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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**

**LAWRENCE SPENCER, THOMAS R.** )  
**MACY, and WILLIAM McCRORY,,** )  
 )  
 *Plaintiffs,* )  
 vs. )  
 )  
 **NORTH IDAHO COLLEGE, and NORTH** )  
 **IDAHO COLLEGE FOUNDATION, an Idaho** )  
 **non-profit corporation,.** )  
 )  
 *Defendants.* )

Case No. **CV 2009 8934**

**MEMORANDUM DECISION AND  
ORDER GRANTING DEFENDANT  
NIC'S "MOTION TO DISMISS OR  
DENY PLAINTIFF'S MOTION FOR  
RECONSIDERATION AND MOTION  
TO STAY DISCOVERY"**

**I. PRODEDURAL HISTORY AND BACKGROUND.**

The factual and procedural background of this case has been previously set forth by this Court in its Memorandum Decision and Order on Summary Judgment, filed March 19, 2010:

Defendant North Idaho College (NIC) is a community college district organized pursuant to I.C. § 33-2101, *et seq.* Defendant North Idaho College Foundation (Foundation) is an Idaho non-profit corporation incorporated pursuant to I.C. § 30-3-1, *et seq.* Plaintiffs are three individuals who own property in Kootenai County, and thus, electors and taxpayers within the district boundaries of that community college. Complaint, p. 2, ¶¶ 3-5, 8.

On July 23, 2009, the Foundation purchased property in Kootenai County known as the "Mill Site." At an open public meeting on July 21, 2009, NIC, acting through its Board of Trustees (Board), authorized NIC to enter into a lease agreement with the Foundation for the Mill Site. Resolution 2009-01 was approved by the Board on that date; it was determined the lease was "in the best interests of the students, residents and taxpayers of Kootenai County..." Complaint, Exhibit 3, Resolution No. 2009-01, p. 1. On July 23, 2009, NIC executed the lease agreement which provided for NIC to lease the Mill Site from the Foundation on a yearly basis; renewal of the lease would require affirmative action by the

Board each year through. Complaint, Exhibit 3, Lease Agreement, p. 2.

On October 27, 2009, Plaintiffs filed their *pro se* Complaint, alleging a violation of Article VIII, Section 3 of the Idaho Constitution. Plaintiffs claim the lease agreement is a *de facto* installment land sale contract for which NIC did not obtain the required 2/3 assent of the qualified elector's in the district. Complaint, p. 5, ¶¶ 32-33. Plaintiffs also claim NIC did not obtain judicial validation of the lease agreement pursuant to I.C. § 7-1304, as an alternative to the assent of 2/3 of qualified electors in the district. *Id.*, ¶ 34. Plaintiffs seek a declaratory judgment that the lease agreement violates Article VIII, Section 3 of the Idaho Constitution; permanent injunctive relief prohibiting NIC from making further expenditures under the lease agreement until the lease is approved by 2/3 of qualified electors in the district, should that occur; and an entry of judgment compelling the Foundation to return all monies received from NIC under the lease. Complaint, pp. 6-7. On November 25, 2009, NIC and the Foundation filed their separate Answers to the Complaint.

On January 22, 2010, NIC filed its motion for summary judgment, "Memorandum in Support of Motion for Summary Judgment on Behalf of North Idaho College", and the Affidavit of Tom Komberec (Vice-President of NIC Foundation) in Support of Motion for Summary Judgment". Also on January 22, 2010, the Foundation filed "North Idaho College Foundation's Joinder in North Idaho College's Motion for Summary Judgment." In its motion for summary judgment, NIC requests this Court grant summary judgment in NIC's favor as to the validity of the lease. "If the Lease Agreement does not violate Article VIII, Section 3, all other claims or remedies sought by the Plaintiffs are moot and this lawsuit must be dismissed." Defendants' Memorandum in Support of Motion for Summary Judgment, p. 13. On February 18, 2010, the plaintiffs filed "Plaintiff's Answering Brief in Response to defendant's Motion for Summary Judgment", an "Affidavit of Lawrence Spencer Supplementing Plaintiffs' Answering Brief in Response to Defendants' Motion for Summary Judgment" and the "Affidavit of William McCrory Supplementing Plaintiffs' Answering Brief in Response to Defendants' Motion for Summary Judgment". On February 16, 2010, the Foundation filed the "Foundation Reply Brief in Support of Motion for Summary Judgment." Also on February 16, 2010, NIC filed its "Reply Memorandum in Support of Motion for Summary Judgment." On February 22, 2010, the "Affidavit of William McCrory in Opposition to Motion for Summary Judgment" was filed. Oral argument was held on February 22, 2010.

Memorandum Decision and Order Granting Defendant North Idaho College's Motion for Summary Judgment, pp. 1-3.

The Court entered its Memorandum Decision and Order on Summary Judgment on March 19, 2010, and thereafter, plaintiffs filed a motion for reconsideration and

motion to extend time in which to file affidavits and/or depositions in support of their motion for reconsideration. In response, defendants filed a motion for entry of judgment *nunc pro tunc*, and motions for protective order regarding the taking of depositions. NIC also moved the Court for an Order quashing the subpoenas issued by Plaintiffs. On April 23, 2010, the Court heard oral argument on the various post-summary judgment motions and issued its “Memorandum Decision and Order On: Plaintiffs’ Motion for Extension of Time; Defendants’ Motion for Entry of Judgment *Nunc Pro Tunc*; Defendants’ Motion for Protective Order; and Defendants’ Motion to Quash Subpoena (And Motion to Shorten Time)” on May 5, 2010.

A proposed revised Final Judgment was submitted by NIC on May 10, 2010, and plaintiffs objected thereto on the same date. On May 13, 2010, NIC filed its “Motion for Reconsideration, Motion for Protective Order Regarding Document Request or Alternatively, Motion for Clarification Regarding Post-Summary Judgment Discovery”; its memorandum in support thereof; and its Notice of Objection to Request to Produce (regarding Post-Summary Judgment Depositions). NIC Foundation joined in NIC’s motions on May 14, 2010. And, on May 21, 2010, plaintiffs vacated their hearing on Plaintiffs’ Motion to Reconsider pending the outcome of the defendants’ motions then before the Court. Plaintiffs’ Reply Brief to Defendants’ Joint Motions was filed on June 10, 2010. Oral argument was held on June 16, 2010, and this Court issued its Memorandum Decision and Order on July 1, 2010, ordering defendants’ motion for reconsideration denied, granting defendants’ motion for clarification and protective order in part, and overruling plaintiffs’ objection to entry of judgment. Memorandum Decision and Order on: 1) Defendant NIC’s Motion for Reconsideration, Motion for Protective Order Regarding Document Request or Alternatively, Motion for Clarification Regarding

Post-Summary Judgment Discovery; 2) Defendant NIC's Objection to Request to Produce; and 3) Plaintiffs' Objection to Entry of Judgment, pp. 16-17. On July 1, 2010, Judgment was entered in favor of NIC and NIC's Foundation.

