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

AED, INC., an Idaho Corporation,)
)
Plaintiff,)
vs.)
)
KDC INVESTMENTS, LLC, a Virginia LLC, and LEE CHAKLOS and KRYSTAL CHAKLOS, individually,)
Defendants.)
)
)

Case No. **CV 2010 7217**

MEMORANDUM DECISION AND ORDER GRANTING DEFENDANT KDC'S MOTION FOR SUMMARY JUDGMENT AND DENYING PLAINTIFF AED'S MOTION FOR RECONSIDERATION

I. PROCEDURAL HISTORY AND FACTUAL BACKGROUND.

This matter is before the Court on defendant KDC Investments LLC's (KDC) Motion for Summary Judgment filed December 15, 2010.

This Motion for Summary Judgment follows on the heels of KDC's Motion for Preliminary Injunction filed November 17, 2010, which was denied on December 15, 2010, as this Court found there are too many unanswered questions to grant such relief. Memorandum Decision and Order on Defendant KDC's Motion for Preliminary Injunction, p. 27-28. The following facts are taken from that December 15, 2010, "Memorandum Decision and Order on Defendant KDC's Motion for Preliminary Injunction":

> This lawsuit involves the sale of a bridge across the Ohio River on the Ohio/West Virginia border. Due to a December 23, 2009, Order from Federal District Court in Ohio, that bridge must be demolished no later than December 21, 2011. Affidavit of Krystal Chaklos in Support of Motion for Expedited Hearing, filed October 6, 2010, Exhibit C, p. 1. Defendant

KDC bought the bridge from plaintiff AED, Inc. (AED) via what will be referred to as the "purchase agreement", a document signed May 20, 2010. Amended Complaint, Exhibit A. Under the terms of that purchase agreement, KDC assumed responsibility for "proper demolition and removal [of the bridge] on or before June 1, 2011." *Id.,* p. 1. Subsequently, a separate "demolition agreement" between the parties was at least discussed, if not executed. At the end of the "demolition agreement" AED's Eric J. Kelly, Sr. signed the document on June 1, 2010, as did KDC's Krystal Chaklos, also on June 1, 2010. However, the "demolition agreement" which is titled a "proposal" lacks a signature by any person from KDC on the first page "accepting" the agreement. The "purchase agreement" clearly places the responsibility to demolish the bridge on KDC. The "demolition agreement", if it was in fact executed by KDC, places that responsibility on AED. AED filed this lawsuit, and KDC claims the moment AED filed this lawsuit KDC's efforts to demolish the bridge stopped as a result of a letter sent the United States Coast Guard "…until the court sorts out ownership of the Bellaire Bridge." Affidavit of Krystal Chaklos in Support of Motion for Preliminary Injunction filed November 18, 2010, Exhibit 2. KDC then moved for a preliminary injunction "…prohibiting AED from repudiating the Purchase Agreement so that KDC Investments can continue its efforts to demolish and remove the Bridge..." Memorandum in Support of Motion for Mandatory Injunction, p. 20.

AED, an Idaho corporation, filed its Complaint and Jury Demand in the instant matter on August 23, 2010. AED alleged defendant KDC Investments, LLC, a Virginia LLC, and defendants Lee Chaklos and Krystal Chaklos individually (hereinafter "KDC" collectively) induced AED to enter into an agreement to sell a bridge to KDC via a promise that AED would be hired to later demolish said bridge. Complaint, p. 1, ¶ 6; Amended Complaint, p. 2, ¶ 9. AED alleges: "Said promise was material to the parties' transaction and Plaintiff would not have agreed to sell the bridge without the promise that Plaintiff would be allowed to demolish the bridge." Amended Complaint, p. 2, ¶ 9. This allegation is completely contrary to the written language found in the "purchase agreement." The "purchase agreement" places the responsibility for demolition of the bridge squarely and solely upon KDC. Amended Complaint, Exhibit A. AED would only have the right to demolish the bridge if KDC failed to do so. Amended Complaint, p. 2, ¶ 7. AED's Amended Complaint alleges fraud in the inducement and breach of contract, and seeks rescission, damages, or specific performance. Amended Complaint, pp. 3-4. In the Amended Answer to Amended Complaint and Demand for Jury Trial and Defendant KDC Investments, LLC's Amended Counterclaim, filed on November 9, 2010, KDC counterclaims fraud, breach of contract, and seeks a declaratory judgment to quiet title to the bridge. Amended Answer to Amended Complaint and Demand for Jury Trial and Defendant KDC Investments, LLC's Amended Counterclaim, pp. 8-10.

On November 17, 2010, KDC filed its motion for preliminary injunction and memorandum and affidavits in support thereof, asking this

Court to enjoin "AED from continuing to breach the sale agreement by repudiating its validity and seeking to rescind the agreement so that KDC Investments may continue the demolition process in order to demolish and remove the Bridge by June 1, 2011." Memorandum in Support of Motion for Mandatory Injunction, p. 2. KDC noticed a hearing for November 24, 2010. AED filed its Objection to Defendants' Motion for Preliminary Injunction on November 18, 2010, arguing only procedural, not substantive, issues with regard to KDC's motion. On November 22, 2010, KDC filed its Reply to Plaintiff's Objection to Defendant KDC Investments, LLC's Motion for Mandatory Injunction. At oral argument on November 24, 2010, the Court indicated its frustration with both sides: with KDC for not filing its motion for preliminary injunction until November 17, 2010, in spite of the fact that at a hearing held October 22, 2010, this Court set aside that November 17, 2010, date for hearing additional motions; and with AED for not making any substantive argument opposing the preliminary injunction, choosing instead to simply complain that KDC had violated I.R.C.P. 7(b)(3)(A) by not providing written notice of the motion fourteen days prior to the hearing. At the November 24, 2010, hearing, the Court re-scheduled oral argument on KDC's motion for preliminary injunction to December 6, 2010, providing AED with more than the requisite notice under I.R.C.P. 7(b)(3)(A). At the November 24, 2010, hearing, due to the time-sensitive nature of this case, and with the agreement of counsel for both sides, this Court also scheduled this case for a three-day jury trial beginning February 22, 2011. Following the hearing on November 24, 2010, AED filed a "Motion to Strike Portions of Krystal Chaklos Affidavit." On November 24, 2010, AED also filed the "Affidavit of Mark Wilburn in Support of Plaintiff's Objection to Issueance [sic] of Preliminary Injunction" and the "Affidavit of Eric J. Kelly in Support of Plaintiff's Objection to Issueance [sic] of Preliminary Injunction." On November 29, 2010, AED filed "Plaintiff's Response to Issuance of Preliminary Injunction", providing the Court with AED's substantive arguments regarding KDC's motion for preliminary injunction. On December 2, 2010, KDC filed "Defendant KDC Investments, LLC's Reply in Support of Motion for Preliminary Injunction." Also on December 2, 2010, KDC filed "Defendant KDC Investments, LLC's Motion to Strike Affidavits of Eric J. Kelly and Mark Wilburn." On December 3, 2010, KDC filed an "Affidavit of Lee Chaklos in Support of Motion for Preliminary Injunction" and an "Affidavit of Krystal Chaklos in Support of Motion for Preliminary Injunction".

On December 6, 2010, the same day scheduled for oral argument, AED filed a "Motion to Strike Affidavits of Krystal Chaklos and Lee Chaklos" and a motion to shorten time to hear such motion at the hearing scheduled for December 6, 2010. Also on December 6, 2010, AED filed a pleading entitled "Plaintiff's Notice of Filing" to which was attached the Idaho Secretary of State's Corporation Reinstatement Certificate dated December 3, 2010. Oral argument was held on December 6, 2010. At that hearing, counsel for KDC had no objection to AED's motion to shorten time to hear AED's Motion to Strike Affidavits of Krystal Chaklos and Lee

> Chaklos. Argument was then heard on that motion to strike, at the conclusion of which this Court denied AED's Motion to Strike Affidavits of Krystal Chaklos and Lee Chaklos.
>
> Next, argument was heard on KDC's motion to strike the affidavits of Eric J. Kelly and Mark Wilburn. At the conclusion of that argument, the Court granted KDC's motion to strike the affidavit of Eric J. Kelly as to all paragraphs except paragraphs 15-22 and the exhibits attached referred to in those paragraphs, and the Court granted KDC's motion to strike the affidavit of Mark Wilburn in its entirety. The Court then heard oral argument on KDC's motion for preliminary injunction, following which the Court took said motion under advisement.
>
> The bridge at issue is the Bellaire Toll Bridge which spans the Ohio River on the border of Ohio and West Virginia, connecting the towns of Bellaire, Ohio and Benwood, West Virginia. Memorandum in Support of Motion for Preliminary Injunction, p. 1. Demolition of the bridge was the subject of a federal lawsuit resulting in an Order requiring AED to demolish and remove the bridge by December 11, 2011. Amended Complaint, p. 1, ¶ 5.
>
> KDC and AED entered into an Asset Purchase and Liability Assumption Agreement (purchase agreement) on May 20, 2010, in which AED sold the bridge to KDC for $25,000. Memorandum in Support of Motion for Mandatory Injunction, p. 2. AED's initiation of this litigation in Idaho has brought demolition efforts to a halt, according to KDC. *Id.* KDC now seeks a preliminary injunction "to prohibit AED from continuing to breach the Purchase Agreement by repudiating its validity and seeking to rescind the Agreement." Reply to Plaintiff's Objection to Defendant KDC Investment, LLC's Motion for Mandatory Injunction, p. 4.

Memorandum Decision and Order on Defendant KDC's Motion for Preliminary Injunction, pp. 1-5.

As mentioned above, KDC filed its Motion for Summary Judgment on December 15, 2010. Also on December 15, 2010, KDC filed its Memorandum in Support of Motion for Summary Judgment, and the Affidavits of Randall Schmitz, Lee Chaklos, and Krystal Chaklos in support of its motion for summary judgment.

This Court's Pretrial Order, dated November 24, 2010, required the party opposing any motion for summary judgment to serve and file materials objecting thereto no later than 14 days before hearing on the motion. KDC's motion for summary judgment was scheduled for hearing on January 12, 2010. The deadline for AED to

object to the motion was December 29, 2010. Nothing was received by the Court from AED by this deadline, nor was anything filed by AED by that deadline.

On December 30, 2010, AED filed its "Response to Summary Judgment", an "Affidavit of Eric J. Kelly in Opposition to Summary Judgment", an "Affidavit of Arthur M. Bistline in Opposition to Summary Judgment".

On January 5, 2011, KDC filed its "Motion to Strike Affidavits of Arthur M. Bistline, Eric J. Kelly, and Mark Wilburn Filed in Support of Plaintiff's Opposition to Defendants' Motion for Summary Judgment", a "Memorandum in Support of Motion to Strike Affidavits of Arthur M. Bistline, Eric J. Kelly, and Mark Wilburn Filed in Support of Plaintiff's Opposition to Defendants' Motion for Summary Judgment", as well as a "Motion to Shorten Time" to hear the Motion to Strike Affidavits of Arthur M. Bistline, Eric J. Kelly, and Mark Wilburn Filed in Support of Plaintiff's Opposition to Defendants' Motion for Summary Judgment, since said motion was filed less than fourteen days before the January 12, 2011, hearing. I.R.C.P. 7(b)(3)(A). Also on January 5, 2011, KDC filed "Defendants' Reply Memorandum in Support of Motion for Summary Judgment." On January 7, 2011, AED filed "Plaintiff's Response to Defendants' Motion to Strike Plaintiff's Affidavits Filed in Support of Plaintiff's Opposition to Motion for Summary Judgment." On January 10, 2011, AED filed an "Affidavit of Eric J. Kelly in Support of Plaintiff's Opposition to Defendants' Motion to Strike and Defendants' Motion for Summary Judgment." The next day, on January 11, 2011, KDC filed its "Objection to Affidavit of Eric J. Kelly in Support of Plaintiff's Opposition to Defendants' Motion to Strike and Defendants' Motion for Summary Judgment."

