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 C. SAMUEL, an individual,

Plaintiff,

vs.

BLACK ROCK DEVELOPMENT, INC., an Idaho Corporation, MARSHALL R. CHESROWN, an individual, et. al.,

Defendants.

Case No. **CV 2012 4492**

MEMORANDUM DECISION AND ORDER GRANTING IN PART AND DENYING IN PART PLAINTIFF SAMUEL'S MOTION FOR SUMMARY JUDGMENT

I. PROCEDURAL HISTORY AND FACTUAL BACKGROUND.

This matter is before the Court on plaintiff's motion for summary judgment.

On June 15, 2012, plaintiff Robert Samuel (Samuel) filed his Complaint, alleging that on November 8, 2004, he transferred $4,600,000.00 in a loan to defendant Black Rock Development (BRD), that Samuel and BRD entered into a written promissory note for $4,600,000.00, and that BRD executed a Deed of Trust, Security Agreement and Fixture Filing for the "Black Rock 6th Addition" as collateral for the promissory note. Complaint, p. 4 ¶ 13. Chesrown admits all of this. Answer, p. 4, ¶ 13. Samuel alleges the Deed of Trust was recorded on November 9, 2004. Complaint, p. 4, ¶ 14. Chesrown claims to not know if this is true. Answer, p. 4, ¶ 14. Samuel claims defendant Marshall Chesrown (Chesrown) personally executed the Promissory Note as "Guarantor" in the event BRD failed to make payments on the Promissory Note. Complaint, p. 5, ¶ 17. Chesrown admits this. Answer, p. 5, ¶ 17. Samuel claims

Chesrown is a shareholder and Chief Executive Officer of BRD. Complaint, p. 2, ¶ 3. Chesrown admits this. Answer, p. 2, ¶ 2. On August 30, 2007, Samuel states he and BRD entered into the First Addendum to Promissory Note, in which the deadline for full repayment of the Promissory Note was extended from November 8, 2007, to June 1, 2008, while leaving all of the other terms and conditions in effect. Complaint, p. 5, ¶ ¶ 18, 19. Samuel then claims that on March 30, 2008, he and BRD entered into the Second Addendum to Promissory Note, in which 1) BRD reaffirmed the original $4,600,000.00 obligation to Samuel, 2) BRD and Samuel stipulated that $1,000,000.00 had been paid on the original Promissory Note, 3) Samuel agreed to loan BRD an additional $1,000,000.00, and 4) the parties reaffirmed that the due date for repayment was June 1, 2008. Complaint, p. 6, ¶ 20. Samuel states that at the time of the execution of the Addendum, the debt remained secured by 18 of the original 23 improved lots. *Id*. Samuel claims on March 22, 2010, he filed a UCC Financing Statement, identifying those 18 lots. Complaint, p. 6, ¶ 21. Further, Samuel alleges BRD got a loan from defendant Idaho Independent Bank (IIB) in the amount of $9,950,000.00 and that Deeds of Trust securing the loan were recorded on May 27, 2008. Complaint, p. 6, ¶ 22. Samuel also claims defendant Black Rock Homeowner's Association recorded 18 separate homeowners association Claims of Lien against the 18 secured lots identified above. Complaint, p. 6, ¶ 23.

Samuel alleges BRD and Chesrown did not pay the amounts due under the Promissory Note and Addenda, and they did not pay the applicable Kootenai County property taxes as required by the Promissory Note. Complaint, p. 7, ¶¶ 24-25. Samuel alleges essentially three causes of action in its Complaint: 1) breach of contract related to the failure to remit payment due and owning, failure to pay Kootenai County tax assessments, failure to comply with the Loan Documents' Examination of Books and

Records provision, and failure to comply with guarantee obligations, 2) breach of the implied covenant of good faith and fair dealing and 3) judicial deed of trust foreclosure. Complaint, pp. 8-9.

BRD and Chesrown filed their Answer on August 6, 2012. Answer, p. 1. In their Answer, BRD and Chesrown admit that on or about November 8, 2004, BRD entered into an original Promissory Note for $4,600,000.00 and executed an original Deed of Trust, Security Agreement and Fixture Filings for "Black Rock 6th Addition" as collateral for the Promissory Note. Answer, p. 4, ¶ 13. BRD and Chesrown further argue the Loan Documents and Promissory Note "speak for themselves regarding the terms therein." Answer, p. 4, ¶¶ 15-16. In addition, BRD and Chesrown admit that BRD executed an Addendum to Promissory Note on or about August 30, 2007, and another Addendum to Promissory Note on or about March 30, 2008. Answer, p. 5, ¶¶ 19-20. As to both Addenda, BRD and Chesrown claim the terms of the Addenda "speak for themselves." *Id*. Both BRD and Chesrown deny the causes of action alleged by Samuel in his Complaint. Answer, pp. 7-9. Finally, BRD and Chesrown set forth five affirmative defenses: 1) failure to state a claim; 2) claims against Chesrown based on the guaranty are barred due to the terms of the Promissory Note being modified; 3) deficiency judgment is limited by I.C. § 6-101 and § 6-108; 4) Chesrown is not a party to the Deed of Trust and is therefore not contractually bound by its terms and conditions; and 5) Samuel has no right to demand an examination of the books and records of Chesrown. Answer, p. 9.

Samuel filed his Motion for Summary Judgment and supporting memorandum on October 3, 2012. As a result of the alleged breaches by BRD and Chesrown, Samuel seeks summary judgment on his right to foreclose on the secured property, judgment against BRD and Chesrown in the amount of $3,107,080.19 for unpaid principal,

$1,460,783.31 for accrued unpaid interest, $148,807.96 for reimbursement of real estate taxes Samuel has paid, and $18,879.88 for attorney fees. Motion for Summary Judgment, p. 1; Memorandum in Support of Plaintiff Robert C. Samuel's Motion for Summary Judgment, p. 9. In his Memorandum, Samuel argues that because BRD and Chesrown have failed to remit full payment under the Promissory Note, they are in breach of their obligations under the Note and under the terms of the Loan Documents. Memorandum in Support of Plaintiff's Motion for Summary Judgment, p. 5. Further, Samuel argues he made payment demands upon Chesrown which were not met by either Chesrown or BRD. *Id*. As a result, Samuel claims that on the Note alone, BRD and Chesrown owe the principal amount of $3,107,080.19 as well the unpaid accrued interest of $1,460,783.31. *Id.,* p. 6.

