

2-14-2011

# Oakes v. Boise Heart Clinic Physicians, PLLC Augmentation Record Dckt. 38146

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## Recommended Citation

"Oakes v. Boise Heart Clinic Physicians, PLLC Augmentation Record Dckt. 38146" (2011). *Idaho Supreme Court Records & Briefs*. 2843.  
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In the Supreme Court of the State of Idaho

LAW CLERK

DAVID F. OAKES, M.D.,  
Plaintiff-Counterdefendant-Appellant,  
v.  
BOISE HEART CLINIC PHYSICIANS,  
PLLC,  
Defendant-Counterclaimant-  
Respondent.

ORDER GRANTING STIPULATION  
REGARDING ADDITION TO THE  
CLERK'S RECORD

Supreme Court Docket No. 38146-2010  
Ada County Docket No. 2009-15341

A STIPULATION REGARDING ADDITION TO THE CLERK'S RECORD was filed  
counsel for Respondent on February 9, 2011. Therefore, good cause appearing,

IT HEREBY IS ORDERED that the STIPULATION REGARDING ADDITION TO T  
CLERK'S RECORD be, and hereby is, GRANTED and upon receipt of the Clerk's Record  
Appeal, the file stamped copies of the document which accompanied this Stipulation shall  
inserted into the Record on Appeal:

- 1. Bench Brief in Support of Defendant's Motion for Directed Verdict, file-stam  
September 21, 2010.

DATED this 14<sup>th</sup> day of February 2011.

For the Supreme Court

*Stephen Kenyon*  
Stephen W. Kenyon, Clerk

**AUGMENTATION RECORD**

cc: Counsel of Record

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- Docket No. 38146-2010

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cc: Counsel of Record

ORDER GRANTING STIPULATION REGARDING ADDITION TO THE CLERK'S RECORD  
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NO. \_\_\_\_\_  
FILED \_\_\_\_\_  
A.M. \_\_\_\_\_ P.M. \_\_\_\_\_

SEP 21 2010

J. DAVID NAVARRO, Clerk  
By RIC NELSON  
DEPUTY

Keely E. Duke  
ISB #6044; [ked@hallfarley.com](mailto:ked@hallfarley.com)  
Kara L. Heikkila  
ISB #8090; [klh@hallfarley.com](mailto:klh@hallfarley.com)  
HALL, FARLEY, OBERRECHT & BLANTON, P.A.  
702 West Idaho, Suite 700  
Post Office Box 1271  
Boise, Idaho 83701  
Telephone: (208) 395-8500  
Facsimile: (208) 395-8585  
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Attorneys for Defendant/Counterclaimant

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

DAVID F. OAKES, M.D.,

Plaintiff/Counterdefendant,

vs.

BOISE HEART CLINIC PHYSICIANS, PLLC,

Defendant/Counterclaimant.

Case No. CV OC 0915341

**BENCH BRIEF IN SUPPORT OF  
DEFENDANT'S MOTION FOR  
DIRECTED VERDICT**

COPY

COMES NOW defendant Boise Heart Clinic, PLLC ("Boise Heart Clinic"), by and through its undersigned counsel of record, Hall, Farley, Oberrecht & Blanton, P.A., and hereby submits this bench brief in Support of Defendant's in-court Motion for a directed verdict pursuant to IRCP 50(a).

## I. SUMMARY

Plaintiff Dr. David Oakes has failed to support by substantial evidence his claims for breach of contract, breach of the covenant of good faith and fair dealing, the Idaho Wage Claim Act, *quantum meruit* and unjust enrichment, and conversion. Boise Heart Clinic respectfully moves for a directed verdict on these claims.

## II. LEGAL ANALYSIS

### A. **Standard on a Motion for Directed Verdict**

A motion for directed verdict may be granted so long as there is not substantial evidence to justify submitting the case to the jury. *Stephens v. Stearns*, 106 Idaho 249, 678 P.2d 41 (1984). Rule 50(a) of the Idaho Rules of Civil Procedure provides a party may move for a directed verdict “at the close of evidence offered by an opponent,” and requires that the moving party state the specific grounds for the motion. *See* I.R.C.P. 50(a); *see also* Idaho Trial Handbook, § 28:2 (2d ed.).

