3-16-2008

Gray v. Tri-Way Constr. Servs. Clerk's Record v. 1 Dckt. 34666

LAW CLERK 1 of 1

IN THE

SUPREME COURT

OF THE

STATE OF IDAHO

ROBERT GRAY,

PLAINTIFF-APPELLANT,

vs.

TRI-WAY CONSTRUCTION SERVICES, INC., a Washington corporation; RAY ALLRAD, an individual; KATHY PETERSON, an individual; GARY PETERSON, an individual,

DEFENDANTS-RESPONDENTS.

Appealed from the District Court of the Fourth Judicial District of the State of Idaho, in and for ADA County

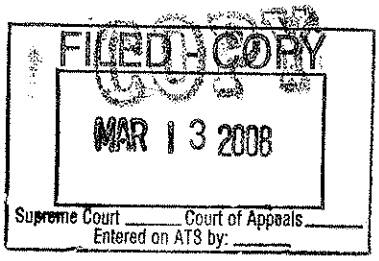
Hon CHERI C. COPSEY, *District Judge*

ERIK F. STIDHAM

Attorney for Appellant

JASON G. MURRAY

Attorney for Respondents



IN THE SUPREME COURT OF THE STATE OF IDAHO

ROBERT GRAY, Plaintiff-Appellant, vs. TRI-WAY CONSTRUCTION SERVICES, INC., a Washington corporation; RAY ALLRAD, an individual; KATHY PETERSON, an individual; GARY PETERSON, an individual, Defendants-Respondents.	Supreme Court Case No. 34666

CLERK'S RECORD ON APPEAL

Appeal from the District Court of the Fourth Judicial District, in and for the County of Ada.

HONORABLE CHERI C. COPSEY

ERIK F. STIDHAM	JASON G. MURRAY
ATTORNEY FOR APPELLANT	ATTORNEY FOR RESPONDENT
BOISE, IDAHO	BOISE, IDAHO

TABLE OF CONTENTS.....PAGE NO.

TABLE OF CONTENTS.....PAGE NO.

INDEX TO THE CLERK'S RECORD.....PAGE NO.

INDEX TO THE CLERK'S RECORD.....PAGE NO.

Fo[illegible]n Judicial District Court - Ada County

ROA Report

Case: CV-OC-2004-12362 Current Judge: Cheri C. Copsey

Robert Gray vs. Tri-way Construction Services Inc, etal.

Robert Gray vs. Tri-way Construction Services Inc, Ray Allrad, Kathy Peterson, Gary Peterson

Date	Code	User		Judge
12/2/2004	NEWC	CCCOLEMJ	New Case Filed	Cheri C. Copsey
		CCCOLEMJ	Civil Complaint, More Than $1000, No Prior Appearance	Cheri C. Copsey
	SMIS	CCCOLEMJ	Summons Issued	Cheri C. Copsey
2/14/2005	SUBC	CCMONGKJ	Substitution Of Counsel (stidham For Gray)	Cheri C. Copsey
4/7/2005	AFSV	CCEAUCCL	Affidavit Of Service And Summons (3/18/05)	Cheri C. Copsey
	MOTD	CCCARUHA	Motion To Dismiss	Cheri C. Copsey
	LODG	CCCARUHA	Lodged Memo In Support Of Motion	Cheri C. Copsey
		CCEARLJD	Civil Appearance, More Than $1000, No Prior Appearance(p Olsson For Tri-way Co.)	Cheri C. Copsey
4/11/2005	HRSC	CCGROSPS	Hearing Scheduled & Scheduling Order (05/16/2005) Cheri C. Copsey	Cheri C. Copsey
4/26/2005	ORDR	CCGROSPS	Stip And Order Re: Scheduling	Cheri C. Copsey
4/27/2005	AFFD	CCTAYSSE	Affidavit Of Erik Stidham In Support Of M Dsm	Cheri C. Copsey
4/28/2005	OPPO	CCSTACAK	Plaintiff's Opposition Tp Motion To Dismiss	Cheri C. Copsey
5/4/2005	RPLY	CCBLACJE	Def's Reply Memo In Support Of Motn To Dismis	Cheri C. Copsey
5/6/2005	NOTC	CCBLACJE	Plaintiff's Notice Of Lodgment In Support Of	Cheri C. Copsey
	CONT	CCBLACJE	Opposition To Motion To Dismiss	Cheri C. Copsey
5/12/2005	AFFD	CCBLACJE	Affidavit Of Robert Gray	Cheri C. Copsey
5/16/2005	HRHD	CCGROSPS	Hearing Held	Cheri C. Copsey
5/20/2005	ORDR	CCGROSPS	Order Denying Mtn To Dismiss	Cheri C. Copsey
5/23/2005	HRSC	CCGROSPS	Notice Of Telephonic Status (07/15/2005) Cheri C. Copsey	Cheri C. Copsey
6/7/2005	NOTS	CCEARLJD	Notice Of Service	Cheri C. Copsey
7/13/2005	ANSW	CCCHILER	Answer To Complnt (p Olsson For Tri-way)	Cheri C. Copsey
7/14/2005	STSC	CCDWONCP	Stipulation For Scheduling And Planning	Cheri C. Copsey
7/15/2005	HRVC	CCGROSPS	Hearing Vacated	Cheri C. Copsey
7/19/2005	NOTS	CCEARLJD	Notice Of Service	Cheri C. Copsey
7/20/2005	HRSC	CCGROSPS	Hearing Scheduled - Pre-trial Conference (04/27/2006) Cheri C. Copsey	Cheri C. Copsey
	JTSC	CCGROSPS	Jury Trial Scheduled - (05/08/2006) Cheri C. Copsey	Cheri C. Copsey
7/25/2005	NOTS	CCBLACJE	Notice Of Service	Cheri C. Copsey
1/6/2006	MOTN	CCAMESLC	Motion For Leave To File First Amended Compl	Cheri C. Copsey
	LODG	CCAMESLC	Lodged Memo In Support Of Motion For Leave	Cheri C. Copsey
1/20/2006	NOTC	CCWATSCL	Notice of Hearing	Cheri C. Copsey
	HRSC	CCWATSCL	Hearing Scheduled (Motion 02/21/2006 04:00 PM) Moton for Leave to File 1st Amended Complaint	Cheri C. Copsey

Robert Gray vs. Tri-way Construction Services Inc, Ray Allrad, Kathy Peterson, Gary Peterson

Date	Code	User		Judge
2/10/2006	HRVC	CCBOURPT	Hearing result for Motion held on 02/21/2006 04:00 PM: Hearing Vacated Moton for Leave to File 1st Amended Complaint	Cheri C. Copsey
	AMCO	CCBOURPT	Amended Complaint Filed and Demand for Jury Trial	Cheri C. Copsey
2/23/2006	ACCP	CCDWONCP	Acceptance Of Service (02/22/06)	Cheri C. Copsey
3/13/2006	ANSW	CCSHAPML	Answer to Complaint and Demand for Jury Trial and Counterclaim (Murray for Defendant)	Cheri C. Copsey
3/30/2006	NOTD	CCWATSCL	Notice Of Taking Deposition	Cheri C. Copsey
	NOTC	CCWOODCL	Notice Of Motion & Motion To Strike Purusant To Rules 12(F), 15(A) & 16(B), & Motion To Dismiss Pursuant To Rule 12(B)(6) & 8(A) By Robert Gray	Cheri C. Copsey
	LODG	CCWOODCL	Memorandum In Support Of Motion To Strike Purusant To Rules 12(F), 15(A) & 16(B), & Motion To Dismiss Pursuant To Rule 12(B)(6) & 8(A) By Robert Gray	Cheri C. Copsey
4/3/2006	NOTC	CCSHAPML	Notice of Hearing on Plaintiffs Motion to Strike and Motion to Dismiss Counterclaims (4/20/06 @ 3:00PM)	Cheri C. Copsey
	HRSC	CCSHAPML	Hearing Scheduled (Motion 04/20/2006 03:00 PM)	Cheri C. Copsey
4/7/2006	NOTC	CCDWONCP	Notice of Continued Deposition Duces Tecum of Robert Gray	Cheri C. Copsey
4/17/2006	NOTC	CCAMESLC	Notice of Errata Re: Missing Page in Pl. Memo in Support of Motion to Strike and Motion to Dismiss	Cheri C. Copsey
4/19/2006	LODG	CCEARLJD	Lodged Reply Memorandum in Support of Motion to Strike and Motion to Dismiss	Cheri C. Copsey
4/20/2006	HRHD	CCGROSPS	Hearing result for Motion held on 04/20/2006 03:00 PM: Hearing Held	Cheri C. Copsey
4/25/2006	ORDR	DCANDEML	Order Denying Motion to Strike and Motion to Dismiss	Cheri C. Copsey
5/2/2006	HRVC	CCGROSPS	Hearing result for Jury Trial held on 05/08/2006 09:00 AM: Hearing Vacated	Cheri C. Copsey
	HRVC	CCGROSPS	Hearing result for Pre-trial Conference held on 04/27/2006 04:30 PM: Hearing Vacated	Cheri C. Copsey
	HRSC	CCGROSPS	Hearing Scheduled (Pretrial Conference 10/19/2006 04:30 PM)	Cheri C. Copsey
	HRSC	CCGROSPS	Order Governing Proceedings and Setting Trial - Hearing Scheduled (Jury Trial 10/30/2006 09:00 AM)	Cheri C. Copsey
8/2/2006	MOTN	CCYRAGMA	Motion for Summary Judgment	Cheri C. Copsey
	MEMO	CCYRAGMA	Memorandum in Support of Def Motion for Summary Judgment	Cheri C. Copsey
	AFFD	CCYRAGMA	Affidavit of Jason G Murray in Support of Def Motion for Summary Judgment	Cheri C. Copsey

Robert Gray vs. Tri-way Construction Services Inc, Ray Allrad, Kathy Peterson, Gary Peterson

Date	Code	User		Judge
8/3/2006	MOTN	CCYRAGMA	Motion for Summary Judgment	Cheri C. Copsey
	MEMO	CCYRAGMA	Memorandum in Support of Plnt Motion for Summary Judgment	Cheri C. Copsey
	AFFD	CCYRAGMA	Affidavit of Erik F Stidham in Support of Plnt's Motion for Summary Judgment	Cheri C. Copsey
	AFFD	CCYRAGMA	Affidavit of Robert Gray in Support of Plnt Motion for Summary Judgment	Cheri C. Copsey
8/4/2006	ANSW	CCWRIGRM	Plaintiffs Answer to Tri-Way Constructions Services and Gary Petersons Counterclaim	Cheri C. Copsey
8/17/2006	NOTC	CCMAXWSL	Notice of Hearing on Motions for Summary Judgment (Sept. 23, 2006 @ 3:00pm)	Cheri C. Copsey
	HRSC	CCMAXWSL	Hearing Scheduled (Motion for Summary Judgment 09/25/2006 03:00 PM)	Cheri C. Copsey
8/18/2006	NOTC	CCGROSPS	Notice of hearing on Summary Judgment and Scheduling order	Cheri C. Copsey
8/23/2006	NOTC	CCEARLJD	Notice of Hearing on Motion for Summary Judgment (9.25.06@3pm)	Cheri C. Copsey
8/30/2006	MEMO	CCWRIGRM	Plaintiffs Memorandum in Opposition to Defendants Motion for Summary Judgment	Cheri C. Copsey
	AFFD	CCWRIGRM	Affidavit of Robert Gray	Cheri C. Copsey
	AFFD	CCWRIGRM	Affidavit of Scott E. Randolph	Cheri C. Copsey
	MEMO	MCBIEHKJ	Memorandum in Opposition to Motion for Summary Judgment	Cheri C. Copsey
	AFFD	MCBIEHKJ	Affidavit of Jason G Murphy	Cheri C. Copsey
9/13/2006	RPLY	CCWRIGRM	Robert Grays Reply Memorandum in Support of Motion	Cheri C. Copsey
9/14/2006	RPLY	CCTEELAL	Defendant's Reply Memorandum In Support Of Motion For Summary Judgment	Cheri C. Copsey
9/15/2006	NOTS	CCWRIGRM	Notice Of Service	Cheri C. Copsey
9/25/2006	HRHD	CCGROSPS	Hearing result for Motion for Summary Judgment held on 09/25/2006 03:00 PM: Hearing Held	Cheri C. Copsey
10/10/2006	NOTC	CCEARLJD	Notice of Change of Address	Cheri C. Copsey
10/11/2006	MISC	CCWRIGRM	Stipulated Briefing Schedule re Statute of Frauds	Cheri C. Copsey
10/13/2006	MEMO	CCWRIGRM	Supplemental Memorandum in Support of Defendants Motion for Summary Judgment	Cheri C. Copsey
10/17/2006	MEDI	CCGROSPS	Mediation Ordered	Cheri C. Copsey
	HRSC	CCGROSPS	Hearing Scheduled (Pretrial Conference 09/06/2007 04:30 PM)	Cheri C. Copsey
	HRSC	CCGROSPS	Order Governing Proceedings and Setting Trial - Hearing Scheduled (Jury Trial 09/17/2007 09:00 AM)	Cheri C. Copsey
10/19/2006	HRVC	CCGROSPS	Hearing result for Pretrial Conference held on 10/19/2006 04:30 PM: Hearing Vacated	Cheri C. Copsey

Robert Gray vs. Tri-way Construction Services Inc, Ray Allrad, Kathy Peterson, Gary Peterson

Date	Code	User		Judge
10/19/2006	HRVC	CCGROSPS	Hearing result for Jury Trial held on 10/30/2006 09:00 AM: Hearing Vacated	Cheri C. Copsey
11/7/2006	MOTN	MCBIEHKJ	Motion to Continue Briefing Schedule	Cheri C. Copsey
	AFFD	MCBIEHKJ	Affidavit of Erik F Stidham	Cheri C. Copsey
11/9/2006	ORDR	DCANDEML	Order on Motion to Continue Briefing Schedule re: Statute of Frauds	Cheri C. Copsey
11/13/2006	MEMO	CCTEELAL	Plaintiff's Supplemental Memorandum in Support Of Motion For Summary Judgment RE Statute Of Frauds	Cheri C. Copsey
11/27/2006	RPLY	CCWRIGRM	Reply to Plaintiffs Supplemental Memorandum re Statute of Fraud	Cheri C. Copsey
3/19/2007	STIP	CCBLACJE	Stipulation of Counsel	Cheri C. Copsey
4/17/2007	NOHG	CCWATSCL	Notice of Telephonic Status Conference	Cheri C. Copsey
	HRSC	CCWATSCL	Hearing Scheduled (Status by Phone 04/27/2007 08:30 AM)	Cheri C. Copsey
4/27/2007	HRHD	CCGROSPS	Hearing result for Status by Phone held on 04/27/2007 08:30 AM: Hearing Held	Cheri C. Copsey
5/11/2007	STIP	CCNAVATA	Stipulation re: Completion of Briefing	Cheri C. Copsey
6/5/2007	CDIS	CCGROSPS	Order Granting Motion for Summary Judgment to Tri Way	Cheri C. Copsey
6/14/2007	ORDR	CCGROSPS	Order Denying in Part and Grating In Part Gray's Motion for Summary Judgment	Cheri C. Copsey
6/28/2007	NOTC	MCBIEHKJ	Notice of Status Conference (7/17/07 @ 9 am)	Cheri C. Copsey
	HRSC	MCBIEHKJ	Hearing Scheduled (Status 07/17/2007 09:00 AM)	Cheri C. Copsey
7/3/2007	MOTN	CCDWONCP	Plaintiff's Motion for Clarification of Order Granting Motion for Summary Judgment to Tri-Way	Cheri C. Copsey
	NOTC	CCDWONCP	Notice of Hearing (07/17/07 @ 9:00 AM)	Cheri C. Copsey
7/12/2007	HRSC	CCGROSPS	Order Resetting Status Conference - Hearing Scheduled (Status 07/20/2007 01:00 PM)	Cheri C. Copsey
7/18/2007	HRHD	CCHUNTAM	Hearing result for Status held on 07/20/2007 01:00 PM: Hearing Held	Cheri C. Copsey
8/7/2007	ORDR	DCANDEML	Order Clarifying June 5, 2007 Summary Judgment Order & Correcting the Order	Cheri C. Copsey
9/6/2007	STIP	CCWRIGRM	Stipulation for Dismissal of Counterclaim with Prejudice	Cheri C. Copsey
9/10/2007	ORDR	TCWEATJB	Order Granting Stipulation for Dismissal with Prejudice	Cheri C. Copsey
	HRVC	TCWEATJB	Hearing result for Pretrial Conference held on 09/06/2007 04:30 PM: Hearing Vacated	Cheri C. Copsey
	HRVC	TCWEATJB	Hearing result for Jury Trial held on 09/17/2007 09:00 AM: Hearing Vacated	Cheri C. Copsey

Robert Gray vs. Tri-way Construction Services Inc, Ray Allrad, Kathy Peterson, Gary Peterson

Date	Code	User		Judge
9/10/2007	CDIS	TCWEATJB	Civil Disposition entered for: Allrad, Ray, Defendant; Peterson, Gary, Defendant; Peterson, Kathy, Defendant; Tri-way Construction Services Inc, Defendant; Gray, Robert, Plaintiff. order date: 9/10/2007	Cheri C. Copsey
9/12/2007	JDMT	DCANDEML	Judgment	Cheri C. Copsey
9/26/2007	MOTN	CCBOYIDR	Motion for Attorney Fees	Cheri C. Copsey
	MEMO	CCBOYIDR	Memorandum of Costs and Fees	Cheri C. Copsey
	AFFD	CCBOYIDR	Affidavit in Support of Memorandum of Costs and Fees	Cheri C. Copsey
10/15/2007	APSC	CCTHIEBJ	Appealed To The Supreme Court	Cheri C. Copsey
	STIP	CCTHIEBJ	Stipulation To Extend Deadline To Object To Motion For Attorneys Fees	Cheri C. Copsey
10/24/2007	STIP	CCBLACJE	Stipulation to Extend Deadline to Object to Motion for Atty Fees	Cheri C. Copsey
10/25/2007	OBJT	CCWRIGRM	Plaintiffs Objection to Defendants Motion for Fees and Costs	Cheri C. Copsey
11/8/2007	HRSC	CCBLACJE	Notice of Hearing Scheduled (Hearing Scheduled 11/29/2007 09:30 AM)	Cheri C. Copsey
11/29/2007	AFFD	CCBLACJE	Affidavit of Erik F. Stidham Re: Atty Fees Hearing	Cheri C. Copsey
	AFFD	CCBLACJE	Affidavit of Debra L. Jenkins Re: Atty Fees Hearing	Cheri C. Copsey
	HRHD	TCWEATJB	Hearing result for Hearing Scheduled held on 11/29/2007 09:30 AM: Hearing Held	Cheri C. Copsey
12/10/2007	REQU	CCTHIEBJ	Respondents' Request For Additions To Record	Cheri C. Copsey
	AFFD	CCTHIEBJ	Affidavit Of Jason G. Murray In Support Of Request For Additions To Record	Cheri C. Copsey
12/21/2007	ORDR	TCWEATJB	Order Granting Costs and Attorney Fees	Cheri C. Copsey
1/18/2008	AMEN	CCTHIEBJ	Amended Notice Of Appeal	Cheri C. Copsey

ORIGINAL

Erik F. Stidham, ISB #5483
STOEL RIVES LLP
101 S. Capitol Boulevard, Suite 1900
Boise, ID 83702-5958
Telephone: (208) 389-9000
Facsimile: (208) 389-9040

Attorneys for Plaintiff

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

ROBERT GRAY,

Plaintiff,

v.

DEFENDANT TRI-WAY CONSTRUCTION SERVICES, INC., a Washington Corporation,

Defendant.

Case No.: CV OC 0409193D

COMPLAINT AND DEMAND FOR JURY TRIAL

Plaintiff, Robert Gray ("Plaintiff Gray"), by and through his attorneys, Stoel Rives LLP, alleges as follows:

JURISDICTION AND PARTIES

1. At all times relevant hereto, Robert Gray was a resident of the State of Idaho, County of Ada.

2. Defendant, Defendant Tri-Way Construction Services, Inc., ("Defendant Tri-Way") is, and was at all times mentioned herein, a corporation organized and existing under the laws of the State of Washington, with its principal place of business in Vancouver, Washington.

///

JURISDICTION AND VENUE

3. This Court has jurisdiction as the amount in controversy exceeds the jurisdictional minimum of this Court.

4. Venue is properly conferred on this Court as the actions which make up the subject matter of this lawsuit took part in Ada County, Idaho.

5. On information and belief, Defendant Tri-Way has transacted business within this state as defined by I.C. § 5-514 and is therefore subject to the jurisdiction of this Court.

6. Defendant Tri-Way purposefully availed itself to this Court's jurisdiction by initiating contact with Idaho resident Plaintiff Gray regarding employment. Defendant Tri-Way's recruiting efforts and negotiating efforts were directed at Plaintiff Gray while he resided in Idaho. Among other contacts, Defendant Tri-Way directed contacts to Plaintiff Gray via email, fax and telephone while Plaintiff Gray was a resident of Idaho. Defendant Tri-Way conducted it business with Plaintiff Gray and within the State of Idaho for the purpose of realizing pecuniary benefit and for the purpose of realizing, transacting, and/or enhancing Defendant Tri-Way's business purposes and objectives. At all times relevant, Defendant Tri-Way knew that it was negotiating and contracting with an Idaho resident. Moreover, Defendant Tri-Way initiated contact with Plaintiff Gray for the purpose of obtaining certain construction contracts with Albertsons, Inc., a corporation with its principal place of business in Boise, Idaho ("Albertsons Projects").

GENERAL ALLEGATIONS

7. At all times mentioned herein Defendant Tri-Way was in the construction business, managing and serving as general contractor for commercial construction projects.

8. In April, 2004, Plaintiff Gray and Defendant Tri-Way entered into negotiations for the purpose of creating a contract of employment between said parties and for the purpose of establishing an office in Phoenix, Arizona, and securing certain Albertsons Projects for Tri-Way.

9. Pursuant to the terms of this agreement, Defendant was to employ Plaintiff as General Manager at Defendant Tri-Way, responsible for overseeing certain Defendant Tri-Way construction projects. Defendant was to provide certain company resources, including but not limited to, company employees, so that Plaintiff Gray could increase the net profits which he was to share.

10. Defendant was to compensate Plaintiff Gray at an escalating base salary as well as at an annual amount equal to 50% of the net profit realized by the Defendant's efforts. In addition, the contract provided that Plaintiff would be entitled to purchase an ownership interest in Defendant Tri-Way at a set share price agreed to by the parties.

11. Relying upon this representation and their mutual agreement, Plaintiff resigned his position at Albertsons, Inc., his former place of employment in Boise, Idaho to take employment with Tri-Way. Under the terms of the agreement, Plaintiff Gray secured two Albertsons Projects for Defendant Tri-Way, managed those projects successfully, and passed the contractor licensing exam in Arizona, all for the benefit of Defendant Tri-Way. Without the efforts of Plaintiff Gray, Defendant Tri-Way would not have secured the Albertsons Projects.

12. On or about June 1, 2004, Plaintiff moved to Arizona and began working for Defendant according to the terms of the contract. Plaintiff Gray fulfilled all of his obligations pursuant to the agreement between the parties.

13. Defendant Tri-Way failed to satisfy its obligations under the agreement. On or about September 1, 2004, Defendant Tri-Way began attempting to renegotiate certain portions of

its agreement with Plaintiff Gray. The new terms proposed by Defendant were substantially different than the existing terms originally agreed upon by the parties. The new terms proposed by Defendant adversely affected Plaintiff Gray, by and among other things, decreasing Plaintiff Gray's wages and increasing the cost of Plaintiff Gray purchasing an ownership interest in Defendant Tri-Way.

14. Plaintiff Gray refused to accept the proposed modification to the agreement. On or about October 22, 2004, Defendant sent Plaintiff an email informing him that his employment was terminated. Defendant Tri-Way failed to pay Plaintiff Gray in accordance with the agreement and failed to allow Plaintiff Gray to purchase an ownership interest in Tri-Way at the agreed upon price.

15. As a direct and proximate result of the wrongful acts and omissions of Defendant Tri-Way, Plaintiff has suffered significant economic damages, in excess of the jurisdictional limit.

16. At the time Defendant entered into the employment contract with Plaintiff Defendant knew or should have known that the representations Defendant made concerning the terms and conditions of said agreement were false. During negotiations, including but not limited to discussions taking place in March 2004, on or about April 17, 2004 and on or about June 9, 2004, Defendant Tri-Way, through Ray Allrad, Kathy Peterson and Gary Peterson, represented that Plaintiff Gray would receive 50% of certain profits and would be allowed to purchase ownership in Tri-Way at a set price. Defendant Tri-Way made these representations knowing that these representations were false. Defendant Tri-Way made these representations for the purpose of inducing Plaintiff Gray to secure the Albertsons Projects for Tri-Way and to cause Plaintiff Gray to enter an employment contract with Tri-Way.

17. Defendant knowingly concealed facts from Plaintiff regarding the terms and conditions of the parties' employment agreement and Defendant's plan to withdraw or modify the terms of said agreement after Plaintiff Gray secured the Albertsons Projects and after Plaintiff Gray took the position with Tri-Way in Phoenix, Arizona. Defendant Tri-Way never intended to compensate Plaintiff Gray as promised. Defendant Tri-Way concealed this plan from Plaintiff Gray until October 2004.

18. At all times mentioned herein Defendant intended that Plaintiff rely upon Defendant's representations and concealment of facts in order to induce Plaintiff Gray to secure the Albertsons Projects for Tri-Way and to induce Plaintiff Gray to work for Defendant.

19. Plaintiff relied, to his detriment, on the false representations made by Defendant Tri-Way and was induced to act by Tri-Way's concealment of facts. Plaintiff Gray's detriment includes, but is not limited to, quitting his existing employment, taking employment with Tri-Way, and disrupting his residence and family in Boise, Idaho so that he could perform General Manager services for Tri-Way in Phoenix, Arizona.

COUNT I

BREACH OF CONTRACT

20. Plaintiff hereby incorporates and realleges each and every preceding paragraph and incorporates the same by reference herein.

21. The terms of the employment agreement entered into by the parties, called for Plaintiff to perform the duties of General Manager for Defendant Tri-Way and, in consideration thereof, Defendant was to compensate Plaintiff according to the mutually agreed upon terms of said contract. Plaintiff performed all duties owing Defendant under the subject employment contract until Defendant breached this agreement.

22. Defendant failed to fulfill its obligations under the terms of the contract. Defendant's failure includes, but is not limited to, unilateral revocation and/or modification of material terms of the contract, including failure to compensate Plaintiff according to the agreed upon terms and failure to sell Plaintiff Gray shares of Defendant Tri-Way at the agreed upon price.

23. As a direct and proximate result of Defendant's knowing concealment of material facts, its intention for Plaintiff to rely upon Defendant's representations and concealment of facts and its failure to perform its obligations pursuant to its contract with Plaintiff, Plaintiff Robert Gray has been damaged in an amount to be proven at trial.

COUNT II

STATUTORY CLAIM FOR WAGES

24. Plaintiff hereby incorporates and realleges each and every preceding paragraph and incorporates the same by reference herein.

25. Defendant Tri-Way has failed and/or refused to pay the amount owed to Plaintiff for work pursuant to an agreement.

26. Plaintiff Gray makes claim for all wages currently due and owing, attorney fees and any other damages allowed under Idaho's wage claim statues, Idaho Code § 45-601, *et. seq.*

27. Plaintiff Gray also makes claim for prejudgment interest upon amounts owed pursuant to his wage contract under Idaho Code § 28-22-104.

COUNT III

PROMISSORY ESTOPPEL

28. Plaintiff hereby incorporates and realleges each and every preceding paragraph and incorporates the same by reference herein.

29. Defendant represented, and Plaintiff reasonably relied upon the parties' past performance and representations concerning the terms of their employment agreement. By doing so, Plaintiff suffered substantial economic detriment including, but not limited to, the loss of past and future income, owing to him pursuant to the terms of the contract.

30. Defendant foresaw or should have foreseen that Plaintiff would act in reliance upon Defendant's past practices and on Defendant's representations and that, as a result of this reliance, Plaintiff would suffer substantial economic detriment.

COUNT IV

EQUITABLE ESTOPPEL

31. Plaintiff hereby incorporates and realleges each and every preceding paragraph and incorporates the same by reference herein.

32. Defendant falsely represented to Plaintiff and/or concealed from Plaintiff, material facts essential to and part of, the terms of the parties' employment contract. Defendant intended that said representations and concealed facts would be relied upon by Plaintiff all to Plaintiff's economic detriment.

33. Plaintiff was without knowledge of Defendant's misrepresentations and concealment of material facts and thus, Plaintiff's performance of his employment obligations was based upon Defendant's misrepresentations and concealment, all to his own prejudice. As a result, Plaintiff was damaged in an amount to be proven at trial.

COUNT V

FRAUD

34. Plaintiff hereby incorporates and realleges each and every preceding paragraph and incorporates the same by reference herein.

35. Defendant made representations to and concealed information from Plaintiff regarding the terms and conditions of the parties employment agreement.

36. The representations made by Defendant were false.

37. The representations made by Defendant were material.

38. Defendant knew that such representations were false or were ignorant of the truth of such representations.

39. Defendant intended that such representations would be acted upon by Plaintiff.

40. Plaintiff was ignorant of the falsity of such representations.

41. Plaintiff relied on the truth of such representations.

42. Plaintiff had a right to rely on such representations.

43. As a direct and proximate result of his reliance upon such representations, Plaintiff suffered damages.

COUNT VI

DAMAGES

44. Plaintiff hereby incorporates and realleges each and every preceding paragraph and incorporates the same by reference herein.

45. As a direct and proximate result of Defendant's conduct complained of herein, Plaintiff has suffered the following damages:

a. Past and future loss of income, including income which Robert Gray ordinarily would have received in merit and longevity wage increases and which would be reasonably expected to be received in his normal career advancement with Defendant Tri-Way.

b. Past and future suffering of general damages, including but not limited to the following:

   i. Severe and irreparable injury to Plaintiff Gray's reputation and good standing, both occupationally and with the public generally; and

   ii. Costs associated with Plaintiff Gray taking steps to establish residency in Arizona;

c. Past wages owing pursuant to his employment contract and/or the State of Idaho's wage claim statutes;

d. For treble damages with respect to wages past due under Idaho Code § 45-615 on the basis that the wages have been fully earned by have been withheld willfully, arbitrarily and without just cause;

e. Restitution damages, including but not limited to monies obtained by Tri-Way for two Albertsons Projects wrongly obtained due to Tri-Way misrepresentations and concealments to Plaintiff Gray;

f. Past and future losses of income which Robert Gray would ordinarily have received;

g. Any further damages as may be proven;

h. Interest according to law, including prejudgment interest on all liquidated sums allowable pursuant to Idaho Code § 38-22-104;

i. Costs and attorneys' fees related to this suit under Idaho Code § 12-120 and § 12-121 and other applicable statutes; and

j. Any other and further relief that this Court considers proper.

///

REQUEST FOR ATTORNEYS' FEES

As a consequence of the complaints, causes, and claims stated herein, Plaintiff has been required to retain the law firm of Stoel Rives LLP, and has incurred and will incur costs and reasonable attorneys' fees related thereto, for which Plaintiff is entitled to under Idaho Code §§ 12-120 and 12-121, 45-615, 45-617, 38-22-104, *et. seq.*, and other comparable provisions of the laws of United States or the State of Idaho.

DEMAND FOR A JURY TRIAL IS HEREBY MADE.

DATED: December 2, 2004.

STOEL RIVES LLP

Erik F. Stidham
Attorneys for Plaintiff

Patricia M. Olsson, ISB No. 3055
Jason G. Murray, ISB No. 6172
MOFFATT, THOMAS, BARRETT, ROCK & FIELDS, CHARTERED
101 S. Capitol Blvd., 10th Floor
Post Office Box 829
Boise, Idaho 83701
Telephone (208) 345-2000
Facsimile (208) 385-5384
pmo@moffatt.com
jgm@moffatt.com
22-072

Attorneys for Defendant

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT

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

ROBERT GRAY,

Plaintiff,

vs.

TRI-WAY CONSTRUCTION SERVICES, INC., a Washington Corporation,

Defendant.

Case No. CV OC 0409193D

ANSWER TO COMPLAINT AND DEMAND FOR JURY TRIAL

COMES NOW the above-named defendant, Tri-Way Construction Services, Inc. ("Tri-Way"), by and through undersigned counsel, and for an Answer and response to plaintiff's Complaint and Demand for Jury Trial alleges as follows:

FIRST DEFENSE

Plaintiff's Complaint fails to state a claim against Tri-Way upon which relief may be granted.

