

11-2-2012

American West Enterprises, Inc. v. CNH, LLC
Clerk's Record Dckt. 40230

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LAW CLERK

IN THE
SUPREME COURT
OF THE
STATE OF IDAHO

SUPREME COURT NO. 40230 -2012
DISTRICT COURT NO.CV-2011-238
AMERICAN WEST ENTERPRISES INC., an Idaho
Corporation,
Appellant
Vs.
CASE NEW HOLLAND, INC.,
Respondent.

Appealed from the District Court of the Fifth Judicial District
of the State of Idaho, in and for
Minidoka County

Honorable JONATHAN P. BRODY, District Judge

Brent T. Robinson, ROBINSON ANTHON & TRIBE, P. O.
Box 396, Rupert, ID 83350

Attorney for Appellant

William A. Fuhrman, TROUT JONES GLEDHILL
FUHRMAN GOURLEY, P.O. Box 1097, Boise, ID 83701

Attorney for Respondent

Filed this 28th day of September, 2012.

Patty Temple, Clerk
Santos Garza, Deputy



40230

**IN THE
SUPREME COURT
OF THE
STATE OF IDAHO**

**Supreme Court Docket No.
Minidoka County Case No.**

**40230-2012
CV-2011-238**

AMERICAN WEST ENTERPRISES,
INC., an Idaho Corporation,
Appellant,

vs.

CASE NEW HOLLAND, INC.,
a Delaware Corporation,

Respondent.

Appealed from the district Court of the Fifth Judicial District
of the State of Idaho
in and for Minidoka County

Honorable JONATHAN P. BRODY, District Judge

William A. Fuhrman, TROUT JONES GLEDHILL FUHRMAN GOURLEY,
P.O. Box 1097 Boise, ID. 83701

Attorney for Respondent, CASE NEW HOLLAND, INC., a Delaware Corp.

Brent T. Robinson, ROBINSON ANTHON & TRIBE,
P.O. Box 396, Rupert, ID. 83350

Attorney for Appellant, AMERICAN WEST ENTERPRISES, INC.,
A Delaware corporation

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American West Enterprises, Inc. vs. Case New Holland, Inc. a Delaware Corporation

Date	Code	User		Judge
3/21/2011	NCOC	JANET	New Case Filed - Other Claims - Complaint	Jonathan Brody
		JANET	Filing: A - All initial civil case filings of any type not listed in categories B-H, or the other A listings below Paid by: American West Enterprises, Inc. (plaintiff) Receipt number: 0001592 Dated: 3/21/2011 Amount: \$88.00 (Check) For: American West Enterprises, Inc. (plaintiff)	Jonathan Brody
	DFJT	JANET	Demand For Jury Trial	Jonathan Brody
	SMIS	JANET	Summons: Summons Issued on 3/21/2011 to Case New Holland, Inc. a Delaware Corporation; Assigned to . Service Fee of \$0.00. Returned to Plaintiff's counsel for service	Jonathan Brody
	APPR	SANTOS	Plaintiff: American West Enterprises, Inc. Appearance Through Attorney Brent T. Robinson	Jonathan Brody
5/11/2011	SMRT	SANTOS	Summons: Summons Returned on 4/27/2011 to Case New Holland, Inc. a Delaware Corporation; Assigned to Private Service. Service Fee of \$0.00.	Jonathan Brody
	AFFD	SANTOS	Affidavit of Service	Jonathan Brody
5/16/2011		SANTOS	Filing: I1 - Initial Appearance by persons other than the plaintiff or petitioner Paid by: Trout Jones Gledhill Fuhrman Receipt number: 0002868 Dated: 5/16/2011 Amount: \$58.00 (Check) For: Case New Holland, Inc. a Delaware Corporation (defendant)	Jonathan Brody
	ANSW	SANTOS	Answer to Complaint and Demand for Jury Trial	Jonathan Brody
3/26/2011	NOTC	SANTOS	Notice of Service of Defendant's First Set of interrogatories and Requests for Production of Documents to Plaintiff	Jonathan Brody
3/20/2011	NOTC	JANET	Notice of service of defendant's 2nd set of interrogatories and requests for production of documents to plaintiff	Jonathan Brody
3/24/2011	NOTC	SANTOS	Notice of Service of Plaintiff's First Set of Interr and Requests for Prod of Doc to Def	Jonathan Brody
12/16/2011	NOTC	SANTOS	Notice of Scheduling and Planning Conference	Jonathan Brody
	HRSC	SANTOS	Hearing Scheduled (Motion 01/30/2012 11:00 AM) Scheduling and Planning Conference	Jonathan Brody
12/23/2011	NSDD	JANET	Notice Of Service Of Discovery Documents	Jonathan Brody
1/20/2012	HRSC	SANTOS	Hearing Scheduled (Motion 02/27/12 11:00 AM) Scheduling and Planning Conference	Jonathan Brody
		SANTOS	Notice Of Hearing	Jonathan Brody
1/25/2012	NSDD	SANTOS	Notice Of Service Of Discovery Documents	Jonathan Brody

American West Enterprises, Inc. vs. Case New Holland, Inc. a Delaware Corporation

Date	Code	User	Judge
2/27/2012	CMIN	JANET	Jonathan Brody
			Court Minutes Hearing type: Motion Hearing date: 2/27/2012 Time: 11:00 am Courtroom: District Courtroom-1 Court reporter: Maureen Newton Minutes Clerk: Janet Sunderland Tape Number: Party: American West Enterprises, Inc., Attorney: Brent Robinson Party: Case New Holland, Inc. a Delaware Corporation, Attorney: William Fuhrman
3/2/2012	CONT	SANTOS	Jonathan Brody
			Hearing result for Motion scheduled on 02/27/2012 11:00 AM: Continued Scheduling and Planning Conference
3/8/2012	MISC	SANTOS	Jonathan Brody
			Letter of unavailable dates Mr. Robinson
3/9/2012	MISC	SANTOS	Jonathan Brody
			Letter of available dates Mr. Fuhrman
3/15/2012	HRSC	SANTOS	Jonathan Brody
			Hearing Scheduled (Jury Trial 08/07/2012 09:00 AM)
	HRSC	SANTOS	Jonathan Brody
			Hearing Scheduled (Pretrial Conference 07/09/2012 01:30 PM)
3/16/2012	PTOR	SANTOS	Jonathan Brody
			Scheduling Order Notice of Trial Setting and Initial Pre-trial Order
5/2/2012	HRSC	SANTOS	Jonathan Brody
			Hearing Scheduled (Motion For Summary Judgment 06/04/2012 11:00 AM)
5/4/2012	MOTN	SANTOS	Jonathan Brody
			Motion for Summary Judgment
	MEMO	SANTOS	Jonathan Brody
			Memorandum in Support of Motion for Summary Judgment
	AFFD	SANTOS	Jonathan Brody
			Affidavit of William A. Fuhrman in Support of Motion for Summary Judgment
	NOTC	SANTOS	Jonathan Brody
			Notice of Hearing on Motion for Summary Judgment
5/21/2012	MISC	SANTOS	Jonathan Brody
			Objection to Motion for Summary Judgment
	MOTN	SANTOS	Jonathan Brody
			Motion to Amend Caption
	MOTN	SANTOS	Jonathan Brody
			Motion for Leave to Amend Complaint
	AFFD	SANTOS	Jonathan Brody
			Affidavit of Frank Jensen in Opposition to Summary Judgment
	AFFD	SANTOS	Jonathan Brody
			Affidavit of Hal Anderson in Opposition to Summary Judgment
	AFFD	SANTOS	Jonathan Brody
			Affidavit of Chuck Simmons
	NOTC	SANTOS	Jonathan Brody
			Notice of Hearing
	HRSC	SANTOS	Jonathan Brody
			Hearing Scheduled (Motion 06/04/2012 11:30 AM) Motion to Amend Caption and Motion for Leave to Amend Complaint
5/29/2012	MEMO	SANTOS	Jonathan Brody
			Reply Memorandum in Support of Motion for Summary Judgment and in Opposition to Motion to Amend Complaint

American West Enterprises, Inc. vs. Case New Holland, Inc. a Delaware Corporation

Date	Code	User	Judge
5/31/2012	CMIN	SANTOS	Jonathan Brody
			Court Minutes Hearing type: Status Conference Hearing date: 5/31/2012 Time: 3:44 pm Courtroom: Court reporter: Maureen Newton Minutes Clerk: Santos Garza Tape Number: Party: American West Enterprises, Inc., Attorney: Brent Robinson Party: Case New Holland, Inc. a Delaware Corporation, Attorney: William Fuhrman
	HRSC	SANTOS	Jonathan Brody
			Hearing Scheduled (Motion 06/11/2012 11:30 AM) Motion to Amend Caption and Motion for Leave to Amend Complaint
	HRSC	SANTOS	Jonathan Brody
			Hearing Scheduled (Motion For Summary Judgment 06/11/2012 11:00 AM)
5/1/2012		SANTOS	Jonathan Brody
			Notice Of Hearing
3/11/2012	CMIN	JANET	Jonathan Brody
			Court Minutes Hearing type: Motion For Summary Judgment Hearing date: 6/11/2012 Time: 12:13 pm Courtroom: District Courtroom-1 Court reporter: Maureen Newton Minutes Clerk: Janet Sunderland Tape Number: Party: American West Enterprises, Inc., Attorney: Brent Robinson Party: Case New Holland, Inc. a Delaware Corporation, Attorney: William Fuhrman
	ADVS	JANET	Jonathan Brody
			Hearing result for Motion scheduled on 06/11/2012 11:30 AM: Case Taken Under Advisement Motion for Leave to Amend Complaint
	ADVS	JANET	Jonathan Brody
			Hearing result for Motion For Summary Judgment scheduled on 06/11/2012 11:00 AM: Case Taken Under Advisement
7/3/2012	MISC	SANTOS	Jonathan Brody
			Defendant's Pre-Trial Memorandum
7/5/2012	HRSC	SANTOS	Jonathan Brody
			Hearing Scheduled (Pretrial Conference 07/23/2012 02:30 PM)
		SANTOS	Jonathan Brody
			Amended Notice Of Hearing
7/13/2012	DEOP	SANTOS	Jonathan Brody
			Memorandum Decision Granting Defendant's Motion for Summary Judgment and Denying Plaintiff's Motion for Leave to Amend Complaint
	MISC	JANET	Jonathan Brody
			Plaintiff's pre-trial memorandum
7/18/2012	HRVC	SANTOS	Jonathan Brody
			Hearing result for Jury Trial scheduled on 08/07/2012 09:00 AM: Hearing Vacated
	HRVC	SANTOS	Jonathan Brody
			Hearing result for Pretrial Conference scheduled on 07/23/2012 02:30 PM: Hearing Vacated

American West Enterprises, Inc. vs. Case New Holland, Inc. a Delaware Corporation

Date	Code	User		Judge
7/18/2012	DPWO	SANTOS	Disposition Without Trial Or Hearing	Jonathan Brody
	FJDE	SANTOS	Judgment	Jonathan Brody
7/27/2012	AFFD	SANTOS	Affidavit of William A. Fuhrman in Support of Motion for Attorney's Fees and Costs	Jonathan Brody
	MEMO	SANTOS	Memorandum in Support of Motion for Attorneys Fees and Costs	Jonathan Brody
	MOTN	SANTOS	Motion For Attorneys Fees and Costs	Jonathan Brody
3/3/2012	APSC	SANTOS	Appealed To The Supreme Court/Notice of Appeal	Jonathan Brody
		SANTOS	Filing: L4 - Appeal, Civil appeal or cross-appeal to Supreme Court Paid by: Robinson, Brent T. (attorney for American West Enterprises, Inc.) Receipt number: 0004085 Dated: 8/3/2012 Amount: \$109.00 (Check) For: American West Enterprises, Inc. (plaintiff)	Jonathan Brody
	BNDC	SANTOS	Bond Posted - Cash (Receipt 4086 Dated 8/3/2012 for 100.00) Clerk's Record estimate	Jonathan Brody
3/8/2012	HRSC	SANTOS	Hearing Scheduled (Motion For Award of Post-Judgment Attorney Fees 08/20/2012 11:00 AM)	Jonathan Brody
3/9/2012	NOTC	SANTOS	Notice of Hearing on Motion for Attorney's Fees and Costs	Jonathan Brody
	MISC	SANTOS	Objection to Motion for Attorney's Fees and Costs	Jonathan Brody
3/14/2012	MEMO	SANTOS	Reply Memorandum in Support of Motion for Attorneys Fees and Costs	Jonathan Brody
	AFFD	SANTOS	Affidavit of William A. Fuhrman RE: Reply in Support of Motion for Attorneys Fees and Costs	Jonathan Brody
3/20/2012	CMIN	SANTOS	Court Minutes Hearing type: Motion For Award of Post-Judgment Attorney Fees Hearing date: 8/20/2012 Time: 11:45 am Courtroom: District Courtroom-1 Court reporter: Maureen Newton Minutes Clerk: Santos Garza Tape Number: Party: American West Enterprises, Inc., Attorney: Brent Robinson Party: Case New Holland, Inc. a Delaware Corporation, Attorney: William Fuhrman	Jonathan Brody
	APSC	SANTOS	Amended Notice of Appeal	Jonathan Brody
	ADVS	SANTOS	Hearing result for Motion For Award of Post-Judgment Attorney Fees scheduled on 08/20/2012 11:00 AM: Case Taken Under Advisement	Jonathan Brody
3/29/2012	ORDR	JANET	Memorandum decision denying in part and granting in part defendant's motion for attorney's fees and costs	Jonathan Brody

Date: 9/25/2012

Fifth Judicial District Court - Minidoka County

User: SANTOS

Time: 10:49 AM

ROA Report

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Case: CV-2011-0000238 Current Judge: Jonathan Brody

American West Enterprises, Inc. vs. Case New Holland, Inc. a Delaware Corporation

American West Enterprises, Inc. vs. Case New Holland, Inc. a Delaware Corporation

Date	Code	User	Judge
9/20/2012		SANTOS	Filing: L4 - Appeal, Civil appeal or cross-appeal to Supreme Court Paid by: Fuhrman, William A. (attorney for Case New Holland, Inc. a Delaware Corporation) Receipt number: 0004903 Dated: 9/20/2012 Amount: \$109.00 (Check) For: Case New Holland, Inc. a Delaware Corporation (defendant)

CASE

2011 MAR 21 AM 10:34

DU: Scott Temple
fls

Brent T. Robinson, Esq.
ROBINSON ANTHON & TRIBE
Attorneys at Law
P. O. Box 396
Rupert, Idaho 83350-0396
Telephone (208) 436-4717
Facsimile (208) 436-6804
btr@idlawfirm.com
ISB No. 1032

Attorneys for Plaintiff

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

AMERICAN WEST ENTERPRISES,)
INC., an Idaho Corporation;)
)
Plaintiff,)
)
vs.)
)
CASE NEW HOLLAND, INC., a Delaware)
Corporation,)
)
Defendant.)
_____)

Case No. CV-2011-238

COMPLAINT

Fee Category: A
Filing Fee: \$88

COMES NOW the plaintiff, American West Enterprises, Inc., an Idaho corporation (hereinafter "American West"), by and through its attorney of record, Brent T. Robinson of the firm Robinson Anthon & Tribe, and for a claim of relief against defendant, alleges as follows:

PARTIES

1. This action is brought by the plaintiff against the defendant corporation and against the officers of the defendant corporation.

2. Plaintiff, American West, is an Idaho corporation authorized to do business within the State of Idaho.

3. Defendant, Case Hew Holland, Inc. (hereinafter "Case"), is a Delaware corporation, with its principal place of business at 100 South Saunders Road, Lake Forest Illinois 60045, and does substantial business in Minidoka County, State of Idaho.

SUMMARY OF CLAIMS

4. The plaintiff seeks redress for the following harm and/or violations of State law perpetrated by the defendant: breach of the implied warranties of merchantability and fitness for a particular purpose, as well as for reimbursement for the costs of parts and labor.

FACTUAL ALLEGATIONS

5. American West is the owner of a Case IH tractor, 3394, Serial No. 9945876.

6. That American West, wanted to sell said tractor because American West wanted to get out of the farming business; however, the tractor needed its engine replaced prior to any sale of the same.

7. American West hired the defendant's authorized dealer and repair center, Pioneer Equipment Company of Rupert, Idaho, to replace the engine.

8. Pioneer Equipment Company performed such labor on or about August 10, 2007, and subsequently charged plaintiff the sum of \$11,955.04 for parts and labor performed. Attached as Exhibit "A" is a copy of the invoice for the parts and labor.

9. That American West then sold the tractor to Frank Jensen. After using the tractor for approximately five hours, the engine froze up on Mr. Jensen.

10. That the tractor was then returned by Frank Jensen to American West who then delivered the tractor to the defendant's authorized dealer and service center, Pioneer

Equipment Company, who found that one of the springs in the new motor was defective and as a result of such, it caused the entire motor to freeze up and caused complete damage to the motor. The tractor was then returned to American West.

11. That an employee of Pioneer Equipment Company, Allan Lloyd, informed American West and Frank Jensen that the warranty provided by Case IH is based upon time, not upon use.

12. That no limited warranty was ever provided by defendant to American West pertaining to this motor and based upon there being no express limited warranty that disclaims any rights that plaintiff has with respect to implied warranty of fitness and merchantability, American West is entitled to rely upon the implied warranty and merchantability and the fitness that existed with respect to the tractor's engine.

CLAIMS FOR RELIEF

COUNT ONE

BREACH OF THE IMPLIED WARRANTY OF MERCHANTABILITY

13. The plaintiff hereby incorporates all of the foregoing paragraphs as if fully set forth herein, namely, the amount of the total cost of repairing said engine.

14. Under Idaho Code § 28-2-314, implied in every contract is a warranty that the goods shall be merchantable in the condition sold.

15. The defendant, by taking the actions described above, provided goods to the plaintiff which were not merchantable, in violation of I.C. § 28-2-314, thereby breaching the implied warranty of merchantability.

16. As a direct and proximate result of the defendant's breach of the implied warranty of merchantability, the plaintiff has been injured in an amount exceeding the

jurisdictional limit of this court.

COUNT TWO

**BREACH OF THE IMPLIED WARRANTY OF FITNESS
FOR A PARTICULAR PURPOSE**

17. The plaintiff hereby incorporates all of the foregoing paragraphs as if fully set forth herein.

18. Under Idaho Code § 28-2-315, implied in every contract is a warranty that the goods shall be fit for the particular purpose for which the goods are required.

19. That the defendant knew the purchase made by the plaintiff, namely, an engine for a tractor, was done for the express purposes of using the motor in a tractor which would be used for farming.

20. By taking the actions described above, the defendant provided goods to the plaintiff which were not fit for the particular purpose described above, in violation of I.C. § 28-2-315, thereby breaching the implied warranty of fitness for a particular purpose.

21. As a direct and proximate result of the defendant's breach of the implied warranty of fitness for a particular purpose, the plaintiff has been injured in an amount exceeding the jurisdictional limit of this court.

22. That based upon such implied warranty of merchantability, defendant should pay for the cost of this engine, as well as the labor expended to repair the same.

ATTORNEY FEES

23. As a consequence of the defendant's conduct, as alleged above, the plaintiff has been required to obtain the services of an attorney to represent it in this matter. As a result, the plaintiff is entitled to a recovery of attorney's fees pursuant to law, including, but not

limited to, Idaho Code §12-120, §12-121, Rule 54 of the Federal Rules of Civil Procedure, and such other laws as may apply. That the sum of \$5,000 is a reasonable fee, plus costs, to be paid to plaintiff for its attorney's fees if this matter is uncontested. If the matter is contested, such fees and costs shall be determined by the Court.

WHEREFORE, plaintiff prays judgment against defendant as follows:

1. That the sum of \$11,955.04 for labor and costs be paid by defendant herein.
2. That defendant pay reasonable attorney's fees in the sum of \$5,000 if this matter is uncontested, plus costs; or, if the matter is contested, a sum to be determined by the Court.
3. Reasonable costs of litigation incurred by the plaintiffs in pursuing this action.
4. For such other relief as the Court may deem proper.

DATED this 18th day of March, 2011.

ROBINSON ANTHON & TRIBE

By: 
Brent T. Robinson
Attorneys for Plaintiff

VERIFICATION

STATE OF Utah)
County of Davis) ss.

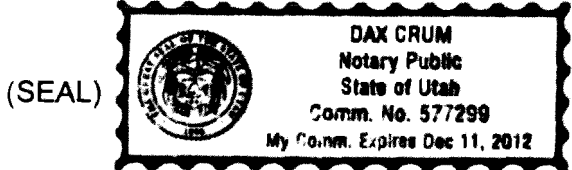
HAL ANDERSON, being first duly sworn on oath, deposes and states:

That he is the registered agent for the plaintiff in the above-entitled action, that he has read the above and foregoing Complaint, knows the contents thereof, and the facts stated he believes to be true.

Hal Anderson
Hal Anderson

SUBSCRIBED AND SWORN to before me this 15th day of March, 2011.

Dax Crum
Notary Public for Davis County Utah
Residing at: 200 N Main Kayville UT
Commission expires: 12/11/2012



PIONEER

EQUIPMENT CO.
 Junction of Highways 24 and 30
 Rupert, ID 83350

33074

New Motor

(208) 436-3191

25% RESTOCKING CHARGE ON ALL NON-STOCKING PARTS,
 ELECTRICAL PARTS NON-RETURNABLE IF INSTALLED!!!
 ASK ABOUT OUR NEW BULK OIL PROGRAM
 WE HAVE AN EARLY DELIVERY

AFTER HOURS FOR PARTS
 CALL 431-7350
 7 DAYS A WEEK

SOLD TO: UQ3215 WAMP... CORP
 SHIP TO: ...

CASE # 994587
 SHIP BY: ...