When deciding a motion for directed verdict, the trial court applies a substantial evidence test. Thus, the trial court “must determine whether, admitting the truth of the adverse evidence and drawing every legitimate inference most favorably to the opposing party, there exists substantial evidence to justify submitting the case to the jury.” *Powers v. Honda Motor Company*, 139 Idaho 333, 335, 79 P.3d 154, 156 (2003) (citations omitted); Idaho Trial Handbook § 28:2 (“For purposes of that determination, the moving party admits the truth of the opponent’s evidence and every favorable inference which may legitimately be drawn therefrom in the light most favorable to the opponent”) (citing *Stephens v. Stearns*, 106 Idaho 249, 678 P.2d 41 (1984)).

“The “substantial evidence” test does not require the [opposing party’s] evidence to be [direct or] uncontradicted. It requires only that the evidence be of sufficient quantity and probative value that reasonable minds could conclude that a verdict in favor of the party against whom the motion is made is proper.” *Powers, supra* (citations omitted). Instead, “substantial evidence is ‘such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.’” *Elce v. State of Idaho and Western Const., Inc.*, 110 Idaho 361, 363, 716 P.2d 505, 507 (1986). However, a verdict cannot be based upon speculation or conjecture, and, therefore, a party opposing a motion for a directed verdict cannot rely on speculation or conjecture to supply an essential element of proof to support submission of its claim to the jury. *Id.*

**B. Grounds for Dr. Oakes’s Failure to Establish Substantial Evidence in Support of His Claims**

Dr. Oakes claims that Boise Heart Clinic breached a contract under which he is owed Gainshare proceeds by failing to pay him those proceeds. However, Dr. Oakes is not entitled to the Gainshare proceeds he is claiming pursuant to either his employment contract or the Gainshare agreement, and thus Boise Heart Clinic cannot be said to have committed a breach for not paying him those proceeds. Furthermore, with no contract entitling him to the Gainshare proceeds he is seeking, failure to pay such proceeds cannot amount to a failure to pay a wage under Idaho law. Correspondingly, the existence of a valid contract prevents a claim for the implied covenant of good faith and fair dealing and for unjust enrichment. His claim of conversion must similarly fail based on the contract language regarding the adjustments to accounts receivable and the lack of entitlement to the assets of the Boise Heart Clinic under the contract.

1. Failure of the Breach of Contract Claim

Dr. Oakes has failed to establish a breach of contract claim because neither of the contracts at issue entitles him to the Gainshare proceeds. A plaintiff bears the burden of establishing the existence of a contract and the fact of its breach. *O'Dell v. Basabe, et al.*, 119 Idaho 796, 810 P.2d 1082 (1991). When the language of a contract is clear and unambiguous, its interpretation and legal effect are questions of law. *Bakker v. Thunder Spring-Wareham, LLC*, 141 Idaho 185, 108 P.3d 332, 337 (2005). In *Bakker*, the plaintiff made contractual and statutory claims for wages, and for *quantum meruit* based on language set out in her employment agreement regarding how and when compensation would be paid:

Your compensation will be \$3500 per month paid semi-monthly at \$1750 per period. You will also be paid .25% of 1% override on all successful closings of escrow on units at Thunder Spring. This begins as of your first day of employment estimated to be on or about December 30, 2001. This includes all transactions written inside or outside the sales venue, and will be in effect until all units at Thunder Spring close escrow. This will not be applicable for units previously disclosed by the developer or those in a holdover period with McCann Daech Fenton. Further, this is in affect (sic) only during your term of employment with ... Thunder Spring.

*Id.* at 337-338. The Court held that this language, and thus the contract, was unambiguous in referring to the entire compensation package, both the monthly wage and the earning of commissions. *Id.* at 338.

