8-12-2008

Bushi v. Sage Health Care, PLLC Respondent's Brief Dckt. 34827

IN THE SUPREME COURT OF THE STATE OF IDAHO

STEPHEN BUSHI, M.D., Plaintiff-Appellant, vs. SAGE HEALTH CARE, PLLC, an Idaho limited liability company; CHARLES C. NOVAK, M.D., DAVID A. KENT, M.D.; And ROBERTO NEGRON, M.D., Defendants-Respondents SAGE HEALTH CARE, PLLC, an Idaho limited liability company; CHARLES C. NOVAK, M.D., DAVID A. KENT, M.D.; And ROBERTO NEGRON, M.D., Counter Claimants-Respondents, vs. STEPHEN BUSHI, M.D., Counter Defendant – Appellant.	)	SUPREME COURT CASE NO. 34827

RESPONDENTS' BRIEF

Appeal from the District Court of the
Fourth Judicial District for Ada County

Honorable Cheri C. Copsey, District Judge, Presiding

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RESPONDENT'S BRIEF

I.
STATEMENT OF THE CASE

This is an appeal from the District Court's grant of summary judgment and an award of attorney's fees in favor of the defendants, Sage Health Care, PLLC, and three members of the Company, Charles C. Novak, M.D., David A. Kent, M.D., and Roberto Negron, M.D. (hereinafter "Sage"). The plaintiff, Stephan Bushi, M.D. (hereinafter "Bushi") is a former member of Sage. Bushi's membership was terminated after the other members had discovered that he had converted some $61,000 in Company funds through use of the Company's line of credit at Wells Fargo Bank without the knowledge or consent of the other members. For the purpose of terminating Bushi's membership, the other members made amendments to the Operating Agreement. The amendments were made in accordance with the express terms of the Agreement. Bushi was tendered payment in full for his membership at the price specified in the Operating Agreement. The operative provisions of the Agreement about which Bushi now complains, are expressly permitted under the terms of the Idaho Limited Liability Company Act.

Bushi now claims on appeal that the actions taken by the other members pursuant to the Operating Agreement constitute a breach of fiduciary duty and a breach of a covenant of good faith and fair dealing. He also complains that the attorney's fees awarded by the Court were improperly awarded and excessive.

A. NATURE OF THE CASE

This is a contract case. Bushi wanted to be paid more for his interest in the limited liability company than the Operating Agreement provided. He took the position

that unless his demands were met, he would not give up his membership in the Company. The other members stood firm. Acting in accordance with the express provisions of the Operating Agreement and the Idaho Limited Liability Company Act, the other members terminated Bushi's membership and tendered him payment in full of all monies he was due under the Operating Agreement.

Bushi instituted this lawsuit. Initially he claimed that the payment provisions of the Operating Agreement entitled him to much more money than the amount tendered to him. Sage had tendered $16,383.30. Bushi claimed he was entitled to receive an amount in excess of $275,000 for his membership. The District Court rules in favor of Sage on this issue in granting summary judgment. Bushi does not appeal this issue. Instead, Bushi now claims that notwithstanding a clear legislative mandate and more than clear provisions in the Operating Agreement (discussed below), permitting termination of his membership, these must be trumped under a theory of fiduciary duty or a theory of breach of a covenant of good faith and fair dealing.

B. STATEMENT OF FACTS

Sage Health Care, PLLC, is an Idaho limited liability company, organized under the provisions of the Idaho Limited Liability Company Act, I.C. §§ 53-601 et seq. (Record, p. 23, ¶ 1).

Sage was originally formed in 1994. Since then it has gone through several changes in membership and several name changes as detailed in the Verified Complaint. In 1994, when Sage was formed, the Members entered into an Operating Agreement. Between 1994 and January 30, 2006, provisions of the Operating Agreement remained unchanged except for changes to Exhibit "A" of the Agreement

reflecting changes in membership interests. A true copy of the Operating Agreement as it existed prior to its amendment on January 30, 2006, is appended to the Verified Answer and Counterclaim as Exhibit A. Bushi has been a signatory to the Operating Agreement beginning in 1994 and continuing through January 30, 2006 (Record, p. 27, ¶1).

Since 1994, the Operating Agreement provided a method to amend its terms and determine valuation upon dissociation. It also addressed the grounds for dissociation of its members and the dissociating member's rights. The Operating Agreement vested management in Sage Health Care's Members with equal rights in the company's management. See Article VI, Section 1. On these issues, the Operating Agreement provided in relevant part as follows:

ARTICLE VI
RIGHTS AND DUTIES OF MEMBERS

****

3. Unanimous Minus One – The following actions require the consent of all but one of the Members:

3.1 *any amendment* to this Company agreement;

****

ARTICLE XI
DISSOCIATION OF A MEMBER

1. Mandatory Dissociation – A Person shall cease to be a Member upon the happening of any of the following events:

1.1 the Withdrawal of a Member with the consent of the Majority of the remaining Members prior to the date set forth in Section 5 of Article II;

1.2 in the case of a Member who is a natural person, the death of the Member or the entry of an order by a court of

competent jurisdiction adjudicating the Member incompetent to manage the Member's person [sic] estate;

1.3 in the case of a Member who is acting as a Member by virtue of being a trustee in a trust, the termination of the trust (but not merely the substitution of a new trustee);

1.4 In the case of a Member that is a separate Organization other than a corporation, the dissolution and commencement of winding up of the separate Organization;

1.5 in the case of a Member that is a corporation, the filing of a certificate of dissolution, or its equivalent, for the corporation or the revocation of its charter; or

2. Dissociation by Vote – A person shall cease to be a Member upon a majority vote of other Members, upon the happening of any of the following events:

2.1 the bankruptcy of a Member;

2.2 the attachment, levy or execution upon a Member's Membership Interest;

2.3 the Member's loss of professional license;

2.4 a finding by a Member's professional society that the Member is guilty of an ethical violation;

2.5 the Member is unable to obtain professional liability insurance coverage;

2.6. the Member is convicted of a felony.

3. Rights of Dissociating Member – In the event any Member dissociates prior to the expiration of the term:

****

3.2 If the dissociation does not cause a dissolution and winding up of the Company under Article XIII, the Member shall be entitled to an amount equal to the value of the Member's Membership Interest in the Company, to be paid within six months of the date of dissociation. Notwithstanding the forgoing, if the dissociation is other than as a result of the death or incompetence of the Member, the Company may pay the value of the Member's

Membership Interest out over a period not to exceed five years, provided the dissociating Member shall be entitled to participate as an Assignee in the Company until the value of such interest (plus interest at the Default Interest Rate) is paid in full.

3.3 The value of the Member's Membership Interest shall be determined by the Company's regular accountant based on the book value of the Company's regular accountant based on the book value of the Company's property, cash on hand and accounts receivable (less the appropriate discount for uncollectible accounts) minus all liabilities. No value shall be attributable to good will. The value of the Member's Membership Interest shall include the amount of any distributions to which the Member is entitled under the Company Agreement and the fair value of the Member's Membership Interest as of the date of dissociation based upon the Member's right to share in Distributions from the Company reduced by any damages sustained by the Company as a result of the Member's dissociation.

****

ARTICLE XIV
AMENDMENT

1. **Company Agreement May be Modified**- The Company Agreement may be modified as provided in this Article XIV (as the same may, from time to time be amended). No Member shall have any vested rights in the Company Agreement which may not be modified through an amendment to the Company Agreement.

2. **Amendment or Modification of Company Agreement** – The Company Agreement may be amended or modified from time to time only by a written instrument adopted and executed by the Members pursuant to Article VI, Section 3.1.

(Record, p.100)

On July 3, 2003 Sage obtained a business line of credit loan from Wells Fargo Bank (the Bank) under account No. 5474 6488 0066 7547 (the business line of credit).

The business line of credit was intended to serve as a back up source of liquidity for Sage if and when needed (Record, p. 27, ¶2).

Since the inception of the business line of credit, it has never been used by Sage for Company purposes (Record, p. 27, ¶3).

In October 2005, a mailing was received by Sage from the Bank which indicated that substantial funds had been borrowed under the business line of credit. Neither Sage's business manager nor any of the members other than Bushi had any knowledge of the borrowings as aforesaid prior to the receipt of the referenced notice, nor had they, in any way, consented or agreed to said borrowings (Record, p. 27, ¶4).

