STATE OF IDAHO)
County of BONNER)ss

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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 BONNER

INSIGHT LLC, an Idaho Limited Liability Company, DONALD F. HUTTON, an unmarried man, et. al., *Plaintiffs*, vs. **SUMMITT, INC., an Idaho Corporation, RON HAZEL, an individual, et.al.,** *Defendants*.	Case No. **S CV 2008 1538** **MEMORANDUM DECISION, FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER FOLLOWING COURT TRIAL**

I. PROCEDURAL HISTORY AND BACKGROUND.

This matter was tried to the Court on June 28, 2010. Plaintiffs are the assignees of a promissory note in the amount of $616,000, assigned by Independent Mortgage Ltd. Co. (IMLC), and secured by a mortgage. Complaint, pp. 1-5. IMLC assigned the promissory note as follows: 11% to plaintiff Insight LLC, an Idaho Limited Liability Company; 14% to plaintiff Donald Hutton; 25% to HLT Real Estate LLC an Idaho Limited Liability Company; 25% to plaintiff Earle-Henrion Trust, Dated January 27, 1998, Sole and Separate Property of Daniel C. Earle; and 25% was retained by IMLC. Complaint, pp. 3-4, ¶ 8.

The borrower was defendant Summitt, Inc., who borrowed the money from IMLC to purchase real property from defendants Gunters. Gunters also financed $200,000 of Summitt's purchase price secured by a deed of trust. Summitt defaulted; this lawsuit

ensued.

Plaintiffs were represented at trial by Charles R. Dean, Jr. Defendants Patrick and Monica Gunter were represented by Marc A Lyons. Defendants Summitt, Inc., Ron Hazel, Sarah Hazel, Daren Brott and Susan Brott did not appear, their defaults having been previously entered. The following factual summary is from this Court's Memorandum Decision and Order on Plaintiffs' Motion for Summary Judgment, dated July 24, 2009:

> Because the other defendants have been defaulted, plaintiffs on April 7, 2008, filed their Motion for Summary Judgment against defendants Patrick and Monica Gunter only. Plaintiffs are lenders and are owners and holders of a promissory note secured by a mortgage and by a deed of trust. Complaint, p. 2, ¶ 1.
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> The Gunters sold the property at issue to Summitt, Inc., (Summitt). Gunters are owners and holders of a deed of trust securing some of the property at issue in the instant action. Complaint, p. 3, ¶ 7. The Gunters financed a portion of Summitt's purchase and accepted a promissory note for $200,000 from Summitt secured by the deed of trust.
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> In June 2006, Summitt executed a note for $616,000 in favor of Independent Mortgage Ltd. Co. (IMLC); the note was secured by a mortgage recorded in first priority on June 19, 2006. Complaint, pp. 3-5. ¶¶ 8-13. On October 10, 2008, plaintiffs initiated the foreclosure action at issue by filing this Complaint, after Summitt and guarantors Ron Hazel and Daren Brott defaulted. On April 7, 2008, plaintiffs filed their Motion for Summary Judgment against defendants Patrick and Monica Gunter. Plaintiffs seek summary judgment on the issue of lien priority because Gunters claim they have the more senior secured interest because, although their interest was recorded after plaintiffs', plaintiffs (specifically Independent Mortgage) was [were] aware of the Gunters' deed of trust in the property, but Gunters were not aware of Independent Mortgage's claim to an interest in the property until well after the Gunters closed. Defendants Gunters filed an answer and demanded a jury trial. This matter is not yet set for a jury trial.

Memorandum Decision and Order on Plaintiffs' Motion for Summary Judgment, pp. 1-2. In their answer Gunters demanded a jury trial. This Court denied plaintiffs' motion for summary judgment, holding: "Because there is a dispute over a material issue of fact as to whether plaintiffs are the initial encumbrancer or the subsequent encumbrancer,

as compared to Gunters, plaintiffs' Motion for Summary Judgment must be denied at this time." A motion to reconsider was filed by plaintiffs on August 3, 2009, and this Court denied such motion in its October 20, 2009, "Memorandum Decision and Order on Reconsideration of Order Denying Plaintiffs' Motion for Summary Judgment." Much of that decision focused on this Court's analysis of the facts of this case (some of which the Court found to be in dispute) and the Idaho Supreme Court case of *Estate of Skvorak v. Security Union Title Ins. Co.,* 140 Idaho 16, 89 P.3d 856 (2004).

On March 3, 2010, the parties stipulated to try all matters to the Court. Prior to the June 28, 2010, trial, both sides submitted Trial Briefs which the Court read in advance of trial. Following trial, the Court requested additional briefing (closing argument) argument and proposed findings of fact and conclusions of law be filed. Both sides timely submitted such, and the Court has reviewed those pleadings.

Following the Court trial, there remained factual issues to be resolved, as set forth in this Court's Memorandum Decision and Order on Plaintiffs' Motion for Summary Judgment at page eight:

> At summary judgment, this court cannot determine who is the *initial* mortgagee/encumberer is and who the subsequent mortgagee/encumberer. That being the key distinguishing factor in *Skvorak*, this Court cannot grant plaintiffs' motion for summary judgment at this time. There is dispute over this key material issue of fact.
>
> If plaintiffs are the initial encumbrancer, then it matters not if they knew of Gunters' interest. Plaintiffs would prevail over Gunters even though they knew of Gunters' interest. However, if plaintiffs are the subsequent encumbrancer, then plaintiffs did not act in good faith because they knew of Gunters' interest. In that sense, the issue of initial versus subsequent encumbrancer is not only a material issue of fact, it is a dispositive issue of material fact.

Another issue for trail was whether Gunters had knowledge of plaintiffs' loan and promissory note at the time the Gunters gave their deed of trust. If that were proven at trial, it would result in Gunters not being a lender in good faith. Also up for

consideration following the court trial is whether there should be any change in this Court's interpretation of *Skvorak,* in light of the fact findings following the court trial.

II. ANALYSIS OF LEGAL ISSUES.

Plaintiffs argue:

> When this Court distinguished *Skvorak* in denying plaintiffs' Motion for Reconsideration, it did not have the benefit of briefing on the issue of when constructive notice is imparted. While plaintiffs can appreciate the Court's concern about fairness of charging the Gunters with such notice, the law is exact. Fairness aside, the Gunters had notice as a matter of law the moment plaintiffs' mortgage was presented to the recorder for recording.
>
> Constructive notice does not depend on how long an instrument has been recorded or, in fact, if that instrument is properly recorded or indexed by the recorder's office. Constructive notice is imparted as an absolute matter of law the moment an instrument is given to the recorder for recording even if the recorder thereafter fails to discharge her statutory recording duties.
>
> Constructive notice is purely a matter of statute that does not depend on what might seem reasonable or fair (*Kalange v. Rencher*, 136 Idaho 192, 195 (2001)). Idaho Code § 55-811 unequivocally provides that an instrument conveying an interest in real property imparts constructive notice "*from the time it is filed with the recorder*".

Plaintiffs' Post-Trial Brief, pp. 5-6. This Court has read *Kalange* several times and cannot find anywhere in that opinion where the Idaho Supreme Court stated anything close to constructive notice not depending "on what might seem reasonable or fair." To the contrary, the Idaho Supreme Court in *Kalange* held:

> The primary purpose of the recording statues is to give notice to others that an interest is claimed in real property. The design of the recording statutes compels the recording of instruments affecting title, for the ultimate purpose of permitting purchasers to rely upon the record title. In addition to giving notice to others that an interest is claimed in real property, the recording statues give protection against *bona fide* third parties who may be dealing in the same property. *See Haugh v. Smelick,* 126 Idaho 481, 887 P.2d 26 (1993), *quoting Matheson v. Harris,* 98 Idaho 758, 761, 572 P.2d 861, 864 (1977).

