STATE OF IDAHO)
County of KOOTENAI)ss

FILED_____

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

AED, INC., an Idaho Corporation,)
)
Plaintiff,)
vs.)
)
KDC INVESTMENTS, LLC, a Virginia LLC, and LEE CHAKLOS and KRYSTAL CHAKLOS, individually,)
Defendants.)
)
)

Case No. **CV 2010 7217**

MEMORANDUM DECISION AND ORDER ON DEFENDANT KDC'S MOTION FOR PRELIMINARY INJUNCTION

I. PROCEDURAL HISTORY AND FACTUAL BACKGROUND.

This matter is before the Court on defendant KDC Investments LLC's (KDC) Motion for Preliminary Injunction filed November 17, 2010. This Court finds there are too many unanswered questions to grant such relief.

This lawsuit involves the sale of a bridge across the Ohio River on the Ohio/West Virginia border. Due to a December 23, 2009, Order from Federal District Court in Ohio, that bridge must be demolished no later than December 21, 2011. Affidavit of Krystal Chaklos in Support of Motion for Expedited Hearing, filed October 6, 2010, Exhibit C, p. 1. Defendant KDC bought the bridge from plaintiff AED, Inc. (AED) via what will be referred to as the "purchase agreement", a document signed May 20, 2010. Amended Complaint, Exhibit A. Under the terms of that purchase agreement, KDC assumed responsibility for "proper demolition and removal [of the bridge] on or before June 1, 2011." *Id.,* p. 1. Subsequently, a separate "demolition agreement" between the

parties was at least discussed, if not executed. At the end of the "demolition agreement" AED's Eric J. Kelly, Sr. signed the document on June 1, 2010, as did KDC's Krystal Chaklos, also on June 1, 2010. However, the "demolition agreement" which is titled a "proposal" lacks a signature by any person from KDC on the first page "accepting" the agreement. The "purchase agreement" clearly places the responsibility to demolish the bridge on KDC. The "demolition agreement", if it was in fact executed by KDC, places that responsibility on AED. AED filed this lawsuit, and KDC claims the moment AED filed this lawsuit KDC's efforts to demolish the bridge stopped as a result of a letter sent the United States Coast Guard "…until the court sorts out ownership of the Bellaire Bridge." Affidavit of Krystal Chaklos in Support of Motion for Preliminary Injunction filed November 18, 2010, Exhibit 2. KDC then moved for a preliminary injunction "…prohibiting AED from repudiating the Purchase Agreement so that KDC Investments can continue its efforts to demolish and remove the Bridge..." Memorandum in Support of Motion for Mandatory Injunction, p. 20.

AED, an Idaho corporation, filed its Complaint and Jury Demand in the instant matter on August 23, 2010. AED alleged defendant KDC Investments, LLC, a Virginia LLC, and defendants Lee Chaklos and Krystal Chaklos individually (hereinafter "KDC" collectively) induced AED to enter into an agreement to sell a bridge to KDC via a promise that AED would be hired to later demolish said bridge. Complaint, p. 1, ¶ 6; Amended Complaint, p. 2, ¶ 9. AED alleges: "Said promise was material to the parties' transaction and Plaintiff would not have agreed to sell the bridge without the promise that Plaintiff would be allowed to demolish the bridge." Amended Complaint, p. 2, ¶ 9. This allegation is completely contrary to the written language found in the "purchase agreement." The "purchase agreement" places the responsibility for demolition of the

bridge squarely and solely upon KDC. Amended Complaint, Exhibit A. AED would only have the right to demolish the bridge if KDC failed to do so. Amended Complaint, p. 2, ¶ 7. AED's Amended Complaint alleges fraud in the inducement and breach of contract, and seeks rescission, damages, or specific performance. Amended Complaint, pp. 3-4. In the Amended Answer to Amended Complaint and Demand for Jury Trial and Defendant KDC Investments, LLC's Amended Counterclaim, filed on November 9, 2010, KDC counterclaims fraud, breach of contract, and seeks a declaratory judgment to quiet title to the bridge. Amended Answer to Amended Complaint and Demand for Jury Trial and Defendant KDC Investments, LLC's Amended Counterclaim, pp. 8-10.

On November 17, 2010, KDC filed its motion for preliminary injunction and memorandum and affidavits in support thereof, asking this Court to enjoin "AED from continuing to breach the sale agreement by repudiating its validity and seeking to rescind the agreement so that KDC Investments may continue the demolition process in order to demolish and remove the Bridge by June 1, 2011." Memorandum in Support of Motion for Mandatory Injunction, p. 2. KDC noticed a hearing for November 24, 2010. AED filed its Objection to Defendants' Motion for Preliminary Injunction on November 18, 2010, arguing only procedural, not substantive, issues with regard to KDC's motion. On November 22, 2010, KDC filed its Reply to Plaintiff's Objection to Defendant KDC Investments, LLC's Motion for Mandatory Injunction. At oral argument on November 24, 2010, the Court indicated its frustration with both sides: with KDC for not filing its motion for preliminary injunction until November 17, 2010, in spite of the fact that at a hearing held October 22, 2010, this Court set aside that November 17, 2010, date for hearing additional motions; and with AED for not making any substantive argument opposing the preliminary injunction, choosing instead to simply complain that KDC had

violated I.R.C.P. 7(b)(3)(A) by not providing written notice of the motion fourteen days prior to the hearing. At the November 24, 2010, hearing, the Court re-scheduled oral argument on KDC's motion for preliminary injunction to December 6, 2010, providing AED with more than the requisite notice under I.R.C.P. 7(b)(3)(A). At the November 24, 2010, hearing, due to the time-sensitive nature of this case, and with the agreement of counsel for both sides, this Court also scheduled this case for a three-day jury trial beginning February 22, 2011. Following the hearing on November 24, 2010, AED filed a "Motion to Strike Portions of Krystal Chaklos Affidavit." On November 24, 2010, AED also filed the "Affidavit of Mark Wilburn in Support of Plaintiff's Objection to Issueance [sic] of Preliminary Injunction" and the "Affidavit of Eric J. Kelly in Support of Plaintiff's Objection to Issueance [sic] of Preliminary Injunction." On November 29, 2010, AED filed "Plaintiff's Response to Issuance of Preliminary Injunction", providing the Court with AED's substantive arguments regarding KDC's motion for preliminary injunction. On December 2, 2010, KDC filed "Defendant KDC Investments, LLC's Reply in Support of Motion for Preliminary Injunction." Also on December 2, 2010, KDC filed "Defendant KDC Investments, LLC's Motion to Strike Affidavits of Eric J. Kelly and Mark Wilburn." On December 3, 2010, KDC filed an "Affidavit of Lee Chaklos in Support of Motion for Preliminary Injunction" and an "Affidavit of Krystal Chaklos in Support of Motion for Preliminary Injunction".