Following receipt of the mailing aforesaid, Sage contacted the Bank and requested information concerning borrowings under the business line of credit. The information provided by the Bank indicated that the borrowings under the business line of credit had been made by Bushi and that the funds from the borrowings had been paid over to Bushi at his authorization and request. The Bank pointed out that Bushi was a member of Sage and had been one of the authorized signatories for the business line of credit (Record, p. 27, ¶5).

Information provided by the Bank further indicated that the Bank had been instructed to forward all of the business line of credit account statements to the address of 890 Curling, Boise, Idaho, which was Bushi's address, not the address of Sage (Record, p. 27, ¶6).

The other members of Sage confronted Bushi with the information received from the Bank and demanded an explanation. Bushi acknowledged that he had personally received the funds borrowed under the business line of credit and converted those

funds for his own use. The other members of Sage demanded that Bushi immediately repay the funds which he had converted from the Company's business line of credit. Then, and on numerous subsequent occasions, Bushi promised to repay all the funds which he had converted from the Company's business line of credit, but through the date of the termination of his membership on January 30, 2006, he had failed to make such repayment. Bushi failed to repay the funds he had converted as aforesaid until June 2006, after Sage had filed a civil action against him in the District Court of the Fourth Judicial District, in and for the County of Ada under Case No. CVOC 0610585 (Record, p. 28, ¶7). A true copy of the Verified Complaint in that action is appended to the Verified Answer and Counterclaim as Exhibit "C".

Subsequent to the filing of CVOC 0610585, Bushi paid off all amounts due and owing on the line of credit. Upon receipt of payment from Bushi, Sage filed a notice of dismissal.

In addition to being an unlawful conversion of funds, the actions of Bushi as aforesaid were also a breach of the express provisions of the Operating Agreement, in particular, Article VI, Section 2.6 which provides as follows:

> "2. Two Thirds Majority – the following actions require the consent of two-thirds majority of the members: . . .
>
> 2.6. The lending of money, investment and reinvestment of the Company's funds, and receipt and holding of property of security for repayment, including, without limitation, the loaning of money to and otherwise helping members, officers, employees and agents."

None of the other members voted in favor of making any "loan" to Bushi or even had knowledge that he was converting the Company's funds to his own use. (Record, p. 32 ¶8).

On January 24, 2006, Sage served on Bushi a notice of the Meeting of Members of Sage Health Care, PLLC, signed by Defendant/Counterclaimant Novak, which provided Notice of the following.

1) An amendment to the Operating Agreement pursuant to Article XI Section 3.1;

2) Following the amendment to the Operating Agreement, the termination of the membership of a member, pursuant to the Operating Agreement as amended:

3) Continuation of the business and existence of the Company (Record, p. 33, ¶3).

On January 30, 2006, at the meeting noticed as aforesaid with all members in attendance, Bushi represented by counsel, Brian C. Larsen, pursuant to Proxy Agreement, the members voted to amend Article XI, Section 1 to add subsection 1.6 that by an affirmative vote of all but one of the members a person shall cease to be a member. As provided in the Operating Agreement, the amendment was adopted by an affirmative vote of all but one of the members, Bushi voting against the amendment (Record, p. 33, ¶4).

Following the amendment of the Operating Agreement, the members acted upon the amendment to Section 1.6 as aforesaid and voted for the mandatory dissociation of Bushi as a member of Sage and that his membership in Sage terminate immediately. This action was taken by an affirmative vote of all but one of the members, with Bushi's vote being cast against his disassociation (Record, p. 33, ¶5).

The actions of the members were taken in accordance with the express terms of the Operating Agreement and the Operating Agreement as amended, and Defendant Bushi is a signatory to the Operating Agreement (Record, p. 34, ¶6).

Article XI Section 3.3.3 of the Sage Operating Agreement provides the method for determining the value of any membership interest in Sage and was reproduced above.

The quoted section is the exclusive method used under the terms of the Operating Agreement for the determination of the value of the membership interest of a dissociating member under any circumstances and for any reason whatsoever (Record p. 34, ¶7).

In accordance with the provisions of the Operating Agreement, the Company's regular accountant calculated the amounts due to Bushi which are $5,138.30 as final payment for 2005 profits and $11,245.00 for buyout of Bushi's membership interest. The calculation amounts are fully detailed in the Affidavit of said accountant, Craig Rasmussen (Record, p. 86, Ex. 4). The Summary Judgment below confirmed this was the correct amount owed Bushi under the Agreement. Bushi takes no appeal on this issue.

Under cover of letter dated July 11, 2006, two checks in the amount of $11,245.00 and $5,138.27 were forwarded to counsel for Bushi and tendered as payment in full. True copies of the checks and the cover letter aforesaid are appended to the Verified Answer and Counterclaim as Exhibit D (Record p. 30, ¶3).

By letter dated July 18, 2006, counsel for Bushi refused tender of the amounts aforesaid and returned the checks (Record, p. 30, ¶ 4).

II.
ADDITIONAL ISSUES PRESENTED ON APPEAL

A. The District Court's Decision Granting Sage's Motion For Summary Judgment Should Be Sustained

1. The Sage Operating Agreement was Amended on January 30, 2006, In Full Compliance With the Terms of the Agreement, and the Requirements of Idaho.

2. Bushi Was Removed as a Member in Accordance With the Terms of the Sage Operating Agreement, as Amended, and in Compliance With the Terms of the Idaho Limited Liability Company Act.

3. When Bushi's Membership Was Terminated, Sage Tendered Checks for the Fair Value of His Membership, Plus All Profit Distributions Due to Him Under the Agreements Through January 31, 2006, His Date of Termination.

4. Both the Idaho Legislature and the Parties to the Operating Agreement Intended That the Provisions of the Operating Agreement Should Govern.

5. The District Court Did Not Resolve Material Factual Issues Which Were in Dispute in Favor of the Defendants. The District Court Did Not Rely on Facts Not in the Record.

6. Sage Did Not Breach Its Fiduciary Duties to Bushi.

a. Bushi breached his duties under the Operating Agreement and breached his fiduciary duty to Sage.

b. The other members of Sage acted in fulfillment of their fiduciary duties to the Company and to one another when they removed Bushi as a member.

c. Under Idaho case law, Sage's actions in compliance with the express terms of the Operating Agreement are not a breach of fiduciary duty.

d. Other jurisdictions concur, no breach of fiduciary duty occurs where the action taken is permitted under the Agreement.

e. The unreported decisions cited by Bushi are not proper precedent and are distinguishable on their facts.

B. Bushi Has Not Raised a Material Issue of Fact as to Whether Sage's Other Members Breached Their Fiduciary Duties.

C. Sage Did Not Breach Its Covenant of Good Faith and Fair Dealing.

D. Sage Asked for Attorneys Fees under I.C. 12-120(3) as a Prevailing Party in a Commercial Transaction.

E. Bushi Had an Opportunity to Oppose an Award of Attorney's Fees Under 12-120(3), Made His Argument and Lost.

F. The Attorney's Fees and Discretionary Costs Awarded by the Court Below Were Within the Court's Sound Discretion.

G. Bushi's Oppositions to Sage's Fee Application Did Not Comply with Court Rules and Bushi Cannot Cure Those Deficiencies by "Arguments" presented in the Appellant's Brief.

H. Sage is entitled to Attorney's Fees on Appeal as a Prevailing Party in a Commercial Transaction Pursuant to I.C. 12-120(3) and IAR 41.

III.
ARGUMENT

A. The District Court's Decision Granting Sage's Motion For Summary Judgment Should Be Sustained

1. The Sage Operating Agreement was Amended on January 30, 2006, In Full Compliance With the Terms of the Agreement, and the Requirements of Idaho Law.

Sage Health Care, PLLC is an Idaho limited liability company, organized under the provisions of the Idaho Limited Liability Company Act, I.C. §§ 53-601 et seq.

