5-26-2010

Allied Bail Bonds v. County of Kootenai Augmentation Record Dckt. 36861

In the Supreme Court of the State of Idaho

ALLIED BAIL BONDS, INC., an Idaho corporation, Plaintiff-Appellant, v. COUNTY OF KOOTENAI, a political subdivision of the State of Idaho, ROCKY WATSON, Kootenai County Sheriff, JOHN and JANE DOES 1 through 13, Defendants-Respondents.	)	ORDER GRANTING MOTION TO AUGMENT THE RECORD Supreme Court Docket No. 36861-2009 Kootenai County Docket No. 2007-7471

A MOTION TO AUGMENT THE RECORD was filed by counsel for Appellant on May 21, 2010. Therefore, good cause appearing,

IT HEREBY IS ORDERED that Appellant's MOTION TO AUGMENT THE RECORD be, and hereby is, GRANTED and the augmentation record shall include the documents listed below, file stamped copies of which accompanied this Motion:

1. Surety Bond, file-stamped March 17, 2008;
2. Memorandum in Support of Renewed Motion to Dismiss, file-stamped February 3, 2009;
3. Response to Defendants' Renewed Motion to Dismiss, file-stamped February 11, 2009;
4. Supplemental Memorandum in Support of Motion to Reconsider, file-stamped February 23, 2009;
5. Memorandum in Support of Motion to Reconsider with attachment, file-stamped March 23, 2009;
6. Motion to Disallow Items of Costs, file-stamped April 3, 2009;
7. Supplemental Argument in Support of Motions to Reconsider, file-stamped April 15, 2009;
8. Memorandum in Support of Motion to Dismiss Amended Complaint, file-stamped July 9, 2008; and
9. Response to Defendants' Motion to Dismiss Second Amended Complaint and Motion to Reconsider, file-stamped July 16, 2008.

AUGMENTATION RECORD

DATED this 26th day of May 2010.

For the Supreme Court

Stephen Kenyon

Stephen W. Kenyon, Clerk

cc: Counsel of Record

American Contractors Indemnity Company

STATE OF IDAHO
COUNTY OF KOOTENAI
FILED:

2008 MAR 17 PM 1:58

In the DISTRICT Court
County of KOOTENAI State of Idaho

CLERK DISTRICT COURT
DEPUTY

ALLIED BAIL BONDS, INC., an Idaho Corporation,

Plaintiff,

vs.

COUNTY OF KOOTENAI, a political subdivision of the State of Idaho, ROCKY WATSON, Kootenai County Sheriff, John and Jane does 1 through 13

Defendants.

Case No. CV-07-7471

UNDERTAKING UNDER SECTION 6-610
American Contractors Indemnity Company
9841 Airport Blvd., 9th Floor
Los Angeles, CA 90045

WHEREAS, the above named ALLIED BAIL BONDS, INC., an Idaho Corporation desires to give an undertaking for APPEAL as provided in Section 6-610

NOW THEREFORE, the undersigned Surety, does hereby obligate itself, jointly and severally, to STATE OF IDAHO under said statutory obligations in the sum of TWENTY FIVE THOUSAND AND NO/100THS********** Dollars ($25,000.00).

IN WITNESS WHEREOF, The corporate seal and name of the said Surety Company is hereto affixed and attested by FRANK MESTER who declares under penalty of perjury that he is its duly authorized Attorney-in-Fact acting under an unrevoked power of attorney on file with the Clerk of the County in which above entitled Court is located.

Executed at LOS ANGELES, California on MARCH 11, 2008

Bond No. 1000795454

The premium charge for this bond is $500.00 per annum.

AMERICAN CONTRACTORS INDEMNITY COMPANY

Attorney-in-Fact FRANK MESTER

0 001

CALIFORNIA ALL-PURPOSE ACKNOWLEDGMENT

State of California

County of LOS ANGELES

On MARCH 11, 2008 (Date) before me, ROCHELLE A. HILL, A NOTARY PUBLIC (Here Insert Name and Title of the Officer),

personally appeared FRANK MESTER (Name(s) of Signer(s))

who proved to me on the basis of satisfactory evidence to be the person(s) whose name(s) is/~~are~~ subscribed to the within instrument and acknowledged to me that ~~he/she/they~~ executed the same in ~~his/her/their~~ authorized capacity~~(ies)~~, and that by ~~his/her/their~~ signature~~(s)~~ on the instrument the person~~(s)~~, or the entity upon behalf of which the person~~(s)~~ acted, executed the instrument.

I certify under PENALTY OF PERJURY under the laws of the State of California that the foregoing paragraph is true and correct.

WITNESS my hand and official seal.

Signature Rochelle A. Hill (Signature of Notary Public)

ROCHELLE A. HILL
Commission # 1634494
Notary Public - California
Los Angeles County
My Comm. Expires Jan 3, 2010

Place Notary Seal Above

OPTIONAL

Though the information below is not required by law, it may prove valuable to persons relying on the document and could prevent fraudulent removal and reattachment of this form to another document.

Description of Attached Document

Title or Type of Document: APPEAL BOND #1000795454

Document Date: _____ Number of Pages: _____

Signer(s) Other Than Named Above: _____

Capacity(ies) Claimed by Signer(s)

Signer's Name: _____

☐ Individual
☐ Corporate Officer — Title(s): _____
☐ Partner — ☐ Limited ☐ General
☐ Attorney in Fact
☐ Trustee
☐ Guardian or Conservator
☐ Other: _____

Signer is Representing: _____

RIGHT THUMBPRINT OF SIGNER
Top of thumb here

Signer's Name: _____

☐ Individual
☐ Corporate Officer — Title(s): _____
☐ Partner — ☐ Limited ☐ General
☐ Attorney in Fact
☐ Trustee
☐ Guardian or Conservator
☐ Other: _____

Signer is Representing: _____

RIGHT THUMBPRINT OF SIGNER
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HCC Surety Group, established via the purchase of American Contractors Indemnity Company and United States Surety Company, is the 9th largest writer of surety in the United States. HCC Surety Group's products, including Contract, Commercial, Court and Bail are backed by the financial stability of our parent company, HCC Insurance Holdings, Inc. (NYSE: HCC), rated AA (Very Strong) by Standard & Poor's and A+ (Superior) by A.M. Best Company.

HCC Surety Group's team of underwriters, claim specialists and client service professionals provides personal service and professional expertise to a large network of independent insurance agents and brokers across the United States. We provide surety bonds to companies of all sizes from sole proprietors to large publicly-traded companies. Our talented group of professionals are adept at underwriting traditional surety. In addition, our professionals possess the knowledge and creativity to offer solutions for specialty "hard-to-place" risks often dismissed by the surety marketplace at-large.

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Recent News

HCC Surety Group, established via the purchase of American Contractors Indemnity Company and United States Surety Company, is the 9th largest writer of surety in the United States. HCC Surety Group's products, including Contract, Commercial, Court and Bail are backed by the financial stability of our parent company, HCC Insurance Holdings, Inc. (NYSE: HCC), rated AA (Very Strong) by Standard & Poor's and A+ (Superior) by A.M. Best Company.

HCC Surety Group's team of underwriters, claim specialists and client service professionals provides personal service and professional expertise to a large network of independent insurance agents and brokers across the United States. We provide surety bonds to companies of all sizes from sole proprietors to large publicly-traded companies. Our talented group of professionals are adept at underwriting traditional surety. In addition, our professionals possess the knowledge and creativity to offer solutions for specialty "hard-to-place" risks often dismissed by the surety marketplace at-large.

1/10/08

American Contractors Indemnity Company

9841 Airport Blvd., 9th Floor Los Angeles, California 90045

POWER OF ATTORNEY

KNOW ALL MEN BY THESE PRESENTS:

That American Contractors Indemnity Company of the State of California, a California corporation, does hereby appoint,

Frank Mester, Ariel T. Heredia, Tah Carazza, Brian Dahlke, or Sylvia Chang of Los Angeles, California

its true and lawful Attorney(s)-in-Fact, with full authority to execute on its behalf bonds, undertakings, recognizances and other contracts of indemnity and writings obligatory in the nature thereof, issued in the course of its business and to bind the Company thereby, in an Amount not to exceed $ *** 3,000,000.00 ***. This Power of Attorney shall expire without further action on June 29, 2009.

This Power of Attorney is granted and is signed and sealed by facsimile under and by the authority of the following Resolution adopted by the Board of Directors of AMERICAN CONTRACTORS INDEMNITY COMPANY at a meeting duly called and held on the 6th day of December, 1990.

"RESOLVED that the Chief Executive Officer, President or any Vice President, Executive Vice President, Secretary or Assistant Secretary, shall have the power and authority

1. *To appoint Attorney(s)-in-Fact and to authorize them to execute on behalf of the Company, and attach the seal of the Company thereto, bonds and undertakings, contracts of indemnity and other writings obligatory in the nature thereof and,*
2. *To remove, at any time, any such Attorney-in-Fact and revoke the authority given.*

RESOLVED FURTHER, that the signatures of such officers and the seal of the Company may be affixed to any such Power of Attorney or certificate relating thereto by facsimile, and any such Power of Attorney or certificate bearing such facsimile signatures or facsimile seal shall be valid and binding upon the Company and any such power so executed and certified by facsimile signatures and facsimile seal shall be valid and binding upon the Company in the future with respect to any bond or undertaking to which it is attached."

IN WITNESS WHEREOF, American Contractors Indemnity Company has caused its seal to be affixed hereto and executed by its Executive Vice President on the 9th day of January, 2007.

AMERICAN CONTRACTORS INDEMNITY CO. INCORPORATED SEPT. 26, 1990 CALIFORNIA

AMERICAN CONTRACTORS INDEMNITY COMPANY

By: _____
Adam S. Pessin, Executive Vice President

STATE OF CALIFORNIA §
COUNTY OF LOS ANGELES §

On this 9th day of January, 2007, before me, Steve Fedunak , a notary public, personally appeared Adam S. Pessin, Executive Vice President of American Contractors Indemnity Company , personally known to me (or proved to me on the basis of satisfactory evidence) to be the person(s) whose name(s) is/are subscribed to the within instrument and acknowledged to me that he/she/they executed the same in his/her/their authorized capacity(ies), and that by his/her/their signature(s) on the instrument the person(s), or the entity upon behalf of which the person(s) acted, executed the instrument.

WITNESS my hand and official seal.

_____
Signature of Notary
My Commission expires June 29, 2009

CMD-1 STEVE FEDUNAK Comm. No. 1593578 NOTARY PUBLIC - CALIFORNIA LOS ANGELES COUNTY My Comm. Exp. June 29, 2009 CMD-1

I, Jeannie J. Kim, Corporate Secretary of American Contractors Indemnity Company, do hereby certify that the Power of Attorney and the resolution adopted by the Board of Directors of said Company as set forth above, are true and correct transcripts thereof and that neither the said Power of Attorney nor the resolution have been revoked and they are now in full force and effect.

IN WITNESS HEREOF, I have hereunto set my hand this 11TH day of MARCH, 2008.

_____
Jeannie J. Kim, Corporate Secretary

Bond No. 1000795454

Agency No. 9012

COPY

Barry McHugh, Kootenai County Prosecuting Attorney
Darrin L. Murphey, Civil Deputy
451 N. Government Way
P.O. Box 9000
Coeur d'Alene, ID 83816-9000
Telephone: (208) 446-1620
Fax: (208) 446-1621
ISB #6221

Attorney for Defendants Kootenai County, and Rocky Watson, Kootenai County Sheriff

STATE OF IDAHO } ss
COUNTY OF KOOTENAI
FILED:

2009 FEB -3 PM 4:33

CLERK DISTRICT COURT

DEPUTY

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

ALLIED BAIL BONDS, INC., an Idaho Corporation, Plaintiff, vs. COUNTY OF KOOTENAI, a political subdivision of the State of Idaho, ROCKY WATSON, Kootenai County Sheriff, John and Jane Does 1 through 13, Defendants.	Case No. CV-07-7471 **MEMORANDUM IN SUPPORT OF RENEWED MOTION TO DISMISS**

COME NOW Defendants Kootenai County, and Rocky Watson, Kootenai County Sheriff, by and through their attorney of record, Darrin L. Murphey, Civil Deputy of the Office of the Kootenai County Prosecuting Attorney, and submit the following Memorandum in Support of Renewed Motion to Dismiss:

I. BACKGROUND

The Court in its Order Granting Motion to Dismiss in Part and Denying Motion to Dismiss in Part, entered on December 12, 2008 ("Order"), dismissed all claims against Sheriff Rocky Watson, all tort claims, all public records claims, all claims challenging the acceptance of a credit card to post bail, and all claims challenging Kootenai County's operation of the Adult Misdemeanor Probation Department and Pre-trial Services Program as without statutory authority and in violation of Article 10, § 5 of the Idaho Constitution. The only remaining claim is a breach of contract claim against Kootenai County arising out of the 2001 Release and Settlement Agreement. Allied alleges "Defendant has breached the Agreement by" soliciting or encouraging inmates to file cash, credit card, or "other sources" of bonds, refusing to make change for the $10 fee, refusing to collect the $10 fee from an inmate's account, and not allowing arrestees access to the phone to call a bonding company. (Second Amended Complaint, ¶ 8). Kootenai County seeks dismissal of this remaining claim pursuant to I.R.C.P. 12(b)(6).

II. STANDARD OF REVIEW

The Court set forth the following standard of review in its Order, which is applicable here.

The standard for reviewing a dismissal for failure to state a cause of action pursuant to I.R.C.P. 12(b)(6) is the same as the standard for reviewing a grant of summary judgment. See Idaho Schools For Equal Education v. Evans, 123 Idaho

573, 578, 850 P.2d 724, 728 (1993); Rim View Trout Co. v. Dep't. of Water Resources., 119 Idaho 676, 677, 809 P.2d 1155, 1156 (1991). The grant of a 12(b)(6) motion will be affirmed where there are no genuine issues of material fact and the case can be decided as a matter of law. See Moss v. Mid-American Fire and Marine Ins. Co., 103 Idaho 298, 302, 647 P.2d 754, 758 (1982); Eliopulos v. Idaho State Bank, 129 Idaho 104, 107-08, 922 P.2d 401, 404-05 (Ct.App.1996). When reviewing an order of the district court dismissing a case pursuant to I.R.C.P. 12(b)(6), the 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. See Idaho Schools for Equal Education, 123 Idaho 573, 578, 850 P.2d 724, 729; Miles v. Idaho Power Co., 116 Idaho 635, 637, 778 P.2d 757, 759 (1989). "The issue is not whether the plaintiff will ultimately prevail, but whether the party 'is entitled to offer evidence to support the claims.' " Orthman v. Idaho Power Co., 126 Idaho 960, 962, 895 P.2d 561, 563 (1995) (quoting Greenfield v. Suzuki Motor Co. Ltd., 776 F.Supp. 698, 701 (E.D.N.Y.1991)).