On December 6, 2010, the same day scheduled for oral argument, AED filed a "Motion to Strike Affidavits of Krystal Chaklos and Lee Chaklos" and a motion to shorten time to hear such motion at the hearing scheduled for December 6, 2010. Also on December 6, 2010, AED filed a pleading entitled "Plaintiff's Notice of Filing" to which was attached the Idaho Secretary of State's Corporation Reinstatement Certificate

dated December 3, 2010. Oral argument was held on December 6, 2010. At that hearing, counsel for KDC had no objection to AED's motion to shorten time to hear AED's Motion to Strike Affidavits of Krystal Chaklos and Lee Chaklos. Argument was then heard on that motion to strike, at the conclusion of which this Court denied AED's Motion to Strike Affidavits of Krystal Chaklos and Lee Chaklos.

Next, argument was heard on KDC's motion to strike the affidavits of Eric J. Kelly and Mark Wilburn. At the conclusion of that argument, the Court granted KDC's motion to strike the affidavit of Eric J. Kelly as to all paragraphs except paragraphs 15-22 and the exhibits attached referred to in those paragraphs, and the Court granted KDC's motion to strike the affidavit of Mark Wilburn in its entirety. The Court then heard oral argument on KDC's motion for preliminary injunction, following which the Court took said motion under advisement.

The bridge at issue is the Bellaire Toll Bridge which spans the Ohio River on the border of Ohio and West Virginia, connecting the towns of Bellaire, Ohio and Benwood, West Virginia. Memorandum in Support of Motion for Preliminary Injunction, p. 1. Demolition of the bridge was the subject of a federal lawsuit resulting in an Order requiring AED to demolish and remove the bridge by December 11, 2011. Amended Complaint, p. 1, ¶ 5.

KDC and AED entered into an Asset Purchase and Liability Assumption Agreement (purchase agreement) on May 20, 2010, in which AED sold the bridge to KDC for $25,000. Memorandum in Support of Motion for Mandatory Injunction, p. 2. AED's initiation of this litigation in Idaho has brought demolition efforts to a halt, according to KDC. *Id.* KDC now seeks a preliminary injunction "to prohibit AED from continuing to breach the Purchase Agreement by repudiating its validity and seeking to

rescind the Agreement." Reply to Plaintiff's Objection to Defendant KDC Investment, LLC's Motion for Mandatory Injunction, p. 4.

/

II. STANDARD OF REVIEW.

The grant of an injunction is within the sound discretion of the trial court and such discretion is not to be abused. *White v. Coeur d'Alene Big Creek Mining Co.,* 56 Idaho 282, 55 P.2d 720 (1936); *Harris v. Cassia County,* 106 Idaho 513, 517, 681 P.2d 988, 992 (1984). The court which is to exercise the discretion is the trial court and not the appellate court, and an appellate court will not interfere absent a manifest abuse of discretion. *Id., citing Milbert v. Carl Carbon, Inc.,* 89 Idaho 471, 406 P.2d 113 (1965); *Western Gas & Power of Idaho, Inc. v. Nash,* 75 Idaho 327, 272 P.2d 316 (1954).

> A preliminary injunction may be granted upon the following grounds:
>
> (1) When it appears by the complaint that the plaintiff is entitled to the relief demanded, and such relief, or any part thereof, consists in restraining the commission or continuance of the acts complained of, either for a limited period or perpetually.
>
> (2) When it appears by the complaint or affidavit that the commission or continuance of some act during the litigation would produce waste, or great or irreparable injury to the plaintiff.
>
> (3) When it appears during the litigation that the defendant is doing, or threatens, or is about to so, or is procuring or suffering to be done, some act in violation of the plaintiff's rights, respecting the subject of the action, and tending to render the judgment ineffectual.

I.R.C.P. 65(e). (subparts 4 and 6 are not applicable to this case). Subsection 5 of I.R.C.P. 65(e) permits the Court to grant a defendant's motion for preliminary injunction where a counterclaim has been filed seeking relief upon the grounds listed in subsections (1) to (4), "subject to the same rules and provisions providing for the issuance of injunctions on behalf of the plaintiff." I.R.C.P. 65(e)(5).

The Idaho Supreme Court has evaluated the proper standard for a trial court to consider in *Harris v. Cassia County,* holding that the party seeking the injunction has the burden of proving a right thereto. *Harris,* 106 Idaho 513, 681 P.2d 988 (1984). Idaho Rule of Civil Procedure 65(d) requires that every order granting an injunction shall set forth the reasons for its issuance, it shall be specific in terms, it shall describe in reasonable detail the act sought to be restrained, and it is binding only upon the parties to the action, their officers, agents, servants, employees, attorneys, and those persons in active concert or participation with them who receive actual notice by personal service or otherwise. I.R.C.P. 65(d).

Idaho Rule of Civil Procedure 65(e)(1) contains "entitled to the relief demanded" language. This Court, in *Moon et al. v. North Idaho Farmers Assoc., et al.,* CV 2002 3890 (D. Ct. First District Kootenai County, Nov. 30, 2002), has stated that this language is frequently restated as a "substantial likelihood of success." *Moon,* CV 2002 3890 at 4. This substantial likelihood of success cannot exist where complex issues of law or fact exist which are not free from doubt. *Id.* In fact, "[i]t is this Court's opinion that there can be no substantial likelihood of success where there exist complex issues of law, the resolution of which are not free from doubt. This is especially true where the record before the Court is incomplete." *Id.* at 5. A "likelihood of success" and even a "good likelihood of success" are not sufficient. *Id.; Harris,* 106 Idaho 513, 518, 681 P.2d 988, 993. In *Moon,* this Court determined that citizen plaintiffs were not entitled to an injunction related to the farmers' burning of grass seed residue "due to the somewhat complex legal issues, the lack of complete record in some aspects, and because the matter is not free from doubt." *Moon,* CV 2002 3890 at 6. The record in *Moon* was incomplete because the citizen plaintiffs' medical records had only been disclosed to the

