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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**

**JACKLIN LAND COMPANY, an Idaho** )  
**limited partnership,** )  
 )  
*Plaintiff,* )  
 )  
vs. )  
 )  
**BLUE DOG RV, INC., an Idaho corporation,** )  
**et al.** )  
 )  
*Defendants.* )  
 )  
 )

Case No. **CV 2008 6752**

**MEMORANDUM DECISION AND  
ORDER GRANTING PLAINTIFF'S  
MOTION FOR RECONSIDERATION,  
GRANTING PLAINTIFF'S SECOND  
MOTION FOR SUMMARY  
JUDGMENT, AND DENYING  
DEFENDANTS' MOTION FOR  
RECONSIDERATION**

**I. PROCEDURAL HISTORY AND BACKGROUND.**

On June 15, 2009, this Court filed its "Memorandum Decision and Order on Cross-Motions for Summary Judgment." At the conclusion of that twenty-seven page decision, this Court ordered as follows:

**IT IS HEREBY ORDERED** plaintiff's motion for summary judgment is GRANTED in favor of plaintiffs on the following issues: 1) The QCA/Jacklin Agreement is enforceable against defendants; 2) the Agreement is a "Use" agreement and not a "development" agreement; 3) Articles 2, 3, 4, 5, and 6 of the Declaration of Covenants, Conditions, and Restrictions apply to defendants; 4) defendants have violated the Agreement.

**IT IS FURTHER ORDERED** plaintiff's motion for summary judgment is DENIED as to its entitlement to declaratory relief sought (eviction) and injunctive relief sought, at this time.

**IT IS FURTHER ORDERED** defendant's motion for summary judgment is DENIED in all aspects, and specifically, this Court finds plaintiff has not breached the covenant of good faith and fair dealing and defendants are not entitled to the defense of waiver or estoppel.

On July 13, 2009, plaintiff Jacklin Land Company (Jacklin) filed “Plaintiff’s Motion for Reconsideration”, “Plaintiff’s Second Motion for Summary Judgment”, and “Memorandum in Support of Plaintiff’s (1) Second Motion for Summary Judgment; and (2) Motion for Reconsideration.” On July 27, 2009, defendants filed a “Response to Plaintiff’s (1) Second Motion for Summary Judgment; and (2) Motion for Reconsideration. On July 27, 2009, defendants (collectively referred to as “Blue Dog”) also filed “Defendants’ Motion for Reconsideration”, a “Memorandum in Support of Defendants’ Motion for Reconsideration” and an “Affidavit of Michael J. Hines in Support of Defendants’ Motion for Reconsideration.” On August 5, 2009, Jacklin filed its “Reply Memorandum in Support of Plaintiff’s (1) Second Motion for Summary Judgment; and (2) Motion for Reconsideration.” On August 7, 2009, defendants filed their “Reply Memorandum in Support of Defendants’ Motion for Reconsideration.” Oral argument on all these motions was held on August 10, 2009. At oral argument, this Court had read all briefs submitted on the motions, but several cases had been cited to the Court and the Court did not have the opportunity to read each of these cases prior to oral argument. Since these cases appeared to be pivotal, the Court took the matter under advisement. The Court has read the cases submitted by counsel for each side.

As an aside, at oral argument, counsel for defendants stated they had no objection to Plaintiff’s Motion to Alter Timelines in the Court’s Pre-Trial Order. Jacklin had moved this Court to alter the deadlines set forth in its January 5, 2009, Scheduling Order, which provides motions for summary judgment shall be filed so as to be heard no less than 90 days before trial. Motion to Alter Timelines, p. 2. Jacklin filed its second motion for summary judgment on June 13, 2009, in response to this Court’s Memorandum Decision and Order on the parties’ cross-motions for summary judgment.

As a result of defendants' no objection, Jacklin's Motion to Alter Timeline in the Court's Pre-Trial Order was granted.

Jacklin's second motion for summary judgment requests the same relief, and sets forth the same arguments, as its motion for reconsideration. Defendants have not objected to the Motion to Alter Timelines. Thus, the motion to alter timelines is granted.

