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

JOSEPH PIERCE, Plaintiff, vs. STEVE MCMULLEN, HIGHLAND FINANCIAL, LLC, and JOHN DOES 1-10, Defendants.	Case No. CV 09- 10418 **MEMORANDUM DECISION, FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER**

MEMORANDUM DECISION

I. BACKGROUND AND PROCEDURAL HISTORY.

Plaintiff Joseph Pierce (Pierce), through counsel, filed his complaint in this matter on December 14, 2009. Pierce alleged defendant Steve McMullen (McMullen) and defendant Highland Financial, LLC (alleged "alter ego" of McMullen, Complaint, p. 2, ¶ 3) convinced Pierce to enter into an agreement regarding Pierce's property to assist Pierce in avoiding foreclosure. *Id.,* ¶ 10. Pierce claims McMullen/Highland had Pierce sign documents that would require McMullen/Highland to pay Pierce's loan, and market the property for sale. *Id.,* p. 4, ¶ 18. Pierce claims McMullen/Highland allowed the property to go into foreclosure and that McMullen/Highland violated the Idaho Consumer Protection Act and breached an implied-in-

law contract. *Id.,* pp. 4-6, ¶¶ 21-33. On April 10, 2010, this Court entered its Order for Publication, allowing Pierce to serve defendants by publication. On August 5, 2010, this Court entered default in favor of Pierce against McMullen and Highland Financial, LLC.

At no time following the August 2010 default did counsel for Pierce submit any proof to support a Judgment. Six months passed and no activity occurred in the file. Accordingly, on February 2, 2011, this Court sent a Notice of Proposed Dismissal. Counsel for Pierce informed the Court that an evidentiary hearing was scheduled for April 25, 2011 (but counsel had not filed a Notice of Hearing); thus, the Court retained the case. At the April 25, 2011, hearing, counsel for Pierce asked the Court to enter an award of punitive damages. The Court suggested if counsel for Pierce were truly seeking punitive damages, she would have to follow the requirement of Idaho Code § 6-1604(2), and file a motion to amend Pierce's complaint to allow a claim for punitive damages. Pierce then testified as to his damages and McMullen's conduct. At the conclusion of the hearing, the Court determined Pierce had met the criteria of I.C. § 6-1604 and allowed Pierce to amend his complaint to add a claim for punitive damages. On May 3, 2011, the Court entered an order to that effect.

On May 11, 2011, Pierce filed his First Amended Complaint. On June 13, 2011, McMullen, *pro se,* and on behalf of Highland (McMullen, who is not an attorney, is not able to represent Highland), filed a Notice of Appearance. On June 24, 2011, Pierce filed a Notice of Intent to take default under I.R.C.P. 55(a)(1). On June 28, 2011, McMullen, *pro se,* and on behalf himself and, again, improperly on behalf of Highland, filed an Answer to First Amended Complaint. McMullen did not raise the affirmative defense of the Statute of Frauds.

On September 28, 2011, a Scheduling Conference was held. Counsel for Pierce appeared, but no one appeared on behalf of McMullen/Highland. A two-day court trial was

scheduled for June 18, 2012, at 9:00 a.m. On October 3, 2011, this Court entered its Scheduling Order, Notice of Trial Setting and Initial Pretrial Order. In that Order, the Court required the filing of a trial brief and proposed findings and conclusions no later than seven days before trial. Scheduling Order, Notice of Trial Setting and Initial Pretrial Order, pp. 4-5, ¶¶ 8, 9. Neither Pierce nor McMullen/Highland satisfied either requirement of timely submitting a trial brief or proposed findings and conclusions.

On June 18, 2012, counsel for Pierce and Pierce appeared for the court trial. Even though Pierce appeared for trial, counsel for Pierce had still not prepared any proposed findings or conclusions even as of the first day of trial. This Court's "Scheduling Order, Notice of Trial Setting and Initial Pretrial Order", filed October 3, 2011, reads:

> **9. PROPOSED FINDINGS AND CONCLUSIONS (if COURT Trial):** No later than **seven __ (7) days prior to a court trial,** each party shall file with the opposing parties and the Court (with copies to chambers) proposed Findings of Fact and Conclusions of Law supporting their position. An electronic version of the proposed findings and conclusions should be provided to the Court's clerk as a Word document, this may be accomplished by e-mail.

Scheduling Order, Notice of Trial Setting and Initial Pretrial Order, pp. 4-5, ¶ 9. While the furnishing an electronic copy is not mandatory, filing proposed findings of fact and conclusions of law a week prior to trial is *required*. This is not "optional" upon party or their attorney. In *Bayes v. State*, 117 Idaho 96, 99-100, 785 P.2d 660, 663-64 (1989), citing *In re Contempt of Reeves,* 112 Idaho 574, 733 P.2d 795 (Ct.App. 1987), the Idaho Court of Appeals wrote:

> Contempt orders frequently result from the refusal of the contemnor to obey the express order of a court.... [T]he contemnor may challenge the procedure by which the contempt is adjudicated. He may argue that there is no substantial evidence to support the finding that he knowingly violated a court order. He may even challenge the penalties imposed. However, he may not knowingly ignore an order of the court, even though he believes it to be incorrect, and then contest the validity of the underlying order on appeal from a finding of criminal contempt. [Citations omitted.] This rule is based upon sound foundations of public policy. A trial court may make numerous rulings and issue a substantial number of orders

during the course of a law suit. **If a party were free to disobey any order with which he or she disagreed, the entire judicial process would break down.** As the United States Supreme Court explained in *Maness v. Meyers,* 419 U.S. 449, 95 S.Ct. 584, 42 L.Ed.2d 574 (1975):

> **We begin with the basic proposition that all orders and judgments of courts must be complied with promptly. If a person to whom a court directs an order believes that order is incorrect the remedy is to appeal, but absent a stay, to comply with the order pending appeal. Persons who make private determinations of the law and refuse to obey an order generally risk criminal contempt even if the order is ultimately ruled incorrect.... Such orders must be complied with promptly and completely, for the alternative would be to frustrate and disrupt the progress of the trial with issues collateral to the central questions in litigation.** This does not mean, of course, that every ruling by a presiding judge must be accepted in silence. Counsel may object to a ruling. An objection alerts opposing counsel and the court to an issue so that the former may respond and the latter may be fully advised before ruling. [Citations omitted.] But, once the court has ruled, counsel and others involved in the action must abide by the ruling and comply with the court's orders.... Remedies for judicial error may be cumbersome but the inquiry flowing from an error generally is not irreparable, and orderly processes are imperative to the operation of the adversary system of justice.

419 U.S. at 458–60, 95 S.Ct. at 591–92. *See also Walker v. City of Birmingham,* 388 U.S. 307, 87 S.Ct. 1824, 18 L.Ed.2d 1210 (1967); *Howat v. Kansas,* 258 U.S. 181, 42 S.Ct. 277, 66 L.Ed. 550 (1922). This rule applies even where the order later is found to have infringed upon constitutional rights or to be based upon an unconstitutional statute. [Citations omitted.] Only in the case where an order was "transparently invalid or had only a frivolous pretense to validity" will a criminal contempt finding be reversed. [Citations omitted.] We believe that this is a heavy burden to meet, and that **an individual who disobeys an order of the court acts at his peril.** Unless he can convince the appellate court that the order was so clearly invalid that no reasonable man could believe otherwise, a criminal contempt order will be upheld. We further consider it incumbent upon the individual to bring the error to the attention of the court before undertaking to disobey the order. [Citations omitted.]

At trial, neither McMullen nor an attorney on behalf of Highland appeared. The Court heard testimony. At the conclusion of the evidence, the Court ordered counsel for Pierce to file proposed findings and conclusions, and to submit a post-trial brief, by June 22, 2012. Such documents were filed on June 22, 2012. Accordingly, the matter is now at issue.

II. ANALYSIS.

A. NO BREACH OF AN IMPLIED-IN-LAW CONTRACT.

Neither Pierce's Trial Brief (presented post-trial) nor Pierce's Proposed Findings of Fact and Conclusion of Law make any mention of Pierce's claims McMullen breached an implied-in-law contract, as set forth in Pierce's Complaint, at p. 6, ¶¶ 30-33. Accordingly, this Court finds Pierce has abandoned the theory of breach of an implied-in-law contract by McMullen.

