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

440 PARTNERS, LLC,

Plaintiff,

vs.

RIVERBANK, a Washington State bank; UNIO DEVELOPMENT, an Idaho limited liability company; 9245 GOVERNMENT WAY, an Idaho limited liability company; and THE LAW OFFICE OF CHARLES V. CARROLL, successor trustee,

Defendants.

Case No. **CV 2013 2116**

MEMORANDUM DECISION AND ORDER GRANTING IN PART AND DENYING IN PART PLAINTIFF 440 PARTNERS, LLC'S MOTION FOR SUMMARY JUDGMENT [AGAINST LAW OFFICES OF CHARLES V. CARROLL] and DENYING PLAINTIFF 440 PARTNERS, LLC'S MOTION TO AMEND COMPLAINT RE: PUNITIVE DAMAGES [AGAINST RIVERBANK]

I. PROCEDURAL HISTORY AND FACTUAL BACKGROUND.

On October 16, 2014, this Court entered its "Memorandum Decision and Order Granting Defendant RiverBank's Motion for Summary Judgment." This matter is now before the Court on: 1) plaintiff 440 Partners, LLC (440 Partners) Motion for Summary Judgment [against Law Offices of Charles V. Carroll], and 2) 440 Partners' Motion to Amend Complaint Re: Punitive Damages [against RiverBank]. The following summary of facts is from this Court's Memorandum Decision and Order Granting Defendant RiverBank's Motion for Summary Judgment:

> Plaintiff 440 Partners, LLC (440 Partners) is an Idaho Limited Liability Company with its principal place of business located in Hayden, Kootenai County, Idaho. Second Amended Complaint, p. 2, ¶ 1. Defendant RiverBank is a Washington State banking corporation licensed

to do business in Washington and Idaho. Affidavit of John Roewe in Support of RiverBank's Motion for Summary Judgment, p. 2, ¶ 2.

On June 25, 2007, 440 Partners executed a Promissory Note in the amount of $1,686,133.00 for the benefit of RiverBank in order to receive a line of credit to acquire and develop real property located at 9205-9265 North Government Way, Hayden, Kootenai County, Idaho (Property). *Id.*, p. 3, ¶ 4; Second Amended Complaint, p. pp. 3, 4, ¶¶ 12, 13, 16. The maturity date for the Promissory Note was June 25, 2016. Affidavit of John Roewe in Support of RiverBank's Motion for Summary Judgment, p. 3, ¶ 4. On June 25, 2007, 440 Partners and RiverBank also executed an Assignment of Rents, which provides in part:

> **RIGHTS AND REMEDIES ON DEFAULT.** Upon the occurrence of any Event of Default and at any time thereafter, Lender may exercise any one or more of the following rights and remedies, in addition to any other rights or remedies provided by law: . . . .
>
> > **Collect Rents.** Lender shall have the right, without notice to Grantor, to take possession of the Property and collect the Rents, including amounts past due and unpaid, and apply the net proceeds, over and above Lender's costs, against the Indebtedness. In furtherance of this right, Lender shall have all the rights provided for in the Lender's Right to Receive and Collect Rents Section above. If the Rents are collected by Lender, then Grantor irrevocably designates Lender as Grantor's attorney-in-fact to endorse instruments received in payment thereof in the name of Grantor and to negotiate the same and collect the proceeds. Payments by tenants or other users to Lender in response to Lender's demand shall satisfy the obligations for which the payments are made, whether or not any proper grounds for the demand existed. Lender may exercise its rights under this subparagraph either in person, by agent, or through a receiver.

Affidavit of Matthew Crotty in Response to Defendant's Motion for Summary Judgment, Exhibit C1 (bold in original).

On June 28, 2007, 440 Partners executed a Deed of Trust granting RiverBank a security interest in the Property. Affidavit of John Roewe in Support of RiverBank's Motion for Summary Judgment, p. 3, ¶ 4. Subsequently, 440 Partners requested an extension on the maturity date for the Promissory Note. *Id*., p. 3, ¶ 5. On March 26, 2010, 440 Partners executed a Change in Terms Agreement to defer the March 25, 2010, principal payment that was due and extending the maturity date of the indebtedness from June 25, 2016, to July 10, 2016. *Id.* Under the terms of the Promissory Note and the Change in Terms Agreement, 440 Partners was required to make monthly principal and interest payments. *Id.*, p. 3, ¶ 6.

During the months of May 2012, June 2012, and July 2012, 440 Partners failed to make monthly payments pursuant to the terms of the agreements and was in default. *Id.*, p. 4, ¶ 8. As a result of the default, "RiverBank declared the entire unpaid principal of the promissory note, together with interest, late fees, collection charges and costs to be immediately due and payable by 440 Partners." *Id.*, pp. 3-4, ¶ 6. RiverBank alleges 440 Partners breached the agreements by failing to make the following payments: $13,365.00 for May 2012, $13,365.00 for June 2012, $29,095.70 for July 2012, $46,267.57 for real estate taxes, $27,571.45 for accrued interest, and $20,802.68 for late charges. *Id.*, p. 4, ¶ 8.

RiverBank hired Charles Carroll, an attorney licensed in the state of Idaho, to act as trustee and conduct a nonjudicial foreclosure of the Property. *Id.*, p. 4, ¶ 7. On July 16, 2012, Mr. Carroll recorded and served a Notice of Default regarding the Deed of Trust and scheduled the nonjudicial foreclosure sale for December 7, 2012, at 10:00 a.m. Second Amended Complaint, p. 4, ¶ 24. At the time the Notice of Default was recorded, 440 Partners owed RiverBank $1,701,442.56 plus accruing interest on the unpaid principal balance at a rate of 1% per annum. Affidavit of John Roewe in Support of RiverBank's Motion for Summary Judgment, p. 4, ¶ 8.

On September 25, 2012, 440 Partners, RiverBank and McCathren Management & Real Estate Services, Inc. (McCathren), entered into a Property Management Agreement. *Id.*, p. 4, ¶ 9. The relevant provisions of the Management Agreement provide as follows:

> 1. Maintenance and Repairs.
>
> Manger [McCathren Management & Real Estate Services, Inc.] shall use its best efforts to ensure that the physical facilities, personal property and ground appertaining to the Property are at all times well maintained and kept in good order, and repair and in a proper state of cleanliness; provided, however, that, notwithstanding the foregoing or any other provision of this Agreement, all expenses incurred for such purpose shall be paid by RiverBank and Manager shall not be obligated to make any advances of funds for or on behalf of RiverBank, provided that Manager shall provide RiverBank with prior notice and obtain approval from RiverBank before incurring such expenses. Manager shall never be obligated to incur any expense or liability, which will exceed, in the aggregate, the amount of RiverBank's funds at the disposal of Manager, and shall not incur such expenses without prior consent from RiverBank. After obtaining prior written approval from RiverBank, Manager may (i) make or contract for all repairs, alterations, decorations or replacements which shall be reasonable required to preserve, maintain, and keep the Property in

> good order, condition and repair, and (ii) acquire such equipment, tools, appliances, material and supplies as are necessary and properly to maintain the Property, except for items, which in the Manager's best judgment, are of an emergency nature. All expenses shall be charged to RiverBank at cost, less all rebates, refunds, allowances and discounts granted to Manager.
>
> ***
>
> 8. Collection of Rents and Remittances of Income.
>
> RiverBank hereby appoints Manager as its true and lawful attorney-in-fact to collect all rents due from tenants in the Property under the Assignment. Manager shall use its best efforts diligently and promptly to collect all security deposits, rents and other charges due under the terms of leases for the Property. 440 Partners agrees to turnover all security deposits, rents and other charges due under the terms of leases for the Property as of the date of this Agreement and not to attempt to collect rents or otherwise interfere in the collection of the rents for the Property by RiverBank or Manager. All monies so collected shall be deposited in an Operating Account designated by Manager. However, Manager may not institute suits or proceedings to recover rents, or to evict or dispossess a tenant, or retain legal counsel to prosecute each suit. Manager shall, on or about the 15th day of each calendar month, remit to RiverBank all income collected by Manager from the rental and operation of the property during the prior calendar month, less all disbursements during such prior month authorized under this Agreement, unless otherwise instructed by RiverBank in writing.