Tax	D	Qty	Description	Price	Amount
-----	---	-----	-------------	-------	--------

PICKUP TRACTOR-N/A
 BILL WINTER SPECIAL PICKUP
 94 POINT INSPECTION - 1209.00
 CHECK CLUTCH & TRANSMISSION SHIFTING
 WHEN PERFORMING 94 POINT INSPECTION ENGINE DEVELOPED NOISE
 REMOVED ENGINE OIL PAN PER HAL ANDERSON FOUND ENGINE BEARINGS
 IN OIL PAN ALSO FOUND ENGINE OIL CONTAMINATED WITH COOLANT
 ALSO ENGINE OIL PUMP RELIEF VALVE BROKEN
 REMOVE LOADER INSTALLED REMANED ENGINE PER HAL
 REPLACED TURBO
 REPLACED FUEL INJECTORS
 REPLACE ALL HOSES & CLAMPS
 REPLACED ENGINE OIL SENDERS & TEMP SENDER
 REPLACED THERMOSTATS
 CLEANED OUT RADIATOR
 CHECK A/C LOW ON R 12 ADDED 2 CANS
 REPLACE ALL FILTERS FUEL OIL WATER AIR HYD

PARTS SHOP

N	B	1	CAS AR77833	ENGINE (EXCH)	6825.00	6825.00
N	B	1	CAS AC77833	CORE	1800.00	1800.00
N	B	5	CAS A156327	NOZZLE	140.36	842.16
N	B	20	CAS A140924	STUD	3.21	64.20
N	B	1	CAS A173566	TEMP SENDR CAB 222	22.36	22.36
N	B	1	CAS 107125A1	SWITCH	57.22	57.22
N	B	1	CAS A167644	SWITCH, IGNI	96.93	96.93
N	B	1	CAS 136495101	SWITCH, IGNI	78.61	78.61
N	B	6	CAS 134278601	GASKET 022	7.15	42.90
N	B	12	CAS 222-101	SLEEVE CAB 038	1.29	15.48
N	B	1	CAS A141495	HOSE	42.32	42.32
N	B	1	CAS A141496	HOSE A052	34.57	34.57
N	B	1	CAS A150449	HOSE, LARGE	26.30	26.30
N	B	1	CAS A154770	HOSE	5.00	5.00
N	B	1	CAS A156842	HOSE, LARGE CAB 003	9.59	9.59
N	B	1	CAS A161557	HOSE	15.34	15.34
N	B	1	CAS A161681	HOSE LAB 000	9.83	9.83

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CREDIT TERMS. Payment Due Date: All bills for purchases made are payable in full upon receipt of the Monthly Billing Statement. A FINANCE CHARGE may be assessed if payment of the New Balance shown on your Monthly Statement is not made within 30 days from the closing date of the statement. The FINANCE CHARGE is determined by applying the periodic rate corresponding to an annual percentage rate to the unpaid balance on which the FINANCE CHARGE is computed. The balance is the sum of the amounts unpaid excluding previously billed and unpaid finance charges and charges added to the account during the billing cycle. The monthly periodic rate is 1 1/2 % equal to the 18% ANNUAL PERCENTAGE RATE or such rate which may be permitted by local applicable law.

In the event the amount is not paid when due and we are forced to collect or sue, I or we agree to pay all collection costs (including attorney fees and court costs.)

PAY THIS AMOUNT → **EXHIBIT A**

PIONEER EQUIPMENT CO.

P.O. BOX 495
Junction of Highways 24 and 25
Pupert, ID 83350
(208) 456-3191

25% RESTOCKING CHARGE ON ALL NON-STOCKING PARTS.
ELECTRICAL PARTS NOT RETURNABLE IF INSTALLED!!!
ASK ABOUT OUR NEW BULK OIL PROGRAM
WE HAVE OIL FROM DELTA

AFTER HOURS FOR PARTS
CALL 404-735M
7 DAYS A WEEK
24 HRS A DAY

SOLD TO

SHIP TO

U03715 AMERICAN WEST ENT CORP
HAL ANDERSON
2142 S 2450 E
MALTA, ID 83342

WINTER SPECIAL 10%
801-232-2345
654-2345
DPO 116149 12/21/06

CASE/IN 3394 SN:9945876
Sold By: LCS PO #: Tax #:

HR 65610 W100 E1
Date 8/10/07 WORK ORDER 0018560
16:06:16 PRT 3

Tax	D	Qty	Description	Price	Amount
N	B	1	CAS 4161681	HOSE CAB 003	9.83
N	B	1	CAS A132017	ASSY HEATP 0053	58.94
N	B	3	CAS A64353	HOSE CAB 003	31.27
N	B	1	CAS A65564	HOSE 0006	28.85
N	B	1	CAS 222-154	SLEEVE CAB 038	4.76
N	B	1	CAS A50737	HOSE 5, 3" CAB 025	10.95
N	B	1	CAS A40192	BEAM TORAQ R040	515.68
N	B	1	CAS A40191	CORE	35.00
N	B	1	CAS 222-101	SLEEVE CAB 038	1.29
N	B	2	CAS 222-103	SLEEVE CAB 038	1.51
N	B	4	CAS 390193	SPACER CAB 038	1.75
N	B	1	CAS A44068	FILTER KIT FIL 84	15.61
N	B	1	CAS WF2071	WATER FILTER FIL 14	7.45
N	B	1	CAS 124275601	GASKET 622	7.11
N	B	2	CAS 244358	CLAMP BC	1.81
N	B	2	CAS 214-1416	CLAMP BC	1.28
N	B	2	CAS 513309	CLAMP BC	1.08
N	B	2	CAS 86525021	CLAMP BC	1.69
N	B	6	CAS 496-21066	WASHER CAB 020	1.04
N	B	2	CAS 56624194	CLAMP BC	2.16
N	B	1	CAS 132321401	FILTER KIT FIL 32	50.68
N	B	1	CAS A138817	SEAL 621	7.88
N	B	4	CAS L14337	N. PIE 134" BC13	2.35
N	B	1	CAS 134372	O-RING CAB 062	1.77
N	B	3	CAS L14337	N. PIE 134" BC13	2.35
N	B	1	CAS AF4636	AIR FILTER FILUP060	50.77
N	B	1	CAS AF905	AIR FILT FILUP023	26.55
N	B	1	CAS AC77833	CORE-ENGINE CORES	1800.00
N	B	3	CAS 134278501	GASKET 622	1.43
N	B	1	CAS 252793A1	PIT. BOWL CAB 039	7.05
N	B	0	CAS B17704	HYDRAN BULK OUTWHS	8.67
N	B	2	EXX 424	HYDRAUL 424 OUTWHS	7.31
N	B	8	MIS RAF	RECYCLED ANT SHOP	5.99
N	B	2	CAS 2804140R1	FREON CAN R TR TOP	62.88

HAULING CHARGE

LABOR CHARGE

M EPA CHARGE

** TOTAL PARTS SHOP 3342.86

** TOTAL HAULING CHARGE

** TOTAL LABOR CHARGE 3069.00

** TOTAL EPA CHARGE 50.00

CREDIT TERMS Payment Due Date: All bills for purchases made are payable in full upon receipt of the Monthly Billing Statement. A FINANCE CHARGE may be assessed if payment of the New Balance shown on your Monthly Statement is not made within 30 days from the closing date of the statement.

The FINANCE CHARGE is determined by applying the periodic rate corresponding to an annual percentage rate to the unpaid balance on which the FINANCE CHARGE is computed. The balance is the sum of the amounts unpaid excluding previously billed and unpaid finance charges and charges added to the account during the billing cycle. The monthly periodic rate is 1 1/2% equal to the 18% ANNUAL PERCENTAGE RATE or such rate which may be permitted by local applicable state law.

In the event the amount is not paid when due and referred for collection or suit, for we agree to pay all collection costs (including attorney fees and court costs).

**PAY THIS
AMOUNT** →

PIONEER EQUIPMENT CO.

P.O. BOX 495
Junction of Highways 24 and 25
Rebert, ID 83350
(208) 436-3191

25% RESTOCKING CHARGE ON ALL NON-STOCKING PARTS,
ELECTRICAL PARTS NON-RETURNABLE IF INSTALLED!!!
ASK ABOUT OUR NEW BULK OIL PROGRAM
WE HAVE ON FARM DELIVER

AFTER HOURS FOR PARTS
CALL 431-7350
7 DAYS A WEEK
24 HRS A DAY

SOLD TO: 11037 LG AMERICAN WEST ENF CORR HALE ANDERSON 8145 S 2450 E WALTA, ID 83348	SHIP TO: WINTER SPECIAL 10 801-832-2345 651-2145 DPO 0575 12/2/06
---	--

CASE # 9394	SN: 9945878	DATE: 8/10/07	WORK ORDER: 15:06:16 PRT
Sold By: LCS	PO #:		
Ship By:	Tax #:		

Tax	Qty	Description	Price	Amount
		SHOP SUPPLIES		50.00
		PICKUP MILEAGE -- 43 MI N/C		N/C
		BILL MILEAGE TO WINTER SPECIAL		N/C

** SUBTOTAL 13211.86
** DISCOUNT 1256.00-

Cash Sale
 Phone: (208) 645-2345
 Date: ? Last Date:

CREDIT TERMS Payment Due Date. All bills for purchases made are payable in full upon receipt of the Monthly Billing Statement. A FINANCE CHARGE may be assessed if payment of the New Balance shown on your Monthly Statement is not made within 30 days from the closing date of the statement. The FINANCE CHARGE is determined by applying the periodic rate corresponding to an annual percentage rate to the unpaid balance on which the FINANCE CHARGE is computed. The balance is the sum of the amounts unpaid excluding previously billed and unpaid finance charges and charges added to the account during the billing cycle. The monthly periodic rate is 1 1/2% equal to the 18% ANNUAL PERCENTAGE RATE or such rate which may be permitted by local applicable law.

In the event the amount is not paid when due and referred for collection or suit, I or we agree to pay all collection costs (including attorney fees and court costs.)

PAY THIS AMOUNT →

9

Chuck Simmons

From: JENSEN Jeff (CNH) [jeff.jensen@cnh.com]
Sent: Wednesday, April 14, 2010 7:00 AM
To: Chuck Simmons
Subject: RE: Emailing: 3394 ENGINE 001, 3394 ENGINE 002, 3394 ENGINE 003, 3394 ENGINE 004, 3394 ENGINE 005, 3394 ENGINE 006, 3394 ENGINE 007, 3394 ENGINE 008, 3394 ENGINE 009

Chuck,

I have talked to Allan Lloyd and SRC warranty and they both have told me the same answer, NO. There is a time limit not hour limit.

Jeff Jensen
Manager Field Service Operations #522
Idaho, Utah & Eastern Washington
CASE IH
Cell: 208-681-0324
Fax: 208-523-5632
jeff.jensen@cnh.com

133 Shoshone St N.
~~133~~ Twin Falls

Lawrence
Robin Brady

734-7510

-----Original Message-----

From: Chuck Simmons [mailto:csimmons@pioneerequipment.com]
Sent: Tuesday, April 06, 2010 4:02 PM
To: JENSEN Jeff (CNH)
Subject: Emailing: 3394 ENGINE 001, 3394 ENGINE 002, 3394 ENGINE 003, 3394 ENGINE 004, 3394 ENGINE 005, 3394 ENGINE 006, 3394 ENGINE 007, 3394 ENGINE 008, 3394 ENGINE 009

Sending pic of engine valve spring broke causing valve to drop down & contact piston sending metal to other pistons & valves
The message is ready to be sent with the following file or link attachments:

- 3394 ENGINE 001
- 3394 ENGINE 002
- 3394 ENGINE 003
- 3394 ENGINE 004
- 3394 ENGINE 005
- 3394 ENGINE 006
- 3394 ENGINE 007
- 3394 ENGINE 008
- 3394 ENGINE 009

Note: To protect against computer viruses, e-mail programs may prevent sending or receiving certain types of file attachments. Check your e-mail security settings to determine how attachments are handled.

Hal Anderson 1-801-232-2345

2011 MAR 21 AM 10:34

[Signature]
DEPUTY

Brent T. Robinson, Esq.
ROBINSON ANTHON & TRIBE
Attorneys at Law
P. O. Box 396
Rupert, Idaho 83350-0396
Telephone (208) 436-4717
Facsimile (208) 436-6804
btr@idlawfirm.com
ISB No. 1032

Attorneys for Plaintiff

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

AMERICAN WEST ENTERPRISES, INC., an Idaho Corporation;)	
	)	Case No. <u>CV-2011-238</u>
)	
Plaintiff,)	
)	
vs.	)	DEMAND FOR JURY TRIAL
)	
CASE NEW HOLLAND, INC., a Delaware Corporation,)	
)	
Defendant.)	
_____)	

COMES NOW the plaintiff, American West Enterprises, Inc., an Idaho corporation, by and through its attorney of record, Brent T. Robinson of the firm Robinson Anthon & Tribe, and demands a trial by jury in the above-captioned matter of not less than twelve (12) individuals

DATED this 18th day of March, 2011.

ROBINSON ANTHON & TRIBE

By: *[Signature]*
Brent T. Robinson

SCANNED

ORIGINAL

William A. Fuhrman/ISB 2932
TROUT ♦ JONES ♦ GLEDHILL ♦ FUHRMAN ♦ GOURLEY, P.A.
225 North 9th Street, Suite 820
P.O. Box 1097
Boise, Idaho 83701
Telephone: 208-331-1170
Facsimile: 208-331-1529

FILED-
CASE #
2011 MAY 16 AM 10:41
PATRICK
DEPUTY

Attorneys for Defendant CNH AMERICA LLC,
improperly named as Case New Holland, Inc.

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

AMERICAN WEST ENTERPRISES, INC.,)	
an Idaho Corporation,)	Case No. CV-2011-238
Plaintiff,)	
vs.)	ANSWER TO COMPLAINT
)	AND DEMAND FOR JURY TRIAL
CASE NEW HOLLAND, INC., a Delaware)	
Corporation,)	
Defendant.)	
_____)	

COMES NOW the Defendant, CNH AMERICA LLC, improperly named as Case New Holland, Inc. (hereinafter "CNH"), by and through its attorneys of record, Trout ♦ Jones ♦ Gledhill ♦ Fuhrman ♦ Gourley, P.A., and for an answer to the Plaintiff's Complaint, admits, denies and affirmatively alleges as follows:

I.

FIRST DEFENSE

1. Plaintiff's claims, or some of them, fail to state proper claims upon which relief may be granted.

SCANNED

2. Defendant CNH denies each and every allegation in Plaintiff's Complaint unless specifically admitted herein.

II.

SECOND DEFENSE

3. Paragraph 1 is denied.

4. Paragraph 2 is admitted.

5. Paragraph 3 is denied. Defendant, Case New Holland, Inc. was improperly named in this suit. It should have been brought against CNH America, LLC.

6. The allegations in paragraph 4 do not appear to be either a factual allegation or a legal claim. To the extent they are so construed, they are denied.

7. Paragraph 5 is admitted.

8. Defendant CNH is without sufficient information to form a belief as to the truth of the allegations in paragraph 6 and therefore denies the same.

9. In answer to paragraph 7 and 8, it is admitted only that American West hired Pioneer Equipment Company of Rupert, Idaho to replace the motor on the tractor identified in paragraph 5 of the complaint.

10. Defendant CNH is without sufficient information to form a belief as to the truth of the facts contained in paragraphs 9, 10 and 11, and therefore denies the same.

11. Paragraph 12 is denied.

12. In answer to paragraph 13, the prior paragraphs of this answer are incorporated by reference and realleged as if stated in full.

13. In answer to paragraph 14, the provisions of Idaho Code § 28-2-314 speak for themselves.

14. Paragraph 15 and 16 are denied.

15. In answer to paragraph 17, the prior paragraphs of this answer are incorporated by reference and realleged as if stated in full.

16. In answer to paragraph 18, the provisions of Idaho Code § 28-2-315 speak for themselves.

17. The allegations in paragraphs 19, 20, 21, and 22 are denied.

18. Paragraph 23 is denied.

III.

THIRD DEFENSE **AFFIRMATIVE DEFENSES**

19. The injuries and damages of which Plaintiff complains were proximately caused by the negligence, fault or the legal liability of Plaintiff.

20. The injuries and damages of which Plaintiff complains were proximately caused by the negligence, fault or the legal liability of third parties for whom Defendant CNH is not legally responsible.

21. Plaintiff's claims may be barred by a lack of privity between the parties.

22. Plaintiff may have failed to mitigate its damages, if any.

23. Plaintiff may not be the real party in interest with regard to its claim.

24. To the extent Plaintiff is seeking to claim breach of warranties, which right to do so is disputed, Plaintiff failed to provide seasonal notice of any alleged breach and therefore its claims are barred by Idaho Code § 28-2-607.

25. Plaintiff's claims may be barred by the doctrines of waiver and/or estoppel.

26. Plaintiff's claims or damages, if any, are limited by the terms of any written warranties and contracts provided by CNH, if any. In making this defense, CNH denies that it breached any warranty, contract or agreement with Plaintiff.

27. Plaintiff's claims may be barred by the statute of limitations, including, but not limited to, Idaho Code § 28-2-725.

28. Plaintiff's claims, if any, are barred by the terms of the original sale agreement, warranty, disclaimer and limitation of remedies applicable to the sale of the tractor and/or motor in question.

29. This action has just commenced and discovery has not yet taken place. Defendant reserves the right to amend, modify, and supplement its affirmative defenses as the case progresses.

IV.

REQUEST FOR ATTORNEY FEES

Defendant has been required to retain the services of legal counsel to defend this action and it is entitled to recover its reasonable attorney fees and costs pursuant to Idaho Code §§ 12-120, 12-121 and the Idaho Rules of Civil Procedure.

PRAYER FOR RELIEF

WHEREFORE, having fully answered the Plaintiff's Complaint, Defendant prays for judgment against the Plaintiff as follows:

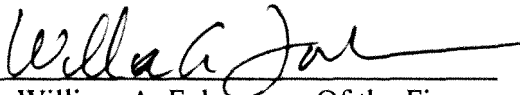
1. That Plaintiff's Complaint, and each cause of action and/or claim stated therein be dismissed, with prejudice, with Plaintiff take nothing thereby.
2. That the Court award to Defendant its costs and attorney's fees incurred herein.
3. That the Court award to Defendant such other and additional relief as to the court deems just and appropriate in the premises.

DEMAND FOR JURY TRIAL

Defendant hereby demands a trial by jury pursuant to Federal Rule of Civil Procedure 38.

DATED this 13 day of May, 2011.

Trout ♦ Jones ♦ Gledhill ♦ Fuhrman ♦ Gourley, P.A.

By: 
William A. Fuhrman – Of the Firm
Attorneys for Defendant CNH

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 13 day of May, 2011, a true and correct copy of the above and foregoing document was forwarded addressed as follows in the manner stated below:

Brent T. Robinson, Esq.
ROBINSON ANTHON & TRIBE
Attorneys at Law
P.O. Box 396
Rupert, ID 83350-0396

[] U.S. Mail
[] Hand-Delivery
[] Facsimile (208)436-6804


William A. Fuhrman

ORIGINAL

William A. Fuhrman/ISB 2932
Christopher P. Graham/ISB 6174
Trout ♦ Jones ♦ Gledhill ♦ Fuhrman ♦ Gourley, P.A.
225 North 9th Street, Suite 820
P.O. Box 1097
Boise, Idaho 83701
Telephone: 208-331-1170
Facsimile: 208-331-1529

FILED-CLERK COURT
CASE #

2012 MAY -4 PM 1:39

PATRIK J. ...
[Signature], DEPUTY

Attorneys for Defendant CNH AMERICA LLC,
improperly named as Case New Holland, Inc.

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

AMERICAN WEST ENTERPRISES, INC.,
an Idaho Corporation,

Plaintiff,

vs.

CASE NEW HOLLAND, INC., a Delaware
Corporation,

Defendant.

)
) Case No. CV-2011-238
)
)
)

) **MOTION FOR SUMMARY JUDGMENT**
)
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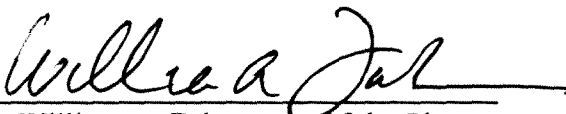
COMES NOW the Defendant, CNH AMERICA LLC, improperly named as Case New Holland, Inc. (hereinafter "CNH"), by and through its attorneys of record, Trout ♦ Jones ♦ Gledhill ♦ Fuhrman ♦ Gourley, P.A., and, pursuant to Idaho Rule of Civil Procedure 56, moves for summary judgment on Plaintiff's claims in this matter. CNH's motion is supported by the Affidavit of William A. Fuhrman in Support of Motion for Summary Judgment, CNH's Memorandum in Support of Motion for Summary Judgment, and the pleadings on file with the Court.

Oral argument is requested

SCANNED

DATED this 3 day of May, 2012.

Trout ♦ Jones ♦ Gledhill ♦ Fuhrman ♦ Gourley, P.A.


By: 
William A. Fuhrman - Of the Firm
Attorneys for Defendant CNH

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 3 day of May, 2012, a true and correct copy of the above and foregoing document was forwarded addressed as follows in the manner stated below:

Brent T. Robinson, Esq.
ROBINSON ANTHON & TRIBE
Attorneys at Law
P.O. Box 396
Rupert, ID 83350-0396

U.S. Mail
 Hand-Delivery
 Facsimile (208)436-6804


William A. Fuhrman

Blank

ORIGINAL

William A. Fuhrman/ISB 2932
Christopher P. Graham/ISB 6174
Trout ♦ Jones ♦ Gledhill ♦ Fuhrman ♦ Gourley, P.A.
225 North 9th Street, Suite 820
P.O. Box 1097
Boise, Idaho 83701
Telephone: 208-331-1170
Facsimile: 208-331-1529

FILED U.S. DISTRICT COURT
CASE NO. CV-2011-238
2012 MAY -4 PM 1:39
PARTY [unclear]
SF, DEPUTY

Attorneys for Defendant CNH AMERICA LLC,
improperly named as Case New Holland, Inc.

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

AMERICAN WEST ENTERPRISES, INC.,)	
an Idaho Corporation,	)	Case No. CV-2011-238
)	
Plaintiff,)	
	)	MEMORANDUM IN SUPPORT OF
vs.	)	MOTION FOR SUMMARY JUDGMENT
)	
CASE NEW HOLLAND, INC., a Delaware)	
Corporation,)	
)	
Defendant.)	
_____)	

COMES NOW the Defendant, CNH AMERICA LLC, improperly named as Case New Holland, Inc. (hereinafter "CNH"), by and through its attorneys of record, Trout ♦ Jones ♦ Gledhill ♦ Fuhrman ♦ Gourley, P.A., and, pursuant to Idaho Rule of Civil Procedure 56, submits the following memorandum in support of its motion for summary judgment.

I. INTRODUCTION

In this case, Plaintiff American West Enterprises, Inc. ("American West") brings breach of implied warranty of merchantability and breach of implied warranty of fitness for a particular purpose claims against CNH to recover purely economic losses sustained in connection with the

replacement of an engine in a Case tractor in August 2007. American West asserts that two years after the engine was replaced, it “froze up,” rendering the tractor useless. American West’s agreement to replace the engine in this case, however, was with Pioneer Equipment Company, not CNH. No contractual privity exists (or existed) between American West and CNH and, as a result, under well settled Idaho law, American West’s implied warranty claims must be dismissed.

II. STANDARD OF REVIEW

Under Idaho Rule of Civil Procedure 56(c), summary judgment is proper “if the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled a judgment as a matter of law.” Idaho R. Civ. P. 56(c). In order to create a genuine issue of material fact, the party opposing the motion must present more than a conclusory assertion that an issue of fact exists. *Allstate Ins. Co. v. Mocaby*, 133 Idaho 593, 596, 990 P.2d 1204, 1207 (1999). Instead, the party opposing summary judgment must respond to the motion with specific facts showing there is a genuine issue for trial. *Id.*; *see also* Idaho R. Civ. P. 56(e) (“[A]n adverse party may not rest upon the mere allegations or denials of that party’s pleadings, but the party’s response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial.”).

