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Boise Mode, LLC v. Donahoe Pace & Partners Clerk's Record Dckt. 39229

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IN THE SUPREME COURT OF THE STATE OF IDAHO

BOISE MODE, LLC, an Illinois limited liability company, successor-in-interest of MODE BUILDING LIMITED PARTNERSHIP, an Idaho limited partnership,

Plaintiff-Counterdefendant-Respondent,

vs.

DONAHOE PACE & PARTNERS LTD, an Idaho corporation,

Defendant-Counterclaimant-Appellant,

and

TIMOTHY PACE,

Defendant-Appellant.

Supreme Court Case No. 39229

CLERK'S RECORD ON APPEAL

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

HONORABLE RONALD J. WILPER

MICHAEL E. KELLY

ATTORNEY FOR APPELLANT

BOISE, IDAHO

STEVEN F. SCHOSSBERGER

ATTORNEY FOR RESPONDENT

BOISE, IDAHO

Boise Mode LLC vs. Donahoe Pace & Partners Ltd, Timothy Pace

Date	Code	User		Judge
1/20/2010	NCOC	CCHOLMEE	New Case Filed - Other Claims	Ronald J. Wilper
	COMP	CCHOLMEE	Complaint Filed	Ronald J. Wilper
	SMFI	CCHOLMEE	(2) Summons Filed	Ronald J. Wilper
2/4/2010	AFOS	CCLATICJ	(2) Affidavit Of Service 01/27/10	Ronald J. Wilper
2/11/2010	ANSW	CCHOLMEE	Answer Counterclaim and Demand for Jury Trial (Kelly for Donahoe Pace & Partners LTD & Timothy Pace)	Ronald J. Wilper
2/23/2010	ANSW	CCSIMMSM	Answer to Counterclaim (Schossberger for Boise Mode, LLC)	Ronald J. Wilper
3/1/2010	NOTC	DCJOHNSI	Notice of Status Conf	Ronald J. Wilper
	HRSC	DCJOHNSI	Hearing Scheduled (Status 04/06/2010 04:30 PM)	Ronald J. Wilper
3/23/2010	STIP	CCWRIGRM	Stipulation for Scheduling and Planning	Ronald J. Wilper
3/29/2010	HRSC	DCABBOSM	Hearing Scheduled (Jury Trial 12/08/2010 09:00 AM) 3 days	Ronald J. Wilper
	HRSC	DCABBOSM	Hearing Scheduled (Civil Pretrial Conference 11/30/2010 03:30 PM)	Ronald J. Wilper
	ORDR	DCABBOSM	Order Setting Proceedings and Trial	Ronald J. Wilper
4/8/2010	MOTN	MCBIEHKJ	Motion to Disqualify Judge Judd	Ronald J. Wilper
	NOTS	MCBIEHKJ	Notice Of Service	Ronald J. Wilper
4/12/2010	ORDR	DCJOHNSI	Order to Disqualify-Judd	Ronald J. Wilper
5/11/2010	NOTS	CCNELSRF	(2) Notice Of Service	Ronald J. Wilper
	NOTC	CCNELSRF	Notice of Compliance	Ronald J. Wilper
6/24/2010	NOSV	CCGARDAL	Notice Of Service	Ronald J. Wilper
7/26/2010	NOTS	CCLATICJ	Notice Of Service	Ronald J. Wilper
7/30/2010	STIP	CCAMESLC	Stipulation to Vacate and Reschedule Trial Date	Ronald J. Wilper
8/6/2010	NOTS	MCBIEHKJ	Notice Of Service	Ronald J. Wilper
8/9/2010	ORDR	DCJOHNSI	Order Granting Stipulation to Reset Trial	Ronald J. Wilper
8/10/2010	ORDR	DCABBOSM	Order Setting Proceedings and Trial	Ronald J. Wilper
	HRSC	DCABBOSM	Hearing Scheduled (Jury Trial 02/23/2011 09:00 AM)	Ronald J. Wilper
	HRSC	DCABBOSM	Hearing Scheduled (Civil Pretrial Conference 02/15/2011 03:30 PM)	Ronald J. Wilper
10/27/2010	NOTD	CCAMESLC	Notice Of Taking Deposition	Ronald J. Wilper
11/24/2010	MOSJ	CCMASTLW	Motion For Summary Judgment on Counterclaimant's Counterclaims	Ronald J. Wilper
	MEMO	CCMASTLW	Memorandum in Support	Ronald J. Wilper
	NOHG	CCMASTLW	Notice Of Hearing (12/22/10 @ 3PM)	Ronald J. Wilper
	HRSC	CCMASTLW	Hearing Scheduled (Motion for Summary Judgment 12/22/2010 03:00 PM) Mo/SJ on Counterclaimant's Counterclaims	Ronald J. Wilper

Boise Mode LLC vs. Donahoe Pace & Partners Ltd, Timothy Pace

Date	Code	User		Judge
11/24/2010	MOTN	CCMASTLW	Motion for Summary Judgment on the Verified Complaint	Ronald J. Wilper
	AFFD	CCMASTLW	Affidavit of Christopher Kiefor CPA	Ronald J. Wilper
	AFFD	CCMASTLW	Affidavit of David Baum	Ronald J. Wilper
	AFFD	CCMASTLW	Affidavit of Angela Aeschliman CPM	Ronald J. Wilper
	AFFD	CCMASTLW	Affidavit of Steven Schossberg	Ronald J. Wilper
	MEMO	CCMASTLW	Memorandum in Support	Ronald J. Wilper
	NOHG	CCMASTLW	Notice Of Hearing (12/22/10 @ 3PM)	Ronald J. Wilper
12/3/2010	AFOS	CCSULLJA	(2) Affidavit Of Service (11/15/10)	Ronald J. Wilper
12/8/2010	MOTN	CCBOYIDR	Motion for Continuance	Ronald J. Wilper
	AFFD	CCBOYIDR	Affidavit in Support of Motion for Continuance	Ronald J. Wilper
12/15/2010	AFFD	CCHOLMEE	Affidavit of Steven F Schossberger in Opposition to Motion	Ronald J. Wilper
	MEMO	CCHOLMEE	Memorandum in Opposition to Counterclaimants Motion for Continuance	Ronald J. Wilper
12/21/2010	REPL	MCBIEHKJ	Reply to Memorandum in Opposition to Motion for Continuance	Ronald J. Wilper
	AFFD	CCLATICJ	Affidavit of Service of Subpoena	Ronald J. Wilper
	NOHG	CCLATICJ	Notice Of Hearing re Motion for Continuance (12/22/10 @ 3 pm)	Ronald J. Wilper
	MOTN	CCLATICJ	Motion to Shorten Time on Boise Mode's Motion to Strike in Part Donahoe Pace's Reply Memorandum re Motion for Continuance Pursuant to IRCP 56(f)	Ronald J. Wilper
	MOTN	CCLATICJ	Motion to Strike in Part Defendant Donahoe Pace & Partners' Reply to Memorandum in Opposition to Defendants' Motion for Continuance	Ronald J. Wilper
	NOHG	CCLATICJ	Notice Of Hearing (Motion to Strike and Disregard) (12/22/10 @ 3 pm)	Ronald J. Wilper
12/22/2010	DCHH	DCJOHNSI	Hearing result for Motion for Summary Judgment held on 12/22/2010 03:00 PM: District Court Hearing Held Court Reporter: cromwell Number of Transcript Pages for this hearing estimated: Mo/SJ on Counterclaimant's Counterclaims; Mo/SJ on Verified Complaint and Motion for Continuance and Motion to Strike-50	Ronald J. Wilper
12/27/2010	ORDR	DCJOHNSI	Order Granting Motions for Summary Judgment	Ronald J. Wilper
1/5/2011	JDMT	CCNELSRF	Judgment	Ronald J. Wilper
	CDIS	CCNELSRF	Civil Disposition entered for: Donahoe Pace & Partners Ltd., Defendant; Pace, Timothy, Defendant; Boise Mode LLC, Plaintiff. Filing date: 1/5/2011	Ronald J. Wilper
	STAT	DCJOHNSI	STATUS CHANGED: closed	Ronald J. Wilper
1/11/2011	MOTN	CCRANDJD	Motion to Stay Execution of Judgment	Ronald J. Wilper

Boise Mode LLC vs. Donahoe Pace & Partners Ltd, Timothy Pace

Date	Code	User		Judge
1/12/2011	MEMO	CCMASTLW	Memorandum of Costs and Attorney Fees	Ronald J. Wilper
1/13/2011	ORDR	DCJOHNSI	Order Granting Motion to Stay Execution of Judgment	Ronald J. Wilper
1/19/2011	MOTN	CCNELSRF	Motion to Amend Judgment	Ronald J. Wilper
	MEMO	CCNELSRF	Memorandum in Support of Motion to Amend Judgment	Ronald J. Wilper
	NOTH	CCNELSRF	Notice Of Hearing	Ronald J. Wilper
	HRSC	CCNELSRF	Hearing Scheduled (Motion to Amend 02/28/2011 11:30 AM)	Ronald J. Wilper
	STAT	CCNELSRF	STATUS CHANGED: Closed pending clerk action	Ronald J. Wilper
1/26/2011	OBJE	MCBIEHKJ	Objection to Memorandum of Costs and Fees	Ronald J. Wilper
	HRSC	MCBIEHKJ	Notice of Hearing Scheduled (Objection to Attorney Fees and Costs 03/07/2011 01:30 PM)	Ronald J. Wilper
2/8/2011	AMEN	CCLATICJ	Amended Notice of Hearing re Defendants' Objection to Plaintiff's Memorandum of Attorney Fees (02/28/11 @ 11:30 am)	Ronald J. Wilper
2/10/2011	HRVC	CCDWONCP	Hearing result for Objection to Attorney Fees and Costs held on 03/07/2011 01:30 PM: Hearing Vacated	Ronald J. Wilper
	HRVC	CCDWONCP	Hearing result for Motion to Amend held on 02/28/2011 11:30 AM: Hearing Vacated and Defendants' Objection to Plaintiff's Memorandum of Attorney Fees	Ronald J. Wilper
	HRSC	CCDWONCP	Amended Notice of Hearing (02/28/2011 03:00 PM) Defendants/Counter-Claimant Donahoe Pace & Partners LTD and Timothy Pace's Motion to Amend Judgment	Ronald J. Wilper
	HRSC	CCDWONCP	Amended Notice of Hearing (03/09/2011 04:00 PM) Defendants/Counter-Claimant Donahoe Pace & Partners LTD and Timothy Pace's Objection to Boise Mode LLC's Verified Memorandum/Costs and Attorney Fees	Ronald J. Wilper
2/18/2011	MISC	CCMASTLW	Plaintiff's Response to Motion to Amend Judgment	Ronald J. Wilper
2/28/2011	DCHH	DCJOHNSI	Hearing result for Motion to Amend held on 02/28/2011 03:00 PM: District Court Hearing Held Court Reporter: cromwell Number of Transcript Pages for this hearing estimated: Defendants/Counter-Claimant Donahoe Pace & Partners LTD and Timothy Pace's Motion to Amend Judgment-50	Ronald J. Wilper
3/2/2011	ORDR	DCJOHNSI	Order Granting Motion	Ronald J. Wilper
4/14/2011	MOTN	CCRANDJD	Motion to Compel	Ronald J. Wilper
	NOHG	CCRANDJD	Notice Of Hearing re Motion to Compel (5.23.11@11am)	Ronald J. Wilper

Boise Mode LLC vs. Donahoe Pace & Partners Ltd, Timothy Pace

Date	Code	User		Judge
4/14/2011	HRSC	CCRANDJD	Hearing Scheduled (Motion to Compel 05/23/2011 11:00 AM)	Ronald J. Wilper
	AFSM	CCSWEECE	Affidavit Of Counsel In Support Of Defendants/Counterclaimants Motion To Compel	Ronald J. Wilper
4/27/2011	MEMO	CCHEATJL	Boise Mode LLC's Memorandum In Support Of Motion For Reconsideration And Further Consideration	Ronald J. Wilper
	NOHG	CCHEATJL	Notice Of Hearing RE: Motion For Reconsideration And Further Consideration 5.23.11 @11:00am	Ronald J. Wilper
	MOTN	CCPINKCN	Motion for Reconsideration and Further Consideration RE Plaintiff/Counterdefendants' Motions for Summary Judgment	Ronald J. Wilper
5/16/2011	MISC	CCMASTLW	Response to Motion for Reconsideration	Ronald J. Wilper
	AFFD	CCBOYIDR	Affidavit in Opposition to Motion to Compel	Ronald J. Wilper
	NOSV	CCBOYIDR	Notice Of Service	Ronald J. Wilper
	MEMO	CCPINKCN	Plaintiff/Counterdefendant's Memorandum in Opposition to Motion to Compel	Ronald J. Wilper
5/17/2011	AFFD	CCLATICJ	Second Affidavit of Steven F. Schossberger in Opposition to Defendants/Counterclaimants' Motion to Compel	Ronald J. Wilper
	NOTS	CCLATICJ	Notice Of Service	Ronald J. Wilper
5/18/2011	RPLY	CCWRIGRM	Reply in Support of Boise Mode LLCs Motion for Reconsideration and Further Reconsideration	Ronald J. Wilper
5/20/2011	RSPN	CCWRIGRM	Further Response to Plaintiff/Counterdefendant Boise Mode LLCs Motion for Reconsideration and Further Consideration	Ronald J. Wilper
5/23/2011	DCHH	DCOATMAD	Hearing result for Motion to Compel held on 05/23/2011 11:00 AM: District Court Hearing Held Court Reporter: Diane Cromwell Number of Transcript Pages for this hearing estimated: less than 25 pgs	Ronald J. Wilper
6/22/2011	ORDR	DCJOHNSI	Order Granting Motion for Reconsideration and Further Consideration	Ronald J. Wilper
7/13/2011	MEMO	CCWRIGRM	Boise Mode LLCs Verified Memorandum of Costs and Attorney Fees re Order Granting Plaintiffs Motion for Reconsideration and Further Consideration	Ronald J. Wilper
7/26/2011	OBJC	CCSULLJA	Defendants'/Counter-claimant's Objection to Boise Mode LLC's Verified Memorandum of Costs and Attorney Fees RE Order Granting Plaintiff's Motion for Reconsideration and Further Consideration	Ronald J. Wilper
7/27/2011	MOTN	CCMASTLW	Motion to Disallow Costs	Ronald J. Wilper
	NOHG	CCMASTLW	Notice Of Hearing	Ronald J. Wilper
	HRSC	CCMASTLW	Hearing Scheduled (Hearing Scheduled 08/15/2011 11:00 AM) Mo/Disallow Costs	Ronald J. Wilper

Boise Mode LLC vs. Donahoe Pace & Partners Ltd, Timothy Pace

Date	Code	User		Judge
8/3/2011	MISC	CCMASTLW	Response to Motion to Disallow Costs	Ronald J. Wilper
8/15/2011	DCHH	DCJOHNSI	Hearing result for Hearing Scheduled scheduled on 08/15/2011 11:00 AM: District Court Hearing Held Court Reporter: cromwell Number of Transcript Pages for this hearing estimated: Mo/Disallow Costs-50	Ronald J. Wilper
	STAT	DCJOHNSI	STATUS CHANGED: closed	Ronald J. Wilper
8/17/2011	ORDR	DCJOHNSI	Order Granting/Denying Motion to Disallow Costs	Ronald J. Wilper
8/26/2011	JDMT	DCJOHNSI	Judgment	Ronald J. Wilper
9/15/2011	AFFD	CCBOYIDR	Affidavit of Computation in Support of Writ of Execution	Ronald J. Wilper
9/16/2011	EXAC	CCLATICJ	Execution Issued - Ada Co.	Ronald J. Wilper
9/30/2011	APSC	CCTHIEBJ	Appealed To The Supreme Court	Ronald J. Wilper
	MISC	DCJOHNSI	Temporary Stay on Execution of Judgment	Ronald J. Wilper
11/29/2011	SRWW	CCTOLEIL	Sheriffs Return On Writ & Writ	Ronald J. Wilper
12/14/2011	NOTC	CCTHIEBJ	Notice Of Transcript Lodged - Supreme Court Docket No. 39229	Ronald J. Wilper

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A.M. _____ P.M.

JAN 20 2010

J. DAVID NAVARRO, Clerk
By E. HOLMES
DEPUTY

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Attorneys for Plaintiff Boise Mode, LLC, successor-in-interest to Mode Building Limited Partnership

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

BOISE MODE, LLC, an Illinois limited liability company, successor-in-interest to Mode Building Limited Partnership, an Idaho limited partnership,
Plaintiff,
vs.
DONAHOE PACE & PARTNERS LTD, an Idaho corporation; and TIMOTHY PACE,
Defendants.

Case No. **CV OC 1001093**

VERIFIED COMPLAINT

Fee Category: A
Filing Fee: \$88.00

COMES NOW, the above-named Plaintiff, Boise Mode, LLC, an Illinois limited liability company, successor-in-interest to Mode Building Limited Partnership, an Idaho limited partnership, by and through its counsel of record, Hawley Troxell Ennis & Hawley LLP, and for claims against Defendants, alleges, avers and states as follows:

CM

**GENERAL ALLEGATIONS
APPLICABLE TO ALL CLAIMS FOR RELIEF**

I.

PARTIES

1. Plaintiff Boise Mode, LLC (“Plaintiff”) is, and at all times relevant hereto, was an Illinois limited liability company and the successor-in-interest to Mode Building Limited Partnership, an Idaho limited partnership.

2. Defendant Donahoe Pace & Partners, Ltd. (“Donahoe”) is, and at all times relevant hereto, was an Idaho corporation with its principal place of business in Ada County, Idaho.

3. Defendant Timothy Pace (“Pace”) is, and at all times relevant hereto, was an individual and upon information and belief is a resident of Ada County, Idaho.

II.

JURISDICTION AND VENUE

4. This Court has jurisdiction pursuant to Idaho Code § 1-705, and the matter in controversy, exclusive of interest and costs, exceeds the sum of \$10,000.00. Venue is proper pursuant to Idaho Code § 5-404.

III.

FACTUAL ALLEGATIONS

5. Plaintiff is the owner of 800 West Idaho Street, Suite 350, Boise, Idaho 83702. Donahoe rented approximately 6,360 square feet of interior space of Suite 350 and 549 square feet of lower level storage space of Suite B10 of 800 West Idaho Street, Boise, Idaho 83702, pursuant to that certain Office Lease Agreement dated November 3, 2006, for a term until

May 31, 2010; with monthly base rent as provided in Exhibit B to the Office Lease Agreement as follows:

03/01/07 – 02/29/08:	\$14/s.f.	\$89,040/year	\$7,420/mo;
03/01/08 – 02/28/09:	\$14.50/s.f.	\$92,220/year	\$7,685/mo;
03/01/09 – 02/28/10:	\$15/s.f.	\$95,400/year	\$7,950/mo;
03/01/10 – 05/31/10:	\$15.50/s.f.	\$98,580/year	\$8,215/mo,

plus additional rent, including but not limited to the tenant's share of operating costs and the CAM/tax/insurance estimates. A true and correct copy of the November 3, 2006 Office Lease Agreement (the "Lease") is attached hereto as Exhibit A, and incorporated herein by reference.

6. As a material term of the Lease, Pace personally guaranteed and remains liable for the full payment of all sums due and owing pursuant to the Lease under the Personal Guaranty of Lease signed by Pace on November 3, 2006, attached as Exhibit H to the Lease.

7. As of December 2008, Defendants Donahoe and Pace have failed and refused to make the required rent, operating costs and charges due and owing under the terms of the Lease. Thereafter, all notices required by law have been served upon the Defendants in the required manner.

8. On November 9, 2009, Plaintiff, by and through its counsel, sent a letter to Defendants Donahoe and Pace confirming that Donahoe had abandoned the premises located at 800 Idaho Street, Suite 350, Boise, Idaho, and notifying Defendants Donahoe and Pace that pursuant to Section 20.3, the Lease remains in effect and Defendants Donahoe and Pace are obligated to pay all rent and other charges due under the Lease until the landlord has re-leased the premises. A true and correct copy of the letter dated November 9, 2009, is attached hereto as Exhibit B, and incorporated herein by reference.

9. Defendants have failed and refused to pay the monthly rent, operating costs and other charges which are due, payable and delinquent for the months of December 2008 through January 2010. The terms of the Lease run through May of 2010. As a direct and proximate result of Defendants Donahoe's and Pace's default and breach of the Lease and Personal Guaranty, Plaintiff is entitled to recover all rent and other monetary charges as damages under the Lease.

10. Plaintiff has attempted to mitigate its damages and locate a new tenant for the space identified in the Lease, but has been unsuccessful.

**FIRST CAUSE OF ACTION
(Breach of Contract)**

11. Plaintiff realleges and incorporates by reference paragraphs 1 through 10 as if set forth in full herein.

12. Plaintiff has performed all of its duties owing to the Defendants under the terms of the Lease.

13. Defendants have failed to fulfill their obligations under the terms of the Lease.

14. Defendants' breach includes their failure to pay all sums which are due, payable and delinquent under the terms of the Lease.

15. As a direct and proximate result of Defendants' breach of contract, Plaintiff has suffered damages in an amount to be proven to the Court, which sum is in excess of \$10,000.00.

**SECOND CAUSE OF ACTION
(Breach of the Implied Covenant of Good Faith and Fair Dealing)**

16. Plaintiff realleges and incorporates by reference paragraphs 1 through 15 as if set forth in full herein.

17. There is implied in the Lease between Plaintiff and the Defendants a covenant of good faith and fair dealing on the part of the Defendants to refrain from denying Plaintiff all benefits that inure to it under the Lease.

18. Through the actions alleged above, Defendants have materially breached the covenant of good faith and fair dealing by denying Plaintiff the benefit of the Lease, including the payment of all sums which are due, payable and delinquent under the terms of the Lease.

19. As a direct and proximate result of Defendants' breach of the covenant of good faith and fair dealing, Plaintiff has suffered damages in an amount to be proven to the Court.

**THIRD CAUSE OF ACTION
(Breach of Personal Guaranty of Lease)**

20. Plaintiff realleges and incorporates by reference paragraphs 1 through 19 as if set forth in full herein.

21. As a condition of the Lease, Defendant Pace agreed to personally guarantee the performance of all obligations and duties owed under the Lease, including but not limited to, timely payment of all amounts due Plaintiff. Defendants have not made all of the required payments under the Lease since December 2008, and said payments are due, payable and delinquent under the Lease and Personal Guaranty.

22. Defendant Pace, as guarantor, is personally, jointly and severally liable for such payments. Defendant Pace, as guarantor, is in breach of the Lease and Personal Guaranty for his failure to pay the financial obligations due and owing Plaintiff.

23. Plaintiff is entitled to damages in an amount to be proven to the Court.

ATTORNEY FEES AND COSTS

Plaintiff has retained the law firm of Hawley Troxell Ennis & Hawley LLP in order to represent its interest in this matter, and it is entitled to recover its reasonable costs and attorney

fees incurred in this matter pursuant to the Lease and Personal Guaranty, Idaho Code § 12-120(3), Idaho Code § 12-121, and I.R.C.P. Rule 54, *et seq.*

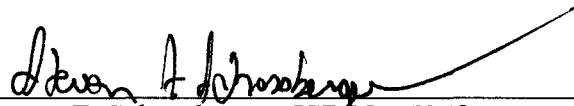
PRAYER FOR RELIEF

WHEREFORE, Plaintiff prays for entry of judgment against the Defendants as follows:

1. For judgment awarding damages to Plaintiff in an amount to be proven to the Court;
2. For an award of reasonable costs and attorney fees; and
3. For such other and further relief as the Court deems just and proper.

DATED THIS 20 day of January, 2010.

HAWLEY TROXELL ENNIS & HAWLEY LLP

By 
Steven F. Schossberger, ISB No. 5358
Attorneys for Plaintiff Boise Mode, LLC,
successor-in-interest to Mode Building Limited
Partnership

MODE BUILDING

Boise, Idaho

OFFICE LEASE AGREEMENT

between

BOISE MODE, LLC,
an Illinois limited liability company

as Landlord

and

Donahoe Pace & Partners, Ltd., an Idaho corporation

as Tenant

Dated: November 3, 2006

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OFFICE LEASE AGREEMENT

LEASE OF SPACE IN: Mode Building, 8th & Idaho Streets
Boise, Idaho 83702

DATED AS OF: November 3, 2006

ARTICLE 1 - TERMS DEFINED

1.1 **LANDLORD:** Boise Mode, LLC, an Illinois limited liability company

1.2 **LANDLORD'S ADDRESS:** 1030 W. Chicago Ave., Suite 300
Chicago, IL 60622
Fax: 312-628-8125
Attn: David Baum

With a copy to:

Baum Brothers, L.L.C.
1030 W. Chicago Ave., Suite 300
Chicago, IL 60622
Fax: 312-628-8255
Attn: Brian L. Howard

1.3 **TENANT:** Donahoe Pace & Partners, Ltd., an Idaho corporation

1.3a **GUARANTOR:** Timothy Pace

1.4 **TENANT'S ADDRESS:** 800 West Idaho St., Suite 350
Boise, Idaho 83702

14a **TENANT'S TRADE NAME:** Donahoe Pace & Partners, Ltd.

1.5 **PREMISES ADDRESS:** 800 West Idaho St., Suite 350
Boise, Idaho 83702

STORAGE ADDRESS: 800 West Idaho St.
Lower Level, Suite B10
Boise, Idaho 83702

1.6 TENANT'S APPROXIMATE FLOOR SPACE (SQ. FT.):

OFFICE SPACE: 6,360 s.f. (Suite 350)

STORAGE SPACE: 549 s.f. (lower level, Suite B10)

1.7 TENANT'S SHARE OF HEREINAFTER DEFINED OPERATING COSTS (PERCENT): 17.9% [See Article 4.2]

TENANT'S SHARE OF TAXES: 17.9% [See Article 7.1].

6,360/35,512 = 17.9%

1.8 PERCENTAGE RENT: N/A

1.9 OFFICE SPACE TERM: December 1, 2006 – May 31, 2010, plus the Option Term if exercised

STORAGE SPACE TERM December 1, 2006 – December 31, 2007

1.10 ESTIMATED COMMENCEMENT DATE:

OFFICE: December 1, 2006 (Lease Commencement and Occupancy);
March 1, 2007 (Rent Commencement);

STORAGE: December 1, 2006 (Lease Commencement and Occupancy),
February 1, 2007 (Rent Commencement)

1.11 BASE RENT: SEE EXHIBIT "B"

1.12 OPTION TO EXTEND: SEE EXHIBIT "D"

1.13 SECURITY DEPOSIT DUE UPON LEASE AGREEMENT: \$7,420.00

1.14 USE OF PREMISES: General Office Uses

1.15 MINIMUM HOURS OF OPERATION: N/A

1.16 SERVICES PROVIDED: Utilities

1.17 BASE YEAR: 2007

ADDENDUM: Special provisions. [See Addendum]

EXHIBITS INDEX:

- EXHIBIT A = SCHEMATIC DEPICTION OF LOCATION OF PREMISES
AND FLOOR PLAN
- EXHIBIT B = BASE RENT
- EXHIBIT C = IMPROVEMENTS
- EXHIBIT D = OPTION TO EXTEND
- EXHIBIT E = BUILDING RULES AND REGULATIONS

- EXHIBIT F = INTENTIONALLY OMITTED
- EXHIBIT G = APPROVED SIGNS
- EXHIBIT H = FORM OF GUARANTY

ARTICLE 2 - PREMISES

2.1 **PREMISES.** Landlord hereby leases to Tenant and Tenant hereby leases from Landlord those certain Premises (the "Premises") situated in the County of Ada, State of Idaho, which consists of the approximate square footage specified in Article 1.6, which such Premises are located at the address specified in Article 1.5 and are located within a Building as shown on Exhibit A hereto in schematic form. The Premises extends to all ceilings, floors, doors, glass and walls enclosing such square footage. The Building, of which the Premises is a portion, together with the common areas as hereinafter defined, are collectively referred to herein as the "Facility." Landlord reserves the right to affect such other tenancies in the Facility as Landlord, in its sole discretion, deems appropriate; and Tenant does not rely on Landlord's leasing to any specific tenant, or to any number of tenants, any space in the Facility. To Landlord's actual knowledge, the Premises were measured according to BOMA standards (Landlord's knowledge deemed to be the actual knowledge of David Baum, without further inquiry or investigation).

2.2 **IMPROVEMENTS.** The respective obligations of Landlord and Tenant to perform work and supply material and labor to prepare the Premises for occupancy are set forth in Exhibit C attached hereto. Landlord and Tenant shall expend all funds and do all acts required of them in Exhibit C and shall have the work performed promptly and diligently in a workmanlike manner.

(a) Landlord represents that to its actual knowledge, the common areas of the Building generally complies with the Americans With Disability Act of 1990 (the "ADA"), provided, however, Landlord may qualify and utilize any hardship exemption available with respect to the Premises. The specific application of such law to the Premises depends to a great extent upon the uses to which the Premises are to be used by the specific Tenants and users of the Premises. Any additional improvements to the Premises required by the operations of Tenant or by the use of the Premises by the customers and invitees of Tenant, shall be the responsibility of Tenant. Tenant shall, at all times during the terms of this Lease, at Tenant's sole cost and expense, maintain and keep the Premises in full compliance with the ADA. Landlord shall be responsible to ensure that the Building Common Area is in compliance with the provisions of ADA.

2.3 **PARKING.** Tenant's lease of the Premises is without any parking provided. Tenant, its employees, customers and invitees shall be required to use the public parking facilities and other legal parking areas in the downtown area.

ARTICLE 3 - TERM

3.1 **LEASE TERM.** The term of this Lease shall be as specified in Article 1.9 above and Exhibit B attached hereto ("Lease Term"). Notwithstanding that the Lease Term is to commence in the future, this is a binding and enforceable agreement from the date of execution by the parties.

3.2 **COMMENCEMENT.** This Lease shall be effective and shall be a binding and enforceable agreement upon the date and year first above written and each of the parties shall have all rights and remedies at law for any breach or anticipatory breach hereof. The term shall

commence on December 1, 2006 and Tenant's obligation to pay rent shall commence March 1, 2007. The rent shall be paid in advance in equal monthly installments on the first day of each and every month. Rent for any partial month shall be prorated.

ARTICLE 4 - RENT

4.1 **BASE RENT.** Tenant shall pay to Landlord as monthly Base Rent for the Premises the amount specified in Article 1.11, which amount shall be paid in advance on the first day of each calendar month from March 1, 2007 and thereafter throughout the term of the Lease; All rent to be paid by Tenant to Landlord under this Lease shall be paid in lawful money of the United States of America and shall be paid at such place or places as may be designated from time to time by Landlord. Except as specifically provided herein, there shall be no deduction, offset or abatement for any reason of the rent or any money payable by Tenant to Landlord. The term "Rent" shall include Base Rent, Additional Rent and any other sums or amounts due Landlord from Tenant.

4.2 **FULL SERVICE LEASE - ADDITIONAL RENT.** This Lease is a full service Lease and Landlord shall provide, subject to Articles 4.3, 4.4 and Article 9 hereof, those basic services to the Premises and the Facility that are customary to similar office buildings in the vicinity, including electricity for lighting and low power usage office machines; water and sewer; and mechanical, heating, cooling and ventilation. The cost for these basic services shall be included in the Base Rent as it may be adjusted from time to time. Base Rent shall not include costs for Janitorial Services, which shall be the responsibility of Tenant. When applicable, as provided below, Tenant shall pay as additional rent Tenant's share, as such share is defined in Article 1.7, of all Taxes and Operating Costs, each as hereinafter defined, to the extent that such costs or taxes exceed the base amount of operating costs or taxes paid or incurred by Landlord during the Base Year ("Additional Rent").

4.3 **OPERATING COSTS.**

(a) For the purpose of this Lease, the term "operating costs" shall include all of Landlord's costs of ownership, operation, management, and maintenance of the Facility (including the Common Areas), as determined by Landlord in accordance with generally accepted accounting practices, and shall include the following costs, by way of illustration, but not as limitation thereto: license, permit and inspection fees; water and sewer charges; ; waste disposal, including providing a dumpster for the use of all tenants in the Building; heat, electric, gas, light and other utilities and power; any costs or fees imposed upon the Building, Facility or Landlord by any duly recorded declarations of restrictions and covenants, recorded maintenance agreements, or associations organized for the maintenance of property of which the Facility is a part or it served by; cleaning services, including replacement of light bulbs, starters, ballast, servicing and maintenance of mechanical equipment such as elevators, plumbing, sprinklers, heating, air conditioning, electrical systems; snow removal; insurance premiums; pest extermination; inspections; window cleaning, gardening and plant maintenance services; roof repairs; wages, salaries and employee benefits or personnel engaged in security, operation and maintenance of the Building, and related Common Area, including the sidewalks and landscaped areas in and around the Facility, and the payroll taxes applicable thereto; any costs or expenses required to comply with all laws, rules, regulations, codes and statutes; and supplies, materials,

equipment and tools; and all property management fees and costs. Operating costs shall not include leasing commissions to real estate agents for leasing of other vacant space in the Facility, legal fees, architectural and consulting fees, and tenant capital improvements made to prepare a vacant space for occupancy by a new tenant, or capital repairs and replacements to the Facility, except for those capital repairs, replacements and improvements to the Facility which (i) result in a reduction of Operating Costs and (ii) are required by law, rules, codes, regulations, and statutes (excluding ADA). Capital repairs and replacements which result in such reduction of Operating Costs or are required by law, rules, codes, regulations and statutes (excluding ADA) shall be amortized over the useful life of the item(s) replaced with interest and charged to the Tenant. Interest rates and amortization terms shall be those charged Landlord for subject financing, or if no financing is used, based upon market rates and terms prevailing in the marketplace at the time such capital investments are required to be made, and Landlord shall attempt to locate such best available market rates and terms. Should Landlord, after the initial financing of said required capital repairs and replacements, be able to refinance at a more favorable rate, the benefits of said rate shall be passed on to Tenant.

4.4 TENANT'S SHARE. In addition to the rent and other monetary charges hereunder, and subject to adjustment as provided in sub-sections (c) and (d) hereunder, and further subject to the limitations of increases in the Base Rent contained in Article 4.2, Tenant shall pay its pro rata share as specified in Articles 1.7 and 4.2, of the operating costs in excess of the Base Year in the following manner:

(a) During any period when Tenant is obligated to pay its share of operating cost increases over the applicable Base Year, Tenant shall pay Landlord on the first day of each calendar month during the term of this Lease, an amount estimated by Landlord to be the Tenant's monthly share of such operating costs as covered in this Article. Landlord may periodically (including retroactively) adjust the operating costs estimated charge of Tenant on the basis of Landlord's experience and reasonably anticipated costs. Additionally, Landlord may provide supplemental billings for extraordinary or unusual operating costs (i.e. when expenses exceed estimates for unusual snow removal, etc.). These supplemental billings shall be due in full within fifteen (15) days after submittal by Landlord. Notwithstanding the foregoing, Tenant's Share of increases in operating costs, exclusive of insurance expenses and Taxes, shall be limited as follows:

- i. 2007: Tenant's share of actual operating costs is included in Base Rent ("Base Year Operating Costs");
- ii. 2008: Tenant's pro rata share of actual operating cost increases over Base Year Operating Costs shall not exceed \$3,239.00;
- iii. 2009: Tenant's pro rata share of actual operating cost increases over Base Year Operating Costs shall not exceed \$6,858.00;
- iv. 2010: Tenant's pro rata share of actual operating cost increases over Base Year Operating Costs shall not exceed \$10,795.00;

- v. If exercised, 2011: Tenant's pro rata share of actual operating cost increases over Base Year Operating Costs shall not exceed \$15,113.00; and
- vi. If exercised, 2012: Tenant's pro rata share of actual operating cost increases over Base Year Operating Costs shall not exceed \$19,876.00.

The intent of the aforementioned language is to limit the amount of operating costs that Tenant is required to pay, to an annual amount which is greater than the Base Year and which is equal to or less than the cap as set forth above. Notwithstanding anything contained herein to the contrary, insurance expenses and Taxes shall not be subject to such cap and Tenant shall be responsible for Tenant's Share of any increases in insurance expenses and Taxes over the Base Year.

(b) Upon completion of Landlord's operating costs reconciliation Landlord shall furnish Tenant with a statement covering the calendar year just expired, certified as correct by Landlord, showing the total operating costs, the amount of Tenant's share of the operating costs for year just expired, and the payments made by Tenant with respect to such calendar year. If Tenant's share of such operating costs exceeds Tenant's payments so made, Tenant shall pay Landlord the deficiency within twenty (20) days after receipt of said statement. The operating costs reconciliation amount determined by Landlord to apply to the Lease shall also be applied to the current year retroactively to the beginning of the current year. If said payments exceed Tenant's share of such operating costs, Tenant shall be entitled to a credit of the excess against payments next thereafter to become due Landlord.

(c) There shall be an appropriate adjustment of Tenant's share of the operating costs as of the commencement of rentals and expiration of the term of this Lease. Failure of Tenant to pay any of the charges required to be paid in this Article shall constitute a default under the terms of the Lease, the same as failure to pay Rent when due.

(d) During the construction, renovation, redevelopment and operation of the Building, Tenant's pro rata share shall mean the fraction (or percentage) which results from dividing the Floor Area of the Premises, expressed in square feet, by the Floor Area of the Building, expressed in Square feet; provided that if the service or facility is being provided or made available to less than all of the premises which make up the Floor Area of the Building, the denominator shall be the Floor Area of those premises being served by the service or facility or which it is available to; provided that Landlord shall only include in Operating Expenses those costs, charges or expenses applicable to the remaining Floor Area made available to the Premises.

(e) "Floor Area" shall mean the square footage of all areas constructed and available, or held for the exclusive use of occupants of the Building measured from the exterior of exterior walls (and from the extensions thereof in the case of openings) and from the center of interior demising partitions.

(f) Tenant may, upon not less than thirty (30) days' prior written notice to the Landlord, inspect the Landlord's records for all Common Area maintenance, insurance and

operating costs incurred during the preceding calendar year and the allocations thereof to the Tenants at the Landlord's General Offices or at such other location reasonably designated by the Landlord at any time during reasonable business hours within one (1) year after the end of said calendar year. If said inspection reveals an overpayment of operating costs, the Landlord shall reimburse the Tenant its proportionate share of any such overpayment within thirty (30) days after receipt of notice of determination, and of the amount, of such overpayment. If said inspection reveals an underpayment of operating costs, the Tenant shall reimburse the Landlord its proportionate share of any such underpayment within thirty (30) days after receipt of billing. If said inspection reveals that the Landlord misstated operating costs by more than five percent (5%) and such error is not the result of a misstatement by a Common Area maintenance contractor or subcontractor, the Landlord shall reimburse the person making such inspection for all costs reasonably incurred in making such inspection within thirty (30) days after receipt of notice of determination, and of the amount, of any such misstatement. The Landlord's expenses for any calendar year shall be deemed correct if the Tenant does not give the Landlord written notice of any such overpayment or underpayment within the one (1) year period provided.

(g) Intentionally Deleted.

ARTICLE 5 - SECURITY DEPOSIT

Concurrently with Tenant's execution of this Lease, Tenant shall deposit with Landlord a security deposit in the amount specified in Article 1.13. Said sum shall be held by Landlord as a Security deposit for the performance by Tenant of all of the terms, covenants, and conditions of this Lease to be kept and performed by Tenant during the term hereof. If Tenant defaults with respect to any provisions relating to the payment of rent and any of the monetary sums due herewith, Landlord may (but shall not be required to) use, apply or retain all or any part of this Security Deposit for the payment of the same or any other amount which Landlord may spend or become obligated to spend by reason of Tenant's default or to compensate Landlord for any other loss or damage which Landlord may suffer by reason of Tenant's default. If any portion of said Deposit is so used or applied, Tenant shall, within ten (10) days after written demand therefore, deposit cash with Landlord in an amount sufficient to restore the Security Deposit to its original amount. Tenant's failure to do so shall be a material breach of this Lease. Landlord shall not be required to keep this Security Deposit separate from its general funds, and Tenant shall not be entitled to interest on such Deposit. If Tenant shall faithfully and fully perform every provision of this Lease to be performed by it, the Security Deposit or any balance thereof shall be returned to Tenant (or, at Landlord's option, to the last assignee of Tenant's interest hereunder) at the expiration of the Lease term and after Tenant has vacated the Premises. In the event of termination of Landlord's interest in the Lease, Landlord shall transfer said Deposit to Landlord's successor in interest, whereupon Tenant agrees to release Landlord from all liability for the return of such Deposit or the accounting therefore.

ARTICLE 6 - COMMON AREAS

6.1 COMMON AREA DEFINITION. The term "Common Areas" means the land and improvements which at the time in question have been designated by Landlord for common use by or for the benefit of more than one tenant, including without limitation, any land and facilities utilized for or as parking areas, access and alleys, truck passage ways, service corridors

and stairways providing access from tenant premises, landscaped areas, drainage facilities, fences, ditches, alleyways, exterior walks, bike racks, stairways, elevators, interior corridors, directory equipment, toilets and wash rooms, drinking fountains, and other public facilities, but excluding any portion of the Building so included within the Common Areas when designated by Landlord for a non-common use. Any portion thereof not previously included within Common Areas shall be included when so designated and improved for common use.

6.2 COMMON AREA AVAILABILITY. Landlord shall make available at all times during the term of this Lease such Common Areas as are designated on the approved final plans and specifications for the Facility. Tenant shall have the non-exclusive right during the term of this Lease to use, subject to Landlord's exercise of reasonable control as provided herein, the Common Areas for itself, its employees, agents, customers, invitees, and licensees.

6.3 COMMON AREA MANAGEMENT. All Common Areas shall be subject to the exclusive management and control of Landlord or such other persons as Landlord may designate to exercise such management or control, in whole or in part, in Landlord's place. Landlord and Landlord's agents shall have the right to establish, modify, amend and enforce reasonable rules and regulations with respect to the Common Areas. Tenant agrees to abide by and conform with such rules and regulations, to cause its employees and agents so to abide and conform, and to use its best efforts to cause its customers, invitees and licensees to so abide and conform, and any failure to so conform shall be an event of default under this Lease, entitling Landlord to the remedies set forth herein. It shall be the duty of the Tenant to keep all of said areas free and clear of any obstructions created or permitted by Tenant or resulting from Tenant's operation and Tenant shall not, without Landlord's prior written approval, sell or solicit in any manner in any of the Common Areas.

6.4 COMMON AREA CONFIGURATION. Landlord shall have the right to increase or reduce the Common Areas, to rearrange such improvements as may be on the Common Areas, and to make such changes therein and thereto from time to time which in its opinion are desirable or necessary so long as reasonable and safe access to the Premises is provided to Tenant and its guests.

ARTICLE 7 - PROPERTY TAXES

7.1 PROPERTY TAXES. Tenant shall be responsible for payment of its pro rata share (as set forth in Article 1.7) of all Taxes that exceed Taxes paid or incurred by Landlord in the Base Year. The term "Taxes" shall include all real and personal property taxes and assessments levied or assessed for any year upon the Facility or upon the operation or occupancy thereof, including any and all costs of any challenges to taxes and any consulting fees paid in connection with the appeal of any property taxes. In addition to the taxes described above, any and all taxes payable by Landlord in respect to the Facility, or Landlord's operation thereof (other than income, estate and inheritance taxes), whether or not now customary or within the contemplation of the parties hereto, shall be included within the definition of Taxes: (a) upon, allocable to, or measured by the area of the Premises or on the rent payable hereunder, including any gross receipts or gross rental tax levied by the State, any political subdivision thereof, County, City or Federal Government with respect to the receipt of such rent; or (b) upon or with respect to the possession, leasing, operations, management, maintenance, alteration, repair, use

or occupancy by Tenant of the Premises or any portion thereof; or (c) upon this transaction or any document to which Tenant is a party creating or transferring an interest or an estate in the Premises; (d) any fees in lieu of property taxes or other fees or charges levied against Landlord by or on behalf of any governmental or quasigovernmental entity for services rendered by or on behalf of any governmental or quasi-governmental entity, or (e) costs of any challenges to taxes, including any consulting or legal fees paid in connection with the appeal of any property taxes;

7.2 During any period when Tenant is obligated to pay its share of Tax increases over the Base Year, Tenant shall pay Tenant's share of Taxes in advance in monthly installments in an amount reasonably estimated by Landlord on the first day of each calendar month during the Term; provided that in the event Landlord is required under any mortgage covering the Facility to escrow real estate taxes Landlord may, but shall not be obligated to, use the amount required to be so escrowed as a basis for its estimate of the monthly installment due from Tenant hereunder. Landlord's estimate of Tenant's share of Taxes shall be made at the beginning of each calendar year or partial lease year, as the case may be. Landlord may adjust each estimate at other times by giving Tenant notice of the adjusted estimate. After Landlord's receipt of actual bills for Taxes, Landlord shall furnish Tenant a statement of Tenant's actual share, and there shall then be an adjustment between the parties so that Landlord shall receive the precise amount of Tenant's share of Taxes for the period, with Tenant paying Landlord any deficiency on or before thirty (30) days after receiving such statement, or Tenant receiving a credit against the next installment of Taxes to the extent that Tenant has overpaid Taxes for such period.

7.3 PERSONAL PROPERTY TAXES. Tenant shall pay, before delinquency, all taxes, assessments, license fees and public charges levied, assessed or imposed upon or measured by the value of its business operation, including but not limited to the furniture, fixtures, leasehold improvements, equipment and other property of Tenant at any time situated on or installed in the Premises by Tenant.

ARTICLE 8 - USE - PROMOTIONAL ASSOCIATION

8.1 USE AND TRADE NAME. Tenant shall use the Premises solely for the purposes specified in Article 1.14. Tenant shall not use or permit the Premises to be used for any other purpose or purposes whatsoever without prior written consent of Landlord.

8.2 SUITABILITY. Tenant acknowledges that it has examined the Premises and that EXCEPT for the work set forth on attached Exhibit C, the same were in satisfactory condition and suitable for the conduct of Tenant's business. Tenant agrees that EXCEPT as set forth in attached Exhibit C, there is no promise, representation, or undertaking by or binding upon Landlord with respect to any construction, alteration, remodeling or redecorating in or to the Premises.

8.3 TENANT COVENANTS.

(a) Tenant further covenants and agrees that it will not use or suffer or permit any person or persons to use the Premises for any use or purpose in violation of the laws of the United States of America or the State in which the Premises is located or the ordinances, regulations and requirements of the City of Boise, County of Ada, or other lawful authorities,

and that during said Term, the Premises, and every part thereof, shall be kept by the Tenant in a clean and wholesome condition, and in compliance with all laws, rules, codes, acts, statutes and regulations.

(b) Tenant shall not do or permit anything to be done in or about the Premises nor bring or keep anything therein which will in any way increase the existing insurance rate or affect any fire or other insurance upon the Premises or Facility, or any of its contents (unless Landlord has consented in writing to such use and Tenant pays any increased premium as a result of such use or acts), or cause a cancellation of any insurance policy covering the Premises or Facility, or any of its contents, nor shall Tenant sell or permit to be kept, used or sold in or about said Premises any articles which may be prohibited by a standard form policy of fire insurance.

(c) Tenant may not store equipment or other materials outside the Premises, building or other improvements located-upon the Facility. Tenant shall not cause, maintain or permit any nuisance in, on or about the Premises or Facility nor shall Tenant commit or suffer to be committed any waste in or upon the Premises or Facility.

(d) Tenant shall not, without the prior written consent of Landlord paint or place any signs on the Premises or Facility, or place any curtains, shades, awnings, aerals or flagpoles, or the like, on the Premises or Facility visible from outside the Premises, except as approved by Landlord. Tenant agrees at its expense to obtain all necessary permits prior to erecting any sign and Tenant shall remove said sign or other erections on the termination of this Lease and repair any damage caused by such removal.

(e) Tenant shall comply with any building rules and regulations of Landlord as may now or hereafter be established or from time to time amended by Landlord. Landlord shall not be liable to Tenant for any violation of such rules and regulations by any other tenant.

(f) Tenant shall be responsible for all janitorial and cleaning of the Premises. Tenant shall store all trash and garbage within the Premises in a clean manner and not cause a nuisance to any other tenants in the Facility. Tenant shall arrange for and bear the expense of the prompt and regular removal of all trash and garbage from the Premises and placement of the same in the Facility's designated trash and garbage collection area(s). Tenant otherwise shall refrain from dumping, disposal, reduction, incineration or other burning of any trash, papers, refuse or garbage of any kind or nature in or about the Premises or Facility.

(g) All telephone, network, computer systems and cable equipment, including but not limited to conduits for telephone wires, lines, outlets, jacks and appurtenances, and other communication systems, if any, shall be supplied, installed, repaired and maintained by Tenant at Tenant's sole cost and expense, and Tenant shall arrange for telephone lines and cable to be brought from the applicable telephone panel, if any, to the Premises. Tenant shall make all necessary arrangements for telephone service and connections with the applicable telephone company. Landlord shall, after receipt of notice from Tenant of the need for maintenance, repair or replacement of telephone lines, cables or equipment outside the Premises (which notice shall be accompanied by written independent evidence satisfactory to Landlord that there is no need for maintenance, repair or replacement inside the Premises), at Tenant's cost and expense,

payable upon demand, cause to be performed the necessary maintenance, repairs and replacements of the telephone equipment, including but not limited to conduits, cables, wires, lines and appurtenances serving the Premises, which is located outside the Premises. At Landlord's option upon the surrender of the Premises, Tenant shall remove all such conduits, cables, wiring, lines, equipment and related materials, at Tenant's sole costs and expense.

(h) Tenant shall complete, or cause to be completed, all deliveries, loading, unloading and services at such locations and times as are approved by Landlord, and shall do so in a manner that will not interfere with Landlord, other tenants, or employees or customers of Landlord or other tenants. Landlord reserves the right to further regulate in a non-discriminatory manner such activities of Tenant.

(i) Tenant agrees that it will operate the air tempering equipment serving its Premises in a manner such that inside temperatures are maintained within a range maintained by a majority of similar type tenants in this state and such that tempered air will not be unduly drained from the Common Areas or Premises. Tenant agrees to use ordinary prudence with respect to conserving energy in its operation of energy consuming equipment.

8.4 CONTINUOUS OPERATION - HOURS. [Intentionally omitted.]

8.5 PROMOTIONAL ASSOCIATION. [Intentionally omitted.]

8.6 ADVERTISING. [Intentionally omitted.]

ARTICLE 9 - UTILITIES

9.1 OPERATING COSTS. Landlord shall, at its own cost and expense, pay for water, gas, electrical, trash removal, sewer services used by Tenant on the Premises, including standby charges and maintenance, repair and inspection costs for any fire sprinkler system, and including all connection charges, except for telephone services to the Premises, provided that any increase in the operating costs attributable to, but not limited to, utilities and other services over the Base Year shall be picked up as Additional Rent as provided for in Article 4.2. If Tenant installs any equipment which consumes or causes to be consumed an extraordinary amount of any utility, or if Tenant otherwise consumes an extraordinary quantity of any utility (when compared to average consumption for comparable facilities), then Landlord may require that Tenant install at Tenant's expense a separate meter for that utility, if a separate meter is not already installed, and Tenant shall thereafter purchase such utility service directly from the utility company. Tenant shall not overload or cause to be overloaded any utility system of the Premises or Facility, and shall use reasonable care to conserve energy costs, such as turning off lights not in use, drawing shades and using energy efficient light bulbs. Tenant shall, at Tenant's sole cost and expense, arrange for janitorial services for the Premises such that the Premises are maintained in the manner required in this Lease. *Tenant may elect to use the janitorial service used by Landlord in connection with the Common Areas, and Tenant shall, upon such election, shall pay the same rate for such services as Landlord would pay for such services.*

9.2 UTILITIES FURNISHED. Landlord shall furnish such amounts and types of utilities to the Common Areas as are reasonably appropriate for the operation and maintenance of

the Facility, including trash removal service, and the cost to Landlord of such utilities shall be included within the definition of "operating costs" as that term is used in Article 4.2.

9.3 DISCLAIMER OF LIABILITY. Landlord shall have no liability, and this Lease shall not terminate nor shall the Rent abate by reason of any failure of the utility companies to provide such services.

9.4 ALLOCATION OF UTILITY COST.

(a) Tenant recognizes that certain facilities and utilities may be provided which will serve and be used by numerous tenants. Except as provided for in Article 9.1, the payments to companies for such services and the expense of maintenance, insurance, repair and replacement of such equipment and services shall be allocated in operating costs to each tenant proportionately in the ratio of the square footage of space served by such facilities with necessary and equitable modification where special or comparatively excessive use of such facilities occurs with respect to or is afforded an individual tenant.

(b) Tenant further recognizes that Landlord may provide central facilities for heating and air conditioning, which will serve and be used by many tenants in the Facility. Except as provided for in Article 9.1, the payment of such heating and air conditioning and the expenses of maintenance, repair and replacement of such equipment and service shall be allocated in operating costs to each tenant prorated proportionately in ratio of square footage of leased Premises to the total square footage of the total area heated or air conditioned by such facility with necessary and equitable modification where special or comparatively excessive use of such facilities occurs with respect to or is afforded an individual tenant. Such utility charge or charges shall be determined from time to time by Landlord's engineer and shall be initially based on a typical office layout comparable to Tenant's proposed use of the Premises, but may be subject to adjustment based upon the actual consumption by Tenant. Landlord agrees, however, that the utility charge to Tenant for utilities furnished by Landlord shall not exceed those of the local public utility company if its services were furnished directly to Tenant.

ARTICLE 10 - MAINTENANCE AND REPAIRS

10.1 Landlord shall repair and maintain the roof and structural portions of the Facility including the basic plumbing, air conditioning, heating and electrical systems, exterior paint and trim, unless such repairs are required as a result, in whole or in part, of the act or neglect of any duty by Tenant, its agents, servants, employees, or invitees, in which event Tenant shall pay to Landlord the reasonable cost of such maintenance and repairs. The cost to Landlord of providing any such maintenance and repairs together with additions during any given year to any maintenance reserve accounts as may reasonably be established by Landlord shall be included within the definition of "operating costs" as that term is used in Article 4.2

10.2 Tenant shall be required to use chair mats under all chairs with wheels. Tenant agrees, at its own cost and expense, to keep the Premises, and each and every part thereof, and any and all appurtenances in a neat, clean and sanitary condition and shall at all times during the term of this Lease, maintain the Premises in good condition and repair, ordinary wear and tear excepted.

10.3 Tenant further covenants and agrees that the Landlord may go upon the Premises by providing Tenant with no less than twenty four (24) hours notice (except in the event of an emergency), and make any necessary repairs to the Premises and perform any work therein which may be necessary to comply with any laws, ordinances, rules or regulations of any public authority or the Idaho Surveying and Rating Bureau or of any similar body or that the Landlord may deem necessary to prevent waste or deterioration in connection with the Premises if the Tenant does not make such repairs or do such work or cause such repairs or work to be performed promptly after receipt of written demand from Landlord. Nothing herein contained shall imply any duty on the part of Landlord to do any such work which under any provision of this Lease the Tenant may be required to do, nor shall it constitute a waiver of Tenant's default in failing to do the same. No exercise by the Landlord of any rights herein shall entitle Tenant to any damage for any injury or inconvenience occasioned thereby nor to any abatement of rent. In the event Landlord makes or causes any such repairs to be made or performed which are the responsibility of Tenant, as provided herein, Tenant shall promptly pay the cost thereof to Landlord as additional rent upon receipt of a bill therefore. All such costs and expenses shall be included within the definition of "operating costs" as that term is used in Article 4.2.

10.4 Tenant acknowledges and agrees that the Urban Renewal Agency of Boise City ("CCDC"), for itself and for the City and other public agencies, at their sole risk and expense, reserves the right to enter the sidewalks adjacent to the Building or any part thereof at all reasonable times and with as little interference as possible for the purposes of construction, reconstruction, maintenance, repair, or service of any public improvements or public facilities located adjacent to the Building, which shall not entitle Tenant to any damage for any injury or inconvenience occasioned thereby nor to any abatement of rent.

10.5 CONDITION UPON EXPIRATION OF TERM. Upon the expiration or earlier termination of this Lease, Tenant shall surrender the Premises in the same relative condition as at the commencement of this Lease, ordinary wear and tear and damage by fire, earthquake, act of God or the elements alone excepted, and shall promptly remove or cause to be removed at Tenant's expense from the Premises and the Facility any signs, notices and displays placed by Tenant. Tenant agrees to repair any damage to the Premises or Facility caused by or in connection with the removal of any articles of personal property, business or trade fixtures, machinery, equipment, cabling, wiring, networks, systems, cabinetwork, signs, furniture, movable partitions, including without limitation thereto, repairing the floor and patching and painting damaged or discolored walls where required by Landlord to Landlord's reasonable satisfaction (subject to ordinary wear and tear), all at Tenant's sole cost and expense. Tenant shall indemnify Landlord against any loss or liability resulting from delay by Tenant in so surrendering the Premises, including without limitation, any claims made by any succeeding tenant founded on such delay. Such work will be accomplished expeditiously and in any event no later than five (5) business days after the expiration or earlier termination of this Lease.

ARTICLE 11 - ALTERATIONS

11.1 Tenant shall not make any alterations or additions to the Premises nor make any contract therefore without first procuring Landlord's written consent which consent shall not be unreasonably withheld and shall provide Landlord with an itemized cost list of such alterations or additions. All alterations, additions and improvements made by Tenant to or upon the

Premises, except light fixtures, signs, electrical equipment, cases, counters or other removable trade fixtures, shall at once when made or installed be deemed to have been attached to the Premises and to have become the property of the Landlord; provided, however, if prior to termination of this Lease, or within thirty (30) days thereafter, Landlord so directs by written notice to Tenant, Tenant shall promptly remove the additions, improvements, fixtures, trade fixtures, and installations which were placed in the Premises by Tenant and which are designated in said notice or which are to be retained by Tenant, and shall repair any damage occasioned by such removal and in default thereof Landlord may effect said removal and repairs at Tenant's expense.

11.2 All work with respect to any alterations, additions, and changes must be done in a good and workmanlike manner and diligently prosecuted to completion to the end that the Premises shall at all times be a complete unit except during the period of work.

11.3 Any such changes, alterations and improvements shall be performed and done strictly in accordance with the laws and ordinances relating thereto. In performing the work of any such alterations, additions or changes, or of any construction, Tenant shall have the work performed in such a manner as not to cause dust outside the Premises or be a nuisance to any other tenant.

11.4 Before commencing any such construction in or about the Premises, Tenant shall notify Landlord in writing of the expected date of commencement thereof. Landlord shall have the right at any time from time to time to post and maintain on the Premises such notices as Landlord deems necessary to protect the Premises and Landlord from mechanics' liens, materialmen's liens, or any other liens.