I.C. §§ 53-623(2) provides that an operating agreement may include written provision for amendment of the operating agreement by less than a unanimous vote:

"...Unless otherwise provided in writing in an operating agreement, the affirmative vote, approval or consent of all members shall be required to: (a) Amend a written operating agreement..." (emphasis added)

The Operating Agreement adopted by Sage Health Care's Members provides a method to amend. Two separate provisions address the amendment procedure – Articles VI, Section 3.1 and XIV, Section 1 and 2 which read as follows:

ARTICLE VI
RIGHTS AND DUTIES OF MEMBERS

****

3. Unanimous Minus One – The following actions require the consent of all but one of the Members:

3.1 *any amendment* to this Company agreement;

ARTICLE XIV
AMENDMENT

1. **Company Agreement May be Modified** - The Company Agreement may be modified as provided in this Article XIV (as the same may, from time to time be amended). No Member shall have any vested rights in the Company Agreement which may not be modified through an amendment to the Company Agreement.

2. **Amendment or Modification of Company Agreement** – The Company Agreement may be amended or modified from time to time only by a written instrument adopted and executed by the Members pursuant to Article VI, Section 3.1.

(Record, pp. 48, 56)

On January 24, 2006, Sage served on Bushi a notice of the Meeting of Members of Sage Health Care, PLLC, signed by Defendant/Counterclaimant Novak, which provided Notice of the following.

4) An amendment to the Operating Agreement pursuant to Article XI Section 3.1;

5) Following the amendment to the Operating Agreement, the termination of the membership of a member, pursuant to the Operating Agreement as amended;

6) Continuation of the business and existence of the Company.

On January 30, 2006 at the meeting, noticed as aforesaid with all members in attendance, Bushi represented by counsel, Brian C. Larsen, pursuant to Proxy Agreement, the members voted to amend Article XI, Section 1 to add subsection 1.6 that by an affirmative vote of all but one of the members a person shall cease to be a member. As provided in the Operating Agreement, the amendment was adopted by an affirmative vote of all but one of the members, Bushi voting against the amendment.

2. Bushi Was Removed as a Member in Accordance With the Terms of the Sage Operating Agreement, as Amended, and in Compliance With the Terms of the Idaho Limited Liability Company Act.

Following the amendment of the Operating Agreement, the members acted upon the amendment to Section 1.6 as aforesaid and voted for the mandatory dissociation of Bushi as a member of Sage and that his membership in Sage terminate immediately. This action was taken by an affirmative vote of all but one of the members, with Bushi's vote being cast against his disassociation.

The actions of the members of the aforesaid were taken in full compliance with the express terms of the Operating Agreement and the Operating Agreement as amended and Defendant Bushi as a signatory to the Operating Agreement is bound by those actions.

This action was taken in compliance with the provisions of I.C. §53-641:

> "**Events of dissociation-**(1) A person ceases to be a member of a limited liability company upon occurrence of one (1) or more of the following events: ...
>
> (c) The member is removed as a member;
>
> (i) In accordance with an operating agreement..."

3. When Bushi's Membership Was Terminated, Sage Tendered Checks for the Fair Value of His Membership, Plus All Profit Distributions Due to Him Under the Agreements Through January 31, 2006, His Date of Termination.

Idaho Code §53-630 authorizes inclusion in an operating agreement of provisions for payment for a member's interest upon removal of a member:

Idaho Limited Liability Company Act I.C. §§53-601 *et seq.*

Distributions on an event of dissociation.- Unless otherwise provided in writing in an operating agreement, if a member dissociates from a limited

liability company without resulting in a dissolution under section 53-642, Idaho Code;

(1) And if the member is removed as a member pursuant to section 53-641(c), Idaho Code[1], then the member shall receive within a reasonable time after dissociation the fair value of the member's interest in the limited liability company as of the date of dissociation limited liability company as if the limited liability company were wound up as of that date;

(Emphasis added)

Article XI Section 3.3.3 of the Sage Operating Agreement provides the method for determining the value of Bushi's membership interest in Sage. It provides in part as follows:

3.3.3 The value of the Member's Membership Interest shall be determined by the Company's regular accountant based on the book value of the Company's property, cash on hand and accounts receivable (less an appropriate discount for uncollectible accounts) minus all liabilities. No value shall be attributed to good will. The value of the Member's Membership Interest shall include the amount of any Distributions to which the Member is entitled under the Company Agreement and the fair value of the Member's Membership Interest on the date of dissociation based upon the Member's right to share in Distributions from the Company reduced by any damages sustained by the Company as a result of the Member's dissociation.

The above quoted section is the exclusive method used under the terms of the Operating Agreement for the determination of the value of the Membership interest of a dissociating member under any circumstances and for any reason whatsoever.

The company tendered checks to Bushi for the full amount owed under the terms of the agreements (Record pp. 30, 72, 73 and 74). The District Court held that Sage had properly determined the amounts due Bushi for his member's interest and his profit

[1] I.C. §53-641(c) provides, in pertinent part:
"...(1) a person ceases to be a member of a limited liability company upon the occurrence of one (1) or more of the following events: ...
(c) the member is removed as a member::
(i) in accordance with an operating agreement..."

distribution through his date of termination, January 31, 2006 (Record, p. 115). Bushi has not appealed on this issue (Appellants Brief, p. 9).

4. Both the Idaho Legislature and the Parties to the Operating Agreement Intended That the Provisions of the Operating Agreement Should Govern.

The Idaho Legislature has spoken as follows:

> "(1) It is intended that the provisions of this chapter (the Limited Liability Company Act) give maximum effect to the principal of freedom of contract and to the enforceability of Operating Agreements.
>
> (2) Unless displaced by particular provisions of this chapter, the principles of law and equity supplement the provisions of this chapter."

I.C. § 53-668.

The District Court correctly obeyed this legislative mandate (Record p. 107).

In the Operating Agreement, the parties agreed as follows:

> "2. **Agreement** – For and in consideration of the mutual covenants herein contained and for other good and valuable consideration, the receipt and sufficiency of which is hereby acknowledged, the Members executing the Company Agreement hereby agree to the terms and conditions of the Company Agreement, as it may from time to time be amended according to its terms. It is the express intention of the Members that the Company Agreement shall be the sole source of agreement of the parties, and, except to the extent a provision of the Company Agreement expressly incorporates federal income tax rules by reference to sections of the Code or Regulations or is expressly prohibited or ineffective under the Act, the Company Agreement shall govern, even when inconsistent with, or different than, the provisions of the Act or any other law or rule. To the extent any provision of the Company Agreement is prohibited or ineffective under the Act, the Company Agreement shall be considered amended to the smallest degree possible in order to make the

> agreement effective under the Act. In the event the Act is subsequently amended or interpreted in such a way to make any provision of the Company Agreement that was formerly invalid valid, such provision shall be considered to be valid from the effective date of such interpretation or amendment."

Operating Agreement, Article II (Record p. 45) (Emphasis Added).

> 1. **Company Agreement may be Modified** – The Company Agreement may be modified as provided in this Article XIV (as the same may, from time to time be amended). No Member shall have any vested rights in the Company Agreement which may not be modified through an amendment to the Company Agreement.

Operating Agreement, Article XIV (Record p. 56). (Emphasis Added.)

The District Court correctly took cognizance of the Operating Agreement and enforced its terms in granting summary judgment (Record p. 106).

Bushi now asks you to ignore the Idaho Legislature, ignore the plain language of the Operating Agreement and consider a conflicting "fiduciary duty" argument which he advances. Bushi is arguing that he has a vested right which may not be modified through an amendment to the Company Agreement. Exactly the opposite of what the Agreement says. We suggest he is clutching at straws.

5. The District Court Did Not Resolve Material Factual Issues Which Were in Dispute in Favor of the Defendants or Rely on Facts Not in the Record.

The "Factual Issues" referenced in this section of Bushi's brief were not considered by the District Court in granting summary judgment to Sage.

> "Given the Operating Agreement language, the Members' reasons for disassociation are irrelevant to this decision."

Order Granting Summary Judgment p. 14, n. 15 (Record p. 109)

At Page 10 of Bushi's brief, Bushi alleges that he was kicked out of the company because he was "dating" a nurse practitioner employed by the Company and he had formed a business affiliation with a competing group of psychiatrists. He characterizes these as "stated reasons for wanting to disassociate". No doubt the other members complained about these two items and their complaints are reflected in the record. Why wouldn't they complaint? Anyone would.

