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Vol 4 of 6

IN THE SUPREME COURT OF THE STATE OF IDAHO

GAYLEN CLAYSON

Plaintiff-Counterdefendant

Respondent

vs.

LAW CLERK

DON ZEBE, RICK LAWSON, LAZE, LLC

Defendant-Counterclaimant

Appellant

Hon. Stephen S. Dunn District Judge

Appealed from the District Court of the Sixth Judicial District of the State of Idaho, in and for Bannock County.

Gary L. Cooper

COOPER & LARSEN, CHARTERED

Attorney X For Appellant X

Blake S. Atkin

ATKIN LAW OFFICES

Attorney X For Respondent X

FILED - COPY

Filed this ______ day of ______ 2008

MAY - 9 2011

Supreme Court ___ Court of Appeals ___

Clerk

Deputy

38471

IN THE DISTRICT COURT OF THE SIXTH JUDICIAL DISTRICT OF THE

STATE OF IDAHO, IN AND FOR THE COUNTY OF BANNOCK

GAYLEN CLAYSON,)
)
Plaintiff-Counterdefendant-Respondent,)
)
)
) Supreme Court No. 38471-2011
vs.)
)
DON ZEBE, RICK LAWSON, LAZE, LLC,)
) Volume IV
Defendant-Counterclaimant-Appellant,)
)
____________________________________)

CLERK'S RECORD

Appeal from the District Court of the Sixth Judicial District of the State of Idaho, in and for the County of Bannock.

Before **HONORABLE Stephen S. Dunn** District Judge.

For Appellant:

Gary L. Cooper
COOPER & LARSEN, CHARTERED
P.O. Box 4229
Pocatello, Idaho 83205-4229

For Respondent:

Blake S. Atkin
ATKIN LAW OFFICES
7579 North Westside Hwy
Clifton, Idaho 83228

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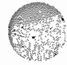


VOLUME IV

Sixth Judicial District Court - Bannock County

ROA Report

Case: CV-2009-0002212-OC Current Judge: Stephen S Dunn

Gaylen Clayson vs. Donald I Zebe, etal.

Gaylen Clayson vs. Donald I Zebe, Rick Lawson, LAZE, LLC

Date	Code	User		Judge
6/8/2009	NCOC	SHAREE	Clerk's	David C Nye
	COMP	SHAREE	Complaint Filed by Blake S Atkin, Attorney for Plaintiff	David C Nye
		SHAREE	Filing: A - Civil Complaint for more than $1,000.00 Paid by: Atkin Law Office PC Receipt number: 0021684 Dated: 6/8/2009 Amount: $88.00 (Check) For:	David C Nye
	ATTR	SHAREE	Plaintiff: Clayson, Gaylen Attorney Retained Blake S Atkin	David C Nye
	SMIS	SHAREE	Summons Issued - Don Zebe, 465 Berrett Ave, Pocatello, ID 83201	David C Nye
	SMIS	SHAREE	Summons Issued - Rick Lawson, 431 Chesapeake Ave, Pocatello, ID 83202	David C Nye
	SMIS	SHAREE	Summons Issued - LAZE LLC % Rick Lawson, 431 Chesapeake Ave, Chubbuck, ID 83202	David C Nye
7/24/2009		MARLEA	Filing: I1 - Initial Appearance by persons other than the plaintiff or petitioner Paid by: bowers law firm Receipt number: 0028119 Dated: 7/27/2009 Amount: $58.00 (Check) For: Lawson, Rick (defendant), LAZE, LLC (defendant) and Zebe, Donald I (defendant)	David C Nye
7/27/2009		CAMILLE	Answer, counterclaim and Demand for Jury; aty John Bowers for def	David C Nye
	ATTR	CAMILLE	Defendant: Zebe, Donald I Attorney Retained John D. Bowers	David C Nye
	ATTR	CAMILLE	Defendant: Lawson, Rick Attorney Retained John D. Bowers	David C Nye
	ATTR	CAMILLE	Defendant: LAZE, LLC Attorney Retained John D. Bowers	David C Nye
8/12/2009		CAMILLE	Answer to Counterclaim; aty Blake Atkin for plntf/counterclaim def	David C Nye
		AMYW	Returns of Service of Summons and Complaint to Don Zebe, Rick Lawson, and Laze, LLC; /s/ Blake Atkin, atty for plantiff/counterclaim def	David C Nye
8/25/2009	ORDR	AMYW	Order of Disqualification and Reference; /s/ J Nye	David C Nye
9/9/2009	ORDR	AMYW	Administrative Order of Reference; matter reassigned to Judge Dunn; /s/ J Nye	David C Nye
9/18/2009	ORDR	KARLA	Order for Submission of Information for Scheduling Order; /s J Dunn 09/18/09	Stephen S Dunn
10/2/2009		KARLA	Stipulated Statement (Atkin forPlaintiff)	Stephen S Dunn
10/13/2009		CAMILLE	Motion for Leave to Amend Complaint; aty Blake Atkin for plntf/counterclaim Def.	Stephen S Dunn
		CAMILLE	Memorandum in support of Motin for Leave to Amend Complaint; aty Blake Atkin for plntf	Stephen S Dunn
		CAMILLE	Certificate of service of Plntfs First set of Interrog to Defs; aty Blake Atkin for defs	Stephen S Dunn

Gaylen Clayson vs. Donald I Zebe, Rick Lawson, LAZE, LLC

Date	Code	User		Judge
10/13/2009		CAMILLE	Certificate of service of Plaintiffs first set of Document requests to Defendants: aty Blake Atkin for plntf/counterclaim def.	Stephen S Dunn
10/23/2009	NOTC	KARLA	Notice of Hearing; Motion for Leave to Amend; (Atkin for Def)	Stephen S Dunn
	HRSC	KARLA	Hearing Scheduled (Motion 11/23/2009 02:00 PM)	Stephen S Dunn
11/16/2009		CAMILLE	Defendants Motion to Continue Hearing on Motion to Amend; aty John Bowers for defs	Stephen S Dunn
		CAMILLE	Defendants Response to Plntfs Motion to Amend Complaint; aty JohnBowers for def	Stephen S Dunn
		CAMILLE	Certificate of service on Discovery Responses; aty JohnBowers for def	Stephen S Dunn
12/1/2009		DCANO	First Amended Complaint; Blake S. Atkin, Attorney for Plntf. Adding Don Zebe, Rick Lawson and Laze, LLC as Counterclaim Plaintiffs, and Gaylen Clayson as Counterclaim Defendant.	Stephen S Dunn
12/14/2009		CAMILLE	Answer to First Amended Complaint; aty John Bowers for Defs/counterclaim plntfs	Stephen S Dunn
12/17/2009	HRHD	KARLA	Hearing result for Motion held on 11/23/2009 02:00 PM: Hearing Held	Stephen S Dunn
		CAMILLE	Order; Motion for Leave to Amend Complaint is Granted; J Dunn 12-14-09	Stephen S Dunn
12/18/2009		CAMILLE	Stipulated Statement; atyBlake Atkin for plntf/counterclaim def	Stephen S Dunn
12/21/2009		CAMILLE	Notice of Depo of Bill Hudson ; set for 1-8-2010 @ 9am:	Stephen S Dunn
12/23/2009	ORDR	KARLA	Order Setting Jury Trial; /s J Dunn 12/23/09	Stephen S Dunn
	HRSC	KARLA	Hearing Scheduled (Jury Trial 03/23/2010 09:00 AM)	Stephen S Dunn
	HRSC	KARLA	Hearing Scheduled (Jury Trial 11/02/2010 09:00 AM)	Stephen S Dunn
12/24/2009		CAMILLE	Certificate of service - aty John Bowers for defs	Stephen S Dunn
12/28/2009		CAMILLE	Amended notice of Depo of Bill Hudson on 1-12-2010: aty Blake Atkin	Stephen S Dunn
12/31/2009		CAMILLE	Amended Notice of Depo of Bill Hudson on 1-12-2010 @ 9am: aty Blake Atkin for plntf	Stephen S Dunn
1/11/2010		CAMILLE	Subpoena Duces Tecum; aty Blake Atkin	Stephen S Dunn
		CAMILLE	Notice of service of Subpoena Duces Tecum; aty Blake Atkin for plnt/conterclaim def	Stephen S Dunn
		CAMILLE	Return of service - srvd on (copy of Subpoena to Becky Holzemer 12-29-09)	Stephen S Dunn
1/13/2010		CAMILLE	Certificate of Service - aty John Bowers for defs	Stephen S Dunn

Gaylen Clayson vs. Donald I Zebe, Rick Lawson, LAZE, LLC

Date	Code	User		Judge
1/14/2010		CAMILLE	Amended Notice of Depo of Gaylen clayson and Subpoena; aty John Bowers for Def and Counterclaim plntfs	Stephen S Dunn
	MOTN	KARLA	Motion for Admission Pro Hac Vice (Bowers for Def)	Stephen S Dunn
1/19/2010	MOTN	KARLA	Defendant's Motion to Modify Scheduling Order (Bowers for Def)	Stephen S Dunn
1/20/2010		CAMILLE	Notice of Deposition of Jeff Randall; on 1-26-2010 @ 9am: aty John Bowers for def	Stephen S Dunn
1/21/2010		CAMILLE	Order modifying deadlines in order setting Jury Trial; J Dunn 1-20-2010	Stephen S Dunn
		CAMILLE	Order of Admission Pro Hac Vice; J Dunn 1-20-2010	Stephen S Dunn
1/25/2010		CAMILLE	Second Amended Notice of Depo of Gaylen Clayson on 2-2-2010 @ 9am: aty John Bowers for def and counterclaim plntf	Stephen S Dunn
		CAMILLE	Amended Notice Depo of Jeff Randall on 2-3-2010 @ 9am: aty John Bowers for defs and counterclaim plntf	Stephen S Dunn
2/1/2010		CAMILLE	Motion and Memorandum to Hold Citizen Community Bank in contempt for nonobedience of subpoena; aty Blake Atkin for plntf/counterclaim def	Stephen S Dunn
2/3/2010		CAMILLE	Defs Motin to Dismiss and or Motion for summary Judgment; aty John Bowers	Stephen S Dunn
		CAMILLE	Defs Memorandum in support of motion to dismiss and or motion for sumary Judgment; aty John Bowers for defs	Stephen S Dunn
		CAMILLE	Certificate of service of plntfs Response to Defs First request for Production of Documents; aty Blake Atkin for plntf	Stephen S Dunn
		CAMILLE	Third Amended Notice of Depo of T Gaylen Clayson on 2-17-2010 @ 9am: aty John Bowers for defs	Stephen S Dunn
		CAMILLE	Amended Notice Depo of Jeff Randall on 2-15-2010 @ 10am: aty John Bowers for defs	Stephen S Dunn
2/8/2010		CAMILLE	Subpoena Duces Tecum; (Glanbia Foods)	Stephen S Dunn
2/10/2010		CAMILLE	Third Amended Notice of Depo of Jeff Randall; set for 2-15-2010: aty John Bowers for def	Stephen S Dunn
		CAMILLE	Fourth Amended Notice of Depo of Gaylen Clayson on 2-17-2010 @ 9am: aty John Bowers for defs	Stephen S Dunn
2/12/2010		CAMILLE	Subpoena Returned; left w/ Jerry Femnger	Stephen S Dunn
2/18/2010		CAMILLE	Fifth Amended Notice of Deposition of Gaylen Clayson on 2-25-2010 @ 9am: aty John Bowers for def and counterclaim plntf	Stephen S Dunn

Gaylen Clayson vs. Donald I Zebe, Rick Lawson, LAZE, LLC

Date	Code	User		Judge
2/22/2010		CAMILLE	Defendants Designation of Fact Witnesses; aty John Bowers for the Def and Counterclaim Plntfs	Stephen S Dunn
		CAMILLE	Certificate of service of plntfs response to Defendants Second request for production of documents; aty Blaker Atkin for plntf/counterclaim def	Stephen S Dunn
2/24/2010	NOTC	KARLA	Notice of Deposition of Rick Lawson (Atkin for Plaintiff)	Stephen S Dunn
	NOTC	KARLA	Notice of Deposition of Don Zebe (Atkin for Plaintiff)	Stephen S Dunn
		CAMILLE	Plaintiffs Designation of Fact Witnesses: aty Blake Atkin for plntf	Stephen S Dunn
2/26/2010		CAMILLE	Motion and Memorandum to be allowed to file late dsignation of Fact Witnesses: aty Blake Atkin for plntf	Stephen S Dunn
		CAMILLE	Defendants Motion to Strike Plaintiffs Witness List;; aty John Bowers for defs	Stephen S Dunn
3/1/2010		CAMILLE	Defendants Motion to Compel Discovery; aty John Bowers for def	Stephen S Dunn
3/2/2010		CAMILLE	Notice of Hearing; set for Defs Motoin to Dismiss/or Motion for Summary Judgment; aty John Bowers for Def	Stephen S Dunn
	HRSC	CAMILLE	Hearing Scheduled (Motion 03/15/2010 02:00 PM)	Stephen S Dunn
3/4/2010		CAMILLE	Amended Notice of Deposition of Rick Lawson 3-4-2010 @ 9am: aty Blake Atkin for plntf	Stephen S Dunn
		CAMILLE	Amended Notice of Deposition of Don Zebe on 3-3-2010 @ 9am: aty Blake Atkin for plntf	Stephen S Dunn
3/11/2010	MOTN	KARLA	Motion to Continue Hearing Date from March 15, 2010 to March 23, 2010 (Bowers for Def)	Stephen S Dunn
3/12/2010	ORDR	KARLA	Order Vacating Hearing on March 15, 2010 and rescheduling for March 23, 2010 /s J Dunn 03/12/10	Stephen S Dunn
	CONT	KARLA	Continued (Motion 03/23/2010 10:00 AM)	Stephen S Dunn
3/18/2010		CAMILLE	Stipulation and understanding of parties concerning Trial date Rescheduling; s/ Don Zebe and Rick Lawson	Stephen S Dunn
3/19/2010	STIP	KARLA	Stipulation and Understanding of Parties Concerning Trial Date Rescheduling (Don Zebe; Rick Lawson)	Stephen S Dunn
3/22/2010		CAMILLE	Certificate of service of Plaintiffs Third set of Requests for Production of Documents to Defendants: aty Blake Atkin for plnt	Stephen S Dunn
		CAMILLE	Certificate of Service of Plaintiffs Second set of Interrog. to Defendants: aty Blake Atkin for plntf/counterclaim Def.	Stephen S Dunn

Gaylen Clayson vs. Donald I Zebe, Rick Lawson, LAZE, LLC

Date	Code	User		Judge
3/22/2010		CAMILLE	Certificate of Service of Plaintiffs First set of Requests for Admissions to Defendants: aty Blake Atkin for plntf/counterclaim def.	Stephen S Dunn
3/23/2010		CAMILLE	Memorandum in Opposition to Defs Motion to Dismiss and or Motin for Summary Judgment; Memorandum in support of Motion to Amend Plntfs First Amended Complaint to Assert a Claim for PUnitive Damages; and Motion to countinue pursuant to IR CP 56f: aty Blake Atkin for p lntf/counterclaim defendant	Stephen S Dunn
		CAMILLE	Affidavit of Blake S Atkin in Support of Plaintiffs Rule 56f Motion; aty Blake Atkin for plntf counterclaim def	Stephen S Dunn
	HRHD	KARLA	Hearing result for Motion held on 03/23/2010 10:00 AM: Hearing Held	Stephen S Dunn
	MEOR	KARLA	Minute Entry and Order-hrg hld 03/23/10 on Motion to dismiss; Court DENY Motion to Dismiss; Plaintiff Rule 56f GRANTED; Def Motion to Compel taken under advisement; set hrg for Def Motion for Summ Judgment;	Stephen S Dunn
3/29/2010		CAMILLE	Certificate of service of Plaintiff Supplemental Response to Defs First Request for Production of documents; aty Blake Atkin for plntf/counterclaim def	Stephen S Dunn
3/31/2010	HRVC	KARLA	Hearing result for Jury Trial held on 03/23/2010 09:00 AM: Hearing Vacated	Stephen S Dunn
4/1/2010	DEOP	KARLA	Memorandum Decision on Defendant's Motion to Compel Discovery; DENIED except as to Bank of Star Valley records; Plaintiff ordered to produce Bank of Star Valley records within 14 days of this order; No costs or fees awarded to either party; /s J Dunn 04/01/10	Stephen S Dunn
4/2/2010	HRSC	KARLA	Hearing Scheduled (Motion for Summary Judgment 07/07/2010 02:00 PM)	Stephen S Dunn
4/19/2010		CAMILLE	Notice of Deposition of Don Zebe on 4-29-2010 @ 9am: atyBlake Atkin for plntf	Stephen S Dunn
		CAMILLE	Notice of Deposition of Rick Lawson on 4-30-2010 @ 9am: aty Blake Atkin for plntf	Stephen S Dunn
		CAMILLE	Certificate of Service of Defs Replies to Plaintiffs First set of Req for Admissions to Defendants; aty John Bowers for def/counterclaimants	Stephen S Dunn
4/22/2010		CAMILLE	Motion for Protective ORder concerning Deposition Scheduled for 4-29-2010 and April 30,2010: aty John Bowers for defs and counterclaim plntfs	Stephen S Dunn
		CAMILLE	Defendants Response to Plaintfs Motion to Extend Deadline to produce Bank of Star Valley Records; aty John Bowers for defs	Stephen S Dunn

Gaylen Clayson vs. Donald I Zebe, Rick Lawson, LAZE, LLC

Date	Code	User		Judge
4/22/2010		CAMILLE	Affidavit of Rod Jensen ; aty John Bowers for defs	Stephen S Dunn
4/23/2010		CAMILLE	Defendants Motion for Contempt; aty John Bowerss for Def. and counterclaim Plntfs	Stephen S Dunn
		CAMILLE	Affidavit of John Bowers; aty John Bowers for defs and counterclaim plntfs	Stephen S Dunn
4/26/2010		CAMILLE	Defendants Response to Plaintiffs Motion to Extend Deadline to Produce Bank of Star Valley Records; aty John Bowers for Defs. counterclaim plntf	Stephen S Dunn
		CAMILLE	Affidavit of Rod Jensen; aty John Bowers for def and counterclaim pltfs	Stephen S Dunn
5/10/2010		CAMILLE	Certificate of Service - Counterclaim Plntfs served upon the plntf, their Responses to Plntfs Interrog and req for production : aty John Bowers for Defs and Counterclaim plntfs	Stephen S Dunn
5/17/2010		CAMILLE	Notice of Association of counsel; aty Gary Cooper for def	Stephen S Dunn
5/20/2010	DEOP	KARLA	Memorandum Decision and Order re; Various Motions; Motion for Protective Order and Motion for Extension of Time to Produce are moot; Court DENIES Motion for Contempt; /s J Dunn 05/19/10	Stephen S Dunn
6/7/2010		CAMILLE	Motion to continue Trial; aty Gary Cooper for Def.	Stephen S Dunn
		CAMILLE	Notice of Hearing; on motion to continue set for 6-21-2010 @2pm: aty Gary Cooper for def	Stephen S Dunn
6/17/2010		CAMILLE	Notice of Deposition of Gaylen Clayson and Subpoena ; aty Gary Cooper	Stephen S Dunn
6/18/2010		CAMILLE	Amended Notice of Deposition of Gaylen Clayson and Subpoena; aty Gary Cooper for Def	Stephen S Dunn
6/21/2010		CAMILLE	Notice of Cancellation of the Depo of Don Zebe and Rick Lawson; aty Blake Atkin for plntf/counterclaim def	Stephen S Dunn
6/25/2010		CAMILLE	Amended Notice of Heaering; set for Defs Motion for Summary Judgment on 8-9-2010 @ 2pm: aty Gary Cooper	Stephen S Dunn
6/29/2010	HRSC	CAMILLE	Hearing Scheduled (Motion for Summary Judgment 08/09/2010 02:00 PM)	Stephen S Dunn
6/30/2010	MEOR	KARLA	Minute Entry and Order; hrg 06/21/10; Def Motion to Continue Trial; Court retained trial date; set backup date; reset Motion for Summary Judgment; /s J Dunn 06/24/10	Stephen S Dunn
	HRSC	KARLA	Hearing Scheduled (Jury Trial 01/11/2011 09:00 AM)	Stephen S Dunn
7/13/2010		CAMILLE	Notice of service - Response to Plntfs Second set of requests for Admissions to Def : aty Gary Cooper	Stephen S Dunn

Gaylen Clayson vs. Donald I Zebe, Rick Lawson, LAZE, LLC

Date	Code	User		Judge
7/15/2010		CAMILLE	Notice of Service - Discovery to Plaintiff and this Notice: aty Gary Cooper for Defs	Stephen S Dunn
7/16/2010		CAMILLE	Notice of service - Response to Plntfs Thrid set of Document requests to defendants: aty Gary Cooper for def	Stephen S Dunn
7/26/2010		CAMILLE	Affidavit of Gary Cooper; aty Gary Cooper	Stephen S Dunn
		CAMILLE	Defendants Lawson and Zebe Reply Memorandum in support of Motion ot Dismiss/Motion for Summary Judgment : aty Gary Cooper for Def.	Stephen S Dunn
8/6/2010		CAMILLE	Notice of Mediation; s/ Judge Brown 8-3-2010	Stephen S Dunn
8/9/2010		CAMILLE	Affidavit of Blake S Atkin in Opposition to Defs Motin to Dismiss or for summary Judgment; aty Blake Atkin for plntf	Stephen S Dunn
	HELD	KARLA	Hearing result for Motion for Summary Judgment held on 08/09/2010 02:00 PM: Motion Held	Stephen S Dunn
8/18/2010		CAMILLE	Certificate of Service of Plntfs Response to Defs Discovery to plntf: aty Blake Atkin for plntf	Stephen S Dunn
9/15/2010		CAMILLE	Memorandum Decision and Orderon Defendants Motion for Summary Judgment; (Court GRANTS Defs Summary Judgment) Defs Motion for Summary Judgment is DENIED; Plntfs Motion to Amend Plntf First Amended Complaint to Assert a Claim of Punitive Damages is DENIED) s/ Judge Dunn 9-14-2010	Stephen S Dunn
9/21/2010		CAMILLE	Second Amended Notice of Deposition of Gaylen Clayson and Subpoena ; set for 9-30-2010: aty Gary Cooper	Stephen S Dunn
10/1/2010		CAMILLE	Defendants Expert and Fact witness Disclosure; aty Gary Cooper	Stephen S Dunn
10/4/2010		CAMILLE	Motion to reconsider damage aspects of decision dated september 15, 2010: aty Blake Atkin for plntf	Stephen S Dunn
		CAMILLE	Memorandum in Support of Defense Motion in Limine; aty Gary Cooper	Stephen S Dunn
		CAMILLE	Second Affidavit of Gary Cooper; aty Gary Cooper	Stephen S Dunn
		CAMILLE	Defs Supplemental Expert and Fact Witness Disclosure; aty Gary Cooper for def	Stephen S Dunn
		CAMILLE	Defense Motion in Limine; aty Gary Cooper	Stephen S Dunn
	HRSC	CAMILLE	Hearing Scheduled (Motion 10/25/2010 01:30 PM)	Stephen S Dunn
10/7/2010		CAMILLE	Motion to Dismiss Counterclaim; aty Gary Cooper for def.	Stephen S Dunn
		CAMILLE	Notice of hearing; set for Motion to Dismiss on 10-25-2010 @ 1:30 pm;	Stephen S Dunn

Gaylen Clayson vs. Donald I Zebe, Rick Lawson, LAZE, LLC

Date	Code	User		Judge
10/8/2010	NOTC	DCANO	Notice of Deposition of Jeff Randall to Preserve Trial Testimony; Gary L. Cooper, Atty for Dfdts.	Stephen S Dunn
10/11/2010	MOTN	KARLA	Motion and Memorandum for Protective Order Re; Deposition of Jeff Randall to Preserve Trial Testimoney (Atkins for Plaintiff)	Stephen S Dunn
10/12/2010		NOELIA	Miscellaneous Payment: For Certifying The Same Additional Fee For Certificate And Seal Paid by: Atkin Law Office Receipt number: 0035333 Dated: 10/12/2010 Amount: $4.50 (Check)	Stephen S Dunn
		CAMILLE	Joint Pre Trial Stipulation; aty Blake Atkin for plntf	Stephen S Dunn
		CAMILLE	Notice of hearing; set for 10-25-2010 @ 1:30 pm: aty Blake Atkin for def	Stephen S Dunn
	MOTN	KARLA	Motion to Reconsider damage aspects of decision dated September 15, 2010 (Atkin for Plaintiff)	Stephen S Dunn
10/15/2010	RESP	KARLA	Def's Response to Plaintiff's Motion for Protective Order	Stephen S Dunn
10/18/2010	MEMO	KARLA	Memorandum In Opposition to Plaintiff's Motion for Reconsideration Re Damage Aspects of Decision Dated September 15, 2010 (Cooper for Defs)	Stephen S Dunn
10/19/2010		CAMILLE	Notice of hearing; set for Motion on 10-25-2010 @ 1:30pm: aty Gary Cooper	Stephen S Dunn
		CAMILLE	Motion Eliminating Jury; aty Gary Cooper	Stephen S Dunn
10/21/2010		CAMILLE	Defendants Supplemental Expert and Fact Witness Disclosure; aty Gary Cooper for Def.	Stephen S Dunn
		KARLA	Return of Service; subpoena of Jeff Randall 10/05/10	Stephen S Dunn
		CAMILLE	Memorandum in Opposition to Defense Motion in Limine; aty Blake Atkin for plntf/counterclaim def	Stephen S Dunn
10/29/2010	DCHH	KARLA	Hearing result for Motion held on 10/25/2010 01:30 PM: District Court Hearing Held Court Reporter: Sheila Fish Number of Transcript Pages for this hearing estimated: less 100	Stephen S Dunn
	ORDR	KARLA	Order; Counterclaim Dismissed; jury demand dismissed; Plaintiff's Motion to Reconsider denied; Def Motion in Limine deferred until trial; /s J Dunn 10/28/10	Stephen S Dunn
	CONT	KARLA	Continued (Jury Trial 11/04/2010 09:30 AM)	Stephen S Dunn
11/1/2010		CAMILLE	Trial Brief; aty Blake Atkin for plntf/counterclaim;	Stephen S Dunn
11/3/2010		CAMILLE	Designation of Testimony from the Deposition of Morris A Farinella ; on 9-30-2010: aty Gary Cooper for Def.	Stephen S Dunn

Gaylen Clayson vs. Donald I Zebe, Rick Lawson, LAZE, LLC

Date	Code	User		Judge
11/8/2010	HRSC	KARLA	Hearing Scheduled (Status Conference 11/08/2010 12:00 PM)	Stephen S Dunn
	HRSC	KARLA	Hearing Scheduled (Jury Trial 11/10/2010 01:30 PM)	Stephen S Dunn
11/16/2010	HRVC	KARLA	Hearing result for Jury Trial held on 01/11/2011 09:00 AM: Hearing Vacated	Stephen S Dunn
	DCHH	KARLA	Hearing result for Jury Trial held on 11/04/2010 09:30 AM: District Court Hearing Held Court Reporter: Sheila Fish Number of Transcript Pages for this hearing estimated: more than 500	Stephen S Dunn
	HRHD	KARLA	Hearing result for Jury Trial held on 11/10/2010 01:30 PM: Hearing Held	Stephen S Dunn
	HRHD	KARLA	Hearing result for Status Conference held on 11/08/2010 12:00 PM: Hearing Held	Stephen S Dunn
	MEOR	KARLA	Minute Entry and Order; Court Trial held; Parties to submit findings of facts and conclusions by 11/24/10; matter will be taken under advisement and written decsion to be issued; /s J Dunn 11/16/10	Stephen S Dunn
11/22/2010		KARLA	Plaintiff's Designation of Portions of the Deposition of Morris Ferinella (Atkin for Plaintiffs)	Stephen S Dunn
11/24/2010		CAMILLE	DefenseObjection to plntfs designation of Deposition excerpts from the Deposition of Morris Farinella : aty Gary Cooper	Stephen S Dunn
		CAMILLE	Defense Proposed Findings of Fact, Conclusions of Law and Argument; aty Gary Cooper	Stephen S Dunn
11/26/2010	BRFS	KARLA	Plaintiff's Post Trial Brief (Atkin for Plaintiff)	Stephen S Dunn
11/29/2010		KARLA	Findings of Fact and Conclusions of Law (Atkin for Plaintiff)(	Stephen S Dunn
12/6/2010		CAMILLE	Memorandum Decision, findings of Fact and Conclusions of law; court finds in favor of Plntf and awards damages totaling $97,310.94: s/ Judge Dunn 12-6-2010	Stephen S Dunn
12/7/2010	JDMT	CAMILLE	Judgment; ag Don Zebe Rick Lawson and Laze, LLC in the total amount of $97,310.94; s/ Judge Dunn 12-6-2010	Stephen S Dunn
	CSTS	CAMILLE	Case Status Changed: Closed	Stephen S Dunn
12/8/2010	MEMO	KARLA	Defense Memorandum on Damage Claim (Cooper for Defs)	Stephen S Dunn
	MEMO	KARLA	Palintiff's Trial Memorandum Regarding the Admissibility of Evidence that Defendants Assumed or Ratified Clayson's Entire Bill to Dairy Systems Company (Atkin for Palintiff)	Stephen S Dunn
	MEMO	KARLA	Reply Memorandum in support of Motion to Reconsider Damage As[ects of Decision Dated September 15, 2010 (Atkin for Plaintiff)	Stephen S Dunn

Gaylen Clayson vs. Donald I Zebe, Rick Lawson, LAZE, LLC

Date	Code	User		Judge
12/20/2010		CAMILLE	Memorandum of costs and Attorney Fees; aty Gary Cooper for def	Stephen S Dunn
		CAMILLE	Affidavit of Gary Cooper in support of Memorandum of costs and attorney fees; aty Gary Cooper for def	Stephen S Dunn
		CAMILLE	Affidavit of John D Bowers for Attorney Fees and costs; aty John Bowers for defs	Stephen S Dunn
12/27/2010		CAMILLE	Memorandum of costs including attorney fees; aty Blake Atkin for plntf	Stephen S Dunn
12/28/2010		CAMILLE	Memorandum in support of defs objection to costs and attorney fees claimed by plntfs: aty Gary Cooper	Stephen S Dunn
		CAMILLE	Objection to Plaintiffs Memorandum of Costs and Attorney fees: aty Gary Cooper for def	Stephen S Dunn
12/29/2010		CAMILLE	Objection to Defendants Memorandum of Costs including attorney fees; aty Blake Atkin	Stephen S Dunn
1/4/2011		CAMILLE	Affidavit of Blake Atkin in support of Memorandum of costs including attorney fees; aty Blake Atkin for plntf	Stephen S Dunn
		CAMILLE	Memorandum Decision on motion for attorney fees and costs; (Based on the foregoing, the court denies both motions for attorney fees and costs: the judgment will not be amended: s/ Judge Dunn 1-4-2011	Stephen S Dunn
1/14/2011		NOELIA	Filing: L4 - Appeal, Civil appeal or cross-appeal to Supreme Court Paid by: Gary L. Cooper Receipt number: 0001682 Dated: 1/14/2011 Amount: $101.00 (Check) For: Clayson, Gaylen (plaintiff)	Stephen S Dunn
	APSC	DCANO	Appealed To The Supreme Court	Stephen S Dunn
	NOTC	DCANO	NOTICE OF APPEAL; Gary L. Cooper, Atty for Dfdts.	Stephen S Dunn
	MISC	DCANO	Paid $101.00 check # 25113 for Filing Fee and Supreme court Fee. Paid $100.00 check # 25114 for deposit of Clerk's Record.	Stephen S Dunn
1/21/2011	MISC	DCANO	CLERK'S CERTIFICATE OF APPEAL; Signed and Mailed to Counsel and SC on 1-21-11.	Stephen S Dunn
1/28/2011	MISC	DCANO	IDAHO SUPREME COURT; Notice of Appeal received in SC on 1-24-11. Docket Number 38471-2011. Clerk's Record and Reporter's Transcript due in SC by 5-5-11. (3-31-11 5 weeks prior to Counsel. The following transcript shall be lodged: Court Trial 11-4-10, 11-5-10 and 11-10-10.	Stephen S Dunn
	MISC	DCANO	CORRECTED CLERK'S CERTIFICATE OF APPEAL. Signed and Mailed to SC and Counsel on 2-4-11.	Stephen S Dunn

Gaylen Clayson vs. Donald I Zebe, Rick Lawson, LAZE, LLC

Date	Code	User		Judge
2/8/2011	MISC	DCANO	IDAHO SUPREME COURT; Clerk's Corrected Certificated received in SC on 2-7-11. All parties are to review title and if any corrections please contact the Dist. Clerk. If not the title on the certificate must appear on all documents filed in SC.	Stephen S Dunn
3/30/2011	MISC	DCANO	NOTICE OF LODGING FOR TRANSCRIPTS: Sheila Fish on 3-30-11.	Stephen S Dunn
	MISC	DCANO	REPORTER'S TRANSCRIPTS RECEIVED IN COURT RECORDS FROM SHEILA FISH ON 3-30-11 for the following: Court Trial held 11-4-10, 11-5-10, and 11-10-10.	Stephen S Dunn
4/1/2011	MISC	DCANO	CLERK'S RECORD received in Court Records on 4-1-11.	Stephen S Dunn

COURT MINUTES

CV-2009-0002212-OC

Gaylen Clayson vs. Donald I Zebe, etal.

Hearing type: Court Trial

Hearing date: 11/04/2010

Time: 9:33 am

Judge: Stephen S Dunn

Courtroom: Room #301, Third Floor

Court reporter: Sheila Fish

Minutes Clerk: Karla Holm

Tape Number:

Party: Donald Zebe, Attorney: Gary Cooper

Party: Gaylen Clayson, Attorney: Blake Atkin

933	Begin; Blake Atkin associate sitting at table; Cooper no objection
934	Cooper Motion to Exclude Witnesses; Granted; witnesses excused
935	Plaintiff called sworn and testified; Gaylen W. Clayson
1046	Cooper-objection on record regarding issues requested during discovery that was not provided
1047	Court-overruled objection
1050	Recess
1104	Reconvene; continue with Palintiff
1109	Plaintiff Exhibit F-document prepared by Plaintiff-summary of work completed by Plaintiff; offered;
1110	Cooper objection

1111	Atkin argument
1113	Court;
1114	Atkin
1119	Court-deny Plaintiff Exhibit F
1126	Cooper objection
1127	Court-allow testimony regarding items marked by arrows on Exhibits F/a-u, those supporting documents maybe admitted
1129	Cooper advise Court of items not provided or identified during deposition
1130	Atkin
1131	Cooper continue with identifying documents not provided or identified at deposition
1139	Court will take under advisement this documents and will make decision at later time;
1140	Atkin
1146	Cooper-Motion to strike; argument; Atkin
1147	Court objection overruled
1207	Cooper Motion to Strike; Sustained
1210	Cooper Motion to Strike; Court grant motion to Strike
1215	Cooper Motion to Strike; Court Grant Motion to Strike
1223	Cooper question in aid of objection; Motion to Strike; Court overruled
1225	Cooper Motion to Strike; Overruled
1227	Cooper-Motion to Strike; Overruled
1228	Exhibit L
1230	Motion to Strike; sustained
1230	Exhibit M

1231	Motion to Strike; Sustained
1231	Exhibit P
1234	Exhibit T
1237	Motion to Strike; sustained
1238	Cooper question in aid of objection; Objection; Overruled
1239	Exhibit U
1240	Atkin-move to remove striking of check to High Sierra for $9100; Court granted
1245	Motion to Strike-Sustained
1246	Cooper-question in aid of objection; Motion to Strike
1247	Court-motion granted
1251	Motion to Strike; Overruled
1255	Cooper-question; Objection-Grant to all charges except at Thayne True Valley Hardware
1257	Motion to Strike-granted
1258	Atkin; Court Exhibit F/a-u admitted except as striken by Court and subject to further ruling by Court on issue of timelyness
1259	Lunch recess until 2 pm
159	Reconvene
159	Cooper-correction of earlier statement regarding supplemental discovery response; Exhibit F/f, F/u, F/t; not withdrawing objection
203	Motion to Publish Deposition Vol 1 and Vol 2 with attached exhibits; Court GRANTED;
204	Continue testimony of Plaintiff
210	Cooper-Objection
211	Court-objection overruled
217	Exhibit G

223	Offered 1st 4 pages of Exhibit G; objection; Admitted as foundational
301	Exhibit F offered; Cooper objection;
301	Court-objection overruled; admitted for limited purpose only, not for proof of what actual out of pocket expenses were -
324	Plaintiff Exhibit D; offered; admitted as stipulated
325	Plaintiff Exhibit N-offered as stipulated; no objection; admitted
326	Recess
340	Reconvene
340	Cooper cross examination
341	Court Publishing deposition Vol 1 and 2 of Mr Clayson with no objection
356	Def Exhibit 5A offered; Atkin objection; Admitted
419	Atkin-redirect examination
430	Witness excused
430	Plaintiff witness , Don Zebe, called sworn and testified
436	Plaintiff Exhibit J offered and admitted
440	Plaintiff Exhibit K, Annual Report from, Milk Market Management; offered
441	Cooper objection; Court admitted
445	Deposition of Don Zebe published without objection (photocopy in lieu of original submitted to Court)
456	Plaintiff Exhibit I, Star Valley Cheese Business Plan, offered; Cooper objected
456	Atkin argument; Court admitted for limited purpose as Atkin stated on record
509	Plaintiff Exhibit Q, SVC Financials from Dec 31, 2008-June 30, 2009
520	Recess for night; begin 8:30 am Friday, November 5, 2010

COURT MINUTES

CV-2009-0002212-OC

Gaylen Clayson vs. Donald I Zebe, etal.

