STATE OF IDAHO)
County of KOOTENAI)ss

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CLERK OF DISTRICT COURT

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Deputy

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE

STATE OF IDAHO IN AND FOR THE COUNTY OF KOOTENAI

ROBERT 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 GRANTING IN PART AND DENYING IN PART SYRINGA GROVE DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

I. PROCEDURAL HISTORY AND FACTUAL BACKGROUND.

This matter is before the Court on the Motion for Summary Judgment filed April 3, 2014, by the "Syringa Grove" defendants (defendants Syringa Grove, LLC, Charlie Nipp and his wife Susan Nipp, Ryan Nipp and Teri Nipp, and Lois Bruce and Scharelant 7, LLC). (The "Sawmill Point" defendants are Sawmill Point Development, Inc., George Hamilton and his wife Rita Hamilton, and Robert Hamilton).

This action arises out of a landslide that occurred in January 2011, which caused damage to real properties owned by the plaintiffs Robert and Amy Kobrick and Robert and Rita Burnett. Complaint, p. 7, ¶ 2.9. Plaintiffs' property is located in Kootenai

County, Idaho, 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 the defendant Lois Bruce (Bruce). *Id.;* Affidavit of Lois Bruce, p. 2 ¶ 3. That parcel contained one residence, Bruce's home. *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.,* p. 3, ¶12(1). On March 25, 2007, Bruce, Charlie Nipp and Ryan Nipp adopted the "Operating Agreement of Syringa Grove, LLC, a Member-Managed Limited Liability Company" (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. Under the Operating Agreement, Bruce's existing home would be included on one of the seven lots created by the plat, and when the plat was approved, Syringa Grove agreed it would title Lot 6 and Lot 7 to her by quitclaim deed. *Id.* On

June 4, 2007, Bruce conveyed by Warranty Deed the 14.69-acre property to Syringa Grove, LLC. *Id.*, p. 4 ¶ 10.

The Operating Agreement identifies Syrninga Grove, LLC as being "[m]anaged exclusively by all of its members." Affidavit of Charlie R. Nipp in Support of Motion for Summary Judgment, Exhibit A, p. 2. The "Articles of Organization" filed with the Idaho Secretary of State also states the LLC was to be managed by its members. Second Affidavit of Charlie R. Nipp in Support of Motion for Summary Judgment, Exhibit B.

Syringa Grove member Lois Bruce received a fifty percent voting interest in the LLC, payment of the sum owed on the land, and an interest to receive a distribution of Lots 6 and 7 in exchange for her capital contribution of 14.69 acres to the LLC. Affidavit of Charlie R. Nipp in Support of Motion for Summary Judgment, Exhibit A, pp. 5-6. The Operating Agreement further stated "[a] distribution of Lots 6 and 7, to [Bruce] will terminate her interest in the LLC partnership and the transfer of real property will be in exchange for her LLC partnership interest." *Id.,* p. 6. At the time of the signing of the Operating Agreement, Bruce owed to her ex-husband "[t]he sum of $1,120,000 plus 8% interest owed on the principal balance accruing from April 1, 2006, (the debt) which sum is secured by the property." *Id.,* p. 5. Syringa Grove identified the Lois Bruce property payment as totaling $1,227,727 once interest was accounted for. Second Affidavit of Charlie R. Nipp in Support of Motion for Summary Judgment, Exhibit I.

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.,* pp. 6-7, ¶ 21. Subsequently, Syringa Grove took steps to develop the property. *Id.,* 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.,* p. 8, ¶ 28.

The Final Plat was recorded with Kootenai County on October 8, 2009. *Id.,* p. 8, ¶ 35. The Plat created seven residential lots and one "Conservation Tract" (Tract A). *Id*., p. 8, ¶ 9. Even though the plat was approved, for some reason two years passed before Syringa Grove conveyed Lot 6 and Lot 7 to Bruce via quitclaim deed on October 24, 2011. Affidavit of Lois Bruce, p. 5, ¶ 12. Bruce attempted to sell Lot 7 but was unable to do so. *Id.,* p. 5, ¶ 13. In the fall of 2012, Bruce informed Charlie Nipp of this and he agreed to purchase the lot from her for $250,000.00. *Id*., p. 5, ¶¶ 14-18. On November 14, 2012, Bruce sold Lot 7 to Scharelant 7, LLC, a company owned by Charles Nipp. *Id.,* p. 5, ¶ 17.

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. Complaint. At the time the action was filed, Syringa Grove was the owner of Lots 1 through 7. Affidavit of Charlie Nipp, p. 20 ¶ 83. Lots 1 through 5 were eventually 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, was unable to sell those lots until 2013. *Id.,* 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.,* p. 21, ¶ 84. The five lots were sold for $275,644.50 more than the assessed value of the five lots. *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 satisfy its obligation to WTB. *Id*., pp. 11-12, 18, ¶¶ 46, 49, 73. In total, Charlie Nipp advanced $1,538,614 to Syringa Grove either directly through loans or by payments of obligations made on behalf of the company. Second Affidavit of Charlie Nipp, p. 10, 18 ¶ 32. An Amended Complaint was filed on March 18, 2013. A Second Amended Complaint and Renewed Demand for Jury Trial was filed on July 17, 2013.

On April 3, 2014, the Syringa Grove defendants filed the present motion for summary judgment, moving for summary judgment on: Count 4 of the plaintiffs' Second Amended Complaint (plaintiffs' claim of negligence against defendants Nipp and Bruce); Count 7 of the plaintiffs' Second Amended Complaint (plaintiffs' claim of trespass defendants against Nipp and Bruce); Count 8 of the plaintiffs' Second Amended Complaint (plaintiffs' claim of nuisance against defendants Nipp and Bruce); and Count 9 of the plaintiffs' Second Amended Complaint (plaintiffs' claim of fraudulent transfers against defendants Nipp, Bruce, Syringa Grove, LLC, and Scharelant 7, LLC). Memorandum In Support of Motion for Summary Judgment, pp. 20-21. This motion for summary judgment is for all claims alleged against defendants Nipp, Bruce, and Scharelant 7 (Counts 4, 7, 8, & 9) and for partial summary judgment in favor of Syringa Grove in that the latter partial motion only relates to Count 9 of the plaintiffs' Second Amended Complaint against Syringa Grove, LLC. *Id.,* p. 21.

In support of the motion for summary judgment, the Syringa Grove defendants initially filed two affidavits on April 3, 2014: "Affidavit of John F. Magnuson In Support of Motion for Partial Summary Judgment" and "Affidavit of Charlie R. Nipp In Support of Motion for Summary Judgment." The plaintiffs responded on April 22, 2014, by filing the "Plaintiffs' Memorandum in Opposition to Defendants' Motion for Summary

Judgment." A "Supplemental Memorandum in Support of Motion for Summary Judgment" was filed by the defendants on June 2, 2014, and is accompanied by the "Affidavit of Darin Krier."

On June 9, 2014, plaintiffs filed "Plaintiffs' Amended Memorandum in Opposition to Defendants' Syringa Grove, LLC, Nipps, Bruce and Scharelant 7, LLC's Motion for Summary Judgment". The amended memorandum was intended to entirely replace the plaintiffs' earlier filing of April 22, 2014. Plaintiffs' Amended Memorandum in Opposition to Defendants' Syringa Grove, LLC, Nipps, Bruce and Scharelant 7, LLC's Motion for Summary Judgment, p. 1. Accompanying the amended memorandum was the "Affidavit of Julie A. Simaytis." Plaintiffs object to the defendants' June 2, 2014, filing of the supplemental memorandum in support of summary judgment "[a]s no allowance for such a supplement was made by the Court at the April 23, 2014, hearing on Plaintiffs' motion to continue the hearing on...summary judgment motion." Plaintiffs' Amended Memo in Opposition to Defendants' Motion for Summary Judgment, p. 31.

Plaintiffs have requested that the supplemental memorandum be disregarded and stricken from the record as a result of being untimely. *Id.* That request is denied as plaintiffs are clearly not prejudiced in any way. Plaintiffs' amended memorandum was filed June 9, 2013, seven days *after* the Syringa Grove defendants' supplemental memorandum was filed. At pages 31-35 of plaintiffs' amended memorandum, plaintiffs discuss the issues raised by the Syringa Grove defendants in their supplemental memorandum filed a week earlier.

The Syringa Grove defendants' responded to the plaintiffs' amended memorandum on June 23, 2014, in the "Reply Memorandum in Support of Motion for Summary Judgment." The Syringa Grove defendants state there is no basis for the objection to the supplemental memorandum of June 2, 2014, that the memorandum

was filed in conformity with I.R.C.P. 56, and that by filing at least twenty-eight days before a hearing, they have complied with the rule. Reply Memorandum in Support of Motion for Summary Judgment, at p. 5. The Court agrees with the Syringa Grove defendants that plaintiffs' objection is baseless.

Hearing on the Syringa Grove Defendants' motion for summary judgment was held on June 30, 2014. The Court took the matter under advisement. For the reasons set forth below, the Court denies the motion in part and grants the motion in part.

III. STANDARD OF REVIEW.

Summary judgment is proper "[i]f the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." *See* I.R.C.P. 56(c). The moving party carries the burden of proving the absence of genuine issues 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)). Any facts in dispute are liberally construed in favor of the nonmoving party, with any inference reasonably drawn from the record done so in favor of the nonmoving party. *Kiebert v. Goss*, 144 Idaho 225, 227, 159 P.3d 862, 864 (2007) (citing *Lockheed Martin Corp. v. Idaho State Tax Comm'n*, 142 Idaho 790, 793, 134 P.3d 641, 644 (2006)).