Samuel also argues BRD's and Chesrown's failure to pay applicable Kootenai County property taxes on "Black Rock 6th Addition" is a breach of the Loan Documents and also forced Samuel to pay the delinquent taxes in the amount of $148,807.96. *Id*. Samuel claims that in addition to the direct cost of paying the delinquent taxes, he is entitled to interest on that amount as an expense paid by the lender in protecting its interest in the property. *Id*. The Default Rate for that amount is alleged to be 12% per annum. *Id*.

Further, Samuel argues BRD and Chesrown breached the covenant against secondary financing by recording a deed of trust against the secured lots with IIB on May 27, 2008. *Id*. Additionally, Samuel claims BRD and Chesrown breached the obligation under the Loan Documents by denying Samuel access to BRD's records. *Id*.

Finally, Samuel argues BRD and Chesrown violated the implied covenant of good faith and fair dealing by failing to pay Kootenai County property tax on the secured

properties for four years and denying Samuel access to the financial records of BRD and Chesrown, as allowed under the Loan Documents. Memorandum in Support of Plaintiff's Motion for Summary Judgment, p. 7.

On October 23, 2012, BRD and Chesrown filed their Memorandum in Response to and in Opposition to Plaintiff's Motion for Summary Judgment. Memorandum in Response to Plaintiff's Motion for Summary Judgment, p. 1. In their response, BRD and Chesrown claim that: 1) Chesrown, in his individual capacity, did not execute either the August 30, 2007, Addendum to the Promissory Note or the March 30, 2008, Second Addendum to the Promissory Note, but that only BRD had done so; 2) Chesrown, in his individual capacity, did not execute the Deed of Trust and so is not bound by the terms of such; and 3) Samuel has no right to examine the books and records of Marshall Chesrown individually. *Id.,* p. 2. BRD and Chesrown argue that Chesrown did not violate the covenant of good faith and fair dealing because he since did not execute, in an individual capacity, the Addenda to the Promissory Note and the Deed of Trust, he is not required to perform under those documents. *Id*. Regarding the issue of judicial foreclosure, BRD and Chesrown argue that such an issue is governed by I.C. § 6-101 and § 6-108 and as such, any deficiency judgment awarded to Samuel is required to take into account the value of the property being foreclosed upon. *Id.,* p. 6. Chesrown has estimated the value of the property in this case to be $3,177,300. *Id.,* p. 7. Next, BRD and Chesrown argue that the legal rate of interest is governed by I.C. § 28-22-104(2), which states the current rate through June 30, 2013, is 5.250%. *Id.,* p. 8. Finally, BRD and Chesrown object to certain costs claimed by Samuel, including Westlaw charges. *Id.,* p. 9.

On October 31, 2012, Samuel filed his Reply to Defendants' Opposition to Motion for Summary Judgment. Plaintiff's Reply to Defendants' Opposition to Motion for Summary Judgment, p. 1. Samuel argues that Chesrown signed, in his individual capacity, the original Promissory Note which expressly incorporates the terms of the Deed of Trust and therefore Chesrown's guarantee of the Promissory Note operates as a guaranty under the terms of the Deed of Trust. *Id.,* p. 2. Further, Samuel claims that both Addenda to the Promissory Note contain the clause "Maker and Payee hereby agree all other terms of said Note with the exception of the above written shall remain in full force and effect," therefore, since neither Addendum mentioned the personal guarantee of the Promissory Note, that the guarantee remained in full force and affect, without any alteration. *Id*. (emphasis added).

Second, Samuel argues that the Deed of Trust grants him access to the records of BRD "and its affiliates" and that Chesrown, as the controlling shareholder, President and CEO was an affiliate of BRD, therefore Samuel did have a right to access Chesrown's books and Chesrown's denial of such access was a breach of the implied covenant of good faith and fair dealing. *Id.,* pp. 3-4.

Third, Samuel claims that with respect to the issue of deficiency, I.C. § 45-1512 does not protect guarantors of secured debt, thus it provides no protection to Chesrown. *Id.,* p. 5. In addition, Samuel states that he is not required to go to BRD first, and that foreclosure may only be necessary if Chesrown's assets are insufficient to satisfy the debt. *Id.,* p. 6.

Fourth, Samuel argues that the legal interest rate set forth in I.C. § 28-22-104(2) only applies to money judgments after they have been entered. *Id*. In addition, Samuel claims that I.R.C.P. 54(d)(1)(D) allows "necessary and exception costs reasonably

incurred" when the "interests of justice" so require. *Id.,* p. 7. As such, the costs to which BRD and Chesrown object are costs which the Court may award in its discretion. *Id*.

Samuel has also sued defendant Idaho Independent Bank and Black Rock Homeowner's' Association, Inc., in his Complaint. Samuel's Motion for Summary Judgment does not pertain to these two defendants. On October 30, 2012, this Court entered its "Order Dismissing Black Rock Homeowner's' Association, Inc., Only", based on the stipulation signed by the attorney for the Homeowner's' Association. On October 30, 2012, this Court also entered its "Order Re: Foreclosure of Lien", where defendant Idaho Independent Bank stipulated its Deed of Trust was inferior and subordinate to the Deed of Trust in favor of Samuel.

Oral argument on Samuel's motion for summary judgment was held November 7, 2012. At that hearing, due to factual issues regarding fair market value, Samuel's attorney withdrew Samuel's motion for judicial foreclosure, reserving the right to raise the issue at a later time. The focus of Samuel's argument on summary judgment was, thus, the personal liability of Chesrown.

At oral argument, counsel for Chesrown and BRD for the first time argued that Samuel had made an "election of remedies." Counsel for Chesrown and BRD for the first time argued that Samuel, had raised a new theory in his "Plaintiff's Reply to Defendants' Opposition to Motion for Summary Judgment", however, counsel for Chesrown and BRD did not elucidate what the claimed new theory was. The only issues raised in Plaintiff's Reply to Defendants' Opposition to Motion for Summary Judgment that were not raised initially on summary judgment were: 1) Samuel's claim that with respect to the issue of deficiency, I.C. § 45-1512 does not protect guarantors of secured debt, thus it provides Chesrown no protection (*Id.,* p. 5), and; 2) Samuel's

claim that he is not required to go to BRD first, and that foreclosure may only be necessary if Chesrown's assets are insufficient to satisfy the debt. *Id.,* p. 6. The Court finds those were not "new theories" on summary judgment, and counsel for BRD and Chesrown's claims to the contrary are without merit.