A mere scintilla of evidence or only a slight doubt as to the facts is insufficient to withstand summary judgment. *Corbridge v. Clark Equip. Co.*, 112 Idaho 85, 87, 730 P.2d 1005, 1007 (1986). Moreover, the existence of disputed facts will not defeat summary judgment when the plaintiff fails to make a showing sufficient to establish the existence of an element essential to his case, and on which he will bear the burden of proof at trial. *E.g.*, *Garzee v. Barkley*, 121

Idaho 771, 774, 828 P.2d 334, 337 (Ct. App. 1992). If the nonmoving party fails to make such a showing on any essential element of its case, “there can be ‘no genuine issue as to any material fact,’ since a complete failure of proof concerning an essential element of the nonmoving party’s case necessarily renders all other facts immaterial.” *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986).

III. STATEMENT OF FACTS

1. On or about June 26, 1997, Cameron Sales, Inc. and American West entered into an agreement wherein American West purchased a used Case 3394 tractor (the “Tractor”). See Affidavit of William A. Fuhrman in Support of Motion for Summary Judgment, Ex. A.

2. More than ten years later, on August 7, 2007, American West entered into an agreement with Pioneer Equipment Company to replace the engine in the Tractor. See Pl.’s Compl., ¶ 7; Pl.’s Compl., Ex. A.

3. Approximately two years after the engine was replaced, the Tractor was then sold by American West to an individual named Frank Jensen. *Id.* at ¶ 8. The replacement engine allegedly “froze up” during use by Mr. Jensen. *Id.*

4. No express warranty was provided in connection with the replacement of the engine. *Id.* at ¶ 12.

5. There is no allegation of personal injury in connection with the replacement and alleged malfunction of the replacement engine.

6. No contractual relationship of any kind existed or exists between American West and CNH.

IV. ARGUMENT

A. American West's Claim for Breach of Implied Warranties of Merchantability and Fitness for a Particular Purpose Should Be Dismissed as a Matter of Law Because There is No Privity of Contract Between American West and CNH.

It is well settled under Idaho law that privity of contract is required in a contract action¹ to recover economic loss for breach of implied warranties. *Salmon River Sportsman Camps, Inc. v. Cessna Aircraft Co.*, 97 Idaho 348, 353, 544 P.2d 306, 311 (1975); *Nelson v. Anderson Lumber Co.*, 140 Idaho 702, 707, 99 P.3d 1092, 1097 (2004).² For example, in *Nelson*, the plaintiff homeowners asserted claims for breach of the implied warranties of merchantability and fitness for a particular purpose against various individuals and entities when it was discovered that the cabin they had built did not meet the county's snow load requirements. *Id.* at 705, 99 P.3d at 1095. The trial court determined that no contract existed between the plaintiffs and any of the defendants who answered the plaintiffs' complaint including, notably, the manufacturer of the wall panels used in constructing the plaintiff's cabin. *Id.* at 706, 99 P.3d at 1096. On appeal, the Idaho Supreme Court upheld the trial court's ruling, citing the lack of privity of contract as an necessary element to succeed on claims of breach of the implied warranties of merchantability and fitness for a particular purpose.

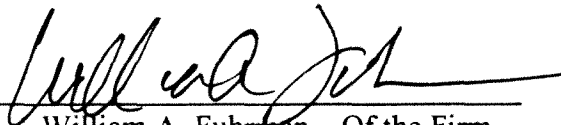
Like *Nelson*, there is no privity of contract between American West and CNH. Rather, American West entered into an agreement in 2007 with Pioneer Equipment Company to replace the engine of the tractor at issue. Pl.'s Compl., ¶ 7. The engine installed in the tractor allegedly "froze up" shortly after American West sold the tractor to an individual named Frank Jenson. *Id.* at ¶ 9. There is no evidence (or even an allegation in American West's Complaint) that CNH

¹ As noted in the Statement of Facts above, there is no allegation in American West's Complaint that anyone was injured as a result of the alleged engine failure. As a result, Idaho Code § 28-2-318, which addresses third party beneficiaries of implied warranties in personal injury actions, does not apply.

had any type of contractual arrangement with American West. As a result, American West's claims for breach of the implied warranties of merchantability and fitness for a particular purpose must be dismissed as matter of law.

DATED this 3 day of May, 2012.

Trout ♦ Jones ♦ Gledhill ♦ Fuhrman ♦ Gourley, P.A.


By: 
William A. Fuhrman – Of the Firm
Attorneys for Defendant CNH

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 3 day of May, 2012, a true and correct copy of the above and foregoing document was forwarded addressed as follows in the manner stated below:

Brent T. Robinson, Esq.
ROBINSON ANTHON & TRIBE
Attorneys at Law
P.O. Box 396
Rupert, ID 83350-0396

U.S. Mail
 Hand-Delivery
 Facsimile (208)436-6804


William A. Fuhrman

² The Idaho Uniform Commercial Code sections addressing merchantability and fitness for a particular purpose likewise expressly reference a contractual agreement and therefore only apply to transactions in which there is contractual privity. See Idaho Code §§28-2-314 and 28-2-315.

ORIGINAL



FILED
CASE

William A. Fuhrman/ISB 2932
Christopher P. Graham/ISB 6174
Trout ♦ Jones ♦ Gledhill ♦ Fuhrman ♦ Gourley, P.A.
225 North 9th Street, Suite 820
P.O. Box 1097
Boise, Idaho 83701
Telephone: 208-331-1170
Facsimile: 208-331-1529

2012 MAY -4 PM 1:20

DEPUTY
[Signature], DEPUTY

Attorneys for Defendant CNH AMERICA LLC,
improperly named as Case New Holland, Inc.

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

AMERICAN WEST ENTERPRISES, INC.,)
an Idaho Corporation,) Case No. CV-2011-238
)
Plaintiff,)
)
vs.) **AFFIDAVIT OF WILLIAM A.**
) **FUHRMAN IN SUPPORT OF MOTION**
) **FOR SUMMARY JUDGMENT**
)
CASE NEW HOLLAND, INC., a Delaware)
Corporation,)
)
Defendant.)
_____)

STATE OF IDAHO)
) ss.
County of Ada)

WILLIAM A. FUHRMAN, being first duly sworn upon oath, deposes and states the following:


1. I am at least eighteen (18) years of age and am competent to testify regarding the matters set forth herein.

SCANNED

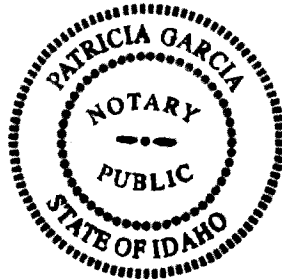
2. I am a member of the law firm of Trout ♦ Jones ♦ Gledhill ♦ Fuhrman ♦ Gourley, P.A., representing the Defendant in this matter, and I make the following statements based upon my own personal knowledge.


3. Attached hereto as **Exhibit 1** and fully incorporated herein by this reference, is a true and correct copy of a sales invoice produced in discovery in this matter referencing an agreement by American West Group, Inc. to purchase a used Case 3394 tractor from Cameron Sales, Inc. in Rupert, Idaho, on or about June 26, 1997.

FURTHER YOUR AFFIANT SAYETH NAUGHT.


William A. Fuhrman

SUBSCRIBED AND SWORN to before me this 3rd day of May, 2012.



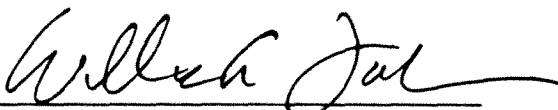

Notary Public for Idaho
Residing at Boise, Idaho
Commission expires: 10/7/14

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 3 day of May, 2012, a true and correct copy of the above and foregoing document was forwarded addressed as follows in the manner stated below:

Brent T. Robinson, Esq.
ROBINSON ANTHON & TRIBE
Attorneys at Law
P.O. Box 396
Rupert, ID 83350-0396

[] U.S. Mail
[] Hand-Delivery
[] Facsimile (208)436-6804


William A. Fuhrman

ORIGINAL

FILED
CASE NO.

2012 MAY -4 PM 1:40

William A. Fuhrman/ISB 2932
Christopher P. Graham/ISB 6174
Trout ♦ Jones ♦ Gledhill ♦ Fuhrman ♦ Gourley, P.A.
225 North 9th Street, Suite 820
P.O. Box 1097
Boise, Idaho 83701
Telephone: 208-331-1170
Facsimile: 208-331-1529

Sp, DEPUTY

Attorneys for Defendant CNH AMERICA LLC,
improperly named as Case New Holland, Inc.

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

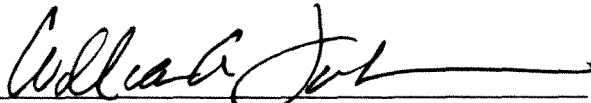
AMERICAN WEST ENTERPRISES, INC.,)	
an Idaho Corporation,	)	Case No. CV-2011-238
)	
Plaintiff,)	
	)	NOTICE OF HEARING ON MOTION
vs.	)	FOR SUMMARY JUDGMENT
)	
CASE NEW HOLLAND, INC., a Delaware)	
Corporation,)	
)	
Defendant.)	
_____)	

TO: ALL PARTIES IN INTEREST:

YOU AND EACH OF YOU ARE HEREBY NOTIFIED that Defendant will call on for hearing its Motion for Summary Judgment on the **4th day of June, 2012 at the hour of 11:30 a.m.**, or as soon thereafter as counsel can be heard before the Honorable Jonathan P. Brody, in the courtroom of the above-entitled court, located at 715 G Street, Rupert, Idaho.

DATED this 3 day of May, 2012,

TROUT ♦ JONES ♦ GLEDHILL ♦ FUHRMAN ♦ GOURLEY, P.A.

By: 
William A. Fuhrman – of the Firm
Attorneys for Defendant

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 3 day of May, 2012, a true and correct copy of the above and foregoing document was forwarded addressed as follows in the manner stated below:

Brent T. Robinson, Esq.
ROBINSON ANTHON & TRIBE
Attorneys at Law
P.O. Box 396
Rupert, ID 83350-0396

[U.S. Mail
[] Hand-Delivery
[] Facsimile (208)436-6804


William A. Fuhrman

FILED
CASE

2012 MAY 21 PM 1:01

DEPUTY

Brent T. Robinson, Esq.
ROBINSON, ANTHON & TRIBE
Attorneys at Law
615 H Street
P. O. Box 396
Rupert, Idaho 83350-0396
Telephone (208) 436-4717
Facsimile (208) 436-6804
ISB No. 1932
btr@jdlawfirm.com

Attorneys for plaintiff

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

AMERICAN WEST ENTERPRISES, INC.,)
an Idaho corporation,)
)
Plaintiff,)
)
vs.)
)
CASE NEW HOLLAND, INC.,)
a Delaware corporation,)
)
Defendant.)

Case No. CV-2011-238

**OBJECTION TO MOTION FOR
SUMMARY JUDGMENT**

COMES NOW the plaintiff, American West Enterprises, Inc., by and through its attorney of record, Brent T. Robinson of the firm Robinson, Anthon & Tribe, submits this objection to the Defendant's *Motion for Summary Judgment* as follows:

I. ARGUMENT

A. Privity is not required as the Plaintiff is a third party beneficiary

The Defendant's motion for summary judgment rests solely on the premise that there was no privity of contract between American West and CNH America. However, the

Defendant overlooks the fact that American West was a third party beneficiary to any contract entered into between Pioneer Equipment and CNH America.

I.C. § 29-102 provides: “A contract, made expressly for the benefit of a third person, may be enforced by him at any time before the parties thereto rescind it.” I.C. § 29-102. A “third-party beneficiary contract” is a contract entered into for the benefit of a third party who, although not a signatory to the contract, thereby possesses the right to enforce the contract. *Intermountain Health Care, Inc. v. Board of County Com’rs of Blaine County, Idaho*, 107 Idaho 248, 688 P.2d 260 (1984). Idaho recognizes the right of a “third-party” to maintain an action on a contract executed for the benefit of such third party. *Davis v. Nelson-Deppe, Inc.*, 91 Idaho 463, 424 P.2d 733 (1967).

While it is clear that Idaho recognizes the right for a third-party to enforce a contract, it must first be established that the contract at issue was a contract that was entered into for the benefit of the third party. The test for determining a party’s status as a third-party beneficiary capable of properly invoking the protection of statute authorizing enforcement by beneficiary, is whether the agreement reflects an intent to benefit the third party. *Idaho Power Co. v. Hulet*, 140 Idaho 110, 90 P.3d 335 (2004); *Seubert Excavators, Inc. v. Eucon Corp.*, 125 Idaho 744, 874 P.2d 555 (1993).

In the case at hand, a new engine was requested by American West. The engine was ordered [contracted for] by Pioneer Equipment from CNH America. It is clear that the engine in question was ordered specifically for the benefit and use of American West in their Case IH 3394 tractor. If American West did not request Pioneer Equipment to order a new engine for CNH America, Pioneer Equipment would not have ordered the engine. Therefore as American West was the intended beneficiary under the contract between CNH America and

Pioneer Equipment, American West “possesses the right to enforce the contract.” *Intermountain Health Care*, supra.

B. Privity is not required as this is a “goods” case

The Defendants rely heavily upon *Salmon Rivers Sportsman Camps, Inc. v. Cessna Air Co.*, in maintaining the proposition that privity of contract is required in an action to recover economic loss for breach of implied warranties. *Salmon Rivers Sportsman Camps, Inc. v. Cessna Air Co.*, 97 Idaho 348, 544 P.2d 306 (1975). In *Tusch Enterprises v. Coffin*, the Idaho Supreme Court, while recognizing the continuing validity of *Salmon Rivers*, wrote:

Therefore, we decline to extend the privity requirement enunciated in *Salmon Rivers* to the facts at hand. **The instant case is not a goods case**, and the question regarding the continued vitality of *Salmon Rivers* in such cases is better left to another day when a response on our part would be something more than mere dictum.

Emphasis added. *Tusch Enterprises v. Coffin*, 113 Idaho 50, 740 P.2d 1035. In *Ramerth v. Hart*, the Idaho Supreme Court again declined to relax the privity requirement but determined the reason for doing so was based upon the facts of that case. *Ramerth V. Hart*, 133 Idaho 194, 983 P.2d 848 (1999). *Ramerth* like *Tusch* was not a goods case, rather *Ramerth* dealt with services. *Id.* The *Ramerth* court did, however, write: “we agree that there may be cases where the plaintiff may be unfairly prejudiced by the operation of the economic loss rule in combination with the privity requirement articulated in *Salmon Rivers*. Given such a case, further relaxation of *Salmon Rivers* may be justified.” *Id.* at 198, 852.

The case at hand is the case that the Supreme Court wrote about where the “plaintiff may be unfairly prejudiced by the operation of the economic loss rule in combination with the privity requirement articulated in *Salmon Rivers*. *Id.* This is clearly a goods case, where the Plaintiff purchased a good from CNH America through its authorized dealer. Enforcement of the *Salmon Rivers* privity requirement will result in no possible remedy for the Plaintiff. It

further means that any provider of goods through an authorized dealer, that does not warrant their goods, can never be held liable for a breach of implied warranties. Such a result would impede both commerce and justice.

C. Privity is not required as Pioneer Equipment was an agent of CNH America

Pioneer Equipment is an authorized dealer and repair shop for CNH America. As such, Pioneer Equipment has express authority to act on behalf of CNH America in selling and repairing equipment. Pioneer Equipment further has the implied authority to accomplish or perform the delegated express authority. *Bailey v. Ness*, 109 Idaho 495, 708 P.2d 900 (1985).

In the case at hand, Pioneer Equipment was merely acting as an agent of CNH America in selling the engine to American West Enterprises. It is not Pioneer Equipment that supplied the faulty engine to American West Enterprises, rather it was CNH America acting through its agent Pioneer Equipment. As such, the Plaintiff is entitled to pursue the Defendant to enforce the contract for an engine in good and workmanlike condition.

II. CONCLUSION

For the reasons herein stated, CNH America's Motion for Summary Judgment should be denied.

DATED this 21 day of May, 2012.

ROBINSON, ANTHON & TRIBE

By: 


Brent T. Robinson
Attorneys for Plaintiff

CERTIFICATE OF SERVICE

I hereby certify that on the 21 day of May, 2012, I caused to be served a true and correct copy of the foregoing, by the method indicated below, and addressed to the following:

William A. Fuhrman, Esq.
TROUT♦JONES♦GLEDHILL♦
FUHRMAN♦GOURLEY, P.A.
P. O. Box 1097
Boise, Idaho 83701

- U.S. Mail, Postage Prepaid
- Facsimile (208) 331-1529
- E-mail
- Special Handling


Brent T. Robinson

FILED
CASE

2012 MAY 21 PM 4:01

DEPUTY
[Signature]

Brent T. Robinson, Esq.
ROBINSON, ANTHON & TRIBE
Attorneys at Law
615 H Street
P. O. Box 396
Rupert, Idaho 83350-0396
Telephone (208) 436-4717
Facsimile (208) 436-6804
ISB No. 1932
btr@idlawfirm.com

Attorneys for plaintiff

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

AMERICAN WEST ENTERPRISES, INC.,)
an Idaho corporation,)
)
Plaintiff,)
)
vs.)
)
CASE NEW HOLLAND, INC.,)
a Delaware corporation,)
)
Defendant.)

Case No. CV-2011-238

MOTION TO AMEND CAPTION

COMES NOW the plaintiff, by and through his attorney of record, Brent T. Robinson of the firm Robinson, Anthon & Tribe, and hereby moves the Court pursuant to Idaho Rule of Civil Procedure 10(a)(1), for leave to amend the caption in the above-entitled matter as the defendant is incorrectly identified. The proper identification of the defendant is CNH America LLC. The proper caption is as follows:

SCANNED

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

AMERICAN WEST ENTERPRISES, INC.,) an Idaho corporation,) Plaintiff,) vs.) CNH AMERICA LLC,) a Delaware Limited Liability Company,) Defendant.)	Case No. CV-2011-238
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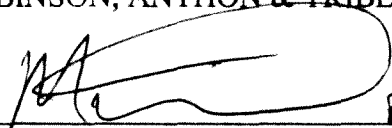
This motion is based on all records, pleadings and files in this case and Rule 10(a)(1) of the Idaho Rules of Civil Procedure.

ORAL ARGUMENT IS REQUESTED.

DATED this 21st day of May, 2012.

ROBINSON, ANTHON & TRIBE

By: _____


Brent T. Robinson
Attorneys for Plaintiff

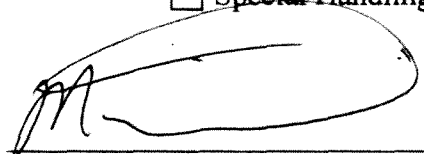
Far

CERTIFICATE OF SERVICE

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William A. Fuhrman, Esq.
TROUT♦JONES♦GLEDHILL♦
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P. O. Box 1097
Boise, Idaho 83701

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- E-mail
- Special Handling



Brent T. Robinson

FILED
CASE

2013 MAY 21 PM 4:01

A, DEPUTY

Brent T. Robinson, Esq.
ROBINSON, ANTHON & TRIBE
Attorneys at Law
615 H Street
P. O. Box 396
Rupert, Idaho 83350-0396
Telephone (208) 436-4717
Facsimile (208) 436-6804
ISB No. 1932
btr@idlawfirm.com

Attorneys for plaintiff

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

AMERICAN WEST ENTERPRISES, INC.,)
an Idaho corporation,)
)
Plaintiff,)
)
vs.)
)
CASE NEW HOLLAND, INC.,)
a Delaware corporation,)
)
Defendant.)

Case No. CV-2011-238

**MOTION FOR LEAVE TO
AMEND COMPLAINT**

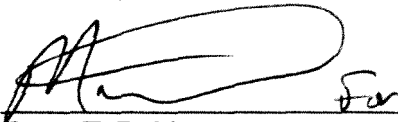
COMES NOW the plaintiff, by and through his attorney of record, Brent T. Robinson of the firm Robinson, Anthon & Tribe, and hereby moves the Court pursuant to Idaho Rule of Civil Procedure 15, for leave to amend the Complaint in the above-entitled matter. Attached hereto as Exhibit "A" is a copy of the proposed Amended Complaint.

This motion is based on all records, pleadings and files in this case and Rule 15(a) of the Idaho Rules of Civil Procedure.

ORAL ARGUMENT IS REQUESTED.

DATED this 21st day of May, 2012.

ROBINSON, ANTHON & TRIBE

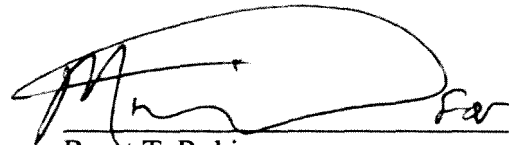
By: 
Brent T. Robinson
Attorneys for Plaintiff

CERTIFICATE OF SERVICE

I hereby certify that on the 21st day of May, 2012, I caused to be served a true and correct copy of the foregoing by the method indicated below, and addressed to the following:

William A. Fuhrman, Esq.
TROUT♦JONES♦GLEDHILL♦
FUHRMAN♦GOURLEY, P.A.
P. O. Box 1097
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Brent T. Robinson

Brent T. Robinson, Esq.
ROBINSON ANTHON & TRIBE
Attorneys at Law
P. O. Box 396
Rupert, Idaho 83350-0396
Telephone (208) 436-4717
Facsimile (208) 436-6804
btr@idlawfirm.com
ISB No. 1032

Attorneys for Plaintiff

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

AMERICAN WEST ENTERPRISES, INC., an Idaho Corporation;)	
	)	Case No. CV-2011-238
Plaintiff,)	
)	
vs.	)	AMENDED COMPLAINT
)	
CASE NEW HOLLAND, INC., a Delaware Corporation,)	
)	
Defendant.)	
<hr/>		

COMES NOW the plaintiff, American West Enterprises, Inc., an Idaho corporation (hereinafter "American West"), by and through its attorney of record, Brent T. Robinson of the firm Robinson Anthon & Tribe, and for a claim of relief against defendant, alleges as follows:

PARTIES

1. This action is brought by the plaintiff against the defendant corporation and against the officers of the defendant corporation.

2. Plaintiff, American West, is an Idaho corporation authorized to do business within the State of Idaho.

3. Defendant, Case Hew Holland, Inc. (hereinafter "Case"), is a Delaware corporation, with its principal place of business at 100 South Saunders Road, Lake Forest Illinois 60045, and does substantial business in Minidoka County, State of Idaho.

SUMMARY OF CLAIMS

4. The plaintiff seeks redress for the following harm and/or violations of State law perpetrated by the defendant: breach of the implied warranties of merchantability and fitness for a particular purpose, as well as for reimbursement for the costs of parts and labor.