Based on testimony, Dr. Oakes was an employee, not owner, subject to an employment contract with the Boise Heart Clinic, which was negotiable, reviewed, and executed on an annual basis. He testified he would have participated in Gainshare “regardless of whether [he] made a dime.” Moreover, he admitted in his Complaint and in his deposition that Gainshare was not covered in his employment contract with the Boise Heart Clinic. *See Complaint at ¶ 9; Exh. 193, 63:2-5.* Dr. Oakes admitted in his deposition there was no written contract between himself and

the Boise Heart Clinic regarding Gainshare proceeds. *Id.*, 62:19-63:10. To the extent that Dr. Oakes might argue that a motion for a directed verdict is inappropriate because his testimony at trial with respect to the two contracts differed from his deposition testimony, such argument is unpersuasive. A party cannot survive a motion for a directed verdict by attempting to manufacture substantial evidence of his claim. As the Court of Appeals for the Ninth Circuit puts it,

“a party cannot create an issue of fact by an affidavit contradicting his prior deposition testimony.” *Kennedy v. Allied Mut. Ins. Co.*, 952 F.2d 262, 266 (9th Cir.1991) . . . *Cf. Combs v. Rockwell Int'l Corp.*, 927 F.2d 486, 488-89 (9th Cir.1991) (dismissing with prejudice and granting Rule 11 sanctions against a party and its counsel because the attorney, in an effort to avoid summary judgment, made substantive changes to the party's deposition testimony in violation of FRCP 30(e)) . . . ; *Thorn v. Sundstrand Aerospace Corp.*, 207 F.3d 383, 389 (7th Cir.2000) (“We also believe, by analogy to the cases which hold that a subsequent affidavit may not be used to contradict the witness's deposition, that a change of substance which actually contradicts the transcript is impermissible unless it can plausibly be represented as the correction of an error in transcription, such as dropping a ‘not.’”) (citations omitted).

*Hambleton Bros. Lumber Co. v. Balkin Enterprises, Inc.*, 397 F.3d 1217, 1224 (9th Cir.,2005).

The Gainshare Agreement defines “Group” as the Boise Heart Clinic, and sets out that St. Luke’s will pay the Group an amount of money based on the cost savings generated. *Defendant’s Exhibits 105 and 106*. Moreover, critical language of the Gainshare Agreement spells out the discretionary nature of how the Group may handle the income it receives, and how St. Luke’s would have no liability associated with how the Group treated that income:

4. (d) Physicians will participate in the Program only through participation in the Group. Participation [sic] Physicians shall be compensated by each Group’s sole discretion and St. Luke’s shall have no liability to individual Participating Physicians relating to payment hereunder.

*Id.* The Gainshare Agreement unambiguously provides for payment to the Group (Boise Heart



Clinic) and allows the Group discretion on what to do with the payment. Dr. Oakes cannot overcome that clear language or the similarly clear language limiting St. Luke's liability in this scenario.<sup>1</sup>

Dr. Oakes remains bound by his employment contract with the Boise Heart Clinic. Paragraph 5, Accounting Required, clarified that "all income generated by the Physician for his services as a Physician, shall belong to the Company." *Defendant's Exhibit 101*. Under paragraph 14, Relationship Between the Parties, language was set out that "nothing in the contract shall be construed to give the Physician any interest in the tangible or intangible assets of the Company." *Id.* An integration clause, paragraph 19, clarified, consistent with Dr. Oakes's testimony, that the employment agreement represented the entire agreement between the parties with respect to the subject, which included the compensation set out in paragraph 3. *Id.* This employment agreement is the only contract that could bind Boise Heart Clinic with respect to payment of compensation to Dr. Oakes and Dr. Oakes agreed it does not cover Gainshare payments to him.

Dr. Oakes does allege that Boise Heart Clinic made representations to him, extrinsic to both contracts, that he would get the portion of the Gainshare money that he is now seeking. To the extent that such alleged promises were made before the contracts came into effect, they were merged into the contracts. Both the employment and Gainshare agreements contain merger clauses. *Defendant's Exhibits 101, at ¶ 19; 105 and 106 at ¶ 22*. Similarly, to the extent any such alleged promises were made after the contracts took effect, they would have constituted modifications to the agreements, which, according to the merger clauses, would have needed to have been in writing and signed by the parties, and would also have had to have been supported by new consideration. *Brand S Corp. v. King*, 102 Idaho 731, 639 P.2d 429 (1981) (holding that

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<sup>1</sup> St. Luke's is obviously not a party to this suit.

consideration is required for modification, citing *Dashnea v. Panhandle Lumber Co. Ltd.*, 57 Idaho 232, 64 P.2d 390 (1937); *Liberty Mutual Fire Ins. Co. v. Hubbard*, 275 Or. 567, 551 P.2d 1288 (1976)). Dr. Oakes has presented no evidence that he offered any additional consideration in exchange for any modifications to the existing contracts. Dr. Oakes testified that he signed no contract modifying his employment agreement and made no request to modify it.

