STATE OF IDAHO)
County of KOOTENAI)ss

FILED_____

AT_____ O'Clock _____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

ROBERT KOBRICK and AMY KOBRICK, husband and wife; and ROBERT BURNETT and RITA BURNETT, husband and wife,

Plaintiffs,

vs.

SAWMILL POINT DEVELOPMENT INC., an Idaho Corporation; GEORGE D. HAMILTON and RITA HAMILTON, husband and wife; ROBERT L. HAMILTON; SYRINGA GROVE, LLC, an Idaho Limited Liability Company, CHARLIE R. NIPP and SUSAN NIPP, husband and wife; RYAN C. NIPP and TERI NIPP husband and wife; LOIS BRUCE, and SCHARELANT 7, LLC, an Idaho Limited Liability Company,

Defendants.

Case No. **CV 2011 2494**

MEMORANDUM DECISION AND ORDER DENYING PLAINTIFFS' MOTION FOR INJUNCTIVE RELIEF AND GRANTING PLAINTIFFS' MOTION TO COMPEL

I. PROCEDURAL HISTORY AND FACTUAL BACKGROUND.

This matter is before the Court on "Plaintiffs' Motion for Injunctive Relief Pursuant to Idaho Code § 55-916 – Uniform Fraudulent Transfer Act and IRCP 65(e)" filed on February 28, 2014. Oral argument was held on March 14, 2014. On April 1, 2014, defendants Syringa Grove, LLC., Charlie R. Nipp, Susan Nipp, Ryan C. Nipp, Teri Nipp, Lois Bruce and Scharelant 7 LLC, filed a "Citation of Additional Authority Re: Opposition to Plaintiffs' Motion for Injunctive Relief Pursuant to I.C. § 55-816 and IRCP 65(e)."

Also at issue to be heard on March 14, 2014, was "Plaintiffs' Motion to Compel

Syringa Grove's, Scharelant 7 and Lois Bruce's Responses to Discovery." At the March 14, 2014, hearing, counsel for plaintiffs requested oral argument on plaintiffs' motion to compel be taken up after oral argument on plaintiffs' motion for injunctive relief. The Court preferred to hear argument on the motion to compel first as it might impact the motion for injunctive relief.

Argument by plaintiffs' counsel and counsel for the Syringa Grove defendants (Syringa Grove, LLC, Charlie R. Nipp, Susan Nipp, Ryan C. Nipp, Teri Nipp, Lois Bruce, and Scharelant 7, LLC) was heard. The Sawmill Point Development Point, Inc. defendants took no position on the motion to compel. At the conclusion of oral argument, the Court took plaintiffs' motion to compel under advisement.

The Court then heard oral argument on the plaintiffs' motion for injunctive relief. Argument by plaintiffs' counsel and counsel for the Syringa Grove defendants was heard. The Sawmill Point Development Point, Inc. defendants took no position on the motion for injunctive relief. At the conclusion of oral argument, the Court took plaintiffs' motion for injunctive relief under advisement.

This action arises out of a landslide that occurred in January 2011, which caused damage to real properties owed by Robert and Amy Kobrick and Robert and Rita Burnett (plaintiffs). Complaint, p. 7, ¶ 2.9. Plaintiffs own real property in Kootenai County, Idaho that is located downhill from a plateau. Memorandum in Support of Plaintiffs' Motion for Injunctive Relief Pursuant to Idaho Code § 55-916 – Uniform Fraudulent Transfer Act and IRCP 65(e), p. 1; Memorandum in Opposition to Plaintiffs' Motion for Injunctive Relief Pursuant to I.C. § 55-916 and IRCP 65(e), p. 2. Situated on the plateau was a parcel of land approximately 14.69 acres in size. Memorandum in Opposition to Plaintiffs' Motion for Injunctive Relief Pursuant to I.C. § 55-916 and IRCP 65(e), p. 2. In 2007, that parcel of land was owned by defendant Lois Bruce (Bruce).

Id.; Affidavit of Lois Bruce, p. 2 ¶ 3. That parcel contained one residence. *Id.* This land was conveyed to Bruce by her ex-husband John Bruce, by a Warranty Deed subject to a Deed of Trust for the benefit of John in the amount of $1,120,000.00. Affidavit of Lois Bruce, p. 2 ¶ 3. In 2007, the assessed valuation for the 14.69 acre parcel of land, including Bruce's home, was $1,428,000.00. Memorandum in Opposition to Plaintiffs' Motion for Injunctive Relief Pursuant to I.C. § 55-916 and IRCP 65(e), p. 2; Affidavit of Lois Bruce p. 3 ¶ 6.

In 2006, Bruce met with Charlie Nipp, Susan Nipp and Ryan Nipp to discuss the potential development of Bruce's property to pay the debt to John Bruce. Affidavit of Charlie Nipp, p. 3 ¶ 10. A limited liability company entitled Syringa Grove, LLC (Syringa Grove) was formed by Bruce, Charlie Nipp and Ryan Nipp. *Id.* at p. 3 ¶ 12(1). On March 25, 2007, Bruce, Charlie Nipp and Ryan Nipp adopted the "Operating Agreement of Syringa Grove, LLC" (Operating Agreement), under the terms of which Bruce deeded the parcel of land to the defendant Syringa Grove, who would then plat the property into seven residential lots. Affidavit of Lois Bruce, p. 4 ¶ 9. Bruce's existing home would be included on one of the seven lots created by the Plat, and Syringa Grove would title Lot 6 and Lot 7 to her by quitclaim deed. *Id.* The property was conveyed by Bruce to Syringa Grove by Warranty Deed on June 4, 2007. Affidavit of Lois Bruce, p. 4 ¶ 10.

On May 31, 2007, Syringa Grove executed a Promissory Note for the benefit of Washington Trust Bank (WTB) in the amount of $1,840,000.00. Affidavit of Charlie Nipp, p. 6 ¶ 18. The Promissory Note was secured by a Deed of Trust executed for the benefit of WTB on June 24, 2007. *Id.* at pp. 6-7 ¶ 21. Subsequently, Syringa Grove took steps to develop the property. *Id.* at p. 7 ¶24. By the end of 2008, Syringa Grove

had drawn all available sums against the WTB line of credit and Charlie Nipp began loaning Syringa Grove money, pursuant to the Operating Agreement. *Id.* at p. 8 ¶ 28.

The Final Plat was recorded with Kootenai County on October 8, 2009. *Id.* at p. 8, ¶ 35. The Plat created seven residential lots and one "Conservation Tract" (Tract A). *Id*. at p. 8 ¶ 9.

In January 2011 a landslide occurred, causing damage to the plaintiffs' property. Memorandum in Support of Plaintiffs' Motion for Injunctive Relief Pursuant to Idaho Code § 55-916 – Uniform Fraudulent Transfer Act and IRCP 65(e), pp. 1-2. On March 23, 2011, plaintiffs commenced this action by filing a Complaint and Summons.

On October 24, 2011, Syringa Grove conveyed Lot 6 and Lot 7 to Bruce via quitclaim deed. Affidavit of Lois Bruce, p. 5 ¶ 12. Bruce attempted to sell Lot 7 but was unable to do so. *Id.* at p. 5 ¶ 13. In the fall of 2012, she informed Charlie Nipp of this and Charlie Nipp agreed to purchase Lot 7 from Bruce for $250,000.00. *Id*. at p. 5 ¶¶ 14-18. On November 14, 2012, Bruce sold Lot 7 to Scharelant 7, LLC, a company owned by Charles Nipp. *Id.* at p. 5 ¶ 17.

At the time the action was filed on March 23, 2011, Syringa Grove was the owner of Lots 1 through 7. Affidavit of Charlie Nipp, p. 20 ¶ 83. Lots 1 through 5 were sold between March 25, 2013, and July 25, 2013, to third-parties who are not affiliated with Syringa Grove. *Id*.

