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AT _____ O'Clock _____ M
CLERK OF DISTRICT COURT

Deputy

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

**LAWRENCE SPENCER, THOMAS R.
MACY, and WILLIAM McCRORY,**

Plaintiffs,

vs.

**NORTH IDAHO COLLEGE, and NORTH
IDAHO COLLEGE FOUNDATION, an
Idaho non-profit corporation,**

Defendants.

Case No. **CV 2009 8934**

**MEMORANDUM DECISION AND ORDER ON:
1) DEFENDANT NIC'S MOTION FOR
RECONSIDERATION, MOTION FOR
PROTECTIVE ORDER REGARDING
DOCUMENT REQUEST OR ALTERNATIVELY,
MOTION FOR CLARIFICATION REGARDING
POST-SUMMARY JUDGMENT DISCOVERY;
2) DEFENDANT NIC'S OBJECTION TO
REQUEST TO PRODUCE; AND
3) PLAINTIFFS' OBJECTION TO ENTRY OF
JUDGMENT**

I. PROCEDURAL HISTORY AND BACKGROUND.

The factual and procedural background of this case has been previously set forth by this Court in its Memorandum Decision and Order on Summary Judgment filed March 19, 2010:

Defendant North Idaho College (NIC) is a community college district organized pursuant to I.C. § 33-2101, *et seq.* Defendant North Idaho College Foundation (Foundation) is an Idaho non-profit corporation incorporated pursuant to I.C. § 30-3-1, *et seq.* Plaintiffs are three individuals who own property in Kootenai County, and thus, electors and taxpayers within the district boundaries of that community college. Complaint, p. 2, ¶¶ 3-5, 8.

On July 23, 2009, the Foundation purchased property in Kootenai County known as the "Mill Site." At an open public meeting on July 21, 2009, NIC, acting through its Board of Trustees (Board), authorized NIC to enter into a lease agreement with the Foundation for the Mill Site. Resolution 2009-01 was approved by the Board on that date; it was determined the lease was "in the best interests of the students, residents

and taxpayers of Kootenai County...” Complaint, Exhibit 3, Resolution No. 2009-01, p. 1. On July 23, 2009, NIC executed the lease agreement which provided for NIC to lease the Mill Site from the Foundation on a yearly basis; renewal of the lease would require affirmative action by the Board each year through. Complaint, Exhibit 3, Lease Agreement, p. 2.

On October 27, 2009, Plaintiffs filed their *pro se* Complaint, alleging a violation of Article VIII, Section 3 of the Idaho Constitution. Plaintiffs claim the lease agreement is a *de facto* installment land sale contract for which NIC did not obtain the required 2/3 assent of the qualified elector’s in the district. Complaint, p. 5, ¶ ¶ 32-33. Plaintiffs also claim NIC did not obtain judicial validation of the lease agreement pursuant to I.C. § 7-1304, as an alternative to the assent of 2/3 of qualified electors in the district. *Id.*, ¶ 34. Plaintiffs seek a declaratory judgment that the lease agreement violates Article VIII, Section 3 of the Idaho Constitution; permanent injunctive relief prohibiting NIC from making further expenditures under the lease agreement until the lease is approved by 2/3 of qualified electors in the district, should that occur; and an entry of judgment compelling the Foundation to return all monies received from NIC under the lease. Complaint, pp. 6-7. On November 25, 2009, NIC and the Foundation filed their separate Answers to the Complaint.