III. ARGUMENT

A. The Release and Settlement Agreement is Void and Unenforceable as Against Public Policy.

Former Kootenai County Commissioner Rankin signed the April 19, 2001 Release and Settlement Agreement (Exhibit A to Second Amend Complaint), to resolve the then pending litigation (Case No. CV-00-5841) between Allied and

Kootenai County,[1] pursuant to the Board's authority. Idaho Code § 31-813. The Release and Settlement Agreement was not judicially entered or otherwise approved by the court, but merely a private agreement between the parties. The terms of the Release and Settlement Agreement stipulate to certain policies and procedures at the jail.

In the present case, the court dismissed Sheriff Watson as a party. Allied now seeks to enforce the Release and Settlement Agreement against the only remaining defendant, Kootenai County. Allied, however, is now seeking to enforce the Release and Settlement Agreement in a manner which would violate public policy.

Whether a contract violates public policy is a question of law for the court to determine from all the facts and circumstances of each case. Bakker v. Thunder Spring-Wareham, LLC, 141 Idaho 185, 189, 108 P.3d 332, 336 (2005). "Public policy may be found and set forth in the statutes, judicial decisions or the constitution." *Id.* "All contracts the purpose of which is to create a situation which tends to operate to the detriment of the public interest are against public policy and void. . ." Barton v. State, 104 Idaho 338, 341, 659 P.2d 92, 95 (1983), *quoting* Western Cab Co. v. Kellar, 523 P.2d 842, 845 (Nev.1974). "[T]he rule in construing contracts in which the government is a party is to resolve all ambiguities, presumptions, and implications in its favor." 17A Am.Jur.2d. Contracts, § 397 (2008).

---

[1] The Sheriff was not a party to the lawsuit, but executed the Release and Settlement Agreement.

1. **Lack of Time Limitation.**

The Release and Settlement Agreement does not contain a time limitation and is therefore void. A contract with a municipality without a time limitation is void as against public policy. *See* Dorchester Manor v. Borough of New Milford, 287 N.J.Super. 163, 169, 670 A.2d 600, 603 (N.J.Super. 1994)(agreement between municipality and owner of apartment complex could not bind municipality perpetually in absence of express statutory authority, and was thus *ultra vires* and void); 56 Am.Jur.2d. Municipal Corporations, § 452 (1998). "It is questionable as to whether a definite promise to do, or not to do, an act or a series of acts in perpetuity is legally enforceable as such a promise may be contrary to public policy." Shultz v. Atkins, 97 Idaho 770, 775, 554 P.2d 948, 953 (1976), citing Corbin on Contracts, § 552 (1960). In Barton v. State, 104 Idaho at 341, 659 P.2d at 95, the Court opined: "The State's power to change its road systems to meet the public's health, safety and welfare needs cannot be circumscribed by a contract in perpetuity, as such would be void as against public policy." More recently, the Idaho Supreme Court has held that in the context of a contract precluding competition for business, the contract is void and unenforceable if it does not contain a limitation as to time. Jorgensen v. Coppedge, __ Idaho__, 181 P.3d 450, 454 (March 27, 2008).

Here, Allied seeks to enforce the Release and Settlement Agreement as a "definite promise to do, or not to do, an act or a series of acts" on the part of Sheriff Watson, and is seeking an order without duration, "requiring the Sheriff's Department to abide by its terms." (Second Amended Complaint, p. 3, ¶ 9, p. 6,

¶ 2). A contract between the County and Allied for an indefinite period or perpetuity is unenforceable. As such, the relief Allied seeks is against public policy. Therefore, the Agreement is void and unenforceable.

2. Attempts to Limit the Power of Successor Boards.

Similarly, the Release and Settlement Agreement, in the manner Allied is seeking to enforce, is void as an attempt by a prior board to bind future boards of the county commission. "Neither county commissioners nor county council have the power to limit the discretionary functions of their successors." Allen County Council v. Stellhorn, 729 N.E.2d 608, 612 (Ind.App. 2000)(lawsuit settlement agreement and court order agreed to by county commissioners which limited discretionary powers, held unenforceable against successor board); Lobolito, Inc. v. North Pocono School Dist., 722 A.2d 249 (Pa.Commw.Ct. 1998).

Here, as discussed above, the purpose of the signature to the Release and Settlement Agreement by former Commissioner Rankin was to resolve the prior litigation pursuant to Idaho Code § 31-813, and not some attempt to afford the county commissioners with authority to direct, supervise or perform the statutory duties of the elected Sheriff. Even assuming Allied's argument that Idaho Code § 31-802 somehow provided Commissioner Rankin and the 2001 Board of County Commissioners with the authority to direct or supervise the Sheriff and his staff and set the policies and procedures at the jail though the Release and Settlement Agreement, the 2001 Board could not limit any such discretionary power of a successor Board. As such, even assuming Allied's argument that the Board has the power to set policies and procedures at

the jail and direct the Sheriff and his staff, and did so in 2001 through the Release and Settlement Agreement, the Agreement is a limitation on each successor Board's discretionary power, and is therefore void and unenforceable.

3. Impedes Public Service and the Rights of Individuals.

Allied alleges that defendants actions are unlawful because it gives preferential treatment to credit card companies to the detriment of Allied. To follow Allied's reasoning, a court would have to find as unlawful, a decision by a municipality to install a public water system because it diverts business away from the water well drilling industry. Construing the Settlement Agreement in that manner would violate public policy. See 17A C.J.S. Contracts § 219 ("contracts which tend to injure the public service of the government or of an executive, administrative, legislative, or judicial officer are against public policy and void."); § 229 ("Agreements calculated to impede the regular administration of justice are void as against public policy and are not entitled to recognition in any of the courts of the country.").

Furthermore, Allied is attempting to enforce the Settlement Agreement in a manner that adversely affects the rights of pretrial detainees, which is in violation of public policy. See 17A C.J.S. Contracts § 269 ("The courts are reluctant to enforce the exercise of freedom of contract when it tends to result in injury to persons beyond the immediate parties to the contract, and an agreement may be contrary to public policy and illegal because it adversely affects or tends to affect, a duty which one person owes to another."). Clearly, pretrial detainees have a right to pre-conviction bail guaranteed by both the Eighth Amendment to the

United States Constitution, and Article 1, Section 6 of the Idaho Constitution. As such, Allied is attempting to enforce the Settlement Agreement in a manner that adversely affects an inmate's right to bail, and an inmate's ability to utilize the pretrial services program. Additionally, Allied is attempting to enforce the Settlement Agreement in violation of the statutory right to the payment of cash bail pursuant to Idaho Code § 31-3221. "No contract rights are created by agreements in contravention of state statutes, or federal statutes or regulations." 17A C.J.S. Contracts § 208. As such, the Release and Settlement Agreement, in the manner Allied is attempting to enforce, is void and unenforceable.

B. Allied's Does not Seek Relief Against Kootenai County.

As discussed above, all claims against Sheriff Watson have been dismissed, leaving only a contract claim against defendant Kootenai County. However, paragraph 9 of Allied's Second Amended Complaint seeks damages "as well as an Order requiring the Sheriff's Department to abide by its terms." As discussed below, such an order would be a delegation of the powers and duties of the Sheriff as set forth in the Idaho Constitution and Idaho Code. Even assuming that Idaho Code § 31-802 was construed to provide the Board of County Commissioners with the authority to direct or supervise the Sheriff and his staff, the fact remains that the members of the commission have not been named in this lawsuit. As such, Allied's complaint for injunctive relief fails to state a claim.

C. The Board of County Commissioners do not Have Authority to Perform or Direct the Statutory Duties of the Sheriff.

The Board of County Commissioners do not have the authority to perform or direct the duties of the Sheriff, including operation of the jail. Allied argues that Idaho Code § 31-802[2] provides the Commissioners with the authority to direct another constitutional officer, the Sheriff, in his management and operation of the jail. Under Article XVIII, § 6, Idaho Constitution, "The board of commissioners has no authority to pass upon the malfeasance, or misfeasance of any officer. The statute is plain and unequivocal upon that question . . ." Gorman v. Board of Commissioners, 1, Idaho 553 (1874). "The legislature cannot take from a constitutional officer a portion of the characteristic duties belonging to the office, and devolve them upon an office of its own creation." Meller v. Board of Logan County Com'rs, 4 Idaho 44, 35 P. 712, 715 (1894)(citation omitted), quoted with approval in Givens v. Carlson, 29 Idaho 133, 157 P. 1120, 1122 (1916); and Wright v. Callahan, 61 Idaho 167, 99 P.2d 961, 966 (1940). "And if this cannot be done by the legislature, will it be seriously contended that it can be done by a board of county commissioners?" *Id.* "Under our state constitution (which provides for the election of sheriffs by the electors of the county), the legislature cannot transfer to other officers, elected by the board of supervisors, important powers and functions which from time immemorial have belonged to the office of sheriff." Wright, 99 P.2d at 965 (quoting Wisconsin law)(quotations and citations

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[2] Of note, Idaho Code § 67-802(1) similarly provides that the Governor has the power to supervise the conduct of state executive officers, which includes the attorney general, secretary of state, state treasurer, etc. Idaho Code § 67-801.

omitted).

Going back to Idaho territorial case law, no case has construed Idaho Code § 31-802 to allow the Commissioners to perform or direct the manner in which another elected county officer performs his duties. In Clark v. Ada County Bd. of Com'rs, 98 Idaho 749, 757, 572 P.2d 501, 509 (1977), Justices Lodge and Scoggins briefly addressed application of Idaho Code § 31-802 in their concurring opinion:

> Another important point of contention in this case is presented by petitioners' argument that Blomquist forbids the Board of County Commissioners to interfere with the Assessor's functions by establishing the independent data processing audit office and by transferring to that office funds which are budgeted to the Assessor. Respondents argue the propriety of the Board's actions on the basis of I.C. § 31-802, which provides county commissioners with the power to "supervise the official conduct of all county officers . . . charged with assessing, collecting, safekeeping, management or disbursement of the public moneys and revenues" and to "see that they faithfully perform their duties . . . ."
>
> Again, I cannot agree with respondents' position. I agree that Section 31-802 may permit the Board to set up an audit division as part of its own administrative staff, but only with funds budgeted to the commissioners for their staff. Creation of a new county office, and diversion to it of funds budgeted to the assessor would appear to violate Article 18, Section 6 of the Constitution, which prohibits the establishment of any county offices other than those named in the Constitution, and this court's decision in Meller v. Board of Commissioners, 4 Idaho 44, 35 P. 712 (1894), which held that the commissioners lack the authority to establish a new office unknown to the Constitution and endow it with functions already affixed by law to another office.

Id. (emphasis added).[3] Thus, it is clear that the Board of County Commissioners cannot usurp the statutory duties and powers of the Sheriff.

Other jurisdictions have held that similar statutory language is limited.

> However, supervisory power over county officials is possessed by county boards only when given by statute, and then only to the extent fixed by statute. A county board may not usurp the power of any county officer specifically imposed by law, or repudiate the acts of such official within the scope of his or her authority. It does not have the power to perform the county officer's statutory duties for them or to direct the manner in which the duties are performed. In this regard, a county board has no authority with an elected official's hiring decision.

20 C.J.S. Counties, § 119 (2008)(emphasis added).

Here, as discussed above, the purpose of the signature to the Release and Settlement Agreement by former commissioner Rankin was to resolve the prior litigation pursuant to Idaho Code § 31-813, and not some attempt to afford the county commissioners with authority to set policies and procedures at the jail and direct, supervise or perform the statutory duties of the elected sheriff. Idaho Code § 31-2202(6) mandates the Sheriff, and not the County Commissioners:

---

[3] Allied argues that Hansen v. White, 114 Idaho 907, 762 P.2d 820 (1988), supports Allied's conclusion that the Board of County Commissioners can supervise the official conduct of the Sheriff. Allied's conclusion is misplaced. Hansen does not mention or address the application of Idaho Code § 31-802 and merely held that the County has authority to implement a county wide merit system. Hansen does not afford the Board with the authority to supervise, direct, or control the conduct of the Sheriff or his staff. No such authority exists. In fact, the Supreme Court has opined that a Board of County Commissioners cannot review the personnel decision of the Sheriff. "Gibson has failed to identify any statute that provides authority allowing the Board to review the personnel decision of an elected County officer." Gibson v. Ada County, 142 Idaho 746, 757, 133 P.3d 1211, 1222 (2006).

"Take charge of and keep the county jail and the prisoners therein." Similarly, Idaho Code § 20-601 provides: "The common jails in the several counties of this state are kept by the sheriffs of the counties in which they are respectively situated. . ." The powers of the Board of County Commissioners are generally limited to management of county property and the county budget. *See* Title 31, Chapter 8, Idaho Code.

Idaho Code § 31-802 did not somehow provide commissioner Rankin and the 2001 Board of County Commissioners with the authority to direct or supervise the Sheriff and his staff and set the policies and procedures at the jail though the Release and Settlement Agreement. Only the elected Sheriff has such authority. Idaho Code §§ 31-2202(6) and 20-601. Likewise, the current Board of County Commissioners does not have the power to set the policies and procedures at the jail nor direct or supervise the Sheriff and his staff in the operation of the jail. *Id.* As such, Allied's allegation that the Board of County Commissioners has the authority to set policies and procedures at the jail and direct the elected Sheriff and his staff in the operation of the jail, fails to state a claim.

D. Kootenai County is not Directly Liable for any Nonperformance of the Sheriff.

Even assuming, without conceding, any liability on the part of the Sheriff, does not result in direct liability on the part of Kootenai County. Idaho Code § 31-2015 requires the Sheriff to maintain an official bond, which is maintained through an insurance policy with the insurer for the County; ICRMP. Idaho Code § 2010 places liability on the bond (and therefore ICRMP):

> Whenever, except in criminal prosecutions, any special penalty, forfeiture or liability is imposed on any officer for nonperformance or malperformance of official duty, the liability therefor attaches to the official bond of such officer and to the principal and sureties thereon.