B. NO BREACH OF A COMMON LAW CONTRACT.

However, in his Trial Brief submitted after the trial, Pierce for the first time claimed McMullen committed a "breach of contract at common law." Trial Brief, p. 14. There are a plethora of problems with Pierce's addition of this new theory at this juncture. First of all, Pierce has at no time ever *pled* the theory of common law breach of contract. While there is a previous default, there is no default on a breach of contract claim as such has never been pled. Second, at the conclusion of the evidence, and in the intervening six weeks to this decision, Pierce has at no time made a motion under I.R.C.P. 15(b) to have the pleadings conform to the evidence. While this is a motion that may be made at any time, it is for the party to make the motion, as the rule provides no ability for the Court to make the motion *sua sponte*. I.R.C.P. 15(b). Third, in Pierce's Trial Brief he makes no analysis of how the elements of a breach of contract have been proven. Fourth, in Pierce's Proposed Findings of Fact and Conclusions of Law Pierce makes no mention, let alone any analysis, of how the elements of a breach of contract have been proven. Due to the failure of Pierce to move to amend under I.R.C.P. 15(b), this Court cannot decide any "common law" "breach of contract" claim by Pierce. Fifth, the "Contract" in this case is Exhibit 1, and Pierce has not proven any breach. Pierce testified McMullen *told* him McMullen would take over Pierce's mortgage payments,

McMullen would sell the property, and pay Pierce the $30,000 he had put down on the property the year before, and they would split the profits. Pierce's first fundamental problem is that deal, that oral promise, that "contract" is found nowhere in Exhibit 1. Pierce's testimony as to what McMullen told him would happen is, other than the return of his $30,000 down payment the year before, completely contradicted by Exhibit 1. A reading of the first page of Exhibit 1 provides a very straightforward description as to what happens with the money. According to Exhibit 1, the "Contract for Purchase and Sale", Pierce sells the property to Highland LLC for a "PURCHASE PRICE **Not to exceed $329,000.00**". Exhibit 1, p. 1. (bold and underlining in original). Highland assumes Pierce's Mortgage with Summit Inc., in the "approximate principle balance of **$294,000.00**." *Id.* (bold and underlining in original). "**$30,000.00 to Joseph Pierce upon selling or refinancing the 40.4 acres.**" *Id.* (bold and underlining in original). There is a "Balance after close" of $20,000.00, and the "contract" is not clear who gets that. *Id.* However, the "contract" is clear that Pierce is selling the property to Highland, LLC, for $329,000.00, that of that sale price, $294,000 comes from Highland assuming Pierce's debt of the Summit, Inc. mortgage Pierce had entered into, and Pierce gets his $30,000.00 down back, *if* the property sells or is refinanced. There is absolutely no mention of splitting the profits between Pierce and McMullen/Highland. The sale price is simply $329,000.00 and nothing more. Pierce's second fundamental problem is an abject lack of proof of the breach of the contract found in Exhibit 1. Pierce testified that the property was being developed, but he does not know by whom. Pierce testified he "assumed" the property was sold in foreclosure, but he does not know that. According to the "contract" terms, Pierce only gets his money if the property sells or is refinanced, and Pierce does not know if either of those contingencies (sale or refinance) has occurred!

C. NO VIOLATION OF THE IDAHO CONSUMER PROTECTION ACT.

In Pierce's Proposed Findings of Fact, Pierce in large part reprints his Complaint. See, Complaint, p. 2, ¶ 7 – p. 4, ¶ 22; Proposed Findings of Fact, Conclusions of Law, p. 1, ¶ 1 – p. 6, ¶ 33. No citation is ever made to any exhibit in evidence or to any of the testimony presented to the Court at trial. Proposed Findings of Fact, Conclusions of Law, p. 1, ¶ 1 – p. 6, ¶ 33. Plaintiff's Trial Brief does make citation to the exhibits.

In Pierce's Conclusions of Law, Pierce claims seven different types of unfair or deceptive acts were committed by McMullen against Pierce. Proposed Findings of Fact, Conclusions of Law, p. 6, ¶ 1 – p. 7 ¶ 7. Specifically, Pierce claims McMullen violated Idaho Code § 48-603 (2), (5) (two different ways), (9), (17), and (18)(two different ways). *Id.* These will be discussed below in the Findings of Fact and Conclusions of Law.

Instead of making any argument as to whether Pierce satisfied the requirements of I.C. § 48-608(1), Pierce instead chose to leap ahead to the issue of damages, writing:

> The two questions before this court are whether Plaintiff has shown ascertainable damages as a result of Defendant's multiple violations of the Idaho Consumer Protection Act; and whether Defendant's violations of the ICPA are repeated or flagrant, entitling Plaintiff to an award of punitive damages.

Plaintiff's Trial Brief, p. 15. Pierce then goes on to discuss simply these damage issues. *Id.,* pp. 15-20.

At no point in either Pierce's Trial Brief (presented post-trial) or Pierce's Proposed Findings of Fact and Conclusions of Law does Pierce ever mention how those various allegedly unfair acts listed in I.C. § 48-603 caused Pierce to be the requisite "*Any person who purchases or leases goods or services* and thereby suffers any ascertainable loss of money or property, real or personal, as a result of the use or employment by another person of a method, act or practice declared unlawful by this act…", under I.C. § 48-608. (italics added).

The only *mention* of I.C. § 48-608 by Pierce or his attorney is in requesting injunctive relief, which is one of the remedies allowed under that statute. Trial Brief, p. 20; Proposed Findings of Fact and Conclusions of Law, p. 7. ¶ 22. Instead, Pierce in his briefing focuses only upon his damage. Pierce copied the text of I.C. § 48-608 into his brief (Trial Brief, p. 12), but at no point analyzed how or why Pierce was a "… person who purchases or leases goods or services…" from McMullen. In fact, the only time the word "goods" is even *mentioned* by Piece, is in the block quote of I.C. § 48-608. Trial Brief, p. 12. The word "services" appears in Pierce's brief in the block quote of I.C. § 48-608, and the word "services" appears again (Trial Brief, p. 8), but only in quoting from one of the exhibits. Exhibit 20. No analysis of "goods" or "services" as used in I.C. § 48-608 is ever made by Pierce.

While there are nineteen discrete unfair methods and practices listed under the Idaho Consumer Protection Act listed in I.C. § 48-603, this Court finds that in order for there to be any *damages* under the Act, there has to one or both of each of the two possibilities in each of these two categories: 1) a "purchase or a lease" of 2) "goods or services." I.C. § 48-608. Pierce has not proven either element for damages. This will be analyzed below.

As an evidentiary matter, all of the verbal misrepresentations attributed to McMullen to which Pierce testified are covered by the Statute of Frauds. I.C. § 9-503, § 9-505(2). McMullen did not raise the defense of the statute of frauds in his *pro se* Answer to First Amended Complaint Answer, filed June 28, 2011. Thus, McMullen has *waived* the defense. *Ernst v. Hemenway & Moser Co.,* 120 Idaho 941, 821 P.2d 996 (Ct.App. 1991); *Slusser v. Aumock,* 56 Idaho 793, 59 P.2d 723 (1936); *Magee v. Winn,* 52 Idaho 553, 16 P.2d 1062 (1932). Accordingly, Pierce's testimony as to what he was "told" by McMullen is admissible as evidence. Additionally, parol evidence is admissible for the purpose of showing fraud in

inducing someone to enter into a contract. *Lindberg v. Roseth,* 137 Idaho 222, 228, 46 P.3d 518, 522 (2002). While fraud has not been alleged, the Court views the alleged violations of the Idaho Consumer Protection Act to be analogous to a claim of fraud, at least for evidentiary purposes, under the facts as alleged and testified to by Pierce.

While the defense of the statute of frauds rests upon McMullen, the elements of a violation of the Idaho Consumer Protection Act and breach of contract rest upon Pierce, the person who filed this lawsuit. As mentioned above, on August 3, 2010, Pierce moved for default of McMullen and Highland based on their failure to answer, and such Entry of Default was made by this Court on August 6, 2010. Pierce then went to trial on April 25, 2011, and wanted to put on proof of punitive damages without complying with I.C. § 6-1604. The Court required compliance with I.C. § 6-1604, which meant filing an amended complaint including a claim for punitive damages. Pierce filed such amended complaint on May 11, 2011, and McMullen answered, *pro se*, on June 13, 2011. To the extent McMullen answered on behalf of Highland, the Court accords such no effect, as McMullen, not being an attorney, cannot appear on behalf of Highland Financial, LLC. An entity can appear only through an attorney as any lay person who attempts to represent an entity is engaged in the unauthorized practice of law. *Kyle v. Beco Corp.,* 109 Idaho 267, 271, 707 P.2d 378, 382 (1985).