On January 22, 2010, NIC filed its motion for summary judgment, “Memorandum in Support of Motion for Summary Judgment on Behalf of North Idaho College”, and the Affidavit of Tom Komberec (Vice-President of NIC Foundation) in Support of Motion for Summary Judgment”. Also on January 22, 2010, the Foundation filed “North Idaho College Foundation’s Joinder in North Idaho College’s Motion for Summary Judgment.” In its motion for summary judgment, NIC requests this Court grant summary judgment in NIC’s favor as to the validity of the lease. “If the Lease Agreement does not violate Article VIII, Section 3, all other claims or remedies sought by the Plaintiffs are moot and this lawsuit must be dismissed.” Defendants’ Memorandum in Support of Motion for Summary Judgment, p. 13. On February 18, 2010, the plaintiffs filed “Plaintiff’s Answering Brief in Response to defendant’s Motion for Summary Judgment”, an “Affidavit of Lawrence Spencer Supplementing Plaintiffs’ Answering Brief in Response to Defendants’ Motion for Summary Judgment” and the “Affidavit of William McCrory Supplementing Plaintiffs’ Answering Brief in Response to Defendants’ Motion for Summary Judgment”. On February 16, 2010, the Foundation filed the “Foundation Reply Brief in Support of Motion for Summary Judgment.” Also on February 16, 2010, NIC filed its “Reply Memorandum in Support of Motion for Summary Judgment.” On February 22, 2010, the “Affidavit of William McCrory in Opposition to Motion for Summary Judgment” was filed. Oral argument was held on February 22, 2010.

Memorandum Decision and Order Granting Defendant North Idaho College’s Motion for Summary Judgment, pp. 1-3.

The Court entered its Memorandum Decision and Order on Summary Judgment on March 19, 2010, and thereafter, plaintiffs filed a motion for reconsideration and motion to extend time in which to file affidavits and/or depositions in support of their motion for reconsideration. That motion for reconsideration was originally noticed up for hearing by plaintiffs to be heard on June 16, 2010, but that hearing was vacated pending the Court's rulings on defendants' motions regarding the taking of depositions.

In response, defendants filed a motion for entry of judgment *nunc pro tunc* and motions for protective order regarding the taking of depositions. NIC also moved the Court for an Order quashing the subpoenas issued by plaintiffs. On April 23, 2010, the Court heard oral argument on the various post-summary judgment motions and on May 5, 2010, issued its "Memorandum Decision and Order On: Plaintiffs' Motion for Extension of Time; Defendants' Motion for Entry of Judgment *Nunc Pro Tunc*; Defendants' Motion for Protective Order; and Defendants' Motion to Quash Subpoena (And Motion to Shorten Time)".

A proposed revised Final Judgment was submitted by NIC on May 10, 2010, and plaintiffs objected thereto on the same date. On May 13, 2010, NIC filed its Motion for Reconsideration, Motion for Protective Order Regarding Document Request or Alternatively, Motion for Clarification Regarding Post-Summary Judgment Discovery, its memorandum in support thereof, and its Notice of Objection to Request to Produce (regarding Post-Summary Judgment Depositions). NIC Foundation joined in NIC's motions on May 14, 2010. And, on May 21, 2010, plaintiffs vacated their hearing on plaintiffs' Motion to Reconsider pending the outcome of the defendants' motions currently before the Court. Plaintiffs' Reply Brief to Defendants' Joint Motions was filed on June 10, 2010. Oral argument was held on June 16, 2010.

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II. STANDARD OF REVIEW.

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 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). A decision to give a judgment *nunc pro tunc* effect or not is also vested in the discretion of the trial court. *Ward v. Lupinacci*, 111 Idaho 40, 42, 720 P.2d 223, 225 (Ct.App. 1986). The grant of a protective order under Rule 26(c) is a matter of discretion for the court; the word "may" in the rule denotes that such an action by the Court is permissive and not compulsory. *Walborn v. Walborn*, 120 Idaho 494, 501 P.2d 817, 160, 167 (1991). Given the permissive language, the Court's decision would not be overturned absent an abuse of discretion. *Selkirk Seed Co. v. Frney*, 134 Idaho 98, 104 P.2d 995, 798, 804 (2000).

In a criminal case on a motion to quash a subpoena *duces tecum*, the Supreme Court reviews the decision of a Magistrate Judge independently of, but with due regard for the decision of the District Judge; findings of fact are upheld where they are supported by substantial and competent evidence and issues of law are freely reviewed. *State v. Salsbury*, 129 Idaho 307, 308, 924 P.2d 208, 209 (1996). See e.g. *Kroopf v. Guffrey*, 183 Cal.App.3d 1351, 1356 (1986) (Review of order granting a motion to quash is governed by the substantial evidence standard of review). Cf. *Leber v. Stretton*, 928 A.2d 262, 266 (Pa.Super., 2007) (citing *Slusaw v. Hoffman*, 861 A.2d 269, 272 (Pa.Super., 2004)) (standard of review on motions to quash a subpoena is typically the

abuse of discretion standard).