At oral argument, counsel for BRD and Chesrown cited two cases to the Court at oral argument, *Wolford v. Tankersley,* 107 Idaho 1062, 695 P.2d 1201 (1984), and *United States Fidelity and Guaranty Co. v. Clover Creek Cattle Co.,* 92 Idaho 889, 452 P.2d 993 (1969), to support their new "election of remedies" argument.

After oral argument, without seeking the Court's permission, and in violation of I.R.C.P. 56(c), on November 14, 2012, Samuel filed his "Supplemental Memorandum in Support of Plaintiff Robert C. Samuel's Motion for Summary Judgment." In that brief, counsel for Samuel claims this late filed brief is permissible under I.R.C.P. 15(d), which allows for supplemental *pleadings*. Supplemental Memorandum in Support of Plaintiff Robert C. Samuel's Motion for Summary Judgment, p. 3. Counsel for Samuel is mistaken, because Samuel's "Supplemental Memorandum in Support of Plaintiff Robert C. Samuel's Motion for Summary Judgment" is not a "pleading." See, I.R.C.P. 7(a). Additionally, the Court finds there is no reason that counsel for Chesrown and BRD could not and should not have addressed election of remedies in their reply brief on summary judgment, especially since counsel for Chesrown and BRD specifically addressed the topic of Idaho's "one action" rule. Defendants' Black Rock Development, In., and Marshall R. Chesrown's Memorandum of Authorities in Response to and in Opposition to Plaintiff's Motion for Summary Judgment, p. 5.

On November 16, 2012, BRD and Chesrown filed "Defendants' Black Rock Development, Inc., and Marshall R. Chesrown's Memorandum of Authorities in Response to Plaintiff's Supplemental Memorandum in Support of Motion for Summary

Judgment." This brief was also filed without seeking the Court's permission, and in violation of I.R.C.P. 56(c). However, neither party has objected to the late filing of the other party. And, since Samuel has not responded to the untimely filing of Chesrown and BRD, apparently Samuel, even though he is the moving party, is content with giving BRD and Chesrown the last word, in contravention of I.R.C.P. 56(c).

Due to the filing of additional briefs post hearing, the earliest Samuel's motion can be considered taken under advisement by the Court for purposes of Article V, Section 17 of the Idaho Constitution and I.C. § 59-502, was November 16, 2012, the date BRD and Chesrown filed their last, untimely, brief. Accordingly, the motion for summary judgment is now at issue.

Defendant IIB and defendant Black Rock Homeowner's Association did not submit any briefing on Samuel's motion for summary judgment, and counsel for those defendant entities did not appear at the November 7, 2012, hearing.

II. STANDARD OF REVIEW.

In considering a motion for summary judgment, the Court may properly grant a motion summary judgment only where there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. I.R.C.P. 56(c). In determining whether any issue of material fact exists, this court construes all facts and inferences contained in the pleadings, depositions, and admissions, together with the affidavits, if any, in a light most favorable to the non-moving party. *Partout v. Harper*, 145 Idaho 683, 685, 183 P.3d 771, 773 (2008). The Court draws all inferences and conclusions in the non-moving party's favor and if reasonable people could reach different conclusions or draw conflicting inferences, then the motion for summary judgment must be denied. *Zimmerman v. Volkswagen of America, Inc.*, 128 Idaho 851, 854, 920 P.2d 67, 70 (1996).

However, if the evidence shows no disputed issues of material fact, then summary judgment should be granted. *Smith v. Meridian Joint School District No. 2*, 128 Idaho 714, 718, 918 P.2d 583, 587 (1996); *Loomis v. City of Hailey*, 119 Idaho 434, 437, 807 P.2d 1272, 1275 (1991). A mere scintilla of evidence or only slight doubt as to the facts is not sufficient to create a genuine issue for purposes of summary judgment. *Samuel v. Hepworth, Nungester & Lezamiz, Inc.,* 134 Idaho 84, 87, 996 P.2d 303, 306 (2000). The non-moving party "must respond to the summary judgment motion with specific facts showing there is a genuine issue for trial." *Id*.

III. ANALYSIS

A. Applicability of Addenda and Deed of Trust to Chesrown.

The Idaho Supreme Court has addressed the liability of guarantors when a modification has been made to the contract. *Gebrueder Heidemann, K.G. v. A.M.R. Corp.*, 107 Idaho 275, 688 P.2d 1180 (1984). The Court held that "a material alteration in the principal contract, when that alteration is made after the execution of the guaranty contract and without the consent of the guarantor, discharges the guarantor *if the material alteration injures the interest of the guarantor.*" *Gebrueder*, 107 Idaho 275, 280, 688 P.2d 1880, 1185 (emphasis added). Thus, the Court held that in order to be released from liability, the guarantor must show injury due to a modification to the principal contract made without his consent. *Id*.

In this case the Addenda were signed after the original Promissory Note was executed. Affidavit of Robert Samuel, p. 2, ¶¶ 3-4, Exhibits, C-D. The Addendum to Promissory Note, executed on August 30, 2007, simply extended the due date of the loan to June 1, 2008. Affidavit of Robert Samuel, Exhibit C. The Second Addendum to Promissory Note, executed March 30, 2008, reaffirmed the original principal amount of

$4,600,000.00, confirmed payment of $1,000,000.00 as of that date, made an additional loan of $1,000,000.00 from Samuel to BRD and confirmed the due date to be June 1, 2008. Affidavit of Robert Samuel, Exhibit D. In both instances, Chesrown executed both Addenda as CEO of BRD. Affidavit of Robert Samuel, Exhibits C-D.

Regarding the Addendum to Promissory Note, executed on August 30, 2007, Chesrown cannot show injury to himself as the guarantor due to Samuel's agreement to extend the due date. There is nothing in the Addendum that states that the loan could not be repaid in full before June 1, 2008. Chesrown has not been injured by the subsequently executed Addendum, as required by *Gebrueder*.

Regarding the Second Addendum to Promissory Note, Chesrown cannot show injury to himself as that agreement did little except to reaffirm the due date and original principle amount (stating that as a result of the repayment and additional loan, the new principle amount was still $4,600,000.00). As Chesrown was the one who signed the document, as BRD's CEO and sole shareholder, no injury was sustained by Chesrown as a result of an additional loan to his company, BRD. Therefore, Chesrown cannot meet his burden to showing injury under *Gebrueder* and thus he, as a guarantor, is subject to both Addenda.

