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

R&R LEASING, LLC, an Idaho ltd liab. co.; WILLIAM RADOBENKO & JULIE A. RADOBENKO, husband and wife, *Plaintiffs*, vs. **GLACIER BANK, a Montana Bank and sucessor in interest by merger to Mountain West Bank,** *Defendant*.	Case No. **CV 2012 3928** **MEMORANDUM DECISION AND ORDER: 1) GRANTING PLAINTIFFS' MOTION TO AMEND COMPLAINT TO ALLOW CLAIM OF PUNITIVE DAMAGES, 2) GRANTING DEFENDANT'S MOTION TO AMEND ANSWER, AND 3) GRANTING IN PART AND DENYING IN PART PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT**

I. PROCEDURAL HISTORY AND FACTUAL BACKGROUND.

A. Procedural History.

At issue before the Court are: plaintiffs R&R leasing (R&R), William Radobenko and Julie Radobenko's (collectively "plaintiffs") Motion for Partial Summary Judgment filed August 1, 2013; plaintiffs' Motion for Leave to Amend Complaint to Assert a Claim for Punitive Damages Pursuant to I.C. § 6-1604 filed August 15, 2013; and defendant Mountain West Bank's (MWB) Motion to Amend Answer filed August 15, 2013.

In their motion for partial summary judgment, plaintiffs request four things: 1) partial summary judgment on plaintiffs' breach of contract claim, finding MWB [MWB originated the loan with plaintiffs and then assigned it to its successor in interest by merger defendant Glacier Bank (Glacier)], breached the terms of the March 7, 2011, Memorandum of Agreement (MOA) by refusing to extend the 2008 Promissory Note for

three years on the same conditions; 2) determination by the Court that the amount of damages for such breach shall be determined by the trier of fact; 3) entry of a decree of specific performance ordering that MWB/Glacier extend the 2008 Loan for three years on the same conditions; and 4) summary judgment denying MWB/Glacier's counterclaims which allege plaintiffs defaulted under the 2008 Loan based upon a failure to make any payments due thereunder. Motion for Partial Summary Judgment, p. 2. Along with their motion for partial summary judgment, plaintiffs filed their "Statement of Undisputed Material Facts in Support of Plaintiffs' Motion for Partial Summary Judgment", "Memorandum in Support of Plaintiffs' Motion for Partial Summary Judgment", and "Affidavit of John F. Magnuson in Support of Plaintiffs' Motion for Partial Summary Judgment".

On August 15, 2013, Glacier filed "Glacier Bank's Opposition to Plaintiff's Motion for Partial Summary Judgment", "Glacier Bank's Submission of Certified Documents in Opposition to Plaintiffs' Motion for Partial Summary Judgment", "Declaration of R. Wayne Sweney in Opposition to Plaintiffs' Motion for Partial Summary Judgment", "Declaration of Peter J. Smith IV in Opposition to Plaintiffs' Motion for Partial Summary Judgment", and "Declaration of Richard Brittain in Opposition to Plaintiffs' Motion for Partial Summary Judgment". On August 16, 2013, Glacier filed its "Amended Declaration of R. Wayne Sweney in Opposition to Plaintiffs' Motion for Partial Summary Judgment", attaching Exhibit 1, which was erroneously omitted from Sweney's first declaration.

In addition to its motion for partial summary judgment, on August 15, 2013, plaintiffs filed their "Motion for Leave to Amend Complaint to Assert a Claim for Punitive Damages Pursuant to I.C. § 6-1604" and "Memorandum in Support of Plaintiffs' Motion for Leave to Amend Complaint to Assert a Claim for Punitive Damages Pursuant to I.C.

§ 6-1604". On August 22, 2012, Glacier filed its "Objection to Plaintiffs' Motion for Leave to Amend Complaint to Assert a Claim for Punitive Damages" and "Declaration of Richard Brittain in Opposition to Plaintiffs' Motion to Amend Complaint".

Also on August 15, 2013, Glacier filed a "Motion to Amend Answer/Notice of Hearing". On August 22, 2013, plaintiffs filed their "Objection to Defendant's Motion to Amend Answer", "Affidavit of John F. Magnuson in Opposition to Motion to Amend" and "Affidavit of William Radobenko in Opposition to Defendant/Counterclaimant Glacier Bank's 'Motion to Amend Answer'". On August 27, 2013, Glacier filed its "Reply Memorandum in support of Glacier Bank's Motion to Amend Answer."

Oral argument on these motions occurred August 28, 2013, following which the Court took the motions under advisement.

B. Factual Background.

In order to present the entire picture related to this case, it is necessary to refer back to facts, some of which were already set forth in this Court's "Memorandum Decision and Order Denying Defendant Glacier's Motion for Summary Judgment", filed June 19, 2013. Memorandum Decision and Order Denying Defendant Glacier's Motion for Summary Judgment, pp. 2-5. Since that decision, the parties have added additional affidavits and deposition transcripts of those involved in the negotiations about the transaction and events after the transaction, and exhibits documenting such.

On August 23, 2005, MWB loaned $4,000,000.00 to R&R in exchange for a promissory note in that amount (2005 loan). 8-1-13 Magnuson Affidavit, Exhibit 1 (Olson Deposition), Exhibit 2. The 2005 loan, bearing loan number 807300876, matured on August 10, 2008, and was renewed on December 12, 2008 (2008 loan). *Id*., Exhibit 1 (Olson Deposition), Exhibit 2. The 2008 loan, also bearing that same loan number, 807300876, was for the principal amount of $5,000,000.00 and matured on

September 10, 2011. 12-28-12 Brittain Affidavit, Exhibit 2; 1-16-13 Radobenko Affidavit, Exhibit A. The Note stated:

> Borrower will pay this loan in one payment of all outstanding principal plus all accrued unpaid interest on September 10, 2011. In addition, Borrower will pay regular monthly payments of all accrued unpaid interest due as of each payment date, beginning January 10, 2009, with all subsequent interest payments to be due on the same day of each month after that.

Id. The Note states the interest rate is four percent. *Id*. Glacier is a Montana state bank which is successor in interest by merger to MWB, and was substituted for MWB by stipulation filed July 9, 2012. Stipulation Regarding Defendant's Motion to Strike Part of Complaint, Substitute Defendant, and Add Additional Parties, p. 1, ¶ 1. Glacier also claims other consideration for the loan included deeds of trust on certain real property and personal guaranties by William and Julie Radobenko. 12-28-12 Brittain Affidavit, Exhibits 3-11. Plaintiffs claim the 2008 loan was a three-year loan and the payment schedule was a monthly payment consisting only of interest, the principal to be due at the September 10, 2011, maturity date. Statement of Facts, pp. 4-5, ¶¶ 12, 13.

There is another loan which is relevant loan to this case. This was a loan from MWB to the Radobenkos and others involved in an entity called BRMC Properties, LLC (BRMC). Plaintiffs independently owned one-half of BRMC; the other half was owned by Marshall Chesrown (Chesrown). 1-16-13 Radobenko Affidavit, p.3. ¶ 10. BRMC borrowed nine million dollars from MWB as a construction loan on and secured by thirty lots in Sunup Bay on Lake Coeur d'Alene. *Id*., pp. 3,4, ¶ 11. An issue in that Sunup Bay development was the water system for those lots which was owned by Cougar Bay Ridge Water, LLC. *Id*., p. 4, ¶ 15. On November 30, 2009, Glacier claims BRMC's loan obligations matured without payment, and on February 8, 2011, MWB filed suit against BRMC and Radobenkos, seeking damages of $9,604,458.97. Glacier Bank's

Opposition to Plaintiff's Motion for Partial Summary Judgment, pp. 2-3. That same day, William met with Richard Brittain, Senior Vice President of MWB, who proposed to pay William $150,000.00 to settle the issues related to the water system of Cougar Bay Ridge Water. January 15, 2013, Affidavit of William Radobenko in Opposition to Defendant/Counterclaimant Glacier Bank's Motion for Summary Judgment, p. 4, ¶ 5. William's affidavit states: "Because R&R independently owed MWB under the terms of the subject Loan, which was maintained in a current status by R&R at that time, and since the subject Loan was maturing later in the same calendar year of 2011 (on September 10, 2011), I advised Mr. Brittain that any resolution of the BRMC transaction would require a resolution of the R&R loan on terms acceptable to me." *Id*., p. 5, ¶ 17. In an e-mail dated February 15, 2011, William Radobenko set forth his proposed terms:

> Mtn West shall reinstate the revolving portion the R&R Credit line (loan # 0807300876), credit the line two hundred thousand dollars, extend the loan until September 10, 2014 under the same terms and conditions with the following exceptions: Freezing advances on the line shall not take place without prior thirty day written notice sent certified mail. The existence of or filing of any future litigation or civil judgments against the borrower or any guarantors or the filing of any Bankruptcy petition by the borrower or guarantors shall not be deemed an event of default. Additionally should another Bank be located during the next 90 days to refinance the R&R Credit line, MtnWest agrees to extend a fifty thousand dollar discount.

Glacier Bank's Opposition to Plaintiff's Motion for Partial Summary Judgment, p. 3; August 15, 2013, Brittain Declaration, Exhibit 2. In a response letter dated February 28, 2011, Brittain set forth MWB's proposed terms:

> Separately as to R&R Leasing:
>
> - The Bank will agree to extend the R&R Leasing loan for 3 years on a rolling one year maturity. At the end of each maturity the loan will automatically roll over for one more year if; the loan has no delinquency, the borrower is solvent and all the guarantors and related financial company financial records are submitted in a timely fashion.

- During the first year the Bank will agree to a $250,000.00 discount of the R&R Leasing note should the borrower obtain a refinance outside Mountain West Bank.

Glacier Bank's Opposition to Plaintiff's Motion for Partial Summary Judgment, p. 3; August 15, 2013, Brittain Declaration, Exhibit 3. Prior to the maturity date of the 2008 loan, a "Memorandum of Agreement" (MOA) dated March 7, 2011, was signed by Brittain, William, Chesrown and Walt Haneke (president of Cougar Bay Water Association) pertaining to both the BRMC loan settlement and the R&R loan. January 15, 2013, Affidavit of William Radobenko in Opposition to Defendant/Counterclaimant Glacier Bank's Motion for Summary Judgment, pp. 5-6, ¶ 19, Exhibit B. The MOA reads in part:

> Separately as to R&R Leasing LLC:
> Mountain West Bank shall extend or renew loan number 0807300876 at maturity under the same terms of the original 2008 loan and extend a $250,000 discount on this loan should the borrower be able to refinance this loan elsewhere during the next twelve months.

Id., Exhibit B, p. 2. In this MOA, the BRMC loan was settled and the R&R Loan resulted in the above language, which Plaintiffs claim became the second part of the contract between them and MWB, extending the maturity date for another three years, with monthly payments of only the loan interest, as the original loan was structured. Memorandum in Support of Plaintiffs' Motion for Partial Summary Judgment, p. 6.

On March 18, 2011, Steve Wetzel (Wetzel), then counsel for plaintiffs, sent an e-mail to MWB's counsel voicing a concern about the MOA and stating, "The MOU need[s] [sic] to survive closing how do we assure that given other language in the documents." August 16, 2013, Sweney Declaration, Exhibit 1. On March 21, 2011, William Radobenko wrote MWB's counsel relaying a concern previously noted by the Radobenkos regarding the MOA stating:

> "The signatures of William Radobenko and Julie radobenko [sic] are conditioned upon receipt of the executed Management Agreement, Water Service Extension Agreement and confirmation that the agreement "Separately as to R&R leasing LLC" which appears on the attached MOU dated March 7th, 2011 survives his agreement."
>
> Let me know how you want to handle the R&R item. The conditional signature works for me but we probably should refer to the paragraph in the Settlement agreement that states no other agreements survive.

August 15, 2013, Smith Declaration, Exhibit 1.

On March 24, 2011, Wetzel e-mailed Brittain advising the documents with the conditional signatures were being delivered, and when "you guys can evidence the survivability of . . . the R&R financing, then we can trade for unconditional . . . signatures." August 15, 2013, Brittain Declaration, Exhibit 5; August 15, 2013, Smith Declaration Exhibit 2. That same day, William wrote an e-mail to Brittain expressing concern over paragraph 10.15 of the BRMC Settlement Agreement, a separate document from the MOA, which states:

> 10.15. Entire Agreement. This Agreement, with exhibits and any other document to be furnished pursuant to the provisions hereof, embodies the entire agreement of the Parties and there are no other agreements between the Parties express or implied except as set forth herein. There are no restrictions, promises, representations, warranties, covenants, or undertakings other than those expressly set forth or referred to in such documents. Such documents supersede all prior agreements and understandings among the Parties with respect to the subject matter hereof.

August 15, 2013, Brittain Declaration, Exhibit 6; August 15, 2013, Smith Declaration, Exhibit 3. William Radobenko's concern was the R&R Leasing agreement in the MOA would not survive under paragraph 10.15 of the BRMC Settlement Agreement. *Id*. William Radobenko represented if Radobenkos received confirmation the R&R Leasing agreement in the MOA survived the BRMC Settlement Agreement, and other issues were resolved, "Steve [Wetzel] can then substitute the clean signature pages." *Id*.