Id., Exhibit D, pp. 2, 4 (underline in original). When the Property Management Agreement was executed, 440 Partners continued to be in default. *Id.*, p. 5, ¶ 10. Again, RiverBank alleges 440 Partners had failed to make the following payments: $13,365.00 for May 2012, $13,365.00 for June 2012, $29,095.70 for July 2012, $29,095.70 for August 2012, $29,095.70 for September 2012, $65, 462.27 for real estate taxes, $94,100.44 for accrued interest, and $22,257.47 for late charges. *Id.* Between October 2012 and March 2013 McCathren collected $53,535.26 in rental income. *Id.*, p. 6, ¶ 12. From that income, McCathren deducted $18,171.35 for its expenses. *Id.* RiverBank did not authorize any expenses for repairs on the Property. John Roewe, the Vice President and Chief Credit Officer at RiverBank, attested:

> . . . during the period of time McCathren provided said management services for the real property, McCathren simply hired people to make those repairs that it felt were necessary in order to preserve the Real Property. The costs

> associated for these repairs were then deducted by McCathren from the rents McCathren was collecting from the Real Property as a property manager. No one from McCathren ever consulted with me in advance of providing any specific repairs to the real property. Furthermore, no one from McCathren ever asked for me to authorize any particular repair for the Real Property.

Id., p. 6, ¶11. On March 19, 2013, "McCathren forwarded to RiverBank a check in the sum of $33,712.28 for rental income from the Real Property which RiverBank then cashed and applied on or about that date to reduce the outstanding balance which [was] owed by 440 Partners on the loan to RiverBank." *Id.*

In October 2012, John Roewe contacted 440 Partners with a settlement offer of $1.45 million. Affidavit of Chris Leach, p. 3, ¶ 8. Following that offer, Chis Leach, one of the partners of 440 Partners, received a call from Gavin Mobraten, a commercial loan officer employed by U.S. Bank, informing him that the local Coeur d'Alene branch could approve a loan of approximately $1 million, but any loan amount above that would need approval from the officer in Portland, Oregon. *Id.*, pp. 3-4, ¶ 10. On November 2, 2012, Greg Brett, one of the partners of 440 Partners, contacted John Roewe to inquire about a settlement proposal. Affidavit of John Roewe in Support of RiverBank's Motion for Summary Judgment, pp. 6-7, ¶ 13. Mr. Roewe informed Mr. Brett that RiverBank would be willing to settle for $1.3 million under the following terms and conditions:

A. Payment of $100,000.00 in the form of a cashier's check not later than noon, November 6, 2012.
B. Not later than noon, November 6, 2012, RiverBank was to receive a firm take-out commitment from another lender in the amount of $1,200,000.00. This firm commitment letter would be subject to RiverBank's review and approval.
C. The balance of the $1,200,000.00 referenced above was required to be delivered to RiverBank on or before December 5, 2012.

Id., p. 7, ¶ 13. 440 Partners was unable to comply with these terms. *Id.*, p. 7, ¶ 14.

Between November 2012 and February 2013, 440 Partners continued to work with U.S. Bank and other lenders to obtain $1.3 million. Affidavit of Chris Leach, p. 4, ¶ 13. U.S. Bank did not agree to the request for refinance because of "the cash flow of the business itself." Excerpts of the Deposition of Gavin Mobraten, p. 35 ll. 10-17. Gavin Mobraten attested that "there is no communication that U.S. Bank received from RiverBank that played into U.S. Bank's decision not to refinance." *Id.*, p. 39, ll. 12-14.

On December 7, 2012, 440 Partners filed a Chapter 11 Bankruptcy Petition in the United States Bankruptcy Court for the District of Idaho. Affidavit of John Roewe in Support of RiverBank's Motion for Summary Judgment, p. 8, ¶ 17; Plaintiff's Statement of Facts (citing Affidavit of Matthew Crotty in Response to Defendant's Motion for Summary Judgment, Exhibit EE). On December 17, 2012, 440 Partners' bankruptcy petition was dismissed. *Id.* Because of the bankruptcy petition, the nonjudicial foreclosure sale was stayed. Affidavit of John Roewe in Support of RiverBank's Motion for Summary Judgment, p. 8, ¶ 17.

On February 21, 2013, at 2:22 p.m., the attorney for 440 Partners received an email from Mr. Carroll stating that the foreclosure sale would take place the next day, on February 22, 2013. Affidavit of Chris Leach, p. 4, ¶ 14. The email did not provide the place, time, identity of the trustee, or amount 440 Partners needed to cure the debt. *Id.* According to Mr. Leach, if 440 Partners had proper notice of the trustee's sale, "440 would have attended and paid the proper amount". *Id*. In support of this claim, Chris Leach submits a letter from RBC Wealth Management providing that Leach "had well in excess of the requested $1.2 million, in cash, available to [him] in the February 2013 timeframe." *Id*., Exhibit A.

The foreclosure sale took place on February 22, 2013. Affidavit of John Roewe in Support of RiverBank's Motion for Summary Judgment, p. 7, ¶ 15. At the time of the nonjudicial foreclosure sale, 440 Partners owed Riverbank $1,606,258.86 for unpaid principal, $234,654.64 for accrued interest, and $58,921.36 for late fees and charges. *Id.*, p. 12, ¶ 31. On February, 22, 2013, Mr. Roewe provided a credit bid of $1.2 million on behalf of RiverBank to purchase the property at the foreclosure sale. *Id*. RiverBank was the successful bidder at the sale. *Id.* RiverBank contends Mr. Roewe had no knowledge whether Mr. Carroll had complied with the applicable notice requirements for nonjudicial foreclosure sales. *Id.*, pp. 8-9, ¶ 19. After purchasing the property, it entered into a real estate purchase agreement with Unio Development, LLC for the sale of the property for $1,215,000. *Id.*, p. 14, ¶ 34. RiverBank maintains that during this negotiation the issue of whether the notice requirements for nonjudicial foreclosure sale had been complied with did not arise. *Id.*

Moreover, based on the Affidavit of Gary Zahller, a Washington and Idaho Certified General Appraiser, RiverBank claims the fair market value of the property on February 22, 2013, was $1,435,000.00. *Id.*; Affidavit of Gary H. Zahller, p. 2, ¶ 1. In response, 440 Partners claims that from April 2012 and June 2012, RiverBank valued the property between $2.1 million and $2.2 million, and in June 2012, 440 Partners claims RiverBank valued the property at $1.5 million. Response to RiverBank's Motion for Summary Judgment, p. 20. It claims U.S. Bank valued the property at $1.4 million. *Id.*, p. 21. In August 2012, 440 Partners claims real estate broker Bill Robinette valued the property at $1.75 million. *Id.* Finally, 440 Partners claims its expert Nick Hogan, an appraiser licensed in the state of Idaho, places the value of the property between $1.6 million and $1.9 million. *Id.*; Affidavit of Nicholas Hogan in Response to Defendant's Motion for Summary Judgment, p. 1 ¶ 1.

October 16, 2014, Memorandum Decision and Order Granting Defendant RiverBank's Motion for Summary Judgment, pp. 1-9.

On August 12, 2014, a "Stipulation and Proposed Order to Amend Complaint" was filed with the Court. It provides: "COME NOW the above-captioned parties who hereby stipulate and agree to amend the Second Amended Complaint in the above-captioned action so as to clarify plaintiff's negligence claim against defendant LAW OFFICE OF CHARLES V. CARROLL. A copy of the proposed Third Amended Complaint is attached hereto as Exhibit A." Stipulation and [Proposed] Order to Amend Complaint, pp. 1-2. This stipulation was signed by counsel for 440 Partners, Matthew Z. Crotty and Bradley C. Crockett, and counsel for Charles V. Carroll, Bruce J. Blohowiak. Counsel for RiverBank did not sign this stipulation. On August 20, 2014, the Court entered an Order Granting Stipulation to Amend Complaint.

On September 30, 2014, 440 Partners filed its Third Amended Complaint, which added a claim of Negligence against Charles V. Carroll alleging Carroll, as trustee of the nonjudicial foreclosure, owed a fiduciary duty to 440 Partners and had a duty to ensure the Property was foreclosed upon in accordance with the requirements of I.C. § 45-1506A. Third Amended Complaint, p. 18, ¶ 157. 440 Partners alleges Carroll breached his fiduciary duty to 440 Partners by representing RiverBank as an attorney and serving as trustee, and failing to comply with the provisions of I.C. § 45-1506A. *Id.*, p. 19, ¶¶ 158-59. It contends Carroll's failure to follow the requirements set forth in I.C. 45-1506A constitutes negligence *per se*. *Id.*, p. 19, ¶ 160.