The following are the facts as recited by this Court in its June 15, 2009, Memorandum Decision and Order on Cross-Motions for Summary Judgment:

As part of plaintiff Jacklin Land Company's (Jacklin) development of the Riverbend Commerce Park, which was platted in 1988, Jacklin recorded an original set of covenants, "Declaration of Covenants, Conditions, and Restrictions of Riverbend Commerce Park." Affidavit of Tom Stoesser, Exhibit B. These covenants were later amended in 1989. The amended covenants encumbered the property which is presently leased by defendant Blue Dog RV, Inc. (Blue Dog), which is the subject of this litigation. Affidavit of Tim Stoesser, Exhibit C.

In 1990, Quality Centers Associates (QCA), the predecessor in interest of defendant KL Properties, Inc. (KLP), wished to purchase the property KLP now owns, and QCA asked Jacklin to remove the 1989 covenants then in effect, as a matter of title. Jacklin agreed on the terms and conditions memorialized in the QCA/Jacklin Agreement (hereinafter "Agreement"), dated November 7, 1990, which removed the then-existing Declaration of Covenants, Conditions, and Restrictions in return for QCA agreeing: (1) to construct and maintain a first-class shopping center; (2) to work with Jacklin to achieve a mutually accepted design and appearance for the shopping center, and (3) to agree to comply with Articles 2,3,4,5, and 6 of the Declarations of Covenants, Conditions, and Restrictions recorded in 1988, as subsequently amended. Affidavit of Pat Leffel, Exhibit B. This agreement between QCA and Jacklin was unique to the property now at issue, Lots 1 to 4 (of Lots 1 to 17) of Block 1 of Phase I of the development, and differs from the covenants applicable to the Riverbend Commerce Park generally. After purchasing lots 1 to 17, QCA worked with Jacklin and achieved a mutually acceptable design and appearance for the Factory Outlets on Lots 5-17 of Block 1. In 2005, KLP purchased the property from QCA, including Lots 1 to 17 of Block 1.

On July 1, 2008, Blue Dog entered into a lease with KLP for Lots 1-4 of Block 1. Jacklin filed its motion for summary judgment on December 11, 2008. Jacklin moves for summary judgment on its claims for a permanent injunction prohibiting the use of the property for an RV dealership/facility and for declaratory judgment that the uses the defendants have put the property to violate the QCA/Jacklin Agreement. Defendants argue no interpretation of the Agreement would prohibit Blue

Dog's RV Center. Defendants argue Jacklin has not made a showing of irreparable injury to support injunctive relief. Defendants argue Jacklin itself breached the Agreement. Finally, defendants argue defendants' waiver and estoppel defenses preclude summary judgment in Jacklin's favor. On February 17, 2009, defendants filed "Defendants Cross-Motion for Summary Judgment." Following extensive briefing and submission of affidavits by both parties, which the Court has considered, oral argument was heard on March 3, 2009. On March 31, 2009, Jacklin filed a "Supplemental Citation of Authority by Plaintiff." That supplemental authority is *Bushi v. Sage Health Care, PLLC*, 2009 Opinion No. 30, 09.6 ISCR 244 (March 4, 2009), a case concerning good faith and fair dealing.

Memorandum Decision and Order on Cross-Motions for Summary Judgment, pp. 1-3.

This case is scheduled for a Court trial on September 21, 2009. Each side has now presented motions which would essentially obviate the need for trial.

Jacklin argues case law from other jurisdictions holds Jacklin does not need to prove irreparable injury when seeking a permanent injunction to enforce a consensually negotiated limitation on the use of real property (restrictive covenant). Jacklin claims that these cases show that essentially, once breach has been shown, that is all that is needed for a permanent injunction.

Blue Dog argues Jacklin does need to prove irreparable harm in order to obtain an injunction. Blue Dog further argues that, Jacklin has not and cannot prove irreparable harm; thus, their motion for reconsideration should be granted and Jacklin's permanent injunction claims should be dismissed.

## **II. STANDARD OF REVIEW.**

At issue are both cross-motions for reconsideration and a second motion for summary by Jacklin.

