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

A&H ESPRESSO TITLE LOANS, INC., *Plaintiff*, vs. **KEITH N. WORLEY and NICOLE T. WORLEY,** *Defendants*.	Case No. **CV 2013 4395** **MEMORANDUM DECISION AND ORDER GRANTING IN PART AND DENYING IN PART PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT, ORDER DENYING MOTIONS TO STRIKE, and ORDER DENYING ANY CROSS MOTION FOR SUMMARY JUDGMENT BY DEFENDANTS**

I. PROCEDURAL HISTORY AND FACTUAL BACKGROUND.

This matter is before the Court on plaintiff A&H Espresso Title Loans, Inc.'s (A&H) motion for summary judgment.

This action was commenced by the plaintiff A&H seeking solely a monetary judgment against the defendants Keith N. Worley and Nicole T. Worley (collectively the Worleys) for an unpaid loan. Complaint, p. 5. On July 28, 2010, Keith Worley obtained a pawn loan from A&H in the amount of $15,000.00 plus interest at a rate of 15% every thirty (30) days or $75 per day. Complaint, p. 2 ¶ IV, VI. According to A&H, Keith Worley granted A&H a security interest in a 2008 Master Craft Boat and trailer until the pawn loan, fees and interest were paid in full. *Id.* at p. 2 ¶ VII. The boat and trailer have separate vehicle identification numbers. *Id.* While A&H normally takes possession of property used for security, because Keith Worley had a loan history with

A&H going back to 2008, A&H allowed the Worleys to continue to use the boat and trailer. *Id.* at p. 2 ¶ VIII; Memorandum in Support of Plaintiff's Motion for Prejudgment Writ of Possession under I.C. § 8-301, p. 4. A&H claims the Worleys have breached the terms of the pawn agreement by failing to make any payments. Complaint*,* p. 3 ¶ IX.

The Worleys admit they obtained a loan from A&H but deny it was a pawn loan and deny they granted A&H a security interest in their boat. Answer, Counterclaim and Demand for Jury Trial, p. 2, ¶¶ 3, 4; Affidavit of Keith Worley, p. 2 ¶ 4. And in any event, the Worleys claim the loan was repaid in cash, in full, in August 2010. *Id.*; Answer, Counterclaim and Demand for Jury Trial, p. 3 ¶ 17. The Worleys do not have a receipt for the payment to A&H. Affidavit of Keith Worley, p. 2 ¶ 3; Answer, Counterclaim and Demand for Jury Trial, p. 3 ¶ 18. According to the Worleys, A&H told Keith Worley the titles would be mailed to him. *Id.*, ¶ 19. Before the Complaint was filed, the boat was removed from the State of Idaho. Affidavit of Keith Worley, p. 2 ¶ 5.

In February 2011, a lien was placed upon the title of the boat by A&H. *Id.* at p. 4 ¶ 22. The Worleys claim "[A&H], and in particular [A&H president] Billy Henderson, caused Counterclaimant Keith Worley's signature to be forged on a Power of Attorney and had said forged signature illegally notarized. The notary involved has been sanctioned by the State of Washington and the investigation is ongoing." ; Answer, Counterclaim and Demand for Jury Trial, p. 4 ¶ 22; Affidavit of Keith Worley, p. 2 ¶ 7. The Worleys claim this forgery was then used to obtain the lien. Defendants' Response to Plaintiff's Motion for Writ of Possession, p. 3. Moreover, they claim that the pawn ticket and title loan attached to A&H's Complaint are forged. Answer, Counterclaim and Demand for Jury Trial, p. 4 ¶ 27.

On March 18, 2014, A&H moved for summary judgment to recover a monetary judgment against the Worleys for the debt owed, to establish an ownership interest in the Master Craft Boat and trailer, allowing A&H to obtain possession of the boat and trailer, and to dismiss the counterclaims filed against A&H. *See* Plaintiff's Motion for Summary Judgment. The Worleys oppose this motion, claiming the basis for A&H's request is based on "inadmissible evidence, innuendo, and allegations irrelevant to this case." Defendant's [sic] Opposition to Plaintiff's Motion for Summary Judgment and Cross Motion for Summary Judgment, p. 2. The Worleys have failed to submit any admissible evidence in support of that position by affidavit setting forth specific facts that demonstrate there is a genuine issue for trial. The only evidence submitted by the Worleys is the affidavit of Keith Worley, provided to this Court on March 7, 2014. The Worleys attach a number of documents to Defendant's [sic] Memorandum in Opposition to Plaintiff's Motion for Summary Judgment and Cross Motion for Summary Judgment, but these documents are not supported by affidavit and several distinct documents are grouped together as exhibits with no explanation of what the documents are. *See* Defendant's [sic] Memorandum in Opposition to Plaintiff's Motion for Summary Judgment and Cross Motion for Summary Judgment.

Hearing on A&H Espresso's motion for summary judgment was held on April 15, 2014. Attorney Patrick Harwood appeared on behalf of plaintiffs, but only as to the counterclaims of Worleys, and he did not provide argument.

At that April 15, 2014, hearing, the Court also heard argument on plaintiff's Motion to Strike Defendants' Statement of Facts and Defendants' Memorandum in Opposition to Plaintiff's Motion for Summary Judgment and Cross Motion for Summary Judgment. While much of defendants' Statement of Facts are not supported by admissible evidence, the motion to strike is denied as the Court mentions in its analysis

what claims are and are not supported by admissible evidence. That same motion as to defendants' Memorandum in Opposition to Plaintiff's Motion for Summary Judgment is likewise denied. At that hearing, the Court also heard argument on defendants' Motion to Strike Exhibits to Plaintiff's Motion for Summary Judgment. Any defects in plaintiff's evidence was rectified by (a) the plaintiff's Supplemental Affidavit of Matthew T. Ries, which attached the court reporter's certification to the depositions of Keith Worley and Nicole Worley, and (b) the Supplemental Affidavit of Billy Henderson, in which he explained the reason the word "Pawn" appears on an exhibit to the complaint.

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)). Specifically, "[t]he trial court must examine the pleadings to determine what issues are raised in the case. The only issues considered on summary judgment are those raised by the pleadings." *Esser Elec. v. Lost River Ballistics Technologies, Inc.*, 145 Idaho 912, 919, 188 P.3d 854, 861 (2008) (citing *Vanvooren v. Astin,* 141 Idaho 440, 111 P.3d 125 (2005); *Lexington Heights Dev., LLC v. Crandlemire,* 140 Idaho 276, 92 P.3d 526 (2004); *Beco Constr. Co. v. City of Idaho Falls,* 124 Idaho 859, 865 P.2d 950 (1993); *Gardner v. Evans,* 110 Idaho 925, 719 P.2d 1185 (1986)).

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)). "The burden may be met by establishing the absence of evidence on an element that the nonmoving party will be required to prove at trial." *Nelson v. Anderson Lumber Co.*, 140 Idaho 702, 707, 99 P.3d 1092, 1097 (2004) (citing *Dunnick v. Elder*, 126 Idaho 308, 311, 882 P.2d 475, 478 (Ct. App. 1994)).