On March 25, 2011, plaintiffs received a letter from Brittain. January 15, 2013, Affidavit of William Radobenko in Opposition to Defendant/Counterclaimant Glacier Bank's Motion for Summary Judgment, Exhibit C; August 15, 2013, Brittain Declaration, Exhibit 7. The letter stated MWB had "agreed to renew your loan on a rolling one year maturity for three years" subject to some additional terms and conditions. *Id*. The additional terms were: 1) the loan would continue to be charged an interest rate of WSJ prime rate plus 0%; 2) the loan would be kept current and not be delinquent or in default; 3) all the guarantors' and company financial information be submitted in a timely fashion; and 4) during the first year the bank would agree to a $250,000 discount of the note if the loan is refinanced out of the bank. *Id*. Plaintiffs argue this letter was an attempt by Brittain, as an agent of MWB, to "unilaterally alter or modify terms of the MOA . . . to which the parties had previously agreed", primarily because instead of agreeing to a single three-year renewal as contemplated by the MOA, Brittain stated MWB agreed to a rolling one-year maturity for three years. Statement of Facts, p. 8, ¶ 28. That same day, Peter Smith, counsel for MWB, sent an e-mail to William Radobenko confirming plaintiffs received a copy of the R&R Leasing loan letter and inquiring as whether the final signature page for the BRMC Settlement Agreement could be released. August 15, 2013, Smith Declaration, Exhibit 4.

On March 28, 2011, Wetzel sent an e-mail stating there was a continued concern about the survivability of the loan agreement in the MOA; however, the plaintiffs felt the e-mails were sufficient to show all parties agreed that matter was separate and would survive as an independent transaction. *Id*., Exhibit 5. As a result, Wetzel stated the unconditional signature page for the BRMC Settlement Agreement would be delivered. *Id*.

On June 30, 2011, Brock Olson (Olson), Assistant Relationship Manager for MWB, sent William Radobenko an e-mail requesting information necessary for the "R&R Leasing renewal", including R&R financial statements, personal financial statements and tax returns. January 15, 2013, Affidavit of William Radobenko in Opposition to Defendant/Counterclaimant Glacier Bank's Motion for Summary Judgment, Exhibit D; August 15, 2013 Brittain Declaration, Exhibit 9.

On August 10, 2011, Olson wrote William stating: "Paula [Smyly (Smyly), Senior Vice President with MWB] & I are preparing for the renewal of the R&R's line which matures 09/10/11" and stating MWB was in the process of ordering new appraisals for the collateral property. January 15, 2013, Affidavit of William Radobenko in Opposition to Defendant/Counterclaimant Glacier Bank's Motion for Summary Judgment, Exhibit G; August 15, 2013 Brittain Declaration, Exhibit 10.

On August 30, 2011, Smyly sent an e-mail to the MWB Loan Committee stating "While we agreed to 3 -1 year renewals to gain cooperation on the BRMC credit, there is a 'solvency' clause that was in the 'agreement letter' with Bill." January 16, 2013, Magnuson Affidavit, Exhibit C.

On September 6, 2011, a "Change in Terms Agreement" (CTA) was signed by the Radobenkos, both as managers for R&R Leasing, LLC. January 15, 2013, Affidavit of William Radobenko in Opposition to Defendant/Counterclaimant Glacier Bank's Motion for Summary Judgment, Exhibit I; December 28, 2012, Brittain Affidavit, p. 4, ¶ 14, Exhibit C. The CTA references loan number 0807300876, and states R&R Leasing LLC as "[b]orrower will pay this loan in one payment of all outstanding principal plus accrued unpaid interest on October 10, 2011." *Id*. The maturity date of the loan was extended to October 10, 2011." *Id*. Only Radobenkos signed the CTA; no representative of MWB (or its successor, Glacier) signed the CTA. *Id.*

Prior to the September 11, 2011, maturity date, William had a meeting with Smyly in which Smyly stated: 1) "for purposes of MWB's regulatory compliance, the loan needed to be extended prior to its maturity date, so the loan would not be classified as in 'default'"; 2) "the loan could not be extended for the full agreed-upon period of three (3) years, as committed by Mr. Brittain on March 7, 2011, absent completion of the appraisals which had then been ordered but yet to be finalized"; 3) "the loan needed to be extended on an interim basis, to keep it in a current status, for purposes of MWB's regulatory compliance"; and 4) "R&R would need to sign a loan extension document, extending the loan for thirty (30) days to maintain the same in a current status, while the appraisals were completed and the full extension documented". January 15, 2013, Affidavit of William Radobenko in Opposition to Defendant/Counterclaimant Glacier Bank's Motion for Summary Judgment, p. 8, ¶ 30. On September 12, 2011, Olson sent an e-mail advising that in order to process the short-term line extension, MWB would need to collect all interest currently due and a document preparation fee in the total amount of $14,045.20. *Id*., Exhibit J. On October 12, 2011, Olson prepared a Problem Loan Summary on the R&R loan. August 1, 2013, Magnuson Affidavit, Exhibit A, pp. 44-45. After preparation, the Problem Loan Summary was sent to Smyly for review and Smyly handwrote, "Don't see way not to renew". *Id*.; Exhibit B, p. 52.

On October 28, 2011, Plaintiffs received a letter from Brittain stating MWB's assessment of R&R's financial condition was R&R was either insolvent or very near and identified several financial weaknesses. January 15, 2013, Affidavit of William Radobenko in Opposition to Defendant/Counterclaimant Glacier Bank's Motion for Summary Judgment, Affidavit, Exhibit L; August 15, 2013, Brittain Declaration, Exhibit B. Two weaknesses allegedly identified by MWB were two lawsuits against the

Radobenkos and R&R: a November 2010 lawsuit by Sterling Bank against Radobenkos for approximately a half million dollars; and a December 2010 lawsuit by Bank of Whitman against Radobenkos and R&R leasing for more than $9 million. Glacier Bank's Opposition to Plaintiffs' Motion for Partial Summary Judgment, p. 2. Glacier claims judgment was entered in the Bank of Whitman case on August 12, 2011. *Id*.; Certified Documents, Exhibit 3.

William Radobenko responded via e-mail on November 2, 2011, with explanations for MWB's concerns. January 15, 2013, Affidavit of William Radobenko in Opposition to Defendant/Counterclaimant Glacier Bank's Motion for Summary Judgment, Exhibit M; August 15, 2013, Brittain Declaration, Exhibit 15. On November 7, 2011, Brittain sent William an e-mail stating Brittain and William could not reach an agreement and an interest-only loan "does not work for us at this time." January 15, 2013, Affidavit of William Radobenko in Opposition to Defendant/Counterclaimant Glacier Bank's Motion for Summary Judgment, Exhibit O; August 15, 2013, Brittain Declaration, Exhibit 16. The next day on November 8, 2011, Brittain informed William the R&R loan had been transferred to MWB's Special Assets Department. January 15, 2013, Affidavit of William Radobenko in Opposition to Defendant/Counterclaimant Glacier Bank's Motion for Summary Judgment, Exhibit Q; August 15, 2013, Brittain Declaration, Exhibit 14. On November 9, 2011, William e-mailed Brittain regarding a meeting and stated, "It is also important, we believe to start the meeting with the March 25th 2011 commitment letter. This is in part what we built our 2011-2012 business plan on." August 15, 2013, Brittain Declaration, Exhibit 17.

On November 28, 2011, Brittain sent a letter to Plaintiffs advising the CTA had a default interest rate and had only extended the R&R loan for 30 days. January 15, 2013, Affidavit of William Radobenko in Opposition to Defendant/Counterclaimant

Glacier Bank's Motion for Summary Judgment, Exhibit S; August 15, 2013, Brittain Declaration, Exhibit 19. On December 7, 2011, William e-mailed Brittain requesting another extension until March 1, 2012. August 15, 2013, Brittain Declaration, Exhibit 18. On January 19, 2012, William inquired of Brittain the status of the R&R loan and Brittain stated "I am moving forward with the approvals." January 15, 2013, Affidavit of William Radobenko in Opposition to Defendant/Counterclaimant Glacier Bank's Motion for Summary Judgment, Exhibit U.

On March 23, 2012, Brittain sent a letter to plaintiffs inquiring as to the status of a "million dollar pay down" on the loan or a "refinance" of the commercial property. January 15, 2013, Affidavit of William Radobenko in Opposition to Defendant/Counterclaimant Glacier Bank's Motion for Summary Judgment, Exhibit W; August 15, 2013, Brittain Declaration, Exhibit 20. In that same letter, Brittain stated the "Bank has decided not to extend the loan unless we get more cooperation and progress toward reducing the loan. *Id*. On April 3, 2012, Brittain wrote William, advising Brittain "could not get your loan renewed." January 15, 2013, Affidavit of William Radobenko in Opposition to Defendant/Counterclaimant Glacier Bank's Motion for Summary Judgment, Exhibit X. On May 4, 2012, MWB provided Plaintiffs with a "Demand and Acceleration Notice." *Id.,* Exhibit Y; August 15, 2013, Brittain Declaration, Exhibit 22.

Plaintiffs filed this lawsuit against MWB on May 25, 2012. On November 13, 2012, Glacier (now substituted in for MWB) filed its Answer and Counterclaim.

II. STANDARD OF REVIEW.

A. Motion to Amend Complaint to Add Claim for Punitive Damages.

Punitive damages cannot be alleged by a party until a motion is brought and the trial court orders such an amendment to the pleadings. I.C. § 6-1604(2). The court shall allow the motion to amend the pleadings if, after weighing the evidence presented,

the court concludes the moving party has established at such hearing a reasonable likelihood of proving facts at trial sufficient to support an award of punitive damages." *Id.* Punitive damages are appropriate where a party acts in an oppressive, fraudulent, malicious, or outrageous manner. I.C. § 6-1604(1). Idaho appellate courts review the trial court's decision to grant or deny such motion to amend to allow a claim for punitive damages under an abuse of discretion standard. *Todd v. Sullivan Constr. LLC,* 146 Idaho 118, 121, 191 P.2d 196, 199 (2008); *Seineiger Law Office P.A. v. North Pacific Ins. Co.,* 145 Idaho 241, 250, 178 P.3d 606, 615 (2008); *Hall v. Farmers Alliance Mutual Insurance Company,* 145 Idaho 313, 319, 179 P.3d 276, 282 (2008).

B. Motion to Amend Answer.

The trial court's decision to grant or deny amendments to pleadings is reviewed under an abuse of discretion standard. *Baxter v. Craney,* 135 Idaho 166, 169, 16 P.3d 263, 266 (2000). Although I.R.C.P. 15(a) provides leave to amend "shall be freely given when justice so requires," the Idaho Supreme Court has upheld trial court decisions denying plaintiffs' motions to amend their complaints. *See Dairy Equip. Co. v. Boehme,* 92 Idaho 301, 304, 442 P.2d 437, 440 (1968) (holding no abuse of discretion when amended complaint was filed five days prior to trial); *Cook v. State Dep't of Transp.,* 133 Idaho 288, 297, 985 P.2d 1150, 1158 (1999) (holding no abuse of discretion where court denied eighth amended complaint filed the morning of trial); *Jones v. Watson,* 98 Idaho 606, 610, 570 P.2d 284, 288 (1977) (finding no abuse of discretion in denying a motion to amend filed the day of trial). But, where an amended petition does not set out a valid claim, or if the opposing party would be prejudiced by the delay in adding a new claim, or where the opposing party has an available defense, such as a statute of limitations, it is not abuse of discretion to deny a motion to file an amended complaint.

Black Canyon Racquetball Club, Inc. v. Idaho First National Bank, 119 Idaho 171, 804 P.2d 900 (1991). The Idaho Supreme Court has held the district court's not considering whether an amendment would cause delay or prejudice the defendants to be abuse of discretion. *Carl H. Christensen Family Trust v. Christensen,* 133 Idaho 866, 993 P.2d 1197 (1999).

C. Summary Judgment.

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

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

(2002). The non-moving party "must respond to the summary judgment motion with specific facts showing there is a genuine issue for trial." *Id*.

In ruling on the motion, the Court considers only material contained in the affidavits and depositions which are based on personal knowledge and which would be admissible at trial. *Samuel*, 134 Idaho 84, 88, 996 P.2d 303, 307. Summary judgment is appropriate where a non-moving party fails to make a sufficient showing to establish the existence of an element essential to its case when it bears the burden of proof. *Id.*

III. ANALYSIS OF PLAINTIFFS' MOTION TO AMEND COMPLAINT TO ADD CLAIM OF PUNITIVE DAMAGES.

As mentioned above, punitive damages cannot be alleged by a party until a motion is brought and the trial court orders such an amendment to the pleadings. I.C. § 6-1604(2). The court shall allow the motion to amend the pleadings if, after weighing the evidence presented, the court concludes the moving party has established at such hearing a reasonable likelihood of proving facts at trial sufficient to support an award of punitive damages. *Id.* Punitive damages are appropriate where a party acts in an oppressive, fraudulent, malicious, or outrageous manner. I.C. § 6-1604(1). Punitive damages are allowed in a commercial dispute. *Gunter v. Murphy's Lounge, L.L.C.,* 141 Idaho 16, 29, 105 P.3d 676, 689 (2005); *Todd v. Sullivan Constr. LLC,* 146 Idaho 118, 121, 191 P.2d 196, 199 (2008). Punitive damages are allowed in a breach of contract action where the non-moving party's conduct represents an extreme deviation from reasonable standards of conduct and the non-moving party's acts were performed with malice or oppression or wantonness. *Hall v. Farmers Alliance Mutual Insurance Company,* 145 Idaho 313, 319-20, 179 P.3d 276, 282-83 (2008). While punitive damages are not available in the routine, ordinary breach of contract action (citing *Linscott v. Rainier Nat'l Life Ins. Co.,* 100 Idaho 854, 861, 606 P.2d 958, 965 (1980), it

should not be construed as a blanket prohibition against punitive damages in breach of contract claims. *Myers v. Workmen's Auto Ins. Co.,* 140 Idaho 495, 502-03, 95 P.3d 977, 984-85 (2004). A breach of contract occasioned through fraud, malice, oppression, or other sufficient reason, will support an award of punitive damages. *Boise Dodge, Inc. v. Clark,* 92 Idaho 902, 907, 453 P.2d 551, 555 (1969).