### **A. Summary Judgment.**

In considering a motion for summary judgment, the Court is mindful that summary judgment may properly be granted only where there are no genuine issues of material fact

and the moving party is entitled to judgment as a matter of law. I.R.C.P. 56(c). In determining whether any issue of material fact exists, this court must construe all facts and inferences contained in the pleadings, depositions, and admissions, together with the affidavits, if any, in the light most favorable to the non-moving party. I.R.C.P. 56(c); *Sewell v. Neilson, Monroe Inc.*, 109 Idaho 192, 194, 706 P.2d 81, 83 (Ct. App. 1985). A mere scintilla of evidence or only slight doubt as to the facts is not sufficient to create a genuine issue for purposes of summary judgment. *Samuel v. Hepworth, Nungester & Lezamiz, Inc.*, 134, Idaho 84, 87, 996 P.2d 303, 306 (2002). Summary judgment must be denied if reasonable persons could reach differing conclusions or draw conflicting inferences from the evidence. *Smith v. Meridian Joint School District No. 2*, 128 Idaho 714, 718, 918 P.2d 583, 587 (1996).

Where, as here, both parties file motions for summary judgment relying on the same facts, issues and theories, the judge, as trier of fact, may resolve conflicting inferences if the record reasonably supports the inferences. *Riverside Dev. Co. v. Ritchie*, 103 Idaho 515, 518-20, 650 P.2d 657, 661-62 (1982). Where both parties file motions for summary judgment relying on the same facts, issues and theories, the fact that both parties have filed summary judgment motions alone does not in itself establish that there is no genuine issue of material fact. *Riverside Dev. Co. v. Ritchie*, 103 Idaho 515, 518, 650 P.2d 657, 661, n. 1. This is so because by filing a motion for summary judgment a party concedes that no genuine issue of material fact exists under the theory that he is advancing, but does not thereby concede that no issues remain in the event that his adversary seeks summary judgment upon different issues of theories. *Id.*

In any case which will be tried to the court, rather than to a jury, the trial judge is not constrained to draw inferences in favor of the party opposing a motion for summary

judgment, but instead, can arrive at the most probable inferences to be drawn from uncontroverted evidentiary facts. *Id.*

### **B. Motion for Reconsideration under I.R.C.P. 11(a)(2)(B).**

A trial court's decision to grant or deny a motion for reconsideration is reviewed for an abuse of discretion. *Jordan v. Beeks*, 135 Idaho 586, 592, 21 P.3d 908, 914 (2001). A motion for reconsideration of an interlocutory order of the trial court may be made at any time before entry of the final judgment, but not later than fourteen days after entry of the final judgment. I.R.C.P. 11(a)(2)(B). A party making a motion for reconsideration is permitted to present new evidence, but is not required to do so. *Johnson v. Lambros*, 143 Idaho 468, 147 P.3d 100 (Ct.App. 2006).

## **III. ANALYSIS.**

### **A. Jacklin's Second Motion for Summary Judgment and Motion for Reconsideration.**

Jacklin moves this Court for reconsideration (or alternatively summary judgment) on issues relating to its claims for declaratory relief and injunctive relief in the form of a permanent injunction. Both claims of declaratory relief and injunctive relief in essence request an order decreeing Blue Dog cease and desist from utilizing the subject property in violation of the terms of the recorded instruments binding the property. Memorandum in Support of Plaintiff's (1) Second Motion for Summary Judgment; and (2) Motion for Reconsideration, p. 2, quoting Complaint, ¶¶ 36 and 39. Jacklin argues this Court erred in determining Jacklin was not entitled to a permanent injunction under I.R.C.P. 65(e) for failure to demonstrate irreparable harm, because a party seeking permanent injunctive relief to enforce a restrictive covenant need not show that money damages will not afford adequate relief and that irreparable harm is presumed when a defendant violates a consensually-negotiated restrictive covenant burdening real

property. Reply Memorandum in Support of Plaintiff's (1) Second Motion for Summary Judgment; and (2) Motion for Reconsideration, p. 5. Jacklin cites for the Court case law from numerous jurisdictions holding that the mere breach of a restrictive covenant is sufficient for the Court to interfere by injunction. Alternatively, Jacklin points the Court to case law which discusses grants of injunctive relief for violations of restrictive covenants via balancing of the equities. Memorandum in Support of Plaintiff's (1) Second Motion for Summary Judgment; and (2) Motion for Reconsideration, pp. 12-13. Jacklin argues the Court has "already held and determined why the 'balancing of the equities,' if necessary to implement the relief requested by Jacklin through a permanent injunction, favors Jacklin over the Defendants". *Id.*, p. 13.