The establishment of an absence of a genuine issue of material fact by the moving party shifts the burden to the nonmoving party to provide specific facts showing

there is a genuine issue for trial. 144 Idaho 225, 228, 159 P.3d 862, 865 (citing *Hei v. Holzer*, 139 Idaho 81, 85, 73 P.3d 94, 98 (2003)). "[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 (citing *Atwood v. Smith*, 143 Idaho 110, 113, 138 P.3d 310, 313 (2006)). The nonmoving party may use circumstantial evidence to create a genuine issue of material fact. *Edged In Stone, Inc. v. Northwest Power Systems, LLC*, 156 Idaho 176, 321 P.3d 726, 730 (2014) (citing *ParkWest Homes, LLC v. Barnson*, 154 Idaho 678, 682, 302 P.3d 18, 22 (2013)). To create a genuine issue, "[h]owever, the [nonmoving] party may not rest on a mere scintilla of evidence." *ParkWest Homes, LLC. V. Barnson*, 154 Idaho 678, 682, 302 P.3d 18, 22 (2013) (citing *McCoy v. Lyons*, 120 Idaho 765, 769, 820 P.2d 360, 364 (1991)). The nonmoving 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). If reasonable people might reach conflicting inferences about the evidence, the motion for summary judgment must be denied. *Ashby v. Hubbard*, 100 Idaho 67, 69, 593 P.2d 402, 404 (1979) (citing *Otts v. Brough*, 90 Idaho 124, 409 P.2d 95 (1965)).

III. ANALYSIS.

A. The Syringa Grove Defendants' Motion for Summary Judgment Regarding Count Nine (Fraudulent Transfers) of Plaintiffs' Second Amended Complaint.

1. Summary of Applicable Law.

A transfer of property or obligation incurred is void against all creditors of the debtor if done with the intent to delay or defraud any creditor or other person of their

demands. I.C. § 55-906. "[T]he question of fraudulent intent is one of fact, and not of law; nor can any transfer or charge be adjudged fraudulent solely on the ground that it was not made for a valuable consideration . . . ." I.C. § 55-908. The Idaho Supreme Court stated, "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). Even if a business is experiencing financial difficulty at the time of a transaction, "[t]he existence of adequate consideration for the conveyance vitiates any inference of fraud." 95 Idaho 38, 43, 501 P.2d 722, 727.

A transfer of a real property asset is made "[w]hen 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). "Transfer" is defined as, "[e]very 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." I.C. § 55-910(12). An obligation evidenced by writing is incurred "[w]hen the writing executed by the obligor is delivered to or for the benefit of the obligee." I.C. § 55-915(5)(b). "Obligation" is not defined by the Idaho Code; however, Black's Law Dictionary defines "obligation" as "A formal, binding agreement or acknowledgment of a liability to pay a certain amount or to do a certain thing for a particular person or set of persons; esp., a duty arising by contract." Black's Law Dictionary, p. 528 (4th pocket ed. 2011).

Idaho Code § 55-914(1) governs present creditors and constructively fraudulent

transfers. Specifically, it provides:

> 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 was insolvent at that time or the debtor became insolvent as a result of the transfer or obligation.

I.C. § 55-914(1) (emphasis added). "The timing of each transfer is considered individually. The fact that [a] new transfer was allegedly made in an attempt to satisfy a preexisting obligation goes to the question of value, not to the question of timing." *Post v. Idaho Farmway, Inc.*, 125 Idaho 475, 478, 20 P.3d 11, 14 (2001). Further, a transfer by a debtor is fraudulent to a creditor whose claims predates the transfer "[i]f the transfer was made to an insider for an antecedent debt, the debtor was insolvent at that time, and the insider had reasonable cause to believe the debtor was insolvent." I.C. § 55-914(2). "A debtor is insolvent if the sum of the debtor's debts is greater than all of the debtor's assets, at a fair valuation." I.C. 55-911(1).

Moreover, a transfer or obligation may be fraudulent even if the creditor's claim arose after the obligation was incurred. *See* I.C. § 55-913(1). Idaho Code § 55-913 states that a transfer made or obligation incurred, either before or after a creditor's claim arose, is fraudulent if it was done "[w]ith actual intent to hinder, delay, or defraud any creditor of the debtor . . . ." I.C. § 55-913(1)(a). However, if a person took in good faith and for a reasonably equivalent value, the transfer made or obligation incurred is not voidable under I.C. § 55-913(1)(a). *See* I.C. § 55-917(1). A similar transaction or obligation may be fraudulent if a reasonably equivalent value is not received in exchange and the debtor "[w]as engaged or was about to engage in a business or transaction for which the remaining assets of the debtor were unreasonably small in relation to the business or transaction . . . ." I.C. § 55-913(1)(b)(1).

In determining actual intent under I.C. § 55-913, a list of factors is provided by statute and consideration may be given to whether:

(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 list is not exhaustive and consideration may be given to other factors. *See* I.C. § 55-913(2). An "insider" is defined by I.C. § 55-910(7)(b) for debtor corporations to include: "1. a director of the debtor; 2. an officer of the debtor; 3. a person in control of the debtor . . . ." I.C. § 55-910(7)(b)(1)-(3). Additionally, an insider may be "[a] managing agent of the debtor." I.C. § 55-910(e).

A statute of limitations exists that may extinguish a cause of action for a fraudulent transfer or obligation if not brought promptly. *See* I.C. § 55-918. Claims under I.C. § 55-913(1)(a) must be made within four (4) years of the date the transfer was made or the obligation was incurred, or if the four (4) year period has past, "[w]ithin one . . . year after the transfer or obligation was or could reasonably have been discovered by the claimant . . . ." I.C. § 55-918(1). If a claim is brought under I.C. § 55-913(1)(b) or 55-914(1), a plaintiff has four (4) years after the transfer was made or the obligation was incurred. I.C. § 55-918(2). Finally, a cause of action brought under

I.C. § 55-914(2) must be brought within one (1) year after the transfer was made or the obligation was incurred.

2. Plaintiffs' Claims Under I.C. § 55-913(1)(a)-(b) and I.C. § 55-914(1) Are Not Extinguished by the Statute of Limitations (Statute of Repose).

The Syringa Grove defendants assert that the statute of limitations set forth in I.C. § 55-918 bars the plaintiffs' cause of action. Supplemental Memorandum in Support of Motion for Summary Judgment, p. 4. In support of their position, the defendants quote the following language from this Court's Memorandum Decision and Order Denying Plaintiffs' Motion for 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 . . . . The Plaintiffs arguably have failed to meet either of these statutory requirements. As stated, 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 . . . .

Id. (quoting Memorandum Decision and Order Denying Plaintiffs' Motion for Injunctive Relief, at p. 30). Thus, it appears the Syringa Grove defendants believe time should be measured from the formation of the Operating Agreement in 2007 and not the date on which the transfers actually occurred.

Plaintiffs do not agree that the relevant dates for analyzing claims under the Uniform Fraudulent Transfer Act occurred in 2007. Plaintiffs' Memorandum in Opposition to Defendants' Motion for Summary Judgment, at p. 4. Plaintiffs allege the "[d]efendants' insistence that the Court look only to the circumstances surrounding the 'obligations' that were agreed upon with the execution of the Syringa Grove Operating Agreement in 2007 is improper and contrary to the laws of this state." *Id.*, pp. 4-5.

Plaintiffs argue "[w]hen analyzing a transfer pursuant to the Act, every obligation

incurred and every transfer made must be considered separately. . . ." *Id.,* p. 5 (emphasis omitted) (citing *Post v. Idaho Farmway, Inc.*, 135 Idaho 475, 20 P.3d 11 (2011)). As such, plaintiffs argue that a "'[q]uitclaim deed represents a new and separate transfer', and second, '[t]he timing of each transfer is considered individually' for purposes of analysis under the Act.'" *Id.,* p. 6.

Moreover, the plaintiffs argue a transfer of real property cannot be protected from a finding of fraud just because it was not executed with an intent to defraud a creditor. *Id.* pp. 6-7. Plaintiffs maintain the law in Idaho "'[e]ffectuate[s] a policy of encouraging transferees to record their real property instruments in a timely fashion or risk loss of their interest." *Id.* (citing *Wilder v. Miller*, 135 Idaho 382, 386, 17 P.3d 883, 887 (Ct. App. 2000). Plaintiffs assert that the Uniform Fraudulent Transfer Act would have no teeth "[i]f a perfected transfer of real property could always be protected from a finding of fraud by doing nothing more than asserting that some prior, unrecorded agreement was paramount in the analysis of the fraud claim . . . ." *Id.* Thus, plaintiffs claim there is a question as to whether the date the obligation was incurred or the date on which the transfer occurred is the relevant date for this analysis.

It appears I.C. § 55-918 is, at a minimum, ambiguous when applied to the facts of this case. Specifically, I.C. § 55-918 provides:

> A cause of action with respect to a fraudulent transfer or obligation under this act is extinguished unless action is brought:
>
> (1) Under section 55-913(1)(a), Idaho Code, within four (4) years after the transfer was made or the obligation was incurred or, if later, within one (1) year after the transfer or obligation was or could reasonably have been discovered by the claimant;
>
> (2) Under section 55-913(1)(b) or 55-914(1), Idaho Code, within four (4) years after the transfer was made or the obligation was incurred; or
>
> (4) Under section 55-914(2), Idaho Code, within one (1) year after the

transfer was made or the obligation was incurred.

I.C. § 55-918(1)-(3). Here, we have an obligation in 2007 that led to a transfer in 2011. The ambiguous language is the phrase "after the transfer was made or the obligation was incurred," as it provides no guidance as to what to do when presented with a related obligation and transfer that took place years apart. However, when I.C. § 55-918 is read in light of the policy enumerated in *Post* and *Wilder*, both Idaho cases that interpreted other sections of the Uniform Fraudulent Transfer Act (UFTA), this Court finds the appropriate reading is that the statute of limitations for fraudulent transfers does not begin to run until the quitclaim deeds are recorded.

Under the Idaho UFTA, a quitclaim deed represents a new transfer, the timing of which is considered individually. *See Post v. Farmway, Inc.*, 135 Idaho 475, 478, 20 P.3d 11, 14 (2001). In *Post*, an alleged preexisting obligation was satisfied by a quitclaim deed after another party had received a judgment against the landholder. 135 Idaho 475, 477, 20 P.3d 11, 13. Initially, the Court observed that "[t]he use of a quitclaim deed to convey fee simple ownership in real property is clearly a transfer as defined by I.C. § 55-910(12)." *Id.* Next, the court stated that "[e]ven if Farmway transferred an interest in the Elmore County farm when it guaranteed the loan, the quitclaim deed represents a new and separate transfer . . . ." 135 Idaho 475, 478, 20 P.3d 11, 14. Thus, the Idaho Supreme Court has not viewed obligations and related subsequent transfers as the same, but rather as separate events.