SECOND DEFENSE

Tri-Way denies each and every allegation of plaintiff's Complaint not herein expressly and specifically admitted.

I.

Tri-Way admits paragraphs 2, 7 and 9 of the Complaint.

II.

With respect to the allegations set forth at paragraph 3 of the Complaint, Tri-Way admits only that the amount to which plaintiff claims he is entitled exceeds the minimum jurisdictional limits of this Court. All other allegations or inferences contained in paragraph 3 are denied.

III.

With respect to the allegations set forth at paragraph 6 of the Complaint, Tri-Way admits only that some communications between the parties occurred while plaintiff was in Idaho, and defendant knew plaintiff was, at times, living in Idaho. All other allegations or inferences in paragraph 6 are denied.

IV.

With respect to the allegations set forth at paragraph 12 of the Complaint, Tri-Way admits only that on or about June 1, 2004, plaintiff moved his residence to Arizona to begin working for Tri-Way. All other allegations or inferences contained in paragraph 12 are denied.

V.

With respect to the allegations set forth at paragraph 14 of the Complaint, Tri-Way admits only that plaintiff refused to negotiate with respect to the terms and conditions of his employment with Tri-Way. Defendant denies any remaining allegations or inferences, and specifically denies that a final agreement had been reached which defendant then sought to modify in any way. Defendant further expressly denies terminating plaintiff's employment, as plaintiff resigned from Tri-Way.

VI.

With respect to the allegations set forth at paragraph 8 of the Complaint, Tri-Way admits only that in or about April, 2004, it was engaged in discussions concerning the employment of plaintiff with Tri-Way. All other allegations which may be construed as an attempt to limit or otherwise define the scope or purpose of those discussions are hereby denied.

VII.

Defendant Tri-Way denies the allegations set forth at paragraphs 1, 4-5, 10-11, 13, and 15-45 of the Complaint.

THIRD DEFENSE

Plaintiff has waived and/or is estopped from asserting the claims set forth in the Complaint.

FOURTH DEFENSE

Plaintiff failed to mitigate the amount of his damages. The damages claimed by plaintiff could have been mitigated by due diligence on his part or by one acting under similar circumstances. Plaintiff's failure to mitigate is a bar to some or all of his recovery under the Complaint.

FIFTH DEFENSE

Plaintiff's claims are barred, either in whole or in part, because the actions complained of were undertaken in good faith and for lawful, legitimate business reasons..

SIXTH DEFENSE

The amounts plaintiff claims are due and owing for lost wages and/or benefits must be reduced and offset by any amount that the plaintiff earned or could have earned, with the exercise of reasonable diligence, during the period for which lost earnings are sought by plaintiff.

SEVENTH DEFENSE

The actions and damages alleged within plaintiff's Complaint were proximately caused, if at all, by plaintiff's own acts or omissions.

EIGHTH DEFENSE

Tri-Way has fully performed each term of the agreement between it and plaintiff, and plaintiff has received the full consideration agreed upon, and that his employment with Tri-Way was carried out in full and in accordance with the parties' agreement.

NINTH DEFENSE

Plaintiff breached the employment agreement, if any, which existed between the parties.

TENTH DEFENSE

That pursuant to Idaho Code, § 6-801, *et seq.*, plaintiff is comparatively responsible for the damages alleged in his Complaint.

ELEVENTH DEFENSE

Plaintiff has failed to state with particularity all averments of fraud as required by Idaho Rule of Civil Procedure 9(b).

TWELFTH DEFENSE

That this Court has no jurisdiction over the defendant for the reason that Tri-Way is a non-resident of Idaho and does not have sufficient minimum contacts with the forum such that exercising jurisdiction over it would violate its right to Due Process.

CAVEAT

Tri-Way, by virtue of pleading a "defense" above, does not admit that said defense is an "affirmative defense" within the meaning of applicable law, and does not thereby assume a burden of proof not otherwise imposed upon it as a matter of law. In addition, in asserting any of the above defenses, Tri-Way does not admit any fault, responsibility, liability or damage, but, to the contrary, expressly denies the same.

WHEREFORE, Tri-Way prays that:

1. Plaintiff takes nothing by his Complaint, and that the Complaint in this action be dismissed, with prejudice;

2. For its costs;

3. For its attorney fees; and

4. For such other and further relief as the Court deems proper.

DEMAND FOR JURY TRIAL

Tri-Way hereby demands a trial by jury on all issues.

DATED this 12th day of July, 2005.

MOFFATT, THOMAS, BARRETT, ROCK & FIELDS, CHARTERED

By Jason G. Murray
Jason G. Murray – Of the Firm
Attorneys for Defendant

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 12th day of July, 2005, I caused a true and correct copy of the foregoing **ANSWER TO COMPLAINT AND DEMAND FOR JURY TRIAL** to be served by the method indicated below, and addressed to the following:

Erik F. Stidham
GREENER BANDUCCI SHOEMAKER, P.A.
815 West Washington Street
Boise, Idaho 83702
Facsimile (208) 319-2601

(✓) U.S. Mail, Postage Prepaid
( ) Hand Delivered
( ) Overnight Mail
( ) Facsimile

Jason G. Murray

ORIGINAL

Erik F. Stidham, ISB #5483
Curtis D. McKenzie, ISB #5591
GREENER BANDUCCI SHOEMAKER PA
815 W. Washington Street
Boise, Idaho 83702
Tel: (208) 319-2600
Fax: (208) 319-2601

Attorneys for Plaintiff

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

ROBERT GRAY, Plaintiff, v. TRI-WAY CONSTRUCTION SERVICES, INC., a Washington Corporation; RAY ALLRAD, an individual; KATHY PETERSON, an individual; GARY PETERSON, an individual, Defendants.	Case No.: CV OC 0409193D FIRST AMENDED COMPLAINT AND DEMAND FOR JURY TRIAL

Plaintiff, Robert Gray ("Plaintiff Gray"), by and through its attorneys, Greener Banducci Shoemaker P.A., alleges as follows:

JURISDICTION AND PARTIES

1. At all times relevant hereto, Robert Gray was a resident of the State of Idaho, County of Ada.

2. Defendant Tri-Way Construction Services, Inc., ("Defendant Tri-Way") is, and was at all times mentioned herein, a corporation organized and existing under the laws of the State of Washington, with its principal place of business in Vancouver, Washington.

3. Defendant Ray Allrad ("Allrad") is, and was at all times mentioned herein, an officer of and shareholder in Tri-Way. On information and belief, Allrad is an individual residing in the State of Washington.

4. Defendant Kathy Peterson is, and was at all times mentioned herein, an officer of and shareholder in Tri-Way. On information and belief, Kathy Peterson is an individual residing in the State of Washington.

5. Defendant Gary Peterson is, and was at all times mentioned herein, an officer of and shareholder in Tri-Way. On information and belief, Gary Peterson is an individual residing in the State of Washington.

6. Defendants Tri-Way, Allrad, Kathy Peterson and Gary Peterson are collectively referred to as "Defendants."

JURISDICTION AND VENUE

7. This Court has jurisdiction as the amount in controversy exceeds the jurisdictional minimum of this Court.

8. Venue is properly conferred on this Court as the actions which make up the subject matter of this lawsuit took part in Ada County, Idaho.

9. On information and belief, Defendants have transacted business within this state as defined by I.C. § 5-514 and is therefore subject to the jurisdiction of this Court.

10. Defendants purposefully availed themselves to this Court's jurisdiction by initiating contact with Idaho resident Plaintiff Gray regarding employment and regarding the sale of Defendant Tri-Way. Defendants' recruiting efforts and negotiating efforts were directed at Plaintiff Gray while he resided in Idaho. Among other contacts, Defendants directed contacts to

Plaintiff Gray via email, fax and telephone while Plaintiff Gray was a resident of Idaho. Defendants conducted business with Plaintiff Gray and within the State of Idaho for the purpose of realizing precuniary benefit and for the purpose of realizing, transacting, and/or enhancing their business purposes and objectives and personal gain. At all times relevant, Defendants knew that they were negotiating and contracting with an Idaho resident. Moreover, Defendants initiated contact with Plaintiff Gray for the purpose of obtaining certain construction contracts with Albertsons, Inc., a corporation with its principal place of business in Boise, Idaho ("Albertsons Projects").

GENERAL ALLEGATIONS

11. At all times mentioned herein Defendant Tri-Way was in the construction business, managing and serving as general contractor for commercial construction projects.

12. At all times mentioned herein, Defendant Allrad was an officer and shareholder in Tri-Way.

13. At all times herein, Defendant Kathy Peterson was an officer and shareholder in Defendant Tri-Way.

14. At all times herein, Defendant Gary Peterson was an officer and shareholder in Defendant Tri-Way.

15. In April, 2004, Plaintiff Gray and Defendants entered into negotiations for the purpose of creating a contract of employment between said parties and for the purpose of establishing an office in Phoenix, Arizona, and securing certain Albertsons Projects for Tri-Way and to sell an interest in Tri-Way.

16. Pursuant to the terms of this agreement, Defendant Tri-Way was to employ Plaintiff as General Manager, responsible for overseeing certain construction projects. Defendants were to provide certain company resources, including but not limited to, company employees, so that Plaintiff Gray could increase the net profits which he was to share.

17. Defendant Tri-Way was to compensate Plaintiff Gray at an escalating base salary as well as at an annual amount equal to 50% of the net profit realized. In addition, the agreement provided that Plaintiff would be entitled to purchase an ownership interest in Defendant Tri-Way at a set share price previously agreed to by the parties. Defendants assured Plaintiff Gray that an agreement was in place and that they would agree to have the term memorialized in a written agreement after he was in Arizona.

18. Defendants Peterson represented to Plaintiff Gray that he would be paid 50% of the net profit realized. Defendants made these representations with the intent that Plaintiff Gray would rely on the representations. At the time the representations were made, Defendants knew the representations were untrue. Defendants never intended to act in accordance with these representations.

19. Relying upon Defendants' representations and their representation of a mutual agreement, Plaintiff resigned his position at Albertsons, Inc., his former place of employment in Boise, Idaho to take employment with Tri-Way. In reliance on Defendants' promises and/or under the terms of the agreement, Plaintiff Gray secured two Albertsons Projects for Defendant Tri-Way, managed those projects successfully, and passed the contractor licensing exam in Arizona, all for the benefit of Defendants. Without the efforts of Plaintiff Gray, Defendant Tri-Way would not have secured the Albertsons Projects and Defendants would not have realized the

financial benefits. Defendants profited from Plaintiff Gray's work on the Albertsons Projects and from his work in Arizona.

20. On or about June 1, 2004, Plaintiff moved to Arizona and began working for Defendant Tri-Way according to the terms of the agreement and pursuant to Defendants' promises. Plaintiff Gray fulfilled all of his obligations pursuant to the agreement between the parties. Plaintiff Gray relied on the promises made by Defendants when he took actions to his detriment.

21. Defendants failed to satisfy their obligations under the agreement. Defendants failed to live up to the representations made to Plaintiff Gray. On or about September 1, 2004, Defendants began attempting to change certain portions of its agreement with Plaintiff Gray. The new terms proposed by Defendants were substantially different than the existing terms originally agreed upon by the parties. The new terms proposed by Defendants adversely affected Plaintiff Gray, by and among other things, decreasing Plaintiff Gray's wages and increasing the cost of Plaintiff Gray purchasing an ownership interest in Defendant Tri-Way. Defendants intended that these new terms were less advantageous to Plaintiff Gray and would damage Plaintiff Gray. Defendants took these wrongful actions knowing that Plaintiff Gray had acted in reliance on their previous representations.

22. Plaintiff Gray refused to allow Defendants to make the proposed modifications to the agreement. On or about October 22, 2004, Defendants sent Plaintiff an e-mail informing him that his employment was terminated. Defendants failed to pay Plaintiff in accordance with the agreement and failed to allow Plaintiff Gray to purchase an ownership interest in Tri-Way at the agreed upon price.

23. As a direct and proximate result of the wrongful acts and omissions of Defendants, Plaintiff has suffered significant economic damages, in excess of the jurisdictional limit.

24. At the time Defendants entered into the employment contract and agreement to purchase an interest in Tri-Way with Plaintiff, Defendants knew or should have known that the representations they made concerning the terms and conditions of said agreements were false. During discussions, including but not limited to discussions taking place in March 2004, on or about April 17, 2004 and on or about June 9, 2004 and in subsequent phone conversations, Defendant Tri-Way, through Ray Allrad, Kathy Peterson and Gary Peterson, represented that Plaintiff Gray would receive 50% of certain profits and would be allowed to purchase ownership in Tri-Way at a set price. Defendants made these representations knowing that these representations were false. Defendants made these representations for the purpose of inducing Plaintiff Gray to secure the Albertsons Projects for Tri-Way and to cause Plaintiff Gray to enter an employment contract with Tri-Way. Defendants profited from the Albertsons Projects secured by Plaintiff Gray.

25. Defendants knowingly concealed facts from Plaintiff regarding the terms and conditions of the parties' employment agreement and Defendants' plan to withdraw or modify the terms of said agreement after Plaintiff Gray secured the Albertsons Projects and after Plaintiff Gray took the position with Tri-Way in Phoenix, Arizona. Defendants never intended to compensate Plaintiff Gray as promised. Defendants never intended to sell Plaintiff Gray an interest in Tri-Way according to the terms discussed. Defendants concealed this plan from Plaintiff Gray until October 2004.

26. At all times mentioned herein Defendants intended that Plaintiff rely upon Defendants' representations and concealment of facts in order to induce Plaintiff Gray to secure the Albertsons Projects for Tri-Way and to induce Plaintiff Gray to work for the benefit of Defendants.

27. Plaintiff relied, to his detriment, on the false representations made by Defendants and was induced to act by Defendants' concealment of facts. Plaintiff Gray's detriment includes, but is not limited to, quitting his existing employment, taking employment with Tri-Way, and disrupting his residence and family in Boise, Idaho so that he could perform General Manager services for Defendants in Phoenix, Arizona.

COUNT I

BREACH OF CONTRACT
(All Defendants)

28. Plaintiff hereby incorporates and realleges each and every preceding paragraph and incorporates the same by reference herein.

29. The terms of the employment agreement entered into by the parties, called for Plaintiff to perform the duties of General Manager for Defendant Tri-Way and, in consideration thereof, Defendants were to compensate Plaintiff according to the mutually agreed upon terms of said contract and to allow Plaintiff Gray to purchase an interest in Tri-Way according to certain terms. Plaintiff performed all duties owing Defendants under the subject employment contract until Defendants breached this agreement.

30. Defendants failed to fulfill its obligations under the terms of the contract. Defendants' failure includes, but is not limited to, unilateral revocation and/or modification of material terms of the contract, including failure to compensate Plaintiff according to the agreed

upon terms and failure to sell Plaintiff Gray shares of Defendant Tri-Way at the agreed upon price.

31. As a direct and proximate result of Defendants' knowing concealment of material facts, its intention for Plaintiff to rely on Defendants' representations and concealment of facts and its failure to perform its obligations pursuant to its contract with Plaintiff, Plaintiff Robert Gray has been damaged in an amount to be proven at trial.

COUNT II

QUASI-CONTRACT/IMPLIED IN-FACT CONTRACT
(All Defendants)

32. Plaintiff hereby incorporates and realleges each and every preceding paragraph and incorporates the same by reference herein.

33. Plaintiff Gray conferred a benefit on Defendants.

34. Defendants appreciated the benefit given by Plaintiff Gray.

35. Defendants accepted the benefit under circumstances that would make it inequitable for Defendants to retain such benefits without payment to Plaintiff Gray of the value thereof.

36. The terms and existence of the contract were manifested by the conduct of the Defendants and Plaintiff Gray and the request by Defendants and performed by Plaintiff Gray can be inferred by their actions.

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COUNT III

STATUTORY CLAIM FOR WAGES
(Defendant Tri-Way)

37. Plaintiff hereby incorporates and realleges each and every preceding paragraph and incorporates the same by reference herein.

38. Defendant Tri-Way has failed and/or refused to pay the amount owed to Plaintiff for his work pursuant to an agreement.

39. Plaintiff Gray makes claim for all wages currently due and owing, attorney fees and any other damages allowed under Idaho's wage claim statues, Idaho Code § 45-601, *et. seq.* and other applicable statutes and, in the alternative, the laws of the States of Washington and Arizona.

40. Plaintiff Gray also makes claim for prejudgment interest upon amounts owed pursuant to his wage contact under Idaho Code § 28-22-104 and other applicable statutes.

COUNT IV

PROMISORRY ESTOPPEL
(All Defendants)

41. Plaintiff hereby incorporates and realleges each and every preceding paragraph and incorporates the same by reference herein.

42. Defendants represented, and Plaintiff reasonably relied upon the parties' past performance and representations concerning the terms of their employment agreement. By doing so, Plaintiff suffered substantial economic detriment including, but not limited to, the loss of past and future income, owing to him pursuant to the terms of the contract and the right to purchase an interest in Tri-Way.

43. Defendants foresaw or should have foreseen that Plaintiff would act in reliance upon Defendants' past practices and on Defendants' representations and that, as a result of this reliance, Plaintiff would suffer substantial economic detriment.

44. Plaintiff Gray has been damaged in an amount to be proven at trial.

COUNT V

EQUITABLE ESTOPPEL
(All Defendants)

45. Plaintiff hereby incorporates and realleges each and every preceding paragraph and incorporates the same by reference herein.

46. Defendants falsely represented to Plaintiff and/or concealed from Plaintiff, material facts essential to and part of, the terms of the parties' employment contract. Defendants intended that said representations and concealed facts would be relied upon by Plaintiff all to Plaintiff's economic detriment.

47. Plaintiff was without knowledge of Defendants' misrepresentations and concealment of material facts and thus, Plaintiff's performance of his employment obligations was based upon Defendants' misrepresentations and concealment, all to his own prejudice. As a result, Plaintiff was damaged in an amount to be proven at trial.

COUNT VI

FRAUD
(All Defendants)

48. Plaintiff hereby incorporates and realleges each and every preceding paragraph and incorporates the same by reference herein.

49. Defendants made representations to and concealed information from Plaintiff regarding the terms and conditions of the parties' employment agreement.

50. The representations made by Defendants were false.

51. The representations made by Defendants were material.

52. Defendants knew that such representations were false or were ignorant of the truth of such representations.

53. Defendants intended that such representations would be acted upon by Plaintiff.

54. Plaintiff was ignorant of the falsity of such representations.

55. Plaintiff relied on the truth of such representations.

56. Plaintiff had a right to rely on such representations.

57. As a direct and proximate result of his reliance upon such representations, Plaintiff suffered damages and Defendants wrongly benefited in an amount to be proven at trial.

COUNT VII

CONSTRUCTIVE FRAUD
(All Defendants)

58. Plaintiff hereby incorporates and realleges each and every preceding paragraph and incorporates the same by reference herein.

59. Defendants and Plaintiff Gray were in a relationship of trust and confidence.

60. Owing to their relationship of trust and confidence, Defendants owed Plaintiff Gray, including but not limited to, a duty not to conceal or misrepresent material facts.

61. Plaintiff Gray was damaged and Defendants benefited in amounts to be proven at trial.

62. As a direct and proximate result of Defendants wrongful actions, Plaintiff suffered damages and Defendants wrongly benefited in an amount to be proven at trial.

COUNT VIII

QUASI-ESTOPPEL
(All Defendants)

63. Plaintiff hereby incorporates and realleges each and every preceding paragraph and incorporates the same by reference herein.

64. Defendants have gained advantage for themselves.

65. Defendants have produced a disadvantage to Plaintiff Gray.

66. Defendants have induced Plaintiff Gray to change his position.

67. It would be unconscionable to allow Defendants to maintain a position which is inconsistent with the position taken when Defendants induced and accepted the benefit.

DAMAGES
(All Defendants)

68. Plaintiff hereby incorporates and realleges each and every preceding paragraph and incorporates the same by reference herein.

69. As a direct and proximate result of Defendants' conduct complaint of herein, Plaintiff has suffered the following damages:

a. Past and future loss of income, including income which Robert Gray ordinarily would have received in merit and longevity wage increases or which would be reasonably expected to be received in his normal career advancement with Defendant Tri-Way.

b. Past and future suffering of general damages, including but not limited to the following:

   i. Severe and irreparable injury to Plaintiff Gray's reputation and good standing, booth occupationally and with the public generally; and

   ii. Costs associated with Plaintiff Gray taking steps to establish residency in Arizona;

c. Past wages owing pursuant to his employment contract and/or the State of Idaho's wage claim statutes;

d. For treble damages with respect to wages past due under Idaho Code § 45-615 on the basis that the wages have been fully earned by have been withheld willfully, arbitrarily and without just cause;

e. Restitution damages, including but not limited to monies obtained by Tri-Way for two Albertsons Projects wrongly obtained due to Tri-Way misrepresentations and concealments to Plaintiff Gray;

f. Past and future losses of income which Robert Gray would ordinarily have received;

g. Any future damages as may be proven;

h. Interest according to law, including prejudgment interest on all liquidated sums allowable pursuant to Idaho Code § 38-22-104;

i. Costs and attorneys' fees related to this suit under Idaho Code § 12-120 and § 12-121 and other applicable statutes; and

j. Any other and future relief that this Court considers proper.

REQUEST FOR ATTORNEYS' FEES
(All Defendants)

As a consequence of the complaints, causes, and claims stated herein, Plaintiff has been required to retain the law firm of Greener Banducci Shoemaker P.A., and has incurred and will incur costs and reasonable attorneys' fees related thereto, for which Plaintiff is entitled to under Idaho Code §§ 12-120 and 12-121, 45-615, 45-617, 38-22-104, *et. seq.*, and other comparable provisions of the laws of United States or the State of Idaho.

DEMAND FOR A JURY TRIAL IS HEREBY MADE.

DATED: February 15th, 2006.

GREENER BANDUCCI SHOEMAKER P.A.

Erik F. Stidham
Attorneys for Plaintiff

CERTIFICATE OF SERVICE

I hereby certify that I caused to be served the foregoing **First Amended Complaint Against Ray Allrad, Kathy Peterson and Gary Peterson** on the following named person(s) on the date indicated below, in the manner indicated below:

Jason G. Murray, Esq. MOFFATT THOMAS BARRETT ROCK & FIELDS, CHTD. 101 S. Capitol Boulevard, 10th Floor Boise, Idaho 83701-0829	[X] U.S. Mail [ ] Facsimile [X] Hand Delivery [ ] Overnight Delivery

DATED this 10th day of February, 2006.

Erik F. Stidham

Patricia M. Olsson, ISB No. 3055
Jason G. Murray, ISB No. 6172
MOFFATT, THOMAS, BARRETT, ROCK & FIELDS, CHARTERED
101 S. Capitol Blvd., 10th Floor
Post Office Box 829
Boise, Idaho 83701
Telephone (208) 345-2000
Facsimile (208) 385-5384
pmo@moffatt.com
jgm@moffatt.com
22-072

Attorneys for Defendant

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT

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

ROBERT GRAY,

Plaintiff / Counter-defendant,

vs.

TRI-WAY CONSTRUCTION SERVICES, INC., a Washington Corporation, RAY ALLRAD [sic], an individual; KATHY PETERSON, an individual, GARY PETERSON, an individual,

Defendant / Counterclaimants.

Case No. CV OC 0409193D

ANSWER TO COMPLAINT AND DEMAND FOR JURY TRIAL, AND COUNTERCLAIM

I. ANSWER

COMES NOW the above-named defendants, Tri-Way Construction Services, Inc. ("Tri-Way"), Ray Allard, Kathy Peterson and Gary Peterson (collectively "defendants"), by and through undersigned counsel, and for an Answer and response to plaintiff's First Amended Complaint and Demand for Jury Trial ("Amended Complaint") allege as follows:

FIRST DEFENSE

Plaintiff's Amended Complaint fails to state a claim against defendants upon which relief may be granted.

SECOND DEFENSE

Defendants deny each and every allegation of plaintiff's Amended Complaint not herein expressly and specifically admitted.

I.

Defendants admit paragraphs 2 through 5, 11 through 14 and 16 of the Amended Complaint.

II.

With respect to the allegations set forth at paragraph 7 of the Amended Complaint, defendants admit only that the amount to which plaintiff claims he is entitled exceeds the minimum jurisdictional limits of this Court. All other allegations or inferences contained in paragraph 7 are denied.

III.

With respect to the allegations set forth at paragraph 10 of the Amended Complaint, defendants admit only that some communications between the parties occurred while

plaintiff was in Idaho, and defendants knew plaintiff was, at times, living in Idaho. All other allegations or inferences in paragraph 10 are denied.

IV.

With respect to the allegations set forth at paragraph 20 of the Amended Complaint, defendants admit only that on or about June 1, 2004, plaintiff moved his residence to Arizona to begin working for defendant Tri-Way. All other allegations or inferences contained in paragraph 20 are denied.

V.

With respect to the allegations set forth at paragraph 22 of the Amended Complaint, defendants admit only that plaintiff refused to negotiate with respect to the terms and conditions of his employment with defendant Tri-Way. Defendants deny any remaining allegations or inferences, and specifically deny that a final agreement had been reached which defendants then sought to modify in any way. Defendants further expressly deny terminating plaintiff's employment, as plaintiff resigned from defendant Tri-Way on October 21, 2004, which resignation was to become effective on October 22, 2004.

VI.

With respect to the allegations set forth at paragraph 15 of the Amended Complaint, defendants admit only that in or about April, 2004, defendant Tri-Way was engaged in discussions concerning the employment of plaintiff. All other allegations which may be construed as an attempt to limit or otherwise define the scope or purpose of those discussions are hereby denied.

VII.

Paragraph 6 of the Amended Complaint merely sets forth a definition of the parties to which no responsive pleading is required.

VIII.

Defendants deny the allegations set forth at paragraphs 1, 8-9, 17-19, 21, and 23-69 of the Amended Complaint.

THIRD DEFENSE

Plaintiff has waived and/or is estopped from asserting the claims set forth in the Amended Complaint.

FOURTH DEFENSE

Plaintiff failed to mitigate the amount of his damages. The damages claimed by plaintiff could have been mitigated by due diligence on his part or by one acting under similar circumstances. Plaintiff's failure to mitigate is a bar to some or all of his recovery under the Amended Complaint.

FIFTH DEFENSE

Plaintiff's claims are barred, either in whole or in part, because the actions complained of were undertaken in good faith and for lawful, legitimate business reasons..

SIXTH DEFENSE

The amounts plaintiff claims are due and owing for lost wages and/or benefits must be reduced and offset by any amount that the plaintiff earned or could have earned, with the exercise of reasonable diligence, during the period for which lost earnings are sought by plaintiff.

SEVENTH DEFENSE

The actions and damages alleged within plaintiff's Amended Complaint were proximately caused, if at all, by plaintiff's own acts or omissions.

EIGHTH DEFENSE

Defendants have fully performed each term of the agreement between them and plaintiff, and plaintiff has received the full consideration agreed upon, and that his employment with Tri-Way was carried out in full and in accordance with the parties' agreement.

NINTH DEFENSE

Plaintiff breached the employment agreement, if any, which existed between the parties.

TENTH DEFENSE

That pursuant to Idaho Code, § 6-801, *et seq.*, plaintiff is comparatively responsible for the damages alleged in his Amended Complaint.

ELEVENTH DEFENSE

Plaintiff has failed to state with particularity all averments of fraud as required by Idaho Rule of Civil Procedure 9(b).

TWELFTH DEFENSE

That this Court has no jurisdiction over the defendant for the reason that defendants are non-residents of Idaho and do not have sufficient minimum contacts with the forum such that exercising jurisdiction over them would violate their right to Due Process.

THIRTEENTH DEFENSE

That plaintiff's conduct in inducing defendants to hire him as a district manager for defendant Tri-Way at an agreed salary and with agreed benefits is such that it would be

unconscionable for him to now maintain a position which is inconsistent with the position taken by defendants when plaintiff induced and accepted the benefit of that agreement.

CAVEAT

Defendants, by virtue of pleading a "defense" above, do not admit that said defense is an "affirmative defense" within the meaning of applicable law, and do not thereby assume a burden of proof not otherwise imposed upon them as a matter of law. In addition, in asserting any of the above defenses, defendants do not admit any fault, responsibility, liability or damage, but, to the contrary, expressly deny the same.

II. COUNTERCLAIM

COME NOW the above-named defendants/counter-claimants Tri-Way Construction Services, Inc., and Gary Peterson (collectively "defendants/counter-claimants"), by and through undersigned counsel, and for a cause of action against plaintiff/counter-defendant Rob Gray alleges as follows:

1. Defendants/counter-claimants incorporate by reference into this Counterclaim the substance of paragraphs 2, 5, 11, 14 and 16 of the First Amended Complaint and Demand for Jury Trial.

2. Although the proposed employment contract submitted by counter-defendant to counter-claimant Tri-Way Construction Services, Inc. ("Tri-Way") was rejected, Tri-Way nevertheless offered the counter-defendant an employment position at a salary of $4,000.00 per month with employee medical benefits to begin effective his first day of employment, June 1, 2004. In addition, Mr. Gray was provided with a company truck to be used for company business, and company credit cards to be used likewise. Pursuant to these terms,

Mr. Gray was to serve as an employee of Tri-Way and act as the manager for the to-be-created Phoenix division.

3. As the division manager for Tri-Way, Rob Gray was to secure all necessary state licenses in Arizona, secure suitable office space, hire necessary crews and/or subcontractors, obtain work for the company, and to begin selling Tri-Way's services using Tri-Way's existing national vendor list. During the period of June 1, 2004 through his resignation on October 22, 2004, counter-defendant failed to provide any of these services for Tri-Way.

4. Shortly before plaintiff/counter-defendant's resignation from Tri-Way, the parties' relationship began to deteriorate. At or near this time, counter-claimants believe, and based thereon assert, that Mr. Gray began to speak harmfully regarding his employer and/or Gary Peterson to third persons and/or other outside entities, which communications harmed counter-claimants' business opportunities.

5. Following Mr. Gray's resignation on October 22, 2004, he was asked to return certain company items which were necessary in order to close out certain job files, including job files pertaining to the Tooele and Juanita projects. Mr. Gray failed and/or refused to return those project files as requested, thereby requiring Tri-Way to expend a substantial amount of time and effort "re-creating" the project files so that the jobs could be closed.

COUNT ONE
(Breach of the Implied Covenant of Good Faith and Fair Dealing)

6. Counter-claimants incorporate by reference the allegations set forth in paragraphs 1 through 5 as though fully set forth herein.

7. As a result of the employment relationship which existed between Mr. Gray and Tri-Way, the expressed and implied promises made in connection with that

relationship, and the acts, conduct, and communications resulting in these implied promises, there arose an implied covenant of good faith and fair dealing by which counter-defendant promised to act in good faith toward and deal fairly with Tri-Way.

8. The implied covenant of good faith and fair dealing requires, among other things, that: each party in the relationship must act with good faith toward the other concerning all matters related to the employment; each party in the relationship must act with fairness toward the other concerning all matters related to the employment; neither party would take any action to unfairly prevent the other from obtaining the full benefits of the employment relationship; that each party would give the other's interests as much consideration as it would give its own interests; and each party would refrain from any act which would prevent or impede the other from receiving the full benefit of the employment agreement.

9. Counter-defendant breached his implied covenant of good faith and fair dealing with regard to Tri-Way by refusing to provide the necessary licenses and by otherwise refusing to perform those necessary duties and functions set forth in paragraph 3, *supra*, and by failing to provide Tri-Way with necessary job files following his resignation from Tri-Way.

10. Counter-defendant's conduct during the course of his employment with Tri-Way was wrongful, in bad faith, and unfair, and therefore a violation of his legal duties.

11. Counter-defendant's breach of the covenant of good faith and fair dealing was a substantial factor in causing damage and injury to Tri-Way. As a direct and proximate result of counter-defendant's conduct alleged in this Counterclaim, Tri-Way has suffered and continues to suffer substantial losses and other benefits it would have received absent counter-defendant's acts in an amount in excess of the minimum jurisdictional limits of this Court, the exact amount of which will be proven at trial.

COUNT TWO
(Tortious Interference With Prospective Economic Advantage)

12. Counter-claimants incorporate by reference the allegations set forth in paragraphs 1 through 11 of the Counterclaim as though fully set forth herein.

13. Counter-defendant Rob Gray knew he was employed by, and therefore owed certain legal duties to, counter-claimant Tri-Way.

14. Rob Gray, for personal reasons which were wrongful and for the purposes of harming both Tri-Way Construction Services, Inc. and Gary Peterson, provided unsubstantiated, inaccurate and/or defamatory information regarding counter-claimants to third persons or entities, purposefully and with the intent to bring about harm to Tri-Way's prospective business dealings.

