STATE OF IDAHO)
County of KOOTENAI)ss

FILED_____

AT_____ O'Clock _____M
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

MOUNTAIN WEST BANK,

Plaintiff,

vs.

IDAHO FENCE COMPANY, INC, ET AL,

Defendant.

Case No. **CV 2010 10203**

MEMORANDUM DECISION AND ORDER GRANTING PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

I. PROCEDURAL HISTORY AND FACTUAL BACKGROUND.

This matter is before the Court on plaintiff Mountain West Bank's (MWB) Motion for Summary Judgment.

On November 24, 2010, MWB began this lawsuit filing its Complaint against defendants Idaho Fence Company, Eli H. Stinger, Eli H. Stinger II and Tamijo Stinger (collectively Idaho Fence). MWB alleges it loaned $750,000.00 to Idaho Fence on June 2, 2005; Idaho Fence gave MWB a promissory note, replaced that note with one in the amount of $202,000.00 on December 10, 2008, and loaned an additional $500.000.00 on March 16, 2007, and Idaho Fence gave MWB an additional promissory note in that amount. Complaint, pp. 1-3, ¶¶ 5-10. Stingers executed guaranties on these loans. *Id.,* pp. 3-4, ¶13. MWB alleges it loaned $1,000,000.00 on October 14, 2005, to Netvest/Magee & Oracle, LLC (Netvest), which is not a party to this lawsuit. *Id.,* p. 3, ¶ 12. Stingers executed guaranties on this loan as well. *Id.,* pp. 3-4, ¶13.

MWB alleges Idaho Fence and Netvest are in default on all loans. *Id.,* p. 4, ¶¶ 14-15. MWB claims Idaho Fence has wrongfully detained the collateral described in the Commercial Security Agreements executed by Eli H. Stinger, II on behalf of Idaho Fence on March 16, 2007, and by Eli H. Stinger on behalf of Idaho Fence on June 2, 2005. Complaint, p. 3, ¶ 10, Exhibit 4 and 5. That security interest in those Commercial Security Interests was perfected by filing with the Idaho Secretary of State. *Id.,* Exhibit 6.

On December 8, 2010, Idaho Fence appeared via filing of an Acceptance of Service by their counsel. On January 25, 2011, Idaho Fence filed its Answer and Affirmative Defenses.

MWB's Complaint seeks principal amounts it loaned to Idaho Fence, plus interest, from Idaho Fence Company and the Stingers jointly and severally following the alleged default and seeks immediate possession of specific property pursuant to I.C. § 28-9-609. On March 29, 2011, MWB filed its motion for summary judgment with supporting memorandum and affidavit.

Rather than file its response brief or file a request for a late filed brief (or simply agree with opposing counsel to an extension on the filing deadline), on April 19, 2011, seven days before hearing on the motion, Idaho Fence simply filed a Motion to Continue, and noticed that motion for hearing on April 26, 2011, the date MWB had scheduled and noticed up their motion for summary judgment. Idaho Fence moved to continue hearing on the motion for summary judgment to a date after July 1, 2011. The stated reason was counsel for Idaho Fence had a deposition scheduled for April 26, 2011. Nowhere in that motion was it stated why counsel for Idaho Fence could not reschedule such deposition or why another attorney in that large legal firm could not handle either the deposition or the motion for summary judgment. Idaho Fence's

motion begged the question that counsel for Idaho Fence could not be in attendance before this Court on April 26, 2011, on MWB's motion for summary judgment in this case, but yet, counsel for Idaho Fence *noticed up for hearing,* at that same date and time, Idaho Fence's motion to continue. Obviously, if an attorney can be present for a secondarily scheduled hearing on a motion to continue, that same attorney can be present on the primarily scheduled motion for summary judgment. Finally, by choosing to not file any response to the summary judgment and instead choosing to file a motion to continue, counsel for Idaho Fence placed the Court in the position of either granting the continuance or deciding the motion for summary judgment after hearing just one party's version of the events. This choice made by counsel for Idaho Fence is extremely risky given the result that could have befallen Idaho Fence via I.R.C.P. 56(e). Entry of summary judgment against Idaho Fence due to their failure to respond is clearly allowed (I.R.C.P. 56(e)), but justice is rarely served by not deciding the matter on the merits.

