montee sign two notes, b) are the notes clear and unambiguous, and 3) did Montee and his companies default on the notes?

Moreover, defense counsel's affidavit fails to explain why the defense counsel cannot establish a genuine issue of material fact through his own witness, Shawn Montee, who attests in his own affidavit that he is personally familiar with the documents at issue in this case. This Court agrees with plaintiff's claim that "In this case, the two parties who have principal knowledge about the nature of this loan are Mr. Wolford and Mr. Montee." Plaintiff's Objection to Defendants' Motion to Continue Summary Judgment, p. 2. This Court finds defendants have failed to meet the burden set forth under I.R.C.P. 57(f) and the defendants' Motion to Continue must be denied.

B. The Motion for Summary Judgment Must be Granted.

Contract interpretation begins with the document's language. *Potlatch Educ. Ass'n v. Potlatch Sch. Dist. No. 285*, 148 Idaho 630, 633, 226 P.3d 1277, 1280 (2010) (citing *Cristo Viene Pentecostal Church v. Paz,* 144 Idaho 304, 308, 160 P.3d 743, 747 (2007)). Contracts that are unambiguous are given their plain meaning. *Id.* "The purpose of interpreting a contract is to determine the intent of the contracting parties at the time the contract was entered." *Id.* Intent of the parties is determined from the contract as a whole. *Id.* (citing *Daugharty v. Post Falls Highway Dist.*, 134 Idaho 731, 735, 9 P.3d 534, 538 (2000)). The interpretation of a clear and unambiguous contract is a question of law. *Lamprech v. Jordan, LLC*, 139 Idaho 182, 185, 75 P.3d 743, 746 (2003) (citing *Iron Eagle Dev't, L.L.C. v. Quality Design Systems, Inc.*, 138 Idaho 487,

491, 65 P.3d 509, 513 (2003)). "'When a written instrument is complete on its face and is unambiguous, extrinsic evidence of prior or contemporaneous representations or negotiations are inadmissible to contradict, vary, alter, add to, or detract from the instrument's terms.' Only when a document is ambiguous is parol evidence admissible to discover the drafter's intent." *Id. Buku Properties, LLC v. Clark*, 153 Idaho 828, 834, 291 P.3d 1027, 1033 (2012) (internal citations omitted). "If a contract is found ambiguous, its interpretation is a question of fact." *Lamprech*, 139 Idaho at 185, 75 P.3d at 746. However, the determination that "a contract is ambiguous is a question of law." *Id.* (citing *Boel v. Steward Title Guar. Co.*, 137 Idaho 9, 13, 43 P.3d 768, 772 (2002)). A contract that is reasonably subject to conflicting interpretations is ambiguous. *Id.* (citing *Lewis v. CEDU Educ. Serv., Inc.*, 135 Idaho 139, 144, 15 P.3d 1147, 1152 (2000)).

The parties do not dispute that two notes were executed in this case. Again, the first note dated May 12, 2009, provides as follows:

> May 12th, 09
>
> Promise to Pay
>
> I Shawn T. Montee agree to pay Bobby Wolford the sum of $1.153mm dollars I owe him for a number of fragmented loans too [sic] me. In addition I agree to pay him $250K for a 90 day extention [sic] all due + payable by July 31st 09. This loan will be paid back by sale of the Tea Cup River Ranch ($4.8mm) or by the funds the U.S. Forest Service ($3.9mm) owes Shawn Montee Timber Co.
>
> /s/ Shawn Montee 5/12/09

Affidavit of Robert Wolford in Support of Plaintiff's Motion for Summary Judgment, Exhibit A (emphasis in original). The second note dated February 16, 2010, provides as follows:

> PROMISSORY NOTE
>
> Date: 2/16/2010 Principle: 1,283,641 w/ penalty Interest: 10%
>
> Borrower: Shawn Montee, Inc. & Abco Wood Recycling, LLC
> PO Box 1329
> Post Falls, ID 83877
>
> Lender: Bobby Wolford
> 22014 W. Bostien Rd.
> Woodinville, WA 98072