However, the minutes of the meeting where Bushi's membership was terminated do not state the reasons. But, those reasons are clearly demonstrated by the attendant circumstances. The fact is that Bushi was not content with "dating" a Company employee and working for a rival psychiatric group which competed with Sage for hospital contracts. The final insult was his conversion of $61,000 in Company funds to his own use.

It is an unsavory prospect to accuse a prominent doctor and long-time business associate of embezzlement. No such accusation has been made by the defendants in this action. Rather, they have characterized Bushi's pirating of Company credit as a "conversion". This is consistent throughout the pleadings both in the action here and in the previous action which defendants filed to get their money back. No good deed goes unpunished.

At Page 10 of Bushi's brief, he claims "Dr. Bushi's use of the line of credit was not an act of conversion, instead it was simply a matter of Dr. Bushi's misunderstanding of the name under which the line of credit had been opened." The citing reference is to Bushi's own affidavit, ¶ 32, where he makes a self-serving statement as follows:

> ". . .We also discussed how I could immediately pay back the Wells Fargo business line of credit which was mistakenly activated by the bank when I though it was my own personal line of credit."

This, by the way, is the only place in the record in which Bushi addresses in any way the proofs of the defendants concerning his conversion of Company funds through use of the Wells Fargo line of credit.

Bushi's denial that his pirating of Company funds constitutes a conversion is made without citation to legal authority. Legal authority indicates exactly the opposite.

> ". . .to create liability for conversion it is not necessary that the actor intends to commit a trespass or a conversion; and the actor may be liable where he has in fact exercised dominion or control, although he may be quite unaware of the existence of the rights to which he interferes.

Wiseman v. Schaffer, 115 Id 537, 541 (Ct. App. 1989).

Correctly stated, Bushi does not deny committing conversion. Actually, he denies committing embezzlement. Embezzlement occurs when a person who has lawful possession of the property of another, with fraudulent intent, appropriates the property to his own use. *State v. Stricklin*, 136 Id 264, 269 (Ct. of App. 2001). Bushi's only statement on the issue, as quoted above, was a denial of embezzlement. He had not been accused of embezzlement by the defendants and the court below did not find him guilty of embezzlement, notwithstanding whether an embezzlement had actually occurred. That was not before the Court.

Next, Bushi makes the outrageous allegation that the litany of his sins in connection with the Company line of credit "are contained only in the first count of Appellee's counterclaim which has been dismissed." (Appellant's Brief, p. 11)

(Emphasis added.) In fact, the Verified Answer and Counterclaim unequivocally states these allegations in the Third Separate Defense (Record p.p. 26 ff), they are reiterated in the Fourth Separate Defense (Record p. 28) and the Fifth Separate Defense (Record p. 29) and in the Second Count of the Counterclaim, paragraph 1 (Record p. 33). The Order of the Court to which Bushi refers provides, in pertinent part, "The first cause of action of the counterclaim is hereby dismissed". (Record p. 91). The Order does not dismiss the Third Separate Defense, Fourth Separate Defense, Fifth Separate Defense and Second Count of the Counterclaim. Here, I.R.C.P. Rule 3.3(a)(1) is implicated. We will expect Bushi's counsel to respond in his reply brief.

Bushi next contends (Appellant's Brief, p.11) that "The District Court's view of the case was tainted by the allegations of conversion." Of course, these weren't allegations, they are facts which are uncontested in the Record:

> THIRD SEPARATE DEFENSE
> Breach Of Contract By Bushi.
>
> 1. At all times relevant prior to January 30, 2006, Bushi was a member of Defendant Sage, a signatory to the Operating Agreement, (Exhibit A) and was bound by the terms and conditions of the Operating Agreement.
>
> 2. In July 3, 2003 Sage obtained a business line of credit loan from Wells Fargo Bank (the Bank) under account No. 5474 6488 0066 7547 (the business line of credit). The business line of credit was intended to serve as a back up source of liquidity for Sage if and when needed.
>
> 3. Since the inception of the business line of credit it has never been used by Sage for Company purposes.
>
> 4. In October, 2005, a mailing was received by Sage from the Bank which indicated that substantial funds had been borrowed under the business line of credit. Neither Sage's business manager nor any of the members

other than Bushi had any knowledge of the borrowings as aforesaid prior to the receipt of the referenced notice nor had they in any way consented or agreed to said borrowings.

5. Following receipt of the mailing aforesaid, Sage contacted the Bank and requested information concerning borrowings under the business line of credit. The information provided by the Bank indicated that the borrowings under the business line of credit had been made by Bushi and that the funds received by the borrowings had been paid over to Bushi on his authorization and request. The Bank pointed out that Bushi was a member of Sage and had been one of the authorized signatories for the business line of credit.

6. Information provided by the Bank further indicated that the Bank had been instructed to forward all the business line of credit account statements to the address of 890 Curling, Boise, Idaho which was Bushi's address, not the address of Sage.

7. The other members of Sage confronted Bushi with the information received from the bank and demanded an explanation. Bushi acknowledged that he had personally received the funds borrowed under the business line of credit and converted those funds for his own use. The other members of Sage demanded that Bushi immediately repay the funds which he had converted from his line of credit. Then, and on numerous subsequent occasions, Bushi promised to pay all the funds which he had converted from the business line of credit, but through the date of the termination of his membership on January 30,2006, he had failed to make such payment. Bushi failed to repay the funds he had converted as aforesaid until June 2006, after Sage had filed a civil action against him in the District Court of the Fourth Judicial District, in and for the County of Ada under Case No. CVOC 0610585. A true copy of the Verified Complaint in that action is appended hereto as Exhibit C and incorporated herein by reference.

5. [sic] In addition to being an unlawful conversion of funds, the actions of Bushi as aforesaid were also a breach of the express provisions of the Operating Agreement (Exhibit A), in particular, Article VI, Section 2.6 which provides as follows:

> "2. Two Thirds Majority – the following actions require the consent of two-thirds majority of the members: . . .
>
> 2.6. The lending of money, investment and reinvestment of the Company's funds, and receipt and holding of property of security for repayment, including, without limitation, the loaning of money to and otherwise helping members, officers, employees and agents."
>
> As noted aforesaid, none of the other members voted in favor of making any "loan" to Bushi or even had knowledge that he was converting the Company's funds to his own use. *See, Camp v. Jiminez*, 107 Idaho 878 (Ct. App. 1984).

Finally, Bushi complains because his conversion of Company funds was not a stated ground for removal of the Operating Agreement, so it was necessary for the other members to amend the Operating Agreement to allow termination of his membership. In other words, Bushi had breached the Operating Agreement and breached his fiduciary duty to the Company and the other members, but should be allowed to get away with it because there was no specific punishment provided in the Operating Agreement. Of course the Operating Agreement did provide express provisions which allowed the other members to amend it. It is hard to understand how the amendment of the Operating Agreement to add a provision which permitted termination of Bushi's membership violated any legal standard. No real explanation has ever been provided by Bushi.

6. Sage Did Not Breach Its Fiduciary Duties to Bushi

a. Bushi Breached His Duties Under the Operating Agreement and His Fiduciary Duty to the Company

An amendment under the Operating Agreement to allow Bushi's elimination for breaching the Agreement does not constitute a breach of fiduciary duty. The Virginia Supreme Court articulates this legal principle in a recent decision, *Gowin v. Granite*

Depot, LLC., 272 Va., 246, 634 S.E.2d 714 (2006). There the court held that the majority member did not breach his fiduciary duty to the limited liability company by amending the articles of organization to allow elimination of a member for nonpayment of his capital contribution. 634 S.E.2d at 722. In performing this analysis, the Court noted "Whether an act constitutes a breach of fiduciary duty will depend on the circumstances of each case." *Id.* In the Virginia case, the complaining member had an obligation to put the money into the company and he did not. In our case, Bushi had an obligation not to take the money out and he did. Both ways, the Company was short of the money, both ways, amending the Operating Agreement to address the problem was not a breach of fiduciary duty.

