No. _____

IN THE
Supreme Court of the United States

HENRY W. DEAN,
Petitioner,
v.
D.L. EVANS BANK,
Respondent.

On Petition for Writ of Certiorari to the Supreme Court of Idaho

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether Petitioner's Constitutional right to procedural due process that he is guaranteed under the Fifth Amendment to the U.S. Constitution and made applicable to all states by the Fourteenth Amendment to the U.S. Constitution was violated such that an Idaho Default Judgment is void.

2. Whether service by publication in a local Idaho newspaper and mailed notice to Petitioner's defunct real estate business's Post Office Box was the method most likely to provide Petitioner, who had moved to Seattle, notice and a meaningful opportunity to be heard sufficient to satisfy due process.

3. Whether the Bank's ex parte application for a default and Idaho Default Judgment without notice to Petitioner, who had emailed the Bank a month earlier, violated Petitioner's due process rights.

4. Whether the Bank's knowingly false misrepresentation to courts in Idaho and in Washington, where the Bank attempted to register the Idaho Default Judgment, deprived Petitioner of his due process rights because the Bank's untruthful misrepresentations to these state courts assured the Bank that Petitioner would not become aware of the Idaho Default Judgment's entry until more than one year had passed, and the passage of more than a year from the date a judgment is entered in Idaho was detrimental to Petitioner's right to have the Idaho Default Judgment vacated.

PARTIES TO THE PROCEEDING

The Petitioner in this Court is Henry W. Dean, a Washington citizen and defendant in the proceedings in the Idaho state court below. The Respondent is D.L. Evans Bank ("D.L. Evans" or the "Bank"), an Idaho state-chartered bank. The other Defendants are Petitioners' defunct and bankrupt real estate development businesses Valley Club Homes, LLC; Sun Valley Development, LLC; which were amongst the plethora of real estate ventures that failed due to the 2008 Great Recession.

RELATED PROCEEDINGS

The following proceedings are directly related to this case within the meaning of Rule 14.1(b)(iii):

1. Blaine County, Idaho, District Court of the Fifth Judicial District of the State of Idaho.
    - No. CV-09-625, *D.L. Evans Bank v. Valley Club Homes,* LLC*; Sun Valley Development, LLC; Henry W. Dean; and Linda Badell*.
    - Ex Parte Default and Default Judgment entered January 12, 2010.
2. Blaine County, Idaho, District Court of the Fifth Judicial District of the State of Idaho.
    - No. CV07-20-00101, *D.L. Evans Bank v. Valley Club Homes, LLC; Sun Valley Development, LLC; and Henry W. Dean*.
    - Memorandum Decision and Orders on Cross-Motions for Summary Judgment and Motion to Strike entered December 23, 2021.
    - Order on Motion to Dismiss and Motion for Judgment on the Pleadings entered March 17, 2021.
    - Order Denying Defendant's Motion for Reconsideration entered June 9, 2022.
    - Order on Motions (including summary judgment) entered July 25, 2022.
    - Judgment entered August 9, 2022.
3. Supreme Court of the State of Idaho.

- No. 50134-2022, *D.L. Evans Bank v. Henry W. Dean* and *Valley Club Homes, LLC and Sun Valley Development, LLC*.
- Opinion filed October 30, 2023; rehearing denied December 5, 2023.

4. Washington Superior Court for King County.
   - No. 10-2-34696-1 SEA, *D.L. Evans Bank v. Henry W. Dean, et. al*.
   - Foreign (Idaho Default) Judgment Registration filed September 30, 2010, and renewed January 9, 2015, and Oct. 22, 2019.
5. Washington Superior Court for King County.
   - 10-2-34696-1 SEA, *D.L. Evans Bank v. Henry W. Dean, et. al*.
   - Foreign (Idaho) Judgment (on a Judgment) filed December 16, 2022.
6. U.S. District Court for the Western District of Washington at Seattle.
   - No. 2:18-cv-1408, *BGH Holdings, LLC; Ginger Atherton, and Henry Dean v. D.L. Evans Bank v. BHG Holdings, LLC et al*.
   - Motion to Dismiss fully briefed and pending since November 13, 2023.
7. Court of Appeals of the State of Washington.
   - No. 849018, *D.L. Evans Bank v. Henry W. Dean v. Valley Club Homes, LLC; Sun Valley Development, LLC; and Linda L. Badell.*
   - Unpublished opinion filed December 18, 2023.

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STATUTES AND OTHER AUTHORITIES

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OPINIONS BELOW

D.L. Evans Bank v. Dean, 538 P.3d 793 (Idaho October 30, 2023), *reh'g denied* (Dec. 5, 2023). App. 1a.

The July 25, 2022, Order on Motions of the District Court of the Fifth Judicial District of the State of Idaho, in and for the County of Blaine. App. 27a.

The April 27, 2022, Order of the District Court of the Fifth Judicial District of the State of Idaho, in and for the County of Blaine. Not published. App. 36a.

The April 27, 2022, Order of the District Court of the Fifth Judicial District of the State of Idaho, in and for the County of Blaine. Not published. App. 39a.

The December 23, 2021, Memorandum Decision and Orders of the District Court of the Fifth Judicial District of the State of Idaho, in and for the County of Blaine. Not published. App. 45a.

The April 21, 2021, Order of the District Court of the Fifth Judicial District of the State of Idaho, in and for the County of Blaine. Not published. App. 84a.

The March 17, 2021, Opinion of the District Court for the Fifth Judicial District of the State of Idaho, in and for the County of Blaine. Not published. App. 92a.

The December 5, 2023 Denial of Rehearing of the Supreme Court of the State of Idaho. *D.L. Evans Bank v. Dean*, 538 P.3d 793 (Idaho 2023), *reh'g denied* (Dec. 5, 2023). App. 108a.

JURISDICTION

The Idaho Supreme Court entered an opinion affirming the lower Idaho trial court on October 30, 2023. The Idaho Supreme Court denied rehearing on December 5, 2023. Mr. Dean invokes this Court's jurisdiction under 28 U.S.C. § 1257(a), having timely filed this petition for a Writ of Certiorari within ninety days of the Idaho Supreme Court's denial of rehearing.

CONSTITUTIONAL AND STATUTORY PROVISIONS

U.S. Const. amend. V provides in relevant part, "No person shall be… deprived of life, liberty, or property, without due process of law…."

U.S. Const. amend. XIV, § 2 provides in relevant part: "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF THE CASE

In 2009, D.L. Evans Bank filed a complaint in Blaine County, Idaho, against Henry W. Dean (and other defendants) to collect the alleged deficiency owed pursuant to a promissory note that was secured by a deed of trust that D.L. Evans Bank had already foreclosed upon. *D.L. Evans Bank v. Dean*, 538 P.3d 793, 796 (Idaho 2023), *reh'g denied* (Dec. 5,

2023). Dean was the guarantor on the promissory note pursuant to a continuing commercial guaranty. *Id*.

On the face of the guarantee(s), Dean's last known address, where he had resided, was correctly listed as 126 River Ranch Road, Ketchum, ID 83340. CP 371.

The last known addresses for the bankrupt and defunct entities that borrowed the money owed on the promissory note (also defendants), Valley Club Homes, LLC, and Sun Valley Development, LLC, were also correctly listed as P.O. Box 5500, Ketchum, ID 83340. CP 372. At that time, the annual reports for the entity defendants filed with the Idaho Secretary of State listed the physical address of the borrower entity defendants as 520 Leadville Ave. N, Ketchum, ID 83340. CP 372.

The entity defendants' offices moved from the Leadville Ave. physical address to 171 2nd St., Ketchum, ID 83340, and this was shown in the 2009 annual reports respectively filed with the Idaho Secretary of State on January 19, 2009, and December 13, 2008. CP 372, 277, 279.

Also in 2006, Dean provided D.L. Evans Bank with his cell phone number and email address, both of which remained the same until well after the date the Bank obtained a Default and Default Judgment without providing Dean any notice. CP 372. D.L. Evans and its employees regularly contacted Dean through both that cell phone number and email address. CP 372.

On April 29, 2008, as a consequence of the large wildfire in the Wood River Valley which had begun

in approximately August 2007, and the Great Recession caused, in large part, by the sharp downturn in real estate markets generally in 2007 and 2008, Valley Club Homes, LLC filed a petition for reorganization under Chapter 11 of the United States Bankruptcy Code. CP 372. The records of that case are available in the U.S. Bankruptcy Court for the District of Idaho, cause number 08-40339. CP 372. The history of Dean's real estate companies in Idaho and the reasons leading up to the attempted reorganization in April 2008 were set forth in the Disclosure Statement, which is Dkt. No. 127 in that bankruptcy case,. CP 372.

D.L. Evans Bank was a creditor in the Valley Club Homes, LLC Chapter 11 bankruptcy case, and it moved for, and obtained relief from, the automatic stay as provided in 11 USC § 362. CP 372. D.L. Evans Bank's Motion for Relief from Stay is at CP 245-48. As a creditor, D.L. Evans Bank, through its counsel, received, or had ready access to, the required mailing matrix which lists the addresses and names of any party having an interest in, or being a creditor of, the Debtor in Possession. CP 372. A great number of people and entities listed in that mailing matrix continued to be in contact with Henry Dean throughout the latter part of 2009 and the early part of 2010. CP 372. A copy of the mailing matrix is at CP 271-72.

Leading up to the Chapter 11 filing on April 29, 2008, substantial litigation was commenced against the two entity defendants and Dean in the Idaho state and U.S. Bankruptcy Courts underlying trial court case. CP 373. There were three cases commenced in federal court, and Dean was personally served with process in all three. CP 373.

The affidavits of service in those cases are available on PACER, which is the U.S. Government's system that provides public access to all federal court documents that were field after approximately 2001. CP 373, 243, 274-75, 281.

In May 2008, Dean was served at 126 River Ranch Road, Ketchum, ID 83340. CP 373. Shortly thereafter, he occupied a friend's home, which was a house Dean, through Valley Club Development, had built, which was located at 30 Sage Valley Court, Hailey, Idaho 83333. CP 373, 274-75. That affidavit of service correctly states that he was served on November 26, 2008, "while at the usual abode of the persons to be served (Dean), was: 30 SAGE VALLEY COURT, HALEY, IDAHO 83333." CP 373. Dean was again personally served at that address on March 7, 2009. CP 373, 281.

While Dean had moved to Seattle, he still occupied the 30 Sage Valley Court address while he was winding up his business affairs through at least the end of 2009, and into early 2010. CP 373. Dean insisted that as a lawyer of over 50 years' experience, it is his practice to accept service when tendered, and not to evade it. CP 373.

Randolph C. Stone, the attorney acting for D.L. Evans Bank who obtained the Idaho Default and Idaho Default Judgment against Dean, regularly practiced in federal court and was necessarily knew how to use PACER and how to obtain the information publicly available from the federal district courts and federal bankruptcy court filings. CP 374. Dean was able to confirm quickly that Mr. Stone had been involved in at least 10 cases in the

Idaho U.S. District Court for Idaho between 1988 and 2019. CP 374, 320.

If Mr. Stone had looked at the documents available on PACER for the U.S. District Court Case No. 08-201, indexed under Dean's name as a Defendant, that were filed only nine days before Stone filed the Idaho District Court complaint for a deficiency judgment against Dean on August 14, 2009, then Stone would have discovered Dean had counsel, Thomas N. Bucknell, a Seattle bankruptcy attorney, and Mr. Bucknell's contact information. CP 374. Mr. Bucknell, with whom Dean was working extensively during that time, contacted Dean regularly. CP 374, 283.

As the Bank was aware when it tried to serve the Idaho Complaint for a deficiency, Dean had moved to Seattle, but Dean has never resided in Everett, Washington, which is about 45 minutes – 1 hour north of Seattle. Nor did Dean have a business address anywhere in Everett, Washington, since at least 1995, when he moved to Sun Valley, Idaho. CP 374. Prior to his move to Idaho, Dean was a partner in a partnership called Port Gardner Partners, LP which, in approximately 1994, had an office at 2731 Wetmore Avenue, Suite 500, Everett, WA 98201-3585. CP 374. Prior to 1995, however, Port Gardner Partners had moved to a different building after completing the building's development. CP 374. That the Wetmore address had no connection to Dean whatsoever after the mid-1990s was confirmed by D.L. Evans Bank's own process server, who attempted to serve Dean at the Suite 500 address and reported back to Mr. Stone: "Attempted Service [at 2731 Wetmore Avenue, Suite 500, Everett, WA 98201-3585]. Address is Providence Hospice and

Home Care of Snohomish County. Phone 425-261-4800. Per receptionist, they have been [in] Suite #500 for seven years." CP 374 and 296. Stone and the Bank, therefore, knew Dean would not receive notice if something were mailed to him at that address.

Dean's former wife, Linda Badell, commenced a divorce action against Dean that was also pending in the Blaine County Idaho Court, Case No. CV-2008-0000843. Both Dean's and Badell's attorneys knew Dean often returned to the Ketchum and Sun Valley area, which are in Blaine County, Idaho, and that he stayed at the 30 Sage Valley Court home when he returned. CP 375. In fact, within a few days after the Bank obtained the Idaho Default and Idaho Default Judgment, Dean had returned to Idaho and was involved in an arbitration in Blaine County. CP 375. Dean's wife's attorney, The Hon. Ned Williamson, a judge who presided over the 2020 Idaho Judgment on a Judgment proceedings until he withdrew himself because he felt he could no longer be impartial toward the Bank due to its bad faith litigation conduct, knew how to find Dean when he was in town. CP 375. Dean was personally represented by Stanley Walsh in those divorce proceedings, and both he and Judge (the attorney) Williams knew how to contact Dean. *Id*. Despite Ketchum, Sun Valley, and Blaine County being small and not well populated, neither the Bank nor Stone made any effort to locate Dean to properly serve him with a Summons or the Complaint in the Idaho Deficiency Proceedings. CP 375.

In 2009, Dean was involved in negotiating with multiple attorneys who represented multiple stake holders regarding the Village Green development.

None of those parties or their attorneys; some of whom were local, had any trouble locating or contacting Dean. CP 375. D.L. Evans Bank's local branch manager, Jim Kino, had long been D.L. Evans Bank's loan officer for Dean's real estate entities. CP 375. Kino knew Dean well from years of approving and making construction loans, approving draw requests, and otherwise supervising and managing the loans for which D.L. Evans Bank sought a deficiency judgment in the Idaho case it commenced in 2008. CP 375. The construction draws that Dean requested and Kino approved were paid to Dean's longtime contractor over the previous 14 years, Craig Johnson, who was and remains Dean's a close friend. CP 375. Neither Stone nor D.L. Evans Bank exercised any due diligence or attempted to discover or inquire about Dean's whereabouts or contact information. CP 375.

Dean was also personally served by an Idaho lawyer, Fritz Haemmerle, who represented Clearwater Landscaping Company, Inc. in a Blaine County, Idaho District Court case commenced for Clearwater about one month after Stone and D.L. Evans Bank obtained the Idaho Default and Idaho Default Judgment against Dean on an ex parte basis. CP 376. Not only was Haemmerle able to locate and personally serve Dean the Summons and Complaint in the Clearwater case, after judgment was entered, Haemmerle was also able to find and personally serve Dean a writ in that case when Dean had returned to Hailey, Idaho. CP 376.

In the late fall of 2008, it became impossible to refinance the entity defendants' indebtedness, or to reorganize the company, and for that reason the Chapter 11 case was dismissed. CP 376. Dean

negotiated reasonable and appropriate resolutions with every creditor of the defendant entities and of the many obligations of those companies. CP 376. In most cases he was successful, including cases where litigation had commenced. CP 376.

Armed with the Blaine County Sheriff's Affidavit of Non-Service that stated Dean could not be found in Blaine County, Idaho and stating Dean's soon-to-be former wife Badell said Dean had moved to Seattle, and the Washington process server who reported that Dean could not be located at the Suite 500 address in Everett, Washington (which is not in Seattle), Stone filed an Affidavit with the Idaho trial court representing that Dean could not be found in Blaine County, Idaho, and he requested the Idaho trial court permit him to serve Dean by publication. Concurrently with swearing under oath that Dean could not be found in Blaine County, Idaho, Stone swore under oath that the most likely way to apprise Dean about the Idaho deficiency proceedings was to publish the Summons in the local Blaine County, newspaper and to mail a copy of the Summons and Complaint to Dean's last known address, which Stone swore was the defendant entities' former P.O. Box in Ketchum, Idaho.

On December 9, 2009, Dean sent Stone an email stating he understood D.L. Evans Bank wanted to collect the deficiency they alleged Dean owed after it had foreclosed upon and taken title to the homes that secured the loans it made to the defendant entities. CP 376. Dean sent Stone the email because Dean had called Stone a couple of times to discuss the status of the defendant entities' loans with D.L. Evans Bank, but Stone had not responded to Dean's calls. CP 376-77. In his email to Stone, Dean

included his current telephone number and email address, and offered to meet Stone to discuss resolving any loan balance D.L. Evans Bank alleged may be owed by the defendant entities or Dean. CP 377, 303. Again, Stone did not respond to Dean's email. CP 377.

About one month later, on January 11, 2010, Stone filed an affidavit with the Idaho trial court, ex parte. An affidavit is required before an Idaho trial court enters a default or a default judgment. Stone, in his sworn affidavit, falsely stated that the "address that is most likely to give those parties notice of this judgment, to the affiant's best information and believe, are as follows: Henry W. Deanl [*sic*] 2731 Wetmore Ave., Suite 500, Everett, WA 98201-3585." CP 377, 311-13. Stone knew, however, that the Suite 500 address in Everett, Washington had not been Dean's address for at least the past seven (7) years, and that mailing a judgment to that address would virtually guarantee Dean would receive absolutely no notice whatsoever that the Idaho Default Judgment had been entered.

The following day, January 12, 2010, Stone obtained for D.L. Evans Bank the Idaho Default and the Idaho Default Judgment against Dean for $1,063,503.16. *D.L. Evans Bank v. Dean*, 538 P.3d at 796

On September 30, 2010, DL Evans Bank attempted to register the Idaho Default Judgment in the King County Superior Court in Washington state. CP 5-6. The Bank hired Rhys Faren with Davis Wright Tremain to register the Idaho Default Judgment in King County. Farren filed a declaration under oath that is a prerequisite to

registering a foreign judgment in Washington. In his Declaration, Farren swore under oath that Dean's last known address was the Suite 500 address in Everett, Washington. CP 6. Like the Idaho Default Judgment. D.L. Evans Bank knew this statement was untrue when it was made. Farren and D.L. Evans Bank waited until more than one year had passed since the Idaho Default Judgment was entered before they tried to execute on Dean's assets in Washington to satisfy the Idaho Default Judgment. Dean finally learned about the Idaho Default Judgment being entered in August 2011 when he was served with a subpoena in lieu of supplemental proceedings. D.L. Evans's affirmative and knowing misrepresentations to both the Idaho and Washington courts about Dean's last known address, which assured he would not learn about the Idaho Default Judgment's entry until more than one year passed, detrimentally affected Dean's rights to have the Idaho Default Judgment vacated in Idaho. In Idaho, the only way to vacate a judgment more than one year after it is entered is to prove that it is void for lack or jurisdiction or for violating a party's Constitutional right to due process.

Astonishingly, D.L. Evans Bank repeated making these knowingly false representations in December 2014, in the Idaho trial court when it renewed the Idaho Default Judgment for an additional five (5) years. The Bank knew Dean's correct mailing address in Bellevue, Washington since August 2011 when Farren took Dean's deposition.

On February 21, 2020, D.L. Evans commenced an action against Dean in Blaine County, Idaho, District Court for the same date by alleging an

unpaid balance on a judgment as its cause of action. ("2020 Complaint"). *D.L. Evans Bank v. Dean*, 538 P.3d at 796. Dean's former counsel filed a document entitled, "Notice of Appearance on Behalf of Defendant Henry W. Dean," ' which stated that "[t]his appearance is without waiver of any defenses, including, but not limited to, insufficient service of process and lack of personal jurisdiction." *Id.* Dean later retained his current Idaho counsel, who moved to dismiss the complaint, arguing that the district court no longer had personal jurisdiction over him. *Id.*

The district court denied the motion after concluding that Dean had voluntarily submitted to the court's personal jurisdiction by filing a general notice of appearance. *Id.*

D.L. Evans later filed a motion for summary judgment. *Id.* D.L. Evans argued it was entitled to partial summary judgment because the 2010 Judgment had been properly renewed in 2015 and 2019, and each renewal restarted the six-year statute of limitations for an action on the 2010 Judgment. *Id.* As a result, the bank was entitled to summary judgment because there were no genuine issues of material fact precluding summary judgment. *Id.* The district court granted D.L. Evans' motion. *Id.* The district court concluded that the 2020 Complaint was timely filed because D.L. Evans had properly renewed the 2010 Judgment in 2015 and 2019 and each renewal restarted the statute of limitations for an action on the 2010 Judgment. *Id.*

D.L. Evans next moved the district court for summary judgment on the amount it was owed. *Id.* D.L. Evans sought an award of $1,780,479.56—the

principal amount of the 2010 Judgment plus accrued interest. *Id.* In opposition, Dean argued that the 2010 Judgment was void and requested that the district court set it aside under Idaho Rule of Civil Procedure 60(b)(4). *Id.* Dean argued that D.L. Evans failed to personally serve him with the summons and complaint in 2009, failed to use due diligence to locate Dean for personal service, and the publication method was deficient because it was not likely to apprise him of the Idaho deficiency proceedings. *Id.* The Idaho trial court denied Dean's motion, to vacate the Idaho Default Judgment and concluded that Dean could not collaterally attack the 2010 Judgment because more than one year had passed since it was entered and Dean had failed to demonstrate that it was void on its face. *Id.* at 796-97. The Idaho trial court also concluded that, even if Dean were able to collaterally attack the 2010 Judgment more than one year after it was entered, his attempt to do so was untimely. *Id.* at 797. The Idaho trial court, therefore, entered a final judgment in favor of D.L. Evans, which Dean timely appealed to the Idaho Supreme Court. *Id.*

The Idaho Supreme Court agreed with Dean that the Idaho District Court erred when it concluded Dean was required to demonstrate the Idaho Default Judgment showed on its face that it was void and that it had discretion to deny Dean's Motion to Vacate if it were void for not affording Dean due process. Nonetheless, it concluded that Dean's Constitutional due process rights had not been violated because he knew about the Bank wanting to collect the deficiency it alleged Dean guaranteed. *Id.* at 804. In doing so, the Idaho Supreme Court relied upon the Ninth Circuit Court of Appeals Opinion in

Espinosa and it concluded that actual notice of a lawsuit satisfies a party's Constitutional right to due process. It, therefore, affirmed the Idaho trial court's decision albeit on grounds other that the grounds in which the Idaho trial court erred. *Id*.

The essential facts are not in dispute:

1) Dean had moved to Seattle and was never personally served with the Summons and Complaint in the Idaho trial court deficiency proceedings.
2) Without exercising reasonable due diligence, D.L. Evans Bank falsely represented to the Idaho trial court that Dean could not be found in Idaho because he moved to Seattle, and D.L. Evans Bank was aware that the Suite 500 address in Everett, Washington was not Dean's address.
3) D.L. Evans served Dean by publication in the local newspaper in the Idaho County in which the Bank swore under oath Dean could not be found and by mailing a copy of the Summons and Complaint to his defunct and bankrupt business' former address in Ketchum, Idaho.
4) D.L. Evans Bank's Idaho and Washington counsel both made knowingly untrue misrepresentations on three separate occasions to both the Idaho trial court and the Washington state court about Dean's last known address being the Suite 500 address in Everett, Washington, which D.L. Evans Bank was virtually guaranteed Dean would not receive any mailing to that address.
5) Because of the knowing misrepresentations by D.L. Evans Bank's Idaho and Washington counsel to the courts, Dean did not learn

about the Idaho Default Judgment's entry until more than one year passed since it was entered, and this over one year delay detrimentally affecting Dean's ability to vacate the Idaho Default Judgment.