15. As a result of Mr. Gray's wrongful conduct, counterclaimants have been injured and damaged in an amount which exceeds the minimum jurisdictional limits of this Court which shall be proven at trial.

COUNT THREE
(Defamation)

16. Counter-claimants incorporate by reference the allegations set forth in paragraphs 1 through 15 of the Counterclaim as though fully set forth herein.

17. Counter-defendant has published, orally, in writing or through his actions, false statements concerning both Tri-Way Construction Services, Inc., and Gary Peterson. These statements have been published, communicated, conveyed and made known by counter-defendant to persons other than Mr. Peterson or entities other than Tri-Way and without privilege to do so.

18. The statements communicated and published by counter-defendant defamed Gary Peterson and Tri-Way and proximately caused counter-claimants' damages.

19. The conduct and statements communicated and published by counter-defendant defamed Tri-Way and Gary Peterson's character by imputing to them conduct or characteristics incompatible with the proper exercise of their lawful business, trade and profession. As such, the conduct and statements communicated and published by counter-defendant constitutes defamation *per se*.

20. Counter-claimants have suffered harm from counter-defendant's defamatory actions, including harm to personal and professional reputation and good name in their communities, and difficulties in finding subsequent construction projects, all in amounts which exceed the minimum jurisdictional limits of this court and in an amount which will be proven at trial.

COUNT FOUR
(Tortious Interference With Contract)

21. Counter-claimants incorporate by reference the allegations set forth in paragraphs 1 through 20 of the Counterclaim as though fully set forth herein.

22. Upon his separation from Tri-Way, Rob Gray was asked to return a number of job files, including project files pertaining to the Tooele and Juanita projects. Rob Gray, for an improper purpose and without any good faith reason for so doing, refused to return those job files. The files wrongfully retained by Mr. Gray contained a number of documents or other information which was essential to Tri-Way's ability to perform under certain contracts and/or subcontracts.

23. As a result of Rob Gray's tortious interference with these contracts and/or subcontracts, Tri-Way has been injured and damaged in an amount which will be proven at the time of trial.

COUNT FIVE
(Conversion)

24. Counter-claimants incorporate by reference the allegations set forth in paragraphs 1 through 23 of the Counterclaim as though fully set forth herein.

25. Plaintiff/counter-defendant's conduct in failing and/or refusing to return the Tri-Way job files constituted an act of dominion wrongfully asserted over the personal and/or business property of counter-claimants, which denied counter-claimants the exercise of their rights over such property.

26. As a result of plaintiff/counter-defendant's conversion of counter-claimants' property, counterclaimants have been damaged in an amount which will be proven at trial.

COUNT SIX
(Quasi-Estoppel)

27. Counter-claimants incorporate by reference the allegations set forth in paragraphs 1 through 26 of the Counterclaim as though fully set forth herein.

28. Because of his employment relationship with defendants/counter-claimants, counter-defendant has gained an advantage for himself.

29. Plaintiff/counter-defendant, through his conduct, placed defendants/counter-claimants at a disadvantage.

30. Plaintiff/counter-defendant deceitfully and for an improper purpose induced defendants/counter-claimants to change their position in reliance upon the employment relationship to which the parties had agreed.

31. It would be unconscionable to allow plaintiff/counter-defendant to maintain a position which is inconsistent with the position taken when he induced and accepted the employment benefit from defendants/counter-claimants.

WHEREFORE, defendants/counterclaimants pray that:

1. Plaintiff takes nothing by his First Amended Complaint, and that the First Amended Complaint in this action be dismissed, with prejudice;

2. For damages which counterclaimants have suffered and will continue to suffer on account of plaintiff/counter-defendant's wrongful conduct described herein;

3. For their costs;

4. For their attorney fees; and

5. For such other and further relief as the Court deems proper.

DEMAND FOR JURY TRIAL

Defendants/counterclaimants hereby demand a trial by jury on all issues.

DATED this 10th day of March, 2006.

MOFFATT, THOMAS, BARRETT, ROCK & FIELDS, CHARTERED

By Jason G. Murray
Jason G. Murray – Of the Firm
Attorneys for Defendant

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 10th day of March, 2006, I caused a true and correct copy of the foregoing **ANSWER TO COMPLAINT AND DEMAND FOR JURY TRIAL, AND COUNTERCLAIM** to be served by the method indicated below, and addressed to the following:

Erik F. Stidham
GREENER BANDUCCI SHOEMAKER, P.A.
815 West Washington Street
Boise, Idaho 83702
Facsimile (208) 319-2601

(✓) U.S. Mail, Postage Prepaid
( ) Hand Delivered
( ) Overnight Mail
(✓) Facsimile

Jason G. Murray

Patricia M. Olsson, ISB No. 3055
Jason G. Murray, ISB No. 6172
MOFFATT, THOMAS, BARRETT, ROCK & FIELDS, CHARTERED
101 S. Capitol Blvd., 10th Floor
Post Office Box 829
Boise, Idaho 83701
Telephone (208) 345-2000
Facsimile (208) 385-5384
pmo@moffatt.com
jgm@moffatt.com
22-072

Attorneys for Defendants

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT

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

ROBERT GRAY,

Plaintiff,

vs.

TRI-WAY CONSTRUCTION SERVICES, INC., a Washington Corporation; RAY ALLRAD [sic], and individual; KATHY PETERSON, an individual; GARY PETERSON, an individual,

Defendants.

Case No. CV OC 0409193D

DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

COME NOW the defendants, Tri-Way Construction Services, Inc, Ray Allard, Kathy Peterson, and Gary Peterson, through counsel, and pursuant to Rule 56 of the Idaho Rules

of Civil Procedure, move this Court for an order granting summary judgment in their favor against plaintiff on all claims asserted in plaintiff's First Amended Complaint.

This motion is based on the pleadings on file herein, and the Memorandum in Support of Defendants' Motion for Summary Judgment and Affidavit of Jason G. Murray, filed contemporaneously herewith.

DATED this 2nd day of August, 2006.

MOFFATT, THOMAS, BARRETT, ROCK & FIELDS, CHARTERED

By Jason G. Murray
Jason G. Murray – Of the Firm
Attorneys for Defendant

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 2nd day of August, 2006, I caused a true and correct copy of the foregoing **DEFENDANTS' MOTION FOR SUMMARY JUDGMENT** to be served by the method indicated below, and addressed to the following:

Erik F. Stidham
GREENER BANDUCCI SHOEMAKER, P.A.
815 West Washington Street
Boise, Idaho 83702
Facsimile (208) 319-2601

(✓) U.S. Mail, Postage Prepaid
( ) Hand Delivered
( ) Overnight Mail
( ) Facsimile

Jason G. Murray

ORIGINAL

Erik F. Stidham, ISB #5483
Scott E. Randolph, ISB #6768
GREENER BANDUCCI SHOEMAKER PA
815 W. Washington Street
Boise, Idaho 83702
Tel: (208) 319-2600
Fax: (208) 319-2601

Attorneys for Plaintiff

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

ROBERT GRAY,

Plaintiff,

v.

TRI-WAY CONSTRUCTION SERVICES, INC., a Washington Corporation; RAY ALLARD, an individual; KATHY PETERSON, an individual; GARY PETERSON, an individual,

Defendants.

AND RELATED COUNTERCLAIMS.

Case No.: CV OC 0409193D

PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

Assigned Judge: Cheri C. Copsey

COMES NOW, the above named Plaintiff Robert Gray ("Gray"). by and through his counsel of record, Greener Banducci Shoemaker P.A., and moves this Court pursuant to Rule 56 of the Idaho Rules of Civil Procedure for an order granting summary judgment against Defendants Tri-Way Construction Services, Inc. and Gary Peterson on their counterclaims against Gray.

This Motion is supported by pleadings previously filed with the Court, a Memorandum in Support of Motion for Summary Judgment, and Affidavits of Erik Stidham, Robert Gray and Mark Sipiora, all filed concurrently herewith.

Oral Argument is requested.

DATED: August 31st, 2006.

GREENER BANDUCCI SHOEMAKER P.A.

Erik F. Stidham
Attorneys for Plaintiff Robert Gray

CERTIFICATE OF SERVICE

I hereby certify that I caused to be served the foregoing **Plaintiff's Motion for Summary Judgment** on the following named person(s) on the date indicated below, in the manner indicated below:

Jason G. Murray, Esq.
MOFFATT THOMAS BARRETT ROCK & FIELDS, CHTD.
101 S. Capitol Boulevard, 10th Floor
Boise, Idaho 83701-0829

[X] U.S. Mail
[X] Facsimile
[ ] Hand Delivery
[ ] Overnight Delivery

DATED this 3rd day of August, 2006

Erik F. Stidham

Erik F. Stidham, ISB #5483
Scott E. Randolph, ISB #6768
GREENER BANDUCCI SHOEMAKER PA
815 W. Washington Street
Boise, Idaho 83702
Tel: (208) 319-2600
Fax: (208) 319-2601

Attorneys for Plaintiff

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

ROBERT GRAY, Plaintiff, v. TRI-WAY CONSTRUCTION SERVICES, INC., a Washington Corporation; RAY ALLARD, an individual; KATHY PETERSON, an individual; GARY PETERSON, an individual, Defendants. AND RELATED COUNTERCLAIM.	Case No.: CV OC 0409193D PLAINTIFF'S ANSWER TO TRI-WAY CONSTRUCTIONS SERVICES, INC. AND GARY PETERSON'S COUNTERCLAIM Assigned Judge: Cheri C. Copsey

COMES NOW Plaintiff Robert Gray ("Gray"), by and through its counsel of record, Greener Banducci Shoemaker P.A., and hereby responds to Defendant Tri-Way Construction Services, Inc. ("Tri-Way") and Gary Peterson's ("Peterson") (collectively "Counterclaimants") Counterclaim as follows:

I. GENERAL DENIAL

Gray denies each and every allegation contained in Counterclaimants' Counterclaim not herein specifically and expressly admitted. Gray reserves the right to amend this and any other

answer or denial stated herein once it has had an opportunity to complete discovery regarding the allegations contained in Counterclaimants' Counterclaim.

II. COUNTERCLAIM

1. Gray admits the allegations contained in Paragraph 1 of the Counterclaim.

2. Gray denies the allegations contained in Paragraph 2 of the Counterclaim.

3. Gray denies the allegations contained in Paragraph 3 of the Counterclaim.

4. Gray denies the allegations contained in Paragraph 4 of the Counterclaim.

5. Gray denies the allegations contained in Paragraph 5 of the Counterclaim.

COUNT ONE
(Breach of the Implied Covenant of Good Faith and Fair Dealing)

6. As to Paragraph 6, Gray hereby refers to each and every admission and/or denial in each and every preceding paragraph and incorporates the same as if fully set forth herein.

7. Gray denies the allegations contained in Paragraph 7 of the Counterclaim, except Gray admits that an implied covenant of good faith and fair dealing exists in each employment relationship.

8. Paragraph 8 of the Counterclaim contains legal conclusion and Gray neither admits nor denies said paragraph.

9. Gray denies the allegations contained in Paragraph 9 of the Counterclaim.

10. Gray denies the allegations contained in Paragraph 10 of the Counterclaim.

11. Gray denies the allegations contained in Paragraph 11 of the Counterclaim.

///

///

///

COUNT TWO
(Tortious Interference with Prospective Economic Advantage)

12. As to Paragraph 12, Gray hereby refers to each and every admission and/or denial in each and every preceding paragraph and incorporates the same as if fully set forth herein.

13. As to Paragraph 13, Gray admits that he was an employee of Tri-Way.

14. Gray denies the allegations contained in Paragraph 14 of the Counterclaim.

15. Gray denies the allegations contained in Paragraph 15 of the Counterclaim.

COUNT THREE
(Defamation)

16. As to Paragraph 16, Gray hereby refers to each and every admission and/or denial in each and every preceding paragraph and incorporates the same as if fully set forth herein.

17. Gray denies the allegations contained in Paragraph 17 of the Counterclaim.

18. Gray denies the allegations contained in Paragraph 18 of the Counterclaim.

19. Gray denies the allegations contained in Paragraph 19 of the Counterclaim.

20. Gray denies the allegations contained in Paragraph 20 of the Counterclaim.

COUNT FOUR
(Tortious Interference with Contract)

21. As to Paragraph 21, Gray hereby refers to each and every admission and/or denial in each and every preceding paragraph and incorporates the same as if fully set forth herein.

22. Gray denies the allegations contained in Paragraph 22 of the Counterclaim.

23. Gray denies the allegations contained in Paragraph 23 of the Counterclaim.

COUNT FIVE
(Conversion)

24. As to Paragraph 24, Gray hereby refers to each and every admission and/or denial in each and every preceding paragraph and incorporates the same as if fully set forth herein.

25. Gray denies the allegations contained in Paragraph 25 of the Counterclaim.

26. Gray denies the allegations contained in Paragraph 26 of the Counterclaim.

COUNT SIX
(Quasi-Estoppel)

27. As to Paragraph 27, Gray hereby refers to each and every admission and/or denial in each and every preceding paragraph and incorporates the same as if fully set forth herein.

28. Gray denies the allegations contained in Paragraph 28 of the Counterclaim.

29. Gray denies the allegations contained in Paragraph 29 of the Counterclaim.

30. Gray denies the allegations contained in Paragraph 30 of the Counterclaim.

31. Gray denies the allegations contained in Paragraph 31 of the Counterclaim.

III. AFFIRMATIVE DEFENSES

FIRST DEFENSE

Counterclaimants' Counterclaim fails to state a claim against Gray upon which relief may be granted.

SECOND DEFENSE

Gray denies each and every allegation of Counterclaimants' Counterclaim not herein expressly and specifically denied

THIRD DEFENSE

Counterclaimants have waived and/or are estopped from asserting the claims set forth in the Counterclaim.

///

FOURTH DEFENSE

Counterclaimants failed to mitigate the amount of their damages. The damages claimed by Counterclaimants could have been mitigated by due diligence on their part or by any acting under similar circumstances. Counterclaimants' failure to mitigate is a bar to some or all of their recovery under the Counterclaim.

FIFTH DEFENSE

Counterclaimants' claims are barred, either in whole or in part, because the action complained of were undertaken in good faith and for lawful, legitimate business reasons.

SIXTH DEFENSE

The actions and damages alleged in Counterclaimants' Counterclaim were proximately caused, if at all, by Counterclaimants' own acts or omissions.

SEVENTH DEFENSE

Gray has fully performed each term of the agreement between the parties, and Counterclaimants have received the full consideration agreed upon, and that Gray's employment with Tri-Way was carried out in full and in accordance with the parties' agreement.

EIGHTH DEFENSE

Counterclaimants breached the employment agreement which existed between the parties.

NINTH DEFENSE

That pursuant to Idaho Code § 6-801, et seq., Counterclaimants are comparatively responsible for the damages alleged in their Counterclaims.

///

TENTH DEFENSE

Counterclaimants have failed to state with particularity all averments of fraud as required by Idaho Rule of Civil Procedure 9(b).

ELEVENTH DEFENSE

That Counterclaimants' conduct in inducing Gray to be hired as a district manager for Tri-Way at an agreed salary and with agreed benefits is such that it would be unconscionable for Counterclaimants to now maintain a position which is inconsistent with the position taken by Counterclaimants when Counterclaimants induced and accepted the benefit of that agreement.

TWELFTH DEFENSE

Counterclaimants' claims are barred by applicable statute of limitations.

IV. PRAYER

WHEREFORE, Gray prays:

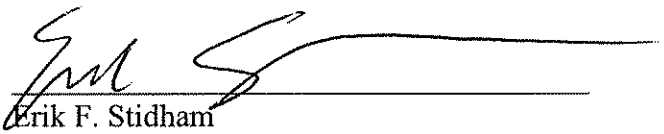
1. That Counterclaimants take nothing by their Counterclaims;

2. For fees and costs; and

3. For such other and further relief as this Court deems just and proper.

DATED: August 4, 2006.

GREENER BANDUCCI SHOEMAKER P.A.



Erik F. Stidham
Attorneys for Plaintiff Robert Gray

Session: copsey092506
Session Date: 2006/09/25
Judge: Copsey, Cheri C.
Reporter: Kreidler, Debora

Division: DC
Session Time: 08:14

Courtroom: CR503

Clerk(s):
Grossman, Paula

State Attorneys:
Berecz, Lamont

Public Defender(s):
Rolfsen, Eric

Prob. Officer(s):

Court interpreter(s):

Case ID: 0003
Case Number: CVOC0409193
Plaintiff:
Plaintiff Attorney: Stidham, Erik
Defendant: CONSTRUCTION, TRI-WAY
Co-Defendant(s):
Pers. Attorney: Murray, Jason
State Attorney: Berecz, Lamont
Public Defender: Rolfsen, Eric

2006/09/25
15:07:22 - Operator
Recording:
15:07:22 - New case
CONSTRUCTION, TRI-WAY
15:07:45 - Judge: Copsey, Cheri C.
questions
15:09:48 - Pers. Attorney: Murray, Jason
argues their mtn for summary judgment
15:10:58 - Pers. Attorney: Murray, Jason
incentive and bonus pay
15:15:49 - Judge: Copsey, Cheri C.
questions - revisions from CPA
15:20:56 - Plaintiff Attorney: Stidham, Erik

15:21:03 - Judge: Copsey, Cheri C.
trying to find Ms. Petersons Depo -
15:21:15 - Plaintiff Attorney: Stidham, Erik
attached to Mr. Randolphs affd in support of plaintiffs oppo
sition
15:22:06 - Plaintiff Attorney: Stidham, Erik
Ex F
15:23:55 - Plaintiff Attorney: Stidham, Erik
begins argument
15:31:58 - Judge: Copsey, Cheri C.
comments
15:32:01 - Plaintiff Attorney: Stidham, Erik
responds
15:47:24 - Judge: Copsey, Cheri C.
wants to know who Jerry Menhof represented
15:47:37 - Plaintiff Attorney: Stidham, Erik
cant recall
15:57:28 - Pers. Attorney: Murray, Jason
reponds
16:07:57 - Plaintiff Attorney: Stidham, Erik
would like additional time to do briefing
16:09:03 - Pers. Attorney: Murray, Jason
will agree to additional briefing - limiting to statute of f
raud only
16:10:52 - Plaintiff Attorney: Stidham, Erik
wants a full week
16:11:01 - Judge: Copsey, Cheri C.
trial date will get slipped -
16:11:12 - Judge: Copsey, Cheri C.
will set a status conference - telephonic - October 13 @ 8:3
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16:12:47 - Judge: Copsey, Cheri C.
wants counsel to get together and put a schedule order toget
her for the
16:13:10 - Judge: Copsey, Cheri C.
briefing
16:13:27 - Judge: Copsey, Cheri C.
does agree with Stidham that this is very difficult
16:13:42 - Plaintiff Attorney: Stidham, Erik
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16:13:55 - Judge: Copsey, Cheri C.
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16:14:16 - Judge: Copsey, Cheri C.
limit to statute of fraud - oral contract containing terms M
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16:14:32 - Judge: Copsey, Cheri C.
it does how does it affect this case
16:17:48 - Operator

Stop recording:

Patricia M. Olsson, ISB No. 3055
Jason G. Murray, ISB No. 6172
MOFFATT, THOMAS, BARRETT, ROCK & FIELDS, CHARTERED
101 S. Capitol Blvd., 10th Floor
Post Office Box 829
Boise, Idaho 83701
Telephone (208) 345-2000
Facsimile (208) 385-5384
pmo@moffatt.com
jgm@moffatt.com
22-072

Attorneys for Defendant

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT

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

ROBERT GRAY,

Plaintiff,

vs.

TRI-WAY CONSTRUCTION SERVICES, INC., a Washington Corporation; RAY ALLRAD [sic], and individual; KATHY PETERSON, an individual; GARY PETERSON, an individual,

Defendants.

Case No. CV OC 0409193D

STIPULATED BRIEFING SCHEDULE RE: STATUTE OF FRAUDS

COME NOW the above-named parties, by and through undersigned counsel, and hereby stipulate and agree to the following briefing schedule in response to the Court's request for additional briefing on Defendants' Motion for Summary Judgment, which briefing shall be

limited to whether Plaintiff's alleged oral agreement is barred by the statute of frauds. To that end, the following schedule shall apply to this request for supplemental briefing:

- Defendants' opening brief shall be due on or before October 13, 2006;
- Plaintiff's response brief shall be due on or before October 27, 2006; and
- Defendants' reply brief shall be due on or before November 3, 2006.

DATED this 11th day of October, 2006.

MOFFATT, THOMAS, BARRETT, ROCK & FIELDS, CHARTERED

By _____
Jason G. Murray – Of the Firm
Attorneys for Defendant

DATED this 9 day of October, 2006.

GREENER BANDUCCI SHOEMAKER, P.A.

By _____
Erik F. Stidham
Attorney for Plaintiff

Patricia M. Olsson, ISB No. 3055
Jason G. Murray, ISB No. 6172
MOFFATT, THOMAS, BARRETT, ROCK & FIELDS, CHARTERED
101 S. Capitol Blvd., 10th Floor
Post Office Box 829
Boise, Idaho 83701
Telephone (208) 345-2000
Facsimile (208) 385-5384
pmo@moffatt.com
jgm@moffatt.com
22-072

Attorneys for Defendants

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT

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

ROBERT GRAY,

Plaintiff,

vs.

TRI-WAY CONSTRUCTION SERVICES, INC., a Washington Corporation; RAY ALLRAD [sic], and individual; KATHY PETERSON, an individual; GARY PETERSON, an individual,

Defendants.

Case No. CV OC 0409193D

REPLY TO PLAINTIFF'S SUPPLEMENTAL MEMORANDUM RE: STATUTE OF FRAUDS

I. INTRODUCTION

Following two separate extensions of time relative to the deadlines set in the parties' earlier Stipulated Briefing Schedule Re: Statute of Frauds, plaintiff filed his

Supplemental Memorandum in Support of Motion for Summary Judgment Re: Statute of Frauds on or about November 13, 2006. In that memorandum, plaintiff provided nearly eight full pages of "factual" arguments, most of which are either unsupported by any record evidence, or are otherwise "supported" solely by plaintiff's affidavit "testimony." Since over two months have now elapsed since oral argument was heard on the parties' motions for summary judgment, however, it is worth noting that on September 25 the court established the parameters of the supplemental statute of frauds briefing. The supplemental briefing was to address the limited question of whether the statute of frauds applies to bar the enforceability of the alleged oral agreement argued by plaintiff, the terms of which consisted exclusively of those terms contained in the Draft Employment Agreement and the Draft Option to Purchase Corporate Stock as they existed on May 21, 2004.

Despite the clear limitation placed on the supplemental briefing, plaintiff has devoted the vast majority of an eight-page "Statement of Facts" to alleged "terms" which he describes as having been modified *after the May 21, 2004 meeting*. Both the court and counsel were abundantly clear at the September 25 hearing that the "terms" of the alleged oral agreement were those that existed in the written Draft Employment Agreement which was presented by plaintiff to the defendants at the May 21, 2004 meeting in Vancouver, Washington. Plaintiff's counsel so conceded, and the scope of this supplemental briefing was thus to be limited to those "terms." Plaintiff's efforts to address any "changes" discussed at the May 21 meeting or at any point thereafter, as well any statements of belief he has made regarding what the parties did or did not agree to thereafter (to the extent that such statements differ from the written document as it existed on May 21), are entirely inappropriate to this discussion. In fact, any discussion by plaintiff concerning modifications, discussions related thereto, or other supposed representations

by any party to continuing negotiations *after May 21, 2004* are beyond the allowable scope of this supplemental briefing. As such the "factual" argument presented by plaintiff, beginning at the second bulleted item on page 3 and continuing thereafter through the conclusion of the "Statement of Facts," should not be considered by the Court.

It should be noted further that while the parties have been asked to submit supplemental briefing on the limited issue of the statute of frauds, nothing in that analysis alters the fact that under Idaho law, in order for there to be a binding contract (oral or otherwise), there must be a complete meeting of the minds, and the overwhelming evidence of record demonstrates that such is not the case here. Plaintiff has failed to submit any admissible evidence that a final agreement had been reached, including any agreement with respect to the bonus pay provisions which he claims are not subject to the statute of frauds. Accordingly, the court does not need to reach the statute of frauds analysis in order to find that no valid or enforceable "contract" exists. Nevertheless, defendant will address plaintiff's statute of frauds arguments in turn.

II. ARGUMENT

A. The Statute of Frauds Issue Is Properly Before the Court.

Plaintiff first argues that defendants have somehow waived any defense based upon the statute of frauds because they did not specifically raise it in the responsive pleadings. *See* Plaintiff's Supplemental Memorandum, p. 9. The basis for plaintiff's argument is Rule 8(c), Idaho Rules of Civil Procedure, and based upon his construction of that Rule, he adamantly refuses to "consent to allowing Defendants to raise a new affirmative defense at this point in the case." *See id.*, pp. 9-10. Had plaintiff reviewed the annotated cases which follow Rule 8(c), however, he would have immediately learned that the defense of the statute of frauds "can be

raised for the first time in the summary judgment motion even though the [responsive pleading] has been filed." *See Bluestone v. Mathewson*, 103 Idaho 453, 455, 649 P.2d 1209, 1211 (1982). This issue has come before the Idaho appellate courts several times, and both the Supreme Court of Idaho and the Court of Appeals have held in favor of allowing the defense.

The Court of Appeals provided the basic analytical framework in the matter of *Good v. Hansen*, 110 Idaho 953, 719 P.2d 1213 (Ct.App. 1986). There, the party seeking to avoid application of the statute of frauds had argued that it could not be considered because the opposing party "failed specifically to plead it." *Good*, 110 Idaho at 955. The Court then noted:

> We acknowledge that a court is not ***obliged*** to consider the statute if not pleaded. But it does not follow that the court is ***prohibited*** from considering the statute. A court has the inherent power to identify and to apply legal authorities germane to the controversy presented. Hansen urges that *Paloukos v. Intermountan Chevrolet Co.*, 99 Idaho 740, 588 P.2d 939 (1978), restricts this power. However, *Paloukos* is a case where a statute of frauds was not considered at all by the district court. The statute was mentioned for the first time on appeal during oral argument. Our Supreme Court simply observed that the statute had been raised "much too late." *Id.* at 744, 588 P.2d at 943. *Paloukos* does not govern where, as here, the district court actually has considered and ruled upon the statute.

Good, 110 Idaho at 955 (emphasis in original).

Several years earlier, the Supreme Court had similarly upheld the trial court's consideration of the statute of frauds, even though it had not been specifically pled. *See Bluestone, supra.* There, the court addressed a line of reasoning that had begun in the federal circuit courts of appeal. In summary, the federal courts had increasingly held that a party could raise an affirmative defense during summary judgment proceedings only when that motion was the "initial pleading" (i.e., a motion to dismiss which was subsequently treated as a motion for summary judgment). The Idaho courts expressly rejected such a limitation, and held as follows:

> [E]ven though it would have been better practice for the appellant to have raised the affirmative defense in the reply to the counterclaim or to have requested an amendment, we decline to follow the federal circuit courts cited. The defendant knew of the affirmative defense and was given time to present argument in opposition to the defense. This case is unlike *Paloukos* where the affirmative defense was not raised until the appeal to this Court.
>
> Therefore, in light of I.R.C.P. 1(a), which mandates that the rules "be liberally construed to secure the just, speedy and inexpensive determination of every action and proceeding," ***we hold that where the defense was raised before trial and the defendant was given time to present argument in opposition, the defense of statute of frauds can be raised for the first time in the summary judgment motion***. . . .

Bluestone, 103 Idaho at 455 (emphasis added).

Here, as in *Bluestone*, the statute of frauds issue was raised by the court at the summary judgment level. In fact, when the court raised the issue, *counsel for plaintiff* suggested that additional briefing could be submitted to address the applicability of the statute. Defendant did not object to this request, but the mere lack of an objection does not amount to "defendants rais[ing] a new affirmative defense," despite plaintiff's claim. *See* Plaintiff's Supplemental Memorandum, pp. 9-10. Plaintiff instead clearly "consented" to the issue when his attorney asked for an opportunity to submit additional briefing, and his argument that raising the defense would be "unfair" is illusory at best. Given these facts, and the clearly controlling case law provided above, plaintiff's argument that the statute of frauds defense has been waived is utterly without merit.

B. Plaintiff's Reliance Upon *Gomez v. Mastec* Is Misplaced.

Plaintiff cites *Gomez v. Mastec North America Inc.*, 2006 WL 36902 (D.Idaho 2006), and argues that even if the Draft Employment Agreement and the Draft Option to Purchase Corporate Stock are themselves subject to the statute of frauds, the "Incentive or Bonus

Pay" provision should be separately enforced because that particular term could have been performed within one year. Defendants first note that the *Gomez* case is an unreported opinion. As such, that case is uncontrolling and of no precedential or even persuasive authority. Furthermore, defendants submit that the very act of citing to such an unpublished opinion is inappropriate, and the case should not be considered.

Even if the *Gomez* decision warranted further consideration, it seems clear that the Idaho appellate courts would have (and arguably *have*) reached a different conclusion. Plaintiff has attempted to distinguish *Treasure Valley Gastroenterology Specialists, Inc. v. Woods*, 135 Idaho 485, 20 P.3d 21 (Ct.App. 2001) from the facts of this case. Specifically, he argues that the plaintiff in that case was attempting to "enforce a provision which related to a number of years," whereas he is "simply bring[ing] a contract claim based upon the agreed upon compensation terms as they relate to his employment of less than one year with Tri-Way." *See* Plaintiff's Supplemental Memorandum, p. 12. A closer reading of the *Treasure Valley* case shows that the plaintiff there was seeking to enforce both a non-competition and a liquidated damages provision. There is no indication, however, that the non-competition provision or the liquidated damages clause would become enforceable against the defendant only after a specified period of time. Instead, they were to apply "after the cessation of her employment with Treasure Valley." *See Treasure Valley*, 135 Idaho at 488. Because there were no other limitations on the provisions at issue they could have become enforceable within one year. Nevertheless, the Court of Appeals held that the entire contract was unenforceable, and did not selectively carve out any exception to the statute of frauds simply because certain terms "could have" been completed in less than one year. Instead, the Court of Appeals applied the statute of frauds uniformly vis-à-vis the contract as a whole.

Section 9-505(1), IDAHO CODE, states only that "[a]n agreement that by its terms is not to be performed within a year from the making thereof" must be in writing. The statute does *not* read "[a]n agreement *or any part thereof*," nor is there any controlling case law which carves out such an exception. To take such a piecemeal approach to the statute of frauds would be incompatible with other holdings of the Idaho Supreme Court. For example, the Idaho Supreme Court established over forty years ago that "if ***any portion*** of the proposed terms is unsettled and unprovided for, there is no contract." *Leavell & Co. v. Grafe & Associates, Inc.*, 90 Idaho 502, 512, 414 P.2d 873 (1966) (emphasis added). Furthermore, in order to be enforceable a contract must contain "***all*** of the terms necessary," and an "acceptance of an offer, to be effectual, ***must be identical with the offer and unconditional***, and must not modify or introduce any new terms into the offer." *Id.* (emphasis added). Admittedly the *Leavell* case dealt with issues of contract formation. Yet to now find plaintiff's proposed five-year employment contract may have particular portions excluded from the writing requirement would eviscerate the holding of *Leavell* and its progeny, which requires that the proposed terms to a contract must be considered as a whole. Thus, the fact that a "portion of the proposed terms" might be completed in less than one year does not alter the fact that the alleged contract must be considered *in its entirety*, and the Idaho courts have yet to carve out the kind of exception argued here.

Rather than being distinguishable as plaintiff suggests, the *Treasure Valley* case is highly instructive in the present matter. Taken to its logical end, plaintiff's argument would result in *any* alleged oral agreement being dissected to the point where a party engaging in good faith negotiations could find himself or herself bound to terms they never intended, so long as just one provision of the "contract" being negotiated could be performed within one year. If a

party were allowed to pick and choose isolated provisions of an alleged oral agreement, which he could later seek to enforce on an individual basis, the possible exceptions to the statute of frauds would quickly swallow the rule.

Finally, plaintiff incorrectly argues that the relief he is seeking is limited only to "the agreed upon bonus structure for the time that he worked at Tri-Way." *See* Plaintiff's Supplemental Memorandum, p. 10. According to the First Amended Complaint, he is seeking, *inter alia*: "past and future loss of income," including income that he "would have received in merit and longevity wage increases" (¶ 69(a)); "past and future suffering" (¶ 69(b)); "past and future losses of income which Robert Gray would ordinarily have received" (¶ 69(f)); "any future damages as may be proven" (¶ 69(g)); as well as attorney fees based upon the contract claims he has continuously pursued (¶ 69(i)). He also continues to seek enforcement of the Draft Option to Purchase Corporate Stock. Thus, the unenforceability of the entire Draft Employment Agreement is still squarely at issue in this case, and both the statute of frauds and controlling case law interpreting that statute preclude enforcement of *any* of the proposed terms.