Bushi converted $61,000 in Company funds to his own use and used them to pay personal expenses. In *Purcell v. Southern Hill Investments, LLC,* 847 N.E.2d 1991 (Ind. App., 2006), the Court held that *Purcell* breached his fiduciary duty when he used Company funds to repay a personal loan without the knowledge or consent of the other members. *Id. at p. 999.*

b. The Other Members of Sage Acted in Fulfillment of Their Fiduciary Duties to the Company and One Another When They Removed Bushi As a Member

Fiduciary duties do not run in one direction only. Bushi conveniently chooses to ignore the fiduciary duties which Bushi owed to Sage and the other members. Bushi also chose to ignore the fiduciary duties which other Sage members owe to one another and to the Company. This leads to some very interesting questions. When the other Sage members voted, was their only obligation to preserve the economic interests of Bushi? We suggest not. Rather, their true fiduciary duties lay in preserving interests of the

Company and each of them was obligated to preserve the interests of the other two members. In fact, a failure to remove Bushi, given his established and undisputed course of conduct, would have been a breach of fiduciary duty by each member of Sage of the fiduciary duty owed to the other members (other than Bushi) and to the Company itself. How could one possibly justify keeping as a member a person who had converted Company funds to his own use, apparently acted to conceal that conversion, and failed to reimburse the funds when notified? If no action had been taken, then perhaps Kent could have sued Novak, Novak could have sued Kent, both of them could have sued Negron and vice versa. These would have been much better causes of action than the one that Bushi now brings.

c. Under Idaho Case Law Sage's Actions in Compliance with the Express Terms of the Operating Agreement Are NOT a Breach of Fiduciary Duty.

Existing Idaho case law follows this rule - Bushi has failed to mention the one Idaho decision which is clearly on point, *Tolley v. THI Co.*, 140 Idaho 253, 92 P.3d 513 (2004). That case holds squarely against Bushi. Tolley was a shareholder in the defendant family corporation as a result of shares transferred to her in a divorce. The stock was subject to a stock purchase and redemption agreement executed by Tolley's former spouse. At the time he signed the agreement, Tolley signed a spousal's consent to be bound by the terms of the agreement. The divorce settlement agreement between Tolley and her spouse clearly contemplated that she would be paid for the stock by the corporation. However, the stockholder agreement gave the corporation the right, but not the obligation, to purchase the stock. The corporation refused to purchase the stock. Tolley contended that this was a breach of a fiduciary duty owed to her by the

corporation. The court held that even though *Tolley* was a shareholder, and the corporation's refusal resulted in frustration of her reasonable economic expectation, since the corporation was acting in accordance with the terms of the shareholders' agreement, there was no breach of fiduciary duty. 140 Idaho at 261.

Our case presents the other side of the same coin which the court examined in *Tolley*. In *Tolley*, the corporation relied on the provision of the shareholder's agreement and refused to purchase the stock. In our case, the company (Sage) is exercising its right under the agreement to buy Bushi's interest. In both instances, we are dealing with the contractual rights of the company/corporation to buy or not to buy the interests of a minority owner. Sage respectfully submits that the holding in *Tolley* governs in this case.

d. Other Jurisdictions Concur, No Breach of Fiduciary Duty Occurs Where the Action Taken is Permitted Under the Agreement.

In *Bishop of Victoria Corp. Sole v. Corporate Business Park, LLC,* 138 Wash. App. 443, 158, P.3d 1183 (App. Div. 2, 2007), the Court held that *Bishop of Victoria* had not breached his fiduciary duty because it had acted in compliance with the express terms of the Operating Agreement. The company was owned by Joseph Finley and the Bishop of Victor Corp. Sole (BV). Finley had approached BV with an idea for an investment opportunity proposing that he and BV purchase a parcel of land in Lacey, Washington, with the intention of reselling it at a substantial profit. Finley agreed to contribute his labor and expertise and BV agreed to contribute financially. There was no evidence presented that either party's obligation to contribute was quantified. 158 P.3d 1186. After the passage of several years, the property had not been sold. Each party suspected the others motives. BV took the perspective that Finley had no personal

interest in selling the property unless he could sell it for a premium price that might never be available. Finley accused BV of wanting to sell the property for pennies on the dollar so it could withdraw for what it considered to be a bad investment. *Id. at p. 1187.* At that point in time, the company's property was already substantially mortgaged and the company had no additional funds. BV refused to make any further mortgage payments and the mortgage on the property was foreclosed. BV subsequently found a buyer for the property in an amount sufficient to pay off the mortgage debts owed by the company. Finley claimed that BV had breached its fiduciary duty when it refused to continue making the mortgage payments on the property and when it had located a purchaser for the property in an amount sufficient to pay off the mortgage debt. Finley's expectation of future profit on resale of the property was thwarted. However, the court held that, as a matter of law, BV had not breached any fiduciary duties owed to Finley because BV had always acted in compliance with the terms and conditions of the agreements between the parties. Thus, a frustrated expectation of future profit is not a strong enough hook to support a claim of breach of fiduciary duty where the party charged has acted in accordance with the requirements of the agreements between the parties. *Id. at 1192.*

In *McConnell v. Hunt Sports Enterprises*, 132 Ohio App.3d 657, 725 N.E.2d 1193, Ohio App. 10 Dist. (1999), the court held that there had been no breach of fiduciary duty because the Operating Agreement permitted the action taken. Under the Operating Agreement, the members were not prohibited from engaging in a venture that was competitive with the company's investing in an operating agreement in a national hockey league franchise. Thus, there was no violation of fiduciary duty. 725 N.E.2d at 1206, 1207. Likewise, in *Ledford v. Smith*, 274 Ga. App. 714, 618 S.E.2d 627 (Ga. App.

2005), the Court held that the defendant had not breached his fiduciary duty because the actions he had taken were permitted under the operating agreement. 618 S.E.2d at 636. In so holding, the court noted, any fiduciary duties that a member of a limited liability company has may be modified or eliminated (with a few exceptions) by the operating agreement. The exceptions were stated in the Georgia, LLC, statutes. *Id.* These three cases all deal with a conflict of interest, a seizure by a member of an economic opportunity which might otherwise have belonged to the company. Absent an operating agreement, there are many decisions which would characterize these types of conduct as breaches of fiduciary duty, but if done in accordance with the provisions of an operating agreement, they are not.

Ironically, Bushi is guilty of conduct in this same category – he acknowledges that he went to work with a psychiatric group that competes with Sage for hospital contracts. However, he claims the shelter of the Operating Agreement. In other words, he gets the shelter of the Agreement, but the defendants do not. What is sauce for the goose is sauce for the gander.

e. The Unreported Decisions Cited by Bushi are Not Proper Precedent and are Distinguishable on Their Facts.

At Page 21 of Appellant's Brief, he claims, incorrectly, that other jurisdictions have found a breach of fiduciary duty under "similar circumstances". As authority, he relies on two unreported decisions which are not a proper citation of authority for a brief before the Idaho Supreme Court. *See* I. S.Ct. Op.R. 15(f).

The first unreported case which Bushi relies on was *Anderson v. Wilder*, 2003 Westlaw 22768666 (Tenn. Ct. App. Nov. 21, 2003). This case illustrates the peril of

reliance upon unreported decisions. It holds contrary to reported Tennessee case precedent. The reported decision of *McGee v. Best*, 106 S.W.3d 48 (Tenn. Ct. App. 2002) held, based on the plain language of the Tennessee LLC statute, that a member of a Tennessee LLC owed a fiduciary duty only to the company, not to the other members. *Id. at pp. 63, 64.* Secondly, *Anderson* is easily distinguished from the case at hand on its facts. In *Anderson* there was no indication of wrongful conduct by the member who was removed. Further, in *Anderson*, the other members turned around and sold the removed members' interest for a tidy profit one month later – clear evidence of a wrongful motive. In our case there is no evidence of a wrongful motive by the defendant members, merely Bushi's speculation and conjecture about their motive, none of which is admissible evidence.

Bushi's second unreported case, *Zulawski v. Taylor*, 2005 Westlaw 3823584 (N.Y. Supp.) is also easily distinguished on its facts. In that case, there was no indication of wrongful conduct by *Zulawski*. The stated facts indicated *Zulawski* was the owner of an interior decorating business which was stolen from him by an investor who made him sign documents under duress. These facts are easily distinguished from the case at hand. Under New York law, the question of whether a fiduciary relationship exists between parties is necessarily fact specific to a particular case. *Weiner v. Lazard Everest Co.*, 241 A.D.2d 114, 122 (1st App. Dept. 1998).