On October 8, 2014, 440 Partners filed "440 Partners, LLC's Motion to Amend Complaint Re: Punitive Damages and Note for Hearing", "440 Partners, LLC's Memorandum in Support of Motion to Amend Complaint Re: Punitive Damages". On

October 27, 2014, RiverBank filed "Defendant Riverbank's Objection to Plaintiff's Motion to Amend Complaint Re: Punitive Damages." On October 31, 2014, 440 Partners filed "440 Partners, LLC's Reply to RiverBank's Response to Plaintiff's Motion to Amend Complaint Re: Punitive Damages."

On October 8, 2014, 440 Partners filed the instant Motion for Summary Judgment. It is supported by "Plaintiff's Memorandum in Support of Motion for Summary Judgment RE[:] Law Offices of Charles V. Carroll", and "Plaintiff's Statement of Facts". On October 21, 2014, RiverBank filed "RiverBank's Memorandum in Response to 440 Partners' Motion for Summary Judgment" and the "Affidavit of Mark A. Ellingsen in Support of RiverBank's Response to 440 Partners' Motion for Summary Judgment". On October 21, 2014, Charles Carroll filed his "Reply Memorandum Opposing 440 Partners[']' Motion for Summary Judgment" and the "Affidavit of Charles Carroll". On October 29, 2014, 440 Partners filed its "Reply to RiverBank's Response to 440 Partners, LLC's Motion for Summary Judgment"; "Plaintiff's Reply Memorandum RE[:] Motion for Summary Judgment Against Law Offices of Charles V. Carroll"; the "Second Affidavit of Chris Leach"; the "Affidavit of Matthew Crotty RE[:] 440 Motion for Summary Judgment RE[:] Carroll"; and the "Affidavit of Bradley C. Crockett in Support of 440 Partners[']' Motion for Summary Judgment". On October 30, 2014, Charles Carroll filed "Defendant Carroll's Motion to Strike the Affidavit of Chris Leach".

Oral argument on 440 Partners' Motion for Punitive Damages and Motion for Summary Judgment was held on November 5, 2014. At oral argument, 440 Partners made an oral motion requesting the Court reconsider its earlier decision finding Carroll was not an agent of RiverBank during the nonjudicial foreclosure process. Counsel for 440 Partners claimed it made a motion for reconsideration on page 7 of its Reply to RiverBank's Response to 440 Partners, LLC's Motion for Summary Judgment.

For the reasons set forth below, the Court denies the motion for punitive damages, grants the motion for summary judgment in part and denies that motion in part, and denies any motion for reconsideration.

II. STANDARD OF REVIEW.

"Summary judgment is appropriate if the pleadings, affidavits, and discovery documents on file with the court . . . demonstrate no material issue of fact such that the moving party is entitled to a judgment as a matter of law." *Brewer v. Washington RSA No. 8 Ltd. Partnership,* 145 Idaho 735, 738, 184 P.3d 860, 863 (2008) (quoting *Badell v. Beeks,* 115 Idaho 101, 102, 765 P.2d 126, 127 (1988) (citing I.R.C.P. 56(c)). The burden of proof is on the moving party to demonstrate the absence of a genuine issue of material fact. *Rouse v. Household Finance Corp.,* 144 Idaho 68, 70, 156 P.3d 569, 571 (2007) (citing *Evans v. Griswold*, 129 Idaho 902, 905, 935 P.2d 165, 168 (1997)). "Once the moving party establishes the absence of a genuine issue of material fact, the burden shifts to the non-moving party," to provide specific facts showing there is a genuine issue for trial. *Kiebert v. Goss*, 144 Idaho 225, 228, 159 P.3d 862, 864 (2007) (citing *Hei v. Holzer,* 139 Idaho 81, 85, 73 P.3d 94, 98 (2003)); *Samuel v. Hepworth, Nungester & Lezamiz, Inc.,* 134 Idaho 84, 87, 996 P.2d 303, 306 (2000).

The non-moving party's case must be anchored in something more than speculation; a mere scintilla of evidence is not enough to create a genuine issue. *Zimmerman v. Volkswagon of America, Inc.*, 128 Idaho 851, 854, 920 P.2d 67, 69 (1996). The non-moving party may not simply rely upon mere allegations in the pleadings, but must set forth in affidavits specific facts showing there is a genuine issue for trial. I.R.C.P. 56(e); *see Rhodehouse v. Stutts*, 125 Idaho 208, 211, 868 P.2d 1224, 1227 (1994). In construing the facts, the court must draw all reasonable factual

inferences in favor of the non-moving party. *Mackay v. Four Rivers Packing Co.,* 145 Idaho 408, 410, 179 P.3d 1064, 1066 (2008). If reasonable people can reach different conclusions as to the facts, then the motion must be denied. *Ashby v. Hubbard*, 100 Idaho 67, 593 P.2d 402 (1979).

If an action is being tried without a jury, "[t]he trial court as the trier of fact is entitled to arrive at the most probable inferences based upon the undisputed evidence properly before it and grant the summary judgment despite the possibility of conflicting inferences." *P.O. Ventures, Inc. v. Loucks Family Irrevocable Trust*, 144 Idaho 233, 237, 159 P.3d 870, 874 (2007) (citing *Intermountain Forest Management v. Louisiana Pacific Corp.*, 136 Idaho 233, 235, 31 P.3d 921, 923 (2001)). The fact finder is responsible for resolution of conflicts between the possible inferences. *Id.* (citing *Cameron v. Neal*, 130 Idaho 898, 900, 950 P.2d 1237, 1239 (1997)). If the Idaho Supreme Court reviews the decision of a judge serving as fact finder, it "[e]xercises free review over the entire record that was before the district judge to determine whether either side was entitled to judgment as a matter of law and reviews the inferences drawn by the district judge to determine whether the record reasonably supports those inferences." *Id.* (citing *Intermountain Forest*, 136 Idaho at 236, 31 P.3d at 924).

III. ANALYSIS OF 440 PARTNERS' MOTION TO AMEND THE THIRD AMENDED COMPLAINT TO ADD A CLAIM OF PUNITIVE DAMAGES.

440 Partners' "Motion to Amend Complaint Re: Punitive Damages and Note for Hearing" does not specify from which of the defendants 440 Partners seeks punitive damages. In 440 Partners' "Memorandum in Support of Motion to Amend Complaint Re: Punitive Damages", it is clear it seeks punitive damages from RiverBank, as 440 Partners writes, "What Riverbank did to 440 Partners, LLC ("440") should not happen in the future." 440 Partners LLC's Memorandum in Support of Motion to Amend

Complaint Re: Punitive Damages, p. 2. 440 Partners concludes, "Conduct rewarded is conduct repeated. Riverbank's conduct should not be repeated." *Id.,* p. 6.

In arguing it should be entitled to amend its complaint to add a claim for punitive damages, 440 Partners reiterates the same alleged behavior of RiverBank, which was found to be insufficient to create a genuine issue of material fact in response to RiverBank's motion for summary judgment on 440 Partners' claims of: a) tortious interference with business relationships/expectancy claims; b) non-judicial foreclosure claims; and c) breach of contract claims. Memorandum Decision and Order Granting Defendant RiverBank's Motion for Summary Judgment, pp. 13-32. The Court granted RiverBank summary judgment against 440 Partners on all those causes of action. Understandably, RiverBank now argues, "Because Plaintiff's claims have been dismissed, Plaintiff is not entitled to the threshold legal or equitable relief required to support an award of punitive damages." Defendant RiverBank's Objection to Plaintiff's Motion to Amend Complaint Re: Punitive Damages, p. 3. RiverBank in essence argues that since all of 440 Partners' causes of action have been dismissed, punitive damages cannot be obtained. At oral argument, counsel for 440 Partners argued that in granting summary judgment against 440 Partners, the Court did not address or dismiss 440 Partners' claims of breach of the duty of good faith and fair dealing by RiverBank. In 440 Partners' [Proposed] Third Amended Complaint, under the heading "Breach of Duty of Good Faith and Fair Dealing", 440 Partners alleges:

> 138. RIVERBANK was required to make a good faith effort to ensure it complied with among other things, the notice provision of the Deed of Trust but failed to do so. In fact, RIVERBANK retained an unlicensed Idaho attorney to advocate against 440 and retained another attorney (Charles Carroll) to act as the foreclosure trustee and bank counsel who, in turn, failed to provide 440 foreclosure sale notice as required by Idaho law and the Loan Documents.
>
> 139. 440 was deprived of the benefits of the Assignment of Rents and the Management Agreement by RIVERBANK's authorization of

> unnecessary and excessive Property related expenses that depleted the Property's rents and increased 440's indebtedness.