Conduct justifying punitive damages requires an intersection of two factors: a bad act and a bad state of mind. *Hall,* 145 Idaho 313, 319, 179 P.3d 276, 282; *Adams v. United States,* 622 F.Supp.2d 996, 1005-06 (D.Idaho 2009), citing *Linscott v. Rainier Nat. Life. Ins. Co.,* 100 Idaho 854, 606 P.2d 958, 962 (1980). The non-moving party must 1) act in a manner that was an extreme deviation from reasonable standards of conduct with an understanding of—or disregard for—its likely consequences, and must 2) act with an extremely harmful state of mind described variously as with malice, oppression, fraud, gross negligence, wantonness, deliberately or willfully. *Adams,* 622 F.Supp.2d 996, 1006, citing *Myers v. Workmen's Auto Ins. Co.,* 140 Idaho 495, 501, 95 P.3d 977, 983 (2004). Alternatively, where the non-moving party's conduct evinces an indifference as to its consequences, punitive damages are appropriate. *Weinstein v. Prudential Property and Casualty Insurance Company,* 149 Idaho 299, 338, 233 P.3d 122, 1260, (2010), citing *State Farm Mut. Auto. Ins. Co. v. Campbell,* 538 U.S. 408, 419, 123 S.Ct. 1513, 1521, 155 L.Ed.2d 585, 602 (2003). MWB/Glacier could be responsible for Brittain's actions, even if no other agent of MWB/Glacier were involved in the bad conduct. There is evidence that Brittain's actions would have benefitted MWB/Glacier financially, and would have inured to MWB/Glacier's benefit regarding those who regulate that bank. The Idaho Supreme Court has held:

> First, Boise Dodge argues that the issue of punitive damages should not have been submitted to the jury at all inasmuch as a

> corporation cannot be held liable for punitive damages based upon the acts of its agents unless the corporation participated in the wrongdoing or previously or subsequently ratified it. We recognize that Idaho is one of those states which applies the rule that a principal is liable for punitive damages based upon the acts of his agents only in which the principal participated or which he authorized or ratified. Of course, a wooden application of this rule, which we reject, would effectively insulate all corporations from punitive damage liability, for a corporation can act only through its agents. On the other hand, it is wise policy from the standpoint of proper corporate responsibility to recognize that, when corporate officials and managing and policy-making agents engage in fraudulent activity in furtherance of corporate profits which inure to the benefit of shareholders, the acts of such agents must be attributed to the corporation: '(T)here may be good reason to use whatever devices are available to deter owners and managing officers from tolerating misconduct by employees. If exemplary damages will encourage employers to exercise closer control over their servants, there is sufficient ground for awarding them.'
>
> It is on this basis that corporate liability for punitive damages has received appropriate judicial sanction, particularly in actions against car dealerships for fraud.
>
> We have no difficulty in applying this principle to the case at bar. The then general manager of Boise Dodge, Inc., admitted that, when the car in this case was sold to respondent Clark, he knew the odometer had been set back nearly 7,000 miles. When the management of Boise Dodge, Inc., allowed this sale to occur with full knowledge of the deception which was inherent in the situation, the corporation effectively ratified the wrongdoing. Indeed, this would even constitute corporate participation in the wrong. Further along the lines of participation, the service manager of Boise Dodge, Inc., testified that it was the corporate general manager who ordered that the odometers be set back. We cannot but conclude, in view of the respective employment history of these officers, that the jury believed this testimony rather than the general manager's denial. Thus, under the Idaho rule and all the authorities cited, the court below properly allowed the jury to award punitive damages against Boise Dodge, Inc., qua corporation.

Boise Dodge, Inc. v. Clark, 92 Idaho 902, 905-06, 453 P.2d 551, 554-55 (1969).

Plaintiffs set forth their evidence regarding punitive damages. Memorandum in Support of Plaintiffs' Motion for leave to Amend Complaint to Assert a Claim for Punitive Damages Pursuant to I.C. §6-1604, pp. 4-11. Paula Smyly is a Senior Vice-President and "Relationship Manager" within MWB/Glacier. Statement of Undisputed Facts, filed August1, 2013, ¶¶ 1-3. Smyly has 37.5 years of experience in banking and has been

employed by MWB/Glacier since the bank opened twenty years ago. *Id.* She was the "Relationship Manager" for the loan in dispute in this lawsuit. *Id.* Brock Olson was "Assistant Relationship Manger" under Smyly. Olson deposition, p. 7. Rich Brittain is a Senior Vice-President with MWB/Glacier. Statement of Undisputed Facts filed August 1, 2013, ¶ 5. Brittain serves as MWB/Glacier's "Special Assets Administrator." *Id.,* ¶ 7. Administration of the loan at issue was left to Smyly except when it had been transferred to "Special Assets" and Brittain. *Id.,* ¶ 4. MWB initially extended credit to plaintiffs as reflected in a promissory note bearing Loan No. 807300876. *Id.,* ¶ 9. That note was secured by deeds of trust on specific property, included a specific interest rate and payment schedule, and had a three year term (or maturity). *Id.* The 2005 Note was renewed in 2008, and the 2008 loan was renewed on the same terms as the 2005 loan. *Id.,* ¶ 10. The same security remained in place, the same interest rate remained, the same payment schedule applied, and the note again had a three-year maturity or term. *Id.,* ¶¶ 11-13. The maturity date of the 2008 loan was established at September 10, 2011. Exhibit 3, Olson/Smyly depositions. By early 2011, certain MWB loans with which the plaintiffs were associated had been transferred to MWB's "Special Assets" department for oversight and control by Brittain. Statement of Undisputed Facts filed August 1, 2013, ¶ 17. These obligations included a $9 million loan MWB had extended to BRMC Properties, LLC. *Id.* William and Julie Radobenko were guarantors of that loan. *Id.,* ¶ 18. By early 2011, MWB had initiated a foreclosure action arising out of the BRMC loan and had brought suit against Radobenkos, personally, on their guaranties. *Id.,* ¶¶ 18-20. On March 7, 2011, MWB, through Brittain, entered into the "Memorandum of Agreement" (MOA) with the BRMC parties, and others, including R&R Leasing. *Id.,* ¶ 25l Radobenko Affidavit, Exhibit B. In order

to obtain cooperation and closure on the BRMC credit, MWB specifically made the following written commitment to R&R and the Radobenkos:

> Mountain West Bank shall extend or renew loan number 0807300876 at maturity under the same terms of the original 2008 loan and extend a $250,000 discount on this loan should the borrower be able to refinance this loan elsewhere during the next twelve months.

Id., ¶ 26; 1-16-13 Radobenko Affidavit, Exhibit B, p. 2. In reliance on that commitment, Radobenkos fully performed all obligations incumbent upon them under the MOA insofar as the BRMC credit was concerned. The BRMC credit was fully compromised and settled under the terms set forth in the MOA. MWB makes no claim to the contrary. Statement of Undisputed Facts filed August 1, 2013, ¶ 27. About three weeks after executing the March 7, 2011, MOA, Brittain sent Radobenkos and Smyly a letter, attempting to change the terms of renewal from a three year term to a "rolling one year maturity for three years subject to [certain] additional terms and conditions…" *Id.,* ¶ 28; Olson/Smyly depositions, Exhibit 5. After resolving the BRMC credit and after executing the March 7, 2011, MOA, Brittain transferred the loan back to Smyly for further administration. *Id.,* ¶ 29. Britain told Smyly to process the loan under the terms and conditions Brittain had unilaterally imposed on R&R and Radobenko through his March 25, 2011, letter rather than under the terms and conditions set forth in the March 7, 2011, MOA. *Id.,* ¶ ¶ 29-30. Smyly was never given a copy of the March 7, 2011, MOA for purposes of processing the administration of the loan renewal. *Id.,* ¶ 30. Smyly never saw the March 7, 2011, MOA until one week before her July 17, 2013, deposition in this case. *Id.* Smyly agreed the March 7, 2011, MOA provided for a different maturity/term (three years) than the maturity/term provided in Brittain's unilateral letter of March 25, 2011 (a one year maturity or three years on a rolling basis, subject to other conditions). *Id.,* ¶ 32. Brittain did not give Olson a copy of the March 7,

2011, MOA even though Olson, like Smyly, was tasked with the renewal of the R&R credit. *Id.,* ¶ 37. The first time Olson saw a copy of the March 7, 2011, MOA was at his deposition on July 17, 2013. *Id.,* ¶ 38. On June 30, 2011, about two months before the maturity date of the 2008 Loan, Olson wrote to Radobenko threatening to transfer R&R's loan "back to Special Assets." *Id.,* ¶ 39. Plaintiffs argue it can be inferred that Brittain, MWB/Glacier's agent who had agreed with Radobenko and R&R to extend the 2008 loan for three years, was orchestrating threats to plaintiffs in direct contravention of MWB's obligation under the March 7, 2011, MOA. Memorandum in Support of Plaintiffs' Motion for leave to Amend Complaint to Assert a Claim for Punitive Damages Pursuant to I.C. §6-1604, p. 7, ¶ 17. Radobenko continued to provide the financial information requested by MWB through the summer of 2011. *Id.,* ¶ 40. On August 10, 2011, Olson advised Radobenko that appraisals had been ordered on the property that had been pledged as collateral for the R&R loan. *Id.,* ¶ 41. On August 30, 2011, Smyly sent an e-mail to the "Mountain West Bank Management Loan Committee." *Id.,* ¶ 42. Brittain was a member of that committee. Olson/Smyly deposition Exhibit 10. Smyly advised the Committee that the R&R loan was maturing on September 10, 2011. *Id.,* Smyly further advised the Committee: "While we agreed to 3 - 1 year renewals to gain cooperation on the BRMC credit, there is a 'solvency' clause that was in the 'agreement letter' with Bill." *Id.* While she sent the August 30, 2011, e-mail, Smyly did not author it; she typed the e-mail "under Rich's [Brittain] guidance." Statement of Undisputed Facts filed August 1, 2013*,* ¶ 43. Smyly acknowledged that she "didn't have personal knowledge of what terms of agreement Bill may have reached with Rich." *Id.* Plaintiffs argue with the R&R loan approaching maturity, Brittain ghost wrote an e-mail for Smyly to send to the MWB Loan Committee (of which Brittain was a member),

misrepresenting the terms of agreement Brittain had entered into with R&R (in the March 7, 2011, MOA), and Smyly was unaware of all this as she had never been provide a copy of the March 7, 2011, MOA. Memorandum in Support of Plaintiffs' Motion for leave to Amend Complaint to Assert a Claim for Punitive Damages Pursuant to I.C. §6-1604, p. 8, ¶ 22. Only Brittain knew of the MOA and he chose by deliberate action not to share the terms of the same with Smyly, Olson, or the MWB Loan Committee, of which Brittain was a member. *Id.* A loan is "reportable" to regulators if not paid within 30 days of maturity. Statement of Undisputed Facts filed August 1, 2013, ¶ 46. As of September 2, 2011, the appraisals that MWB had commissioned were not yet completed. *Id.,* ¶ 47. In this context, Brittain told Smyly to ask MWB's Loan Committee to authorize the extension of the R&R loan at maturity (on September 10, 2011) for three (3) thirty (30) day increments. *Id.,* ¶ 45; Smyly deposition, pp. 47-48. While the loan could have been extended for 90 days to facilitate completion of the appraisals (a regulatory requirement), Brittain chose to extend the loan in 30-day increments "to keep the pressure on" Radobenko. *Id.* Plaintiffs argue Brittain was keeping "pressure" on Radobenko because Brittain, having obtained cooperation on the BRMC credit, didn't want to honor his obligation to extend the R&R loan for three additional years. Memorandum in Support of Plaintiffs' Motion for leave to Amend Complaint to Assert a Claim for Punitive Damages Pursuant to I.C. §6-1604, p. 8, ¶ 25. The loan was no longer considered "an income generating center," and was viewed as a lost opportunity." *Id., citing* Smyly deposition at p. 59. Smyly was told to "Work through these credits as quickly as you can." *Id., citing* Smyly deposition at p. 48. Having obtained the Loan Committee's approval to extend the loan in three (3) thirty (30) day increments, Smyly met with Radobenko prior to maturity to discuss

loan issues. Statement of Undisputed Facts filed August 1, 2013, ¶ 49. Smyly represented to Radobenko that: the loan could not be renewed unless the appraisals were completed; she did not want the loan to show as delinquent so she would extend the same for 30 days while the renewal process went on; and the loan needed to be extended on an interim basis to keep it current for the purposes of MWB's regulatory compliance. *Id.,* ¶¶ 49-50. After Smyly made those representations to Radobenko, the "Change in Terms Agreement" was executed, extending the loan from September 10, 2011, through October 10, 2011. *Id.,* ¶ 51. By September 28, 2011, the appraisals had been completed. *Id.,* ¶ 53. Those appraisals raised no issues and significant collateral value was pledged. On October 10, 2011, the R&R loan matured under the 30-day extension signed September 6, 2011. *Id.,* ¶ 55. On October 12, 2011, under Smyly's direction, Olson prepared a "Problem Loan Summary" for his superiors' review. *Id.,* ¶ 56. Olson's report confirmed that all appraisals had been completed and that MWB had received the final pieces of financial information from R&R and Radobenko. *Id.,* ¶ 58. After reviewing Olson's draft, Smyly handwrote on the "Problem Loan Summary" that she did not "see way not to renew." *Id.,* ¶ 59. After Smyly advised Brittain that she didn't see "way not to renew," Brittain had the loan transferred back to Special Credits. *Id.,* ¶ 61. Smyly and Olson had no further involvement in the renewal of the loan following that transfer. *Id.,* ¶ 65. On October 28, 2011, Brittain wrote Radobenko, effectively declining to renew the loan (notwithstanding the commitments and the March 7, 2011, MOA), stating: "It appears some lenders have pursued litigation to recover their debts [against Radobenko] while there is no plan for the repayment of the Mountain West Bank debt. This is unacceptable to our Bank." *Id.,* ¶ 67. On October 31, 2011, another Problem Loan Summary was prepared and placed in MWB's loan file. *Id.,* ¶