"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). "[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)). 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). "[E]vidence presented in support of or in opposition to motions for

summary judgment must be admissible evidence . . . ." *Hecla Min. Co. v. Star-Morning Min. Co.*, 122 Idaho 778, 784, 839 P.2d 1192, 1198 (1992). "The question of admissibility is a threshold question to be answered before applying the liberal construction and reasonable inferences rule to the admissible evidence." *Id.* If the non-moving party does not provide such a response, summary judgment, if appropriate, shall be entered against the party. *See id.*

III. ANALYSIS.

A. A&H is Not Entitled to Summary Judgment Against the Worleys for Possession of the Master Craft Boat.

A&H contends that it has a perfected security interest in the Master Craft Boat and is entitled to obtain possession of it. Memorandum in Support of Motion for Summary Judgment, p. 3. A&H claims it obtained the security interest pursuant to the pawn loan and perfected that interest when it obtained title to the Master Craft Boat. *Id.* at pp. 3-4. As a secured creditor, it contends it is entitled to a court order for possession of the boat so it can sell it and begin satisfying Worleys' debt. *Id.* at p. 5.

The Worleys contend that since A&H does not plead for possession of the Master Craft Boat in its Complaint, but rather seeks monetary damages and an order confirming its security interest in the Master Craft Boat and trailer, possession of the Mater Craft Boat is not an appropriate remedy. Defendant's [sic] Opposition to Plaintiff's Motion for Summary Judgment and Cross Motion for Summary Judgment, pp. 7-8.

"The only issues considered on summary judgment are those raised by the pleadings." *Esser Electric v. Lost River Ballistics Technologies, Inc.*, 145 Idaho 912, 919, 188 P.3d 854, 861 (2008) (citing *Vanvooren v. Astin,* 141 Idaho 440, 111 P.3d 125 (2005); *Lexington Heights Dev., LLC v. Crandlemire,* 140 Idaho 276, 92 P.3d 526

(2004); *Beco Constr. Co. v. City of Idaho Falls,* 124 Idaho 859, 865 P.2d 950 (1993); *Gardner v. Evans,* 110 Idaho 925, 719 P.2d 1185 (1986)). As stated in this Court's April 4, 2014, Memorandum Decision and Order Denying Plaintiff's Motion for Writ of Possession,

> A&H's "Complaint for Over $10,000" is a claim for damages only, it does not state a claim for the recovery of personal property. . . .
> In its "Complaint for Over $10,000.00", A&H does not state that it is the owner, or was in possession, or is entitled to the possession of the personal property in question. Rather, A&H states "the defendant has refused to deliver the pawned collateral to the plaintiff and plaintiff believe the defendant is secreting the collateral from the plaintiff, and the defendants have failed to apprise the plaintiffs of the collateral's location as required by the pawn agreement" and seeks confirmation in the security interest in the boat and trailer." Complaint, p. 3 ¶¶ X, XIII. Even A&H's "Answer, Affirmative Defenses and Counterclaims" filed August 15, 2013, contains no claim that A&H is entitled to possession of the boat.

Memorandum Decision and Order Denying Plaintiff's Motion for Writ of Possession, pp. 6-7. The issue of possession of the boat has clearly not been raised in A&H's pleadings up to this point, and, as such, under *Esser Electric,* the Court is unable to consider any such non existing claim on summary judgment.

If A&H persists in not moving to amend their complaint to add a claim for possession of the boat. It remains to be seen whether those issues may be presented to the jury at trial, absent that amendment. A&H argues:

> Defendants argue once again that the Court cannot rule that A&H Espresso is entitled to possession of the Boat on Summary Judgment because A&H Espresso did not specifically plead for possession of the Boat in its original Complaint. Defendants' argument is incorrect, and it has already been rejected by the Court in the Court's recent ruling.

Reply Memorandum in Support of Motion for Summary Judgment, pp. 10-11. There was a similar comment made by counsel for A&H at oral argument. Counsel for A&H is tragically, incorrect. What the Court wrote in its earlier decision is as follows:

> This Court finds that even [if] A&H need not amend its complaint and even if the motion and affidavits are sufficient to place the issue before this

> Court, A&H has failed to show that it is entitled to immediate possession of the property requested.

Memorandum Decision and Order Denying Plaintiff's Motion for Writ of Possession, p. 7. The Court specifically did **not** make a finding as to whether or not A&H needed to amend its complaint because the Court found A&H had not presented sufficient evidence to show it was entitled to possession.

Should A&H continue to misread the Court's prior opinion, and continue to resist moving to amend its pleading, A&H might end up presenting only evidence of its monetary damage.

B. A&H is Not Entitled to Summary Judgment for an Award of Monetary Damages Under the Agreement as a Genuine Issue of Material Fact Exists.

A&H further contends that since the Worleys defaulted under the pawn loan and absconded with the Master Craft Boat and Ford Mustang used as collateral, it is entitled to a monetary judgment award in the amount of $116,700.00 pursuant to the pawn loan agreement and Idaho Code § 28-46-508. Memorandum in Support of Motion for Summary Judgment, p. 7. A&H maintains there is no dispute that the obligation owed to A&H was breached by the Worleys and, due to such default, it is entitled to all remedies available under the Uniform Commercial Code. *Id.* at 6. The Worleys, in turn, contend the loan was paid off by Keith Worley. Answer, Counterclaim & Demand for Jury Trial, p. 3 ¶ 17; Affidavit of Keith Worley, p. 2 ¶ 3. A&H claims Keith Worley's statement is hearsay. Memorandum in Support of Motion for Summary Judgment, p. 13. Keith Worley claims he obtained multiple title loans from A&H and "All such loans were repaid in cash." Affidavit of Keith Worley, p. 2 ¶ 3. That statement simply is not hearsay. At oral argument, counsel for A&H claimed this particular affidavit of Keith Worley was not submitted by Worleys in response to A&H's motion for summary

judgment. Keith Worley's affidavit was filed March 7, 2014, eleven days before A&H filed their motion for summary judgment. However, counsel for A&H can point to no authority that would support his argument that an affidavit earlier filed in the same case cannot be used in support or in defense of a motion for summary judgment. In briefing, A&H claims *Koziej v. Commissioner of Internal Revenue Service*, T.C.Summ.Op. 2010-41, 2010 WL 1444621 (U.S.Tax Ct. 2010), supports their argument that Keith Worley statement that "All such loans were repaid in cash", is hearsay. Memorandum in Support of Motion for Summary Judgment, p. 13. Counsel for A&H gives no further analysis to support that claim. Even a cursory reading of *Koziej* reveals A&H's reliance on that case is misplaced. The Tax Court addressed the fact that Koziej "…proffered statements from friends averring that they had paid [Koziej] money in 2004 and 2005 as repayments of previous loans." T.C.Summ.Op. 2010-41, p. 1. The Tax Court appropriately sustained the hearsay objection. *Id.* In the present case, Keith Worley is offering his own statement (not the statement of others), under oath (which the statements of friends in *Koziej* obviously were not), about what he (not others) had done. This is the only "hearsay" discussed in Koziej (an issue about checks was discussed, but this was a foundational issue and not a hearsay issue, *Id.,* p. 2).