440 Partners' [Proposed] Third Amended Complaint, pp. 16-17, ¶¶ 138, 139. 440 Partners fails to explain how such alleged conduct comes close to rising to the requisite level of proving a reasonable likelihood of proving facts at trial sufficient to support an award of punitive damages against RiverBank, the standard at trial being proof by clear and convincing evidence, of oppressive, fraudulent, malicious or outrageous conduct by the party against whom the claim for punitive damages is asserted. I.C. § 6-1604. There is simply no admissible evidence put forth by 440 Partners that RiverBank committed a "bad act with a bad state of mind", as required by *Hall v. Farmers Alliance Mut. Ins. Co.,* 145 Idaho 313, 319, 179 P.3d 276, 282 (2008). There is no evidence that RiverBank's decision to hire Carroll was a bad act done with a bad state of mind. There is no evidence that any assignment of rents was done with a bad state of mind. The "breach of duty of good faith and fair dealing" arises out of a contractual relationship. The Idaho Supreme Court noted:

> Every contract contains a duty of reasonable performance. *Steiner v. Ziegler–Tamura Ltd., Co.,* 138 Idaho 238, 242, 61 P.3d 595, 599 (2002). Additionally, the covenant of good faith and fair dealing is implied by law and "requires the parties to perform, in good faith, the obligations required by their agreement[.]" *Id.* If a party to the contract violates, nullifies or significantly impairs any benefit of the contract, that party has violated this covenant. *Id.*

Commercial Ventures, Inc. v. Rex M. & Lynn Lea Family Trust, 45 Idaho 208, 217, 177 P.3d 955, 964 (2008). Punitive damages are allowed in contract actions, however, they are generally disfavored and should be awarded in only the most unusual and compelling circumstances. *Burks v. Bailey (In re Bailey)*, 499 B.R. 873, 901 (Bankr. D. Idaho 2013). There are no compelling circumstances here.

This Court appreciates that this is a matter left to the discretion of the Court. This Court concludes that even if 440 Partners can present evidence at trial to support its claim of RiverBank's breach of good faith and fair dealing, 440 Partners has not at this juncture presented sufficient evidence to support a claim of punitive damages against RiverBank. It would be an abuse of this Court's discretion to grant 440 Partners' motion to amend complaint to allow a claim for punitive damages.

IV. ANALYSIS OF 440 PARTNERS' MOTION FOR SUMMARY JUDGMENT.

A. Introduction.

Just as 440 Partners was not clear from whom it was seeking punitive damages, 440 Partners is equally unclear in its motion for summary judgment from whom it seeks summary judgment. In 440 Partners' Motion for Summary Judgment filed October 8, 2014, 440 Partners fails to mention against which defendant or defendants its seeks summary judgment. In the "Plaintiff's Memorandum in Support of Motion for Summary Judmgent Re; Law Officers of Charles V. Carroll", it is clear 440 Partners seeks summary judgment only against Charles V. Carroll.

As discussed below, this Court finds 440 Partners has established negligence *per se* through a violation of I.C. § 45-1506A, and has established the first two elements of a common law cause of action in negligence against Carroll, and to that extent, 440 Partners is entitled to summary judgment.

B. 440 Partners' Motion for Summary Judgment is Timely.

Carroll claims 440 Partners did not file its Motion for Summary Judgment in accordance with Idaho Rule of Civil Procedure 56(a) because 440 Partners did not wait twenty days from the time it filed its Third Amended Complaint alleging a claim against him for negligence and filing its Motion for Summary Judgment on that new claim.

Reply Memorandum Opposing 440 Partners[’] Motion for Summary Judgment, p. 4.

Idaho Rule of Civil Procedure 56(a) provides:

> A party seeking to recover upon a claim, counterclaim, or cross-claim or to obtain a declaratory judgment may, at any time after the expiration of twenty (20) days from the service of process upon the adverse party **or** that party's appearance in the action **or** after service of a motion for summary judgment by the adverse party, move with or without supporting affidavits for a summary judgment in that party's favor upon all or any part thereof. Provided, a motion for summary judgment must be filed at least 60 days before the trial date, or filed within 7 days from the date of the order setting the case for trial, whichever is later, unless otherwise ordered by the court.

I.R.C.P. 56(a) (bold and underline added). Carroll only focuses on the first condition. However, Idaho Rule of Civil Procedure 56(a) clearly provides three alternative instances when a plaintiff may file a motion for summary judgment: 1) twenty days from the service of process upon the adverse party; OR 2) twenty days from the defendant’s appearance in the action; OR 3) after service of a motion for summary judgment by the defendant. I.R.C.P. 56(a). The instant Motion for Summary Judgment complies with Idaho Rule of Civil Procedure 56(a) because it was filed on October 8, 2014, more than twenty days after Carroll’s appearance in the action, which occurred on July 11, 2014. Accordingly, the Court finds 440 Partners’ Motion for Summary Judgment is timely.

C. 440 Partners is Entitled to Summary Judgment as to its Negligence *Per Se* Claim and Portions of its Common Law Negligence Claim Against Charles V. Carroll.

The elements a plaintiff must establish for a claim in negligence are: “(1) a duty, recognized by law, requiring the defendant to conform to a certain standard of conduct; (2) a breach of duty; (3) a causal connection between the defendant's conduct and the resulting injuries; and (4) actual loss or damage.” *Jones v. Starnes*, 150 Idaho 257, 260, 245 P.3d 1009, 1012 (2011) (citing *Hansen v. City of Pocatello,* 145 Idaho 700, 702, 184 P.3d 206, 208 (2008)).

"[I]n Idaho, it is well established that statutes and administrative regulations may define the applicable standard of care owed, and that violations of such statutes and regulations may constitute negligence *per se.*" *Sanchez v. Galey*, 112 Idaho 609, 617, 733 P.2d 1234, 1242 (1986) (citing *Brizendine v. Nampa & Meridian Irrigation Dist.,* 97 Idaho 580, 586, 548 P.2d 80 (1976); *Riley v. Larson,* 91 Idaho 831, 832, 432 P.2d 775 (1967); St. *Ex. rel. McKinney v. Richardson,* 76 Idaho 9, 277 P.2d 272 (1954)). "Negligence *per se,* which results from the violation of a specific requirement of law or ordinance, is a question of law" to be decided by the court. *O'Guin v. Bingham Cnty.*, 142 Idaho 49, 51, 122 P.3d 308, 310 (2005) (citing *Ahles v. Tabor,* 136 Idaho 393, 395, 34 P.3d 1076, 1078 (2001)). "The effect of establishing negligence *per se* through violation of a statute is to conclusively establish the first two elements of a cause of action in negligence." *Slade v. Smith's Mgmt. Corp.*, 119 Idaho 482, 489, 808 P.2d 401, 408 (1991).

To replace a common law duty of care with a duty of care from a statute or administrative regulation, the following criteria must be met:

> First, the statute or regulation must clearly define the required standard of conduct; second, the statute or regulation must have been intended to prevent the type of harm defendant's act or omission caused; third, the plaintiff must be a member of the class of persons the statute or regulation was designed to protect; and fourth, the violation must have been a proximate cause of the injury.

Sanchez, 112 Idaho at 617, 733 P.2d at 1242 (internal citations omitted).

Idaho Code section 45-1506A sets forth the requirements for postponement of a sale when a bankruptcy stay is in effect on the date of the scheduled foreclosure sale. It provides in relevant part:

> (2) Notice of the rescheduled sale shall be given at least thirty (30) days before the day of the rescheduled sale by registered or certified mail to the last known address of all persons who were entitled to notice by mail of the original sale and to any person who shall have recorded a request

> for notice of sale at least forty-five (45) days prior to the rescheduled sale date in the form and manner required by section 45-1511, Idaho Code, provided that recording the request prior to notice of default is, for the purposes of this section only, waived.
>
> (3) Notice of the rescheduled sale shall be published in the newspaper of original publication once a week for three (3) successive weeks, making three (3) publishings in all, with the last publication to be at least ten (10) days prior to the day of sale.
>
> (4) The trustee shall make an affidavit stating that he or she has complied with subsections (2) and (3) of this section. The trustee shall make the above affidavit available for inspection at the time of the rescheduled sale together with any affidavit of mailing and posting, when required, which was not of record as required by subsection (7) of section 45-1506, Idaho Code, when the stay became effective. The affidavit or affidavits shall be attached to or incorporated in the trustee's deed.