136 Idaho 192, 196, 30 P.3d 970, 974. In the present case, the party to which plaintiffs seek to ascribe notice to under the recording statute is not an "other" or a "purchaser"

(to whom “the primary purpose” is directed under *Kalange*), but is instead the *seller* of the property, the *current owners* (at the time of the sale), the Gunters. At the moment of sale, of what fact do Gunters need constructive notice? They own the property, they need no constructive notice of that fact.

Perhaps there is a reason plaintiffs argue “constructive notice is purely a matter of statute that does not depend on what might seem reasonable or fair”, even when that concept cannot be ascribed to the text of an Idaho Supreme Court decision. To follow plaintiffs logic, reasonableness and fairness would need to be entirely disregarded. This is because plaintiffs essentially argue the recording statutes give the seller, who carries a note on the property being sold, no protection from the lender to the buyer of the property, when that lender *unilaterally and without telling the seller*, directs the closer to record the lender’s document first, mere seconds before the sellers’ document.

Again, of what fact do Gunters need constructive notice? Adopting plaintiffs’ argument, the Gunters are in need of constructive notice of the fact that plaintiffs recorded their document first. Due to plaintiffs’ interpretation of constructive notice, the sellers of the real property, the Gunters, are automatically in second place to the lender (plaintiffs), due only to the fact that the lender to the buyer (Summitt) of the property, *unilaterally and without telling the seller*, directed the closer to record the lender’s document first, mere seconds before the sellers’ document. The period to which plaintiffs ascribe constructive notice covers in this case, would be measured in seconds. In the intervening seconds between the recording of plaintiffs’ promissory note and the recording of Gunters’ deed of trust, did Gunters even have an *opportunity* to check the recording statutes? That is the purpose of “constructive” notice…it is notice “imparted from the record.” *Kalange,* 136 Idaho 192, 195, 30 P.3d 970, 973. However, in this

case, the notice imparted from the record existed for mere seconds between the moment plaintiffs recorded their promissory note and the moment Gunters deed of trust was recorded immediately after, *at plaintiffs' direction*.

It is important to note that the above quoted portion of *Kalange* reads: "…the recording statues give protection against *bona fide* third parties who may be dealing in the same property." 136 Idaho 192, 196, 30 P.3d 970, 974. The following analysis found in this Court's Memorandum Decision and Order on Plaintiffs' Motion for Summary Judgment discusses the concepts of *bona fide* parties and good faith:

> Idaho is a race-notice state. The Idaho Supreme Court has explained the purpose of the race-notice recording act:
>
> > The purpose of the recording act in a race notice jurisdiction, like Idaho, is to allow recorded interests to be effective against unrecorded interests when the recorded interest is taken for a valuable consideration and in good faith, i.e. without knowledge, either actual or constructive, that unrecorded interests exist.
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> *Froman v. Madden,* 13 Idaho 138, 88 P. 894 (1907). Where one purchases or encumbers with notice of inconsistent claims, one does not do so in good faith and similarly, where one fails to investigate open or obviously inconsistent claims, one cannot take in good faith. *Langroise v. Becker,* 96 Idaho 218, 220, 526 P.2d 178, 180 (1974) (quoting *Amerco, Inc. v. Tullar,* 182 Cal.App.2d 336, 6 Cal.Rptr. 7 (1960)). Idaho Code § 55-606 states:
>
> > Every grant or conveyance of an estate in real property is conclusive against the grantor, also against every one subsequently claiming under him, except a purchaser or encumberer, who in good faith, and for valuable consideration, acquires a title or lien by an instrument or valid judgment lien that is first duly recorded.
>
> Idaho Code § 55-812 is entitled Unrecorded Conveyance Void Against Subsequent Purchasers and reads, in relevant part:
>
> > Every conveyance of real property… is void as against any subsequent purchaser or mortgagee of the same property, or any part thereof, in good faith and for a valuable consideration, whose conveyance is first duly recorded.

> Here, the mortgage given to Independent Mortgage was recorded before the Gunters' interest. Motion for Summary Judgment, p. 4; Defendants' Supplemental Response to Plaintiffs' Motion for Summary Judgment, pp. 4-5. Gunters argue that they were without notice of Independent Mortgage's security interest, but that Independent Mortgage had notice of their interest. Defendants' Supplemental Response to Plaintiffs' Motion for Summary Judgment, pp. 4-5. Gunters argue Independent Mortgage, since it knew of Gunters' interest, "cannot be said to have acted in good faith in its actions." *Id,* citing *Farm Bureau Finance Co., Inc. v. Carney,* 100 Idaho 745, 747-48, 605 P.2d 509, 511-512 (1980) ("When a subsequent encumberancer or purchaser has actual knowledge of a prior interest, it makes no difference whether the prior interest was properly acknowledged and recorded. I.C. §§ 55-606, 55-812.") As such, Gunters argue Independent Mortgage was not acting in good faith, i.e. "without knowledge." *Id.* It appears there is no dispute that Independent Mortgage knew of Gunters' interest before Independent Mortgage loaned and directed the escrow agent (Easyway Escrow) to record Independent Mortgage's interest first. Supplemental Affidavit (of Casey S. Krivor) In Support of Motion for Summary Judgment, p. 2, ¶¶ 3, 4.

Memorandum Decision and Order on Plaintiffs' Motion for Summary Judgment, pp. 3-4. (underlining added). Plaintiffs cannot take in "good faith" because they unequivocally had notice of Gunters' interest. Whether Gunters had knowledge of plaintiffs' predecessors (IMLC) interest, that is, whether Gunters sold to Summitt in good faith without knowledge of IMLC's interest, was one of the factual focal points of the Court trial, discussed in the next section.

This Court finds its analysis of *Skvorak* to be unchanged following trial. Accordingly, the Court reiterates its previous decision. **First** is that portion of the Court's decision on summary judgment included as follows:

> Plaintiffs rely on *Estate of Skvorak v. Security Union Title Insurance Company, ,* 140 Idaho 16, 89 P.3d 856 (2004), for the proposition that where two purchase money mortgages compete for priority, the first to record is entitled to priority and whether the initial encumberer is a good faith purchaser is not relevant. Reply Memorandum in Support of Motion for Summary Judgment, pp. 4-5. *Skvorak* involved the sale of a parcel known as "Gold Cup" from the Skvoraks to the purchasers the Sylvesters. The purchasers Sylvesters received the down payment amount from Crown Pacific and that amount was secured through a mortgage with

Crown Pacific. 140 Idaho 16, 18, 89 P.3d 856, 857. Later the same day, the Sylvesters executed a mortgage in favor of the Skvoraks to secure the balance. *Id.* Crown Pacific recorded its mortgage on January 19, 1995, and Skvoraks mortgage and warranty deed was recorded twelve days later on January 31, 1995. *Id.* In determining Crown Pacific's mortgage had priority, the Idaho Supreme Court noted Crown Pacific executed and recorded its mortgage twelve days before the Skvoraks and the Skvoraks were not good faith purchasers because they knew of the Crown Pacific Mortgage. 140 Idaho 16, 23, 89 P.3d 856, 863.