Blue Dog argues Jacklin fails to establish any support for the proposition that a different standard applies to its request for permanent injunction than that used by the Court in its Memorandum Decision and Order and that irreparable harm must be shown for injunctive relief of any type to issue. Response to Plaintiff's (1) Second Motion for Summary Judgment; and (2) Motion for Reconsideration, p. 5. Blue Dog also argues Jacklin cannot demonstrate irreparable harm. *Id.* Blue Dog argues Idaho, Ninth Circuit, and Supreme Court precedent all require irreparable harm and that the case law cited by Jacklin is not binding on this Court. *Id.*, p. 6. Blue Dog argues Jacklin should not be able to recover monetary damages because monetary damages were not prayed for in Jacklin's Complaint, but to the extent this Court allows Jacklin to establish damages at trial, monetary damages would suffice to return the property to the condition it was in before Blue Dog's operation and, as such, Jacklin has an adequate remedy at law and no injunction is necessary. *Id.*, pp. 9-10.

In its Memorandum Decision and Order, this Court wrote:

Injunctive relief is granted as a matter of discretion of the trial court and an appellate court will not interfere absent a manifest abuse of discretion. *Harris*, 106 Idaho 513, 517, 681 P.2d 988, 992. The party seeking an injunction bears the burden of proving a right thereto. *Id.* Here, Jacklin bears the burden of proving I.R.C.P. 65(e) grounds for preliminary injunction, Jacklin must show: (1) it is entitled to the relief demanded, which consists of restraining continuance of the acts complained of, either for a limited period or perpetually; (2) the complained-of act would produce waste or great or irreparable injury to plaintiff; (3) the defendant is doing something in violation of plaintiff's rights, respecting the subject of the action and tending to render judgment ineffectual; (4) the defendant threatens to or is about to remove or dispose of its property with the intent to defraud. I.R.C.P. 65(e)(1)-(4) (subsections (5) and (6) are not applicable to this matter). Jacklin has shown an entitlement to enjoin Blue Dog from continuing its business in violation of the Agreement. Jacklin has not provided the Court (at least not at summary judgment) with evidence of waste or great injury.

Memorandum Decision and Order on Cross-Motions for Summary Judgment, pp. 25-26.

Indeed, “[t]he requirements for the issuance of a permanent injunction are ‘the likelihood of substantial and immediate irreparable injury and the inadequacy of remedies at law.’” *Easyriders Freedom F.I.G.H.T. v. Hannigan*, 92 F.3d 1486, 1495 (9<sup>th</sup> Cir. 1996) (quoting *American-Arab Anti-Discrimination Comm. v. Reno*, 70 F.3d 1045, 1066-67 (9<sup>th</sup> Cir. 1995)). However, Jacklin’s argument on reconsideration is supported by this Court’s reading of the case law and other authority cited to this Court. Although no Idaho case law addresses the matter, applicable treatises state:

Injunctive relief is equitable in nature, and is the most commonly requested remedy in actions to enforce restrictive covenants. The remedy may take the form of an injunction restraining someone from further violation of the restrictive covenant, or an injunction directing an affirmative act, such as the removal of a structure. The court will weigh the harm which will result from granting injunctive relief against the benefit that will be gained by the injunction.

Typically, injunctive relief requires that an actual and substantial injury be established, but an exception to this rule exists if a breach of a restrictive covenant is shown. This exception relieves the enforcing party from showing substantial damages or the existence of irreparable injury. Thus, the injunction does not depend upon whether the breach will cause damage, and the mere breach is sufficient to support a grant of injunctive

relief. Moreover, a restriction may be enforced through injunction simply by showing that a violation is "threatened."