Oral argument was held on KDC's motion for summary judgment on January 12, 2011. At oral argument on January 12, 2011, counsel for AED had no objection to the

Motion to Shorten Time to hear KDC's Motion to Strike Affidavits of Arthur M. Bistline, Eric J. Kelly, and Mark Wilburn Filed in Support of Plaintiff's Opposition to Defendants' Motion for Summary Judgment. Accordingly, the Motion to Strike was granted. At the conclusion of oral argument this Court took under advisement KDC's Motion to Strike Affidavits of Arthur M. Bistline, Eric J. Kelly, and Mark Wilburn Filed in Support of Plaintiff's Opposition to Defendants' Motion for Summary Judgment, and KDC's Motion for Summary Judgment.

At oral argument on January 12, 2011, counsel for AED objected to KDC's last second attempt to place into the record a Delta Demolition subcontract that was supplied to AED which AED refused to sign. The Court allowed additional briefing on the issue. On January 13, 2011, KDC filed a "Supplemental Affidavit of Lee Chaklos in Support of Motion for Summary Judgment." On January 20, 2011, AED filed "Plaintiff's Argument Regarding Affidavit of Lee Chaklos Pertaining to Subcontractor Proposal." On January 24, 2011, AED filed "Plaintiff's Response to Defendants' Reply Regarding Supplemental Affidavit of Lee Chaklos."

Separate from AED's response and affidavits regarding KDC's motion for summary judgment, on December 30, 2010, AED also filed a "Motion to Reconsider Memorandum Decision Holding that Plaintiff is Not Entitled to Rescission" and a "Plaintiff's Motion to Shorten Time" requesting that AED's Motion to Reconsider Memorandum Decision Holding that Plaintiff is Not Entitled to Rescission be heard on January 12, 2011 (and thus less than 14 days before hearing as required by I.R.C.P. 7(b)(3)(A)), at the same time as KDC's motion for summary judgment. Counsel for AED also filed a Notice of Hearing purporting to notice AED's Motion to Reconsider Memorandum Decision Holding that Plaintiff is Not Entitled to Rescission be heard on

January 12, 2011. However, counsel for AED did not get approval from the Clerk of the Court to have either "Plaintiff's Motion to Shorten Time" requesting that AED's Motion to Reconsider Memorandum Decision Holding that Plaintiff is Not Entitled to Rescission, or AED's motion to shorten time be heard on January 12, 2011. On January 5, 2011, KDC filed "Defendants' Memorandum in Opposition to Plaintiff's Motion to Reconsider Decision Holding that Plaintiff is Not Entitled to Recission". On January 7, 2011, AED filed its "Plaintiff's Reply to Defendants' Response to Motion to Reconsider". At the January 12, 2011, hearing on KDC's motion for summary judgment, the Court made it clear it had not read the pleadings that pertained to AED's motion for reconsideration, that the Court would not hear argument on AED's motion for reconsideration and that such motion for reconsideration would need to be heard at a later point in time. Oral argument on that motion for reconsideration was heard on January 26, 2011.

II. STANDARD OF REVIEW.

Idaho Rule of Civil Procedure 56 sets forth that, in considering a motion for summary judgment, the Court is mindful that summary judgment may properly be granted 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 must construe all facts and inferences contained in the pleadings, depositions, and admissions, together with the affidavits, if any, in the light most favorable to the non-moving party. I.R.C.P. 56(c); *Sewell v. Neilson, Monroe Inc.,* 109 Idaho 192, 194, 706 P.2d 81, 83 (Ct. App. 1985). Summary judgment must be denied if reasonable persons could reach differing conclusions or draw conflicting inferences from the evidence. *Smith v. Meridian Joint School District No. 2,* 128 Idaho 714, 718, 918 P.2d 583, 587 (1996).

A trial court's decision to grant or deny a motion for reconsideration is reviewed for an abuse of discretion. *Jordan v. Beeks,* 135 Idaho 586, 592, 21 P.3d 908, 914 (2001). 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). A motion for reconsideration of an interlocutory order of the trial court may be made at any time before entry of the final judgment, but not later than fourteen days after entry of the final judgment. I.R.C.P. 11(A)(2)(B).

III. ANALYSIS.

A. KDC's Motion to Strike Affidavits of Kelly, Bistline and Wilburn.

> The admissibility of evidence contained in affidavits and depositions in support of or in opposition to a motion for summary judgment is a threshold question to be answered before applying the liberal construction and reasonable inferences rule to determine whether the evidence is sufficient to create a genuine issue for trial. *Gem State Ins. Co. v. Hutchinson,* 145 Idaho 10, 13, 175 P.3d 172, 175 (2007) (citing *Carnell v. Barker Mgmt., Inc.,* 137 Idaho 322, 327, 48 P.3d 651, 656 (2002)). This Court applies the abuse of discretion standard when reviewing a trial court's determination of the admissibility of testimony in connection with a motion for summary judgment. *Id.,* at 15, 175 P.3d at 177. (citing *McDaniel v. Inland Northwest Renal Care Group-Idaho, LLC,* 144 Idaho 219, 221, 159 P.3d 856, 858 (2007)).

J-U-B Engineers, Inc. v. Security Ins. Co. of Hartford, 146 Idaho 311, 314-15, 193 P.3d 858, 861-62 (2008).

KDC seeks to strike the affidavits of Arthur Bistline, Eric Kelly, and Mark Wilburn as irrelevant to the matters before the Court. KDC also argues Bistline's affidavit contains e-mails for which no foundation has been laid and matters which are the subject of settlement negotiations and not properly before the Court pursuant to I.R.E. 408. Memorandum in Support of Motion to Strike- pp. 3-4. KDC claims all but paragraph one of Bistline's affidavit is hearsay. *Id.,* p. 4. KDC states Kelly's affidavit is also irrelevant, and that none of the matters discussed by Kelly dispute that AED did not

have a West Virginia contractor's license. *Id.,* pp. 4-5. Finally, KDC claims none of Wilburn's affidavit is relevant to the matter before the Court as he merely discusses having applied for and received the applicable license and does not dispute AED's not having a valid license at the time it entered into the demolition agreement with KDC. *Id.,* pp. 5-6.

AED responds that its affidavits point to the question of whether KDC ever intended to perform the agreement it had with AED concerning demolition of the bridge. Plaintiff's Response to Defendants' Motion to Strike, pp. 2-4. AED also argues no portion of Bistline's affidavit contains an offer of compromise and Rule 408 is therefore inapplicable and, as Bistline had knowledge of conversations he previously had, no hearsay is implicated. *Id.,* pp. 4-5. With regard to Kelly's and Wilburn's affidavits, AED points out that the mere question of whether AED had a valid contractor's license is not the only issue raised at summary judgment. *Id.,* p. 5. AED, finally, evaluates both Wilburn's and Kelly's affidavits for any plausible hearsay objections and finds none. *Id.,* pp. 6-7.

On summary judgment, the district court is not permitted to weigh evidence or resolve controverted factual issues. *American Land Title Co. v. Isaak,* 105 Idaho 600, 671 P.2d 1063 (1983); *Altman v. Arndt,* 109 Idaho 218, 221, 706 P.2d 107, 110 (Ct.App. 1985). But, where pleadings, depositions, admissions, or affidavits raise questions as to the credibility of witnesses or the weight of the evidence, the motion for summary judgment should be denied. *Merrill v. Duffy Reed Construction Co.,* 82 Idaho 410, 353 P.2d 657 (1960). The Court (as trier of fact at the summary judgment stage of proceedings) is entitled to give testimony the weight to which it deems such evidence is entitled. *Christensen v. Nelson,* 125 Idaho 663, 666, 873 P.2d 917, 920 (Ct.App. 1994)

("As a trier of fact, the district court was allowed to make the final decision on how much weight, if any, to give to an expert's testimony. Provided that the trier of fact does not act arbitrarily, an expert's opinion may be rejected even when uncontradicted. *Simpson v. Johnson,* 100 Idaho 357, 362, 597 P.2d 600, 605 (1979).")

If KDC now seeks to call into question the veracity or credibility of witnesses, it would follow that this Court should not grant it the summary judgment it seeks. The question of whether a matter is relevant under I.R.E. 401 is very broad. That is, whether the existence of *any fact* of consequence to the determination of the action is made more or less probable than it would have been without the proffered evidence. I.R.E. 401. A trial court's ruling on the relevance of evidence before it is reviewed under the abuse of discretion standard. *Slack v. Kelleher,* 140 Idaho 916, 924, 104 P.3d 958, 966 (2004). Therefore, although not relevant to the precise issue identified by KDC (i.e. whether AED had the proper West Virginia license at the time it entered into the demolition agreement), it cannot be said that the affidavits of Bistline, Kelly and Wilburn contain evidence which would not make any fact of consequence more or less probable than it would be without the proffer of such evidence. All of KDC's relevance objections are overruled.

As to KDC's objections to Bistline's affidavit as to lack of foundation and contains inadmissible settlement discussions, those objections are overruled.

As to KDC's hearsay objections to Kelly's affidavit, that is sustained as to paragraph 6. The objection as to paragraph 8 is sustained but on different grounds (it is unclear which of the Chaklos is claimed to be speaking). The objection as offering a legal conclusion is sustained as to paragraphs 9, 11, 12, 13, 14, 19, 20, 21, 22, 23, 24, (but all exhibits referenced in those paragraphs are admitted and considered). The

objection as to being speculative, not based upon personal knowledge and lack of foundation is sustained as to paragraphs 10, 14, 17, 20, 21, 30, 31 and 33.

As to KDC's lack of foundation objection to Wilburn's affidavit, that objection is sustained as no date is mentioned. As to the exhibit attached, the objection is sustained for the same reason.

KDC's Motion to Strike is granted as to all above sustained objections. Any objection not specifically mentioned is overruled, and as to all overruled objections, KDC's Motion to Strike is denied.

B. KDC's Motion for Summary Judgment.

In its Memorandum in Support of Motion for Summary Judgment, KDC makes several arguments: (1) AED's breach of contract claim should be dismissed because it is based on an illegal contract; (2) AED's fraud claim should be dismissed because (a) the claim was not pled with particularity, (b) AED had no right to rely upon any alleged misrepresentations where it did not have a West Virginia Contractor's License and had been administratively dissolved by the Idaho Secretary of State and (c) no evidence exists to demonstrate KDC had no intention of allowing AED to blast the bridge on June 1, 2010; (3) AED is not entitled to rescission of the Purchase Agreement; (4) AED is not entitled to specific performance; (5) AED's claims against Lee Chaklos must be dismissed because he is not an owner, director, officer, or agent of KDC; and (6) KDC should be granted its requested quiet title action. Memorandum in Support of Motion for Summary Judgment, pp. 9-22. These issues will be addressed in that order.

