

7-30-2010

Watkins Co., LLC v. Storms Clerk's Record v. 1 Dckt. 37685

Follow this and additional works at: https://digitalcommons.law.uidaho.edu/idaho_supreme_court_record_briefs

Recommended Citation

"Watkins Co., LLC v. Storms Clerk's Record v. 1 Dckt. 37685" (2010). *Idaho Supreme Court Records & Briefs*. 2705.
https://digitalcommons.law.uidaho.edu/idaho_supreme_court_record_briefs/2705

This Court Document is brought to you for free and open access by Digital Commons @ UIIdaho Law. It has been accepted for inclusion in Idaho Supreme Court Records & Briefs by an authorized administrator of Digital Commons @ UIIdaho Law. For more information, please contact annablaine@uidaho.edu.

Vol 1 of 4

IN THE volume 1 of 2
LAW CLERK SUPREME COURT
OF THE
STATE OF IDAHO

THE WATKINS COMPANY, LLC

Plaintiff and

Respondent-Cross Appellant

SEE AUGMENTATION RECORD

MICHAEL STORMS and KATHY BURGGRAF

Defendant and

Appellants-Cross Respondents

Appealed from the District Court of the Seventh Judicial

District of the State of Idaho, in and for Bonneville County

Hon. Joel E. Tingey, District Judge

Dean C. Brandstetter, Esq

P.O. Box 51600, Idaho Falls, Id 83405-1600
Attorney for Appellant

B.J. Driscoll, Esq

P.O. Box 50731, Idaho Falls, ID 83405-0731
Attorney for Respondent

Filed this Jul 30 2010, 20

Clerk

Deputy

FILED - COPY
JUL 30 2010
Supreme Court Court of Appeals
Entered ATS by

37605 COPY

IN THE SUPREME COURT OF THE STATE OF IDAHO

THE WATKINS COMPANY, LLC,
An Idaho limited liability company,

Plaintiff/Respondent,-Cross
Appellant,

v.

MICHAEL STORMS and KATHY,
BURGGRAF,

Defendant/Appellants-Cross
Respondents,

CLERK'S RECORD ON APPEAL

Appeal from the District Court of the
Seventh Judicial District of the State of Idaho,
in and for the County of Bonneville

HONORABLE Joel E. Tingey, District Judge.

Dean C. Brandstetter, Esq.
COX, OHMAN & BRANDSTETTER
P.O. Box 51600
Idaho Falls, ID 83405-1600

B. J. Driscoll, Esq.
SMITH & DRISCOLL
P.O. Box 50731
Idaho Falls, ID 83405-0731

Attorney for Appellant/Respondent

Attorney for Respondent/Appellants

TABLE OF CONTENTS

	Page
Register of Actions, printed 6-17-10	1
Complaint and Demand for Jury Trial, filed 11-19-08.....	11
Affidavit of Personal Return of Service, filed 12-10-08	20
Defendants’ Answer to Complaint and demand for Jury Trial, filed 3-9-09	21
Minute Entry, dated 7-8-09	26
Order for Telephonic Status Conference, filed 7-8-09	28
Order, filed 7-10-09.....	30
Brief in support of Motion for Partial summary Judgment, filed 7-14-09	33
Amended Complaint and Demand For Jury Trial, filed 8-5-09	41
Reply Brief in Support of Motion for Partial Summary Judgment and in Opposition to Defendants’ Rule 56(f) Motion to Continue Hearing, filed 8-5-09.....	51
Minute Entry, dated 8-12-09	58
Order, filed 8-13-09.....	60
Order and Notice Setting Jury Trial, filed 8-18-09	63
Defendants’ Answer to Amended Complaint and Demand for Jury Trial, filed 8-26-09	66
Minute Entry, dated 11-4-09	71
Order, filed 11-6-09.....	73
Order Allowing Amended Answer, filed 11-13-09.....	76
Defendants’ Amended Answer to Plaintiff’s Amended Complaint, filed 11-13-09	79
Defendants’ Amended Answer to Plaintiff’s Amended Complaint, filed 11-18-09	84
Brief in Support of Motion for Partial Summary Judgment, filed 12-8-09	89

Memorandum in Support of Motion for Partial Summary Judgment, filed 12-10-09	94
Brief in Opposition to the Defendants' Motion for Partial Summary Judgment, filed 12-24-09.....	106
Defendants' Reply to Brief in Opposition to Motion for Partial Summary Judgment, filed 12-31-09.....	111
Reply Brief in Support of Motion for Partial Summary Judgment, filed 1-5-10	118
Minute Entry, dated 1-8-10	124
Order, filed 1-8-10.....	126
Order on Motion for Court Trial, filed 1-12-10	128
Order, filed 1-20-10.....	132
Witness and Exhibit Lists, filed 1-21-10.....	135
Plaintiff's Pretrial Memorandum, filed 1-21-10.....	138
Defendants' Trial Brief, filed 1-21-10	148
Minute Entry, dated 2-9-10	157
Plaintiff's Exhibit List Index, dated 2-9-10.....	164
Post-Trial Memorandum Acceleration of Rent, filed 2-22-10	167
Plaintiff's Closing Brief, filed 2-22-10	175
Order on Supplemental Briefing, filed 2-24-10	202
Supplemental Closing Brief, filed 3-5-10	204
Finding of Fact and Conclusions of Law, filed 3-16-10	222
Judgment for Restitution, filed 3-25-10	242
Brief in Support of Motion for Award of Prejudgment Interest, filed 3-31-10.....	244
Brief in Support of Memorandum RE: Costs and Attorney Fees, filed 4-6-10.....	256
Minute Entry, dated 4-9-10	261

Minute Entry, dated 4-20-10	263
Order on Motion for Costs and Attorney Fees and Prejudgment Interest, filed 4-21-10	265
Amended Judgment, filed 4-21-10	272
Notice of Appeal, filed 4-30-10	274
Notice of Cross Appeal, filed 5-4-10	278
Clerk's Certificate of Appeal, dated 5-10-10	282
Order Conditionally Dismissing Appeal, dated 5-19-10	284
Clerk's Certification of Exhibits, dated 6-17-10	284
Clerk's Certificate of Service, dated 6-17-10	289

INDEX

	Page
Affidavit of Personal Return of Service, filed 12-10-08	20
Amended Complaint and Demand For Jury Trial, filed 8-5-09	41
Amended Judgment, filed 4-21-10	272
Brief in Opposition to the Defendants’ Motion for Partial Summary Judgment, filed 12-24-09.....	106
Brief in Support of Memorandum RE: Costs and Attorney Fees, filed 4-6-10.....	256
Brief in Support of Motion for Award of Prejudgment Interest, filed 3-31-10.....	244
Brief in Support of Motion for Partial Summary Judgment, filed 12-8-09	89
Brief in support of Motion for Partial summary Judgment, filed 7-14-09	33
Clerk’s Certificate of Appeal, dated 5-10-10	282
Clerk’s Certificate of Service, dated 6-17-10.....	289
Clerk’s Certification of Exhibits, dated 6-17-10	284
Complaint and Demand for Jury Trial, filed 11-19-08.....	11
Defendants’ Amended Answer to Plaintiff’s Amended Complaint, filed 11-13-09	79
Defendants’ Amended Answer to Plaintiff’s Amended Complaint, filed 11-18-09	84
Defendants’ Answer to Amended Complaint and Demand for Jury Trial, filed 8-26-09	66
Defendants’ Answer to Complaint and demand for Jury Trial, filed 3-9-09	21
Defendants’ Reply to Brief in Opposition to Motion for Partial Summary Judgment, filed 12-31-09.....	111
Defendants’ Trial Brief, filed 1-21-10	148
Finding of Fact and Conclusions of Law, filed 3-16-10	222

Judgment for Restitution, filed 3-25-10	242
Memorandum in Support of Motion for Partial Summary Judgment, filed 12-10-09	94
Minute Entry, dated 11-4-09	71
Minute Entry, dated 1-8-10	124
Minute Entry, dated 2-9-10	157
Minute Entry, dated 4-20-10	263
Minute Entry, dated 4-9-10	261
Minute Entry, dated 7-8-09	26
Minute Entry, dated 8-12-09	58
Notice of Appeal, filed 4-30-10	274
Notice of Cross Appeal, filed 5-4-10	278
Order Allowing Amended Answer, filed 11-13-09.....	76
Order and Notice Setting Jury Trial, filed 8-18-09	63
Order Conditionally Dismissing Appeal, dated 5-19-10.....	284
Order for Telephonic Status Conference, filed 7-8-09	28
Order on Motion for Costs and Attorney Fees and Prejudgment Interest, filed 4-21-10	265
Order on Motion for Court Trial, filed 1-12-10	128
Order on Supplemental Briefing, filed 2-24-10	202
Order, filed 11-6-09.....	73
Order, filed 1-20-10.....	132
Order, filed 1-8-10.....	126
Order, filed 7-10-09.....	30
Order, filed 8-13-09.....	60

Plaintiff's Closing Brief, filed 2-22-10	175
Plaintiff's Exhibit List Index, dated 2-9-10.....	164
Plaintiff's Pretrial Memorandum, filed 1-21-10.....	138
Post-Trial Memorandum Acceleration of Rent, filed 2-22-10	167
Register of Actions, printed 6-17-10	1
Reply Brief in Support of Motion for Partial Summary Judgment and in Opposition to Defendants' Rule 56(f) Motion to Continue Hearing, filed 8-5-09.....	51
Reply Brief in Support of Motion for Partial Summary Judgment, filed 1-5-10	118
Supplemental Closing Brief, filed 3-5-10	204
Witness and Exhibit Lists, filed 1-21-10.....	135

The Watkins Company vs. Michael Scott Storms, Kathy Burggraf

Date	Code	User	Description	Judge
6/19/2008	SMIS	DOOLITTL	Summons Issued (2)	Joel E. Tingey
	NCOC	DOOLITTL	New Case Filed-Other Claims	Joel E. Tingey
	NOAP	DOOLITTL	Plaintiff: The Watkins Company Notice Of Appearance B.J. Driscoll	Joel E. Tingey
		DOOLITTL	Filing: A - Civil Complaint for more than \$1,000.00 Paid by: Driscoll, B.J. (attorney for The Watkins Company) Receipt number: 0050654 Dated: 11/21/2008 Amount: \$88.00 (Check) For: The Watkins Company (plaintiff)	Joel E. Tingey
7/10/2008	ASRV	DOOLITTL	Affidavit of Service - 12-4-08 Kathy Burggraf	Joel E. Tingey
12/24/2008	NOAP	WILLIAMS	Defendant: Storms, Michael Scott Notice Of Appearance Michael Joseph Whyte	Joel E. Tingey
	NOAP	WILLIAMS	Defendant: Burggraf, Kathy Notice Of Appearance Michael Joseph Whyte	Joel E. Tingey
		WILLIAMS	Filing: 17 - All Other Cases Paid by: Whyte, Michael Joseph (attorney for Burggraf, Kathy) Receipt number: 0055657 Dated: 12/24/2008 Amount: \$58.00 (Check) For: Burggraf, Kathy (defendant)	Joel E. Tingey
1/30/2008	APPL	WOOLF	Application for Entry of Default	Joel E. Tingey
	AFFD	WOOLF	Affidavit in Support of Application for Entry of Default Judgment	Joel E. Tingey
	APPL	WOOLF	Application for Default Judgment	Joel E. Tingey
2/1/2009	NTOS	DOOLITTL	Notice Of Service (Defendants' 1st Interrogatories, Defendants' 1st Request for Production of Documents and Things and Defendants' 1st Request for Admissions and Supplementary Interrogatory	Joel E. Tingey
	ANSW	DOOLITTL	Defendants' Answer to Complaint and Demand for Jury Trial	Joel E. Tingey
3/2/2009	NTOS	WOOLF	Notice Of Service (P's Responses to Defendants' First Set of Requests for Production of Documents to Plaintiff; and P's Responses to Defendants' First Request for Admission of Fact and Supplementary Interrogatory	Joel E. Tingey
	NTOS	WOOLF	Notice Of Service (P's 1st Set of Interrogatories to Defendants; and P's 1st Set of Interrogatories to Defendants; and P's 1st Set of Requests for Production of Documents to Defendant)	Joel E. Tingey
4/2/2009	NTOS	DOOLITTL	Notice Of Service (Defendants' Amended 1st Request for Admissions and Supplementary Interrogatory)	Joel E. Tingey
9/2/2009	NTOS	WILLIAMS	Notice Of Service of Discovery (Responses to Defendants' Amended First Request for Admissions of Fact and Supplementary Interrogatory)	Joel E. Tingey
12/2/2009	HRSC	QUINTANA	Hearing Scheduled (Motion 07/08/2009 09:00 AM) Motion to Compel	Joel E. Tingey

The Watkins Company vs. Michael Scott Storms, Kathy Burggraf

Date	Code	User	Description	Judge
2/2009	MOTN	DOOLITTL	Motion to Compel	Joel E. Tingey
	NOTH	DOOLITTL	Notice Of Hearing 7-8-09 @ 9:00 a.m.	Joel E. Tingey
7/2009	NTOS	DOOLITTL	Notice Of Service (Defendants' Answers to Plaintiff's 1st set of Interrogatories and Defendants' Responses to Plaintiff's 1st Requests for Production)	Joel E. Tingey
7/2009	DCHH	SOUTHWIC	Hearing result for Motion held on 07/08/2009 09:00 AM: District Court Hearing Held Court Reporter: None - hearing was digitally recorded Number of Transcript Pages for this hearing estimated: Plaintiff's Motion to Compel - under 100	Joel E. Tingey
	MINE	SOUTHWIC	Minute Entry	Joel E. Tingey
	ORDR	SOUTHWIC	Order for telephonic status conference	Joel E. Tingey
	HRSC	SOUTHWIC	Hearing Scheduled (Status Conference 08/18/2009 08:45 AM)	Joel E. Tingey
8/2009	ORDR	SOUTHWIC	Order	Joel E. Tingey
4/2009	MOTN	DOOLITTL	Motion for Partial Summary Judgment	Joel E. Tingey
	BRIF	DOOLITTL	Brief Filed in Support of Motion for Partial Summary Judgment	Joel E. Tingey
	AFFD	DOOLITTL	Affidavit of Dane Watkins	Joel E. Tingey
	AFFD	DOOLITTL	Affidavit of B.J. Driscoll	Joel E. Tingey
	NOTH	DOOLITTL	Notice Of Hearing 8-12-09 @ 8:30 a.m.	Joel E. Tingey
9/2009	AFFD	KESTER	Affidavit of Michael J. Whyte	Joel E. Tingey
	AFFD	KESTER	Affidavit of Michael Storms	Joel E. Tingey
	AFFD	KESTER	Affidavit of Kathy Burggraf	Joel E. Tingey
	RESP	KESTER	Defendant's Response to Plaintiff's Motion for Partial Summary Judgment	Joel E. Tingey
	NOTH	KESTER	Notice Of Hearing - 8/12/09 @ 8:30 a.m.	Joel E. Tingey
	STIP	KESTER	Defendant/Counterclaimant's Stipulated Motion to Amend Answer and Counterclaim	Joel E. Tingey
1/2009	NOTH	KESTER	Notice Of Hearing - 8/12/09 @ 8:30 a.m.	Joel E. Tingey
7/2009	BRIF	KESTER	Reply Brief in Support of Motion for Partial Summary Judgment and in Opposition to Defendants' Rule 56(f) Motion to Continue Hearing	Joel E. Tingey
	MOTN	KESTER	Motion to Amend Complaint	Joel E. Tingey
	AMCO	KESTER	Amended Complaint Filed	Joel E. Tingey
	MOTN	KESTER	Motion to Shorten Time	Joel E. Tingey
	NOTH	KESTER	Notice Of Hearing - 8/12/09 @ 8:30 a.m.	Joel E. Tingey
1/2009	NTOS	DOOLITTL	Notice Of Service (Defendants' Supplemental Responses to Plaintiff's 1st Requests for Production)	Joel E. Tingey

The Watkins Company vs. Michael Scott Storms, Kathy Burggraf

Date	Code	User	Description	Judge
2/2009	DCHH	SOUTHWIC	District Court Hearing Held Court Reporter: Jack fuller Number of Transcript Pages for this hearing estimated: under 100	Joel E. Tingey
	MINE	SOUTHWIC	Minute Entry	Joel E. Tingey
	MINE	SOUTHWIC	Minute Entry Hearing type: Motion Hearing date: 8/12/2009 Time: 4:34 pm Courtroom: Court reporter: Minutes Clerk: Marlene Southwick Tape Number: Party: Kathy Burggraf, Attorney: Michael Whyte Party: Michael Storms, Attorney: Michael Whyte Party: The Watkins Company, Attorney: B.J. Driscoll	Joel E. Tingey
3/2009	ORDR	SOUTHWIC	Order	Joel E. Tingey
8/2009	HRHD	SOUTHWIC	Hearing result for Status Conference held on 08/18/2009 08:45 AM: Hearing Held in chambers off record - no court reporter	Joel E. Tingey
	ORPT	SOUTHWIC	Order Setting Pretrial Conference/trial	Joel E. Tingey
	HRSC	SOUTHWIC	Hearing Scheduled (Pretrial Conference 01/26/2010 08:45 AM)	Joel E. Tingey
	HRSC	SOUTHWIC	Hearing Scheduled (Pretrial Conference 06/09/2010 08:30 AM) fallback trial setting	Joel E. Tingey
	HRSC	SOUTHWIC	Hearing Scheduled (Jury Trial 02/09/2010 10:00 AM)	Joel E. Tingey
	HRSC	SOUTHWIC	Hearing Scheduled (Jury Trial 06/22/2010 10:00 AM) fallback trial setting 2-3days	Joel E. Tingey
6/2009	ANSW	LYKE	Defendants' Answer to Amended Complaint and Demand for Jury Trial (Michael J Whyte for Michael Storms and Kathy Burggraf)	Joel E. Tingey
16/2009	MOTN	LYKE	Defendants' Amended Motion to Amend Answer to Complaint	Joel E. Tingey
		LYKE	Amended Notice of Hearing Re: Motion to Amend Answer to Complaint (11/04/09@8:30AM)	Joel E. Tingey
	MOTN	LYKE	Defendants' Motion to Amend Answer to Complaint	Joel E. Tingey
	NOTH	LYKE	Notice Of Hearing Re: Motion to Continue (11/04/09@8:30AM)	Joel E. Tingey
27/2009	NTOS	KESTER	Notice Of Service (Defendants' Supplemental Answers to Plaintiff's First Requests for Production)	Joel E. Tingey
28/2009		KESTER	Objection to Defendants' Amended Motion to Amend Answer to Amended Complaint	Joel E. Tingey
	NOTH	KESTER	Notice Of Hearing - 11/4/09 @ 8:30 a.m.	Joel E. Tingey

The Watkins Company vs. Michael Scott Storms, Kathy Burggraf

Date	Code	User	Description	Judge
4/2009	DCHH	SOUTHWIC	District Court Hearing Held Court Reporter: Jack fuller Number of Transcript Pages for this hearing estimated: under 100	Joel E. Tingey
	MINE	SOUTHWIC	Minute Entry Hearing type: Motion Hearing date: 11/4/2009 Time: 10:44 am Courtroom: Court reporter: Minutes Clerk: Marlene Southwick Tape Number: Party: Kathy Burggraf, Attorney: Michael Whyte Party: Michael Storms, Attorney: Michael Whyte Party: The Watkins Company, Attorney: B.J. Driscoll	Joel E. Tingey
6/2009	ORDR	SOUTHWIC	Order	Joel E. Tingey
12/2009	NTOS	LYKE	Notice Of Service - Defendants' Second Supplemental Answers to Plaintiff's First Requests for Production	Joel E. Tingey
13/2009	ORDR	SOUTHWIC	Order Allowing Amended Answer	Joel E. Tingey
		SOUTHWIC	Def's Amended Answer to Pl's Amended Complaint	Joel E. Tingey
18/2009	ANSW	WOOLF	Defendants' Amended Answer to Plaintiff's Amended Complaint	Joel E. Tingey
8/2009	MOTN	KESTER	Motion for Partial Summary Judgment	Joel E. Tingey
	AFFD	KESTER	Affidavit of Dane Watkins, Sr.	Joel E. Tingey
	BRIF	KESTER	Brief in Support of Motion for Partial Summary Judgment	Joel E. Tingey
	NOTH	KESTER	Notice Of Hearing - 1/8/10 @ 9 a.m.	Joel E. Tingey
10/2009	AFFD	KESTER	Affidavit of Michael Storms in Support of Motion for Partial Summary Judgment	Joel E. Tingey
	NOTH	KESTER	Notice Of Hearing - 1/8/10 @ 9 a.m.	Joel E. Tingey
	MEMO	KESTER	Memorandum in Support of Motion for Partial Summary Judgment	Joel E. Tingey
11/2009	AFFD	KESTER	Affidavit of Michael J. Whyte in Support of Motion for Partial Summary Judgment	Joel E. Tingey
24/2009	NDDT	DOOLITTL	Notice Of Deposition Duces Tecum	Joel E. Tingey
	NOTH	DOOLITTL	Notice Of Hearing 1-8-10 @ 9:00 a.m.	Joel E. Tingey
	AFFD	DOOLITTL	Affidavit of Dane Watkins, Sr.	Joel E. Tingey
	BRIF	DOOLITTL	Brief Filed in Opposition to The Defendants' Motion for partial Summary Judgment	Joel E. Tingey
	MOTN	DOOLITTL	Motion for Trial by the Court	Joel E. Tingey
28/2009	NTOS	DOOLITTL	Notice Of Service (Defendant's 3rd Supplemental Responses to Discovery)	Joel E. Tingey

e Watkins Company vs. Michael Scott Storms, Kathy Burggraf

e	Code	User		Judge
2/28/2009	AFFD	DOOLITTL	Affidavit of Michael Storms in Support of His Objection to Plaintiff's Motion for partial Summary Judgment	Joel E. Tingey
	RESP	DOOLITTL	Defendant's Response to Plaintiff's Motion for Partial Summary Judgment	Joel E. Tingey
3/31/2009	MISC	KESTER	Defendants' Reply to Brief in Opposition to Motion for Partial Summary Judgment	Joel E. Tingey
	MOTN	KESTER	Motion for Protective Order	Joel E. Tingey
	NOTH	KESTER	Notice Of Hearing - 1/8/10 @ 9 a.m.	Joel E. Tingey
	MISC	KESTER	Defendants' Objection to Motion for Trial by the Court	Joel E. Tingey
4/2/2010	BRIF	WOOLF	Reply Brief in Support of Motion for Partial Summary Judgment	Joel E. Tingey
4/2/2010	DCHH	SOUTHWIC	District Court Hearing Held Court Reporter: Jack fuller Number of Transcript Pages for this hearing estimated: under 100	Joel E. Tingey
	MINE	SOUTHWIC	Minute Entry Hearing type: Motion Hearing date: 1/8/2010 Time: 11:39 am Courtroom: Court reporter: Minutes Clerk: Marlene Southwick Tape Number: Party: Kathy Burggraf, Attorney: Michael Whyte Party: Michael Storms, Attorney: Michael Whyte Party: The Watkins Company, Attorney: B.J. Driscoll	Joel E. Tingey
	ORDR	SOUTHWIC	Order	Joel E. Tingey
	NOTC	WOOLF	Amended Notice of Taking Deposition	Joel E. Tingey
5/1/2010	NOTC	LYKE	Notice to Take Deposition (Duces Tecum)	Joel E. Tingey
5/2/2010	ORDR	SOUTHWIC	Order on motion for court trial	Joel E. Tingey
5/5/2010	NOTC	WOOLF	Notice That No Additional Briefing Will Be Filed	Joel E. Tingey
5/9/2010	NOTC	WOOLF	Amended Notice to Take Deposition (Duces Tecum)	Joel E. Tingey
	NTOS	LYKE	Notice Of Service of Discovery	Joel E. Tingey
6/0/2010	ORDR	SOUTHWIC	Order	Joel E. Tingey
6/1/2010	NTOS	DOOLITTL	Notice Of Service (Defendant's 4th Supplemental Responses to Discovery)	Joel E. Tingey
		DOOLITTL	Witness and Exhibit Lists	Joel E. Tingey
	BRIF	DOOLITTL	Defendant's Trial Brief Filed	Joel E. Tingey
		DOOLITTL	Plaintiff's Pretrial Memorandum	Joel E. Tingey

The Watkins Company vs. Michael Scott Storms, Kathy Burggraf

Date	Code	User	Description	Judge
5/26/2010	DCHH	SOUTHWIC	Hearing result for Pretrial Conference held on 01/26/2010 08:45 AM: District Court Hearing Held Court Reporter: Jack Fuller Number of Transcript Pages for this hearing estimated: under 100	Joel E. Tingey
	MINE	SOUTHWIC	Minute Entry Hearing type: Pretrial Conference Hearing date: 1/26/2010 Time: 10:24 am Courtroom: Court reporter: Minutes Clerk: Marlene Southwick Tape Number: Party: Kathy Burggraf, Attorney: Michael Whyte Party: Michael Storms, Attorney: Michael Whyte Party: The Watkins Company, Attorney: B.J. Driscoll	Joel E. Tingey
5/26/2010	NTOS	KESTER	Notice Of Service (Defendants' Fifth Supplemental Responses to Discovery)	Joel E. Tingey
5/26/2010	NTOS	WOOLF	Notice Of Service (Defendants' Sixth Supplemental Responses to Discovery)	Joel E. Tingey
5/26/2010		SOUTHWIC	Request to obtain approval to video record, broadcast or photograph a court proceeding	Joel E. Tingey
	DENY	SOUTHWIC	Denied -- Request to Broadcast	Joel E. Tingey
5/26/2010	TLST	SOUTHWIC	Hearing result for Jury Trial held on 02/09/2010 10:00 AM: Trial Started 2-3 days	Joel E. Tingey
6/9/2010	HRVC	SOUTHWIC	Hearing result for Pretrial Conference held on 06/09/2010 08:30 AM: Hearing Vacated fallback trial setting	Joel E. Tingey
	HRVC	SOUTHWIC	Hearing result for Jury Trial held on 06/22/2010 10:00 AM: Hearing Vacated fallback trial setting 2-3days	Joel E. Tingey
	MINE	SOUTHWIC	Minute Entry Hearing type: Trial Hearing date: 2/11/2010 Time: 9:47 am Courtroom: Court reporter: Minutes Clerk: Marlene Southwick Tape Number: Party: Kathy Burggraf, Attorney: Michael Whyte Party: Michael Storms, Attorney: Michael Whyte Party: The Watkins Company, Attorney: B.J. Driscoll	Joel E. Tingey
6/22/2010	MEMO	KESTER	Post-Trial Memorandum Acceleration of Rent	Joel E. Tingey
	BRIF	LYKE	Plaintiff's Closing Brief Filed	Joel E. Tingey
6/22/2010	PETN	KESTER	Petition to Supplement Post-Trial Brief or in the Alternative Motion to Strike Portions of Plaintiff's Closing Brief	Joel E. Tingey

The Watkins Company vs. Michael Scott Storms, Kathy Burggraf

Date	Code	User	Description	Judge
3/2010	MISC	WOOLF	Plaintiff's Rebuttal to Defendants' Post-Trial Memorandum	Joel E. Tingey
4/2010	ORDR	SOUTHWIC	Order on supplemental briefing	Joel E. Tingey
4/2010	BRIF	KESTER	Supplemental Closing Brief	Joel E. Tingey
3/2010	FCLO	SOUTHWIC	Findings Of Fact, Conclusions Of Law & Order	Joel E. Tingey
		LYKE	Miscellaneous Payment: For Making Copy Of Any File Or Record By The Clerk, Per Page Paid by: Danika Receipt number: 0012321 Dated: 3/16/2010 Amount: \$18.00 (Cash)	Joel E. Tingey
7/2010		LYKE	Miscellaneous Payment: For Making Copy Of Any File Or Record By The Clerk, Per Page Paid by: Joelyn Hansen Receipt number: 0012570 Dated: 3/17/2010 Amount: \$18.00 (Credit card)	Joel E. Tingey
		LYKE	Miscellaneous Payment: Technology Cost - CC Paid by: Joelyn Hansen Receipt number: 0012570 Dated: 3/17/2010 Amount: \$3.00 (Credit card)	Joel E. Tingey
3/2010	JDMT	SOUTHWIC	Judgment (Watkins Company LLC recover from Defs Michael Storms and Kathy Burggraf the sum of \$43,096.25 plus interest	Joel E. Tingey
	CDIS	SOUTHWIC	Civil Disposition entered for: Burggraf, Kathy, Defendant; Storms, Michael Scott, Defendant; The Watkins Company, Plaintiff. Filing date: 3/23/2010	Joel E. Tingey
4/2010	MOTN	LYKE	Motion for Award of Attorney's Fees and Costs	Joel E. Tingey
	AFFD	LYKE	Affidavit of B.J. Driscoll in Support of Motion for Award of Attorney's Fees and Costs	Joel E. Tingey
	MEMO	LYKE	Memorandum of Attorney's Fees and Costs	Joel E. Tingey
5/2010	AFFD	LYKE	Affidavit in Support of Writ of Execution	Joel E. Tingey
	WRIT	LYKE	Writ Issued for Michael Storms \$43,117.53 Bonneville	Joel E. Tingey
		LYKE	Miscellaneous Payment: Writs Of Execution Paid by: Driscoll Receipt number: 0013961 Dated: 3/25/2010 Amount: \$2.00 (Check)	Joel E. Tingey
	AFFD	LYKE	Affidavit in Support of Writ of Execution	Joel E. Tingey
	WRIT	LYKE	Writ Issued \$43,117.53 Fremont	Joel E. Tingey
		LYKE	Miscellaneous Payment: Writs Of Execution Paid by: Driscoll Receipt number: 0013964 Dated: 3/25/2010 Amount: \$2.00 (Check)	Joel E. Tingey
	AFFD	LYKE	Affidavit in Support of Writ of Execution	Joel E. Tingey
	WRIT	LYKE	Writ Issued for Kathy Burggraf \$43,117.53 Bonneville	Joel E. Tingey
		LYKE	Miscellaneous Payment: Writs Of Execution Paid by: Driscoll Receipt number: 0013971 Dated: 3/25/2010 Amount: \$2.00 (Check)	Joel E. Tingey

ROA Report

Case: CV-2008-0007258 Current Judge: Joel E. Tingey

The Watkins Company vs. Michael Scott Storms, etal.