11.5 FIXTURES INSTALLATION. It is mutually agreed that in order to expedite the commencement of Tenant's business in the Premises, Tenant may enter upon the Premises for the purpose of installing trade fixtures and furnishings during the period prior to commencement of the Lease term; provided, however, that Landlord shall not be liable to Tenant for damage to or loss of such fixtures, equipment or furnishings, Tenant accepting the full risk for such damage or loss, if any and agrees to indemnify Landlord as set forth in this Lease; and provided further that such entry disturbs neither existing tenants, if any, of the Facility, nor any contractors hired by Landlord to prepare the Premises or Facility for occupancy. Tenant shall pay for all utilities consumed by Tenant or its contractors in preparing the Premises for opening of Tenant's business. Notwithstanding anything in this Lease to the contrary, all terms and conditions of this Lease shall be fully binding upon Tenant upon the execution date of this Lease by Landlord and Tenant and this Lease shall be in full force and effect, despite the future Commencement Date.

ARTICLE 12 - ENTRY BY LANDLORD

12.1 Landlord and the authorized representatives of Landlord may enter the Premises by providing the Tenant with no less than twenty four (24) hours notice (except in the event of an emergency), for the purpose of exhibiting the same to interested parties and, during the final six (6) months of the term of this Lease, may exhibit the Premises for hire and may advertise the same in such manner as shall not unreasonably interfere with Tenant's business. Tenant hereby grants to Landlord such licenses or easements in and over the Premises or any portion thereof as

shall be reasonably required for the installation or maintenance of mains, conduits, pipes or other facilities to serve the Premises or Facility. Landlord and its agents shall have free access to the Premises during all reasonable hours for the purpose of examining the same to ascertain if they are in good repair, and to make reasonable repairs that Landlord may be allowed to make hereunder. Except in the case of emergency, Landlord shall provide no less than twenty-four (24) hours notice to Tenant prior to such entry onto the Premises.

ARTICLE 13 - LIENS

13.1 Tenant agrees that it will pay or cause to be paid all costs for work done by it on the Premises, and Tenant will keep the Premises free and clear of all mechanics' liens on account of work done by Tenant or persons claiming under Tenant. Tenant agrees to and shall indemnify and save Landlord free and harmless against liability, loss, damage, costs, attorneys' fees, and all other expenses on account of claims of lien of laborers or material men or others for work performed or materials or supplies furnished to Tenant or persons claiming under Tenant.

13.2 Tenant shall, before the commencement of any work that might result in any such lien, give to Landlord written notice of its intention so to do in sufficient time to enable Landlord to file and record notice to protect Landlord from such liens.

13.3 If any lien is filed against the Premises or Facility on account of work done by Tenant or persons claiming under Tenant, Landlord may (but shall not be required to) pay the claim and any costs and the amount so paid, together with reasonable attorneys' fees incurred in connection therewith, shall be immediately due and owing from Tenant to Landlord, with interest at the rate which is two (2) percentage points over the prime rate of the bank in which Landlord maintains its accounts at the time of the Landlord's payments from the dates of Landlord's payments (provided, however, that Tenant shall have the right to contest any claim of lien, and so long as Tenant is actively contesting a claim of lien, until and unless an adverse judgment is entered in favor of the lien claimant, Landlord shall not pay the claim. Further provided that Landlord at Landlord's discretion may require Tenant to post a bond during the pendency of any contest sufficient to cause a title company to remove the lien as an exception to a commitment for title insurance).

ARTICLE 14 - ARTICLE 14 - INDEMNITY

14.1 TENANT INDEMNITY. Tenant shall defend, indemnify and hold harmless Landlord and its members, managers, agents, employees and representatives (collectively, "Landlord Representatives") from and against any and all claims, suits, damages, expenses, fines, judgments, penalties, costs, liabilities or losses (collectively, "Claims") arising from Tenant's use of the Premises or the conduct of its business or from any activity, work, or thing done, permitted or suffered by Tenant in or about the Premises or Facility and shall further indemnify and hold Landlord and Landlord's Representatives harmless from and against any and all Claims arising from any breach or default in the performance of any obligation on Tenant's part to be performed under the terms of this Lease or arising from any act or negligence of Tenant or any of its agents, contractors or employees and from and against all costs, attorneys' fees, expenses and liabilities incurred in or from any such claims or any action or proceeding brought thereon; and in case any action or proceeding be brought against Landlord by reason of such claim, Tenant, upon notice

from Landlord, shall defend the same at Tenant's expense by counsel reasonably satisfactory to Landlord.

14.2 Landlord and Landlord's Representatives shall not be liable for injury or damage which may be sustained by the person, goods, wares, merchandise or property of Tenant, its employees, invitees or customers or any other person in or about the Premises caused by or resulting from other tenants, fire, steam, electricity, gas, water or rain, freezing or leakage, obstruction or other defects of the pipes, sprinklers, wires, appliances, plumbing, air conditioning or lighting fixtures so long as not caused by Landlord's willful or negligent conduct. Tenant, as a material part of the consideration to Landlord, hereby assumes all risk of damage to property or injury to persons in, upon or about the Premises from any cause and Tenant hereby agrees to insure its property for the full value that Tenant places on such property and agrees to look solely to such insurance for any damage, destruction, loss of use, business interruption or other claims or occurrences. Tenant shall be directly responsible to other tenants of the Facility for any damage to such other tenants proximately caused by Tenant's use of the Premises, by fluid discharge or other failure of any mechanical equipment (including plumbing and sprinkling systems) of the Facility when such failure originates or occurs from Tenant's equipment or fixtures or when caused by any acts of negligence of Tenant or its employees, agents or customers.

14.3 Without limiting the generality of any other provision of this Lease, Tenant shall not cause or permit any hazardous or toxic substances to be used, stored, generated on, transported over or disposed of on or in the Premises, except in accordance with applicable governmental statutes and regulations. If hazardous substances are used, stored, generated on, transported over or disposed of on or in the Premises by Tenant, its customers or invitees, or if the Premises become contaminated in any manner caused by Tenant, its customers or invitees, Tenant shall indemnify and hold harmless Landlord from any and all claims, damages, fines, judgments, penalties, costs, liabilities or losses including, without limitation, the decrease in the value of the Premises, damages caused by loss or restriction of rentable or useable space or other damages caused by adverse impact on marketing of the space and any and all sums paid for settlement of claims and attorneys fees arising during or after the Lease is terminated or arising as a result of that contamination by Tenant. This indemnification includes without limitation, any and all costs incurred because of any investigation of the site or any clean up, removal or restoration mandated by federal, state or local agencies or political subdivisions. All agreements and indemnities contained in the foregoing provision shall be deemed to survive the expiration or other termination of the Lease. Without limiting the foregoing, if Tenant causes or permits the presence of any hazardous or toxic substances on the Premises and that results in a contamination, Tenant shall first obtain Landlord's approval for any remedial action.

For purpose of this Lease, "hazardous or toxic substance" shall mean and include (1) a "hazardous substance" as defined in 42 U.S.C. Section 9601(14), or as defined under applicable state health, safety, and water codes, and (2) any other material, gas or substance known or suspected to be toxic or hazardous (including, without limitation, any radioactive substance, methane gas, volatile hydrocarbons, industrial solvents and asbestos) or which could cause a material detriment to, or materially impair the beneficial use of the Property, or constitute a material health, safety or environmental risk to tenants, occupants or patrons of the Property.

14.4 LANDLORD INDEMNITY. Landlord agrees to indemnify and hold Tenant and its agents, employees and invitees (collectively, "Tenant Parties") harmless against and from any and all Claims arising from: (i) any negligent or willfully committed action done, permitted or suffered by Landlord, its agents, employees, or invitees, (ii) arising from injury during the Term to person or property sustained in or about the Common Areas caused by the negligence or willfully committed act (except to the extent such claim, damage or other liability is caused by the negligent or intentional act or omission of Tenant, its agents, employees or invitees). Landlord shall further indemnify and hold Tenant harmless against and from any and all claims arising from any breach or default in the performance of any obligation on Landlord's part to be performed under the terms of this Lease.

14.5 PROPERTY DAMAGE. Tenant shall give prompt written notice to Landlord within three (3) days of the occurrence of a fire or accident involving the Premises or Facility

ARTICLE 15 - INSURANCE

15.1 GENERAL LIABILITY AND PROPERTY DAMAGE. Tenant shall at all times during the term hereof and at its own cost and expense procure and continue in force Workers' Compensation Insurance and Commercial General Liability Insurance adequate to protect Landlord and naming Landlord as an additional insured in the liability contract against liability for injury or death of any person in connection with the use, operation or condition of the Premises. Such liability insurance at all times shall be in an amount of not less than One Million Dollars (\$1,000,000.00) combined single limit for bodily injury and property damage, except for medical payments which shall be not less than Five Thousand and No/100ths Dollars (\$5,000.00) per person. The limits of such insurance shall not limit the liability of Tenant.

15.2 FIRE AND EXTENDED COVERAGE

(a) Landlord shall procure and maintain during the term of this Lease, Fire, Windstorm and Extended Coverage Insurance (with additional perils to be covered at Landlord's option) on the Facility in amounts as may from time to time be determined by Landlord, and the cost thereof, together with the cost of any other insurance carried by Landlord in connection with the Facility and the operation thereof, shall be included within the definition of "operating costs" as that term is used in computing the additional rent provided for in Article 4.2. Tenant shall pay for all increases in such insurance premiums, and all increases in insurance premiums of other tenants in the Facility, caused by Tenant's use or occupancy of the Premises, acts of negligence, or violation of the Policy provisions.

(b) Tenant shall at all times during the term hereof, and at its cost and expense, (i) maintain in effect policies of insurance covering its fixtures and equipment located on the Premises, providing protection against any peril included within the classification Fire and Extended Coverage, together with insurance against sprinkler damage, vandalism and malicious mischief and (ii) be responsible for the maintenance, repair and replacement of the plate glass and other glass on the Premises but shall have the option either to insure the risk or to self insure. Tenant shall be responsible, at its own cost and expense, to acquire its own business interruption insurance due to casualty damage to the Premises, if Tenant desires to insure this risk.

(c) RENT LOSS ENDORSEMENT. Landlord may require that the policy of insurance under Article 15.2.A be written with rent loss endorsements in favor of Landlord in amounts sufficient to pay Tenant's obligations hereunder, including without limitation, the Minimum Rent, Promotional Costs, insurance premiums, taxes, Common Area Expenses and utility costs for such periods as Landlord or its Lender's shall deem appropriate. The cost to Landlord of such endorsement shall be considered an operating cost.

15.3 WAIVER OF CLAIMS. Landlord and Tenant for themselves and their successors, each hereby mutually waive any and all claims, liability or rights of recovery against and mutually release and discharge each other and their officers, employees, agents and representatives of such other party for loss or damage to such waiving party of its property or the property of others insured under the form of casualty insurance policy with all permissible extension endorsements covering additional perils or under any other policy of insurance carried by such waiving party (or should have been carried by such waiving party as required by this Lease) in lieu thereof regardless of the cause of the damage or loss. The insurance required by this Lease shall contain an endorsement waiving the insurer's right of subrogation against Landlord and Landlord's lender or Tenant, as applicable, provided that such waiver of the right of subrogation shall not be operative in any case where the effect thereof is to invalidate such insurance coverage or increase the cost thereof.

15.4 FORM OF POLICIES. All insurance required to be carried by Tenant or Landlord at the Tenant's expense hereunder shall be with companies rated A+ or better in "Best's Insurance Guide", or as otherwise approved by Landlord, and shall be on forms and with loss payable clauses satisfactory to Landlord naming Landlord and Tenant as insured's as their interest may appear. Copies of policies of such insurance or certificates issued by the insurance company evidencing such insurance to be acquired by Tenant shall be delivered to Landlord by Tenant prior to Tenant occupying the Premises. Said insurance shall have a Landlord's Protective Liability endorsement attached thereto and shall name the Landlord's Lender as an additional insured. No such policy shall be cancelable (or coverage reduced) except after ten (10) day's written notice to Landlord. All such policies shall be written as primary policies, not contributing with and not in excess of coverage that Landlord may carry. Tenant shall furnish Landlord with renewals or "binders" thereof at least ten (10) days prior to the expiration of such policies, or Landlord may order such insurance and charge the costs thereof to Tenant, which amount shall be payable by Tenant upon demand. Tenant shall have the right to provide such insurance coverage pursuant to blanket policies obtained by Tenant provided such blanket policies expressly afford coverage to the Premises and to the Tenant as required by this Lease. The insurance required by this Lease shall contain an endorsement waiving the insurer's right of subrogation against Landlord and Landlord's lender or Tenant, as applicable, provided that such waiver of the right of subrogation shall not be operative in any case where the effect thereof is to invalidate such insurance coverage or increase the cost thereof.

ARTICLE 16 - DAMAGE OR DESTRUCTION

16.1 If at any time during the term hereof, the Premises are destroyed or damaged and such damage is not "substantial" as that term is hereinafter defined, then Landlord shall promptly repair such damage at Landlord's expense and this Lease shall continue in full force and effect. If at any time during the term hereof the Premises are destroyed or damaged and if such damage

is "substantial" as that term is hereinafter defined, then Landlord may at its option either (a) repair such damage as soon as reasonably possible (but not to exceed a period of one hundred twenty (120) days from the date of occurrence of the damage) at Landlord's expense, provided that all insurance proceeds are made available to Landlord, in which event, this Lease shall continue in full force and effect, or (b) cancel and terminate this Lease as of the date of the occurrence of such damage, by giving Tenant written notice of its election to do so within sixty (60) days after the date of occurrence of such damage, provided that insurance proceeds are made available to Landlord. In the event Landlord, in its reasonable business judgment, determines that the repair of damage or destruction will not be complete within one hundred twenty (120) days after the date of occurrence of such damage, Landlord shall notify Tenant of the estimated time for completion, and Tenant may elect to terminate this Lease by giving Landlord written notice of its election to do so no later than ten (10) days after Landlord makes such determination.

16.2 If the Premises are destroyed or damaged and Landlord repairs or restores them pursuant to the provisions of this Article, Tenant shall continue the operation of its business in the Premises to the extent reasonably practicable from the standpoint of prudent business management; and the Base Rent payable hereunder for the period during which such damage, repair or restoration continues shall be abated in proportion to the degree to which the Premises are rendered untenable. Additional rent or other monetary charge payable hereunder by Tenant to Landlord shall likewise be abated in proportion to the degree to which the Premises are rendered untenable. Tenant shall have no claim against Landlord for any damage suffered by Tenant by reason of any such damage, destruction, repair or restoration, provided Landlord undertakes and accomplishes repairs in a reasonably timely fashion.

16.3 In the event the damage to the Premises, causing new construction or need of repair of the same, are caused by the negligence or willful acts of Tenant or Tenant's employees and agents, there shall be no duty to repair the same on the part of the Landlord nor shall the rent abate as provided in this Article.

16.4 For the purpose of this Article, "substantial" damage to the Premises shall be deemed to be damage, the estimated cost of repair of which exceeds ten percent (10%) of the then estimated replacement cost of the improvements included in the Premises. The determination in good faith by Landlord of the estimated cost of repair or any damage and/or of the estimated replacement cost of the Facility or any part thereof shall be conclusive for the purpose of this Article.

ARTICLE 17 - CONDEMNATION

17.1 ENTIRE OR SUBSTANTIAL TAKING. If the entire Premises, or so much thereof as to make the balance not reasonably adequate for the conduct of Tenant's business, notwithstanding restoration by Landlord as hereinafter provided, shall be taken under the power of eminent domain, this Lease shall automatically terminate as of the date on which the condemning authority takes title or possession, whichever shall first occur.

17.2 PARTIAL TAKING. In the event of any taking under the power of eminent domain that does not so result in a termination of this Lease, the rent payable hereunder shall be

reduced, on an equitable basis, taking into account the relative value of the portion taken as compared to the remaining portion. Landlord shall promptly at its expense restore the portion of the Premises not so taken to as near its former condition as is reasonably possible and this Lease shall continue in full force and effect

17.3 AWARDS. Any award for any taking of all or any part of the Premises under the power of eminent domain shall be the property of Landlord, whether such award shall be made as compensation for diminution in value of the leasehold or for the taking of the fee. Nothing contained herein, however, shall be deemed to preclude Tenant from obtaining, or to give Landlord any interest in, any award to Tenant for loss of or damage to Tenant's trade fixtures and removable personal property or for damage for cessation or interruption of Tenant's business, or for any other element of an award measured in damage suffered by Tenant as a result of the taking.

17.4 SALE UNDER THREAT OF CONDEMNATION. A sale by Landlord to any authority having the power of eminent domain, either under threat of condemnation or while condemnation proceedings are pending, shall be deemed a taking under the power of eminent domain for all purposes under this Article.

17.5 TENANT'S OPTION. A taking of any portion of the leased floor area of the Premises, provided such taking substantially affects the Tenant's normal business operations, shall confer upon Tenant the option, to be exercised only within sixty (60) days after Tenant shall have received written notice thereof, to terminate this Lease effective as of the date of such taking, upon written notice to Landlord. Failure of Tenant to exercise such option shall constitute Tenant's agreement that the balance of the Premises is reasonably adequate for the conduct of Tenant's business, and this Lease shall remain in effect subject to Article 17.2 hereof.

ARTICLE 18 - ASSIGNMENT AND SUBLEASE

18.1 Tenant shall not voluntarily or by operation of law assign, license, transfer, mortgage or otherwise encumber all or any part of Tenant's interest in this Lease or in the Premises, and shall not sublet or assign all or any part of the Premises, without the prior written consent of Landlord, which consent shall not be unreasonably withheld, and any attempted assignment, transfer, mortgage, encumbrance or subletting without such consent shall be wholly void.

18.2 Subletting or assignment by the Tenant, even with the consent of Landlord, shall not relieve Tenant of its obligation to pay the rent and to perform all of the other obligations to be performed by Tenant hereunder. The acceptance of rent by Landlord from any other person shall not be deemed to be a waiver by Landlord of any provision of this Lease or to be a consent to any assignment, subletting or other transfer.

ARTICLE 19 - SUBORDINATION, QUIET ENJOYMENT, ATTORNMENT

19.1 This Lease at Landlord's option shall be subject and subordinate to all ground or underlying leases which now exist or may hereafter be executed affecting the Premises or Facility, and to the lien of any mortgages or deeds of trust in any amount or amounts whatsoever now or hereafter placed on or against the land or improvements or either thereof, of which the Premises are a part, or on or against Landlord's interest or estate therein, or on or against any

ground or underlying lease without the necessity of the execution and delivery of any further instruments on the part of Tenant to effectuate such subordination; on the condition that so long as the Tenant shall not be in default under the terms of this Lease, the Lease shall not be terminated nor shall any of the Tenant's rights and obligations under the Lease be disturbed by such lender or ground lessor in the exercise of its rights under the deed of trust, mortgage or ground lease. If any mortgagee, trustee, or ground lessor shall elect to have this Lease prior to the lien of its mortgage, deed of trust or ground lease, and shall give written notice thereof to Tenant, this Lease shall be deemed prior to such mortgage, deed of trust or ground lease, whether this Lease is dated prior to or subsequent to the date of said mortgage, deed of trust, or ground lease or the date of the recording thereof.

19.2 Tenant covenants and agrees to execute and deliver upon demand without charge therefore, such further instruments evidencing such subordination of this Lease to such ground or underlying leases and to the lien of any such mortgages or deeds of trust as may be required by Landlord.

19.3 QUIET ENJOYMENT. Landlord agrees that Tenant, upon paying the rent and other monetary sums due under this Lease and performing the covenants and conditions of this Lease and upon recognizing purchaser as Landlord, may quietly have, hold and enjoy the Premises during the term hereof; subject, however, to loss by casualty and all restrictions and covenants contained or referred to in this Lease.

19.4 ATTORNMENT. In the event any proceedings are brought for default under ground or any underlying lease or in the event of foreclosure or in the exercise of the power of sale under any mortgage or deed of trust made by Landlord covering the Premises, Tenant shall attorn to the purchaser upon any such foreclosure or sale and recognize such purchaser as the Landlord under this Lease, provided said purchaser expressly agrees in writing to be bound by the terms of this Lease.

ARTICLE 20 - DEFAULT; REMEDIES

20.1 DEFAULT. The occurrence of any of the following shall constitute a material default and breach of this Lease by Tenant:

(a) Any failure of Tenant to pay the Base Rent, additional rent, or any other monetary sums required to be paid hereunder. If Tenant fails to cure said default within five (5) days after written notice by Landlord to Tenant, Landlord shall be entitled to exercise its rights and remedies as provided in Article 20.3 herein, without further notice to Tenant;

(b) The abandonment of the Premises by Tenant without Tenant continuing to pay Base Rent in a timely manner;

(c) A failure by Tenant to observe and perform any other provisions of this Lease to be observed or performed by Tenant. If Tenant fails to cure said default within thirty (30) days after written notice by Landlord to Tenant, Landlord shall be entitled to exercise its rights and remedies as provided in Article 20.3 herein; provided however, that if the nature of the default is such that the same cannot reasonably be cured within said thirty (30) day period,

Tenant shall not be deemed to be in default if Tenant shall within such period commence such cure and thereafter diligently prosecute the same to completion; or

(d) The making by Tenant of any general assignment or general arrangement for the benefit of creditors, the filing by or against Tenant of a petition to have Tenant adjudged a bankrupt or of a petition for reorganization or arrangement under any law relating to a bankruptcy (unless, in the case of a petition filed by Tenant, the same is dismissed within sixty (60) days), the appointment of a trustee or receiver to take possession of substantially all of Tenant's assets located at the Premises or of Tenant's interest in this Lease, where possession is not restored to Tenant within thirty (30) days, or the attachment, execution or other judicial seizure of substantially all of Tenant's assets located at the Premises or of Tenant's interest in this Lease, where such seizure is not discharged within thirty (30) days.

20.2 **REIMBURSEMENT.** Tenant shall reimburse Landlord, in addition to any other obligations hereunder, for the cost of sending each Notice of Default hereunder, and no default shall be deemed cleared or satisfied until reimbursement of such cost is made; provided, however, that the minimum amount payable by Tenant for each Notice sent shall be Fifty Dollars (\$50.00).

20.3 **REMEDIES.** In the event of any such material default or breach by Tenant, Landlord may at any time thereafter without limiting Landlord in the exercise of any right or remedy at law or in equity which Landlord may have by reason of such default or breach:

(a) Maintain this Lease in full force and effect and recover the rent and other monetary charges as they become due, irrespective of whether Tenant shall have abandoned the Premises. In the event Landlord elects not to terminate this Lease, Landlord shall have the right to attempt to re-let the Premises at such rent and upon such conditions and for such a term, and to do all acts necessary to maintain or preserve the Premises as Landlord deems reasonable and necessary without being deemed to have elected to terminate this Lease, including removal of all persons and property from the Premises, and including entering upon the Premises for the purpose of making repairs and making the Premises ready for re-letting. In the event Landlord removes property from the Premises such property may be removed and stored in a public warehouse or elsewhere at the cost of and for the account of Tenant, and if Tenant does not pay for storage, then sold at public auction and the proceeds of such auction shall first be applied against amounts owed by Tenant to Landlord. In the event any such re-letting occurs, this Lease shall terminate automatically upon the new tenant taking possession of the Premises, but Tenant shall nevertheless be responsible for damages, including but not limited to all rent and other sums then due with interest as provided herein, leasing commissions and alteration costs incurred by Landlord in securing the new tenant, and the difference in rent rates between this Lease and such re-letting if such re-letting is at lesser rates than provided by this Lease. Notwithstanding that Landlord fails to elect to terminate the Lease initially, Landlord at any time during the term of this Lease may elect to terminate this Lease by virtue of such previous default of Tenant, unless cured within the applicable grace period.

(b) Terminate Tenant's right to possession by any lawful means, in which case this Lease shall terminate and Tenant shall immediately surrender possession of the Premises to Landlord. In such event Landlord shall be entitled to recover from Tenant all damages incurred

by Landlord by reason of Tenant's default, including without limitation thereto, the following: (i) The worth at the time of award of any unpaid rent which has been earned at the time of such termination; plus (ii) the worth at the time of award of the amount by which the unpaid rent which would have been earned after termination until the time of award exceeds the amount of such rental loss that is proved by Tenant could have been reasonably avoided; plus (iii) the worth at the time of award of the amount by which the unpaid rent for the balance of the term after the time of award exceeds the amount of such rental loss that is proved by Tenant could be reasonably avoided; plus (iv) any other amount necessary to compensate Landlord for all the detriment proximately caused by Tenant's failure to perform his obligation under this Lease or which in the ordinary course of events would be likely to result therefrom; plus (v) at Landlord's election, such other amounts in addition to or in lieu of the foregoing as may be permitted from time to time by applicable State law. Upon any such re-entry Landlord shall have the right to make any reasonable repairs, alterations or modifications to the Premises, which Landlord in its sole discretion deems reasonable and necessary. As used in (i) and (ii) above, the "worth at the time of award" is computed by allowing interest from the date of default at the reference rate of the bank in which Landlord maintains its accounts, as such rate fluctuates, on a fully floating basis. As used in (iii) above, the "worth at the time of award" is computed by discounting such amount at the same reference rate applicable to (i) and (ii) above. The term "rent," as used in this Article, shall be deemed to be and to mean the rent to be paid pursuant to Article 4 and all other monetary sums required to be paid by Tenant pursuant to the terms of this Lease.

(c) In addition to the damages for breach of this Lease described above, Tenant agrees that Landlord shall be entitled to receive from Tenant any and all costs in connection with Tenant's default hereunder, including without limitation, administrative costs of Landlord associated with Tenant's default, costs of repairing and/or remodeling the Premises for new tenants and leasing commissions for any leasing agent engaged to re-let the Premises.

(d) Landlord shall have the obligation to make reasonable efforts to mitigate the loss or damage occasioned by a default of the Tenant, provided that said obligation to mitigate shall not relieve the Tenant of the burden of proof as required in this Article or otherwise affect the rights and remedies available to the Landlord in the event of a default by the Tenant as provided in this Article, or otherwise allowed by law or equity. Nothing herein contained shall obligate the Landlord to mitigate rental loss by re-letting the Premises so long as the Landlord has other similar premises vacant or by re-letting the Premises to a new tenant whose use of the Premises would be undesirable in the reasonable judgment of the Landlord, require the Landlord to expend any money to remodel, alter or improve the Premises, or would be result in the Landlord being in breach or default under any contractual obligations of the Landlord. Landlord shall credit its savings resulting from Landlord's mitigation pursuant to the provisions hereunder, less Landlord's costs and expenses in conducting such mitigation, against the damages caused by Tenant's default hereunder.

20.4 LATE CHARGES. Tenant hereby acknowledges that late payment by Tenant to Landlord of rent or other sums due hereunder will cause Landlord to incur costs not contemplated by this Lease, the exact amount of which will be extremely difficult to ascertain. Such costs include, but are not limited to, processing and accounting charges and late charges which may be imposed on Landlord by the terms of any mortgage or trust deed covering the Premises. Accordingly, if any installment of rent or any other sum due from Tenant shall not be

received by Landlord or Landlord's agent within ten (10) days after Landlord's notice to Tenant that such amounts are due, Tenant shall pay to Landlord, in addition to interest as provided herein, a late charge equal to five percent (5%) of such overdue amount. The parties hereby agree that such late charge represents a fair and reasonable estimate of the costs Landlord will incur by reason of late payment by Tenant. Acceptance of such late charge by Landlord shall in no event constitute a waiver of Tenant's default with respect to any other overdue amount, nor prevent Landlord from exercising any of the rights and remedies granted hereunder.

20.5 LIMITATION ON LANDLORD'S LIABILITY. If Landlord is in default under this Lease, and as a consequence Tenant recovers a money judgment against Landlord, the judgment shall be satisfied only out of the proceeds of sale received on execution of the judgment and levy against the right, title and interest of Landlord in the building, other improvements and land of which the Premises are a part, and out of rent or other income from such real property receivable by Landlord or out of the consideration received by Landlord from the sale or other disposition of all or any part of Landlord's right, title and interest in the building, other improvements and land of which the Premises are a part. No members or managers comprising the limited liability company designated as Landlord shall be personally liable for any deficiency.

ARTICLE 21 - NONDISCRIMINATION

The Tenant herein covenants by and for himself, his heirs, executors, administrators and assigns, and all persons claiming under or through him, that this Lease is made and accepted upon and subject to the following conditions:

That there shall be no discrimination against or segregation of any person or group of persons on account of race, color, creed, religion, sex, marital status, age, handicap, national origin or ancestry in the leasing, subleasing, transferring, use, occupancy, tenure, or enjoyment of the land herein leased, nor shall the Tenant himself, or any person claiming under or through him, establish or permit any such practice or practices of discrimination or segregation with reference to the selection, location, number, use or occupancy of tenants, lessees, subtenants, sublessees or vendees in the Premises herein leased.

ARTICLE 22 - MISCELLANEOUS

22.1 EXCLUSIVE. It is herewith agreed that this Lease contains no restrictive covenants or exclusives in favor of Tenant.

22.2 ESTOPPEL CERTIFICATE. Tenant shall at any time upon not less than ten (10) days prior written notice from Landlord execute, acknowledge and deliver to Landlord a statement in writing (a) certifying that this Lease is unmodified and in full force and effect (or, if modified, stating the nature of such modification and certifying that this Lease, as so modified, is in full force and effect) and the date to which the rent and other charges are paid in advance, if any, and (b) acknowledging that there are not, to Tenant's knowledge, any uncured defaults on the part of Landlord hereunder, or specifying such defaults if there are claims, and (c) acknowledging and certifying such other and further facts in connection with this Lease as may be reasonably requested by Landlord or a prospective purchaser or lender of the Facility or any

part thereof. Any such statement may be conclusively relied upon by any prospective purchaser or encumbrancer of the Premises or Facility. Tenant's failure to deliver such statement within such time shall be conclusive upon Tenant (a) that this Lease is in full force and effect, without modification except as may be represented by Landlord, (b) that there are no uncured defaults in Landlord's performance, and (c) that not more than an amount equal to one (1) month's rent has been paid in advance. If Landlord desires to finance, refinance or sell its interest in the Premises or property on which the Premises are located, or any part thereof or in the Facility, Tenant hereby agrees to deliver to any lender or purchaser designated by Landlord banking references and business history as Landlord may reasonably request. All such financial statements shall be received by Landlord in confidence and shall be used only for the purpose herein set forth.

22.3 TRANSFER OF LANDLORD'S INTEREST. In the event of a sale or conveyance by Landlord of Landlord's interest in the Premises or in the Facility other than a transfer for security purposes only, Landlord shall be relieved from and after the date specified in any such notice of transfer of all obligations and liabilities accruing on the part of Landlord, provided that any funds in the hands of Landlord at the time of transfer in which Tenant has an interest, shall be delivered to the successor of Landlord. This Lease shall not be affected by any such sale and Tenant agrees to attorn to the purchaser or assignee.

22.4 CAPTIONS; ATTACHMENTS; DEFINED TERMS. The captions of the sections and paragraphs of this Lease are for convenience only and shall not be deemed to be relevant in resolving any question of interpretation or construction of any section of this Lease. Exhibits attached hereto, and addendums and schedules are deemed by attachment to constitute part of this Lease and are incorporated herein. The words "Landlord" and "Tenant," as used herein, shall include the plural as well as the singular. Words used in neuter gender include the masculine and feminine and words in the masculine or feminine gender include the feminine or masculine or neuter, as the case may be. If there be more than one Landlord or Tenant, the obligations hereunder imposed upon Landlord and Tenant shall be joint and several; as to a Tenant which consists of husband and wife the obligations shall extend individually to their sole and separate property as well as community property. The obligations contained in this Lease to be performed by Landlord shall be binding on Landlord's successors and assigns only during their respective periods of ownership.

22.5 ENTIRE AGREEMENT. This instrument along with any exhibits and attachments hereto constitutes the entire agreement between Landlord and Tenant relative to the Premises and this Lease and the exhibits and attachments may be altered, amended or revoked only by an instrument in writing signed by both Landlord and Tenant. It is understood that there are no oral agreements or representations between the parties hereto affecting this Lease, and this Lease supersedes and cancels any and all previous negotiations, arrangements, brochures, agreements or representations and understandings, if any, between the parties hereto or displayed by Landlord to Tenant with respect to the subject matter hereof, and none thereof shall be used to interpret or construe this Lease. There are no other representations or warranties between the parties or the parties and their agents or representatives and all reliance with respect to representations is solely upon the representations and agreements contained in this document.

22.6 SEVERABILITY. If any term or provision of this Lease shall, to any extent be determined by a court of competent jurisdiction to be invalid or unenforceable, the remainder of

this Lease shall not be affected thereby, and each term and provision of this Lease shall be valid and be enforceable to the fullest extent permitted by law; and it is the intention of the parties hereto that if any provision of this Lease is capable of two (2) constructions, one (1) of which would render the provision void and the other of which would render the provision valid, then the provision shall have the meaning which renders it valid.

22.7 COST OF SUIT. If Tenant or Landlord shall bring any action for any relief against the other, declaratory or otherwise, arising out of this Lease, including any suit by Landlord for the recovery of rent or possession of the Premises, the losing party shall pay the successful party a reasonable sum for attorneys' fees which shall be deemed to have accrued on the commencement of such action and shall be paid whether or not such action is prosecuted to judgment. Should either party, without fault on his part, be made a party to any litigation instituted by the other or by any third party against the other, or by or against any person holding under or using the Premises, by license of the other, or for the foreclosure of any lien for labor or materials furnished to or for the other, or any such other person or otherwise arising out of or resulting from any act or transaction of the other, each party covenants to save and hold the other harmless from any judgment rendered against him or the Premises or any part thereof, and all costs and expenses, including reasonable attorneys' fees, incurred by the other in connection with such litigation.

22.8 TIME; JOINT AND SEVERAL LIABILITY. Time is of the essence of this Lease and each and every provision hereof, except as to the conditions relating to the delivery of possession of the Premises to Tenant. All the terms, covenants and conditions contained in this Lease to be performed by either party, if such party shall consist of more than one person or organization, shall be deemed to be joint and several, and all rights and remedies of the parties shall be cumulative and nonexclusive of any other remedy at law or in equity.

22.9 BINDING EFFECT; CHOICE OF LAW. The parties hereto agree that all the provisions hereof are to be construed as both covenants and conditions as though both the words importing such covenants and conditions were used in each separate paragraph hereof. Subject to any provisions hereof restricting assignment or subletting by Tenant and subject to Article 21.3, all of the provisions hereof shall bind and inure to the benefit of the parties hereto and their respective heirs, legal representatives, successors and assigns. This Lease shall be governed by the laws of the State of Idaho.

22.10 WAIVER. No covenant, term or condition or the breach thereof shall be deemed waived, except by written consent of the party against whom the waiver is claimed, and any waiver or the breach of any covenant, term or condition shall not be deemed to be a waiver of any other covenant, term or condition. Acceptance by Landlord of any performance by Tenant after the time the same shall become due unless cured within the applicable grace period, shall not constitute a waiver by Landlord of the breach or default of any covenant, term or condition unless otherwise expressly agreed to by Landlord in writing.

22.11 SURRENDER OF PREMISES. The voluntary or other surrender of this Lease by Tenant or a mutual cancellation thereof, shall not work a merger, and shall, at the option of Landlord, terminate all or any existing subleases or subtenancies, or may, at the option of Landlord, operate as an assignment to it of any or all such subleases and subtenancies.

22.12 HOLDOVER. If Tenant remains in possession of all or any part of the Premises after the expiration of the term hereof and any extensions thereof, without the express consent of Landlord, and without some other agreement set forth in writing, such tenancy shall be from month to month only, and in such case, rent and other monetary sums due hereunder shall be payable in the amount and at the time specified in this Lease, except that the Base Rent shall be adjusted to an amount which is equal to the Base Rent (as such Base Rent amount may have been adjusted as of the expiration of the term pursuant to Exhibit B) multiplied by one and one half (1.5), and such month to month tenancy shall be subject to every other term, covenant and agreement contained herein. Such month-to-month tenancy may be terminated upon fifteen (15) days written notice. This inclusion of this Article shall not be construed as Landlord's permission for Tenant to hold over. Notwithstanding the foregoing, in the event that Tenant provides Landlord with at least one hundred fifty (150) days written notice of its intent to remain in possession of the Premises specifically one (1), two (2) or three (3) months beyond the expiration date of this Lease (and no more than three (3) months) and Tenant is not in default under this Lease, Base Rent during such one, two or three month holdover period, as applicable, shall be adjusted to an amount which is equal to Base Rent (as such Base Rent amount may have been adjusted as of the expiration of the term pursuant to Exhibit B) multiplied by one and one quarter (1.25), and such month to month tenancy shall be subject to every other term, covenant and agreement contained herein.

22.13 FORCE MAJEURE. Any prevention, delay or stoppage due to acts of God or causes beyond the reasonable control of the party obligated to perform, shall excuse the performance by such party for a period of time equal to any such prevention, delay or stoppage except the obligations imposed with regard to rent and other charges to be paid by Tenant pursuant to this Lease.

22.14 NOTICES. Whenever any notice, approval, consent, request or election is given or made pursuant to this Lease, it shall be deemed delivered (i) when it is in writing and personally delivered or (ii) forty eight (48) hours after it is deposited in the United States mail, postage prepaid, certified or registered mail, return receipt requested and addressed to the party at the address set forth in Articles 1.2 and 1.4 above, or at such other addresses Landlord or Tenant may from time to time notify the other in writing; (iii) when it is deposited with a reputable overnight courier service (such as Federal Express or DHL), delivery charges paid, receipt confirmation requested, and addressed to the party at the address set forth in Articles 1.2 and 1.4 above, or at such other addresses Landlord or Tenant may from time to time notify the other in writing; or (iv) one (1) business day after transmission by electronic mail, facsimile or other electronic system.

22.15 INTEREST ON PAST DUE AMOUNTS. Except as expressly provided herein, any amount due to Landlord not paid when due shall bear interest at the lesser of (i) the reference rate set forth in Article 20.3(b) plus five percent (5%) per annum, or (ii) eighteen percent (18%), from the due date until the date paid. Payment of such interest shall not excuse or cure any default by Tenant under this Lease.

22.16 CORPORATE AUTHORITY. If Tenant is a corporation each individual executing this Lease on behalf of said corporation represents and warrants that such individual is duly authorized to execute and deliver this Lease on behalf of said corporation in accordance

with a duly adopted resolution of the Board of Directors of said corporation or in accordance with the Bylaws of said corporation, and that this Lease is binding upon said corporation in accordance with its terms. Tenant shall prior to or concurrently with the execution of this Lease, deliver to Landlord a certified copy of a resolution of the Board of Directors of said corporation authorizing or ratifying the execution of this Lease.

22.17 RECORDING. Neither this Lease nor any memorandum thereof shall be recorded without the express written consent of Landlord, and any such unauthorized recording of the same shall constitute an event of default by Tenant.

22.18 BROKERAGE. Tenant and Landlord represent and warrant that to one another that they have had no dealings with any broker or agent in connection with this Lease other than Landlord's broker, Colliers International, and Tenant's broker, DK Commercial. Each of Tenant and Landlord covenant hold harmless and indemnify one another from and against any and all cost, expense or liability for any compensation, commissions and charges claimed by any other broker or agent with respect to this Lease or the negotiation thereof. Landlord shall be responsible for payment of the brokerage fee pursuant to separate agreement, such commission to be split 50/50 with Colliers International and DK Commercial.

22.19 BUSINESS IMPROVEMENT DISTRICT. Tenant and Landlord understand and acknowledge that the City of Boise has established a Business Improvement District pursuant to Ordinance No. 5019 to operate and maintain public capital improvements, and that Tenant is subject to the provisions of that ordinance. This shall include responsibility for payment of fees and assessments, if any, which may be levied against Tenant or the Premises on account of its location within the Business Improvement District, which assessments shall be directly paid to the Downtown Boise Association or as directed.


ARTICLE 23 - SPECIAL PROVISIONS (See Addendum)

IN WITNESS WHEREOF, Landlord and Tenant have executed this Lease the date and year first above written.

LANDLORD:

Boise Mode, LLC, an Illinois limited liability company

By: Baum Brothers, LLC, its manager

By: 
Name: DAVID L. BAUM
Title: member

TENANT:

Donahoe Pace & Partners, Ltd., an Idaho corporation

By: 
Name: Timothy Pace
Title: President

ADDENDUM

SPECIAL PROVISIONS

- 23.1. Notwithstanding anything to the contrary in this Lease or any exhibits, schedules or addendums, in the event that Tenant does not or cannot exercise the Option for the Option Term, Tenant shall pay Landlord the amount of \$4,119.91 in one lump sum prior to the termination of this Lease. In the event that Tenant does not pay such amount, Landlord shall have all rights and remedies available at law, equity or under this Lease to enforce this provision and collect such payment.

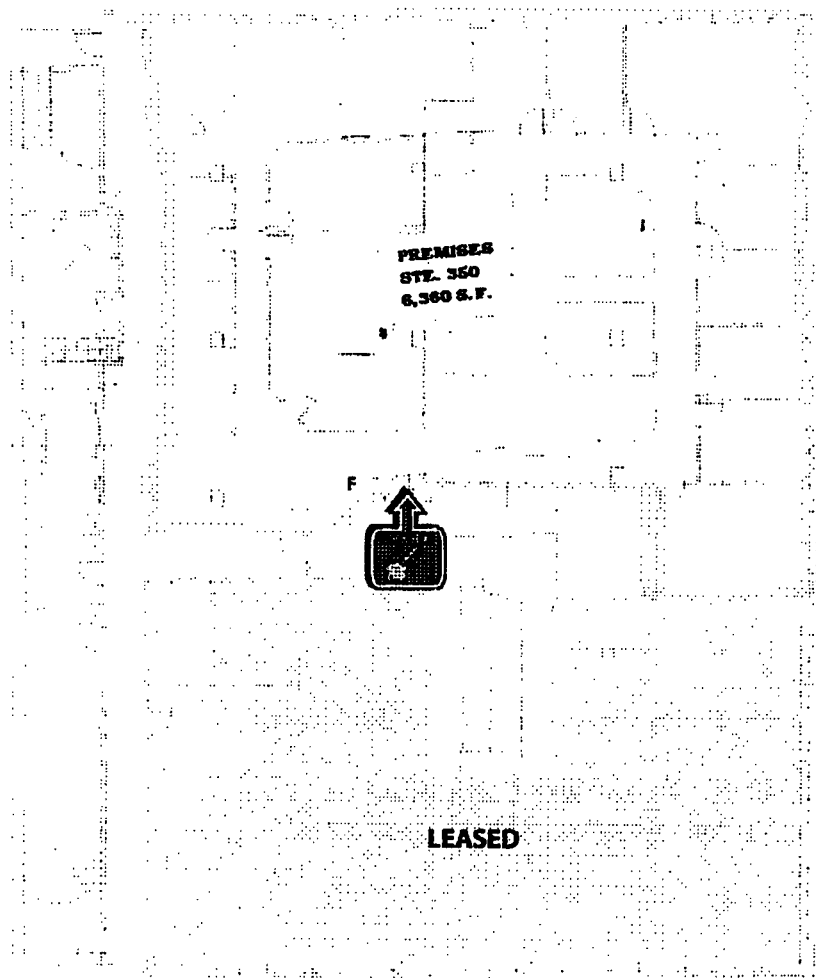
EXHIBIT "A"

SCHEMATIC DEPICTION OF LOCATION OF PREMISES AND FLOOR PLAN

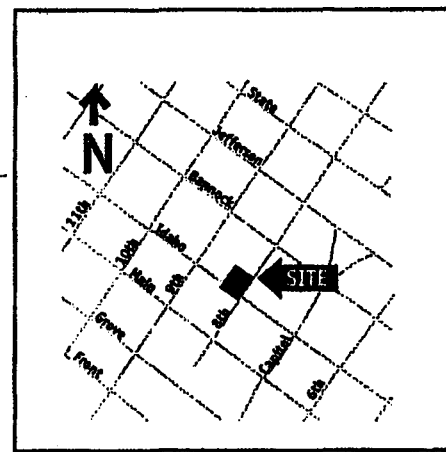
Mode Building

Corner of Eighth and Idaho • Boise, Idaho

3rd Floor Plan



3rd Floor: 10,380 SF Total



Historic Mode Building

Corner of Eighth and Idaho
Boise, Idaho

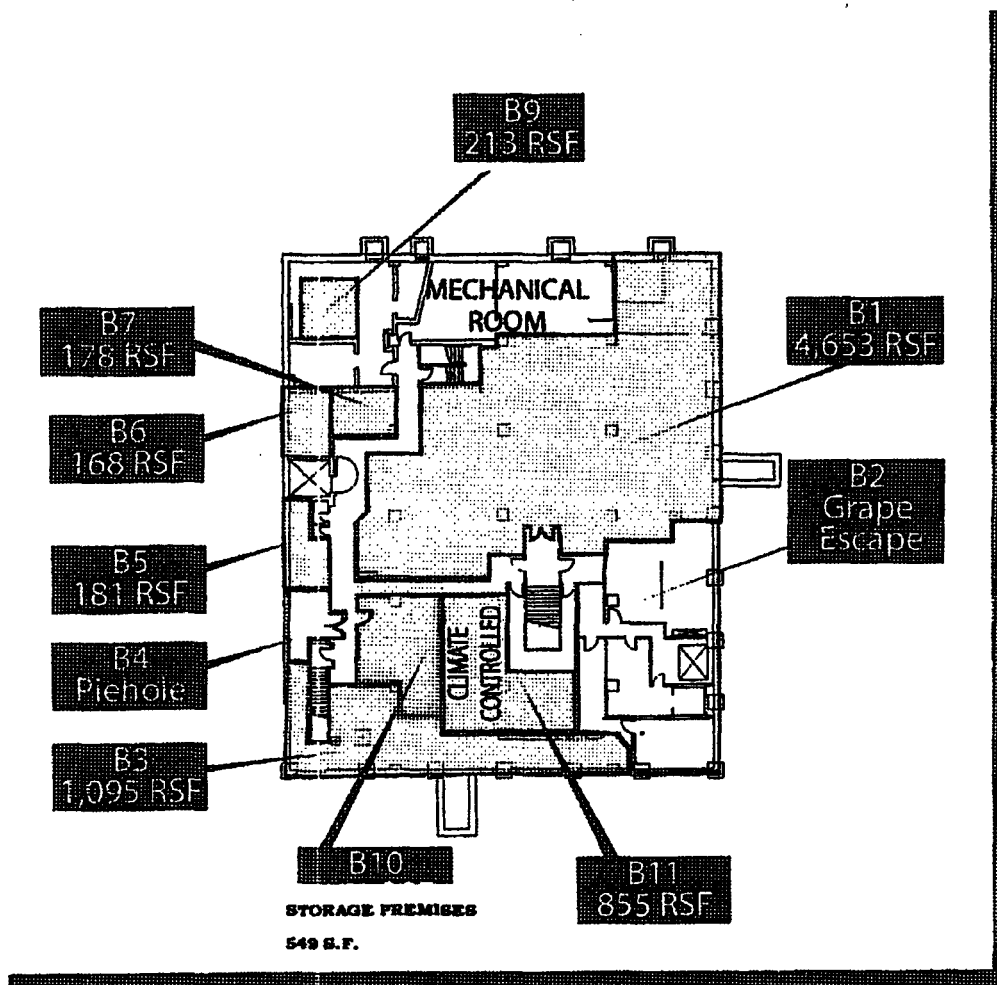


EXHIBIT "B"

BASE RENT

OFFICE:

December 1, 2006-February 28, 2006: Base Rent for the Office Space shall be abated.

Initial Term Base Rent:

03/01/07- 02/28/08: <i>SP/MS</i>	\$14.00/s.f.	\$89,040.00/year	\$7,420.00/mo.
03/01/08- 02/28/09:	\$14.50/s.f.	\$92,220.00/year	\$7,685.00/mo.
03/01/09- 02/28/10:	\$15.00/s.f.	\$95,400.00/year	\$7,950.00/mo.
03/01/10- 05/31/10:	\$15.50/s.f.	\$98,580.00/year	\$8,215.00/mo.

Extended Term Base Rent:

06/01/10 – 05/31/11:	\$15.63/s.f.	\$99,406.80/year	\$8,283.90/mo.
06/01/11 – 05/31/12:	\$16.13/s.f.	\$102,586.80/year	\$8,548.90/mo.

STORAGE SPACE:

December 1, 2006- January 31, 2007: Base Rent for the Storage Space shall be abated.

Initial Term Base Rent:

01/31/07- 12/31/07:	\$6.00/s.f.	\$3,294.00/year	\$274.50/mo.
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Extended Term:

The term of the Storage Space shall be renewable annually upon written mutual agreement of Landlord and Tenant.

Notwithstanding anything in this Lease to the contrary, the Premises shall include both the office space and the storage space and all obligations of Tenant and Landlord are not divisible between such office and storage space, including without limitation, payment of Base Rent. The above breakdown between the Base Rent for the office space and storage space is for clarification purposes and for all purposes under the Lease, all payments of Base Rent shall include the total amount of Base Rent due for both the office space and the storage space. In the event the term of the Storage Space is not renewed, then all payments of Base Rent shall include only the Office Space.

Landlord *MS* Tenant *A*

EXHIBIT "C"

IMPROVEMENTS

Landlord shall pay to Tenant an allowance on account of all direct costs paid by Tenant for construction and completion of the following work ("Tenant's Work") (but only including those portion of Tenant's Work which are related to leasehold improvements, including hard construction costs, engineering and architectural plans), in a total maximum amount of which shall not exceed Forty Thousand and No/100 Dollars (\$40,000) (the "Construction Allowance"). In connection with reimbursement requests, Tenant shall submit to Landlord the following items: (a) a sworn affidavit (including the general contractor's sworn statement) from Tenant reasonably acceptable to Landlord stating the actual direct costs paid to all contractors and subcontractors, the names of all contractors and suppliers of Tenant's work and a statement that all parties involved in Tenant's Work have been paid in full; (b) mechanic's lien waivers, in form and substance reasonably acceptable to Landlord, from all parties, in the form attached hereto as Schedule 1. Within fourteen (14) days after receipt of all such items, Landlord shall pay the applicable portion of the Construction Allowance to Tenant, provided that at the time of payment there is not a continuing event of default.

Tenant's minimum improvements to the Premises shall include:

1. New Building Standard carpet and/or tile, color at Tenant's option with Landlord's approval.
2. New Building Standard paint and/or wall covering throughout, color at Tenant's option with Landlord's approval.
3. Provide and install a glass office wall and door where shown on Exhibit A attached hereto.
4. Replace existing high counters on cubicles and countertop in kitchen with new laminate and/or countertops, laminate at Tenant's option with Landlord's approval.
5. Replace existing flooring in kitchen with new tile flooring.
6. Install additional glass privacy panels at cubicle identified on Exhibit A attached hereto.
7. Chair rail shall be installed in northern most office/conference room with built-in AV cabinet to be built by Tenant's contractor but to be a part of Landlord's tenant improvement allowance to Tenant.
8. Replacement of certain windows, provided that the remaining portion of the Construction Allowance is sufficient after the completion of tenant's minimum improvements one through seven above, or at Tenant's expense if the Construction Allowance is exhausted or insufficient. The type, location and construction of the windows must be reasonably approved by Landlord.

In the event the above referenced improvements exceed the allowance, Tenant shall pay for any improvements in excess of the allowance or, upon the written consent of Landlord, eliminate portions of the foregoing tenant improvements. All of such improvements and work shall be in compliance with the terms of the Lease. All improvements shall require approval by Landlord, including review of plans, specifications and other materials, which approval shall not be unreasonably withheld.

Landlord  Tenant 

The Landlord shall provide the following Landlord Improvements:

1. Once Tenant has removed the existing floor coverings in the Premises, Tenant shall provide written notice to Landlord and Landlord shall perform reasonable repairs on the sub-floor of the Premises, in order to ready such sub-floor for the coverings to be installed by Tenant.
2. Public restrooms on the 3rd floor shall be redecorated with new flooring and paint. Partitions shall also be painted.

Other than the Landlord Improvements specified above, Tenant accepts the Premises and the Facility in an "as-is" – "where-is" condition.

SCHEDULE 1 – FORM OF LIEN WAIVER

LIEN RELEASE

FROM: _____

TO: _____

PHONE _____

CONDITIONAL RELEASE

The undersigned does hereby acknowledge that upon receipt by the undersigned of a check from _____ in the sum of \$ _____ payable to _____ and when the check has been properly endorsed and has been paid by the bank upon which it was drawn, this document shall become effective to release any mechanic's lien, stop notice or bond right the undersigned has on the above referenced job to the following extent. This release covers a progress payment for labor, services, equipment and materials furnished through _____ only and does not cover any retention or items furnished after said date. Before any recipient of this document relies on it, said party should verify evidence of payment to the undersigned.

Signature of Authorized Agent

Date

PROJECT

FROM: _____

TO: _____

PHONE _____

UNCONDITIONAL RELEASE

The undersigned does hereby acknowledge that the undersigned has been paid and has received progress payments in the sum of \$ _____ for labor, services, equipment, and materials furnished to the above referenced job and does hereby release any mechanic's lien, stop notice, and bond right that the undersigned has on the referenced job to the following extent. This release covers a progress payment for labor, services, equipment, and materials furnished to the above referenced job _____ only and does not cover any retention or items furnished after that date. NOTICE: THIS DOCUMENT WAIVES RIGHTS UNCONDITIONALLY AND STATES THAT YOU HAVE BEEN PAID FOR GIVING UP THOSE RIGHTS. THIS DOCUMENT IS ENFORCEABLE AGAINST YOU IF YOU SIGN IT EVEN IF YOU HAVE NOT BEEN PAID. IF YOU HAVE NOT BEEN PAID USE A CONDITIONAL RELEASE FORM.

Signature of Authorized Agent

Date

EXHIBIT "D"

MODE BUILDING

OPTION TO EXTEND

OPTION TERM

OFFICE SPACE:

So long as Tenant shall have satisfactorily performed the terms of the Lease and has not been placed in default during the term, Tenant shall have the right, at its election, to extend the original Term of this Lease for, one (1) extension period of two (2) years commencing upon the expiration of the original Term, (sometimes herein referred to as an "Option Term" or "Extension Period"), provided that Tenant shall give Landlord written notice of the exercise of such election at least one hundred eighty (180) days prior to the expiration of the then current original Term or Extension Period, as the case may be. Prior to the exercise by Tenant of any such election to extend the original Term, the expression "the term of this lease" shall mean the period described in Article 1.9. After the exercise by Tenant of any of such elections, the expression "the term of this lease" shall mean the lease term as it has then been extended. Except as otherwise expressly provided in this Lease, all the agreements and conditions contained in this Lease shall apply to each period or periods to which the lease term shall be extended as aforesaid; provided that no Landlord Improvements shall be provided with respect to such extension periods. If Tenant shall give notice of the exercise of any such election in the manner and within the time provided aforesaid, the term shall be extended upon the giving of such notice without the requirement of any action on the part of Landlord. Tenant may exercise its option to extend the Office Space specified above without being obligated to extend the term relating to the Storage Space. .

STORAGE SPACE:

The term of the Storage Space shall be renewable annually upon mutual agreement of Landlord and Tenant.

OPTION BASE RENT


The Base Rent during any Extension Period shall be as specified on Exhibit B.

EXHIBIT "E"

BUILDING RULES AND REGULATIONS

Except as otherwise provided in the Lease, the following rules and regulations shall apply for the Building and Facility:

1. The sidewalks, entrances, halls, passages, elevators and stairways shall not be obstructed by any of the Tenants, or used by them for any other purpose than for ingress and egress to and from their respective Premises.
2. Tenants, their agents, employees, or visitors, shall not make or commit any improper noises or disturbances of any kind in the building, or make or define the water closets, toilet rooms, windows, elevators, or doors of the Building or interfere in any way with other Tenants or those having business with them.
3. The toilet rooms, water closets, and other water apparatus shall not be used for any purpose other than those for which they were constructed, and no sweepings, rubbish, rags, ashes, chemicals, or the refuse from electric batteries or other unsuitable substance, shall be thrown therein. Any damage from such misuse or abuse shall be borne by the Tenant by whom or by those employees or visitors it shall be caused.
4. No carpet, rug, or other article shall be hung or shaken out of any window or placed in corridors as a door mat, and nothing shall be thrown or allowed to drop by the Tenants, their agents, employees, or visitors, out of the windows or doors, or down the passages or shafts of the Building, and no Tenant shall sweep or throw, or permit to be thrown from the Premises, any dirt or other substances into any of the corridors or halls, elevators, shafts, or stairways of said building.
5. No linoleum, or oil cloth, or rubber or other air-tight coverings shall be laid on the floors, nor shall articles (except for interior artwork) be fastened to, or holes drilled, or nails or screws driven into walls, windows, partitions, nor shall the walls or partitions be painted, papered or otherwise covered, or in any way marked or broken, without the prior written consent of the Landlord.
6. Nothing shall be placed on the outside of the Building, or on the windows, window sills, or projections.
7. The only window treatment permitted for the windows in the Premises is that installed by and approved in writing by the Landlord.
8. No sign, advertisement, or notice shall be inscribed, painted, or affixed on any part of the *outside or inside of the common area of said Building*, other than as provided for in the Lease. Signs on doors and windows shall be subject to approval by Landlord, the cost of affixing to be paid by Tenant. A directory in the lobby, with the names of Tenants, will be provided by Landlord.

Landlord  Tenant 

9. After permission to install telephones, call boxes, telegraph wires, or other electric wires has been granted, Landlord will direct where and how the same are to be placed. No wires shall be run in any part of the Building excepting by or under the direction of Landlord. Attaching of wires to the outside of the Building is absolutely prohibited. It is understood that telephones are installed solely for the use and benefit of Tenant and, accordingly, Tenant will save Landlord harmless for any damages thereto.
10. The Landlord shall in all cases have the right to prescribe the weight and proper position of safes or other heavy objects in the Building; and the bringing in of said safes, all furniture, fixtures or supplies, the taking out of said articles, and moving about of said articles within the building, shall only be at such time and in such manner as the Landlord shall designate; and any damage caused by any of the before mentioned operations, or by any of the said articles during the time they are in the Building, shall be repaired by Tenant at Tenant's expense.
11. No motor vehicles will be allowed in Building.
12. No Tenant shall do or permit anything to be done in said Premises, or bring or keep anything therein which will in any way increase the rate of fire insurance on said Building or on property kept therein, or obstruct or interfere with the rights of other Tenants, or in any way injure or annoy them or conflict with the laws relating to fires, or with the regulations of the Fire Department or with any insurance policy upon said Building or any part thereof, or conflict with any of the rules and ordinances of the Department of Health. Tenant understands and agrees that the vehicle of any Tenant obstructing any unauthorized area, and particularly in areas designated by specially painted curbs as fire lane areas, may be towed away at owner's risk and expense.
13. No animals or birds shall be brought into or kept in or upon the Premises, but this shall not prohibit house pets that may be brought into the Premises with express written consent of Landlord. Landlord may revoke its consent at any time by providing Tenant with written notice for any reason.
14. No machinery of any kind, other than normal office machines (i.e., electric typewriters, dictating or adding machines, computers or similar desk-type equipment, only), shall be allowed to be operated on the Premises without prior written consent of Landlord.
15. The use of office suites as: sleeping apartments; for the preparation of foods; or for any immoral or illegal purpose is absolutely prohibited.
16. No Tenant shall conduct, or permit any other person to conduct any auction upon the Premises, or store goods, wares, or merchandise upon the Premises without the prior written approval of the Landlord except for the usual supplies and inventory to be used by the Tenant in the conduct of its business.
17. Any and all damage to floors, walls, or ceilings due to Tenant or Tenant's employees' or customers failure to shut off running water or liquid shall be paid by Tenant.