On July 9, 2010, plaintiffs filed a "Motion for Rule 60 (b)(1) and (6) Relief from the Judgment Entered July 1, 2010" (motion to reconsider), and noticed such for hearing on August 30, 2010.

Then, on August 4, 2010, plaintiffs appealed this Court's July 1, 2010, Judgment to the Idaho Supreme Court.

On August 13, 2010, plaintiffs re-noticed their motion for reconsideration for October 26, 2010, which vacated the August 30, 2010, hearing. On October 8, 2010, plaintiffs re-noticed their motion for reconsideration for December 7, 2010, vacating the October 26, 2010, hearing. On November 12, 2010, plaintiffs re-noticed their motion for reconsideration for February 23, 2011. Plaintiffs' motions for reconsideration and for relief from the judgment are currently scheduled for hearing before the Court on February 23, 2011.

On December 16, 2010, defendant NIC filed its motion to stay discovery and a motion to dismiss or deny plaintiffs' motion for reconsideration, arguing that all issues raised by plaintiffs are now moot because the lease between NIC and NIC Foundation has been extinguished. On December 27, 2010, defendant NIC filed a notice of hearing scheduling their motion to dismiss or deny plaintiffs' motion for reconsideration for hearing on February 2, 2011. Plaintiffs filed their response to defendants' motion to dismiss or deny reconsideration and motion to stay discovery on January 21, 2011. On January 26, 2011, defendant NIC filed its "Reply in Support of Motion to Dismiss or Deny Plaintiffs' Motion for Reconsideration and Motion to Stay Discovery." Also, on

January 26, 2011, defendant Foundation filed its “North Idaho College Foundation’s Joinder in North Idaho College’s Motion to Dismiss or Deny Plaintiffs’ Motion for Reconsideration and Motion to Stay Discovery”.

Thereafter, on January 28, 2011, plaintiffs filed a “Motion to Strike the Defendants’ Reply Memorandum or in the Alternative to Grant Plaintiffs Time to respond by Filing a Brief Prior to Oral Argument”, and a “Motion to Shorten Time” in order to hear such on February 2, 2011. While plaintiffs filed a Notice of Hearing on their motions, plaintiffs failed to request of this Court’s Scheduling Clerk that this matter be heard by the Court on February 2, 2011. Only one hour was initially requested by NIC and allotted by the Court’s Scheduling Clerk for the February 2, 2011, hearing, and just prior to that hearing date, without the Court’s permission or knowledge, counsel for plaintiffs unilaterally noticed up other matters on plaintiffs’ behalf. That practice is unacceptable.

At the February 2, 2011, hearing on defendants’ motion to dismiss or deny plaintiffs’ motion for reconsideration, the Court first inquired as to plaintiffs’ motion to shorten time on their motion to strike. Counsel for NIC and Foundation had no objection to plaintiff’s Motion to Shorten time. Accordingly, plaintiffs’ motion to shorten time was granted on the record. The Court then heard argument on plaintiffs’ Motion to Strike the Defendants’ Reply Memorandum or in the Alternative to Grant Plaintiffs Time to respond by Filing a Brief Prior to Oral Argument. At the conclusion of that argument, the Court denied the plaintiffs’ motion to strike, but granted plaintiffs’ motion to grant plaintiffs’ time to respond by filing a brief prior to oral argument, by allowing plaintiffs to file any additional brief regarding the standing issue by no later than February 14, 2011, and allowing defendants to respond with any brief by no later than February 18, 2011. The Court then heard oral argument on defendants Motion to Dismiss or Deny Plaintiffs’

Motion for Reconsideration and Motion to Stay Discovery.

At oral argument, counsel for NIC made this Court aware that the Idaho Supreme Court had decided plaintiffs' appeal by dismissing such appeal as "moot." Prior to oral argument, this Court was unaware of this development, as this Court had not received the Idaho Supreme Court's "Order Granting Motion to Dismiss Appeal as Moot."

Counsel for NIC tendered a copy of the Idaho Supreme Court's "Order Granting Motion to Dismiss Appeal as Moot." Idaho Supreme Court Docket Number 37945-2010.

Although that document shows a copy being sent by the Idaho Supreme Court to this Court on January 26, 2011, such had not been received by this Court as of February 2, 2011, nor had such been filed with the Clerk of the District Court as of that date.

Counsel for NIC also submitted a copy of all briefing submitted to the Idaho Supreme Court, and counsel for plaintiffs did not object to the Court reviewing such. Counsel for plaintiffs asked this Court to review plaintiffs' Motion to Stay filed by plaintiffs with the Idaho Supreme Court, to which counsel for NIC and Foundation did not object.

Following oral argument, the Court took the matter under advisement and waited for receipt of the parties' post-hearing briefs. Plaintiff filed their "Plaintiffs Brief Regarding Standing" on February 4, 2011. Defendant NIC filed "Defendant's Reply Brief on Standing on February 14, 2011. Also on February 14, 2011, counsel for NIC submitted a copy of the Idaho Supreme Court's Order Denying Motion to Stay Appeal, dated February 11, 2011. On February 15, 2011, counsel for plaintiffs submitted a copy of "Appellant's Petition for Rehearing Pursuant to I.A.R Rule 42.

## **II. STANDARD OF REVIEW.**

Reviewing courts exercise free review over questions of jurisdiction, and such questions must be addressed before the merits of an appeal are reached. *Bach v.*

*Miller*, 144 Idaho 142, 144-45, 158 P.3d 305, 307-08 (2008). “A case becomes moot, and therefore will not be considered by the court, when the issues presented are no longer live, the parties lack a legally cognizable interest in the outcome, or a judicial determination will have no practical effect upon the outcome.” *Goodson v. Nez Perce County Bd. Of County Comm’rs*, 133 Idaho 851, 853, 993 P.2d 614, 616 (2000). When standing is raised as an issue, the focus is on the party seeking the relief, not on the merits of the issues raised. *Scona, Inc. v. Green Willow Trust*, 133 Idaho 283, 288, 985 P.2d 1145, 1150 (1999). “Indeed, a party can have standing to bring an action, but will lose on the merits.” *Bagley v. Thomason*, 149 Idaho 806, \_\_\_\_, 241 P.3d 979, 981 (2010), citing *Miles v. Idaho Power Co.*, 116 Idaho 635, 778 P.2d 757 (1989).