34 Am.Jur. 3d *Proof of Facts* § 10 (2009) (Violation of Restrictive Covenant) (citations omitted). See also *Sandstrom v. Larsen*, 59 Haw. 491, 583 P.2d 971, 978 (Haw. 1978) (Injunctive relief is appropriate when restrictive covenants are violated); *Marshall v. Adams*, 447 S.W.2d 57 (Ky.App. 1969) (Breach of a restrictive covenant may be enjoined even absent a showing of the amount of damage in fact caused by the breach). It is clear that this Court may properly exercise its discretion in determining on reconsideration whether issuance of a permanent injunction is proper. Jacklin argues the Court has already balanced the equities in matter in Jacklin's favor. Memorandum in Support of Plaintiff's (1) Second Motion for Summary Judgment; and (2) Motion for Reconsideration, p. 13. It is also without question that this Court determined declaratory relief in the instant matter "[relates] to the fact that defendants breached the Agreement and the applicability and validity of the Agreement and Articles it incorporates." Memorandum Decision and Order on Cross-Motions for Summary Judgment, p. 24.

Not requiring proof of irreparable harm in restrictive covenant cases makes sense in a variety of ways. **First** of all, the landowner would only put into place restrictive covenants that are important to the landowner. The landowner would only place restrictive covenants in the lease if the landowner felt at the time the covenants were created, that if the restrictive covenants were ever violated in the future, the landowner would be harmed. In essence, the landowner has determined in advance that violation of the restrictive covenant will cause the landowner harm. This would be true whether or not damages for that harm were easily determined. It may well be that a landowner would put a restrictive covenant in place, which happened to be important

to the landowner, for which a violation would cause absolutely no economic harm or monetary damage, yet, obviously disturb the landowner. **Second**, the lessee (or purchaser of property subject to a restrictive covenant) is on notice of the restrictive covenant when the lessee chooses to enter into the lease agreement. This was noted by the Supreme Court of South Carolina in *Houck v. Rivers*, 450 S.E.2d 106 (So.Car. 1994): “While it is true that the awarding of an injunction is addressed to the conscience of the Court, this rule is not applicable where it clearly appears that an injunction is necessary to prevent one from violating the equitable rights of another where he has notice, actual or constructive, of such rights.” Citing *Sprouse v. Winston*, 232 S.C. 176, 46 S.E.2d 874 (1948); 43A C.J.S. Injunctions § 100 (1978). **Third**, as pointed out by Jacklin’s counsel at oral argument, a contrary ruling would leave the landowner with a lessee (or subsequent purchaser) who has entered into a lease (or purchase), with full notice and knowledge of this consensual restrictive covenant, who may later breach that restrictive covenant if the lessee or subsequent purchaser feels the landowner will have difficulty proving damages for his lost business. Any restrictive covenant for which damages would be difficult to prove would be worthless and impossible to enforce.

One of the cases cited by Blue Dog is *Holmes Harbor Water Co., Inc. v. Page*, 8 Wn.App. 600, 508 P.2d 628 (1973). Citing *Holmes Harbor*, Blue Dog claims: “Washington courts require a showing of necessity and irreparable injury to be proven in restrictive covenant cases.” Response to Plaintiff’s (1) Second Motion for Summary Judgment; and (2) Motion for Reconsideration, p. 7. As pointed out by Jacklin, this simply is not true. Reply Memorandum in Support of Plaintiff’s (1) Second Motion for Summary Judgment and (2) Motion for Reconsideration, p. 8. *Holmes Harbor* is a case where plaintiffs sought to enforce restrictive covenants regarding the height of

structures built within a plat. The court declined to grant the injunction, holding:

The principal question of law raised by this dispute is whether plaintiff is entitled to a mandatory injunction. No plaintiff is entitled to such an injunction as of course, merely because of a violation of a covenant affecting real property, for which, to be sure, there is no adequate remedy at law. The allowance of injunctive relief is a discretionary matter, in that the Court may be called upon to give or withhold relief depending upon variables, namely, the circumstances of the case.