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III. ANALYSIS.

A. NIC's (and NIC Foundation's) Motion for Reconsideration of the Order Denying its Motion for Protective Order and Motion to Quash Subpoenas.

In its May 5, 2010 decision, this Court addressed NIC's objection to plaintiffs' subpoenas for the taking of additional depositions in support of plaintiffs' motion for reconsideration (of the Court's March 19, 2010, ruling on summary judgment), through which plaintiff seeks to demonstrate the illegality of the lease agreement. The Court wrote:

In essence, plaintiffs' counsel assures the Court that if allowed to take these depositions, the plaintiffs will find reasons to overturn the Court's grant of summary judgment in favor of NIC and the Foundation. As mentioned above, "Parol evidence is always admissible to show the illegality of a contract, no matter how valid it may be upon its face." *Settle v. Sterling*, 1 Idaho 259, 265, 1869 WL 2374 *4 (Idaho Terr. 1869). If plaintiffs' counsel is wrong in its assurances to the Court that if allowed to take these depositions, the plaintiffs will find reasons to overturn the Court's grant of summary judgment in favor of NIC and the Foundation, sanctions in all likelihood will be imposed. In that way, should the depositions prove not relevant, the risk of harassment to NIC and the Foundation is at least mitigated.

Memorandum Decision and Order On: Plaintiffs' Motion for Extension of Time; Defendants' Motion for Entry of Judgment *Nunc Pro Tunc*; Defendants' Motion for Protective Order; and Defendants' Motion to Quash Subpoena (And Motion to Shorten Time), p. 22. The Court also considered whether the non-party witnesses sought to be deposed by plaintiffs had themselves made objections to the depositions sought, whether the subpoenas were issued primarily to harass, whether there were other viable means for plaintiffs to obtain the same information, and whether the information sought was relevant, non-privileged, and crucial to plaintiffs' case. *Id.*, pp. 20-22. This

Court concluded: there was no basis upon which to give the non-party deponents “extra consideration” as they had not appeared; defendants had failed to substantiate any of their claims of harassment with actual evidence; no party had suggested to the Court other means of securing the evidence existed; and sanction would likely lie against plaintiffs if the depositions did not turn up the evidence they had assured the Court would be uncovered. *Id.*

NIC argues the Court’s noting that parol evidence is always admissible to show illegality of a contract was in error because:

[P]arol evidence is not relevant in this case because the Plaintiffs’ allegation of illegality is based on their comparison of the language of the Lease Agreement to the language of Article III, Section 3 of the Idaho Constitution. There is no allegation that the lease was the result of coercion, fraud or illegal consideration.

The allegation that the Lease Agreement was made in contravention of Article VIII, Section 3 of the Idaho Constitution is the sole basis on which Plaintiffs contend the Lease Agreement was illegal.

Memorandum in Support of NIC’s Motion for Reconsideration, etc., p. 4. NIC goes on to argue no questions of material fact exist regarding the purported illegality of the lease agreement. *Id.*, pp. 4-6. NIC argues plaintiffs improperly analyzed case law on this issue and:

The issue is only whether the college has incurred a debt or liability in excess of budgeted available funds during the current fiscal year. That determination can be made from review of the contract language.

Id., p. 5. NIC’s final argument in this respect is that the testimony sought from the non-party deponents identified by plaintiffs has not been properly identified under Rule 27(b).

Plaintiffs respond the Lease Agreement, “is ‘illegal’ because it violates Article VIII Section III of the Idaho Constitution, not because as between the parties (College and Foundation) it is illegal or was obtained by fraud, misrepresentation or duress.”