As a preliminary matter of law, this Court finds Idaho law applies to the contracts at issue. Counsel for AED argued at oral argument on summary judgment on January 12, 2011, that "…there is no provision in that [blasting] contract that says it's to be

interpreted by Idaho law." That is simply false. Affidavit of Krystal Chaklos in Support of Motion for Summary Judgment, Exhibit A, Bates Stamp 437, reads: "In consideration of the strict liability nature of many of AED's operations, the parties hereto agree that this agreement shall be governed by and interpreted in accordance with laws of Kootenai County, ID and subject to prime agreement." The purchase agreement also specifically states Idaho law shall apply. Complaint and Amended Complaint, Exhibit A, p. 11, ¶ 36 reads: "This Agreement shall be controlled and interpreted according to the laws of the State of Idaho."

1. Illegal Contract.

KDC argues AED's breach of contract claim on the "demolition agreement" must be dismissed because the demolition contract was illegal given AED's failure to obtain a valid contractor's license before entering into the demolition agreement. Memorandum in Support of Motion for Summary Judgment, pp. 9-12. KDC claims: "It is undisputed that AED did not have its West Virginia contractor's license at the time of entering the demolition agreement and did not receive it until October 17, 2010." *Id.,* p. 11. No citation is given for this claim. The Affidavit of Krystal Chaklos in Support of Motion for Summary Judgment, p. 3, ¶ 8, places the fact in the record, and places the burden on AED to rebut the claim. Krystal Chaklos of KDC states:

> KDC did not pay the $30,000 to AED because AED never supplied any of the necessary permits or licenses to perform operations in West Virginia. KDC repeatedly informed AED that it needed a West Virginia contractor's license to perform the blasting. However, at no time did AED ever provide proof that it obtained a West Virginia contractor's license.

Affidavit of Krystal Chaklos in Support of Motion for Summary Judgment, p. 3, ¶ 8.

It is KDC's contention that the demolition agreement between the parties is illegal, and therefore void, because it amounts to a contract to perform an act prohibited

by law; that is, AED entered into the demolition agreement without the required West Virginia contractor's license. *Id.,* p. 9. AED does not deny it lacked a contractor's license when it entered into the contract. AED instead argues the *purpose* of the contract was not illegal, thus, the contract itself is not rendered illegal. Response to Summary Judgment, p. 5. AED states it had the ability to obtain a valid West Virginia contractor's license (and eventually did so), and further, West Virginia law does not render a contract illegal for failure to obtain proper government approval. *Id.,* p. 6.

KDC cites for this Court the Idaho Supreme Court case *Trees v. Kersey,* 138 Idaho 3, 56 P.3d 765 (2002), as being factually similar. *Id.,* p. 10. AED states the purpose of the agreement here, unlike the one in *Trees,* was not to break the law. Response to Summary Judgment, p. 5. In *Trees,* the general contractor plaintiff lost its public works license and bonding capacity, but entered into an agreement with a second general contractor, "which provided that the Kerseys would bid on the project in their name, procure the bond, insurance, and pay the bills, and Trees would be responsible for everything else, including acting as the general contractor on the job." 138 Idaho 3, 5, 56 P.3d 765, 767. In Idaho, an illegal contract is one which "rests on illegal consideration consisting of any act or forbearance which is contrary to law or public policy." *Trees,* 138 Idaho 3, 6, 56 P.3d 765, 768, citing *Quiring v. Quiring,* 130 Idaho 560, 566, 944 P.2d 695, 701 (1997). As quoted by KDC, a contract "made for the purpose of furthering any matter or thing which is prohibited by statute…is void." *Kunz v. Lobo Lodge,* 133 Idaho 608, 611, 990 P.2d 1219, 1222 (Ct.App. 1999). Memorandum in Support of Motion for Summary Judgment, p. 11. The District Court in *Trees* had enforced the illegal contract between the parties, finding that a joint venture existed. The Idaho Supreme Court found this to be error. 138 Idaho 3, 9-10, 56 P.3d

765, 771-72. However, because of the unique facts of the case, particularly the District Court's finding that Kerseys had committed many instances of fraud independent of the wrong committed to the public, the Idaho Supreme Court opted not to strictly apply the illegality doctrine, but rather applied a fraud exception. 138 Idaho 3, 10, 56 P.3d 765, 772. (holding the Kerseys could not benefit from the joint venture agreement, engage in fraudulent conduct, and then seek to avoid enforcement of the agreement.)

In their Purchase Agreement in this case, AED and KDC agreed the terms of the agreement be controlled and interpreted according to *Idaho* law. Purchase Agreement, p. 11, ¶ 36. Such choice of law provisions are addressed by Idaho Code § 28-1-105:

> Except as provided hereafter in this section, when a transaction bears a reasonable relation to this state and also to another state or nation, the parties may agree that the law either of this state or such other state or nation shall cover their rights and duties. Failing such agreement, this act applies to transactions bearing an appropriate relation to the state.

I.C. § 28-105(1). The requirements of the Idaho Contractor Registration Act (and/or the Idaho Public Works Contractors Act) and the West Virginia Contractor Licensing Act are substantially similar. Both require a contractor to be registered or licensed in order to engage in the business or act in the capacity of a contractor or when holding himself out as a contractor. *See* I.C. § 54-1902(1); I.C. § 54-5201(1); W.Va.Code § 21-11-1. Both the Idaho and West Virginia Codes contemplate the licensing and registration requirements to apply when a person submits a bid to perform construction; there is no requirement that actual construction be performed. I.C. § 54-1901(b); I.C. § 54-5203(4)(a); W.Va. Code § 21-11-3(c). Because of the choice of law provision in the Purchase Agreement, Idaho law controls regarding submission of bids and entering into contracts to perform construction while not properly licensed and/or registered.

A court has a duty to *sua sponte* raise the issue of illegality of a contract. *Barry*

v. Pacific West Construction, Inc., 140 Idaho 827, 832, 103 P.3d 440, 445 (2004) (holding a contract between a general contractor and subcontractor on a public works project was void for failure of the subcontractor to have a public works license and that both the district courts and Appellate Courts of Idaho have a duty to raise the issue of illegality.); *ParkWest Homes, LLC v. Barnson,* 149 Idaho 603, ___, 238 P.3d 203, 208 (2010). In Idaho, where a public works contractor does not fall within an exemption listed in I.C. § 54-1903, and is required to have a public works license, the failure by a subcontractor to have the requisite license will render its contract with a general contractor illegal, "because the contract constituted an agreement to perform an illegal act." *Barry,* 140 Idaho 827, 832, 103 P.3d 440, 445. The Idaho Supreme Court in *Barry* found the contract between a general contractor and the illegally unlicensed subcontractor to be illegal and therefore unenforceable, but then went on to determine whether either party was entitled to its damages outside the existence of a legal contract; the Court held the illegally unlicensed subcontractor was entitled to recover under the theory of unjust enrichment. 140 Idaho 827, 833, 103 P.3d 440, 446. The *Trees* decision, as argued by AED, is likely inapposite as the purpose of the contract in *Trees* was from its inception to engage in illegal behavior.

Here, the facts are more similar to those in *Barry.* The contract would have been illegal by virtue of AED's failure to properly register/and or be licensed. In the instant matter, KDC's repudiation of the contract was based, at least in part, upon AED's failure to obtain the necessary licensing/registration. The date on which precisely AED obtained its West Virginia contractor's license is unclear, but likely did not happen until October 17, 2010. It is undisputed that AED did not have its West Virginia contractor's license at the time of contracting. In his affidavit, dated November 24, 2010, Mark

Wilburn testifies AED "has acquired all necessary permits to demolish the bridge, other than permission of the United States Coast Guard." Affidavit of Mark Wilburn, p. 1, ¶ 3. But November 24, 2010, is not the relevant time period.

Even in the light most favorable to AED, the non-moving party, the motion for summary judgment by KDC on the issue of illegality of the underlying demolition agreement must be granted. Because a contractor must be licensed at the time a bid is submitted, and AED has presented this Court with no evidence as to what precise date upon which it became licensed, AED could not have properly submitted the bid in *spring* of 2010 and then later secure appropriate licensing in the *fall* of 2010. At the time of actual *performance* of this executory contract, it is likely that AED could have had, or perhaps even would have had, any necessary licensing/registration to perform the contract as agreed upon by the parties. However, there is simply nothing before the Court to indicate that this licensing/registration was in place at the time AED submitted the bid which gave rise to the demolition agreement.

KDC is entitled to summary judgment on its claim that AED lacked the required license and lacked the required permits at the time it entered into the demolition agreement. The demolition agreement is an illegal contract. KDC is entitled to summary judgment against AED on its breach of contract claims on that agreement.

2. AED's Fraud Claim.

KDC argues AED's fraud claim should be dismissed because: (a) the claim was not plead with particularity ; (b) AED had no right to rely upon any alleged misrepresentations where it did not have a West Virginia contractor's license and had been administratively dissolved by the Idaho Secretary of State; and (c) no evidence exists to demonstrate KDC had no intention of allowing AED to blast the bridge on

June 1, 2010. Memorandum in Support of Motion for Summary Judgment, pp. 12-18. In response, AED argues its complaint set forth exactly what promise KDC made and never intended to keep. Response to Summary Judgment, p. 7. AED argues this is sufficient to comply with the rule that fraud allegations be pled with specificity. *Id.* AED goes on to argue its corporate status was reinstated, rendering KDC's argument regarding AED's inability to rely on statements made during AED's dissolution irrelevant. *Id.,* pp. 7-8. Finally, AED argues the issue of fraudulent inducement involves a question of fact implicating the circumstances surrounding breach of the demolition agreement and whether KDC ever intended to honor the agreement. *Id.,* pp. 8-9.

As a preliminary matter, KDC errs in its contention that a party must demonstrate fraud concerning a future event by clear and convincing evidence. Memorandum in Support of Motion for Summary Judgment, pp. 12, 15. Appellate courts in Idaho have refused to apply the clear and convincing burden of proof in reviewing summary judgment in fraud and misrepresentation cases. *Large v. Cafferty Realy, Inc.,* 123 Idaho 676, 680, 851, P.2d 972, 976 (1993). In fraud and misrepresentation cases, courts apply the usual standard of review at summary judgment to determine whether there is a genuine issue of material fact making summary judgment improper. *G&M Farms v. Funk Irrigation Co.,* 119 Idaho 514, 417-18, 808 P.2d 851, 854-55 (1991). Thus, all AED must do in order to survive summary judgment is identify a genuine issue of material fact with regard to its fraudulent inducement claim.

a. Failure to Plead Fraud With Particularity is Not Fatal to AED's Claim.

In its Amended Complaint, AED alleges:

> In order to induce Plaintiff to enter into the agreement to sell the bridge to Defendants, Defendants agreed they would hire Plaintiff to demolish the bridge. Said promise was material to the parties' transaction

> and Plaintiff would not have agreed to sell the bridge without the promise that Plaintiff would be allowed to demolish the bridge.
>
> …
>
> Defendants' conduct of promising to allow Plaintiff to demolish the bridge when Defendants' [sic] had no intention of honoring that commit [sic] amounts to fraud in the inducement.