There is only one reason for Idaho Fence to file the motion to continue and request the hearing on summary judgment be re-set to after July 1, 2011, and that is the non-judicial foreclosure on the secured property is scheduled to occur on June 11, 2011.

In any event, on April 22, 2011, MWB filed Plaintiff's Objection to Motion to Continue Hearing. Idaho Fence's motion to continue was heard by the Court on April 26, 2011, during the time originally set for oral argument on the motion for summary judgment. At that hearing, counsel for Idaho Fence argued the firm attorney assigned to the case was out of the country when MWB filed its motion for summary judgment, and did not return until eight days later. The Court was not impressed with this argument given the fact that Idaho Fence's response brief was not due for another

six days after assigned counsel's return to this country, fourteen days after MWB's brief and affidavits are filed. I.R.C.P. 56(c). The Court granted Idaho Fence's motion to continue hearing on the motion for summary judgment, but only rescheduling hearing on the summary judgment for May 11, 2011. This gave counsel for Idaho Fence three days from April 26, 2011, to file its response brief, which, at that time, was already *twenty-days* late. Due to the conduct of Idaho Fence regarding the motion to continue, the Court awarded attorney fees against Idaho Fence in favor of MWB for time spent addressing Idaho Fence's motion to continue and the April 26, 2011, hearing. Order Granting Defendants' Motion to Continue Hearing Re: Plaintiff's Motion for Summary Judgment, pp. 1-2.

On April 29, 2011, Idaho Fence filed its Memorandum in Opposition to Plaintiff's Motion for Summary Judgment and supporting affidavits of Jennifer Fegert and Eli Stinger. On May 6, 2011, MWB filed its Reply Memorandum in Support of Motion for Summary Judgment. On May 6, 2011, MWB also moved to strike the Affidavit of Jennifer Fegert and portions of the Affidavit of Eli Stinger, and to shorten time on its motion to strike.

At oral argument on May 11, 2011, this Court granted MWB's motion to shorten time (Idaho Fence had no objection to the motion to shorten time), and then the Court heard argument on MWB's Motion to Strike Affidavits of Jennifer H. Fegert and Eli Singer. At the conclusion of such argument, the Court denied MWB's Motion to Strike. Following which, the Court heard oral argument on MWB's Motion for Summary Judgment. This matter is currently scheduled for a four-day Court trial commencing on January 23, 2012. Of paramount importance is fact that the non-judicial foreclosure is scheduled for June 11, 2011.

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II. STANDARD OF REVIEW.

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). A mere scintilla of evidence or only slight doubt as to the facts is not sufficient to create a genuine issue for purposes of summary judgment. *Samuel v. Hepworth, Nungester & Lezamiz, Inc.,* 134, Idaho 84, 87, 996 P.2d 303, 306 (2002). 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); *Riverside Dev. Co. v. Ritchie,* 103 Idaho 515, 519, 650 P.2d 657, 662 (1982). In summary judgment in a case scheduled for a court trial, the Court as the trier of fact is entitled to arrive at the most probable inferences based on the undisputed evidence properly before the Court. *J.R. Simplot Co. v. Bosen,* 144 Idaho 611, 618, 167 P.3d 748, 755 (2006).

III. ANALYSIS.

A. Introduction.

MWB moves this Court for summary judgment on all amounts now due and owing following Idaho Fence's alleged default. MWB argues Eli and Tamijo Stinger each executed a personal guaranty of Idaho Fence's debts to MWB, and Eli Stinger II executed a personal guaranty of Netvest/McGee's obligations and debts to MWB.