farmers' counsel at the time of hearing. *Id.*

Idaho Rule of Civil Procedure 65(e)(2) requires that a preliminary injunction issue only in extreme cases where irreparable injury would result to the plaintiff if not granted. *Moon,* CV 2002 3890 at 7. In *WGI Heavy Minerals v. Gorrill,* this Court determined the analysis to be two-part: (1) whether the right is "very clear" and (2) whether there will be great or irreparable injury. *WGI,* CV 2006 384 at 7. Ultimately, "[t]he requirements for the issuance of a permanent injunction are 'the likelihood of substantial and immediate irreparable injury and the inadequacy of remedies at law.'" *Easyriders Freedom F.I.G.H.T. v. Hannigan,* 92 F.3d 1486, 1495 (9th Cir.1996) (quoting *American-Arab Anti-Discrimination Comm. v. Reno,* 70 F.3d 1045, 1066-67 (9th Cir.1995)).

Idaho Rule of Civil Procedure 65(e)(3) pertains to the situation where the party opposing the preliminary injunction is doing something against the moving party that violates the moving party's rights "…tending to render the judgment ineffectual." Idaho Rule of Civil Procedure 65(e)(3) appears to have been interpreted by the Idaho Supreme Court only once in *Gilpin v. Sierra Nevada Consol. Mining Co.,* 2 Idaho 696, 703, 23 P. 547, 549 (1890). That case dealt with whether an injunction regarding a mine in Shoshone County should have been denied by the district court. The Idaho Supreme Court held: "To remove the ore from the mine, and leave but a worthless shell to be contended for, would certainly have a 'tendency to render ineffectual' any judgment which the plaintiff might recover." *Id.* It should be noted that in *Gilpin* the Idaho Supreme Court reversed the district court's denial of a preliminary injunction, and itself ordered a preliminary injunction, not even remanding the issue back to the trial court. 23 P. 547, 552.

The requirement of Idaho Rule of Civil Procedure 65(e)(2) that an injunction cannot "have the effect of giving to the party seeking the injunction all the relief sought in the action" does not apply to Idaho Rule of Civil Procedure 65(e)(3). Thus, an injunction granting all relief requested could issue under this ground.

III. ANALYSIS OF KDC's RIGHT TO INJUNCTIVE RELIEF I.R.C.P 65(e).

A. A Plethora of Preliminary Problems.

1. AED's Ability to Enter Into *Any* Contract.

KDC argues:

> AED was administratively dissolved six (6) months prior to entering the Purchase Agreement. *Since it was dissolved prior to entering the Purchase Agreement, and a dissolved corporation cannot transact business other than to wind up its affairs, it could not have legally entered into a contract to demolish the Bridge.* Since AED did not have the ability to legally perform the demolition of the Bridge, it could not have reasonably relied upon any alleged promise by KDC Investment to hire AED to demolish the Bridge. Since it could not reasonably rely upon such an alleged promise, AED cannot prove fraud in the inducement. Therefore, as a matter of law, AED is not entitled to rescind the Purchase Agreement.

Memorandum in Support of Motion for Mandatory Injunction, p. 13. (italics added) While AED and KDC in their briefing differ on the legal significance of being administratively dissolved, in making the above italicized argument, KDC ignores the bigger question: "If AED is administratively dissolved prior to entering into the purchase agreement, and a dissolved corporation cannot transact business other than to wind up its affairs, **then how could AED have entered into the sale agreement with KDC?**" If AED had no legal ability to enter into the sale agreement with KDC, do we even have the sale of this bridge?

For purposes of a preliminary injunction, what is troubling about KDC's argument is KDC is seeking equitable relief based on AED not being able to now rely on an affirmative statement KDC made (that AED would be the one to demolish the bridge)

as a result of a deficiency AED had with Idaho's Secretary of State. The only way KDC gets around the misrepresentation it made (that AED would demolish the bridge) is via AED failing to send in the proper paperwork to the Secretary of State. Thus, KDC cannot make a "clean hands" argument.

> The clean hands doctrine "stands for the proposition that 'a litigant may be denied relief by a court of equity on the ground that his conduct has been inequitable, unfair and dishonest, or fraudulent and deceitful as to the controversy in issue.' " *Gilbert v. Nampa Sch. Dist. No. 131,* 104 Idaho 137, 145, 657 P.2d 1, 9 (1983) (citing 27 Am.Jur.2d Equity § 136 (1996)).

*Ada County Highway Dist. v. Total Success Investments, LLC***,** 145 Idaho 360, 370, 179 P.3d 323, 333 (2008).

Not only are KDC's hands unclean, KDC would apparently like to be able to pick and choose when AED lacked capacity to enter into a contract and when it did not. KDC argues:

> AED does not deny that it is administratively dissolved. Instead, it argues only that KDC Investments lacks standing to contest AED's capacity. While it is true that AED lacked capacity to enter into any contract to demolish the Bridge, KDC Investments is not contesting AED's capacity to contract. KDC Investments, in this motion, is not attempting to void the "demolition agreement." Rather, KDC Investments is arguing that AED cannot satisfy a necessary element of its fraud claim because it could not reasonably rely upon a representation to transact business when AED itself knew it was illegal for it to transact business.

Defendant KDC Investments, LLC's Reply in Support of Motion for Preliminary Injunction, p. 8. KDC does not get to pick and choose the consequence of AED's being "administratively dissolved". If AED lacked the capacity to enter into the demolition contract, then it also lacked capacity to sell the bridge to KDC. It is both or none.

It appears the answer to that question is "none." Idaho Code § 30-1-1422 states:

> 30-1-1422.REINSTATEMENT FOLLOWING ADMINISTRATIVE DISSOLUTION.

> (1) A corporation administratively dissolved under section 30-1-1421, Idaho Code, may apply to the secretary of state for reinstatement within ten (10) years after the effective date of dissolution. The application must:
>
> (a) Recite the name of the corporation at the time of its dissolution and the date of its incorporation;
>
> (b) State that the corporation applies for reinstatement;
>
> (c) State that the corporation's proposed name satisfies the requirements of section 30-1-401, Idaho Code; and
>
> (d) Be accompanied by a current annual report, appointment of registered agent or articles of amendment to extend the corporate existence, as appropriate to the reason for administrative dissolution.
>
> (2) If the secretary of state determines that the application contains the information required by subsection (1) of this section and that the information is correct, he shall cancel the dissolution and prepare a certificate of reinstatement that recites the fact and effective date of the reinstatement, file a copy thereof and return the original to the corporation.
>
> (3) When the reinstatement is effective, it relates back to and takes effect as of the effective date of the administrative dissolution and the corporation resumes carrying on its business as if the administrative dissolution had never occurred.