Amended Complaint, pp. 2-3, ¶ ¶ 9 and 15. KDC noted AED uses the term "Defendants" collectively throughout its Complaint and never identifies specific allegations asserted against each defendant. Memorandum in Support of Motion for Summary Judgment, p. 13. AED is deficient in that regard. KDC also notes the heart of AED's fraud claim is that "[i]n order to induce Plaintiff to enter the agreement to sell the bridge to Defendants, Defendants agreed they would hire Plaintiff to demolish the Bridge." Memorandum in Support of Motion for Summary Judgment, p. 13, citing Amended Complaint, ¶ 9. KDC then correctly argues: "This general conclusory statement is insufficient to maintain a fraud claim against three separate defendants." *Id.* In support of that argument, KDC quotes from 37 Am.Jur.2d *Fraud and Deceit*, § 464 (2001):

> A Plaintiff alleging fraud must specify the time, place, and contents of any alleged false representations and the full nature of the transaction, including the content of the false representations, the fact misrepresented, what was obtained or given up as a consequence of fraud, and which individual made the representation….
> If fraud is alleged against multiple defendants, acts complained of by each defendant should be separately set forth in the complaint.

Id. The claim in AED's Amended Complaint that "[i]n order to induce Plaintiff to enter the agreement to sell the bridge to Defendants, Defendants agreed they would hire Plaintiff to demolish the Bridge" satisfies *neither* of the requirements of time and place. The requirement of "contents of the representation" and "why it was false" are only minimally satisfied. The requirement of "who made the representation" is not satisfied at all. Even though AED now concedes claims against Lee Chaklos individually should

be dismissed, and accordingly, AED could make the argument that *which party* engaged in the purported fraud is therefore, moot, "which party" is not what the above quote from Am.Jur.2d says. The quote from Am.Jur.2d says: "which individual made the representation". A corporation can only act through its agents, and AED has not set forth in its Amended Complaint who within KDC agreed AED would "demolish the Bridge."

> A party must establish nine elements to prove fraud: "1) a statement or representation of fact; 2) its falsity; 3) its materiality; 4) the speaker's knowledge of its falsity; 5) the speaker's intent that there be reliance; 6) the hearer's ignorance of the falsity of the statement; 7) reliance by the hearer; 8) justifiable reliance; and 9) resultant injury."

Glaze v. Deffenbaugh, 144 Idaho 829, 833, 172 P.3d 1104, 1008 (2007) (quoting *Mannos v. Moss,* 143 Idaho 927, 931, 155 P.3d 1166, 1170 (2007) ("Reed fails to plead these elements in a general sense, let alone with particularity and, as such, has failed to state a claim upon which relief may be granted as to fraud.").

> An allegation of fraud is a conclusion of law. General allegations that do not set forth the particular circumstances are not sufficient, and every element of the cause of action must be alleged in full, factually and specifically. Allegations in the form of conclusions on the part of the pleader as to the existence of fraud are insufficient.

37 AM.JUR 2D *Fraud and Deceit,* § 464 (2010). Mere assertions of "fraud" or that a party "acted fraudulently" without including facts to which such a term has a reference is nothing more than a mere legal conclusion. *Id. See e.g. Sunset Financial Resources, Inc. v. Redevlopment Group V, LLC,* 417 F.Supp.2d 632, 643, n. 17 (D.N.J. 2006). "Plaintiff asserting a fraud claim is not required to plead date, place, or time of fraud, so long as plaintiff uses alternative means of injecting precision and some measure of substantiation into its allegations." *Id.*, quoting *Seville Indus. Machinery v. Southmost Machinery,* 742 F.2d 786, 791, (3d Cir.1984).

> In *Seville,* the Third Circuit held that plaintiffs satisfied Rule 9(b) by incorporating into plaintiff's complaint a specific list of machine parts involved in the fraud, as well as described the transactions that involved these parts. *See id.* The court concluded that the heightened pleading requirement was met because the complaint "sets forth [i] the nature of the alleged misrepresentations, and [ii] while it does not describe the precise word used, each allegation of fraud adequately describes the nature and subject of the alleged misrepresentation." *Id.*

417 F.Supp.2d 632, 643, n. 17. While AED may not have pled their fraud in the inducement claim with the particularity KDC would have preferred, AED's fraud claim goes well beyond a mere legal conclusion and, arguably, while not naming the time, date and place of the alleged fraud, KDC has been provided with a sufficient measure of precision and substantiation of AED's claim.

b. AED Had No Right to Rely on any Alleged Misrepresentation by KDC.

KDC next claims AED had no right to rely on any alleged misrepresentations by KDC because AED had been administratively dissolved by the Idaho Secretary of State and had no West Virginia Contractor's license. Memorandum in Support of Motion for Summary Judgment, pp. 14-15. KDC argues AED had no right, as a matter of law, to rely upon the representations of KDC that KDC would hire AED to demolish the bridge. *Id.,* p. 14. KDC notes the demolition agreement was entered into on June 1, 2010, but AED failed to secure a West Virginia contractor's license at least until October 17, 2010, which was well after the demolition agreement had been terminated in July 2010. *Id.* Because AED could not have even submitted a bid to blast the bridge without the proper license, it follows, per KDC, that AED could not have relied upon any alleged misrepresentation. KDC makes essentially the same argument with respect to AED's having been administratively dissolved on November 5, 2009, and for the six moths prior to entering into the purchase agreement. *Id.,* pp. 14-15. Because AED could not

have legally performed the demolition of the bridge at the time it entered into agreements to do so, because of a lack of licensing, AED could not have rightfully relied upon the promise that it would be the party selected to demolish the bridge. *Id.*

AED responds only that KDC cannot challenge any corporate action on the ground that AED had been administratively dissolved; that AED has been reinstated by the Secretary of State, which reinstatement is retroactive to the time of dissolution; and that the question of whether fraud in the inducement is present is one for the trier of fact. Response to Summary Judgment, pp. 7-8. In reply, KDC clarifies any agreement entered into by the parties whereby AED was to blow the bridge was void as it violated the West Virginia Contractor Licensing Act. Defendants' Reply Memorandum in Support of Motion for Summary Judgment, p. 7.

As discussed *supra,* the demolition agreement entered into by the parties was void and illegal due to AED's failure to have the proper license under West Virginia law at the time it contracted to demolish the bridge. The West Virginia requirements for contractors mirror those in Idaho. And, importantly, both the Idaho and West Virginia Codes contemplate the licensing and registration requirements apply when a person submits a bid to perform construction; there is no requirement that actual construction be performed. I.C. § 54-1901(b); I.C. § 54-5203(4)(a); W.Va. Code § 21-11-3(c). Thus, any position AED may take with regard to the contract for demolition being executory, and AED's ability to secure the proper registration and licensing pursuant to the Codes prior to demolition work commencing, is inapposite. AED must have had the proper registration and license at the time of contracting, in addition to having the same at the time of performance. While I.C. § 30-1-1422(3) does, as argued by AED, provide that reinstatement of a formerly dissolved corporation relates back to the date of dissolution

"and the corporation resumes carrying on its business as if the administrative dissolution had never occurred", AED's failure to comply with statutory requirements for registration and licensing does result in AED's being unable to, as a matter of law, justifiably rely upon alleged misrepresentations by KDC. Accordingly, summary judgment must be granted in favor of KDC on this aspect of AED's fraud claims.

c. AED Has No Evidence That on June 1, 2010, KDC Did Not Intend to Allow AED to Blast the Bridge.

Regarding AED's fraudulent inducement claim, the parties provide different facts regarding each parties' intentions on June 1, 2010. KDC argues it made a representation concerning a future date on June 1, 2010, and that AED cannot prove KDC entered into the demolition agreement with no intent to perform. Memorandum in Support of Motion for Summary Judgment, pp. 15-16. AED argues KDC had no intention of fully performing the parties' agreement as of June 1, 2010. Response to Summary Judgment, p. 8. In support of its argument, AED claims KDC improperly attempted to create a condition precedent (that one or both of the parties never had proper prerequisite West Virginia licenses, registrations, or permits) where none existed. And, AED claims KDC withheld payment based on KDC's own failure to obtain the necessary licenses (in addition to withholding payment based on AED's failure to obtain licenses, registrations, and permits.) *Id.,* p. 9. Specifically, AED claims:

> Not only was KDC creating conditions precedent where none existed, KDC was withholding payment based on the failure of KDC to obtain the necessary permits. Krystal Chaklos clearly sets forth that AED will be paid when KDC obtains the necessary permits. [25]

Response to Summary Judgment, p. 9. This claim by AED's counsel that "…KDC was withholding payment based on the failure of KDC to obtain the necessary permits" is not supported by the very "facts" AED submits in its own agent's affidavit. Footnote 25 of

AED's Response to Summary Judgment reads: "Affidavit of Eric Kelly at 26."

Paragraph 26 of the Affidavit of Eric Kelly reads:

> That evening [June 16, 2010 according to ¶ 24], Krystal Chaklos sent an e-mail stating that AED needed a West Virginia Contractors License to participate in the project and that AED would be paid when Delta had achieved the City of Benwood's permit to proceed. (See Exhibit "J" attached hereto and incorporated herein.)

Affidavit of Eric J. Kelly in Opposition to Summary Judgment, p. 6, ¶ 26. Here is what the actual email from Krystal Chaklos to Eric Kelly reads:

> Eric,
> You will need a WEST VIRGINIA CONTRACTORS LICENCE! From the state of West Virginia to participate in this project. Your mobility advance will be given to you once Delta has achieved the city of Benwoods permit to proceed.

Affidavit of Eric J. Kelly in Opposition to Summary Judgment, Exhibit J. (all emphasis in original). To make what AED's counsel writes in its brief true, Delta must be KDC. Delta is not KDC. Delta Demoltion Group, Inc., (Delta Demo) is a Virginia corporation in good standing, which was hired by KDC to act as the general contractor responsible for demolishing this bridge, and AED was to act as an independent subcontractor to Delta Demo for purposes of blasting that bridge. Affidavit of Lee Chaklos in Support of Motion for Summary Judgment, p. 2, ¶¶ 2, 4. Lee Chaklos is president and sole shareholder of Delta Demolition Group, Inc., and Lee Chaklos is not a member, officer or director of KDC. *Id.,* ¶¶ 2, 3. Thus, this claim by AED's counsel that "…KDC was withholding payment based on the failure of KDC to obtain the necessary permits" is false according to AED own agent's affidavit. There is no basis set forth in AED's Response to Summary Judgment (pages 8 and 9) which refutes KDC's argument in this regard.