On April 25, 2011, an "evidentiary hearing" was held. No notice was given to the Court as no Notice of Hearing was ever filed. Additionally, no Notice of Hearing was shown going by Pierce to McMullen. At the beginning of the hearing, counsel for Pierce stated that no notice was given to McMullen because no notice was required as no defendant had appeared. "A non-appearing party is not entitled to notice under the rules, but it is common practice for counsel who intends to take a default judgment to contact such a party or their counsel to

advise them of the intention and encourage the filing of an answer if one is contemplated." D. Craig Lewis, Idaho Trial Handbook 2nd, Edition (2005), § 3:16, p. 63. "This is not only a matter of courtesy; it may serve to avoid subsequent time and effort spent in proceedings to set aside the default judgment, and may immunize the default judgment against attack." *Id*. In any event, no notice was sent to McMullen.

At that April 25, 2011, hearing, Pierce's counsel announced to the Court that the evidence was only to be on this issue of damages. However, the "evidentiary hearing" became a hearing on whether Pierce could meet the requirements of I.C. § 6-1604. Pierce testified about what had occurred, and at the conclusion of that hearing, the Court held Pierce could amend his complaint to add a claim for punitive damages. An amended complaint was filed, and McMullen answered that amended complaint.

A scheduling conference was held September 28, 2011. At the scheduling conference counsel for Pierce announced to the Court that a trial on the issue of actual and punitive damages is all that would be needed, as default had been entered. However, this was a default on the original complaint, not the amended complaint. At the scheduling conference, the case was scheduled for trial to begin June 18, 2012.

On June 18, 2012, at the beginning of trial, counsel for Pierce stated her client had already received a default as to the liability, and that the only evidence to be presented to the Court at trial was evidence on the issue of damages. Pierce's attorney moved to strike McMullen's answer under Idaho's default rules and Rule 16 for failing to attend the trial. The Court held default was appropriate due to McMullen's failure to appear at trial, and struck McMullen's answer pursuant to I.R.C.P. 41(b). Evidence was then presented by Pierce.

At each of the above hearings, counsel for Pierce has misapprehended the effect of a "default." A "default" does not necessarily mean all that is left is proof of damages. The plaintiff, after taking default, must apply to the court for relief demanded in the complaint, and must establish by proof *the material allegations of his complaint*. *Joyce v. Rubin,* 23 Idaho 296, 304-05, 130 P. 793 (1913). (italics added)

> A default judgment may be entered by the court clerk when the claim is for a sum certain or an amount which can by computation be made certain. Idaho R. Civ. Proc. 55(b)(1). Otherwise a judgment by default may only be entered by the court, which may require a hearing to take evidence concerning *the validity of the claim* and the amount of damages. Idaho R. Civ. Proc. 55(b)(2).

D. Craig Lewis, Idaho Trial Handbook, 2nd Edition (2005), § 3:16, p. 63. (italics added). "If, in order to enable the court to enter judgment or to carry it into effect, it is necessary to take an account or to establish the truth of any averment by evidence or to make an investigation of any other matter, the court may conduct such hearings or order such references as it deems necessary and proper." *Olson v. Kirkham,* 111 Idaho 34, 37, 720 P.2d 217, 220 (Ct.App. 1986), quoting I.R.C.P. 55(b)(2). (italics added to quote from I.R.C.P. 55(b)(2), italics in *Olson* opinion). In the present case, neither the Complaint nor the Amended Complaint were "verified" as allowed under I.R.C.P. 6(c)(2), and as such, neither the Complaint nor the Amended Complaint can be accorded any evidentiary value under I.R.C.P. 56(e), *Camp v. Jiminez,* 107 Idaho 878, 693 P.2d 1080 (Ct.App. 1984); *Olson v. Kirkham,* 111 Idaho 34, 37, 720 P.2d 217, 220 (Ct.App. 1986).

However, the immediate problem facing Pierce is not that there is a lack of proof or evidence on whether there was a "purchase" or a "lease" of "goods" or "services" under I.C. § 48 608, but rather, a complete lack of *legal argument* of that issue, based on the evidence that was presented. Idaho Code § 48-608(1), reads in its entirety:

48-608. Loss from purchase or lease -- Actual and punitive damages.

(1) Any person who purchases or leases goods or services and thereby suffers any ascertainable loss of money or property, real or personal, as a result of the use or employment by another person of a method, act or practice declared unlawful by this chapter, may treat any agreement incident thereto as voidable or, in the alternative, may bring an action to recover actual damages or one thousand dollars ($1,000), whichever is the greater; provided, however, that in the case of a class action, the class may bring an action for actual damages or a total for the class that may not exceed one thousand dollars ($1,000), whichever is the greater. Any such person or class may also seek restitution, an order enjoining the use or employment of methods, acts or practices declared unlawful under this chapter and any other appropriate relief which the court in its discretion may deem just and necessary. The court may, in its discretion, award punitive damages and may provide such equitable relief as it deems necessary or proper in cases of repeated or flagrant violations.

In *Idaho First Nat'l Bank v. Wells,* 100 Idaho 256, 596 P.2d 429 (1979), the Idaho Supreme Court held although "goods" defined under the Idaho Consumer Protection Act include intangible property which could encompass money, it would take a strained construction of the act to be able to hold that the signing of a personal guarantee for a loan to a corporation was "purchase of goods." 100 Idaho 256, 259, 596 P.2d 429, 432. In *Wells*, the bank had loaned money to the Wellses' business, and Ivyl Wells and Novell Wells each signed personal guarantees to secure those loans. When the bank sued to collect on those guarantees, the Wellses defended claiming the Idaho Consumer Protection Act was violated by the bank on the basis that the guarantees were signed in blank. 100 Idaho 256, 258, 596 P.2d 429, 431. In the present case, Pierce was the seller of his own real property. Pierce sold his real property to McMullen, and Pierce now claims McMullen did not pay Pierce the monies obligated under the contract or as orally represented. The problem for Pierce is identical to the problem the Wellses faced. Pierce was not "any person who purchases or leases goods or services and thereby suffers any ascertainable loss of money…as a result of the use or employment by another person of a method, act or practice declared unlawful by this act." I.C.

§ 48-608; 100 Idaho 256, 259, 596 P.2d 429, 432. Pierce *purchased* nothing. Pierce *sold* his property to McMullen in exchange for McMullen to perform acts in the future which McMullen apparently did not perform. In addition to the fact that Pierce purchased nothing from McMullen, the transaction did not involve any *goods* or *services* from McMullen or Highland. Pierce did not *lease* any goods or services from McMullen or Highland. The only thing Pierce "purchased" was future acts by McMullen, which, just as the signing of a promissory note in *Wells*, is not a purchase or a lease of goods or services.

In *Western Acceptance Corp v. Jones*, 117 Idaho 399, 788 P.2d 214 (1990), the Idaho Supreme Court held the collection of a debt arising out of a sale of goods or services is subject to the provisions of the Idaho Consumer Protection Act (the Act), even when the collection of the debt is by a third party who has purchased the debt from the seller; it is the sale of goods and services that brings the debt into existence that is the crucial event, and debts that do not arise out of the sale of goods and services are subject to the provisions of the Act are not covered. 117 Idaho 399, 401, 788 P.2d 214, 216. The important message from *Jones* is for the Idaho Consumer Protection Act to apply to a debt collection case (which the present case might be under a strained interpretation), there must be an *underlying* "sale (or lease) of goods and services". In Pierce's case, there is no underlying sale of goods or services. Those elements are entirely lacking.