508 P.2d 628, 631-32. In particular, the circumstances found by the court were:

The landowner acted innocently; he attempted to comply with the restrictive covenants; and his violation of it was unintentional. The plaintiffs delayed bringing suit until the construction was complete; *they failed to prove any injury*; and the cost of removing the violation was exorbitant when compared with the slight violation of the covenant.

508 P. 2d 628, 632. (emphasis added). In no way does the italicized portion state, as Blue Dog argues: “Washington courts require a showing of necessity and irreparable injury to be proven in restrictive covenant cases.” Response to Plaintiff’s (1) Second Motion for Summary Judgment; and (2) Motion for Reconsideration, p. 7. The facts of that case were *Holmes Harbor* failed to prove injury, but the holding of that case is not that irreparable injury is required in restrictive covenant cases. Irreparable injury is certainly a factor in such cases. The holding of *Holmes Harbor* is that just because a party violates a restrictive covenant, does not mean that injunctive relief will necessarily be granted...it depends on the facts. The facts in this case are quite different from those found in *Holmes Harbor*. Blue Dog did not act “innocently”, as the violating party in *Holmes Harbor* did. This Court has already found Blue Dog “simply started its business on KLP’s property without asking for approval from anyone”, “Blue Dog is already in violation of the Agreement, through only its own fault”. Memorandum Decision and Order on Cross-Motions for Summary Judgment, p. 16. Similarly, Blue Dog has not “attempted to comply with the restrictive covenants” such as the offending

party in *Holmes Harbor*. Blue Dog's violation of the restrictive covenants in this case was intentional, unlike the offending party in *Holmes Harbor*, whose conduct was unintentional. In *Holmes Harbor* the height restriction was violated by either four inches or 2.6 feet, depending from where on the property the height was measured, thus supporting the court's conclusion that: "...the cost of removing the violation was exorbitant when compared with the slight violation of the covenant." In the present case, there is nothing Blue Dog would need to tear down and rebuild. In fact, it is the *lack* of building the conforming accoutrements required by the restrictive covenants which is the cause of this litigation.

As noted by Jacklin (Reply Memorandum in Support of Plaintiff's (1) Second Motion for Summary Judgment and (2) Motion for Reconsideration, p. 10), the Washington Court of Appeals case of *W.F. Hagemann v. Worth*, 56 Wn.App. 85, 782 P.2d 1072 (1989), has clearly held:

In Washington, owners of land have an equitable right to enforce covenants by means of a general building scheme designed to make it more attractive for residential purposes, without showing substantial damage from the violation.

782 P.2d 1072, 1974.

This Court agrees with Jacklin's argument that the "irreparable harm" requirement is inapplicable regarding a prayer for injunctive relief where a breach of a restrictive covenant is alleged. Thus, it is proper for this Court to grant the injunctive relief sought by Jacklin. This is also the case if the Court were to balance the equities in determining Jacklin's entitlement to a permanent injunction.

In its Memorandum Decision, this Court noted that a grant of a permanent injunction would result in Jacklin receiving the principal relief sought without having to bring the cause to trial. Memorandum Decision and Order on Cross-Motions for

Summary Judgment, p. 27. Jacklin argues the case law cited by Blue Dog at page ten of their Response to Plaintiff's (1) Second Motion for Summary Judgment; and (2) Motion for Reconsideration, is inapposite as it deals with preliminary injunctions and temporary restraining orders, not permanent injunctive relief. Reply Memorandum in Support of Plaintiff's (1) Second Motion for Summary Judgment; and (2) Motion for Reconsideration, p. 12. Jacklin states it is entitled to the permanent injunction and "[t]he request for permanent injunctive relief, if granted, will end the case", and "There is no necessity of a trial to establish the likelihood of damages or any irreparable harm given that irreparable harm and damages are unnecessary under the great weight of authority when consensually-negotiated covenants are at issue." *Id.*

Although Idaho case law on the matter does indeed focus on preliminary injunctions, the Idaho Supreme Court has stated:

The rule against granting a preliminary injunction which will have the effect of giving to the party seeking the injunction all the relief sought in the action, does not preclude the granting of such an injunction in a proper case. Rather, it is to be understood as requiring the moving party in such case to show a clear right to the relief sought.

