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**

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| **ROBERT C. SAMUEL, an individual**, *Plaintiff*, vs. **BLACK ROCK DEVELOPMENT, INC., an Idaho Corporation, MARSHALL R. CHESROWN, an individual, et. al.,** *Defendants*. | Case No. **CV 2012 4492** **MEMORANDUM DECISION AND ORDER GRANTING IN PART AND DENYING IN PART PLAINTIFF SAMUEL'S MOTION FOR AWARD OF ATTORNEY FEES AND COSTS AND GRANTING PLAINTIFF'S MOTION TO CERTIFY JUDGMENT** |

## I. PROCEDURAL HISTORY AND FACTUAL BACKGROUND.

This matter is before the Court on plaintiff's Motion for Award of Attorney Fees and Costs and plaintiff's Motion to Certify Judgment.

The Court has previously set forth the factual and procedural history of this case in its January 27, 2013, Memorandum Decision and Order Granting in Part and Denying in Part Samuel's Motion for Summary Judgment:

> On June 15, 2012, plaintiff Robert Samuel (Samuel) filed his Complaint, alleging that on November 8, 2004, he transferred $4,600,000.00 in a loan to defendant Black Rock Development (BRD), that Samuel and BRD entered into a written promissory note for $4,600,000.00, and that BRD executed a Deed of Trust, Security Agreement and Fixture Filing for the "Black Rock 6th Addition" as collateral for the promissory note. Complaint, p. 4 ¶ 13. Chesrown admits all of this. Answer, p. 4, ¶ 13. Samuel alleges the Deed of Trust was recorded on November 9, 2004. Complaint, p. 4, ¶ 14. Chesrown claims to not know if this is true. Answer, p. 4, ¶ 14. Samuel claims defendant Marshall Chesrown (Chesrown) personally executed the Promissory Note as "Guarantor" in the event BRD failed to make payments on the Promissory Note. Complaint, p. 5, ¶ 17. Chesrown admits this. Answer,

p. 5, ¶ 17. Samuel claims Chesrown is a shareholder and Chief Executive Officer of BRD. Complaint, p. 2, ¶ 3. Chesrown admits this. Answer, p. 2, ¶ 2. On August 30, 2007, Samuel states he and BRD entered into the First Addendum to Promissory Note, in which the deadline for full repayment of the Promissory Note was extended from November 8, 2007, to June 1, 2008, while leaving all of the other terms and conditions in effect. Complaint, p. 5, ¶ ¶ 18, 19. Samuel then claims that on March 30, 2008, he and BRD entered into the Second Addendum to Promissory Note, in which 1) BRD reaffirmed the original $4,600,000.00 obligation to Samuel, 2) BRD and Samuel stipulated that $1,000,000.00 had been paid on the original Promissory Note, 3) Samuel agreed to loan BRD an additional $1,000,000.00, and 4) the parties reaffirmed that the due date for repayment was June 1, 2008. Complaint, p. 6, ¶ 20. Samuel states that at the time of the execution of the Addendum, the debt remained secured by 18 of the original 23 improved lots. *Id*. Samuel claims on March 22, 2010, he filed a UCC Financing Statement, identifying those 18 lots. Complaint, p. 6, ¶ 21. Further, Samuel alleges BRD got a loan from defendant Idaho Independent Bank (IIB) in the amount of $9,950,000.00 and that Deeds of Trust securing the loan were recorded on May 27, 2008. Complaint, p. 6, ¶ 22. Samuel also claims defendant Black Rock Homeowner's Association recorded 18 separate homeowners association Claims of Lien against the 18 secured lots identified above. Complaint, p. 6, ¶ 23.

Samuel alleges BRD and Chesrown did not pay the amounts due under the Promissory Note and Addenda, and they did not pay the applicable Kootenai County property taxes as required by the Promissory Note. Complaint, p. 7, ¶¶ 24-25. Samuel alleges essentially three causes of action in its Complaint: 1) breach of contract related to the failure to remit payment due and owning, failure to pay Kootenai County tax assessments, failure to comply with the Loan Documents' Examination of Books and Records provision, and failure to comply with guarantee obligations, 2) breach of the implied covenant of good faith and fair dealing and 3) judicial deed of trust foreclosure. Complaint, pp. 8-9.

BRD and Chesrown filed their Answer on August 6, 2012. Answer, p. 1. In their Answer, BRD and Chesrown admit that on or about November 8, 2004, BRD entered into an original Promissory Note for $4,600,000.00 and executed an original Deed of Trust, Security Agreement and Fixture Filings for "Black Rock 6$^{th}$ Addition" as collateral for the Promissory Note. Answer, p. 4, ¶ 13. BRD and Chesrown further argue the Loan Documents and Promissory Note "speak for themselves regarding the terms therein." Answer, p. 4, ¶¶ 15-16. In addition, BRD and Chesrown admit that BRD executed an Addendum to Promissory Note on or about August 30, 2007, and another Addendum to Promissory Note on or about March 30, 2008. Answer, p. 5, ¶¶ 19-20. As to both Addenda, BRD and Chesrown claim the terms of the Addenda "speak for themselves." *Id*. Both BRD and Chesrown deny the causes of action alleged by Samuel in his Complaint. Answer, pp. 7-9. Finally, BRD and

Chesrown set forth five affirmative defenses: 1) failure to state a claim; 2) claims against Chesrown based on the guaranty are barred due to the terms of the Promissory Note being modified; 3) deficiency judgment is limited by I.C. § 6-101 and § 6-108; 4) Chesrown is not a party to the Deed of Trust and is therefore not contractually bound by its terms and conditions; and 5) Samuel has no right to demand an examination of the books and records of Chesrown. Answer, p. 9.