White v. Mock, 140 Idaho 882, 104 P.3d 356, (2004), concerned a case where Mocks owned residential property and sold that property to the Whites. 140 Idaho 882, 885, 104 P.3d 356, 359. Within a month after closing, Whites had to treat a termite problem not disclosed in the property disclosure statement. *Id.* A short time later Whites began remodeling and found uncovered evidence of earlier water damage and non-toxic mold. *Id.* Following an eight-day

jury trial, Whites received a verdict that the Mocks did not commit fraud; the jury found there was a violation of the Idaho Consumer Protection Act, but the jury also found no damages were proximately caused by the violation. *Id.* Whites appealed and Mocks cross-appealed. One of the issues on cross-appeal was whether the district court erred in holding that individuals selling real property are subject to the Idaho Consumer Protection Act. 140 Idaho 882, 885-86,104 P.3d 356, 359-60. In discussing the Idaho Consumer Protection Act issue, Idaho Supreme Court held:

> The Mocks challenge the district court's ruling holding them subject to the Idaho Consumer Protection Act, arguing that the Act does not apply to individuals who are not in the business of selling real property.
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> The purpose of the Idaho Consumer Protection Act is "to protect both consumers and businesses against unfair methods of competition and unfair and deceptive practices in the conduct of trade or commerce, and to provide efficient and economical procedures to secure such protection. It is the intention of the legislature that this chapter be remedial and so construed." I.C. § 48–601. Idaho Code § 48–603, which contains a knowledge requirement, provides an enumeration of unfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce that the legislature declared to be unlawful. I.C. § 48–603C also declares any unconscionable method, act or practice in the trade or commerce to be a violation of the Idaho Consumer Protection Act whether it occurs before, during, or after the conduct of the trade or commerce. White alleged in his complaint that the Mocks' failure to disclose the true, defective condition of the property and the making of false affirmative statements violated Sections 603 and 603C of the Act.
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> Legislative definitions of terms included within a statute control and dictate the meaning of those terms as used in the statute. *Roe v. Hopper,* 90 Idaho 22, 408 P.2d 161 (1965). The Mocks are clearly "persons" within the definition found at I.C. 48–602(1). The Mocks' real property is clearly within the definition of "goods," which "mean any property ... real, personal or mixed ..." I.C. § 48–602(6). Finally, "trade" or "commerce" encompasses "the advertising, offering for sale, selling, leasing, renting, collecting debts arising out of the sale or lease of goods or services or distributing goods or services, either to or from locations within the state of Idaho, or directly or indirectly affecting the people of this state." I.C. § 48–602(2).
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> *Haskin v. Glass,* 102 Idaho 785, 640 P.2d 1186 (Ct.App.1982), a case relied upon by White, held that the Act was inapplicable to a transaction that was merely contemplated. *Haskin* did not, however, resolve the applicability of the Act to individuals. The authority cited by the Mocks interpreted a Tennessee statute, which admittedly is very similar to Idaho's statute. *Ganzevoort v. Russell,*

> *et al.,* 949 S.W.2d 293 (Tenn.1997). There, in the context of the sale of the Russells' residence, the Court held: "Although this language does not explicitly exclude from the Act sellers not in the business of selling property as owners or brokers, a reasonable construction is that they are not included." *Id.* at 297. "The majority of jurisdictions in which real estate sales are governed by the act, have held that persons making an isolated sale of their home are not covered by the Act." *Id.* at 298.
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> Whether a statute applies is a matter of law. *Floyd v. Board of Comm'rs of Bonneville County,* 131 Idaho 234, 953 P.2d 984 (1998). We agree with the distinction noted by the district court between the sale of one's residence versus the sale of other property and accordingly hold the Idaho Consumer Protection Act applicable to the Mocks' sale of investment property. We affirm the district court.

140 Idaho 882, 890-91, 104 P.3d 356, 364-65. In the present case, the two parcels were not Pierce's residence. Those two parcels appear to be "investment property" as the term was used in *Mock*. Thus, to that extent, Pierce's transaction is compliant with that aspect of *Mock*. However, in *Mock*, it was the *buyers*, the Whites, the party who *purchased* (as required by I.C. § 48-608) investment real property from the *seller* of the real property, the Mocks, who sought to hold the seller, the Mocks', liable for violating the Idaho Consumer Protection Act. In the present case, Pierce is the *seller* of the real property, not the *purchaser* (as required by I.C. § 48-608) of the real property, as the plaintiff Whites were in *Mock*. The Court finds Pierce has not met the requirements of I.C. § 4-608 because he purchased nothing from McMullen (Pierce sold to McMullen), and the transaction with McMullen did not involve goods or services.

Case law from other jurisdictions in analogous fact situations support this finding. In *Schmueser v. Burkburnett Bank*, 937 F.2d 1025, 20 Fed.R.Serv.3d 1376, 15 UCC Rep.Serv.2d 721, (5th Cir. 1991) the Fifth Circuit Court of Appeals held, as a matter of law, that the Bank, which issued a one-year, $20,000 irrevocable letter of credit as security against default of purchasers, did not provide "services" to vendors within meaning of Texas Deceptive Trade Practices and Consumer Protection Act (DTPA), merely by encouraging surviving purchaser to

pay on note and by lending money to purchaser so that she could pay note, and thus, vendors were not "consumers" and had no valid cause of action against the bank under the DTPA. 937 F.2d 1025, 1028-29. In *Shibata v. Lim*, 133 F.Supp.2d 1311 (M.D.Fla. 2000), the court held:

> The parties cite to no authority indicating that DUTPA was intended to apply to loans. Defendants state, without any authority, that lending money to a corporation does not fall within the provisions of the Florida DUTPA because it is not a "sale, rental, or otherwise, of any good or service, or property." This Court need not resolve this issue because it finds that, under Florida law, Dr. Shibata was not a "consumer" entitled to protection under the DUTPA. An examination of the transaction between the parties, as alleged by Dr. Shibata, shows that Dr. Shibata was not the "purchaser" of goods or services. Assuming (solely for the sake of argument) that the monies provided * constitute a "good or service" under the DUTPA, Dr. Shibata was the provider, not the purchaser, of the monies at issue, and therefore is not entitled to protection under the DUTPA.

133 F.Supp.2d 1311, 1321-22. In the recent case of *Montalvo v. Bank of America Corp.*, ___ F.Supp.2d ___, 2012 WL 1078093, (W.D.Tex., March 30, 2012), the federal district court held the borrower, Montalvo, was not a consumer under the DTPA. Under the DTPA, "'Consumer' means an individual who seeks or acquires by purchase or lease, any goods or services," "'Goods' means tangible chattels or real property purchased or leased for use," and "'Services' means work, labor, or service purchased or leased for use, including services furnished in connection with the sale or repair of goods." "Only 'when a borrower's objective is to obtain goods or services and the loan provides the means for obtaining the goods or services, the borrower qualifies as a consumer.'" FN65 A "person who seeks "only the extension... 2012 WL 1078093, p. 24, n. 65.5-11.

D. PIERCE HAD NO RIGHT TO RELY ON McMULLEN'S ORAL REPRESENTATIONS, BUT RELIANCE IS NOT AN ELEMENT OF THE IDAHO CONSUMER PROTECTION ACT.

At trial, Pierce did not address the issue as to whether he had the right to rely on McMullen's oral misrepresentations, when those misrepresentations are at direct odds with the

written documents Pierce signed. Pierce provided no testimony as to this issue. In post trial briefing, Pierce's counsel made the following argument:

> Evidence that Plaintiff's belief in Defendant's representations were reasonable, is seen in the document entitled "right to cancel" (Plaintiff's Exhibit 20). The "right to cancel" document clearly indicates that a contract has been entered into.

Plaintiff's Trial Brief, p. 15.

The Court specifically finds that Pierce's belief about McMullen's representations was not reasonable. The "Contract for Purchase and Sale" signed by Pierce simply does not contain most of the terms that Pierce testified McMullen had "told" him. The Court has read Exhibit 20, and while the document is entitled "Right to Cancel", it does not refer to the "Contract for Purchase and Sale", so Exhibit 20 can provide no modification to the "Contract for Purchase and Sale." Additionally, all the Right to Cancel provides is that if Pierce were to "retain the services of any other party other than Highland Financial", Pierce would owe Highland Financial $150 per hour. Per hour of "what" is entirely unclear, but Exhibit 20 does nothing to indicate "a contract has been entered into" as argued by Pierce's attorney, and does nothing to indicate Pierce had the right to rely on McMullen's oral representations.