Public policy suggests that the date a quitclaim deed is recorded should be the date of a transfer under the UFTA and separate from any other obligation. *See Wilder v. Miller*, 135 Idaho 382, 386, 17 P.3d 883, 887 (Idaho Ct. App. 2000). In *Wilder*, the Idaho Court of Appeals found a quitclaim deed executed in 1987 with no actual

fraudulent intent to be constructively fraudulent when recorded in 1993. 135 Idaho 382, 387, 17 P.3d 883, 888. In that case, a judgment in a personal injury action was granted in 1992 that left the grantor of the 1987 quitclaim deed with no personal assets. 135 Idaho 382, 384, 17 P.3d 883, 885. The Idaho Court of Appeals articulated that the result was not absurd, as "[i]t appears to merely effectuate a policy of encouraging transferees to record their real property instruments in a timely fashion or risk loss of their interest. It also prevents a debtor from benefitting from secret, unrecorded transfers of assets which enable the debtor to retain legal title and thereby misrepresent his or her financial status and mislead creditors." 135 Idaho 382, 386, 17 P.3d 883, 887. Thus, a court will focus on the date the transfer was perfected, not the date the writing was executed when analyzing a fraudulent transfer claim.

In the present case, the appropriate application of the statute of limitations to the facts leads to the conclusion that the relevant date is in 2011; therefore, plaintiffs' claims are not extinguished by time. Like the fact in *Post* that there was an alleged preexisting obligation, the Operating Agreement for Syringa Grove is also preexisting. In both cases the parties attempted to satisfy the preexisting obligation by the transfer of real property with a quitclaim deed. In *Post* the Idaho Supreme Court did not focus on the preexisting obligation, but rather the actual transfer of the property itself. Thus, in the present case the Bruce Quitclaim is considered to be a "new and separate transfer" and the statute of limitations begins from the time the deeds were recorded.

Further, strong policy reasons exist for marking the statute of limitations from the point of time the deeds are recorded. As pointed out by the Idaho Court of Appeals, a party should record their real property instruments in a timely manner or risk losing their interest. Here, the Operating Agreement specified certain dates by which lots could be dispersed; the failure to do so with urgency is a risk the defendants took. Additionally,

like the fact in *Wilder* where the deeds were not recorded until after an injury took place and there was an apparent need to secure assets in the interest of an insider, here we have the case where an alleged injury took place before the quitclaim deeds were executed and an allegation that assets were secured in favor of an insider. If the statute of limitations found in I.C. § 55-918 were to bar any action after four (4) years where a written obligation existed, a debtor could benefit from an unrecorded obligation and misrepresent his financial status by doing no more than waiting the statutory period of four years to start a project after an agreement is signed.

Finding that the relevant date for the statute of limitations analysis is the date the deed was recorded would be consistent with at least one other jurisdiction. As found by the United States District Court in *PNC Equipment Finance, LLC v. Zilberbrand*, 2013 WL 1278602 (N.D. Ill. 2013), whether a claim is time barred is not measured from the date of the agreement, but rather the actual transfer date. Like our case, the action would have been barred if measured from the preexisting agreement, but was timely when measured from the date of the actual transfer. This Court finds the statute of limitations for fraudulent transfer did not begin to run until the quitclaim deeds were recorded for Lots 6 through 7 in 2011 and for Lots 1 through 5 in 2013. Plaintiffs commenced their action in a timely manner and the claim is not extinguished.

3. The Syringa Grove Defendants' Motion for Summary Judgment Regarding Syringa Grove, LLC' Transfer of Lots 1 Through 5 Must Be Granted.

The Syringa Grove defendants claim no genuine issue of material fact exists with regard to Syringa Grove's alleged fraudulent sale of Lots 1 through 5. Memorandum in Support of Motion for Summary Judgment, p. 29. In support of this assertion, the Syringa Grove defendants claim that a preference of one creditor over another is not an

actionable claim under the Uniform Fraudulent Conveyances Act in the absence of actual intent to defraud. *Id.,* pp. 24, 28. In support of this, the Syringa Grove defendants rely on language of the Idaho Supreme Court in *Rodgers vs. Boise Ass'n of Credit Men, Ltd.*, 33 Idaho 513, 196 P. 213 (1921) and *Pettengill v. Blackman*, 30 Idaho 241, 164 P. 358 (1917) to oppose the claim that a preference is fraudulent. Memorandum in Support of Motion for Summary Judgment, p. 29. In *Rogers* the Court stated, "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." *Rodgers v. Boise Ass'n of Credit Men, Ltd.*, 33 Idaho 513, 196 P. 213, 214 (1921). Similarly, in *Pettengill*, the Idaho Supreme Court stated, "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." *Pettengill v. Blackman*, 30 Idaho 241, 164 P. 358, 362 (1917) (citing Bump, Fraud. Conv. (2d Ed.) p. 187; *Currie v. Bowman*, 25 Or. 364, 35 P. 848-852 (1894)).

In this case, the sale of Lots 1 through 5 to independent third parties occurred between March 20, 2013 and July 19, 2013. Memorandum in Support of Motion for Summary Judgment, p. 29. Each of the lots sold for an amount greater than their assessed value in 2013, with the entirety of the sales proceeds being applied to the obligation owed to WTB. *Id.* (citing Exhibit A). The Syringa Grove defendants acknowledge that the sale of Lots 1 through 5 were insufficient to pay off the entire obligation owed to WTB as a result of the devaluation of real estate during the recessionary period. *Id.*

As this Court previously found, "[i]f 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." Memorandum Decision and Order Denying Plaintiffs' Motion for Injunctive Relief, p. 14. Under I.C. § 55-912(1) "[v]alue is given for a transfer or an obligation, if, in exchange for the transfer or obligation, property is transferred or an antecedent debt is secured or satisfied . . . ." I.C. § 55-912(1).

Here, it is not disputed that an antecedent debt was satisfied by the sale of Lots 1 through 5. The Syringa Grove defendants have submitted affidavits containing evidence that the entirety of the proceeds of the sales were applied to satisfy the debt owed WTB. Affidavit of Charlie R. Nipp Re: Plaintiffs' Motion for Injunctive Relief Pursuant to I.C. § 55-916 and IRCP 65(e), Exhibit L, p. 6. The lots were valued in 2013 at: Lot 1 - $161,230; Lot 2 - $161,157; Lot 3 - $160,000; Lot 4 - $160,970; Lot 5 - $208,889. *Id. ,* Exhibit Q. That same year, the net sales proceeds of the lots were: Lot 1 - $170,712.79; Lot 2 - $233,476.44; Lot 3 - $222,845.65; Lot 4 - $233,943.61; Lot 5 - $268,066.50. *Id.,* Exhibits JJ, KK, LL, MM, and NN. In each case, the lots were sold for amounts in excess of their assessed value. Thus, Syringa Grove defendants exercised a preference in choosing to satisfy the debt owed to WTB and did so for value.

By showing that no genuine issue of material fact exists with regards to the transfers of Lot 1 through 5, the Syringa Grove defendants shift the burden to the plaintiffs as the non-moving party to establish a genuine issue of material fact. *See Kiebert v. Goss*, 144 Idaho 225, 228, 159 P.3d 862, 865 (2007). "A non-moving party must come forward with evidence by way of affidavit or otherwise which contradicts the evidence submitted by the moving party, and which establishes the existence of a

material issue of disputed fact. *Id.* (citing *Hei v. Holzer*, 139 Idaho 81, 85, 73 P.3d 94, 98 (2003); *Zehm v. Assoc. Logging Contractors, Inc.*, 116 Idaho 349, 350, 775 P.2d 1191, 1192 (1988)).

In response, the plaintiffs argue that they have not pleaded claims of fraud with respect to the sales of Lots 1 through 5 to third parties. Plaintiffs' Memorandum in Opposition to Defendants' Motion for Summary Judgment, pp. 8-9. Specifically, the plaintiffs write that:

> At this time, Plaintiffs have *not* pleaded claims of fraud with respect to: 1. the transfer of property from Lois Bruce to Syringa Grove in 2007; 2. the execution of the a [sic] promissory note in favor of Washington Trust Bank in 2007 . . . or the recording of a Deed of Trust that benefitted Washington Trust Bank . . .; 3. the sales of Lots 1 through 5 to alleged third parties in 2013; or 4. the transfer of the Conservation Tract to the HOA.

Id. However, Count Nine of the Second Amended Complaint states that "[t]he transfers made and the obligations incurred, after this lawsuit was filed, with respect to the seven . . . lots that comprise Syringa Grove were fraudulent as to Plaintiffs as creditors, pursuant to Idaho's Uniform Fraudulent Transfer Act . . . ." Second Amended Complaint and Renewed Demand for Jury Trial, Count Nine, ¶ 104. Thus, it appears at some point the plaintiffs alleged fraud as to the sale of Lots 1 through 5 as they are part of the seven lots comprising Syringa Grove and occurred after the filing of this case. In a footnote, the plaintiffs do say that they have not found or been presented with any evidence that WTB no longer has a security interest in Lots 2, 4, or 5. Plaintiffs' Memo in Opposition to Defendants' Motion for Summary Judgment, p. 9, note 3. However, the fact that the plaintiffs have seen no evidence that the entire obligation to WTB on Lots 1 through 5 has been repaid does not refute the fact that the entirety of the proceeds from the sales were used to pay the preexisting obligation to a preexisting creditor.

Plaintiffs additionally assert that the defendants' characterization of preference is

not complete. Plaintiffs write:

> Defendants invite this Court to read these four cases as standing for the proposition that a debtor may *always* pay one creditor in preference to another and *never* be in violation of the Act. While each of these cases does recognize a general rule that permits a debtor to prefer one creditor over another, each of these cases also specifically recognizes the general rule is subject to exception in cases of fraud. *Wyzard*, at 1187 ("The general rule permitting [preferences] has long been subject to exceptions in cases of fraud."); *Irving*, at 818 (transfer held to be a mere preference where Plaintiff did not set forth sufficient facts to state a cause of action for fraud); *Rodgers*, at 214 ("A preference is valid in the absence of an actual intent to defraud."); and *Pettengill*, at 362 ("in the absence of collusion or fraud an insolvent corporation is not prohibited from preferring certain creditors over others.")

Plaintiffs' Memo in Opposition to Defendants' Motion for Summary Judgment, pp. 8-9. Thus, the plaintiffs would need to show fraud for the general rule of preference to not apply. While the plaintiffs do include additional discussion of why there is reason to consider the transactions fraudulent in regards to Lots 6 and 7, they do not include a discussion of why the transactions regarding Lots 1 through 5 would be fraudulent. *Id.,* pp. 10-21.