I.C. § 45-1506A(2), (3).

440 Partners argues Carroll owed 440 Partners a duty under I.C. § 45-1506A and that duty was breached under the negligence *per se* principles. Plaintiff's Memorandum in Support of Motion for Summary Judgment RE[:] Law Offices of Charles V. Carroll, pp. 4-5. Specifically, 440 Partners claims Carroll, as trustee of the nonjudicial foreclosure, owed a duty to the borrower, 440 Partners, to provide proper notice of the time and place of the sale, and the amount due. *Id.*, p. 5. They contend Carroll breached subsection (2), (3) and (4) of I.C. § 45-1506A when he failed to notify 440 Partners of the rescheduled sale thirty days in advance, failed to publish notice of the rescheduled sale in the newspaper for three consecutive weeks, and failed to make an affidavit attesting that he complied with those two requirements. *Id.*, p. 4. According to 440 Partners, on February 21, 2013, at approximately 2:20 p.m., the attorney for 440 Partners received an email from Carroll stating that the foreclosure sale would take place the next day, on February 22, 2013. Plaintiff's Statement of Facts, p. 3, ¶ 8; Affidavit of Chris Leach, p. 4, ¶ 14. The email did not provide the place, time, identity of the trustee, or amount 440 Partners needed to cure the debt. *Id.* According to 440

Partners member Chris Leach, if 440 Partners had proper notice of the trustee's sale, "440 would have attended and paid the proper amount". Plaintiff's Statement of Facts, p. 3, ¶ 9; Affidavit of Chris Leach, p. 4, ¶ 14. In support of this claim, Leach submits a letter from RBC Wealth Management providing that Leach "had well in excess of the requested $1.2 million, in cash, available to [him] in the February 2013 timeframe." *Id*., Exhibit A. 440 Partners maintains Carroll's breach of I.C. § 45-1506A caused harm to 440 Partners because it was unable to maintain possession of the Property, resulting in damages to 440 Partners for that loss, which includes "the Property's $1,930,000.00 value (at the time of the February 22, 2013, loss) and the loss that the Property would have earned (between $128,922 - $195,668 annually)." Plaintiff's Memorandum in Support of Motion for summary Judgment RE[:] Law Offices of Charles V. Carroll, p. 5.

In response, Carroll does not appear to dispute his lack of compliance with the notice provisions of I.C. § 45-1506A, but rather he disputes 440 Partners' contention that it was damaged and the amount of damages, if any, that are permissible in this case. Reply Memorandum Opposing 440 Partners['] Motion for Summary Judgment, p. 5. Citing to this Court's October 16, 2014, Memorandum Decision and Order Granting Defendant RiverBank's Motion for Summary Judgment, Carroll maintains there is a genuine issue of material fact regarding the value of the Property on February 22, 2014. *Id.*, p. 5. He contends there is a question of fact as to whether 440 Partners has even sustained damages because of the amount it owed to RiverBank on the Promissory Note. *Id*., p. 6. Carroll also claims there is a genuine issue of material fact as to whether 440 Partners could have paid off the outstanding obligation owed to RiverBank because, "Mr. Leach plainly stated that he had in excess of $1,200,000.00; not the required $1,899,834.86." *Id.*, p. 7. According to Carroll, to prevail on summary judgment, 440 Partners needs to provide this Court with evidence that it could have

paid the entire amount owing on the Promissory Note on February 22, 2014, $1,899,834.86, not just an amount more than the credit bid offered by RiverBank, $1,200,000.00 plus $1.00. *Id.*, p. 8. As such, Carroll maintains summary judgment should be denied. *Id.*

In this case, on July 17, 2012, Carroll recorded and served a Notice of Default and Notice of Sale regarding the Deed of Trust and scheduled the nonjudicial foreclosure sale for December 7, 2012, at 10:00 a.m. Plaintiff's Statement of Facts, p. 2, ¶ 2. On December 7, 2012, 440 Partners filed a Chapter 11 Bankruptcy Petition in the United States Bankruptcy Court for the District of Idaho. *Id.*, p. 2 ¶ 3; Affidavit of John Roewe in Support of RiverBank's Motion for Summary Judgment, p. 8, ¶ 17. On December 17, 2012, 440 Partners' bankruptcy petition was dismissed. Plaintiff's Statement of Facts, p. 3, ¶ 5. Because of the bankruptcy petition, the nonjudicial foreclosure sale was stayed. "[I]f a stay is in effect on the date of a scheduled sale, postponement proceeds according to § 45-1506A. . . ." *Fed. Home Loan Mortg. Corp. v. Appel*, 143 Idaho 42, 46, 137 P.3d 429, 433 (2006). Among other things, I.C. § 45-1606A requires thirty days' notice of the rescheduled sale and publication of the rescheduled sale in the newspaper of original publication for three successive weeks. I.C. § 45-1506A(2), (3). There is no dispute that Carroll failed to comply with the notice provisions set forth in I.C. § 45-1506A. He attests that, "I either personally or through an agent, postponed the sale by announcement on January 4, 2013 to January 18, 2013; on January 18, 2013 to February 1, 2013; on February 1, 2013 to February 8, 2013; on February 8, 2013 to February 15, 2013; and on February 15, 2013 to February 22, 2013. No one appeared at any of the subsequent sale dates and postponements." Affidavit of Charles V. Carroll, ¶ 10. Moreover, on February 21, 2013, at 2:22 p.m., the

attorney for 440 Partners received an email from Carroll stating that the foreclosure sale would take place the next day, on February 22, 2013. Affidavit of Chris Leach, p. 4, ¶ 14. The email did not provide the place, time, identity of the trustee, or amount 440 Partners needed to cure the debt. *Id.*

Because of the bankruptcy stay, 440 Partners was not present at the original date scheduled for the trustee's sale to hear the subsequent sale dates to hear the postponements. If the members of 440 Partners were not present at the first postponement, knowing the sale would be rescheduled because of the bankruptcy petition filing, they would have no personal knowledge of any of the future dates. Idaho Code § 45-1506A clearly sets forth the required standard of conduct a trustee must comply with when a sale is postponed due to a bankruptcy stay; the trustee must provide thirty days' notice of the rescheduled sale and publication of the rescheduled sale in the newspaper of original publication for three successive weeks. The notice requirements were enacted to protect borrowers from the very type of harm suffered in this case, the borrower not having knowledge of the date of the rescheduled trustee's sale. 440 Partners, as a borrower, is a member of the class of persons I.C. § 45-1506A was designed to protect. Failure by Carroll to properly notify 440 Partners of the rescheduled trustee's sale was a proximate cause of its injury, not having notice of the sale so members of 440 Partners could attend and potentially bid on the property. As such, 440 Partners has established negligence *per se* through a violation of I.C. § 45-1506A, and has established the first two elements of a common law cause of action in negligence (duty and breach of duty) against Carroll.

However, a question remains as to the amount of damages 440 Partners has sustained as a result of that breach. As the Court stated in its October 16, 2014,

Memorandum Decision and Order Granting Defendant RiverBank's Motion for Summary Judgment:

> There is clearly a genuine issue of material fact regarding the value of the Property on February 22, 2013. RiverBank alleges through the Affidavit of Gary Zahller, the fair market value of the Property at the time of the foreclosure was $1,435,00.00. Affidavit of Gary H. Zahller, p. 5, ¶ 8. 440 Partners alleges, through the Affidavit of Nicholas Hogan, four possible means of determining the value of the Property at the time of foreclosure. Affidavit of Nicholas Hogan in Response to Defendant's Motion for Summary Judgment, Exhibit A, p. 59. Under each of those theories, it has set forth a different value for the Property: Cost Approach - $1,700,000.00; Income Approach - $1,630,000.00; Sales Comparison Approach - $1,930,000.00; and Estimated At Stabilized Approach - $1,650,000.00. *Id.* The alleged debt owing at the time of foreclosure, including the unpaid principal, late charges, and other costs was $1,899,834.86. Affidavit of John Roewe in Support of RiverBank's Motion for Summary Judgment, p. 14, ¶ 33.

October 16, 2014, Memorandum Decision and Order Granting Defendant RiverBank's Motion for Summary Judgment, p. 44. As such, a genuine issue of material fact remains on the element of damages.