Idaho Code § 31-2010 (emphasis added); *See also*, Idaho Code § 31-2018 ("Each county shall indemnify its officials and employees against all losses of public moneys or property, except those which are the result of negligence, gross negligence, or intentional conduct by the public official or employee, pursuant to the authority in the Idaho tort claims act."; Idaho Code § 6-903(b)(1)("A governmental entity shall provide a defense to its employee, including a defense and indemnification against any claims brought against the employee. . ."). However, Kootenai County is not directly liable for the acts or omissions of county officials and employees.

Thus, Kootenai County is subject to derivative liability, but not direct liability, for the nonperformance or malperformance of a duty by the Sheriff. Similar to the context of insurance liability, a party injured in an automobile accident may sue the tortfeasor, but cannot bring a direct cause of action against the tortfeasor's insurer. As such, Allied's direct cause of action against Kootenai County for the conduct of the Sheriff, fails to state a claim.

IV. CONCLUSION.

Based on the foregoing, Kootenai County requests that the Court enter an order dismissing Allied's Second Amended Complaint.

DATED this 3rd day of February, 2009.

Kootenai County Prosecuting Attorney

By _____
Darrin L. Murphey, Civil Deputy
Attorney for Defendants Kootenai County, and Rocky Watson, Kootenai County Sheriff

CERTIFICATE OF SERVICE

I hereby certify that on this 3rd day of February, 2009, I caused to be served a true and correct copy of the foregoing by the method indicated below, and addressed to the following:

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STATE OF IDAHO } SS
COUNTY OF KOOTENAI
FILED:
2009 FEB 11 AM 9:37
CLERK DISTRICT COURT
DEPUTY

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Attorney for Plaintiff

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

ALLIED BAIL BONDS, INC., an Idaho Corporation,

Plaintiff,

vs.

COUNTY OF KOOTENAI, a political subdivision of the State of Idaho, ROCKY WATSON, Kootenai County Sheriff, John and Jane Does 1 through 13,

Defendant

Case No.: No. CV-07-7471

RESPONSE TO DEFENDANTS' RENEWED MOTION TO DISMISS

COMES NOW, the above named Plaintiff, by and through its Attorney of Record, ARTHUR M. BISTLINE, hereby submits this Response to Defendants' Renewed Motion to Dismiss as follows:

A. <u>This issue is not the proper subject of a motion to dismiss.</u>

The entire premise of the County's motion to dismiss is that the settlement agreement here is not valid because it violates public policy. This is an argument that can, as a matter of law, only be made in a summary judgment motion as it necessarily involves consideration of issues outside the pleadings. Furthermore, no argument whatsoever is advanced as to why this agreement is against public policy. That is because it is not against public policy.

When ruling on a motion to dismiss, the Court infers all matters in favor of the non-moving party which can be reasonably inferred from the complaint. *Gibson v. Bennett* 141 Idaho 270, 273, 108 P.3d 417, 420 (Ct. App.2005). If considering anything outside the pleadings, the Court must treat the motion as one for summary judgment and afford the parties the opportunity to present material relevant to the summary judgment. *Id.*

Whether or not a contract violates public policy is a question of law that is to be determined from all the facts and circumstances of each case. *Bakker v. Thunder Spring-Wareham, LLC,* 141 Idaho 185, 189, 108 P.3d 332, 336 (2005). In order to make the determination that the contract violates public policy, this Court is required to consider matters outside the pleadings by considering the facts and circumstances of the case.

This motion should be dismissed and the matter properly addressed on summary judgment.

B. The County has cited no authority for the proposition that the Settlement agreement is void because it does not contain a time limitation

The County cites no Idaho authority for the proposition that a contract with a state agency that does not contain a time limitation violates public policy as a matter of law. In fact, *Barton v. State*, 104 Idaho 338 (1983), cited by the County, establishes the exact opposite conclusion. *Barton* holds that contracts without a time limitation may be invalid, based on the facts and circumstances of each case.

The contract here is not against public policy and the County has made no attempt to show that it is. A party claiming a contract violates public policy has the burden to show that fact. "Public policy may be found and set forth in the constitution or in the statutes, or where it is found in neither it is sometimes set forth by judicial decision." *Stearns v. Williams* 72 Idaho 276, 287, 240 P.2d 833, 840 (1952) citing Brooks v. Cooper, 50 N.J.Eq. 761, 26 A. 978, 21 L.R.A. 617, 35 Am.St.Rep. 793. The County has cited no authority whatsoever to support the

allegation that the settlement agreement is void as against public policy. The County has not explained how, considering the facts and circumstances of this case, the settlement agreement is against public policy.

The settlement agreement only requires the County and Sheriff to treat Allied Bail Bonds, and other bond agents, in a fair manner. It is not against public policy to require the County and Sheriff to do what they ought to be doing anyway. No argument is being advanced as to how this contract violates public policy, the lack of any time limitation is not relevant and the motion to dismiss should be denied.

C. The fact that the settlement agreement may limit successor boards conduct does not invalidate the settlement agreement. That determination involved consideration of the facts and circumstances of each case.

All the cases cited by the County in support of this argument establish that there is no per se illegality of a contract which limits the conduct of future boards. It is a case by case analysis.

Allen County Council v. Stellhorn, 729 N.E.2d 608, 612 (Ind.App.,2000) specifically holds that a County can bind future boards to a settlement agreement based on existing law, but cannot stop them from exercising discretionary functions which may later be granted to the County by the legislature.

Lobolito, Inc. v. North Pocono School Dist., 722 A.2d 249, 251 -252 (Pa.Cmwlth.,1998) holds that a board cannot bind a future board and stop it from exercising its governmental functions. That case seems to also say that a board cannot execute a binding contract that extends beyond the composition of that board. That may be the law of the state of Pennsylvania, but it is not the law of the State of Idaho. Idaho Code 31-601 provides that a county is a body corporate. Idaho Code 31-602 provides that the County may only act through its board of commissioners. Idaho Code 31-604 specifically provides what the County may do (as opposed to the County Commissioners) and one of those things is enter into contracts. There is simply

no authority to support the proposition that a contract entered into by one board of county commissioners can be avoided by the next; just as there is no authority for that proposition in the law of private corporations.

Furthermore, *Lobolito* is referring to "governmental functions." To rely on that case here presumes that the functions which the County wishes to perform and cannot (which are as of yet unidentified) are governmental functions. If they were, then there would have been no need for the County to enter into this settlement agreement.

The facts and circumstances of how this agreement impacts the discretion of the board of County Commissioners is the proper subject of a summary judgment. How the agreement impermissibly impinges on future boards' discretion is not set forth. What discretion the board wishes to exercise and cannot is not set forth. The motion to dismiss on these grounds should be denied.

D. The County has advanced no argument to support its contention that the Settlement agreement adversely affects the rights of pre trial detainees and it in fact seems to protect them.

The County has provided no explanation as to how the settlement agreement adversely impacts the rights of pretrial detainees and the motion should be denied on those grounds. Furthermore, the settlement agreement seems to protect the rights of detainees.

Paragraph 1., provides for a certain type of phone book which provides a full spectrum of bonding options to the detainee. Paragraph 2., provides that the $10 bonding fee be collected from the inmates account if available, which helps facilitate the bonding process. Paragraph 3., provides that a receipt shall be provided when the $10 bonding fee is paid, which is required by Idaho Code 31-3218. Paragraph 4., provides that the Sheriff shall make change for up to a $50 bill when paying the $10 bonding fee, and Paragraph 5., provides for contact between Allied and

its customers, both facilitating the bonding process. Paragraph 6., requires the Sheriff to only point to a plaque that explains bonding options rather than providing oral advice to any individual. Lastly, Paragraph 7., requires that the Sheriff and County take reasonable steps to remove blocks which prevent an inmate from calling Allied. How any of these could adversely impact the rights of pre-trial detainees has not been argued and there is no argument that can be made in that regard. This Court has already ruled that the law of non-competition agreements is not relevant. The motion to dismiss should be denied on these grounds.

E. The Board of County Commissioners does have authority over the Sheriff and can direct his activities.

The Board is given broad authority over the sheriff's department through Article 18, Section 6 of the Idaho Constitution. This authority is expounded upon in Idaho Code 31-802, which specifies that the BOCC shall supervise "the official conduct of all county officers" and shall "direct prosecution of delinquencies." The sheriff is defined as a county officer under Idaho Code 31-2001 (1). Thus, the conduct of the sheriff is subject to the supervision of the Board.

Case law has language supporting this conclusion. In *Hansen v. White* 114 Idaho 907, 907 (1988), the court held that the BOCC had the authority to implement a merit system limiting the circumstances in which county officers may terminate its employees. Article 18, Section Six clearly places the Sheriff in charge of who is hired. Notwithstanding this fact, the BOCC has the authority to control how the Sheriff fires his employees. If Sheriff Watson was arbitrarily depriving deputies of their property right in continued employment, and the BOCC did not like it, the BOCC could stop it. Here, the Sheriff is engaging in a course of conduct which denies bond agents their property right and certainly the BOCC can stop it. If the BOCC chooses not to, it is not doing its job and can be held directly accountable for that.

Gorman is not on point. In *Gorman,* an elected tax collector presented a bond as required for his elected office. 1 Idaho 553, 553 (1874). The bond was denied on the basis of insufficiency and testimony "'that he was drunk when he signed the bond, and that he would not be worth a dollar if his debts were paid.'" *Id.* Shortly thereafter, the board removed the tax collector from office without a hearing and appointed another in his place. *Id.* The court held that the denial and termination were invalid because a statute in place determined the amount of the bond, and expressly limited the board to exigent circumstances. *Id.* In addition, it stated that "[t]he board of commissioners has no authority to pass upon the malfeasance, or misfeasance of any officer... without hearing the officer or even giving him an opportunity to be heard." *Id.*

In *Gorman*, the context was where the board, without a hearing or explanation, denied an elected official a right. This case is about whether the county is responsible for the sheriff's actions where it does act in an unacceptable manner and the County does nothing to stop it. AG 86-10 is weakened by *Hansen,* thus placing the accuracy of the AG opinion into question. In that case, the court held that the Merit System implemented by the Board was a valid limitation on the sheriff's constitutional right to hire as granted in Article 18, Section 6. 114 Idaho at 907. *Hansen* stated that although the authority to hire is generally associated with the equal authority to fire, it is a common law right that may be "restricted by law". 114 Idaho 907 at 915, fn 11. The Merit System, which disallows the sheriff from discharging certain employees with showing just cause, does just that.

However, the AG opinion found that while a Board-mandated personnel system may be enacted to keep track of the number and type of employees, one allowing "the commissioners to control the discipline, suspension, or firing for cause of deputies and assistants of other officers would almost certainly be forbidden" 86-10, p.3. Because *Hansen* expressly held otherwise, it is

unlikely that the AG Opinion can even be considered persuasive authority. Obviously, a conflict exists between the AG Opinion and *Hansen*.

The BOCC is supposed to be taking the action that Allied Bail Bonds is taking right now and are not. If the Sheriff will not listen to the BOCC, then the Sheriff will be subject to an injunction filed by the prosecutor, whose duty it is to prosecute actions on behalf of the BOCC. Idaho Code 31-2604. The Sheriff is not free to ignore the direction of the BOCC and the BOCC is not free to simply allow the Sheriff to engage in lawless activity.

F. Kootenai County is liable for the Sheriff's actions and the fact that a bond may be in place and the County has to indemnify the Sheriff is not relevant.

Plaintiff is not allowed to sue the bond directly as pointed out by the County and there is no authority for the proposition that Plaintiff is required to sue the Sheriff directly because of this bond. Furthermore, the suit against the County is for failing to control the conduct of the Sheriff which they clearly can do and are not doing. The County has direct liability for failing to discharge its duty to monitor the activities of the Sheriff and direct the Kootenai County prosecutor to take action when necessary.

CONCLUSION

The motion before the Court is proper as a summary judgment motion not a motion to dismiss and this Court should deny the motion on those grounds. If the Court does consider the motion, the County has advanced no argument or authority as to how this settlement agreement violates public policy. The settlement agreement does not and this motion should be denied.

DATED this 11 day of February, 2009.

ARTHUR M. BISTLINE
ATTORNEY AT LAW

CERTIFICATE OF SERVICE

I hereby certify that on the 12th day of February, 2009, I caused to be served a true and correct copy of the foregoing document by the method indicated below, and addressed to the following:

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Kootenai County Department of Legal	[ ]	Regular mail
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	[ ]	Interoffice Mail

BY: ~~SARAH F. OBCHSLE~~ Jennifer Hoskins

STATE OF IDAHO } SS
COUNTY OF KOOTENAI
FILED:

2009 FEB 23 AM 8:12

CLERK DISTRICT COURT

DEPUTY

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Attorney for Plaintiff

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ALLIED BAIL BONDS, INC., an Idaho Corporation,

Plaintiff,

vs.

COUNTY OF KOOTENAI, a political subdivision of the State of Idaho, ROCKY WATSON, Kootenai County Sheriff, John and Jane Does 1 through 13,

Defendant

Case No. CV-07-7471

SUPPLEMENTAL MEMORANDUM IN SUPPORT OF MOTION TO RECONSIDER

ARGUMENT

I. No case has held, and the statute does not expressly say, that the bond must be filed first or the case must be dismissed.

To the extent that the Court is ruling that the filing of the bond the day after the complaint requires dismissal, that ruling should be reconsidered and reversed. The statute does not expressly say that, no Idaho Case has ever said that, the Idaho Supreme Court has questioned such a literal reading, and such a holding does not further the purposes of the statute.

The provisions of Idaho Code 6-610 which provide for dismissal of an action are Idaho Code 6-610(5) through (7). In order to seek a dismissal under subsections (5) through (7), subsection (4) requires the law enforcement to take exception to certain aspects of the bond. That section provides that a law enforcement officer can except to 1) failure to file a bond, 2) the sufficiency of the sureties, or 3) to the amount of the bond. Idaho Code 6-610(4) does not specifically provide for an exception for the failure to file a bond before filing the action.

No case has ever held that failing to file a bond *before* filing suit was grounds for dismissal. All cases on point, to Plaintiff's knowledge, have held that failing to file a bond *at all* is grounds for dismissal. *Monson v. Boyd*, 81 Idaho 575, 582, 348 P.2d 93, 97 (1959), does not state that failure to file a bond prior to the action is grounds for dismissal. It only says that if a bond is never filed, the Court is not required to grant the petitioner leave to do so on a motion to dismiss.