Syringa Grove had attempted to sell Lots 1 through 5 for several years prior to the landslide, but because of the downturn in the real estate market, Syringa Grove was unable to sell those lots until 2013. *Id.* at p. 18, ¶ 74. The lots were sold for net sales proceeds of $1,128,890.50, all of which was paid to WTB to satisfy the debt still owing. *Id.* at p. 21 ¶ 84. The five lots were sold collectively for $275,644.50 more than the

then-assessed value. *Id.* Syringa Grove used the proceeds from the sale to satisfy its obligation to WTB. *Id.* There was no excess money for Syringa Grove or Charlie Nipp. *Id.* Prior to the sale of these lots, Charlie Nipp advanced $1,339,122.00 to Syringa Grove, to allow Syringa Grove to satisfy its obligation to WTB. *Id*. at pp. 11-12, 18 ¶¶ 46, 49, 73.

On March 4, 2013, a stipulation was filed signed by the three attorneys (counsel for plaintiffs, counsel for the Sawmill Point and Hamilton defendants, and counsel for Syringa Grove), stipulating to plaintiffs filing an amended complaint, and an order allowing amendment of the complaint was filed on March 5, 2013, by Judge Haynes. A First Amended Complaint was filed on March 18, 2013. This amendment added Charlie R.Nipp and his wife Susan Nipp, Ryan C. Nipp and his wife Teri Nipp, and Lois Bruce as defendants. On March 21, 2013, John Magnuson, the same attorney who had been representing Syringa Grove, filed a Notice of Appearance for Bruce. Also on March 21, 2013, Bruce moved to disqualify District Judge Lansing Haynes, who had been assigned this case since its inception two years earlier. On March 22, 2013, the undersigned, then Administrative District Judge, assigned District Judge Benjamin Simpson to this case. On April 5, 2013, John Magnuson, the same attorney who had been representing Syringa Grove and now Bruce, filed a Notice of Appearance for the various Nipp defendants. The same three attorneys representing all parties filed a stipulation on July 12, 2013, to allow another amendment to plaintiffs' complaint. On July 15, 2013, an order allowing amendment of the complaint was filed by Judge Simpson. A Second Amended Complaint was filed on July 17, 2013. This amendment added Scharelent 7 as a defendant. On July 23, 2013, the same attorney representing Syringa Grove, Bruce and the Nipp defendants, filed a Notice of Appearance for

Scharelant 7. On July 24, 2013, Scharelant 7 moved to disqualify Judge Simpson. An order was entered July 25, 2013, assigning the undersigned to preside over this case.

For clarification, where practical, the defendants represented by John Magnuson, which consist of Syringa Grove, LLC, Lois Bruce, Charlie R. Nipp, Susan Nipp, Ryan C. Nipp, and Teri Nipp, and Scharelant 7, will be referred to as the "Syringa Grove defendants." The defendants represented by Patrick Risken, which consist of Sawmill Point Development Corporation and George Hamilton and his wife Rita Hamilton, will be referred to as "Sawmill Point defendants."

On February 28, 2014, plaintiffs filed Plaintiffs' Motion to Compel Syringa Grove's, Scharelant 7's and Lois Bruce's Responses to Discovery, which was accompanied by the Memorandum in Support of Plaintiffs' Motion to Compel Syringa Grove's, Scharelant 7's and Lois Bruce's Responses to Discovery and Affidavit of Julie A. Simaytis RE: Plaintiffs' Motion to Compel. In response, on March 7, 2014, the defendants filed a Memorandum in Opposition to Plaintiffs' Motion to Compel Discovery, which was accompanied by the Affidavit of Lois Bruce in Opposition to (1) Plaintiffs' Motion for Injunctive Relief Pursuant to I.C. § 55-916 and IRCP 65(e); and (2) Plaintiffs' Motion to Compel Discovery, and the Affidavit of John F. Magnuson in Opposition to (1) Plaintiffs' Motion for Injunctive Relief Pursuant to I.C. § 55-916 and IRCP 65(e); and (2) Plaintiffs' Motion to Compel Discovery.

Also on February 28, 2014, plaintiffs filed the instant motion for injunctive relief claiming against "certain defendants" (Memorandum in Support of Plaintiffs' Motion for Injunctive Relief Pursuant to Idaho Code § 55-916 – Uniform Fraudulent Transfer Act and IRCP 65(e), p. 5) specifically, Charlie R. Nipp, Susan Nipp, Ryan C. Nipp, Teri Nipp, and Scharelant 7 (Plaintiffs' Motion for Injunctive Relief Pursuant to Idaho Code § 55-916 – Uniform Fraudulent Transfer Act and IRCP 65(e), pp. 3-4), that the transfer of

property in this case is void or voidable under the Idaho Uniform Transfer Act, arguing that the transfers were made to hinder, delay or defraud them. Memorandum in Support of Plaintiffs' Motion for Injunctive Relief Pursuant to Idaho Code § 55-916 – Uniform Fraudulent Transfer Act and IRCP 65(e), p. 5. In support of this contention, they filed Plaintiffs' Motion for Injunctive Relief Pursuant to Idaho Code § 55-916 – Uniform Fraudulent Transfer Act and IRCP 65(e), which was accompanied by the Affidavit of Julie A. Simaytis RE: Plaintiffs' Motion for Injunctive Relief Pursuant to Idaho Code § 55-916 – Uniform Fraudulent Transfer Act and IRCP 65(e). In response, on March 7, 2014, the Syringa Grove defendants filed a Memorandum in Opposition to Plaintiffs' Motion for Injunctive Relief Pursuant to I.C. § 55-916 and IRCP 65(e), which was accompanied by the Affidavit of Lois Bruce in Opposition to (1) Plaintiffs' Motion for Injunctive Relief Pursuant to I.C. § 55-916 and IRCP 65(e); and (2) Plaintiffs' Motion to Compel Discovery, Affidavit of Charlie R. Nipp Re: Motion for Injunctive Relief Pursuant to I.C. § 55-916 and IRCP 65(e), and the Affidavit of John F. Magnuson in Opposition to (1) Plaintiffs' Motion for Injunctive Relief Pursuant to I.C. § 55-916 and IRCP 65(e); and (2) Plaintiffs' Motion to Compel Discovery. A Reply Memorandum in Support of Plaintiff's Motion for Injunctive Relief Pursuant to Idaho Code § 55-916 – Uniform Fraudulent Transfer Act and IRCP 56(e) was filed by the plaintiffs on March 12, 2014. As mentioned above, after oral argument on March 14, 2014, the Syringa Grove defendants on April 1, 2014, filed a "Citation of Additional Authority Re: Opposition to Plaintiffs' Motion for Injunctive Relief Pursuant to I.C. § 55-816 and IRCP 65(e)".

II. STANDARD OF REVIEW.

A. Motion to Compel.

"Control of discovery is within the discretion of the trial court." *Jen-Rath Co. v. Kit Mfg. Co.,* 137 Idaho 330, 336, 48 P.3d 659, 665 (2002). As such, the decision to

grant or deny a motion to compel rests in the discretion of the trial court. *Sirius LC v. Erickson,*144 Idaho 38, 43, 156 P.3d 539, 544 (2007); *Kirk v. Ford Motor Co.,* 141 Idaho 697, 700–01, 116 P.3d 27, 30–1 (2005). Idaho Rule of Civil Procedure 26(b) allows for the discovery of all relevant subject matter. Specifically it states:

> Unless otherwise limited by order of the court in accordance with these rules, the scope of discovery is as follows: (1) Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party, including the existence, description, nature, custody, condition and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of any discoverable matter. It is not ground for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.

I.R.C.P. 26(b).

Idaho Rule of Civil Procedure 37(a)(1) requires that the moving party in a discovery dispute between the parties file with the Court a certification that the movant has made a good faith attempt to confer with the opposing party to obtain the disclosure without court action. I.R.C.P. 37(a)(1). This Court, in its standard Pretrial Order further instructs the movant that "[t]he motion shall not refer the Court to other documents in the file. For example, if the sufficiency of an answer to an interrogatory is in issue, the motion shall contain, verbatim, both the interrogatory and the allegedly insufficient answer, followed by each party's contentions, separately stated." Scheduling Order, Notice of Trial Setting ¶ 3.