There is no reason why this Court cannot consider Keith Worley's affidavit and his claim therein that "All such loans were repaid in cash." Thus, there is clearly a factual dispute between the parties as to whether the Worleys owe A&H money under the agreement. The parties dispute whether the Worleys paid off the loan. Keith Worley attests that all title loans he obtained from A&H were repaid in cash. Affidavit of Keith Worley, p. 2 ¶ 3. That creates a genuine issue of material fact about the

damages issue. A jury trial was requested in this case. As a result of this factual dispute, summary judgment is inappropriate on the issue of damages.

C. A&H is Entitled to Summary Judgment on the Worleys' Claims of Fraud Based Upon an Alleged "Forged Pawn Ticket/Contract", Those Claims are Dismissed.

"For a fraud claim to succeed a [party alleging fraud] must 'establish nine elements with particularity: (1) a statement or a representation of fact; (2) its falsity; (3) its materiality; (4) the speaker's knowledge of its falsity; (5) the speaker's intent that there be reliance; (6) the hearer's ignorance of the falsity of the statement; (7) reliance by the hearer; (8) justifiable reliance; and (9) resultant injury.'" *Bank of Commerce v. Jefferson Enterprises, LLC*, 154 Idaho 824, 833, 303 P.3d 183, 192 (2013) (quoting *Chavez v. Barrus,* 146 Idaho 212, 223, 192 P.3d 1036, 1047 (2008) (citing *Lettunich,* 141 Idaho at 368, 109 P.3d at 1110)).

However, "fraud upon the court requires more than interparty misconduct, and, in Idaho, has been held to require more than perjury or misrepresentation by a party or witness, even where the misrepresentation was made to establish the court's jurisdiction. . . . [F]raud upon the court will be found only in the presence of such tampering with the administration of justice as to suggest a wrong against the institutions set up to protect and safeguard the public." *Davis v. Parrish*, 131 Idaho 595, 597, 961 P.2d 1198, 1200 (1998) (internal citations omitted).

A&H seeks summary judgment dismissing Worleys' claim that A&H acted fraudulently when it altered the loan agreement by stamping the word "pawn" on it. Memorandum in Support of Motion for Summary Judgment, p. 7. A&H claims the addition of the word "pawn" to the agreement was added for internal filing purposes of A&H and does not change the substance of the agreement. *Id.* at p. 8. In support of

this, they submitted a Supplemental Affidavit of Billy Henderson in Support of A&H Espresso's Response to Defendants' Motion to Strike. In that document, Billy Henderson attests to the following:

> 3. The word "Pawn" was stamped on the Contract for filing purposes. A&H Espresso maintains a Title Loan Book and a Pawn Book. Loan contracts made by A&H Espresso that A&H Espresso classified as a title loan are kept in the Title Loan Book. Loan contracts made by A&H Espresso that A&H Espresso classified as a pawn loan are kept in A&H Espresso's Pawn Book. These loans are made on the same loan form. Pawn loans are typically made on equipment that does not have a title, such as construction equipment. (See e.g. the pawn loan made by A&H Espresso to Mr. Worley on February 19, 2010 where a 320 CL Excavator was used as collateral for a $10,000 loan attached as Exhibit "G" to my previous Affidavit filed with the Court on February 28, 2014). In this case, A&H Espresso classified the loan made to Mr. Worley by the Contact where the Boat was used as collateral, as a pawn loan. Thus, the Contract is in the Pawn Book and stamped "Pawn." A copy of the Contract from the Pawn Book with the word "Pawn" was then attached to the Complaint.
>
> 4. A copy of the Contract with the original title and other loan documents was also maintained in a separate file folder located at A&H Espresso's business at 3996 W. Riverbend Post Falls, Idaho. The copy of the Contact in that folder was not stamped with the word "Pawn". That copy without the stamped word attached as Exhibit K to my February 28, 2014 Affidavit was a true and correct copy of the Contract. That copy was simply pulled from the file rather than from the Pawn Book.

Supplemental Affidavit of Billy Henderson in Support of A&H Espresso's Response to Defendants' Motion to Strike, pp. 2-3 ¶¶ 3-4.

The Worleys admit Keith Worley took out a loan on a Master Craft Boat in February 2010. Defendant's [sic] Opposition to Plaintiff's Motion for Summary Judgment and Cross Motion for Summary Judgment, p. 9. They argue that the word "pawn" was stamped onto this agreement, altering the meaning of the contract and misleading the Court into believing the loan in dispute was a pawn loan. *Id.* at p. 11. In their Opposition to Plaintiff's Motion for Summary Judgment and Cross Motion for Summary Judgment, counsel for A&H writes, "31. Mr. Worley had never seen the pawn

ticket that was submitted with the original Complaint until receiving the Complaint." *Id.* at p. 9.

A&H has submitted admissible evidence, through the affidavit by Billy Henderson, that the word "pawn" was stamped on the agreement after it was signed by Keith Worley. This shifts the burden to the Worleys to present admissible evidence that a genuine issue of material fact exists about their fraud claim. In order for the Worleys to prevail on a claim that fraud was committed against them, as their argument appears to be interpreted by A&H, they must present admissible evidence that A&H made a false statement to them, that they were aware of any statement, that they relied on it, or that they suffered an injury as a result of that reliance. The Worleys have failed to do this. They have failed to provide any admissible evidence to this Court in support of that claim.

Moreover, there is no basis for a claim of "fraud on the court" connected with A&H's attachment of the agreement to its Complaint. The affidavit of Billy Henderson clears up any issue with the word "pawn" being stamped on the agreement. Nothing presented to the Court rises to the level of fraud upon the court.

Accordingly, the Court grants summary judgment to A&H on this fraud issue.

D. A&H is Entitled to Summary Judgment on the Worleys' Claims A&H's Security Interest in the Master Craft Boat was Fraudulently Obtained Using a Forged Power of Attorney. Those Claims are Dismissed.

A&H seeks summary judgment dismissing Worleys' claim that A&H's security interest in the Master Craft Boat was obtained by fraud. Memorandum in Support of Summary Judgment, p. 9. In support of this, A&H directs the Court to the agreement between the Worleys and A&H, which specifically grants A&H a security interest as well as the requirements of the Oregon State Marine Board, which it claims does not require a power of attorney to transfer title. Memorandum in Support of Summary Judgment, p.

9. Moreover, it specifically claims Keith Worley signed a Power of Attorney authorizing transfer of the title of collateral to A&H. *Id.*; Affidavit of Billy Henderson in Support of Motion for Writ of Possession, p. 7 ¶ 13.

The Worleys claim "[A&H], and in particular [A&H president] Billy Henderson, caused Counterclaimant Keith Worley's signature to be forged on a Power of Attorney and had said forged signature illegally notarized. The notary involved has been sanctioned by the State of Washington and the investigation is ongoing." Answer, Counterclaim and Demand for Jury Trial, p. 4 ¶ 22; Affidavit of Keith Worley, p. 2 ¶ 7. Worleys claim that this conduct allowed A&H to fraudulently obtain a security interest in the Master Craft Boat. Defendant's [sic] Opposition to Plaintiff's Motion for Summary Judgment and Cross Motion for Summary Judgment, p. 12.

