STATE OF IDAHO)
County of KOOTENAI)ss

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CLERK OF DISTRICT COURT

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Deputy

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE

STATE OF IDAHO IN AND FOR THE COUNTY OF KOOTENAI

R&R LEASING, LLC, an Idaho Limited Liability Company; WILLIAM RADOBENKO and JULIE REDOBENKO, husband and wife,

Plaintiffs,

vs.

GLACIER BANK, a Montana Bank and sucessor in interest by merger to Mountain West Bank,

Defendant.

Case No. **CV 2012 3928**

MEMORANDUM DECISION AND ORDER DENYING DEFENDANT GLACIER'S MOTION FOR SUMMARY JUDGMENT

I. PROCEDURAL HISTORY AND FACTUAL BACKGROUND.

A. Procedural History.

This matter is before the Court on defendant Glacier Bank's (Glacier) Motion for Summary Judgment filed December 28, 2012. Oral argument on the motion was held May 21, 2013.

Glacier's motion requests entry of summary judgment on all plaintiffs' R&R Leasing, LLC (R&R), William Radobenko and Julie Radobenko, (together Radobenko) (collectively, plaintiffs) claims for listed in the Complaint. Motion for Summary Judgment, p. 1. Accompanying Glacier's motion was a Memorandum in Support of Defendant's Motion for Summary Judgment Against Plaintiffs and an Affidavit in Support of Defendant's Motion for Summary Judgment.

On January 15, 2013, plaintiffs filed their Memorandum in Opposition to Defendant/Courterclaimant Glacier Bank's Motion for Summary Judgment, an Affidavit

of William Radabenko, an Affidavit of John F. Magnuson filed January 15, 2013, and a Second Affidavit of John F. Magnuson filed January 16, 2013. On January 23, 2013, Glacier filed Defendant's Memorandum in Opposition to Plaintiffs' Motion to "Alter Timelines" and Reply in Support of its Motion for Summary Judgment.

Plaintiffs argue that the contract at issue is two-fold. Memorandum in Opposition, pp. 19-20. First, plaintiffs claim the first part of the contract is the Promissory Note for a three-year, five million dollar loan, signed by R&R in 2008. *Id.*, p. 20. Second, plaintiffs argue the remaining part of the contract is the Memorandum of Agreement (MOA), executed by plaintiffs and Glacier on March 7, 2011. *Id*. Complaint, Exhibit A.

B. Factual Background.

On December 12, 2008, Mountain West Bank (MWB) loaned $5,000,000.00 to R&R in exchange for a promissory note in that amount. Memorandum in Support, p. *2,* ¶¶ 1-2; Affidavit of Richard Brittain, p. 2, ¶ 4, Exhibit 2. The note stated:

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

Affidavit of Richard Brittain, p. 2, ¶ 4, Exhibit 2. The interest rate is four percent. *Id.* Glacier Bank (Glacier) is a Montana state bank which is successor in interest by merger to MWB, and was substituted for MWB by stipulation filed July 9, 2012. Stipulation Regarding Defendant's Motion to Strike Part of Complaint, Substitute Defendant, and Add Additional Parties, p. 1, ¶ 1. Glacier also claims other consideration for the loan included deeds of trust on certain real property and personal guaranties by William and Julie. Memorandum in Support, p. *2,* ¶¶ 3-5. Plaintiffs claim loan number 0807300876

refers to the 2008 Mountain West Bank (MWB) loan to R&R, a three-year loan for $5,000,000 at 4% interest. Memo in Opposition, *p.* 2. The payment schedule for the Loan was a monthly payment consisting only of interest, the principal to be due at the maturity date of September 10, 2011. *Id*.

Prior to that maturity date, a "Memorandum of Agreement" (MOA) dated March 7, 2011, was signed by Rich Brittain, Senior Vice President of MWB, William Radobenko, Marshall Chesrown, and Walt Haneke (president of Cougar Bay Water Association). Signatures of Chesrown and Haneke are explained as follows.

Before the December 12, 2008, loan at issue in this case between R&R/Radobenkos and MWB/Glacier, the Radobenkos, through an entity called BRMC Properties, LLC, (BRMC) had a banking relationship with MWB. Affidavit of William Radobenko, p. 3, ¶ ¶ 8, 9. R&R (Radobenkos) independently owned one-half of BRMC, the other half was owned by Marshall Chesrown. *Id.,* ¶ 10. BRMC borrowed nine million dollars from MWB as a construction loan on and secured by 30 lots in Sunup Bay on Lake Coeur d'Alene. *Id.,* pp. 3, 4, ¶ 11. An issue in that Sunup Bay development was the water system for those lots which was owned by Cougar Bay Ridge Water, LLC. *Id.,* p. 4, ¶ 15. On February 8, 2011, William Radobenko met with Brittain, and Brittain proposed to pay William Radobenko $150,000 to settle the issues related to the water system of Cougar Bay Ridge Water. *Id.,* p. 16. William Radobenko's affidavit states: "Because R&R independently owed MWB under the terms of the subject Loan, which was maintained in a current status by R&R at that time, and since the subject Loan was maturing later in the same calendar year of 2011 (on September 10, 2011), I advised Mr. Brittain that any resolution of the BRMC

transaction would require a resolution of the R&R loan on terms acceptable to me." *Id.,* p. 5, ¶ 17.

