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

ALPHA HOLDINGS, LLC,

Plaintiff,

vs.

BETTY CHANEY, ET AL,

Defendant.

Case No. **CV 2012 7948**

MEMORANDUM DECISION AND ORDER DENYING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT, AND ON MOTIONS TO STRIKE

I. PROCEDURAL HISTORY AND FACTUAL BACKGROUND.

This matter is before the Court on defendant Chaney's motion for summary judgment and cross motions to strike related to affidavits filed regarding that motion for summary judgment.

A. Factual Background.

On March 28, 2011, Black Bay Village Home Owners Association (Association) recorded a Notice of Homeowner's Association Lien against property owned by Nancy Chaney (Chaney) and other defendants. The property is a condominium unit subject to CC&Rs which were recorded in 2006 (hereinafter, "Declaration"). The Declaration required each condominium owner to pay monthly assessments to the Association.

Defendants Chaney, Joslin, Newman, Stanic, and Vezina are condominium owners who on October 31, 2012, were sued by plaintiff Alpha Holdings, LLC, (Alpha), assignee of the homeowners association, to foreclose on its lien it has on defendants condominiums, for non-payment of assessments. Complaint, p. 9. Black Bay Village Condominiums were advertised as a full

maintenance, gated townhome community with a homeowners association. Affidavit of Melanie Baillie (Baillie Affidavit), Exhibit 2, Exhibit A, H. There are three primary documents that govern Black Bay Village Condominiums. The Articles of Incorporation, filed on August 11, 2006, created Black Bay Village Owners Association, Inc. (Association). *Id.*, Exhibit 1, Exhibit B. In addition to the Articles of Incorporation, the Association is governed by association bylaws. *Id.*, Exhibit 2, Ex. E

The final document that governs Black Bay Village Condominiums is the Declaration. *Id.*, Exhibit 1, Ex. B. This was submitted by the condominium project developer, Defendant Northwest Group, LLC, who is also the Declarant of the CCRs. *Id.* The CCRs were filed with the Kootenai County Recorder on August 16, 2006. *Id.* In addition to the CCRs, and referenced in paragraph A of the CCRs, plats for the units and common area of Black Bay Village were recorded with Kootenai County on August 17, 2006. *Id.* at ¶ A; Exhibit 1, Ex. A. No more recent plats have been submitted to this Court. On the plats filed for Black Bay Village Condominiums, Unit O is labeled as a "club house." *Id.*, Exhibit 1, Ex. A, p. 3. Additionally, according to the legend provided on the recorded plat, Unit O is demarcated as a common area. *Id.* The clubhouse also contains a pool. *Id.*, Exhibit 4, ¶ 6; Exhibit 5, ¶ 6; Exhibit 6, ¶ 6.

Defendants, owners of some of the condominium units, began to have concerns with the operation of Black Bay Village Condominiums. Some unit owners communicated their concerns to the Association. *Id.*, Exhibit 2, Exhibit B; Exhibit 3, Exhibit A. Additionally, at least two individuals requested copies of the Association's financial statements. Attorney Erika Grubbs, representing several condominium owners, requested copies of operation budgets and financial statements for 2007 and 2008 from the Association. *Id.*, Exhibit 3, Exhibit A. Between September 2009 and September 2010, condominium owner Nancy Conley made five written requests for a copy of the Association's financial statements. *Id.*, Exhibit 2, Exhibit J.

Developer Northwest Group defaulted on a financial obligation, and on April 6, 2012, Idaho Trust Bank foreclosed Black Bay Village Condominiums. *Id.*, Exhibit 1, Exhibit G. On that date,

Northwest Group's interest in the development was transferred to the bank. *Id.* Each unit transferred included an individual condominium and an undivided interest in the common area, referring to the areas that had been identified in the CCRs as they were recorded with Kootenai County on August 17, 2006. *Id.* The CCRs refer to the plats that were filed on the same date and are described above. *Id.*, Exhibit 1, Exhibit A. On August 14, 2012, Northwest Group repurchased Units A and B of the Black Bay Village Condominiums, which included each individual unit and an interest in the common areas that were identified in the CCRs recorded on August 17, 2006. *Id.*, Exhibit 1, Exhibit H.

The Declaration required each owner in the condominium complex to pay monthly assessments to the Association. Chaney withheld her assessments in response to a lack of communication from the Board of Directors of the Association (Board). Chaney Affidavit, p. 2, ¶ 8. Instead Chaney deposited the assessments in an account in Kootenai Case Number CV-2011-7723 *Conley v. Black Bay Village Association*. *Id*. Presumably, Chaney deposited the assessments in that case because she was a party to that case, keeping in mind the instant case was not filed until October 31, 2011. After Judge Simpson on April 6, 2012, granted summary judgment to Alpha in *Alpha Holdings v. Conley*, Kootenai Case Number CV-2011-9436, (a case in which Chaney was not a party), Alpha, on May 15, 2012, at 4:39 p.m., through an email by its attorney Peter J. Smith, IV to Chaney's (and others) attorney, Steven Wetzel, extended the deadline for payment by Chaney and others to Alpha, until May 17, 2012. *Id.*, Affidavit of Peter J. Smith IV, filed March 28, 2013, Exhibit A. Also in that email, Alpha dictated that if that deadline were not met, an additional $500 would be added per client of Wetzel's, for attorney fees for preparation of the foreclosure complaint. *Id.* Since that demand was made at the end of that day, the deadline imposed by Alpha's attorney was two business days away. On May 17, 2012, Steven C. Wetzel, as Chaney's attorney (and also as the attorney for Collins, Stanic, Venzona, Joslin and Newman) sent counsel for Alpha, Peter J. Smith, IV, a letter in which Chaney authorized the release of funds deposited with the court in CV 2011 7723, which included a copy of the "Order Granting Disbursal of Funds Deposited With Court", signed by

Judge Lansing Haynes, on behalf of Judge Luster, which ordered release of the funds to Lukins & Annis, PS Trust Account on behalf of Alpha Holdings, LLC. *Id*., and Affidavit of Melanie Baillie, Exhibit 13, Order Granting Disbursal of Funds Deposited With Court, p. 2. However, the check actually dispersing the funds to Lukins & Annis, PS, was available to be picked up only by Lukins & Annis, PS, from the Kootenai County Auditor's office on May 21, 2012. Affidavit of Melanie Baillie, Exhibit 16.

Essentially, this lawsuit was filed because: 1) the funds which were timely ordered released by court on behalf of Chaney ($8,814.37) and others, were not available to Alpha's attorney on the date which Alpha's attorney had demanded only two days earlier, and 2) because of that, Chaney wouldn't then pay the extra $500 demanded by Alpha's attorney. The attorney fees and costs involved by both sides in preparation of one hundred pages of briefing and over a thousand pages of affidavits and attachments, must be astonishing and must pale in light of the amounts in controversy.

B. Procedural Background.

This matter is before the Court on defendant Betty Chaney's (Chaney) motion for partial summary judgment. On October 31, 2012, Alpha filed its "Complaint" in which it requests this Court 1) declare Alpha to have a valid and subsisting lien on the Chaney Property and 2) enter a decree of foreclosure that the Chaney Property and the interest therein be sold in accordance with Idaho law, the proceeds of the sale be returned to the court, and Alpha be paid the amounts due under the claim of lien, plus interest. On December 6, 2012, Chaney and the other defendants filed their "Answer and Counterclaim".

On March 13, 2013 Chaney (and only Chaney, it is unknown what became of the other defendants) filed her "Motion for Partial Summary Judgment", "Memorandum in Support Defendant's Motion for Partial Summary Judgment", "Defendants' Statement of Uncontested Material Facts", "Affidavit of Deborah Hylton in Support of Defendants' Motion for Partial Summary Judgment", "Affidavit of Betty Chaney in Support of Defendants' Motion for Partial

Summary Judgment" and "Affidavit of Melanie Baillie in Support of Defendants' Motion for Partial Summary Judgment." On March 15, 2013 Chaney filed her "Certificate of Law Not Contained in Idaho Reports" and "Errata to Memorandum in Support of Defendants' Motion for Partial Summary Judgment". The errata simply corrects a citation mistake in the memorandum. Errata, p. 2.

On March 28, 2013 Alpha filed its "Alpha Holdings, LLC's Objection to Defendant Chaney's Motion for Partial Summary Judgment", "Affidavit of Peter J. Smith IV", "Affidavit of Mike Rai" and "Plaintiff's Submission of Foreign Authority in Support of Objection to Defendants' Motion for Summary Judgment" as well as a "Plaintiff's Motion to Strike".

On April 2, 2013 Chaney filed her "Motion to Shorten Time" and "Errata to Affidavit of Melanie Baillie in Support of Defendants' Motion for Partial Summary Judgment". On April 3, 2013 Chaney filed her "Defendant's Memorandum in Opposition to Plaintiff's Motion to Strike" and "Motion to Strike Portions of Affidavits of Mike Rai and Peter Smith", as well as "Reply in Support of Defendant's Motion for Partial Summary Judgment" and "Reply Affidavit of Deborah Hylton in Support of Defendant's Motion for Partial Summary Judgment".

On April 3, 2013 Alpha filed its "Plaintiff's Opposition to Defendants' Motion to Strike Affidavits Filed in Support of Plaintiff's Motion for Partial Summary Judgment" and "Affidavit of Peter J. Smith IV in Support of Opposition to Defendants' Motion to Strike". On April 5, 2013 Alpha filed its "Plaintiff's Supplemental Opposition to Defendants' Motion to Strike Affidavits Filed in Support of Plaintiff's Motion for Partial Summary Judgment" and "Certificate of Law Not Contained in Idaho Reports".

Chaney seeks a partial summary judgment for the following issues:

1. Whether Chaney owes any more money to the Association or Alpha
2. Whether Alpha has the right to pursue a collection action against Chaney or foreclose on her condominium
3. Whether the actions of Alpha against Chaney are unlawful under the Fair Debt Collection Practices Act, 15 U.S.C.A. 1692.

Memorandum in Support, pp. 6-7. Oral argument was held on April 10, 2013.

C. Procedural Background of Related Cases.

There are two related Kootenai County civil cases which have had decisions made by two other First District Court District Judges, which must be noted.

The first case in which there was a decision made by a District Judge was *Alpha Holdings, LLC v. David Michael Conley and Nancy Ann Conley as Co-Trustees of the David and Nancy Conley Living Trust (Conley),* Kootenai County Case No. CV 2011 9436. In that case, on April 6, 2012, District Judge Benjamin R. Simpson filed a "Memorandum Decision and Order Granting in part and Denying in Part Plaintiff's Motion to Strike, Granting Plaintiff's Motion for Summary Judgment, Denying Defendants' Motion to Continue and Denying Defendants' Motion to Consolidate". This case is the most similar to the present case, as in this case, Black Bay Village Homeowners Association recorded a Notice of Lien against the defendants property owners (the Conleys and their trust). April 6, 2012, CV 2011 9436, Memorandum Decision, pp. 1-2. Black Bay Village Homeowner's Association assigned to PITA Group, LLC on July 7, 2011, and PITA Group, LLC assigned to Alpha Holdings on November 22, 2011. *Id.*, p. 2. Judge Simpson found it was undisputed that the Conleys failed to pay the assessments levied by Black Bay Village Homeowner's Association. *Id.* Alpha Holdings sought to foreclose the $8,897.94 lien against Conleys' property. *Id.* Judge Simpson found Alpha Holdings had the right to sue Conleys for the foreclosure of the lien and/or collection of the assessments. *Id.*, pp. 7-18. This portion of Judge Simpson's decision will be discussed in detail below.