*Farm Service, Inc. v. U.S. Steel Corp.*, 90 Idaho 570, 586, 414 P.2d 898, 906-07 (1966).

As discussed *supra*, Jacklin bears the burden of proving I.R.C.P. 65(e) grounds for preliminary injunction. Jacklin must show: it is entitled to the relief demanded, which consists of restraining continuance of the acts complained of, either for a limited period or perpetually; the complained-of act would produce waste or great or irreparable injury to plaintiff; the defendant is doing something in violation of plaintiff's rights, respecting the subject of the action and tending to render judgment ineffectual; the defendant threatens to or is about to remove or dispose of its property with the intent to defraud. I.R.C.P. 65(e)(1)-(4) (subsections (5) and (6) are not applicable to this matter). With the

“great waste or irreparable injury” requirement taken out of the analysis for the purposes of Jacklin’s request for a permanent injunction to enforce the restrictive covenant, Jacklin would only need to demonstrate its entitlement to the relief sought and Blue Dog’s violation of Jacklin’s rights. This Court held at summary judgment that the Agreement is enforceable against Defendants and Defendants have violated the Agreement. Memorandum Decision and Order on Cross-Motions for Summary Judgment, pp. 27-28. Therefore, Jacklin has already shown a clear right to the relief sought, and despite this Court’s granting a permanent injunction giving Jacklin all relief sought, such relief is not barred outright by the Idaho Supreme Court.

As noted by Jacklin (Memorandum in Support of Plaintiff’s (1) Second Motion for Summary Judgment and (2) Motion for Reconsideration, p. 7), this Court erred at page twenty-seven of its decision when it wrote: “Jacklin has not provided this Court with evidence at this time entitling it to enjoin Blue Dog’s continued business on the subject property pursuant to IRCP 65(e).” The conditions of I.R.C.P. 65(e) are applied to requests for preliminary injunctive relief, not requests for permanent injunctive relief such as the present case. It is important for this Court to recognize this mistake, because Blue Dog in essence has made the rather conclusory argument that just because this Court has decided a certain way previously means Blue Dog wins on reconsideration. Blue Dog argues: “The Court already determined as a matter of law that in order for an injunction to issue in this case, Jacklin must present evidence of waste or irreparable injury pursuant to I.R.C.P. 65(e). See Memorandum Decision and Order on Cross-Motions for Summary Judgment (Decision and Order)”, p. 25.”; and “As set forth in *Defendants’ Response to Plaintiff’s (1) Second Motion for Summary Judgment; and (2) Motion for Reconsideration*, the Court correctly applied the standard

set forth in I.R.C.P. 65(e) to determine that an injunction could not issue at the summary judgment stage of this case, and that in order for an injunction to issue, Jacklin must present evidence of great or irreparable injury.” Reply Memorandum in Support of Defendants’ Motion for Reconsideration, p. 2. This Court got it wrong in citing I.R.C.P. 65(e). Blue Dog’s argument that this Court got it right is: “Although Jacklin continues to couch this motion as one for a permanent injunction, it is in fact a motion for a preliminary injunction because there has not been a trial in this matter.” *Id.*, p. 4. Blue Dog has cited no authority that the only distinguishing feature between a preliminary injunction and a permanent injunction, is a trial.

This confusion between preliminary injunctions and permanent injunctions also explains why Blue Dog’s reliance on *Fox Farm Estates Landowners Assoc. v. Kreisch*, 285 Mont. 264, 947 P.2d 79 (1997), is misplaced.

While the facts of this case have not changed, this Court has been given new information in the form of overwhelming case law which provides the basis for this Court to overturn this Court’s previous ruling. *Jordan v. Beeks*, 135 Idaho 586, 592, 21 P.3d 908, 914 (2001).