B. Motion for Injunctive Relief.

The decision whether to grant or deny injunctive relief is within the discretion of the trial court. *Harris v. Cassia Cnty.*, 106 Idaho 513, 517, 681 P.2d 988, 992 (1984) (citing *Milbert v. Carl Carbon, Inc.,* 89 Idaho 471, 406 P.2d 113 (1965); *Western Gas &*

Power of Idaho, Inc. v. Nash, 75 Idaho 327, 272 P.2d 316 (1954)). The exercise of such discretion will not be overturned absent a manifest abuse of discretion. *Id.*

Idaho Rule of Civil Procedure 65(e) provides the grounds to issue a preliminary injunction. It states a preliminary injunction may be granted in the following cases:

> (1) When it appears by the complaint that the plaintiff is entitled to the relief demanded, and such relief, or any part thereof, consists in restraining the commission or continuance of the acts complained of, either for a limited period or perpetually.
> (2) When it appears by the complaint or affidavit that the commission or continuance of some act during the litigation would produce waste, or great or irreparable injury to the plaintiff.
> (3) When it appears during the litigation that the defendant is doing, or threatens, or is about to do, or is procuring or suffering to be done, some act in violation of the plaintiff's rights, respecting the subject of the action, and tending to render the judgment ineffectual.
> (4) When it appears, by affidavit, that the defendant during the pendency of the action, threatens, or is about to remove, or to dispose of the defendant's property with intent to defraud the plaintiff, an injunction order may be granted to restrain the removal or disposition.
> (5) A preliminary injunction may also be granted on the motion of the defendant upon filing a counterclaim, praying for affirmative relief upon any of the grounds mentioned above in this section, subject to the same rules and provisions provided for the issuance of injunctions on behalf of the plaintiff.
> (6) The district courts, in addition to the powers already possessed, shall have power to issue writs of injunction for affirmative relief having the force and effect of a writ of restitution, restoring any person or persons to the possession of any real property from the actual possession of which the person or persons may be ousted by force, or violence, or fraud, or stealth, or any combination thereof, or from which the person or persons are kept out of possession by threats whenever such possession was taken from them by entry of the adverse party on Sunday or a legal holiday, or in the nighttime, or while the party in possession was temporarily absent therefrom. The granting of such writ shall extend only to the right of possession under the facts of the case, in respect to the manner in which the possession was obtained, leaving the parties to their legal rights on all other questions the same as though no such writ had issued: provided, that no such writ shall issue except upon notice in writing to the adverse party of at least five (5) days of the time and place of making application therefor.

I.R.C.P. 65(e).

"[A] preliminary mandatory injunction is granted only in extreme cases where the right is very clear and it appears that irreparable injury will flow from its refusal." *Harris*, 106 Idaho 513, 518, 681 P.2d 988, 993 (citing *Evans v. District Court of the Fifth Judicial District,* 47 Idaho 267, 270, 275 P. 99, 100 (1929); *quoting Farm Service, Inc. v. United States Steel Corp.,* 90 Idaho 570, 587, 414 P.2d 898, 907 (1966)). The burden is on the party seeking an injunction to prove that they have a right to the relief demanded and are likely to prevail at trial. *Id*. (citing *Lawrence Warehouse Co. v. Rudio Lumber Co.,* 89 Idaho 389, 405 P.2d 634 (1965)). "The substantial likelihood of success necessary to demonstrate that [the moving party is] entitled to the relief they demand cannot exist where complex issues of law or fact exist which are not free from doubt." *Id.* (citing *First National Bank & Trust Co., v. Federal Reserve Bank*, 495 F.Supp. 154 (W.D. Mich. 1980); *Avins v. Widner College, Inc*., 421 F.Supp. 858 (D. Del 1976); *Wm. Rosen Monuments, Inc. v. Phil Madonick Monuments, Inc.*, 62 A.D.2d 1053, 404 N.Y.S.2d 113 (NY. App. Div. 1978)).

III. ANALYSIS.

A. Plaintiffs' Motion to Compel Must be Granted.

Initially, Plaintiffs' Motion to Compel Syringa Grove's, Scharelant 7's and Lois Bruce's Responses to Discovery, filed February 28,2014, were quite broad. Plaintiffs' Motion to Compel Syringa Grove's, Scharelant 7's and Lois Bruce's Responses to Discovery, pp. 1-2; Memorandum in Support of Plaintiffs' Motion to Compel Syringa Grove's, Scharelant 7's and Lois Bruce's Responses to Discovery, pp. 1-21. The Memorandum in Opposition to Plaintiffs' Motion to Compel Discovery, filed March 7, 2014, claims there remain only a dispute as to Scharelant 7, LLC's response to Request for Production No. 2, and Syringa Grove's response to Request for Production

No. 6(c) and (e). Memorandum in Opposition to Plaintiffs' Motion to Compel Discovery, pp. 4-7. At oral argument, counsel for plaintiffs agreed as to the remaining discovery issues covered by the plaintiffs' motion to compel.

Plaintiffs' motion to compel Scharelant 7 LLC's response to plaintiffs' Request for Production No. 2 must be granted. Plaintiffs' Request for Production No. 2 reads:

> Produce all accounting books and records for Scharelant 7 LLC and all monthly statements of accounts from all banks or institutions with which Scharelant 7 LLC has currently or has previously had any business, checking or savings accounts since its organization as an LLC.

Magnuson Affidavit, Exhibit E, p. 4. Scharelant 7 objected as follows:

> Request for Production No. 2 calls for information not reasonably calculated to lead to the discovery of admissible evidence. Request for Production No. 2 is further objected to on the basis that said request is overbroad, unduly burdensome, and oppressive. Objection is further interposed on the basis that said request seeks information of a personal or proprietary nature for which no reasonable basis exists to compel disclosure.

Id. Scharelant 7 then claims the answer may involve attorney work product. Memorandum in Opposition to Plaintiffs' Motion to Compel Discovery, p. 5. Finally, Scharelant 7 claims neither Lois Bruce nor Syringa Grove could be liable to the plaintiffs. Scharelant 7 has not proven Request for Production No. 2 is overbroad, unduly burdensome, and oppressive. Scharelant 7 has not proven the request seeks information of a personal or proprietary nature. Scharelant 7 has not proven the information sought is not reasonably calculated to lead to the discovery of admissible evidence.

Plaintiffs' motion to compel Syringa Grove's response to Request for Production No. 6(c) and (e) must be granted. Request for Production No. 6(c) seeks records related to the funding of Syringa Grove. Syringa Grove states it has provided such. Memorandum in Opposition to Plaintiffs' Motion to Compel Discovery, p. 6. At oral

argument on March 14, 2014, counsel for plaintiffs argued the "operating agreement" has not been produced. Syringa Grove has articulated no good reason not to disclose such if it exists. Request for Production No. 6(e) seeks records related to insurance for Syringa Grove. At oral argument on March 14, 2014, plaintiffs' counsel argued they had been told Syringa Grove did not have insurance in 2011, but later discovered a certificate of insurance for a later point in time. If there is additional insurance information, it must be disclosed, regardless of the date of coverage.

B. Plaintiffs' Motion for Injunctive Relief Must be Denied.

"The law governing conveyances in fraud of creditors has developed from the concept that the debtor's property constitutes a source from which debts should be paid; consequently, the debtor should not be permitted to dispose of the property in a manner violative of the creditors' equitable rights. *Mohar v. McLelland Lumber Co.,* 95 Idaho 38, 41, 501 P.2d 722, 725 (1972) (citing *Ocklawaha River Farms Co. v. Young*, 73 Fla. 159, 74 So. 644 (1971); *Knight v. Packer*, 12 N.J.Eq. 214 (1859); *Candler v. Pettit,* 1 Paige (N.Y.) 168 (1828)). "Fraud is never presumed. All essential elements thereof must be established by the party relying thereon by clear and convincing evidence." *Chester B. Brown Co. v. Goff*, 89 Idaho 170, 175, 403 P.2d 855, 858 (1965) (citing *Mountain Electric Co. v. Swartz*, 87 Idaho 403, 393 P.2d 724 (1964); *Thompson v. Marks*, 86 Idaho 166, 384 P.2d 69 (1963); *Barron v. Koening*, 80 Idaho 28, 324 P.2d 388 (1958); *Cooper v. Westco Builders*, 76 Idaho 278, 281 P.2d 669 (1955)).