As for the Deed of Trust, the original Promissory Note, executed by both BRD and Chesrown, as a guarantor, states clearly that "This Note is secured by a Deed of Trust of even date herewith, in favor of Payee on real property located in Kootenai County, State of Idaho and more particularly described in Exhibit "B" hereto. A true and correct copy of said Deed of Trust is attached hereto and thereby incorporated herein by reference." Affidavit of Robert Samuel, Exhibit A. The Note expressly incorporates the Deed of Trust and therefore, when Chesrown executed the Note as a guarantor, he subjected himself to the obligations set forth in the Deed of Trust. Chesrown's defense

that Samuel's claims against Chesrown based on the guaranty are barred due to the terms of the Promissory Note being modified (Answer, p. 9), is without merit. Samuel is entitled to summary judgment on that issue.

B. Good Faith and Fair Dealing.

The Idaho Supreme Court has stated that "Good faith and fair dealing are implied obligations of every contract." *Luzar v. Western Surety*, 107 Idaho 693, 696, 692 P.2d 337, 340 (1984). The covenant is an objective determination of whether the parties have acted in good faith in terms of enforcing the contractual provisions. *Jenkins v. Boise Cascade Corp.*, 141 Idaho 233, 243, 108 P.3d 380, 390 (2005). However, the implied covenant of good faith and fair dealing cannot be inconsistent with the agreement executed by the parties. *First Security Bank of Idaho v Gaige*, 115 Idaho 172, 176, 765 P.2d 683, 687 (1988). Thus, the covenant does not provide for additional rights that are not available under the negotiated contract. *Cantwell v. City of Boise*, 146 Idaho 127, 136, 191 P.3d 205, 214 (2008). However, the covenant protects the rights of the parties to an agreement to receive the benefits that they have entered into. *Parker v. Boise Telco Federal Credit Union*, 129 Idaho 248, 256, 923 P.2d 493, 501 (Ct. App. 1996). The denial of a party's rights to those benefits, whatever they may be, breaches the duty of good faith implicit in the contract. *Id*.

In this case, BRD and Chesrown argue Chesrown has not breached any terms of the Deed of Trust or Addenda because he did not execute those documents in an individual capacity. Defendants' Memorandum in Response to Plaintiff's Motion for Summary Judgment, p. 4. However, as discussed above, Chesrown is subject to those documents. Chesrown's failure to allow Samuel access to his records (Affidavit of Robert Samuel, Exhibit B, p. 12, ¶ 7.5 (Deed of Trust); Affidavit of Robert Samuel,

Exhibit I), and BRD's obtaining secondary financing, in violation of the covenant against secondary financing (Affidavit of Robert Samuel, Exhibit B, p. 9, ¶ 5 (Deed of Trust)), and BRD's failure to pay taxes on the property (Affidavit of Robert Samuel, Exhibit B, p. 4, ¶ 2.7 (Deed of Trust)) are each sufficient to prove a breach of the implied covenant of good faith and fair dealing. Samuel is entitled to summary judgment on that issue.

C. Judicial Foreclosure and Deficiency Judgment (the Anti-Deficiency Statute Does Not Apply to Chesrown).

While at oral argument, counsel for Samuel withdrew Samuel's claim for judicial deed of trust foreclosure, reserving his right to raise it at a later point in time, the non-applicability of the anti-deficiency statute to Chesrown must be discussed.

Title 45, Chapter 15 of the Idaho Code governs trust deeds. Neither side in this case is contesting the fact that Title 45, Chapter 15 governs in the instant case. Idaho Code § 45-1512 states:

> At any time within 3 months after any sale under a deed of trust, as hereinbefore provided, a money judgment may be sought for the balance due upon the obligation for which such deed of trust was given as security, and in such action the plaintiff shall set forth in his complaint the entire amount of indebtedness which was secured by such deed of trust and the amount for which the same was sold and the fair market value at the date of sale, together with interest from such date of sale, costs of sale and attorney's fees. Before rendering judgment the court shall find the fair market value of the real property sold at the time of sale. The court may not render judgment for more than the amount by which the entire amount of indebtedness due at the time of sale exceeds the fair market value at that time, with interest from date of sale, but in no event may the judgment exceed the difference between the amount for which such property was sold and the entire amount of the indebtedness secured by the deed of trust.

I.C. § 45-1512.

This code section essentially caps the potential amount of the deficiency judgment using the property's fair market value. I.C. § 45-1512. The Idaho Supreme Court has held that I.C. § 45-1512 does not apply to guarantors. *First Sec. Bank of*

Idaho, N.A. v. Gaige, 115 Idaho 172, 174, 765 P.2d 683, 685 (1988). The Court found that it was better policy to follow the wording of the Idaho statute and leave any expansion of coverage to the legislature. *Id*. That principle has yet to be overruled by subsequent appellate case law in Idaho, or by the Idaho Legislature.

A court can hold a defendant liable on the guaranty agreement only. *Id*. Language that states that the guarantors are "jointly, severally, and unconditionally promise and guaranty full and complete payment . . . " of the obligation of the principal has been held to be that of an absolute guaranty. *McConnon & Co. v. Stallings*, 44 Idaho 510, 510, 258 P. 527, 528 (1927). An absolute or unconditional guarantee is a promise by the guarantor to pay the debt or perform the obligation without requiring the secured party to first exhaust its remedies against the debtor. *CIT Financial Services v. Herb's Indoor RV Center, Inc.*, 118 Idaho 185, 187, 795 P.2d 890, 892 (Ct. App. 1990). An action on a guaranty provides a separate remedy from those on the underlying principal obligation and may generally be pursued independently of an action on the principal obligation or debt. 38 Am. Jur. 2d Guaranty § 92 (2012). Thus, an unconditional guaranty does not require a creditor to attempt to collect from the principal debtor before seeking collection from the guarantor. *CIT*, 118 Idaho 185, 187, 795 P.2d 890, 892. However, suit on a guaranty still requires the non-performance of the principal debtor because by definition, a guaranty is "an undertaking by a third person to another to answer for the payment of a debt, incurred by a named person, in the event that the named person fails to pay." *Eubank v. First Nat. Bank of Bellvill*, 814 S.W.2d 130, 133 (Tex. App. 1991). A separate remedy simply refers to the fact that a creditor may choose whether to sue the principal debtor on the underlying obligation or sue the guarantor on the guaranty.