#### **B. Blue Dog’s Motion for Reconsideration.**

Blue Dog moves this Court to reconsider its decision to reserve the issue of irreparable injury and/or damages for trial, arguing that Jacklin cannot show any evidence of irreparable harm. Memorandum in Support of Defendants’ Motion for Reconsideration, p. 2. Blue Dog also urges the Court to determine as a matter of law that Jacklin would not be entitled to money damages at trial due to its failure to request damages in its complaint and put Blue Dog notice. *Id.*

Blue Dog argues Jacklin must demonstrate it would suffer waste or irreparable

injury for an injunction to issue, and that Jacklin was unable to do so at summary judgment. *Id.*, pp. 5-6. Further, Blue Dog argues Jacklin is bound to the testimony of its I.R.C.P. 30(b)(6) designee, which at summary judgment this Court found to be speculative as to injury to Jacklin, and cannot now offer testimony contrary to the designee's prior testimony. *Id.*, p. 6. Blue Dog also argues Jacklin has not timely designated or disclosed any expert witnesses and should therefore be barred from presenting any experts who would contradict the testimony of Jacklin's I.R.C.P. 30(b)(6) designee. *Id.*, pp. 8-9. Finally, Blue Dog argues Jacklin did not request money damages in its Complaint and, if Jacklin is able to establish damages, it should nonetheless not be entitled to recover any money damages as the Complaint seeks only declaratory and injunctive relief. *Id.*, pp. 10-11.

In response to Blue Dog's argument that no expert has been disclosed, Jacklin clarifies that its I.R.C.P. 30(b)(6) designee would provide any necessary testimony on damages and irreparable harm. Memorandum in Opposition to Defendants' Motion for Reconsideration, p. 8. Jacklin states the designee advised Blue Dog in his deposition testimony that he is the expert on whether or not Blue Dog's operations would cause Jacklin to lose tenants or forego land sales and that, as an agent of the owner of the property, the designee is competent to testify about damages. *Id.*, pp. 8-9. It is likely that Blue Dog's concerns about Jacklin offering testimony contradicting the I.R.C.P. 30(b)(6) designee's deposition testimony are unfounded given Jacklin's reply that if any testimony on irreparable harm is necessary, it will come from Mr. Stoesser, Jacklin's I.R.C.P. 30(b)(6) designee.

Jacklin replies to Blue Dog's argument that the failure to request damages in its Complaint bars Jacklin from entitlement to recover damages by stating, again, that

damages are not required to entitle a party to injunctive relief in enforcing a restrictive covenant. Memorandum in Opposition to Defendants' Motion for Reconsideration, p. 9. Jacklin also argues "damages or irreparable harm, to the extent necessary, may be proven as an element of the request for permanent injunctive relief without a concurrent request for an award of damages under a breach of contract claim." *Id.*, p. 10. In this regard, Jacklin's argument is well-taken. The Complaint states a claim for injunctive relief, which by its very nature generally requires a moving party to prove damage; thus, it is unlikely that Defendants would be caught off guard or otherwise prejudiced if this Court required Jacklin to set forth evidence of irreparable harm (in the form of a monetary damage amount) at trial on this matter.

For the reasons discussed above, this Court finds as a matter of law that Jacklin need not establish great waste, irreparable injury, or an inadequate remedy at law in order to receive the permanent injunction it seeks here.

#### **IV. CONCLUSION AND ORDER.**

For the reasons stated above, this Court exercises its discretion and grants Jacklin's motion for reconsideration/summary judgment, finding as a matter of law that no irreparable harm need be shown when issuing a permanent injunction to enforce a restrictive covenant. Because no such showing need be made, this Court denies Blue Dog's motion for reconsideration (asking the Court to hold as a matter of law that Jacklin cannot make any showing of irreparable injury and to determine as a matter of law that Jacklin cannot recover damages).

IT IS HEREBY ORDERED plaintiff Jacklin's Motion for Reconsideration is GRANTED, plaintiff Jacklin's Second Motion for Summary Judgment is GRANTED.

IT IS FURTHER ORDERED defendants' Motion for Reconsideration is DENIED.

Entered this 14<sup>th</sup> day of September, 2009.

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John T. Mitchell, District Judge

**Certificate of Service**

I certify that on the \_\_\_\_\_ day of September, 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  
John Magnuson

Fax #

| Lawyer  
Michael Hines

Fax #

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Secretary