Idaho Code § 55-906 deems every transfer of property made or obligation incurred with the intent to delay or defraud a creditor, as void against all creditors of the debtor. I.C. § 55-906. A "transfer" of real property is made "when the transfer is so far perfected that a good-faith purchaser of the asset from the debtor against whom

applicable law permits the transfer to be perfected cannot acquire an interest in the asset that is superior to the interest of the transferee." I.C. § 55-915(1)(a). A "transfer" is defined as "every mode, direct or indirect, absolute or conditional, voluntary or involuntary, of disposing of or parting with an asset or an interest in an asset, and includes payment of money, release, lease, and creation of a lien or other encumbrance." *Post v. Idaho Farmway, Inc*., 135 Idaho 475, 477, 20 P.3d 11, 13 (2001). I.C. § 55-910(12). A written "obligation" is incurred "when the writing executed by the obligor is delivered to or for the benefit of the obligee." I.C. § 55-915(5)(b).

"Whether a particular transaction was fraudulent is a question of fact to be determined from all the circumstances. Actual fraud must be proven by clear and convincing evidence; but when certain 'badges of fraud' attend the conveyance, and are not adequately explained, an inference of actual fraud may be warranted." *Mohar v. McLelland Lumber Co.,* 95 Idaho 38, 42, 501 P.2d 722, 726 (1972) (internal citations omitted); I.C. § 55-908.

Idaho Code § 55-914(1) discusses the situation when the creditor's claim arises *before* the alleged fraudulent transaction: "A transfer made or obligation incurred by a debtor is fraudulent as to a creditor whose claim arose *before* the transfer was made or the obligation was incurred if the debtor made the transfer or incurred the obligation without receiving a reasonably equivalent value in exchange for the transfer or obligation and the debtor became insolvent as a result of the transfer or obligation." *Post v. Idaho Farmway, Inc*., 135 Idaho 475, 477, 20 P.3d 11, 13, citing I.C. § 55-914(1). Idaho Code § 55-913(1)(a) states any transfer made or obligation incurred, *whether before* <u>*or after*</u> a creditor's claim arose, is fraudulent if the debtor made the transfer or incurred the obligation with actual intent to hinder, delay or defraud a creditor

of the debtor. I.C. § 55-913(1)(a). (italics and underlining added). While "intent" is subjective and difficult to determine, I.C. § 55-913(2) provides some objective guidance. Under subsection two of that statute, non-exclusive factors to consider in determining whether there was actual intent to hinder, delay or defraud a creditor, include whether or not:

> (a) The transfer or obligation was to an insider;
> (b) The debtor retained possession or control of the property transferred after the transfer;
> (c) The transfer or obligation was disclosed or concealed;
> (d) Before the transfer was made or obligation was incurred, the debtor had been sued or threatened with suit;
> (e) The transfer was of substantially all the debtor's assets;
> (f) The debtor abscounded [absconded];
> (g) The debtor removed or concealed assets;
> (h) The value of the consideration received by the debtor was reasonably equivalent to the value of the asset transferred or the amount of the obligation incurred;
> (i) The debtor was insolvent or became insolvent shortly after the transfer was made or the obligation was incurred;
> (j) The transfer occurred shortly before or shortly after a substantial debt was incurred; and
> (k) The debtor transferred the essential assets of the business to a lienor who transferred the assets to an insider of the debtor.

I.C. §§ 55-913(2)(a)-(k). "The timing of each transfer is considered individually. The fact that [a] new transfer was allegedly made in an attempt to satisfy a pre-existing obligation goes to the question of value, not to the question of timing." *Post,* 135 Idaho 475, 478, 20 P.3d 11, 14. This Court finds that if the transfers that were made to settle the preexisting obligation to WTB occurred after this lawsuit was filed, those transfers do not revert back to the original obligation date for the purpose of timing, but rather raise a question of value; and value is one of the factors that determines intent. The

Court would still look to the Idaho Code §§ 55-913(2)(a)-(k) factors to determine whether the intent of the transfers was fraudulent.

A cause of action for a fraudulent transfer brought under Idaho Code § 55-913(a) must be commenced "within four (4) years after the transfer was made . . . or, if later, within one (1) year after the transfer...was or could reasonably have been discovered by the claimant." I.C. § 55-918(1).

Plaintiffs claim the transfer of property in this case is void or voidable under the Idaho Uniform Transfer Act, codified in I.C. § 55-901 *et seq.* Memorandum in Support of Plaintiffs' Motion for Injunctive Relief Pursuant to Idaho Code § 55-916 – Uniform Fraudulent Transfer Act and IRCP 65(e), p. 5. Although plaintiffs do not specifically cite to the factors found in Idaho Code § 55-913(2), it appears as though they argue the Syringa Grove defendants made the transfer with actual intent to hinder, delay or defraud them because factors (a),(b),(d), (h) and (i) are present. *Id*., p. 9. Specifically, plaintiffs claim they are entitled to an injunction under Idaho Code §§ 55-913 and 55-914 because:

> All of the transfers occurred after Defendants knew they had been sued in a lawsuit that involved significant damage to Plaintiffs' properties. Many of these transfers and obligations involved "insiders" to Defendant [Syringa] Grove. Some of the transfers were made without an exchange of reasonably equivalent value at the time of transfer (i.e. quitclaim transfers). Some of the transfers occurred after Defendant [Syringa] Grove was purporting to be insolvent or those transfers caused Defendant [Syringa] Grove to become insolvent. Defendant [Syringa] grove retained possession and control of some of the properties after the transfer.

Id. Moreover, plaintiffs claim that even though the obligations of Syringa Grove to WTB were made prior to the initiation of this lawsuit, the transfer of property by Syringa Grove to Bruce, and then Bruce to Charlie Nipp via Scharelant 7, are separate transfers that occurred after the initiation of this lawsuit, making them fraudulent transfers under the Uniform Fraudulent Transfer Act. Reply Memorandum in Support of Plaintiff's

Motion for Injunctive Relief Pursuant to Idaho Code § 55-916 – Uniform Fraudulent Transfer Act and IRCP 56(e), p. 5. As such, the plaintiffs seek to enjoin the Syringa Grove defendants from further transferring Lots 6 and 7 and Tract A to preserve their ability in the future to levy execution of a judgment against them. Memorandum in Support of Plaintiffs' Motion for Injunctive Relief Pursuant to Idaho Code § 55-916 – Uniform Fraudulent Transfer Act and IRCP 65(e), p. 10.

In response, the Syringa Grove defendants maintain that the transfer of property in this case was not fraudulent because the obligations that led to the transfers occurred before the landslide occurred, said landslide being the basis to the plaintiffs' claims. Memorandum in Opposition to Plaintiffs' Motion for Injunctive Relief Pursuant to I.C. § 55-916 and IRCP 65(e), p. 24. The Syringa Grove defendants claim Syringa Grove obligated itself to WTB, Bruce, and Charlie Nipp in 2007, nearly four years prior to the landslide which is the underlying basis for this lawsuit. *Id.,* pp. 22-30. In support of this claim, the Syringa Grove defendants make the following five arguments:

First, Syringa Grove executed a Promissory Note for the benefit of WTB in the amount of $1,840,000.00 on May 31, 2007. *Id.* at p. 24. The Promissory Note was secured by a Deed of Trust executed for the benefit of WTB, on June 24, 2007. *Id.* These events occurred three years and eight months prior to the underlying events of this cause of action, the landslide. *Id.,* p. 24.

The Syringa Grove defendants maintain plaintiffs cannot establish the transfer or obligation are fraudulent under Idaho Code § 55-913(1) because there is "no evidence that WTB or [Syringa Grove] collusively committed some act or fraud in the ordinary course of commercial business by borrowing money, reflected by a Promissory Note, and then securing the same with a Deed of Trust. Further there is no showing that

WTB did not receive a 'reasonably equivalent value' in exchange for the transfer or obligation." *Id.,* p. 24 (emphasis in original).

