STATE OF IDAHO)
County of BONNER)ss

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

RONALD A. MILLER,

Plaintiff,

vs.

COLLATERALOAN OF IDAHO, LLC,

Defendant.

Case No. **S CV 2006 1500**

MEMORANDUM DECISION AND ORDER ON APPEAL FROM MAGISTRATE DIVISION

I. PROCEDURAL BACKGROUND.

On January 13, 2005, plaintiff/respondent Ronald A. Miller (Miller) filed a Complaint in a different lawsuit, Bonner County Case No. CV 2005 38, against Mark Jones and Robert Weaver regarding the same transaction which gave rise to the instant matter, Bonner County Case No. CV 2006 1500. In each of these two cases, Miller has represented himself *pro se*. In CV 2006 1500, Miller sued Collateraloan of Idaho, LLC, which has been represented by Mark Jones, an attorney.

On December 14, 2004, Miller purchased a gun in an online auction from Collateraloan of Idaho, LLC dba Bid2WinGuns.com (Collateraloan). Miller paid for the gun on December 15, 2004. Miller claims the gun he purchased was used and defective. Miller claims Collateraloan asked him to return the gun and offered him a refund, which he has never received. Following Miller's filing of CV 2005 38 in Bonner County, but before hearing on the matter, Miller also filed a Complaint in the State of Kansas, naming Collateraloan as defendant. On June 23, 3005, Miller moved to

dismiss Bonner County Case No. CV 2005 38, as it would be heard in Sedgwick County, Kansas. On June 24, 2005, Magistrate Judge Barbara Buchanan dismissed CV 2005 38 with prejudice. Miller moved to amend the Judgment on July 6, 2005, but Judge Buchanan denied the motion on July 25, 2005. On July 17, 2006, Miller obtained a Judgment in the Kansas small claims case, against Collateraloan for $425.00, plus costs in the amount of $51.00 and sheriff's service fee in the amount of $5.00, totaling $481.00.

On August 30, 2006, Miller then filed the action that makes up the instant appeal, Bonner County Case No. CV 2006 1500, by filing the foreign judgment in Bonner County. A Writ of Execution was issued on January 15, 2008. On February 19, 2008, Magistrate Judge Deborah Heise denied Collateraloan's Motion to Quash the Writ, denied Collateraloan's Motion to Strike the Foreign Judgment and Return Levied Assets, and vacated the *Ex Parte* Motion to Retain Levied Assets of Defendant Pending Defendant's Motions. Judge Heise reasoned she was without authority to re-litigate the issues that were tried, or could have been tried, before the Kansas Court and the Kansas Judgment was entitled to full faith and credit. On February 20, 2008, Collateraloan filed its Notice of Appeal, appealing Judge Heise's Order Denying Defendant's Motion to Quash Writ of Execution, Strike Foreign Judgment and Return Levy Assets of Defendant. Subsequently, Miller filed the following: Motion to Uphold Idaho Court's Ruling (Amended, and Addendum thereto); Motion to Impose Additional Interest Penalties; Motion to Dismiss Notice of Appeal; Request that the Court Rule with No Court Attendance by Plaintiff; Motion to Find Jones Guilty of Perjury; Motion for Relief from Judgment in CV 2005 38; and Motion to Dismiss Appeal for Non-Compliance (and Addendum thereto). On January 20, 2009, this Court at the

conclusion of oral argument, denied Miller's Motion to Dismiss Notice of Appeal, the only motion Miller had noticed for hearing. An order to that effect was signed by the Court on March 1, 2009. The remaining motions filed by Miller have not been noticed for hearing.

In the instant case on appeal, Bonner County Case No. CV 2006 1500, on January 23, 2009, Miller filed a "Motion for Relief From Judgment for Idaho Case No. CV 2005-38." This motion was made by Miller pursuant to I.R.C.P. 60(a). However, this Court on appeal in CV 2006 1500 does not have jurisdiction to hear such a motion pertaining solely to a different case, CV 2005 38.

In its appeal regarding this $481.00 judgment against it, Collateraloan identified seven issues. One of those seven issues was Collateraloan's claim that the foreign Kansas judgment is unenforceable under five theories:

> 1. Whether the Kansas Judgment is barred by *res judicata* since an Idaho Court earlier dismissed Miller's claims;
> 2. Whether this Court must give full faith and credit to the original Idaho Judgment (in CV 2005 38) which dismissed Miller's claim, and not give full faith and credit to the subsequent foreign (Kansas) judgment;
> 3. Whether the foreign judgment fits within the definition of "Foreign Judgment" of I.C. § 10-1301;
> 4. Whether the State of Kansas had personal jurisdiction over Collateraloan;
> 5. Whether the State of Kansas had subject matter jurisdiction over Collateraloan.