Samuel filed his Motion for Summary Judgment and supporting memorandum on October 3, 2012. As a result of the alleged breaches by BRD and Chesrown, Samuel seeks summary judgment on his right to foreclose on the secured property, judgment against BRD and Chesrown in the amount of $3,107,080.19 for unpaid principal, $1,460,783.31 for accrued unpaid interest, $148,807.96 for reimbursement of real estate taxes Samuel has paid, and $18,879.88 for attorney fees. Motion for Summary Judgment, p. 1; Memorandum in Support of Plaintiff Robert C. Samuel's Motion for Summary Judgment, p. 9. In his Memorandum, Samuel argues that because BRD and Chesrown have failed to remit full payment under the Promissory Note, they are in breach of their obligations under the Note and under the terms of the Loan Documents. Memorandum in Support of Plaintiff's Motion for Summary Judgment, p. 5. Further, Samuel argues he made payment demands upon Chesrown which were not met by either Chesrown or BRD. *Id*. As a result, Samuel claims that on the Note alone, BRD and Chesrown owe the principal amount of $3,107,080.19 as well the unpaid accrued interest of $1,460,783.31. *Id.,* p. 6.

Samuel also argues BRD's and Chesrown's failure to pay applicable Kootenai County property taxes on "Black Rock 6$^{th}$ Addition" is a breach of the Loan Documents and also forced Samuel to pay the delinquent taxes in the amount of $148,807.96. *Id*. Samuel claims that in addition to the direct cost of paying the delinquent taxes, he is entitled to interest on that amount as an expense paid by the lender in protecting its interest in the property. *Id*. The Default Rate for that amount is alleged to be 12% per annum. *Id*.

Further, Samuel argues BRD and Chesrown breached the covenant against secondary financing by recording a deed of trust against the secured lots with IIB on May 27, 2008. *Id*. Additionally, Samuel claims BRD and Chesrown breached the obligation under the Loan Documents by denying Samuel access to BRD's records. *Id*.

Finally, Samuel argues BRD and Chesrown violated the implied covenant of good faith and fair dealing by failing to pay Kootenai County property tax on the secured properties for four years and denying Samuel access to the financial records of BRD and Chesrown, as allowed under the Loan Documents. Memorandum in Support of Plaintiff's Motion for Summary Judgment, p. 7.

On October 23, 2012, BRD and Chesrown filed their Memorandum in Response to and in Opposition to Plaintiff's Motion for Summary Judgment. Memorandum in Response to Plaintiff's Motion for Summary Judgment, p. 1. In their response, BRD and Chesrown claim that: 1) Chesrown, in his individual capacity, did not execute either the August 30, 2007, Addendum to the Promissory Note or the March 30, 2008, Second Addendum to the Promissory Note, but that only BRD had done so; 2) Chesrown, in his individual capacity, did not execute the Deed of Trust and so is not bound by the terms of such; and 3) Samuel has no right to examine the books and records of Marshall Chesrown individually. *Id.,* p. 2. BRD and Chesrown argue that Chesrown did not violate the covenant of good faith and fair dealing because he since did not execute, in an individual capacity, the Addenda to the Promissory Note and the Deed of Trust, he is not required to perform under those documents. *Id*. Regarding the issue of judicial foreclosure, BRD and Chesrown argue that such an issue is governed by I.C. § 6-101 and § 6-108 and as such, any deficiency judgment awarded to Samuel is required to take into account the value of the property being foreclosed upon. *Id.,* p. 6. Chesrown has estimated the value of the property in this case to be $3,177,300. *Id.,* p. 7. Next, BRD and Chesrown argue that the legal rate of interest is governed by I.C. § 28-22-104(2), which states the current rate through June 30, 2013, is 5.250%. *Id.,* p. 8. Finally, BRD and Chesrown object to certain costs claimed by Samuel, including Westlaw charges. *Id.,* p. 9.

On October 31, 2012, Samuel filed his Reply to Defendants' Opposition to Motion for Summary Judgment. Plaintiff's Reply to Defendants' Opposition to Motion for Summary Judgment, p. 1. Samuel argues that Chesrown signed, in his individual capacity, the original Promissory Note which expressly incorporates the terms of the Deed of Trust and therefore Chesrown's guarantee of the Promissory Note operates as a guaranty under the terms of the Deed of Trust. *Id.,* p. 2. Further, Samuel claims that both Addenda to the Promissory Note contain the clause "Maker and Payee hereby agree all other terms of said Note with the exception of the <u>above</u> written shall remain in full force and effect," therefore, since neither Addendum mentioned the personal guarantee of the Promissory Note, that the guarantee remained in full force and affect, without any alteration. *Id*. (emphasis added).

Second, Samuel argues that the Deed of Trust grants him access to the records of BRD "and its affiliates" and that Chesrown, as the controlling shareholder, President and CEO was an affiliate of BRD, therefore Samuel did have a right to access Chesrown's books and Chesrown's denial of such access was a breach of the implied covenant of good faith and fair dealing. *Id.,* pp. 3-4.

Third, Samuel claims that with respect to the issue of deficiency, I.C. § 45-1512 does not protect guarantors of secured debt, thus it provides no protection to Chesrown. *Id.,* p. 5. In addition, Samuel states that he is not required to go to BRD first, and that foreclosure may only be

necessary if Chesrown's assets are insufficient to satisfy the debt. *Id.,* p. 6.

Fourth, Samuel argues that the legal interest rate set forth in I.C. § 28-22-104(2) only applies to money judgments after they have been entered. *Id*. In addition, Samuel claims that I.R.C.P. 54(d)(1)(D) allows "necessary and exception costs reasonably incurred" when the "interests of justice" so require. *Id.,* p. 7. As such, the costs to which BRD and Chesrown object are costs which the Court may award in its discretion. *Id*.

Samuel has also sued defendant Idaho Independent Bank and Black Rock Homeowner's' Association, Inc., in his Complaint. Samuel's Motion for Summary Judgment does not pertain to these two defendants. On October 30, 2012, this Court entered its "Order Dismissing Black Rock Homeowner's' Association, Inc., Only", based on the stipulation signed by the attorney for the Homeowner's' Association. On October 30, 2012, this Court also entered its "Order Re: Foreclosure of Lien", where defendant Idaho Independent Bank stipulated its Deed of Trust was inferior and subordinate to the Deed of Trust in favor of Samuel.