68. That Problem Loan Summary identified Smyly "as the author" and stated R&R would not agree to a restructured loan that included "a true principal repayment plan." *Id.,* ¶ 66. The Problem Loan Summary was not authored "by the designated author" (Smyly), as Smyly had never seen the October 31, 2011, Problem Loan Summary until one week before her July 2013 deposition. *Id.,* ¶ 70. The inference is the only person who likely prepared the Problem Loan Summary was Brittain. *Id.,* ¶ 72. The October 31, 2011, Problem Loan Summary further attributed Smyly as having had conversations with Radobenko's other lenders and concluding that MWB would "push the guarantor [Radobenko] and business [R&R Leasing] into involuntary bankruptcy to solve the outstanding creditor issues." *Id.,* ¶ 69. Smyly testified she never called the creditors of R&R or Radobenko. *Id.,* ¶ 87. In fact, in her 37.5 years in banking Smyly had never called a customer's other lender or creditor to discuss or arrange a possible involuntary bankruptcy. *Id.* In November 2011, another "Problem Loan Summary" was prepared. *Id.,* ¶ 84. This Summary was also attributed to Smyly; again she testified she had nothing to do with its preparation. *Id.,* ¶ 85 *Id.* The November 30, 2011, Problem Loan Summary again threatened to push Radobenko and R&R into involuntary bankruptcy if they would not agree to restructure the loan in some form other than an interest-only loan. *Id.,* ¶ 86. Similar Problem Loan Summaries were prepared in the months that followed (December 2011, January 2012 and February 2012). *Id.,* ¶ 88. These Problem Loan Summaries continued to discuss and plan an involuntary bankruptcy of Radobenko and R&R, all under the false byline of Smyly, and in direct contravention of the March 7, 2011, MOA. *Id.,* ¶ 88. R&R continued to make full and timely payment of all sums due MWB under the subject loan based upon the terms and conditions set forth in the March 7, 2011, MOA. *Id.,* ¶ 92. On May 4, 2012, Brittain wrote R&R,

claiming that the Borrower was in default under the terms of the 2008 Promissory Note, which was to have been extended at maturity for three more years, and Brittain accelerated the outstanding indebtedness. *Id.,* ¶ 94. 65. Next, plaintiffs filed this lawsuit against MWB on May 25, 2012. Memorandum in Support of Plaintiffs' Motion for leave to Amend Complaint to Assert a Claim for Punitive Damages Pursuant to I.C. §6-1604, pp. 4-11.

To summarize, plaintiffs contend they had an agreement with MWB, the March 7, 2011, MOA; which, shortly after entering into it, Brittain tried to unilaterally change. When Radobenkos were unwilling to accede to Brittain's unilateral changes, Brittain used other MWB employees to attempt to get Radobenkos to agree to certain changes, which, under the terms of the March 7, 2011, MOA, Radobenkos did not need to agree to. The reason for those changes was to appease the bank's regulators.

Plaintiffs argue MWB's Brittain took this loan back to "Special Assets" where Brittain could control the loan. Memorandum in Support of Plaintiffs' Motion for leave to Amend Complaint to Assert a Claim for Punitive Damages Pursuant to I.C. §6-1604, p. 13. "Then a series of Problem Loan Summaries were authored to the MWB loan committee, all falsely attributed to Smyly." *Id.* These Problem Loan Summaries claimed that Radobenko wouldn't agree to restructure the loan. That is false. " *Id.* Yet Brittain, who is the inferential author of these false reports, apparently chose not to share the March 7, 2011, MOA with anyone else in the bank. *Id.* "To make matters worse, after putting a bag over the collective heads of Smyly and Olson, and after authoring false Problem Loan Summaries under Smyly's name, Brittan cajoled MWB's Loan Committee to call the loan, with the false perception that Radobenko and R&R were inflexible recalcitrants." *Id.,* pp. 13-14.

MWB/Glacier argues, "This case involves a bona fide, good faith dispute over the construction of the communications and agreements between the parties." Objection to Plaintiffs' Motion for Leave to Amend Complaint to Assert a Claim for Punitive Damages, p. 2. MWB/Glacier argues "plaintiffs cannot show that they have a reasonable likelihood of establishing their underlying cause of action for breach of contract—specifically the March 7, 2011 Memorandum of Agreement ("MOA")—and thus they cannot show that Glacier has committed a bad act." *Id.* This Court disagrees. Plaintiffs have furnished proof which, if believed by the trier of fact, could show MWB/Glacier breached the March 7, 2011, MOA. Plaintiffs have also furnished proof which, if believed by the trier of fact, could show bad intent on the part of MWB/Glacier's agent, Brittain. MWB/Glacier argues the March 7, 2011, MOA was not disseminated to Smyly/Olson because it was ineffective and had been replaced by the terms of Brittain's March 25, 2011, letter. *Id.,* p. 8. This conclusory argument by MWB/Glacier certainly ignores this Court's June 19, 2013, Memorandum Decision and Order Denying Defendant Glacier's Motion for Summary Judgment. This conclusory argument by MWB/Glacier was also made prior to the present decision that the March 7, 2011, MOA controls. MWB/Glacier then argues that it was legally entitled to consider involuntary bankruptcy as an option against plaintiffs. *Id.,* pp. 9-11. While a creditor can discuss a debtor's situation with other creditors of the debtor, for MWB/Glacier to have that discussion in the present case may be a different matter. In this case, the plaintiffs have evidence that Brittain entered into a contractual agreement with plaintiffs on March 7, 2011, and then immediately began attempts to unilaterally change that contract. And when plaintiffs would not agree to these unilateral changes, Brittain had other bank employees lie to plaintiffs about the need to modify the contract. When such modification was entered into by plaintiffs, arguably in response to MWB/Glacier's

fraud, the modifications allowed tighter timelines and pressure upon plaintiffs, then MWB/Glacier discussed involuntary bankruptcy. While discussing involuntary bankruptcy is "legal", in light of those facts, discussing involuntary bankruptcy is evidence of fraudulent conduct by MWB/Glacier for the trier of fact to consider at trial.

Plaintiffs' Motion for Leave to Amend complaint to Assert a Claim for Punitive Damages Pursuant to I.C. § 6-1604 must be granted.

IV. ANALYSIS OF DEFENDANT'S MOTION TO AMEND ANSWER.

On August 15, 2013, MWB/Glacier filed its Motion to Amend Answer. Other than simply stating that I.R.C.P 15 applied, no briefing was supplied with that motion. The only thing MWB/Glacier attached to that motion was the proposed amended answer. On August 22, 2013, plaintiffs filed an Objection to Defendant's Motion to Amend Answer. Plaintiffs note that MWB/Glacier seeks to add the following paragraph 32:

> Plaintiffs concealed from [MWB] the filing of a lawsuit against them on January 11, 2011 by Bank of Whitman seeking recovery from them of $8,229,270.85 plus interest and costs; the filing of such a claim was material to Plaintiffs' finances and their ability to perform their obligations under their agreements with Bank, including those attached to the counterclaim; the Plaintiffs had actual knowledge of the Bank of Whitman claim prior to February 15, 2011; the Bank was not aware of the Bank of Whitman claim prior to August 1, 2011; the Plaintiffs intentionally did not disclose the existence of the Bank of Whitman claim to Bank with the intent that the Bank not be aware of it and that it relied on Plaintiffs' non-disclosure in negotiating the terms for the extension of the R&R Note held by the Bank; the Bank reasonably relied on the non-disclosure of the Bank of Whitman claim by Plaintiffs; and has suffered damages as a result.

Objection to Defendant's Motion to Amend Answer, p. 2, citing Proposed Amended Answer at ¶ 32. Plaintiffs argue that MWB had an obligation to extend the R&R credit at its maturity on October 10, 2011, and prior to that, MWB was provided with evidence and confirmation that the $8.2 million Bank of Whitman credit had been compromised for $2.6 million. *Id.,* Affidavit of Radobenko at ¶¶ 19-22. Plaintiffs claim:

> Moreover, there is no disputed issue of fact, based upon documents obtained from MWB's own loan files, that MWB knew of the obligation and of its existence for at least two years prior to the date the loan matured (under the Change in Terms of Agreement) on October 10, 2011. In fact, when the Change in Terms Agreement (CTA) was signed on September 6, 2011, Mountain West was again readvised of the existence of the obligation through financial disclosures dated and provide the same day. *Id.,* at ¶ 16 and Ex. C.
>
> It serves little purpose to allow a party to amend its affirmative defenses and counterclaims to include a factual allegation that is refuted by correspondence since obtained directly from the moving party's files. Under these circumstances, it is not an abuse of discretion for the Court to deny a request for leave to amend if the new claims proposed would simply fail to state a valid cause of action or defense.
>
> Moreover, under the circumstances, the incredible allegations made by Mr. Brittan [sic] that he had no knowledge of the obligation or the settlement thereof, allegations which are directly contradicted by materials in Mountain West's loan files, will require that Mr. Brittan's [sic] deposition be taken again.

Objection to Defendant's Motion to Amend Answer, p. 3.

In MWB/Glacier's Reply Memorandum in support of Glacier Bank's Motion to Amend Answer, MWB/Glacier argues that plaintiffs have failed to meet their burden under I.R.C.P. 15 as to why this Court should not grant MWB/Glacier leave to amend its answer. Reply Memorandum in support of Glacier Bank's Motion to Amend Answer, p. 2. While I.R.C.P. 15(a) does state that "leave to amend shall be freely given when justice so requires", MWB/Glacier notes the Idaho Supreme Court has placed the burden of showing why a court should not grant leave to amend on the party opposed to the amendment. *Clark v. Olsen,* 110 Idaho 323, 326, 715 P.2d 989, 992 (1986), *citing Smith v. Great Basin Grain Co.,* 98 Idaho 266, 272-73, 561 P.2d 1299, 1305-06 (1977). Because plaintiffs focused on paragraph 32, to the omission of paragraphs 23 and 31, MWB/Glacier argues: "In conclusion, Plaintiffs have not demonstrated any basis why this Court should not heed the mandate of I.R.C.P. 15(a) and Grant Glacier Bank leave to amend its Answer to include proposed Paragraphs 23 and 31." Reply Memorandum in support of Glacier Bank's Motion to Amend Answer, p. 5. That

argument is well taken, and MWB/Glacier's motion to amend must be granted as to those paragraphs. As to paragraph 32, MWB/Glacier argues:

> Mr. Radobanko [sic] mischaracterizes the dispute in a number of ways. First, Glacier never alleged that it was unaware of Plaintiffs' obligation to the Bank of Whitman; thus, the fact that the Plaintiffs' submitted financial statements listing the Bank of Whitman loan as a contingent liability is immaterial. What was not disclosed was the Bank of Whitman's filing and service of a complaint on the Plaintiffs' obligations just a month before Mr. Radobenko sent an email on February 15, 2011 to Mr. Brittain outlining terms for the MOA. *See Decl. of Richard Brittain in Opp. To Pls.' Mot. For Partial Summ. J.* Ex. 2. What was concealed from Glacier was the fact that Plaintiffs had defaulted on their obligation, causing the entire multi-million dollar obligation to become immediately due and owing. Glacier was not informed of the default or the litigation until late summer of 2011, shortly before a $9 million judgment was entered against Plaintiffs, creating an immediate threat to the availability of Plaintiffs' assets and legitimate questions about their ability to perform their obligations to Glacier.

Reply Memorandum in support of Glacier Bank's Motion to Amend Answer, pp. 5-6. While MWB/Glacier view the evidence much differently than do the plaintiffs, MWB/Glacier has met its burden as to paragraph 32 as well. MWB/Glacier's motion to amend its answer must be granted as to paragraph 32.