D. Any "Motion" to Reconsider by 440 Partners is Denied.

"The decision to grant or deny a request for reconsideration generally rests in the sound discretion of the trial court." *Campbell v. Reagan*, 144 Idaho 254, 258, 159 P.3d 891, 895 (2007) (quoting *Carnell v. Barker Mgmt. Inc.,* 137 Idaho 322, 329, 48 P.3d 651, 658 (2002)); *see also Agrisource, Inc. v. Johnson*, 156 Idaho 903, 332 P.3d 815, 826 (2014). A motion to reconsider may be brought under either I.R.C.P. 11(a)(2)(B) or 60(b).

Idaho Rule of Civil Procedure 11(a)(2)(B) states:

> A motion for reconsideration of any interlocutory orders of the trial court may be made at any time before the entry of final judgment but not later than fourteen (14) days after the entry of the final judgment. A motion for reconsideration of any order of the trial court made after entry of final judgment may be filed within fourteen (14) days from the entry of such order; provided, there shall be no motion for reconsideration of an order of

> the trial court entered on any motion filed under Rules 50(a), 52(b), 55(c), 59(a), 59(e), 59.1, 60(a), or 60(b).

I.R.C.P. 11(a)(2)(B). When an order granting summary judgment is filed before a final judgment, that order is an interlocutory order. *Agrisource, Inc. v. Johnson*, 156 Idaho 903, 332 P.3d 815, 823 (2014) (citing *PHH Mortgage Servs. Corp. v. Perreira,* 146 Idaho 631, 635, 200 P.3d 1180, 1184 (2009)). Idaho Rule of Civil Procedure 60(b) provides:

> (b) Mistakes, Inadvertence, Excusable Neglect, Newly Discovered Evidence, Fraud, Grounds for Relief From Judgment on Order. On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time, and for reasons (1), (2), and (3) not more than six (6) months after the judgment, order, or proceeding was entered or taken. A motion under this subdivision (b) does not affect the finality of a judgment or suspend its operation. Such motion does not require leave from the Supreme Court, or the district court, as the case may be, as though the judgment has been affirmed or settled upon appeal to that court. This rule does not limit the power of a court to: (i) entertain an independent action to relieve a party from a judgment, order or proceeding, or (ii) to set aside, as provided by law, within one (1) year after judgment was entered, a judgment obtained against a party who was not personally served with summons and complaint either in the state of Idaho or in any other jurisdiction, and who has failed to appear in said action, or (iii) to set aside a judgment for fraud upon the court.

I.R.C.P. 60(b).

At oral argument, 440 Partners made an oral motion requesting the Court reconsider its earlier decision finding Carroll was not an agent of RiverBank during the nonjudicial foreclosure process. It further claimed it made a request for reconsideration

on page 7 of its Reply to RiverBank's Resopnse to 440 Partners, LLC's Motion for Summary Judgment. On page 7, 440 Partners writes, "Additionally, the Court should reconsider its Order granting RiverBank's motion for summary judgment to the extent it found that Carroll was not RiverBank's agent. Reconsideration of that fact is proper given RiverBank's repeated admissions and failure to inform the Court of the same." Reply to RiverBank's Response to 440 Partners, LLC's Motion for Summary Judgment, p. 7. However, other than mentioning "reconsideration" in its brief, 440 Partners did not file a written *motion* to reconsider. The relief requested at the conclusion of 440 Partners' brief does not include a request for the Court to reconsider is October 16, 2014, Memorandum Decision and Order Granting Defendant RiverBank's Motion for Summary Judgment. *See id*., pp. 8-9.

Idaho Rule of Civil Procedure 7 governs civil motions, and provides:

> (b)(1) *Motions and Other Papers.* An application to the court for an order shall be by motion which, unless made during a hearing or trial, shall be made in writing, **shall state with particularity the grounds therefor including the number of the applicable civil rule, if any, under which it is filed, and shall set forth the relief or order sought.** A proposed form of order, if included, shall be a separate document. The requirement of writing is fulfilled if the motion is stated in a written notice of the hearing of the motion.

I.R.C.P. (7)(b)(1) (emphasis added). 440 Partners has failed to comply with the requirements of I.R.C.P. 7.

Additionally, 440 Partners did not cite to any rule in support of its request for reconsideration either orally or in writing. But even if it had, the Court would deny a motion to reconsider its decision from the October 16, 2014, Memorandum Decision and Order Granting Defendant RiverBank's Motion for Summary Judgment finding Carroll was the agent of RiverBank. 440 Partners has not presented this Court with any new evidence or case law that would persuade it to reach a different decision, as is

discussed in more detail in the section below. A party making a motion for reconsideration is permitted to present new evidence, but is not required to do so. *Johnson v. Lambros,*143 Idaho 468, 147 P.3d 100 (Ct. App. 2006). However, with no additional evidence or case law to support its theory that Carroll acted as the agent for RiverBank, the Court denies any "motion" for reconsideration made by 440 Partners.

E. 440 Partners Did Not Obtain Consent from RiverBank or Approval from this Court to File Its Third Amended Complaint Against RiverBank

Idaho Rule of Civil Procedure 15(a) governs the amendment of pleadings and provides in pertinent part:

> (a) Amended and Supplemental Pleadings--Amendments. A party may amend the party's pleading once as a matter of course at any time before a responsive pleading is served or, if the pleading is one to which no responsive pleading is permitted and the action has not been placed upon the trial calendar, the party may so amend it at any time within twenty (20) days after it is served. Otherwise **a party may amend a pleading only by leave of court or by written consent of the adverse party**; and leave shall be freely given when justice so requires, and the court may make such order for the payment of costs as it deems proper. . . .

I.R.C.P. 15(a) (emphasis added).

RiverBank argues 440 Partners failed to obtain leave from the Court or written consent of RiverBank to amend the Complaint against RiverBank for a claim of negligence. RiverBank's Memorandum in Response to 440 Partners' Motion for Summary Judgment, p. 5. According to RiverBank, "[b]ased upon the representations of 440 Partners' Counsel regarding [ ] the scope of this proposed Negligence claim, Counsel for RiverBank did not have any objection to the proposed Third Amended Complaint so long as it did not add any additional claims against RiverBank which would require a responsive pleading." *Id.* RiverBank emailed a document to 440 Partners on July 31, 2014, entitled "Stipulation Regard 440 Partners['] Proposed Third Amended Complaint/RiverBank's Answer/Counterclaim". Affidavit of Bradley C.

Crockett in Support of 440 Partners[’] Motion for Summary Judgment, p. 2, ¶ 2, Exhibit A. That document provides:

> COMES NOW, the above-captioned parties who hereby stipulate and agree that 440 Partners, LLC may amend the Second Amended Complaint in the above-captioned action so as to add a cause of action for negligence against defendant LAW OFFICE OF CHARLES V. CARROLL. A copy of the proposed Third Amended Complaint if attached hereto as Exhibit A. Furthermore, as a condition of the Stipulation, the parties also stipulate and agree that the Answer/Counterclaim filed by RiverBank on July 3, 2014 to Plaintiff’s Second Amended Complaint shall be deemed to be RiverBank’s responsive pleading to this Third Amended Complaint and shall be deemed to contain RiverBank’s counter-claim which is currently pending adjudication by this Court. Accordingly, RiverBank shall not be required to file any further responsive pleadings to Plaintiff’s Third Amended Complaint and shall not be required to seek any additional leave of the Court to file the counter-claim which is contained in RiverBank’s Answer/Counter-claim filed with the Court on July 2, 2014.

Id., Exhibit A. It does not appear that this document was ever filed with the Court.

In response, 440 Partners claims RiverBank agreed to the filing of the Third Amended Complaint. Reply to RiverBank’s Response to 440 Partners, LLC’s Motion for Summary Judgment, p. 7. In support of this, 440 Partners contends it believed RiverBank had filed the “Stipulation Regard 440 Partners[’] Proposed Third Amended Complaint/RiverBank’s Answer/Counterclaim”. It also claims on September 30, 2014, counsel for 440 Partners and Counsel for RiverBank had a conversation about the filing of the Third Amended Complaint and at that time, “Mr. Ellingsen did not indicate that he had not stipulated to the amendment, nor did he indicate that he disapproved of 440’s actions.” *Id.*, pp. 7-8. 440 Partners does not specifically argue that RiverBank agreed to the filing of the Third Amended Complaint to add new claims against RiverBank.