Oral argument on Samuel's motion for summary judgment was held November 7, 2012. At that hearing, due to factual issues regarding fair market value, Samuel's attorney withdrew Samuel's motion for judicial foreclosure, reserving the right to raise the issue at a later time. The focus of Samuel's argument on summary judgment was, thus, the personal liability of Chesrown.

At oral argument, counsel for Chesrown and BRD for the first time argued that Samuel had made an "election of remedies." Counsel for Chesrown and BRD for the first time argued that Samuel, had raised a new theory in his "Plaintiff's Reply to Defendants' Opposition to Motion for Summary Judgment", however, counsel for Chesrown and BRD did not elucidate what the claimed new theory was. The only issues raised in Plaintiff's Reply to Defendants' Opposition to Motion for Summary Judgment that were not raised initially on summary judgment were: 1) Samuel's claim that with respect to the issue of deficiency, I.C. § 45-1512 does not protect guarantors of secured debt, thus it provides Chesrown no protection (*Id.,* p. 5), and; 2) Samuel's claim that he is not required to go to BRD first, and that foreclosure may only be necessary if Chesrown's assets are insufficient to satisfy the debt. *Id.,* p. 6. The Court finds those were not "new theories" on summary judgment, and counsel for BRD and Chesrown's claims to the contrary are without merit.

At oral argument, counsel for BRD and Chesrown cited two cases to the Court at oral argument, *Wolford v. Tankersley,* 107 Idaho 1062, 695 P.2d 1201 (1984), and *United States Fidelity and Guaranty Co. v. Clover Creek Cattle Co.,* 92 Idaho 889, 452 P.2d 993 (1969), to support their new "election of remedies" argument.

> After oral argument, without seeking the Court's permission, and in violation of I.R.C.P. 56(c), on November 14, 2012, Samuel filed his "Supplemental Memorandum in Support of Plaintiff Robert C. Samuel's Motion for Summary Judgment." In that brief, counsel for Samuel claims this late filed brief is permissible under I.R.C.P. 15(d), which allows for supplemental *pleadings*. Supplemental Memorandum in Support of Plaintiff Robert C. Samuel's Motion for Summary Judgment, p. 3. Counsel for Samuel is mistaken, because Samuel's "Supplemental Memorandum in Support of Plaintiff Robert C. Samuel's Motion for Summary Judgment" is not a "pleading." See, I.R.C.P. 7(a). Additionally, the Court finds there is no reason that counsel for Chesrown and BRD could not and should not have addressed election of remedies in their reply brief on summary judgment, especially since counsel for Chesrown and BRD specifically addressed the topic of Idaho's "one action" rule. Defendants' Black Rock Development, In., and Marshall R. Chesrown's Memorandum of Authorities in Response to and in Opposition to Plaintiff's Motion for Summary Judgment, p. 5.
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> On November 16, 2012, BRD and Chesrown filed "Defendants' Black Rock Development, Inc., and Marshall R. Chesrown's Memorandum of Authorities in Response to Plaintiff's Supplemental Memorandum in Support of Motion for Summary Judgment." This brief was also filed without seeking the Court's permission, and in violation of I.R.C.P. 56(c). However, neither party has objected to the late filing of the other party. And, since Samuel has not responded to the untimely filing of Chesrown and BRD, apparently Samuel, even though he is the moving party, is content with giving BRD and Chesrown the last word, in contravention of I.R.C.P. 56(c).
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> Due to the filing of additional briefs post hearing, the earliest Samuel's motion can be considered taken under advisement by the Court for purposes of Article V, Section 17 of the Idaho Constitution and I.C. § 59-502, was November 16, 2012, the date BRD and Chesrown filed their last, untimely, brief. Accordingly, the motion for summary judgment is now at issue.
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> Defendant IIB and defendant Black Rock Homeowner's Association did not submit any briefing on Samuel's motion for summary judgment, and counsel for those defendant entities did not appear at the November 7, 2012, hearing.

Memorandum Decision and Order on Summary Judgment, pp. 1-9.

At the conclusion of the November 7, 2012, hearing, this Court took the matter under advisement and issued its decision (quoted in part above) on December 27, 2012. In that decision, this Court held: 1) the Promissory Note expressly incorporates

the Deed of Trust and so Chesrown subjected himself to the obligations of the Deed of Trust and subsequently the modification of the Promissory Note; 2) both BRD and Chesrown breached their duties under the promissory note and loan documents and so are jointly and severally liable for any outstanding amounts; 3) both BRD and Chesrown breached the duty of good faith; 4) Samuel was entitled to a deficiency judgment for all amounts owed; 5) Samuel was entitled to collect the entire judgment from Chesrown; 6) Samuel did not elect his remedy by alleging judicial foreclosure; 7) Samuel was granted summary judgment in the amounts of $3,107,080.19 for unpaid principal, $1,460,783.31 in accrued unpaid interest and $148,807.96 for reimbursement for real estate taxes; 8) until the Court ordered a judgment, Samuel was entitled to the stated interest rate of 12% per annum; 9) Samuel was denied summary judgment on the issue of costs and attorney fees; and 10) Samuel was designated the prevailing party against both Chesrown and BRD. Memorandum Decision and Order on Summary Judgment, pp. 26-28. Central to that decision was the Court's finding, as a matter of law, Samuel can proceed directly against Chesrown on Chesrown's guaranty, and need not proceed against the principal (BRD) first, and that Idaho's anti-deficiency statute does not apply to Chesrown. This Court held:

> This code section essentially caps the potential amount of the deficiency judgment using the property's fair market value. I.C. § 45-1512. The Idaho Supreme Court has held that I.C. § 45-1512 does not apply to guarantors. *First Sec. Bank of Idaho, N.A. v. Gaige*, 115 Idaho 172, 174, 765 P.2d 683, 685 (1988). The Court found that it was better policy to follow the wording of the Idaho statute and leave any expansion of coverage to the legislature. *Id*. That principle has yet to be overruled by subsequent appellate case law in Idaho, or by the Idaho Legislature.
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> A court can hold a defendant liable on the guaranty agreement only. *Id*. Language that states that the guarantors are "jointly, severally, and unconditionally promise and guaranty full and complete payment . . . " of the obligation of the principal has been held to be that of an absolute guaranty. *McConnon & Co. v. Stallings*, 44 Idaho 510, 510, 258 P. 527, 528 (1927). An absolute or unconditional guarantee is a promise by the guarantor to pay the debt or perform the obligation without requiring the