Memorandum in Support of Plaintiff's Motion for Summary Judgment, p. 5. [Netvest/Mcgee & Oracle, LLC is not named as a defendant, but is mentioned at ¶¶ 11, 12, and 15 of the Complaint. MWB sets forth no authority for this Court's jurisdiction over Netvest/McGee. Nevertheless, MWB seeks an award of this Court regarding the amounts MWB claims are due and owing from Netvest/McGee in its motion for summary judgment, although no request for relief in the Complaint involves Netvest/McGee.] It is MWB's contention that Idaho Fence and the Stingers have failed to perform and have breached their written agreements with MWB "[b]y failing to pay IFC/Netvest's debts to MWB as promised under each of their respective guaranties." Memorandum in Support of Plaintiff's Motion for Summary Judgment, p. 7. MWB goes on to argue Idaho Fence has waived its rights to assert any claim or defense requiring MWB to exhaust any collateral it has to secure the underlying obligation expressly in the written guaranty agreements. *Id.,* pp. 7-8.

In response, Idaho Fence argues the relief MWB now seeks is violative of the one-action rule codified at Idaho Code § 45-1503 and that "until [the] collateral has been foreclosed, the parties cannot know whether the foreclosure sale will satisfy the obligation, or result in a deficiency for which the lender can seek a judgment." Defendants' Memorandum in Opposition to Plaintiff's Motion for Summary Judgment, p. 2. Idaho Fence also argues MWB is seeking a judgment against a non-party because "MWB has failed to bring Netvest/McGee in as a proper party…and therefore judgment against the Note and Deed of Trust executed on behalf of Netvest/McGee is improper." *Id.*

MWB replies Netvest/McGee is not a necessary party to the instant action because it seeks only "to recover against Defendant Eli H. Stinger II *on the Guaranty* he executed guaranteeing Netvet's promissory note." Plaintiff's Reply Memorandum in

Support of Motion for Summary Judgment, p. 2. (italics in original). MWB also argues the one-action rule is inapplicable because of defendants' waiver of all rights or defenses arising by virtue of any one-action rule or anti-deficiency law. *Id.,* p. 3. MWB also notes Idaho Fence has presented no evidence to raise any issues of fact with regard to their being the grantor of a deed of trust or their having any interest in the collateral secured by a deed of trust "that would subject them to a multiplicity of suits." *Id.,* pp. 3-4.

B. Failure to Make Netvest a Party Does not Preclude MWB's Instant Action Against the Guarantors.

The first question for this Court is whether a party may institute a suit against a guarantor where the underlying borrower (Netvest) is not a named defendant to the action. As argued by MWB, this Court finds this question may be answered in the affirmative. The Idaho Court of Appeals has addressed this issue in *Johnson Equipment, Inc. v. Nielsen,* 108 Idaho 867, 702 P.2d 905 (Ct.App. 1985):

> The rights of a creditor against a guarantor are strictly determined by the terms of the guaranty contract. *Industrial Investment Corp. v. Rocca, supra.* Where the terms of the contract are plain and ambiguous, they alone are consulted to ascertain the obligations guaranteed. As a general rule of contract law, the intent of the parties must be derived from the language of an instrument if it is ambiguous. *International Engineering Co. v. Daum Industries, Inc.,* 102 Idaho 363, 630 p.2d 155 (1981); *Bailey v. Ewing,* 105 Idaho 636, 671 P.2d 1099 (Ct.App. 1983).

108 Idaho 867, 871, 702 P.2d 905, 909. An unconditional guarantee is a promise by the guarantor to pay the debt or perform the obligation upon default without requiring the secured party to first exhaust its remedies against the debtor. *CIT Financial Services v. Herb's Indoor RV Center, Inc.,* 118 Idaho 185, 187, 795 P.2d 890, 892 (Ct.App. 1990) (citing *Commercial Credit Corp. v. Chisholm Bros. Farm Equipment Co.,* 96 Idaho 194, 525 P.2d 976 (1974)). It follows that suit against a guarantor is a

separate action from suit against a separate borrower, and claims against a guarantor are governed solely by the guaranty contract. And, as such, Idaho Fence has raised no material issues of fact with regard to MWB's decision not to bring Netvest/McGee into the action as a party, and MWB is entitled to judgment on this issue as a matter of law.