Notice of Appeal, p. 2. Collateraloan reconfigured its issues on appeal in its Appellant's Brief, filed January 8, 2009. The first two issues enumerated immediately above remained, but issues 3-5 were changed to:

> 3. The doctrine of judicial estoppel applies to this case and [Miller] is estopped from claiming the State of Kansas had jurisdiction over this matter.
> 4. The magistrate court committed reversible error and/or abused its deiscretion in its actions/rulings during the hearing for this matter.
> 5. The Bonner County Sheriff failed to follow Idaho law and has wrongfully retained [Collateraloan's] assets.

Appellant's Brief, p. 3.

Oral argument in this matter was held on March 12, 2009. At oral argument, the Court had just received Miller's "Plaintiff's Brief" and "Addendum to Plaintiff's Brief." No objection by Collateraloan was made to the late submission of these briefs. The late submission prevented the Court from ruling at the conclusion of oral argument.

II. STANDARD OF REVIEW.

The Idaho Rules of Civil Procedure state that appeals from the magistrate's division shall be heard by the district court as an appellate proceeding. If the record on appeal is not adequate, the district court may order a trial *de novo* or remand the matter to the magistrate's division. I.R.C.P. 83(b). Thus, as the Idaho Supreme Court has stated, in an appeal from a magistrate court's decision, the district court should proceed in one of two ways: "(1) the district court could act as an appellate court and consider the record from the magistrate court, yet hear new evidence on matters not addressed below because they occurred after the appeal was filed; or (2) the district court could choose to wipe the slate clean and conduct a 'full' trial de novo." *Leavitt v. Leavitt,* 142 Idaho 664, 669, 132 P.3d 421, 426 (2006). Idaho Rule of Civil Procedure 83(u) sets forth the scope of appellate review on appeal to the District Court from the magistrate division.

> (1) Upon an appeal from the magistrate's division of the district court, not involving a trial de novo, the district court shall review the case on the record and determine the appeal as an appellate court in the same manner and upon the same standards of review as an appeal from the district court to the Supreme Court under the statutes and law of this state, and the appellate rules of the Supreme Court.
> (2) Upon appeal from the magistrates division of the district court involving a trial de novo, the district court shall render a decision in the action as a trial court as though the matter were initially brought before the district court.

I.R.C.P. 83(u). No party has asked for a *de novo* review. When the Idaho Supreme Court reviews the decision of a district court acting in its appellate capacity over the magistrate division, the Court reviews the magistrate court's decision independently of, but with due regard for, the district court's intermediate appellate decision. *State v. Doe,* 140 Idaho 271, 273, 92 P.3d 521, 523 (2004); *Marchbanks v. Roll,* 142 Idaho 117, 119, 124 P.3d 993, 995 (2005). The Supreme Court will uphold the magistrate court's findings of fact supported by substantial and competent evidence and exercises free review with regard to conclusions of law. *Doe,* 140 Idaho at 273.

III. ANALYSIS.

A. Issue and Claim Preclusion.

Collateraloan asks: "can an individual file suit against the wrong defendants, lose the case, re-file suit in a distant state against the proper defendant, obtain a default judgment and collect on the foreign judgment in the original judgment?" Appellant's Brief, p. 2. Magistrate Judge Debra A. Heise answered that question "yes" on February 15, 2008. This Court affirms that decision.

Miller's brief on appeal (Brief in Support of Plaintiff's Response to Appellant's Brief) appears to argue that *res judicata* would not bar his claim because Bonner County, Idaho Case No. CV 2005 0038 was filed against Robert Weaver and Mark Jones, while the instant matter on appeal (Bonner County Case No. CV 2006 1500, the registration in Idaho of the Kansas Judgment) was filed against the limited liability corporation Collateraloan of Idaho, LLC. Miller argues "resjudicata [sic] does not apply because there is not an exact identity between the parties." Brief in Support of Plaintiff's Response to Appellant's Brief, p. 1. Collateraloan argues both issue and claim preclusion bar Miller's ability to enforce the foreign Kansas judgment because the same

transaction formed the basis of CV 2005 38 and the Kansas case. Appellant's Brief, pp. 5-8. Collateraloan argues the identities of the persons or parties to the action were known, or should have been known, to Miller and he failed to name the correct party in his Complaint in Bonner County Case No. CV 2005 38. *Id.,* p. 6.