REASONS FOR GRANTING THE PETITION

The United States Constitution, Amendment V, as made applicable to the states by Amendment XIV, requires a defendant be given procedural due process before a state court may enter an in personam monetary judgment against a defendant. *Mullane v. Cent. Hanover Bank & Tr. Co.*, 339 U.S. 306, 314, 70 S.Ct. 652, 657-58, 94 L.Ed. 865 (1950). Under *Mullane*, minimum due process requires "notice reasonably calculated under all the circumstances to apprise interested parties of the pendency of the action and affords them an opportunity to present their objections." *Id.* at 318.

Mullane was a quasi in rem action that sought to adjudicate rights people had to a common trust fund, and the only notice given of commencement of the action was by publication in a newspaper, as directed by New York law. *Mullane*, 339 U.S. at 307–12. The Supreme Court held notice by publication rendered the New York state decision void because the published notice to beneficiaries, whose places of residency were known by the special guardian of the trust, was inadequate to satisfy the beneficiaries' Constitutional due process rights. This Court stated that the law requiring only notice by publication was "not reasonably calculated to reach those who could easily be informed by other means at hand." *Id.* at 319. The Court held that "the New York Banking Law § 100–c(12) is incompatible with the

requirements of the Fourteenth Amendment as a basis for adjudication depriving known persons whose whereabouts are also known of substantial property rights." *Id*. at 320.

A. Notice by publication to a party outside the jurisdiction alone is insufficient to satisfy due process when other means are available that are more likely to provide notice.

D.L. Evans Bank served Henry Dean by publication. Notice by publication stands on a different footing when individuals to be noticed have known places of residence. *Mullane v. Cent. Hanover Bank & Tr. Co.*, 339 U.S. 306, 318, 70 S. Ct. 652, 659, 94 L. Ed. 865 (1950). Exceptions in the name of necessity do not sweep away the rule that within the limits of practicability, notice must be *reasonably calculated to reach interested parties*. *Id.* (Emphasis added). Where the names and post office addresses of those affected by a proceeding are at hand, the reasons disappear for resort to means less likely than the mails to apprise them of its pendency. *Id.* Notice is inadequate, not because in fact it *fails* to reach everyone, but because under the circumstances it is *not reasonably calculated* to reach those who could easily be informed by other means at hand. *Id.* at 319 (emphasis added).

Federal common law prohibits anything but personal service within a state's territorial jurisdiction to validly guarantee an out-of-state citizen's due process rights. *Pennoyer v. Neff*, 95 U.S. 714, 719, 24 L. Ed. 565 (1877), overruled on other grounds by *Shaffer v. Heitner*, 433 U.S. 186, 97 S. Ct. 2569, 53 L. Ed. 2d 683 (1977).. When this Court issued its ruling in *International Shoe Co. v.*

Washington, 326 U.S. 310, 66 S.Ct. 154, 90 L.Ed. 95 (1945), it retreated from the presence within the territorial jurisdiction of the state being necessary for personal jurisdiction and, instead, conclude certain minimum contacts were sufficient to establish personal jurisdiction. *Int'l Shoe*, 326 U.S. at 316, 66 S.Ct. 154. In response to the *International Shoe* Opinion, states began developing long arm statutes that allow its courts to hale people into court there who have the requisite minimum contacts to establish personal jurisdiction under *International Shoe*. *Ferrer v. Almanza*, 667 S.W.3d 735, 739 (Tex. 2023). Neither *International Shoe* nor *Shaffer v. Heitner*, 433 U.S. 186, 97 S.Ct. 2569, 531 L.Ed.2d (1977) discuss service of process by publication.

This case concerns whether Idaho ever obtained personal jurisdiction over Dean, but Dean does not argue he did not have the requisite minimum contacts with Idaho; rather he argues he did not receive due process. *United States v. Bigford*, 365 F.3d 859, 865–66 (10th Cir. 2004) ("Personal jurisdiction traditionally consists of two distinct components. First, the exercise of jurisdiction must be consistent with the state's jurisdictional requirements, and second, the exercise of jurisdiction must be consistent with the Due Process Clause of the United States Constitution.") This is the concept of "traditional notions of substantial justice and fair play" that *International Shoe* requires. When an out of state defendant is served by substituted service, which is service other than personal service, then the due process component of personal jurisdiction is determined by deciding one critical issue: "whether or not the form of substituted

service…employed is reasonably calculated to give him actual notice of the proceedings and an opportunity to be heard." *Milliken v. Meyer*, 311 U.S. 457, 463, 61 S. Ct. 339, 342–43, 85 L. Ed. 278 (1940).

Quite simply, that is the sole issue raised in Dean's Petition. He argues D.L. Evans Bank did not employ means of substituted service that were "reasonably calculated under all the circumstances to apprise [him] of the pendency of the action and affords [him] an opportunity to present [his]objections." *Mullane,* at 318.

Notice by publication is insufficient to establish in personam jurisdiction over a defendant not found within a state court's territorial jurisdiction. This Court held in *McDonald v. Mabee*, 243 U.S. 90, 92, 37 S.Ct. 343, 344, 61 L. Ed. 608 (1917), "There is no dispute that service by publication does not warrant a personal judgment against a nonresident." In *Stewart v. Eaton*, the state court in Michigan agreed, stating:

> To secure personal jurisdiction over nonresidents, a personal service beyond the limits of the State is equally ineffective as is constructive service by publication. The process of a court runs legally only within the limits of its jurisdiction and it is only by service made within those limits that a right to recognize a personal judgment against a nonresident without his consent is acquired.

Stewart v. Eaton, 287 Mich. 466, 477, 283 N.W. 651 (1939) (citing *Sugg v. Thornton*, 132 U.S. 524, 10 S.Ct. 163, 33 L.Ed. 447 (1889)); *De la Montanya v. De la Montanya*, 112 Cal. 101, 115, 44 P. 345, 32

L.R.A. 82, 53 Am.St.Rep. 165 (1896); *Atherton v. Atherton*, 181 U.S. 155, 21 S.Ct. 544, 45 L.Ed. 794 (1901); and McGehee, Lucius Polk, *Due Process of Law Under the Federal Constitution*, 92 (1906).

Stewart, like this case, was a suit on a promissory note. *Stewart*, 287 Mich. at 472. The note was secured by a mortgage. *Id*. The mortgage securing the note was foreclosed in Illinois and the mortgaged property sold to satisfy the mortgage. *Id.* There was no personal service of process upon defendant in the Illinois suit to foreclose the mortgage. *Id*. There was only substituted service upon defendant by an order of publication made by the Illinois court and then duly published. *Id*. But the Michigan Supreme Court held that constructive service by publication was ineffective beyond the limits of the state. *Id.* at 477.

The Due Process Clause affords protection against "judgments without notice." *Shaffer v. Heitner*, 433 U.S. 186, 217, 97 S. Ct. 2569, 2587, 53 L. Ed. 2d 683 (1977) (Stevens, J., concurring) (citing *International Shoe Co. v. Washington*, 326 U.S. 310, 324, 66 S.Ct. 154, 162, 90 L.Ed. 95 (opinion of Black, J.)). Publication, notice by registered mail, or *extraterritorial personal service* has been an essential ingredient of any procedure that serves as a substitute for personal service within the jurisdiction. *Id.* (emphasis added). In other words, notice may be given inside the jurisdiction by publication or registered mail, but where a person is *outside* the jurisdiction, as was Mr. Dean, personal service is required.

When applying for an order authorizing it to serve Dean by publication, D.L. Evans Bank produced a Declaration of Non-Service from the

Blaine County Sheriff that stated Dean could not be located within Blaine County, and that the Sheriff has been advised Dean moved to Seattle. In one breath, D.L, Evans Bank cites the Sherrif's Declaration as the reason it could not serve Dean within the State. In the next breath, however, it argues that publishing the Summons in the local newspaper and mailing the Summons and Complaint to Dean at the entity defendants' former Post Office Box in Ketchum, Blaine County, Idaho would satisfy *Mullane* that "notice reasonably calculated under all the circumstances to apprise interested parties of the pendency of the action and affords them an opportunity to present their objections."

Both cannot be true, however. If Dean could have been found in Blaine County, then publishing the Summons in the local newspaper and mailing the Summons and Complaint to a local Post Office Box plausibly could have been *Mullane* compliant notice. If the Sheriff's Declaration was correct (which it was) and Dean had moved to Seattle from his former family home in Blaine County, then publishing notice in the Blaine County local newspaper and mailing notice to the defendant entities' former local Post Office Box could not have been *Mullane* compliant notice. Either way, D.L. Evans Bank's diametrically contradictory arguments fail one way or the other.

D.L. Evans Bank's two-sided argument, while palpably implausible, pales in comparison to its egregious conduct that deprived Dean of notice it was going to court for default and default judgment, not allowing him adequate opportunity to present his objections and be heard. Stone stated under oath

that the address that would most likely give Dean notice of the entry of the Default and Default Judgment was the Suite 500 address in Everett, Washington. Nothing happened between September 2009 when Stone swore the best address to provide Dean notice was the Ketchum Post Office Box and January 2010 when Stone swore the best address to give Dean notice was the Suite 500 address in Everett. The only thing that happened was Stone mailed the Summons and Complaint to Dean and Dean, coincidentally, emailed Stone and provided Stone with his contact information.

Not only did Stone not respond to Dean, he never notified the Idaho trial court that Dean had contacted him and provided Stone his contact information. More likely than not, had Stone apprised the Idaho trial court about Dean's email, then the Idaho Court would have required Stone to send Dean notice about D.L. Evans Bank applying for a Default and Default Judgment against Dean. While Dean sent the email to D.L. Evans because he understood D.L. Evans Bank claimed Dean owed them the deficiency and wanted to collect it, neither Stone or the Bank understood Dean's email was coincidentally sent after the Summons and Complaint was mailed to the Ketchum P.O. Box. From Stone's and D.L. Evans Bank's perspective, Dean's email supported the conclusion that the Ketchum P.O. Box was the best address to give Dean notice. Yet, Stone swore under oath it was no longer the best way to notify Dean, and the address he knew Dean was not at for over 7 years had become the best address.

Not only did Stone lie to the Idaho trial court, but D.L. Evans Bank's Washington counsel made the

same untrue representation to the King County Superior Court, which the Clerk of that Court, like the Clerk of the Idaho trial court, was required to mail the Idaho Default Judgment to Dean to provide him *Mullane* compliant notice that the Judgment had been entered and was now being registered in Washington. Then D.L. Evans Bank and its Washington counsel wait almost a year before subpoenaing Dean and taking his deposition wherein he discloses his address.

As can be seen by the Idaho trial court's erroneous decision, Dean's inability to bring a Motion to Vacate within one year after the Idaho trial court entered the Idaho Default Judgment had a profound negative impact on Dean's ability to vacate it.

Then, D.L. Evans Bank did it again in Idaho state court in December 2014.

B. *Espinosa* is inapposite.

Espinosa v. United Student Aid Funds, Inc., 553 F.3d 1193 (9th Cir. 2008), aff'd, 559 U.S. 260, 130 S. Ct. 1367, 176 L. Ed. 2d 158 (2010), the case on which the Idaho Supreme Court relied for the proposition that actual notice satisfies due process requirements, is a rare case with exceptional facts, and is, thus, inapposite. Interestingly, the Idaho Supreme Court did not cite this Court's Opinion; rather it cited the Ninth Circuit Court of Appeals' Opinion. This Court's *Espinosa* opinion states the facts as Espinosa had sought bankruptcy protection under Chapter 13 of the U.S. Bankruptcy Code. This Court framed its constitutional due process analysis as involving Fed. R. Civ. P. 60(b), and noting, "If the opposing party is given no notice at all of the lawsuit,

or notice is so inadequate as to violate due process, any judgment entered against that party would be void (subsection 4), and such constitutionally deficient service would certainly be a just reason for relief from the judgment (subsection 6)." 553 F.3d at 1202. This Court then cited *Mullane v. Cent. Hanover Bank & Tr. Co.*, 339 U.S. 306, 314, 70 S.Ct. 652, 94 L.Ed. 865 (1950) to point out that the standard for what amounts to constitutionally adequate notice, is fairly low; needing only "notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objection." *Id.* (quoting *Mullane).* This Court concluded that the particular notices the student loan creditor, United Student Aid Funds, Inc., received was unusually detailed about its rights and the time within which and the way it had to object to the Debtor's Plan and the legal effects if the lender did not act satisfied due process. There, the student loan lender received the Debtor's proposed Chapter 13 plan, a warning of the consequences of failing to object, and it affirmatively acted by filing a proof of claim, *id.* at 1202-03. After the Debtor's Plan was confirmed the U.S. Trustee sent the lender a copy of the confirmed plan and notified the lender that if it did not notify the Trustee within 30 days, then it would no longer have a right to contest the Plan. Under these peculiar circumstances, this Court did not find the lender's argument that it was because the Debtor failed to personally commence an adversary proceeding and personally serve the

lender that the lender's due process rights were violated. *Id*. at 1205.

This case is readily distinguishable from *Espinosa*. "Notice by publication is a poor and sometimes a hopeless substitute for actual service of notice. Its justification is difficult at best." *City of New York v. New York, N. H. & H. R. Co.*, 344 U.S. 293, 296, 73 S. Ct. 299, 301, 97 L. Ed. 333 (1953). Therefore, in cases like *Espinosa*, where a creditor receives actual notice not only of the bankruptcy proceeding, but also all the information that is required under the required notice, due process is satisfied. *Jackson v. Le Ctr. on Fourth, LLC (In re Le Ctr. on Fourth, LLC)*, 17 F.4th 1326, 1336 (11th Cir. 2021). When creditors only receive actual notice of the pending bankruptcy, but not the proposed plan of reorganization, the hearing date for confirmation, or the claims bar date, then there is a due process violation. *City of New York*, 344 U.S. 293, 297, 73 S.Ct. 299,301; *Spring Valley Farms, Inc. v. Crow*, 863 F.2d 832 (11th Cir. 1989); and *In re Collins*, 647 B.R. 425, 433 (Bankr. M.D. Ga. 2022).

This case is more like *City of New York, Spring Valley Farms,* and *Collins* and is more unlike *Jackson*. Here, Dean knew about a lawsuit, but he was denied the traditional notions of substantial justice and fair play that *Internation Shoe* requires. While he did know about D.L. Evans Bank asserting a claim for a deficiency judgment against him, he did not receive a meaningful opportunity to be heard when Stone refused to respond to Dean, contacted the Idaho trial court ex parte and obtained the Idaho Default and Idaho Default Judgment against Dean without providing Dean any notice whatsoever of those ex parte proceedings. Then, D.L. Evans Bank

lied to the Idaho and Washington courts to make sure Dean did not discover what it had done until after Dean's rights were compromised.

Dean's argument that the Idaho Supreme Court's Opinion is an aberrational departure from this Court's binding precedent is supported by other decisions from this Court. For example, *McDonald v. Mabee*, 243 U.S. 90, 37 S.Ct. 343, 61 L. Ed. 608 (1917), is far more analogous and on point with this case. *McDonald* also involved service by publication on an alleged debtor, Mabee, who was being sued on a promissory note he had signed. *Id.* at 90. The only service upon Mabee was by publication in a newspaper after his final departure from the state, and he did not appear in the suit. *McDonald*, 243 U.S. at 91. Mabee had left Texas with the intent to establish a home elsewhere, although his family still resided in Texas. *Id.* at 91. Mabee was served by publication in a local newspaper once a week for four successive weeks after his final departure from Texas. *Id.* The Texas Supreme Court, like the Idaho Supreme Court in this case, held that service by publication in the local newspaper in Texas satisfied due process, and that the default judgment the Texas state court entered was valid and not void. This Court granted certiorari and reversed the Texas Supreme Court's decision and held service by publication did not warrant a personal judgment against Mabee who no longer was a Texas citizen. *Id.* at 91.

Also in *Memphis Light, Gas & Water Div. v. Craft*, 436 U.S. 1, 98 S. Ct. 1554, 56 L. Ed. 2d 30 (1978). *Memphis Light* defines what is necessary to satisfy due process requirements. The issue in *Memphis Light* was whether due process requires

that a municipal utility notify the customer of the availability of an avenue of redress within the organization should he wish to contest a particular charge. *Id*. at 13. Under *Memphis Light*, the Due Process Clause requires notice informing the customer not only of the possibility of termination but also of a procedure for challenging a disputed bill. 436 U.S. at 12.

This Court held that Memphis Light's notification procedure, while adequate to apprise the customer of the threat of termination of service, was not "reasonably calculated" to inform them of the availability of "an opportunity to present their objections" to their bills, citing *Mullane,* 339 U.S. at 314. *Id.* at 14. This Court went on to say that the purpose of notice under the Due Process Clause is to apprise the affected individual of, and permit adequate preparation for, an impending "hearing." *Id.* Notice did not comport with constitutional requirements when it did not advise the customer of the availability of a procedure for protesting a proposed termination of utility service as unjustified. *Id.* at 14-15. As no such notice was given respondents—despite "good faith efforts" on their part—they were deprived of the notice which was their due. *Id.* at 15.

Again, Dean, although he knew there was a lawsuit, did not have notice of a date, time, or place to be heard, or that a default or default had been sought or entered. He never had a meaningful opportunity to object to the Idaho Default Judgment's entry.

C. Notice must be reasonably calculated, under the circumstances, to apprise interested parties of the pendency of the action and afford them opportunity to present their objections.

Another case relying on and quoting *Mullane*'s requirement of "notice reasonably calculated, under the circumstances, to apprise interested parties of the pendency of the action and afford them the opportunity to present their objections" is *Peralta v. Heights Med. Ctr., Inc.*, 485 U.S. 80, 108 S. Ct. 896, 99 L. Ed. 2d 75 (1988). There, Peralta, the defendant, alleged that the return of service itself showed a defective service, that he in fact had not been personally served at all, and that the default judgment entered against him was therefore void under Texas law. *Peralta*, 485 U.S. at 81-82. The Texas courts nevertheless held that to have the judgment set aside, Peralta was required to show that he had a meritorious defense. *Id.* at 85. This Court disagreed, reversing the judgment below, and holding that where a person has been deprived of property in a manner contrary to the most basic tenets of due process, "it is no answer to say that in his particular case due process of law would have led to the same result because he had no adequate defense upon the merits." *Id.* at 86-87 (quoting *Coe v. Armour Fertilizer Works*, 237 U.S. 413, 424, 35 S.Ct. 625, 629, 59 L.Ed. 1027 (1915)).

> An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under the circumstances, to apprise interested parties of the pendency of the action and afford them the opportunity to

> present their objections." (citing *Mullane* at 314). Failure to give notice violates "the most rudimentary demands of due process of law."

Peralta, 485 U.S. at 84.

In reversing the Texas Supreme Court's decision, this Court reaffirmed the 1915 holding in *Coe v. Armour Fertilizer Works*, 237 U.S. 413, 424, 35 S.Ct. 625, 59 L.Ed. 1027 (1915), by citing *Armstrong v. Manzo*, 380 U.S. 545, 550, 85 S.Ct. 1187, 1190, 14 L.Ed.2d 62 (1965) that when due process is not afforded to a defendant who does not receive proper notice of an action, "wip[ing] the slate clean ... would have restored the petitioner to the position he would have occupied had due process of law been accorded to him in the first place." *Peralta*, 485 U.S. at 87. That is the only reasonable remedy when a party's due process rights have been violated and that is the remedy required in Mr. Dean's case.

Mennonite Bd. of Missions v. Adams, 462 U.S. 791, 103 S. Ct. 2706, 77 L. Ed. 2d 180 (1983) is another case affirming *Mullane*, in particular for the proposition that notice by publication is not reasonably calculated to provide actual notice of the pending proceeding and is, therefore, inadequate to inform those who could be notified by more effective means such as personal service or mailed notice. *Id.*, 462 U.S. at 795.

In *Mennonite*, buyers of real property at a tax sale sought to quiet title. An Indiana statute required notice by certified mail to a property owner, but only publication notice to other interested parties, such as mortgagees. In holding that publication notice to a mortgagee was inadequate, the U.S. Supreme Court stated, citing *Mullane*, that

notice by publication was not reasonably calculated to provide actual notice of a pending proceeding, and was therefore inadequate to inform those who could be notified by more effective means such as personal service or mailed notice. *Mennonite*, 462 U.S. at 792-93.

Here, Mr. Dean, on April 28, 2008, filed a United States Bankruptcy Court Petition for his corporate entity Valley Club Home, LLC listing its street address as 171 2nd Street, Ketchum, ID 83340. Two months later, D.L. Evans filed a Motion for Relief from Automatic Stay in the Sun Valley Homes Bankruptcy using the same law firm that claimed it could not locate Mr. Dean after exercising due diligence. On November 26, 2008, a creditor in *Imperial Cap. Bank v. Henry Dean*, No. CV 1:08-cv-00510-EJL-REB (D. Dist. of Idaho 2008), served Mr. Dean at his residence at #30 Sage Valley Ct., Haley, ID 83333 and an Affidavit of Service was filed in that action on December 8, 2008, and was available on PACER. Aff. Of Service, ECF No. 12. Likewise, another creditor commenced an action in the U.S. District Court, District of Idaho, against Mr. Dean's company, Valley Club Homes, LLC, in *Cal. Nat'l Bank vs. Valley Club Homes, LLC*, 1:09-cv-00086-REB (D. Dist. of Idaho 2009) and served Mr. Dean at his residence at #30 Sage Valley Ct., Haley, ID 83333 on March 7, 2009 and filed the Affidavit of Service on March 12, 2009, that was available on PACER. Aff. Of Service, ECF No. 3.

If *Mennonite* required notice, rather than publication, be mailed to a mortgagee at an address identified in a publicly recorded mortgage, then surely a plaintiff seeking an in personam monetary judgment against an alleged debtor should be

required to personally serve or at least mail the notice to the alleged debtor at an address that is available by reference to the publicly available documents filed in federal proceedings in PACER. Here, those publicly filed documents identified Dean could be served at the 30 Sage Court address, and had been successfully served there just five months prior to the attempted service in the 2009 proceedings.

Instead, D.L. Evans obtained a Sheriff's Statement that was neither notarized nor sworn under oath that the "Serving Officer" received the Summons and Complaint on August 19, 2009, and returned it five days later on August 24, 2009 stating Mr. Dean could not be found in Blaine County, Idaho based solely on a comment made by his soon-to-be former wife who was divorcing him in a contested divorce indicating she thought he was "living in Seattle."

In *Jones v. Flowers*, 547 U.S. 220, 126 S.Ct. 1708, 164 L.Ed.2d 415 (2006), this Court held that when a mailed notice of a tax sale is returned unclaimed, a government agency must take additional reasonable steps to attempt to provide notice to the property owner before selling the property, so long as it is practicable. *Jones*, 547 U.S. at 225. In *Jones*, after the property owner became delinquent on his property taxes, a certified letter was sent to his address informing him that the property would be sold two years later to pay the delinquent taxes. *Id.* at 223. Nobody was home to sign for the letter and nobody retrieved it from the post office, and it was returned to the Commissioner of State Lands "unclaimed." *Id.* at 224. Two years later, and after notice was published in the newspaper without

receiving a response from the taxpayer, the Commissioner received a private purchase offer. *Id*. The Commissioner then sent another certified letter to the owner's last known address; but it also came back unclaimed. *Id*.