Because the plaintiffs have not made an attempt to establish the existence of fraudulent intent regarding the sales of Lots 1 through 5, and instead claim that they never plead a fraud claim regarding those lots at all, no genuine issue of material fact exists. The Syringa Grove defendants have interpreted the plaintiffs' position to be that Lots 1-5 are no longer the subject of a pending fraud claim. Supplemental Memorandum in Support of Motion for Summary Judgment, p. 4.

As shown, the debtor received value for the transfer by satisfying an antecedent debt. The lots were all sold for amounts in excess of their assessed values. Since the plaintiffs have neither set forth nor cited to specific facts in affidavits establishing a genuine issue of material fact, summary judgment must be granted to the Syringa

Grove defendants regarding the Syringa Grove defendants' sale of lots 1 through 5, if such a claim by plaintiffs still exists.

4. The Syringa Grove Defendants' Motion for Summary Judgment Regarding Syringa Grove, LLC's Transfer of the Conservation Easement (Tract A) Must Be Granted.

The Syringa Grove defendants contend that no material question of fact exists as to whether the Conservation Easement Tract A was conveyed in a manner devoid of all fraud. Memorandum in Support of Motion for Summary Judgment, p. 37. The Syringa Grove defendants argue that the County's Order of Decision required Tract A to be impressed with a Conservation Easement. *Id.* (citing First Nipp Affidavit at Ex. N, p. 5 (Section 2.17)). Further, they assert that the October 8, 2009, CC&Rs obligated the conveyance of Tract A to the Syringa Grove Owners Association, Inc. *Id.* Due to the impressment of the conservation easement, Tract A has been valued at $1,000 by Kootenai County consistently. *Id.*

Similar to the failure to plead of fraud with respect to the sale of Lots 1 through 5, plaintiffs' state they have not pleaded a claim of fraudulent transfer for purposes of this Motion with regard to the transfer of the Conservation Tract. Plaintiffs' Memo in Opposition to Defendants' Motion for Summary Judgment, at p. 9.

Thus, there is no question of material fact regarding the transfer of Tract A. It is not clear that a claim of fraudulent transfer has been pled; to the extent it has, summary judgment must be granted.

5. The Syringa Grove Defendants' Motion for Summary Judgment Regarding Plaintiffs' Claims of Fraudulent Transfer of Lots 6 and 7 to Bruce Must Be Denied (Except as to Claims Under I.C. § 55-914(2)).

The Syringa Grove defendants argue that summary judgment should be granted with respect to plaintiffs' allegation of a fraudulent conveyance of Lots 6 and 7 to Bruce.

Memorandum in Support of Motion for Summary Judgment, p. 35. They claim the conveyance of Lots 6 and 7 to Bruce was not fraudulent because Lots 6 and 7 were conveyed to Bruce in exchange for title to the entire subject property. *Id.*, p. 32. The defendants make five arguments why the conveyance of Lots 6 and 7 to Bruce was not fraudulent, despite the fact that the conveyance occurred after this lawsuit was initiated by the plaintiffs: 1) plaintiffs' claim of prejudice as a result of the Syringa Grove Operating Agreement is not legally significant because the obligation and transfer was for adequate consideration; 2) the obligation Syringa Grove owed to Bruce was not a "debt[1]" or "claim[2]" because it did not involve a right to payment, but rather a distribution of two separate parcels of real property "[w]hich were but a portion of the property she had previously deeded the company" [3] (*Id.*); 3) plaintiffs have previously "[a]cknowledged that had the Company deeded Lots 6 and 7 to Lois the day before the occurrence of events for which Plaintiffs seek recovery [the landslide], the transfer would not have been fraudulent" (*Id.*, pp. 33-34, indicating in Note 5 that the

[1] Idaho Code § 55-910 defines "debt" under the Act as meaning "[l]iability on a claim." I.C. § 55-910(5).
[2] "Claim" is defined as "[a] right to payment . . . ." I.C. § 55-910(3).
[3] Although not included in the pleadings, there may be a question of whether the LLC was actually entitled to make the distribution. Idaho Code § 30-6-405(1)(b) states that a limited liability company may not make a distribution if after the distribution "[t]he company's total assets would be less than the sum of its total liabilities plus the amount that would be needed, if the company were to be dissolved, wound up and terminated at the time of the distribution, to satisfy the preferential rights upon dissolution, winding up and termination of members whose preferential rights are superior to those of persons receiving the distributions." I.C. § 30-6-405(1)(b). The contributions by Lois Bruce of 14.69 acres to the LLC were characterized as a capital contribution. Affidavit of Charlie R. Nipp in Support of Motion for Summary Judgment, Exhibit A, p. 5. By the end of 2011, Syringa Grove, LLC remained indebted to WTB for $1.84 million and to Charlie Nipp for $1,067,805. Memorandum in Support of Motion for Summary Judgment, p. 9, ¶ 38. The assessed value of Lots 1 through 5, those remaining assets after the quitclaim, only totaled $1,654,890. *Id.* Exhibit A. "[P]ersons making capital contributions are not corporate creditors." *Idaho Development, LLC v. Teton View Golf Estates, LLC*, 152 Idaho 401, 405, 272 P.3d 373, 377 (2011). However, "'[t]he determination whether an advance is debt or equity . . . depends on the distinction between a creditor who seeks a definite obligation that is payable in any event, and a shareholder who seeks to make an investment and to share in the profits and risks of loss in the venture . . . ." *Id.*

defendants have requested a partial transcript of the comments from March 14, 2014, to apply to the Court by supplementation); 4) there is no evidence that Syringa Grove's performance of a pre-existing duty to convey Lots 6 and 7 was done with an actual fraudulent intent because the Operating Agreement is objectively verifiable as pre-dating the dispute by four years (*Id.,* p. 34); and 5) I.C. § 55-914(2) is no benefit to plaintiffs because there is no disputed issue of fact that that "[t]he Company's transfer of Lots 6 and 7 to [Bruce] was not 'for an antecedent debt' or that Lois was 'an insider.'" *Id.* They argue Bruce is a simple "member" in an LLC "[w]ith the same voting rights of all other members, and with no status as a manager, officer, director, or general partner." *Id.,* p. 35.

In response, the plaintiffs argue that "preference" does not support summary judgment if there is still a material issue of fact regarding the actual intent of the debtor. Plaintiffs' Memorandum in Opposition to Defendants' Motion for Summary Judgment, pp. 9-10. Citing to the same case relied upon by the defendants to establish the validity of preference, plaintiffs note "[t]he general rule permitting [preferences] has long been subject to exceptions in cases of fraud." *Id.* p.10 (citing *Wyzard v. Goller*, 23 Cal. App.4th 1183, 1187 (Cal.App.2ndDist. 1994)). They claim fraudulent intent is a question of fact under the Act, and the plaintiffs assert that it may "[o]nly be settled by the trier of fact." *Id.* (citing I.C. § 55-908).

Moreover, plaintiffs state that I.C. § 55-913(2) identifies eleven "badges of fraud" to be considered in determining actual intent under I.C. § 55-913(1)(a). While stated above, for ease of reference they are:

(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). Plaintiffs state that "[m]any of these 'badges of fraud' suggest Syringa Grove actually intended to hinder, delay or defraud Plaintiffs when it transferred property and incurred obligations to Lois Bruce . . . ." Plaintiffs' Memorandum in Opposition to Defendants' Motion for Summary Judgment, at p. 11. Specifically, plaintiffs argue factors a, c, d, e, g, h, and i.

In support of this position, plaintiffs claim these factors are met because: 1) the transfer or obligation was to an insider, Bruce, because she is a managing member of the LLC (*Id.,* p.11); 2) the transfer or obligation was concealed because "[a]fter the Bruce Quitclaim was recorded in October 2011, Syringa Grove made no effort to supplement its answers to discovery to alert Plaintiffs that the transfer had occurred" (*Id.,* p. 12); 3) the Bruce Quitclaim was recorded seven months after the first complaint was filed on March 28, 2011 (*Id.,* pp.14-15); 4) the Bruce Quitclaim was all of Syringa Grove's assets (*Id.,* p. 15), and after the Bruce Quitclaim was executed, the plaintiffs allege that Lots 1 through 5 and the Conservation Easement only had a combined assessed value of "$1,655,890, which was $127,558 less than the amount owing on the WTB Note" (*Id.* p. 16), thus, the plaintiffs argue that the lots transferred to Bruce represented all of the company's assets, being the property that exceeded the amount

owed to WTB (*Id*); 5) the Bruce Quitclaim, being a transfer of all Syringa Grove's assets, the plaintiffs believe "[t]here is no doubt Syringa Grove removed assets with the Bruce Quitclaim" (*Id.*); 6) the plaintiffs argue that the value of consideration received by Syringa Grove was not reasonably equivalent to the value of the asset transferred or the amount owed because:

> When Lois Bruce transferred all of the subject property (14.69 acres) to Syringa Grove in 2007, Syringa Grove received property with an assessed value of $1,428,000. (Defendants' Memo, SOF ¶ 4). In exchange for the transfer of the property, Syringa Grove paid off Lois Bruce's indebtedness to her ex-husband, in an amount of $1,216,899. (Defendants' Memo, SOF ¶ 16). However, when the Bruce Quitclaim was executed, Lois received property (lots 6 and 7) that had appreciated in value to $1,448,660, and Syringa Grove received nothing.

(*Id.*, at p. 17), and finally; 7) the plaintiffs argue Syringa Grove was allegedly insolvent at the time of the transfer because "[a]fter the Bruce Quitclaim, Syringa Grove no longer held assets that of sufficient value to cover the debt owed under the WTB note. At that point in time . . . Syringa Grove became insolvent, as that term is defined in the Act, as a result of the Bruce Quitclaim." *Id.*, p. 18.

Plaintiffs argue that the "badges of fraud" allegedly present in this case are sufficient to raise a question of the actual intent of Syringa Grove regarding the transfer of Lots 6 and 7. *Id.* p. 18. Since questions of actual intent are to be decided by the trier of fact under the Act, plaintiffs argue summary judgment would be premature.