KDC argues as follows:

> On June 1, 2010, AED and KDC signed the "demolition agreement." The demolition agreement embodies the promise upon

> which AED bases its fraud claim; KDC's promise to allow AED to blast the bridge. One of the terms of the demolition agreement required KDC to pay AED a $30,000 "deposit" on June 9, 2010. Another term required AED to supply the necessary federal and state permits to perform blasting operations in the State of West Virginia. It is undisputed that the deposit was never paid. The non-payment of the deposit is what led AED to terminate the demolition agreement by threatening to file a lawsuit and rescind the demolition agreement. However, the failure to pay the deposit was not because KDC never intended to allow AED to blast the Bridge. Rather, the deposit was not paid because AED refused to get the necessary licenses and permits to perform the work.
>
> * * *
>
> The evidence shows that AED was required to obtain all necessary permits and licenses to perform the blasting work in West Virginia. AED submitted the applications, but refused to pay for the permits. Therefore, it did not receive the permits. Pursuant to the West Virginia Contractor Licensing Act, AED also needed to obtain a contractor's license. It did not do so until October 17, 2010, after both parties terminated the "demolition agreement," and after AED filed its original complaint in this case. KDC informed AED that it would not pay any money to AED until it received the necessary permits and licenses. KDC did not decide to use a different contractor to blast the Bridge until it received threatening emails from AED and its lawyer. The evidence shows that KDC refused to pay AED the "deposit" because AED failed to obtain the necessary permits and licenses to perform blasting work in West Virginia, not because KDC never intended to allow AED to perform the blasting. Since there is no evidence that KDC had no intention of allowing AED to perform the blasting at the time the demolition agreement was signed, AED cannot prove fraud concerning this future event.

Response to Summary Judgment, pp. 16-18. While the above passage contains no citation to the record, the argument is supported by the record. Affidavit of Krystal Chaklos in Support of Motion for Summary Judgment, ¶1-9; Affidavit of Eric J. Kelly in Opposition to Summary Judgment, pp. 4-5, ¶ 19, Exhibit F. The very first obligation AED assumed in that demolition agreement was to "Supply the necessary explosives permits, both Federal and State, to perform operations in the State of WV." Id., Exhibit F, p. 4. West Virginia statutes require any contractor to be licensed in West Virginia to bid on or conduct any work in the state of West Virginia. West Virginia Code § 21-11-64; 21-11-3. The above email from Krystal Chaklos to Eric Kelly shows the

requirement that AED have a West Virginia's contractor's license: "You will need a WEST VIRGINIA CONTRACTORS LICENCE!" Affidavit of Eric J. Kelly in Opposition to Summary Judgment, Exhibit J. (all emphasis in original). AED failed in its duty to have the federal and state permits and to have a West Virginia contractor's license.

As noted by KDC:

> Generally, the representation forming the basis of a claim for fraud must concern past or existing material facts. Representations concerning future events are usually not considered actionable.

Magic Lantern Productions, Inc. v. Dolsot, 126 Idaho 805, 807, 892 P.2d 480, 482 (1994), *see also Thomas v. Medical Center Phys.,* 138 Idaho 200, 207, 61 P.3d 557, 564 (2002) (An action for fraud or misrepresentation will not lie for statements of future events). Memorandum in Support of Motion for Summary Judgment, p. 15. A promise or statement is actionable if it is proven that the speaker made the promise without intending to keep it. *Id., citing Magic Lantern,* 126 Idaho 805, 807, 892 P.2d 480, 482; *Thomas,* 138 Idaho 200, 207, 61 P.3d 557, 564. KDC thus argues:

> AED must prove that on June 1, 2010, when KDC allegedly entered the demolition agreement, KDC did not intend to perform the agreement. There is no evidence to support this claim.

Id. This Court agrees. AED has shown nothing that demonstrates KDC never intended to permit AED to demolish the bridge on the date the demolition agreement was entered into. Accordingly, summary judgment must be granted in favor of KDC on this aspect of AED's fraud claims.

3. Rescission of the Purchase Agreement is Not Available to AED.

There is both an issue of law and a factual discussion about the rescission issue. First the **legal** discussion.

Both parties cite to *O'Connor v. Harger Construction,* 145 Idaho 904, 18 P.3d

846 (2008), as being dispositive of whether rescission is available to AED. In its Memorandum Decision and Order on Defendant KDC's Motion for Preliminary Injunction, this Court determined:

> KDC argues AED did not tender back to KDC the $25,000.00 KDC paid to AED in consideration for the purchase agreement. Therefore, KDC argues AED is not entitled to rescission of the Agreement. Memorandum in Support of Motion for Mandatory Injunction, pp. 13-16. KDC quotes extensively from *Robinson v. State Farm Mut. Auto Ins. Co.,* 137 Idaho 181, 45 P.3d 829, 837 (2002), for the proposition that a party seeking to rescind a contract must tender any consideration or benefit received before rescinding. *Id.,* p. 14. Here, AED alleges fraud and breach of contract in its Complaint. The relief sought by AED is for the Court to "[e]nter judgment rescinding the parties' agreement and restoring the parties to their status quo with all offsets and credits as are required to fashion and [sic] equitable remedy for Plaintiff." Complaint, p. 4. Thus, at all times AED has sought rescission of the "purchase agreement", and AED certainly had not disputed that it did not at any time tender the $25,000.00 back to KDC.
>
> AED argues: "A valid tender is no longer required under Idaho Law to seek rescission", citing *O'Connor v. Harger Construction Inc.,* 145 Idaho 904, 188 P.3d 846 (2008). Plaintiff's Response to Issuance of Preliminary Injunction, p. 4. This Court agrees with KDC, that such proposition by AED is a grossly misleading argument. As noted by KDC, the Idaho Supreme Court in *O'Connor* stated:
>
> > [a] party seeking to rescind a contract ordinarily must return any consideration of the benefit received before the rescission is valid. More than a mere offer of the deposit is required; the party must exhibit an actual intent and willingness to pay to constitute a valid tender.
>
> 145 Idaho 904, 911, 188 P.3d 846, 853. Defendant KDC Investments, LLC's Reply in Support of Motion for Preliminary Injunction, p. 11. AED has failed to tender the $25,000.00. Rescission is not available to AED. However, with all the other unsolved issues in this case, a preliminary injunction cannot be granted in favor or KDC.

Memorandum Decision and Order on Defendant KDC's Motion for Preliminary Injunction, pp. 16. Subsequent to the Court's ruling on the preliminary injunction, AED filed a motion for reconsideration asking the Court to reconsider its ruling with regard to rescission. This motion was not properly noticed-up, but was unilaterally tacked-on by counsel for AED to the time for hearing on KDC's motion for summary judgment. Thus,

AED's motion for reconsideration was not heard on January 12, 2011, but was instead heard on January 26, 2011.

AED argues that rescission is a valid form of relief available to it in its response memorandum on summary judgment. Response to Summary Judgment, pp. 9-12. AED argues in *O'Connor* the Idaho Supreme Court correctly "…sets forth the law regarding an action at law to enforce a rescission, but states the instant matter differs as it is an equitable action for rescission – an action on rescission, as opposed to an equitable action for rescission." *Id.,* p. 9. (emphasis in original). AED continues:

> An action at law based on a rescission requires that a valid tender occur. It is an element of rescission. This is an action for rescission based on fraud and also on material breach of contract, and tender is not required, only an offer of tender.

Id. AED argues *O'Connor* stands for the proposition that where rescission amounts to an offer and acceptance outside of court, valid tender is required. *Id.,* p. 10. AED argues: "However, when a rescission agreement is not reached and one of the parties goes to court seeking rescission, tender is not required." *Id.*

On reconsideration, AED cites *Gamblin v. Dickson,* 18 Idaho 734, 736, 112 Idaho P. 213, 213 (1910), and *Hayton v. Clemens,* 30 Idaho 25, 32, 165 P. 994, 996 (1916) in support of this argument.

The entire pertinent portion of *Gamblin*, is as follows:

> In *Nelson v. Carlson,* 54 Minn. 90, 55 N. W. 821, the court held that, where a party seeks the aid of a court to rescind a contract, it is not necessary that he previously attempt a rescission or make any tender to the other party, except where such tender is necessary to put the other party in default. In *Carlton v. Hulett,* 49 Minn. 308, 51 N. W. 1053, it was contended that a restoration or tender should have been made before the action could be brought, but the court held against that contention in the following language: "Authorities in support of respondent's position on this point are abundant, but are foreign to the case, because she has not attempted to abrogate and rescind the mortgage contract by her own act, but by judicial proceedings instead. In such cases, where one seeks the

> aid of a court to set aside and rescind a contract, it is not essential that he should have previously attempted a rescission, or should have made any tender to the other party, except when such tender is necessary to put the other party in default. By submitting her cause to the court, the plaintiff expressed a willingness to perform such conditions as it may regard necessary to impose as proper terms on which relief shall be granted. What such a plaintiff ought to do, and what he must do, to reinstate the other party in statu quo, as a condition for repudiation and rescission, is for the court, which always possesses the necessary power to determine the question." The same rule is adhered to in *Hansen v. Allen,* 117 Wis. 61, 93 N. W. 805, and in *Ludington v. Patton,* 111 Wis. 208, 86 N. W. 571. In the latter case the court clearly draws the distinction between a suit for a rescission of a contract on the ground of fraud and an action at law to recover back that which has been paid upon a contract void for fraud. The latter contemplates a precedent rescission of the contract by act of the plaintiff, and an action in equity to rescind a contract invites and requires equity to effect that end, and looks to the decision in that action to accomplish it and to impose such terms of rescission as may be deemed equitable under all of the facts in the case. The earlier decisions in California, Colorado, and Washington and some other states would indicate that they were made without reference to the distinction above mentioned. See, also, *Clark v. O'Toole,* 20 Okl. 319, 94 Pac. 547, where the rule here laid down is discussed at length and authorities cited.

18 Idaho 734, 735-36, 112 Idaho P. 213, 213-14. There are several problems relying on *Gamblin*. **First,** *Gamblin* is 100 years old and *O'Connor* is the most recent case from the Idaho Supreme Court on the issue. *O'Connor* is clear:

> [a] party seeking to rescind a contract ordinarily must return any consideration of the benefit received before the rescission is valid. More than a mere offer of the deposit is required; the party must exhibit an actual intent and willingness to pay to constitute a valid tender.

145 Idaho 904, 911, 188 P.3d 846, 853. *O'Connor* dealt with a situation where the court was being asked to rescind a contract. Thus, to the extent *Gamblin* and *O'Connor* are inconsistent, *O'Connor* controls and overrules *Gamblin*. **Second,** AED makes the argument that this is not a rescission at law, but rather an equitable rescission based on fraud and tender is not required, only an offer of tender. Response to Summary Judgment, p. 9. That being the case, AED is not entitled to equity as it did not have the requisite West Virginia contractor's license in place. That failure by AED is undisputed.

Additionally, AED *may* have assigned what they had no right to assign and in so doing committed a fraud upon Barrack and the federal court. Affidavit of Eric J. Kelly in Support of Plaintiff's Opposition to Defendants' Motion to Strike and Defendants' Motion for Summary Judgment, Exhibit A, p. 11, Exhibit B. Counsel for AED objected to this In any event, based on AED's failure to obtain the West Virginia contractor's license at the time of contracting with KDC, AED cannot claim equity be accorded due to AED's own unclean hands.

> The clean hands doctrine "stands for the proposition that 'a litigant may be denied relief by a court of equity on the ground that his conduct has been inequitable, unfair and dishonest, or fraudulent and deceitful as to the controversy in issue.' " *Gilbert v. Nampa Sch. Dist. No. 131,* 104 Idaho 137, 145, 657 P.2d 1, 9 (1983) (citing 27 Am.Jur.2d Equity § 136 (1996)).