While I.C. § 45-1512 seems to apply to BRD as a borrower, under *Gaige* it does not apply to Chesrown as a guarantor. In his reply brief, Samuel states that:

> [O]nce the liability of Defendants is adjudicated, Plaintiff may legally collect the entire judgment from Defendant Chesrown as a guarantor, without exercising the power of sale rights under the Deed of Trust. Non-judicial foreclosure will be necessary only if Defendant Chesrown's assets are insufficient to satisfy the judgment. In the event that foreclosure proceeds fail to satisfy the remaining judgment amounts outstanding, Plaintiff may then seek a deficiency judgment against Defendant Black Rock Development within three months thereafter, pursuant to Idaho Code § 45.1512. At that time, evidence may be submitted as to the Property's fair market value as of the date of sale.

Plaintiff's Reply to Defendants' Opposition to Motion for Summary Judgment, pp. 5-6.

Under *CIT*, Samuel is not required to exhaust its remedies against BRD before seeking redress from Chesrown because, as the Note shows, it was an unconditional guaranty, as there was no limiting language included (Affidavit of Robert Samuel, Exhibit A, p. 2 (Promissory Note)). Therefore, the anti-deficiency statute does not apply to Chesrown and thus, the deficiency cannot be limited by such.

D. Election of Remedies.

At oral argument on November 7, 2012, BRD and Chesrown for the first time claimed Samuel made an election of remedies by seeking judicial foreclosure in his Complaint. At oral argument, counsel for BRD and Chesrown for the first time cited to the Court two cases related to election on remedies: *U. S. Fidelity & Guaranty Co. v. Clover Creek Cattle Co.*, 92 Idaho 889, 452 P.2d 993 (1969) and *Wolford v. Tankersley*, 107 Idaho 1062, 692 P.2d 1201 (1984). At oral argument, counsel for BRD and Chesrown argued that *U.S. Fidelity* sets forth the three-part test for election of remedies, that *Wolford* affirmed the test, and that this case meets the three-part test. Counsel for BRD and Chesrown argued the three part test is: 1) there must be two or more competing exiting remedies between which the party has the right to elect, 2) the

remedies open to that party are inconsistent, and 3) by bringing the action or by some other act, that party indicates that party's choice between the two (or more) inconsistent remedies. Counsel for BRD and Chesrown further argued Samuel cannot have this Court make a determination that Samuel has a right to non-judicial foreclosure because he already previously "elected" to request for judicial foreclosure, both in his Complaint and his Memorandum for Summary Judgment. As such, BRD and Chesrown claim that the mortgage foreclosure statutes, I.C. § 6-101 and § 6-108 apply. BRD and Chesrown argue this result because I.C. § 45-1505 states that a trustee may foreclose a deed of trust by advertisement and sale under this act if no action, suit or proceeding has been instituted to recover the debt then remaining or if such action or proceeding has been instituted, the action or proceedings has been dismissed. BRD and Chesrown further argue that I.C. § 45-1503 states that a deed of trust may be foreclosed by advertisement and sale in the manner provided herein or at the option of the beneficiary, by foreclosure as provided by law for the foreclosure of mortgages on real property and if any obligation secured by a trust deed is breached, the beneficiary may not institute a judicial action against the grantor to enforce an obligation owed by the grantor unless the action is one for foreclosure as provided for foreclosure of mortgages on real property. As such, BRD and Chesrown state that I.C. § 6-108 applies, which would allegedly serve to limit the potential deficiency judgment via the market value of the property. Thus they appear to be making the argument that by "electing" judicial foreclosure in his Complaint and Memorandum in Support of Summary Judgment, Samuel is precluded from requesting non-judicial foreclosure.

Counsel for Samuel responded by noting that BRD and Chesrown had not pointed to any issues of material fact as to whether or not a default had occurred in this case. Supplemental Memorandum in Support of Plaintiff Robert C. Samuel's Motion for

Summary Judgment, pp. 2-3. Further, Samuel argued that because Samuel had withdrawn his motion for summary judgment on the issue of judicial foreclosure, that the points made by BRD and Chesrown at least relative to the "one action" rule, are moot. *Id.,* pp. 4-5.

U.S. Fidelity held that the three-part test for election of remedies are: 1) there must be in fact two or more coexisting remedies between which the party has the right to elect; 2) the remedies thus open to him must be inconsistent; and 3) he must, by actually bringing his action or by some other decisive act, with knowledge of the facts, indicate his choice between two inconsistent remedies. It was noted that the term election of remedies is "generally limited to a choice by a party between inconsistent remedial rights; the assertion of one being necessarily repugnant to or a repudiation of the other." 92 Idaho 889, 899, 452 P.2d 993, 1003. *Wolford* did little more than that reaffirm the reasoning behind the doctrine of election of remedies. *Wolford* defined inconsistency of remedies as an inconsistency in the facts relied upon, not an inconsistency between the remedies. 107 Idaho 1062, 1067, 695 P.2d 1201, 1206.

First, the "election of remedies" issue is not pertinent here as the elected remedy has been withdrawn by Samuel from consideration of this summary judgment motion. BRD and Chesrown have not argued that Samuel lacks the ability to withdraw the issue from summary judgment. Nothing in I.R.C.P. 56 prohibits withdrawal of claims or issues on summary judgment. Even if there were no withdrawal by Samuel of the judicial foreclosure, there likely was no election of remedies as alternative theories on summary judgment may be considered. *Pullin v. City of Kimberly,* 100 Idaho 34, 592 P.2d 859 (1970). Nothing prohibits summary judgment on part of the issues. *Fairchild v. Wiggins,* 85 Idaho 402, 380 P.2d 6 (1963).

Second, even if this Court could somehow conclude that Samuel had indicated his choice between two remedies (it cannot) by Samuel's listing judicial foreclosure as a potential remedy in the Complaint, subsequently mentioning such in Samuel's opening brief on summary judgment, only to withdraw the issue from summary judgment after BRD and Chesrown had responded and pointed out disputed factual issues, BRD and Chesrown have not shown the remedies are "inconsistent" with each other. As *Wolford* defined inconsistency of remedies as an inconsistency in the facts relied upon, not an inconsistency between the remedies (107 Idaho 1062, 1067, 695 P.2d 1201, 1206), the *facts* holding Chesrown personally liable on his Guaranty and Promissory Note and BRD liable on the Promissory Note, are the same *facts* that would result in judicial foreclosure. Those *facts* are the existence of a note and guaranty, validity of the note and guaranty, and breach of the note and guaranty. BRD and Chesrown have simply not met the requirements of *U.S. Fidelity* and *Wolford*.