Res Judicata includes both claim preclusion and issue preclusion. *Ticor Title Co. v. Stanion,* 144 Idaho 119, 123, 157 P.3d 613, 617 (2007). Issue preclusion bars relitigation of an issue determined in a previous proceeding where: (1) the party against whom the previous decision was asserted had a full and fair opportunity to litigate the issue, (2) the issue decided was identical to the issue presented in the current matter, (3) the issue sought to be precluded was actually decided in the prior litigation, (4) there was a final judgment on the merits in the prior litigation, and (5) the party against whom the issue is asserted was a party or in privity with a party to the litigation. *Id.,* 144 Idaho 119, 124, 157 P.3d 613, 618. Claim preclusion is a bar to subsequent litigation where three requirements are met: (1) the same parties; (2) the same claim; and (3) a final judgment. *Id.*

At issue here is whether the same parties are in this and the prior litigation and whether the dismissal with prejudice amounted to a final judgment on the merits. It is undisputed that the same claim was made in (1) CV 2005 38, and (2) the Kansas litigation and the subsequent registration of that Kansas Judgment in the present case on appeal to this Court. The Supreme Court of Idaho has determined that a party is in privity with another when he derives his interest from one who was a party to the former action. *Kite v. Eckley,* 48 Idaho 454, 459, 282 P. 868, 869 (1929); *Foster v. City of St. Anthony,* 122 Idaho 883, 887, 841 P.2d 413, 418 (1992). The question for this Court is whether Collateraloan LLC, which was not a party to the prior action, derives its interest

from the named defendants in that earlier case, Robert Weaver and Mark B. Jones (the attorney for Collateraloan in the instant case).

The Idaho Supreme Court has examined the issue of privity as it relates to *res judicata. See e.g., First National Bank v. Hays,* 7 Idaho 139, 61 P.287 (1900) (grantees are in privity with a judgment lien entered against grantor); *Schuler v. Ford,* 10 Idaho 739, 80 P. 219 (1905) (possessor of land not in privity with seller where action against seller commenced after contract of sale was signed); *Smith v. Kessler,* 22 Idaho 589 127 P.172 (1912) (assignee of tax sale certificate was in privity with assignor); *Collard v. Universal Auto Ins. Co.,* 55 Idaho 560, 45 P.2d 288 (1935) (injured passenger not in privity with driver in automobile accident); *Kite v. Eckley,* 48 Idaho 454, 282 P. 868 (1929) (beneficiaries of trust not in privity with trustee); and *Smith v. Smith,* 67 Idaho 349, 180 P.2d 853 (1947) (natural father with no notice of child being adopted not in privity with natural mother who received notice). Although not addressed in either the corporate or limited liability context, the LLC in the instant matter cannot be in privity with the individually named member-defendants. If it were, the LLC's existence as a separate legal entity would cease to have any meaning. Further, the Kansas Judge determined:

> This lawsuit is identical in things sued for and cause of action. It is not identical in identity of the parties. This lawsuit was originally filed against Robert Weaver and Mark Jones, then amended to reflect the limited liability company as Defendant. The limited liability company is a separate entity under law and therefore res judicata does not apply because there is not an exact identity between the parties.

Order of Judge Woodring, dated July 17, 2006, p. 1. While the "law of the case" doctrine does not apply (Dopp v. Idaho Commission of Pardons and Parole, 144 Idaho 402, 407, 162 P.3d 781, 786, n. 3 (Ct.App. 2007), Judge Woodring's factual recitation

and legal analysis are sound. Collateraloan has cited no authority to the contrary.

Collateraloan argues only, "[c]ertainly the original defendants, members of Collateraloan of Idaho, LLC, are in privity [with Collateraloan]…", yet counsel for Collateraloan provides no legal authority for this position. Appellant's Brief, p. 7. Individual Weaver and Jones were not named in the Kansas action (the Kansas Judge granted Plaintiff's Motion to Amend the Petition "listing only the legal entity Collateraloan of Idaho, LLC and not the individuals listed previously." *See* Order of Judge Woodring, filed August 11, 2005.). If the parties in Bonner County Case No. CV 2005 38 (Weaver and Jones) and the party in the Kansas Judgment (Collateraloan) are not the same parties or in not in privity, Collateraloan's argument, as to both issue and claim preclusion, fails.