The second case in which there was a decision made by a District Judge was *Nancy Conley and David Conley, Betty Chaney, Bill Joslin, Lynda Nutt, Ray Vezina Jim Collins, and Zoran Stanic, v. Black Bay Village Owner's Association, Inc., Mike Rai, Nick Rail Tammy Morris and Northwest Group, LLC.* Kootenai County Case No. CV 2011 7723. In that case, on January 17, 2013, District Judge John P. Luster filed a "Memorandum Opinion and Order Re: Plaintiffs' Motion for Partial Summary Judgment." In that case, seven condominium owners, including Betty Chaney in the

present case, sued their homeowners association, the association's board of directors and the original developer. January 17, 2013, CV 2011 7723, Memorandum Decision, p. 2. The developer, defendant Northwest Group, LLC, was also the declarant of the CCRs. *Id.* Defendant Northwest Group defaulted on its financial obligation to Idaho Trust Bank, and on April 6, 2012, Idaho Trust Bank foreclosed on Black Bay Village Condominiums. *Id.,* p. 3. Idaho Trust Bank then owned all of the developer, Northwest Group, LLC's interest in the project. The group of homeowners sought summary judgment that Unit O (which contained a clubhouse and pool) was a common area with each separate condominium owner owning a 2.5 percent interest in such. *Id.,* p. 4. Defendant developer Northwest Group argued that Paragraph B of the CCRs did not require the developer to designate the common area until the thirtieth unit had sold, and due to the fact that only sixteen condominium units had been sold, Northwest Group argued its obligation to designate a community center or clubhouse had not been triggered. *Id.,* pp. 6-7. Judge Luster disagreed and granted summary judgment in favor of the homeowners, finding that once Idaho Trust Bank foreclosed on April 6, 2012, on the twenty-four unsold and unconstructed units, there were as of that date no more unsold units and thus, the foreclosure triggered the duty to designate the community center and clubhouse. *Id.,* p. 7. Judge Luster also found that the foreclosure by Idaho Trust Bank on April 6, 2012, converted all Class B memberships (those memberships or units owned by the declarant developer Northwest Group, and which held three votes per unit) to Class A memberships (those memberships or units owned by those who actually purchased their condominium units, and which only held one vote per unit). *Id.,* pp. 8-9. Again, Judge Luster held the foreclosure resulted in a sale to Idaho Trust Bank, and declarant, developer Northwest Group ceased to own anything. *Id.,* p. 9.

II. STANDARD OF REVIEW.

In considering a motion for summary judgment, the Court may properly grant a motion summary judgment only where there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. I.R.C.P. 56(c). In determining whether any issue of material

fact exists, this court construes all facts and inferences contained in the pleadings, depositions, and admissions, together with the affidavits, if any, in a light most favorable to the non-moving party. *Partout v. Harper*, 145 Idaho 683, 685, 183 P.3d 771, 773 (2008). The Court draws all inferences and conclusions in the non-moving party's favor and if reasonable people could reach different conclusions or draw conflicting inferences, then the motion for summary judgment must be denied. *Zimmerman v. Volkswagen of America, Inc.*, 128 Idaho 851, 854, 920 P.2d 67, 70 (1996).

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

Chaney's and Alpha's Motions to Strike must be addressed first. The Idaho Supreme Court has made it clear that before a motion for summary judgment can be decided, the Court must address the admissibility of expert testimony. *Suhadolnik v. Pressman*, 141 Idaho 110, 114, 254 P.3d 11, 15 (2011). The applicable standard of review is an abuse of discretion standard. *McDaniel v. Inland Northwest Renal Care Group-Idaho, LLC*, 144 Idaho 219, 221-22, 159 P.3d 856, 858-59 (2007). The "liberal construction and reasonable inferences standard" does not apply in such a case. *Suhadolnik*,

141 Idaho 110, 114, 254 P.3d 11, 15. Alpha seeks to strike portions of the affidavits of Chaney and Melanie Baillie (Baillie). Plaintiff's Motion to Strike, p. 2. Chaney seeks to strike portions of the affidavits of Mike Rai (Rai) and Peter Smith (Smith). Defendants' Motion to Strike, p. 2. The Court will start with Alpha's Motion to Strike.

A. Rulings on Alpha's Motion to Strike.

With regards to Chaney's affidavit, Alpha seeks to strike particular paragraphs based on lack of foundation and hearsay. Plaintiff's Motion to Strike, p. 3. Specifically, Alpha objects to paragraph 5 of Chaney's affidavit, regarding her being told the condominium project would include a pool/clubhouse, lawn care and snow removal, on the grounds of hearsay. *Id.* Idaho Rule of Evidence 801 deals with hearsay definitions and specifically identifies statements which are not hearsay in I.R.E. 801(d). I.R.E. 801. Idaho Rule of Evidence 801(d)(2) regarding admissions by party-opponents specifically:

> The statement is offered against a party and is (A) the party's own statement, in either an individual or a representative capacity, or (B) a statement of which the party has manifested an adoption or belief in its truth, or (C) a statement by a person authorized by a party to make a statement concerning the subject, or (D) a statement by a party's agent or servant concerning a matter within the scope of the agency or employment of the servant or agent, made during the existence of the relationship . . .

I.R.E. 801(d)(2). Chaney argues statements about what the condominium project entailed are not hearsay under I.R.E. 801(d)(2)(A), admission of a party-opponent. Defendants' Memorandum in Opposition to Plaintiff's Motion to Strike, p. 2. It is a well-recognized rule that "admissions by a predecessor in interest are admissible in an action against a successor in interest when there is a privity between the two." *Jolley v. Clay,* 103 Idaho 171, 176, 646 P.2d 413, 418 (1982). *Jolley* involved a decedent's estate in which the trial court admitted the statement of the decedent, finding there was privity between the decedent and the personal representative of the decedent's estate. *Id.* In stating the rule, the Court in *Jolley* cited *Matusik v. Large,* 85 Nev. 202, 452 P.2d 457 (1969). *Id. Matusik* involved a creditor who sued the debtor and attached an oil rig, which

the court released back to the debtor and which the debtor sold to a third party. 85 Nev. 202, 204, 452 P.2d 457, 458. The creditor then sued the third-party purchaser of the rig. *Id*. The court admitted the transcript of the debtor's testimony given during his judgment debtor examination, offered by the creditor, holding "whenever a party claims under, or in, the interest or right of another, the declarations of such other person pertaining to the subject of the claim are admissible against him". *Matsuk v. Large*, 85 Nev. 202, 206, 452 P.2d 457, 459.

In this case, there seems to be no dispute the Association assigned its interest in the collection of these dues to PITA and PITA assigned that same interest to Alpha. Presumably, these statements to Chaney were made by agents of the Association, who was the predecessor in interest of the collection of these dues. Under the general rule set forth in *Jolley*, such statements are admissions by a party-opponent as against Alpha and those statements are admitted. The motion to strike is denied as to this point. (Due to the extremely high number of specific motions to strike by both sides, for brevity in this opinion, from this point on if a statement/exhibit is admitted/allowed/considered, then the motion to strike is denied; conversely, if the statement/exhibit is not admitted/not allowed/not considered, then the motion to strike is granted.)

Alpha also objects on foundation grounds to paragraph 6 of Chaney's affidavit where it identifies the Secretary of the Association. Plaintiff's Motion to Strike, p. 3. Chaney argues her affidavit establishes she has been an owner since 2007 and so can be reasonably expected to know who the secretary was. Defendants' Memorandum in Opposition to Plaintiff's Motion to Strike, p. 3. Alpha cites to I.R.E. 602 relating to lack of personal knowledge and I.R.E. 703 relating to expert testimony. Plaintiff's Motion to Strike, p. 3. Idaho Rule of Evidence 602 states:

> A witness may not testify to a matter unless evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter. Evidence to prove personal knowledge may, but need not, consist of the testimony of the witness. This rule is subject to the provisions of Rule 702, relating to opinion testimony by expert witnesses.

It appears reasonable to expect a condominium owner, who has resided at Black Bay Village since May 2007 (almost six years) would know who the secretary of the Association would be, particularly when Chaney's affidavit also states she contacted Nancy Nelson (Nelson) to give her a list of items to be fixed at Black Bay Village (BBV). Certainly expert testimony is not necessary, as any lay person with personal knowledge could testify as to who the secretary of the Association was. Because Chaney has established her almost six-year residence at BBV, as a member of the Association, she has set forth the foundation for her personal knowledge required under I.R.E. 602 and so Paragraph 6 of her affidavit is admitted.

Next, Alpha objects to the portions of Paragraph 7 of Chaney's affidavit regarding the weeds growing "so tall they were a fire hazard" and that the Board raised the assessments without "any warning or justification for doing so." Plaintiff's Motion to Strike, p. 3. Chaney argues the statement about the weeds is supported by the Baillie Affidavit, Exhibit 2 (Conley Affidavit). Defendants' Memorandum in Opposition to Plaintiff's Motion to Strike, p. 3. Specifically, Chaney points to Exhibit I of Conley's Affidavit, p. 13, which is purportedly a picture of field weeds. *Id.* Alpha claims Chaney has failed to establish the foundational knowledge of when the height of weeds becomes a fire hazard and that such a statement is conclusory. Plaintiff's Motion to Strike, p. 3. Chaney argues her testimony, accompanied by the picture from Conley's affidavit fall under I.R.E. 701 and should not be excluded. Idaho Rule of Evidence 701 states:

> If the witness is not testifying as an expert, the testimony of the witness in the form of opinions or inferences is limited to those opinions or inferences which are (a) rationally based on the perception of the witness and (b) helpful to a clear understanding of the testimony of the witness or the determination of a fact in issue, and (c) not based on scientific, technical or other specialized knowledge within the scope of Rule 702.

I.R.E. 701.

In this instance, while Chaney does not set forth facts in her affidavit qualifying her as an expert in fire hazard, her personal opinion regarding how tall the weeds were and how they presented a fire hazard appears to be commonplace. A person's observation of how tall weeds are is not

scientific or technical and Chaney's perception that they created a fire hazard is rationally-based (based on the photograph) and assists in understanding Chaney's purported reasoning for withholding Association dues. This is proper lay-witness testimony and is admitted.

With regard to Chaney's statement related to the Board raising assessments, it appears from Alpha's motion to strike they only object to the statement that the Board raised assessments "without justification", based on foundational grounds. Plaintiff's Motion to Strike, p. 3. Chaney argues Paragraph 8 of her affidavit explains the lack of communication between the residents and the Board, which demonstrates the "without justification" testimony is a "statement of fact, not a conclusion." Defendants' Memorandum in Opposition to Plaintiff's Motion to Strike, p. 3. However, the lack of communication set forth in Paragraph 8 does not necessarily automatically lead to the fact that the assessments were raised without justification. The wording "without justification" is conclusory and is stricken, however the remaining portion of Paragraph 7 stating the assessments were raised without warning is admitted.