FACTUAL ALLEGATIONS

5. American West is the owner of a Case IH tractor, 3394, Serial No. 9945876.

6. That American West, wanted to sell said tractor because American West wanted to get out of the farming business; however, the tractor needed its engine replaced prior to any sale of the same.

7. American West hired the defendant's authorized dealer and repair center, Pioneer Equipment Company of Rupert, Idaho, to replace the engine.

8. Pioneer Equipment Company performed such labor on or about August 10, 2007, and subsequently charged plaintiff the sum of \$11,955.04 for parts and labor performed. Attached as Exhibit "A" is a copy of the invoice for the parts and labor.

9. That American West then sold the tractor to Frank Jensen. After using the tractor for approximately five hours, the engine froze up on Mr. Jensen.

10. That the tractor was then returned by Frank Jensen to American West who then delivered the tractor to the defendant's authorized dealer and service center, Pioneer

Equipment Company, who found that one of the springs in the new motor was defective and as a result of such, it caused the entire motor to freeze up and caused complete damage to the motor. The tractor was then returned to American West.

11. That an employee of Pioneer Equipment Company, Allan Lloyd, informed American West and Frank Jensen that the warranty provided by Case IH is based upon time, not upon use.

12. That no limited warranty was ever provided by defendant to American West pertaining to this motor and based upon there being no express limited warranty that disclaims any rights that plaintiff has with respect to implied warranty of fitness and merchantability, American West is entitled to rely upon the implied warranty and merchantability and the fitness that existed with respect to the tractor's engine.

CLAIMS FOR RELIEF

COUNT ONE

BREACH OF THE IMPLIED WARRANTY OF MERCHANTABILITY

13. The plaintiff hereby incorporates all of the foregoing paragraphs as if fully set forth herein, namely, the amount of the total cost of repairing said engine.

14. Under Idaho Code § 28-2-314, implied in every contract is a warranty that the goods shall be merchantable in the condition sold.

15. The defendant, by taking the actions described above, provided goods to the plaintiff which were not merchantable, in violation of I.C. § 28-2-314, thereby breaching the implied warranty of merchantability.

16. As a direct and proximate result of the defendant's breach of the implied warranty of merchantability, the plaintiff has been injured in an amount exceeding the

jurisdictional limit of this court.

COUNT TWO

**BREACH OF THE IMPLIED WARRANTY OF FITNESS
FOR A PARTICULAR PURPOSE**

17. The plaintiff hereby incorporates all of the foregoing paragraphs as if fully set forth herein.

18. Under Idaho Code § 28-2-315, implied in every contract is a warranty that the goods shall be fit for the particular purpose for which the goods are required.

19. That the defendant knew the purchase made by the plaintiff, namely, an engine for a tractor, was done for the express purposes of using the motor in a tractor which would be used for farming.

20. By taking the actions described above, the defendant provided goods to the plaintiff which were not fit for the particular purpose described above, in violation of I.C. § 28-2-315, thereby breaching the implied warranty of fitness for a particular purpose.

21. As a direct and proximate result of the defendant's breach of the implied warranty of fitness for a particular purpose, the plaintiff has been injured in an amount exceeding the jurisdictional limit of this court.

22. That based upon such implied warranty of merchantability, defendant should pay for the cost of this engine, as well as the labor expended to repair the same.

COUNT THREE

THIRD PARTY BENEFICIARY

23. The plaintiff hereby incorporates all of the foregoing paragraphs as if fully set forth herein.

24. Under Idaho Code § 29-102, a third-party beneficiary may enforce a contract

that was entered into for the benefit of the third party.

25. That the plaintiff contracted with Pioneer Equipment who contracted with CNH America for the acquisition of a new engine for the express purpose of installing it in the Plaintiffs tractor.

26. That the defendant knew the purchase made by the plaintiff, namely, an engine for a tractor, was made for the direct benefit of the plaintiff.

27. That the plaintiff, as the direct beneficiary of the contract between Pioneer Equipment and CNH America, is entitled to enforce the contract for an engine in good and workmanlike condition.

COUNT FOUR

AGENCY

28. The plaintiff hereby incorporates all of the foregoing paragraphs as if fully set forth herein.

29. That Pioneer Equipment is an authorized dealer and repair shop for the defendant.

30. That Pioneer Equipment acted as the defendant's agent in selling and installing the new engine in the plaintiff's tractor.

31. That the plaintiff is entitled to pursue the plaintiff, who was the principal in the agreement to furnish an engine in good and workmanlike condition.

ATTORNEY FEES

23. As a consequence of the defendant's conduct, as alleged above, the plaintiff has been required to obtain the services of an attorney to represent it in this matter. As a result, the plaintiff is entitled to a recovery of attorney's fees pursuant to law, including, but not

limited to, Idaho Code §12-120, §12-121, Rule 54 of the Federal Rules of Civil Procedure, and such other laws as may apply. That the sum of \$5,000 is a reasonable fee, plus costs, to be paid to plaintiff for its attorney's fees if this matter is uncontested. If the matter is contested, such fees and costs shall be determined by the Court.

WHEREFORE, plaintiff prays judgment against defendant as follows:

1. That the sum of \$11,955.04 for labor and costs be paid by defendant herein.
2. That defendant pay reasonable attorney's fees in the sum of \$5,000 if this matter is uncontested, plus costs; or, if the matter is contested, a sum to be determined by the Court.
3. Reasonable costs of litigation incurred by the plaintiffs in pursuing this action.
4. For such other relief as the Court may deem proper.

DATED this 21 day of May, 2012.

ROBINSON ANTHON & TRIBE

By: 

Brent T. Robinson
Attorneys for Plaintiff

CERTIFICATE OF SERVICE

I hereby certify that on the ____ day of _____, 2012, I caused to be served true and correct copy of the foregoing, by the method indicated below, and addressed to the following:

William A. Fuhrman, Esq.
TROUT♦JONES♦GLEDHILL♦
FUHRMAN♦GOURLEY, P.A.
P. O. Box 1097
Boise, Idaho 83701

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- E-mail
- Special Handling

Brent T. Robinson

2012 MAY 21 PM 4:02

DEPUTY
[Signature]

Brent T. Robinson, Esq.
ROBINSON, ANTHON & TRIBE
Attorneys at Law
615 H Street
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btr@idlawfirm.com

Attorneys for plaintiff

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

AMERICAN WEST ENTERPRISES, INC.,)
an Idaho corporation,)
)
Plaintiff,)
)
vs.)
)
CASE NEW HOLLAND, INC.,)
a Delaware corporation,)
)
Defendant.)

Case No. CV-2011-238

**AFFIDAVIT OF FRANK JENSEN IN
OPPOSITION TO SUMMARY
JUDGMENT**

State of Idaho)
) ss.
County of Minidoka)

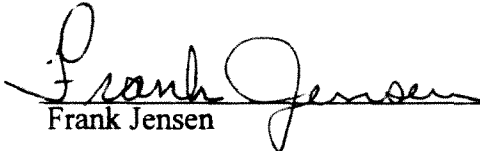
Frank Jensen being first duly sworn on oath deposes and says:

1. That he is over the age of twenty-one (21) years and competent to testify as to the matters contained in this Affidavit and the facts stated are of his own knowledge.
2. That in approximately the spring of 2009 I purchased the Case IH 3394 from American West Enterprises that is the subject of this dispute.
3. That immediately upon purchasing the tractor I changed all of the fluids and filters in the Case IH 3394 because it hadn't been used much in the preceding two years.

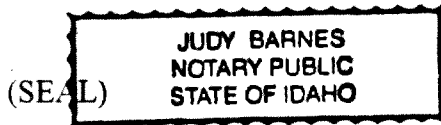
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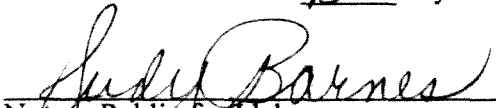
4. That I used the Case IH 3394 for approximately four hours when it began to make a bad engine noise and then stopped running.
5. The Case IH 3394 was taken to Pioneer Equipment where the motor was torn down to diagnose the problem.
6. That I was called to come into Pioneer Equipment to look at the problem.
7. That I saw that there was a broken valve spring that had caused the engine to fail.
8. That I saw that some of the valve springs in the motor appeared to be new and still had their paint, while others appeared to be used and did not have their paint.
9. That I was told that the engine would not be warranted.

FURTHER THIS AFFIANT SAITH NAUGHT.


Frank Jensen

SUBSCRIBED AND SWORN to before me this 18th day of May, 2012.



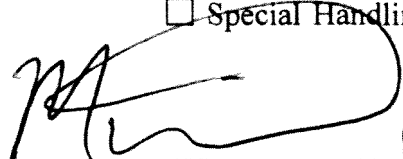

Notary Public for Idaho
Residing at: Rupert, Idaho
My Commission expires: 2/12/2017

CERTIFICATE OF SERVICE

I hereby certify that on the 21st day of May, 2012, I caused to be served a true and correct copy of the foregoing, by the method indicated below, and addressed to the following:

William A. Fuhrman, Esq.
TROUT♦JONES♦GLEDHILL♦
FUHRMAN♦GOURLEY, P.A.
P. O. Box 1097
Boise, Idaho 83701

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Brent T. Robinson For

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CASE #

2012 MAY 21 PM 4:02

DEPUTY
[Signature]

Brent T. Robinson, Esq.
ROBINSON, ANTHON & TRIBE
Attorneys at Law
615 H Street
P. O. Box 396
Rupert, Idaho 83350-0396
Telephone (208) 436-4717
Facsimile (208) 436-6804
ISB No. 1932
btr@idlawfirm.com

Attorneys for plaintiff

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

AMERICAN WEST ENTERPRISES, INC.,)
an Idaho corporation,)
)
Plaintiff,)
)
vs.)
)
CASE NEW HOLLAND, INC.,)
a Delaware corporation,)
)
Defendant.)

Case No. CV-2011-238

**AFFIDAVIT OF HAL ANDERSON IN
OPPOSITION TO SUMMARY
JUDGMENT**

State of Idaho)
) ss.
County of Minidoka)

Hal Anderson being first duly sworn on oath deposes and says:

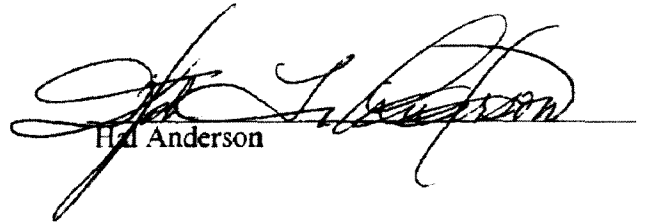
1. That he is over the age of twenty-one (21) years and competent to testify as to the matters contained in this Affidavit and the facts stated are of his own knowledge.
2. That I the President of American West Enterprises, Inc., which is an Idaho corporation.
3. That on June 26, 1997, American West Enterprises purchased a Case IH 3394 from Cameron Sales, Inc., which was the predecessor to Pioneer Equipment Co.

SCANNED

4. That in 2002, I was diagnosed with cancer and decided to get out of the farming business.
5. That beginning in 2002 I leased my farm out with an option to purchase.
6. That the option to purchase was exercised in approximately 2007.
7. That on approximately August 10, 2007, American West Enterprises, Inc., engaged Pioneer Equipment to install a new motor in America West's Case IH 3394 tractor.
8. That in order to accomplish this, I requested Pioneer Equipment to order a new engine from CNH America LLC to install in America West's Case IH 3394.
9. That the new engine was installed by Pioneer Equipment in the Case IH 3394 and American West Enterprises, Inc., paid \$11,955.04 for the service.
10. That I kept the Case IH 3394 for approximately two years and only used it occasionally for loader purposes.
11. That I put less than approximately fifteen (15) hours on the tractor in two (2) years.
12. That in approximately the spring of 2009, the Case IH 3394 was sold to Frank Jensen.
13. That Mr. Jensen used the Case IH 3394 for approximately five (5) hours before the engine blew up.
14. That Mr. Jensen returned the Case IH 3394 to me and I refunded him the purchase price of the tractor.
15. That I caused the Case IH 3394 to be returned to Pioneer Equipment to diagnose the engine problems.
16. That the Case IH 3394 still had the same new engine, which had previously been installed by Pioneer Equipment.
17. That the new engine had less than approximately fifteen (15) hours put on it since it was installed.
18. That Pioneer Equipment tore the engine down to diagnose the problem.

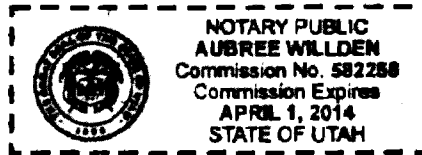
- 19. That I viewed photographs taken by Chuck Simmons of the defective engine, which showed a broken valve spring.
- 20. That I was told by Pioneer Equipment that the engine would not be warranted.

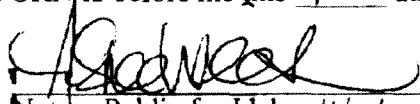
FURTHER THIS AFFIANT SAITH NAUGHT.


 Hal Anderson

SUBSCRIBED AND SWORN to before me this 18th day of May, 2012.

(SEAL)





 Notary Public for ~~Idaho~~ Utah
 Residing at: Kangville, Utah
 My Commission expires: 4-01-14

CERTIFICATE OF SERVICE

I hereby certify that on the 21st day of May, 2012, I caused to be served a true and correct copy of the foregoing, by the method indicated below, and addressed to the following:

William A. Fuhrman, Esq.
TROUT♦JONES♦GLEDHILL♦
FUHRMAN♦GOURLEY, P.A.
P. O. Box 1097
Boise, Idaho 83701

- U.S. Mail, Postage Prepaid
- Facsimile (208) 331-1529
- E-mail
- Special Handling


Brent T. Robinson

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CASE #

2012 MAY 21 PM 4:02

DEPUTY
Sk

Brent T. Robinson, Esq.
ROBINSON, ANTHON & TRIBE
Attorneys at Law
615 H Street
P. O. Box 396
Rupert, Idaho 83350-0396
Telephone (208) 436-4717
Facsimile (208) 436-6804
ISB No. 1932
btr@jdlawfirm.com

Attorneys for plaintiff

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

AMERICAN WEST ENTERPRISES, INC.,)
an Idaho corporation,)
)
Plaintiff,)
)
vs.)
)
CASE NEW HOLLAND, INC.,)
a Delaware corporation,)
)
Defendant.)

Case No. CV-2011-238

**AFFIDAVIT OF
CHUCK SIMMONS**

State of Idaho)
) ss.
County of Minidoka)

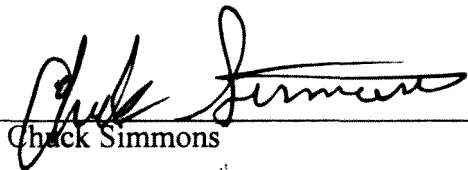
Chuck Simmons being first duly sworn on oath deposes and says:

1. That he is over the age of twenty-one (21) years and competent to testify as to the matters contained in this Affidavit and the facts stated are of his own knowledge.
2. That I am the Service Manager with Pioneer Equipment Co., which is an authorized dealer of Case IH equipment and CNH America LLC.
3. That in the spring of 2007, American West Enterprises, Inc., engaged Pioneer Equipment to install a new motor in America West's Case IH 3394 tractor.

4. That in order to accomplish this, Pioneer Equipment ordered a new engine, part number AR77833, and new core, part number AC77833 from CNH America LLC to install in America West's Case IH 3394.
5. That the engine and core were ordered specifically for the benefit of American West Enterprises, Inc., and for use in their Case IH 3394.
6. That due to cost, it is not customary to order new engines and cores unless they are ordered for specific customers for use in specific equipment.
7. That the new engine was installed by Pioneer Equipment and American West Enterprises, Inc., was billed and paid \$11,955.04 for the service.
8. That the Case IH 3394 was returned to Pioneer Equipment some time later with engine problems.
9. That the Case IH 3394 still had the same new engine, which had previously been installed by Pioneer Equipment.
10. That the new engine had only approximately seven (7) hours put on it since it was installed.
11. That Pioneer Equipment tore the engine down to diagnose the problem.
12. That it was discovered that the new engine ordered from CNH America LLC, had a faulty engine valve spring that broke and caused the valve to drop down and contact the piston, which caused metal to be sent to the other pistons and valves causing extensive damage to the engine.
13. That it appeared that some of the springs in the engine were new springs and still had their paint while others appeared used and did not have any paint.
14. That the reason for the engine failure was the faulty engine valve spring.

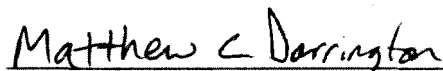
15. That I contacted CNH America field representative Jeff Jensen and requested that the engine be warranted due to the faulty engine valve spring and was told that the engine would not be warranted.
16. Attached as Exhibit A is a copy of an e-mail which Jeff Jensen sent to me indicating that the engine would not be warranted.

FURTHER THIS AFFIANT SAITH NAUGHT.

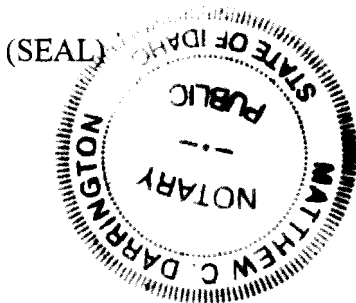


Chuck Simmons

SUBSCRIBED AND SWORN to before me this 21 day of May, 2012.



Notary Public for Idaho
Residing at: Burley, ID
My Commission expires: 12-4-2015




CERTIFICATE OF SERVICE

I hereby certify that on the 21st day of May, 2012, I caused to be served a true and correct copy of the foregoing, by the method indicated below, and addressed to the following:

William A. Fuhrman, Esq.
TROUT♦JONES♦GLEDHILL♦
FUHRMAN♦GOURLEY, P.A.
P. O. Box 1097
Boise, Idaho 83701

- U.S. Mail, Postage Prepaid
- Facsimile (208) 331-1529
- E-mail
- Special Handling


Brent T. Robinson *For*

Chuck Simmons

From: JENSEN Jeff (CNH) [jeff.jensen@cnh.com]
Sent: Wednesday, April 14, 2010 7:00 AM
To: Chuck Simmons
Subject: RE: Emailing: 3394 ENGINE 001, 3394 ENGINE 002, 3394 ENGINE 003, 3394 ENGINE 004, 3394 ENGINE 005, 3394 ENGINE 006, 3394 ENGINE 007, 3394 ENGINE 008, 3394 ENGINE 009

Chuck,

I have talked to Allan Lloyd and SRC warranty and they both have told me the same answer, NO. There is a time limit not hour limit.

Jeff Jensen
Manager Field Service Operations #522
Idaho, Utah & Eastern Washington
CASE IH
Cell: 208-681-0324
Fax: 208-523-5632
jeff.jensen@cnh.com

-----Original Message-----

From: Chuck Simmons [mailto:csimmons@pioneerequipment.com]
Sent: Tuesday, April 06, 2010 4:02 PM
To: JENSEN Jeff (CNH)
Subject: Emailing: 3394 ENGINE 001, 3394 ENGINE 002, 3394 ENGINE 003, 3394 ENGINE 004, 3394 ENGINE 005, 3394 ENGINE 006, 3394 ENGINE 007, 3394 ENGINE 008, 3394 ENGINE 009

Sending pic of engine valve spring broke causing valve to drop down & contact piston sending metal to other pistons & valves
The message is ready to be sent with the following file or link attachments:

3394 ENGINE 001
3394 ENGINE 002
3394 ENGINE 003
3394 ENGINE 004
3394 ENGINE 005
3394 ENGINE 006
3394 ENGINE 007
3394 ENGINE 008
3394 ENGINE 009

Note: To protect against computer viruses, e-mail programs may prevent sending or receiving certain types of file attachments. Check your e-mail security settings to determine how attachments are handled.

FILED-L
CASE #

2012 MAY 21 PM 4:02

CLERK OF DISTRICT COURT
df, DEPUTY

Brent T. Robinson, ISB No. 1932
Matthew C Darrington, ISB No. 7939
ROBINSON, ANTHON & TRIBE
Attorneys at Law
P. O. Box 396
Rupert, Idaho 83350
Telephone (208) 436-4717
Facsimile (208) 436-6804

Attorneys for Plaintiff

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

AMERICAN WEST ENTERPRISES, INC.,)
an Idaho corporation)
)
Plaintiff,)
)
vs.)
)
CASE NEW HOLLAND, INC.,)
a Delaware corporation)
)
Defendant.)

Case No. CV-2011-238
NOTICE OF HEARING

PLEASE TAKE NOTICE that the undersigned will bring its Motion to for Leave to Amend Complaint and Motion to Amend caption on for hearing before the above-entitled Court on Monday, the 4th day of June, 2012, at 11:30 o'clock a.m., or as soon thereafter as counsel can be heard.

DATED this 21st of May, 2012.

ROBINSON, ANTHON & TRIBE


By: *[Signature]* For
Brent T. Robinson
Attorneys for Plaintiff

CERTIFICATE OF SERVICE

I hereby certify that on the 21st day of May, 2012, I caused to be served a true and correct copy of the foregoing, by the method indicated below, and addressed to the following:

William A. Fuhrman, Esq.
TROUT♦JONES♦GLEDHILL♦
FUHRMAN♦GOURLEY, P.A.
P. O. Box 1097
Boise, Idaho 83701

- U.S. Mail, Postage Prepaid
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- E-mail
- Special Handling



Brent T. Robinson

William A. Fuhrman/ISB 2932
 Christopher P. Graham/ISB 6174
Trout ♦ Jones ♦ Gledhill ♦ Fuhrman ♦ Gourley, P.A.
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 P.O. Box 1097
 Boise, Idaho 83701
 Telephone: 208-331-1170
 Facsimile: 208-331-1529

2012 MAY 29 PM 3:35

PATTY TELLEPSA

[Signature], DEPUTY

Attorneys for Defendant CNH AMERICA LLC,
 improperly named as Case New Holland, Inc.

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

AMERICAN WEST ENTERPRISES, INC.,)	
an Idaho Corporation,	)	Case No. CV-2011-238
)	
Plaintiff,)	
	)	REPLY MEMORANDUM IN SUPPORT
vs.	)	OF MOTION FOR SUMMARY
	)	JUDGMENT AND IN OPPOSITION TO
CASE NEW HOLLAND, INC., a Delaware	)	MOTION TO AMEND COMPLAINT
Corporation,)	
)	
Defendant.)	
)	

COMES NOW the Defendant, CNH AMERICA LLC, improperly named as Case New Holland, Inc. (hereinafter "CNH"), by and through its attorneys of record, Trout ♦ Jones ♦ Gledhill ♦ Fuhrman ♦ Gourley, P.A., and, pursuant to Idaho Rules of Civil Procedure 56 and Rule 7(b)(3), submits the following reply memorandum in support of its motion for summary judgment and in opposition to Plaintiff's motion to amend complaint.