> secured party to first exhaust its remedies against the debtor. *CIT Financial Services v. Herb's Indoor RV Center, Inc.*, 118 Idaho 185, 187, 795 P.2d 890, 892 (Ct. App. 1990). An action on a guaranty provides a separate remedy from those on the underlying principal obligation and may generally be pursued independently of an action on the principal obligation or debt. 38 Am. Jur. 2d Guaranty § 92 (2012). Thus, an unconditional guaranty does not require a creditor to attempt to collect from the principal debtor before seeking collection from the guarantor. *CIT*, 118 Idaho 185, 187, 795 P.2d 890, 892. However, suit on a guaranty still requires the non-performance of the principal debtor because by definition, a guaranty is "an undertaking by a third person to another to answer for the payment of a debt, incurred by a named person, in the event that the named person fails to pay." *Eubank v. First Nat. Bank of Bellvill*, 814 S.W.2d 130, 133 (Tex. App. 1991). A separate remedy simply refers to the fact that a creditor may choose whether to sue the principal debtor on the underlying obligation or sue the guarantor on the guaranty.
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> While I.C. § 45-1512 seems to apply to BRD as a borrower, under *Gaige* it does not apply to Chesrown as a guarantor. In his reply brief, Samuel states that:
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> > [O]nce the liability of Defendants is adjudicated, Plaintiff may legally collect the entire judgment from Defendant Chesrown as a guarantor, without exercising the power of sale rights under the Deed of Trust. Non-judicial foreclosure will be necessary only if Defendant Chesrown's assets are insufficient to satisfy the judgment. In the event that foreclosure proceeds fail to satisfy the remaining judgment amounts outstanding, Plaintiff may then seek a deficiency judgment against Defendant Black Rock Development within three months thereafter, pursuant to Idaho Code § 45.1512. At that time, evidence may be submitted as to the Property's fair market value as of the date of sale.
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> Plaintiff's Reply to Defendants' Opposition to Motion for Summary Judgment, pp. 5-6.
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> Under *CIT*, Samuel is not required to exhaust its remedies against BRD before seeking redress from Chesrown because, as the Note shows, it was an unconditional guaranty, as there was no limiting language included (Affidavit of Robert Samuel, Exhibit A, p. 2 (Promissory Note)). Therefore, the anti-deficiency statute does not apply to Chesrown and thus, the deficiency cannot be limited by such.

Memorandum Decision and Order on Summary Judgment, pp. 13-15. Following that decision, a "Judgment" prepared by counsel for Samuel, was entered by the Court on January 10, 2013.

On January 24, 2013, Samuel filed a "Motion for Award of Attorney Fees and Costs" along with a supporting memorandum and affidavit of Robert Dunn (Dunn). On February 6, 2013, BRD and Chesrown filed "Defendants Black Rock Development, Inc., and Marshall R. Chesrown's Objections to Plaintiff's Memorandum of Costs and Motion to Disallow Certain Costs Requested by Plaintiff Robert C. Samuel in His Memorandum of Costs" (Objection to Costs). On February 28, 2013, Samuel filed: "Plaintiff Robert C. Samuel's Response to Defendants' Objection to Costs", "Plaintiff Robert C. Samuel's Motion to Certify Judgment", and "Plaintiff's Memorandum in Support of Motion to Certify Judgment". On March 6, 2013, BRD and Chesrown filed its "Response to Plaintiff's Motion to Certify Judgment." On March 11, 2013, Samuel filed "Plaintiff Robert C. Samuel's Reply in Support of Motion to Certify Judgment." That same day, BRD and Chesrown filed "Defendants Black Rock Development, Inc., and Marshall R. Chesrown's Reply to Plaintiff's Response to Motion to Disallow Costs."

Oral argument was held on March 12, 2013, and Samuel's motion for costs and attorney fees and motion to certify were taken under advisement. At that hearing, a scheduling conference was held and the Court scheduled the case for hearing on foreclosure for July 8, 2013.

## II. STANDARD OF REVIEW.

Idaho Rule of Civil Procedure 54(d) states "costs *shall* be allowed as a matter of right to the prevailing party or parties, unless otherwise ordered by the court." I.R.C.P. 54(d)(1)(A) (emphasis added). Costs include those awarded as a matter of right, actually paid and listed in I.R.C.P. 54(d)(1)(C), and those awarded as discretionary costs under I.R.C.P. 54(d)(1)(D). I.R.C.P. 54(d)(1). The trial court determines who the prevailing party is by considering the final judgment or the result of the action in relation to the relief sought by the respective parties. I.R.C.P. 54(d)(1)(B). The trial court has

discretion to determine a party prevailed in part and did not prevail in part, and apportion the costs appropriately, after considering all of the issues and claims involved in the action and the resulting judgment or judgments obtained. *Id*. In determining whether a party prevailed entirely or partially, a court must consider three things: "(a) the final judgment or result obtained in the action in relation to the relief sought by the respective parties; (b) whether there were multiple claims or issues between the parties; and (c) the extent to which each of the parties prevailed on each of the issues or claims." *Chadderdon v. King*, 104 Idaho 406, 411, 659 P.2d 160, 165 (1983); *Jerry J. Joseph C.L.U. Ins. Assoc., Inc. v. Vaught*, 117 Idaho 555, 557, 789 P.2d 1146, 1148 (Ct.App. 1990). The obtained result may be the product of a court judgment or of a settlement reached during litigation. *Vaught*, 117 Idaho 555, 557, 789 P.2d 1146, 1148.