Only three cases from other jurisdictions examining whether privity may possibly exist between a limited liability company and its members could be found. The first, *Aranki v. Goldman & Assoc., LLP,* 34 A.D.3d 510, 825 N.Y.S.2d 97 (N.Y.A.D. 2 Dept. 2006), is not on point as it was a legal malpractice action involving allegations of minority members of an LLC (a law firm) that the law firm colluded with majority members. The court in that case held plaintiff's allegations were sufficient to state a cause for malpractice under the fraud, collusion, malicious acts exception to the requirement that such a cause of action cannot be asserted absent a showing of actual or near privity. In *Lee v. Clinical Research Center of Florida, L.C.,* 889 So.2d 317, 328 (La.App. 2004), the Court of Appeals for the Fourth Circuit of Louisiana held individual members of the limited liability company in a suit brought by a former employee brought suit against the limited liability company, were not in privity with the employee, and, therefore, the members were not liable for the alleged breach of an employment

contract. Finally, *Maxemus Entertainment, LLC v. Josey,* 2003 WL 22205931 (Conn. Superior Court, Sep. 10, 2003) an unreported Connecticut case, is likely the most on point. In that case, a defendant, Josey, moved for summary judgment as the Plaintiff LLC's complaint was barred by *res judicata* and collateral estoppel because the same claims and counterclaims alleging fraud and misrepresentation had been fully litigated in an action between Josey and Tate George, where Josey and George had together formed the plaintiff LLC to operate and manage an independent record company. The Connecticut court examined whether privity existed between the LLC and one of its members or managers. That court determined the LLC and George were in privity because of the applicability of the exception to § 59 of the Restatement (Second), Judgments. The general rule is that a judgment in actions involving an officer, director, stockholder, or member of a non-stock corporation has no preclusive effect on the corporation. However, an exception exists where a corporation is closely held and the members/stockholder's interests and those of the corporation coincide. *Id.,* at *3. Of course, in the instant matter, the issues in CV 2005 38 were arguably not fully litigated, and Appellant makes no argument for the applicability of Restatement (Second), Judgments, § 59. The pertinent portion of the *Josey* opinion is as follows:

> No Connecticut decisions discuss the circumstances under which a court properly may conclude that privity exists between a limited liability company and one of its members or managers. A federal district court, however, recently granted summary judgment on grounds of claim preclusion and issue preclusion, holding that the defendant limited liability companies were in privity for preclusionary purpose with the person who was the designated manager of the companies and had a controlling ownership interest. *Direct Marketing Concepts, Inc. v. Trudeau,* United States District Court, Docket No. 02 C 9014 (N.D.Ill. June 5, 2003). The district court stated: "In light of [the person's] self-created total control over both [limited liability companies] by virtue of his management, coupled with his ownership interest in both, it would represent the height of artificiality-an impermissible exaltation of form (and indeed not much formal separation at that) over substance-to view the [limited liability

companies] as anything other than in privity with [the person]." *Id.* We also look to the Restatement (Second) of Judgments for guidance.

Generally, a judgment in an action involving "an officer, director, stockholder, or member of a non-stock corporation" has no preclusive effect on the party's corporation. 2 Restatement (Second), Judgments § 59, pp. 93-94 (1982). "This rule of general applicability, however, is subject to an exception for corporations that are closely held: 'If the corporation is closely held, in that one or a few persons hold substantially the entire ownership in it, the judgment in an action by ... the holder of ownership in it is conclusive upon the [corporation] as to issues determined therein ... except when relitigation of the issue is justified in order to protect the interest of another owner or a creditor of the corporation.' " *Joe's Pizza, Inc. v. Aetna Life And Casualty Co., supra,* 236 Conn. at 869, quoting 2 Restatement (Second), *supra,* § 59(3)(b).[4] Comment (e) to § 59 states: "When the corporation is closely held ... interests of the corporation's management and stockholders and the corporation itself generally fully coincide ... For the purpose of affording opportunity for a day in court on issues contested in litigation ... there is no good reason why a closely held corporation and its owners should be ordinarily regarded as legally distinct. On the contrary, it may be presumed that their interests coincide and that one opportunity to litigate issues that concern them in common should sufficiently protect both."

That rationale is equally applicable to the facts in the present case. The parties do not dispute that George is the plaintiff's sole member. The plaintiff's current interests regarding the alleged fraud and misrepresentation fully coincide with those of George in the previous action. Although procedural steps toward final dissolution were at issue at the time of the previous action, the plaintiff's interest in remedying a fraudulent inducement of a membership interest was nevertheless fully represented in the previous action by George: The plaintiff has not argued or presented evidence that the respective interests were in conflict in some way. There is no evidence that relitigation of the particular issue is necessary to protect someone else's ownership interest or the interest of a creditor. Because there is an overwhelming identity of interest as to the underlying allegations of misrepresentation and fraud common to both lawsuits, this court will consider the plaintiff in privity with George as to prior determinations of the court regarding those issues.

n. 4. Although not a corporation, under Connecticut law, a limited liability company may sue and be sued in its own name. General Statutes §§ 34-124(b) and 34-186. That separate jural identity makes a limited liability company more like a corporation than like a partnership when considering issues of preclusion. Connecticut courts have applied other rules governing corporations to limited liability companies due to that similarity. See, e.g., *Litchfield Asset Management Corp. v. Howell,* 70 Conn.App. 133, 158, 799 A.2d 298, cert. denied, 261 Conn. 911, 806 A.2d 49 (2002) (court applies "identity" rule to "pierce the corporate veil" of limited liability company); *Stone v. Frederick Hobby Assoc. II,* Superior