On August 12, 2014, a “Stipulation and Proposed Order to Amend Complaint” was filed with the Court. It provides: “COME NOW the above-captioned parties who hereby stipulate and agree to amend the Second Amended Complaint in the above-

captioned action so as to clarify plaintiff's negligence claim against defendant LAW OFFICE OF CHARLES V. CARROLL. A copy of the proposed Third Amended Complaint is attached hereto as Exhibit A." Stipulation and [Proposed] Order to Amend Complaint, pp. 1-2. This document is signed by Counsel for 440 Partners Matthew Z. Crotty and Bradley C. Crockett, and Counsel for Charles V. Carroll, Bruce J. Blohowiak. Counsel for RiverBank did not sign this document. There was no line on this document for Counsel for RiverBank to sign. On August 20, 2014, the Court entered an Order Granting Stipulation to Amend Complaint, based on the August 12, 2014, stipulation.

It is clear that the stipulation filed on August 12, 2014, seeks to amend the Second Amended Complaint to clarify the negligence claim against the Law Office of Charles V. Carroll. The stipulation is signed by counsel for 440 Partners, the party seeking to amend the Second Amended Complaint, and counsel for Carroll, the adverse party to the disclosed amendment. The stipulation complies with Idaho Rule of Civil Procedure 15(a) for the purposes of amending the Second Amended Complaint against Carroll only. 440 Partners does not have a signed stipulation from RiverBank to amend the Second Amended Complaint against it. Even if the "Stipulation Regard 440 Partners['] Proposed Third Amended Complaint/RiverBank's Answer/Counterclaim" had been filed with the Court, that document does not provide written consent to 440 Partners by RiverBank to amend the Second Amended Complaint against RiverBank. Rather, it only agrees to allow 440 Partners to amend the Second Amended Complaint against Carroll.

Moreover, the Proposed Third Amended Complaint that was attached to the Stipulation and [Proposed] Order to Amend Complaint only adds a claim of Negligence against Charles V. Carroll alleging Carroll, as trustee of the nonjudicial foreclosure, owed a fiduciary duty to 440 Partners and had a duty to ensure the Property was

foreclosed upon in accordance with the requirements of I.C. § 45-1506A. Third Amended Complaint, p. 18, ¶ 157. 440 Partners alleges Carroll breached his fiduciary duty to 440 Partners by representing RiverBank as an attorney and serving as trustee, and failing to comply with the provisions of I.C. § 45-1506A. *Id.*, p. 19, ¶¶ 158-59. It contends Carroll's failure to follow the requirements of I.C. § 45-1506A constitutes negligence *per se*. *Id.*, p. 19, ¶ 160. There are no new claims against RiverBank.

As such, 440 Partners has failed to comply with I.R.C.P. 15(a) regarding any amendments to the Second Amended Complaint against RiverBank.

F. RiverBank is not Joint and Severally Liable with Carroll.

440 Partners claims that under I.C. § 6-803, RiverBank should be held jointly and severally liable for Carroll's negligence. Plaintiff's Memorandum in Support of Motion for Summary Judgment RE[:] Law Offices of Charles V. Carroll, p. 5. The portions of I.C. § 6-803 440 Partners relies upon provide:

> (3) The common law doctrine of joint and several liability is hereby limited to causes of action listed in subsection (5) of this section. . . .
>
> ***
>
> (5) A party shall be jointly and severally liable for the fault of another person or entity or for payment of the proportionate share of another party where they were acting in concert or when a person was acting as an agent or servant of another party. As used in this section, "acting in concert" means pursuing a common plan or design which results in the commission of an intentional or reckless tortious act.

I.C. § 6-803(3), (5). 440 Partners contends that Carroll, as RiverBank's attorney, was acting as RiverBank's agent when he served as trustee during the nonjudicial foreclosure and when he represented RiverBank against 440 Partners in the bankruptcy litigation. Plaintiff's Memorandum in Support of Motion for Summary Judgment RE[:] Law Offices of Charles V. Carroll, p. 5. Relying on *Klem v. Washington Mut. Bank*, 176 Wash. 2d 771, 295 P.3d 1179 (2013), 440 Partners maintains that when a trustee acts

at the direction of the beneficiary, the trustee is an agent of the beneficiary, and vicarious liability may be imposed against the beneficiary. Plaintiff's Memorandum in Support of Motion for Summary Judgment RE[:] Law Offices of Charles V. Carroll, p. 6.

Klem discussed a trustee who falsely dated notarized documents to allow for a quicker trustee's sale. 176 Wash.2d at 774, 295 P.3d at 1181. In that case, an elderly homeowner under a Deed of Trust was delinquent on her mortgage. *Id.* Her guardian secured a signed purchase and sale agreement for more than the debt owing against the home, but closing was scheduled after the foreclosure sale date. *Id.* at 775, 295 P.3d at 1181. Despite having discretion to postpone the sale, at the direction of the bank, the trustee proceeded with the nonjudicial foreclosure sale and sold the property for less than the purchase and sale agreement secured by the guardian and less than the appraised value of the home. *Id*. The trustee had an agreement with the bank that specifically instructed that a trustee's sale could not be delayed except upon express direction of the bank. *Id.,* at 777, 295 P.3d at 1183. The Washington Supreme Court held "the practice of a trustee in a nonjudicial foreclosure deferring to the lender on whether to postpone a foreclosure sale and thereby failing to exercise its independent discretion as an impartial third party with duties to both parties is an unfair or deceptive act or practice and satisfies the first element of the [Consumer Protection Act]." *Id.,* at 792, 295 P.3d at 1190. In a footnote, that Court noted "[w]here the beneficiary so controls the trustee so as to make the trustee a mere agent of the beneficiary, then as principle, the beneficiary may be liable for the acts of its agent." *Id.*, fn. 12. However, as the bank was not a party to the lawsuit in *Klem*, no ruling was made as to whether the bank was liable under an agency theory for the acts of the trustee.

Using excerpts from the Affidavit of Charles V. Carroll, 440 Partners makes the claim that RiverBank exercised control over Carroll and Carroll took direction from RiverBank to postpone the trustee's sale. Reply to RiverBank's Response to 440 Partners, LLC's Motion for Summary Judgment, pp. 6, 7. Specifically, 440 Partners directs the Court to the fact that there are billing statements between Carroll and RiverBank for his duties as trustee and the following language from Carroll's Affidavit: "Following the initial postponement of the Trustee's Sale, I caused it be postponed a number of additional times at the request of the Beneficiary." *Id.* (citing Affidavit of Charles V. Carroll, ¶ 10). However, while not included by 440 Partners, that sentence does not end with the word "Beneficiary", but continues "...which I understood to be due to ongoing communications with the Grantor concerning the potential for a payoff of the obligation secured by the Deed of Trust...". Affidavit of Charles V. Carroll, ¶ 10. Any direction by RiverBank to Carroll about postponing the trustee's sale does not rise to the level of direction discussed by the Washington Supreme Court in *Klem.* Nor is there sufficient evidence that RiverBank and Carroll were "acting in concert" by "pursuing a common plan or design which results in the commission of an intentional or reckless tortious act."

Unlike *Klem*, in this case, Carroll attests, "...I caused it to be postponed a number of additional times at the request of the Beneficiary which I understood to be due to ongoing communications with the Grantor concerning the potential for a payoff of the obligation secured by the Deed of Trust...". Affidavit of Charles V. Carroll, ¶ 10. Moreover, he claims, "at no time during my service as Successor Trustee did I refuse any requests of the Borrower for a postponement of the sale, for the amount necessary to cure the defaults at any time, for any information or any other request. I received no such requests from the Borrower and I did nothing contrary to the interests of or

prejudicial to the Borrower." *Id*., ¶ 12. Unlike *Klem,* there was no agreement between Carroll and RiverBank that postponements could only occur at the direction of RiverBank. The evidence before the Court is that Carroll postponed the foreclosure sale for the benefit of 440 Partners based on email communications with counsel for 440 Partners and RiverBank, to allow it more time to obtain a loan payment. Carroll did not act at the discretion of RiverBank to the detriment of 440 Partners. As such, *Klem* does not support the arguments of 440 Partners.