AED's December 6, 2010, "Notice of Filing" to which was attached the Idaho Secretary of State's Corporation Reinstatement Certificate dated December 3, 2010, in all likelihood makes this Court's concerns about AED's ability to enter into the purchase agreement and the demolition agreement, moot. However, because of KDC's own "unclean hands", KDC's argument that AED cannot rely on KDC's misrepresentation is wholly without merit.

2. AED's Ability to Assign the Demolition.

AED alleges what appear to be very inconsistent positions. First, AED alleges in its Amended Complaint that: "Plaintiff, as owner of the bridge, was subject to a non-assignable obligation to demolish and remove the bridge." Amended Complaint, pp. 2-3, ¶ 12. AED does not favor us with the genesis of AED's claimed inability to assign its obligation to demolish and remove the bridge. But AED also alleges: "The sale contract expressly provides that defendant shall be responsible for removal of the

bridge and plaintiff retained the right to take all steps to do so should defendant fail to do so." Amended Complaint, p. 2, ¶ 7. Essentially, AED admits assigning what AED also claims it was unable to assign.

If AED could not assign its obligation to demolish the bridge, then how is the "purchase agreement" with KDC valid, since what AED did in the "purchase agreement" was to assign the obligation to demolish the bridge exclusively to KDC? KDC points this out in its Amended Answer when it alleges: "In the event AED's claim that it was subject to a non-assignable obligation to demolish and remove the Bridge is true, then AED fraudulently represented to KDC Investments that it had the ability and authority to assign its rights and obligations to demolish and remove the Bridge." Amended Answer to Amended Complaint and Demand for Jury Trial and Defendant KDC Investments, LLC's Amended Counterclaim, p. 9, ¶ 13.

3. AED's Failure to Sign the "Demolition Agreement."

An unanswered (and un-briefed) question exists regarding the "demolition agreement". The "demolition agreement" itself is captioned "Proposal". Amended Complaint, Exhibit B. On the first page of the "demolition agreement" or the "Proposal" is a space for the signature and date of the person accepting the "Proposal". The entity accepting the "Proposal" in this case would be KDC. THERE IS NO SIGNATURE. That portion of the "Proposal" specifies the significance of the lack of signature on this document:

> **Acceptance of Proposal:**
> The above prices, specifications and conditions are satisfactory and are hereby accepted. You are authorized to do the work as specified. Payment will be made as outlined above.

Amended Complaint, Exhibit B, p. 2. At the end of the "Proposal", there is a signature line and date specifically for Erick J. Kelly Sr., Vice-president of AED, and Krystal

Chaklos of KDC. Both signatures appear and both signatures purport to be affixed on June 1, 2010. *Id.,* p. 9. However, there is nothing in written language in the "Proposal" attaching any significance to the signatures at that point of the document (page nine), while there is specific significance attached to the *lack* of a signature on page two.

The question remains as to whether AED even has a valid demolition agreement.

4. Whose Ability to Demolish?

The "purchase agreement" places the ability to demolish the bridge only in the hands of KDC. KDC alleges: "Pursuant to paragraph 5 of the Purchase Agreement, as a 'material inducement and as part of the consideration to the Sellers to enter into this Agreement, Buyer [KDC] hereby agrees that it shall demolish and remove the bridge…'" Amended Answer to Amended Complaint and Demand for Jury Trial and Defendant KDC Investments, LLC's Amended Counterclaim, p. 9, ¶ 6; Exhibit A, p. 2, ¶ 5. Indeed, the "purchase agreement" uses that exact language. It is difficult to imagine how AED claims it would not have sold the bridge to KDC if AED would not retain the ability to blow up the bridge, when in the "purchase agreement" AED specifically gave KDC the *exclusive* ability to demolish the bridge.

5. Is Ownership of the Bridge Really an Issue in this Litigation?

The entire focus of KDC's argument is that determining ownership of the bridge is crucial to this lawsuit and to KDC's ability to continue on with its demolition of the bridge. Memorandum in Support of Motion for Mandatory Injunction, p. 7, p. 20; Defendant KDC Investments, LLC's Reply in Support of Motion for Preliminary Injunction, p. 7. However, AED in its original complaint did not make ownership of the bridge an issue. In AED's Amended Complaint AED makes a cryptic allegation:

"Plaintiff, as owner of the bridge, was and is subject to a non-assignable obligation to demolish and remove the bridge." Amended Complaint, p. 2, ¶ 12. Is plaintiff AED now claiming it is the owner, or is AED claiming it was the owner of the bridge prior to selling the bridge to KDC? Nowhere in KDC's "Answer to Amended Complaint and Demand for Jury trial and Defendant KDC Investments, LLC's Counterclaim" did KDC make ownership of the bridge an issue. It was only Count III of KDC's Counterclaim in KDC's "Amended Answer to Amended Complaint and Demand for Jury trial and Defendant KDC Investments, LLC's Amended Counterclaim", in which KDC finally makes ownership of the bridge an issue to be determined in this litigation. Amended Answer to Amended Complaint and Demand for Jury Trial and Defendant KDC Investments, LLC's Amended Counterclaim, p. 10, Count III, ¶¶ 18-21. In its briefing KDC argues ownership is an issue:

> However, after AED filed suit claiming it owned the Bridge, the Coast Guard issued KDC Investments a letter on September 20, 2010, stating: "We regret to inform you that until final ownership is determined in a court of law; no bridge work of any sort may proceed. Previous approvals issued by this officer are hereby suspended until further notice."

Memorandum in Support of Motion for Mandatory Injunction, p. 7; Affidavit of Krystal Chaklos in Support of Motion for Preliminary Injunction, filed November 18, 2010, Exhibit 2. This Court is unable to find any support for the proposition that, by its filing this lawsuit, AED claimed it owned the bridge. KDC alleges: "AED, by virtue of filing its Amended Complaint, has claimed an ownership interest in the Bridge." Amended Answer to Amended Complaint and Demand for Jury Trial and Defendant KDC Investments, LLC's Amended Counterclaim, p. 10, Count III, ¶ 20. Even this ignores the sequence of events. AED's Amended Complaint was filed October 29, 2010, and the Coast Guard's letter was written September 20, 2010.