Landlord  Tenant 

18. At any time while the Building is in charge of a watchman, any person entering or leaving the Building may be questioned as to his business in the Building; and anyone not satisfying the watchman of his right to enter the Building may be excluded by him.

EXHIBIT "F"

[Intentionally omitted]

Landlord  Tenant 

EXHIBIT "G"

MODE BUILDING APPROVED SIGNS

EXTERIOR SIGNAGE

It is not anticipated that office tenants will have any exterior signage, but will be allowed appropriate space on the Building's tenant directory. Tenant shall have the right to install signage at its suite entrance, upon the reasonable approval by Landlord.

Landlord DM Tenant D

EXHIBIT H - PERSONAL GUARANTEE OF LEASE

LANDLORD: BOISE MODE, LLC

(Name of Landlord)

TENANT: DONAHOE PACE & PARTNERS, LTD

(Name of Tenant)

GUARANTOR: TIMOTHY PACE

The undersigned guarantee(s) to Landlord as follows:

1. GUARANTEE: The Undersigned jointly, severally, personally, and individually guarantee(s) payment when due, or upon demand after the due date, all obligations and the full amount of money that Tenant now or in the future owes Landlord arising under or relating to the Lease (except any extension thereof as provided below), plus interest, attorney fees, costs, penalties and expenses of collection incurred because of Tenant default, including post-judgment collection costs ("Liabilities"). The Liabilities shall not be reduced by any claim of setoff or counterclaim of Tenant or Undersigned, loss of contribution from any of the Undersigned, or any settlement or compromise between Tenant and Landlord.

2. PAYMENT: If Tenant shall fail to pay all or any part of the Liabilities when due, whether by acceleration or otherwise, the Undersigned, immediately upon written demand by the Landlord, will pay to the Landlord the full amount of the Liabilities as if the Liabilities constituted the direct and primary obligation of each of the Undersigned.

3. WAIVER: The Undersigned waive(s) notice of acceptance of this Guarantee and of transactions between Tenant and Landlord, including but not limited to amounts, terms, default, waiver or cure of default disputes, and settlements of disputes. The Undersigned waive(s) the right of subrogation and the right of release or discharge arising from (a) any change in the terms of the Lease or amounts, except any renewal, extension, modification, refinancing, or other indulgence, (b) the addition or release of, or compromise or settlement with, any party that may be primarily or secondarily liable, or (c) the acquisition or disposition of any security, including the impairment of or failure to obtain, perfect, or enforce a lien or security interest in any collateral. The Undersigned waive the benefit of all homestead exemption laws.

J.M)

4. EXPIRATION OF GUARANTEE: This Guarantee shall expire and the Undersigned shall be released from any ongoing obligation to guarantee this lease at the expiration of the original term (May 31, 2010) provided no outstanding defaults by Tenant in the payment of rents or other sums to be paid under the Lease exist and that all sums to be paid by Tenant have been made in accordance with the terms of this Lease.


5. LEGAL ACTION AND ATTORNEY FEES: Landlord may proceed against one of the Undersigned before or after proceeding against tenant, any co-guarantor, or other party, or any security. If a suit, action, or other proceeding arising out of or related to this Guarantee is instituted, the prevailing party shall be entitled to recover its reasonable attorney fees, expert witness fees, and costs (i) incurred in any settlement negotiations, (ii) incurred in preparing for and prosecuting any suit, action, or other proceeding, and (iii) incurred in preparing for an prosecuting any appeal of any suit, action, or other proceeding. This section shall survive and remain enforceable notwithstanding any rescission of this Guarantee or a determination by a court of competent jurisdiction that all or any portion of the remainder of this Agreement is void, illegal, or against public policy.

6. GOVERNING LAW AND JURISDICTION: This Agreement shall be construed and interpreted in accordance with the laws of the State of Idaho. The parties agree that the courts of Idaho shall have exclusive jurisdiction and agree that Ada County is the proper venue.

GUARANTOR

Dated November 3, 2006

Timothy Pace
(Guarantor's Name)


(Guarantor's Signature)

800 West Idaho Street, Suite 350
(Street Address)

Boise, Idaho 83702
(City, State, and Zip Code)

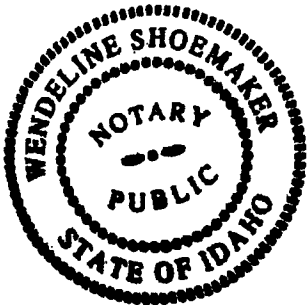
(208) 424-3422
(Telephone Number)

Landlord  Tenant 

STATE OF IDAHO)
):ss
County of Ada)

On this 3rd day of November 2006, before me, the undersigned, a Notary Public in and for said State, personally appeared Kimberly Pace, known or identified to me to be the person whose name is subscribed to the within instrument, and acknowledged to me that he executed the same.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal the day and year in this written.



Wendeline Shoemaker
Notary Public for Idaho

Residing at Boise, Idaho

My commission expires: 7/20/2010

STEVEN F. SCHOSSBERGER
ADMITTED TO PRACTICE LAW IN IDAHO AND CALIFORNIA
EMAIL: SSCHOSSBERGER@HAWLEYTROXELL.COM
DIRECT DIAL: 208.388.4975
DIRECT FAX: 208.954.5260

November 9, 2009

VIA UNITED STATES MAIL

**VIA CERTIFIED MAIL WITH
RETURN RECEIPT REQUESTED**

Donahoe Pace & Parnters, Ltd
800 W. Idaho Street, Suite 350
Boise, ID 83702

Timothy Pace, Guarantor
800 W. Idaho Street, Suite 350
Boise, ID 83702

Re: *Delinquent Rent for Lease of 800 W. Idaho Street, Suite 350, Boise, Idaho 83702*

Dear Mr Pace:

I have been informed that you have abandoned the premises located at 800 Idaho Street, Suite 350, Boise, Idaho, which is leased by Donahoe Pace & Partners, Ltd., Tenant, from Boise Mode, LLC, Landlord, pursuant to that certain Retail Lease Agreement dated November 3, 2006, (hereinafter the "Lease"). Pursuant to Section 20.3, the Lease remains in effect and Donahoe Pace & Partners, Ltd., and you as guarantor, will be obligated to pay all rent and other charges due under the Lease until Landlord has re-leased the premises. The current amount past due and owing to Landlord is \$30,292.49.

I have read your letter dated November 4, 2009, to Angela Aeschliman. You are mistaken in your contention that your alleged past damages somehow excuses you from paying Landlord all rent and other charges which are outstanding and which continue to accrue under

Donahoe Pace & Partners, Ltd.
Mr. Timothy Pace, Guarantor
November 9, 2009
Page 2

the Lease. Prior to abandoning the premises, you did not take any action pursuant to Idaho Code § 6-320 against Landlord, and all such claims, which Landlord disputes, have now been waived.

I am returning your check NO. 5485 in the amount of \$3,000.00 which was referenced as "Final Lease Payment" and offered per your October 12, 2009, settlement letter. Landlord rejected that offer on October 26, 2009. In return, per the Lease and your personal guaranty agreement, you are contractually and legally obligated to provide Landlord with a check in the amount of \$30,292.40 per the attached Tenant Statement. Please deliver that payment to my office no later than this Friday, November 13, 2009.

Sincerely,

HAWLEY TROXELL ENNIS & HAWLEY LLP


Steven F. Schossberger

SFS/bab
Enclosure
cc: Client

Watermark Property Management
1030 West Chicago Avenue
Suite 300
Chicago, IL 60642

Tenant Statement

Make Payments to: Boise Mode, LLC
Dept. 5410
P.O. Box 745
Milwaukee, IL 53201-0745

Donahoe, Pace & Partners Ltd.
Attn: Mr. Tim Pace
800 West Idaho Street, Suite 350
Boise, ID 83702

Statement Date : 11/09/09

Tenant : Donahoe, Pace & Partners, Ltd. - donapace

Property : modebidg
800 W Idaho St., Boise, ID

Unit : 350 & B10

Balance Due : \$30,292.49

Date	Description	Charges	Payments	Balance
	Balance Forward			19,967.99
09/01/09	0 - Storage Rent (09/2009)	274.50		20,242.49
09/01/09	0 - Base Rent Office (09/2009)	7,950.00		28,192.49
09/10/09	Chk# 5371 - Payment		7,224.50	20,967.99
09/11/09	September Late Fee	50.00		21,017.99
10/01/09	0 - Base Rent Office (10/2009)	7,950.00		28,967.99
10/01/09	0 - Storage Rent (10/2009)	274.50		29,242.49
10/05/09	Chk# 5478 - Payment		7,224.50	22,017.99
10/09/09	10/09 Late Fee: 5% of \$1,0000 short paid	50.00		22,067.99
11/01/09	0 - Storage Rent (11/2009)	274.50		22,342.49
11/01/09	0 - Base Rent Office (11/2009)	7,950.00		30,292.49

This statement is provided to assist you in maintaining a current balance on your account. It contains all charges posted to your account through the statement date.

Donahoe Pace & Partners Ltd.
dba Stratus & Associates Boise

5485

Voucher#	Reference	Balance	Amount Paid	Disc.	Payment
117183PBH	FINAL LEASE PAYMENT	3000.00	3000.00	0.00	3000.00

Totals:		3000.00	3000.00	0.00	3000.00
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ORIGINAL DOCUMENT PRINTED ON CHEMICAL REACTIVE PAPER WITH MICROPRINTED BORDER

Donahoe Pace & Partners Ltd.
dba Stratus & Associates Boise
P.O. Box 1219 • Boise, Idaho 83701 • (208) 344-7374

IDAHO INDEPENDENT BANK
8361 W. OVERLAND RD.
BOISE, ID 83709
92-373/1231

5485

EXACTLY THREE THOUSAND & NO/100 DOLLARS

DATE AMOUNT

10/12/09 \$*****3,000.00

PAY
TO THE
ORDER
OF

BOISE MODE, LLC
DEPT 5410
P.O. BOX 745
MILWAUKEE, WI 53201-0745

Donahoe Pace & Partners Ltd.
dba Stratus & Associates Boise



SECURITY
SECURITY
SECURITY

THIS DOCUMENT CONTAINS HEAT SENSITIVE INK. TOUCH OR PRESS HERE. RED IMAGE DISAPPEARS WITH HEAT.

000548510 1231037321 1000000310

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DonahoePace

Donahoe Pace & Partners, Ltd.
The Mode Building
Suite 350 | 800 West Idaho Street
PO Box 1219 | Boise, Idaho 83701-1219

MR. STEVEN SCHOSSBERGER
HAWLEY TROXELL ENNIS & HAWLEY LLP
877 MAIN STREET, SUITE 1000
BOISE, ID

received
2:55 10/12

000071

HAWLEY TROXELL

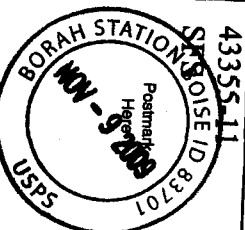
877 Main Street, Suite 1000
P.O. Box 1617
Boise, Idaho 83701-1617

November 9, 2009
Jimmy Green

7007 3020 0003 0230 6128

Sent to: Donahoe Pace & Partners, Ltd.
Street, Apt. No.: 800 W. Idaho St., Ste. 350
or PO Box No.:
City, State, ZIP+4: Boise, ID 83702
PS Form 3800 August 2006

Postage	\$ 44
Certified Fee	2.80
Return Receipt Fee (Endorsement Required)	2.20
Restricted Delivery Fee (Endorsement Required)	
Total Postage & Fees	\$5.54



OFFICIAL USE
U.S. Postal Service
CERTIFIED MAIL RECEIPT
(Domestic Mail Only: No Insurance Coverage Provided)
For delivery information visit our website at www.usps.com

VIA CERTIFIED MAIL
RETURN RECEIPT REQUESTED

See Reverse for Instructions

SENDER: COMPLETE THIS SECTION		COMPLETE THIS SECTION ON DELIVERY	
<ul style="list-style-type: none"> Complete items 1, 2, and 3. Also complete item 4 if Restricted Delivery is desired. Print your name and address on the reverse so that we can return the card to you. Attach this card to the back of the mailpiece, or on the front if space permits. 		<p>A. Signature <i>Beverly Green</i> <input type="checkbox"/> Agent <input type="checkbox"/> Addressee</p> <p>B. Received by (Printed Name) <input type="checkbox"/> <i>Beverly Green</i></p> <p>C. Date of Delivery <input type="checkbox"/> NOV 10 2009</p> <p>D. Is delivery address different from item 1? <input type="checkbox"/> Yes if YES, enter delivery address below: <input type="checkbox"/> No</p>	
<p>1. Article Addressed to:</p> <p>Donahoe Pace & Partners, Ltd 800 W. Idaho Street, Suite 350 Boise, ID 83702</p>		<p>3. Service Type</p> <input checked="" type="checkbox"/> Certified Mail <input type="checkbox"/> Express Mail <input type="checkbox"/> Registered <input checked="" type="checkbox"/> Return Receipt for Merchandise <input type="checkbox"/> Insured Mail <input type="checkbox"/> C.O.D.	
<p>2. Article Number (Transfer from service label)</p>		<p>4. Restricted Delivery? (Extra Fee) <input type="checkbox"/> Yes</p>	
PS Form 3811, February 2004		Domestic Return Receipt	

7007 3020 0003 0230 6128

102-112-M-1540

000072

HAWLEY TROXELL

877 Main Street, Suite 1000
P.O. Box 1617
Boise, Idaho 83701-1617

Postage & Stamp
Timothy Pace

CERTIFIED MAIL



7007 3020 0003 0230 6111

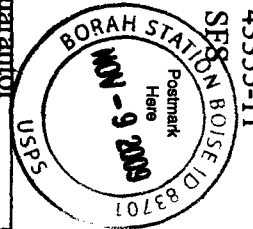
U.S. Postal Service
CERTIFIED MAIL[®] RECEIPT
(Domestic Mail Only. No Insurance Coverage Provided)

OFFICIAL USE

For delivery information visit our website at www.usps.com

Postage	\$.44
Certified Fee	2.80
Return Receipt Fee (Endorsement Required)	2.70
Restricted Delivery Fee (Endorsement Required)	
Total Postage & Fees	\$ 6.94

Sent to: Timothy Pace, Guarantor
Street, Apt. No.: 800 W. Idaho St., Ste. 350
or P.O. Box No.:
City, State, ZIP+4: Boise, ID 83702
PS Form 3800, August 2006 See Reverse for Instructions



**VIA CERTIFIED MAIL
RETURN RECEIPT REQUESTED**

SENDER: COMPLETE THIS SECTION

- Complete items 1, 2, and 3. Also complete item 4 if Restricted Delivery is desired.
- Print your name and address on the reverse so that we can return the card to you.
- Attach this card to the back of the mailpiece, or on the front if space permits.

1. Article Addressed to:

Timothy Pace, Guarantor
800 W. Idaho Street, Suite 350
Boise, ID 83702

2. Article Number
(Transfer from service label)

COMPLETE THIS SECTION ON DELIVERY

A. Signature *Beverly Messersmith* Agent
 Addressee

B. Received by (Printed Name) *NOV 10 2009* C. Date of Delivery

D. Is delivery address different from item 1? Yes
If YES, enter delivery address below: No

NOV 12 2009

3. Service Type
 Certified Mail Express Mail
 Registered Return Receipt for Merchandise
 Insured Mail C.O.D.

4. Restricted Delivery? (Extra Fee) Yes

7007 3020 0003 0230 6111

000073

RONALD J. WILPER

NO. _____ FILED _____
A.M. _____ P.M. _____

JAN 20 2010

J. DAVID NAVARRO, Clerk
By **E. HOLMES**
DEPUTY

Steven F. Schossberger, ISB No. 5358
HAWLEY TROXELL ENNIS & HAWLEY LLP
877 Main Street, Suite 1000
P.O. Box 1617
Boise, ID 83701-1617
Telephone: 208.344.6000
Facsimile: 208.954.5260
Email: sschossberger@hawleytroxell.com

Attorneys for Plaintiff Boise Mode, LLC, successor-in-
interest to Mode Building Limited Partnership

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

BOISE MODE, LLC, an Illinois limited liability company, successor-in-interest to Mode Building Limited Partnership, an Idaho limited partnership,)
Plaintiff,)
vs.)
DONAHOE PACE & PARTNERS LTD, an Idaho corporation; and TIMOTHY PACE,)
Defendants.)

CV OC 1001093
Case No. _____
SUMMONS

NOTICE: YOU HAVE BEEN SUED BY THE ABOVE-NAMED PLAINTIFF. THE COURT MAY ENTER JUDGMENT AGAINST YOU WITHOUT FURTHER NOTICE UNLESS YOU RESPOND WITHIN 20 DAYS. READ THE INFORMATION BELOW.

TO: TIMOTHY PACE

You are hereby notified that in order to defend this lawsuit, an appropriate written response must be filed with the above designated court within 20 days after service of this Summons on you. If you fail to so respond the court may enter judgment against you as demanded by the Plaintiff in the Complaint.

SUMMONS - 1

01

A copy of the Complaint is served with this Summons. If you wish to seek the advice of or representation by an attorney in this matter, you should do so promptly so that your written response, if any, may be filed in time and other legal rights protected.

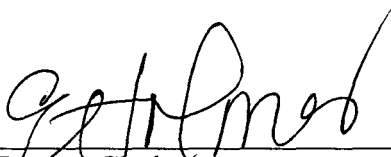
An appropriate written response requires compliance with Rule 10(a)(1) and other Idaho Rules of Civil Procedure and shall also include:

1. The title and number of this case.
2. If your response is an Answer to the Complaint, it must contain admissions or denials of the separate allegations of the Complaint and other defenses you may claim.
3. Your signature, mailing address, and telephone number, or the signature, mailing address, and telephone number of your attorney.
4. Proof of mailing or delivery of a copy of your response to Plaintiff's attorney, as designated above.

To determine whether you must pay a filing fee with your response, contact the Clerk of the above-named Court.

DATED THIS 20 day of January, 2010.

J. DAVID NAVARRO
Clerk of the Court

By 
Deputy Clerk

RONALD J. WILPER

NO. _____ FILED _____
A.M. _____ P.M. *5*

JAN 20 2010

J. DAVID NAVARRO, Clerk
By E. HOLMES
DEPUTY

Steven F. Schossberger, ISB No. 5358
HAWLEY TROXELL ENNIS & HAWLEY LLP
877 Main Street, Suite 1000
P.O. Box 1617
Boise, ID 83701-1617
Telephone: 208.344.6000
Facsimile: 208.954.5260
Email: sschossberger@hawleytroxell.com

Attorneys for Plaintiff Boise Mode, LLC, successor-in-interest to Mode Building Limited Partnership

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

BOISE MODE, LLC, an Illinois limited liability company, successor-in-interest to Mode Building Limited Partnership, an Idaho limited partnership,

Plaintiff,

vs.

DONAHOE PACE & PARTNERS LTD, an Idaho corporation; and TIMOTHY PACE,

Defendants.

Case No. **CV OC 1001093**
SUMMONS

NOTICE: YOU HAVE BEEN SUED BY THE ABOVE-NAMED PLAINTIFF. THE COURT MAY ENTER JUDGMENT AGAINST YOU WITHOUT FURTHER NOTICE UNLESS YOU RESPOND WITHIN 20 DAYS. READ THE INFORMATION BELOW.

TO: DONAHOE PACE & PARTNERS LTD.

You are hereby notified that in order to defend this lawsuit, an appropriate written response must be filed with the above designated court within 20 days after service of this Summons on you. If you fail to so respond the court may enter judgment against you as demanded by the Plaintiff in the Complaint.

SUMMONS - 1

aw

A copy of the Complaint is served with this Summons. If you wish to seek the advice of or representation by an attorney in this matter, you should do so promptly so that your written response, if any, may be filed in time and other legal rights protected.

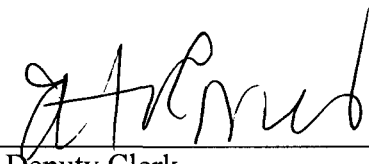
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1. The title and number of this case.
2. If your response is an Answer to the Complaint, it must contain admissions or denials of the separate allegations of the Complaint and other defenses you may claim.
3. Your signature, mailing address, and telephone number, or the signature, mailing address, and telephone number of your attorney.
4. Proof of mailing or delivery of a copy of your response to Plaintiff's attorney, as designated above.

To determine whether you must pay a filing fee with your response, contact the Clerk of the above-named Court.

DATED THIS 20 day of January, 2010.

J. DAVID NAVARRO
Clerk of the Court

By 
Deputy Clerk

FEB 04 2010

J. DAVID NAVARRO, Clerk
By A. GARDEN
DEPUTY

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

Boise Mode, LLC

Plaintiff(s):

AFFIDAVIT OF SERVICE

vs.

Case Number: CV OC 1001093

Donahoe Pace & Partners, LTD. et al.

Defendant(s):

For:
Hawley Troxell Ennis & Hawley LLP
877 Main St., Ste. 1000
Boise, ID 83702

STATE OF IDAHO)
)
)**ss**
COUNTY OF ADA)

Received by TRI-COUNTY PROCESS SERVING LLC on January 22, 2010 to be served on **DONAHOE PACE & PARTNERS, LTD..**

I, Antonio Roque, who being duly sworn, depose and say that on Wednesday, January 27, 2010, at 9:02 PM, I:

SERVED the within named **Donahoe Pace & Partners, LTD.** by delivering a true copy of the **Summons and Verified Complaint** to Timothy Pace, Registered Agent, a person authorized to accept service on behalf of Donahoe Pace & Partners, LTD.. Said service was effected at **6277 W. Parapet Ct., Boise, ID 83703.**

I hereby acknowledge that I am a Process Server in the county in which service was effected. I am over the age of Eighteen years and not a party to the action.

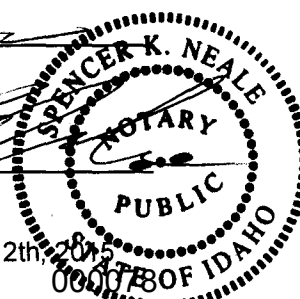
Our Reference Number: 90911
Client Reference: Steven F. Schossberger

Subscribed and sworn before me today
Wednesday, February 3, 2010

TRI-COUNTY PROCESS SERVING LLC
P.O. Box 1224
Boise, ID, 83701
(208) 344-4132

(Signature)

Notary Public for the State of Idaho
Residing at Boise, Idaho
My Commission Expires on February 12th, 2015



FEB 04 2010

J. DAVID NAVARRO, Clerk
By A. GARDEN
DEPUTY

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

Boise Mode, LLC

Plaintiff(s):

AFFIDAVIT OF SERVICE

vs.

Case Number: CV OC 1001093

Donahoe Pace & Partners, LTD. et al.

Defendant(s):

For:
Hawley Troxell Ennis & Hawley LLP
877 Main St., Ste. 1000
Boise, ID 83702

STATE OF IDAHO)
 :SS
COUNTY OF ADA)

Received by TRI-COUNTY PROCESS SERVING LLC on January 22, 2010 to be served on **TIMOTHY PACE**.

I, Antonio Roque, who being duly sworn, depose and say that on Wednesday, January 27, 2010, at 9:02 PM, I:


SERVED the within named person(s) by delivering to and leaving with **TIMOTHY PACE** a true copy of the **Summons and Verified Complaint**. Said service was effected at **6277 W. Parapet Ct., Boise, ID 83703**.

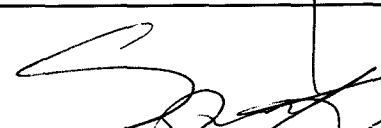
I hereby acknowledge that I am a Process Server in the county in which service was effected. I am over the age of Eighteen years and not a party to the action.

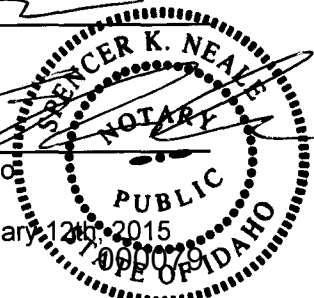
Our Reference Number: 90910
Client Reference: Steven F. Schossberger

Subscribed and sworn before me today
Wednesday, February 3, 2010

TRI-COUNTY PROCESS SERVING LLC
P.O. Box 1224
Boise, ID, 83701
(208) 344-4132





Notary Public for the State of Idaho
Residing at Boise, Idaho
My Commission Expires on February 12th, 2015


Handwritten mark

Michael E. Kelly, ISB #4351
John J. Browder, ISB #7531
LOPEZ & KELLY, PLLC
PO Box 856
Boise, Idaho 83701
Telephone: (208) 342-4300
Facsimile: (208) 342-4344
7008.001/AnswerCounterCln.wpd

FILED
A.M. P.M. 4:54

FEB 11 2010

J. DAVID NAVARRO, Clerk
By E. HOLMES
DEPUTY

Attorneys for Defendants

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

BOISE MODE, LLC, an Illinois limited liability company, successor-in-interest to Mode Building Limited Partnership, an Idaho limited partnership,

Plaintiff,

vs.

DONAHOE PACE & PARTNERS LTD, an Idaho corporation; and TIMOTHY PACE,

Defendants.

DONAHOE PACE & PARTNERS LTD, an Idaho corporation,

Counter-Claimant,

vs.

BOISE MODE, LLC, an Illinois limited liability company, successor-in-interest to Mode Building Limited Partnership, an Idaho limited partnership,

Counter-Defendant.

Case No. **CV OC 1001093**

ANSWER, COUNTERCLAIM AND DEMAND FOR JURY TRIAL

Fee Category: I(7)

Filing Fee: \$68.00

COME NOW, Defendants, DONAHOE PACE & PARTNERS LTD, an Idaho corporation;

000080

an

and TIMOTHY PACE, by and through their attorneys of record, Lopez & Kelly, PLLC, and answer Plaintiff's Verified Complaint ("Complaint") as follows:

FIRST DEFENSE

The Plaintiff failed to state a claim against these answering Defendants upon which relief may be granted.

SECOND DEFENSE

I.

These answering Defendants deny each and every allegation of Plaintiff's Complaint not herein expressly and specifically admitted.

II.

These answering Defendants admit those allegations contained in paragraphs 2, 3, and 4 of the Plaintiff's Complaint.

III.

These answering Defendants are without sufficient information or knowledge to either admit or deny those allegations contained in paragraph 10 of the Plaintiff's Complaint.

IV.

In answering paragraph 1 of the Plaintiff's Complaint, these answering Defendants admit that Plaintiff is, and at all times relevant to this lawsuit was, an Illinois limited liability company. These answering Defendants are without sufficient information or knowledge to either admit or deny the remaining allegations contained in paragraph 1 of the Plaintiff's Complaint and, therefore, deny the same.

V.

In answering paragraph 5 of the Plaintiff's Complaint, these answering Defendants admit, upon information and belief, that the Plaintiff is the owner of 800 West Idaho Street, Suite 350, Boise, Idaho 83702 (the "Premises"). In further answering paragraph 5 of the Plaintiff's Complaint, these answering Defendants firmly allege that the terms and conditions of that certain Office Lease Agreement dated November 3, 2006, and that is referred to and incorporated by reference into the Plaintiff's Complaint speak for themselves. These answering Defendants deny all other allocations contained in paragraph 5 of the Plaintiff's Complaint.

VI.

In answering paragraph 6 of the Plaintiff's Complaint, these answering Defendants affirmatively allege that the terms and conditions of the Lease and the Personal Guaranty of Lease dated November 3, 2006, attached as Exhibit H to the Lease, speak for themselves. These answering Defendants deny all other allegations contained in paragraph 6 of the Plaintiff's Complaint.

VII.

In answering paragraph 8 of the Plaintiff's Complaint, these answering Defendants admit that the Plaintiff sent a letter dated November 9, 2009, to Defendants, the terms and conditions of which speak for themselves. These answering Defendants deny the remaining allegations contained in paragraph 8 of the Plaintiff's Complaint.

VIII.

In answering paragraph 17 of the Plaintiff's Complaint, these answering Defendants admit that a covenant of good faith and fair dealing is implied by law into the Lease. These answering Defendants deny the remaining allegations contained in paragraph 17 of the Plaintiff's Complaint.

IX.

In answering paragraph 21 of the Plaintiff's Complaint, these answering Defendants affirmatively allege that the terms and conditions of the Lease and Personal Guaranty, attached as Exhibit H of the Lease, speak for themselves. These answering Defendants deny the remaining allegations contained in paragraph 21 of the Plaintiff's Complaint.

THIRD DEFENSE

Plaintiff has failed to mitigate its damages.

FOURTH DEFENSE

Plaintiff acted with negligent, careless misconduct at the time of and in connection with the matters and damages alleged in the Plaintiff's Complaint, which negligence and misconduct proximately caused and contributed to said events and damages, if any.

FIFTH DEFENSE

Plaintiff, through its actions or those of its agents, has waived any claims or is estopped from asserting against the Defendants any such claims under the Lease and Personal Guaranty, attached as Exhibit H to the Lease.

SIXTH DEFENSE

Because Plaintiff was aware of and failed to disclose facts material to the Lease, Defendants are discharged of any obligation to perform under the Lease.

SEVENTH DEFENSE

Defendants are entitled to recoupment and/or set-off of Plaintiff's damages, if any, in an amount to be proven at trial.

EIGHTH DEFENSE

As these answering Defendants have not yet had the opportunity to conduct discovery in this matter, by failing to assert affirmative defenses, these answering Defendants do not intend to waive any such defenses and specifically reserve the right to amend this Answer and/or to seek leave to amend this Answer to assert additional defenses to which they may be entitled which may apply to the claims asserted by the Plaintiff.

WHEREFORE, these answering Defendants pray for relief as follows: that Plaintiff take nothing by its Complaint, that the same be dismissed, and that these answering Defendants be awarded their cost of suit and attorney fees pursuant to I.C. §§ 12-120(3), 12-121, Idaho Rule of Civil Procedure 54 and other applicable law, and such other and further relief as the Court deems just.

COUNTERCLAIM

COMES NOW Counter-Claimant, DONAHOE PACE & PARTNERS LTD, an Idaho corporation, by and through its attorneys of record, Lopez & Kelly, PLLC, and submits its counter-claims against Counter-Defendant, BOISE MODE, LLC, an Illinois limited liability company.

I.

Donahoe Pace & Partners Ltd. is, and at all relevant times hereto, was an Idaho corporation with its principal place of business in Ada County, Idaho.

II.

The Counter-Defendant is, and at all relevant times hereto, was an Illinois limited liability company.

III.

The Counter-Defendant is the owner of 800 West Idaho Street, Suite 350, Boise, Idaho 83702.

IV.

This court has jurisdiction pursuant to Idaho Code § 1-705, and the matter in controversy, exclusive of interest and costs, exceeds the sum of ten thousand dollars (\$10,000.00). Venue is proper pursuant to Idaho Code § 5-404.

V.

The Counter-Claimant rented Suite 350 and approximately 549 square feet of storage space of Suite B10 of 800 West Idaho Street, Boise, Idaho 83702 (the "Premises"), pursuant to that Office Lease Agreement dated November 3, 2006, for a term until May 31, 2010 (the "Lease"). A true and correct copy of the Lease is attached hereto as Exhibit "A," and incorporated herein by reference.

VI.

Counter-Defendant has breached duties and obligations imposed by contract and/or law including, without limitation: (1) failing to ensure that other tenants of 800 West Idaho Street, Boise, Idaho 83702 do not unreasonably interfere with the Counter-Claimant's use and enjoyment of the Premises; (2) preventing the Counter-Claimant access to the Premises required by the Lease; (3) allowing agents of the Counter-Defendant to pilfer and steal the Counter-Claimant's personal property; (4) allowing agents of the Counter-Defendant to intrude into computer and data processing systems belonging to the Counter-Claimant; (5) failing to maintain 800 West Idaho Street, Boise, Idaho 83702 and, as a result, caused wrongful interference with the Counter-Claimant's use and enjoyment of the Premises; (6) causing disruption of utility and elevator services to which the

Counter-Claimant is entitled; and (7) failing to adequately hire, train and/or supervise its agents. As a direct and proximate result of Counter-Defendant's breaches of contractual and legal duties and obligations, Counter-Claimant is entitled to recover damages in an amount to be proven at trial.

**FIRST CAUSE OF ACTION
(BREACH OF CONTRACT)**

VII.

Counter-Claimant realleges and incorporates by reference paragraphs I through VI as if set forth fully herein.

VIII.

Counter-Claimant has performed all of the duties owed to the Counter-Defendant under the terms and conditions of the Lease.

IX.

Counter-Defendant has failed to fulfill and breached its obligations and duties under the terms and conditions of the Lease.

X.

As a direct and proximate result of Counter-Defendant's breaches of the Lease, Counter-Claimant has suffered damages in an amount to be proven at trial, which amount is in excess of ten thousand dollars (\$10,000.00).

**SECOND CAUSE OF ACTION
(BREACH OF THE IMPLIED COVENANT OF GOOD FAITH AND FAIR DEALINGS)**

XI.

Counter-Claimant realleges and incorporates by reference paragraphs I through X as if set forth fully herein.

XII.

There is implied in the Lease a covenant of good faith and fair dealing whereby the Counter-Defendant is obliged to refrain from denying the full benefits of performance to which the Counter-Claimant is entitled under the Lease.

XIII.

Counter-Defendant has materially breached the covenant of good faith and fair dealing by denying the Counter-Claimant the full benefits to which it is entitled under the Lease.

XIV.

As a direct and proximate result of Counter-Defendant's breach of the covenant of good faith and fair dealing, Counter-Claimant has suffered damages in an amount to be proven at trial.

**THIRD CAUSE OF ACTION
(NEGLIGENCE/NEGLIGENT SUPERVISION)**

XV.

Counter-Claimant realleges and incorporates by reference paragraphs I through XIV as if set forth fully herein.

XVI.

Counter-Defendant owed or assumed a duty to insure that its agents did not interfere with, intrude upon or steal Counter-Claimant's property or information.

XVII.

Counter-Defendant breached duties owed to Counter-Claimant by allowing or causing Counter-Defendant's agents to interfere with, intrude upon and steal the Counter-Claimant's personal property.

XVIII.

As a result of Counter-Defendant's breaches of duties owed to Counter-Claimant, Counter-Claimant has sustained damages in an amount to be proven at trial.

**FOURTH CAUSE OF ACTION
(TORTUOUS INTERFERENCE WITH CONTRACT)**

XIX.

Counter-Claimant realleges and incorporates by reference paragraphs I through XVIII as if set forth fully herein.

XX.

Counter-Claimant was a party to an existing contract and/or had contractual expectations with a video production unit.

XXI.

Counter-Defendant knew or should have known of this contract and/or contractual expectations.

XXII.

Counter-Defendant and/or its agents intentionally interfered with this contract and/or contractual expectations, thereby causing a breach.

XXIII.

As a proximate result of the Counter-Defendant's TORTUOUS interference with the aforementioned contract and/or contractual relations, the Counter-Claimant has been damaged in an amount to be proven at trial.

**FIFTH CAUSE OF ACTION
(CONSTRUCTIVE EVICTION)**

XXIV.

Counter-Claimant realleges and incorporates by reference paragraphs I through XXIV as if set forth fully herein.

XXV.

As alleged herein, the Counter-Defendant's actions, or those of its agents, were intentional and substantially interfered with the Counter-Claimant's intended use and enjoyment of the Premises.

XXVI.

The Counter-Defendant's actions rendered the Premises unsuitable for the Counter-Claimant's business and have permanently deprived the Counter-Claimant of its intended use and enjoyment of the Premises.

XXVII.

As a result of the Counter-Defendant's substantial interference with the Counter-Claimant's intended use and enjoyment of the Premises, the Counter-Claimant was forced to vacate the Premises and obtain alternate suitable space in which to conduct its business.

XXVIII.

As a result of the Counter-Defendant's actions, Counter-Claimant has been damaged in an amount to be proven at trial.

XXIX.

Counter-Claimant has been forced to retain the services of counsel to pursue this matter.

Counter-Claimants are entitled to recover their reasonable costs and attorney fees pursuant to Idaho Code §§ 6-918(a), 12-117 and 12-121, Idaho Rules of Civil Procedure 54, and other applicable statutes.

WHEREFORE, Counter-Claimant prays for judgment in its favor for damages in an amount to be proven at trial; an award of reasonable attorney fees and costs; and such further relief as the Court may deem just and proper.

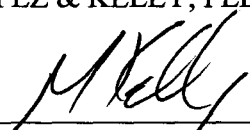
DEMAND FOR JURY TRIAL

Pursuant to IRCP 38(b), the Counter-Claimant demands a trial by jury of no less than twelve (12) members.

DATED this 11 day of February, 2010

LOPEZ & KELLY, PLLC

By: _____


Michael E. Kelly, Of the Firm
Attorneys for Defendants

VERIFICATION

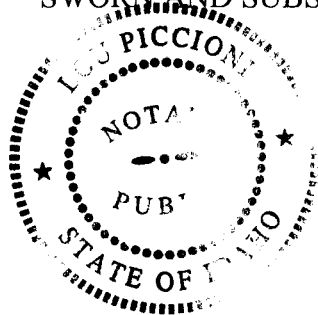
STATE OF IDAHO)
)
:SS.
County of Ada)

I, TIMOTHY PACE, individually and as an agent of DONAHOE PACE & PARTNERS, LTD., after first being duly sworn upon oath, deposes and states that I have read the foregoing answers and responses to discovery requests and believe the same are true to the best of my knowledge.



TIMOTHY PACE, individually and as an agent of DONAHOE PACE & PARTNERS, LTD.

SWORN AND SUBSCRIBED to me before this 11th day of February, 2010.



Notary Public for the State of Idaho
Residing at: Eagle, Idaho
My Commission Expires: 3/27/13

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 11 day of February, 2010, I served a true and correct copy of the foregoing by delivering the same to each of the following individuals, by the method indicated below, addressed as follows:

Steven F. Schossberger
HAWLEY, TROXELL, ENNIS & HAWLEY
877 Main Street, Suite 1000
PO Box 1617
Boise, ID 83701-1617
Telephone: (208) 344-6000
Facsimile: (208) 954-5260
sschossberger@hawleytroxell.com

- U.S. Mail
- Hand-Delivered
- Overnight mail
- Facsimile



Michael E. Kelly

FEB 23 2010

J. DAVID NAVARRO, Clerk
By P. BOURNE
DEPUTY

Steven F. Schossberger, ISB No. 5358
HAWLEY TROXELL ENNIS & HAWLEY LLP
877 Main Street, Suite 1000
P.O. Box 1617
Boise, ID 83701-1617
Telephone: 208.344.6000
Facsimile: 208.954.5260
Email: sschossberger@hawleytroxell.com

Attorneys for Plaintiff/Counter-Defendant Boise Mode, LLC,
successor-in-interest to Mode Building Limited Partnership

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

BOISE MODE, LLC, an Illinois limited liability company, successor-in-interest to Mode Building Limited Partnership, an Idaho limited partnership,

Plaintiff,

vs.

DONAHOE PACE & PARTNERS LTD, an Idaho corporation; and TIMOTHY PACE,

Defendants.

DONAHOE PACE & PARTNERS LTD, an Idaho corporation,

Counter-Claimant,

vs.

BOISE MODE, LLC, an Illinois limited liability company, successor-in-interest to Mode Building Limited Partnership, an Idaho limited partnership,

Counter-Defendant.

Case No. CV OC 1001093

ANSWER TO COUNTERCLAIM



COMES NOW Boise Mode, LLC (“Boise Mode”), by and through its undersigned counsel of record, and in answer to the Counterclaim, admits, denies and alleges as follows:

GENERAL DENIAL

Boise Mode denies all allegations of the Counterclaim not specifically admitted herein.

SPECIFIC ADMISSIONS AND DENIALS

1. The allegations in paragraph 1 of the Counterclaim are admitted.
2. The allegations in paragraph 2 of the Counterclaim are admitted.
3. The allegations in paragraph 3 of the Counterclaim are admitted.
4. In response to the allegations in paragraph 4 of the Counterclaim, Boise Mode admits that the Court has jurisdiction pursuant to Idaho Code § 1-705, and that venue is proper pursuant to Idaho Code § 5-404, and the remaining allegation that there is an amount in controversy asserted by Counter-Claimant in the sum of \$10,000 is denied.
5. The allegations in paragraph 5 of the Counterclaim are admitted.
6. The allegations in paragraph 6 of the Counterclaim are denied.
7. In response to paragraph 7 of the Counterclaim, Boise Mode incorporates by reference its answers set forth in paragraphs 1 through 6 above.
8. The allegations in paragraph 8 of the Counterclaim are denied.
9. The allegations in paragraph 9 of the Counterclaim are denied.
10. The allegations in paragraph 10 of the Counterclaim are denied.
11. In response to paragraph 11 of the Counterclaim, Boise Mode incorporates by reference its answers set forth in paragraphs 1 through 10 above.
12. In response to the allegations in paragraph 12 of the Counterclaim, there is only the assertion of a legal conclusion to which no response is required. To the extent a response is

required, Idaho common law controls application of the covenant of good faith and fair dealing implied in a contract.

13. The allegations in paragraph 13 of the Counterclaim are denied.

14. The allegations in paragraph 14 of the Counterclaim are denied.

15. In response to paragraph 15 of the Counterclaim, Boise Mode incorporates by reference its answers set forth in paragraphs 1 through 14 above.

16. The allegations in paragraph 16 of the Counterclaim are denied.

17. The allegations in paragraph 17 of the Counterclaim are denied.

18. The allegations in paragraph 18 of the Counterclaim are denied.

19. In response to paragraph 19 of the Counterclaim, Boise Mode incorporates by reference its answers set forth in paragraphs 1 through 18 above.

20. In response to the allegations in paragraphs 20 of the Counterclaim, Boise Mode lacks knowledge and information sufficient to form a belief as to the truth of the allegations and, therefore, they are denied.

21. The allegations in paragraph 21 of the Counterclaim are denied.

22. The allegations in paragraph 22 of the Counterclaim are denied.

23. The allegations in paragraph 23 of the Counterclaim are denied.

24. In response to paragraph 24 of the Counterclaim, Boise Mode incorporates by reference its answers set forth in paragraphs 1 through 23 above.

25. The allegations in paragraph 25 of the Counterclaim are denied.

26. The allegations in paragraph 26 of the Counterclaim are denied.

27. The allegations in paragraph 27 of the Counterclaim are denied.

28. The allegations in paragraph 28 of the Counterclaim are denied.

29. The allegations in paragraph 29 of the Counterclaim are denied.

30. In response to Counter-Claimant's request for attorney's fees, Boise Mode denies that Counter-Claimant is entitled to the relief requested therein.

RESPONSE TO PRAYER FOR RELIEF

In response to the relief prayed for in the Counterclaim, Boise Mode denies that Counter-Claimant is entitled to the relief requested therein.

AFFIRMATIVE DEFENSES

The following defenses are not stated separately as to each claim for relief or allegation of the Counterclaim against Boise Mode. Nevertheless, the following defenses are applicable, where appropriate, to Counter-Claimant's purported claim for relief against Boise Mode. In addition, Boise Mode, in asserting the following defenses, does not admit that the burden of proving the allegations or denials contained in the defenses is upon it, but, to the contrary, asserts that by reason of its denials and/or by reason of relevant statutory and judicial authority, the burden of proving the facts relevant to many of the defenses and/or burden of proving the inverse of the allegations and many of the defenses is upon Counter-Claimant. Moreover, Boise Mode does not admit, in asserting any defense, any responsibility or liability, but to the contrary, specifically denies any and all allegations of responsibility and liability alleged in the Counterclaim by Counter-Claimant against it.

FIRST AFFIRMATIVE DEFENSE

The Counterclaim fails to state a claim against Boise Mode upon which relief can be granted, and should be dismissed pursuant to Rule 12(b)(6) of the Idaho Rules of Civil Procedure.

SECOND AFFIRMATIVE DEFENSE

Counter-Claimant is barred from maintaining this action against Boise Mode based upon the doctrine of estoppel.

THIRD AFFIRMATIVE DEFENSE

Counter-Claimant is barred from maintaining this action against Boise Mode because it has failed to mitigate the damages to which it claims to be entitled, if any.

FOURTH AFFIRMATIVE DEFENSE

Counter-Claimant is barred from maintaining this action against Boise Mode because Boise Mode's alleged breach of contract, if any, is excused by Counter-Claimant's breach of the contract.

FIFTH AFFIRMATIVE DEFENSE

Counter-Claimant is barred from maintaining this action against Boise Mode for failure to comply with the provisions of Idaho Code § 6-320(a), (b), and (d) and Idaho Code § 6-323.

REQUESTS FOR COSTS AND ATTORNEY FEES

Boise Mode requests that it be awarded its reasonable costs, including attorney fees, incurred in defending against the Counterclaim.

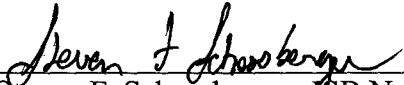
PRAYER FOR RELIEF

WHEREFORE, Boise Mode prays as follows:

1. That the Counterclaim be dismissed with prejudice and that Counter-Claimant take nothing thereunder;
2. That judgment be entered in favor of Boise Mode;
3. That Boise Mode be awarded its reasonable costs, including attorney fees; and
4. For such other and further relief as the Court deems just and proper.

DATED THIS 23rd day of February, 2010.

HAWLEY TROXELL ENNIS & HAWLEY LLP

By 

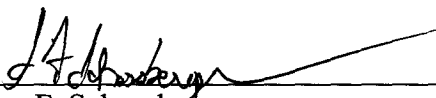
Steven F. Schossberger, ESB No. 5358
Attorneys for Plaintiff/Counter-Defendant
Boise Mode, LLC, successor-in-interest to
Mode Building Limited Partnership

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 23 day of February, 2010, I caused to be served a true copy of the foregoing ANSWER TO COUNTERCLAIM by the method indicated below, and addressed to each of the following:

Michael E. Kelly
John J. Browder
LOPEZ & KELLY, PLLC
702 W. Idaho Street, Suite 1100
P.O. Box 856
Boise, ID 83701
[Attorneys for Defendants and Counter-Claimant]

U.S. Mail, Postage Prepaid
 Hand Delivered
 Overnight Mail
 E-mail
 Telecopy: 208.342.4344



Steven F. Schossberger

FILED: 3/1, 2010 at 9:30.
J. David Navarro, Clerk

By: _____
Inga Johnson, Deputy

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

BOISE MODE, LLC, an Illinois limited liability
company, successor-in-interest to Mode
Building Limited Partnership, an Idaho
Limited Partnership,
Plaintiff/ Counter-Defendant,
vs.
DONAHOE PACE & PARTNERS LTD, an
Idaho corporation; and TIMOTHY PACE,
Defendants,

Case No. CVOC10-01093
NOTICE OF STATUS CONFERENCE
UNDER I.R.C.P. 16(a) & 16(b)

Upon review, the Court has determined that this matter is appropriate for a scheduling order under I.R.C.P. 16(b).

You are hereby notified that a status conference is set for April 6, 2010 at 4:30 p.m. before the Honorable Ronald J. Wilper, Ada County Courthouse, **200 Front St.**, Boise, Idaho. A scheduling order under I.R.C.P. 16(b) may issue following this conference.

All parties must appear at this time in person or by counsel. Counsel must be the handling attorney, or be fully familiar with the case, and have authority to bind his/her client and law firm on all matters set forth in I.R.C.P. 16(a) and 16(b).

In lieu of this status conference, if all parties agree on all matters set forth on the attached stipulation for scheduling and planning, the stipulation may be completed, signed and filed before the date set for the status conference.

Dated: March 1, 2010

J. David Navarro
Clerk of the District Court

Inga Johnson, Deputy Clerk

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

3 BOISE MODE, LLC, an Illinois limited liability
4 company, successor-in-interest to Mode
5 Building Limited Partnership, an Idaho
6 Limited Partnership,

Plaintiff/ Counter-Defendant,

vs.

7 DONAHOE PACE & PARTNERS LTD, an
8 Idaho corporation; and TIMOTHY PACE,
9 Defendants,

Case No. CVOC10-01093
STIPULATION FOR SCHEDULING
AND PLANNING

10 1. The parties hereby stipulate to the following preferences for trial dates: (Please confer and
11 complete. Do not attach "unavailable dates".)

(a) Week of **Wednesday**, _____, **2010/2011**

(b) Week of **Wednesday**, _____, **2010/2011**

(c) Week of **Wednesday**, _____, **2010/2011**

12 ***NOTE- All trials will be set no more 12 months from the filing of**
13 **the Complaint.**

14 The Court's clerk will confirm dates with counsel if preferences cannot be met. A pretrial
15 conference will be scheduled 7 to 15 days prior to trial.

16 2. Parties estimate the case will take _____ days to try.

17 Case to be tried as a:

18 Court Trial

19 12 person Jury Trial

20 6 person Jury Trial

21 3. Parties further stipulate to the following scheduling deadlines:

22 a. The last day to file amendments to any pleading, or to join any additional parties, shall
23 be _____.

24 b. The advancing party shall disclose all expert witnesses to be used at trial by
25 _____.

26 c. The responding party shall disclose all rebuttal expert witnesses to be used at trial by
_____.

1 d. The last day for the initiation of any discovery (serving an interrogatory, requesting a
document or noticing a deposition) shall be _____.

2 e. The last day for filing motions for summary judgment shall be
3 _____, (must be at least 60 days prior to trial.)

4 4. With respect to settlement procedure, the parties request that:

5 The Court schedule a further Rule 16 Status Conference approximately 90 days prior
to trial (on or about _____) to review and facilitate settlement
6 possibilities with Counsel.

7 No action by the Court is necessary at this time. The parties agree to pursue
settlement, if and as appropriate, on their own.

8 5. The parties reserve the right to amend this stipulation by agreement of all parties, subject to
9 Court approval, and each party reserves the right to seek amendment hereof by Court order.
10 Any party may request a further status conference for any purpose at any time.

11 Counsel for Plaintiff(s):

_____ Date: _____

12 _____ Date: _____

13 Counsel for Defendant(s):

14 _____ Date: _____

15 _____ Date: _____

16 Counsel for Other Parties:

17 _____ Date: _____

18 _____ Date: _____

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CERTIFICATE OF MAILING

I HEREBY CERTIFY That on this 1 day of March, 2010, I caused a true and correct copy of the above and foregoing instrument to be mailed, postage prepaid, to:

Steven Schossberger
Attorney at Law
PO Box 1617
Boise Id 83701-1617

Michael Kelly
Attorney at Law
PO Box 856
Boise Id 83701

J. David Navarro

By: _____
Inga Johnson
Deputy Clerk

MAR 23 2010

DAVID NAVARRO, Clerk
By A. GARDEN
DEPUTY

Steven F. Schossberger, ISB No. 5358
HAWLEY TROXELL ENNIS & HAWLEY LLP
877 Main Street, Suite 1000
P.O. Box 1617
Boise, ID 83701-1617
Telephone: 208.344.6000
Facsimile: 208.954.5260
Email: sschossberger@hawleytroxell.com

Attorneys for Plaintiff/Counterdefendant Boise Mode, LLC,
successor-in-interest to Mode Building Limited Partnership

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

BOISE MODE, LLC, an Illinois limited liability company, successor-in-interest to Mode Building Limited Partnership, an Idaho limited partnership,

Plaintiff,

vs.

DONAHOE PACE & PARTNERS LTD, an Idaho corporation; and TIMOTHY PACE,

Defendants.

Case No. CV OC 1001093

STIPULATION FOR SCHEDULING AND PLANNING

DONAHOE PACE & PARTNERS LTD, an Idaho corporation,

Counterclaimant,

vs.

BOISE MODE, LLC, an Illinois limited liability company, successor-in-interest to Mode Building Limited Partnership, an Idaho limited partnership,

Counterdefendant.

ms

1. The parties hereby stipulate to the following preferences for trial dates: (Please confer and complete. Do not attach “unavailable dates”.)

- (a) Week of Wednesday, December 1, 2010
- (b) Week of Wednesday, December 8, 2010
- (c) Week of Wednesday, January 5, 2010

***NOTE – All trials will be set no more than 12 months from the filing of the Complaint.**

The Court’s clerk will confirm dates with counsel if preferences cannot be met. A pretrial conference will be scheduled 7 to 15 days prior to trial.

2. Parties estimate the case will take 3 days to try.

Case to be tried as a:

- Court Trial
- 12 person Jury Trial
- 6 person Jury Trial

3. Parties further stipulate to the following scheduling deadlines:

- (a) The last day to file amendments to any pleading, or to join any additional parties, shall be one hundred twenty (120) days before trial.
- (b) The advancing party shall disclose all expert witnesses to be used at trial by ninety (90) days before trial.
- (c) The responding party shall disclose all rebuttal expert witnesses to be used at trial by sixty (60) days before trial.
- (d) The last day for the initiation of any discovery (serving an interrogatory, requesting a document or noticing a deposition) shall be sixty (60) days before trial.

(e) The last day for filing motions for summary judgment shall be sixty (60) days prior to trial).

4. With respect to settlement procedure, the parties request that:

The Court schedule a further Rule 16 Status Conference approximately 90 days prior to trial (on or about _____) to review and facilitate settlement possibilities with Counsel.

No action by the Court is necessary at this time. The parties agree to pursue settlement, if and as appropriate, on their own.

5. The parties reserve the right to amend this stipulation by agreement of all parties, subject to Court approval, and each party reserves the right to seek amendment hereof by Court order. Any party may request a further status conference for any purpose at any time.

DATED THIS 22 day of March, 2010.

HAWLEY TROXELL ENNIS & HAWLEY LLP

By Steven F. Schossberger

Steven F. Schossberger, ISB No. 5358
Attorneys for Plaintiff/Counterdefendant
Boise Mode, LLC, successor-in-interest to
Mode Building Limited Partnership

DATED THIS 22 day of March, 2010.

LOPEZ & KELLY, PLLC

By Michael E. Kelly

Michael E. Kelly
John J. Browder
Attorneys for Defendants and Counterclaimant

MAR 29 2010

J. DAVIE NAVARRO, Clerk
By: [Signature]

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

BOISE MODE, LLC, an Illinois limited liability company, successor-in-interest to Mode Building Limited Partnership, an Idaho limited partnership,

Plaintiff,

vs.

DONAHOE PACE & PARTNERS, LTD,
an Idaho corporation; and TIMOTHY
PACE,

Defendants.

DONAHOE PACE & PARTNERS, LTD,
an Idaho corporation,

Counterclaimant,

vs.

BOISE MODE, LLC, an Illinois limited liability company, successor-in-interest to Mode Building Limited Partnership, an Idaho limited partnership,

Counterdefendant.

Case No. CVOC1001093

ORDER SETTING PROCEEDINGS
AND TRIAL

THE PARTIES, BY AND THROUGH THEIR ATTORNEYS, HAVING FILED A STIPULATION FOR SCHEDULING AND PLANNING ON MARCH 23, 2010; ACCORDINGLY, THE FOLLOWING SCHEDULING ORDER IS ORDERED AS FOLLOWS

1) **DESIGNATED TRIAL COUNSEL:**

Plaintiff: Steven F. Schossberger of Hawley Troxell Ennis & Hawley, LLP
Defendant: Michael E. Kelly and John J. Browder of Lopez & Kelly, PLLC

Each party to the action shall be represented at all pre-trial hearings by the attorney or party who is to conduct the trial or by co-counsel with full knowledge of the case and with authority to bind the party by stipulation. If any attorney has not been given such authority to bind the party by stipulation, the party shall be present or available at the pre-trial conference.

2) **TRIAL DATE:** The three (3) day jury trial of this action shall commence before this Court on **December 8, 2010 at 9:00 o'clock a.m.**

Notice is hereby given, pursuant to Idaho Rule of Civil Procedure 40(d)(1)(G), that an alternate judge may be assigned to preside over the trial of this case. The following is a list of potential alternate judges:

Hon. Phillip M. Becker
Hon. G. D. Carey
Hon. Dennis Goff
Hon. Nathan Higer
Hon. Daniel C. Hurlbutt Jr.
Hon. James Judd
Hon. Duff McKee
Hon. Daniel Meehl
Hon. George R. Reinhardt, III
Hon. Ronald Schilling
Hon. W. H. Woodland
Hon. Linda Copple Trout
Hon. Kathryn Sticklen
Hon. Barry Wood
Any sitting 4th District Judge
Any sitting 5th District Judge

Unless a party has previously exercised their right to disqualification without cause under Rule 40(d)(1), each party shall have the right to file one (1) motion for disqualification without cause as to any alternate judge not later than ten (10) days after service of this notice.

3) **PRE-TRIAL CONFERENCE**: Counsel for the parties shall appear before this Court in chambers on **November 30, 2010 at 3:30 o'clock p.m.** for a final pre-trial conference. Counsel shall be prepared to discuss settlement possibilities, and all items set forth in Rules 16(a) through (j), I.R.C.P.

4) **MOTIONS**: All motions, including Motions in Limine and Motions for Summary Judgment, shall be heard no later than **60 days prior to trial**.

5) **DISCOVERY CUT-OFF**: The last day for the initiation of any discovery (serving an interrogatory, requesting a document or noticing a deposition) shall be **60 days prior to trial**.

6) **DISCLOSURE OF EXPERTS**: The advancing party's expert witnesses shall be disclosed no later than **90 days prior to trial**. The responding party's expert witnesses shall be disclosed no later than **60 days prior to trial**. All parties' disclosure as to experts, shall be in compliance with Rule 26(b)(4). An expert is defined under Rule 702 of the Idaho Rules of Evidence.

7) **FILING OF AMENDMENTS**: The last day to file amendments to any pleading, or to join any additional parties, shall be **120 days prior to trial**.