Moreover, between March 20, 2013, and July 19, 2013, Syringa Grove sold Lots 1 through 5 to third-parties, and the proceeds of the sales went to WTB, pursuant to the Deed of Trust. *Id*. at pp. 24-24. The proceeds were not enough to satisfy the entire obligation owing to WTB, due to selling price, which was due to the economy at the time of the sale. *Id*., p. 25; Charlie Nipp Affidavit, Exhibit Q. However, the Syringa Grove defendants claim the sales were for more than the assessed value at the time of the sale. *Id*., p. 30 (citing Exhibit A attached to Memorandum in Opposition to Plaintiffs' Motion for Injunctive Relief Pursuant to I.C. § 55-916 and IRCP 65(e); Affidavit of Charlie Nipp, Exhibits JJ through OO). As such, Syringa Grove defendants claim the conveyance of Lots 1 through 5 were not fraudulent under Idaho Code § 55-917. *Id.*

Second, in May 2007, Bruce and Syringa Grove adopted an Operating Agreement that provided Bruce would transfer 14.69 acres to Syringa Grove in exchange for Syringa Grove deeding Lots 6 and 7 to Bruce at the time the Final Plat was recorded, creating seven lots and a conservation tract. *Id.*, p. 25; Affidavit of Charlie Nipp, Exhibits F and J. On June 4, 2007, Bruce deeded the property to Syringa Grove. *Id*. at p. 5; Affidavit of Charlie Nipp, Exhibits F. The Syringa Grove defendants claim that the obligation and transfer to Bruce occurred in June 2007, when Bruce deeded the property to Syringa Grove, approximately sixteen months prior to the January 2011 landslide which give rise to this case. *Id.* at pp. 25-26. They contend that Bruce gave sufficient value for Lots 6 and 7 because the value of the property at the time she contributed was worth $257,998.00 more than its current assessed value. *Id.,* p. 29; Affidavit of Lois Bruce, p. 7 ¶ 28.

Third, the Syringa Grove defendants claim they obligated themselves to repay Charlie Nipp prior to the January 2011 landslide. *Id*., p. 27. Between 2008 and 2011, Charlie Nipp loaned Syringa Grove money totaling $1,067,805, so that Syringa Grove could meet its obligations to WTB. *Id.,* p. 28. Most of this debt was incurred prior to the March 23, 2011, filing of this Complaint. *Id*.

The Court finds these first three claims by Syringa Grove are based on obligations which occurred prior to the landslide. That issue was addressed in *Post,* 135 Idaho 475, 20 P.3d 11. In that case, the Posts farmed land owned by Idaho Farmway, Inc. (Farmway). Farmway owed the Corders money. *Post,* 135 Idaho 475, 476, 20 P.3d 11, 12. In 1995, Corders filed a lawsuit against Farmway to collect that debt and obtained a judgment in January 1998. Posts were served with a notice of garnishment in June 1998, as Corders attempted to garnish Posts' lease payments to be made to Farmway. *Id.* In July 1998, Farmway sent Posts a letter informing the Posts that in February 1998, the farm had been transferred by Farmway to Wietz & Co. *Id.* Posts filed an interpleader action. In that interpleader action, the Corders alleged the transfer of the farm owned by Farmway violated I.C. § 55-914(1). *Id.* Farmway claimed the transfer was made so Wietz & Co. could sell the farm to satisfy the Key Bank loan Farmway had guaranteed for Weitz & Co. in 1994. *Id.* Farmway claimed since the transfer was made to satisfy a preexisting creditor, the transfer was not fraudulent. *Id.* Corders claimed Farmway received no consideration for the transfer and the lender has since foreclosed on Farmway and Weitz & Co. 135 Idaho 475, 477, 20 P.3d 11, 13. The Idaho Supreme Court affirmed the district judge's finding that the Corders' claim arose before Farmway transferred the property to Weitz & Co.:

> Farmway argues that because it guaranteed the Key Bank loan before the Corders' claim arose and the transfer to Weitz & Co. was made

> in an attempt to satisfy the loan, the Corders' claim did not arise before the transfer. Even if Farmway transferred an interest in the Elmore County farm when it guaranteed the loan, the quitclaim deed represents a new and separate transfer, just as the Post leasehold represents a separate transfer. The timing of each transfer is considered individually. The fact that the new transfer was allegedly made in an attempt to satisfy the pre-existing obligation goes to the question of value, not to the question of timing. Therefore, the district judge properly found that the Corders' claim which was reduced to judgment on January 5, 1998, arose before the Elmore County farm was transferred to Weitz & Co., on February 23, 1998.

135 Idaho 475, 478, 20 P.3d 11, 14. In the present case, under *Post*, what occurred in 2007 between Syringa Grove and WTB, and between Syringa Grove and Bruce, does not create a "defense" to Syringa Grove to plaintiffs' potential claim for damages allegedly caused by the 2011 landslide. The landslide, and plaintiffs' potential claim for damages, occurred after those transfers and obligations were made in 2007. "The fact that the new transfer was allegedly made in an attempt to satisfy the pre-existing obligation goes to the question of value, not to the question of timing." *Id*. There were additional transfers which occurred in 2013 when the lots sold.

In *Post*, the decision for the district judge and for the Idaho Supreme Court centered around "reasonably equivalent value." In the present case, the facts regarding value are certainly more known than in *Post.* The Idaho Supreme Court noted:

> The Corders provided the district judge with an affidavit demonstrating the Elmore County farm was estimated by Philip Weitz to have a value of $1.5 million with only $500,000 still owing on the purchase price; Farmway received no cash for the transfer; Key Bank did not have a security interest in the Elmore County farm; and the Key Bank loan was not satisfied. This was sufficient evidence to support the Corders' allegation that a fraudulent transfer had occurred in that Farmway had not received equivalent value for the property.
>
> Once the moving party has provided sufficient evidence to support the motion, the party against whom a motion for summary judgment is sought may not merely rest on allegations contained in the pleadings, but must come forward and produce evidence by way of deposition or affidavit to contradict the assertions of the moving party and establish a genuine issue of material fact. I.R.C.P. 56(e); *McCoy v. Lyons,* 120 Idaho 765,

> 770, 820 P.2d 360, 365 (1991). Such evidence must consist of specific facts, and cannot be conclusory or based on hearsay. *State v. Shama Res., Ltd. P'ship,* 127 Idaho 267, 271, 899 P.2d 977, 981 (1995).
>
> The only relevant statements in the affidavit in opposition to the motion are Philip Weitz's assertions that the property was transferred so that it could be sold to satisfy the Key Bank debt and to shift any tax implications of the sale from Farmway to Weitz & Co. Although a transfer that satisfies an antecedent debt is value as defined by I.C. § 55-912, the debt must actually be satisfied and the value must be reasonably equivalent. Philip Weitz's affidavit admits Farmway did not receive any money for the property, the debt was not satisfied, and Key Bank reduced its loan to a judgment with a right to sell Farmway's real property located in Ada and Canyon counties. Philip Weitz's affidavit says nothing concerning the equivalency of the values. Furthermore, Philip Weitz's assertion that the transfer would shift the tax consequences of any sale to Weitz & Co. is unsupported, conclusory and insufficient to create a genuine issue of material fact.
>
> Since the affidavits submitted by Farmway in opposition to the motion failed to provide any admissible contradictory evidence concerning equivalent value, the district judge properly found there was no genuine issue of material fact that Farmway did not receive equivalent value for the property transferred.

135 Idaho 475, 478, 20 P.3d 11, 14. This Court finds the evidence regarding the various obligations that occurred in this case prior to the 2011 landslide do not provide a defense, but are certainly relevant to the valuation issue.

On April 1, 2014, counsel for the Syringa Grove defendants filed a "Citation of Additional Authority Re: Opposition to Plaintiffs' Motion for Injunctive Relief Pursuant to I.C. § 55-816 and IRCP 65(e)". Plaintiffs have not objected to this filing. The four cases cited in that Citation of Additional Authority certainly come closer to establishing a "defense" of pre-existing obligation to a claim of fraudulent transfer than did the Idaho Supreme Court in *Post*. In *Irving Trust Co. v. Kaminsky,* 19 F.Supp. 816 (S.D.N.Y. 1937), the federal district court dismissed claims of a bankruptcy trustee, against a bank, to set aside alleged transfers made by the bankrupt to the bank. The bankrupt owed the bank $27,500.00. Before filing for bankruptcy, the bankrupt transferred to the bank mortgages and stock as collateral security for the antecedent debt. 19 F.Supp.