In a fraud case, the plaintiff must establish that he had a "right to rely" on the defendants representations. In Idaho, this is phrased as "the plaintiff's reliance was reasonable under the circumstances" (IDJI 4.60) or was "justified." IDJI 6.27.1. Pierce's reliance was neither reasonable nor justified, as little in the claimed representations Pierce testified McMullen made find their way into the "Contract for Purchase and Sale." Decades ago, the element of proving justifiable reliance was enforced.

> Many cases took the position that it was the duty of every person to take notice of obvious facts and to investigate the truth of representations. The credulous were deemed to have invited their own misfortunes.

John D. Calamari and Joseph M. Perillo, The Law of Contracts, 2nd Ed. (West 1977), § 9-15. p. 280.

> But the tide turned. The Vermont Court proclaimed that "the law will afford relief even to the simple and credulous who have been duped by art and falsehood." The same court stated, "no rogue should enjoy his ill-gotten plunder for the simple reason that his victim is by chance a fool."
>
> As Vermont went, so has gone the nation. It is the exceptional case today where, especially in the face of an intentional misrepresentation, relief will be denied on the ground of the undue credulity or negligence of the defrauded party.

Id. Snow's Auto Supply v. Dormaier, 108 Idaho 73, 696 P.2d 924 (Ct.App. 1984) provides an excellent discussion of the history of the "reliance" issue in Idaho:

> We next consider whether Snow forfeited any right to rely upon the sellers' representation of acreage when he viewed the farm and undertook, albeit unsuccessfully, to obtain acreage data from the local ASCS office. This question presents the difficult task of drawing a line between holding a seller accountable for his representations and holding the buyer to the terms of his original bargain. At common law, in cases involving personal property, a seller generally was held not liable for an innocent misrepresentation if the buyer had an equal opportunity to ascertain the truth, but was held liable for a fraudulent or reckless misrepresentation regardless of the buyer's opportunity. Annot., 61 A.L.R. 492 (1929). Where the seller engaged in fraud, it was no defense that he also referred the buyer to a source of truthful information. *Id.* at 514. Finally, as a corollary to the general requirement that reliance be proven in a fraud case, the seller was held not liable if the buyer, rather than relying upon the seller's representation, conducted his own investigation and the seller did nothing to impede him. *Id.* at 537.
>
> The Idaho Supreme Court has maintained an uneasy ambivalence toward these common law rules, in real and personal property cases. In *Smith v. Johnson,* 47 Idaho 468, 276 P. 320 (1929), the Court held that where a seller of sheep innocently misrepresented their weight and the buyer conducted his own investigation, the seller bore no liability. Similarly, in *Petersen v. Holland,* 79 Idaho 63, 310 P.2d 810 (1957), the Court held that where the seller of a ranch misrepresented the range rights and the number of cattle, there was no liability because the misrepresentation had not been proven fraudulent and the buyer had conducted his own investigation.
>
> However, in *Lanning v. Sprague,* 71 Idaho 138, 227 P.2d 347 (1951), the Supreme Court charted a different course. In that case a land buyer sued the seller for misrepresenting a boundary line. The Court said that a lack of fraud would not insulate the seller from liability:
>
> > Where one makes representations as to the boundary lines of property which he owns and is selling, and such statements are

> in fact false, and the boundary pointed out by him is not the true boundary and the vendee, relying on such false statements suffers a loss by reason thereof, the right of the vendee to recover damages is universally recognized.
>
> If the defendant did not know where the true boundary of the line in question was, he should not have taken upon himself to point out the same, and to make a definite and positive representation concerning it and which the state of knowledge did not enable him to make with verity and correctness.
>
> * * *
>
> Even honesty in making a mistake is no defense as it is incumbent upon the vendor to know the facts.

71 Idaho at 143, 227 P.2d at 349–50. The direction charted in *Lanning* was followed in *Summers v. Martin,* 77 Idaho 469, 295 P.2d 265 (1956). There, the seller of a farm, without knowing the true facts, misrepresented the irrigated acreage. The buyer was held entitled to rescission even though the contract recited that the buyer had inspected the property and had not been influenced by any representation of the seller. Such contract language was deemed contrary to public policy.

The ambivalence of Idaho case law has continued to the present day, as exemplified by two recent decisions. In *Sorenson v. Adams,* 98 Idaho 708, 571 P.2d 769 (1977), the Supreme Court held that where the seller of a farm showed the buyer an ASCS document overstating the number of cultivated acres, a false representation had occurred. The Court reversed a district judge's involuntary dismissal of the buyer's suit for damages based upon a shortage of actual acres. In response to a contention that the seller's conduct had been innocent, the Court cited *Lanning* and added the following comments:

> [T]he general rule is that "a vendor may be liable in tort for misrepresentations as to the area of land conveyed, notwithstanding such misrepresentations were made without actual knowledge of their falsity." [Citation omitted.] The reason, of course, is that the parties to a real estate transaction do not deal on equal terms. An owner is presumed to know the boundaries of his own land, the quantity of his acreage, and the amount of water available. If he does not know the correct information, he must find out or refrain from making representations to unsuspecting strangers.
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> * * *
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> Finally, we observe that respondents ... challenge appellants' *right to rely* on the [ASCS] figures in light of their opportunity to check the figures themselves at the tax assessor's office, or by a survey of the land. The trial court did not address this particular element of fraud in its bench remarks. Such argument, however, has never found favor with this Court:

> "False statements found ... to have been made and relied on cannot be avoided by the appellants by the contention that the respondents could have, by independent investigation, ascertained the truth.
>
> "The appellants having stated what was untrue cannot now complain because the respondents believed what they were told. Lack of caution on the part of respondents because they so believed, and the contention that respondents could have made an independent investigation and determined the true facts, is no defense to the action." *Weitzel v. Jukich,* 73 Idaho 301, 305, 251 P.2d 542, 544 (1953). *And see, Lanning v. Sprague, supra.*

98 Idaho at 715, 571 P.2d at 776.

However, in *Faw v. Greenwood,* 101 Idaho 387, 613 P.2d 1338 (1980), the Court held that where the seller of a business made an inaccurate projection of future income, and the buyer made an independent examination of the business books, the seller was not liable to the buyer for losses subsequently sustained. The case might have been distinguished from *Sorenson v. Adams, supra,* and from other cases discussed above, because it involved a projection of future events rather than a representation of present facts. But the Court eschewed this distinction and stated:

> Appellants argue that the fact that they could have ascertained the truth by independent investigation is not a defense to the fraud action, citing *Sorenson v. Adams*.... We think that is a correct statement of the law as far as it goes. However, when a purchaser is given the opportunity to conduct an independent investigation of the records *and does so,* it is generally held that he is not entitled to rely on alleged misrepresentations of the seller.

101 Idaho at 389, 613 P.2d at 1340 (emphasis added).

All of these cases demonstrate that Idaho has struggled with the task of holding a seller accountable while holding the buyer to his bargain. However, some common threads in the Idaho decisions may be discerned. If a seller engages in fraud, he will be liable unless the buyer actually examines sources of information used by the seller and draws his own independent conclusions. Conversely, if the buyer merely has an opportunity to examine such sources, but does not do so because he reasonably relies upon what the seller tells him, then he is entitled to relief from the seller's misrepresentation, whether made fraudulently or not.

In the present case, the record fails to show that Snow's reliance upon the sellers' representation of cultivated acreage would have been unreasonable. Concededly, Snow visited the farm before buying it. But the shape and topography of the farm were irregular and parts of it were wooded or adjacent to a stream. We cannot say that an acreage deficiency would have been readily apparent. Neither are we persuaded that Snow's futile visits to the ASCS office barred him from relying upon the sellers' representation of cultivated acreage. There is, we believe, a distinction between an investigation conducted and an

> investigation attempted. When an investigation is conducted, it affords the buyer an independent basis to decide whether to purchase the property. When an investigation is attempted unsuccessfully and produces no independent information, the buyer is left to rely upon the seller's representations. As noted above, several Idaho cases have allowed buyers to obtain relief from seller misrepresentations despite an opportunity to investigate. We think it would be anomalous to afford a buyer less protection when he attempts to investigate than when he makes no use of an opportunity to do so. Accordingly, we conclude that Snow did not forfeit his right to rely upon the sellers' representation of cultivated acreage when he observed the farm and tried without success to examine the ASCS records.
>
> We hold that the summary judgment, based upon rulings that Snow did not rely—and was not entitled to rely—upon the sellers' representation, must be set aside. Our holding is limited, as was the decision below, to the question of reliance. We intimate no view as to whether all elements of a cause of action for fraud or misrepresentation have been established. Neither do we reach the question whether, even if a misrepresentation occurred and Snow relied upon it, he is entitled to the damage remedy he seeks. These questions were not addressed by the district court and have not been fully briefed or argued on appeal. We will not discuss them sua sponte.