> Promise to Pay. Shawn Montee, Inc. &/or Abco Wood Recycling, LLC (Borrower) promises to pay the 10% monthly interest on the above principle balance (starting January 2010) to Bobby Wolford (Lender), in lawful money of the United State of America.
>
> Payment Plan: TBD (between Shawn Montee & Bobby Wolford)
>
> Borrower: /s/ Shawn Montee Lender: _____
> Shawn Montee Bobby Wolford
> Shawn Montee, Inc. &
> Abco Wood Recycling, LLC

Affidavit of Robert Wolford in Support of Plaintiff's Motion for Summary Judgment, Exhibit B.

Wolford contends the defendants defaulted under the terms of these promissory notes. Memorandum in Support of Plaintiff's Motion for Summary Judgment, p. 4. He alleges these Notes are clear and unambiguous. Reply Memorandum in Support of Plaintiff's Motion for Summary Judgment, p. 4. He maintains that under the May 12, 2009, Note, Shawn Montee personally agreed to pay off the loan not later than July 31, 2009. *Id.*, p. 5; Memorandum in Support of Plaintiff's Motion for Summary Judgment, p. 4. He claims there is no dispute that this did not occur. *Id.* He further alleges no payments have been made since September 20, 2012, and the $250,000.00 loan extension fee also remains unpaid. *Id.* Based on this, Wolford claims the entire unpaid principal balance and all accrued interest and costs are immediately due and payable.

Defendants contend that the February 16, 2010, Note, was drafted with the intent that it replace the May 12, 2009, Note. Memorandum in Opposition to Motion for Summary Judgment, p. 2. They claim the February 16, 2010, Note, does not contain payment terms, "any definitive agreement as to repayment", nor any acceleration clause. *Id.* The defendants maintain "Mr. Wolford told Mr. Montee that the monies advanced could be prepaid, if and when, Mr. Montee's companies had the abilty or funds." *Id.* Moreover, they allege the February 16, 2010, Note, "clearly establishes that Shawn Montee, Inc., an Idaho Corporation and ABCO Wood Recycling, LLC, an Idaho

limited liability company are the 'Borrower' under the same. As such, no claim exists against Shawn Montee or Heather Montee individually or personally." *Id.*

In response, Wolford contends "[Shawn] Montee attempts to 'rewrite' the terms of [the May 12, 2009,] Note by claiming that he, personally, never agreed to repay the Note and that there was no agreed repayment terms . . . [is] extrinsic/parol evidence . . . [and] cannot be considered by this Court to re-write the terms of Note 1." Reply Memorandum in Support of Plaintiff's Motion for Summary Judgment, p. 6. Wolford further alleges the interest rate that was agreed upon for the May 12, 2009, Note, is memorialized in the February 16, 2010, Note, at 10%. *Id.*, p. 8. "However, if this court is going to find that there wasn't an expressed term fixing the rate of interest owed by Defendant Montee pursuant to Note 1, then this court must look to Idaho Code 28-22-104 to determine the interest which is owed . . . ." *Id.* Pursuant to Idaho Code § 28-22-104, Wolford alleges the applicable interest rate is 12% per annum on all funds advanced. *Id.*, p. 9.

Moreover, Wolford claims there is no evidence that the February 16, 2010, Note releases Shawn Montee from personal liability under the May 12, 2009, Note because there is no language in the second Note releasing Shawn Montee from liability and there is no evidence of any additional consideration provided in exchange for any alleged release. *Id.*, p. 7. Wolford also contends the February 16, 2010, Note obligated Montee Inc. and Abco Wood Recycling, LLC to pay, at a minimum, 10% of the accrued interest each month. *Id.*, p. 8. Having failed to do pay monthly interest from October 2012 to date, Wolford alleges Montee Inc. and Abco Wood Recycling, LLC are in default under the terms of the February 16, 2010, Note. *Id*.