V. ANALYSIS OF PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT.

A. Introduction and Prior Decision by the Court.

In their Motion for Partial Summary Judgment, plaintiffs seek three things: 1) in the March 7, 2011, MOA, MWB agreed to extend the R&R loan through a maturity date of September 10, 2014, and plaintiffs are entitled to partial summary judgment on its breach of contract claim that MWB is liable for its breach of the terms of the MOA (with the amount of damages to be determined by the jury at trial); 2) plaintiffs are entitled to partial summary judgment and a decree of specific performance which orders MWB to renew the loan through September 10, 2014, "under the same terms of the original 2008 Loan" according to the MOA; and 3) plaintiffs are entitled to partial summary

judgment against MWB on MWB's counterclaims that: the loan matured on October 10, 2011; that plaintiffs are in default because they failed to pay that loan on that maturity date; and that MWB is entitled to foreclose under its Deeds of Trust securing the Note based upon that default. Memorandum in Support of Plaintiffs' Motion for Partial Summary Judgment, pp. 3-4. The Court would have to find no dispute of material fact exists that: 1) MWB agreed to extend the loan through September 10, 2014; 2) plaintiffs have fully performed their payment obligations under the Note extension; and 3) there is no default on the part of plaintiffs based upon any failure to pay sums owing under the Note when due. *Id.*

Plaintiffs argue the MOA is an extension of the 2008 loan and is clear, unambiguous and binding on the parties. *Id*., p. 5. The terms of the 2008 loan was memorialized in the December 12, 2008, Promissory Note, and include: 1) principal amount of $5,000,000.00 (this increase to $5 million was the only change between the 2005 loan and the 2008 loan); 2) interest rate remained at Wall Street Journal prime, fully floating (prime plus zero percent index); 3) R&R would make monthly payments of all accrued unpaid interest; 4) the maturity date at which all principal and interest was due was three years from the maturity date of the 2005 loan (September 10, 2008), or September 10, 2011, and at the due date, R&R would pay the loan in one payment of all outstanding principal plus all accrued unpaid interest; and 4) the loan remained secured by the same Deeds of Trust on the same properties that secured the 2005 loan. January 15, 2013, Affidavit of William Radobenko in Opposition to Defendant/Counterclaimant Glacier Bank's Motion for Summary Judgment, Exhibit A, pp. 1-2; Statement of Undisputed Facts, pp. 4-5, ¶¶ 12-13. There does not appear to be a dispute of fact as to the general terms of the 2008 loan, other than the duration. Plaintiffs state many times in briefing the term was for three years. However, as the

2008 loan is dated December 12, 2008, and the stated maturity date was September 10, 2011, the period of the loan was in fact thirty-two (32) months. January 15, 2013, Affidavit of William Radobenko in Opposition to Defendant/Counterclaimant Glacier Bank's Motion for Summary Judgment, Exhibit A, p. 1; Statement of Material Facts, pp. 4-5, ¶ 12; Smyly Deposition, p. 28, L. 23 – p. 29, L. 18. Because even Paula Smyly on behalf of MWB/Glacier agrees the loan maturity date was now September 10, 2011, there is no dispute of fact on this issue.

Plaintiffs then argue the March 7, 2011, MOA is equally unambiguous, as it uses the operative word "shall" in the provision pertaining to the R&R loan, specifically:

> Mountain West *shall* extend or renew Loan No. 0807300876 at maturity under the same terms of the original 2008 Loan . . .

January 15, 2013, Affidavit of William Radobenko in Opposition to Defendant/Counterclaimant Glacier Bank's Motion for Summary Judgment, Exhibit B, p. 2 (Emphasis added). This Court's decision regarding the validity of the MOA was set forth in its June 19, 2013, "Memorandum Decision and Order Denying Defendant Glacier's Motion for Summary Judgment":

> Based on the above information, plaintiffs argue the MOA was in fact part of the Loan contract and, by it terms, the Loan was extended an additional three-year period through September 10, 2014, with R&R making interest-only payments until the principal amount became due at that maturity date. *Id*. at 20. [Plaintiffs' Memorandum in Opposition to Defendant/Counterclaimant Glacier Bank's Motion for Summary Judgment] Plaintiffs agree with Glacier that a breach of contract claim requires an agreement crating a contractual duty that, if materially breached, would entitle the plaintiffs to relief sought, under *Idaho Wool*. *Id*. at 19. Plaintiffs state they have accomplished such through the execution of the initial promissory note and then the subsequent execution of the MOA. *Id*. at 20. Plaintiffs argue the word "shall" in the MOA provision regarding the extension of the Loan bestowed on MWB a contractual duty to extend the loan for an additional three years under the same terms as the promissory note, including interest-only monthly payments. *Id*.
>
> Plaintiffs also claim once the MOA was executed on March 7, 2011, Brittain, on behalf of MWB, could not unilaterally modify the

terms of that agreement via Brittain's March 25, 2011, letter, by trying to make the extension not one three-year extension but three one-year extensions. *Id*. , p. 21. Again, this Court agrees.

In a suit regarding a contract, "the burden of proving the existence of a contract and the fact of its breach is upon the Plaintiff, and once those facts are established, the Defendants have the burden of pleading and proving affirmative defenses, which legally excuse performance." *Idaho Power Co. v. Cogeneration, Inc.*, 134 Idaho 738, 747, 9 P.3d 1204, 1213 (Idaho 2000). Contract formation requires mutual assent, a "distinct understanding common to both parties." *Thompson v. Pike*, 122 Idaho 690, 696, 838 P.2d 293, 299 (1992). This manifestation of mutual intent to contract takes the form of an offer and acceptance. *P.O. Ventures, Inc. v. Loucks Family Irrevocable Trust*, 144 Idaho 233, 238, 159 P.3d 870, 875 (2007). The statute of frauds under I.C. §9-505 also is relevant when there is a "promise or commitment to lend money or to grant or extend credit in an original principal amount of fifty thousand dollars ($50,000) or more, made by a person or entity engaged in the business of lending money or extending credit." I.C. § 9-505. The statute of frauds states that such agreements are invalid, "unless the same or some note or memorandum thereof, be in writing and subscribed by the party charged, or by his agent." *Id*.

> Breach of contract has been defined as:
> "[f]ailure, without legal excuse to perform any promise which forms the whole or part of a contract. Prevention or hindrance by party to contract of any occurrence or performance requisite under the contract for the creation or continuance of a right in favor of the other party or the discharge of a duty by him. Unequivocal, distinct and absolute refusal to perform agreement."

Hughes v. Idaho State University, 122 Idaho 435, 437, 835 P.2d 670, 672 (Ct. App. 1992) (quoting BLACK'S LAW DICTIONARY 188 (6th ed. 1990)).

If a written contract is unambiguous and complete on its face, with no fraud or mistake being alleged, extrinsic evidence of prior or contemporaneous negotiations or conversations are not admissible to contradict, vary, alter, add to, or detract from the terms of the contract. *Howard*, 141 Idaho 139, 141, 106 P.3d 465, 467 (2005). A written contract is complete on its face when it contains a merger clause. *Kimbrough v. Reed*, 130 Idaho 512, 515, 943 P.2d 1232, 1235 (1997). The purpose of a merger clause to establish that the parties have agreed that the contract contains the parties' entire agreement. *Howard*, 141 Idaho 139, 142, 106 P.3d 465, 468. As such, the existence of a merger clause is proof the agreement is integrated. *Id*.

In this case, as stated above in *Idaho Power*, it is the burden of plaintiffs to prove the existence of a contract extending the maturity date on the Loan. In viewing the facts in the light most favorable to plaintiffs, the non-moving party, an offer was made in the form of the

MOA, sent from Brittain to William on March 7, 2011, and accepted by Brittain on behalf of MWB, via his signature, on that same date. Radobenko Aff., p. 5, ¶ 18, Ex. B. Both Brittain, on behalf of MWB, and William signed the MOA, satisfying the statute of frauds under I.C. § 9-505. It seems both parties had a chance to review the document and both signed the document; thus, it appears a meeting of the minds did occur and the MOA is indeed a contract. However, because it is not a complete contract, as vital terms are missing, the question then becomes how the MOA affects the original Note.

When there is an original contract executed and subsequently a supplementary contract is executed regarding the same subject matter, the Idaho Supreme Court has held the two contracts are to be construed together. *Columbia Trust Co. v. Elkelberger*, 42 Idaho 90, 99, 245 P. 78, 81 (1925), *citing Chicago Trust Bank v. Chicago Title Trust Co.*, 190 Ill. 404, 410-11, 83 Am.St. 138, 60 N.E. 586, 588 (Ill 1901); *Blagen v. Thompson*, 23 Or. 239, 31 P. 647 (Or. 1892). The Illinois Supreme Court held;

> [It] Is said that 'where two instruments are executed as part of the same transaction and agreement, whether at the same or different times, they will be taken and construed together.' In *Gardt v. Brown*, 113 Ill. 475, the late Mr. Justice Walker, speaking for the court, says: 'No rule of interpretation is more familiar than, when two instruments are executed as the evidence of one transaction, they shall be read and construed as one instrument.' And in Wilson v. Roots, 119 Ill. 379, 10 N.E. 204, the court says: 'The rule is familiar, and of frequent application in cases before this court, that, where different instruments are executed as evidence of one transaction or agreement, they are to be read and construed as constituting but a single instrument.' That is the rule of construction very generally, if not universally, adopted by courts of justice.

Chicago Trust Bank, 190 Ill. 404, 410-11, 83 Am.St. 138, 60 N.E. 586, 588-89. "When two written contracts are entered into between the same parties concerning the same subject-matter, whether made simultaneously or on different days, they may, under some circumstances, be regarded as one contract, and interpreted together. *Blagen*, 23 Or. 239, 246, 31 P. 647, 650, citing *Dean v. Lawham*, 7 Or. 422; *Kruse v. Prindle*, 8 Or. 158; Bish.Cont. § 165. In *Blagen*, the Oregon Supreme Court found the two contracts were not between the same parties as the first was between a railroad company and the defendants in the Blagen case, where the second contract was between the defendants in the Blagen case and Blagen himself. *Id*. In the present case the first contract (the $5 million load [loan] to R&R) was between Glacier and R&R Radobenkos, and the second contract (the March 7, 2011, MOA) was between Glacier and William Radobenko as well as Marshall Chesrown. Glacier and Radobenkos are the common denominators. The first contract involved only Glacier and R&R/Radobenkos, and the second contract modified that first

contract but also cleared up a water rights issue in a different contract (a $9 million loan) between Glacier and Radobenkos and Marshall Chesrown. The Court finds the "same parties" requirement has been met. And, If the two contracts differ, then the first contract is held to be modified; if not, then the first contract is enforced according to its terms. *Columbia Trust Co. v. Elkelberger*, 42 Idaho 90, 99, 245 P. 78, 81. In order for a later instrument to rescind an earlier one, there must be a demonstration of mutual intent. *Miller v. Estate of Prater*, 141 Idaho 208, 212, 108 P.3d 355, 359 (2005). General rules of contract interpretation apply; thus, if there is no ambiguity on the issue, it may be decided as a matter of law. *Id*. On the other hand, if an inconsistency between the two instruments creates an ambiguity, then the intent of the parties must be determined through a factual inquiry. *Id*. Amended agreements should be construed together with the original agreements where possible. *Opportunity L.L.C. v. Ossewarde*, 136 Idaho 602, 607, 38 P.3d 1258, 1263 (2002). The making of a new contract does not necessarily supersede a former contract unless it 1) explicitly rescinds it, 2) deals with the subject matter so comprehensively as to be compete in itself, or 3) is so inconsistent with the first contract that the two cannot be read together. *Id*. When a subsequently executed agreement specifically references and relies on a former agreement, the two agreements must be interpreted together, if possible. *Id*. In *Ossewarde*, the amended purchase agreement was incomplete and specifically referenced the original purchase agreement, the original promissory note and the amended promissory note. *Id*. However, the amended promissory note explicitly rescinded the former promissory note. *Id*. The Idaho Supreme Court held the original and amended purchase agreements were to be construed together, but the amended promissory note stood alone. *Id*.

According to *Columbia Trust* and *Ossewarde* the two agreements must be read together where possible. Under *Ossewarde*, a new contract does not supersede a former contract unless it explicitly rescinds the former contract, deals with the subject matter so comprehensively as to be complete in itself or is so inconsistent with the former contract the two cannot be read together. Here, the MOA specifically references the loan: "Mountain West Bank shall extend or renew loan number 08073009870 at maturity under the same terms of the original 2008 loan and extend a $250,000.00 discount on this loan should the borrower be able to refinance this loan should the borrower be able to refinance the loan elsewhere during the next twelve months." The MOA clearly does not rescind the Note, and the MOA is not comprehensive enough to read by itself (as it does not include key components, such as loan amount, interest rate, etc). Thus, the MOA and the original loan are two agreements which must be read together.

The question then becomes what the contract terms became when read together. As stated above under *Miller*, general rules of contract interpretation apply, so if there is no ambiguity, then it a legal question. However, if there is an ambiguity then the intent of the

> parties must be determined through a factual inquiry. This is where the issue lies. It can be argued the extension of the loan "under the same terms of the original 2008 loan" could be ambiguous, as the original Note did not have a set term, just a set maturity date. *This Court concludes there cannot be any question that an extension was agreed to*. However, there is a question as to what the extension entailed. The intent of the parties must be determined through a factual inquiry under *Miller*. That inquiry alone allows this issue to survive summary judgment, as there is a material factual dispute as to the terms of the extension which will determine whether or not MWB breached the contractual terms of that extension.

June 19, 2013, Memorandum Decision and Order Denying Glacier's Motion for Summary Judgment, pp. 15-20 (italics added).

The attached chronological summary of the events at issue may be of assistance in understanding past events in this case.

B. The March 7, 2011, MOA, not the March 25, 2011, Letter is the Operative Agreement.

Despite this Court's earlier holding above, Glacier continues to argue the March 25, 2011, letter from Brittain to plaintiffs is the operative agreement, not the MOA. Glacier Bank's Opposition to Plaintiffs' Motion for Partial Summary Judgment, p 9. Glacier states the MOA was merged out by the BRMC Settlement Agreement and thus has no validity. *Id*., p. 10. As stated above, the purpose of a merger clause is to establish the parties have agreed the contract contains the parties' entire agreement. *Howard*, 141 Idaho 139, 142, 106 P.3d 465, 468. The presence of a merger clause indicates a complete written contract. *Kimbrough*, 130 Idaho 512, 515, 943 P.2d 1232, 1235. However, it becomes necessary to determine, in cases where a person is an agent for multiple separate parties, which parties are represented and therefore bound by any one agreement. In this case the BRMC Settlement Agreement is signed by William Radobenko, who is identified at the beginning of the document as: 1) the manager of Cougar Bay Ridge Water, LLC, and 2) a director of BRMC Development.