108 Idaho 73, 77-79, 696 P.2d 924, 928-930.

Even though this reliance requirement has softened, this Court finds that does not mean Pierce can completely *ignore* the language of the Contract for Purchase and Sale which Pierce signed. "If a seller engages in fraud, he will be liable unless the buyer actually examines sources of information used by the seller and draws his own independent conclusions." 108 Idaho 73, 78, 696 P.2d 924, 929. Pierce testified he was presented with so much information he didn't understand what he was signing. Because he did not understand the language of what he signed, Pierce apparently now claims he is only bound by McMullen's oral representations. However, Pierce read the "Contract for Purchase and Sale"; he now claims he just didn't understand it. Choosing to ignore that language and rely on what McMullen told him is "his own independent conclusion", and under *Snow's Auto Supply*, there is no fraud. Choosing to ignore language in a signed document was addressed by the Bankruptcy Court in *In re Schwalb*, 347 B.R. 726, 743, 60 UCC Rep.Serv.2d 755 (D.Nev. 2006):

> Ms. Schwalb's further argument that she did not understand the import of the words she subscribed to is also unavailing. Even though they appear in tiny five-point type, the words are discernable as an integral part of the pawn ticket. It has long been the common law rule that signing a document authenticates and adopts the words it contains, even if there was a lack of subjective understanding of the words or their legal effect. In essence, people are presumed to be bound by what they sign. *Campanelli v. Conservas Altamira, S.A.,* 86 Nev. 838, 841, 477 P.2d 870, 872 (1970)

But this is not a "fraud" case. It turns out that under the Idaho Consumer Protection Act, there might be no limit to Pierce's acceptable credulity.

The Court can find no Idaho appellate case that discusses the issue of "reliance" under the Idaho Consumer Protection Act. The case law from other jurisdictions indicates plaintiff must prove the defendant intended plaintiff to rely on misrepresentations, but does not require plaintiff to prove the plaintiff had a right to rely. *People of State of Ill. ex rel. Hartigan v. Commonwealth Mortg. Corp. of America*, 732 F.Supp. 885, 889 (N.D.Ill. 1990); *In re New Motor Vehicles Canadian Export Antitrust Litigation*, 350 F.Supp.2d 160, 177, 190 (discussing Arizona and Minnesota statutes, respectively, at those pages). Pierce's testimony is unrebutted. Pierce testified McMullen told him they would split the profits, even though their contract does not say anything like that. If McMullen told Pierce they would split the profits, such statement would have been made with the intent that Pierce rely on that statement, and that is all that is required under the Idaho Consumer Protection Act.

Even though the Idaho Consumer Protection vests Pierce with the ability to bury his head in the sand, Pierce is not able to make the Idaho Consumer Protection Act apply to his case because: 1) Pierce purchased nothing, and he certainly purchased no goods or services, and 2) Pierce doesn't even know what McMullen did with the property Pierce sold him, so there is no way to determine if there are any profits to split.

The Court now addresses Pierce's Proposed Findings of Fact and Conclusions of Law, and makes its own Findings of Fact and Conclusions of law.

FINDINGS OF FACT

1. On or about December 18, 2007, plaintiff Joseph Pierce (Pierce) entered into an agreement titled "Contract for Purchase and Sale" with defendant Highland Financial, LLC (through its manager, defendant Steven McMullen) to purchase an interest in Pierce's real property located in Bonner County, State of Idaho, known as the Providence Lake Property. Plaintiff's Exhibit 1. The Court finds Proposed Finding of Fact No. 1 has been proven. Additionally, the Court finds Highland, through McMullen's signature, did not sign the Contract for Purchase and Sale until the following day, December 19, 2007. Pierce testified Exhibit 1 was "my agreement", that it bore his signature. Pierce testified he asked McMullen to explain it to him, that McMullen did explain it to him, but that Pierce did not understand such explanation. Also introduced into evidence, signed on December 18, 2007, by Pierce, were the Assignment of Beneficial Interest in the Trust (Exhibit 3), the Limited Power of Attorney (Exhibit 4), and the Warranty Deed (Exhibit 5). The "Trust Agreement" is dated December 18, 2007, but is apparently signed by Pierce before a notary on December 12, 2007. Exhibit 2. The Trust Agreement places all of Pierce's real property in the "Providence Lake Trust", with Heidi Russell as Trustee, a person whom Pierce testified he'd never met. The pertinent documents admitted in evidence are all between Pierce and Highland Financial, LLC, as signed by Steve McMullen.

2. Pierce testified his Providence Lake Property consisted of two parcels of property comprising 40.4 acres more or less, with each parcel being approximately 20 acres in size. The Court finds Proposed Finding of Fact No. 2 has been proven. The Court also finds the

number of parcels and acreage at issue is not corroborated by Exhibits A-D of Plaintiff's Exhibit 1. However, McMullen/Highland have presented no evidence to the contrary.

3. At the time of entering into the agreement, Pierce was the fee simple owner of the Providence Lake property, and was in default on the mortgage loans which were at the time secured by the property. Pierce testified that he bought the property in 2006 and began having trouble making the payments on the property in 2007. The Court finds Proposed Finding of Fact No. 3 has been proven.

4. Pierce testified the amount owed by Pierce on the property at the time Pierce entered into his agreement with McMullen/Highland was $288,000.00. The Court finds Proposed Finding of Fact No. 4 has been proven. Additionally, the Court finds Pierce testified he owed this $288,000.00 to Summit Inc., his lender when he purchased the property in 2006.

5. McMullen/Highland advertised and held themselves out to be a company that could save property owners from foreclosure. The Court finds Proposed Finding of Fact No. 5 has been proven.

6. After seeing their advertisement, Pierce contacted McMullen/Highland to obtain assistance in saving the Providence Lake Property from foreclosure. The Court finds Proposed Finding of Fact No. 6 has been proven.

7. McMullen/Highland and/or their agents represented to Pierce that they could assist him with saving the equity in his property by buying an interest in the property and by stopping the foreclosure on the property. The Court finds this portion of Proposed Finding of Fact No. 3 has been proven. Pierce claims that through the conduct of McMullen, Pierce testified that he believed that he was selling a "partial" interest in the property in exchange for assistance in catching up his mortgage payment. Proposed Finding of Fact No. 7. The Court finds there is

no evidence to support Pierce's "belief." The "Contract for Purchase and Sale" does not bear out Pierce's belief that he was selling only a "partial" interest in Pierce's property to McMullen/Highland. The Contract for Purchase and Sale simply states: "**Joseph Pierce,** as Seller and **Highland Fianncial LLC and or assignees**, as Buyer, hereby agree that the Seller shall sell and Buyer shall buy the following legally described property." Plaintiff's Exhibit 1. (emphasis in original). The legal description was attached to the Contract for Purchase and Sale as Exhibits A-D.

8. Pierce testified that McMullen represented to Pierce that Pierce would still have an interest in the property. The Court finds Proposed Finding of Fact No. 8 has been proven.

9. Pierce testified that McMullen further represented that they would aggressively market the property as necessary to sell it and obtain a price for the property that would assure Pierce received most of his equity. Pierce claims that McMullen, through his subsequent actions, made it so that Pierce could not sell the property. The Court finds Proposed Finding of Fact No. 9 has been proven.

10. At the time Pierce contacted McMullen, Pierce claimed he had approximately $111,658 in equity in the two parcels, according to an "equity disclosure" document prepared by McMullen and given to Pierce. Exhibit 19. Pierce claims that equity estimate was based upon the county tax assessment, less the amount due under the deed of trust. The property was on the market for $650,000. Pierce testified he had interested buyers for the property at the time. The Court finds Proposed Finding of Fact No. 10 has been proven.