8) **ATTORNEYS CONFERENCE**: Counsel for Plaintiff shall convene an attorneys conference two weeks prior to final pre-trial conference for the purposes of exchange and marking of all exhibits, exchange of all witness lists, the noting of any foundational objections to exhibits or witnesses, stipulate to uncontested facts, explore all settlement possibilities, and prepare a pre-trial stipulation pursuant to Rule 16(e), I.R.C.P., which stipulation will be presented to this Court at the final pre-trial conference.

9) **PRE-TRIAL MEMORANDA**: Parties shall submit to the Court, no later than five (5) days before the final pre-trial conference, a pre-trial memoranda which will include the following:

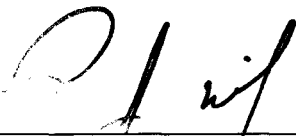
- a. Elements of Plaintiff's case (Plaintiff);
- b. Defenses of Defendant's case (Defendant)
- c. Contested facts;
- d. Contested issues of law;
- e. Evidentiary issues
- f. Agreed or stipulated facts; and
- g. Memorandum of Points and Authorities on issues of law.

10) **JURY INSTRUCTIONS**: Each party shall submit all proposed jury instructions to the Court on or before **November 30, 2010 at 3:30 p.m.**

11) **SANCTIONS**: Failure to comply with this Order shall subject a party or its attorney to appropriate sanctions, including, but not limited to, costs and reasonable attorney fees, the dismissal with prejudice of Plaintiff's claim, or the striking of a Defendant's defenses. A party may be excused from strict compliance with any provisions of this Order only upon motion showing extraordinary circumstances.

12) **CONTINUANCES**: If all parties request a continuance of the trial date, this Court will only consider a Motion to Continue if the motion is signed by all parties personally and their counsel.

Dated: March 25, 2010,



RONALD J. WILPER
DISTRICT JUDGE

CERTIFICATE OF MAILING

I hereby certify that on March ~~30~~^{29th}, 2010 I mailed a true and correct copy of the within instrument to:

Steven F. Schossberger
HAWLEY TROXELL ENNIS & HAWLEY LLP
877 W Main St, Ste 1000
PO Box 1617
Boise, ID 83701-1617

Michael E. Kelly
LOPEZ & KELLY, PLLC
413 W Idaho St, Ste 100
PO Box 856
Boise, ID 83701-0856

J. DAVID NAVARRO
Clerk of the District Court

By:



Deputy Court Clerk

ORIGINAL

Michael E. Kelly, ISB #4351
John J. Browder, ISB #7531
LOPEZ & KELLY, PLLC
PO Box 856
Boise, Idaho 83701
Telephone: (208) 342-4300
Facsimile: (208) 342-4344
7008.001/Disqualify Mtn.wpd

NO. _____
A.M. _____ FILED P.M. 3:48

APR 08 2010
J. DAVID NAVARRO, Clerk
By KATHY J. BIEHL
DEPUTY

Attorneys for Defendants

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

BOISE MODE, LLC, an Illinois limited liability company, successor-in-interest to Mode Building Limited Partnership, an Idaho limited partnership,

Plaintiffs,

vs.

DONAHOE PACE & PARTNERS LTD, an Idaho corporation; and TIMOTHY PACE,

Defendants.

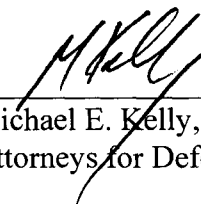
Case No. **CV OC 1001093**

**MOTION TO DISQUALIFY
ALTERNATE JUDGE JAMES JUDD**

COMES NOW Defendants DONAHOE PACE & PARTNERS LTD, and TIMOTHY PACE, by and through their counsel of record, Lopez & Kelly, PLLC, and move this Court pursuant to I.R.C.P. 40 d(1) for its order disqualifying the Honorable James Judd from the above-captioned matter.

Respectfully Submitted this 8 day of April 2010.

LOPEZ & KELLY, PLLC

By: 
Michael E. Kelly, Of the Firm
Attorneys for Defendants

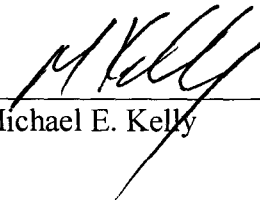
KJB

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 8 day of April, 2010, I served a true and correct copy of the foregoing by delivering the same to each of the following individuals, by the method indicated below, addressed as follows:

Steven F. Schossberger
HAWLEY, TROXELL, ENNIS & HAWLEY
877 Main Street, Suite 1000
PO Box 1617
Boise, ID 83701-1617
Telephone: (208) 344-6000
Facsimile: (208) 954-5260
sschossberger@hawleytroxell.com

- | | |
|-------------------------------------|----------------|
| <input checked="" type="checkbox"/> | U.S. Mail |
| <input type="checkbox"/> | Hand-Delivered |
| <input type="checkbox"/> | Overnight mail |
| <input type="checkbox"/> | Facsimile |



Michael E. Kelly

ORIGINAL

Michael E. Kelly, ISB #4351
John J. Browder, ISB #7531
LOPEZ & KELLY, PLLC
PO Box 856
Boise, Idaho 83701
Telephone: (208) 342-4300
Facsimile: (208) 342-4344
7008.001/Interrogatories.RFP.RFA.NOS.wpd

FILED 3:48
P.M.
A.M.

APR 08 2010

J. DAVID NAVARRO, Clerk
By KATHY J. BIEHL
DEPUTY

Attorneys for Defendants

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

BOISE MODE, LLC, an Illinois limited liability company, successor-in-interest to Mode Building Limited Partnership, an Idaho limited partnership,

Plaintiff,

vs.

DONAHOE PACE & PARTNERS LTD, an Idaho corporation; and TIMOTHY PACE,

Defendants.

DONAHOE PACE & PARTNERS LTD, an Idaho corporation,

Counter-Claimant,

vs.

BOISE MODE, LLC, an Illinois limited liability company, successor-in-interest to Mode Building Limited Partnership, an Idaho limited partnership,

Counter-Defendant.

Case No. CV OC 1001093

NOTICE OF SERVICE

KS

TO: THE CLERK OF THE ABOVE-ENTITLED COURT:

PLEASE TAKE NOTICE that on the 8 day of April, 2010, I served a true and correct copy of Defendant/Counterclaimant's First Set of Interrogatories, Defendant/Counterclaimant's First Set of Requests for Admissions to Plaintiff and Defendant/Counterclaimant's First Set of Requests for Production of Documents to Plaintiff, together with a copy of this Notice, by the method indicated below in an envelope addressed to:

Steven F. Schossberger
HAWLEY, TROXELL, ENNIS &
HAWLEY
877 Main Street, Suite 1000
PO Box 1617
Boise, ID 83701-1617

U.S. Mail, postage prepaid
 Hand-Delivered
 Overnight Mail
 Facsimile

DATED this 8 day of April, 2010

LOPEZ & KELLY, PLLC

By: _____


Michael E. Kelly, Of the Firm
Attorneys for Defendants

ORIGINAL

Michael E. Kelly, ISB #4351
John J. Browder, ISB #7531
LOPEZ & KELLY, PLLC
PO Box 856
Boise, Idaho 83701
Telephone: (208) 342-4300
Facsimile: (208) 342-4344
7008.001/Disqualify Order.wpd

NO. _____ FILED _____
A.M. 9:45 P.M.

APR 12 2010

J. DAVID NAVARRO, Clerk
By _____
TINA JOHNSON

Attorneys for Defendants

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

BOISE MODE, LLC, an Illinois limited liability company, successor-in-interest to Mode Building Limited Partnership, an Idaho limited partnership,

Plaintiffs,

vs.

DONAHOE PACE & PARTNERS LTD, an Idaho corporation; and TIMOTHY PACE,

Defendants.

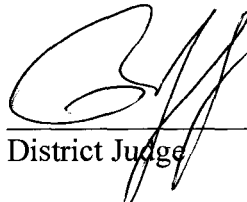
Case No. CV OC 1001093

ORDER OF DISQUALIFICATION

THIS MATTER having come before this Court on the motion of the Defendants, and good cause appearing therefore,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED and this does hereby order, adjudge and decree that the Honorable James Judd be disqualified from this matter.

DATED this 10th day of April, 2010.


District Judge



CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 12 day of April, 2010, I served a true and correct copy of the foregoing by delivering the same to each of the following individuals, by the method indicated below, addressed as follows:

Steven F. Schossberger	<input checked="" type="checkbox"/>	U.S. Mail
HAWLEY, TROXELL, ENNIS & HAWLEY	<input type="checkbox"/>	Hand-Delivered
877 Main Street, Suite 1000	<input type="checkbox"/>	Overnight mail
PO Box 1617	<input type="checkbox"/>	Facsimile
Boise, ID 83701-1617		
Telephone: (208) 344-6000		
Facsimile: (208) 954-5260		
<i>sschossberger@hawleytroxell.com</i>		

Michael E. Kelly	<input checked="" type="checkbox"/>	U.S. Mail
LOPEZ & KELLY, PLLC	<input type="checkbox"/>	Hand-Delivered
413 W. Idaho Street	<input type="checkbox"/>	Overnight mail
Post Office Box 856	<input type="checkbox"/>	Facsimile
Boise, ID 83701		
Telephone: (208) 342-4300		
Facsimile: (208) 342-4344		
<i>Attorneys for Defendants</i>		

J. DAVID NAVARRO
INGA JOHNSON

Clerk of Court

MAY 11 2010

J. DAVID NAVARRO, Clerk
By CARLY LATIMORE
DEPUTY

Steven F. Schossberger, ISB No. 5358
HAWLEY TROXELL ENNIS & HAWLEY LLP
877 Main Street, Suite 1000
P.O. Box 1617
Boise, ID 83701-1617
Telephone: 208.344.6000
Facsimile: 208.954.5260
Email: sschossberger@hawleytroxell.com

Attorneys for Plaintiff/Counterdefendant Boise Mode, LLC,
successor-in-interest to Mode Building Limited Partnership

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

BOISE MODE, LLC, an Illinois limited liability company, successor-in-interest to Mode Building Limited Partnership, an Idaho limited partnership,

Plaintiff,

vs.

DONAHOE PACE & PARTNERS LTD, an Idaho corporation; and TIMOTHY PACE,

Defendants.

Case No. CV OC 1001093

NOTICE OF SERVICE

DONAHOE PACE & PARTNERS LTD, an Idaho corporation,

Counterclaimant,

vs.

BOISE MODE, LLC, an Illinois limited liability company, successor-in-interest to Mode Building Limited Partnership, an Idaho limited partnership,

Counterdefendant.)
_____)

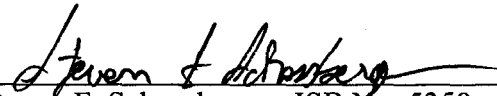
Pursuant to Rule 33 of the Idaho Rules of Civil Procedure, Boise Mode, LLC hereby gives notice that on May 10, 2010, said party served the original of Plaintiff/Counterdefendant's Answers To Defendant/Counterclaimant's First Set Of Interrogatories upon the following person or persons:

Michael E. Kelly
John J. Browder
LOPEZ & KELLY, PLLC
702 W. Idaho Street, Suite 1100
P.O. Box 856
Boise, ID 83701

DATED THIS 10 day of May, 2010.

HAWLEY TROXELL ENNIS & HAWLEY LLP

By




Steven F. Schossberger, ISB No. 5358
Attorneys for Plaintiff/Counterdefendant
Boise Mode, LLC, successor-in-interest to
Mode Building Limited Partnership

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 10 day of May, 2010, I caused to be served a true copy of the foregoing NOTICE OF SERVICE by the method indicated below, and addressed to each of the following:

Michael E. Kelly
John J. Browder
LOPEZ & KELLY, PLLC
702 W. Idaho Street, Suite 1100
P.O. Box 856
Boise, ID 83701
[Attorneys for Defendants and Counterclaimant]

U.S. Mail, Postage Prepaid
 Hand Delivered
 Overnight Mail
 E-mail
 Telecopy: 208.342.4344



Steven F. Schossberger

MAY 11 2010

J. DAVID NAVARRO, Clerk
By CARLY LATIMORE
DEPUTY

Steven F. Schossberger, ISB No. 5358
HAWLEY TROXELL ENNIS & HAWLEY LLP
877 Main Street, Suite 1000
P.O. Box 1617
Boise, ID 83701-1617
Telephone: 208.344.6000
Facsimile: 208.954.5260
Email: ssschossberger@hawleytroxell.com

Attorneys for Plaintiff/Counterdefendant Boise Mode, LLC,
successor-in-interest to Mode Building Limited Partnership

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

BOISE MODE, LLC, an Illinois limited
liability company, successor-in-interest to
Mode Building Limited Partnership, an Idaho
limited partnership,

Plaintiff,

vs.

DONAHOE PACE & PARTNERS LTD, an
Idaho corporation; and TIMOTHY PACE,

Defendants.

DONAHOE PACE & PARTNERS LTD, an
Idaho corporation,

Counterclaimant,

vs.

BOISE MODE, LLC, an Illinois limited
liability company, successor-in-interest to
Mode Building Limited Partnership, an Idaho
limited partnership,

Case No. CV OC 1001093

NOTICE OF SERVICE

Counterdefendant.)
_____)

Pursuant to Rule 36 of the Idaho Rules of Civil Procedure, Boise Mode, LLC hereby gives notice that on May 10, 2010, said party served the original of Plaintiff/Counterdefendant's Answers To Defendant/Counterclaimant's First Set Of Requests for Admissions upon the following person or persons:

Michael E. Kelly
John J. Browder
LOPEZ & KELLY, PLLC
702 W. Idaho Street, Suite 1100
P.O. Box 856
Boise, ID 83701

DATED THIS 10 day of May, 2010.

HAWLEY TROXELL ENNIS & HAWLEY LLP

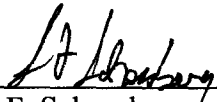
By Steven F. Schossberger
Steven F. Schossberger, ISB No. 5358
Attorneys for Plaintiff/Counterdefendant
Boise Mode, LLC, successor-in-interest to
Mode Building Limited Partnership

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 10 day of May, 2010, I caused to be served a true copy of the foregoing NOTICE OF SERVICE by the method indicated below, and addressed to each of the following:

Michael E. Kelly
John J. Browder
LOPEZ & KELLY, PLLC
702 W. Idaho Street, Suite 1100
P.O. Box 856
Boise, ID 83701
[Attorneys for Defendants and Counterclaimant]

U.S. Mail, Postage Prepaid
 Hand Delivered
 Overnight Mail
 E-mail
 Telecopy: 208.342.4344



Steven F. Schossberger

NO. _____ FILED _____
A.M. _____ P.M. *2:50*

MAY 11 2010

J. DAVID NAVARRO, Clerk
By CARLY LATIMORE
DEPUTY

Steven F. Schossberger, ISB No. 5358
HAWLEY TROXELL ENNIS & HAWLEY LLP
877 Main Street, Suite 1000
P.O. Box 1617
Boise, ID 83701-1617
Telephone: 208.344.6000
Facsimile: 208.954.5260
Email: sschossberger@hawleytroxell.com

Attorneys for Plaintiff/Counterdefendant Boise Mode, LLC,
successor-in-interest to Mode Building Limited Partnership

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

BOISE MODE, LLC, an Illinois limited
liability company, successor-in-interest to
Mode Building Limited Partnership, an Idaho
limited partnership,

Plaintiff,

vs.

DONAHOE PACE & PARTNERS LTD, an
Idaho corporation; and TIMOTHY PACE,

Defendants.

Case No. CV OC 1001093

NOTICE OF COMPLIANCE

DONAHOE PACE & PARTNERS LTD, an
Idaho corporation,

Counterclaimant,

vs.

BOISE MODE, LLC, an Illinois limited
liability company, successor-in-interest to
Mode Building Limited Partnership, an Idaho
limited partnership,

Counterdefendant.)
)

Pursuant to Rule 34 of the Idaho Rules of Civil Procedure, Boise Mode, LLC hereby gives notice that on May 10, 2010, it responded to Defendant/Counterclaimants First Set of Requests for Production of Documents to Plaintiff by serving the original of Plaintiff/Counterdefendant's Responses To Defendant/Counterclaimant's First Set Of Requests for Production of Documents upon the following person or persons:

Michael E. Kelly
John J. Browder
LOPEZ & KELLY, PLLC
702 W. Idaho Street, Suite 1100
P.O. Box 856
Boise, ID 83701

DATED THIS 10 day of May, 2010.

HAWLEY TROXELL ENNIS & HAWLEY LLP

By Steven F. Schossberger
Steven F. Schossberger, ISB No. 5358
Attorneys for Plaintiff/Counterdefendant
Boise Mode, LLC, successor-in-interest to
Mode Building Limited Partnership

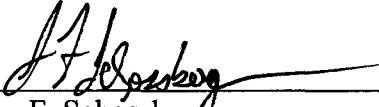
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 10 day of May, 2010, I caused to be served a true copy of the foregoing NOTICE OF COMPLIANCE by the method indicated below, and addressed to each of the following:

Michael E. Kelly
John J. Browder
LOPEZ & KELLY, PLLC
702 W. Idaho Street, Suite 1100
P.O. Box 856
Boise, ID 83701

[Attorneys for Defendants and Counterclaimant]

U.S. Mail, Postage Prepaid
 Hand Delivered
 Overnight Mail
 E-mail
 Telecopy: 208.342.4344



Steven F. Schossberger

JUN 24 2010

J. DAVID NAVARRO, Clerk
By A. GARDEN
DEPUTY

Steven F. Schossberger, ISB No. 5358
HAWLEY TROXELL ENNIS & HAWLEY LLP
877 Main Street, Suite 1000
P.O. Box 1617
Boise, ID 83701-1617
Telephone: 208.344.6000
Facsimile: 208.954.5260
Email: sschossberger@hawleytroxell.com

Attorneys for Plaintiff/Counterdefendant Boise Mode, LLC,
successor-in-interest to Mode Building Limited Partnership

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

BOISE MODE, LLC, an Illinois limited
liability company, successor-in-interest to
Mode Building Limited Partnership, an Idaho
limited partnership,

Plaintiff,

vs.

DONAHOE PACE & PARTNERS LTD, an
Idaho corporation; and TIMOTHY PACE,

Defendants.

DONAHOE PACE & PARTNERS LTD, an
Idaho corporation,

Counterclaimant,

vs.

BOISE MODE, LLC, an Illinois limited
liability company, successor-in-interest to
Mode Building Limited Partnership, an Idaho

Case No. CV OC 1001093
NOTICE OF SERVICE

CS

limited partnership,)
)
 Counterdefendant.)
)
 _____)

Pursuant to Rules 33, 34, and 36 of the Idaho Rules of Civil Procedure, Plaintiff hereby gives notice that on June 24, 2010, it served a copy of PLAINTIFF'S FIRST SET OF INTERROGATORIES, REQUESTS FOR PRODUCTION OF DOCUMENTS AND REQUESTS FOR ADMISSION TO DEFENDANT DONAHOE PACE & PARTNERS LTD upon the following person or persons:

Michael E. Kelly
John J. Browder
LOPEZ & KELLY, PLLC
702 W. Idaho Street, Suite 1100
P.O. Box 856
Boise, ID 83701
[Attorneys for Defendants and Counterclaimant]

DATED THIS 24 day of June, 2010.

HAWLEY TROXELL ENNIS & HAWLEY LLP

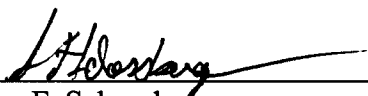
By Steven F. Schossberger
Steven F. Schossberger, ISB No. 5358
Attorneys for Plaintiff/Counterdefendant
Boise Mode, LLC, successor-in-interest to
Mode Building Limited Partnership

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 24 day of June, 2010, I caused to be served a true copy of the foregoing NOTICE OF SERVICE by the method indicated below, and addressed to each of the following:

Michael E. Kelly
John J. Browder
LOPEZ & KELLY, PLLC
702 W. Idaho Street, Suite 1100
P.O. Box 856
Boise, ID 83701
[Attorneys for Defendants and Counterclaimant]

U.S. Mail, Postage Prepaid
 Hand Delivered
 Overnight Mail
 E-mail
 Telecopy: 208.342.4344



Steven F. Schossberger

ORIGINAL

Michael E. Kelly, ISB #4351
John J. Browder, ISB #7531
LOPEZ & KELLY, PLLC
PO Box 856
Boise, Idaho 83701
Telephone: (208) 342-4300
Facsimile: (208) 342-4344
7008.001/Ans to Pltfs1stRFA.NOS.wpd

RECEIVED
JUL 26 2010
Ada County Clerk
NO. 10:36 FILED
A.M. PM
JUL 26 2010
J. DAVID NAVARRO, Clerk
By KATHY J. BIEHL
DEPUTY

Attorneys for Defendants

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

BOISE MODE, LLC, an Illinois limited liability company, successor-in-interest to Mode Building Limited Partnership, an Idaho limited partnership,

Plaintiff,

vs.

DONAHOE PACE & PARTNERS LTD, an Idaho corporation; and TIMOTHY PACE,

Defendants.

Case No. CV OC 1001093

NOTICE OF SERVICE

DONAHOE PACE & PARTNERS LTD, an Idaho corporation,

Counter-Claimant,

vs.

BOISE MODE, LLC, an Illinois limited liability company, successor-in-interest to Mode Building Limited Partnership, an Idaho limited partnership,

Counter-Defendant.

W

TO: THE CLERK OF THE ABOVE-ENTITLED COURT:

PLEASE TAKE NOTICE that on the 23rd day of July, 2010, I served a true and correct copy of Defendant/Counterclaimant's Responses to Plaintiff's First Set of Requests for Admission, together with a copy of this Notice, by the method indicated below in an envelope addressed to:

Steven F. Schossberger
HAWLEY, TROXELL, ENNIS &
HAWLEY
877 Main Street, Suite 1000
PO Box 1617
Boise, ID 83701-1617

U.S. Mail, postage prepaid
 Hand-Delivered
 Overnight Mail
 Facsimile

DATED this 23 day of July, 2010

LOPEZ & KELLY, PLLC

By: *Michael E. Kelly*
Michael E. Kelly, Of the Firm
Attorneys for Defendants

No. _____ FILED _____
A.M. _____ P.M. 2:24

JUL 30 2010

J. DAVID NAVARRO, Clerk
By E. AMES
REPUTY

Steven F. Schossberger, ISB No. 5358
HAWLEY TROXELL ENNIS & HAWLEY LLP
877 Main Street, Suite 1000
P.O. Box 1617
Boise, ID 83701-1617
Telephone: 208.344.6000
Facsimile: 208.954.5260
Email: sschossberger@hawleytroxell.com

Attorneys for Plaintiff/Counterdefendant Boise Mode, LLC,
successor-in-interest to Mode Building Limited Partnership

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

BOISE MODE, LLC, an Illinois limited liability company, successor-in-interest to Mode Building Limited Partnership, an Idaho limited partnership,

Plaintiff,

vs.

DONAHOE PACE & PARTNERS LTD, an Idaho corporation; and TIMOTHY PACE,

Defendants.

DONAHOE PACE & PARTNERS LTD, an Idaho corporation,

Counterclaimant,

vs.

BOISE MODE, LLC, an Illinois limited liability company, successor-in-interest to

Case No. CV OC 1001093

STIPULATION TO VACATE AND RESCHEDULE TRIAL DATE

LA

7/26/2010 8:52:20 AM

Karen Foruria

Hawley Troxell

Page 4

Mode Building Limited Partnership, an Idaho
 limited partnership,
 Counterdefendant.

The above parties, by and through their undersigned counsel of record, hereby stipulate to vacate and reschedule the trial date in this matter from December 8, 2010 to February 23, 2011. The reason for this stipulation is that both counsel have scheduling conflicts and agree that the February 23, 2011 trial setting will not present any additional scheduling conflicts.

DATED THIS 26th day of July, 2010.

HAWLEY TROXELL ENNIS & HAWLEY LLP

By Steven F. Schossberger
 Steven F. Schossberger, ISB No. 5358
 Attorneys for Plaintiff/Counterdefendant
 Boise Mode, LLC, successor-in-interest to
 Mode Building Limited Partnership

DATED THIS 29 day of July, 2010.

LOPEZ & KELLY, PLLC

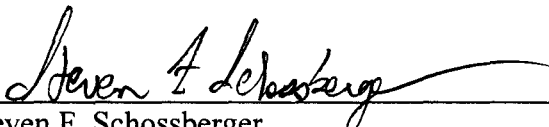
By Michael E. Kelly
 Michael E. Kelly
 Attorneys for Defendants/Counterclaimant
 Donahoe Pace & Partners Ltd and
 Timothy Pace

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 30 day of July, 2010, I caused to be served a true copy of the foregoing STIPULATION TO VACATE AND RESCHEDULE TRIAL DATE by the method indicated below, and addressed to each of the following:

Michael E. Kelly
John J. Browder
LOPEZ & KELLY, PLLC
702 W. Idaho Street, Suite 1100
P.O. Box 856
Boise, ID 83701
[Attorneys for Defendants and Counterclaimant]

U.S. Mail, Postage Prepaid
 Hand Delivered
 Overnight Mail
 E-mail
 Telecopy: 208.342.4344



Steven F. Schossberger

Michael E. Kelly, ISB #4351
John J. Browder, ISB #7531
LOPEZ & KELLY, PLLC
PO Box 856
Boise, Idaho 83701
Telephone: (208) 342-4300
Facsimile: (208) 342-4344
7008.001/Ans to Pltfs1stRogs.RFP.NOS.wpd

NO. _____
FILED _____
A.M. // P.M.

RECEIVED
AUG - 6 2010
Ada County Clerk

AUG 06 2010

J. DAVID NAVARRO, Clerk
By KATHY J. SIEHL
DEPUTY

ORIGINAL

Attorneys for Defendants

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

BOISE MODE, LLC, an Illinois limited liability company, successor-in-interest to Mode Building Limited Partnership, an Idaho limited partnership,

Plaintiff,

vs.

DONAHOE PACE & PARTNERS LTD, an Idaho corporation; and TIMOTHY PACE,

Defendants.

DONAHOE PACE & PARTNERS LTD, an Idaho corporation,

Counter-Claimant,

vs.

BOISE MODE, LLC, an Illinois limited liability company, successor-in-interest to Mode Building Limited Partnership, an Idaho limited partnership,

Counter-Defendant.

Case No. **CV OC 1001093**

NOTICE OF SERVICE

20

TO: THE CLERK OF THE ABOVE-ENTITLED COURT:

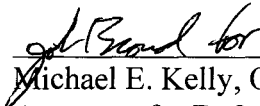
PLEASE TAKE NOTICE that on the 5th day of August, 2010, I served a true and correct copy of Defendant/Counterclaimant's Answers and Responses to Plaintiff's First Set of Interrogatories and Requests for Production of Documents, together with a copy of this Notice, by the method indicated below in an envelope addressed to:

Steven F. Schossberger
HAWLEY, TROXELL, ENNIS &
HAWLEY
877 Main Street, Suite 1000
PO Box 1617
Boise, ID 83701-1617

U.S. Mail, postage prepaid
 Hand-Delivered
 Overnight Mail
 Facsimile

DATED this 5 day of August, 2010

LOPEZ & KELLY, PLLC

By: 
Michael E. Kelly, Of the Firm
Attorneys for Defendants

NO. _____ FILED _____
A.M. 9:40 P.M. _____

AUG 09 2010

By J. DAVID NAVARRO, Clerk
INGA JOHNSON
DEPUTY

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

BOISE MODE, LLC, an Illinois limited liability company, successor-in-interest to Mode Building Limited Partnership, an Idaho limited partnership,

Plaintiff,

vs.

DONAHOE PACE & PARTNERS LTD, an Idaho corporation; and TIMOTHY PACE,

Defendants.

DONAHOE PACE & PARTNERS LTD, an Idaho corporation,

Counterclaimant,

vs.

BOISE MODE, LLC, an Illinois limited liability company, successor-in-interest to Mode Building Limited Partnership, an Idaho limited partnership,

Counterdefendant.

Case No. CV OC 1001093

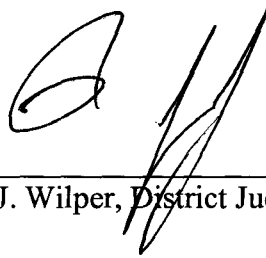
ORDER GRANTING STIPULATION TO VACATE AND RESCHEDULE TRIAL DATE

Based upon the stipulation to vacate and reschedule trial date, entered into between the parties, and good cause appearing therefor,

IT IS HEREBY ORDERED that said stipulation is granted as follows: The three (3) day jury trial of this action shall commence before this Court on February 23, 2011 at 9:00 a.m. The Court will issue an amended order setting proceedings and trial.

SO ORDERED this 27 day of ~~July~~, 2010.

Aug



Ronald J. Wilper, District Judge

CLERK'S CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 9 day of ~~July~~ ^{August}, 2010, I caused to be served a true copy of the foregoing ORDER GRANTING STIPULATION TO VACATE AND RESCHEDULE TRIAL DATE by the method indicated below, and addressed to each of the following:

Steven F. Schossberger, ISB No. 5358
HAWLEY TROXELL ENNIS & HAWLEY LLP
877 Main Street, Suite 1000
P.O. Box 1617
Boise, ID 83701-1617
[Attorneys for Plaintiff/Counterdefendant Boise
Mode, LLC, successor-in-interest to Mode
Building Limited Partnership]

U.S. Mail, Postage Prepaid
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 Overnight Mail
 E-mail
 Telecopy: 208.954.5260

Michael E. Kelly
John J. Browder
LOPEZ & KELLY, PLLC
702 W. Idaho Street, Suite 1100
P.O. Box 856
Boise, ID 83701
[Attorneys for Defendants and Counterclaimant]

U.S. Mail, Postage Prepaid
 Hand Delivered
 Overnight Mail
 E-mail
 Telecopy: 208.342.4344

J. DAVID NAVARRO
Clerk of the Court

By INGA JOHNSON
Deputy Clerk

AUG 10 2010

J. DAVID NAVARRO, Clerk
By *[Signature]* DEPUTY

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

BOISE MODE, LLC, an Illinois limited liability company successor-in-interest to Mode Building limited Partnership, an Idaho limited partnership,

Plaintiff,

vs.

DONAHOE PACE & PARTNERS, LTD,
an Idaho corporation; and TIMOTHY PACE,

Defendants.

DONATHOE PACE & PARTNERS,
LTD, an Idaho corporation,

Counter-Claimant

vs.

BOISE MODE, LLC, an Illinios limited liability company, successor-in-interest,

Counter-Defendant.

Case No. CVOC1001093

ORDER SETTING PROCEEDINGS
AND TRIAL

THE FOLLOWING SCHEDULING ORDER IS ORDERED AS FOLLOWS:

1) **DESIGNATED TRIAL COUNSEL:**

Plaintiff: Steven F. Schossberger of Hawley Troxell Ennis & Hawley
Defendant: Michael E. Kelly and John J. Browder of Lopez & Kelly

Each party to the action shall be represented at all pre-trial hearings by the attorney or party who is to conduct the trial or by co-counsel with full knowledge of the case and with authority to bind the party by stipulation. If any attorney has not been given such authority to bind the party by stipulation, the party shall be present or available at the pre-trial conference.

2) **TRIAL DATE:** The jury trial of this action shall commence before this Court on **February 23, 2011 at 9:00 o'clock a.m.**

Notice is hereby given, pursuant to Idaho Rule of Civil Procedure 40(d)(1)(G), that an alternate judge may be assigned to preside over the trial of this case. The following is a list of potential alternate judges:

Hon. G. D. Carey
Hon. Dennis Goff
Hon. Daniel C. Hurlbutt Jr.
Hon. James Judd
Hon. Duff McKee
Hon. Daniel Meehl
Hon. George R. Reinhardt, III
Hon. W. H. Woodland
Hon. Linda Copple Trout
Hon. Kathryn Sticklen
Hon. Barry Wood
Hon. Peter McDermott
Any sitting 4th District Judge
Any sitting 5th District Judge

Unless a party has previously exercised their right to disqualification without cause under Rule 40(d)(1), each party shall have the right to file one (1) motion for disqualification without cause as to any alternate judge not later than ten (10) days after service of this notice.

3) **PRE-TRIAL CONFERENCE:** Counsel for the parties shall appear before this Court in chambers on **February 15, 2011 at 3:30 o'clock p.m.** for a final pre-trial conference. Counsel shall be prepared to discuss settlement possibilities, and all items set forth in Rules 16(a) through (j), I.R.C.P.

4) **MOTIONS**: All motions, including Motions in Limine and Motions for Summary Judgment, shall be heard no later than **60 days prior to trial**.

5) **DISCOVERY CUT-OFF**: The last day for the initiation of any discovery (serving an interrogatory, requesting a document or noticing a deposition) shall be **60 days prior to trial**.

6) **DISCLOSURE OF EXPERTS**: The advancing party's expert witnesses shall be disclosed no later than **90 days prior to trial**. The responding party's expert witnesses shall be disclosed no later than **60 days prior to trial**. All parties' disclosure as to experts, shall be in compliance with Rule 26(b)(4). An expert is defined under Rule 702 of the Idaho Rules of Evidence.

7) **FILING OF AMENDMENTS**: The last day to file amendments to any pleading, or to join any additional parties, shall be **120 days prior to trial**.

8) **ATTORNEYS CONFERENCE**: Counsel for Plaintiff shall convene an attorneys conference two weeks prior to final pre-trial conference for the purposes of exchange and marking of all exhibits, exchange of all witness lists, the noting of any foundational objections to exhibits or witnesses, stipulate to uncontested facts, explore all settlement possibilities, and prepare a pre-trial stipulation pursuant to Rule 16(e), I.R.C.P., which stipulation will be presented to this Court at the final pre-trial conference.

9) **PRE-TRIAL MEMORANDA**: Parties shall submit to the Court, no later than five (5) days before the final pre-trial conference, a pre-trial memoranda which will include the following:

- a. Elements of Plaintiff's case (Plaintiff);
- b. Defenses of Defendant's case (Defendant)
- c. Contested facts;
- d. Contested issues of law;
- e. Evidentiary issues
- f. Agreed or stipulated facts; and
- g. Memorandum of Points and Authorities on issues of law.

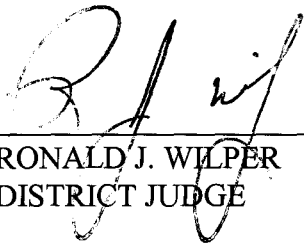
10) **JURY INSTRUCTIONS**: Each party shall submit all proposed jury instructions to the Court on or before **February 15, 2011 at 3:30 p.m.**

11) **SANCTIONS**: Failure to comply with this Order shall subject a party or its attorney to appropriate sanctions, including, but not limited to, costs and reasonable attorney fees, the dismissal with prejudice of Plaintiff's claim, or the striking of a Defendant's defenses.

A party may be excused from strict compliance with any provisions of this Order only upon motion showing extraordinary circumstances.

12) **CONTINUANCES**: If all parties request a continuance of the trial date, this Court will only consider a Motion to Continue if the motion is signed by all parties personally and their counsel.

Dated: August 10, 2010



RONALD J. WILPER
DISTRICT JUDGE

CERTIFICATE OF MAILING

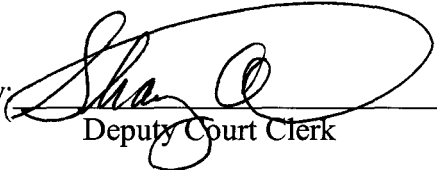
I hereby certify that on August 10, 2010 I mailed a true and correct copy of the within instrument to:

Steven F. Schossberger
HAWLEY TROXELL ENNIS & HAWLEY, LLP
877 W Main St, Ste 1000
PO Box 1617
Boise, ID 83701-1617

Michael E. Kelly
LOPEZ & KELLY, PLLC
413 W Idaho St, Ste 100
PO Box 856
Boise, ID 83701-0856

J. DAVID NAVARRO
Clerk of the District Court

By:



Deputy Court Clerk

OCT 27 2010

J. DAVID NAVARRO, Clerk
By CARLY LATIMORE
DEPUTY

Steven F. Schossberger, ISB No. 5358
HAWLEY TROXELL ENNIS & HAWLEY LLP
877 Main Street, Suite 1000
P.O. Box 1617
Boise, ID 83701-1617
Telephone: 208.344.6000
Facsimile: 208.954.5260
Email: ssschossberger@hawleytroxell.com

Attorneys for Plaintiff/Counterdefendant Boise Mode, LLC,
successor-in-interest to Mode Building Limited Partnership

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

BOISE MODE, LLC, an Illinois limited liability company, successor-in-interest to Mode Building Limited Partnership, an Idaho limited partnership,

Plaintiff,

vs.

DONAHOE PACE & PARTNERS LTD, an Idaho corporation; and TIMOTHY PACE,

Defendants.

Case No. CV OC 1001093

NOTICE OF RULE 30(b)(6)
DEPOSITION *DUCES TECUM* OF
DONAHOE PACE & PARTNERS LTD,
AN IDAHO CORPORATION

DONAHOE PACE & PARTNERS LTD, an Idaho corporation,

Counterclaimant,

vs.

BOISE MODE, LLC, an Illinois limited liability company, successor-in-interest to Mode Building Limited Partnership, an Idaho limited partnership,

Counterdefendant.

NOTICE OF RULE 30(b)(6) DEPOSITION *DUCES TECUM* OF DONAHOE PACE & PARTNERS LTD, AN IDAHO CORPORATION - 1

LA

TO: DONAHOE PACE & PARTNERS LTD., AN IDAHO CORPORATION

PLEASE TAKE NOTICE that pursuant to Idaho Rule of Civil Procedure 30(b)(6), counsel for Plaintiff/Counterdefendant Boise Mode, LLC (“Boise Mode”) will take the deposition of the corporate representative of Donahoe Pace & Partners, Ltd., an Idaho corporation (“Donahoe Pace”), commencing on November 11, 2010, at 9:00 a.m. MDT, at the offices of Hawley Troxell Ennis & Hawley LLP, 877 Main Street, Suite 1000, Boise, Idaho 83702, and continuing from time to time until completed, at which place and time you are invited to appear and take part in such deposition as you deem proper.

YOU ARE HEREBY REQUIRED to designate one or more representatives to testify as to matters known or reasonably available to Donahoe Pace regarding the following topics:

1. The Answer to Plaintiff’s Complaint dated February 11, 2010, including each denial of the factual allegations set forth in the Verified Complaint.
2. The facts which support each of the affirmative defenses asserted in the Answer to the Verified Complaint dated February 11, 2010.
3. The facts which support each of the allegations asserted in the Counterclaim dated February 11, 2010.
4. Each of the documents attached to Donahoe Pace’s Responses to Plaintiff’s First Set of Interrogatories and Requests for Production of Documents dated August 5, 2010.
5. Each of the Answers to Plaintiff’s First Set of Interrogatories and Requests for Admission.

The deponent is required to bring the following documents for production at the time of the deposition:

1) All documents, notes, records, files, statements, bills, diaries, and writings which support Donahoe Pace's denials of the factual allegations in Plaintiff's Verified Complaint.

2) All documents, notes, records, files, statements, bills, diaries, and writings which support or refute each of the causes of action asserted in the Counterclaim dated February 11, 2010.

3) All witness statements made or taken by you concerning the allegations and events described in the Counterclaim dated February 11, 2010.

4) All journals, diaries, summaries, notes, emails, letters, and other written materials which document or reference in any manner any facts or matters related to the facts or circumstances surrounding this litigation or your alleged claim for damages.

5) All documents, including but not limited to, journals, diaries, summaries, notes, emails, letters, and other written materials which support or refute the contention in your Counterclaim wherein you allege that, "Counter-defendant has breached duties and obligations imposed by contract and/or law, including, without limitation: (1) failing to ensure that other tenants of 800 West Idaho Street, Boise, Idaho 83702 do not unreasonably interfere with the Counter-claimant's use and enjoyment of the premises; (2) preventing the Counter-claimant access to the premises required by the lease; (3) allowing agents of the Counter-defendant to intrude into computer and data processing systems belonging to the Counter-claimant; (4) failing to maintain 800 West Idaho Street, Boise, Idaho 83702 and, as a result, caused wrongful interference with the Counter-claimant's use and enjoyment of the premises; (5) causing disruption of utility and elevator services to which the Counter-claimant is entitled; and (6) failing to adequately hire, train and/or supervise its agents.

6) All documents, notes, records, files, statements, bills, diaries, and writings which support or refute the contention in your Counterclaim wherein you allege that, “As a direct and proximate result of Counter-defendant’s breaches of the lease, Counter-claimant has suffered damages in an amount to be proven at trial, which amount is in excess of Ten Thousand Dollars (“Ten Thousand”).

7) All documents, notes, records, files, statements, bills, diaries, and writings which support or refute the contention in your Counterclaim wherein you allege that, “Counterclaimant was a party to an existing contract and/or had contractual expectations with a video production unit.”

8) All documents, notes, records, files, statements, bills, diaries, and writings which support or refute the contention in your Counterclaim wherein you allege that, “Counterdefendant knew or should have known of this contract and/or contractual expectations.”

9) All documents, notes, records, files, statements, bills, diaries, and writings which support or refute the contention in your Counterclaim wherein you allege that, “Counterdefendant and/or its agents intentionally interfered with this contract and/or contractual expectations, thereby causing a breach.”

10) All documents, notes, records, files, statements, bills, diaries, and writings which support or refute the contention in your Counterclaim wherein you allege that, “As a proximate result of the Counter-defendant’s tortious interference with the aforementioned contract and/or contractual relations, the Counter-claimant has been damaged in an amount to be proven at trial.”

11) All documents, notes, records, files, statements, bills, diaries, and writings which support or refute the contention in your Counterclaim wherein you allege that, “As alleged

herein, the Counterdefendant's actions, or those of its agents, were intentional and substantially interfered with the Counterclaimant's intended use and enjoyment of the premises."

12) All documents, notes, records, files, statements, bills, diaries, and writings which support or refute the contention in your Counterclaim wherein you allege that, "The Counterdefendant's actions render the premises unsuitable for the Counterclaimant's business and have permanently deprived the Counterclaimant of its intended use and enjoyment of the premises."

13) All documents, notes, records, files, statements, bills, diaries, and writings which support or refute the contention in your Counterclaim wherein you allege that, "As a result of the Counter-defendant's substantial interference with the Counterclaimant's intended use and enjoyment of the premises, the Counterclaimant was forced to vacate the premises and obtain alternate suitable space in which to conduct its business."

14) All documents, notes, records, files, statements, bills, diaries, and writings which support or refute the contention in your Counterclaim wherein you allege that, "As a result of the Counter-defendant's actions, Counterclaimant has been damaged in an amount to be proven at trial."

15) All of Donahoe Pace's customer lists for the years 2006, 2007, 2008, 2009, and 2010.

16) The Bylaws and Articles of Incorporation for Donahoe Pace that were in effect for each of the years 2006 – 2010.

17) All documents of minutes of meetings of the Board of Directors of Donahoe Pace for the time period 2006 – 2010.

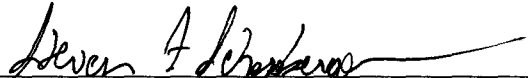
18) A complete set of financial statements (including income statements, balance sheets, and statements of cash flow) of Donahoe Pace for each of the years 2006 – 2010.

- 19) A complete set of the filed federal and state income tax returns of Donahoe Pace for each of the years 2006 – 2010.
- 20) All bank statements of Donahoe Pace showing rent payments to Boise Mode for each of the years 2006 – 2010.
- 21) All cancelled checks of Donahoe Pace showing rent payments made to Boise Mode for each of the years 2006 – 2010.
- 22) All documents relating to any contract or agreement entered into between Donahoe Pace and any third party in connection with the services offered by Donahoe Pace for each of the years 2006 – 2010.
- 23) All documents of all contracts or agreements by which Donahoe Pace agreed, under specific terms, to lease or otherwise make operating space available at Suite 350, 800 West Idaho Street, Boise, Idaho, to any other person, partnership, limited liability company, corporation, or any other form of entity in connection with Donahoe Pace as the tenant of Suite 350, 800 West Idaho Street, Boise, Idaho, for each year 2006 – 2010.

The above deposition will be conducted pursuant to the Idaho Rules of Civil Procedure before a Notary Public of the State of Idaho, or such other officer authorized by law to administer oaths.

DATED THIS 27th day of October, 2010.

HAWLEY TROXELL ENNIS & HAWLEY LLP

By 
Steven F. Schossberger, ISB No. 5358
Attorneys for Plaintiff/Counterdefendant Boise
Mode, LLC, successor-in-interest to Mode
Building Limited Partnership

CERTIFICATE OF SERVICE

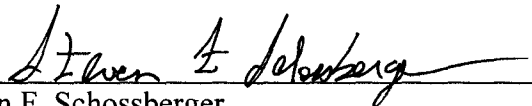
I HEREBY CERTIFY that on this 27th day of October, 2010, I caused to be served a true copy of the foregoing NOTICE OF RULE 30(B)(6) DEPOSITION DUCES TECUM OF DONAHOE PACE & PARTNERS LTD, AN IDAHO CORPORATION by the method indicated below, and addressed to each of the following:

Michael E. Kelly
John J. Browder
LOPEZ & KELLY, PLLC
702 W. Idaho Street, Suite 1100
P.O. Box 856
Boise, ID 83701
[Attorneys for Defendants and Counterclaimant]

U.S. Mail, Postage Prepaid
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 Overnight Mail
 E-mail
 Telecopy: 208.342.4344

M & M Court Reporting
421 W Franklin
P.O. Box 2636
Boise, ID 83701-2636

U.S. Mail, Postage Prepaid
 Hand Delivered
 Overnight Mail
 E-mail
 Telecopy



Steven F. Schossberger

NOV 24 2010

J. DAVID NAVARRO, Clerk
By A. GARDEN
DEPUTY

Steven F. Schossberger, ISB No. 5358
HAWLEY TROXELL ENNIS & HAWLEY LLP
877 Main Street, Suite 1000
P.O. Box 1617
Boise, ID 83701-1617
Telephone: 208.344.6000
Facsimile: 208.954.5260
Email: sschossberger@hawleytroxell.com

Attorneys for Plaintiff/Counterdefendant Boise Mode, LLC,
successor-in-interest to Mode Building Limited Partnership

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

BOISE MODE, LLC, an Illinois limited liability company, successor-in-interest to Mode Building Limited Partnership, an Idaho limited partnership,

Plaintiff,

vs.

DONAHOE PACE & PARTNERS LTD, an Idaho corporation; and TIMOTHY PACE,

Defendants.

DONAHOE PACE & PARTNERS LTD, an Idaho corporation,

Counterclaimant,

vs.

BOISE MODE, LLC, an Illinois limited liability company, successor-in-interest to Mode Building Limited Partnership, an Idaho limited partnership,

Case No. CV OC 1001093

MOTION FOR SUMMARY JUDGMENT
ON COUNTERCLAIMANT'S
COUNTERCLAIMS

MOTION FOR SUMMARY JUDGMENT ON COUNTERCLAIMANT'S
COUNTERCLAIMS - 1

3

Counterdefendant.)
_____)

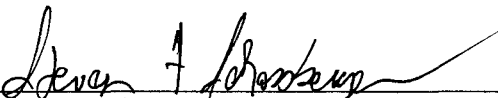
Counterdefendant Boise Mode, LLC, by and through its undersigned counsel of record, and pursuant to I.R.C.P. 56(c), moves this Court for summary judgment on all counterclaims asserted by Counterclaimant Donahoe Pace & Partners LTD.

This motion is supported by the accompanying memorandum of points and authorities and the Affidavits of Christopher Kiefor, CPA, David L. Baum, Angela Aeschliman, CPM, CCIM, and Steven F. Schossberger, Esq. filed concurrently herewith.

Oral argument requested.

DATED THIS 24th day of November, 2010.

HAWLEY TROXELL ENNIS & HAWLEY LLP

By 

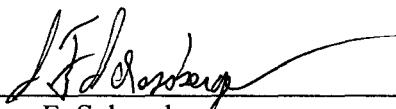
Steven F. Schossberger, ISB No. 5358
Attorneys for Plaintiff/Counterdefendant Boise
Mode, LLC, successor-in-interest to Mode
Building Limited Partnership

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 24th day of November, 2010, I caused to be served a true copy of the foregoing MOTION FOR SUMMARY JUDGMENT ON COUNTERCLAIMANT'S COUNTERCLAIMS by the method indicated below, and addressed to each of the following:

Michael E. Kelly
John J. Browder
LOPEZ & KELLY, PLLC
702 W. Idaho Street, Suite 1100
P.O. Box 856
Boise, ID 83701
[Attorneys for Defendants and Counterclaimant]

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 Telecopy: 208.342.4344



Steven F. Schossberger

NOV 24 2010

J. DAVID NAVARRO, Clerk
By A. GARDEN
DEPUTY

Steven F. Schossberger, ISB No. 5358
HAWLEY TROXELL ENNIS & HAWLEY LLP
877 Main Street, Suite 1000
P.O. Box 1617
Boise, ID 83701-1617
Telephone: 208.344.6000
Facsimile: 208.954.5260
Email: sschossberger@hawleytroxell.com

Attorneys for Plaintiff/Counterdefendant Boise Mode, LLC,
successor-in-interest to Mode Building Limited Partnership

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

BOISE MODE, LLC, an Illinois limited liability company, successor-in-interest to Mode Building Limited Partnership, an Idaho limited partnership,

Plaintiff,

vs.

DONAHOE PACE & PARTNERS LTD, an Idaho corporation; and TIMOTHY PACE,

Defendants.

Case No. CV OC 1001093

MEMORANDUM IN SUPPORT OF
MOTION FOR SUMMARY JUDGMENT
ON DEFENDANT'S COUNTERCLAIMS

DONAHOE PACE & PARTNERS LTD, an Idaho corporation,

Counterclaimant,

vs.

BOISE MODE, LLC, an Illinois limited liability company, successor-in-interest to Mode Building Limited Partnership, an Idaho limited partnership,

Counterdefendant.

3

COMES NOW Plaintiff/Counterdefendant Boise Mode, LLC (“Boise Mode” or “Landlord”), by and through its undersigned counsel of record, and hereby submits this Memorandum in Support of Motion for Summary Judgment on the counterclaims asserted by Defendant/Counterclaimant Donahoe Pace & Partners Ltd. (“Defendant” or “Tenant”).

**I.
INTRODUCTION**

Defendant breached a commercial lease agreement entered into with Boise Mode by failing to timely pay rent in full and by abandoning the leased premises without paying the rent due. Rather than make good on its obligations, Defendant has filed counterclaims.

Defendant and Boise Mode executed a commercial lease agreement for “General Office Use” in downtown Boise in November, 2006. At some point after Defendant moved into the leased premises, Boise Mode upgraded certain portions of the building in which the premises were located, including the common areas. Defendant registered some complaints about the construction, and Boise Mode granted Defendant a one time rent concession in return. Defendant subsequently began falling behind on its rent payments, which constituted a material breach of its lease. Boise Mode demanded that Defendant bring its account current. Rather than pay the past rent due, however, Defendant began lodging additional complaints about routine maintenance issues and nighttime noise from a neighboring tenant. Boise Mode attempted to resolve the issues with Defendant while also making additional demands upon Defendant to pay its past rent due – none of which was ever met.

After rejecting Boise Mode’s offer of additional concessions, Defendant abandoned the premises in November, 2009, with seven months remaining on its lease, and discontinued any rent payments. As a result of its refusal to timely pay its rent due under the terms of its lease and its abandonment of the leased premises, Defendant now owes Boise Mode nearly \$100,000 in

back rent and associated charges and fees. Instead of paying its debt pursuant to the contract it executed, however, Defendant has asserted various defenses and counterclaims in an attempt to avoid its obligations. Chief among those claims is an allegation that Defendant was “forced to vacate” the leased premises. Defendant, however, remained in the leased premises long after the construction ceased and, **despite its complaints about the leased premises, Defendant sought to enter into an extension of its lease as late as at least June 8, 2009.** Moreover, Defendant negotiated for concessions in rent through late October, 2009, belying its contention that it was “forced” out. Defendant’s counterclaims lack merit and should be dismissed as a matter of law.

II. LEGAL STANDARDS

Summary judgment is appropriate where the affidavits, depositions, admissions, and other evidence in the record demonstrate that there are no genuine issues of material fact and that the moving party is entitled to judgment as a matter of law. I.R.C.P. Rule 56(c); *Heinz v. Heinz*, 129 Idaho 847, 934 P.2d 20 (1997). When considering a motion for summary judgment, the court “liberally construes the record in a light most favorable to the party opposing the motion and draws all reasonable inferences and conclusions in that party’s favor.” *Brooks v. Logan*, 130 Idaho 574, 576, 944 P.2d 709, 711 (1997).

Affidavits submitted in support of and in opposition to motions for summary judgment must be made on personal knowledge, set forth facts that would be admissible at trial on the issue addressed, and demonstrate that the affiant is competent to testify to the matters stated therein. I.R.C.P. Rule 56(e). When a motion for summary judgment is supported by affidavits or deposition testimony, the non-moving party cannot rest on the allegations and/or denials in the pleadings, but must set forth specific facts demonstrating a genuine issue of material fact for trial. *Arnold v. Diet Center, Inc.*, 113 Idaho 581, 746 P.2d 1040 (Ct. App. 1987). While the

moving party generally bears the burden of demonstrating the absence of material facts, a failure of proof on an essential element of the opposing party's case makes all other facts immaterial.

Badell v. Beeks, 115 Idaho 101, 765 P.2d 126 (1988) (citing *Celotx v. Catrett*, 117 U.S. 317 (1986) (emphasis added)). Creating only a slight doubt or presenting only a scintilla of evidence is insufficient to withstand a motion for summary judgment. *West v. Sonke*, 243 Idaho 133, 968 P.2d 228 (1998).

III. STATEMENT OF UNDISPUTED FACTS

A. The Lease.

1. On or about November 3, 2006, Defendant and Boise Mode entered into an Office Lease Agreement (“Lease”) for the premises located at 800 Idaho Street, Suite 350, Boise, Idaho (“Premises”), together with lower level storage space in the same building (the building at 800 Idaho Street will be referred to hereafter as the “Facility”). *See* Verified Complaint filed January 21, 2010 (“Verified Compl.”), ¶ 6, Exh. A.

2. In connection with the Lease, Defendant Timothy Pace (“Tim Pace” or “Guarantor”) executed a Personal Guarantee of Lease (“Personal Guarantee”) whereby he personally guaranteed all obligations owed Boise Mode by Defendant arising under or relating to the Lease. *See* Verified Compl., ¶ 6, Exh. A.

3. The Lease specifies that the Premises are to be used by Tenant for “General Office Uses.” *See* Verified Compl., Exh. A, Article 1.14.

4. Article 2.1 of the Lease provides:

Landlord reserves the right to affect such other tenancies in the Facility as Landlord, in its sole discretion, deems appropriate; and Tenant does not rely on Landlord's leasing to any specific tenant, or to any number of tenants, any space in the Facility.

See Verified Compl., Exh. A (emphasis added).

5. The Lease provides that “Except as specifically provided herein, there shall be no deduction, offset or abatement for any reason of the rent or any money payable by Tenant to Landlord.” See Verified Compl., Exh. A, Article 4.1 (emphasis added).

6. The Lease contains a prohibition on assignment or sublease. In particular, Article 18.1 of the Lease provides:

Tenant shall not voluntarily or by operation of law assign, license, transfer, mortgage or otherwise encumber all or any part of Tenant’s interest in this Lease or in the Premises, and shall not sublet or assign all or any part of the Premises, without the prior written consent of Landlord, which consent shall not be unreasonably withheld, and any attempted assignment, transfer, mortgage, encumbrance or subletting without such consent shall be wholly void.

See Verified Compl., Exh. A.

7. Article 19.3 of the Lease contains a covenant of quiet enjoyment, which is expressly conditioned upon the Tenant paying rent and is expressly made subject to all restrictions and covenants in the Lease:

QUIET ENJOYMENT. Landlord agrees that Tenant, upon paying the rent and other monetary sums due under this Lease and performing the covenants and conditions of this Lease and upon recognizing purchaser as Landlord, may quietly have, hold and enjoy the Premises during the term hereof; subject, however, to loss by casualty and all restrictions and covenants contained or referred to in this Lease.

See Verified Compl., Exh. A (Emphasis added.)

8. Article 20.1 of the Lease specifies that the following occurrences “shall constitute a material default and breach of this Lease by Tenant”:

(a) Any failure of the Tenant to pay the Base Rent, additional rent, or any other monetary sums required to be paid hereunder. If tenant fails to cure said default within five (5) days after written

notice by Landlord to Tenant, Landlord shall be entitled to exercise its rights and remedies as provided in Article 20.3 herein, without further notice to Tenant.

(b) The abandonment of the Premises by Tenant without Tenant continuing to pay Base Rent in a timely manner.

See Verified Compl., Exh. A (emphases added).

9. Article 20.3 of the Lease specifies the remedies available to Boise Mode upon default by the Tenant:

In the event of any such material default or breach by Tenant, Landlord may at any time thereafter without limiting Landlord in the exercise of any right or remedy at law or in equity which Landlord may have by reason of such default or breach:

(a) Maintain this Lease in full force and effect and recover the rent and other monetary charges as they become due, irrespective of whether Tenant shall have abandoned the Premises. . . .

See Verified Compl., Exh. A.

10. The Lease term is from December 1, 2006 through May 31, 2010. *See* Verified Compl., Exh. A, Article 1.9.

B. The Breach, Failure to Cure, and Abandonment of the Premises.

11. As of December, 2008, Defendant failed and refused to make the required rent, operating costs and charges due and owing under the terms of the Lease to Boise Mode. *See* Verified Compl., ¶ 7.

12. On May 13, 2009, Angela Aeschliman, the Director of Property Management for Boise Mode's property manager, Watermark Property Management ("Watermark"), sent a written demand to Defendant and Guarantor, noting that despite a previous notice of delinquency for delinquent rent payments from December 2008 through May 2009 in connection with the Lease, Defendant had failed to make the required rent payments. The letter made demand for

payment of delinquent rent payments totaling \$22,958.80 for the months December 2008 through May 2009. Affidavit of Angela Aeschliman filed concurrently herewith (“Aeschliman Aff.”), Exh. A.

13. Also on May 13, 2009, Ms. Aeschliman sent an additional letter to Defendant to “clear up misunderstandings.” In that letter, Ms. Aeschliman explained that Boise Mode had previously granted Defendant a one time \$1,000 rent abatement “[f]or “goodwill” in connection with the inconveniences caused by the construction in the Facility even though, pursuant to the terms of the Lease, Boise Mode was within its rights to improve the building without offset of Defendant’s rent. Aeschliman Aff., Exh. B. *See* Verified Compl. Exh. A, Article 4.1.