Finally, to the extent that Dr. Oakes may allege that an implied contract regarding Gainshare entitled him to monies he is seeking, that claim must also fail, due to the fact that there is an express agreement covering Gainshare.

Because Dr. Oakes has failed to establish by substantial evidence a breach of contract claim, a directed verdict must be entered on this claim and the claim must not be sent to the jury.

## 2. Failure of the Idaho Wage Claim Act Claim

Because the employment contract did not cover Gainshare, Dr. Oakes cannot establish an Idaho Wage Claim Act violation, as such a claim is inherently tied to the contract for compensation. Dr. Oakes testified he was not contending that he was not paid for services under his employment contract regarding Gainshare, as he was fully paid for those services. Again, Gainshare is based on cost savings associated with products, not with services. Dr. Oakes also testified that he was not claiming that the Boise Heart Clinic failed to pay him wages under his employment contract.

The Supreme Court has held that when a plaintiff in a case fails to establish that amounts in dispute were actually *due* from his employer because no contract provision covering that matter was ever finalized, the plaintiff's statutory wage claim was appropriately dismissed. *Gray v. Tri-Way Const. Services, Inc.*, 147 Idaho 378, 210 P.3d 63, 70 (2009). Similarly, in *Bakker v. Thunder Spring-Wareham*, where the plaintiff's employment contract was clear and

unambiguous and her commissions complied with general rules governing the earnings of commissions by a broker, the Supreme Court concluded that any other terms associated with her wages would be found in and determined by the terms of the employment agreement negotiated between the parties. *Bakker, supra*, 108 P.3d at 336-37. Dr. Oakes agrees Gainshare monies were not mentioned, nor were they covered, by the employment agreement. As such, Dr. Oakes' wage claim must fail.

Moreover, the nature of Gainshare savings is antithetical to a wage claim. The principle behind wage laws has to do with the fact that the "average wage earner depends greatly on the regular receipt of earned wages. If unpaid, serious economic injury may result to the wage earner." *Goff v. H.J.H. Co.*, 95 Idaho 837 (1974). This principle was supported, for example, by the holding in *Bilow v. Preco, Inc.*, 132 Idaho 23, 966 P.2d 23 (1998). In that case, the employee bought a wage claim for unpaid deferred incentive compensation due to him under his contract. *Id.* at 25, 966 P.2d at 25. The employment agreement precisely defined the parameters of the deferred compensation, which consisted of

6.25% of Preco's monthly "pre-tax profit" as defined in the agreement. Preco paid out 20% of the 6.25% each month (or 1.25% of Preco's monthly "pre-tax profit") as a "current incentive compensation payment" for that month. The remaining 80% (or 5% of Preco's "pre-tax profit") was allocated to a deferral account. The amount allocated to the deferral account was to be paid to Bilow over a rolling four-year period, with 1/48th of the account balance being paid each month, beginning in January of 1990.<sup>FN2</sup> The purpose of the incentive compensation plan was to average Bilow's income over a four-year period.

FN2. The agreement explained a monthly payout in the following fashion:

For example, in the event that Bilow has been an employee of Preco pursuant to this Agreement through the month of January of 1990, Bilow shall be paid as incentive compensation for the month of January 1990 any positive total of the following positive and/or negative amounts: (a) 1.25% of the January 1990 Preco "pre-tax

profit,” (b) 1/48th of 5% of the 1989 Preco “pre-tax profit” from the Bilow “deferral account,” (c) 1/48th of 5% of the 1988 Preco “pre-tax profit” from the Bilow “deferral account,” (d) 1/48th of 5% of the 1987 Preco “pre-tax profit” from the Bilow “deferral account,” and (e) 1/48th of 5% of the 1986 Preco “pre-tax profit” from the Bilow “deferral account.”