Despite his efforts, plaintiff has failed to distinguish this case from the operative facts and holding at issue in the *Treasure Valley* case. The fact remains that significant portions of the Draft Employment Agreement were unsettled, and the contract in its entirety is unenforceable. Because the Idaho courts have refused to carve out the limited exception urged by plaintiff, and indeed have consistently held that proposed contractual terms must be analyzed in the aggregate, there is no room for a piecemeal approach under the statute of frauds. Of course, defendants have already established through prior briefing in support of their motion for summary judgment that there has never been a sufficient meeting of the minds to support that a valid contract for payment of bonus or incentive pay provisions was ever formed in the first

place. The fact that those terms are also subject to the statute of frauds in this case is but a secondary reason supporting entry of summary judgment in defendants' favor.

C. The Doctrine of Equitable Estoppel Based on Part Performance Does Not Apply to a Contract Which Comes Within the Statute of Frauds Because It Cannot Be Performed Within One Year.

Finally, plaintiff has argued that the doctrine of equitable estoppel bars a defense based upon the statute of frauds because there has been "part performance" by the parties. He further argues that all of the "acts of performance are solely explainable by Gray's employment agreement," and thus that performance is "explainable solely by the contract at issue." *See* Plaintiff's Supplemental Memorandum, p. 12. These arguments either ignore or fail to consider the plain language of the controlling case law cited by defendants in their initial statute of frauds briefing. Both the Supreme Court and the Court of Appeals of Idaho have held that "the doctrine of part performance ***is not applicable to a contract which comes within the statute of frauds because it cannot be performed within one year.***" *Treasure Valley*, 135 Idaho at 489 (emphasis added) (citing *Allen v. Moyle*, 84 Idaho 18, 23, 367 P.2d 579, 582 (1961)). A narrow "exception to the exception" thus has been expressly recognized by the Idaho courts in order to avoid "nullification of the statute." *Id.* (quoting 49 Am.Jur. 798, § 497).

Because the equitable estoppel exception to the statute of frauds does not apply to the May 21 Draft Employment Agreement in the first place, there is no need for the court to consider whether the alleged performance is "consistent solely with the alleged contract."

III. CONCLUSION

The issue now before the court is much simpler than plaintiff would suggest. The court need not, and based upon the comments made during the September 25 hearing *should not*, consider further the factual arguments plaintiff has presented in his supplemental briefing. First,

the facts set forth by plaintiff go well beyond the narrow issue on which supplemental briefing was requested. Plaintiff had an opportunity to address the full spectrum of facts in his moving papers, and his effort to supplement the factual record at this juncture is contrary to both the rules and the scope of supplemental briefing prescribed by the court. In addition, plaintiff's "statement of facts" is largely either unsupported or supported solely by his own self-serving affidavit testimony.

Plaintiff's substantive arguments also carry little or no weight. The most rudimentary search of Idaho law would have led plaintiff to conclude that the court is free to raise the statute of frauds issue if it is "germane to the controversy presented." For him to further argue that the statute of frauds should not be considered as an issue in this case is further belied by the fact that he, and not defendants, requested the opportunity to submit additional briefing if the court felt that it was appropriate. Similarly, plaintiff's supplemental memorandum has failed to provide any authority contrary to the findings of the *Treasure Valley* court. There, the Court of Appeals confirmed the long-standing rule that part performance does not apply when the basis for applying the statute of frauds is due to the fact that the alleged contract cannot be performed within one year. Finally, the Idaho appellate courts have never carved out the particular kind of exception urged by plaintiff when an isolated term within an unenforceable contract may be capable of performance within one year. Had the courts been so inclined, they presumably would have done so in the *Treasure Valley* case, since the provisions which the plaintiff sought to enforce in that case "could have" become applicable within one year. Instead, the appellate courts have routinely applied the statute of frauds to the contract as a whole, and there is no controlling authority which would support a finding that allows for a separate evaluation in the manner urged by plaintiff.

Defendants respectfully submit that the exceptions argued by plaintiff in his supplemental briefing do not apply to the particular facts and circumstances of this case. The statute of frauds clearly applies to the Draft Employment Agreement as it existed on May 21, 2004. Since the "terms" of that alleged agreement were never reduced to a final writing, they are unenforceable. Accordingly, defendant is entitled to entry of summary judgment on plaintiff's contract claims, including the claim for "compensation" based upon the unenforceable contract.

DATED this 27th day of November, 2006.

MOFFATT, THOMAS, BARRETT, ROCK & FIELDS, CHARTERED

By _____
Jason G. Murray – Of the Firm
Attorneys for Defendant

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 27th day of November, 2006, I caused a true and correct copy of the foregoing **REPLY TO PLAINTIFF'S SUPPLEMENTAL MEMORANDUM RE: STATUTE OF FRAUDS** to be served by the method indicated below, and addressed to the following:

Erik F. Stidham
GREENER BANDUCCI SHOEMAKER, P.A.
950 West Bannock Street, Suite 900
Boise, Idaho 83702
Facsimile (208) 319-2601

(✓) U.S. Mail, Postage Prepaid
( ) Hand Delivered
( ) Overnight Mail
( ) Facsimile

Jason G. Murray

THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF

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

NO. _____ FILED A.M. _____ P.M. 4:30

JUN 05 2007

J. DAVID NAVARRO, Clerk

By _____ DEPUTY

ROBERT GRAY,

Plaintiff,

vs.

TRI-WAY CONSTRUCTION SERVICES, INC.

Defendant.

Case No. CVOC 0409193D

ORDER GRANTING MOTION FOR SUMMARY JUDGMENT TO TRI-WAY

On August 3, 2006, Tri-Way Construction Services, Inc. ("Tri-Way") moved this Court to grant summary judgment finding the parties never entered into an employment contract. Tri-Way supported its Motion with affidavits and documents. Robert Gray opposed and filed supporting affidavits. Tri-Way replied

The Court heard argument September 25, 2006, and *sua sponte* ordered further briefing regarding the applicability of the statute of frauds to the employment agreement because by its terms the parties contemplated a five year term of employment. Both parties filed additional memoranda.

The Court further ordered the parties into mediation.

Mediation failed and the parties asked the Court to enter a decision. Pursuant to stipulation of counsel, the Court took the matter under advisement on May 11, 2007.

For the reasons stated below, the Court grants Tri-Way's and Peterson's Motion for Summary Judgment.

BACKGROUND[1]

This dispute arises out of an alleged employment contract between Robert Gray and Tri-Way, a Washington corporation. Tri-Way is a general contractor building commercial construction projects. In 2004, Tri-Way was expanding its operations into Arizona. Gray worked as a senior

[1] These facts are undisputed. To the extent any facts are disputed, Gray's facts are considered true for the purposes of Tri-Way's summary judgment only. To the extent Gray "argues" that his conclusion that an agreement had been reached is a fact, thereby creating a material dispute, the Court disagrees. It is a legal conclusion.

construction manager for Albertson's Inc. when he began negotiations for employment with Tri-Way Construction in January 2004. Albertson's was going through a down-sizing and by 2002 had laid off at least half of its construction managers. Gray had begun working for Albertsons in 1986.

Following a February 2004, meeting with Tri-Way, Gray retained counsel to prepare a written agreement containing the proposed terms of his employment and a proposal whereby Gray would buy out Peterson's interest. On March 10, 2004, Gray e-mailed Peterson and Ray Allard at Tri-Way that he would have his counsel prepare a proposed employment agreement. Gray testified in his deposition that there was no agreement between the parties as to any material terms.

On March 16, 2004, Gray e-mailed an outline of his employment proposal to Tri-Way which included a buy-out of Gary Peterson's interest in the Seattle-Portland business and a salary and bonus plan. Gray proposed that Allard, Peterson and Gray each contribute $15,000 to a capital account to provide start-up costs for the Arizona venture. Gray also proposed that the Arizona and Seattle-Portland operations be tracked separately until 2008 when they would be combined. Under his proposal, none of the parties would take dividends out of the retained earnings until 2009, and at that time Gray's share would be 33% of the retained earnings.

For 2004, Gray proposed he would draw a minimal salary of $400 per week, and in 2005 he would be paid $110,000 either as salary or draws. This amount would increase by 8% through 2008. Gray proposed that as of January 1, 2009, he would become 50-50 partners in the Tri-Way Seattle-Portland operation. However, he indicated he was open to suggestions. Gray testified that on or about April 29, 2004, he sent an e-mail to his accountant, Rob Grover, referencing partnership papers that he was having his attorney draft for a "corporation/partnership in Arizona."

On May 19, 2004, Gray e-mailed his initial Draft[2] Employment Agreement, drafted by his attorney. It proposed a term of employment of 5 years, beginning June 1, 2004, and ending August 1, 2009, unless otherwise terminated as provided in the draft agreement. He also proposed that his salary would be $4,000 per month until January 2005 when it would raise to $10,000. The draft also included an annual bonus of 50% of the net profits before taxes of only the Arizona operation. This draft differed significantly from the proposal Gray e-mailed Tri-Way on March 16, 2004. Peterson

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[2] The document is clearly labeled "Draft."

acknowledged he received the e-mail with the draft proposal on May 19, 2004, at 10:31 in the morning.

Gray testified that prior to May 21st, his attorney also generated what was labeled a Draft Option to Purchase Corporate Stock. Gray testified that this document was discussed at the May 21st meeting. This document was clearly labeled a draft. In it, Gray agreed he would tender $5,000 to the Petersons when the agreement was executed as consideration for the Petersons granting him the option to purchase their stock. He testified he never tendered (or offered) the $5,000 to Peterson and that no party ever signed the Option to Purchase. That draft agreement also proposed that Gray would be entitled to exercise the option to purchase the Petersons' stock at "any time during the period from April 1, 2009 through and including August 1, 2009," approximately five years in the future. Peterson testified neither nor his wife ever agreed to this option.

Subsequent to this draft, another draft was prepared. This new draft contained Gray's handwritten notes. No party ever executed this draft. Gray testified that he sent e-mails to Peterson and that in an e-mail dated July 27, 2004, he wrote: "I also hope to have the final draft of our agreements with me, so we could possibly go over those and sign them, and I could hand you your $5,000."

Gray quit his job at Albertson's May 1, 2004, before the parties met to discuss Gray's draft agreement on May 21, 2004, and before Gray e-mailed his initial Draft Employment Agreement or sent Peterson a copy of the Draft Option to Purchase Corporate Stock.

The parties, Gary Allard, Gary Peterson, Peterson's wife and Gray, met on May 21, 2004. Peterson testified at his deposition that Tri-Way (Allard, Peterson and his wife) told Gray they rejected Gray's proposed employment agreement. Gray denies they told him that and testified in his affidavit as follows:

> As of May 21, 2004, I had an agreement regarding the substantial terms of my employment with Tri-Way Construction Services, Inc., including but not limited to, compensation and profit sharing and my option to purchase the Petersons' ownership interest in Tri-Way.
>
> On May 21, 2004 during the meeting regarding my employment with Tri-Way, Gary Peterson and Ray Allard gave me the impression that we had an agreement regarding my option to purchase the Petersons' interest in Tri-Way and regarding my

compensation. Based on their conduct during the meeting, I believed that we had reached an agreement.[3]

However, subsequent to this May 21st meeting, Gray acknowledges that another draft was prepared -- Exhibit 7 to Gray's deposition. Gray acknowledged this draft was prepared after the May 21st meeting. While the date it was actually prepared is unclear, Gray testified it obviously reflected a later version of the employment agreement because it contained a non-compete and non-disclosure clause discussed at the May 21, 2004, meeting; his draft did not contain these items. Therefore, he testified it must have been prepared after the May 21, 2004, meeting. Gray also testified the handwritten changes to Exhibit 7 were his, and he further testified that Exhibit 7 was not the same document used at the May 21, 2004, meeting. His handwritten changes reflect significant changes to salary and the bonus pay provisions.

Gray began working for Tri-Way on June 1, 2004, opening its Arizona office, even though admittedly no party had signed any employment or buy-out agreement. After he began working, Gray and Tri-Way continued to negotiate his employment contract and the buy-out agreement.[4]

Tri-Way's attorneys prepared another version, (labeled "Ver. 1 6/04/04" at the top) reflecting some of the things discussed at the May 21st meeting. This version was dated three days after Gray began working and modified his proposed salary, reducing the 2005 salary to $8,000 per month and pro-rating the proposed incentive or bonus pay. This version is clearly a draft because it contained typed italicized remarks inserted in the middle of text – most significantly -- text directly addressing compensation and bonuses. For example, in Article 4, which addressed compensation and incentive or bonus pay, this draft contained the following language inserted in the middle of the text:

> **Section 4.2. Performance Based Salary**. . . . * *this section is too confusing?* . . . . **computed when—each month at the end of the first year?*

Peterson testified he rejected this version.

Gray testified that this version reflected some of the things discussed in the May 21st meeting, but he did not believe it accurately reflected everything discussed in the meeting. In fact, Gray

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[3] These two statements represent Gray's conclusions that he had an agreement and represent his perceptions. They are not factual statements.

[4] While Gray disputes there were continued "negotiations," his own exhibits clearly demonstrate that the agreement continued to evolve over a period of time subsequent to his beginning employment and that the parties continued to discuss the important provisions regarding compensation.

testified he wanted the non-compete to be changed. Likewise, Gray testified that he recalled receiving a subsequent version labeled "Ver.2 6/10.04" at the top. Gray testified that this June 10, 2004, version contained changes Gray suggested, and his handwritten notes on this version suggests further changes. Like the previous version, it also contained typed italicized remarks inserted in the middle of text expressing continued concerns about the language in the compensation and bonus section, among other things.

Gray claims that there were no further discussions about the employment agreement beyond June 22, 2004, twenty-two days after he began working for Tri-Way and testified as follows:

> A. I believe they were completed and there were no discussions necessary at this point.
>
> Q. And why do you say that?
>
> A. Because of the discussions that took place on May 21st and final drafts were executed between June 1st and June 10th
>
> Q. When you say "final drafts were executed," what do you mean by "executed"?
>
> A. I mean typed.
>
> Q. Prepared?
>
> A. Prepared.
>
> Q. Okay. Revised?[5]
>
> A. Correct.
>
> Q. Okay. And yet none of those revised agreements were signed by any party at any time, correct?
>
> A. Correct.

On July 27, 2004, approximately 6 weeks after he began working, Gray e-mailed Peterson, in relevant part, as follows:

> I also hope to have the final draft of our agreements with me, so we could possibly go over those and sign them, and I could hand you your $5,000.

The parties continued to modify and discuss the salary and bonus provisions throughout September 2004, as well as, the proposed buy-out agreement. During this period, the parties had numerous conversations negotiating the employment agreement terms. Peterson testified that the Arizona

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[5] Neither party introduced any evidence of a "final" version that contained no italicized comments clearly suggesting continued concerns about the versions.

division would not effectively be run if 50 percent of its net profits were being taken out in cash and given to Gray. These concerns caused Peterson to have his attorney to make further revisions to the compensation provision in the employment agreement -- Article 4.

Gray testified that around September 1, 2004, Tri-Way began attempting to change portions of the "agreement." On September 13, 2004, Gray e-mailed Peterson and Ray Allard, in relevant part, as follows:

> I understand from our conversation that if AZ profit for the year was $300,000 for example, and $184,000 after taxes, your proposal was to have me take 50% of the $184,000, or $92,000, as my annual bonus. Of the remaining $92,000, ½ was going to go to the company as retained earnings, and ½ was going to go to a separate escrow account, which would fund the buyout (or a portion thereof) in 4 years as a dividend payout to Gary [Peterson]. This agreement you sent me below doesn't say that. It says ½ of my 50% bonus would go to the escrow account each year. Which defeats the purpose of having the option to buy stock agreement, and would be unacceptable to me anyway. If you can have this revised to read the way it was discussed, I'll pass it on to my CPA for review and get back to both of you. If I misunderstood our discussion, please let me know.

Peterson responded by e-mail as follows:

> Rob
>
> Think about what you are asking. You want Ray and I to buy me out in 4 ½ years and give you half of the company!
>
> The 50% after taxes that is for the owners will stay in retained earnings as cash flow. Your 50% as we discussed will be divided with ½ in cash bonus to you and the other half to remain in the company as a separate account to use as the purchase agreement.
>
> Any questions – Please respond.
>
> Gary

On October 2, 2004, Gray sent another proposal to Ray Allard and indicated this was a "last gasp" to "try and put this deal together." Gray gave Tri-Way until October 25, 2004, to agree to his terms. October 20, 2004, he returned the company credit cards and on October 21, 2004, he e-mailed Ray Allard, as follows:

> As I mentioned in our conversation earlier today [October 21, 2004], I'd like to make next Friday my last day with Tri Way. . . .
>
> I will not seek reimbursement from Tri Way for those costs I incurred in Attorney and CPA fees as we tried to draft our agreements over the last 6 months, even though they are substantial. As is the earnest money deposit I'll be walking away from on the

> house here in Phoenix. As is the amount of depleted retirement savings. Buy [sic] hey, like I said, I'm a big boy and I put myself into this nightmare, I'll have to dig myself (and my family) out of it.
>
> I would hope that whatever portion of the profits I generated for Tri Way over the last 4 months that you and Gary feel I'm entitled to could be paid to me by November 1st.

(Emphasis added.) October 26, 2004, Gray again e-mailed Ray Allard and Peterson in relevant part as follows:

> Gary,
> Just wanted to thank you for the opportunity to try to put this 'deal' together over the last few months. . . .
>
> Let me try to explain: The last two weeks were not good ones for me. After 5 or 6 months of effort, I have to admit that our failure to put this deal together. . .

(Emphasis added.) Gray testified he "refused to allow" Tri-Way to make the proposed "modifications" and that on or about October 22, 2004, Tri-Way emailed Gray terminating him.

Peterson testified that Gray gave Tri-Way an October 25, 2004, deadline to respond to Gray's final offer. However, according to Tri-Way, at some point prior to October 20, 2004, Gray returned all the corporate credit cards and on October 21, 2004, Gray tendered his resignation. Gray does not dispute that he returned all the corporate credit cards. He claims, however, he was terminated by Tri-Way.

According to Tri-Way, it paid Gray the agreed-upon salary for the work he had done so far and offered him a bonus of $60,000. Gray brought two projects to Tri-Way – generating gross revenues of $960,000 and $215,000. Kathy Peterson testified that the Arizona division generated $271,792.48 in net profits from June 2004 to September 30, 2004.

Gray testified that Tri-Way misrepresented and concealed certain facts which form the basis of the cause of his action for fraud and upon which he claims he relied. He testified Tri-Way represented to him that he could purchase Gary Peterson's interest in Tri-Way for a certain amount. For example, he testified he was unaware that Kathy Peterson owned a 25% interest in Tri-Way, until the May 21st meeting or that she was unwilling to sell her shares. However, in his deposition, Gray testified that he never had any discussions with her about her willingness to sell her shares and no one ever communicated to him that she was unwilling. Gray also testified that Tri-Way represented it would compensate him "at an escalating base salary as well as at an annual amount equal to 50% of the net profit realized by the Defendant's efforts [Tri-Way]." Gray asserts that

because of the representations made regarding these terms, he quit his job at Albertson's and accepted employment with Tri-Way.

Gray brought suit alleging breach of contract, a statutory claim for wages, promissory estoppel, equitable estoppel, and fraud. Relevant to this Motion for Summary Judgment, Gray seeks "past and future" loss of income, including income that he "would have received in merit and longevity wage increases," and "past and future losses of income which Robert Gray would ordinarily have received." He also seeks enforcement of the "Draft Option to Purchase Corporate Stock."

Tri-Way moves for summary judgment and asks the Court to dismiss all Gray's claims with prejudice. Gray also moves for summary judgment and asks the Court to dismiss Tri-Way's and Peterson's counterclaims.

ANALYSIS

Rule 56(c) of the Idaho Rules of Civil Procedure provides that summary judgment is "rendered forthwith if the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." I.R.C.P. § 56(c); *See also First Security Bank of Idaho, N.A. v. Murphy*, 131 Idaho 787, 790, 964 P.2d 654, 657 (1998). A party against whom summary judgment is sought may not merely rest on allegations contained in his pleadings, but must come forward and produce admissible evidence to contradict the assertions of the moving party and establish a genuine issue of material fact. *McCoy v. Lyons*, 120 Idaho 765, 820 P.2d 360 (1991); *Olsen v. J.A. Freeman Co.*, 117 Idaho 706, 791 P.2d 1285 (1990). *See Rhodehouse v. Stutts*, 125 Idaho 208, 211, 868 P.2d 1224, 1227 (1994). Any sworn statements that are part of the record are to be considered by the trial court in deciding whether there is a genuine issue of material fact.

On causes of action to be tried to a jury, the party opposing summary judgment is entitled to the benefit of every reasonable inference that can be drawn from the evidentiary facts. *G & M Farms v. Funk Irrigation Co.*, 119 Idaho 514, 808 P.2d 851 (1991); *Meridian Bowling Lanes, Inc. v. Meridian Athlete Ass'n, Inc.*, 105 Idaho 509, 670 P.2d 129 4 (1983). All controverted facts are liberally construed in favor of the party opposing the summary judgment. *Tusch Enterprises v. Coffin*, 113 Idaho 37, 740 P.2d 1022 (1987); *Doe v. Durtschi*, 110 Idaho 466, 716 P.2d 1238 (1986).

The existence of disputed facts, however, will not defeat summary judgment when the non-moving party fails to make a showing sufficient to establish the existence of an element essential to its case. *Garzee v. Barclay*, 121 Idaho 771, 774, 828 P.2d 334, 337 (Ct.App. 1992).

Moreover, disputes of material facts are not created by mere conclusory statements. *Hecla Mining Co. v. Star-Morning Mining Co.*, 122 Idaho 778, 786, 839 P.2d 1192, 1200 (1992). The requirements of Rule 56(e) are not satisfied by an affidavit that is conclusory, based on hearsay, or not supported by personal knowledge. *See also Oats v. Nissan Motor Corp. in U.S.A.*, 126 Idaho 162, 166, 879 P.2d 1095, 1099 (1994); *Ivey v. State*, 123 Idaho 77, 80-81, 844 P.2d 706, 709-10 (1992). Only material contained in affidavits or depositions that is based upon personal knowledge or that is admissible at trial will be considered by the Court. *Id.* Conclusory assertions, in the face of the facts, are not sufficient to create a genuine issue of material fact. *See Farm Credit Bank of Spokane v. Stevenson*, 125 Idaho 270, 274, 869 P.2d 1365, 1369 (1994) (citing *Hecla Mining Co.*, 122 Idaho at 786, 839 P.2d at 1200)

The admissibility of the evidence contained in affidavits and depositions in support of or in opposition to a motion for summary judgment is a threshold question to be answered before applying the liberal construction and reasonable inferences rule to determine whether the evidence is sufficient to create a genuine issue for trial. *Hecla Mining Co.*, 122 Idaho at 794, 839 P.2d at 1198 ("[t]he question of admissibility is a threshold question to be answered before applying the liberal construction and reasonable inferences rule to the admissible evidence."); *see also State v. Shama Resources Ltd. Partnership*, 127 Idaho 267, 270, 899 P.2d 977, 981 (1995). Therefore, Gray's "conclusions" that he had an agreement or that he had the impression he had an agreement alone do not create a material dispute of fact, especially in the face of the overwhelming evidence the parties simply did not have an agreement, including Gray's own evidence.

I. THERE WAS NO MEETING OF THE MINDS AS TO ALL THE TERMS OF THESE CONTRACTS.

There is no evidence that the parties ever had a meeting of the minds as to either agreement. A valid contract requires a meeting of the minds of the parties as to all the terms of the contract. *Leavell & Co. v. Grafe & Associates, Inc.*, 90 Idaho 502, 512 (1966). Accordingly, to be effective, an acceptance

> must be identical with the offer and unconditional, and must not modify or introduce any new terms into the offer. An acceptance which varies from the terms of the offer is a rejection of the offer and is a counter proposition, which must in turn be accepted by the offeror in order to constitute a binding contract.

Id. In this case, the parties continued to introduce new terms and to modify the language of the proposed agreements and never finalized any agreement.

In particular with respect to the employment agreement, they continued to discuss the very term central to this lawsuit – compensation. Even the last written draft labeled "Ver. 1 6/10/04" was not final. It contained italicized comments in the compensation section -- like "this section is too confusing" and "computed when – each month at the end of the first year?" In fact, Gray himself conceded he wanted the section regarding the non-compete changed. This was after the May 21st meeting where he testified he had concluded they had an agreement. Clearly, they did not have an agreement and his conclusion, unsupported by admissible facts, does not create a material dispute of fact, sufficient to defeat summary judgment. *Hecla Mining Co.,* 122 Idaho at 794, 839 P.2d at 1198.

The general rules for the formation of a binding contract are well established in Idaho. In *C. H. Leavell & Co.* , the Idaho Supreme Court reiterated these general rules as follows:

> 'In order to constitute a contract, there must be a distinct understanding common to both parties. The minds of the parties must meet as to all of its terms, and, if any portion of the proposed terms is unsettled and unprovided for, there is no contract. 9 Cyc. 245. An offer to enter into a contractual relation must be so complete that upon acceptance an agreement is formed which contains all of the terms necessary to determine whether the contract has been performed or not. 1 PAGE ON CONTRACTS, sec. 27; 9 Cyc. 248. An acceptance of an offer, to be effectual, must be identical with the offer and unconditional, and must not modify or introduce any new terms into the offer. 1 PAGE ON CONTRACTS, sec. 45; 9 Cyc. 267. An acceptance which varies from the terms of the offer is a rejection of the offer and is a counter proposition, which must in turn be accepted by the offerer in order to constitute a binding contract.

C. H. Leavell & Co. v. Grafe & Associates, Inc., 90 Idaho 502, 511-12, 414 P.2d 873, ___ (1966) (quoting *Phelps v. Good,* 15 Idaho 76, 84, 96 P. 216, 218 (1908)) (Emphasis added). In other words, if Gray cannot establish that the most important term – compensation – was settled in any way – there is no enforceable contract. In this case, other than Gray's conclusory statement that they had an agreement, there is no evidence to support his conclusion that the parties had actually agreed on all the terms of employment, especially compensation including a bonus, and there is no evidence they

agreed on the option to purchase. In fact, his own testimony and evidence is that they continued to discuss and negotiate the terms of both contracts.

Gray has the burden of proof to prove each contract's existence and its enforceability. *Johnson v. Albert*, 67 Idaho 44, 170 P.2d 403 (1946). Thus, Gray must show a contract was formed through mutual assent. *Thompson v. Pike,* 122 Idaho 690, 696, 838 P.2d 293, 299 (1992). A distinct understanding common to both parties is necessary in order for a contract to exist. *Mitchell v. Siqueiros,* 99 Idaho 396, 400, 582 P.2d 1074, 1078 (1978)(citing *Brothers v. Arave,* 67 Idaho 171, 174 P.2d 202 (1946)).

Furthermore, in this case, it appears the parties intended to reduce any agreements to writing in order to make them enforceable. Whether a contract exists when contracting parties agree to reduce their agreement to writing, is a question of the parties' intent. *Id. See also, Thompson,* 122 Idaho at 696, 838 P.2d at 299. Gray does not testify or introduce evidence that he did not intend for their agreements to be in writing. Generally, there is no requirement that a contract be in writing unless the parties did not intend the contract to be binding until the terms had been reduced to writing. *Intermountain Forest Management, Inc. v. Louisiana-Pacific Corp.,* 136 Idaho 233, 237, 31 P.3d 921 (2001). The factors which show an intent to have a written contract are:

> (1) whether the contract is one usually put in writing, (2) whether there are few or many details, (3) whether the amount involved is large or small, (4) whether it requires a formal writing for a full expression of the covenants and promises, and (5) whether the negotiations indicate that a written draft is contemplated as the final conclusion of negotiations.

Id. An oral agreement will not be valid if the intent of the parties was to have a writing be the "consummation of the negotiation." *Id.*

In this case, the undisputed facts on the record support a conclusion that these parties intended these contracts to be in writing because throughout the negotiations, the parties were exchanging written drafts of the agreement. Moreover, both contained a section indicating the agreement was an integrated document.

At Gray's request, Gray's attorney and accountant drafted the first proposed agreements. Furthermore, these are the kinds of contracts usually put in writing, given the parties proposed a five year employment contract and given the option to purchase could not be exercised for five years. The proposed contracts contained numerous details, and involved large amounts of money. The

matters covered in the draft employment agreement included detailed non-competition clauses, detailed grounds for termination for cause (sexual harassment, alcohol or drug use, violence, etc.), employee benefits (insurance, withholding), non-disclosure clauses and specifically provided for attorney fees and indicated it was the entire integrated agreement. Likewise, the proposed draft option agreement involved a great deal of money, required consideration and addressed areas like warranties and detailed how the parties were to treat each other. Based on all of this, the Court finds the parties clearly anticipated consummating any contract negotiations with a written document. The parties agree none was ever consummated.

An oral agreement is only valid if the written draft is viewed by the parties as a mere record; however, the oral agreement is not valid if the parties view the written draft as a consummation of the negotiation. *Id.* Furthermore, "[w]here it is clear that one party has agreed that an oral agreement must be reduced to writing before it shall be binding, there is no contract until a formal document is executed." *Mitchell,* 99 Idaho at 400, 582 P.2d at 1078 (citations omitted). Therefore, the Court finds there was no meeting of the minds and no contracts were formed.

Finally, with respect to any option to purchase corporate stock five years from the date of employment, Gray's draft option agreement clearly required him to pay the Petersons $5,000 as a condition precedent. Gray admits that he never tendered the $5,000 consideration clearly anticipated by his draft option agreement. Therefore, with respect to any option agreement, even if the parties had an oral agreement, it was never consummated because Gray failed to tender the consideration clearly required in his own draft agreement.

Finally, even if the Court were to determine that there were oral contracts, as Gray contends, the statute of frauds precludes enforcement.

II. THE STATUTE OF FRAUDS PRECLUDES THE COURT FROM ENFORCING ANY ALLEGED CONTRACT.[6]

It is undisputed that neither party ever signed any employment contract creating a written contract. Thus, at best, Gray had an oral contract for employment. It is also undisputed that the employment contract Gray contends existed was for a term of five years.

Likewise, it is undisputed that neither party signed any Option to Purchase Corporate Stock. It is also undisputed that the draft option agreement clearly by its terms anticipated that the option could not be exercised for five years.

For the purposes of this summary judgment analysis only, the Court assumed Gray and Tri-Way had oral or implied employment contract as asserted by Gray and that Gray and the Petersons had an oral option to purchase agreement as asserted by Gray. Therefore, the question presented is whether the enforcement of those two oral agreements is prohibited by the statute of frauds, I.C. § 9-505, which provides, in relevant part, as follows:

> In the following cases the agreement is invalid, unless the same or some note or memorandum thereof, be in writing and subscribed by the party charged, or by his agent. Evidence, therefore, of the agreement cannot be received without the writing or secondary evidence of its contents:
>
> 1. An agreement that by its terms is not to be performed within a year from the making thereof.