Finally, Wolford responds to an allegation found within Shawn Montee's affidavit where "[Mr.] Montee asserts that he gave Mr. Wolford a Motorcycle worth $40,000, two chip van trailers worth $20,000 each, a commercial water pump on a trailer, and 'allowed Mr. Wolford to use a Krause Sorting/Picking Belt Station valued at $300,000'". *Id.*, p. 9 (citing Affidavit of Shawn Montee in Opposition to Summary Judgment ¶ 7). Wolford contends there is no evidence these items were given to him as repayment on the outstanding loan. *Id.* As such, Wolford rejects the argument that these items should be considered by the Court as payment against the outstanding balance owing, rather than as gifts. *Id.*

The Court finds the Notes are clear and unambiguous. The May 12, 2009, Note obligates Shawn Montee personally to pay Wolford $1.153 million plus $250,000.00 by July 31, 2009. The uncontroverted evidence before this Court is that the balance owing on this Note remains outstanding. Affidavit of Robert Wolford in Support of Plaintiff's Motion for Summary Judgment, p. 3 ¶ 5; Affidavit of Shawn Montee in Opposition to Summary Judgment, p. 3 ¶ 5. While there are no monthly payment terms, the Note clearly sets forth an amount owning and a date upon which the final payment must be made. The intent of the parties as evidenced by the language of the document is that Shawn Montee would repay Bobby Wolford $1.153 million plus $250,000.00 by July 31, 2009. The fact that the 2009 Note does not contain a set interest rate is not fatal to the validity of that Note, nor does the absence of an interest rate create any ambiguity as claimed by counsel for defendants at oral argument. This is because if an express contract is silent on the interest rate, which is the case here with the 2009 Note, then a 12% interest rate is applied as a matter of law. I.C. § 28-22-104(2).

The defendants do not dispute that Shawn Montee borrowed money from Wolford. The defendants present no evidence that the outstanding amounts borrowed

have been repaid; thus, it is uncontroverted that defendants are in default on valid, unambiguous notes. Instead, Mr. Montee attests that the May 12, 2009, Note "was meant only for [Wolford's] security if something happened to [Shawn Montee] and [Shawn Montee] wanted him to have some protection. . . [Wolford] knew [Shawn Montee] did not have the ability to pay him . . . ." Affidavit of Shawn Montee in Opposition to Summary Judgment, p. 3 ¶ 5. The Court finds the reason(s) for making the 2009 Note is entirely irrelevant. Additionally, since the May 12, 2009, Note is complete on its face, any extrinsic evidence offered by the defendants is inadmissible and cannot be considered by this Court when interpreting the terms actually set forth in the document. There is no genuine issue of material fact that Shawn Montee owes Wolford the outstanding balance on the loans plus and additional $250,000.00 for the extension; that he signed the May 12, 2009 Note; or that he agreed to repay the outstanding balance by July 31, 2009. As such, the Court finds Shawn Montee personally liable under the May 12, 2009, Note.

The second note, dated February 16, 2010, is similarly clear and unambiguous. This note obligates Shawn Montee, Inc. and Abco Wood Recycling, LLC to pay Bobby Wolford $1,283,641 plus 10% monthly interest beginning January 2010. The evidence before this Court is that the balance owing on this Note remains outstanding. Affidavit of Robert Wolford in Support of Plaintiff's Motion for Summary Judgment, p. 4, ¶ 7; Affidavit of Shawn Montee in Opposition to Summary Judgment, p. 4, ¶ 6. The intent of the parties as evidenced by the language of the document is that Shawn Montee, Inc. and Abco Wood Recycling, LLC pay Bobby Wolford $1,283,641 plus 10% monthly interest beginning January 2010. The defendants do not dispute that Shawn Montee, Inc. and Abco Wood Recycling, LLC agreed to pay Wolford under the terms provided in the Note and do not present evidence that the outstanding amounts have been repaid.