> Lastly, plaintiff contends the court should not have summarily dismissed the action upon defendants' motion, but should have allowed plaintiff time to file a bond, upon determining the statute was applicable. This point was settled adversely to plaintiff in Pigg v. Brockman, supra. where it is made to appear by evidence in where it is made to appear by evidence in support of a motion to dismiss, that the action is against peace officers and arises out of or in the course of the performance of the duty of such officers, if I.C. § 6-610 has not been complied with, the action must be dismissed.
>
> *Monson v. Boyd*, 81 Idaho 575, 582-583, 348 P.2d 93, 97 (1959).

The Sheriff also points to *Johnson v. Boundary School Dist. No. 101*, 138 Idaho 331, 336, 63 P.3d 457, 462 (2003), for the proposition that failing to file a bond before suit requires dismissal. The language itself says nothing of dismissing a case for failing to file a bond before the complaint; it only notes Idaho Code 6-610 "...expressly states that the preparation and filing of the bond is a prerequisite to suit." *Id.* More importantly, that language is *dicta*, as the

Supreme Court was only pointing out that the language of Idaho Code 34-2008, the statute at issue, was not, *as argued by one of the parties,* the same as Idaho Code 6-610.

Idaho Code 6-610 does not provide for a dismissal for failing to file a bond before the complaint and no Idaho case has ever held that. Reaching that conclusion requires the making of new law by interpreting the statute in that manner. Such an interpretation creates an additional unstated ground for exception to a bond, fulfills no purpose of the statute, and has already been called into question by the Idaho Supreme Court.

The only way to interpret Idaho Code 6-610 to require dismissal if the bond was not filed before the complaint would be by reading the "prerequisite" requirement of subsection (2) with the language of subection (5), which allows dismissal if the Sheriff excepts to the "...failure to file a bond under this section...." The argument would therefore be that you do not "file a bond under this section" if you do not file it first.

This interpretation ignores the plain language of Idaho Code 6-610(4), which provides for an exception for failing to file a bond, and does not make any mention of the timing of the bond. Furthermore, it would add an additional exception to subsection (4) in allowing for exception for failing to file a bond first, one which is not expressly laid out in the statute. More importantly, this interpretation has already been called into question by the Idaho Supreme Court.

In *Rogers v. State*, 98 Idaho 742, 572 P.2d 176 (1977), the Plaintiff's claim was dismissed for completely failing to file a bond. The Supreme Court declined to hear the case as it was not ripe for appeal, but on remand noted that if the Trial Court chose to reconsider, it should do so in light of the "*...sizeable jurisdictional problem which materializes from a literal reading of the I.C. s 6-610 requirement that the district court set the undertaking prior to gaining*

jurisdiction over the case which seemingly occurs only upon the filing of a complaint." Allied raised this exact point in front of Judge Luster, who informed Allied of some of the various "end arounds" that have been utilized in an attempt to deal with this problem. However, the real way to deal with it is to interpret the statute to only allow dismissal if the bond is absent, or inadequate.

The purposes of the statute are to ensure diligent prosecution and source of funds for an award of costs. The only concern of Idaho Code 6-610 is that a bond be filed and that it be backed by sufficient sureties of a sufficient amount. The Sheriff's argument that a bond must be filed first does nothing to further any of these purposes and the Sheriff *has never argued otherwise*. No reasonable person could make any such argument.

Lastly, in this case, just as in *Garren v. Butigan*,

> The plaintiff's complaint presents no hint of the motives or facts which the statute seeks to prohibit. In light of the prolonged and dilatory proceedings *the plaintiff deserves an adjudication on the merits of his case*, and we reiterate 'that a motion to dismiss, presented under I.R.C.P. 12(b)(6), has generally been viewed with disfavor because of the probable waste of time in case of a reversal or a dismissal of the action and *because the primary objective of the law is to obtain a determination of the merits of the claim.*'
>
> 95 Idaho 355, 359, 509 P.2d 340, 344 (1973) (emphasis added), citing *Hadfield v. State*, 86 Idaho 561, 568, 388 P.2d 1018, 1022 (1963); *Wackerli v. Martindale*, 82 Idaho 451, 353 P.2d 782 (1960).

Throughout these proceedings, the Sheriff has made it sound as if the black letter law states that failing to file a bond before the complaint requires dismissal. The statute does not say this. Barring a tortured interpretation, no Court has ever said this, and the Supreme Court has

specifically suggested that such a literal reading is problematic. Lastly, no purpose whatsoever is served by this interpretation. It only increases litigation costs and denies Allied its day in Court.

II. The County assumed a duty under the contract and is therefore liable for the Sheriff's breach of that contract.

The County moved to dismiss this case on the grounds that it failed to state a claim upon which relief can be granted because the County cannot control the action of the Sheriff and is not directly liable for the actions of the sheriff. The Court granted the motion on those grounds.

The County voluntarily entered into a written settlement agreement that required certain conduct on the part of the sheriff. If the County did not wish to assume the responsibility for the Sheriff's actions, then the County should not have signed that agreement. "A voluntary duty is distinct from any other duty the party may have as a result of another undertaking or relationship." *Jones v. Runft, Leroy, Coffin & Matthews, Chartered*, 125 Idaho 607, 612, 873 P.2d 861, 866 (1994). When parties enter into a contractual relationship, they assume contractual duties. *Badell v. Badell* 122 Idaho 442, 447, 835 P.2d 677, 682 (Ct. App. 1992) The County's defenses that it has no control over the sheriff is one of impossibility of performance and not the proper subject of a 12(b)(6) motion.

Futhermore, impossibility requires that something happen that was not in the contemplation of the parties. *Ferguson v. City of Orofino*, 131 Idaho 190, 193, 953 P.2d 630, 633 (Ct. App., 1998). None of the relevant County laws have changed since the contract was signed. Impossibility is therefore not applicable as a defense because nothing has happened to be outside the contemplation of the parties.

Lastly, to suggest that the County cannot control any aspect of the Sheriff's conduct, other than merit-based raises and firing issues, is just wrong. Besides Idaho Code 31-802, which

specifically requires the Commissioners to supervise the Sheriff and direct prosecution for delinquencies, Idaho Code 20-622 specifically gives the commissioners authority to take action inside the Sheriff's compound by providing for inspections and requires the commissioners to take all necessary precaution against escape sickness or infection. Additionally, Idaho Code 31-1503 allows the commissioners to control the Sheriff by controlling the funds paid to the sheriff. That section provides that commissioners "...must not allow any account of any County officer while he neglects or refuses to perform any duty required of him by law or is *liable upon any official bond or other bond.*" Emphasis added. The County has just successfully argued that the Sheriff's bond is liable, but then has done nothing to control his lawless actions. The County can control the Sheriff because the County controls the money and directs the County Attorney. If the County is not going to control the Sheriff then who is? If the Sheriff begins absconding with County money, are the tax payers to wait for the next election?

The County voluntarily assumed a duty to see that the terms of this settlement agreement were followed. The County has control of the County Prosecutor as well as the Sheriff's purse strings. The County can statutorily control the actions of the Sheriff and besides that has assumed a contractual duty to do so. The County should be reinstated as a party defendant to this lawsuit.

CONCLUSION

Pursuant to the above, the Court should Grant the motion to reconsider.

DATED this 20th day of February, 2009.

ARTHUR M. BISTLINE
ATTORNEY FOR PLAINTIFF

CERTIFICATE OF SERVICE

I hereby certify that on the 20th day of February, 2009, I caused to be served a true and correct copy of the foregoing document by the method indicated below, and addressed to the following:

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BY: _____
JENNIFER HOSKINS

STATE OF IDAHO
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Attorney for Plaintiff

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Plaintiff,

vs.

COUNTY OF KOOTENAI, a political subdivision of the State of Idaho, ROCKY WATSON, Kootenai County Sheriff, John and Jane Does 1 through 13,

Defendant

Case No. CV-07-7471

MEMORANDUM IN SUPPORT OF MOTION TO RECONSIDER

ARGUMENT

1. **The claim for public records must be reinstated because the plaintiff fulfilled the pleading requirements of Rule 8 and is entitled to relief under the Public Records Act.**

Rule 8(a)(1) requires a "short and plain statement of the claim showing that the pleader is entitled to relief," and must be "construed as to do substantial justice." I.R.C.P. 8(f). Whether a pleading complies with this requirement is "interpreted liberally." *Crea v. FMC*

Corporation, 135 Idaho 175, 178, 16 P.3d 272, 275 (Sup. Ct. 2000); *see also Whitlock v. Haney Seed Co.*, 114 Idaho 628, 759 P.2d 919 (Ct. App. 1988), *Greenwade v. Idaho State Tax Comm'n*, 119 Idaho 501, 808 P.2d 420 (Ct. App. 1991). In *Whitlock*, the plaintiff made claims against his employer for unpaid vacation and withholding of an insurance policy. 114 Idaho 628, 633 (Ct. App. 1988). The court found in the plaintiff's favor as to those two items and awarded treble damages as ordered by statute, although the statute was not pled by either party. *Id.* The court of appeals affirmed, holding that since the plaintiff generally pled monetary damages, the court could award what monetary damages it saw fit: "[Defendant] has not cited any authority supporting the proposition that statutes automatically enhancing or limiting damage awards must be specifically pleaded, nor has our research disclosed any authority on this point." *Id.* at 634. In addition, the court relied on the fact that the statute in question was of a "mandatory – rather than discretionary – application," and thus "[i]ts application to a fact pattern within its scope is automatic." *Id.*

Here, Allied Bail Bonds pled in the complaint that public records were improperly denied, and generally requested "any other relief that this court deems fair and equitable." (Complaint, final paragraph). The statute states that if a court finds improper denial of a public records request, it *shall* order the withholding authority to immediately produce those records requested. I.C. § 9-344 (2). Just as in *Whitlock*, Allied pled factual circumstances and general relief. Since the statute in question is of a mandatory nature, and there is nothing in it that requires an express and specific request for production of public records, this Court should reconsider its decision to dismiss for failure to state a claim.

2. <u>Because the court, not the defendant, excepted to the sufficiency of the sureties, dismissal of the Sheriff on this basis is error.</u>

A plaintiff "shall prepare and file with, and at the time of filing the complaint or petition in any such action, a written undertaking with at least two (2) sufficient sureties in an amount to be fixed by the court." I.C. § 6-610 (2). However, objection by the defendant must first be had before the court may dismiss the case. *Pigg v. Brockman*, 79 Idaho 233, 238, 314 P.2d 609, 611 (1957); *Beehler v. Fremont County*, 145 Idaho 656, 659, 182 P.3d 713, 716 (Ct. App. 2008). Once the defendant objects to the sufficiency of the sureties, "the sureties must be justified by

the plaintiff or petitioner." I.C. § 6-610 (6). Only if the plaintiff fails to justify must the court then dismiss the case. *Id.*

Here, there is no evidence that the defendant *ever* excepted to the sufficiency of the sureties. Under the statute, the court is powerless to move *sua sponte* in exception to the sufficiency of the surety or bond. In addition, the plaintiff was never given an opportunity to justify the existing sureties. Thus, the dismissal by the court through its own action is inappropriate and undermines the due process procedures provided by the legislature within the statute.

3. **Plaintiff submitted a bond supported by "two (2) sufficient sureties" as required by statute.**

Prior to filing suit against any law enforcement arising out of the officer's performance of duty, a claimant must first submit a bond supported by two sufficient sureties and approved by the court. I.C. § 6-610. "Two sufficient sureties" is not defined anywhere in Idaho. Because there is no case that discusses what would be sufficient, nor any statutory comment or direction, it is unclear as to what standard Plaintiff should have abided.

In this case, Plaintiff attempted to follow the statute as closely as possible under the circumstances. He was issued a bond by surety American Contractors Indemnity Company. American Contractors is one of several branches of HCC Surety Group ("HCC Surety"), "the 9th largest writer of surety in the United States." (Exhibit A – HCC Surety Webpage). HCC Surety is, in turn, a subsidiary and "backed by the financial stability of [its] parent company, HCC Insurance Holdings, Inc." ("HCC Insurance") (See Exhibit A). Since American Contractors is backed by both HCC Surety and its branches along with HCC Insurance, it appears that there were multiple sureties and that they would be more than sufficient in satisfying the statutory requirements. The policy of obtaining such a bond with sufficient sureties is to "ensure diligent prosecution" and provide a dependable source of payment from which an officer may recover if judgment is entered against the petitioner. IC. 6-610 (2). Here, Plaintiff obtained sufficient sureties for his bond because there are several branches and backers, and it is highly unlikely that the Sheriff would be unable to recover from the ninth largest writer of sureties in the United States. Thus, the bond was sufficient under the statute and its policies, and this court should reinstate the bond as posted.

4. **Because the language of Title X, Section 5 of the Constitution is clear and unambiguous, the Court may not engage in interpreting its plain language.**

When interpreting the Constitution, the courts generally follow the standard rules of interpretation used in interpreting statutory provisions. *Sweeney v. Otter,* 119 Idaho 135, 138, 804 P.2d 308, 311 (1990). Under the statutory rules of interpretation, where the language is clear and unambiguous, the court must carry out the plain language and "'expressed intent.'" *Id.*, quoting *State Dept. of Law Enforcement v. One 1955 Willys Jeep*, 100 Idaho 150, 153, 595 P.2d 299, 302 (1979). That is, "where the language is unambiguous, there is no occasion for the application of the rules of interpretation. *Id.* "The fundamental object in construing Constitutional provisions is to ascertain the intent of the drafters by reading the words as written, employing their natural and ordinary meaning, and construing them to fulfill the intent of the drafters. *Id.* at 139, 804 P.2d at 312. Only where the language is "ambiguous, incomplete, absurd, or arguably in conflict with other laws" may the court engage in judicial construction. *Arel v. T & L Enterprises, Inc.*, 146 Idaho 29, __, 189 P.3d 1149, 1152 (2008).

Article 10, Section 5 of the Constitution reads as follows:

> State Prisons – Control Over. The state legislature shall establish a nonpartisan board to be known as the state board of correction, and to consist of three members appointed by the governor, one member for two years, one member for four years, and one member for six years. After the appointment of the first board the term of each member appointed shall be six years. ***This board shall have the control, direction and management of the penitentiaries of the state, their employees and properties, and of adult probation and parole***, with such compensation, powers, and duties as may be prescribed by law.

emphasis added (last amended 1941). This language **is not ambiguous or subject to any other construction other than the board of correction has control, direction and management of adults on probation.**

Even if this Court does engage in construction, the conclusion is the same. At the time of the last amendment of the Article 10, Section 5, probation for misdemeanors as not recognized. *See* **Sess. Laws 1911, c. 15, §2, p. 33 (misdemeanor punishable only by fine or imprisonment); §73 of the Public Utilities Act, cited in *Neil v Public Utilities Commission of Idaho,* 32**

Idaho 44, __, 178 P 271, 281 (1919) (Budge, J., dissenting) (misdemeanor punishable only by fine or imprisonment). By the same token, the legislature *had* distinguished between misdemeanors and felonies by the time that portion of the Constitution was last revised. See Rev. Code 1887, §§ 6312, 6313. In fact, as of the time of last amendment of Article 10, Section 5, legislative code existed that authorized county probation officers, but *only* in relation and limited to the direction and care of children as juvenile delinquents. I.C. 31-1215, *et seq*, 31-1312 (Rev. Code 1932).