In the present motion regarding the transfer of Lots 6 and 7, when the facts and inferences are viewed in the light most favorable to the nonmoving party, plaintiffs have established a genuine issue of material fact regarding whether there was an actual intent to "hinder, delay, or defraud any creditor of the debtor" under I.C. § 55-913(a) and whether a reasonably equivalent value was received in exchange for the Bruce Quitclaim at a time when the debtor allegedly had no remaining assets under § 55-

913(b)(1).

If there is an actual fraudulent intent, the concept of preference does not apply. In *Wyzard v. Goller*, 23 Cal.App.4th 1183, 1187, the California Court of Appeal set out that "[t]he 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." *Id.* The court held in that case that there was not a fraudulent transfer and a valid preference was exercised because the transfer made to a creditor was for legal services and was not done to "hinder, delay or defraud" another creditor. 23 Cal. App. 4th 1183, 1188. However, "The California statute [enacted version of Uniform Fraudulent Transfer Act] did not enact the 'badges of fraud' provision, although a legislative committee that considered the bill . . . noted them . . . ." 23 Cal. App. 4th 1183, 1190. It is significant that the Idaho and California laws differ, as Idaho has enacted the "badges of fraud" provision. *See* I.C. § 55-913(2)(a)-(k).

An inference of actual fraud may be warranted from certain "badges of fraud." In *Mohar v. McLelland Lumber Co.*, 95 Idaho 38, 501 P.2d 722 (1972) the Idaho Supreme Court held, "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*, 95 Idaho at 42, 501 P.2d at 725. In *Mohar*, there was no evidence provided to establish the alleged "badges of fraud," which lead the court to hold that a debtor's preference of his daughter as a creditor was a valid preference. *Id.,* p. 43.

In contrast, in *In re Lake Country Investments*, 255 B.R. 588 (Bankr. D. Idaho 2000) the United States Bankruptcy Court for the District of Idaho denied a motion for summary judgment on a fraud contention when several I.C. § 55-913(2) factors were

present. In that case when explaining the application of "badges of fraud," the Bankruptcy Court wrote:

> The Court finds . . . the burden met by Esposito in regard to the cause of action for actual fraud under § 55-913(1)(a). While more is required than mere suspicion alone, and little is properly before the Court at this stage, § 55-913(2) indicates that the Court may consider numerous factors in determining actual intent. Among these are the status of the transferee as an insider of the transferor, § 55-913(2)(a); the reasonable equivalence of consideration received by the transferor to the value of the asset(s) transferred, § 55-913(2)(h); and the question of the present or immediately following insolvency of the transferor; § 55-913(2)(i). The status of Noyes as a shareholder at the time of the transfer, the need to evaluate the entirety of the evidence in order to establish the reasonable equivalence of value, and the questions raised through the Short declaration as to solvency support denial of the motion for summary judgment on the actual fraud contentions at this time.

255 B.R. 588, 603-04. It is significant to this Court that another court has denied a motion for summary judgment regarding a claim under I.C. § 55-913(1)(a) when just three "badges of fraud" may have been present.

Reasonably equivalent value must be determined from the entirety of the circumstances. The court in *Lake Country Investments* held that summary judgment regarding a constructive fraudulent transfer claim was not appropriate when a company's financial condition at the time of the transfer needed to be evaluated. *Id.,* p. 603. In that case, the defendant "[r]eceived but $2,000,000 for over twice that amount in surrendered equity and release of debt may ultimately prove to be quite a hurdle for Plaintiff." *Id.* The court stated that, despite a weak showing by the plaintiff to that point, the function of the inquiry was not to weigh evidence or determine if the claim could be proven successfully. *Id.*

The trier of fact determines whether reasonably equivalent value has been given for a transfer. *See In re Jordan*, 392 B.R. 428 (Bankr. D. Idaho 2008). In *Jordan*, the bankruptcy court explained that "The concept is not particularly esoteric; a party

receives reasonably equivalent value if it gets roughly the value it gave." 392 B.R. 428, 441-42 (citing *VFB LLC v. Campbell Soup Co.*, 482 F.3d 624, 631 (3d Cir. 2007)). However, the court was clear that exact equality was not required for reasonable equivalency. 392 B.R. 428*,* 442 (citing *Kendall v. Carbaat (In re Carbaat)*, 357 B.R. 553, 560 (Bankr. N.D. Cal. 2006)).

In the present case, material issues of fact remain as to the actual intention of the defendants and whether reasonably equivalent value was received for Lots 6 and 7. Unlike *Wyzard*, where California did not enact the portion of the Uniform Fraudulent Transfer Act that included the "badges of fraud" that are to be considered in determining actual intent, Idaho has enacted that portion of the Act. Further, Idaho recognizes the general rule that the concept of preference does not apply in cases of fraud. Unlike the fact in *Mohar*, where "badges of fraud" were alleged but not supported by evidence, the factors alleged in this case are supported by evidence in the record. If an inference of fraud is supported, then preference as to creditors cannot be used as the basis for showing an absence of issues of material fact.

Much like the fact that the presence of three "badges of fraud" was sufficient to deny summary judgment in *Lake Country Investments*, the plaintiffs here have alleged and provided some evidentiary support for seven "badges of fraud." If three factors supported by some evidence is enough to deny a motion, then it is likewise sufficient that a motion for summary judgment should be denied when a plaintiff has supported seven.

While the Syringa Grove defendants may claim Bruce was not an insider and that Charlie Nipp was actually the managing agent of Syringa Grove, contradictory evidence exists that requires a weighing by the finder of fact. For instance, the Syringa

Grove Operating Agreement states that the company is to be managed exclusively by all of its members. Affidavit of Charlie R. Nipp in Support of Motion for Summary Judgment, Exhibit A, p. 2. Further, for purposes of voting, Lois Bruce was given a fifty percent (50%) interest, twice that of the other two members. *Id.,* pp. 5-6. The fact that Bruce has fifty percent (50%) of the voting rights in the LLC is in conflict with the defendants' statement that she has the same voting rights as the other members. By statutory definition, an insider includes a person in control of the debtor; it is hard to argue that an individual with a plurality of voting power is not a person in control.

Additionally, a trier of fact will need to determine whether reasonably equivalent value was given for Lots 6 and 7. Like *Lake Country Investments*, this case involves a situation where the defendant has been alleged to have received less than what was contributed. As pointed out by the plaintiffs, however, Bruce had a sizeable debt satisfied at the time of her conveyance of the 14.69 acres to Syringa Grove. The reasonably equivalent value of the transfer must take into account the entirety of the circumstances, not just the value of the land she transferred in 2007 compared to the value of Lots 6 and 7 she received in 2011. "Reasonable equivalency was explained in *Jordan* as "getting roughly what you gave." If Bruce benefitted from Syringa Grove paying off $1,216,899 in debt in exchange for land with an assessed value in 2007 of $1,428,000 (a roughly equivalent value), the finder of fact must determine if receiving an additional benefit of land valued at $1,448,660 (Lots 6 and 7) in 2011 is outside the scope of "getting roughly what you gave." Also complicating the issue is that when Bruce kept lots 6 and 7, they were now encumbered by WTB's lien of $403,000. Affidavit of Charlie Nipp Re: Plaintiffs' Motion for Injunctive Relief, p. 18, ¶ 72. A final complicating factor is that while Bruce contributed her land in 2007, she should have received her deed back for Lots 6 and 7 about October 8, 2009 (Nipp Affidavit, p. 8

¶35), but those lots were not conveyed to her until October 24, 2011. Affidavit of Lois Bruce, p. 5, ¶ 12.

Syringa Grove defendants point out in the 2007 Operating Agreement, Lois Bruce conveyed all her property to Syringa Grove and Syringa Grove obligated itself to convey Lots 6 and 7 to Bruce when the final plat was recorded. Memorandum in Support of Motion for summary Judgment, p. 32. The plat was approved and recorded in 2009, and two years later, on October 24, 2011, Lots 6 and 7 were conveyed to Bruce. *Id.* The Syringa Grove defendants state plaintiffs base their claim of fraud on the fact that Syringa Grove did not perform its binding obligation to deed Lots 6 and 7 to Bruce until after this lawsuit was filed. *Id.* The Court agrees that, as a matter of law, that obligation to deed Lots 6 and 7 to Bruce was not a "debt", which is defined under the Act as a "liability on a claim." *Id., citing* I.C. § 55-910(5). A "claim" is defined as "a right to payment." *Id., citing* I.C. § 55-910(3). This Court agrees that Syringa Grove's obligation to Bruce was not a "debt" or a "claim" as it involved no right to payment. *Id.* This obligation was specifically enforceable by Bruce. The fact that the obligation was not satisfied until after the landslide is of no import as Syringa Grove's duty to convey Lot 6 and 7 to Bruce existed nearly four years *before* the landslide.

However, this Court finds that even though the obligation to transfer Lots 6 and 7 to Bruce was not a "debt", the actual conveyance of those lots to Bruce could be a "transfer", which 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." I.C. § 55-910(12).

Viewing the facts and inferences in a light most favorable to the non-moving

party, a genuine issue of material fact remains. Thus, the motion for summary judgment regarding Lots 6 and 7 should be denied as to both the actual and constructive fraud allegations.

Idaho Code § 55-914(2) states, "A transfer made by a debtor is fraudulent as to a creditor whose claim arose before the transfer was made if the transfer was made to an insider for an antecedent debt, the debtor was insolvent at the time, and the insider had a reasonable cause to believe that the debtor was insolvent." Memorandum in Support of Motion for Summary Judgment, p. 34. The Syringa Grove defendants claim "there is no disputed issue of fact the Company's transfer of Lots 6 and 7 to Lois was not 'for an antecedent debt' or that Lois was 'an insider'". *Id.* The Syringa Grove defendants point out Lois was not entitled to "payment", and the Operating Agreement specifically notes Lois was entitled "to receive a distribution of Lots 6 and 7" which would "terminate her interest in the LLC." *Id.* The Syringa Grove defendants point out Lois was not an officer of Syringa Grove, was not "a person in control" of Syringa Grove, and was not a "relative" of Syringa Grove's officer or manager (Charlie Nipp); Lois Bruce was only a "member" in an LLC "with the same voting rights of all other members, and with no status as a manager, officer, director, or general partner. *Id.,* p, 35. Syringa Grove defendants point out *Alcan Bldg. Products v. Peoples,* 124 Idaho 338, 859 P.2d 374 (1993) and *Post v. Idaho Farmway, Inc.,* 135 Idaho 475. 20 P.3d 11 (2001) lead to this result. *Id.,* n. 6.