B. Bushi has not Raised a Material Issue of Fact as to Whether Sage's Other Members Breached Their Fiduciary Duties.

In this section of Bushi's brief, he raises a debate about the reasons motivating the other members when they terminated his membership. But the District Court said:

"Given the Operating Agreement language, the Members' reasons for dissociation are irrelevant to this decision." Order Granting Summary Judgment, p. 14, l. 15 (Record p. 109) Further, Bushi relies on conclusory assertion unsupported by specific facts.

"...conclusory assertions unsupported by specific facts are insufficient to raise a genuine issue of material fact precluding summary judgment. *Goodman v. Lathrop*, 143 Idaho 622, 627 (2007) citing, *State v. Shama Res. Ltd. P'ship,* 127 Idaho 267, 271 (1995); *Nanney v Linella, Inc.*, 130 Idaho 477, 480 (Ct. App. 1997).

We have all enjoyed the performances of magicians -- "Magic"-- now you see it, now you don't, primarily through the use of distraction. You look at the magician's waving hand while his other hand disappears in the fold of his cape to produce the rabbit. This is the tactic which Bushi is now attempting. A tactic of distraction. Bushi spends pages and pages of argument on an abstract discussion on the concept of fiduciary duty and an urging that Idaho courts should apply fiduciary duty standards to the members of limited liability companies. The hand waves once.

The second wave of the hand consists of a lengthy discussion of Bushi's personal economic expectations and some uncorroborated conjecture about why the other members wanted to remove him. As noted above, he knows why, he is just trying to distract the Court. Certainly, the other members of Sage had plenty of complaints against Bushi, but it is clear what broke the camel's back. It was a very large straw indeed - $61,000 worth.

In all these arguments about fiduciary duty, Bushi has cited no precedent, no legal authority whatsoever, which would support on a factual basis that the actions taken by the other members of Sage really constitute a breach of fiduciary duty. Respondents have

attempted to supply correct legal authority to the Court. We hope that the Court notices the differences in these arguments.

Bushi's other transgressions were not the straw that broke the camel's back, however, he is quite free in misrepresenting the facts surrounding them. At Page 18 of Appellant's Brief, Bushi says "Appellees informed Dr. Bushi that they wanted him out as a member of Sage because he was dating a nurse practitioner. *See* Record, Ex. 11, ¶ 27. First, this is only Bushi's statement about his recollection of the statement of other persons. The attachment to his Affidavit only includes an agenda that says "Discuss NP". He goes on to say "Of course, nothing in the Operating Agreement or any other agreement precludes such activity", conveniently making no reference to the potential violations of Federal law that might result from such a relationship.

Next, Appellant says "Plaintiff was obviously concerned about the future of his practice with Sage, and arranged also to become a part of another psychiatric group in November in 2005." Bushi goes on to say that Article VI, Paragraph 8 of the Operating Agreement "specifically allows a member to become associated with a competing company."

Actually, this isn't what the Agreement says:

> "A Member shall be entitled to enter into transactions that may be considered to be competitive with, or a business opportunity that may be beneficial to the Company."

This Court can see the actual agreement refers to "transactions" not to "competing company." As Bushi has previously noted, the psychiatrists in this group also had individual patients outside the group (Appellant's Brief, p. 2). The Plaintiff has mischaracterized the Agreement.

The next point, and this one spins like a tornado, is on Page 18 of Appellant's Brief where, bold and underlined, he says "Voting the Plaintiff would not be entitled to any profit sharing starting in the year 2006 due to his connection with our competitor." was a breach of fiduciary duty. Our response is, so what, it never happened. No question the other members were angry. Who would not have been angry? They spoke intemperately, but, in fact, they sent him the money. This was simply a threat and they not only did not follow through with the threat, they tendered him a check. The numbers in this case are all contained in the Affidavit of Craig Rasmussen, Ex. 4. See in particular Paragraphs 7 and 8 and Exhibit A which demonstrate that the monies tendered to Bushi included his profit participation for the first month of 2006 – the time period before he was disassociated. They offered to pay him his money. This was not a breach of fiduciary duty. He just would not take the money.

C. Sage Did Not Breach its Covenant of Good Faith and Fair Dealing.

Under Idaho law and under the law of numerous sister jurisdictions, the concepts of fiduciary duty and the concept of a covenant of good faith and fair dealing become intertwined. While Idaho has little case law on fiduciary duty, it has substantial case law on the same concept of good faith and fair dealing as applied to the law of the contracts. Here, in particular, because the Operating Agreement is so clearly an issue, these become especially relevant.

The Operating Agreement by its terms reserved a right to amend that Agreement by the vote of all of the members less one. Bushi now contends that the amendment of the Agreement, which permitted the other members to vote him out of the Company,

violates a covenant of good faith and fair dealing implicit in the Operating Agreement. However, Bushi's assertion is direct conflict with controlling case precedent.

The implied covenant of good faith and fair dealing constitutes a promise made implicit by law in every contract. *Bliss Valley Foods, Inc. v. Idaho 1st National Bank*, 121 Idaho 266, 824 P.2d at 863, citing *Burton v. Atomic Workers Federal Credit Union*, 119 Idaho 17, 803 P.2d 518 (1990). The covenant requires that the parties perform, in good faith, and a violation occurs only when either party violates, nullifies or significantly impairs any benefit of the contract. *Idaho Power Co. v. Cogeneration, Inc.*, 134 Idaho 738, 9 P.2d 1204, 1216 (2000), citing *Bliss Valley Foods*, 824 p.2d at 863. No duty will be implied which is contrary to the terms of the contract negotiated and executed by the parties. *Id.*, citing *First Security Bank of Idaho v. Gaige*, 115 Idaho 172, 765 P.2d 683, 687 (1988); *Clement v. Farmers Ins. Exchange*, 115 Idaho 298, 766 P.2d 768, 770 (1988). The duty does not arise until a contract exists and therefore cannot apply to negotiations.

Without a breach of the express terms of a contract, the Court will "necessarily conclude that there was no breach of the implied covenant." *See, Totman v. Eastern Idaho Technical College*, 129 Idaho 714, 931 P.2d 1232, 1236 (App.1997), citing *Clement*, 766 P.2d at 770; *Olson v. Idaho State University*, 125 Idaho 177, 868 P.2d 505, 510 (App.1994). "[B]y merely standing upon the terms of a contract, a party does not fail to deal honestly with another party regardless of how onerous the terms of that contract may be." *Bliss Valley Foods*, 824 P.2d at 863.

Bushi asks the Court to impose a duty of good faith and fair dealing which is contrary to express rights of the other members under the Operating Agreement. Under

Idaho law, however, "The covenant of good faith cannot override an express provision of the contract." *Independence Lead Mines Company v. Hecla Mining Company,* 143 Idaho 22, ___, 137 P.2d 409, 413(2006). "There is no basis for claiming implied terms contrary to express rights contained in the parties' agreement." "no covenant will be implied which is contrary to the terms of the contract negotiated and executed by the parties." *Id.* (citing *Idaho Power Co. v. Cogeneration, Inc.,* 134 Idaho 738, 750, 9 P.3d 1204, 1216 (2000)).

A recent decision of the Idaho Supreme Court applied this same legal principle to a contract which contained a right to amend. *Shawver v. Huckleberry Estates, LLC.*, 140 Idaho 254, 93 P.2d 685 (2004). In that case, the Shawvers agreed to purchase property governed by restrictive covenants which could be amended by written consent of seventy-five percent of the existing lot owners. At the time of contracting, they received a copy of the original covenants. Subsequently, Huckleberry filed an amendment to the covenants which increased the minimum house size required in the subdivision. The Shawvers wanted to build a smaller house. They took the position that they were bound only by the original CC & Rs, not by the subsequent amendment. *Id.* at 362. However, the Court held that the Shawvers were bound by the terms of the amended CC & Rs "Under the express provisions of the sale agreement, amendments to the existing CC & Rs could be adopted upon written consent of at least seventy-five percent of the existing lot owners. To imply that Huckleberry was obligated to perform the Sale Agreement subject only to the original recorded CC & Rs would be contrary to the terms of the contract negotiated and executed by the parties." *Id.*

The Shawvers also claimed that Huckleberry's conduct constituted a breach of good faith and fair dealing. The Court held "The implied covenant of good faith and fair dealing is a covenant implied by law in the parties' contract. (Citation Omitted.) No covenant will be implied which is contrary to the terms of the contract negotiated and executed by the parties." *Id.* Thus, the Court held that there was also no violation of the covenant of good faith and fair dealing.