> Court, judicial district of Stamford-Norwalk at Stamford, Docket No. CV 000181620 (July 10, 2001, Mintz, J.) (same).
>
> > The court, therefore, applies the rule and exceptions outlined in § 59 of the Restatement in the present case. Such treatment also accords with § 61 of the Restatement (Second) of Judgments dealing with unincorporated associations, which states in relevant part: "If under applicable law an unincorporated association is treated as a jural entity distinct from its members, a judgment for or against the association has the same effects with respect to the association and its members as judgment for or against a corporation, as stated in § 59." 2 Restatement (Second), Judgments § 61(2) (1982).

Id., pp. 3-4. Thus, the "general rule" would support the ruling made by the Kansas Judge in the present case that: "The limited liability company is a separate entity under law and therefore res judicata does not apply because there is not an exact identity between the parties." Order of Judge Woodring, dated July 17, 2006, p. 1. In any event, on appeal this Court has no ability to determine any "exception" to the "general rule", because in the present case, Collateraloan put on no proof as to the LLC status before Judge Heise in the February 15, 2008, hearing. T. p. 2, L. 1 – p. 10, L. 24. In fact, at no time during that hearing did counsel for Collateraloan, Mark Jones, ever mention the LLC, let alone the structure and ownership of the LLC or the distinction between the LLC one hand and Jones/Weaver, on the other.

The Kansas Judge later determined collateral estoppel, or issue preclusion, did not bar the Kansas lawsuit because "the Idaho case was dismissed without a hearing on the merits". Order of Judge Woodring, filed August 11, 2005. Idaho law leads to a different conclusion. "A dismissal of an action 'with prejudice' is simply an adjudication on the merits of the plaintiff's claim." *Straub v. Smith,* 145 Idaho 65, 73, 175 P.3d 754, 762 (2007) (Eismann, concurring), *citing King v. Lang,* 126 Idaho 905, 42 P.3d 698 (2002). *See also,* BLACK'S LAW DICTIONARY 482 (7th Ed. 1999) (Dismissal with prejudice is an "adjudication on the merits, and final disposition, barring the right to bring or

maintain such an action on the same claim or cause."). However, here the dismissal was prompted by Miller voluntarily seeking dismissal, not as a result of litigation and adjudication on the merits of Miller's claims against Collateraloan. And, even if a final judgment was arguably reached, it was reached as to Weaver and Jones, not Collateraloan of Idaho, LLC. Which brings us back to Judge Woodring's finding that: "The limited liability company is a separate entity under law and therefore res judicata does not apply because there is not an exact identity between the parties", (Order of Judge Woodring, dated July 17, 2006, p. 1), which finding this Court agrees with on appeal, because Collateraloan has provided no evidence in the record to support any other finding.

B. The Original Idaho Judgment and Full Faith and Credit.

As discussed *supra,* Collateraloan has set forth no authority which would convince this Court on appeal that Magistrate Judge Heise "violated the Full Faith and Credit Clause by failing to uphold the integrity of the judgment entered in the same courthouse", where the Judgment of which Collateraloan speaks is the one involving defendants Weaver and Jones, not Collateraloan. Appellant's Brief, p. 8. Collateraloan also argues it, the "winning party", believed the case to have been over and did not fight the new lawsuit in a distant forum. *Id.,* p. 9. That is a choice made by Collateraloan and its counsel. And while this argument may have held water until Miller amended his petition to name only the instant Appellant, Collateraloan, not the individual defendants previously listed (Weaver and Jones), Collateraloan had made a limited appearance with its motion to dismiss, and knew that as far as Miller was concerned the case was not over. *See* Journal Entry of Judgment, dated January 26, 2006. Ultimately, even giving Collateraloan what it seeks, full faith and credit of Judge Buchanan's Dismissal

with Prejudice of CV 2005 38, the instant Appellant (Collateraloan) would still not benefit as it was not named in that case and is not in privity with then-defendants Weaver and Jones, *see supra.*

I

C. Judicial Estoppel, Lack of Subject-Matter Jurisdiction, Personal Jurisdiction and Improper Venue.

Collateraloan argues Miller should be estopped from asserting Kansas is the proper forum, estopped from asserting Kansas law applies, and/or estopped from asserting Kansas has subject-matter jurisdiction when he previously voluntarily subjected himself to the jurisdiction of Idaho and filed the claim in Bonner County. Appellant's Brief, p. 10. Collateraloan concedes that after the individual defendants Weaver and Jones in CV 2005 38 filed an answer, Miller filed an "identical lawsuit (with the proper party, Collateraloan of Idaho, LLC) in Kansas. *Id.* Collateraloan argues the paperwork in both cases shows Miller attempted to delay the Idaho case until he could get a default in Kansas, in part because Miller never appeared at any hearings. *Id.*, pp. 10-11. The record indicates one continuance was sought and granted before Miller moved to dismiss CV 2005 38.