14. On May 21, 2009, at 8:19 P.M. Tim Pace sent an e-mail to Ms. Aeschliman and “Sid” at Mountain Top Maintenance, thanking Sid “for all your time this week on the elevator front, as well as the new elevator keys.” Mr. Pace also informed Ms. Aeschliman and Sid that the elevator in the Facility was not working and requested that they address the problem as soon as possible. One half-hour later, at 8:49 P.M., Ms. Aeschliman responded, “Tim we will get someone out asap. Thanks for informing us.” At 7:37 a.m. the next morning, Ms. Aeschliman sent an e-mail to Tim Pace informing him that “The elevator is working at this time” and requesting that he let her know if he experienced additional problems. Aeschliman Aff., Exh. C.

15. On June 3, 2009, Ms. Aeschliman sent another letter to Defendant, informing Defendant, among other things, that “the construction has ended and has been complete now for almost 2 months.” The letter also addressed issues with noise from the comedy club, informing Defendant that the club did not operate until after 5 P.M. and did not begin shows until 7 P.M. and requesting that if Defendant had a specific issue regarding the noise from the comedy club, “please report it immediately so that it can be dealt with in a timely manner.” The letter further

directed Defendant to immediately report any issues with “noise, the elevator, the hallways, et cetera.” The letter concluded by again demanding payment of the outstanding rent due by June 5, 2009. Aeschliman Aff., Exh. C.

16. On June 8, 2009, Tim Pace sent an e-mail to David Baum, a Member of Baum Development, LLC, the Manager of Boise Mode, stating that “we think now may be a time to consider rewriting the balance of our lease and extending into the end of next year. Is that an option you might consider.” (Emphasis added.) In that same email, Mr. Pace mentioned concerns about noise emanating from the “night club on the second floor.” Affidavit of David L. Baum filed concurrently herewith (“Baum Aff.”), Exh A.

17. On June 29, 2009, David Baum sent an e-mail to Tim Pace in which he stated, among other things, “We have continued to improve the building for the benefit of all of our tenants. The improvements have improved the quality of the space and reduced operating expenses for both the tenants and the landlord. We have now completed our major improvements.” Baum Aff., Exh. A.

18. On July 2, 2009, David Baum responded to Tim Pace, informing him that he was “open and available to discuss the items” Mr. Pace raised in an e-mail dated July 1, 2009, but reiterating that Defendant first needed to bring his past due rent of \$25,781.26 current. Baum Aff., Exh. A.

19. One week later, on July 9, 2009, Tim Pace responded, stating that he had sent payment for July rent to Mr. Baum, that he was preparing a summary of issues with the Premises for Mr. Baum’s review, and mentioning, “FYI” that music from the floor below had been playing intermittently through the morning. Baum Aff., Exh. B.

20. David Baum responded the next day, July 10, 2009, informing Mr. Pace, “I continue to anxiously await your ‘summary’ which we have been talking about for more than a month.” Mr. Baum also reminded Mr. Pace that, even after receiving the July rent check, he would still be more than \$20,000 behind in his rent, and that he should call the management office as soon as he had any issue with music from below. Mr. Baum also informed Mr. Pace that the tenant on the second floor “has promised their cooperation.” Baum Aff., Exh. B.

21. After five days passed with no response from Mr. Pace, David Baum sent an e-mail to Mr. Pace on July 15, 2009, stating, “Once again, I have not heard back from you. Your current rent balance is \$18,556.76. I feel that you have left me no other choice but to turn this matter over to our attorneys.” Only after that e-mail was sent did Mr. Pace respond, again promising delivery of the “summary” within the next two days. David Baum responded in less than one hour: “I look forward to seeing your suggested resolution.” Baum Aff., Exh. C.

22. On July 24, 2009, Tim Pace finally provided David Baum a copy of his summary of alleged issues with the Premises. Baum Aff., Exh. D.

23. On July 30, 2009, David Baum offered a resolution to Tim Pace. Mr. Baum apologized for “any inconveniences and interruptions,” and noted that he disagreed with a number of the issues Mr. Pace had described in his letter. Mr. Baum mentioned that a number of the improvements Boise Mode had made to the building would result in increased energy efficiency and lower energy costs for Defendant. Mr. Baum offered to Defendant a rent reduction from August through June as well as an agreement to purchase \$500 of consulting work each month from Donahoe Pace. In return, he asked only that all past due balances be paid by August 3rd. Mr. Baum concluded, “I hope that this is a solution that everyone can be happy

with it gives us an opportunity to work together for the common good of all the tenants on the block. It is obviously my preference to solve this problem amicably.” Baum Aff., Exh. E.

24. On August 10, 2009, David Baum again e-mailed Tim Pace, stating, “Although we had agreed you would get back to me by the 31st of August, your email says that you needed more time and would get back to me sometime next week; that was last week. It has now been more than two months and the pattern continues to repeat itself. I feel I’ve been left with no choice and have turned the matter over to our attorney.” Baum Aff., Exh. E.

25. The next day, August 11, 2009, David Baum sent another e-mail to Tim Pace, in which he stated, “I made a very specific proposal. I am not closing off communication and I am happy to consider and hear a specific resolution. The attorney has been engaged, but again, that is not my preferred path.” Baum Aff., Exh. E.

26. On August 13, 2009, Boise Mode, by and through its counsel, sent a written demand to Defendant and Guarantor for payment by August 24, 2009, of the delinquent rent and charges owed by Defendant under the terms of the Lease, which sums totaled \$19,967.99. Affidavit of Steven F. Schossberger filed concurrently herewith (“Schossberger Aff.”), Exh. A.

27. On August 14, 2009, Tim Pace made a counter-proposal to David Baum, seeking a 10% rent reduction for August through June “as an acceptable resolution for the past limitations placed on our ability to conduct business due to construction problems,” as well as other concessions. (Emphasis added.) Baum Aff., Exh. E.

28. On August 24, 2009, Tim Pace sent a letter to counsel for Boise Mode seeking a reduction in “the amount due under the Office Lease by \$1,000 per month.” Schossberger Aff., Exh. B.

29. On October 5, 2009, Boise Mode, by and through its counsel, sent a letter entitled THREE (3) DAYS' NOTICE TO PAY RENT AND/OR TO QUIT AND VACATE THE PREMISES (Three Days' Notice) to Defendant and Guarantor notifying both that Defendant was in default under the terms of the Lease and demanding, pursuant to Idaho Code § 6-303(2), payment of the past due amount of \$29,242.49 to Boise Mode within three days of service of the notice. Schossberger Aff., Exh. C.

30. On October 8, 2009, Boise Mode, by and through its counsel, sent an e-mail to Defendant referencing the Three Days' Notice and offering, as a compromise and settlement, a \$13,000 credit against the \$22,017.99 outstanding rent in exchange for entering into an amendment to the Lease. Schossberger Aff., Exh. D.

31. On October 12, 2009, Defendant responded to the e-mail from counsel for Boise Mode, detailing a "counter-offer" that involved, among other things, additional substantial financial concessions and a termination of the lease effective November 1, 2009 -- effectively seeking approximately \$69,000 in monetary concessions from Boise Mode. Schossberger Aff., Exh. E.

32. On October 26, 2009, Boise Mode, by and through its counsel, sent a letter to Defendant advising Defendant that Boise Mode has considered and rejected Defendant's counteroffer detailed in its letter of October 12, 2009. The letter specified that Boise Mode's offer would remain open until October 30, 2009. The letter also reminded Defendant that, should it vacate the premises on November 1, 2009, it "will remain obligated to make timely payments of the rent through the duration of the term of the Lease." Schossberger Aff., Exh. F.

33. Defendant vacated the Premises on or around November 3, 2009.

34. On November 9, 2009, Boise Mode, by and through its counsel, sent a letter to Defendant confirming that Defendant had abandoned the Premises and notifying Defendant that pursuant to Article 20.3 of the Lease, the Lease remained in effect and Defendant remained obligated to pay all rent and other charges due under the Lease until Boise Mode re-leased the Premises. *See* Verified Compl., ¶ 8, Exh. B.

35. Defendant has failed and refused to pay the full monthly rent, operating costs and other charges which are due, payable and delinquent for the months of December 2008 through, May 2010, the end of the term of the Lease. *See* Verified Compl., ¶ 9, Exh. A, Article 1.9.

36. Boise Mode attempted to mitigate its damages and locate a new tenant for the Premises. Boise Mode successfully leased the Premises, but rent payments by the new tenant did not begin until June, 2010. *See* Verified Compl., ¶ 9; *see* Affidavit of Christopher Kiefor, CPA (“Kiefor Aff.”), ¶ 5.

IV. ARGUMENT

In its Answer, Counterclaim, and Demand for Jury Trial filed with this Court on February 11, 2010 (“Counterclaim”), Defendant asserts a number of claims against Boise Mode. Each of these claims lacks merit and should be dismissed as a matter of law.

A. Defendant Lacks Standing to Bring its Counterclaims for Breach of Contract, Breach of the Covenant of Good Faith and Fair Dealing, and Constructive Eviction Because it Failed to Provide Boise Mode with the Required Notice.

As an initial matter, Defendant is precluded from bringing certain of its counterclaims because it failed to provide Boise Mode the three-day notice required by statute. Idaho Code § 6-320(a) provides that a tenant may bring certain claims against a landlord:

(a) A tenant may file an action against a landlord for damages and specific performance for:

- (1) Failure to provide reasonable waterproofing and weather protection of the premises;
- (2) Failure to maintain in good working order electrical, plumbing, heating, ventilating, cooling, or sanitary facilities supplied by the landlord;
- (3) Maintaining the premises in a manner hazardous to the health or safety of the tenant;
- (4) Failure to return a security deposit as and when required by law;
- (5) Breach of any term or provision of the lease or rental agreement materially affecting the health and safety of the tenant, whether explicitly or implicitly a part thereof;

Subsection (d) of § 6-320 conditions the right to bring such claims on the tenant providing advance notice to the landlord and giving the landlord an opportunity to cure the complained-of conditions:

(d) Before a tenant shall have standing to file an action under this section, he must give his landlord three (3) days written notice, listing each failure or breach upon which his action will be premised and written demand requiring performance or cure. If, within three (3) days after service of the notice, any listed failure or breach has not been performed or cured by the landlord, the tenant may proceed to commence an action for damages and specific performance.

Under § 6-320, the relevant question is not whether the action by a tenant is in the form of a complaint or a counterclaim, but rather whether the tenant's claims, however nominally styled, "fall within the purview of title 6, chapter 3 of the Idaho Code, and therefore are subject to the notice requirement of I.C. § 6-320(d)." *Action Collection Service, Inc. v. Haught*, 146 Idaho 300, 303-305, 193 P.3d 460, 463 - 465 (Ct.App. 2008).

A claim for breach of a lease based upon interference with the right of quiet enjoyment falls within the purview of I.C. § 6-320(a)(5) and thus implicates the § 6-320(d) notice requirements. *Worden v. Ordway*, 105 Idaho 719, 722, 672 P.2d 1049, 1051 (1983).

Defendant's counterclaims for breach of contract, breach of the covenant of good faith and fair dealing, and constructive eviction are each based, at least in part, on Defendant's allegation that Boise Mode interfered with Defendant's right of quiet enjoyment. Defendant did not, however, give the required three-day notice under § 6-320(d) prior to filing its Counterclaim. As a result, Defendant lacks standing to bring a counterclaim against Boise Mode for breach of contract, breach of the covenant of good faith and fair dealing, and constructive eviction, and each of these claims should be dismissed.

B. Each of Defendant's Counterclaims Fails as a Matter of Law.

Even if this Court chooses to address Defendant's counterclaims on the merits, each fails as a matter of law and should be dismissed.

1. Defendant's Counterclaims for Constructive Eviction, Breach of Contract, and Breach of the Covenant of Quiet Enjoyment are Precluded as a Matter of Law.

First, as a matter of law, a tenant cannot maintain an action for constructive eviction – or for breach of the covenant of quiet enjoyment – if the tenant has not kept current on rent payments. *See Richard Barton Enterprises, Inc. v. Tsern*, 928 P. 2d 368, 374 (Utah 1996) (“To establish a constructive eviction, however, the lessee had to vacate the entire lease-hold, *and only then* could the lessee withhold rent.”) (emphasis added); 49 Am.Jur.2d § 494 (“The payment of all required rent is a condition precedent to the maintenance of an action for breach of the covenant [of quiet enjoyment].”). This legal principle is consistent with the Lease, which expressly conditions the right of quiet enjoyment upon payment of “rent and other monetary

sums due under this Lease and performing the covenants and conditions of this Lease.” *See* Verified Compl., Exh. A, Article 19.3.

It is undisputed that Defendant was behind on its rent payments at the time it vacated the premises in November 2009. Indeed, Boise Mode had notified Defendant multiple times prior to that month that Defendant was substantially in arrears on its rent payments. *See, e.g.*, Aeschliman Aff., Exhs. A, D; Baum Aff., Exhs. A, B; Schossberger Aff., Exhs. A. In fact, Defendant owed Boise Mode more than \$20,000 in back rent and other charges as of November, 2009. *See* Verified Compl., Exh. B. Defendant cannot, therefore, maintain an action for breach of the covenant of quiet enjoyment or for constructive eviction.

Second, constructive eviction does not apply if a tenant waits to abandon the leased premises until after a problem ceases. 49 Am.Jur. 2d § 517 (“However much the tenant may be disturbed in the beneficial enjoyment of the premises by the landlord’s wrongful act, there is no constructive eviction if the tenant continues in possession of the premises.”); *id.* at § 518 (“The tenant loses the right to abandon the premises if, before carrying out the intention to abandon, the cause for abandonment ceases to exist.”).

Here, Defendant bases its constructive eviction claim upon the construction activity occurring in the Facility. Defendant complains that “[Boise Mode’s] actions rendered the Premises unsuitable for [Defendant’s] business.” Counterclaim ¶ XXVII. The “actions” that Defendant alleges include preventing access to the Premises, failing to maintain the Premises, and causing disruption of utility and elevator services – actions apparently resulting from the construction. Counterclaim ¶ VI.

It is undisputed, however, that the construction ceased prior to November, 2009, when Defendant vacated the Premises. *See, e.g.*, Aeschliman Aff., Exh. D (letter dated June 3, 2009,

stating, “the construction has ended and has been complete now for almost 2 months”); Baum Aff., Exh. A (e-mail dated June 29, 2009, stating, “We have now completed our major improvements.”) For this reason, Defendant cannot maintain an action for constructive eviction based upon any disruption caused by construction.

To the extent that Defendant seeks to claim constructive eviction based upon alleged noise from the comedy club downstairs or from routine maintenance issues, Defendant can fare no better. Constructive eviction occurs only where the interference by a landlord with the possession of the tenant or with the tenant’s enjoyment of the premises is “of a substantial nature and so injurious to the tenant as to deprive the tenant of the beneficial enjoyment of a part or whole of the demised premises.” 49 Am.Jur.2d § 515. In other words, “minor inconveniences and annoyances are not actionable breaches of the landlord’s implied covenant of quiet enjoyment”; instead, a tenant only has a claim where the landlord’s conduct “substantially interfere[s] with a tenant’s right to use and enjoy the premises for the purposes contemplated by the tenancy.” *Id.* § 481. *See also Richard Barton Enterprises, Inc. v. Tsern*, 928 P. 2d 368, 377 (Utah 1996) (“Only a significant breach of a covenant material to the purpose for which the lease was consummated justifies a lessee in abating rent. Temporary or minor breaches of routine covenants by a lessor do not. Thus, if a breach has little effect on the essential objectives of the lessee in entering into the lease, the lessee may not withhold rent.”).

Here, the Lease expressly states that the purposes “contemplated by the tenancy” are “General Office Uses.” Lease, Article 1.14. Noise from a comedy club that operated after normal business hours does not constitute a “substantial interference” with a space leased for general office use. *See Candell v. Western Federal Sav. & L. Ass’n of Denver*, 400 P. 2d 909, 911-912 (Colo. 1965) (no eviction where plaintiff leased office in office building and landlord

changed locks and kept main entrance locked on Sundays, evenings and holidays, thereby inconveniencing plaintiff, who testified that he often worked in office on Sundays and holidays). *See also Reid v. Mutual of Omaha Ins. Co.*, 776 P. 2d 896, 899 (Utah 1989) (“the noise and other annoyances were not so egregious as to render the premises unsuitable for their intended use, as is required for a claim of constructive eviction”); *Kahona Beach LLC v. Santa Ana Restaurant Corp.* 2010 WL 4054473, *5 (N.Y.Sup. 2010) (“the unreasonableness of an alleged interference with a property owner's rights also requires the evaluation and weighing of multiple other factors, including the duration of the allegedly offending sound, the times at which it is made, whether the condition is recurring, and if so, with what frequency”).

Moreover, the basis of Defendant’s counterclaim for constructive eviction – that it “was forced to vacate the Premises and obtain alternate suitable space in which to conduct its business” is belied by the evidence. Rather than being “forced to vacate” in November, 2009, because the space was unsuitable, Defendant actually sought to extend the term of its Lease at least as recently as June 8, 2009, see Baum Aff., Exh. A, and was actively negotiating rent concessions up through late October, 2009. *See, e.g.*, Baum Aff., Exh. E, Schossberger Aff., Exhs. D, E. Notably, Defendant’s suggestion to extend the lease came after construction had ceased and after the date of its last letter to Watermark regarding the alleged “problems” with the Premises. *See Aeschliman Aff.*, Exh. E.

Futhermore, Defendant’s request to extend the lease was also made in the same e-mail in which Defendant mentioned noise from the comedy club, belying any claim by Defendant that such noise was the reason it vacated the premises. In short, Defendant was not “forced to vacate”; rather, Defendant chose to leave rather than pay its contractual obligations under the Lease, despite substantial financial concessions offered by Boise Mode. *See Baum Aff.*, Exh. E;

Schossberger Aff., Exh. D. It was only when Defendant's attempts to extract additional concessions from Boise Mode were rejected that it vacated the Premises. Defendant's counterclaim for constructive eviction fails as a matter of law and should be dismissed.

For the same reasons, Defendant's counterclaims for breach of contract and breach of the covenant of good faith and fair dealing fail as a matter of law insofar as such counterclaims are premised upon an alleged breach of the covenant of quiet enjoyment. 49 Am.Jur.2d § 494 ("The payment of all required rent is a condition precedent to the maintenance of an action for breach of the covenant [of quiet enjoyment]."). Although the Defendant's allegations are particularly vague, the alleged breach of quiet enjoyment appears to be the primary basis upon which Defendant asserts these claims.

To the extent that Defendant asserts breaches based upon alleged occasional leaks in the roof, alleged sporadic problems with the elevator, and the like, such maintenance issues are "nothing other than the normal problems encountered with most any building" and, where maintenance problems are remedied within a reasonable time, there is neither a breach of a lease nor constructive eviction. *Brugger v. Fonoti*, 645 P.2d 647, 648 (1982).

Here, Boise Mode directed Defendant to report any such maintenance problems to Watermark, its Property Manager, who promptly remedied such problems when they were reported. *See, e.g.*, Aeschliman Aff., Exh. C (property manager responded within one half hour to Defendant's complaint about elevator and fixed elevator by early the following morning). As a result, the routine maintenance issues raised by Defendant cannot constitute a breach of the Lease nor a breach of the covenant of good faith and fair dealing -- let alone constitute grounds for constructive eviction.

Moreover, even if the maintenance or construction-related issues did constitute a breach, Defendant cannot show any damages. Accordingly, “a failure of proof on an essential element of the opposing party’s case makes all other facts immaterial.” *Badell v. Beeks*, 115 Idaho 101, 765 P.2d 126 (1988). Defendant can also demonstrate no damages for the unspecified “security breaches” of which it complains. For these reasons, Defendant has no viable claim for breach of contract.

Under Idaho law, a breach of the implied covenant of good faith and fair dealing must be based upon an underlying breach of contract. *First Security Bank of Idaho v. Gage*, 115 Idaho 172, 176, 765 P.2d 683, 687 (1988). See *Fox v. Mountain West Elec., Inc.*, 137 Idaho 703, 52 P.3d 848, 855-56 (2002) (The implied covenant of good faith and fair dealing is a covenant implied by law in a party’s contract. ... The covenant requires the parties to perform, in good faith, the obligations required by their agreement, and a violation of the covenant occurs when either party violates, nullifies or significantly impairs any benefit of the contract.”) (emphasis added) (citation omitted). Here, because there is no underlying breach of contract by Boise Mode, there is likewise no breach of the covenant of good faith and fair dealing.

2. Defendant’s Claim for Negligent Supervision Fails Because the Individuals Whose Conduct Allegedly Damaged Defendant Were Neither Employees of Nor in a “Special Relationship” with Boise Mode.

Defendant alleges that Boise Mode “breached duties owed to [Defendant]” by allowing its “agents” to interfere with, intrude upon and steal Defendant’s personal property, and that, as a result, Boise Mode is liable for negligent supervision. Counterclaim ¶¶ XVI-XVIII. Defendant is mistaken. No claim for negligent supervision lies here.

“A negligent supervision claim is based upon the employer's own negligence in failing to exercise due care to protect third parties from the foreseeable tortious acts of an employee.”

Mallonee v. State, 139 Idaho 615, 622, 84 P.3d 551, 558 (2004) (emphasis added). Defendant does not allege that any *employee* of Boise Mode caused it harm. As a result, Defendant cannot maintain an action for negligent supervision based upon an employee-employer relationship.

Idaho courts have also recognized a claim for negligent supervision under Section 319 of the Restatement (Second) of Torts, which applies where there is a “special relationship” involving a person of known dangerous propensities. Although that section of the Restatement appears to contemplate negligent supervision claims outside the employment context, it does so only where a “special relationship” exists between a supervisor and supervisee, which relationship is created where the supervisor “takes charge of a third person whom he knows or should know to be likely to cause bodily harm to others if not controlled.” *Podolan v. Idaho Legal Aid Services, Inc.*, 123 Idaho 937, 945-946, 854 P.2d 280, 288-289 (Ct.App. 1993).

Defendant’s counterclaim based upon negligent supervision alleges that Boise Mode allowed its agents to steal Defendant’s property and intrude into computer systems belong to the Defendant. Counterclaim ¶ VI, XVII. Defendant does not allege, however, that these unspecified “agents” were employees, nor that they were supervised by Boise Mode, let alone that Boise Mode had a “special relationship” with the “agents.” And to the extent that Defendant is referring to conduct by employees of Boise Mode’s property manager, Watermark, or the company that Watermark contracted with to provide janitorial services, Mountain Top Maintenance, each of those entities is an independent contractor whose employees were neither employees of Boise Mode nor individuals with whom Boise Mode had a “special relationship.” Defendant’s claim for negligent supervision thus fails as a matter of law and ought to be

dismissed. Any claim for negligent supervision of the janitorial staff lies only with the employer of such staff, not with Boise Mode.

3. Defendant's Claim for Tortious Interference with Contract Fails Because Defendant Cannot Establish the Elements of the Claim

Defendant's claim for tortious interference with contract should be dismissed because Defendant cannot establish the elements of the claim. A prima facie case of tortious interference with contract requires the plaintiff to establish four elements: "the existence of a contract, knowledge of the contract on the part of the defendant, intentional interference causing breach of the contract, and injury to the plaintiff resulting from the breach." *BECO Const. Co., Inc. v. J-U-B Engineers, Inc.*, 145 Idaho 719, 723, 184 P.3d 844, 848 (2008). In addition, even where intentional interference with another's performance of a contract is established, liability for tortious interference attaches only where that interference is "improper." *Id.*

To establish the first two elements, therefore, Defendant must present evidence establishing the existence of an actual contract between it and the "video production unit," as well as Boise Mode's knowledge of such contract.¹ Defendant cannot produce such evidence. Indeed, Defendant tips its hand by alleging (1) that it was either a party to an existing contract or "had contractual expectations"; and (2) that Boise Mode "knew or should have known" of the contract. Counterclaim ¶ XX. But establishing the tort of intentional interference with contract requires (1) an actual contract, not merely "contractual expectations"; and (2) "knowledge of the

¹ Notably, to the extent that any such contract involved a sublease or assignment to the video production company, Defendant's Lease expressly forbids a sublease or assignment and, as a result, the alleged contract would be void. And a claim for tortious interference with contract is not viable if based upon a void contract. See *Barlow v. International Harvester Co.* 95 Idaho 881, 893, n.2, 522 P.2d 1102, 1114, n.2 (Idaho 1974).

contract on the part of the defendant,” not merely that the defendant “should have known.”

BECO Const. Co., 145 Idaho at 723, 184 P.3d at 848. Unless Defendant can produce evidence that it was a party to an actual contract, of which Boise Mode had actual knowledge, Defendant’s claim for tortious interference fails.

Moreover, even if Defendant could establish knowledge of the alleged contract, it cannot establish intentional interference, let alone *improper* intentional interference. The determination whether conduct is improper turns on consideration of the following factors:

- (a) the nature of the actor's conduct,
- (b) the actor's motive,
- (c) the interests of the other with which the actor's conduct interferes,
- (d) the interest sought to be advanced by the actor,
- (e) the social interests in protecting the freedom of action of the actor and the contractual interests of the other,
- (f) the proximity or remoteness of the actor's conduct to the interference and
- (g) the relations between the parties.

Id., 145 Idaho at 723-724, 184 P.3d at 848 – 849 (citing Restatement (Second) of Torts § 767 (1979)). Of these, the first – the nature of the actor’s conduct – is of chief importance, and the issue “is not simply whether the actor is justified in causing the harm, but rather he is justified in causing it in the matter in which he does cause it.” Restatement (Second) of Torts § 767, comment c (1979). As to the second factor, motive, where there is no desire to cause the interference, and where the interference thus results only as a consequence of conduct engaged in for an entirely different purpose, the conduct is less likely to be deemed improper. *Id.*, comment d. Moreover, where the means used by the actor are “innocent or less blameworthy,” the desire

to cause an interference is “more essential to a holding that the interference was improper.” For these reasons, although the intentional interference element can be established where the actor “knows that the interference is certain or substantially certain to occur as a result of his action,” interference that is not the desired result of the actor’s conduct but is instead merely an incidental result of innocent conduct is much less likely to be deemed improper.

Here, as with all of its allegations, Defendant is vague about the conduct it alleges constituted intentional interference with its alleged contract. The Counterclaim is devoid of any mention of conduct on the part of Boise Mode directly related to Defendant’s alleged contract, however. The claim for tortious interference could, therefore, be based only upon conduct by Boise Mode that indirectly affected the alleged contract. Indeed, evidence in the record suggests that Defendant’s allegations might be based upon Boise Mode’s decision to lease space in the Facility to a comedy club, which was allegedly noisy at night. *See* Baum Aff., Exh. E.

Boise Mode’s decision to lease space in a commercial building to a tenant cannot constitute the basis for tortious interference with contract because Defendant cannot establish that such conduct constituted intentional interference, nor that such conduct was improper.

First, Defendant cannot establish that Boise Mode knew that the alleged interference was “certain or substantially certain to occur” as a result of leasing space to a comedy club that held performances outside normal business hours. Indeed, such a claim defies logic and imputes to Boise Mode a capacity for clairvoyance heretofore reserved only to Nostradamus.

Second, Defendant cannot establish that any intentional interference was improper. It cannot be disputed that Boise Mode’s decision to lease space to a comedy club was motivated by its economic interests in producing leasehold income rather than by a desire to interfere with Defendant’s alleged contract. Moreover Boise Mode’s conduct in leasing to the comedy club

was expressly authorized by and consistent with Article 2.1 of Defendant's Lease, which provides: "Landlord reserves the right to affect such other tenancies in the Facility as Landlord, in its sole discretion, deems appropriate; and Defendant does not rely on Landlord's leasing to any specific tenant, or to any number of tenants, any space in the Facility." *See* Verified Compl., Exh. A. Boise Mode's actions were thus justified and innocent.

For these reasons, even if Boise Mode was aware that the decision to lease space to a comedy club would cause interference with an alleged contract between Defendant and a third party – and Boise Mode was not so aware – Boise Mode's actions were not wrongful, and any interference was, therefore, not improper. *See* Restatement (Second) Torts § 766 , comment j ("If the actor is not acting criminally nor with fraud or violence or other means wrongful in themselves but is endeavoring to advance some interest of his own, the fact that he is aware that he will cause interference with the plaintiff's contract may be regarded as such a minor and incidental consequence and so far removed from the defendant's objective that as against the plaintiff the interference ay be found to be not improper.").


As a matter of law, therefore, Defendant cannot prevail on its claim for tortious interference with contract, and the claim should be dismissed.

V. CONCLUSION

For the foregoing reasons, there is no genuine issue of material fact regarding Defendant's counterclaims. Each counterclaim should be dismissed as a matter of law.

DATED THIS 24th day of November, 2010.

HAWLEY TROXELL ENNIS & HAWLEY LLP

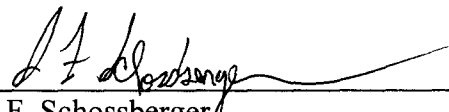
By 
Steven F. Schossberger, ISB No. 5358
Attorneys for Plaintiff/Counterdefendant Boise
Mode, LLC, successor-in-interest to Mode
Building Limited Partnership

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 24th day of November, 2010, I caused to be served a true copy of the foregoing MEMORANDUM IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT ON DEFENDANT'S COUNTERCLAIMS by the method indicated below, and addressed to each of the following:

Michael E. Kelly
John J. Browder
LOPEZ & KELLY, PLLC
702 W. Idaho Street, Suite 1100
P.O. Box 856
Boise, ID 83701
[Attorneys for Defendants and Counterclaimant]

U.S. Mail, Postage Prepaid
 Hand Delivered
 Overnight Mail
 E-mail
 Telecopy: 208.342.4344



Steven F. Schossberger

NO. _____
A.M. _____ FILED 249
P.M. _____

NOV 24 2010

J. DAVID NAVARRO, Clerk
By A. GARDEN
DEPUTY

Steven F. Schossberger, ISB No. 5358
HAWLEY TROXELL ENNIS & HAWLEY LLP
877 Main Street, Suite 1000
P.O. Box 1617
Boise, ID 83701-1617
Telephone: 208.344.6000
Facsimile: 208.954.5260
Email: sschossberger@hawleytroxell.com

Attorneys for Plaintiff/Counterdefendant Boise Mode, LLC,
successor-in-interest to Mode Building Limited Partnership

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

BOISE MODE, LLC, an Illinois limited liability company, successor-in-interest to Mode Building Limited Partnership, an Idaho limited partnership,

Plaintiff,

vs.

DONAHOE PACE & PARTNERS LTD, an Idaho corporation; and TIMOTHY PACE,

Defendants.

Case No. CV OC 1001093

NOTICE OF HEARING

DONAHOE PACE & PARTNERS LTD, an Idaho corporation,

Counterclaimant,

vs.

BOISE MODE, LLC, an Illinois limited liability company, successor-in-interest to Mode Building Limited Partnership, an Idaho limited partnership,

Counterdefendant.

TO ALL PARTIES AND THEIR COUNSEL OF RECORD:

PLEASE TAKE NOTICE that the Plaintiff/Counterdefendant Boise Mode, LLC, successor-in-interest to Mode Building Limited Partnership will call its Motion for Summary Judgment on Counterclaimant's Counterclaims for hearing before the above-entitled Court on the 22nd day of December, 2010, at 3:00 p.m., or as soon thereafter as counsel can be heard, before the Honorable Ronald J. Wilper, District Judge.

DATED THIS 24 day of November, 2010.

HAWLEY TROXELL ENNIS & HAWLEY LLP

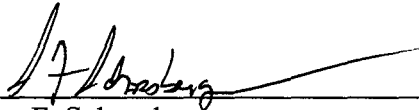
By Steven F. Schosberger
Steven F. Schosberger, ISB No. 5358
Attorneys for Plaintiff/Counterdefendant Boise
Mode, LLC, successor-in-interest to Mode
Building Limited Partnership

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 24 day of November, 2010, I caused to be served a true copy of the foregoing NOTICE OF HEARING by the method indicated below, and addressed to each of the following:

Michael E. Kelly
John J. Browder
LOPEZ & KELLY, PLLC
702 W. Idaho Street, Suite 1100
P.O. Box 856
Boise, ID 83701
[Attorneys for Defendants and Counterclaimant]

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Steven F. Schossberger

NOV 24 2010

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Attorneys for Plaintiff/Counterdefendant Boise Mode, LLC,
successor-in-interest to Mode Building Limited Partnership

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

BOISE MODE, LLC, an Illinois limited liability company, successor-in-interest to Mode Building Limited Partnership, an Idaho limited partnership,

Plaintiff,

vs.

DONAHOE PACE & PARTNERS LTD, an Idaho corporation; and TIMOTHY PACE,

Defendants.

Case No. CV OC 1001093

PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT ON THE VERIFIED COMPLAINT

DONAHOE PACE & PARTNERS LTD, an Idaho corporation,

Counterclaimant,

vs.

BOISE MODE, LLC, an Illinois limited liability company, successor-in-interest to Mode Building Limited Partnership, an Idaho limited partnership,

Counterdefendant.

3

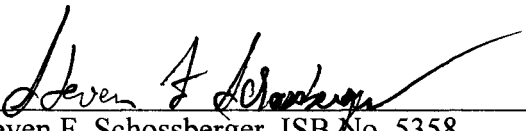
Plaintiff Boise Mode, LLC, by and through its undersigned counsel of record, and pursuant to I.R.C.P. 56(c), moves this Court for summary judgment on all counts asserted in the Verified Complaint.

This motion is supported by the accompanying memorandum of points and authorities, the Affidavit of Christopher Kiefor, CPA, and the Affidavit of Steven F. Schossberger, Esq. filed concurrently herewith.

Oral argument requested.

DATED THIS 24th day of November, 2010.

HAWLEY TROXELL ENNIS & HAWLEY LLP

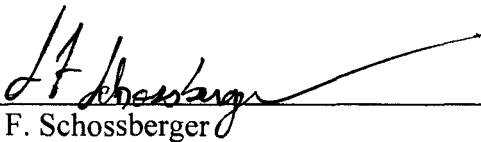
By 
Steven F. Schossberger, ISB No. 5358
Attorneys for Plaintiff/Counterdefendant Boise
Mode, LLC, successor-in-interest to Mode
Building Limited Partnership

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 24th day of November, 2010, I caused to be served a true copy of the foregoing PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT ON THE VERIFIED COMPLAINT by the method indicated below, and addressed to each of the following:

Michael E. Kelly
John J. Browder
LOPEZ & KELLY, PLLC
702 W. Idaho Street, Suite 1100
P.O. Box 856
Boise, ID 83701
[Attorneys for Defendants and Counterclaimant]

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By A. GARDEN
DEPUTY

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Attorneys for Plaintiff/Counterdefendant Boise Mode, LLC,
successor-in-interest to Mode Building Limited Partnership

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

BOISE MODE, LLC, an Illinois limited liability company, successor-in-interest to Mode Building Limited Partnership, an Idaho limited partnership,

Plaintiff,

vs.

DONAHOE PACE & PARTNERS LTD, an Idaho corporation; and TIMOTHY PACE,

Defendants.

Case No. CV OC 1001093

AFFIDAVIT OF CHRISTOPHER KIEFOR, CPA, IN SUPPORT OF PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

DONAHOE PACE & PARTNERS LTD, an Idaho corporation,

Counterclaimant,

vs.

BOISE MODE, LLC, an Illinois limited liability company, successor-in-interest to Mode Building Limited Partnership, an Idaho limited partnership,

Counterdefendant.

Christopher Kiefor, CPA, being first duly sworn upon oath, deposes and states as follows:

AFFIDAVIT OF CHRISTOPHER KIEFOR, CPA, IN SUPPORT OF PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT - 1

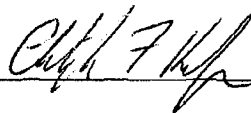
1. I make this affidavit based upon my personal knowledge.
2. I am the Chief Financial Officer of Watermark Property Management LLC (“Watermark”), the authorized agent of Boise Mode, LLC. Watermark manages all of Boise Mode, LLC’s properties in Boise, Idaho.
3. Based upon the terms of the Office Lease Agreement dated November 3, 2006, specifically sections 1.7, 1.9, 1.10, 4.1, 4.2, 4.3, 4.4, and 7.1 and Exhibit B, which documents are attached to the Verified Complaint as Exhibit A, I have prepared a Tenant Statement indicating all amounts past due and owing by the past tenant, Donahoe Pace & Partners Ltd, of the space located at 800 West Idaho Street, Suite 350, Boise, Idaho (the “Premises”), from November 2008 through November 2010, including unpaid rent for office and storage space, unpaid CAM & RE Taxes (Reconciled per calendar year), unpaid electric bills, unpaid maintenance bills, Late Fees, and Interest. A true and correct copy of the Tenant Statement is attached hereto as **Exhibit 1** and incorporated herein by reference.
4. On or about March 5, 2010, Boise Mode, LLC and TEM Enterprises d/b/a Xtra Airways entered into a Retail Lease Agreement for the Premises. A true and correct copy of the lease is attached hereto as **Exhibit 2** and incorporated herein by reference. Pursuant to that Retail Lease Agreement, the rent commencement date was June 1, 2010.
5. Boise Mode, LLC retained Colliers International to locate a new tenant for the Premises. On March 18, 2010 and June 30, 2010, Boise Mode, LLC paid Colliers International a commission of \$10,460.61 for services rendered in locating a new tenant. A true and correct copy of the marketing materials prepared by Colliers International in connection with locating a new tenant is attached hereto as **Exhibit 3**.

6. Based upon the numbers shown in Exhibit 1, I prepared a damages summary sheet providing the total amounts of unpaid rent, unpaid CAM & RE Taxes (Reconciled per calendar year), unpaid electric bills, unpaid maintenance costs, Late Fees, and Interest. A true and correct copy of the damages summary is attached hereto as **Exhibit 4** and incorporated herein by reference.

7. Based upon the above analysis, the total amount of Boise Mode, LLC's damages is \$95,975.96.

8. This affidavit is based upon my personal knowledge obtained from my personal review of the business records, and if called to testify I could and would competently testify to the matters discussed herein.

Further your affiant sayeth naught.



Christopher Kiefor, CPA

STATE OF ILLINOIS)
) ss.
County of Cook)

SUBSCRIBED AND SWORN before me this 23rd day of November, 2010.



Name: Dragica Perunac
Notary Public
Residing at 1030 W. Chicago Ave
My commission expires 6-29-2011

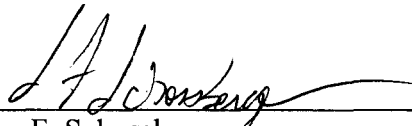
AFFIDAVIT OF CHRISTOPHER KIEFOR, CPA, IN SUPPORT OF
PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT - 3

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 24 day of November, 2010, I caused to be served a true copy of the foregoing AFFIDAVIT OF CHRISTOPHER KIEFOR, CPA, IN SUPPORT OF PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT by the method indicated below, and addressed to each of the following:

Michael E. Kelly
John J. Browder
LOPEZ & KELLY, PLLC
702 W. Idaho Street, Suite 1100
P.O. Box 856
Boise, ID 83701
[Attorneys for Defendants and Counterclaimant]

U.S. Mail, Postage Prepaid
 Hand Delivered
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 E-mail
 Telecopy: 208.342.4344



Steven F. Schossberger

Make Payments to :

Boise Mode, LLC
 Dept. 5410
 P.O. Box 745
 Milwaukee, WI 53201-0745

Mr. Tim Pace
 Donahoe Pace & Partners Ltd.
 800 West Idaho Street, Suite 350
 Boise , ID , 83702

Tenant : ement

Tenant: Donahoe Pace & Partners Ltd. - donapace
Property: 800 W Idaho St.
Unit(s):

Statement Date: 11/16/2010

Balance Due: \$103,250.36

<u>Date</u>	<u>Description</u>	<u>Charges</u>	<u>Payments</u>	<u>Balance</u>
	Balance Forward			0.00
11/25/08	10/08 Open rent balance from Take over	7,685.00		7,685.00
11/25/08	11/08 Open rent balance at Take over	7,685.00		15,370.00
11/25/08	10/08 open balance at Takeover	274.50		15,644.50
11/25/08	11/08 Open balance at Take over	274.50		15,919.00
11/25/08	5/07 & 4/08 New entry keys, repair cold air	104.59		16,023.59
12/01/08	Base Rent Office (12/2008)	7,685.00		23,708.59
12/01/08	Storage Rent (12/2008)	274.50		23,983.09
12/17/08	12/08 late fee: 6% of \$7,959.50	477.57		24,460.66
12/18/08	Chk# 4658 - Payment		20,878.50	3,582.16
01/01/09	Base Rent Office (01/2009)	7,685.00		11,267.16
01/01/09	Storage Rent (01/2009)	274.50		11,541.66
01/09/09	Chk# 4725 - Payment		6,959.50	4,582.16
02/01/09	Base Rent Office (02/2009)	7,685.00		12,267.16
02/01/09	Storage Rent (02/2009)	274.50		12,541.66
02/10/09	Chk# 4787 - Payment		6,959.50	5,582.16
02/11/09	Concession for construction related issues	(1,000.00)		4,582.16
02/11/09	Reverse charge for new entry key	(76.00)		4,506.16
02/12/09	Reverse charge for cold air draft	(28.59)		4,477.57
03/01/09	Base Rent Office (03/2009)	7,950.00		12,427.57
03/01/09	Storage Rent (03/2009)	274.50		12,702.07
03/12/09	Late Fee 3/09, 5% of \$7,119.91	356.00		13,058.07
04/01/09	Base Rent Office (04/2009)	7,950.00		21,008.07
04/01/09	Storage Rent (04/2009)	274.50		21,282.57
04/11/09	April Late Fee	411.23		21,693.80
04/13/09	Payment		6,959.50	14,734.30
05/01/09	Base Rent Office (05/2009)	7,950.00		22,684.30
05/01/09	Storage Rent (05/2009)	274.50		22,958.80
05/12/09	May Late Fee: 5% of \$8224.50	411.23		23,370.03
05/22/09	Payment		7,224.50	16,145.53
06/01/09	Base Rent Office (06/2009)	7,950.00		24,095.53
06/01/09	Storage Rent (06/2009)	274.50		24,370.03
06/11/09	June Late Fee: 5% of \$8,224.50	411.23		24,781.26
06/15/09	Payment		7,224.50	17,556.76
07/01/09	Base Rent Office (07/2009)	7,950.00		25,506.76
07/01/09	Storage Rent (07/2009)	274.50		25,781.26
07/08/09	July late fee: 5% of \$8,224.50	411.23		26,192.49
07/10/09	Chk# 5194 - Payment		7,224.50	18,967.99
08/01/09	Base Rent Office (08/2009)	7,950.00		26,917.99
08/01/09	Storage Rent (08/2009)	274.50		27,192.49

Make Payments to :**Boise Mode, LLC**Dept. 5410
P.O. Box 745
Milwaukee, WI 53201-0745Mr. Tim Pace
Donahoe Pace & Partners Ltd.
800 West Idaho Street, Suite 350
Boise , ID , 83702**Tenant : ment****Tenant:** Donahoe Pace & Partners Ltd. - donapace
Property: 800 W Idaho St.
Unit(s):**Statement Date:** 11/16/2010**Balance Due:** \$103,250.36

<u>Date</u>	<u>Description</u>	<u>Charges</u>	<u>Payments</u>	<u>Balance</u>
08/07/09	Chk# 5275 - Payment		7,224.50	19,967.99
09/01/09	Base Rent Office (09/2009)	7,950.00		27,917.99
09/01/09	Storage Rent (09/2009)	274.50		28,192.49
09/10/09	Chk# 5371 - Payment		7,224.50	20,967.99
09/11/09	September Late Fee	50.00		21,017.99
10/01/09	Base Rent Office (10/2009)	7,950.00		28,967.99
10/01/09	Storage Rent (10/2009)	274.50		29,242.49
10/05/09	Chk# 5478 - Payment		7,224.50	22,017.99
10/09/09	10/09 Late Fee: 5% of \$1,0000 short paid	50.00		22,067.99
11/01/09	Base Rent Office (11/2009)	7,950.00		30,017.99
11/01/09	Storage Rent (11/2009)	274.50		30,292.49
11/02/09	12/08 Interest	124.98		30,417.47
11/03/09	1/09 Interest	44.69		30,462.16
11/04/09	2/09 Interest	44.99		30,507.15
11/05/09	3/09 Interest	90.61		30,597.76
11/06/09	4/09 Interest	117.86		30,715.62
11/07/09	5/09 Interest	146.39		30,862.01
11/08/09	6/09 Interest	140.97		31,002.98
11/09/09	7/09 Interest	146.95		31,149.93
11/10/09	8/09 Interest	149.71		31,299.64
11/11/09	9/09 Interest	157.10		31,456.74
11/12/09	11/09 Late Fee, 5% of \$8,224.50	411.23		31,867.97
11/12/09	10/09 Interest	161.70		32,029.67
12/01/09	Base Rent Office (12/2009)	7,950.00		39,979.67
12/01/09	Storage Rent (12/2009)	274.50		40,254.17
12/01/09	11/09 Interest	215.76		40,469.93
12/10/09	Breach of Contract Litigation	277.42		40,747.35
12/11/09	DEC09 Late Fee, 5% of \$8,224.50	411.23		41,158.58
12/14/09	Maintenance Inv. #ID09121403	88.00		41,246.58
12/17/09	MAY09 Electric usage	65.85		41,312.43
12/17/09	APR09 Electric usage	132.78		41,445.21
12/17/09	MAR09 Electric usage	106.67		41,551.88
12/17/09	FEB09 Electric usage	98.57		41,650.45
12/17/09	JAN09 Electric usage	105.67		41,756.12
12/17/09	DEC08 Electric usage	106.96		41,863.08
12/17/09	JUN09 Electric usage	281.12		42,144.20
12/17/09	JUL09 Electric usage	383.19		42,527.39
12/17/09	AUG09 Electric usage	329.91		42,857.30
12/17/09	SEP09 Electric usage	249.58		00,102.8

Make Payments to :**Boise Mode, LLC**

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P.O. Box 745
Milwaukee, WI 53201-0745

Mr. Tim Pace
Donahoe Pace & Partners Ltd.
800 West Idaho Street, Suite 350
Boise , ID , 83702

Tenant Statement

Tenant: Donahoe Pace & Partners Ltd. - donapace
Property: 800 W Idaho St.
Unit(s):

Statement Date: 11/16/2010

Balance Due: \$103,250.36

<u>Date</u>	<u>Description</u>	<u>Charges</u>	<u>Payments</u>	<u>Balance</u>
12/17/09	OCT09 Electric usage	170.93		43,277.81
12/17/09	NOV09 Electric usage	128.31		43,406.12
01/01/10	DEC09 Interest	287.22		43,693.34
01/01/10	Real Estate Tax Estimate (01/2010)	66.00		43,759.34
01/01/10	Base Rent Office (01/2010)	7,950.00		51,709.34
01/01/10	Storage Rent (01/2010)	274.50		51,983.84
01/25/10	Prior Year Tax Reconciliation (01/2009 - 12/2009)	939.76		52,923.60
01/27/10	:Load 1 - DEC09 Electric usage	141.47		53,065.07
02/01/10	Real Estate Tax Estimate (02/2010)	66.00		53,131.07
02/01/10	Base Rent Office (02/2010)	7,950.00		61,081.07
02/01/10	Storage Rent (02/2010)	274.50		61,355.57
02/01/10	JAN10 Interest	366.00		61,721.57
02/01/10	:Load 1 - JAN10 Electric usage	136.42		61,857.99
02/09/10	FEB10 Late Fee	414.53		62,272.52
03/01/10	Real Estate Tax Estimate (03/2010)	66.00		62,338.52
03/01/10	Base Rent Office (03/2010)	8,215.00		70,553.52
03/01/10	Storage Rent (03/2010)	274.50		70,828.02
03/01/10	FEB10 Interest	393.86		71,221.88
03/15/10	Late Fee MAR10	427.78		71,649.66
03/31/10	:Load 1 - FEB10 Electric usage	120.60		71,770.26
04/01/10	Real Estate Tax Estimate (04/2010)	66.00		71,836.26
04/01/10	Base Rent Office (04/2010)	8,215.00		80,051.26
04/01/10	Storage Rent (04/2010)	274.50		80,325.76
04/01/10	MAR10 Interest	501.55		80,827.31
04/01/10	JAN10 Legal Fees	912.70		81,740.01
04/01/10	JAN10 Legal Admin Fee	136.91		81,876.92
04/01/10	MAR10 Electric usage	159.54		82,036.46
04/13/10	APR10 Late Fee	427.78		82,464.24
04/15/10	March 2010 Legal Fees	51.98		82,516.22
04/15/10	March Legal Admin Fee	7.80		82,524.02
04/15/10	FEB10 Legal Fees	612.60		83,136.62
04/15/10	FEB Legal Admin Fee	91.89		83,228.51
04/15/10	OCT09 Legal Fees	1,176.26		84,404.77
04/15/10	OCT Legal Admin Fee	176.44		84,581.21
05/01/10	Real Estate Tax Estimate (05/2010)	66.00		84,647.21
05/01/10	Base Rent Office (05/2010)	8,215.00		92,862.21
05/01/10	Storage Rent (05/2010)	274.50		93,136.71
05/01/10	APR10 Interest	565.91		93,702.62
05/01/10	APR10 Electric usage	167.03		93,869.65

009169.65

Make Payments to :**Boise Mode, LLC**Dept. 5410
P.O. Box 745
Milwaukee, WI 53201-0745Mr. Tim Pace
Donahoe Pace & Partners Ltd.
800 West Idaho Street, Suite 350
Boise , ID , 83702**Tenant S ment****Tenant:** Donahoe Pace & Partners Ltd. - donapace
Property: 800 W Idaho St.
Unit(s):**Statement Date:** 11/16/2010**Balance Due:** \$103,250.36

<u>Date</u>	<u>Description</u>	<u>Charges</u>	<u>Payments</u>	<u>Balance</u>
06/01/10	MAY10 Interest	657.73		94,527.38
07/01/10	JUN10 Interest	640.97		95,168.35
08/01/10	JUL10 Interest	666.83		95,835.18
08/12/10	April 2010 Legal fees	800.00		96,635.18
08/12/10	April 2010 Legal fees Admin fee	120.00		96,755.18
08/12/10	May 2010 Legal fees	2,306.84		99,062.02
08/12/10	May 2010 Legal fees Admin fee	346.03		99,408.05
08/12/10	June 2010 Legal fees	875.72		100,283.77
08/12/10	June 2010 Legal fees Admin fee	131.36		100,415.13
08/23/10	July 2010 Legal Fees	502.16		100,917.29
08/23/10	July 2010 Legal Fees Admin fee	75.32		100,992.61
09/01/10	AUG10 Interest	707.64		101,700.25
09/22/10	SR #719960073 - remove debris	142.60		101,842.85
10/05/10	SEP10 Interest	689.70		102,532.55
11/12/10	OCT10 Interest	717.81		\$ 103,250.36

Subtotal Legal	\$ 6,325.56
Subtotal Legal Admin	\$ 948.84
	<u>\$ 7,274.40</u>

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MODE BUILDING

Boise, Idaho

OFFICE LEASE AGREEMENT

between

BOISE MODE, LLC,
an Illinois limited liability company

as Landlord

and

TEM ENTERPRISES, d/b/a XTRA AIRWAYS,
a Nevada corporation

as Tenant

Dated: March 5, 2010

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OFFICE LEASE AGREEMENT

LEASE OF SPACE IN: Mode Building, 8th & Idaho Streets
Boise, Idaho 83702

DATED AS OF: March 5, 2010

ARTICLE 1 - TERMS DEFINED

- 1.1 **LANDLORD:** Boise Mode, LLC, an Illinois limited liability company
- 1.2 **LANDLORD'S ADDRESS:** 1030 W. Chicago Ave., Suite 300
Chicago, IL 60642
Fax: (312) 628-8125
Attn: David Baum
- With a copy to:
- Baum Development, LLC
1030 W. Chicago Ave., Suite 300
Chicago, IL 60642
Fax: (312) 628-8255
Attn: Legal Dept
- PROPERTY MANAGER:** Watermark Property Management, LLC
1030 W. Chicago Ave., Suite 300
Chicago, IL 60642 Fax: (312) 628-8099
Attn: Angela Aeschliman
- 1.3 **TENANT:** TEM ENTERPRISES, d/b/a XTRA Airways, a Nevada corporation
- 1.3a **GUARANTOR:** Not Applicable
- 1.4 **TENANT'S ADDRESS PRIOR TO LEASE COMMENCEMENT** TEM ENTERPRISES, d/b/a XTRA Airways
331 7th Street
Elko, NV 89801
Attn: Lisa Dunn
Ph Number: 775-738-6040

- 1.4a **TENANT'S ADDRESS AFTER LEASE COMMENCEMENT** 800 West Idaho St.
Suite 304
Boise, Idaho 83702
Attn:
Ph Number:
- 1.4b **TENANT'S TRADE NAME:** XTRA Airways
- 1.5 **PREMISES ADDRESS:** 800 West Idaho
Suite 304;
Boise, Idaho 83702
- 1.6 **TENANT'S APPROXIMATE FLOOR SPACE (RENTABLE SQ. FT.):** 6,579
- 1.7 **TENANT'S SHARE OF HEREINAFTER DEFINED OPERATING COSTS (PERCENT):** 19.68% [See Article 7.1]
- TENANT'S SHARE OF TAXES:** 19.68% [See Article 7.1].
- $6,579/33,423 = 19.68\%$
- 1.8 **PERCENTAGE RENT:** N/A
- 1.9 **LEASE TERM:** Two (2) Years
- 1.10 **DELIVERY DATE:** Upon Full Lease Execution
- 1.10a **COMMENCMENT DATE:** May 1, 2010
- 1.11 **BASE RENT and RENT PAYMENT SCHEDULE:** SEE EXHIBIT "B"
- 1.12 **OPTION TO EXTEND:** One (1) Three (3) Year Option SEE EXHIBIT "D"
- 1.13 **SECURITY DEPOSIT DUE UPON LEASE AGREEMENT:** \$15,251.32 (two (2) months of Base Rent)
- 1.14 **USE OF PREMISES:** General Office Uses
- 1.15 **MINIMUM HOURS OF OPERATION:** N/A
- 1.16 **SERVICES PROVIDED:** Full Service, excluding Janitorial.

1.17 BASE YEAR:

2010 with respect to Operating Expenses, Insurance and Taxes (from time to time referred to as the "Operating Expense Base Year");

2009 with respect to Utility usage (based on comparison of usage of Utilities, including but not limited to power and gas with prior tenant of Premises) (from time to time referred to as the "Utility Base Year")

EXHIBITS INDEX:

- EXHIBIT A = SCHEMATIC DEPICTION OF LOCATION OF PREMISES AND FLOOR PLAN;
- EXHIBIT B = BASE RENT;
- EXHIBIT C = IMPROVEMENTS;
- EXHIBIT D = OPTION TO EXTEND;
- EXHIBIT E = BUILDING RULES AND REGULATIONS
- EXHIBIT F = INTENTIONALLY OMITTED;
- EXHIBIT G = APPROVED SIGNS;
- EXHIBIT H = ESTOPPEL FORM

ARTICLE 2 - PREMISES

2.1 **PREMISES.** Landlord hereby leases to Tenant and Tenant hereby leases from Landlord those certain Premises (the "Premises") situated in the County of Ada, State of Idaho, which consists of the approximate square footage specified in Article 1.6, which such Premises are located at the address specified in Article 1.5 and are located within a Building as shown on Exhibit A hereto in schematic form. The Premises extends to and include all doors, glass and walls enclosing such square footage. The Building, of which the Premises is a portion, together with the common areas as hereinafter defined, are collectively referred to herein as the "Facility." Landlord reserves the right to affect such other tenancies in the Facility as Landlord, in its sole discretion, deems appropriate; and Tenant does not rely on Landlord's leasing to any specific tenant, or to any number of tenants, any space in the Facility.

2.2 IMPROVEMENTS.

(a) The respective obligations of Landlord and Tenant to perform work and supply material and labor to prepare the Premises for occupancy are set forth in Exhibit C attached hereto. Landlord and Tenant shall expend all funds and do all acts required of them in Exhibit C and shall have the work performed promptly and diligently in a workmanlike manner.

(b) Tenant shall, at all times during the terms of this Lease, at Tenants sole cost and expense, maintain and keep the Premises in full compliance with the Americans With Disability Act of 1990 (the "ADA"). Any additional improvements to the Premises required by the operations of Tenant or by the use of the Premises by the customers and invitees of Tenant, shall be the responsibility of Tenant. Tenant shall indemnify and hold Landlord harmless from and against any all claims rising from non compliance or alleged non compliance with the provisions of ADA with respect to the Premises in effect during the term of this lease, and from and against all costs, attorneys' fees, expenses and liabilities incurred in or from any such claim. For the Premises, Landlord shall be responsible to ensure that the Building Common Areas, as hereinafter defined, is in compliance with the provisions of ADA. If Landlord is hereafter required to make any improvements in the common area in order to comply with the ADA, then the cost of such improvements shall be included as operating costs for purposes of the provisions of paragraph of Article 4 hereafter.

2.3 PARKING. Tenant's lease of the Premises is without any parking provided. Tenant, its employees, customers and invitees shall be required to use the public parking facilities and other legal parking areas in the downtown area.

ARTICLE 3 - TERM

3.1 LEASE TERM. The term of this Lease shall be as specified in Article 1.9 above and Article 23.1 of the Addendum ("Lease Term"). The "Estimated Commencement Date" specified in Article 1.10 above is intended as an estimate only, and Landlord and Tenant hereby agree that the actual commencement date shall be determined as hereinafter provided, and said estimate shall in no way alter the following definition. Notwithstanding that the Lease Term is to

commence in the future, this is a binding and enforceable agreement from the date of execution by the parties.

3.2 COMMENCEMENT AND RENT COMMENCEMENT. This Lease shall be effective and shall be a binding and enforceable agreement upon the date and year first above written and each of the parties shall have all rights and remedies at law for any breach or anticipatory breach hereof. The term, and Tenant's obligation to pay Rent, shall commence on the Commencement Date, except as provided on **Exhibit B**. The Rent shall be paid in advance in equal monthly installments on the first day of each and every month. Rent for any partial month shall be prorated. Within ten (10) days of the commencement of the term, Landlord and Tenant shall execute a written acknowledgement of the date of commencement in the Form attached hereto as Exhibit F.

ARTICLE 4 - RENT

4.1 BASE RENT, AND REVENUE REPORTING.

Tenant shall pay to Landlord as monthly Base Rent for the Premises the amount specified in Article 1.11, which amount shall be paid in advance on the first day of each calendar month from Commencement Date and thereafter throughout the term of the Lease;. All rent to be paid by Tenant to Landlord under this Lease shall be paid in lawful money of the United States of America and shall be paid at such place or places as may be designated from time to time by Landlord. Except as specifically provided herein, there shall be no deduction, offset or abatement for any reason of the rent or any money payable by Tenant to Landlord. The term "Rent" shall include Base Rent, Additional Rent and any other sums or amounts due Landlord from Tenant.