August 15, 2013, Smith Declaration, Exhibit 1. R&R is not mentioned anywhere in the BRMC Settlement Agreement document. *Id*. It is logical to conclude William Radobenko signed the BRMC Settlement Agreement as an agent for BRMC, and not as agent of R&R. The fact that William Radobenko is also an agent for R&R does not mean William Radobenko's signature on *any* document (especially one not mentioning R&R at all) binds R&R as well. Such a conclusion would make it impossible for any person to act as agent for more than one entity, as the agent's signature would bind every party the agent represents in any capacity. As such, the merger clause in the BRMC Settlement Agreement has no effect on the R&R Leasing agreement in the MOA. The fact that two years ago, Steve Wetzel, then Radobenkos' attorney, had concerns about the merger clause does not change this Court's legal conclusion that the merger clause in the BRMC Settlement Agreement has no effect on the R&R Leasing agreement in the MOA.

Glacier also argues the March 25, 2011, letter from Brittain is the operative agreement because plaintiffs accepted the terms of that letter by performance, and thus, created a new contract, superseding the MOA. Glacier Bank's Opposition to Plaintiffs' Motion for Partial Summary Judgment, p. 12. As support, Glacier offers e-mails from William Radobenko and Steve Wetzel, prior to Brittain's March 25, 2011, letter, which e-mails indicate plaintiffs' concern for the survivability of the R&R agreement in the MOA. *Id*. Glacier argues the Radobenkos withheld their unconditional signatures from the BRMC Agreement until "Glacier provided a separate written document addressing the R&R loan." *Id*. Glacier claims after Brittain sent his March 25, 2011, letter, in an e-mail dated March 28, 2011, Wetzel indicated the issue was "done" and the Radobenkos' unconditional signatures were released. *Id*. Glacier

argues this was a clear acceptance by performance, ensuring "the terms of Brittain's March 25, 2011 [letter] controlled as to any extension of the R&R loan." *Id*. Glacier's representations and arguments are too broad.

First, while it is true both William Radobenko and Steve Wetzel sent multiple e-mails to Brittain and MWB's counsel regarding the survivability of the R&R agreement of the MOA, none of the e-mails produced indicate a requirement for a "separate" agreement, as is now represented by Glacier. Wetzel's March 18, 2011, e-mail to MWB's counsel simply states the MOA must survive closing. August 16, 2013, Sweney Declaration, Exhibit 1. William Radobenko's e-mail to MWB's counsel on March 21, 2011, indicates William's awareness of the merger clause of the BRMC Settlement Agreement, but rather than asking for a separate agreement before releasing the unconditional signature pages, William simply requests confirmation that the R&R Leasing agreement survives the BRMC Settlement Agreement. August 15, 2013, Smith Declaration, Exhibit 1. Wetzel's March 24, 2011, e-mail to Brittain, and seemingly seconded by William Radobenko's e-mail to Brittain that same day, states once MWB can evidence the survivability of the R&R financing, the Radobenkos would release the unconditional signatures. August 15, 2013, Brittain Declaration, Exhibit 5. Then on March 25, 2011, Brittain sent the letter to plaintiffs with the new conditions for the R&R loan and Smith sent an e-mail to William confirming plaintiffs' receipt of the letter and inquiring whether the final signature pages could be released. August 15, 2013, Smith Declaration, Exhibit 4. On March 28, 2011, Wetzel sent an e-mail stating while there was continued concern over the survivability of the R&R loan agreement, plaintiffs felt the e-mails were sufficient to show all parties agreed the matter was separate and would survive as an independent transaction from the BRMC Settlement Agreement, so the signature pages would be delivered that day. *Id*. This is what Glacier considers to

be the "acceptance by performance" of the conditions of the March 25, 2011, letter. Glacier Bank's Opposition to Plaintiffs' Motion for Partial Summary Judgment, p. 12.

Reading the e-mails in the light most favorable to Glacier, it is impossible to see how the release of the signature pages was an acceptance of the March 25, 2011, letter. In fact, the actual content of the e-mail, rather than Glacier's paraphrased versions, seems to indicate while plaintiffs were certainly concerned with the survivability of the R&R Leasing agreement in the MOA, they were not requiring a "separate" agreement, as claimed by Glacier, but were simply looking for confirmation from MWB that it was understood the R&R Leasing agreement in the MOA would survive the BRMC Settlement Agreement, regardless of the merger clause. As for the "acceptance" part, Glacier's argument hinges on Wetzel's final e-mail on March 28, 2011. Reading that e-mail in the light most favorable to Glacier, this Court simply cannot conclude the signature pages were an "acceptance" to MWB's terms. There is no mention of the March 25, 2011, letter, or its terms, in Wetzel's March 28, 2011, e-mail. In fact, a plain reading of the e-mail suggests the reason for plaintiffs release of the unconditional signature page is not the March 25, 2011, Brittain letter; the content of the e-mail chain between MWB and its counsel and plaintiffs and their counsel show that is what convinced plaintiffs there was indeed a mutual understanding between the parties that the R&R Leasing agreement of the MOA would survive the BRMC Settlement Agreement. Glacier's argument that plaintiffs accepted the terms of the Brittains March 25, 2011, letter via plaintiffs' performance is rejected.

Plaintiffs are entitled to summary judgment on the fact that the March 7, 2011, MOA is the operative agreement, not the March 25, 2011, unilateral letter from Brittain.

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C. The MOA is not Ambiguous as to the Term of the Loan Extension.

Glacier next argues the MOA is incomplete and ambiguous as to the extended maturity date of the R&R loan and therefore a question of fact exists as to when the R&R loan extension expires. Glacier Bank's Opposition to Plaintiffs' Motion for Partial Summary Judgment, pp. 13-18. First, Glacier points to this Court's Memorandum Decision, quoted above, which states:

> However, there is a question as to what the extension entailed. The intent of the parties must be determined through a factual inquiry under *Miller*. That inquiry alone allows this issue to survive summary judgment, as there is a material factual dispute as to the terms of the extension which will determine whether or not MWB breached the contractual terms of that extension.

Id., p. 13, citing Memorandum Decision and Order Denying Glacier's Motion for Summary Judgment, p. 20. Glacier's argument at the present time on plaintiffs' motion for partial summary judgment ignores two things: first, what the Court was deciding on June 19, 2013, when it denied Glacier's motion for summary judgment, and second, the argument ignores that portion of this Court's June 19, 2013, decision which discussed *Miller*:

> In order for a later instrument to rescind an earlier one, there must be a demonstration of mutual intent. *Miller v. Estate of Prater*, 141 Idaho 208, 212, 108 P.3d 355, 359 (2005). General rules of contract interpretation apply; thus, if there is no ambiguity on the issue, it may be decided as a matter of law. *Id*. On the other hand, if an inconsistency between the two instruments creates an ambiguity, then the intent of the parties must be determined through a factual inquiry. *Id*. Amended agreements should be construed together with the original agreements where possible. *Opportunity L.L.C. v. Ossewarde*, 136 Idaho 602, 607, 38 P.3d 1258, 1263 (2002). The making of a new contract does not necessarily supersede a former contract unless it 1) explicitly rescinds it, 2) deals with the subject matter so comprehensively as to be compete in itself, or 3) is so inconsistent with the first contract that the two cannot be read together. *Id*. When a subsequently executed agreement specifically references and relies on a former agreement, the two agreements must be interpreted together, if possible. *Id*.

Memorandum Decision and Order Denying Glacier's Motion for Summary Judgment, pp. 18-19. At that time, Glacier was attempting to obtain summary judgment that: a) Glacier did not breach the terms of the loan documents (Memorandum in Suport of Defendant's Motion for Summary Judgment, pp. 5-12), an argument prefaced on the Change in Terms Agreement (CTA); b) that plaintiffs cannot prove Glacier breached the covenant of good faith and fair dealing and Glacier is entitled to summary judgment on the plaintiffs' breach of contract claims (*Id.,* pp. 12-14); c) plaintiffs are not entitled to specific performance of a non-existent contract (*Id.,* pp. 14-15); d and e) plaintiffs claims of declaratory relief and injunctive relief are remedies and not a cause of action (*Id.,* pp. 14-18); f) Glacier is entitled to judgment against plaintiffs for their breach of the note and guarantees (*Id.,* pp. 18-20); and g) Glacier is entitled to a decree of foreclosure and judgment against plaintiffs. *Id.,* p. 20. The Court denied Glacier's motion on all grounds. Memorandum Decision and Order Denying Glacier's Motion for Summary Judgment, p. 26. When the Court wrote "there is a question as to what the extension entailed" (*Id.,* p. 20), it was in the context of denying Glacier's motion for summary judgment, specifically in the context of finding that the extension in the March 7, 2011, MOA existed ("This Court concludes there cannot be any question that an extension was agreed to." *Id.*), and that the term of that extension had to be analyzed under *Miller*, looking at the 2008 Loan agreement and the March 7, 2011, MOA and its extension of that 2008 agreement, *together*. On June 19, 2013, the Court did not engage in the analysis under *Miller* (viewing both documents *together*), because at that time the issue was not before the Court. That issue *is* now before the Court, via plaintiffs' motion for partial summary judgment. And for Glacier to now argue that when the Court on June 19, 2013, wrote, "there is a question as to what the extension

entailed", that such statement now precludes summary judgment for plaintiffs, is entirely misplaced.

Glacier states the "MOA is incomplete and therefore unenforceable because the parties did not reach an agreement on the maturity date at the time it was executed." Glacier Bank's Opposition to Plaintiffs' Motion for Partial Summary Judgment, p. 13. However, this argument also ignores this Court's express holding that "[t]his Court concludes there cannot be any question that an extension was agreed to." Memorandum Decision and Order Denying Glacier's Motion for Summary Judgment, p. 20. This Court has already concluded an extension was agreed to and did not find the potential ambiguity of the maturity date was lethal to the validity of the MOA when this Court denied Glacier's motion for summary judgment. It is even more clear now, as compared to the evidence before the Court when deciding Glacier's motion for summary judgment, that there were negotiations between William Radobenko and Brittain, prior to the execution of the March 7, 2011, MOA, regarding the extension of the R&R loan and its terms. The MOA states in no uncertain terms MWB *shall* extend the R&R loan "under the same terms of the original 2008 loan." January 15, 2013, Affidavit of William Radobenko in Opposition to Defendant/Counterclaimant Glacier Bank's Motion for Summary Judgment, Exhibit B, p. 2. By itself, this provision is rather meaningless, but when it is read in conjunction with the Promissory Note of the original 2008 loan, as required under *Miller, Columbia Trust* and *Ossewarde*, it becomes clear exactly what are the terms of the loan extension.

While it is true the original 2008 loan does not *expressly* state the *term* of the loan, it is but a simple calculation to determine the term, by figuring out how much time elapsed between the expressly stated date of the note (December 12, 2008) and the expressly stated maturity date (September 10, 2011). So while the term of the loan was

not expressly stated, it takes only seconds to determine the *term* of the original 2008 loan was for thirty-three (33) months. While Glacier's Smyly testified that such was thirty two (32) months due to four months of extensions, she made it clear it was for a three year term and not a rolling one year term for three years. August 1, 2013, Affidavit of John F. Magnuson in Support of Plaintiffs' Motion for Partial Summary Judgment, Exhibit B, Smyly depo., p. 28, L. 16 – p. 29, L. 18. In that context, given the fact that as of December 12, 2008, only three months (not four) had been taken up with extensions, as compared to September 10, 2008, it is obvious Smyly meant three months were used in extensions, as applied to the thirty three month extension of the loan which was memorialized on December 10, 2008.

Glacier next attempts to argue the "same terms" language of the MOA simply was an "agreement to agree", and that Glacier was merely agreeing to hold off on calling the note, but not for any specified period. Glacier Bank's Opposition to Plaintiffs' Motion for Partial Summary Judgment, p. 14. This argument flies in the face of the facts presented to this Court. While, at this juncture, the standard is to view the facts in light most favorable to the non-moving party, Glacier, doing so does not require this Court to wholly ignore the facts before it. It is absurd to think the language "same terms" found in the March 7, 2011, MOA would apply to *all the other* terms and conditions (which are not challenged by Glacier), but somehow not apply to the one of the most important terms of all, the extension period. There is no indication in the MOA this was Glacier's intent to exclude the extension period from the "same terms" language, and for Glacier to argue such was the case is not supported by the evidence before this Court. As such, this Court to holds the extended term of the 2008 loan is thirty-three (33) months beginning December 12, 2008, thus, the term ended September 10, 2011.

Glacier also argues the plain and literal language of the MOA "under the same terms of the original 2008 note" is patently ambiguous because such would lead to a nonsensical result; namely, if the terms of the extension were "exactly the same," the maturity date of the extension would still be September 10, 2011, as that is the exact maturity date set forth in the original 2008 loan. Glacier Bank's Opposition to Plaintiffs' Motion for Partial Summary Judgment, p. 15. Incredibly, Glacier makes this argument immediately after correctly citing the law: "If the ordinary meaning of the plain language leads to 'two different reasonable interpretations *or* the language is nonsensical.'" *Id.* (citations omitted, italics and underlining added). A reading of the cases cited by Glacier show ambiguity is found either when there are "two different reasonable interpretations" OR "the language is nonsensical". Glacier is arguing its new interpretation that the 2008 extension term is the same as the original term which ended September 10, 2008, is a competing "reasonable interpretation" when in fact it is not reasonable, it is absurd. Glacier's interpretation ignores the fact that what was being negotiated was an *extension*. There is nothing nonsensical about the language of the MOA in light of the 2008 agreement, it is only Glacier's argument which is "nonsensical." It makes no sense for MWB to grant an extension of the 2008 loan without ever actually extending the due date.