### **III. ANALYSIS.**

#### **A. Plaintiffs’ Motion for Reconsideration is Moot.**

Defendants argue the issues in this case are now moot and request that the Court stay any discovery sought by plaintiffs. Memorandum in Support of Motion to Dismiss or Deny Plaintiffs’ Motion for Reconsideration and Motion to Stay Discovery, p. 1. Defendants’ argument is that plaintiffs’ Complaint sought to have the lease declared unconstitutional, and since the lease now ceases to exist, the entire action is moot. *Id.*, p. 2. The lease was extinguished following NIC’s acquisition of the Mill Site from the NIC Foundation. “On December 3, 2010, the Foundation paid the underlying debt secured by the property and the Foundation’s President, Tim Komberec, executed a Deed transferring title from the Foundation to NIC for the Mill Site property.” Affidavit of Rayelle Anderson in Support of Motion to Dismiss or Deny Plaintiffs’ Motion for Reconsideration and Motion to Stay Discovery, p. 2, ¶ 4. Defendants seek an order staying discovery in light of there being no reason to continue discovery now that the

issues raised by plaintiffs in their motion for reconsideration are moot. Memorandum in Support of Motion to Dismiss or Deny Plaintiffs' Motion for Reconsideration and Motion to Stay Discovery, p. 2.

Defendants cite to *Koch v. Canyon County*, 145 Idaho 158, 177 P.3d 372 (2008) as being legally and factually similar. *Id.*, pp. 4-7. Defendants are correct in noting the Idaho Supreme Court in *Koch* held that, because the lease being challenged as violative of Article VIII § 3 of the Idaho Constitution was no longer in effect after the County purchased (and then sold) the property at issue, “[w]ere we to remand the case to the district court for further proceedings, it could not grant the Plaintiffs any specific relief regarding the lease agreement.” 145 Idaho 158, 163, 177 P.3d 372, 377.

Exceptions to the mootness doctrine exist where (1) there is the possibility of collateral legal consequences imposed on the person raising the issue; (2) the challenged conduct is likely to evade judicial review and is therefore capable of being repeated; or (3) an otherwise moot issue raises concerns of substantial public interest. *Ameritel Inns, Inc. v. Greater Boise Auditorium Dist.*, 141 Idaho 849, 851-52, 119 P.3d 624, 626-27 (2005). The Idaho Supreme Court in *Koch* found none of the exceptions to the mootness doctrine had any applicability because the plaintiff taxpayers had not argued they had any possibility of incurring collateral legal consequences, the court's standing ruling made the challenged conduct unlikely to evade judicial review, and remanding the issue of whether the lease violates Article VIII § 3 to the district court would be asking the court to make an advisory opinion since doing so would not resolve any dispute between the parties. *Koch*, 145 Idaho 158, 163, 177 P.3d 372, 377. Defendants in the present case argue: “There is no longer any justiciable controversy in this matter and any relief sought by the Plaintiffs, either on appeal or in connection with

the motion for reconsideration before this Court, must be denied.” Memorandum in Support of Motion to Dismiss or Deny Plaintiffs’ Motion for Reconsideration and Motion to Stay Discovery, p. 5.

In response, plaintiffs concede the question of whether the lease complies with Article VIII § 3 of Idaho’s Constitution may be moot. Plaintiffs’ Response to Defendants’ Motion to Dismiss or Deny Plaintiffs’ Motion for reconsideration and Defendants’ Motion to Stay Discovery, pp. 1-2. Plaintiffs write: “As a result of the conveyance of title, from the Foundation to the College, under *Koch v. Canyon County*, 145 Idaho 158, 177 P.3d 372 (2008) the issue of whether the agreement complies with Article VIII Section 3 of Idaho’s Constitution may be, *as between the parties to this specific case*, moot.” *Id*, p. 2. (italics in original, underlining added). The underlined word shows plaintiffs are equivocal in their concession as to mootness. Even though the plaintiffs have all but conceded the issue, this Court finds this case is now moot. This Court has reviewed the briefing submitted to the Idaho Supreme Court. This Court has also reviewed the Idaho Supreme Court’s “Order Granting Motion to Dismiss Appeal as Moot”, entered January 26, 2011. That Order reads: “IT IS HEREBY ORDERED that Respondent’s MOTION TO DISMISS APPEAL AS MOOT be, and hereby is, GRANTED and this appeal is DISMISSED as moot.” Order Granting Motion to Dismiss Appeal as Moot, p. 1.

Identical to the present argument before this Court, defendants before the Idaho Supreme Court argued:

The complaint in this lawsuit sought to have the lease declared unconstitutional and void. This complaint is of no further moment as the lease no longer exists, and no relief would be available to the Appellants [plaintiffs below] even if the District Court had not already granted summary judgment.

Memorandum in Support of Motion to Dismiss Appeal as Moot, p. 3. Defendants cited

the Idaho Supreme Court to *Koch v. Canyon County*, 145 Idaho 158, 177 P.3d 372 (2008). *Id.*, pp. 4-7. Just as in the present case, defendants made compelling argument to the Idaho Supreme Court that none of the exceptions to the mootness doctrine applied. *Id.*, pp. 6-7. Plaintiffs' argument to the Idaho Supreme Court is difficult to follow. Reply to Motion to Dismiss Appeal, pp. 1-6. Essentially, plaintiffs' only argument against mootness is: "Until the Appellants' Motion for Reconsideration is finally decided, sometime after February 23, 2010 [sic 2011], it will be unknown whether this appeal may be, technically, moot but subject to exceptions for proceeding with the appeal." *Id.*, p. 4. No reason is given by plaintiffs for that proposition. Plaintiffs' proposition to the Idaho Supreme Court ignores the obvious and simple fact that while plaintiffs' motion for reconsideration is pending hearing on February 23, 2011, before this Court, there is *nothing* this Court has been asked to do upon reconsideration, *nor could ever do* upon reconsideration, that could change the fact that the *lease* which was the subject of this lawsuit *ceases to exist!* No other *logical* interpretation can be made by this Court other than that this case is now moot. Because the Idaho Supreme Court has already decided defendants' Motion to Dismiss Appeal as Moot against plaintiffs, and has found this case and the appeal to be moot, no *legal* interpretation can be made by this Court other than this case is now moot.