Gunters argue *Skvorak* is inapposite as the factual difference between that case and the instant matter lies in the vendor in *Skvorak* (the Skvoraks) having notice of the third party purchase money mortgage, and the vendors in the instant case (Gunters) having been "completely unaware" of the third party mortgage:

> In *Skvorak* the sellers of the real property were aware that the buyer was financing the remainder of the purchase price with a third party. In this case the sellers of the real property were not aware that the buyer was financing the remainder of the purchase price with a third party.

Memorandum in Support of Motion to Strike and in Response to Plaintiff's Reply memorandum, p. 4. Despite plaintiffs' argument, the Court in *Skvorak* determined that whether Crown Pacific was a good faith purchaser was *irrelevant* because it had recorded twelve days before the Skvoraks, but as to Idaho's recording statutes:

> Whether Crown Pacific is a good faith purchaser in this case is irrelevant because Crown Pacific was the initial encumbrancer. Therefore, these rules do not apply to Crown Pacific and to that extent the district court erred.

140 Idaho 16, 22-23, 89 P.3d 856, 862-63. Thus, the Idaho Supreme Court's analysis in Skvorak revolved around which party was the "initial encumbrancer." Crown Pacific was the "initial encumbrancer", presumably because of the following sequence:

> The morning of January 13, 1995, the Sylvesters and Norm Suenkel (Suenkel), resource officer for Crown Pacific, met at Lamanna's office and executed a mortgage in favor of Crown Pacific for the down payment. Lamanna and the Skvoraks were not present at this meeting, but Cox notarized the Crown Pacific mortgage. The Sylvesters also executed a promissory note for $450,075, a log purchase agreement, and a UCC-1 financing agreement, all of which Crown Pacific prepared. Later that day, the Sylvesters returned to Lamanna's office and executed a mortgage in favor of the Skvoraks to secure payment on a promissory note for the balance, and accepted delivery of the deed. Cox also notarized this mortgage. Crown Pacific recorded its mortgage January 19, 1995. Linda Skvorak recorded the Skvoraks' mortgage and warranty deed on January 31, 1995.

140 Idaho 16, 18, 89 P.3d 856, 858. The Idaho Supreme Court in *Skvorak* then analyzed whether Skvoraks, a *subsequent* mortgagee (though still a purchase money mortgagee) were good faith purchasers. 140 Idaho 16, 22-23, 89 P.3d 856, 862-63. The district court had found that there was sufficient evidence that the Skvoraks knew of the Crown Pacific mortgage interest and did not take as a good faith purchaser, and the Idaho Supreme Court upheld that finding. 140 Idaho 16, 22, 89 P.3d 856, 862.

In the present case, the recordation of the two interests occurred within minutes of each other. But what is unclear, at least at this summary judgment juncture, is who the *initial* mortgagee/encumberer is and who the *subsequent* mortgagee/encumberer is.

It *appears* plaintiffs may be the subsequent mortgagees/encumberers based on their knowledge of the prior existing (yet at the time, unrecorded) deed of trust already encumbering the property at issue. Casey S. Krivor, Manager of Independent Mortgage, stated in his affidavit that Mr. Hazel [president of defendants Summitt] asked Krivor if Independent Mortgage would finance 100% of the $799,000 purchase price for Summitt to purchase this property from Gunters, and Krivor declined, advising Hazel that Independent Mortgate would not consider making a loan of more than 75% loan to value. Affidavit (of Casey S. Krivor) in Support of Motion for Summary Judgment, p. 2, ¶ 2. Krivor then stated:

> Mr. Hazel [president of defendants Summitt] later advised me that the sellers, Mr. and Mrs. Gunter, had agreed to carry back $200,000 of the purchase price. A loan of $616,000 was acceptable to IMLC [Independent Mortgage] since it would thus be protected by at least 25% in additional value.

Id., ¶ 3.

However, it also *appears* Gunters may be the subsequent encumbrancers, since Gunters perhaps should have expected Summitt was financing this purchase because Summitt needed Gunters "help" in order to make this sale go through. Monica Gunter explains that she and her husband were under the "…understanding that Summitt, Inc., would be paying cash without financing [other than Gunters agreeing to carry a $200,000 note on the property] the remainder of the balance due on the property." Affidavit of Monica Gunter, p. 2, ¶ 4. That must be put in context with Monica Gunter's claim that in the original agreement between Gunters and Summitt, Summitt would be paying the entire sales price and that:

> The Agreement did not provide for a financing contingency for the buyer Summitt, Inc. It was our understanding that Summitt, Inc. would be paying cash at closing for the property without financing.

Affidavit of Monica Gunter, p. 2, ¶ 3. The Real Estate Purchase and Sale Agreement does state that the balance (other than the $1,000 earnest money) would be paid as follows: "cash at closing". *Id.,* Exhibit 1. "Cash

at closing" would occur even if there were financing. The form itself does not provide for a financing contingency (or no financing contingency), so Gunters argument is not overly persuasive.

The exhibits provided do not answer the question. Plaintiffs claim defendants executed a note in favor of plaintiffs on June 19, 2006. Complaint, p. 3, ¶ 8. However, the note between defendants and Gunters is likewise dated June 19, 2006. Affidavit of Monica Gunter, p. 3, ¶ 7, Exhibit 5.

At summary judgment, this court cannot determine who is the *initial* mortgagee/encumberer is and who the subsequent mortgagee/encumberer. That being the key distinguishing factor in *Skvorak*, this Court cannot grant plaintiffs' motion for summary judgment at this time. There is dispute over this key material issue of fact.

If plaintiffs are the initial encumbrancer, then it matters not if they knew of Gunters' interest. Plaintiffs would prevail over Gunters even though they knew of Gunters' interest. However, if plaintiffs are the subsequent encumbrancer, then plaintiffs did not act in good faith because they knew of Gunters' interest. In that sense, the issue of initial versus subsequent encumbrancer is not only a material issue of fact, it is a dispositive issue of material fact.

Memorandum Decision and Order on Plaintiffs' Motion for Summary Judgment, pp. 4-8.

Second is that portion of this Court's analysis on plaintiffs' motion for reconsideration:

In this Court's Order on Plaintiffs' Motion for Summary Judgment, it reasoned pursuant to the Idaho Supreme Court's decision in *Estate of Skvorak v. Security Union Title Ins. Co.,* 140 Idaho 16, 89 P.3d 856 (2004), a disputed issue of material fact remained as to whether plaintiffs or the defendants Gunters were the initial encumbrancer. Accordingly, this Court denied plaintiffs' motion for summary judgment. Order on Plaintiffs' Motion for Summary Judgment, p. 8. This Court noted the recordation of the two interests in this matter occurred within moments of each other. *Id.,* p. 6. Plaintiffs may have been the subsequent encumbrancer based on their knowledge of a prior-existing, but unrecorded, deed of trust already being in place. *Id.* However, Gunters may also have been the subsequent encumbrancer because they "perhaps should have expected Summitt was financing this purchase because Summitt needed Gunters' 'help' in order to make this sale go through." *Id.,* p. 7.