The Worleys' fraud claim lacks merit. A&H has provided an affidavit from Billy Henderson in which he attests, "13. In February, 2011, I sent the original Certificate of Title For a Boat with Mr. Worley's signature along with the Release of Interest/ Power of Attorney signed by the Oregon State Marine Board. Attached as **Exhibit P** is a true and correct copy of these documents." Affidavit of Billy Henderson in Support of Motion for Writ of Possession, p. 7 ¶ 13 (emphasis in original).

This shifts the burden to the Worleys to present admissible evidence that a genuine issue of material fact exists about their claim A&H's security interest was obtained by fraud. The Worleys have failed to do this. They have failed to provide any admissible evidence to this Court in support of that claim. While they attach a letter from Janess Eilers, Registration Operation and Policy Analyst for the Oregon State Marine Board, providing the procedure for a title transaction using a Power of Attorney, that letter is simply attached to the Worleys' memorandum and not attached to any supporting affidavit. As such, it is inadmissible and will not be considered by the Court.

Also, Worleys have produced no evidence that the Power of Attorney was forged. Keith Worley attests that "[A&H] and/or Bill Henderson fraudulently had the Power of Attorney found in Plaintiff's Exhibit P prepared and also had it illegally notarized by Connie Reinhardt out of my presence and without my knowledge or consent. Connie Reinhardt was sanctioned by Washington State for this illegal notarization." Affidavit of Keith Worley, p. 2 ¶ 7. However, the Worleys have failed to provide this Court with any foundation or documentation supporting that conclusory, hearsay, legal conclusion.

Moreover, the agreement at issue in this case specifically provides on the first page: "You are giving a security interest in the following pledged goods", with the words "2008 Black Mastercraft Boat & Trailer" handwritten in and signed by Keith Worley. "Complaint For Over $10,000", p. 2, ¶ 4, Exhibit A. While the first page of the exhibit attached to the "Complaint For Over $10,000" is not marked with the letter "A", it is the ONLY exhibit referenced in, and is clearly identified in the language of the verified "Complaint For Over $10,000." The "Complaint For Over $10,000" is "verified" as it is signed by Billy Henderson as "President A&H Espresso Inc" before a notary. *Id.,* p. 6. "A verified complaint may be presented to the court in support of a motion for summary judgment and it will be accorded the probative force of an affidavit if it meets the requirements of I.R.C.P. 56(e). *Camp v. Jiminez,* 107 Idaho 878, 881, 693 P.2d 1080, 1083 (Ct.App. 1984) The fourth page of the only Exhibit attached to the "Complaint For Over $10,000" is titled "Motor Vehicle Title Loan Contract" and reads in part: "**SECURITY**: Lender will have a security interest in the bailment of a certificate of title to the motor vehicle described above." *Id.,* p. 4 (emphasis in original). The "vehicle described above" is a "2008, black, Master Craft Boat and Trailer, license number WA U424089, vehicle identification number MBCNMHS7L708." *Id.*

Accordingly, the Court grants summary judgment to A&H on this issue. Worleys' claims that the security interest was fraudulently obtain using a forged power of attorney are completely without merit.

E. A&H is Entitled to Summary Judgment on the Worleys' Claims A&H's Stamping the Word "Pawn" on the Agreement Did Not Make it Void, Those Claims are Dismissed.

Worleys contend the agreement between the parties is void pursuant to Idaho Code §§ 9-601 and 28-3-407. Answer, Counterclaim & Demand for Jury Trial, p. 3 ¶ 17; Defendant's [sic] Opposition to Plaintiff's Motion for Summary Judgment and Cross Motion for Summary Judgment, pp. 5-7, 16. Worleys' attorney claims that by stamping the word "Pawn" on the agreement, A&H did so for only one reason, "…and that is to attempt to perpetrate a fraud upon the Court." Defendant's [sic] Opposition to Plaintiff's Motion for Summary Judgment and Cross Motion for Summary Judgment, p. 5, ¶11. The significance attached to this "Pawn" stamp by counsel for Worleys will be discussed in more detail below.

Both Idaho Code §§ 9-601 and 28-3-407 govern alterations. Idaho Code § 9-601 governs the admission of an altered writing into evidence. Specifically, it provides:

> The party producing a writing as genuine which has been altered, or appears to have been altered, after its execution, in a part material to the question in dispute, must account for the appearance or alteration. He may show that the alteration was made by another without his concurrence, or was made with the consent of the parties affected by it, or otherwise properly or innocently made, or that the alteration did not change the meaning or language of the instrument. If he [does] that he may give the writing in evidence, but not otherwise.

I.C. § 9-601. The Court finds the "Supplemental Affidavit of Billy Henderson in Suport of A&H Espresso's Response to Defendant's Motion to Strike" satisfies I.C. § 9-601. Billy Henderson states:

> 3. The word “Pawn” was stamped on the Contract for filing purposes. A&H Espresso maintains a Title Loan Book and a Pawn Book. Loan contracts made by A&H Espresso that A&H Espresso classified as a title loan are kept in the Title Loan Book. Loan contracts made by A&H Espresso that A&H Espresso classified as pawn loan are kept in A&H Espresso’ Pawn Book. These loans are mad on the same loan form. Pawn loans are typically made on equipment that does not have a title, such as construction equipment. (See e.g. the pawn loan made by A^H Espresso to Mr. Worley on February 19, 2010 where a 320 CL Excavator was used as collateral for a $10,000 loan attached as Exhibit “G” to my previous Affidavit filed with the Court on February 28, 2014). In this case, A&H Espresso classified the loan made to Mr. Worley by the Contract where the Boat was used as collateral, as a pawn loan. Thus, the Contract is in the Pawn Book and stamped “Pawn.” A copy of the Contract from the Pawn Book wth the word “Pawn” was then attached to the Complaint.

Supplemental Affidavit of Billy Henderson in Support of A&H Espresso’s Response to Defendants’ Motion to Strike, pp. 2-3, ¶ 3. Idaho Code § 28-3-407 governs alteration to negotiable instruments under the Uniform Commercial Code. Specifically, it provides:

> (1) “Alteration” means (i) an unauthorized change in an instrument that purports to modify in any respect the obligation of a party, or (ii) an unauthorized addition of words or numbers or other change to an incomplete instrument relating to the obligation of a party.
>
> (2) Except as provided in subsection (3) of this section, an alteration fraudulently made discharges a party whose obligation is affected by the alteration unless that party assents or is precluded from asserting the alteration. No other alteration discharges a party, and the instrument may be enforced according to its original terms.
>
> (3) A payor bank or drawee paying a fraudulently altered instrument or a person taking it for value, in good faith and without notice of the alteration, may enforce rights with respect to the instrument (i) according to its original terms, or (ii) in the case of an incomplete instrument altered by unauthorized completion, according to its terms as completed.