It is obvious that this Court, at this preliminary injunction juncture, should not (and cannot) be making ownership decisions based only upon a statement (not even a request) in a letter from the Coast Guard, when AED has arguably never requested such a determination in its pleadings and only recently has KDC requested such.

6. Late Payment by KDC of the $25,000.00 Sale Price.

AED argues the $25,000.00 purchase price for the bridge had to be paid no later than May 25, 2010, and that the money was not paid until June 3, 2010. Plaintiff's Response to Issuance of Preliminary Injunction, pp. 1-2. This leadoff argument by AED is unconvincing. First of all, the "purchase agreement", signed by AED's Eric Kelly on May 20, 2010, does not state when the $25,000 is to be paid. AED argues a later document, a "letter of contingency", signed by both Kelly for AED and Krystal Chaklos for KDC, required the $25,000.00 be paid by May 26, 2010. Affidavit of Eric Kelly, p. 3, ¶ 15, Exhibit A. However, the "Bill of Sale and General Assignment" at the end of the purchase agreement, states:

> I, Eric Kelly, as Vice President of Advanced Explosives Demolition, Inc., in the City of Coeur d'Alene, State of Idaho, and in my personal capacity in consideration of $25,000.00 and other agreements, paid by KDC Investments/Krystal Chaklos *the receipt of which is acknowledged*, grant, sell, transfer an deliver to KDC Investments and its heirs, executors, administrators, successors and assigns the following:
>
> All interest in a bridge crossing the Ohio River from Bellaire, Ohio to Benwood, West Virginia commonly known as the Bellaire Toll Bridge…

Amended Complaint, Exhibit A, last (unnumbered) page. (italics added). In any event, apparently AED has accepted the $25,000.00, which would seem to waive any complaint that KDC was late in such payment by eight days.

7. Failure of AED to Tender to KDC the $25,000.00 Sale Price.

KDC argues AED did not tender back to KDC the $25,000.00 KDC paid to AED in consideration for the purchase agreement. Therefore, KDC argues AED is not entitled to rescission of the Agreement. Memorandum in Support of Motion for Mandatory Injunction, pp. 13-16. KDC quotes extensively from *Robinson v. State Farm Mut. Auto Ins. Co.,* 137 Idaho 181, 45 P.3d 829, 837 (2002), for the proposition that a party seeking to rescind a contract must tender any consideration or benefit received before rescinding. *Id.,* p. 14. Here, AED alleges fraud and breach of contract in its Complaint. The relief sought by AED is for the Court to "[e]nter judgment rescinding the parties' agreement and restoring the parties to their status quo with all offsets and credits as are required to fashion and [sic] equitable remedy for Plaintiff." Complaint, p. 4. Thus, at all times AED has sought rescission of the "purchase agreement", and AED certainly had not disputed that it did not at any time tender the $25,000.00 back to KDC.

AED argues: "A valid tender is no longer required under Idaho Law to seek rescission", citing *O'Connor v. Harger Construction Inc.,* 145 Idaho 904, 188 P.3d 846 (2008). Plaintiff's Response to Issuance of Preliminary Injunction, p. 4. This Court agrees with KCD, that such proposition by AED is a grossly misleading argument. As noted by KCD, the Idaho Supreme Court in O'Connor stated:

> [a] party seeking to rescind a contract ordinarily must return any consideration of the benefit received before the rescission is valid. More than a mere offer of the deposit is required; the party must exhibit an actual intent and willingness to pay to constitute a valid tender.

145 Idaho 904, 911, 188 P.3d 846, 853. Defendant KDC Investments, LLC's Reply in Support of Motion for Preliminary Injunction, p. 11.

AED has failed to tender the $25,000.00. Rescission is not available to AED. However, with all the other unsolved issues in this case, a preliminary injunction cannot be granted in favor or KDC.

8. The Mystery Assignment Clause.

In its Amended Complaint, AED alleges: "Plaintiff, as owner of the bridge, was and is subject to a non-assignable obligation to demolish and remove the bridge." Amended Complaint, p. 2, ¶ 12. No citation is given for this claim, no reference is made to any exhibit to the Amended Complaint. While AED mentions this non-assignment argument in passing, the Court can find no support in the record for this claim. If AED had this non-assignment clause with the prior owner, or with some governmental entity, then how can and why did AED specifically assign that right to KDC in the purchase agreement? There are too many unanswered questions at this juncture to consider granting a preliminary injunction.

B. May the Court Enjoin a Breach of Contract?

KDC argues injunctive relief is available to prevent breach of a contract. Memorandum in Support of Motion for Mandatory Injunction, p. 8. In its initial brief, KDC did not cite to any case law in support of this argument. In its reply brief, KDC cites only law from other jurisdictions. In Idaho, at least at present, the ability of a court to enjoin breaches of contracts seems to be limited to situations where the issue confronting the court is one of enforcement of a restrictive covenant. *See Smith v. Shinn,* 82 Idaho 141, 148, 350 P.2d 348, 351-52 (1960) ("Where a court of equity is asked to enforce a covenant by ordering specific performance and granting an injunction to prevent a breach of it, equitable principles will prevail and the rules of fair dealing and good conscience must be applied. So in this case if such proffered evidence discloses that a substantial number of homes within the subdivision are in fact located less than 25 feet from the front property line it would be inequitable to require applicants to comply with the restrictions under an interpretation or construction different

from that applied to other property owners."). *See also, Payette Lakes Ass'n v. Lake reservoir Co.,* 68 Idaho 111, 130- 131, 189 P. 2d 1009, 1020-21 (1948); *Jacklin Land Co. v. Blue Dog RV, Inc.,* 2009 WL 3287578 (Idaho District Court, September 14, 2009). Injunctive relief has, however, also been applied in the context of employment law, specifically enforcement of a covenant not to compete. *See Drong v. Coulthard,* 87 Idaho 486, 496, 394 P.2d 283, 289 (1964).