440 Partners also claims "RiverBank admitted that 'At all times relevant to the acts complained of, RIVERBANK claims that Charles Carroll was acting in the capacity of RIVERBANK'S attorney.' (440 Partner's [sic] Second Amended Complaint, ¶20 [sic] and RiverBank's Answer at ¶17 [sic])." Reply to RiverBank's Response to 440 Partners. LLC's Motion for Summary Judgment, p. 4. 440 Partners maintains that RiverBank is bound by this judicial admission. *Id.*, pp. 4, 6. While Paragraph 21 of the Second Amended Complaint is accurately quoted above, RiverBank's response to that allegation in the Answer to Second Amended Complaint and Counterclaim is mischaracterized by 440 Partners. To the allegation contained in Paragraph 20 of the Second Amended Complaint, RiverBank responded as follows: "18. Regarding the allegations contained in paragraph 21 of the Complaint, RiverBank admits that it hired attorney Charles Carroll to conduct the nonjudicial foreclosure of the Deed of Trust which is attached hereto as Exhibit B to the Complaint. RiverBank lacks information regarding the remainder of the allegations contained in Paragraph 21 and therefore denies the same." RiverBank's Answer to Second Amended Complaint and Counterclaim, p. 4, ¶ 18. Despite 440 Partners' claims, RiverBank's response to this allegation is not an admission that Charles Carroll was acting in the capacity of RiverBank's attorney throughout the nonjudicial foreclosure.

At oral argument, counsel for 440 Partners also argued RiverBank made a judicial admission regarding agency when it admitted Carroll was its attorney in its response to Paragraph 149 of the Second Amended Complaint. Paragraph 149 of the Second Amended Complaint provides: "149. Throughout the nonjudicial foreclosure process Carroll acted as RIVERBANK's attorney." Second Amended Complaint, p. 18, ¶ 149. To this allegation, RiverBank responded: "108. RiverBank admits the allegations contained in Paragraph 149 of the Complaint." RiverBank's Answer to Second Amended Complaint and Counterclaim, p. 13, ¶ 108.

Whether a statement constitutes a judicial admission is a question of law. *Strouse v. K-Tek, Inc.*, 129 Idaho 616, 618, 930 P.2d 1361, 1363 (Ct. App. 1997). "A judicial admission is a formal act or statement made by a party or attorney, in the course of judicial proceedings, for the purpose, or with the effect, of dispensing with the need for proof by the opposing party of some fact." *Id.,* at 618-19, 930 P.2d at 1363-64 (citing *McLean v. City of Spirit Lake,* 91 Idaho 779, 783, 430 P.2d 670, 674 (1967); 29A AM. JUR.2d *Evidence* § 770 (1994); BLACK'S LAW DICTIONARY 48 (6th ed. 1990)). "Statements in the party's pleadings are generally seen as binding judicial admissions." *Id.,* at 619, 930 P.2d at 1364 (citing *Cloughley v. Orange Transportation Co.,* 80 Idaho 226, 230, 327 P.2d 369, 371 (1958); *McLean,* 91 Idaho at 783, 430 P.2d at 674; 29 WRIGHT & GRAHAM, FEDERAL PRACTICE AND PROCEDURE § 6726; 29A AM. JUR.2d *Evidence* § 770).

In a vacuum, the admission that throughout the nonjudicial foreclosure process Carroll acted as the attorney for RiverBank could be helpful to 440 Partners in establishing its agency theory. However, the very next allegation by 440 Partners and response by RiverBank does not support an agency theory. Paragraph 150 of the

Second Amended Complaint alleges: “150. Throughout the nonjudicial foreclosure process, Mr. Carroll acted on RIVERBANK’s behalf.” Second Amended Complaint, p. 18, ¶150. To this allegation, RiverBank responded: “RiverBank lacks information regarding the allegations contained in Paragraph 150 of the Complaint and therefore denies the same.” RiverBank’s Answer to Second Amended Complaint and Counterclaim, p. 13, ¶ 109. When these four paragraphs, 149 and 150 of the Second Amended Complaint and 108 and 109 of RiverBank’s Answer to Second Amended Complaint and Counterclaim, are read together, it is clear RiverBank is not making an admission that Carroll was acting as its agent during the nonjudicial foreclosure because RiverBank denies that Carroll was acting on behalf of RiverBank. He was hired as an attorney by RiverBank to conduct the nonjudicial foreclosure. 440 Partners has not dispensed with the need for proof of an agency relationship with an admission to Paragraph 149 of the Second Amended Complaint.

Finally, 440 Partners contends that “Carroll carries *no liability insurance* therefore 440 must look to Riverbank to be made whole.” At oral argument 440 Partners also argued that since RiverBank was the party who selected which attorney would conduct the nonjudicial foreclosure sale, and the attorney selected by RiverBank was an attorney with no malpractice insurance, RiverBank should be liable for the acts of the attorney they selected. 440 Partners has not provided any authority to support this position that hiring an attorney without malpractice insurance makes that attorney an agent of the bank who hired him. As such, this argument is of no concern in analyzing the motion before the Court.

RiverBank denies that Carroll, in his capacity as trustee, was an agent of RiverBank and directs the Court to its October 16, 2014, Memorandum Decision and

Order Granting Defendant RiverBank's Motion for Summary Judgment where the Court concluded:

> 440 Partners claims RiverBank was on inquiry notice of the statutory defect with the notice of the foreclosure sale since Charles Carroll was the agent of RiverBank. Response to RiverBank's Motion for Summary Judgment, p. 23. "An agent is a person authorized to act for or in the place of the principal." *Edwards v. Mortgage Elec. Registration Sys., Inc.*, 154 Idaho 511, 517, 300 P.3d 43, 49 (2013) (quoting *Knutsen v. Cloud,* 142 Idaho 148, 151, 124 P.3d 1024, 1027 (2005)). "Pursuant to the grant of authority by the principal, the agent is the representative of the principal and **acts for, in the place of, and instead of, the principal**." 3 *Id.* (quoting Am. Jur. 2d *Agency* § 1 (2002) (emphasis added)). In this case, RiverBank was the beneficiary of the Deed of Trust. Pursuant to Idaho Code § 45-1505, it is the trustee, not the beneficiary, who forecloses on the Deed of Trust. I.C. § 45–1505. A beneficiary cannot perform such action. RiverBank, as the beneficiary, could not have foreclosed on the Deed of Trust. Charles Carroll could not have been acting for, in the place of, or instead of RiverBank when he foreclosed on the Deed of Trust as trustee because that duty could never be performed by RiverBank. As such, Charles Carroll, in his duties as trustee, was not an agent of RiverBank.

RiverBank's Memorandum In Response to 440 Partners' Motion for Summary Judgment, p. 7 (emphasis in original) (quoting October 16, 2014, Memorandum Decision and Order Granting Defendant RiverBank's Motion for Summary Judgment, p. 27). Based on this ruling, RiverBank maintains that since Carroll is not an agent for RiverBank, any negligence claim against RiverBank based on Carroll's actions must fail. *Id.*, pp. 7-8.

The Court finds RiverBank cannot be held joint and severally liable for any negligence of Carroll under I.C. § 6-803 because, as was determined in its October 16, 2014, Memorandum Decision and Order Granting Defendant RiverBank's Motion for Summary Judgment, Carroll, in his capacity as trustee, was not the agent of RiverBank. October 16, 2014, Memorandum Decision and Order Granting Defendant RiverBank's Motion for Summary Judgment, p. 27. No motion has been made by 440 Partners

which complies with the Idaho Rules of Civil Procedure, to have this Court reconsider its decision that Carroll was not the agent of RiverBank. 440 Partners has set forth no new evidence demonstrating Carroll was acting as the agent of RiverBank. 440 Partners has set forth no case law that supports its position that any of the actions taken by Carroll should be imparted to RiverBank. As such, any claim of negligence against Carroll will not be extended to RiverBank.

IV. CONCLUSION AND ORDER.

For the reasons set forth above,

IT IS HEREBY ORDERED plaintiff 440 Partners' motion to amend complaint to allow a claim for punitive damages against defendant RiverBank is DENIED.

IT IS FURTHER ORDERED plaintiff 440 Partners' Motion for Summary Judgment is GRANTED against defendant Law Offices of Charles V. Carroll **only**, and only as to 440 Partners' claims of negligence per se and as to the elements of duty and breach of duty under 440 Partners' claims of common law negligence against Law Offices of Charles V. Carroll. All other aspects of 440 Partners' Motion for Summary Judgment are DENIED.

Entered this 19th day of November, 2014.

_____
John T. Mitchell, District Judge

Certificate of Service

I certify that on the _____ day of November, 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 #
Bradley C. Crockett	509-624-2902	Matthew Z. Crotty	509-703-7957
Mark A. Ellingsen	667-8470	Thomas T. Bassett	509-456-0146
Bruce J. Blohowiak	509-328-6436		

_____
Jeanne Clausen, Deputy Clerk