I.C. § 28-3-407. For a writing to be a negotiable instrument under Article 3 of the Uniform Commercial Code, it must meet the requirements provided in Idaho Code § 28-3-104, which provides:

> "[N]egotiable instrument" means an unconditional promise or order to pay a fixed amount of money, with or without interest or other charges described in the promise or order, if it:
>
>> (a) Is **payable to bearer or to order** at the time it is issued or first comes into possession of a holder;
>> (b) Is payable on demand or at a definite time; and
>> (c) Does not state any other undertaking or instruction by the person promising or ordering payment to do any act in addition to the payment of money, but the promise or order may contain (i) an undertaking or power to give, maintain, or protect collateral to secure payment, (ii) an authorization or power to the holder to confess judgment or realize on or dispose of collateral, or (iii) a waiver of the benefit of any law intended for the advantage or protection of an obligor.

I.C § 28-3-104(1)(a)-(c) (emphasis added). Idaho Code § 28-3-109 then provides:

> (1) A promise or order is payable to bearer if it:
>> (a) States that it is payable to bearer or to the order of bearer or otherwise indicates that the person in possession of the promise or order is entitled to payment;
>> (b) Does not state a payee; or
>> (c) States that it is payable to or to the order of cash or otherwise indicates that it is not payable to an identified person.
>
> (2) A promise or order that is not payable to bearer is payable to order if it is payable (i) to the order of an identified person, or (ii) to an identified person or order. A promise or order that is payable to order is payable to the identified person.

I.C. § 28-3-109(1), (2). If a writing is not a negotiable instrument, it will be governed by contract law. *See Sirius LC v. Erickson*, 144 Idaho 38, 42, 156 P.3d 539, 543 (2007).

Worleys claim A&H Espresso altered the loan agreement by stamping the word "pawn" on it, changing the loan from a title loan to a pawn loan, without the knowledge or authorization of the Worleys, thus "materially alter[ing] the rights and obligations of the parties." Defendant's [sic] Opposition to Plaintiff's Motion for Summary Judgment and Cross Motion for Summary Judgment, p. 7. As such, they claim they should be discharged from the obligation owing under the contract. *Id.,* p. 5. The Worleys have failed to submit any admissible factual evidence about the altered document, by

affidavit or otherwise. Worleys have produced no evidence as to how this "Pawn" stamp came to appear on a copy of the agreement. Thus, Worleys simply speculate upon the possible reasons cast unjustified aspersions as to A&H's evil intent in stamping "Pawn" upon A&H's own copy of the agreement. Even if there were evil intent by A&H in stamping the word "Pawn" on A&H's copy of the agreement, Worleys' interpretation of the legal significance is entirely without merit.

A&H disputes Worleys' argument under I.C. § 9-601 for three reasons: First, it contends the copy of the agreement submitted to the Court for purposes of this Motion does not have the word "pawn" stamped on it, so there is no alteration. Reply Memorandum in Support of Motion for Summary Judgment, p. 6. Second, it contends under Idaho Code § 9-601 adding the word "pawn" did not materially change the words of the agreement or the rights and remedies of the parties in this case. *Id.,* pp. 6-7. Third, A&H claims even if adding the word "pawn" materially altered the agreement, said alteration can be explained as added by A&H for filing purposes. *Id.*, p. 7. A&H also argues I.C. § 28-3-407 is inapplicable to the agreement because the agreement is not a negotiable instrument. *Id.,* p. 8.

The writing in question here lacks the requisite words of negotiability and is not a negotiable instrument. The agreement is not payable to bearer or to order. As such, it is governed by contract law and I.C. § 28-3-407 is inapplicable. Moreover, under I.C. § 9-601, the Court finds that adding the word "pawn" to the agreement did not materially alter the meaning or language of the document.

As such, the Court finds A&H is entitled to summary judgment on Worleys' claims that A&H's stamping the word "Pawn" on the agreement made the agreement void. Worleys' claims in this regard are dismissed.

F. A&H is Not Entitled to Summary Judgment on Worleys' Claims about the Ford Mustang.

A&H requests Worleys' counterclaim of "Count 3 - Theft: Mustang and Personal Property" be dismissed. Memorandum in Support of Motion for Summary Judgment, p. 11; Answer Counterclaim and Demand for Jury Trial, pp. 5-6, ¶¶ 37-41.

A&H contends any claim of conversion made by the Worleys fails because A&H had a contractual right to repossess the vehicle and any right the Worleys had to personal property left in the vehicle after repossession was waived when they failed to make a timely demand for the property. *Id.,* pp. 12, 17. Obviously, that contractual right to repossess the Mustang would evaporate if Worleys had paid all loans.

A&H maintains that the Court cannot consider the statements contained in Keith Worley's affidavit that he paid off the loan in cash. *Id.* A&H claims that because those statements are not supported by banking documents, they are inadmissible hearsay. *Id.,* p. 13. The "not supported by banking documents" argument will be discussed below. The "hearsay" argument is entirely unfounded. A&H cites to *Fragnella v. Petrovich*, 153 Idaho 266, 274-74, 281 P.3d 103, 110-11 (2012) for the proposition that "pursuant to IRCP 56(e) the Court cannot consider inadmissible hearsay testimony for summary judgment motion." *Id. Fragnella* provides no support A&H's proposition. The only portion of *Fragnella* which even discusses hearsay is in reference to striking the admission of police reports as inadmissible hearsay because I.R.E. 803(8)(A) specifically provides "'investigative reports by police and other law enforcement personnel, except when offered by an accused in a criminal case,' are not within an exception to the hearsay rule." *Fragnella*, 153 Idaho at 274, 281 P.3d at 111 (2012).

Hearsay is a "statement". I.R.E. 801(c). Keith Worley's description that he paid off all loans, while describing an "act", is still a "statement." A "statement" is "(1) an oral

or written assertion or (2) nonverbal conduct of a person, if it is intended by the person as an assertion." I.R.E. 801(a). Obviously Keith Worley intends his statement that he paid off all loans as an "assertion." Hearsay is a "statement, *other than one made by the declarant while testifying at the trial or hearing,* offered in evidence to prove the truth of the matter asserted." I.R.E. 801(c). Worley's statement that he paid the loan off in cash is certainly offered for the truth of the matter asserted. But this is where A&H's hearsay argument runs aground. Keith Worley can testify about what he did. It is not hearsay. The United States Court of Appeals, Eleventh Circuit held:

> With regard to the portions of the affidavit that the court ruled were "inadmissible hearsay," we believe the court erred in its determination. As noted in part II.A.1, *supra,* " '[h]earsay' is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Fed.R.Evid. 801(c). No part of Caine's affidavit fits this definition. Caine testifies in his affidavit regarding the withdrawn Mobile bid, bidding practices at Industrial, and bidding practices at Harcros—all matters in which he personally participated or which he personally observed. At no point in the affidavit does Caine relate any statement made by anyone that constitutes inadmissible hearsay.

City of Tuscaloosa v. Harcros Chemicals, Inc., 158 F.3d 548, 560-61 (11th Cir. 1998). A&H's argument that Keith Worley's statement that he paid all loans is not hearsay.

