STATE OF IDAHO)
County of Bonner)ss

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AT_____ O'Clock _____M
CLERK OF DISTRICT COURT

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Deputy

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

MARJORIE STANLEY, *Plaintiffs*, vs. **LENNOX INDUSTRIES, INC., and MAPLE CHASE COMPANY, and DOES 1-5.** *Defendants*.	Case No. **CV 00 893** **ORDER DENYING PLAINTIFF'S MOTION IN LIMINE RE: "EMPTY CHAIR" DEFENSE AND ORDER FOR MEDIATION**

I. INTRODUCTION.

Plaintiff Marjorie Stanley had her home damaged when its heating system overheated the house while she was on vacation. This Court granted summary judgment on behalf of defendant Lennox (manufacturer of the furnace controller) and defendant Maple Chase (manufacturer of the thermostat), and Stanley appealed only as against Lennox. The Idaho Supreme Court reversed the granting of summary judgment in favor of Lennox and remanded. *Stanley v. Lennox,* 140 Idaho 785, 102 P.3d 1104 (2004).

Stanley filed a motion in limine to prohibit Lennox from producing evidence at trial as to any malfunction of the Maple Chase thermostat, and to keep Maple Chase off the jury verdict. At trial, Lennox wants Maple Chase on the special verdict form, and wishes to have a special verdict form that enumerates the fact that Stanley in her case-in-chief must rule out other reasonable causes. Additional Briefing on Court's Partial Summary Judgment, dated December 19, 2006, p. 1. "A *prima facie* case may be proved by direct or circumstantial evidence of a malfunction of the product

and the absence of evidence of abnormal use and the absence of evidence of reasonable secondary causes which would eliminate liability of the defendant." *Farmer v. International Harvester Co.*, 97 Idaho 742, 747, 553 P.2d 1306, 1311 (1976). Stanley not only opposes allowing Maple Chase to be on the jury verdict form, but also opposes any attempts by Lennox to blame the malfunction on Maple Chase. Plaintiff's Supplemental Brief Re: Summary Judgment on the Merits and Defendant Lennox's Empty Chair Defense, pp. 1-2. Oral argument on Stanley's motion in limine was held on February 7, 2007. Additional briefing on this issue was requested by the Court and provided by the parties. Accordingly, Stanley's motion in limine is now at issue. At oral argument, the Court ordered mediation to occur between the parties no later than six weeks from the Court's written decision on Stanley's motion in limine.

II. ANALYSIS.

There are two issues here: Whether Maple Chase should be on the verdict form and whether Lennox should be allowed to put on proof that the damage occurred due to the Maple Chase thermostat. The first question is somewhat answered by whether this is a comparative fault situation.

This has always been a lawsuit about which of two things, the Maple Chase thermostat or the Lennox furnace controller, caused the damages sustained by Marjorie Stanley. It at all times seems to have been an "either/or" situation…either the Maple Chase thermostat caused the damage or the Lennox Furnace Controller caused the damage. Stanley is not at fault, and there is no evidence that any other non-party is at fault. In Way's February 12, 2003, affidavit, he claimed in paragraph 14: "2) The only possible causes for the heat damage to the Stanley residence are a malfunction of the Lennox furnace controller or a malfunction of the Maple Chase thermostat *or a combination thereof*". (emphasis added). However, the Court has seen no evidence to date to support a claim

that the Lennox furnace controller acted in concert with the Maple Chase thermostat to cause the damage to Stanley, but certainly there could be evidence adduced at trial. But unless there is some evidence that the malfunction occurred as a result of the interface between the two components, we are not dealing with a "comparative fault" situation. Unless there is some evidence that the damage occurred as a result of the interface between the two components, we are not dealing with an "apportionment" situation.

At trial, this case comes down to which of two experts the jury believes. The experts place the responsibility on the Maple Chase thermostat (William Drake and initially, Paul Way) or the Lennox furnace controller (Paul Way currently). Without testimony that the damage occurred as a result of the interface between the two components, a jury verdict apportioning some fault to Maple Chase and some fault to Lennox would be based on speculation, or by compromise or by lot, and would result in a mistrial. There simply would be no evidence to support a jury verdict that placed some fault on the Maple Chase thermostat (Lennox' expert's position) and some fault on the Lennox furnace controller (Stanley's expert's position).