Alpha also objects to portions of Paragraph 10 of Chaney's affidavit, particularly subsection (c) regarding snow removal as part of the CC&R's, on grounds of hearsay and lack of foundation, and subsection (d) regarding the complex not being "maintained as promised" and the project not being "appropriately cared for", on foundational grounds. Motion to Strike, pp. 3-4. With regard to the statements relating to the maintenance of the complex, Chaney argues the promise to maintain the complex was an admission of a party-opponent and the failure to maintain is confirmed by the Conley Affidavit (contained in the Baillie affidavit). Defendants' Memorandum in Opposition to Plaintiff's Motion to Strike, p. 4. Alpha argues the "implied promise" made is hearsay and Chaney failed to state who made the promise.

The Conley affidavit has attached as Exhibit A a "welcome letter" from the Association. As stated above, statements made by the Association, or its agents, are statements of a party-opponent and not hearsay. As for the foundational grounds, the welcome letter sets forth the included

"maintenance" and is signed by Valerie Brady Rongey and Kim Transue, agents of the Association. It is noteworthy that Chaney could have avoided this and many other objections by setting forth her statements in greater detail.

With regard to the statement that the project was not being "appropriately cared for", Alpha claims Chaney fails to state how she reached the conclusion that the project was not being appropriately cared for and this statement is an opinion without foundation. Plaintiff's Motion to Strike, p. 4. Chaney argues the foundation is set forth in the Conley Affidavit, attached to the Baillie affidavit. Defendants' Memorandum in Opposition to Plaintiff's Motion to Strike, p. 4. However, and it should be noted above for the other Paragraph 10 objections, it is not necessary to address whether or not the statements by Chaney are hearsay or without foundation because the objected to statements are not the testimony, but details as to what Chaney asked the Board to address. Chaney Affidavit, p. 3. This Court does not have to address the question of hearsay because the relevant fact is that *Chaney asked the Board to address these issues,* not the truth or accuracy of the issues themselves.

Alpha also objects to a number of exhibits attached to the Baillie Affidavit. Plaintiff's Motion to Strike, p. 4. Specifically, Alpha objects to Exhibit 1 (Affidavit of Steven C. Wetzel in Opposition to Motion for Leave to Amend Answer, Paragraph 6 and Exhibit "D"), Exhibit 2 (Affidavit of Nancy Conley in Opposition to Motion for Leave to Amend Answer), Exhibit 3 (Affidavit of Erika B. Grubbs, Exhibit "A"), Exhibit 3 (Affidavit of Erika B. Grubbs, Exhibit "B"), Exhibit 4 (Affidavit of Bill Joslin in Opposition to Motion for Leave to Amend Answer), Exhibit 5 (Affidavit of Lynda Nutt in Opposition to Motion for Leave to Amend Answer), Exhibit 6 (Affidavit of Ray Vezina in Opposition to Motion for Leave to Amend Answer) and Exhibit 7 (Affidavit of Zoran Stanic in Opposition to Motion for Leave to Amend Answer). *Id.*

Alpha argues the stated portion of Exhibit 1 should be excluded because Exhibit "D" was not included. In response, Chaney filed an Errata to the Baillie affidavit which included a copy of Exhibit "D". Errata to Baillie Affidavit, p. 2. The Errata cures the defect, so Exhibit "D" is admitted.

Alpha objects to the entirety of Exhibit 2 (Conley Affidavit) as irrelevant and containing inadmissible hearsay. Plaintiff's Motion to Strike, p. 4. Chaney argues the hearsay objection is improperly made as Alpha failed to articulate what specific portions of the Conley affidavit are hearsay and it is not irrelevant because it "explains why assessments are not owed from owner's view and confirms the failures of the Board which claims assessments are owed". Defendants' Memorandum in Opposition to Plaintiff's Motion to Strike, p. 5. Alpha's hearsay objection is improper because Alpha failed to articulate the particular statements it considered to be hearsay. It is Alpha's responsibility to articulate for this Court what it considers to be hearsay in the Conley Affidavit, it is not the Court's job to search a document trying to speculate what Alpha claims is hearsay. Regarding the relevance objection, that affidavit was based on litigation arising from the same event, between the same parties, thus, it is relevant.

Alpha also objects to Exhibit 3 (Exhibit A of Grubbs Affidavit), letter from Grubbs to Kim Transue of the Association, on the grounds of hearsay. Plaintiff's Motion to Strike, p. 4. Chaney argues the letter is offered not for the truth of the matter asserted (the issues between the Association and the residents) but rather to demonstrate the timing of notice to the Association of the asserted problems. Defendants' Memorandum in Opposition to Plaintiff's Motion to Strike, p. 5. Under that limited purpose only, the letter is admitted.

Alpha objects to Exhibit 3 (Exhibit B of Grubbs Affidavit), letter from Mike Rai to Grubbs acknowledging receipt of December 10, 2008, letter, as hearsay. Plaintiff's Motion to Strike, p. 4. Chaney argues the letter is a statement by a party-opponent. Defendants' Memorandum in Opposition to Plaintiff's Motion to Strike, p. 5. As stated above, statements by agents of the

Association, such as Mike Rai, are admissions of party-opponents, so Exhibit B of the Grubbs Affidavit is admitted.

Alpha also objects to Exhibit 4 (Joslin Affidavit), Exhibit 5 (Nutt Affidavit), Exhibit 6 (Vezina Affidavit) and Exhibit 7 (Stanic Affidavit) in their entirety on the grounds that they contain inadmissible hearsay and are irrelevant. Plaintiff's Motion to Strike, p. 4. Chaney argues the affidavits are relevant as they show the decline in value, failure of the Board to communicate why assessments were not owed, the reason for withholding assessments and the good faith basis for his actions, all of which are alleged explanations of the breach of declaration and why Chaney was released from her obligation to pay the assessments. Defendants' Memorandum in Opposition to Plaintiff's Motion to Strike, pp. 5-6. Chaney does not address the hearsay objection but as Alpha has failed to allege which statements are hearsay, the objection is improper. As stated above with the Conley Affidavit, the statements of the Joslin, Nutt, Vezina and Stanic affidavits are relevant to Chaney's argument that she was excused from paying the assessment by the Association breaching the Declaration, and are admitted.

B. Rulings on Chaney's Motion to Strike.

Now this Court addresses Chaney's Motion to Strike portions of the Rai Affidavit and Smith Affidavit. Chaney first objects to the entirety of the Rai Affidavit, except Paragraphs 1, 2 and 13 on foundational grounds. Defendants' Motion to Strike, p. 2. Chaney argues Rai's statements in Paragraphs 2, 3, 5, 6, 7, 8, 9, and 10 that he is familiar with the issues covered in the affidavit is not the same as personal knowledge, specifically knowledge Rai gained from his attorney. Defendants' Motion to Strike, pp. 3-5. Chaney also argues the statements by Rai in Paragraphs 11 and 12 are conclusory statements lacking adequate foundation. Defendants' Motion to Strike, p. 6. In addition, Chaney claims the Rai Affidavit should be excluded based on untimeliness, as it was not served until March 28, 2013, one day late. Defendants' Motion to Strike, p. 7. Chaney acknowledges her attorneys would typically not be concerned with one day's tardiness, but argues if Alpha is going to

hold Chaney to strict deadlines, then Alpha should be held to similarly strict deadlines. *Id*. Alpha claims its service of the Smith Affidavit and the Objection to Defendants' Motion to Strike was timely served on March 27, 2013 and the only reason the Rai Affidavit was served one day later was Rai was traveling and was not available to sign the affidavit. Plaintiff's Opposition to Defendants' Motion to Strike, pp. 2-3. Alpha argues this is sufficiently good reason to allow the Rai Affidavit as well as the lack of harm to Chaney. Plaintiff's Opposition to Defendants' Motion to Strike, p. 4. With regard to Chaney's objections to Paragraphs 2-11, Alpha generally argues Rai has personal knowledge of the facts at issue in the dispute involving Alpha, as he is Alpha's manager. Plaintiff's Supplemental Opposition to Defendants' Motion to Strike, p. 3. Alpha also generally argues a rule prohibiting a finding of personal knowledge based on information initially learned from the attorney would "detrimental to the broad discovery practices of our judicial system." *Id*. Regarding Chaney's objections to Paragraphs 11 and 12, Alpha argues the statements are not conclusory, but simply factual statements, made by someone with personal knowledge. *Id*.

As to the timeliness issue, Chaney has failed to show how one day's tardiness in the filing of an affidavit is prejudicial. In fact, Chaney herself stated in her motion to strike that her attorneys would not normally be concerned with such a small delay. Chaney wishes to take a hard line with Alpha's filing deadlines for the affidavit in retaliation for Alpha's hard line regarding the payment deadline of May 17, 2012. Such a position might hold some sway on the playground at recess, but Chaney has shown absolutely no prejudice, and admits such. Chaney's timeliness objection is denied as it is wholly without merit.

Regarding Paragraph 2 of the Rai Affidavit, Chaney states Rai could not have personal knowledge of the attorney fees and costs incurred in the Chaney matter because he did not do the legal work or keep track of the firm's billed time. Defendants' Motion to Strike, p. 3. This is a stretch to say the least, as it is reasonable (and even expected) that a client would have knowledge of the fees and costs associated with a lawsuit because they are getting billed for those amounts. Rai

does not have to personally do the legal work in order to know how much he is getting billed for it. Paragraph 2 is admitted.

Chaney argues that Paragraph 3 is inadmissible because Rai could not know Chaney and five other residents requested the lien amounts because this was a discussion between attorneys, not between himself and the residents. Defendants' Motion to Strike, p. 3. However, as manager of Alpha, it is reasonable to expect Rai would know Chaney and the others requested this information as Rai's attorney would have consulted with Rai on those amounts. Paragraph 3 is admitted.

Regarding Paragraph 5, Chaney argues Rai had no personal knowledge of when the sum necessary for release of the lien was provided, but was informed of this by his attorney, as the amounts were attorney fees. Defendants' Motion to Strike, pp. 3-4. As stated above, it is reasonable to conclude Rai, as manager of Alpha, would have personal knowledge of what was owed, even if they were attorney fees because Alpha is getting billed for those fees. Paragraph 5 is admitted.

Chaney claims Paragraph 6 should be excluded because Rai could not have personal knowledge of Chaney depositing the lien amounts with the Court, that such resulted in a delay resulting in additional interest and attorney fees. Defendants' Motion to Strike, p. 4. However, this is unpersuasive, as the manager of Alpha would certainly be aware the monies were not paid directly to Alpha and in investigating the situation would find the funds were instead deposited with the Court. Again, as stated above, the amount of attorney fees and costs incurred would be reasonably known by Rai, as manager of Alpha. Paragraph 6 is admitted.