11. Pierce testified he believed that he was selling an interest in his Providence Lake Property to McMullen/Highland so that McMullen would catch up the mortgage, make the payments, and market the property; in exchange, Pierce and McMullen would split any profit

from any sale. The Court finds Proposed Finding of Fact No. 11 has been not been proven. There is no evidence to support Pierce's "belief" that he was selling only a partial interest or that Pierce and McMullen would split any profit for sale. The "Contract for Purchase and Sale" directly contradicts Pierce's "belief" that he was selling only a partial interest or that Pierce and McMullen would split any profit for sale.

12. Pierce testified that McMullen prepared and presented to Pierce a series of documents, purportedly to effectuate the sale of an interest to McMullen. The Court finds this portion of Proposed Finding of Fact No. 12 has been proven. Pierce claims the documents were confusing, misleading, and ambiguous, and that the documents were designed to grossly favor McMullen over Pierce in the transaction. The Court finds this portion of Proposed Finding of Fact No. 12 has not been proven. The Court does not find the documents to be confusing, misleading or ambiguous. There were a lot of documents signed, many were simply superfluous, but they were not confusing, misleading or ambiguous.

13. Pursuant to representations made by McMullen or his agents, Pierce claims he believed that he would receive $30,000 "off the top" plus one-half of the profits. The Court finds the first part of this portion of Proposed Finding of Fact No. 13 has been proven. The $30,000.00 amount is corroborated by the Contract for Purchase and Sale, Plaintiff's Exhibit 1, pp. 1, 7. It is also corroborated by the Promissory Note. Exhibit 6. The split of one-half of the profits is not mentioned in the Contract for Purchase and Sale, or any of the other Exhibits submitted by Pierce. Thus, the Court finds the portion of Proposed Finding of Fact No. 13 dealing with the split of profits has not been proven. As a result of the words and conduct of McMullen, Pierce claims he was guaranteed a minimum of $55,829, depending upon the re-sale price of the property. Proposed Finding of Fact No. 13. Such claim is not corroborated by

the Contract for Purchase and Sale or any of the other Exhibits submitted by Pierce, and thus, the Court finds that portion of Proposed Finding of Fact No. 13 has not been proven.

14. Pierce claims McMullen induced Pierce to sign documents that were designed to be confusing, misleading, ambiguous, and grossly favoring McMullen/Highland. Proposed Finding of Fact No. 14. Pierce claims he did not understand the significance or purpose of the documents and relied on McMullen's representations regarding what Pierce believed was the substance of the parties' agreement. *Id.* The Court finds neither portion of Proposed Finding of Fact No. 14 has been proven.

15. Based upon McMullen's representations, Pierce claims he believed the documents he was signing were necessary to the transaction. Such documents included, but were not limited to, a trust agreement (Plaintiff's Exhibit 2), assignment of interest in trust (Plaintiff's Exhibit 3), limited power of attorney (Plaintiff's Exhibit 4) and "Warranty Deed" (Plaintiff's Exhibit 5). Plaintiff also signed and received a promissory note from Defendants for the sum of $30,000, payable upon sale of the property. Plaintiff's Exhibit 6. The Court finds Proposed Finding of Fact No. 15 has been proven.

16. Pierce claims McMullen represented to Pierce that McMullen/Highland would assume the loans for which Pierce was responsible, pay the loan and market the property for sale. Proposed Finding of Fact No. 16. The Court finds Proposed Finding of Fact No. 16 has not been proven. Pierce testified McMullen did not assume Pierce's loan (the Summit, Inc. mortgage). No other evidence was provided by Pierce as to whether or not McMullen did assume the loan. However, Pierce did testify that McMullen made one payment on Pierce's loan, in the amount of about $11,000.00, at a time when the loan was about $20,000.00 in arrears by Pierce.

17. Pierce claims that on or around March 7, 2008, McMullen entered into a compensation agreement for the sale of the property with Century 21 Real Estate on the Lake. Plaintiff's Proposed Finding No. 17. This is corroborated by Plaintiff's Exhibit 7. The Court finds Proposed Finding of Fact No. 17 has been proven. The Court also finds Pierce testified that McMullen did not disclose this real estate agreement to Pierce. Pierce testified the real estate agreement entered into by McMullen did not provide for listing of the property on the multiple listing service. Pierce testified that all McMullen did to try to market the property was to list the property with Century 21 Real Estate on the Lake.

18. Pierce testified that, at about the same time, Pierce had also entered into a real estate contract to market and sell the property. Proposed Finding of Fact No. 18. The Court finds Proposed Finding of Fact No. 18 has been proven. The Court also finds that Pierce testified he could not remember with whom he had listed the property.

19. Pierce testified that Pierce's unknown and now unknowable real estate agent found a buyer for the real property. However, before obtaining a written offer on the property, Pierce testified he discovered through Pierce's real estate agent that the property could not be sold through Pierce's unknown real estate agent. To that extent, the Court finds Proposed Finding of Fact No. 19 has been proven.

20. Pierce claims: "Subsequently, Defendants began pressuring Plaintiff to sign a new Warranty Deed to the Providence Lake Property that transferred all ownership by warranty deed from Plaintiff to the 'Providence Lake Trust. Defendants threatened that if Plaintiff did not sign the new deed, that they would stop making payments on the loans that they had represented to Plaintiff that they had assumed." Proposed Finding of Fact No. 20. No such

testimony was given by Pierce at trial. The Court finds Proposed Finding of Fact No. 20 has not been proven.

21. Pierce claims, "Plaintiff refused to sign the new deed because he became suspicious that Defendant was attempting to transfer the entire interest out of Plaintiff's name." Proposed Finding of Fact No. 21. No such testimony was given by Pierce at trial. Additionally, Pierce transferred all of his interest to the Providence Lake Trust via the Contract and Purchase of Sale (Exhibit 1), the Trust Agreement (Exhibit 2), the Assignment of Beneficial Interest in the Trust (Exhibit 3), the Limited Power of Attorney (Exhibit 4), and the Warranty Deed (Exhibit 5). The Court finds Proposed Finding of Fact No. 21 has not been proven.

22. According to Pierce, McMullen then stopped making the payments on the loans in breach of the parties' contract. Pierce remained the named borrower on the loans at the time that McMullen ceased making payments. Proposed Finding of Fact No. 22. The Court finds Proposed Finding of Fact No. 22 has been proven.

23. Pierce claims, "The Providence Lake Property was subsequently foreclosed." Proposed Finding of Fact No. 23. However, Pierce testified he only assumes the property was sold in foreclosure. Accordingly, the Court finds Proposed Finding of Fact No. 4 has not been proven by a preponderance of the evidence.

24. Pierce claims McMullen promised to pay to Pierce $30,000 as evidenced by the promissory note signed by McMullen. Proposed Findings of Fact No. 24. Pierce claims McMullen continues to owe Pierce $30,000. *Id.* However, the promissory note does not discuss the maker of the note's identity. The note appears to be signed by "Steve McMullen, manager", presumably as "manager" of Highland, LLC. Exhibit 6. Because the maker of the note is unclear, the Court finds Proposed Finding of Fact No. 24 has not been proven.

25. Pierce claims McMullen promised to pay to Pierce one-half of the equity from the sale of the property. Proposed Findings of Fact No. 25. Pierce calculates that one-half of the amount of equity in the property totaled at least $55,829, to save the property from foreclosure. *Id.* As mentioned above in Finding of Fact No. 13, the split of one half of the profits is not mentioned in the Contract for Purchase and Sale or any of the other Exhibits submitted by Pierce. As a result of the words and conduct of McMullen, Pierce claims he was guaranteed a minimum of $55,829, depending upon the re-sale price of the property. Proposed Finding of Fact No. 13. This Court has found such claim is not corroborated by the Contract for Purchase and Sale or any of the other Exhibits submitted by Pierce. Finding of Fact No. 13, above.

26. Pierce claims that McMullen failed to pay Pierce his $30,000 down payment. Proposed Findings of Fact No. 26. The Court finds Proposed Finding of Fact No. 26 has been proven.

27. Pierce claims McMullen failed to pay Pierce a minimum payment of $55,829, for his interest in the property. Proposed Findings of Fact No. 27. The Court finds no evidence supports that claim. The Court finds Proposed Finding of Fact No. 27 has not been proven.

28. Pierce claims McMullen did not save Pierce's property from foreclosure. Proposed Findings of Fact No. 28. The Court finds Proposed Finding of Fact No. 28 has not been proven, because Pierce only testified he "assumed" the property was sold in foreclosure.