Rather, Mr. Montee attests the second note was intended to replace the first note and the second not does not contain repayment terms based on the parties understanding that "[Montee] could pay him back, when and if, funds were available." Affidavit of Shawn Montee in Opposition to Summary Judgment, p. 4 ¶ 6. Like the May 12, 2009, Note, the February 16, 2010, Note is complete on its face. As such, any extrinsic evidence offered by the defendants is inadmissible and cannot be considered by this Court when interpreting the terms actually set forth in the document. There is no genuine issue of material fact that Shawn Montee, Inc. and Abco Wood Recycling, LLC promised to pay Bobby Wolford 10% monthly interest on $1,283,641 beginning January 2010; that Shawn Montee signed the February 16, 2010 Note on behalf of Shawn Montee, Inc. and Abco Wood Recycling, LLC; or that he agreed to begin making payments in January 2010.

There is no merit to defendants' argument that the 2010 Note somehow "replaced" the 2009 Note. Based on the plain language of both Notes, there is no evidence whatsoever that they are to be construed together. The February 16, 2010 Note does not reference the May 12, 2009, Note, and vice versa.

While amended agreements should be construed together with the original agreements where possible (*Silver Syndicate, Inc. v. Sunshine Mining Co.,* 101 Idaho 226, 235, 611 P.2d 1011, 1020 (1979)), the making of a new contract does not necessarily abrogate a former contract unless it explicitly rescinds it, deals with the subject matter so comprehensively as to be complete in itself, or is so inconsistent with the first contract that the two cannot stand together. *Opportunity, L.L.C. v. Ossewarde*, 136 Idaho 602, 607, 38 P.3d 1258, 1263 (2002). Moreover, when a subsequently executed agreement specifically references and relies on a former agreement, the two are to be interpreted together, if possible. *Id.*

In *Silver Syndicate, Inc. v. Sunshine Min. Co.*, 101 Idaho 226, 235, 611 P.2d 1011, 1020 (1979), the Idaho Supreme Court held:

> It is well settled that the terms of a written contract may be varied, modified, waived, annulled, or wholly set aside by any subsequently executed contract, whether that contract be in writing or parol. *Belts v. State Dept. of Highways,* 86 Idaho 544, 388 P.2d 982 (1964); *Coonrod & Walz Constr. Co. v. Motel Enterprises, Inc.,* 217 Kan. 63, 535 P.2d 971 (1975). Thus, the making of a second contract dealing with the subject matter of an earlier contract does not necessarily abrogate the former contract. To have the effect of complete rescission, the new contract must either explicitly rescind the earlier contract, or deal with the subject matter of the former contract so comprehensively as to be complete within itself and to raise the legal inference of substitution, or it must present such inconsistencies with the first contract that the two cannot in any substantial respect stand together. *Commercial Nat'l Bank of Charlotte v. Charlotte Supply Co.,* 226 N.C. 416, 38 S.E.2d 503 (1946). *See also Rosenberg v. D. Kaltman & Co.,* 28 N.J.Super. 459, 101 A.2d 94 (1953); A. Corbin, Contracts s 1296 (1950).
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> * * *
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> > "A new contract with reference to the subject matter of a former one does not supersede the former and destroy its obligations, except in so far as the new one is inconsistent therewith, when it is evident from an inspection of the contracts and from an examination of the circumstances that the parties did not intend the new contract to supersede the old, but intended it as supplementary thereto." 17A C.J.S. Contracts s 395.
>
> *See also Mail-Well Envelope Co. v. Saley,* 262 Or. 143, 497 P.2d 364 (1972); *Fane Dev. Co. v. Townsend,* 381 P.2d 1012 (Okl.1963); *Turner v. Turner,* 242 N.C. 533, 89 S.E.2d 245 (1955); 5 Corbin on Contracts s 1296 (1962). Those provisions of the earlier contract which are not substantially involved in the contradiction (and revoked thereby) still subsist and may be enforced.