Again, Collateraloan does not clearly set forth any evidence from which Judge Heise or this Court could possibly reach the conclusion that as members of an LLC, Weaver and Jones should be considered the *same* party as the instant Appellant, Collateraloan.

Judge Heise, in denying Defendant's motion to Quash the Writ of Execution and to Strike the Foreign Judgment and Return Levied Assets, reasoned:

> Defendant raises several affirmative defenses to the merits of the claim that resulted in the imposition of the Judgment in the State of Kansas, including the defense of the doctrine of res judicata. This Court determines that it is without authority to relitigate the issues that were tried

> or could have been tried in the Kansas Court. The Kansas Judgment, that is, the Foreign Judgment filed in this case, is entitled to full faith and credit by the courts of the State of Idaho.

Order Denying Motions and Order Vacating Exparte Order, pp. 1-2. In Kansas, Collateraloan failed to appear at hearing on Miller' Motion to File an Amended Petition naming only Collateraloan of Idaho, LLC. On October 6, 2005, Judge Woodring in Kansas entered Judgment in favor of Miller, noting Collateraloan had not appeared for hearing. Subsequently, Collateraloan filed a Motion to Vacate Default Judgment on October 18, 2005, arguing the Kansas Court had no personal jurisdiction over Collateraloan. Judge Woodring analyzed Appellant's contacts with the state of Kansas and found:

> This Court finds specific personal jurisdiction over the Defendant in the contacts by internet following the sale of the gun. The Court finds that Defendant had sufficient contacts with the State of Kansas in reaching a settlement agreement following sale of the gun. These contacts were directly with the Plaintiff following the sale of the gun, and constitute an enforceable agreement entered into in the State of Kansas, and constitute a "purposeful availment" sufficient to find jurisdiction over the Defendant.

Order of Judge Woodring, dated July 17, 2006, p. 2.

Now, Collateraloan argues, "Mr. Miller cannot voluntarily submit to jurisdiction in Idaho and then argue that defendant(s), who have no ties to Kansas, be forced to travel two thousand miles to defend a claim that was already resolved in Idaho." Appellant's Brief, p. 11. But Collateraloan makes no argument against Judge Woodring's analysis of its contacts. Collateraloan only argues: "Plaintiff's [sic] actions do not rise to the level of 'minimum contacts' with the state of Kansas." *Id.* Saying it doesn't make it so. Collateraloan never addresses the numerous contacts Collateraloan had with Miller over the internet or the settlement agreement found by the Kansas Judge.

In *Burger King Corp. v. Rudzewicz,* 471 U.S. 462, 105 S.Ct. 2174 (1985), Justice

Brennan reasoned minimum contacts required by *International Shoe v. Washington,* 326 U.S. 310, 66 S.Ct. 154 (1945), are present where a defendant "purposefully directs" activities at residents in the forum state and litigation arises out of or relates to those activities. 471 U.S. 462, 472, 105 S.Ct. 2174, 2182. In contacts cases, where a defendant reaches out beyond one state and creates a continuing relationship and obligation to residents in another state, he is subject to suit in the other state for the consequences of his activities. *Id.* It is clear that in the instant case, although selling items using an internet auction service likely does not suffice to find minimum contacts, Collateraloan's statements to Miller via email thereafter did create a relationship and obligation to a Kansas resident. Collateraloan is subject to suit in Kansas for the consequences of its activities in that state regardless of Miller's having initiated suit against Weaver and Jones in Idaho and later having brought suit against Collateraloan in Kansas.