ARGUMENT

As noted in CNH's opening memorandum, it is well settled under Idaho law that privity of contract is required in a contract action to recover economic loss for breach of implied

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warranties. *Salmon River Sportsman Camps, Inc. v. Cessna Aircraft Co.*, 97 Idaho 348, 353, 544 P.2d 306, 311 (1975); *Nelson v. Anderson Lumber Co.*, 140 Idaho 702, 707, 99 P.3d 1092, 1097 (2004). American West concedes that no contract existed between it and CNH but attempts to sidestep the privity requirement in this matter in three ways. First, American West argues that it was a third party beneficiary of CNH's "agreement" to provide an engine to Pioneer Equipment Company for the Tractor owned by American West. Second, American West asserts that privity is not required to maintain its implied warranty claims because the sale in this case involved "goods" as opposed to "services." Third, American West argues that because it was an "authorized dealer" of CNH products, it was CNH's agent with respect to the sale of the engine. As discussed in more detail below, however, each of American West's arguments is lacking in both proof and legal merit. Consequently, the Court should grant CNH's summary judgment motion and dismiss American West's claims as a matter of law.

A. American West Was Not a Third Party Beneficiary to any "Agreement" Between CNH and Pioneer Equipment Company.

Idaho Code Section 29-102 provides that a contract made expressly for the benefit of a third person may be enforced by the third person at any time before the parties thereto rescind it. *Nelson*, 140 Idaho at 708, 99 P.3d at 1098 (citing *Cannon Builders, Inc. v. Rice*, 126 Idaho 616, 622, 888 P.2d 790, 796 (Ct. App.1995)). The test for determining a party's status as a third-party beneficiary is whether the agreement reflects an intent to benefit the third party. *Idaho Power Co. v. Hulet*, 140 Idaho 110, 112, 90 P.3d 335, 337 (2004). Thus, in order for a third party beneficiary to recover on a breach of contract claim, the third party must show that the contract was made for its direct benefit and that it is more than a mere incidental beneficiary. *Id.* (citing *Dawson v. Eldredge*, 84 Idaho 331, 337, 372 P.2d 414, 418 (1962)). Notably, the contract itself must express an intent to benefit the third party. *Id.* (citing *Stewart v. Arrington Constr. Co.*,

In the present case, there is no evidence in the record of a written agreement between CNH and Pioneer Equipment Company. Thus, there can be no written expression of an intent to benefit American West. Moreover, American West has failed to set forth the terms of an oral "agreement" between CNH and Pioneer Equipment Company showing an intent that the agreement benefit American West. What is clear from the record is that CNH had no knowledge, implied or otherwise, of the Tractor at issue or that the Tractor belonged to anyone in particular. American West was, at best, an incidental beneficiary of Pioneer Equipment Company's purchase of the engine from CNH, whether that purchase is termed an "agreement" or not. As a result, American West cannot be an intended beneficiary of CNH's "agreement" to provide the engine for the Tractor.

In addition, to the extent American West argues that the circumstances surrounding the formation of an "agreement" between CNH and Pioneer Equipment Company to provide the engine must be considered to show whether American West could be a member of a limited class of people for whose benefit the "agreement" was made, see *Just's Inc. v. Arrington Constr. Co.*, 99 Idaho 462, 583 P.2d 997 (1978), the Idaho Supreme Court has already held in *Stewart v. Arrington Constr. Co.*, that circumstances surrounding an agreement's formation are only considered when the contract is ambiguous as to the intent to benefit a third party. 92 Idaho 526, 532, 446 P.2d 895, 901 (1968). Where, as here, there is no written contract and no evidence in the record of any terms of an oral "agreement," there can be no such ambiguity.

B. Privity is Required in "Goods" Cases.

American West next argues that the Court should decline to follow well settled Idaho law requiring privity in a contract action to recover economic loss for breach of implied warranties on the basis that this is a "goods," as opposed to a "services," case. American West ignores,

however, that in *Nelson v. Anderson Lumber Co*, a case cited by CNH in its initial summary judgment memorandum, the Idaho Court of Appeals upheld the privity requirement in a “goods” case involving building materials for a cabin. 140 Idaho 702, 99 P.3d 1092 (2004). Notably, the plaintiffs in *Nelson*, like American West, argued that their case was “the case” the Idaho Supreme Court spoke of in *Ramerth v. Hart* when it mentioned that ““there may be cases where the plaintiff may be unfairly prejudiced by the operation of the economic loss rule in combination with the privity requirement.”” *Id.* (quoting *Ramerth v. Hart*, 133 Idaho 194, 198, 983 P.2d 848, 852 (1999)).

The *Nelson* court disagreed, noting that although the plaintiffs were precluded from recovery on their implied warranty claims based upon the privity requirement, the plaintiffs still had a viable cause of action against the party with which they contracted with to design and obtain the materials to build their cabin. 140 Idaho at 711, 99 P.3d at 1101. Similarly, in this case, based upon the alleged failure of the Tractor’s engine, American West had a viable cause of action for breach of contract against the party it directly dealt with, i.e., Pioneer Equipment Company. CNH should not be substituted in Pioneer Equipment Company’s place because American West failed to take advantage of an available legal remedy against the party with whom it dealt. *Cf.*, *Nelson*, 140 Idaho at 711, 99 P.3d at 1101 (“The fact that the [plaintiffs] may not be fully compensated for their losses does not mean that the [plaintiffs] have been unfairly prejudiced nor does it persuade us to allow recovery against another party”) (emphasis added).

C. Pioneer Equipment Company Was Not CNH’s Agent.

Last, while conceding that no contract existed between American West and CNH, American West argues that its implied warranty claims should still succeed based upon the

theory that Pioneer Equipment Company was CNH's agent with respect to the sale of the engine. There are three separate types of agency, any of which are sufficient to bind the principal to a contract entered into by an agent with a third party. *Bailey v. Ness*, 109 Idaho 495, 497, 708 P.2d 900, 902 (1985). The three types of agencies are: express authority, implied authority, and apparent authority. *Id.* Both express and implied authority are forms of actual authority. *Id.* Express authority refers to that authority which the principal has explicitly granted the agent to act in the principal's name. *Id.* Implied authority refers to that authority "which is necessary, usual, and proper to accomplish or perform" the express authority delegated to the agent by the principal. *Id.* Here, there is no evidence in the record of any express authority and, therefore, no actual authority was expressly granted or impliedly conferred upon Pioneer Equipment Company by CNH.

Apparent authority differs from express and implied authority in that it is not based on the words and conduct of the principal toward the agent, but on the principal's words and conduct toward a third party. *Tri-Circle, Inc. v. Brugger Corp.*, 121 Idaho 950, 954-55, 829 P.2d 540, 544-45 (Ct. App. 1992). As a result, apparent authority cannot arise from the acts and statements of the agent alone; it must be based upon the principal's words and conduct. *See Idaho Title Co. v. American States Ins. Co.*, 96 Idaho 465, 468, 531 P.2d 227, 230 (1975). In this case, there is no evidence in the record of an act or statement by anyone from CNH suggesting that Pioneer Equipment Company was acting as CNH's agent with respect to Pioneer Equipment Company's sale of the engine to American West. Rather, American West incorrectly asserts that because Pioneer Equipment Company was an "authorized dealer" of CNH products, it was – and had authority to act as – CNH's agent. American West's argument ignores both that Pioneer Equipment Company was acting on its own accord in selling the engine to American West and

that courts in multiple other jurisdictions have rejected the same “authorized dealer” argument. *See, e.g., Bruce v. ICI Americas, Inc.*, 933 F. Supp. 781, 789–790 (S.D. Iowa 1996) (insufficient control by manufacturer over authorized distributors to create question of material fact regarding existence of principal-agent relationship); *Doll v. Ford Motor Co.*, 814 F. Supp. 2d 526, 540 (D. Md. 2011) (“In the Amended Complaint, Plaintiffs have not pled any facts to show that an agency relationship existed between Ford and the dealer. Plaintiffs merely state that the Illinois dealership from which Abraham bought his car is an authorized Ford dealership. (Am. Compl. ¶ 6). This sole fact fails to demonstrate the existence of an agency relationship.”); *Connick v. Suzuki Motor Co., Ltd.*, 675 N.E.2d 584, 592 (Ill. 1997) (“Plaintiffs, in their complaint, alleged that they ‘purchased their vehicles from authorized Suzuki dealers, who were agents of defendants,’ and further alleged that certain named plaintiffs ‘understood’ the local Suzuki dealers to be agents of Suzuki. Such allegations alone are mere legal conclusions and thus insufficient to plead agency because they contain no facts to support a finding that the local Suzuki dealers had actual or apparent authority to act on Suzuki’s behalf.”); *Cline v. Allis-Chalmers Corp.*, 690 S.W.2d 764, 769 (Ky. Ct. App.1985) (simply being an “authorized dealer” is insufficient to establish true agency); *Theos & Sons, Inc. v. Mack Trucks, Inc.*, 729 N.E.2d 1113, 1122 (Mass. 2000) (“Similarly, Vigor’s representation of itself as an authorized parts and service dealer of Mack is not a sufficient ground for Theos to reasonably believe that Vigor had apparent authority to act as Mack’s agent”).


D. American West’s Motion to Amend Should Be Denied Because the Claims it Seeks to Add to the Complaint Are Subject to Dismissal as a Matter of Law.

As a final attempt to avoid summary judgment, American West has moved to amend its complaint to add claims under the above-discussed third party beneficiary and agency theories. In determining whether an amended complaint should be allowed, where leave of court is

required under Idaho Rule of Civil Procedure 15(a), the court may consider whether the new claims proposed to be inserted into the action by the amended complaint state a valid claim. *Bissett v. State*, 111 Idaho 865, 869, 727 P.2d 1293, 1296 (Ct. App.1986) ("The record which was before the trial court contains no allegations which, if proven, would entitle Bissett to the injunctive relief he claims. In addition, Bissett has failed to state on appeal any additional allegations which would establish a cause of action... We hold that the district court did not abuse its discretion in failing to allow amendment of Bissett's complaint.") Where, as here, the amended pleading does not set out valid claims, or if the opposing party would be prejudiced by the delay in adding the new claims, it is not an abuse of discretion for the trial court to deny the motion to file the amended complaint. See *Black Canyon Racquetball Club, Inc. v. Idaho First Nat. Bank, N.A.*, 119 Idaho 171, 175, 804 P.2d 900, 904 (1991).

DATED this 29 day of May, 2012.

Trout ♦ Jones ♦ Gledhill ♦ Fuhrman ♦ Gourley, P.A.

By: 
William A. Fuhrman – Of the Firm
Attorneys for Defendant CNH

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 29 day of May, 2012, a true and correct copy of the above and foregoing document was forwarded addressed as follows in the manner stated below:

Brent T. Robinson, Esq.
 ROBINSON ANTHON & TRIBE
 Attorneys at Law
 P.O. Box 396
 Rupert, ID 83350-0396

U.S. Mail
 Hand-Delivery
 Facsimile (208)436-6804



 William A. Fuhrman

FILED
CASE

2012 JUN -1 PM 12:51

CLERK

Sp, DEPUTY

**FIFTH JUDICIAL DISTRICT COURT, STATE OF IDAHO
IN AND FOR THE COUNTY OF MINIDOKA
715 G STREET
RUPERT, IDAHO 83350**

American West Enterprises, Inc.)	
	)	Case No: CV-2011-0000238
vs.)	
	)	<u>AMENDED</u>
Case New Holland, Inc. a Delaware Corporation	)	NOTICE OF HEARING

NOTICE IS HEREBY GIVEN that the above-entitled case is hereby set for:

Hearing:	ALL PENDING MOTIONS	
Date:	Monday, June 11, 2012	11:30 AM
Judge:	Jonathan Brody*	
Courtroom:	District Courtroom-1	

I hereby certify that the foregoing is a true and correct copy of this Notice of Hearing entered by the Court and on file in this office. I further certify that copies of this Notice were served as follows on June 1st, 2012.

Mail To: Mailed Hand Delivered

Copy to: William A. Fuhrman P. O. Box 1097, Boise, ID, 83701 (Defense Attorney);
Copy to: Brent T. Robinson P.O. Box 396, Rupert, ID, 83350-0396 (Plaintiff Attorney)

Dated: June 1st, 2012
Patty Tempie, Clerk Of The District Court

By: *[Signature]*
Deputy Clerk

* Alternate Judges: Notice is hereby given that the presiding Judge assigned to this case intends to utilize the provision of I.R.C.P. 40(d)(1)(G). Notice is also given that if there are multiple parties, any disqualification pursuant to I.R.C.P. 40(d)(1)(A) is subject to a prior determination under I.R.C.P. 40-(d)(1)(C). The panel of alternate Judges consists of the following Judges who have otherwise not been disqualified in this action: Judges Bevan, Butler, Crabtree, Elgee, Higer, Hurlbutt, Meehl, St. Clair, Stoker, Wildman and Wood

SCANNED

FILED-DISTRICT COURT
CASE # _____

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PATTY TEMPLE, CLERK
He, DEPUTY

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

American West Enterprises, Inc.,)
)
 Plaintiff,)
)
 v.)
)
 CNH America, LLC,)
)
 Defendant.)
)

CASE NO. CV 2011-238

**MEMORANDUM DECISION GRANTING DEFENDANT'S MOTION FOR SUMMARY
JUDGMENT AND DENYING PLAINTIFF'S MOTION FOR LEAVE TO AMEND
COMPLAINT**

The defendant has moved for summary judgment in this case. The plaintiff's original complaint includes claims for breach of the implied warranty of merchantability (count I), and

breach of the implied covenant of fitness for a particular purpose (count II). In response to the defendant's motion for summary judgment, the plaintiff attempts to bolster its complaint by filing a motion for leave to amend its complaint to add theories of third party beneficiary and agency. Oral argument was heard before this court on both motions on June 11, 2012.

The plaintiff argues that summary judgment should be denied because of the legal theories asserted in its original complaint, as well as theories it attempts to add in its proposed amended complaint. Furthermore, the plaintiff relies on the facts already contained in the record to support these theories; therefore, deciding the plaintiff's motion for leave to amend the complaint on a summary judgment standard is appropriate. *See Sound of Music Co. v. Minnesota Mining & Manufacturing Co.*, 977 F.3d 910, 923 (7th Cir. 2007) (If, at the close of discovery, the amendment would be futile because it would not survive summary judgment, denial of the amendment is proper). This court finds that the record contains no genuine issue of material fact, and that the legal theories upon which the plaintiff grounds its complaint and proposed amended complaint fail as a matter of law. Therefore, the plaintiff's proposed amendments would be futile. For these reasons, the defendant's motion for summary judgment is granted, and the plaintiff's motion for leave to amend the complaint is denied.

FACTUAL HISTORY

This dispute arises from the malfunction of a tractor engine that was purchased in August of 2007. In August 2007, American West Enterprises ("American West"), acting through its President, Hal Anderson, entered into an agreement with Pioneer Equipment Company ("Pioneer") to replace a motor in a Case IH 3394 tractor originally purchased by American West in 1997. To accomplish this replacement service, a new engine and core was ordered by Pioneer from CNH America ("CNH"). Pioneer Equipment was at the time, and still is, an authorized

dealer of CNH. After the engine was received, it was subsequently installed in the Case IH 3394 by Pioneer. The tractor was used for only approximately fifteen hours in the two years after the engine was installed. In the spring of 2009, Frank Jensen purchased the Case IH 3394. Mr. Jensen used the tractor for approximately four to five hours before the engine stopped running. American West refunded the purchase price of the tractor to Mr. Jensen. Mr. Anderson then took the tractor to Pioneer to diagnose the problem. The problem was determined to be a faulty engine valve spring. Pioneer contacted CNH requesting that the engine be warranted. CNH responded that any time limit on the warranty had expired, and that the engine would not be warranted. American West then filed the current action against CNH America claiming a breach of the implied warranty of merchantability as well as a breach of the implied warranty of fitness for a particular purpose. CNH subsequently filed this motion for summary judgment. In response, American West seeks leave to file an amended complaint to further substantiate its breach of implied warranty claims.

ANALYSIS

CNH bases its motion on the fact that there was no privity of contract between American West and CNH. CNH argues that Idaho law requires that when there has been only economic injury, privity of contract is required in order to maintain a breach of implied warranty action. American West argues that in a goods case, where the plaintiff may be unfairly prejudiced by the operation of the economic loss rule, privity of contract is not required. Alternatively, American West argues that privity is not required for two reasons. First, it argues that American West was a third party beneficiary to the contract for the engine between Pioneer and CNH, and as such, it has a right to enforce the contract against CNH. Second, it argues that Pioneer, as an authorized dealer of CNH, was an agent of CNH, hence American West can enforce the contract against

CNH. Because this court finds that Idaho precedent does dictate that privity is required in a goods case where only economic damage is alleged; American West was not a third party beneficiary; and Pioneer was not an agent of CNH, the defendant's motion for summary judgment is granted and the plaintiff's motion for leave to amend its complaint is denied.

A. Summary Judgment Standard

Summary judgment is proper "if the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." I.R.C.P. 56(c); *Scona, Inc. v. Green Willow Trust*, 133 Idaho 283 (1999). The court must liberally construe all disputed facts in favor of the non-moving party, and draw all reasonable inferences and conclusions supported by the record in favor of the party opposing the motion. *Bonz v. Sudweeks*, 119 Idaho 539, 541 (1999). If conflicting inferences are possible, summary judgment should be denied. Only if there is no genuine issue of material fact after the affidavits, pleadings, and depositions have been construed in the light most favorable to the non-moving party should summary judgment be awarded. *Loomis v. City of Hailey*, 119 Idaho 434 (1991).

B. Privity of Contract is Required to Recover for Economic Loss for Breach of an Implied Warranty

The Idaho Court of Appeals has reaffirmed, as recently as 2004, that privity of contract is required to recover economic loss for breach of implied warranties. *Nelson v. Anderson Lumber Co.*, 140 Idaho 702, 707 (Idaho Ct. App. 2004). There is no dispute in this case as to whether American West entered into a contract with CNH, it did not. Therefore, there is no privity of contract between the two parties. American West argues that this is a unique situation where the privity requirement, coupled with the economic loss rule, would unfairly prejudice it. The Idaho

American West. The undisputed facts of this case, however, do provide enough evidence to construe the contract between Pioneer and CNH.

There is no evidence that the contract between Pioneer and CNH reflected intent to benefit American West. Mr. Anderson took American West's tractor to Pioneer to have its engine replaced. In order to accomplish this task, Pioneer had to order an engine from CNH. That is, in order for Pioneer to complete its service contract with American West, it needed to procure the necessary parts. It did so by ordering those parts from CNH. Pioneer's apparent purpose was to take the necessary steps in order to complete its contract with American West. There is no evidence on the record to suggest that CNH's purpose was to do anything other than to sell parts to Pioneer in order to make a profit. While, it is true that American West would benefit under this contract, there is no evidence that American West was the intended beneficiary of the contract, let alone an express beneficiary. Rather, Pioneer was intending to benefit itself by doing what was necessary to comply with its contract with American West.

American West argues that since the engine was ordered specifically for the benefit and use of American West, that it was the intended beneficiary. This could perhaps be the case if American West was simply procuring the engine, at cost, merely to give the engine over to American West, but this is not the case. And even in such a case, the intent to benefit American West would have to have been reflected in the contract itself. In this case, Pioneer charged American West for its services, including a labor charge of over \$3,000 for the replacement of the engine. American West was a beneficiary only in the sense that anyone who takes their vehicle into a mechanic is a beneficiary when that mechanic must order parts to repair the vehicle. This type of beneficiary is not a direct beneficiary, but rather an incidental beneficiary. *See Nelson*, 140 Idaho at 709 (explaining that ordering parts necessary to complete an existing

Supreme Court has hinted that such a situation may exist, and that in such a situation the privity requirement could be removed. *See Ramerth v. Hart*, 133 Idaho 194, 198 (1999).

While this court is sympathetic to the possibility that the economic loss rule coupled with the privity requirement may result in little or no recovery for American West, it is not this court's prerogative to ignore precedent. In *Ramerth*, though it expressed skepticism at the continuing vitality of the privity requirement announced in *Salmon Rivers Sportsman Camps, Inc. v. Cessna Air. Co.*, 97 Idaho 348 (1975), the Court expressly stated that the requirement remains valid. *Ramerth*, 133 Idaho at 198. Therefore, this court is obliged to follow this rule in finding that privity of contract is required to recover for economic loss for breach of implied warranties.

C. American West Was Not a Third Party Beneficiary Because There is No Evidence of Intent to Benefit American West

A contract which is "made expressly for the benefit" of a third party may be enforced by that party at any time before the parties to the contract rescind it. I.C. § 29-102. The question in this case is whether the contract between Pioneer and CNH for the replacement engine was made expressly for the benefit of American West. In order to qualify as a third party beneficiary the agreement between the contracting parties must reflect intent to benefit the third party. *Idaho Power Co. v. Hulet*, 140 Idaho 110, 112 (2004). This means that the contract itself must reflect intent to benefit the third party, unless the document is ambiguous. *Id.* at 113. Further, the third party must be a direct beneficiary of the contract, not a mere incidental beneficiary. *Id.* at 112.

The issue of whether a party is an intended beneficiary is one of contract construction. In construing a contract, a court should look to the "apparent purpose the parties are trying to accomplish." *Id.* at 113 (quoting 17A Am.Jur.2d § 441. *Construction of a Contract in General*). In this case, there is no written contract on the record between Pioneer and CNH. Therefore, there is no document to construe to determine whether the contract itself reflects intent to benefit

service contract with another does not give rise to third party beneficiary status). As such, American West is not entitled to enforce the contract between Pioneer and CNH on a third party beneficiary theory.

D. Pioneer Equipment Was Not an Agent of CNH America

American West argues that its claims can succeed based upon the theory that Pioneer was acting as CNH's agent when it ordered the engine. Specifically, American West argues that because Pioneer was an authorized dealer and repair shop of CNH, it had both express and implied authority to act on behalf of CNH. To decide whether American West can proceed on this basis the court must first examine the preliminary issue of whether the existence of a principal-agent relationship is one of fact or law.

When a principal-agent relationship is disputed, Idaho courts have held that the existence of an agency relationship is a question for the trier of fact to resolve from the evidence. *Adkinson Corp v. American Bldg. Co.*, 107 Idaho 406, 409 (1984); *Clark v. Gneitling*, 95 Idaho 10, 12 (1972). However, the existence of an agency relationship can be one of law in certain circumstances. *See Idaho Lumber, Inc. v. Buck*, 109 Idaho 737, 741 (1985) ("Where the question depends upon the construction of an undisputed, unambiguous written lease, and its legal effect, the question becomes one of law as to whether the terms of the instrument constituted the lessee the owner's agent."). The following is instructive on this question:

When the facts relied upon to establish the existence of an agency are undisputed, and conflicting inferences cannot be drawn from them, the question of the existence of the agency is one of law for the court. On the other hand, when the facts pertaining to the existence of an agency are conflicting, or conflicting inferences may be drawn from the evidence, the question is one of fact for the [trier of fact].