In the present case, the 2010 Note does not even mention the 2009 Note, let alone "specifically rescind" the 2009 Note. While the two notes deal with the same "subject matter", the do not deal with the same subject matter "…so comprehensively as to be complete within itself and to raise the legal inference of substitution", nor do they "…present such inconsistencies with the first contract that the two cannot in any substantial respect stand together."

A plain reading of the second Note is that Shawn Montee, Inc. and Abco Wood Recycling, LLC are also liable to Robert Wolford, in addition to Shawn Montee personally liable under the first Note.

Additionally, this Court finds defendants interpretation that the second note "replaced" the first note, is not supported by and consideration for Wolford. The Court agrees with Wolford's argument that "…in order for there to be an enforceable agreement releasing Defendant Montee from liability, such an agreement must have been supported by additional consideration given by Defendant Montee for said release." Reply Memorandum in Support of Plaintiff's Motion for Summary Judgment, p. 7, *citing Weisel v. Beaver Springs Owners Ass'n, Inc.,* 152 Idaho 519, 526-27, 272 P.3d 491, 498-99 (2012). The only argument made by defendants in the present case as to consideration for the second note is that there was no interest rate on the first note and there was a 10% interest rate on the second note. The Court finds such to be entirely unpersuasive because in the second note it is Montee's companies that are committing to a 10% interest rate, while in the first note I.C. § 28-22-104(1) supplies a higher 12% interest rate to Montee personally.

Finally, any arguments by Wolford in response to claims within Shawn Montee's affidavit that Montee gave Wolford a motorcycle, two chip van trailers, a commercial water pump on a trailer, and allowed Wolford to use a Krause Sorting/Picking Belt Station, cannot be viewed by the Court as claims by the defendants that these items were provided to offset any outstanding balance owed to Wolford. Even Montee does not specifically argue these items were given to Wolford for that purpose, but rather Montee seems to discuss this as evidence of the relationship between the parties. *See* Affidavit of Shawn Montee in Opposition to Summary Judgment, p. 4, ¶ 7. Because the

relationship of the parties is entirely irrelevant, it is not necessary for that Court to address these arguments by Wolford.

Therefore, the Court finds that under the May 12, 2009, Note, Shawn Montee is personally liable for the amounts owing to Wolford at an interest rate of 12% per annum, and under the February 16, 2010, Note, Shawn Montee, Inc. and Abco Wood Recycling, LLC are liable to Wolford for the amounts owing a monthly rate of 10%.

The Court finds plaintiff is the prevailing party for purposes of costs and fees under I.C. § 12-120(3) and I.R.C.P. 54(d)(1).

IV. CONCLUSION AND ORDER.

For the reasons set forth above, the Court should denies defendants' Motion to Continue and grants the plaintiffs' Motion for Summary Judgment.

IT IS HEREBY ORDERED defendants' Motion to Continue Summary Judgment is DENIED.

IT IS FURTHER ORDERED plaintiff's Motion to Seal/Redact is GRANTED in that all of the "Affidavit of Shawn Montee in Opposition to Motion for Summary Judgment" is ordered sealed, but the Court has reviewed such. The sealed affidavit shall be available for any appeal of this Court's decision.

IT IS FURTHER ORDERED defendants' "Motion for Examination Pursuant to I.R.C.P. 35(a) (Mental Examination)" is DENIED.

IT IS FURTHER ORDERED plaintiff's Motion for Summary Judgment is GRANTED in all aspects. Plaintiff is the prevailing party for purposes of costs and fees.

Entered this 19th day of September, 2014.

_____

John T. Mitchell, District Judge

Certificate of Service

I certify that on the _____ day of September, 2014, a true copy of the foregoing was mailed postage prepaid or was sent by interoffice mail or facsimile to each of the following:

Lawyer	**Fax #**	**Lawyer**	**Fax #**
Mark A. Ellingsen	667-8470	Paul W. Daugharty	666-0550

_____
Deputy Clerk