Plaintiffs' Reply Brief to Defendants' Joint Motions, p. 2. Plaintiffs note case law, previously cited and quoted at earlier stages in this litigation, discussing the importance of evaluating contracts such as the one before the Court for what may be done under its terms, not what is actually done. *Id.*, p. 3. Plaintiffs argue the intent of the parties controls, necessitating the taking of depositions for a determination on whether the intention of the parties was to cover a purchase price through rental amounts. *Id.*, pp. 4-5. Plaintiffs do not directly address NIC's contention that the answers sought by plaintiffs as reasons for seeking the depositions "are irrelevant to the constitutional issue set forth in the Plaintiffs' complaint and there is no reason to allow discovery sought." Memorandum in Support of NIC's Motion for Reconsideration, etc., p. 8. However, in its brief, NIC only arguably answers the first of plaintiffs' questions, stating the \$4,000,000 for the Mill Site purchase was previously budgeted and was available, therefore it did not involve the Foundation purchasing the site using NIC tax dollars; the remaining questions are answered by stating the questions are irrelevant "because the College is not liable for any amounts beyond the current year appropriated rents..." *Id.*, p. 7.

First, NIC's contention that parol evidence would only be admissible to show illegality of a contract because of coercion, fraud, or illegal consideration fails. The First Circuit Court of Appeals has stated:

[W]here the parties put their engagement in writing all prior negotiations and agreements are merged in the instrument, and each is bound by its terms unless his signature is obtained by fraud or the contract be reformed on the grounds of fraud or mistake, or the contract is illegal.

Wheeler v. Blumling, 521 F.3d 1, 4 (1st Cir., 2008) (quoting *Childers & Venters, Inc. v. Sowards*, 460 S.W.2d 343, 345 (Ky. 1970)). A contract may be illegal if the contract violates a statute. Whether a contract violates a statute is a question of law for the Court from all facts and circumstances, and upon finding an illegal contract, the Court

will deny enforcement. *Trees v. Kersey*, 138 Idaho 3, 6, 56 P.3d 765, 768 (2002). Contracts made to further any matter prohibited by statute or violative of public policy are void and will not be enforced. *Kunz v. Lobo Lodge, Inc.*, 133 Idaho 608, 611, 990 P.2d 1219, 1222 (Ct.App. 1999). “Public policy may be found and set forth in the statutes, judicial decision or the constitution.” *Bakker v. Thunder Spring-Wareham, LLC*, 141 Idaho 185, 189, 108 P.3d 332, 336 (2005). The lease agreement at issue is alleged by plaintiffs to be illegal based on violation of public policy as set forth in the Idaho Constitution, not simply that it was the result of coercion, fraud or illegal consideration

Second, questions of material fact may result if plaintiffs are permitted to investigate the circumstances surrounding the formation of the lease agreement. Given the question of the legality of the lease agreement remaining, see immediately *supra*, it cannot be fairly stated the *only* question is whether a debt in excess of the amount budgeted for the current fiscal year was incurred.

Finally, this Court has previously found in its May 5, 2010, Memorandum Decision and Order that:

Plaintiffs have arguably complied with the notice provisions of I.R.C.P. 27(b) by listing the names and addresses of the parties and non-parties they wish to depose, the substance of what they hope such depositions will reveal, and the reasons for seeking the depositions (at least plaintiffs have done so by stating there would be no need for the depositions if NIC and the Foundation would stipulate to four facts). Response to NIC’s Motion to Quash, pp. 4-5. The Court finds such depositions “proper to avoid a failure or delay of justice”.

Memorandum Decision and Order On: Plaintiffs’ Motion for Extension of Time; Defendants’ Motion for Entry of Judgment *Nunc Pro Tunc*; Defendants’ Motion for Protective Order; and Defendants’ Motion to Quash Subpoena (And Motion to Shorten Time), p. 23. NIC points out that the four “facts” are:

1. Whether the Foundation, acting as a “straw man,” purchased the Mill Site using \$4,000,000 of NIC tax dollars;
2. Whether the Foundation, as a “straw man,” obtained the Mountain West loan based upon Lease Agreement;
3. Whether the Foundation could, on its own, qualify for the loan; and
4. Whether the agreement between the Foundation and NIC is a “multi-year purchase agreement.”