Even if it were hearsay, such description of his action is a present sense impression under I.R.E. 803(1): "A statement describing or explaining an event or condition made while the declarant was perceiving the event or condition, or immediately thereafter." Such description would also be a statement by Keith Worley of his then existing state of mind under I.R.E. 803(3). "The witnesses' declarations at trial that they feared arresting Miller-Fontaine numbers writers are obviously not hearsay, since they were the witnesses' statements concerning their own state of mind at a particular time. *U.S. v. Nacrelli,* 468 F.Supp. 241, 252-53 (D.C.Pa., 1979).

A&H next contends "Even if the Court does consider the Worleys' unsubstantiated hearsay story, it is not sufficient to be submitted to the jury." Memorandum in Support of Motion for Summary Judgment, p. 14. Again, A&H contends the Worleys are required to produce non-testimonial evidence to substantiate the testimony of Keith Worley that he repaid the loan in cash. In support of that proposition, A&H cites to *Federal Land Bank of Spokane v. Parsons*, 116 Idaho 545, 777 P.2d 1218 (Ct. App. 1989). This citation completely ignores the context of Keith Worley's testimony about one alleged fact in the present case, compared to unsubstantiated claims in *Parsons*. In *Parsons*, the Idaho Court of Appeals was addressing a case where the debtors did not provide "testimony" about facts, but instead simply made unsubstantiated "claims" of fraud, a cause of action where at trial all nine elements of which must be proven by clear and convincing evidence. The Idaho Court of Appeals held:

> Here, the trial court found that the debtors did not establish a claim in fraud on any of these elements. We agree. The debtors' general and conclusory allegations of fraud, unsupported by the evidence, were not sufficient to take the case to a jury.

116 Idaho 545, 549. 777 P.2d 1218, 1223. In the present case, Keith Worley's statement that he paid the loan off is a claim, but it is also a description of an action he alleges he performed. The fact that Keith Worley's description of his action may be "unsubstantiated" goes to the weight of that testimony, not its admissibility. The logical outcome of A&H's argument that one always needs non-testimonial evidence to substantiate the testimony of a witness, in this case Keith Worley, would be to abolish all testimonial evidence. In this case, on the issue of whether the loans were repaid, while Keith Worley's statement that he paid the loan is not corroborated, his statement

is not a conclusory allegation. He is testifying about his version of the facts, of which he has personal knowledge. His testimony is evidence to be considered by a jury.

The final argument made by A&H regarding Worleys' counterclaim of "theft" of the Mustang is the Worleys have "waived" their right to that counterclaim. A&H claims:

> The Worley's [sic] claim regarding personal property located in the repossessed Mustang dos not constitute conversion because the Worleys have failed to demonstrate that they made a proper demand for the return of their personal property located in the Mustang as required by Peasley Transfer & Storage Co. v. Smith, 132 Idaho 732, 743-44, 979 P.2d 605, 616-17 (1999).
>
> If possession of the property at issue was not acquired by a tortious taking or where possession is obtained rightfully in the first instance, no evidence of conversion exists until there is proof that a proper demand for possession was made by the rightful owner and that the possessor wrongfully refused delivery.

Memorandum in Support of Motion for Summary Judgment, p. 17. A&H's argument presupposes that the Worleys failed to pay the loans. If the Worleys did pay off the loan, then A&H's repossession of the Mustang is wrongful. Worleys claim the loan was paid off "in early August 2010." Answer, Counterclaim and Demand for Jury Trial, p.3, ¶ 17. Worleys claim the repossession occurred in February 2012. *Id.,* p. 4, ¶ 20. A&H agrees with that timing. Memorandum in Support of Motion for Summary Judgment, p. 18. Thus, if the jury believes Keith Worley paid off the loan in August 2010, the repossession by A&H in February 2012 was wrongful.

G. A&H is Not Entitled to Summary Judgment on Worleys' Claims of Trespass to Chattels.

A&H contends that the Worleys' claim for trespass to chattels regarding the Mustang and personal property located within the Mustang must be dismissed. Memorandum in Support of Motion for Summary Judgment, p. 19. A&H contends that since the loan was never repaid, it was entitled to repossess the Mustang pursuant to

the security agreement. *Id.* Again, this presupposes that Keith Worley did not pay off the loan.

There is a factual dispute between the parties as to whether the Worleys repaid the loans. That creates a genuine issue of material fact about the repayment of the loan in this case and whether A&H was entitled to repossess the Mustang. A jury must first determine whether the loan was repaid before it can establish whether A&H was entitled to repossess the Mustang and has a right to the personal property found inside.

Accordingly, summary judgment is denied on this issue.

H. A&H is Entitled to Summary Judgment on Worleys' Counterclaim of Unfair and Deceptive Practices Under the Idaho Consumer Protection Act. Those Counterclaims are Dismissed.

In their Answer, Counterclaim and Demand for Jury Trial, the Worleys generally allege A&H Espresso violated the Idaho Consumer Protection Act by engaging in unfair and deceptive practices. Answer, Counterclaim and Demand for Jury Trial, p. 6-7. In their Opposition to Plaintiff's Motion for Summary Judgment and Cross Motion for Summary Judgment, Worleys specifically argue A&H was in violation of I.C. § 48-603(12), which provides:

> The following unfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce are hereby declared to be unlawful, where a person knows, or in the exercise of due care should know, that he has in the past, or is:
> . . .
> (12) Obtaining the signature of the buyer to a contract when it contains blank spaces to be filled in after it has been signed.

I.C. § 48-603(12). Worleys' claim Keith Worley was required to sign a blank Power of Attorney. Defendant's [sic] Opposition to Plaintiff's Motion for Summary Judgment and Cross Motion for Summary Judgment, p. 17. The Power of Attorney was executed on July 28, 2010. Idaho Code § 48-619 limits the time period in which a claim may be brought under the Idaho Consumer Protection Act. Specifically it provides: "No private

action may be brought under this act more than two (2) years after the cause of action accrues." I.C. § 48-619. Worleys ask this Court "find that the statute in this case was tolled by the outrageous and offensive actions [of] A&H Espresso." Defendant's [sic] Opposition to Plaintiff's Motion for Summary Judgment and Cross Motion for Summary Judgment, p. 17. Worleys have not cited to any case law that supports tolling the statute of limitations for that purpose. As such, Worleys' counterclaims under the Idaho Consumer Protection Act are barred by the statute of limitations.

Alternatively, even if the Court were to find the claim is not barred by the statute of limitations, Worleys counterclaims under the Idaho Consumer Protection Act must be dismissed because they are wholly without merit.

A&H claims Keith Worley signed a Power of Attorney authorizing transfer of the title of collateral to A&H. *Id.*; Affidavit of Billy Henderson in Support of Motion for Writ of Possession, p. 7 ¶ 13. This shifts the burden to the Worleys to demonstrate the Power of Attorney was somehow created in violation of the law. Worleys have failed to meet this burden. Worleys have provided no admissible evidence that the Power of Attorney was forged or that Keith Worley signed a blank form. In his affidavit, Keith Worley attests:

> [A&H] and/or Bill Henderson fraudulently had the Power of Attorney found in Plaintiff's Exhibit P prepared and also had it illegally notarized by Connie Reinhardt out of my presence and without my knowledge or consent. Connie Reinhardt was sanctioned by Washington State for this illegal notarization.