The Watkins Company vs. Michael Scott Storms, Kathy Burggraf

Date	Code	User	Description	Judge
3/25/2010	JDMT	SOUTHWIC	Judgment for Restitution - jdmt for restitution of premises that defs forfeit their lease	Joel E. Tingey
	CDIS	SOUTHWIC	Civil Disposition entered for: Burggraf, Kathy, Defendant; Storms, Michael Scott, Defendant; The Watkins Company, Plaintiff. Filing date: 3/25/2010	Joel E. Tingey
3/25/2010		LYKE	Objection to Writ of Immediate Possession	Joel E. Tingey
	NOTH	LYKE	Notice Of Hearing Re: Objection to Writ (04/09/10@9:00AM)	Joel E. Tingey
3/25/2010	MOTN	KESTER	Joint Motion to Set Aside Judgment for Restitution	Joel E. Tingey
4/20/2010	MOTN	DOOLITTL	Motion for Award of Prejudgment Interest	Joel E. Tingey
	BRIF	DOOLITTL	Brief Filed in Support of Motion for Award of Prejudgment Interest	Joel E. Tingey
	NOTH	DOOLITTL	Notice Of Hearing 4-20-10 @ 9:30 a.m.	Joel E. Tingey
4/20/2010	BRIF	DOOLITTL	Brief Filed in Support of Memorandum RE: Costs and Attorney Fees	Joel E. Tingey
	MEMO	DOOLITTL	Memorandum RE: Costs and Attorney Fees; Affidavit of Attorney	Joel E. Tingey
	MOTN	DOOLITTL	Motion for Attorney Fees and Costs	Joel E. Tingey
	WRTU	LYKE	Writ returned, Unsatisfied	Joel E. Tingey
4/20/2010		QUINTANA	Objection to Petition for Attorney Fees and Costs	Joel E. Tingey
	MOTN	DOOLITTL	Motion to Disallow Defendants' Motion for Attorney Fees and Costs	Joel E. Tingey
	NOTH	DOOLITTL	Notice Of Hearing 4-20-10 @ 9:30 a.m.	Joel E. Tingey
	MOTN	DOOLITTL	Motion to Shorten Time	Joel E. Tingey
	AFFD	DOOLITTL	Affidavit of B.J. Driscoll	Joel E. Tingey
4/20/2010	MEMO	ANDERSEN	Amended Memorandum re: Costs and Attorney Fees; Affidavit of Attorney	Joel E. Tingey
4/20/2010	DCHH	SOUTHWIC	District Court Hearing Held Court Reporter: Jack Fuller Number of Transcript Pages for this hearing estimated: under 100	Joel E. Tingey
	MINE	SOUTHWIC	Minute Entry Hearing type: Motion Hearing date: 4/9/2010 Time: 1:39 pm Courtroom: Court reporter: Minutes Clerk: Marlene Southwick Tape Number: Party: Kathy Burggraf, Attorney: Michael Whyte Party: Michael Storms, Attorney: Michael Whyte Party: The Watkins Company, Attorney: B.J. Driscoll	Joel E. Tingey

The Watkins Company vs. Michael Scott Storms, Kathy Burggraf

Date	Code	User	Description	Judge
3/2010	DCHH	SOUTHWIC	District Court Hearing Held Court Reporter: Jack Fuller Number of Transcript Pages for this hearing estimated: under 100	Joel E. Tingey
	MINE	SOUTHWIC	Minute Entry Hearing type: Motion Hearing date: 4/20/2010 Time: 9:50 am Courtroom: Court reporter: Minutes Clerk: Marlene Southwick Tape Number: Party: Kathy Burggraf, Attorney: Michael Whyte Party: Michael Storms, Attorney: Michael Whyte Party: The Watkins Company, Attorney: B.J. Driscoll	Joel E. Tingey
1/2010	JDMT	SOUTHWIC	Amended Judgment -- total jdmt against Defs is \$69,861.90 plus interest	Joel E. Tingey
	ORDR	SOUTHWIC	Order on Motion for Costs and Attorney Fees and Prejudgment Interest	Joel E. Tingey
	STATUS	SOUTHWIC	Case Status Changed: closed	Joel E. Tingey
7/2010	ABST	SBARRERA	Amended Abstract Judgment Issued	Joel E. Tingey
0/2010		DOOLITTL	Filing: L4 - Appeal, Civil appeal or cross-appeal to Supreme Court Paid by: Whyte, Michael Joseph (attorney for Storms, Michael Scott) Receipt number: 0020419 Dated: 5/4/2010 Amount: \$101.00 (Check) For: Burggraf, Kathy (defendant) and Storms, Michael Scott (defendant)	Joel E. Tingey
	APDC	DOOLITTL	Appeal Filed In District Court	Joel E. Tingey
	NOTC	DOOLITTL	Notice of Appeal	Joel E. Tingey
2/2010		DOOLITTL	Filing: H8 - Petition for civil protection order or to enforce foreign CPO pursuant to Ch. 63, Title 39, I.C. pleadings Paid by: Driscoll, B.J. (attorney for The Watkins Company) Receipt number: 0021116 Dated: 5/6/2010 Amount: \$.00 (Check) For: The Watkins Company (plaintiff)	Joel E. Tingey
		DOOLITTL	Filing: L4 - Appeal, Civil appeal or cross-appeal to Supreme Court Paid by: Driscoll, B.J. (attorney for The Watkins Company) Receipt number: 0021116 Dated: 5/6/2010 Amount: \$101.00 (Check) For: The Watkins Company (plaintiff)	Joel E. Tingey
	NOTC	DOOLITTL	Notice of Cross-Appeal	Joel E. Tingey
2/2010	MOTN	DOOLITTL	Motion for Emergency Relief Under the Automatic Stay Provision (I.A.R. 13 (a)) (fax)	Joel E. Tingey
0/2010		SHULTS	Sent notice of Appeal and Cross Appeal to S.C. 5-10-10	Joel E. Tingey
7/2010	NOTC	SOLIS	Notice Of Posting Cash Deposit	Joel E. Tingey
	MISC	SOLIS	Application For Stay Of Execution	Joel E. Tingey

te: 6/17/2010

Seventh Judicial District Court - Bonneville County

User: SHULTS

ne: 11:30 AM

ROA Report

ge 10 of 10

Case: CV-2008-0007258 Current Judge: Joel E. Tingey

The Watkins Company vs. Michael Scott Storms, etal.

he Watkins Company vs. Michael Scott Storms, Kathy Burggraf

te	Code	User		Judge
9/2010	ORDR	SHULTS	S.C. Order Conditionally Dismissing Appeal	Joel E. Tingey
		SHULTS	S.C. Clerk's Record/Reporter's Transcript Suspended.	Joel E. Tingey
4/2010	BNDC	SOLIS	Bond Posted - Cash (Receipt 24063 Dated 5/24/2010 for 93652.18)	Joel E. Tingey
	STATUS	SOLIS	Case Status Changed: Closed pending clerk action	Joel E. Tingey
7/2010	ORDR	SOUTHWIC	Order Staying Execution	Joel E. Tingey
	BNDC	SHULTS	Bond Posted - Cash (Receipt 24760 Dated 5/27/2010 for 100.00)\$100.00 deposit for Clerks record on appeal	Joel E. Tingey
	TRAN	SHULTS	Transcript Filed by Fuller (Trial 9-10, 2010)	Joel E. Tingey
/2010	WRRT	ANDERSEN	Writ Returned - UNSATISFIED	Joel E. Tingey
/2010		LYKE	Substitution of Counsel - Dean C. Brandstetter for Michael J. Whyte	Joel E. Tingey
	NOAP	LYKE	Defendant: Storms, Michael Scott Notice Of Appearance Dean C. Brandstetter	Joel E. Tingey
	NOAP	LYKE	Defendant: Burggraf, Kathy Notice Of Appearance Dean C. Brandstetter	Joel E. Tingey

Bryan D. Smith, Esq. – ISB #4411
B. J. Driscoll, Esq. – ISB # 7010
SMITH, DRISCOLL & ASSOCIATES, PLLC
414 Shoup Ave.
P.O. Box 50731
Idaho Falls, Idaho 83405
Telephone: (208) 524-0731
Facsimile: (208) 529-4166

BONNEVILLE COUNTY
IDAHO

2008 NOV 19 PM 4: 28

Attorneys for Plaintiff

IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT OF
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF BONNEVILLE

THE WATKINS COMPANY, LLC,
an Idaho limited liability company,

Plaintiff,

v.

MICHAEL STORMS and KATHY
BURGGRAF,

Defendants.

Case No. CV- 08-7258

**COMPLAINT AND DEMAND FOR
JURY TRIAL**

Category: A.1
Fee: \$88.00

COMES NOW the plaintiff, THE WATKINS COMPANY, LLC (“Plaintiff”), and
as and for a cause of action against the defendants, states, alleges, and avers as follows:

PARTIES, JURISDICTION, VENUE, AND BACKGROUND

1. Plaintiff is an Idaho limited liability company with its principal place of
business in Bonneville County, Idaho.
2. The defendant, Michael Storms (“Storms”), is and at all times relevant
hereto was an individual residing in Bonneville County, Idaho.

3. The defendant, Kathy Burggraf (hereafter, "Burggraf"), was at all times relevant hereto an individual residing in Bonneville County, Idaho. Storms and Burggraf are collectively referred to herein as "Defendants."

4. Venue is proper in Bonneville County, Idaho pursuant to Idaho Code Section 5-401, or in the alternative, Section 5-404.

5. Plaintiff is the successor in interest to the assets of Watkins and Watkins, an Idaho general partnership, which assets include the written "Commercial Lease and Deposit Receipt" ("Lease") executed by Watkins and Watkins as lessor/landlord and Defendants as lessees/tenants on July 31, 1996 for the lease of real property located in Bonneville County, Idaho.

6. Addendum "A" to the Lease provides in pertinent part as follows:

Lessor will be entitled to 5% of the gross sales of the entire operation (on premises) for the previous month or the base rent indicated above, whichever is greater. By the 10th of each month, Lessee will provide Lessor the monthly sales figures for the previous month – if a percentage rent is due, Lessee will pay the Lessor the difference owed by the 15th of that month. This addendum will act as a power of attorney for Lessor to check sales figures with Idaho State Sales Tax Commission in Idaho Falls. In no event will the monthly rent be less than the base rent.

7. Addendum "B" to the Lease provides that Defendants are responsible for a portion of the cost for the maintenance of the roof of the building covered by the Lease.

8. Defendants leased the property included in the Lease for the purpose of operating a restaurant and microbrewery.

9. Plaintiff has satisfied all the conditions, covenants, and promises required on its part under the Lease and other agreements with Defendants as outlined herein.

//

//

COUNT ONE

(Breach of Written Lease Contract – Failure to Pay Amounts Due)

10. Plaintiff realleges all previous allegations contained in the Complaint as if set forth in full.

11. Defendants have breached the Lease by failing to timely pay rent, late fees, and interest as required by the terms of the Lease.

12. As a direct and proximate result of Defendants' breach of the Lease as herein alleged, as of November 1, 2008 Plaintiff has been damaged in the amount of \$25,107.19, or such other amount as may be proven at trial.

COUNT TWO

(Breach of Written Lease Contract – Acceleration)

13. Plaintiff realleges all previous allegations contained in the Complaint as if set forth in full.

14. Paragraph 22 of the Lease provides among other things that upon Defendants' breach of the Lease, Plaintiff is entitled to recover the amount of all future rent due under the Lease through the end of the lease term.

15. The total amount of lost future rent due under the Lease from December 1, 2008 through the end of the original term of the Lease is \$1,119,875.00.

16. As a direct and proximate result of Defendants' breach of the Lease as herein alleged, as of December 1, 2008 Plaintiff is entitled to recover lost future rents in the amount of \$1,119,875.00, or such other amount as may be proven at trial.

COUNT THREE

(Breach of Written Lease Contract – Failure to Provide Monthly Sales Reports)

17. Plaintiff realleges all previous allegations contained in the Complaint as if set forth in full.

18. Defendants have breached the Lease by failing to provide Plaintiff with “the monthly sales figures” showing the “gross sales of the entire operation (on premises)” covered by the Lease in order for Plaintiff to determine the alternative rent owed under the terms of Addendum “A” to the Lease.

19. As a direct and proximate result of Defendants’ breach of the Lease as herein alleged, Plaintiff seeks an order requiring Defendants to specifically perform their duty under Addendum “A” to the Lease by providing Plaintiff with the gross monthly sales figures of the entire restaurant and microbrewery operation on the premises from November 1, 1997 to the present, and for an accounting of the same.

20. As a direct and proximate result of Defendants’ breach of the Lease as alleged herein, Plaintiff have been damaged in an amount to be determined at trial.

COUNT FOUR

(Breach of Written Lease Contract – Failure to Pay for Roof Repairs)

21. Plaintiff realleges all previous allegations contained in the Complaint as if set forth in full.

22. Defendants have breached the Lease by failing to pay their portion of roof repair expenses in the amount of \$5,000.00, plus interest at 12% per annum from June 2008 through October 2008 in the amount of \$300.00, plus interest thereafter at a rate of 12% per annum.

23. As a direct and proximate result of Defendants’ breach of the Lease as herein alleged, Plaintiff has been damaged in the amount of \$5,300.00, or such other amount as may be proven at trial.

//

//

COUNT FIVE

(Breach of Oral Lease Contract/Unjust Enrichment – Upstairs Storage)

24. Plaintiff realleges all previous allegations contained in the Complaint as if set forth in full.

25. Plaintiff and Storms entered into an oral agreement for the lease of certain space upstairs in the building covered by the Lease but not included in the Lease, wherein Plaintiff agreed to lease the space as storage to Defendants for the price of \$100.00 per month through June 2008, and thereafter for the price of \$750.00 per month.

26. Storms has breached the oral agreement for the lease of the upstairs storage space by failing to timely pay rent due thereon.

27. As a direct and proximate result of Storms' breach of the oral agreement as herein alleged, as of November 1, 2008 Plaintiff has been damaged in the amount of \$4,050.00, or such other amount as may be proven at trial.

28. In the alternative, Storms has received the benefit of using the upstairs space as storage, for Storms to accept this benefit without paying Plaintiff the value of the benefit would be inequitable, and Storms has been unjustly enriched in the amount of \$4,050.00, or such other amount as may be proven at trial.

COUNT SIX

(Unjust Enrichment – Cooler Storage)

29. Plaintiff realleges all previous allegations contained in the Complaint as if set forth in full.

30. Storms has been storing a large, walk-in cooler on Plaintiff's property for approximately 41 months as of the date of this Complaint.

31. Storms has paid Plaintiff nothing for the use of Plaintiff's property to store Storms' cooler.

32. Storms has received the benefit of storing the cooler on Plaintiff's property, for Storms to accept this benefit without paying Plaintiff the value of the benefit would be inequitable, and Storms has been unjustly enriched in the amount of \$100.00 per month, for a total of \$4,100 as of November 1, 2008, or in such other amount as may be proven at trial.

COUNT SEVEN

(Unjust Enrichment – Space #16 Storage)

33. Plaintiff realleges all previous allegations contained in the Complaint as if set forth in full.

34. Storms has been storing various items of personal property in a portion of a building owned by Plaintiff referred to as Space #16 for approximately 37 months as of the date of this Complaint.

35. Storms has paid Plaintiff nothing for the use of Space #16 to store Storms' personal property.

36. Storms has received the benefit of storing the cooler in Space #16, for Storms to accept this benefit without paying Plaintiff the value of the benefit would be inequitable, and Storms has been unjustly enriched in the amount of \$200.00 per month, for a total of \$5,000 as of November 1, 2008, or in such other amount as may be proven at trial.

//

//

COUNT EIGHT
(Unjust Enrichment – Outdoor Dining Area Use)

37. Plaintiff realleges all previous allegations contained in the Complaint as if set forth in full.

38. Each year since approximately 2002, from approximately April through October, Storms has been using portions of Plaintiff's property located immediately outside of and adjoining the premises covered in the written Lease but not included in the Lease as an outdoor dining area for his restaurant and microbrewery business.

39. Storms has paid Plaintiff nothing for the use of this outside dining area.

40. Storms has received the benefit of using Plaintiff's property as an outdoor dining area for his restaurant and microbrewery business, for Storms to accept this benefit without paying Plaintiff the value of the benefit would be inequitable, and Storms has been unjustly enriched in the amount of \$500.00 per month, for a total of \$21,000.00 as of November 1, 2008, or such other amount as may be proven at trial.

COUNT NINE
(Eviction)

41. Plaintiff realleges all previous allegations contained in the Complaint as if set forth in full.

42. As a result of Defendants' breaches of the Lease and other agreements and Storms' conduct outlined herein, Plaintiff seeks an order and judgment for eviction of Defendants from the premises covered by the Lease and for the eviction of Storms from all of Plaintiff's properties previously used by Storms as outlined herein.

//

//

COUNT TEN
(Attorney's Fees)

43. Plaintiff realleges all previous allegations contained in the Complaint as if set forth in full.

44. Plaintiff has been required to seek the legal services of the firm of Smith, Driscoll & Associates, PLLC to prosecute this action and has incurred attorney's fees and costs because of Defendants' wrongful conduct as alleged herein, entitling Plaintiff to recover an award of reasonable attorney's fees and costs as herein alleged pursuant to the Lease, Idaho Code §§ 12-120 and 12-121, and Idaho Rule of Civil Procedure 54.

WHEREFORE, Plaintiff prays for judgment against Defendants as follows:

1. For judgment against defendant Michael Storms in the amount of \$1,184,432.19, or such other amount as may be proven at trial;
2. For judgment against defendant Kathy Burggraf in the amount of \$1,150,282.19, or such other amount as may be proven at trial;
3. For a judgment and order requiring Defendants to specifically perform their duties under the Lease to provide Plaintiff with the gross monthly sales figures of the entire operation on the leased premises from November 1, 1997 to the present and for an accounting of the same;
4. For a judgment and order evicting Defendants from the leased premises and delivering possession of the leased premises to Plaintiff;
5. For a judgment and order evicting defendant Michael Storms from all of Plaintiff's properties previously used by Storms as outlined herein
6. For judgment awarding Plaintiff prejudgment interest;


7. For judgment awarding Plaintiff its reasonable attorney's fees incurred herein as provided by the Lease, Idaho Code Section 12-120 and 12-121, and Idaho Rule of Civil Procedure 54 in the amount of two thousand five hundred dollars (\$2,500.00) if this matter is uncontested, and otherwise in such amounts as the court may determine;

8. For judgment awarding Plaintiff its costs of suit incurred herein as provided by the Lease and Idaho Rule of Civil Procedure 54; and

9. For such other and further relief as appears just and equitable in the premises.

DATED this 19 day of November, 2008.

SMITH, DRISCOLL & ASSOCIATES PLLC

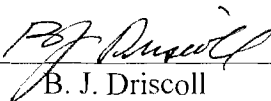
By 
B. J. Driscoll
Attorneys for Plaintiff

DEMAND FOR JURY TRIAL

COME NOW the plaintiffs and make demand for a jury trial of all issues herein pursuant to Rule 38 of the Idaho Rules of Civil Procedure.

DATED this 19 day of November, 2008.

SMITH, DRISCOLL & ASSOCIATES PLLC

By 
B. J. Driscoll
Attorneys for Plaintiff

IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF BONNEVILLE
MAGISTRATE DIVISION

BONNEVILLE COUNTY

2008 DEC 10 PM 4:37

THE WATKINS COMPANY, LLC,
an Idaho limited liability company,

Plaintiffs,

MICHAEL STORMS
AND KATHY BURGRAFF,

Defendant.

Case No. CV-08-7258

AFFIDAVIT OF PERSONAL RETURN OF
SERVICE

STATE OF IDAHO)

)ss:

County of BONNEVILLE)

I, GORDON WILCOX, being duly sworn, deposes and states as follows:

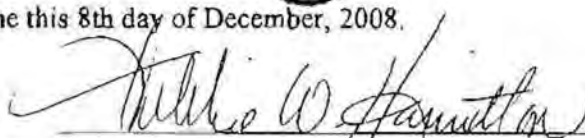
1. I am an adult over the age of 18, and make this Affidavit of Personal Service based on my personal knowledge.
2. On December 4th, 2008, I delivered a copy of the SUMMONS AND COMPLAINT and filed in this matter on * KATHY BURGRAFF *, personally at her RESIDENCE located at 172 STONE HEDGE COURT, IDAHO FALLS, within the County of BONNEVILLE, State of IDAHO.

DATED this 8th day of December, 2008.



Gordon Wilcox

SUBSCRIBED AND SWORN TO before me this 8th day of December, 2008.



Notary Public for the State of Idaho
Residing at: Bonneville County



My Commission Expires: 04/11/11

2009 MAR -9 10:14:23

DISTRICT COURT
MAGNETIC DIVISION
BONNEVILLE COUNTY

Michael J. Whyte, Esq., ISB #4645
THOMSEN STEPHENS LAW OFFICES, PLLC
2635 Channing Way
Idaho Falls ID 83404
Telephone (208)522-1230
Fax (208)522-1277

Attorney for Defendants

IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF BONNEVILLE

THE WATKINS COMPANY, LLC,)
an Idaho limited liability company,)
)
Plaintiff,)
)
v.)
)
MICHAEL STORMS and KATHY)
BURGGRAF,)
)
Defendants.)
_____)

Case No. CV-08-7258

DEFENDANTS' ANSWER TO
COMPLAINT AND DEMAND
FOR JURY TRIAL

COME NOW defendants Michael Storms and Kathy Burggraf, by and through their attorney of record, and answer the complaint filed in this matter.

1. Complaint fails to state a claim upon which relief can be granted.
2. Defendants deny each and every allegation contained in the complaint unless specifically admitted herein.
3. Defendants admit the allegations contained in paragraphs 1, 2, 3, 4, 7 and 8 of the complaint.

4. Defendants deny the allegations contained in paragraphs 9, 11, 12, 15, 16, 18, 19, 20, 22, 23, 25, 26, 27, 28, 31, 32, 34, 35, 36, 38, 39, 40, 42 and 44 of the complaint.

5. Answering paragraphs 10, 13, 17, 21, 24, 29, 33, 37, 41 and 43, no specific response is necessary as the claims contained in these allegations are merely reallegations.

6. Defendants are unaware of the allegations contained in paragraph 5 of the complaint, and therefore deny the same.

7. In answering paragraph 6 of the complaint, defendants admit that the language listed in paragraph 6 is contained in the lease executed between the parties. Defendants deny that plaintiff is entitled to any alleged damages pursuant to said language.

8. In answering paragraph 14 of the complaint, defendants admit that the lease contains language discussing the payment of future rent due if there is a breach of the lease. Defendants deny that defendants have taken any action or course of conduct which is a breach of this lease and entitles plaintiff to damages.

9. In answering paragraph 30 of the complaint, defendants admit that there were occasions during the lease when a cooler was located on the property. Defendants deny that the cooler gives rise to damages or additional compensation due to plaintiff.

FIRST AFFIRMATIVE DEFENSE

As a separate further answer and defense, defendants allege that plaintiff has failed to reasonably mitigate damages and that plaintiff may not recover for damages which could have been reasonably avoided.

SECOND AFFIRMATIVE DEFENSE

As a separate further answer and defense and without waiving any denial that plaintiff is entitled to damages, defendants allege that if plaintiff is entitled to any damages, all or a portion of plaintiff's cause of action against defendants is barred by the applicable statute of limitations.

THIRD AFFIRMATIVE DEFENSE

As a separate further answer and defense, defendants allege that plaintiff's cause of action is barred by the equitable doctrine of laches.

FOURTH AFFIRMATIVE DEFENSE

As a separate further answer and defense, defendants allege that plaintiff and defendants entered into a course of conduct throughout the history of the lease which is the subject of this lawsuit and said course of conduct altered and amended the written lease.

REQUEST FOR ATTORNEY FEES

Defendants allege that the services of Thomsen Stephens Law Offices have been engaged in the defense of plaintiff's complaint and that they are entitled to reasonable attorney fees from plaintiff pursuant to Idaho Code §§12-120 and/or 12-121, or any other statute pled by the plaintiff.

WHEREFORE, defendants pray the judgment, order, and decree of this court as follows:

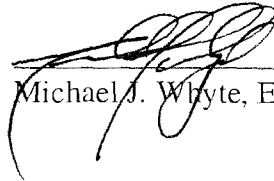
1. That plaintiff's complaint be dismissed with prejudice and plaintiff take nothing thereby.
2. For judgment against plaintiff for costs and disbursements incurred herein.
3. For judgment against plaintiff for attorney fees as set by this court pursuant to statute and court rule.

4. For such other and further relief as the court deems just and proper under the circumstances.

DATED this 9th day of March, 2009.

THOMSEN STEPHENS LAW OFFICES, PLLC

By:



Michael J. Whyte, Esq.

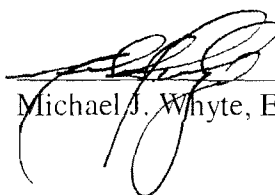
DEMAND FOR JURY TRIAL

Defendants demand trial by jury of not less than 12 persons as to all issues triable to a jury in this matter.

DATED this 9th day of March, 2009.

THOMSEN STEPHENS LAW OFFICES, PLLC

By:



Michael J. Whyte, Esq.

CERTIFICATE OF SERVICE

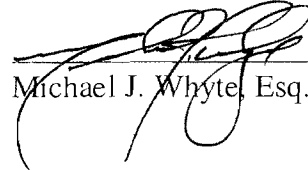
I hereby certify that I am a duly licensed attorney in the State of Idaho, resident of and with my office in Idaho Falls, Idaho; that on the 9th day of March, 2009, I caused a true and correct copy of the foregoing **DEFENDANTS' ANSWER TO COMPLAINT AND DEMAND FOR JURY TRIAL** to be served upon the following persons at the addresses below their names either by depositing said document in the United States mail with the correct postage thereon or by hand delivering or by transmitting by facsimile as set forth below.

BRYAN D SMITH ESQ
B J DRISCOLL ESQ
PO BOX 50731
IDAHO FALLS ID 83405-0731

Mail
 Hand Delivery
 Facsimile

THOMSEN STEPHENS LAW OFFICES, PLLC

By:


Michael J. Whyte, Esq.