Idaho Code § 45-1505 states:

> The trustee may foreclose a trust deed by advertisement and sale under this act if:
> . . . (4) No action, suit or proceeding has been instituted to recover the debt then remaining secured by the trust deed, or any part thereof, or if such action or proceeding has been instituted, the action or proceeding has been dismissed.

IC. § 45-1505. Idaho Code § 45-1503 states:

> (1) Transfers in trust of any estate in real property as defined in section 45-1502(5), Idaho Code, may hereafter be made to secure the performance of an obligation of the grantor or any other person named in the deed to a beneficiary. Where any transfer in trust of any estate in real property is hereafter made to secure the performance of such an obligation, a power of sale is hereby conferred upon the trustee to be exercised after a breach of the obligation for which such transfer is security, and a deed of trust executed in conformity with this act may be foreclosed by advertisement and sale in the manner hereinafter provided, or, at the option of beneficiary, by foreclosure as provided by law for the foreclosure of mortgages on real property. If any obligation

> secured by a trust deed is breached, the beneficiary may not institute a judicial action against the grantor or his successor in interest to enforce an obligation owed by the grantor or his successor in interest unless:
> (a) The trust deed has been foreclosed by advertisement and sale in the manner provided in this chapter and the judicial action is brought pursuant to section 45-1512, Idaho Code; or
> (b) The action is one for foreclosure as provided by law for the foreclosure of mortgages on real property; or
> (c) The beneficiary's interest in the property covered by the trust deed is substantially valueless as defined in subsection (2) of this section, in which case the beneficiary may bring an action against the grantor or his successor in interest to enforce the obligation owed by grantor or his successor in interest without first resorting to the security; or . . .
> (2) As used in this section, "substantially valueless" means that the beneficiary's interest in the property covered by the trust deed has become valueless through no fault of the beneficiary, or that the beneficiary's interest in such property has little or no practical value to the beneficiary after taking into account factors such as . . . and such other factors as the court may deem relevant in determining the practical value to the beneficiary of the beneficiary's interest in the real property covered by the trust deed.
> (3) The beneficiary may bring an action to enforce an obligation owed by grantor or his successor in interest alleging that the beneficiary's interest in the property covered by the trust deed is substantially valueless . . . If the court finds that the property is not substantially valueless, the beneficiary may seek judicial foreclosure of the trust deed, or he may dismiss the action and foreclose the trust deed by advertisement and sale in the manner provided in this chapter. If the court finds that the beneficiary's interest in the property covered by the trust deed is substantially valueless and enters a judgment upon the obligation, when that judgment becomes final the beneficiary shall execute a written request to the trustee to reconvey to the grantor or his successor in interest the estate in real property described in the trust deed. . .

I.C. § 45-1503.

Idaho Code § 45-1505 makes it clear that in order to foreclose a deed of trust by advertisement and sale (non-judicial foreclosure), no other action must have been instituted to recover the debt, i.e. a lawsuit. Thus, BRD and Chesrown are correct in concluding that unless this lawsuit is dismissed, Samuel cannot proceed with a non-judicial foreclosure.

Further, under I.C. § 45-1503, the beneficiary of a deed of trust, in this case Samuel, is allowed to institute a judicial action against the grantor to enforce an obligation owed by the grantor because the action is "one for foreclosure as provided by the law for the foreclosure of mortgages on real property." I.C. § 45-1503(1)(b).

BRD and Chesrown argue that because the remedy available to Samuel is judicial foreclosure, I.C. § 6-108 applies, which restricts deficiency judgments in cases involving a foreclosure of a mortgage on real property. I.C. § 6-108 states:

> No court in the state of Idaho shall have jurisdiction to enter a deficiency judgment in any case involving a foreclosure of a mortgage on real property in any amount greater than the difference between the mortgage indebtedness, as determined by the decree, plus costs of foreclosure and sale, and the reasonable value of the mortgaged property, to be determined by the court in the decree upon the taking of evidence of such value.

I.C. § 6-108.

Although this Court can find no case directly on point with I.C. § 6-108 pertaining to guarantors, it is important to note *First Sec. Bank of Idaho, N.A. v. Gaige*, 115 Idaho 172, 174, 765 P.2d 683, 685 (1988). As stated in the earlier in this decision, the Idaho Supreme Court has held that I.C. § 45-1512 (another anti-deficiency statute) does not apply to guarantors. *First Sec. Bank of Idaho, N.A. v. Gaige*, 115 Idaho 172, 174, 765 P.2d 683, 685 (1988). The Idaho Supreme Court found that it was better policy to follow the wording of the Idaho statute and leave any expansion of coverage to the legislature. *Id*. That principle has yet to be overruled in Idaho. As such, it is likely that the same principle and reasoning would apply to the anti-deficiency statute in I.C. § 1-608. Thus Chesrown's liability for the deficiency would not be limited by I.C. § 1-608.

In any event, what is most important to note is that first in his reply brief and then more directly in his oral argument, Samuel has withdrawn his motion for summary judgment on the issue of judicial foreclosure. As such, that issue is off the table and to

decide that issue now would be premature. Thus, that issue will not be addressed at this time.

Chesrown and BRD raised the issue of election of remedies as a defense to Samuel's summary judgment motion. Although Chesrown and BRD have not filed a motion for summary judgment, this Court grants summary judgment in favor of Samuel and against Chesrown and BRD as to the inapplicability of the doctrine of election of remedies to the facts of this case.

E. Legal Interest Rate.

Idaho Code § 28-22-104(2) sets forth the legal rate of interest on judgments:

> (2) The legal rate of interest on money due on the judgment of any competent court or tribunal shall be the rate of five percent (5%) plus the base rate in effect at the time of entry of the judgment. The base rate shall be determined on July 1 of each year by the Idaho state treasurer and shall be the weekly average yield on United States treasury securities as adjusted to a constant maturity of one (1) year and rounded up to the nearest one-eighth percent (⅛ %). The base rate shall be determined by the Idaho state treasurer utilizing the published interest rates during the second week in June of the year in which such interest is being calculated. The legal rate of interest as announced by the treasurer on July 1 of each year shall operate as the rate applying for the succeeding twelve (12) months to all judgments declared during such succeeding twelve (12) month period. The payment of interest and principal on each judgment shall be calculated according to a three hundred sixty-five (365) day year.