3 Am.Jur.2d Agency § 352. In this case, the facts relied upon to establish the existence of an agency relationship are indeed undisputed. There is no dispute that Pioneer is an authorized

dealer of CNH products, and this is the fact upon which American West grounds its argument that Pioneer was CNH's agent. Therefore, the only question is whether conflicting inferences can be drawn from this fact concerning whether Pioneer was CNH's agent.

There is no evidence on the record indicating that Pioneer was given any express power to act on behalf of CNH. The mere fact that Pioneer was an authorized dealer of CNH is not sufficient to justify an inference that it was also an agent of CNH. On the contrary, the undisputed evidence on the record leads to the inference that Pioneer was acting solely on its own behalf in procuring an engine to complete its contract with American West. Therefore, the only inference that may be drawn from the evidence is that Pioneer was not an agent of CNH. Because of this, the existence of an agency relationship is one of law, and for the reasons stated above this court finds that no agency relationship can be inferred to have existed from the evidence on the record.

E. There is No Genuine Issue of Material Fact, and the Facts on the Record Are Insufficient as a Matter of Law to Support American West's Amended Bases for its Claims

The facts on the record are not in dispute. Pioneer, an authorized CNH dealer, contracted with CNH for a new engine in order to complete service on American West's tractor. Approximately two years later the engine failed due to an apparent defect in the engine. There is no allegation that privity of contract existed between American West and CNH. These facts are insufficient as a matter of law to establish that American West was a third party beneficiary of the contract between Pioneer and CNH. And, finally, the mere fact that Pioneer is an authorized dealer of CNH is insufficient to lead to an inference that it was acting as an agent for CNH. For these reasons, summary judgment in favor of CNH is proper, and American West's motion for leave to amend its complaint is properly denied

CONCLUSION

Defendant's motion for summary judgment is GRANTED, and Plaintiff's motion for leave to amend its complaint is DENIED for the reasons stated in this decision.

IT IS SO ORDERED

Dated: 7/12/12

Signed: Jonathan Brody
Jonathan Brody, District Judge

CERTIFICATE OF SERVICE

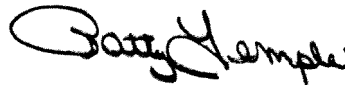
I, Santos Garza, Deputy Clerk for the County of Minidoka, do hereby certify that on the 13 day of July, 2012, I filed the original and caused to be served a true and correct copy of the above and foregoing document: **ORDER GRANTING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT AND DENYING PLAINTIFF'S MOTION FOR LEAVE TO AMEND COMPLAINT** to each of the persons as listed below:

Brent T. Robinson, Esq.
Robinson, Anthon & Tribe
PO Box 396
Rupert, ID 83350-0396


- U.S. Mail, Postage Prepaid
- Hand Delivery
- Overnight Mail
- Via Facsimile

William A. Fuhrman
PO Box 1097
Boise, ID 83701

- U.S. Mail, Postage Prepaid
- Hand Delivery
- Overnight Mail
- Via Facsimile



CLERK OF THE DISTRICT COURT

BY: 
Santos Garza
Deputy Clerk

ORIGINAL

William A. Fuhrman/ISB 2932
Christopher P. Graham/ISB 6174
Trout ♦ Jones ♦ Gledhill ♦ Fuhrman ♦ Gourley, P.A.
225 North 9th Street, Suite 820
P.O. Box 1097
Boise, Idaho 83701
Telephone: 208-331-1170
Facsimile: 208-331-1529

FILED
CASE

2012 JUL 13 PM 4:20

PATTY S. ... CLERK

[Signature], DEPUTY

Attorneys for Defendant CNH AMERICA LLC,
improperly named as Case New Holland, Inc.

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


AMERICAN WEST ENTERPRISES, INC.,)	
an Idaho Corporation,	)	Case No. CV-2011-238
)	
Plaintiff,)	
	)	JUDGMENT
vs.)	
)	
CASE NEW HOLLAND, INC., a Delaware)	
Corporation,)	
)	
Defendant.)	
_____)	

The Court, having issued its Memorandum Decision Granting Defendant's Motion for Summary Judgment and Denying Plaintiff's Motion for Leave to Amend Complaint on July 13, 2012, and having been fully advised in the premises and good cause appearing therefore;

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that Judgment is entered in favor of Defendant CNH America LLC, improperly named as Case New Holland, Inc., a Delaware Corporation. It is further ordered that the claims of Plaintiff American West Enterprises, Inc., are dismissed with prejudice.

This Court shall retain jurisdiction to adjudicate issues related to an award of fees and costs to Defendant Case New Holland, Inc., as well as any other motion permitted by the Idaho Rules of Civil Procedure and this Judgment may be amended as may be appropriate thereby.

Dated this 18th day of July, 2012.



HONORABLE JONATHAN BRODY
DISTRICT JUDGE

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 19 day of July, 2012, a true and correct copy of the above and foregoing document was forwarded addressed as follows in the manner stated below:


Brent T. Robinson, Esq.
ROBINSON ANTHON & TRIBE
Attorneys at Law
P.O. Box 396
Rupert, ID 83350-0396

U.S. Mail
 Hand-Delivery
 Facsimile (208)436-6804

William A. Fuhrman
Trout ♦ Jones ♦ Gledhill ♦ Fuhrman ♦
Gourley, P.A.
225 North 9th Street, Suite 820
P.O. Box 1097
Boise, Idaho 83701

U.S. Mail, postage prepaid
 Hand-delivered
 Facsimile (208) 331-1529

CLERK OF THE DISTRICT COURT

By: 
Deputy Clerk

ORIGINAL

William A. Fuhrman/ISB 2932
Christopher P. Graham/ISB 6174
Trout ♦ Jones ♦ Gledhill ♦ Fuhrman ♦ Gourley, P.A.
225 North 9th Street, Suite 820
P.O. Box 1097
Boise, Idaho 83701
Telephone: 208-331-1170
Facsimile: 208-331-1529

FILED-DISTRICT COURT
CASE # _____
TIME _____

JUL 27 2012

PATTY TEMPLE, CLERK
slb, DEPUTY

Attorneys for Defendant CNH AMERICA LLC,
improperly named as Case New Holland, Inc.

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

AMERICAN WEST ENTERPRISES, INC.,)	
an Idaho Corporation,	)	Case No. CV-2011-238
)	
Plaintiff,)	
	)	MOTION FOR ATTORNEY'S FEES
vs.	)	AND COSTS
)	
CASE NEW HOLLAND, INC., a Delaware)	
Corporation,)	
)	
Defendant.)	
_____)	

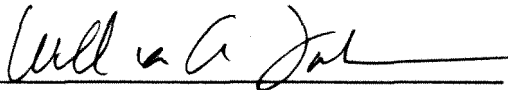
COMES NOW the Defendant CNH America LLC, improperly named as Case New Holland, Inc., a Delaware Corporation ("Defendant"), by and through their counsel of record, Trout • Jones • Gledhill • Fuhrman • Gourley, P.A., and, pursuant to Idaho Rule of Civil Procedure 54 and Idaho Code Section 12-120(3), hereby moves this Court for an award of its attorney's fees and costs incurred in prosecuting this action.

This Motion is based upon the grounds that Defendant is the prevailing party pursuant to the Court's Memorandum Decision Granting Defendant's Motion for Summary Judgment and Denying Plaintiff's Motion for Leave to Amend Complaint entered on or about July 13, 2012,

and the order of Judgment entered herein on July 18, 2012. This Motion is further supported by the Memorandum in Support of Motion for Attorney's Fees and Costs and the Affidavit of William A. Fuhrman filed concurrently herewith.

DATED this 26 day of July, 2012.

Trout ♦ Jones ♦ Gledhill ♦ Fuhrman ♦ Gourley, P.A.

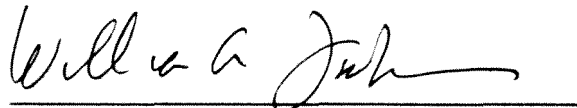
By: 
William A. Fuhrman – Of the Firm
Attorneys for Defendant CNH

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 26 day of July, 2012, a true and correct copy of the above and foregoing document was forwarded addressed as follows in the manner stated below:

Brent T. Robinson, Esq.
ROBINSON ANTHON & TRIBE
Attorneys at Law
P.O. Box 396
Rupert, ID 83350-0396

U.S. Mail
 Hand-Delivery
 Facsimile (208)436-6804


William A. Fuhrman

ORIGINAL

William A. Fuhrman/ISB 2932
Christopher P. Graham/ISB 6174
Trout ♦ Jones ♦ Gledhill ♦ Fuhrman ♦ Gourley, P.A.
225 North 9th Street, Suite 820
P.O. Box 1097
Boise, Idaho 83701
Telephone: 208-331-1170
Facsimile: 208-331-1529

Attorneys for Defendant CNH AMERICA LLC,
improperly named as Case New Holland, Inc.

FILED-DISTRICT COURT
CASE # _____
TIME _____

JUL 27 2012

PATTY TEMPLE, CLERK
Sb, DEPUTY

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

AMERICAN WEST ENTERPRISES, INC.,)	
an Idaho Corporation,	)	Case No. CV-2011-238
)	
Plaintiff,)	
	)	MEMORANDUM IN SUPPORT OF
vs.	)	MOTION FOR ATTORNEY'S FEES
	)	AND COSTS
CASE NEW HOLLAND, INC., a Delaware)	
Corporation,)	
)	
Defendant.)	
_____)	

COMES NOW the Defendant CNH America LLC, improperly named as Case New Holland, Inc., a Delaware Corporation ("Defendant"), by and through their counsel of record, Trout • Jones • Gledhill • Fuhrman • Gourley, P.A., and, hereby submits this Memorandum in Support of its Motion for Attorney Fees and Costs.

On July 13, 2012, this Court entered its Memorandum Decision Granting Defendant's Motion for Summary Judgment and Denying Plaintiff's Motion for Leave to Amend Complaint. Thereafter, on July 18, 2012, the Court entered Judgment in favor of Defendant on all claims of Plaintiff American West Enterprises, Inc. Based upon the foregoing, Defendant is the prevailing

party and is therefore entitled to an award of attorney fees in the amount of \$11,961.00 and costs as a matter of right in the amount of \$58.00 pursuant to Idaho Code §§ 12-120(3) and Idaho Rule of Civil Procedure 54.

ARGUMENT

A. Defendant is Entitled to an Award of Attorney Fees Pursuant to Idaho Code Section 12-120(3).

Idaho Code §12-120(3) provides for the award of attorney fees, to be taxed and collected as costs, to the prevailing party in a commercial transaction. It provides:

In any civil action to recover on an open account, account stated, note, bill, negotiable instrument, guaranty, or contract relating to the purchase or sale of goods, wares, merchandise, or services and in any commercial transaction unless otherwise provided by law, the prevailing party shall be allowed a reasonable attorney's fee to be set by the court, to be taxed and collected as costs.

The term "commercial transaction" is defined to mean all transactions except transactions for personal or household purposes. The term "party" is defined to mean any person, partnership, corporation, association, private organization, the state of Idaho or political subdivision thereof.

Idaho Code § 12-120(3).

"Attorney fees unquestionably are to be awarded under this subsection where the cause of action is for breach of a commercial contract." *Erickson v. Flynn*, 138 Idaho 430, 436, 64 P.3d 959, 965 (Ct.App. 2002). The critical test in determining whether a civil action is for a commercial transaction is whether the commercial transaction not only comprises the gravamen of the lawsuit, but is integral to the claim, and constitutes the basis upon which the party is attempting to recover. *Esser Elec. v. Lost River Ballistics Technologies, Inc.*, 145 Idaho 912, 921, 188 P.3d 854, 863 (2008).

Similarly, even if no contract is found to exist, fees may still properly be awarded pursuant to I.C. § 12-120(3) if the contract as alleged would be a commercial transaction. *Peterson v. Shore*, 146 Idaho 476, 481-82, 197 P.3d 789, 794-95 (Ct. App. 2008) ("[A]s to

whether commercial transactions turn on the existence of an alleged agreement, the Idaho Supreme Court has noted that, ‘where a party alleges the existence of a contract that would be a commercial transaction under Idaho Code § 12-120(3), that claim triggers the application of the statute and the prevailing party may recover attorney fees even if no liability under the contract is established.’ ” *Id.* at 481-82, 197 P.3d at 794-95 (quoting *Lexington Heights Dev., LLC v. Crandlemire*, 140 Idaho 276, 287, 92 P.3d 526, 537 (2004)).

In this case, the gravamen of Plaintiff’s Complaint was a commercial transaction. In particular, Plaintiff’s claims all arose out of, and were integrally related to a claim that Plaintiff was a third-party beneficiary to contract between Defendant and Pioneer Equipment Company to provide an engine for a tractor owned by Plaintiff, and that Defendant breached certain warranties with respect to the tractor engine. Defendant moved for summary judgment upon the basis that there was no privity of contract as required for a claim for breach of implied warranties. This Court agreed and entered summary judgment against Plaintiff. Notwithstanding, there can be no question that Plaintiff alleged the existence of a contract that would be a commercial transaction, that this commercial transaction was integral to Plaintiff’s claims, and that Defendant ultimately prevailed on the claims asserted by Plaintiff. As a result, Defendant is entitled to an award of attorney fees under Idaho Code Section 12-120(3).

B. Consideration of the Factors Under Idaho Rule of Civil Procedure 54(e)(3) Supports the Reasonableness of Counterdefendants’ Fees.

The amount of attorney fees to be awarded under Idaho Code Section 12-120(3) is committed to the sound discretion of the trial court. *Lettunich v. Lettunich*, 141 Idaho 425, 435, 111 P.3d 110, 120 (2005). In considering the reasonableness of the attorney’s fees, a trial court must consider the factors set forth in Idaho Rule of Civil Procedure 54(e)(3), as well as any other factor that the court deems appropriate. *Lee v. Nickerson*, 146 Idaho 5, 10-11, 189 P.3d 467,

472-73 (2008). A trial court need not specifically address all of the factors contained in I.R.C.P. 54(e)(3) in writing, so long as the record clearly indicates that the Court considered them all. *Boel v. Stewart Title Guarantee Company*, 137 Idaho 9, 16, 43 P.3d 768, 775 (2002). “[T]he bottom line in an award of attorney's fees is reasonableness.” *Lettunich*, 141 Idaho at 435, 111 P.3d at 120.

Consideration of the appropriate factors identified in Idaho Rule of Civil Procedure 54(e)(3) supports the conclusion that Defendants should be awarded all attorney fees sought in this action.

1. The Time and Labor Required.

This matter was resolved only after Defendant filed its motion for summary judgment. Plaintiff contested entry of summary judgment and further moved to amend its Complaint. As the court in *Craft Wall of Idaho, Inc. v. Stonebraker*, 108 Idaho 704, 701 P.2d 324 (Ct. App. 1985) recognized, the amount of time “expended by the attorney on behalf of his client is, in general, one of the most important factors, if not the most important factor” in determining an award of fees. *Craft Wall of Idaho, Inc.*, 108 Idaho at 706, 701 P.2d at 326. Here, the time and labor involved in this case was reasonable and fully warranted by the issues asserted and supports the attorney fee request sought by Defendant.

2. Novelty and Difficulty of Questions.

Although the issues involved in this matter were not particularly novel or difficult, the amount of attorney fees sought is commiserate with complexity of the issues and consideration of this factor supports Defendant’s attorney fee request.

3. Requisite Skill and Ability of the Attorneys/Prevailing Rates.

As evidenced by the Affidavit of William A. Fuhrman (hereinafter referred to as the “Fuhrman Affidavit”) filed contemporaneously herewith, the rates charged by Trout Jones

Gledhill Fuhrman and Gourley are commensurate with those prevailing in the State of Idaho for similar services by lawyers of reasonably comparable skill, experience and reputation. The Fuhrman Affidavit identifies the amounts charged by the attorneys involved and further relates that the attorneys involved had the requisite skill to perform the legal services properly and that the rates are reasonable based upon the nature and complexity of the case.

4. Amounts Involved and Results Obtained.

After more than a year of litigation, discovery, and a dispositive motion, Defendant has prevailed on all claims asserted by Plaintiff. In light of the factual and procedural history of this matter, and the results obtains, the fees claimed by Defendant are reasonable and should be awarded.

5. Other Factors.

The other factors identified in Idaho Rule of Civil Procedure 54(e)(3) are either inapplicable or neutral in this matter and thus need not be addressed.

Thus, consideration of all factors identified in Idaho Rule of Civil Procedure 54(e)(3) support the award of attorney fees as requested by Counterdefendants in this matter.

C. Defendant is Entitled to an Award of Costs as a Matter of Right.

The following are the costs which are recoverable as a matter of right pursuant to Idaho Rule of Civil Procedure 54(d)(1)(C):

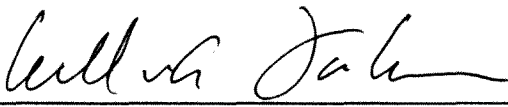
<u>Filing Fees:</u> Answer	\$58.00
-------------------------------	---------

CONCLUSION

For the reasons stated, and supported by the Affidavit of William A. Fuhrman filed concurrently herewith, Defendant requests that this Court grant an award of attorney fees and costs in the total amount of \$12,019.00 in accordance with Idaho Code Section 12-120(3) and Idaho Rule of Civil Procedure 54.

DATED this 26 day of July, 2012.

Trout ♦ Jones ♦ Gledhill ♦ Fuhrman ♦ Gourley, P.A.

By: 

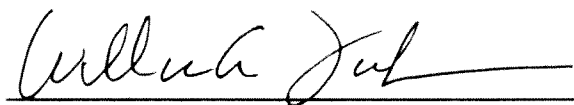
William A. Fuhrman – Of the Firm
Attorneys for Defendant CNH

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 26 day of July, 2012, a true and correct copy of the above and foregoing document was forwarded addressed as follows in the manner stated below:

Brent T. Robinson, Esq.
ROBINSON ANTHON & TRIBE
Attorneys at Law
P.O. Box 396
Rupert, ID 83350-0396

U.S. Mail
 Hand-Delivery
 Facsimile (208)436-6804



William A. Fuhrman

William A. Fuhrman/ISB 2932
Christopher P. Graham/ISB 6174
Trout ♦ Jones ♦ Gledhill ♦ Fuhrman ♦ Gourley, P.A.
225 North 9th Street, Suite 820
P.O. Box 1097
Boise, Idaho 83701
Telephone: 208-331-1170
Facsimile: 208-331-1529

Attorneys for Defendant CNH AMERICA LLC,
improperly named as Case New Holland, Inc.

FILED-DISTRICT COURT
CASE # _____
TIME _____
JUL 27 2012
PATTY TEMPLE, CLERK
sla, DEPUTY

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

AMERICAN WEST ENTERPRISES, INC.,)
an Idaho Corporation,)
)
Plaintiff,)
)
vs.)
)
CASE NEW HOLLAND, INC., a Delaware)
Corporation,)
)
Defendant.)
_____)

Case No. CV-2011-238

**AFFIDAVIT OF WILLIAM A.
FUHRMAN IN SUPPORT OF MOTION
FOR ATTORNEY'S FEES AND COSTS**

STATE OF IDAHO)
) ss.
County of Ada)

Comes now, William A. Fuhrman, who being first duly sworn, on oath, deposes and says:

1. I am the attorney of record for the Defendant CNH America LLC, improperly named as Case New Holland, Inc., a Delaware Corporation ("Defendant"), in the above entitled matter, and have personal knowledge of the facts contained herein.

SCANNED

2. I was retained by the Defendant for the purposes of defending this action on behalf of Defendant, and that said attorneys have diligently prosecuted this action on Defendant's behalf.

3. That the following constitutes a full, true and correct statement of Defendant's costs, disbursements, and attorney fees expended in this action and each item having been actually and necessarily incurred to the best of affiant's information and belief, and that said costs and disbursements claimed are in compliance with Rule 54 of the Idaho Rules of Civil Procedure:

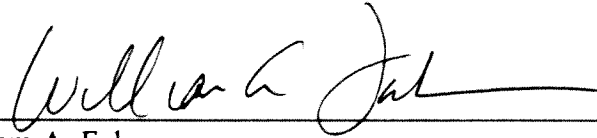
Filing Fee For Answer, IRCP 54(d)(1)(C)	\$58.00
Attorneys Fees pursuant to Idaho Code § 12-120	\$11,961.00

Attached hereto as Exhibit "A" is a true and correct copy of the time records applicable to the work performed as summarized above. Exhibit "A" reflects the specific services provided, the time spent on said services, and the applicable hourly rate.

4. That this affidavit and memorandum have been timely filed, that the amount included herein for attorney fees was computed on the basis and method of considering time and labor required, the novelty and difficulty of the case, the requisite skill to perform the legal service properly and the experience and the ability of the attorney in the particular field of law and the prevailing charges for like work, the amount involved and the results obtained, and awards in similar cases; and that reasonable attorney fees incurred by Defendant in this action should be awarded in the amount set forth above.

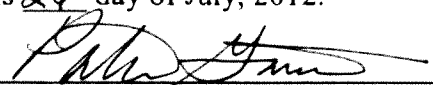
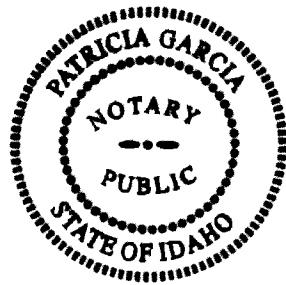
FURTHER YOUR AFFIANT SAITH NAUGHT.

DATED this 26 day of July, 2012.



William A. Fuhrman

SUBSCRIBED AND SWORN to before me this 26th day of July, 2012.



Notary Public for Idaho
Residing at: Boise, ID
My Commission Expires: 10/7/16

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 26 day of July, 2012, a true and correct copy of the above and foregoing document was forwarded addressed as follows in the manner stated below:

Brent T. Robinson, Esq.
ROBINSON ANTHON & TRIBE
Attorneys at Law
P.O. Box 396
Rupert, ID 83350-0396

[] U.S. Mail
[] Hand-Delivery
[] Facsimile (208)436-6804



William A. Fuhrman

Trout Jones Gledhill Fuhrman Gourley, P.A.

20-4944753

225 N 9th St., Ste. 820, PO Box 1097

Boise, ID 83701

Ph:(208) 331-1170

Fax:(208) 331-1529

CNH America, LLC
700 State St.
Racine, WI 53404

Jun 01, 2011

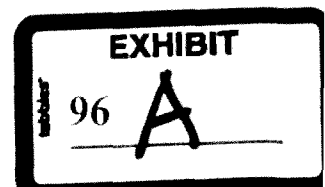
Attention: Tim Maciocek, Senior Counsel

File #: 3859-006

Inv #: 19548

RE: American West Enterprises, Inc.