4.2 FULL SERVICE LEASE - ADDITIONAL RENT and BASE YEAR. This Lease is a full service Lease and Landlord shall provide, subject to Articles 4.3, 4.4 and Article 9 hereof, those basic services to the Premises and the Facility that are customary to similar office buildings in the vicinity, including electricity for lighting and low power usage office machines; water and sewer; and mechanical, heating, cooling and ventilation. The cost for these basic services shall be included in the Base Rent as it may be adjusted from time to time, provided that to the extent that such costs exceed the base amount of the costs incurred in the Utility Base Year, Tenant shall pay those increased utility costs as Additional Rent. Base Rent shall not include costs for Janitorial Services, which shall be the responsibility of Tenant. When applicable, as provided below, Tenant shall pay as additional rent Tenant's share, as such share is defined in Article 1.7, of all Taxes and Operating Costs, each as hereinafter defined, to the extent that such costs or taxes exceed the base amount of operating costs or taxes paid or incurred by Landlord during the Operating Cost Base Year or the Utility Cost Base Year as provided in Section 1.17.

4.3 OPERATING COSTS.

(a) For the purpose of this Lease, the term "operating costs" shall include all of Landlord's costs of operation, management, and maintenance of the Facility (including the Common Areas), as determined by Landlord in accordance with generally accepted accounting practices, and shall include the following costs, by way of illustration, but not as limitation

thereto: license, permit and inspection fees; water and sewer charges; waste disposal, including providing a dumpster for the use of all tenants in the Building; heat, electric, gas, light and other utilities and power; any costs or fees imposed upon the Building, Facility or Landlord by any duly recorded declarations of restrictions and covenants, recorded maintenance agreements, or associations organized for the maintenance of property of which the Facility is a part or it served by; cleaning services, including replacement of light bulbs, starters, ballast, servicing and maintenance of mechanical equipment such as elevators, plumbing, sprinklers, heating, air conditioning, electrical systems; snow removal; insurance premiums; pest exterminations; inspections; window cleaning, gardening and plant maintenance services; roof repairs; wages, salaries and employee benefits or personnel engaged in security, operation and maintenance of the Building, and related Common Area, including the sidewalks and landscaped areas in and around the Facility, and the payroll taxes applicable thereto; any costs or expenses required to comply with all laws, rules, regulations, codes and statutes, including Americans with Disability Act of 1990 ("ADA"); and supplies, materials, equipment and tools; and all property management fees and costs. Operating costs shall also include capital repairs and replacements to the Facility, except for those capital repairs, replacements and improvements to the Facility which (i) result in a reduction of Operating Costs and (ii) are required by law, rules, codes, regulations, and statutes or by Landlord's insurance carriers or lenders. Capital repairs and replacements and improvements to the Facility as set forth in the foregoing section shall be amortized over the useful life of the item(s) replaced with interest and charged to the Tenant. Interest rates and amortization terms shall be those charged Landlord for subject financing, or if no financing is used, based upon market rates and terms prevailing in the marketplace at the time such capital investments are required to be made. Should Landlord, after the initial financing of said required capital repairs and replacements, be able to refinance at a more favorable rate, the benefits of said rate shall be passed on to Tenant.

4.4 TENANT'S SHARE. In addition to the rent and other monetary charges hereunder, and subject to adjustment as provided in sub-sections (c) and (d) hereunder, and further subject to the limitations of increases in the Base Rent contained in Article 4.2, Tenant shall pay its pro rata share as specified in Articles 1.7 and 4.2, of the operating costs in excess of the Operating Expense Base Year in the following manner:

(a) During any period when Tenant is obligated to pay its share of operating cost increases over the applicable Operating Expense Base Year, Tenant shall pay Landlord on the first day of each calendar month during the term of this Lease, an amount estimated by Landlord to be the Tenant's monthly share of such operating costs as covered in this Article. Landlord may periodically (including retroactively) adjust the operating costs estimated charge of Tenant on the basis of Landlord's experience and reasonably anticipated costs. Additionally, Landlord may provide supplemental billings for extraordinary or unusual operating costs (i.e. when expenses exceed estimates for unusual snow removal, etc.). These supplemental billings shall be due in full within fifteen (15) days after submittal by Landlord.

(b) Upon completion of Landlord's operating costs reconciliation Landlord shall furnish Tenant with a statement covering the calendar year just expired, certified as correct by Landlord, showing the total operating costs, the amount of Tenant's share of the operating costs for year just expired, and the payments made by Tenant with respect to such calendar year. If Tenant's share of such operating costs exceeds Tenant's payments so made, Tenant shall pay

Landlord the deficiency within twenty (20) days after receipt of said statement. The operating costs reconciliation amount determined by Landlord to apply to the Lease shall also be applied to the current year retroactively to the beginning of the current year. If said payments exceed Tenant's share of such operating costs, Tenant shall be entitled to a credit of the excess against payments next thereafter to become due Landlord.

(c) There shall be an appropriate adjustment of Tenant's share of the operating costs as of the commencement of rentals and expiration of the term of this Lease. Failure of Tenant to pay any of the charges required to be paid in this Article shall constitute a default under the terms of the Lease, the same as failure to pay Rent when due.

(d) During the construction, renovation, redevelopment and operation of the Building, Tenant's pro rata share shall mean the fraction (or percentage) which results from dividing the Floor Area of the Premises, expressed in square feet, by the Floor Area of the Building, expressed in Square feet; provided that if the service or facility is being provided or made available to less than all of the premises which make up the Floor Area of the Building, the denominator shall be the Floor Area of those premises being served by the service or facility or which it is available to.

(e) "Floor Area" shall mean the square footage of all areas constructed and available, or held for the exclusive use of occupants of the Building measured from the exterior of exterior walls (and from the extensions thereof in the case of openings) and from the center of interior demising partitions.

(f) Tenant may, upon not less than thirty (30) days' prior written notice to the Landlord, inspect the Landlord's records for all Common Area maintenance, insurance and operating costs incurred during the preceding calendar year and the allocations thereof to the Tenants at the Landlord's General Offices or at such other location reasonably designated by the Landlord at any time during reasonable business hours within one (1) year after the end of said calendar year. If said inspection reveals an overpayment of operating costs, the Landlord shall reimburse the Tenant its proportionate share of any such overpayment within thirty (30) days after receipt of notice of determination, and of the amount, of such overpayment. If said inspection reveals an underpayment of operating costs, the Tenant shall reimburse the Landlord its proportionate share of any such underpayment within thirty (30) days after receipt of billing. If said inspection reveals that the Landlord misstated operating costs by more than five percent (5%) and such error is not the result of a misstatement by a Common Area maintenance contractor or subcontractor, the Landlord shall reimburse the person making such inspection for all costs reasonably incurred in making such inspection within thirty (30) days after receipt of notice of determination, and of the amount, of any such misstatement. The Landlord's expenses for any calendar year shall be deemed correct if the Tenant does not give the Landlord written notice of any such overpayment or underpayment within the one (1) year period provided.

ARTICLE 5 - SECURITY DEPOSIT

5.1 Concurrently with Tenants execution of this Lease, Tenant shall deposit with Landlord a security deposit in the amount specified in Article 1.13. Said sum shall be held by Landlord as a Security deposit for the performance by Tenant of all of the terms, covenants, and

conditions of this Lease to be kept and performed by Tenant during the term hereof. If Tenant defaults with respect to any provisions relating to the payment of rent and any of the monetary sums due herewith, Landlord may (but shall not be required to) use, apply or retain all or any part of this Security Deposit for the payment of the same or any other amount which Landlord may spend or become obligated to spend by reason of Tenant's default or to compensate Landlord for any other loss or damage which Landlord may suffer by reason of Tenant's default. If any portion of said Deposit is so used or applied, Tenant shall, within ten (10) days after written demand therefor, deposit cash with Landlord in an amount sufficient to restore the Security Deposit to its original amount. Tenant's failure to do so shall be a material breach of this Lease. Landlord shall not be required to keep this Security Deposit separate from its general funds, and Tenant shall not be entitled to interest on such Deposit. If Tenant shall faithfully and fully perform every provision of this Lease to be performed by it, the Security Deposit or any balance thereof shall be returned to Tenant (or, at Landlord's option, to the last assignee of Tenant's interest hereunder) at the expiration of the Lease term and after Tenant has vacated the Premises. In the event of termination of Landlord's interest in the Lease, Landlord shall transfer said Deposit to Landlord's successor in interest, whereupon Tenant agrees to release Landlord from all liability for the return of such Deposit or the accounting therefor.

ARTICLE 6 - COMMON AREAS

6.1 COMMON AREA DEFINITION. The term "Common Areas" means the land and improvements which at the time in question have been designated by Landlord for common use by or for the benefit of more than one tenant, including without limitation, any land and facilities utilized for or as parking areas, access and alleys, truck passage ways, service corridors and stairways providing access from tenant premises, landscaped areas, drainage facilities, fences, ditches, alleyways, exterior walks, bike racks, stairways, elevators, interior corridors, directory equipment, toilets and wash rooms, drinking fountains, and other public facilities, but excluding any portion of the Building so included within the Common Areas when designated by Landlord for a non-common use. Any portion thereof not previously included within Common Areas shall be included when so designated and improved for common use.

6.2 COMMON AREA AVAILABILITY. Landlord shall make available at all times during the term of this Lease such Common Areas as are designated on the approved final plans and specifications for the Facility. Tenant shall have the non-exclusive right during the term of this Lease to use, subject to Landlord's exercise of reasonable control as provided herein, the Common Areas for itself, its employees, agents, customers, invitees, and licensees.

6.3 COMMON AREA MANAGEMENT. All Common Areas shall be subject to the exclusive management and control of Landlord or such other persons as Landlord may designate to exercise such management or control, in whole or in part, in Landlord's place. Landlord and Landlord's agents shall have the right to establish, modify, amend and enforce reasonable rules and regulations with respect to the Common Areas. Tenant agrees to abide by and conform with such rules and regulations, to cause its employees and agents so to abide and conform, and to use its best efforts to cause its customers, invitees and licensees to so abide and conform, and any failure to so conform shall be an event of default under this Lease, entitling Landlord to the remedies set forth herein. It shall be the duty of the Tenant to keep all of said areas free and clear of any obstructions created or permitted by Tenant or resulting from Tenant's operation and

Tenant shall not, without Landlord's prior written approval, sell or solicit in any manner in any of the Common Areas.

6.4 COMMON AREA CONFIGURATION. Landlord shall have the right to increase or reduce the Common Areas, to rearrange such improvements as may be on the Common Areas, and to make such changes therein and thereto from time to time which in its opinion are desirable or necessary so long as reasonable and safe access to the Premises is provided to Tenant and its guests.

ARTICLE 7 - PROPERTY TAXES

7.1 PROPERTY TAXES. Tenant shall be responsible for payment of its pro rata share (as set forth in Article 1.7) of all Taxes which exceed Taxes paid or incurred by Landlord in the Operating Expense Base Year. The term "Taxes" shall include all real and personal property taxes and assessments levied or assessed for any year upon the Facility or upon the operation or occupancy thereof, including any and all costs of any challenges to taxes and any consulting fees paid in connection with the appeal of any property taxes. In addition to the taxes described above, any and all taxes payable by Landlord in respect to the Facility, or Landlord's operation thereof (other than income, estate and inheritance taxes), whether or not now customary or within the contemplation of the parties hereto, shall be included within the definition of Taxes: (a) upon, allocable to, or measured by the area of the Premises or on the rent payable hereunder, including any gross receipts or gross rental tax levied by the State, any political subdivision thereof, County, City or Federal Government with respect to the receipt of such rent; or (b) upon or with respect to the possession, leasing, operations, management, maintenance, alteration, repair, use or occupancy by Tenant of the Premises or any portion thereof; or (c) upon this transaction or any document to which Tenant is a party creating or transferring an interest or an estate in the Premises; or (d) any fees in lieu of property taxes or other fees or charges levied against Landlord by or on behalf of any governmental or quasigovernmental entity for services rendered by or on behalf of any governmental or quasi-governmental entity, or (e) costs of any challenges to taxes, including any consulting or legal fees paid in connection with the appeal of any property taxes;

7.2 During any period when Tenant is obligated to pay its share of Tax increases over the Operating Expense Base Year, Tenant shall pay Tenant's share of Taxes in advance in monthly installments in an amount reasonably estimated by Landlord on the first day of each calendar month during the Term; provided that in the event Landlord is required under any mortgage covering the Facility to escrow real estate taxes Landlord may, but shall not be obligated to, use the amount required to be so escrowed as a basis for its estimate of the monthly installment due from Tenant hereunder. Landlord's estimate of Tenant's share of Taxes shall be made at the beginning of each calendar year or partial lease year, as the case may be. Landlord may adjust each estimate at other times by giving Tenant notice of the adjusted estimate. After Landlord's receipt of actual bills for Taxes, Landlord shall furnish Tenant a statement of Tenant's actual share, and there shall then be an adjustment between the parties so that Landlord shall receive the precise amount of Tenant's share of Taxes for the period, with Tenant paying Landlord any deficiency on or before thirty (30) days after receiving such statement, or Tenant receiving a credit against the next installment of Taxes to the extent that Tenant has overpaid Taxes for such period.

7.3 **PERSONAL PROPERTY TAXES.** Tenant shall pay, before delinquency, all taxes, assessments, license fees and public charges levied, assessed or imposed upon or measured by the value of its business operation, including but not limited to the furniture, fixtures, leasehold improvements, equipment and other property of Tenant at any time situated on or installed in the Premises by Tenant. If at any time during the term of this Lease any of the foregoing are assessed as part of the real property of which the Premises are a part, Tenant shall pay to Landlord upon demand the amount of such additional taxes as may be levied against said real property by reason thereof. For the purpose of determining said amount, figures supplied by the County Assessor as to the amount so assessed shall be conclusive.

ARTICLE 8 - USE - PROMOTIONAL ASSOCIATION

8.1 **USE AND TRADE NAME.** Tenant shall use the Premises solely for the purposes specified in Article 1.14. Tenant shall not use or permit the Premises to be used for any other purpose or purposes whatsoever without prior written consent of Landlord.

8.2 **SUITABILITY.** Tenant acknowledges that neither Landlord nor any agent of Landlord has made any representation or warranty with respect to the Premises or with respect to the suitability of the Premises or the Facility for the conduct of Tenant's business, nor has Landlord agreed to undertake any modification, alteration or improvement to the Premises except as provided in this Lease. The taking of possession by Tenant of the Premises shall conclusively establish that the Premises were at such time in satisfactory condition. Notwithstanding anything to the contrary in this Lease, except for any work to be performed by Landlord as set forth on Exhibit B, the Premises are hereby taken in its "as is, where is" condition with all faults and defects. Except as expressly set forth herein, no representations or warranties of any kind or nature, express or implied, are made by Landlord.

8.3 **USES PROHIBITED.**

(a) Tenant further covenants and agrees that it will not use or suffer or permit any person or persons to use the Premises for any use or purpose in violation of the laws of the United States of America or the State in which the Premises is located or the ordinances, regulations and requirements of the City of Boise, County of Ada, or other lawful authorities, and that during said Term the Premises, and every part thereof, shall be kept by the Tenant in a clean and wholesome condition, and maintain and keep in full compliance with all laws, rules, codes, acts, statutes and regulations.

(b) Tenant shall not do or permit anything to be done in or about the Premises nor bring or keep anything therein which will in any way increase the existing insurance rate or affect any fire or other insurance upon the Premises or Facility, or any of its contents (unless Landlord has consented in writing to such use and Tenant pays any increased premium as a result of such use or acts), or cause a cancellation of any insurance policy covering the Premises or Facility, or any of its contents, nor shall Tenant sell or permit to be kept, used or sold in or about said Premises any articles which may be prohibited by a standard form policy of fire insurance.

(c) Tenant may not store equipment or other materials outside the Premises, building or other improvements located-upon the Facility. Tenant shall not cause, maintain or permit any nuisance in, on or about the Premises or Facility nor shall Tenant commit or suffer to be committed any waste in or upon the Premises or Facility.

(d) Tenant shall not, without the prior written consent of Landlord paint or place any signs on the Premises or Facility, or place any curtains, shades, awnings, aerals or flagpoles, or the like, on the Premises or Facility visible from outside the Premises, except as approved by Landlord. Tenant agrees at its expense to obtain all necessary permits prior to erecting any sign and Tenant shall remove said sign or other erections on the termination of this Lease and repair any damage caused by such removal.

(e) Tenant shall comply with any building rules and regulations of Landlord as may now or hereafter be established or from time to time amended by Landlord. Landlord shall not be liable to Tenant for any violation of such rules and regulations by any other tenant.

(f) Tenant shall be responsible for all janitorial and cleaning of the Premises. Tenant shall store all trash and garbage within the Premises in a clean manner and not cause a nuisance to any other tenants in the Facility. Tenant shall arrange for and bear the expense of the prompt and regular removal of all trash and garbage from the Premises and placement of the same in the Facility's designated trash and garbage collection area(s). Tenant otherwise shall refrain from dumping, disposal, reduction, incineration or other burning of any trash, papers, refuse or garbage of any kind or nature in or about the Premises or Facility.

(g) All telephone, network, computer systems and cable equipment, including but not limited to conduits for telephone wires, lines, outlets, jacks and appurtenances, and other communication systems, if any, shall be supplied, installed, repaired and maintained by Tenant at Tenant's sole cost and expense, and Tenant shall arrange for telephone lines and cable to be brought from the applicable telephone panel, if any, to the Premises. Tenant shall make all necessary arrangements for telephone service and connections with the applicable telephone company. Landlord shall, after receipt of notice from Tenant of the need for maintenance, repair or replacement of telephone lines, cables or equipment outside the Premises (which notice shall be accompanied by written independent evidence satisfactory to Landlord that there is no need for maintenance, repair or replacement inside the Premises), at Tenant's cost and expense, payable upon demand, cause to be performed the necessary maintenance, repairs and replacements of the telephone equipment, including but not limited to conduits, cables, wires, lines and appurtenances serving the Premises, which is located outside the Premises. At Landlord's option upon the surrender of the Premises, all of such conduits, cables, wiring, lines, equipment and related materials shall be removed by Tenant, at Tenant's sole costs and expense.

(h) Tenant shall complete, or cause to be completed, all deliveries, loading, unloading and services at such locations and times as are approved by Landlord, and shall do so in a manner that will not interfere with Landlord, other tenants, or employees or customers of Landlord or other tenants. Landlord reserves the right to further regulate in a non-discriminatory manner such activities of Tenant.

(i) Tenant agrees that it will operate the air tempering equipment serving its Premises in a manner such that inside temperatures are maintained within a range maintained by a majority of similar type tenants in this state and such that tempered air will not be unduly drained from the Common Areas or Premises. Tenant agrees to use ordinary prudence with respect to conserving energy in its operation of energy consuming equipment.

8.4 CONTINUOUS OPERATION - HOURS. [Intentionally omitted.]

8.5 PROMOTIONAL ASSOCIATION. [Intentionally omitted.]

8.6 ADVERTISING. [Intentionally omitted.]

ARTICLE 9 - UTILITIES

9.1 COSTS. Landlord shall, at its own cost and expense, pay for water, gas, electrical, trash removal, sewer services used by Tenant on the Premises, including standby charges and maintenance, repair and inspection costs for any fire sprinkler system, and including all connection charges, except for telephone services to the Premises, provided that any increase in the operating costs attributable to, but not limited to, utilities and other services over the Utility Base Year shall be paid by Tenant as Additional Rent as provided for in Article 4.2. If Tenant installs any equipment which consumes or causes to be consumed an extraordinary amount of any utility, or if Tenant otherwise consumes an extraordinary quantity of any utility (when compared to average consumption for comparable facilities), then Landlord may require that Tenant install at Tenant's expense a separate meter for that utility, if a separate meter is not already installed, and Tenant shall thereafter purchase such utility service directly from the utility company. Tenant shall not overload or cause to be overloaded any utility system of the Premises or Facility, and shall use reasonable care to conserve energy costs, such as turning off lights not in use, drawing shades and using energy efficient light bulbs. Tenant shall, at Tenant's sole cost and expense, arrange for janitorial services for the Premises such that the Premises are maintained in the manner required in this Lease. Tenant may elect to use the janitorial service used by Landlord in connection with the Common Areas, and Tenant shall, upon such election, shall pay the same rate for such services as Landlord would pay for such services.

9.2 UTILITIES FURNISHED. Landlord shall furnish such amounts and types of utilities to the Common Areas as are reasonably appropriate for the operation and maintenance of the Facility, including trash removal service, and the cost to Landlord of such utilities shall be included within the definition of "operating costs" as that term is used in Article 4.2.

9.3 DISCLAIMER OF LIABILITY. Landlord shall have no liability, and this Lease shall not terminate nor shall the rent abate by reason of any failure of the utility companies to provide such services. Landlord shall not be liable for any failure to make any repairs or to perform any maintenance services to the utility systems within the Premises, unless such failure to make any repairs or to perform any maintenance services shall persist for an unreasonable period of time after written notice of the need of such repair or maintenance is given to Landlord by Tenant.

9.4 ALLOCATION OF UTILITY COST.

(a) Tenant recognizes that certain facilities and utilities may be provided which will serve and be used by numerous tenants. Except as provided for in Article 9.1, the payments to companies for such services and the expense of maintenance, insurance, repair and replacement of such equipment and services shall be allocated in operating costs to each tenant proportionately in the ratio of the square footage of space served by such facilities with necessary and equitable modification where special or comparatively excessive use of such facilities occurs with respect to or is afforded an individual tenant.

(b) Tenant further recognizes that Landlord may provide central facilities for heating and air conditioning which will serve and be used by many tenants in the Facility. Except as provided for in Article 9.1, the payment of such heating and air conditioning and the expenses of maintenance, repair and replacement of such equipment and service shall be allocated in operating costs to each tenant prorated proportionately in ratio of square footage of leased Premises to the total square footage of the total area heated or air conditioned by such facility with necessary and equitable modification where special or comparatively excessive use of such facilities occurs with respect to or is afforded an individual tenant. Such utility charge or charges shall be determined from time to time by Landlord's engineer and shall be initially based on a typical office layout comparable to Tenant's proposed use of the Premises, but may be subject to adjustment based upon the actual consumption by Tenant. Landlord agrees, however, that the utility charge to Tenant for utilities furnished by Landlord shall not exceed those of the local public utility company if its services were furnished directly to Tenant.

ARTICLE 10 - MAINTENANCE AND REPAIRS

10.1 Landlord shall repair and maintain the roof and structural portions of the Facility including the basic plumbing, air conditioning, heating and electrical systems, exterior paint and trim, unless such repairs are required as a result, in whole or in part, of the act or neglect of any duty by Tenant, its agents, servants, employees, or invitees, in which event Tenant shall pay to Landlord the reasonable cost of such maintenance and repairs. The cost to Landlord of providing any such maintenance and repairs together with additions during any given year to any maintenance reserve accounts as may reasonably be established by Landlord shall be included within the definition of "operating costs" as that term is used in Article 4.2. Landlord shall not be liable for any failure to make any repairs or to perform any maintenance unless such failure shall persist for an unreasonable time after written notice of the need of such repairs or maintenance is given to Landlord by Tenant.

10.2 Tenant shall be required to use chair mats under all chairs with wheels. Tenant agrees, at its own cost and expense, to keep the Premises, and each and every part thereof, and any and all appurtenances in a neat, clean and sanitary condition and shall at all times during the term of this Lease, maintain the Premises in good condition and repair, ordinary wear and tear excepted.

10.3 Tenant further covenants and agrees that the Landlord may go upon the Premises by providing Tenant with no less than twenty four (24) hours notice (except in the event of an emergency), and make any necessary repairs to the Premises and perform any work therein

which may be necessary to comply with any laws, ordinances, rules or regulations of any public authority or the Idaho Surveying and Rating Bureau or of any similar body or that the Landlord may deem necessary to prevent waste or deterioration in connection with the Premises if the Tenant does not make such repairs or do such work or cause such repairs or work to be performed promptly after receipt of written demand from Landlord. Nothing herein contained shall imply any duty on the part of Landlord to do any such work which under any provision of this Lease the Tenant may be required to do, nor shall it constitute a waiver of Tenant's default in failing to do the same. No exercise by the Landlord of any rights herein shall entitle Tenant to any damage for any injury or inconvenience occasioned thereby nor to any abatement of rent. In the event Landlord makes or causes any such repairs to be made or performed which are the responsibility of Tenant, as provided herein, Tenant shall promptly pay the cost thereof to Landlord as additional rent upon receipt of a bill therefor. All such costs and expenses shall be included within the definition of "operating costs" as that term is used in Article 4.2.

10.4 Tenant acknowledges and agrees that the Urban Renewal Agency of Boise City ("CCDC"), for itself and for the City and other public agencies, at their sole risk and expense, reserves the right to enter the sidewalks adjacent to the Building or any part thereof at all reasonable times and with as little interference as possible for the purposes of construction, reconstruction, maintenance, repair, or service of any public improvements or public facilities located adjacent to the Building, which shall not entitle Tenant to any damage for any injury or inconvenience occasioned thereby nor to any abatement of rent.

10.5 CONDITION UPON EXPIRATION OF TERM. Upon the expiration or earlier termination of this Lease, Tenant shall surrender the Premises in the same relative condition as at the commencement of this Lease, ordinary wear and tear and damage by fire, earthquake, act of God or the elements alone excepted, and shall promptly remove or cause to be removed at Tenant's expense from the Premises and the Facility any signs, notices and displays placed by Tenant. Tenant agrees to repair any damage to the Premises or Facility caused by or in connection with the removal of any articles of personal property, business or trade fixtures, machinery, equipment, cabling, wiring, networks, systems, cabinetwork, signs, furniture, movable partitions, including without limitation thereto, repairing the floor and patching and painting damaged or discolored walls where required by Landlord to Landlord's reasonable satisfaction (subject to ordinary wear and tear), all at Tenant's sole cost and expense. Tenant shall indemnify Landlord against any loss or liability resulting from delay by Tenant in so surrendering the Premises, including without limitation, any claims made by any succeeding tenant founded on such delay. Such work will be accomplished expeditiously and in any event no later than five (5) business days after the expiration or earlier termination of this Lease.

ARTICLE 11 - ALTERATIONS

11.1 Tenant shall not make any alterations or additions to the Premises nor make any contract therefor without first procuring Landlord's written consent which consent shall not be unreasonably withheld and shall provide Landlord with an itemized cost list of such alterations or additions. All alterations, additions and improvements made by Tenant to or upon the Premises, except light fixtures, signs, electrical equipment, cases, counters or other removable trade fixtures, shall at once when made or installed be deemed to have been attached to the Premises and to have become the property of the Landlord; provided, however, if prior to

termination of this Lease, or within thirty (30) days thereafter, Landlord so directs by written notice to Tenant, Tenant shall promptly remove the additions, improvements, fixtures, trade fixtures and installations which were placed in the Premises by Tenant and which are designated in said notice or which are to be retained by Tenant, and shall repair any damage occasioned by such removal and in default thereof Landlord may effect said removal and repairs at Tenant's expense.

11.2 All work with respect to any alterations, additions, and changes to be performed by Tenant must be done in a good and workmanlike manner and diligently prosecuted to completion to the end that the Premises shall at all times be a complete unit except during the period of work.

Any such changes, alterations and improvements shall be performed and done strictly in accordance with the laws, codes, rules, acts, statutes and ordinances relating thereto. In performing the work of any such alterations, additions or changes, or of any construction, Tenant shall have the work performed in such a manner as not to cause dust outside the Premises or be a nuisance to any other tenant.

11.3 Before commencing any such construction in or about the Premises, Tenant shall notify Landlord in writing of the expected date of commencement thereof. Landlord shall have the right at any time from time to time to post and maintain on the Premises such notices as Landlord deems necessary to protect the Premises and Landlord from mechanics' liens, materialmen's liens, or any other liens.

11.4 **FIXTURES INSTALLATION.** It is mutually agreed that in order to expedite the commencement of Tenant's business in the Premises, Tenant may enter upon the Premises for the purpose of installing trade fixtures and furnishings during the period prior to commencement of the Lease term; provided, however, that Landlord shall not be liable to Tenant for damage to or loss of such fixtures, equipment or furnishings, Tenant accepting the full risk for such damage or loss, if any and agrees to indemnify Landlord a set forth in this Lease; and provided further that such entry disturbs neither existing tenants, if any, of the Facility, nor any contractors hired by Landlord to prepare the Premises or Facility for occupancy. Tenant shall pay for all utilities consumed by Tenant or its contractors in preparing the Premises for opening of Tenant's business. Notwithstanding anything in this Lease to the contrary, all terms and conditions of this Lease shall be fully binding upon Tenant upon the execution date of this Lease by Landlord and Tenant and this Lease shall be in full force and effect, despite the future Commencement Date.

ARTICLE 12 - ENTRY BY LANDLORD

12.1 Landlord and the authorized representatives of Landlord may enter the Premises by providing the Tenant with no less than twenty four (24) hours notice (except in the event of an emergency), for the purpose of exhibiting the same to interested parties and, during the final six (6) months of the term of this Lease, may exhibit the Premises for hire and may advertise the same in such manner as shall not unreasonably interfere with Tenant's business. Tenant hereby grants to Landlord such licenses or easements in and over the Premises or any portion thereof as shall be reasonably required for the installation or maintenance of mains, conduits, pipes or other facilities to serve the Premises or Facility. Landlord and its agents shall have free access to the

Premises during all reasonable hours for the purpose of examining the same to ascertain if they are in good repair, and to make reasonable repairs which Landlord may be allowed to make hereunder.

ARTICLE 13 - LIENS

13.1 Tenant agrees that it will pay or cause to be paid all costs for work done by it on the Premises, and Tenant will keep the Premises free and clear of all mechanics' liens on account of work done by Tenant or persons claiming under Tenant. Tenant agrees to and shall indemnify and save Landlord free and harmless against liability, loss, damage, costs, attorneys' fees, and all other expenses on account of claims of lien of laborers or material men or others for work performed or materials or supplies furnished to Tenant or persons claiming under Tenant.

13.2 Tenant shall, before the commencement of any work which might result in any such lien, give to Landlord written notice of its intention so to do in sufficient time to enable Landlord to file and record notice to protect Landlord from such liens.

13.3 If any lien is filed against the Premises or Facility on account of work done by Tenant or persons claiming under Tenant, Landlord may (but shall not be required to) pay the claim and any costs and the amount so paid, together with reasonable attorneys' fees incurred in connection therewith, shall be immediately due and owing from Tenant to Landlord, with interest at the rate which is two (2) percentage points over the prime rate of the bank in which Landlord maintains its accounts at the time of the Landlord's payments from the dates of Landlord's payments (provided, however, that Tenant shall have the right to contest any claim of lien, and so long as Tenant is actively contesting a claim of lien, until and unless an adverse judgment is entered in favor of the lien claimant, Landlord shall not pay the claim. Further provided that Landlord at Landlord's discretion may require Tenant to post a bond during the pendency of any contest sufficient to cause a title company to remove the lien as an exception to a commitment for title insurance).

ARTICLE 14 - INDEMNITY

14.1 Tenant shall defend, indemnify and hold harmless Landlord and its members, managers, agents, employees and representatives (collectively, "Landlord Representatives") from and against any and all claims, suits, damages, expenses, fines, judgments, penalties, costs, liabilities or losses (collectively, "Claims") arising from Tenant's use of the Premises or the conduct of its business or from any activity, work, or thing done, permitted or suffered by Tenant in or about the Premises or Facility and shall further indemnify and hold Landlord and Landlord Representatives harmless from and against any and all Claims arising from any breach or default in the performance of any obligation on Tenant's part to be performed under the terms of this Lease or arising from any act or negligence of Tenant or any of its agents, contractors or employees and from and against all costs, attorneys' fees, expenses and liabilities incurred in or from any such claims or any action or proceeding brought thereon; and in case any action or proceeding be brought against Landlord by reason of such claim, Tenant, upon notice from Landlord, shall defend the same at Tenant's expense by counsel reasonably satisfactory to Landlord.

14.2 Landlord and Landlord's Representatives shall not be liable for injury or damage which may be sustained by the person, goods, wares, merchandise or property of Tenant, its employees, invitees or customers or any other person in or about the Premises caused by or resulting from other tenants, fire, steam, electricity, gas, water or rain, freezing or leakage, obstruction or other defects of the pipes, sprinklers, wires, appliances, plumbing, air conditioning or lighting fixtures. Tenant, as a material part of the consideration to Landlord, hereby assumes all risk of damage to property or injury to persons in, upon or about the Premises from any cause and Tenant hereby agrees to insure its property for the full value that Tenant places on such property and agrees to look solely to such insurance for any damage, destruction, loss of use, business interruption or other claims or occurrences. Tenant shall be directly responsible to other tenants of the Facility for any damage to such other tenants proximately caused by Tenant's use of the Premises, by fluid discharge or other failure of any mechanical equipment (including plumbing and sprinkling systems) of the Facility when such failure originates or occurs from Tenant's equipment or fixtures or when caused by any acts of negligence of Tenant or its employees, agents or customers.

14.3 Without limiting the generality of any other provision of this Lease, Tenant shall not cause or permit any hazardous or toxic substances to be used, stored, generated on, transported over or disposed of on or in the Premises, except in accordance with applicable governmental statutes and regulations. If hazardous substances are used, stored, generated on, transported over or disposed of on or in the Premises by Tenant, its customers or invitees, or if the Premises become contaminated in any manner caused by Tenant, its customers or invitees, Tenant shall indemnify and hold harmless Landlord from any and all claims, damages, fines, judgments, penalties, costs, liabilities or losses including, without limitation, the decrease in the value of the Premises, damages caused by loss or restriction of rentable or useable space or other damages caused by adverse impact on marketing of the space and any and all sums paid for settlement of claims and attorneys fees arising during or after the Lease is terminated or arising as a result of that contamination by Tenant. This indemnification includes without limitation, any and all costs incurred because of any investigation of the site or any clean up, removal or restoration mandated by federal, state or local agencies or political subdivisions. All agreements and indemnities contained in the foregoing provision shall be deemed to survive the expiration or other termination of the Lease. Without limiting the foregoing, if Tenant causes or permits the presence of any hazardous or toxic substances on the Premises and that results in a contamination, Tenant shall first obtain Landlord's approval for any remedial action.

For purpose of this Lease, "hazardous or toxic substance" shall mean and include (1) a "hazardous substance" as defined in 42 U.S.C. Section 9601(14), or as defined under applicable state health, safety, and water codes, and (2) any other material, gas or substance known or suspected to be toxic or hazardous (including, without limitation, any radioactive substance, methane gas, volatile hydrocarbons, industrial solvents and asbestos) or which could cause a material detriment to, or materially impair the beneficial use of the Property, or constitute a material health, safety or environmental risk to tenants, occupants or patrons of the Property.

14.4 LANDLORD INDEMNITY. Landlord agrees to indemnify and hold Tenant and its agents, employees and invitees (collectively, "Tenant Parties") harmless against and from any

and all Claims arising from: (i) any grossly negligent or willfully committed action done, permitted or suffered by Landlord, its agents, employees, or invitees and, (ii) arising from injury during the Term to person or property sustained in or about the Common Areas caused by the gross negligence or willfully committed act of Landlord, its agents, employees or invitees (except to the extent such claim, damage or other liability under Article 14.4 (i) and/or (ii) above is caused by the negligent or intentional act or omission of Tenant, its agents, employees or invitees).

14.5 PROPERTY DAMAGE. Tenant shall give prompt written notice to Landlord within three (3) days of the occurrence of a fire or accident involving the Premises or Facility.

ARTICLE 15 - INSURANCE

15.1 COVERAGE.

A. Tenant, at Tenant's expense, agrees to purchase and maintain in force, and cause its contractors and installers to maintain, during its installation and use of the Premises: (i) Comprehensive General Liability Insurance on an occurrence basis with minimum limits of liability in an amount of \$2,000,000 for bodily injury, personal injury or death to any one person and \$2,000,000 for bodily injury, personal injury or death to more than one person, and \$500,000 with respect to damage to property, including water and sprinkler damage (ii) Products and Completed Operations Aggregate coverage with minimum limits of liability in an amount of \$2,000,000; (iii) Casualty insurance to cover his personality and all of Tenant's improvements at 100% of replacement cost; (iv) Worker's Compensation Employers Liability with minimum limits of liability in the amount of \$500,000/\$500,000/\$500,000; (v) Excess Liability Umbrella coverage with minimum limits of liability in the amount of \$4,000,000; (vi) Auto Liability with minimum limits of liability in the an amount of \$1,000,000 which must cover owned, hired and non-owned auto coverage (provided however, if no owned autos, then only strictly non owned & hired liability coverage shall be accepted), and (viii) Business Interruption Insurance with a 12 month minimum coverage, all from an insurance carrier which is rated no lower than A-, VIII by A.M. Best.

B. The policies referred to in this section shall name Landlord, its mortgagee, its property manager, Watermark Property Management, and their respective agents and employees as additional insureds; and shall contain the following provisions and endorsements: (i) that such insurance may not be canceled or amended without thirty (30) days' prior written notice to Landlord; (ii) an express waiver of any right of subrogation by the insurance company against Landlord and their respective agents and employees; and (iii) that the policy shall not be invalidated should the insured waive in writing prior to a loss, any or all rights of recovery against any other party for losses covered by such policies.

C. Tenant shall deliver to Landlord, signed certificates of insurance of all policies and renewals thereof to be maintained by Tenant hereunder, no less than ten (10) days prior to the commencement of Tenant's work and not less than ten (10) days prior to the expiration date of each policy, and each certificate shall expressly state that the coverage is "primary and non-contributory" on the certificate. Provided that the insurance policies of Tenant will not be invalidated nor will the right of the insured to collect the proceeds payable under such policies be adversely affected by the waiver contained in the following portion of this sentence, Tenant hereby expressly waives all rights of recovery which it might otherwise have against Landlord or its agents, and employees, for loss or damage to person, property or business to the extent that such loss or damage is covered by valid and collectible insurance policies, notwithstanding that such loss or damage may result from negligence of Landlord, or their agents or employees. Tenant shall use its best efforts to obtain from its insurer the right to waive claims as set forth in the preceding sentence without thereby invalidating its insurance or affecting its right to proceeds payable thereunder.

15.2 WAIVER OF CLAIMS. Landlord and Tenant for themselves and their successors, each hereby mutually waive any and all claims, liability or rights of recovery against and mutually release and discharge each other and their officers, employees, agents and representatives of such other party for loss or damage to such waiving party of its property or the property of others insured under the form of casualty insurance policy with all permissible extension endorsements covering additional perils or under any other policy of insurance carried by such waiving party in lieu thereof regardless of the cause of the damage or loss. The insurance required by this Lease shall contain an endorsement waiving the insurer's right of subrogation against Landlord and Landlord's lender or Tenant, as applicable, provided that such waiver of the right of subrogation shall not be operative in any case where the effect thereof is to invalidate such insurance coverage or increase the cost thereof.

ARTICLE 16 - DAMAGE OR DESTRUCTION

16.1 If at any time during the term hereof, the Premises are destroyed or damaged and such damage is not "substantial" as that term is hereinafter defined, then Landlord shall promptly repair such damage at Landlord's expense and this Lease shall continue in full force and effect. If at any time during the term hereof the Premises are destroyed or damaged and if such damage is "substantial" as that term is hereinafter defined, then Landlord may at its option either (a) repair such damage as soon as reasonably possible (but not to exceed a period of one hundred twenty (120) days from the date of occurrence of the damage) at Landlord's expense, provided that all insurance proceeds are made available to Landlord, in which event, this Lease shall continue in full force and effect, or (b) cancel and terminate this Lease as of the date of the occurrence of such damage, by giving Tenant written notice of its election to do so within sixty (60) days after the date of occurrence of such damage provided that insurance proceeds are made available to Landlord. In the event Landlord, in its reasonable business judgment, determines that the repair of damage or destruction will not be complete within one hundred twenty (120) days after the date of occurrence of such damage, Landlord shall notify Tenant of the estimated time for completion, and Tenant may elect to terminate this Lease by giving Landlord written notice of its election to do so no later than ten (10) days after Landlord makes such determination.

16.2 If the Premises are destroyed or damaged and Landlord repairs or restores them pursuant to the provisions of this Article, Tenant shall continue the operation of its business in the Premises to the extent reasonably practicable from the standpoint of prudent business management; and the Base Rent payable hereunder for the period during which such damage, repair or restoration continues shall be abated in proportion to the degree to which the Premises are rendered untenable. There shall be no abatement of any item of additional rent or other monetary charge payable hereunder by Tenant to Landlord, and Tenant shall have no claim against Landlord for any damage suffered by Tenant by reason of any such damage, destruction, repair or restoration, provided Landlord undertakes and accomplishes repairs in a reasonably timely fashion.

16.3 In the event the damage to the Premises, causing new construction or need of repair of the same, are caused by the negligence or willful acts of Tenant or Tenant's employees and agents, there shall be no duty to repair the same on the part of the Landlord nor shall the rent abate as provided in this Article.

16.4 For the purpose of this Article, "substantial" damage to the Premises shall be deemed to be damage, the estimated cost of repair of which exceeds ten percent (10%) of the then estimated replacement cost of the improvements included in the Premises. The determination in good faith by Landlord of the estimated cost of repair or any damage and/or of the estimated replacement cost of the Facility or any part thereof shall be conclusive for the purpose of this Article.

ARTICLE 17 - CONDEMNATION

17.1 ENTIRE OR SUBSTANTIAL TAKING. If the entire Premises, or so much thereof as to make the balance not reasonably adequate for the conduct of Tenant's business, notwithstanding restoration by Landlord as hereinafter provided, shall be taken under the power of eminent domain, this Lease shall automatically terminate as of the date on which the condemning authority takes title or possession, whichever shall first occur.

17.2 PARTIAL TAKING. In the event of any taking under the power of eminent domain which does not so result in a termination of this Lease, the rent payable hereunder shall be reduced, on an equitable basis, taking into account the relative value of the portion taken as compared to the remaining portion. Landlord shall promptly at its expense restore the portion of the Premises not so taken to as near its former condition as is reasonably possible and this Lease shall continue in full force and effect.

17.3 AWARDS. Any award for any taking of all or any part of the Premises under the power of eminent domain shall be the property of Landlord, whether such award shall be made as compensation for diminution in value of the leasehold or for the taking of the fee. Nothing contained herein, however, shall be deemed to preclude Tenant from obtaining, or to give Landlord any interest in, any award to Tenant for loss of or damage to Tenant's trade fixtures and removable personal property or for damage for cessation or interruption of Tenant's business, or for any other element of an award measured in damage suffered by Tenant as a result of the taking.

17.4 SALE UNDER THREAT OF CONDEMNATION. A sale by Landlord to any authority having the power of eminent domain, either under threat of condemnation or while condemnation proceedings are pending, shall be deemed a taking under the power of eminent domain for all purposes under this Article.

17.5 TENANT'S OPTION. A taking of any portion of the leased floor area of the Premises, provided such taking substantially affects the Tenant's normal business operations, shall confer upon Tenant the option, to be exercised only within thirty (30) days after Tenant shall have received written notice thereof, to terminate this Lease effective as of the date of such taking, upon written notice to Landlord. Failure of Tenant to exercise such option shall constitute Tenant's agreement that the balance of the Premises is reasonably adequate for the conduct of Tenant's business, and this Lease shall remain in effect subject to Article 17.2 hereof.

ARTICLE 18 - ASSIGNMENT AND SUBLEASE

18.1 Provided Tenant has obtained the prior written consent of Landlord, which consent shall not be unreasonably withheld or delayed, Tenant shall have the right to sublet or assign all or any part of the Premises. Any attempted assignment, transfer, mortgage, encumbrance or subletting without such consent shall be wholly void. If Tenant requests Landlord to consent to a proposed assignment or sublease, Tenant shall pay to Landlord, whether or not consent is ultimately given, Landlord's reasonable attorney's fees incurred in connection with each such request.

If Tenant is a partnership or limited liability company, a withdrawal or change of the partner(s) or member(s), as applicable owning 50% or more of the partnership or company, or the dissolution of the partnership or company, shall be deemed a voluntary assignment. If Tenant consists of more than one person, the purported assignment from one person to the other or vice versa shall be deemed a voluntary assignment. If Tenant is a corporation, other than a corporation the stock of which is traded through an exchange or over the counter, any dissolution, merger, consolidation, or other reorganization of Tenant, or the sale or other transfer of 51% of the capital stock of Tenant, or the sale of at least 51% of the value of the assets of Tenant shall be deemed a voluntary assignment and subject to the terms hereof.

18.2 Subletting or assignment by the Tenant, even with the consent of Landlord, shall not relieve Tenant of its obligation to pay the rent and to perform all of the other obligations to be performed by Tenant hereunder. The acceptance of rent by Landlord from any other person shall not be deemed to be a waiver by Landlord of any provision of this Lease or to be a consent to any assignment, subletting or other transfer.

ARTICLE 19 - SUBORDINATION, ATTORNMENT

19.1 SUBORDINATION. This Lease at Landlord's option shall be subject and subordinate to all ground or underlying leases which now exist or may hereafter be executed affecting the Premises or Facility, and to the lien of any mortgages or deeds of trust in any amount or amounts whatsoever now or hereafter placed on or against the land or improvements or either thereof, of which the Premises are a part, or on or against Landlord's interest or estate therein, or on or against any ground or underlying lease without the necessity of the execution

and delivery of any further instruments on the part of Tenant to effectuate such subordination; on the condition that so long as the Tenant shall not be in default under the terms of this Lease, the Lease shall not be terminated nor shall any of the Tenant's rights and obligations under the Lease be disturbed by such lender or ground lessor in the exercise of its rights under the deed of trust, mortgage or ground lease. If any mortgagee, trustee, or ground lessor shall elect to have this Lease prior to the lien of its mortgage, deed of trust or ground lease, and shall give written notice thereof to Tenant, this Lease shall be deemed prior to such mortgage, deed of trust or ground lease, whether this Lease is dated prior to or subsequent to the date of said mortgage, deed of trust, or ground lease or the date of the recording thereof.

19.2 Tenant covenants and agrees to execute and deliver upon demand without charge therefor, such further instruments evidencing such subordination of this Lease to such ground or underlying leases and to the lien of any such mortgages or deeds of trust as may be required by Landlord.

19.3 ATTORNNMENT. In the event any proceedings are brought for default under ground or any underlying lease or in the event of foreclosure or in the exercise of the power of sale under any mortgage or deed of trust made by Landlord covering the Premises, Tenant shall attorn to the purchaser upon any such foreclosure or sale and recognize such purchaser as the Landlord under this Lease, provided said purchaser expressly agrees in writing to be bound by the terms of this Lease.

ARTICLE 20 - DEFAULT; REMEDIES

20.1 **EVENTS OF DEFAULT**. Any one or more of the following occurrences or acts shall constitute an event of default under this Lease.

a. If Tenant, at any time during the Term shall: (i) fail to make any payment of Rent or other sum herein required to be paid by Tenant for a period of five (5) days after any such payment has become due; (ii) if Tenant fails to cure, immediately after notice from Landlord, any hazardous or dangerous condition which Tenant has created or suffered in violation of law; or (iii) if Tenant fails to observe or perform any other provision of this Lease for thirty (30) days after Landlord shall have delivered to Tenant written notice of such failure; provided, however, that in the case of any default referred to in this clause (iii) which cannot with diligence be cured within such thirty (30) day period, if Tenant shall commence to cure the same within such thirty (30) day period and thereafter shall prosecute the curing of same with diligence and continuity, then the time within which such failure may be cured shall be extended for such period as may be reasonably necessary to complete the curing of the same with diligence and continuity;

b. if the Premises shall have been abandoned which, for purposes of this Lease shall be deemed to mean if Tenant fails to carry on its business at the Premises for a period of thirty (30) consecutive days unless precluded from so doing by reason of casualty or condemnation;

c. if Tenant fails to maintain the insurance required to be maintained pursuant to Article 15 hereof for a period of thirty (30) days after delivery of written notice by Landlord to Tenant of such failure;

d. the failure of Tenant to discharge or insure over liens and encumbrances pursuant to Article 13 hereof for a period of thirty (30) days after delivery by Landlord of written notice to Tenant of such failure; and

e. Tenant's insolvency, business failure, arrangement of debts appointment or assignment for the benefit of creditors, petition for relief in bankruptcy or failure to obtain dismissal of any petition filed against it in bankruptcy, or appointment of a receiver.

Any notice period provided for under this Article 20 shall run concurrently with any statutory notice periods and any notice given hereunder may be given simultaneously with or incorporated into any such statutory notice.

20.2 LANDLORD'S ELECTION TO TERMINATE LEASE OR POSSESSION. If an event of default shall have occurred, Landlord shall have the right at its election, to give Tenant written notice of Landlord's election to terminate this Lease or to terminate Tenant's rights of possession of the Premises on a date specified in such notice. Upon the giving of such notice, this Lease or Tenant's right to possession of the Premises, as the case may be, shall expire and terminate on such date as fully and completely and with the same effect as if such date were the date hereinbefore fixed for the expiration of the Term, if applicable, but Tenant shall remain liable as hereinafter provided. No act by Landlord other than giving written notice to Tenant as provided herein shall terminate this Lease.

20.3 RE-ENTRY. If any event of default shall have occurred, Landlord shall have the immediate right, whether or not this Lease shall have been terminated pursuant to Article 20.2 hereof, to re-enter and repossess the Premises or any part thereof by notice and judicial proceedings, and shall have the right to remove all persons and property therefrom. Landlord shall be under no liability for or by reason of any such re-entry, repossession or removal. No such re-entry or taking of possession of the Premises by Landlord shall be construed as an election on Landlord's part to terminate this Lease unless a written notice of such election be given to Tenant pursuant to Article 20.2 or unless the termination of this Lease be decreed by a court of competent jurisdiction.

20.4 RELETTING. From and after the repossession of the Premises, if this Lease shall not have been terminated pursuant to Article 20.2, Landlord shall use good faith efforts to relet the Premises or any part thereof, in the name of Tenant or Landlord or otherwise, for such term

or terms (which may be greater or less than the period which would otherwise have constituted the balance of the Term) and on such conditions and for such uses as Landlord, may reasonably determine; and Landlord may collect and receive any rents payable by reason of such reletting. Tenant shall pay to Landlord the Rent due under this Lease on the dates the Rent is due, less the rent the Landlord receives from any reletting.

20.5 TENANT'S LIABILITIES.

- a. No repossession of the Premises without the termination of this Lease, and no reletting of the Premises without the termination of this Lease, shall relieve Tenant of its liabilities and obligations hereunder, all of which shall survive such repossession or reletting. In the event of any repossession of the Premises or any part thereof by reason of the occurrence of an event of default, Tenant will pay to Landlord the Rent and other sums required to be paid by Tenant for the period to and including the date of such repossession and, thereafter, until the end of what would have been the Term, in the absence of such repossession, whether or not the Premises or any part thereof shall have been relet, Tenant shall be liable to Landlord for, and shall pay to Landlord, as liquidated and agreed current damages (not as a penalty), Landlord's reasonable estimate of the Rent and other sums which would be payable under this Lease by Tenant in the absence of such repossession, less the net proceeds, if any, of any reletting effected for the account of Tenant pursuant to Article 20.4 after deducting from such proceeds all of Landlord's expenses reasonably incurred in connection with such reletting (including, without limitation, all reasonable repossession costs, brokerage commissions, legal expenses, attorneys' fees, alteration expenses, and expenses of preparation for such reletting). Tenant will pay such current damages on the days on which Rent would have been payable under this Lease in the absence of such repossession, and Landlord shall be entitled to recover the same from Tenant on each such day. Landlord shall have no duty to mitigate damages in connection with a default by Tenant. Tenant agrees that Landlord may, in advance of the expiration of the Term, file suit to recover any sums falling due under the terms of this paragraph (b) from time to time and that no suit or recovery of any portion due Landlord hereunder shall be any defense to any subsequent action brought for any amount not theretofore reduced to judgment in favor of Landlord.
- b. In the event of any such default or breach by Tenant, Landlord may, at its election and without limiting Landlord's other rights and remedies, accelerate the payment of all Rent and other monetary sums payable by Tenant for the balance of the Term and upon any such election such sums shall be immediately due and payable in full.
- c. In addition to the damages for breach of this Lease described above, Tenant agrees that Landlord shall be entitled to receive from Tenant any and all costs in connection with Tenant's default hereunder, including without limitation, attorney's fees, administrative costs of Landlord associated with Tenant's default, costs of repairing

and/or remodeling the Premises for new tenants and leasing commissions for any leasing agent engaged to re-let the Premises.

20.6 NO WAIVER OF LANDLORD'S REMEDIES. No right or remedy herein conferred upon or reserved to Landlord is intended to be exclusive of any other right or remedy, and each and every right and remedy shall be cumulative and in addition to any other right and remedy given hereunder or now or hereafter existing at law or in equity or by statute. The failure of Landlord to insist at any time upon the strict performance of any covenant or agreement or to exercise any option, right, power or remedy contained in this Lease shall not be construed as a waiver or relinquishment thereof for the future. The receipt by Landlord of any Rent or any other sum payable hereunder with knowledge of the breach of any covenant or agreement contained in this Lease shall not be deemed a waiver of such breach, and no waiver by Landlord of any provision of this Lease shall be deemed to have been made unless expressed in writing and signed by Landlord. In addition to the other remedies provided in this Lease, Landlord shall be entitled, to the extent permitted by applicable law, to injunctive relief in case of the violation of any of the covenants, agreements, conditions or provisions of this Lease, or to a decree compelling performance of this Lease, or to any other remedy allowed to Landlord at law or in equity.

20.7 LITIGATION EXPENSES. In the event either Landlord or Tenant shall be in default in the performance of any of its obligations under this Lease, and an action shall be brought for the enforcement thereof in which it shall be determined that Landlord or Tenant was in default, the losing party shall pay to the prevailing party all reasonable attorneys' fees and court costs incurred or paid by it in connection therewith. In the event Landlord shall, without fault on its part, be made a party to any, litigation commenced against Tenant, and if Tenant, at its expense, shall fail to provide Landlord with counsel reasonably satisfactory to Landlord, Tenant shall pay as Additional Rent all costs and reasonable attorneys' fees incurred or paid by Landlord in connection with such litigation. In the event Tenant shall, without fault on its part, be made a party to any litigation commenced against Landlord, and if Landlord, at its expense, shall fail to provide Tenant with counsel reasonably satisfactory to Tenant, Landlord shall reimburse Tenant for all costs and reasonable attorney's fees incurred or paid by Tenant in connection with such litigation.

20.8 LANDLORD'S ELECTION TO CURE TENANT'S DEFAULT(S). Landlord may, but shall not be obligated to, cure any default by Tenant after complying with the notice provisions herein set forth, and whenever Landlord so elects, all costs and expenses paid or incurred by Landlord in curing such default, plus interest at the Default Rate including without limitation reasonable attorney's fees, shall be so much Additional Rent due on demand.

20.9 LATE CHARGES. Tenant hereby acknowledges that late payment by Tenant to Landlord of Rent hereunder will cause Landlord to incur costs not contemplated by this Lease,

the exact amount of which will be extremely difficult to ascertain. Such costs include, but are not limited to, processing and accounting charges and late charges which may be imposed on landlord by the terms of any mortgage or trust deed covering the Premises. Accordingly, if any Rent shall be past due, Tenant shall pay to Landlord, in addition to interest as provided herein, a late charge equal to \$150.00 will be due for each month Rent is received late. The parties hereby agree that such late charge represents a fair and reasonable estimate of costs Landlord will incur by reason of late payment by Tenant. Acceptance of such late charge by Landlord shall in no event constitute a waiver of Tenant's default with respect to any other overdue amount, nor prevent Landlord from exercising any of the rights and remedies granted hereunder.

ARTICLE 21 - NONDISCRIMINATION

The Tenant herein covenants by and for himself, his heirs, executors, administrators and assigns, and all persons claiming under or through him, that this Lease is made and accepted upon and subject to the following conditions:

That there shall be no discrimination against or segregation of any person or group of persons on account of race, color, creed, religion, sex, marital status, age, handicap, national origin or ancestry in the leasing, subleasing, transferring, use, occupancy, tenure, or enjoyment of the land herein leased, nor shall the Tenant himself, or any person claiming under or through him, establish or permit any such practice or practices of discrimination or segregation with reference to the selection, location, number, use or occupancy of tenants, lessees, subtenants, sublessees or vendees in the Premises herein leased.

ARTICLE 22 - MISCELLANEOUS

22.1 EXCLUSIVE. It is herewith agreed that this Lease contains no restrictive covenants or exclusives in favor of Tenant.

22.2 ESTOPPEL CERTIFICATE. Tenant shall at any time upon not less than ten (10) days prior written notice from Landlord execute, acknowledge and deliver to Landlord a statement in substantially the same form as the attached Exhibit H, in writing (a) certifying that this Lease is unmodified and in full force and effect (or, if modified, stating the nature of such modification and certifying that this Lease, as so modified, is in full force and effect) and the date to which the rent and other charges are paid in advance, if any, and (b) acknowledging that there are not, to Tenant's knowledge, any uncured defaults on the part of Landlord hereunder, or specifying such defaults if there are claims, and (c) acknowledging and certifying such other and further facts in connection with this Lease as may be reasonably requested by Landlord or a prospective purchaser or lender of the Facility or any part thereof. Any such statement may be conclusively relied upon by any prospective purchaser or encumbrancer of the Premises or Facility. Tenant's failure to deliver such statement within such time shall be conclusive upon Tenant (a) that this Lease is in full force and effect, without modification except as may be represented by Landlord, (b) that there are no uncured defaults in Landlord's performance, and (c) that not more than an amount equal to one (1) month's rent has been paid in advance. If Landlord desires to finance, refinance or sell its interest in the Premises or property on which the

Premises are located, or any part thereof or in the Facility, Tenant hereby agrees to deliver to any lender or purchaser designated by Landlord banking references and business history as Landlord may reasonably request. All such financial statements shall be received by Landlord in confidence and shall be used only for the purpose herein set forth.

22.3 TRANSFER OF LANDLORD'S INTEREST. In the event of a sale or conveyance by Landlord of Landlord's interest in the Premises or in the Facility other than a transfer for security purposes only, Landlord shall be relieved from and after the date specified in any such notice of transfer of all obligations and liabilities accruing on the part of Landlord, provided that any funds in the hands of Landlord at the time of transfer in which Tenant has an interest, shall be delivered to the successor of Landlord. This Lease shall not be affected by any such sale and Tenant agrees to attorn to the purchaser or assignee.