Hearing type: Court Trial

Hearing date: 11/05/2010

Time: 8:26 am

Judge: Stephen S Dunn

Courtroom:

Court reporter: Sheila Fish

Minutes Clerk: Karla Holm

Tape Number:

Party: Donald Zebe, Attorney: Gary Cooper

Party: Gaylen Clayson, Attorney: Blake Atkin

826	Ruling on timelyness of Plaintiff's Exhibits; (see log notes)
845	Continued testimony of Don Zebe
850	Plaintiff Exhibit S; Email Don Zebe to Val Pendleton, 1/14/09; offered and admitted
857	Plaintiff Exhibit U, Email Don Zebe to Klark Gailey 1/31/09; offered; objection
858	Cooper argument; Court admitted for portion dealing with Dairy Systems in the past
908	Ruling on testimony regarding Dairy Systems bill; case limited to $50,000 paid by Clayson; Objection to last question sustained
913	Plaintiff Exhibit W, email from Don Zebe to Klark Gailey, 02/25/09, offered
914	Cooper-objection

915	Court-admitted
9123	Plaintiff Exhibit X, email from Don Zebe to Klark Gailey 03/07/09; offered
923	Cooper-objection; argument
924	Court-objection overruled; Exhibit X admitted
934	Recess
946	Reconvene; Court addresses party regarding additional research to be done;
947	Atkin comments
948	Cooper comments
948	Cooper direct examination of Don Zebe
1013	Def Exhibit 11-A, Offered
1014	Atkin-objection argument
1015	Cooper
1016	Atkin withdraw objection; Court admitted Def Exhibit 11-A
1030	Exhibit N, admitted by stipulation
1038	Atkin-re-cross examination
1043	Plaintiff Exhibit V, email Don Zebe to Klark Gailey, offered
1043	Cooper-objection
1044	Atkin
1044	Court-Admitted for purpose of challenging credibility
1051	Witness excused
1051	Atkin-identify witness and offer of testimony to be presented
1100	Cooper-objection to offer of testimony
1101	Court-testimony not admissible; ruling; Objection sustained
1102	Atkin

1102	Plaintiff rests subject to Court reconsideration of prior issue
1103	Recess
100	Reconvene; update of witnesses; tel conf 12 pm Monday; Court to instigate call; no Court on Tuesday; Wednesday 1:30 pm; any submissions by Saturday at 12 pm by email;
104	Cooper-highlighted deposition of Morris Ferineli submitted to Court
106	Atkin
106	Def witness-Ricky Layne Lawson called sworn and testified
125	Atkin-question in aid of objection; objection
126	Court-overruled
129	Def Exhibit 11, IRE 1006, summary of Clayson Invoices paid by SVC, offered; no objection; admitted
139	Court questions witness
141	Atkin cross examination
143	Plaintiff Exhibit Q, SVC Financials from 12/31/08-06/30/09
145	Offered-pages 7 & 8-only; Cooper objections
146	Atkin; Court overruled objection; Admitted
204	Cooper-re-direct examination
205	Exhibit Q, last 2 pages, offered; Atkin objected
206	Court –admitted
209	Witness excused;
209	Recess; Court instructions to parties regarding submissions on pending issues;
212	end

COURT MINUTES

CV-2009-0002212-OC

Gaylen Clayson vs. Donald I Zebe, etal.

Hearing type: Status Conference

Hearing date: 11/08/2010

Time: 11:59 am

Judge: Stephen S Dunn

Courtroom: Room #301, Third Floor

Court reporter: Sheila Fish

Minutes Clerk: Karla Holm

Tape Number:

Party: Donald Zebe, Attorney: Gary Cooper

Party: Gaylen Clayson, Attorney: Blake Atkin

1200	Court's decision on pending issue
1201	Decision
1206	Resume trial 1:30 pm Wednesday;
1206	Atkin-rebuttal witnesses

COURT MINUTES

CV-2009-0002212-OC

Gaylen Clayson vs. Donald I Zebe, etal.

Hearing type: Jury Trial

Hearing date: 11/10/2010

Time: 1:54 pm

Judge: Stephen S Dunn

Courtroom: Room #301, Third Floor

Court reporter: Sheila Fish

Minutes Clerk: Karla Holm

Tape Number:

Party: Donald Zebe, Attorney: Gary Cooper

Party: Gaylen Clayson, Attorney: Blake Atkin

154	Court Trial Continued
155	Atkin regarding exclusion of witnesses
156	Def witness Jeff Randall called sworn and testified
222	Court questions witness
223	Atkin cross examination
228	Plaintiff Exhibit CC, declaration of Jeff Randall, marked,
233	Exhibit CC, offered; Cooper objection; Court admitted
242	Cooper redirect
246	Witness excused; Defense rests
246	Plaintiff Rebuttal witness, Don Zebe, called and testified

251	Witness excused
251	Plaintiff Rebuttal witness, Gaylen Clayson
253	Cooper cross examination
253	Witness excused; Plaintiff rests; 5 minute recess
306	Reconvene; Cooper-no sur rebuttal
306	Court-Atkin;
307	Cooper;
308	Court-require proposed findings and conclusions from both parties; due 11/24/10; taken under advisement at that time; decision shall be issued by 12/24/10;
311	end

IN THE DISTRICT COURT OF THE SIXTH JUDICIAL DISTRICT OF THE

STATE OF IDAHO, IN AND FOR THE COUNTY OF BANNOCK

Register No.CV-2009-02212-OC

GAYLEN CLAYSON, Plaintiff, -vs- DON ZEBE, RICK LAWSON, AND LAZE, LLC., Defendants.	MINUTE ENTRY & ORDER

On November 4, 2010, the above entitled matter came before the Court for the purpose of a Court Trial. Blake Atkin, appeared on behalf of the Plaintiff and Gary Cooper, appeared for the Defendants.

Sheila Fish performed as Court Reporter for this proceeding.

At the outset, counsel for the Defendants made an oral motion for the exclusion of witnesses. Counsel for the Plaintiff had no objection. Court granted motion and witnesses were excused.

The Plaintiff was called, sworn and testified.

Plaintiff's Exhibit F, and supplemental Exhibits F/a-u, were offered, objected to and admitted into evidence, except as stricken by the Court, or admitted for a limited purpose as outlined by the Court.

Plaintiff's Exhibits G, pages 1-4 Invoices and Statements of Dairy Systems, August 2008-June 2009, D, Contract to buy real estate, and N, Addendum A1 Assignment, were offered and admitted.

Defendant's Exhibit 5A, Ferinella deposition, offered and admitted.

Plaintiff's witness, Don Zebe, called, sworn and testified.

Plaintiff's Exhibit J, Article of Organization DVC, LLC, Exhibit K, Annual Report from, Milk Market Management, Exhibit I, Star Valley Cheese business plan, were offered and admitted. Exhibit I being admitted for a limited purpose as stated by the Court.

Recess for night at 5: 21 p.m. Court instructed parties to reconvene Friday, November 5, 2010, at 8:30 a.m.

The Court reconvened at 8:26 a.m. on November 5, 2010.

At the outset, the Court advised the parties of its ruling regarding the Defendant's objection to the timeliness of Plaintiff's Exhibits.

Testimony of Plaintiff's witness, Don Zebe, continued.

Plaintiff's Exhibit S, email from Don Zebe to Val Pendleton dated January 14, 2009, Plaintiff Exhibit W, email from Don Zebe to Klark Gailey, dated February 25, 2009, Plaintiff Exhibit X, email from Don Zebe to Klark Gailey, dated march 7, 2009, Plaintiff Exhibit V, email from Don Zebe to Klark Gailey dated February 19, 2009, were offered and admitted into evidence.

Plaintiff Exhibit U, email from Don Zebe to Klark Gailey, January 31, 2009, offered and objected to. The Court admitted Exhibit U limited to the portion regarding Dairy Systems dealings in the past.

Defendant Exhibit 11-A, bills paid through November 25, 2008, was offered and admitted into evidence.

Plaintiff Exhibit N, Addendum A1 Assignment Gaylen Clayson, November 4, 2008, was admitted by stipulation of parties.

The witness was excused.

Plaintiff's counsel made an offer of proof of the proposed testimony of Klark Gailey. Defendant objected. The Court sustained the objection.

The Plaintiff rests.

The Court recessed for lunch at 11:03 a.m.

The Court reconvened at 1 p.m.

The Court reviewed the pending trial schedule with the parties.

Counsel for the Defendant submitted a highlighted copy of the deposition of Morris Ferinella to the Court for review.

Defendant Ricky L. Lawson was called sworn and testified.

Defendant Exhibit 11, IRE 1006, Summary of Clayson Invoices paid by SVC, LLC, was offered and admitted into evidence.

Plaintiff's Exhibit Q, SVC Financials from December 31, 2008 to June 30, 2009, pages 7 and 8, and last two pages, were offered and admitted into evidence.

The Court recessed for the night at 2:13 p.m. The Court instructed counsel for the parties as to the submission of briefings to the Court regarding pending issues. The Court also instructed the parties as to the pending trial schedule.

The Court held a telephonic hearing on Monday, November 8, 2010 at 12 p.m. At that time the Court issued its ruling on the record on the pending issues.

The Court reconvened on Tuesday, November 10, 2010 at the hour of 1:54 p.m.

Defendant's witness, Jeff Randall, was called sworn and testified.

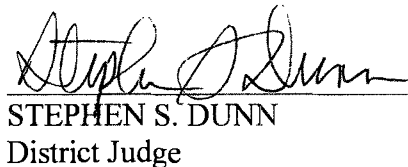
Plaintiff's Exhibit CC, Affidavit of Jeff Randall, was marked, offered and admitted into evidence as limited by the Court.

Defense rests.

Plaintiff's Rebuttal Witnesses, Don Zebe and Gaylen Clayson, were recalled and testified.

The Court required that proposed findings of facts and conclusions be submitted by both parties no later than November 24, 2010. At that time, this issue will be deemed under advisement and a written decision shall be issued by the Court.

DATED November 16, 2010.



STEPHEN S. DUNN
District Judge

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 16 day of Nov, 2010, I served a true and correct copy of the foregoing document upon each of the following individuals in the manner indicated.

Blake S. Atkin 7579 North Westside Highway Clifton, ID 83228	(✓) U.S. Mail ( ) Email ( ) Hand Deliver ( ) Facsimile
Blake S. Atkin Atkin Law Office 837 South 500 West, Ste 200 Bountiful, UT 84010	(✓) U.S. Mail ( ) Email ( ) Hand Deliver ( ) Facsimile
Gary L. Cooper Cooper & Larsen PO Box 4229 Pocatello, ID 83205-4229	(✓) U.S. Mail ( ) Email ( ) Hand Deliver ( ) Facsimile

DATED this 16 day of November, 2010.

[signature]

Deputy Clerk

Blake S. Atkin (ISB# 6903)
7579 North Westside Highway
Clifton, Idaho 83228
Telephone: (208) 747-3414

ATKIN LAW OFFICES, P.C.
837 South 500 West, Suite 200
Bountiful, Utah 84010
Telephone: (801) 533-0300
Facsimile: (801) 533-0380

Attorney for Defendants

IN THE SIXTH JUDICIAL DISTRICT COURT IN AND FOR BANNOCK COUNTY, STATE OF IDAHO

GAYLEN CLAYSON, Plaintiff, v. DON ZEBE, RICK LAWSON, and LAZE, LLC, Defendants. DON ZEBE, RICK LAWSON, and LAZE, LLC, Counterclaim Plaintiffs, v. GAYLEN CLAYSON, Counterclaim Defendant.	PLAINTIFF'S DESIGNATION OF PORTIONS OF THE DEPOSITION OF MORRIS FARINELLA Case No: CV-2009-02212-OC Judge: Dunn

The Plaintiff, Gaylen Clayson designates the following portions of the deposition of Morris Farinella attached hereto as exhibit A.

P. 14 lines 7 through 17.

P. 14 line 18 through P. 15 line 4.

P. 18 line 16 through P. 19 line 6.

P. 35 lines 13 through 20.

P. 40 lines 14 through 25.

P. 42 lines 4 through 15.

P. 43 lines 4 through 17.

P. 46 line 3 through P. 50 line17.

P. 56 line 2 through line 21.

P. 58 line 5 through line 13.

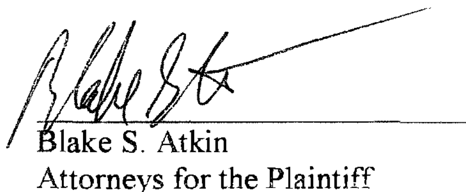
P. 61 line 19 through P. 62 line 13.

P. 63 line 7 through 14.

P. 65 line 9 through line 20.

Dated this 9 day of November, 2010

Atkin Law Offices, P.C.



Blake S. Atkin
Attorneys for the Plaintiff

Deposition of

MORRIS A. FARINELLA

LAZE, LLC v. DAIRY SYSTEMS COMPANY, INC.

Taken On
September 30, 2010

Transcript provided by:

HUTCHINGS[SM]
COURT REPORTERS, LLC
CSR 649

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CERTIFIED COPY

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT

IN AND FOR THE COUNTY OF LINCOLN, STATE OF WYOMING

LAZE, LLC, a Wyoming Limited Liability Company, DON ZEBE, RICK LAWSON,

Petitioners,

vs.

DAIRY SYSTEMS COMPANY, INC., a Utah Corporation,

Respondent.

AND RELATED COUNTER-CLAIMS.

No. 2009-89-DC

DEPOSITION OF MORRIS A. FARINELLA, a defendant herein, noticed by Bowers Law Firm, PC, taken at 6055 East Washington Boulevard, Los Angeles, California, at 9:10 a.m., on Thursday, September 30, 2010, before Lori S. Turner, CSR 9102, CP, RPR.

Hutchings Number 279888

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1 APPEARANCES OF COUNSEL:
2
3 For LAZE, LLC; DON ZEBE and RICK LAWSON:
4 BOWERS LAW FIRM, PC
5 BY JOHN D. BOWERS (Present telephonically)
6 685 South Washington Street
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8
9 - AND -
10
11 COOPER & LARSEN
12 BY GARY L. COOPER (Present telephonically)
13 151 North 3rd Avenue, Suite 210
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16 For MORRIS A. FARINELLA:
17 ATKIN LAW OFFICES, PC
18 BY BLAKE S. ATKIN (Present telephonically)
19 837 South 500 West, Suite 200
20 Bountiful, Utah 84010
21
22 Also Present: MANNY MARIN
23
24
25

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1 INDEX
2 WITNESS: MORRIS A. FARINELLA
3 EXAMINATION BY: PAGE
4 MR. BOWERS 5
5 MR. ATKIN 68
6
7
8 EXHIBITS
9 Exhibit identification within the transcript is flagged with "[EXH]" as an identifier.
10

EXHIBIT	DESCRIPTION	IDENTIFIED	MARKED
1	2-page document Bates stamped 1 through 2 entitled "Warranty Deed" [EXH-1]	19	19
2	1-page document Bates stamped 3 entitled "Bill of Sale" [EXH-2]	22	22
3	4-page document Bates stamped 4 through 7 entitled "Bill of Sale" [EXH-3]	24	24
4	Documents Bates stamped 8 through 19 referred to a "Offer to Purchase" [EXH-4]	26	26
5	2-page document Bates stamped 20 and 21 [EXH-5]	37	37
6	1-page document Bates stamped 22 [EXH-6]	38	38

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1 EXHIBITS (Continued)

EXHIBIT	DESCRIPTION	IDENTIFIED	MARKED
7	Documents Bates stamped 23 through 26 [EXH-7]	40	41
8	Documents Bates stamped 27 through 30 [EXH-8]	42	42
9	1-page document Bates stamped 31 [EXH-9]	43	43
10	Documents Bates stamped 32 through 39 [EXH-10]	44	44

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1 MORRIS A. FARINELLA,
2 a defendant herein, having been sworn, testifies as
3 follows:
4
5 -EXAMINATION-
6
7 BY MR. BOWERS:
8 Q. Mr. Farinella. My name is John Bowers. I
9 represent Rick Lawson, Don Zebe and Laze, LLC in this
09:12 10 matter.
11 Would you please state your full name for the
12 record.
13 A. Morris A. Farinella, F-a-r-i-n-e-l-l-a.
14 Q. Great.
09:12 15 And your current address?
16 MR. MARIN: 9323 --
17 THE WITNESS: 9323 Tweedy Lane, Downey, California
18 "90240."
19 MR. BOWERS: Thank you.
09:12 20 Q. Mr. Farinella, have you ever had your
21 deposition taken before?
22 A. Yes.
23 Q. So you understand the procedure? I get to ask
24 the questions and you get to answer them; correct?
09:13 25 A. To the best of my ability, yes.

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09:13 1 Q. And just a couple things.
2 On the telephone, this will make it easier, because
3 we'll be more likely to answer questions verbally, but
4 sometimes in human nature, we have a habit of shrugging
09:13 5 and shaking our heads, and our court reporter Lori won't
6 be able to take that down. So we'll verbalize our
7 answers.
8 The other things is we have to slow down. I have a
9 habit of talking over people. So if you have that same
09:13 10 habit, just wait until I finish my question before you
11 answer.
12 Okay?
13 A. Yes.
14 Q. Are you on any type of medication today, sir?
09:13 15 A. No.
16 Q. How old are you?
17 A. 87.
18 Q. Any reason medically, or there's no medication
19 that would prevent you from understanding and answering
09:13 20 my questions today truthfully?
21 A. No.
22 The only thing I take is aspirin.
23 Q. Great.
24 Okay. Can you tell me what you did in preparation
09:14 25 for this deposition?

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09:14 1 A. Nothing.
2 Q. Did you talk to anybody?
3 A. No.
4 Q. Okay.
09:14 5 Did you talk to Gaylen Clayson?
6 A. No.
7 Q. When is the last time you spoke with
8 Mr. Clayson?
9 A. A year, I guess, ago. Maybe a year, year and a
09:14 10 half. I don't know.
11 Q. Did you review any documents?
12 A. No.
13 Q. Have you ever spoken to Clark Gayley?
14 A. I don't know him.
09:14 15 Q. John Gayley?
16 A. I don't know him.
17 Q. That would mean you haven't spoken to them?
18 A. If I don't know them, I don't think I talked to
19 them.
09:14 20 Q. That's right. Okay.
21 Mr. Farinella, you, through a company that I
22 understand that you own, were the owners for a long
23 period of time of a business located in Thayne, Wyoming
24 that we refer to as Star Valley Cheese Plant; is that
09:15 25 true?

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09:15 1 A. Yes. Since 1975.
2 Q. Thank you. '75.
3 And in 2008, that plant was in bankruptcy; is that
4 correct?
09:15 5 A. I believe so.
6 Q. Or under the direction of bankruptcy?
7 A. Well, under a Chapter 11 and Chapter 7, I
8 think.
9 Q. Okay.
09:15 10 And did there come a time when you sold the plant?
11 A. No.
12 Q. When I refer to plant, I'll -- whether it's
13 plant or Star Belly Cheese Factory or Star Belly Plant,
14 it's all the same thing.
09:15 15 A. Yes.
16 No, we haven't sold it.
17 Q. Okay.
18 So can you tell me about -- Apparently there was a
19 time when you were allowed to sell the plant even though
09:15 20 it was in bankruptcy.
21 Can you tell me how that transpired?
22 A. You don't understand the procedure of a
23 bankruptcy.
24 Q. Yes, I do.
09:16 25 A. You say "bankruptcy" -- a bankruptcy lawyer was

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09:16 1 there, and he runs the show. The Court runs the show;
2 not me.
3 So when it went in bankruptcy, we took bids to get
4 the money to pay the people. And the bids had to be
09:16 5 okayed by the court. I was appointed as president to
6 take the bids with the broker from Wyoming, the real
7 estate broker, who had the authority to sell the plant
8 for the bankruptcy court.
9 Q. Okay.
09:16 10 So just to make sure I understand this.
11 A. Okay.
12 Q. You would receive bids or offers to purchase
13 it. Then you would forward that information to the
14 bankruptcy trustee for his approval?
09:16 15 A. That's correct.
16 Q. And so, hypothetically, let's say, you wanted
17 to sell the plant to a friend or somebody else for a
18 lower price. You couldn't do that because you had to
19 send the offer to the bankruptcy trustee; correct?
09:17 20 A. I think that would be fraud.
21 Q. Fair enough.
22 A. I couldn't sell it to a friend of mine. I'm
23 sure it has to go to the bankruptcy court. They had to
24 approve everything.
09:17 25 Q. Fair enough.

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09:17 1 So in 2008 -- just kind of short circuit this -- my
2 understanding is you were receiving offers.
3 Val D. Pendleton of Caldwell Bankers was working
4 with you a little bit or, I guess, soliciting offers; is
09:17 5 that correct?
6 A. We worked together, yes.
7 Q. Worked together.
8 And during that time period of time, did you
9 have a -- did you run into or did you know a Gaylen
09:17 10 Clayson?
11 A. I don't know what year that was, but he did
12 approach the broker, which was Pendleton, and said "I'd
13 like to put a bid in to buy the plant."
14 Q. Okay.
09:18 15 And when you say "a bid," if he puts a bid in, it's
16 got to go through the same process you've already
17 explained to me.
18 A. Yes.
19 And we had meetings at the plant with open bids
09:18 20 with other people while Gaylen was there.
21 Q. And what about -- Let me back up just a little
22 bit.
23 In 2008, did you ever allow him to operate the
24 restaurant on the premises?
09:18 25 A. I don't know what year it was, but at the time

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09:18 1 the restaurant -- during the bankruptcy, the lawyer says
2 let the restaurant operate in front of the plant so we
3 can have some revenue come in.
4 So we hired two little Mexican girls there to run
09:18 5 the plant for the bankruptcy court. Okay?
6 But they were a little mixed up. And Gaylen was
7 there everyday. And I asked him to help to take care of
8 the restaurant while I'm living in L. A., and -- I
9 couldn't do it. You know, here, Wyoming, hear, back and
09:19 10 forth. I couldn't go. So I says, "Take care of that
11 restaurant with those two girls."
12 And he says, "I will look after it," and that was
13 all.
14 Q. And when you said your agreement with Gaylen --
09:19 15 and I separate the two. I separate in my mind the
16 restaurant out in front and then the cheese plant, the
17 manufacturing plant in the back.
18 A. Yes. They were separated.
19 In other words, the plant was closed, but the
09:19 20 restaurant was open. And they kept it open to get
21 revenue to -- for the bankruptcy court to put it in
22 there.
23 Q. Okay.
24 And what was -- What was Gaylen to do, if anything,
09:19 25 with the plant in the back?

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09:19 1 A. Nothing. Until he bought it.
2 Nobody had nothing to do with the plant. It's in
3 bankruptcy.
4 Q. So it was just sit there, and then he could run
09:20 5 the restaurant out front and -- What was your
6 understanding of the terms of the agreement to allow him
7 to run the restaurant?
8 A. Just to watch over it so those two little girls
9 knew what they were doing there. That's all.
09:20 10 Q. Okay.
11 How was he to be paid for that?
12 A. He wasn't going to get paid anything. He was
13 doing me a favor.
14 Q. He was doing you --
09:20 15 A. Not me. He was doing the bankruptcy people a
16 favor.
17 Q. The bankruptcy court?
18 A. Yeah.
19 Q. Where was the money to go? You know, each day
09:20 20 you have the money that comes in from the sales.
21 A. It was supposed to go into a bank account that
22 we had for the restaurant.
23 Q. Okay.
24 A. I think it was Wells Fargo Bank.
09:20 25 THE WITNESS: Wasn't it?

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09:20 1 MR. MARIN: Yeah.
2 THE WITNESS: Wells Fargo Bank in Star Valley.
3 MR. BOWERS:
4 Q. Was Mr. Clayson allowed to spend any of that
09:20 5 money on his personal needs?
6 A. He had to pay the bills with the providers, the
7 people who brought the food there for the restaurant to
8 operate. That's all he had to do. Make sure the people
9 got paid.
09:21 10 Q. For lack of a better word, was he allowed to
11 convert any of that money to pay his own personal bills
12 not related to the restaurant?
13 A. Not as -- that I know of, no.
14 Q. Was -- did he have authority to take any of
09:21 15 that money and put into his own personal account?
16 A. He had no authority to do that, no.
17 Q. Do you remember where the -- I'm going to call
18 it the trustee receivership account for the restaurant.
19 Do you know where that account, which bank it was held
09:21 20 at?
21 A. Receivership or the -- I think it was Wells
22 Fargo.
23 MR. MARIN: Wells Fargo.
24 THE WITNESS: Wells Fargo.
09:21 25 MR. BOWERS:

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09:21 1 Q. I know, Mr. Farinella, this is a dumb question,
2 but I'll ask it anyway.
3 You don't by chance have any documents with you
4 that would give us the account numbers for that, would
09:21 5 you?
6 A. I don't have them anymore.
7 Gaylen offered to run the restaurant after he made
8 the offer to -- was accepted.
9 After he bought the -- he made the offer to buy the
09:22 10 plant at the time. So with that in mind, I figured he
11 can be trusted to run the restaurant. That's the way
12 that happened. Just to run it so -- to keep it open.
13 Q. Because you assumed that at some point he would
14 be able to buy the whole thing?
09:22 15 A. It was already in process of him buying it
16 through the bankruptcy court.
17 Q. Okay.
18 A. He made an initial bid for it.
19 After the -- we had three different bids there when
09:22 20 it first started.
21 And one was from somebody out of L. A., another one
22 was from another place. And me and the broker decided
23 that let's go -- we had the same two bids from two
24 different people. So me and the lawyer, myself and the
09:22 25 lawyer -- I mean the lawyer -- the real estate for the

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09:22 1 bankruptcy court, decided to go with Gaylen because he
2 was a local, he had the milk, and it was good for the
3 environment there, and hire some people in that area to
4 run the plant.
09:23 5 The other people that were going to bid on it, they
6 were just going to tear it apart and pull it out.
7 Q. Did they -- Do you remember what the numbers
8 were they bid?
9 A. The numbers what? What was bid?
09:23 10 Q. Yes.
11 A. Yeah.
12 800,000.
13 Q. That was Gaylen Clayson's bid?
14 A. That was his bid and somebody else's too. I
09:23 15 forget the other guy.
16 Q. Oh. So the other two bids weren't higher, but
17 they were --
18 A. No.
19 Q. -- at least the same?
09:23 20 A. One was lower. One was less. 500,000.
21 Q. Okay.
22 So Mr. Clayson's was one of the highest bids?
23 A. Well, no.
24 We -- actually we started at 1.5, 1.2, and nobody
09:23 25 bid. And you know how the bids go. And we go lower and

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09:23 1 lower until it came down to 800,000.
2 Then with that in mind, I proceeded to go to the
3 bankruptcy lawyer and give him the information that the
4 most we could have got with the broker, real estate
09:24 5 broker, was 800,000. And he okayed it.
6 Q. Okay.
7 So it was the bankruptcy trustee or attorney as you
8 call it --
9 A. Right.
09:24 10 Q. -- that approved the sale?
11 A. Absolutely.
12 Q. Okay.
13 Let's see. During the time that the plant was
14 under -- under the direction of the bankruptcy court,
09:24 15 did you have authority to sell equipment out of there?
16 MR. ATKIN: Objection. Calls for a legal
17 conclusion.
18 THE WITNESS: Would you repeat that, please.
19 MR. ATKIN: Calls for a legal conclusion.
09:25 20 THE REPORTER: I can read it back to you.
21 (The record is read by the reporter.)
22 THE WITNESS: No.
23 THE REPORTER: He answered "No."
24 MR. BOWERS:
09:25 25 Q. Did the bankruptcy trustee or the bankruptcy

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09:25 1 court give Gaylen Clayson authority to sell equipment
2 out of the plant?
3 A. No.
4 Nothing was to be touched until escrow closed.
09:25 5 Q. "Escrow closed." You mean the actual sale?
6 A. Sale of the plant when escrow closed.
7 Q. I just want to make sure my definition is the
8 same as yours.
9 That's the day the money transfers and there's a
09:25 10 deed issued?
11 A. Absolutely.
12 Q. Fair enough.
13 If there was any equipment that was sold, should
14 that money have been returned back -- if there was any
09:25 15 equipment sold by Gaylen Clayson, should that money have
16 been returned back to the bankruptcy court?
17 A. I don't know how to answer that because I don't
18 know if he sold anything.
19 Q. Okay.
09:26 20 So -- We've got some documents here that I think
21 may help us as we walk through this.
22 The first one is -- Well, do you remember,
23 ultimately who the plant was sold to?
24 A. At the very end when it was sold?
09:26 25 Q. Yes.

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09:26 1 A. Well, you know, really -- where is that -- this
2 guy -- wait a minute.
3 I think you're jumping in -- you're going ahead.
4 You're talking about Gaylen, and now you're going who
09:26 5 bought the plant.
6 Q. I know, and I apologize.
7 The reason for that is when I e-mailed the
8 documents to you, two of them are out of order. So
9 we're going to have to jump ahead so it's going to mess
09:27 10 up the documents.
11 A. Do you want me to sit here and tell it the way
12 it was?
13 Q. Yeah. Let's do that.
14 A. Okay.
09:27 15 Q. Perfect.
16 A. As far as I know, Gaylen made the bid.
17 Everything was okay, and the bankruptcy lawyer agreed
18 and the real estate broker agreed and we backed off, and
19 that was it. It was gone into escrow. They had to come
09:27 20 up with the money.
21 At that time, the second visit to Wyoming, Gaylen
22 introduced me to these two people that I do not know
23 very well. One of them is Don Zebe. Don Zebe and Rick.
24 Rick "Larson."
09:27 25 I really don't know them at all -- at all except

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09:27 1 from Gaylen telling me they got the money; they're going
2 to buy it.
3 So I told Gaylen, "I don't care who comes up with
4 the money, but just buy it." The bid was okay, and
09:27 5 everything's -- "buy it."
6 And that's where it ended up with me.
7 Q. Okay. Fair enough.
8 So let's jump ahead then and then it will get back
9 in order here in a second, Mr. Farinella.
09:28 10 A. Okay.
11 MR. BOWERS: If I can have the court reporter mark
12 Bates stamped 1 through 2, which is a Warranty Deed, two
13 pages, as Exhibit 1. [EXH-1]
14 Q. I'll have you look at that Mr. Farinella when
09:28 15 she's ready.
16 (Whereupon the document referred to is marked by
17 the reporter as Exhibit 1 for identification.)
18 MR. BOWERS:
19 Q. As you pointed out, Mr. Farinella, these are a
09:28 20 little bit out of order.
21 This -- I'll represent to you what my understanding
22 is -- is the warranty deed that was executed as -- you
23 call it the escrow, I call it the closing -- when the
24 cheese plant was sold.
09:28 25 Is that what your understanding of Exhibit 1 is?

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09:28 1 A. Look, I'm not a lawyer and I'm not an
2 accountant, and I don't know where this come from.
3 Because once it was out, I was out of it.
4 It was taken -- taken by the --
09:29 5 THE WITNESS: Who is the one that did the closing
6 up there? The escrow company?
7 MR. MARIN: Alliance.
8 THE WITNESS: Alliance. Yeah. Alliance.
9 So where this came from, I have no idea.
09:29 10 MR. BOWERS:
11 Q. Why don't you look at page one on the bottom.
12 Is that your signature there?
13 MR. MARIN: This one (indicating).
14 THE WITNESS: Yeah, that's my signature.
09:29 15 Warranty --
16 MR. BOWERS:
17 Q. Do you remember signing this warranty deed?
18 A. Not really, but I guess I did.
19 What does it say there?
09:29 20 Yeah, I signed it, I guess.
21 THE WITNESS: But who did I sign this for?
22 MR. MARIN: It was for the escrow company.
23 THE WITNESS: For the escrow company, yeah.
24 MR. BOWERS:
09:29 25 Q. Right.

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09:29 1 And this is what's been represented to me as the
2 warranty deed that you signed to sell the cheese plant
3 at the close of escrow when the property was transferred
4 to my client.
09:30 5 A. After he put up the money I guess, yeah.
6 Q. Okay.
7 And that's all I'm asking you. I just need you to
8 validate, first of all, that that's your signature.
9 A. Yeah.
09:30 10 Q. You did sign the warranty deed?
11 A. You know what? Why did I sign a warranty deed?
12 I held the mortgage on that property.
13 MR. MARIN: You were representing Star Valley.
14 THE WITNESS: Okay.
09:30 15 I represent Star Valley Cheese Corporation. I
16 guess that's why I signed it.
17 Go ahead.
18 MR. BOWERS:
19 Q. Okay.
09:30 20 Mr. Farinella is this -- is this a warranty deed
21 that you signed?
22 A. I guess I did, yes.
23 Q. All right. Thank you.
24 I know it's hard to go back and look at documents.
09:30 25 A. Yeah. We're talking eight years.

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09:30 1 Q. Whatever time you need, just take it.
2 Now I'll have you look at what I'll have the court
3 reporter -- Bates stamp 3, the Bill of Sale, and ask
4 that Lori mark that as deposition Exhibit 2. [EXH-2]
09:31 5 When she gets done, I'll have you take a look at
6 that, Mr. Farinella.
7 (Whereupon the document referred to is marked by
8 the reporter as Exhibit 2 for identification.)
9 THE REPORTER: Okay.
09:31 10 MR. BOWERS:
11 Q. Mr. Farinella, I'll have you look at deposition
12 Exhibit 2 and it's Bates stamp 3.
13 First of all, is that your signature on the bottom
14 towards the bottom of the page?
09:31 15 A. Yes.
16 Q. And I understand that this was executed at the
17 same time as the warranty deed as part of the close of
18 the escrow or the sale. Is that your understanding?
19 A. My understanding says this is from the escrow
09:32 20 company that made me sign it, yes.
21 Q. Okay.
22 Was this part of the sale of the plant?
23 A. From the bankruptcy court, I guess, yes.
24 Can I talk to you one minute?
09:32 25 Q. Sure. Go ahead.

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09:32 1 A. Why -- I say why am I being sued? I'm not -- I
2 want to know why I'm being sued.
3 Q. That's something I can probably talk to you
4 about with you and your attorney when we're not in a
09:32 5 deposition.
6 How does that sound?
7 A. No, it doesn't sound right.
8 I'm here to get a question from you. Why am I
9 getting sued?
09:32 10 Q. Mr. Farinella, unfortunately this is a
11 situation where I don't have to answer your questions.
12 A. I'll retract that.
13 Q. That's a legitimate question, and I'll answer
14 it when we're done with the -- when we can talk
09:32 15 sometime.
16 In fact, while I'm thinking of it, Mr. Farinella, I
17 sent a letter -- I don't know -- asking if I can talk to
18 you or talk to your personal attorney about this matter.
19 Have you received a copy of that?
09:33 20 A. I don't know.
21 MR. MARIN: Your attorney called --
22 THE WITNESS: My attorney -- my attorney in Wyoming
23 told me about it. And I told him "No, I don't want to
24 talk to Don Zebe or anybody up there."
09:33 25 MR. BOWERS:

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09:33 1 Q. Okay.
2 A. I didn't get a letter. I just got a "voice"
3 from my attorney telling me.
4 Q. Okay.
09:33 5 Well sometime if your attorney and you want to talk
6 to me about it, we'll be glad to talk to you about it
7 outside of this setting.
8 A. No, I don't want to talk to nobody.
9 MR. BOWERS: Now I'll ask the court reporter if
09:33 10 she'll mark as deposition Exhibit 3 for identification
11 purposes, what's Bates stamped 4 through 7. [EXH-3]
12 (Whereupon the document referred to is marked by
13 the reporter as Exhibit 3 for identification.)
14 MR. BOWERS:
09:34 15 Q. I'm going to have you look at what's been
16 marked for identification purposes deposition Exhibit 3.
17 On top of it is "Bill of Sale."
18 And my understanding is this was in reference to
19 the closing of the escrow, but does that -- is that your
09:34 20 signature about three-quarters of the way down on the
21 first page?
22 A. Yes, I signed this.
23 Q. And was that part of the closing on the plant
24 too?
09:34 25 A. I guess, 'cause I'm not familiar with --

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09:34 1 THE WITNESS: I got this from the escrow company;
2 didn't I?
3 MR. MARIN: Yes.
4 THE WITNESS: Yeah. I guess it is a bill of sale.
09:34 5 MR. BOWERS:
6 Q. And then would you mind looking at the second
7 page -- the second, third, fourth page on there. The
8 list of equipment.
9 A. Where is the list of equipment?
09:34 10 MR. MARIN: That one.
11 THE WITNESS: Yes.
12 MR. BOWERS:
13 Q. Does that look like equipment that would have
14 been at Star Valley Cheese Plant that was sold pursuant
09:35 15 to the sale?
16 A. I guess.
17 THE WITNESS: Who took this here? This inventory,
18 who took it?
19 MR. MARIN: That was the list from --
09:35 20 THE WITNESS: That was the list from who?
21 MR. MARIN: That was from the list of Frank Dana.
22 THE WITNESS: Oh. I guess it is, yes.
23 It is a list from the plant manager.
24 MR. BOWERS:
09:35 25 Q. It sounded like Frank Dana?

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09:35 1 A. Yeah.
2 MR. MARIN: Before he died.
3 THE WITNESS: Before he died.
4 MR. BOWERS:
09:35 5 Q. Is this a fair and accurate representation of
6 the bill of sale that was signed at the time of closing
7 with my client?
8 A. Yes, I guess. Yes.
9 Q. Okay. Perfect.
09:35 10 MR. BOWERS: Now let's go -- I'll have the court
11 reporter -- this is a little longer. If you wouldn't
12 mind marking as deposition Exhibit 4 what's been marked
13 as Bates stamp 8 through 19. [EXH-4]
14 (Whereupon the document referred to is marked by
09:36 15 the reporter as Exhibit 4 for identification.)
16 MR. BOWERS:
17 Q. If you would look, Mr. Farinella, at deposition
18 Exhibit 4. Now we're maybe a little back on order
19 pursuant to our previous conversation.
09:36 20 I believe this is the offer to purchase that you
21 made reference to initially -- in fact it's dated
22 October 17th, 2008 -- that you were talking about Gaylen
23 Clayton.
24 Would you mind taking a look at the front page and
09:37 25 see if that refreshes your memory that this looks like

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09:37 1 the document that you were talking about that --
2 A. I've never seen this document. This is
3 Caldwell Banker's, the broker.
4 Q. You've never seen this document?
09:37 5 A. No, I've never seen this. It went to the
6 broker, Coldwell Banker.
7 MR. MARIN: I know, but this refers to you.
8 THE WITNESS: He made me sign it.
9 MR. BOWERS:
09:37 10 Q. Yeah, I think your signature -- or at least
11 somebody signed it.
12 If you look at Bates stamped 13.
13 THE WITNESS: I guess I've seen it, but I don't
14 remember it.
09:37 15 MR. BOWERS:
16 Q. Is that your signature on Bates stamp 14 of
17 Exhibit 4?
18 A. That's not my signature. That's not my
19 signature.
09:38 20 MR. MARIN: That was a stamp.
21 THE WITNESS: Oh, that's a stamp. I signed it.
22 10/4/08 it says.
23 MR. BOWERS:
24 Q. Right.
09:38 25 A. Is that correct?

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09:38 1 Q. You know, I understand it's hard when you look
2 at these documents and --
3 A. That's why I wanted to know why I'm being sued.
4 Q. There you go. There you go.
09:38 5 A. I've gone through this, which you should have
6 the broker here who handled the sale, not me. I'm not a
7 real estate broker.
8 All I was there for is to take the bids for the
9 bankruptcy lawyer and submit them to him. That's all.
09:38 10 Q. Okay.
11 A. And as president, I signed all -- and the
12 escrow company. That's all I know.
13 So I don't know why you don't have -- Go ahead.
14 Excuse me. I'm sorry.
09:38 15 Q. I told you I have a habit of talking over. I
16 apologize.
17 A. I apologize too.
18 Q. So to clarify. Your job was just to submit,
19 receive the bids, but it was the bankruptcy trustee that
09:39 20 approved them; correct?
21 A. Absolutely.
22 Q. Do you know if -- and you may not because of
23 what you just told me, but on page one of deposition
24 Exhibit 4, Bates stamped 8, it says it was to be an
09:39 25 "Earnest Money" paid at $10,000, on paragraph ten there.