On this issue, plaintiffs write:

> It is this section that raises the biggest red flag with respect to the disputed transfers in this case and sheds light on Defendants motives in taking some of the positions they now take
>
> In light of the language of §55-914(2), it is clear why Defendants want this Court to accept their unsupported declaration that the Bruce Quitclaim was "not a debt." (Defendants' Memo, at p. 33). In light of this

> language in §55-914(2), it is also clear why the Defendants so vigorously argue that Charlie Nipp is and has been the only manager of the company, despite the overwhelming evidence to the contrary. If the Bruce Quitclaim was executed to satisfy a pre-existing debt, and if Lois Bruce is an insider by virtue of being a manager of the company, the law says the transfer of Lots 6 and 7 to her was constructively fraudulent. These questions should be left to the trier of fact.

Plaintiffs' Amended Memorandum in Opposition to Defendants' Motion for Summary Judgment, pp. 26-27. Plaintiffs cite to no evidence. Summary judgment cannot be defended by simply conjecturing with multiple "ifs" in an attempt to get the issue to the trier of fact. Summary judgment cannot be defended by simply claiming "overwhelming evidence to the contrary" and then not citing to any evidence.

Syringa Grove defendants point out plaintiffs have failed to prove "insolvency." Reply Memorandum in Support of Motion for Summary Judgment, p. 22. They also note Lois is not an "insider" as the Act defines an "insider" as a "managing agent of the debtor." I.C. § 55-910(7)(e). *Id.* The Court agrees there is no disputed evidence that the members of the LLC (Lois, Charlie and Ryan), in the Operating Agreement, unanimously appointed Charlie Nipp as manager and president for purposes of managing all Company business. *Id.* However, being a "managing agent of the debtor" is not the exclusive definition of an "insider" under I.C. § 55-910(7). Under I.C. 55-910(7)(c)(1), If the debtor is a partnership, an "insider" may be "a general partner of the debtor." Bruce meets that definition. Thus, there is an issue of fact as to Bruce being an insider.

However, this Court finds there is no disputed issue of fact the Company's transfer of Lots 6 and 7 to Lois was not "for an antecedent debt". For that reason alone, plaintiffs have no cause of action under I.C. § 55-914(2). In that limited regard, defendant is granted summary judgment for any claims plaintiffs have for the transfer of Lots 6 and 7.

6. The Syringa Grove Defendants' Claim that the Promissory Note Made for the Benefit of Charlie Nipp is Now Moot, is Not Supported by Evidence, and the Motion for Summary Judgment on That Issue Must be Denied.

The Syringa Grove defendants claim that no material issue of fact remains regarding the Promissory Note and Second Deed of Trust delivered to Charlie Nipp. Memorandum in Support of Motion for Summary Judgment, at p. 30-31. The defendants' argue that the Deed of Trust has been released, and that Nipp received no money under the Note. *Id.* p. 31. While the defendants do not provide evidence to verify that the Deed of Trust has been released, they do cite to Exhibit A of the Memorandum in Support of Motion for Summary Judgment in support of the claim that no funds were paid on the Promissory Note. Memorandum in Support of Motion for Summary Judgment, p. 31.

Further, the defendants claim that the rule in Idaho precludes fraud regarding the Note and Deed of Trust. The defendants rely on *Pettengill v. Blackman*, 20 Idaho 241, 164 P. 358, 362 (1917), which states "[t]hat wherever there is a true debt and a real transfer for adequate consideration, there is no collusion, and . . . fraud in its legal sense cannot be predicated on such a transaction." Memorandum in Support of Motion for Summary Judgment, p. 31 (citing *Pettengill v. Blackman*, 20 Idaho 241, ___, 164 P. 358, 362 (1917)). The obligation to provide finances to Syringa Grove for the development of the project is said to have been recorded in the Operating Agreement. *Id.* p. 30 (citing First Nipp Affidavit at Exhibit F, at p. 6).

Finally, the defendants appear to argue that Charlie Nipp's status is irrelevant. Reply Memorandum in Support of Motion for Summary Judgment, p. 26. The defendants' argument that Nipp's status as an insider is irrelevant centers on the fact that "[t]here was no transfer or payment to him under the note and deed of trust nor can

there be since the five lots secured by note were sold to third-parties for amounts insufficient to even pay the Washington Trust indebtedness, let [alone] Mr. Nipp." *Id.*

In response, the plaintiffs allege that the Note and Deed of Trust were actually fraudulent due to the presence of "badges of fraud" and constructively fraudulent because a reasonable equivalence may not have been received in return. Plaintiffs' Memorandum in Opposition to Defendants' Motion for Summary Judgment, p. 16. The plaintiffs acknowledge that more discovery may be needed regarding the Note and Deed of Trust to determine "[w]hen the loans were made, from whose pocket book the borrowed funds came and into whose pocket the borrowed funds were paid, what debts or obligations of Syringa Grove were satisfied by the loans, etc. Until such time as discovery is completed . . . the question of . . . reasonably equivalent value . . . remains open . . . ." *Id.* p. 17.

The plaintiffs further disagree with the characterization that Charlie Nipp was obligated to provide finances for Syringa Grove. *Id.* p. 13. Plaintiffs argue that the Operating Agreement states, "No member of this LLC shall be personally liable for the expenses, debts, obligations or liabilities of the LLC, or for claims made against it." *Id.* Additionally, the Operating Agreement is said to state, "Member Charlie R. Nipp (Charlie) has the financial resources to borrow the funds necessary to pay the debt and fund the cost of the residential development." *Id.* As such, the plaintiffs appear to be arguing that Nipp had the authority to borrow money on behalf of the LLC and did not have to do so from his own personal funds.

Additionally, plaintiffs disagree with the characterization of the Nipp Promissory Note as being no longer relevant. Plaintiffs' Amended Memorandum in Opposition to Defendants' Motion for Summary Judgment, at p. 33. Plaintiffs assert "Charlie Nipp

acknowledged at his deposition that the promissory note is a contract that can be enforced on its terms alone even if the Deed of Trust that originally secured payment of the note is no longer enforceable." *Id.* (citing Ex. B., Deposition of Charlie Nipp, p.126, line 23 through p.127, line 1). Plaintiffs allege that should Syringa Grove become the owner of Lots 6 and 7 again, the promissory note could be used to obtain a judgment. *Id.* Were that to happen, "[Nipp] then personally becomes a judgment creditor who can one again remove the assets from Plaintiffs' reach." *Id.* Plaintiffs believe the fact that no money has been paid on the Note to this point as being inconsequential; what matters is the potential for future payment on the Note.

For purposes of the instant motion, there appears to exist a genuine issue of material fact. While the Deed of Trust given to Charlie Nipp on Lots 1 through 5 appears to have been released, the Promissory Note given to Nipp to memorialize the loans he provided to Syringa Grove up until that point is still in existence. Thus, the issue is not moot as claimed by the defendants. As such, that obligation must be examined under I.C. § 55-913 to determine if the transfer was done with actual fraudulent intent or without receiving reasonably equivalent value, and under § 55-914 to determine whether it was constructively fraudulent. By statute, an obligation evidenced by writing is deemed to have been incurred "[w]hen the writing executed by the obligor is delivered to or for the benefit of the obligee." I.C. 55-915(5)(b). Because the note was not delivered to Nipp until after this lawsuit was filed, plaintiffs properly characterize themselves as present creditors.

Requiring much the same analysis as the transfer of Lots 6 and 7, an allegation of actual fraud under I.C. § 55-913(1)(a) requires an examination of the "badges of fraud" factors provided by statute. *See* I.C. § 55-913(2)(a)-(k). Specifically, a genuine question of material fact exists in regards to whether the obligation was to an insider.

One of the statutory definitions of an "insider" is "[a] person in control of the debtor . . . ." I.C. § 55-910(e). The Syringa Grove defendants themselves have characterized Charlie Nipp as being the sole managing agent of the debtor, but now insist that status is irrelevant because there was no transfer or payment to him under the note. Reply Memorandum in Support of Motion for Summary Judgment, at p. 26. However, in light of the Note still existing, that argument is not persuasive as the potential for payment on the Note still exists, more so if Lots 6 and 7 return to the possession of Syringa Grove.

Moreover, it is alleged that the Nipp Note was concealed. *Id.* p. 20. Plaintiffs have questioned why the debt owed Nipp wasn't memorialized on an annual basis, and believe the answer to be that Syringa Grove had no reasons to remove its assets from the reach of creditors until the landslide occurred. *Id.,* p. 20. Plaintiffs further allege the existence of the Note was not disclosed to plaintiffs for more than one year after it was executed. *Id.,* p. 21.

Third, plaintiffs allege Syringa Grove had been sued prior to the Nipp Note being executed. *Id.* Whether an obligation was incurred after the debtor had been sued is a statutory factor to consider. *See* I.C. § 55-913(2)(d). In this case, the present lawsuit was filed before the Nipp Note was executed.

Finally, plaintiffs allege Syringa Grove was insolvent at the time of the Nipp Note. Plaintiffs' Amended Memorandum in Opposition to Defendants' Motion for Summary Judgment, at p. 24. The Nipp Note was executed roughly three months after the Bruce Quitclaim that removed Lots 6 and 7 from Syringa Grove. *Id.* Plaintiffs have alleged that, under the Act's definition of insolvency, Syringa Grove was insolvent at the time of the Bruce Quitclaim and remained so when the Note was executed.

As discussed previously, the existence of three "badges of fraud" is sufficient

reason to deny a motion for summary judgment. Here, even discounting the shaky grounds on which concealment of the Nipp Note are alleged, there is a genuine issue of material fact as to at least three statutory factors for actual intent under I.C. § 55-913(1)(a). As such, summary judgment regarding the Syringa Grove defendants' motion and the Nipp Note must be denied.

An additional question of material fact exists regarding the plaintiffs' claim of fraudulent transfer under I.C. § 55-914(2). Under that section of the Act, "A transfer made by a debtor is fraudulent as to a creditor whose claim arose before the transfer was made if the transfer was made to an insider for an antecedent debt, the debtor was insolvent at that time, and the insider had reasonable cause to believe that the debtor was insolvent." I.C. § 55-914(2). A transfer under the Act can include the "[c]reation of a lien or other encumbrance." I.C. § 55-910(12).