DATE	DESCRIPTION	HOURS	AMOUNT	LAWYER
Apr-28-11	Communicate (with client) email from and to Tracy re new suit v. CNH	0.40	78.00	WAF
	Review/analyze complaint	0.50	97.50	WAF
May-04-11	Review/analyze documents sent by Tracy	0.30	58.50	WAF
	Draft/revise answer	0.80	156.00	WAF
	Communicate (with client) email to/from M Flynn re improper defendant and answer	0.30	58.50	WAF
May-11-11	Draft/revise and edit answer	0.40	78.00	WAF
	Communicate (with client) email to M Flynn re answer	0.30	58.50	WAF
May-13-11	Communicate (with client) email from Mike re answer and file same	0.30	58.50	WAF
	Draft/revise discovery to plaintiff	0.50	97.50	WAF
May-23-11	Draft/revise discovery requests	0.70	136.50	WAF
May-24-11	Communicate (with client) email to/from Tracy re CNH records	0.30	58.50	WAF
	Draft/revise discovery to plaintiff	0.50	97.50	WAF
May-25-11	Draft/revise discovery and notice of service re same	0.30	58.50	WAF



Totals

5.60 \$1,092.00

FEE SUMMARY:

Lawyer	Hours	Effective Rate	Amount
William A. Fuhrman	5.60	\$195.00	\$1,092.00

DISBURSEMENTS

		Disbursements	Receipts
May-11-11	Filing Fee: Answer (pg)	58.00	
Totals		\$58.00	\$0.00

Total Fees, Disbursements **\$1,150.00**

Previous Balance \$0.00

Previous Payments \$0.00

Balance Due Now **\$1,150.00**

Trout Jones Gledhill Fuhrman Gourley, P.A.

20-4944753

225 N 9th St., Ste. 820, PO Box 1097

Boise, ID 83701

Ph:(208) 331-1170

Fax:(208) 331-1529

CNH America, LLC
700 State St.
Racine, WI 53404

Jun 29, 2011

Attention: Tim Maciocek, Senior Counsel

File #: 3859-006

Inv #: 19797

RE: American West Enterprises, Inc.

DATE	DESCRIPTION	HOURS	AMOUNT	LAWYER
May-27-11	Communicate (with client) email from and to Tracy re tel con and documents/records re tractor and motor and tel con	0.30	58.50	WAF
	Review/analyze tractor documents sent by Tracy	0.80	156.00	WAF
	Draft/revise 2d discovery request	0.70	136.50	WAF
May-31-11	Communicate (with client) emails to and from Tracy re tel con to discuss facts	0.30	58.50	WAF
Jun-01-11	Communicate (with client) tel con w/ Tracy, Lloyd and Jensen	0.50	97.50	WAF
	Communicate (with client) email from and to Tracy re tel con and facts	0.40	78.00	WAF
	Review/analyze Dealer Guide re warranty info	0.40	78.00	WAF
	Draft/revise report to M Flynn re status and settlement	0.40	78.00	WAF
Jun-03-11	Communicate (with client) emails from Jensen re investigation	0.30	58.50	WAF
Jun-17-11	Draft/revise 2d discovery requestsi	0.40	78.00	WAF
	Totals	4.50	\$877.50	

FEE SUMMARY:

Lawyer

Hours

Effective Rate

Amount

98

William A. Fuhrman

4.50

\$195.00

\$877.50

Total Fees, Disbursements	\$877.50
Previous Balance	\$1,150.00
Previous Payments	\$0.00

Balance Due Now	\$2,027.50
------------------------	-------------------

Trout Jones Gledhill Fuhrman Gourley, P.A.

20-4944753

225 N 9th St., Ste. 820, PO Box 1097

Boise, ID 83701

Ph:(208) 331-1170

Fax:(208) 331-1529

CNH America, LLC
700 State St.
Racine, WI 53404

Jan 03, 2012

Attention: Tim Maciocek, Senior Counsel

File #: 3859-006

Inv #: 21557

RE: American West Enterprises, Inc.

DATE	DESCRIPTION	HOURS	AMOUNT	LAWYER
Dec-05-11	Draft/revise draft discovery responses	1.10	214.50	WAF
	Review/analyze file materials to determine which documents to produce	0.50	97.50	WAF
Dec-08-11	Draft/revise and edit discovery draft response	0.50	97.50	WAF
	Communicate (with client) tel and email to/from T Glaman re discovery	0.30	58.50	WAF
Dec-09-11	Communicate (with client) email discovery to Tracy and email to/from same re same and status	0.50	97.50	WAF
Dec-13-11	Communicate (with client) email from/to Tracy re telcon	0.30	58.50	WAF
Dec-14-11	Communicate (with client) emails re telcon w/ M Lyons	0.30	58.50	WAF
Dec-15-11	Communicate (with client) emails re telcon w/ Lyons	0.30	58.50	WAF
Dec-16-11	Plan and prepare for for telcon (review file)	0.50	97.50	WAF
	Appear for/attend telcon w/ Glaman and Lyons and review discovery	0.50	97.50	WAF
	Draft/revise edit discovery responses and forward to Tracy/Mike	0.60	117.00	WAF
	Review/analyze responses signed by Mike	0.20	39.00	WAF
Dec-19-11	Review/analyze NOH re trial setting and scheduling	0.20	39.00	WAF
Dec-22-11	Draft/revise and finalize discovery responses and documents and serve same	0.50	97.50	100 WAF

CNH America, LLC
700 State St.
Racine, WI 53404

Jul 26, 2012

PREBILL

Attention: Tim Maciocek, Senior Counsel

File #: 3859-006
Inv #: Sample

RE: American West Enterprises, Inc.

DATE	DESCRIPTION	HOURS	AMOUNT	LAWYER
Jul-02-12	Draft/revise pre-trial memorandum and element sheet pursuant to court's scheduling order	1.60	288.00	CPG
Jul-05-12	Review/analyze notice from court re pretrial conference rescheduling	0.20	39.00	WAF
Jul-12-12	Review/analyze decision on our MSJ	0.90	175.50	WAF
	Communicate (with client) email to/from client re MSJ ruling	0.40	78.00	WAF
	Communicate (in firm) conf w/ EPJ re preparing judgment	0.30	58.50	WAF
Jul-16-12	Review/analyze court's memorandum decision granting summary judgment	0.40	72.00	CPG
	Review/analyze decision on MSJ	0.50	97.50	WAF
	Communicate (with client) email to/from client re decision	0.30	58.50	WAF
	Communicate (in firm) conf w/ EPJ re preparing judgment and cost bill	0.30	58.50	WAF
	Draft/revise proposed Judgment; corr. to the Court re: the same	0.70	115.50	EPJ
Jul-25-12	Draft/revise motion for atty fees; memorandum of law in support; affidavit of WAF in support	3.60	594.00	EPJ
	Totals	9.20	\$1,635.00	

FEE SUMMARY:

Lawyer	Hours	Effective Rate	Amount
Christopher P. Graham	2.00	\$180.00	\$360.00
William A. Fuhrman	2.90	\$195.00	\$565.50
Erika P. Judd	4.30	\$165.00	\$709.50

Total Fees, Disbursements	\$1,635.00
Previous Balance	\$5,766.86
Previous Payments	\$3,667.16
Balance Due Now	\$3,734.70

Totals

6.30 \$1,228.50

FEE SUMMARY:

Lawyer	Hours	Effective Rate	Amount
William A. Fuhrman	6.30	\$195.00	\$1,228.50
 Total Fees, Disbursements			\$1,228.50
Previous Balance			\$2,027.50
Previous Payments			\$2,027.50
 Balance Due Now			\$1,228.50

Trout Jones Gledhill Fuhrman Gourley, P.A.

20-4944753

225 N 9th St., Ste. 820, PO Box 1097

Boise, ID 83701

Ph:(208) 331-1170

Fax:(208) 331-1529

CNH America, LLC
700 State St.
Racine, WI 53404

Feb 13, 2012

Attention: Tim Maciocek, Senior Counsel

File #: 3859-006

Inv #: 21857

RE: American West Enterprises, Inc.

DATE	DESCRIPTION	HOURS	AMOUNT	LAWYER
Jan-04-12	Review/analyze email and repair estimate from Tracy	0.30	58.50	WAF
	Review/analyze notice of hearing	0.20	39.00	WAF
	Review/analyze letter from counsel re hearing	0.20	39.00	WAF
	Draft/revise letter to court re hearing	0.40	78.00	WAF
	Draft/revise letter to counsel re discovery	0.40	78.00	WAF
Jan-05-12	Draft/revise and edit letters to court and counsel and send same	0.20	39.00	WAF
	Totals	1.70	\$331.50	

FEE SUMMARY:

Lawyer	Hours	Effective Rate	Amount
William A. Fuhrman	1.70	\$195.00	\$331.50

Total Fees, Disbursements	\$331.50
Previous Balance	\$1,228.50
Previous Payments	\$0.00

Balance Due Now	\$1,560.00
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Trout Jones Gledhill Fuhrman Gourley, P.A.

20-4944753

225 N 9th St., Ste. 820, PO Box 1097

Boise, ID 83701

Ph:(208) 331-1170

Fax:(208) 331-1529

CNH America, LLC
700 State St.
Racine, WI 53404

Mar 27, 2012

Attention: Tim Maciocek, Senior Counsel

File #: 3859-006

Inv #: 22304

RE: American West Enterprises, Inc.

DATE	DESCRIPTION	HOURS	AMOUNT	LAWYER
Feb-27-12	Plan and prepare for for tel con hearing	0.30	58.50	WAF
	Appear for/attend tel to court re hearing	0.40	78.00	WAF
Mar-09-12	Review/analyze letter from counsel re trial setting	0.20	39.00	WAF
	Draft/revise letter to court re trial setting	0.30	58.50	WAF
Mar-14-12	Review/analyze complaint and discovery responses re: motion for summary judgment	0.70	126.00	CPG
Mar-15-12	Research - conduct legal research re: current Idaho caselaw on implied warranty for use in summary judgment motion	0.80	144.00	CPG
	Communicate (other external) tel from/to court re trial setting	0.40	78.00	WAF
Mar-16-12	Research - conduct additional legal research re: lack of privity and Idaho caselaw	0.70	136.50	CPG
Mar-20-12	Research - conduct additional legal research re: Idaho caselaw on implied warranties	0.50	90.00	CPG
	Totals	4.30	\$808.50	

FEE SUMMARY:

Lawyer	Hours	Effective Rate	Amount
Christopher P. Graham	2.70	\$183.89	\$496.50

William A. Fuhrman

1.60

\$195.00

\$312.00

Total Fees, Disbursements	\$808.50
Previous Balance	\$1,560.00
Previous Payments	\$1,228.50
Balance Due Now	\$1,140.00

Trout Jones Gledhill Fuhrman Gourley, P.A.

20-4944753

225 N 9th St., Ste. 820, PO Box 1097

Boise, ID 83701

Ph:(208) 331-1170

Fax:(208) 331-1529

CNH America, LLC
700 State St.
Racine, WI 53404

May 03, 2012

Attention: Tim Maciocek, Senior Counsel

File #: 3859-006

Inv #: 23576

RE: American West Enterprises, Inc.

DATE	DESCRIPTION	HOURS	AMOUNT	LAWYER
Mar-29-12	Communicate (with client) email from and to Tracy re status and trial setting	0.40	78.00	WAF
	Review/analyze Am West discovery response	0.80	156.00	WAF
Apr-05-12	Review/analyze trial setting order	0.40	78.00	WAF
Apr-10-12	Communicate (with client) email to Tracy re trial setting and MSJ	0.30	58.50	WAF
Apr-13-12	Review/analyze email from Tracy re settlement and tel con	0.30	58.50	WAF
	Totals	2.20	\$429.00	

FEE SUMMARY:

Lawyer	Hours	Effective Rate	Amount
William A. Fuhrman	2.20	\$195.00	\$429.00

Total Fees, Disbursements **\$429.00**

Previous Balance \$1,140.00

Previous Payments \$331.50

Balance Due Now **108**
\$1,237.50

Trout Jones Gledhill Fuhrman Gourley, P.A.

20-4944753

225 N 9th St., Ste. 820, PO Box 1097

Boise, ID 83701

Ph:(208) 331-1170

Fax:(208) 331-1529

CNH America, LLC
700 State St.
Racine, WI 53404

Jun 01, 2012

Attention: Tim Maciocek, Senior Counsel

File #: 3859-006

Inv #: 23878

RE: American West Enterprises, Inc.

DATE	DESCRIPTION	HOURS	AMOUNT	LAWYER
Apr-27-12	Communicate (with client) email from/to Tracy re telcon	0.30	58.50	WAF
May-01-12	Communicate (with client) email to/from Tracy re telcon	0.30	58.50	WAF
	Communicate (with client) t/c w/ Tim and Tracy re MSJ and settlement	0.30	58.50	WAF
	Communicate (in firm) conf w/ CPG re MSJ	0.40	78.00	WAF
May-02-12	Draft/revise memorandum in support of motion for summary judgment	1.60	288.00	CPG
	Communicate (in firm) - conference with WAF re: summary judgment arguments and affidavit issues	0.40	72.00	CPG
	Research - conduct additional legal research re: privity of contract requirement for warranty claims	0.80	144.00	CPG
May-03-12	Draft/revise - finalize motion for summary judgment, memorandum and affidavit in support of motion for summary judgment	0.70	126.00	CPG
	Review/analyze and edit MSJ memo	0.80	156.00	WAF
	Draft/revise affidavit	0.30	58.50	WAF
	Draft/revise notice of hearing	0.30	58.50	WAF
	Communicate (in firm) conf w/ CPG re MSJ	0.40	78.00	WAF
	Communicate (with client) email to/from Tim and Tracy re MSJ	0.30	58.50	WAF

May-17-12	Communicate (with client) email to Tracy re MSJ and settlement	0.30	58.50	WAF
May-18-12	Review/analyze email from Tracy re settkenebt	0.20	39.00	WAF
May-21-12	Review/analyze Am West response to MSJ	0.80	156.00	WAF
	Review/analyze affidavits in oppo to MSJ	0.50	97.50	WAF
	Review/analyze Am West motion to amend	0.40	78.00	WAF
May-22-12	Communicate (with client) email from and to Tracy re status report	0.30	58.50	WAF
	Communicate (with client) tel to Tracy re status report	0.20	39.00	WAF
	Draft/revise status report	1.00	195.00	WAF
May-24-12	Research caselaw cited in plaintiff's memorandum in opposition to summary judgment	0.60	108.00	CPG
	Draft/revise reply memorandum in support of motion for summary judgment	4.30	774.00	CPG
	Review/analyze - additional review and analysis of plaintiff's summary judgment opposition memorandum, affidavits, and motion to amend	0.70	126.00	CPG
May-25-12	Draft/revise - finalize draft of reply in support of motion for summary judgment, addition section in opposition to plaintiff's motion to amend complaint	2.50	450.00	CPG
	Review/analyze and edit reply brief drafted by CPG	0.60	117.00	WAF
	Communicate (with client) email to client re reply brief draft	0.30	58.50	WAF
Totals		19.60	\$3,648.00	

FEE SUMMARY:

Lawyer	Hours	Effective Rate	Amount
Christopher P. Graham	11.60	\$180.00	\$2,088.00
William A. Fuhrman	8.00	\$195.00	\$1,560.00

DISBURSEMENTS

	Disbursements	Receipts
May-24-12 FedEx Charge - Invoice # 7-898-69930 - Acct. # 1988-3253-7	19.16	
Totals	\$19.16	\$0.00



Total Fees, Disbursements	\$3,667.16
Previous Balance	\$1,237.50
Previous Payments	\$808.50
Balance Due Now	\$4,096.16

Trout Jones Gledhill Fuhrman Gourley, P.A.

20-4944753

225 N 9th St., Ste. 820, PO Box 1097

Boise, ID 83701

Ph:(208) 331-1170

Fax:(208) 331-1529

CNH America, LLC
700 State St.
Racine, WI 53404

Jun 28, 2012

Attention: Tim Maciocek, Senior Counsel

File #: 3859-006

Inv #: 24064

RE: American West Enterprises, Inc.

DATE	DESCRIPTION	HOURS	AMOUNT	LAWYER
May-31-12	Communicate (other external) telcon w/ court re recusal issue	0.40	78.00	WAF
Jun-04-12	Communicate (with client) email from and to client re tel con and reply brief	0.30	58.50	WAF
	Communicate (with client) re possible conflict issue with judge	0.30	58.50	WAF
Jun-07-12	Communicate (other outside counsel) tel from Am West counsel re recusal of judge	0.20	39.00	WAF
Jun-10-12	Plan and prepare for hearing on MSJ	1.20	234.00	WAF
Jun-11-12	Other travel to/from Rupert Id for MSJ hearing	5.50	1,072.50	WAF
	Appear for/attend hearing on MSJ	1.50	292.50	WAF
Jun-12-12	Draft/revise report re hearing on MSJ	0.40	78.00	WAF
	Totals	9.80	\$1,911.00	

FEE SUMMARY:

Lawyer	Hours	Effective Rate	Amount
William A. Fuhrman	9.80	\$195.00	\$1,911.00

DISBURSEMENTS

Disbursements

Receipts

Jun-11-12 Mileage to/from Rupert, ID for Summary
Judgment Hearing (340 miles x \$0.555 per
mile = \$188.70)

188.70

Totals

\$188.70

\$0.00

Total Fees, Disbursements**\$2,099.70**

Previous Balance

\$4,096.16

Previous Payments

\$429.00

Balance Due Now**\$5,766.86**

Brent T. Robinson, Esq.
ROBINSON, ANTHON & TRIBE
Attorneys at Law
615 H Street
P. O. Box 396
Rupert, Idaho 83350-0396
Telephone (208) 436-4717
Facsimile (208) 436-6804
ISB No. 1932
btr@idlawfirm.com

Attorneys for Plaintiff

FILED-DISTRICT COURT

CASE # _____

TIME 3:15 pm

AUG - 3 2012

PATTY TEMPLE, CLERK

ST

DEPUTY

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

AMERICAN WEST ENTERPRISES, INC.,
an Idaho corporation,

Appellant,

vs.

CASE NEW HOLLAND, INC.,
a Delaware corporation,

Respondent.

) Case No. CV-2011-238

) NOTICE OF APPEAL

) Fee Category: L 4

) Filing Fee: \$109

TO: The above-named defendant, CNH America, LLC, improperly named as Case New Holland, Inc., a Delaware corporation, and its attorneys of record, Trout, Jones, Gledhill, Fuhrman, Gourley, P.A.

NOTICE IS HEREBY GIVEN THAT:

1. The above-named appellant American West Enterprises, Inc., an Idaho corporation appeals against the above-named respondent, CNH America, LLC, improperly named as Case New Holland, Inc., a Delaware corporation, to the Idaho Supreme Court from a Judgment entered in the above-entitled action on the 18th day of July, 2012, the Honorable Jonathan Brody presiding.

2. That the party has a right to appeal to the Idaho Supreme Court, and the Judgment described in paragraph 1 above is an appealable Judgment under and pursuant to

Rule 11(a)(3), the Summary Judgment having been certified by the trial court to be final as provided by Rule 54(b), I. R. C. P.

3. A preliminary statement of issues the appellant intends to assert on appeal are as follows:

1. WHETHER THE COURT IN GRANTING SUMMARY RULED CORRECTLY WITH RESPECT TO THE ISSUE OF PRIVITY PERTAINING TO THE SALE OF GOODS.
2. WHETHER THE COURT ERRED WHEN IT GRANTED SUMMARY JUDGMENT FINDING IN THIS CASE THAT AMERICAN WEST ENTERPRISES, INC., WAS NOT A THIRD-PARTY BENEFICIARY. THERE ARE TWO ISSUES WITHIN ISSUE: (1) WHETHER THE ISSUE OF INTENT IS NOT A FACTUAL ISSUE WHICH SHOULD REQUIRE THE CASE TO BE TRIED; AND, (2) WHETHER THE COURT ERRED WITH RESPECT TO ITS APPLICATION OF LAW AS TO THE THIRD-PARTY BENEFICIARY.
3. WHETHER THE COURT ERRED WHEN IT FOUND AS A MATTER OF LAW THAT PIONEER WAS NOT AN AGENT OF CASE.

4. It is hereby requested that the reporter provide a transcript of the hearing which occurred with respect to the Judgment.

5. The appellant requests that the following documents be included in the clerk's record, in addition to those automatically included under Rule 28, I.A.R.:

- 5/4/2012 Motion for Summary Judgment
- 5/4/2012 Memorandum in Support of Motion for Summary Judgment
- 5/4/2012 Affidavit of William A. Fuhrman in Support of Motion for Summary Judgment
- 5/4/2012 Notice of Hearing on Motion for Summary Judgment
- 5/21/2012 Objection to Motion for Summary Judgment
- 5/21/2012 Motion to Amend Caption
- 5/21/2012 Motion for Leave to Amend Complaint
- 5/21/2012 Affidavit of Frank Jensen in Opposition to Summary Judgment
- 5/21/2012 Affidavit of Hal Anderson in Opposition to Summary Judgment
- 5/21/2012 Affidavit of Chuck Simmons
- 5/21/2012 Notice of Hearing
- 5/21/2012 Motion to Amend Caption and Motion for Leave to Amend Complaint
- 5/29/2012 Reply Memorandum in Support of Motion for Summary Judgment and in Opposition to Motion to Amend Complaint

- 5/31/2012 Motion to Amend Caption and Motion for Leave to Amend Complaint
- 6/1/2012 Notice of Hearing
- 7/13/2012 Memorandum Decision Granting Defendant's Motion for Summary Judgment and Denying Plaintiff's Motion for Leave to Amend Complaint
- 7/18/2012 Judgment
- 7/27/2012 Affidavit of William A. Fuhrman in Support of Motion for Attorney's Fees and Costs
- 7/27/2012 Memorandum in Support of Motion for Attorney's Fees and Costs
- 7/27/2012 Motion for Attorney's Fees and Costs

6. I certify:

- (a) That a copy of this Notice of Appeal has been served on the reporter;
- (b) That the Clerk of the District Court has been paid the estimated fee for the preparation of the reporter's transcript.
- (c) That the estimated fee for preparation of the Clerk's record has been paid.
- (d) That the appellant's filing fee has been paid.
- (e) That service has been made upon all parties required to be served pursuant to Rule 20.

7. That the appellant reserves the right to amend the Notice of Appeal based upon if there be an award of any attorney's fees in favor of the respondent.

DATED this 30th day of August, 2012.

ROBINSON ANTHON & TRIBE

By 
Brent T. Robinson

CERTIFICATE OF SERVICE

I hereby certify that on the 3rd day of August, 2012, I caused to be served a true and correct copy of the foregoing upon:

William A. Fuhrman, Esq.
TROUT♦JONES♦GLEDHILL♦
FUHRMAN♦GOURLEY, P.A.
P. O. Box 1097
Boise, Idaho 83701

Maureen Newton, Reporter
Minidoka County Courthouse
P. O. Box 368
Rupert, Idaho 83350

by depositing a copy thereof in the United States mail, postage prepaid, in envelope addressed to said parties at the foregoing addresses.