A contract of employment for a fixed term greater than one year is subject to the statute of frauds. *Treasure Valley Gastroenterology Specialists, P.A. v. Woods*, 135 Idaho 485, 20 P.3d 21 (Ct. App. 2001); *Burton v. Atomic Workers Fed. Credit Union,* 119 Idaho 17, 20, 803 P.2d 518, 521 (1990); *Allen v. Moyle,* 84 Idaho 18, 23, 367 P.2d 579, 582 (1961). Likewise, an option to purchase

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[6] While Gray argues that Tri-Way and Peterson waived their right to rely on the statute of frauds and, thus, the Court should not consider this defense, the Court disagrees. In *Bluestone v. Mathewson*, the Idaho Supreme Court held that where the defense was raised before trial *and the party was given time to present argument in opposition*, the defense of statute of frauds can be raised for the first time in the summary judgment motion. *Bluestone v. Mathewson*, 103 Idaho 453, 649 P.2d 1209 (1982)(citing *McKinley v. Bendix Corp.*, 420 F.Supp. 1001 (W.D.Mo.1976); *Greenwald v. Cunard Steam-Ship Company*, 162 F.Supp. 250 (S.D.N.Y.1958); *See Baker v. Chicago, Fire & Burglary Detection, Inc.*, 489 F.2d 953 (7th Cir. 1973)); *see also Good v. Hansen*, 110 Idaho 953, 719 P.2d 1213 (Ct. App. 1986). Furthermore, the court has the inherent power to identify and to apply legal authorities germane to the controversy presented. *Good v. Hansen*, 110 Idaho 953, 719 P.2d 1213 (Ct. App. 1986). In this case, the Court gave both parties the opportunity to address this issue and both did.

stock contract which by its terms cannot be completed within one year (the sale of the stock nearly five years after the alleged oral contract) is subject to the statute of frauds. *Id.*

The statute of frauds does not prevent the creation of an oral contract but precludes the contract's enforcement.[7] Thus, in *Hoffman v. S.V. Co., Inc.,* 102 Idaho 187, 628 P.2d 218 (1981), the Supreme Court affirmed the trial court's holding that an oral contract for the conveyance of real property had been formed but that failure to comply with the statute of frauds rendered the oral agreement unenforceable. *See also Treasure Valley Gastroenterology Specialists, supra*; *Hemingway v. Gruener,* 106 Idaho 422, 424, 679 P.2d 1140, 1142 (1984); *Wing v. Munns,* 123 Idaho 493, 499, 849 P.2d 954, 960 (Ct.App.1992). Therefore, the alleged oral or implied employment contract, with the bonus provisions upon which Gray relies, is rendered unenforceable by the statute of frauds unless there are circumstances which exempt this transaction from the strictures of the statute. *Id.* Likewise, any option to purchase at some time after five years is rendered unenforceable. *Id.*

Gray argues that by beginning to work for Tri-Way June 1, 2004, part performance takes this employment "contract" and the option contract out of the application of the statute of frauds. The Court disagrees. First, it has long been established in Idaho law that the doctrine of part performance is not applicable to a contract which comes within the statute of frauds because it cannot be performed within one year. *Id.*; *Allen,* 84 Idaho at 23, 367 P.2d at 582. "The mere part performance of such a contract does not take it out of the operation of the statute or permit a recovery under the contract for any part of the contract remaining executory.... [T]o hold that part performance is performance would be a nullification of the statute." *Id.* (quoting 49 AM.JUR. 798, § 497). *See also Burton,* 119 Idaho at 20, 803 P.2d at 521.

Second, under Idaho law, part performance *per se* does not remove a contract from the operation of the statute of frauds. Rather, "[t]he doctrine of part performance is best understood as a specific form of the more general principle of equitable estoppel." *Treasure Valley Gastroenterology Specialists,* 135 Idaho at 490, 20 P.3d at 26; *Wing v. Munns,* 123 Idaho 493, 500, 849 P.2d 954, 961 (Ct.App.1992). Therefore, the question whether part performance allows Gray to avoid application of

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[7] To the extent that Gray relies on an unreported opinion issued by the Magistrate Judge in the Federal Bankruptcy Court, his reliance is misplaced. *See Gomez v. Mastec North America,* 2006 WL 36902 (D. Idaho 2006). Gray argues that the Court should simply excise portions of the employment agreement that are not directly tied to the five year employment clause and enforce those provisions. He is simply wrong. This would nullify the Statute of Frauds.

the statute of frauds depends upon whether the part performance is such as to equitably estop Tri-Way from relying upon the statute as a defense. The Court finds it does not. The elements of equitable estoppel with respect to the party to be estopped are:

> ... (1) Conduct which amounts to a false representation or concealment of material facts, or, at least, which is calculated to convey the impression that the facts are otherwise than, and inconsistent with, those which the party subsequently attempts to assert; (2) intention, or at least expectation, that such conduct shall be acted upon by the other party; (3) knowledge, actual or constructive, of the real facts. As related to the party claiming the estoppel, they are: (1) Lack of knowledge and of the means of knowledge of the truth as to the facts in question[;] (2) reliance upon the conduct of the party estopped; and (3) action based thereon of such a character as to change his position prejudicially.

Treasure Valley Gastroenterology Specialists, 135 Idaho at 490, 20 P.3d at 26; *Tew v. Manwaring,* 94 Idaho 50, 53, 480 P.2d 896, 899 (1971). *See also Charpentier v. Welch,* 74 Idaho 242, 248, 259 P.2d 814, 817 (1953); *Frantz,* 111 Idaho at 1010, 729 P.2d at 1073. Where all these elements have been proven, estoppel bars the party making the false representation from raising the statute of frauds as a defense. *Frantz, supra.*[8]

In this case, while the evidence may show there was an employment relationship, it is clear that the actual terms of that relationship, in particular compensation, were still being negotiated and, to be specifically enforced by operation of the doctrine of part performance, an oral agreement "must be complete, definite and certain in all its material terms, or contain provisions which are capable in themselves of being reduced to certainty." *Lettunich v. Key Bank Nat. Ass'n,* 141 Idaho 362, 365, 109 P.3d 1104, 1109 (2005) (citing *Bear Island Water Ass'n, Inc. v. Brown*, 125 Idaho 717, 723, 874 P.2d 528, 534 (1994)). Like *Lettunich*, what is lacking is a sufficiently definite agreement to be enforced. *See also Black Canyon Racquetball v. First Nat'l,* 119 Idaho 171, 178, 804 P.2d 900, 907 (1991). A contract will be enforced if it is "complete, definite and certain in all its material terms, or contains provisions which are capable in themselves of being reduced to certainty." *Dursteler v. Dursteler*, 108 Idaho 230, 234, 697 P.2d 1244, 1248 (Ct. App.,1985) (quoting *Giacobbi Square v. PEK Corp.,* 105 Idaho 346, 348, 670 P.2d 51, 53 (1983) (emphasis omitted). To meet this standard the contract must embody a distinct understanding of the parties, showing a meeting of the minds as

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[8] Likewise, the party claiming estoppel must be referable only to the contractual term that is in dispute – in this case, the bonus provisions. *Treasure Valley Gastroenterology Specialists,* 135 Idaho at 490, 20 P.3d at 26.

to all necessary terms of the contract. The obligations of the parties must be identified so that the adequacy of performance can be ascertained. *Dale's Service Co., v. Jones,* 96 Idaho 662, 534 P.2d 1102 (1975). If terms necessary to a contract are left for future negotiation, the contract cannot be enforced. *Brothers v. Arave,* 67 Idaho 171, 174 P.2d 202 (1946).

Contrary to Gray's conclusory statements that an agreement as to "regarding the substantial terms of my employment with Tri-Way Construction Services, Inc., including but not limited to, compensation and profit sharing and my option to purchase the Petersons' ownership interest in Tri-Way," there is no evidence to support his conclusion. Equitable estoppel assumes the existence of a complete agreement, which is clearly lacking here. Therefore, equitable estoppel will not render either the Draft Employment Agreement or the Draft Option to Purchase Corporate Stock enforceable.

Therefore, neither contract is enforceable and partial summary judgment is granted to Tri-Way and to Peterson.

III. SINCE THE PARTIES NEVER AGREED ON THE TERMS OF ANY BONUS, GRAY'S STATUTORY WAGE CLAIM FAILS.

Gray also makes a claim for wages due and owing under Idaho Code § 45-601 which provides,

> "Wage claim" means an employee's claim against an employer for compensation for the employee's own personal services, and includes any wages, penalties, or damages provided by law to employees with a claim for unpaid wages.

Tri-Way concedes that the term wage includes "any ascertainable unpaid commissions and bargained-for compensation." *Moore v. Omnicare, Inc.,* 141 Idaho 809, 118 P.3d 141 (2005). Likewise, it concedes that a "claim for an employee bonus, which was calculated by reference to the net profit of the defendant company and paid yearly, was part of the compensation bargained for in the agreement of employment." *Johson v. Allied Stores Corp.*, 106 Idaho 363, 367, 679 P.2d 640 (1984).

However, Tri-Way argues that because the bonus was the part of the contract that was never finally agreed to, there was never a "bargained for agreement" in this case and no possible wage claim. On this issue, Gray argues that since there is an issue of fact whether there was a valid agreement summary judgment is not appropriate. However, the Court disagrees. As discussed

above, Gray introduces no evidence that the parties ever actually agreed on the terms of his bonus. Thus, this cause of action fails.

Therefore, based on the above the Defendants' Motion for Summary Judgment is granted.

IT IS SO ORDERED.

Dated this 5th day of June 2007.

Cheri C. Copsey
District Judge

CERTIFICATE OF MAILING

I hereby certify that on this 5 day of June 2007, I mailed (served) a true and correct copy of the within instrument to:

ERIK F. STIDHAM
ROBERT R. BALL
GREENER BANDUCCI SHOEMAKER P.A.
815 WEST WASHINGTON STREET
BOISE, IDAHO 83702

PATRICIA M. OLSSON
JASON G. MURRAY
MOFFATT, THOMAS, BARRETT ROCK & FIELDS, CHTD.
P.O BOX 829
BOISE, IDAHO 83701

J. DAVID NAVARRO
Clerk of the District Court

Paula Grossman
Deputy Clerk

NO. _____ FILED
A.M. _____ P.M. 2:12

JUN 14 2007
J. DAVID NAVARRO, Clerk
By _____ DEPUTY

THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

ROBERT GRAY,

Plaintiff,

vs.

TRI-WAY CONSTRUCTION SERVICES, INC.

Defendant.

Case No. CVOC 0409193D

ORDER DENYING IN PART AND GRANTING IN PART GRAY'S MOTION FOR SUMMARY JUDGMENT

On August 3, 2006, Robert Gray moved this Court to grant summary judgment dismissing Tri-Way Construction Services, Inc. ("Tri-Way") counterclaims.[1] Gray supported his Motion with affidavits and documents. Tri-Way opposed and filed supporting affidavits.

The Court heard argument September 25, 2006, and ordered the parties into mediation. Mediation failed and the parties asked the Court to enter a decision. Pursuant to stipulation of counsel, the Court took the matter under advisement on May 11, 2007.

Although Gray moved for summary judgment on counts I-VI of Tri-Way's counterclaims, Tri-Way only responded to Counts I (Breach of the Implied Covenant of Good Faith and Fair Dealing), IV (Tortious Interference with Contract), and V (Conversion). Therefore, as to Counts II, III and VI, the Court dismisses those counts.

Furthermore, for the reasons stated below, the Court denies Gray's Motion for Summary Judgment as to the remaining Counts I, IV and V finding there are disputes of material facts. By reference, the Court hereby incorporates the factual statement found in its Order Granting Summary Judgment to Tri-Way dated June 5, 2007.

ANALYSIS

Rule 56(c) of the Idaho Rules of Civil Procedure provides that summary judgment is "rendered forthwith if the pleadings, depositions, and admissions on file, together with the affidavits,

if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." I.R.C.P. § 56(c); *See also First Security Bank of Idaho, N.A. v. Murphy*, 131 Idaho 787, 790, 964 P.2d 654, 657 (1998). A party against whom summary judgment is sought may not merely rest on allegations contained in his pleadings, but must come forward and produce admissible evidence to contradict the assertions of the moving party and establish a genuine issue of material fact. *McCoy v. Lyons*, 120 Idaho 765, 820 P.2d 360 (1991); *Olsen v. J.A. Freeman Co.*, 117 Idaho 706, 791 P.2d 1285 (1990). *See Rhodehouse v. Stutts*, 125 Idaho 208, 211, 868 P.2d 1224, 1227 (1994). Any sworn statements that are part of the record are to be considered by the trial court in deciding whether there is a genuine issue of material fact.

On causes of action to be tried to a jury, the party opposing summary judgment is entitled to the benefit of every reasonable inference that can be drawn from the evidentiary facts. *G & M Farms v. Funk Irrigation Co.*, 119 Idaho 514, 808 P.2d 851 (1991); *Meridian Bowling Lanes, Inc. v. Meridian Athlete Ass'n, Inc.*, 105 Idaho 509, 670 P.2d 129 4 (1983). All controverted facts are liberally construed in favor of the party opposing the summary judgment. *Tusch Enterprises v. Coffin*, 113 Idaho 37, 740 P.2d 1022 (1987); *Doe v. Durtschi*, 110 Idaho 466, 716 P.2d 1238 (1986).

Although Gray moved for summary judgment on counts I-VI of Tri-Way's counterclaims, Tri-Way only responded to Counts I (Breach of the Implied Covenant of Good Faith and Fair Dealing), IV (Tortious Interference with Contract), and V (Conversion). Therefore, as to Counts II, III and VI, the Court dismisses those counts. However, with respect to the remaining counterclaims, the Court finds that there are disputes of material facts that preclude summary judgment.

Therefore, based on the above Gray's Motion for Summary Judgment on the conversion, tortious interference with contract and breach of the covenant of good faith and fair dealing is denied.

IT IS SO ORDERED.

Dated this 11th day of June 2007.

Cheri C. Copsey
District Judge

[1] The Court granted summary judgment to Tri-Way on its Motion on June 5, 2007.

CERTIFICATE OF MAILING

I hereby certify that on this 14 day of June 2007, I mailed (served) a true and correct copy of the within instrument to:

ERIK F. STIDHAM
ROBERT R. BALL
GREENER BANDUCCI SHOEMAKER P.A.
815 WEST WASHINGTON STREET
BOISE, IDAHO 83702

PATRICIA M. OLSSON
JASON G. MURRAY
MOFFATT, THOMAS, BARRETT ROCK & FIELDS, CHTD.
P.O BOX 829
BOISE, IDAHO 83701

J. DAVID NAVARRO
Clerk of the District Court

Paula Grossman
Deputy Clerk

Erik F. Stidham, ISB No. 5483
Dean Arnold, ISB No. 6814
HOLLAND & HART LLP
Suite 1400, U.S. Bank Plaza
101 South Capitol Blvd.
Mailing Address:
P.O. Box 2527
Boise, ID 83701-2527
Telephone: (208) 342-5000
Facsimile: (208) 343-8869
E-mail: efstidham@hollandhart.com

Attorneys for Plaintiff Robert Gray

DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF

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

ROBERT GRAY, Plaintiff v. TRI-WAY CONSTRUCTION SERVICES, INC., a Washington Corporation; RAY ALLRAD, an individual; KATHY PETERSON, an individual; GARY PETERSON, an individual, Defendants.	Case No. CVOC 0409193D **PLAINTIFF'S MOTION FOR CLARIFICATION OF ORDER GRANTING MOTION FOR SUMMARY JUDGMENT TO TRI-WAY** Assigned Judge: Cheri C. Copsey

Plaintiff, Robert Gray ("Gray"), by and through his counsel of record, Holland & Hart, LLP, moves for an order clarifying the Court's Order regarding Tri-Way's Motion for Summary Judgment entered on June 5, 2007 ("June 5 Order").

Gray seeks clarification that the June 5 Order is limited to Gray's claim for Breach of Contract (Count I) and his Statutory Claim for Wages (Count III).

The June 5 Order discusses Gray's claim for Breach of Contract. (June 5 Order, at 9-16). At the conclusion of the Court's discussion of the Breach of Contract claim,

the June 5 Order states "neither contract is enforceable and partial summary judgment is granted as to Tri-Way and Peterson." (Id at 16). In turn, the June 5 Order considers Gray's Statutory Wage Claim. (Id. at 16-17). After considering the Statutory Wage Claim, the Order states "[t]hus, this cause of action fails." (June 5 Order at 17) (emphasis added).

The June 5 Order is silent regarding Gray's other causes of action. Accordingly, Gray understands that five of his causes of action (Counts II, IV, V, VI, VII, and VIII) remain to be tried before a jury. Accordingly, Gray requests that the Court clarify that its June 5th Order is limited to Gray's Breach of Contract Claim (Count I) and his Statutory Wage Claim (Count III).

Such clarification is necessary in order to eliminate the various uncertainties in the Court's June 5th Order. Clarifying these uncertainties will help facilitate adequate litigation of the claims in this matter.

This Motion is supported by the Court's record.

DATED this 3rd day of July, 2007.

HOLLAND & HART LLP

Erik F. Stidham, of the firm
Attorneys for Plaintiff Robert Gray

CERTIFICATE OF SERVICE

I hereby certify that on this 3rd day of July 2007, I caused to be served a true and correct copy of the foregoing by the method indicated below, and addressed to the following:

Jason G. Murray, Esq.
MOFFATT THOMAS BARRETT ROCK & FIELDS, CHTD.
101 S. Capitol Blvd., 10th Floor
P.O. Box 829
Boise, Idaho 83701-0829
Fax: (208) 385-5384

- ☐ U.S. Mail
- ☒ Hand Delivered
- ☐ Overnight Mail
- ☐ Telecopy (Fax)

for HOLLAND & HART LLP

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NO. _____
A.M. 8:35 FILED P.M. _____

AUG 07 2007

J. DAVID NAVARRO, Clerk
By Barbara Anderson
DEPUTY

THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT

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

ROBERT GRAY,

Plaintiff,

vs.

TRI-WAY CONSTRUCTION SERVICES, INC.

Defendant.

Case No. CVOC 0409193D

ORDER CLARIFYING JUNE 5, 2007 SUMMARY JUDGMENT ORDER AND CORRECTING THE ORDER

On August 3, 2006, Tri-Way Construction Services, Inc. ("Tri-Way") moved this Court to grant summary judgment finding the parties never entered into an employment contract. Tri-Way supported its Motion with affidavits and documents. Robert Gray opposed and filed supporting affidavits. Tri-Way replied

The Court heard argument September 25, 2006, and *sua sponte* ordered further briefing regarding the applicability of the statute of frauds to the employment agreement because by its terms the parties contemplated a five year term of employment. Both parties filed additional memoranda.

The Court further ordered the parties into mediation.

Mediation failed and the parties asked the Court to enter a decision. Pursuant to stipulation of counsel, the Court took the matter under advisement on May 11, 2007.

On June 5, 2007, the Court granted Tri-Way summary judgment and issued a Memorandum Decision. July 3, 2007, Gray moved the Court to clarify its decision to indicate whether it intended to grant summary judgment to Tri-Way on all counts.

In reviewing the prior decision, the Court observed a typographical error and hereby issues this errata. Section III, paragraph 1 is corrected to read as follows with the change underlined.

> Gray also makes a claim for wages due and owing under Idaho Code § 45-601 which provides,
>
> > "Wage claim" means an employee's claim against an employer for compensation for the employee's own personal services, and includes any

wages, penalties, or damages provided by law to employees with a claim for unpaid wages.

Tri-Way concedes that the term wage includes "any ascertainable unpaid commissions and bargained-for compensation." *Moore v. Omnicare, Inc.*, 141 Idaho 809, 118 P.3d 141 (2005). Likewise, it concedes that a claim for an employee bonus may be part of the compensation bargained for in the agreement of employment. *Johnson v. Allied Stores Corp.*, 106 Idaho 363, 367, 679 P.2d 640 (1984).

For the reasons stated below, the Court clarifies its June 5, 2007, decision.

BACKGROUND[1]

This dispute arises out of an alleged employment contract between Robert Gray and Tri-Way, a Washington corporation. Tri-Way is a general contractor building commercial construction projects. In 2004, Tri-Way was expanding its operations into Arizona. Gray worked as a senior construction manager for Albertson's Inc. when he began negotiations for employment with Tri-Way Construction in January 2004. Albertson's was going through a down-sizing and by 2002 had laid off at least half of its construction managers. Gray had begun working for Albertsons in 1986.

Following a February 2004, meeting with Tri-Way, Gray retained counsel to prepare a written agreement containing the proposed terms of his employment and a proposal whereby Gray would buy out Peterson's interest. On March 10, 2004, Gray e-mailed Peterson and Ray Allard at Tri-Way that he would have his counsel prepare a proposed employment agreement. Gray testified in his deposition that there was no agreement between the parties as to any material terms.

On March 16, 2004, Gray e-mailed an outline of his employment proposal to Tri-Way which included a buy-out of Gary Peterson's interest in the Seattle-Portland business and a salary and bonus plan. Gray proposed that Allard, Peterson and Gray each contribute $15,000 to a capital account to provide start-up costs for the Arizona venture. Gray also proposed that the Arizona and Seattle-Portland operations be tracked separately until 2008 when they would be combined. Under his proposal, none of the parties would take dividends out of the retained earnings until 2009, and at that time Gray's share would be 33% of the retained earnings.

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[1] These facts are undisputed. To the extent any facts are disputed, Gray's facts are considered true for the purposes of Tri-Way's summary judgment only. To the extent Gray "argues" that his conclusion that an agreement had been reached is a fact, thereby creating a material dispute, the Court disagrees. It is a legal conclusion.

For 2004, Gray proposed he would draw a minimal salary of $400 per week, and in 2005 he would be paid $110,000 either as salary or draws. This amount would increase by 8% through 2008. Gray proposed that as of January 1, 2009, he would become 50-50 partners in the Tri-Way Seattle-Portland operation. However, he indicated he was open to suggestions. Gray testified that on or about April 29, 2004, he sent an e-mail to his accountant, Rob Grover, referencing partnership papers that he was having his attorney draft for a "corporation/partnership in Arizona."

On May 19, 2004, Gray e-mailed his initial Draft[2] Employment Agreement, drafted by his attorney. It proposed a term of employment of 5 years, beginning June 1, 2004, and ending August 1, 2009, unless otherwise terminated as provided in the draft agreement. He also proposed that his salary would be $4,000 per month until January 2005 when it would raise to $10,000. The draft also included an annual bonus of 50% of the net profits before taxes of only the Arizona operation. This draft differed significantly from the proposal Gray e-mailed Tri-Way on March 16, 2004. Peterson acknowledged he received the e-mail with the draft proposal on May 19, 2004, at 10:31 in the morning.

Gray testified that prior to May 21st, his attorney also generated what was labeled a Draft Option to Purchase Corporate Stock. Gray testified that this document was discussed at the May 21st meeting. This document was clearly labeled a draft. In it, Gray agreed he would tender $5,000 to the Petersons when the agreement was executed as consideration for the Petersons granting him the option to purchase their stock. He testified he never tendered (or offered) the $5,000 to Peterson and that no party ever signed the Option to Purchase. That draft agreement also proposed that Gray would be entitled to exercise the option to purchase the Petersons' stock at "any time during the period from April 1, 2009 through and including August 1, 2009," approximately five years in the future. Peterson testified neither nor his wife ever agreed to this option.

Subsequent to this draft, another draft was prepared. This new draft contained Gray's handwritten notes. No party ever executed this draft. Gray testified that he sent e-mails to Peterson and that in an e-mail dated July 27, 2004, he wrote: "I also hope to have the final draft of our agreements with me, so we could possibly go over those and sign them, and I could hand you your $5,000."

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[2] The document is clearly labeled "Draft."

Gray quit his job at Albertson's May 1, 2004, before the parties met to discuss Gray's draft agreement on May 21, 2004, and before Gray e-mailed his initial Draft Employment Agreement or sent Peterson a copy of the Draft Option to Purchase Corporate Stock.

The parties, Gary Allard, Gary Peterson, Peterson's wife and Gray, met on May 21, 2004. Peterson testified at his deposition that Tri-Way (Allard, Peterson and his wife) told Gray they rejected Gray's proposed employment agreement. Gray denies they told him that and testified in his affidavit as follows:

> As of May 21, 2004, I had an agreement regarding the substantial terms of my employment with Tri-Way Construction Services, Inc., including but not limited to, compensation and profit sharing and my option to purchase the Petersons' ownership interest in Tri-Way.
>
> On May 21, 2004 during the meeting regarding my employment with Tri-Way, Gary Peterson and Ray Allard gave me the impression that we had an agreement regarding my option to purchase the Petersons' interest in Tri-Way and regarding my compensation. Based on their conduct during the meeting, I believed that we had reached an agreement.[3]

However, subsequent to this May 21st meeting, Gray acknowledges that another draft was prepared -- Exhibit 7 to Gray's deposition. Gray acknowledged this draft was prepared after the May 21st meeting. While the date it was actually prepared is unclear, Gray testified it obviously reflected a later version of the employment agreement because it contained a non-compete and non-disclosure clause discussed at the May 21, 2004, meeting; his draft did not contain these items. Therefore, he testified it must have been prepared after the May 21, 2004, meeting. Gray also testified the handwritten changes to Exhibit 7 were his, and he further testified that Exhibit 7 was not the same document used at the May 21, 2004, meeting. His handwritten changes reflect significant changes to salary and the bonus pay provisions.

Gray began working for Tri-Way on June 1, 2004,[4] opening its Arizona office, even though admittedly no party had signed any employment or buy-out agreement. After he began working, Gray and Tri-Way continued to negotiate his employment contract and the buy-out agreement.[5]

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[3] These two statements represent Gray's conclusions that he had an agreement and represent his perceptions. They are not factual statements.

[4] In preparing this Clarification, the Court reviewed all of the affidavits contained in the file. This case has been hard fought and Tri-Way initially moved the Court to dismiss the case for lack of jurisdiction. The Court notes that in two

Tri-Way's attorneys prepared another version, (labeled "Ver. 1 6/04/04" at the top) reflecting some of the things discussed at the May 21st meeting. This version was dated three days after Gray began working and modified his proposed salary, reducing the 2005 salary to $8,000 per month and pro-rating the proposed incentive or bonus pay. This version is clearly a draft because it contained typed italicized remarks inserted in the middle of text – most significantly -- text directly addressing compensation and bonuses. For example, in Article 4, which addressed compensation and incentive or bonus pay, this draft contained the following language inserted in the middle of the text:

> **Section 4.2. Performance Based Salary**. . . . * *this section is too confusing?* . . . . **computed when—each month at the end of the first year?*

Peterson testified he rejected this version.

Gray testified that this version reflected some of the things discussed in the May 21st meeting, but he did not believe it accurately reflected everything discussed in the meeting. In fact, Gray testified he wanted the non-compete to be changed. Likewise, Gray testified that he recalled receiving a subsequent version labeled "Ver.2 6/10.04" at the top. Gray testified that this June 10, 2004, version contained changes Gray suggested, and his handwritten notes on this version suggests further changes. Like the previous version, it also contained typed italicized remarks inserted in the middle of text expressing continued concerns about the language in the compensation and bonus section, among other things.

Gray claims that there were no further discussions about the employment agreement beyond June 22, 2004, twenty-two days after he began working for Tri-Way and testified as follows:

> A. I believe they were completed and there were no discussions necessary at this point.
>
> Q. And why do you say that?
>
> A. Because of the discussions that took place on May 21st and final drafts were executed between June 1st and June 10th
>
> Q. When you say "final drafts were executed," what do you mean by "executed"?

---

affidavits submitted by Gray (dated April 27, 2005, and May 12 2005, respectively), he testified under oath that he began work for Tri-Way May 2004 and that he immediately obtained two Albertson's projects on behalf of Tri-Way as Tri-Way's employee.

[5] While Gray disputes there were continued "negotiations," his own exhibits clearly demonstrate that the agreement continued to evolve over a period of time subsequent to his beginning employment and that the parties continued to discuss the important provisions regarding compensation.

A. I mean typed.

Q. Prepared?

A. Prepared.

Q. Okay. Revised?[6]

A. Correct.

Q. Okay. And yet none of those revised agreements were signed by any party at any time, correct?

A. Correct.

On July 27, 2004, approximately 6 weeks after he began working, Gray e-mailed Peterson, in relevant part, as follows:

> I also hope to have the final draft of our agreements with me, so we could possibly go over those and sign them, and I could hand you your $5,000.

The parties continued to modify and discuss the salary and bonus provisions throughout September 2004, as well as, the proposed buy-out agreement. During this period, the parties had numerous conversations negotiating the employment agreement terms. Peterson testified that the Arizona division would not effectively be run if 50 percent of its net profits were being taken out in cash and given to Gray. These concerns caused Peterson to have his attorney to make further revisions to the compensation provision in the employment agreement -- Article 4.

Gray testified that around September 1, 2004, Tri-Way began attempting to change portions of the "agreement." On September 13, 2004, Gray e-mailed Peterson and Ray Allard, in relevant part, as follows:

> I understand from our conversation that if AZ profit for the year was $300,000 for example, and $184,000 after taxes, your proposal was to have me take 50% of the $184,000, or $92,000, as my annual bonus. Of the remaining $92,000, ½ was going to go to the company as retained earnings, and ½ was going to go to a separate escrow account, which would fund the buyout (or a portion thereof) in 4 years as a dividend payout to Gary [Peterson]. This agreement you sent me below doesn't say that. It says ½ of my 50% bonus would go to the escrow account each year. Which defeats the purpose of having the option to buy stock agreement, and would be unacceptable to me anyway. If you can have this revised to read the way it was discussed, I'll pass

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[6] Neither party introduced any evidence of a "final" version that contained no italicized comments clearly suggesting continued concerns about the versions.

it on to my CPA for review and get back to both of you. If I misunderstood our discussion, please let me know.

Peterson responded by e-mail as follows:

> Rob
>
> Think about what you are asking. You want Ray and I to buy me out in 4 ½ years and give you half of the company!
>
> The 50% after taxes that is for the owners will stay in retained earnings as cash flow. Your 50% as we discussed will be divided with ½ in cash bonus to you and the other half to remain in the company as a separate account to use as the purchase agreement.
>
> Any questions – Please respond.
>
> Gary

On October 2, 2004, Gray sent another proposal to Ray Allard and indicated this was a "last gasp" to "try and put this deal together." Gray gave Tri-Way until October 25, 2004, to agree to his terms. October 20, 2004, he returned the company credit cards and on October 21, 2004, he e-mailed Ray Allard, as follows:

> As I mentioned in our conversation earlier today [October 21, 2004], I'd like to make next Friday my last day with Tri Way. . . .
>
> I will not seek reimbursement from Tri Way for those costs I incurred in Attorney and CPA fees as we tried to draft our agreements over the last 6 months, even though they are substantial. As is the earnest money deposit I'll be walking away from on the house here in Phoenix. As is the amount of depleted retirement savings. Buy [sic] hey, like I said, I'm a big boy and I put myself into this nightmare, I'll have to dig myself (and my family) out of it.
>
> I would hope that whatever portion of the profits I generated for Tri Way over the last 4 months that you and Gary feel I'm entitled to could be paid to me by November 1st.

(Emphasis added.) October 26, 2004, Gray again e-mailed Ray Allard and Peterson in relevant part as follows:

> Gary,
> Just wanted to thank you for the opportunity to try to put this 'deal' together over the last few months. . . .
>
> Let me try to explain: The last two weeks were not good ones for me. After 5 or 6 months of effort, I have to admit that our failure to put this deal together. . .

(Emphasis added.) Gray testified he "refused to allow" Tri-Way to make the proposed "modifications" and that on or about October 22, 2004, Tri-Way emailed Gray terminating him.

Peterson testified that Gray gave Tri-Way an October 25, 2004, deadline to respond to Gray's final offer. However, according to Tri-Way, at some point prior to October 20, 2004, Gray returned all the corporate credit cards and on October 21, 2004, Gray tendered his resignation. Gray does not dispute that he returned all the corporate credit cards. He claims, however, he was terminated by Tri-Way.

According to Tri-Way, it paid Gray the agreed-upon salary for the work he had done so far and offered him a bonus of $60,000. Gray brought two projects to Tri-Way – generating gross revenues of $960,000 and $215,000. Kathy Peterson testified that the Arizona division generated $271,792.48 in net profits from June 2004 to September 30, 2004.

Gray testified that Tri-Way misrepresented and concealed certain facts which form the basis of the cause of his action for fraud and upon which he claims he relied. He testified Tri-Way represented to him that he could purchase Gary Peterson's interest in Tri-Way for a certain amount. For example, he testified he was unaware that Kathy Peterson owned a 25% interest in Tri-Way, until the May 21st meeting or that she was unwilling to sell her shares. However, in his deposition, Gray testified that he never had any discussions with her about her willingness to sell her shares and no one ever communicated to him that she was unwilling. Gray also testified that Tri-Way represented it would compensate him "at an escalating base salary as well as at an annual amount equal to 50% of the net profit realized by the Defendant's efforts [Tri-Way]." Gray asserts that because of the representations made regarding these terms, he quit his job at Albertson's and accepted employment with Tri-Way.

Gray brought suit alleging breach of contract, a statutory claim for wages, promissory estoppel, equitable estoppel, and fraud. Relevant to this Motion for Summary Judgment, Gray seeks "past and future" loss of income, including income that he "would have received in merit and longevity wage increases," and "past and future losses of income which Robert Gray would ordinarily have received." He also sought enforcement of the "Draft Option to Purchase Corporate Stock."

Tri-Way and Peterson moved for summary judgment and asked the Court to dismiss all Gray's claims with prejudice.