Here, the Court has already determined Samuel to be the prevailing party against both BRD and Chesrown. Memorandum Decision and Order on Summary Judgment, p. 28. As the language of the Court does not in any way limit this determination, Samuel is the prevailing party for all claims in the case. In addressing Samuel's request for costs under I.R.C.P. 54(d)(1), this Court expressly held, "a final determination of costs at this time is premature, because Samuel has not filed a memorandum of costs. Were Samuel to follow the procedure set forth in I.R.C.P. 54(d)(5), the Court could properly address costs." *Id.,* p. 24. Similarly, with regard to requested attorney fees, this Court has already determined Samuel to be the prevailing party, but in its previous decision, found an award of attorney fees to be premature as a memorandum of costs had yet to be filed. *Id.,* pp. 25-26.

Idaho Appellate Courts review a decision to certify a judgment as a final order for appeal purposes under I.R.C.P. 54(b), by determining if the district court abused its

discretion. *Provident Fed. Sav. & Loan Ass'n v. Idaho Land Developers, Inc.,* 114 Idaho 453, 455, 757 P.2d 716, 718 (Ct.App. 1988).

## III. ANALYSIS OF ATTORNEY FEES AND COSTS.

### A. Compliance with I.R.C.P. 54(d)(5).

BRD and Chesrown object to Samuel's motion for costs and fees on the grounds of technical non-compliance with I.R.C.P. 54(d)(5). Objection to Costs, p. 6. Idaho Rule of Civil Procedure 54(d)(5) sets forth the requirements for the memorandum of costs: "[s]uch memorandum must state that to the best of the party's knowledge and belief the items are correct and that the costs claimed are in compliance with this rule." I.R.C.P. 54(d)(5). Rather than simply filing an additional affidavit or an amended memorandum of costs, Samuel responded by stating he has "substantially complied" with the rule by itemizing the claimed expenses, explaining the basis for each, and citing to the accompanying Affidavit of Robert Dunn in the Memorandum of Costs. Response to Objection to Costs, p. 6. The Idaho Supreme Court has stated substantial compliance is sufficient. In *Estate of Holland v. Metropolitan Property and Cas. Ins. Co.,* 153, Idaho 94, 102, 279 P.3d 80, 88 (2012), the Idaho Supreme Court directed this Court on remand to determine if a party's attorney's affidavit "substantially complied" with I.R.C.P. 54(d)(5) and met the criteria of a memorandum of cost, even though the language "to the best of the party's knowledge and belief the items are correct and that the costs claimed are in compliance with this rule".

The present case is more clear than those of *Estate of Holland*. In the present case, attorney fees are determined on an hourly basis; in *Estate of Holland* they were based on a contingent arrangement. *Id.* In the present case, the memorandum in Support of Motion for Attorney Fees and Costs itemizes each cost and itemizes all

attorney fees, as does the Affidavit of Robert A. Dunn, filed January 24, 2013, p. 3, ¶ 7. Dunn states "…the fees requested are reasonable. The attorney fees incurred were necessary to the successful prosecution of Samuel's case", and the hourly rates are usual, customary, and reasonable in the community." *Id.,* ¶ 11. This Court finds there has been substantial compliance with I.R.C.P. 54(d)(5), even though the language "to the best of the party's knowledge and belief the items are correct and that the costs claimed are in compliance with this rule" has not been included.

**B. Finality of the Judgment.**

BRD and Chesrown object to Samuel's request for costs and fees on the grounds that "such an award would be premature at this juncture of the case. No final judgment has been entered in this case." Objection to Costs, p. 2. To support their argument, BRD and Chesrown cite to a number of cases which stand for the rule of "[u]ntil all issues and claims or causes of action have been determined by the Court and a final judgment entered on 'all claims for relief, except costs and fees, asserted by or against all parties in the action,' it is premature to rule upon or enter an award of costs and attorney fees." *Id*. In *Bear Island Water Association, Inc., v. Brown*, 125 Idaho 717, 874 P.2d 528 (1994), the Court did rule the district court's ruling on the issue of costs and attorney fees was premature, however at the time of the ruling, there was still the issue of property rights in an irrigation line which was in dispute and not settled at summary judgment. 125 Idaho 717, 721, 874 P.2d 528, 532. In *Bagley v. Thomason*, 149 Idaho 799, 241 P.3d 972 (2010), there were counterclaims which had yet to be decided. 149 Idaho 799, 801, 241 P.3d 972, 974. In *Caldwell v. Cometto*, 151 Idaho 34, 253 P.3d 708 (2011), there were still easement arguments which had yet to be adjudicated. 151 Idaho 34, 40, 253 P.3d 208, 714.

Each of these cases is distinguishable from the case at hand because here, there are no counterclaims to be decided, nor additional arguments. The only "claim" yet to be decided is judicial foreclosure, which Samuel had taken off of the table prior to oral argument on his summary judgment motion. As this Court has determined BRD and Chesrown are jointly and severally liable, Samuel can collect against Chesrown alone, without going through judicial foreclosure. Thus, it is not necessary to adjudicate the issue of judicial foreclosure. While it is true this Court granted only partial summary judgment to Samuel, the only issues denied on summary judgment were Samuel's requests for attorney fees and costs, and only because Samuel had not filed a memorandum of costs pursuant to I.R.C.P. 54(d). Idaho Rule of Civil Procedure 54(a) states "[a] judgment is final if either it has been certified as final pursuant to subsection(b)(1) of this rule or judgment has been entered on all claims for relief, except costs and fees, asserted by or against all parties in the action." I.R.C.P. 54(a). Judgment has been rendered on all claims brought before the court in summary judgment except for costs and fees, which is not fatal under I.R.C.P. 54(a). As stated above, the non-adjudication of Samuel's judicial foreclosure claim is not fatal because under this Court's decision, Samuel can collect the entire amount of the judgment from Chesrown as guarantor, without having to first foreclose on the property. Therefore, under I.R.C.P. 54(a), judgment is "final" and Samuel's memorandum of costs and fees is not premature.