C. Guarantors Waived any Defense that MWB Must First Exhaust Collateral.

Additionally, MWB points out the specific language used in the agreement between MWB and the individually named defendants, waives any claim or defense that MWB would have to exhaust collateral before seeking judgment. Memorandum in Support of Plaintiff's Motion for Summary Judgment, pp. 7-8. MWB argues the Stingers expressly waived any and all rights or defenses which may arise by reason of the one-action rule or anti-deficiency statutes. Plaintiff's Reply Memorandum in Support of Motion for Summary Judgment, p. 3.

Waiver requires an intentional relinquishment of a known right. *Hecla Mining Co. v. Star-Morning Mining Co.,* 122 Idaho 778, 782, 839 P.2d 1192, 1196 (1992). "…[T]o establish waiver the intention to waive must clearly appear…" *Id.* It is, in effect, a voluntary, intentional relinquishment of a right or advantage. *Tiffany v. City of Payette,* 121 Idaho 396, 825 P.2d 1157 (Ct.App. 1990); *Soloaga v. Bannock County,* 119 Idaho 678, 809 P.2d 1157 (Ct.App. 1990). Statutory rights may in some instances be waived. In *Lee v. Sun Valley Co.,* 107 Idaho 976, 695 P.2d 361 (1984), the Idaho Supreme Court examined whether the duty imposed by I.C. § 6-1204 (on duties of an outfitter guide) can be waived or exempted by statute. The Court wrote:

> There are some statutory rights and duties which may be waived or exempted by contract. *E.g., Leventhal v. Atlantic Finance Corp.*, 316 Mass. 194, 55 N.E.2d 20 (1944) (stockholders' right to seek dissolution may be waived); *Newey v. Newey,* 161 Colo. 395, 421 P.2d 464 (1966) (antenuptial agreement is binding as waiver of property, alimony and

> support rights); *Perry v. Perry,* 551 P.2d 256 (Okla.1976) (property, alimony and support statutory rights may be waived by contract); *Matter of Burgess' Estate,* 646 P.2d 623 (Okla.App.1982) (statutory inheritance rights may be waived by contract); *Dunbabin v. Brandenfels,* 18 Wash.App. 9, 566 P.2d 941 (1977) (rights of usury defense may be waived by contract).
>
> Other statutory rights and duties may not be waived or exempted by contract. *Sherba Bros., Inc. v. Campbell,* 361 So.2d 814 (Fla.App.1978) (minimum wage); *Iowa Mutual Ins. Co. v. Parr,* 189 Kan. 475, 370 P.2d 400 (1962) (property exemptions from attachment and execution); *Egy v. U.S. Fidelity & Guaranty Co.,* 8 Kan.App.2d 144, 651 P.2d 954 (1982), *aff'd,* 233 Kan. 234, 661 P.2d 1239 (1983) (property exemption for workmen's compensation benefits); *Fireman's Fund Ins. Co. v. Sand Lake Lounge, Inc.,* 514 P.2d 223 (Alaska 1973) (statute of limitations); *Southwestern Bell Tel. Co. v. Employment Sec. Bd. of Review,* 210 Kan. 403, 502 P.2d 645 (1972) (unemployment compensation); *Elson Development Co. v. Arizona Savings & Loan Ass'n,* 99 Ariz. 217, 407 P.2d 930 (1965) (statutory right of redemption).[FN2]
>
> FN2. The citations above are merely examples of other jurisdictions' treatment of specific contractual waivers of statutory rights. They are not necessarily precedent for the same disposition in Idaho.

107 Idaho 976, 989, 695 P.2d 361, 364. Although no Idaho case law is on point for the specific issue before the Court, it is important to recall that Idaho Fence is the mortgagor, while the individually-named defendants are guarantors. With this in mind, the Court looks to a decision of the Oklahoma Supreme Court in which that Court wrote:

> The terms of the guaranty agreement define the specific nature of the promise extracted from the guarantor and thus determine both the scope of the guarantor's liability and the available defenses the guarantor may raise against that liability. **As the specially protected beneficiaries of the anti-deficiency statute, mortgage debtors cannot contract away that statute's protection. (Citation Omitted). The guarantor is not so constrained.** A consenting guarantor may waive the protections provided by the separate statutory scheme regulating guaranty contracts. Such waivers as may exist will be ascertained from the express terms of the agreement.