MJW:clm
6753\002 Answer

IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF BONNEVILLE

THE WATKINS COMPANY, LLC,)	
an Idaho limited liability)	
company,)	
)	
Plaintiff,)	
)	MINUTE ENTRY
vs.)	Case No. CV-08-7258
)	
MICHAEL STORMS and KATHY)	
BURGGRAF,)	
)	
Defendants.)	
)	

On the 8th day of July, 2009, Plaintiff's motion to compel discovery came before the Honorable Joel E. Tingey, District Judge, in open court at Idaho Falls, Idaho.

Mrs. Marlene Southwick, Deputy Court Clerk, was present.

Mr. B. J. Driscoll appeared on behalf of the Plaintiff.

Mr. Michael Whyte appeared on behalf of the Defendants.

Mr. Driscoll presented Plaintiff's motion to compel discovery. Mr. Whyte responded.

The Court will take the motion under advisement with the Defendant ordered to provide supplemental discovery within 14 days.

Mr. Driscoll addressed the matter of statute of limitations issues. Mr. Whyte addressed the motion. Mr. Driscoll presented rebuttal argument.

Court was thus adjourned.

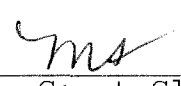


JOEL E. TINGEY
DISTRICT JUDGE

CERTIFICATE OF SERVICE

I hereby certify that on the 8 day of July, 2009, I caused a true and correct copy of the foregoing document to be delivered to the following:

RONALD LONGMORE



Deputy Court Clerk

Bryan D. Smith
B. J. Driscoll
PO Box 50731
Idaho Falls, ID 83405

Michael J. Whyte
2635 Channing Way
Idaho Falls, ID 83404

IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT OF THE COUNTY OF BONNEVILLE
STATE OF IDAHO, IN AND FOR THE COUNTY OF BONNEVILLE

9 JUL -8 A7:27

THE WATKINS COMPANY, LLC,)
an Idaho limited liability)
company,)
)
Plaintiff,)
)
vs.)
)
MICHAEL STORMS and KATHY)
BURGGRAF,)
)
Defendants.)
_____)

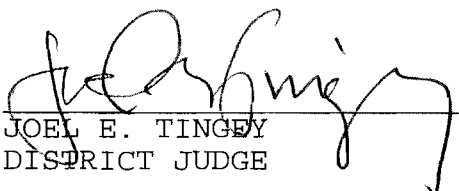
ORDER FOR TELEPHONIC
STATUS CONFERENCE
Case No. CV-08-7258

Pursuant to Rule 16, I.R.C.P., it is hereby ordered that a status conference be conducted by and between the Court and the counsel of record in regard to the above-entitled case on August 18, 2009, at 8:45 a.m.

It is further ordered that at least one of the attorneys for each party participating in said status conference have authority to enter into stipulations and to make admissions regarding all matters that the parties may reasonably anticipate being discussed. (See Rule 16 (b) and Rule 16 (c)). Counsel shall also be prepared to furnish the Court with available dates for a pre-trial conference and trial setting.

The Plaintiff is directed to initiate the telephone conference call to the Court. The telephone number is 529-1350 extension 1340.

Dated this 8 day of July, 2009.



JOEL E. TINGEY
DISTRICT JUDGE

CERTIFICATE OF SERVICE

I hereby certify that on the 8 day of July, 2009, that I mailed or hand delivered a true and correct copy of the foregoing document to the following:

RONALD LONGMORE

BY


DEPUTY CLERK

Bryan D. Smith
B. J. Driscoll
PO Box 50731
Idaho Falls, ID 83405

Michael J. Whyte
2635 Channing Way
Idaho Falls, ID 83404

BONNEVILLE COUNTY
IDAHO

9 JUL 10 A8:39

Bryan D. Smith, Esq. – ISB #4411
B. J. Driscoll, Esq. – ISB # 7010
SMITH, DRISCOLL & ASSOCIATES, PLLC
414 Shoup Ave.
P.O. Box 50731
Idaho Falls, Idaho 83405
Telephone: (208) 524-0731
Facsimile: (208) 529-4166

Attorneys for Plaintiff

IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT OF
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF BONNEVILLE

THE WATKINS COMPANY, LLC,
an Idaho limited liability company,

Plaintiff,

v.

MICHAEL STORMS and KATHY
BURGGRAF,

Defendants.

Case No. CV-08-7258

ORDER

THIS MATTER having come on regularly for hearing before the Honorable Joel E. Tingey, District Judge, on July 8, 2009, upon Plaintiff's Motion to Compel, with appearing by and through B. J. Driscoll Esq., of the firm Smith, Driscoll & Associates, PLLC, and defendants appearing by and through Michael J. Whyte, Esq.; and the Court having reviewed its files, considered oral arguments from counsel, and otherwise being fully advised on the premises;

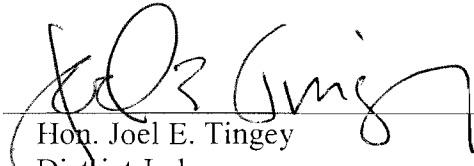
IT IS HEREBY ORDERED that the plaintiff's motion is taken under advisement.

The defendants shall supplement their discovery responses within fourteen (14) days (by

RECEIVED
JUL - 6 2009
By

July 22, 2009). If the plaintiff has further concerns or objections to the defendants' responses after that time, the plaintiff may reset this matter for hearing.

MADE AND ENTERED this 9 day of July, 2009.

By: 
Hon. Joel E. Tingey
District Judge

CERTIFICATE OF SERVICE

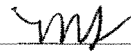
I HEREBY CERTIFY that on this 10 day of July, 2009, I caused a true and correct copy of the foregoing **ORDER** to be served, by placing the same in a sealed envelope and depositing in the United States Mail, postage prepaid, or hand delivery, facsimile transmission or overnight delivery, addressed to the following:

Michael J. Whyte, Esq.
THOMSEN STEPHENS LAW
OFFICES, PLLC
2635 Channing Way
Idaho Falls, ID 83404

- U. S. Mail
- Fax
- Overnight Delivery
- Hand Delivery

B. J. Driscoll, Esq.
SMITH, DRISCOLL &
ASSOCIATES, PLLC
P.O. Box 50731
Idaho Falls, ID 83405

- U. S. Mail
- Fax
- Overnight Delivery
- Hand Delivery



Clerk of the Court

Bryan D. Smith, Esq. – ISB #4411
B. J. Driscoll, Esq. – ISB # 7010
SMITH, DRISCOLL & ASSOCIATES, PLLC
414 Shoup Ave.
P.O. Box 50731
Idaho Falls, Idaho 83405
Telephone: (208) 524-0731
Facsimile: (208) 529-4166

2009 JUN 11 10:14:10
CLERK
COUNTY

Attorneys for Plaintiff

IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT OF
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF BONNEVILLE

THE WATKINS COMPANY, LLC,
an Idaho limited liability company,

Plaintiff,

v.

MICHAEL STORMS and KATHY
BURGGRAF,

Defendants.

Case No. CV-08-7258

**BRIEF IN SUPPORT OF MOTION
FOR PARTIAL SUMMARY
JUDGMENT**

I. INTRODUCTION.

The plaintiff, The Watkins Company, LLC (“Watkins”), file this brief in support of its motion for partial summary judgment against the defendants, Michael Storms (“Storms”) and Kathy Burggraf (“Burggraf”) (collectively, “Defendants”). Because there is no genuine issue of material fact, this court should grant partial summary judgment to Watkins.

II. SUMMARY JUDGMENT STANDARD.

In *State v. Shama Resources Ltd. Partnership*, 127 Idaho 267, 270 (1995), the Idaho Supreme Court explained when the court should grant summary judgment:

Summary judgment is proper “if the pleadings, depositions, admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.” I.R.C.P. 56(c). The party moving for summary judgment bears the burden of establishing the absence of a genuine issue of material fact. *Tingley v. Harrison*, 125 Idaho 86, 89, 867 P.2d 960, 963 (1994); *Harris v. Department of Health & Welfare*, 123 Idaho 295, 298, 847 P.2d 1156, 1159 (1992). Once the moving party establishes the absence of a genuine issue, the burden shifts to the nonmoving party to make a showing of the existence of a genuine issue of material fact on the elements challenged by the moving party. *Thomson v. Idaho Ins. Agency, Inc.*, 126 Idaho 527, 530-31, 887 P.2d 1034, 1037-38 (1994). I.R.C.P. 56(c) requires the entry of summary judgment against a nonmoving party who “fails to make a showing sufficient to establish the existence of an element essential to that party’s case and in which that party will bear the burden of proof at trial.” *Olsen v. J. A. Freeman*, 117 Idaho 706, 720-21, 791 P.2d 1285, 1299-1300 (1990) (citing *Celotex v. Catrett*, 477 U.S. 317, 322-23, 106 S.Ct. 2548, 2552, 91 L.Ed.2d 265 (1986)). See *Hecla Mining Co. v. Star-Morning Mining Co.*, 122 Idaho 778, 784, 839 P.2d 1192, 1198 (1992).

III. STATEMENT OF UNDISPUTED MATERIAL FACTS.

The parties signed a “Commercial Lease and Deposit Receipt” (“Lease”) dated July 31, 1996.¹ The Lease includes Addendum A, Addendum B, Exhibit C, and Addendum D.² The Lease identifies Watkins as the landlord and Storms and Burggraf as tenants of the property identified in Exhibit “C” (“Property”), which consists of a portion of a strip mall.³

Upstairs above the Property is a storage area that is expressly separate from the leasehold premises.⁴ In Addendum D, the parties agreed that after Defendants remodeled the upstairs storage space, the parties would “meet and determine a fair price for Tenant to pay for rent on this additional space and such agreement will become an additional addendum to the lease.”⁵ Although the parties never met to discuss rent on this additional

¹ See Exhibit “A” to the Affidavit of Dane Watkins filed concurrently herewith.

² See Exhibit “A” to the Affidavit of Dane Watkins filed concurrently herewith.

³ See Exhibit “A” to the Affidavit of Dane Watkins filed concurrently herewith.

⁴ See ¶ 7 of Addendum D to Exhibit “A” of the Affidavit of Dane Watkins filed concurrently herewith.

⁵ See ¶ 7 of Addendum D to Exhibit “A” of the Affidavit of Dane Watkins filed concurrently herewith.

upstairs storage space, Defendants did begin paying \$100.00 per month to Watkins for rent on this upstairs storage space, which Watkins accepted for a time.⁶

Addendum D also identifies some “common area entrance and storage space . . . shown on Exhibit C as Lease Space #16 (in the northwest interior corner of Eagle Rock Station) which is now being utilized by the Quilted Bear.”⁷ Discussing this Space #16, the parties agreed in Addendum D that “[i]f this space becomes available for rent in the future, Tenant shall have a first right-of-refusal of renting this space.”⁸ Watkins and Defendants never reached any agreement for Defendants to lease Space #16.⁹ Storms has never paid rent to Watkins on Space #16, but uses this space as storage.¹⁰

Addendum D further recites that the “curb, sidewalk and driveways adjacent to the leasehold premises are presently being improved.”¹¹ Addendum D identifies these improvements and explains what the “Landlord” and the “Tenant” each agreed to pay in relation to the improvements.¹² The parties never had any agreement for Storms to use the “curb, sidewalk and driveways adjacent to the leasehold premises” for any purpose.¹³ For several years, Storms has been using this space during the summer months for outdoor dining and continues to do so, but has never paid Watkins any rent on this space.¹⁴

For several years, Storms has been storing a large, walk-in cooler on another parcel of Watkins’ property commonly referred to as the “pipeyard.”¹⁵ The parties had no

⁶ See the Affidavit of Dane Watkins filed concurrently herewith.

⁷ See ¶ 8 of Addendum D to Exhibit “A” of the Affidavit of Dane Watkins filed concurrently herewith.

⁸ See ¶ 8 of Addendum D to Exhibit “A” of the Affidavit of Dane Watkins filed concurrently herewith.

⁹ See the Affidavit of Dane Watkins filed concurrently herewith.

¹⁰ See the Affidavit of Dane Watkins filed concurrently herewith.

¹¹ See ¶ 2 of Addendum D to Exhibit “A” of the Affidavit of Dane Watkins filed concurrently herewith.

¹² See ¶¶ 2-4 of Addendum D to Exhibit “A” of the Affidavit of Dane Watkins filed concurrently herewith.

¹³ See the Affidavit of Dane Watkins filed concurrently herewith.

¹⁴ See the Affidavit of Dane Watkins filed concurrently herewith.

¹⁵ See the Affidavit of Dane Watkins filed concurrently herewith.

agreement for Storms' use of this space. Storms has never paid anything to Watkins for use of this space.¹⁶

On April 13, 2009, counsel for Watkins faxed and mailed a "Notice of Termination of Tenancy and Demand for Possession" ("Notice") to counsel for Defendants.¹⁷ The Notice provides in pertinent part as follows:

To the extent your client, Michael Storms, or any entity affiliated with him, currently has possession of, or claims any tenancy in or right to possession to, any real property or storage space owned by The Watkins Company, LLC or any other entity affiliated with Dane H. Watkins, Sr. (other than the premises included in the Commercial Lease and Deposit Receipt that is the subject of the above-referenced lawsuit), this letter shall serve as notice of the termination of any such right, claim, or tenancy effective thirty (30) days from the date of this letter, and a demand for immediate possession of the same. Specifically, this notice and demand includes but is not limited to (1) the storage area located upstairs from the Brownstone Restaurant and Brewhouse, (2) Suite 16 located to the west of and contiguous to the Brownstone, (3) the outdoor area known as the "pipeyard" where Mr. Storms currently stores a large, walk-in cooler, and (4) the sidewalk and other areas immediately outside of the Brownstone formerly used by the Brownstone for outdoor dining.

If Mr. Storms continues in possession after expiration of the thirty (30) days, Mr. Storms will be considered a trespasser and The Watkins Company, LLC will seek to enforce its rights. Please advise your client accordingly.¹⁸

In response to Watkins' Notice, Storms sent a letter dated May 29, 2009 through counsel representing that he would move the cooler from the "pipeyard."¹⁹ However, to date Storms has not removed the cooler.²⁰ Storms refused to vacate the upstairs storage, Space #16, or the curb, sidewalk, and driveway areas.²¹

¹⁶ See the Affidavit of Dane Watkins filed concurrently herewith.

¹⁷ See the Affidavit of B. J. Driscoll filed concurrently herewith.

¹⁸ See Exhibit "A" to the Affidavit of B. J. Driscoll filed concurrently herewith.

¹⁹ See Exhibit "B" to the Affidavit of B. J. Driscoll filed concurrently herewith.

²⁰ See the Affidavit of Dane Watkins filed concurrently herewith.

²¹ See Exhibit "B" to the Affidavit of B. J. Driscoll filed concurrently herewith.

Each month, Storms pays his rent with a single check.²² In his June and July 2009 rent payments on the Property, Storms included an additional \$100.00 per month as rent on the upstairs storage space.²³ Watkins deposited Storms' rent payment checks, but then refunded \$200.00 to Storms for the purported rent of the upstairs storage space for June and July 2009.²⁴

IV. THE COURT SHOULD GRANT SUMMARY JUDGMENT TO WATKINS AND EVICT STORMS FROM THE UPSTAIRS STORAGE, SPACE #16, THE CURB AND SIDEWALK, AND THE "PIPEYARD."

Idaho Code Section 6-303 states, "A tenant of real property, for a term less than life, is guilty of an unlawful detainer: 1. When he continues in possession, in person or by a subtenant, of the property, or any part thereof, after the expiration of the term for which it is let to him, without the permission of the landlord . . ." Idaho Code 55-208 provides, "A tenancy or other estate at will, however created, may be terminated: (1) By the landlord's giving notice in writing to the tenant, in the manner prescribed by the code of civil procedure, to remove from the premises within a period of not less than one (1) month, to be specified in the notice." The Idaho Rule of Civil Procedure 5(a) requires that every written notice "shall be served upon each of the parties affected thereby." Rule 5(b) states that "[w]henver under these rules service is required or permitted to be made upon a party represented by an attorney the service shall be made upon the attorney unless service upon the party is ordered by the court." Service upon an attorney may be by mail or fax, among other methods. I.C.R.P. 5(b). Idaho Code 55-209 states that after the notice of termination has been served and the time expired, "the landlord may reenter, or proceed according to law to recover possession."

²² See the Affidavit of Dane Watkins filed concurrently herewith.

²³ See the Affidavit of Dane Watkins filed concurrently herewith.

²⁴ See the Affidavit of Dane Watkins filed concurrently herewith.

Here, the court should grant partial summary judgment to Watkins on Count Nine and enter an order evicting Storms from the upstairs storage area, Space #16, the sidewalk, and the “pipeyard” because Watkins terminated any lease agreement the parties may have had regarding these four areas by serving them with the thirty day notice of termination of tenancy and demand for possession. Watkins addresses each item as follows:

Upstairs Storage

There is no issue of fact that the Lease and Addendum D contain no express right for Storms to rent “the storage space over the lease premises.”²⁵ While Storms paid and Watkins accepted \$100.00 per month for a time,²⁶ Watkins clearly terminated any month-to-month lease rights Storms may have had to the upstairs storage area when it sent the Notice to Storms and refunded the purported rent payments for June and July 2009.²⁷ As such, as of June 1, 2009, Storms continues in possession of the upstairs storage space without Watkins’ permission. As a matter of law, Storms has no right to possession of the upstairs storage space.

Space #16 Storage

There is no issue of fact that the Lease and Addendum D contain no express right for Storms to rent Space #16.²⁸ The only right Storms has to Space #16 is a first right-of-refusal.²⁹ The parties had no agreement for Storms to lease Space #16.³⁰ Storms has never paid any rent to Watkins for Space #16.³¹ Even if Storms had acquired some right of

²⁵ See ¶ 7 of Addendum D to Exhibit “A” of the Affidavit of Dane Watkins filed concurrently herewith.

²⁶ See the Affidavit of Dane Watkins filed concurrently herewith.

²⁷ See the Affidavit of Dane Watkins filed concurrently herewith.

²⁸ See ¶ 8 of Addendum D to Exhibit “A” of the Affidavit of Dane Watkins filed concurrently herewith.

²⁹ See ¶ 8 of Addendum D to Exhibit “A” of the Affidavit of Dane Watkins filed concurrently herewith.

³⁰ See the Affidavit of Dane Watkins filed concurrently herewith.

³¹ See the Affidavit of Dane Watkins filed concurrently herewith.

possession to Space #16, Watkins terminated any such right by service of the Notice on Storms.³² As a matter of law, Storms has no right to possession of Space #16.

Outdoor Dining On The Sidewalk And Curb

There is no issue of fact that the Lease and Addendum D contain no express right for Storms to rent or use the “curb, sidewalk and driveways adjacent to the leasehold premises” for outdoor dining.³³ Addendum D discusses improvements to this area and the parties’ respective obligations to pay for these improvements, with nothing more.³⁴ The parties had no agreement for Storms to lease the curb, sidewalk and driveways for his business.³⁵ Storms has never paid any rent to Watkins for the curb, sidewalk, or driveways.³⁶ Even if Storms had acquired some right of possession to use the curb, sidewalk, or driveways for outdoor dining, Watkins terminated any such right by service of the Notice on Storms.³⁷ As a matter of law, Storms has no right to possession of the curb, sidewalk, or driveways for use as an outdoor dining area.

Walk-in Cooler Storage In The “Pipeyard”

There is no issue of fact that Storms has no right to possession of any area in the “pipeyard.” Although Watkins originally allowed Storms to store his cooler in Watkins’ “pipeyard,” Storms has refused to pay any rent and has refused to remove the cooler.³⁸ Storms’ response to Watkins’ Notice suggests he will remove the cooler, but now two months, he has not done so. As a matter of law, Storms has no right to possession in the “pipeyard” to store his cooler.

³² See the Affidavit of B. J. Driscoll filed concurrently herewith.

³³ See ¶¶ 2-4 of Addendum D to Exhibit “A” of the Affidavit of Dane Watkins filed concurrently herewith.

³⁴ See ¶¶ 2-4 of Addendum D to Exhibit “A” of the Affidavit of Dane Watkins filed concurrently herewith.

³⁵ See the Affidavit of Dane Watkins filed concurrently herewith.

³⁶ See the Affidavit of Dane Watkins filed concurrently herewith.

³⁷ See the Affidavit of Dane Watkins filed concurrently herewith.

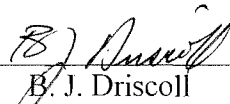
³⁸ See the Affidavit of Dane Watkins filed concurrently herewith.

V. CONCLUSION.

By serving the Notice, Watkins terminated any tenancy at will or month-to-month lease Storms may have had or claimed by implied agreement or conduct of the parties. Watkins owns the four properties discussed in this motion and has the right to their productive use. At present, Storms is using these areas without permission and without paying rent. Because there is no genuine issue of fact that Storms has no right to possession in any of the four spaces discussed in this motion, the court should grant partial summary judgment to Watkins and enter an order evicting Storms from the upstairs storage area, Space #16, the curb, sidewalk, and driveways, and the "pipeyard."

DATED this 14 day of July, 2009.

SMITH, DRISCOLL & ASSOCIATES PLLC

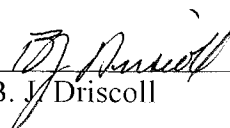
By 
B. J. Driscoll
Attorneys for Plaintiff

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 14 day of July, 2009, I caused a true and correct copy of the foregoing **BRIEF IN SUPPORT OF MOTION FOR PARTIAL SUMMARY JUDGMENT** to be served, by placing the same in a sealed envelope and depositing in the United States Mail, postage prepaid, or hand delivery, facsimile transmission or overnight delivery, addressed to the following:

Michael J. Whyte, Esq.
THOMSEN STEPHENS LAW
OFFICES, PLLC
2635 Channing Way
Idaho Falls, ID 83404

U. S. Mail
 Fax
 Overnight Delivery
 Hand Delivery


B. J. Driscoll

Bryan D. Smith, Esq. – ISB #4411
B. J. Driscoll, Esq. – ISB # 7010
SMITH, DRISCOLL & ASSOCIATES, PLLC
414 Shoup Ave.
P.O. Box 50731
Idaho Falls, Idaho 83405
Telephone: (208) 524-0731
Facsimile: (208) 529-4166

Attorneys for Plaintiff

IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT OF
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF BONNEVILLE

THE WATKINS COMPANY, LLC,
an Idaho limited liability company,

Plaintiff,

v.

MICHAEL STORMS and KATHY
BURGGRAF,

Defendants.

Case No. CV-08-7258

**AMENDED COMPLAINT AND
DEMAND FOR JURY TRIAL**

COMES NOW the plaintiff, THE WATKINS COMPANY, LLC (“Plaintiff”), and
as and for a cause of action against the defendants, states, alleges, and avers as follows:

PARTIES, JURISDICTION, VENUE, AND BACKGROUND

1. Plaintiff is an Idaho limited liability company with its principal place of
business in Bonneville County, Idaho.
2. The defendant, Michael Storms (“Storms”), is and at all times relevant
hereto was an individual residing in Bonneville County, Idaho.

3. The defendant, Kathy Burggraf (hereafter, "Burggraf"), was at all times relevant hereto an individual residing in Bonneville County, Idaho. Storms and Burggraf are collectively referred to herein as "Defendants."

4. Venue is proper in Bonneville County, Idaho pursuant to Idaho Code Section 5-401, or in the alternative, Section 5-404.

5. Plaintiff is the successor in interest to the assets of Watkins and Watkins, an Idaho general partnership, which assets include the written "Commercial Lease and Deposit Receipt" ("Lease") executed by Watkins and Watkins as lessor/landlord and Defendants as lessees/tenants on July 31, 1996 for the lease of real property located in Bonneville County, Idaho.

6. Addendum "A" to the Lease provides in pertinent part as follows:

Lessor will be entitled to 5% of the gross sales of the entire operation (on premises) for the previous month or the base rent indicated above, whichever is greater. By the 10th of each month, Lessee will provide Lessor the monthly sales figures for the previous month – if a percentage rent is due, Lessee will pay the Lessor the difference owed by the 15th of that month. This addendum will act as a power of attorney for Lessor to check sales figures with Idaho State Sales Tax Commission in Idaho Falls. In no event will the monthly rent be less than the base rent.

7. Addendum "B" to the Lease provides that Defendants are responsible for a portion of the cost for the maintenance of the roof of the building covered by the Lease.

8. Defendants leased the property included in the Lease for the purpose of operating a restaurant and microbrewery.

9. Plaintiff has satisfied all the conditions, covenants, and promises required on its part under the Lease and other agreements with Defendants as outlined herein.

//

//

COUNT ONE

(Breach of Written Lease Contract – Failure to Pay Amounts Due)

10. Plaintiff realleges all previous allegations contained in the Amended Complaint as if set forth in full.

11. Defendants have breached the Lease by failing to timely pay rent, late fees, and interest as required by the terms of the Lease.

12. As a direct and proximate result of Defendants' breach of the Lease as herein alleged, as of August 5, 2009 Plaintiff has been damaged in the amount of \$23,947.46, or such other amount as may be proven at trial.

COUNT TWO

(Breach of Written Lease Contract – Acceleration)

13. Plaintiff realleges all previous allegations contained in the Amended Complaint as if set forth in full.

14. Paragraph 22 of the Lease provides among other things that upon Defendants' breach of the Lease, Plaintiff is entitled to recover the amount of all future rent due under the Lease through the end of the lease term.

15. The total amount of lost future rent due under the Lease from September 1, 2009 through the end of the original term of the Lease is \$1,023,750.00.

16. As a direct and proximate result of Defendants' breach of the Lease as herein alleged, as of August 5, 2009 Plaintiff is entitled to recover lost future rents in the amount of \$1,023,750.00, or such other amount as may be proven at trial.

COUNT THREE

(Breach of Written Lease Contract – Failure to Provide Monthly Sales Reports)

17. Plaintiff realleges all previous allegations contained in the Amended Complaint as if set forth in full.

18. Defendants have breached the Lease by failing to provide Plaintiff with “the monthly sales figures” showing the “gross sales of the entire operation (on premises)” covered by the Lease in order for Plaintiff to determine the alternative rent owed under the terms of Addendum “A” to the Lease.

19. As a direct and proximate result of Defendants’ breach of the Lease as herein alleged, Plaintiff seeks an order requiring Defendants to specifically perform their duty under Addendum “A” to the Lease by providing Plaintiff with the gross monthly sales figures of the entire restaurant and microbrewery operation on the premises from November 1, 1997 to the present, and for an accounting of the same.

20. As a direct and proximate result of Defendants’ breach of the Lease as alleged herein, Plaintiff have been damaged in an amount to be determined at trial.

COUNT FOUR

(Breach of Written Lease Contract – Failure to Pay for Roof Repairs)

21. Plaintiff realleges all previous allegations contained in the Amended Complaint as if set forth in full.

22. Defendants have breached the Lease by failing to pay their portion of roof repair expenses in the amount of \$4,500.00, plus interest at 12% per annum from June 2008 until paid.

23. As a direct and proximate result of Defendants’ breach of the Lease as herein alleged, Plaintiff has been damaged in the amount of \$4,500.00 plus interest from June 2008 as herein alleged, or such other amount as may be proven at trial.

//

//

COUNT FIVE

(Breach of Oral Lease Contract/Unjust Enrichment – Upstairs Storage)

24. Plaintiff realleges all previous allegations contained in the Amended Complaint as if set forth in full.

25. Plaintiff and Storms entered into an oral agreement for the lease of certain space upstairs in the building covered by the Lease but not included in the Lease, wherein Plaintiff agreed to lease the space as storage to Defendants for the price of \$100.00 per month through June 2008, and thereafter for the price of \$750.00 per month.

26. Storms has breached the oral agreement for the lease of the upstairs storage space by failing to timely pay rent due thereon.

27. As a direct and proximate result of Storms' breach of the oral agreement as herein alleged, as of August 5, 2009 Plaintiff has been damaged in the amount of \$9,400.00, or such other amount as may be proven at trial.

28. In the alternative, Storms has received the benefit of using the upstairs space as storage, for Storms to accept this benefit without paying Plaintiff the value of the benefit would be inequitable, and Storms has been unjustly enriched in the amount of \$9,400.00 as of August 5, 2009, or such other amount as may be proven at trial.

COUNT SIX

(Unjust Enrichment – Cooler Storage)

29. Plaintiff realleges all previous allegations contained in the Amended Complaint as if set forth in full.

30. For approximately 49 months until July 2009, Storms stored a large, walk-in cooler on Plaintiff's property.

31. Storms has paid Plaintiff nothing for the use of Plaintiff's property to store Storms' cooler.

32. Storms received the benefit of storing the cooler on Plaintiff's property, for Storms to accept this benefit without paying Plaintiff the value of the benefit would be inequitable, and Storms has been unjustly enriched in the amount of \$100.00 per month, for a total of \$4,900, or in such other amount as may be proven at trial.