I.C. § 28-22-104(2).

However, I.C. § 28-22-104(2) does not squarely address interest that accrues from the date of default until judgment is rendered. The Idaho Supreme Court has held that where the deed of trust provides an applicable interest rate, in the event of default, that such language clearly gives the lender a right to receive that stated interest rate until the date of judgment. *Frontier Federal Sav. And Loan Ass'n v. Douglass*, 123 Idaho 808, 814, 853 P.2d 553, 559 (1993). The Court in *Frontier* stated:

> The deed of trust provides that in the event of default, the holder of the note can declare the whole amount due and payable "and the same shall thereafter bear interest at the rate of sixteen percent (16%)." The note provides for the payment of interest until the entire indebtedness is fully paid. This language clearly gives Frontier a right to receive the 16% interest it alleged in the amounts owing. We hold that Frontier is entitled to this rate of interest until the date of judgment.

123 Idaho 808, 814, 853 P.2d 553, 559 (1993).

In this case, as argued by Samuel, judgment has not yet been rendered. Therefore, the post-judgment interest rate set forth in I.C. § 28-22-104(2) does not apply. The stated default interest rate in the original Promissory Note, executed by both BRD and Chesrown, as guarantor, is 12% per annum. Affidavit of Robert Samuel, Exhibit A, p. 1 (Promissory Note). Under *Frontier*, the stated interest rate, if clearly stated in the Note, gives the lender a right to that interest rate, until the date of judgment. Therefore, until the time the Court enters a judgment, Samuel is entitled to the stated interest rate of 12% per annum.

F. Costs under I.R.C.P. 54(d)(1).

Idaho Rule of Civil Procedure 54(d)(1) sets forth allowable costs. I.R.C.P. 54(d)(1). Discretionary costs are set forth in I.R.C.P. 54(d)(1)(D):

> (D) Discretionary Costs. Additional items of cost not enumerated in, or in an amount in excess of that listed in subparagraph (C), may be allowed upon a showing that said costs were necessary and exceptional costs reasonably incurred, and should in the interest of justice be assessed against the adverse party. The trial court, in ruling upon objections to such discretionary costs contained in the memorandum of costs, shall make express findings as to why such specific item of discretionary cost should or should not be allowed. In the absence of any objection to such an item of discretionary costs, the court may disallow on its own motion any such items of discretionary costs and shall make express findings supporting such disallowance.

I.R.C.P. 54(d)(1)(D)

Discretionary costs may include "long distance phone calls, photocopying, faxes, travel expenses" and additional costs for expert witnesses. *Hayden Lake Fire*

Protection Dist. v. Alcorn, 141 Idaho 307, 314, 109 P.3d 161, 168 (2005). The trial court must make express findings as to why a party's discretionary costs should or should not be allowed. I.R.C.P. 54(d)(1)(D); *Id*. Express findings as to the general nature of the costs requested and whether those costs are necessary, reasonably, exceptional, and in the interests of justice is sufficient. *Id*.

In this case, BRD and Chesrown dispute the award of costs for Westlaw legal research ($189.30), American Data Find charges ($3,000.00) and "hand deliver charges" ($10.00). Defendants' Memorandum in Response to Plaintiff's Motion for Summary Judgment, p. 9. Samuel agrees with BRD and Chesrown that such costs are not expenses that should be granted as a matter of right under I.R.C.P. 54(d)(1)(C), but Samuel argues that the Court has discretion to award these costs under I.R.C.P. 54(d)(1)(D). Plaintiff's Reply to Defendants' Opposition to Motion for Summary Judgment, p. 7. Samuel claims the American Data Find expense was to determine the reasonableness of filing a lawsuit against Chesrown and BRD. *Id.* Samuel claims the Westlaw expenses are allowable under I.R.C.P. 54(e)(3)(K). *Id.* The Court does have discretion to award costs that are necessary and exceptional costs that are reasonably incurred under I.R.C.P. 54(d)(1)(D). The Court finds the American Data Find expenses are "exceptional". If BRD and Chesrown were judgment proof, there is little reason to proceed with the lawsuit. That expense was necessarily incurred, reasonable, exceptional, and in the interests of justice, for purposes of this lawsuit. *Hayden Lake Fire Protection Dist. v. Alcorn*, 141 Idaho 307, 314, 109 P.3d 161, 168 (2005). The "hand delivery charge" is simply not exceptional, even though it may have been necessary and reasonable. Samuel misinterprets I.R.C.P. 54(e)(3)(K) in arguing that Westlaw expenses are "allowable" under I.R.C.P. 54(e)(3)(K). *Id.* Idaho rule of Civil

Procedure 54(e)(3)(K) does not make attorney fees "allowable" in a cost analysis under I.R.C.P. 54(d). This Court interprets I.R.C.P. 54(e)(3)(K) to require this Court to consider "the reasonable cost of automated research" as one of several factors in determining the amount of attorney fees under I.R.C.P. 54(e)(3). Westlaw expenses might be "exceptional" under I.R.C.P. 54(d)(1)(D), in the right case, or in this case if more explanation were given. At this point, this Court cannot determine the Westlaw expenses to be "exceptional" in order to be considered as a discretionary cost.

This Court finds that at the present time, the $3,000.00 American Data Find expense would likely be allowed as a discretionary costs, but the other requested discretionary costs would likely be denied. However, as set forth below, a final determination of costs at this time is premature, because Samuel has not filed a memorandum of costs. Were Samuel to follow the procedure set forth in I.R.C.P. 54(d)(5), the Court could properly address costs.

G. Attorney Fees.

Samuel has requested attorney fees in the amount of $18,879.88. Memorandum in Support of Plaintiff Robert C. Samuel's Motion for Summary Judgment, p. 9. This amount is supported by the Affidavit of Robert A. Dunn in Support of Plaintiff's Motion for Summary Judgment, which includes a copy of the billing sheet in this case. Samuel did not set forth the basis for that award in his Memorandum, motion or affidavits. However, BRD and Chesrown did not object to the request for attorney fees. Samuel's Complaint obliquely requests "…all interest, attorney fees, and costs as provided for in the contracts, statues and at law;" Complaint, p. 11, ¶ 1. The promissory note is silent on the issue of attorney fees. Complaint, Appendix A. The deed of trust lists attorney fees. Complaint, Appendix B, p. 15, ¶ 12.4. That paragraph reads:

> Borrower shall pay to Lender on demand any and all legal expenses, including legal expenses and attorney's fees, incurred or paid by Lender in protecting its interest in the Property or Personal Property or in collecting any amount payable hereunder or in enforcing its rights hereunder with respect to the Property or Personal Property, whether or not any legal proceeding is commenced hereunder or thereunder and whether or not any default or Event of Default shall have occurred and is continuing, together with interest thereon at Default Rate from the date paid or incurred by Lender until such expense are paid by Borrower.