With regard to Paragraph 7, Chaney again questions Rai's personal knowledge of the deposit to the Court and the attorney fees involved. Defendants' Motion to Strike, pp. 4-5. For the reasons stated above, Paragraph 7 is admitted.

Chaney argues Paragraph 8 should be excluded as Rai was not working in his attorney's office and so could not have personal knowledge of when payment was received. Defendants' Motion to Strike, p. 5. Again, as Alpha's manager, it is reasonable to conclude he knew when Chaney paid

because Alpha did not receive the monies until five days after the set deadline. For this reason, Paragraph 8 is admitted.

Chaney claims Paragraph 9 should be stricken as Rai has no personal knowledge of the amounts owed, so cannot conclude the amount due under the lien was not satisfied. Defendants' Motion to Strike, p. 5. For the reasons already stated above, Paragraph 9 is admitted.

Regarding Paragraph 10, Chaney argues Rai had no personal knowledge that costs and fees incurred by Alpha had not been paid by the date of the Complaint filing. Defendants' Motion to Strike, p. 5. This is an unreasonable claim as it can reasonably be assumed that if the sums were paid, the Complaint would not have been filed. For this reason and the reasons already stated above, Paragraph 10 is admitted.

Chaney argues Paragraph 11 should be stricken as Rai does not have personal knowledge of Alpha not engaging in the business of collecting debts. Defendants' Motion to Strike, p. 6. Again, this is an unreasonable claim as Rai is the manager of Alpha and certainly would have personal knowledge of what businesses Alpha is engaged in. Chaney seems to forget that while Rai may make a statement based on personal knowledge, it does not necessarily follow that this Court will believe it. Based on Rai's position as Alpha's manager, Paragraph 11 is admitted.

Chaney also claims Paragraph 12 should be stricken as Rai cannot conclude "corporate" is not limited to agents of a corporation. Defendants' Motion to Strike, p. 6. However, Rai is only testifying as to what his subjective intention was. Again, his making the statement does not necessarily mean this Court believes such statement of Rai's subjective intention. This Court can and will make its own determinations as to the weight it gives to each affidavit, and the statements therein). For this reason, Paragraph 12 is admitted.

With regard to the Smith Affidavit (filed March 28, 2013), Chaney objects to Paragraphs 3 and 4 on the grounds of hearsay regarding the accuracy of the amount of the sums owed, all but the first sentence of Paragraph 5 as conclusory statements without adequate foundation, Paragraphs 6-9

as conclusory statements without adequate foundation, Paragraph 10 as irrelevant, Paragraph 11 on grounds of hearsay and lack of foundation, Paragraph 12 as conclusory and on hearsay grounds, Paragraph 13 as conclusory without adequate foundation, Paragraph 14 on the grounds that the Declaration speaks for itself, and Paragraph 15 as conclusory without adequate foundation. Defendants' Motion to Strike, pp. 7-9. In response, Alpha simply states the Smith statements are statements of fact and not conclusory. Plaintiff's Supplemental Opposition to Defendants' Motion for Summary Judgment, pp. 3-4.

Regarding Paragraphs 3 and 4 of the Smith Affidavit, Chaney argues the May 15, 2012, letter from Smith to Alpha is hearsay, however it appears from the objection Alpha is not disputing the letter can be used to show how much Alpha claimed was owing, but disputes it being used to show the amount was accurate. Defendants' Motion to Strike, p. 8. Based on this limited objection, Paragraphs 3 and 4 are not hearsay, as they are not submitted for the truth of the matter asserted (sums are accurate and owing).

Chaney objects to all but the first sentence of Paragraph 5, arguing the statements regarding additional fees incurred are conclusory. Defendants' Motion to Strike, p. 8. As the attorney on the case, Smith would certainly have personal knowledge of what attorney fees and costs were incurred in this lawsuit. For these reasons, Paragraph 5 is admitted. Smith's statement that "Some of the additional fees were incurred in preparation of a Complaint against Chaney; however, fees were also incurred dealing with Chaney's attorney." is so ambiguous, it is of little use. However, being of little use does not affect its admissibility.

Chaney argues Paragraphs 6-9 regarding communications between Smith and Wetzel are without foundation and conclusory. Defendants' Motion to Strike, p. 8. However, in reviewing those particular paragraphs, they appear to be nothing more than mere statements of facts, perceived by Smith as Alpha's attorney. As such, Paragraphs 6-9 are admitted.

Regarding Paragraph 10, Chaney argues the statement of the intent of the letter describes Smith's state of mind, which is irrelevant and should be stricken. Defendants' Motion to Strike, p. 8. Upon reading the statement, it appears this is relevant because it goes to the reasoning of Alpha in bringing this lawsuit. Paragraph 10 is admitted.

Chaney objects to Paragraph 11 as hearsay regarding the additional attorney fees. Defendants' Motion to Strike, p. 8. However this likely is not hearsay as it is arguably not offered to prove the truth of the matter asserted, but rather offered to show the effect on the listener, to show Smith pursued a course of action based on this communication from his client. Paragraph 11 is admitted.

Chaney next objects to Paragraph 12 as hearsay and conclusory, stating the billings have not been produced. Defendants' Motion to Strike, p. 8. It appears from the objection Chaney's position is "the billing should be produced so that the Court and Mrs. Chaney can actually review what these documents say." *Id*. Chaney should be reminded however, that a Motion to Strike is not a substitute for a discovery request. Smith is the attorney on the case and as such, reasonably has personal knowledge of the fees incurred. The fact that Smith has not attached the billing statements to his affidavit are certainly potentially harmful to his credibility but certainly not lethal as to admissibility. This Court can weigh the evidence as it sees fit. For this reason, Paragraph 12 is admitted.

Regarding Paragraph 13, Chaney argues the statements regarding alleged attorney fees incurred is conclusory and lacks foundation. For the reasons stated above, Paragraph 13 is admitted.

Regarding Paragraph 14, it is not clear to this Court exactly what Chaney is objecting to, as she objects to the entire paragraph, but then goes on state she "agrees the Declaration says the Association only has a right to actual attorney fees," which is the language of Paragraph 14. Defendants' Motion to Strike, p. 8. So it appears Chaney simultaneously agrees with the statement, yet wants it excluded. All Smith is doing is regurgitating the language set forth in the Declaration. Thus, he is setting forth a fact, not a conclusion. Paragraph 14 is admitted.

Chaney lastly argues Paragraph 15 should be stricken as it is conclusory and lacks foundation, regarding the reasoning the attorney fees were passed on to Chaney. Defendants' Motion to Strike, p. 9. The paragraph is actually somewhat unintelligible. The paragraph reads:

> 15. It should be noted that the reason these fees were passed on to Chaney resulted from the actions of the Chaney failing to meeting a reasonable pay off deadline. If the payoff had been made pursuant to the deadline provide by my client, these fees would not have been passed on.

Affidavit of Peter J. Smith, IV, p. 3, ¶ 15. Again, this statement simply states a fact, the reason the fees were incurred, from Smith's perspective. However, the language that the pay-off deadline was "reasonable" is conclusory, and is stricken. It is up to this Court's discretion to determine whether the statement that the fees would not have been passed on had the payoff date been met should be allowed. It seems like it is simply a flip of the earlier statement, unnecessary maybe, but not harmful.

IV. ANALYSIS OF CHANEY'S MOTION FOR SUMMARY JUDGMENT.

A. There is a Dispute of Fact as to Whether Chaney Owes Money to the Association or Alpha and There is a Dispute of Fact as to "actual attorney fees".

Chaney's argues the alleged additional charges from Alpha are not "actual attorney's fees" as contemplated by the Idaho Condominium Property Act and the Declaration. Memo in Support, p. 8. The Idaho Condominium Property Act I.C. § 15-1518 deals with condominium assessments and states such assessments, as well as other costs, including attorney's fees "shall be and become a lien upon the condominium assessed . . ." I.C. § 15-1518. The Declaration defines assessments in Section 1.2 and in Section 6.1 states in part: "[a]ll assessments, together with interest, costs, penalties, and actual attorneys' fees, shall be a charge and a continuing lien upon the Completed Unit against which each assessment is made . . ." Baillie Affidavit, Exhibit 1, Ex. A, p. 11. Section 6.10 of the Declaration, pertaining to enforcement of assessment obligations, states in part: "[t]he Board may impose reasonable monetary penalties, including actual attorneys' fees and costs . . " Baillie Affidavit, Exhibit 1, Ex. A, p. 14. Chaney argues she paid the $8,920.14 assessments following a ruling by Judge Simpson in *Alpha v. Conley,* Kootenai County Case No. CV 2011 9436. Memo in

Support, p. 7. Specifically, Chaney claims after the ruling in *Alpha v. Conley*, she received a letter from Alpha's attorney dated May 15, 2012, and allegedly e-mailed May 16, 2012 stating:

> If the funds are not delivered on May 17, 2012 at 4:00 p.m., an additional fee of $500 to each of your clients will be incurred for the preparation of the foreclosure complaint. As a courtesy to you and your clients, we have not passed on the cost of preparing the complaints to your clients, but will do so after 4:00 p.m. on May 17, 2012.

Memo in Support, p. 10.

Chaney claims on May 17, 2012 Judge Haynes, acting for Judge Luster, signed an order granting disbursal of the deposited funds, though the funds were not available until May 21, 2012. Memo in Support, p. 10. Chaney states she is not sure what fees and costs are being incurred and claims she has not been provided with proof of such. Memo in Support, p. 11. Chaney also states Alpha's refusal to verify the costs and fees is a violation of the FDCPA, an argument which will be discussed below.

Chaney also claims the alleged costs incurred are an unlawful penalty, as the order to disburse the funds was signed by Alpha's stated deadline and that the funds were not disbursed until four days later was not the fault of Chaney. Memo in Support, pp. 12-13. Chaney posits it is unreasonable to think Alpha incurred over $3,000 in new fees in four days. Memo in Support, p. 13.

Alpha in its response states it agreed to waive attorney fees related to Chaney's matter if payment was made by May 17, 2012, and when payment was not made by that deadline, the waived fees were incurred. Memo in Opposition, p. 2. This Court is forced to infer (as Alpha does not bother stating it outright in its memorandum) that the $3,000+ fees contested by Chaney were not for the drafting of a future complaint but rather for previously incurred attorney fees.

In any event, there is clearly conflicting evidence regarding whether or not Chaney owes additional fees under the lien. It is noteworthy that while Smith in his affidavit states he incurred $2,850.00 in fees between April 14, 2012, and May 15, 2012, he does not bother to attach any billing statements to support that claim. This is a factor which goes to Smith's credibility, but which is not

fatal to establishing there is a genuine issue of material fact here. While it may be incredible to imagine how over $3,000 in attorney fees were incurred in such a short time (48 hours), that is for a jury to decide. On this ground alone, summary judgment must be denied.