The Court held in *Jones* that under the circumstances, it would have been practicable for the State to take additional reasonable steps, though the notice required would "vary with [the] circumstances and conditions [in each case]." *Id*. at 224 (internal quotation and citation omitted). The Court pondered specifically whether due process entails more responsibility when the government becomes aware, prior to the taking, that its attempt at notice has failed and whether that knowledge creates a "circumstance and condition" that varies the "notice required." *Id*. at 227. The Court held that other reasonable measures should have been taken to provide notice to the property owner. *Id*. at 234-35.

As in *Jones*, D.L. Evans Bank swore under oath that the address most likely to provide notice to Mr. Dean was first an address it knew was not his address; rather the entity defendants' former Post Office Box (the entities' then current address was on file with the Secretary of State) and mailed the notice to him at that address. Then after it had reason to believe Dean actually did receive the notice it mailed to Dean at that address, it changed the most likely address to notify Dean from the Post Office Box to the Suite 500 address in Everett, Snohomish County, Washington. Because they attempted to serve Dean at that address four months earlier on September 3, 2009, the bank's Washington process server notified the Bank on

September 4, 2009, that Dean could not be found at that address because that had been the address for "Providence Hospice and Home Care of Snohomish County …Per receptionist they have been Suite #500 for seven years." Mailing Dean any notice to this address would assuredly not be received by him and would not provide Dean any notice at all. D.L. Evans Bank's conduct and that of its counsel in both Idaho and Washington is the antithesis of *Mullane* compliant notice.

D.L. Evans's own files revealed Idaho addresses for Mr. Dean. Immediately before the Great Recession devastated the real estate market in Idaho and elsewhere starting in late 2008, D.L. Evans received an appraisal that was prepared for Mr. Dean's company by an attorney in Boise, Idaho and by an MAI appraiser in Sun Valley, Idaho. Yet, D.L. Evans never contacted either the attorney or the appraiser to attempt to locate Mr. Dean. Additionally, the Commercial Guaranty, itself, that was allegedly signed by Henry Dean and that underpins the deficiency Default Judgment, clearly says that the address for Mr. Dean is 126 River Ranch Road, Ketchum, Idaho 83340.

Federal law determining whether a defendant was afforded the due process required by the United States Constitution is simple and straightforward—courts have a nondiscretionary duty to vacate any default judgment that was entered without affording the defendant the due process required by the U.S. Constitution. *Thomas P. Gonzalez Corp. v. Consejo Nacional De Produccion De Costa Rica*, 614 F.2d 1247, 1256 (9th Cir. 1980) (citing Charles Alan Wright et al, *Federal Practice & Procedure (Wright & Miller) § 2862 Void Judgment* 197 (Mary Kay

Kane 3d ed., 2023)). There is no time limit within which a defendant is allowed to bring a motion to set aside a judgment as void. *Bookout v. Beck*, 354 F.2d 823, 825 (9th Cir. 1965).

D. The Idaho Supreme Court decision conflicts with the decision out of Michigan.

In *Stewart*, *supra*, the Michigan court held that to secure personal jurisdiction over nonresidents, personal service beyond the limits of the state and constructive service by publication were equally ineffective. This holding is in accord with the holding in *Mullane*, *supra*, and the cases following *Mullane*, holding that notice must be reasonably calculated under all the circumstances to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections, and that notice by publication was inadequate when places of residency were known. Idaho did not follow this standard in Mr. Dean's case. This Court should accept review to resolve the conflict between the Idaho and Michigan decisions and uphold the U.S. Constitution's standard of due process.

CONCLUSION

Due Process is a long established fundamental Constitutional right that is guaranteed to all persons in this Country. Dean's due process rights were violated because Dean did not receive notice of the deficiency proceedings, especially D.L. Evans Bank's ex parte application for a default and default judgment, even though it knew Dean's email address and phone number contact information. D.L. Evans Bank also did not provide Dean with a meaningful opportunity to respond. While Dean may have known about the Idaho deficiency proceedings, he

was unaware of any court dates or deadlines within which D.L. Evans Bank would convert its deficiency claim into a judgment. Then D.L. Evans lied to both the Idaho trial court and the Washington courts to make sure Dean did not become aware of the Idaho Default Judgment until his rights to vacate it were substantially diminished.

The Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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MARCH 4, 2024

APPENDIX

TABLE OF APPENDICES

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APPENDIX A — OPINION OF THE SUPREME COURT OF THE STATE OF IDAHO, FILED OCTOBER 30, 2023

IN THE SUPREME COURT OF IDAHO

Docket No. 50134-2022

Boise, August 2023 Term

Opinion filed: October 30, 2023

Melanie Gagnepain, Clerk

D.L. EVANS BANK,

Plaintiff-Respondent,

v.

HENRY W. DEAN,

Defendant-Appellant,

and

VALLEY CLUB HOMES, LLC and SUN VALLEY DEVELOPMENT, LLC,

Defendants.

Appeal from the District Court of the Fifth Judicial District of the State of Idaho, Blaine County. Jonathan P. Brody, District Judge.

The decision of the district court is affirmed.

Appendix A

ZAHN, Justice.

This appeal primarily concerns when the statute of limitations begins to run on a claim for action on a judgment. Respondent, D.L. Evans Bank, obtained a default judgment against Appellant, Henry W. Dean, in 2010. Pursuant to Idaho Code section 10-1111(1), D.L. Evans obtained orders renewing the 2010 Judgment in 2015 and 2019. In 2020, D.L. Evans filed this lawsuit, alleging a single claim for action on the 2010 Judgment and seeking a new judgment for the amount that Dean owed on the 2010 Judgment plus accrued interest, attorney fees, and costs.

The district court concluded that D.L. Evans properly renewed the 2010 Judgment in 2015 and 2019, and that each renewal restarted the applicable six-year statute of limitations on D.L. Evans' claim for an action on a judgment. Dean argues that the district court erred because the limitation period on D.L. Evans' claim began to run when the judgment was first issued in 2010. Dean also argues that the district court erred in denying his motion to dismiss for lack of personal jurisdiction and denying his Idaho Rule of Civil Procedure 60(b)(4) motion to set aside the 2010 Judgment as void. For the reasons discussed below, we affirm the district court.

I. FACTUAL AND PROCEDURAL BACKGROUND

In 2009, D.L. Evans filed a complaint against Dean (and others who have not appeared in this appeal) to collect on a promissory note secured by a deed of trust.

Dean was the guarantor on the promissory note pursuant to a continuing commercial guaranty. After unsuccessful attempts to personally serve Dean with a copy of the complaint and summons, D.L. Evans mailed copies of the documents to Dean via certified mail. D.L. Evans also served Dean via publication. Less than two months later, Dean sent a letter dated December 9, 2009, to D.L. Evans' attorney acknowledging the complaint and asking D.L. Evans to dismiss the lawsuit. However, Dean never appeared in the action, and, on January 12, 2010, D.L. Evans obtained the 2010 Judgment against Dean for $1,063,503.16. On January 9, 2015, after filing a motion to renew the 2010 Judgment, D.L. Evans obtained an order from the district court renewing it. On October 22, 2019, after filing another motion to renew the 2010 Judgment, D.L. Evans obtained a second order renewing the judgment.

On February 21, 2020, D.L. Evans filed a complaint ("2020 Complaint") against Dean (and others who have not appeared in this appeal) alleging a single claim for action on the 2010 Judgment. Dean's former counsel filed a document entitled, "Notice of Appearance on Behalf of Defendant Henry W. Dean,"' which stated that "[t]his appearance is without waiver of any defenses, including, but not limited to, insufficient service of process and lack of personal jurisdiction." Dean later retained his current counsel, who moved to dismiss the complaint, arguing that the district court did not have personal jurisdiction over him. Dean later filed a second motion to dismiss, asserting that the claim was time-barred.

The district court denied both motions. The district court denied the first motion after concluding that Dean had voluntarily submitted to the court's personal jurisdiction by filing a general notice of appearance. The district court denied the second motion on the basis that the parties had failed to adequately brief the issue of whether the 2020 Complaint was timely filed and advised the parties that they could brief the issue in a motion for summary judgment.

Both parties later filed motions for summary judgment. Dean argued that the 2020 Complaint should be dismissed because it was time-barred. D.L. Evans argued that it was entitled to partial summary judgment because the 2010 Judgment had been properly renewed in 2015 and 2019, and each renewal restarted the six-year statute of limitations for an action on the 2010 Judgment. As a result, the bank was entitled to summary judgment because there were no genuine issues of material fact precluding summary judgment. The district court denied Dean's motion and granted D.L. Evans' motion. The district court concluded that the 2020 Complaint was timely filed because D.L. Evans had properly renewed the 2010 Judgment in 2015 and 2019 and each renewal restarted the statute of limitations for an action on the 2010 Judgment.

D.L. Evans next moved the district court for summary judgment on the amount it was owed. D.L. Evans sought an award of $1,780,479.56—the principal amount of the 2010 Judgment plus accrued interest. In his memorandum in opposition to the motion, Dean argued that the 2010

Judgment was void and requested that the district court set it aside under Idaho Rule of Civil Procedure 60(b)(4). Specifically, Dean argued that D.L. Evans failed to properly serve him with the summons and complaint in 2009 and failed to mail other court filings to Dean's last known address. The district court denied Dean's motion, concluding that Dean could not collaterally attack the 2010 Judgment because Dean had failed to demonstrate that it was void on its face. The district court also concluded that, even if Dean were able to collaterally attack the 2010 Judgment, his attempt to do so was untimely. The district court entered a final judgment in favor of D.L. Evans, which Dean timely appealed.

II. ISSUES ON APPEAL

1. Whether the district court erred in denying Dean's motion to dismiss for lack of personal jurisdiction.

2 Whether the district court erred in granting D.L. Evans' motion for partial summary judgment because D.L. Evans' claim for an action on its judgment was time-barred.

3. Whether the district court erred in denying Dean's Rule 60(b)(4) motion to set aside the 2010 Judgment as void.

4. Whether either party is entitled to attorney fees on appeal.

III. STANDARDS OF REVIEW

When reviewing a district court's order granting or denying a motion to dismiss, the standard of review for this Court depends on which subsection of Idaho Rule of Civil Procedure 12(b) is at issue. *Compare Fulfer v. Sorrento Lactalis, Inc.*, 171 Idaho 296, 300, 520 P.3d 708, 712 (2022) (de novo review of a dismissal pursuant to Rule 12(b)(6)), *with Herrera v. Estay*, 146 Idaho 674, 678-79, 201 P.3d 647, 651-52 (2009) (bifurcated review of a dismissal pursuant to Rule 12(b)(5)). We freely review a district court's decision that it possessed personal jurisdiction over an out-of-state defendant, which may be challenged pursuant to Idaho Rule of Civil Procedure 12(b)(2). *See Dep't of Fin., Sec. Bureau v. Zarinegar*, 167 Idaho 611, 621, 474 P.3d 683, 693 (2020).

"When reviewing an order for summary judgment, the standard of review for this Court is the same standard used by the district court in ruling on the motion." *Neeser v. Inland Empire Paper Co.*, 170 Idaho 692, 696, 516 P.3d 562, 566 (2022) (quoting *Mendenhall v. Aldous*, 146 Idaho 434, 436, 196 P.3d 352, 354 (2008)). "The court must grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." I.R.C.P. 56(a). "The burden of establishing the absence of a genuine issue of material fact rests at all times with the party moving for summary judgment." *Neeser*, 170 Idaho at 696, 516 P.3d at 566 (quoting *Van v. Portneuf Med. Ctr.*, 147 Idaho 552, 556, 212 P.3d 982, 986 (2009)). "If there is no genuine issue of material fact, only a question of law remains,

over which this Court exercises free review." *Demoney-Hendrickson v. Larsen*, 171 Idaho 917, 921, 527 P.3d 520, 524 (2023) (citation omitted).

IV. ANALYSIS

A. The district court had personal jurisdiction over Dean.

Dean argues that the district court erred when it denied his motion to dismiss for lack of personal jurisdiction. Dean asserts that the 2020 Complaint failed to allege a basis for the district court's personal jurisdiction over him. Dean also disputes the district court's conclusion that he voluntarily submitted to the jurisdiction of the district court because the notice of appearance specifically stated that it did not waive any defenses, including lack of personal jurisdiction.

D.L. Evans counters that the district court had personal jurisdiction over Dean under Idaho Code section 5-514(a) because the 2010 Judgment arose from a business relationship that Dean had in Idaho. Additionally, D.L. Evans asserts that Dean waived his objection to personal jurisdiction when he consented to jurisdiction in a continuing commercial guaranty and when his attorney filed a notice of appearance in the matter.

The district court denied Dean's motion. It first concluded that the 2020 Complaint alleged sufficient facts to establish personal jurisdiction under Idaho Code section 5-514(a) and (c) because the 2010 Judgment was

"predicated on the transaction of business by the parties and on the ownership, use and possession of real property." The district court then determined that Dean voluntarily submitted to the court's personal jurisdiction when his counsel filed a general notice of appearance in the action.

We agree that Dean's notice of appearance constituted a voluntary appearance waiving any right to contest personal jurisdiction and affirm the district court's decision on that basis. Our analysis of this issue begins with Idaho Rule of Civil Procedure 4.1(a), which provides that the voluntary appearance of a party, except as provided in subsection (b) of the rule, constitutes a voluntary submission to the personal jurisdiction of the court. Subsection (b) of the rule then identifies how a party can specially appear to contest personal jurisdiction:

> (b) Motion or Special Appearance to Contest Personal Jurisdiction. The following do not constitute a voluntary appearance by a party under this Rule:
>
> > (1) a motion under Rule 12(b)(2), (4) or (5), whether raised before or after judgment;
> >
> > (2) a motion under Rule 40(a) or (b);
> >
> > (3) a motion for an extension of time to answer or otherwise appear;
> >
> > (4) the joinder of other defenses in a motion under Rule 12(b)(2), (4) or (5);

> (5) a response to discovery or to a motion filed by another party after a party files a motion under Rule 12(b)(2), (4) or (5), action taken by that party in responding to discovery or to a motion filed by another party;
>
> (6) pleading further and defending an action by a party whose motion under Rule 12(b)(2), (4), or (5) is denied; or
>
> (7) *filing a document entitled "special appearance," which does not seek relief but merely provides notice that the party is entering a special appearance to contest personal jurisdiction, if a motion under Rule 12(b)(2), (4), or (5) is filed within fourteen (14) days after filing the special appearance, or within such later time as the court permits.*

I.R.C.P. 4.1(b) (emphasis added). We have held that a notice of appearance that "reserve[d] all objections and defenses, including but not limited to defenses provided for under Rule 12(b) of the Idaho Rules of Civil Procedure" had "no effect" and constituted a general appearance. *Engleman v. Milanez*, 137 Idaho 83, 85, 44 P.3d 1138, 1140 (2002). Here, counsel for Dean filed a notice of appearance, which could only constitute a special appearance to contest personal jurisdiction if it met the requirements of Rule 4.1(b)(7) and if he subsequently filed the necessary motion within fourteen days after filing the special appearance.

We hold that Dean's notice of appearance did not meet the requirements of Rule 4.1(b)(7) and therefore constituted a general appearance. First, the notice of appearance was not entitled "special appearance." Second, Dean did not file a motion under Rules 12(b)(2), (4), or (5) within fourteen days after filing his notice of appearance, nor did he seek leave from the court to extend the time for such a filing. Having failed to satisfy the requirements to contest personal jurisdiction under Rule 4.1(b)(7), Dean's notice of appearance constituted a voluntary submission to the personal jurisdiction of the court. I.R.C.P. 4.1(a).

Dean argues that the district court erred in concluding that he voluntarily submitted to the district court's personal jurisdiction because his notice of appearance purported to reserve his right to contest personal jurisdiction. Dean also contends that his motion to dismiss was timely under the rule because D.L. Evans' counsel granted him a ten-day extension to respond to the complaint and Dean filed a motion contesting the district court's personal jurisdiction within that timeframe.

Dean's first argument is foreclosed by our decision in *Engleman*. Dean's notice of appearance is virtually identical to the one we found lacking in *Engleman*. It was not entitled "special appearance" and contained only a general statement that Dean was not waiving any defenses, including lack of personal jurisdiction. The notice of appearance did not comply with Rule 4.1(b) and, as a result, it constituted a general appearance under the rule. *See Engleman*, 137 Idaho at 85, 44 P.3d at 1140.

Dean's second argument, that D.L. Evans' extension to answer the complaint served to extend his time to file a motion to dismiss under Rule 4.1(b)(7), is also unpersuasive. Dean cites no authority for his contention that parties can agree to extend the rule's fourteen-day timeframe without the court's express approval. Further, for reasons already discussed, Dean cannot satisfy the other requirements of Rule 4.1(b)(7). Accordingly, we affirm the district court's conclusion that Dean voluntarily submitted to the district court's personal jurisdiction.

B. The 2020 Complaint was timely filed.

Having determined that the district court had personal jurisdiction over Dean, we now turn to the merits of Dean's appeal. The district court concluded that D.L. Evans' claim for an action on its judgment was not barred by the six-year limitation period in Idaho Code section 5-215 (2004).[1] The district court concluded that each time D.L. Evans obtained a court order renewing the 2010 Judgment, the order restarted the limitation period for filing an action on the judgment. It then concluded that D.L. Evans timely renewed the 2010 Judgment in 2015 and 2019, and therefore, its 2020 Complaint for an action on the judgment was timely filed.

Dean argues that the district court erred because the six-year statute of limitations for an action on the judgment began to run when the judgment was originally

1. All references to Idaho Code section 5-215 in this opinion are to the version that existed before it was amended during the 2015 legislative session.

entered in 2010. Dean maintains that the 2015 and 2019 orders renewing the 2010 Judgment are not "judgments"; therefore, they did not restart the statute of limitations for an action on the judgment. D.L. Evans counters that Idaho law unequivocally provided for the "renewal" of its 2010 Judgment. Therefore, the 2015 and 2019 orders renewing the 2010 Judgment restarted the limitation period for an action on the judgment.

At the time the 2010 Judgment was entered, Idaho Code section 10-1111 provided that a judgment was valid for five years. I.C. § 10-1111 (2004).[2] Idaho law also provided two processes for a judgment creditor to ensure the judgment remains effective after the initial five-year period: (1) renewing the judgment under Idaho Code section 10-1111, and (2) bringing a common law "action on the judgment." *See Smith v. Smith*, 131 Idaho 800, 802, 964 P.2d 667, 669 (Ct. App. 1998) (*Smith I*).

Under the first method, a creditor could file a motion in the original case to renew the judgment for an additional five-year period. I.C. § 10-1111. The parties agree that the 1995 version of section 10-1111, which was in effect at the time the 2010 Judgment was entered, is applicable here.

Under the second method, a creditor could bring a common law claim for an "action on the judgment." *Smith I*, 131 Idaho at 802, 964 P.2d at 669; *see also* I.C. § 5-215. An action on a judgment is a new lawsuit seeking a new

2. All references to Idaho Code section 10-1111 in this opinion are to the version that was enacted in 1995 and that remained in effect until it was amended during the 2011 legislative session.

judgment for the amount remaining due on the original judgment. *See Grazer v. Jones*, 154 Idaho 58, 67, 294 P.3d 184, 193 (2013) ("An action on a judgment results in a completely new Idaho judgment in favor of the judgment creditor."). When the 2010 Judgment was issued, Idaho law provided a six-year statute of limitations for an action on a judgment. I.C. § 5-215.

The crux of Dean's statute of limitations argument is that an order renewing a judgment is different than a judgment. Dean does not argue that the 2015 or 2019 orders renewing the 2010 Judgment were improper. Instead, Dean argues that, because the six-year statute of limitations in Idaho Code section 5-215 pertains to an action upon *a judgment*, the 2015 and 2019 *orders* did not restart the six-year statute of limitations. According to Dean, only a document entitled "judgment" can restart the statute of limitations. Dean's argument requires us to interpret the 1995 version of section 10-1111 to determine whether the district court's 2015 and 2019 orders renewed the judgment and, therefore, restarted the six-year statute of limitations for an action on the judgment.

"The objective of statutory interpretation is to derive the intent of the legislative body that adopted the act." *Chester v. Wild Idaho Adventures RV Park, LLC*, 171 Idaho 212, 223, 519 P.3d 1152, 1163 (2022) (quoting *Nelson v. Evans*, 166 Idaho 815, 820, 464 P.3d 301, 306 (2020)). Statutory interpretation begins with the literal language of the statute giving the words their plain, usual, and ordinary meaning. *See Access Behav. Health v. Dep't of Health & Welfare*, 170 Idaho 874, 881, 517 P.3d 803, 810

(2022) (citation omitted). "If the statute is not ambiguous, this Court does not construe it, but simply follows the law as written." *Chester*, 171 Idaho at 223, 519 P.3d at 1163 (quoting *Verska v. Saint Alphonsus Reg'l Med. Ctr.*, 151 Idaho 889, 893, 265 P.3d 502, 506 (2011)). "Statutory language is ambiguous where reasonable minds might differ or be uncertain as to its meaning." *Nordgaarden v. Kiebert*, 171 Idaho 883, 890, 527 P.3d 486, 493 (2023) (alteration omitted) (quoting *City of Idaho Falls v. H-K Contractors, Inc.*, 163 Idaho 579, 582, 416 P.3d 951, 954 (2018)).

The plain language of section 10-1111 provides that a court may "renew" a judgment at any time prior to the expiration of the judgment. It does not specify that a new judgment must be issued in order to renew the prior judgment:

> Unless the judgment has been satisfied, at any time prior to the expiration of the lien created by section 10-1110, Idaho Code, or any renewal thereof, *the court which entered the judgment, other than a judgment for child support, may, upon motion, renew such judgment*. The renewed judgment may be recorded in the same manner as the original judgment, and the lien established thereby shall continue for five (5) years from the date of judgment.

I.C. § 10-1111 (emphasis added). Although the statute does not define the term "renew," "[t]his Court often turns to dictionary definitions '[t]o ascertain the ordinary meaning

of an undefined term in a statute[.]'" *State v. Bodenbach*, 165 Idaho 577, 586, 448 P.3d 1005, 1014 (2019) (second alteration in original) (citation omitted). The edition of Black's Law Dictionary in effect during 1995 defined "renew" as "[t]o make new again; to restore to freshness; to make new spiritually; to regenerate; to begin again; to recommence; to resume; to restore to existence; to revive; to reestablish; to recreate; to replace; to grant or obtain an extension of." *Renew*, Black's Law Dictionary (6th ed. 1990). The plain meaning of the term "renew" indicates that a court order granting a motion to renew a judgment "recommences" the judgment, thus making it new again.

Dean contends that the statutory language providing that "[t]he renewed judgment may be recorded in the same manner as the original judgment" indicates that a document entitled "renewed judgment" must be entered in order to renew a judgment. We disagree and decline to adopt such a narrow reading of the statute. Dean's argument takes the term "renewed judgment" out of context. The sentence immediately prior to the language Dean relies on states that, "the court which entered the judgment . . . may, upon motion, renew such judgment." Nothing in the statute indicates that a separate document entitled "renewed judgment" must be entered. Rather, when read in conjunction with the rest of section 10-1111 and the plain meaning of the word "renew," the language that Dean references simply stands for the proposition that the court order granting the motion to renew constitutes the renewed judgment and may be recorded in the same manner as the original judgment.

We hold that the plain language of section 10-1111 indicated that an order renewing a judgment operated to renew the judgment itself; therefore, the entry of another judgment was unnecessary to renew the original judgment. Our holding is further supported by our recent decision in another case interpreting the 1995 version of section 10-1111, in which we held that "[Idaho Code section] 10-1111 provides for the renewal of judgments, not just judgment liens." *See Alpha Mortg. Fund II v. Drinkard*, 169 Idaho 446, 452, 497 P.3d 200, 206 (2021) (alteration in original) (quoting *Smith I*, 131 Idaho at 802, 964 P.2d at 669).