Back to the March 7, 2011, MOA in the present case. The MOA reads in part:

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

Affidavit of William Radobenko, Exhibit B, p. 2 (Radobenko Aff.). Plaintiffs state the MOA was proposed by Rich Brittain (Brittain), Senior Vice President of MWB, primarily to deal with another loan to from MWB to BRMC Development, Inc. and BRMC Properties, LLC, entities in which William and Julie, along with another gentleman, have equal ownership interests. *Id*., p. 3. Brittain proposed MWB pay $150,000 to William and Julie to settle a water system ownership dispute in relation to the BRMC property so MWB may execute a deed in lieu of foreclosure to settle the loan. *Id*., pp. 4-5. One of William and Julie's conditions for a settlement of the BRMC loan was the R&R Loan would be resolved as well. *Id*., p. 5. In the resulting MOA, the BRMC loan was settled and the R&R Loan resulted in the above language, which Plaintiffs claim became the second part of the contract between them and MWB, extending the maturity date for another three years, with monthly payments of only the loan interest, as the original loan was structured. Memorandum in Opposition, p. 20.

On March 25, 2011, plaintiffs received a letter from Brittain. Radobenko Aff., Exhibit C. The letter stated MWB had "agreed to renew your loan on a rolling one year maturity for three years" subject to some additional terms and conditions. *Id*. The additional terms were: 1) the loan would continue to be charged an interest rate of WSJ prime rate plus 0%; 2) the loan would be kept current and not be delinquent or in default; 3) all the guarantors' and company financial information be submitted in a

timely fashion; and 4) during the first year the bank would agree to a $250,000 discount of the note if the loan is refinanced out of the bank. *Id*. Plaintiffs argue this letter was an attempt by Brittain, as an agent of MWB, to "unilaterally renegotiate terms to which MWB had committed", primarily because instead of agreeing to a single three-year renewal as allegedly contemplated by the MOA, Brittain stated that MWB agreed to a rolling one-year maturity for three years. Memo in Opposition, p. 21.

On September 6, 2011, a "Change in Terms Agreement" (CTA) was signed by William and Julie Radobenko, both as managers for R & R Leasing, LLC. Brittain Affidavit, p. 4, ¶ 14, Exhibit C. The CTA references loan number 0807300876, and states R&R Leasing LLC as "[b]orrower will pay the loan in one payment of all outstanding principal plus accrued unpaid interest on October 10, 2011." *Id.* The maturity date of the loan was extended to October 10, 2011. *Id.* No representative of MWB (or its successor, Glacier) signed the CTA.

In a nutshell, Glacier claims plaintiffs are in default on the original loan and Note, as modified by the CTA, making all amounts due on October 10, 2011. On the other hand, plaintiffs claim they are not in default on the original Note, as modified by the MOA, which extended the original loan and Note for three additional years after September 2011. William Radobenko states that R&R Leasing has at all times made all interest payments under the loan and is not in default on the loan. Radobenko Affidavit, p. 15, ¶¶ 56 and 57. Glacier has not contradicted that fact.

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. ANALYSIS.

A. Breach of Contract.

Glacier specifically moved for summary judgment against plaintiffs on their claims that Glacier breached the terms of the loan documents. Memorandum in

Support of Defendant's Motion for Summary Judgment Against Plaintiffs, pp. 5-12. Plaintiffs countered, claiming their claims for breach of contract survive summary judgment. Memorandum in Opposition to Defendant/Counterclaimant Glacier Bank's Motion for Summary Judgment, pp. 19-25. Glacier responded to plaintiffs' arguments. Defendant's Memorandum in Opposition to Plaintiffs' Motion to "Alter Timelines" and Reply in Support of its Motion for Summary Judgment, pp. 7-12.

Glacier states on December 12, 2008, it extended credit to R&R in the amount of $5,000,000 in exchange for a promissory note. Memorandum in Support, p. 2, ¶¶ 1-2 (Memo in Support); Affidavit of Richard Brittain, ¶ 4 (Brittain Aff.). Glacier also claims other consideration for the loan included deeds of trust on certain real property and personal guaranties by William and Julie. *Id*. at 2; ¶¶ 3-5. Glacier claims plaintiffs are in default on their obligations pursuant to the Note and personal guaranties. *Id*. at 3, ¶ 6; Brittain Aff., ¶ 13. Finally, Glacier claims the Change in Terms Agreement (CTA) signed September 6, 2011, is part of the Note and states plaintiffs will pay all outstanding principal plus interest on October 10, 2011. *Id*. at 3, ¶ 7.

Glacier simply argues when the CTA was executed, the maturity date was only extended from September 10, 2011, to October 10, 2011. *Id*. at 6. Specifically, Glacier points to the following provision:

> CONTINUING VALIDITY. Except as expressly changed by this Agreement, the terms of the original obligation or obligations, including all agreements evidenced or securing the obligation(s) remain unchanged and in full force and effect. Consent by lender to this Agreement does not waive Lender's right to strict performance of the obligation(s) as changed, nor obligate Lender to make any future change in terms. Nothing in this Agreement will constitute a satisfaction of the obligation(s). It is the intention of Lender to retain as liable parties all makers and endorsers of the original obligation(s), including accommodation parties, unless a party is expressly released by Lender in writing. Any maker or endorser, including accommodation makers, will not be released by virtue of this Agreement. If any person who signed the original obligation does not sign this Agreement below,

> then all persons signing below acknowledge that this Agreement is given conditionally, based on the representation to Lender that the non-signing party consents to the changes and provisions of this Agreement or otherwise will not be released by it. This waiver applies not only to any initial extension, modification or release, but also to all such subsequent actions.