B. Even if the Association Materially Breached the Declaration, Such Breach Does Not Excuse Chaney's Performance.

Chaney also argues the Association materially breached the Declaration and thus she is excused from the requirement to pay assessments. Memo in Support, p. 14. This same argument was made in by Conleys (who were represented by the same attorneys as Chaney in the instant case) in *Alpha Holdings v. Conley*. After reviewing Chaney's arguments in the present case and Judge Simpson's memorandum decision in *Alpha Holdings v. Conley*, this Court finds Judge Simpson's memorandum decision in *Alpha Holdings v. Conley* persuasive. What follows is the relevant excerpt:

> Breach of the Declaration gives rise to an action in breach of contract. *Asbury Park, LLC v. Greenbriar Estate Homeowners' Ass'n, Inc.*, ___ P.3d ___. 2012 WL 75322 (January 11, 2012). In Idaho, a material breach of contract an excuse the requirement of a payment due under a contract. In *J.P. Stravens Planning Associates, Inc. v. City of Wallace*, 129 Idaho 542, 545, 928 P.2d 46, 49 (Ct. App. 1996), the court defined a material breach:
>
> > The more appropriate inquiry is whether Stravens' failure to perform in a workmanlike manner was a "material" breach of the contract. If a breach of contract is material, the other party's performance is excused. *Ervin Const. Co. v. Van Orden*, 125 Idaho 695, 700, 874 P.2d 506, 511 (1993); *Enterprise, Inc. v. Nampa City*, 96 Idaho 734, 740, 536 P.2d 729, 735 (1975); *Ujdur v. Thompson*, 126 Idaho 6, 878 P.2d 180 (Ct.App.1994); *Mountain Restaurant Corp. v. ParkCenter Mall Associates*, 122 Idaho 261, 265, 833 P.2d 119, 123 (Ct.App.1992). "A substantial or material breach of contract is one which touches the fundamental purpose of the contract and defeats the object of the parties in entering into the contract." *Ervin Const. Co.*, 125 Idaho at 699, 874 P.2d at 510. *See also Enterprise, Inc.*, 96 Idaho at 740, 536 P.2d at 735; *Ujdur*, 126 Idaho at 9, 878 P.2d at 183. A breach of contract is not material if substantial performance has been rendered. *Mountain Restaurant Corp.*, 122 Idaho at 265, 833 P.2d at 123. Substantial performance is performance which, despite a deviation from contract requirements, provides the important and essential benefits of the contract to the promisee. *Id.* Whether a breach of contract is material is a question of fact. *Ervin Const. Co.*, 125 Idaho at 700, 702, 874 P.2d at 511, 513.
>
> *Id.* at 545, 928 P.2d at 49.
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> Although a material breach of contract can excuse another party's performance, this does not end the analysis. Plaintiff argues that while the excusal of performance may have been proper under the facts in *J.P. Stravens*, here, the Court is dealing with a very

specific type of contract, for which the general rule permitting a party to a contract to withhold performance does not apply. Thus, the issue properly before the Court is whether a condominium owner may withhold payment of assessments for an alleged breaches(es) of a Declaration by an association. There is no controlling case law in the state of Idaho which directly answers this question. Therefore, the Court is left to look for authority either in the statutes governing condominium associations, or the language of the parties' contract.

Idaho's Condominium Property Act is set forth at Title 55, Chapter 15, Idaho Code I.C. § 55-1518 states in pertinent part that

> [a]n assessment upon any condominium made in accordance with the declaration, any recorded by-laws, or any duly promulgated project regulation, *shall be a debt of the owner thereof at the time the assessment is made.* The amount of any assessment, together with those other charges thereon, such as interest, costs (including attorney's fees), and penalties, which may be provided for in the declaration, shall be and become a lien upon the condominium assessed when the management body causes to be recorded with the court recorder of the county in which such condominium is located a notice of assessment . . .
>
> . . .
>
> Such lien may be enforced by sale by the management body, its attorney or other person authorized to make the sale, after failure of the owner to pay such an assessment in accordance with its terms, such sale to be conducted in the manner permitted by law for the exercise of powers of sale in deeds of trust or any other manner permitted by law.

(Emphasis added). While this statute provides that an assessment becomes the debt of the owner at the time the assessment is made, the statute does not directly address the remedies, if any, available to an owner when an association breaches the Declaration. The Court agrees with Defendants that the Act does not directly address the remedies available to an owner upon breach by an Association.

Additionally, the Declaration does not explicitly permit, or prohibit, the withholding of assessments under the facts before this Court. Article 6 of the Declaration provides, in part:

> 6.1. Creation of the Lien and Personal Obligation of Assessments. The Declarant, for each Completed Unit owned within the Project, hereby covenants, and each Owner of any Completed Unit by acceptance of a deed therefore, whether or not it shall be so expressed in such deed, is deemed to covenant and agree to pay to the Association the following Assessments, which shall be established and collected as provided herein:
>
> a. Regular Assessments;
> b. Extraordinary Assessments; and
> c. Special Assessments.
>
> All Assessments, together with interest, costs, penalties, and actual attorneys' fees, shall be a charge and a continuing lien upon the Completed Unit against which each Assessment is made, the lien to become effective upon recordation of a Notice of Assessment Lien by the Board or upon delivery of written notification to the Owner. Each such Assessment, together with interest, costs, penalties, and actual attorneys' fees, shall also be the personal obligation of the person who was the Owner of such Unit

at the time when the Assessment fell due. No Owner of a Unit may exempt himself or herself from liability for his or her contribution toward the Common Expenses by waiver of the use or enjoyment of any of the Common Area or any other part of the Project, or by the abandonment of his or her Unit.

6.2. Purpose of Assessments. The Assessments levied by the Association shall be used exclusively to promote the health, safety, and welfare of all the Owners of Units in the entire Project and/or for the operation, maintenance, improvement, repair, and replacement of the Common Area for the common good of the Project. The Regular Assessments shall include an adequate reserve fund for maintenance, repair, and replacement of those elements of the Common Area which must be replaced on a periodic basis . . .

. . .

6.10 Enforcement of Assessment Obligation; Priorities; Discipline. If any part of any Assessment is not paid and received by the Association or its designated agent within ten (10) days after the due date, an automatic late charge equal to five percent (5%) of the Assessment (but not less that $10.00) shall be added to and collected with the Assessment. Additionally, if any part of any Assessment is not paid and received by the Association or its designated agent within thirty (3) days after the due date, the total unpaid Assessment (including the late charge) shall thereafter bear interest at the rate of sixteen percent (16%) per annum until paid.

Each unpaid Assessment . . . shall constitute a lien on each respective Unit . . .

By this language, as with the language of I.C. § 55-1518, assessments must be paid when they are assessed. The Court finds that this language does not, however, directly address the issue before the Court. Plaintiff argues that if the Act and Declaration fail to adequately address the issue, the Court should adopt the rule set forth in the Restatement (Third) of Property: Servitudes Section 6.5, comment e. Comment e states:

e. Assessment obligation is independent of association duties to owners or side deals with developer. Because of the importance of maintaining the association's income stream, the owners of individual properties are not entitled to withhold assessments to set off against defaults by the association in fulfilling its duties to the property owner. Nor are members entitled to set up agreements reached with the developer as defenses to the obligation to pay assessments. In the absence of an express reservation of power in the declaration, the developer does not have the power to waive the assessment obligations imposed on property within the common-interest community.

This Court "will not adopt a Restatement provision if it is inconsistent with Idaho precedent, a different formulation resolve[s] the issue, or the issue can be resolved by current Idaho law." *Asbury Park*, __ P.3d at 6 (quoting *Estate of Skvorak v. Sec. Union title Ins. Co.*, 140 Idaho 16, 22, 89 P.3d 856, 862 (2004)). Therefore, the Court cannot adopt the Restatement if Idaho law "provides a means by which to resolve the parties' . . . dispute." *See Id*. Here, either Idaho law nor the plain language of the Declaration adequately resolve the parties' issue. Therefore, the Court may adopt the Restatement to aid in its determination.

In addition to urging the Court to adopt the Restatement, Plaintiff cites out of state authority to support the same conclusion: that owners are not permitted to withhold assessments to set off against defaults by an association, and that p7ublic policy supports this conclusion because aggrieved owners should not have the power to cut off an association's income stream to the detriment of the association and other owners.

Plaintiff first cites *Park Place Estates Homeowners Assn. v. Naber*, 29 Cal.App.4th 427, 35 Cal.Rptr.2d 51 (1994). *Park Place* was an action by a condominium homeowners association against an owner, wherein the association sought injunctive relief to make repairs to the defendant's unit after defendant refused to permit the repairs. *Id*. at 429. Injunctive relief was granted, the repairs were performed, and the owner cross-complaied, alleging negligent performance of the repairs. *Id.* The association then amended its complaint, seeking to foreclose an assessment lien and requesting damages. *Id*. The trial court granted a motion later raised by the association to exclude any evidence that the owner was entitled to withhold or set off his assessment obligations because the association had allegedly failed to maintain the common area, and the owner appealed. *Id*. at 430-31. The appellate court held:

> The Legislature has enacted very specific procedural rules governing condominium assessments. (See Civ. Code, §§ 1366, 1367.) Condominium homeowners associations *must* assess fees on the individual owners in order to maintain the complexes. (Civ. Code, § 1366, subd. (a).) The assessment "shall be a debt of the owner ... at the time the assessment ... [is] levied." (Civ. Code, § 1367, subd. (a).) When an owner defaults, the association may file a lien on the owner's interest for the amount of the fees. (Civ. Code, § 1367, subd. (b).) If the default is not corrected, the association may pursue any remedy permitted by law, including judicial foreclosure or foreclosure by private power of sale. [FN7] (Civ. Code, § 1367, subd. (d).)
>
> > FN7 The CC&R's contain parallel provisions as to the procedures for imposing monthly assessments and remedies for nonpayment of such assessments. These provisions state the purpose of the assessment "is to promote the recreation, health, safety, and welfare of the residents in the Project and for the improvement and maintenance of the Common Area for the common good of the project." Pursuant to the CC&R's, an assessment is a personal obligation of the owner on the date the assessment falls due.
>
> These statutory provisions reflect the Legislature's recognition of the importance of assessments to the proper functioning of condominiums in this state. Because homeowners associations would cease to exist without regular payment of assessment fees, the Legislature has created procedures for associations to quickly and efficiently seek relief against a nonpaying owner. Permitting an owner to broadly assert the homeowners association's conduct as a defense or "setoff" to such enforcement action would seriously undermine these rules. (See also *Baker v. Monga* (1992) 32 Mass.App. 450, fn. 8 [590 N.E.2d 1162, 1164] ["The independent nature of the covenant to pay in timely fashion common charges to the condominium unit owner's organization is implicit in the contractual agreement of the association's members that maintenance charges and other proper assessments are necessary to the sound ongoing financial management and stability of the entire complex."].)

Id. at 431-32, 35. Additionally, while not explicitly deciding the issue of other an owner is permitted to withhold assessments if an association fails to perform its obligations under a declaration, the *Park Place* court noted that:

> . . . courts in other states have refused to permit an owner to withhold payment of lawfully assessed common area charges by asserting an offset right against those charges. These courts have emphasized the importance of assessment fees to condominium management and the absence of legislative authorization for an offset. (*Trustees of Prince Condo. Tr. v. Prosser* (1992) 412 Mass. 723 [592 N.E.2d 1301, 1302] ["A system that would tolerate a [condominium] owner's refusal to pay an assessment because the unit owner asserts a grievance . . . would threaten the financial integrity of the entire condominium operation."] see also, *Rivers Edge Condominium Ass'n v. Rere, Inc.* (1990) 390 Pa.Super. 196 [568 A.2d 261, 263]; *Newport west Condominium Ass'n v. Veniar* (1984) 134 Mich.App. 1 [350 N.W.2d 818, 822-823]; accord, Advising California Condominium & Homeowners Associations (Cont.Ed.Bar 1991) § 6.43, pp. 295-296.)