COUNT SEVEN
(Unjust Enrichment – Space #16 Storage)

33. Plaintiff realleges all previous allegations contained in the Amended Complaint as if set forth in full.

34. Storms has been storing various items of personal property in a portion of a building owned by Plaintiff referred to as Space #16 for approximately 34 months as of the date of this Amended Complaint.

35. Storms has paid Plaintiff nothing for the use of Space #16 to store Storms' personal property.

36. Storms has received the benefit of storing his property in Space #16, for Storms to accept this benefit without paying Plaintiff the value of the benefit would be inequitable, and Storms has been unjustly enriched in the amount of \$200.00 per month, for a total of \$6,800 as of August 5, 2009, or in such other amount as may be proven at trial.

COUNT EIGHT
(Unjust Enrichment – Outdoor Dining Area Use)

37. Plaintiff realleges all previous allegations contained in the Amended Complaint as if set forth in full.

38. Each year since approximately 2002, from approximately April through October, Storms has been using portions of Plaintiff's property located immediately outside of and adjoining the premises covered in the written Lease but not included in the Lease as an outdoor dining area for his restaurant and microbrewery business.

39. Storms has paid Plaintiff nothing for the use of this outside dining area.

40. Storms has received the benefit of using Plaintiff's property as an outdoor dining area for his restaurant and microbrewery business, for Storms to accept this benefit without paying Plaintiff the value of the benefit would be inequitable, and Storms has been unjustly enriched in the amount of \$500.00 per month, for a total of \$30,500.00 as of August 5, 2009, or such other amount as may be proven at trial.

COUNT NINE
(Eviction)

41. Plaintiff realleges all previous allegations contained in the Amended Complaint as if set forth in full.

42. As a result of Defendants' breaches of the Lease and other agreements and Storms' conduct outlined herein, Plaintiff seeks an order and judgment for eviction of Defendants from the premises covered by the Lease and for the eviction of Storms from all of Plaintiff's properties previously used by Storms as outlined herein.

COUNT TEN
(Food and Drink Credit)

43. Plaintiff realleges all previous allegations contained in the Amended Complaint as if set forth in full.

44. Under the terms of the Addenda to the Lease and the parties' course of conduct, Plaintiff is entitled to a \$250 food and drink credit per month.

45. Defendants have breached the Lease by failing to provide Plaintiff the \$250 food and drink credit per month according to the Addenda and the parties' course of conduct.

46. As a direct and proximate result of Defendants' breach of the Lease as herein alleged, Plaintiff has been damaged in the amount of \$3,000, or such mother amount as may be proven at trial.

COUNT ELEVEN
(Attorney's Fees)

47. Plaintiff realleges all previous allegations contained in the Amended Complaint as if set forth in full.

48. Plaintiff has been required to seek the legal services of the firm of Smith, Driscoll & Associates, PLLC to prosecute this action and has incurred attorney's fees and costs because of Defendants' wrongful conduct as alleged herein, entitling Plaintiff to recover an award of reasonable attorney's fees and costs as herein alleged pursuant to the Lease, Idaho Code §§ 12-120 and 12-121, and Idaho Rule of Civil Procedure 54.

WHEREFORE, Plaintiff prays for judgment against Defendants as follows:

1. For judgment against defendant Michael Storms in the amount of \$1,106,797.46, or such other amount as may be proven at trial;
2. For judgment against defendant Kathy Burggraf in the amount of \$1,055,197.46, or such other amount as may be proven at trial;
3. For a judgment and order requiring Defendants to specifically perform their duties under the Lease to provide Plaintiff with the gross monthly sales figures of the entire operation on the leased premises from November 1, 1997 to the present and for an accounting of the same;

4. For a judgment and order evicting Defendants from the leased premises and delivering possession of the leased premises to Plaintiff;

5. For a judgment and order evicting defendant Michael Storms from all of Plaintiff's properties other than the lease premises previously used by Storms as outlined herein

6. For judgment awarding Plaintiff prejudgment interest;

7. For judgment awarding Plaintiff its reasonable attorney's fees incurred herein as provided by the Lease, Idaho Code Section 12-120 and 12-121, and Idaho Rule of Civil Procedure 54 in the amount of seven thousand dollars (\$7,000.00) if this matter is uncontested, and otherwise in such amounts as the court may determine;


8. For judgment awarding Plaintiff its costs of suit incurred herein as provided by the Lease and Idaho Rule of Civil Procedure 54; and

9. For such other and further relief as appears just and equitable in the premises.

DATED this 5 day of August, 2009.

SMITH, DRISCOLL & ASSOCIATES PLLC

By

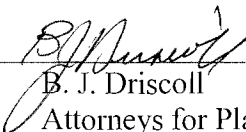

B.J. Driscoll
Attorneys for Plaintiff

DEMAND FOR JURY TRIAL

COMES NOW the plaintiff and makes demand for a jury trial of all issues herein pursuant to Rule 38 of the Idaho Rules of Civil Procedure.

DATED this 5 day of August, 2009.

SMITH, DRISCOLL & ASSOCIATES PLLC

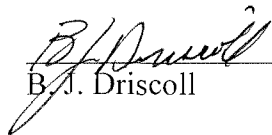
By 
B. J. Driscoll
Attorneys for Plaintiff

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 5 day of August, 2009, I caused a true and correct copy of the foregoing **AMENDED COMPLAINT AND DEMAND FOR JURY TRIAL** to be served, by placing the same in a sealed envelope and depositing in the United States Mail, postage prepaid, or hand delivery, facsimile transmission or overnight delivery, addressed to the following:

Michael J. Whyte, Esq.
THOMSEN STEPHENS LAW
OFFICES, PLLC
2635 Channing Way
Idaho Falls, ID 83404

- U.S. Mail
- Fax
- Overnight Delivery
- Hand Delivery


B. J. Driscoll

Bryan D. Smith, Esq. – ISB #4411
B. J. Driscoll, Esq. – ISB # 7010
SMITH, DRISCOLL & ASSOCIATES, PLLC
414 Shoup Ave.
P.O. Box 50731
Idaho Falls, Idaho 83405
Telephone: (208) 524-0731
Facsimile: (208) 529-4166

Attorneys for Plaintiff

IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT OF
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF BONNEVILLE

THE WATKINS COMPANY, LLC,
an Idaho limited liability company,

Plaintiff,

v.

MICHAEL STORMS and KATHY
BURGGRAF,

Defendants.

Case No. CV-08-7258

**REPLY BRIEF IN SUPPORT OF
MOTION FOR PARTIAL
SUMMARY JUDGMENT AND IN
OPPOSITION TO DEFENDANTS'
RULE 56(f) MOTION TO CONTINUE
HEARING**

- I. THE COURT SHOULD DENY DEFENDANTS' RULE 56(F) MOTION TO CONTINUE THE HEARING ON WATKINS' MOTION FOR PARTIAL SUMMARY JUDGMENT.

Idaho Rule of Civil Procedure 56(f) provides as follows:

Should it appear from the *affidavits* of a party opposing the motion *that the party cannot for reasons stated present by affidavit facts essential to justify the party's opposition*, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

(Emphasis added.)

Here, Defendants rely on Rule 56(f) and ask the court to continue the hearing on Watkins' motion for partial summary judgment "until defendant has had an opportunity to complete discovery, including depositions under Rule 30(b)(6) and 26(b)(4), and possible other written discovery to plaintiff."¹ However, the court should deny Defendants' 56(f) motion for several reasons.

First, Defendants identify no specific facts they lack but need to discover in order to respond to the motion. Instead, Defendants' refer generally to a need to conduct discovery without more. However, Defendants currently have no discovery pending and have scheduled no depositions. Worse yet, Defendants cite the need to take depositions under Rule 26(b)(4), which is for expert witnesses, even though neither party has disclosed an expert witness in this case. Finally, Defendants' need for "possible other written discovery" is too vague and indefinite to justifiably continue the hearing on Watkins' motion.

Second, contrary to Defendants' assertion, Watkins *will* be prejudiced by any delay of the hearing. As explained in its moving brief, Watkins has the right to the possession and productive use of this property. As explained below, there are no genuine issues of fact and this court can determine as a matter of law that Storms should be evicted from the properties identified in Watkins' motion. Any delay in the hearing prevents Watkins from making productive use of these properties, either by Watkins' own use or by renting the properties to others that will pay for the use of the property. Any delay in the hearing would only harm Watkins and benefit Storms. In fact, Storms would likely prefer to continue not paying rent and delay any discussion of his eviction from the sidewalk area until after the summer dining season has concluded.

¹ See p. 1 of Rule 56(f) Motion to Continue Hearing on Plaintiff's Motion for Partial Summary Judgment dated July 29, 2009, already on file with the court.

Third, the motion does not comply with Rule 56(f)'s own provisions because none of the affidavits filed by Defendants provides any explanation of why they cannot present "facts essential to justify [their] opposition" to Watkins' motion for partial summary judgment. In fact, Defendants fail to identify any specific facts at all. The affidavit requirement of Rule 56(f) is important because it requires a sworn statement from a party regarding the need for additional time to conduct specific discovery. Otherwise, a party could submit a generic request for a continuance that may be submitted for an improper purpose such as to cause unnecessary delay. *See* I.R.C.P. 11(a)(1).

II. THE COURT SHOULD GRANT PARTIAL SUMMARY JUDGMENT TO WATKINS AND EVICT STORMS FROM THE UPSTAIRS STORAGE, SPACE #16, AND THE CURB AND SIDEWALK.²

Defendants raise no genuine issue of fact regarding their unlawful detainer of Watkins' property. *See* I.C. § 6-303. While Watkins disputes Defendants' right to any tenancy in the upstairs storage, Space #16, or the curb and sidewalk, Watkins terminated any such tenancy by providing the requisite statutory notice. *See* I.C. § 55-208.

Upstairs Storage

There is no issue of fact that the Lease and Addendum D contain no right for Storms to rent "the storage space over the lease premises"³ Without any citation to the record or quotation from the Lease, Defendants claim that "specifically Addendum D states that defendants would be allowed to use this upstairs space."⁴ The Lease and Addendum D say no such thing. Rather, Addendum D expressly states that "this space is currently *not*

² Subsequent to Watkins' moving brief, Storms did remove his cooler from the "pipeyard," rendering this portion of Watkins' motion as moot.

³ See ¶ 7 of Addendum D to Exhibit "A" of the Affidavit of Dane Watkins dated July 13, 2009, already on file with the court.

⁴ See p. 6 of Defendant's Response to Plaintiff's Motion for Partial Summary Judgment dated July 29, 2009, already on file with the court.

included as part of the leasehold premises”⁵ and provides merely that the parties would meet after remodeling was complete to then determine a price for rent “on this additional space,” which is nothing more than an agreement-to-agree. The upstairs storage is not included in the original lease premises. Watkins terminated any agreement implied by its conduct of accepting \$100.00 per month from Storms for a time.⁶ Because Defendants present no facts establishing any right to continue using the upstairs storage space, the court should grant partial summary judgment to Watkins.

Space #16 Storage

Again without citation to the agreement itself, Defendants claim that the Lease and Addendum “specifically contemplated and included Space #16,” which, according to Defendants, “is actually a hallway leading from the outside of the building to the inside of the restaurant.”⁷ However, Addendum D belies both of Defendants’ assertions. Addendum D identifies Space #16 as a “common area entrance and *storage space*,”⁸ so Space #16 clearly includes storage space and must be more than just a hallway leading from the outside of the building into the restaurant. Moreover, Addendum D only grants Defendants a first right of refusal to Space #16.⁹ There is no issue of fact that Defendants have no right to possession of Space #16. Storms has never paid any rent to Watkins for Space #16.¹⁰ Although Defendants may have been using Space #16, Watkins revoked any acquiescence to Defendants’ use of Space #16 when it served the Notice of Termination. Because

⁵ See ¶ 7 of Addendum D to Exhibit “A” of the Affidavit of Dane Watkins dated July 13, 2009, already on file with the court. (Emphasis added.)

⁶ See the Affidavit of Dane Watkins dated July 13, 2009, already on file with the court.

⁷ See p. 7 of Defendant’s Response to Plaintiff’s Motion for Partial Summary Judgment dated July 29, 2009, already on file with the court.

⁸ See ¶ 8 of Addendum D to Exhibit “A” of the Affidavit of Dane Watkins dated July 13, 2009, already on file with the court. (Emphasis added.)

⁹ See ¶ 8 of Addendum D to Exhibit “A” of the Affidavit of Dane Watkins dated July 13, 2009, already on file with the court.

¹⁰ See the Affidavit of Dane Watkins dated July 13, 2009, already on file with the court.

Defendants present no facts establishing any right to continue using Space #16, the court should grant partial summary judgment to Watkins.

Outdoor Dining On The Sidewalk And Curb

Again without pointing to any express language in the Lease or addenda, Defendants assert that the agreement “specifically contemplated and included use of outdoor space by defendant for their restaurant.”¹¹ Defendants attempt to rely on language from Addendum B stating, “Tenant has permission to have an outside deck Lessor will approve the design and size of the deck and must meet all city codes.”¹² This language grants Defendants nothing more than the specific right to have an “outside deck” contingent upon Watkins’ approval of the design and size. However, Defendants have put no evidence in the record that they are using any “outside deck” or that Watkins “approve[d] the design and size of the deck.” Rather, they are trying to bypass the requirement for Watkins’ approval of the size and design of an outside deck and instead just started using the sidewalk for an outdoor dining area. Although Defendants may have been using the sidewalk and curb as an outside dining area, Watkins revoked any acquiescence to Defendants’ use in this regard when it served the Notice of Termination. Again, Storms has never paid any rent to Watkins for the use of this area outside of the lease premises.¹³

Defendants’ claim that they “have a right to use this outdoor space,”¹⁴ but provide no basis for this “right.” Just because Watkins did not object prior to the Notice of Termination does not mean that Defendants have acquired a right to the indefinite use of the

¹¹ See p. 7 of Defendant’s Response to Plaintiff’s Motion for Partial Summary Judgment dated July 29, 2009, already on file with the court.

¹² See ¶ 4 of Addendum B to Exhibit “A” of the Affidavit of Dane Watkins dated July 13, 2009, already on file with the court.

¹³ See the Affidavit of Dane Watkins dated July 13, 2009, already on file with the court.

¹⁴ See p. 8 of Defendant’s Response to Plaintiff’s Motion for Partial Summary Judgment dated July 29, 2009, already on file with the court.

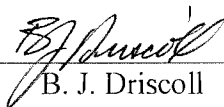
sidewalk and curb area for free. Because Defendants present no facts establishing any right to continue using the sidewalk and curb as an outdoor dining area, the court should grant partial summary judgment to Watkins.

III. CONCLUSION.

Defendants have shown no good reason why this court should continue the hearing on Watkins' motion for partial summary judgment, especially where any delay will only benefit Defendants and harm Watkins. The record is clear and undisputed that Defendants have no right to use the upstairs storage area, Space #16, or the curb and sidewalk. As such, the court should grant partial summary judgment to Watkins on Count Nine and enter an order evicting Storms from the upstairs storage area, Space #16, and the curb and sidewalk. Watkins reserves the right to seek compensation for the reasonable value of Defendants' past use of these areas.

DATED this 5 day of August, 2009.

SMITH, DRISCOLL & ASSOCIATES PLLC


By 
B. J. Driscoll
Attorneys for Plaintiff

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 5 day of August, 2009, I caused a true and correct copy of the foregoing **REPLY BRIEF IN SUPPORT OF MOTION FOR PARTIAL SUMMARY JUDGMENT AND IN OPPOSITION TO DEFENDANTS' RULE 56(f) MOTION TO CONTINUE HEARING** to be served, by placing the same in a sealed envelope and depositing in the United States Mail, postage prepaid, or hand delivery, facsimile transmission or overnight delivery, addressed to the following:

Michael J. Whyte, Esq.
THOMSEN STEPHENS LAW
OFFICES, PLLC
2635 Channing Way
Idaho Falls, ID 83404

- U. S. Mail
- Fax
- Overnight Delivery
- Hand Delivery



B. A. Driscoll

IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF BONNEVILLE

THE WATKINS COMPANY, LLC,)
an Idaho limited liability)
company,)
)
Plaintiff,)
)
vs.)
)
MICHAEL STORMS and KATHY)
BURGGRAF,)
)
Defendants.)
)

MINUTE ENTRY
Case No. CV-08-7258

On the 12th day of August, 2009, Plaintiff's motion for partial summary judgment, motion to amend complaint, and motion to compel discovery came before the Honorable Joel E. Tingey, District Judge, in open court at Idaho Falls, Idaho.

Mr. Jack Fuller, Court Reporter, and Mrs. Marlene Southwick, Deputy Court Clerk, were present.

Mr. B. J. Driscoll appeared on behalf of the Plaintiff.

Mr. Michael Whyte appeared on behalf of the Defendants.

Upon inquiry, Mr. Driscoll stated that discovery has been received and requested the motion be tabled for the time being.

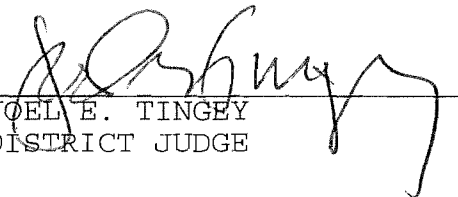
Upon inquiry from the Court, Mr. Whyte stated he did not object to the motion to amend complaint. The Court granted the motion to amend complaint.

Mr. Driscoll presented Plaintiff's motion for partial summary judgment. Mr. Whyte responded to the motion for partial summary judgment and presented Defendant's motion to continue

motion. Mr. Driscoll presented rebuttal argument.

The Court denied the motion for continuance. The Court determined that Defendant's are not entitled to space 16 and granted Plaintiff's motion for partial summary judgment; denied as to outside use. Defendant's will have fourteen days to vacate the premises. Mr. Driscoll will prepare a proposed order for the Court's signature.

Court was thus adjourned.



JOEL E. TINGEY
DISTRICT JUDGE

CERTIFICATE OF SERVICE

I hereby certify that on the 12 day of August, 2009, I caused a true and correct copy of the foregoing document to be delivered to the following:

RONALD LONGMORE



Deputy Court Clerk

Bryan D. Smith
B. J. Driscoll
PO Box 50731
Idaho Falls, ID 83405

Michael J. Whyte
2635 Channing Way
Idaho Falls, ID 83404

Bryan D. Smith, Esq. – ISB #4411
B. J. Driscoll, Esq. – ISB # 7010
SMITH, DRISCOLL & ASSOCIATES, PLLC
414 Shoup Ave.
P.O. Box 50731
Idaho Falls, Idaho 83405
Telephone: (208) 524-0731
Facsimile: (208) 529-4166

BONNEVILLE COUNTY
IDAHO

9 AUG 13 P4:19

Attorneys for Plaintiff

IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT OF
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF BONNEVILLE

THE WATKINS COMPANY, LLC,
an Idaho limited liability company,

Plaintiff,

v.

MICHAEL STORMS and KATHY
BURGGRAF,

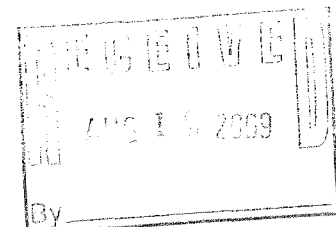
Defendants.

Case No. CV-08-7258

ORDER

THIS MATTER having come on regularly for hearing before the Honorable Joel E. Tingey, District Judge, on August 12, 2009, upon Plaintiff's Motion to Compel, Plaintiff's Motion for Partial Summary Judgment, Defendants' Motion to Continue, Plaintiff's Motion to Shorten Time, and Plaintiff's Motion to Amend Complaint, with plaintiff appearing in person and by and through B. J. Driscoll Esq., of the firm Smith, Driscoll & Associates, PLLC, and defendants appearing by and through Michael J. Whyte, Esq.; and the Court having reviewed its files, considered oral arguments from counsel, and otherwise being fully advised on the premises;

IT IS HEREBY ORDERED as follows:



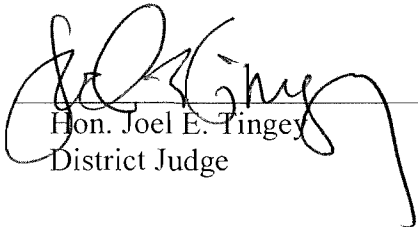
1. That Plaintiff's Motion to Compel is CONTINUED. If Plaintiff has further concerns or objections to the Defendants' responses, Plaintiff may reset this motion for hearing;

2. That Plaintiff's Motion to Shorten Time and Motion to Amend Complaint are GRANTED and the Amended Complaint shall be deemed filed as of August 12, 2009;

3. That Defendants' Motion to Continue is DENIED; and

4. That Plaintiff's Motion for Partial Summary Judgment is GRANTED IN PART, DENIED IN PART, AND MOOT IN PART. Plaintiff's motion is denied as to the request to evict Defendants from the sidewalk and curb area used for outdoor dining. Plaintiff's motion is granted and Defendants shall have fourteen (14) days from August 12, 2009 to remove themselves and all their property from the upstairs storage space and Space #16. Plaintiff's motion is moot insofar as Defendants have removed the cooler from the area known as the "pipeyard."

MADE AND ENTERED this 13 day of August, 2009.

By: 
Hon. Joel E. Tingey
District Judge

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 13 day of August, 2009, I caused a true and correct copy of the foregoing **ORDER** to be served, by placing the same in a sealed envelope and depositing in the United States Mail, postage prepaid, or hand delivery, facsimile transmission or overnight delivery, addressed to the following:

Michael J. Whyte, Esq.
THOMSEN STEPHENS LAW
OFFICES, PLLC
2635 Channing Way
Idaho Falls, ID 83404

- U. S. Mail
- Fax
- Overnight Delivery
- Hand Delivery

B. J. Driscoll, Esq.
SMITH, DRISCOLL &
ASSOCIATES, PLLC
P.O. Box 50731
Idaho Falls, ID 83405

- U. S. Mail
- Fax
- Overnight Delivery
- Hand Delivery



Clerk of the Court

BONNEVILLE COUNTY
IDAHO

IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF BONNEVILLE

9 AUG 18 12:38

THE WATKINS COMPANY, LLC,)
an Idaho limited liability)
company,)
)
Plaintiff,)
)
vs.)
)
MICHAEL STORMS and KATHY)
BURGGRAF,)
)
Defendants.)

ORDER AND NOTICE
SETTING JURY TRIAL
Case No. CV-08-7258

Pursuant to Rule 16 of the Idaho Rules of Civil Procedure,
the following pre-trial schedule shall govern all proceedings in
this case:

- I. **IT IS HEREBY ORDERED:**
- 1. A Pre-trial Conference is scheduled for January 26, 2010 at 8:45 a.m. Fallback Pre-trial setting is June 9, 2010 at 8:30 a.m.
- 2. Jury trial is scheduled for 10:00 a.m. on February 9, 2010. Fallback trial setting is June 22, 2010 at 10:00 a.m. Trial is anticipated to last 2-3 days.
- 3. Dispositive motions must be filed at least 60 days prior to trial.
- 4. Plaintiff(s) expert witness disclosure, including opinions and conclusions must be filed at least 100 days before trial. Defendant(s) expert witness disclosure including opinions and conclusions must be filed at least 80 days before trial.
- 5. All discovery shall be completed 45 days prior to trial.
- 6. The parties and their attorneys shall attend a mediation session before a qualified attorney mediator or district judge selected by the parties. Unless excused by Mediator, lead trial counsel, the parties and a representative of any insurer of a party shall attend the mediation with adequate settlement

authority. Mediation should be completed at least 90 days prior to trial.

II. IT IS FURTHER ORDERED that each attorney shall, no later than three (3) days prior to the pre-trial conference:

1. File a list of names of persons who may be called to testify.
2. File a descriptive list of all exhibits proposed to be offered into evidence
3. File a brief citing legal authorities upon which the party relies as to each issue of law to be litigated.
4. File proposed jury instructions. The parties need not submit IDJI2 instruction numbers 1.01 through 1.43. All instructions shall be prepared in accordance with I.R.C.P. 51(a).

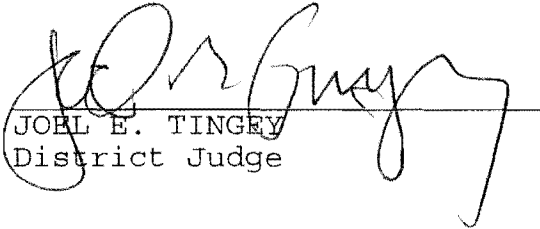
III. IT IS FURTHER ORDERED that each attorney shall no later than seven (7) days before trial:

1. File any objections to the jury instructions requested by an opponent specifying the instruction and the grounds for the objection.

IV. IT IS FURTHER ORDERED that:

1. Any exhibits or witnesses discovered after the last required disclosure shall immediately be disclosed to the court and opposing counsel by filing and service stating the date upon which the same was discovered.
2. No witnesses shall testify and no exhibits shall be admitted into evidence at trial other than those disclosed, listed and submitted to the clerk of the court in accordance with this order.
3. On the first day of trial deposit with the clerk of the court all exhibits to be introduced. Plaintiff shall pre-mark and staple exhibits in numerical sequence as outlined in Plaintiff's exhibit list and Defendant's exhibits shall be pre-marked and stapled in alphabetical sequence as outlined in Defendant's exhibit list. Pages of exhibits shall be stapled, with a sticker placed on the first page of the actual exhibit.
4. This order shall control the course of this action unless modified for good cause shown to prevent manifest injustice.
5. The Court may impose appropriate sanctions for violation of this order.

DATED this 18 day of August, 2009.


JOEL E. TINGEY
District Judge

CERTIFICATE OF SERVICE

I hereby certify that on the 18 day of August, 2009, I caused a true and correct copy of the foregoing document to be delivered to the following:

RONALD LONGMORE


Deputy Court Clerk

Bryan D. Smith
B. J. Driscoll
PO Box 50731
Idaho Falls, ID 83405

Michael J. Whyte
2635 Channing Way
Idaho Falls, ID 83404

2009 APR 22 10:18 AM
CLERK OF DISTRICT COURT
IDAHO FALLS, IDAHO

Michael J. Whyte, Esq., ISB #4645
THOMSEN STEPHENS LAW OFFICES, PLLC
2635 Channing Way
Idaho Falls ID 83404
Telephone (208)522-1230
Fax (208)522-1277

Attorney for Defendants

IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF BONNEVILLE

THE WATKINS COMPANY, LLC,)
an Idaho limited liability company,)
)
Plaintiff,)
)
v.)
)
MICHAEL STORMS and KATHY)
BURGGRAF,)
)
Defendants.)
_____)

Case No. CV-08-7258

DEFENDANTS' ANSWER TO
AMENDED COMPLAINT AND DEMAND
FOR JURY TRIAL

COME NOW defendants Michael Storms and Kathy Burggraf, by and through their attorney of record, and answer the amended complaint filed in this matter.

1. Amended complaint fails to state a claim upon which relief can be granted.
2. Defendants deny each and every allegation contained in the amended complaint unless specifically admitted herein.
3. Defendants admit the allegations contained in paragraphs 1, 2, 3, 4, 7 and 8 of the amended complaint.

4. Defendants deny the allegations contained in paragraphs 9, 11, 12, 15, 16, 18, 19, 20, 22, 23, 25, 26, 27, 28, 31, 32, 34, 35, 36, 38, 39, 40, 42, 44, 45, 46 and 48 of the amended complaint.

5. Answering paragraphs 10, 13, 17, 21, 24, 29, 33, 37, 41 and 43, no specific response is necessary as the claims contained in these allegations are merely reallegations.

6. Defendants are unaware of the allegations contained in paragraph 5 of the amended complaint, and therefore deny the same.

7. In answering paragraph 6 of the amended complaint, defendants admit that the language listed in paragraph 6 is contained in the lease executed between the parties. Defendants deny that plaintiff is entitled to any alleged damages pursuant to said language.

8. In answering paragraph 14 of the amended complaint, defendants admit that the lease contains language discussing the payment of future rent due if there is a breach of the lease. Defendants deny that defendants have taken any action or course of conduct which is a breach of this lease and entitles plaintiff to damages.