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09:39 1 Do you see that?
2 A. I see it, yeah.
3 Q. Do you know if that was ever paid by
4 Mr. Clayson or Mr. Randall?
09:39 5 MR. MARIN: Whatever money --
6 THE WITNESS: I don't know if it was paid.
7 MR. MARIN: -- it went to the broker.
8 THE WITNESS: It went to the broker.
9 If it did, it went to the broker. I never seen it;
09:39 10 I never heard it.
11 This must have been with the broker, the real
12 estate broker.
13 Is it the deposit or what? Is that what it is?
14 MR. BOWERS:
09:39 15 Q. It speaks for itself, but that's what I would
16 understand it would be, a deposit.
17 A. Why would I know about it?
18 Q. Well you were soliciting the bids. That's my
19 question. I didn't know if you did or not.
09:40 20 A. No.
21 But the money, everything, transaction goes to the
22 real estate broker.
23 Like I said, I was not a real estate broker. I was
24 taking the bids and it went to the real estate broker
09:40 25 who in turn referred to the bankruptcy court to approve.

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09:40 1 As far as that goes, that's all I know.
2 I didn't know he put up $10,000.
3 I don't know.
4 MR. MARIN: It went to escrow.
09:40 5 THE WITNESS: It went to the Pendleton, I guess.
6 MR. MARIN: It was escrow. Escrow company.
7 THE WITNESS: Escrow company.
8 Maybe it went to the escrow company. I have no
9 idea.
09:40 10 But I don't know. The answer is I don't know.
11 MR. BOWERS:
12 Q. You know, there's nothing wrong with an "I
13 don't know."
14 A. You know, I really don't know.
09:40 15 Q. Okay.
16 Would you mind looking on deposition Exhibit 4.
17 Would you mind looking on the Bates stamp Number 13 at
18 the top of the page.
19 A. Just a minute.
09:41 20 Here I got it in front of me.
21 Q. And right down there, there's a Roman XVI. Off
22 to the side there's a line -- is it 228 -- "Consents And
23 Acknowledgments."
24 It's about the middle -- top of the middle of the
09:41 25 page.

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09:41 1 Do you see that?
2 A. Yeah.
3 Q. Okay.
4 It says "All prior representations made in the
09:41 5 negotiations of this sale have been incorporated herein,
6 and there are no oral agreements or representations
7 between Buyer, Seller or Brokers to modify the terms and
8 conditions of this Contract."
9 Did you read that before you signed this document?
09:41 10 A. No.
11 Q. You didn't read that?
12 A. No.
13 Q. When you signed this agreement --
14 THE WITNESS: Where did this paper come from?
09:41 15 MR. MARIN: It's --
16 THE WITNESS: It's what?
17 MR. MARIN: -- part of the offer with the --
18 THE WITNESS: Of the offer from?
19 MR. MARIN: From --
09:42 20 THE WITNESS: To the real estate broker?
21 MR. MARIN: Yes.
22 THE WITNESS: No, I didn't even see this.
23 MR. BOWERS:
24 Q. If you look to the next page. I just want to
09:42 25 clarify on Bates stamp 14, the next page, that that's

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09:42 1 your signature on this document; correct?
2 A. There's a lot of signatures on here.
3 MR. MARIN: This one (indicating).
4 MR. BOWERS:
09:42 5 Q. Right.
6 A. I see my signature there.
7 Q. I know you -- Do you normally sign legal
8 documents without reading them?
9 A. Like I told you, I'm not a broker and I'm not a
09:42 10 lawyer. I trust the people who are giving me the
11 documents from either the broker or the escrow company.
12 Q. Okay.
13 Well, Mr. Farinella, let me just --
14 A. You know what? You're going around and around
09:42 15 in circles. Why don't you get to the bottom of this
16 what you really want to know?
17 This is all bullshit you pay time over here. Get
18 to the point you really want to know. I know what
19 you're going around and around about because all of this
09:43 20 is --
21 Q. Unfortunately, what I want to ask, I can't.
22 A. Get to the point what you really want to know.
23 Q. I'm an attorney. I have to do the round and
24 round.
09:43 25 A. I know you do.

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09:43 1 Q. I don't like it any more than you do.
2 A. I hope not.
3 Q. So on page -- on the front page of Exhibit 4,
4 if I understand when I read this -- just there may be --
09:43 5 To move this along. Star Valley -- your company is the
6 seller, even though we know that it has to be approved
7 by the bankruptcy trustee; Caldwell Banker is the
8 broker, and then at least on this document it lists
9 Gaylen Clayson and Jeff Randall.
09:43 10 Do you know who Jeff Randall is?
11 A. No.
12 Q. Have you ever met him before?
13 A. Hell no. No.
14 Q. Okay.
09:43 15 When you signed this document, were there any other
16 agreements, oral or written, between yourself as the
17 seller of the property and Gaylen Clayson and Jeff
18 Randall about the sale of the property?
19 A. No, there was no oral agreement at all.
09:44 20 Q. Okay.
21 So whatever -- Basically the agreement was what was
22 in this offer which you signed, which is Exhibit 4;
23 correct?
24 A. Yes.
09:44 25 You have to put it in -- I live in Los Angeles and

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09:44 1 this all took place in Wyoming.
2 And what was going on there is between the broker
3 and the bankruptcy court had to go between me. So when
4 they sent me papers up here and papers down there, it
09:44 5 was kind of confusing what they're doing because I was
6 completely out of it. I was out of it.
7 I know I'm signing here, but once a company goes
8 into bankruptcy, it's handled by the bankruptcy court,
9 the realtor who is trying to sell it and the bankruptcy
09:44 10 lawyer.
11 All I was there was helping them out. Or I could
12 have walked away from it all. But I helped them out
13 trying to get the bids.
14 You do understand that?
09:45 15 Q. I do.
16 A. So if they send me a paper down here and say
17 "Sign this because you've got to do it," I signed it.
18 I didn't go get a lawyer to look it over and see
19 it. I signed it because that's what I had to do.
09:45 20 Q. Well, Mr. Farinella, you asked me to kind of
21 cut to the chase.
22 A. Yeah, I did.
23 Q. Here's what I'm trying to get at.
24 A. I know. Let's get to it.
09:45 25 Q. I have a whole bunch of documents that I want

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09:45 1 to go through with you, and I'll move along pretty
2 quick, but all the documents say there was no other oral
3 representations or agreement.
4 A. No.
09:45 5 Q. But your attorney has alleged in some pleadings
6 that there was some other agreements, full agreements.
7 And I don't understand them.
8 And so I want -- I'm just trying to find out -- I'm
9 confused because the documents say there are no other
09:45 10 agreements, and I just need to go through these --
11 A. I understand.
12 Q. -- and find out if there was another agreement.
13 A. I understand what you're going through, but
14 there was no oral agreement other than what I told you
09:46 15 what he did. And once he bid for it, it was out of my
16 hands. They agreed to the bid, and I backed off after
17 that.
18 Until I found out Gaylen had a partner, and then I
19 said, "Do what you want to do, both of you." So I came
09:46 20 back to L. A.
21 Q. And it was out of your hands?
22 A. Naturally it's out of my hands. They already
23 bid it, it went into escrow, and what they did between
24 the two of them over there God only knows.
09:46 25 Q. Okay. That's a nice summary.

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09:46 1 Mr. Farinella, here's what I'm going to do. I've
2 got some more documents I'm going to go through, and
3 I'll tell you what I'm going to do.
4 A. All right.
09:46 5 Q. It looks like a whole bunch of these documents
6 are extensions. It looks likes there was a closing date
7 and it keeps getting extended, extended.
8 The only reason I'm going through with these is I'm
9 going to have them show you the document.
09:46 10 A. All right.
11 Q. I'm going to probably ask you two questions.
12 One is "Is your signature on the document," have you
13 look at that.
14 A. Okay.
09:46 15 Q. There's some more -- I already alluded to this.
16 There's some more wording on the documents that says
17 there was no oral agreement.
18 So my second question will be to have you think
19 back see if there were any other agreements other than
09:47 20 what's on the paper; okay? And we'll try to move
21 through as quick as possible.
22 How's that?
23 A. That's fine. Thank you.
24 Q. You bet.
09:47 25 Let's -- the court reporter can look at -- or pull

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09:47 1 up the next two pages, which is Bates stamped 20 and 21,
2 and mark that as deposition Exhibit 5. [EXH-5]
3 (Whereupon the document referred to is marked by
4 the reporter as Exhibit 5 for identification.)
09:47 5 MR. BOWERS:
6 Q. Mr. Farinella?
7 A. Yes.
8 Q. Exhibit 5 appears to me to be a -- a change of
9 deadline on this real estate contract that we talked
09:48 10 about, I think it was Exhibit 4.
11 But would you look at deposition Exhibit 5. Is
12 that your signature on the bottom?
13 A. Yes.
14 Q. Okay.
09:48 15 And then would you look at "D" in the middle of the
16 page.
17 A. D is --
18 Q. "All prior representations" -- Let me say,
19 quote, "All prior representations made in the
09:48 20 negotiations of this sale have been incorporated herein,
21 and there are no oral agreements or representations
22 between Buyer, Seller or their agents to modify the
23 terms and conditions of this Contract."
24 Are you aware of any other oral agreements other
09:48 25 than this real estate -- this extension and the real

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09:48 1 estate contract?
2 A. No.
3 There was no oral -- No, none of that. None at
4 all.
09:48 5 Q. All right.
6 MR. BOWERS: Lori, if you wouldn't mind taking
7 Bates stamped number 22 and mark it as
8 Exhibit 6. [EXH-6]
9 (Whereupon the document referred to is marked by
09:49 10 the reporter as Exhibit 6 for identification.)
11 MR. BOWERS:
12 Q. On deposition Exhibit "8," Mr. Farinella I
13 don't see your signature on there anywhere.
14 Do you?
09:49 15 THE REPORTER: You said "8."
16 THE WITNESS: You said "8."
17 MR. BOWERS:
18 Q. Deposition Exhibit 6.
19 A. I don't see any signature on here.
09:49 20 I see Zebe's here. No, it's not Zebe.
21 Who is this? Oh, Jeff Randall and Gaylen. That's
22 on this page.
23 Q. Okay. This -- have you seen -- Do you remember
24 ever seeing this document before?
09:50 25 A. Never.

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09:50 1 Q. Okay. Then we'll just move on.
2 Let me -- and then I want to clarify.
3 When you talk about, on my notes here -- when you
4 talk about the escrow again, you're talking about the
09:50 5 closing when money is paid, deed's transferred and the
6 property is completed and sold; correct?
7 A. Right.
8 Q. So up to that point, I want to clarify that no
9 one had the authority to do anything on the property as
09:50 10 far as, I guess, unusual expenses without the authority
11 of the bankruptcy trustee; correct?
12 MR. ATKIN: Objection. Calls for a legal
13 conclusion.
14 Blake Atkins.
09:51 15 THE WITNESS: You want me to answer that?
16 MR. BOWERS:
17 Q. Yes, please.
18 A. That nobody had authority to do anything or to
19 spend any money at the plant while it was in process of
09:51 20 escrow to close. Is that what you're trying to say?
21 Q. Yes. Without the bankruptcy trustee's
22 permission; correct?
23 A. That's normal. Yes. That's right.
24 Q. Okay.
09:51 25 MR. BOWERS: Lori, if you would now take Bates

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09:51 1 stamp number 23 through 26 and mark that as deposition
2 Exhibit 7. [EXH-7]
3 A. John?
4 Q. Yes.
09:51 5 A. Gaylen submitted his offer and was accepted at
6 the time.
7 Then Gaylen suggested to run the plant and
8 restaurant --
9 MR. MARIN: (Indicating.)
09:52 10 THE WITNESS: What the hell is this?
11 MR. MARIN: Familiarize.
12 THE WITNESS: To what?
13 MR. MARIN: To familiarize on the operation.
14 THE WITNESS: -- to familiarize on the operation.
09:52 15 Gaylen then suggested --
16 What the hell is this?
17 MR. MARIN: To clean.
18 THE WITNESS: -- to clean the plant. Yeah, I
19 remember that.
09:52 20 He says, "I'll clean the plant and get it ready.
21 As soon as escrow closes, we can start opening and make
22 cheese at the time."
23 And I told him "Go ahead and do what you want as
24 long as it doesn't cost the bankruptcy or me or anybody
09:52 25 any money to spend."

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09:52 1 That's where we -- that's the thing that I -- I
2 think that's where we're going in the first place,
3 aren't we?
4 MR. BOWERS: It sounds reasonable.
09:53 5 (Whereupon the document referred to is marked by
6 the reporter as Exhibit 7 for identification.)
7 MR. BOWERS:
8 Q. Deposition Exhibit 7, when you look on the
9 second page -- no, it's not the second -- yours isn't on
09:53 10 the second. There's so many pages to this.
11 Would you look on the fourth page and see if that's
12 your signature.
13 A. Yes.
14 Q. Okay.
09:53 15 And then up above there, two paragraphs up, number
16 two states, "All representations made in the
17 negotiations of this sale have been incorporated herein,
18 there are no verbal agreements between Buyer, Seller
19 and/or any other Brokers to modify terms and
09:53 20 conditions."
21 Was that a fair statement at the time?
22 A. I think so, yes.
23 Q. Were you aware of any other oral or agreements
24 other than what was spelled out in these documents we've
09:54 25 discussed?

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09:54 1 A. No.
2 Except what I read to you.
3 Q. Okay.
4 Basically that Gaylen could familiarize himself and
09:54 5 run the plant as long as it didn't cost anybody any
6 money?
7 A. Right.
8 And it was agreed by him and his partners.
9 Q. Okay.
09:54 10 A. That he was going to get the plant ready to
11 operate as soon as escrow closed.
12 Q. Okay.
13 A. But Gaylen slept there I think. He slept
14 there. He never went home.
09:54 15 Q. Okay.
16 MR. BOWERS: Lori, if you would look at
17 deposition -- or Bates stamp 27 through 30.
18 That is deposition Exhibit 8. [EXH-8]
19 (Whereupon the document referred to is marked by
09:55 20 the reporter as Exhibit 8 for identification.)
21 MR. BOWERS:
22 Q. Okay.
23 Deposition Exhibit 8. Would you look at the very
24 last page.
09:55 25 MR. ATKIN: Would you say the pages again.

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09:55 1 MR. BOWERS: It's Bates stamp 30.
2 THE WITNESS: That's my signature.
3 MR. BOWERS:
4 Q. Again, on paragraph two, it states there's no
09:55 5 other representations or oral agreement.
6 Do you agree with that --
7 A. Yes.
8 Q. -- that when you signed this there was no other
9 oral agreement?
09:55 10 A. Yes. Yes. Yes. Yes. Yes.
11 That's the same as the other ones; right?
12 Q. Same as the other ones.
13 A. Okay.
14 Q. And I'll say except for what you explained to
09:55 15 me. How's that?
16 A. That's fine. That's exactly fine.
17 Q. Okay.
18 MR. BOWERS: Lori, if you wouldn't mind taking
19 Bates stamp 31. If you could mark that deposition
09:55 20 Exhibit 9. [EXH-9]
21 (Whereupon the document referred to is marked by
22 the reporter as Exhibit 9 for identification.)
23 THE WITNESS: I got it.
24 MR. BOWERS: Actually, we've covered that. So
09:56 25 we'll skip that one.

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09:56 1 Let's go to Bates stamp -- Lori, if you'll pull
2 Bates stamp 32 through 39. Mark that as deposition
3 Exhibit Number 10. [EXH-10]
4 (Whereupon the document referred to is marked by
09:56 5 the reporter as Exhibit 10 for identification.)
6 MR. BOWERS:
7 Q. And would you mind looking at Exhibit 10 Bates
8 stamp 39. That would be the very last page.
9 MR. MARIN: Last page.
09:57 10 MR. BOWERS:
11 Q. And see if that's your signature,
12 Mr. Farinella?
13 A. Yes.
14 Q. See up above there, two paragraphs up, it
09:57 15 states "All representations made in the negotiations of
16 this sale have been incorporated herein, there are no
17 verbal agreements between Buyer, Seller and/or Brokers
18 to modify the terms and conditions."
19 Other than what you explained to us, which really
09:57 20 doesn't have to do with the terms of the sale, but
21 taking that into account, was there any other agreement
22 referenced in the sale that is not -- was not contained
23 in these real estate documents we've discussed?
24 MR. ATKIN: Object to the question as
09:57 25 argumentative.

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09:57 1 You can go ahead and answer.
2 This is Blake Atkin.
3 THE WITNESS: I don't know how to answer that.
4 Can you repeat it again.
09:58 5 MR. BOWERS: Lori, can you read that back to him,
6 please.
7 (The record is read by the reporter.)
8 THE WITNESS: No, there was no other agreement.
9 MR. BOWERS:
09:58 10 Q. All right. Thank you.
11 A. This is all real estate stuff from the broker.
12 MR. BOWERS: You know, if we could take a -- about
13 a two-minute break. If everybody can stay on the line,
14 we've covered a lot of the materials I have, and if we
09:58 15 can take two to five minutes, we'll be able to move this
16 along.
17 (A recess is taken.)
18 MR. BOWERS:
19 Q. Mr. Farinella, do you have documents in front
10:10 20 of you today that you brought or Manny brought?
21 A. What kind of documents?
22 Q. Did you bring documents, any documents?
23 A. I got one here.
24 THE WITNESS: Is that what we --
10:10 25 MR. MARIN: (Nods head in the affirmative.)

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10:10 1 MR. BOWERS:
2 Q. Tell me what it is.
3 MR. MARIN: It's an e-mail.
4 THE WITNESS: What the hell is it?
10:10 5 It's an e-mail.
6 MR. BOWERS:
7 Q. Can you read it to me.
8 A. Well, it's a long one.
9 What do you want? You're supposed to ask me
10:10 10 questions.
11 Q. I am asking you questions. Does it have
12 reference to this case?
13 A. Only if he asks me a question.
14 Q. Have you been referring to it during this
10:10 15 deposition?
16 A. Okay. I'll read it to you.
17 This is an e-mail sent by Zebe.
18 MR. MARIN: Don Zebe.
19 THE WITNESS: Don Zebe.
10:11 20 I can't read too much, Manny. You want to read it
21 to them?
22 The writing is so little, I told you before about
23 my --
24 Read it for them. It's an e-mail.
10:11 25 MR. BOWERS:

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10:11 1 Q. Is it -- Well, let me ask you this.
2 Is it an e-mail from -- is it an e-mail from Manny
3 reference the accounts?
4 A. No. From Donald Zebe.
10:11 5 Q. Who gave you that e-mail today?
6 MR. MARIN: We have that.
7 THE WITNESS: We had it.
8 MR. MARIN: We have this on file.
9 MR. BOWERS:
10:11 10 Q. So you just decided to bring that today?
11 A. Yeah.
12 MR. MARIN: No. Because we -- we have this file.
13 This was sent to you.
14 THE WITNESS: Yeah.
10:11 15 MR. MARIN: To my e-mail address.
16 THE WITNESS: It was sent to your e-mail?
17 MR. MARIN: Yeah.
18 MR. BOWERS:
19 Q. So somebody sent you this document --
10:11 20 A. I don't understand why you're asking me this.
21 What documents did I bring? What relevance --
22 Q. Let me finish, Mr. Farinella.
23 You're a business man?
24 A. I'm not a lawyer.
10:12 25 Q. I want to know if anybody tried to influence

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10:12 1 you or somebody -- what you did to prepare for this.
2 It sounds to me, correct me if I'm wrong, somebody
3 sent you an e-mail with a copy of an old e-mail from my
4 client to prep you and influence you for this
10:12 5 deposition.
6 A. No. No.
7 They sent me an e-mail to answer any questions that
8 you ask me.
9 Q. Oh, they sent you an e-mail to answer --
10:12 10 A. No. Nobody sent -- I have an e-mail that was
11 sent to the -- the real estate --
12 MR. MARIN: Yeah.
13 THE WITNESS: Was it sent to Pendleton?
14 MR. MARIN: Yeah, he sent it to Pendleton.
10:12 15 THE WITNESS: -- to Pendleton that we had on file
16 here.
17 MR. BOWERS:
18 Q. But it was just sent to you in the last day or
19 so to prepare you for this deposition?
10:12 20 A. No. No.
21 This was sent -- Do you want to read the date on
22 there? January 14th --
23 MR. MARIN: 2009.
24 THE WITNESS: -- 2009.
10:13 25 MR. BOWERS:

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10:13 1 Q. So my question is why didn't you bring other
2 things from the file other than this?
3 A. You must think I'm a stupid jerk over here. I
4 know what you're getting at over here. I have to answer
10:13 5 your question.
6 MR. MARIN: We brought the listing agreement.
7 THE WITNESS: We brought all the listings from the
8 Caldwell "Banks" we've got here, and all the listings --
9 but I have an e-mail.
10:13 10 I don't know why you're asking me about an e-mail.
11 Would you please explain that.
12 MR. BOWERS:
13 Q. It sounded to me like somebody had sent you an
14 e-mail --
10:13 15 A. It sounds like. It sounds like.
16 Is that the way a lawyer talks? It sounds like.
17 Q. Yes.
18 It sounds like they sent you --
19 A. It don't sound like that.
10:13 20 Q. In the last five days, did anybody e-mail you
21 material, either you or Manny, in reference to this
22 upcoming deposition?
23 A. No.
24 MR. MARIN: I prepared it.
10:13 25 THE WITNESS: Manny prepared it.

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10:13 1 He prepared it for this deposition. He prepared it
2 for this deposition.
3 MR. BOWERS:
4 Q. Good.
10:14 5 Do you have -- you can ask him. Does he have or do
6 you have in front of you the August 28, 2008
7 authorization which you signed in which you gave
8 Mr. Clayson permission to run the operations of the Star
9 Valley restaurant?
10:14 10 MR. MARIN: It was in that e-mail.
11 THE WITNESS: It was in that e-mail?
12 MR. MARIN: Yes.
13 THE WITNESS: You got it with you?
14 MR. MARIN: So I don't have it, but I know it was
10:14 15 in the file. That's the reason you signed this.
16 THE WITNESS: Yeah, this is why I signed this.
17 Yeah.
18 MR. BOWERS:
19 Q. Okay.
10:14 20 Do you have that? Can you review that, the
21 August 28, 2008 letter authorization?
22 MR. MARIN: This is exactly what was in there. We
23 didn't bring that.
24 THE WITNESS: We didn't bring it with us, that part
10:14 25 of it.

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10:14 1 MR. BOWERS:
2 Q. Okay.
3 A. October 8, the owner of Star Valley Cheese --
4 You know, these words are --
10:15 5 Listen, I'm not a lawyer, but when you go bankrupt,
6 how do you own it anymore?
7 Do you own anything after you're bankrupt? Do you
8 still own it? As a lawyer, answer me. Do you still own
9 it after a place goes bankrupt?
10:15 10 Q. Let me ask you this: Did you believe you owned
11 it or you didn't when it went bankrupt?
12 A. No, the court owns it. The court takes it
13 over.
14 You might be a principal there, but you don't own
10:15 15 it.
16 Q. So --
17 A. So here it says -- it says that "As I was the
18 owner of Star Valley Cheese Plant in Thayne, Wyoming to
19 the company of Star Valley Cheese Corporation."
10:15 20 I was always working for the courts, not as an
21 individual owner. So I want you to straighten that one
22 out.
23 I'm not going to get any deeper with this thing
24 because I have nothing to do with any of you guys. I'm
10:15 25 getting a little --

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10:16 1 Q. Since you weren't the owner, then you didn't
2 have authorization to have Gaylen Clayton --
3 A. Only -- only for the restaurant. Don't put
4 words in my mouth. Only for the restaurant.
10:16 5 I had the right to keep it open as much as I could,
6 but the people there weren't running it right, and
7 Gaylen was staying there and living there. I told him
8 to look after it, to take care of it, to keep it open.
9 Otherwise, I would have had to close the
10:16 10 restaurant, and it wouldn't look good for the courts.
11 Q. But you didn't have the authorization or power
12 to allow Gaylen Clayson to sell equipment out of the
13 plant?
14 A. Hell no. No. Excuse me. No.
10:16 15 MR. ATKIN: This is Blake Atkin.
16 Object to the question. Calls for a legal
17 conclusion.
18 MR. BOWERS: Okay.
19 Q. If Mr. Clayton sold -- during the time prior to
10:16 20 the closing of the escrow, if Mr. Clayton sold equipment
21 out of the plant, then he did so without your approval;
22 correct?
23 A. If anything came out of that plant it was
24 absolutely without my approval.
10:17 25 As I said, again -- I will read it again to you.

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10:17 1 After Gaylen submitted and the offer was accepted, he
2 suggested to run the plant and restaurant and keep it
3 familiarized and to operations -- keep it in operation.
4 That I didn't mind as long as it didn't cost any
10:17 5 money to the courts.
6 Q. Let me clarify -- While we're on that subject,
7 let me clarify then.
8 It wasn't sold -- when there was money coming into
9 the restaurant, because you have customers paying, did
10:17 10 Gaylen Clayton have any authority to withdraw or use any
11 of that money for his personal use?
12 A. No. Nobody.
13 Neither did Don Zebe.
14 Q. Neither did Don Zebe?
10:17 15 A. As far as I know, both of them were over there.
16 Q. So the money was to go back into either paying
17 for the suppliers --
18 A. Right, exactly.
19 And the help. Which we had -- I got sued by the
10:18 20 state of Wyoming.
21 THE WITNESS: What was that? The -- the labor
22 department.
23 What was the name of this?
24 MR. MARIN: For state tax.
10:18 25 THE WITNESS: For state tax.

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10:18 1 MR. MARIN: Sales tax.
2 THE WITNESS: Sales tax.
3 They weren't paying. I got sued.
4 And I called up Gaylen and the girls that worked
10:18 5 there and said, "You have to pay this." Between Don
6 Zebe and Gaylen, whoever, they paid it.
7 MR. BOWERS:
8 Q. And did there come a time before the sale of
9 the property that the bankruptcy was discharged and you
10:18 10 were what is referred to as a debtor in possession?
11 A. Did -- Can you clarify that?
12 You mean in simple words was the -- was the
13 bankrupt taken out?
14 Q. Was it --
10:18 15 A. No. Never.
16 Q. Ever?
17 A. Never.
18 Q. Let me tell you -- You know, I have it in front
19 of you, and I'll just read it to you what I have in
10:19 20 front of you.
21 It's an August 28, 2008. I think you told me that
22 you reviewed this.
23 It says, "To whom it may concern. This will
24 authorize Mr. Gaylen Clayton to run the operations of
10:19 25 the Star Valley restaurant" --

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10:19 1 A. Right.
2 Q. -- "and he will also be responsible for
3 providing workers' compensation insurance" --
4 A. Yeah.
10:19 5 Q. -- "for the restaurant employees."
6 A. Correct.
7 Q. And the next line, "In addition, Mr. Clayson
8 will also take care of the cleanliness of the plant.
9 Sincerely, Morris A. Farinella."
10:19 10 Is that the authorization you reviewed you were
11 making reference to earlier?
12 MR. MARIN: Yes.
13 THE WITNESS: Yes.
14 MR. BOWERS:
10:19 15 Q. So he was to pay for workers' compensation
16 insurance for employees of the restaurant?
17 A. Correct.
18 Q. Did he do that?
19 A. After we told him that it was being sued by the
10:19 20 state, then he paid, I think. I believe he paid it.
21 Yes, he paid it.
22 Q. You thought he paid it after you got sued;
23 correct?
24 A. No. You know, the state sent him letters and
10:20 25 they're going to sue you this and that, and I kept on

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10:20 1 him until he paid it.
2 Q. And, again, he didn't have any -- it was
3 basically -- the only authorization you gave him in
4 August 28th on the plant was to just maintain the
10:20 5 cleanliness; correct?
6 A. Yeah. That's what he wanted to do.
7 He wanted -- he suggested that himself after --
8 Here, I'll read it to you again.
9 Gaylen then suggested to clean the plant and fix
10:20 10 the electrical and plumbing. And it was confirmed -- it
11 was confirmed by John -- Don Zebe. He authorized it
12 also that he should do that.
13 Q. Who told you that?
14 A. Don Zebe.
10:20 15 He -- he became his partner. When he became his
16 partner he had it noted too that he was going to do the
17 cleaning and fix the plant so it could be running when
18 escrow closed.
19 Q. Who told you that Don Zebe was his partner?
10:21 20 MR. MARIN: Don Zebe.
21 THE WITNESS: Don Zebe himself told me.
22 MR. BOWERS: Manny, I can hear you in the
23 background telling him the answers.
24 THE WITNESS: Well, that's why I brought him here.
10:21 25 MR. BOWERS: Yeah, well, I'm not deposing him.

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10:21 1 And I don't mind you giving documents and helping,
2 but I've got to ask that you refrain from giving the
3 answers.
4 Will you do that for me?
10:21 5 THE WITNESS: Okay.
6 MR. MARIN: Okay.
7 MR. BOWERS: Otherwise, we'll set up another
8 deposition.
9 THE WITNESS: No. No. Just get to the point here.
10:21 10 MR. BOWERS: Okay.
11 Q. So he told -- you have an independent
12 recollection outside of what Manny just told you --
13 A. I didn't even hear what Manny said, to tell you
14 the truth. I didn't hear what he said. Okay?
10:21 15 Q. Okay.
16 When did Don Zebe tell you that he was partners
17 with Gaylen?
18 A. The last time I was at Wyoming when he made the
19 bid and it was accepted.
10:22 20 And I told Man- -- told Gaylen, "You're going to
21 have to come up with the money."
22 He said, "No, Don Zebe has got the money. Both of
23 us are going to. He's my partner."
24 And I came back to L. A., and that was the end of
10:22 25 that.

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10:22 1 Q. So he said he was -- did Gaylen tell you he was
2 going to be his partner?
3 A. Yeah.
4 Q. He was going to be partners with Don Zebe?
10:22 5 A. Yeah. He introduced him to me at the time. I
6 didn't know Don Zebe.
7 Q. Did he introduce him as his partner?
8 A. He said he was going to be his partner.
9 Q. Okay. Okay.
10:22 10 So Gaylen told you that he was going to be Don
11 Zebe's partner; correct?
12 A. Don Zebe said it too.
13 Q. Okay.
14 So did you ever enter into any agreement with Don
10:22 15 Zebe?
16 A. Never.
17 Q. Okay.
18 A. He wanted to borrow money from me. After he
19 closed it, he says "Lend me" -- "lend me 2- or 300,000,"
10:23 20 what it was. And I told him "No, I couldn't do it."
21 Q. All right.
22 So let me just get back. We got off track.
23 So I just want to clarify because here's -- and I'm
24 just paraphrasing. My understanding now is that at
10:23 25 least in some document Gaylen Clayson has alleged that

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10:23 1 he had the right to withdraw money out of the restaurant
2 and use it for his personal use.
3 That's not true; correct?
4 A. No.
10:23 5 Q. You never gave him authority to do that?
6 A. No.
7 Q. I also understand that Gaylen Clayton sold some
8 equipment.
9 One, I think somebody's alleged that he sold a
10:23 10 dryer for over -- was it $10,000 or 12,000, some --
11 A. Where did you get that information from?
12 Q. That's what we --
13 A. Don Zebe.
14 Q. I'm trying to --
10:23 15 THE REPORTER: Wait. You guys are talking at the
16 same time. I couldn't hear.
17 THE WITNESS: Where did you get information that he
18 sold equipment?
19 That I don't know about.
10:24 20 MR. BOWERS:
21 Q. Actually, Mr. Clayson admitted that he sold the
22 equipment, but he claims you gave him permission.
23 A. Nobody gave him permission. I haven't got the
24 right to give him permission.
10:24 25 Q. So if he sold any equipment out -- you don't

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10:24 1 remember giving him permission to sell any equipment;
2 correct?
3 A. I don't have the right in the bankruptcy court
4 they give permission to sell equipment out of a bankrupt
10:24 5 plant. I didn't do it. It's impossible.
6 Q. Do you remember ever -- ever remember in the
7 history of your relationship with Gaylen Clayson giving
8 him permission to sell equipment out of that plant?
9 A. Never.
10:24 10 Q. All right.
11 A. To cleanup -- he could have cleaned up -- You
12 know, if there was junk in the -- You know what I mean
13 by cleanup?
14 Are you familiar with the cleanup -- what it means
10:24 15 cleanup the plant outside and in? So it will look
16 decent.
17 In fact, you want me to tell you the truth. I told
18 him don't clean it too good because other bidders are
19 coming. They're going to bid higher than you.
10:25 20 But he cleaned the outside, which was a job, the
21 garbage around the plant. That's what I thought he was
22 cleaning. And he cleaned inside.
23 And I said, "Okay. As long as it don't cost the
24 bankruptcy lawyer."
10:25 25 Q. So at one point you assumed there was going to

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10:25 1 be higher bidders than Gaylen Clayton; correct?
2 A. I'll back off.
3 Before he wanted to clean the plant, I said, "No."
4 When he wanted to fix the plant I said, "No."
10:25 5 The bids were not in at that time. So I'll read it
6 back to you what I did.
7 After he -- after he submitted the offer and was
8 accepted is when I told him you can go and clean it and
9 get ready for it, as long as it don't cost no money,
10:25 10 until this escrow closes, to the bankruptcy court.
11 Q. Okay.
12 A. And Gaylen -- he suggested he clean the plant
13 and fix the electrical, plumbing.
14 Why would I tell him that without -- Yeah, they're
10:26 15 not going pay for all of this. The bankruptcy court is
16 not going to pay for that. It's in bankruptcy.
17 So he was doing it for his purpose and Don Zebe's
18 purpose. And John, whatever his name is, knew it too.
19 Q. Did you ever give Gaylen permission to have a
10:26 20 couple hundred thousand dollars worth of electrical work
21 done on the plant?
22 A. No, I didn't know anything about it. That
23 was -- that was the two partner's idea, both Don and
24 Gaylen.
10:26 25 Q. And who told you that?

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10:26 1 A. Gaylen and Don. Don Zebe too.
2 Q. He told you that he was -- that he wanted to
3 spend a couple hundred thousand dollars to get
4 electrical work --
10:26 5 A. Yeah. That's what he told me.
6 Q. Okay.
7 When was that?
8 A. That was on January 14th, 2009 at 2:36 p.m.
9 Q. Okay.
10:27 10 And what are you looking at?
11 A. At an e-mail that he sent to the real
12 "estater," and he sent one here -- he sent me one too.
13 Q. Okay.
14 Other than that, do you have any -- did you have
10:27 15 any independent recollection of that without looking at
16 that document?
17 A. Recollection about what? That Don Zebe was a
18 partner?
19 Q. Here's how it's supposed to work, and it's hard
10:27 20 from the telephone.
21 A. I know it's hard.
22 Q. I'm supposed to ask you a question.
23 A. Go ahead.
24 Q. If you don't know, you don't know.
10:27 25 If you need to look at a document, you're supposed

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10:27 1 to say "I need to look at a document."
2 A. Okay. I'm sorry.
3 Q. That's okay.
4 Let's see here.
10:27 5 A. I got to get new glasses. I can hardly read
6 the little writing.
7 You didn't ask me if you wanted to hear what the
8 e-mail says.
9 Q. I've seen the e-mail.
10:28 10 A. Did you see the paragraph where Zebe says he's
11 going to do it for $200,000. And he's going to take
12 full responsibility and prepared to pay for it himself?
13 Did you read that part of it?
14 Q. I did.
10:28 15 A. Actually we're on the same page.
16 Q. No. No, we're not.
17 A. Why not? You've got this e-mail.
18 Q. No, we're not on because --
19 A. Doesn't it say that he's prepared to pay?
10:28 20 Q. No, it doesn't.
21 A. No?
22 Q. So Mr. Farinella, let me ask you this --
23 A. Yeah.
24 Q. -- the offer was accepted on October 17th;
10:28 25 correct? The date that --

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10:28 1 A. I don't remember.
2 Q. Well, let's look.
3 A. You are going to get me to the point where I'm
4 going to say I don't remember anything and forget about
10:28 5 it because you haven't answered me.
6 Q. No, no, no.
7 You got to understand the rules. I get to ask you
8 the questions.
9 A. I know the rules.
10:28 10 You're asking the questions, but I'm asking them of
11 you now.
12 This is the point that we came here for in the
13 first place.
14 Q. That's right. We can go all day and I won't
10:29 15 answer your questions. We can get through a lot quicker
16 if you just answer the questions.
17 A. Go ahead.
18 Q. Would you look at deposition Exhibit 4. That's
19 the real estate contract.
10:29 20 A. Why don't you tell it to the real estate guy?
21 I never read it.
22 Q. Well you signed it; correct?
23 A. Well he sent it to me.
24 That's not my signature.
10:29 25 Q. That's not your signature?

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10:29 1 A. It's a thousand miles away.
2 THE REPORTER: Let us get the exhibit.
3 MR. BOWERS:
4 Q. After --
10:29 5 THE REPORTER: Wait. Wait. Wait.
6 Let us get the exhibit.
7 Okay. Ready.
8 MR. BOWERS:
9 Q. When you talked about once the offer was
10:30 10 accepted from Gaylen and you allowed him to go in and
11 take care of the restaurant; correct?
12 A. Well, I allowed him. I asked him to.
13 As long as he's going buy the place and I'm having
14 problems with the help over there in the restaurant,
10:30 15 rather than closing it, to keep it open while escrow
16 closed to run it and take care of it.
17 Q. I'm trying to figure these dates out.
18 So then that would be sometime after October 17th,
19 2008?
10:30 20 A. I don't remember.
21 Q. Well you said that once the offer was
22 accepted -- Your exact testimony was something along
23 that line --
24 A. Yeah.
10:30 25 Q. -- after the offer was accepted, I told him he

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10:30 1 could do this and this.
2 A. Yeah.
3 Q. Okay.
4 So then prior to October 17th, 2008, he didn't have
10:31 5 permission; correct?
6 A. No.
7 Neither did Don Zebe either. Because he was in
8 that restaurant too, you know, taking money out too.
9 Q. So Don Zebe was taking money out too?
10:31 10 A. Yeah. Absolutely.
11 As far as I know, they were both fighting over
12 there and you guys got me involved up there.
13 That's a circus going on up there. You know that.
14 Excuse me, off the record. That is a circus going on
10:31 15 between the two of them.
16 Q. Well, we're not off the record. Everything is
17 on the record.
18 A. Okay.
19 Q. Did you -- Did you ever tell Gaylen Clayson or
10:31 20 authorize him as your agent to do whatever he needed to
21 get the plant running?
22 A. No. He's not my agent.
23 Q. Did you -- would you ever authorize him to do
24 anything to get the plant running?
10:32 25 A. I wouldn't authorize him or Don Zebe without

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10:32 1 signing a piece of paper in front of a lawyer. I don't
2 trust either one of them.
3 Q. Fair enough. Fair enough.
4 A. They're a bunch of crooks up there.
10:32 5 MR. MARIN: (Indicating).
6 THE WITNESS: I know.
7 MR. BOWERS: Okay. Let's take another 30 seconds
8 to 2-minute break and we may be wrapping up.
9 (A recess is taken.)
10:35 10 MR. BOWERS: Mr. Farinella, I don't have anymore
11 questions.
12 Mr. Atkins will have the right.
13 I just wanted to throw this out one more time.
14 THE WITNESS: Go ahead.
10:35 15 MR. BOWERS: And Manny, I'm sorry, I don't know
16 your last name. I don't mean any disrespect for calling
17 you that.
18 MR. MARIN: Marin, M-a-r-i-n.
19 MR. BOWERS: The only thing is -- apparently you
10:35 20 got it, but I would still throw out there that I would
21 like to talk to Mr. Farinella and Manny and their
22 personal attorney about settling this case between us
23 when there's the time convenient for you.
24 THE WITNESS: Settle the case.
10:35 25 MR. BOWERS: I don't have any more questions.