KDC in its reply brief cites case law from other jurisdictions for the proposition that an injunction may be used to restrain a breach of contract. Defendant KDC Investments, LLC's Reply in Support of Motion for Preliminary Injunction, pp. 4-7. This Court has read that cited authority (42 Am.Jur.2d, 2000, Injunctions § 120; *Cody Community Television Corp. v. Way,* 356 P.2d 1113 (Wyo. 1960); *Chisholm v. Redfield,* 347 P.2d 523, 525 (Nev. 1959); and *General Building Contractors' Association v. Local Unions Nos. 542, 542-A & 542-B,* 87 A.2d 250 (Pa. 1952), and concludes that in light of existing Idaho appellate case law which has, up to this time, focused only on covenants, the "right to relief" is far from "certain" for KDC.

C. Under I.R.C.P. 65(e)(1), Has KDC Proven a Substantial Likelihood of Success?

KDC argues it is entitled to the relief demanded, pursuant to the language in I.R.C.P. 65(e)(1) because: it has a substantial likelihood of success because no complex issues of fact or law exist as (a) KDC alone owns the bridge and is responsible for demolition of the bridge (Memorandum in Support of Motion for Mandatory Injunction, pp. 8-11); (b) AED could not have been fraudulently induced to enter the "purchase agreement" because AED could not have relied on KDC's alleged representation that it would hire AED to demolish the bridge in light of AED's having been administratively dissolved by the Idaho Secretary of State six months prior to the

parties' entering into the Agreement (*Id.,* pp. 12-13); (c) if the parties indeed entered into an agreement for AED to demolish the bridge, there can have been no fraud (*Id.,* p. 13); and (d) AED is not entitled to rescission where there was no tender of the $25,000 back to KDC. *Id.,* pp. 13-16. Regarding each of these arguments made by KDC, AED does not really address (a) the ownership issue. Regarding (b) fraud in the inducement, AED simply argues KDC has no standing to make that argument, citing *Scona, Inc. v. Green Willow Trust,* 133 Idaho 283, 287, 985, P.2d 1145, 1149 (1999). Plaintiff's Objection to Issuance of Preliminary Injunction, p. 3. *Scona* certainly seems to indicated KDC would lack standing to make this argument. However, AED notes the statute which the Idaho Supreme Court discussed in *Scona,* was *repealed* in July 1997. Obtusely, AED makes the argument that "Although decided under Idaho's prior corporate states, the statutes read substantially the same." Plaintiff's Response to Issuance of Preliminary Injunction, p. 4. It is not clear what counsel for AED is trying to convey. What is clear is that if counsel for AED is trying to convey that the present Idaho Business Corporation Act contains a similar statute, such would be false. Thus, there is no indication that KDC lacks standing. Regarding (c) KDC's argument that if the parties indeed entered into an agreement for AED to demolish the bridge, there can have been no fraud, AED responds that KDC entered into such "demolition agreement" never intending to honor that written agreement. *Id.* Finally, the issue of lack of tender (d) is discussed above.

The "entitled to the relief demanded" language found in Idaho Rule of Civil Procedure 65(e)(1) is frequently restated as "substantial likelihood of success." The Idaho Supreme Court in *Harris* interpreted "substantial likelihood of success" as follows:

> The substantial likelihood of success necessary to demonstrate that appellants are entitled to the relief they demanded cannot exist where complex issues of law or fact exist which are not free from doubt. *First National Bank & Trust Co. v. Federal Reserve Bank,* 495 F.Supp. 154 (W.D.Mich. 1980); *Avins v. Widener*

> *College, Inc.,* 421 F.Supp. 858 (D.Del. 1976) (not granted where issues of fact and law are seriously disputed); *Wm. Rosen Monuments, Inc. v. Phil Madonick Monuments, Inc.,* 62 A.D.2d 1053, 404 N.Y.S.2d 133 (N.Y.App.Div. 1978) (granted only upon the clearest evidence). Appellants claim of right in this case is not one which is free from doubt and, accordingly, we hold that appellants have not carried their burden of proof under I.R.C.P. 65(e)(1).

106 Idaho at 518, 681 P.2d at 993. In *First National Bank & Trust Co. v. Federal Reserve Bank,* 495 F.Supp. 154 (W.D.Mich. 1980), the federal district judge wrote:

> Although it appears to the Court that Plaintiff has a likelihood of success, whether it has a "substantial likelihood" as required by Mason, supra, is, at this juncture, unclear.
>
> It is the Court's opinion that there can be no substantial likelihood of success where there exist complex issues of law, the resolution of which are not free from doubt. This is especially true when the record before the Court is incomplete.

495 F.Supp. at 157. This Court finds KDC has not proven even a likelihood of success, let alone a "substantial likelihood" of success as required by Idaho Rule of Civil Procedure 65(e)(1) and *Harris.* There are many issues of fact in dispute. The matter is not "free from doubt". The Court determines that a preliminary injunction under Idaho Rule of Civil Procedure 65(e)(1) is not appropriate here due to the somewhat complex legal issues, the lack of a complete record in some aspects, and because the matter is not free from doubt.

D. Under I.R.C.P. 65(e)(2), Has KDC Proven Great or Irreparable Harm?

KDC also argues it is entitled to injunctive relief under I.R.C.P. 65(e)(2) because (1) KDC has proven a substantial likelihood of success via its "very clear" ownership of the bridge and its duty to demolish and remove the bridge, and (2) KDC would suffer great or irreparable injury if an injunction did not issue. Memorandum in Support of Motion for Mandatory Injunction, pp. 17-18. There remain several questions of fact, as discussed *supra,* with regard to KDC's "substantial likelihood of success" in this matter. Problematic is KDC's own argument:

> …[I]f AED is allowed to continue breaching the Purchase Agreement by repudiating its validity and seeking rescission, it will be impossible for KDC Investments to meet the June 1, 2011, deadline for demolition ***should it*** ultimately be declared the owner of the Bridge.

Memorandum in Support of Motion for Mandatory Injunction, p. 18 (emphasis added). Given KDC's own use of such qualifying language, it cannot be said that KDC has shown anything beyond a "likelihood of success" or possibly a "good likelihood of success"; neither are sufficient for the relief KDC now seeks. *Harris,* 106 Idaho 513, 518, 681 P.2d 988.