Plaintiffs move for reconsideration, arguing that this Court erred in distinguishing between an "initial encumbrancer" and the first party to record. Memorandum in Support of Motion for Reconsideration, p. 2. Plaintiffs argue that although generally the first party to record does not take in good faith when the party has actual or constructive notice of a prior existing claim, *Estate of Skvorak* makes knowledge of an existing claim irrelevant where two purchase-money mortgages are involved. *Id.,* p. 3. "The rules that would otherwise pertain to knowledge of another's

senior interest do not apply when dealing with two or more purchase money mortgages." *Id.* And, "a sampling of the express language [the Idaho Supreme Court] used makes it crystal clear that 'initial encumberancer' means the first encumbrancer to record and nothing else". *Id.*

In response, Gunters argue the reasoning in *Estate of Skvorak* must be limited to cases involving similar facts, that is, two purchase money mortgagors who are both not good faith encumbrancers because each had notice of the other. Memorandum in Response to Plaintiffs' Motion for Reconsideration, p. 2. "Unlike [*Estate of*] *Skvorak,* this case involves a dispute over the priority of two purchase money encumbrancers where only one encumberancer had notice of the other." *Id.,* p. 3. Gunters state *Estate of Skvorak* stands for the proposition that only where neither of two purchase money mortgagors are good faith encumbrancers is priority established by who records first. *Id.,* pp. 2-3.

This Court is being asked, again, to determine whether the Supreme Court's analysis in *Estate of Skvorak* is equally applicable here. The facts in *Estate of Skvorak,* as argued by Gunters, differ from the facts of the instant case. In *Estate of Skvorak,* the District Court determined both purchase money mortgagors had notice of each other's mortgages prior to recording and at issue was the priority between two purchase money mortgages executed in the same transaction. 140 Idaho 16, 19, 89 P.3d 856, 859. The Supreme Court determined that the rule that one who purchases or encumbers with notice of an inconsistent claim does not take in good faith was inapplicable to the Skvoraks, who recorded twelve days after defendants/appellants and had knowledge of defendants/appellants' plans and intent to advance the down payment amount. 140 Idaho 16, 22, 89 P.3d 856, 862.

In the instant case, to the extent there remains a genuine issue of fact as to whether Gunters had constructive knowledge of plaintiffs' recordation, denial of plaintiffs' summary judgment motion was proper. While plaintiffs argue Gunters had such knowledge because plaintiffs recorded first (Memorandum in Support of Motion for Reconsideration, p. 4, n. 1), mere seconds elapsed between the two recordations in this case and there would have likely been no computer entry or other record of plaintiffs' filing available to Gunters. It is likely unreasonable to require the recording clerk to recognize a filing as being applicable to one filed seconds later and to so notify the subsequent filer, the Gunters. It is even more unreasonable to require such recognition, let alone appreciation of such by Gunters. Plaintiffs have set forth no evidence to establish that Gunters had actual knowledge of the first-recorded mortgage. The instant facts vary from *Estate of Skvorak* in that there has been no finding here that both encumbrances were part of the same transaction or that "the vendor has notice of the third party's mortgage *and* [the third party purchase money mortgage] was recorded first." *See* 140 Idaho 16, 22, 89 P.3d 856 (emphasis added).

As aptly put by Gunters' counsel at oral argument, Idaho is a "race-notice" state, and *Estate of Skvorak* discusses the "race" component of

> that statute since both parties were aware of each other and both parties were aware there was going to be two encumbrancers. Thus, the "notice" component was not at issue in *Estate of Skvorak*.. In the present case, there is at least a dispute of fact as to whether the Gunters had notice of plaintiffs. To adopt the result plaintiffs desire and to adopt plaintiffs' argument that this case is identical to *Estate of Skvorak* would turn Idaho's "race-notice" statute (Idaho Code § 55-606, Order on Plaintiffs' Motion for Summary Judgment, p. 3), into a "race" only statute. That is for the Idaho Legislature, and is not the province of this Court.

Memorandum Decision and Order on Reconsideration of Order Denying Plaintiffs' Motion for Summary Judgment, pp. 6-9. **Third** this Court finds, based on the above analysis and based upon additional evidence presented at trial, that Gunters were the initial encumbrancer. This is not a situation like *Skvorak* where the seller did not record for quite some time later. In the present case, this Court finds Gunters were kept in the dark as to any potential competing security interest in their property they were selling. The Court finds Gunters were the initial encumbrancer because they owned the property, and until they agreed to sell that property, plaintiffs had nothing to encumber.

An issue not discussed by this Court in its Memorandum Decision and Order on Plaintiffs' Motion for Summary Judgment or in its Memorandum Decision and Order on Reconsideration of Order Denying Plaintiffs' Motion for Summary Judgment is the concept of "one continuous transaction" enunciated in *Skvorak*. Gunters raised this issue in both their pre-trial and post-trial briefing. Plaintiffs have not addressed this issue in their Plaintiffs' Post-Trial Brief. The pertinent portion of *Skvorak* reads:

> Both mortgages are clearly purchase money mortgages. Idaho Code § 45-112, defines a purchase money mortgage as "a mortgage given for the price of real property, at the time of conveyance." In this case, Crown Pacific and the Skvoraks each received a mortgage for a portion of the price of Gold Cup and received the mortgage at the time of conveyance. Each party would have this Court find that the mortgages were created in separate transactions, however, we agree with the district court's finding that the deed and both mortgages were part of *one continuous transaction* involving the purchase of Gold Cup.

Skvorak, 140 Idaho 16, 21, 89 P.3d 856, 861. (italics added). This Court finds no reason to disagree with the following set forth by Gunters in Defendant's Closing Statement:

> If the Gunter Deed of Trust is the first encumbrance, that Deed of Trust has priority regardless of whether the IM mortgage was recorded first. It also does not matter whether the IM mortgage document was signed by Ron Hazel on behalf of Summitt before Hazel signed the IM mortgage.
>
> The Gunter Deed of Trust necessarily must be the first encumbrance because that deed of trust came into being as an encumbrance when the sale of land between Gunter and Summitt occurred. The Gunter/Summitt sale transaction was separate from the loan transaction between Summitt and IM. Thus, the creation of the Deed of Trust and the IM mortgage was not part of "one continuous transaction" involving the purchase and sale of the Gunter eighteen acres. This is in contrast to the trial court's finding in *Skvorak v. Security Union*, 140 Idaho 16, 89 P.3d 856, 861 (2004).
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> Like the situation in *Skvorak*, the case before this Court involved the priority of liens affecting property. In the *Skvorak* case, the vendor, Skvorak, sold real estate to a buyer, Sylvester. Skvorak financed a portion of the purchase price through a promissory note and took a mortgage as security. Sylvester also borrowed money from Crown Pacific against timber on the property and also gave Crown a mortgage. Both the land sale and the Crown mortgage were closed through the office of attorney Lamanna. The buyer, Sylvester, went to the Lamanna office to execute all of the paperwork necessary for both the Skvorak land sale and the Crown mortgage. Sylvester signed both mortgages at the Lamanna office on the same day. The Crown mortgage was signed first and the Skvorak mortgage was signed later that day. The Crown mortgage was recorded first.
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> The Idaho Supreme Court in *Skvorak* concluded that the Crown mortgage was entitled to priority because Crown was the first encumbrancer of the land sold to Sylvester. Although Crown recorded first, that was not the determinative finding from *Svkorak*. The analysis of whether the parties were "good faith purchasers" and the timing of recordation was part of a discussion by the Supreme Court as to whether Skvorak, as a second encumbrancer, could claim priority over Crown as the first encumbrancer. The Idaho Supreme Court recognized that because the Skvoraks had knowledge of the Crown mortgage and did not record first, the Skvorak mortgage could not be given priority over the first encumbrance.
>
> Thus, the *Skvorak* case turned on who was the first encumbrancer. The recognition by the Supreme Court that Crown was the first encumbrancer was based upon the trial court finding that the buyer, Sylvester, executed the Crown mortgage before he executed the Skvorak mortgage. Necessary to the determination of "first encumbrancer" was the conclusion by the trial judge that both mortgages were created as part of "one continuous transaction." The case before this Court is similar in some respects but very different because, unlike *Skvorak*, the Gunter/Summitt purchase sale transaction was <u>separate</u> from the Summitt/IM loan transaction. The matter before this court does not involve "one continuous

transaction."