As support for the argument the MOA is ambiguous, Glacier continuously points to e-mail messages from William Radobenko and plaintiffs' counsel regarding potential maturity dates. This violates the parol evidence rule. The parol evidence rule states, "[w]here preliminary negotiations are consummated by written agreement, the writing supercedes [sic] all previous understandings and the intent of the parties must be ascertained from the writing." *Nysingh v. Warren*, 94 Idaho 384, 385, 488 P.2d 355, 356 (1971); *Nuquist v. Bauscher*, 71 Idaho 89, 94, 227 P.2d 83, 86 (1951). If the

written agreement is complete on its face and unambiguous, with no fraud or mistake being alleged, extrinsic evidence of prior or contemporaneous negotiations or conversations is not admissible to contradict, vary, alter, add to or detract from the terms of the written contract. *Valley Bank v. Christensen*, 119 Idaho 496, 498, 808 P.2d 415, 417 (1990). Because this Court finds the language of the MOA regarding "same terms and conditions" as the 2008 loan, together with language of the 2008 loan itself, are not ambiguous as to the term of the extension, these e-mails may not be used by the Court to determine what the term of the loan extension is. As stated above, it is clear, taking one simple calculation from the expressed terms, to find the term of the original 2008 loan was thirty-three (33) months, and an extension under the "same terms and conditions" would also be for 33 months. Paula Smyly's testimony supports that conclusion. Paula Smyly's testimony does not violate the parol evidence rule as her testimony occurred subsequent to the March 7, 2011, MOA (and is not "prior or contemporaneous" to the MOA), and her testimony is consistent with a plain reading of the two agreements (and is not being used to "contradict, vary, alter, add to or detract" from the language of those two agreements). Again, because this Court finds the MOA, together with the 2008 loan is unambiguous, the parol evidence rule prevents this Court from considering the e-mails leading up to the MOA's execution.

Glacier also argues any ambiguity in the language of the MOA regarding the maturity date must be resolved against plaintiffs, as plaintiffs were the drafters of the MOA. It is true the MOA is drafted on William's letterhead and was sent from William to Brittain on March 7, 2011. January 15, 2013, Affidavit of William Radobenko in Opposition to Defendant/Counterclaimant Glacier Bank's Motion for Summary Judgment, Exhibit B. And it is true any ambiguity in the MOA should be construed in

Glacier's favor. However, as stated above, this Court finds there is not an ambiguity as to the term of the extension, so that rule of construction is not applicable.

Plaintiffs are entitled to summary judgment that the March 7, 2011, MOA, viewed in conjunction with the 2008 loan agreement, is not ambiguous, and the extension of the term of the loan in the March 7, 2011, MOA was until September 10, 2014.

D. There is a Material Dispute of Fact as to Glacier's Counterclaim of an Alleged Breach by Plaintiffs Regarding their Financial Status.

Plaintiffs claim they are entitled to partial summary judgment against MWB on MWB's counterclaims that: the loan matured on October 10, 2011; that plaintiffs are in default because they failed to pay that loan on that maturity date; and that MWB is entitled to foreclose under its Deeds of Trust securing the Note based upon that default. Memorandum in Support of Plaintiffs' Motion for Partial Summary Judgment, pp. 3-4.

The Court finds the loan did not mature on October 10, 2011. Thus, the Court finds that plaintiffs are not in default because they failed to pay because that was not the maturity date. However, there is a dispute of facts as to other potential defaults.

Glacier makes its argument that plaintiffs defaulted prior to the October 10, 2011, Maturity Date by "not disclosing material and adverse changes to their financial conditions." Glacier Bank's Opposition to Plaintiff's Motion for Summary Judgment, p. 18. This is the maturity date that would apply if the Change in Terms Agreement (CTA) were in effect. The Court has already stated why the CTA is not applicable. Memorandum Decision and Order Denying Glacier's Motion for Summary Judgment, p. 20-22. This Court specifically finds Glacier's current argument that: "The September 6, 2011, Change in Terms Agreement superseded all prior agreements between plaintiffs and Glacier in regards to an extension of the R&R Loan" (Glacier Bank's Opposition to

Plaintiff's Motion for Summary Judgment, pp. 21-22), to be without merit in its defense of plaintiffs' motion for partial summary judgment. This is more fully discussed below.

Glacier then argues that even if it is the March 7, 2011, MOA which is applicable, there is a dispute of fact that plaintiffs were in default at that time, and are in default at present, for failing to provide accurate financial information. Glacier Bank's Opposition to Plaintiff's Motion for Summary Judgment, pp. 18-20.

Glacier claims the 2008 loan contained multiple examples of potential default scenarios, including:

> **Other Defaults.** Borrower fails to comply with or to perform any other term, obligation, covenant or condition contained in this Note or in any of the related documents or to comply with or to perform any term, obligation, covenant or condition contained in any other agreement between Lender and Borrower.
> **False Statement.** Any warranty, representation or statement made or furnished to Lender by Borrower or on Borrower's behalf under this Note or the related documents is false or misleading in any material respect, either now or at the time made or furnished or becomes false or misleading at any time thereafter.
> . . .
> **Adverse Change.** A material adverse change occurs in Borrower's financial condition, or Lender believes the prospect of payment or performance of this Note is impaired.
> **Insecurity.** Lender in good faith believes itself insecure.

Id., p. 18; Brittain Affidavit, Exhibit 2; January 15, 2013, Affidavit of William Radobenko in Opposition to Defendant/Counterclaimant Glacier Bank's Motion for Summary Judgment, Exhibit A, p. 1. Glacier also claims the following language in the related Business Loan Agreement with Glacier and R&R signed in connection with the 2008 Note places additional requirements of candor and disclosure on plaintiffs regarding their financial condition:

> …Borrower understands and agrees that: (A) in granting, renewing, or extending any Loan, Lender is relying upon Borrower's representations, warranties, and agreements as set forth in this Agreement; …
>
> * * *

> **REPRESENTATIONS AND WARRANTIES**. Borrower represents and warrants to lender, as of the date of this Agreement, as of the date of each disbursement of loan proceeds, as of the date of any renewal, extension or modification of any Loan, and at all times any Indebtedness exists:
>
> *** * ***
>
> **Financial Information**. Each of Borrower's financial statement6s supplied to Lender truly and completely disclosed Borrower's financial condition as of the date of the statement, and there has been no material adverse change in Borrower's financial condition subsequent to the date of the most recent financial statement supplied to Lender. Borrower has no material contingent obligations except as disclosed in such financial statements.

Id., p. 19; Brittain Affidavit, Exhibit 23.;

Glacier claims plaintiffs failed to disclose to Glacier the Bank of Whitman litigation, described above, and failed to disclose the $9,000,000 judgment entered against plaintiffs in that litigation. Glacier Bank's Opposition to Plaintiff's Motion for Summary Judgment, p. 20. Additionally, Glacier claims once it became aware of the Bank of Whitman litigation and judgment, plaintiffs made false and misleading statements to Glacier regarding settlement of the judgment, specifically that on November 7, 2011, William Radobenko wrote to Brittain representing "[t]here is no outstanding personal judgment for $9,000,000," despite court records indicating the judgment was entered August 12, 2011, against the Radobenkos personally and the court docket shows the judgment has not been satisfied as of this day. *Id*.; Radobenko Affidavit, Exhibit Q. Finally, Glacier argues the mere existence of the $9,000,000 judgment, in addition to other financial issues, led Glacier to "reasonably determine that a material adverse change in Plaintiffs' financial condition had occurred and to deem itself insecure, both of which are incidents of default under the loan documents." *Id.* Glacier acknowledges plaintiffs' argument that Glacier is not "insecure", because the collateral pledged as security for the R&R loan was more than sufficient to cover any default, but Glacier claims plaintiffs argument "ignores the fact that Glacier makes loans

based upon the borrower's promise to pay, not the strength of the collateral pledged as security for the loan." *Id*. Under this logic, collateral and its value is immaterial to the bank making a loan; rather, it is simply based on any person's "promise to pay."

Plaintiffs in their reply argue an allegation of a default, in the performance of obligations after the loan was to be extended on October 10, 2011, is an issue for a counterclaim, not an issue pertaining to this motion for partial summary judgment. Reply Memorandum in Support of Partial Summary Judgment, p. 14. Plaintiffs also state there has been no deception as to the Bank of Whitman litigation and judgment, that financial statements disclosed for two years prior contained the Bank of Whitman liability, and when judgment was entered in that case, it was brought to MWB's attention. *Id*., p. 16.

The Court has previously found plaintiffs' financial position is highly disputed. This Court previously stated in its Memorandum Decision:

> Plaintiffs' financial position is a highly disputed issue, as MWB claimed plaintiffs were insolvent or nearing insolvency and plaintiffs contend this is simply not true. This is a clear dispute of material fact (material because the financial condition of plaintiffs may or may not be considered a breach) . . .

Memorandum Decision and Order Denying Glacier's Motion for Summary Judgment, p. 22. Since that decision there is further evidence that has been submitted regarding the circumstances surrounding certain liabilities by plaintiffs, particularly the Bank of Whitman liability. The question of plaintiffs' alleged breach for financial reasons or disclosure reasons is a material issue of fact that cannot be decided at summary judgment. As this is one of Glacier's counterclaims, summary judgment on this particular counterclaim must be denied.

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E. The CTA Does Not Supersede All Prior Agreements.

Glacier restates its position the CTA agreement supersedes all prior agreements pertaining to the R&R loan. Glacier Bank's Opposition to Plaintiff's Motion for Summary Judgment, p. 21. Glacier writes: "This Court previously determined that this provision did not prevent the MOA from being read consistently with the terms of the CIT agreement. *Mem. Decision,* at 21." *Id.,* p. 22. This Court finds Glacier's present interpretation on this Court's June 19, 2013, decision to be unfounded. The Court previously held:

> Finally, Glacier argues when the CTA was executed on September 6, 2011, it became a fully integrated agreement with the original Note, containing an unconditional promise to pay the principal amount, plus all accrued interest on October 10, 2011. Memo in Support, pp. 7-8. Glacier specifically points to the clause which states:
>
> > Except as expressly changed by this Agreement, the terms of the original obligation or obligations, including all agreements evidenced or securing the obligation{s), remain unchanged and in full force and effect.
>
> *Id*. at 7; Brittain Aff., Ex. C. Glacier argues this clause expressly states the terms of the original Note were unchanged, except as provided by the CTA, which served only to extend the due date to October 10, 2011. *Id*. at 7.
>
> The flaw in Glacier's logic is when the CTA was executed, another contract (the MOA) had already been executed and was in effect as well, making it part of the original obligation. As such, all the above provision in the CTA did was state the Note and the MOA were unchanged, except as provided in the CTA.
>
> The question now becomes whether the provision in the CTA regarding the maturity date trumps MWB's prior obligation to extend the Loan in the MOA. The pertinent provision of the MOA states: "Mountain West Bank shall extend or renew loan number 0807300876 at maturity under the same terms of the original 2008 loan . . ." Radobenko Aff., Ex. B, p. 2. The CTA states: "Borrower will pay this loan in one payment of all outstanding principal plus all accrued interest on October 10, 2011." *Id*. at Ex. I. The original maturity date for the Loan was September 10, 2011. *Id*. at Ex. A, p. 1.
>
> The logical interpretation of the two documents together clearly suggests the Loan maturity date was extended from September 10, 2011, to October 10, 2011, via the CTA. However, the language "extend or renew loan number 0807300876 *at maturity*" is instructive. At the maturity date (whenever that would be), MWB would be required to extend or

> renew the Loan for another three years, pursuant to the same provision. The MOA does not give a specific maturity date (which is partially why the MOA must be read with the original Note), but instead, the MOA states whenever the Loan matures, MWB was required to extend the Loan. The CTA simply extended the maturity date of the original Note to October 10, 2011. When October 10, 2011, arrived, per the MOA, the Loan should have been extended for another three years. This did not happen, and, thus, it certainly appears MWB (Glacier) breached the contract, not plaintiffs. As such, summary judgment for Glacier must be denied.

Memorandum Decision and Order Denying Glacier's Motion for Summary Judgment, pp. 20-21. Glacier now makes a very language specific argument regarding the CTA. Again, the CTA reads in part:

> Except as expressly changed by this Agreement, the terms of the original obligation or obligations, including all agreements evidenced or securing the obligation{s), remain unchanged and in full force and effect.