*Id.* at 26, 966 P.2d at 26. The Court held that the deferred compensation monies constituted “wages” under Idaho wage law, and quoted the district court’s analysis:

Bilow earned, as payment for services rendered over the course of seven years, the balance of the funds in the deferral account. They were part and parcel of his incentive compensation agreement, and were paid out over a rolling four year period. These funds represent compensation paid in direct consideration of services rendered, over and above Bilow’s “regular paychecks”

*Id.* at 29, 966 P.2d at 29. The deferred compensation in this case was directly related to Bilow’s services and was properly understood as compensation falling within the definition of a “wage.”

By contrast, the only parameter of Gainshare savings that might have been paid to Dr. Oakes that is defined anywhere in writing states that the payment of Gainshare proceeds is discretionary. *Defendant’s Exhibits 105 and 106 at ¶ 4.d.* Gainshare savings were not tied directly to Dr. Oakes’ performance; indeed, it was the group, rather than the individual, that participated in Gainshare. For example, Exhibit “C” of the Gainshare agreements (Defendant’s Exhibits 105 and 106) provides that “[n]otwithstanding the following, no payment shall be made in the event that Group’s utilization of the Cost Savings Items is less than the recommended minimum utilization of such items . . . .” In other words, if Boise Heart Clinic as a Group failed to use enough of the cost saving items, the group would not get any Gainshare payout whatsoever, regardless of whether Dr. Oakes did everything he could to help the Group meet the minimum requirements.

Also in contrast to the compensation in *Bilow*, there was further uncertainty regarding

any payout to physicians under the Gainshare program due to a termination clause. On page 13, ¶ 15, the Gainshare agreement states that “any party may terminate this Agreement with or without cause at any time by giving the other party written notice of such intention at least thirty (30) days prior to such termination. Upon expiration of the [one year] term or sooner termination of this Agreement (the “Termination Date”), all obligations of the parties to each other hereunder shall cease . . . .” *Defendant’s Exhibits 105 and 106*. Had St. Luke’s or Boise Heart Clinic or Goodroe terminated the Gainshare agreement before payment (if any) from St. Luke’s to Boise Heart Clinic was made, St. Luke’s obligation, if any, to pay Boise Heart Clinic would have ceased. Stated another way, there was no contractual guarantee that Boise Heart Clinic would receive money that it could then, at its sole discretion, attribute to Dr. Oakes for this outside program.

3. Failure of the Breach of the Covenant of Good Faith and Fair Dealing

The covenant of good faith and fair dealing protects the rights of parties to receive benefits of an employment agreement that they have entered. *Parker v. Boise Telco Fed. Credit Union*, 129 Idaho 248, 923 P.2d 493 (1996). That is, only denial of a benefit to which the employee was entitled under the terms of the employment agreement will support a claim for breach of this covenant. *Id.* The covenant does not inject substantive terms into a contract, but requires only that the parties perform in good faith the obligations imposed by their agreement. *Id.*

No covenant will be implied which is contrary to the terms of the contract negotiated and executed by the parties. The covenant requires “that the parties perform in good faith the obligations imposed by their agreement,” and a violation of the covenant occurs only when “either party . . . violates, nullifies or significantly impairs any benefit of the . . . contract . . . .”

*Idaho First Natl. Bank v. Bliss Valley Foods*, 121 Idaho 266, 288, 824 P.2d 841, 863 (1991) (citations omitted).

Because Dr. Oakes has admitted in this lawsuit that his employment contract did not cover Gainshare proceeds, he cannot recover under the breach of contract or a breach of the covenant of good faith and fair dealing theory as it relates to that contract. As such, Dr. Oakes has also failed to establish substantial evidence of a breach of the covenant of good faith and fair dealing.