9. In answering paragraph 30 of the amended complaint, defendants admit that there were occasions during the lease when a cooler was located on the property. Defendants deny that the cooler gives rise to damages or additional compensation due to plaintiff.

FIRST AFFIRMATIVE DEFENSE

As a separate further answer and defense, defendants allege that plaintiff has failed to reasonably mitigate damages and that plaintiff may not recover for damages which could have been reasonably avoided.

SECOND AFFIRMATIVE DEFENSE

As a separate further answer and defense and without waiving any denial that plaintiff is entitled to damages, defendants allege that if plaintiff is entitled to any damages, all or a portion of plaintiff's cause of action against defendants is barred by the applicable statute of limitations.

THIRD AFFIRMATIVE DEFENSE

As a separate further answer and defense, defendants allege that plaintiff's cause of action is barred by the equitable doctrine of laches.

FOURTH AFFIRMATIVE DEFENSE

As a separate further answer and defense, defendants allege that plaintiff and defendants entered into a course of conduct throughout the history of the lease which is the subject of this lawsuit and said course of conduct altered and amended the written lease.

REQUEST FOR ATTORNEY FEES

Defendants allege that the services of Thomsen Stephens Law Offices have been engaged in the defense of plaintiff's amended complaint and that they are entitled to reasonable attorney fees from plaintiff pursuant to Idaho Code §§12-120 and/or 12-121, or any other statute pled by the plaintiff.

WHEREFORE, defendants pray the judgment, order, and decree of this court as follows:

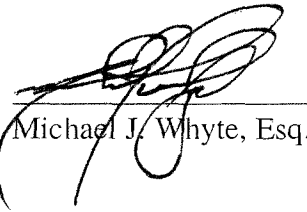
1. That plaintiff's amended complaint be dismissed with prejudice and plaintiff take nothing thereby.
2. For judgment against plaintiff for costs and disbursements incurred herein.
3. For judgment against plaintiff for attorney fees as set by this court pursuant to statute and court rule.

4. For such other and further relief as the court deems just and proper under the circumstances.

DATED this 26th day of August, 2009.

THOMSEN STEPHENS LAW OFFICES, PLLC

By:



Michael J. Whyte, Esq.

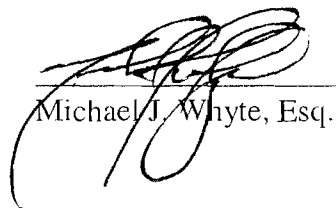
DEMAND FOR JURY TRIAL

Defendants demand trial by jury of not less than 12 persons as to all issues triable to a jury in this matter.

DATED this 26th day of August, 2009.

THOMSEN STEPHENS LAW OFFICES, PLLC

By:



Michael J. Whyte, Esq.

CERTIFICATE OF SERVICE

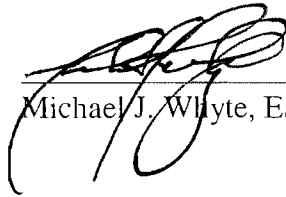
I hereby certify that I am a duly licensed attorney in the State of Idaho, resident of and with my office in Idaho Falls, Idaho; that on the 26th day of August, 2009, I caused a true and correct copy of the foregoing **DEFENDANTS' ANSWER TO AMENDED COMPLAINT AND DEMAND FOR JURY TRIAL** to be served upon the following persons at the addresses below their names either by depositing said document in the United States mail with the correct postage thereon or by hand delivering or by transmitting by facsimile as set forth below.

BRYAN D SMITH ESQ
B J DRISCOLL ESQ
PO BOX 50731
IDAHO FALLS ID 83405-0731

Mail
 Hand Delivery
 Facsimile

THOMSEN STEPHENS LAW OFFICES, PLLC

By:



Michael J. Whyte, Esq.

MJW:clm
6753\009 Amd Answer

IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF BONNEVILLE

THE WATKINS COMPANY, LLC,)
an Idaho limited liability)
company,)
)
Plaintiff,)
)
vs.)
)
MICHAEL STORMS and KATHY)
BURGGRAF,)
)
Defendants.)
)

MINUTE ENTRY
Case No. CV-08-7258

On the 4th day of November, 2009, Defendants' motion to amend answer and Plaintiff's motion to compel discovery came before the Honorable Joel E. Tingey, District Judge, in open court at Idaho Falls, Idaho.

Mr. Jack Fuller, Court Reporter, and Mrs. Marlene Southwick, Deputy Court Clerk, were present.

Mr. B. J. Driscoll appeared on behalf of the Plaintiff.

Mr. Michael Whyte appeared on behalf of the Defendants.

Mr. Driscoll presented Plaintiff's motion to compel discovery. Mr. Whyte presented argument in opposition to the motion.

The Court granted the motion to compel and ordered the records to be produced within 10 days. Mr. Driscoll will prepare a proposed order for the Court's signature.

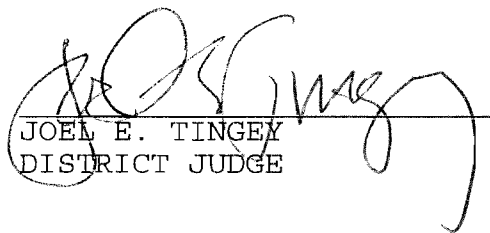
Mr. Whyte presented Defendants' motion to amend answer. Mr. Driscoll presented argument in opposition.

The Court will grant the motion. Mr. Whyte will prepare appropriate documents for the Court's signature.

The Court extended the discovery cutoff to January 9, 2010.

The parties are in process of setting up the mediation process.

Court was thus adjourned.


JOEL E. TINGEY
DISTRICT JUDGE

CERTIFICATE OF SERVICE

I hereby certify that on the 4 day of November, 2009, I caused a true and correct copy of the foregoing document to be delivered to the following:

RONALD LONGMORE


Deputy Court Clerk

Bryan D. Smith
B. J. Driscoll
PO Box 50731
Idaho Falls, ID 83405

Michael J. Whyte
2635 Channing Way
Idaho Falls, ID 83404

Bryan D. Smith, Esq. – ISB #4411
B. J. Driscoll, Esq. – ISB # 7010
SMITH, DRISCOLL & ASSOCIATES, PLLC
414 Shoup Ave.
P.O. Box 50731
Idaho Falls, Idaho 83405
Telephone: (208) 524-0731
Facsimile: (208) 529-4166

BONNEVILLE COUNTY
CLERK
9 NOV -6 P1 59

Attorneys for Plaintiff

IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT OF
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF BONNEVILLE

THE WATKINS COMPANY, LLC,
an Idaho limited liability company,

Plaintiff,

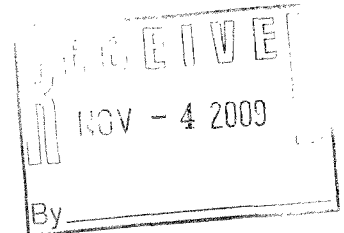
v.

MICHAEL STORMS and KATHY
BURGGRAF,

Defendants.

Case No. CV-08-7258

ORDER

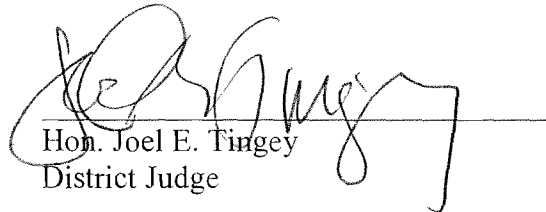


THIS MATTER having come on regularly for hearing before the Honorable Joel E. Tingey, District Judge, on November 4, 2009, upon Plaintiff's Motion to Compel, with plaintiff appearing by and through B. J. Driscoll Esq., of the firm Smith, Driscoll & Associates, PLLC, and defendants appearing by and through Michael J. Whyte, Esq.; and the Court having reviewed its files, considered oral arguments from counsel, and otherwise being fully advised on the premises;

IT IS HEREBY ORDERED that the plaintiff's motion to compel is HEREBY GRANTED and the defendants shall produce documentation showing the gross monthly sales for August, September, and October 2009 from the defendants' business operating

on the lease premises to the plaintiff by November 11, 2009. Defendants shall have an ongoing duty to produce this sales information to the plaintiff for future months.

MADE AND ENTERED this 6 day of November, 2009.


Hon. Joel E. Tingey
District Judge

CERTIFICATE OF SERVICE

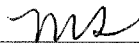
I HEREBY CERTIFY that on this 6 day of November, 2009, I caused a true and correct copy of the foregoing **ORDER** to be served, by placing the same in a sealed envelope and depositing in the United States Mail, postage prepaid, or hand delivery, facsimile transmission or overnight delivery, addressed to the following:

Michael J. Whyte, Esq.
THOMSEN STEPHENS LAW
OFFICES, PLLC
2635 Channing Way
Idaho Falls, ID 83404

- U. S. Mail
- Fax
- Overnight Delivery
- Hand Delivery

B. J. Driscoll, Esq.
SMITH, DRISCOLL &
ASSOCIATES, PLLC
P.O. Box 50731
Idaho Falls, ID 83405

- U. S. Mail
- Fax
- Overnight Delivery
- Hand Delivery



Clerk of the Court

BONNEVILLE COUNTY
IDAHO
9 NOV 13 P3:39

Michael J. Whyte, Esq., ISB #4645
THOMSEN STEPHENS LAW OFFICES, PLLC
2635 Channing Way
Idaho Falls ID 83404
Telephone (208)522-1230
Fax (208)522-1277

Attorney for Defendants

IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF BONNEVILLE

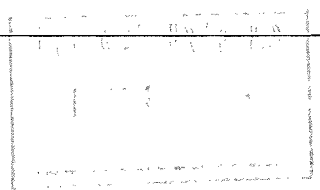
THE WATKINS COMPANY, LLC,)
an Idaho limited liability company,)
)
Plaintiff,)
)
v.)
)
MICHAEL STORMS and KATHY)
BURGGRAF,)
)
Defendants.)
_____)

Case No. CV-08-7258

ORDER ALLOWING AMENDED
ANSWER

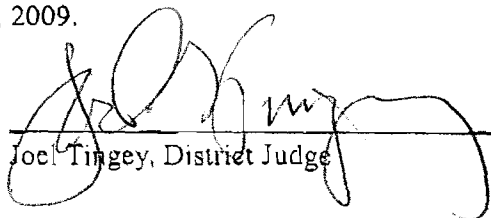
This matter came before the court on defendants' motion to amend their answer to the amended complaint. Present at the hearing representing plaintiff was its attorney, B. J. Driscoll and representing defendants was their attorney, Michael J. Whyte. The court having read the petition, proposed amended answer and having heard argument, IT IS ORDERED AS FOLLOWS:

1. The court hereby grants defendants' motion to file an amended answer in th is matter.

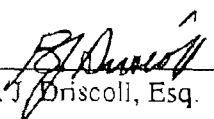


2. With the amendment of this answer the court extends the current discovery cutoff from December 21, 2009 to January 9, 2010. If the parties need additional time to complete discovery, the court will allow additional time if the parties can stipulate to such.

DATED this 13 day of November, 2009.


Joel Tingey, District Judge

APPROVED AS TO FORM
AND CONTENT:


B.J. Driscoll, Esq.

CLERK'S CERTIFICATE OF MAILING

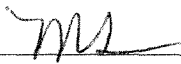
I certify that I am the duly elected and qualified Clerk of the District Court of the Seventh Judicial District of the State of Idaho, in and for the County of Bonneville; that I mailed [or delivered by courthouse box] a copy of the foregoing **ORDER ALLOWING AMENDED ANSWER** to the following attorneys this 13 day of November, 2009.

BRYAN D SMITH ESQ
B J DRISCOLL ESQ
SMITH DRISCOLL & ASSOCIATES
COURTHOUSE BOX

MICHAEL J WHYTE ESQ
THOMSEN STEPHENS LAW OFFICES, PLLC
COURTHOUSE BOX

Clerk

By: _____


Deputy Clerk

MJW:clm
6753\PLEADINGS\013 Ord Allowing Amd Answer

9 NOV 13 P3:39

Michael J. Whyte, Esq., ISB #4645
THOMSEN STEPHENS LAW OFFICES, PLLC
2635 Channing Way
Idaho Falls ID 83404
Telephone (208)522-1230
Fax (208)522-1277

Attorney for Defendants

IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF BONNEVILLE

THE WATKINS COMPANY, LLC,)
an Idaho limited liability company,)
)
Plaintiff,)
)
v.)
)
MICHAEL STORMS and KATHY)
BURGGRAF,)
)
Defendants.)
_____)

Case No. CV-08-7258

DEFENDANTS' AMENDED ANSWER
TO PLAINTIFF'S AMENDED COMPLAINT

COME NOW defendants Michael Storms and Kathy Burggraf, by and through their attorney of record, and answer the amended complaint filed in this matter.

1. Amended complaint fails to state a claim upon which relief can be granted.
2. Defendants deny each and every allegation contained in the amended complaint unless specifically admitted herein.
3. Defendants admit the allegations contained in paragraphs 1, 2, 3, 4, 7 and 8 of the amended complaint.

4. Defendants deny the allegations contained in paragraphs 9, 11, 12, 15, 16, 18, 19, 20, 22, 23, 25, 26, 27, 28, 31, 32, 34, 35, 36, 38, 39, 40, 42, 44, 45, 46 and 48 of the amended complaint.

5. Answering paragraphs 10, 13, 17, 21, 24, 29, 33, 37, 41 and 43, no specific response is necessary as the claims contained in these allegations are merely reallegations.

6. Defendants are unaware of the allegations contained in paragraph 5 of the amended complaint, and therefore deny the same.

7. In answering paragraph 6 of the amended complaint, defendants admit that the language listed in paragraph 6 is contained in the lease executed between the parties. Defendants deny that plaintiff is entitled to any alleged damages pursuant to said language.

8. In answering paragraph 14 of the amended complaint, defendants admit that the lease contains language discussing the payment of future rent due if there is a breach of the lease. Defendants deny that defendants have taken any action or course of conduct which is a breach of this lease and entitles plaintiff to damages.

9. In answering paragraph 30 of the amended complaint, defendants admit that there were occasions during the lease when a cooler was located on the property. Defendants deny that the cooler gives rise to damages or additional compensation due to plaintiff.

FIRST AFFIRMATIVE DEFENSE

As a separate further answer and defense, defendants allege that plaintiff has failed to reasonably mitigate damages and that plaintiff may not recover for damages which could have been reasonably avoided.

SECOND AFFIRMATIVE DEFENSE

As a separate further answer and defense and without waiving any denial that plaintiff is entitled to damages, defendants allege that if plaintiff is entitled to any damages, all or a portion of plaintiff's cause of action against defendants is barred by the applicable statute of limitations.

THIRD AFFIRMATIVE DEFENSE

As a separate further answer and defense, defendants allege that plaintiff's cause of action is barred by the equitable doctrine of laches.

FOURTH AFFIRMATIVE DEFENSE

As a separate further answer and defense, defendants allege that plaintiff and defendants entered into a course of conduct throughout the history of the lease which is the subject of this lawsuit and said course of conduct altered and amended the written lease.

FIFTH AFFIRMATIVE DEFENSE

As a separate further answer and defense, defendants allege that plaintiff's cause of action is barred by accord and satisfaction.

SIXTH AFFIRMATIVE DEFENSE

As a separate further answer and defense, defendants allege that plaintiff's cause of action is barred by *res judicata*.

REQUEST FOR ATTORNEY FEES

Defendants allege that the services of Thomsen Stephens Law Offices have been engaged in the defense of plaintiff's amended complaint and that they are entitled to reasonable attorney fees from plaintiff pursuant to Idaho Code §§12-120 and/or 12-121, or any other statute pled by the plaintiff.

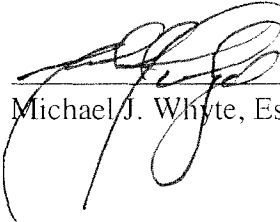
WHEREFORE, defendants pray the judgment, order, and decree of this court as follows:

1. That plaintiff's amended complaint be dismissed with prejudice and plaintiff take nothing thereby.
2. For judgment against plaintiff for costs and disbursements incurred herein.
3. For judgment against plaintiff for attorney fees as set by this court pursuant to statute and court rule.
4. For such other and further relief as the court deems just and proper under the circumstances.

DATED this 10 day of November, 2009.

THOMSEN STEPHENS LAW OFFICES, PLLC

By:



Michael J. Whyte, Esq.

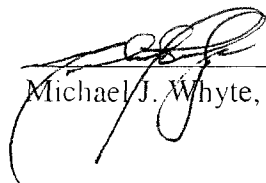
DEMAND FOR JURY TRIAL

Defendants demand trial by jury of not less than 12 persons as to all issues triable to a jury in this matter.

DATED this 10 day of November, 2009.

THOMSEN STEPHENS LAW OFFICES, PLLC

By:



Michael J. Whyte, Esq.

CERTIFICATE OF SERVICE

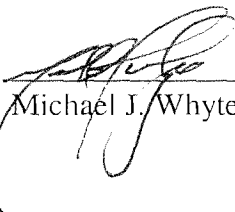
I hereby certify that I am a duly licensed attorney in the State of Idaho, resident of and with my office in Idaho Falls, Idaho; that on the 12 day of November, 2009, I caused a true and correct copy of the foregoing **DEFENDANTS' AMENDED ANSWER TO PLAINTIFF'S AMENDED COMPLAINT** to be served upon the following persons at the addresses below their names either by depositing said document in the United States mail with the correct postage thereon or by hand delivering or by transmitting by facsimile as set forth below.

BRYAN D SMITH ESQ
B J DRISCOLL ESQ
PO BOX 50731
IDAHO FALLS ID 83405-0731

Mail
 Hand Delivery
 Facsimile

THOMSEN STEPHENS LAW OFFICES, PLLC

By:



Michael J. Whyte, Esq.

MJW:clm
6753\011 Amd Ans to Amd Complaint

2009 NOV 18 PM 3: 38

Michael J. Whyte, Esq., ISB #4645
THOMSEN STEPHENS LAW OFFICES, PLLC
2635 Channing Way
Idaho Falls ID 83404
Telephone (208)522-1230
Fax (208)522-1277

Attorney for Defendants

IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF BONNEVILLE

THE WATKINS COMPANY, LLC,)
an Idaho limited liability company,)
)
Plaintiff,)
)
v.)
)
MICHAEL STORMS and KATHY)
BURGGRAF,)
)
Defendants.)
_____)

Case No. CV-08-7258

DEFENDANTS' AMENDED ANSWER
TO PLAINTIFF'S AMENDED COMPLAINT

COME NOW defendants Michael Storms and Kathy Burggraf, by and through their attorney of record, and answer the amended complaint filed in this matter.

1. Amended complaint fails to state a claim upon which relief can be granted.
2. Defendants deny each and every allegation contained in the amended complaint unless specifically admitted herein.
3. Defendants admit the allegations contained in paragraphs 1, 2, 3, 4, 7 and 8 of the amended complaint.

4. Defendants deny the allegations contained in paragraphs 9, 11, 12, 15, 16, 18, 19, 20, 22, 23, 25, 26, 27, 28, 31, 32, 34, 35, 36, 38, 39, 40, 42, 44, 45, 46 and 48 of the amended complaint.

5. Answering paragraphs 10, 13, 17, 21, 24, 29, 33, 37, 41 and 43, no specific response is necessary as the claims contained in these allegations are merely reallegations.

6. Defendants are unaware of the allegations contained in paragraph 5 of the amended complaint, and therefore deny the same.

7. In answering paragraph 6 of the amended complaint, defendants admit that the language listed in paragraph 6 is contained in the lease executed between the parties. Defendants deny that plaintiff is entitled to any alleged damages pursuant to said language.

8. In answering paragraph 14 of the amended complaint, defendants admit that the lease contains language discussing the payment of future rent due if there is a breach of the lease. Defendants deny that defendants have taken any action or course of conduct which is a breach of this lease and entitles plaintiff to damages.

9. In answering paragraph 30 of the amended complaint, defendants admit that there were occasions during the lease when a cooler was located on the property. Defendants deny that the cooler gives rise to damages or additional compensation due to plaintiff.

FIRST AFFIRMATIVE DEFENSE

As a separate further answer and defense, defendants allege that plaintiff has failed to reasonably mitigate damages and that plaintiff may not recover for damages which could have been reasonably avoided.

SECOND AFFIRMATIVE DEFENSE

As a separate further answer and defense and without waiving any denial that plaintiff is entitled to damages, defendants allege that if plaintiff is entitled to any damages, all or a portion of plaintiff's cause of action against defendants is barred by the applicable statute of limitations.

THIRD AFFIRMATIVE DEFENSE

As a separate further answer and defense, defendants allege that plaintiff's cause of action is barred by the equitable doctrine of laches.

FOURTH AFFIRMATIVE DEFENSE

As a separate further answer and defense, defendants allege that plaintiff and defendants entered into a course of conduct throughout the history of the lease which is the subject of this lawsuit and said course of conduct altered and amended the written lease.

FIFTH AFFIRMATIVE DEFENSE

As a separate further answer and defense, defendants allege that plaintiff's cause of action is barred by accord and satisfaction.

SIXTH AFFIRMATIVE DEFENSE

As a separate further answer and defense, defendants allege that plaintiff's cause of action is barred by *res judicata*.

REQUEST FOR ATTORNEY FEES

Defendants allege that the services of Thomsen Stephens Law Offices have been engaged in the defense of plaintiff's amended complaint and that they are entitled to reasonable attorney fees from plaintiff pursuant to Idaho Code §§12-120 and/or 12-121, or any other statute pled by the plaintiff.

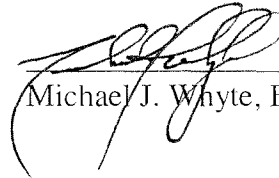
WHEREFORE, defendants pray the judgment, order, and decree of this court as follows:

1. That plaintiff's amended complaint be dismissed with prejudice and plaintiff take nothing thereby.
2. For judgment against plaintiff for costs and disbursements incurred herein.
3. For judgment against plaintiff for attorney fees as set by this court pursuant to statute and court rule.
4. For such other and further relief as the court deems just and proper under the circumstances.

DATED this 17th day of November, 2009.

THOMSEN STEPHENS LAW OFFICES, PLLC

By:


Michael J. Whyte, Esq.

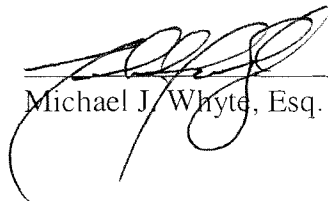
DEMAND FOR JURY TRIAL

Defendants demand trial by jury of not less than 12 persons as to all issues triable to a jury in this matter.

DATED this 17th day of November, 2009.

THOMSEN STEPHENS LAW OFFICES, PLLC

By:


Michael J. Whyte, Esq.

CERTIFICATE OF SERVICE

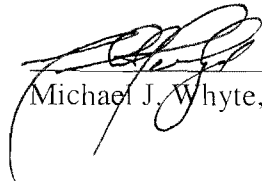
I hereby certify that I am a duly licensed attorney in the State of Idaho, resident of and with my office in Idaho Falls, Idaho; that on the 17th day of November, 2009, I caused a true and correct copy of the foregoing **DEFENDANTS' AMENDED ANSWER TO PLAINTIFF'S AMENDED COMPLAINT** to be served upon the following persons at the addresses below their names either by depositing said document in the United States mail with the correct postage thereon or by hand delivering or by transmitting by facsimile as set forth below.

BRYAN D SMITH ESQ
B J DRISCOLL ESQ
PO BOX 50731
IDAHO FALLS ID 83405-0731

Mail
 Hand Delivery
 Facsimile

THOMSEN STEPHENS LAW OFFICES, PLLC

By:



Michael J. Whyte, Esq.

MJW:clm
6753011 Amd Ans to Amd Complaint

Bryan D. Smith, Esq. – ISB #4411
B. J. Driscoll, Esq. – ISB # 7010
SMITH, DRISCOLL & ASSOCIATES, PLLC
414 Shoup Ave.
P.O. Box 50731
Idaho Falls, Idaho 83405
Telephone: (208) 524-0731
Facsimile: (208) 529-4166

2009 DEC -8 PM 4: 35
DISTRICT COURT
MAGISTRATE DIVISION
BONNEVILLE COUNTY
IDAHO

Attorneys for Plaintiff

IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT OF
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF BONNEVILLE

THE WATKINS COMPANY, LLC,
an Idaho limited liability company,

Plaintiff,

v.

MICHAEL STORMS and KATHY
BURGGRAF,

Defendants.

Case No. CV-08-7258

**BRIEF IN SUPPORT OF MOTION
FOR PARTIAL SUMMARY
JUDGMENT**

I. INTRODUCTION.

The plaintiff, The Watkins Company, LLC (“Watkins”), files this brief in support of its motion for partial summary judgment against the defendants, Michael Storms (“Storms”) and Kathy Burggraf (“Burggraf”) (collectively, “Defendants”). Because there is no genuine issue of material fact, this court should grant partial summary judgment to Watkins as set forth in Watkins’ motion.

II. SUMMARY JUDGMENT STANDARD.

In *State v. Shama Resources Ltd. Partnership*, 127 Idaho 267, 270 (1995), the Idaho Supreme Court explained when the court should grant summary judgment:

Summary judgment is proper “if the pleadings, depositions, admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.” I.R.C.P. 56(c). The party moving for summary judgment bears the burden of establishing the absence of a genuine issue of material fact. *Tingley v. Harrison*, 125 Idaho 86, 89, 867 P.2d 960, 963 (1994); *Harris v. Department of Health & Welfare*, 123 Idaho 295, 298, 847 P.2d 1156, 1159 (1992). Once the moving party establishes the absence of a genuine issue, the burden shifts to the nonmoving party to make a showing of the existence of a genuine issue of material fact on the elements challenged by the moving party. *Thomson v. Idaho Ins. Agency, Inc.*, 126 Idaho 527, 530-31, 887 P.2d 1034, 1037-38 (1994). I.R.C.P. 56(c) requires the entry of summary judgment against a nonmoving party who “fails to make a showing sufficient to establish the existence of an element essential to that party’s case and in which that party will bear the burden of proof at trial.” *Olsen v. J. A. Freeman*, 117 Idaho 706, 720-21, 791 P.2d 1285, 1299-1300 (1990) (citing *Celotex v. Catrett*, 477 U.S. 317, 322-23, 106 S.Ct. 2548, 2552, 91 L.Ed.2d 265 (1986)). See *Hecla Mining Co. v. Star-Morning Mining Co.*, 122 Idaho 778, 784, 839 P.2d 1192, 1198 (1992).

III. STATEMENT OF UNDISPUTED MATERIAL FACTS.

The parties signed a “Commercial Lease and Deposit Receipt” (“Lease”) dated July 31, 1996.¹ The Lease includes Addendum A, Addendum B, Exhibit C, and Addendum D.² The Lease identifies Watkins as the landlord and Storms and Burggraf as tenants of the property identified in Exhibit “C” (“Property”), which consists of a portion of a strip mall.³ The Lease provides that “[n]o failure of Lessor to enforce any term hereof shall be deemed to be a waiver.”⁴ The Lease further states that the rent shall be payable as follows in italics:

. . . . The rent for each year is as follows:

The first seven months (April 1, 1997 through October 31, 1997) will be rent free. Beginning November 1, 1997 Lessee will begin making monthly rent payments as follows:

¹ See Exhibit “A” to the Affidavit of Dane Watkins dated July 13, 2009 already on file with the court.

² See Exhibit “A” to the Affidavit of Dane Watkins dated July 13, 2009 already on file with the court.

³ See Exhibit “A” to the Affidavit of Dane Watkins dated July 13, 2009 already on file with the court.

⁴ See p. 2, paragraph 27 of Exhibit “A” to the Affidavit of Dane Watkins dated July 13, 2009 already on file with the court.

*First ten years: November 1, 1997 through October 31, 2007:
\$3,750/mo*

*Second ten years: November 1, 2007 through October 31, 2017:
\$4,375/mo*

*Third ten years: November 1, 2017 through October 31, 2020:
\$5,000/mo*

*Lessor will be entitled to **5% of the gross sales of the entire operation** (on premises) for the previous month **or the base rent** indicated above, **whichever is greater**. By the 10th of each month, Lessee will provide to Lessor the monthly sales figures for the previous month – if a percentage rent is due, Lessee will pay the the [sic] Lessor the difference owed by the 15th of that month. . . .*

Landlord will be entitled to a \$250 food and drink credit per month to be used at his discretion; i.e., gift certificates or food and drink. This credit will be cumulative.⁵

Addendum D to the Lease relates to the foregoing language from Addendum A and provides in pertinent part as follows in italics:

5. During the approximately eight month period while the monthly rent is being covered by the prepaid rent, the rent shall be \$3,750 per month and the 5% of the gross alternative rent shall not apply, regardless of Tenant's gross incomes.