Affidavit of Keith Worley, p. 2 ¶ 7. Ignoring the legal argument made by Keith Worley, the Worleys have failed to provide this Court with any admissible evidence supporting that conclusory claim. A&H devotes several pages in its memorandum attempting to guess the basis for the Worleys' Idaho Consumer Protection Act claim and discussing why those hypothesized claims fail. Memorandum in Support of Motion

for Summary Judgment, pp. 20-23. Because this Court finds these claims are barred by the statute of limitations, and unsupported by any evidence, the Court will not discuss those arguments by A&H. Accordingly, the Worleys' counterclaims for unfair deceptive practices are dismissed.

I. A&H is Entitled to Summary Judgment on Worleys' Counterclaims of Abuse of Process. Those Counterclaims Are Dismissed.

"Abuse of process involves two elements: (1) a willful act in the use of legal process not proper in the regular course of the proceeding that was (2) committed for an ulterior, improper purpose." *Berkshire Investments, LLC v. Taylor*, 153 Idaho 73, 84, 278 P.3d 943, 954 (2012) (citing *Badell v. Beeks,* 115 Idaho 101, 104, 765 P.2d 126, 129 (1988)). In *Berkshire Investment*, the Court notes in a parenthetical that the "act of 'recording a lis pendens ... as leverage to demand money, property, or some advantage' to be a proper basis for an abuse of process claim." 153 Idaho 73, 85, 278 P.3d 943, 955 (quoting *Yadon v. Lowry*, 126 P.3d 332, 337 (Colo. Ct. App. 2005)). "The purpose of a lis pendens is simply to give notice of the pendency of a lawsuit affecting the title or the right to possession of real property." *Benz v. D.L. Evans Bank*, 152 Idaho 215, 223, 268 P.3d 1167, 1175 (2012). Idaho Code § 5-505 governs lis pendens. It provides:

> In an action affecting the title or the right of possession of real property, the plaintiff at the time of filing the complaint, and the defendant at the time of filing his answer, when affirmative relief is claimed in such answer, or at any time afterward, may file for record with the recorder of the county in which the property or some part thereof is situated, a notice of the pendency of the action, containing the names of the parties, the object of the action or defense, and a description of the property in that county affected thereby. From the time of filing such notice for record only shall a purchaser or incumbrancer of the property affected thereby be deemed to have constructive notice of the pendency of the action, and only of its pendency against parties designated by their real names.

I.C § 5-505.

A document entitled “Lis Pendens” was filed with the Kootenai County Recorder’s Office on June 12, 2013. Affidavit of Matthew T. Ries in Support of Plaintiff’s Motion for Summary Judgment, Exhibit A, Exhibit 27. Specifically it provides: “Notice is hereby given that A&H Espresso has filed a lawsuit in the above entitled court concerning the above named individuals and claiming a security interest in the following described **personal** property: 2008 Master Craft Boat VIN# MBCNMHSL708, Trailer # OR U424089 Trailer Vin# 19MSB242582D40162”. Affidavit of Matthew T. Ries in Support of Plaintiff’s Motion for Summary Judgment, Exhibit A, Exhibit 27 (emphasis added).

A&H contends “this is not a lis pendens as contemplated by the statute, and it has not had any affect on any of the Worleys’ property. . . . The pleading entitled ‘lis pendens’ concerned personal property, and it was never filed or recorded in any Recorder’s office where the Worleys own real property.” Memorandum in Support of Motion for Summary Judgment, p. 25. A&H maintains Keith Worley testified during his deposition that he does not own any real property. Affidavit of Matthew T. Ries in Support of Plaintiff’s Motion for Summary Judgment, Exhibit A, p. 103, Ll. 3-10. A&H also notes that at the time the document was filed, the Worleys had already retained counsel, who filed a demand letter to A&H Espresso on April 30, 2013. Reply Memorandum in Support of Motion for Summary Judgment, p. 16.

In response, the Worleys contend:

> A&H attempted to use the Lis Pendens to intimidate the unknowledgeable Worleys into conceding defeat before the litigation had even begun. The Worleys, not having any legal knowledge of their own, had no way of knowing that a lis pendens could not ally to a Boat title in any way, that the document had no legal significance.

Defendant’s [sic] Opposition to Plaintiff’s Motion for Summary Judgment and Cross Motion for Summary Judgment, p. 18. Worleys maintain that the document was filed to

intimidate the Worleys into not defending the lawsuit and merely turning the boat over to A&H. *Id.*

Given the fact that the document filed was not actually a lis pendens, and at the time it was filed the Worleys already had obtained counsel, it cannot be shown that it was filed "for an ulterior, improper purpose". The document filed has no legal significance. This fact is acknowledged by the Worleys in their Reply Memorandum in Support of Motion for Summary Judgment. As such, Worleys' counterclaim for abuse of process is dismissed.

J. A&H is Entitled to Summary Judgment on Worleys' Claims for Infliction of Emotional Distress. Those Claims are Dismissed as a Matter of Law.

"[W]hen damages are sought for breach of a contractual relationship, there can be no recovery for emotional distress suffered by a plaintiff." *Brown v. Fritz*, 108 Idaho 357, 363, 699 P.2d 1371, 1377 (1985). "If the conduct of a defendant has been sufficiently outrageous, we view the proper remedy to be in the realm of punitive damages." *Id.* In response, Worleys contend:

> [i]n this case, however, there has not yet been established that there has been a breach of contract. That is one of the one of the [sic] issues of material fact that are disputed.

Defendant's [sic] Opposition to Plaintiff's Motion for Summary Judgment and Cross Motion for Summary Judgment, p. 19. Worleys apparently misunderstand that while a "breach" of contract is in dispute, the fact of a contract is not. It is undisputed that A&H loaned Keith Worley money. In doing that, the parties entered into a contract setting forth the term of the loan and the rights of the parties. The basis for this lawsuit is for the recovery of money under that loan. Given the Worleys' agreement that they obtained a loan from A&H, Worleys cannot claim there was no contract. Accordingly,

any claim of infliction of emotional distress must be dismissed. That cause of action is not available to Worleys.

K. A&H is Entitled to Summary Judgment on Worleys' Claims that Billy Henderson Should be Held Personally Liable.

> As a general rule, officers and directors of a corporation are not personally liable on corporate contracts. The separate existence of a validly formed corporation will be recognized unless it is shown that the corporate veil should be pierced to avoid unjust consequences inconsistent with the corporate concept.

Barlow's, Inc. v. Bannock Cleaning Corp., 103 Idaho 310, 314-15, 647 P.2d 766, 770-71 (Ct. App. 1982). In the instant action, Worleys alleged that such consequences (piercing the corporate veil) should result because Mr. Henderson fraudulently signed a Power of Attorney naming himself attorney-in-fact, rather than naming himself as a signor of the corporation. Defendant's [sic] Opposition to Plaintiff's Motion for Summary Judgment and Cross Motion for Summary Judgment, p. 20.