ANALYSIS

Rule 56(c) of the Idaho Rules of Civil Procedure provides that summary judgment is "rendered forthwith if the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." I.R.C.P. § 56(c); *See also First Security Bank of Idaho, N.A. v. Murphy*, 131 Idaho 787, 790, 964 P.2d 654, 657 (1998). A party against whom summary judgment is sought may not merely rest on allegations contained in his pleadings, but must come forward and produce admissible evidence to contradict the assertions of the moving party and establish a genuine issue of material fact. *McCoy v. Lyons*, 120 Idaho 765, 820 P.2d 360 (1991); *Olsen v. J.A. Freeman Co.*, 117 Idaho 706, 791 P.2d 1285 (1990). *See Rhodehouse v. Stutts*, 125 Idaho 208, 211, 868 P.2d 1224, 1227 (1994). Any sworn statements that are part of the record are to be considered by the trial court in deciding whether there is a genuine issue of material fact.

On causes of action to be tried to a jury, the party opposing summary judgment is entitled to the benefit of every reasonable inference that can be drawn from the evidentiary facts. *G & M Farms v. Funk Irrigation Co.*, 119 Idaho 514, 808 P.2d 851 (1991); *Meridian Bowling Lanes, Inc. v. Meridian Athlete Ass'n, Inc.*, 105 Idaho 509, 670 P.2d 129 4 (1983). All controverted facts are liberally construed in favor of the party opposing the summary judgment. *Tusch Enterprises v. Coffin*, 113 Idaho 37, 740 P.2d 1022 (1987); *Doe v. Durtschi*, 110 Idaho 466, 716 P.2d 1238 (1986).

A. GRAY'S CLAIM BASED ON QUANTUM MERUIT OR IMPLIED CONTRACT FAILS.

The doctrine of quantum meruit is a remedy for an implied in fact contract and permits a party to recover the reasonable value of services rendered or materials provided on the basis of an implied promise to pay. *Cheung v. Pena*, 143 Idaho 30, __,137 P.3d 417, 422 (2006); *Bakker v. Thunder Spring-Wareham, LLC*, 141 Idaho 185, 191, 108 P.3d 332, 338 (2005). "An implied in fact contract is defined as one where the terms and existence of the contract are manifested by the conduct of the parties with the request of one party and the performance by the other often being inferred from the circumstances attending the performance." *Fox v. Mountain West Elec., Inc.*, 137 Idaho 703, 708, 52 P.3d 848, 853 (2002) (quoting *Farnworth v. Femling*, 125 Idaho 283, 287, 869 P.2d 1378, 1382 (1994)).

The implied-in-fact contract is grounded in the parties' agreement and tacit understanding; it is a contract. *Kennedy v. Forest*, 129 Idaho 584, 587, 930 P.2d 1026, 1029 (1997). A contract implied-in-fact is a true contract whose existence and terms are inferred from the conduct of the parties. *Kennedy v. Forest*, 129 Idaho 584, 587, 930 P.2d 1026, 1029 (1997) (citing *Continental Forest Prods., Inc. v. Chandler Supply Co.*, 95 Idaho 739, 743, 518 P.2d 1201, 1205 (1974). Such a contract is grounded in the parties' agreement and tacit understanding. Id., 95 Idaho at 743, 518 P.2d at 1205. *Hausam v. Schnabl*, 126 Idaho 569, 574, 887 P.2d 1076, 1081 (Ct. App. 1994). "The general rule is that where the conduct of the parties allows the dual inferences that one performed at the other's request and that the requesting party promised payment, then the court may find a contract implied in fact." *Homes by Bell-Hi, Inc. v. Wood*, 110 Idaho 319, 321, 715 P.2d 989, 991 (1986) (citing *Clements v. Jungert*, 90 Idaho 143, 153, 408 P.2d 810, 815 (1965); *Bastian v. Gafford*, 98 Idaho 324, 325, 563 P.2d 48, 49 (1977)).

For a quantum meruit claim, the measure of recovery is the reasonable value of the services rendered or of goods received, regardless of whether the defendant was enriched and the burden is on the party claiming quantum meruit. *Erickson v. Flynn*, 138 Idaho 434-435, 64 P.3d 959, 963-964 (Ct. App. 2002). This is an objective measure and is proven by evidence demonstrating the nature of the work and the customary rate of pay for such work in the community at the time the work was performed. *Baker v. Boren*, 129 Idaho 885, 894, 934 P.2d 951, 960 (Ct. App. 1997); *Peavey v. Pellandini*, 97 Idaho at 659, 551 P.2d at 614. Thus, if the dispute was that Gray had not been compensated for his services, this would be a jury issue.

However, Gray does not dispute that he was compensated for his services at the agreed upon salary. The issue is whether he was entitled to a bonus and the value of that bonus (if any).[7] To the extent this quantum meruit claim is based on the alleged agreed upon bonus, as the Court ruled on his wage claim, Gray introduced no evidence that the parties ever actually agreed on the terms of his bonus. They continued to negotiate right up until Gray quit. In addition, in response to the summary

---

[7] Although unclear, Gray also apparently claims that he should be compensated for the value of the two projects he brought to Tri-Way. While he characterizes this as a quantum meruit claim, it is really a claim of unjust enrichment based on the value Tri-Way received from receiving the two projects and not based on "the nature of the work and the customary rate of pay for such work in the community at the time the work was performed." Thus, quantum meruit is not appropriate for this claim.

judgment motion, he introduced no evidence that the customary rate of pay for his work in the community at the time the work was performed included such a bonus. Thus like his wage claim, this cause of action fails. *See also Robertson v. Hansen*, 89 Idaho 107, 111, 403 P.2d 585, 587 (1965); *Weatherhead v. Cooney*, 32 Idaho 127, 180 P. 760 (1919).[8] Tri-Way's motion for summary judgment is granted on this issue.

B. GRAY'S CLAIM OF UNJUST ENRICHMENT FAILS

Unjust enrichment, or restitution, is the measure of recovery under a contract implied in law. *Barry v. Pacific West Const., Inc.*, 140 Idaho 827, 834, 103 P.3d 440, 447 (2004) (citing *Peavey v. Pellandini*, 97 Idaho 655, 658, 551 P.2d 610, 613 (1976)). A contract implied in law, or quasi-contract, "is not a contract at all, but an obligation imposed by law for the purpose of bringing about justice and equity without reference to the intent of the agreement of the parties, and, in some cases, in spite of an agreement between the parties." *Erickson v. Flynn,* 138 Idaho 430, 434-35, 64 P.3d 959, 963-64 (Ct.App.2002). Recovery under an unjust enrichment theory is limited to the amount by which the defendant was unjustly enriched. *Id.* at 434, 64 P.3d at 963; 66 Am.Jur.2d. RESTITUTION AND IMPLIED CONTRACTS § 2 (1973). The essence of a contract implied in law is that a party has received a benefit from another which it would be inequitable for him to retain without compensation to the other. In *Smith v. Smith*, the Idaho Supreme Court noted that:

> "Restitution" and "unjust enrichment" are the modern designations for the older doctrine of "quasi contracts." The substance of an action for unjust enrichment lies in a promise, implied by law, that a party will render to the person entitled thereto that which in equity and good conscience belongs to the latter.

95 Idaho 477, 511 P.2d 294 (1973).

The unjust enrichment doctrine, also referred to as quasi-contract, contract implied in law, or restitution, allows recovery where the defendant has received a benefit from the plaintiff which it would be inequitable to retain without compensating the plaintiff for the value of the benefit. *Continental Forest Products, Inc. v. Chandler*, 95 Idaho 739, 743, 518 P.2d 1201, 1205 (1974);

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[8] The Court notes that these cases involve the application of I.C. § 9-508 which is similar to the statute of frauds. I.C. § 9-508 requires all real estate brokerage contracts to be in writing to be enforceable. As the court stated in *Weatherhead* when it rejected arguments similar to the ones before this Court: "The vital question is whether recovery can be had on a quantum meruit in the face of this statute, there being admittedly no written contract. . . We think the construction contended for by appellant would absolutely nullify the statute."

Idaho Lumber, Inc. v. Buck, 109 Idaho 737, 744, 710 P.2d 647, 654 (Ct.App.1993). In this case, Gray's contention is that Tri-Way was unjustly enriched by the two projects he brought to the company. Thus, he argues the recipient (Tri-Way) must make restitution to him. However, according to the Idaho case law, restitution shall be made only to the extent that, as between the two, the benefit would be unjust for the recipient to retain. *Idaho Lumber*, 109 Idaho at 744, 710 P.2d at 654. The burden is on Gray to establish what that amount is.[9]

Importantly, the measure of recovery in a quasi-contractual action is not the actual amount of the enrichment, but the amount of enrichment which, *as between the two parties it would be unjust for one party to retain. Hixon v. Allphin*, 76 Idaho 327, 281 P.2d 1042 (1955); 66 Am.Jur.2d, RESTITUTION AND IMPLIED CONTRACTS, at p. 946 (1973). "Thus, the substance of an action for unjust enrichment lies in a promise, implied by law, that one will render to the person entitled thereto that which in equity and good conscience, belongs to the latter." *Hixon*, 76 Idaho 333, 281 P.2d 1045. In *Gillette v. Storm Circle Ranch*, the Supreme Court wrote:

> Unjust enrichment is an equitable doctrine and is inapplicable where the plaintiff in an action fails to provide the proof necessary to establish the value of the benefit conferred upon the defendant.

101 Idaho 663, 667, 619 P.2d 1116, 1120 (1980) (lessee harvested fall crop that leaser had planted and then planted the next crop, but before it could be harvested the leaser sold the property).

In *Blaser v. Cameron*, the Court of Appeals indicated that a party seeking recovery under an unjust enrichment theory must present evidence not only of the value of the services it rendered, but also "the amount of the benefit which, if retained by the [defendant], would result in their unjust enrichment." 121 Idaho 1012, 1017, 829 P.2d 1361, 1366 (Ct.App.1991). The Court of Appeals affirmed the district court's finding that the plaintiff failed to establish a claim for unjust enrichment because it did not present evidence of the amount by which the defendant was unjustly enriched. *Id.*; *See also, Hertz v. Fiscus*, *supra* (tenant remodeled restaurant-lounge business and then the relationship soured and the landlord took possession of the business); *Continental Forest Products,*

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[9] Furthermore, to the extent Gray may rely on his "employment" agreement, the Idaho Supreme Court ruled that an implied-in-law contract cannot create an employment relationship. *Kennedy v. Forest*, 129 Idaho 584, __, 930 P.2d 1026, 1029-1030 (1997). For a quasi-contractual obligation to arise, Tri-Way would have to have been unjustly enriched by its retention of the benefits of Gray's services (as opposed to the two projects). In this case, however, Tri-Way was

Inc. v. Chandler Supply Co., *supra* (lumber wholesaler ordered and received two carloads of plywood from a different lumber broker than the one from which the order was placed); *Smith v. Smith*, 95 Idaho 477, 511 P.2d 294 (1973) (relatives brought suit to quit title to property and to determine the individual interests in the property); *Brown v. Yacht Club of Coeur d'Alene, Ltd.*, *supra* (purchaser entitled to recover reliance damages from seller on a real estate contract); *Pichon v. L.J. Broekemeier, Inc.*, 108 Idaho 846, 702 P.2d 884 (Ct.App.1985) (vendor of real estate brought action to recover damage caused by purchaser in default); *Idaho Lumber, Inc. v. Buck*, *supra* (owner of rented property was enriched by the remodeling accomplished at the request of the lessee by the contractor).

Similarly, the Court finds that in response to summary judgment, Gray introduced no evidence of the amount Tri-Way was enriched by bringing it two projects. Thus, his claim for unjust enrichment fails and summary judgment to Tri-Way is entered on this issue.

Finally, in two affidavits submitted by Gray (dated April 27, 2005, and May 12 2005, respectively), he testified under oath that he began work for Tri-Way May 2004 and that he immediately obtained two Albertson's projects on behalf of Tri-Way as Tri-Way's employee. He points to no case law that would allow an employee to recover the profit earned by an employer simply by virtue of the employee's labor absent an agreement. Therefore, the Court grants summary judgment to Tri-Way on this issue.

C. GRAY'S CLAIM BASED ON EQUITABLE ESTOPPEL[10] FAILS

As previously ruled in the June 7, 2007, decision, equitable estoppel assumes the existence of a complete agreement, which is lacking here. Therefore, the Court need not address the issue of whether equitable estoppel even applies as an exception to I.C. § 9-505(5). *Lettunich v. Key Bank Nat. Ass'n*, 141 Idaho 362, 367, 109 P.3d 1104, 1109 (2005). Tri-Way's motion for summary judgment is granted on this issue.

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not unjustly enriched by the retention of the benefits of Gray's services. Even if Tri-Way received a "benefit" from Gray's services, Tri-Way compensated Gray for his services.

[10] The Court has already ruled on his promissory estoppel claim.

D. GRAY'S CLAIM BASED ON FRAUD FAILS.

Finally, Gray claims fraud. In *Witt v. Jones*, 111 Idaho 165, 722 P.2d 474, (1986) the Idaho Supreme Court set forth the elements for a cause of action in Idaho based on fraud:

> The elements for a cause of action based on fraud are: (1) a representation; (2) its falsity; (3) its materiality; (4) speaker's knowledge of its falsity or ignorance of its truth; (5) speaker's intent that it should be acted upon by another person and in manner reasonably contemplated; (6) hearer's ignorance of its falsity; (7) hearer's reliance on truth; (8) hearer's right to rely thereon; and (9) hearer's consequent and proximate injury.

Faw v. Greenwood, 101 Idaho 387, 389, 613 P.2d 1338, 1340 (1980). Gray must make a prima facie case on each element. *Smith v. King*, 100 Idaho 331, 597 P.2d 217 (1979).

There is no indication in the record that Gray was justified in relying upon any alleged oral representations made by Tri-Way that they had an agreement. By his own admission, Gray clearly knew that the agreement terms were still being negotiated when he began working for Tri-Way. Furthermore, the draft agreement was not even prepared by Tri-Way; Gray prepared it. The agreement itself cannot be the basis of any alleged representations.

The Court is not required to simply accept Gray's conclusory opinions that he had an agreement when the facts so clearly indicate that when he began working for Tri-Way he himself continued to send and receive draft agreements with italicized words in the very sections addressing the bonus issue indicating the provisions needed revisions. Moreover, there is no evidence that there was ever any agreement on the buy-out. Therefore, Gray was not justified in relying on Tri-Way's alleged oral representations nor was he ignorant of the inaccuracy of any alleged Tri-Way's oral representations to the effect he had an agreement on the bonus or the buyout.

Therefore, the Court clarifies that it grants Tri-Way's and Peterson's summary judgment motion.

IT IS SO ORDERED.

Dated this 6th day of August 2007.

Cheri C. Copsey
District Judge

CERTIFICATE OF MAILING

I hereby certify that on this 8th day of August 2007, I mailed (served) a true and correct copy of the within instrument to:

ERIK F. STIDHAM
HOLLAND & HART LLP
P.O. BOX 2527
BOISE, IDAHO 83701-2527

PATRICIA M. OLSSON
JASON G. MURRAY
MOFFATT, THOMAS, BARRETT ROCK & FIELDS, CHTD.
P.O BOX 829
BOISE, IDAHO 83701

J. DAVID NAVARRO
Clerk of the District Court

Melanie Anderson
~~John Weatherby~~
Deputy Clerk

Jason G. Murray, ISB No. 6172
MOFFATT, THOMAS, BARRETT, ROCK & FIELDS, CHARTERED
101 S. Capitol Blvd., 10th Floor
Post Office Box 829
Boise, Idaho 83701
Telephone (208) 345-2000
Facsimile (208) 385-5384
jgm@moffatt.com
22-072

Attorneys for Defendant

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT

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

ROBERT GRAY,

Plaintiff,

vs.

TRI-WAY CONSTRUCTION SERVICES, INC., a Washington Corporation; RAY ALLRAD [sic], and individual; KATHY PETERSON, an individual; GARY PETERSON, an individual,

Defendants.

Case No. CV OC 0409193D

STIPULATION FOR DISMISSAL OF COUNTERCLAIM WITH PREJUDICE

COME NOW the above-named parties, by and through their undersigned counsel, and hereby stipulate and agree that all counterclaims or causes of action brought on behalf of defendants/counterclaimants Gary Peterson and Tri-Way Construction Services, Inc., against the

plaintiff/counterdefendant, Robert Gray, which remain following the Court's Order Denying in Part and Granting in Part Gray's Motion for Summary Judgment, entered on or about June 11, 2007, may be dismissed with prejudice.

DATED this 6th day of September, 2007.

HOLLAND & HART LLP

By _____
Erik F. Stidham – Of the Firm
Attorneys for Plaintiff/Counterdefendant

DATED this 6th day of September, 2007.

MOFFATT, THOMAS, BARRETT, ROCK & FIELDS, CHARTERED

By _____
Jason G. Murray – Of the Firm
Attorneys for Defendants/
Counterclaimants

Jason G. Murray, ISB No. 6172
MOFFATT, THOMAS, BARRETT, ROCK & FIELDS, CHARTERED
101 S. Capitol Blvd., 10th Floor
Post Office Box 829
Boise, Idaho 83701
Telephone (208) 345-2000
Facsimile (208) 385-5384
jgm@moffatt.com
22-072

Attorneys for Defendant

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Plaintiff,

vs.

TRI-WAY CONSTRUCTION SERVICES, INC., a Washington Corporation; RAY ALLRAD [sic], and individual; KATHY PETERSON, an individual; GARY PETERSON, an individual,

Defendants.

Case No. CV OC 0409193D

ORDER GRANTING STIPULATION FOR DISMISSAL OF COUNTERCLAIMS WITH PREJUDICE

The stipulation of defendants/counterclaimants Gary Peterson and Tri-Way Construction Services, Inc., and the plaintiff/counterdefendant, Robert Gray, having come before this Court and good cause appearing therefor;

IT IS HEREBY ORDERED AND THIS DOES ORDER that the counterclaims of defendants/counterclaimants are hereby dismissed with prejudice.

DATED this 10th day of September, 2007.

Cheri Copsey

The Honorable Cheri C. Copsey,
District Judge

CLERK'S CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 11 day of September, 2007, I caused a true and correct copy of the foregoing **ORDER GRANTING STIPULATION FOR DISMISSAL OF COUNTERCLAIMS WITH PREJUDICE** to be served by the method indicated below, and addressed to the following:

Erik F. Stidham
HOLLAND & HART LLP
101 South Capitol Boulevard, Suite 1400
Post Office Box 2527
Boise, Idaho 83701-2527
Facsimile (208) 343-8869

(✓) U.S. Mail, Postage Prepaid
( ) Hand Delivered
( ) Overnight Mail
( ) Facsimile

Jason G. Murray
MOFFATT, THOMAS, BARRETT, ROCK & FIELDS, CHTD.
101 South Capitol Boulevard, 10th Floor
Post Office Box 829
Boise, Idaho 83701-0829
Facsimile (208) 385-5384

(✓) U.S. Mail, Postage Prepaid
( ) Hand Delivered
( ) Overnight Mail
( ) Facsimile

District Court Clerk

Patricia M. Olsson, ISB No. 3055
Jason G. Murray, ISB No. 6172
MOFFATT, THOMAS, BARRETT, ROCK & FIELDS, CHARTERED
101 S. Capitol Blvd., 10th Floor
Post Office Box 829
Boise, Idaho 83701
Telephone (208) 345-2000
Facsimile (208) 385-5384
pmo@moffatt.com
jgm@moffatt.com
22-072

Attorneys for Defendants

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vs.

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Defendants.

Case No. CV OC 0409193D

JUDGMENT ~~AND RULE 54(b) CERTIFICATE~~

The Motion for Summary Judgment filed on behalf of defendants having come before the Court and being briefed and argued; and

The Court being fully advised in the premises and having issued its Order Granting Motion for Summary Judgment to Tri-Way on June 5, 2007, and its subsequent Order Clarifying June 5, 2007 Summary Judgment Order and Correcting the Order on August 7, 2007;

NOW THEREFORE, Judgment on the plaintiff's amended complaint is hereby entered in favor of the defendants and against the plaintiff, and plaintiff's action is dismissed as against said defendants.

DATED this 11th day of September, 2007.

Cheri C Copsey

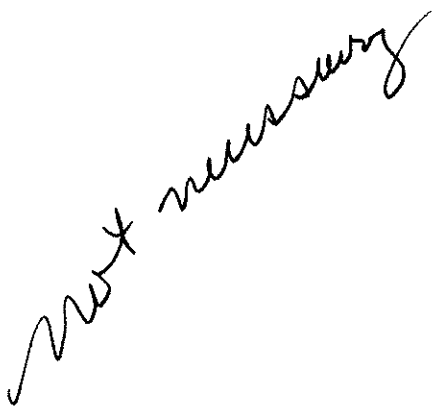
The Honorable Cheri C. Copsey
District Judge

RULE 54(b) CERTIFICATE

With respect to the issues determined by the above judgment or order on Defendants' Motion for Summary Judgment, it is hereby CERTIFIED, in accordance with Rule 54(b), I.R.C.P., that the Court has determined that there is no just reason for delay of the entry of a final judgment and that the Court has and does hereby direct that the above final judgment be entered.

DATED this _____ day of _____, 2007.

_____
The Honorable Cheri C. Copsey
District Judge



00127

CLERK'S CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 12th day of ~~August~~ Sept, 2007, I caused a true and correct copy of the foregoing **JUDGMENT AND RULE 54(b) CERTIFICATE** to be served by the method indicated below, and addressed to the following:

Erik F. Stidham HOLLAND & HART LLP 101 South Capitol Boulevard, Suite 1400 Post Office Box 2527 Boise, Idaho 83701-2527 Facsimile (208) 343-8869	(X) U.S. Mail, Postage Prepaid ( ) Hand Delivered ( ) Overnight Mail ( ) Facsimile
Jason G. Murray MOFFATT, THOMAS, BARRETT, ROCK & FIELDS 101 S. Capitol Blvd., 10th Floor Post Office Box 829 Boise, Idaho 83701 Facsimile (208) 385-5384	(X) U.S. Mail, Postage Prepaid ( ) Hand Delivered ( ) Overnight Mail ( ) Facsimile

Melanie Anderson
Deputy Clerk

Patricia M. Olsson, ISB No. 3055
Jason G. Murray, ISB No. 6172
MOFFATT, THOMAS, BARRETT, ROCK & FIELDS, CHARTERED
101 S. Capitol Blvd., 10th Floor
Post Office Box 829
Boise, Idaho 83701
Telephone (208) 345-2000
Facsimile (208) 385-5384
pmo@moffatt.com
jgm@moffatt.com
22-072

Attorneys for Defendant

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT

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

ROBERT GRAY,

Plaintiff,

vs.

TRI-WAY CONSTRUCTION SERVICES, INC., a Washington Corporation; RAY ALLRAD [sic], and individual; KATHY PETERSON, an individual; GARY PETERSON, an individual,

Defendants.

Case No. CV OC 0409193D

DEFENDANTS' MOTION FOR ATTORNEY FEES

COME NOW the above-named defendants, by and through undersigned counsel, and pursuant to Rule 54 of the Idaho Rules of Civil Procedure and Idaho Code Sections 12-120(3) and 12-121, move this Court for an award of attorney fees in addition to those costs

allowed as a matter of right and other discretionary costs described in those Rules. The basis for defendants' motion is as follows:

I. INTRODUCTION

As prevailing parties, defendants Tri-Way Construction Services, Inc., Gary Peterson, Kathy Peterson and Ray Allard (collectively "Tri-Way" or "defendants") seek to recover all attorneys' fees that they have incurred in defending against the various claims brought by plaintiff Rob Gray in this matter involving a purported employment contract. On June 5, 2007, following over two years of litigation, the Court issued its Order Granting Motion for Summary Judgment to Tri-Way, granting summary judgment on all of plaintiff's claims alleged against the defendants. On June 14, 2007, the Court entered an Order Denying in Part and Granting in Part Gray's Motion for Summary Judgment. In short, the Court dismissed Counts II, III and VI because they were abandoned by defendants. However, the Court denied plaintiff's Motion for Summary Judgment on those claims which defendants opposed. Plaintiffs subsequently moved for clarification of the Court's Order granting Tri-Way summary judgment, and an Order Clarifying Summary Judgment Order was entered on August 6, 2007, making it amply clear that defendants had prevailed on all causes of action raised by plaintiffs. A final Judgment was entered by the Court in defendants' favor on September 12, 2007. As prevailing parties, defendants are entitled to an award of attorneys' fees under Idaho Code Sections 12-121 and 12-120(3).

II. ARGUMENT

A. Idaho Code Section 12-120(3) represents a substantial policy of the state of Idaho.

The Idaho courts have routinely described the mandatory award of attorneys' fees pursuant to Section 12-120(3) as a "***cost of using the [Idaho] court system*** to resolve disputes in

specified types" of actions which "allocates this cost between the parties." *Sanders v. Lankford*, 134 Idaho 322, 325, 1 P.3d 823, 826 (Ct. App. 2000) (quoting *DeWils Interiors, Inc. v. Dines*, 106 Idaho 288, 291, 678 P.2d 80 (Ct. App. 1984)) (emphasis added). In explaining that an award of attorneys' fees under Idaho Code Section 12-120(3) is a "fair" cost of using the Idaho court system, the Idaho Court of Appeals in *DeWils* described the effect and purpose of Section 12-120(3) as follows:

> Section [12-120(3)] produces a harsh result for the losing party in litigation over a commercial dispute. This party suffers not only the outcome of the dispute and his own legal expense, but also is burdened with costs and attorney fees awarded to the other side. ***However, this result is fair if the benefits and costs of litigation are identified in advance and the parties can guide their decision accordingly***. The parties are abjured by the statute to evaluate carefully the merits of their claims or defenses in the commercial dispute. ***When deciding whether to litigate, each party must weigh the potential benefits of prevailing against the potential costs of losing. There is a direct relationship between a party's decision to litigate a commercial dispute and the benefits or costs which flow from that decision***.

106 Idaho at 293, 678 P.2d at 85 (emphasis added). Though the *DeWils* case specifically dealt with an underlying commercial transaction, the same reasoning applies to the facts and claims in the present matter, as it was based upon a "contract relating to . . . services." *See* Idaho Code Section 12-120(3).

As further evidence that Section 12-120(3) represents a substantial policy of the state of Idaho, the Idaho Court of Appeals has made it clear that an award of attorneys' fees in cases involving a contract under Section 12-120(3) is ***mandatory*** as opposed to discretionary. *See Myers v. Vermaas*, 114 Idaho 85, 87, 753 P.2d 296 (1988) (emphasis added). Specifically, the Idaho Court of Appeals has described the nature and purpose of Section 12-120(3) as follows:

> However, we think a different analysis is required to I.C. § 12-120. Unlike I.C. §§ 12-121 and 61-617A, ***I.C. § 12-120 provides for a mandatory, not discretionary, award of attorney fees to the prevailing party***. . . . The automatic nature of an award under I.C. § 12-120 makes it, in effect, an adjunct to the underlying . . . agreement between the parties. ***It establishes an entitlement***.

Id. (emphasis added).

As additional support for the strong policy in favor of mandatory attorney fee awards under Section 12-120(3), the Idaho Supreme Court held in *Ward v. PureGro Co.*, 128 Idaho 366, 913 P.2d 582 (1996), that Section 12-120(3) required an award of attorneys' fees to the prevailing party when the nature of the underlying suit was among those specifically listed under the statute. Among the issues raised on appeal in the *Ward* case was the claim that no attorney fees should be awarded under Section 12-120(3) because the substantive merits of the contract claim had been analyzed under California law. Nevertheless, when it came to the determination of whether Ward was entitled to an award of attorneys' fees, the Idaho Supreme Court strengthened the policy in favor of mandatory attorney fees under Section 12-120(3) by awarding fees to Ward as the prevailing party, notwithstanding the fact that the substantive contract claims were analyzed under the substantive law of another state. In so doing, the Idaho Supreme Court explicitly held:

> I.C. § 12-120(3) provides that in any civil action to recover on a contract relating to a "commercial transaction," ***the prevailing party shall be allowed a reasonable attorney fee if the commercial transaction is the gravamen of the lawsuit.*** *Brower v. E.I. DuPont De Nemours & Co.*, 117 Idaho 780, 784, 792 P.2d 345, 349 (1990) . . . . Since Ward brought this action claiming a breach of that contract, a "commercial transaction" was the gravamen of this lawsuit. Thus, Ward ***is entitled to an award of attorney fees*** incurred on appeal pursuant to I.C. § 12-120(3). *E.g., Farm Credit Bank of Spokane v. Stevenson*, 125 Idaho 270, 869 P.2d 1365 (1994).

Ward, 128 Idaho at 370, 913 P.2d at 586 (emphasis added).

The holding in *Ward* is clear and applies with great force to the facts presented here. The Idaho Supreme Court has made it clear that the award of attorneys' fees, pursuant to Section 12-120(3), is a fundamental policy of the state of Idaho. That fundamental policy applies to this case, in that the alleged employment agreement was the gravamen of ***all*** of plaintiff's claims. As the Idaho appellate courts have recognized, a mandatory award of fees in cases involving a contract relating to services under Section 12-120(3) is simply a "cost of using the [Idaho] court system to resolve disputes" in specified types of actions. *DeWils*, 106 Idaho at 291, 678 P.2d at 83; *Sanders*, 134 Idaho at 325, 1 P.3d at 828. And, the Idaho courts have found nothing punitive about a mandatory fee award under Section 12-120(3). *Id.* Indeed, over twenty years ago, the Idaho Supreme Court cautioned litigants who are looking to file suit in Idaho in a case involving the specified causes of action set forth in Section 12-120(3), and admonished would-be litigants to evaluate the merits of their claims or defenses carefully before filing an action involving a commercial dispute. Why? Because "[t]here is a direct relationship between a party's decision to litigate a commercial dispute and the benefits or costs which flow from that decision." *DeWils*, 106 Idaho at 293.

Presumably, Mr. Gray performed such an evaluation before he filed this suit, or at least when he chose to oppose defendant Tri-Way's initial Motion to Dismiss, which argued that this matter should properly have been brought in Washington. Mr. Gray's insistence that Idaho was the proper forum, and that its law should apply, further supports the policy in favor of applying the mandatory attorney fee provisions of Section 12-120(3). Mr. Gray also specifically prayed for attorney fees pursuant to Section 12-120(3) in his Complaint and Amended Complaint, further acknowledging its applicability in this matter.

In addition, as the Idaho Supreme Court acknowledged in *Ward*, the strength of Idaho's policy of allowing attorneys' fees in those types of cases specified in the statute is paramount and applies even where the substantive claims in this case are governed by the law of another jurisdiction. *See Ward*, 128 Idaho at 370, 913 P.2d at 586. When read together, the cases of *Ward, Sanders,* and *DeWils* illustrate that, for cases involving those causes of action specified under Section 12-120(3), the Idaho courts view a mandatory award of attorneys' fees as part and parcel with litigating a contract case in Idaho. After all, a party who chooses to litigate in Idaho necessarily generates attorneys' fees in Idaho and uses the time and resources of the Idaho courts, which impacts chambers, its staff, the clerk of the court, and other court personnel. This is simply another way of articulating why Section 12-120(3) is a "cost of using the [Idaho] court system" as stated in the *DeWils* and *Sanders* cases. Accordingly, Idaho has a strong interest in ensuring that Section 12-120(3) governs the award of attorneys' fees. This principle is woven into the fabric of the Idaho authorities addressed above and applies with great force to the facts presented here.

Finally, the award of attorneys' fees in cases involving contracts specified under Section 12-120(3) has been the law in Idaho for decades. Section 12-120(3) unequivocally provides that "the prevailing party ***shall*** be allowed a reasonable attorney's fee" in cases involving a commercial transaction. This language is mandatory, unavoidable, and emphatic. To be sure, Section 12-120(3) is not a default provision or gap filler, subject to override by the parties in cases involving contracts that relate to services. Rather, it represents a basic and fundamental policy choice by the State of Idaho that, for cases involving such contracts, an award of attorneys' fees is mandatory. In fact, one could easily speculate that a substantial factor in Mr. Gray choosing to file this suit in Idaho rather than Washington is because of the

mandatory availability of attorneys' fees under Section 12-120(3). In light of the Idaho Court of Appeals' twenty year old admonishment in *DeWils* that would be litigants should choose their forum carefully because the "costs" of litigating commercial cases in Idaho will come in the form of the award of fees under Section 12-120(3), taken together with plaintiff's acknowledgment in his pleadings that Section 12-120(3) governs a fee award in this case, plaintiff cannot now avoid the application of Section 12-120(3).

B. Standards Governing an Award of Attorneys' Fees Under Idaho Code Section 12-120(3).

The defendants seek an award of their attorneys' fees for their defense of plaintiff's claims pursuant to Section 12-120(3), which 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.