**C. Costs as a Matter of Right.**

Idaho Rule of Civil Procedure 54(d)(1)(C) entitles the prevailing party to court filing fees. I.R.C.P. 54(d)(1)(C)(1). Under the allowances of this rule, Samuel has submitted a memorandum of costs which includes filing fees of $88.00. Memorandum

of Costs, p. 2. As noted above, Samuel is the prevailing party. Thus, this Court grants Samuel this cost as a matter of right pursuant to I.R.C.P. 54(d)(1)(C).

**D. Discretionary Costs.**

Idaho Rule of Civil Procedure 54(d)(1)(D) gives a court power to award discretionary costs when a party's costs exceed the monetary limits and the categories provided for under costs as a matter of right under I.R.C.P. 54(d)(1)(C):

> Additionally items of costs not enumerated in, or in an amount in excess of that listed in subparagraph (C), may be allowed upon a showing that said costs were necessary and exceptional costs reasonably incurred, and should in the interest of justice be assessed against the adverse party. The trial court, in ruling upon objections to such discretionary costs contained in the memorandum of costs, shall make express findings as to why such specific item of discretionary cost should or should not be allowed. In the absence of any objection to such an item of discretionary costs, the court may disallow on its own motion any such items of discretionary costs and shall make express findings supporting such disallowance.

I.R.C.P. 54(d)(1)(D). Samuel has submitted the following discretionary costs:

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| American Data Find | $3,000.00 |
| Kootenai County Title Company Report | $400.00 |
| Facsimile charges: | $120.00 |
| Photocopies: | $282.00 |
| Long distance telephone charges: | $0.44 |
| Postage/shipping charges: | $86.98 |
| Mileage: | $36.63 |

Memorandum of Costs, p. 2. Discretionary costs may include "long distance phone calls, photocopying, faxes, travel expenses" and additional costs for expert witnesses. *Hayden Lake Fire Protection Dist. v. Alcorn*, 141 Idaho 307, 314, 109 P.3d 161, 168 (2005). The trial court must make express findings as to why a party's discretionary costs should or should not be allowed. I.R.C.P. 54(d)(1)(D); *Id*. Express findings as to the general nature of the costs requested and whether those costs are necessary, reasonably, exceptional, and in the interests of justice is sufficient. *Id*.

In this case, BRD and Chesrown dispute the award of costs for the American Data Find charges on the grounds of not being a necessary or exceptional cost, as well as the costs for facsimiles, photocopies, long distance telephone calls, postage/shipping and mileage on the grounds of not being exceptional costs. Objection to Costs, pp. 8-10.

This Court has already found the American Data Find expense to be exceptional under I.R.C.P. 54(d)(1)(D) stating in its decision, "if BRD and Chesrown were judgment proof, there is little reason to proceed with the lawsuit. That expense was necessarily incurred, reasonable, exceptional, and in the interests of justice, for purposes of this lawsuit." Memorandum Decision and Order on Summary Judgment, p. 23. Even though this Court made that finding, Chesrown and BRD argue pre-filing asset searches are not exceptional, as "Every Plaintiff would like to know in advance if he will be able to collect on a potential judgment against a defendant." Defendants Black Rock Development, Inc., and Marshall R. Chesrown's Response to Plaintiff's Motion to Disallow Costs, p. 5. Such argument, while ignoring the law of this case, is also unpersuasive. While every plaintiff would like to know in advance if he will be able to collect on a potential judgment, in this case Samuel had several defendants from which to choose to proceed against, and Samuel had to choose to proceed against all of them at the same time, or in a logical sequence. The asset search was the only way to obtain the information needed to make that decision. Consistent with this Court's earlier decision, this Court now finds the American Data Find charges are allowed as a discretionary cost under I.R.C.P. 54(d)(1)(D).

BRD and Chesrown did not object to Samuel's request for costs associated with the Kootenai County Title Company Report for $400. Failure to timely object to an item in the memorandum of costs constitutes a waiver of the cost claimed. I.R.C.P. 54(d)(6);

*Fearless Farris Whsle., Inc. v. Howell*, 105 Idaho 699, 704, 672 P.2d 577, 582 (Ct.App. 1983). Even though BRD and Chesrown did not object to this cost, and thus, both have waived the expense, the Court must still determine if such is necessary, reasonable, and exceptional. Samuel claims the title report was incurred to determine the priority of Samuel's Deed of Trust as it pertains to the property. Plaintiff Robert C. Samuel's Memorandum in Support of Motion for Award of Attorney Fees and Costs, p. 3. This Court finds such expense to be necessary, reasonable, and exceptional due to Chesrown further encumbering the property after borrowing from Samuel.

With regard to the remaining objected-to charges, Samuel states they are exceptional because the court proceedings "took place across state lines from the office of Samuel's attorneys" and "multiple parties to the action reside in different states," requiring the necessity of such costs. *Id.*, p. 3. No one forced Samuel to choose counsel located in Washington to litigate this Idaho case. When Samuel chose to have counsel from Spokane, Washington, he should have realized his attorneys would be required to cross state lines for court proceedings in Kootenai County, Idaho. Similarly, when Samuel chose to initiate suit against Chesrown and BRD, it would include multiple parties, necessitating multiple copies being mailed or faxed. These circumstances simply do not in any way rise to the level of exceptional costs under I.R.C.P. 54(d)(1)(D) and will not be allowed.

**E. Attorney Fees.**

A court may award reasonable attorney's fees to a prevailing party, but the award of fees must be authorized either by contract or statute. *Wattenbarger v. A.G. Edwards & Sons, Inc.*, 150 Idaho 308, 324, 246 P.3d 961, 977 (2010); *Bream v.*

*Benscoter*, 139 Idaho 364, 369, 79 P.3d 723, 728 (2008); I.R.C.P. 54(e)(1). Paragraph 12.4 of the Deed of Trust states:

> 12.4. **Attorney's Fees for Enforcement.** Borrower shall pay to Lender on demand any and all expenses including legal expenses and attorney's fees, incurred or paid by Lender in protecting its interest in the Property or Personal Property or in collecting any amount payable hereunder or in enforcing its rights hereunder with respect to the Property or Personal Property, whether or not any legal proceeding is commenced hereunder or thereunder and whether or not any default or Event of Default shall have occurred and is continuing, together with interest thereon at the Default Rate from the date paid or incurred by Lender until such expenses are paid by Borrower.