In *Alpha Mortgage*, the respondent, Alpha Mortgage Fund II, obtained a judgment against the appellants, Robert and Nancy Drinkard, and later moved to renew its judgment within five years after it was entered. *Id.* at 449, 497 P.3d at 203. The district court entered an order renewing the judgment, but Alpha Mortgage never filed or recorded the renewed judgment to extend its judgment lien. *See id.* Within five years of the order renewing the original judgment, Alpha Mortgage filed another motion to renew the original judgment, which the district court granted. *Id.* The Drinkards appealed the district court's second order renewing the original judgment. *Id.*

On appeal, the Drinkards argued that the original judgment expired and the "2015 Judgment"—which was actually the district court's order renewing the original judgment—was not subject to renewal because it had never been recorded. *Id.* at 451, 497 P.3d at 205. Interpreting the same version of section 10-1111 as the one

before us now, we concluded that recording a judgment is unnecessary to the renewal process and rejected the Drinkards' argument because the second order for renewal was timely filed and Alpha Mortgage was not required to record a new judgment in order to renew it. *Id.* at 452-53, 497 P.3d at 206-07.

Similarly, in this case, no additional action beyond entry of the orders of renewal was required to renew D.L. Evans' 2010 Judgment. It was not necessary for D.L. Evans to also obtain a document entitled "renewed judgment," because section 10-1111, "[b]y its terms, . . . provides for the renewal of judgments, not just judgment liens." *Id.* at 451-52, 497 P.3d at 205-06 (citation omitted).

Dean argues that *Alpha Mortgage* does not control the outcome here because it did not concern whether the statute of limitations for an action on a judgment is reset by an order renewing a judgment under section 10-1111. We agree that, while *Alpha Mortgage* is instructive on the question of whether the 2015 and 2019 orders renewed the judgment, it did not address whether the orders could restart the statute of limitations for an action on the judgment. However, our holding today that the 2015 and 2019 orders renewed the 2010 Judgment resolves the issue.

As previously discussed, we hold that the 2015 and 2019 orders renewed the 2010 Judgment. The version of section 5-215 in effect in 2010 provided for a six-year statute of limitations to bring an action on a judgment. Each time the 2010 Judgment was renewed, the renewal restarted the six-year statute of limitations for an action

on the judgment. We therefore affirm the district court's decision that the 2020 Complaint, filed the year after the 2010 Judgment was last renewed in 2019, was timely filed.

C. The 2010 Judgment was not void for purposes of Rule 60(b)(4).

Dean also argues that the district court erred in declining to set aside the 2010 Judgment. The district court concluded that Dean could not set aside the 2010 Judgment through a collateral attack because it was not void on its face. The district court concluded that, even if a collateral attack were allowed, Dean's Rule 60(b)(4) motion to set aside the 2010 Judgment was untimely because the record demonstrated that Dean knew about the 2010 Judgment for over a decade before seeking to set it aside. As a result, the district court never reached the question of whether the 2010 Judgment was void.

Dean argues that the district court's decision is erroneous for several reasons. First, Dean argues that he could attack the validity of the 2010 Judgment in the present action as an affirmative defense to D.L. Evans' action on that judgment. Thus, Dean argues that he did not collaterally attack the judgment and, therefore, the district court erred in concluding that he must demonstrate the 2010 Judgment was void on its face. Dean next argues that the district court erred when it concluded that he failed to timely move to set aside the 2010 Judgment because a motion under Rule 60(b)(4) can be filed at any time. Finally, Dean contends that the evidence he presented in support of his motion for summary judgment established that D.L.

Evans had failed to properly serve him with the summons, complaint, and other documents in the underlying action that resulted in the 2010 Judgment.

D.L. Evans argues that the district court correctly held that Dean could not collaterally attack the 2010 Judgment because he has not argued that it is void on its face. D.L. Evans also argues that Dean's Rule 60(b)(4) motion was untimely. Finally, D.L. Evans argues that Dean was afforded due process in the underlying action and that Dean had actual notice of the underlying action.

"Generally, 'final judgments, *whether right or wrong*, are not subject to collateral attack.'" *Jim & Maryann Plane Fam. Tr. v. Skinner*, 157 Idaho 927, 933, 342 P.3d 639, 645 (2015) (quoting *Cuevas v. Barraza*, 152 Idaho 890, 894, 277 P.3d 337, 341 (2012)). However, a void judgment can be collaterally attacked because a "void judgment is a nullity, and no rights can be based thereon[.]" *Prather v. Loyd*, 86 Idaho 45, 50, 382 P.2d 910, 912-13 (1963) (citations omitted). This Court has historically held that, when collaterally attacked, a judgment must be void on the face of the judgment roll, and the judgment roll historically contained the record of the proceedings. *See Weil v. Defenbach*, 36 Idaho 37, 44, 208 P. 1025, 1026-27 (1922); *Welch v. Morris*, 49 Idaho 781, 783, 291 P. 1048, 1049 (1930); *O'Neill v. Potvin*, 13 Idaho 721, 731-32, 93 P. 20, 24 (1907).

Our holding in *Weil* predated the advent of our current rules of civil procedure. After we promulgated the rules of civil procedure, a separate but related body

of caselaw developed under Rule 60(b)(4), which allows a court to set aside a judgment upon motion when the judgment is void. We have stated that, "[n]otwithstanding the timeliness requirements of Rule 60(b), void judgments can be attacked at any time." *Golub v. Kirk-Scott, Ltd.*, 157 Idaho 966, 970, 342 P.3d 893, 897 (2015) (citing *Meyers v. Hansen*, 148 Idaho 283, 291, 221 P.3d 81, 89 (2009)). Accordingly, a litigant can mount a direct attack under Rule 60(b)(4) on a void judgment in the same action where it was entered or use Rule 60(b)(4) as a vehicle for avoiding the collateral consequences of a void judgment—such as in an enforcement action on the judgment. *See id.*

In light of the foregoing, we hold that the district court twice erred in its analysis of Dean's Rule 60(b)(4) motion. First, the district court erred by concluding that Dean's collateral attack on the 2010 Judgment failed because he did not argue that the judgment was void on its face. In rendering its decision, the district court relied on this Court's decision in *Weil* for the proposition that a collateral attack on a judgment can only succeed when the judgment is void on its face. *See Weil*, 36 Idaho 37, 208 P. 1025. Setting aside that *Weil* references the face of the "judgment roll" not the face of the "judgment," we reiterate today that a Rule 60(b)(4) motion can be brought at any time, including as a collateral attack on a void judgment in an action on that judgment.

The district court also erred when it concluded that Dean's collateral attack on the 2010 Judgment was untimely. As noted, a void judgment may be attacked at any time. *E.g., Golub*, 157 Idaho at 970, 342 P.3d at 897.

Accordingly, Dean was able to challenge the validity of the 2010 Judgment by arguing that it was void. Nonetheless, we affirm the district court's ultimate conclusion denying Dean relief from the 2010 Judgment because Dean has failed to establish that the 2010 Judgment was void. *Syringa Networks, LLC v. Idaho Dep't of Admin.*, 159 Idaho 813, 827, 367 P.3d 208, 222 (2016) ("The Court 'will uphold the decision of a trial court if any alternative legal basis can be found to support it.'" (citation omitted)).

To balance the interest in upholding the finality of judgments with the interest in not enforcing void judgments, the concept of a void judgment is narrowly construed. *Golub*, 157 Idaho at 970, 342 P.3d at 897 (citation omitted). A judgment is void only when there is some jurisdictional defect or the judgment was entered without due process of law:

> In order for a judgment to be void, there must generally be some jurisdictional defect in the court's authority to enter the judgment, either [1] because the court lacks personal jurisdiction or [2] because it lacks jurisdiction over the subject matter of the suit. A judgment is also void where it is [3] entered in violation of due process because the party was not given notice and an opportunity to be heard.

Skinner, 157 Idaho at 933, 342 P.3d at 645 (alteration in original) (citation omitted). A judgment is void on due process grounds when the "court's action amounts to a plain usurpation of power constituting a violation of due

process." *Meyers*, 148 Idaho at 291, 221 P.3d at 89 (quoting *Dep't of Health & Welfare v. Housel*, 140 Idaho 96, 100, 90 P.3d 321, 325 (2004)).

In this case, Dean contends that the judgment violated his procedural due process rights under both the United States and Idaho Constitutions because D.L. Evans failed to properly effectuate service of process on him in the 2009 lawsuit, as required by the Idaho Rules of Civil Procedure. Procedural due process requires notice and an opportunity to be heard, both of which "must occur at a meaningful time and in a meaningful manner[.]" *S Bar Ranch v. Elmore County*, 170 Idaho 282, 307, 510 P.3d 635, 660 (2022) (citation omitted). We conclude that Dean has failed to demonstrate a violation of his procedural due process rights.

Although Dean asserts that D.L. Evans' *service of process* in the 2009 action failed to comply with the Idaho Rules of Civil Procedure, the record establishes that Dean had *actual notice* of the underlying lawsuit, which establishes that he was afforded due process. The record includes a letter that Dean sent to D.L. Evans' attorney on December 9, 2009. In that letter, Dean states that "[y]ou [D.L. Evans] have filed an action against me and my former wife on our personal guarantees for the deficiency arising out of the foreclosure sale of two homes for the bank at the Village Green project located at the Valley Club." A review of the complaint in the 2009 action reveals that Dean's 2009 letter accurately recites the allegations set out in that complaint. The 2010 Judgment was not entered until January 13, 2010, which means

Dean had actual notice of the action more than a month before judgment was entered against him. Despite having received the 2009 Complaint, Dean never appeared in the lawsuit. Moreover, Dean also admitted in a debtor's examination that he had notice of D.L. Evans' lawsuit and chose not to defend:

> I continued with my problem with D.L. Evans, of course, and they chose --I sent them a letter; I tried to work with them; they wouldn't respond. And then a lawsuit was filed. I had no defenses to it, and I know what I'm saying. And so a judgment was taken.

The record demonstrates that Dean received actual notice of the suit and opted not to appear and defend himself. Dean's actual notice of the 2009 Complaint over a month before entry of the 2010 Judgment satisfied the requirements of procedural due process as a matter of law. *See S Bar Ranch*, 170 Idaho at 308, 510 P.3d at 661 (holding that hearing notices lacking certain details related to conditional use permit application did not violate appellant's procedural due process rights because the record revealed that appellant had actual notice of the details prior to the hearing).

Dean does not dispute that he received actual notice of the lawsuit, but instead argues that actual notice does not meet "the high burden of service of process and due process" because "[t]his Court has held on several occasions a defendant's actual notice of a lawsuit—even a defendant's possession of copies of a complaint and

summons—is not sufficient to constitute legally required service of process." While it is true that this Court has held that actual notice is insufficient to demonstrate legally sufficient service of process, we have also held that actual notice would meet the requirements of due process. *Elliott v. Verska*, 152 Idaho 280, 287, 271 P.3d 678, 685 (2010) ("In fact, we held in *Campbell* that receiving a copy of the summons and complaint in the mail, which would obviously meet the requirements of due process, did not constitute service of the summons and complaint." (citing *Campbell v. Reagan*, 144 Idaho 254, 159 P.3d 891 (2007))).

Dean has not cited us to any authority supporting his position that, despite a party having received actual notice of a lawsuit, the failure to properly serve that party constitutes a due process violation. State and federal caselaw hold the contrary. *See id.*; *see also Espinosa v. United Student Aid Funds, Inc.*, 553 F.3d 1193, 1203 (9th Cir. 2008) ("Because 'due process does not require actual notice, it follows a fortiori that actual notice satisfies due process. We find the argument that the Constitution requires something *more* than actual notice strained to the point of bizarre." (internal citation omitted)).

Because Dean had actual notice of the complaint over a month prior to the entry of judgment against him, Dean failed to establish a violation of his procedural due process rights. *See S Bar Ranch*, 170 Idaho at 308, 510 P.3d at 661. As a result, Dean has failed to demonstrate that the 2010 Judgment is void, and we affirm the district court's order refusing to set aside the 2010 Judgment under Rule 60(b)(4).

D. D.L. Evans is entitled to an award of reasonable attorney fees on appeal pursuant to the commercial guaranty.

D.L. Evans seeks attorney fees under the terms of the commercial guaranty that Dean signed, which was the basis for Dean's liability in the underlying lawsuit that resulted in the 2010 Judgment. "Attorney fees on appeal may be awarded to the prevailing party when the parties contemplated such fees in the underlying contract." *Gordon v. U.S. Bank Nat'l Ass'n*, 166 Idaho 105, 123, 455 P.3d 374, 392 (2019) (citation omitted).

D.L. Evans is the prevailing party here because we have affirmed the district court's order. We hold that D.L. Evans is entitled to its attorney fees on appeal as provided in the commercial guaranty that Dean signed. The commercial guaranty contemplates an award of attorney fees related to D.L. Evans' enforcement efforts, including its defense of this appeal:

> Guarantor [Dean] agrees to pay upon demand all of Lender's [D.L. Evans'] costs and expenses, including Lender's reasonable attorneys' fees and Lender's legal expenses, incurred in connection with the enforcement of this Guaranty. Lender may hire or pay someone else to help enforce this Guaranty, and Guarantor shall pay the costs and expenses of such enforcement. *Costs and expenses include Lender's reasonable attorneys' fees and legal expenses whether or not there is a lawsuit, including reasonable attorneys' fees and legal*

> *expenses for* bankruptcy proceedings (including efforts to modify or vacate any automatic stay or injunction), *appeals*, and any anticipated post-judgment collection services. Guarantor also shall pay all court costs and such additional fees as may be directed by the court.

(Emphasis added.) D.L. Evans seeks recovery of attorney fees incurred in connection with its efforts to enforce Dean's liability under the guaranty. The plain language of the guaranty permits this award and we, therefore, award D.L. Evans its reasonable attorney fees on appeal.

Both parties also seek attorney fees on appeal under Idaho Code section 12-120(3). Section 12-120(3) provides that, "[i]n any civil action to recover on . . . any commercial transaction unless otherwise provided by law, the prevailing party shall be allowed a reasonable attorney's fee to be set by the court, to be taxed and collected as costs." Dean has not prevailed on appeal and, therefore, is not entitled to an award of fees. We need not address whether D.L. Evans would be entitled to an award of fees under this statute because we have already determined it is entitled to attorney fees under the commercial guaranty.

V. CONCLUSION

We affirm the district court's judgment in favor of D.L. Evans and award D.L. Evans its reasonable attorney fees pursuant to the commercial guaranty. D.L. Evans is also entitled to its costs pursuant to Idaho Appellate Rule 40.

Chief Justice BEVAN, Justices STEGNER and MOELLER, and Pro Tem Justice BROWN CONCUR.

APPENDIX B — ORDER ON MOTIONS OF THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF BLAINE, FILED JULY 25, 2022

IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT OF THE STATE OF IDAHO IN AND FOR THE COUNTY OF BLAINE

Case No. CV07-20-00101

D L EVANS BANK,

vs.

Plaintiff,

VALLEY CLUB HOMES, LLC, SUN VALLEY DEVELOPMENT, LCC, HENRY DEAN

Defendant.

ORDER ON MOTIONS

On June 27, 2022, a hearing was held on several motions from Defendant and Plaintiff. (For clarity, even though there are multiple Defendants, "Defendant" shall refer to Henry Dean). This hearing heard additional argument on Plaintiff's Motion for Summary Judgment and its supplemental materials. Plaintiff's Motion for Summary Judgment was first heard by this Court on May 23, 2022. Defendant sought to strike this supplementation by Plaintiff.

Appendix B

For reasons stated on the record, Defendant's Motion to Strike Supplement to Plaintiff's Motion for Summary Judgment and Affidavit of Robert Squire Re Ownership of Default Judgment was DENIED. Defendant's Motions Pursuant to IRCP 60(b)(4) and 56(d) and Plaintiff's Motion for Summary Judgment were taken under advisement.

For the following reasons, Defendant's Motions Pursuant to IRCP 60(b)(4) and 56(d) are DENIED. Plaintiff's Motion for Summary Judgment is GRANTED.

FACTUAL AND PROCEDURAL BACKGROUND

Defendants defaulted on a loan provided by Plaintiff. Plaintiff sought a default judgment in Blaine County Case No. CV-2009-625. An entry of default was entered on January 13, 2010. This judgment was renewed on December 17, 2014, and was subsequently amended on January 09, 2015. Another order renewing judgment was entered on October 22, 2019.

On February 21, 2020, Plaintiff initiated this proceeding and sought an Action on Judgment. Plaintiff previously received an Order Granting Partial Summary Judgment in its favor and now seeks to receive full summary judgment on the rest of its claim. Defendant opposes this motion and seeks to set aside the default judgment entered in Blaine County Case No. CV-2009-625 as void due to inadequate and/or improper service via a collateral attack. Defendant has not sought to set aside the judgment directly.

Appendix B

STANDARD OF REVIEW

"The decision to grant or deny a motion to set aside [judgment] generally rests in the sound discretion of the trial court." *Nunez v. Johnson*, 163 Idaho 692, 695 (Ct. App. 2018) (citation omitted). However, a collateral attack seeking to void a judgment is only allowed if the judgment is void on its face. *Weil v. Defenbach*, 36 Idaho 37, 208 P. 1025, 1026 (1922).

> A party may move for summary judgment, identifying each claim or defense, or the part of each claim or defense, on which summary judgment is sought. The court must grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.

Idaho R. Civ. P. 56(a) (2022).

> It is axiomatic that upon a motion for summary judgment the non-moving party may not rely upon its pleadings, but must come forward with evidence by way of affidavit or otherwise which contradicts the evidence submitted by the moving party, and which establishes the existence of a material issue of disputed fact. [The court] liberally construes all disputed facts in favor of the nonmoving party, and all reasonable inferences drawn from the record will be drawn in favor of the nonmoving party.

Appendix B

> If reasonable persons could reach differing conclusions or draw conflicting inferences from the evidence presented, then summary judgment is improper.

Gray v. Tri-Way Const. Services, Inc., 147 Idaho 378, 383 (2009) (quotation marks and citations omitted). Also, this "[C]ourt is not required to search the record looking for evidence that may create a genuine issue of material fact; the party opposing the summary judgment is required to bring the evidence to the court's attention." *Vreeken v. Lockwood Eng'g, B.V.*, 148 Idaho 89, 104 (2009) (citation omitted).

ANALYSIS

I. The judgment in Blaine County Case No. CV-2009-625 is not subject to collateral attack since it is not facially void.

Defendant strongly and repeatedly contends that the judgment entered in CV-2009-625 is void due to inadequate and/or improper service. Defendant also argues that the judgment is subject to collateral attack due to Plaintiff submitting a Commercial Guaranty document in that case as well as this case. However, these arguments are without merit.

A collateral attack seeking to void a judgment can only happen where the judgment is void on its face. *Weil v. Defenbach*, 36 Idaho 37, 208 P. 1025, 1026 (1922). The facts in *Weil* are also important here. The defendant in

Weil stated that he never received service at any time or place. *Id.* The defendant sought to void the judgment via collateral attack. *See id.* The Idaho Supreme Court found that the district court did not err in finding that the judgment was not void on its face. *Id.*

Here, Defendant emphatically states that Plaintiff sent service to an old address once used by Defendant. Defendant states that Plaintiff knew this address was not the best address to serve Defendant and therefore, attempts to serve at that address were inadequate and improper. Also, Defendant states that since Plaintiff tried to serve him at this old address, it was insufficient to demonstrate that service by publication would be appropriate. However, even in the light most favorable to Defendant, these arguments are inapposite.

Defendant has not articulated how service at an old address, and a later service by publication, cause the judgment to be void on its face. Defendant does not cite to any authority that state that this is a judgment void on its face and subject to collateral attack. In fact, this case is very similar to *Weil*, where the defendant stated that they were not properly served and did not have proper notice of the case. This simply is not enough to show that a judgment is facially void. *Id.*; *see also Tingwall v. King Hill Irr. Dist.*, 66 Idaho 76, 82 (1945).

Also, Defendant has not cited to any authority that allows a collateral attack on a judgment if a document in the possession of a party is used in this proceeding and the underlying case. Much less, Defendant does not

provide any argument that use of this document causes the judgment to be void on its face and therefore subject to collateral attack.

Therefore, Defendant's collateral attack to void the judgment in Blaine County Case No. CV-2009-625 is unavailable since the judgment is not facially void.

In the alternative, even if a collateral attack were allowed, the attack would be untimely. In Defendant's own declaration, Defendant was apprised of the entry of default judgment over a decade ago. *See* Declaration of Henry W. Dean in Opposition to Plaintiff's Motion for Partial Summary Judgment p. 6 (July 26, 2021) ("I received no notice of the entry of the Idaho Default Judgment until more than a year later."). There is also some evidence that Defendant knew about these proceedings before a default was entered. *See* Declaration of R.C. Stone Exhibits A and B (August 2, 2021) (A certified mail receipt dated September 16, 2009 that was sent to Henry Dean and an email sent from Henry Dean to R.C. Stone referencing the lawsuit in December 2009).

To allow a motion to set aside judgment in a collateral attack, more than a decade after Defendant learns of the entry of default, would be an abuse of judicial power. *See McGrew v. McGrew*, 139 Idaho 551, 559, 82 P.3d 833, 841 (2003) (questioned on other grounds) ("Where judgment is entered without the party's knowledge, what constitutes a reasonable time is judged from the time that the party learned of the judgment.").

Thus, even if a collateral attack were available to Defendant, the Motion to Set Aside Judgment would fail due to untimeliness.

II. There is no genuine issue of material fact.

Defendant states that there are multiple genuine issues of material fact that would preclude summary judgment. The majority of Defendant's arguments attack the underlying judgment, which as discussed earlier, these do not raise genuine issues of material fact since the judgment is not void and not subject to collateral attack. Thus, the remaining issue for this Court is if summary judgment on Plaintiff's Action on Judgment is proper.

In an action on judgment, which is a common law remedy, Plaintiff must demonstrate that it is the owner of a judgment and that the judgment has not been paid. *Pratali v. Gates*, 4 Cal. App. 4th 632, 644 (1992) ("In an action on the judgment, the only relevant question is whether the judgment has been satisfied or remains unpaid."); *see also Bennett v. Bank of E. Oregon*, 167 Idaho 481, 492 (2020) *and Idaho Tr. & Sav. Bank v. Ridenbaugh*, 29 Idaho 647, 161 P. 868, 871 (1916).

Defendant argues that there is a genuine issue of material fact if Plaintiff owns the judgment and if the amount of judgment is proper based on the sale of real property that was once owned by Defendants. However, each of these arguments are without merit.

Appendix B

Plaintiff has submitted an affidavit from Robert Squire that shows that Plaintiff owns the judgment. *See* Affidavit of Robert Squire Re Ownership of Default Judgment (June 6, 2022). Plaintiff assigned the judgment to Karma Power, LLC, which was later reassigned to Plaintiff from Karma Power, LLC. *Id.* at Exhibits A and C. Defendant stated in the hearing that it believes that there are still "gaps" in the ownership timeline. However, Defendant does not point to any specific time or timeframe or present any documents, affidavits, or other evidence that would contradict the evidence provided by Plaintiff that shows Plaintiff owns the judgment against Defendant. Since Defendant's arguments are merely conclusory, and Plaintiff has put forth evidence of its ownership of the judgment, there is no genuine issue of material fact that Plaintiff owns the judgment.