Because these are separate transactions and because the transfer of the eighteen acres from Gunter to Summitt occurs contemporaneous with the indebtedness to Gunter secured by the Deed of Trust, absent a subordination agreement, the Gunter Deed of Trust must be the first encumbrance on the eighteen acres sold to Summitt. It does not matter whether Hazel signed the IM mortgage document first, that mortgage could not encumber the eighteen acres, because Summitt did not own the eighteen acres when the mortgage was signed.

It is also worth noting that the IM mortgage described 160 acres, only 18 of which is the Gunter land. Summitt, the mortgagor, did at the time of execution, own 142 of the acreage described, but did not own the Gunter 18 acres. Consequently Hazel's execution of the mortgage could not encumber the Gunter 18 acres until the real estate purchase and sale transaction was closed and the property transferred to Summitt. When the property was transferred to Summitt is was already subject to the Deed of Trust in favor of Gunter.

It is undisputed that the land sale transaction closed separately from the Summitt/IM loan and mortgage. Both Ron Hazel, the President of Summitt, and Monica Gunter testified that as part of the sale of the eighteen acres, they agreed to use EasyWay Escrow as the closer for this transaction. The purchase and sale agreement executed by the Gunters and Summitt identifies the closer for both parties to be EasyWay Escrow. The purchase and sale agreement (Exhibit 1) indicated that the purchase price was to be paid "cash at closing" and set the closing date for June 19, 2006. In paragraph 7 of that agreement, possession was delivered to buyer "at closing." Although the agreement did give the buyer approximately one month to determine "feasibility" of the purchase, there was no financing contingency or other mention of any loan being pursued by the buyer.

The only other document discussing the purchase and sale terms was Monica Gunter's notes taken as part of a telephone conversation with Ron Hazel regarding the Gunters carrying $200,000.00 of the purchase price. The notes are included as page 3 of Exhibit V. Nowhere in any of the documents contained in the entire closing file of EasyWay Escrow is there any mention of an IM mortgage on the Gunter 18 acres. The Gunter/Summitt land sale transaction must be a separate transaction and it stands on its own.

Independent Mortgage also agrees that the Gunter/Summitt transaction was closed separately from the Summitt/IM loan transaction. Casey Krivor, manager for IM, testified that IM did not close its transaction through EasyWay Escrow. Although he was aware that EasyWay Escrow was closing the land sale transaction, he testified that IM did not use EasyWay Escrow and that IM closed its own loan transactions. Casey Krivor identified Stephanie Brown (formerly Reif) as IM's in-house loan closer.

Stephanie Brown also testified that she separately closed the IM loan, mortgage and related documents. While Stephanie Brown did testify that she discussed with Carol Sommerfeld of EasyWay Escrow that Independent Mortgage was loaning money to Summitt to acquire the Gunter 18 acres and

> that she believed Carol Sommerfeld knew that the loan would be secured by a first priority mortgage, there is no documentation to support IM's or Ms. Brown's contention that EasyWay Escrow knew of the IM loan to Summitt and its mortgage.
>
> Again, the real estate closing file (Exhibit V) has no reference to IM's third party mortgage, and Ms. Brown admitted in testimony that she did not send any of her closing documents, including recording instructions, to EasyWay Escrow. She also agreed that IM's file does not have EasyWay Escrow's recording instructions or other documents from EasyWay related to the real estate closing. The separate closings of different transactions are not part of "one continuous transaction."
>
> * * *
>
> Thus, the Court should make factual findings that 1) the real estate transaction between Summitt/Gunter was a separate transaction from the Summitt/IM loan transaction; 2) that the Warranty Deed, the Deed of Trust and the IM loan and Mortgage were not part of one continuous transaction; 3) that when the Summitt/Gunter sale closed, the transfer of ownership of the Gunter's property to Summitt came with the contemporaneous Deed of Trust in favor of Gunter; 4) the Gunter Deed of Trust created an encumbrance on the 18 acres before the IM Mortgage encumbered the property; 5) the Gunter Deed of Trust was the first encumbrance on the 18 acres sold by Gunter to Summitt; and 6) the Gunter Deed of Trust has priority over the IM Mortgage.

Defendants' Closing Statement, pp. 2-8. This Court finds the Summitt/Gunter transaction occurred *before* the Summitt/IMLC transaction (the Gunter Deed of Trust was the first encumbrance because that deed of trust came into being as an encumbrance when the sale of land between Gunter and Summitt occurred) and was a *separate transaction* from the Summitt/IMLC transaction because: they occurred at different times; they involved different acreage amounts; and they closed separately. The Court finds the Gunter Deed of Trust was the first encumbrance.

III. ANALYSIS OF FACTUAL ISSUES.

Gunters argue:

> Monica Gunter testified that she and Pat understood the land sale transaction to be initially for the full cash purchase price. Later, Ron Hazel asked if they would carry $200,000.00. She testified that Ron Hazel never told her that he was borrowing money that would be secured by a mortgage, and that she and Pat did not have any knowledge of the IM mortgage until after they received a Christmas card from Hazel in December of 2007 – a year and one-half after the real estate transaction closed. Monica testified

that she and Pat would not have financed $200,000.00 of the purchase price if their note was in a second position.

Ron Hazel testified in stark contrast to the testimony of Monica Gunter. Mr. Hazel's assertions that he told Monica Gunter that he was borrowing money from IM and that the Gunter Deed of Trust would need to be subordinate or in second position to an IM mortgage is not credible. Mr. Hazel's assertions are not supported by the exhibits or the other witnesses. First, there is no reference in the EasyWay Escrow closing file that Gunters knew about the IM loan and mortgage. Second, the closing agent selected by both Hazel and Gunter did not know of the mortgage and testified that she was not told of such by Hazel. Third, the notes by Monica Gunter that she took during the phone conversation with Ron Hazel when he asked if the Gunters would carry back $200,000 of the purchase price (page 3 of exhibit V), do not have any reference to another loan, much less that the carry back financing would be in second position. There is also no evidence to corroborate Hazel's assertion that he had these discussions with Monica Gunter. Witnesses Krivor, Sommerfield and Brown testified that they had no information that Pat and Monica Gunter know of the IM transaction at closing or prior to. Finally, Ron Hazel has an incentive to have the IM mortgage in first position because he is personally liable on the debt to IM; he has no such personal liability to Gunters (depo of Hazel pg. 38, line 24-25; pg. 39, line 1-5). In short, Ron Hazel's testimony on this issue is not credible.