Stanley's argument that Lennox should not be allowed to have Maple Chase on the verdict form is based on the fact that summary judgment was granted in favor of Maple Chase on March 10, 2003, and Maple Chase was dismissed with prejudice. Plaintiff's Supplemental Brief Re: Summary Judgment on the Merits and Defendant Lennox' Empty Chair Defense, p. 2. Stanley argues that a dismissal of all claims on summary judgment is a final judgment on the merits. *Id.* pp. 2-4. This Court agrees. It *is* a final judgment on the merits. Stanley cites *Carr v. Carr,* 116 Idaho 747, 751, n. 2, 779 P.2d 422 (Ct.App. 1989), *Id.* at p. 4. *Carr* is an appeal of a divorce decree, and the footnote deals with one limited aspect of that decree which was not appealed. *Carr* is not a products liability case where the plaintiff Stanley has the burden of proof of ruling out other causes. Lennox cites *Vannoy v. Uniroyal Tire Company,* 111 Idaho 536, 76 P.2d 648 (1986), specifically:

> Indeed, in many instances, it will not be possible to establish liability for various reasons including immunity, settlement, failure to join as a party, unknown identity, statute of limitations, or numerous other possible causes. In determining whether or not to include additional parities on the verdict form, the question is not whether a judgment would or could not be rendered against that person, but whether or not his conduct or his product caused or contributed to the accident and injuries.

Additional Briefing on Court's Partial Summary Judgment Dated December 19, 2006, pp. 6-7, *citing* 111 Idaho at 543-44, 726 at 655-56. Lennox's argument is that "entry of summary judgment falls within the confines of immunity, settlement, statue of limitations, or 'numerous other possible causes' that keep non-parties from being liable, but do not keep them off the special verdict form." *Id.* p. 7, *citing* 111 Idaho at 543, 726 P.2d at 655. The Court agrees with Lennox's argument. First, even though the summary judgment against Maple Chase is a final judgment on the merits, it was Stanley's decision not to appeal as against Maple Chase and only appeal as against Lennox that caused the granting of Maple Chase's summary judgment motion to become a final judgment on the merits. Thus, Stanley had a conscious and an integral part in the fact that there is a final judgment against Maple Chase. Second, this case has evolved over the course of seven years. More information is now known (compared to what existed five years ago at summary judgment) that could place liability on Maple Chase. Third, ruling out other causes is part of Stanley's case-in-chief…it is her burden to prove there were no other reasonable causes. For the Court to rule otherwise would not only be allowing Stanley to skip past one of the elements of her case, it would also be eliminating Lennox's primary defense that there is some cause other than the Lennox furnace controller (the Maple Chase thermostat), a defense that appears to be supported by admissible evidence, all for the sole reason that Stanley did not pursue her appeal against Maple Chase. The Court cannot do this. This Court finds that the summary judgment against Maple Chase is, as stated in *Vannoy*, akin to "immunity, settlement, statue of limitations" and is one of the "'numerous other possible causes' that keep non-parties from being liable, but do not keep them off the special verdict form." 111 Idaho at 543, 726 P.2d at 655.

Stanley argues, "It would be error to allow Lennox to point to an 'empty chair' because Maple Chase was dismissed with prejudice through a motion for summary judgment" and "Allowing Lennox to introduce evidence regarding Maple Chase puts Plaintiff in the position of having to defend an absent defendant even though the Court determined as a matter of law that Maple Chase did not have any liability for the malfunction at the Stanley home." Plaintiff's Supplemental Brief Re: Summary Judgment on the Merits and Defendant Lennox' Empty Chair Defense, p. 4. All of that is true, but all of that ignores the fact that, as mentioned above: 1) even though the summary judgment against Maple Chase is a final judgment on the merits, it was Stanley's decision not to appeal as against Maple Chase and only appeal as against Lennox which causes the Maple Chase summary judgment to be a final judgment on the merits; 2) the passage of time since summary judgment against Maple Chase has produced more information that could place liability on Maple Chase; and 3) ruling out other causes is part of Stanley's case in chief. Stanley then argues that she will be "in the untenable position of being forced to defend Maple Chase, despite the original claims and this Court's previous rulings." *Id.* pp. 5-6. Again, it is not untenable, as ruling out other causes (other than Lennox) has at all times been Stanley's burden in this product liability lawsuit, and Stanley made the decision not to appeal this Court's summary judgment decision in favor of Maple Chase.