The framers of the last amendment to Article 10, Section 5, were aware that crimes could be divided into misdemeanors and felonies and that control of juveniles on probation had been legislatively delegated to County control. At no point is "felony" or "misdemeanor probation" mentioned in either the whole of the Constitution, or in Article 10, Section 5. If such a distinction – that is, to limit the State Department of Corrections to only control probation for felonies – was intended by the framers at the time of drafting and amendment of Article 10, Section 5, they would have said so, since they were aware that probation at a county level could exist.

The language of Article 10, Section 5, is not subject to interpretation or construction as it is plain and not ambiguous. Even if this Court does engage in interpretation and construction, the only conclusion that can be reached is that the framers of Article 10, Section 5, knew that misdemeanor probation for juveniles had been delegated to the County and they chose not to do the same for adults on probation. Therefore, the Court should grant this motion to reconsider and reinstate Plaintiff's claim under Article 10, Section 5, of the Constitution.

CONCLUSION

Based on the grounds stated above, this Court should GRANT Plaintiff's motion to reconsider and REINSTATE Plaintiff's claims.

DATED this 23 day of March, 2009.

ARTHUR M. BISTLINE
ATTORNEY FOR PLAINTIFF

CERTIFICATE OF SERVICE

I hereby certify that on the 23rd day of March, 2009, I caused to be served a true and correct copy of the foregoing document by the method indicated below, and addressed to the following:

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JENNIFER HOSKINS

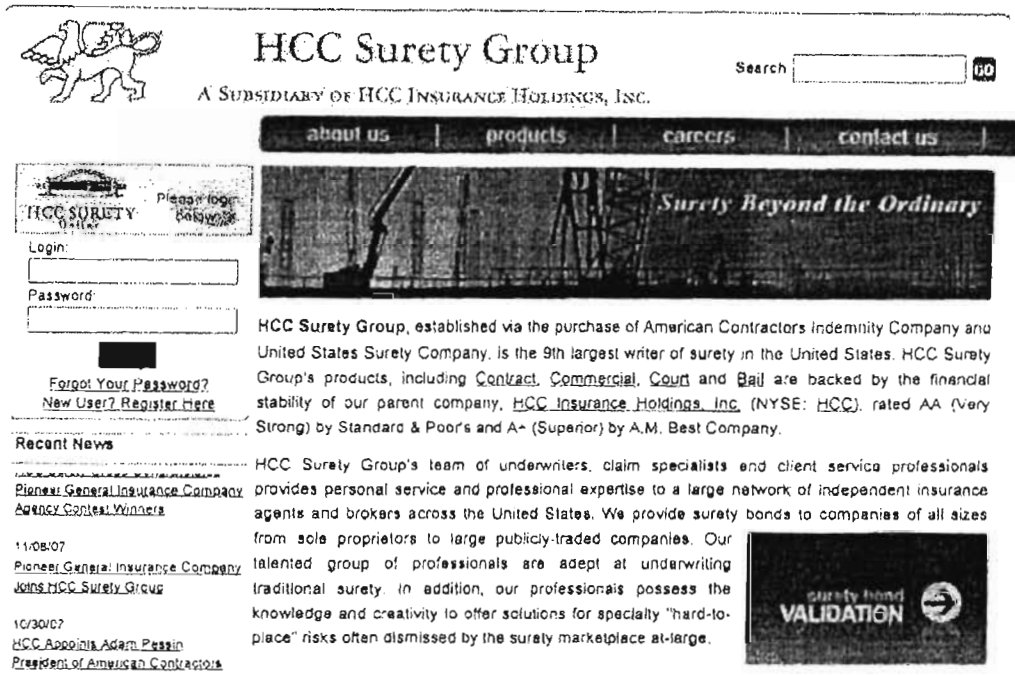

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EXHIBIT
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STATE OF IDAHO
COUNTY OF KOOTENAI } SS
FILED:

2009 APR -3 PM 4:59

CLERK DISTRICT COURT

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Attorney for Plaintiff

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

ALLIED BAIL BONDS, INC., an Idaho Corporation,

Plaintiff,

vs.

COUNTY OF KOOTENAI, a political subdivision of the State of Idaho, ROCKY WATSON, Kootenai County Sheriff, John and Jane Does 1 through 13,

Defendant

Case No. CV-07-7471

MOTION TO DISALLOW ITEMS OF COSTS.

COMES NOW, the Plaintiff, ALLIED BAIL BONDS, by and through its attorney of record, ARTHUR M. BISTLINE, and hereby requests that the Court disallow certain items of costs sought by Defendants in this action.

1. The Defendants have presented no reasoned argument as to why any of the cited statutes allow for an award of attorneys fees and the motion should be denied on those grounds.

When a party makes application for attorney's fees, the party must cite to the statute or part of the contract that allows the award of fees. "The party must then provide a reasoned argument, supported by case law as necessary, explaining why that statutory or contractual provision entitles the party to an award of attorney fees in this instance. For example, if the party seeks an award of attorney fees under Idaho Code § 12 120(3) on the ground that the case is an

action to recover in a commercial transaction, the party should, to the extent necessary, provide facts, authority, and argument supporting the claim that the case involves a 'commercial transaction' and that such transaction is the gravamen of the lawsuit." *Bream v. Benscoter*, 139 Idaho 364, 369-370, 79 P.3d 723, 728 - 729 (2003). Here, Defendant sets forth a laundry list of statutes under which he might claim fees (See Defendant's Motion and Affidavit for Attorney's Fees), but only makes an argument for fees utilizing a clause in the contract. His request on the grounds of a frivolous lawsuit merely state the claim is frivolous; he cites to no case law and fails to point out *how* the claims were frivolous other than that Plaintiff was put on notice of it by his responsive pleadings.

Most importantly, no authority is cited for the proposition that a governmental lawyer is entitled to hourly rate of a private attorney, or any hourly rate for that matter.[1] It is incumbent on the County to provide this citation and the failure to do so is fatal to the claim for fees.

Therefore, because there is no reasoned argument supporting Defendant's request for attorney's fees, the motion should be denied. Furthermore, none of the statues apply.

The statutes listed by Defendants in support of his motion for attorney's fees are inapplicable. Under I.C. §9-344, an award of attorney's fees is given if a claim for public records is frivolously requested or denied. Here, the request was not frivolous, it was merely dismissed for failure to make the proper requests as required under the statute. Therefore, that statute is inapplicable. I.C. § 6-610 only allows for an award of attorneys fees "...as provided by law." 6-610(3) and makes no provision for an award of fees based on that statute. *Athay v. Stacey* 196 P.3d 325, 331 (2008)

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[1] The undersigned does not mean to suggest that Mr. Murphey or any governmental lawyer for that matter is any less competent than private counsel.

I.C. §6-918A only allows fees if the action is brought in bad faith. Similarly Idaho Code 12-121, Idaho Code 12-117 only allows for fees if there is no reasonable basis in law or fact for the claim against the governmental agency. The County signed a contract. That alone is enough basis to bring suit against the County. There other claim related the operation of Adult Misdemeanor probation certainly has a basis in law and fact. The Idaho Constitution says that adults on probation or under the supervision of the department corrections, not the County. This Court engaged in unnecessary and improper construction to reach a different conclusion.

2. Neither the County nor the Sheriff are prevailing parties.

Costs are only allowed to a prevailing party and attorneys fees can only be allowed as a cost when the same is provided for by statute or contract.

The Sheriff is not a prevailing party. A dismissal based on failure to comply with Idaho Code 6-610 is not an adjudication of the claim on the merits, *Athay v. Stacey*, 196 P.3d 325, 332 (2008), and there can be no "prevailing party" until there has been an *adjudication* on the merits. *Straub v. Smith*, 145 Idaho 65, 72-73, 175 P.3d 754, 761 - 762 (2007).

The County is not a "prevailing party" because the claims against the County were likewise not determined on their merits, but dismissed because the County has no control over the Sheriff. As set forth below, the County answers for the conduct of its Sheriff under the doctrine of respondeat superior.

3. Because Plaintiff's claims cannot all be considered frivolous, fees awarded based on frivolity would be improper.

"[A] court may award attorney fees to a prevailing party where it finds the case was brought, pursued or defended frivolously, unreasonably or without foundation. In determining the prevailing party, the court examines the final result obtained in relation to the relief sought, whether there were multiple claims or issues, and the extent to which either party prevailed on

each separate issue or claim." *First State Bank of Eldorado v. Rowe*, 142 Idaho 608, 615, 130 P.3d 1146, 1153 (2006), citing I.C. § 12-121 and IRCP 54(e)(1).

Here, Plaintiff's claim for breach of contract was valid. It was based on activities taking place in the jail that had previously been the basis of the settlement agreement, and the sheriff had agreed to refrain from such activities. The fact that the offensive behavior litigated and settled before had started up again is a basis for claiming breach of the contract. With regard to Plaintiff's other claims, there was no law against those claims; to state they were frivolous merely because no one had made those challenges before is ludicrous.

In addition, most of the claims were dismissed for procedural technicalities; the claims the court stated sounded in tort were dismissed for failure to file a tort claim prior to commencing litigation, the claims against the Sheriff were dismissed for failure to file a sufficient bond, and the claims against the county for the behavior at the jail were dismissed because the court found that the county was an improper party as it did not have control over the Sheriff.

Finally, most of the claims were dismissed without prejudice, so it is unreasonable for Defendants to state that they were the prevailing parties when such claims can be re-filed. Therefore, this Court should deny Defendant's motion for attorney's fees.

4. According to the County, the County is not a party to the contract upon which it seeks an award of attorneys fees, but merely a signatory to allow the claims against the Sheriff to be dismissed. To the extent that the County is a party to the Settlement Agreement, then that agreement is void as it is illusory and unsupported by consideration.

At page 11 of the County's renewed motion to dismiss filed February 3rd, 2009, the County argued, "Here, as discussed above, the purpose of the signature to the release and Settlement Agreement by former commissioner Rankin was to resolve the prior litigation pursuant to Idaho Code 31-813, and not some attempt to afford the county commissioners with

authority to set policies and procedures at the jail and direct, supervise or perform the statutory duties of the elected sheriff." This Court agreed. If the County Commissioners were not a party to that contract, and merely acting as the sole entity who could bind the Sheriff, then it is not entitled to the benefit of the contract's terms, particularly the attorney's fees provision.

Furthermore, if the County couldn't agree to any of those terms because it lacked the authority to do so, then there is no contract with the County Commissioners as any such contract lacks consideration. *Shore v. Peterson*, 2009 WL 540542, 8 (2009).

Lastly, it was error to dismiss the County. The County answers for the malfeasance of its Sheriff under the doctrine of respondeat superior. "Even though Deputy Athay and Sheriff Stacey were properly dismissed [pursuant to IC 6-6100] as defendants in this action, that dismissal was not on the merits. Therefore, Bear Lake County could still be liable under the doctrine of respondeat superior." *Athay v. Stacey,* 196 P.3d 325, 332 (2008).

DATED this 3rd day of April, 2009.

ARTHUR M. BISTLINE
ATTORNEY FOR PLAINTIFF

CERTIFICATE OF SERVICE

I hereby certify that on the 3rd day of April, 2009, I caused to be served a true and correct copy of the foregoing document by the method indicated below, and addressed to the following:

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Attorney for Plaintiff

STATE OF IDAHO } SS
COUNTY OF KOOTENAI }
FILED:
2009 APR 15 PM 4:53
CLERK DISTRICT COURT
DEPUTY

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

ALLIED BAIL BONDS, INC., an Idaho Corporation,

Plaintiff,

vs.

COUNTY OF KOOTENAI, a political subdivision of the State of Idaho, ROCKY WATSON, Kootenai County Sheriff, John and Jane Does 1 through 13,

Defendant

Case No. CV-07-7471

SUPPLMENTAL ARGUMENT IN SUPPORT OF MOTIONS TO RECONSIDER

ISSUE: Whether the Idaho Tort Claims Act applies to Allied's cause of action based on Idaho Constitution Article 8, Section 4.

This Court stated, "Even though the allegation in paragraph 8(h) of the Second Amended Complaint dated October 22nd, 2008, alleges a constitutional violation, (*see School District No. 8, Twin Falls County v. Twin Falls County Mutual Fire Ins. Co.*, 30 Idaho 400, 164 P. 1174 (1917) for a discussion of Idaho Constitution Article 8, Section 4), as alleged it is a tort." The Court concludes that because the effect of the violation of this constitutional provision is to interfere with Allied's business, it is the tort of

interference with business relations. The nature of the damages does not determine the nature of the cause of action. While there may be a common law tort for tortiuous interference with business relationship, that does not change the fact that Allied's claim is based in the constitution.

In *McQuillen v. City of Ammon*, 113 Idaho 719, 727, 747 P.2d 741, 749 (1987), an inverse condemnation case, the Idaho Supreme Court made clear that while there may be causes of action that cover the same conduct, that does not change the underlying nature of the claim. "It is made clear that **what would otherwise be a common law or statutory tort action** for destruction or impairment of property or property rights when the defendant is a state or other governmental entity, it is an action predicated on the Constitution itself, i.e., a constitutionally grounded damage action, and not a cause of action created by the legislature. 113 Idaho 719, 727, 747 P.2d 741, 749 (1987)

The Sheriff and County's conduct is in violation of the Idaho Constitution. The effect of that is to harm Allied's business and while there may be torts that cover the same conduct, that does not change the nature of the claim and that claim is based in the Constitution.

ISSUE: Whether the County can be held responsible for the Sheriff's action in respondeat superior.

In Athay v. Stacey, 196 P.3d 325 (2008), the Idaho Supreme Court affirmed that the Sheriff's dismissal for failing to file a bond, and stated, "Even though Deputy Athay and Sheriff Stacey were properly dismissed as defendants in this action, that dismissal was not on the merits. Therefore, Bear Lake County could still be liable under the doctrine of respondent superior."