The argument that judicial estoppel should now prevent any action in Kansas is flawed. The doctrine of judicial estoppel was considered and adopted by the Idaho Supreme Court in *Loomis v. Church,* 76 Idaho 87, 227 P.2d 561 (1954). In *Loomis,* the plaintiff sued the driver of a car in which she was a passenger, alleging that the driver caused an accident with a truck by failing to stop. *Id.,* pp. 93-94. The plaintiff had previously recovered from the truck driver, alleging that the car's driver had stopped at a stop sign. *Id.* The Court set forth the doctrine of judicial estoppel, holding that where a litigant obtains a judgment, advantage, or consideration from one party, he cannot thereafter by repudiating such allegations obtain recovery or a right against another party arising out of the same transaction or subject-matter. *Id.* At issue is whether a person is playing "fast and loose" with the court. *Heinze v. Bauer,* 145 Idaho 232, 236,

178 P.3d 597, 601 (2008). Here, Miller did not obtain a judgment, advantage, or consideration from Collateraloan (or Weaver and Jones as individuals, for that matter) in dismissing his action in CV 2005 38. Miller also did not repudiate any allegations he'd made against Weaver and Jones in bringing suit in Kansas (Miller had initially named Weaver and Jones as defendants in the Kansas action and only later amended the claim to name only Collateraloan). In fact, in the heading of the motion for "Dismissal by Plaintiff" Miller in Bonner County Case No. CV 2005, Miller specifically states the case will be heard in Sedgwick County, Kansas and that "Defendants have submitted to the jurisdiction of the Courts of the State of Kansas." Dismissal by Plaintiff, filed June 23, 2005, p. 1. There was no playing fast and loose with the Court, or even with Collateraloan, Weaver or Jones, on the part of Miller.

D. The Magistrate's Alleged Reversible Error and Abuse of Discretion.

Collateraloan alleges Magistrate Judge Heise committed reversible error and/or abused the Court's discretion in failing to bar Miller's claim for the foreign judgment because a valid, final decision in Idaho had previously dismissed his claim. Appellant's Brief, p. 1. Collateraloan argues: (1) the Kansas Judgment is not a "foreign judgment" as defined by Idaho Code § 10-1301; (2) Judge Heise committed reversible error in ruling the $75 vehicle tow fee was not allowable as part of the judgment, but failing to deduct the amount from her written order; (3) Collateraloan was denied due process rights when the Court precluded it from providing testimony and/or evidence in support of its motion to set aside the foreign judgment; and (4) the Court erred in not upholding Appellant's objections to documents filed by Miller, which Appellant alleged were hearsay, had no evidentiary value, and did not comply with I.C. § 11-203(b) and in refusing to order the Sheriff to return Appellant's assets. Appellant's Brief, p. 12.

Collateraloan cites no authority for these assignments of error and has provided this Court with nothing more than its conclusory statements. There was no legal authority cited to Judge Heise at the February 15, 2008, hearing. T. p. 2, L.1 – p. 10. L. 24. Judge Heise's Order, filed the same date as hearing on the matter was held, is all that this Court has to consider on appeal. There is absolutely no argument by Collateraloan as to *why* the Order of the Kansas Judge would not be a "judgment, decree or order of a court of the United States or of any other court…" as contemplated by I.C. § 10-1301 (presumably Appellant is arguing the Kansas Court lacked personal jurisdiction), no argument whatsoever regarding the $75 vehicle tow fee (though Miller did later file a Motion to Refund $75 vehicle Tow Fee to Plaintiff on February 27, 2008, it is unclear whether he wished the fee to be returned to himself or Collateraloan and it is unclear what action was taken in this regard), no proof of Collateraloan's being precluded from testifying or presenting evidence on the February 15, 2008, hearing, and no mention by Judge Heise in her Order of her having been provided or her having considered any evidence by Collateraloan. Further, Collateraloan does not point out for this Court which specific documents filed by Miller allegedly do not comply with the Idaho Rules of Civil Procedure or Idaho law. *See* Brief of Appellant, p. 12. Collateraloan has not provided this Court with any support for its argument that Judge Heise abused her discretion in denying the Motions to Quash Writ, Strike Foreign Judgment and Return Levied Assets.

E. Bonner County Sheriff's Retaining of Appellant's Assets.

Collateraloan's final argument is that the Bonner County Sheriff failed to return Collateraloan's assets to Collateraloan after it filed a claim of exemption. Appellant's Brief, p. 13. Collateraloan argues I.C. § 11-203(c) requires the Sheriff to return

Collateraloan's assets where a judgment creditor, Miller in this case, fails to schedule a hearing on a motion to contest the claim of exemption. *Id.*

A debtor wishing to claim exemption in property that has been levied upon may mail a claim of exemption to the sheriff within fourteen days of service of the writ of execution. I.C. § 1-203(a). The judgment creditor then has five days to contest the claim of exemption. I.C. § 11-203(b). If the claim is contested, a hearing must be held within twelve days. *Id.* If the time for contesting a claims of exemption expires, or the creditor notifies the sheriff the claim will not be contested, the sheriff must release the claimed property to the debtor. I.C. § 11-293(c).