Bank of Oklahoma, NA v. Red Arrow Marina Sales & Service, Inc., 224 P.3d 685, 698 (Okla. 2009) (Emphasis in original). The Oklahoma Supreme Court reasoned that the

protections of its state's anti-deficiency statute apply only to mortgage debtors and therefore the statute does not automatically discharge guarantors from further liability on their independent and separate obligations. *Red Arrow,* 224 P.3d 685, 698. This reasoning applies equally here. Idaho Fence Company (and although not applicable to the issues before the Court, Netvest/McGee) is entitled to protections to which the individually named Stinger defendants are not.

D. The "One-Action" Rule Provides No Defense to Summary Judgment.

As mentioned above, Idaho Fence argues the relief sought by MWB violates the one-action rule codified at I.C. § 45-1503 and "until [the] collateral has been foreclosed, the parties cannot know whether the foreclosure sale will satisfy the obligation, or result in a deficiency for which the lender can seek a judgment." Defendants' Memorandum in Opposition to Plaintiff's Motion for Summary Judgment, p. 2.

The obvious reason the "one-action" rule does not apply in this case is, as correctly noted by MWB, "Defendants have presented no evidence that in any way raises a genuine issue of fact as to whether any of obligations that are the subject of the *Complaint* are secured by a deed of trust granted by the Defendants." Plaintiff's Reply Memorandum in Support of Motion for Summary Judgment, p. 3. There are additional reasons the "one-action" rule cannot apply as a defense in the present case.

If there were a deed of trust involved (and there is not), Idaho Fence (and arguably Netvest/McGee if it were a party) is entitled to the one-action rule protection. However, the Stingers are signatories of a guaranty which explicitly states they waive any right to require MWB to "proceed directly against or exhaust any collateral held by lender from Borrower, any other guarantor, or any other person…" Exhibits 1 and 2 to the Affidavit of Shelly Romine in Support of Plaintiff's Motion for Summary Judgment.

The one-action rule found in I.C. § 6-101 (foreclosure on a mortgage) is distinct from I.C. § 45-1502 *et seq.* Under a deed of trust, a trustee may foreclose a trust deed by advertisement and sale where "no action, suit, or proceeding has been instituted to recover the debt then remaining secured by the trust deed, or any part thereof, or if such action or proceeding has been instituted, the action or proceeding has been dismissed." I.C. § 45-1505(4). The Idaho Legislature amended I.C. § 45-1503 in 1989, to include a form of one-action rule, and the amended language provides: "If an obligation secured by a deed of trust is breached, the beneficiary may not institute a judicial action against the grantor or his successor in interest to enforce an obligation owed by the grantor or his successor in interest unless: [four different situations are then listed where pursuing a judicial action is not prohibited against the grantor]" I.C. § 45-1503(1); From the plain language of this amendment, it is clear the "one-action" rule adopted only applies to actions against the "grantor" or the "successor in interest" to the grantor. *Id.* Idaho case law prohibits pursuit of two remedies against the *same* debtor where one remedy is statutory and the other judicial, and that amendment was the legislative response to *Frazier v. Neilsen & Co.,* 115 Idaho 739, 769 P.2d 1111 (1989). *Frazier* concerned a situation where the beneficiary sought to pursue a judicial action against the grantor before pursuing a non-judicial foreclosure action to foreclose the deed of trust granted to the beneficiary, and the case makes it clear the beneficiary cannot file a judicial action against the "grantor" until after the non-judicial foreclosure sale has been completed.

As guarantors, Stingers can find no protection under the anti-deficiency statutes or the "one action" statutes. Two decisions by Fourth District Court Judge Michael McLaughlin illustrate this point: *America West Bank v. Union Land Co., LLC,* Ada Co.