6. Landlord is entitled to a \$250 per month food and drink credit, to be used at his discretion, i.e., gift certificates, food, or drink. . . .⁶

Now that Watkins has received the rest of Defendants' gross monthly sales reports,⁷ the unpaid alternative rent is \$28,903.39.⁸ Defendants have paid the base rent under the

⁵ See Addendum A to Exhibit "A" of the Affidavit of Dane Watkins dated July 13, 2009 already on file with the court. (Bold emphasis added.)

⁶ See Addendum D to Exhibit "A" of the Affidavit of Dane Watkins dated July 13, 2009 already on file with the court.

⁷ See Order dated November 6, 2009, granting Watkins' Motion to Compel. The defendants complied with the Order, but have not yet provided Watkins with the November 2009 report.

⁸ See the Affidavit of Dane Watkins filed concurrently herewith.

Lease, but have not paid the alternative rent.⁹ Further, Defendants have not provided any food and drink credit to Watkins since December 2008.¹⁰

IV. THE COURT SHOULD GRANT SUMMARY JUDGMENT THAT DEFENDANTS OWE WATKINS \$28,903.39 IN UNPAID RENT.

The Lease expressly and unambiguously provides that Defendants shall pay the greater of the “base rent” or “5% of the gross sales of the entire operation.”¹¹ After receiving the rest of Defendants’ gross monthly sales reports, the undisputed facts show that Defendants owe an additional \$28,903.39 above the base rent already paid.¹² The court should grant Watkins partial summary judgment in this regard. Damages may be ongoing.

V. THE COURT SHOULD GRANT SUMMARY JUDGMENT THAT DEFENDANTS OWE WATKINS \$3,000.00 IN FOOD AND DRINK CREDITS.

The Lease expressly and unambiguously provides that Defendants shall provide Watkins a “\$250 per month food and drink credit.”¹³ Defendants have not provided Watkins with the monthly food and drink credit since December 2008. Thus, the court should grant Watkins partial summary judgment of \$250 per month for 12 months for a total of \$3,000. Damages may be ongoing.

VI. CONCLUSION.

The Lease expressly provides that Defendants will pay the greater of the base rent or 5% of the gross sales of the business operated on the premises, but they have failed to do so. There is no issue of fact that Defendants are liable for \$28,903.39 in unpaid rent due under the Lease. Likewise, the Lease expressly provides that Defendants will provide Watkins

⁹ See the Affidavit of Dane Watkins filed concurrently herewith.

¹⁰ See the Affidavit of Dane Watkins filed concurrently herewith.

¹¹ See Addendum A to Exhibit “A” of the Affidavit of Dane Watkins dated July 13, 2009 already on file with the court. (Emphasis added.)

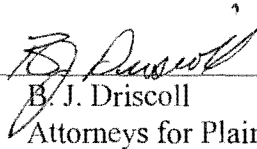
¹² See the Affidavit of Dane Watkins filed concurrently herewith.

¹³ See Addendum D to Exhibit “A” of the Affidavit of Dane Watkins dated July 13, 2009 already on file with the court.

with a \$250 monthly food and drink credit. There is no issue of fact that Defendants are liable for \$3,000 in unpaid food and drink credit.

DATED this 7 day of December, 2009.

SMITH, DRISCOLL & ASSOCIATES PLLC

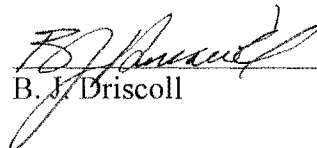
By  _____
B. J. Driscoll
Attorneys for Plaintiff

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 7 day of December, 2009, I caused a true and correct copy of the foregoing **BRIEF IN SUPPORT OF MOTION FOR PARTIAL SUMMARY JUDGMENT** to be served, by placing the same in a sealed envelope and depositing in the United States Mail, postage prepaid, or hand delivery, facsimile transmission or overnight delivery, addressed to the following:

Michael J. Whyte, Esq.
THOMSEN STEPHENS LAW
OFFICES, PLLC
2635 Channing Way
Idaho Falls, ID 83404

U. S. Mail
 Fax
 Overnight Delivery
 Hand Delivery

 _____
B. J. Driscoll

BONNEVILLE COUNTY
IDAHO

2009 DEC 10 PM 4:22

Michael J. Whyte, Esq., ISB #4645
THOMSEN STEPHENS LAW OFFICES, PLLC
2635 Channing Way
Idaho Falls ID 83404
Telephone (208)522-1230
Fax (208)522-1277

Attorney for Defendants

IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF BONNEVILLE

THE WATKINS COMPANY, LLC,)
an Idaho limited liability company,)
)
Plaintiff,)
)
v.)
)
MICHAEL STORMS and KATHY)
BURGGRAF,)
)
Defendants.)
_____)

Case No. CV-08-7258

MEMORANDUM IN SUPPORT
OF MOTION FOR PARTIAL
SUMMARY JUDGMENT

COME NOW defendants, by and through their attorney of record, and file this Memorandum
in Support of their Motion for Partial Summary Judgment.

UNDISPUTED FACTS

1. On July 31, 1996, the parties in this matter entered into a long-term lease of property
located in Idaho Falls, Bonneville County, Idaho (hereinafter referred to as The Brownstone
Restaurant).

2. This long-term lease included a document titled “Commercial Lease and Deposit Receipt” as well as Addenda A, B, C and D. (See Michael Whyte affidavit and previous pleadings from parties).

3. The original lease term was for 30 years with an option to renew the lease for an additional 10 years.

4. The language of the main commercial lease and all the addenda, are considered part of the complete lease and read as one complete document. Addendum A specifically outlines the monthly lease payments due from defendants. Contained in Addendum A is a clause that provide that additional rent could be added to the monthly base rent if gross sale exceed a particular amount. While it is disputed for purposes of the answer and general complaint that plaintiff is entitled to any additional compensation because of this clause, for purposes of this summary judgment motion, the interpretation of Addendum A is irrelevant.

5. Addendum A further contains language that the plaintiff is entitle to a \$250.00 food and drink credit per month.

6. Addendum B outlines the maintenance responsibilities for plaintiff and defendants. It further contains language that the defendants have permission to use an outside deck area.

7. Prior to this lawsuit beginning, there were extensive problems with the roof over The Brownstone and the adjacent buildings. Repairs on the roof occurred prior to the commencement of this lawsuit. (See complaint).

8. On or about June 12, 2008, plaintiff’s attorneys forwarded to defendants’ prior attorney a list of claimed breaches of the lease agreement and a demand for payment of claimed damages. (See Michael Storms Affidavit and Michael Whyte Affidavit).

9. On or about July 10, 2008, plaintiff, or someone on plaintiff's behalf, delivered to defendant Storms a document titled "Three Day Notice to Pay Rent or Quit the Premises". Said document alleged that defendant Storms was in default of the rent in the amount of \$17,900.00. Said Three-day Notice to Pay Rent or Quit the Premises further stated, "If you pay the above amount in full within three days from the date of delivery of this notice, you may remain in possession of the premises and in compliance with the lease agreement." (See Michael Storms Affidavit; Michael Whyte Affidavit; Request for Admissions and plaintiff's Responses to Defendants' Amended First Request for Admissions of Fact and Supplementary Interrogatory).

10. On July 11, 2008, defendant Storms delivered a check to plaintiff in the amount of \$17,900.00. (See Michael Whyte Affidavit; Michael Storms Affidavit and Responses to Defendants' Amended First Request for Admissions of Fact and Supplementary Interrogatory).

11. On or about September 12, 2008, plaintiff, or someone on plaintiff's behalf delivered to defendants a document titled "Three-Day Notice to Pay Rent or Quit the Premises". Said document claimed that defendants were in default under the lease agreement in the amount of \$6,219.00. Said document further stated, "If you pay the above amount in full within three days from the date of delivery of this notice, you may remain in possession of the premises and in compliance with the lease agreement." (See Michael Whyte Affidavit; Michael Storms Affidavit and Responses to Defendants' Amended First Request for Admissions of Fact and Supplementary Interrogatory).

12. Upon receiving the September 12, 2008, "Three-Day Notice to Pay Rent or Quit the Premises" defendants, through their attorney requested more information regarding the basis for the amount claimed (See Michael Whyte Affidavit and Michael Storms Affidavit).

13. Defendant sent a list of particular months and claimed amounts due and owing for those months. (See Michael Whyte Affidavit).

14. Upon receipt of plaintiff's list, defendant paid the amount requested and it was accepted by plaintiff. (See Michael Whyte Affidavit; and Request for Admissions).

15. The original complaint in this matter was filed November 19, 2008. In said complaint plaintiff lists numerous allegations, all of which relate to claims that defendants failed to pay amounts due under the lease agreement. An amended complaint was filed which contained the same claims. These claims include the following:

- a. Failure to pay rent, late fees and interest dating back to the start of the lease;
- b. Failure to pay for roof repairs incurred prior to filing the complaint;
- c. Failure to pay for use of the upstairs storage unit;
- d. Failure to pay for storage of a cooler from June 2005 through July 2009;
- e. Failure to pay for "space #16" from October 2006 through August 2009.
- f. Failure to pay for use of the outdoor sidewalk area beginning in 2002; and
- g. Failure to pay food and drink gift cards from August 2008.

SUMMARY JUDGMENT STANDARD

Rule 56(c) of the Idaho Rules of Civil Procedure allows that summary judgment "shall be 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." *Smith v. Meridian Joint School Dist. No. 2*, 128 Idaho 714, 718, 918 P.2d 583, 587 (1996) (quoting I.R.C.P. 56(c)); *see also Idaho Building Contractors Association v. City of Coeur d'Alene*, 126 Idaho 740, 890 P.2d 326 (1995); *Avila v. Wahlquist*, 126 Idaho 745,

890 P.2d 331 (1995). In making this determination, a Court should liberally construe the record in favor of the party opposing the motion and draw all reasonable inferences and conclusions in that party's favor. *Smith*, 128 Idaho at 718, 918 P.2d at 587 (citing *Friel v. Boise City Hous. Auth.*, 126 Idaho 484, 485, 887 P.2d 29, 30 (1994)). If reasonable persons could reach differing conclusions or draw conflicting inferences from the evidence, summary judgment must be denied. *Id.* (citing *Harris v. Department of Health & Welfare*, 123 Idaho 295, 298, 847 P.2d 1156, 1159 (1992)). However, if the evidence reveals no disputed issues of material fact, then summary judgment should be granted. *Id.*, 128 Idaho at 718-719, 918 P.2d at 587-88 (citing *Loomis v. City of Hailey*, 119 Idaho 434, 437, 807 P.2d 1272 (1991)).

The burden of establishing the absence of a genuine issue of material fact rests at all times with the party moving for summary judgment. *Id.*, 128 Idaho at 719, 918 P.2d at 588 (citing *Tingley v. Harrison*, 125 Idaho 86, 89, 867 P.2d 960, 963 (1994)). In order to meet its burden, the moving party must challenge in its motion and establish through evidence the absence of any genuine issue of material fact on an element of the nonmoving party's case. *Id.* (citing *Thomson v. Idaho Ins. Agency, Inc.*, 126 Idaho 527, 530, 887 P.2d 1034, 1037 (1994)). If the moving party fails to challenge an element or fails to present evidence establishing the absence of a genuine issue of material fact on that element, the burden does not shift to the nonmoving party, and the nonmoving party is not required to respond with supporting evidence. *Id.* (citing *Thomson*, 126 Idaho at 530, 887 P.2d at 1038)). However, if the moving party challenges an element of the nonmoving party's case on the basis that no genuine issue of material fact exists, the burden then shifts to the nonmoving party to come forward with sufficient evidence to create a genuine issue of fact. *Id.* (citing *Tingley*, 125 Idaho at 90, 867 P.2d at 964). Summary judgment is properly granted in favor

of the moving party, when the nonmoving party fails to establish the existence of an element essential to that party's case upon which that party bears the burden of proof at trial. *Id.* (citing *Thomson*, 126 Idaho at 530-31, 887 P.2d at 1037-38; *Badell v. Beeks*, 115 Idaho 101, 102, 765 P.2d 126 (1988)). The party opposing the summary judgment motion "may not rest upon the mere allegations or denials of that party's pleadings, but the party's response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial." *Id.* (quoting Idaho R. Civ. P. 56(e)). The nonmoving party's case must be anchored in something more than speculation, and a mere scintilla of evidence is not enough to create a genuine issue of fact. *Tuttle v. Sudenga Industries, Inc.*, 125 Idaho 145, 868 P.2d 473 (1994) (plaintiff who produces mere scintilla of evidence, or otherwise raises only slight doubt as to facts, will not withstand summary judgment); *Nelson v. Steer*, 118 Idaho 409, 797 P.2d 117 (1990). If the nonmoving party does not come forward as provided in the rule, then summary judgment should be entered against that party. *State v. Shama Resources Ltd. Partnership*, 127 Idaho 267, 270, 899 P.2d 977, 980 (1995).

ARGUMENT

Defendants Should be Granted a Summary Judgment with Respect to Any Amounts Plaintiff Claimed Due and Owing Prior to November 19, 2003

As indicated in the undisputed facts, the parties entered into a long-term lease beginning July 1996. Plaintiff's complaint and amended complaint makes several allegations that defendants owe plaintiff additional amounts over and above what has already been paid under this lease. Specifically, plaintiff makes a claim that defendant owes plaintiff additional compensation based on defendant's sales proceeds; and additional amounts are owing for the using a patio/deck area located immediately in front of the Brownstone entrance. At least a portion of both of these claims arose

prior to November 19, 2003. Regarding plaintiff's claim that defendant owes additional funds each month based on defendant's sales proceeds, plaintiff's complaint claims amounts owing dating back to the beginning of the contract (See complaint). With respect to the claim that additional amounts are owed for use of the outdoor area, plaintiff's complaint references defendants' use of this area beginning in 2002. (See complaint). It is reasonable to presume from the complaint language that plaintiff is seeking compensation for the use of this area from 2002 forward. As indicated in the factual statements, defendants have disputed whether any additional amounts are owed under the parties' lease. However, for purposes of this partial summary judgment motion, and treating the facts in a light most favorable to the plaintiff, even if some additional compensation is due under the lease, plaintiff is precluded from seeking and being awarded any damages that would have accrued prior to November 19, 2003. Idaho Code §5-216 states that actions arising under a contract, such as the lease agreement in this action, must be brought within five years. Plaintiff is claiming damages that may have arisen longer than five years before the filing of the complaint. Reviewing all facts in a light most favorable to plaintiff, defendants are still entitled to a partial summary judgement on plaintiff's claims seeking additional compensation or damages under the lease which arose, or would have arisen, prior to November 19, 2003.

Defendants are Entitled to Partial Summary Judgment on Any Amounts Due and Owing Prior to September 12, 2008

Prior to plaintiff filing this current lawsuit, on two separate occasions, plaintiff sent to defendants a document titled "Three Day Notice to Pay Rent or Quit the Premises" (hereinafter referred to as "three-day notices"). (See Michael Whyte Affidavit, Request for Admissions and Responses to Request for Admissions). The first notice sent in July 2008, claimed that defendants

were in violation of the lease in the amount of \$17,900.00. The second notice sent September 12, 2008 claimed that defendants were in violation of the lease in the amount of \$6,219.00. In both notices, plaintiff stated that if this amount was paid, defendants would be in compliance with the lease. (See Request for Admissions and Responses to Request for Admissions). Regardless of whether defendant disagreed that any additional amounts were owed at the time the notices were sent, defendant paid the amount outlined in each notice within the time requested. (See Responses to Request for Admissions).

Said three-day notices, when sent by plaintiff, were the equivalent of an offer to compromise a disputed claim between the parties. When defendant paid the amounts requested within the time allowed, defendant accepted the plaintiff's offer which precludes plaintiff from seeking additional amounts that may be owing as of the date of the three-day notices. Plaintiff cannot now seek additional amounts for any amount claimed to be outstanding prior to the date of the offer.

Idaho Code §28-3-310 addresses what is necessary for an accord and satisfaction. This statute states:

(1) If a person against whom a claim is asserted proves that (i) that person in good faith tendered an instrument to the claimant as full satisfaction of the claim, (ii) the amount of the claim was unliquidated or subject to a *bona fide* dispute, and (iii) the claimant obtained payment of the instrument, the following subsections apply.

(2) Unless subsection (3) of this section applies, the claim is discharged if the person against whom the claim is asserted proves that the instrument or an accompanying written communication contained a conspicuous statement to the effect that the instrument was tendered as full satisfaction of the claim.

Idaho Code §28-3-310.

It is the defendants' burden to prove that in good faith plaintiff tendered an instrument as full satisfaction of the claim and that there was conspicuous statement to the effect that it was tendered as full satisfaction of the claim. In most circumstances, the written communication and payment are both coming from the debtor. However, in this case, plaintiff is the individual who created the written communication (in the form of the three-day notices) offering to compromise a disputed claim with the defendants. The three-day notices clearly state the amounts which plaintiff believed defendants owed under the lease and which plaintiff was willing to accept. (See Affidavit of Michael Whyte and Exhibits to Request for Admissions). Plaintiff's offer contained in the three-day notices were offers to resolve all issues under the lease. The three-day notices stated that defendants were not in compliance with the lease and that by paying the requested amount the defendants would be in compliance with the lease and could remain in possession of the Brownstone Restaurant. The conspicuous language in the three-day notices, created by plaintiff, was accepted by defendants when payment was made. There was no language restricting this offer of compromise except for the length of time the offer was open. When defendant made this payment within the time specified, an accord and satisfaction took place. "To establish an accord and satisfaction the parties accepting a new or different obligation must do so knowingly and intentionally". *Harris v. Wildcat Corp.*, 97 Idaho 884, 886, 556 P.2d 67, 69 (1976). However, "an accord and satisfaction may be implied from the attendant circumstances". *Id.*

The elements of an accord and satisfaction are the following:

1. A *bona fide* dispute as to the amount owed;
2. That the debtor tendered an amount to the creditor with the intent that it be in total satisfaction of the amount owed; and

3. The creditor accepted payment in full satisfaction of the amount owed.

Beard v. George, 135 Idaho 635, 689, 23 P.3d 147 (2001).

In this current case, all elements have been met. The parties were engaged in an ongoing dispute with respect to the amount owed. Plaintiff had been seeking additional monies from defendants prior to each of the three-day notices as is clear from plaintiff's attorney's demand letter. (See Michael Whyte Affidavit and Exhibit A to said Affidavit). Specifically, contained in said letter were claims for additional monies for the following: additional rent; roof repairs; use of the upstairs storage unit; storage of a cooler; use of "space #16"; use of the outdoor sidewalk area; and food and drink gift cards. All these alleged claims existed as of the dates when the three-day notices were delivered to defendants. The three-day notices state that if defendants paid the amounts listed they would be allowed to remain in possession of the Brownstone and in compliance with the lease. When defendant made the payment, based on plaintiff's own language, plaintiff agreed that defendants were in compliance with the lease as of that date. When payment was accepted by plaintiff according to its own terms, plaintiff accepted a compromise of its alleged, disputed claims. If defendants were in compliance at the time of payment, then plaintiff is estopped and precluded from seeking additional amounts which may have accrued as of the date the defendants paid the requested amount.

Only after these payments were made, did plaintiff file its lawsuit seeking damages and other compensation dating back farther than September 2008 when the second accord and satisfaction was reached by the parties. However, by the plaintiff's own actions, an accord and satisfaction was reached with respect to any claimed compensation or claimed damages which may have accrued prior to September 12, 2008. Once the defendants made payment of the amounts requested, and the

plaintiff accepted these payments, the parties fully compromised all amounts due under any lease term as of the date of the accord and satisfaction, including all claims for additional rent as of September 2008; all claims for roof repairs which accrued prior to September 2008; all claims for rent for the upstairs storage unit which accrued prior to September 2008; all claims for rent for the storage of a cooler prior to September 2008; all claims for rent for the use of "space #16" which accrued prior to September 2008; and claims for rent for use of the outdoor sidewalk area prior to September 2008; and food and drink gift cards which accrued prior to September 2008.

All plaintiff's claims contained in the complaint arise from the lease between the parties. Reviewing the facts in a light most favorable to plaintiff, defendants are entitled to a partial summary judgment on all issues and claimed damages that existed as of September 2008 when plaintiff and defendant reached the accord and satisfaction.

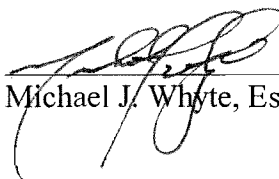
CONCLUSION

Defendants are entitled to partial summary judgment under two theories: The first theory is for any claim arising prior to November 19, 2003 based on the statute of limitations; and the second theory is under accord and satisfaction under Idaho Code §28-3-310 for any amounts claimed due and owing prior to September 2008.

DATED this 10 day of December, 2009.

THOMSEN STEPHENS LAW OFFICES, PLLC

By:


Michael J. Whyte, Esq.

CERTIFICATE OF SERVICE

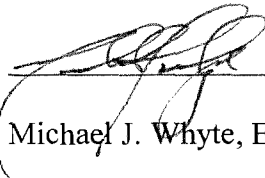
I hereby certify that I am a duly licensed attorney in the State of Idaho, resident of and with my office in Idaho Falls, Idaho; that on the 2 day of December, 2009, I caused a true and correct copy of the foregoing **MEMORANDUM IN SUPPORT OF MOTION FOR PARTIAL SUMMARY JUDGMENT** to be served upon the following persons at the addresses below their names either by depositing said document in the United States mail with the correct postage thereon or by hand delivering or by transmitting by facsimile as set forth below.

BRYAN D SMITH ESQ
B J DRISCOLL ESQ
PO BOX 50731
IDAHO FALLS ID 83405-0731

Mail
 Hand Delivery
 Facsimile

THOMSEN STEPHENS LAW OFFICES, PLLC

By:



Michael J. Whyte, Esq.

MJW:clm

6753\014 Mem Supp MSJ

BONNEVILLE COUNTY
ID

2009 DEC 24 PM 12:06

Bryan D. Smith, Esq. – ISB #4411
B. J. Driscoll, Esq. – ISB # 7010
SMITH, DRISCOLL & ASSOCIATES, PLLC
414 Shoup Ave.
P.O. Box 50731
Idaho Falls, Idaho 83405
Telephone: (208) 524-0731
Facsimile: (208) 529-4166

Attorneys for Plaintiff

IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT OF
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF BONNEVILLE

THE WATKINS COMPANY, LLC,
an Idaho limited liability company,

Plaintiff,

v.

MICHAEL STORMS and KATHY
BURGGRAF,

Defendants.

Case No. CV-08-7258

**BRIEF IN OPPOSITION TO THE
DEFENDANTS' MOTION FOR
PARTIAL SUMMARY JUDGMENT**

I. INTRODUCTION.

The defendants, Michael Storms (“Storms”) and Kathy Burggraf (“Burggraf”) (collectively, “Defendants”), filed a motion for partial summary judgment asking for a determination that the plaintiff, The Watkins Company, LLC (“Watkins”), cannot recover any amounts due from Defendants before November 19, 2003 based on Idaho Code Section 5-216. The Defendants also seek a determination that Watkins cannot recover any amounts due from Defendants before September 12, 2008 based on the doctrine of accord and satisfaction. For the reasons set forth hereinbelow, the court should deny the Defendants’ motion as to the defense of accord and satisfaction.

**BRIEF IN OPPOSITION TO THE DEFENDANTS’ MOTION FOR PARTIAL SUMMARY
JUDGMENT – Page 1**

F:\CLIENTS\BDS\7973\Pleadings\033 Brief.Opp.PSJ.doc

II. WATKINS CAN RECOVER AMOUNTS DUE FROM THE DEFENDANTS BEFORE SEPTEMBER 12, 2008 BECAUSE STORMS' PAYMENT OF THE UNDISPUTED RENT AMOUNT IN THE THREE-DAY NOTICES DID NOT CONSTITUTE AN ACCORD AND SATISFACTION OF WATKINS' CLAIMS.

For a defendant to establish the defense of accord and satisfaction at summary judgment by payment of a negotiable instrument, the party asserting the defense must establish that there is no genuine issue of any material fact (1) that there is “a *bona fide* dispute as to the amount owed; (2) that the debtor tendered an amount to the creditor with the intent that such payment would be in total satisfaction of the debt owed to the creditor; and (3) that the creditor agreed to accept payment in full satisfaction of the debt, or that both the debtor and the creditor understood that the acceptance of the check was in full payment of all sums owed by the debtor.” *Beard v. George*, 135 Idaho 685, 689 (2001) (declined to follow in *Shore v. Peterson*, 146 Idaho 903 (2009), on the grounds that *Beard* involved an instrument to effectuate the accord and satisfaction, whereas *Shore* did not). Moreover, the party asserting the defense must establish that the other party “knowingly and intentionally” accepted “a new or different obligation.” *Harris v. Wildcat Corp.*, 97 Idaho 884, 886 (1976).

Here, the Defendants cannot establish any of the three requirements to establish an accord and satisfaction at summary judgment. First, it is clear there was no “*bona fide* dispute” as to the amounts of rent owed. The July 2008 three-day notice notified Storms that he was in “default with [his] payment to [Watkins] under the lease *of rent* . . . in the amount of \$17,900.”¹ Storms paid this exact amount of unpaid rent with no adjustment to the amount Watkins claimed.² In his affidavit, Storms says “[a]lthough [he] disputed the

¹ See Exhibit “A” to the Affidavit of Dane Watkins, Sr. dated December 21, 2009, filed concurrently herewith. (Emphasis added.)

² See ¶ 4 of the Affidavit of Michael Storms in Support of Motion for Partial Summary Judgment dated
**BRIEF IN OPPOSITION TO THE DEFENDANTS' MOTION FOR PARTIAL SUMMARY
JUDGMENT – Page 2**

claims outlined in said *letter*,³ upon receiving the three-day notice to pay rent or quit the premises, [he] *agreed to pay the requested amount* in order to resolve and satisfy the plaintiff's claims."⁴ Storms never says that he disputed the amount of unpaid rent sought in the July 2008 three-day notice. The three-day notice sought only the unpaid rent, which Storms paid. Subsequently, Watkins served the September 2008 three-day notice, again stating that Storms was in "default with [his] payment to [Watkins] under the lease *of rent* . . . in the amount of \$6,219."⁵ Storms again paid the exact amount of unpaid rent sought in the notice with no adjustment to the amount Watkins claimed.⁶ Storms labels the amount as a "compromised" amount,⁷ but there was no "compromise." Storms paid the exact amount Watkins' requested in the three-day notice.⁸ In sum, Storms paid the exact amount of unpaid rent Watkins sought—twice. Nothing in the record indicates that there was any *bona fide* dispute over the amount of unpaid rent. The parties may have disputed the other items in the June 2008 letter, but not the rent that Watkins sought and Storms paid.

As to the second element for an accord and satisfaction, Storms provides no evidence that he tendered payment of the unpaid rent to Watkins "with the intent that such payment would be in total satisfaction of the debt" owed to Watkins. *See Beard, supra*. In his affidavit, Storms says he intended that the July 2008 payment would "resolve and satisfy

December 10, 2009, already on file with the court.

³ The June 2008 letter outlined several claims by Watkins, including unpaid rent, unpaid roof repair charges, late fees, failure to provide gross monthly sales figures, and payment of utilities. See Exhibit "A" to the Affidavit of Michael J. Whyte in Support of Motion for Partial Summary Judgment dated December 10, 2009, already on file with the court.

⁴ See ¶ 4 of the Affidavit of Michael Storms in Support of Motion for Partial Summary Judgment dated December 10, 2009, already on file with the court. (Emphasis added.)

⁵ See Exhibit "B" to the Affidavit of Dane Watkins, Sr. dated December 21, 2009, filed concurrently herewith. (Emphasis added.)

⁶ See ¶ 6 of the Affidavit of Michael Storms in Support of Motion for Partial Summary Judgment dated December 10, 2009, already on file with the court.

⁷ See ¶ 6 of the Affidavit of Michael Storms in Support of Motion for Partial Summary Judgment dated December 10, 2009, already on file with the court.