Memorandum in Support of North Idaho College’s Motion for Reconsideration, Motion for Protective Order Regarding Document Request or Alternatively, Motion for Clarification Regarding Post-Summary Judgment Discovery, p. 7. NIC argues: “None of these items bear on the question of whether the Lease Agreement creates a debt of liability on the part of North Idaho College that exceeds current year budgeted funds.”

Id. NIC argues none of these four areas are relevant. *Id.* While that may later prove to be true, the question at the present time is whether discovery into these areas is “reasonably calculated to lead to the discovery of admissible evidence.” I.R.C.P. 26(b)(1). Since this is after the Court’s decision granting summary judgment to NIC and Foundation, additional specificity is required under I.R.C.P. 27(b), and this Court has previously found NIC has “arguably” done so. While NIC’s additional arguments that these four areas are not relevant is not lost on the Court, those argument were kept in mind when the Court initially reached its decision allowing limited discovery. Limited discovery into these four areas could lead to relevant evidence to the issue before the Court...whether the Lease Agreement creates a debt or liability on the part of NIC that exceed the current year budgeted funds.

B. NIC’s (and Foundation’s) Motion for Clarification of the Court’s Order Regarding Production of Documents and Motion for Protective Order Regarding Document Production

NIC claims the Court’s Memorandum Decision and Order On: Plaintiffs’ Motion for Extension of Time; Defendants’ Motion for Entry of Judgment *Nunc Pro Tunc*;

Defendants' Motion for Protective Order; and Defendants' Motion to Quash Subpoena (And Motion to Shorten Time) did not address the production of documents sought pursuant to plaintiffs' subpoenas *duces tecum*. NIC is correct in that claim. However, the Court has reviewed the briefing involved in this issue, and the Court was only directed by all parties to the issue of the depositions themselves, not the request for documents that might be involved in those depositions. Defendant North Idaho College's Reply to Plaintiff's Objection Regarding Entry of Judgment and Memorandum in Support of Motion for Protective Order, pp. 4, 5. Similarly, plaintiffs were focused on the depositions and not documents. Reply to Motion for Protective Order, p. 6. And when the Foundation entered into this issue, the focus was still on the depositions themselves and not documents. North Idaho College Foundation Objection to Plaintiffs' Motion for Extension of Time, Objection Regarding Entry of Judgment and In Support of Motion for Protective Order, pp. 4, 5. Next, when NIC filed its Motion to Quash Subpoenas on April 20, 2010, the focus remained on the depositions themselves. Defendants' Memorandum in Support of Motion to quash Subpoenas, pp. 1-12. Finally, when plaintiffs responded, they were still focused on the taking of the depositions, not on documents. Response to NIC's Motion to Quash, pp. 1-6.

In the alternative to its motion for reconsideration, NIC seeks clarification as to what discovery precisely is contemplated by the Court's Order. NIC voices concern that the subpoena *duces tecum* issued by plaintiffs seeks production of every document dealing with the Mill Site, not simply those with reference to the lease agreement; NIC argues the request is overly broad and burdensome. Memorandum in Support of Motion for Reconsideration, Motion for Protective Order Regarding Document Request or Alternatively, Motion for Clarification Regarding Post-Summary Judgment Discovery,

p. 8.

Plaintiffs respond its correspondence with NIC and the Foundation:

...reveal a good faith effort to limit document production by asking the Defendants to provide even a hint as to how they have filed documents pertaining to the Mill Site, seek cooperation to avoid unnecessary effort by the Defendants and even suggest an initial informal evaluation to further expedite and limit the document production. Despite these good faith attempts the Plaintiffs have been met with literally no response. (Footnote omitted)