The Idaho Supreme Court was presented with more detailed argument by plaintiffs as to why exceptions to the mootness doctrine apply in this case (Reply to Motion to Dismiss Appeal, pp. 4-6) than have been presented before this Court. Plaintiffs' Response to Defendants' Motion to Dismiss or Deny Plaintiffs' Motion for Reconsideration and Defendant's Motion to Stay Discovery, p. 2. Plaintiffs essentially enumerated the three exceptions, citing *Koch*, but failed to argue to this Court why

those exceptions would apply in the present case. *Id.* Apparently, even with a more fleshed out argument, the Idaho Supreme Court was not impressed with plaintiffs' argument on the exceptions to mootness. This Court specifically finds none of the exceptions to mootness apply in the instant case.

### **B. Plaintiffs Lack Standing.**

While plaintiffs concede the question of whether the lease complies with Article VIII § 3 of Idaho's Constitution may be moot, plaintiffs also argue "transfer of title from the Foundation to the College of the College [sic] has now squarely placed the return of rental surplus issue before this Court for its resolution." Plaintiffs' Response to Defendants' Motion to Dismiss or Deny Plaintiffs' Motion for reconsideration and Defendants' Motion to Stay Discovery, pp. 1-2. Plaintiffs argue the surplus rent paid by NIC to the Foundation must be ordered returned by this Court pursuant to the language of the lease agreement itself. *Id.*, pp. 2-6. Plaintiffs calculate the annual lease amount to be \$2,611,201.02 and argue the lease agreement's plain language only allows NIC to not renew the first lease term or to renew the first lease term annually for up to four years, but does not provide NIC with an option to purchase the Mill Site. *Id.*, p. 4. Plaintiffs now contend the Foundation has been unjustly enriched and must repay NIC the amount of \$6,745,602.60. *Id.*, p. 9. [It is entirely unclear how plaintiffs reach their calculations, as the entire lease amount, had the lease been renewed for all four terms, would have amounted to the annual lease amount of \$1,074,134.02 for four years plus \$4,000,000, for a total of \$8,296,536.08; and NIC leased the property for the July 2009 to December 2010 time period before purchasing the Mill Site.]

In their Reply Brief, defendants argue plaintiffs have no standing to enforce an agreement between NIC and the Foundation and the Court lacks jurisdiction to hear any

issues not specifically contemplated by Idaho Appellate Rules as a result of plaintiffs' appeal to the Idaho Supreme Court. Reply in Support of Motion to Dismiss or Deny Plaintiffs' Motion for Reconsideration and Motion to Stay Discovery, pp. 2 *et seq.*

Defendants argue:

The Plaintiffs seek to have this Court order a return of all funds previously transferred by the College to the Foundation. Regardless of Plaintiffs' interpretation of the terms of the Lease Agreement, they do not have standing to assert a cause of action on behalf of the College because they cannot show a particularized injury to themselves separate from that of all taxpayers by reason of the alleged non-enforcement of the Lease Agreement.

*Id.*, p. 3. Defendants argue this Court previously held the lease at issue did not violate constitutional provisions and, as this was what plaintiffs sought reconsideration of, any new arguments about pre-paid rent are not an effort to seek reconsideration of the Court's grounds for granting summary judgment. *Id.*, p. 5. Finally, defendants argue that because Idaho Appellate Rule 13(b) lists the exclusive matters as to which the district court retains jurisdiction once a matter is appealed to the Supreme Court, and plaintiffs are seeking to make collateral attacks based on theories which were not the basis for this Court's summary judgment ruling. *Id.*, pp. 6-7.

This Court, in its July 1, 2010, Memorandum Decision and Order described the Complaint and relief sought:

On October 27, 2009, Plaintiffs filed their *pro se* Complaint, alleging a violation of Article VIII, Section 3 of the Idaho Constitution. Plaintiffs claim the lease agreement is a *de facto* installment land sale contract for which NIC did not obtain the required 2/3 assent of the qualified elector's in the district. Complaint, p. 5, ¶¶ 32-33. Plaintiffs also claim NIC did not obtain judicial validation of the lease agreement pursuant to I.C. § 7-1304, as an alternative to the assent of 2/3 of qualified electors in the district. *Id.*, ¶ 34. Plaintiffs seek a declaratory judgment that the lease agreement violates Article VIII, Section 3 of the Idaho Constitution; permanent injunctive relief prohibiting NIC from making further expenditures under the lease agreement until the lease is approved by 2/3 of qualified electors in the district, should that occur; and an entry of judgment compelling the

Foundation to return all monies received from NIC under the lease. Complaint, pp. 6-7. On November 25, 2009, NIC and the Foundation filed their separate Answers to the Complaint.

Memorandum Decision and Order on: 1) Defendant NIC's Motion for Reconsideration, Motion for Protective Order Regarding Document Request or Alternatively, Motion for Clarification Regarding Post-Summary Judgment Discovery; 2) Defendant NIC's Objection to Request to Produce; and 3) Plaintiffs' Objection to Entry of Judgment, p. 2. Specifically, plaintiffs listed their third cause of action as "Affirmative Injunctive Relief", and alleged they were entitled to an Order compelling the Foundation to return all monies paid to it by NIC under the terms of the Lease Agreement, including statutory interest. Complaint, pp. 6-7, ¶ 42.

It is clear the lease now being extinguished renders plaintiffs' arguments at summary judgment moot. What remains for this Court is whether plaintiffs have the ability to challenge the now-moot lease and demand the Foundation return monies received from NIC. In *Taylor v. Maile*, 146 Idaho 705, 201 P.3d 1282 (2009), the Idaho Supreme Court wrote:

"Standing is a preliminary question to be determined by this Court before reaching the merits of the case." *Young v. City of Ketchum*, 137 Idaho 102, 104, 44 P.3d 1157, 1159 (2002). "The doctrine of standing focuses on the party seeking relief and not on the issues the party wishes to have adjudicated." *Miles v. Idaho Power Co.*, 116 Idaho 635, 641, 778 P.2d 757, 763 (1989). To satisfy the requirement of standing, "litigants generally must allege or demonstrate an injury in fact and a substantial likelihood that the judicial relief requested will prevent or redress the claimed injury." *Id.*

146 Idaho 705, 709, 210 P.3d 1282, 1286. The question of standing is jurisdictional. The Idaho Supreme Court has stated that it is a fundamental tenet of American jurisprudence that a party have standing to invoke a court's jurisdiction. *Van Valkenburgh v. Citizens for Term Limits*, 135 Idaho 121, 124, 15 P.3d 1129, 1132