⁸ See ¶ 7 of the Affidavit of Michael Storms in Support of Motion for Partial Summary Judgment dated December 10, 2009, already on file with the court.

the plaintiff's claims"⁹ and that the September 2008 payment would again "finalize and satisfy any disputed claims plaintiff had under the lease,"¹⁰ but Storms points to no evidence that he expressed this undisclosed, subjective intention to Watkins.

As to the third element for an accord and satisfaction, Storms points to no evidence that Watkins "agreed to accept payment in full satisfaction of the debt, or that both the debtor and creditor understood that the acceptance of the check was in full payment of all sums owed by the debtor." *See Beard, supra*. Not only does Watkins flatly deny this,¹¹ but Storms offers no evidence to support this element of his accord and satisfaction defense. The notices expressly addressed unpaid rent and nothing more.¹² The notices did not address any of the other disputed items outlined in the June 2008 letter.¹³ The notices did not provide any indication that Watkins would accept payment of the undisputed amounts of unpaid rent in satisfaction of anything other than the unpaid rent.

Finally, the Defendants offer no evidence that Watkins "knowingly and intentionally" accepted a "new or different obligation" as required by *Harris, supra*. In the three day notices, Watkins sought unpaid rent. Storms paid the exact amounts sought. This was not a "new or different obligation," but Storms' existing obligation to pay rent. In short, there was no compromise of any disputed claims. Storms paid the amounts Watkins sought. There was no accord, and there was no satisfaction.

⁹ See ¶ 4 of the Affidavit of Michael Storms in Support of Motion for Partial Summary Judgment dated December 10, 2009, already on file with the court.

¹⁰ See ¶ 6 of the Affidavit of Michael Storms in Support of Motion for Partial Summary Judgment dated December 10, 2009, already on file with the court.

¹¹ See ¶¶ 7-8 of the Affidavit of Dane Watkins, Sr. dated December 23, 2009, filed concurrently herewith.

¹² See Exhibit "B" to the Affidavit of Dane Watkins, Sr. dated December 21, 2009, filed concurrently herewith.

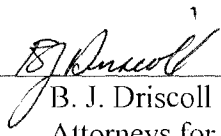
¹³ See Exhibit "A" to the Affidavit of Michael J. Whyte in Support of Motion for Partial Summary Judgment dated December 10, 2009, already on file with the court.

III. CONCLUSION.

Although it seems the Defendants correctly assert that Idaho Code Section 5-216 prohibits Watkins from recovering amounts due from the Defendants before November 19, 2003, the record clearly establishes that the Defendants have not established the defense of accord and satisfaction. As such, the court should deny their motion in this regard.

DATED this 24 day of December, 2009.

SMITH, DRISCOLL & ASSOCIATES PLLC

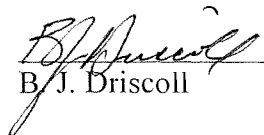
By 
B. J. Driscoll
Attorneys for Plaintiff

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 24 day of December, 2009, I caused a true and correct copy of the foregoing **BRIEF IN OPPOSITION TO THE DEFENDANTS' MOTION FOR PARTIAL SUMMARY JUDGMENT** to be served, by placing the same in a sealed envelope and depositing in the United States Mail, postage prepaid, or hand delivery, facsimile transmission or overnight delivery, addressed to the following:

Michael J. Whyte, Esq.
THOMSEN STEPHENS LAW
OFFICES, PLLC
2635 Channing Way
Idaho Falls, ID 83404

U. S. Mail
 Fax
 Overnight Delivery
 Hand Delivery


B. J. Driscoll

Michael J. Whyte, Esq., ISB #4645
THOMSEN STEPHENS LAW OFFICES, PLLC
2635 Channing Way
Idaho Falls ID 83404
Telephone (208)522-1230
Fax (208)522-1277

Attorney for Defendants

IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF BONNEVILLE

THE WATKINS COMPANY, LLC,)
an Idaho limited liability company,)
)
Plaintiff,)
)
v.)
)
MICHAEL STORMS and KATHY)
BURGGRAF,)
)
Defendants.)
_____)

Case No. CV-08-7258

DEFENDANTS' REPLY TO BRIEF
IN OPPOSITION TO MOTION FOR
PARTIAL SUMMARY JUDGMENT

In both plaintiff's complaint and in its most recent motion for partial summary judgment, it claims defendants owe Watkins \$28,903.38 in unpaid "rent" under the lease. However, in its brief in opposition to the defendants' motion for partial summary judgment, plaintiff wants to distinguish between what defendants have already paid and the additional amounts it seeks under the lease. Plaintiff does not dispute that both the July and September three-day notices sought unpaid rent. But in its brief in opposition, plaintiff wants to claim that the amounts defendant paid in response to the three-day notices was something different than the "rent" it is seeking in its complaint. Up

until plaintiff's brief in opposition to the defendants' motion for partial summary judgment, plaintiff has maintained that the defendants owed additional "rent" under the terms of the lease. Throughout this lawsuit, plaintiff has consistently maintained that the "rent" due under the lease to be either the specific amount listed in Addendum A, or an amount greater to be calculated using the gross sales at the Brownstone Restaurant.

The three-day notices which are at the heart of this summary judgment motion, do not distinguish between the amount requested in said three-day notices and whether this amount was just for base rent or was for all rent under the gross sales formula. As indicated previously, plaintiff sent a June 2008 letter outlining plaintiff's claims, including unpaid rent (which incorporated a claim for rent due as part of the gross sales formula). The three-day notices do not distinguish, define or categorize in any way the "rent" sought as only the base rent and not the rent claimed under the gross sales formula. Until plaintiff's objection to the motion for summary judgment, plaintiff has consistently maintained that "rent" under the lease includes both the specific amount listed in Addendum A and the additional amount under the gross sales formula. Plaintiff cannot now change this definition of "rent", or clarify, quantify or restrict the "rent" sought under the three-day notices as something different.

The three-day notices created by plaintiff were offers which were accepted by defendants upon defendants paying the amount requested. The three-day notices therefore became the contract between the parties.

The interpretation of a contract begins with the language of the contract itself. *Criston Viene Pentecostal Church v. Paz*, 144 Idaho 304, 308, 160 P.3d 743, 747 (2007). If the language of the contract is unambiguous, then its meaning and legal effect must be determined from its words. *Id.* A contract is ambiguous if it is

reasonably subject to conflicting interpretations. *Id.* Determining whether a contract is ambiguous is a question of law over which the Court exercises free review. *Id.* Where a contract is ambiguous and the parties mutual intent cannot be understood from the language, intent is a question for the trier of fact. *Farnsworth v. Dairymen's Creamery Ass'n*, 125 Idaho 866, 870, 876 P.2d 148, 152 (Ct. App. 1994).

Bauchman-Kingston Partnership, LP, v. Haroldsen, 2008 Ida. Lexis 220, 5.

The language used in the three-day notices in this case is unambiguous. Plaintiff created the three-day notices, and used the following words throughout said notices: "Please take notice that you are in default to your payment to Watkins and Watkins under the lease of rent for The Brownstone Restaurant..."; "If you fail to pay the rental due within three days from the date of delivery of this notice, ..."; "Your rental payment must be received within three-days ..."; and "If you pay the above amount in full within three days from the date of delivery of this notice, you may remain in possession of the premises and in compliance with the lease agreement." Plaintiff referred to the rent due under the lease throughout the three-day notices. No restriction, limitation or clarification of the term "rent" was placed in the three-day notice. Therefore, the reasonable, unambiguous reading of the three-day notices is that it included all potential rent, including the rent claimed owing under the gross sales formula.

Plaintiff's affidavit filed in opposition attempts to offer parol evidence as to the meaning of this contract; however, plaintiff has not shown that the language of this contract is ambiguous and that parol evidence is necessary to determine the parties' intent. Plaintiff created the unambiguous terms of this three-day notice and should not now be allowed to provide parol evidence to attempt to alter or limit the clear language of this contract.

There is no genuine issue of material fact with respect to the existence of a *bona fide* dispute regarding the amount owed; that the defendants tendered an amount to plaintiff with the intent that the payment be in total satisfaction of the disputed amount owed; and that plaintiff accepted payment in full satisfaction of the debt.

With respect to the first element, defendants provided the factual basis confirming a dispute with respect to the amounts owed. The existence of this dispute is also evident in the fact that plaintiff was requesting amounts allegedly not paid by Storms and was threatening to evict Storms if requested amounts were not paid. The important fact to focus on is that plaintiff claimed an amount was owed over and above what Storms had already paid. In plaintiff's brief, plaintiff attempts to distinguish between the amounts Storms paid and the claim for additional amounts. However, there is no distinction and dispute that the amount Storms paid was for "rent". This rent owed by defendants was either the specific amount listed in the lease or was rent owed under the gross proceeds formula. No distinction was made in plaintiff's three-day notice, no distinction was made in plaintiff's complaint and no distinction was made in plaintiff's motion for partial summary judgment in that both the base rent and the claimed additional amount owed under the formula were both titled "rent."

If there is no bona fide dispute regarding the amount owed, summary judgment is still warranted because the plaintiff claimed an amount owed for rent and defendant agreed and paid.

The second element necessary to prove accord and satisfaction is that defendants tendered the payment with the intent that the payment be in total satisfaction of the debt. Plaintiff wants to focus on whether Storms disclosed that his payment would be in full satisfaction of the claimed

amounts owed. However, plaintiff fails to acknowledge that it was plaintiff who made the offer to defendants that if payment was made “in full within three days from the date of delivery of this notice, you may remain in possession of the premises and *in compliance with the lease agreement.*” It was plaintiff’s language in the three-day notices that satisfies this second element of accord and satisfaction that the tendered payment was with the intention to satisfy the total debt.

The third and final element necessary for an accord and satisfaction has also been satisfied. Plaintiff claims that there is nothing to indicate that the acceptance of payment was in full satisfaction of the debt. Again, plaintiff fails to look at plaintiff’s own language in the three-day notice. Plaintiff’s states that if the amount is paid, defendants will be in compliance with the lease. Again, no distinguishment or limitation was placed in these three-day notices with respect to the payment applying to something other than the amounts owed under the lease. Plaintiff now wants to place a restriction on its own language and claim that in essence, it really did not mean what was clearly stated -- that if defendants paid the amount claimed that defendants would be in compliance with the lease.

Defendant’s compliance extends to all issues under the lease. Plaintiff’s complaint outlines other areas wherein defendants allegedly owe plaintiff money under the lease, including amounts for repairs, and amounts for use of additional space. Plaintiff’s three-day notices state that if defendant paid the amounts stated that defendant would be in compliance with the entire lease. Defendant’s paid the amounts requested. Unfortunately for plaintiff, plaintiff’s own language specifically states that if defendants paid the amount, they would be in compliance with the lease. This is interpreted as all areas of the lease. Plaintiff should not know be allowed to try and clarify, limit or restrict its

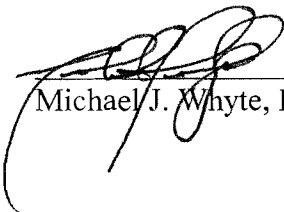
own language and define the language of the three-day notice to mean something other than its clear intention.

WHEREFORE, all three elements of an accord and satisfaction have been satisfied, mostly by the plaintiff in the creation of its own document and using its own language when it presented the offer to defendants. Defendants complied with the request with the intention that they fully satisfied the debt as offered by plaintiff. Plaintiff cannot now recant on its offer after having accepted the payment of defendants of the amounts due. It can also no longer recant its offer that if payment were made, they would in fact be in compliance with the lease.

DATED this 31st day of December, 2009.

THOMSEN STEPHENS LAW OFFICES, PLLC

By:



Michael J. Whyte, Esq.

CERTIFICATE OF SERVICE

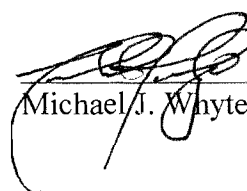
I hereby certify that I am a duly licensed attorney in the State of Idaho, resident of and with my office in Idaho Falls, Idaho; that on the 31st day of December, 2009, I caused a true and correct copy of the foregoing DEFENDANTS' REPLY TO BRIEF IN OPPOSITION TO MOTION FOR PARTIAL SUMMARY JUDGMENT to be served upon the following persons at the addresses below their names either by depositing said document in the United States mail with the correct postage thereon or by hand delivering or by transmitting by facsimile as set forth below.

BRYAN D SMITH ESQ
B J DRISCOLL ESQ
PO BOX 50731
IDAHO FALLS ID 83405-0731

Mail
 Hand Delivery
 Facsimile

THOMSEN STEPHENS LAW OFFICES, PLLC

By:



Michael J. Whyte, Esq.

MJW:clm
6753\023 Reply

Bryan D. Smith, Esq. – ISB #4411
B. J. Driscoll, Esq. – ISB # 7010
SMITH, DRISCOLL & ASSOCIATES, PLLC
414 Shoup Ave.
P.O. Box 50731
Idaho Falls, Idaho 83405
Telephone: (208) 524-0731
Facsimile: (208) 529-4166

BONNEVILLE COUNTY, IDAHO

2010 JAN -5 PM 4: 28

Attorneys for Plaintiff

IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT OF
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF BONNEVILLE

THE WATKINS COMPANY, LLC,
an Idaho limited liability company,

Plaintiff,

v.

MICHAEL STORMS and KATHY
BURGGRAF,

Defendants.

Case No. CV-08-7258

**REPLY BRIEF IN SUPPORT OF
MOTION FOR PARTIAL
SUMMARY JUDGMENT**

Watkins filed a motion for partial summary judgment that the Lease requires the Defendants to pay the greater of a base rent amount or 5% of the gross sales. In opposition to the motion, the Defendants argue that the Lease language is ambiguous because Storms interprets the alternative minimum rent language of Addendum A to apply only to the third 10-year term of the Lease. If the court rejects that argument, the Defendants further argue that the parties consented to an unwritten amendment of the Lease to be implied by the parties' conduct. The Defendants also ask the court to deny Watkins' partial summary judgment on the food and drink credit "because of the change in the reading of the reading

of the contract language.” As explained below, the Defendants’ arguments in this regard are without merit and the court should grant Watkins partial summary judgment.

I. THE LEASE REQUIREMENT THAT THE DEFENDANTS’ PAY THE ALTERNATIVE MINIMUM RENT IS NOT AMBIGUOUS.

Well-established Idaho law provides, “various provisions in a contract must be construed, if possible, so to give force and effect to every part thereof.” *Twin Lakes Village Property Ass’n, Inc. v. Crowley*, 124 Idaho 132, 137 (1993) (citations omitted). Stated another way, “Apparently conflicting provisions must be reconciled so as to give meaning to both, rather than nullifying a contractual provision . . .” *Madrid v. Roth*, 134 Idaho 802 (Ct.App. 2001) (quoting 17A C.J.S. *Contracts* § 324 (1999)).

Here, Addendum A to the Lease clearly provides that the Defendants must pay the greater of the base rent or 5% of the gross monthly sales.¹ Further, Paragraph 1 of Addendum D to the Lease provides that the lease term begins on November 1, 1997, but the Defendants would prepay \$25,000 in rent in July 1997 and that this prepaid rent would “be credited against the monthly rent as it becomes due pursuant to the lease.”² Then Paragraph 5 of Addendum D provides, “During the approximately eight month period while the monthly rent is being covered by the prepaid rent [discussed in Paragraph 1 above], the rent shall be \$3,750 per month and *the 5% of gross alternative rent shall not apply, regardless of Tenant’s gross incomes.*”³ The Lease expressly provides that the alternative monthly rent requirement does not apply to the first few months of the initial lease term.

¹ See Addendum A to Exhibit “A” of the Affidavit of Dane Watkins dated July 13, 2009 already on file with the court.

² See Addendum D to Exhibit “A” of the Affidavit of Dane Watkins dated July 13, 2009 already on file with the court.

³ See Addendum D to Exhibit “A” of the Affidavit of Dane Watkins dated July 13, 2009 already on file with the court. (Emphasis added.)

Watkins' interpretation is the only interpretation of Addendum A and Addendum D that "give[s] force and effect to every part thereof" and that avoids "nullifying" the provisions of Addendum D. Addendum D confirms that the alternative minimum rent provisions applied from the beginning of the lease on November 1, 1997, except for the first few months when Watkins credited the prepaid rent. If the alternative rent calculation did not apply until the third 10-year term of the lease, as the Defendants suggest, then Addendum D would make no sense at all. There is no reason for stating that the alternative rent would not apply to the first few months of the lease if the alternative rent did not apply in the first place. The Defendants' interpretation runs contrary to clear Idaho law because the Defendants' interpretation renders Paragraph 5 of Addendum D a nullity. There would be no reason for Paragraph 5 to recite that the alternative minimum rent would not apply in 1997 and 1998 if the alternative minimum rent did not take effect until 2017 as the Defendants suggest. The Defendants' interpretation of the Lease is not reasonable because it ignores Addendum D. The Lease is not ambiguous that the alternative minimum rent applies from the beginning of the lease, except for the approximately eight-month hiatus provided in Paragraph 5 of Addendum D.

II. THE DEFENDANTS CANNOT RELY ON THEIR OWN BREACH OF THE LEASE TO SUGGEST A CONTRACTUAL MODIFICATION BY THE CONDUCT OF THE PARTIES THAT IS EXPRESSLY PROHIBITED BY THE LEASE.

Addendum A of the Lease imposes a contractual duty on the Defendants to provide Watkins with the gross monthly sales information, and then pay the difference, if any, between the base rent due and 5% of the gross sales. Addendum A states, "By the 10th of each month, Lessee will provide to Lessor the monthly sales figures for the previous month

-- if a percentage rent is due, Lessee will pay the the [sic] Lessor the difference owed by the 15th of that month.”⁴

Here, the Defendants attempt to create an issue of fact based on their own breach of their contractual duty to provide Watkins with the gross sales information. The Lease requires the Defendants to provide the gross monthly sales reports by the 10th of each month. The Defendants did not do this. In fact, Watkins did not obtain this information until September 2009.⁵ The Defendants have submitted no evidence to the contrary, nothing establishing that Watkins had this information before September 2009. Nonetheless, the Defendants rely on their own failure to perform their contractual duty as the basis for suggesting that Watkins agreed to modify the Lease.

Not only do the Defendants attempt to rely on their own bad conduct to avoid summary judgment, but they do so in disregard for the plain language of the Lease. Paragraph 27 of the Lease provides in pertinent part, “WAIVER: No failure of Lessor to enforce any term hereof shall be deemed to be a waiver.”⁶ Further, the Lease provides, “ENTIRE AGREEMENT: The foregoing constitutes the entire agreement between the parties and *may be modified only by a writing signed by both parties.*”⁷ The “no waiver” provision is designed to protect the lessor against the exact type of conduct that the Defendants exhibit in this case. Moreover, the “written modification provision is designed to protect both parties by requiring any amendment to the lease terms

⁴ See Addendum D to Exhibit “A” of the Affidavit of Dane Watkins dated July 13, 2009 already on file with the court.

⁵ See ¶ 5 of the Affidavit of Dane Watkins dated December 23, 2009 already on file with the court.

⁶ See Paragraph 27 of Exhibit “A” of the Affidavit of Dane Watkins dated July 13, 2009 already on file with the court.

⁷ See p. 2 of Exhibit “A” of the Affidavit of Dane Watkins dated July 13, 2009 already on file with the court. (Emphasis added.)

to be in written and signed by both parties to avoid any confusion or mistake as to each party's contractual obligations.

Although the Defendants frame their argument as one of contractual modification, in its essence the Defendants' argument is one of waiver. In this regard, Idaho law is clear that "[w]aiver is a voluntary, intentional relinquishment of a known right or advantage." *Wernecke v. St. Maries Joint School Dist. No. 401*, 147 Idaho 277, --- (2009) (citation omitted). Here, Watkins could not have "waived" its right to the alternative minimum rent payments because it did not know of this right until September 2009. There can be no waiver where there is no knowledge of the right that one is waiving.

III. THE COURT SHOULD GRANT SUMMARY JUDGMENT THAT DEFENDANTS OWE WATKINS \$3,000.00 IN FOOD AND DRINK CREDITS.

The Defendants offer no substantive argument that Watkins should not receive the "\$250 per month food and drink credit" provided by the Lease.⁸ The Defendants admit that they have not paid the credit to Watkins since December 2008.⁹ The only explanation the Defendants offer is that there was a "change in the reading of the contract."¹⁰ However, this explanation, with nothing more, does not create an issue of fact. The Lease language is clear that the Defendants agreed to provide the food and drink credit. The record is undisputed that the Defendants have not provided it since December 2008. The court should grant partial summary judgment to Watkins in this regard.

//

//

⁸ See Addendum D to Exhibit "A" of the Affidavit of Dane Watkins dated July 13, 2009 already on file with the court.

⁹ See p. 2 of Defendant's Response To Plaintiff's Motion For Partial Summary Judgment dated December 24, 2009, already on file with the court.

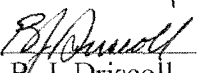
¹⁰ See p. 2 of Defendant's Response To Plaintiff's Motion For Partial Summary Judgment dated December 24, 2009, already on file with the court.

IV. CONCLUSION.

For the foregoing reasons, the court should grant Watkins' motion for partial summary judgment.

DATED this 4 day of January, 2010.

SMITH, DRISCOLL & ASSOCIATES PLLC

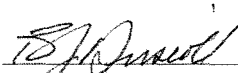
By 
B. J. Driscoll
Attorneys for Plaintiff

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 4 day of January, 2010, I caused a true and correct copy of the foregoing **REPLY BRIEF IN SUPPORT OF MOTION FOR PARTIAL SUMMARY JUDGMENT** to be served, by placing the same in a sealed envelope and depositing in the United States Mail, postage prepaid, or hand delivery, facsimile transmission or overnight delivery, addressed to the following:

Michael J. Whyte, Esq.
THOMSEN STEPHENS LAW
OFFICES, PLLC
2635 Channing Way
Idaho Falls, ID 83404

U.S. Mail
 Fax
 Overnight Delivery
 Hand Delivery


B. J. Driscoll

IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF BONNEVILLE

THE WATKINS COMPANY, LLC,)	
an Idaho limited liability)	
company,)	
)	
Plaintiff,)	
)	MINUTE ENTRY
vs.)	Case No. CV-08-7258
)	
MICHAEL STORMS and KATHY)	
BURGGRAF,)	
)	
Defendants.)	
)	

On the 8th day of January, 2010, Plaintiff's motion for partial summary judgment and Defendants' motion for summary judgment, Defendants' motion for protective order came before the Honorable Joel E. Tingey, District Judge, in open court at Idaho Falls, Idaho.

Mr. Jack Fuller, Court Reporter, and Mrs. Marlene Southwick, Deputy Court Clerk, were present.

Mr. B. J. Driscoll appeared on behalf of the Plaintiff. Mr. Dane Watkins appeared as a representative of Watkins Company.

Mr. Michael Whyte appeared on behalf of the Defendants.

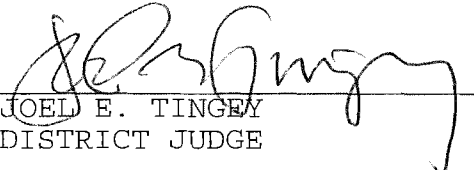
Mr. Driscoll presented Plaintiff's motion for partial summary judgment. Mr. Whyte presented argument in opposition to the Plaintiff's motion and presented Defendants' motion for summary judgment. Mr. Driscoll presented rebuttal argument and argument in opposition to Defendants' motion for summary judgment. Mr. Whyte presented rebuttal argument.

Defendants' motion for protective order has been resolved.

The issue of jury trial vs. court trial was discussed.

The Court found that Plaintiff's motion is granted in as to the lease agreement. The Court found that Addendum A is not ambiguous. The Court will take the other matters under advisement and issue an opinion as soon as possible. Mr. Whyte will have seven days to supplement the consideration issue for the record.

Court was thus adjourned.



JOEL E. TINGEY
DISTRICT JUDGE

CERTIFICATE OF SERVICE

I hereby certify that on the 8 day of January, 2010, I caused a true and correct copy of the foregoing document to be delivered to the following:

RONALD LONGMORE



Deputy Court Clerk

Bryan D. Smith
B. J. Driscoll
PO Box 50731
Idaho Falls, ID 83405

Michael J. Whyte
2635 Channing Way
Idaho Falls, ID 83404

10 JAN -8 AIO 139

IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF BONNEVILLE

THE WATKINS COMPANY, LLC,

Plaintiffs,

v.

MICHAEL STORMS and KATHY
BURGGRAF,

Defendants.

Case No. CV-08-7258

ORDER

THIS MATTER comes before the Court upon the Parties' motions for summary judgment, and Plaintiff's motion for court trial. The Court having reviewed the record and heard oral argument, and good cause appearing therefore;

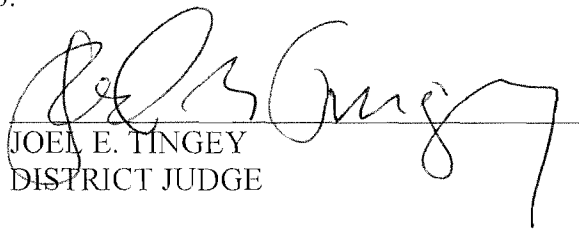
IT IS HEREBY ORDERED THAT Plaintiff's motion is granted in part as to the subject Lease Agreement. The Court finds that the language of the Agreement and Addendum A are unambiguous and as a matter of law provide for payment of rent throughout the term of the Lease (not including the initial months of the lease covered by prepaid rent) of 5% of gross sales, if such amount exceeds the designated base amount of rent.

Defendant's motion for summary judgment on the issue of accord and satisfaction is denied. The Court finds that the subject three day notice(s) upon which the argument is based is vague and ambiguous. The interpretation of the document and the intent of the Parties will be determined by the trier of fact at the time of trial.

The remaining issues are taken under advisement and the Parties shall have until January 15, 2010 to submit additional briefing or pleadings on the issue of whether consideration is necessary for a consensual modification of a contract.

Plaintiff's motion for a court trial is further taken under advisement and the Parties shall have until January 15, 2010 to submit addition briefing or pleadings on the issue of whether the Parties have agreed to waive or modify the Agreement as to a court trial in this matter.

Dated this 8 day of January, 2010.


JOE E. TINGEY
DISTRICT JUDGE

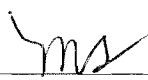
CERTIFICATE OF SERVICE

I hereby certify that on this 8 day of January, 2010, I did send a true and correct copy of the foregoing document upon the parties listed below by mailing, with the correct postage thereon; by causing the same to be placed in the respective courthouse mailbox; or by causing the same to be hand-delivered.

Bryan D. Smith
B.J. Driscoll
414 Shoup Ave.
P.O. Box 50731
Idaho Falls, ID 83405

Michael J. Whyte
THOMSEN STEPHENS
2635 Channing Way
Idaho Falls, ID 83404

RONALD LONGMORE
Clerk of the District Court
Bonneville County, Idaho

By 
Deputy Clerk

BONNEVILLE COUNTY
IDAHO

10 JAN 12 P3:43

IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF BONNEVILLE

THE WATKINS COMPANY, LLC, an Idaho
limited liability company,

Plaintiff,

v.

MICHAEL STORMS and KATHY
BURGGRAF,

Defendants.

Case No. CV-08-7258

**ORDER ON MOTION FOR COURT
TRIAL**

THIS MATTER is before the Court on Plaintiff's motion for court trial. The Parties have submitted briefs on this issue and the Court heard oral argument on January 8, 2010.

The Parties' lease agreement contains a provision waiving the right to a jury trial in any litigation involving the lease. Notwithstanding this provision, both Parties demanded a jury trial in their initial pleadings. Then, in their amended pleadings filed approximately ten months later, both Parties again demanded a jury trial. Now, Plaintiff seeks an order from the Court enforcing the jury trial-waiver clause in the lease agreement. Defendants argue that the Parties modified the lease agreement's jury trial-waiver clause by consent when they each requested a jury trial.

The Idaho Supreme Court outlined the general rule for contract modifications as follows:

This Court has followed the general rule of law that parties to an unperformed contract may, by mutual consent, modify it by altering, excising or adding provisions, and such modification may be by parol agreement though the contract is in writing. *Smith v. Washburn-Wilson Seed Co.*, 54 Idaho 659, 34 P.2d 969 (1934); *Idaho Gold Dredging Corp. v. Boise Payette Lumber Co.*, 62 Idaho 683, 115 P.2d 401 (1941); *Inland Empire Refineries v. Jones*, 69 Idaho 335, 296 P.2d 519 (1949); *Brooks v. Beach*, 50 Idaho 185, 294 P. 505 (1930).