Case No. CVOC0802909, Memorandum Decision dated October 14, 2008, and *Home Federal Bank v. West Wind Investments, LLC,* Ada Co. Case No. CVOC 0907590, Memorandum Decision dated August 26, 2009. Both cases correctly interpret: *First Security Bank of Idaho v. Gaige,* 115 Idaho 172, 174, 765 P.2d 683, 685 (1988) where the Idaho Supreme Court first decided the anti-deficiency protections under I.C. § 45-1512 only extend to grantors of deeds of trust and do not extend to guarantors; and *Valley Bank V. Larson,* 104 Idaho 772, 774, 663 P.2d 653, 655 (1983), where the Idaho Supreme Court looked at case law from other jurisdictions to support its conclusion that "Trust Deed Statutes protect the principal debtor, but the guarantor may not claim the protection because his obligation is independent of the principal debtors." Judge McLaughlin correctly noted:

> Again the central issue is whether sections 45-1502 and 45-1505(4) extend to actions against guarantors. For the reasons referenced above, section 45-1505(4) only applies to actions against grantors, not guarantors.

Home Federal Bank v. West Wind Investments, LLC, Ada Co. Case No. CVOC 0907590, p. 7.

The Idaho Court of Appeals has also addressed this issue in *Johnson Equipment, Inc. v. Nielsen,* 108 Idaho 867, 702 P.2d 905 (Ct.App. 1985):

> The rights of a creditor against a guarantor are strictly determined by the terms of the guaranty contract. *Industrial Investment Corp. v. Rocca, supra.* Where the terms of the contract are plain and ambiguous, they alone are consulted to ascertain the obligations guaranteed. As a general rule of contract law, the intent of the parties must be derived from the language of an instrument if it is ambiguous. *International Engineering Co. v. Daum Industries, Inc.,* 102 Idaho 363, 630 p.2d 155 (1981); *Bailey v. Ewing,* 105 Idaho 636, 671 P.2d 1099 (Ct.App. 1983).

108 Idaho 867, 871, 702 P.2d 905, 909. An unconditional guarantee is a promise by the guarantor to pay the debt or perform the obligation upon default without requiring

the secured party to first exhaust its remedies against the debtor. *CIT Financial Services v. Herb's Indoor RV Center, Inc.,* 118 Idaho 185, 187, 795 P.2d 890, 892 (Ct.App. 1990) (citing *Commercial Credit Corp. v. Chisholm Bros. Farm Equipment Co.,* 96 Idaho 194, 525 P.2d 976 (1974)). It follows that suit against a guarantor is a separate action from suit against a separate borrower, and claims against a guarantor are governed solely by the guaranty contract.

IV. CONCLUSION AND ORDER.

For the reasons stated above, MWB's motion for summary judgment must be granted, MWB is entitled to the relief sought, and the trial scheduled must be vacated.

IT IS HEREBY ORDERED MWB's Motion for Summary Judgment is GRANTED against defendants as follows;

IT IS FURTHER ORDERED MWB is entitled to judgment as a matter of law against Idaho Fence, Eli H. Stinger, and Tamijo Stinger, jointly and severally, for $640,885.67, plus prejudgment interest accruing from September 24, 2010, at the rate of 5% per anum, or $87.79255 per diem;

IT IS FURTHER ORDERED MWB is entitled to judgment as a matter of law against Eli H. Stinger II in the amount of $862,949.32, plus prejudgment interest accruing from November 23, 2010, at the rate of 5% per anum, or $88,659.17 per diem;

IT IS FURTHER ORDERED MWB is entitled to judgment against Idaho Fence for immediate possession of the Collateral described in Complaint, Exhibit 4 and Exhibit 5;

IT IS FURTHER ORDERED MWB is the prevailing party, and counsel for MWB shall prepare a judgment consistent with this Memorandum Decision and Order Granting MWB's Motion for Summary Judgment;

IT IS FURTHER ORDERED the trial scheduled to begin January 23, 2012, is VACATED.

Entered this 20th day of May, 2011.

_____
John T. Mitchell, District Judge

Certificate of Service

I certify that on the _____ day of May, 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 #**
R. Wayne Sweney, Lindsay R. Simon	664-4125	Fonda L. Jovick, Jennifer Fegert	664-6338

_____
Jeanne Clausen, Deputy Clerk