The facts of *Shawver* are clearly analogous to our case. In both instances, the parties were subject to an agreement which provided by its terms that it could be amended. The agreement was subsequently amended in accordance with its terms. The Court squarely held that such an amendment did not constitute a violation of a covenant of good faith and fair dealing. Sage respectfully submits that *Shawvers* is controlling on the present case.

D. Sage Asked for Attorneys Fees under I.C. 12-120(3) as a Prevailing Party in a Commercial Transaction.

First, it should be noted that Sage is a defendant in this action. Bushi, the Plaintiff, included claims for attorney's fees under I.C. 12-120 (Record pp. 19-20). *See, Magic Lantern Productions, Inc. v. Dolsat*, 126 Idaho 805 (1993) where the court considered plaintiff's attorney fees claim under I.C. § 12-120 as a basis for awarding fees to a prevailing defendant.

Sage's Motion for Summary Judgment requested judgment "awarding attorney's fees and costs to defendant/counterclaimants in this action as a prevailing party." (Record p. 87).

Sage's Memorandum argued: "It is undisputed that the claim and causes of action in this case are a commercial dispute subject to an award of attorney's fees and costs pursuant to the provisions of I.C. § 12-120. *See* Verified Complaint, ¶ 57. In the event that this Court sees fit to grant Sage's Summary Judgment as to all claims, then Sage would be a prevailing party and entitled to such an award." (Ex. 5 at p. 11)

E. Bushi Had an Opportunity to Oppose an Award of Attorney's Fees Under 12-120(3), Made His Argument and Lost.

The Court granted summary judgment to Sage on all claims and ordered Sage to prepare an appropriate judgment.

In the proposed judgment, Sage included an award for costs and attorney fees. In response, Bushi objected and wrote as follows:

> "Idaho Code 120(3) is inapplicable because this case did not involve a commercial transaction which was both integral to the claim and constitute the basis upon which the party was attempting to recover. *See Blimka v. My Web Wholesaler*, 143 Idaho 723 (2007); *see Tolley v. Thi Co.*, 140 Idaho 253 (2004). Analogous to the facts and holding in the *Tolley* case, the instant case involved a complaint to enforce Dr. Bushi's membership rights under the Operating Agreement. The case did not arise from a "commercial transaction" between the parties. S*ee Tolley*, 140 Idaho at 262-63. Albiet the lawsuit involved limited liability company matters, this did not implicate a commercial transaction. *Id.; seeIdaho Newspaper Foundation v, City of Cascade,* 117 Idaho 422 (Ct. App. 1990). In *Tolley*, the Idaho Supreme Court provided that a commercial transaction does not arise in every instance in which a commercial relationship exists. *Id.; see Idaho Newspaper Foundation, supra,* 117 Idaho 422. Accordingly, the Court should follow this case precedent and deny any motion for award of attorneys' fees under Idaho Code 12-120(3).

Plaintiff's Objection to the Defendants' Proposed Form of Summary Judgment, p. 3 (Record pp. 114, 120)

Sage responded on August 6, 2007, and specifically addressed the reason that attorney fees are appropriate under I.C. § 12-120(3). Defendant/Counterclaimant's Reply to Plaintiff's Objection to Defendants' Proposed Form of Summary Judgment, pp. 3-5 (Record pp. 124-126). Sage analyzed each case raised by Bushi.

It is true that in the Affidavit of the Memorandum of Costs and Fees, Sage does not reference I.C. § 12-120. But there is no requirement in Rules 54(d)(5) or 54(e)(5) that such a reference be included there. Sage has always requested fees under I.C. § 12-120(3) and at oral argument, Sage argued Sage was entitled to fees because a commercial transaction was integral to the claims.

This is not like the *Bingham v. Montane Resources Associates*, 133 Idaho 420, 987 P.2d 1035 (1999). In *Bingham*, neither party ever sought attorney fees under I.C. § 45-413, the statute the trial court used to award attorney fees. The Idaho Supreme Court correctly ruled that a trial court cannot *sua sponte* award attorney fees on a basis not asserted by the parties.

In this case, both Sage and Bushi sought attorney fees under I.C. § 12-120(3). Moreover, Sage Health Care specifically asked for attorney fees based on I.C. § 12-120(3) in its Motion for Summary Judgment. Sage and Bushi specifically briefed an award under this statute, and Sage clearly articulated it wanted attorney fees at the oral argument because the commercial transaction was integral to the claims and constituted the based upon which Bushi was attempting to recover. The rationale in *Bingham* is due process. Here Bushi carefully briefed any award of attorney fees under I.C. § 12-120(3) in response to the proposed judgment. There are no due process problems. Therefore,

the District Court correctly found that Sage did assert attorney fees pursuant to I.C. § 12-120(3).

F. The Attorney's Fees and Discretionary Costs Awarded by the Court Below Were Within the Court's Sound Discretion.

At the first hearing before the Court, having observed the tactics and tendencies of Bushi's counsel, discussing scheduling, and the delays requested for discovery, Sage's counsel expressed his trepidations: "The only problem I've got is I don't want this lawsuit to assume Dickinsonian proportions." (TR 31-7). At the same hearing, Sage's counsel was saying: "And to let you know, there will be complicated issues, there will be complicated motions. We're going to have accountants and testimony and breach of fiduciary duty and breach of the covenant of good faith and it is a lot more complicated." (TR 32-24 ff).

At that point, on March 22, 2007, Sage had just filed a simple, straight forward Motion for Summary Judgment, supported by an 11 page memorandum. But Bushi's counsel made things "a lot more complicated," just as he said. Now that he has lost, and the bill comes due, he should not complain. He is hoist by his own petard.

Sage requested an award of $78,414.44 in attorney fees. Bushi contested the reasonableness of these attorney fees, arguing many of the fees were duplicative, unreasonable, and outrageous. However, in making that objection, Bushi did not identify with any particularity what he considers duplicative, unreasonable, and outrageous. More specifically, he contended as follows:

> The Defendants request for an award of attorney fees in the amount of $78,414.44 is unreasonable and outrageous. With the exception of the limited time entries for telephone conferences, Plaintiff objects to every other time entry as blatantly excessive and unreasonable. These

> time entries appear to present a case of "churning." The time and labor actually expended by an attorney is to be considered under I.R.C.P. 54(e)(3)(A), but it is also to be evaluated under a standard of reasonableness. *Daisy Manufacturing Co., Inc. v. Paintball Sports, Inc.*, 134 Idaho 259, 263, 999 P.2d 914, 918 (Ct. App. 2000). "A court is permitted to examine the reasonableness of the time and labor expended by the attorney under I.R.C.P. 54(e)(3)(A) and need not blindly accept the figures advanced by the attorney.... An attorney cannot 'spend' his time extravagantly and expect to be compensated by the party who loses at trial." *Id.; Craft Wall of Idaho, Inc. v. Stonebraker*, 108 Idaho 704, 706, 701 P.2d 324, 326 (Ct. App. 1985). Thus, a court may disallow fees that were unnecessarily and unreasonably incurred or that were the product of attorney "churning."
>
> Additionally, what has been provided as an attachment to the Memorandum of Costs and Attorney Fees completely fails to satisfy the Defendants' burden under Rule 54(e)(3). Plaintiff objects to the Defendants' use of what is either four attorneys, or three attorneys and a paralegal, on this noncomplex matter. The billings also indicate multiple duplication of work, and excessive time billed for the limited explanation of services rendered. Again, Plaintiff does not believe the Court should get to this detailed analysis, but if it does, Plaintiff challenges the time entries on Exhibit A as excessive, unreasonable, duplicative, and not necessarily incurred by counsel.

"Objection and Memorandum in Opposition to Defendants/Counterclaimants Memorandum of Costs and Attorney Fees", (Ex. Pp.7-8.) This objection is not sufficient.

Rules 54(e)(1) provides as follows: "In any civil action the court may award reasonable attorney fees, which at the discretion of the court may include paralegal fees, to the prevailing party or parties as defined in Rule 54(d)(1)(B), when provided for by any statute or contract." Determining whether the amount of an attorney fee award is reasonable is within the Court's sound discretion. *Craft Wall of Idaho, Inc. v. Stonebraker*, 108 Idaho 704, 701 P.2d 324 (Ct.App. 1985). Rule 54 provides the criteria

courts must consider in awarding attorney's fees. Rule 54(e)(3) provides that the Court should consider the specified factors in determining the amount of such fees.