(2000). Importantly, a challenge to a court's subject-matter jurisdiction may be raised at any time during the proceedings, even for the first time on appeal, and may never be waived by the parties. *State v. Armstrong*, 148 Idaho 372, 374, 195 P.3d 731, 733 (Ct.App. 2008). "The issue may even be raised sua sponte by a trial or appellate court." *State v. Peterson*, 148 Idaho 610, 612-13, 226 P.3d 552, 554-55 (Ct.App. 2010). An order entered without subject matter jurisdiction is void. *Troupis v Summer*, 148 Idaho 77, 79, 218 P.3d 1138, 1140 (2009). See e.g. *Cetacean Cmty v. Bush*, 386 F.3d 1169, 1174 (9<sup>th</sup> Cir. 2004) ("A suit brought by a plaintiff without Article III standing is not a 'case or controversy,' and an Article III federal court therefore lacks subject matter jurisdiction over the suit."); *Univ. of Pittsburgh v. Varian Med. Sys., Inc.*, 569 F.3d 1328, 1332 (Fed. Cir., 2009) ("A dismissal for lack of standing is jurisdictional and not an adjudication on the merits.").

Here, the injunctive relief originally sought by plaintiffs was a return of all monies paid to the Foundation by NIC. Now, it appears plaintiffs seek only the return of amounts they have termed "prepaid rent," but the basis under which plaintiffs seek this return of monies is unclear. To the extent plaintiffs seek return of the money as the remedy for defendants' purported unconstitutional lease agreement, this Court cannot grant such relief. Plaintiffs claim no proper basis or authority for the return of monies paid; they argue only that amounts paid under the (now extinguished) lease resulted in unjust enrichment to the Foundation. Plaintiffs concede that they know of no amendment to the lease agreement or contract between NIC and the Foundation for purchase of the Mill Site. Plaintiffs' Response to Defendants' Motion to Dismiss or Deny Plaintiffs' Motion for Reconsideration and Defendants' Motion to Stay Discovery, p. 5. Plaintiffs fail to provide the Court with any argument as to why they would be entitled to

such documents. And, although plaintiffs seek to strike defendants' Reply Memorandum or a grant of more time to brief the standing issue, the issue of standing may be properly raised at any stage in the proceeding. *Armstrong*, 148 Idaho 372, 374, 195 P.3d 731, 733. This Court had the option of raising the matter *sua sponte*. *Peterson*, 148 Idaho 610, 612-13, 226 P.3d 552, 554-55. As such, it cannot be said that any prejudice inured to plaintiffs as a result of defendants raising the issue of standing in their January 26, 2011, brief.

In an abundance of caution, the Court allowed plaintiffs to brief the standing issue. Even if given the opportunity to submit additional briefing on the issue of standing, it is at best unclear to the Court how plaintiffs could demonstrate "an injury in fact and a substantial likelihood the relief requested will prevent or redress the claimed injury", or that the harm claimed is not a "generalized grievance shared by all or a large class of citizens." (*Miles*, 116 Idaho 635, 639, 778 P.2d 757, 761) (quoting *Warth v. Seldin*, 422 U.S. 490, 95 S.Ct. 2197 (1975)).

The first eight pages of "Plaintiffs' Brief on Standing" are devoted to rehashing the facts of this case to this point in time. Plaintiffs then get around to making the following "factual" argument as to why there is still an issue before this court:

Because the lease agreement was in effect and because the College did lease the property and thus owed the Foundation rent under the lease, from July 23, 2009 to December 3, 2010, that rent is not subject to an Order of this Court requiring repayment. What is subject to the Order of this Court is the repayment of the prepaid rent the College paid to the Foundation applicable to the period of December 3, 2010 through 2013. The specific terms of the lease agreement provide that when the Foundation pays off the Foundation's loan with the bank that title will be conveyed to the College "for no additional consideration." The rent prepaid by the College for the lease period of December 3, 2010 through 2013 is not due to the Foundation under the lease agreement whether as rent or "additional consideration." As of December 3, 2010 the College owned the property. The Foundation has nothing to lease to the College. The College can not just "gift" away any taxpayer money, let alone \$6.7

million dollars.

Plaintiffs' Brief on Standing, p. 7. The reader may find this argument difficult to comprehend. The Court certainly does. The argument almost assumes the College could not prepay its lease payments, and, then, given that improper assumption, make another assumption that such prepayment of the College's rent was a "gift" from the College to the Foundation. That argument ignores the fact that the prepayment of the lease by the College to the Foundation caused the College's lease with the Foundation to end, that prepayment simultaneously allowed the Foundation to pay off the loan to the bank, which caused the title to simultaneously vest in the College.

The only "legal" argument plaintiffs make regarding standing is as follows:

Since 1908 the Idaho Supreme Court has held that taxpayers have standing to sue to recover taxpayer money spent on **void contracts**, when the proper governmental authorities refuse to do so. Money paid by a municipal corporation upon a **void contract** may be recovered back by such corporation; or, in case the proper authorities refuse to proceed to do so, a taxpayer thereof may do so for the corporation." *Independent School Dist. No. 5 v. Collins*, 15 Idaho 535, 542, 98 P. 857 (1908).

The Plaintiffs, taxpayers, have standing to have the Court enter its Order requiring the Foundation to pay the prepaid rent back to the College.

Plaintiffs' Brief on Standing, p. 7. (bold added, italics in original). However, simply making the conclusory claim that "The Plaintiffs, taxpayers, have standing to have the Court enter its Order requiring the Foundation to pay the prepaid rent back to the College" does not make it so. *Collins* does state that "...where a public corporation has a cause of action which should be prosecuted for its use, whether legal or equitable, and its governing body neglects and refuses to institute an action therefore, a taxpayer may, on behalf of himself or others similarly situated, institute an action to redress the wrong to the corporation." 15 Idaho 535, 543. However, the predicate for that action by the taxpayer is a **void contract**. There is no "void contract" in the present case. This

Court specifically found such in its Memorandum Decision and Order Granting Defendant North Idaho College's Motion for Summary Judgment:

NIC argues Article VIII, Section 3 of the Idaho Constitution only prohibits NIC from incurring debt or liability exceeding the income or revenue provided in the current year for that debt or liability. Defendants' Memorandum in Support of Motion for Summary Judgment, pp. 8-9. NIC states the lease agreement does not contemplate future aggregate rents and "the only obligation being incurred by NIC was the current yearly rent under the lease." *Id.*, at p. 9. Therefore, NIC argues, there is no requirement for the assent of two-thirds of the qualified electors; nor does any obligation to seek judicial confirmation exist as this is merely an available discretionary statutory process. *Id.*, pp. 8-9. NIC argues the lease agreement does not violate the Idaho Constitution for several reasons: rents are only due and owing for years beyond the 2009-2010 fiscal year if the lease term is extended, and nothing in the lease agreement obligates NIC to renew for any of the four consecutive one-year terms available under the lease; the lease itself does not create any debt or liability as those terms are defined by Idaho case law; NIC has not pledged or encumbered any of its own property beyond the 2009-2010 term; and the lease agreement is a typical ground lease, therefore NIC's agreement to pay assessments, provide insurance, etc. are common and limited to the current year and no liability for taxes or insurance would be incurred if the lease agreement is not renewed. Defendants' Memorandum in Support of Motion for Summary Judgment, pp. 9-12.