In *Abbey Park Homeowners Association v. Bowen*, 508 So.2d 554 (1987), the defendant failed to make her monthly assessments of the common expenses, which resulted in plaintiff filing an action to foreclose a claim of lien against her. Bowen filed an affirmative defense, asserting that she was not liable for the common area assessments because plaintiff failed to maintain the common areas as required by the CC&Rs. *Id*. at 554-55. Evidence of defendant's affirmative defense was presented at trial, and a jury found that the plaintiff breached the declaration by failing to maintain the common elements. *Id*. at 555. The trial court entered judgment denying plaintiff's claim for foreclosure. *Id*. On appeal, the court said:

> In the instant case, it is not disputed that Bowen has not paid assessment fees since July 1983, and at the time of trial, she owed $1,977.60 plus interest. Bowen's duty to pay the assessment fees was conditioned solely on her acquisition of title as stated in the declaration. Her only defense asserted at trial was Abbey Park's failure to maintain the common elements. However, the affirmative defense of failure to maintain the common elements is inadequate as a matter of law. *Sandles v. Sheridan Lakes Condominium, Inc.*, 388 So.2d 1096 (Fla. 4th DCA 1980). As this defense is inadequate as a matter of law, the trial court erred in entering final judgment in favor of Bowen as to the foreclosure suit. Therefore, we reverse and remand for entry of a final judgment for Abbey Park on its foreclosure claim.

Id. at 555.

Next, Plaintiff cites *Forest Villas Condominium Association, Inc. v. Camerio*, 422 S.E.2d 884 (1992). There, plaintiff sued defendant owners to recover condominium fees. *Id*. at 617-18, 422 S.E.2d at 885. Defendants alleged a number of affirmative defenses, as well as a counterclaim asserting that the Association failed to honor its obligations by performing maintenance and making repairs on the units owned by Defendants, that the Association had mismanaged funds paid by defendants, and that the Association had discriminated against defendants. *Id*. at 618, 422 S.E.2d at 885. In part, they sought an accounting of the monies handled by the association, reimbursement for expenses they incurred due to the Association's alleged breach, and a declaration that certain

unspecified actions of the Association in contravention of Georgia law and the condominium declaration, bylaws, and rules be declared null and void. *Id*. The Association moved for summary judgment, which was denied. *Id*. at 618, 422 S.E.2d at 885-86. The trial court denied the motion because it concluded, in part, that "the word 'exempt' found in O.C.G.A. § 44-3-80(d) does not mean that the Defendants in this case could never have any justification for withholding the assessments charged to them." *Id*. at 618, 422 S.E.2d at 886. That statutory section stated that "No unit owner other than the association shall be exempted from any liability for any assessment under this Code section or under any condominium instrument for any reason whatsoever, including, without limitation, abandonment, nonuse, or waiver of the use or enjoyment of his unit or any part of the common elements." *Id*. (Citation omitted). On appeal, the Court held:

> The language is plain and susceptible of only one interpretation insofar as it relates to the defenses. There is no legal justification for a condominium owner to fail to pay valid condominium assessments. This reflects a clear choice by the legislature that the owner's obligation to pay assessments be absolute and a condominium unit owner involved in a dispute with the condominium Association about its services and operations may not exert leverage in that controversy by withholding payment but must seek other remedy. The obligation to pay the assessment is independent of the Association's obligations to provide services. This is necessary because the communal business of the condominium Association for the benefit in common of all condominium owners continues unabated during the pendency of any such individual dispute. The public policy expressed in the statute assures that fulfillment of obligations and the functioning of a condominium association as a whole not be jeopardized or compromised by individual disputes, which may or may not be meritorious.

Id. at 618-19, 422 S.E.2d at 886 (internal citations omitted).

Here, Plaintiff's authority, while out of state and not binding, is very persuasive. It is directly on point with regard to condominium association assessments, and provides sound policy behind the limitation on the right to withhold assessments for perceived violations by an association. The out of state authority is also on point with the Restatement, which this Court finds prudent to adopt in the face of a lack of Idaho authority on point.

Further, even though Title 55, Chapter 15, Idaho Code and the Declaration do not specifically address the right to withhold assessments under the circumstances, I.C. § 55-1518 provides that an assessment becomes the debt of the owner at the time of assessment, and permits an association to file a lien on the owner's interest in the event of owner default. This "statutory provision [] reflect[s] the Legislature's recognition of the importance of assessments to the proper functioning of condominiums in this state." *See Park Place Estates,* 29 Cal. App.4th at 432. "Because homeowners associations would cease to exist without regular payment of assessment fees, the Legislature has created procedures for associations to quickly and efficiently seek relief against a nonpaying owner." *Id.* Further the Declaration contains language making assessments the debt of the owner at the time they are levied, and does nto allow withholding of assessments even in the event that an owner chooses to waive the right to use or enjoyment of any of the Common Area or abandons his or her unit. The assessments levied by the Association are expressly established to "promote the health, safety, and welfare of all the Owners of Units in the entire Project." Thus, there can be no dispute that the Declaration does not contemplate an owner's ability to withhold assessments based upon a personal belief that

> the Association is not acting in conformity with the Declaration, and by withholding assessments, the owner injures every other owner by depleting the capital available to the Association to perform its duties.
>
> While Defendants are correct that Declaration is a contract, Plaintiff has convinced the Court, based upon policy considerations inherent in the Condominium Act, the language in the Declaration, the Restatement, and out of state case law, that payments of assessments under the circumstances in this case must be distinguished from other types of contracts for the purposes of determining whether a material breach may excused a party's performance. Therefore, the Court finds that Defendants acted improperly by withholding assessments, and withholding assessments because of an alleged breach of the Declaration by the Association does not hinder the Association's ability to foreclose for nonpayment of these assessments. Therefore, Plaintiff is entitled to summary judgment.

April 6, 2012, "Memorandum Decision and Order Granting in part and Denying in Part Plaintiff's Motion to Strike, Granting Plaintiff's Motion for Summary Judgment, Denying Defendants' Motion to Continue and Denying Defendants' Motion to Consolidate", Kootenai County Case No. CV 2011 9436, pp. 9-18; Baillie Affidavit, Exhibit 8, pp. 9-18.

Chaney argues Judge Simpson made this ruling without knowing Judge Luster in *Conley et al. v. Black Bay Village Owners Ass'n et al.,* would later hold the Declarant no longer owns the clubhouse/swimming pool (after foreclosure), rather each condominium owner owns 2.5% of the clubhouse/swimming pool, it as an undivided interest, and this fact is sufficient for this Court to make a ruling in her favor. Memo in Support, pp. 16-17. However, Judge Simpson's reasoning above applies whether the Association wrongfully tried to sell the clubhouse/swimming pool or not. Under the analysis above, condominium assessments are made for the benefit of all the owners, and failure to pay those assessments similarly harms all owners, regardless of the alleged breach by the Association. Policy dictates the proper remedial measure is a lawsuit, rather than the withholding of assessments. Under the reasoning set forth above, the motion for summary judgment on this ground must be denied.

C. The Board did not violate the Bylaws in conducting its meetings.

The final argument from Chaney on this particular issue is she has already paid more than she owes to the Association because the increase of the assessment from $75 to $150 each month was

wrongful and in violation of the Declaration. Memo in Support, p. 19. Chaney argues at the time of the assessment increase, there were no owners on the Board, in violation of the Bylaws. Again, this argument was already made to Judge Simpson in *Alpha Holdings v. Conley.* After reviewing that decision and reading Chaney's arguments in the present case, this Court finds the reasoning of Judge Simpson to be much more persuasive:

> The Bylaws state, in part:
>
> > 3.1 Number and Term of Directors. The Board shall consist of three (3) Directors, each of whom shall be an Owner of a Unit or an agent of a corporate Owner. The initial Directors shall serve until the first annual meeting of the Association.
>
> Defendants assert that according to the current ownership of the condo units, only one possible corporate owner exists. Additionally, only one "owner of a unit" could possibly be on the board, an individual named Rosemary Mullan. Thus, given the character of the board of directors, such board was not able to act.
>
> In support of their argument that no other "owners" were on the Board, Defendants cite *Investors Ltd. of Sun Valley v. Sun Mountain Condominiums, Phase I, Inc. Homeowners Ass'n*, 106 Idaho 855, 857, 683 P.2d 891, 893 (Ct.App. 1984). In *Investors Ltd.*, the court held that "owner" was defined by reference to physically existing condominium units, rather than to physically existing units and all platted condominiums, whether built or unbuilt. *Id*. at 857-58, 683 P.2d at 893-94. However, the court in *Investors Ltd.* specifically limited its holding to the facts in that case, and based its decision upon the particular language of the relevant condominium documents. *Id*. at 855-856, 683 P.2d at 891-92.
>
> Here, the term "Owner" is defined in Section 1.17 of the Declaration, and provides as follows:
>
> > Owner or Owners. The record holder or holders of title to a Unit in the Project. This shall include any person having title to any Unit, but shall exclude persons or entities having any interest merely as security for the purpose of any obligation. Further, if a Unit is sold under a recorded contract of sale to a purchaser, the purchaser, rather than the title owner, shall be considered the "Owner."
>
> A "person" is defined in Section 1.18 as "Any individual or any corporation, limited liability company, joint venture, limited partnership, partnership, firm, association, trust, or other similar entity or organization." The term "Unit" is used separately from the term "Completed Unit." *See* Section 1.23. "Completed Unit" refers "only to those Units which shall be substantially completed, or with respect to which a Certificate of Occupancy has been issued." "Unit," however, is also used in Section 1.23 to refer to, in part, unbuilt units.
>
> Based on the foregoing, *Investors Ltd.* is distinguishable. "Owners" include "persons," which can include limited liability companies. "Units" include unbuilt units. Thus, although Northwest Group LLC's "Units" may not be "Completed Units" (Which is not entirely clear from the record), Northwest Group, LLC is nevertheless an "Owner" who owns multiple Units. Plaintiff has highlighted facts in the record showing that other members of the Board include Mike Rai, Nick Rai, and Tammy Morris, each of whom

> are agents of Northwest Group, LLC. Therefore, the Court finds that the Board was properly comprised pursuant to the Bylaws, and the Board therefore had authority to act when filing the lien against Defendants' Property.

April 6, 2012, "Memorandum Decision and Order Granting in part and Denying in Part Plaintiff's Motion to Strike, Granting Plaintiff's Motion for Summary Judgment, Denying Defendants' Motion to Continue and Denying Defendants' Motion to Consolidate", Kootenai County Case No. CV 2011 9436, pp. 8-9; Baillie Affidavit, Exhibit 8, pp. 8-9.