Stanley then cites cases from Montana (which has a statute prohibiting the "empty chair" defense) and a California statute which prohibits the "empty chair" defense. *Id.* Idaho has no such statute.

Stanley then cites *McKenney v. Jersey City Medical Center*, 167 N.J. 359, 771 A.2d 1153 (N.J. 2001) which in turn cited *Bahrle v. Exxon Corp.*, 279 N.J.Super. 5, 22, 652 A.2d 178 (N.J.App.Div. 1995). Plaintiff's Supplemental Brief Re: Summary Judgment on the Merits and Defendant Lennox' Empty Chair Defense, pp. 6-8. During the course of each case, a party or parties

had been dismissed by summary judgment with prejudice. At first read, those cases seem to be on point, but neither case dealt with a products liability matter where the plaintiff had the burden of ruling out other causes as part of her case-in-chief.

McKenney dealt with a wrongful birth claim where the parents are not required to prove medical causation in the sense that a physician's negligence caused the birth defect, but rather, the nature of the cause of action required the parents to prove that the physician's negligence was a proximate cause of the parents being deprived of the option to have an elective abortion. 167 N.J. at 362, 771 A.2d at 1154. The present case deals with a products liability claim, where part of Stanley's *prima facie* case is proving there is no other reasonable cause for the damage. *McKenney* did not allow the "empty chair" defense to argue that a hospital employee named Sipra De was negligent, but the case turned on surprise testimony and inability to be prepared at trial because De's testimony was significantly different at trial than it was in her earlier deposition. It is clear from reading the appellate opinion, not only did De (who was dismissed on summary judgment) testify, but fault was attributed to her employer via respondent superior. The Supreme Court of New Jersey wrote: "Third, although the summary judgment order dismissing De from the case precluded defendants from arguing the "empty-chair" defense to the jury, that order did not preclude De from accepting more responsibility than had been the case in her depositions." 167 N.J. at 373, 771 A.2d at 1162. It is not clear from the *McKenney* opinion whether New Jersey has a statute that prohibits the "empty chair" defense.

Bahrle v. Exxon Corp was a groundwater contamination lawsuit. Unlike Stanley, the plaintiffs in *Bahrle* did not have as an element in the plaintiff's case-in-chief the duty to rule out other possible causes. The New Jersey Superior Court ruled the trial court erred in allowing evidence of liability against Exxon/Ritchie (the second owners of a gas station with a leaky underground storage tank who were dismissed at summary judgment) in a trial that proceeded

against Texaco/Rule (the first owners of the gas station). An important reason that result was equitable was after the court dismissed Exxon and Ritchie at summary judgment, the plaintiff **settled** with Exxon. *Bahrle* reads in pertinent part:

> In granting summary judgment to Exxon/Ritchie, the motion judge concluded that, based on both plaintiffs' and Exxon's experts' reports, plaintiffs "could not possibly have suffered damage as a result of any ··· toxic contaminants from Exxon's Service Station." This finding was predicated on the undisputed groundwater velocity rate agreed upon by ERM and Bello. Texaco did not oppose the summary judgment motion, and therefore did not submit a report contradicting ERM and Bello. The motion judge thereafter denied Texaco's motion to set aside the dismissal in favor of the Ritchies and also "preclude [d] Texaco from challenging the flow rate and the hydrogeological situation accepted to this point in the case." It was the motion judge's view that to allow new experts to "change what has been accepted as the facts in this matter, specifically the flow rate" would make a "mockery out of case management and court orders entered····"
>
> At trial, the trial judge entertained Texaco's and Rule's motion to submit the testimony of Lloyd LaBrie, a consulting engineer who stated that Exxon/Ritchie's post-1975 conduct contaminated some of plaintiffs' wells. The judge reviewed the transcripts of the summary judgment motions and determined that the summary judgment orders, though ending Exxon's and the Ritchie's legal liability, did not preclude Texaco from arguing that the contamination was due to the conduct of third parties over whom it had no control, including Exxon and Rule. The judge reasoned that Texaco could argue "in defense" that Exxon/Ritchie may have caused the contamination, so long as those proofs and arguments are predicated on the same groundwater flow rates that were contained in the experts' reports.
>
> Based on the trial judge's ruling, Texaco presented LaBrie who concluded that, even accepting the agreed-upon groundwater flow rate, station discharges after 1976 could have reached the well heads of various plaintiffs. On cross-examination, plaintiffs' counsel questioned LaBrie concerning his calculations of flow rates. The trial judge thereupon permitted LaBrie, on redirect, to testify that a station discharge as late as 1980, the year the Ritchies showed a 5,000 gallon inventory shortfall, could have reached some of plaintiffs' well heads.