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10:35 1 THE WITNESS: You want to settle? How do we settle
2 this case?
3 MR. MARIN: You can arrange it with Blake as far as
4 that schedule.
10:36 5 Morris he wanted to talk to you and me so that's
6 fine.
7 THE WITNESS: Who wanted to talk to me?
8 MR. ATKIN: I do have a couple questions if that's
9 okay, Morris.
10:36 10 THE WITNESS: Yeah.
11
12 -EXAMINATION-
13
14 BY MR. ATKIN:
10:36 15 Q. Do you recall, you know, you --
16 MR. BOWERS: Wait a minute. Wait a minute. Are we
17 deposing Morris? I'm sorry. I thought you said Manny.
18 MR. ATKIN: I said "Morris."
19 THE WITNESS: Morris.
10:36 20 MR. BOWERS: You did.
21 MR. ATKIN:
22 Q. You were asked some questions by Mr. Bowers
23 about this document that we've marked, the offer that
24 was accepted in October of 2008.
10:36 25 Do you recall that Gaylen had made an offer earlier

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10:36 1 in the year in 2008, sometime back in February 2008?
2 A. Yes.
3 Q. And so some of those conversations that you
4 talked about with Gaylen about running the restaurant
10:37 5 and doing whatever was necessary to make the plant
6 operational, those conversations, didn't they occur
7 before October of 2008 as to that first offer in
8 February?
9 A. Well, he made an offer and it was not accepted.
10:37 10 Gaylen made the first offer. I don't know. I think it
11 was February -- I think it was --
12 THE WITNESS: Was it February 7th that he made his
13 offer? February 7. That's 2008.
14 MR. MARIN: Yes.
10:37 15 THE WITNESS: 2008, February 7, and he offered
16 500,000. And it was not accepted. It was turned down.
17 MR. ATKIN:
18 Q. In any event, he started running the restaurant
19 at about that time, didn't he, February 2008?
10:37 20 A. It was much later than February though. It was
21 after -- after the 500,000 was rejected, he offered
22 $800,000 with another offer of 800-, and we accepted
23 his. And that's when I found out Don Zebe was a
24 partner. He made -- he accepted the offer of 800,000 --
10:38 25 we accepted that.

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10:38 1 So when we accepted that, that means that the thing
2 was closed. Like I said, I read it to you again.
3 After the accepting of the offer, Gaylen asked me
4 if he can clean it up and get it ready to run.
10:38 5 Which I said go ahead, as long as it don't cost the
6 court any money.
7 Q. All right.
8 A. And they said, "Okay."
9 Because I got an e-mail from Don Zebe that says
10:38 10 they're willing to pay anything -- that they -- you
11 know, that they -- Gaylen -- Gaylen and Don Zebe will
12 accept up to 200 something thousand -- $245,000 to
13 cleanup the plant. They will pay for it and not charge
14 us or the courts or anybody.
10:38 15 I got an e-mail to that it effect.
16 Q. And that's the e-mail that you talked about
17 earlier that you received in January of 2009?
18 A. Right.
19 Q. Okay.
10:39 20 And --
21 A. The plant was closed for a couple of years.
22 That's why it got so dirty and crumby and everything.
23 That's why it wasn't cleaned. It was closed for two
24 years.
10:39 25 Any piece of property that has been closed --

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10:39 1 Q. Wasn't there junk on the property that had been
2 used that was no longer usable? It was considered junk
3 on the property?
4 A. Yes.
10:39 5 And in fact, we had what we call a junkyard. We
6 used to throw the equipment that was not good or didn't
7 work no more out in the back.
8 Q. And wasn't that weigh dryer part of that junk?
9 A. I believe so. I believe we had and old weigh
10:39 10 dryer -- Well, it was a pan. They call it a pan. It
11 was thrown in the back. It couldn't be used at all. It
12 wasn't worth anything. It was scrap.
13 Q. And you authorized Gaylen to get rid of that?
14 A. I didn't authorize him to get rid of that or
10:40 15 any particular item. Only to clean it up.
16 If that meant to get rid of that, I guess he did
17 it. But not to cost any money to court -- not to cost
18 me or the bankruptcy court. Because they would have
19 come -- I had no authority to tell him anything anyway.
10:40 20 He might as well ask a monkey on a tree what he
21 could do. I had no authority.
22 MR. ATKIN: That's all I have.
23 THE WITNESS: Okay.
24 MR. BOWERS: That's all. I have nothing else.
10:40 25 THE REPORTER: So we're off the record.

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1 MR. BOWERS: We're off the record.
2 (The proceedings concluded at 10:40 a.m.)
3 ***
4
5 I declare under penalty of perjury under the laws
6 of the State of California that the foregoing is true
7 and correct.
8
9 Executed at ____________________, California,
10 on ____________________.
11
12
13 ____________________
MORRIS A. FARINELLA
14
15
16
17
18
19
20
21
22
23
24
25

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1 STATE OF CALIFORNIA) ss
2
3 I, Lori S. Turner, CSR 9102, CP, RPR, do hereby
4 declare:
5
6 That, prior to being examined, the witness named in
7 the foregoing deposition was by me duly sworn pursuant
8 to Section 2093(b) and 2094 of the Code of Civil
9 Procedure;
10
11 That said deposition was taken down by me in
12 shorthand at the time and place therein named and
13 thereafter reduced to text under my direction.
14
15 I further declare that I have no interest in the
16 event of the action.
17
18 I declare under penalty of perjury under the laws
19 of the State of California that the foregoing is true
20 and correct.
21
22 WITNESS my hand this __________ day of
23 ____________________, __________.
24
25 ____________________
Lori S. Turner, CSR 9102, CP, RPR

Gary L. Cooper - Idaho State Bar #1814
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Counsel for Defendants

2010 NOV 24 AM 10:36
BY ____ DEPUTY CLERK

IN THE DISTRICT COURT OF THE SIXTH JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF BANNOCK

GAYLEN CLAYSON,

Plaintiff,

vs.

DON ZEBE, RICK LAWSON, AND LAZE, LLC.,

Defendants.

CASE NO. CV-2009-0002212-OC

DEFENSE OBJECTION TO PLAINTIFF'S DESIGNATION OF DEPOSITION EXCERPTS FROM THE DEPOSITION OF MORRIS FARINELLA

COME NOW the Defendants and object to the Plaintiff's designation of excerpts from the deposition of Morris Farinella as follows:

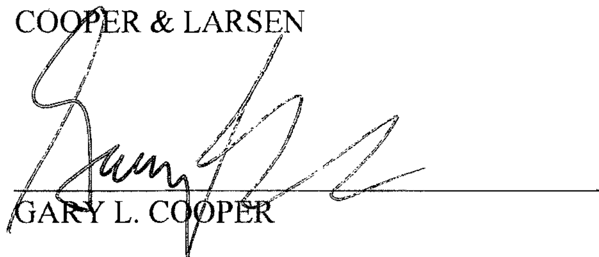
DESIGNATION	OBJECTION
Page 14, lines 7 - 17	No objection
Page 14, line 18 - Page 15, line 4	No objection
Page 18, line 16 - Page 19, line 6	No objection (part of the Defense designation)
Page 35, lines 13 - 20	No question designated. Answer was non-responsive and the answer to the extent it seeks to raise the issue of "partnership" is not relevant to the claims and defenses at issue in this trial

ORIGINAL

Page 40, lines 14 - 25	No objection
Page 42, lines 4 - 15	To the extent the answer raises the issue of "partnership" it was not responsive and is not relevant to the claims and defenses at issue in this trial
Page 43, lines 4 - 17	Answer makes no sense because the exhibit is not identified
Page 46 line 3 - Page 50, line 17	relevance
Page 56, lines 2 - 21	To the extent the answer raises the issue of "partnership" it was not responsive and is not relevant to the claims and defenses at issue in this trial
Page 58, lines 5 - 13	To the extent the answer raises the issue of "partnership" it was not responsive and is not relevant to the claims and defenses at issue in this trial
Page 61, line 19 - Page 62, line 13	To the extent the answer raises the issue of "partnership" it was not responsive and is not relevant to the claims and defenses at issue in this trial
Page 63, lines 7 - 14	No question designated. Answer was non-responsive and the answer to the extent it seeks to raise the issue of "partnership" is not relevant to the claims and defenses at issue in this trial
Page 65, lines 9 - 20	relevance

DATED this 24th day of November, 2010.

COOPER & LARSEN



GARY L. COOPER

CERTIFICATE OF SERVICE

I hereby certify that on the 24th day of November, 2010, I served a true and correct copy of the foregoing to:

Blake S. Atkin 7579 North Westside Hwy Clifton, ID 83228	[✓] U.S. mail [✓] Email: blake@atkinlawoffices.net [ ] Hand delivery [ ] Fax: 801-533-0380
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IN THE DISTRICT COURT OF THE SIXTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF BANNOCK

GAYLEN CLAYSON,

Plaintiff,

vs.

DON ZEBE, RICK LAWSON, AND LAZE, LLC.,

Defendants.

CASE NO. CV-2009-0002212-OC

DEFENSE PROPOSED FINDINGS OF FACT, CONCLUSIONS OF LAW AND ARGUMENT

PROPOSED FINDINGS OF FACT

1. Gaylen Clayson is a dairy farmer with approximately 38 years experience as a dairy farmer.

2. Don Zebe is a real estate agent with a 25 year business background and 6 year commercial real estate sales and development background.

3. Rick Lawson is an accountant with 25 years experience as a CPA who is now managing the Star Valley restaurant located on the property at issue in this litigation.

4. Jeff Randall is a milk hauler who has a long-standing business relationship with Gaylen Clayson hauling his milk and commodities. About 25% to 40% of his revenue is attributable to hauling milk and commodities for Gaylen Clayson.

5. Gaylen Clayson used Dairy Systems to service his dairy equipment and to update and install new milking equipment in his dairies prior to 2008.

ORIGINAL

6. Gaylen Clayson had a close working relationship with Dairy Systems before 2008 during which times he had engaged it on time and materials contracts and worked out billing disputes directly with the owners of Dairy Systems.

7. Gaylen Clayson had experience prior to 2008 operating and renovating cheese plants.

8. Gaylen Clayson had a relationship with Star Valley Cheese and its owner, Morris Farinella, prior to 2008, which included both selling his milk to Star Valley Cheese in the 1970's and again in the 1990's as well as operating the cheese plant as a part of a receivership in the 1980's.

9. In June of 2008, Gaylen Clayson met with Morris Farinella who was then about 85. The cheese plant had been shut down for about 2 ½ years and was in bankruptcy. The restaurant was open. Morris Farinella was trying to sell the cheese plant and restaurant with the help of a Wyoming real estate agent through the bankruptcy court. Clayson had expressed an interest in purchasing the cheese plant and restaurant. Morris Farinella asked Clayson to help operate the restaurant. Clayson was not to be paid because he was doing it as a favor to Farinella. On July 1, 2008, Gaylen Clayson took over operation of the restaurant. The money from operating the restaurant was supposed to go into an account which had been established for the restaurant and was supposed to be used to pay the bills to the food vendors and help.

10. Gaylen Clayson had no ownership interest in the restaurant or the cheese plant on July 1, 2008 and never thereafter had an ownership interest in the restaurant or cheese plant. Gaylen Clayson believed he would be able to put something together to buy the restaurant and cheese plant so that he would have a place to sell his milk.

11. It was not until August 28, 2008, that Gaylen Clayson had anything in writing authorizing him to operate the restaurant and it only authorized him to run the restaurant, take care of the worker's compensation insurance for the restaurant employees and take care of the cleanliness of the plant. (Exhibit 5A to deposition of Gaylen Clayson)

12. Gaylen Clayson told Morris Farinella that if the cheese plant was not up and running by October 2008 he could not be a part of it.

13. Gaylen Clayson spent time from July 1, 2008 to October 8, 2008, at the restaurant and cheese plant. He managed the restaurant, opened and closed the restaurant, worked around the plant and supervised others in working around the plant. Gaylen Clayson did not keep track of the time he spent. He testified his time was worth $15/hour but provided no evidence to corroborate his opinion..

14. After July 1, 2008, paint and floor work was accomplished on the inside and outside of the cheese plant.

15. Gaylen Clayson opened a bank account at the Bank of Star Valley on approximately July 1, 2008, which was funded primarily with receipts from the restaurant. By October of 2008 it was depleted and closed.

16. Gaylen Clayson stipulated that all the expenses documented in Exhibit F were not approved in advance by Defendants and further that his claim is entirely based on implied agreement by Defendants after the fact to reimburse him. This stipulation does not include the debt to Dairy Systems.

17. In July of 2008, Gaylen Clayson paid Johnson Plumbing $1,872 from the Bank of Star Valley account for plumbing work in the restrooms of the restaurants. The Defendants did not request or encourage him to incur this indebtedness. (Exhibit F(A))

18. Jeff Randall introduced Gaylen Clayson to Don Zebe. Randall was acquainted with and had a personal relationship with both Gaylen Clayson and Don Zebe. This introduction took place in late July or early August, 2008. This is consistent with the recollection of Don Zebe. Rick Lawson, however, was not introduced until the last week in August, 2008. Gaylen Clayson, Don Zebe and Rick Lawson all agree that the initial introduction was for the purpose of having Don Zebe write a business plan for Gaylen Clayson, not finance the acquisition of the plant and restaurant. Gaylen Clayson testified that almost immediately the relationship changed and by mid-August, 2008, Don Zebe and Rick Lawson became interested in acquiring the plant and restaurant. Don Zebe and Rick Lawson disagree and testified that they did not become interested in acquiring the plant and restaurant until the end of September 2008. On October 2, 2008, Rick Lawson prepared paperwork to form SVC, LLC which included Clayson, Lawson and Zebe as members. (Exhibit J) On the same date Rick Lawson made some changes to the annual report form for an existing company called Milk Market Management, LLC, which included the names of Clayson, Lawson and Zebe as well as Jeff Randall. (Exhibit K) The disputed evidence is most consistent with Zebe and Lawson not becoming interested in acquiring the plant and restaurant until the end of September, 2008, just before the paperwork on the two LLC's was generated.

19. In the latter part of July, Gaylen Clayson contacted Dairy Systems regarding some work at the cheese plant. Sometime near the first of August, 2008, Clayson initially hired Dairy Systems to get power on in the cheese plant. After Dairy Systems started Gaylen Clayson was advised that it was more involved and could cost as much as

$200,000 to get the cheese plant operational. Gaylen Clayson felt this was cheap because it would cost as much as $2 Million to build a new plant so he instructed Dairy Systems to proceed. Dairy Systems agreed to bill monthly for time and materials and they did. Defendants Don Zebe and Rick Lawson did not request Gaylen Clayson to hire Dairy Systems. According to Clayson, it was Morris Farinella, the owner of the cheese plant and restaurant, who authorized Gaylen Clayson to get this work done. Morris Farinella testified that he did not authorize Gaylen Clayson or anybody else to "get the plant running." Don Zebe and Rick Lawson deny they requested Dairy Systems to perform any work at the cheese plant. Don Zebe specifically told Dairy Systems to stop work at the plant shortly after October 8, 2008, when SVC, LLC took over operation of the restaurant from Clayson. This disputed evidence does not support the formation of an express or implied agreement on the part of the Defendants to reimburse Clayson for the payment he made to Dairy Systems.

20. On September 30, 2008, Gaylen Clayson paid plumber, Casey Monson, $10,772.41 for work in the cheese plant. This was paid from the Bank of Star Valley account. The Defendants did not request or encourage him to incur this indebtedness. (Exhibit F(B))

21. On August 14, 2008, Gaylen Clayson attended an Idaho Milk Producers Association meeting in Sun Valley and charged $644.01 as expenses for attending that meeting to his personal Bank of America credit card. (Exhibit F(D)) Although Clayson testified that he talked this over with Zebe and Lawson before attending, Clayson stipulated that this expense was not approved in advance by the Defendants. Clayson had not even met Lawson at the time of this meeting. There is no evidence that this expenditure improved the plant or restaurant.

22. On August 13, 2008, Gaylen Clayson paid Golden Ram Painting $2,000 for a down payment on painting from the Bank of Star Valley account. On August 25, 2008, Gaylen Clayson paid Golden Ram Painting $8,621 from his personal checking account for payment in full on painting. (Exhibit F(F)) The Defendants did not request Clayson to incur this indebtedness.

23. On August 21, 2008, Gaylen Clayson charged $379.14 at Columbia Paint on his personal Bank of America credit card. (Exhibit F(G)) The Defendants did not request Clayson to incur this indebtedness.

24. Between September 3, 2008 and October 3, 2008, Gaylen Clayson paid Joshua Flud $3,917.02 from the Bank of Star Valley account for working on refurbishing the

cheese plant. (Exhibit F(I)) The Defendants did not request Clayson to incur this indebtedness.

25. Between August 15, 2008 and September 26, 2008, Gaylen Clayson paid April McMurdo $5,100.06 from the Bank of Star Valley account for secretarial work and answering phones. (Exhibit F(J)) There is no evidence that this work improved the plant or restaurant. The Defendants did not request Clayson to incur this indebtedness.

26. Between August 1, 2008 and September 10, 2008 Gaylen Clayson paid Mark Pittman $3,532 from the Bank of Star Valley account for clean up work and work in the restaurant cooked and waited tables. (Exhibit F (K)) There was no evidence regarding how much of Pitttman's time was spent cleaning up or what he cleaned. The Defendants did not request Clayson to incur this indebtedness.

27. On August 13, 2008, Gaylen Clayson charged $1,778 in travel expenses on his personal Bank of America credit card for two repairmen from Viking to travel to Thayne Wyoming to get some equipment running. (Exhibit F(P)) The Defendants did not request Clayson to incur this indebtedness.

28. On September 25, 2008, Gaylen Clayson paid $9,100 to High Sierra for work expanding the restaurant. (Exhibit F(T)) Defendants did not request him to incur this indebtedness and, in fact, counseled him against incurring the expense.

29. Gaylen Clayson charged $308.61 for some unidentified items at Thayne True Value Hardware on his personal Bank of America charge card in August of 2008. (Exhibit F(U)) The Defendants did not request Clayson to incur this indebtedness.

30. Dairy Systems sent four invoices/statements before Clayson turned over operation of the restaurant to SVC, LLC on October 8, 2008. The last statement was dated September 30, 2008 and shows a $50,000 payment. (Exhibit G (first 4 pages)) The statements and invoices were all directed to Star Valley Cheese. Gaylen Clayson paid the $50,000 payment by a check drawn on his personal account at US Bank dated September 16, 2008. (Exhibit F(U)) At the time the payment was made Morris Farinella (or his company) owned the cheese factory and restaurant.

31. Gaylen Clayson also gave Dairy Systems two other checks drawn on the Bank of Star Valley account, each for $50,000, which were never funded and never cashed by Dairy Systems. The account was closed shortly after October 8, 2008, by Clayson.

32. Gaylen Clayson testified that he asked Defendants Zebe and Lawson to fund the checks. According to him, both indicated they would work on getting the money to fund the checks, but they never did fund the checks. Defendants Zebe and Lawson deny they ever discussed the checks with Clayson or Dairy Systems and deny they were even aware of the two unfunded checks until litigation was commenced in Wyoming and Idaho. This disputed evidence does not support an agreement that Defendants agreed to reimburse Clayson for the $50,000 check he used to pay Dairy Systems.

33. Gaylen Clayson stipulated that Dairy Systems is not presently making a legal claim against him to recover its bills for time and materials at the Star Valley Cheese Plant.

34. Gaylen Clayson did not have the money to make the October payroll at the restaurant and called Rick Lawson on October 8, 2008, to inform him of that fact. Rick Lawson advised him that if they were going to take over the restaurant they wanted him out of there. Gaylen Clayson quit the restaurant at that time and turned it over to Defendants Zebe and Lawson. The Defendant's version of this event is relatively consistent with that of Clayson, except that Defendants testified that Clayson told them he was "done" and if they were "interested they could take it over." Jeff Randall testified that Gaylen Clayson told him he was out of money and if "those guys" (i.e. Don Zebe and Rick Lawson) wanted to take over they could. Even if one accepts Clayson's version of events, the evidence does not support an express or implied agreement on the part of the Defendants to reimburse Clayson for expenses he had paid prior to October 8, 2008.

35. Although Gaylen Clayson was briefly a member of SVC, LLC his name was removed from the LLC shortly after he turned the restaurant over to Don Zebe and Rick Lawson on October 8, 2008.

36. Gaylen Clayson testified that there was a meeting in Rick Lawson's office which was attended by Clayson, Zebe, Lawson and Jeff Randall when he asked and Zebe and Lawson agreed to reimburse him the expenses he had incurred of about $130,000, but Gaylen Clayson has not provided proof that such an amount was actually paid by him. He was unsure of the date except that he recalled it occurred before November 4, 2008. All of these expenses were incurred by Gaylen Clayson before he quit the restaurant and turned it over to Defendants Zebe and Lawson on October 8, 2008. Both Zebe and Lawson deny that such a meeting took place before November 4, 2008, and deny that they agreed to pay his expenses. Jeff Randall does not recall such a meeting prior to November 4, 2008. The disputed evidence does not support Clayson's testimony.

37. Gaylen Clayson has paid no debts since he turned over operation of the restaurant to SVC, LLC on October 8, 2008. He did, however, receive a $20,000 refund from the power company according to Rick Lawson. Clayson claims he did not receive the $20,000 refund. .

38. Gaylen Clayson testified that Rick Lawson and Don Zebe agreed to pay the bills that came in October. Zebe and Lawson deny they agreed to pay any of Clayson's bills except the payroll which was upcoming after October 8, 2008. However, Zebe and Lawson did pay $25,986.01 in bills Clayson incurred prior to October 8, 2008 in the first month after SVC, LLC started operating the restaurant. (Exhibit 11A) These bills included payroll, payroll taxes, food vendors, utilities and back sales tax. Zebe and Lawson testified that if they had not paid these bills they would not have been able to operate the restaurant because the utilities would have been turned off and the vendors would not have supplied food for the restaurant. Additional bills were paid thereafter, primarily after SVC, LLC closed the transaction to purchase the plant and restaurant. Bills paid by SVC, LLC which were incurred prior to October 8, 2008, while Clayson was operating the restaurant totaled $78,237.79. (Exhibit 11) The disputed evidence does not support an implied or express agreement by the Defendants to reimburse expenses paid by Clayson before October 8, 2008.

39. Gaylen Clayson and Jeff Randall signed a Purchase and Sale Agreement on October 17, 2008 in which they agreed to buy the Star Valley Cheese Plant from its owner, Morris Farinella, in its "present condition" for $800,000 (Exhibit D). The testimony about the circumstances surrounding the execution of that agreement are disputed. Clayson testified that he signed the agreement because he had the relationship with Farinella and because Don Zebe and Rick Lawson said they were not going to spend any money until they got ownership and they were making no effort to purchase the cheese plant and restaurant. Don Zebe testified that he decided to make an offer at the prompting of Jeff Randall in a phone conversation on October 16, 2008. Jeff Randall testified that he made the decision on October 16, 2008 to make an offer of $800,000 to "get the ball rolling" because if the cheese plant opened he felt he would benefit from revenue earned from trucking milk to the plant. The following day, October 17, 2008, Jeff Randall drove with Gaylen Clayson to the Star Valley restaurant and met with Don Zebe. Both Jeff Randall and Don Zebe recalled that Zebe called the realtor to tell him he was going to make and offer, but the realtor and Zebe got into an argument and Zebe told Randall he had changed his mind and was not going to make the offer. Randall persisted and Zebe agreed to have Randall make the offer of $800,000 for him but instructed him to have the words "and/or assigns" included so that Randall could assign the PSA to Zebe. Randall stated that he did not know where the realtor lived and Clayson offered to show him. Randall testified that neither he nor Clayson had the money to perform and Randall's intent was to make

the offer on behalf of Zebe and assign it to Zebe. The disputed evidence is most consistent with Clayson and Randall executing the PSA on behalf of Zebe with the anticipation that Clayson and Randall would then assign it to Zebe.

40. Later that day Randall and Clayson returned to the Star Valley restaurant and presented Zebe with the PSA which had been executed. Zebe was upset because he did not see the "and/or assigns" language in the document and because Clayson's name was on the document. The PSA did, in fact, have the "and/or assigns" language, but it was on the third page at line 117. (Exhibit D) Randall agreed that Zebe was upset when he saw Clayson's name on the document and when he could not see the "and/or assigns" language. Randall called the realtor who told him the "and/or assigns" language was in the PSA. Randall told Zebe that it did not make any difference whether Clayson's name was on the PSA because they were going to assign it to Zebe anyway. Randall's and Zebe's version is most consistent with Clayson and Randall executing the PSA on behalf of Zebe with the anticipation that Clayson and Randall would then assign it to Zebe.

41. The PSA provided that the buyer was purchasing the "cheese plant, equipment, restaurant . . . with all improvements thereon, easements and other appurtenances and all fixtures of a permanent nature currently on the premises except as hereinafter provided, in their present condition, ordinary wear and tear excepted . . ." (Exhibit D)

42. Gaylen Clayson admits he did not have the $800,000 to close the transaction when he signed the PSA on October 17, 2008. Gaylen Clayson testified that he was not worried because he had talked to the Department of Agriculture and Morris Farinella. Randall testified that Clayson told him he did not have the money to perform.

43. SVC, LLC paid the $10,000 earnest money called for in the PSA which was executed by Randall and Clayson on October 17, 2008.

44. Don Zebe and Rick Lawson testified that on November 4, 2008, they attended a meeting at Rick Lawson's accounting office with Gaylen Clayson and Jeff Randall to obtain Clayson's and Randall's signature on a written assignment of the PSA which Don Zebe prepared. Gaylen Clayson presented them with a handwritten list of bills he wanted them to pay. Zebe and Lawson refused to pay any bills and presented Clayson with a list of bills they had already paid and told him that because of the mess he had left them with they wanted him to pay these bills. Zebe and Lawson testified that the list they showed Clayson was the general ledger for SVC, LLC which included the bills they had paid through November 4, 2008. (See Exhibit 11A) Jeff Randall testified that the meeting got heated and he backed out to let them resolve it.

He only recalls Zebe and Lawson agreeing to pay some bills associated with operating the restaurant, specifically the payroll and payroll taxes. Zebe testified that Clayson claimed he had paid some of the bills Zebe and Lawson paid and Zebe responded that if he could prove it with invoices and checks they would reimburse him. Zebe and Lawson testified that Clayson grumbled but backed down and agreed to sign the assignment. The disputed evidence does not support an implied or express agreement by the Defendants to reimburse expenses paid by Clayson before October 8, 2008.

45. Both Jeff Randall and Gaylen Clayson admit that on November 4, 2008, they assigned all their right title and interest in the October 17, 2008 PSA to SVC, LLC whose members were Don Zebe and Rick Lawson. (Exhibit N) Gaylen Clayson knew he was not a member of SVC, LLC when he signed the assignment.

46. After the Assignment was signed by Clayson and Randall, Don Zebe and Rick Lawson sought financing to close the transaction. In the course of doing so they presented a business plan they prepared. The business plan contained representations that the plant had been undergoing cosmetic and physical renovations, including electrical, resurfacing of the floors, plastering of walls, cleaning, removal of old equipment, maintenance, repairs and painting. They also represented that the principals of SVC, LLC had paid for the electrical retrofit at a cost of $225,000, which Don Zebe admitted was a misrepresentation. The business plan also represented the restaurant was profitable. Both Zebe and Lawson admitted that it was questionable whether the restaurant was profitable, but stated that it had been represented to them that it was. Zebe and Lawson were eventually able to secure $2 Million in loans.

47. On January 14, 2009, Don Zebe wrote an email to the realtor and two of Morris Farinella's representatives seeking $3,000 to pay some of the expenses SVC, LLC had incurred in operating the restaurant before closing. The email was not directed to or copied to Clayson or Dairy Systems. In that email Don Zebe stated that "we are prepared to absorb what we have paid in and most of what was done while Gaylen was in charge, i.e. electrical, plumbing, to the tune of $245k." There is no evidence to indicate that Gaylen Clayson received this email.

48. The transaction to purchase the restaurant and plant from Morris Farinella (or his company) closed on February 24, 2009 for $800,000. Laze, LLC owns the real property and buildings. SVC, LLC operates the restaurant.

49. After closing, Gaylen Clayson approached Rick Lawson in March of 2009 again requesting that Zebe and Lawson pay some of his bills. Lawson refused. Clayson claimed SVC, LLC was using meat he had supplied at the restaurant and had not paid

for it. The following week Lawson and Clayson met at the restaurant and Clayson retrieved what was left of the meat he supplied. Lawson paid him $3,700 for the meat which Clayson claimed had been used by the restaurant. Clayson agrees that Rick Lawson paid him for the meat which had been used in the restaurant.

50. Don Zebe used the $50,000 payment Clayson made on September 16, 2008, in negotiations with Dairy Systems over its bill. (Exhibit W and Exhibit X) The negotiations were not successful. The Defendants have been sued by Dairy Systems in Wyoming where Dairy Systems seeks to recover for the labor and materials it put into the cheese plant.

51. Rick Lawson testified that he feels no obligation to reimburse Gaylen Clayson for any of his expenses, including the $50,000, because SVC, LLC was required to pay over $78,000 of Clayson's bills after Clayson turned over operation of the restaurant to SVC, LLC on October 8, 2008.

DISCUSSION OF LAW AND ARGUMENT

The issues to be resolved are as follows: (1) Is there an implied-in-fact contract which would support the remedy of quantum meruit requiring the Defendants to reimburse any of the admitted Exhibit F debts claimed by Plaintiff?; and/or (2) Is there an implied-in-law contract supporting an unjust enrichment or restitution recovery in favor of Plaintiff and against the Defendants? Defendants submit that the answer to both questions is "No" for the following reasons.

A. IMPLIED-IN-FACT CONTRACT/QUANTUM MERUIT

Plaintiff's stipulation concerning the Exhibit F expenses is inconsistent with the concept of an implied-in-fact contract. Plaintiff stipulated that all the expenses documented in Exhibit F which the Court admitted for purposes of evaluating Clayson's claim were not approved in advance by Defendants and that his claim is entirely based on agreement by

Defendants after the fact to reimburse him[1]. Dairy Systems was engaged by Clayson before he even met Zebe and Lawson so there can be no claim that the Defendants approved incurring the indebtedness before Dairy Systems started its work. "The general rule is that where the conduct of the parties allows the dual inferences that one performed at the other's request and that the requesting party promised payment, then the court may find a contract implied in fact." *Gray v. Tri-Way Constr. Servs.*, 147 Idaho 378, 387 (Idaho 2009)[2] Plaintiff's stipulation establishes that Clayson did not perform at the request of the Defendants. Therefore, no "implied-in-fact contract" was created based on the dual inferences that Clayson performed at the Defendant's request and that the Defendant's promised payment. Even Clayson's September 16, 2008 $50,000 check to Dairy Systems fails this analysis. According to Clayson his payment was not conditioned upon an "in-advance" implied promise by Zebe and Lawson to reimburse him for the check. He paid Dairy Systems and expected Zebe and Lawson to each fund two other $50,000 checks. Setting aside the fact that Zebe and Lawson deny Clayson's version of the events, even

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[1]The stipulation did not cover the $50,000 payment to Dairy Systems.

[2]While there are earlier Idaho cases which make reference to quantum meruit and/or implied contracts, the earliest Idaho case *explaining* the "implied-in-fact contract" theory of recovery used almost identical language in its explanation: "An implied contract is one, the existence and terms of which are manifested by the conduct of the parties, ***with the request of one party, and performance by the other party often being inferred*** from the circumstances attending the performance." *Clements v. Jungert*, 90 Idaho 143, 153 (Idaho 1965) All subsequent "implied-in-fact contract" decisions suggest that the factual basis requires performance at the request of the party to be held responsible as the necessary requirement.

assuming Clayson's version to be accurate, the fact that Zebe and Lawson did not fund the other two $50,000 checks does not transform these circumstances into an implied promise to reimburse Clayson.

Before an "after the fact" agreement can provide a basis for Clayson to recover against the Defendants for an "implied-in-fact" contract, Clayson must carry the burden of proving that "the conduct of the parties implies an agreement from which an obligation in contract exists." *Continental Forest Prods. v. Chandler Supply Co.*, 95 Idaho 739, 743 (Idaho 1974) See also *Willnerd v. Sybase, Inc.*, 2010 U.S. Dist. LEXIS 114544 (D. Idaho Oct. 26, 2010) (In order to assert breach of an implied-in-fact contract, a plaintiff must demonstrate that both parties to the contract are aware of the contract's existence) To prevail Clayson has the burden of proving all the elements of a contract. As explained in *GEM Indus. v. Sun Trust Bank*, 700 F. Supp. 2d 915, 922 (N.D. Ohio 2010):

> The existence of an implied-in-fact contract, as with an express contract, "hinge[s] upon proof of all the elements of a contract." *Stepp v. Freeman*, 119 Ohio App. 3d 68, 74, 694 N.E.2d 510 (1992). The difference is that mutual assent to the essential elements of an implied-in-fact contract is shown not by an express offer and acceptance, but by the "surrounding circumstances, including the conduct and declarations of the parties[.]" *Id.* Those circumstances must "make it inferable that the contract exists as a matter of tacit understanding." *Id.*

The basic elements of a contract are subject matter, consideration, mutual assent by all the parties to all the terms, and an agreement that is expressed plainly and explicitly enough to show what the parties have agreed. *State v. Korn*, 224 P.3d 480, 482 (Idaho 2009) Clayson's own testimony proves that there was no plain or explicit understanding about what

was agreed. Clayson claims Zebe and Lawson[3] agreed to reimburse him approximately $130,000 for bills he paid. The bills listed on the first page of Exhibit "F" do not total anything close to $130,000[4]. The bills Clayson could actually substantiate with a check or credit card is a different amount, i.e. $98,023.98 which includes the $50,000 check to Dairy Systems. What was the "after the fact" contract? Was it $130,000? Was it $98,023.98? Was it $48,023.98? Was it $69,600. Gaylen Clayson himself does not know what the agreement was. Zebe and Lawson deny the existence of any such agreement. Zebe's January 14, 2009 email does not save this claim because it contains a different number, "245k", which Don Zebe testified was a reference to the Dairy Systems bill, not the bills which Clayson is now seeking to recover under a theory of implied-in-fact contract. While that e-mail may be significant in Dairy System's lawsuit in Wyoming, it does not support an implied-in-fact agreement between any of the Defendants and Clayson.

Gaylen Clayson has failed to carry his burden of proving an implied-in-fact contract. The conduct of the parties and the circumstances do not support an inference that a contract to reimburse Gaylen Clayson exists. Clayson did not prove that he incurred the debts because Zebe and Lawson encouraged him to or asked him to incur the debts such that an inference was created that the Defendants intended to reimburse Clayson. Clayson has not proven

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[3]There was a clear failure of proof against Laze, LLC on the implied-in-fact contract. There was simply no testimony that Zebe and Lawson were acting on behalf of Laze, LLC at any time when an alleged implied-in-fact contract came into existence.

[4]The total is $69,600

what the agreement was. Clayson has not proven that both parties were even aware of the existence of the implied-in-fact contract. The claim of an implied-in-fact contract is not supported by the facts and circumstances, is speculative and must fail because Clayson failed to carry his burden of proving it.

B. IMPLIED-IN-LAW CONTRACT/UNJUST ENRICHMENT

To prevail, Clayson must present evidence of the amount by which the Defendants were unjustly enriched, not just the value of the services rendered. Clayson made no attempt to present and presented no evidence of the amount he claims the Defendants were unjustly enriched. His implied-in-law/unjust enrichment claim must fail.

> In *Blaser v. Cameron*, the Court of Appeals indicated that a party seeking recovery under an unjust enrichment theory must present evidence not only of the value of the services it rendered, but also "the amount of the benefit which, if retained by the [defendant], would result in their unjust enrichment." 121 Idaho 1012, 1017, 829 P.2d 1361, 1366 (Ct. App. 1991). The Court of Appeals affirmed the district court's finding that the plaintiff failed to establish a claim for unjust enrichment because it did not present evidence of the amount by which the defendant was unjustly enriched. *Id.*

Barry v. Pac. West Constr., Inc., 140 Idaho 827, 834 (Idaho 2004)

> The proper measure of recovery on an unjust enrichment claim is not the actual amount of the enrichment, but the amount of enrichment which, as between the two parties, it would be unjust for one party to retain. *Beco Constr. Co., Inc. v. Bannock Paving Co., Inc.*, 118 Idaho 463, 466, 797 P.2d 863, 866 (1990) (citing *Hixon v. Allphin*, 76 Idaho 327, 281 P.2d 1042 (1955)). Blaser had the burden of proving that the Camerons received a benefit and of proving the amount of the benefit which the Camerons unjustly retained. *Gillette v. Storm Circle Ranch*, 101 Idaho 663, 667, 619 P.2d 1116, 1120 (1980); *Hartwell Corp. v. Smith*, 107 Idaho 134, 139-40, 686 P.2d 79, 84-5 (Ct.App.1984). Damages need not be proven with mathematical precision, but the value of any benefit unjustly received must be proven to a reasonable certainty. *Gillette*, 101 Idaho at 667, 619 P.2d at 1120.