In response, the *pro se* plaintiffs disagree with the assertion that the lease agreement does not create or involve a debt or liability extending beyond one year. Answering Brief in Response to Defendants' Motion for Summary Judgment, p. 2. Specifically, plaintiffs point to public documents (including the lease agreement itself), and claim such evince the Board's intent to acquire title to the Mill Site, and not merely lease the property on an annual basis. *Id.*, pp. 3-6. Plaintiffs write:

Plaintiffs contend that while the Lease Agreement takes the form of a lease, it is in fact a disguised installment purchase agreement that contravenes the Idaho Constitution, Article 8, Section 3.

*Id.*, p. 5. Plaintiffs continue:

The Lease Agreement, ¶ 3, obligates Defendant College to pay Defendant Foundation \$4,000,000 in "prepaid rent" upon execution of the Agreement. As explained earlier, it appears that \$500,000 of that is "good faith deposit." The Lease Agreement does not explain for what period of time the remaining \$3,500,000 of "prepaid rent" pays the rent. Thereafter, Defendant is obligated to make six semi-annual payments of exactly \$1,074, 134.02 for three years, contingent on appropriating the annual amount due by the Defendant College in its annual budget. The total of those

six semi-annual payments is \$6,444,804.12. Adding the \$4,000,000 in “prepaid rent” to the sum of the six equal semi-annual payments results in a total amount of \$10,444,804.12 to be paid by Defendant College to Foundation.

*Id.*, pp. 6-7. Plaintiffs note \$444,804.12 in payments “must be interest or fees”, but they are unable to further explain the amount pending receipt of discovery responses. *Id.*, p. 7. Additionally, plaintiffs point to the Tax Agreement Regarding Revenue Ruling (attached to plaintiffs’ Complaint) conferring tax exempt status, for support of their argument that:

...Defendants had to know and agree when the Lease Agreement was signed that it is, in fact, a sales contract and not a lease-option agreement. It is this Tax Agreement Regarding Revenue Ruling that binds Defendants together was a single unit in this action.

*Id.*, p. 8. Finally, plaintiffs argue NIC’s exercise of the non-appropriation option in the lease agreement may result in actual or possible losses including the good faith deposit and any buildings or improvements placed on the Mill Site by NIC, *inter alia*. *Id.*, p. 10.

The Foundation, in its reply brief, argues no long-term obligation was necessary in this transaction, nor was any long-term obligation the intent of defendants. Foundation Reply Brief in Support of Summary Judgment, p. 2. The Foundation notes the requirements of the Tax Code “obscure some of the language typically used in this type of transaction but do not change the nature of the transaction.” *Id.* That is: the Foundation incurred a debt to purchase property, it leased the property to NIC on a year-to-year basis, the debt is secured by the property- not by the lease, only the Foundation is obligated to pay the debt, the Foundation intends to use the lease proceeds to make payments on the debt but is not required to do so, NIC did not enter into a long-term lease, and NIC did not incur the debt. *Id.* The Foundation discusses cases cited by plaintiffs as being inapposite and notes the Tax Agreement Revenue Ruling does not require the lease to be a long-term obligation. *Id.*, pp. 4-5.

NIC, in its reply brief, argues the only issue before the Court is whether NIC incurred a debt or obligation violative of Article VIII, Section 3, of the Idaho Constitution; whether or not NIC’s ultimate intent is to own the Mill Site is of no import. Reply Memorandum in Support of Motion for Summary Judgment, p. 2. NIC then discusses in detail the Wisconsin case *Dieck v. Unifies School District of Antigo*, 165 Wis.2d 458, 477 N.W.2d 613 (Wisc. 1991), and argues the non-appropriation provision of the Lease Agreement protects NIC’s future incomes and revenues. *Id.*, p. 5.

If the College decides that a successive year’s revenue is insufficient to make such [rent] payments, then the College may elect not to budget rent payments and not renew the Lease for an additional one-year period. There are no penalties associated with failing to renew. Paragraph 2.1 of the Lease Agreement prohibits the College from pledging

future years' income to make rent payments.

*Id.* At issue here is Article VIII, Section 3 of the Idaho Constitution, which states:

**SECTION 3. LIMITATIONS ON COUNTY AND MUNICIPAL INDEBTEDNESS.** No county, city, board of education, or school district, or other subdivision of the state, shall incur any indebtedness, or liability, in any manner, or for any purpose, exceeding in that year, the income and revenue provided for it for such year, without the assent of two-thirds of the qualified electors thereof voting at an election to be held for that purpose, nor unless, before or at the time of incurring such indebtedness, provisions shall be made for the collection of an annual tax sufficient to pay the interest on such indebtedness as it falls due, and also to constitute a sinking fund for the payment of the principal thereof, within thirty years from the time of contracting the same. Any indebtedness or liability incurred contrary to this provision shall be void: Provided, that this section shall not be construed to apply to the ordinary and necessary expenses authorized by the general laws of the state...

The issue for this Court then, is whether ¶ 2.1 of the Lease Agreement sufficiently ensures that renewal of the lease agreement beyond the *current* year is *solely* at NIC's option, and whether such renewal may only be had where funds are duly budgeted and appropriated therefore. Paragraph 2.1 reads:

COLLEGE may, solely at its own option, and when it duly budgets and appropriates funds therefore from revenues legally available to it for the ensuing fiscal year, renew this Lease for an additional annual renewal term. Each annual renewal of this Lease shall be deemed to be exercised by the COLLEGE upon the adoption on or before June 30 of each year, of a budget for the ensuing fiscal year, duly budgeting and appropriating the amount of money required to make the Lease payments during such year. Within ten (10) days following the adoption of a budget duly budgeting and appropriating said funds for the ensuing year, COLLEGE shall deliver to the FOUNDATION a written statement certifying that it has duly budgeted and appropriated said funds for the ensuing year, which written statement shall be accompanied by a copy of the budget so adopted. Each renewal term shall commence on July 23 of the fiscal year following adoption of the budget as provided hereinabove and shall terminate on July 22 of the following calendar year.