279 N.J.Super. at 19-20, 652 A.2d at 185. In that case the trial judge allowed Texaco, which sat on the sidelines as Exxon put on evidence it was not liable (and Exxon prevailed on summary judgment), to later put on proof at trial that Exxon may have been at fault. The appellate court did not allow that based on the "empty chair" doctrine. 279 N.J.Super at 22, 652 A.2d at 186. In the present case, it was the *plaintiff Stanley's own expert* (not Lennox's expert) Paul Way who initially

established evidence of a malfunction against Maple Chase or its thermostat, and did not establish any evidence against Lennox. Lennox' Memorandum in Support of Summary Judgment, filed January 10, 2003. Way's opinion that Maple Chase caused the damage was based on Stanley noticing the thermostat read "ERR 35" or "ERR 36" on the thermostat, and that "ERR 35" is an out of range indicator indicating that the thermostat believed the temperature to be low, below 32 degrees Fahrenheit and calling for heat, as opposed to an "ERR 36" code indicating the thermostat believed the temperature to be high. Defendant Maple Chase Company's Motion for Summary Judgment, p. 5. Maple Chase simply defended on the ground that Way was wrong in his assumption, as neither "ERR 35" or "ERR 36" exist as out of range indicators. *Id.* p. 6. Defendant's (Lennox) Reply Memorandum in Support of its Motion for Summary Judgment shows that Lennox did not argue Maple Chase was at fault. Lennox simply argued that plaintiff Stanley, through her expert Paul Way, even with his affidavit which was very contradictory to his deposition testimony, still had no evidence against Lennox. Lennox argued: "Mr. Way even at this time, has not come up with a conclusion regarding whether he believes that the Maple Chase thermostat or the Lennox furnace malfunctioned. In essence, he has not removed other reasonable causes." Defendant's (Lennox) Reply Memorandum in Support of its Motion for Summary Judgment, p. 4. In Way's February 12, 2003 affidavit, he claimed in paragraph 14:

> 1) The heating system consisting of the Maple Chase thermostat and the Lennox furnace malfunctioned, ran continuously, and overheated the Stanley residence;
> 2) The only possible causes for the heat damage to the Stanley residence are a malfunction of the Lennox furnace controller or a malfunction of the Maple Chase thermostat or a combination thereof;
> 3) The Stanley residence was damaged by excessive heat generated by the heating system; and
> 4) The Lennox furnace controller malfunctioned and continuously called for heat from the furnace resulting in the damage to the Stanley residence.

Obviously, Stanley made her decision to appeal only as against Lennox based on the strength of Way's opinion in subparagraph 4 and ignoring subparagraph 3 in which Stanley's own expert stated:

The **only** possible causes for the heat damage to the Stanley residence are a malfunction of the Lennox furnace controller **or** a **malfunction of the Maple Chase thermostat** or a combination thereof;"

But the main reason *Bahrle* is factually different from the present case is Texaco not only sat on the sidelines as Exxon made and prevailed on its motion for summary judgment; Texaco, after Exxon was dismissed, assured the trial court it would not try to pin liability on Exxon at trial. While the trial court allowed Texaco to do just that at trial, the appellate court obviously took issue with that:

> …the motion judge found that:
>
> > The [summary judgment] motion was not opposed by anyone. No one even asked that it be delayed for discovery purposes, or for any other reason, and then the Court granted the motion as unopposed.
>
> The judge also explained that after the summary judgment orders were entered and during ensuing settlement discussions, all counsel were specifically asked whether any party intended to produce further expert hydrogeological reports, and Texaco's counsel:
>
> > represented, not only to counsel in the matter but to the Court, Texaco was not going to produce an expert or obtain an expert in regard to the matter. As a result of all of that, counsel entered into a settlement.
>
> Texaco should not have been permitted to shift gears and focus on Exxon/Ritchie's liability at trial when it had made a tactical choice not to oppose Exxon/Ritchie's summary judgment motions by submitting a competing hydrogeological report.