*Ada County Highway Dist. v. Total Success Investments, LLC***,** 145 Idaho 360, 370, 179 P.3d 323, 333 (2008). **Third,** AED claims: "This is an action for rescission based on fraud and also on material breach of contract, and tender is not required, only an offer of tender." Response to Summary Judgment, p. 9. Eric Kelly of AED's email response: "Last chance for you guys to accept a return of your money" (Affidavit of Eric J. Kelly in Opposition to Summary Judgment, p. 6, ¶ 29; Exhibit "M") is not sufficient in detail to be an offer of rescission. **Fourth,** the above quote from Gamblin indicates a pleading requirement is necessary with the language: "By submitting her cause to the court, the plaintiff expressed a willingness to perform such conditions as it may regard necessary to impose as proper terms on which relief shall be granted." This pleading requirement is discussed below in *Hayton*. In AED's Amended Complaint, AED has not alleged that it is willing to perform all conditions to place the parties back in their original position.

The following is most of the entire opinion on rehearing in *Hayton v. Clemens,* 30 Idaho 25, 32, 165 P. 994, 996 (1916). It is only the first paragraph which counsel for

AED quoted in Plaintiff's Reply to Defendants' Response to Motion to Reconsider, p. 3.

> The contention of appellant on this point, as I understand it, is that before a party is entitled to rescind a contract he must put, or offer to put, the other party in statu quo by a full restoration of all that he has received. This court has heretofore held that this rule is applicable in cases where a rescission is made before an action is brought, but that such a tender or offer is not necessary as a condition precedent to a suit for rescission, and I feel that such decision is controlling and correct. *Gamblin v. Dickson,* 18 Idaho, 734, 112 Pac. 213.
>
> After the filing of the original complaint in this action, the rights of all the parties hereto in the Walla Walla property were canceled by a decree of the superior court of Washington for Walla Walla county, forfeiting the rights of all parties claiming under the Preston-Kenworthy contract for default in payment of moneys due November 1, 1912, under the terms of the contract. The amended complaint, on which this action was tried, pleads the decree of the Washington court.
>
> *Conceding that it is necessary in a suit for rescission that the plaintiff plead his willingness to restore the consideration received by him and to do equity*, do the facts pleaded in relation to the foreclosure of the Washington contract, under which contract both appellants and respondents acquired an interest in the Walla Walla property, obviate the necessity of an offer in the amended complaint to restore the consideration received? I think they do. One of the very purposes of pleading the Washington decree must have been to show that the consideration received by Hayton had gone from his control and could not be returned on account of the decree foreclosing for a default in a payment past due at the time Hayton and Clemans made their contract, which payment Clemans fraudulently and falsely represented had been made. At the time of the filing of the amended or supplemental complaint in this action, Hayton had no interest in the Walla Walla property. His rights had been foreclosed by the Washington decree. He had nothing to tender back to Clemans and was in this condition through no default of his own. Under these circumstances, it would be a futile offer on his part to assign back to Clemans his foreclosed equity in the Walla Walla land.

30 Idaho 25, 32-33, 165 P. 994, 995-96. (italics added). Focusing on the italicized portion: "*Conceding that it is necessary in a suit for rescission that the plaintiff plead his willingness to restore the consideration received by him and to do equity*," in the present case, AED has not only not offered to tender back the $25,000, nowhere in AED's amended complaint does AED make the claim that it is willing to tender back to KDC the $25,000. Amended Complaint, pp. 1-4. Indeed, all AED claims is: "Because of

Defendant's fraud, Plaintiff is entitled to rescind the contract and to an award of a sum of money as may be required to make it whole in light o f the rescission of the parties' contract, in an amount in excess of $10,000 to be proved at trial." Id., p. 3, ¶ 17. Not only does AED fail in its Amended Complaint to make the claim that it is willing to tender back to KDC the $25,000, AED doesn't even acknowledge in its complaint that KDC paid AED $25,000 in the first place.

And unlike Hayton in *Hayton,* who no longer had control of the consideration to return to the other party, AED has at all times had and kept the $25,000. Where Hayton had "nothing to tender back", AED does have $25,000 to tender back, and has not.

KDC argues AED failed to properly preserve a claim for rescission of the purchase agreement by failing to tender the consideration amount underlying that agreement back to KDC. Memorandum in Support of Motion for Summary Judgment, pp. 18-19. KDC refutes AED's argument that *O'Connor* did away with the valid tender requirement; positing the valid tender requirement in *O'Connor* was done away with given the specific facts of that case because O'Connor, the party asserting the valid tender requirement, had been the party to file suit for breach of contract against Harger, thereby relieving Harger of his duty to tender O'Connor's deposit. *Id.,* p. 19. KDC correctly argues:

> The *O'Connor* Court did not analyze whether or not Harger completed a valid tender because it determined that "[o]nce O'Connor [the party asserting the valid tender rule] filed suit for breach of contract against Harger, Harger was relieved of his duty to tender O'Connor's deposit, constituting a valid rescission, absent a court order." *Id* at 912, 854. The Court decided it could fashion its own equitable remedy and it was "not necessary for this Court to determine the sufficiency of Harger's tender in this case." *Id.*
>
> O'Connor differs from the case at bar in one important respect; KDC, the party asserting the valid tender rule, did not file suit against AED. Rather, AED filed suit against KDC. KDC is, therefore, still entitled to assert the valid tender rule as a defense. Since AED admittedly failed

> to make a valid tender, it is not entitled to rescind the Purchase Agreement.

Id.

This Court does not agree with AED's interpretation of *O'Connor*. No attorney should better know *O'Connor* than counsel for AED, as counsel for AED argued the losing end of *O'Connor* on appeal to the Idaho Supreme Court.

No attorney, and certainly not this Court, can overlook the general rule set forth by the Idaho Supreme Court in *O'Connor*:

> [a] party seeking to rescind a contract ordinarily must return any consideration of the benefit received before the rescission is valid. More than a mere offer of the deposit is required; the party must exhibit an actual intent and willingness to pay to constitute a valid tender.

145 Idaho 904, 911, 188 P.3d 846, 853. The reason that general rule did not come into play in *O'Connor* was: rescission was not pled by either party (*Id.*), but mutual mistake was pled by Harger and rescission is a remedy for mutual mistake (*Id.*), and the district court on its own ruled that rescission was the most equitable remedy between the parties (145 Idaho 904, 912, 188 P.3d 846, 854). In *O'Connor,* counsel for O'Connor (counsel for AED in the instant case), "…argues that Harger never offered to return her deposit; therefore, rescission as a remedy is not available to him." 145 Idaho 904, 911, 188 P.3d 846, 853. It was then that the Idaho Supreme Court reiterated the general rule quoted above, that "[a] party seeking to rescind a contract ordinarily must return any consideration of the benefit received before the rescission is valid" and that more than a mere offer of the deposit is required for a valid tender. *Id.* Immediately following that pronouncement, the Idaho Supreme Court wrote:

> Here, Harger made O'Connor an offer in April of 2005, offering to sell the land or rescind the contract and return her deposit. O'Connor responded to the offer of rescission and the return of her deposit by filing the lawsuit for breach of contract. O'Connor argues that without the return

> of her deposit, rescission is an unavailable remedy for Harger. O'Connor is confusing the issues here. The district court did not rule that Harger made a valid rescission by offering to tender O'Connor's deposit. The district court ruled that rescission was the most equitable remedy between the parties. Whether Harger's April 2005 letter constitutes a valid tender of O'Connor's deposit, and whether rescission as an equitable remedy is available are two separate issues. Once O'Connor filed suit for breach of contract against Harger, Harger was relieved of his duty to tender O'Connor's deposit, constituting a valid rescission, absent a court order. Whether Harger completed a valid tender, making rescission outside of court proper does nothing to reduce the equitable powers of the trial court. The district court, in this case was free to fashion an equitable remedy as it saw fit. Therefore it is not necessary for this Court to determine the sufficiency of Harger's tender in this case.

145 Idaho 904, 911-12, 188 P.3d 846, 853-54. In *O'Connor*, the party seeking to rescind the contract and return the deposit (Harger) (AED in the instant case as argued by AED) was met in response to that offer to return the deposit with a lawsuit by O'Connor, and O'Connor then claimed that since Harger in fact did not return that deposit, rescission was an unavailable remedy for Harger. The party offering the return of deposit and the party seeking rescission (Harger) was rebuffed in that offer not with a "No", but with the filing of a lawsuit by O'Connor against them. Then, the party filing the lawsuit (O'Connor) argued Harger's tender wasn't complete. Not surprisingly, the Idaho Supreme Court held: "Once O'Connor filed suit for breach of contract against Harger, Harger was relieved of his duty to tender O'Connor's deposit, constituting a valid rescission, absent a court order." Any exception to the general rule (that "[a] party seeking to rescind a contract ordinarily must return any consideration of the benefit received before the rescission is valid") set forth in *O'Connor* is clearly peculiar to the *facts* in *O'Connor*. Those facts are exactly the <u>opposite</u> of the facts in the present case. The Idaho Supreme Court in *O'Conner* noted "O'Connor is confusing the issues here." 145 Idaho 904, 912, 188 P.3d 846, 854. In the present case, that same attorney is not only confusing the issues but is confusing the facts.

AED's contention that when a rescission agreement is not reached and one of the parties goes to court, an offer to tender is all that is required, finds no support in a reading of *O'Connor.* In *O'Connor*, the trial court fashioned an equitable remedy, rescission, which had not been pled by any party, let alone the party seeking relief, O'Connor. The Idaho Supreme Court wrote in *O'Connor*:

> O'Connor was on notice that rescission was a possible remedy even though it was not specifically plead. She was given the opportunity to try the issue of whether a mutual mistake of fact existed between the parties, in which one of the potential remedies is rescission. In any event, rescission is ironically in her favor since if the contract is simply held unenforceable she forfeits her $40,000 deposit, whereas if it is rescinded, she is entitled to a refund of her deposit. The district court had the power to grant rescission in this instance. This Court affirms that decision.

145 Idaho 904, 911, 188 P.3d 846, 853. AED's differentiation between rescission as an equitable remedy versus as an action based on parties' reaching an agreement to rescind is of no import. Again, the Idaho Supreme Court wrote in *O'Connor*:

> Here, Harger made O'Connor an offer in April of 2005, offering to sell the land or rescind the contract and return her deposit. O'Connor responded to the offer of rescission and the return of her deposit by filing the lawsuit for breach of contract. O'Connor argues that without the return of her deposit, rescission is an unavailable remedy for Harger. O'Connor is confusing the issues here. The district court did not rule that Harger made a valid rescission by offering to tender O'Connor's deposit. The district court ruled that rescission was the most equitable remedy between the parties. Whether Harger's April 2005 letter constitutes a valid tender of O'Connor's deposit, and whether rescission as an equitable remedy is available are two separate issues. Once O'Connor filed suit for breach of contract against Harger, Harger was relieved of his duty to tender O'Connor's deposit, constituting a valid rescission, absent a court order. Whether Harger completed a valid tender, making rescission outside of court proper does nothing to reduce the equitable powers of the trial court. The district court, in this case was free to fashion an equitable remedy as it saw fit. Therefore it is not necessary for this Court to determine the sufficiency of Harger's tender in this case.