A&H has provided an affidavit from Billy Henderson in which he attests:

> 13. In February, 2011, I sent the original Certificate of Title For a Boat with Mr. Worley's signature along with the Release of Interest/ Power of Attorney signed by the Oregon State Marine Board. Attached as **Exhibit P** is a true and correct copy of these documents.

Affidavit of Billy Henderson in Support of Motion for Writ of Possession, p. 7 ¶ 13 (emphasis in original). Based on this, Worleys cannot rest upon a mere allegation of fraud. They must respond by affidavit or otherwise with specific facts showing there is a genuine issue for trial. They have submitted nothing to support their fraud claim. As such, summary judgment on this issue must be granted.

L. Counsel for A&H and Mr. Henderson Do Not Represent A-Z Pawn and Loan, LLC, and Cannot Request Dismissal on its Behalf.

On August 14, 2013, attorneys Steven O. Anderson and Matthew T. Ries filed a Notice of Substitution of Counsel that they would be representing A&H and Billy

Henderson. On August 30, 2013, Rick Harter filed a pro se Answer for A-Z Pawn Loans, LLC (A-Z). At no time after this date have plaintiff's attorneys Steven O. Anderson or Matthew T. Ries filed a notice of appearance for A-Z. Counsel for A&H and Billy Henderson do not claim to represent A-Z. Instead, those attorneys claim:

> A&H Espresso has a legitimate interest in simplifying this litigation as much as possible by this summary judgment motion. If the Court should find for some reason that an issue needs to be resolved through a trial, A&H Espresso does not want to further complicate this case by having A-Z Pawn as a co-defendant, when the Defendants have no factual or legal basis to bring claims against the company.

Reply Memorandum in Support of Summary Judgment, p. 19. There no legal basis for which counsel for A&H to make this argument. It is unknown how a party's wish to not "further complicate this case" now substitutes for the requirement of an **appearance** by an attorney for a party. I.R.C.P. 4(i)(1).

Idaho Rule of Professional Conduct 1.2 also provides guidance on this issue:

> (a) Subject to paragraphs (c) and (d), a lawyer shall abide by a client's decisions concerning the objectives of representation and, as required by Rule 1.4, shall consult with the client as to the means by which they are to be pursued. A lawyer may take such action on behalf of the client as is impliedly authorized to carry out the representation. A lawyer shall abide by a client's decision whether to settle a matter. In a criminal case, the lawyer shall abide by the client's decision, after consultation with the lawyer, as to a plea to be entered, whether to waive jury trial and whether the client will testify.
>
> (b) A lawyer's representation of a client, including representation by appointment, does not constitute an endorsement of the client's political, economic, social or moral views or activities.
>
> (c) A lawyer may limit the scope of the representation if the limitation is reasonable under the circumstances and the client gives informed consent.
>
> (d) A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent, but a lawyer may discuss the legal consequences of any proposed course of conduct with a client and may counsel or assist a client to make a good faith effort to determine the validity, scope, meaning or application of the law.

Moreover, Comment 1 to Rule 1.2 provides:

> [1] Paragraph (a) confers upon the client the ultimate authority to determine the purposes to be served by legal representation, within the limits imposed by law and the lawyer's professional obligations. The decisions specified in paragraph (a), such as whether to settle a civil matter, must also be made by the client. See Rule 1.4(a)(1) for the lawyer's duty to communicate with the client about such decision. With respect to the means by which the client's objectives are to be pursued, the lawyer shall consult with the client as required by Rule 1.4(a)(2) and may take such action as is impliedly authorized to carry out the representation.

Counsel for A&H and Billy Henderson have not set forth any evidence that they have consulted with Rick Harter about how he wants to proceed in this action and whether he wanted the attorneys for A&H and Henderson to include Harter or A-Z in their Motion for Summary Judgment. Without such authority, it is entirely improper for counsel for A&H and Henderson to have submitted anything on behalf of A-Z. As such, the Court denies the A&H's Motion for Summary Judgment on this issue.

IV. ANY CROSS MOTION FOR SUMMARY JUDGMENT BY WORLEYS IS DENIED.

Worleys' brief is entitled "Defendant's [sic] Memorandum in Opposition to Plaintiff's Motion for Summary Judgment and Cross Motion for Summary Judgment". In such document, filed on April 2, 2014, Worleys' counsel writes: "Defendants request the Court to grant their request herein for their Cross motion for Summary Judgment." Defendant's [sic] Memorandum in Opposition to Plaintiff's Motion for Summary Judgment and Cross Motion for Summary Judgment, p. 2. A separate document captioned "Defendant's [sic] Opposition to Plaintiff's Motion for Summary Judgment and Cross Motion for Summary Judgment" was also filed April 2, 2014. In that document, Worleys repeat, "Defendants request the Court to grant their request herein for their Cross motion for Summary Judgment." Defendant's [sic] Opposition to Plaintiff's Motion for Summary Judgment and Cross Motion for Summary Judgment.

In neither of these documents does Worleys' attorney bother to enlighten the Court as to what Worleys would like summary judgment upon. Do Worleys want summary judgment on their counterclaims? If so, they haven't asked. Counsel for Worley concludes her brief, "For the foregoing reasons Defendants Keith and Nicole Worley respectfully request this Court to enter Summary Judgment in their favor on each claim asserted and to deny Plaintiff A&H Espresso's Motion for Summary Judgment in its entirety." Defendant's [sic] Memorandum in Opposition to Plaintiff's Motion for Summary Judgment and Cross Motion for Summary Judgment, p. 21.

If this could somehow be viewed as a motion for summary judgment under I.R.C.P. 56, Worleys have not complied in any manner with I.R.C.P. 56(c), submitting their memorandum twelve days before oral argument (as opposed to the required twenty-eight). Upon that failure to follow the Idaho Rules of Civil Procedure, any motion for summary judgment made by Worleys is denied.

From a factual standpoint, as mentioned above, many of the Worleys' counterclaims are now dismissed. As to all *remaining* counterclaims, any motion for summary judgment by the Worleys is denied based on disputed issue of material facts.

IV. CONCLUSION AND ORDER.

For the reasons stated above,

IT IS HEREBY ORDERED defendants' Motion to Strike Exhibits to Plaintiff's Motion for Summary Judgment is DENIED.

IT IS FURTHER ORDERED plaintiff's Motion to Strike Defendants' Statement of Facts and Defendants' Memorandum in Opposition to Plaintiff's Motion for Summary Judgment and Cross Motion for Summary Judgment is DENIED.

IT IS FURTHER ORDERED plaintiff's Motion for Summary Judgment is GRANTED in part and DENIED in part, as set forth above.

IT IS FURTHER ORDERED any cross motion for summary judgment that has been filed by Worleys is DENIED.

Entered this 21st 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 #
Steven O. Anderson/ Matthew T. Ries	(509) 326-4891	Ann Jacuot	208 209-6399
Patrick W. Harwood	(509) 624-2081		

____

Jeanne Clausen, Deputy Clerk