4. Failure of the Claim for Unjust Enrichment

Unjust enrichment, or restitution, is the measure of recovery under a contract implied at law. *Barry v. Pacific West Coast, Inc.*, 140 Idaho 827; 103 P.3d 440, 447 (2004). These claims are not established when there is an express contract governing the relationships of the parties. *Wolford v. Tankersley*, 107 Idaho 1062, 695 P.2d 1201 (1984) (emphasis added). However, an equitable remedy may be found even when an express contract exists if the contract is unlawful, unconscionable, or violates public policy. *U.S. Bank Nat. Ass'n v. Kuenzli*, 134 Idaho 222, 999 P.2d 877 (2000). Whether a contract violates public policy is a question of law for the court to determine from all the facts and circumstances of each case. *Quiring v. Quiring*, 130 Idaho 560, 944 P.2d 695, 701 (1997). Public policy may be found in statutes, judicial decisions, or the constitution. *Id.* Notably, as a matter of public policy, nothing in the Idaho Wage Claim Act places limits on the ability of the employer and employee to contract for the terms of the employee's compensation. *Bakker v. Thunder Spring-Wareham, LLC*, 141 Idaho 185, 108 P.3d 332, 337 (2005). As long as the employer is meeting the minimum wage requirements of state law, further compensation is subject to negotiation between the employer and employee. *Id.* Correspondingly, for a contract to be voided as unconscionable, it must be both procedurally and

substantively unconscionable. *Id.* at 338., citing *Lovey v. Regence BlueShield of Idaho*, 139 Idaho 37, 72 P.3d 877 (2003)(citing cases). “Procedural unconscionability relates to the bargaining process leading to the agreement while substantive unconscionability focuses on the terms of the agreement itself.” *Id.* It is not sufficient that the contractual provisions appear unwise or their enforcement seems harsh. *Id.* Whether a contractual term is unconscionable is also a matter of law. *Id.*

Here, a claim for unjust enrichment has not been supported by any evidence, let alone substantial evidence, because an employment contract governs the relationship of the parties. Additionally, such a claim cannot be made in the absence of claims in this case that the contracts at issue were unlawful, unconscionable, or violated public policy. No evidence has been admitted on such an allegation.

As such, a motion for directed verdict is appropriate on this claim.

5. Failure of the Claim for Conversion

A claim for conversion requires: 1) that the defendant exercised dominion and control over plaintiff’s items of property without a right to do so, 2) that the plaintiff was consequently deprived of possession of those items of property, and 3) that the plaintiff was damaged. *Peasley Transfer & Storage Co.*, 132 Idaho 732, 979 P.2d 605 (1999). Under the express terms of Dr. Oakes’s employment contract, paragraph 14, he had no right as an employee to any assets of the Boise Heart Clinic. Dr. Oakes testified that the contract specifically stated he had no interest in the tangible or intangible assets of the Boise Heart Clinic. The amount earned under the contract with St. Luke’s was income to and an asset of the Boise Heart Clinic to which he had no entitlement (and such amount was “comingled” in Boise Heart’s account with other Boise Heart income). Nor did anything in the Gainshare Agreement establish his right to any of the

payments made under the terms of that contract with the Boise Heart Clinic. That is, Dr. Oakes cannot and did not establish a property right or a deprivation in this circumstance.

Based on this failure, this claim too must be subject to a directed verdict.

**III. CONCLUSION**

Based on the foregoing specific failures to establish substantial evidence on these claims, the Boise Heart Clinic respectfully requests that this Court grant its Motion for Directed Verdict.

DATED this 21 day of September, 2010.

HALL, FARLEY, OBERRECHT &  
BLANTON, P.A.

By: *Keely E. Duke* 15B#8038 for  
Keely E. Duke – Of the Firm  
Kara Heikkila – Of the Firm  
Attorneys for Defendant/Counterclaimant

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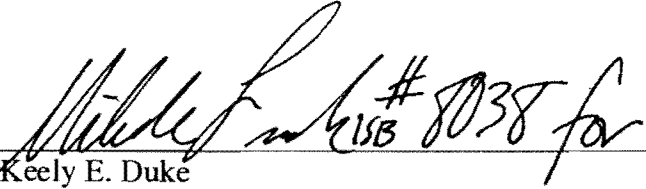


**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on the 21 day of September, 2010, I caused to be served a true copy of the foregoing document, by the method indicated below, and addressed to each of the following:

Thomas A. Banducci  
Dara Labrum  
BANDUCCI WOODARD SCHWARTZMAN  
PLLC  
802 West Bannock, Ste. 500  
Boise, Idaho 83702

- U.S. Mail, Postage Prepaid
- Hand Delivered
- Overnight Mail
- Fax No. 342-4455

  
\_\_\_\_\_  
Keely E. Duke  
Kara Heikkila