> Blaser presented evidence as to the value of the services he performed for the Camerons. n4 The value of services rendered can be used as evidence of the value of the benefit bestowed under the theory of unjust enrichment, *Hartwell Corp.*, 107 Idaho at 141, 686 P.2d at 86, but Blaser also had to prove the amount of the benefit which, if retained by the Camerons, would result in their unjust enrichment. Mere proof of Blaser's costs was inadequate to establish the value of any benefit the Camerons may have unjustly retained. *Gillette*, 101 Idaho at 667, 619 P.2d at 1120.

Blaser v. Cameron, 121 Idaho 1012, 1017 (Idaho Ct. App. 1991)

> The district court, however, instructed the jury on the theory of unjust enrichment. The measure of recovery under this theory is that part of the benefit bestowed by Smith upon the Corporation which, if retained by the Corporation, would result in its unjust enrichment. *Gillette v. Storm Circle Ranch*, supra. This is to be contrasted with the measure of damages under the theory of quantum meruit, which is the reasonable value of the services rendered. There seems to be a continuing confusion of these two theories of recovery. See e.g., *Interform Co. v. Mitchell*, 575 F.2d 1270 (9th Cir.1978), and the dissents in *Gillette*, supra. Suffice it to say that *Interform* and the dissents in *Gillette* merely point out that the result under both theories is often the same. The method of measuring damages, on the other hand, is quite different, as indicated earlier. We see no need, however, to blur the distinction between the theories and use the terms interchangeably simply because in some cases it does not change the result. See *Peavey v. Pellandini*, 97 Idaho 655, 551 P.2d 610 (1976). Such shortcuts cause more harm than good in leading to the confusion noted among the members of the bar and the judiciary. The fact of the matter is that the results are not always the same under the two methods of measuring damages, as we show later.
>
> This is not to say that there is no overlap between the two theories. While unjust enrichment is measured in terms of the value of the benefit to, in this case, the Corporation, the value of Smith's services can be used as evidence of the value of that benefit, as we have shown. D. DOBBS, HANDBOOK ON THE LAW OF REMEDIES § 4.5 at 261 (1973). However, the jury needs to take this one step further and determine the amount of the benefit which, if retained by the Corporation, would result in its unjust enrichment.

Hartwell Corp. v. Smith, 107 Idaho 134, 141 (Idaho Ct. App. 1984)

Clayson seeks recovery of three different classes of benefit he claims enriched the property which is owned by Laze, LLC[5]. The three classes of benefits are: (1) Clayson's own efforts; (2) The Exhibit F(A) - (T) expenses including the True Value Hardware expenditures; and (3) the$50,000 payment on the Dairy Systems account.

1. Clayson's own efforts

Clayson's testimony was that he was present at the cheese factory and restaurant six days a week from July 1, 2008 until approximately October 10, 2008. He further testified that his time was worth $15/hour. He made no effort to identify the total number of hours he is claiming and has made no effort to break down his time between the restaurant and the cheese factory improvements. A review of the credit card charges he submitted in support of his claims for reimbursement show that in the month of August he was somewhere other than Thayne, Wyoming on August 9, 14, 15, 16, 18, 20, 21, 22, 23, 25 and 26[6]. It would be pure speculation to try to determine the number of hours Gaylen Clayson spent performing services which benefitted the property. While damages need not be proven with mathematical precision, the value of any benefit unjustly received must be proven to a reasonable certainty. *Gray v. Tri-Way Constr. Servs.*, 147 Idaho 378, 389 (Idaho 2009) (value

[5] There is a clear failure of proof against Don Zebe or Rick Lawson on the implied-in-law contract/unjust enrichment claim because Zebe and Lawson do not personally own the property on which the improvements were made.

[6] Clayson did not submit credit card charges for July or September so a similar comparison cannot be made in those months.

of any benefit unjustly received by the defendant in an action based upon unjust enrichment, must be proven to a reasonable certainty)

Even if one accepts the proposition that Clayson's services had a value of $15/hour, it would require pure speculation to determine the number of hours Clayson spent benefitting the property. *Peavey v. Pellandini*, 97 Idaho 655, 661 (Idaho 1976) provides some guidance about the type of proof which is required to support a claim for services:

As noted in 66 Am.Jur.2d, *Restitution and Implied Contracts*, § 89 at 1031:

> "Generally, in order to be entitled to recover the value of his services, the plaintiff must prove such value. Thus, evidence of the value of work or materials is ordinarily essential to a recovery under the common counts. In an action to recover the value of services rendered, any competent evidence which reasonably tends to establish such value is, of course, admissible. Evidence of what others received for like services may properly be considered. Proof of the value of services may also be shown by the opinion of witnesses who are familiar with the value of such services, including, it is generally held, the opinion of the person who performed the services."

Clayson offered no evidence of what others received for like services. Clayson offered no opinion evidence about the value of his services. Although Clayson may have been able to offer an opinion of the value of his services, he did not and only offered an opinion about the hourly value of his services without offering testimony about the number of hours or the overall benefit he provided. In fact, Clayson never kept track of the number of hours he spent and offered no reasoned estimate. The claim for the value of Clayson's services and the value unjustly retained by Laze, LLC fails for lack of proof and speculation.

2. ***The Exhibit F(A) - (T) expenses including the True Value Hardware expenditures***

Most of the expenses in this category were paid from the checking account Gaylen Clayson opened at the Bank of Star Valley on approximately July 1, 2008, which was funded primarily with receipts from the restaurant. (Exhibit F(A) Johnson Plumbing $1,872; Exhibit F(B) Casey Monson $10,772.41; Exhibit F(F) Golden Ram Painting $2,000; Exhibit F(I) Joshua Flud $3,917.02; Exhibit F(J) April McMurdo $5,100.06; Exhibit F(K) Mark Pittman $3,532) According to the owner, Morris Farinella, the money from the operation of the restaurant was supposed to go into the account to be used to pay the expenses associated with keeping the restaurant operating. (See Farinella deposition, p. 10, line 1 to page 13, line 9) Instead Clayson used some of these funds to make improvements to the cheese plant and the restaurant despite having no authorization to do so from the owner, Morris Farinella. (See Farinella deposition, p. 66, line 19 to page 67, line 2) The consequence of using these funds for improvements instead of operations was that Clayson ran out of money and turned the restaurant over to Zebe and Lawson who had to pay operating expenses which Clayson failed to pay while he was operating the restaurant. (Exhibits 11 and 11A)

Mere proof of payment of these expenses from the restaurant checking account is inadequate to establish the value of any benefit Laze, LLC may have unjustly retained. As between Clayson and Laze, LLC why is it unjust for Laze, LLC to retain whatever benefit these expenses created? SVC, LLC had to pay payroll, payroll taxes, utilities and suppliers which could have been paid from this account if Clayson had used the account for the purposes it was created. It was not Clayson's money, it was the restaurant's money. No

equity is created by allowing Clayson to benefit personally. Finally, SVC, LLC paid for all of these improvements when it paid the owner $800,000 to buy the property. The October 17, 2008 PSA provided that the buyer was purchasing the "cheese plant, equipment, restaurant . . . with all improvements thereon, easements and other appurtenances and all fixtures of a permanent nature currently on the premises except as hereinafter provided, in their present condition, ordinary wear and tear excepted . . ." Clayson made no attempt to present and presented no evidence of the amount he claims Laze, LLC was unjustly enriched. Clayson has failed to carry his burden of proof.

The expenses which were not paid from the Star Valley restaurant account include (Exhibit F(D) – $644.01 for attending the Idaho Milk Producers Association meeting in Sun Valley charged to Clayson's Bank of America credit card; Exhibit F(F) – $8,621 for Golden Ram Painting paid from Clayson's personal checking account; Exhibit F(G) – $379.14 for Columbia Paint charged on Clayson's personal Bank of America credit card ; Exhibit F(P) – $1,778 in travel expenses for two repairmen from Viking to travel to Thayne Wyoming to get some equipment running charged on Clayson's personal Bank of America credit card ; Exhibit F(T) – $9,100 to High Sierra for work expanding the restaurant paid by Clayson's personal check; (Exhibit F(U) for $308.61 to Thayne True Value Hardware charged on Clayson's personal Bank of America charge card. Mere proof of payment of these expenses is inadequate to establish the value of any benefit Laze, LLC may have unjustly retained. SVC, LLC paid for all of these improvements when it paid the owner $800,000 to buy the

property. It was Morris Farinella, not Laze, LLC that benefitted from whatever improvement these expenses caused because the October 17, 2008 PSA provided that the buyer was purchasing the "cheese plant, equipment, restaurant . . . with all improvements thereon, easements and other appurtenances and all fixtures of a permanent nature currently on the premises except as hereinafter provided, in their present condition, ordinary wear and tear excepted . . ." Clayson made no attempt to present and presented no evidence of the amount he claims Laze, LLC was unjustly enriched by these expenditures. Clayson has failed to carry his burden of proof.

3. The$50,000 payment on the Dairy Systems account

The same arguments presented above apply to this payment. Mere proof of payment to Dairy Systems is inadequate to establish the value of any benefit Laze, LLC may have unjustly retained. SVC, LLC paid for any improvements when it paid the owner $800,000 to buy the property. It was Morris Farinella, not Laze, LLC, that benefitted from whatever improvement these expenses caused because the October 17, 2008 PSA provided that the buyer was purchasing the "cheese plant, equipment, restaurant . . . with all improvements thereon, easements and other appurtenances and all fixtures of a permanent nature currently on the premises except as hereinafter provided, in their present condition, ordinary wear and tear excepted . . ." Clayson made no attempt to present and presented no evidence of the amount he claims Laze, LLC was unjustly enriched by paying Dairy Systems $50,000 for the work it did at the request of Clayson. *Great Plains Equip. v.*

Northwest Pipeline Corp., 132 Idaho 754, 767 (Idaho 1999) (Unjust enrichment, as a fictional promise or obligation implied by law, allows recovery where the defendant has received a benefit from the plaintiff that would be inequitable for the defendant to retain without compensating the plaintiff for the value of the benefit) Although Zebe attempted to use Clayson's $50,000 payment to negotiate the Dairy Systems' bill, no agreement was reached and Defendants realized no benefit from the negotiation. Clayson has failed to carry his burden of proving the value o f the benefit which it would be inequitable for Laze, LLC to retain.

PROPOSED CONCLUSIONS OF LAW

1. The conduct of the parties does not permit the dual inference that Clayson performed at the request of the Defendants and that Defendants promised payment because Clayson admits that he did not perform at the request of the Defendants.

2. The conduct of the parties does not imply an agreement from which an obligation in contract exists. Clayson has the burden of proving all the elements of a contract, because even in the case of an implied-in-fact contract its existence hinges upon proof of all the elements. While Clayson claims the Defendants agreed to reimburse him for $130,000 in expenses he incurred, he did not prove that he incurred $130,000 in expenses nor did he identify what specific expenses he claims the Defendants agreed to reimburse him. The document he claimed identified the expenses the Defendants agreed to pay only totals $69,600, but the amount Clayson could substantiate was yet a different amount. The disparity between the amounts is too great to imply an agreement to pay a reasonably certain amount. Thus, the conduct of Clayson himself does not imply an agreement by the Defendants to pay a reasonably certain amount. Clayson failed to carry his burden of proving an implied-in-fact agreement on the part of the Defendants to reimburse him for expenses he incurred.

3. Under an unjust enrichment theory Clayson has the burden of presenting evidence not only of the value of the services he rendered, but also "the amount of the benefit which, if retained by the [Defendants], would result in their unjust enrichment." In the case of his own services Clayson failed to prove the value of his services and

offered no evidence by which to determine the amount of the benefit which, if retained by the Defendants, would result in their unjust enrichment.

4. Under an unjust enrichment theory Clayson has the burden of presenting evidence not only of the value of the services or property he paid for, but also "the amount of the benefit which, if retained by the [Defendants], would result in their unjust enrichment." In the case of the Exhibit F expenses which were paid from the Bank of Star Valley restaurant account the Defendants were not unjustly enriched at the expense of Clayson because the services and property were paid from the restaurant account and because the Defendants paid other restaurant expenses which would have been paid from the restaurant account if Clayson had not diverted the funds in the restaurant account to pay for cheese plant improvements. Clayson offered no evidence by which to determine the amount of the benefit which, if retained by the Defendants, would result in their unjust enrichment. Clayson failed to carry his burden of proof.

5. Under an unjust enrichment theory Clayson has the burden of presenting evidence not only of the value of the services or property he paid for, but also "the amount of the benefit which, if retained by the [Defendants], would result in their unjust enrichment." In the case of the Exhibit F expenses which were paid from Clayson's personal checking account or his personal credit card mere proof of payment is insufficient to establish the value of any benefit Defendants may have unjustly retained. Clayson offered no evidence by which to determine the amount of the benefit which, if retained by the Defendants, would result in their unjust enrichment. In any event Defendants paid for any improvements when SVC, LLC purchased the property in its "then condition" after the improvements were made for $800,000. Clayson failed to prove Defendants were unjustly enriched by the Exhibit F expenses which were paid from Clayson's personal checking account or his personal credit card.

6. Under an unjust enrichment theory Clayson has the burden of presenting evidence not only of the value of the services or property he paid for, but also "the amount of the benefit which, if retained by the [Defendants], would result in their unjust enrichment." In the case of Clayson's $50,000 payment to Dairy Systems, the Dairy Systems work was performed while Morris Farinella (or his company) owned the property, not Clayson and not the Defendants. Defendants paid for any improvements when SVC, LLC purchased the property in its "then condition" after the improvements were made for $800,000. Although Zebe attempted to negotiate the Dairy Systems bill using the $50,000 Clayson paid he was not successful and Defendants did not benefit from the negotiation. Clayson failed to prove Defendants were unjustly enriched by Clayson's $50,000 payment to Dairy Systems.

CONCLUSION

Gaylen Clayson decided before he met Don Zebe and Rick Lawson that he wanted to purchase and operate the Star Valley Cheese plant and restaurant. He knew the cheese plant had to be operational by the fall of 2008 or he could not participate and he testified that this is what he told Morris Farinella. As fall approached the plant was not operational and Clayson was running short on funds. He turned over the operation of the restaurant to Don Zebe and Rick Lawson. He assigned any interest he had in the PSA to SVC, LLC. His mistake was that he invested some of his own funds into fixing up the cheese plant before he had a clear understanding or agreement with the owner, Morris Farinella, or with the Defendants who eventually purchased the property from Farinella.

Gaylen Clayson took a risk. Because of his prior relationship with Morris Farinella and the lack of any agreement with him, he did not pursue recovery of his unwise investment from Farinella. Because of his prior relationship with Dairy Systems he advanced money for work he had requested before he had any authority to do so. With no legal basis to recover this unwise investment, Clayson is left to seek some recovery through the equitable remedies of implied-in-fact contract and implied-in-law contract. Clayson's record keeping and his recollection of events is spotty and inconsistent. Clayson admits he never performed any work and never paid for any services or materials at the request of the Defendants. He is unable to verify or quantify the time he allegedly spent improving the cheese plant. His records of expenditures do not match his claim and his memory of events do not match that of the Defendants in many critical respects. More significantly, his memory does not match

that of the non-part witness, Jeff Randall, in many critical respects. This inconsistent and contradictory evidentiary record makes it clear that no implied contract can be concocted because to do so would involve pure speculation. Clayson failed to prove an implied-in-fact contract.

Gaylen Clayson has the burden of proving unjust enrichment. Clayson used restaurant money that should have been used to operate the restaurant to make improvements resulting in the Defendants paying many of Clayson's restaurant expenses that went unpaid due to lack of funds. Most of his evidence was devoted to trying to establish how unfairly Clayson had been treated and little of his evidence was devoted to how much he paid for the improvements he claimed he made. Again what he paid for and what he received for what he paid is largely left to speculation. None of his evidence answered the critical question about the extent, if any, to which his efforts and expenditures actually enriched the Defendants who bought the property "as is" with all the improvements for $800,000 from the owner. If Clayson is to be believed, he is the one that negotiated the price of $800,000 so he can hardly complain now that $800,000 was not fair value. Because the Defendants bought the property after the improvements were made it is illogical to now claim the Defendants were unjustly enriched by Clayson's efforts. Clayson failed to prove the Defendants were unjustly enriched.

Defendants request this Court to deny Clayson's claims for implied-in-fact and implied-in-law contracts, enter judgment in favor of the Defendants dismissing Clayson's claims with prejudice and award costs and attorney fees in favor of the Defendants.

DATED this 24th day of November, 2010.

COOPER & LARSEN

GARY L. COOPER

CERTIFICATE OF SERVICE

I hereby certify that on the 24th day of November, 2010, I served a true and correct copy of the foregoing to:

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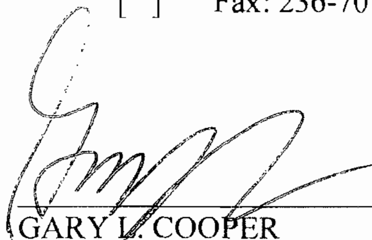

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IN THE SIXTH JUDICIAL DISTRICT COURT IN AND FOR BANNOCK COUNTY, STATE OF IDAHO

GAYLEN CLAYSON, Plaintiff, v. DON ZEBE, RICK LAWSON, and LAZE, LLC, Defendants, ________________ DON ZEBE, RICK LAWSON, and LAZE, LLC, Counterclaim Plaintiffs, v. GAYLEN CLAYSON, Counterclaim Defendant.	**PLANTIFF'S POST-TRIAL BRIEF** Case No: CV-2009-02212-OC Judge: Stephen S. Dunn

Plaintiff submits this Post-Trial Brief with the attached proposed Findings of Fact and Conclusions of Law and a proposed Judgment pursuant to the direction of the Court at the end of trial. Plaintiff has not attempted to reproduce here the analysis set out in the proposed Findings of Fact and Conclusions of Law themselves, but only matters that may not be necessary to decision, but which may be helpful to the Court as he analyzes the evidence introduced at the trial.

To the extent practicable, Plaintiff has attempted to organize the information by paragraph numbers corresponding to the paragraph numbers in the Findings of Fact.

Paragraph 7.

There is no dispute that Mr. Farinella told the Plaintiff to do whatever he wanted to get the Cheese Plant ready to open and make cheese as soon as the escrow closes, as long as it didn't cost Mr. Farinella or the bankruptcy court anything. Mr. Clayson testified that was his understanding. Mr. Farinella, although a bit confused as to the timing of events essentially agreed. Farinella deposition at 40, 42.[1] Defendants may try to argue that there is an issue of fact about when that authorization came about. But logically there is not. Mr. Clayson testified that Mr. Farinella gave him that authorization when he moved into the Cheese Plant in July 2008. Mr. Farinella testified that it came in conjunction with Mr. Clayson's having made an offer to

[1] Defendants may try to argue that Mr. Farinella admitted in his deposition that there were no oral agreements relating to the Cheese Plant. However, that is not how he testified. After Mr. Farinella had set out this agreement he had with Gaylen that he could do whatever he wanted so long as it did not cost Mr. Farinella any money, then Mr. Bowers, who was conducting the deposition, prefaced the "no oral agreements questions" with "except for what you explained to me, how's that?" Farinella deposition at 43. Mr. Farinella made it clear that there were no other agreements "other than what I told you what he did." Farinella deposition at 35. Referring to the fact that Gaylen was living at the plant while he operated the restaurant to get the plant ready to reopen upon close of escrow. Farinella deposition at 42.

buy the Cheese Plant, Farinella deposition at 60-61, but he also connected the timing of that authorization with Mr. Clayson taking over the running of the restaurant.

> Gaylen offered to run the restaurant after he made the offer to—was accepted. After he bought the—he made the offer to buy the plant at the time. So with that in mind, I figured he can be trusted to run the restaurant. That's the way that happened. Just to run it to keep it open.
> Q. Because you assumed that at some point he would be able to buy the whole thing?
> A. It was already in process of him buying it through the bankruptcy court.
> Q. Okay.

Farinella deposition at 14.

We know that Gaylen began running the restaurant on July 1, 2008, so the understanding to which Gaylen testified, that Morris Farinella told him "the Cheese Plant is yours," to go ahead and get the plant operational and he would work out the title problems and authorization to do whatever you want to get the Cheese Plant operational by the time of closing, must have been given in the July time frame as testified by Mr. Clayson. Moreover, it would not make any sense to argue that the authorization came after the October 17, 2008, formal offer because by that time Gaylen was no longer running the restaurant and Defendants had taken control of the Cheese Plant. Mr. Zebe testified that it would be illogical for a person to do all the work that Mr. Clayson was doing unless he had the assurance he would someday own the property. And indeed, it would be. Mr. Farinella must have assured Mr. Clayson that he would own the plant and given the authorization to "do what you want to get the Plant ready to operate upon the closing," at the time of the oral agreement in late June or early July.

Paragraph 8.

While there is some slight dispute in the record over the facts set out in paragraph 8, paragraph 8 is the most logical interpretation of the disputed facts. While Mr. Farinella testified in his deposition that Gaylen did not have the authority to apply the proceeds of the restaurant to his personal account, and that he was running the restaurant as a favor to the bankruptcy court, that testimony can be discounted because there has never been any request by the bankruptcy court, Mr. Farinella, or anyone else for an accounting, even though Mr. Zebe attempted to foment a call for such an accounting in his email dated January 14, 2009. Exhibit S. Moreover, Mr. Clayson's actions are not those of a mere manager who was not entitled to the fruit of his labors. Defendants complained about Mr. Clayson incurring about $18,000 in debt to move a wall in the restaurant just before turning over the operations of the restaurant to the Defendants. Not the work of an hireling. In any event, Mr. Farinella testified that he authorized Mr. Clayson to do whatever he wanted to get the Cheese Plant ready to reopen upon close of escrow, as long as it didn't cost Mr. Farinella or the bankruptcy court any money. Farinella deposition at 40. Given this record, Mr. Clayson had the right to use the money in the Star Valley Cheese account to pay himself or to refurbish the Cheese Plant, and any argument that he had a duty to account to Mr. Farinella or to the bankruptcy court for that money is irrelevant to Defendant's duty to reimburse him for the expenditure of that money to refurbish the Cheese Plant.[2]

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[2] Any duty Mr. Clayson might have to account to Mr. Farinella or the Bankruptcy Court in addition to being irrelevant between these parties is as least as remote as Mr. Clayson's duty to pay Dairy Systems for their remaining unpaid debt in the event the Defendants do not pay it.

Paragraph 9.

The facts set out in this paragraph are undisputed. Each witness who testified on the issue observed the fact that Gaylen Clayson was so dedicated to the reopening of the Cheese Plant that he lived and worked full time on site. The significance of these facts is not only in the facts themselves, but in the logical inferences that should be drawn from them. Mr. Zebe testified that it would be illogical for a person to do all the work that Mr. Clayson was doing unless he had the assurance he would someday own the property. Mr. Zebe is correct in that observation. That observation makes illogical defendants assumption, based on no evidence, that Mr. Clayson was anxious to avoid having to close the purchase for $800,000 and that is the reason he assigned his rights to the defendants. The logical inference to draw is that Mr. Clayson was doing the work because Mr. Farinella, whom he had known for years, with whom he had done business in the past, and who had financed his associated business ventures would keep his promise that "the plant is yours", especially when he and his son Joe looked to profit from the brokering of the cheese from the plant. At it turns out that reliance was justified as was demonstrated when Mr. Farinella accepted the offer and closed on the agreement with parties whom he had been told were Mr. Clayson's partners.

Paragraphs 16 through 19.

Defendants try to downplay the significance of Gaylen Clayson's role in helping them obtain the right to buy the Cheese Plant, but there is little doubt in the record that Gaylen played a significant role in securing the right to buy the plant. Defendants try to argue that Gaylen was out of the picture when he and Mr. Randall went to Wyoming to make the offer on the Plant.

But the Court will recall that when Mr. Randall decided to make that offer he called Gaylen Clayson, not Don Zebe, to announce his intention because at that time the four of them were going to put together a deal "to buy the plant, refurbish it, and reopen it together." And while both he and Mr. Clayson were looking to Don and Rick to bring the money to the table to put the financing together, it would not be the first time that the people with the brains needed someone with the financial muscle to put together their dream.

Mr. Farinella also testified to the importance of Mr. Clayson's involvement in the mix. He testified that there had been other offers on the plant but that they had decided to go with Mr. Clayson because he was a local and had the milk supply. Farinella deposition at 14-15. Farinella further testified that that he did not care that Don Zebe was paying the money because he had been introduced to Don Zebe as Gaylen's partner. Farinella Depositon at 35, 57.

Paragraphs 26 through 28.

At first it appeared that Mr. Zebe and Mr. Lawson contradicted one another about their promise to pay Gaylen for his out of pocket expenses and the debts he incurred to contractors working on the plant. Mr. Zebe stipulated and stipulated that they would pay what was documented and what they could use, and, with regard to the Dairy Systems debt, represented that they had paid it, Exhibit I at p. 6, and specifically and repeatedly stated and indicated they would pay upon closing. Exhibit S, Exhibit V.

Mr. Lawson, on the other hand, stated categorically that there was no agreement to pay any of Mr. Claysons bills. Mr. Zebe cleared up the confusion when he testified that the discussion referred to by Mr. Lawson related solely to the restaurant debts. Mr. Randall, who

"sang to himself" so as not to know what was going on during that discussion apparently did not catch that the "heated discussion" related only to the restaurant debt and not the refurbishment debt the Defendants had stipulated and stipulated they would pay upon the closing.

Thus, at most, even if Defendants' version of the facts were believed, they have proven only a compromise between Clayson and themselves with regard to the restaurant debt. Having thus compromised the restaurant debt for the restaurant bills they paid, it would not be equitable to allow them to double dip and claim an offset against Mr. Clayson's out of pocket refurbishment expenses or the $50,000 he paid to Dairy Systems.

Defendants may try to argue that any obligation they have to pay Gaylen Clayson for his out of pocket expenses or for the $50,000 he paid to Dairy Systems is offset by the many thousands of dollars they paid "on Gaylen's behalf" when they took over operations of the restaurant. Defendants failed to establish any right to setoff. First, there was a complete lack of evidence whether the restaurant bills being disputed had been incurred by Mr. Clayson during his three month management of the restaurant or had been incurred during the occupancy of Mr. Farinella's other managers. Mr. Lawson's statement that he and Mr. Zebe expected to be reimbursed those costs upon the closing, suggests that the bills originated with Mr. Farinella before Mr. Clayson's appearance on the scene.

Another difficulty in trying to calculate any offset is the failure by Defendants to document the value of the inventory they received from Mr. Clayson. Mr. Lawson testified that when they took over the restaurant, they not only inherited the bills, but they also inherited a substantial inventory. When asked whether they had kept a record of the inventory or had

attempted to value the inventory, Mr. Lawson candidly answered "no." If they inherited $100,000 worth of inventory but paid only $70,000 for it, then Defendants owe Plaintiff on account of the restaurant in addition to what they owe for refurbishment of the Cheese Plant. Without putting a value on the inventory, it is not fair for Defendants to ask for credit for paying the bills of the restaurant. For example, $36,335.74 of the bills Defendants claim to have paid was for propane in a 10,000 gallon tank that was still there and full when they took over the restaurant. Similarly $7,797.00 was paid to Sysco Foods, the supplier of the ice cream served in cones at the restaurant. Defendants surely do not expect to be paid for the propane they used, or the ice cream they served. Without an inventory, there is no way to determine if Defendants are entitled to any setoff.

Finally, Defendants testified that they paid the restaurant debts, not because of any agreement with Mr. Clayson, but because they needed those suppliers in order to continue to operate the restaurant. the law does not allow a party who, without legal obligation to do so, voluntarily pays a debt to seek to recover the debt from the originally debtor. It is well settled that a person cannot-by way of set-off, counterclaim or direct action-recover money which he or she has voluntarily paid with full knowledge of all the facts but with no obligation to make such payment. Chinchurreta v. Evergreen Management, Inc., 790 P.2d 372, 374 (Idaho Ct. App. 1989).

Credibility of Witnesses

While many of the facts are not in serious dispute, and even fewer of the disputes make any logical sense, there are a few facts that are in dispute and for which the Court may need to

judge the credibility of witnesses. In that regard, when judging the credibility of the Defendants the Court might note that Defendants were willing to misrepresent to the banks that they had paid Dairy Systems for 90 percent of the electrical retrofit in the amount of $225,000. Since this is one of the very debts at issue in this case, a court of justice might well choose not to believe testimony of the Defendants tending to negate their duty to reimburse Plaintiff for that portion of the debt they claimed to have paid and that he actually paid.

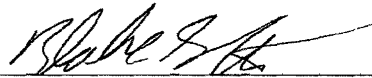
Jeff Randall's testimony, for the most part, corroborates the position of the Plaintiff that he continued to be involved with the group in their attempt to purchase, refurbish, and reopen the Cheese Plant even after his name was removed from the LLC documents on October 8, 2008.

His attempts to minimize the importance of Mr. Clayson's role in purchasing the Cheese Plant came about because of defendant's attempts to influence his testimony. Defendants, particularly Mr. Zebe, with whom Mr. Randall felt some particular kinship because of their shared tragedies, got to Mr. Randall, told him he had "thrown them under the bus" with his statement that he and Clayson "sold" them the plant in November 2008, and obviously influenced his testimony on that issue. The reality is that Clayson and Randall did "sell" the plant to Defendants in November 2008. Just as the contract purchaser of a home is the owner of the home, Walker v. Nunnenkamp, 84 Id. 485, 373 P. 2d 559 (1962), so Clayson and Randall were the owners of the Cheese Plant under their contract to purchase dated October 17, 2008. Their November assignment of that contract to Defendants was a "sale" of the Cheese Plant. The purchase price was Defendants' agreement to give Mr. Randall the work shipping the milk

and the purchase price to Clayson was the promise to reimburse his out of pocket expenses, take his milk, and assume the debts he had incurred. Exhibit CC.

Dated this 24th day of November, 2010.

ATKIN LAW OFFICES, P.C.



Blake S. Atkin
Attorney for the Plaintiff/Counterclaim Defendant

CERTIFICATE OF SERVICE

The undersigned certifies that on the 24th day of November, 2010, he caused to be served a true and correct copy of the foregoing **POST-TRIAL BRIEF** by the method of delivery designated below:

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Judge Stephen Dunn P.O. Box 4126 Pocatello, Idaho 83205 Facsimile: (208) 236-7012	__x_ U.S. Mail __x_ email ___ Fax

Blake S. Atkin

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IN THE SIXTH JUDICIAL DISTRICT COURT IN AND FOR
BANNOCK COUNTY, STATE OF IDAHO

GAYLEN CLAYSON, Plaintiff, v. DON ZEBE, RICK LAWSON, and LAZE, LLC, Defendants, DON ZEBE, RICK LAWSON, and LAZE, LLC, Counterclaim Plaintiffs, v. GAYLEN CLAYSON, Counterclaim Defendant.	**FINDINGS OF FACT AND CONCLUSIONS OF LAW** Case No: CV-2009-02212-OC Judge: Stephen S. Dunn

FINDINGS OF FACT

1. The Plaintiff Gaylen Clayson has known Morris Farinella, the former owner of the Star Valley Cheese Plant ("Cheese Plant") for many years.

2. Mr. Clayson supplied milk to the Cheese Plant over the years while it was being run by Mr. Farinella. He helped Mr. Farinella recruit other dairy farmers to supply milk to the

Cheese Plant and, at one point, Mr. Farinella loaned him money to purchase and operate a dairy in Wyoming that supplied milk to the Cheese Plant.

3. The Cheese Plant has not been able to remain profitable over recent years in part because of emerging environmental concerns over the disposal of whey, a byproduct of cheese production. The expense of whey disposal has resulted in recent years in the bankruptcy of several cheese plants in the area, including the plant in Blackfoot, Idaho, and resulted in a second bankruptcy of the Star Valley Cheese Plant in about 2005.

4. In 2007, Mr. Clayson was contacted by Morris Farinella who wanted him to reopen the Cheese Plant. Mr. Farinella knew that Mr. Clayson had the ability to supply the milk, Mr. Farinella and his son Joe Farinella assured Plaintiff they could market the cheese, and Mr. Farinella assured Mr. Clayson that he could clear up the title to the property so that Mr. Clayson could purchase the Cheese Plant.

5. At the time of this contact, Mr. Clayson was in southern California on a mission and informed Mr. Farinella that he would not be back until the next summer. Mr. Farinella indicated that would give him time to work out the title problems with the Cheese Plant.

6. Mr. Clayson was interested in reopening the Cheese Plant because he had a business plan to ship the whey back to the farmer who supplied the milk. The farmer could use the whey in feeding his cattle, and the value of the whey would offset the cost of shipping. In this fashion, both the environmental hazard connected with the whey and the cost of shipping milk to the remote location of the Cheese Plant could be offset.

7. In late June 2008, Mr. Clayson met Mr. Farinella at the Cheese Plant. At that meeting, Mr. Farinella promised Mr. Clayson that "the Cheese Plant is yours," that he should do whatever was necessary to get the Cheese Plant ready to reopen, and that Mr. Farinella would work things out so that he could buy the Cheese Plant. He even offered to finance the purchase of the Cheese Plant by Mr. Clayson.

8. During that meeting, it was also agreed that Mr. Clayson would take over the operations of the restaurant located on the premises. Mr. Farinella told him that he had to "cash flow" the restaurant and that it was his operation and he should run it as his own.

9. On July 1, 2008, Mr. Clayson physically moved into the Cheese Plant. He lived on site, managed the restaurant, and worked and supervised the work of others whom he hired to help him refurbish the Cheese Plant and make it ready for reopening. He also interfaced with potential lenders, notably the United States Department of Agriculture, and other people in the milk industry who would be instrumental in the successful operation of a cheese plant in Wyoming. Mr. Clayson spent 10 to 12 hours a day, 6 days a week from July 1, 2008, through October 8, 2008, hiring and supervising workers on the Cheese Plant, working on cleaning and refurbishing the Cheese Plant, resurfacing the floors, plastering and painting walls, cleaning out unnecessary and scrap equipment, and cleaning and painting the plant, lining up contacts to supply milk to the Cheese Plant and to take excess milk when needed, discussing financing with the United States Department of Agriculture, giving tours of the Cheese Plant to interested parties and working toward reopening the Cheese Plant.

10. In mid-August 2008, Mr. Clayson hired Dairy Systems Company, Inc. ("Dairy Systems"), a company with whom he had dealt for over 20 years, to upgrade the electrical work at the Cheese Plant.

11. Over the years, as Dairy Systems has performed work for Mr. Clayson they have billed him monthly. Mr. Clayson would review the bills and if he had concerns or questions he and Dairy Systems would discuss the bill and either he would be convinced that the charges were appropriate or the bill would be modified. He expected to be billed by Dairy Systems in the same manner for the work they performed on the Cheese Plant.

12. In early September 2008, Mr. Clayson received a bill from Dairy Systems for the work they had performed in August. Mr. Clayson had been onsite watching the work being performed by Dairy Systems during the month of August. Upon receiving the bill, Mr. Clayson reviewed that bill and had no concerns and voiced no objections to the Dairy Systems billings.

13. In early October 2008, Mr. Clayson received the bill for the work done in September. Again, Mr. Clayson had been on site watching the work being performed by Dairy Systems during the month of September. Upon a review of the bill, Mr. Clayson had no concerns about the September billing and voiced no objections. On September 16, 2008 he paid Dairy Systems $50,000 toward their bill.[1]

[1] At about the same time Mr. Clayson delivered two additional $50,000 checks to Dairy Systems to be applied toward the bill and to purchase a MCC, a large ticket item that needed to be ordered several weeks in advance of when it would be needed. Mr. Clayson told Dairy Systems that the two additional $50,000 checks would be funded by Mr. Lawson and Mr. Zebe. The checks were never funded.

14. On October 2, 2008, Mr. Clayson, Mr. Zebe and Mr. Lawson formed a limited liability company, SVC, LLC, to purchase, refurbish and operate the Cheese Plant. That LLC is the entity that operates the Cheese Plant for Mr. Zebe and Mr. Lawson to this day. On that same day, Mssrs. Lawson and Zebe had their names added as members of an LLC in Idaho known as Milk Marketing Management, LLC. Before their joining the company, Milk Marketing Management, LLC, had been owned by Gaylen Clayson and Jeff Randall. After entry of Mr. Lawson and Mr. Zebe into the company, the parties planned to use Milk Marketing Management, LLC, to secure the milk supply for the Cheese Plant.

15. Mr. Zebe does not lightly enter into business with others, and did not enter into this business relationship with Mr. Clayson without first thoroughly checking out the cheese industry and Mr. Clayson. Logically then, even though the paperwork for SVC, LLC and Milk Market Management, LLC, was not filed until October 2, 2008, the agreement of the parties to, as Mr. Randall put it, work together to purchase, refurbish and reopen the Cheese Plant, occurred sometime before October 2, 2008.

16. On October 8, 2008, Mr. Clayson's name was voluntarily removed from the SVC, LLC, records, but Mr. Clayson remained involved as is evidenced by the fact that when it came time to make an offer on the Cheese Plant, Mr. Randall talked first to Mr. Clayson, and only called Mr. Zebe on the phone as he and Mr. Clayson were on the way to Wyoming to make the offer.

17. On October 17, 2008, Mr. Clayson and Jeff Randall went to Wyoming to the home of the broker, Val Pendleton, and made an offer to purchase the Cheese Plant for $800,000.

On their way to Wyoming to make that offer they called Don Zebe to tell him what they were doing and he agreed that it was a good move.

18. True to the promise he had made to Gaylen Clayson in July that "the Cheese Plant is yours," and that he would work out the paperwork so Mr. Clayson could buy it, Mr. Farinella accepted the offer.

19. On November 4, 2008, Gaylen Clayson and Jeff Randall assigned the contract to purchase the Cheese Plant to Don Zebe and Rick Lawson and the company of which they were the principles, SVC, LLC. Mr. Zebe and Mr. Lawson borrowed $2 million from Citizens Community Bank of Idaho, backed by the United States Department of Agriculture to purchase and operate the Cheese Plant. They closed the purchase on February 24, 2009, once they had obtained that funding.

20. In addition to being supplied to Mr. Clayson, the Dairy Systems bills were delivered to Mr. Zebe and Mr. Lawson. Neither voiced any objection to the bills until after they had obtained their financing from Citizens Community Bank on February 24, 2009.

21. During the several months that they had the Dairy Systems bills in hand, Mr. Zebe and Mr. Lawson had complete control and access to the Cheese Plant. They employed experts, Bill Sulzer of Statco, and J.P. Electric, to examine the Dairy Systems work to determine what needed to be done to complete the electric retrofit. Following the review by Defendants' own experts, Mr. Zebe and Mr. Lawson kept the design originated by Dairy Systems and even put their new Motor Control Center ("MCC") in the same location as designed by Dairy Systems.

They also kept, and are using to this day, transformers, breaker panels, and wire pulled by Dairy Systems.

22. During discussions with Klark Gailey of Dairy Systems related to a threat by the supplier of the MCC to put a lien on the Cheese Plant, Mr. Zebe did not voice any objection to the Dairy Systems bills.