And, it is axiomatic that "equitable claims will not be considered where an adequate legal remedy is available." *Iron Eagle Development, LLC v. Quality Design Systems, Inc.,* 138 Idaho 487, 492, 65 P.3d 509, 514 (2003) (finding a claim for unjust enrichment precluded were the parties had entered into a contract). KDC not only has the ability to pursue other legal remedies, such as fraud, but has already counterclaimed for the appropriate legal remedies at this time. The great or irreparable harm identified by KDC includes the possibility it would be held in contempt by the Ohio Court for failing to complete demolition by December 21, 2011, its having incurred approximately $70,000 in expenses in purchasing the bridge and in preparation for the demolition of the bridge, and the possibility that currently pending contracts may not be available by the time this matter is decided, thereby requiring KDC "to start its search for contractors all over again, thus delaying the demolition schedule even further." Memorandum in Support of Motion for Mandatory Injunction, pp. 17-19. KDC has not set forth for this Court how any of the possible outcomes individually, or even taken collectively, amount to irreparable injury. Case law in Idaho demonstrates preliminary injunctions are granted in extreme cases where the right is very clear, although injunctions will issue where the injury is great, albeit not irreparable. *Meyer v. First*

National Bank, 10 Idaho 175, 181, 77 P. 334, 336 (1904). At this time, none of the possible injuries listed by KDC are anything other than speculative. KDC has not adequately demonstrated how the failure to enjoin AED from pursuing its claim cannot be addressed by the legal remedies KDC has available to it, nor has KDC demonstrated the possible injuries are great and/or irreparable.

The Idaho Supreme Court in *Harris* interpreted Idaho Rule of Civil Procedure 65(b)(2) requirement of "irreparable injury" as follows:

> We have previously stated that "a preliminary mandatory injunction is granted only in extreme cases where the right is very clear and it appears that irreparable injury will flow from its refusal." *Evans v. District Court of the Fifth Judicial District,* 47 Idaho 267, 270, 275, P.99, 100 (1929); *quoted in Farm Service, Inc., v. United States Steel Corp.,* 90 Idaho 570, 587, 414 P.2d 898, 907 (1966). The district court's findings state that: "[t]he evidence clearly indicates that neither of the named plaintiffs nor, for that matter, any of the other proposed plaintiffs whose records were presented are in danger of any irreparable damage." We agree.

106 Idaho at 518, 681 P.2d at 988. There are two issues then to be analyzed: 1) a right that is "very clear" and 2) irreparable injury.

1. A "Very Clear" Right.

This Court determines that the statement in *Harris* that the right must be "very clear" interpreting I.R.C.P. 65(e)(2) is not applicable in all instances for the following reasons: **First**, that statement in Harris is based on *Farm Service, Inc., v. United States Steel Corp.,* 90 Idaho 570, 587, 414 P.2d 898, 907 (1966), which interpreted Idaho Code § 8-402(2), the predecessor to I.R.C.P. 65(e)(2). A reading of *Farm Service* shows that it is only when the granting of the preliminary injunction "will have the effect of giving to the party seeking the injunction all the relief sought in the action", that the moving party must show "a clear right to the relief sought." *Id.* In addition to being declared the owner of the bridge, KDC seeks damages. Thus, being declared the

owner of the bridge does not have the "effect of giving to the party seeking the injunction (KDC) all (or nearly all) the relief sought in the action". If injunctive relief falls short of that to which a party feels it is entitled, then, according to *Farm Service,* there need be no showing of "a clear right to the relief sought." **Second**, a plain reading of I.R.C.P. 65(e)(1) and (2) shows that "a clear right to relief" is not contemplated under I.R.C.P. 65(e)(2), while it is a requirement set forth in I.R.C.P. 65(e)(1), through the language "When it appears by the complaint that the plaintiff is entitled to the relief demanded…". Idaho Rule of Civil Procedure 65(e)(2) is completely silent on this aspect, and thus, it is presumed not to be contained as an element set forth in Rule 65(e)(2). As noted by the Idaho Supreme Court in *Gilpin v. Sierra Nevada Consol. Mining Co.,* 2 Idaho 696, 703, 23 P. 547, 549 (1890), (interpreting Revised Statute of Idaho Section 4288, the statutory predecessor to Idaho Code § 8-402(2), the statutory predecessor to Idaho Rule of Civil Procedure 65(e)(2)), the various grounds for granting an injunction were "disjoined in the statute from the other grounds." In other words, each ground is separate and stands alone.

Here, KDC appears to argue in its counterclaim that it is entitled to the relief demanded, that is, an Order of this Court "prohibiting AED from continuing to breach the sale agreement by repudiating its validity and seeking to rescind the agreement…" Memorandum in Support of Motion for Mandatory Injunction, p. 2. But, contrary to KDC's assertion, complex issues of fact and law do exist in the instant matter. A grant of a preliminary injunction as sought here would, in effect, give KDC the principal relief it seeks, short of going to trial. A grant of preliminary injunction would render AED's Complaint moot as the very bridge AED claims it is entitled to demolish pursuant to an agreement between the parties, will likely have been demolished well before the matter

is tried. In Idaho, whether mutual assent to a contract exists is a question of fact. *Gray v. Tri-Way Const. Services, Inc.,* 147 Idaho 378, 384, 210 P.3d 63, 69 (2009), citing *Thompson v. Pike,* 122 Idaho 690, 696, 838 P.2d 293, 299 (1992) (Contract formation requires mutual assent and "a distinct understanding common to both parties is necessary in order for a contract to exist."). And, unless the facts presented are undisputed, whether there was a breach of the terms of a contract is a question of fact. *Borah v. McCandless,* 147 Idaho 73, 79, 205 P.3d 1209, 1215 (2009). A material breach by one party will allow the other to rescind the contract; a material breach touches the fundamental purpose of the contract and is more than incidental *Ervin Constr. Co. v. Van Orden,* 125 Idaho 695, 700, 874 P.2d 506, 511 (1993). Whether a breach is material is a question of fact as well. *Id.* In the matter before the Court, whether the demolition agreement existed is in dispute and whether an alleged breach of the demolition agreement was material so as to entitle AED to rescission likewise remains in dispute. The disputes surrounding the "demolition agreement" signed on June 10, 2010, and the portions of the earlier "purchase agreement" signed on May 20, 2010, which discuss issues of demolition, also amount to remaining questions of fact.

This Court finds that under I.R.C.P. 65(e)(2), if the injunctive relief granted would "have the effect of giving to the party seeking the injunction all the relief sought in the action", KDC would then face the burden of showing "a clear right" to the relief sought. KDC has not met this burden.