22.4 CAPTIONS; ATTACHMENTS; DEFINED TERMS. The captions of the sections and paragraphs of this Lease are for convenience only and shall not be deemed to be relevant in resolving any question of interpretation or construction of any section of this Lease. Exhibits attached hereto, and addendums and schedules are deemed by attachment to constitute part of this Lease and are incorporated herein. The words "Landlord and "Tenant," as used herein, shall include the plural as well as the singular. Words used in neuter gender include the masculine and feminine and words in the masculine or feminine gender include the feminine or masculine or neuter, as the case may be. If there be more than one Landlord or Tenant, the obligations hereunder imposed upon Landlord and Tenant shall be joint and several; as to a Tenant which consists of husband and wife the obligations shall extend individually to their sole and separate property as well as community property. The obligations contained in this Lease to be performed by Landlord shall be binding on Landlord's successors and assigns only during their respective periods of ownership.

22.5 ENTIRE AGREEMENT. This instrument along with any exhibits and attachments hereto constitutes the entire agreement between Landlord and Tenant relative to the Premises and this Lease and the exhibits and attachments may be altered, amended or revoked only by an instrument in writing signed by both Landlord and Tenant. It is understood that there are no oral agreements or representations between the parties hereto affecting this Lease, and this Lease supersedes and cancels any and all previous negotiations, arrangements, brochures, agreements or representations and understandings, if any, between the parties hereto or displayed by Landlord to Tenant with respect to the subject matter hereof, and none thereof shall be used to interpret or construe this Lease. There are no other representations or warranties between the parties or the parties and their agents or representatives and all reliance with respect to representations is solely upon the representations and agreements contained in this document.

22.6 SEVERABILITY. If any term or provision of this Lease shall, to any extent be determined by a court of competent jurisdiction to be invalid or unenforceable, the remainder of this Lease shall not be affected thereby, and each term and provision of this Lease shall be valid and be enforceable to the fullest extent permitted by law; and it is the intention of the parties hereto that if any provision of this Lease is capable of two (2) constructions, one (1) of which would render the provision void and the other of which would render the provision valid, then the provision shall have the meaning which renders it valid.

22.7 COST OF SUIT. If Tenant or Landlord shall bring any action for any relief against the other, declaratory or otherwise, arising out of this Lease, including any suit by Landlord for the recovery of rent or possession of the Premises, the losing party shall pay the successful party a reasonable sum for attorneys' fees which shall be deemed to have accrued on the commencement of such action and shall be paid whether or not such action is prosecuted to judgment. Should either party, without fault on his part, be made a party to any litigation instituted by the other or by any third party against the other, or by or against any person holding under or using the Premises, by license of the other, or for the foreclosure of any lien for labor or materials furnished to or for the other, or any such other person or otherwise arising out of or resulting from any act or transaction of the other, each party covenants to save and hold the other harmless from any judgment rendered against him or the Premises or any part thereof, and all costs and expenses, including reasonable attorneys' fees, incurred by the other in connection with such litigation.

22.8 TIME; JOINT AND SEVERAL LIABILITY. Time is of the essence of this Lease and each and every provision hereof, except as to the conditions relating to the delivery of possession of the Premises to Tenant. All the terms, covenants and conditions contained in this Lease to be performed by either party, if such party shall consist of more than one person or organization, shall be deemed to be joint and several, and all rights and remedies of the parties shall be cumulative and nonexclusive of any other remedy at law or in equity.

22.9 BINDING EFFECT; CHOICE OF LAW. The parties hereto agree that all the provisions hereof are to be construed as both covenants and conditions as though both the words importing such covenants and conditions were used in each separate paragraph hereof. Subject to any provisions hereof restricting assignment or subletting by Tenant and subject to Article 21.3, all of the provisions hereof shall bind and inure to the benefit of the parties hereto and their respective heirs, legal representatives, successors and assigns. This Lease shall be governed by the laws of the State of Idaho.

22.10 WAIVER. No covenant, term or condition or the breach thereof shall be deemed waived, except by written consent of the party against whom the waiver is claimed, and any waiver or the breach of any covenant, term or condition shall not be deemed to be a waiver of any other covenant, term or condition. Acceptance by Landlord of any performance by Tenant after the time the same shall become due unless cured within the applicable grace period, shall not constitute a waiver by Landlord of the breach or default of any covenant, term or condition unless otherwise expressly agreed to by Landlord in writing.

22.11 SURRENDER OF PREMISES. The voluntary or other surrender of this Lease by Tenant or a mutual cancellation thereof, shall not work a merger, and shall, at the option of Landlord, terminate all or any existing subleases or subtenancies, or may, at the option of Landlord, operate as an assignment to it of any or all such subleases and subtenancies.

22.12 HOLDOVER. If Tenant remains in possession of all or any part of the Premises after the expiration of the term hereof and any extensions thereof, without the express consent of Landlord, and without some other agreement set forth in writing, such tenancy shall be from month to month only, and in such case, rent and other monetary sums due hereunder shall be payable in the amount and at the time specified in this Lease, except that the Base Rent shall be

adjusted to an amount which is equal to the Base Rent (as such Base Rent amount may have been adjusted as of the expiration of the term pursuant to Exhibit D) multiplied by one and one-half (1.5), and such month to month tenancy shall be subject to every other term, covenant and agreement contained herein. Such month-to-month tenancy may be terminated upon fifteen (15) days written notice. This inclusion of this Article shall not be construed as Landlord's permission for Tenant to hold over.

22.13 FORCE MAJEURE. Any prevention, delay or stoppage due to acts of God or causes beyond the reasonable control of the party obligated to perform, shall excuse the performance by such party for a period of time equal to any such prevention, delay or stoppage except the obligations imposed with regard to rent and other charges to be paid by Tenant pursuant to this Lease.

22.14 NOTICES. Whenever any notice, approval, consent, request or election is given or made pursuant to this Lease, it shall be deemed delivered (i) when it is in writing and personally delivered or (ii) forty eight (48) hours after it is deposited in the United States mail, postage prepaid, certified or registered mail, return receipt requested and addressed to the party at the address set forth in Articles 1.2 and 1.4 above, or at such other addresses Landlord or Tenant may from time to time notify the other in writing; (iii) when it is deposited with a reputable overnight courier service (such as Federal Express or DHL), delivery charges paid, receipt confirmation requested, and addressed to the party at the address set forth in Articles 1.2 and 1.4 above, or at such other addresses Landlord or Tenant may from time to time notify the other in writing; or (iv) one (1) business day after transmission by electronic mail, facsimile or other electronic system.

22.15 INTEREST ON PAST DUE AMOUNTS. Except as expressly herein provided, any amount due to Landlord not paid when due shall bear interest at a rate of eighteen percent (18%) from the due date. Payment of such interest shall not excuse or cure any default by Tenant under this Lease.

22.16 CORPORATE AUTHORITY. If Tenant is a corporation each individual executing this Lease on behalf of said corporation represents and warrants that such individual is duly authorized to execute and deliver this Lease on behalf of said corporation in accordance with a duly adopted resolution of the Board of Directors of said corporation or in accordance with the Bylaws of said corporation, and that this Lease is binding upon said corporation in accordance with its terms. Tenant shall prior to or concurrently with the execution of this Lease, deliver to Landlord a certified copy of a resolution of the Board of Directors of said corporation authorizing or ratifying the execution of this Lease.

22.17 RECORDING. Neither this Lease nor any memorandum thereof shall be recorded without the express written consent of Landlord, and any such unauthorized recording of the same shall constitute an event of default by Tenant.

22.18 BROKERAGE. Tenant and Landlord represent and warrant that to one another that they have had no dealings with any broker or agent in connection with this Lease other than Landlord's broker, Lew Manglos of Colliers International, and Tenant's broker, Karen Warner of Colliers International. Each of Tenant and Landlord covenant hold harmless and indemnify one

another from and against any and all cost, expense or liability for any compensation, commissions and charges claimed by any other broker or agent with respect to this Lease or the negotiation thereof. Landlord shall be responsible for payment of the brokerage fee pursuant to separate agreement.

22.19. BUSINESS IMPROVEMENT DISTRICT. Tenant and Landlord understand and acknowledge that the City of Boise has established a Business Improvement District pursuant to Ordinance No. 5019 to operate and maintain public capital improvements, and that Tenant is subject to the provisions of that ordinance. This shall include responsibility for payment of fees and assessments, if any, which may be levied against Tenant or the Premises on account of its location within the Business Improvement District, which assessments shall be directly paid to the Downtown Boise Association or as directed.

22.20 LIMITATION ON LANDLORD'S LIABILITY. If Landlord is in default under this Lease, and as a consequence Tenant recovers a money judgment against Landlord, the judgment shall be satisfied only out of the proceeds of sale received on execution of the judgment and levy against the right, title and interest of Landlord in the building, other improvements and land of which the Premises are a part, and out of rent or other income from such real property receivable by Landlord or out of the consideration received by Landlord from the sale or other disposition of all or any part of Landlord's right, title and interest in the building, other improvements and land of which the Premises are a part. No members or managers comprising the limited liability company designated as Landlord shall be personally liable for any deficiency.

22.21 CONFIDENTIALITY. Landlord and Tenant acknowledge that the terms of this Lease are confidential and are related to matters solely between the parties, and therefore this Lease and its terms and conditions have only been, and will only be divulged: (a) on a need-to-know basis to Tenant's employees, members of professional firms serving it or potential lenders; (b) as any governmental agency may require in order to comply with applicable laws; and (c) to the extent that such information is a matter of public record.

22.22 FINANCIAL STATEMENTS AND REPORTS. Upon the written request of Landlord, Tenant shall promptly furnish Landlord, upon Landlord's request, financial statements and reports accurately reflecting Tenant's then current financial condition, which request shall not be made more than once on an annual basis unless required by Landlord's lender or by a prospective lender or purchaser of the Property. All such financial statements shall be received by Landlord in confidence. Notwithstanding the foregoing, Landlord expressly acknowledges that Tenant has provided 2009 financial statements in connection the execution of this Lease. The next request will not be prior to the one year anniversary of the Lease Execution date unless required by a prospective lender or purchase of the property.

23 **RIGHT OF FIRST OFFER.** Subject to Section 23.2 below, and subject to the rights of any tenant or tenants of the ROFO Space (as defined below) existing as of the date of this Lease (individually, the "Prior Tenant"), during the Term of the Lease, Tenant shall have and is hereby granted a right of first offer on any rentable space in the Building that is on the third floor of the Building (the "ROFO Space"), which right shall be exercised in accordance with the procedures set forth in Section 23.1 below.

23.1 If at any time during the Term of the Lease any ROFO Space becomes available for lease to anyone other than a Prior Tenant, Landlord shall give written notice thereof to Tenant (the "Landlord's ROFO Notice") identifying that portion of the ROFO Space that is available (the "Subject ROFO Space"). Landlord's ROFO Notice may be given at any time up to twelve (12) months in advance of such availability and shall contain the terms upon which Landlord intends to offer the Subject ROFO Space for lease to the market. Tenant shall notify Landlord within five (5) business days of receipt of Landlord's ROFO Notice whether it desires to lease the Subject ROFO Space on the terms set forth in Landlord's ROFO Notice; provided, however, that failure to notify Landlord within said 5 business-day period shall be deemed a refusal by Tenant. Tenant shall only be permitted to exercise its right of first offer as to all of the Subject ROFO Space described in any ROFO Notice. After any such refusal or deemed refusal, Tenant shall have no further rights to such Subject ROFO Space, and Landlord shall be free to enter into one or more leases for the Subject ROFO Space to any person or entity on any terms and conditions. If Tenant exercises its right of first offer with respect to such Subject ROFO Space, such space shall be added to the Premises for the remaining Term of the Lease (including the Option Term, if any) on all the terms, covenants and conditions specified in the Landlord's ROFO Notice, and otherwise on the terms, covenants and conditions of the Lease to the extent that such terms, covenants and conditions of the Lease do not conflict with the terms, covenants and conditions specified in the Landlord's ROFO Notice. Any ROFO Space added to the Premises pursuant to this Section 23 shall become a part of the Premises for all purposes of this Lease, and any reference in this Lease to the term "Premises" shall be deemed to refer to and include such portion of the ROFO Space, except as expressly provided otherwise in this Lease.

23.2 Tenant's right to exercise its right of first offer with respect to any portion of the ROFO Space pursuant to this Section 23, is subject to the following conditions: (i) that on the date that Tenant delivers its binding written notice of its election to exercise its right of first offer, Tenant is not in default under any of the terms, covenants or conditions of the Lease, and an unmatured event of default has not occurred and is not continuing; and (ii) that Tenant shall not have assigned the Lease or sublet any portion of the Premises at any time during the period commencing with the date that Tenant delivers its binding written notice to Landlord of its exercise of its right of first offer and ending on the date on which such ROFO Space is available to be added to the Premises, or at any time prior to such period, if such assignment or sublease extends into such period.

23.3 Promptly after Tenant's exercise of its right of first offer pursuant to this Section 23, Landlord shall prepare an amendment to the Lease to reflect changes in the size of the Premises, Base Rent, Tenant's Proportionate Share and any other appropriate

terms, due to the addition of the ROFO Space. Tenant shall execute and return such an amendment to the Lease within fifteen (15) days after its submission to Tenant.

[signature page follows]

IN WITNESS WHEREOF, Landlord and Tenant have executed this Lease the date and year first above written.

LANDLORD:

TENANT:

Boise Mode, LLC, an Illinois limited liability company

TEM ENTERPRISES, d/b/a XTRA Airways, a Nevada corporation

By: Baum Development, LLC, its manager

By: *Lisa Owen*
Name: *Lisa Owen*
Title: *President*

By: *D L Baum*
Name: *DAVID L. BAUM*
Title: *manager*

EXHIBIT "A"

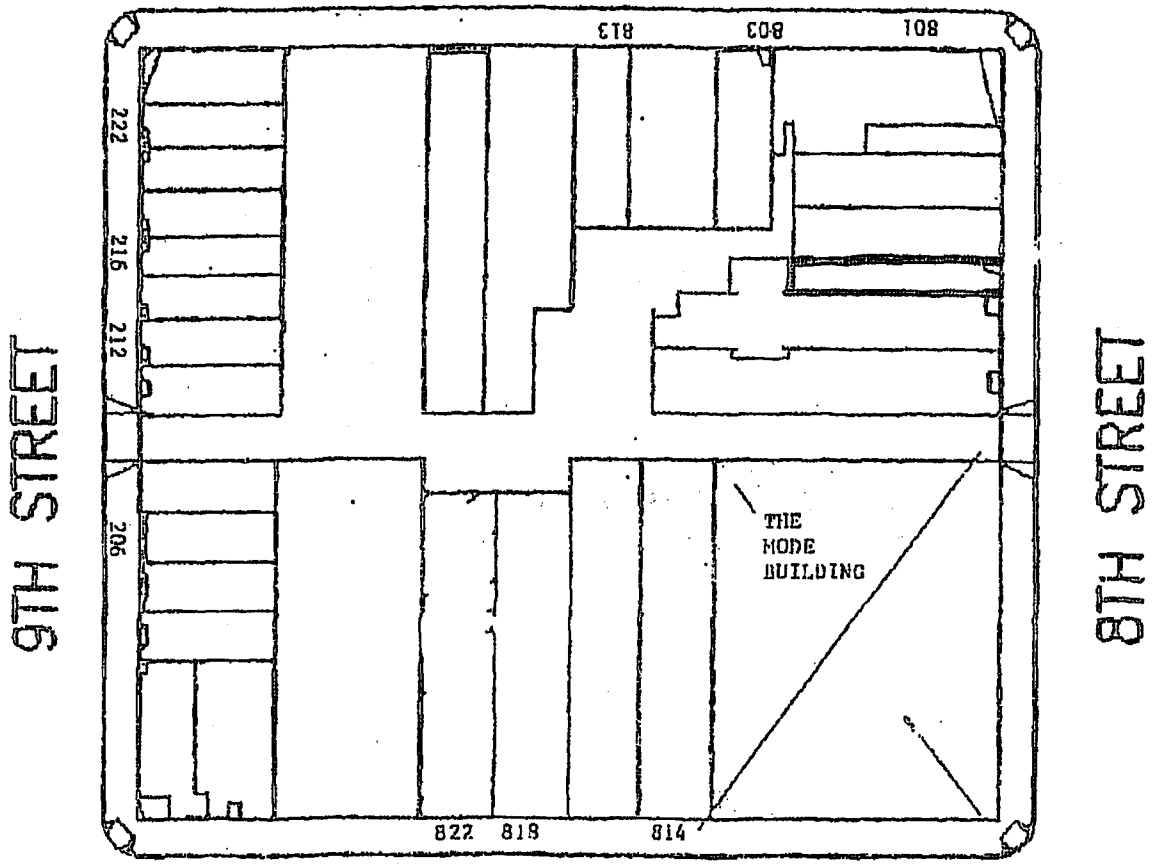
SCHEMATIC DEPICTION OF LOCATION OF PREMISES AND FLOOR PLAN

(SEE ATTACHED TWO PAGES)

EXHIBIT A

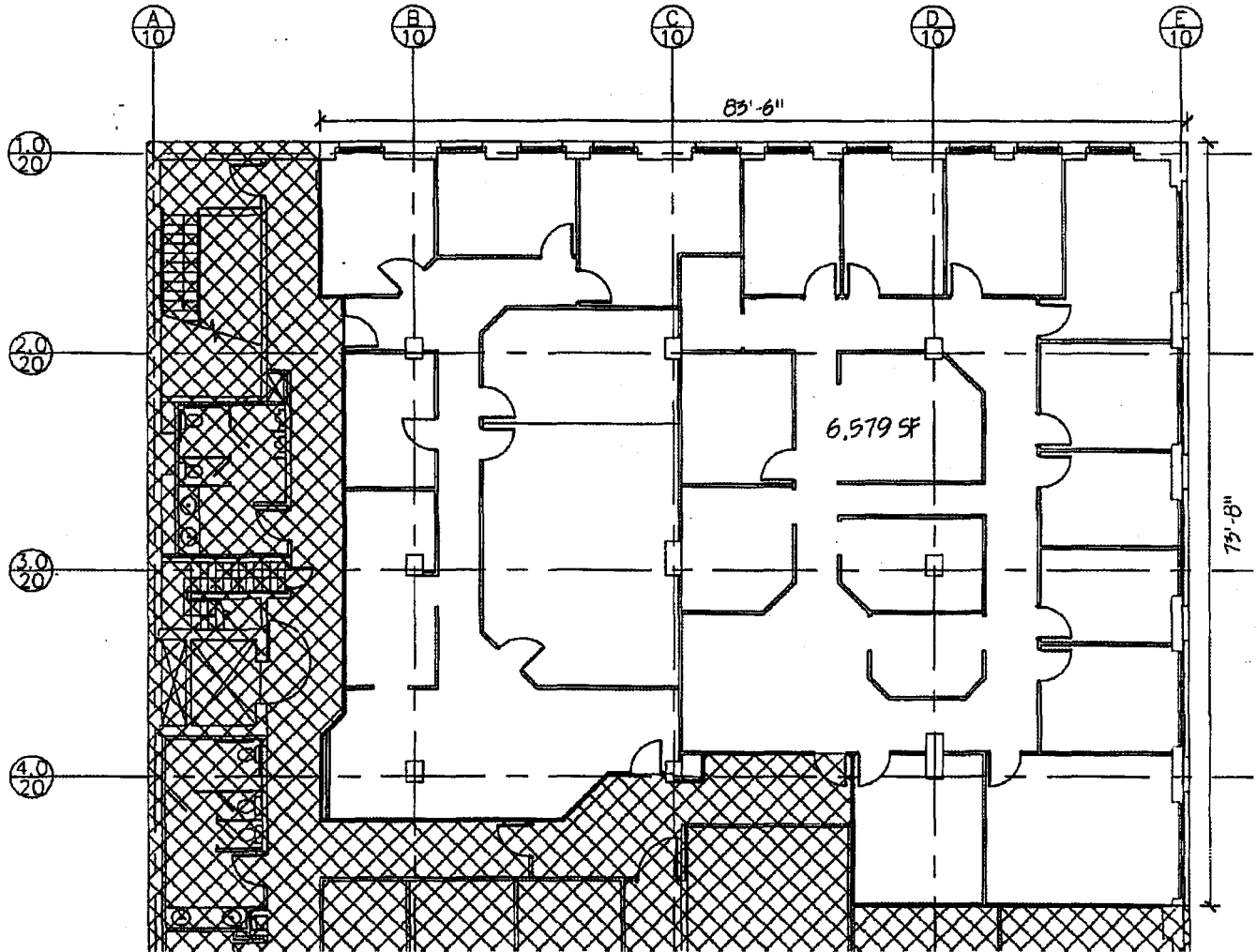
Location of Premises - Schematic Depiction

BANNOCK STREET



IDAHO STREET

OFFICE/RETAIL LEASE AGREEMENT - 30



DEVELOPER MAKES NO REPRESENTATIONS OR WARRANTY REGARDING
THE ACCURACY OR COMPLETENESS OF THE DRAWINGS. ALL WALL
DIMENSIONS AND SQUARE FOOTAGES ARE APPROXIMATE AND SUBJECT
TO CHANGE WITHOUT WARNING.

1 THIRD FLOOR PLAN
A.0 1/16" = 1'-0"

EXHIBIT "B"

BASE RENT

For all periods from and after the Rent Commencement Date, Tenant shall pay Base Rent with respect to the Premises at the dates and in the amounts set forth below:

<u>Period</u>	<u>Annual Base Rent</u>	<u>Monthly Base Rent</u>
5/1/10-5/31/10	Base Rent Abatement	Base Rent Abatement
6/1/10-4/30/11	\$83,882.25	\$7,625.66
*5/1/11-5/31/11	*Base Rent Abatement	*Base Rent Abatement
6/1/11-4/30/12	\$90,461.25	\$8,223.75

**provided Tenant is not in Default beyond under any applicable cure periods, Base Rent shall abate during this one month period, however, if Tenant is in Default beyond under any applicable cure periods under the Lease, Base Rent shall not abate for this month and shall be spread out over the 12 month period commencing on 5/1/11 through 4/30/12 such that Tenant's Rent Schedule for Lease Year 2 shall be :*

<i>5/1/11-4/30/12</i>	<i>\$90,461.25</i>	<i>\$7,538.44 .</i>
-----------------------	--------------------	---------------------

EXHIBIT "C"

IMPROVEMENTS

LANDLORD IMPROVEMENTS

The Landlord shall provide the following Landlord Improvements:

1. Landlord shall enclose the server room and provide its own cooling system that will cool the space to a constant 68 degrees. (Tenant's architect shall spec the cooling system for Landlord's approval prior to commencement of Landlord's work)
2. Landlord shall add a 220 volt outlet to the copier room.

The cost of the Landlord Improvements shall be amortized over five years (the length of the initial Term of the Lease and the Option Term). In the event that Tenant does not exercise its right to enter into the Option Term, Tenant shall reimburse Landlord for the unamortized costs of the above Landlord Improvements.

Other than the Landlord Improvements specified above, Tenant accepts the Premises and the Facility in an "as-is" – "where – is" condition.

TENANT IMPROVEMENTS

All other improvements to the space not specified under Landlord Improvements above, will be at the sole cost and expense of Tenant.

Tenant may, at its sole cost and expense, and subject to all required municipal approvals, add a fire suppression system or adjust the sprinklers in the server room of the Premises and Landlord will fully cooperate in Tenant's endeavors to accomplish same.

EXHIBIT "D"

MODE BUILDING

OPTION TO EXTEND

OPTION TERM

Tenant shall have the right, at its election, to extend the original term of this Lease for one (1) extension period of three (3) years, commencing upon the expiration of the original term, or the original term as thus previously extended (sometimes herein referred to as an "Extended Term"), provided that Tenant shall give Landlord notice of the exercise of such election at least one hundred eighty (180) days prior to the expiration of the original term, or the original term as previously extended, as the case may be. Prior to the exercise by Tenant of any such elections to extend the lease term, the expression "the term of this lease" shall mean the Initial Term; after the exercise by Tenant of any of such elections, the expression "the term of this lease" shall mean the lease term as it may have then been extended by the Extended Term. Except as expressly otherwise provided in this lease, all the agreements and conditions in this lease contained shall apply to each period or periods to which the lease term shall be extended as aforesaid. If Tenant shall give notice of the exercise of any such election in the manner and within the time provided aforesaid, the term shall be extended upon the giving of such notice without the requirement of any action on the part of Landlord.

Additionally, the cost of the Landlord Improvements set forth in Exhibit C shall be amortized over five years (the length of the initial Term of the Lease and the Option Term). In the event that Tenant does not exercise its right to enter into the Option Term described above, Tenant shall reimburse Landlord for the unamortized costs of the above Landlord Improvements.

EXTENDED TERM BASE RENT

A. Annual Base Rent payable during the Extended Term shall be at ninety five percent (95%) of the then current market rental rate with respect to comparable retail space in downtown Boise, Idaho (the "Market Rate") at the time of the commencement of such Extended Term, but in no event less than the fully escalated annual Base Rent per Rentable Square Foot in effect for the calendar month immediately prior to the commencement of such Extended Term. Landlord and Tenant shall negotiate in good faith to determine the amount of annual Base Rent for each Extended Term within thirty (30) days of the date of Landlord's receipt of Tenant's written notice of its election to exercise the extension option provided for under Article 3.2. Tenant shall notify Landlord of the necessity to determine the Market Rent in its renewal notice.

B. In the event Landlord and Tenant are unable to agree upon the annual Base Rent for any Extended Term within said thirty (30) day period, the annual Base Rent for the such Extended Term shall be based upon the Market Rate determined by a board of three (3) licensed real estate brokers, one of whom shall be named by Landlord, one by Tenant, and the two so appointed shall select a third. Each member of the board of brokers shall be licensed in the State of Idaho as a real estate broker, specializing in the field of commercial retail leasing in

downtown Boise, Idaho, having no less than ten (10) years experience in such field, and be recognized as ethical and reputable within the field. Landlord and Tenant agree to make their appointments promptly within five (5) days after the expiration of the thirty (30) day period, or sooner if mutually agreed upon. The two brokers selected by Landlord and Tenant shall promptly select a third broker within ten (10) days after they both have been appointed, and each broker, within fifteen (15) days after the third broker is selected, shall submit his or her determination of said Market Rate. The Market Rate shall be the mean of the two closest rental rate determinations; however, in no event shall the determination of the annual Base Rent be less than the fully escalated annual Base Rent in effect for the calendar month immediately prior to the commencement of such Extended Term. Once the Market Rate is determined, Landlord shall have the right to allocate the annual Base Rent and allowances to Tenant, such that the aggregate net cost to Tenant equals ninety five percent (95%) of the Market Rate. Landlord and Tenant shall each pay the fee of the broker selected by it, and they shall equally share the payment of the fee of the third broker.

C. An amendment modifying this Lease to set forth the annual Base Rent for the Premises during each such Extended Term shall be executed by Landlord and Tenant within ten (10) days of the parties' agreement, or, in the alternative, within ten (10) days of the brokers' determination of the Monthly Base Rent for the Extended Term.

D. In the event Tenant assigns or sublets the Premises, this option to extend shall become null and void.

EXHIBIT "E"

BUILDING RULES AND REGULATIONS

Except as otherwise provided in the Lease, the following rules and regulations shall apply for the Building and Facility:

1. The sidewalks, entrances, halls, passages, elevators and stairways shall not be obstructed by any of the Tenants, or used by them for any other purpose than for ingress and egress to and from their respective Premises.
2. Tenants, their agents, employees, or visitors, shall not make or commit any improper noises or disturbances of any kind in the building, or make or define the water closets, toilet rooms, windows, elevators, or doors of the Building or interfere in any way with other Tenants or those having business with them.
3. The toilet rooms, water closets, and other water apparatus shall not be used for any purpose other than those for which they were constructed, and no sweepings, rubbish, rags, ashes, chemicals, or the refuse from electric batteries or other unsuitable substance, shall be thrown therein. Any damage from such misuse or abuse shall be borne by the Tenant by whom or by those employees or visitors it shall be caused.
4. No carpet, rug, or other article shall be hung or shaken out of any window or placed in corridors as a door mat, and nothing shall be thrown or allowed to drop by the Tenants, their agents, employees, or visitors, out of the windows or doors, or down the passages or shafts of the Building, and no Tenant shall sweep or throw, or permit to be thrown from the Premises, any dirt or other substances into any of the corridors or halls, elevators, shafts, or stairways of said building.
5. No linoleum, or oil cloth, or rubber or other air-tight coverings shall be laid on the floors, nor shall articles (except for interior artwork) be fastened to, or holes drilled, or nails or screws driven into walls, windows, partitions, nor shall the walls or partitions be painted, papered or otherwise covered, or in any way marked or broken, without the prior written consent of the Landlord.
6. Nothing shall be placed on the outside of the Building, or on the windows, window sills, or projections.
7. The only window treatment permitted for the windows in the Premises is that installed by and approved in writing by the Landlord.
8. No sign, advertisement, or notice shall be inscribed, painted, or affixed on any part of the outside or inside of the common area of said Building, other than as provided for in the Lease. Signs on doors and windows shall be subject to approval by Landlord. Directory in the lobby, with the names of Tenants, will be provided by Landlord.
9. After permission to install telephones, call boxes, telegraph wires, or other electric wires has been granted, Landlord will direct where and how the same are to be placed. No

wires shall be run in any part of the Building excepting by or under the direction of Landlord. Attaching of wires to the outside of the Building is absolutely prohibited. It is understood that telephones are installed solely for the use and benefit of Tenant and, accordingly, Tenant will save Landlord harmless for any damages thereto.

10. The Landlord shall in all cases have the right to prescribe the weight and proper position of safes or other heavy objects in the Building; and the bringing in of said safes, all furniture, fixtures or supplies, the taking out of said articles, and moving about of said articles within the building, shall only be at such time and in such manner as the Landlord shall reasonably designate, provided that Landlord shall work in concert with Tenant to designate mutually agreeable times; and any damage caused by any of the before mentioned operations, or by any of the said articles during the time they are in the Building, shall be repaired by Tenant at Tenant's expense.
11. No motor vehicles will be allowed in Building.
12. No Tenant shall do or permit anything to be done in said Premises, or bring or keep anything therein which will in any way increase the rate of fire insurance on said Building or on property kept therein, or obstruct or interfere with the rights of other Tenants, or in any way injure or annoy them or conflict with the laws relating to fires, or with the regulations of the Fire Department or with any insurance policy upon said Building or any part thereof, or conflict with any of the rules and ordinances of the Department of Health. Tenant understands and agrees that the vehicle of any Tenant obstructing any unauthorized area, and particularly in areas designated by specially painted curbs as fire lane areas, may be towed away at owner's risk and expense.
13. No animals or birds shall be brought into or kept in or upon the Premises.
14. No machinery of any kind, other than normal office machines, shall be allowed to be operated on the Premises without prior written consent of Landlord.
15. The use of office suites as: sleeping apartments; for the preparation of foods; or for any immoral or illegal purpose is absolutely prohibited.
16. No Tenant shall conduct, or permit any other person to conduct any auction upon the Premises, or store goods, wares, or merchandise upon the Premises without the prior written approval of the Landlord except for the usual supplies and inventory to be used by the Tenant in the conduct of its business.
17. Any and all damage to floors, walls, or ceilings due to Tenant or Tenant's employees' or customers failure to shut off running water or liquid shall be paid by Tenant.
18. At any time while the Building is in charge of a watchman, any person entering or leaving the Building may be questioned by him as to his business in the Building; and anyone not satisfying the watchman of his right to enter the Building may be excluded by him.

EXHIBIT "F"

FORM OF CONFIRMATION OF TERM

This Confirmation of Term is entered into on this ___ day of _____, 20___, between Boise Mode, LLC, an Illinois limited liability company ("Landlord"), whose address is 1030 West Chicago Avenue, Suite 300, Chicago, Illinois, 60642, and _____ ("Tenant"), whose address is _____.

Landlord and Tenant entered into a certain Lease dated _____, 20___ (the "Lease"), demising certain premises located at the _____, Boise, Idaho, as more particularly described in the Lease. All capitalized terms not defined herein shall have the meanings respectively ascribed to them in the Lease.

Landlord and Tenant hereby agree to confirm the establishment of the Commencement and Expiration Dates of the Term as follows:

- (a) _____ is the "Commencement Date" of the Term referred to in the Lease.
- (b) _____ is the "Rent Commencement Date" of the Term referred to in the Lease.
- (c) _____ is the date that the [initial] Term of the Lease shall expire (the "Expiration Date").
- (d) Tenant has ___ () option(s) to extend the Term for a period of ___ () years (each).

Tenant hereby confirms the following: Tenant has accepted possession of the Premises pursuant to the terms of the Lease; the improvements and space required to be furnished according to the Lease by Landlord have been furnished; there are no offsets or credits against Rent, nor has any security deposit been paid, except as provided in the terms of the Lease; and the Lease is in full force and effect.

This Confirmation of Term and all of the provisions hereof, shall inure to the benefit of, or bind (as the case may be), Landlord and Tenant and their respective successors and assigns, subject to the restrictions on assignment and subletting set forth in the Lease.

LANDLORD:

TENANT:

**Boise Mode, LLC, an Illinois
limited liability company**

By: Baum Development, LLC,
its manager

By: _____

Name: _____

Its: _____

By: _____
Name/ Title: _____

EXHIBIT "G"

MODE BUILDING APPROVED SIGNS

INTERIOR SIGNAGE

Landlord will provide signage to Tenant on the building lobby directory, in the 3rd floor landing, and on Tenant's door, all at Landlord's sole cost and expense.

EXTERIOR SIGNAGE

Subject to approval from the City of Boise and all appropriate governmental agencies (all to be obtained at Tenant's sole cost and expense) and subject to Landlord's reasonable approval of such signage, Tenant shall have the right to install exterior building signage at Tenant's sole cost and expense (including the costs associated with maintenance and removal of the sign).

**TEM ENTERPRISES dba
Xtra Airways and Casino Express**

331 7th Street Elko, Nevada 89801 (775) 738-6040

ESTOPPEL LETTER

March 5 _____, 2010

ASSOCIATED BANK, NATIONAL ASSOCIATION
Corporate 500 Centre
520 Lake Cook Road #375
Deerfield, IL 60015
Attention: _____

Re: Mode Building (the "Building")

Gentlemen:

We understand that you ("Lender") have committed to make a loan ("Loan") to Landlord (hereinafter defined), to be secured by, among other things, (a) a mortgage ("Mortgage") on the Building, and (b) an assignment of rents and leases respecting such Building. Furthermore, we understand that, as a condition to making the Loan, you have required this agreement and certification by the undersigned.

The undersigned ("Tenant"), being the Tenant under the lease referred to in Paragraph 1 below, covering certain premises ("Leased Premises") in the Building hereby certifies to you that the following statements are true, correct and complete as of the date hereof.

1. Tenant is the tenant under a lease with Boise Mode, LLC ("Landlord"), or Landlord's predecessor in title to the Building dated _____, 20____, demising to Tenant 6579 square feet in the Building. The initial term of the lease commenced on _____, 20____, and will expire on _____, 20____, exclusive of unexercised renewal options, extension options and termination rights contained in the lease. There have been no amendments, modifications or revisions to the lease, and there are no agreements of any kind between Landlord and Tenant regarding the Leased Premises, except as provided in the lease or except as follows: (if none, write "none").

The lease, and all amendments and other agreements referred to above are referred to in the following portions of this letter collectively as the "Lease."

2. The Lease has been duly authorized and executed by Tenant and is in full force and effect and Tenant has delivered to Landlord and Lender concurrently herewith a true, correct and complete copy of the Lease.

3. Tenant has accepted and is in sole possession of the Leased Premises and is presently occupying the Leased Premises. The Lease has not been assigned, by operation of law or otherwise, by Tenant, and no sublease, concession agreement or license, covering the Leased Premises, or any portion of the Leased Premises, has been entered into by Tenant. If the landlord named in the Lease is other than Landlord, Tenant has received notice of the assignment to

EXHIBIT G - 43

TEM ENTERPRISES dba
Xtra Airways and Casino Express

331 7th Street Elko, Nevada 89801 (775) 738-6040

Landlord of the landlord's interest in the Lease and Tenant recognizes Landlord as the landlord under the Lease.

4. Tenant began paying rent on _____. Tenant is obligated to pay fixed or base rent under the Lease in the annual amount of _____ Dollars (\$ _____), payable in monthly installments of _____ Dollars (\$ _____). No rent under the Lease has been paid more than one (1) month in advance, and no other sums have been deposited with Landlord other than _____ Dollars (\$ _____) deposited as security under the Lease. Except as specifically stated in the Lease, Tenant is entitled to no rent concessions or free rent. Percentage Rent for the last lease year ending _____, 20__, in the amount of _____ Dollars (\$ _____) based upon Tenant's receipts of _____ Dollars (\$ _____) has been paid by Tenant to Landlord. The Lease provides that Tenant pay _____ percent (___%) of any increase in operating expenses and real property taxes in excess of the 20__ base year operating expenses and real property taxes of _____ Dollars (\$ _____).

5. All conditions and obligations of Landlord relating to completion of tenant improvements and making the Leased Premises ready for occupancy by Tenant have been satisfied or performed and all other conditions and obligations under the Lease to be satisfied or performed, or to have been satisfied or performed, by Landlord as of the date hereof have been fully satisfied or performed.

6. There exists no defense to, or right of offset against, enforcement of the Lease by Landlord. Neither Tenant nor, to Tenant's knowledge, Landlord is in default under the Lease and no event has occurred which, with the giving of notice or passage of time, or both, could result in such a default.

7. Tenant has not received any notice of any uncured present violation of any federal, state, county or municipal laws, regulations, ordinances, orders or directives relating to the use or condition of the Leased Premises or the Building.

8. Except as specifically stated in the Lease, Tenant has not been granted (a) any option to extend the term of the Lease, (b) any option to expand the Leased Premises or to lease additional space within the Building or elsewhere, (c) any right of first refusal on any space in the Building, (d) any right to terminate the Lease prior to its stated expiration, or (e) any option or right of first refusal to purchase the Leased Premises or the Building or any part thereof.

9. Tenant acknowledges having been notified that Landlord's interest in and to the Lease has been, or will be, assigned to you pursuant to the aforesaid assignment of rents and leases, as security for the Loan. Until further notice from you, however, Tenant will continue to make all payments under the Lease to Landlord and otherwise look solely to Landlord for the performance of the Landlord's obligations under the Lease.

10. So long as the Mortgage is in effect, Tenant will not, without your prior written consent, (a) agree to any assignment, sublet, adjustment, modification, supplement or

EXHIBIT G - 44

TEM ENTERPRISES dba
Xtra Airways and Casino Express

331 7th Street Elko, Nevada 89801 (775) 738-6040

amendment to the Lease, (b) pay any rent under the Lease more than one (1) month in advance, or (c) agree to any termination, cancellation or surrender of the Lease. Tenant will allow your employees and representatives to inspect the Leased Premises from time to time upon reasonable advance notice.

11. Tenant agrees to give to you, by certified mail, a copy of any notice of default under the Lease served by Tenant upon Landlord. Tenant further agrees that if Landlord shall have failed to cure such default within the time provided in the Lease, then you shall have an additional thirty (30) days after the expiration of Landlord's cure period within which to cure such default, or, if such default is not a monetary default, such default cannot be cured within that time, then such additional time as may be necessary if, within your initial thirty (30) day cure period, you shall have commenced and shall be diligently pursuing the remedies necessary to cure such default (including, but not limited to, commencement of foreclosure proceedings if necessary to effect such cure). Such period of time shall be extended by any period within which you are prevented from commencing or pursuing such foreclosure proceedings by reason of the bankruptcy of Landlord. Until the time allowed as aforesaid for you to cure such default has expired without cure, Tenant shall have no right to and shall not terminate the Lease on account of such default.

The agreements and certifications set forth herein are made with the knowledge and intent that you will rely on them in making the aforesaid loan, and you and your successors and assigns may rely upon them for that purpose.

Very truly yours,



(Name of Tenant)

By: Lisa Dunn

Title: President

The undersigned Guarantor(s) of the Lease hereby certify to Lender and its successors and assigns as of the date hereof that their guaranty of the Lease is in full force and effect and has not been amended or modified and that the undersigned Guarantor(s) have no claims or defenses under the guaranty or otherwise with respect to their performance in full of all terms, covenants and conditions of the guaranty.



Damage Calculation For MODE Building Donahoe Pace

<i>Tenant</i>	<i>Lease Term</i>				
Donahoe Pace	12/1/2006 5/31/2010	Lease Rate		\$8,215.00	Billed through May 2010
Tenant Vacated on or about 11-03-2009	MTM	Storage		\$274.50	
		ReTax est		\$66.00	
				\$8,555.50	
Xtra Airways	5/1/2010 4/30/2012	Lease Rate		\$7,625.66	
Replacement Lease Term		Lease Cost		\$7,625.66	
Possession Date 3-5-2010		Abatement	1month (May)	\$10,460.61	
		Commissions			
		Marketing			
		Turnover Costs			
		TI			
		Difference in Rent		(\$589.34)	Months 1
Donahoe Open Account Ledger				\$103,250.36	
Break Out Legal Fees				(\$7,274.40)	
Total Due				\$95,975.96	

121709

COLLIERS
INTERNATIONAL

**DOWNTOWN OFFICE
SPACE FOR LEASE**

Mode Building
Corner of 8th & Idaho | Boise

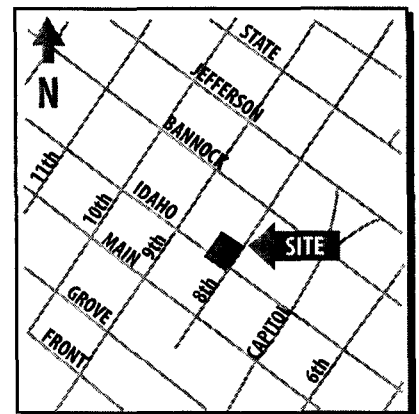


OFFICE SPACE AVAILABLE

The Mode Building occupies the best corner in Downtown Boise. Conveniently located next to other Class 'A' offices, restaurants, and shops, it is an ideal location for your business.

OFFERING SUMMARY

- Office Space Available:
Third Floor, Suite 304: ±222 RSF - ±6,579 RSF, divisible
- Extraordinary number of amenities in the immediate area
- Excellent location in the Downtown core
- Large windows with excellent views
- Within walking distance of Capitol, shops, and restaurants
- Ready for occupancy
- Lease Rate: \$13.90 PSF, FSEJ



FOR MORE INFORMATION:
LEW MANGLOS, CCIM
208-472-2841
lew.manglos@colliersidaho.net

Sales & Leasing | Investment | Property Management | Site Selection | Valuation | Consulting

COLLIERS
INTERNATIONAL

BOISE 755 W. Front St., Suite 300 • Boise, Idaho 83702 • Tel. 208.345.9000 | SUN VALLEY 200 W. Rivers St., Suite 301 • Ketchum, Idaho 83340 • Tel. 208.726.1918

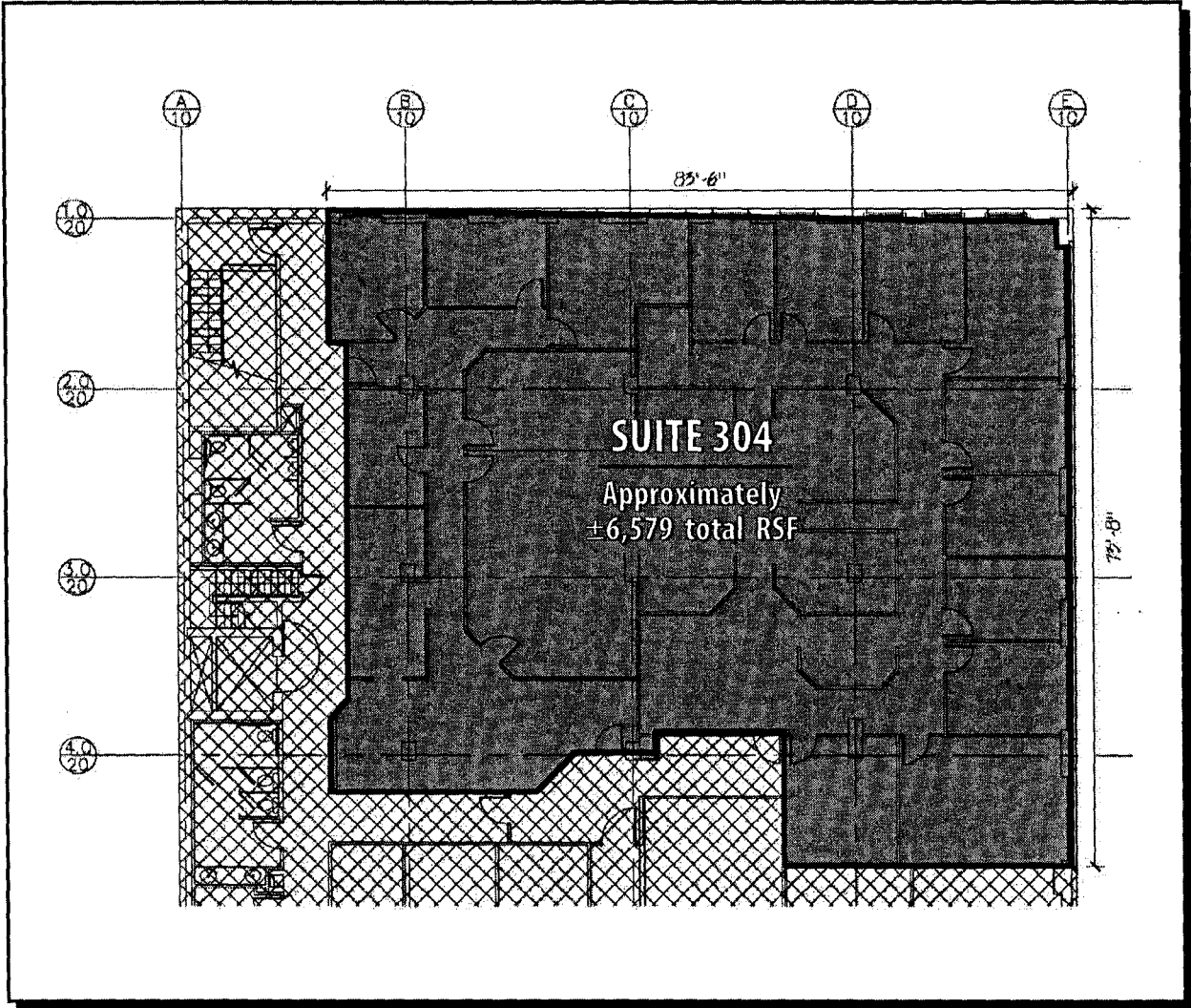
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EXHIBIT 4

DOWNTOWN OFFICE
SPACE FOR LEASE

Mode Building

Corner of 8th & Idaho | Boise



FOR MORE INFORMATION:

LEW MANGLOS, CCIM

208-472-2841

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755 W. Front St., Suite 300
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208.345.9000

NAMPA
5660 E. Franklin Rd., Suite 110
Nampa, Idaho 83687
208.472.1660

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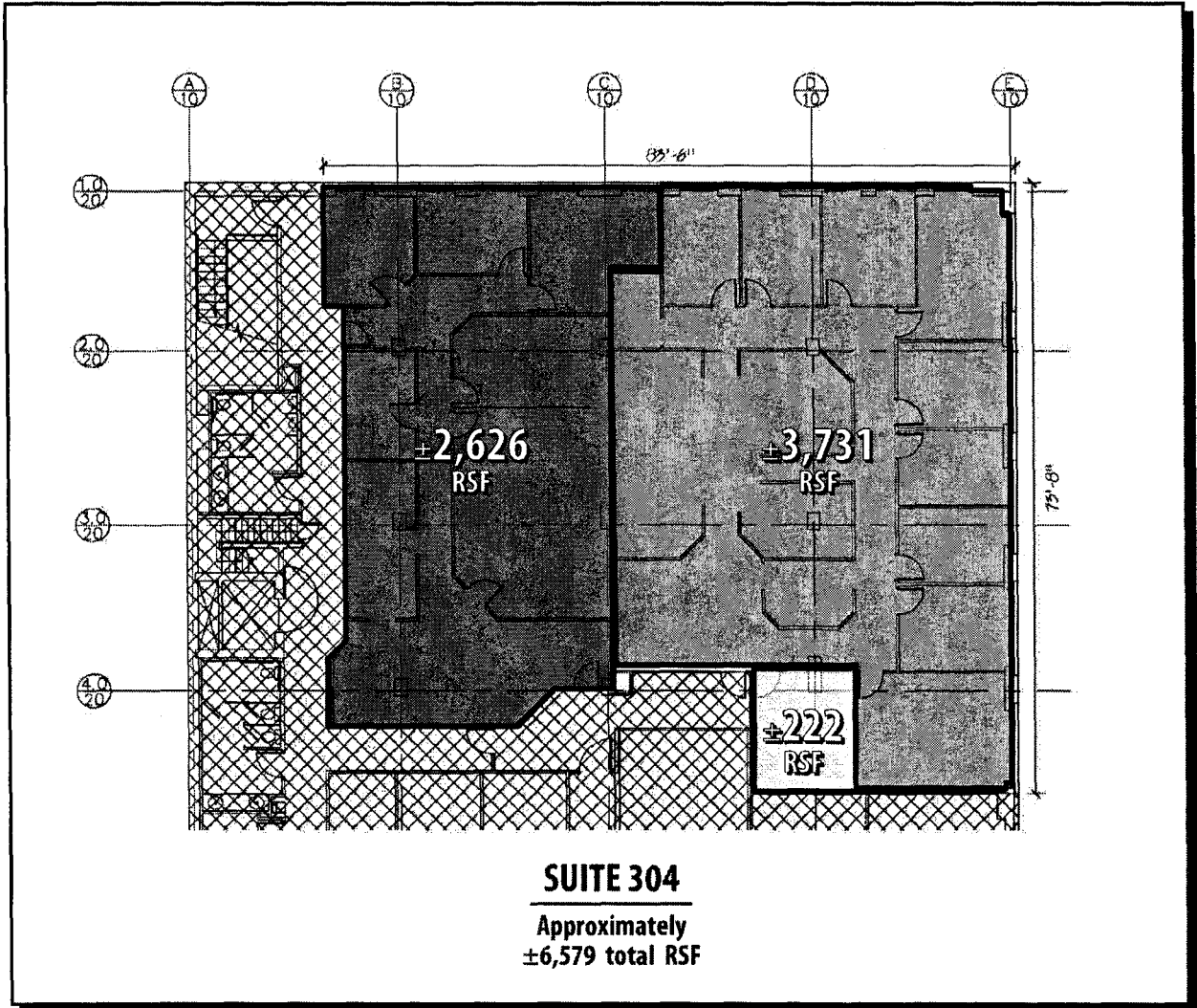
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000249

DOWNTOWN OFFICE
SPACE FOR LEASE

Mode Building

Corner of 8th & Idaho | Boise



FOR MORE INFORMATION:

LEW MANGLOS, CCIM

208-472-2841

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000250

NOV 24 2010

J. DAVID NAVARRO, Clerk
By A. GARDEN
DEPUTY

Steven F. Schossberger, ISB No. 5358
HAWLEY TROXELL ENNIS & HAWLEY LLP
877 Main Street, Suite 1000
P.O. Box 1617
Boise, ID 83701-1617
Telephone: 208.344.6000
Facsimile: 208.954.5260
Email: sschossberger@hawleytroxell.com

Attorneys for Plaintiff/Counterdefendant Boise Mode, LLC,
successor-in-interest to Mode Building Limited Partnership

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

BOISE MODE, LLC, an Illinois limited liability company, successor-in-interest to Mode Building Limited Partnership, an Idaho limited partnership,

Plaintiff,

vs.

DONAHOE PACE & PARTNERS LTD, an Idaho corporation; and TIMOTHY PACE,

Defendants.

Case No. CV OC 1001093

AFFIDAVIT OF DAVID L. BAUM IN SUPPORT OF PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

DONAHOE PACE & PARTNERS LTD, an Idaho corporation,

Counterclaimant,

vs.

BOISE MODE, LLC, an Illinois limited liability company, successor-in-interest to Mode Building Limited Partnership, an Idaho limited partnership,

Counterdefendant.

David L. Baum, being first duly sworn upon oath, deposes and states as follows:

AFFIDAVIT OF DAVID L. BAUM IN SUPPORT OF PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT - 1

1. I make this affidavit based upon my personal knowledge.
2. I am currently the President of Baum Realty Group, LLC. I am also a Member of Baum Development, LLC, the Manager of Boise Mode, LLC. I held these same positions during 2009.
3. Attached hereto as Exhibit A is a true and correct copy of e-mail correspondence between Timothy Pace and me that occurred between June 4, 2009, and July 2, 2009.
4. Attached hereto as Exhibit B is a true and correct copy of e-mail correspondence between Timothy Pace and me that occurred on July 9, 2009, and July 10, 2009.
5. Attached hereto as Exhibit C is a true and correct copy of e-mail correspondence between Timothy Pace and me that occurred between July 15, 2009, and July 28, 2009.
6. Attached hereto as Exhibit D is a true and correct copy of the "Summary of Tenant Dispute" that Timothy Pace e-mailed to me on or about July 24, 2009.
7. Attached hereto as Exhibit E is a true and correct copy of e-mail correspondence between Timothy Pace and me that occurred between July 30, 2009, and August 14, 2009.
8. This affidavit is based upon my personal knowledge obtained from my personal review of the business records, and if called to testify I could and would competently testify to the matters discussed herein.

Further your affiant sayeth naught.

David L. Baum

David L. Baum

STATE OF ILLINOIS)
) ss.
County of Cook)

SUBSCRIBED AND SWORN before me this 24th day of November, 2010.



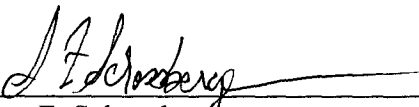
Name: Dragica Perunac
Notary Public
Residing at 1030 W. Chicago Ave
My commission expires 6-29-2011

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 24 day of November, 2010, I caused to be served a true copy of the foregoing AFFIDAVIT OF DAVID L. BAUM IN SUPPORT OF PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT by the method indicated below, and addressed to each of the following:

Michael E. Kelly
John J. Browder
LOPEZ & KELLY, PLLC
702 W. Idaho Street, Suite 1100
P.O. Box 856
Boise, ID 83701
[Attorneys for Defendants and Counterclaimant]

U.S. Mail, Postage Prepaid
 Hand Delivered
 Overnight Mail
 E-mail
 Telecopy: 208.342.4344



Steven F. Schossberger

EXHIBIT

A

Tim Pace

From: David Baum [david@baumrealty.com]
Sent: Thursday, July 02, 2009 9:36 AM
To: 'Tim Pace'
Cc: TDonahoe@donahoepace.com; 'Angela Aeschliman'
Subject: RE: Thanks for your call
Attachments: 2009-06-18 MODEBLDG DONAPACE Statement.pdf

Tim-

As I have indicated, I am open and available to discuss the items you raise below, but as a threshold matter, your past due rent needs to be made current. The obligation to pay rent under your lease is an independent covenant that must be complied with, and I cannot have a dialogue about new terms with you while you are in default. I don't want our discussions to somehow be viewed as a waiver of this default or imply that landlord has done anything wrong, because it has not. In the meantime, again, if you have specific instances where you encounter a problem with your current space, please let us know right away so we can work to resolve them.

I want to continue our relationship, but you have a balance of \$25,781.26 that needs to be paid. I believe our property management team has sent you notices of these delinquencies and this needs to be resolved as soon as possible. As soon as this default issue has been resolved, I will call you, or again, you can always feel free to call me at your convenience to further discuss your comments below.

I look forward to receiving your rent payment and discussing your concerns. Enjoy your holiday. I appreciate your cooperation and immediate attention to this issue. Thanks.

Best regards,

David

David Baum
 Baum Realty Group, LLC
 1030 W. Chicago Ave. Suite 200
 Chicago, IL 60642

(p) 312.275.3110
 (f) 312.666.7970
 (e) david@baumrealty.com

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<http://www.baumrealty.com/>

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EXHIBIT A

000256

8/18/2009

dissemination or distribution of this communication to other than the intended recipient is strictly prohibited. If you have received this communication in error, please notify us immediately and return the original message to us.

From: Tim Pace [mailto:tpace@donahoepace.com]
Sent: Wednesday, July 01, 2009 9:56 PM
To: 'David Baum'
Subject: RE: Thanks for your call

David, I realize I'm tardy getting back to your email from Monday.

We're plagued by summer vacation and holiday schedules, yet client deadlines don't move. We are under major pre holiday pressure tomorrow, but I hope to call you late afternoon or Friday.

We realize retail spaces may be the only alternative, and we are willing to consider any different configuration in preference to the night club below us, it inhibits our ability to operate after 5p as we've done the past couple years, focus groups research is a good example.

I wish ours was the 9-5 office others often perceive it to be, but it's not; 6a – 6p is our weekly routine, as well as late nights and weekends.

I'm not sure if sound proofing the 2nd floor ceiling could have helped or not, it's pretty loud and annoying right now. If you could let me know what alternative space might work, we could make time to look over the long weekend, thanks!

From: David Baum [mailto:david@baumrealty.com]
Sent: Monday, June 29, 2009 7:28 AM
To: 'Tim Pace'
Cc: TDonahoe@donahoepace.com
Subject: RE: Thanks for your call

Tim,

We have continued to improve the building to the benefit of all of our tenants. These improvements have improved the quality of the space and reduced operating expenses for both the tenants and the landlord. We have now completed our major improvements.

I only have a few vacancies and they are all retail spaces which would not be appropriate for you (size, price, location, etc...). Despite the market, I'm in current negotiations to fill each space.

I am available this afternoon, anytime, to discuss.

Best regards,

David

David Baum
Baum Realty Group, LLC
1030 W. Chicago Ave. Suite 200
Chicago, IL 60642

(p) 312.275.3110
(f) 312.666.7970
(e) david@baumrealty.com

000257

8/18/2009



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From: Tim Pace [mailto:tpace@donahoepace.com]
Sent: Friday, June 26, 2009 6:32 PM
To: 'David Baum'
Subject: RE: Thanks for your call

David, thanks again for your time with me on the phone when you visited Boise earlier this month.

As I mentioned to you then, I wanted to discuss with my partners what options we might consider to remediate problems we've had at The Mode Building. As you know, we've not been happy with the situation here for some time.

It occurs to us that you may have other properties that would be more conducive to our professional services business, and if so, we would be interested to know if moving into one of them might be an option at this time?

As much as we hate to even contemplate the idea of moving, it's clear to us the ability to conduct our normal course of business under the current conditions here is not viable, and I am happy to discuss our issues further whenever you like.

We appreciate your willingness to consider whatever alternatives you think are fair and reasonable for both of us. Please let me know what time(s) next week may be best for you to schedule a call to discuss options, thanks!