Defendant argues that the balance of the judgment is incorrect since Plaintiff sold the real property that was once owned by Defendants after the default is entered. Defendant fails to mention that in the Complaint in Blaine County Case No. CV-2009-625 that Plaintiff states that it bought these properties on credit before the Default and pursued the deficiency against Defendants. This was also read into the record in this case during the deposition of Robert Squire. *See* Supplemental Declaration of Counsel in Support of Defendant Henry W. Dean's Opposition to Plaintiff's Motion for Summary Judgment Exhibit H pp. 27-32 (April 06, 2022). However, Defendant fails to present any authority or argument of how he is entitled to the proceeds after Plaintiff purchased these properties on credit and sold them at a later date.

Defendant seeks to challenge appraisals from the time of the default and otherwise re-litigate the underlying case. Any of that information is irrelevant to this case. Even if the underlying case could be re-litigated, it should have been a decade ago via a motion to set aside the original judgment in the underlying case. Not that such a challenge would have prevailed necessarily, but any such issues could have been raised and should have been raised in 2010 or 2011.

Defendant also asks for additional time to respond to Plaintiffs Motion for Summary Judgment under Rule 56(d). However, Defendant has had plenty of additional time since its request to conduct additional discovery and supplement the record. This Court even asked Defendant at the hearing on June 27, 2022, if he would like additional time to respond and Defendant averred. Therefore, no additional time will be granted.

CONCLUSION

Defendant's Motion to Strike and Motions Pursuant to Rule 60(b)(4) and Rule 56(d) are DENIED. Plaintiffs Motion for Summary Judgment is GRANTED.

IT IS SO ORDERED

1/21/2022 4:34:20 PM
Date

/s/
Jonathan Brody
Fifth District Judge

APPENDIX C — ORDER OF THE UNITED STATES DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF BLAINE, FILED JUNE 9, 2022

IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF BLAINE

Case No. CV07-20-00101

D.L. EVANS BANK,

Plaintiff,

v.

VALLEY CLUB HOMES, LLC, SUN VALLEY DEVELOPMENT, LLC, HENRY W. DEAN,

Defendants.

ORDER DENYING DEFENDANT'S MOTION FOR RECONSIDERATION

On December 23, 2021, the district court entered its Memorandum Decision & Orders on Cross-Motions for Summary Judgment and Motion to Strike. Partial Summary Judgment was entered in favor of Plaintiff. On February 02, 2022, Defendant Henry W. Dean submitted a Motion for Reconsideration along with a Memorandum in Support of Motion. For the following reasons, this motion is DENIED.

Appendix C

STANDARD OF REVIEW

> On a motion for reconsideration, the court must consider any new admissible evidence or authority bearing on the correctness of an interlocutory order. However, a motion for reconsideration need not be supported by any new evidence or authority. When deciding the motion for reconsideration, the district court must apply the same standard of review that the court applied when deciding the original order that is being reconsidered . . . . [This Court] was asked to reconsider the granting of a motion for [partial] summary judgment, so the summary judgment standard applie[s to] the motion for reconsideration[.]

Fragnella v. Petrovich, 153 Idaho 266, 276 (2012).

ANALYSIS

I. Defendant does not raise any genuine issues of material fact to prevent the granting of partial summary judgment.

Defendant's additional factual assertions don't change the analysis or create genuine issues of material fact. This Court has examined the district court's decision and finds that its legal analyses and conclusions are sound and well-reasoned. As such, this Court will not revisit that decision. The decision was and is correct. The arguments advanced by Defendant do not support reconsideration.

Appendix C

CONCLUSION

Defendant has not demonstrated any genuine issues of material fact to prevent an award of partial summary judgment in favor of Plaintiff in the Motion for Reconsideration. Thus, Defendant's Motion for Reconsideration is DENIED.

IT IS SO ORDERED

6/8/2022 2:37:44 PM

_____

Date

/s/ Jonathan Brody
Jonathan Brody
Fifth District Judge

APPENDIX D — ORDER OF THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF BLAINE, FILED APRIL 27, 2022

IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF BLAINE

Case No. CV07-20-00101

D.L. EVANS BANK,

Plaintiff,

v .

VALLEY CLUB HOMES, LLC, SUN VALLEY DEVELOPMENT LLC, HENRY W. DEAN

Defendants.

ORDER ON MOTION FOR DISQUALIFICATION

The matter before the Court is a Motion for Disqualification of Judge for Cause ("Motion for Disqualification") filed by Plaintiff, D.L. Evans Bank ("D.L. Evans"). The Motion for Disqualification is based on I.R.C.P. 40(b)((1)(C) and (D). D.L. Evans did not request a hearing on the Motion for Disqualification. The Defendant, Henry Dean ("Dean"), opposes the Motion for Disqualification.

Appendix D

On April 18, 2022, the Court conducted a hearing on a Motion for Reconsideration filed by Dean and a Motion for Summary Judgment filed by D.L. Evans. In the motion for summary judgment, Dean moved under I.R.C.P. 60(b)(4) for an order relieving Dean from the judgment entered in Blaine County Case No. CV2009-625 ("2009 Case"). At the hearing on the pending motions, the Court requested briefing on the propriety of seeking relief from a judgment in the 2009 Case under Rule 60(b)(4) in this case. The Court set a briefing schedule and scheduled a hearing on the motions for May 23, 2022 at 3:00 p.m. Shortly after the April 19 hearing, D.L. Evans filed the Motion to Disqualify.

In pertinent part, I.R.C.P. 40(b)(1) provides:

> (C) the judge has been attorney or counsel for any party in the action or proceeding;
>
> (D) the judge is biased or prejudiced for or against any party or the subject matter of the action.

I.R.C.P. 40(b)(1)(C) is not applicable. The Court has not been an attorney in this action or proceeding. The Court did briefly represent a party in 2009 Case, but that case is a collateral case. I.R.C.P. 40(b)(1)(C) only refers to "the" action or proceeding, not to a collateral or related case. Equally important and as explained later, D.L. Evans was informed of the Court's representation of Mr. Dean's ex-wife, who is a named defendant in the 2009 Case, but then D.L. Evans expressly stated it was comfortable with the Court remaining in the case.

For two reasons, I.R.C.P. 40(b)(1)(D) is also not applicable. First, D.L. Evans fails to submit any evidence of bias or prejudice by the Court. To the contrary, the Court states without any reservation that it does not have any bias or prejudice for or against either party in this matter. Second, D.L. Evans has waived any objection to a disqualification based on a prior representation of Mr. Dean's wife. At the first hearing in this case, the Court disclosed that it represented Mr. Dean in real estate matters many years ago and Mr. Dean's ex-wife. *See court minutes* on February 8, 2021. At this initial hearing, the Court stated it did not have any bias for or against either party in this matter. The Court advised the attorneys that they could consult with their clients and advise the clerk whether either party wished the Court to recuse itself. The Court's statements to the parties comply with Canon 2.11(C) of the Idaho Code of Judicial Conduct. The attorneys for both parties stated they were comfortable proceeding without recusal. Under this scenario, the Code of Judicial Conduct allows a judge to participate. In summary, there is no basis for a disqualification of the Court under I.R.C.P. 40(b)(1)(C) or (D).[1] For these reasons, the Court denies the Motion for Disqualification.

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1. D.L. Evans also relies on a statement by Mr. Dean that D.L. Evans could have located him to serve him with a complaint in the 2009 Case by contacting his divorce attorney or his ex-wife's divorce attorney, Ned Williamson, who earlier hired a process server to Dean in the divorce case. D.L. Evans contends that the Court is a fact witness. Regardless, D.L. Evans fails to allege grounds for disqualification based on the Court's role as a "fact witness." Whether the Court is a fact witness is not germane to I.R.C.P. 40(b)(1)(C) or (D).

Appendix D

Notwithstanding the analysis under I.R.C.P. 40(b)(1)(C) and (D), the Court will recuse itself from this case. The Court is disturbed by the dilatory maneuvers of D.L Evans. D.L. Evans was aware of the Court's involvement with Mr. Dean's ex-wife since February 2021. Even before the Court had an opportunity to disclose its involvement with Dean and his ex-wife, Dean submitted evidence that service was not proper for the Court to enter the default judgment in the 2009 Case.[2] As such, D.L. Evans was on notice that Dean was challenging the judgment in the 2009 Case and if D.L. Evans believed that attorney Ned Williamson had a material role in the 2009 Case, D.L. Evans should have raised that issue much sooner in this litigation. D.L. Evans attempts to justify its late maneuver by explaining that it did not believe issues in the 2009 case would surface in the pending case. That justification acknowledges that D.L. Evans made a conscious decision not to raise any issue about the Court's involvement in the 2009 case when the Court disclosed its relationship with Dean and his ex-wife. By making such a decision, D.L. Evans would have at least considered the possibility that the Court's prior involvement could be problematic. Regardless whether D.L. Evans made such an analysis, D.L. Evans should not have waited to raise that issue at this late date. D.L. Evans' late challenge has needlessly wasted time, money and judicial resources and may now lead to an inconsistent result.

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2. *Declaration of Henry W. Dean* filed November 2, 2020. Later, Dean alleged an affirmative defense that the underlying judgment in the 2009 Case was not valid. *Answer to Complaint and Demand for Jury Trial*, p. 4.

Appendix D

The Court is also disturbed by the unfounded accusations by D.L. Evans. Without any citation to the record, counsel for D.L. Evans, Mr. Rhett Miller, states, Judge Williamson has "advocated for a party against whom the Default Judgment was entered, thereby forming a bias in favor of the Defendants in the 2009 Case, and independent opinions and bias relating to the facts and subject matter therein." *Motion for Disqualification*, p. 2. A review of the record in 2009 Case shows that attorney Ned Williamson made a "Notice of Appearance," which merely states that he was appearing in the matter without any admission or denial. Then attorney Ned Williamson filed a motion to withdraw, which the Court granted. Contrary to D.L. Evans' argument, there is nothing in the record in 2009 Case showing that attorney Ned Williamson "advocated for a party against whom the Default Judgment was entered." Without any basis in the record or in fact, the statements that the Court advocated against D.L. Evans and formed a bias are reckless. Such statements are not acceptable in any pleading filed with any court.

Based on D.L. Evans' latest arguments, the Court has developed a level of skepticism with D.L. Evans' arguments. If the Court retained this case, the Court would be viewing the arguments of D.L. Evans and its attorney through a lens of distrust. For this reason and this reason alone, the Court will recuse itself from this matter. The Court will avoid the appearance of any impropriety by recusing itself from further proceedings.

The Court strongly believes that it has an obligation to preside over cases even when it may be convenient to

recuse itself from a proceeding. The Court is reluctant to remove itself from the case. This recusal may result in a delay and added expense to the parties. A reassignment will also result in considerable burden on a new judge. But at the end of the day, the parties should focus on the facts and law, not the Court. To that end, the Court DENIES the Motion for Disqualification but will enter an Order of Voluntary Disqualification. The current schedule for briefing shall remain in effect and the hearing on May 23, 2022 shall be conducted, unless otherwise revised by the assigned District Judge.

IT IS SO ORDERED this 27th day of April, 2022.

4/27/2022 1:13:36 PM

/s/ Ned C. Williamson
Ned C. Williamson, District Judge

APPENDIX E — MEMORANDUM DECISION AND ORDERS OF THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF BLAINE, FILED DECEMBER 23, 2021

IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF BLAINE

Case No. CVO7-20-00101

D.L. EVANS BANK,

Plaintiff,

vs.

VALLEY CLUB HOMES, LLC, SUN VALLEY DEVELOPMENT LLC, HENRY W. DEAN

Defendants.

MEMORANDUM DECISION AND ORDERS ON CROSS-MOTIONS FOR SUMMARY JUDGMENT AND MOTION TO STRIKE

I. INTRODUCTION

The matters before the Court are Defendant Henry W. Dean's Motion for Summary Judgment ("Dean's Motion for Summary Judgment") and Defendant Henry W. Dean's Motion to Strike Affidavit of Rhett M. Miller in Support of Plaintiff's Reply to Defendant Dean's Memorandum

in Opposition to Plaintiff's Motion for Partial Summary Judgment ("Dean's Motion to Strike") filed by Henry W. Dean ("Dean"), and Plaintiff's Motion for Partial Summary Judgment ("D.L. Evans' Motion for Partial Summary Judgment") filed by D.L. Evans Bank. Dean's Motion for Summary Judgment, Motion to Strike and D.L. Evans' Motion for Partial Summary Judgment are referred to as the "Motions."

This is a post-judgment proceeding. D.L. Evans is a judgment creditor and Dean is the judgment debtor. The original judgment is in excess of one million dollars. The primary issue before the Court is whether D.L. Evans is time-barred from filing an "action on a judgment" under the applicable statute of limitations. To reach that issue, the Court must first address several subsidiary issues. The material facts in this case are simple and undisputed. Accordingly, the cross-motions for summary judgment can be resolved based on the law. Unfortunately, the law involving an action on a judgment and a motion for renewal of a judgment is not so simple and greatly disputed by the parties. Based on the Court's analysis of the law, the Court finds that the action on a judgment against Dean is not time-barred. Therefore, the Court DENIES Dean's Motion for Summary Judgment and GRANTS D.L. Evans' Motion for Partial Summary Judgment.

II. PERTINENT PROCEDURAL HISTORY

On February 21, 2020, D.L. Evans filed a Complaint alleging Action on a Judgment against Dean, Valley Club Homes, LLC and Sun Valley Development LLC

(collectively "Defendants"), based on a default judgment entered by this Court in 2009. The Court previously heard Henry W. Dean's Motion to Dismiss and Motion for Judgment on the Pleadings and Henry W. Dean's Second Motion to Dismiss.[1] The Court entered orders denying both motions and allowed the case to proceed. Eventually, Dean filed an Answer to Complaint and Demand for Jury Trial, generally denying the allegations in the Complaint and asserting affirmative defenses, including the statute of limitations under Idaho Code § 5-215. Both parties filed motions for summary judgment. A jury trial is scheduled to begin August 9, 2022.

The Court conducted a hearing on the Motions on September 20, 2021. D.L. Evans was represented by Rhett Miller, Esq. and Robert Squire, Esq. Dean was represented by Bradley VandenDries, Esq. At the conclusion of the hearing, the Court took the matter under advisement. On October 29, 2021, D.L. Evans filed a Motion to Present Supplemental Legal Authority Re Motions for Summary Judgment, alerting the Court to a recent Idaho Supreme Court decision *Alpha Mortgage Fund II v. Robert L. Drinkard and Nancy A. Drinkard and Pheasant Run VI, LLC,* 2021 WL 4762575, 497 P.3d 200 ("Alpha Mortgage") that D.L. Evans believes

1. The Court clarifies one portion of the Order on Second Motion to Dismiss. On page 5 of the Order on Second Motion to Dismiss, the Court states, "the statute of limitation for an Action on a Judgment begins to run on date of the renewed judgment lien." The Court revises this statement to delete "lien." The statute of limitation begins on the date of the judgment. *Grazer v. Jones,* 154 Idaho 58, 66, 294 P.3d 184, 192 (2013).

is dispositive on some or all of the issues raised in the cross-motions for summary judgment. The Court provided the parties an opportunity to simultaneously brief the applicability of Alpha Mortgage. Both parties submitted their briefs and the Court again took the matter under advisement. The Court now renders its decision.

III. UNDISPUTED FACTS

The material facts necessary to decide the cross-motions for summary judgment are undisputed. Those material undisputed facts are as follows:

1. On January 12, 2010, D.L. Evans obtained a judgment ("Original Judgment") against Dean for a principal sum of $1,063,503.16 together with the statutory rate of interest in Blaine County Case No. CV-09-625 ("Original Case").[2]

2. On January 9, 2015, D.L. Evans obtained an order renewing judgment ("First Amended Renewal Order") against Dean in the Original Case. *Squire Affidavit,* p. 2, ¶ 3.

3. On October 22, 2019, D.L. Evans again obtained an order renewing judgment ("Second Amended Renewal Order") against Dean in the Original Case. *Squire Affidavit,* p. 2, ¶ 4.

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2. *Affidavit of Robert Squire in Support of Plaintiff's Motion for Partial Summary Judgment* ("Squire Affidavit"), pp. 2-3, ¶ 2.

4. On February 21, 2020, D.L. Evans filed a Complaint alleging an Action on a Judgment against the Defendants in this case. *Complaint.*

5. Following the First and Second Amended Renewal Orders, a renewed judgment was not filed in the Original Case.[3]

IV. STANDARD OF REVIEW

A. Motions to Strike.

A court can only rely on admissible evidence when ruling on motions for summary judgment. *Campbell v. Kvamme*, 155 Idaho 692, 696, 316 P.3d 104, 108 (2013). Affidavits submitted in support of or opposition to motions for summary judgment must contain admissible evidence and be based on the personal knowledge of affiant. *I.R.C.P. 56(c)(4)*. A motion to strike is a permissible method to challenge the admissibility of affidavits or declarations

3. Dean requests the Court to take judicial notice of the "absence" of renewed judgments in the Original Case. *Memorandum in Support of Defendant Henry W. Dean's Motion for Summary Judgment*, p. 3. D.L. Evans has not objected to the request to take judicial notice of the absence of renewed judgments in the Original Case. *See generally Memorandum in Opposition to Defendant's Motion for Summary Judgment.* I.R.E. 201(c) requires the Court to identify the document so noticed. In the absence of an objection by D.L. Evans and even though I.R.E. 201(c) only suggests that judicial notice is proper to identify documents, the Court believes it can review the documents in the Original Case and then identify an absence of renewed judgments.

submitted in a motion for summary judgment. *Sales v. Peabody,* 157 Idaho 195, 202, 335 P.3d 40, 47 (2014). A court must rule on the admissibility of evidence before it can apply the general rules and inferences applicable to evidence in motions for summary judgment. *Fragnella v. Petrovich*, 153 Idaho 266, 271, 281 P.3d 103, 108 (2012). A motion to strike involves the exercise of the Court's discretion. *See Gem State Ins. Co. v. Hutchison*, 145 Idaho 10, 15, 175 P.3d 172, 177 (2007).

B. Motions for Summary Judgment.

The standard of review for a motion for summary judgment is well established.

> Under Idaho Rule of Civil Procedure 56(a), a party is entitled to summary judgment "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." When considering whether the evidence in the record shows that there is no genuine issue of material fact, the trial court must liberally construe the facts, and draw all reasonable inferences, in favor of the nonmoving party.

Budget Truck Sales, LLC v. Tilley, 163 Idaho 841, 846, 419 P.3d 1139, 1144 (2018) (citations omitted).

The moving party bears the burden of proving there is no genuine dispute of material fact. *Kiebert v. Goss,* 144 Idaho 225, 228, 159 P.3d 862, 865 (2007) (citing *Hei v.*

Holzer, 139 Idaho 81, 85, 73 P.3d 94, 98 (2003)). Generally, in determining whether there is a genuine dispute of material fact, a court must liberally construe facts in favor of the non-moving party. *Pratt v. State Tax Commission*, 128 Idaho 883, 884, 920 P.2d 400, 401 (1996). Once the moving party establishes the absence of a genuine dispute of material fact, the burden shifts to the nonmoving party to show the existence of a genuine issue of material fact. *Id.* A nonmoving party must come forward with evidence by way of affidavit or otherwise that contradicts the evidence submitted by the moving party, and that establishes the existence of a material issue of disputed fact. *Id.* (citing *Zehm v. Assoc. Logging Contractors, Inc.*, 116 Idaho 349, 350, 775 P.2d 1191, 1192 (1988)). "[T]he nonmoving party cannot rely on mere speculation, and a scintilla of evidence is insufficient to create a genuine [dispute] of material fact." *Intermountain Real Props., LLC v. Draw, LLC,* 155 Idaho 313, 316–17, 311 P.3d 734, 737–38 (2013). "[T]he party opposing the motion may not merely rest on the allegations contained in the pleadings; rather, evidence by way of affidavit or deposition must be produced to contradict the assertions of the moving party." *Ambrose v. Buhl Joint School District No. 412,* 126 Idaho 581, 584, 887 P.2d 1088, 1091 (Ct. App. 1993) (quoting *Podolan v. Idaho Legal Aid Services, Inc.*, 123 Idaho 937, 941-42, 854 P.2d 280, 284-85 (Ct. App. 1993)). Summary judgment is inappropriate where "reasonable people could reach different conclusions or draw conflicting inferences from the evidence" regarding a genuine dispute of material fact. *Kalange v. Rencher*, 136 Idaho 192, 195, 30 P.3d 970, 973 (2001).

Appendix E

> Where the parties have filed cross-motions for summary judgment relying on the same facts, issues and theories, the parties effectively stipulate that there is no genuine issue of material fact that would preclude the district court from entering summary judgment. However, the mere fact that both parties move for summary judgment does not in and of itself establish that there is no genuine issue of material fact. However, the mere fact that both parties move for summary judgment does not in and of itself establish that there is no genuine issue of material fact. The fact that the parties have filed cross-motions for summary judgment does not change the applicable standard of review, and this Court must evaluate each party's motion on its own merits. . . . When an action will be tried before the court without a jury, the trial court as the trier of fact is entitled to arrive at the most probable inferences based upon the undisputed evidence properly before it and grant the summary judgment despite the possibility of conflicting inferences. The test for reviewing the inferences drawn by the trial court is whether the record reasonably supports the inferences.

Intermountain Forest Management, Inc. v. Louisiana Pacific Corp., 136 Idaho 233, 235, 31 P.3d 921, 923 (2001) (citations omitted).

In the event an affirmative defense is raised in a motion for summary judgment, the nonmoving defendant

has the burden of supporting a claimed affirmative defense. *Chandler v. Hayden*, 147 Idaho 765, 771, 215 P.3d 485, 491 (2009). "The moving party is entitled to [summary] judgment when the nonmoving party fails to make a showing sufficient to establish the existence of an element essential to that party's case on which that party will bear the burden of proof at trial." *Badell v. Beeks*, 115 Idaho 101, 102 765 P.2d 126, 127 (1988) (citing *Celotex v. Catrett*, 477 U.S. 317, 322-23 (1986). "In such a situation, there can be no 'genuine [dispute] of material fact,' since a complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial." *Jarmon v. Hale*, 122 Idaho 952, 956, 842 P.2d 288, 292 (Ct. App. 1992), *abrogated on other grounds by Puckett v. Verska*, 144 Idaho 161, 166, 158 P.3d 937, 942 (2007).

V. ANALYSIS

A. Motion to Strike/Objection.

1. Dean's Motion to Strike.

Dean objects to an affidavit[4] filed by D.L. Evans after Dean's opposition brief to D.L. Evans' Motion for Summary Judgment. The Miller Affidavit attaches three documents from the Idaho Supreme Court's website. Those documents are "Instructions How to Renew a Civil Judgment," a "Motion to Renew Judgment" and an

4. *See Affidavit of Rhett M. Miller in Support of Plaintiff's Reply to Defendant Dean's Memorandum in Opposition to Plaintiff's Motion for Partial Summary Judgment* ("Miller Affidavit").

"Order Renewing Judgment." In his Motion to Strike, Dean objects to the Miller Affidavit pursuant to I.R.C.P. 56(b)(2) based on timeliness. I.R.C.P. 56(b)(2) requires documents supporting D.L. Evans' Motion for Partial Summary Judgment to be filed at least 28 days before the hearing on a motion for summary judgment. The time restraints under I.R.C.P. 56(b)(2) may be altered by the Court for good cause shown. *I.R.C.P. 56(b)(3).*

The Miller Affidavit was filed seven (7) days before the hearing on the Motions. As such, the Miller Affidavit was not timely under I.R.C.P. 56(b)(2). Further, D.L. Evans has not attempted to show good cause to alter the time requirements under I.R.C.P. 56(b)(2). Absent any showing of good cause and in the exercise of its discretion, the Court GRANTS Dean's Motion to Strike.