Defendants' Closing Statement, pp. 7-8. On the other hand, plaintiffs argue:

D. The Gunters Had Actual Knowledge Of Plaintiffs' Loan. The only disputed issue in this case, though not determinative of the priority issue under *Skvorak*, is the Gunters' claim that they did not know Summitt was borrowing money from IMLC. While Mr. Gunter may not have appreciated that fact and may never have been told given that his wife handled the transaction, Mrs. Gunter undoubtedly knew. To believe otherwise means that this Court would have to believe Mr. Hazel's testimony was perjured, that he instead hid the fact of IMLC's involvement from the Gunters, that Mr. Krivor was never identified to Mrs. Gunter as being from IMLC, that Stephanie Reif never contacted Sommerfeld to coordinate closings and money delivery, but instead aided Mr. Hazel in keeping IMLC's loan secret, and that Sommerfeld did not disclose her knowledge of IMLC's loan as the Gunters' agent and friend. The Gunters would also have to plausibly explain (1) why they did not foreclose when Summitt first defaulted if they truly thought they had $600,000 or so in equity in the property above their lien, (2) the absence of any claims about priority until this action began and (3) why, after admittedly learning of their junior position in December of 2007, they against extended the loan and modified their deed of trust.

The more plausible scenario is that Mr. Hazel is not a crook, that he did in fact tell Mrs. Gunter he was borrowing from IMLC and introduced Mr. Krivor to her as he testified, that IMLC processed its loan as usual and in so doing had several conversations with Sommerfeld who naturally

> would have kept the Gunters apprised, and that the Gunters were agreeable to taking a second position since they would realize almost $600,000 from the sale.
>
> The Gunters should therefore be held to be just like the sellers in *Skvorak* – they had both actual and constructive knowledge of plaintiffs' loan and mortgage.

Plaintiffs' Post-Trial Brief, pp. 7-8. While this Court need not make the finding that Hazel's testimony was "perjured", this Court must make a credibility finding. This Court finds the testimony of Monica Gunter to be credible. Why would Gunters go from what they initially thought was a full price cash sale to agreeing to financing $200,000 of the sale price *and* agreeing to be in second position regarding that $200,000? The Court finds that proposition to be incredible. And to the extent Hazel so testified, the Court finds him to be not credible. The Court finds credible Monica Gunter's testimony that she and Pat understood the land sale transaction to be initially for the full cash purchase price, but that later, Hazel asked if they would carry $200,000.00. This Court finds credible Monica Gunter's testimony that Hazel never told her that he was borrowing money that would be secured by a mortgage, and that she and Pat did not have any knowledge of the IM mortgage until after they received a Christmas card from Hazel in December of 2007 – a year and one-half after the real estate transaction closed.

The next issue to be discussed is "imputed knowledge". Gunters argue:

> Carol Sommerfeld of EasyWay Escrow testified that she received her instructions for the closing from the Purchase and Sale Agreement and from Monica Gunter's notes (Exhibit V, pages 2 and 3). Based upon those instructions, she provided the forms for the Warranty Deed, the Promissory Note and the Deed of Trust to the parties to that transaction, Gunter and Summitt. Ms. Sommerfeld also testified that the transaction was closed when all of the documents were executed and the purchase money was paid. Although she testified that she did receive a check for $600,000.00 drawn on IM's account, it was not her responsibility to look into the source of the funds. Once the documents were signed and the monies received, the closing was completed. Ms. Sommerfeld testified that she was unaware that Summitt was mortgaging one hundred sixty (160) acres, including the eighteen (18) acres acquired from Gunter. Based on her experience working

with Summitt in the past, Carol Sommerfeld was aware that Summitt owned a significant amount of property and that it had borrowed monies in the past by cross-collateralizing other properties. Carol Sommerfeld, as the closing agent for the real estate sale transaction, was unaware that Summitt was giving a mortgage on the Gunter property.

Carol Sommerfeld's testimony is supported by the EasyWay Escrow closing file. This can be illustrated by a hypothetical. If, for example, EasyWay Escrow actually was coordinating the closing of the land sale transaction with IM's closing of its loan to Summitt and a first mortgage on the Gunter land, one would expect to find some reference to this coordination and agreement by the parties in the real estate closing file. One would expect to see correspondence between the closing agents discussing the loan and mortgage. One would expect to see some discussion of subordination or other agreement by the seller that the seller's deed of trust would be in second position. Instead, <u>there is absolutely no correspondence, memoranda or other documented reference of such "understanding" or "coordination."</u>

It is apparently IM's position that EasyWay Escrow must have known of the IM mortgage because Carol Sommerfeld has closed numerous transactions for Summitt that were financed by IM, and she should know that IM always takes a first position. IM also points to the references to IM in the EasyWay Escrow closing file related to the check for $600,000 and the refund to Summitt for an overpayment in the amount of $326.82 (pages 4 and 33 of Exhibit V). Ms. Sommerfeld testified that her file does not indicate that there was to be a mortgage on the Gunter property and she was not told of such by Stephanie Brown or anyone else with IM. She clarified that even if Summitt had borrowed money from IM, that does not indicate that a mortgage would be placed on the eighteen acres.

Defendants' Closing Statement, pp. 5-7. Plaintiffs argue:

E. <u>The Gunters Had Imputed Knowledge</u>. The testimony of Sommerfeld that she did not know about IMLC's loan was pure fabrication. Whether she was trying to help her friends or protect herself from a claim is uncertain, but what was certain is that she was not telling the truth.

Sommerfeld knew IMLC was a hard money lender who loaned against the value of real property. She knew from 53 transactions spanning several years that IMLC processed and closed its loans independent of her escrow. She knew that the money she had to close the deal came from IMLC and knew it was a loan (See Exhibits 2, 13 and V). She knew from those 53 loans that IMLC virtually always took first position security in the property at issue.

To claim as Sommerfeld did that she did not know or even suspect that IMLC would be taking a mortgage against the Gunters' property is fiction of the highest degree. Cementing that conclusion is her testimony that had IMLC been taking security in the property, Stephanie would have contacted her to coordinate closings. Though she claimed that did not occur, the facts speak otherwise. A review of all of the closing documents

(deed, mortgage, deed of trust, IMLC's check) all show they were signed/executed on June 19th. Since IMLC would not have drawn $600,000 and delivered it to Easyway without assuring itself that Easyway was ready to close the sale end of the transaction, the timing of those signings clearly establish that the "coordination" between Stephanie and Easyway did in fact occur, meaning, of course, that Sommerfeld knew full well Summitt was borrowing the balance of the purchase price from IMLC.

Summitt and the Gunters had selected Easyway Escrow to handle the escrow functions of their sale; IMLC did not. Easyway was thus a dual agent of the buyer and sellers in that transaction. The issue is therefore whether the knowledge of Easyway is imputed to the Gunters. That issue has not been addressed in Idaho, but it has in California, a state with virtually identical recording statutes and agency laws. In *In Re Marriage of James and Dana Cloney*, 91 Cal.App.4th 429 (2001), the appellate court was presented with a situation where a money judgment against James Michael Cloney was properly recorded and thus a lien on any real property he owned. Years later, he took title to property in his nickname – Mike Cloney. As a result, the judgment was not detected by the title company when Cloney subsequently sold the property. When the judgment creditor attempted to execute on the property, the buyers contended that they did not have constructive notice of the judgment in light of the name differences. The California court did not need to address that issue, since it found the parties' escrow agent had seen the seller's driver's license bearing his legal name while notarizing documents to consummate the sale. The court held that the actual knowledge of the true legal name of the seller was imputed to the buyers who thus took title with constructive knowledge of the lien whether or not the recording statutes also gave constructive notice.