Id., p. 6-7; Affidavit of Richard Brittain, Exhibit C.

Glacier's primary argument is the CTA and the 2008 promissory note constitute an integrated agreement setting forth an unconditional promise to pay Glacier the principal amount in full at the maturity date of October 11, 2011. *Id*., p. 7. Glacier argues the integrated agreement constructed from the two documents is not ambiguous so the parol evidence rule applies and the "letters" dated March 7, 2011, and March 25, 2011, stating the terms of such, should not be considered. *Id*.

It is simply not the truth when Glacier's counsel writes: "Plaintiffs argue that Exhibits A [March 7, 2011, MOA] and B to the Complaint, copies of letters from Glacier, are agreements by Glacier to extend their obligations beyond the original maturity date of Exhibit 2 [the note, Exhibit 2 to Brittain Affidavit]." Memorandum in Support of Defendant's Motion for Summary Judgment, p. 5. (underlining added). Granted, Exhibit B to the Complaint is a "letter", a letter by Glacier's Brittain, which this Court finds is nothing more than a unilateral attempt to modify the March 7, 2011, MOA. However, the lack of candor exhibited by Glacier is the fact that the March 7, 2011, MOA is not a "letter from Glacier" in any way shape or form; it is not a "letter" at all; it is an *agreement* captioned "MEMORANDUM OF AGREEMENT" between Glacier (signed by Rick Brittain), signed by William Radobenko and signed by Marshall Chesrown.

Glacier states when a written instrument is complete on its face and unambiguous, any extrinsic evidence of prior or contemporaneous representations or negotiations are inadmissible if used to contradict, vary, alter, add to or detract from the

instrument's terms, under *Howard v. Perry*, 141 Idaho 139, 106 P.3d 465 (2005). *Id*. Glacier also states an unambiguous contract must be given its plain meaning and because it argues this integrated agreement is unambiguous, it must be given its plain meaning. *Id*., pp. 7-8. As such, Glacier claims the outstanding principal, plus all accrued interest, was due on October 10, 2011, and failure of plaintiffs to remit payment on that date was a default of the Loan. *Id*., p. 8.

Glacier acknowledges plaintiffs' argument that the March 7, 2011, MOA and the March 25, 2011, letter from Brittain to William Radobenko (discussed below) evidence an agreement. However, Glacier claims this argument has previously been submitted to and ultimately rejected by the Idaho Supreme Court in *Idaho First National Bank v. David Steed and Associates, Inc.*, 121 Idaho 356, 825 P.2d 79 (1992) regarding the parole evidence rule. *Id*. Glacier cites that case as authority for its argument that the March 7, 2011, MOA and Brittain's March 27, 2011, letter, are both parol evidence and cannot be used to contradict the terms of the Note. *Id.*, pp. 8-9. However, Glacier's interpretation of *Idaho First National Bank v. Steed* is too narrow, certainly as far as the March 7, 2011, MOA is concerned. In *Steed*, the defendant attempted to use a letter from the plaintiff bank to overcome summary judgment on its counterclaim for breach of the covenant of good faith and fair dealing. 121 Idaho 356, 360, 825 P.2d 79, 83. The letter stated the plaintiff bank had approved the request for changes in the structure of defendant's credit lines with the bank and further highlighted some of the changes. *Id*. The letter also confirmed the maturity date, which was at issue in the case. *Id*. The Supreme Court held that "to the extent the statement concerning principle payments in the Bank's letter of January 1985 conflicts with the loan agreement, the trial court properly refused to consider the letter under the parol evidence rule." *Steed*, 121 Idaho

356, 361, 825 P.2d 79, 84. In *Steed*, it was a letter which was at issue, not a separately executed agreement, as in the present case. A separate contract, read together with the original promissory note, is not subject to the parol evidence rule because it is part of the overall contract, and is not extrinsic evidence about the contract. Thus, Glacier's reliance on the holding in *Steed* is misplaced, and Steed bears no weight as to the March 7, 2011, MOA.

In their argument, plaintiffs claim the relevant language indicating the existence of a contract in the MOA is:

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

Affidavit of William Radobenko, Exhibit B, p. 2 (Radobenko Aff.).