In arriving at its decision, the Court applied all the required factors to determine whether the claimed fees were reasonable. The Court reviewed the submissions of the parties and the Court's opinion included detailed findings on the Rule 54(e) factors (Record, pp. 172-174).

The Court made a full review of the detailed time records submitted by Sage's counsel and made appropriate reductions:

> "With respect to the actual fees, while Bushi failed to identify what he considered "excessive, unreasonable, duplicative, and not necessarily incurred by counsel," the Court did carefully review all the fees. With respect to any fees associated with the Motion to Dismiss the Court denies those fees. The Court notes that this was not hard to do, because the billings attached to Mr. Goodrum's supplemental affidavit were very detailed and the time spent on the Motion to Dismiss was clearly delineated. The Court also removed one item for reading a law review article on LLC freeze outs. The rest of the time and labor was reasonable. It was not all related to the summary judgment motion. A significant amount of time was associated with discovery and the accounting requested by Bushi. Based on the Court's review the Court finds that the amount of $73,233.19 is fair and reasonable.
>
> The Court, in an exercise of discretion, therefore awards Sage Health Care $73,233.19 in reasonable attorney fees."

(Record, p. 174)

Sage also moved for an award of discretionary costs, for postage, facsimiles and photocopies in the amount of $196.54, pursuant to I.R.C.P. 54(d)(1)(D). Sage also asked the Court to grant it $5,665.00 in discretionary costs associated with the accountant who

prepared a number of the exhibits filed in support of summary judgment and made the accounting requested by Bushi. Rule 54(d)(1)(D) provides:

> Additional items of cost not enumerated in, or in an amount in excess of that listed in subparagraph (C) ["Costs as a Matter of Right"], may be allowed upon a showing that said costs were necessary and exceptional costs reasonably incurred, and should in the interest of justice be assessed against the adverse party. The trial court, in ruling upon objections to such discretionary costs contained in the memorandum of costs, shall make express findings as to why such specific item of discretionary cost should or should not be allowed.

The Court recognized this issue as one of discretion. (Record, p. 175)

The Court found postage, facsimile and photocopying costs were not "exceptional" costs as contemplated by the Rule and did not allow them (Record, p.175)

However, the Court acknowledged that with respect to the accountant's fees, the Idaho Supreme Court has expressly rejected the argument that expert witness fees are never "exceptional" under Rule 54(d)(1)(D). *See Richard J. and Esther E. Wooley Trust v. DeBest Pluming, Inc.*, 133 Idaho 180, 186-87, 983 P.2d 834, 840-41 (1999). The Idaho Supreme Court and the Court of Appeals, on a number of occasions, affirmed an award of discretionary costs for the expense of expert witness fees. *See Wooley Trust*, 133 Idaho at 187, 983 P.2d at 841; *Zimmerman v Volkswagen of America, Inc.*, 128 Idaho 851, 858, 920 P.2d 67, 74 (1996); *Beale v. Speck*, 127 Idaho 521, 537, 903 P.2d 110, 126 (Ct. App. 1995); *Bodine v. Bodine*, 114 Idaho 163, 167-68, 754 P.2d 1200, 1204-05 (Ct. App. 1988) (affirming an award to an accountant).

The Court found that this case involved the involuntary separation of one member from a limited liability company where that member (Bushi) specifically questioned the

amount he was owed under the Operating Agreement and specifically pled a claim for an equitable accounting in his complaint. The Court found that the legal and factual issues raised by Bushi turned directly on the value of his membership and how that value would be determined. Therefore, an expert accountant's testimony was, by necessity, an expense incurred in response to the issues presented and was an exceptional cost, reasonably incurred.

Therefore, in an exercise of discretion, the Court granted discretionary costs to Sage in the amount of $5,665.00 (Record, p. 175).

G. Bushi's Oppositions to Sage's Fee Application Did Not Comply with Court Rules and Bushi Cannot Cure Those Deficiencies by "Arguments" presented in the Appellant's Brief.

In the District Court's Order granting Sage's Motion for Attorneys Fees, the District Court pointed out "Bushi does not identify with any particularity what he considers duplicative, unreasonable and outrageous (fees)" (Record, p. 170). Then again the District Court noted: "With respect to the actual fees, while Bushi failed to identify what he considered 'excessive, unreasonable, duplicative and not necessarily incurred by counsel,' the Court did carefully review all the fees... The Court notes that this was not hard to do, because the billings attached to Mr. Goodrum's supplemental affidavit were very detailed..." (Record, p. 174).

At oral argument, Bushi's counsel objected "to every entry other than telephone calls". (T.R. 100-8) and contended "under the Rules of Civil Procedure, no paralegal fees are awarded under Rule 54." (T.R. 100-13, 14)

> "Awards of costs and attorneys fees are governed by I.R.C.P. 54(d) and 54(e). When attorney fees are requested by a litigant, the claim fees must be included in the memorandum of costs filed with the court...An opposing

> party may object to a requests for costs and attorneys fees by filing a motion to disallow them within 14 days after the cost memorandum has been served...Rule 54(d)(6) "is designed to establish a deadline for informing the court of any objections for items claimed in the memorandum of costs" and "enable the trial court expeditiously to rule upon such objections and bring the case to a conclusion."

Nanney v. Linella, Inc., 130 Idaho 477, 481 citing *Hooper v. State*, 127 Idaho 945, 949 (Ct. App. 1995) and *Operating Engs. Local Union 370 v. Goodwin Const. Co. of Blackfoot*, 104 Idaho 83, 85 (Ct. App. 1982)

The *Nanney* decision goes on to state:

> "Also significant is I.R.C.P. 7(b)(1), which requires that motions "state with particularity the grounds therefor" and that they "set forth the relief or order sought". This requirement of particularity is "real and substantial" and good practice "demands that the basis for a motion and the relief sought shall be clearly stated" so that the other party will not suffer surprise or prejudice." *Id.* citing *Patton v. Patton*, 88 Idaho 288 (1965) and *Mason v. Tucker and Assoc. S,* 125 Idaho 429, 432 (Ct. App. 1994)

In this case, Bushi seeks to address to deficiencies in his opposition below by adding them to his Appellant's Brief. Appellants' Brief pp. 31-42. None of these specific objections were raised by Bushi in a timely fashion before the District Court. For the Court to now consider these particular objections would violate both the letter and the spirit of the Court Rules cited above. These objections were not available for the consideration of the District Court or for rebuttal by Sage. They should not be considered now. We respectfully request that they be stricken.

H. Sage is entitled to Attorney's Fees on Appeal as a Prevailing Party in a Suit the Gravamen of Which is a Commercial Transaction Pursuant to I.C. 12-120(3) and IAR 41.

Sage is entitled to recover attorneys fees incurred on appeal pursuant to I.C. § 12-120(3). The District Court previously determined that Sage was a prevailing party in this

litigation and that the gravamen of the litigation was a commercial transaction. Bushi has not appealed these aspects of the decision rendered by the Court below. Accordingly, if Sage prevails on appeal, Sage is entitled to recover attorneys fees incurred on appeal pursuant to I.C. 12-120(3) as well as costs in an amount to be determined under IAR 40 and 41. *Nanney v. Linella, Inc.*, 130 Idaho 477, 482 (Ct. App. 1997).

IV.
CONCLUSION

Sage respectfully contends that based on the facts and arguments advanced above, the summary judgment granted by the District Court should be affirmed, the award of attorney fees and costs ordered by the District Court should be affirmed, and Sage should be awarded its costs and reasonable attorney fees on appeal to be determined under IAR 40 and 41.

DATED THIS 12th day of August 2008.

MUNTHER GOODRUM SPERRY, CHARTERED

By: Forrest R. Goodrum
Forrest R. Goodrum, Attorney for Respondents

CERTIFICATE OF SERVICE

I, the undersigned, certify that on the 12th day of August 2008, I caused a true and correct copy of the foregoing RESPONDENT'S BRIEF to be forwarded to the following parties by the methods(s) listed below:

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