2. D.L. Evans' Objection.

D.L. Evans also objects to a declaration filed by Dean in opposition to D.L. Evans' Motion for Partial Summary Judgment.[5] The Dean Declaration largely critiques D.L. Evans' attempts to secure service of the complaint in the Original Case but also complains about D.L. Evans' collection efforts in the state of Washington. D.L. Evans contends the Dean Declaration is irrelevant, scandalous and misleading.[6] As pointed out by D.L. Evans, Dean did

5. *See Declaration of Henry W. Dean in Opposition to Plaintiff's Motion for Partial Summary Judgment* ("Dean Declaration").

6. *Plaintiff's Reply to Defendant Dean's Memorandum in Opposition to Plaintiff's Motion for Partial Summary Judgment* ("D.L. Evans Reply Memorandum"), pp. 2-3.

not mention the contents of the Dean Declaration in its opposition to D.L. Evans' Motion for Partial Summary Judgment.[7] The Motion for Partial Summary Judgment raises the broad issue whether the Complaint is time-barred. Neither party is raising an issue about the validity of the Original Judgment or the collection efforts of D.L. Evans in the state of Washington. Stated differently, the Dean Declaration is not material to any issue raised in the Motion for Partial Summary Judgment. As such, the Court will sustain the objection to the Dean Declaration. *I.R.C.P. 56(c)(2).*

B. Cross-Motions for Summary Judgment.

The Court will first outline the applicable law relating to an action on a judgment and renewal of judgments and then analyze the merits of the parties' cross-motions for summary judgment. As it turns out, the cross-motions for summary judgment raise nearly identical legal issues. The Court believes Dean's Motion for Summary Judgment best outlines the relevant issues. For these reasons, the Court will first analyze Dean's Motion for Summary Judgment and then incorporate its analysis into D.L. Evans' Motion for Partial Summary Judgment.

1. Applicable law.

The Idaho Supreme Court recognizes that the law involving an "action on a judgment" and the renewal

7. *See generally Defendant Dean's Memorandum in Opposition to Plaintiff's Motion for Partial Summary Judgment* ("Dean's Opposition Memorandum").

of judgments is a complex area of law. *Grazer v. Jones*, 154 Idaho 58, 65, 294 P.3d 184, 191 (2013). "An 'action on a judgment' is a common-law cause of action based on the debt represented by a judgment." *Id.* at 64, 294 P.3d at 190. "An action on a judgment is a new and separate action on the debt represented by a prior judgment." *G & R Petroleum, Inc. v. Clements*, 127 Idaho 119, 122, 898 P.2d 50, 53, n. 4, *rev'd on other grounds, Glazer v. Jones,* at 66-67, 294 P.3d at 192-93. "A judgment lien is distinct from the underlying judgment, and therefore the judgment does not expire merely because the lien has expired." *Id.* at 65, 294 P.3d at 191. "Expiration of the *lien* of a judgment does not extinguish the judgment. It simply terminates the statutory security." *Platts v. Pac. First Fed. Sav. & Loan, Ass'n of Tacoma*, 62 Idaho 340, 348-49, 111 p.2d 1093, 1096 (1941) (emphasis in original). At the relevant time in 2016, Idaho Code § 5-215 created a six (6) year statute of limitations beginning on the date of the original judgment to file an action on a judgment.[8] *Grazer v. Jones,* at 66, 294 P.3d at 192.

The courts recognize that there are two cumulative means of renewing a judgment—an action on a judgment and a motion to renew a judgment under Idaho Code § 10-1111. *Smith v. Smith*, 131 Idaho 800, 802, 964 P.2d 667, 669 (Ct. App. 1998); *see also Grazer v. Jones,* at 65, 294 P.3d at 191. "[P]rior to adoption of I.C. § 10-1111, a money judgment could be renewed only by bringing an action on the judgment . . . . The apparent legislative purpose in adopting § 10-1111 was to create a simpler means of judgment renewal which would not require the

8. The statute of limitation established in Idaho Code § 5-215 was increased from six (6) to eleven (11) years in 2015.

commencement of an entirely new action."[9] *Smith v. Smith*, at 802, 964 P.2d at 669 (citations omitted).

2. Dean's Motion for Summary Judgment.

a. Parties' Positions.

Dean argues that a renewed judgment cannot be executed upon under applicable Idaho law and instead a judgment can only be executed upon for the initial life of a judgment. *Dean's Opening Memorandum*, pp. 5-8. Thus, Dean contends that since D.L. Evans lost its right to execute on the judgment, D.L. Evans' only remaining remedy was to bring an action on judgment within the six (6) year statute of limitations, which it failed to do. *Id.* at 8-9. Because D.L. Evans did not file an action on a judgment within the six (6) year statute of limitations, Dean asserts that D.L. Evans' action on judgment is time-

9. Idaho Code § 10-1111 was repealed in 1975 by the Idaho legislature for the reason that the legislature believed the statute was in conflict with procedural rules by the Idaho Supreme Court. *Session Laws 1975, ch. 242, § 1, p. 652.* Shortly thereafter, the Idaho legislature apparently reversed its course and added Idaho Code § 10-1111. *Session Laws 1978, ch. 115, § 1, p. 266.* Thereafter, there have been several amendments to the statute, but only two amendments are potentially pertinent to this case. In 2016, the statute was amended to increase the length of a lien created by a judgment from five (5) to ten (10) years. *Session Laws 2016, ch. 269, § 1, p. 724.* However, this amendment in 2016 does not impact this case as the amendment is applicable only to judgments issued after July 1, 2015. In 2018, the statute was also amended to add language allowing the statute of limitation under Idaho Code § 5-215 to begin anew after an order renewing a judgment. The Court will address the 2018 amendment. *See discussion infra* at § V(B)(2)(b)(ii), pp. 13-16.

barred under Idaho Code § 5-215. *Id.* Dean again asserts that the Court lacks personal jurisdiction over him in this case. *Id.* at 18-20.

D.L. Evans contends the right to commence an action on judgment is not dependent on a right to execute on a judgment.[10] D.L. Evans further argues this case does not present the question whether D.L. Evans is entitled to execute on the judgment. *D.L. Evans' Opposition Memorandum, pp.* 5-6. Nonetheless, D.L. Evans maintains that it has a right to execute on a renewed judgment. *Id.* at 6-7. D.L. Evans relies on the Court's prior determination that the Court has personal jurisdiction over Dean. *Id.* at 9.

b. Analysis.

i. The Issue Whether D.L. Evans Has Lost Its Right to Execute on the Judgment Is Not a Material Issue Before the Court and Is Not Relevant to Determine Whether the Statute of Limitations for an Action on Judgment Applies.

The pleadings frame the issue before the Court. "[I]ssues considered on summary judgment are those raised by the pleadings." *Gardner v. Evans,* 110 Idaho 925, 939, 719 P.2d 1185, 1199 (1986) (quoting *Argyle v. Slemaker,* 107 Idaho 668, 669, 691 P.2d 1283, 1284 (Ct.

10. *Memorandum in Opposition to Defendant's Motion for Summary Judgment* ("D.L. Evans' Opposition Memorandum"), pp. 5-7.

App.1984)). Thus, this Court must determine whether the "pleadings . . . can fairly be viewed as adequately giving notice of the claim." *Partout v. Harper*, 145 Idaho 683, 686, 183 P.3d 771, 774 (2008) (quoting *O'Guin v. Bingham County,* 139 Idaho 9, 15, 72 P.3d 849, 855 (2003)).

D.L. Evans only alleges one cause of action in its complaint—an Action on a Judgment. In that complaint, D.L. Evans seeks a judgment based on the Original Judgment, along with attorney fees and costs. In his answer, Dean denies almost every allegation in the complaint but he has not filed a counterclaim. In short, the pleadings only provide notice of the issues involving an action on a judgment and there is no allegation or request relating to the issuance of a writ of execution. Accordingly, Dean's argument that D.L. Evans lost its right to execute on the judgment is not before the Court and would therefore not be material.

Dean has not presented any authority that the existence of a present right to execute on a judgment is an element of the cause of action for an action on a judgment. After a review of the law on an action on a judgment in Idaho and elsewhere, the Court has not located any such authority. To the contrary, the Court finds authority that the proof needed to establish the cause of action for an action on a judgment is rather limited. "In an action on a judgment, the only relevant question is whether the judgment has been satisfied or remains unpaid." *50 C.J.S. Judgments § 1228.* But more to the point, "generally, the right to maintain an action on a judgment is not dependent on the right to issue execution on it, and the action is maintainable notwithstanding the right to issue execution on the original judgment remains unimpaired, since such

right is merely a cumulative remedy." *Id.; Gertztowt v. Humphrey*, 53 Idaho 631, 633-34, 27 P.2d 64, 64 (1933) ("the right to maintain an action on a judgment is not dependent upon the right to issue an execution").

ii. The Statute of Limitations for an Action on a Judgment Does Not Bar D.L. Evans' Action on a Judgment.

Dean contends that the amendment of the Original Judgment in 2015 does not "begin anew" the statute of limitations for an action on a judgment. *Dean's Opening Memorandum*, pp. 9-13. As a starting point, Dean argues that D.L. Evans' reliance on *Leman v. Cunningham*, 12 Idaho 135, 85 Pac. 212 (1906) is misplaced because *Leman* concerns the judgment laws of sister states, while this case only concerns an Idaho judgment and collection law. *Dean's Opening Memorandum*, p. 11. Dean further contends that Idaho law does not allow a judgment to be revived and instead contends that a judgment can only be executed for five (5) years from the entry of judgment. *Id.* at 11-12. Dean also argues that the First and Second Amended Renewal Orders are of no consequence and do not extend the six (6) year statute of limitations to file an action on a judgment. *Id.* at 12-13. The Court will separately address the sometimes overlapping issues raised by the parties under the headings set forth below.

Revival of Original Judgment

The basis for Dean's belief that the Original Judgment cannot be revived is found in *Leman*, where the Idaho Supreme Court stated that Nebraska allowed a judgment

to be revived, while Idaho did not. However, the *Leman* Court did not ultimately place any significance on this distinction. In *Leman,* a judgment creditor received a judgment in Nebraska in 1895, which became dormant in 1900 and then later revived by motion in Nebraska in 1905. 12 Idaho at 137-39. An action on a judgment was commenced in Idaho more than six (6) years after the original judgment in 1895. *Id.* at 138. The *Leman* Court noted the differences between reviving a judgment upon motion and an action on a judgment. A motion to revive a judgment is brought in the case that created the judgment, while an action on a judgment requires a new lawsuit and results in a new judgment. *Id.* at 139-141. The *Leman* Court explained that the Idaho remedy "is a little harsher and more exacting on the judgment creditor." *Id.* at 139. After reviewing authority in several states, the *Leman* Court concluded, "it matters not what the final action of the district court of Nebraska may be termed–let it be an order reviving an old judgment, or let it be a new judgment, the object and purpose of the order is the same in either case." *Id.* at 142.

Similarly, the Court declines to place the significance urged by Dean based on the procedural differences between a motion to renew or revive a judgment and an action on a judgment. The two procedures are cumulative means of renewing a judgment. *Smith v. Smith*, 131 Idaho at 802, 964 P.2d at 669; *see also Grazer v. Jones,* at 65, 294 P.3d at 191. The courts recognize that there are currently two cumulative means of renewing a judgment—an action on a judgment and a motion to renew a judgment under Idaho Code § 10-1111. *Smith v. Smith*, 131 Idaho 800, 802, 964 P.2d 667, 669 (Ct. App. 1998); *see also Grazer v. Jones,* at 65, 294 P.3d at 191. The Idaho Court of Appeals

believes that a motion to renew a judgment under Idaho Code § 10-1111 is a simpler means of judgment renewal. *Smith v. Smith*, at 802, 964 P.2d at 669. Even though the procedures for an action on a judgment and a motion to renew a judgment are different, the result is the same–a judgment can be renewed under either procedure.

Idaho Code § 10-1111

Dean's argument that the First Amended Renewal Order does not "begin anew" the statute of limitations for an action on a judgment is partially premised on the 2018 amendment to Idaho Code § 10-1111. *Dean's Opening Memorandum,* p. 9. On one hand, Dean contends the 2018 amendment changes the law for judgments after the effective date of the amendment. *Id.* at 15-16 (citing *Bennett v. Bank of Eastern Oregon,* 167 Idaho 481, 472 P.3d 1125 (2020) ("When a statute is amended, it is presumed that the legislature intended it to have a meaning different from that accorded to it before the amendment.")). On the other hand, D.L. Evans claims that the 2018 amendment is a mere codification of existing law. *D.L. Evans' Opposition Memorandum*, pp. 5-7. The Court must determine if the 2018 amendment to Idaho Code § 10-1111 is retroactive. If not retroactive, the Court must then determine whether the 2018 amendment is a mere codification of existing law.

In the Order on Second Motion to Dismiss, the Court noted that Dean argued the 2018 version of Idaho Code § 10-1111 should not be applied retroactively but the Court believed the arguments involving the retroactive application of Idaho Code § 10-1111 were not fully briefed.

Thus, the Court declined to analyze the retroactivity argument at such an early stage of the litigation. The parties have now had an opportunity to brief this argument.

The 2018 amendment to Idaho Code § 10-1111 added the following sentence:

> Entry of an order renewing judgment maintains both the date of the original judgment and the priority of collection thereof, and it begins anew the time limitation for an action upon a judgment set forth in section 5-215, Idaho Code.

Dean maintains that the 2018 amendment to Idaho Code § 10-1111 is not retroactive.[11] D.L. Evans does not directly refute Dean's argument about retroactivity. Instead, D.L. Evans argues that the amendment to Idaho Code § 10-1111 is a "mere codification of existing law."[12] *D.L. Evans' Opposition Memorandum*, pp. 5-7.

"In general, legislation acts prospectively. 'Retrospective or retroactive legislation is not favored.' As such, 'a well-settled and fundamental rule of statutory

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11. *Memorandum in Support of Defendant Henry W. Dean's Motion for Summary Judgment* ("Dean's Opening Memorandum"), pp. 15-18.

12. When making this argument, D.L. Evans refers to 2011 and 2016 amendments to Idaho Code § 10-1111. The 2011 amendment merely renumbered the statute into two subparagraphs. The 2016 amendment to Idaho Code § 10-1111 substituted ten (10) years for five (5) years in subparagraph 1 of the statute. Neither of these amendments relate to Dean's retroactivity argument.

construction' is to construe statutes to have a prospective rather than retroactive effect." *Guzman v. Piercy*, 155 Idaho 928, 937, 318 P.3d 918, 927 (2014); *accord Idaho Code § 73-101* ("No part of these compiled laws is retroactive, unless expressly so declared").

The recent *Alpha Mortgage* decision resolves this argument. There, the Idaho Supreme Court stated:

> The current renewal statute is nearly identical to the 1995 version except that the timeframe for renewal is every ten years instead of every five. *I.C. § 10-1111* (2018). Even so, the Original Judgment was entered in 2010 when the statute required renewal every five years. Thus, Alpha is subject to the restraints of the 1995 version. *See Nye,* 165 Idaho at 460-62, 447 P.3d at 908-10 (applying version of a statute in effect at the time a case was filed despite the statute being amended approximately six months later).

Alpha Mortgage, 2021 WL 4762575, 497 P.3d 200, 208, n. 1. In other words, the Court cannot apply the sentence added to Idaho Code § 10-1111 in 2018 to the facts of this case. If the added sentence applied, then either the First or Second Amended Renewal Orders would begin anew the statute of limitations under Idaho Code § 5-215. However, under the controlling precedent, the Court cannot apply the 2018 version of Idaho Code § 10-1111. The question remains whether the sentence added to Idaho Code § 10-1111 in 2018 is a mere codification of existing law.

Appendix E

Courts must construe statutes "under the assumption that the legislature knew of all legal precedent and other statutes in existence at the time the statute was passed." *City of Sandpoint v. Sandpoint Indep. Highway Dist.*, 126 Idaho 145, 150, 879 P.2d 1078, 1083 (1994). "Where the clear implication of a legislative act is to change the common law rule we recognize the modification because the legislature has the power to abrogate the common law." *Baker v. Ore–Ida Foods, Inc.*, 95 Idaho 575, 583, 513 P.2d 627, 635 (1973). "It is true that, as a general principal, the rules of common law are not to be changed by doubtful implication. However, where the implication is obvious it cannot be ignored." *Statewide Constr., Inc. v. Pietri*, 150 Idaho 423, 429, 247 P.3d 650, 656 (2011) (citations omitted).

The legislative history of the 2018 amendment to Idaho Code § 10-1111 states, **"[t]his amendment also *clarifies* that the entry of an order renewing judgment** which is recorded in the same manner as the original judgment maintains the original judgment's date and collection priority, and **starts a new clock on the statute of limitation for actions to enforce the judgment**."[13] Using the word "clarifies" suggests the legislature was not changing the existing law and instead desired to provide more clarity to this complex area of the law. The case law in Idaho since 1906, which has not been reversed or modified, provides that a judgment can be revived or renewed before the commencement of an action on a judgment. *Leman v. Cunningham*, 12 Idaho at 141-42. Based on the legislative intent of the 2018 amendment to Idaho Code § 10-1111

13. *Statement of Purpose, RS25855* (emphasis added).

and the existing law relating to renewed judgments and an action on a judgment, the Court concludes the rules involving the common-law cause of action on an action on a judgment were not expressly changed or changed by implication when Idaho Code § 10-1111 was amended in 2018. "[T]he rules of common law are not to be changed by doubtful implication." *Statewide Constr., Inc. v. Pietri,* 150 Idaho at 429. 247 P.3d at 656 (citations omitted). In this instance, any implication that the rules involving the application of the statute of limitations for an action on a judgment have changed is doubtful and not obvious to the Court. In other words, the Court views the 2018 amendment as a clarification of existing law.

Right of Enforcement

Based on Idaho Code § 11-101, Dean asserts that D.L. Evans' execution rights lapsed after five (5) years from entry of the Original Judgment.[14] Even though a judgment creditor, such as D.L. Evans, can seek to renew a judgment under Idaho Code § 10-1111, Dean reasons that the right to execute after five (5) years from the entry of the judgment is limited to real property, provided the judgment creditor

14. *Reply Memorandum in Support of Defendant Henry W. Dean's Motion for Summary Judgment* ("Dean's Reply Memorandum"), pp. 5-6; *Dean's Opening Memorandum,* pp. 5-9. As discussed earlier, the existence or nonexistence of a right of enforcement of a judgment is not necessarily an issue to be resolved in an action on a judgment. *See discussion supra* at § V(B)(2)(b)(i), pp. 10-11. Nonetheless, the Court will specifically address D.L. Evans' right to enforce the Original Judgment after the lapse of five (5) years under Idaho Code § 11-101.

files an action on a judgment within six (6) years of the entry of judgment. *Dean's Reply Memorandum*, pp. 5-6. D.L. Evans argues that *Alpha Mortgage* and Idaho Code § 10-1111(1) allows a judgment to be renewed and that the limitation period for an execution of a judgment runs from the date of the judgment or when last renewed.[15] The Court ultimately agrees with D.L. Evans.

A critical issue in Dean's argument is whether a judgment creditor can only pursue a writ of execution for five (5) years after entry of judgment (under the applicable version of Idaho Code § 11-101) without the necessity of filing an action on a judgment.[16] However, Idaho Code § 11-101 must be read together with Idaho Code § 10-1111.

> The purpose of statutory interpretation is to give effect to legislative intent. Interpreting a statute "must begin with the literal words of the statute; those words must be given their plain, usual, and ordinary meaning; and the statute must be construed as a whole." To give effect to legislative intent, statutes are construed together in pari materia. "Statutes are in pari materia when they relate to the same

15. *Supplemental Post-Hearing Brief in Support of Motion for Partial Summary Judgment and in Opposition to Motion for Summary Judgment*, pp, 7-8.

16. Idaho Code § 11-101 was amended in 2015 to increase the five (5) year period to ten (10) years and in 2019 to measure the ten (10) year period from entry of a judgment to entry of a judgment or order of renewal.

> subject." Such statutes are "taken together and construed as one system[.]" "It is to be inferred that a code of statutes relating to one subject was governed by one spirit and policy, and was intended to be consistent and harmonious in its several parts and provisions." Language in a particular statutory section need not be viewed in a vacuum; all sections of applicable statutes must be construed together to determine legislative intent.

Goodrick v. Field (*In re Order Certifying Question to the Idaho Supreme Court*), 167 Idaho 280, 283, 469 P.3d 608, 611 (2020) (citations omitted).

Idaho Code §§ 10-1110, 10-1111 and 11-101 relate to one subject and system—the enforcement of judgments. The time frames set forth in the statutes are also consistent thereby creating an integrated system for the enforcement of judgments. The version of Idaho Code § 10-1111 applicable to this case allows a judgment to be renewed before the expiration of any lien created by Idaho Code § 10-1110 **or any renewal thereof.** Clearly, Idaho Code § 10-1111 expressly allows judgments to be renewed. As noted by the courts, a renewed judgment under Idaho Code § 10-1111 revives or renews the judgment. *See Leman v. Cunningham,* at 141; *Smith v. Smith,* 131 Idaho at 802, 964 P.2d at 669; *Alpha Mortgage,* 2021 WL 4762575, 497 P.3d at 206. When interpreting Idaho Code § 11-101, the Court must also construe Idaho Code § 10-1111 at the same time. Since Idaho Code § 10-1111 permits a judgment to be renewed, the Court interprets Idaho

Code § 11-101 in a consistent manner. Accordingly, when referring to the entry of a judgment, Idaho Code § 11-101 is describing the entry of a judgment or the renewal or revival of that judgment.

In addition, the Court interprets the plain and ordinary language in Idaho Code § 11-101 to mean that a writ of execution can be issued after the entry of a judgment or after the renewal of a judgment. The applicable version of Idaho Code § 11-101 allows a writ of execution to be issued following the entry of judgment. In turn, a writ of execution broadly allows collection against both personal and real property. Contrary to Dean's argument, the statute does not limit the application of a writ of execution to certain categories of property. If the legislature intended to limit execution on personal property to the period stated in Idaho Code § 11-101 but allow execution on real property for a longer period, the Court would expect the legislature to expressly codify the limitations.[17] Absent any language to the contrary, the Court interprets the language in Idaho Code § 11-101 consistently to mean that any "writ of execution issued for enforcement" under Idaho Code § 11-101 allows a writ

17. The Court recognizes that Idaho Code § 11-105 makes a distinction between cases resulting in a judgment for money and all other cases. However, the Court does not find that Idaho Code § 11-105 to be controlling. Dean argues that the statutory scheme treats property to be executed differently for a money judgment, not for other types of judgments under Idaho Code § 11-105. For that reason, Idaho Code § 11-105 is not instructive, particularly when a party can renew a judgment and continue to receive a writ of execution on a money judgment.

of execution to be applied to personal and real property during the effective periods of a judgment or following a renewal of a judgment. Regardless of the timing, a writ of execution allows a judgment creditor to pursue personal or real property so long as there is an effective judgment or renewal of a judgment. Such an interpretation gives the words in Idaho Code § 11-101 their plain, usual, and ordinary meaning without resorting to Dean's nuanced interpretation creating different enforcement rights against different property at different times. *Goodrick v. Field* (*In re Order Certifying Question to the Idaho Supreme Court*), 167 Idaho at 283, 469 P.3d at 611.

Necessity to Obtain a Separate Renewed Judgment

Dean argues that the orders renewing judgments under Idaho Code § 10-1111 are not effective since D.L. Evans failed to receive a renewed judgment. *Dean Opening Memorandum*, pp. 12-13. Dean also contends that the First Amended Renewal Order cannot be categorized as a judgment because the order would not comply with I.R.C.P. 54. *Dean's Reply Memorandum*, pp. 9-10. The Court does not agree.