Affidavit of Robert Dunn, Exhibit A, p. 15, ¶ 12.4.

As stated in the Court's summary judgment decision in this case, "[t]his action is certainly one brought under the contract (deed of trust) or to enforce the terms of the contract, in order for attorney fees to be awarded. *Lane Ranch Partnership v. City of Sun Valley*, 144 Idaho 584, 591-92, 166 P.3d 374, 381-82 (2007)." Memorandum Decision and Order on Summary Judgment, p. 25. In its decision, as noted above, this Court found Samuel was the prevailing party. *Id*. The Court went on to state, "[u]nder the terms of the contract, Samuel is entitled to reasonable attorney fees against BRD, but not against Chesrown. This ruling does not preclude a later application by Samuel against Chesrown. The amount of attorney fees requested by Samuel, as set forth in the Affidavit of Robert Dunn, appear at this juncture, to be reasonable." *Id*. Samuel is correct in noting that Chesrown is also liable under Paragraph 12.4 of the Deed of Trust because this Court has held that Chesrown, as guarantor, "subjected himself to the obligations set forth in the terms of the Deed of Trust…" Plaintiff Robert C. Samuel's Memorandum in Support of Motion for Award of Attorney Fees and Costs, p. 4, citing Memorandum Decision and Order on Summary Judgment, p. 26.

Samuel is entitled to attorney fees against both BRD and Chesrown, under the terms of the Deed of Trust and because Samuel is the prevailing party and this is a "commercial transaction" under I.C. § 12-120(3).

Even though this Court previously stated: "The amount of attorney fees requested by Samuel, as set forth in the Affidavit of Robert Dunn, appear at this juncture, to be reasonable" (Memorandum Decision and Order on Summary Judgment, p. 25), this Court now has had additional time to review such claim for attorney fees and there is now additional information before the Court. When the Court made the above statement as to reasonableness of the fees sought, the Court had before it the Affidavit of Robert Dunn in Support of Plaintiff's Motion for Summary Judgment, filed October 3, 2012. That Affidavit gave a total amount of claimed costs and fees, but at the time the Court reviewed such, the Court did not pay close attention to the hourly amount of attorney fees. Even though counsel for BRD and Chesrown, at the March 13, 2013, oral argument, stated they had no objection to the amount of attorney fees sought (the objection by counsel was attorney fees award at this time would be premature), the Court must still determine the reasonableness of the amounts requested by Samuel.

This Court specifically finds the $400.00 per hour rate by attorney Robert A. Dunn to be unreasonable. The Court finds the $275.00 per hour rate by Kevin W. Roberts, $225.00 per hour rate by Jason T. Piskel and $220 per hour rate by Michael R. Tucker, attorneys licensed in Idaho for five years, seven years and six years, respectively, to be unreasonable. The Court finds paralegal rates of $95.00 per hour and $110.00 per hour to be unreasonable.

Furthermore, it is inappropriate for BRD and Chesrown to pay for attorney fees on work related to the judicial foreclosure. Up to the present time, such work, according to the billing information, is negligible. There is a claim for foreclosure in the Complaint.

Foreclosure was discussed by counsel for Samuel in Samuel's opening brief on summary judgment, but then abandoned. Even though foreclosure was discussed, it appears little or no attorneys fees have been expended by Samuel on the subject of valuation, which is all that is really left to be litigated if there is foreclosure. Still, the fact that some time has been spent on the subject of foreclosure, requires a downward departure from the attorney fees sought by Samuel.

Accordingly, this Court, after weighing all the criteria under I.R.C.P. 54(e)(3), adjusts the amount of fees sought downward by 33%, primarily due to I.R.C.P. 54(e)(3)(A) "the time and labor required", considering some very limited time was spent on foreclosure, and (D) "the prevailing charges for like work", all other factors (54(e)(3)(B, C, E-L)) being neutral. Samuel seeks an award of $21,953.50 for attorney fees. Applying the 33% reduction, attorney fees in the amount of $14,645.66 are awarded in favor of Samuel against both BRD and Chesrown. Westlaw fees in the amount of $306.91 are allowed, but are included in the Court's determination of the attorney fees awarded. I.R.C.P. 54(e)(3)(K).

**IV. ANALYSIS OF MOTION TO CERTIFY JUDGMENT AS AGAINST CHESROWN.**

The Judgment entered January 10, 2013, listed both Chesrown and BRD as judgment creditors. Judgment, p. 1. Presumably in response to the "lack of finality" argument raised by BRD and Chesrown's in their objection to Samuel's costs, Samuel filed a motion to certify judgment under I.R.C.P. 54(b)(1), as that January 10, 2013, Judgment "…pertains to Marshall R. Chesrown." Motion to Certify Judgment, p. 1. Idaho Rule of Civil Procedure 54(b)(1) states the court may "direct the entry of a final judgment upon one or more but less than all of the claims or parties only upon an express determination that there is no just reason for delay and upon an express direction for the entry of judgment." I.R.C.P. 54(b). Even though this Court determines

all claims have not been decided, it is still appropriate to certify the judgment pursuant to I.R.C.P. 54(b)(1) because, as stated above, judgment has already been found for the entire amount as against BRD, and now as against Chesrown. There is no reason for delay because Samuel has the right to collect the entire amount of the judgment from Chesrown as the guarantor, and BRD, without having to first foreclose upon the property.