Plaintiffs' Reply to Defendants' Joint Motions, pp. 5-6. Plaintiffs seek: an outline describing how NIC classified and filed documents pertaining to the Mill Site; any study/opinion that the costs are an ordinary and necessary expense; any documents describing any practical effect of not renewing the lease; any documents between NIC and Mountain West Bank regarding the \$6 million loan to the Foundation; any documents between NIC representatives and the Foundation regarding the September 18, 2008 letter of intent; documentation of what expenses were by NIC or reimbursed to the Foundation by NIC pursuant to the September 18, 2008, letter of intent; communications between NIC and bond counsel regarding the Mill Site purchase by NIC or the Foundation; any documentation or opinion letters by any attorney regarding the need for, application of, and requirements of the July 23, 2009, Tax Agreement Regarding Revenue Ruling; documentation of communication between NIC and the University of Idaho pertaining to the Mill Site; documentation pertaining to the "issuance and sale of the Note and lease of the Mill Site" to NIC as referenced in the July 21, 2009, Resolution; documentation identifying the period for which the \$4 million payment to the Foundation represents "pre-paid rent under the Lease Agreement"; and any documentation between NIC and Lake City Development Corp. pertaining to the corporation's investment of money into the Mill Site. Affidavit of Marc Lyons in Support

of Motion for Reconsideration, etc., Exhibit B, pp. 1-3.

Idaho Rule of Civil Procedure 26 sets forth discovery methods and the scope of discovery in general. I.R.C.P. 26(a), (b)(1). Production of documents and things are permitted as to any unprivileged matter relevant to the subject matter of the action, whether or not the information sought would be admissible at trial, so long as the information “appears reasonably calculated to lead to the discovery of admissible evidence.” *Id.* A protection Order may be sought by a party where justice so requires and the discovery sought would subject the moving party to annoyance, embarrassment, oppression, or undue burden or expense. I.R.C.P. 26(c). Plaintiff’s counsel states in his letter (in which he attempts to clarify his request for production), “At the moment, I would agree that probably a majority of the documents requested are probably not relevant to the issues.” Affidavit of Marc Lyons in Support of Motion for Reconsideration, etc., Exhibit B, p. 2. Plaintiffs’ counsel then sets forth numbered items clarifying what documents are sought in addition to a general outline setting forth the filing process used.

It appears that the parties have not been able to successfully confer with one another and establish what documents specifically are being sought by plaintiffs. Even plaintiffs’ counsel has admitted the request, as it is currently phrased, for “all documents and objects pertaining, in any manner, to the transfer of money or other consideration to NORTH IDAHO COLLEGE FOUNDATION and/or NORTH IDAHO COLLEGE from the non-parties; and documents from the parties, including, for example:...” is overly broad and the material sought are is relevant to the issues. However, the numbered list and index of filing requested clearly appear to be reasonably calculated to lead to the discovery of admissible evidence. To the extent the documents sought in the numbered

list and the filing index itself exist, it would not be unreasonably burdensome for defendants to produce the same.

However, reasonable limits must be placed. This Court will not order NIC or the Foundation to provide an “outline” of how they classified their documents, although that seems to be a good idea, and NIC and the Foundation are encouraged to provide such. This Court is ordering that the documents listed in plaintiffs’ counsel’s May 6, 2010, letter be produced, if they exist, but only going back three years prior to July 23, 2009, the date the Lease Agreement was signed. Finally, the documents must be produced prior to the taking of the depositions.

C. Plaintiffs’ Objection to Entry of Judgment.

Following this Court’s March 19, 2010, Memorandum Decision and Order on Summary Judgment, on April 7, 2010, NIC filed its “*Motion for Entry of Judgment Nunc Pro Tunc.*” Plaintiffs responded on April 20, 2010. Following oral argument on that issue, and others, this Court issued its “Memorandum Decision and Order On: Plaintiffs’ Motion for Extension of Time; Defendants’ Motion for Entry of Judgment *Nunc Pro Tunc*; Defendants’ Motion for Protective Order; and Defendants’ Motion to Quash Subpoena (And Motion to Shorten Time)”, on May 5, 2010. In that decision, this Court held:

B. NIC’s “Motion for Entry of Judgment *Nunc Pro Tunc.*”

NIC urges the Court to exercise its discretion and give the proposed judgment it seeks *nunc pro tunc* effect. Defendants’ Memorandum in Support of Motion for Entry of Judgment, p. 2. NIC quotes a case in which the Idaho Court of Appeals held that where the *delay in rendering a judgment arises from an act of the Court*, the judgment may be entered retroactively as of the time it should have been entered. *Id.*, pp. 2-3, quoting *Ward v. Lupinacci*, 111 Idaho 40, 42, 720 P.2d 223, 225 (Ct. App. 1986). NIC writes:

[W]here the delay in rendering a judgment or a decree arises from the act of the court, ...the judgment or decree may be entered retrospectively, as of a time when it should or might have been entered up.” *Id.*, (quoting *Mitchell v. Overman*, 103 U.S. (13 Otto) 62, 64-65, 26 L.Ed. 369 [1881].)