The *Cloney* court recognized that an escrow agent serves dual masters and therefore reduced the analysis to two inquiries. First, was the information arguably imputed acquired in the course and scope of the agency? Second, was the information material to the subject matter of the agency (*Id* at 438-440)? If both questions are answered in the affirmative, then the law conclusively imputes knowledge to the agent's principal. Because the agent in *Cloney* acquired knowledge of the seller's legal name while acting in her capacity as an escrow agent and since that information was material to her duties, the agent's knowledge was constructively imparted to the buyers.

The same is true in this case. Easyway Escrow had knowledge during the course of the transaction that Summitt was borrowing the balance of the purchase price. That information was acquired during the course and scope of its agency and material to its function as an escrow agent. Whether or not the Gunters had actual knowledge of IMLC's loan and mortgage is thus irrelevant. The Gunters' agent knew and they are charged by law with that knowledge.

Plaintiffs' Post-Trial Brief, pp. 8-10. This Court finds that Sommerfeld, like the Gunters,

had no reason to know that this was anything other than a cash sale, save for the $200,000 the Gunters were carrying back. This makes *Cloney* inapposite. In *Cloney,* the agent knew of the seller's legal name. Sommerfeld had seen no documentation, other than the check used to close the transaction (discussed below) was drawn on the account of IMLC. The closing agent in *Cloney* had knowledge of a *fact,* the seller's legal name. In the present case, the closing agent, Sommerfeld, only had knowledge of whom a check was drawn upon, and plaintiffs ask this Court to *infer* that Sommerfeld knew for a fact that IMLC therefore had a security interest in this transaction. Because Sommerfeld knew of Hazel's prior history of "cross-collateralizing" (discussed below), and Sommerfeld's testimony in that regard is uncontradicted**,** that is an inference that simply cannot be made.

Sommerfeld testified that there was no information given to her that the buyer Summitt was planning on mortgaging the property. Sommerfeld testified Hazel never told him they borrowed or mortgaged this property. While the funds to close the transaction were from IMLC, Sommerfeld testified "the check is money", and she had no idea that just because the check was on an IMLC account, (Exhibit "V", p. 4), there was any security interest in IMLC on *this* property. On cross-examination Sommerfeld testified she knew from that check that Summitt's funding came from IMLC, and she knew that IMLC was a "hard money lender" which usually took first positions. However, she mentioned that any loan could have been "cross-collateralized", that is, collateralized by other property. Sommerfeld testified that Hazel has a history of cross-collateralizing with a lot of other property. Hazel did not testify at trial. Hazel testified via deposition taken April 17, 2009. Court Exhibit 2. In fact, Hazel testified as president of Summitt that this very property was "cross-collateralized":

> Q. [by Ms. Linscott, attorney for Gunters] So is it your understanding that the independent Mortgage financing was secured by property in addition to the Gunters' property?
> A. Independent Mortgage's first mortgage was cross-collateralized with the adjacent property, the Verhigh (phonetic) property, 142 acres, as a second mortgage, yes.

Ron Hazel Deposition, p. 37, Ll. 13-19; p. 10, Ll. 12-20. Casey Krivor, owner and manager of IMLC, testified that before Summitt bought the Gunters' property, Summitt had already owned the adjacent 142 acres. Thus, not only is Sommerfeld's testimony regarding previous cross-collateralization uncontradicted, it is corroborated *by Hazel,* president of Summitt. The Court has reviewed the exhibits. There is nothing that would have made it clear to Sommerfeld that *this* property of Gunters was being used to secure all of the $600,000 or even part of the $600,000. Sommerfeld simply did not know of the arrangement between IMLC and Summitt. Sommerfeld testified that as the agent of the Gunters, she was not under any duty to inquire where Summitt was getting its funding. Sommerfeld testified "a check is a check." Sommerfeld testified that no one mentioned a subordination agreement before closing, and that she learned of the subordination agreement after recording had taken place, when she was asked by Sandpoint Title Company. Sommerfeld's testimony that the first she ever heard of any subordination agreement was after recording is corroborated by Casey Krivor's testimony. Krivor, an owner and manager of IMLC, testified that this was the *first* transaction that IMLC had ever even *attempted* to get a subordination agreement upon, and that *they did not get one here*. Sommerfeld testified there was nothing in the documents she reviewed that showed the Gunters' deed of trust was in first or in second position because "I was only aware of the first position", that being the Gunters. Sommerfeld testified she was aware of no information that the Gunters would have had regarding the IMLC promissory note, that is should have shown on the purchase and

sale agreement and did not. While Sommerfiled testified she knew Gunters since eighth grade, she also testified she knew Hazel as a personal friend. Sommerfeld could not recall who asked her to close this part of the transaction, that it could have been Gunters, but she had also done a lot of work for Summitt during this time. The Court finds Sommerfeld to be credible.

Indeed, Krivor, owner and president of IMLC, corroborates Sommerfeld's lack of knowledge about the existence of any IMLC loan. Krivor testified that it would not be necessary for EasyWay to get our recording instructions to Sandpoint Title. That fact, testified to by Krivor, kept Sommerfeld in the dark, kept the existence of any loan by IMLC to Summitt in the dark, and kept IMLC's instructions to record IMLC's loan *first,* in the dark.

IV. FINDINGS OF FACT.

1. In April of 2006, Pat and Monica Gunter (Gunters) negotiated the sale of their 18 acre home site to Summitt, Inc., (Summitt) a property development company. Because Pat Gunter was working during the relevant times, Monica Gunter handled all discussions and negotiation regarding the sale of the Gunter home site. Summitt was represented in these negotiations by its President, Ron Hazel (Hazel).

2. Summitt had recently acquired the 142-acre property that adjoined the Gunter 18 acres. The Gunters had previously leased the same 142 acres from the prior owner for farming, in combination with their own 18 acres. Summitt planned to develop the property as a residential subdivision. After Summitt purchased the adjoining 142-acre property and Gunters learned of the subdivision plan, the Gunters decided that they did not want to live on property surrounded by residential development.

3. Monica Gunter contacted Hazel to inquire if Summitt was interested in purchasing the Gunters' home site to combine it with the development property. Hazel told Monica Gunter that Summitt wanted to buy the Gunter home site and the parties agreed on a price of $799,000 for the 18 acres. On April 21, 2006, a purchase and sale agreement was executed by Pat and Monica Gunter as Sellers and Hazel, on behalf of Summitt, as Buyer for purchase of the Gunters' 18-acre home site.

4. The Purchase and Sale Agreement (exhibit 1) was prepared by Hazel and identified EasyWay Escrow as the closing agent for the parties to this transaction. The payment terms were $1,000 earnest money and the balance of the purchase price identified to be "cash at closing." The purchase and sale agreement specified that possession was to be delivered to the buyer "at closing," with a closing date of June 19, 2006.

5. The purchase and sale agreement also specified that the "buyer [Summitt] shall have until 5-19-06 to determine the feasibility of this purchase." The purchase and sale agreement did not have a financing contingency and did not indicate that the buyer would use or was seeking third-party financing.

6. Shortly after the execution of the purchase and sale agreement, Hazel contacted Monica Gunter and told her that Summitt could not come up with the full amount of the purchase price. Hazel informed the Gunters that Summitt could pay $599,000 of the purchase price and asked if the Gunters would consider financing the remaining $200,000 of the purchase price. The Gunters agreed, and Monica Gunter took notes of the conversation with Hazel regarding the agreement to finance $200,000 of the purchase price.

7. At Hazel's request, Monica Gunter delivered her written notes to the closing agent at EasyWay Escrow. The notes are contained in the EasyWay Escrow file (Exhibit V, page 3) and do not mention or identify any other loan or financing contemplated by Summitt for the purchase of the Gunters' property.