279 N.J.Super at 23, 652 A.2d at 187. Lennox has made no representations to this Court similar to what Texaco told the motions judge in *Bahrle.* Maple Chase not only did not sit on the sidelines as Lennox brought its motion for summary judgment, but Maple Chase joined in Lennox' summary judgment (Motion for Defendant Maple Chase Company's Joinder in Defendant Lennox Industries, Inc.'s Summary Judgment, filed February 13, 2003), and Maple Chase filed its own motion for summary judgment on February 13, 2003 as well. Another distinguishing feature within *Bahrle* is plaintiffs' expert agreed Exxon was not liable:

> Indeed, on Exxon/Ritchie's summary judgment motions, both Exxon's expert, Environmental Resources Management (ERM) and plaintiffs' expert, Donald Bello, had agreed that any discharge from the gasoline station during the Exxon/Ritchie era could not have reached the remaining plaintiffs' wells. This conclusion was reached based on the maximum distance any contaminant could have travelled by applying groundwater velocity rates ranging between 114 and 91 feet per year. ERM identified three potential sources of contamination in the western zone: (1) the gasoline station; (2) septic system discharges; and (3) home automobile repairs. Because of the groundwater velocity rate, ERM concluded that the "Exxon plume" contamination was caused by a discrete event, a spill, occurring in 1986, and did not affect any of the plaintiffs' wells except those within the one and one-and-one-half block radius of the station.

279 N.J.Super. at 19, 652 A.2d at 184. Thus, in *Bahrle*, Exxon's expert and the plaintiff's expert agreed Exxon could not be liable. The *Bahrle* court continued:

> In granting summary judgment to Exxon/Ritchie, the motion judge concluded that, based on both plaintiffs' and Exxon's experts' reports, plaintiffs "could not possibly have suffered damage as a result of any ··· toxic contaminants from Exxon's Service Station." This finding was predicated on the undisputed groundwater velocity rate agreed upon by ERM and Bello. Texaco did not oppose the summary judgment motion, and therefore did not submit a report contradicting ERM and Bello. The motion judge thereafter denied Texaco's motion to set aside the dismissal in favor of the Ritchies and also "preclude [d] Texaco from challenging the flow rate and the hydrogeological situation accepted to this point in the case." It was the motion judge's view that to allow new experts to "change what has been accepted as the facts in this matter, specifically the flow rate" would make a "mockery out of case management and court orders entered····"

279 N.J.Super. at 19, 652 A.2d at 185. The fact that plaintiffs' expert and Exxon's expert agreed Exxon could not be liable, and Texaco didn't oppose that summary judgment motion, one can see why it would be unfair for the trial judge to let Texaco lie in wait and then allow Texaco to present evidence at trial that Exxon was liable. That isn't the situation here. Plaintiff Stanley had evidence at summary judgment that Maple Chase was liable, as Stanley's own expert stated:

> 2) The only possible causes for the heat damage to the Stanley residence are a malfunction of the Lennox furnace controller <u>or a malfunction of the Maple Chase thermostat</u> or a combination thereof;

Stanley then chose to not contest the summary judgment order in favor of Maple Chase when Stanley chose to only appeal the summary judgment order in favor of Lennox.

Another reason the *Bahrle* appellate court reached its decision was the doctrine of "judicial estoppel".

> Judicial estoppel is a principle of equity, but unlike equitable estoppel it "looks to the connection between the litigant and the judicial system" rather than the relationship between the parties. *Oneida Motor Freight, Inc. v. United Jersey Bank,* 848 *F.*2d 414, 419 (3rd Cir.), *cert. denied,* 488 *U.S.* 967, 109 *S.Ct.* 495, 102 *L.Ed.*2d 532 (1988). Its fundamental premise is to protect the integrity of the judicial system by preventing litigants from " 'playing fast and loose' " with the court "to suit the exigencies of self interest." *USLIFE Corp. v. U.S. Life Ins. Co.,* 560 *F.Supp.* 1302, 1304-05 (N.D.Tex.1983) (quoting *Scarano v. Central R. Co.,* 203 *F.*2d 510, 513 (3rd Cir.1953)).