This Court agrees entirely with Judge Simpson's decision and his reasoning supporting that decision. As a result, Chaney's motion for summary judgment on this ground must be denied.

Chaney additionally argues the increase in the assessment from $75 to $150 was illegal because the increase was by more than 20% in violation of Section 6.3 of the CC&R's and also the Association failed to give 60 days' notice prior to the implementation of the increased assessments in violation of that same section. Memo in Support, p. 21. However, as explained above, an alleged material breach of a contract is not a defense to nonpayment of assessments. On that basis, this part of the motion for summary judgment should be denied.

D. The Idaho Collection Agency Act Does not Apply; Alpha Has a Right to Foreclose on Chaney's Condominium; Alpha and PITA Have a Legal Right to Foreclose on a Lien in the State of Idaho.

Chaney argues Alpha is engaging in collection activity in violation of I.C. § 26-2223. Memo in Support, p. 22. The Idaho Collection Agency Act is found at I.C. § 26-2221 et seq. Idaho Code § 26-2223 states:

> No person shall without complying with the terms of this act and obtaining a license from the director:
> . . .
> (2) Engage, either directly or indirectly, in this state in the business of collecting or receiving payment for others of any account, bill, claim or other indebtedness.
> . . .
> (6) Engage or offer to engage in this state, directly or indirectly, in the business of collection any form of indebtedness for that person's own account if the indebtedness was acquired from another person and if the indebtedness was either delinquent or in default at the time it was acquired.

I.C. § 26-2223. Chaney claims Alpha falls under I.C. § 26-2223(2) because it is "engaging, either directly or indirectly, in the business of collecting or receiving payment for Black Bay Condo Association." Reply, p. 15. Chaney also claims Alpha falls under I.C. § 26-2223(6) as it acquired the indebtedness after Chaney was in default. *Id*. In response, Alpha points to *PurCo Fleet Services, Inc. v. Idaho State Dept. of Finance*, 140 Idaho 121, 90 P.3d 346 (2004).

In that case, PurCo was a company in the business of acquiring, enforcing, and settling rental car damage claims. *PurCo*, 140 Idaho 121, 123, 90 P.3d 346, 348. PurCo and Thrifty entered into a contract wherein Thrifty car rental company assigns "all claims, rights and causes of action" for damaged vehicles to PurCo in consideration for cash payments, training, and consulting services. *Id*. The Department of Finance notified PurCo to immediately cease engaging in collection activity in Idaho until it had qualified under the Idaho Collection Agency Act. *Id*. According to the assignment agreement, Thrifty assigned all claims, rights, and causes of action to PurCo. *Purco*, 140 Idaho 121, 125, 90 P.3d 346, 350. The Idaho Supreme Court held the rental vehicle damage claim, which PurCo collected against the Idaho resident, constituted a claim or other indebtedness under I.C. § 26-2223(2). *Id*. The Idaho Supreme Court distinguished between a collection agency that falls within the purview of I.C. § 26-2223(2). *Id*. Specifically, if PurCo was attempting to collect on the claim it owned, that is, if Thrifty's claim was assigned in its entirety without recourse, then PurCo would be collecting on its own behalf and thus would not be acting as a collection agency. *Id*. *PurCo* defined "assignment" as "the transfer of rights or property." *Id*. In order to determine whether an assignment is sufficient as transferring rights in their entirety, the Court looks to the contract between the assignor and the assignee. *Purco*, 140 Idaho 121, 126, 90 P.3d 346, 351. Specifically, an assignment of the chose in action transfers to the assignee and divests the assignor of all control and right to the cause of action, and the assignee becomes the real party in interest. *Id.*

The Idaho Supreme Court held PurCo collected on Thrifty's behalf rather than PurCo's own behalf, based on a number of specific factors, particularly: 1) the agreement requires Thrifty to sue in

its own name in small claims court, which demonstrates Thrifty is the real party in interest as to the claim, rather than PurCo, 2) the agreement requires PurCo to provide Thrifty with information and instruction necessary for Thrifty to prosecute actions in small claims, 3) Thrifty was not divested of control and right to the cause of action, 4) agreement allows Thrifty to access the claim and obtain copies of any correspondence and documents regarding the claim while it is in PurCo's possession and 5) the agreement provided Thrifty had the right to revoke the assignment with thirty (30) days' written notice. *Id*. Based on these factors, the Idaho Supreme Court held it was evident from the agreement that PurCo did not receive a complete assignment of the claim. *Id*.

An assignee for collection holds any proceeds of the assigned claim in trust for the assignor. *Id*. The Idaho Supreme Court held that because the agreement in *Purco* stated the monies collected would be placed in a trust account, from which PurCo disburses the appropriate sums to Thrifty after retaining a percentage of monies collect, the assignment was for the purpose of collection.

The pertinent language of the July 1, 2011, Assignment from Black Rock Village Owner's Association to PITA reads:

> For good and valuable consideration, Assignor does hereby assign to Assignee the homeowner's lien ("Lien") on the real property described as
>
> * * *
>
> Pursuant to this Assignment, Assignee shall have full authority to enforce the Lien herein assigned and to collect and receive the debt secured by said Lien. Any recovery made on the Lien or the underlying debt shall be applied:
>
> 1. First to the costs incurred in collecting on the debt and/or enforcing the Lien,
> 2. Then to any outstanding balance on the Promissory Note between Assignor (maker) and Northwest Group, LL, a Idaho LLC (payee) dated April 23, 2009 and all assignments, amendments thereto;
> 3. Any remainder, if any, will be split equally between the Assignor and Assignee.

Complaint, Exhibit 3. Not surprisingly, the subsequent Assignment on November 22, 2011, from PITA to Alpha contains this exact language. Complaint, Exhibit 6.

Comparing the language of the two assignments to the factors highlighted by the Idaho Supreme Court in *PurCo*, it is apparent both assignments in the present case are attempts at a

complete assignment. The assignment agreements in the present case do not require the Association to sue in its own name in small claims court, do not require PITA to provide the Association with information and instruction necessary for the Association to prosecute actions in small claims, do not allow the Association to access the claim and obtain copies of correspondence and documents regarding the claim, and do not have a right of revocation. The language in the assignment agreements also seeks to divest the Association of control, as it states PITA will "have full authority to enforce the Lien" and makes no mention of any further control by the Association. What gives pause is the third paragraph in each assignment agreement, the provision regarding recovery on that lien, that "Any remainder, if any, will be split equally between the Assignor and Assignee." This language is similar, though not identical to the language in *PurCo*. However, the big difference between the agreement in *PurCo* and the agreement in the present case, is that in *Purco*, the assignment agreement stated the monies collected would be placed in a trust account and "the appropriate sums" disbursed to Thrifty, after PurCo took out its percentage. No mention is made of what the "appropriate sums" were, but it seemed implied the sums referenced were sums originally owed to Thrifty. In the present case, the agreement states the monies collected will first go to the costs of debt collection and/or lien enforcement, then to the balance of the original Promissory Note and the remainder to be split between PITA and the Association. The language is not the same as that in *PurCo*, but when reading the provision in the present case as a whole, it is clear the Association is dictating where the monies go and in what priority, and not PITA. Certainly that is "control", but it is not control of where the assignee goes from the point of assignment on. It really is only control in that the assignor has controlled by the agreement, that the assignor gets half the left over proceeds. While the fact that the assignor controlled the return of half the left over proceeds when it entered into the agreement, the Court finds that is not a factor that would weigh in favor of this being an assignment for collections (and falling under the Act). Looking at this issue from simply an ownership (not "control") standpoint, both assignments are still a 50/50 distribution of remaining

proceeds between the Association and PITA (and then PITA and Alpha). Even if this Court were to just look at the division of proceeds, they assignor and assignee would at best be co-owners. But it is not just ownership, it is "the transfer of rights or property" as stated by the Idaho Supreme Court. 140 Idaho 121, 125, 90 P.3d 346, 350. Specifically, an assignment of the chose in action transfers to the assignee and divests the assignor of all control and right to the cause of action, and the assignee becomes the real party in interest. *Id*. While the assignor in each of these assignments gets half the left over proceeds, there appears to be absolutely no "control" remaining with the assignor, all "control" is given to the assignee in each assignment.

However, it is not necessary for this Court to reach this issue because *Alpha is not seeking to collect on the debt owed but rather to enforce and foreclose on the lien*. Idaho has no case law regarding whether a person or entity seeking to foreclose on a security interest is a "debt collector" under I.C. § 26-2223. As discussed below, foreign case law for FRCPA is instructive on this issue and is persuasive that a foreclosure on a security interest in not a debt collector. As such, the Idaho Collection Agency Act does not apply and the motion for summary judgment is denied on this issue.

E. Alpha Has a Valid Assignment From PITA.

Chaney's next argument is the assignment from PITA to Alpha was not valid because 1) PITA is not authorized to do business in Idaho and 2) was certified by the Secretary of the State of Delaware to no longer be in existence as of June 1, 2011 for failure to pay annual taxes, and the assignment to PITA allegedly occurred on July 1, 2011. Memo in Support, p. 23. The Delaware Limited Liability Act includes provisions pertaining to the cancellation of certificate of formation for failure to pay taxes and the revival of the same. 6 Delaware Code § 18-1108; 6 Delaware Code § 18-1109. The Delaware Limited Liability Act states a domestic limited liability company whose certificate of formation has been canceled (as is the case here), may be revived if the necessary paperwork is filed. 6 Delaware Code § 18-1109(a). That Act also states:

> (c) . . . All real and personal property, and all rights and interests, which belonged to the limited liability company at the time its certificate of formation was canceled . . . or which were *acquired by the limited liability company following the cancellation of its certification of formation* . . . which were not disposed of prior to the time of its revival, shall be vested in the limited liability company after its revivals as fully as they were held by the limited liability company at, or after, as the case may be, the time its certificate of formation was canceled . . .

6 Delaware Code § 18-1109(c) (emphasis added).

The plain language of the Act anticipates a limited liability company can receive property interests after its certification of formation has been cancelled and also can dispose of those interests prior to the certificate being revived. Thus, the fact PITA's certificate of formation was cancelled at the time it received the assignment from the Association and at the time it assigned the interest to Alpha is not dispositive here and Chaney's motion for summary judgment on this issue must be denied.