Brent T. Robinson

2012 AUG 20 11:11-01

DEPUTY CLERK

Sp DEPUTY

Brent T. Robinson, Esq.
ROBINSON, ANTHON & TRIBE
Attorneys at Law
615 H Street
P. O. Box 396
Rupert, Idaho 83350-0396
Telephone (208) 436-4717
Facsimile (208) 436-6804
ISB No. 1932
btr@idlawfirm.com

Attorneys for Appellant

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

AMERICAN WEST ENTERPRISES, INC.,
an Idaho corporation,

Appellant,

vs.

CASE NEW HOLLAND, INC.,
a Delaware corporation,

Respondent.

Case No. CV-2011-238
Supreme Court No. 40230-2012

AMENDED
NOTICE OF APPEAL

TO: The above-named defendant, CNH America, LLC, improperly named as Case New Holland, Inc., a Delaware corporation, and its attorneys of record, Trout, Jones, Gledhill, Fuhrman, Gourley, P.A.

NOTICE IS HEREBY GIVEN THAT:

1. The above-named appellant American West Enterprises, Inc., an Idaho corporation appeals against the above-named respondent, CNH America, LLC, improperly named as Case New Holland, Inc., a Delaware corporation, ("Case") to the Idaho Supreme Court from a Judgment entered in the above-entitled action on the 18th day of July, 2012, the Honorable Jonathan Brody presiding, pursuant to Case's Motion for Summary Judgment filed May 4, 2012.

2. That the party has a right to appeal to the Idaho Supreme Court, and the Judgment described in paragraph 1 above is an appealable Judgment under and pursuant to

SCANNED 1118

Rule 11(a)(3), the Summary Judgment having been certified by the trial court to be final as provided by Rule 54(b), I. R. C. P.

3. A preliminary statement of issues the appellant intends to assert on appeal are as follows:

1. WHETHER THE COURT IN GRANTING SUMMARY RULED CORRECTLY WITH RESPECT TO THE ISSUE OF PRIVITY PERTAINING TO THE SALE OF GOODS.
2. WHETHER THE COURT ERRED WHEN IT GRANTED SUMMARY JUDGMENT FINDING IN THIS CASE THAT AMERICAN WEST ENTERPRISES, INC., WAS NOT A THIRD-PARTY BENEFICIARY. THERE ARE TWO ISSUES WITHIN ISSUE: (1) WHETHER THE ISSUE OF INTENT IS NOT A FACTUAL ISSUE WHICH SHOULD REQUIRE THE CASE TO BE TRIED; AND, (2) WHETHER THE COURT ERRED WITH RESPECT TO ITS APPLICATION OF LAW AS TO THE THIRD-PARTY BENEFICIARY.
3. WHETHER THE COURT ERRED WHEN IT FOUND AS A MATTER OF LAW THAT PIONEER WAS NOT AN AGENT OF CASE.

4. It is hereby requested that the reporter provide a transcript, both a hard copy and in electronic format, of the hearings on the following:

- June 11, 2012, hearing on Case's Motion for Summary Judgment;
- June 11, 2012, hearing on American West's Motion to Amend Caption and Motion for Leave to Amend Complaint.

5. The appellant requests that the following documents be included in the clerk's record, in addition to those automatically included under Rule 28, I.A.R.:

- 5/4/2012 Motion for Summary Judgment
- 5/4/2012 Memorandum in Support of Motion for Summary Judgment
- 5/4/2012 Affidavit of William A. Fuhrman in Support of Motion for Summary Judgment
- 5/4/2012 Notice of Hearing on Motion for Summary Judgment
- 5/21/2012 Objection to Motion for Summary Judgment
- 5/21/2012 Motion to Amend Caption
- 5/21/2012 Motion for Leave to Amend Complaint
- 5/21/2012 Affidavit of Frank Jensen in Opposition to Summary Judgment
- 5/21/2012 Affidavit of Hal Anderson in Opposition to Summary Judgment
- 5/21/2012 Affidavit of Chuck Simmons
- 5/21/2012 Notice of Hearing

- 5/21/2012 Motion to Amend Caption and Motion for Leave to Amend Complaint
- 5/29/2012 Reply Memorandum in Support of Motion for Summary Judgment and in Opposition to Motion to Amend Complaint
- 5/31/2012 Motion to Amend Caption and Motion for Leave to Amend Complaint
- 6/1/2012 Notice of Hearing
- 7/13/2012 Memorandum Decision Granting Defendant's Motion for Summary Judgment and Denying Plaintiff's Motion for Leave to Amend Complaint
- 7/18/2012 Judgment
- 7/27/2012 Affidavit of William A. Fuhrman in Support of Motion for Attorney's Fees and Costs
- 7/27/2012 Memorandum in Support of Motion for Attorney's Fees and Costs
- 7/27/2012 Motion for Attorney's Fees and Costs

6. I certify:

- (a) That a copy of this Notice of Appeal has been served on the reporter;
- (b) That the Clerk of the District Court has been paid the estimated fee for the preparation of the reporter's transcript.
- (c) That the estimated fee for preparation of the Clerk's record has been paid.
- (d) That the appellant's filing fee has been paid.
- (e) That service has been made upon all parties required to be served pursuant to Rule 20.

7. That the appellant reserves the right to amend the Notice of Appeal based upon if there be an award of any attorney's fees in favor of the respondent.

DATED this 20th day of August, 2012.

ROBINSON ANTHON & TRIBE

By: 
Brent T. Robinson

CERTIFICATE OF SERVICE

I hereby certify that on the 20th day of August, 2012, I caused to be served a true and correct copy of the foregoing upon:

William A. Fuhrman, Esq.
TROUT♦JONES♦GLEDHILL♦
FUHRMAN♦GOURLEY, P.A.
P. O. Box 1097
Boise, Idaho 83701

Maureen Newton, Reporter
Minidoka County Courthouse
P. O. Box 368
Rupert, Idaho 83350

by depositing a copy thereof in the United States mail, postage prepaid, in envelope addressed to said parties at the foregoing addresses.



Brent T. Robinson

ED-DISTRICT COURT
CASE # _____
TIME 2:04pm

AUG 29 2012

PATTY TEMPLE, CLERK
[Signature], DEPUTY

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

American West Enterprises, Inc.,)
)
 Plaintiff,)
)
 v.) CASE NO. CV 2011-238
)
 CNH America, LLC,)
)
 Defendant.)
 _____)

**MEMORANDUM DECISION DENYING IN PART AND GRANTING IN PART
DEFENDANT'S MOTION FOR ATTORNEY'S FEES AND COSTS**

CNH America, LLC, the Defendant, filed a Motion for Attorney's Fees and Costs on July 27, 2012. Oral argument was heard on the motion on August 20, 2012. The Plaintiff, American West Enterprises, objects to the motion on the grounds that there is no basis for an award of

MEMORANDUM DECISION DENYING IN PART AND GRANTING IN PART DEFENDANT'S MOTION FOR ATTORNEY'S FEES AND COSTS

attorney's fees. Specifically, American West argues that the basis of its claim was not a commercial transaction. Because the underlying basis of American West's claim was not a commercial transaction between parties to this case, CNH's Motion for Attorney's Fees and Costs is denied as to fees. However, because CNH is entitled to costs as a prevailing party under I.R.C.P. 54(d)(1)(A), its motion is granted as to costs.

FACTS

This case arose from the malfunction of a tractor engine that was purchased in August of 2007. In August 2007, American West Enterprises ("American West"), acting through its President, Hal Anderson, entered into an agreement with Pioneer Equipment Company ("Pioneer") to replace a motor in a Case IH 3394 tractor originally purchased by American West in 1997. To accomplish this replacement service, a new engine and core was ordered by Pioneer from CNH America ("CNH"). Pioneer Equipment was at the time, and still is, an authorized dealer of CNH. After the engine was received, it was subsequently installed in the Case IH 3394 by Pioneer. The tractor was used for only approximately fifteen hours in the two years after the engine was installed. In the spring of 2009, Frank Jensen purchased the Case IH 3394. Mr. Jensen used the tractor for approximately four to five hours before the engine stopped running. American West refunded the purchase price of the tractor to Mr. Jensen. Mr. Anderson then took the tractor to Pioneer to diagnose the problem. The problem was determined to be a faulty engine valve spring. Pioneer contacted CNH requesting that the engine be warranted. CNH responded that any time limit on the warranty had expired, and that the engine would not be warranted. American West then filed an action against CNH America claiming a breach of the implied warranty of merchantability as well as a breach of the implied warranty of fitness for a particular

purpose. CNH subsequently filed this motion for summary judgment. On July 13, 2012 this Court granted that motion for summary judgment.

ANALYSIS

CNH argues that it is allowed to collect a reasonable attorney's fee from American West in this case because it is a prevailing party, and because American West's Complaint rested upon the existence of a contract that would be a commercial transaction. Idaho allows such an award:

In any civil action to recover on an open account, account stated, note, bill, negotiable Instrument, guaranty, or contract relating to the purchase or sale of goods, wares, merchandise, or services and in any commercial transaction unless otherwise provided by law, the prevailing party shall be allowed a reasonable attorney's fee to be set by the court, to be taxed and collected as costs.

The term "commercial transaction" is defined to mean all transactions except transactions for personal or household purposes. The term "party" is defined to mean any person, partnership, corporation, association, private organization, the state of Idaho or political subdivision thereof.

I.C. § 12-120(3). In order to be awarded attorney's fees, the prevailing party must show that a "commercial transaction comprises the gravamen of the lawsuit. Attorney's fees are not appropriate under I.C. § 12-120(3) unless the commercial transaction is integral to the claim, and constitutes the basis upon which the party is attempting to recover." *Brower v. E.I. DuPont De Nemours & Co.*, 117 Idaho 780, 784, 792 P.2d 345, 349 (1990). However, the alleged commercial transaction must be more than remotely connected with the case. *Id.*

There is no dispute that CNH is the prevailing party, as this Court granted its motion for summary judgment on all of American West's claims. There are two disputes. The first dispute is whether American West's Complaint constituted a civil action to recover on a commercial transaction. The second dispute is whether the amount of fees sought by CNH of \$11,961.00 is

reasonable. Because this Court finds that American West's Complaint did not constitute a civil

MEMORANDUM DECISION DENYING IN PART AND GRANTING IN PART DEFENDANT'S MOTION FOR ATTORNEY'S FEES AND COSTS

action to recover on a commercial transaction within the meaning of I.C. § 12-120(3), the reasonableness of the fees is irrelevant.

In order to be awarded fees under I.C. § 12-120(3) the basis of the complaint must be a commercial transaction between the parties. *Great Plains Equipment, Inc. v. Northwest Pipeline Corp.*, 136 Idaho 466, 471, 36 P.3d 218, 223 (2001). However, it is not necessary that there be a contract between the parties. *Id.* at 472. Rather, the gravamen of the claim upon which the motion for attorney's fee is based must be a commercial transaction between the parties. *Id.*

In *Brower*, the Idaho Supreme Court held that there was no commercial transaction between the parties where Brower, relying on the claims made to him by DuPont, purchased DuPont chemicals from a local co-op. *Brower*, 117 Idaho at 784, 792 P.2d at 349. Likewise, in *Great Plains Equipment, Inc.*, the Court held that even though a party's claim was commercial in nature, where there is no commercial transaction between the parties, I.C. § 12-120(3) does not apply. *Great Plains Equipment, Inc.*, 136 Idaho at 472, 36 P.3d at 224.

This Court found in its Memorandum Decision Granting Defendant's Motion for Summary Judgment that no contract existed and no transaction took place between the parties in this case. American West relies on *Peterson v. Shore*, 146 Idaho 476, 197 P.3d 789 (Ct. App. 2008) in distinguishing the present case from those where a finding of no commercial transaction between the parties rendered I.C. § 12-120(3) inapplicable. In that case, the Court of Appeals held that where a party alleges the existence of a contract that would be a commercial transaction under I.C. § 12-120(3) the statute is applicable, and attorney's fees can be awarded to the prevailing party even if the court finds no liability under the alleged contract. *Peterson*, 146 Idaho at 481-82, 197 P.3d 794-95 (citing *Lexington Heights Dev., LLC v. Crandlemire*, 140 Idaho 276, 287, 92 P.3d 526, 537 (2004)). Therefore, the applicability of I.C. § 12-120(3) rests

MEMORANDUM DECISION DENYING IN PART AND GRANTING IN PART DEFENDANT'S MOTION FOR ATTORNEY'S FEES AND COSTS

on whether American West based its claims on an alleged (even if nonexistent) commercial transaction between the parties in this case.

CNH argues that American West's claims arose out of a contention that American West was a third-party-beneficiary to a contract between CNH and Pioneer Equipment Company to provide an engine for a tractor. Def. Memorandum in Support of Motion for Attorney's Fees and Costs at 3. This underlying contract between CNH and Pioneer is undoubtedly a commercial transaction. However, the Idaho Supreme Court has recently reinforced the principle that the commercial transaction at issue must be "between the parties to the lawsuit." *Printcraft Press, Inc. v. Sunnyside Park Utilities, Inc.*, Nos. 36556, 36567, 2012 WL 2529230 at 19 (July 2, 2012). In that case, the plaintiff, Printcraft Press, Inc. sought attorney's fees based on a "Third Party Beneficiary Agreement" entered into by Sunnyside Park Utilities and Sunnyside Industrial Park, where Printcraft Press, Inc. was a beneficiary. The Court held that though the agreement was a commercial transaction, it was not a basis to support the application of I.C. § 12-120(3) because the commercial transaction was not between the parties to the case. *Id.* at 20. Similarly, in this case American West alleged that it was a third party beneficiary to a contract between CNH and Pioneer. However, since this underlying agreement was not between the parties to the case it cannot support an application of I.C. § 12-120(3).

American West later sought leave to amend its complaint to add the legal theory that Pioneer was merely acting as CNH's agent for the sale of the tractor engine. In that case, American West would have entered into a contract with CNH. However, American West's Motion to Amend was denied by this Court. American West's original Complaint contains neither an allegation that a contract was entered into between it and CNH, nor an allegation that American West ever entered into a commercial transaction with CNH. Rather, American West

MEMORANDUM DECISION DENYING IN PART AND GRANTING IN PART DEFENDANT'S MOTION FOR ATTORNEY'S FEES AND COSTS

alleges that it entered into an agreement with Pioneer for parts and labor. Pl. Complaint ¶8. Therefore, this Court does not find a commercial transaction between the parties upon which American West based its Complaint. Rather, American West based its Complaint upon a commercial transaction between CNH and Pioneer, which is not a party to this lawsuit.

CONCLUSION

For the foregoing reasons, the Defendant's Motion for Attorney's Fees and Costs is hereby DENIED as to the attorney's fees. The Defendant also moved for an award of costs in the amount of \$58.00. Because a prevailing party is entitled to costs as a matter of right under I.R.C.P. 54(d)(1)(A), the Defendant's Motion for Attorney's Fees and Costs is GRANTED in the amount of \$58.00.

IT IS SO ORDERED

Dated: August 29, 2012

Signed: Jonathan Brody
Jonathan Brody, District Judge

CERTIFICATE OF SERVICE

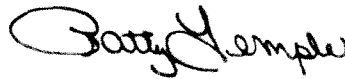
I, Janet Sunderland, Deputy Clerk for the County of Minidoka, do hereby certify that on the 29th day of August, 2012, I filed the original and caused to be served a true and correct copy of the above and foregoing document: **MEMORANDUM DECISION DENYING IN PART AND GRANTING IN PART DEFENDANT'S MOTION FOR ATTORNEY'S FEES AND COSTS** to each of the persons as listed below:

Brent T. Robinson, Esq.
Robinson, Anthon & Tribe
PO Box 396
Rupert, ID 83350-0396

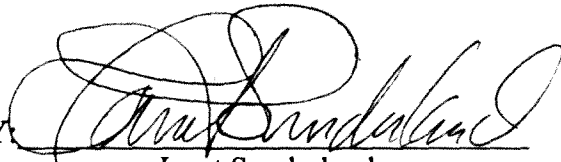
U.S. Mail, Postage Prepaid
 Hand Delivery
 Overnight Mail
 Via Facsimile

William A. Fuhrman
PO Box 1097
Boise, ID 83701

U.S. Mail, Postage Prepaid
 Hand Delivery
 Overnight Mail
 Via Facsimile



CLERK OF THE DISTRICT COURT

BY: 
Janet Sunderland
Deputy Clerk

MEMORANDUM DECISION DENYING IN PART AND GRANTING IN PART DEFENDANT'S MOTION FOR ATTORNEY'S FEES AND COSTS

ORIGINAL

William A. Fuhrman/ISB 2932
Erika P. Judd/ISB 8241
Jones ♦ Gledhill ♦ Fuhrman ♦ Gourley, P.A.
225 North 9th Street, Suite 820
P.O. Box 1097
Boise, Idaho 83701
Telephone: 208-331-1170
Facsimile: 208-331-1529

Attorneys for Defendant CNH AMERICA LLC,
improperly named as Case New Holland, Inc.

FILED-DISTRICT COURT
CASE # _____
TIME 10:00 am

SEP 20 2012

PATTY TEMPLE, CLERK
SB, DEPUTY

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

AMERICAN WEST ENTERPRISES, INC.,)	
an Idaho Corporation,)	Case No. CV-2011-238
)	
Appellant/Cross-Respondent)	
)	NOTICE OF CROSS-APPEAL
vs.)	
)	
CASE NEW HOLLAND, INC., a Delaware)	
Corporation,)	
)	
Respondent/Cross-Appellant.)	
_____)	

TO: THE ABOVE NAMED CROSS-RESPONDENT, American West Enterprises, Inc., and its attorney of record, Brent T. Robinson, of the firm Robinson, Anthon & Tribe, located at 615 H Street, Rupert, Idaho, 83350-0396, and the CLERK OF THE ABOVE ENTITLED COURT.

NOTICE IS HEREBY GIVEN THAT:

1. The above named cross-appellant, CNH America LLC, improperly named as Case New Holland, Inc., a Delaware Corporation, appeals against the above named cross-respondent to the Idaho Supreme Court from the Memorandum Decision Denying In Part and Granting In Part

Defendant's Motion for Attorney's Fees and Costs, entered in the above entitled action on the 29th day of August, 2012, the Honorable Judge Brody presiding.

2. That the cross-appellant has a right to cross-appeal to the Idaho Supreme Court, and the order described in paragraph 1 above is an appealable order under and pursuant to Rule 11(g), I.A.R.

3. A preliminary statement of issues Cross-Appellant intends to assert in the appeal are as follows:

- a. Whether the district court erred when it denied Cross-Appellant's Motion for Attorney's Fees, made pursuant to Idaho Code § 12-120(3).

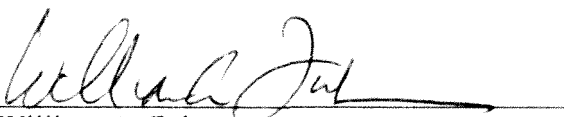
4. No additional reporter's transcript is requested.

5. The cross-appellant requests the following document be included in the clerk's record: August 29, 2012 Memorandum Decision Denying In Part and Granting In Part Defendant's Motion for Attorney's Fees and Costs, which document should be part of the Standard Record automatically included under Rule 28, I.A.R., and as designated by the appellant in the amended notice of appeal.

6. I certify:

(a) That service has been made upon all parties required to be served pursuant to Rule 20.

DATED this 19 day of September, 2012.


William A. Fuhrman
Attorneys for Respondent/Cross-Appellant

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 19 day of September, 2012, a true and correct copy of the above and foregoing document was forwarded addressed as follows in the manner stated below:

Brent T. Robinson, Esq.
ROBINSON ANTHON & TRIBE
Attorneys at Law
P.O. Box 396
Rupert, ID 83350-0396

U.S. Mail
 Hand-Delivery
 Facsimile (208)436-6804



William A. Fuhrman

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

* * * * *

**AMERICAN WEST ENTERPRISES,
INC., an Idaho Corporation,**

Appellant,
vs.

**CASE NEW HOLLAND, INC., a
Delaware Corporation,**

Respondent.

) **SUPREME COURT NO. 40230-2012**

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District Court # CV-2011-238

**CLERK'S CERTIFICATE TO
RECORD**

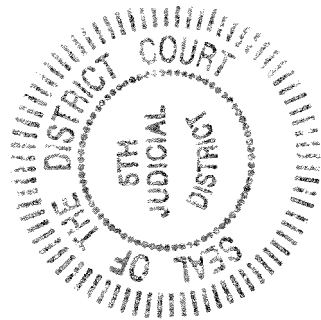
STATE OF IDAHO)

)ss.

County of Minidoka)

I, PATTY TEMPLE, Clerk of the District Court of the Fifth Judicial District of the State of Idaho, in and for the County of Minidoka, do hereby certify that the above and foregoing record in the above-entitled case was compiled and bound under my direction, and is a true and correct record of the pleadings and documents that are automatically required under Rule 28 of the Idaho Appellate Rules, as well as those requested by counsel.

I FURTHER CERTIFY that the Notice of Appeal was filed on the 3rd day of August, 2012



PATTY TEMPLE
Clerk of the District Court

By: Santos Garza
Santos Garza, Deputy Clerk

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

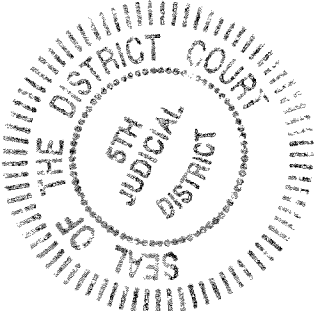
* * * * *

AMERICAN WEST ENTERPRISES, INC., an Idaho Corporation	)	Supreme Court No. 40230-2012
)	
Appellant,	)	District Court No. CV-2011-238*D
)	
vs.)	
	)	CLERK'S CERTIFICATE OF
CASE NEW HOLLAND, INC., A Delaware corporation,	)	SERVICE
)	
Respondent.)	

I, Santos Garza, Deputy Clerk of the District Court of the Fifth Judicial District of the State of Idaho, in and for the County of Minidoka, do hereby certify that I have personally served or mailed by United States Mail, postage prepaid, one copy of the Clerk's Record to each of the parties or their attorney of record as follows:

Brent T. Robinson ROBINSON ANTHON & TRIBE P. O. Box 396 Rupert, ID 83350	William A. Fuhrman TROUT JONES GLEDHILL FUHRMAN GOURLEY P.O. Box 1097 Boise, ID 83701
---	--

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said Court in Rupert, Idaho, the 28th day of September, 2012.



DUANE SMITH
Clerk of the District Court
By: Santos Garza
Santos Garza, Deputy Clerk