According to plaintiffs, loan number 0807300876 refers to the 2008 Mountain West Bank (MWB) loan to R&R, a three-year loan for $5,000,000 at 4% interest. Memo in Opposition, *p.* 2. The payment schedule for the Loan was a monthly payment consisting only of interest, the principal to be due at the maturity date of September 10, 2011. *Id*. Again, plaintiffs state the MOA was proposed by Rich Brittain (Brittain), Senior Vice President of MWB, primarily to deal with another loan to from MWB to BRMC Development, Inc. and BRMC Properties, LLC, entities in which William and Julie, along with another gentleman, have equal ownership interests. *Id*., p. 3. Brittain proposed MWB pay $150,000 to William and Julie, to settle a water system ownership dispute in relation to the BRMC property so MWB may execute a deed in lieu of foreclosure to settle the loan. *Id*., pp. 4-5. One of William and Julie's conditions for a settlement of the BRMC loan was the R&R Loan would be resolved as well. *Id*., p. 5. In the resulting MOA, the BRMC loan was settled and the R&R Loan resulted in the

above language, which plaintiffs claim became the second part of the contract between them and MWB, extending the maturity date for another three years, with monthly payments of only the loan interest, as the original loan was structured. Memorandum in Opposition, p. 20.

Again, plaintiffs argue on March 25, 2011, they received a letter from Brittain. Radobenko Aff., Exhibit C. The letter stated MWB had "agreed to renew your loan on a rolling one year maturity for three years" subject to some additional terms and conditions. *Id*. The additional terms were: 1) the loan would continue to be charged an interest rate of WSJ prime rate plus 0%; 2) the loan would be kept current and not be delinquent or in default; 3) all the guarantors' and company financial information be submitted in a timely fashion; and 4) during the first year the bank would agree to a $250,000 discount of the note if the loan is refinanced out of the bank. *Id*. Plaintiffs argue this letter was an attempt by Brittain, as an agent of MWB, to "unilaterally renegotiate terms to which MWB had committed" primarily because instead of agreeing to a single three-year renewal as allegedly contemplated by the MOA, Brittain stated that MWB agreed to a rolling one-year maturity for three years. Memo in Opposition, p. 21. The Court agrees. The March 25, 2011, letter by Brittain has no legal significance.

Plaintiffs also point to a message on January 15, 2012, from MWB's Senior Vice President Paula Smyly (Smyly) to MWB's Loan Committee which states:

> While we [MWB] agreed to three one-year renewals to gain cooperation on the BRMC credit, there is a 'solvency' clause that was in the 'agreement letter' with Bill [Radobenko]. We are waiting for appraisals and want to meet with Bill (with Rich) to determine reasonableness of solvency moving forward. We are waiting for final pieces of financial information, but likely not have this resolved prior to 10/31 when it would be reportable.

Id. at 21; Second Affidavit of John Magnuson, Exhibit C.

Plaintiffs argue Smyly's statement is proof of a few things; namely, 1) MWB did indeed have an obligation to renew the Loan, and 2) MWB had the intent all along to breach the obligation to plaintiffs as Smyly's statement regarding a "solvency clause" pursuant to an "agreement letter" (the March 25th letter) indicates at the very least Brittain believed MWB had the discretionary authority to terminate its renewal based on its determination of plaintiffs' "solvency" which plaintiffs argue was not part of the MOA contract. *Id*. at 21-22.

Plaintiffs also claim between March 2011 and September 2011 Radobenko exchanged a number of e-mails with Smyly and Brock Olson (Olson) of MWB regarding the status of the Loan renewal, e-mails in which both Olson and Smyly appear to refer specifically to the "R&R . . . renewal." *Id*. at 6-7. Radobenko Aff., Exhibits D-H. Plaintiffs allege William was told by Olson that MWB required appraisals be done prior to the renewal of the Loan for regulatory compliance, but by September 2, 2011, the required appraisals had been ordered, but not yet completed. *Id*. at 7. Plaintiffs claim William and Smyly met the following week, prior to the September 11, 2011, original maturity date to discuss the status of the renewal. *Id*. at 7; Radobenko Aff. Plaintiffs allege at that meeting Smyly advised William: 1) for regulatory purposes, the loan would have to be extended, prior to its maturity date of September 11, 2011, in order for the Loan to not be classified as in "default," 2) without the required appraisals, the Loan could not be extended the full agreed-upon three-year term, 3) as such, the Loan would need to be extended for an interim period, for regulatory compliance, until the appraisals could be completed, in order to keep the Loan in "current" status, and 4) therefore, R&R would need to sign a loan extension document, which would extend

the loan for thirty (30) days, to allow the appraisals to be completed. *Id* at 8; Radobenko Aff. That loan extension document was the CTA. *Id*.

The CTA was executed by plaintiffs on September 6, 2011. Radobenko Aff., Exhibit I, p. 2. Plaintiffs claim they signed the CTA on the representations made by Smyly as noted above. *Id*. Plaintiffs claim on September 12, 2011, Olson advised William via e-mail that in order to process the thirty-day extension, MWB would need to collect interest and documentation/preparation fees in the amount of $14,045.20, an amount allegedly paid by plaintiffs. *Id*. Plaintiffs then claim the appraisals were thereafter completed and the property was valued at an actual loan-to-value ratio of approximately 67%. Memo in Opposition, p. 9. However, plaintiffs state on October 28, 2011, they received a letter from Brittain stating MWB's assessment of R&R's financial condition was R&R was either insolvent or very near and several weaknesses had been identified, including decline in personal credit rating, declining asset values, declining global cash flow, pending foreclosures, negative debt service coverage and outstanding personal judgments in excess of $9,000,000. Radobenko Aff., Ex. L, p. 1. The letter also stated Brittain wished to meet with William and Julie to discuss those issues. *Id*. Plaintiffs claim on November 2, 2011, William responded to Brittain's letter and subsequently met with Brittain on November 7, 2011. Memo in Opposition, p. 10. After the meeting, plaintiffs state William wrote an e-mail to Brittain with an overview of what was covered in the meeting, including, among other things, the representations that R&R is not insolvent or near insolvency, there is no negative debt service coverage, there has been no decline in asset value to debt since Spring 2011, there is no outstanding personal judgment for $9,000,000 and essentially, MWB's representation of R&R's financial condition was incorrect. Radobenko Aff., Ex. N. Plaintiffs then claim