F. The Declaration Allows Alpha the Right to Sue Chaney to Foreclose its Lien or to Collect the Assessments.

Chaney next argues Alpha has no right to enforce the lien against Chaney because Section 16.1 of the Declaration specifically sets for who can enforce the lien and there no mention of assignees having such a right, therefore Alpha as the assignee does not have that right. Memo in Support, pp. 22-23. Again, this issue was addressed in *Alpha Holdings v. Conley* and Judge Simpson's reasoning in that case is persuasive:

The Declaration provides, in part:

> 16.1 Enforcement. The Association (acting through the Board), any Owner, and any governmental or quasi-governmental agency or municipality having jurisdiction over the Project shall have the right to enforce, by any proceedings at law or in equity, all restrictions, conditions, covenants, reservations, liens, and charges now or hereafter imposed by this Declaration, and in such action shall be entitled to recover costs and reasonable attorneys' fees as are ordered by the Court. Any such action by the Association shall be taken on behalf of two (2) or more Unit Owners, as their respective interests may appear, with respect to any cause of action relating to the Common Area or more than one Unit. Failure by any such

> person or entity to enforce any such provision shall in no event be deemed a waiver of the right to do so thereafter.
>
> (Emphasis added). Because Plaintiff is not the Association, an owner, or a governmental or quasi-governmental agency or municipality, Defendants argue that Plaintiff is precluded from enforcing the lien; Defendants refer to Section 16.1 as a "restriction which prohibits the assignment of any enforcement right." *Memorandum in Opposition to Motion for Summary Judgment*, at 6.
>
> Simply put, the language of 16.1 does not preclude *assignment* of the right to enforce the Declaration, even assuming (without deciding) that Section 16.1 prohibits enforcement by any person or entity not explicitly named therein. The right to enforce the lien currently before the Court is granted to the Association pursuant to the Declaration, and Idaho statutory law. *See* I.C. § 55-1518. The undisputed facts show that the Association then assigned the right to enforce Defendants' obligations to PITA Group, LLC, which then assigned the enforcement right to Plaintiff. No language in the Declaration prevents this. Therefore, Defendants' argument fails to withstand Plaintiff's motion.

April 6, 2012, "Memorandum Decision and Order Granting in part and Denying in Part Plaintiff's Motion to Strike, Granting Plaintiff's Motion for Summary Judgment, Denying Defendants' Motion to Continue and Denying Defendants' Motion to Consolidate", Kootenai County Case No. CV 2011 9436, pp. 7-8; Baillie Affidavit, Exhibit 8, pp. 7-8. (emphasis in original).

Chaney acknowledges Judge Simpson's earlier decision but urges this Court to separately rule on this issue in favor of her position that only those individuals specifically stated in Section 16.1 of the Declaration are allowed to enforce the lien. Memo in Support, p. 24. Chaney's argument is unpersuasive as Judge Simpson's ruling on the issue is well reasoned. Chaney's argument is unpersuasive as Chaney incorrectly argues this is a restrictive covenant which should not be extended by implication. This is <u>not</u> a restrictive covenant against the use of private property. This provision is simply a provision for enforcement of assessments. Chaney's argument on this point being wholly unpersuasive, the motion for summary judgment on that issue must be denied.

G. The Directors Who Allegedly Assigned the Right to Collect the Chaney Assessment and the Right to Foreclose HAD the Authority to Act for the Association.

The issue of whether the directors fell within the requirements of the Bylaws has already been addressed above, and under that reasoning, the motion for summary judgment on this issue must be denied.

Chaney also argues there was not a quorum of directors present at the meetings, because not all of the directors required for a quorum attended "in person." Memo in Support, p. 25. Section 3.8 of the Bylaws defines quorum as "the presence in person of a majority of the Directors at any meeting of the Board . . . The vote of a majority of the quorum actually present at any meeting shall constitute the vote of the Board . . ." *Id*. Idaho Code § 30-3-74(3) states:

> Unless the articles or bylaws provide otherwise, a board may permit any or all directors to participate in a regular or special meeting by, or conduct the meeting through the use of, any means of communication by which all directors participating may simultaneously hear each other during the meeting. A director participating in a meeting by this means is deemed to be present in person at the meeting.

Chaney argues the Bylaws are very specific, the Board members must attend in person, which she interprets to mean literally in the flesh. However, the Bylaws mirror the language of I.C. § 30-3-74(3) regarding being "present in person." It is reasonable to assume the phrase "presence in person" in the Bylaws carries with it the same meaning as I.C. § 30-3-74(3) allowing participation via means such as teleconference. As such, the quorum was met and this issue of the motion for summary judgment must be denied.

H. **Alpha has not violated the Fair Debt Collection Practices Act (FDCPA).**

Chaney argues Alpha violated the FDCPA in its collection actions against her. Memo in Support, p. 28. The arguments for the different factors are set forth separately below.

1. Alpha is Not Liable Under the FDCPA Because Alpha is Not a Debt Collector.

The FDCPA defines "debt collector" as any person who uses any instrumentality of interstate commerce or the mails in any business the principal purpose of which is the collection of any debts, or who regularly collects or attempts to collect, directly or indirectly, debts owed or due or asserted to be owed or due another." 15 U.S.C. § 1692(a)(6). Section 1692(a)(6) also states that "for the purpose of section 1692f(6) of this title, such term also includes any person who uses any instrumentality of interstate commerce or the mails in any business the principal purpose of which is

the *enforcement of security interest*." *Id.* (emphasis added). Since Idaho has no case law on point, foreign case federal case law becomes helpful. The question to be answered here is whether enforcers of security interests are "debt collectors" for purposes of the FDCPA. There is a split of authority on that subject. However, some courts, including the Eleventh and Sixth Circuit Court of Appeals have held an enforcer of a security interest is not a debt collector for purposes other than Section 1692f(6), as this is the only section the FDCPA expressly states they are applicable to. *Derisme v. Hunt Leibert Jacobson P.C.*, 880 F.Supp.2d 311, 323-24 (D.Conn. 2012); *Warren v. Countrywide Home Loans, Inc.*, 342 Fed.Appx. 458, 460 (11th Cir. 2009); *Montogmery v. Huntington Bank*, 346 F.3d 693, 700-01 (6th Cir. 2003). Both circuits have held the purposeful inclusion of enforcers of security interests for one section of the FDCPA "implies that the term debt collector does not include an enforcer of security interests for any other section of the FDCPA." *Derisme*, 880 F.Supp.2d 311, 324. The court in *Derisme* summarized the reasoning of the both circuit courts and while it acknowledged there is still a split of authority on this issue, a majority of courts have concluded that foreclosing on a mortgage does not qualify as debt collection activity under the FDCPA. 880 F.Supp.2d 311, 325.

In making its ruling, the Sixth Circuit Court of Appeals relied heavily on the reasoning set forth in *Jordan v. Kent Recovery Servs., Inc.*, 731 F.Supp. 652, (D.Del. 1990). The Court in *Jordan* found that "although Congress included within the definition of "debt collectors" those who enforce security interest, it limited this definition only to the provisions of § 1692f(6) . . . '[s]uch a purposeful inclusion for one section of the FDCPA implies that the term 'debt collector' does not include an enforcer of a security interest for any other section of the FDCPA'". 731 F.Supp. 652, 657; *Montgomery*, 346 F.3d 693, 700. The Court in *Jordan* reasoned the FDCPA was enacted in order to "prevent the 'suffering and anguish' which occur when a debt collector attempts to collect money which the debtor, through no fault of his own, does not have", and is not implicated in the situation of a repossession agency that enforces "present right" to a security interest because an enforcer of a

security interest with a "present right" to something is attempting to retrieve something the holder of the security interest still owns. 731 F.Supp. 652, 658; *Montgomery*, 346 F.3d 693, 700.

This reasoning can be carried over to the situation in the present case. There is currently a lien on Chaney's property for her alleged failure to pay assessments due. Alpha now seeks to foreclose on that lien (a security interest), which it is entitled to do under the Declaration and assignment. The reasoning of *Derisme, Jordan* and *Montgomery* are persuasive. Ass such, Alpha is not a "debt collector" under the FDCPA.

While Chaney acknowledges the holdings of these cases, she argues they are not applicable to this case because those cases involved "creditors" which are defined in the FDCPA as "any person who offers or extends credit creating a debt . . . but such term does not include any person [who] receives an assignment or transfer of a debt in default." Reply, p. 29. Chaney claims the distinction between a creditor and a debt collector is when the debt was transferred. *Id*. Chaney argues since the transfer here allegedly occurred after the debt was in default, Alpha is a debt collector, not a creditor and the FDCPA applies. *Id.* Chaney supports her argument stating Alpha has pointed to "no legal authority that supports its contention that association dues are analogous to a loan under a deed of trust". *Id*. However Chaney also fails to point to any language in *Derisme* and the other cases that limits the holdings to creditors only. In fact, *Derisme* does not use the term "creditor" but consistently uses the phrase "enforcers of security interests" which does not have such a narrow meaning as "creditor" under the FDCPA. The reasoning of *Derisme* and similar cases is persuasive and Chaney's argument fails.

2. **The Condominium Assessments are a "Debt" Under the FDCPA.**

Though it is not necessary, given the holding above, it may be helpful to address the question of whether condominium assessments are "debts" under the FDCPA. In support of her argument that the assessments are "debts," Chaney cites a number of federal court of appeals cases holding association dues are a "debt" under the FDCPA. *Haddad v. Alexander, Zelmanski, Danner &*

Fioritto, PLLC, 698 F.3d 290 (6th Cir. 2012); *Ladick v. Van Gemert*, 146 F.3d 1205 (10th Cir. 1998) *cert denied* 119 S.Ct. 511, 525 U.S. 1002, 142 L.Ed.2d 424; *Newman v. Boehm, Pearlstein & Bright, Ltd.*, 119 F.3d 477 (7th Cir. 1997). In *Haddad*, the Sixth Circuit Court of Appeals held that a condominium assessment is a debt because the obligation to pay "arose in connection with the purchase of the home itself, even if the timing and amount of particular assessments was yet to be determined." 698 P.3d 290, 294. That court held this fit under the FDCPA definition of "debt": "any obligation or alleged obligation of a consumer to pay money arising out of a transaction in which the money, property, insurance, or services which are the subject of the transaction are primarily for personal, family, or household purposes . . ." *Haddad*, 698 F.3d 290, 293.

In response, Alpha cites a Civil Court case from the City of New York, *Barry v. Board of Mgrs. Of Elmwood Park Condominium II*, 18 Misc.3d 559, 853 N.Y.S.2d 827 (2007), which acknowledged the trend to expand the FDCPA to include the collection of condominium association dues, but held the monthly assessments were are statutory obligation to pay imposed on each unit, rather than a "debt" under the FDCPA. Objection to MPSJ, pp. 10-11. Alpha requests this Court go against the trend and adopt the reasoning of the *Barry* court. However, the trend is not only overwhelming, but the holding in those cases that these dues are a "debt" is quite persuasive. As such, this Court finds the assessments in this case are a debt under the FDCPA. However, as Alpha is not a debt collector, the motion for summary judgment must be denied. Because the Court does not find Alpha to be a debt collector under the FDCPA, the Court will not analyze Chaney's claims that Alpha used misleading misrepresentations, improper notice, or attempted to collect amounts it was not entitled to collect under that Act.

V. CONCLUSION AND ORDER.

For the reasons stated above,

IT IS HEREBY ORDERED Chaney's and Alpha's Motions to Strike are DENIED except as to the one limited area in each motion which was GRANTED.

IT IS FURTHER ORDERED Chaney's Motion for Partial Summary Judgment is DENIED.

Entered this 11th day of April, 2013.

_____
John T. Mitchell, District Judge

Certificate of Service

I certify that on the _____ day of April, 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 #**
Peter J. Smith	664-4125	Steven C. Wetzel	664-1684

Hon. John P. Luster, via email
Hon. Benjamin R. Simpson, via email

_____
Jeanne Clausen, Deputy Clerk