8. After execution of the purchase and sale agreement, Ron Hazel separately contacted Independent Mortgage (IMLC), an equity or hard money lender, to see if Independent Mortgage would loan the entire $799,000. IMLC's manager, Casey Krivor, went with Hazel and toured the Gunter 18 acres. Although Krivor met Monica Gunter, she was not informed that Krivor represented a third-party lender. Krivor was aware of Summitt's plans to include the Gunter 18 acres with the 142 acres in the development residential subdivision, and Krivor and Hazel discussed and recognized that the Gunter 18 acres would complement the existing 142-acre property for development.

9. IMLC agreed to loan Summitt $616,000. This loan was conditioned on Summitt executing a promissory note, with the principals of Summitt, Hazel and Daren Brott, executing personal guarantees. Summitt was also to execute a mortgage on 160 acres of land that included both 142 acres already owned by Summitt and the 18 acres being acquired by Summitt from Gunter.

10. The purchase and sale transaction between Gunter and Summitt for the 18 acres was closed separately from the loan transaction between Independent Mortgage and Summitt. Carol Sommerfeld, the Owner of EasyWay Escrow, closed the Gunter/Summitt transaction. Stephanie Rief (now Brown) as the in-house closer for IMLC, prepared all documents related to and closed the Summitt/Independent Mortgage loan transaction.

11. As part of its in-house closing, Independent Mortgage prepared assignments of interest to investors, a power of attorney to facilitate the assignments and related documents. Independent Mortgage did not intend this closing to close the purchase and sale transaction between Summitt and Gunter.

12. While the closing agents for both transactions used Sandpoint Title Insurance for recording services and to provide title insurance for each transaction, the closing file documentation for EasyWay Escrow does not reflect coordination of a single closing effort. The complete EasyWay Escrow file was admitted as Exhibit V and does not contain any references to a third-party mortgage.

13. The Gunter/Summitt real estate sale transaction was closed by Carol Sommerfeld of EasyWay Escrow without her knowledge that the buyer, Summitt, was executing a promissory note to IMLC. Sommerfeld was not aware of the mortgage that Summitt executed for the 160 acres of property as security for Independent Mortgage's loan to Summitt.

14. The Gunters were not told by any representative of Independent Mortgage that Summitt was borrowing additional funds to purchase the 18 acres. The Gunters were unaware of the loan transaction between Summitt and Independent Mortgage prior to and at the time of the closing of the real estate purchase transaction.

15. Although Hazel testified that he told Monica Gunter that Summitt was financing through IMLC, Monica Gunter disputes this and testified that prior to the closing on the sale of the 18 acres to Summitt, Hazel never informed her of any financing other than the Gunters' $200,000 note. The Gunters testified that until they received a Christmas card in December of 2007, they were unaware of the IMLC Promissory Note and Mortgage. The Gunters' testimony is consistent with that of the

closing agent with EasyWay Escrow, Carol Sommerfeld, and is consistent with the fact that there is no reference in the closing file or the notes taken by Monica Gunter of her telephone conversation with Hazel about the carry back of $200,000 of the purchase price.

16. The testimony of Monica Gunter and Sommerfeld on the issue of whether Hazel informed them of the IMLC loan and mortgage is more credible. The testimony of Monica Gunter and Carol Sommerfeld is supported by the exhibits, including the fact that there is no mention of the Independent Mortgage loan in Monica Gunter's contemporaneous notes of her phone discussion with Hazel, and there is no indication in the EasyWay Escrow file that Summitt was financing through IMLC and would encumber the 18 acres.

17. Casey Krivor of Independent Mortgage was aware of the Gunter Deed of Trust and that it would be an encumbrance on the 18 acres. Krivor instructed IMLC's closer, Stephanie Brown, that subordination of the Gunter Deed of Trust was necessary. IMLC did not prepare a subordination agreement, did not send correspondence to EasyWay Escrow regarding a subordination agreement and did not advise either EasyWay Escrow or the Gunters that IMLC was planning to have its encumbrance be in first position.

18. Although EasyWay Escrow and IMLC ordered title insurance through Sandpoint Title Insurance and sent recording instructions to Sandpoint Title, these actions were not part of the same transaction. Neither IMLC nor EasyWay Escrow knew of the other closing agency's recording instructions.

19. The closing of the Gunter/Summitt real estate transaction was separate and independent from the closing of the Summitt/IMLC loan transaction, and these separate closings were not part of one continuous transaction.

20. The Gunter Deed of Trust became an encumbrance on the 18 acres at the time that the real estate sale transaction with Summitt closed.

21. Although Hazel signed the Mortgage document for the 160 acres before he signed the Deed of Trust, the Mortgage did not create an encumbrance on the Gunter 18 acres until after the Gunter/Summitt transaction closed. At the time Hazel signed the Mortgage, Summitt did not have any ownership interest in the 18 acres.

22. The Deed of Trust from Summitt to Gunter necessarily created an encumbrance on the 18 acres before the Mortgage to IMLC encumbered the 18 acres.

23. IMLC instructed Sandpoint Title to record its Mortgage first, before the Gunters' Deed of Trust. EasyWay Escrow was unaware of the Mortgage to IMLC and gave instructions to Sandpoint Title to record the Gunters' Warranty Deed and Deed of Trust. The conflicting instructions support the Court's finding that the transactions were separate and not part of a continuous transaction.

24. Gunters were the first encumbrancers of the 18 acres which they sold to Summitt.

25. IMLC is not a purchase money mortgager; the loan to Summitt was secured by 142 acres owned by Summitt at the time of the loan. The 18 acres did not come within the mortgage security until after the real estate purchase and sale transaction with the Gunters closed.

V. CONCLUSIONS OF LAW.

By executing a deed of trust when he closed the purchase and sale for Gunters'

eighteen acres, Hazel, as president of Summitt, created a first encumbrance in favor of Gunters for that eighteen acres. The fact that Hazel separately negotioated and transacted an agreement with IMLC to borrow money by giving a mortgage on one hundred and sixty acres to secure a loan does not create an encumbrance on Gunters' eighteen acres at the time that mortgage was given. IMLC's encumbrance was valid at the time of execution as to the one hundred forty-two acres already owned by Summitt, but only became valid as to the Gunters' eighteen acres after the Summitt land purchase transaction with Gunters had closed.

Based upon the Court's finding that the real estate purchase and sale transaction was separate from the Summitt/IMLC loan transaction and the finding that the Deed of Trust given to Gunter and the Mortgage executed in favor of IMLC were not part of one continuous transaction, the Court concludes that the Deed of Trust given to Gunter was the first encumbrance on the eighteen acres sold by Gunter to Summitt.

Although the Mortgage to IMLC was recorded first, IMLC was not a good faith purchaser because IMLC was aware of the Gunters' financing of the sale to Summitt and was aware that the Gunter financing was secured by a Deed of Trust.

Because Gunters were the first encumbrancers of the real property sold to Summitt and because IMLC was not a good faith purchaser the Gunter Deed of Trust has priority over the Mortgage despite the fact that the Mortgage was recorded one minute before the Deed of Trust.

Entered this 2nd day of August, 2010.

_____
John T. Mitchell, District Judge

Certificate of Service

I certify that on the _____ day of August, 2010, 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 #
Catherine Dullea	(208) 265-1556	Charles Dean	(208) 664-9844
Douglas Marfice/April Linscott	(208) 664-5884		

_____
Deputy Clerk