The County should not have been dismissed from this suit.

DATED this 15th day of April, 2009.

ARTHUR M. BISTLINE
ATTORNEY FOR PLAINTIFF

CERTIFICATE OF SERVICE

I hereby certify that on the 15th day of ~~February,~~ April, 2009, I caused to be served a true and correct copy of the foregoing document by the method indicated below, and addressed to the following:

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Attorney for Defendants Kootenai County and
Rocky Watson, Kootenai County Sheriff

STATE OF IDAHO)ss
COUNTY OF KOOTENAI)
FILED:

2008 JUL -9 PM 3:51

CLERK DISTRICT COURT

DEPUTY

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF

THE STATE OF IDAHO, IN AND FOR THE COUNTY OF KOOTENAI

ALLIED BAIL BONDS, INC., an Idaho Corporation, Plaintiff, vs. COUNTY OF KOOTENAI, a political subdivision of the State of Idaho, ROCKY WATSON, Kootenai County, Sheriff, John and Jane Does I through 13, Defendants.	Case No. CV 07-7471 **MEMORANDUM IN SUPPORT OF MOTION TO DISMISS AMENDED COMPLAINT**

I. INTRODUCTION

The plaintiff, Allied Bail Bonds, Inc. ("Allied") filed this civil action against Kootenai County and Sheriff Rocky Watson arising out of contract, tort and state statute.

II. BACKGROUND

1. On or about April 19, 2001, the parties entered into a Release and Settlement Agreement, resolving certain disputes between the parties, including but not limited to the collection of bonding fees and bonding information provided to inmates. (Amended Complaint, pg. 2, ¶ 7).

2. Allied submitted to the County a letter dated October 9, 2007, and entitled "Notice of Tort Claim." (Murphey Affidavit dated February 18, 2008, Ex. "B"). The letter alleges that for an unknown period of time, Kootenai County has deprived Allied of its prospective economic opportunity and breached the settlement agreement, but fails to describe the individuals involved nor the amount of damages claimed. *Id.*

3. On or about October 9, 2007, the same date as Allied's "Notice of Tort Claim," Allied filed a Complaint seeking damages and injunctive relief for breach of the Release and Settlement Agreement and "other conduct designed to deprive Plaintiff of its economic opportunity", and damages arising out of alleged denial of public records requests submitted by Frank Davis. (Complaint, pg. 2 - 3, ¶ 8, pg. 4, ¶ 2, and pg. 3, ¶ 9).

4. On October 10, 2007, after Allied filed its Complaint, Allied filed a bond in the amount of $700.00, with one surety.

5. Defendants filed an Answer and affirmative defenses on February 7, 2008.

6. On or about February 19, 2008, defendants filed a Motion to Dismiss on the grounds that the Complaint fails to state a claim and that the court lacks subject matter jurisdiction. The motion was noticed to be heard on

March 4, 2008, but rescheduled to the court's next earliest date, July 23, 2008, due to a conflict in the schedule of plaintiff's counsel.

7. On March 24, 2008, after hearing, the court entered its Order Granting Defendant's Motion Excepting to Bond, ordering Allied to file a bond with the court no later than five (5) days from the date of the order, with at least two (2) sufficient sureties in an amount not less than $25,000.00. Allied subsequently filed a power of attorney, which by its terms expires on June 29, 2009.

8. On or about June 17, 2008, the court entered an order granting Allied leave to file an amended complaint. In addition to the claims in Allied's original Complaint, Allied's Amended Complaint alleges that the County breached the Settlement Agreement by "Directly soliciting inmates to file cash or credit card bonds" and by "[n]ot allowing arrestees access to the phone to call a bonding company until after Pre-Trial Services has conducted interviews with the arrestees", as well as other allegations of breach of the agreement. (Amended Complaint, pg. 2, ¶ 8). Allied also alleges in its Amended Complaint that accepting credit cards for payment of bail is not authorized by Idaho Code or Criminal Rule, and that the County's operation of the Adult Misdemeanor Probation Department and the pre-trial services program is not lawful. (Amended Complaint, pg. 3-4, ¶¶ 10-15).

III. MOTION TO DISMISS STANDARD

Idaho Rule of Civil Procedure 12(b) provides, in pertinent part, as follows:

> Every defense, in law or fact, to a claim for relief in any pleading, whether a claim, counterclaim, cross-claim or third-party claim, shall be asserted in the responsive pleading thereto if one is required, except that the following defenses shall be made by motion: (1) lack of jurisdiction over the subject matter, (2) lack of jurisdiction over the person, (3) improper venue, (4) insufficiency of process, (5) insufficiency of service of process, (6) failure to state a claim upon which relief can be granted, (7) failure to join an indispensable party, (8) another action pending between the same parties for the same cause.

The standard for ruling on a motion under Idaho Rule of Civil Procedure 12(b)(6), for failure to state a claim upon which relief may be granted, is familiar.

> Our standard for reviewing a Rule 12(b)(6) motion for dismissal of the complaint is the same as our summary judgment standard. The nonmoving party is entitled to have all inferences from the record viewed in his favor and only then may the question be asked whether a claim for relief has been stated.

Miles v. Idaho Power Co., 116 Idaho 635, 637, 778 P.2d 757, 759 (1989). *See also*, Orthman v. Idaho Power Co., 126 Idaho 960, 962, 895 P.2d 561, 563 (1995); Coghlan v. Beta Theta Pi Fraternity, 133 Idaho 388, 398, 987 P.2d 300, 310 (1999). Although defendants must accept the factual allegations of the complaint as true in a Rule 12(b)(6) motion, neither defendants nor the court are bound by legal conclusions cast by a complaint as allegations of fact:

> On a motion brought under Fed.R.Civ.P. 12(b)(6), this Court's inquiry is essentially limited to the content of the complaint, although matters of public record, orders, items appearing in the record of the case, and exhibits attached to the complaint may also be taken into account. *See e.g.*, Chester County Intermediate Unit v. Pennsylvania Blue Shield, 896 F.2d 808 (3rd Cir. 1990). In evaluating a motion for dismissal under Rule 12(b)(6), the Court must "consider the pleadings and affidavits in a light most favorable to Plaintiff." Jones v. City of Carlisle, Ky., 3 F.3d 945, 947 (6th Cir. 1993) (*quoting* Welsh v. Gibbs, 631

> F.2d 436, 439 (6th Cir. 1980), *cert. denied*, 450 U.S. 981 (1981)). However, though construing the complaint in favor of a non-moving party, a trial court will not accept conclusions of law or unwarranted inferences cast in the form of factual allegations. *See, e.g.*, City of Heath, Ohio v. Ashland Oil, Inc., 834 F. Supp. 971, 975 (S.D. Ohio 1993). This Court will not dismiss a complaint for failure to state a claim "unless it appears beyond doubt that Plaintiff can prove no set of facts in support of his claim which would entitle him to relief." Conley v. Gibson, 355 U.S. 41, 45-46 (1957).

Czupih v. Card Pak Incorporated, 916 F.Supp. 687, 689 (N.D. Ohio 1996) (bare statement of unlawful racial discrimination is legal conclusion that need not be accepted as true). "[W]e are not bound to accept as true a legal conclusion couched as a factual allegation." Papasan v. Allain, 478 U.S. 265, 286 (1986) (statement that funding disparity leads to a minimally adequate education is a legal conclusion, not allegation of fact). "[T]he court is not required to accept legal conclusions cast in the form of factual allegations if those conclusions cannot reasonably be drawn from the facts alleged." Clegg v. Cult Awareness Network, 18 F.3d 752, 754 (9th Cir. 1994) (citations omitted). "However, legal conclusions, deductions or opinions couched as factual allegations are not given a presumption of truthfulness." 2A Moore's Federal Practice. 12.07, at 63 (2d ed. 1986) (footnote omitted).

Unlike a Rule 12(b)(6) motion, a Rule 12(b)(1) motion can attack the substance of a complaint's jurisdictional allegations despite their formal sufficiency, and in so doing rely on affidavits or any other evidence properly before the court. "A motion to dismiss for lack of subject matter jurisdiction may either attack the allegations of the complaint or may be made as a 'speaking motion' attacking the existence of subject matter jurisdiction in fact." Thornhill Publishing Co. v. General Tel. & Elec. Corp., 594 F.2d 730, 733 (9th

Cir. 1979) (analyzing similar federal rule). The standards applicable to a Rule 12(b)(1) speaking motion differ greatly from the standards for ruling on a motion for summary judgment.

> Faced with a factual attack on subject matter jurisdiction, 'the trial court may proceed as it never could under Rule 12(b)(6) or Fed.R.Civ.P. 56. . . . (N)o presumptive truthfulness attaches to plaintiff's allegations, and the existence of disputed material facts will not preclude the trial court from evaluating for itself the merits of jurisdictional claims. Moreover, the plaintiff will have the burden of proof that jurisdiction does in fact exist.

Id. (citations omitted) (analyzing similar federal rule).

Until all statutory administrative remedies are exhausted, the court lacks subject matter jurisdiction.

> Pursuit of statutory administrative remedies is a condition precedent to judicial review. Fairway Dev. Co. v. Bannock County, 119 Idaho 121, 124, 804 P.2d 294, 297 (1990). "[T]he doctrine of exhaustion generally requires that the case run the full gamut of administrative proceedings before an application for judicial relief may be considered." Regan v. Kootenai County, 140 Idaho 721, 724, 100 P.3d 615, 618 (2004).

Park v. Banbury, 143 Idaho 576, __, 149 P.3d 851, 853 (2006). The court lacks subject matter jurisdiction on action brought under the Tort Claims Act where the plaintiff fails to comply with notice requirements. Madsen v. Idaho Dept. of Health and Welfare, 116 Idaho 758, 779, 761 P.2d 433, 436 (Ct. App. 1989).

IV. ARGUMENT

A. The Court Lacks Subject Matter Jurisdiction on Allied's Tort Claims For Failure to Comply with the Tort Claims Act.

Allied's Amended Complaint alleges that defendants have deprived Allied of its economic opportunity or prospective business advantage by accepting credit cards for

bail and operation of the Adult Misdemeanor Probation Department and pre-trial services program. (Amended Complaint, ¶¶ 10-16). Interference with economic opportunity or prospective business advantage sounds in tort. *See* Idaho First Nat'l Bank v. Bliss Valley Foods, Inc., 121 Idaho 266, 824 P.2d 841 (1991). This court lacks subject matter jurisdiction on Allied's claims based upon Allied's failure to satisfy the notice requirements set forth in Idaho Code § 6-907.

Until all statutory administrative remedies are exhausted, the court lacks subject matter jurisdiction.

> Pursuit of statutory administrative remedies is a condition precedent to judicial review. Fairway Dev. Co. v. Bannock County, 119 Idaho 121, 124, 804 P.2d 294, 297 (1990). "[T]he doctrine of exhaustion generally requires that the case run the full gamut of administrative proceedings before an application for judicial relief may be considered." Regan v. Kootenai County, 140 Idaho 721, 724, 100 P.3d 615, 618 (2004).

Park v. Banbury, 143 Idaho 576, __, 149 P.3d 851, 853 (2006). The court lacks subject matter jurisdiction on action brought under the Tort Claims Act where the plaintiff fails to comply with notice requirements. Madsen v. Idaho Dept. of Health and Welfare, 116 Idaho 758, 779, 761 P.2d 433, 436 (Ct. App. 1989).

It is well settled that compliance with the Tort Claims Act's notice requirement is a mandatory condition precedent to bringing suit, the failure of which is fatal to a claim, no matter how legitimate. Udell v. Idaho State Board of Land Comm'rs Ex Rel. Idaho Att'y Gen., 119 Idaho 1018, 1020, 812 P.2d 325 (Ct. App. 1991); McQuillen v. City of Ammon, 113 Idaho 719, 722, 747 P.2d 741 (1987); Jacaway v. State, 97 Idaho 694, 551 P.2d 1330 (1976). Once it is determined that the claimant has not filed the prerequisite

notice, dismissal of the action by district court is mandated by the act. *Id.*; Idaho Code § 6-908.

Allied's Notice of Tort Claim[1] does not satisfy the statutory requirements of Idaho Code § 6-907. Idaho Code § 6-907 provides as follows:

> All claims presented to and filed with a governmental entity shall accurately describe the conduct and circumstances which brought about the injury or damage, describe the injury or damage, state the time and place of the injury or damage occurred, **state the names of all persons involved**, if known, and **shall contain the amount of damages claimed**, together with a statement of the actual residence of the claimant at the time of presenting and filing the claim and for a period of six (6) months immediately prior to the time the claim arose. If the claimant is incapacitated from presenting and filing his claim within the time prescribed or if the claimant is a minor or if the claimant is a non-resident of the state and is absent during the time within which his claim is required to be filed, the claim may be presented and filed on behalf of the claimant by any relative, attorney, or agent representing the claimant. A claim filed under the provisions of this section shall not be held invalid or insufficient by reason of an inaccuracy in stating the time, place, nature, or cause of the claim, or otherwise, unless it is shown that the governmental entity was in fact misled to its injury thereby.

Idaho Code § 6-907 (*emphasis added*).

Failure to provide the required elements in a Notice of Tort Claim is fatal to the claim. Idaho Code § 6-907 allows for "inaccuracy" in stating the elements in a Notice of Tort Claim, unless it is shown that the governmental entity was in fact misled to its injury thereby. However, the Act does not allow for the omission of one of the five essential elements. In Tucking v. Board of Comm'rs of Jefferson County, 796 P.2d 1055 (Kan. App. 1990), the court held that an omission rather than an inaccuracy in a Notice of Tort Claim does not substantially comply with the notice requirement and requires dismissal

[1] See Exhibit "B" attached to Affidavit of Darrin L. Murphey dated February 19, 2008.

of the case. *Id.* at 1059. The claimant's request or demand for payment of monetary damages is the very essence of a written notice required by a Tort Claims Act. Mesa County Valley School Dist. v. Kelsey, 8 P.3d 1200, 1205 (Colo. 2000). In Kelsey, the court held that the claimant's failure to include the amount of damages claimed in her Notice of Tort Claim was fatal to the claim notwithstanding oral communications and medical documents provided to the entity. *Id.*; *see also*, Wiggins v. Housing Authority, 873 P.2d 1377, 1380 (Kan. App. 1994) (tort claim for retaliatory discharge was subject to dismissal for failure to provide concise statement of factual basis of claim in Notice of Tort Claim); C.J.S., Municipal Corporations § 829 (2002), and cases cited therein. The Idaho Appellate Courts are in agreement. In Thompson v. City of Idaho Falls, 126 Idaho 587, 887 P.2d 1094 (Ct. App. 1994), the court held that where the claimant's Notice of Tort Claim failed to make any claim for interference with contract or prospective business advantage, nor described the conduct and circumstances which brought about the alleged injury, the Notice of Tort Claim failed to comply with Idaho Code § 6-907; *see also*, Wickstrom v. North Idaho College, 111 Idaho 450, 452, 725 P.2d 155, 157 (1986) (action in tort dismissed where notice of tort claim failed to state the name and address of claimants, the amount of claimed damages, and the nature of the injury); Friesen v. Cuff, Kootenai County Case No. CV-05-9047 (August 22, 2006) (plaintiff's complaint dismissed for failure to describe injury or amount of damages claimed in notice of tort claim).