Here, the transfer was made to an insider for an antecedent debt. As previously discussed, Charlie Nipp has been characterized as the managing agent of the debtor and is also a member of the Syringa Grove LLC. The Nipp Note was executed with the intention of memorializing an antecedent debt, that being all the loans that Nipp had personally provided to the LLC up to that point in time. Finally, being that Nipp was the individual responsible for the finances of the LLC and having had to personally loan money to the company as a result of the depreciation of any assets the company held, Nipp would have been aware or at least have had reasonable cause to believe the debtor was insolvent. Thus, all statutory elements for constructive fraud under I.C. § 55-914(2) are met at least on a *prima facie* basis.

However, any claim of constructive fraud under I.C. § 55-914(2) may be extinguished by the statute of limitations. The Nipp Note was delivered by Syringa Grove to Nipp in January of 2012. Reply Memorandum in Support of Motion for

Summary Judgment, p. 6. Under the Act, an obligation that is evidenced by writing is incurred when it "[i]s delivered to or for the benefit of the obligee." I.C. § 55-915(5)(b). Because plaintiffs did not allege fraud under the Act until March of 2013 in their amended complaint, the action may not have been timely in regard to I.C. § 55-914(2) alone.

Assuming there are no statute of limitations issues, summary judgment must be denied regarding the Nipp Note because material questions of fact exist regarding both the actual fraud and constructive fraud claims.

7. The Syringa Grove Defendants' Motion for Summary Judgment Regarding the Sale of Lots 7 to Scharelant 7 Must be Denied.

The Syringa Grove defendants argue there is no showing of fraud regarding the sale and transfer of Lot 7 from Lois Bruce to Scharelant 7. Memorandum in Support of Motion for Summary Judgment, p. 36. The Syringa Grove defendants assert the company acted properly in conveying Lots 6 and 7 to Lois Bruce and that as a result, the land was freely alienable. *Id.* The Syringa Grove defendants additionally point out that Scharelant 7, LLC purchased Lot 7 for a total compensation amount of $250,000 when the Lot had an assessed value of only $260,000 and remained encumbered by the WTB Deed of Trust. Reply Memorandum in Support of Motion for Summary Judgment, at p. 29. Thus, Syringa Grove defendants appear to argue that Nipp purchased Lot 7 as a benevolent act to assist Bruce who was in need of money.

In response, plaintiffs allege that Scharelant 7, LLC was not a good faith taker of Lot 7. Plaintiffs' Amended Memo in Opposition to Defendants' Motion for Summary Judgment, p. 27. Idaho Code § 55-917 provides that a transfer "[i]s not voidable . . . against a person who took in good faith and for a reasonably equivalent value or against any subsequent transferee or obligee." I.C. § 55-917(1). Plaintiffs question the

actual intention behind the transfer of Lot 7, as a close relationship exists between Syringa Grove, Lois Bruce, Charlie Nipp, and Scharelant 7.

Under the Operating Agreement, Syringa Grove had a contractual duty to convey Lot 7 to Bruce. Once Lot 7 was in Bruce's hands, it would seem she could do with it what she wanted. However, because the Syringa Grove defendants appear to rely on the presumption that the transfer of Lots 6 and 7 via the Bruce Quitclaim deed were not fraudulent, a fact that has not yet been established by the trier of fact, a material issue of fact remains regarding the subsequent sale of Lot 7 to Scharelant 7. Thus, summary judgment is not appropriate at this time.

B. Analysis of Syringa Grove Defendants' Motion for Summary Judgment Regarding Plaintiffs' Alter Ego Claims.

"A limited liability company is an entity distinct from its members." I.C. § 30-6-104. "The debts, obligations or other liabilities of a limited liability company" do not become the debts, obligations, or liabilities of an individual member unless the company is an alter ego of that member. I.C. § 30-6-304(1). "This is the equivalent of piercing the corporate veil for a limited liability company. Piercing the corporate veil imposes personal liability on otherwise protected corporate officers, directors, and shareholders for a company's wrongful acts allowing the finder of fact to ignore the corporate form." *Wandering Trails, LLC v. Big Bite Excavation, Inc.*, Idaho Supreme Court Opinion No. 40124, 2014 WL 2765956, at *7 (Idaho June 18, 2014) (internal citations omitted).

To prove that a company is the alter ego of a member, and pierce the corporate veil, "there must be (1) a unity of interest and ownership to a degree that the separate personalities of the corporation and individual no longer exist and (2) if the acts are treated as acts of the corporation an inequitable result would follow. *Vanderford Co.,*

Inc. v. Knudson, 144 Idaho 547, 556-57, 165 P.3d 261, 270-71 (2007) (citing *Surety Life Ins. Co. v. Rose Chapel Mortuary,* 95 Idaho 599, 601, 514 P.2d 594, 596 (1973)). The court should consider several factors when deciding whether to pierce the corporate veil, including, but not limited to: "the level of control that the shareholder exercises over the corporation, the lack of corporate formalities, the failure to operate corporations separately, keeping separate books, and the decision-making process of the entity." *Wandering Trails*, at *7 (citing *Surety Life Ins. Co. v. Rose Chapel Mortuary, Inc.,* 95 Idaho 599, 602, 514 P.2d 594, 597 (1973)). However, "the failure of a limited liability company to observe any particular formalities relating to the exercise of its powers or management of its activities is not a ground for imposing liability on the members or managers for the debts, obligations or other liabilities of the company." I.C. § 30-6-304(2).

In *Hutchinson v. Anderson*, 130 Idaho 936, 950 P.2d 1275 (Ct. App. 1997), the Idaho Court of Appeals found substantial competent evidence that the defendant was the alter ego of the corporation and should be held personally liable because "the separate personalities of the person and the corporation were indistinguishable." 130 Idaho 936, 940, 950 P.2d 1275, 1279. In making this finding, it determined that the defendant was in complete control of the corporation because he acted as the president and all of the shareholders were members of his immediate family; there were no minutes of the annual meetings of the board of directors; the defendant held himself out as the owner; and the defendant used his name and the name of the corporation interchangeably when dealing with third parties. *Id.*

The Syringa Grove defendants maintain plaintiffs are not entitled to seek recovery under the claims of negligence (Count 4), trespass (Count 7) and nuisance

(Count 8) against the defendants Lois Bruce, Ryan Nipp and/or Charlie Nipp personally because Syringa Grove, LLC is an Idaho Limited Liability Company. Memorandum in Support of Motion for Summary Judgment, p. 38. Charlie Nipp is the Manager/President and Lois Bruce and Ryan Nipp are members of Syringa Grove, LLC, which the defendants allege are legally separate and distinct from the entity Syringa Grove. *Id.*

In turn, plaintiffs claim an inequitable result would result if the defendants Lois Bruce, Ryan Nipp and Charlie Nipp are not held personally responsible because as the individual members of Syringa Grove they "perpetuated fraud when they depleted the assets of the company after this lawsuit was filed in an attempt to make the LLC judgment proof." Plaintiffs' Amended Memorandum in Opposition to Defendants Syringa Grove, LLC, Nipps, Bruce and Scharelant 7, LLC's Motion for Summary Judgment, p. 29. Moreover, they claim a unity of interest and ownership exists between the defendants personally and Syringa Grove because the members did not hold regular meetings, there was a "disregard of economic separateness", the individual members held titles other than the title of member, and the company was undercapitalized. *Id.,* pp. 30-31.

Whether there is sufficient evidence to find that Syringa Grove is an alter ego of each individual member will be discussed in turn below. *See Hutchinson v. Anderson*, 130 Idaho 936, 940, 950 P.2d 1275, 1279 (Ct. App. 1997).

1. Lois Bruce is Not an Alter Ego of Syringa Grove, LLC.

Plaintiffs claim Syringa Grove is the alter ego of Lois Bruce because "the LLC continued to identify Bruce as the owner of the land in documents presented to the County, well after she had executed the deed to transfer the land to the LLC." Plaintiffs' Amended Memorandum in Opposition to Defendants Syringa Grove, LLC, Nipps, Bruce

and Scharelant 7, LLC's Motion for Summary Judgment, p. 30. Plaintiffs contend this creates a genuine issue of material fact as to whether Bruce can be held personally liable. *Id.,* p. 31.

The Syringa Grove defendants maintain Bruce was only identified as an owner of the Subject Property in an on-site sewage system application, which was submitted to Panhandle Health District in June 2006, prior to the Operating Agreement being signed or the Subject Property being conveyed to Syringa Grove by Bruce. Memorandum in Support of Motion for Summary Judgment, p. 40. As such, the Syringa Grove defendants maintain Bruce should not be held personally liable in this case.

There is no genuine issue of material fact evidencing unity of interest amount Syringa Grove and Bruce. Listing Bruce as the owner of the Subject property on one document is not enough to demonstrate "a unity of interest and ownership to a degree that the separate personalities of the corporation and individual no longer exist." *Vanderford Co., Inc.*, 144 Idaho 547, 556-57, 165 P.3d 261, 270-71. The document cited to by plaintiffs was drafted by the Syringa Grove defendants prior to the execution of the Operating Agreement. Plaintiffs have cited to no additional evidence that demonstrates a lack of distinction between the personalities of Bruce and Syringa Grove, and have certainly not provided evidence anywhere near the extent that was relied upon in *Hutchinson*.

As such, the Court grants summary judgment that Bruce cannot be held personally liable.

2. Ryan Nipp is Not an Alter Ego of Syringa Grove, LLC.

Plaintiffs claim Syringa Grove is an alter ego of Ryan Nipp because he held himself out to be a contractor in a document filed with Kootenai County. Plaintiffs' Amended Memorandum in Opposition to Defendants Syringa Grove, LLC, Nipps, Bruce

and Scharelant 7, LLC's Motion for Summary Judgment, p. 30. Plaintiffs contend this creates a genuine issue of material fact as to whether Ryan can be held personally liable. *Id.,* p. 31.

The Syringa Grove defendants claim Ryan Nipp was listed as one of the owners of the Subject Property and as the applicant on an on-site sewage system application, which was submitted to Panhandle Health District in June 2006, "in order to establish his capacity to make application on behalf of the then-record title owner of the property, Lois Bruce." Memorandum in Support of Motion for Summary Judgment, p. 40. They claim this occurred prior to the Operating Agreement being signed or the Subject Property being conveyed to Syringa Grove by Bruce. *Id*. As such, the Syringa Grove defendants maintain that Ryan Nipp should not be held personally liable in this case.