on November 7, 2011, despite the above discussions and despite the agreement of March 7, 2011, Brittain sent William an e-mail in which Brittain stated he and William simply cannot agree and, "An interest only loan does not work for us [MWB] at this time." Memorandum in Opposition, p. 10; Radobenko Aff., Ex. O. Plaintiffs claim William responded to the e-mail, inquiring as to what information was found to be disagreeable. *Id*. at 10, Radobenko Aff., Ex. P. On November 8, 2011, Brittain informed William the Loan had been transferred to R&R's Special Assets Department. *Id*. at 11, Radobenko Aff., Ex. Q. Plaintiffs state William met with Brittain again on November 17, 2011, with Brittain informing William "an interest-only loan" no longer worked for MWB. *Id*. at 11; Radobenko Aff., ¶ 45. On November 28, 2011, Brittain sent a letter to William advising him the CTA had within it a default interest rate and only extended the Loan for 30 days. *Id*. at 12, Radobenko Aff., Exhibit S. Between November 28, 2011, and April 3, 2012, communications continued between plaintiffs and Brittain. *Id*. at 12-13. On April 3, 2012, Brittain wrote William and advised him Brittain "could not get your loan renewed." *Id*. at 13; Radobenko Aff., Ex. X. Plaintiffs claim on May 4, 2012, MWB provided R&R with a "Demand and Acceleration Notice," (Demand) which stated the reasons for such were 1) the deteriorating financial condition of the guarantors, 2) the failure to reduce the principal on the Loan, and 3) MWB's belief the prospects for getting repaid on the note were impaired. *Id*. at 13; Radobenko Aff., Ex. Y. Plaintiffs argue the Demand did not take into account the MOA and, thus, was an incorrect statement, the Demand was based on a non-existent promissory note, under the MOA terms, no default had occurred and the Demand's statements regarding the financial condition of R&R was factually incorrect. *Id*. at 13-14. Plaintiffs claim that throughout the life of the Loan, under the terms of the MOA,

they have always made timely and full payments due (interest). *Id*. at 14; Radobenko Aff.

Based on the above information, plaintiffs argue the MOA was in fact part of the Loan contract and, by its terms, the Loan was extended an additional three-year period through September 10, 2014, with R&R making interest-only payments until the principal amount became due at that maturity date. *Id*. at 20. Plaintiffs agree with Glacier that a breach of contract claim requires an agreement creating a contractual duty that, if materially breached, would entitle the plaintiffs to relief sought, under *Idaho Wool*. *Id*. at 19. Plaintiffs state they have accomplished such through the execution of the initial promissory note and then the subsequent execution of the MOA. *Id*. at 20. Plaintiffs argue the word "shall" in the MOA provision regarding the extension of the Loan bestowed on MWB a contractual duty to extend the Loan for an additional three years under the same terms as the promissory note, including interest-only monthly payments. *Id*.

Plaintiffs also claim once the MOA was executed on March 7, 2011, Brittain, on behalf of MWB, could not unilaterally modify the terms of that agreement via Brittain's March 25, 2011, letter, by trying to make the extension not one three-year extension but three one-year extensions. *Id*., p. 21. Again, this Court agrees.

In a suit regarding a contract, "the burden of proving the existence of a contract and the fact of its breach is upon the Plaintiff, and once those facts are established, the Defendants have the burden of pleading and proving affirmative defenses, which legally excuse performance." *Idaho Power Co. v. Cogeneration, Inc.*, 134 Idaho 738, 747, 9 P.3d 1204, 1213 (Idaho 2000). Contract formation requires mutual assent, a "distinct understanding common to both parties." *Thompson v. Pike*, 122 Idaho 690, 696, 838

P.2d 293, 299 (1992). This manifestation of mutual intent to contract takes the form of an offer and acceptance. *P.O. Ventures, Inc. v. Loucks Family Irrevocable Trust*, 144 Idaho 233, 238, 159 P.3d 870, 875 (2007). The statute of frauds under I.C. §9-505 also is relevant when there is a "promise or commitment to lend money or to grant or extend credit in an original principal amount of fifty thousand dollars ($50,000) or more, made by a person or entity engaged in the business of lending money or extending credit." I.C.§ 9-505. The statute of frauds states that such agreements are invalid, "unless the same or some note or memorandum thereof, be in writing and subscribed by the party charged, or by his agent." *Id*.