145 Idaho 904, 911-12, 188 P.3d 846, 853-54. The Court in *O'Connor* never reached the sufficiency of tender by Harger, precisely because it upheld the District Court's

fashioning an equitable remedy consisting of rescission. Distinguishing the instant matter from the facts in *O'Connor* are that the party seeking rescission here was also the party filing the lawsuit; additionally, this Court has determined at the preliminary injunction stage that rescission as an equitable remedy is not available to AED. Nothing before the Court at this time would indicate the Court erred in its previous holding. There are no law or facts before the Court to support anything but summary judgment in favor of KDC on the issue of rescission. [Similarly, this Court has evinced no inclination to grant AED the equitable relief of specific performance either. And, the very demolition agreement AED seeks specific performance of has been deemed illegal. *See supra.*]

In its motion to reconsider, AED cites *Watson v. Weick,* 141 Idaho 500, 507, 112 P.3d 788, 795 (2005), for the proposition that all that is needed is an *offer* to rescind. Plaintiff's Reply to Defendants' Response to Motion to Reconsider, p. 1. The offer to rescind in *Watson v. Weick* certainly went further toward restoring the parties to their previous position than Kelly's curt statement in an email in the present case: "Last chance for you guys to accept a return of your money" (discussed immediately below). This Court is quite familiar with *Watson v. Weick*. In *Watson v. Weick*, the Idaho Supreme Court noted Weick's attorney, in a letter specifically seeking rescission, made the following offer:

> My client seeks to rescind the contract of sale and promissory note and return the parties to their pre-sale status.
>
> To that end, we tender to you resignations from the Board of Directors, all stock in each of the companies which were subject to the purchase agreement referred to in the promissory note attached to your Complaint, to wit, The Watson Agency, Inc., Pacific Personnel, Inc., and Watson U.S. Phoenix Corporation, as well as deeds to the real property purchased concurrently. This tender shall be in full satisfaction of the provisions of

> the contract and promissory note and would affect total rescission between the parties.

141 Idaho 500, 507-08, 112 P.3d 788, 795-96. This Court, as the trial court, felt such was not sufficient. The Idaho Supreme Court agreed, and held:

> The tender made no mention of obligations incurred by the Watson Agency after the Weicks purchased it including a $150,000 liability to the IRS; 25 to 30 additional employees; a new office in Los Angeles; the purchase of 12 to 14 new vehicles; and the purchase of $10,000 to $15,000 in computers. Tendering back the corporation with those new liabilities did not constitute offering to restore the Watsons to the status quo before the Agreement was formed. The district court did not err in dismissing the claim for rescission.

141 Idaho 500, 508, 112 P.3d 788, 796. There was certainly more to the attempt to tender in *Watson v. Weick* than there was to any attempt "tender" in Kelly's one sentence in an email in the present case, and in *Weick* it was *still* not enough. As pointed out by counsel for KDC in the January 26, 2011, oral argument on AED's motion for reconsideration, as of July 13, 2010, when Kelly's "Last chance for you guys to accept a return of your money" email was authored, KDC had already expended effort and incurred expense furthering demolition of this bridge, so simply offering the $25,000 back (if that is in fact what Kelly was offering), is not sufficient tender.

AED also cites *Lithocraft, Inc. v. Rocky Mountain Marketing, Inc.,* 108 Idaho 247, 248, 697 P.2d 1261, 1262 (Ct.App. 1985), for the proposition that an offer to tender is sufficient. Plaintiff's Reply to Defendants' Response to Motion to Reconsider, p. 1. A review of that case shows the Idaho Court of Appeals made short work of the lack of any meaningful offer to tender in that case:

> The record here is devoid of any such tender (or offer to tender) by Rocky Mountain which would have restored to Hawes, or to his assignee, the ownership of the *Sun Valley Magazine* trade name. Quite the contrary, Rocky Mountain tells us that it declined to do so because it might not have been able to recover anything back from Hawes. It makes no contention that Lithocraft is in any way responsible for what Hawes might owe on any

> accounting on a rescission, nor does it contend that there is any legal theory upon which it could hold Lithocraft so accountable.

108 Idaho 247, 248-49, 697 P.2d 1261, 1262-63. *Watson v. Weick* and *Lithocraft* show a valid tender takes a lot, it really must be a full restoration of a parties' previous position. It certainly requires more than one line in an email by Kelly which reads: "Last chance for you guys to accept a return of your money."

Now, a discussion of the **facts** regarding rescission, viewed in the light most favorable to AED.

AED also claims its offer to tender was all that was required and the offer was made July 13, 2010. *Id.,* p. 11. AED claims:

> When a party is seeking a judgment for rescission, an offer to tender is all that is required and such was made in this case. On July 13th, 2010, AED informed KDC it was their last chance to accept the return of the money.[26] That is an offer to return the consideration provided and sufficient to allow AED to seek rescission.

Response to Summary Judgment, p. 11. Footnote 26 cites to "Affidavit of Eric Kelly at 29". Paragraph 29 of the Affidavit of Eric J. Kelly in Opposition to Summary Judgment reads:

> On July 13th, I offered to return KDC's purchase money for the bridge. (See Exhibit "M" attached hereto and incorporated herein.) I regret the language I used, however, I was understandably very frustrated with this situation by that point.

Affidavit of Eric J. Kelly in Opposition to Summary Judgment, p. 6, ¶ 29. Exhibit "M" to Kelly's affidavit is an email, with the heading "Buyout", sent by Kelly on July 13, 2010, to "deltademo" (Delta Demo is not KDC, Affidavit of Lee Chaklos in Support of Motion for Summary Judgment, p. 2, ¶¶2, 3, 4), which reads:

> Last chance for you guys to accept a return of your money. You've been flapping your mouth to the media without knowing the legal facts.
>
> I met with my lawyer and I am moving forward to have you tossed off the

job. It will cost you far more than the amount you paid.

I am not going to screw with you liars anymore.

Eric J. Kelly Sr.
Vice-president
Advanced Explosive Demolition, Inc.

Affidavit of Eric J. Kelly in Opposition to Summary Judgment, p. 6, ¶ 29; Exhibit "M". This is the only point in Eric J. Kelly's affidavit where Kelly discusses a "return of your money". Nowhere in Kelly's affidavit does Kelly state what "KDC's purchase money for the bridge" amounted to. Krystal Chaklos states on June 3, 2010, KDC wired payment of $25,000 to AED for payment on the Asset Purchase and Liability Assumption Agreement ("Purchase Agreement"). Affidavit of Krystal Chaklos in Support of Motion for Summary Judgment, p. 2, ¶¶ 3, 4. Krystal Chaklos states:

> In July 2010, AED proposed rescinding the Purchase Agreement as a way to resolve the dispute between AED and KDC concerning demolition of the Bridge. However, at no time did AED actually attempt to return KDC's payment of $25,000. AED merely offered to return the payment as part of the proposal to rescind the Purchase Agreement.

Id., pp. 3-4, ¶ 15. The "return of your money" statement by Kelly to Delta Demo on July 13, 2010, needs to be put in context. Six days earlier, on July 7, 2010, Kelly's/AED's attorney, Arthur Bistline, sent Lee and Krystal Chaklos the following email;

> I have been contacted by Eric Kelly regarding the Bellaire Bridge. I have reviewed the contract documents.
>
> The contract provides that the demolition of the bridge is a material term of the parites agreement. The contract also provides that time is of the essence. The contract to demolish the bridge provides, **without condition,** that you were to pay $30,000 by June 9th, 2010, which you have not done. Since the demolition contract has been breached and the demolition is a material term of the parties contract, Mr. Kelly and/or AED is entitled to rescind the contract. "A material breach by one party will allow the other party to rescind the contract." *Borah v. McCandless,* 147 Idaho 72, 79, 205 P.3d 1209, 1215 (2009).
>
> Mr. Kelly has parties interested in taking over your position in this matter.

> If you fail to make arrangement with me to wire the money by the close of business tomorrow, then suit will be filed here in Kootenai County, as is allowed in the contract, seeking to rescind the contract and for damages occasioned by the delay's your failure to perform have caused, which damages will be an offset against the $25,000 you have paid for the bridge.
>
> Please contact me after you have considered the above.
>
> Arthur Bistline
> Bistline Law

Affidavit of Krystal Chaklos in Support of Motion for Summary Judgment, p. 3, ¶ 13, Exhibit "D". (bold and underlining in original).

This Court finds that Kelly's one sentence "Last chance for you guys to accept a return of your money" in Kelly's July 13, 2010, email to Delta Demo, is not a tender. First of all, it is an email to the wrong party, Delta Demo, when KDC paid the money. Second, Kelly doesn't state how much "money" he is talking about. Third, Kelly does not state that he is ready to pay such funds. Prior to July 13, 2010, KDC was certainly aware that AED was not obtaining any of the necessary permits or licenses to perform operations in West Virginia (Affidavit of Krystal Chaklos in Support of Motion for Summary Judgment, p. 3, ¶ 8), and KDC was aware AED was wanting the mobilization money (*Id.,* Exhibit B), so KDC would have reason to be concerned about AED's ability to repay what KDC had sent to AED just one month earlier. Fourth, Krystal Chaklos, who is an officer of KDC, had just been told by Kelly/AED's attorney Bistline that KDC had to wire Bistline $30,000 the next day or he would file a lawsuit against KDC on behalf of AED, in which the $25,000 KDC paid for the bridge would be treated as an "offset." Regarding the third and fourth reason, keep in mind the Idaho Supreme Court in *O'Connor* wrote:

> A party seeking to rescind a contract ordinarily must return any consideration of the benefit received before the rescission is valid.

> *Robinson [v. State Farm],* 137 Idaho [173] at 181, 45 P.3d [829] at 837. More than a mere offer of the deposit is required; the party must exhibit an actual intent and willingness to pay to constitute a valid tender. Pollard Oil Co. v. Christensen, 103 Idaho 110, 116, 645 P.2d 344, 350 (1982).

145 Idaho 904, 911, 188 P.3d 846, 853. Because Kelly's email statement "Last chance for you guys to accept a return of your money" was to the wrong party, unspecific in amount, did not state Kelly is ready to pay such funds and was totally contrary to what Kelly's lawyer had written just six days prior to Kelly's email, this statement can hardly be considered an *offer*, let alone "…an actual intent and willingness to pay to constitute a valid tender."

KDC is entitled to summary judgment on AED's claims of rescission. The remedy of rescission is simply not available to AED because AED did not tender the $25,000 to KDC when AED had a legal duty to do so. AED did not "offer" to tender the $25,000 to KDC when AED had a legal duty to do so. Both for purposes of KDC's summary judgment motion and for purposes of AED's motion to reconsider, rescission is not available to AED.

4. AED's Claims of Specific Performance.

KDC argues that assuming AED can prove fraud, it is still not entitled to specific performance of the demolition agreement. First of all, this Court has determined, as set forth above, that AED cannot prove fraud and KDC is entitled to summary judgment.

Alternatively, even if AED could prove fraud, or even if AED appeals this Court's decisions on summary judgment, this Court finds that AED is not entitled to specific performance as a remedy.

AED has sued for specific performance. Amended Complaint, p. 4, Count Three, ¶¶ 21-23. KDC argues *Chandler v. Hayden,* 147 Idaho 765, 771, 215 P.3d 485, 491

(2009), when discussing the three remedies for fraud: "damages, rescission, or enforcement of the contract according to the defrauding party's representation of the bargain", refers to the proper measure of damages under the benefit of the bargain rule. Memorandum in Support of Motion for Summary Judgment, pp. 19-20. Without reaching that issue, this Court finds that AED would not be entitled to specific performance in any event.