While not the "better practice", the fact that Samuel did not set forth the basis for the award of attorney fees in his Memorandum, motion or affidavits, is not fatal. *Devine v. Cluff,* 110 Idaho 1, 4, 713 P.2d 437, 440 (Ct.App. 1985); *Eighteen Mile Ranch v. Nord Excavating & Paving,* 141 Idaho 716, 117 P.3d (2005). The Complaint requests attorney fees as allowed under the contract. The contract in this case is the deed of trust. Attorney fees can be awarded by the trial court when provided for by contract. *Thomas v. Arkoosh Produce, Inc.,* 137 Idaho 352, 361, 48 P.3d 1241, 1250 (2002). This action is certainly one brought under the contract (the deed of trust) or to enforce the terms of the contract, in order for attorney fees to be awarded. *Lane Ranch Partnership v. City of Sun Valley,* 144 Idaho 584, 591-92, 166 P.3d 374, 381-82 (2007).

This Court finds Samuel to be the prevailing party in this case. Under the terms of the contract, Samuel is entitled to reasonable attorney fees against BRD, but not against Chesrown. This ruling does not preclude a later application by Samuel against Chesrown. The amount of attorney fees requested by Samuel, as set forth in the Affidavit of Robert Dunn, appear at this juncture, to be reasonable. Applying the factors in I.R.C.P. 54(e)(3)(A)-(K), (including the Westlaw expense) this Court at this time can find no reason to justify an upward or downward adjustment to the amount of fees Samuel seeks. Were the correct procedure to have been followed by Samuel, BRD and Chesrown's failure to object would constitute a waiver of the right to contest the

requesting party's entitlement to the fees sought. *Fearless Farris Wholesale, Inc. v. Howell,* 105 Idaho 699, 704, 672 P.2d 577, 582 (Ct.App. 1983).

However, this Court finds that to award attorney fees at this time would be premature. Idaho Rule of Civil Procedure 54(e)(5) allows attorney fees to be "…processed in the same manner as costs and included in the memorandum of costs," and costs are discussed in I.R.C.P. 54(d)(5). Idaho Rule of Civil Procedure 54(d)(5) allows for a memorandum of costs to be filed after the court's decision or a verdict of a jury. There has been no such memorandum of costs file at this time, and this Court, while making a "decision", has not entered any judgment at this time.

IV. CONCLUSION AND ORDER.

For the reasons stated above;

IT IS HEREBY ORDERED the Promissory Note expressly incorporates the Deed of Trust and therefore, when Chesrown executed the Note as a guarantor, Chesrown subjected himself to the obligations set forth in the Deed of Trust. Chesrown's defense that Samuel's claims against Chesrown based on the guaranty are barred due to the terms of the Promissory Note being modified (Answer, p. 9) is without merit. Because the Promissory Note expressly incorporates the Deed of Trust, when Chesrown executed that Note as guarantor, he subjected himself to the obligations set forth in the terms of the Deed of Trust, and that fact is unchanged by later modification of the Promissory Note. Samuel is GRANTED summary judgment against Chesrown on that issue.

IT IS FURTHER ORDERED Samuel's Motion for Summary Judgment is GRANTED in part as to Samuel's claims that: 1) BRD and Chesrown have both breached their duties under the promissory note and loan documents, and thus, are jointly and severally liable for amounts outstanding under the promissory note; and

2) BRD and Chesrown have breached the duty of good faith implied in their contract with Samuel.

IT IS FURTHER ORDERED Samuel is granted summary judgment that he is entitled to a deficiency judgment for all amounts owed by BRD and Chesrown which remain unsatisfied after any future foreclosure of the deed of trust.

IT IS FURTHER ORDERED defendant Chesrown has breached his duties under the unconditional guarantee; Samuel may collect his entire judgment against defendant Chesrown without exercising its power of sale rights under the Deed of Trust; Samuel may proceed directly against defendant Chesrown to satisfy any judgment entered by this Court; and the anti-deficiency statute does not apply to Chesrown and thus, the deficiency cannot be limited by such.

IT IS FURTHER ORDERED that Samuel has not "elected his remedy" by alleging judicial foreclosure in his Complaint, by raising the issue on summary judgment and subsequently withdrawing such. Furthermore, *Gaige* shows Chesrown's liability for the deficiency would not be limited by I.C. § 1-608. Any claim made by Chesrown and BRD of an "election of remedies" made by Samuel is DENIED on summary judgment.

IT IS FURTHER ORDERED that plaintiff Samuel is entitled to Summary Judgment against defendant BRD and defendant Chesrown in the amount of $3,107.080.19 for unpaid principal; accrued unpaid interest of $1,460.783.31 calculated at 12% per anum; and $148,807.96 for reimbursement for real estate taxes paid by Samuel.

IT IS FURTHER ORDERED until the time the Court enters a Judgment, Samuel is entitled to the stated interest rate of 12% per annum (the stated default interest rate in the original Promissory Note, executed by both BRD and Chesrown, as guarantor) on

the debt and guarantee; because judgment has not yet been rendered the post-judgment interest rate set forth in I.C. § 28-22-104(2) does not apply.

IT IS FURTHER ORDERED plaintiff Samuel's Motion for Summary Judgment as it pertains to costs and attorney fees is DENIED at the present time, to be addressed at a later time after Samuel follows the procedure set forth in I.R.C.P. 54(d)(5).

IT IS FURTHER ORDERED plaintiff Samuel is the prevailing party as against both defendant BRD and defendant Chesrown.

IT IS FURTHER ORDERED that counsel for plaintiff Samuel prepare a Judgment consistent with this Memorandum Decision and Order.

Entered this 27th day of December, 2012.

_____
John T. Mitchell, District Judge

Certificate of Service

I certify that on the _____ day of December, 2012, 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 #**
Kevin W. Roberts, Maximilian Held	(509) 455-8734	Sheila Schwager	(208) 954-5261
John F. Magnuson	(208) 667-0500	Timothy J. Giesa	(509) 838-6341

_____
Jeanne Clausen, Deputy Clerk