The law treats judgments and judgment liens differently. "A judgment lien is distinct from the underlying judgment, and therefore the judgment does not expire merely because the lien has expired." *Glazer v. Jones,* at 65, 294 P.3d at 191. "Expiration of the *lien* of a judgment does not extinguish the judgment. It simply terminates the statutory security." *Platts v. Pac. First Fed. Sav. & Loan, Ass'n of Tacoma*, 62 Idaho at 348-49,

111 P.2d at 1096. Recording of a lien creates a lien on all real property owned by the judgment debtor. *Idaho Code § 10-1110.*

Idaho Code § 10-1111 provides that a renewed judgment **may** be recorded. There is no requirement that a judgment creditor must record a judgment. Thus, it follows that at the time of an order renewing a judgment, a judgment creditor may elect to seek a renewed judgment. There may be legitimate reasons not to seek a judgment. A judgment creditor may not seek a renewed judgment if the judgment creditor knows that the judgment debtor does not own real property. The judgment creditor can subsequently decide to obtain and record a renewed judgment if the judgment creditor believes such an action is appropriate. The law does not require a separate judgment following an order renewing judgment. *Accord Alpha Mortgage*, 2021 WL 4762575, 497 P.3d at 206 (a judgment can be renewed under Idaho Code § 10-1111 even if the prior renewed judgment is not recorded).

Based on *Cook v. Arias*, 164 Idaho 766, 767, 435 P.3d 1086, 1087 (2015), Dean asserts that an order renewing judgment cannot qualify as a judgment. *Cook* established a bright-line rule that a judgment must strictly comply with I.R.C.P. 54(a). A failure to comply with I.R.C.P. 54(a) prohibits an appellate court from hearing an appeal. *Id.* at 767-71, 435 P.3d at 1087-1091. *Cook* is not useful in this analysis though. As just explained, the law does not require a judgment creditor to receive a renewed judgment. The more important question is whether an order renewing a judgment can be recorded, which in turn can act as a lien

on a judgment debtor's real property under Idaho Code § 10-1110. If an order renewing judgment is recorded in lieu of a renewed judgment, the order renewing the judgment would still provide constructive notice of the renewal of a judgment. In both instances, the recorded document–either a renewed judgment or an order renewing judgment–would provide constructive notice of the renewal of the Original Judgment.[18] "The primary purpose of the recording statutes is to give notice to others that an interest is claimed in real property, and thus give protection against *bona fide* third parties who may be dealing in the same property." *Haugh v. Smelick*, 126 Idaho 481, 483, 887 P.2d 26, 28 (1993) (quoting *Matheson v. Harris*, 98 Idaho 758, 761, 572 P.2d 861, 864 (1977). In other words, the purposes of complying with I.R.C.P. 54 and obtaining either a renewed judgment or order renewing a judgment are much different. Dean's argument premised on *Cook v. Arias* is not germane to the purpose of recordation of documents.

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18. Compared to other recordable documents, which can affect title to real property, any deficiency with recording an order renewing judgment compared to recording a renewed judgment is insignificant. For example, a *lis pendens* provides constructive notice to third parties that a party has filed an action affecting the title or right of possession to real property. *Idaho Code § 5-505.* Of course, a *lis pendens* can be created at the beginning of a lawsuit without court approval. In contrast, an order renewing judgment can be obtained at the end of a lawsuit but the order requires judicial approval. Regardless of the document, if it is recorded, the key purpose of the document is to provide third parties with constructive notice of court proceedings.

Appendix E

Accrual Date of the Statute of Limitations for an Action on a Judgment

Another critical issue in Dean's argument is whether a "judgment can [be] 'revived,' or stated over, one time through an 'an action on a judgment,' which must be filed within six years from the date of entry of judgment." *Dean's Reply Memorandum*, p. 10. Dean elaborates by asserting, "[t]he purpose of an action on judgment is to pursue collection on a judgment after the five year enforceability period on such judgment has expired by filing an entirely new lawsuit—which must have been filed within six years of the date of the original judgment. Thus, of course an action on a judgment can only be made on any given judgment one time." *Id.* For several reasons, the Court disagrees with this restrictive approach.

First, contrary to Dean's assertion, the statute of limitations for an action on a judgment begins on the date of a revival of a judgment, not only within six years of the Original Judgment. *Leman v. Cunningham,* at 142; *see also Alpha Mortgage,* 2021 WL 4762575, 497 P.3d at 206 ("the limitations period begins to run 'from the date the judgment is entered or *last renewed* in the rendering state.'" (emphasis in original)) (quoting *Grazer v. Jones*, at 67, 294 P.3d at 193).

Second, again contrary to Dean's assertion, a judgment can be revived or renewed by either an action on a judgment or a motion to renew judgment, not only one time by an action on a judgment. The courts recognize that there are currently two cumulative means of renewing a

judgment—an action on a judgment and a motion to renew a judgment under Idaho Code § 10-1111. *Smith v. Smith*, 131 Idaho at 802, 964 P.2d at 669; *Grazer v. Jones,* at 65, 294 P.3d at 191. For these reasons, the Court declines to adopt Dean's restrictive interpretation, which would limit enforcement of a judgment to personal property to a five (5) year window after entry of the Original Judgment and would only allow enforcement of a judgment to real property after the five (5) year window, provided an action on a judgment is filed within six (6) years of the entry of the judgment.[19]

Applicability of Bennett

Dean also relies on *Bennett v. Bank of Eastern Oregon* for the proposition that D.L. Evans' action on a judgment is barred by the six (6) year statute of limitations. In *Bennett*, the Bank of Eastern Oregon lent money to the Bennetts who defaulted on the payment of the loan. 167 Idaho at 484, 472 P.3d at 1128. The loan was secured by a deed of trust on Idaho property. *Id.* The bank filed a collection action against the Bennetts in Oregon and received a judgment in 2010, which was shortly thereafter domesticated in Idaho. *Id.* The Bennetts then filed for Chapter 7 bankruptcy. *Id.* The bankruptcy estate abandoned the property secured by the deed of trust and later the Bennetts received their final bankruptcy discharge in 2011. *Id.* Eight (8) years after the bankruptcy discharge, the Bennetts filed a

19. This Court believes that the adoption of Dean's interpretation of Idaho's judgment enforcement procedures would dramatically and impermissibly impact the enforcement of many judgments throughout the state.

quiet title action to quiet title to the property, which was encumbered by the deed of trust and abandoned by the bankruptcy estate. *Id.*

The *Bennett* Court explained that there are "two methods by which a judgment creditor may 'collect or enforce' on a foreign judgment in Idaho: (1) an 'action on a judgment'; and (2) a filing pursuant to [Idaho's Enforcement of Foreign Judgment Act]." *Id.* at 492, 472 P.3d at 1132. The *Bennett* Court then quickly concluded that an action on a judgment was not a viable cause of action because more than six (6) years elapsed between the date of the original judgment in 2010 and the filing of the quiet title action. *Id.* The bank had six (6) years to file an action on a judgment after the original 2010 judgment, which it did not. Therefore, the statute of limitations under Idaho Code § 5-215 precluded the bank from pursuing any interest in the real property subject to the deed of trust.

Bennett is distinguishable from this case in that the bank in *Bennett* did not renew the judgment, while D.L. Evans renewed the Original Judgment by the First and Second Amended Renewal Orders within a six (6) year period before filing the action on a judgment. *Bennett* does not provide authority on how to apply the statute of limitations under Idaho Code § 5-215 when there has been a renewal of a judgment and when the renewal is within six (6) years of the filing of an action on a judgment.

Appendix E

Summary

Even though there is no genuine dispute of material fact involving the action on a judgment, Dean is not entitled to judgment as a matter of law. None of Dean's legal arguments are persuasive and D.L. Evans has commenced the action on a judgment within the six (6) year statute of limitations under Idaho Code § 5-215.

iii. Personal Jurisdiction.

Dean points out that the Complaint in this case only alleges that Dean "is currently a resident of the State of Washington" and that since the Original Judgment was a default judgment, there was no determination of personal jurisdiction in the prior proceedings. *Dean's Opening Memorandum*, p. 19. Dean then directs the Court to the legal principle that a default judgment is void if the court does not have personal jurisdiction over a party. *Id.* (citing *Secured Inv. Corp. v. Myers Executive. Bldg., LLC.*, 162 Idaho 105, 109, 394 P.3d 807, 811 (Ct. App. 2016). With this background, Dean contends that D.L. Evans must **allege and prove** the Court has personal jurisdiction in this case. *Id.* D.L. Evans merely refers the Court to the orders filed on March 17, 2021 and April 21, 2021. *D.L. Evans' Opposition Memorandum*, p. 9.

The Court previously addressed the question whether the Court has personal jurisdiction over Dean.[20] For the most part, the Court incorporates that analysis on

20. *Order on Motion to Dismiss and Motion for Judgment on the Pleadings* ("First Order on Motion to Dismiss"), pp. 4-6.

the personal jurisdiction issue raised in First Order on Motion to Dismiss. The Court stated, "[t]he Court views the present action before the Court as a continuation of the prior action where personal jurisdiction was not challenged." *First Order on Motion to Dismiss,* p. 5. The Court clarifies that an action on a judgment is a new and separate action on the debt represented by a prior judgment, not necessarily a continuation of the prior action. *G & R Petroleum, Inc. v. Clements*, 127 Idaho 119, 122, 898 P.2d 50, 53, n. 4; *Smith v. Smith,* at 802, 964 P.2d at 669.

The issue whether the Original Judgment is void for lack of personal jurisdiction is not before the Court in this action. As noted in *Secured Inv. Corp. v. Myers Executive. Bldg., LLC.*, I.R.C.P. 60(b)(4) provides a mechanism for relief from a default judgment when a judgment is void for a lack of personal jurisdiction. 162 Idaho at 109, 394 P.3d at 811. Of course, a motion for relief from a judgment under I.R.C.P. 60(b)(4) should be brought in the Original Case, not in this case. In addition, the Court only has cross-motions for summary judgment involving one cause of action—an action on a judgment. The cross-motions raise the question whether there is personal jurisdiction in this case, not whether there was personal jurisdiction in the Original Case. For these reasons, the Court declines to address the argument that there was not personal jurisdiction over Dean in the Original Case.

Dean argues that the Complaint does not allege an act subjecting Dean to the personal jurisdiction of Idaho courts and therefore Dean believes that the cause of action for an action on a judgment is subject to dismissal for lack of personal jurisdiction. *Dean's Opening Memorandum*,

pp. 19-20. Neither party has directed the Court to a rule of procedure setting forth the rules for alleging personal jurisdiction. I.R.C.P. 8(a)(1) provides that a complaint must contain "short and plain statement of the grounds for the court's jurisdiction." In contrast, I.R.C.P. 1.1 states, "[t]hese rules should not be construed to extend or limit the jurisdiction of any court of this state, or the venue of actions." I.R.C.P. 1(b) also provides, "[t]hese rules should be construed and administered to secure the just, speedy and inexpensive determination of every action and proceeding."

D.L. Evans' complaint does not expressly allege there is personal jurisdiction over Dean in the State of Idaho. The Complaint does, however, allege that venue is proper in Blaine County. *Complaint,* p. 2, ¶ 2. Of course, if D.L. Evans alleges that venue is proper in Blaine County, Idaho, it follows that D.L Evans also believes jurisdiction is proper in Idaho. In addition, the Complaint details the history of the proceedings in the Original Case filed in Blaine County, Idaho, the orders renewing the judgment filed in the Original Case and the orders renewing the judgment recorded in Blaine County, Idaho. *Id.*, at 2, ¶'s 3-8. Dean has not identified, nor has the Court found any prejudice to Dean, based on a failure to allege personal jurisdiction in the Complaint. Based on the applicable rules of civil procedure and the facts alleged in the Complaint, the Court finds that there is substantial compliance under I.R.C.P. 8(a)(1) and no prejudice to Dean for the absence of a statement alleging personal jurisdiction over Dean.

The more significant issue is whether D.L. Evans can prove personal jurisdiction. The Court relies on its

prior decision. *See First Order on Motion to Dismiss*, pp. 4-6. The Court previously held that Dean voluntarily submitted to personal jurisdiction. *Id.* at 5-6. In its ruling, the Court relied on *Engleman v. Milanez*, 137 Idaho 83, 84-85, 1138, 1139-40 (2002). Notably, Dean did not argue in the cross-motions for summary judgment the Court erred in its analysis that Dean voluntarily submitted to the Court's personal jurisdiction. As explained in the First Order on Motion to Dismiss, the Court still maintains that Dean submitted to the Court's jurisdiction over his person. A Notice of Appearance was filed on October 13, 2020.[21] That Notice of Appearance states, "[t]his appearance is without waiver of any defenses, including, but not limited to, insufficient service of process and lack of personal jurisdiction." Dean then filed a motion to dismiss under I.R.C.P. 12(b)(2) contesting personal jurisdiction twenty (20) days later on November 2, 2020.

I.R.C.P. 4.1 provides that "[t]he voluntary appearance of a party or service of any pleading by the party, except as provided in subsection (b) of this Rule, constitutes voluntary submission to the personal jurisdiction of the court." In pertinent part, I.R.C.P. 4.1(b) allows a special appearance provided there is a notice that the party intends to contest personal jurisdiction and then files a motion to contest personal jurisdiction within fourteen (14) days after filing the special appearance, unless a court allows a later filing of a motion to contest personal jurisdiction. The undisputed record in this case establishes the motion to dismiss based on a lack of personal jurisdiction was not filed within the fourteen (14)

21. The Notice of Appearance was filed by Dean's previous attorney.

days required under I.R.C.P. 4.1(b)((7) and that the Court did not extend the time to file a motion to dismiss under I.R.C.P. 12(b)(2). As such, the Notice of Appearance filed on October 13, 2020 became a voluntary submission to the personal jurisdiction of the Court. There is no genuine dispute of material fact involving personal jurisdiction but Dean is not entitled to judgment as a matter of law. *I.R.C.P. 56(a).* In short, Dean has not established a lack of personal jurisdiction over Dean.

c. Conclusion.

The facts necessary to determine Dean's Motion for Summary Judgment are not in dispute. However, for the reasons explained above, the Court does not accept Dean's legal arguments that D.L. Evans cannot maintain an action on a judgment. The Court believes an action on a judgment can be filed following an order renewing a judgment. Therefore, Dean is not entitled to judgment as a matter of law. *I.R.C.P. 56(a).* The Court finds there is personal jurisdiction over Dean and even if there is no personal jurisdiction, Dean has waived any objection to a lack of personal jurisdiction by his appearance in this case. Dean's Motion for Summary Judgment is DENIED.

4. D.L. Evans' Motion for Partial Summary Judgment.

a. Parties' Positions.

D.L. Evans maintains that this case is not time-barred as it was brought within six (6) years of either the First

or Second Amended Renewal Order.[22] D.L. Evans then addresses two arguments raised by Dean in his Motion for Summary Judgment. First, D.L. Evans contends that an order renewing a judgment under Idaho Code § 10-1111 renews a judgment. *D.L. Evans' Opening Memorandum*, pp. 5-7. Second, D.L. Evans argues that the right to commence and maintain an action on a judgment is not dependent on a right to issue a writ of execution for enforcement of a judgment. *Id.* at 7-8.

Again, Dean argues that the law requires more than just an order renewing judgment; rather, Dean asserts the law requires a separate renewal judgment. *Dean's Opposition Memorandum*, pp. 5-6. Dean reviews case authority and asserts that several appellate cases support his position. *Id.* at 7-9. Once again, Dean asserts that since D.L. Evans lost its right to enforce the judgment under Idaho Code § 11-105, D.L. Evans has also lost its right to file an action on a judgment based on the six (6) year statute of limitations set forth in Idaho Code § 5-215.

b. Analysis.

In response to Dean's argument that the law requires more than just an order renewing judgment and instead requires a separate renewal judgment, the Court incorporates its analysis of the Dean Motion for Summary Judgment. *See discussion supra* at § V(B)(2)(b)(i) and (ii), pp. 10-23. Similarly, in response to Dean's argument that

22. *Memorandum in Support of Plaintiff's Motion for Partial Summary Judgment* ("D.L. Evans' Opening Memorandum"), p. 4.

D.L Evans has lost its right to file an action on a judgment based on the six (6) year statute of limitations set forth in Idaho Code § 5-215 as a result of D.L. Evans losing its right to enforce the judgment under Idaho Code § 11-105, the Court incorporates its analysis of the Dean Motion for Summary Judgment. *See discussion supra* at § V(B)(2)(b)(i) and (ii), pp. 10-23.

c. Conclusion.

Based on the foregoing, the Court finds there is no genuine dispute of material fact involving the procedural history of the Original Judgment, the First Amended Renewal Order and the Second Amended Renewal Order. D.L. Evans' Motion for Partial Summary Judgment can be resolved as a matter of law. As explained above, the Court concludes as a matter of law that D.L. Evans is permitted to proceed with an action on a judgment and is not barred by the six (6) year statute of limitations under Idaho Code § 5-215. D.L. Evans' Motion for Partial Summary Judgment is GRANTED. The remaining issues in the action on the judgment will be resolved before or during the scheduled trial on August 9, 2022.

VI. CONCLUSION

As previously mentioned, the parties have filed cross-motions for summary judgment. The material facts needed to decide the cross-motions for summary judgment are undisputed. Where the parties have filed cross-motions for summary judgment relying on the same facts, issues and theories, the parties effectively stipulate that there

is no genuine issue of material fact that would preclude the district court from entering summary judgment. Intermountain Forest Management, Inc. v. Louisiana Pacific Corp, at 235, 31 P.3d at 923. The parties essentially make the same legal arguments in the cross-motions for summary judgment. As a matter of law, the action on a judgment filed by D.L. Evans is not time-barred under Idaho Code § 5-215.

VII. ORDERS

The Court enters the following orders:

1. Dean's Motion to Strike is GRANTED;

2. D.L. Evans' objection to SUSTAINED;

3. Dean's Motion for Summary Judgment is DENIED; and

4. D.L. Evans' Motion for Partial Summary Judgment is GRANTED.

IT IS SO ORDERED this 22nd day of December, 2021.

12/22/2021 11:46:08 AM

/s/_____
Ned C. Williamson, District Judge

APPENDIX F — ORDER OF THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF BLAINE, FILED APRIL 21, 2021

IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT OF THE STATE OF IDAHO IN AND FOR THE COUNTY OF BLAINE

Case No. CV07-20-00101

D.L. EVANS BANK,

Plaintiff,

vs.

VALLEY CLUB HOMES, LLC, SUN VALLEY DEVELOPMENT LLC, HENRY W. DEAN,

Defendants.

ORDER ON SECOND MOTION TO DISMISS

I. INTRODUCTION

The matter before the Court is Defendant Henry W. Dean's Second Motion to Dismiss ("Second Motion") filed by Defendant, Henry W. Dean ("Dean"). The Court heard the Second Motion on April 12, 2021. Plaintiff D.L. Evans Bank ("D.L. Evans") was represented by Rhett M. Miller, Esq. Dean was represented by Bradley VanderDries, Esq. At the conclusion of the hearing, the Court denied the Second Motion and now enters its order denying the Second Motion.

Appendix F

D.L. Evans filed a complaint ("Complaint") alleging an Action on Judgment against Dean, Valley Club Homes, LLC and Sun Valley Development LLC ("Defendants"), based on a default judgment entered by this Court in 2009.[1] The Court previously heard Henry W. Dean's Motion to Dismiss and Motion for Judgment on the Pleadings ("First Motion") and entered an Order on Motion to Dismiss and Motion for Judgment on the Pleadings ("Order on First Motion") denying the First Motion.

II. STANDARD OF REVIEW

In pertinent part, I.R.C.P. 12(b) provides "[e]very defense, in law or fact, to a claim for relief in any pleading, whether a claim, counterclaim, cross-claim or third party claim, must be asserted in the responsive pleading if one is required. But a party may assert the following defenses by motion:

> (2) lack of personal jurisdiction
>
> * * * * *
>
> (6) failure to state a claim upon which relief can be granted

I.R.C.P. 12(b)(2) and *(6).*

1. Valley Club Homes, LLC and Sun Valley Development LLC have not filed an appearance or an answer. The Court recently entered a default of Valley Club Homes, LLC and Sun Valley Development LLC.

"A 12(b)(6) motion looks only at the pleadings to determine whether a claim for relief has ben stated." *Taylor v. McNichols*, 149 Idaho 826, 833, 243 P.3d 642, 649 (2010). "[T]he non- moving party is entitled to have all inferences from the record and pleadings viewed in its favor, and only then may the question be asked whether a claim for relief has been stated." *Coghlan v. Beta Theta Pi Fraternity*, 133 Idaho 388, 398, 987 P.2d 300, 310 (1999). "If, on a motion under Rule 12(b)(6) or 12(c), matters outside the pleadings are presented to and not excluded by the court, the motion must be treated as one for summary judgment under Rule 56. All parties must be given a reasonable opportunity to present all of the material that is pertinent to the motion." *I.R.C.P. 12(d).* "When this Court reviews an order dismissing an action pursuant to I.R.C.P. 12(b)(6), we apply the same standard of review we apply to a motion for summary judgment. After viewing all facts and inferences from the record in favor of the non-moving party, the Court will ask whether a claim for relief has been stated. The issue is not whether the plaintiff will ultimately prevail, but whether the party is entitled to offer evidence to support the claims." *Losser v. Bradstreet*, 145 Idaho 670, 672-73, 183 P.3d 758, 760-61 (2008) (internal citations and quotations omitted).

III. ANALYSIS

The Second Motion seeks dismissal of the Complaint against Dean for two reasons. First, Dean seeks a dismissal for lack of personal jurisdiction under I.R.C.P. 12(b)(2). After the filing of the Second Motion, the Court entered the Order on First Motion, which in part determined the

Court had personal jurisdiction over Dean. Thereafter, Dean did not pursue any argument supporting the claim involving personal jurisdiction. The Court relies on its Order on First Motion and denies the Second Motion in the challenge to personal jurisdiction over Dean.

Second, Dean seeks dismissal for failure to state a claim upon which relief can be granted under I.R.C.P. 12(b)(6). Dean's argument under Rule 12(b)(6) is premised on the contention that the six (6) year statute of limitation for an Action on a Judgment has run.[2] The original default judgment was entered on January 12, 2010, while the Complaint was filed on February 21, 2020. D.L. Evans has renewed the original default judgment on January 9, 2015 and October 22, 2019.

If the six (6) year statute of limitation under Idaho Code § 5-215 is measured from the original default judgment date of January 12, 2010, the present Action on Judgment alleged in the Complaint would be barred because more than six years have elapsed between the date of entry of the original default judgment and the date of filing of the Complaint on February 21, 2020. In contrast, if the six (6) year statute of limitation under Idaho Code § 5-215 is measured from either renewal date of January 9, 2015 or October 22, 2019, the present Action on Judgment alleged in the Complaint would not be barred because less than six years have elapsed between the date of renewals of the original default judgment and the date of filing of the Complaint on February 21, 2020.

2. An Action on a Judgment is a "common-law cause of action based on the debt represented by a judgment." *Grazer v. Jones*, 154 Idaho 58, 64, 294 P.3d 184, 190 (2013).

Appendix F

In pertinent part, Idaho Code § 10-1111 provides:

> Entry of an order renewing judgment maintains both the date of the original judgment and the priority of collection thereof, and it begins anew the time limitation for an action upon a judgment set forth in section 5-215, Idaho Code.

This version of Idaho Code § 10-1111 was adopted in 2018 and expressly contemplates that the statute of limitation for an Action upon a Judgment starts "anew" from any order renewing judgment. Under the present version of Idaho Code § 10-1111, the six (6) year statute of limitation for an Action on a Judgment would start anew by the October 22, 2019 Order Renewing Judgment, thereby allowing the filing of the Complaint on February 21, 2020.