The foregoing authorities make it clear that the Tort Claims Act allows for inaccuracy in stating the time, place, nature, or cause of the claim, or otherwise . . ." Idaho Code § 6-907. However, a complete omission from the notice of the amount of

damages claimed is fatal. Here, Allied has failed to describe any of the individuals involved and has failed to describe the amount of damages claimed. The statute mandates that the notice shall "state the names of the persons involved" and "shall contain the amount of damages claimed." *Id.* Therefore, Allied has failed to satisfy the requirements of Idaho Code § 6-907. As such, this court lacks subject matter jurisdiction on Allied's claims seeking damages for accepting credit card payment for bail and operation of the Adult Misdemeanor Probation and pre-trial services program, or any other tort.

B. This Court Lacks Subject Matter Jurisdiction on Allied's Tort Claims on the Grounds that Allied has Not Allowed the County the Opportunity to Evaluate its Claims.

Even assuming that Allied's Notice of Tort Claim satisfied the notice requirements of the Tort Claims Act, Allied prematurely filed its complaint. Generally, an amendment to the complaint relates back to the date the complaint was filed. I.R.C.P. 15(c). Idaho Code § 6-910 allows a suit to be brought only after the tort claim has been denied.

> If the claim is denied, a claimant may institute an action in the district court against the governmental entity or its employee in those circumstances where an action is permitted by this act.

Idaho Code § 6-910. A claim is not denied until the County denies the claim or has failed to approve or deny the tort claim within ninety days.

> Within ninety (90) days after the filing of the claim against the governmental entity or its employee, the governmental entity shall act thereon and notify the claimant in writing of its approval or denial. A claim shall be deemed to have been denied if at the end of the ninety (90) day period the governmental entity has failed to approve or deny the claim.

Idaho Code § 6-909.

Until Allied has exhausted all statutory administrative remedies, this court lacks subject matter jurisdiction. Park, 143 Idaho at __, 149 P.3d at 853. The court lacks subject matter jurisdiction on any action covered by the Tort Claims Act where the plaintiff failed to comply with notice requirements. Madsen, 116 Idaho at 779, 761 P.2d at 436. "The notice of claim requirement of [Idaho Code § 6-906] serves the purposes of providing an opportunity for parties to resolve their dispute through settlement without resort to the courts, allowing authorities to conduct a timely investigation of the claimant's cause of action to determine the extent of the [county's] liability, if any, and allowing the [county] to prepare its defenses." Overman v. Klein, 103 Idaho 795, 797, 654 P.2d 888, 890 (1982) (*citing* Farber v. State, 102 Idaho 398, 630 P.2d 685 (1981)).

Here, Allied's Notice of Tort Claim is dated October 9, 2007, the same date Allied filed its complaint. Allied has failed to exhaust the requirements of the Tort Claims Act by allowing the County the opportunity to evaluate Allied's claims and then respond. As such, this court lacks subject matter jurisdiction on Allied's tort claims.

C. Allied's Claim For Damages Arising Out of Any Denial of Frank Davis's Public Records Requests Fails to State a Claim.

Allied's Complaint for damages arising out of the alleged denial of public records requests submitted by Frank Davis is statutorily precluded. Idaho Code § 9-343 provides, in pertinent part, as follows:

> The sole remedy for a person aggrieved by the denial of a request for disclosure is to institute proceedings in the district court of the county where the records or some part thereof are located, to compel the public agency or independent public body corporate and politic to make the information available for public inspection in accordance

> with the provisions of sections 9-337 through 9-348, Idaho Code.

Idaho Code § 9-343(1) (emphasis added). No cause of action for damages is available.[2] As such, Allied's claim for damages arising out of the alleged wrongful denial of Frank Davis's public records requests, should be dismissed.

D. Allied Lacks Standing to Protest the Alleged Denial of Frank Davis's Public Records Request.

Allied lacks standing to file a petition contesting any denial by Kootenai County or Sheriff Watson of public records requests submitted by Frank Davis. Allied's Amended Complaint did not include any attached exhibits. Even assuming Exhibits B through K attached to the original complaint are the public records requests Allied is referring to in its Amended Complaint, those requests were made by Frank Davis, not Allied. Allowing an amendment of the complaint to name the real party in interest, pursuant to I.R.C.P. 17(a) would be futile, as the statutory time period for filing a petition, one hundred eighty (180) calendar days from the date of the mailing of the notice of denial, has expired, and the action does not relate back to the date the Complaint was filed, as there is no evidence of a factual mistake in naming Frank Davis. *See* Tingley v. Harrison, 125 Idaho 86, 92, 867 P.2d 960, 966 (1994). As such, pursuant to I.R.C.P. 12(b)(6), Allied's cause of action contesting the denial of public records should be dismissed on the grounds that Allied has failed to allege facts that would give it standing to bring a petition contesting denial of public records.

---

[2] As discussed below, Allied lacks standing to protest any denial of public records requested by Frank Davis. Even assuming for the sake of argument that Frank Davis timely filed a petition to examine records in which defendants denied disclosure, the remedy is disclosure of documents, not damages. Additionally, despite repeated requests by defendants, Frank Davis has failed to inform the defendants of which records he believes defendants have denied disclosure.

E. **Allied's Claims against Sheriff Watson must be Dismissed on the Grounds that Allied has Failed to Comply with the Bonding Requirements of Idaho Code § 6-610.**

Allied has failed to comply with the bond requirements set forth in Idaho Code § 6-610, which provides as follows:

> (1) For purposes of this section, a "law enforcement officer" shall be defined as any court personnel, sheriff, constable, peace officer, state police officer, correctional, probation or parole official, prosecuting attorney, city attorney, attorney general, or their employees or agents, or any other person charged with the duty of enforcement of the criminal, traffic or penal laws of this state or any other law enforcement personnel or peace officer as defined in chapter 51, title 19, Idaho Code.
>
> (2) **Before any civil action may be filed against any law enforcement officer** or service of civil process on any law enforcement officer, when such action arises out of, or in the course of the performance of his duty, or in any action upon the bond of any such law enforcement officer, **the proposed plaintiff or petitioner, as a condition precedent thereto, shall prepare and file with, and at the time of filing the complaint or petition in any such action, a written undertaking with at least two (2) sufficient sureties in an amount to be fixed by the court.** The purpose of this requirement is to ensure diligent prosecution of a civil action brought against a law enforcement officer, and in the event judgment is entered against the plaintiff or petitioner, for the payment to the defendant or respondent of all costs and expenses that may be awarded against the plaintiff or petitioner, including an award of reasonable attorney's fees as determined by the court.
>
> (3) In any such civil action the prevailing party shall be entitled to an award of costs as otherwise provided by law. The official bond of any law enforcement officer under this section shall be liable for any such costs.
>
> (4) At any time during the course of a civil action against a law enforcement officer, the defendant or respondent may except to either the plaintiff's or petitioner's failure to file a bond or to the sufficiency of the sureties or to the amount

of the bond.

> (5) When the defendant or respondent excepts to the plaintiff's or petitioner's failure to post a bond under this section, the judge shall dismiss the case.
>
> (6) When the defendant or respondent excepts to the sufficiency of the sureties [,] the sureties must be justified by the plaintiff or petitioner. Upon failure to justify the judge must dismiss the case.
>
> (7) When the amount of the bond is excepted to, a hearing may be held upon notice to the plaintiff or petitioner by the defendant or respondent of not less than two (2) nor more than ten (10) working days after the date the exception is filed, before the judge of the court in which the action is brought. If it appears that the bond is insufficient in amount, the judge shall order a new bond sufficient in amount to be filed within five (5) days of the date such order is received by the plaintiff or petitioner. If no such bond is filed as required by the order of the court, the judge shall dismiss the action.

Id. (emphasis added).

Here, the court's files and records show that Allied filed its complaint naming Sheriff Rocky Watson as a defendant on October 9, 2007, and on October 10, 2007, filed a bond in the amount of $700.00, with one surety. After hearing on Sheriff Watson's motion excepting to the amount of the bond, on March 24, 2008, the court entered its Order Granting Defendant's Motion Excepting to Plaintiff's Bond, requiring Allied to file with the court, no later than five (5) days from the date the order is received by Allied's Counsel, an undertaking with at least two (2) sufficient sureties in an amount not less than $25,000.00. Allied subsequently filed a power of attorney which expires on June 29, 2009.

Allied's filing of a bond with the court after the complaint was filed is untimely and therefore does not satisfy the requirements of Idaho Code § 6-610. Additionally, the

power of attorney filed by Allied does not satisfy the undertaking requirements required by the statute, in that the power of attorney has an expiration date and the court has not received adequate surety. Idaho Code § 6-610 mandates that as a condition precedent to filing any civil action, a plaintiff must file a bond, in an amount fixed by the court, with at least two (2) sufficient sureties. Idaho Code § 6-610(2). The Idaho Supreme Court has held that a plaintiff who did not file a pre-suit bond may not cure the defect, but must suffer dismissal of his complaint. Monson v. Boyd, 81 Idaho 575, 582, 348 P.2d 93, 97 (Idaho 1959); Beehler v. Fremont County, __ Idaho __, 182 P.3d 713 (Idaho App., April 14, 2008) ("Filing a written undertaking prior to initiating any civil action against a law enforcement officer is mandatory;" "Dismissal in this circumstance is mandatory.") Athay v. Stacey, 2008 WL 2437857, (Idaho, June 18, 2008); *Cf.* Johnson v. Boundary School District No. 101, 138 Idaho 331, 336, 63 P.3d 457, 462 (Idaho 2003) (distinguishing the bond required for contesting a school district election from the law enforcement officer suit bond, particularly noting that the language of Idaho Code § 6-610 "expressly states that the preparation and filing of the bond is a prerequisite to the suit").

Here, the court's record shows that Allied failed to file a bond prior to bringing this action against Sheriff Watson. "Dismissal in this circumstance is mandatory." Beehler, *supra*. Furthermore, the power of attorney filed by Allied does not satisfy the mandatory undertaking requirements required by the statute, in that the power of attorney has an expiration date and the court has not received adequate surety. Therefore, the court must dismiss all claims against Sheriff Watson.

F. **The Settlement Agreement is Void and Unenforceable.**

The Settlement Agreement is void and unenforceable for failing to contain a limitation as to time. Allied is attempting to enforce the parties Settlement Agreement, dated April 19, 2001, as a covenant by the defendants not to compete with Allied. *See* Amended Complaint ¶ 8 ("Defendant has breached the Agreement by" "Directly soliciting inmates to file cash or credit card bonds" and by "not allowing arrestees access to the phone to call a bonding company until after Pre-Trial Services has conducted interviews with the arrestees"). A covenant not to compete is void and unenforceable if it does not contain a limitation as to time. Jorgensen v. Coppedge, __ Idaho __, 181 P.3d 450, 454, (March 27, 2008). The Settlement Agreement does not contain any limitation as to time. As such, the Settlement Agreement is void and unenforceable. Therefore, Allied's claims arising out of the Settlement Agreement fail to state a claim.

G. **Allied Does Not Have a Property or Contract Right in Any Specific Bail Bond Business.**

Allied has a license to conduct its bonding business, which is a mere privilege and does not rise to the level of a property right or contract for any specific bail bond business. *See* BHA Investments v. State, 138 Idaho 348, 354-55, 63 P.3d 474 (2003) (license is a mere privilege and is neither a right of property nor a contract, or a contract right). Allied's claim against the defendants is no different than attempting to assert a claim against competing bond companies for interference with economic opportunity or prospective business advantage. Allied is not entitled to any specific bond business or a monopoly in general. Moreover, Allied's claim is speculative at best, requiring evidence that the pre-trial service participants and individuals paying a cash bail with a credit card would have bonded with Allied. The law does not provide relief for such uncertain

claims. *See* Harrington v. Hadden, 69 Idaho 22, 27, 202 P.2d 236 (1949). As such, Allied's claims arising out of any alleged diminishment in bonding business, fail to state a claim.

H. Allied Does Not Have Standing to Challenge the Acceptance of Credit Cards or the Operation of Adult Misdemeanor Probation and the Pre-Trial Services Program.

"It is a fundamental tenet of American jurisprudence that a person wishing to invoke a court's jurisdiction must have standing." Gallagher v. State, 141 Idaho 665, 668, 115 P.3d 756, 759 (2005)(citations omitted). To fulfill the standing requirement, Allied must establish a peculiar or personal injury that is different than that suffered by the public. *Id.* In Gallagher, the Supreme Court rejected Gallagher's argument that as a smoker, he had a particularized injury not suffered by all tax payers, and therefore had standing to challenge a cigarette tax. *Id.*

Here, Allied similarly lacks a particularized injury on its challenge to accepting credit cards for bail or operation of the Adult Misdemeanor Probation Department and Pre-Trial Services Program. As discussed above, Allied does not have a property or contract right to any specific bail bond business, and its claim is speculative at best. Furthermore, neither Allied nor anyone else has been denied the constitutional right to bail or bond. As such, Allied cannot show a particularized injury. Therefore, Allied lacks standing to challenge accepting credit cards for bail or operation of the Adult Misdemeanor Probation Department and Pre-Trial Services Program.

I. Idaho Law Does Not Prohibit Accepting Bail by Credit Card.

Idaho law expressly allows for the payment of a cash bail bond with a credit card. Idaho Criminal Rule 46 authorizes the payment of bail in "cash". Idaho Code § 31-3221, enacted on July 1, 2003, authorizes the district court to accept a credit card for payment of a "cash deposit of bail".