BRD and Chesrown cite as authority *Pichon v. L.J. Broekemeier, Inc.*, 99 Idaho 598, 586 P.2d 1042 (1978), stating there has been no showing of any hardship, injustice or other compelling reason for Rule 54(b) certification by Samuel. The Court in *Pichon* analyzed the federal equivalent of I.R.C.P. 54(b) and noted: 1) the purpose of allowing appeals from partial dispositions of a whole case is to "avoid the possible injustice of a delay in judgment of a distinctly separate claim"; 2) Rule 54(b) certification is improper where a trial remained to be had "on other claims similar or identical with those disposed of"; and 3) partial dispositions should be certified as final only "in the infrequent harsh case" in order to avoid an injustice which might result if an appeal were delayed until final disposition of the entire case." 99 Idaho 598, 602, 586 P.2d 1042, 1046. The Court in *Pichon* held the case did not justify certification based on hardship or injustice potentially suffered. *Id*. However, the Court went on to say "it appears the orders of partial summary judgment from which this appeal is taken were entered so that the trial court could streamline the case by eliminating the *equitable* claims so that the remaining *legal* claims could be tried to jury." *Id.* (emphasis added).

In this case, there are no other legal claims to be tried. In fact, both parties have stated the only other potential claim remaining would be judicial foreclosure, and both parties have stated the only issue in foreclosure would be the valuation of the property.

All legal claims were decided at summary judgment: BRD and Chesrown breached their duties under the loan documents, breached the duty of good faith, and BRD and Chesrown are jointly and severally liable for those breaches. Memorandum Decision and Order on Summary Judgment, pp. 26-27. There is simply no legal issue left for any jury to try. The only issue is potential valuation of the property, which would only need to be decided if foreclosure is necessary, and foreclosure is only necessary if the amount of Samuel's judgment cannot be collected from Chesrown. Valuation of the property is entirely irrelevant to the judgment against Chesrown as guarantor.

BRD and Chesrown also claim certification would potentially prejudice BRD because it would "strip the trial court of jurisdiction should defendants be forced to appeal now and deprive the trial court of jurisdiction. This would prevent the Court from entering a decree of judicial foreclosure pending completion of any appeal." Response to Motion to Certify Judgment, pp. 4-5. However, as Samuel points out in his reply, I.A.R. 13(b)(13) allows the district court to "take any action or enter any order required for the enforcement of any judgment or order." I.A.R. 13(b)(13).

Judgment has already been found for Samuel. The questions regarding attorney fees and costs have now been addressed above. If Samuel submits an amended judgment, adding the costs and fees to the Judgment entered on January 10, 2013, it would not be a "final" judgment, just as the existing judgment is not a "final" judgment. The existing judgment does not, and any future judgment submitted including attorney fees and costs does will not, include "all claims for relief…asserted by or against all parties in the action." I.R.C.P. 54(a). This is because the issue of foreclosure has not been addressed.

Samuel has requested certification under I.R.C.P. 54(b). Under that rule, due to the issue of foreclosure, "less than all claims" have been decided. In that event that

less than all claims are decided, under that rule the Court may still "…direct the entry of final judgment upon one or more but less than all of the claims or parties only upon an express determination that there is no just reason for delay and upon and express direction for the entry of the judgment."

The only issue remaining is how Samuel will collect the judgment. The only reason Samuel now seeks certification under I.R.C.P. 54(b) is "so that collection proceedings may be commenced." Plaintiff's Memorandum in Support of Motion to Certify Judgment, p. 3. While foreclosure is an option, it is not the only option. This Court found Chesrown to be liable under the unconditional guarantee. At this time, Samuel can attempt to collect judgment against Chesrown *if* there is a certified judgment. Otherwise, Samuel cannot obtain a writ of execution against Chesrown. I.R.C.P. 69.

Potential prejudice to BRD is not persuasive here because BRD does not have a right to judicial foreclosure (Samuel has the right against BRD), particularly if Samuel seeks to collect the judgment from Chesrown alone. This Court agrees with Samuel that "Because the appealable issues facing each defendant are largely independent, an appeal of a certified judgment against Chesrown would have little bearing on Samuel's case against BRD." Plaintiff Samuel's Reply in Support of Motion to Certify Judgment, p. 3. On the other hand, there is extreme potential prejudice to Samuel due to any delay. Samuel has a sizeable judgment against Chesrown and BRD. This Court agrees with Samuel's claim that "Due to the judgment's considerable size, depletion of Chesrown's assets is a serious concern, rendering critical the timing of Samuel's collection efforts." *Id.,* p. 4. Without certification, Samuel will need to wait several more months for foreclosure to occur before having a final judgment, and even at that time, BRD or Chesrown may then opt for an appeal. If certification is granted now, Chesrown

may well opt for an appeal, but a decision on that appeal on that limited issue is likely to occur many months before any appeal of all issues following foreclosure. And, if certification is granted now, and Chesrown appeals, it is possible that the foreclosure may still proceed at the same time any appeal by Chesrown, due to I.A.R. 13(b)(13). There is no just reason for delay, and the motion to certify judgment is granted.

**V. CONCLUSION AND ORDER.**

For the reasons stated above, it is proper for this Court to grant Samuel's motion for costs as a matter of right, grant Samuel's motion for discretionary costs with regard to the American Data Find charges and Kootenai County Title Company Report and deny Samuel's motion for discretionary costs as to all remaining costs, grant Samuel's motion for attorney fees as modified, and grant Samuel's motion to certify judgment

IT IS HEREBY ORDERED Samuel's motion for costs as a matter of right in the amount of $88.00 is GRANTED.

IT IS FURTHER ORDERED Samuel's motion for discretionary costs with regard to the American Data Find cost of $3,000.00 and Kootenai County Title Company Report cost of $400.00, is GRANTED.

IT IS FURTHER ORDERED Samuel's motion for discretionary costs as to all remaining costs is DENIED.

IT IS FURTHER ORDERED Samuel's motion for attorney fees in the modified amount of $14,645.66 is GRANTED.

IT IS FURTHER ORDERED Samuel's motion to certify judgment against defendant Marshall R. Chesrown is GRANTED.

Entered this 18th day of March, 2013.

_____

John T. Mitchell, District Judge

**Certificate of Service**

I certify that on the _____ day of March, 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 #** |
|---|---|---|---|
| Kevin W. Roberts, Maximilian Held | (509) 455-8734 | Sheila Schwager | (208) 954-5261 |
| John F. Magnuson | (208) 667-0500 | Timothy J. Giesa | (509) 838-6341 |

_____
Jeanne Clausen, Deputy Clerk