23. On February 19, 2009, Mr. Zebe wrote an email to Klark Gailey telling him that the funding was in the bank and inviting him to confirm that fact with the broker, Val Pendleton. Exhibit V. Mr. Zebe admitted sending this email, but offered no explanation. Without some explanation, this email, which does not voice any objection to the Dairy Systems bills he had then had for at least four months, can only be interpreted as a communication to a creditor that the funding is in and he is soon to be paid.

24. Mr. Zebe and Mr. Lawson represented to lenders from whom they were successful in borrowing $2 million, that they had paid $225,000 to Dairy Systems. Exhibit I at 6. They also told Morris Farinella that upon closing they were prepared to absorb most of the debts incurred by Gaylen Clayson, including specifically the $245K owed to Dairy Systems. Exhibit S.

25. After the funding had been obtained and liens on the property could no longer interfere with financing, Mr. Zebe wrote an email to Klark Gailey in which he acknowledged that even from his point of view, Dairy Systems was owed more than the $50,000 that Gaylen Clayson had paid them. Mr. Zebe, however, insisted that he would deduct from amounts owed to Dairy Systems the $50,000 that Gaylen Clayson had paid. Exhibits W and X.

26. That Defendants agreed to pay at least some of Mr. Clayson's costs incurred in refurbishing the Cheese Plant cannot be doubted.

27. Mr. Zebe testified that he had stipulated and stipulated that they would pay any expenses incurred by Mr. Clayson that were supported by cancelled checks or invoices and with the additional stipulation that they be for things that the Defendants could use.

28. Defendants offered no evidence that any expenses incurred by Mr. Clayson were for things that Defendants could not use. What evidence is in the record indicates that most, if not all, of Mr. Clayson's efforts were useful to the Defendants. In the Business Plan that Mr. Zebe prepared, Exhibit I at 6, he lists for the banks, the work that had been done to that point in getting the Cheese Plant ready to reopen. That list included cosmetic and physical renovations, an electrical retrofit of the plant, resurfacing floors, plastering of walls, cleaning, removal of old equipment, maintenance, repairs and painting. If the work done was significant enough to merit a mention to the lenders, it can hardly be argued that it somehow could not be used by Defendants.

29. The amount of Mr. Clayson's out of pocket expenses was difficult to ascertain and consumed more than its share of trial time to sort out. Mr. Clayson prepared a hand written summary of his expenses that was introduced at the trial as the first page of Exhibit F. That handwritten summary, which was delivered to defendants at the time they were discussing Mr. Clayson's withdrawal from the business, was prepared by Mr. Clayson at the Star Valley Cheese Plant offices from invoices that were kept in the ordinary course of business of the Cheese Plant by April McMurdo, the company's secretary. Mr. Clayson turned the office and all its contents,

including the file containing those invoices, over to the Defendants when he left in October 2008. Defendants did not produce that file or any documents relating to the cost of refurbishing the Cheese Plant.

30. While Mr. Clayson's legal team tried to support the amounts set out in Exhibit F's first page with cancelled checks and credit card receipts currently in Plaintiff's possession, it became clear as foundation was being laid for those documents that only some of them actually supported the claim.

31. Adding all the expenses listed in the first page of Exhibit F supported by admissible evidence produced at trial, the total comes to $47,715.62.

32. But the evidence also showed that the first page of Exhibit F was delivered by the Mr. Clayson to the Defendants during the discussions in which the Defendants agreed to pay his out of pocket expenses in refurbishing the Cheese Plant. That fact, coupled with the failure by Defendants to produce the supporting documents which they now control, supports a finding that all the expenses detailed in the first page of Exhibit F should be paid by Defendants to Mr. Clayson. The total Exhibit F charges is $74,108.00.

33. Mr. Clayson lived and worked at the Cheese Plant from July 1, 2008, through October 8, 2008. He worked 10 to 12 hours per day, 6 days per week. He testified that he would not do such work for less than $100,000 but valued his services at $15 per hour.

CONCLUSIONS OF LAW

1. In its ruling on Defendants' Motion for Summary Judgment, this Court ruled that the express terms of the assignment of rights by Mr. Clayson to Defendants precluded him from

proving that he had benefitted Defendants beyond the value of the Cheese Plant reflected in that document, namely the $800,000 purchase price that the Defendants assumed and paid. The Court determined, however, that:

> Conflicting evidence in this case demonstrates that the Assignment of Rights Contract could have possibly been part of a larger agreement, or that there were other, separate agreements between the parties, thus not precluding the claims of an implied-in-fact and/or implied-in-law contract.

This trial was held to determine those issues.

2. The Idaho Supreme Court has stated:

> "An implied in fact contract is defined as one where the terms and existence of the contract are manifested by the conduct of the parties with the request of one party and the performance by the other often being inferred from the circumstances attending the performance." *Farnworth v. Femling,* 125 Idaho 283, 287, 869 P.2d 1378, 1382 (1994) (citing *Clements v. Jungert,* 90 Idaho 143, 153, 408 P.2d 810, 815 (1965)). The implied-in-fact contract is grounded in the parties' agreement and tacit understanding. *Kennedy v. Forest,* 129 Idaho 584, 587, 930 P.2d 1026, 1029 (1997). "The general rule is that where the conduct of the parties allows the dual inferences that one performed at the other's request and that the requesting party promised payment, then the court may find a contract implied in fact." *Homes by Bell-Hi, Inc. v. Wood,* 110 Idaho 319, 321, 715 P.2d 989, 991 (1986) (citing *Clements v. Jungert,* 90 Idaho 143, 153, 408 P.2d 810, 815 (1965); *Bastian v. Gafford,* 98 Idaho 324, 325, 563 P.2d 48, 49 (1977)).

Fox v. Mountain West Elec., Inc., 137 Idaho 703, 708, 52 P.3d 848, 853 (2002)

3. Furthermore, the Idaho Supreme Court has declared that:

> The doctrine of quantum meruit is a remedy for an implied-in-fact contract and permits a party to recover the reasonable value of services rendered or material provided on the basis of an implied promise to pay. *See Cheung v. Pena,* 143 Idaho 30, 35, 137 P.3d 417, 422 (2006).

Gray v. Tri-Way Const. Services, Inc., 147 Idaho 378, 387, 210 P.3d 63, 72 (2009)

4. As to contracts implied-in-Law and unjust enrichment, the Idaho Supreme Court has stated:

> Unjust enrichment, or restitution, is the measure of recovery under a contract implied in law. *Barry v. Pacific West Const., Inc.*, 140 Idaho 827, 834, 103 P.3d 440, 447 (2004). "A contract implied in law ... 'is not a contract at all, but an obligation imposed by law for the purpose of bringing about justice and equity without reference to the intent of the agreement of the parties....' " *Id.* The measure of recovery on an unjust enrichment claim "is not the actual amount of the enrichment, but the amount of enrichment which, as between two parties it would be unjust for one party to retain." *Beco Constr. Co., Inc. v. Bannock Paving Co., Inc.*, 118 Idaho 463, 466, 797 P.2d 863, 866 (1990). The plaintiff has the burden of proving that the defendant received a benefit and of proving the amount of the benefit which the defendants unjustly retained. *Blaser v. Cameron,* 121 Idaho 1012, 1017, 829 P.2d 1361, 1366 (Ct.App.1992). "The value of services rendered can be used as evidence of the value of the benefit bestowed under the theory of unjust enrichment." *Id.* "Although damages need not be proven with mathematical precision, the damages, i.e., the value of any benefit unjustly received by the defendant in an action based upon unjust enrichment, must be proven to a reasonable certainty." *Gillette v. Storm Circle Ranch,* 101 Idaho 663, 667, 619 P.2d 1116, 1120 (1980).

Gray v. Tri-Way Const. Services, Inc., 147 Idaho 378, 388-389, 210 P.3d 63, 73 - 74 (2009)

5. The circumstances of this case and the conduct of the Defendants and the Plaintiff establishes the dual inferences that Plaintiff relinquished his interest in the Plant and the business that would run the plant based upon the promises of the Defendants to pay the value of his efforts, reimbursement of his out of pocket expenses, and the $50,000 that he paid to Dairy Systems.

6. Plaintiff relinquished his interest in the Cheese Plant after he had spent three months of his life, over $100,000.00 dollars, and his political capital with Mr. Farinella, the United States Department of Agriculture, Dairy Systems, a trusted supplier, and others preparing

the Cheese Plant to be reopened. Defendants' arguments that he agreed to do so without any expectation of compensation for his efforts or reimbursement for the substantial money he paid simply is not credible.

7. Indeed, even Defendants themselves do not believe so absurd a proposition. Mr. Zebe stipulated and stipulated that they would pay Mr. Clayson his costs of refurbishment if they were "supported by cancelled checks or invoices" and if "they could use the work." Similarly, he testified that they would have paid the Dairy Systems bill if they could use the work.

8. Defendants' supposition that the Plaintiff might have been willing to walk away from his investment in this project because he was afraid he could not come up with the $800,000 and might be liable to pay it by December 2008, had Defendants not rescued him is also wholly without support.

9. There was no evidence, other than the fact that Mr. Clayson did not have the $800,000 in his pocket to pay the purchase price, to suggest that fear of that payment was his motivation to give up this opportunity.

10. To the contrary, the evidence was that Mr. Farinella, who had in the past financed Mr. Clayson's businesses connected to this Cheese Plant, and who, with his son Joe, planned to profit from the brokering of the cheese, offered to finance the purchase for Mr. Clayson. Moreover, Mr. Clayson had had discussions with the United States Department of Agriculture who advised him that a lot of people would like to see that plant reopened and he would have no trouble getting help with the financing.

11. Defendants did not pay the purchase price out of their own pocket. They paid the $800,000 purchase price with money borrowed from Citizens Community Bank of Idaho and guaranteed by the United States Department of Agriculture. That loan came about as a result of the business plan Defendants provided to the bank and the United States Department of Agriculture that championed the work efforts of the Plaintiff and the $225,000 that supposedly had been paid to his contractor Dairy Systems. Defendants simply did not prove that Gaylen Clayson could not have purchased this Cheese Plant on his own.

12. Something other than the fear of the $800,000 purchase price must have motivated Mr. Clayson to relinquish his interest in the Cheese Plant. The evidence is that motivation came from the promises that Defendants made him.

13. In its Memorandum Decision on the Motion for Summary Judgment, this court carved out those promises as one of the equitable claims that were allowed to go forward in this case:

> When Zebe stated an agreement to pay for "most of what was done while Gaylen was in charge . . . to the tune of 245K" or to pay the Dairy Systems debt . . . a question of fact arises as to the extent of that obligation, whether pursuant to an implied-in-fact contract or by way of unjust enrichment. What the nature of the agreement was, how much was agreed to be paid, and for what, are questions the jury must decide. (emphasis added).

Memorandum Decision and Order on Defendants' Motion for Summary Judgment at p. 21.

14. Defendants admitted that they agreed to pay Plaintiff's out of pocket expenses to the extent they were documented and that they could use them. Defendants offered no evidence as to any improvements made by Mr. Clayson or Dairy Systems that they could not use.

15. Likewise, there is no question that Defendants benefited from Mr. Clayson's refurbishment efforts and expenses. Defendants, in their business plan that they used to obtain $2 million from the bank and the USDA, referenced this refurbishment work.

> The facility has and is undergoing cosmetic and physical renovations. To include but not limited to; an electrical retrofit of the plant, resurfacing floors, plastering of walls, cleaning, removal of old equipment, maintenance, repairs and painting.

Exhibit I at 6. This is a reference to the work done and procured by the Plaintiff. Not only is this an acknowledgement that the Plaintiff's efforts benefited the Defendants in their continued operation of the Cheese Plant, but their reliance on those efforts also helped them to obtain the funding to purchase and operate the Cheese Plant and therefore benefitted them in that fashion.

16. The Court concludes that the Plaintiff is entitled to recover all the amounts set out on the first page of Exhibit F that was delivered to the Defendants in connection with the agreement to remove his name from the operating documents of Defendants' LLC. While Plaintiff was unable to support all of those charges with receipts, cancelled checks or credit card receipts, this failure is due in large measure to the fact that the Plaintiff left those receipts with the Defendants at the time he left the Cheese Plant. Defendants made no attempt to produce those records or explain at the trial why they could not produce those records if they thought they would show something different from the totals shown in Exhibit F. That total is $74,108.00.

17. As to the value of the time Mr. Clayson dedicated to the reopening of the Cheese Plant, the evidence is undisputed that Mr. Clayson spent at least ten hours per day, 6 days per week for a period of 14 weeks working on the plant, interfacing with people and entities that could be instrumental in the reopening of the Cheese Plant and supervising workers at the plant.

Mr. Clayson worked a total of at least 840 hours in those activities. Defendants did not dispute Plaintiff's evidence that his time was worth $15 per hour. Therefore, the value of Mr. Clayson's efforts is $12,600.

18. Mr. Clayson is entitled to be repaid the $50,000 that he paid toward the Dairy Systems debt. There was an implied-in-fact contract between Defendants and Mr. Clayson that they would pay the Dairy Systems debt.

19. On January 14, 2009, Mr. Zebe wrote an email to various recipients with the urgent request that it be put into the hands of Morris Farinella, the seller of the plant. In that email he stated "once we close we are prepared to absorb what we have paid in and most of what was done while Gaylen was in charge, i.e., electrical, plumbing, to the tune of 245k."

20. Mr. Zebe testified that was a reference to the Dairy Systems debt.

21. Defendants' conduct toward Dairy Systems after Mr. Clayson withdrew from the business further establishes that Defendants must have agreed with Mr. Clayson to pay the Dairy Systems debt. After having been given copies of the Dairy Systems invoices and having reviewed them, in numerous emails to Klark Gailey of Dairy Systems, Mr. Zebe discussed the work that had been done by Dairy Systems and plans to complete the work once funding had been obtained.

22. In none of those emails did Mr. Zebe ever suggest that he would not pay the bill when the funding had been obtained nor even that he would be disputing the amount of the bill. On January 31, 2009, for instance, after asking for information about what work had been done, Mr. Zebe stated "I have noticed there is [sic] many parts lying around including wire on rolls,

conduit ets. . ., I just want to be clear on what it is that has been done, and materials used. Would what is remaining be used for work to be completed?" Exhibit U.

23. During a discussion with Klark Gailey of Dairy Systems about a lien that the manufacturer of the Motor Control Center, CED, had threatened to put on the Cheese Plant, Mr. Zebe never suggested that he would not be paying the Dairy Systems debt.

24. In an email to Klark Gailey of Dairy Systems on February 19, 2009, days before the funding was to be received, Mr. Zebe wrote a simple email to Klark Gailey stating that "Our funds are in the title companies account waiting for distribution. Once it records we will be funded." He then invited Mr. Gailey to verify the funds with the broker. Exhibit V. Without other explanation that email can only be interpreted by the creditor recipient that he is soon to be paid.

25. Further evidencing their having agreed to pay the Dairy Systems debt, after the funding was obtained and there was no longer any threat that liens would impair the funding, Mr. Zebe wrote an email to Klark Gailey and for the first time stated that he would not pay the entire Dairy Systems debt but only that amount he could use. Mr. Zebe then stated "The amounts will be calculated and subtracted from the Fifty thousand that you have been paid, what is remaining is what will be paid." Exhibit W. He calculated that amount to be $62,333.55. Exhibit X. He never paid the $12,333.55 to Dairy Systems, and never paid the $50,000 to Mr. Clayson either.

26. Those communications with Dairy Systems are consistent with an agreement with Mr. Clayson that Defendants would "absorb" the Dairy Systems debt and not with any other scenario. Therefore the Court finds that Defendants agreed to pay the Dairy Systems debt.

27. As to the amount that Defendants will be required as a part of this action to pay the Plaintiff toward the Dairy Systems debt, the Court is limiting the recovery to the $50,000 that Mr. Clayson actually paid. During the trial, the Plaintiff stipulated that there is pending in Wyoming an action involving Dairy Systems and the Plaintiff and Defendants in this case, and that in that matter, Dairy Systems has not, as yet, asserted a claim against Mr. Clayson. That being the case, the Court is limiting Mr. Clayson's recovery to the $50,000 he has actually paid since any claim beyond that amount has not yet accrued.

28. Defendants introduced evidence of payments they made to suppliers who were owed money for goods and services they had supplied to the restaurant before the time when Defendants took over the running of the restaurant. Defendants testified that they paid those restaurant bills, not because of any agreement with Mr. Clayson but because those suppliers were important to the continued operation of the restaurant and they wanted to keep them happy. Defendants seek to offset those amounts against what they owe to Mr. Clayson.

29. Such an offset cannot be allowed in this case. First, Defendants failed to show which of those debts were incurred when Mr. Clayson was running the restaurant versus the debts incurred when Mr. Farinella was running the restaurant before Mr. Clayson took over on July 1, 2008. Mr. Lawson's statement that he and Mr. Zebe expected to be reimbursed those costs upon the closing suggests that the debts may have belonged to Mr. Farinella.

30. Additionally, Mr. Lawson testified that Defendants inherited from Mr. Clayson not only some debts but also some unquantified amount of inventory. Without knowing the value of the inventory, the Court could not calculate whether or how much Defendants were

benefited or hurt by what they inherited from Mr. Clayson with regard to the restaurant. There is not sufficient evidence for the Court to allow any offset to the Defendants.

31. Finally, the law does not allow a party who, without legal obligation to do so, voluntarily pays a debt to seek to recover the debt from the originally debtor. It is well settled that a person cannot-by way of set-off, counterclaim or direct action-recover money which he or she has voluntarily paid with full knowledge of all the facts, and without any fraud, duress or extortion, although no obligation to make such payment existed. Chinchurreta v. Evergreen Management, Inc., 790 P.2d 372, 374 (Idaho Ct. App. 1989).

CONCLUSION

The Plaintiff has proven an implied-in-fact contract with the Defendants to pay him $124,108.00 in out of pocket expense reimbursement which includes the $74,108.00 shown on Exhibit F and the $50,000 he paid to Dairy Systems. Mr. Clayson is also entitled to recover $12,600 for the time he spent preparing the Plant to reopen. Judgment will be entered in the amount of $136,708.00 in favor of the Plaintiff and against the Defendants.

Dated this ___ day of December, 2010.

By the Court

____

Honorable Stephen S. Dunn, District Judge

CERTIFICATE OF SERVICE

The undersigned certifies that on the 24th day of November, 2010, he caused to be served a true and correct copy of the foregoing **FINDINGS OF FACT AND CONCLUSIONS OF LAW** by the method of delivery designated below:

John D. Bowers Bowers Law Firm, PC 685 South Washington P.O. Box 1550 Afton, Wyoming 83110 Facsimile: (307) 885-1002	_x__ U.S. Mail ___ Hand delivery ___ Fax
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Judge Stephen Dunn P.O. Box 4126 Pocatello, Idaho 83205 Facsimile: (208) 236-7012	__x_ U.S. Mail __x_ email ___ Fax

Blake S. Atkin

2010 DEC -5 PM 2:35

BY [illegible] DEPUTY CLERK

IN THE DISTRICT COURT OF THE SIXTH JUDICIAL DISTRICT OF THE

STATE OF IDAHO, IN AND FOR THE COUNTY OF BANNOCK

Register#CV-2009-2212-OC		
GAYLEEN CLAYSON,	)	
	)	
Plaintiff,	)	
	)	
-vs-	)	MEMORANDUM DECISION,
	)	FINDINGS OF FACT AND
DON ZEBE, RICK LAWSON, and LAZE, LLC,	)	CONCLUSIONS OF LAW
	)	
Defendants.	)	
DON ZEBE, RICK LAWSON, and LAZE, LLC,	)	
	)	
Counterclaim Plaintiffs	)	
	)	
-vs-	)	
	)	
GAYLEN CLAYSON,	)	
	)	
Counterclaim Defendant.	)	

This matter is before the Court for decision following a court trial, held on November 4, 5, and 10, 2010. The Court has carefully considered the testimony and exhibits offered and admitted at trial, the deposition testimony of Morris Farinella, different portions of which were offered by the parties, and the parties' post-trial briefs and proposed findings of fact and conclusions of law. Defendants' objection to portions of the Farinella deposition designated by

the Plaintiff is overruled. The Court considers all of the portions of the deposition designated by both parties to be relevant to the issues raised in this case. The Court notes that the Defendants' Counterclaim was dismissed prior to trial. The Court also notes that it had previously granted Defendants' Motion for Summary Judgment, in part, by order filed on September 15, 2010 ("MSJ Decision"), which is incorporated herein by reference, which order limited the issues to be tried.

STANDARD OF REVIEW

In this case, the Court is charged both with the responsibility of deciding questions of law and questions of fact. Deciding the credibility of witnesses and the weight to be given to the testimony are matters exclusively within the province of the Court, as the trier of fact. *Comish v. Smith*, 97 Idaho 89, 540 P.2d 274 (1975); *Pierson v. Sewell*, 97 Idaho 38, 539 P.2d 590 (1975). "When a case has been tried to a court, it is the province of the trial judge to weigh the conflicting evidence and testimony and to judge the credibility of witnesses." *Magic Valley Truck Brokers, Inc. v. Meyer*, 133 Idaho 110, 114, 982 P.2d 945, 989 (Ct.App. 1999).

FINDINGS OF FACT

The Court sets forth, in memorandum form, the facts that the Court finds most relevant to the legal issues to be determined. The facts stated here will constitute the Findings of Fact required by I.R.C.P. 52(a). For the most part, the facts are not in dispute. To the extent important facts are in dispute, the Court will indicate the basis for its factual determinations.

Since 1975 the Star Valley Cheese Plant located in Thayne, Wyoming ("Plant") was owned by Morris Farinella ("Farinella"), apparently through a corporation. The Plant closed its

operations in 2004 or 2005, and ultimately, Farinella's Plant corporation was in bankruptcy. Farinella was authorized by the bankruptcy court to receive and convey offers, or "bids" to purchase the Plant. Sometime in 2007, Farinella contacted the Plaintiff, Gaylen Clayson ("Clayson"), to see if he was interested in buying the Plant. Clayson had some interest but was not available to do anything personally until sometime in 2008. In approximately February 2008, Clayson made a "bid"[1] to purchase the Plant for $800,000. Sometime in June 2008, Clayson[2] had Farinella's permission to operate the restaurant which was adjacent to the Plant, and to clean up and make the Plant operational, as long as his efforts didn't cost Farinella or the bankruptcy court any money.[3] Beginning July 1, 2008, Clayson actually moved to and lived on the premises, where he operated the restaurant and began to clean up the Plant and make it operational. While Clayson did not yet own the Plant, he was authorized by Farinella to do what he was doing, the intent being that he would ultimately purchase the Plant. From that point, until October 8, 2008, Clayson put in considerable time and effort in running the restaurant and cleaning up the Plant,[4] which included hiring various individuals and companies to paint, plaster and repair the floors, walls and exterior, and to perform plumbing and electrical services on Plant

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[1] The Court infers that this "bid" was not a formal offer to purchase, but was part of a process by which interest to purchase for certain amounts could be shown and "accepted" by the bankruptcy court, thus allowing the person making the accepted bid to do some authorized activities related to the Plant.

[2] Clayson has been a dairy farmer for 38 years in Firth, Idaho, and, at one point, sold milk to the Plant when it was operational.

[3] Farinella Depo., p. 40. This is also confirmed in part by Farinella's letter dated August 28, 2008, included in the record as Farinella Deposition Ex. 5A. There is a conflict in the testimony as to whether Clayson had the authority to keep and use any funds from the restaurant business in excess of those needed for restaurant operations, including food, wages, employment taxes, workers compensation payments, etc. Farinella testified that Clayson had no authority to keep any funds personally, and Clayson testified he could keep any excess funds, and he created a bank account for that purpose. The Court need not resolve this conflict because it is not relevant to the issues to be decided here.

equipment.[5] It is agreed that Defendants never personally requested or authorized any of the refurbishment work Clayson did or had done. One of the companies hired by Clayson was Dairy Systems Company, Inc. ("Dairy Systems"), a company who had provided various plumbing, electrical and maintenance services for Clayson at his dairy for many years. Dairy Systems provided certain services at the Plant and billed Clayson monthly. Clayson personally paid Dairy Systems $50,000.[6]

Clayson testified to substantial additional refurbishment expenses. Plaintiff's Ex. F is a handwritten list of his claims, but was admitted only for the purpose of showing what Clayson claimed and not as proof of what was actually paid. Subparts A through V of Plaintiff's Ex. F are the supporting documents for Clayson's payments. Certain of those exhibits were stricken as lacking foundation of personal knowledge. The Court finds that Clayson made the following payments: Subpart A - $1872.00; Subpart B - $10,772.41; Subpart C - $0; Subpart D - $643.99; Subpart E - $0; Subpart F - $10,621.00; Subpart G - $379.14; Subpart H - $0; Subpart I - $3887.02; Subpart J - $5100.06; Subpart K - $3532.00; Subpart L - $0; Subpart M - $0; Subpart N - $0; Subpart O - $0; Subpart P - $1738.00; Subpart Q - $0; Subpart R - $0; Subpart S - $0; Subpart T - $9100.00; Subpart U - $50,000.00, plus $308.61 (True Value charges). These payments total $97,954.23, including the $50,000 payment Clayson made to Dairy Systems.

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[4] Clayson's undisputed testimony is that he worked 6 days a week, 10-12 hours per day, from July 1 to October 8. He testified that his opinion of the value of his personal labor is $15 per hour.

[5] All the work done or authorized by Clayson shall hereafter be referred to as the "refurbishment work."

[6] The testimony is that Clayson also gave Dairy Systems two unfunded checks, each for $50,000, telling Dairy Systems that Defendants would fund those checks at a later time. He also asserts that Defendants reviewed and agreed to fund those checks and to pay the entire Dairy Systems debt, totaling something in excess of $250,000 for services rendered prior to January 1, 2009 (Plaintiff's Ex. G). However, per Court rulings prior to and during trial,

At some point in late July, August and September, 2008, Defendants, Don Zebe and Rick Lawson,[7] were introduced to Clayson by the mutual friend of all the parties, Jeff Randall ("Randall"). It is undisputed that at the beginning Zebe, who was a real estate developer, was going to help Clayson prepare a business plan to assist in obtaining financing for the purchase of the Plant. Lawson, a certified public accountant, was initially involved in the accounting aspects of the business plan. At some point, but no later than late September by their own testimony, Defendants became interested in participating in the ownership of the Plant.[8]

On October 2, 2008, Clayson, Zebe and Lawson became members of a Wyoming limited liability company, SVC, LLC ("SVC"),[9] with the expectation that they would jointly own and operate the Plant. However, by October 8, 2008, Clayson did not have any more money to put into the restaurant or the Plant, and could not pay the restaurant payroll due at that time. A conversation occurred between Clayson and Lawson. There is a minor conflict in the testimony, with Lawson testifying that Clayson called him and said he had no more money, that Defendants should take over the restaurant and Plant, and that Clayson "was through." Clayson's testimony is that he wanted Defendants to start paying the expenses of the facilities, including the payroll,

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the sole issue on the Dairy Systems debt is whether Defendants are required to reimburse Clayson the $50,000 he paid to Dairy Systems. Therefore, no further discussion is needed about the entire Dairy Systems debt.

[7] Collectively referred to as Defendants and individually referred to as "Zebe" and "Lawson".

[8] There is a significant dispute in the testimony as to when the Defendants' interest in the project became more involved. Clayson testified that it was almost immediately, or in mid-August, and Defendants testified that they did not become interested in ownership participation until late September. The Court need not resolve this conflict because it is not relevant. The question is whether Defendants ever agreed to reimburse Clayson's refurbishment expenses or whether it would be unjust to allow them to retain the benefits of those expenses. When they became interested in participating in the ownership of the plant is not pertinent to those questions.

[9] Plaintiff's Ex. J. At or about the same time these same parties, plus Randall, became involved in another limited liability company, Milk Management, LLC. However, that company was not involved in the dispute over the refurbishment expenses.

but that Lawson told him if Defendants were to do that Clayson was out of the business. Clayson admitted that he "relinquished" his continued participation in the business at that time. It is clear that from October 8 forward Clayson left the premises, had no further involvement in SVC, and did not do any further work on the Plant. The SVC articles were amended to delete Clayson as a member. Defendants took over the operation of the restaurant and physical possession of the Plant, under essentially the same arrangement with Farinella that Clayson had.[10]

Shortly thereafter, on or about October 10, 2008, Clayson testified that Defendants agreed to reimburse him all his refurbishment expenses, which he estimated at somewhere between $100,000 and $150,000. Clayson asserts that he was told "when we get our funding we will reimburse for you're out of pocket expenses." Defendants adamantly deny that any such conversation took place. The Court will resolve this dispute below.

On October 17, 2008, Clayson and Randall signed a formal offer to purchase the Plant from Star Valley Cheese, Inc., for $800,000. The conversations between the parties on that day

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[10] Over the course of several weeks in October and November, 2008, Defendants paid some expenses related to restaurant operations which they testified had been incurred, but unpaid by Clayson, totaling $25,986.01. Defendants' Ex. 11A. Defendants also assert that they paid substantial additional expenses in the ensuing months, both related to restaurant operations and renovations, as well as Plant refurbishment. The total combined payments testified to by Defendants was $78,237.79. Defendants' Ex. 11. Defendants testified to these payments to demonstrate that they had dealt with Clayson fairly, but they do not make any claim for reimbursement of these expenses and dismissed the Counterclaim that may have asserted such a claim. In addition, in an e-mail from Zebe to Pendleton and others dated January 14, 2009, Zebe stated: "From October 8th we (Rick & I) have paid every invoice and bill that has been incurred with no regret. We have also paid over 35k of bills Gaylen incurred. I know this is my issue and I accept that, my fault and my mistake...Once we close we are prepared to absorb what we have paid in...." Lawson also testified that it was advantageous enough to keep the restaurant open, that they decided to pay these bills, and that some of the bills were for inventory that was on the premises when they took it over. Thus, there would be no legal or factual basis for Defendants to seek reimbursement of these expenses.

are significantly in dispute. After careful consideration, including evaluation of credibility and reconciliation of the testimony, the Court finds the following facts.

At the urging of Randall, Defendants determined to make a formal offer to purchase the Plant for $800,000. On October 17, 2008, Randall was going to meet with Defendants to facilitate the offer. He picked up Clayson and the four of them met at the Plant. While Clayson may have had the intent to participate in the purchase, Defendants were surprised to see him. Zebe then had a telephone conversation with Val Pendleton, the realtor handling the sale, and they got into an argument over the sales commission. Zebe hung up and it appeared that no offer would be made. However, Randall encouraged Defendants to allow him to go to Pendleton to make an offer himself. Defendants agreed to that procedure if the agreement Randall signed included the language "and assigns" so the contract could be transferred to Defendants.

Defendants also provided the $10,000 earnest money for the contract. Randall believed that he was going to be the only person to purchase the Plant that day but when he and Clayson arrived at Pendleton's the prepared contract had both Randall and Clayson listed as purchasers. Randall believed that this was because Clayson had prior conversations with Pendleton expressing an interest in purchasing. When Randall and Clayson returned with the signed contract, Zebe was upset because Clayson's name was on the contract and it did not contain the "assigns" language.[11] Randall did not consider that a concern because he had signed the agreement with the intent to assign it to Defendants. Although Defendants did not intend to have Clayson be one of the purchasers of the Plant on October 17, the fact is that a contract for the

sale of the Plant occurred on that date with Clayson as one of the buyers. In fact, Zebe testified that he was upset enough when the contract was returned to him that he said if Clayson and Randall wanted to buy it they could.

On November 4, 2008 another meeting took place between the parties, and including Randall, at Lawson's office in Pocatello, Idaho. It is uncontested that Clayson produced a list of expenses that he wanted to be reimbursed for[12] and stated that he was unwilling to sign an assignment of the sales contract to Defendants without that reimbursement. It is also agreed by all that Defendants refused to make those reimbursements, asserting that they had already paid many of Clayson's unpaid bills.[13] Clayson ultimately signed an assignment of the sales contract without any agreement on that day that he would be reimbursed.[14]

The Court also finds the following material facts. At some point in October, Defendants had a conversation with Clayson where he requested reimbursement of his refurbishment expenses, among other things, and Zebe stated he would not pay any of those expenses without invoices or canceled checks and that they would pay for "the work that was done in the design" only if they could use that work in their design.[15]

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[11] Plaintiff's Ex. D.
[12] It may have been Plaintiff's Ex. F, or some form thereof.
[13] Referring to Defendants' Ex. 11A.
[14] The assignment is Plaintiff's Ex. N.
[15] Zebe Depo., pp. 112-13.

On January 14, 2009, in an e-mail to Pendleton (copied to Lawson), Zebe stated that "[o]nce we close we are prepared to absorb what we have paid in and most of what was done while Gaylen was in charge, i.e., electrical, plumbing, to the tune of $245k."[16]

In the Business Plan submitted by Defendants to support a bank loan they received, Defendants stated: "The facility has and is undergoing cosmetic and physical renovations. To include but not limited to: an electrical retrofit of the plant, resurfacing floors, plastering of walls, cleaning, removal of old equipment, maintenance, repairs and painting. Ninety percent of the electrical retrofit has been completed at a cost of $225,000 which has been paid by the principles of SVC, LLC...The current restaurant business has been profitable to date, however, the facility is old and out dated. The structure is sound. However, an exterior and interior upgrade would benefit the overall appearance and value of the facility."[17]

In an e-mail from Zebe to Dairy Systems dated February 19, 2009 (copied to Lawson), Zebe stated: "Our funds are in the title companies [sic] account waiting for distribution. Once it records we will be funded."[18] The Court infers from this that Defendants were stating an intent to pay Dairy Systems at least some amount.

In an e-mail from Zebe to Dairy Systems dated February 25, 2009 (copied to Lawson), Zebe stated: "The long and short of it is this, we will pay for work that is accepted. We will pay

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[16] Plaintiff's Ex. S.
[17] Plaintiff's Ex. I, p. 5. Zebe acknowledged that this business plan was submitted to the bank after Clayson was no longer a member of SVC. Thus, the statements contained herein are those of the Defendants. Zebe admitted that the statement relating to having made the payments already was a misrepresentation to the bank.
[18] Plaintiff's Ex. V.

for material used only...The amounts will be calculated and subtracted from the Fifty thousand that you have been paid, what is remaining is what will be paid."[19]

In an e-mail from Zebe to Dairy Systems dated March 7, 2009 (copied to Lawson), where Zebe identified Defendants' assessment of the Dairy Systems work they found acceptable, Zebe stated: "I have attached my calculations for materials used, hours worked, expenses. This is all I can justify and this is what will be paid. You received $50,000.00 from Gaylen and our amount total is $62,333.55. We will have a check for you Monday in the amount of $12,335.55 for that final and absolute payment."[20] Dairy Systems rejected this compromise and no additional payment was made.

On February 24, 2009, Defendants formally closed on the purchase of the Plant and have owned it since that time.[21]

CONCLUSIONS OF LAW

The legal issues to be resolved in this case are whether the facts support the conclusion that Clayson is entitled to reimbursement of the refurbishment expenses from Defendants, based on an implied contract in fact (quantum meruit) and/or an implied contract at law (unjust enrichment).[22] The Idaho Court of Appeals has stated:

> There are essentially three types of contractual arrangements: express contracts, implied-in-fact contracts and contracts implied-in-law. *Continental Forest Products, Inc. v. Chandler Supply Co.*, 95 Idaho 739, 743, 518 P.2d 1201, 1205 (1974); *Podolan v. Idaho Legal Aid Services, Inc.*, 123 Idaho 937, 942, 854 P.2d 280, 285 (Ct.App.1993). Express contracts exist where the parties expressly agree regarding a transaction. *Id.* Contracts

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[19] Plaintiff's Ex. W.
[20] Plaintiff's Ex. X.
[21] Zebe testified that Laze, LLC owns the Plant and SVC, LLC is the operating entity.
[22] *See* MSJ Decision.

> implied-in-fact are those where there is no express agreement but the conduct of the parties implies an agreement from which the contractual obligation arises. *Id.* To find such a contract, the facts must be such that the intent to make a contract may be fairly inferred. *Podolan, supra.*

Baker v. Boren, 129 Idaho 885, 890-91, 934 P.2d 951, 956-57 (Ct.App.1997).

As to an implied-in-fact contract, the Idaho Supreme Court has also stated:

> 'An implied in fact contract is defined as one where the terms and existence of the contract are manifested by the conduct of the parties with the request of one party and the performance by the other often being inferred from the circumstances attending the performance.' *Farnworth v. Femling,* 125 Idaho 283, 287, 869 P.2d 1378, 1382 (1994) (citing *Clements v. Jungert,* 90 Idaho 143, 153, 408 P.2d 810, 815 (1965)). The implied-in-fact contract is grounded in the parties' agreement and tacit understanding. *Kennedy v. Forest,* 129 Idaho 584, 587, 930 P.2d 1026, 1029 (1997). 'The general rule is that where the conduct of the parties allows the dual inferences that one performed at the other's request and that the requesting party promised payment, then the court may find a contract implied in fact.' *Homes by Bell-Hi, Inc. v. Wood,* 110 Idaho 319, 321, 715 P.2d 989, 991 (1986) (citing *Clements v. Jungert,* 90 Idaho 143, 153, 408 P.2d 810, 815 (1965); *Bastian v. Gafford,* 98 Idaho 324, 325, 563 P.2d 48, 49 (1977)).

Fox v. Mountain West Elec., Inc., 137 Idaho 703, 708, 52 P.3d 848, 853 (2002). As to the remedy for an implied-in-fact contract, the Idaho Supreme Court has declared:

> The doctrine of quantum meruit is a remedy for an implied-in-fact contract and permits a party to recover the reasonable value of services rendered or material provided on the basis of an implied promise to pay. *See Cheung v. Pena,* 143 Idaho 30, 35, 137 P.3d 417, 422 (2006).

Gray v. Tri-Way Const. Services, Inc., 147 Idaho 378, 387, 210 P.3d 63, 72 (2009). Defendants focus on this additional statement from *Gray*: "The general rule is that where the conduct of the parties allows the dual inferences that one performed at the other's request and that the requesting party promised payment, then the court may find a contract implied in fact." *Id.* Defendants contend that because Clayson stipulated to and the evidence showed that Defendants

did not, at any time prior to October 8, 2008, agree to, authorize, or direct Clayson to perform any refurbishment services, they cannot be held responsible to reimburse him for them. They assert that any implied promise to pay must be made "in advance" of the services rendered.