> (1) **The clerk of the district court may accept payment of a debt owed to the court by a credit card or debit card.** . . .
> (2) Definitions. As used in this section:
> . . .
> (d) "Debt owed to the court" means any assessment of fines, court costs, surcharges, penalties, fees, restitution, **cash deposit of bail**, moneys expended in providing counsel and other defense services to indigent defendants, or other charges which a court judgment has ordered to be paid to the court or which a party has agreed to pay in criminal or civil cases and includes any interest or penalty on such unpaid amounts as provided for in the judgment or by law.
> . . .
> (3) The supreme court may adopt rules as deemed appropriate for the administration of this section and may enter into contracts with an issuer or other organization to implement the provisions of this section.

Id. (emphasis added).

Idaho Code § 31-3221 does not usurp any power from the judiciary. The amount of bail is set by the court, and Idaho Code § 31-3221 does not conflict with that power. Additionally, the Idaho Constitution vests the power to enact substantive laws in the Legislature. Idaho Const. art. III, § 1. The right to pre-conviction bail is guaranteed in both the Eighth Amendment to the United States Constitution, and Art. 1, § 6, of the Idaho Constitution, and therefore a substantive right. As such, the legislature is vested with the constitutional authority to enact legislation concerning the payment of bail,

including the payment of bail by credit card. Moreover, the Administrative Judge has approved the procedures for posting bail with a credit card. As such, Allied's claims challenging the acceptance of a credit cards to post bail, fails to state a claim.

J. The County's Operation of the Adult Misdemeanor Probation Department and the Pre-Trial Services Program is Lawful.

Allied alleges that the county's operation of the Adult Misdemeanor Probation Department is without statutory authority and in violation of Article 10, § 5, of the Idaho Constitution, and therefore the pre-trial services program is unlawful. (Amended Complaint, ¶¶ 12-15; Memorandum in Support of Second Motion For Preliminary Injunction, pp. 4-5). Allied's argument is without merit. Article 10, § 5 of the Idaho Constitution addresses the powers of the state board of corrections concerning persons convicted of a felony. *See* Idaho Code § 20-219 ("The state board of correction shall be charged with the duty of supervising all persons convicted of a felony placed on probation or released from the state penitentiary on parole . . ."). Persons convicted of a misdemeanor are managed by the counties, not the state. *See generally,* Idaho Code § 18-113(1) ("Except in cases where a different punishment is prescribed in this code, every offense declared to be a misdemeanor, is punishable by imprisonment in a county jail not exceeding six (6) months, or by a fine not exceeding one thousand dollars ($1,000), or by both.").

As recognized by Allied, the legislature has acknowledged the operation of Adult Misdemeanor Probation Departments by counties. *See* Idaho Code § 20-227(5)("In counties where there are misdemeanor probation officers in addition to department of correction parole or probation officers, those officers shall have the same authority conferred upon department of correction parole or probation officers in this section, to

arrest a misdemeanor probationer without a warrant for misdemeanor probation violations occurring in the officer's presence as otherwise provided in this section"); and § 31-3201D(providing for county misdemeanor probation supervision fee).

House Bill 408, which was signed by the Governor on March 14, 2008, and effective on July 1, 2008, not only acknowledges, but now specifically mandates county commissioners to provide for misdemeanor probation services, adding new sections designated as Idaho Code §§ 19-3947 and 31-878. Of interest is the Statement of Purpose which provides that the bill was developed and recommended by the Department of Corrections, among others. Also of interest is the Fiscal Note which states that "While this bill states that counties have the responsibility of providing misdemeanor probation services, almost all counties are already providing such services." In any event, Allied's challenge to the operation of the Adult Misdemeanor Department and the pre trial services program, fails to state a claim.

V. CONCLUSION

Based on the foregoing, defendants respectfully request that the court enter an order dismissing Allied's Amended Complaint.

DATED this 9th day of July, 2008.

Kootenai County
Department of Legal Services

By _____
DARRIN L. MURPHEY
Attorney for Defendants

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 9th day of July, 2008, I caused to be served a true and correct copy of the foregoing by the method indicated below, and addressed to the following:

Arthur M. Bistline
5431 N. Government Way, Suite 101A
Coeur d'Alene, ID 83815

John P. Luster, District Judge
Delivered to Chambers

☐ U.S. MAIL
☒ HAND DELIVERED
☐ OVERNIGHT MAIL
☐ TELECOPY (FAX) to: (208) 676-8680

DARRIN L. MURPHEY

ARTHUR M. BISTLINE
LAW OFFICE OF ARTHUR M. BISTLINE
5431 N. Government Way, Ste. 101A
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(208) 676-8680 (fax)

Attorney for Plaintiff

STATE OF IDAHO } SS
COUNTY OF KOOTENAI
FILED
2008 JUL 16 PM 4:28
CLERK DISTRICT COURT
DEPUTY

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

ALLIED BAIL BONDS, INC., an Idaho Corporation, Plaintiff, vs. COUNTY OF KOOTENAI, a political subdivision of the State of Idaho, ROCKY WATSON, Kootenai County Sheriff, John and Jane Does 1 through 13, Defendant	Case No.: No. CV-07-7471 RESPONSE TO DEFENDANTS' MOTION TO DISMISS SECOND AMENDED COMPLAINT AND MOTION TO RECONSIDER

COMES NOW, Plaintiff by and through its attorney of record, and responds to Defendants' Motion to Dismiss Second Amended Complaint and Motion to Reconsider as follows:

All affidavits filed by Allied in this matter are incorporated here as if set forth in full.

MOTION TO DISMISS SECOND AMENDED COMPLAINT

A. <u>The Court Lacks Subject Matter Jurisdiction on Allied's Proposed New Claims for Damages for Failure to Comply with the Tort Claims Act.</u>

Allied's claims do not sound in tort, but in contract and as an interested tax payer seeking to prevent illegal conduct.

Allied's claims are:

1) That Kootenai County and the Sheriff's Department are violating the terms of a settlement agreement;

2) That Kootenai County is Kootenai County is illegally operating an adult misdemeanor probation program; and

3) That the Sheriff's practice of accepting credit cards for bonding purposes is illegal.

Allied's claims are not tort claims. The claims are based in contract and are taxpayer suits to stop illegal conduct of public officials. The fact that the illegal conduct is financially harming Plaintiff provides a basis for standing, but does not convert the action to one in tort. The Tort Claims Act is not applicable to Allied's claims.

To the extent that Allied has any tort claims, and has in fact failed to comply with the act, that would only justify dismissing the tort claims, not any of the other claims or outright dismissing the entire complaint.

B. The Court Lacks Subject Matter Jurisdiction on Allied's Proposed Amended Claims for Damages on the Grounds that Allied has Not Allowed the County the Opportunity to Evaluate its Claims.

This argument is also based on the Tort Claims Act. See section A above.

C. Allied's Claim for Damages Arising Out of Any Denial of Frank Davis' Public Record Request Fails to State a Claim.

Allied does not seek damages for the violation of Idaho Code, Title 9, Chapter 3, other than for attorneys fees.

D. Allied Lacks Standing To Protest The Alleged Denial of Frank Davis's Public Records Request.

Frank Davis is the president and owner of Allied Bail Bonds, Inc., and was requesting the information in that capacity. See Affidavit Of Frank Davis.

E. Allied's Claims against Sheriff Watson must be Dismissed on the Grounds that Allied has Failed to Comply with the Bonding Requirements of I.C. 6-610.

The Court has granted Allied leave to file the amended complaint, and the County has answered that Complaint. There was a bond in place prior to the filing of the complaint because the original complaint is *functus officio*, and is not part of the record. *Pacheco v. Safeco Ins. Co.*

of America, 116 Idaho 794, 809, 780 P.2d 116, 131 (1989). The "Relation Back" Doctrine speaks only to statutes of limitation and is not relevant here.

The County should have stood on its request for dismissal and not stipulated to the filing of a sufficient bond. A sufficient bond has now been filed and the purposes of Idaho Code 6-610 have been fulfilled. Dismissing the action against Sheriff Watson would be a waste of resources and serve no purpose whatsoever.

F. The Settlement Agreement is Void and Unenforceable.

Allied is not attempting to enforce the settlement agreement as a "covenant not to compete." That is how the County is attempting to characterize the settlement agreement. The County does not "compete" with bail bondsmen. The credit card companies do.

If the County actually was competing in the bonding business that would be unfair as the County would certainly have an unfair advantage given that its "customer" is in its jail and under the complete control of its employees.

The County is not in competition with the bonding companies. A bonding company puts its name and credit on the line. The County, by accepting credit cards, does no such thing. Allied's competition is the credit card company, a private enterprise, not the County. By pushing credit cards, the County is giving preferential treatment to one private enterprise to the detriment of Allied.

> "It is obvious that private enterprise, not so favored, could not compete with industries operating thereunder. If the state-favored industries were successfully managed, private enterprise would of necessity be forced out, and the state, through its municipalities, would increasingly become involved in promoting, sponsoring, regulating and controlling private business, and our free private enterprise economy would be replaced by socialism. The constitutions of both state and nation were founded upon a capitalistic private enterprise economy and were designed to protect and foster private property and private initiative."
>
> *Village of Moyie Springs v. Aurora Mfg. Co.*
> 82 Idaho 337, 350, 353 P.2d 767, 775 (1960)

G. Allied Does Not Have A Property Or Contract Right In Any Specific Bail Bond Business.

No Property Right.

The County sites *BHA Investments v. State,* 138 Idaho 348, 63 P.3d 474 (2003) for the proposition that Allied has no property right in its license to write bonds. The reliance is misplaced.

The Supreme court in *BHA* noted that there is a property right in conducting your chosen business citing *Coeur d'Alene Garbage Service v. City of Coeur d'Alene*, 114 Idaho 588, 591, 759 P.2d 879, 882 (1988), and held that *BHA's* claim in that case was not a claim based on the denial of such a property right. The claim was based on a taking of property without just compensation because a transfer fee was too high. In *dicta* the Court noted that a liquor license is not a property right and cited a case specific to liquor licenses for such a proposition.

Allied is a bail agent. A bail agent is a licensed producer in the line of insurance that is authorized by an insurer to execute or countersign undertakings of bail. I.C. 41-1038. A bail agent must have a license, I.C. 41-1039, and must file a performance bond. I.C. 41-1040. As such, Allied has the right and license to sell bail bonds and make a profit doing so and that is a property right.

Speculative claim.

Allied may not be able to prove that any one particular bond would have been written by Allied if the jail had not accepted a credit card. However, it certainly can and has proved the obvious -- that when the jail illegally accepts credit cards, or provides advice on bonding decisions, or allows members of adult probation and parole access to arrestees to provide the same advice, the total business to the bail bond industry decreases. Allied has now, and has for many years, a large percentage of that business so proving injury in fact.

H. Allied Does Not Have Standing To Challenge the Acceptance of Credit Cards or the Operation of Adult Misdemeanor Probation and the Pre-Trial Services Program.

As a general rule, a citizen or taxpayer, by reason of that status alone, does not have standing to challenge governmental action. *Koch v. Canyon County*, 177 P.3d 372, 374 (2008). However, if a taxpayer can show an injury that is not shared equally by all citizens, then the tax payer has standing. *Id* citing *Young v. City of Ketchum*, 137 Idaho 102, 44 P.3d 1157 (2002).

As set forth above, Allied is part of an exclusive group of individuals and entities which are licensed to provide surety bonds for bail purposes. Utilizing credit cards and reducing the amount of bonds creates a reduction in the number of bonds written and the amount of those bonds. This results in injury only upon licensed bail bonding companies such as Allied. Allied has standing to bring the claims.

I. Idaho Law Does Not Prohibit Accepting Bail By Credit Card.

Idaho Code 31-3221 does allow "debts to the Court" to be paid with credit cards, and does define bail as a debt to the Court; however, section three of that statute specifically provides that, "The supreme court may adopt rules as deemed appropriate for the administration of this section and may enter into contracts with an issuer or other organization to implement the provisions of this section." The Idaho Supreme Court was asked to speak and speak it did; credit cards are not authorized for cash bond purposes. Furthermore, only the Supreme Court may enter into contracts with credit card issues, not the county as in this case.

J. The County's Operation of the Adult Misdemeanor Probation Department and the Pretrial Services is Lawful.

As this Court already ruled, this is the proper subject for a summary judgment hearing. This is a motion to dismiss.

In any event, the relevant Constitutional provision is not ambiguous and not, therefor, subject to any interpretation other than what it says which is that the Department of Corrections is in charge of adults on probation – not the County.

The County argues that Article 10, Section 5 of the Constitution addresses the power of the state board of corrections over persons convicted of a felony. The word felony appears nowhere in that Constitutional provision and it plainly states that the Board shall have jurisdiction over adults on probation. Perhaps the framers of the Constitution saw the efficacy in having a uniform system for managing adults on probation, as opposed to an ad hoc county by county system; in any event, the language of the relevant constitutional provision is not ambiguous.

The Legislature may think that having the Counties manage adults on misdemeanor probation is a good idea, but the Framers of our State's Constitution did not. "Where the Constitution, being the supreme law of the state, forbids an act, no legislative enactment can legalize it. And for this court to do other than to adhere strictly to the provision of the Constitution would be an act of judicial lawlessness." *Fluharty v. Board of Com'rs of Nez Perce County*, 158 P. 320, 322 (1916)

In order to interpret the Constitutional provision, this Court must first determine it to be ambiguous. It is only ambiguous if it is reasonably susceptible to conflicting interpretations. *Atwood v. Smith* 143 Idaho 110, 114, 138 P.3d 310, 314 (2006). There is nothing ambiguous about the language in question and it is not, therefor, subject to any interpretation other than what it says. The Department of Corrections is in charge of adults on probation. Just because the Department of Corrections is also in charge of the penitentiary does not render the phrase "adults on probation" ambiguous.

MOTION TO RECONSIDER

This Motion is based on its arguments pertaining to the Tort Claims Act and the bond requirement. The arguments in the response set forth above are incorporated here.

DATED this 16th, day of July 2008.

ARTHUR M. BISTLINE

CERTIFICATE OF SERVICE

I hereby certify that on the 16th day of July, 2008, I caused to be served a true and correct copy of the foregoing document by the method indicated below, and addressed to the following:

Darrin Murphey	[ ]	Hand-delivered
Kootenai County Department of Legal	[ ]	Regular mail
Services	[ ]	Certified mail
PO Box 9000	[ ]	Overnight mail
Coeur d'Alene, ID 838116	[X]	Facsimile 446-1621
	[ ]	~~Interoffice Mail~~

BY: _____
JENNIFER HOSKINS