Breach of contract has been defined as:

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

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

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

In this case, as stated above in *Idaho Power*, it is the burden of plaintiffs to prove the existence of a contract extending the maturity date on the Loan. In viewing the facts in the light most favorable to plaintiffs, the non-moving party, an offer was made in the form of the MOA, sent from Brittain to William on March 7, 2011, and accepted by Brittain on behalf of MWB, via his signature, on that same date. Radobenko Aff., p. 5, ¶ 18, Ex. B. Both Brittain, on behalf of MWB, and William signed the MOA, satisfying the statute of frauds under I.C. § 9-505. It seems both parties had a chance to review the document and both signed the document; thus, it appears a meeting of the minds did occur and the MOA is indeed a contract. However, because it is not a complete contract, as vital terms are missing, the question then becomes how the MOA affects the original Note.

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

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

Chicago Trust Bank, 190 Ill. 404, 410-11, 83 Am.St. 138, 60 N.E. 586, 588-89. "When two written contracts are entered into between the same parties concerning the same subject-matter, whether made simultaneously or on different days, they may, under some circumstances, be regarded as one contract, and interpreted together. *Blagen,* 23 Or. 239, 246, 31 P. 647, 650, citing *Dean v. Lawham,* 7 Or. 422; *Kruse v. Prindle,* 8 Or. 158; Bish.Cont. § 165. In *Blagen*, the Oregon Supreme Court found the two contracts were not between the same parties as the first was between a railroad company and the defendants in the Blagen case, where the second contract was between the defendants in the Blagen case and Blagen himself. *Id.* In the present case the first contract (the $5 million load to R&R) was between Glacier and R&R Radobenkos, and the second contract (the March 7, 2011, MOA) was between Glacier and William Radobenko as well as Marshall Chesrown. Glacier and Radobenkos are the common denominators. The first contract involved only Glacier and R&R/Radobenkos, and the second contract modified that first contract but also cleared up a water rights issue in a different contract (a $9 million loan) between Glacier and Radobenkos and Marshall Chesrown. The Court finds the "same parties" requirement has been met. And, If the two contracts differ, then the first contract is held to be modified; if not, then the first contract is enforced according to its terms. *Columbia Trust Co. v. Elkelberger*, 42 Idaho 90, 99, 245 P. 78, 81. In order for a later instrument to rescind an earlier one, there must be a demonstration of mutual intent. *Miller v. Estate of Prater*, 141 Idaho 208, 212, 108 P.3d 355, 359 (2005). General rules of contract interpretation apply; thus, if there is no ambiguity on the issue, it may be decided as a matter of law. *Id*. On the other hand, if an inconsistency between the two instruments creates an ambiguity, then the intent of the parties must be determined through a factual inquiry. *Id.* Amended agreements

should be construed together with the original agreements where possible. *Opportunity L.L.C. v. Ossewarde*, 136 Idaho 602, 607, 38 P.3d 1258, 1263 (2002). The making of a new contract does not necessarily supersede a former contract unless it 1) explicitly rescinds it, 2) deals with the subject matter so comprehensively as to be complete in itself, or 3) is so inconsistent with the first contract that the two cannot be read together. *Id*. When a subsequently executed agreement specifically references and relies on a former agreement, the two agreements must be interpreted together, if possible. *Id.* In *Ossewarde*, the amended purchase agreement was incomplete and specifically referenced the original purchase agreement, the original promissory note and the amended promissory note. *Id*. However, the amended promissory note explicitly rescinded the former promissory note. *Id*. The Idaho Supreme Court held the original and amended purchase agreements were to be construed together, but the amended promissory note stood alone. *Id*.

According to *Columbia Trust* and *Ossewarde* the two agreements must be read together where possible. Under *Ossewarde*, a new contract does not supersede a former contract unless it explicitly rescinds the former contract, deals with the subject matter so comprehensively as to be complete in itself or is so inconsistent with the former contract the two cannot be read together. Here, the MOA specifically references the loan: "Mountain West Bank shall extend or renew loan number 00073009870 at maturity under the same terms of the original 2008 loan and extend a $250,000.00 discount on this loan should the borrower be able to refinance this loan should the borrower be albe to refinance the loan elsewhere during the next twelve months." The MOA clearly does not rescind the Note, and the MOA is not comprehensive enough to be read by itself (as it does not include key components, such as loan amount, interest

rate, etc.). Thus, the MOA and the original loan are two agreements which must be read together.

The question then becomes what the contract terms became when read together. As stated above under *Miller*, general rules of contract interpretation apply, so if there is no ambiguity, then it is a legal question. However, if there is an ambiguity, then the intent of the parties must be determined through a factual inquiry. This is where the issue lies. It can be argued the extension of the loan "under the same terms of the original 2008 loan" could be ambiguous, as the original Note did not have a set term, just a set maturity date. This Court concludes there cannot be any question that an extension was agreed to. However, there is a question as to what the extension entailed. The intent of the parties must be determined through a factual inquiry under *Miller*. That inquiry alone allows this issue to survive summary judgment, as there is a material factual dispute as to the terms of the extension which will determine whether or not MWB breached the contractual terms of that extension.

Finally, Glacier argues when the CTA was executed on September 6, 2011, it became a fully integrated agreement with the original Note, containing an unconditional promise to pay the principal amount, plus all accrued interest on October 10, 2011. Memo in Support, pp. 7-8. Glacier specifically points to the clause which states:

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

Id. at 7; Brittain Aff., Ex. C. Glacier argues this clause expressly states the terms of the original Note were unchanged, except as provided by the CTA, which served only to extend the due date to October 10, 2011. *Id*. at 7.