Dean urges the Court not to apply the 2018 version of Idaho Code § 10-1111. Dean initially argues that the six (6) year statute of limitation under Idaho Code § 5-215 requires D.L. Evans to file the Complaint for an Action on a Judgment within six (6) years of the original judgment.[3] In support of his contention, Dean relies on *Bennett v. Bank of E. Or.*, 472 P.3d 1125, 1136, n. 8 (2020). The Idaho Supreme Court in *Bennett* held that "an action on judgment filed in Idaho was required to be brought within 6 years." *Id.* The Court does find *Bennett* to be instructive. Unlike this case, the *Bennett* Court was not confronted with the facts where a judgment was renewed and then the

3. *Defendant Henry W. Dean's Memorandum in Support of Second Motion to Dismiss*, p. 3.

judgment creditor filed an Action on a Judgment following a renewal of a judgment lien under Idaho Code § 10-1111.

In the alternative, D.L Evans urges the Court to rely on *Leman v. Cunningham*, 12 Idaho 135, 85 P. 212 (1906). Based on *Leman*, D.L Evans contends that when a judgment is renewed, the statute of limitation for an Action on a Judgment begins to run on the date of the renewed judgment lien, not the earlier date of the judgment.[4] In response, Dean argues that reliance on *Leman* is misplaced.[5] *Leman* discusses the difference between Idaho and Nebraska law in 1906 on keeping a judgment alive. In 1906, Nebraska allowed a motion to be filed to revive a judgment, while Idaho allowed a judgment to be restored by a new action.[6] 12 Idaho at 139, 85 P. at 215. Nonetheless, *Leman* recognizes that an Action on a Judgment is allowed after a judgment is revived. When discussing the impact of the statute of limitations on renewal of a judgment, the *Leman* Court held "[o]ur statute would begin to run against the judgment or order of reviver from its date." *Id.* at 142. Based on this limited authority, the Court agrees with D.L. Evans' position that the statute of limitation for an Action on a Judgment begins to run on the date of the renewed judgment lien.

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4. *Objection to Second Motion to Dismiss*, p. 4.

5. *Defendant Henry W. Dean's Reply in Support of Second Motion to Dismiss* ("Dean's Reply Memorandum"), pp. 5-6.

6. Of course, Idaho has made the renewal of a judgment far easier with the adoption of Idaho Code § 10-1111 in 1978.

Such a position is consistent with the Court's understanding of the impact of judgments and judgment liens. "A judgment lien is distinct from the underlying judgment." *Platts v. Pac. First Fed. Sav. & Loan Ass'n of Tacoma*, 62 Idaho 340-348-49, 111 P.2d 1093, 1096 (1941). A judgment is treated as a judgment lien when it is recorded. *Idaho Code § 10-1110.* A judgment on its own allows for the issuance of a writ of execution, which in turn allows for the seizure and sale of personal and real property. *Idaho Code §§ 11-101 and 11-201.* Of course, a judgment may be renewed upon motion, thereby allowing collection on a judgment after the renewal. *Idaho Code § 10-1111.* Dean fails to support his position and the Court has not located any authority or policy reason why an Action on a Judgment cannot be pursued within the statute of limitation after the January 9, 2015 renewed judgment.

In later briefing, Dean specifically contends that the 2018 version of Idaho Code § 10-1111 does not provide for a revival of a lapsed cause of action or otherwise create a retroactive application. *Dean's Reply Memorandum*, pp. 6-7. The Court does not believe the legal arguments whether the express language of the 2018 version of Idaho Code § 10-1111 can be applied retroactively have been fully briefed. General principles involving retroactive application of amended statutes have been addressed by the Idaho Supreme Court. *See e.g., Guzman v. Piercy* , 155 Idaho 928, 318 P.3d 918 (2014). Notwithstanding these general principles, the Court declines to apply these principles without the benefit of briefing by the parties. Perhaps, a motion for summary judgment would afford the parties a better opportunity to address these matters.

Without further authority to the contrary, the Court concludes that an Action on a Judgment may be filed within the statute of limitation under Idaho Code § 5-215 after the renewal of a judgment.[7] Accordingly, the Court finds that the Complaint was timely filed and denies the Second Motion without prejudice.[8]

IV. ORDER

IT IS HEREBY ORDERED that Defendant's Second Motion to Dismiss is DENIED. IT IS SO ORDERED this 20th day of April, 2021.

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/s/_____
Ned C. Williamson,
District Judge

7. At the April12, 2021 hearing, counsel for Dean expressed a desire to appeal any order denying the Second Motion under I.A.R. 12. For the benefit of the parties, the Court questions whether an appeal by permission will materially advance the resolution of the litigation and whether this case is an exceptional case, which are required before an appeal by permission is granted. Nonetheless, the Court will analyze any such request for an appeal by permission.

8. The argument involving the six (6) year statute of limitation can be raised again in a motion for summary judgment.

APPENDIX G — OPINION OF THE DISTRICT COURT FOR THE FIFTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF BLAINE, FILED MARCH 17, 2021

IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF BLAINE

Case No. CV07-20-00101

D.L. EVANS BANK,

Plaintiff,

v.

VALLEY CLUB HOMES, LLC, SUN VALLEY DEVELOPMENT LLC, HENRY W. DEAN

Defendants.

ORDER ON MOTION TO DISMISS AND MOTION FOR JUDGMENT ON THE PLEADINGS

The matter before the Court is Defendant Henry W. Dean's Motion to Dismiss and Motion for Judgment on the Pleadings ("Motion") filed by Defendant, Henry W. Dean ("Dean"). Plaintiff D.L. Evans Bank ("D.L. Evans") filed a complaint ("Complaint") alleging one cause of action against Dean, Valley Club Homes, LLC and Sun Valley Development LLC ("Defendants"), based on a default judgment entered by this Court in 2009.[1] The primary issues in this case are

1. To date, there has been no appearance on behalf of Valley Club Homes, LLC or Sun Valley Development, LLC, who are allegedly administratively dissolved. *Complaint*, ¶ 2.

1) whether the Court has personal jurisdiction over Dean, 2) whether the Complaint states a claim upon which relief can be granted and 3) whether the pending Washington litigation precludes the Court from granting relief.[2]

I. ALLEGED FACTS

The Complaint alleges:

1. In 2010, D.L. Evans obtained a $1,063,503.16 default judgment ("Judgment") against Dean in the Fifth Judicial District of the State of Idaho in Blaine County Case No. CV-09-625.[3]

2. A judgment lien was created through the recording of the Judgment, recorded as Instrument Number 574646 in the Blaine County Recorder's office.[4]

3. The Judgment has been renewed in 2015 and 2019. Each renewed judgment has been recorded with the Blaine County Recorder's Office.[5]

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2. In 2018, Dean filed a complaint challenging the default judgment and alleging multiple causes of action against D.L. Evans in the United States District Court for the Western District of Washington. The Washington federal court has yet to rule on any of the issues raised by the parties.

3. *Complaint,* ¶ 3.

4. *Complaint,* ¶ 4.

5. Complaint, ¶'s 5-8.

Dean also submits:

A. In 2018, Dean filed a Complaint For Violation of 42 U.S.C. 1983; Conversion, Unjust Enrichment, Declaratory Relief, Injunctive Relief, Attorneys' Fees, and Costs in the United States District Court for the Western District of Washington in Case No. 2:18-cv-1408 ("Federal Case"). In the Federal Case, Dean requests relief from the Judgment due to lack of due process and illegal actions by D.L. Evans.[6]

B. Thereafter, D.L. Evans answered the complaint filed in the Federal Case and filed a counterclaim. The Federal Case remains pending.[7]

The parties have not argued that the allegations set forth above are in dispute.

II. STANDARD OF REVIEW

In pertinent part, I.R.C.P. 12(b) provides "[e]very defense, in law or fact, to a claim for relief in any pleading, whether a claim, counterclaim, cross-claim or third party claim, must be asserted in the responsive pleading if one is required. But a party may assert the following defenses by motion:

(2) lack of personal jurisdiction

* * * * *

6. *Declaration of Henry W. Dean*, Ex. B.

7. *Declaration of Henry W. Dean*, Ex. C.

> (6) failure to state a claim upon which relief can be granted
>
> * * * * *
>
> (8) another action pending between the same parties for the same cause.

I.R.C.P. 12(b)(2),(6) and *(8).*

Idaho Rule of Civil Procedure 12(c) governs motions for judgment on the pleadings.

> By its terms, Rule 12(c) treats such motions similarly to motions for summary judgment. Thus, the standard of review applicable to lower courts' rulings on motions for summary judgment also applies to motions for judgment on the pleadings. Summary judgment is appropriate if the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. Furthermore, all doubts are to be resolved against the moving party, and the motion must be denied if the evidence is such that conflicting inferences may be drawn therefrom, and if reasonable people might reach different conclusions.

Union Bank, N.A. v. JV L.L.C., 163 Idaho 306, 311–12, 413 P.3d 407, 412–13 (2017).

"If, on a motion under Rule 12(b)(6) or 12(c), matters outside the pleadings are presented to and not excluded by the court, the motion must be treated as one for summary judgment under Rule 56. All parties must be given a reasonable opportunity to present all of the material that is pertinent to the motion." *I.R.C.P. 12(d).* "When this Court reviews an order dismissing an action pursuant to I.R.C.P. 12(b)(6), we apply the same standard of review we apply to a motion for summary judgment. After viewing all facts and inferences from the record in favor of the non-moving party, the Court will ask whether a claim for relief has been stated. The issue is not whether the plaintiff will ultimately prevail, but whether the party is entitled to offer evidence to support the claims." *Losser v. Bradstreet*, 145 Idaho 670, 672-73, 183 P.3d 758, 760-61 (2008) (internal citations and quotations omitted). The "trial court's determination under I.R.C.P. 12(b)(8) whether to proceed with an action where a similar case is pending in another court is discretionary." *Klaue v. Hern*, 133 Idaho 437, 439, 988 P.2d 211, 213 (1999).

III. ANALYSIS

A. This Court Has Personal Jurisdiction over Dean.

1. Parties' Positions.

Dean argues the Complaint in the case does not allege sufficient facts for this Court's personal jurisdiction over Dean.[8] D.L. Evans argues this Court possesses personal

8. *Defendant Henry W. Dean's Memorandum in Support of Motion to Dismiss and Motion for Judgment on the Pleadings* ("Opening Memorandum"), pp. 4-5.

jurisdiction over Dean because both the original case and the present case concern a deed of trust for property located in Blaine County.[9] D.L. Evans also contends that Dean waived any personal jurisdiction defense because he failed to raise it by pre-answer motion and that he has voluntarily submitted to the personal jurisdiction of this Court.[10]

2. Applicable Law.

In pertinent part, Idaho's long-arm statute provides:

> Any person, firm, company, association or corporation, whether or not a citizen or resident of this state, who in person or through an agent does any of the acts hereinafter enumerated, thereby submits said person, firm, company, association or corporation, and if an individual, his personal representative, to the jurisdiction of the courts of this state as to any cause of action arising from the doing of any of said acts:
>
> (a) The transaction of any business within this state which is hereby defined as the doing of any act for the purpose of realizing pecuniary benefit or accomplishing or attempting to

9. *Plaintiff D.L. Evans Bank's Verified Memorandum in Opposition of Henry W. Dean's Memorandum in Support of Motion to Dismiss and Motion for Judgment on the Pleadings* ("Opposition Memorandum"*)*, p. 5.

10. *Opposition Memorandum*, pp. 4-7.

> accomplish, transact or enhance the business purpose or objective or any part thereof of such person, firm, company, association or corporation;
>
> (c) The ownership, use or possession of any real property situate within this state.

Idaho Code § 5-514.

Rule 4(i) of the Idaho Rules of Civil Procedure provides:

> The voluntary appearance of a party or service of any pleading by the party, except as provided herein, constitutes voluntary submission to the personal jurisdiction of the court. A motion under Rule 12(b)(2), (4) or (5), whether raised before or after judgment, does not constitute a voluntary appearance by the party under this rule. The joinder of other defenses in a motion under Rule 12(b)(2), (4) or (5) does not constitute a voluntary appearance by the party under this rule. If, after a motion under Rule 12(b)(2), (4), or (5) is denied, the party pleads further and defends the action, such further appearance and defense of the action will not constitute a voluntary appearance under this rule.

3. Analysis.

The Complaint alleges facts that give rise to the Court's personal jurisdiction over Dean. While the

Complaint states, "Henry W. Dean is currently a resident of Washington," the Complaint also details the entry of the default judgment against the Defendants, which sought the recovery of a deficiency from a deed of trust sale for property located in Idaho. The Complaint makes clear that the claim for action on a judgment is based on that default judgment filed in an Idaho Court. There is no dispute that there was personal jurisdiction over Dean in the original action resulting in the Judgment and that the renewals of the Judgment in Idaho have been proper. The Court views the present action before the Court as a continuation of the prior action where personal jurisdiction was not challenged. The Judgment is also predicated on the transaction of business by the parties and on the ownership, use and possession of real property. Thus, there are sufficient ties to Idaho under Idaho Code § 5-514(a) and (c). The Complaint alleges sufficient facts giving rise to this Court's personal jurisdiction over Dean.

Dean has also voluntarily submitted to this Court's personal jurisdiction. Under Rule 4(i) of the Idaho Rules of Civil Procedure, "the filing of a notice of appearance by a party is equivalent to the service of process upon that party." *Engleman v. Milanez*, 137 Idaho 83, 84–85, 44 P.3d 1138, 1139–40 (2002).

> [T]he voluntary appearance or service of any pleading by a party constitutes voluntary submission to the personal jurisdiction of the court. Because it is by service of the summons that the court acquires personal jurisdiction over a party, the voluntary appearance by a

> party is equivalent to service of the summons upon that party.

Engleman v. Milanez, 137 Idaho 83, 84–85, 44 P.3d 1138, 1139–40 (2002).

In *Engleman*, counsel for defendants filed a notice of appearance which stated that he appeared on behalf of the defendants and that counsel "reserves all objections and defenses, including but not limited to defenses provided for under Rule 12(b) of the Idaho Rules of Civil Procedure." *Id.* at 84, 44 P.3d at 1139. Later, defendants filed an answer alleging an affirmative defense of insufficient process. *Id.* The *Engleman* court held that the notice of appearance was the equivalent of a summons upon the defendant and that the district court had jurisdiction. *Id.* Here, Dean's counsel filed "Notice of Appearance on Behalf of Defendant Henry W. Dean" on October 13, 2020. That notice of appearance was not a motion under Idaho Rule of Civil Procedure 12(b)(2), (4) or (5), thus the filing was a voluntary appearance by Dean in this action. Dean contends he did not voluntarily appear because his attorney's Notice of Appearance stated, "[t]his appearance is without waiver of any defenses, including, but not limited to, insufficient service of process and lack of personal jurisdiction." However, like *Engleman*, "[c]ounsel's statement in the notice of appearance that he 'hereby reserves all objections and defenses, including but not limited to defenses provided for under Rule 12(b) of the Idaho Rules of Civil Procedure' was of no effect." *Id.* Accordingly, this Court has personal jurisdiction over Dean.

B. D.L. Evans Has Stated a Claim Upon Which Relief Can Be Granted.

1. Parties' Positions.

Dean argues that the only avenue for enforcing the default judgment is through Idaho Code § 11-101 *et seq.*, and enforcement through Idaho Code § 5-215 is improper because the doctrines of res judicata, claim preclusion, issue preclusion and estoppel bar an action on the judgment. Dean also argues that an action on a judgment is meant only for foreign judgments.[11] D.L. Evans argues Idaho case law supports a broader interpretation of an action on a judgment.[12]

2. Analysis.

A statute of limitation, Idaho Code § 5-215, recognizes an action upon a judgment. Idaho Code § 5-215 states:

> Within eleven (11) years:
>
> (1) An action upon a judgment or decree of any court of the United States, or of any state or territory within the United States.
>
> (2) An action for mesne profits of real property.

The courts also recognize the cause of action for an action on a judgment. "An 'action on a judgment' is a common-

11. *Opening Memorandum*, pp. 5-6.

12. *Opposition Memorandum*, pp. 7-8.

law cause of action based on the debt represented by a judgment." *Grazer v. Jones*, 154 Idaho 58, 64, 294 P.3d 184, 190 (2013). Notably, there is no language contained in Idaho Code § 5-215 limiting its use only to foreign judgments, nor has Dean directed the Court to any authority limiting an action on the judgment to foreign judgments. The Court finds *Western Corp. v. Vanek*, instructive on this point. 144 Idaho 150, 150, 158 P.3d 313, 313 (Ct. App. 2006). *Vanek* recognizes that an action on a judgment is a valid cause of action in Idaho and supports the proposition that an action on a judgment is not just reserved for domestication of foreign judgments. In *Vanek*, the parties earlier stipulated to entry of a judgment and then years later the judgment creditor filed "an independent action on the judgment, alleging that it had not been fully paid." *Id.* Even though the issue before the Court–whether an action on a judgment is limited to foreign judgments–was not specifically argued in *Vanek*, the *Vanek* Court allowed an action on an Idaho judgment, not just a foreign judgment.

While Dean is certainly correct that Idaho statutes provide one means of enforcing and renewing the Judgment, it is not the only means. Idaho Code § 10-1111 allows a money judgment to be renewed by motion before the expiration of a judgment lien without the necessity to file an independent action on a judgment. *Smith v. Smith,* 131 Idaho 800, 802, 964 P.2d 667, 669 (Ct. App. 1998). The expedited procedure of renewing a judgment by motion was a significant procedural development created in 1978. The Court would have expected the legislature at that time to eliminate the common-law cause of action of an action on

a judgment when it adopted the expedited procedure to renew a judgment set forth in Idaho Code § 10-1111 if that is what the legislature intended. But, the applicable statutes are silent on the elimination of an action on a judgment. The Court concludes that an action on a judgment provides an alternative means of renewing a judgment.

Moreover, the doctrine of res judicata does not bar D.L. Evans from seeking an action on the judgment. "The doctrine of *res judicata* covers both claim preclusion (true *res judicata*) and issue preclusion (collateral estoppel)." *Ticor Title Co. v. Stanion*, 144 Idaho 119, 123, 157 P.3d 613, 617 (2007). Claim preclusion operates to bar "a subsequent action between the same parties upon the same claim or upon claims 'relating to the same cause of action.'" *Stoddard v. Hagadone,* 147 Idaho 186, 190, 207 P.3d 162, 166 (2009). "A claim is precluded if it could have been brought in the previous action, regardless of whether it was actually brought, where "(1) the original action ended in a final judgment on the merits, (2) the present action involves the same parties as the original action, and (3) the present claim arises out of the same transaction or series as the original action." *Berkshire Invs., LLC v. Taylor,* 153 Idaho 73, 81, 278 P.3d 943, 951 (2012). Issue preclusion bars relitigation of an issue when: "(1) the party against whom the earlier decision was asserted had a full and fair opportunity to litigate the issue decided in the earlier case; (2) the issue decided in the prior litigation was identical to the issue presented in the present action; (3) the issue sought to be precluded was actually decided in the prior litigation; (4) there was a final judgment on the merits in the prior litigation; and (5) the party against whom the issue is asserted was a party or in privity with a party to

the litigation." *Pocatello Hosp., LLC v. Quail Ridge Med. Inv., LLC*, 157 Idaho 732, 738, 339 P.3d 1136, 1142 (2014).

In this case, D.L. Evans is attempting to enforce the Judgment entered by this Court in 2010 and is not seeking to relitigate any issues or claims previously decided by the Court. The doctrine of res judicata is inapplicable here. Moreover, "*res judicata* is an affirmative defense and the party asserting it must prove all of the essential elements by a preponderance of the evidence. *Foster v. City of St. Anthony,* 122 Idaho 883, 890, 841 P.2d 413, 420 (1992). Dean merely states, "[t]he doctrines of res judicata, claim preclusion, issue preclusion, and estoppel prevent Plaintiff from seeking a new judgment in this case when it already has the Default Judgment. To allow otherwise would subject Defendant Dean to duplicative and conflicting judgments." *Opening Memorandum*, p. 6. Dean does not elaborate as to how enforcement of the default judgment through an action on the judgment would subject him to duplicative judgments, and that statement alone does not prove all of the essential elements of res judicata by a preponderance of the evidence.

For these reasons, D.L. Evans is entitled to seek relief through an independent action on a judgment.

C. Dismissal under Idaho Rule of Civil Procedure 12(b)(8) Is Inappropriate.

1. Parties' Positions.

Dean argues the Complaint seeks a new judgment on the same debt, which is the subject of pending litigation

between the parties in the Federal Case.[13] D.L. Evans argues the action on a judgment is a renewal of the default judgment and involves separate claims from the Federal case.[14]

2. Analysis.

Dismissal under Idaho Rule of Civil Procedure 12(b)(8) is appropriate when there is "another action pending between the same parties for the same cause." In order for the Complaint to be dismissed due to another action pending for the same cause, Dean would need to show that this Court and the court in the Federal Case are being asked to decide substantially the same question(s). That is not the case. In this action, D.L. Evans is the plaintiff and Dean is the defendant. D.L. Evans is seeking an action on a judgment in order to renew the Judgment. In the Federal Case, Dean is the plaintiff and D.L. Evans is the defendant. There, Dean is pursuing a federal challenge of a state court action and the federal court is being asked to decide whether the Judgment was proper. If this Court were to grant D.L. Evans the relief it seeks in its Complaint, that relief would not resolve the pending Washington litigation. Therefore, dismissal under Idaho Rule of Civil Procedure 12(b)(8) would be inappropriate as the cases involve different actions.

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13. *Opening Memorandum*, p. 7.

14. *Opposition Memorandum*, p. 10.

Appendix G

IV. ORDER

IT IS HEREBY ORDERED that Defendant's Motion to Dismiss and Motion for Judgment on the Pleadings is DENIED.

IT IS SO ORDERED this 17th day of March, 2021.

3/17/2021 9:59:06 AM
/s/ Ned C. Williamson
Ned C. Williamson, District Judge

Appendix G

CERTIFICATE OF SERVICE

I, Deputy Clerk for the County of Blaine, do hereby certify that as of the date indicated next to my signature below, I have filed the original and caused to be served a true and correct copy of the above and foregoing document:

Rhett M. Miller (rhett@pmt.org) **X** E-Service
Parsons, Smith, Stone,
Loveland and Shirley, LLP
P.O. Box 910
Burley, Idaho 83318
Attorney for Plaintiff, D.L. Evans Bank

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Turnbow & McKlveen, Chartered
1111 W. Jefferson St., Suite 530
P.O. Box 1368
Boise, Idaho 83701-1368
Attorneys for Defendant, Henry W. Dean

/s/ 3/17/2021 11:38 AM
Deputy Clerk

APPENDIX H — DENIAL OF REHEARING OF THE SUPREME COURT OF THE STATE OF IDAHO, DATED DECEMBER 5, 2023

IN THE SUPREME COURT
OF THE STATE OF IDAHO

Supreme Court Docket No. 50134-2022

Blaine County District Court No. CV07-20-00101

D.L. EVANS BANK,

Plaintiff-Respondent,

v.

HENRY W. DEAN,

Defendant-Appellant,

and

VALLEY CLUB HOMES, LLC, and
SUN VALLEY DEVELOPMENT, LLC,

Defendants.

ORDER DENYING PETITION FOR REHEARING

The Appellant having filed a Petition for Rehearing on November 13, 2023, and supporting brief on November 27, 2023, of the Court's Published Opinion released October 30, 2023; therefore, after due consideration,

Appendix H

IT IS ORDERED that Appellant's Petition for Rehearing is denied.

Dated December 05, 2023.

By Order of the Supreme Court

/s/ Melanie Gagnepagn
Melanie Gagnepagn
Clerk of the Courts