STATE OF IDAHO)
County of KOOTENAI)ss

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AT_____ O'Clock _____M
CLERK OF DISTRICT COURT

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Deputy

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE STATE OF IDAHO IN AND FOR THE COUNTY OF KOOTENAI

DIVERSIFIED EQUITY SYSTEMS, *Plaintiff*, vs. **SHAWN T. MCGLOTHEN,** *Defendant*.	Case No. **CV 2012 8881** **MEMORANDUM DECISION AND ORDER GRANTING PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT**

I. PROCEDURAL HISTORY AND FACTUAL BACKGROUND.

This matter is before the Court on plaintiff Diversified Equity Systems' (DES) Motion for Summary Judgment, filed May 10, 2013, seeking a monetary judgment against defendant Shawn McGlothen (McGlothen) on the balance of a loan in the principal amount of $2,445.13. Brief in Support, p. 1. In its December 7, 2012 Complaint, DES alleges McGlothen is indebted to it on a loan account McGlothen originally had with Cash Call, Inc. (Cash Call), the date of the loan was May 27, 2007. Affidavit of Ilene Ricks, p. 1, ¶ 2, Exhibit A. The Cash Call account was assigned to First Financial Investment Fund IV, LLC (First Financial), and then purchased by DES from CashCall. Complaint, pp. 1-2. In its Complaint, DES seeks the sum of $2,445.13 (outstanding principal), plus $11,293.24 in prejudgment interest, the filing fee of $96.00 and the reasonable attorney fees and costs of $4,808.42, due to McGlothen's failure to make timely payments. Complaint, pp. 2-3. The stated annual percentage rate on this loan is an incredible 96.16% per year. McGlothen apparently signed nothing for the

loan, everything taking place on line. However, at summary judgment, DES only seeks summary judgment on the principal amount of $2,445.13. McGlothen appeared *pro se,* and in January 14, 2013, Answer, denied DES's allegations. Answer, pp. 1-2. This matter is set for a one (1) day court trial on November 4, 2013 at 9:00 a.m.

In addition to its "Motion for Summary Judgment", DES has filed its "Brief in Support of Motion for Summary Judgment" and "Affidavit in Support of Motion for Summary Judgment". McGlothen did not file any responsive memorandum. Oral argument occurred on June 20, 2013. McGlothen appeared pro se. At oral argument, McGlothen stated that he did not recall signing anything, but added that he had discussions with his ex-wife, who recalled the loan.

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 (2000). The non-moving party "must respond to the summary judgment motion with specific facts showing there is a genuine issue for trial." *Id*. In passing on motions for summary judgment, unsworn statements are entitled to no probative weight; mere denials unaccompanied by facts admissible in evidence are insufficient to raise genuine issues of fact. *Camp v. Jiminez*, 107 Idaho 878, 882, 693 P.2d 1080, 1084 (Ct. App. 1984). A summary judgment motion is essentially uncontested when opposed only by an unverified answer, without affidavits. *Golay v. Loomis*, 118 Idaho 387, 389, 797 P.2d 95, 97 (1990). Under such circumstances, there is no evidence cognizable under Rule 56(c) before the court, thus no facts are presented by the non-moving party to raise a material issue of fact. *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. *Id*. at 88. 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.* Neither party to this matter has requested a jury trial. In cases set for a court trial, the Court is entitled to arrive at the most probable inference to be drawn from the undisputed evidence presented. *J.R. Simplot v. Bosen,* 144 Idaho 611, 618, 167 P.3d 748, 755 (2006). "The test for reviewing the inferences drawn by the trial court is whether the record reasonably supports the inferences." *Id.,* citing *Shawver v. Huckleberry Estates, LLC,* 140 Idaho

354, 360-61, 93 P.3d 685, 691-92 (2004).

III. ANALYSIS.

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).

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 part 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)).