* * *

It is true that one party to a contract cannot alter its terms without the assent of the other and that the minds of the parties must meet as to any proposed modification. The fact of agreement may be implied from a course of conduct in accordance with its existence and assent may be implied from the acts of one party in accordance with the terms of a change proposed by the other. 17 C.J.S. Contracts § 375, p. 860; *Smith v. Washburn-Wilson Seed Co.*, *supra*.

Ore-Ida Potato Products, Inc. v. Larsen, 83 Idaho 290, 293-296, 362 P.2d 384, (1961).

The party asserting a contract modification must prove its existence by clear and convincing evidence. *Kline v. Clinton*, 103 Idaho 116, 645 P.2d 350 (1982). “Furthermore, general principles of contract law require that a contract modification, like the formation of any contract, must be supported by valid consideration.” *Great Plains Equip., Inc. v. NW Pipeline Corp.*, 132 Idaho 754, 769, 979 P.2d 627 (1999), citing *Brand S Corp. v. King*, 102 Idaho 731, 733, 639 P.2d 429 (1981).

In the present case, there is no evidence that the Parties actually reached an agreement or a meeting of the minds to modify the lease agreement. While the “course of conduct,” in this matter may be consistent with a modification of the agreement, it does not establish a modification.

Instead, the record before the Court indicates that the Parties filed their jury trial demands independently, without any discussion, and without the requisite intent to modify the jury trial waiver clause in the lease agreement. Thus, the Parties never “reached a mutual understanding for modification.” *Hecla Min. Co. v. Star-Morning Min. Co.*, 122 Idaho 778, 797, 839 P.2d 1192 (1992). On the contrary, the jury demand, at least on the part of the Plaintiff, was inadvertent and without consideration for what the agreement provided.

Accordingly, the Court finds that the Parties’ lease agreement was not modified by consent when both Parties requested a jury trial.

Although not raised in Defendants’ objection to Plaintiff’s motion for trial by court, Defendants’ counsel suggested during oral argument that Plaintiff had somehow waived its right to enforce the jury trial waiver clause.

Waiver is a voluntary, intentional relinquishment of a known right or advantage. The party asserting the waiver must show that he has acted in reliance upon such a waiver and reasonably altered his position to his detriment. *Brand S Corp. v. King*, 102 Idaho 731, 639 P.2d 429 (1981).

Scott v. Castle, 104 Idaho 719, 725, 662 P.2d 1163 (Ct. App. 1983)

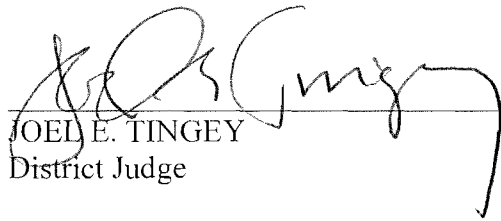
In the present case, Defendants have failed to establish that Plaintiff voluntarily relinquished a known right. Moreover, there is no evidence that Defendants were prejudiced as a result of Plaintiff’s alleged waiver. Therefore, the Court finds that Plaintiff did not waive its contractual right to proceed without a jury trial in this case.

Finally, the Court finds that the provision in the agreement whereby the Parties agreed to a court trial is enforceable. Similar to an arbitration agreement or venue clause, the Parties may contractually limit the manner in which a dispute is resolved.

Therefore, based on the foregoing and the record before the Court, and good cause appearing therefore;

IT IS HEREBY ORDERED that Plaintiff's motion for trial by the Court is granted. This case will proceed to bench trial on February 9, 2010.

Dated this 12 day of January 2010.


JOEL E. TINGEY
District Judge

CERTIFICATE OF SERVICE

I hereby certify that on this 12 day of January, 2010, I did send a true and correct copy of the foregoing document upon the parties listed below by mailing, with the correct postage thereon; by causing the same to be placed in the respective courthouse mailbox; or by causing the same to be hand-delivered.

B.J. Driscoll
SMITH DRISCOLL &
ASSOCIATES, PLLC
P.O. Box 50731
Idaho Falls, ID 83405

Michael J. Whyte
THOMSEN STEPHENS
LAW OFFICES, PLLC
2635 Channing Way
Idaho Falls, ID 83404

RONALD LONGMORE
Clerk of the District Court
Bonneville County, Idaho

By ms

Deputy Clerk

BONNEVILLE COUNTY
IDAHO

10 JAN 20 P1:48

IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF BONNEVILLE

THE WATKINS COMPANY, LLC,

Plaintiffs,

v.

MICHAEL STORMS and KATHY
BURGGRAF,

Defendants.

Case No. CV-08-7258

ORDER

THIS MATTER comes before the Court upon Plaintiff's motion for partial summary judgment.

The Court previously granted in part Plaintiff's motion for partial summary judgment, finding the language of the Lease Agreement to be unambiguous in requiring "payment of rent throughout the term of the Lease (not including the initial months of the lease covered by prepaid rent) of 5% of gross sales, if such amount exceeds the designated base amount of rent." The Court allowed additional time for briefing on the issue of whether the Parties modified the Lease by consent. Defendants filed a notice that no additional briefing would be filed "due to the discovery of additional documents and information ... that limits defendants [sic] claim that the contract had been modified."

Idaho follows the general rule that an unperformed contract may be modified by consent of the parties. *Ore-Ida Potato Products, Inc. v. Larsen*, 83 Idaho 290, 362 P.2d 384 (1961). However, "general principles of contract law require that a contract

modification, like the formation of any contract, must be supported by valid consideration.” *Great Plains Equip., Inc. v. NW Pipeline Corp.*, 132 Idaho 754, 769, 979 P.2d 627 (1999), citing *Brand S Corp. v. King*, 102 Idaho 731, 733, 639 P.2d 429 (1981). The party asserting a contract modification must prove its existence by clear and convincing evidence. *Kline v. Clinton*, 103 Idaho 116, 645 P.2d 350 (1982).

Defendants have apparently abandoned their contract modification argument. Defendants have failed to establish that consideration is unnecessary when modifying a contract or present evidence that the alleged contract modification was supported by valid consideration. Accordingly, Plaintiff is entitled to partial summary judgment on its claim for unpaid rent under the alternative rent calculation. Because questions of fact still exist as to whether the Parties reached an accord and satisfaction on September 12, 2008, it is only possible to quantify the amount unpaid rent due after that date. Based on the record, the Court finds that amount to be \$13,160.00. However, the record does create an inference that that amount may be subject to an offset.

THEREFORE, IT IS HEREBY ORDERED that Plaintiff’s motion for partial summary judgment is granted in part, consistent with the foregoing.

Dated this 20 day of January, 2010.



JOEL E. TINGEY
DISTRICT JUDGE

CERTIFICATE OF SERVICE

I hereby certify that on this 20 day of January, 2010, I did send a true and correct copy of the foregoing document upon the parties listed below by mailing, with the correct postage thereon; by causing the same to be placed in the respective courthouse mailbox; or by causing the same to be hand-delivered.

Bryan D. Smith
B.J. Driscoll
414 Shoup Ave.
P.O. Box 50731
Idaho Falls, ID 83405

Michael J. Whyte
THOMSEN STEPHENS
2635 Channing Way
Idaho Falls, ID 83404

RONALD LONGMORE
Clerk of the District Court
Bonneville County, Idaho

By 
Deputy Clerk

BONNEVILLE COUNTY
IDAHO

2010 JAN 21 PM 4:02

Michael J. Whyte, Esq., ISB #4645
THOMSEN STEPHENS LAW OFFICES, PLLC
2635 Channing Way
Idaho Falls ID 83404
Telephone (208)522-1230
Fax (208)522-1277

Attorney for Defendants

IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF BONNEVILLE

THE WATKINS COMPANY, LLC,)
an Idaho limited liability company,)
)
Plaintiff,)
)
v.)
)
MICHAEL STORMS and KATHY)
BURGGRAF,)
)
Defendants.)
_____)

Case No. CV-08-7258

WITNESS
AND EXHIBIT LISTS

COME NOW defendants, by and through counsel of record, and hereby submit the following
list of witnesses which they intend to call to testify at the trial of this cause:

1. Michael Storms;
2. Kathy Burggraf;
3. Dane Watkins;
4. Justin Briggs, owner of Briggs Roofing; and
5. Eric Waters, owner of Waters Construction.

Defendant reserves the right to call any other individual listed by plaintiff in this matter.

Defendants hereby submit their list of trial exhibits which they intend or expect to offer into evidence at the trial of the within cause:

1. Lease;
2. 3-day notice of eviction dated July 2008;
3. 3-day notice of eviction dated September 2008;
4. 3-day notice of eviction dated December 2008;
5. September 20, 2006 letter from Briggs Roofing Company;
6. Spreadsheet showing payments made by defendants;
7. Idaho Sales and Use Tax Returns for The Brownstone Restaurant;
8. City of Idaho Falls utility billing statements reflecting amounts owed by defendants and amounts actually paid by defendants;
9. Brownstone monthly rent deposits reflecting amounts owed by defendants and amounts actually paid by defendants;
10. Copies of checks from defendants or Brownstone Restaurant verifying amounts paid for rent
11. Copies of checks from defendants or Brownstone Restaurant verifying amounts paid for roof repairs;
12. Letter from Briggs Roofing outlining the amount owed for roof repairs;
13. Copy of judgment against plaintiff in Bonneville County Small Claims case CV-07-4741;
14. Photographs of upstairs space;
15. Photographs of pipe yard;

16. Photographs of "Space 16"; and

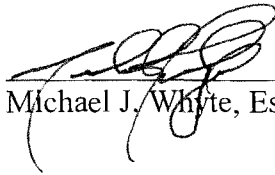
17. Photographs of the outdoor space used by defendants.

Defendant reserves the right to use any documents introduced by plaintiffs in this matter.

DATED this 21st day of January, 2010.

THOMSEN STEPHENS LAW OFFICES

By:


Michael J. Whyte, Esq.

CERTIFICATE OF SERVICE

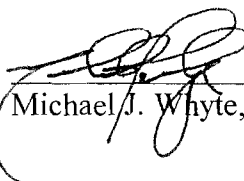
I hereby certify that I am a duly licensed attorney in the State of Idaho, resident of and with my office in Idaho Falls, Idaho; that on the 21st day of January 2010, I caused a true and correct copy of the foregoing **DEFENDANTS' WITNESS AND EXHIBIT LISTS** to be served upon the following persons at the addresses below their names either by depositing said document in the United States mail with the correct postage thereon or by hand delivering or by transmitting by facsimile as set forth below.

BRYAN D SMITH ESQ
B J DRISCOLL ESQ
PO BOX 50731
IDAHO FALLS ID 83405-0731

Mail
 Hand Delivery
 Facsimile

THOMSEN STEPHENS LAW OFFICES, PLLC

By:


Michael J. Whyte, Esq.

MJW:clm
6753\PLEADINGS\027 Wit-Ex Lists

Bryan D. Smith, Esq. – ISB #4411
B. J. Driscoll, Esq. – ISB # 7010
SMITH, DRISCOLL & ASSOCIATES, PLLC
414 Shoup Ave.
P.O. Box 50731
Idaho Falls, Idaho 83405
Telephone: (208) 524-0731
Facsimile: (208) 529-4166

BONNEVILLE COUNTY
CLERK

2010 JAN 21 PM 4: 56

Attorneys for Plaintiff

IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT OF
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF BONNEVILLE

THE WATKINS COMPANY, LLC,
an Idaho limited liability company,

Plaintiff,

v.

MICHAEL STORMS and KATHY
BURGGRAF,

Defendants.

Case No. CV-08-7258

**PLAINTIFF'S PRETRIAL
MEMORANDUM**

Pursuant to the court's Order and Notice Setting Jury Trial dated August 18,
2009, 2008, as modified by the court's Order on Motion for Court Trial dated January 12,
2010, the plaintiff, The Watkins Company, LLC, submit this Pretrial Memorandum.

I. NAMES OF PERSONS WHO MAY BE CALLED TO TESTIFY.

1. Dane Watkins, Sr.
2. Linda Miller
3. Michael Storms
4. Kathy Burggraf

Additionally, Plaintiff reserves the right to call rebuttal or impeachment
witnesses.

II. DESCRIPTIVE LIST OF ALL EXHIBITS PROPOSED TO BE OFFERED INTO EVIDENCE.

Exhibit No.	Description
1.	Commercial Lease and Deposit Receipt dated 7/31/1996 with Addendum A, Addendum B, Exhibit C, and Addendum D
2.	The Watkins Company, LLC documents
3.	Documents re: Brownstone monthly gross sales and sales tax payments
4.	"Brownstone Monthly Rent Deposit" forms
5.	Utility records for Brownstone
6.	Rent accounting records for Brownstone
7.	Invoice 2005-105 dated 1/21/2005 from Briggs Roofing to Watkins Enterprises for \$2,680.00
8.	Ck #3934 dated 3/15/2005 from Brownstone Companies, Inc. to Watkins Enterprises for \$1,780.00
9.	Ck #2051 stub dated 5/18/2005 from The Watkins Company to Briggs Roofing for \$2,330.00
10.	Ck #4146 dated 12/23/2005 from Brownstone Companies, Inc. to Watkins Enterprise for \$5,000.00
11.	Invoice #2006-226 dated 5/2/2006 from Briggs Roofing to Watkins Enterprises for \$12,135.00
12.	Invoice 6-10-594 dated 10/5/2006 from Custom Gutter, LLC to Dane Watkins for \$311.45
13.	Invoice 120 from Briggs Roofing Company to Watkins Enterprise
14.	Ck #1225 dated 6/21/2007 from Brownstone Companies, Inc. to Dane Watkins for \$500.00
15.	Ck #4187 dated 6/22/2007 from The Watkins Company, LLC to Briggs Roofing Company for \$5,500.00
16.	Ck #4621 dated 12/4/2007 from The Watkins Company, LLC to Waters Construction for \$4,000.00
17.	Bill from J.D. Roofing & Siding, L.L.C. dated 5/10/2008 for \$500.00
18.	Three Day Notice to Pay Rent or Quit the Premises dated 7/10/2008
19.	Three Day Notice to Pay Rent or Quit the Premises dated 9/12/2008
20.	"Brownstone Rent Deducted Due"
21.	Ck #1542 dated 7/11/2008 from Brownstone Companies, Inc. to Watkins & Watkins for \$17,900.00
22.	Ck #1583 dated 9/14/2008 from Brownstone Companies, Inc. to Watkins Enterprises for \$6,219.00
23.	8/10/1999 letter from Kathy Burggraf to Dane Watkins with documents
24.	1/8/2007 letter from Dane Watkins to Marvin Smith
25.	5/5/2008 letter from Dane Watkins to Mike Storms
26.	6/12/2008 letters from Bryan D. Smith to Brad Williams and Kathy Burggraf
27.	9/23/2008 letter from Michael J. Whyte to Bryan D. Smith
28.	4/30/2009 letter from B. J. Driscoll to Michael J. Whyte

29.	4/13/2009 letter from B. J. Driscoll to Michael J. Whyte
30.	Photos of upstairs storage area
31.	Photos of Space #16
32.	Photos of sidewalk area
33.	Photos of "pipeyard" storage area
34.	Rent, Late Fees, And Interest Summary
35.	Unjust Enrichment Summary
36.	Roof Damage Summary
37.	Total Damage Summary
38.	Expired gifts certificates from Brownstone
39.	Defendants' Answers to Plaintiff's First Set of Interrogatories dated 7/7/2009
40.	Defendants' Responses to Plaintiff's First Set of Requests for Production dated 7/7/2009
41.	Defendants' Supplemental Responses to Plaintiff's First Set of Requests for Production dated 8/11/2009
42.	Defendants' Supplemental Answers to Plaintiff's First Set of Interrogatories dated 10/27/2009
43.	Defendants' Second Supplemental Responses to Plaintiff's First set of Interrogatories and Requests for Production dated 11/12/2009
44.	Affidavit of Michael Storms dated 12/10/2009
45.	Affidavit of Michael Storms dated 7/28/2009
46.	Affidavit of Michael Storms in Support of his Objection to Plaintiff's Motion for Partial Summary Judgment dated 12/23/2009
47.	Affidavit of Kathy Burggraf dated 7/29/2009

In addition to the exhibits described above, Plaintiff reserves the right to introduce any exhibits identified by the defendants, plus impeachment or rebuttal exhibits.

III. LEGAL AUTHORITIES UPON WHICH PLAINTIFF RELIES AS TO EACH ISSUE OF LAW EXPECTED TO BE LITIGATED.

a. Date When Rent Is Due When Date Not Expressly Identified In The Lease.

"Unless otherwise agreed, periodic rent is payable at the beginning of any term of one month or less and otherwise in equal monthly installments at the beginning of each month." UNIFORM RESIDENTIAL LANDLORD & TENANT ACT § 1.401(c). Further, if a lease agreement does not expressly identify the date that rent payments are due each month, then the rent is due on the date "either expressly made or to be gathered by

necessary implication from the acts and circumstances of the parties or by custom or usage in the community.” AM.JUR.2D *Landlord and Tenant* § 555.

b. Acceleration.

Idaho law recognizes the enforceability of acceleration clauses. *See Parrott v. Wallace*, 127 Idaho 306, 310-311 (Ct.App. 1995).

c. Eviction.

Idaho Code Section 6-303, *et seq.*, provides for the remedy of eviction. If a tenant fails to pay rent, the landlord is entitled to restitution of the premises. *Brooks v. Coppedge*, 71 Idaho 166, 170 (1951). In such a case, the lease is not terminated until after entry of a judgment to that effect. *Id.* 71 Idaho at 171.

d. Unjust Enrichment.

“A prima facie case of unjust enrichment consists of three elements: (1) there was a benefit conferred upon the defendant by the plaintiff; (2) appreciation by the defendant of such benefit; and (3) acceptance of the benefit under circumstances that would be inequitable for the defendant to retain the benefit without payment to the plaintiff for the value thereof.” *Vanderford Co., Inc. v. Knudson*, 144 Idaho 547, 558 (2007) (citation omitted).

e. Expert Testimony.

Idaho Rule of Evidence 702 states, “If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.”

In Idaho, a court abuses its discretion if it admits expert testimony that was not properly disclosed and that prejudices the opposing party. *Clark v. Raty*, 137 Idaho 343, 347 (Ct.App. 2002). The *Clark* court explained as follows:

[F]ailure to meet the requirements of Rule 26 “typically” results in exclusion of the proffered evidence. The potential for prejudice to the opposing party from the admission of evidence that was not disclosed in discovery is particularly acute with respect to expert testimony, for as the court noted in *Radmer*, “[e]ffective cross-examination of an expert witness requires advance preparation,” and “effective rebuttal requires advance knowledge of the line of testimony of the other side.”

Id. (quoting *Radmer v. Ford Motor Co.*, 120 Idaho 86, 89 (1991)). The *Radmer* court explained as follows:

It is fundamental that opportunity be had for full cross-examination, and this cannot be done properly in many cases without resort to pretrial discovery, particularly when expert witnesses are involved . . . Before an attorney can even hope to deal on cross-examination with an unfavorable expert opinion he [or she] must have some idea of the bases of that opinion and the data relied upon. If an attorney is required to await examination at trial to get this information, he [or she] often will have too little time to recognize and expose vulnerable spots in the testimony.

Id. at 89 (citing Friedenthal, *Discovery and Use of an Adverse Party's Expert Information*, 14 Stan.L.Rev. 455, 485 (1962)); see also *Hopkins v. Duo-Fast Corp.*, 123 Idaho 205, 217-218 (1993) (noting that I.R.C.P. 26(e)(1) obligates counsel to supplement discovery responses, particularly the substance of an expert's testimony).

However, “it is settled in Idaho that, in civil actions, the owner of property is competent to testify as to its market value without qualifying the owner as an expert witness.” *State v. Vandenacre*, 131 Idaho 507, 509 (Ct.App. 1998) (citing *Pocatello Auto Color, Inc. v. Akzo Coatings, Inc.*, 127 Idaho 41, 43, 896 P.2d 949, 951 (1995); *Howes v. Curtis*, 104 Idaho 563, 568, 661 P.2d 729, 734 (1983); *McFarland v. Joint School*

District No. 365 in Elmore and Owyhee Counties, 108 Idaho 519, 522, 700 P.2d 141, 144 (Ct.App.1985)). Refusal to allow an otherwise competent property value witness to testify as to the rental value of that property is reversible error. *Valdez v. Christensen*, 89 Idaho 285, 292-293 (1965).

f. Affirmative Defense Of Contract Modification.

Any modification of a contract requires consideration. Consideration means the promisee's action or forbearance given in exchange for the promisor's promise. *Shore v. Peterson*, 146 Idaho 903 (2009); *Boise Tower Assocs., LLC v. Hogland*, 147 Idaho 774 (2009). "The doing by one of the parties of something that he is not legally bound to do constitutes consideration for the other's promise to modify the terms of the original agreement. *Shore, supra*, 146 Idaho at 910 (citing *Dashnea v. Panhandle Lumber Co.*, 57 Idaho 232 (1937)).

Further, Idaho law provides as follows:

It is well settled in Idaho that parties to a written contract may modify its terms by subsequent oral agreement or may contract further with respect to its subject matter. *Silver Syndicate, Inc. v. Sunshine Mining Co.*, 101 Idaho 226, 611 P.2d 1011 (1979); *Olson v. Quality-Pak Co.*, 93 Idaho 607, 469 P.2d 45 (1970); *Belts v. State*, 86 Idaho 544, 388 P.2d 982 (1964). However,

... one party to a contract cannot alter its terms without the assent of the other and the minds of the parties must meet as to any proposed modification. The fact of agreement may be implied from a course of conduct in accordance with its existence and assent may be implied from the acts of one party in accordance with the terms of the change proposed by the other.

Ore-Ida Potato Products, Inc. v. Larsen, 83 Idaho 290, 296, 362 P.2d 384, 387 (1961). See also *Resource Engineering, Inc. v. Siler*, 94 Idaho 935, 500 P.2d 836 (1972). The party asserting an oral modification of a written contract has the burden of proving the modification by clear and convincing evidence. *Kline v. Clinton*, 103 Idaho 116, 645 P.2d 350 (1982).

Scott v. Castle, 104 Idaho 719, 724 (Ct.App. 1983).

g. Waiver.

“Waiver is a voluntary, intentional relinquishment of a known right or advantage.” *Wernecke v. St. Maries Joint School Dist. No. 401*, 147 Idaho 277, --- (2009) (citing *Hecla Mining Co. v. Star-Morning Mining Co.*, 122 Idaho 778, 782, 839 P.2d 1192, 1196 (1992)).

h. Affirmative Defense Of Accord and Satisfaction.

Idaho Code Section 28-3-310 provides as follows:

ACCORD AND SATISFACTION BY USE OF INSTRUMENT. (1) If a person against whom a claim is asserted proves that (i) that person in good faith tendered an instrument to the claimant as full satisfaction of the claim, (ii) the amount of the claim was unliquidated or subject to a bona fide dispute, and (iii) the claimant obtained payment of the instrument, the following subsections apply.

(2) Unless subsection (3) of this section applies, the claim is discharged if the person against whom the claim is asserted proves that the instrument or an accompanying written communication contained a conspicuous statement to the effect that the instrument was tendered as full satisfaction of the claim.

(3) Subject to subsection (4) of this section, a claim is not discharged under subsection (2) of this section if either of the following applies:

(a) The claimant, if an organization, proves that (i) within a reasonable time before the tender, the claimant sent a conspicuous statement to the person against whom the claim is asserted that communications concerning disputed debts, including an instrument tendered as full satisfaction of a debt, are to be sent to a designated person, office or place, and (ii) the instrument or accompanying communication was not received by that designated person, office, or place.

(b) The claimant, whether or not an organization, proves that within ninety (90) days after payment of the instrument, the claimant tendered repayment of the amount of the instrument to the person against whom the claim is asserted. This paragraph does not apply if the claimant is an organization that sent a statement complying with paragraph (a)(i) of this subsection.

(4) A claim is discharged if the person against whom the claim is asserted proves that within a reasonable time before collection of the instrument was initiated, the claimant, or an agent of the claimant having

direct responsibility with respect to the disputed obligation, knew that the instrument was tendered in full satisfaction of the claim.

Moreover, the Idaho Supreme Court recently explained the defense of accord and satisfaction as follows:

An accord and satisfaction is generally defined as “a method of discharging a contract or cause of action, [w]hereby the parties agree to give and accept something in settlement of the claim or demand of the one against the other, and perform such agreement, the ‘accord’ being the agreement and the ‘satisfaction’ its execution or performance.” *Strother*, 136 Idaho at 867, 41 P.3d at 753 (quoting *Fairchild v. Mathews*, 91 Idaho 1, 4, 415 P.2d 43, 46 (1966)); see also *Conklin v. Patterson*, 85 Idaho 331, 338, 379 P.2d 428, 431 (1963) (recognizing that a prima facie case of accord and satisfaction is shown when a creditor offers to accept something other than the original performance stated in the agreement, and the debtor gives that performance); 1 AM.JUR.2D *Accord & Satisfaction* § 1 (1994). “To establish an accord and satisfaction the parties accepting a new or different obligation must do so knowingly and intentionally”; however, an accord and satisfaction may be implied from the attendant circumstances.^{FN5} *Harris v. Wildcat Corp.*, 97 Idaho 884, 886, 556 P.2d 67, 69 (1976). Since an accord and satisfaction is a substituted contract, the essentials of a valid contract must be present, including: proper subject matter, competent parties, a meeting of the minds, and consideration. 1 AM.JUR.2D *Accord & Satisfaction* § 5 (1994).

Shore v. Peterson, 146 Idaho 903, 909 (2009).

Finally, “It cannot be too strongly stated that an ***accord and satisfaction can never be implied from language of doubtful meaning***; indeed, the words themselves deny this possibility. Hence, where a substantial doubt arises, there can be no such application, the usual rule applies, and the payment will be treated as on account only.” *Fairchild v. Mathews*, 91 Idaho 1, 4 (1966) (superseded on other grounds by I.C. § 28-3-310) (emphasis added).

i. Affirmative Defense Of *Res Judicata*.

Regarding the defense of *res judicata*, the Idaho Supreme Court recently explained as follows:

Claim preclusion [i.e., *res judicata*] bars a subsequent action between the same parties upon the same claim or upon claims “relating to the same cause of action ... which might have been made.” *Ticor Title*, 144 Idaho at 123, 157 P.3d at 617 (quoting *Hindmarsh v. Mock*, 138 Idaho 92, 94, 57 P.3d 803, 805 (2002)). There are three requirements for claim preclusion to bar a subsequent action: (1) same parties, (2) same claim, and (3) final judgment. *Ticor Title*, 144 Idaho at 124, 157 P.3d at 618. . . . The burden of proof for *res judicata* is on the party asserting the affirmative defense and it must prove all of the essential elements by a preponderance of the evidence. *Id.* at 122, 157 P.3d at 616.

Kootenai Elec. Co-op., Inc. v. Lamar Corp., 148 Idaho 116, --- (2009).

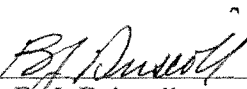
j. Waiver Of Defenses Not Asserted In Responsive Pleading.

Idaho Rule of Civil Procedure 12(b) provides that certain, enumerated defenses shall be made by motion. Otherwise, “**Every defense, in law or fact**, to a claim for relief in any pleading, whether a claim, counterclaim, cross-claim or third-party claim, **shall be asserted in the responsive pleading** thereto if one is required . . .” I.R.C.P. 12(b) (emphasis added).

DATED this 21 day of January, 2010.

SMITH, DRISCOLL & ASSOCIATES PLLC

By



B. J. Driscoll

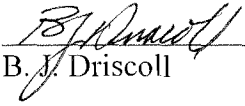
Attorneys for Plaintiff

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 21 day of January, 2010, I caused a true and correct copy of the foregoing **PLAINTIFF'S PRETRIAL MEMORANDUM** to be served, by placing the same in a sealed envelope and depositing in the United States Mail, postage prepaid, or hand delivery, facsimile transmission or overnight delivery, addressed to the following:

Michael J. Whyte, Esq.
THOMSEN STEPHENS LAW
OFFICES, PLLC
2635 Channing Way
Idaho Falls, ID 83404

- U. S. Mail
- Fax
- Overnight Delivery
- Hand Delivery



B. J. Driscoll