Even if that were not the case, and there was no required showing of a "very clear" right, injunctive relief for KDC would still be inappropriate because KDC has not proven its injury is great or irreparable.

2. Great or Irreparable Injury to KDC.

At first glance the above quote in *Harris* might indicate that the Idaho Supreme Court felt an injunction could be granted only where the injury is irreparable. 106 Idaho at 518, 681 P.2d at 988. But that interpretation would be out of context with Idaho Rule of Civil Procedure 65(e)(2) which reads: "When it appears by the complaint or affidavit that the commission or continuance of some act during the litigation would produce waste, or great or irreparable injury to the plaintiff." A review of other Idaho Supreme Court cases makes it clear that injunctions can be granted under Idaho Rule of Civil Procedure 65(e)(2), where the injury is "great" **or** "irreparable". As stated in *Meyer v. First Nat'l Bank,* 10 Idaho 175, 181, 77 P. 334, 336 (1904):

> The contention of defendants that plaintiffs have an adequate remedy by an action at law, and cannot, therefore, resort to an equitable remedy, is not well founded. It is true that they have their remedy for damages, but under our statute, section 4288, Revised Statutes, a party is not under the necessity of waiting till his property has been damaged and destroyed, and his business disorganized, and his premises encroached upon to the extent of his own ouster, and then resorting to an action at law for redress. In *Staples v. Rossi,* 7 Idaho, 618, 65 Pac. 67 [1901], this court laid down the rule under our statute as follows: "Injunctions will issue to restrain temporarily an act which will result in great damage to the plaintiff, although the injury is not irreparable, and notwithstanding that other remedies lie in behalf of plaintiff."

The last sentence in the above quote makes it clear that "Injunctions ***will*** issue to restrain temporarily an act which will result in great damage to plaintiff", even though the injury is not irreparable and even though damages may later compensate the injured party for that injury. (emphasis added). In the present case KDC has failed to show great damage to KDC. All KDC argues is it has spent about $70,000 getting ready to demolish the bridge and cannot go forward now due to AED's lawsuit. Memorandum in Support of Motion for Mandatory Injunction, pp. 17-19. KDC argues: "If an injunction does not issue to prevent AED from repudiating the Purchase Agreement and seeking rescission so that KDC Investments can resume its efforts to demolish the Bridge, the

demolition work will most certainly not meet the Ohio Court's December 21, 2011, deadline." *Id.,* p. 19. However, KDC fails to tell *this* Court what (if anything) will happen to KDC if it is not able to timely demolish the bridge. It would appear that *if* KDC does *not* own the bridge, then AED owns the bridge. But no matter who owns the bridge, it was AED (or its predecessor), to which the underlying order from the Federal District Court in Ohio to have the bridge demolished by December 21, 2011, is directed. Thus, it would seem AED and not KDC is in peril with that court. There has been no showing by KDC that their anticipated damage is "irreparable" in that KDC cannot for some reason be made whole with monetary damages.

E. Under I.R.C.P. 65(e)(3), Has KDC Proven Judgment Would be Ineffectual?

Idaho Rule of Civil Procedure 65(e)(3) allows a preliminary injunction: "When it appears during the litigation that the defendant is doing, or threatens, or is about to do, or is procuring or suffering to be done, some act in violation of the plaintiff's rights, respecting the subject of the action, and tending to make the judgment ineffectual." Idaho Rule of Civil Procedure 65(e)(3) appears to have been interpreted by the Idaho Supreme Court only once in *Gilpin v. Sierra Nevada Consol. Mining Co.,* 2 Idaho 696, 703, 23 P. 547, 549 (1890). That case as discussed *supra,* dealt with whether an injunction regarding a mine in Shoshone County should have been denied by the district court. The Idaho Supreme Court held: "To remove the ore from the mine, and leave but a worthless shell to be contended for, would certainly have a 'tendency to render ineffectual' any judgment which the plaintiff might recover." *Id.*

In the present case, all KDC argues in this regard is to repeat its earlier argument that KDC will not have sufficient time to demolish the bridge: "The issue at stake with this injunction is time." Memorandum in Support of Motion for Mandatory Injunction, p.

20. KDC continues: "Once time is lost, it cannot be recovered." *Id.* "In this case, AED's repudiation of the Purchase Agreement and claim for rescission jeopardizes the deadlines set forth in the purchase Agreement and the Ohio Court's order for demolishing the Bridge." *Id.* A missed deadline is hardly the situation contemplated in *Gilpin*. KDC has not even told this Court if it would suffer any consequences at the hands of the Federal District Court in Ohio. KDC has not explained how any monetary judgment in their favor against AED would be "ineffectual".

This Court finds as a factual matter, and as a matter of law, that the requirements of I.R.C.P. 65(e)(3) have not been met by KDC. There is simply no support for KDC's contention that filing a lawsuit (which necessarily respects the subject of the action) is in violation of KDC's rights and would render a judgment by this Court ineffectual. The question ultimately before the Court on KDC's counterclaim is whether AED has acted in violation of KDC's rights, but this Court likely cannot find at this time that AED's filing of its Complaint violates KDC's rights, in light of the remaining questions of fact discussed *supra,* or that AED's filing would make a Judgment by this Court ineffectual.

IV. CONCLUSION AND ORDER.

For the reasons stated above, this Court must deny defendant KDC's request for a preliminary injunction pursuant to I.R.C.P. 65(e). It may well be that these issues can resolve on summary judgment. At the present time, Idaho courts, unlike Federal courts are not allowed to consider summary judgment *sua sponte*. The new Federal Rule of Civil Procedure 56(f) allows a judge to not only grant summary judgment to a non-moving party, but the court may, after providing notice to the parties, "consider summary judgment on its own after identifying for the parties material facts that may not

be in dispute." Fed. R.Civ.P. 56(f)(3). In Idaho, this Court may only do so upon motion by a party before it.

IT IS HEREBY ORDERED defendant KDC's Motion for Preliminary Injunction is DENIED.

Entered this 15th day of December, 2010.

_____
John T. Mitchell, District Judge

Certificate of Service

I certify that on the _____ day of December, 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 #**
Arthur Bistline	665-7290	Randy L. Schmitz	208-395-8585

_____
Jeanne Clausen, Deputy Clerk