With its Motion for Summary Judgment, DES submits the affidavit of Ilene Ricks (Ricks), an employee for DES, who states she is familiar with DES's accounts and the accounts of CashCall. Ricks Aff., p. 1. Ricks does not give her specific job title, nor does she explain the nature of her familiarity with these accounts. Nonetheless. Ricks identifies the relevant CashCall Inc. account number and attaches five exhibits: 1) a loan transaction history for the account, 2) the assignment of accounts from CashCall to First Financial (First Financial), 3) a bill of sale of the account from First Financial to DES, 4) a copy of the promissory note for the account and 5) the certificate of assumed business name for DES. Ricks Aff., pp. 1-2. At first glance, there appears to be a

grave issue with respect to the promissory note, as it has not been signed by McGlothen, the party being charged. Ricks Aff, Exhibit D. However, a closer inspection of I.C. § 9-505, related to contracts required to be in writing, indicates the only remotely applicable subsections are (1) contracts which by its terms is not to be performed within a year, and (5) a promise or commitment to lend money . . . 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. But upon closer inspection of the promissory note, neither of these subsections is applicable. Subsection 1 is not applicable because while the contract does state the final payment will be made over three years after the initial loan is made, it also allows for McGlothen to pay off the loan at any time, without penalty. Idaho courts have held the statute of frauds does not apply to a contract that "might have been fully performed and terminated within a year . . ." *Whitlock v. Haney Seed Co.*, 110 Idaho 347, 348, 715 P.2d 1017, 1018 (Ct.App. 1986) (quoting *Darknell v. Coeur d'Alene & St. Joe Transportation Co.*, 18 Idaho 61, 69, 108 P. 536, 539 (1910)). While it was contemplated in the promissory note here the loan would not be paid off until December 2010, it would have been possible for McGlothen to pay off the loan within a year, thus I.C. § 9-505(1) does not apply. Subsection 5 does not apply because the loan amount here was for $2,525.00, an amount significantly less than $50,000, the statutory minimum for the statute of frauds to apply. As such I.C. § 9-505 does not apply to this promissory note and so McGlothen's lack of signature is not fatal.

Although it is still not entirely certain DES has established the existence of a contract, it is likely it has with the promissory note containing complete terms. As such, DEC has likely established the existence of the contract under *Idaho Power*, both by affidavit and by procurement of evidence of payment on the account via the loan

transaction history. Ricks Aff., p. 2. Ricks has further set forth via the loan transaction history that McGlothen has failed to make timely payments on the account. Though it is not clearly stated, it is inferred this has caused the account to be currently in default on the terms of the promissory note. *Id.* This is likely a breach under *Hughes*. DES requests an order for summary judgment as there is no dispute as to material facts in this matter and states it is entitled to judgment as a matter of law under IRCP 56.

McGlothen has not replied to DES's motion for summary judgment; he previously filed a *pro se* Answer denying DES's allegations. As stated in *Camp* and similarly in *Golay*, unsworn statements, including unverified answers, hold no probative weight regarding motions for summary judgment. *Golay*, 118 Idaho 387, 389, 797 P.2d 95, 97, *Camp*, 107 Idaho 878, 882, 693 P.2d 1080, 1084. Furthermore, in *Golay*, the Court found that with only an unverified answer, the summary judgment motion was uncontested, presenting no issue of material fact. *Golay*, 118 Idaho 387, 389, 797 P.2d 95, 97.

Because McGlothen has not set forth any objections or assertions of disputed, material facts for this Court regarding the outstanding amount owed, the Court must grant summary judgment in favor of DES. There are no conflicting inferences regarding the debt to be drawn from the evidence before the Court and DES is entitled to judgment as a matter of law.

IV. CONCLUSION AND ORDER.

For the reasons stated above, this Court grants summary judgment in favor of plaintiff DES against defendant Shawn McGlothen on the principal amount of the loan, in the amount of $2,445.13.

IT IS HEREBY ORDERED plaintiff DES's motion for summary judgment against

defendant Shawn McGlothen on the principal amount of the loan in the amount of $2,445.13, is GRANTED.

Entered this 20TH day of June, 2013.

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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 #**
Bryan N. Zollinger		Shawn T. McGothen, Pro Se	

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Jeanne Clausen, Deputy Clerk