(Emphasis added.)

As demonstrated below, the defendants are clearly the prevailing parties and this action meets the criteria established by Section 12-120(3) for an award of attorney fees. As the Supreme Court of Idaho has noted:

> Under I.C. § 12-120(3), the prevailing party in a civil action involving a commercial transaction is entitled to an award of reasonable attorneys fees. There is a two-stage analysis necessary to determine whether a prevailing party is entitled to an award of attorney fees under I.C. § 12-120(3). ***First, the commercial transaction must be integral to the claim, and second, the commercial transaction must provide the actual basis for recovery.*** A commercial transaction means all transactions except those for personal or household purposes.

Iron Eagle Dev. LLC v. Quality Design Sys., Inc., 138 Idaho 487, 493, 65 P.3d 509, 515 (2003) (citations omitted and emphasis added). Again, as stated above, though *Iron Eagle Dev. LLC* dealt with the "commercial transaction" provision of Section 12-120(3), because the alleged employment contract was one "relating to . . . services" as provided under the statute, the same rationale employed by the *Iron Eagle* Court applies to this case as well.

Here, the entirety of plaintiff's action was based upon the purported employment agreement. As such, the underlying contract was certainly "integral" to the various causes of action, including those sounding in tort. The second element addressed by the *Iron Eagle* Court is also present here, in that all theories of recovery asserted by plaintiff were based upon the "terms" of the alleged employment agreement. Indeed, the contractual terms which plaintiff sought to enforce represented the entirety of his damage claims, and thus the two-stage analysis set forth above has been satisfied.

1. The defendants are the prevailing parties in this action.

"The determination of whether a litigant is the prevailing party is committed to the discretion of the trial court." *Sanders*, 134 Idaho at 325, 1 P.3d at 826; *see also* IDAHO R. CIV. P. 54(d)(1)(B). In Idaho, governing legal standards on the prevailing party issue are provided by Idaho Rule of Civil Procedure 54(d)(1)(B). There are three principal factors the trial court must consider when determining which party, if any, prevailed: "(1) the final judgment or result obtained in relation to the relief sought; (2) whether there were multiple claims or issues; and (3) the extent to which each party prevailed on each issue or claim." *Jerry Joseph C.L.U. Ins. Assoc., Inc. v. Vaught*, 117 Idaho 555, 557, 789 P.2d 1146, 1148 (1990). Importantly, under Idaho law, "[a] determination of who qualifies as a prevailing party is determined 'from an overall view, not a claim-by-claim analysis.'" *Vanderford v. Knudson*, --- P.3d ---, 2007 WL

2012425, *10 (Idaho July 13, 2007) (quoting *Eighteen Mile Ranch, L.L.C. v. Nord Excavating & Paving, Inc.*, 141 Idaho 716, 719, 117 P.3d 130, 133 (2005).

On August 7, 2007, this Court issued its errata Order granting the defendants' motion for summary judgment on all claims asserted by Mr. Gray in this action. Moreover, on September 12, 2007, the Court entered a final Judgment in favor of the defendants and dismissed this case with prejudice, which included all of plaintiff's claims for relief against the defendants. Accordingly, the final judgment and result obtained by the defendants in relation to the relief sought overwhelmingly and exclusively favors the defendants. As the United States Supreme Court has stated, "[r]espect for ordinary language requires that a plaintiff receive at least some relief on the merits of his claim before he can be said to prevail." *Hewitt v. Helms*, 482 U.S. 755, 760, 107 S. Ct. 2672, 96 L. Ed. 2d 654 (1987). Here, Mr. Gray received none of the relief sought by way of his Amended Complaint, as final Judgment was entered in the defendants' favor.

Moreover, "in deciding whether a party was the prevailing one the inquiry is not conducted motion-by-motion or argument-by-argument." *Lettunich v. Lettunich*, 141 Idaho 425, 434, 111 P.3d 110, 119 (2005). Rather, the prevailing party determination is done from an overall view. *Eighteen Mile Ranch,* 117 P.3d at 133. As demonstrated above, in analyzing the prevailing party issue as a coherent whole, it is clear that the defendants are the prevailing party in this action.[1]

[1] Although the defendants alleged a counterclaim against Mr. Gray, the defendants stipulated and agreed to dismiss those counterclaims with prejudice in an effort to bring some finality to this matter. Indeed, although the defendants agreed to dismiss their counterclaims, they did so in order to effectuate an appeal or, in the event no such appeal was taken, to obtain closure. As such, plaintiff did not "prevail" on the defendants' counterclaims.

2. The gravamen of this litigation is a contract of the type described in Section 12-120(3).

In what is a familiar expression of Idaho law, to determine whether attorneys' fees are available under Section 12-120(3), "[t]he critical test is whether the [contract at issue] comprises the gravamen of the lawsuit; the [contract] must be integral to the claim and constitute a basis upon which the party is attempting to recover." *Bingham v. Montane Res. Assoc.*, 133 Idaho 420, 426, 987 P.2d 1035, 1041 (1999). There can be no doubt that the gravamen of this lawsuit involves a contract of the type specified in Section 12-120(3). All of plaintiff's claims—including those allegations of fraud, constructive fraud, quantum meruit, implied contracts, quasi-contracts, unjust enrichment or equitable estoppel—sought to enforce or were otherwise entirely based upon the terms of the alleged employment agreement and/or option to purchase stock. As such, the alleged contracts were not simply the "gravamen" of the case, they were ***the*** case, and defendants clearly prevailed on all counts.

3. The defendants are entitled to all of their attorneys' fees incurred in the defense of this action.

Defendants have fully detailed for the Court the scope and amounts of fees claimed in this action by way of the Memorandum of Costs and Fees filed concurrently herewith. Under Section 12-120(3) and controlling Idaho law, defendants submit that they are entitled to an award of all of their reasonable attorneys' fees incurred in the defense of this action.

In a recent case involving the issue of the enforceability of an unsigned loan commitment letter, the Idaho Supreme Court concluded that the attorneys' fees incurred by the defendant bank in defending against claims for breach of contract, breach of the implied covenant of good faith, ***and fraud*** were recoverable under Section 12-120(3) because such claims arose in the context of the underlying contract. *See Lettunich v. Key Bank Nat'l Ass'n*,

141 Idaho 362, 368-69, 109 P.3d 1104, 1110-11 (2005). Notably, the plaintiff argued that the defendant bank could not recover attorneys' fees in defending against the fraud claim. *Id.* at 369, 109 P.3d at 1111. In rejecting this argument, the Idaho Supreme Court stated, "the fact is, all of [plaintiff's] claims arise within the . . . context of [plaintiff] attempting to obtain a loan for his business. The fraud claim is simply another aspect of [plaintiff's] claim that he purchased cattle at the sale as a result of [the defendant bank's] representations. All of this is integral to the [contract] between [the defendant bank] and [plaintiff]." *Id.*

More recently, the Idaho Supreme Court clarified its holding from *Lettunich* stating:

> From time to time the Court has denied fees under I.C. § 12-120(3) on the commercial transaction ground either because the claim sounded in tort or because no contract was involved. ***The commercial transaction ground in I.C. § 12-120(3) neither prohibits a fee award for a commercial transaction that involves tortious conduct*** (*see Lettunich v. Key Bank Nat'l Ass'n*, 141 Idaho 362, 369, 109 P.3d 1104, 1111 (2005)), ***nor does it require that there be a contract. Any previous holdings to the contrary are overruled.*** We hold that [plaintiff] is entitled to a fee award on appeal with respect to his fraud claim, as he is seeking recovery of damages sustained as a result of the commercial transaction involved in this case.

Blimka v. My Web Wholesaler, LLC, 143 Idaho 723, 152 P.3d 594, 559-600 (2007) (emphasis added). Thus, whether in the context of an underlying contract or a commercial transaction, when the transaction at issue involves one of those transactions specified in Section 12-120(3), the prevailing party's entitlement to attorney fees is mandatory, even if the underlying lawsuit is based in part on a tort theory of recovery.

In light of *Lettunich* and *Blimka*, the defendants are entitled to an award of attorneys' fees under Section 12-120(3) for all reasonable fees incurred in the defense of this action. As demonstrated above, there can be no dispute that plaintiff's claims flow from the

central issue in this case: his failed effort to enforce the Draft Employment Agreement and the Draft Option to Purchase Stock. The Idaho Supreme Court's reasoning in *Lettunich* applies with equal force here because, the fact is, all of plaintiff's claims arise within the context of his attempt to enforce a purported contract relating to services. *See Lettunich*, 141 Idaho at 369, 109 P.3d at 1111. The dismissal of plaintiff's claims for fraud and other equitable remedies are simply alternative aspects of his more general complaint that the defendants wrongfully refused to comply with the terms of the underlying "contracts." As a result, the defendants are entitled to an award of their attorneys' fees incurred in connection with the defense of such claims.

Finally, the Court's determination that there was no meeting of the minds sufficient to form a binding contract does not alter the fact that plaintiffs pursued this action under a contract theory. As such, plaintiff may not avoid the mandatory attorney fee provisions of Section 12-120(3) simply by arguing that no valid contract was ever found to exist. To adopt such a premise would render the statute illusory to virtually every defendant forced to defend itself under similar facts.

III. CONCLUSION

In light of the foregoing, defendants respectfully request that the Court award them their attorney fees in the amount set forth in their Memorandum of Costs and Fees.

DATED this 26th day of September, 2007.

MOFFATT, THOMAS, BARRETT, ROCK & FIELDS, CHARTERED

By Jason G. Murray
Jason G. Murray – Of the Firm
Attorneys for Defendant

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 26th day of September, 2007, I caused a true and correct copy of the foregoing **DEFENDANTS' MOTION FOR ATTORNEY FEES** to be served by the method indicated below, and addressed to the following:

Erik F. Stidham
HOLLAND & HART LLP
101 South Capitol Boulevard, Suite 1400
Post Office Box 2527
Boise, Idaho 83701-2527
Facsimile (208) 343-8869

(✓) U.S. Mail, Postage Prepaid
( ) Hand Delivered
( ) Overnight Mail
( ) Facsimile

Jason G. Murray

00141

Erik F. Stidham, ISB #5483
Dean Arnold, ISB #6814
HOLLAND & HART LLP
Suite 1400, U.S. Bank Plaza
101 South Capitol Boulevard
P.O. Box 2527
Boise, Idaho 83701-2527
Telephone: (208) 342-5000
Facsimile: (208) 343-8869

Attorneys For Plaintiff/Appellant

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

ROBERT GRAY, Plaintiff/Appellant, vs. TRI-WAY CONSTRUCTION SERVICES, INC., a Washington Corporation; RAY ALLRAD, an individual; KATHY PETERSON, an individual; GARY PETERSON, an individual, Defendants/Respondent.	Case No. CV OC 0409193D **ROBERT GRAY'S NOTICE OF APPEAL** Assigned Judge: Cheri C. Copsey

TO: THE ABOVE-NAMED RESPONDENT, TRI-WAY CONSTRUCTION SERVICES, INC., RAY ALLRAD, KATHY PETERSON, GARY PETERSON, AND ITS ATTORNEYS OF RECORD: JASON MURRAY, OF THE FIRM MOFFATT THOMAS BARRETT ROCK & FIELDS, CHTD, 101 S. CAPITOL BLVD., 10TH FLOOR, P.O. BOX 829, BOISE, IDAHO 83701-0829, AND THE CLERK OF THE ABOVE-ENTITLED COURT.

NOTICE IS HEREBY GIVEN THAT:

1. The above-named Appellant, Robert Gray ("Gray"), hereby appeals the Order entered by the Court on June 5, 2007 and subsequent Order Clarifying June 5, 2007 Summary

Judgment Order and Correcting the Order on August 7, 2007, which was later reduced to Judgment entered on September 12, 2007, Hon. Cheri C. Copsey, presiding.

2. Appellant Gray has the right to appeal to the Idaho Supreme Court, and the Judgment and Order described in Paragraph 1 above are appealable under and pursuant to Rule 11(a)(1) of the Idaho Appellate Rules.

3. Appellant intends to assert a number of issues on appeal including, but not limited to, the following:

a. the Trial Court erred granting of Defendants' Motion for Summary Judgment against all claims made by Plaintiff Rob Gray;

b. the Trial Court erred in ruling that Rob Gray's claim for breach of contract fails as a matter of law;

c. the Trial Court erred in ruling that Rob Gray's statutory claim for wages fails as a matter of law;

d. the Trial Court erred in ruling that Rob Gray's claim for promissory estoppel fails as a matter of law;

e. the Trial Court erred in ruling that Rob Gray's claim for equitable estoppel/ quantum meruit fails as a matter of law;

f. the Trial Court erred in ruling that Rob Gray's claim for fraud fails as a matter of law.

Appellant reserves the right to add additional issues on appeal and to revise or restate the issues set forth above.

4. No order has been entered sealing all or any portion of the record.

5. Appellant requests the reporter's transcript.

6. Appellant requests that all documents and pleadings in the Court file be included in the clerk's record on appeal, in addition to those automatically included under Rule 28 I.A.R., and specifically including all briefs and affidavits submitted by Appellant Gray in this matter.

7. The undersigned hereby certifies:

a. That the estimated fee for preparation of the clerk's record has been paid.

b. That the appellate filing fee has been paid.

c. That service has been made on all parties required to be served pursuant to Rule 20.

DATED this 12th day of October, 2007.

HOLLAND & HART LLP

By _____
Erik F. Stidham, of the firm
Attorneys for Plaintiff Robert Gray

CERTIFICATE OF SERVICE

I hereby certify that on this 12th day of October 2007, I caused to be served a true and correct copy of the foregoing by the method indicated below, and addressed to the following:

Jason G. Murray, Esq.
MOFFATT THOMAS BARRETT ROCK & FIELDS, CHTD.
101 S. Capitol Blvd., 10th Floor
P.O. Box 829
Boise, Idaho 83701-0829
Fax: (208) 385-5384

- [x] U.S. Mail
- [ ] Hand Delivered
- [ ] Overnight Mail
- [ ] Telecopy (Fax)

_____
for HOLLAND & HART LLP

3766645_1.DOC

Date: 10/15/2007
Time: 08:33 AM

rth Judicial District Court - Ada Coun

Receipt

NO. 0034525
Page 1 of 1

Received of: Stidham, Erik F (attorney for Gray, Robert) $ 15.00

Fifteen and 00/100 Dollars

Case: CV-OC-2004-12362	Litigant: Robert Gray vs. Tri-way Construction Services Inc, etal.	Amount
T - Civil Appeals To The Supreme Court ($86.00 Directly to Supreme Court Plus this amount to the Distri		15.00
Total:		**15.00**

Check: 62003812
Payment Method: Check
Amount Tendered: 15.00

Clerk: CCTHIEBJ

J. David Navarro, Clerk of the Court

By: _____
Deputy Clerk

00145

Erik F. Stidham, ISB No. 5483
Dean Arnold, ISB No. 6814
HOLLAND & HART LLP
Suite 1400, U.S. Bank Plaza
101 South Capitol Blvd.
Mailing Address:
P.O. Box 2527
Boise, ID 83701-2527
Telephone: (208) 342-5000
Facsimile: (208) 343-8869
E-mail: efstidham@hollandhart.com

Attorneys for Plaintiff Robert Gray

DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF

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

ROBERT GRAY, Plaintiffs v. TRI-WAY CONSTRUCTION SERVICES, INC., a Washington Corporation; RAY ALLRAD, an individual; KATHY PETERSON, an individual; GARY PETERSON, an individual, Defendants.	Case No. CVOC 0409193D **STIPULATION TO EXTEND DEADLINE TO OBJECT TO MOTION FOR ATTORNEYS FEES** Assigned Judge: Cheri C. Copsey

Plaintiff, Robert Gray ("Gray"), by and through his counsel of record, Holland & Hart, LLP, and Defendant, Tri-Way Construction Services, Inc. ("Tri-Way") both agree to a one (1) week extension of time for Gray to object to Tri-Way's Motion for Attorneys Fees and Costs.

DATED this 12th day of October, 2007.

HOLLAND & HART LLP

Erik F. Stidham, of the firm
Attorneys for Plaintiff Robert Gray

MOFFATT THOMAS BARRETT ROCK & FIELDS, CHTD

Jason Murray, of the firm
Attorneys for Defendant Tri-Way Construction Services, Inc.

CERTIFICATE OF SERVICE

I hereby certify that on this 12th day of October 2007, I caused to be served a true and correct copy of the foregoing by the method indicated below, and addressed to the following:

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- ☐ Telecopy (Fax)

for HOLLAND & HART LLP

Erik F. Stidham, ISB No. 5483
Julie Tetrick, ISB No. 6985
HOLLAND & HART LLP
Suite 1400, U.S. Bank Plaza
101 South Capitol Blvd.
Mailing Address:
P.O. Box 2527
Boise, ID 83701-2527
Telephone: (208) 342-5000
Facsimile: (208) 343-8869
E-mail: efstidham@hollandhart.com

Attorneys for Plaintiff Robert Gray

DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF

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

ROBERT GRAY, Plaintiffs v. TRI-WAY CONSTRUCTION SERVICES, INC., a Washington Corporation; RAY ALLRAD, an individual; KATHY PETERSON, an individual; GARY PETERSON, an individual, Defendants.	Case No. CVOC 0409193D **STIPULATION TO EXTEND DEADLINE TO OBJECT TO MOTION FOR ATTORNEYS FEES** Assigned Judge: Cheri C. Copsey

Plaintiff, Robert Gray ("Gray"), by and through his counsel of record, Holland & Hart, LLP, and Defendant, Tri-Way Construction Services, Inc. ("Tri-Way") both agree to extend the time for Gray to object to Tri-Way's Motion for Attorneys Fees and Costs. The parties recognize that the original Motion for Attorneys Fees and Costs served on Gray on September 26, 2007 was incomplete. Tri-Way has now provided a complete copy to Gray. The parties thereby stipulate to a further three (3) day extension of time

for Gray to object to Tri-Way's Motion for Attorneys Fees and Costs such that Gray's objection will be filed on or before October 25, 2007.

DATED this 23rd day of October, 2007.

HOLLAND & HART LLP

Erik F. Stidham, of the firm
Attorneys for Plaintiff Robert Gray

MOFFATT THOMAS BARRETT ROCK & FIELDS, CHTD

Jason Murray, of the firm
Attorneys for Defendant Tri-Way Construction Services, Inc.

CERTIFICATE OF SERVICE

I hereby certify that on this 23rd day of October 2007, I caused to be served a true and correct copy of the foregoing by the method indicated below, and addressed to the following:

Jason G. Murray, Esq.
MOFFATT THOMAS BARRETT ROCK & FIELDS, CHTD.
101 S. Capitol Blvd., 10th Floor
P.O. Box 829
Boise, Idaho 83701-0829
Fax: (208) 385-5384

- ☐ U.S. Mail
- ☒ Hand Delivered
- ☐ Overnight Mail
- ☐ Telecopy (Fax)

for HOLLAND & HART LLP

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Erik F. Stidham, ISB No. 5483
Julie Tetrick, ISB No. 6985
HOLLAND & HART LLP
Suite 1400, U.S. Bank Plaza
101 South Capitol Blvd.
Mailing Address:
P.O. Box 2527
Boise, ID 83701-2527
Telephone: (208) 342-5000
Facsimile: (208) 343-8869
E-mail:efstidham@hollandhart.com

Attorneys for Plaintiff Robert Gray

DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

ROBERT GRAY,

Plaintiffs

v.

TRI-WAY CONSTRUCTION SERVICES, INC., a Washington Corporation; RAY ALLRAD, an individual; KATHY PETERSON, an individual; GARY PETERSON, an individual,

Defendants.

Case No. CVOC 0409193D

PLAINTIFF'S OBJECTION TO DEFENDANTS MOTION FOR FEES AND COSTS

Assigned Judge: Cheri C. Copsey

I. INTRODUCTION

Defendants are not entitled to the attorneys' fees which they seek. First, Defendants should not be considered the "prevailing party" under Idaho Code § 12-120(3) and Rule 54 of the Idaho Rules of Civil Procedure. Defendants asserted six claims against Plaintiff Robert Gray ("Gray"). Of the six (6) claims, Defendants conceded at summary judgment that three (3) of their claims against Gray were without factual or legal merit. Then Defendants dismissed the remaining three (3) claims against Gray. In short, neither Defendants nor Gray should be

considered the prevailing party given that none of the parties prevailed on any of the affirmative claims.

Second, even if Defendants are considered to be prevailing parties, Defendants should not recover all of the $64,359.19 in fees and costs they seek. The Court should equitably apportion all fees and costs to reflect that Defendants' victory was only a partial victory. Moreover, Defendants, even if they prevailed on a particular claim, may only recover fees for those claims which were grounded in contract, and may not recover fees and costs for those claims which were grounded in tort or based on statute. Also, Defendants should not be allowed to recover fees related to unnecessary and meritless motions such as their unsuccessful motions to dismiss based upon jurisdiction.

Finally, Defendants are not entitled to their discretionary costs because they failed to provided sufficient evidentiary support justifying the costs and also failed to establish that this case's costs were "exceptional" and the costs were reasonably incurred.

II. ARGUMENT

A. Defendants Are Not Prevailing Parties under Rule 54, and Thus, Are Not Entitled to an Award of Fees and Costs.

The Court should deny Defendants' request for fees and costs in its entirety on the basis that Defendants were not the prevailing party. Under both Idaho Code Section 12-120(3), which authorizes an attorney fees in a civil action involving a commercial transaction based on a contract, and Rule 54(d)(1)(A) of the Idaho Rules of Civil Procedure, which authorizes an award of costs as a matter of right, the party seeking such fees and costs must first prove it qualifies as "the prevailing party." Idaho Rule of Civil Produce 54(d)(1)(B) provides the framework for determining the prevailing party issue for entitlement to both fees and costs, which states:

> In determining which party to an action is a prevailing party and entitled to costs, the trial court shall in its sound discretion consider

> the final judgment or result of the action in relation to the relief sought by the respective parties, whether there were multiple claims, multiple issues, counterclaims, third party claims, cross-claims, or other multiple or cross issues between the parties, and the extent to which each party prevailed upon each of such issue or claims...

Thus, under I.R.C.P. 54(d)(1)(B), there are three principal factors the trial court must consider when determining which party, if any, prevailed. First, the court must evaluate the final judgment or result obtained in relation to the relief sought; second, whether there were multiple claims or issues between the parties; and third, the extent to which each of the parties prevailed on each of the claims or issues. *Chadderdon v. King*, 104 Idaho 406, 411-12, 659 P.2d 160, 165-66 (Ct.App. 1983). "The mandate of [Rule 54] is clear: The trial court is vested with the discretion to apportion costs and fees, taking into account counterclaims, cross-claims or other multiple issues." *Jones v. Whiteley,* 112 Idaho 886, 889, 736 P.2d 1340, 1343 (Idaho App. 1987).

For example, in *Jones*, the plaintiffs brought suit against the defendants for sums due on a contract. The defendant counterclaimed for restitution of overpayment made to the plaintiffs in a previous transaction. 112 Idaho at 887, 736 P.2d at 1341. The trial court found for the plaintiffs on the contract claim, but reduced the plaintiffs' recovery by the amount of the overpayments. *Id.* Based upon these facts, the trial court refused to find that either party prevailed for purposes of awarding fees and costs, noting that the plaintiffs had prevailed on some claims and defendant had prevailed on others. *Id.* at 889, 736 P.2d at 1343. The Court of Appeals affirmed the trial courts decision: "We find no abuse of discretion in such decision. I.R.C.P. 54(d)(1)(A), which authorizes costs to the prevailing party, and I.C. § 12-120(2), which authorizes attorney fees to a prevailing party, are not applicable where, as here, there is no prevailing party." *Id.* at 889-890, 736 P.2d at 1343-1344.

In *Ruge v. Posey*, 114 Idaho 890, 761 P.2d 1242 (Ct. App. 1988), a pedestrian and her husband brought action against an automobile driver for injuries sustained as a result of a motor vehicle accident. At trial, the plaintiffs prevailed on the compensatory damages claim, but did not prevail on the claims for loss of consortium and punitive damages. *Id.* Pursuant to Rule 54(d)(1), plaintiffs sought an award of costs. *Id.* The trial judge, however, determined that although plaintiffs prevailed on the issue of compensatory damages, there was no overall prevailing party within the meaning of the rule, and as such, plaintiffs were not entitled to an award of costs. *Id.*

Similarly, this case involved multiple claims and issues. Here, Plaintiff asserted a total of eight claims against Defendants, including breach of contract, fraud, estoppel, and statutory wage claim violations. *See* First Amended Complaint and Demand for Jury Trial ("Amended Complaint"). Defendants counterclaimed against Plaintiff, asserting six claims, including breach of the covenant of good faith and fair dealing, tortious interference with prospective economic advantage, defamation, tortious interference with contract, conversion, and quasi-estoppel. *See* Answer to Complaint and Demand for Jury Trial, and Counterclaim. After engaging in discovery, the parties filed cross-motions for summary judgment. The Court heard argument on September 25, 2006. At summary judgment, Defendants conceded that their claims for Tortious Interference with Prospective Economic Advantage (Count II), Defamation (Count III) and Quasi-Estoppel (Count VI) were without legal or factual support. *See* Order Denying in Part and Granting in Part Gray's Motion for Summary Judgment.

On June 5, 2007, this Court granted Defendants' Motion for Summary Judgment. *See* Order Granting Motion for Summary Judgment to Tri-Way. Nine days later, on June 14, 2007, the Court entered a separate decision on Plaintiff's Motion for Summary Judgment, granting it in

part and denying it in part. *See* Order Denying in Part and Granting in Part Gray's Motion for Summary Judgment. Shortly thereafter, Defendants dismissed the remainder of their counterclaims, which were not already dismissed by the Court's prior decision. Neither party recovered on any of their respective claims.

Stated differently, Gray can be said to have prevailed on six of the fourteen claims asserted while Defendants can be said to have prevailed on eight of the fourteen claims asserted. Taking into account the parties' proportional success on the multiple claims and issues, the Court – under both *Jones* and *Ruge* – would be within its sound discretion to find that no party prevailed, and that each party must bear its own costs. *See Jones*, 112 Idaho at 889-890, 736 P.2d at 1343-1344; *Ruge*, 114 Idaho at 892, 761 P.2d at 1244. Like the parties in *Jones* and *Ruge*, both Plaintiff and Defendants in this case only prevailed on a fraction of their respective claims. Therefore, the Court should find that Rule 54(d)(1)(A) and I.C. § 12-120(2), do not apply here – where there is no prevailing party.

B. Even Assuming Defendants Are Prevailing Parties, Defendants Are Not Entitled To Recover Of All The Fees Sought.

1. Fees and Costs Should Be Apportioned.

Even if the Court deems Defendants the "most" prevailing party, Defendants are not entitled to the entire fee and cost award they have requested given that they did not prevail on a significant portion of the total claims asserted. "Where parties have each prevailed on different causes of action tried in the same lawsuit, attorney fees [and costs] may be apportioned accordingly." *Massey-Ferguson Credit Corp. v. Peterson*, 102 Idaho 111, 121, 626 P.2d 767, 777 (Idaho 1980) (citing *Jensen v. Shank*, 99 Idaho 565, 585 P.2d 1276 (1978) and I.R.C.P. 54(d)(1)(B)). *See also Bumgarner v. Bumgarner*, 124 Idaho 629, 862 P.2d 321 (Idaho Ct.App.

1993); *Badell v. Badell*, 122 Idaho 442, 835 P.2d 677 (Idaho App. 1992); *Prouse v. Ransom*, 117 Idaho 734, 791 P.2d 1313 (Ct.App. 1989).

In *Badell*, the Idaho Court of Appeals affirmed the trial court's award of a seventy-five percent attorney fee award where the court found that the plaintiff only prevailed in part. 122 Idaho at 450, 835 P.2d at 685 (Idaho Ct.App. 1992). Similarly, in *Bumgarner*, the Court of Appeals affirmed the trial court's decision to reduce the plaintiff's fee award by one-half to reflect the fact that the plaintiff only prevailed on one of his trespass claims, which overlapped to some extent with his other trespass claim, but was not successful on his emotional distress claim and a separate trespass claim. 124 Idaho at 644, 862 P.2d at 336. *See also Northwest Bec-Corp v. Home Living Service*,136 Idaho 835, 41 P.3d 263 (Idaho 2002)(affirming trial court's decision to award defendant only one-half of attorneys' fees as a portion of her fees were incurred during the preparation of her counterclaim upon which she did not prevail).

Application of this equitable rule to the present case should result in a pro-rata reduction of Defendants' fee award for the claims on which Plaintiff prevailed. Here, each of the parties has prevailed on different causes of action tried within the same lawsuit. Thus, attorney fees should be apportioned accordingly in accordance with the prior decisions of Idaho courts. It would certainly be within the Court's sound discretion to award Defendants no more than 60% of the fees and costs requested, or $38,615.51, to reflect the fact that Defendants only prevailed on eight of the fourteen claims asserted (approximately 60% of the claims). *See Massey-Ferguson*, 102 Idaho at 121, 626 P.2d at 777; *Bumgarner*, 124 Idaho 629, 862 P.2d at 336; *Badell*, 122 Idaho at 450, 835 P.2d at 685.

2. Fees Incurred On The Tort And Statutory Claims May Not Be Allowed.

In addition, Defendants are not entitled to fees incurred prosecuting and defending claims grounded in tort and/or statutory violations. Idaho Code Section 12-120(3) does not authorize

attorneys' fees for claims grounded in tort or statutory violations. *Northwest Bec-Corp v. Home Living Service*, 136 Idaho 835, 41 P.3d 263 (Idaho 2002); *Prop. Mgmt. West, Inc. v. Hunt*, 126 Idaho 897, 899-900, 894 P.2d 130, 133-34 (Idaho 1995). Accordingly, the attorneys' fees claimed by Defendants must be apportioned to exclude the unrecoverable fees spent on the other causes of action not grounded in a contract. *Hunt*, 126 Idaho at 899-900.

In *Prop. Mgmt. West, Inc. v. Hunt*, 126 Idaho 897, 894 P.2d 130 (1995), the plaintiff sued the defendant on a variety of theories after the defendant's employment relationship with the plaintiff soured. A major issue on appeal was whether the district court erred in granting attorney fees under I.C. § 12-120(3) to plaintiff as the prevailing party on the claims. *Id.* The Supreme Court held that the plaintiff could not be awarded attorney fees on two of the claims upon which it prevailed because, although the underlying relationship between the parties may have been based on the defendant's employment with the plaintiff, those two claims were grounded in tort, not in contract. *Id.* at 899-900, 894 P.2d at 132-33. *C.f., Atwood v. W. Constr., Inc.*, 129 Idaho 234, 923 P.2d 479 (Ct.App.1996) (awarding attorney fees expended on employment contract but disallowing fees expended on plaintiff's age discrimination claim which was rooted in statute).

Just as the plaintiff in *Hunt* could not recover attorneys' fees expended on non-contract based claims, Defendants should not be allowed to recover for fees incurred prosecuting and defending claims grounded in tort and statutory violations. Plaintiff brought claims for fraud, constructive fraud, and violations of Idaho's wage claim statutes. Defendants asserted counterclaims for tortious interference with prospective economic advantage, defamation, tortious interference with contract, and conversion. None of these foregoing claims pleaded by the parties can be fairly said to be an action "on the contract" for purposes of Section 12-120(3).

Thus, no contractual or statutory authority for an award of attorneys' fees exists on these seven causes of action – which constitute one-half of the claims asserted; and Defendants' fee award should be reduced accordingly.

Combining the numbers of claims on which Defendants did not prevail (the six counterclaims) and the number of claims that are not contract-based (three in addition to the six counterclaims), the Court should find nine claims for which Defendants would *not* be entitled to be awarded fees and costs (assuming Defendants are even deemed the "prevailing party"). Thus, subtracting those nine claims from the total of fourteen claims asserted, Defendants should only receive fees incurred in relation to the five remaining claims as represented by a percentage of the overall claims asserted, or a thirty-three percent fee award of $20,305.20[1].

3. Defendants Should Not Be Allowed to Recover Attorney Fees and Costs Associated With Its Motion to Dismiss.

Furthermore, Defendants wrongfully seek fees and costs associated with their unsuccessful motions to dismiss based upon jurisdiction. The Court clearly held that it had jurisdiction over the Defendants. Defendants did not prevail on these arguments, and therefore are not entitled to fees and costs associated with those arguments. Defendants incurred fees of $6,872.00 related to the meritless motion to dismiss based on lack of jurisdiction.[2] Accordingly,

[1] Note that the calculation excludes discretionary costs.