While this is a true statement in the right context, it misses the mark in terms of the evidence in this case. The Court is not finding a contract implied in fact based on Defendants' promise to pay Clayson for refurbishment expenses before they were incurred. The Court finds that an implied-in-fact contract exists because Defendants conduct and statements create an implied agreement to pay Clayson's refurbishment expenses when he transferred operation of the Plant and restaurant to Defendants on October 8, 2008. Zebe's own statement, in response to a question about whether he had agreed to reimburse Clayson's debts and out-of-pocket expenses, arising out of a conversation with Clayson at or shortly after October 8, 2008, was: "And again, I answered that question by saying we wanted invoices to prove that the work had been done. Okay...And without invoices, without canceled checks, we were not going to reimburse him a dime. And the other stipulation was, again, is that if we would use the work that was done in the design that we were going to design, we would pay for those expenses."[23]

Although Defendants refused to confirm this agreement at the meeting on November 4, 2008, Zebe did confirm this implied agreement, including the agreement to pay that part of the Dairy Systems bill Defendants felt they could use, with his statements on multiple other occasions.[24] While Defendants denied Clayson's testimony that they agreed to reimburse him in

[23] Zebe Depo., pp. 112-13.
[24] *See* facts stated on pp. 8-10, *infra*.

a conversation on October 10, 2008, the Court finds Zebe's deposition testimony more credible, particularly in light of admissions made in later statements.

As to an implied-in-law contract, claiming unjust enrichment, the Idaho Supreme Court has stated:

> Unjust enrichment, or restitution, is the measure of recovery under a contract implied in law. *Barry v. Pacific West Const., Inc.*, 140 Idaho 827, 834, 103 P.3d 440, 447 (2004). "A contract implied in law ... 'is not a contract at all, but an obligation imposed by law for the purpose of bringing about justice and equity without reference to the intent of the agreement of the parties....' " *Id.* The measure of recovery on an unjust enrichment claim "is not the actual amount of the enrichment, but the amount of enrichment which, as between two parties it would be unjust for one party to retain." *Beco Constr. Co., Inc. v. Bannock Paving Co., Inc.*, 118 Idaho 463, 466, 797 P.2d 863, 866 (1990). The plaintiff has the burden of proving that the defendant received a benefit and of proving the amount of the benefit which the defendants unjustly retained. *Blaser v. Cameron*, 121 Idaho 1012, 1017, 829 P.2d 1361, 1366 (Ct.App.1992). "The value of services rendered can be used as evidence of the value of the benefit bestowed under the theory of unjust enrichment." *Id.* "Although damages need not be proven with mathematical precision, the damages, i.e., the value of any benefit unjustly received by the defendant in an action based upon unjust enrichment, must be proven to a reasonable certainty." *Gillette v. Storm Circle Ranch*, 101 Idaho 663, 667, 619 P.2d 1116, 1120 (1980).

Gray v. Tri-Way Const. Services, Inc., 147 Idaho 378, 388-89, 210 P.3d 63, 73-74 (2009).

Applying this legal standard to the facts found above, the Court concludes that the Defendants benefited from Clayson's refurbishment efforts and expenses. When they took over the Plant and restaurant on October 8, 2008, they received a Plant and restaurant that was better than it had been before Clayson's efforts and expenses. Defendants admitted that these efforts improved the Plant and restaurant in their business plan. They clearly accepted those benefits. Even as to the Dairy Systems bill, which Defendants claim did not benefit them to the full extent

of the bill, they admit that the value they received exceeds the $50,000.00 Clayson paid.[25] Defendants are free to assert, in other litigation, that they did not agree to pay or receive a benefit in excess of $62,333.55. But as between Clayson and Defendants they have agreed that they received at least a $50,000.00 benefit, for which they must reimburse Clayson. Based on Defendants statements and the benefits Defendants received, the Court finds that an implied-in-law contract exists. Based on the foregoing analysis, the Court renders the following Conclusions of Law.

1. The conduct of the parties creates a contract-in-fact whereby Defendants agreed to reimburse Plaintiff for the expenses shown to have been incurred in refurbishing the Plant.

2. The conduct of the parties also creates an implied-in-law contract whereby Defendants are obligated to reimburse Plaintiff for benefits they received in his refurbishment efforts.

3. Defendants are obligated to reimburse Plaintiff for the $50,000.00 he paid to Dairy Systems for work done on the Plant. Defendants both impliedly agreed to reimburse that amount to Clayson and admitted that they received a benefit of that work in excess of the $50,000.00.

4. As to additional refurbishment expenses, claimed in Subparts A through V of Plaintiff's Exhibit F, the Court concludes that Clayson's expenses to attend the Idaho Milk Producers conference (Subpart D) are not legitimate refurbishment expenses and are not allowed. All other refurbishment expenses supported by documentation, listed by the Court above, are legitimate, reflect the benefit Defendants received, and Defendants are obligated to reimburse Plaintiff for those amounts, totaling $47,310.24.

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[25] Plaintiff's Ex. X.

5. While the Court accepts the fact that Clayson did work many hours at the restaurant and Plant from July 1 through October 8, 2008, the evidence is insufficient to establish how many hours Clayson worked in operating the restaurant as opposed to working on refurbishment of the Plant. In the Court's view, only the latter hours would be compensable, but there is no evidence from which the Court can infer that number. To the extent Clayson spent time operating the restaurant, he was receiving the benefit of any net income of that operation and those hours did not go to improving or refurbishing the restaurant or the Plant. The Court can infer from Clayson's testimony that much of the refurbishment efforts were undertaken by employees and contractors, who were supervised by Clayson. While his supervision time would have been compensable if proven, unless also duplicated by hours he spent running the restaurant, the evidence is insufficient to determine how much time was spent supervising Plant refurbishment. The burden of proof on this issue is Plaintiff's.[26] His compensable time must be shown with reasonable certainty. That has not occurred, and damages based on conjecture or speculation are not allowed. Therefore, based on a lack of sufficient evidence, the Court declines to award any amounts for time spent.

CONCLUSION

Based on the foregoing, the Court finds in favor of Plaintiff and awards damages totaling $97,310.94. A Judgment is entered contemporaneously herewith.

IT IS SO ORDERED.

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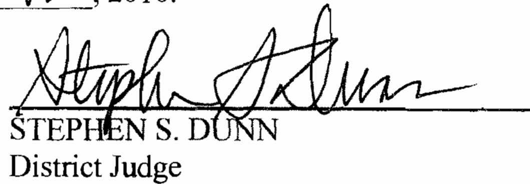
[26] *Horner v. Sani-Top, Inc.*, 143 Idaho 230, 237, 141 P.3d 1099. 1107 (2006).

DATED 6th day of December, 2010.

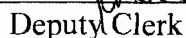


STEPHEN S. DUNN
District Judge

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 10 day of December, 2010, I served a true and correct copy of the foregoing document upon each of the following individuals in the manner indicated.

Blake S. Atkin 7579 North Westside Hwy Clifton, ID 83228	(✓) U.S. Mail ( ) Overnight Delivery ( ) Hand Deliver ( ) Facsimile
Atkin Law Offices 837 South 500 West, Ste 200 Bountiful, UT 84010	(✓) U.S. Mail ( ) Overnight Delivery ( ) Hand Deliver ( ) Facsimile
John D. Bowers Bowers Law Firm PO Box 1550 Afton, WY 83110	(✓) U.S. Mail ( ) Overnight Delivery ( ) Hand Deliver ( ) Facsimile
Gary L. Cooper COOPER & LARSEN, CHARTERED 151 North Third Avenue, Second Floor P.O. Box 4229 Pocatello, ID 83205-4229	(✓) U.S. Mail ( ) Overnight Delivery ( ) Hand Deliver ( ) Facsimile



Deputy Clerk

IN THE DISTRICT COURT OF THE SIXTH JUDICIAL DISTRICT OF THE

STATE OF IDAHO, IN AND FOR THE COUNTY OF BANNOCK

2010 DEC -7 AM 11: 05

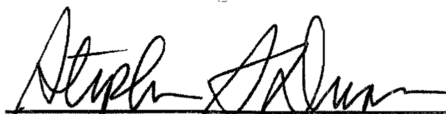
DEPUTY CLERK

Register#CV-2009-2212-OC		
GAYLEEN CLAYSON,	)	
Plaintiff,	)	
-vs-	)	
DON ZEBE, RICK LAWSON, and LAZE, LLC,	)	JUDGMENT
Defendants.	)	
DON ZEBE, RICK LAWSON, and LAZE, LLC,	)	
Counterclaim Plaintiffs	)	
-vs-	)	
GAYLEN CLAYSON,	)	
Counterclaim Defendant.	)	

Following a Court trial and pursuant to a Memorandum Decision, Findings of Fact and Conclusions of Law dated the 6th day of December, 2010;

WHEREFORE, by virtue of the law and pursuant to I.R.C.P. 54(a), it is hereby ORDERED, ADJUDGED AND DECREED that JUDGMENT be entered in this matter in favor of the Plaintiff, Gaylen Clayson, and against the Defendants, Don Zebe, Rick Lawson and Laze, LLC, in the Total Amount of $97,310.94. Costs and fees, if any, are to be determined at a later date pursuant to Idaho law and I.R.C.P. 54.

DATED 6th day of December, 2010.



STEPHEN S. DUNN
District Judge

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the ________ day of ________________, 2010, I served a true and correct copy of the foregoing document upon each of the following individuals in the manner indicated.

Blake S. Atkin 7579 North Westside Hwy Clifton, ID 83228	( ) U.S. Mail ( ) Overnight Delivery ( ) Hand Deliver ( ) Facsimile
Atkin Law Offices 837 South 500 West, Ste 200 Bountiful, UT 84010	( ) U.S. Mail ( ) Overnight Delivery ( ) Hand Deliver ( ) Facsimile
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____
Deputy Clerk

Case No. CV-2009-2212-OC
JUDGMENT
Page 2

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Counsel for Defendant

2010 DEC -3 AM 9:45
BY ____ DEPUTY CLERK

IN THE DISTRICT COURT OF THE SIXTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF BANNOCK

GAYLEN CLAYSON, Plaintiff, vs. DON ZEBE, RICK LAWSON, AND LAZE, LLC., Defendants,	CASE NO. CV-2009-0002212-OC DEFENSE MEMORANDUM ON DAMAGE CLAIM

INTRODUCTION

The purpose of this Memorandum is to provide briefing and evaluation of the equitable basis, if any, for a claim by Plaintiff asserting damages for the entire Dairy Systems' bill beyond the $50,000 payment he made on September 16, 2008. To the extent that this Memorandum cites to or discusses equitable theories beyond the implied-in-fact and implied-in-law/unjust enrichment claims which are at issue in this litigation, this Memorandum should not be considered express or implied consent or acquiescence by the Defendants for Plaintiff to expand his theories of recovery.

DISCUSSION OF RELEVANT LAW

A. PERTINENT FACTS

Mr. Clayson stipulated that there is no legal claim by Dairy Systems against Clayson to recover its claim for work performed and materials provided at the Star Valley Cheese Plant in 2008

and 2009. Dairy Systems did not bill Clayson, it billed "Star Valley Cheese." Dairy Systems is pursuing the Defendants to recover its claim, not Clayson, in the lawsuit it filed in Wyoming.

B. PLAINTIFF CAN ONLY RECOVER TO THE EXTENT HE HAS PAID THE DAIRY SYSTEMS DEBT

Even under equitable theories, Clayson can only recover from Defendants what he paid. In a scenario somewhat analogous to this case, where one pays the debt of another, that party may seek recovery from the party that benefitted under the equitable theory of subrogation. The Idaho Supreme Court explained the equitable remedy of subrogation[1] in *Williams v. Johnston*, 92 Idaho 292, 298 (Idaho 1968):

> ". . . Its principle is often extended to those who, because of their interest in the property on which debts of others are a charge, are entitled to pay such debts and be substituted to the place of the original creditor. ***Generally speaking it is only in cases where one advances money to pay the debt of another to protect his own rights that a court of equity substitutes him in place of the creditor*** as a matter of course, without any express agreement to that effect. The doctrine of subrogation is not administered as a legal right but the principle is applied to subserve the ends of justice and to do equity." [quoting *Houghtelin v. Diehl*, 47 Idaho 636, 277 P. 699 (1929)] (***emphasis*** supplied)

The equitable remedy of subrogation is not available to a party[2] who has not paid the debt of the party against whom it seeks recovery for the payment. In fact, subrogation is not available to a party who has not discharged the entire debt. *Restat 1st of Restitution*, § 162 provides:

> *c. Where obligation not fully discharged.* Where property of one person is used in partially discharging an obligation owed by another, and the balance of the

[1]See also *May Trucking Co. v. International Harvester Co.*, 97 Idaho 319, 321 (Idaho 1975)

[2]Subrogation is also not available to a party who had no obligation to pay or had no interest to protect by paying. A person who was only a volunteer cannot invoke the aid of subrogation.

obligation has not been discharged, the former is not entitled to be subrogated to the position of the obligee. Until the obligation is fully discharged, the obligee is himself entitled to enforce the balance of his claim, and the person whose property has been used in discharging only a part of the claim is not entitled to occupy his position. If the balance of the claim is subsequently discharged by the obligor, however, the person whose property was used in discharging a part of the obligation is entitled then to be subrogated to the claim to the extent that his property was used in discharging the claim.

See also *Labella Winnetka, Inc. v. General Cas. Ins. Co.*, 259 F.R.D. 143, 147 (N.D. Ill. 2009) (Equitable subrogation implicates a body of equitable principles, which include a requirement that "the claim or debt under which the subrogee asserts his rights [be] paid in full.")

There is no equitable remedy which would allow Clayson to recover for a liability he has not paid. His only payment to Dairy Systems was a $50,000 payment on September 16, 2008 from his personal account and he is limited to attempting to recover the $50,000 from the Defendants.

C. UNJUST ENRICHMENT IS NOT AVAILABLE FOR HYPOTHETICAL FUTURE LIABILITIES

The equitable remedy of unjust enrichment does not protect against hypothetical future liabilities:

> The elements for unjust enrichment are that the defendant was enriched, that such enrichment was at the plaintiff's expense and that the circumstances were such that in equity and good conscience the defendant should return the money or property to the plaintiff. *Axel Johnson, Inc. v. Arthur Andersen & Co.*, 830 F. Supp. 204, 211 (S.D.N.Y. 1993); see also Bank of America, N.A. v. Moyer, 18 V.I. 220, 224 (Terr. Ct. 1982). Hyatt has not alleged that Skopbank has been enriched at Hyatt's expense. Hyatt simply alleges that if it should be awarded judgment against 35 Acres, then Skopbank and GGF will be unjustly enriched "when the shell entity 35 Acres is left insolvent and unable to satisfy a judgment rendered in favor of Hyatt." However, no claim of unjust enrichment lies for "hypothetical future liabilities." *Axel Johnson*, 830 F. Supp. at 211-12.

Gov't Guar. Fund of Fin. v. Hyatt Corp., 955 F. Supp. 441, 460 (D.V.I. 1997)

To salvage the claim, Andersen articulates an entirely different version of

> the claim in its memoranda of law, basing the allegation on the "possibility" of Johnson obtaining a judgment against Andersen in the future, rather than on the past occurrence of Johnson's purchase of ITI stock. Andersen's present argument is that if it were to be forced to pay damages to Johnson, then the third party defendants -- who are the real wrongdoers and accordingly should be the ones paying damages -- would be unjustly enriched.
>
> As a preliminary matter, such a claim, even if valid, is not alleged in the complaint. However, even if this version had been properly pleaded, no cause of action for unjust enrichment lies for hypothetical future liabilities.

Axel Johnson, Inc. v. Arthur Andersen & Co., 830 F. Supp. 204, 211-212 (S.D.N.Y. 1993)

Dairy Systems has not attempted to hold Clayson liable to date for a debt incurred by Star Valley Cheese in 2008. Dairy Systems has sued the Defendants for that debt. Clayson's liability is, at best, a "hypothetical future liability" for which no action for unjust enrichment lies.

CONCLUSION

There is no equitable remedy for an obligation which the Plaintiff has not paid. There is, therefore, no basis for Clayson to assert damages for the entire Dairy Systems bill. The Defendants respectfully request that this Court deny Clayson's claim for any amount related to the Dairy Systems debt which exceeds the $50,000 payment he actually made on September 16, 2008.

DATED this 6th day of November, 2010.

COOPER & LARSEN

/s/ Gary L. Cooper

GARY L. COOPER

CERTIFICATE OF SERVICE

I hereby certify that on the 6th day of November, 2010, I served a true and correct copy of the foregoing to:

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/s/ Gary L. Cooper

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IN THE SIXTH JUDICIAL DISTRICT COURT IN AND FOR BANNOCK COUNTY, STATE OF IDAHO

GAYLEN CLAYSON, Plaintiff, v. DON ZEBE, RICK LAWSON, and LAZE, LLC, **Defendants,**	**PLANTIFF'S TRIAL MEMORANDUM REGARDING THE ADMISSIBILITY OF EVIDENCE THAT DEFENDANTS ASSUMED OR RATIFIED CLAYSON'S ENTIRE BILL TO DAIRY SYSTEMS COMPANY** Case No: CV-2009-02212-OC Judge: Stephen S. Dunn
DON ZEBE, RICK LAWSON, and LAZE, LLC, Counterclaim Plaintiffs, v. GAYLEN CLAYSON, Counterclaim Defendant.	

Historically there were two courts. Courts of law and courts of equity. Rules were developed in the law courts to prevent the skullduggery that unfortunately is often the nature and disposition of people in their dealings with one another. These concerns give rise to such legal principles as the statute of frauds that precludes legal enforcement of certain classes of contracts unless the contract is in writing. But when the facts of the case demonstrate that such legal principles are being used unscrupulously in order to promote injustice, another court, a court of equity, would step in and provide a remedy so that justice might be done against the clever use of legal principles. Thus, familiar equitable maxims such as "the Statute of Frauds cannot be used to perpetrate a fraud."

Today, in Idaho, as in most jurisdictions, the courts of law and the courts of equity have been joined in a single court, but equity still has the power to prevent skullduggery and clever use of the law to injure others. The equitable jurisdiction of this Court has been invoked in this case because this is one of those instances where, if the equitable jurisdiction of the Court is not brought to bear, the Defendants' clever use of legal principles will result in great injustice to Plaintiff Gaylen Clayson and to people with whom he dealt who still believe that a man's word is his bond, and that a handshake should still be honored.

Mr. Zebe testified that in his view, promises don't mean anything in real estate unless they are in writing and if Gaylen Clayson does not know that he is stupid. If equity cannot be relied upon in this case to enforce these Defendants' oral agreement to reimburse Plaintiff for his out of pocket expenses in refurbishing the Cheese Plant and to pay the workmen who, based on 20 years of trust, went to work for him to get the plant going as quickly as possible so he would

have a home for his milk, knowing that he was an honest man who would see that they were paid, then equity has lost its ability to serve the purpose for which it was born.

Under the facts of this case, a court of equity cannot allow these Defendants to not pay the Dairy Systems debt they promised Clayson they would pay. Not only do the facts in evidence, and the facts proffered by the Plaintiff, clearly establish the dual inferences required in a court of equity to enforce a contract implied in fact, i.e., the existence and terms of a contract to pay Dairy Systems, Fox v. Mountain West Elec., Inc., 137 Idaho 703, 52 P. 3d 848, 853 (2002), these Defendants misrepresented to a Federally insured Idaho Bank and to the United States Department of Agriculture that they had paid Dairy Systems for 90% of the electrical retrofit in the amount of $225,000. Exhibit I, page 6. Defendants now admit that was an outright misrepresentation to the banks, and the evidence is clear that neither Mr. Zebe nor Mr. Lawson has paid a nickel to Dairy Systems. That Mr. Clayson's $50,000 check of September 16, 2008, was the only money that had been paid to Dairy Systems and Defendants are now trying to deny authorizing the other two $50,000 checks that were delivered to Dairy Systems on their behalf. But having made that representation and having benefited greatly by having induced Citizens Community Bank of Idaho and the United States Department of Agriculture to loan them $2 Million on the basis of this fraudulent representation, Defendants cannot be allowed in a court of equity to walk away from the obligation underlying this fraud, i.e., the payment of Dairy Systems.

Defendants conduct with regard to their agreement to pay the Dairy Systems debt has been "dishonest, [and] fraudulent and deceitful as to the controversy in issue." See, Ada County

Highway Dist. v. Total Success Investments, LLC, 145 Idaho 360, 370, 179 P.3d 323, 333 (2008), and a court of equity is not without power to now enforce the agreement they made that is consistent with their fraudulent conduct.[1] The Defendants are willing to lie regarding this obligation at the expense of Gaylen Clayson, Dairy Systems, Citizens Community Bank of Idaho and the United States Department of Agriculture. Defendants cannot be allowed to profit from a misrepresentation that they have paid the debt and now avoid the obligation.

I. WHETHER THE DEFENDANTS ASSUMED OR RATIFIED CLAYSON'S OBLIGATION TO DAIRY SYSTEMS COMPANY HAS ALWAYS BEEN AN ISSUE IN THIS CASE.

The Complaint in this case alleged that Defendants had assumed Clayson's obligation to Dairy Systems.

> 12. Defendants later offered to buy out Plaintiff's partnership interest for reimbursement of his out of pocket expenses, assumption of the debt he incurred in refurbishing The Plant, including the debt to Dairy Systems and payment of $500,000.00 in cash. As part of this agreement, Defendants also agreed to take all of Plaintiff's milk supply at class 3 prices, FOB the dairy.
> 13. Because Plaintiff's real interests lie in the dairy industry, Plaintiff agreed to this buyout arrangement. Pursuant to the agreement, Plaintiff transferred to Defendants his interest in the contract with Farinella and facilitated the purchase of Morris Farinella's interest by the Defendants.
> 14. Defendants have failed and refused to reimburse Plaintiff's out of pocket expenses, have failed and refused to assume the debt to Dairy Systems, and have been unable or unwilling to take Plaintiff's production of milk as promised.

See, Amended Complaint on file with the Court, paragraphs 12-14.

In its memorandum decision, this court carved out this obligation as one of the equitable claims that were allowed to go forward in this case:

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[1] While the Ada County case involved the equitable doctrine of clean hands that is typically used as a shield, it nonetheless illustrates the concept that a court in equity should not bend over backwards to help a party avoid liability for a debt they fraudulently represented to the bank they had paid!

> the trier of fact could reasonably infer that Zebe, on behalf of SVC, LLC, had agreed to assume some of the debts owed by Clayson, and it is reasonably possible that Clayson assigned his rights over to the Defendants to purchase the Plant in reliance of these payments or assumptions of debt, or that a separate implied-in-fact agreement had been entered into where SVC, LLC agreed to make such payments. When Zebe stated an agreement to pay for "most of what was done while Gaylen was in charge . . . to the tune of 245K" or to pay the Dairy Systems debt . . . a question of fact arises as to the extent of that obligation, whether pursuant to an implied-in-fact contract or by way of unjust enrichment. What the nature of the agreement was, how much was agreed to be paid, and for what, are questions the jury must decide. (emphasis added).

Memorandum Decision and Order on Defendants' Motion for Summary Judgment at p. 21.

II. GAYLEN CLAYSON HAS THE LEGAL OBLIGATION TO CAUSE DAIRY SYSTEMS TO BE PAID.

Under the facts in this case, Gaylen Clayson clearly has a contractual obligation to pay Dairy Systems for the work they performed at the Star Valley Cheese Plant. He had a long term relationship with Dairy Systems under which he would call upon them for service, they would provide services to him and bill him monthly for the services performed, and he would pay. If he questioned any of their charges he would bring it up, they would discuss it and it would be either adjusted or not and he would pay.

In this case, Mr. Clayson called upon Dairy Systems to perform work at the plant. They performed that work. As was their usual and customary practice, they billed him for the work on a monthly basis. Mr. Clayson received the bills, and even discussed them with Dairy Systems and raised no objections. Those facts support not only a contract, but an account stated. When a statement shows on its face that it is intended to be a final settlement up to date, assent to that account rendered is implied from a failure to object to the billing within a reasonable period of

time. This conduct transforms the account into an account stated. Argonaut Insurance Companies v. Tri-west Construction company, 107 Idaho 643, 691 P. 2d 1258 (Idaho 1984).

Mr. Clayson not only has the obligation to pay, but at this late date, having had the bills, having watched the work be performed, having been in control of the premises and able to have the work inspected as he saw fit, and with all this knowledge having not raised any question to the bills, the bills are an account stated and he is obligated to pay them as they stand. Id.

Moreover, Mr. Clayson will be under that legal obligation until Dairy Systems is paid or the statute of limitations has run. The pendency of an action in Wyoming in which Dairy Systems is attempting to get paid by Defendants does not change this analysis. The Wyoming case at this point is completely irrelevant. The fact that Dairy Systems has not asserted a claim against him yet is irrelevant. The statute of limitations on this account stated is six years. If Dairy Systems should get thrown out of court in Wyoming, or if Dairy Systems should obtain a judgment in Wyoming and Defendants file bankruptcy or otherwise fail to pay, Dairy Systems will still have a claim it can pursue against Mr. Clayson. There is no evidence that Dairy Systems has made any agreement not to pursue Mr. Clayson if Defendants do not pay. In fact, Mr. Clayson testified that he was anxious to have Defendants pay Dairy Systems because otherwise he is "on the hook." When two courts have concurrent jurisdiction over an issue, the pendency of proceedings in one court can be no affect on the other court until one court reaches a final judgment. Erwin v. State, Dept. of Family Services, 237 P.3d 409, 412 (Wyo. 2010) (Emphasis added) (internal citation omitted). Res judicata bars the relitigation of previously litigated claims or causes of action. Erwin, 237 P.3d at 412 (Emphasis added) (internal citation

omitted). Here, there has been no adjudication of any issues in the Wyoming court, and there is no final judgment in that court.

There is no quasi-estoppel or judicial estoppel applicable to the facts of this case.

> ... doctrine of quasi-estoppel applies when: (1) the offending party took a different position than his or her original position, and (2) either (a) the offending party gained an advantage or caused a disadvantage to the other party; (b) the other party was induced to change positions; or (c) it would be unconscionable to permit the offending party to maintain an inconsistent position from one he or she has already derived a benefit or acquiesced in.

Terrazas v. Blaine County, 147 Idaho 193, 200 (Idaho 2009).

In this case, Clayson has not taken a position different in this case than the position he has taken in Wyoming. In both cases, Clayson takes the position that he contracted with Dairy Systems to perform the refurbishment work on the Cheese Plant and that Defendants agreed with him that in exchange for relinquishing his interest in the plant and the limited liability company that was set up by the parties to refurbish and run the plant, that the Defendants would, among other things, assume that Dairy Systems obligation. Nor is there any evidence that Defendants were disadvantaged, were induced to change positions, or that it would be unconscionable for Clayson to continue to pursue Defendants for their failure to pay Dairy Systems.

Judicial estoppel is even more remote. Before judicial estoppel is applicable, a party must, in a prior proceeding "obtain a judgment, advantage, or consideration from one party . . ." Indian Springs, LLC v. Indian Springs Land Inv., LLC, 147 Idaho 737, 748 (2009). Defendants' third party complaint in the Wyoming case was filed after this action and has not come to judgment. Moreover, even after judgment in the prior proceeding, judicial estoppel only

prevents a party from taking a position contrary to the position taken in the prior proceeding in "sworn statements." In this case, Clayson is taking the same position in this case as he took in the "subsequently" filed third party complaint in Wyoming—namely that he contracted with Dairy Systems to confer a benefit on himself and his partners Don Zebe and Rick Lawson which they agreed to satisfy when he agreed to relinquish his interest in the plant and the limited liability company set up by the parties to refurbish and run the plant. There simply is no rationale by which this Court can or should defer to proceedings that are merely pending in Wyoming.

III. GAYLEN CLAYSON'S MORAL OBLIGATION TO PAY DAIRY SYSTEMS IS SUFFICIENT CONSIDERATION TO SUPPORT DEFENDANTS' AGREEMENT TO PAY DAIRY SYSTEMS ON HIS BEHALF.

A moral obligation, even though legally unenforceable, is sufficient consideration to support creation of a binding contract. Homefinders v. Lawrence, 80 Idaho 543, 549, 335 P.2d 893, 897 (1959); Woods v. Locke, 49 Id. 486, 289 P. 610, 612 (1930). Gaylen Clayson, promised Dairy Systems that they would be paid if they would drop everything, go to a remote location in Wyoming, and, in rapid fire, bring a cheese plant that had been in moth balls for two and a half years back online. It seems obvious that those facts created a legally binding contract—especially where neither party to the contract are disputing its existence. If that did not create a legal obligation on Mr. Clayson's part to Dairy Systems, it at least created a moral obligation to see that they were paid for their work.

In determining whether there is a contract implied in law, the court needs to examine whether the terms and existence of the contract are manifested by the conduct of the parties. Fox

v. Mountain West Elec., Inc., 137 Idaho 703, 708, 52 P.3d 848, 853. The facts and circumstances in this case clearly support the inference that the Defendants agreed to assume or ratify all of Clayson's debt to Dairy Systems and not just the $50,000 check that Clayson funded.

Clayson testified that he was "on the hook" to Dairy Systems and Defendants agreed to pay that and the other debts he had incurred in the refurbishment of the plant. Defendants, in their Business Plan, represented to banks and the United States Department of Agriculture that they had paid Dairy Systems for 90 percent of electrical retrofit in the amount of $225,000. Exhibit I at p. 6. They further represented to third parties that, upon closing, they would absorb Dairy System's debt of $245K. Exhibit S.

Contrary to his testimony on cross-examination that he informed contractors hired by Clayson that he did not know how they would be paid, Mr. Zebe told Dairy Systems that they would be paid upon closing as suggested by Plaintiff's Exhibit V, which clearly appears to be assurance to a legitimate creditor, that the money is in and is about to be paid. These facts raise an inference that there was a contract by Defendants to pay Dairy Systems, and upon closing they would pay Dairy Systems in full, thus fulfilling Gaylen Clayson's legal and/or moral obligations to Dairy Systems.

IV. IF THE COURT RULES THAT GAYLEN CLAYSON HAS A RIGHT TO ENFORCE DEFENDANTS' AGREEMENT TO PAY DAIRY SYSTEMS THERE IS STILL NO NEED FOR FURTHER EVIDENCE ON THE AMOUNT OWING TO DAIRY SYSTEMS BEYOND THE EVIDENCE CONTAINED IN PLAINTIFF'S EXHIBIT L.

In his emails to Klark Gailey, Exhibits W and X, Mr. Zebe clearly ratifies the contract between Dairy Systems and Gaylen Clayson. He makes reference to the $50,000 Clayson paid

Dairy Systems and states that Dairy Systems must deduct that amount from the amount they are owed, a clear reference to the Clayson contract and a clear adoption of a benefit from that contract. The only problem is, Defendants want to ratify the contract as to the parts they like, but not as to the parts they don't. Similarly, Mr. Zebe admitted that when they decided not to pay Dairy Systems, they did not rip out the wires Dairy Systems had installed. They kept the components they liked and those components installed by Dairy Systems are still working in their plant to this day.

Thus Defendant have ratified the Dairy Systems contract, but are attempting to have that ratification apply only to the extent of "work we can use." A court of equity should reject the notion that Defendants were free to pick and choose what parts of the Dairy Systems contract they would not reimburse. A party cannot ratify only a part of an agreement. Honesty and fair dealing require him to stand by the contract "in toto." Henry Gold Mining Co v. Henry, 25 Idaho 333, 137 P. 523 (Id. 1913).

Dairy Systems provided Mr. Clayson and the Defendants with monthly statements setting out the amount of their bill, Mr. Clayson never objected to the bills, and six months went by, with ongoing discussions about Dairy Systems finishing the work and Defendants manifesting their intent to make payment once their funding was available. During that entire time, Defendants did not make any objection to the Dairy Systems bills. In fact, $150,000 in payments was made during that period, although only $50,000 of the payment cleared the bank. A party can ratify a contract by remaining silent about the matter for several months after full knowledge of all the facts. Henry Gold Mining Co v. Henry, 25 Idaho 333, 137 P. 523 (Id. 1913). Here,

defendants had the bills from Dairy Systems for several months during which time they had complete control of the premises and could and did inspect the work Dairy Systems had done. Mr. Zebe testified that he hired William Sulzer and J.P Electric, two of Defendants' designated experts, to examine the plant to determine what it would take to finish the work started by Dairy Systems. That work was done prior to the January 14, 2009 email to Morris Farinella, Exhibit S, in which Defendants stated their intention to absorb the Dairy Systems bill upon closing, and before Mr. Zebe's assurance email to Klark Gailey that funding was imminent on February 19, 2009. Exhibit V. Yet Mr. Zebe testified that to that point he had not objected to the Dairy Systems bills, but had only asked for information about the work that had been done because "I just want to be clear on what it is that has been done . . . " Exhibit U. An objection to an account rendered must be "more than a mental operation on the part of the person receiving the account, and must be made to the party rendering the account." Argonaut Insurance Companies v. Tri-West Construction Company, 107 Idaho 643, 646, 691 P. 2d 1258, 1261 (1984).

Because it would not be equitable for the Court to allow Defendants under the circumstances of this case to pay only for the parts of the contract that "they can use," and because Defendants went months without raising any question about the bills, repeatedly reaffirmed the fact that they would pay once they obtained their funding, all the while having the ability to examine Dairy Systems' work, they should not now be allowed to question the amount of the Dairy System bills, therefore the evidence that Defendants would put on relating to what they deem the value of Dairy Systems work to be is not relevant to any issue in this case.

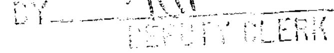
There is an additional reason Defendants should not be allowed to dispute the amount of the Dairy Systems debt. There is a time honored equitable principle called "estoppel" that prevents a party from disputing certain facts when a person has previously asserted those facts to his advantage. In this case, Defendants represented to a federally insured bank in the State of Idaho and to the United States Department of Agriculture that they had paid $225,000.00 to Dairy Systems for 90 percent of electrical retrofit on the project. On the basis of that representation, Defendants obtained $2 million from Citizens Community Bank of Idaho that was guaranteed 80 percent by the United States Department of Agriculture. While Mr. Zebe has admitted during his testimony that this was an outright misrepresentation to the banks, Defendants, because of that conduct, should be estopped from now asserting they are not responsible to pay in full what they represented that they had paid.

Dated this ___ day of November, 2010.

ATKIN LAW OFFICES, P.C.

____

Blake S. Atkin
Attorney for the Plaintiff/Counterclaim Defendant



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IN THE SIXTH JUDICIAL DISTRICT COURT IN AND FOR BANNOCK COUNTY, STATE OF IDAHO

GAYLEN CLAYSON, Plaintiff, v. DON ZEBE, RICK LAWSON, and LAZE, LLC, Defendants, DON ZEBE, RICK LAWSON, and LAZE, LLC, Counterclaim Plaintiffs, v. GAYLEN CLAYSON, Counterclaim Defendant.	**REPLY MEMORANDUM IN SUPPORT OF MOTION TO RECONSIDER DAMAGE ASPECTS OF DECISION DATED SEPTEMBER 15, 2010** Case No: CV-2009-02212-OC Judge: Stephen S. Dunn

Plaintiff, by and through undersigned counsel, hereby submits this Reply Memorandum in Support of its Motion to Reconsider Damage Aspects of Decision Dated September 15, 2010.

ARGUMENT

I. PLAINTIFF HAS ADMISSIBLE EVIDENCE OF THE VALUE OF THE CHEESE PLANT AT THE TIME IT WAS CONVEYED TO THE DEFENDANTS.

Shortly after joining Gaylen Clayson in the SVC, LLC venture to refurbish and bring the Cheese plant on line, Defendants prepared a business plan for the purpose of soliciting money to purchase the cheese plant and to bring it on line. Zebe Deposition transcript at pp. 6-11, 21-22. As part of that effort, Defendants commissioned two appraisals on the property. One was an appraisal of the plant equipment by William Sulzer, and the other was an appraisal of the real estate by the broker Val Pendleton. Mr. Sulzer appraised the equipment at $2,760,100.00 and Mr. Pendleton appraised the plant, restaurant, and acreage at $2,100,000.00. These appraisals were appended to the business plan and referred to in the business plan under the title of "funding." The business plan also included financial statements of SVC, LLC which represented the value of the equipment at $1,150,000. Defendants then used the business plan with its financials and appraisals to obtain loans from the bank of at least $1.6 million . See, Deposition transcript of Don Zebe, p. 38. The business plan with its opinions of value and the loan documents is not hearsay and even if it were the plan would be admissible as exceptions to the hearsay rule.

The fact that the bank loaned substantial amounts on the plant and equipment on the basis of the business plan with its representations as to the value of the property is admissible evidence of the value of the property. See, U.S. v. Licavoli, 604 F. 2d 613 (9th Cir. 1979) cert denied, 446 U.S. 935 (1980)(fact that insurer relied on appraisal before any litigation made appraisal reliable).

A. The values of the plant and its equipment are admissible under Idaho Rule of Evidence 801(d)(2)(B) as being adopted by the Defendant when it relied on those number when it submitted its business plan to obtain financing.

Don Zebe wrote the business plan, Zebe deposition transcript at p. 5. On the page of the business plan entitled "Funding," Mr. Zebe specifically states that "the appraisal of this equipment was done by Bill Sulzer of Statco in the amount of $2,760,100.00." Zebe deposition transcript at p. 39.

By definition, this statement by Mr. Zebe, a party opponent, is not hearsay. Rule 801(d)(1)(2) (A) provides that "A statement is not hearsay if . . . The statement is offered against a party and is (A) the party's own statement, in either an individual or representative capacity, ..."

The statements as to value in the business plan are not hearsay and are thus admissible as evidence of the value of the property.

Even though the broker's opinion of the value of the real estate is not specifically mentioned in the body of the business plan, it is appended thereto as a "supporting document." Thus, evidencing Mr. Zebe's adoption of that appraisal and making it not hearsay under rule 801(d)(2)(B). That rule provides that "A statement is not hearsay if . . . . The statement is offered against a party and is a statement of which the party has manifested an adoption . . . ."

When Don Zebe relied on the appraisal values of the Cheese Plant and its equipment given to him by William Sulzer and Val Pendelton by including them in his business plan, his actions manifested an adoption of those numbers. As a result, those appraisal numbers are not hearsay and are admissible as an admission of a party opponent under Idaho Rule of Evidence 801(d)(2)(B). White Industries, Inc. v. Cessna Aircraft Company, 611 F.Supp 1049 (W.D. Mo. 1985), discusses when a party's use of a document supplied by another in fact represents that party's intended assertion of the truth of the information contained in that document and

therefore an adoptive admission can be found. While the White case relied on the Federal Rules of Evidence, Rule 801(d)(2)(B) of the Idaho Rules is the same as the corresponding federal rule.

Don Zebe, who prepared the business plan which was submitted to the bank for the purpose of obtaining financing, included in that business plan appraisals by both William Sulzer and Val Pendelton as to the value of the plant, restaurant, equipment and the acreage on which the cheese plant is located. As a result of the business plan, Defendants ultimately received loans from Citizens Community Bank totaling at least $1.6 million. See, Zebe deposition transcript at p. 38.