Similar to Bruce, there is no genuine issue of material fact evidencing unity of interest amount Syringa Grove and Ryan Nipp. Listing Bruce as the owner of the Subject property on one document is not enough to demonstrate "a unity of interest and ownership to a degree that the separate personalities of the corporation and individual no longer exist." *Vanderford Co., Inc.*, 144 Idaho at 556-57, 165 P.3d at 270-71. Even less convincing is plaintiffs' claim that he is an alter ego of Syringa Grove because he was listed as a contractor in a document filed with the County. The document cited to by the defendants, where Ryan Nipp was listed as an owner and the applicant for an on-site sewage system, was drafted by the defendants prior to the execution of the Operating Agreement. Plaintiffs contend that Ryan Nipp "held himself out as a contractor in a document filed by the County", but that document has not been provided to the Court, nor has it been specifically referenced by the plaintiffs. Plaintiffs' Amended Memorandum in Opposition to Defendants' Motion for Summary Judgment, p. 30. Regardless, plaintiffs have cited to no additional evidence that demonstrates a

lack of distinction between the personalities of Ryan Nipp and Syringa Grove, and certainly fail to provide anywhere near the evidence that was relied upon in *Hutchinson*.

As such, the Court grants summary judgment that Ryan Nipp cannot be held personally liable.

3. Plaintiffs Have Presented an Issue of Fact That Charlie Nipp is an Alter Ego of Syringa Grove, LLC.

Plaintiffs claim Syringa Grove is an alter ego of Charlie Nipp because they claim "he, and he alone, managed the affairs of the company and unilaterally made all financial decisions for the company, despite the Operating Agreement which states the company is to be managed by all of its members." Plaintiffs' Amended Memorandum in Opposition to Defendants' Motion for Summary Judgment, p. 29. In support of this claim, plaintiffs merely cite to all of the Affidavits of Charlie Nipp generally, and do not direct the Court to specific locations in the record. *Id.* Moreover, plaintiffs allege Charlie Nipp intermingled his personal funds with the funds of Syringa Grove and Syringa Grove "was forced to operate almost totally from Charlie's personal pocket by the end of 2008" because it was undercapitalized. *Id*., p. 30.

In response, the Syringa Grove defendants maintain that Charlie Nipp wrote personal checks on behalf of Syringa Grove for company obligations and loaned Syringa Grove money to funds its expenses and obligations. Reply Memorandum in Support of Motion for Summary Judgment, pp. 12-13. They contend the provisions of the Operating Agreement obligated Charlie Nipp to either loan this money to Syringa Grove or obtain third-party funding. *Id.,* p. 13. In total, the Syringa Grove defendants claim Charlie Nipp advanced $1,538,614 to Syringa Grove either directly through loans or by payments of obligations made on behalf of the company. *Id*., fn. 7; Second Affidavit of Charlie Nipp, p. 10, 18 ¶ 32. They also note that Charlie Nipp was listed as

one of the owners of the Subject Property and as the applicant on an on-site sewage system application, which was submitted to Panhandle Health District in June 2006, "in order to establish his capacity to make application on behalf of the then-record title owner of the property, Lois Bruce." *Id*.

Viewing the evidence in the light most favorable to the plaintiffs, at a minimum a genuine issue of material fact exists evidencing a unity of interest among Charlie Nipp and Syringa Grove. Charlie Nipp is the Manager and President with respect to the management of the company and finances. Second Affidavit of Charlie R. Nipp in Support of Motion for Summary Judgment, p. 3 ¶ 9. While he did not have a majority voting interest, together with his son Ryan Nipp, at fifty percent he had a plurality voting interest in the company. Affidavit of Charlie R. Nipp in Support of Motion for Summary Judgment, Exhibit A, pp. 6, 7. Per the Operating Agreement, the LLC "[t]he LLC shall designate one or more banks or other institutions for the deposit of funds of the LLC, and shall establish savings, checking, investment and other such accounts as are reasonable and necessary for its business and investments. . . ." *Id*., Exhibit A, p. 5 ¶ 5. However, Charlie Nipp attests that he frequently wrote checks from his personal account for the obligations of Syringa Grove. *See* Second Affidavit of Charlie R. Nipp in Support of Motion for Summary Judgment. Of importance, Charlie Nipp states the following in his Second Affidavit in Support of Motion for Summary Judgment:

> 5. I agreed to personally advance the costs incurred by the LLC through the development stages so as to determine whether or not the proposed project would be feasible.
>
> ***
>
> 9. Upon adoption of the Operating Agreement on May 25, 2007, the LLC's three members (Lois, Ryan, and I) unanimously agreed that I would serve as Manger and President of the LLC with respect to management of the company and its finances.
>
> ***
>
> 15. . . . I wrote [personal thirteen (13) personal checks] to pay expenses of the Company during the development stage of the

> Company and, with the exception of Check Nos. 1339 and 1350, obligations of the Company before it had established its own checking account.
>
> ***
>
> 17. . . . I personally wrote six (6) checks, between July 1, 2007 and December 1, 2007, to pay interest that had accrued on the WTB loan. . . .
>
> ***
>
> 21. . . . [I]n 2008, I either directly loaned monies to the Company, or made payments on behalf of the Company (as loans), that cumulatively totaled $481,598.95. . . .
> 22. . . . I personally deposited $250,721.95 in the Syringa Grove, LLC checking account as loans. . . . During calendar year 2009, I wrote five (5) personal checks for Company expenditures. . . . These sums were all characterized as loans on behalf of the Company as they were in payment of Company obligations. During 2009, I also write [sic] three (3) personal checks to pay interest sums due WTB by Syringa Grove under the terms of it[s] credit facilities. . . .
>
> ***
>
> 24. . . . I wrote three checks from my personal account for obligations of Syringa Grove (totaling $9.828.68). . . .
> 25. . . . During the calendar year 2011, I wrote six (6) personal checks on behalf of the Company, totaling $9,728.47. . . . I also loaned the Company $192,725.88 to allow it to pay its interest obligations and other debts. In total, in 2011 I loaned the Company $202,454.35, all of which was characterized on the Company's 2011 tax return as a loan (consistent with the Company's obligations under the terms of the Operating Agreement).
>
> ***
>
> 30. . . . [D]uring 2012, I wrote 13 personal checks on behalf of the Company, which included 11 checks to Attorney Magnuson to represent the Company and me (personally), as well as the Kootenai County Treasurer for property taxes and Jim Coleman for Continuing engineering services. Further, during 2012, I loaned the Company $243,288.20 in additional monies to help fund the Company's interest payments to WTB and its expenses to third-party creditors.
> 31. In tax year 2013, I wrote twelve (12) checks (personally) for Company obligations. . . . Eleven (11) of the checks were to Mr. Magnuson for fees incurred in the defense of Syringa Grove, LLC and me personally. During that year, I also loaned the Company $186,500 to provide it with the funds necessary to pay its expenses and interest obligations to WTB. . . .

Second Affidavit of Charlie R. Nipp in Support of Motion for Summary Judgment, pp. 3-10. As attested by Charlie Nipp, rather than placing funds into the Syringa Grove, LLC checking account, which was required to exist under the terms of the Operating

Agreement, he wrote checks on behalf of Syringa Grove to third-parties from his personal account. Charlie Nipp was making payments from his personal account rather than depositing the money into the Syringa Grove checking account and withdrawing funds from the LLC account. While he classifies these personal payments to third-parties as loans, by drawing checks from both his personal account and the LLC checking account to make payments on behalf of Syringa Grove, he failed to demonstrate to third parties that he was separate from Syringa Grove. As such, there appears to be sufficient evidence for a finding of unity of interest between Charlie Nipp and Syringa Grove.

Finally, under *Vanderford* an "inequitable result" may result if only the LLC was held liable. Based on the affidavits of Charlie Nipp, Syringa Grove was undercapitalized. Affidavit of Charlie Nipp, p. 8 ¶ 28. According to the first Affidavit of Charlie Nipp, 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.* Any attempt by the plaintiffs to collect on a judgment against Syringa Grove would likely be fruitless. Summary judgment that Charlie Nipp cannot be the alter ego of Syringa Grove must be denied at this point.

IV. CONCLUSION AND ORDER.

For the reasons stated above,

IT IS HEREBY ORDERED the Syringa Grove Defendants' Motion for Summary Judgment is GRANTED as to: 1) any cause of action by plaintiffs for fraud regarding Syringa Grove, LLC' Transfer of Lots 1 Through 5; 2) any cause of action by plaintiffs regarding Syringa Grove, LLC's Transfer of the Conservation Easement (Tract A); 3) plaintiffs' claims of fraudulent transfer of Lots 6 and 7 to Bruce under I.C. § 55-914(2); 4) plaintiffs' claims that Lois Bruce is the alter ego of Syringa Grove, LLC; and

5) plaintiffs' claims that Ryan Nipp is the alter ego of Syringa Grove, LLC.

IT IS FURTHER ORDERED the Syringa Grove Defendants' Motion for Summary Judgment is DENIED as to 1) plaintiffs' claims under I.C. § 55-913(1)(a)-(b) and I.C. § 55-914(1) are not extinguished by the statute of limitations (Statute of Repose); 2) plaintiffs' Claims of Fraudulent Transfer of Lots 6 and 7 to Bruce (Except as to Claims Under I.C. § 55-914(2) which is GRANTED above); 3) plaintiffs' claims of fraud regarding the Sale of Lots 7 to Scharelant 7; and plaintiffs' claims that Charlie Nipp is the alter ego of Syringa Grove, LLC.

IT IS FURTHER ORDERED THAT the Syringa Grove Defendants' Motion for Summary Judgment that the Promissory Note made for the benefit of Charlie Nipp is now moot, is not supported by evidence, and the motion for summary judgment on that Issue is DENIED.

Entered this 11th day of August, 2014.

_____
John T. Mitchell, District Judge

Certificate of Service

I certify that on the _____ day of August, 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	Everett Coulter	509 455-3632
		Pat Risken	(509) 455-3632
Jason T. Piskel	509 321 5935	John F. Magnuson	667-0500

_____
Jeanne Clausen, Deputy Clerk