Complaint, Exhibit 3, Lease Agreement, p. 2, ¶ 2.1. As argued by the Foundation, there are two steps NIC must take in order to renew the Lease Agreement: (1) budget and appropriate funds from the ensuing year's revenues for renewal of the lease term for an additional year, and

(2) delivery to the Foundation, within ten days of adoption of the budget, a written statement certifying NIC has duly budgeted and appropriated funds for the ensuing year, accompanied by a copy of the budget itself. Foundation Reply Brief in Support of Summary Judgment, p. 3. And, as argued by NIC, the only issue raised at the summary judgment stage by NIC and the Foundation, is whether the lease agreement violates Article VIII, Section 3, of the Idaho Constitution so as to make the lease agreement void. Reply Memorandum in Support of Motion for Summary Judgment, p. 2.

Article VIII, Section 3 of the Idaho Constitution prohibits state subdivisions for incurring indebtedness or liability exceeding the income or revenue of that year unless the indebtedness or liability is approved by two-thirds of qualified electors, but ordinary and necessary expenses are excepted from the provision. *Loomis v. City of Hailey*, 119 Idaho 434, 440, 807 P.2d 1272, 1278 (1991). Thus, the *intent* of NIC to ultimately purchase the Mill Site from the Foundation is simply not relevant to the instant motion. Likewise, the issue of any rental surplus resulting from the initial pre-payment of \$4,000,000 in rent, and the possibility that this “surplus” may not be returned to NIC, should NIC opt to not renew the lease agreement, is also not an issue not before the Court on the instant motion. See Lease Agreement, p. 4, ¶ C. See also, Complaint, p. 4, ¶¶ 19-20. In *In Re University Place/Idaho Water Center Project*, 146 Idaho 527, 547, 199 P.3d 102, 122 (2008) (J. Jones, concurring), Justice Jones stated:

The district court apparently held the view that the performance under the allegedly novated contract was automatically disqualified as being comparable to the performance under the Foundation’s contract because the Parking Access Agreement provided the University’s parking lease was renewable each year and was subject to termination by the University in the event funds were not available. The fact of the matter is that all state contracts contain those same provisions because Article VIII § 1 of the Idaho Constitution prohibits the State from incurring multi-year indebtedness without submitting the matter to the public for a vote. Article VIII § 3 imposes a similar limitation on public indebtedness with respect to subdivision of state government. It is virtually impossible to present every multi-year governmental contract or lease to the public for a vote. Thus, leases and other contracts that are intended to extend beyond one year always contain provisions (1) making the government’s performance subject to the availability of appropriated funds and (2) making the agreement renewable on an annual basis for the contemplated term.

146 Idaho 527, 547, 199 P.3d 102, 122. As such, the lease agreement before the Court in the instant matter does not differ from those entered into by governments and subdivisions of governments. Although the lease at issue likely implicitly contemplates extending beyond one year, so long

as it contains specific language making NIC's renewal subject to the availability of therefore appropriated funds and makes the lease term renewable on a yearly basis, the lease complies with the Idaho Constitution.

This was also the result *Dieck*, the 1991 Wisconsin Supreme Court case discussed by NIC at length. There, the Wisconsin Supreme Court reasoned:

“indebtedness” contemplates a “voluntary and absolute undertaking to pay a sum certain. No indebtedness exists if the municipal body may avoid its obligation or if conditions precedent exist... The undertaking must be enforceable by the creditor against the municipal body or its assets.

165 Wis.2d 458, 470, 477 N.W.2d 613, 625. Because the school district in *Dieck* had the right under the non-appropriation option to terminate the lease by opting to not appropriate funds for the following fiscal year's payment, no district funds were jeopardized beyond the current fiscal year.

165 Wis.2d 458, 465, 477 N.W.2d 613, 620. We have precisely that same situation in the present case. As stated in *Dieck*:

The test, [for “indebtedness” under Wisconsin's similar constitutional provision], is not whether the municipal body unit will probably pay or whether the municipal body would be foolish not to pay. The test is whether the municipal body is under an obligation to pay and the creditor has a right to enforce payment against the municipal body or its assets.

165 Wis.2d 458, 470, 477 N.W.2d 613, 625. Under the terms of the Lease Agreement, NIC is not under an obligation to pay and the Foundation has no right to enforce payment by NIC. The *Dieck* Court found that because the lease-purchase at issue in that case contained a “non-appropriation option”, the lease agreement did not violate Wisconsin's Constitution because payments were to be made solely from the current year's budget.

The *Dieck* Court found the lease-purchase agreement with the non-appropriation option, meets the purposes of and maintains the integrity of the constitutional debt limitations:

A nonappropriation option preserves for each successive legislative body the responsibility of reviewing the wisdom of the lease and of deciding whether to continue it and shield taxpayers from burgeoning debt. Future generations are not burdened by past decisions.

165 Wis.2d 458, 472, 477 N.W.2d 613, 627. The *Dieck* Court noted the majority of other jurisdictions hold that lease agreements containing non-appropriation clauses do not constitute impermissible debt under similar state constitutional limitations, and cited those cases. 165 Wis.2d 458, 472, n. 8, 477 N.W.2d 613, 627, n. 8. Those cases are: *Department of Ecology v. State Finance Comm.*, 116 Wash.2d 246, 804 P.2d 1241, 1244-47 (1991) (“The overwhelming majority of jurisdictions that have considered the issue have concluded that a nonappropriation clause precludes the creation of debt.” 116 Wash.2d 246, 256, n. 9; 804 P.2d 1246, n. 9); *State ex rel. Kane v. Goldschmidt*, 308 Or. 573, 783 P.2d