Here, the writ of execution was issued on January 15, 2008. A Claim of Exemption was filed by Appellant on February 4, 2008, more than fourteen days after service of the writ (presuming the writ was served upon Appellant on or before January 20, 2008). The Claim of Exemption related to "all items/assets levied upon" and was based on the Motion to Quash Writ of Execution, Strike Foreign Judgment and Return Levied Assets of Defendant, the Ex Parte Motion to Retain Levied Assets of Defendant, and Defendant's Brief. Claim of Exemption, p. 1. On February 15, 2008, Judge Heise denied all of the motions which formed the basis for the exemption. Therefore, based on Collateraloan's untimely filing of the Claim for Exemption, and Judge Heise's having denied the bases for the Claim for Exemption, the Sheriff did not act in violation of Idaho law in retaining the assets. *See e.g. Peasley Transfer & Storage Co. v. Smith,* 132 Idaho 732, 739, 979 P.2d 605, 612 (1999) (A Sheriff's possession of property seized pursuant to a validly issued writ of execution is lawful pending the outcome of proceedings under I.C. § 11-203, provided the Sheriff performs his statutory duties under § 11-203.)

F. Attorney's Fees and Costs.

Collateraloan requests fees and costs under I.A.R. 40 and 41 and I.C. §§ 12-120, 12-121. As required by I.A.R. 41, Collateraloan asserted a claim for fees in the first appellate brief filed. I.A.R. 41(a). However, Collateraloan is not the prevailing party, and Collateraloan is therefore not entitled to costs on appeal, or fees pursuant to I.C. §§ 12-121 or 12-120. Miller is entitled to costs on appeal against Collateraloan. As Miller is *pro se,* Miller is not entitled to attorney fees against Collateraloan.

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G. Conduct of the Parties and Counsel.

Much effort has been expended by the parties over $481.00. Certainly that is the right of the parties. However, the relationship between these parties over this amount is absolutely acrimonious. Miller accuses Mark B. Jones of lying, unethical and fraudulent behavior. Addendum to Plaintiff's Brief, p. 1. Jones claims the following regarding Miller: "The customer [Miller] continues an onslaught of threats and other conduct that illustrate customer has some serious mental issue problems" and "…he obviously has some serious mental health issues." Appellant's Brief, p. 2. By footnote, Jones, an attorney, attributes these two statements to: "In Appellant's opinion." *Id.,* n. 4, 8. First of all, the appellant is a LLC, a business entity, and cannot have an "opinion". Since Appellant's Brief was signed by Mark B. Jones, an attorney, this Court concludes it is Jones that harbors this "opinion". Second, there is nothing in the record that would support that Miller has a mental illness. Third, this is a breach of contract case, and the mental health of any party is of no relevance as no one claims a lack of capacity. By making the unsubstantiated claim that his *pro se* opponent suffers from a mental illness, Jones does nothing to instill confidence or respect from the legal profession. A lawyer

shall not assert an issue unless there is a basis in fact for doing so. Idaho Rule of Professional Conduct 3.1. A lawyer shall not knowingly make a false statement of fact to a tribunal. *Id.,* 3.3. In fairness to his opposing party, a lawyer shall not allude to any matter that the lawyer does not reasonably believe is relevant or that will not be supported by admissible evidence, assert personal knowledge of facts in issue except when testifying as a witness, or state a personal opinion as to the justness of a cause, the credibility of a witness or the culpability of a civil litigant. *Id.,* 3.4. A lawyer shall not use means that have no substantial purpose other than to embarrass, delay, or burden a third person. *Id.,* 4.4. It is professional misconduct for a lawyer to violate or even attempt to violate the Rules of Professional Misconduct, or to engage in conduct involving dishonesty, fraud, deceit or misrepresentation. *Id.,* 8.4. This Court does not condone Miller accusing Jones of lying, engaging in unethical and fraudulent behavior, simply because it is not relevant to this Court's resolution of the issues on appeal. However, it would appear Jones has reaped what he has sown. By accusing Miller of having serious mental health issues in his opening brief, Jones should not be surprised his *pro se* opponent has chosen to follow suit in his response brief.

III. ORDER.

IT IS HEREBY ORDERED the Order Denying Motions to Quash Writ, Strike Foreign Judgment and Return Levied Assets, Order Vacating Expare Order to Retain Levied Assets, entered by Judge Heise on February 15, 2008, is AFFIRMED in all aspects. Costs on appeal are awarded to Miller against Collateraloan.

Entered this 16th day of March, 2009.

_____
John T. Mitchell, District Judge

Certificate of Service

I certify that on the _____ day of March, 2009, 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 #**		**Fax #**
Mark B. Jones P.O. Box 2011 Sandpoint, ID 83864		Ron Miller 5650 Park Hollow Witchita, KS 67208 Hon. Debra A. Heise Hon. Barbara A. Buchanan	

_____
Jeanne Clausen, Deputy Clerk