29. Pierce claims McMullen promised to pay to Pierce a minimum of one-half his equity, which totaled at least $55,829 for his interest in the Providence Lake Property, and promised to save the property from foreclosure. Proposed Findings of Fact No. 29. This was not proven, as discussed in Finding of Fact No. 13, 25 and 28.

30. Pierce claims McMullen failed to pay Pierce a minimum payment of $55,829, and ultimately did not save the Pierce's property from foreclosure. Proposed Finding of Fact No. 30. The lack of payment claim is unrebutted, so it was proven. The foreclosure issue, as discussed in Finding of Fact No. 13, 25 and 28, was not proven.

31. Pierce claims he has shown that he has sustained ascertainable damages as a result of McMullen's wrongful conduct. Proposed Finding of Fact No. 31. It is clear there is some damage, but the Court finds Pierce has not proven any specific amount. Additionally, the Court finds Pierce has failed to prove liability under the Idaho Consumer Protection Act.

32. Pierce claims McMullen/Highland have repeatedly violated the Idaho Consumer Protection Act. Proposed Finding of Fact No. 32. Pierce called Lee Birge as a witness. She testified that she was introduced to McMullen through a friend, Heidi Russell. This appears to be the same Heidi Russell that Pierce signed all his property to as the Trustee of the Providence Lake Trust (Plaintiff's Exhibit 2), and whom Pierce said he had never met. Birge testified in 2006 she was presented with a bunch of confusing documents with Highland Financial (Exhibits 31, 32, 33, 34) similar to those Pierce signed. Birge testified she signed the documents, lost her house, lost her equity, that Highland Financial sold their house twice while they were still living in it; they subsequently moved and lost their $70,000 equity in the house. Due to Pierce's failure to prove liability under the Idaho Consumer Protection Act, repeated violations are not relevant and the Court will not reach that issue.

33. Pierce claims McMullan/Highlands' violations of the Idaho Consumer Protection Act were flagrant. Proposed Finding of Fact No. 33. The Court finds the Idaho Consumer Protection Act was not violated, and thus, will not reach the issue of flagrant violations.

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CONCLUSIONS OF LAW

1. Pierce claims McMullen engaged in an unfair or deceptive act or practice in the conduct of the transaction with Pierce in violation of I.C. § 48-603(2) by causing likelihood of confusion or of misunderstanding as to the source, sponsorship, approval or certification of the services McMullen/Highland claimed they were providing to Pierce. Proposed Conclusion of Law, No. 1. The Court finds as a matter of fact and law there were no "services" under I.C. § 48-603(2), and there was no "purchase" or "lease" of "goods" or "services" under I.C. § 48-608.

2. Pierce claims McMullen engaged in an unfair or deceptive act or practice in the conduct of the transaction with Pierce in violation of I.C. § 48-603(5), by representing that the services McMullen/Highland claimed to be providing to Pierce had benefits that they did not have – namely to save Pierce from foreclosure; that the transaction was an joint investment with Pierce; and that Pierce would receive money for the sale of the Providence Lake Property by McMullen/Highland. Proposed Conclusion of Law, No. 2. The Court finds as a matter of fact and law that there were no "services" under I.C. § 48-603(5), and there was no "purchase" or "lease" of "goods" or "services" under I.C. § 48-608.

3. Pierce claims McMullen engaged in an unfair or deceptive act or practice in the conduct of the transaction with Pierce in violation of I.C. § 48-603(5) by representing to Pierce that McMullen had sponsorship, approval, status, affiliation, connection, qualifications or license that he did not have. Proposed Conclusion of Law, No. 3. The Court finds there was no testimony on this issue. The Court finds as a matter of fact and law that no violation of I.C. § 48-603(5) was proven.

4. Pierce claims McMullen engaged in an unfair or deceptive act or practice in the conduct of the transaction with Pierce in violation of I.C. § 48-603(9) by "advertising

[McMullen's] goods or services with intent not to sell them as advertised." Proposed Conclusion of Law No. 4. The Court finds as a matter of fact and law there were no "goods" or "services" under I.C. § 48-603(5), and no "purchase" or "lease" of "goods" or "services" under I.C. § 48-608.

5. Pierce claims McMullen engaged in an unfair or deceptive act or practice in the conduct of the transaction with Pierce in violation of I.C. § 48-603(17) by engaging in acts and practices which were misleading, false or deceptive to consumer (Pierce). Proposed Conclusion of Law, No. 5. The Court finds as a matter of fact and law that while McMullen's oral representations to Pierce may have been misleading, false or deceptive, as interpreted by Pierce, and by Pierce ignoring the written documents which he signed, the transaction did not involve a "purchase" or "lease" of "goods" or "services" under I.C. § 48-608.

6. Pierce claims McMullen engaged in an unfair or deceptive act or practice in the conduct of the transaction with Pierce in violation of I.C. § 48-603(18) by engaging in an unconscionable method, act or practice in the conduct of trade or commerce as provided in section 48-603C, Idaho Code, by inducing Pierce to enter into a series of transactions that were excessively one-sided in favor of McMullen. See I.C. § 48-603C. Proposed Conclusion of Law, No. 6. The Court finds as a matter of fact and law this has not been proven. This was one transaction. There was no "purchase" or "lease" of "goods" or "services" under I.C. § 48-608.

7. Pierce claims McMullen engaged in an unfair or deceptive act or practice in the conduct of the transaction with Pierce in violation of I.C. § 48-603(18) by engaging in conduct or a pattern of conduct that outrages or offends the public conscience. Proposed Conclusion of Law, No. 7. The Court finds this was not proven, even through the testimony of Ms. Birge.

Two instances does not make a pattern of conduct. The four exhibits Ms. Birge testified having signed in her dealings with McMullen/Highland (Exhibits 31-34) differ significantly from those Pierce signed.

8. Pierce claims McMullen breached their agreement with Pierce. Proposed Conclusion of Law, No. 8. Pierce has proven he has not received payment on his promissory note. However, there is no cause of action under the Idaho Consumer Protection Act, Pierce has abandoned his implied in law breach of contract theory, has not pled a breach of contract, and the note itself is unclear as to whom is the maker of the note. Plaintiff's Exhibit 6.

9. Pierce claims that as a result of McMullen's violations of the Idaho Consumer Protection Act, Pierce is entitled to the sum of $85,829.00 in ascertainable damages. Proposed Conclusion of Law, No. 9. The Court finds no violations of the Idaho Consumer Protection Act.

10. Pierce claims that as a result of McMullen's repeated and flagrant violations of the Idaho Consumer Protection Act, Plaintiff is awarded the sum of $240,000.00 in punitive damages. Proposed Conclusion of Law, No. 10. The Court finds no violations of the Idaho Consumer Protection Act. The Court finds no repeated violations of the Idaho Consumer Protection Act. The Court finds no flagrant violations of the Idaho Consumer Protection Act.

11. Pierce claims McMullen should be enjoined from engaging in any further deceptive acts or practices in violation of I.C. § 48-608. Proposed Conclusion of Law, No. 11. However, Pierce testified he did not know if McMullen was still in business. The Court finds no injunction is warranted.

12. Pierce claims he should be awarded his actual attorney fees and costs in the prosecution of this matter. Proposed Conclusion of Law, No. 12. Reasonable attorney fees

shall be awarded under the Idaho Consumer Protection Act, but only if the plaintiff prevails. I.C. § 48-608(4). The Court finds plaintiff Pierce has not prevailed on his Idaho Consumer Protection Act claims.

ORDER

IT IS HEREBY ORDERED that plaintiff has failed to prove any of his claims;

IT IS FURTHER ORDERED Pierce's Complaint and First Amended Complaint are DISMISSED WITH PREJUDICE, and that following the Court trial in this matter that Pierce take nothing as a result of this lawsuit.

DATED: July 31, 2012

_____
John T. Mitchell, District Judge

Certificate of Service

I HEREBY CERTIFY that a true and correct copy of the foregoing document was served on the following parties this 22nd day of June, 2012, by the method indicated.

Melanie Bailey, via fax, at (208) 664-1684

Steve McMullen
Defendant Pro Se
P.O. Box 3510
Post Falls, ID 83877
Via U.S. First Class Mail

By: _____
Jeanne Clausen, Deputy Clerk