2

Attorney	Dates	Total
Patricia M. Olsson	12/7/04, 12/15/04, 2/15/05, 4/6/05, 4/25/05, 5/4/05, 5/16/05	$1455.50
Jason G. Murray	12/8/04, 12/9/04, 12/16/04, 2/22/05, 2/23/05, 3/22/05, 3/28/05, 3/31/05, 4/6/05, 4/7/05, 4/8/05, 4/12/05, 4/25/05, 5/2/05, 5/3/05, 5/4/05, 5/12/05, 5/16/05, 5/17/05, 5/23/05	$3904.00
Russell G. Metcalf	2/22/05, 2/23/05, 3/7/05, 3/23/05, 3/24/05, 9/7/06, 9/8/06	$1512.50
TOTAL		**$6872.00**

the award to Defendants should be reduced by $6,872.00 to deduct the fees and costs associated with their failed motions to dismiss based on lack of jurisdiction.

C. Defendants Are Not Entitled to Discretionary Costs Because It Cannot Show Such Costs Were Necessary And Exceptional.

In general, an award of discretionary costs is "committed to the sound discretion of the district court." *Zimmerman v. Volkswagen of America, Inc.*, 128 Idaho 851, 858, 920 P.2d 67, 74 (1996). However, the burden is on the prevailing party to make an adequate and initial showing that discretionary costs were necessary and exceptional costs reasonably incurred, and should in the interest of justice be assessed against the adverse party. *Hines v. Hines*, 129 Idaho 847, 934 P.2d 20 (1997); *Automobile Club Ins. Co. v. Jackson*, 124 Idaho 874, 880, 865 P.2d 965, 971 (1993), citing *Westfall v. Caterpillar, Inc.*, 120 Idaho 918, 926, 821 P.2d 973, 981 (1991). Furthermore, it is important to note that even if a requested discretionary cost is necessary and reasonable, if the Plaintiff fails to prove that the cost was not exceptional, the court must deny the cost on that basis alone. *See Bingham v. Montane Resource Associates*, 133 Idaho 420, 987 P.2d 1035 (1999); *Fish v. Smith*, 131 Idaho 492, 493-94, 960 P.2d 175, 176-77 (1988); *see also Inama v. Brewer*, 132 Idaho 377, 384, 973 P.2d 148, 155 (1999).

Plaintiff objects to the Defendants claimed discretionary costs pursuant to I.R.C.P. Rule 54(d)(l)(D), which provides in relevant part, as follows:

> Additional items of cost not enumerated in, or in an amount in excess of that listed in subparagraph (C), 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....
>
> *Id.*

Specifically, Plaintiff objects to the Defendants' claimed discretionary costs described as follows:

1. Photocopying Imaging (1,353.23)
2. Vendor Services ($177.00)
3. Westlaw Research ($560.11)
4. Out-of-Town Travel – depositions of G. Peterson, K. Peterson, and R. Allard ($647.15)

Defendants have made no showing that these discretionary costs "were necessary and exceptional costs reasonably incurred, and should in the interest of justice be assessed against [Plaintiff]." There is no basis for the Court to find from the record that the additional sums claimed by the Defendants fall within the category of exceptional costs. The Supreme Court has approved, as a proper reading of the term "exceptional" in Rule 54(d)(1)(D), a trial court's denial of expert witness fees, travel and lodging expenses for expert witnesses and attorneys, and photocopying charges on the ground that the use of such experts and other expenses are commonly incurred in serious personal injury actions. *Fish v. Smith*, 131 Idaho 492, 960 P.2d 175 (1998). The same rationale is applicable in this contract dispute action. Indeed, there is nothing exceptional about the discretionary costs claimed by Defendants and Defendants make no effort to prove otherwise. Because Defendants have not put forth any effort to justify their discretionary costs and nonetheless would be unable to do so, their request for such costs in the amount of $2,828.29 should also be denied.

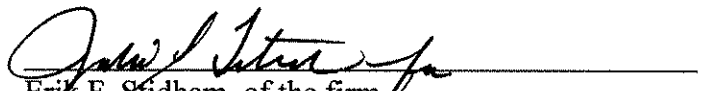
III. CONCLUSION

To the extent Defendants only partially prevailed, the Court should either deny attorney fees altogether or fairly apportion such fees and costs to the extent that each party prevailed. In

addition, Defendants are not entitled to fees and costs incurred in the prosecution and defense of non-contract based claims. Defendants are not entitled to any discretionary costs.

DATED this 25th day of October, 2007.

HOLLAND & HART LLP



Erik F. Stidham, of the firm
Attorneys for Plaintiff Robert Gray

CERTIFICATE OF SERVICE

I hereby certify that on this 25th day of October 2007, I caused to be served a true and correct copy of the foregoing by the method indicated below, and addressed to the following:

Jason G. Murray, Esq.
MOFFATT THOMAS BARRETT ROCK & FIELDS, CHTD.
101 S. Capitol Blvd., 10th Floor
P.O. Box 829
Boise, Idaho 83701-0829
Fax: (208) 385-5384

- ☐ U.S. Mail
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- ☐ Telecopy (Fax)

for HOLLAND & HART LLP

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Patricia M. Olsson, ISB No. 3055
Jason G. Murray, ISB No. 6172
MOFFATT, THOMAS, BARRETT, ROCK & FIELDS, CHARTERED
101 S. Capitol Blvd., 10th Floor
Post Office Box 829
Boise, Idaho 83701
Telephone (208) 345-2000
Facsimile (208) 385-5384
pmo@moffatt.com
jgm@moffatt.com
22-072

Attorneys for Defendant

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT

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

ROBERT GRAY,

Plaintiff,

vs.

TRI-WAY CONSTRUCTION SERVICES, INC., a Washington Corporation; RAY ALLRAD [sic], and individual; KATHY PETERSON, an individual; GARY PETERSON, an individual,

Defendants.

Case No. CV OC 0409193D

RESPONDENTS' REQUEST FOR ADDITIONS TO RECORD

COME NOW the above-named defendants/respondents, Tri-Way Construction Services, Inc., Ray Allard, Kathy Peterson and Gary Peterson, by and through undersigned counsel, and request that, in addition to those documents automatically included under Rule 28

of the Idaho Appellate Rules, the following documents be included in the Clerk's Record on Appeal:

1. Defendants' Motion for Summary Judgment, filed on August 2, 2006;

2. Memorandum in Support of Defendants' Motion for Summary Judgment, filed on August 2, 2006;

3. Affidavit of Jason G. Murray in Support of Defendants' Motion for Summary Judgment, filed on August 2, 2006;

4. Memorandum in Opposition to Plaintiff's Motion for Summary Judgment, filed on August 30, 2006;

5. Affidavit of Jason G. Murray in Opposition to Plaintiff's Motion for Summary Judgment, filed on August 30, 2006;

6. Defendants' Reply Memorandum in Support of Motion for Summary Judgment, filed on September 14, 2006;

7. Supplemental Memorandum in Support of Defendants' Motion for Summary Judgment, filed on October 13, 2006;

8. Reply to Plaintiff's Supplemental Memorandum Re: Statute of Frauds, filed on November 27, 2006;

9. Order Granting Motion for Summary Judgment to Tri-Way, lodged on June 5, 2007;

10. Order Clarifying June 5, 2007 Summary Judgment Order and Correcting the Order, lodged on August 7, 2007; and

11. Judgment, entered by the Court on September 12, 2007.

Defendants/Respondents further request that the Exhibits to the Affidavits of Jason G. Murray requested herein (Request Nos. 3 and 5, respectively) be filed as Exhibits to the Clerk's Record in accordance with I.A.R. 31.

This Request for Additions to the Clerk's Record on Appeal is brought pursuant to Idaho Appellate Rule 28(c), and is further supported by the Affidavit of Jason G. Murray in Support of Request for Additions to Record, filed contemporaneously herewith.

DATED this 10th day of December, 2007.

MOFFATT, THOMAS, BARRETT, ROCK & FIELDS, CHARTERED

By Jason G. Murray
Jason G. Murray – Of the Firm
Attorneys for Defendants/Respondents

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 10th day of December, 2007, I caused a true and correct copy of the foregoing **RESPONDENTS' REQUEST FOR ADDITIONS TO RECORD** to be served by the method indicated below, and addressed to the following:

Erik F. Stidham
HOLLAND & HART LLP
101 South Capitol Boulevard, Suite 1400
Post Office Box 2527
Boise, Idaho 83701-2527
Facsimile (208) 343-8869

( ) U.S. Mail, Postage Prepaid
(✓) Hand Delivered
( ) Overnight Mail
( ) Facsimile

Jason G. Murray

THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

ROBERT GRAY,
Plaintiff,

vs.

TRI-WAY CONSTRUCTION SERVICES, INC., *et al.*

Defendants.

Case No. CVOC 0409193D

ORDER GRANTING COSTS AND ATTORNEY FEES

On June 5, 2007, the Court granted Tri-Way Construction Services, Inc. and the Petersons (collectively "Tri-Way") summary judgment on all of Robert Gray's claims and on August 9, 2007, the Court clarified its Order Granting Summary Judgment to Tri-Way.

On June 11, 2007, the Court denied Gray's Motion for Summary Judgment on Tri-Way's Counterclaim as to the Counts I, IV and V of Tri-Way's Counterclaims finding there were disputes of material facts. As to Counts II, III, and VI, the Court dismissed those counterclaim counts. On September 6, 2007, the parties stipulated to dismiss Tri-Way's remaining counterclaims. The Court entered final judgment on September 12, 2007. Gray appealed and on September 26, 2007, Tri-Way moved for costs and fees under I.C. § 12-120(3) and I.C. § 12-121. Gray opposed.

The Court scheduled argument for November 29, 2007. Gray's attorney failed to appear but later Gray's attorney filed an affidavit in which he testified that he had not received notice of the hearing. The Court clerk contacted Gray's attorney and he indicated the Court could make its decision without further argument. Therefore, on December 20, 2007, the Court took the matter under advisement.

For the reasons stated below, the Court grants Tri-Way's Motion for Costs and Attorney Fees and the Court awards Tri-Way attorney's fees in the amount of $48,207.75 and costs as a matter of right in the amount of $2,217.40. In an exercise of discretion, the Court denies Tri-Way any discretionary costs. By reference, the Court hereby incorporates the factual statement found in its Order Granting Summary Judgment to Tri-Way dated June 5, 2007.

ANALYSIS

In Idaho, parties pay their own attorney's fees unless a statute or contract provides otherwise. *Rohr v. Rohr*, 128 Idaho 137, 911 P.2d 133 (1996); *Owner-Operator Independent Drivers v. Idaho Public Utilities Com'n*, 125 Idaho 401, 871 P.2d 818 (1994); *Matter of Estate of Keeven*, 126 Idaho 290, 882 P.2d 457 (Ct.App. 1994) (also called the "American Rule"). The party who claims attorney fees must present the Court either a statute or contract between the parties permitting such an award; if the party does not point the Court to a statute or contract, attorney fees may be denied. *Fournier v. Fournier*, 125 Idaho 789, 74 P.2d 600 (Ct.App. 1994).

Tri-Way moved for attorney's fees and costs pursuant to I.C. §§ 12-120(3), 12-121 and I.R.C.P. 54. It contends it is the prevailing party. It further claims that the gravamen of the case was a commercial transaction and that attorney's fees are proper under I.C. § 12-120(3). Gray timely[1] objected to Tri-Way's memorandum of fees and costs. *See* I.R.C.P. 54(d)(6), 54(e)(6).

I. TRI-WAY AND THE PETERSONS ARE THE PREVAILING PARTIES.

The Court finds Tri-Way and the Petersons are the prevailing parties. The determination as to which party, if any, prevailed is within the Court's discretion. *Holmes v. Holmes*, 125 Idaho 784,787, 874 P.2d 595, 598 (Ct.App. 1994) (citing *Badell v. Badell*, 122 Idaho 442, 450, 835 P.2d 677, 685 (Ct.App.1992)). In determining whether there is a prevailing party, the Court first looks to the Idaho Rules of Civil Procedure. Rule 54(e)(1) incorporates Rule 54(d)(1)(B) which provides in part:

> In determining which party to an action is a prevailing party and entitled to costs, the trial court shall in its sound discretion consider the final judgment or result of the action in relation to the relief sought by the respective parties, whether there were multiple claims, multiple issues, counterclaims, third party claims, cross-claims, or other multiple or cross issues between the parties, and the extent to which each party prevailed upon each of such issue or claims.

See also Jerry J. Joseph C.L.U. Ins. Associates v. Vaught, 117 Idaho 555, 789 P.2d 1146 (Ct.App. 1990).

Here, the Court granted summary judgment against Gray, dismissing all his claims and in favor of Tri-Way. Gray succeeded on absolutely none of his claims. In fact, while the Court did

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[1] By stipulation, the parties extended the time for Gray to file his objection.

dismiss three of Tri-Way's counterclaims, the Court denied Gray summary judgment against Tri-Way on the other three counterclaims. In determining which party prevailed in an action where there are claims and counterclaims between opposing parties, the court determines who prevailed "in the action." That is, the prevailing party question is "examined and determined from an overall view, not a claim-by-claim analysis." *Eighteen Mile Ranch, L.L.C. v. Nord Excavating & Paving, Inc.*, 141 Idaho 716, 719, 117 P.3d 130, 133 (2005). The Court is to view the overall success.

While the Court did dismiss three of Tri-Way's counterclaims, these were only a very small part of this litigation. Tri-Way prevailed in defeating all of Gray's claims in which he requested past and future loss of income, merit and longevity wages,[2] reputation damages, treble damages on his wage claim and restitution damages based on Tri-Way's alleged breach of contract. While the only issue upon which Gray prevailed was the initial Motion to Dismiss based on a lack of personal jurisdiction, Gray cannot claim success; on the merits, Tri-Way clearly avoided liability. As the Idaho Supreme Court opined:

> In litigation, avoiding liability is as good for a defendant as winning a money judgment is for a plaintiff. The point is, while a plaintiff with a large money judgment may be more exalted than a defendant who simply walks out of court no worse for the wear, courts must not ignore the value of a successful defense. . .

Eighteen Mile Ranch, L.L.C., 141 Idaho at 719, 117 P.3d at 133. Gray's victory in getting the three counterclaims dismissed[3] does not outweigh Tri-Way's success against him on Gray's complaint and had minimal effect on the overall case.

After a full consideration of the entire litigation, including the respective claims and defenses, the Court is still of the view that Tri-Way and the Petersons are clearly the primary prevailing parties. *See Freeman & Co. v. Bolt*, 132 Idaho 152, 968 P.2d 247 (Ct. App. 1998). Thus, the Court finds, in an exercise of its discretion, that Tri-Way and the Petersons are the prevailing parties in this matter and are entitled to a reasonable award of attorney's fees provided a statute applies to their request.

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[2] Gray contended he was entitled to 50% of the net profits for the Arizona projects which for June 2004 to September 30, 2004 amounted to $271,792.48 in net profits.

[3] The Court acknowledges that subsequent to the Court's decision, the parties stipulated to dismiss all of Tri-Way's counterclaims but that does not change the Court's analysis.

II. TRI-WAY AND PETERSON ARE ENTITLED TO ATTORNEY FEES UNDER I.C. §12-120(3) ONLY FOR THOSE CLAIMS BASED ON THE EMPLOYMENT CONTRACT -- NOT THE WAGE CLAIM.

Tri-Way and Peterson claim fees under I.C. § 12-121(3) claiming the gravamen of the lawsuit was a commercial transaction – Gray's alleged employment contract. I.C. § 12-120(3) provides that the prevailing party in an action based upon "any commercial transaction" is entitled to recover attorney fees. The statute defines "commercial transaction" as "all transactions except transactions for personal or household purposes." The test for the application of this section is "whether the commercial transaction comprises the gravamen of the lawsuit, that is, whether the commercial transaction is integral to the claim and constitutes the basis upon which the party is attempting to recover." *Spence v. Howell,* 126 Idaho 763, 776, 890 P.2d 714, 717 (1995).

The term "commercial transaction" is defined in I.C. §12-120(3) to mean "all transactions except transactions for personal or household purposes." Thus, by the plain terms of the statute, "[w]here a party alleges the existence of a contractual relationship of a type embraced by section 12-120(3), . . . that claim triggers the application of the statute." *Cont'l Cas. Co. v. Brady,* 127 Idaho 830, 835, 907 P.2d 807, 812 (1995). However, there must also be a nexus between the commercial transaction and the lawsuit:

> [T]he award of attorney's fees [under § 12-120(3)] is not warranted every time a commercial transaction is remotely connected with the case. Rather, the test is whether the 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.

Id. quoting *Brower v. E.I. DuPont De Nemours and Co.*, 117 Idaho 780, 784, 792 P.2d 345, 349 (1990). "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." *Fritts v. Liddle & Moeller Const., Inc.*, 144 Idaho 171, __, 158 P.3d 947, 951 (2007).

In *Brooks v. Gigray Ranches*, 128 Idaho 72, 910 P.2d 744 (1996), the Court outlined the two stages of analysis to determine whether a prevailing party could avail itself of I.C. § 12-120(3):(1) "there must be a commercial transaction that is integral to the claim"; and (2) "the commercial transaction must be the basis upon which recovery is sought." *Brooks*, 128 Idaho at 78, 910 P.2d at

750. That clearly exists here. The prevailing party in an action brought for breach of an employment contract is entitled to an award of fees under I.C. § 12-120(3), on the basis that an employment contract constitutes a contract for the purchase or sale of services under that statute. *See Jenkins v. Boise Cascade Corp.*, 141 Idaho 233, __, 108 P.3d 380, 391 (2005); *Clark v. State, Dept. of Health and Welfare*, 134 Idaho 527, 5 P.3d 988 (2000); *Atwood v. Western Const. Inc.*, 129 Idaho 234, 237, 923 P.2d 479, 482 (Ct.App.1996).

Gray alleged the existence of an employment contract in his Complaint and claimed Tri-Way and the Petersons breached that contract. Gray does not concedes that if the Court finds Tri-Way to be the prevailing party, it would be entitled to reasonable attorney fees associated with defending Gray's employment contract claims. However, Gray argues Tri-Way is not be entitled to attorney fees associated with defending against the statutory claims he made pursuant to I.C. § 45-612(2). The Court agrees.

Former employers who prevail on a former employee's statutory claim for wages and treble damages can not recover attorney fees under I.C. § 12-120(3) for defending against the statutory wage claim. *Shay v. Cesler*, 977 P.2d 199, 132 Idaho 585 (1999). The wage claim statute's attorney fees provision for prevailing employers is the exclusive code section under which former employers could recover attorney fees. I.C. § 45-612(2); *Id.* The Idaho Supreme Court clearly ruled that I.C. § 12-120(3) is not an appropriate source for awarding attorney fees in wage claim disputes. *See Polk v. Larrabee*, 17 P.3d 247, 135 Idaho 303 (2000).

Therefore, when various statutory and common law claims are separable, the court should bifurcate the claims and award fees pursuant to I.C. § 12-120(3) only on the commercial transaction. *See Willie v. Board of Trustees*, 138 Idaho 131, 136, 59 P.3d 302, 307 (2002); *Brooks v. Gigray Ranches Inc.*, 128 Idaho 72, 77-79, 910 P.2d 744, 749-51 (1996); *Atwood v. Western Const., Inc.*, 129 Idaho 234, 241, 923 P.2d 479, 486 (Ct.App.1996).

III. ATTORNEYS FEES IN THE AMOUNT OF $48,207.75 ARE REASONABLE.

Tri-Way seeks an award of $58,818.50 in attorney fees. Gray contests the reasonableness of these attorney fees, and contends the Court should apportion those fees if the Court finds Tri-Way was the prevailing party. The Court agrees.

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 follow factors in determining the amount of such fees:

(A) The time and labor required.

(B) The novelty and difficulty of the questions.

(C) The skill requisite to perform the legal service properly and the experience and ability of the attorney in the particular field of law.

(D) The prevailing charges for like work.

(E) Whether the fee is fixed or contingent.

(F) The time limitations imposed by the client or the circumstances of the case.

(G) The amount involved and the results obtained.

(H) The undesirability of the case.

(I) The nature and length of the professional relationship with the client.

(J) Awards in similar cases.

(K) The reasonable cost of automated legal research (Computer Assisted Legal Research), if the court finds it was reasonably necessary in preparing a party's case.

(L) Any other factor which the court deems appropriate in the particular case.

In arriving at its decision, the Court applied all the required factors to determine whether the claimed fees were reasonable.

Among other things, the Court notes the fees were neither fixed nor contingent; they were hourly. The Court finds that the hourly fees are reasonable and reflect the prevailing rate. This case was hard fought. It stems from a business relationship gone sour. Furthermore, the law was complex and, more importantly, determining what facts were relevant and material was complicated. Therefore, the Court finds the issues in this case deserved more time than might normally be associated with a case. Moreover the circumstances of the case drove the fees.

With respect to the actual fees, the Court carefully reviewed all the fees. With respect to any fees associated with the Motion to Dismiss or the statutory wage claim, the Court denies those fees. Tri-Way provided detailed billings that allowed the Court to reduce the fees by those fees associated with the unsuccessful Motion to Dismiss for Lack of Jurisdiction and those associated with the

statutory claim. The Court further reduced the fees to reflect the fact the Court finds Tri-Way and the Petersons to have prevailed on 95% of the claims associated with defending against the employment contract. The Court notes that this was not hard to do, because the billings attached to Mr. Murray's affidavit were very detailed and the time spent on the Motion to Dismiss and wage claims were clearly delineated. The rest of the time and labor was reasonable. Based on the Court's review the Court finds that the amount of $48,207.75 is fair and reasonable.

The Court, in an exercise of discretion and based upon the totality of the case, therefore awards Tri-Way $48,207.75, and finds that this is the most equitable method of apportionment.

IV. THE COURT GRANTS TRI-WAY NON-DISCRETIONARY COSTS.

Rule 54(d)(1)(C), I.R.C.P., governs awards of costs as a matter of right to the prevailing party. Tri-Way claims $2,217.40 for non-discretionary costs and Gray did not object. After reviewing the amounts claimed, the Court finds they fit within the rule and the Court awards Tri-Way these costs as a matter of right.

V. THE COURT DENIES TRI-WAY DISCRETIONARY COSTS.

Tri-Way also moves for an award of discretionary costs, for postage, facsimiles, photocopies and out of town depositions in the amount $2,828.29, pursuant to I.R.C.P. 54(d)(1)(D). The Court recognizes this issue as one of discretion. Although these costs may be reasonable and justified, the Court cannot find that these costs are "exceptional" costs as contemplated by the Rule. Postage, facsimile, deposition travel costs and photocopying costs are the commonplace and everyday expenses of practicing law. There is no evidence that any of these costs are exceptional.

Therefore, in an exercise of discretion, the Court denies discretionary costs to Tri-Way.

ORDER

NOW, THEREFORE, IT IS ORDERED that Tri-Way's Motion for Costs and Attorney Fees is hereby **GRANTED** and Tri-Way and the Petersons are awarded attorney's fees in the amount of $48,207.75 and costs as a matter of right in the amount of $2,217.40.

IT IS SO ORDERED.

Dated this 21st day of December 2007.

Cheri C. Copsey

Cheri C. Copsey
District Judge

00173

CERTIFICATE OF MAILING

I hereby certify that on this 21 day of December 2007, I mailed (served) a true and correct copy of the within instrument to:

ERIK F. STIDHAM
HOLLAND & HART LLP
P.O. BOX 2527
BOISE, IDAHO 83701-2527

PATRICIA M. OLSSON
JASON G. MURRAY
MOFFATT, THOMAS, BARRETT ROCK & FIELDS, CHTD.
P.O BOX 829
BOISE, IDAHO 83701

J. DAVID NAVARRO
Clerk of the District Court

John Weatherby
Deputy Clerk

Erik F. Stidham, ISB #5483
Dean Arnold, ISB #6814
HOLLAND & HART LLP
Suite 1400, U.S. Bank Plaza
101 South Capitol Boulevard
P.O. Box 2527
Boise, Idaho 83701-2527
Telephone: (208) 342-5000
Facsimile: (208) 343-8869

Attorneys For Plaintiff/Appellant

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

ROBERT GRAY, Plaintiff/Appellant, vs. TRI-WAY CONSTRUCTION SERVICES, INC., a Washington Corporation; RAY ALLRAD, an individual; KATHY PETERSON, an individual; GARY PETERSON, an individual, Defendants/Respondent.	Case No. CV OC 0409193D **ROBERT GRAY'S NOTICE OF APPEAL** Assigned Judge: Cheri C. Copsey

TO: THE ABOVE-NAMED RESPONDENT, TRI-WAY CONSTRUCTION SERVICES, INC., RAY ALLRAD, KATHY PETERSON, GARY PETERSON, AND ITS ATTORNEYS OF RECORD: JASON MURRAY, OF THE FIRM MOFFATT THOMAS BARRETT ROCK & FIELDS, CHTD, 101 S. CAPITOL BLVD., 10TH FLOOR, P.O. BOX 829, BOISE, IDAHO 83701-0829, AND THE CLERK OF THE ABOVE-ENTITLED COURT.

NOTICE IS HEREBY GIVEN THAT:

1. The above-named Appellant, Robert Gray ("Gray"), hereby appeals the Order Granting Attorneys' Fees and Costs entered by the Court on December 21, 2007, Hon. Cheri C. Copsey, presiding.

2. Appellant Gray has the right to appeal to the Idaho Supreme Court, and the Judgment and Order described in Paragraph 1 above are appealable under and pursuant to Rule 11(a)(1) of the Idaho Appellate Rules.

3. Appellant intends to assert a number of issues on appeal relating to the award of attorneys' fees including, but not limited to, the following:

a. the Trial Court erred in determining that Defendants were entitled to attorneys fees as the prevailing party pursuant to § 12-120(3);

b. the Trial Court erred in awarding attorney fees in the amount of $48,207.75.

Appellant reserves the right to add additional issues on appeal and to revise or restate the issues set forth above.

4. No order has been entered sealing all or any portion of the record.

5. Appellant requests that all documents and pleadings relating to the award of attorney fees be included in the clerk's record on appeal, in addition to those automatically included under Rule 28 I.A.R., and specifically including all briefs and affidavits submitted by Appellant Gray and Defendants in this matter relating to the award of attorneys' fees.

- Defendants Motion for Attorney Fees
- Defendants Memorandum of Costs and Fees
- Affidavit of Jason G. Murray in Support of Defendants' Memorandum of Costs and Fees
- Stipulation to Extend Deadline to Object to Motion for Attorneys Fees

- Plaintiffs' Objection to Defendants' Motion for Fees and Costs
- Notice of Hearing on Defendants Motion for Attorney Fees
- Affidavit of Erik F. Stidham Regarding Attorneys' Fees Hearing
- Affidavit of Debra L. Jenkins Regarding Attorneys' Fees Hearing
- Order Granting Costs and Attorney Fees

6. The undersigned hereby certifies:

   a. That the estimated fee for preparation of the clerk's record has been paid.

   b. That the appellate filing fee has been paid.

   c. That service has been made on all parties required to be served pursuant to Rule 20.

DATED this 18th day of January, 2008.

HOLLAND & HART LLP

By _____
Erik F. Stidham, of the firm
Attorneys for Plaintiff Robert Gray

CERTIFICATE OF SERVICE

I hereby certify that on this 19th day of January 2008, I caused to be served a true and correct copy of the foregoing by the method indicated below, and addressed to the following:

Jason G. Murray, Esq.
MOFFATT THOMAS BARRETT ROCK & FIELDS, CHTD.
101 S. Capitol Blvd., 10th Floor
P.O. Box 829
Boise, Idaho 83701-0829
Fax: (208) 385-5384

- ☐ U.S. Mail
- ☒ Hand Delivered
- ☐ Overnight Mail
- ☐ Telecopy (Fax)

for HOLLAND & HART LLP

3814935_1.DOC

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

ROBERT GRAY, Plaintiff-Appellant, vs. TRI-WAY CONSTRUCTION SERVICES, INC., a Washington corporation; RAY ALLRAD, an individual; KATHY PETERSON, an individual; GARY PETERSON, an individual, Defendants-Respondents.	Supreme Court Case No. 34666 CERTIFICATE OF EXHIBITS

I, J. DAVID NAVARRO, Clerk of the District Court of the Fourth Judicial District of the State of Idaho in and for the County of Ada, do hereby certify:

There were no exhibits offered for identification or admitted into evidence during the course of this action.

I FURTHER CERTIFY, that the following documents will be submitted as CONFIDENTIAL EXHIBITS to the Record:

1. Affidavit of Jason G. Murray in Support of Defendants' Memorandum of Costs and Fees, filed September 26, 2007.

I FURTHER CERTIFY, that the following documents will be submitted as EXHIBITS to the Record:

1. Memorandum in Support of Defendants' Motion for Summary Judgment, filed August 2, 2006.
2. Affidavit of Jason G. Murray in Support of Defendants' Motion for Summary Judgment, filed August 2, 2006.
3. Memorandum in Support of Plaintiff's Motion for Summary Judgment, filed August 3, 2006.
4. Affidaivt of Robert Gray in Support of Plaintiff's Motion for Summary Judgment, filed August 3, 2006.
5. Affidavit of Erik F. Stidham in Support of Plaintiff's Motion for Summary Judgment, filed August 3, 2006.
6. Plaintiff's Memorandum in Opposition to Defendants' Motion for Summary Judgment, filed August 30, 2006.

CERTIFICATE OF EXHIBITS

7. Affidaivt of Robert Gray in Support of Plaintiff's Opposition to Defendants' Motion for Summary Judgment, filed August 30, 2006.
8. Affidavit of Scott E. Randolph in Support of Plaintiff's Opposition to Defendants' Motion for Summary Judgment, filed August 30, 2006.
9. Memorandum in Opposition to Plaintiff's Motion for Summary Judgment, filed August 30, 2006.
10. Affidavit of Jason G. Murray in Opposition to Plaintiff's Motion for Summary Judgment, filed August 30, 2006.
11. Robert Gray's Reply Memorandum in Support of Motion for Summary Judgment, filed September 13, 2006.
12. Defendant's Reply Memorandum in Support of Motion for Summary Judgment, filed September 14, 2006.
13. Supplemental Memorandum in Support of Defendants' Motion for Summary Judgment, filed October 13, 2006.
14. Plaintiff's Supplemental Memorandum in Support of Motion for Summary Judgment Re Statute of Frauds, filed November 13, 2006.
15. Defendants' Memorandum of Costs and Fees, filed September 26, 2007.
16. Affidaivt of Erik F. Stidham Regarding Attorneys' Fees Hearing, filed November 29, 2007.
17. Affidavit of Debra L. Jenkins Regarding Attorneys' Fees Hearing, filed November 29, 2007.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of the said Court this 24th day of January, 2008.

J. DAVID NAVARRO
Clerk of the District Court

By BRADLEY J. THIES
Deputy Clerk

CERTIFICATE OF EXHIBITS

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICTOF
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

ROBERT GRAY, Plaintiff-Appellant, vs. TRI-WAY CONSTRUCTION SERVICES, INC., a Washington corporation; RAY ALLRAD, an individual; KATHY PETERSON, an individual; GARY PETERSON, an individual, Defendants-Respondents.	Supreme Court Case No. 34666 CERTIFICATE OF SERVICE

I, J. DAVID NAVARRO, the undersigned authority, do hereby certify that I have personally served or mailed, by either United States Mail or Interdepartmental Mail, one copy of the following:

CLERK'S RECORD

to each of the Attorneys of Record in this cause as follows:

ERIK F. STIDHAM
ATTORNEY FOR APPELLANT
BOISE, IDAHO

JASON G. MURRAY
ATTORNEY FOR RESPONDENT
BOISE, IDAHO

J. DAVID NAVARRO
Clerk of the District Court

Date of Service: FEB 12 2008

By BRADLEY J. THIES
Deputy Clerk

SEAL

CERTIFICATE OF SERVICE

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

ROBERT GRAY, Plaintiff-Appellant, vs. TRI-WAY CONSTRUCTION SERVICES, INC., a Washington corporation; RAY ALLRAD, an individual; KATHY PETERSON, an individual; GARY PETERSON, an individual, Defendants-Respondents.	Supreme Court Case No. 34666 CERTIFICATE TO RECORD

I, J. DAVID NAVARRO, Clerk of the District Court of the Fourth Judicial District of the State of Idaho, in and for the County of Ada, do hereby certify that the above and foregoing record in the above-entitled cause was compiled and bound under my direction as, 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 Counsels.

I FURTHER CERTIFY, that the Notice of Appeal was filed in the District Court on the 15TH day of October, 2007.

J. DAVID NAVARRO
Clerk of the District Court

By BRADLEY J. THIES
Deputy Clerk

SEAL