As noted by KDC, specific performance is a matter within the court's discretion, and "Specific performance is an extraordinary remedy that can provide relief when legal remedies are inadequate." *Kessler v. Tortoise Dev., Inc.,* 134 Idaho 264, 270, 1 P.3d 292, 298 (2000), *citing Hancock v. Dusenberry,* 110 Idaho 147, 152, 715 P.2d 360, 265 (Ct.App. 1986); *P.O. Ventures, Inc. v. Loucks Family Irrevocable Trust,* 144 Idaho 233, 237, 159 P.3d 870, 874 (2007); Memorandum in Support of Motion for Summary Judgment, p. 20. Even if AED could prevail on its fraud theory, the legal remedy of damages is entirely appropriate. *Iron Eagle Dev., LLC v. Quality Design Sys., Inc.,* 138 Idaho 487, 492, 65 P.3d 509, 514 (2003).

AED argues: "AED is the party on the hook to Roger Barack, the original owner of the bridge, as well as to the United States Federal District Corut to ensure proper removal of the bridge." Response to Summary Judgment, p. 12. AED then claims: KDC's indication that it no longer intends to use AED or to use explosives to demolish the bridge "…increases the risk and costs associated with removal of the bridge" and "This increases the risk that AED will be required to expend money to comply with its obligations to Barrack as well as to the federal court, but no number can be placed on that risk." *Id.,* p. 13. Taking this unsupported argument at face value, the argument itself establishes that monetary damages are appropriate and adequate. This argument

assumes something that has not even occurred, that AED will have "to expend money to comply with its obligations to Barrack", but even given that assumption, the amount of money AED spends would certainly be simply and readily ascertainable.

The Court is not at all persuaded by AED's final argument:

> AED bargained for and received the consideration that it would participate in the demolition of the bridge to guard against certain identified risks. AED is entitled to what it bargained for and if not entitled to rescission, AED is entitled to specific performance. If KDC does not wish for AED to be involved, KDC should accept AED's offer of rescission.

Id., p. 13. Given the fact that it was AED which filed this lawsuit, and given the fact that AED's filing this lawsuit has placed KDC in precarious position to have this bridge demolished on time, the last sentence smacks of financial terrorism. AED is essentially arguing: If KDC cannot demolish this bridge because of this lawsuit, and AED filed this lawsuit, and if KDC wishes AED go to away, then KDC should accept AED's offer of rescission.

KDC simply responds to AED's specific performance argument that the Asset Purchase and Liability Assumption Agreement removed any liability AED has regarding demolition of the bridge. Defendant's Reply Memorandum in Support of Motion for Summary Judgment, p. 10. If that is true, then not only is the remedy of specific performance without legal basis, it would also be lacking any factual basis.

KDC is entitled to summary judgment on AED's claims of specific performance. The remedy of specific performance is not available to AED.

5. AED's Claims Against Lee Chaklos are Dismissed Because Lee Chaklos is not an Owner, Director, Officer or Agent of KDC.

KDC argues AED's claims against Lee Chaklos must be dismissed because Lee Chaklos is not an owner, director, officer, or agent of KDC. AED concedes this point as AED states:

> KDC is only entitled to summary judgment that Lee Chaklos bears no personal responsibility as an officer, director or shareholder of KDC as he held none of these positions.

Response to Summary Judgment, p. 5, 13. Because AED concedes KDC is entitled to summary judgment of all claims against Lee Chaklos, summary judgment is granted and all claims of AED against Lee Chaklos are dismissed with prejudice.

6. KDC Must be Granted its Requested Quiet Title Action.

KDC claims it is "…entitled to judgment as a matter of law as to all of Plaintiff's claims, and on Defendant's claim to quiet title which is contained in their Amended Counterclaim in this matter." Memorandum in Support of Motion for Summary Judgment, p. 1. KDC's Count III of its Counterclaim in "KDC's Amended Answer to Amended Complaint and Demand for Jury Trial and Defendant KDC Investments, LLC's Amended Counterclaim," filed November 17, 2010, alleges that "Pursuant to the terms of the Purchase Agreement, and by virtue of the Bill of Sale, KDC Investments is the rightful owner of the Bridge, that AED by filing its Amended Complaint, has claimed an ownership interest in the Bridge", and that "KDC seeks a decree from this Court quieting title to the Bridge in favor of KDC Investments." KDC's Amended Answer to Amended Complaint and Demand for Jury Trial and Defendant KDC Investments, LLC's Amended Counterclaim, Count III, p. 10, ¶¶ 18-21. After KDC made application for default on December 6, 2010, AED filed Plaintiff's Answer to Defendants' Amended Counterclaim on December 8, 2010. In that answer, AED denies that "Pursuant to the terms of the Purchase Agreement, and by virtue of the Bill of Sale, KDC Investments is the rightful owner of the Bridge." Amended Complaint and Demand for Jury Trial and Defendant KDC Investments, LLC's Amended Counterclaim, Count III, p. 10, ¶ 19; Amended Answer to Amended Complaint and Demand for Jury Trial and Defendant KDC

Investments, LLC's Amended Counterclaim, p. 2, ¶ 8. However, AED admits that "AED, by virtue of filing its Amended Complaint, has claimed an ownership interest in the Bridge", and "KDC Investments seeks a decree from this Court quieting title to the Bridge in favor of KDC Investments." Amended Complaint and Demand for Jury Trial and Defendant KDC Investments, LLC's Amended Counterclaim, Count III, p. 10, ¶¶ 20-21; Amended Answer to Amended Complaint and Demand for Jury Trial and Defendant KDC Investments, LLC's Amended Counterclaim, p. 2, ¶ 9.

In its briefing AED does not address KDC's request that title to the bridge be quieted in KDC's name.

In AED's Amended Complaint AED makes a cryptic allegation: "Plaintiff, as owner of the bridge, was and is subject to a non-assignable obligation to demolish and remove the bridge." Amended Complaint, p. 2, ¶ 12. That allegation is unsupported by any evidence. AED has put forth no evidence that it owns this bridge. In its prior briefing, KDC sets forth the problem caused by AED creating the ownership issue:

> However, after AED filed suit claiming it owned the Bridge, the Coast Guard issued KDC Investments a letter on September 20, 2010, stating: "We regret to inform you that until final ownership is determined in a court of law; no bridge work of any sort may proceed. Previous approvals issued by this officer are hereby suspended until further notice."

Memorandum in Support of Motion for Mandatory Injunction, p. 7; Affidavit of Krystal Chaklos in Support of Motion for Preliminary Injunction, filed November 18, 2010, Exhibit 2.

KDC has paid for the bridge. This Court finds the Purchase Agreement and the Bill of Sale are not ambiguous. Those documents state ownership of the bridge was transferred to KDC. The only argument AED has advanced to prevent that transfer of ownership is its fraud argument. The Court has granted summary judgment against

AED and in favor of KDC on AED's fraud claims for a variety of reasons. Ultimately, this Court has determined that the remedy of rescission is no longer available to AED, and thus, any claim of AED to ownership of this bridge evaporates. Because AED cannot rescind the Purchase Agreement, the transfer of ownership in this bridge to KDC remains completely valid. KDC is entitled to summary judgment quieting title to the bridge in the name of KDC.

7. KDC's Standing to Contest AED's Corporate Status Need Not Be Reached on Summary Judgment.

In this Court's Memorandum Decision and Order on Defendant KDC's Motion for Preliminary Injunction, this Court discussed whether AED, due to it being corporately dissolved, had the ability to enter into any of these contracts, and whether KDC has standing to raise that issue. Memorandum Decision and Order on Defendant KDC's Motion for Preliminary Injunction, pp. 9-11. On summary judgment, AED again raises the issue of standing. Response to Summary Judgment, pp. 7-8. This Court need not decide this issue for purposes of summary judgment, as the Court has already held that AED created an illegal agreement due to its failure to have a valid contractor's license and failure to obtain the required permit at the time it entered into this demolition agreement with KDC.

IV. CONCLUSION AND ORDER.

IT IS HEREBY ORDERED defendant KDC's Motion to Shorten Time to hear KDC's Motion to Strike Affidavits of Arthur M. Bistline, Eric J. Kelly, and Mark Wilburn Filed in Support of Plaintiff's Opposition to Defendants' Motion for Summary Judgment is GRANTED.

IT IS FURTHER ORDERED defendant KDC's Motion to Strike Affidavits of Arthur M. Bistline, Eric J. Kelly, and Mark Wilburn Filed in Support of Plaintiff's Opposition to Defendants' Motion for Summary Judgment is granted and denied as set forth above.

IT IS FURTHER ORDERED defendant KDC's Motion for Summary Judgment is GRANTED as to AED's breach of contract claim on the "demolition agreement", and that claim must be dismissed because the demolition agreement was illegal given AED's failure to obtain a valid contractor's license and procure the necessary permits before entering into the demolition agreement with KDC. The demolition agreement is an illegal contract from AED's standpoint. KDC is entitled to summary judgment against AED on AED's breach of contract claims on the demolition agreement.

IT IS FURTHER ORDERED defendant KDC's Motion for Summary Judgment is GRANTED as to AED's fraud claims because 1) AED had no right to rely upon any alleged misrepresentations where it did not have a West Virginia Contractor's License; and 2) no evidence exists to demonstrate KDC had no intention of allowing AED to blast the bridge on June 1, 2010.

IT IS FURTHER ORDERED defendant KDC's Motion for Summary Judgment is DENIED as to AED's fraud claim should be dismissed because those claims were not pled with particularity.

IT IS FURTHER ORDERED defendant KDC's Motion for Summary Judgment is GRANTED on AED's claims of rescission. The remedy of rescission is simply not available to AED because AED did not tender or offer to tender the $25,000 to KDC when it had a legal duty to do so.

IT IS FURTHER ORDERED plaintiff AED's Motion for Reconsideration is DENIED because the remedy of rescission is not available to AED because AED did not tender or offer to tender the $25,000 to KDC when it had a legal duty to do so.

IT IS FURTHER ORDERED defendant KDC's Motion for Summary Judgment is GRANTED on AED's claims of specific performance. The remedy of specific performance is not available to AED.

IT IS FURTHER ORDERED defendant KDC's Motion for Summary Judgment is GRANTED on AED's claims against Lee Chaklos. Those claims are dismissed because Lee Chaklos is not an owner, director, officer, or agent of KDC.

IT IS FURTHER ORDERED defendant KDC's Motion for Summary Judgment is GRANTED and KDC is entitled to judgment as a matter of law as to all of AED's claims of ownership (all such claims are dismissed), and KDC's claim of quiet title contained in its Amended Counterclaim is GRANTED.

IT IS FURTHER ORDERED AED's claims are DISMISSED. Trial remains only on the issues raised in KDC's Amended Counterclaim.

Entered this 28th day of January, 2010.

_____
John T. Mitchell, District Judge

Certificate of Service

I certify that on the _____ day of February, 2011, 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 #
Arthur Bistline	665-7290	Randy L. Schmitz	208-395-8585

_____
Jeanne Clausen, Deputy Clerk