816, 817. The federal district judge, interpreting New York's Uniform Fraudulent Conveyance Act, specifically the sections dealing with transfers without fair consideration, held: "A transfer in good faith to secure an antecedent debt, however, is declared to be a transfer for fair consideration, provided the amount of the debt is not disproportionately small to the value of the property transferred." 19 F.Supp. 816, 818. "Under the Statute of Elizabeth a transfer by an insolvent debtor to pay or to secure an antecedent debt has never been treated as a transfer to hinder, delay or defraud creditors, although it is self-evident that other creditors are necessarily hindered and delayed by such a transfer." *Id.* The district court then concluded:

> The transaction alleged to have taken place between the bankrupt and the bank was a preference, nothing more. The bankrupt, being indebted to the bank, transferred property to the bank to serve as collateral security for the debt. The transaction is not made more offensive by the allegation that the transfer was part of a plan concocted by the bankrupt and known to the bank to hinder, delay or defraud other creditors or to put his property into the hands of kinsmen and out of the reach of creditors. *Irving Trust Co. v. Chase Nat. Bank*, 65 F.(2d) 409 (C.C.A.2). The mere giving of a preference in the ordinary way is not part of a scheme to hinder, delay or defraud creditors as those words are understood in law. If the transaction as carried into operation involved more than what appears on the surface, the plaintiff should have alleged the additional facts. As the bill stands, it alleges no cause of action against the defendant bank.

19 F.Supp. 816, 818-19. In *Wyzard v. Goller*, 23 Cal.App.4th 1183, 28 Cal.Rptr.2d 608 (Cal.Ct.App.2nd Dist. Div. 4 1994), the California Court of Appeal held a client (Steve Manning) who, toward the end of trial, executed a promissory note to his attorney (Nathan Goller) for legal services already rendered, and secured it with two parcels of real property Manning owned, was not fraudulently conveying property to "hinder, delay or defraud" Kenneth Wyzard, the eventual prevailing party in the *Wyzard v. Manning* litigation. 23 Cal.App.4th 1183, 1185-87, 28 Cal.Rptr.2d 608, 608-10. Finding no

fraudulent conveyance, the discussion by the California Court of Appeal gives the history of the concept that a debtor can give preference to one creditor over another:

> Mr. Wyzard's argument to the trial court, and to this court, is that the deeds of trust to Mr. Goller were made "with actual intent to hinder, delay, or defraud" Mr. Wyzard as a creditor of Mr. Manning. Mr. Wyzard invokes Civil Code section 3439.04: "A transfer made or obligation incurred by a debtor is fraudulent as to a creditor, whether the creditor's claim arose before or after the transfer was made or the obligation was incurred, if the debtor made the transfer or incurred the obligation as follows: (a) With actual intent to hinder, delay, or defraud any creditor of the debtor."
>
> Before proceeding with a discussion of this provision, we note the statute to which it would be opposed according to appellant's argument. Civil Code section 3432, enacted as part of the 1872 Field Codes, provides that "A debtor may pay one creditor in preference to another, or may give to one creditor security for the payment of his demand in preference to another." Even before enactment of the Field Codes, it had been recognized that a failing or insolvent debtor could prefer one creditor over another. (See *Randall v. Buffington* (1858) 10 Cal. 491, 494 ["... it is difficult to perceive how the payment of a debt which [is] justly owed, and which was past due, can be tortured into an act to hinder, delay, and defraud creditors"]; *Wheaton v. Neville* (1861) 19 Cal. 41, 46.) Subsequent cases continued the judicial refusal to set aside a preferential transfer solely because it worked a preference. (See *McGee v. Allen* (1936) 7 Cal.2d 468, 474 [60 P.2d 1026]; *Bradley v. Butchart* (1933) 217 Cal. 731 [20 P.2d 693].) If the transfer was for fair consideration and not fraudulent, the only basis to set it aside was through bankruptcy, which now reaches transfers made within 90 days of the adjudication. (11 U.S.C. § 547(b)(4)(A); see *McGee v. Allen*, *supra*, 7 Cal.2d at p. 474.)
>
> The general rule permitting a debtor to prefer one creditor or group of creditors over others has long been subject to exceptions in cases of fraud. The subject was dealt with by the National Conference of Commissioners on Uniform State Laws which, in 1918, proposed what became the Uniform Fraudulent Conveyance Act (the Uniform Act). By 1984, the Uniform Act had been adopted in 25 jurisdictions. (See 7A West's U. Laws Ann. (1984) Bus. & Fin. Laws, comrs. note, p. 639.) California was one of them; it adopted the uniform law in 1939. (Stats. 1939, ch. 329, § 9, p. 1669.) Civil Code section 3439.07, which was taken directly from section 7 of the Uniform Act, declared conveyances made to hinder, delay or defraud present or future creditors to be fraudulent. [FN3]
>
> FN3 Civil Code former section 3439.07 stated: "Every conveyance made and every obligation incurred with actual intent, as distinguished from intent presumed in law, to hinder, delay, or defraud either present or future creditors, is fraudulent as to both present and future creditors." (12 West's Ann. Civ. Code (1970 ed.) p. 623.)

As a result of major changes in the Bankruptcy Act and the Uniform Commercial Code, and in recognition of other changes in the law, the commissioners undertook a study and revision of the Uniform Act in 1978. The result was the 1984 version, which, like its predecessor, has been widely adopted. (7A West's U. Laws Ann., *op. cit supra*, Bus. & Fin. Laws, comrs. note, p. 639.) The California version was enacted in 1986, and was in effect when the conveyances at issue in this case were made. (See Stats. 1986, ch. 383, § 2.) (The law has been retitled; it is now the Uniform Fraudulent Transfer Act; see Civ. Code, § 3439.)

Civil Code section 3439.04 combines the substance of several separate provisions of the former Act. (See *Reddy v. Gonzalez* (1992) 8 Cal.App.4th 118, 123 [10 Cal.Rptr.2d 55].) We have quoted the language pertinent to this case, which appears in subdivision (a). The redrafted provision is substantially the same as Civil Code section 3439.07 of the former Act. Civil Code section 3439.12 of the new Act provides in part that provisions of the new law, insofar as they are substantially the same as provisions of the former statute, "shall be construed as restatements and continuations, and not as new enactments."

We therefore turn to the principal issue on this appeal: whether a preferential transfer, if made for proper consideration ("value" under the new law; see Civ. Code, § 3439.03), but with recognition that the transfer will effectively prevent another creditor from collecting on his debt, is one made with "actual intent to hinder, delay, or defraud" that creditor.

As we have discussed, California cases predating the Act rejected the claim that a debtor's preference of some creditors over others is improper as to those who are not preferred. Later cases reached the same result on the basis of Civil Code section 3432, without discussion of the Act. (See *U.S. Fid. & Guar. Co. v. Postel* (1944) 64 Cal.App.2d 567, 572 [149 P.2d 183] ["[t]he statutory right of a debtor to prefer one creditor to another is based upon the principle that in the absence of fraud the owner of property may do with it as he pleases ..., nor does the fact that such preference hinders or delays other creditors in the collection of their claims render it void, nor the fact that the preferred creditor had knowledge that such consequences would follow the preference"]; *United States v. Eleven Certain Parcels of Land* (S.D.Cal. 1942) 45 F.Supp. 289 [preference of one creditor over another proper under California law even if insolvency results].)

This has been the rule for over 400 years, since the Statute of Elizabeth in 1571. (13 Eliz., ch. 5 (1571); see 1 Glenn, Fraudulent Conveyances and Preferences (rev. ed. 1940) §§ 58, 289, pp. 79, 488.) Cases decided under the law of jurisdictions that adopted the Uniform Act reached the same result under section 7 of the uniform law. (See *Irving Trust Co. v. Kaminsky* (D.N.Y. 1937) 19 F.Supp. 816.)

The *Irving Trust Co.* decision, a leading case, pointed out that a transfer made in good faith to secure an antecedent debt is declared to be for fair consideration, and does not amount to an act to "hinder, delay or defraud" an unpreferred creditor. (19 F.Supp. at p. 818.)