The flaw in Glacier's logic is when the CTA was executed, another contract (the MOA) had already been executed and was in effect as well, making it part of the original obligation. As such, all the above provision in the CTA did was state the Note and the MOA were unchanged, except as provided in the CTA.

The question now becomes whether the provision in the CTA regarding the maturity date trumps MWB's prior obligation to extend the Loan in the MOA. The pertinent provision of the MOA states: "Mountain West Bank shall extend or renew loan number 0807300876 at maturity under the same terms of the original 2008 loan . . ." Radobenko Aff., Ex. B, p. 2. The CTA states: "Borrower will pay this loan in one payment of all outstanding principal plus all accrued interest on October 10, 2011." *Id*. at Ex. I. The original maturity date for the Loan was September 10, 2011. *Id*. at Ex. A, p. 1.

The logical interpretation of the two documents together clearly suggests the Loan maturity date was extended from September 10, 2011, to October 10, 2011, via the CTA. However, the language "extend or renew loan number 0807300876 *at maturity*" is instructive. At the maturity date (whenever that would be), MWB would be required to extend or renew the Loan for another three years, pursuant to the same provision. The MOA does not give a specific maturity date (which is partially why the MOA must be read with the original Note), but instead, the MOA states whenever the Loan matures, MWB was required to extend the Loan. The CTA simply extended the maturity date of the original Note to October 10, 2011. When October 10, 2011, arrived, per the MOA, the Loan should have been extended for another three years. This did not happen, and, thus, it certainly appears MWB (Glacier) breached the contract, not plaintiffs. As such, summary judgment for Glacier must be denied.

Glacier argues there was another breach by plaintiffs according to the Adverse Change default provision of the Loan, which identifies one of the default events as "[a] material change occurs in Borrower's financial condition, or Lender believes that the prospect of payment or performance of this Note is impaired." Reply, p. 8. Glacier points to letters from Brittain to Radobenko as support. Radobenko Aff., Ex. L, Ex. S. The first letter, dated October 28, 2011, identified a number of weaknesses in plaintiffs' financial condition found by MWB. The second letter, dated November 28, 2011, further discussed plaintiffs' financial situation and provided options for loan restructuring. *Id*.

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

The first letter identified by Glacier is dated October 28, 2011, eighteen days after the new maturity date, eighteen days after the Loan should have been renewed already, pursuant to the MOA. Glacier is attempting to argue plaintiffs breached first by having an "adverse change" in their financial condition, excusing performance, but in fact the bank breached first by not extending the Loan on October 10, 2011. Glacier's argument simply has no merit.

B. Fraud.

Plaintiffs' Complaint does not specifically allege a separate cause of action for fraud. As such, Glacier did not discuss fraud in its Memorandum in Support of Defendant's Motion for Summary Judgment Against Plaintiffs. Plaintiffs discussed the issue of fraud in the inducement in its reply brief. Memorandum in Opposition to Defendant/Counterclaimant Glacier Bank's Motion for Summary Judgment, pp. 27-30. Glacier then responded claiming the elements of fraud have not been established by

plaintiffs. Defendant's Memorandum in Opposition to Plaintiffs' Motion to "Alter Timelines" and Reply in Support of its Motion for Summary Judgment, pp. 12-15.

Idaho Rule of Civil Procedure 9(b) requires a party alleging fraud to plead the factual circumstances constituting fraud "with particularity." *Galaxy Outdoor Adver. v. Idaho Transp. Dep't*, 109 Idaho 692, 696, 710 P.2d 602, 606 (1985). That rule states:

> [f]raud, mistake, condition of the mind, violation of civil or constitutional rights: In all averments of fraud . . . the circumstances constituting fraud . . . shall be stated with particularity. Malice, intent, knowledge, and other condition of mind of a person may be averred generally.

In order to establish fraud, nine elements must be shown: 1) a representation of fact, 2) its falsity, 3) its materiality, 4) the speaker's knowledge of its falsity, 5) the speaker's intent that the representation will be acted upon in a reasonably contemplated manner, 6) the listener's ignorance of its falsity, 7) the listener's reliance on the truth of the representation, 8) the listener's right to rely on the truth of the representation, and 9) the listener's consequent and proximate injury. *McCoy v. Lyons*, 120 Idaho 765, 777, 820 P.2d 360, 372 (1991).

There have been multiple Idaho cases regarding fraud. Conclusory statements, without more, are insufficient for fraud pleadings. *Witt v. Jones*, 111 Idaho 165, 168, 722 P.2d 474, 477 (1986). In *Witt*, the plaintiff made a conclusory allegation that "devious tactics [were] imposed to Defendants to thwart Plaintiff," without stating particular factual allegations disclosing what the "tactics" were, what made them devious or when they were made; thus, the Court held that the fraud had not been pleaded with particularity. *Id*. The party claiming fraud must also provide some credible evidence regarding the fraud to satisfy the particularity requirement. *Kugler v. Drown*, 119 Idaho 687, 689, 809 P.2d 1166, 1168 (Ct. App. 1991). In *Kugler*, the Court held that the fraud had not been pleaded with particularity because the only evidence concerning fraud came from the

plaintiff's deposition stating that he had heard from others that there was undue influence as well as that the party was "tight" with his money. *Id*.