988, 991-96 (1989) (discussing many prior decisions by the Oregon Supreme Court going back to 1873, consistently adopting the majority view); *Glennon Heights, Inc. v. Central Bank & Trust*, 658 P.2d 872, 878-79 (Colo.1983); *Edgerly v. Honeywell Information Sys., Inc.*, 377 A.2d 104, 108 (Me.1977); *Ruge v. State*, 201 Neb. 391, 267 N.W.2d 748, 750-52 (1978); *Enourato v. New Jersey Bldg. Auth.*, 182 N.J.Super. 58, 440 A.2d 42, 46-47 (1981), *aff'd*, 90 N.J. 396, 448 A.2d 449, 455-56 (1982); *Caddell v. Lexington Cy. Sch. Dist. 1*, 296 S.C. 397, 373 S.E.2d 598, 599-600 (1988); *McFarland v. Barron*, 83 S.D. 639, 164 N.W.2d 607, 609-10 (1969); *Texas Pub. Bldg. Auth. v. Mattox*, 686 S.W.2d 924, 928 (Tex.1985); *Baliles v. Mazur*, 224 Va. 462, 297 S.E.2d 695, 698-700 (1982); *State ex rel. West Virginia Resource Recovery-Solid Waste Disposal Auth. v. Gill*, 174 W.Va. 109, 323 S.E.2d 590, 594-95 (1984). This Court has reviewed those cited cases, and finds the *Dieck* Court's analysis sound. This view is consistent with a treatise cited by the *Dieck* Court in which:

One author concluded that declaring a lease purchase agreement with a nonappropriation option constitutional was the "optimal approach that establishes both the correct legal rule and encourages utilization of lease-purchasing." Reuven Mark Bisk, *State and Municipal Lease-Purchase Agreements: A Reassessment*, 7 Harv.J.L. & Pub.Pol'y 521, 546 (1984).

165 Wis.2d 458, 472, n. 8, 477 N.W.2d 613, 627, n. 8. The minority view, according to the *Dieck* Court, was noted in *Montano v. Gabaldon*, 108 N.M. 94, 766 P.2d 1328, 1329-30 (1989), where a lease purchase agreement with nonappropriation clause creates moral or equitable obligation to continue payment and therefore creates debt. 165 Wis.2d 458, 472, n. 8, 477 N.W.2d 613, 627, n. 8. This Court is more persuaded that the majority view is correct. That conclusion that the majority view is correct is certainly bolstered by the concurring opinion of Justice Jim Jones in *In Re University Place/Idaho Water Center Project*, 146 Idaho 527, 547, 199 P.3d 102, 122 (2008), (J. Jones, concurring), where the practicality of such arrangements is noted. NIC simply does not incur a liability if it elects to not renew the Lease Agreement for a subsequent year term. Before a liability exists, there must be an enforceable duty against the municipality to make the payment. *Lewis v. Brady*, 17 Idaho 251, 256, 104 P. 900, 301 (1909). (interpreting Idaho Constitution, Article III, Section 1). Here, there is no enforceable duty against NIC to make the next year's payment. The various hypothetical scenarios presented by plaintiffs of situations that *could* happen which *could* result in liabilities (Plaintiff's Answering Brief in Response to Defendant's Motion for Summary Judgment, p. 10), do not show *current* liabilities, they are all contingent on other events occurring in the future. The fact remains there is no penalty if NIC fails to renew the Lease Agreement.

Plaintiffs cite *O'Bryant v. City of Idaho Falls*, 78 Idaho 313, 303 P.2d 672 (1956), for the proposition:

What cannot be done directly [by the City of Idaho Falls

because of constitutional limitations] cannot be accomplished indirectly. That which the constitution directly prohibits may not be done by indirection through a plan or instrumentality attempting to evade the constitutional prohibition.

Plaintiff's Answering Brief in Response to Defendant's Motion for Summary Judgment, pp. 10-11. William McCrory argued that point at oral argument on his behalf. That is an accurate quote from *O'Bryant*. 78 Idaho 313, 325. While *O'Bryant* also dealt with Article III, Section 3 of the Idaho Constitution, the facts are much different to those of the present case. Some of those facts are set forth below in the following quote from *O'Bryant*:

The creation of the Cooperative, its contracts for the purchase of gas and for the sale of its bonds to raise funds for the construction, operation and maintenance of a gas distribution system and the ordinance of the City of Idaho Falls granting an exclusive franchise for thirty years to the Cooperative with the contract provided for by such ordinance are all parts of a plan and design devised to enable the City of Idaho Falls to evade and circumvent the limitations and prohibitions of the constitution and statutes; and to exercise powers not granted to a municipality. The purpose of the whole plan is to allow the City to do indirectly what it cannot do directly, that is, to construct, operate and maintain a system for the distribution of gas; *and to pay for same by the creation of indebtedness and liabilities in excess of its revenues for the current year* without a vote of the qualified electors and without providing for an annual tax to retire such indebtedness.

78 Idaho 313, 327. This quote illustrates just some of the distinctions between the present case and *O'Bryant*, but the italicized portion shows the critical undisputed distinction between the present case and *O'Bryant* which cause plaintiff's reliance upon *O'Bryant* to be completely misplaced. The evidence is uncontradicted by plaintiffs that NIC paid for this lease by revenues it had for the current year. See, Plant fund Expenditures, Plant fund Budget, General Fund Budget Proposal FY 10, Attached to Affidavit of William McCrory; Lease Agreement, p. 1 ¶ C.

Memorandum Decision and Order Granting Defendant North Idaho College's Motion for Summary Judgment, pp. 4-12.

NIC correctly argues the general rule is taxpayers, such as plaintiffs, do *not* have standing to challenge government action. Defendant's Reply Brief on Standing, p. 6.

An exception existed earlier in this litigation to allow the taxpayers, plaintiffs, to

challenge whether the Lease Agreement was constitutional under Article VIII, § 3. *Id.* But the constitutionality of the Lease Agreement is now moot, as the lease ceases to exist. This “repayment of the prepaid rent” now advanced by plaintiffs does not change the fact that the lease no longer exists. No sleight of hand argument by plaintiffs can resurrect the lease that was entirely paid off.

**C. Discovery.**

Without standing to challenge the “prepaid rent” issue, which is the only issue remaining as conceded by plaintiffs, any further discovery would serve no purpose.

**IV. CONCLUSION AND ORDER.**

For the reasons stated above, this Court must grant defendants’ Motions to (1) Dismiss or Deny Plaintiffs’ motion for reconsideration and (2) Stay Discovery.

**IT IS HEREBY ORDERED** defendant NIC’s Motion to Dismiss is **GRANTED**.

**IT IS FURTHER ORDERED** defendant NIC’s Motion to Deny Plaintiff’s Motion for Reconsideration is **GRANTED**, and the hearing scheduled for February 23, 2011, is **VACATED**.

**IT IS FURTHER ORDERED** defendant NIC’s Motion to Stay Discovery is **GRANTED**.

Entered this 15<sup>th</sup> day of February, 2011.

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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  
Starr Kelso

Fax #  
664-6261

Lawyer  
Marc Lyons  
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Jeanne Clausen, Deputy Clerk