Defendants' Memorandum in Support of Motion for Entry of Judgment, pp. 2-3. As already noted above, the Foundation notes the local practice in this Judicial District is to have the prevailing party draft the final judgment, circulate it, and submit it to the Court, but that, "this practice does not negate the requirements of I.R.C.P. 58(a)." North Idaho College Foundation Objection to Plaintiff's Motion for Extension of Time, p. 5. Plaintiffs object to the entry of judgment, arguing: "Defendant wishes to rush to judgment in this matter despite the pending Motion for Reconsideration and it would be a travesty for the Court to take such action at this time given the pending and scheduled for hearing motion." Objection to Entry of Judgment, p. 1.

In the present case, no judgment, set forth in a separate document as required by Rule 58(a), was presented by either defendant to the Court. It cannot be said that NIC's or the Foundation's failure to do so amounts to an act of *the Court* causing delay in the rendering of a judgment. Given the fact that only seven days transpired between this Court's filing its "Memorandum Decision and Order Granting Defendant North Idaho College's Motion for Summary Judgment" on March 19, 2010, and plaintiffs filing their "Motion to Extend Time" on March 26, 2010, there is no "...delay in rendering a judgment or a decree arises from the act of the court..." under *Ward*. Even if delay could be attributed, it could only be attributed from March 29, 2010, on the date counsel for NIC submitted to the Court a proposed Judgment. The Court was unable to sign such when presented because the Court was out of the country on that date, and for two weeks thereafter. However, between March 19, 2010, and March 29, 2010, plaintiffs had filed their Motion to Extend Time. Accordingly, it would not be appropriate for this Court to grant NIC's Motion for Entry of Judgment *Nunc Pro Tunc*.

There simply was no final judgment in this matter despite this Court's having granted NIC and the Foundation summary judgment as to all of plaintiffs' claims. Therefore, plaintiff's motion for reconsideration, a matter committed to the Court's discretion, was properly and timely filed.

That finding, in turn, results in plaintiffs having properly sought to admit additional evidence. See *Johnson v. Lambros*, 143 Idaho 468, 147 P.3d 100 (A party making a motion for reconsideration is permitted to present new evidence, but is not required to do so.) And, the decision to extend the time period within which plaintiffs may submit additional evidence in support of their motion to reconsider is also a matter vested in the Court's discretion. Given plaintiffs' timely filing of their Motion for Reconsideration and timely filing of the Motion for Extension of Time, NIC's and/or the Foundation's failure to submit a final judgment (until after plaintiffs filed their Motion for Extension of Time), and (upon a Motion for Reconsideration the Court having discretion as to whether hear reconsideration) the requirement that the Court consider new evidence bearing upon the motion for summary judgment, this Court can properly grant the motion to extend time sought by plaintiffs. NIC and the Foundation have set forth no evidence of prejudice which would inure to them if the Court grants plaintiffs' motion. See e.g. I.R.C.P. 61.

Id., pp. 15-17. Obviously, that decision focused on the *nunc pro tunc* aspect of the proposed judgment. The above analysis does not apply to a simple “judgment.”