In the present case, plaintiffs' Complaint states:

> 21. MWB induced R&R Leasing to sign the "Change in Terms Agreement" to extend the loan for one (1) month based upon the representations (as previously made) on March 7, 2011 (Exhibit A), and March 25, 2011 (Exhibit B), that the loan would be renewed for three (3) years on the same terms and conditions. In breach of its representations and agreements, including those noted in Exhibit A and B, MWB inserted a new provision into the temporary renewal accomplished by the "Change in Terms Agreement" to add a potential default interest rate at 18.00% per annum.
> 22. In reliance upon the representations previously made by MWB (including those summarized and set forth in Exhibits A and B), Plaintiff R&R Leasing executed the subject "Change in Terms Agreement" to renew the subject loan for a one (1) month period pending final documentation to renew the same for three (3) years.

Complaint, p. 6, ¶¶ 21-22.

This Court finds the allegations set forth in the Complaint meet the particularity requirement, as it indicates where the fraud allegedly occurred and what the alleged fraud consisted of regarding representations made. It certainly contains more information than the vague allegation that "devious tactics" were used or a party was "tight" with money, as was the case in *Witt* and *Kugler*. As such, Glacier's motion for summary judgment on this issue is denied.

C. Breach of Covenant of Good Faith and Fair Dealing.

At the outset, Glacier did specifically move for summary judgment against plaintiffs on their claims that Glacier breached the covenant of good faith and fair dealing. Memorandum in Support of Defendant's Motion for Summary Judgment Against Plaintiffs, pp. 12-14. Plaintiffs countered Glacier's arguments. Memorandum in Opposition to Defendant/Counterclaimant Glacier Bank's Motion for Summary Judgment, pp. 31-32. Glacier responded to plaintiffs' arguments. Defendant's

Memorandum in Opposition to Plaintiffs' Motion to "Alter Timelines" and Reply in Support of its Motion for Summary Judgment, pp. 15-16.

The Idaho Supreme Court has stated "[g]ood faith and fair dealing are implied obligations of every contract." *Luzar v. Western Surety*, 107 Idaho 693, 696, 692 P.2d 337, 340 (1984). The covenant is an objective determination of whether the parties have acted in good faith in terms of enforcing the contractual provisions. *Jenkins v. Boise Cascade Corp.*, 141 Idaho 233, 243, 108 P.3d 380, 390 (2005). However, the implied covenant of good faith and fair dealing cannot be inconsistent with the agreement executed by the parties. *First Security Bank of Idaho v Gaige*, 115 Idaho 172, 176, 765 P.2d 683, 687 (1988). The covenant does not provide for additional rights not available under the negotiated contract. *Cantwell v. City of Boise*, 146 Idaho 127, 136, 191 P.3d 205, 214 (2008). However, the covenant protects the rights of the parties to an agreement to receive the benefits that they have entered into. *Parker v. Boise Telco Federal Credit Union*, 129 Idaho 248, 256, 923 P.2d 493, 501 (Ct. App. 1996). The denial of a party's rights to those benefits, whatever they may be, breaches the duty of good faith implicit in the contract. *Id*.

Given the analysis above regarding the loan extension and given the nature of the e-mails provided by plaintiffs, at the very least there is a question of material fact as to whether or not the bank acted in good faith. Glacier is correct in their briefing that *Wooden v. First Security Bank of Idaho, N.A.*, 121 Idaho 98, 822 P.2d 995 (1991) holds the covenant "only requires that the parties perform in good faith the obligations imposed by their agreement." 121 Idaho 98, 101, 822 P.2d 995, 998. However, as stated above, there was an agreement in the MOA to extend the Loan for three years after the maturity date, which was not, as Glacier argues, superseded by the CTA, so

MWB did have an obligation to extend the Loan in good faith. The Loan was not extended, at least in Glacier's view, so Glacier's motion for summary judgment on this issue is denied.

D. Specific Performance, Declaratory Relief, Injunctive Relief and Decree of Foreclosure.

It is not necessary to address the issues of specific performance or foreclosure because MWB, not plaintiffs, is in breach, so summary judgment on those issues must be denied.

Glacier argues it should be granted summary judgment on the issues of declaratory relief and injunctive relief because both are remedies, not causes of action. Memo in Support, pp. 15-16. However, it is not necessary to address this as summary judgment is not appropriate in the underlying issue of contractual breach. Summary judgment on these issues is denied.

IV. CONCLUSION AND ORDER.

For the reasons stated above, this Court must deny Glacier's motion for summary judgment.

IT IS HEREBY ORDERED Glacier's Motion for Summary Judgment is DENIED.

Entered this 19th day of June, 2013.

_____
John T. Mitchell, District Judge

Certificate of Service

I certify that on the _____ day of June, 2013, a true copy of the foregoing was mailed postage prepaid or was sent by interoffice mail or facsimile to each of the following:

Lawyer	Fax #	Lawyer	Fax #
John Magnuson	667-0500	R. WAYNE SWENEY	664-4125

_____
Jeanne Clausen, Deputy Clerk