> The New Jersey Supreme Court summarized the rule in the following terms: "We start with the proposition that a preference as such is not a fraudulent conveyance. True, a creditor who collects from an insolvent debtor fares better than other claimants. Yet if the transfer were set aside in favor of another creditor, there would be but a substitution of one preference for another. For that reason a preference cannot be undone by a competing creditor whether the preference was obtained through judicial process or by a transfer from the debtor, and the Uniform Fraudulent Conveyance Act did not alter that proposition." (*Smith v. Whitman* (1963) 39 N.J. 397 [189 A.2d 15, 18]; see also *Marroquin v. Barrial* (1959) 174 Cal.App.2d 540, 543 [345 P.2d 30]; *In re Olson* (Bankr. D.Minn. 1984) 45 Bankr. 501, 505; *Peoples-Pittsburgh T. Co. v. Holy Family P. Nat. C. Ch.* (1941) 341 Pa. 390 [19 A.2d 360, 361]; *American Cas. Co. of Reading Pa. v. Line Materials Indus*. (10th Cir. 1964) 332 F.2d 393, 396; *Manello v. Bornstine* (1954) 44 Wn.2d 769 [270 P.2d 1059, 45 A.L.R.2d 494]; *Boston Trading Group, Inc. v. Burnazos* (1st Cir. 1987) 835 F.2d 1504, 1508 [hypothetical debtor who owes $10,000 to A and $20,000 to B, but has only $8,000, which he uses to satisfy his debt to A, does not make "fraudulent conveyance" under the Uniform Act because payment satisfies a debt owed to legitimate creditor; "B must find a remedy in bankruptcy, or in some other, law"].)
>
> We conclude that the transfer to Mr. Goller, in payment for his legal services, while a preference, is not for that reason a transfer made to "hinder, delay or defraud" Mr. Wyzard.

23 Cal.App.4th 1183, 1188-91, 28 Cal.Rptr.2d 608, 610-12. Syringa Grove cites two Idaho cases, the first, *Rogers v. Boise Association of Credit Men, Ltd.,* 33 Idaho 513, 196 P. 213 (1921). Discussing whether an assignment caused delay or fraud upon certain creditors, the Idaho Supreme Court held:

> Even if the assignment had the effect of preferring certain creditors, it would not be invalid for that reason. A preference is valid in the absence of an actual intent to defraud. The existence of such intent is a question of fact. The mere fact that preference results is not proof of fraud. *Wilson v. Baker Clothing Co.*, 25 Idaho, 378, 137 Pac. 896, 50 L. R. A. (N. S.) 239; *Capital Lumber Co. v. Saunders, supra*; *Pettengill v. Blackman*, 30 Idaho, 241, 164 Pac. 358; *Bates v. Papesh*, 30 Idaho, 529, 166 Pac. 270.

33 Idaho 513, ___, 196 P. 213, 214 (1921). *Pettingill v. Balckman*, 30 Idaho 214, 164 P. 358 (1917) is the other Idaho case cited by Syringa Grove. *Pettingill* is cited by the

Idaho Supreme Court in *Rogers* in the passage quoted above. The Idaho Supreme Court in *Pettingill* held:

> Appellant seems to lay great stress upon the fact that the bank was insolvent at the time the mortgage was given to Blackman. He does not contend, however, that the bank would not have authority to prefer a creditor even while insolvent. And indeed it must be regarded as settled law in this state that in the absence of collusion or fraud an insolvent corporation is not prohibited from preferring certain creditors over others. This principle was announced in the case of *Wilson v. Baker Clothing Co.,* 25 Idaho, 378, 137 Pac. 896, 50 L. R. A. (N. S.) 239. And the rule there laid down by this court was followed in the case of *Capital Lumber Co. v. Saunders*, 26 Idaho, 408, 143 Pac. 1178. The insolvency of the bank, therefore, would only be material in the event that appellant were able to show either collusion or fraud. But the trial court found that Blackman had no knowledge of the insolvency of the bank at the time of taking the mortgage, and this finding is supported by the evidence. The trial court further found, and it is not questioned by appellant, that the bank was indebted to Blackman substantially in the amount for which the security was given. And we think the rule to be that wherever there is a true debt and a real transfer for an adequate consideration, there is no collusion, and that fraud in its legal sense cannot be predicated on such a transaction. Bump, Fraud. Conv. (2d Ed.) p. 187; *Currie v. Bowman*, 25 Or. 364, 35 Pac. 848-852.

30 Idaho 214, ___, 164 P. 358, 362. Whether termed "reasonably equivalent value" under *Post,* or "adequate consideration" under *Pettingill*, a material issue remains for the trier of fact. Most importantly, for purposes of plaintiffs' motion for injunctive relief, based on the evidence presented at this time, this Court cannot determine the plaintiffs' "right is very clear" and the plaintiffs are "likely to prevail at trial." *Harris*, 106 Idaho 513, 518, 681 P.2d 988, 993.

Fourth, the Syringa Grove defendants also maintain the plaintiffs' cannot show there was fraud in the conveyance of Tract A or Lot 7 from Bruce to Scharelant 7. *Id.,* pp. 26, 29. In support of this, the Syringa Grove defendants contend the creation of Tract A was not fraudulent because Kootenai "County's Order of Decision, from August of 2009, <u>required</u> that [Tract A] be impressed with a Conservation Easement to be held

and managed by Three Lakes Conservation Group"; "the CC&Rs recorded October 8, 2009, obligated Syringa Grove to convey Tract A to the Syringa Grove Owners Association, Inc."; and prior to the events that give rise to this case, "Syringa Grove conveyed Tract A (burdended by law with a Conservation Easement), with an assessed value of $1,000, to those parties who were contractually entitled to receive the same (the Syringa Grove Owners Association)." *Id.,* p. 26 (internal citations omitted) (emphasis in original); Affidavit of Charlie Nipp, Exhibit N. Similarly, the Syringa Grove defendants claim Bruce always intended on selling Lot 7 and based on the documentation provided as evidence of that transaction, the Syringa Grove defendants claim no fraud was committed. *Id.,* p. 29.

Fifth, and finally, the Syringa Grove defendants assert the plaintiffs' claims are barred by the four-year statute of limitations set forth in Idaho Code § 55-918. *Id.,* p. 30. The Syringa Grove defendants incurred the obligation for Lots 1 through 5 in 2007. The Syringa Grove defendants contend a claim was not asserted against those lots until the plaintiffs filed their First Amended Complaint, on March 18, 2013, more than four years after the obligation was incurred. *Id*. According to the Syringa Grove defendants, the plaintiffs needed to bring their claim before June 2011. *Id.* Similarly, the Syringa Grove defendants contend plaintiffs were obligated to bring a claim about the transfer of Lots 6 and 7 to Bruce by June 2011 since Syringa Grove conveyed those lots to Bruce under the Operating Agreement no later than June 2007. *Id.* But even if the plaintiffs did not have prior knowledge of the Operating Agreement and the obligations required under it, the Syringa Grove defendants maintain they would have been required to assert their claim by June 2012 under Idaho Code § 55-918(3), since the obligation should have reasonably discovered when they were provided a copy of

the Operating Agreement in June 2011. *Id.,* pp. 31-32. The Syringa Grove defendants contend that since the plaintiffs' claim was not asserted against those lots until March 2013, it is also time barred. *Id.,* p. 32.

Plaintiffs argue the Syringa Grove defendants' arguments that "…the obligation to make the transfers arose many years before Plaintiffs' claims arose, thereby shielding Defendants from Allegations of fraud under the [Uniform Fraudulent Transfer] Act" (Reply Memorandum in Support of Plaintiffs' Motion for Injunctive Relief Pursuant to Idaho Code § 55-916 – Uniform Fraudulent Transfer Act and IRCP 65(e), p. 3), is not supported by *Wilder v. Miller,* 135 Idaho 382, 17 P.3d 883 (Ct.App. 2000), and *Post*. *Id.,* pp. 3-5. *Wilder* states a real property transfer is made when it is recorded. *Wilder,* 135 Idaho 382, 386, 17 P.3d 883, 887. As such, plaintiffs argue: "In this case, regardless of any prior agreement between Defendant Grove, Defendant Charlie and Defendant Bruce, the transfers at issue in this motion were made after this lawsuit was filed and are, therefore, subject to scrutiny under the Act." Reply Memorandum in Support of Plaintiffs' Motion for Injunctive Relief Pursuant to Idaho Code § 55-916 – Uniform Fraudulent Transfer Act and IRCP 65(e), p. 4. Citing *Post*, plaintiffs argue: "Here, even if some transfer occurred or obligation was incurred in 2007 when Defendant Grove, Defendant Charlie and Defendant Bruce made their deals, each of the instruments recorded after this lawsuit was filed represents a new and separate transfer at the time it was recorded." *Id.,* p. 5.