On May 10, 2010, counsel for NIC submitted a proposed “Judgment” to the Court, copy to counsel. Apparently in response to that submission, later in the day on May 10, 2010, counsel for plaintiffs filed an “Objection to Entry of Judgment”. Due to that objection, this Court did not immediately sign the Judgment presented by NIC. In plaintiffs’ Objection to Entry of Judgment, plaintiffs argued that the depositions originally scheduled for April now had to be scheduled for June. Objection to Entry of Judgment, p. 1. Since this Court is just now issuing the present decision, document production and depositions will obviously not be completed in June. Plaintiffs additionally argue in their “Objection to Entry of Judgment”:

If the Court enters the proposed Judgment, the 42 days to appeal will begin to run. This will mean that an appeal will need to be filed with the Idaho Supreme Court before the hearing on the Motion for Reconsideration will be able to be held. Requiring this appeal to be perfected in view of the late advisement by the Foundation’s counsel of unavailable dates, 25 days after notice of the depositions was provided and the hearing date on the Motion for Reconsideration scheduled to dovetail therewith, is extremely prejudicial to the Plaintiffs from a cost and time standpoint. It literally serves no purpose of justice for this proposed Judgment to be entered at this time, given the Court’s ruling, the pending depositions, and the pending hearing on the Motion for Reconsideration. If nothing else, judicial economy dictates that any Judgment be held in abeyance pending the Court’s decision on the Motion for Reconsideration.

The issue regarding the appeal date from any Judgment entered by the Court is not of Plaintiffs’ making. If the depositions could proceed as scheduled, even if the Judgment was entered today, the appeal date would not have run until six days after the hearing on the Motion for Reconsideration.

Objection to Entry of Judgment, p. 2. There are a couple of problems with this argument. First, it is now July 1, 2010, and plaintiffs’ Motion for Reconsideration has not been heard. Not only that, but plaintiffs’ Motion for Reconsideration has not even

been set for hearing. Certainly that may be due in part to this Court taking the present motions under advisement and depositions and document production being in a state of flux until this decision, but the reality is no hearing date has been set for such motion. Second, NIC and Foundation prevailed at summary judgment. That occurred on March 19, 2010. At the time the Motion for Reconsideration was filed on March 26, 2010, the Court was led to believe that the plaintiffs could quickly take depositions and get this new evidence before the Court in short order. The ambitious schedule by plaintiffs has not come to pass, not through any party's fault, but the fact remains that NIC and Foundation prevailed more than three months ago, and no judgment has been entered. Third, plaintiffs have advanced no *legal* reason why judgment should not be entered. While holding in abeyance entry of judgment may result in some cost savings to plaintiffs, the fact remains NIC and Foundation have prevailed and three months later have no judgment to show for it. Fourth, while economy of costs are important, economy of time is important. If an appeal results in this case, delaying a judgment for additional months only delays the beginning of that appellate process and the inevitable delay of the ultimate decision from the appellate court. All parties would like this action resolved, but at the present time, NIC and Foundation have prevailed. Delaying judgment only postpones a decision by an appellate court.

IV. CONCLUSION AND ORDER.

For the reasons stated above;

IT IS HEREBY ORDERED NIC's (and NIC Foundation's) Motion for Reconsideration of the Order Denying its Motion for Protective Order and Motion to Quash Subpoenas is DENIED.

IT IS FURTHER ORDERED NIC's (and Foundation's) Motion for Clarification of

the Court's Order Regarding Production of Documents and Motion for Protective Order Regarding Document Production is GRANTED IN PART, in that limits must be placed: NIC and the Foundation are encouraged but not required to provide an "outline" of how they classified their documents; NIC and Foundation are ordered to produce the documents listed in plaintiffs' counsel's May 6, 2010, letter to NIC's counsel, if they exist, but only going back three years prior to July 23, 2009, the date the Lease Agreement was signed; such documents must be produced as soon as possible, no later than as required under I.R.C.P. 35(a), and these documents must be produced prior to the taking of the depositions.

IT IS FURTHER ORDERED plaintiffs' Objection to Entry of Judgment is OVERRULED, the Judgment presented by NIC on May 10, 2010, will be entered.

Entered this 1st day of July, 2010.

John T. Mitchell, District Judge

Certificate of Service

I certify that on the _____ day of July, 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
Starr Kelso

Fax #
664-6260

Lawyer
Dana Rayborn Wetzel
Marc Lyons

Fax #
664-6741
664-5884

Jeanne Clausen, Deputy Clerk