Id., p. 20. Glacier's argument now is: "This [Court's previous] determination fails to consider that the MOA was not an "original" obligation." Glacier Bank's Opposition to Plaintiff's Motion for Summary Judgment, p. 22. (underlining in original). Even if the MOA was not an "original obligation" (there is no indication how that is defined by Glacier), the MOA modified the 2008 loan agreement which modified the 2005 loan agreement, which would have been an "original obligation" under any definition. As shown above, this Court previously indicated why it is legally bound to construe the MOA and the 2008 agreement together. Nothing about Glacier's new "original obligation" argument is at all persuasive to the Court that it should now adopt Glacier's claim that "…the CIT agreement executed by the Plaintiffs on September 7, 2011 supersedes all prior agreements pertaining to an extension of the R & R loan." *Id.* Glacier then writes: "As the non-moving party, Glacier is entitled to have any disputed facts and inferences to be drawn from those disputed facts construed in its favor when this Court determines the purpose and effect of the CIT agreement." *Id.,* p. 22. Glacier

has not brought a motion to reconsider this Court's June 19, 2013, decision under either I.R.C.P. 11 or 60. And, simply because Glacier is now the non-moving party, is no reason for the Court to change its prior legal ruling as to the effect of the Change in Terms Agreement. The language has not changed in the intervening four months, and it was that same language which was interpreted by this Court's in its June 19, 2013, Memorandum Decision and Order Denying Glacier's Motion for Summary Judgment. Plaintiffs are entitled to summary judgment on Glacier's counterclaim (that the plaintiffs were in default under the terms of the subject loan for failure to pay the same as of the alleged maturity date of October 11, 2011), and the CTA does not supersede all prior agreements.

F. Plaintiffs Have Not Shown They are Entitled to Specific Performance.

Plaintiffs claim they are entitled to partial summary judgment and a decree of specific performance which orders MWB to renew the loan through September 10, 2014, "under the same terms of the original 2008 Loan" according to the MOA. Memorandum in Support of Plaintiffs' Motion for Partial Summary Judgment, pp. 3-4.

Glacier argues plaintiffs have failed to demonstrate they are entitled to the extraordinary remedy of specific performance. Glacier Bank's Opposition to Plaintiff's Motion for Summary Judgment, p. 22. Glacier argues specific performance is an extraordinary remedy to which plaintiffs are not entitled primarily because plaintiffs have made no argument regarding the inadequacy of monetary damages. *Id.* Further, Glacier claims there is no contract for plaintiffs to enforce by specific performance, as the R&R loan is ambiguous.

Specific performance is an extraordinary remedy which can provide relief in the event legal remedies are inadequate. *Fullerton v. Griswold*, 142 Idaho 820, 823, 136 P.3d 291, 294 (2006). The inadequacy of remedies at law is presumed in an action for

a breach of a real estate purchase and sale agreement due to the perceived uniqueness of land. *Id*. Whether specific performance is granted is a discretionary matter with the court and in making such a determination, the court "must balance the equities between the parties to determine whether specific performance is appropriate." *Kessler v. Tortoise Dev., Inc.*, 134 Idaho 264, 270, 1 P.3d 292, 298 (2000).

While Idaho has recognized specific performance is presumed to be appropriate in an action for a breach of a real estate sale agreement, due to the unique nature of land, there is no such recognition for agreements to extend to bank loans in Idaho. Plaintiffs argue the balance of equities is clearly in their favor, as evidenced by the questionable conduct by Glacier pertaining to this loan. However, plaintiffs provide no legal authority for their position (extending unique property considerations to bank loans which collaterally involve unique property), and in any event, this Court cannot see how plaintiffs' relief cannot be satisfied via a monetary judgment. For this reason, plaintiffs' motion for summary judgment on the issue of specific performance must be denied.

VI. CONCLUSION AND ORDER.

For the reasons stated above,

IT IS HEREBY ORDERED plaintiffs' Motion for Leave to Amend complaint to Assert a Claim for Punitive Damages Pursuant to I.C. § 6-1604 is GRANTED.

IT IS FURTHER ORDERED defendant MWB/Glacier Bank's Motion to Amend Answer is GRANTED.

IT IS FURTHER ORDERED plaintiffs' motion for partial summary judgment is GRANTED that the March 7, 2011, MOA is the operative agreement, not the March 25, 2011, unilateral letter from Brittain.

IT IS FURTHER ORDERED plaintiffs' motion for partial summary judgment is GRANTED that the March 7, 2011, MOA language, viewed in conjunction with the 2008

loan agreement, are not ambiguous, and the extension of the term of the loan in the March 7, 2011, MOA was until September 10, 2014.

IT IS FURTHER ORDERED the Court finds plaintiffs' motion for partial summary judgment as to Glacier's counterclaim that the loan matured on October 10, 2011, and that plaintiffs are in default because they failed to pay by that maturity date is GRANTED, because this Court finds no dispute of material fact that October 10, 2011, was not the maturity date.

IT IS FURTHER ORDERED that because there is a dispute of facts as to other potential defaults, plaintiffs' motion for partial summary judgment as to other defaults is DENIED.

IT IS FURTHER ORDERED plaintiffs are entitled to summary judgment on Glacier's counterclaim that the plaintiffs were in default under the terms of the subject loan for failure to pay the same as of the alleged maturity date of October 10, 2011, and on Glacier's counterclaim that the CTA does not supersede all prior agreements; as to these two counterclaims of Glacier, plaintiffs' motion for summary judgment is GRANTED.

IT IS FURTHER ORDERED plaintiffs' motion for summary judgment on the issue of specific performance is DENIED.

Entered this 18th day of October, 2013.

_____
John T. Mitchell, District Judge

Certificate of Service

I certify that on the _____ day of October, 2013, 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 #**
John Magnuson	667-0500	R. WAYNE SWENEY	664-4125

_____
Jeanne Clausen, Deputy Clerk

R&R v. Glacier Bank Timeline

Date	Events	Source
Dec. 12, 2008	MWB/Glacier loans $5,000,000 to R&R and R&R signs promissory note	12-28-12 Brittain Affidavit, Exhibit 2 1-16-13 Radobenko Affidavit, Exhibit A
Nov. 30, 2009	MWB/Glacier alleges BRMC's loan obligations with MWB/Glacier matured without payment	Stated with no supporting citation in Memo in Opposition, pp. 2-3.
Nov. 2010	MWB/Glacier alleges Radobenkos were sued by Sterling Bank for approximately $500,000	Stated with no supporting citation in Memo in Opposition, p. 2 Passing mention is made of Sterling Bank litigation in 8-22-13 Brittain Affidavit, p. 3, ¶ 5, with no supporting exhibits
Dec. 10, 2010	Radobenkos and R&R were sued by Bank of Whitman for over $9,000,000	Certified Documents, Exhibit 1 (Affidavit of Service) states the Summons and Complaint were served on December 12, 2010 (the Complaint itself has not been filed with this Court)
Feb. 8, 2011	MWB/Glacier filed suit against BRMC	Verified via Istars
	William met with Brittain who proposed to pay William $150,000 to settle water system issues of Cougar Bay Ridge Water	1-16-13 Radobenko Affidavit, p. 4, ¶ 16
Feb. 15, 2011	William e-mailed Brittain with a proposal, which included an agreement modifying R&R's loan	8-15-13 Brittain Declaration, Exhibit 2
Feb. 28, 2011	Brittain sent a letter to William setting forth MWB/Glacier's proposed terms regarding the R&R loan	8-15-13 Brittain Declaration Exhibit 3
March 7, 2011	MOA signed by Brittain, William, Chesrown and Haneka	1-16-13 Radobenko Affidavit, Exhibit B
March 18, 2011	Wetzel sent an e-mail to MWB/Glacier's counsel voicing a concern with the MOA and stating "The MOU need[s] to survive closing	8-16-13 Sweney Declaration, Exhibit 1

	how we assure that given other language in the documents"	
March 21, 2011	William wrote to MWB/Glacier's counsel to relaying a previous concern with the MOA, stating the Radobenkos signatures are condition on confirmation the R&R loan agreement of the MOA survived the BRMC Settlement Agreement	8-15-13 Smith Declaration, Exhibit 1
March 24, 2011	Wetzel e-mailed Brittain advising the documents with the conditional signatures were being delivered, and when "you guys can evidence the survivability of . . . the R&R financing, then we can trade for unconditional . . . signatures."	8-15-13 Smith Declaration, Exhibit 2
March 24, 2011	William sent and e-mail to Brittain expressing concern the R&R loan agreement in the MOA would not survive the merger clause of the BRMC Settlement Agreement, and once the Radobenkos received confirmation the R&R loan agreement survived, "Steve can then substitute the clean signature pages"	8-15-13 Smith Declaration, Exhibit 3 8-15-13 Brittain Declaration, Exhibit 6
March 25, 2011	Letter from Brittain to Radobenko agreeing to renew the loan on a rolling one year basis for three years subject to additional terms and conditions	1-16-13 Radobenko Affidavit, Exhibit C 8-15-13 Brittain Declaration, Exhibit 7
	MWB/Glacier's counsel forwarded the 3-25-11 letter to William and counsel and asked whether the matter was resolved, stating "Please let me know if the final signature page for the settlement agreement can now be released"	8-15-13 Smith Declaration, Exhibit 4
March 28, 2011	Wetzel responded and stated while there was a continued concern, Plaintiffs felt the e-mails were sufficient to show all parties agreed the R&R loan matter was separate and would survive the BRMC Settlement Agreement	8-15-13 Smith Declaration, Exhibit 5
June 30, 2011	Olson e-mailed Radobenko requesting additional financial information needed for the R&R loan renewal	1-16-13 Radobenko Affidavit, Exhibit D 8-15-13 Brittain Declaration, Exhibit

		9
Aug. 10, 2011	Olson wrote Radobenko to advise that Olson and Smyly were preparing for the renewal of R&R's line and MWB/Glacier was in the process of ordering new appraisals	1-16-13 Radobenko Affidavit, Exhibit G 8-15-13 Brittain Declaration, Exhibit 10
Aug. 12, 2011	Judgment entered in Bank of Whitman case	Certified Documents, Exhibit 3
Aug. 30, 2011	E-mail from Smyly to MWB/Glacier Loan Committee stating MWB/Glacier agreed to three one-year renewals but there was a "solvency" clause	1-16-13 Magnuson Affidavit, Exhibit C
Sept. 6, 2011	CTA signed by Radobenkos, but not MWB/Glacier, extending due date to Oct. 10, 2011	1-16-13 Radobenko Affidavit, Exhibit I 12-28-12 Brittain Affidavit, Exhibit C
Sept. 10, 2011	Original 2008 loan due date	1-16-13 Radobenko Affidavit, Exhibit A
Sept. 12. 2011	Olson advised William via e-mail MWB/Glacier would need interest and fees of $14,045.20 to process the 30-day extension	1-16-13 Radobenko Affidavit, Exhibit J
Oct. 10, 2011	Due date according to the CTA	1-16-13 Radobenko Affidavit, Exhibit I
Oct. 12, 2011	Olson prepared a "Problem Loan Summary" which on which is handwritten by Smyly "Don't see way not to renew"	1-16-13 Magnuson Affidavit, Exhibit D
Oct. 28, 2011	Plaintiffs received letter from Brittain stating MWB/Glacier's assessment of R&R's financial condition was that R&R was either insolvent or very near and several weaknesses had been identified	1-16-13 Radobenko Affidavit, Exhibit L 8-15-13 Brittain Declaration, Exhibit 13
Nov. 2, 2011	William responded via e-mail to Brittain's 10/28/11 letter with explanations for MWB/Glacier's concerns	1-16-13 Radobenko Affidavit, Exhibit M 8-15-13 Brittain Declaration, Exhibit 15
Nov. 7, 2011	Brittain sent William an e-mail stating he and William cannot agree and an interest only loan	1-16-13 Radobenko Affidavit, Exhibit O

	did not work for MWB/Glacier	8-15-13 Brittain Declaration, Exhibit 16
Nov. 8, 2011	Brittain informed William the R&R loan had been transferred the Special Assets Department	1-16-13 Radobenko Affidavit, Exhibit Q 8-15-13 Brittain Declaration, Exhibit 14
Nov. 9, 2011	William e-mailed Brittain regarding a meeting time and stating "It is also important, we believe to start the meeting with the March 25th 2011 commitment letter. This is in part what we built our 2011-2012 business plan on."	8-15-13 Brittain Declaration, Exhibit 17
Nov. 28, 2011	Brittain sent a letter to William advising him the CTA had a default interest rate and had only extended the R&R loan for 30 days	1-16-13 Radobenko Affidavit, Exhibit S 8-15-13 Brittain Declaration, Exhibit 19
Dec. 7, 2011	William e-mailed Brittain to request another extensions until March 1, 2012	8-15-13 Brittain Declaration, Exhibit 18
Jan. 19, 2012	Radobenko made inquiry of Brittain as to the status and Brittain responded "I am moving forward with the approvals"	1-16-13 Radobenko Affidavit, Exhibit U
March 23, 2012	Brittain sent letter to Radobenko inquiring as to the status of a "million dollar pay-down" on the loan or a "refinance" of the commercial property and MWB/Glacier had decided not to extend the loan without more cooperation and progress toward reducing the loan	1-16-13 Radobenko Affidavit, Exhibit W 8-15-13 Brittain Declaration, Exhibit 20
April 3, 2012	Brittain wrote William advising Brittain could not get the loan renewed	1-16-13 Radobenko Affidavit, Exhibit X
May 4, 2012	MWB/Glacier provided Plaintiffs with a "Demand and Acceleration Notice"	1-16-13 Radobenko Affidavit, Exhibit Y 8-15-13 Brittain Declaration, Exhibit 22
May 25, 2012	Plaintiffs filed suit against MWB/Glacier	Complaint, p. 1
July 9, 2012	Glacier substituted for MWB/Glacier by	Stipulation Regarding Defendant's Motion to Strike Part of Complaint,

	stipulation	Substitute Defendant, and Add Additional Parties, p. 1, ¶ 1
Nov. 13, 2012	MWB/Glacier filed its Answer and Counterclaim	Answer: Counterclaim; Third-Party Complaint, p. 1
Sept. 10, 2014	Current due date for the R&R loan under the MOA, according to Plaintiffs, and as found by the Court.	Memo in Support, p. 3