The Court must keep in mind the burden applicable to plaintiffs at this motion for injunctive relief juncture. As stated above:

> [A] preliminary mandatory injunction is granted only in extreme cases where the right is very clear and it appears that irreparable injury will flow from its refusal. The burden is on the party seeking an injunction to prove that they have a right to the relief demanded and are likely to prevail at

> trial. The substantial likelihood of success necessary to demonstrate that [the moving party is] entitled to the relief they demand cannot exist where complex issues of law or fact exist which are not free from doubt.

Harris, 106 Idaho 513, 518, 681 P.2d 988, 993. (citations omitted). Plaintiffs have not shown irreparable injury will flow from this Court not granting the injunctive relief requested. Plaintiffs have not shown they are likely to prevail at trial, either on the fraudulent transfer issue (which was discussed in detail by plaintiffs and the Syringa Grove defendants), or on the underlying liability issue regarding the landslide (which has not been discussed at all by the Syringa Grove defendants).

The plaintiffs cannot demonstrate that they are reasonably likely to prove at trial that the transfers were made with actual intent to hinder, delay or defraud them. The plaintiffs became a potential creditor of the defendants only after the landslide occurred in January 2011. However, Syringa Grove incurred the obligations several years prior to the landslide. Affidavit of Charlie Nipp, pp. 6-7 ¶¶ 18, 21, Exhibits H and K. Syringa Grove was indebted to WTB in 2007, when it executed a Promissory Note in the amount of $1,840,000.00 for the benefit of WTB, which was secured by a Deed of Trust. *Id.* Under the terms of the Deed of Trust it was obligated to repay the loan to WTB. *Id*. To accomplish that, it attempted to sell Lots 1 through 5 for several years prior to the landslide, but because of the downturn in the real estate market, was unable to make the sales until 2013. *Id.,* p. 18, ¶ 74. Lots 1 through 5 were sold between March 25, 2013, and July 25, 2013, to third-parties who are not affiliated with Syringa Grove. *Id.,* p. 20 ¶ 83. These transfers of property are new and separate from the original obligation that incurred in 2007. *See Post*, 135 Idaho 475, 478, 20 P.3d 11, 14. However, that alone does not make these transfers fraudulent. Rather, the Court must look to the value of these new transfers to see if there was fraudulent intent, specifically

looking to the question of value. *Id.* Merely making a transfer after a creditor's claim arises is not enough to satisfy the requirements of the Uniform Fraudulent Transfer Act. I.C §55-913(1)(a). Instead, the creditor must show the debtor made the transfer or incurred the obligation with actual intent to hinder, delay or defraud a creditor of the debtor. *Id*.

In this case, the lots were sold for net sales proceeds of $1,128,890.50, all of which was paid to WTB to satisfy the debt still owing. Affidavit of Charlie Nipp, p. 21 ¶ 84. The five lots were sold for $275,644.50 more than the assessed value. *Id.* Syringa Grove was required to take the proceeds from the sale and satisfy its obligation to WTB, leaving no excess money for Syringa Grove or Charlie Nipp. *Id.* Prior to the sale of those lots, Charlie Nipp advanced money to Syringa Grove to satisfy its obligation to WTB. *Id*., pp. 11-12 ¶¶ 46, 49. In total, Charlie Nipp loaned Syringa Grove $1,339,122.00. *Id.,* p. 18 ¶ 73. As such, the plaintiffs cannot demonstrate a likelihood of proving at trial that the sale of Lots 1 through 5 were for an insufficient value, or that the defendants became insolvent as a result of the sale. Ample evidence has been provided to establish that the transfers made after this lawsuit was filed were made to satisfy obligations prior obligations.

Plaintiffs also claim that the transfers and obligations were to "insiders" of Syringa Grove. Memorandum in Support of Plaintiffs' Motion for Injunctive Relief Pursuant to Idaho Code § 55-916 – Uniform Fraudulent Transfer Act and IRCP 65(e), p. 9. However, the transfers Syringa Grove made to Bruce were a result of an Operation Agreement entered into on March 27, 2007, prior to this lawsuit. Affidavit of Charlie Nipp, p. 14; Affidavit of Lois Bruce, p. 3 ¶ 7, Exhibit E. Under the terms of the agreement, she would transfer the subject property to Syringa Grove by quitclaim deed,

that would be platted into seven lots and she would receive two lots after the Final Plat was recorded. Affidavit of Charlie Nipp, p. 3-4, ¶¶ 8-9. The Plat was recorded on October 8, 2009. *Id.,* p. 10 ¶ 38. On October 11, 2011, Syringa Grove conveyed Lot 6 and Lot 7 to Bruce by quitclaim deed pursuant to the obligation from May 25, 2007. *Id*., pp. 10, 14 ¶¶ 39, 55-56. As such, the plaintiffs cannot demonstrate a reasonable likelihood of proving at trial that the transfer was to an insider. Based on the foregoing, the elements of I.C. §§ 55-913 and 55-914 the plaintiffs have based their claim upon have not been met, at least not to the standard required for injunctive relief.

However, even if plaintiffs could have met the elements of I.C. §§ 55-913 and 55-914, their claims may well be barred by the statute of limitations set forth in I.C. § 55-918. That likelihood must be taken into consideration by the Court in analyzing whether plaintiffs are entitled to injunctive relief. Under I.C. § 55-918, a cause of action for fraudulent transfer or obligation under the Uniform Fraudulent Transfer Act must be brought within four years after the transfer was made **or the obligation was incurred**, or within one year of when it could have been discovered. I.C. § 55-918(1) (emphasis added). The plaintiffs arguably have failed to meet either of these statutory requirements. As stated above, the obligations were incurred in 2007. The First Amended Complaint alleging fraudulent transfer was not filed until March 18, 2013, almost six years later. As such, the plaintiffs' claims may be barred by the statute of limitations. Complicating the statute of limitations issue is "The timing of each transfer is considered individually" and "The fact that [a] new transfer was allegedly made in an attempt to satisfy a pre-existing obligation goes to the question of value, not to the question of timing", as discussed above. *Post,* 135 Idaho 475, 478, 20 P.3d 11, 14.

Counsel for Syringa Grove made the following argument at the March 14, 2014, hearing: "Plaintiffs are arguing that you should breach your pre-existing financial

obligations so you can pay a debt that hasn't yet been proven." This Court above has discussed the factual and legal problems confronting plaintiffs on their Uniform Fraudulent Transfer Act claims, which lead to this Court denying their motion for injunctive relief. Even if these factual and legal problems did not exist, plaintiffs have not discussed the "…debt that hasn't yet been proven." At this injunctive relief stage, plaintiff has to prove a likelihood of success not only on the Uniform Fraudulent Transfer Act claims, but also on the underlying claim that the Syringa Grove defendants are legally responsible for the landslide. There is no evidence on this issue at all. At oral argument, counsel for plaintiffs argued that they had no proof on this issue of the acts of Syringa Grove's causation of the landslide because "We haven't disclosed our own experts yet." While that may be true *for purposes of trial* (set for October 6, 2014), it provides no excuse for plaintiffs' failure to prove a likelihood of success on the issue of the acts of Syringa Grove's causing of the landslide *for purposes of plaintiffs' motion for injunctive relief*. The Court must decide the motion for injunctive relief as presented by the plaintiffs at this time, based on the evidence presented by plaintiffs. As to the causation issue, there has been no evidence submitted by plaintiffs.

IV. CONCLUSION AND ORDER.

For the reasons stated above,

IT IS HEREBY ORDERED plaintiffs' Motion to Compel is GRANTED only as to the remaining issues: Scharelant 7 LLC's Response to Request for Production No. 2; and Syringa Grove's Response to Request for Production No. 6(c) and 6(e).

IT IS FURTHER ORDERED "Plaintiffs' Motion for Injunctive Relief Pursuant to Idaho Code § 55-916 – Uniform Fraudulent Transfer Act and IRCP 65(e)" is DENIED.

Entered this 15th day of April, 2014.

_____

John T. Mitchell, District Judge

Certificate of Service

I certify that on the _____ day of April, 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 #**
Julie Simaytis	208-806-0210		
John F. Magnuson	667-0500	Pat Risken	(509) 455-3632

_____
Jeanne Clausen, Deputy Clerk