According to White, in order to find an "adoptive" admission

> the mere fact that the party has acted (or failed to act, in the case of an admission by silence) in some way in reference to the statement or information (as by repeating it or retaining it) is not sufficient, standing alone, to justify a finding that there has been an adoption. Instead, the surrounding circumstances, including the circumstances and nature of the underlying statement itself, must be examined to determine whether an intent to adopt the statement is fairly reflected by the act or failure to act which is in question.

White, 611 F.Supp. at 1062 (Internal citations omitted). Zebe's inclusion of the Sulzer and Pendelton numbers in his business plan evidences an intent to adopt those numbers. The White court goes on to state that while it may be difficult to find adoption when "the document (or information from it) is merely used in some internal fashion by the party", Id. at 1063, "there is no doubt that where a party's use of a document supplied by another in fact represents the party's intended assertion of the truth found in the information therein, an adoptive admission can be found." Id. at 1063.

Don Zebe prepared the business plan. Zebe deposition transcript at p. 5. As part of the business plan, in the section entitled "Funding," Mr. Zebe states that, with regard to the loan

being sought, it would "be secured by all fixtures, furniture, equipment, treatment plant, water treatment facility, excluding the restaurant equipment. The appraisal of this equipment was done by Bill Sulzer of Statco in the amount of $2,760,100." Zebe deposition transcript at p. 39. That appraisal was done by Mr. Sulzer at the request of Mr. Zebe. Zebe deposition transcript at pp. 39-40. Mr. Zebe also included in the business plan an estimated opinion of value based on normal market conditions of the Star Valley Cheese Plant, Restaurant, and Acreage, in the amount of $2,100,000.00. Zebe deposition transcript, Exhibit 1. One of the purposes of writing a business plan is to convince lending institutions to lend you money. Zebe deposition transcript at p. 21. Mr. Zebe provided the business plan to the lending institutions that Defendants were seeking to borrow the money from, including Citizens Community Bank. Zebe deposition transcript at p. 11-12. Defendants ultimately borrowed at least $1.6 million from Citizens Community Bank as a result of the business plan submitted previously. Zebe deposition transcript at p. 38.

By using the appraisal values of Sulzer and Pendelton in the business plan and submitting that business plan to the bank for the purpose of obtaining financing, which they did obtain in the amount of at least $1.6 million, Zebe deposition transcript at p. 38, Defendants can not now claim that these numbers are hearsay and cannot be admitted. This information is admissible as an exception to the hearsay rule under Idaho Rule of Evidence 801(d)(2)(B).

B. EVEN IF HEARSAY, THE APPRAISALS ATTACHED TO THE BUSINESS PLAN ARE EXCEPTIONS TO THE HEARSAY RULE

Even were the appraisals still considered hearsay despite Mr. Zebe's adoption of them, it is not true that appraisals and the like must be excluded as hearsay. The business plan with its attached financials and appraisals are business records and thus exceptions to the hearsay rule.

This business plan and the appraisals were prepared in the course of SVC's attempts to obtain the financing necessary to purchase the cheese plant and was in fact used for that purpose. Zebe deposition transcript at pp. 11-12, 21, 39-46. The copy of the appraisal we have today was kept by SVC, LLC and is the only copy of the business plan that was ever created. Zebe deposition transcript at pp. 10-11. The business plan was assembled using information provided to Mr. Zebe by Gaylen Clayson, Val Pendleton, and William Sulzer, with the best information they had at the time. Zebe deposition transcript at pp. 24, 39-46. It was prepared by the Defendants at a time when they were still working with the Plaintiff, [Plaintiff relinquished his interest in SVC, LLC on October 2, 2008 and entered into the contract to purchase the Cheese Plant and Restaurant on October 17, 2008 and assigned that contract to Defendants on November 4, 2008] and not for the purpose of litigation, was submitted to banks, financial institutions, and government agencies who guarantee loans, and loans were actually obtained from those institutions to purchase the Plant and restaurant. Zebe deposition transcript at pp. 8-9, 11-14, 37. Appraisals, even when standing alone and not as part of a business record and even when offered without the presence of the appraiser, are often admitted under the business records exception to the hearsay rule, Rule 803(6), or the general exception, Rule 803(24). In fact, rule 803(6) specifically allows admission of "opinions" if found within a business record, such as Defendants business plan. Both exceptions apply in this case. U.S. v. Licavoli, 604 F. 2d 613, (9th cir. 1979) cert. denied 446 U.S. 935 (1980); Selig v. U.S., 740 F. 2d 572 (6th cir. 1984); Aero Union Corp. v. U.S. 1981 WL 30814 (ct. cl. 1981). As the analysis of these cases show, the focus is on the circumstances surrounding the creation and use of the documents that indicate trustworthiness. See, Christensen v. Rice, 114 Id. 929, 763 P. 2d 302 (Ct. App. 1988)(Certain

types of hearsay evidence are admissible because the circumstances behind their creation implies a high degree of veracity). The fact that an appraisal was not created for purposes of litigation is one such compelling fact that supports admissibility of the document. See, Aero Union Corp. v. U.S., 1981 WL 30814 (Ct. cl. 1981). Similarly, the fact that persons other than the proponent of the document relied on the appraisal before the litigation began is strong support for its reliability and therefore its admissibility. U.S. v. Licavoli, 604 F. 2d 613, (9th cir. 1979). In this case, Defendants relied on the appraisals in the business plan that they submitted to the bank that provided their purchase money for the cheese plant.

In addition to the business record exception, the business plan with its financials and appraisals fit cleanly in the "other exceptions" of Rule 803(24). A document is admissible under this rule if (A) it is offered as evidence of a material fact, (B) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and (C) the general purpose of the rules of evidence and the interests of justice will best be served by admission of the statement.

The values of the business that Gaylen Clayson relinquished and conveyed to Defendants is a material question in this case and the business plan, its financials and its appraisals offer cogent and reliable evidence of that material fact. The values that Defendants assigned to the opportunity they obtained from Gaylen Clayson before the litigation was commenced is more probative of those values than any hired gun expert could provide, and because this document was created before the litigation, indeed before the falling out between the parties, was relied upon by the Defendants in attempting to procure financing, and was relied upon by the lenders in

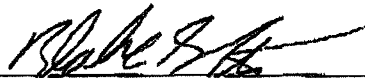
loaning at least $1,600,000.00 to the Defendants, the business plan and its values serve the purpose of the rules of evidence and the interests of justice.

CONCLUSION

Since Defendants' opposition to Plaintiff's Motion to Reconsider and allow Plaintiff to show the finder of fact the true value of the business opportunity Plaintiff relinquished to the Defendants is limited to argument that Plaintiff cannot prove that value, and because, as shown above, admissible non hearsay admissions of the Defendants establish that value at over $4 million, the Court should grant Plaintiff's motion and allow the Plaintiff to show the value of the business through the business plan Don Zebe wrote.

DATED THIS 21st day of October, 2010.

ATKIN LAW OFFICES, P.C.

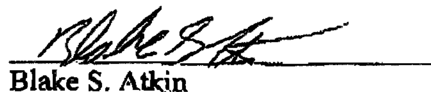


Blake S. Atkin
Attorney for the Plaintiff/Counterclaim Defendant

CERTIFICATE OF SERVICE

The undersigned certifies that on the 21st day of October, 2010, he caused to be served a true and correct copy of the foregoing **REPLY MEMORANDUM IN SUPPORT OF MOTION TO RECONSIDER DAMAGE ASPECTS OF DECISION DATED SEPTEMBER 15, 2010** following by the method of delivery designated below:

John D. Bowers Bowers Law Firm, PC 685 South Washington P.O. Box 1550 Afton, Wyoming 83110 Facsimile: (307) 885-1002	___ U.S. Mail ___ Hand delivery _X__ Fax
Gary L. Cooper COOPER & LARSEN, CHARTERED 151 North Third Avenue, Second Floor P.O. Box 4229 Pocatello, Idaho 83205-4229 Facsimile: (208) 235-1182	___ U.S. Mail ___ Hand delivery _X__ Fax
Bannock County Court 624 E. Center St. Pocatello, ID 83205 Facsimile: (208) 236-7208	___ U.S. Mail ___ Hand delivery _X__ Fax
Judge Stephen Dunn P.O. Box 4126 Pocatello, Idaho 83205 Facsimile: (208) 236-7012	___ U.S. Mail ___ Hand delivery _X__ Fax



Blake S. Atkin

ATKIN LAW OFFICES

A PROFESSIONAL CORPORATION
837 South 500 West, Suite 200
BOUNTIFUL, UTAH 84010
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The information contained in this facsimile message is legally privileged and confidential information intended only for the use of the individual or company named below. If the reader of this message is not the intended recipient, you are hereby notified that any dissemination, distribution or copy of this facsimile is strictly prohibited. If you have received this facsimile in error, please immediately notify us by telephone and return the original message to us at the address above via the United States Postal Service. Thank you.

DATE: October 21, 2010

TO: Bannock County Court

FAX NUMBER: (208) 236-7208

FROM: Blake S. Atkin

RE: *Clayson v. Zebe, Lawson, and Laze, LLC*
Idaho Civil No.: 2009-02212

TOTAL NUMBER OF PAGES (including cover sheet): 10

IF PROBLEMS ARISE PLEASE CONTACT: (801) 533-0300

COMMENTS:

2011 JAN -4 PM 2:45
BY CW DEPUTY CLERK

IN THE DISTRICT COURT OF THE SIXTH JUDICIAL DISTRICT OF THE

STATE OF IDAHO, IN AND FOR THE COUNTY OF BANNOCK

Register#CV-2009-2212-OC

GAYLEEN CLAYSON, Plaintiff, -vs- DON ZEBE, RICK LAWSON, and LAZE, LLC, Defendants.	MEMORANDUM DECISION ON MOTIONS FOR ATTORNEY FEES AND COSTS
DON ZEBE, RICK LAWSON, and LAZE, LLC, Counterclaim Plaintiffs -vs- GAYLEN CLAYSON, Counterclaim Defendant.	

This matter is before the Court on Motions by both parties for costs and attorney fees. The Court has considered all written submissions of both parties, as well as the arguments of counsel, together with applicable rules and legal authority, and now renders this Memorandum Decision.

COURSE OF PROCEEDINGS

This matter involved a dispute over a claim for reimbursement of expenses incurred by the Plaintiff in partial refurbishment the Star Valley Cheese Plant in 2008, prior to the time the

Defendants obtain control over and ultimately purchased the cheese plant.[1] In summary, the Decision, filed December 6, 2010, awarded some, but not all of the damages sought by Plaintiff, in the total amount of $97,310.94. The MSJ, filed September 15, 2010, found that no contract existed between the parties, determined that several other claims should be dismissed, but allowed the case to go forward on equitable theories of quantum meruit and unjust enrichment for certain damages. At trial the Plaintiff's damage claims were further limited, with Plaintiff being allowed to seek reimbursement of amounts paid to Dairy Systems directly, but not any additional amounts sought by Dairy Systems.

Both parties now file requests for costs and fees, asserting that they were the prevailing party.

STANDARD OF REVIEW

In any determination of an award of costs and fees, the threshold question is which party prevailed. I.R.C.P. 54(e)(1) states: "In any civil action the court may award reasonable attorney fees, which at the discretion of the court may include paralegal fees, to the prevailing party or parties as defined in Rule 54(d)(1)(B), when provided for by any statute or contract." [Emphasis added]. I.R.C.P. 54(d)(1)(B) governs the prevailing party issue:

> In determining which party to an action is a prevailing party and entitled to costs, the trial court shall in its sound discretion consider the final judgment or result of the action in relation to the relief sought by the respective parties. The trial court in its sound discretion may determine that a party to an action prevailed in part and did not prevail in part, and upon so finding may apportion the costs between and among the parties in a fair

[1] The Court's Trial Decision ("Decision"), filed December 6, 2010, sets forth the facts found by the Court in this case, and are incorporated herein by reference. Also incorporated herein is the Court's Memorandum Decision ("MSJ"), filed September 15, 2010, which granted summary judgment to Defendants on several issues raised by Plaintiff in this case.

and equitable manner after considering all of the issues and claims involved in the action and the resultant judgment or judgments obtained.

The determination of who is the prevailing party is committed to the sound discretion of the trial court. *Rockefeller v.Grabow,* 139 Idaho 538, 82 P.3d 450 (2003).

The legal basis for an award of costs is I.R.C.P. 54(d)(1). Some costs are awarded to a prevailing party as a matter of right and some costs can be awarded in the discretion of the Court. Discretionary costs are allowed "upon a showing that said costs were necessary and exceptional costs reasonably incurred, and should in the interest of justice be assessed against the adverse party." When objections to discretionary costs are made the Court "shall make express findings as to why such specific item of discretionary cost should or should not be allowed." Such costs may also be disallowed without objection, in the discretion of the Court and upon express findings. The determination of whether a cost is "exceptional" involves an evaluation both of the cost itself, i.e., whether it is the kind of cost commonly incurred in the type of litigation at issue, and whether the case itself is exceptional. *City of McCall v. Seubert*, 142 Idaho 580, 130 P.3d 1118 (2006); *Hayden Lake Fire Protection Dist. v. Alcorn*, 141 Idaho 307, 109 P.3d 161 (2005); *Fish v. Smith*, 131 Idaho 492, 960 P.2d 175 (1998).

The award of attorney fees is governed by I.R.C.P. 54(e)(1), which provides that such an award is discretionary, to the prevailing party, "when provided for by any statute or contract." Whether to award fees and the amount of the fees awarded are matters of discretion, unless it involves a specific determination of a statute which allows for attorney fees. *Grover v.*

Wadsworth, 147 Idaho 60, 205 P.3d 1196 (2009); *Taylor v. Maile*, 146 Idaho 705, 201 P.3d 1282 (2009); *Contreras v. Rubley*, 142 Idaho 573, 130 P.3d 1111 (2006).

If fees are awarded, the trial court, in the exercise of its discretion, must consider the factors set forth in I.R.C.P. 54(e)(3). *Sanders v. Lankford*, 135 Idaho 322, 1 P.3d 823 (Ct.App.2000); *Boel v. Stewart Title Co.*, 137 Idaho 9, 16, 43 P.3d 768, 775 (2002); *Brinkman* v. *Aids Insurance Co.*, 115 Idaho 346, 351, 766 P.2d 1227, 1232 (1988). The district court must, at a minimum, provide a record which establishes that the court considered these factors. *Building Concepts, Ltd. v. Pickering*, 114 Idaho 640, 645, 759 P.2d 931, 936 (Ct.App.1988). A trial court need not specifically address all of the factors contained in I.R.C.P. 54(e)(3) in writing, so long as the record clearly indicates that the court considered them all. *Brinkman*, 115 Idaho at 351, 766 P.2d at 1232. In addition, a court need not blindly accept those attorney fees requested by a party, and may disallow those fees that were incurred unnecessarily or unreasonably. *Craft Wall of Idaho, Inc. v. Stonebraker*, 108 Idaho 704, 706, 701 P.2d 324, 326 (Ct.App.1985).

Plaintiff seeks recovery of attorney fees pursuant to I.C. § 12-120(3), claiming that this matter involves a commercial transaction. Defendants do not identify any particular basis for their claim for attorney fees. Idaho Code § 12-120(3) provides:

> In any civil action to recover on an open account, account stated, note, bill, negotiable instrument, guaranty, or contract relating to the purchase or sale of goods, wares, merchandise, or services and in any commercial transaction unless otherwise provided by law, the prevailing party shall be allowed a reasonable attorney fee to be set by the court, to be taxed and collected as costs.
>
> The term "commercial transaction" is defined to mean all transactions except transactions for personal or household purposes.

"A court is not required to award reasonable attorney fees every time a commercial transaction is connected with a case. The critical test is whether the commercial transaction comprises the gravamen of the lawsuit; the commercial transaction must be integral to the claim and constitute a basis on which the party is attempting to recover." *Bingham v. Montane Resources Assoc.*, 133 Idaho 420, 426, 987 P.2d 1035, 1041 (1999). The award of attorney fees is warranted when the commercial transaction comprises the crux of the lawsuit. *Broods v. Gigray Ranches, Inc.*, 910 P.2d 744, 750 (1996). There is a two-part test in determining whether attorney fees are appropriate in a commercial transaction. "First, the commercial transaction must be integral to the claim, and second, the commercial transaction must provide the actual basis for recovery." *Iron Eagle Development, LLC v. Quality Design Systems, Inc.*, 65 P.3d 509, 515 (2003). If the complaint asserts a claim under a contract that qualifies as a commercial transaction under I.C. § 12-120(3), this statute must be applied even if no liability under the contract is established. *Lexington Heights Develop. LLC v. Crandlemire*, 140 Idaho 276, 287, 92 P.3d 526, 537 (2004); *Peterson v. Shore*, 146 Idaho 476, 197 P.3d 789 (Ct.App.2008). Even when allowed under this statute, the amount of the award is within the discretion of the court. *Johanneson v. Utterbeck*, 146 Idaho 423, 196 P.3d 341 (2008); *Lettunich v. Lettunich*, 141 Idaho 425, 111 P.3d 110 (2005).

ANALYSIS AND DECISION

The Court's first determination is whether there is a prevailing party. Both parties claim that they are the prevailing party. In determining the prevailing party, the Court is required to consider the issues and claims involved and the resulting judgment. Each party offers its own

analysis of why they believe they prevailed. Rather than focus on what the parties have stated, the Court makes its own analysis of that issue.

There were several important issues raised in this case. First, Plaintiff asserted that a contract existed between the parties which provided, among other things, that he would sell milk to the Defendants over three years and receive $500,000 for those sales, and that Defendants would assume all debts Plaintiff incurred in refurbishing the cheese plant, including the entire debt owed to Dairy Systems, arguably something in the neighborhood of $250,000. In the MSJ the Court found that no contract existed and that Plaintiff could not recover damages in either of these instances, except for the amounts paid directly by Plaintiff to Diary Systems, totaling $50,000.[2]

Secondly, Plaintiff's complaint sought damages for extortion, duress, slander and defamation, but those claims were also dismissed in the MSJ, this Court concluding that no factual basis for these claims existed.

Thirdly, Plaintiff was allowed to seek, on equitable theories, reimbursement of expenses he incurred in refurbishing the cheese plant. He also sought payment for his personal labor in that effort. His claims totaled $136,708, including $12,600 for his labor. In the Decision the Court found that there was insufficient evidence to support all of Plaintiff's claims but did award $97,310.94 in damages. Defendants claimed that they owed nothing to Plaintiff but, as found in the Decision, there was substantial evidence to support their reimbursement obligation on an equitable basis.

At best, the Court concludes that the results of this case are mixed, with either side prevailing in part. The Idaho appellate courts have held that mixed results, including recovery of less than the amount sought, can support an award of attorney fees.[3] However, the Court, in its discretionary consideration of "the final judgment or result of the action in relation to the relief sought by the respective parties," determines that both parties "prevailed in part and did not prevail in part," and further determines that careful consideration of the outcomes in this case leads to the conclusion that no fees or costs should be awarded to either party.

Secondarily, the Court also concludes that even if a determination had been made that the Plaintiff prevailed, no fees would be awarded because this case, in the final analysis, did not involve a commercial transaction. Recovery under I.C. § 12-120(3) requires a contractual foundation of some kind. In this case the Court found that there is no contract and that any recovery was on an equitable basis. This is insufficient to find a commercial transaction.[4]

CONCLUSION

Based on the foregoing, the Court denies both Motions for Attorney Fees and Costs. The Judgment will not be amended.

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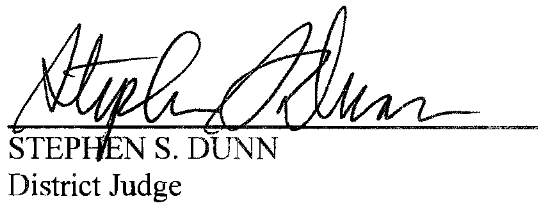
[2] At trial Plaintiff continued to claim that he could be reimbursed for the total Dairy Systems bill, but that claim was not allowed.

[3] *Bates v. Seldin*, 146 Idaho 772, 203 P.3d 702 (2009) (attorney fee award upheld even though prevailing party recovered substantially less than the relief sought); *Eighteen Mile Ranch, LLC v. Nord Excavating & Paving, Inc.*, 141 Idaho 716, 117 P.3d 130 (2005) (award of fees upheld although recovery on counterclaim was less than ten percent of amount sought); *Nguyen v. Bui*, 146 Idaho 187, 191 P.3d 1107 (Ct.App.2008); *Chadderdon v. King*, 104 Idaho 406, 659 P.2d 160 (Ct.App.1983). Based on these cases, the question of whether Plaintiff has prevailed is a close one.

[4] *See Hausam v. Schnable*, 126 Idaho 569, 887 P.2d 1076 (Ct.App.1994). The Court notes that the successful defense against a contract can, in certain circumstances, be held to support a claim for fees. *See Lawrence v. Jones*, 124 Idaho 748, 864 P.2d 194 (Ct.App.1993). However, in this case, Defendants successful defense of the contract

DATED 4th day of January, 2010.

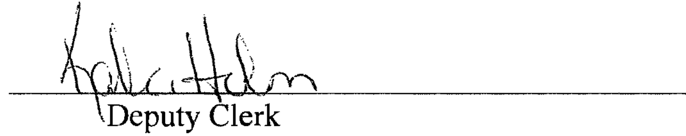


STEPHEN S. DUNN
District Judge

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 4 day of January, 2010, I served a true and correct copy of the foregoing document upon each of the following individuals in the manner indicated.

Blake S. Atkin 7579 North Westside Hwy Clifton, ID 83228	(✓) U.S. Mail ( ) Overnight Delivery ( ) Hand Deliver ( ) Facsimile
Atkin Law Offices 837 South 500 West, Ste 200 Bountiful, UT 84010	(✓) U.S. Mail ( ) Overnight Delivery ( ) Hand Deliver ( ) Facsimile
John D. Bowers Bowers Law Firm PO Box 1550 Afton, WY 83110	(✓) U.S. Mail ( ) Overnight Delivery ( ) Hand Deliver ( ) Facsimile
Gary L. Cooper COOPER & LARSEN, CHARTERED 151 North Third Avenue, Second Floor P.O. Box 4229 Pocatello, ID 83205-4229	(✓) U.S. Mail ( ) Overnight Delivery ( ) Hand Deliver ( ) Facsimile



Deputy Clerk

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claim is not, in the Court's view, an adequate basis for allowing fees to the Defendants, particularly considering that the closer question is whether the Plaintiff was the prevailing party.

Gary L. Cooper - Idaho State Bar #1814
COOPER & LARSEN, CHARTERED
151 North Third Avenue, Second Floor
P.O. Box 4229
Pocatello, ID 83205-4229
Telephone: (208) 235-1145
Facsimile: (208) 235-1182

Counsel for Defendant

IN THE DISTRICT COURT OF THE SIXTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF BANNOCK

GAYLEN CLAYSON, Plaintiff, vs. DON ZEBE, RICK LAWSON, AND LAZE, LLC., Defendants,	CASE NO. CV-2009-0002212-OC **NOTICE OF APPEAL** Fee Category/Amount: (I)($101)
DON ZEBE, RICK LAWSON, AND LAZE, LLC., Counterclaim Plaintiff, vs. GAYLEN CLAYSON, Counterclaim Defendants,	

TO: THE ABOVE NAMED RESPONDENT, GAYLEN CLAYSON, AND HIS ATTORNEY, BLAKE S. ATKIN, 7579 NORTH WESTSIDE HWY, CLIFTON, ID 83228; AND THE CLERK OF THE ABOVE ENTITLED COURT.

NOTICE OF HEREBY GIVEN THAT:

1. The above named Appellants, Don Zebe, Rick Lawson and Laze, LLC, appeal against the above named Respondent to the Idaho Supreme Court from the Memorandum Decision, Findings of Fact and Conclusions of Law dated December 6, 2010, and Judgment dated December 6, 2010, which rulings were entered in the above entitled action on the dates stated above by the Honorable Stephen S. Dunn, District Judge, presiding.

2. That the party has a right to appeal to the Idaho Supreme Court, and the judgments or orders described in Paragraph 1 above are appealable orders under and pursuant to Rule 11 (a)(1) and/or 11(a)(7), I.A.R.

3. A preliminary statement of the issues on appeal which the Appellants then intend to assert in the appeal; provided, any such list of issues on appeal shall not prevent the Appellants from asserting other issues on appeal, including the following:

   A. The Court improperly applied the law governing implied-in-fact contracts and quantum merit.

   B. The Court improperly concluded that Defendants were unjustly enriched despite Defendants having purchased the plant and equipment for its fair market value.

4. Has an order been entered sealing all or any portion of the record? **NO.**

5. (a) Is a reporter's transcript requested? **YES.**

   (b) The Appellants request the preparation of the following portions of the reporter's transcript:

   NOVEMBER 4, 5 and 10, 2010 COURT TRIAL

6. The Appellants request the following documents to be included in the Clerk's record in addition to those automatically included under Rule 28, I.A.R.:

A.	02-03-2010	Defendants' Motion to Dismiss and/or Motion for Summary Judgment;
B.	02-03-2010	Defendants' Memorandum in Support of Motion to Dismiss and/or Motion for Summary Judgment;
C.	03-23-2010	Memorandum in Opposition to Defendants' Motion to Dismiss and/or Motion for Summary Judgment;
D.	03-23-2010	Memorandum in Support of Motion to Amend Plaintiff's First Amended Complaint to Assert a Claim for Punitive Damages;
E.	03-23-2010	Motion to Continue Pursuant to IRCP 56f;
F.	03-23-2010	Minute Entry and Order on Motion to Dismiss;
G.	07-26-2010	Defendants Lawson and Zebe Reply Memorandum in Support of Motion to Dismiss/Motion for Summary Judgment;
H.	08-05-2010	Affidavit of Blake S. Atkin in Opposition to Defendants' Motion to Dismiss or for Summary Judgment;
I.	08-09-2010	Affidavit of Blake S. Atkin in Opposition to Defendants' Motion to Dismiss or for Summary Judgment;
J.	08-09-2010	Hearing result for Motion for Summary Judgment held 08-09-2010
K.	09-15-2010	Memorandum Decision and Order on Defendants' Motion for Summary Judgment;
L.	10-04-2010	Motion to Reconsider Damage Aspects of Decision dated 9-15-10;
M.	10-04-2010	Memorandum in Support of Defense Motion in Limine;
N.	10-04-2010	Second Affidavit of Gary L. Cooper;
O.	10-05-2010	Defense Motion in Limine;
P.	10-07-2010	Motion to Dismiss Counterclaim;
Q.	10-12-2010	Joint Pre-Trial Stipulation;
R.	10-12-2010	Motion to Reconsider Damage Aspects of Decision dated 9-15-10;
S.	10-18-2010	Memorandum in Opposition to Plaintiff's Motion for Reconsideration Re Damage Aspects of Decision Dated September 15, 2010;
T.	10-21-2010	Memorandum in Opposition to Defense Motion in Limine;
U.	10-29-2010	Hearing result for Motion held on 10-25-2010;
V.	11-01-2010	Trial Brief;
W.	11-03-2010	Designation of Testimony from the Deposition of Morris A. Farinella
X.	11-08-2010	Hearing Scheduled (Status Conference 11/08/2010);
Y.	11-08-2010	Hearing Scheduled (Jury Trial 11/10/2010);
Z.	11-16-2010	Hearing result for Jury Trial held on 01/11/2011;
AA.	11-16-2010	Hearing result for Jury Trial held on 11/04/2010;
BB.	11-16-2010	Court hearing held Court Reporter;
CC.	11-16-2010	Hearing result for Jury Trial held on 11/10/2010;
DD.	11-16-2010	Hearing result for Status Conference held on 11/08/2010;
EE.	11-16-2010	Minute Entry and Order; Court Trial held;
FF.	11-22-2010	Plaintiff's Designation of Portions of Deposition of Morris Farinella;

GG.	11-24-2010	Defense Objection to Plaintiff's Designation of Deposition Excerpts from the Deposition of Morris Farinella;
HH.	11-24-2010	Defense Proposed Findings of Fact, Conclusions of Law and Argument;
II.	11-26-2010	Plaintiff's Post Trial Brief;
JJ.	11-29-2010	Findings of Fact and Conclusions of Law;
KK.	12-08-2010	Defense Memorandum on Damage Claim;
LL.	12-08-2010	Plaintiff's Trial Memorandum Regarding the Admissibility of Bill to Dairy Systems Company;
MM.	12-08-2010	Reply Memorandum in Support of Motion to Reconsider Damage Aspects of Decision Dated September 15, 2010;
NN.	01-04-2011	Memorandum Decision on Motion for Attorney Fees and Costs.

7. I certify:

(a) That a copy of this Notice of Appeal has been served on each reporter of whom a transcript has been requested as named below at the address set out below:

Sheila Fish, Court Reporter
c/o District Court Clerk
624 E Center, Room 218
Pocatello, ID 83201

(b)(1) That the Clerk of the District Court has been paid the estimated fee for preparation of the reporter's transcript.

(c)(1) That the estimated fee for preparation of the Clerk's record has been paid.

(d)(1) That the Appellants filing fee has been paid.

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

DATED this 14th day of January, 2011.

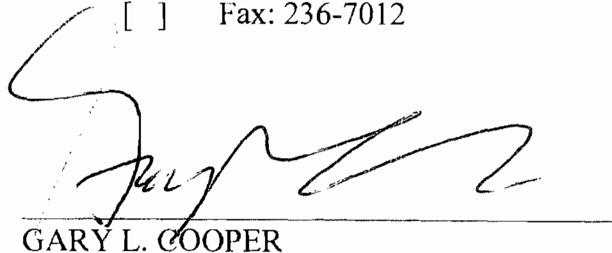
COOPER & LARSEN

GARY L. COOPER

CERTIFICATE OF SERVICE

I hereby certify that on the 14th day of January, 2011, I served a true and correct copy of the foregoing to:

Blake S. Atkin 7579 North Westside Hwy Clifton, ID 83228	[✓] U.S. mail [✓] Email: blake@atkinlawoffices.net [ ] Hand delivery [ ] Fax: 801-533-0380
Atkins Law Offices 837 South 500 West, Ste 200 Bountiful, UT 84010	[✓] U.S. mail [✓] Email: blake@atkinlawoffices.net [ ] Hand delivery [ ] Fax: 801-533-0380
John D. Bowers Bowers Law Firm PO Box 1550 Afton, WY 83110	[✓] U.S. mail [✓] Email: john@thebowersfirm.com [ ] Hand delivery [ ] Fax: 307-885-1002
Honorable Stephen S. Dunn District Judge 624 E Center, Room 220 Pocatello, ID 83201	[✓] U.S. mail [✓] Email: karlav@bannockcounty.us [ ] Hand delivery [ ] Fax: 236-7012



GARY L. COOPER

IN THE DISTRICT COURT OF THE SIXTH JUDICIAL DISTRICT OF THE

STATE OF IDAHO, IN AND FOR THE COUNTY OF BANNOCK

GAYLEN CLAYSON,)	
)	
Plaintiff-Counterdefendant-Respondent,)	Supreme Court No. 38471-2011
)	
vs.)	
)	CLERK'S CERTIFICATE OF APPEAL
DON ZEBE, RICK LAWSON, LAZE, LLC,)	
)	
Defendant-Counterclaimant-Appellant)	
)	
____________________________)	

RECEIVED IDAHO SUPREME COURT COURT OF APPEALS
2011 FEB -7 A 8: 52

Appealed from: Sixth Judicial District, Bannock County

Honorable Judge Stephen S. Dunn presiding

Bannock County Case No: CV-2009-2212-OC

Order of Judgment Appealed from: Memorandum Decision, Findings of Fact and Conclusions of Law filed the 6th day of December, 2010 and Judgment filed the 7th day of December, 2010.

Attorney for Appellant: Gary L. Cooper, COOPER & LARSEN, CHARTERED, Pocatello, Idaho.

Attorney for Respondent: Blake S. Atkin, ATKIN LAW OFFICES, Clifton, Idaho.

Appealed by: Don Zebe, Rick Lawson, and Laze, LLC.,

Appealed against: Gaylen Clayson

Notice of Appeal filed: January 14, 2011

Notice of Cross-Appeal filed: No

Appellate fee paid: Yes

Request for additional records filed: No

FILED - ORIGINAL
FEB - 7 2011
Supreme Court ___ Court of Appeals ___
Entered on ATS by DB

Request for additional reporter's transcript filed: No

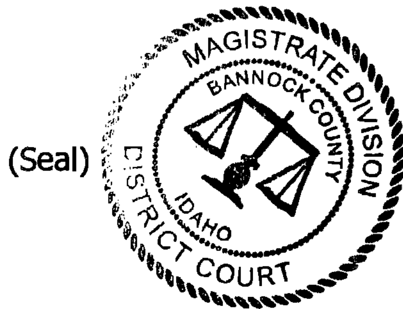
Name of Reporter: Sheila Fish

Was District Court Reporter's transcript requested? Yes

Estimated Number of Pages: More than 500

Dated February 4, 2011

DALE HATCH,
Clerk of the District Court

(Seal) 

By ____________
Deputy Clerk

IN THE DISTRICT OF THE SIXTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF BANNOCK

STATE OF IDAHO 2011 MAR 30 PM 12: 18

NOTICE

VS. BY________ DEPUTY

OF

LODGING

DON ZEBE, RICK LAWSON, AND LAZE, LLC.,

SUPREME COURT CASE NO. 38471-2011

DISTRICT COURT CASE NO. 2009-2212

The transcript in the above entitled matter consisting of 516 pages was lodged with the District Court Clerk at the Bannock County Courthouse in Pocatello, Idaho, on the 29th day of March, 2011.

The following hearings were lodged: November 4, 2011, Court Trial; November 5, 2011, Court Trial; November 10, 2011, Court Trial.

DATED this 29th day of March, 2011.

Via:

(XX) Hand-Delivery
( ) U.S. Mail
(XX) Electronic Copy to ISC/COA; BCCO; AG; SAPD

(Signature of Reporter)

SHEILA T. FISH, RPR, CSR
(Typed name of Reporter)

Cc:
Diane Cano, Bannock Co. Appellate Clerk
ISC/COA-Klondy L.
ISC/COA-Karel L.

IN THE DISTRICT COURT OF THE SIXTH JUDICIAL DISTRICT OF THE

STATE OF IDAHO, IN AND FOR THE COUNTY OF BANNOCK

GAYLEN CLAYSON,	)	
	)	Supreme Court No. 38471-2011
Plaintiff-Counterdefendant-Respondent,	)	
	)	
vs.	)	CLERK'S CERTIFICATE
	)	
DON ZEBE, RICK LAWSON, LAZE, LLC,	)	
	)	
Defendant-Counterclaimant-Appellant,	)	
______________________________________	)	

I, DALE HATCH, Clerk of the District Court of the Sixth Judicial District, of the State of Idaho, in and for the County of Bannock, do hereby certify that the above and foregoing record in the above-entitled cause was compiled and bound under my direction as, and is a true, full, and correct record of the pleadings and documents as are automatically required under Rule 28 of the Idaho appellate Rules.

I do further certify that all exhibits, offered or admitted in the above-entitled cause, will be duly lodged with the Clerk of the Supreme Court along with the court reporter's transcript and the clerk's record as required by Rule 31 of the Idaho Appellate Rules.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said Court at Pocatello, Idaho, this 1 day of April, 2011.

DALE HATCH,
Clerk of the District Court
Bannock County, Idaho Supreme Court

(Seal)

By ______________________
Deputy Clerk

IN THE DISTRICT COURT OF THE SIXTH JUDICIAL DISTRICT OF THE

STATE OF IDAHO, IN AND FOR THE COUNTY OF BANNOCK

GAYLEN CLAYSON,	)	Supreme Court No. 38471-2011
Plaintiff-Counterdefendant-Respondent,	)	
vs.	)	CERTIFICATE OF EXHIBITS
DON ZEBE, RICK LAWSON, LAZE, LLC,	)	
Defendant-Counterclaimant-Appellant,	)	

I, DALE HATCH, the duly elected, qualified and acting Clerk of the District Court of the Sixth Judicial District of the State of Idaho, in and for the County of Bannock, do hereby certify that the following are the original exhibits marked for identification and introduced in evidence at trial of the above and foregoing cause, to wit:

DEFENDANT'S EXHIBITS

1. Exhibit 5A Ferinella Desposition.
2. Exhibit 11 IRE 1006, Summary of Clayson Invoices paid by SVC.
3. Exhibit 11-A Bills paid through Nov. 25, 2008.

PLAINTIFF'S EXHIBITS

1. Exhibit D Contract to Buy Real Estate.
2. Exhibit G Pages 1-4 of Invoices and Statements of Dairy Systems.

3. Exhibit I Star Valley Cheese business plan.

4. Exhibit J Article of Organization.

5. Exhibit K Annual Report from Milk Market Management.

6. Exhibit N Addendum A1 Assignment.

7. Exhibit Q Financial from 12/31/08 to 6/30/09, pages 7 and 8, and last two pages.

8. Exhibit S Email from Don Zebe date 2/25/09.

9. Exhibit U Email from Don Zebe dated 1/31/09.

10. Exhibit V Email from Don Zebe dated 2/19/09.

11. Exhibit W Email from Don Zebe dated 2/25/09.

12. Exhibit X Email form Don Zebe dated 3/7/09.

13. Exhibit CC Affidavit of Jeff Randall.

I FURTHER CERTIFY that the above exhibits are attached to, and made a part of, the original transcript on appeal in said cause.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said Court, this the __1__ day of __April__, 2011.

DALE HATCH, Clerk of the District Court
Bannock County, State of Idaho

(Seal)

By:
Deputy Clerk

IN THE DISTRICT COURT OF THE SIXTH JUDICIAL DISTRICT OF THE

STATE OF IDAHO, IN AND FOR THE COUNTY OF BANNOCK

GAYLEN CLAYSON,	)	Supreme Court No. 38471-2011
Plaintiff-Counterdefendant-Respondent,	)	
vs.	)	CERTIFICATE OF SERVICE
DON ZEBE, RICK LAWSON, LAZE, LLC,	)	
Defendant-Counterclaimant-Appellant.	)	

I, DALE HATCH, Clerk of the District Court of the Sixth Judicial District, of the State of Idaho, in and for the County of Bannock, do hereby certify that I have personally served or mailed, by United States mail, one copy of the REPORTER'S TRANSCRIPT and CLERK'S RECORD to each of the Attorneys of Record in this cause as follows:

Gary L. Cooper
COOPER & LARSEN, CHARTERED
Post Office Box 4229
Pocatello, Idaho 83205-4229

Blake S. Atkin
ATKIN LAW OFFICES
7579 North Westside Hwy
Clifton, Idaho 83228

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said Court at Pocatello, Idaho, this 8 day of April, 2011.

DALE HATCH,
Clerk of the District Court
Bannock County, Idaho Supreme Court

(Seal)

By [signature]
Deputy Clerk