279 N.J.Super. at 23, 652 A.2d at 186. In light of the discussion above, given Texaco's statements that it wouldn't develop expert testimony against Exxon, and Texaco's subsequent about face, it is easy to see why judicial estoppel was applied by the appellate court. In the present case, it seems like Stanley is the one that ought to be estopped. At summary judgment she was claiming both Lennox and Maple Chase were at fault. Now, because she didn't appeal against Maple Chase, she wants to not only have Lennox found to be at fault, but preclude Lennox from asserting that the Maple Chase thermostat may be the cause.

Finally, yet another reason the appellate court in *Bahrle* reversed the trial court was the doctrine of "the law of the case". That doctrine holds: "where there is an unreversed decision of a question of law or fact made during the course of litigation, such decision settles that question for all subsequent stages of the suit." 279 N.J.Super. at 21, 652 A.2d at 186. The *Bahrle* court went on to hold:

> Of course, the doctrine is " 'discretionary and the court is never irrevocably bound by its prior interlocutory ruling····' " *Daniel v. State, Dep't of Transp.,* 239 *N.J.Super.* 563, 581, 571 *A.*2d 1329 (App.Div.1990), *certif. denied,* 122 *N.J.* 325, 585 *A.*2d 343 (1990) (quoting *Sisler v. Gannett Co.,* 222 *N.J.Super.* 153, 159, 536 *A.*2d 299 (App.Div.1987), *certif. denied,* 110 *N.J.* 304, 540 *A.*2d 1283 (1988)), and "should be applied flexibly to serve the interests of justice." *State v. Reldan,* 100 *N.J.* 187, 205, 495 *A.*2d 76 (1985).

279 N.J.Super. at 21, 652 A.2d at 186. In the present case, the interests of justice would not be

served by barring Lennox from putting on proof that the Maple Chase thermostat could have caused Stanley's damages. To hold otherwise would relieve Stanley of one of her *prima facie* elements of her products liability case against Lennox, and would deprive Lennox of its primary defense in this case.

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III. ORDER.

IT IS HEREBY ORDERED that Maple Chase will be allowed on the verdict form if appropriate evidence is adduced (regarding comparative fault or that in some other way Maple Chase should be on the verdict form). The "empty chair" doctrine will not preclude Maple Chase from being placed on the verdict form. Lennox will be allowed to put on evidence that the damage occurred due to the Maple Chase thermostat.

IT IS FURTHER ORDERED that mediation must occur between Stanley and Lennox by no later than April 9, 2007 (six weeks from the date of this decision, as announced at the February 7, 2007 hearing). The parties must have a mediator agreed upon by no later than March 5, 2007, and if the parties are unable to agree upon the mediator, the attorneys for the parties must notify the Court of that fact in a joint letter to the Court in chambers in Kootenai County, and the Court will select a mediator. The parties and counsel shall in good faith mediate this matter until it is either resolved or the mediator determines the matter is at an impasse. The parties shall provide to the mediator such information, position statements or settlement materials as requested by the mediator. Each counsel shall have his or her client (or a representative of such client having full settlement authority) present at the scheduled mediation so that the possibility of settlement may be fully explored. The parties shall pay a pro rata share of the costs of the mediator. I.R.C.P. 16(k)(8).

If resolution or partial resolution is accomplished, the resolution must at a minimum be placed on the record. The preferred alternative is a written agreement signed by the parties and filed with the Court. Failure to comply with this Order for Mediation may result in the imposition of sanctions, including without limitation those identified in I.R.C.P. 16(i).

Entered this 26th day of February, 2007.

_____
John T. Mitchell, District Judge

Certificate of Service

I certify that on the _____ day of February, 2007, 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 #**
Robert T. Wetherell	(208) 344-7077	Marc Lyons	(208) 664-5884
Clark Richards	(509) 363-2469		

_____
Secretary