From: David Baum [mailto:david@baumrealty.com]
Sent: Tuesday, June 09, 2009 8:30 PM
To: 'Tim Pace'
Subject: RE: Thanks for your call

Tim,

We had the music problem once before and it turned out to be North Face. If it happens again, please call our office ASAP so we can get to the root of the problem.

I'm happy to talk with you about a lease extension. How long of an extension would you like? As this may take some time, please send us a rent for rent ASAP – even if it's not for your entire outstanding balance.

Best regards,

David

David Baum

000258

8/18/2009

Baum Realty Group, LLC
1030 W. Chicago Ave. Suite 200
Chicago, IL 60642

(p) 312.275.3110
(f) 312.666.7970
(e) david@baumrealty.com

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From: Tim Pace [mailto:tpace@donahoepace.com]
Sent: Monday, June 08, 2009 6:55 PM
To: 'David Baum'
Subject: RE: Thanks for your call

David,

Sorry to be so late getting back to you today, I've just returned from client meetings out of the office.

Thanks for taking time on Friday to further discuss some of our problems and concerns at The Mode Building.

Having considered different solutions regarding construction issues of the past ten months and how best to move forward, we think now may be a time to consider rewriting the balance of our lease and extending it into the end of next year.

Is that an option you might consider?

P.S. We opened our offices this morning to rock and roll emanating from the night club on the second floor. I know there's a perception the club operates only after 5p or 7p, but that's not been our experience, FYI.

From: David Baum [mailto:david@baumrealty.com]
Sent: Thursday, June 04, 2009 3:51 PM
To: 'Tim Pace'
Subject: RE: Thanks for your call

Tim,

Thanks for you call and email. I will be available tomorrow at 8 am, 1:30 pm and 2:45 pm mountain time. Please let me know what time works for you.

Best regards,

David

David Baum
Baum Realty Group, LLC
1030 W. Chicago Ave. Suite 200
Chicago, IL 60642

(p) 312.275.3110
(f) 312.666.7970
(e) david@baumrealty.com


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From: Tim Pace [mailto:tpace@donahoepace.com]
Sent: Thursday, June 04, 2009 4:01 PM
To: David Baum
Subject: Thanks for your call

David,

I appreciate your call earlier today. I left you a message this afternoon after I returned to the office with a request to return my call at your first convenience.

Unfortunately, I have to leave the office again shortly for a medical appointment with my mother. If there is any good time(s) for you to schedule a call tomorrow, please let me know.

In the interim, I trust you have received copies of our prior communications with Angela, if that is not the case, would you please let me know?

Tim Pace
DonahoePace&Partners Ltd.

The Mode Building
Suite 350
800 West Idaho Street
Boise, ID 83702

Direct 208/424-3422
Fax 208/344-7401

000260

8/18/2009

EXHIBIT

B

Tim Pace

From: David Baum [david@baumrealty.com]
Sent: Friday, July 10, 2009 7:40 AM
To: 'Tim Pace'
Cc: TDonahoe@donahoepace.com
Subject: RE: Follow up to our prior conversation

Tim,

We look forward to receiving your check.

I continue to anxiously await your "summary" which we have been talking about for more than a month. Please send it today. If I apply the "check in the mail" you are still \$20,000+ behind in your rent. Again, this needs to be resolved ASAP. I will give it one more week for us to try to reach a resolution. Fair?

In regards to music: again, please call the management office as soon as there is a problem so that we can solve it. The second floor tenant has promised their cooperation.

Best regards,

David

David Baum
Baum Realty Group, LLC
1030 W. Chicago Ave. Suite 200
Chicago, IL 60642

(p) 312.275.3110
(f) 312.666.7970
(e) david@baumrealty.com

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From: Tim Pace [mailto:tpace@donahoepace.com]
Sent: Thursday, July 09, 2009 4:45 PM
To: 'David Baum'

EXHIBIT B

000262

8/18/2009

Subject: Follow up to our prior conversation

David,

We sent payment for July rent for delivery to your office tomorrow.

I am also preparing a summary to review with you, which will hopefully facilitate our discussion regarding items we've disputed.

FYI, we had music from the night club below us playing intermittently throughout this morning.

*Tim Pace
DonahoePace&Partners Ltd.*

*The Mode Building
Suite 350
800 West Idaho Street
Boise, ID 83702*

*Direct 208/424-3422
Fax 208/344-7401*

EXHIBIT

C

Tim Pace

From: David Baum [david@baumrealty.com]
Sent: Tuesday, July 28, 2009 1:28 PM
To: 'Tim Pace'
Subject: RE: Payment

I look forward to speaking with you tomorrow afternoon. If you get back after 4:15 pm, please try my cell at 312-203-2286.

Best regards,

David

David Baum
Baum Realty Group, LLC
1030 W. Chicago Ave. Suite 200
Chicago, IL 60642

(p) 312.275.3110
(f) 312.666.7970
(e) david@baumrealty.com

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-----Original Message-----

From: Tim Pace [mailto:tpace@donahoepace.com]
Sent: Tuesday, July 28, 2009 2:13 PM
To: 'David Baum'
Subject: RE: Payment

David, thanks for your follow up calls today.

We have a 2p meeting tomorrow out of the office, I will hopefully be back by 4p or shortly after and can call you then, thanks again!

-----Original Message-----

From: David Baum [mailto:david@baumrealty.com]
Sent: Monday, July 27, 2009 7:14 AM
To: 'Tim Pace'
Cc: TDonahoe@donahoepace.com
Subject: RE: Payment

Tim,

I have been receiving your emails including the one last Tuesday, July 21st "David, this is to advise that I am planning to send you our summary of resolutions by tomorrow, pending limited interruptions from clients. Thanks again for your patience." The follow up was sent early Friday evening and I opened it first thing when I arrived at the office this morning.

I am happy to have finally received your "summary of resolutions".

I will get back to you with my thoughts within 24 hours.

Best regards,

David

David Baum
Baum Realty Group, LLC
1030 W. Chicago Ave. Suite 200
Chicago, IL 60642

(p) 312.275.3110
(f) 312.666.7970
(e) david@baumrealty.com

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-----Original Message-----

From: Tim Pace [mailto:tpace@donahoepace.com]
Sent: Friday, July 24, 2009 6:30 PM
To: david@baumrealty.com
Subject: RE: Payment

David, please confirm you receive this email, we've had several issues with our internet provider this week, and I'm not sure which emails I've sent have actually been delivered.

-----Original Message-----

From: David Baum [mailto:david@baumrealty.com]
Sent: Wednesday, July 15, 2009 7:33 PM
To: Tim Pace
Subject: Re: Payment

I look forward to seeing your suggested resolution.
Sent from my Verizon Wireless BlackBerry

-----Original Message-----

From: "Tim Pace" <tpace@donahoepace.com>

Date: Wed, 15 Jul 2009 18:49:37

To: 'David Baum' <david@baumrealty.com>

Subject: RE: Payment

David,

I apologize for not getting back to you sooner since my email of last week, my intent was to follow up with you yet this week.

The summary I'm preparing is fairly exhaustive, but I can certainly abbreviate and expedite it to you tomorrow or Friday.

The long and short of it is, we've disputed the accounting of our rents as outlined in communications we've had over the past year with your respective property managers.

The fact is for the first 20 months of our lease we accommodated numerous disruptions to our offices from construction without complaining too loudly.

It wasn't until North Face construction made our offices untenable that we requested any reciprocation under the terms of our lease, and we have certainly been patient in seeking equitable resolutions since last August.

During this process we've also proposed alternatives to correct problems and resolve differences, so if your position is we've been unresponsive or given you no alternative other than attorneys, we respectively disagree.

I trust you can extend to us the same degree of consideration that we have certainly extended to others in The Mode Building.

From: David Baum [mailto:david@baumrealty.com]
Sent: Wednesday, July 15, 2009 9:45 AM
To: 'Tim Pace'
Cc: TDonahoe@donahoepace.com
Subject: RE: Payment

Tim,

Attached below is your email from July 9th and my response on the 10th. I've not heard nor seen anything further.

Tim,

We look forward to receiving your check.

I continue to anxiously await your "summary" which we have been talking about for more than a month. Please send it today. If I apply the "check in the mail" you are still \$20,000+ behind in your rent. Again, this needs to be resolved ASAP. I will give it one more week for us to try to reach a resolution. Fair?

In regards to music: again, please call the management office as soon as there is a problem so that we can solve it. The second floor tenant has promised their cooperation.

Best regards,

David

David Baum

Baum Realty Group, LLC

1030 W. Chicago Ave. Suite 200

Chicago, IL 60642

(p) 312.275.3110

(f) 312.666.7970

(e) david@baumrealty.com

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From: Tim Pace [mailto:tpace@donahoepace.com]
Sent: Thursday, July 09, 2009 4:45 PM
To: 'David Baum'
Subject: Follow up to our prior conversation

David,

We sent payment for July rent for delivery to your office tomorrow.

I am also preparing a summary to review with you, which will hopefully facilitate our discussion regarding items we've disputed.

FYI, we had music from the night club below us playing intermittently throughout this morning.

Tim Pace

DonahoePace&Partners Ltd.

The Mode Building

Suite 350

800 West Idaho Street

Boise, ID 83702

Direct 208/424-3422

Fax 208/344-7401

Best regards,

David

David Baum

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1030 W. Chicago Ave. Suite 200

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From: Tim Pace [mailto:tpace@donahoepace.com]
Sent: Wednesday, July 15, 2009 10:36 AM
To: 'David Baum'

Subject: RE: Payment

David, I sent you an email last week, did you not receive it?

From: David Baum [mailto:david@baumrealty.com]
Sent: Wednesday, July 15, 2009 9:25 AM
To: 'Tim Pace'; TDonahoe@donahoepace.com
Cc: 'Talia Lissner'; 'Angela Aeschliman'
Subject: Payment

Tim and Tom,

Once again, I have not heard back from you. Your current rent balance is \$18,556.76. I feel that you left me with no other choice but to turn this matter over to our attorneys. You can expect to receive correspondence from them in the next couple of days.

Best regards,

David

David Baum

Baum Realty Group, LLC

1030 W. Chicago Ave. Suite 200

Chicago, IL 60642

(p) 312.275.3110

(f) 312.666.7970

(e) david@baumrealty.com

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Best regards,

David

David Baum

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(e) david@baumrealty.com

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From: Tim Pace [mailto:tpace@donahoepace.com]
Sent: Wednesday, July 15, 2009 10:36 AM
To: 'David Baum'
Subject: RE: Payment

David, I sent you an email last week, did you not receive it?

From: David Baum [mailto:david@baumrealty.com]
Sent: Wednesday, July 15, 2009 9:25 AM
To: 'Tim Pace'; TDonahoe@donahoepace.com
Cc: 'Talia Lissner'; 'Angela Aeschliman'
Subject: Payment

Tim and Tom,

Once again, I have not heard back from you. Your current rent balance is \$18,556.76. I feel that you left me with no other choice but to turn this matter over to our attorneys. You can expect to receive correspondence from them in the next couple of days.

Best regards,

David

David Baum

Baum Realty Group, LLC

1030 W. Chicago Ave. Suite 200

Chicago, IL 60642

(p) 312.275.3110

(f) 312.666.7970

(e) david@baumrealty.com

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EXHIBIT

D

July 23, 2009

David Baum
Boise Mode LLC
Summary of Tenant Dispute

We are providing an abbreviated summary of issues that have been previously communicated with the respective property managers for The Mode Building as regards conduct of our professional services business in Suite 350. This summary is not intended to be exhaustive; the issues as noted below demonstrate the scope of problems we've encountered, but do not constitute a full or complete list.

With the changes of property managers that have occurred since we moved in December 2006, it is not clear to us as to which issues may have been addressed with you or not, but now seems an appropriate time to provide an overview that reflects the ongoing concerns we have with offices we currently occupy.

As a professional services firm, we have a relatively low tolerance for the nature of disturbances created by construction crews since we moved in. Some of these issues may result from the perception among others that ours is a 9:00 am to 5:00 pm office, when in fact we operate 6:00 am to 6:00 pm daily, as well as nights and weekends to meet the demands of our clients as they arise.

We have been very patient in accommodating disruptions to our offices that occurred as the result of initial construction phases when you were remodeling Caprock and common areas, 8th Street and Idaho Street entrances, restrooms, etc.

Please note that through the course of the initial construction phases in the first two years, we repeatedly accommodated the 'inconveniences' of construction, as they were often referred, and did not assert the right of Quiet Enjoyment or 24 hours notice to which we are entitled under the terms of lease.

North Face Construction

Despite the construction problems created for us and our clients during the first two years, it was in August last year, after North Face construction began, that we were forced to confront Colliers as to the untenable level of disruption that displaced us from conducting the normal course of business in our offices.

Specifically on August 15, 2008, we met with Colliers to advise their agent of disruptions occurring during the prior week. As one example, we scheduled three meetings in our conference room on August 14th.

- Construction noise at 10:30 am was so loud we had to ask participants to repeat themselves across the conference room table because we couldn't hear each other clearly.
- In a second meeting at 2:00 pm, the noise was so disruptive we had to move out of our conference room entirely to be heard at all.
- By 4:00 pm, the construction noise had subsided, presumably because construction workers had left the building.

We continued to communicate with Colliers in subsequent weeks as to the disruption and displacement of our business created by construction, and we suggested alternatives that would help us accommodate the resulting problems, including advanced notice of construction schedules that might predict the potential embarrassment of conference room chaos. During this time, we scheduled conferences on numerous occasions outside of our offices to accommodate construction schedules.

As North Face construction continued into October, we asserted the right of Quiet Enjoyment under the lease and requested that Colliers advise you of our request for reciprocal accommodation, however, we did not receive any answer from Colliers other than they were awaiting response.

There are numerous other examples of disruptions to our business that we accommodated into the latter part of November, which was the time we understood North Face construction would be concluded. As examples, several projects that began with the North Face construction were left unattended and uncompleted for weeks and months at a time, many of which created safety hazards to our employees and clients, and utility services were frequently interrupted that required us to shut down office operations completely, and not always with the benefit of any advanced notice.

Page 2

David Baum
Boise Mode LLC
Summary of Tenant's Disputes
July 23, 2009

Comedy Club Construction

After the first of December, we received word via second-hand sources that a night club was being constructed on the second floor beneath our offices; we never received advance notice of this construction, nor did we ever receive copies of any construction schedules, despite our repeated requests.

It soon became obvious the night club construction projects were not being professionally managed. During this time, we again asserted the right of Quiet Enjoyment under the lease and provided specific examples of construction problems we continued to encounter, including;

- Construction workers and inspectors repeatedly entered our offices without any advance notice or authorization in order to gain access to our ceiling and other areas.
- Constant construction noise emanated from the second floor that exceeded our employees' tolerance; on multiple occasions employees had to leave the office early in order to conduct their work from home.
- Faulty construction work resulted in recurring problems, such as monthly water leaks into our offices from March through June.

The first week of March was a particularly bad one for us. Not only did faulty construction workmanship on a roof fan leave us with leaks into our lobby after a heavy spring storm, but we arrived one morning to find a construction worker and his ladder, along with two large tool carts on wheels, prominently planted in the middle of our reception area with no room for a receptionist to even sit at the desk.

This was not the first incident of construction workers or others entering our space without advanced notice and without authorization; the construction worker in this instance demonstrated no respect for anyone's interest other than his own. Consequently we asserted the right to no less than 24 hours notice of entry as provided by the terms of the lease.

Since opening, the night club intermittently plays loud music prior to opening at 5pm, sometimes as early as 9am or throughout the morning. Nevertheless with the opening of the night club, our ability to schedule our offices for client projects after 5:00pm, such as conducting focus group research as we have in the past, is no longer viable due to night club disruptions during evening hours.

Security Breaches

Since moving into The Mode Building, we've experienced repeated breaches of our offices security, including pilfering of personal property from offices, rifling of office drawers caught on web cams, and violation of our computer network after hours; all of which have been reported to property management and maintenance services.

Since the opening of the night club on the second floor, security lapses in the building appear to be on the rise, including the elevator to the 3rd floor remaining unlocked after 6pm and weekends, the back door to the alley repeatedly left propped open throughout the day and into the evening hours for what one presumes to be the convenience of delivery services.

I have personally taken to checking the back alley door at the end of the day when I leave the office late and removing the prop after 6pm, as well as locking the elevator when I find it unlocked after 6pm or on weekends, as it was on July 12th.

000277

Page 3

David Baum
Boise Mode LLC
Summary of Tenant's Disputes
July 23, 2009

Remediation

We originally proposed remediation of these issues, among others, through rent abatement, as we believe the terms of the lease provide it should be; we agreed to \$1000 abatement of rents beginning with October until such time as conditions return to a professional office status, as our payments reflect.

Further, the failure on numerous occasions of property management to provide no less than 24 hours notice of entry as a condition of lease should be remediated; we withheld payment of March rents for violation of those rights under the terms of lease, as we advised property management at that time.

We've clearly and consistently communicated with the respective property managers that we believe primary responsibility to ensure the right of Quiet Enjoyment and to provide no less than 24 hours notice lies with the lessor, and not with any third party as has previously been suggested. We also believe the accounting of our record to date has not been accurately represented to you by the respective property managers.

Resolution

To be clear, for the first 20 months of construction, we had no issues with payment of rents for any months prior to August 2008, nor did we assert rights to which we are entitled under the lease until such time as we were no longer able to conduct our normal course of business due to multiple disruptions from construction projects managed by third parties.

Only after repeated requests for relief went unanswered did we withhold any payment of rents pending a more satisfactory resolution that respects the responsibilities of both parties under the terms of lease.

Today, equitable resolution provides \$1000 abatement from the time of our advisement as to violation of the right to Quiet Enjoyment in August, through the time of most recent damages to our offices in June; moving forward, abatement should compensate the loss of income potential resulting from night club operations without sound proofing.

Alternatively, we have offered to consider any other space options that you may have available for lease. Recognizing other space options may not otherwise be an ideal choice for our business, at this juncture, it would offer a welcome relief from the negative environment we've experienced over the past 12 months.

We also appreciate the fact that you may have alternate resolutions to consider, but we feel it imperative that our discussion reflect a full accounting of the respective record and responsibility of both parties under the terms of lease, and to this point that has not been fully accorded to us.

000278

EXHIBIT

E

Tim Pace

From: Tim Pace [tpace@donahoepace.com]
Sent: Friday, August 14, 2009 3:19 PM
To: 'David Baum'
Subject: RE: The Mode Building

David, sorry I have been out of the office and unable to reply to you sooner.

1. We will agree to 10% rent abatement for August through June, which is @ 2.175 days per month based on an average 22 day month, as an acceptable resolution for the past limitations placed on our ability to conduct business due to construction problems
2. Moving forward, we will create a trade account for you to access our public relations and promotional services for The Mode's 100th Anniversary and/or for other projects as you may choose to use the trade account.
3. We are currently facing a loss of @ \$1100 in monthly income due to limitations on our ability to conduct business as a result of the night club operating without sound proofing, and we will establish a trade account to reflect that amount.

Please let me know if this is sufficiently specific or if you have questions? Like you, we prefer the path of resolution not confrontation, and we believe our response to your proposal is fair and reasonable for both parties.

From: David Baum [mailto:david@baumrealty.com]
Sent: Wednesday, August 12, 2009 4:32 PM
To: 'Tim Pace'
Cc: TDonahoe@donahoepace.com
Subject: RE: The Mode Building

Either I'm missing something or I'm stupid; the latter is certainly a possibility. If you sent something that was "clear and specific as to your points for resolution and moving forward", please resend those exact points. Thanks.

Best regards,

David

David Baum
Baum Realty Group, LLC
1030 W. Chicago Ave. Suite 200
Chicago, IL 60642

(p) 312.275.3110
(f) 312.666.7970
(e) david@baumrealty.com


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000280

8/18/2009



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From: Tim Pace [mailto:tpace@donahoepace.com]
Sent: Tuesday, August 11, 2009 7:06 PM
To: 'David Baum'
Subject: RE: The Mode Building

David, I'm not sure why there's a question given our respective assurances.

Our response was clear and specific as to your points for resolution and moving forward.

Our response sent by EOD on July 31st as agreed and emailed again to confirm receipt, but we received a bounce back from your email, did you receive the error message I sent you?

'Sometime next week' refers to your review and reply coming to 'further agreement', if that wasn't made clear.

Unfortunately after 5p is our way of life.

From: David Baum [mailto:david@baumrealty.com]
Sent: Tuesday, August 11, 2009 4:31 PM
To: 'Tim Pace'
Cc: TDonahoe@donahoepace.com
Subject: RE: The Mode Building

Aside from the fact that "sometime next week" became Friday evening after 5 pm – again, I didn't see any move towards resolution. I made a very specific proposal. I am not closing off communication and I am happy to hear and consider a specific resolution. The attorney has been engaged, but again, that is not my preferred path.

Best regards,

David

David Baum
Baum Realty Group, LLC
1030 W. Chicago Ave. Suite 200
Chicago, IL 60642

(p) 312.275.3110
(f) 312.666.7970
(e) david@baumrealty.com

The logo for BAUM REALTY GROUP, featuring a stylized infinity symbol or knot icon to the left of the text "BAUM REALTY GROUP".
<http://www.baumrealty.com/>

000281

8/18/2009



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From: Tim Pace [mailto:tpace@donahoepace.com]
Sent: Monday, August 10, 2009 10:43 AM
To: 'David Baum'
Subject: RE: The Mode Building

What is it about our email of July 31st that you find non responsive?

From: David Baum [mailto:david@baumrealty.com]
Sent: Monday, August 10, 2009 9:33 AM
To: 'Tim Pace'
Cc: TDonahoe@donahoepace.com
Subject: RE: The Mode Building

I received your email. Although we had agreed you would get back to me by the 31st of August, your email says that you needed more time and would get back to me sometime next week; that was last week. It has now been more than two months and the pattern continues to repeat itself. I feel I've been left with no choice and I have turned the matter over to our attorney.

Best regards,

David

David Baum
Baum Realty Group, LLC
1030 W. Chicago Ave. Suite 200
Chicago, IL 60642

(p) 312.275.3110
(f) 312.666.7970
(e) david@baumrealty.com


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000282

8/18/2009

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From: Tim Pace [mailto:tpace@donahoepace.com]
Sent: Friday, August 07, 2009 2:36 PM
To: 'David Baum'
Subject: RE: The Mode Building

David, did you receive the email below from us last week?

I know we suffered IP problems over the last weeks and aren't sure which emails were delivered or if you replied. We also sent payment for August rents for delivery to your office by today.

Boise was hit by a nasty summer storm yesterday, 3+" of rain and hail predicted through the day and night, our office ceiling leaked again, and we advised Sid as he was in the building at the time, FYI.

From: Tim Pace [mailto:tpace@donahoepace.com]
Sent: Friday, July 31, 2009 5:21 PM
To: 'David Baum'
Subject: RE: The Mode Building

David, I am somewhat premature in responding to your email of yesterday, as explained further below, but want to assure you that we're on the same page in hoping to find a more positive way forward.

I am more than happy to review any of our concerns in more depth to bring greater clarity as to what we see as violations in the terms of lease and to resolve them amicably, which I believe we've consistently endeavored to do during the term of our lease.

At your suggestion, we are viewing your proposal as a means to resolution of both past issues and for moving forward.

- We have previously agreed to \$1000 abatement of rents starting with October, and we will honor that agreement through June. Based on an average 22 day month, this would equate to @ 2 days per month since August, which is less than 10% of actual office time and a resolution in your favor.
- We also appreciate your suggestion as to creating a trade agreement, and we would like to pursue that moving forward, as we have very high interest in your 100 year anniversary vision for The Mode Building, and there is no firm better qualified than ours to maximize the impact for Mode tenants.
- Due to the sound insulation problems we've experienced from the night club below us, we are currently facing a loss of \$1100 income per month, this is in addition to the loss of potential income that we've generated through client services that can only deliver in evening hours, such as focus group research of \$8000 in the past year.

I realize there will be need for you to further review these matters. Please recall that we have four complementary communications firms in our office suite, all of whom function as marketing partners through a central operating system that reduces the cost of operations for each.

Two of these partners are not available to me today to review how a move forward plan may affect their ability to conduct business, as I am obligated to do. I apologize that it will be sometime next week before we can come to further agreement, and I trust that is acceptable.

At the end of last year, we brought in a video production group as a marketing partner to replace an internet design group that moved into their own building.

000283

8/18/2009

As I mentioned to you Wednesday, the video production group has advised they are forced to relocate as they are no longer able to complete studio editing during evening hours as is often required of their business, a direct result of the night club's failure to sound proof its ceiling.

As you know, we've also had breaches of our office security, and we continue to have security concerns with The Mode Building, while those concerns are not addressed specifically here, I expect to have further discussion as to how those may be resolved to the benefit of all tenants.

As you advised, this communication is being sent only for the purposes of negotiation. Nothing contained in this letter shall be deemed to have waived any of our rights or remedies under the lease, nor shall it be deemed an admission of any error or omission on our part.

From: David Baum [mailto:david@baumrealty.com]
Sent: Friday, July 31, 2009 8:29 AM
To: 'Tim Pace'
Subject: RE: The Mode Building

Tim,

I appreciate your cooperation and look forward to hearing back from you later today. Rather than focus on the validity of the past, I'm hoping we can find a positive way forward.

Best regards,

David

David Baum
Baum Realty Group, LLC
1030 W. Chicago Ave. Suite 200
Chicago, IL 60642

(p) 312.275.3110
(f) 312.666.7970
(e) david@baumrealty.com


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From: Tim Pace [mailto:tpace@donahoepace.com]
Sent: Thursday, July 30, 2009 6:47 PM
To: 'David Baum'

000284

8/18/2009

Subject: RE: The Mode Building

David, thanks for your time on the phone yesterday and your follow up today.

We appreciate your consideration and understand how long distances can create challenges, and we feel we have demonstrated patience through the process.

I am planning to review your proposal with my partners tomorrow afternoon when they both are back in the office, as they would be affected by whatever agreement we come to.

I would like to know which concerns that we've expressed that you may disagree with, Quiet Enjoyment, 24 Hours Notice, Security Breaches, or something else?

If you feel that we have misstated these concerns, I would appreciate knowing that as well.

To be sure, we are interested in moving forward in a more positive environment and look forward to working with you to that end.

From: David Baum [mailto:david@baumrealty.com]

Sent: Thursday, July 30, 2009 6:26 AM

To: 'Tim Pace'

Cc: TDonahoe@donahoepace.com

Subject: The Mode Building

Tim,

I'm glad we had a chance to speak today. Per your request, I am sending you a recap of what we discussed.

I have reviewed your letter. I apologize for any inconveniences and interruptions, though I respectfully disagree with a number of issues outlined in your letter. My intention is to run a first class operation and to provide our tenants with top of the line service. I hope that the improvements we have made, including the new bathrooms, common areas and windows make your space better. These improvements have increased the energy efficiency of the building and have resulted in lower common area costs. This is why you have never seen a CAM bill above your base and will very likely never see one.

My hope is that we can move forward from here. I will agree to the following:

\$500 rent reduction from August through June.

On a going forward basis, Baum will purchase \$500 of consulting work each month from DonahoePace. My intention is work collaboratively with you to promote the block. I have two specific "events" in mind, but would like your input and expertise to maximize value. My goal is to drive traffic to the tenants on the block.

All past due balances paid by August 3rd.

I hope that this is a solution that everyone can be happy with it gives us an opportunity to work together for the common good of all of the tenants on the block. It is obviously my preference to solve this problem amicably. Per our agreement, I look forward to hearing back from you with a specific response by the end of business on Friday.

Please be advised that this letter is being sent only for the purposes of negotiation. Nothing contained in this letter shall be deemed to have waived any of landlord's rights or remedies under the lease, nor shall it be deemed an admission of any error or omission on the part of landlord.

Best regards,

David

000285

8/18/2009

David Baum

Baum Realty Group, LLC
1030 W. Chicago Ave. Suite 200
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NOV 24 2010

J. DAVID NAVARRO, Clerk
By A. GARDEN
DEPUTY

Steven F. Schossberger, ISB No. 5358
HAWLEY TROXELL ENNIS & HAWLEY LLP
877 Main Street, Suite 1000
P.O. Box 1617
Boise, ID 83701-1617
Telephone: 208.344.6000
Facsimile: 208.954.5260
Email: sschossberger@hawleytroxell.com

Attorneys for Plaintiff/Counterdefendant Boise Mode, LLC,
successor-in-interest to Mode Building Limited Partnership

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

BOISE MODE, LLC, an Illinois limited liability company, successor-in-interest to Mode Building Limited Partnership, an Idaho limited partnership,

Plaintiff,

vs.

DONAHOE PACE & PARTNERS LTD, an Idaho corporation; and TIMOTHY PACE,

Defendants.

Case No. CV OC 1001093

AFFIDAVIT OF ANGELA AESCHLIMAN, CPM, CCIM IN SUPPORT OF PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

DONAHOE PACE & PARTNERS LTD, an Idaho corporation,

Counterclaimant,

vs.

BOISE MODE, LLC, an Illinois limited liability company, successor-in-interest to Mode Building Limited Partnership, an Idaho limited partnership,

Counterdefendant.

AFFIDAVIT OF ANGELA AESCHLIMAN, CPM, CCIM IN SUPPORT OF PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT - 1


3

Angela Aeschliman, CPM, CCIM, being first duly sworn upon oath, deposes and states as follows:

1. I make this affidavit based upon my personal knowledge.
2. I am the Director of Property Management at Watermark Property Management LLC (“Watermark”), the authorized agent of Boise Mode, LLC. Watermark manages all of Boise Mode, LLC’s properties in Boise, Idaho. Watermark is an independent contractor and not an employee of Boise Mode, LLC.
3. In my capacity as Director of Property Management at Watermark, I corresponded with Tim Pace of Donahoe Pace Partners Ltd. (“Donahoe Pace”) during the time period that Donahoe Pace was a tenant in Boise Mode LLC’s building at 800 West Idaho Street, Boise, ID 83702.
4. A true and correct copy of a letter that I sent to Tim Pace of Donahoe Pace on May 13, 2009, is attached hereto as Exhibit A.
5. A true and correct copy of an additional letter that I sent to Tim Pace of Donahoe Pace on May 13, 2009, is attached hereto as Exhibit B.
6. A true and correct copy of e-mail correspondence between Mr. Pace and me from May 21, 2009, to May 22, 2009, is attached hereto as Exhibit C.
7. A true and correct copy of a letter that I sent to Tim Pace of Donahoe Pace on June 3, 2009, is attached hereto as Exhibit D.
8. A true and correct copy of letters that I received from Tim Pace from December 17, 2008, to April 9, 2009 is attached hereto as Exhibit E. The first page of Exhibit E is a letter that was mistakenly dated December 17, 2009. I believe that the date on that letter should read “December 17, 2008.”

9. This affidavit is based upon my personal knowledge obtained from my personal review of the business records, and if called to testify I could and would competently testify to the matters discussed herein.

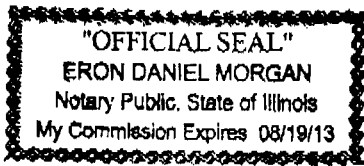
Further your affiant sayeth naught.

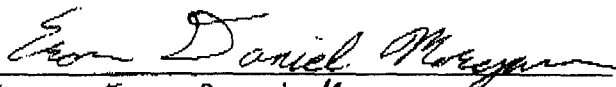


Angela Aeschliman, CPM, CCIM

STATE OF ILLINOIS)
) ss.
County of Cook)

SUBSCRIBED AND SWORN before me this 23rd day of November, 2010.



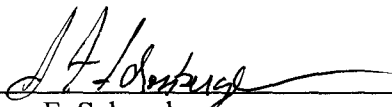

Name: Eron Daniel Morgan
Notary Public
Residing at 3105 W. Diverscy Ave Apt 1F 60647
My commission expires 8/19/13

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 24 day of November, 2010, I caused to be served a true copy of the foregoing AFFIDAVIT OF ANGELA AESCHLIMAN, CPM, CCIM IN SUPPORT OF PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT by the method indicated below, and addressed to each of the following:

Michael E. Kelly
John J. Browder
LOPEZ & KELLY, PLLC
702 W. Idaho Street, Suite 1100
P.O. Box 856
Boise, ID 83701
[Attorneys for Defendants and Counterclaimant]

U.S. Mail, Postage Prepaid
 Hand Delivered
 Overnight Mail
 E-mail
 Telecopy: 208.342.4344



Steven F. Schossberger

EXHIBIT

A



Via Certified Mail With Return Receipt Requested May 13, 2009

Donahoe Pace & Partners, Ltd. &
Mr. Timothy Pace – guarantor
800 W. Idaho Street, Suite 350
Boise, ID 83702

Re: Your Lease of 800 W. Idaho Street, Suite 350, Boise, Idaho 83702

Dear Mr. Pace:

We write as agent and property managers for Boise Mode, LLC which is the landlord of those certain premises located at 800 W. Idaho Street, Boise, Idaho which are leased to Donahoe Pace & Partners, Ltd., as Tenant, pursuant to that certain Retail Lease Agreement dated November 3rd, 2006 ("Lease").

Previously written notice of delinquency was provided to you by Watermark Property Management, LLC ("Watermark Management") for payment of the delinquent rent payments owed by you for the months December 2008 through May 2009 in connection with the Lease. Our records indicate that you still have failed to make the required rent payments.

You are furthermore hereby advised that your ongoing failure to make the required rent payments due and owing in connection with the Lease, can result in the Landlord, Boise Mode, LLC declaring that you are in default under the terms and provisions of the Lease. Failure to make these required rent payments is in violation of Article 20 and Section 20.1a of the Lease.

Notice of DEMAND IS HEREBY MADE that you submit payment in the amount of \$22,958.80 immediately to our office at 1030 W. Chicago Avenue, Suite 300, Chicago, IL, 60642, in the form of a cashier's or certified check payable to Boise Mode, LLC.

The sum of \$22,958.80 represents the balance due on this account which was due and payable on May 1, 2009.

In the event the Landlord initiates an action to enforce the Lease against you, you are advised that the Landlord will seek to recover all of the attorneys' fees and costs it will incur due to your defaults of the Lease.

You are furthermore reminded that the next scheduled rent payment under the terms of the Lease is due and payable on June 1, 2009. Please make this payment on time. If you have any questions about this required June 1, 2009 payment or this letter, please contact me directly.

Angela Aeschliman, CPM, CCIM
Director of Property Management
312.275.6020 direct
angela@watermarkpm.com

EXHIBIT

B

WATERMARK

Property Management, LLC

Via email & Fax
May 13, 2009

Tim Pace
Donahoe Pace & Partners Ltd.
Suite 350
The Mode Building
800 West Idaho Street
Boise, ID 83702

Re: Suite 350 Rent

Dear Tim;

After several attempts to discuss this in further detail I find that I must write this letter to clear up your misunderstandings.

We are aware that the construction of the building has caused inconveniences, and we have addressed those concerns and have given an abatement in the amount of \$1000.00 as a single occurrence. When we initially were discussing this you had asked for a month gross abatement, which was not approved, nor did the conversation encompass a \$1,000.00 abatement per month.

We discussed that as Landlord and Owner we are within our rights to improve the building without offset of rents for your space, this is explicit in the Lease. For goodwill and to help overcome the issues that you faced, we graciously provided an abatement of \$1,000.00.

I have attempted several times to call and speak with you, in addition I stopped by your office when I was in town, but was not able to meet with you. I have been patient and was so hoping to discuss this with you in a warm manner rather than a cold letter; which will be followed by a Default.

Please pay your account in full immediately.

Sincerely;



Angela Aeschliman, CPM, CCIM
Director of Property Management
Watermark Property Management, LLC

312-275-6020

Watermark Property Management, LLC
 1030 West Chicago Avenue
 Suite 300
 Chicago, IL 60642

Tenant Statement

Make Payments to: **Boise Mode, LLC**
 Dept. 5410
 P.O. Box 745
 Milwaukee, IL 53201-0745

Donahoe, Pace & Partners Ltd.
 Attn: Mr. Tim Pace
 800 West Idaho Street, Suite 350
 Boise, ID 83702

Statement Date : 04/30/09

Tenant : Donahoe, Pace & Partners, Ltd. - donspace

Property : modebidg
 800 W Idaho St., Boise, ID
 Unit : 350 & B10

Balance Due : \$22,958.80

Date	Description	Charges	Payments	Balance
	Balance Forward			4,477.57
03/01/09	0 - Base Rent Office (03/2009)	7,950.00		12,427.57
03/01/09	0 - Storage Rent (03/2009)	274.50		12,702.07
03/12/09	Late Fee 3/09, 5% of \$7,119.91	356.00		13,058.07
04/01/09	0 - Storage Rent (04/2009)	274.50		13,332.57
04/01/09	0 - Base Rent Office (04/2009)	7,950.00		21,282.57
04/11/09	April Late Fee	411.23		21,693.80
04/13/09	Payment		6,959.50	14,734.30
05/01/09	0 - Base Rent Office (05/2009)	7,950.00		22,684.30
05/01/09	0 - Storage Rent (05/2009)	274.50		22,958.80

This statement is provided to assist you in maintaining a current balance on your account. It contains all charges posted to your account through the statement date, including the recurring charges for the upcoming month. Other charges may be posted to your account before the end of the month. If so, they will be included on future statements. If you have any questions, please feel free to call us at 312.275.6006.

EXHIBIT

C

Tim Pace

From: Angela Aeschliman [angela@watermarkpm.com]
Sent: Friday, May 22, 2009 7:37 AM
To: 'tpace@donahoepace.com'
Cc: 'mountaintopsid@msn.com'
Subject: Fw: Elevator

The elevator is working at this time. Sid has put signs up just in case. Please let us know if you experience additional problems.

Angela E. Aeschliman, CPM, CCIM
Director of Property Management

Watermark Property Management
312 275 6020

From: Angela Aeschliman
To: 'tpace@donahoepace.com' <tpace@donahoepace.com>; 'mountaintopsid@msn.com' <mountaintopsid@msn.com>
Sent: Thu May 21 20:49:49 2009
Subject: Re: Elevator is officially dysfunctional

Tim we will get someone out asap

Thanks for informing us
Angela E. Aeschliman, CPM, CCIM
Director of Property Management

Watermark Property Management
312 275 6020

From: Tim Pace <tpace@donahoepace.com>
To: Sid <mountaintopsid@msn.com>
Cc: Angela Aeschliman
Sent: Thu May 21 20:19:43 2009
Subject: Elevator is officially dysfunctional

Sid, thanks for all your time this week on the elevator front, as well as new elevator keys today.

It is official as of 5:43pm MDT, the elevator is not functioning. I just spent 10+ minutes on the 3rd floor waiting for the elevator to arrive. On the return trip, I spent 3 minutes inside the elevator on the 1st floor waiting for the doors to close so I could return. It was a test due to our experiences of the past few weeks.

The elevator does not respond to pushing the floor buttons, and the doors do not respond to pushing buttons inside the elevator.

You can imagine our frustration tomorrow if clients arrive and they experience the same dysfunction. Assuming they figure out how to access the stairwell, they can't get in the doors to the third floor.

I will of course try to contact them, but who knows? If so, we will have to meet with them in a coffee shop down the street.

I know this is as frustrating for you as it is for us, and I appreciate everything you can do to address the problem

EXHIBIT C

000297

8/18/2009

immediately and alert us as to a schedule to correct it. Thanks again!

Tim Pace
DonahoePace&Partners Ltd.

The Mode Building
Suite 350
800 West Idaho Street
Boise, ID 83702

Direct 208/424-3422
Fax 208/344-7401

EXHIBIT

D

WATERMARK

Property Management, LLC
June 3, 2009
Via Mail and Fax

Tim Pace
Donahoe Pace & Partners Ltd.
Suite 350
The Mode Building
800 West Idaho Street
Boise, ID 83702

Re: Suite 350 Rent

Dear Tim;

To date you have not yet cured your monetary default. Again I have attempted to contact you via phone and email.

As I have stated previously the Owners and Landlord have the right and obligation to improve the Building and Lease it to full occupancy. Although there has been noise and disturbance the construction has ended and has been complete now for almost 2 months. The Tenant that is below your space does not operate the business until after 5pm daily, and the shows begin after 7pm. Should you have a specific issue please report it immediately so that it can be dealt with in a timely manner. This is not a Quiet Enjoyment issue.

With regard to the issues of the contracted Electrician and your ceiling; I am aware that the specific contractor dealt with you on your issues and resolved them. We in fact were not in charge of that project and any damage incurred from the contractor will be resolved through the contractor's insurance, should you have any.

With regard to the issues with the cleaning company; again that issue was not a result of our management. As I have been made aware that was dealt with directly through the cleaning company and you. In addition, after a Lease review per section 4.2 you are responsible to contract and pay for directly, any janitorial services. I will audit the cost of this through the years that you have occupied the space and bill you back directly for the expenses as the have occurred. In addition, I will notify you and the cleaning company with a 30 days notice that we will no longer be including your suite in our contract.

Any issues you may have with noise, the elevator, the hallways, and etcetera, needs your immediate and direct reporting and is required under the terms of your Lease. I can provide to you our service records of the elevator if you would like them.

With respect to your rental payments, none of the above gives you the right to withhold rental payments.

If we do not receive the full balance due by 6/05/09 we will forward your file to our attorney to accelerate the Default to the fullest extend of the law.


Angela Aeschliman, CPM, CCIM
Director of Property Management

dger

WATERMARK

Property Management, LLC

Date : 6/3/2009

Lease Ledger

Code donapace Property modebldg Lease From 12/1/2006
Name Donahoe Pace & Partners Ltd. Unit 350,B10 Lease To

Date	Description	Charge	Payment	Balance	Chg/Rec
11/25/2008	10/08 Open rent balance from Take over	7,685.00		7,685.00	9928
11/25/2008	11/08 Open rent balance at Take over	7,685.00		15,370.00	9929
11/25/2008	10/08 open balance at Takeover	274.50		15,644.50	9930
11/25/2008	11/08 Open balance at Take over	274.50		15,919.00	9931
11/25/2008	5/07 & 4/08 New entry keys, repair cold air draft	104.59		16,023.59	9932
12/1/2008	Base Rent Office (12/2008)	7,685.00		23,708.59	9943
12/1/2008	Storage Rent (12/2008)	274.50		23,983.09	9944
12/17/2008	12/08 late fee: 6% of \$7,959.50	477.57		24,460.66	10063
12/18/2008	Chk# 4658 Payment		20,878.50	3,582.16	7858
1/1/2009	Base Rent Office (01/2009)	7,685.00		11,267.16	10377
1/1/2009	Storage Rent (01/2009)	274.50		11,541.66	10378
1/9/2009	Chk# 4725 Payment		6,959.50	4,582.16	7976
2/1/2009	Base Rent Office (02/2009)	7,685.00		12,267.16	10605
2/1/2009	Storage Rent (02/2009)	274.50		12,541.66	10606
2/10/2009	Chk# 4787 Payment		6,959.50	5,582.16	8139
2/11/2009	Concession for construction related issues	(1,000.00)		4,582.16	10658
2/11/2009	Reverse charge for new entry key	(76.00)		4,506.16	10659
2/12/2009	Reverse charge for cold air draft	(28.59)		4,477.57	10660
3/1/2009	Base Rent Office (03/2009)	7,950.00		12,427.57	10835
3/1/2009	Storage Rent (03/2009)	274.50		12,702.07	10836
3/12/2009	Late Fee 3/09, 5% of \$7,119.91	356.00		13,058.07	10956
4/1/2009	Base Rent Office (04/2009)	7,950.00		21,008.07	11140
4/1/2009	Storage Rent (04/2009)	274.50		21,282.57	11141
4/11/2009	April Late Fee	411.23		21,693.80	11197
4/13/2009	Payment		6,959.50	14,734.30	8451
5/1/2009	Base Rent Office (05/2009)	7,950.00		22,684.30	11446
5/1/2009	Storage Rent (05/2009)	274.50		22,958.80	11447
5/12/2009	May Late Fee: 5% of \$8224.50	411.23		23,370.03	11601
5/22/2009	Payment		7,224.50	16,145.53	8633
6/1/2009	Base Rent Office (06/2009)	7,950.00		24,095.53	11759
6/1/2009	Storage Rent (06/2009)	274.50		24,370.03	11760

EXHIBIT

E

December 17, 2009

Angela Aeschliman
Watermark Property Management
1030 West Chicago Avenue
Suite 300
Chicago, IL 60622

Re: Boise Mode LLC

Dear Angela,

Please accept this letter in response to the voice message you left for me last Thursday afternoon, December 11, as I was out of the office, and we've been unable to email in the interim.

We are enclosing payments as you requested for rent of our offices in Suite 350 during October, November, and December, based on our prior conversations. As you are aware, these rents were not paid previously as we've encountered numerous disruptions to our business since August as a direct result of construction in The Mode Building, including displacement from our offices of client conferences due to excessive noise levels emanating from the second floor.

On August 15, 2008, we formally advised the property management agent for Boise Mode LLC as to specific problems resulting from construction activities that make this situation untenable and inhibit our ability to conduct business as a professional services office, many of which remain unresolved today.

The right of Quiet Enjoyment for general offices to which we are entitled under the terms of our lease dated November 3, 2006, has been denied to us during the past five months, and our work continues to be disadvantaged daily by repeated disruptions from construction noise, as well as interruptions in utility and elevator services, obstructions to office entries, and miscellaneous construction projects left unattended after being initiated, among other continuing problems.

As you know, it was our prior understanding that construction would conclude with the opening of The North Face at the end of November, and we were not given any notice of new construction to begin at that time, nor have we received any response to our request for an updated construction schedule since then.

During the past five months, we have made every reasonable attempt to accommodate all of the lessor's requests of us in the course of construction for The Mode Building despite the negative impact it continues to create on our daily conduct of business.

It is our understanding that the lessor's intent is to provide for a reciprocal accommodation through rent abatement in proportion to the degree of disruption and displacement we've experienced as a result of construction, until such time as the current construction conditions return to a professional office status, which currently remains unknown. If we misunderstood the lessor's intent or if you have questions as to the scope of our construction concerns, please let me know.

Sincerely,



Tim Pace
Donahoe Pace & Partners Ltd.
Suite 350
The Mode Building
800 West Idaho Street
Boise, ID 83702

January 7, 2009

Angela Aeschliman
Watermark Property Management
1030 West Chicago Avenue
Suite 300
Chicago, IL 60622

Re: Boise Mode LLC

Dear Angela,

Enclosed please find payment for January rents of offices in Suite 350 as previously outlined in our communications with you in December.

At this time, we have not received any further communication from you as to the current status of construction or schedule for completion in The Mode Building.

It is our understanding that the lessor's intent is to abate rent in proportion to the degree of disruption and displacement we've experienced as a result of construction, until such time as the current construction conditions return to a professional office status.

If we misunderstood the lessor's intent or if you have questions as to the scope of our construction concerns, please let me know.

Thank you,

A handwritten signature in black ink, appearing to be 'Tim Pace', with a large, stylized initial 'P' and a long horizontal flourish extending to the right.

Tim Pace
Donahoe Pace & Partners Ltd.
Suite 350
The Mode Building
800 West Idaho Street
Boise, ID 83702

000304

February 9, 2009

Angela Aeschliman
Watermark Property Management
1030 West Chicago Avenue
Suite 300
Chicago, IL 60622

Re: Boise Mode LLC

Dear Angela,

Enclosed please find payment for February rents of offices in Suite 350 as previously outlined in our communications with you in December.

At this time, we have not received a corrected statement of our account delineating \$1000 abatement of rents and credits to remove maintenance charges from our open TI account, nor have we received any further communications from you as to the current status of construction or schedule for completion in The Mode Building.

It is our understanding that the lessor's intent is to abate rent in proportion to the degree of disruption and displacement we've experienced as a result of construction, until such time as the current construction conditions return to a professional office status, which is currently unknown.

Thank you,



Tim Pace
Donahoe Pace & Partners Ltd.
Suite 350
The Mode Building
800 West Idaho Street
Boise, ID 83702

000305

March 6, 2009

Angela Aeschliman
Watermark Property Management
1030 West Chicago Avenue
Suite 300
Chicago, IL 60622

Re: Boise Mode LLC

Dear Angela,

We are writing today to advise you as to the construction conditions that continue to create an untenable environment for our professional services offices at The Mode Building.

As we advised you in December, numerous disruptions during our daily business hours since August have frequently required us to remove employees from their offices to work from home and move agency conferences to alternate locations due to untenable construction noise emanating from the second floor.

Our frequent requests for a copy of the current construction schedule have gone unanswered, while construction tools and materials left unattended in hallways and entry areas have created a hazardous environment for our clients and employees, and we have yet to receive a corrected statement of our account delineating the abatement of \$1000 rents to which we previously agreed.

This past week has been particularly miserable. A new ceiling fan was improperly installed on the roof that allowed leakage into our lobby area during a particularly nasty storm. We arrived yesterday morning to find construction crew, tool carts, and ladder had literally taken over our front office reception area, with literally no room for a receptionist to sit. We did not authorize anyone's entry into our private offices, we received no request for such authorization or any notice from you that such invasion of our office space was imminent. The construction crew showed no respect for our offices or those who work here, and only after I asked Sid, did they remove their tool carts to a less conspicuous area, which of course was another one of our offices. We were interrupted again today in other office areas.

On August 15, 2008, we formally advised the property management agent for Boise Mode LLC as to specific problems resulting from construction activities that make our situation untenable and inhibit our ability to conduct business professionally, as the past week clearly demonstrates. The right of Quiet Enjoyment to which we are entitled under the terms of our lease dated November 3, 2006, continues to be denied us eight months later, and we continue to be disadvantaged daily by repeated disruptions from construction noise, interruptions in utility and elevator services, obstructions to building and office entries, and construction projects that are left unattended after being initiated.

During these past eight months, we have made every reasonable effort to accommodate the multiple problems created by construction schedules gone awry, and it is clear to us that there is no professional contractor or agent managing this process.

Due to the apparent lack of interest and resolution on the part of the lessor for our disadvantaged conditions, we are not paying any additional rents until such time as construction has been completed and the office areas to which we are entitled are returned to their full professional services status.

Sincerely,

Tim Pace
Donahoe Pace & Partners Ltd.
Suite 350
The Mode Building
800 West Idaho Street
Boise, ID 83702

000306

May 20, 2009

Ms. Angela Aeschliman
Director of Property Management
Watermark Property Management LLC
1030 West Chicago Avenue, Suite 300
Chicago, IL 60642

Re: Boise Mode LLC

Dear Ms. Aeschliman:

Please find enclosed our payment of rents due May 2009 for Suite 350 in The Mode Building at 800 West Idaho Street, Boise, Idaho, 83702, in accordance with provisions to which we have previously agreed.

As you know, we have disputed your accounting of rents due to ongoing disruption and displacement of our office services, employees, and clients, during the past ten months as a result of extensive construction to The Mode Building; we have clearly and consistently communicated with you and your predecessors at Colliers International to such effect since August 2008.

We previously agreed to accept \$1000 abatement of rents effective as of October 2008 as accommodation to the Landlord for its failure to perform the Quiet Enjoyment provisions of our lease since August 2008, and we have consistently advised you as agent of the Landlord as to the multiple recurrences of defects, most recently May 12, 2009.

In our initial communication with you as of December 17, 2008, we clearly delineated the understanding that \$1000 abatement of rents is effective, "until such time as the current construction conditions return to a professional office status," and stated at that time, "If we misunderstood the lessor's intent or if you have questions as to the scope of our construction concerns," that you should so advise us.

Our subsequent communications with you further reiterated this understanding, as well as advised you of recurring problems resulting from the new construction of a night club on the second floor located directly below our offices; yet your letter dated May 13, 2009, is the first advising us to the contrary?

We have on numerous occasions during the past ten months of construction yielded benefit of the doubt to the Landlord. Despite ongoing disruptions and displacement due to construction activities, construction crews entering our offices without notice, recurring interruptions in utility and elevator services (including again today), unsafe obstructions to building and office entries, extended delays in completing construction projects that were initiated but left unattended for months, recurring leaks and damages to our offices from faulty construction, and breaches of our office's security, we have nonetheless performed in good faith; this despite the conspicuous absence of professional construction managers or advance notice of construction schedules as we have repeatedly requested during this process, and notwithstanding the Landlord's own failure to cure its recurring defaults.

To assert at this juncture that default lies with a failure on our part to perform, given our consistent efforts to communicate clearly in these matters and the extent to which we have accommodated the Landlord's convoluted construction schedules, belies the degree to which your record of our respective performance is inaccurate. Any action on the part of the Landlord that does not acknowledge its own responsibilities under the terms of lease is neither fair nor reasonable.

Sincerely,

Tim Pace
Donahoe Pace & Partners Ltd.
800 West Idaho Street, Suite 350
Boise, Idaho 83702

000307

April 9, 2009

Angela Aeschliman
Watermark Property Management
1030 West Chicago Avenue
Suite 300
Chicago, IL 60622

Re: Boise Mode LLC

Dear Angela,

We are sending payment today for April rents of offices in Suite 350 in accordance with our prior communications with you. At this time, we have not received any communication from you as to the current status of construction or projected schedule for completion at The Mode Building.

We trust you've been advised as to the numerous adverse effects of construction we continue to experience, including recurring leaks in our lobby from a roof fan that was not installed properly more than a month ago, inoperable elevator service without any advance notice that allows us to alert our clients or other visitors, and continuing obstructions to entry and other access areas of the building that create hazardous conditions for our employees.

Nor have we as yet received your corrected statement of our account delineating the \$1000 abatement of rents since October as previously agreed.

It now appears that improvements on the second floor directly below us, that has been under construction since November, do not include any plans to sound proof the second floor ceiling, and consequently, daily disruptions due to noise emanating from the second floor sound systems will continue to inhibit our ability to conduct a professional services business from our offices.

As we communicated clearly with you in December, it has been our understanding the lessor's intent is to abate rent in proportion to the degree of disruption and displacement we experience as a result of second floor construction, until such time as conditions at The Mode Building are returned to a professional office status, which now appears to be unknown.

While we have made every reasonable effort to accommodate the multiple disruptions and displacements created by unknown construction schedules, it is clear there is no professional contractor or agent managing this process, which only serves to exacerbate the problems. Please advise us as to what remedy you propose to resolve these continuing problems?

Sincerely,



Tim Pace
Donahoe Pace & Partners Ltd.
Suite 350
The Mode Building
800 West Idaho Street
Boise, ID 83702

NOV 24 2010

J. DAVID NAVARRO, Clerk
By A. GARDEN
DEPUTY

Steven F. Schossberger, ISB No. 5358
HAWLEY TROXELL ENNIS & HAWLEY LLP
877 Main Street, Suite 1000
P.O. Box 1617
Boise, ID 83701-1617
Telephone: 208.344.6000
Facsimile: 208.954.5260
Email: sschossberger@hawleytroxell.com

Attorneys for Plaintiff/Counterdefendant Boise Mode, LLC,
successor-in-interest to Mode Building Limited Partnership

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

BOISE MODE, LLC, an Illinois limited liability company, successor-in-interest to Mode Building Limited Partnership, an Idaho limited partnership,

Plaintiff,

vs.

DONAHOE PACE & PARTNERS LTD, an Idaho corporation; and TIMOTHY PACE,

Defendants.

Case No. CV OC 1001093

AFFIDAVIT OF STEVEN F SCHOSSBERG, ESQ. IN SUPPORT OF PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

DONAHOE PACE & PARTNERS LTD, an Idaho corporation,

Counterclaimant,

vs.

BOISE MODE, LLC, an Illinois limited liability company, successor-in-interest to Mode Building Limited Partnership, an Idaho limited partnership,

Counterdefendant.

Steven F. Schossberger, Esq., being first duly sworn upon oath, deposes and says:

AFFIDAVIT OF STEVEN F SCHOSSBERG, ESQ. IN SUPPORT OF PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT - 1

37

1. I make this affidavit based on my personal knowledge in support of Plaintiff Boise Mode LLC's ("Boise Mode) motion for summary judgment.

2. I am a partner of the law firm Hawley Troxell Ennis & Hawley LLP, counsel of record for Boise Mode LLC.

3. Attached hereto as Exhibit A is a true and correct copy of a letter that I sent to Defendant Donahoe Pace & Partners, Ltd. ("Defendant") and Timothy Pace on behalf of Boise Mode on August 13, 2009.

4. Attached hereto as Exhibit B is a true and correct copy a letter from Timothy Pace to me dated August 24, 2009.


5. Attached hereto as Exhibit C is a true and correct copy of a letter entitled THREE (3) DAYS' NOTICE TO PAY RENT AND/OR QUIT AND VACATE THE PREMISES that I sent to Defendant and Timothy Pace on behalf of Boise Mode on October 5, 2009.

6. Attached hereto as Exhibit D is a true and correct copy of e-mail correspondence between Timothy Pace and me from October 8, 2009, and October 9, 2009.

7. Attached hereto as Exhibit E is a true and correct copy a letter from Timothy Pace to me dated October 12, 2009.

8. Attached hereto as Exhibit F is a true and correct copy of a letter that I sent to Defendant and Timothy Pace on behalf of Boise Mode on October 26, 2009, together with a copy of an e-mail I sent Mr. Pace that same day attaching a copy of the letter.

Further your affiant sayeth naught.



Steven F. Schossberger

STATE OF IDAHO)
) ss.
County of Ada)

SUBSCRIBED AND SWORN before me this 24th day of November, 2010.



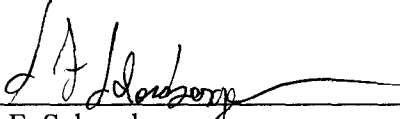
Karen Foruria
Notary Public for Idaho
Residing at Boise, Idaho
My commission expires 6-18-11

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 24 day of November, 2010, I caused to be served a true copy of the foregoing AFFIDAVIT OF STEVEN F SCHOSSBERG, ESQ. IN SUPPORT OF PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT by the method indicated below, and addressed to each of the following:

Michael E. Kelly
John J. Browder
LOPEZ & KELLY, PLLC
702 W. Idaho Street, Suite 1100
P.O. Box 856
Boise, ID 83701
[Attorneys for Defendants and Counterclaimant]

U.S. Mail, Postage Prepaid
 Hand Delivered
 Overnight Mail
 E-mail
 Telecopy: 208.342.4344



Steven F. Schossberger

EXHIBIT

A

HAWLEY TROXELL

ATTORNEYS AND COUNSELORS

Hawley Troxell Ennis & Hawley LLP
877 Main Street, Suite 1000
P.O. Box 1617
Boise, Idaho 83701-1617
208.344.6000
www.hawleytroxell.com

STEVEN F. SCHOSSBERGER
ADMITTED TO PRACTICE LAW IN IDAHO AND CALIFORNIA
EMAIL: SSCHOSSBERGER@HAWLEYTROXELL.COM
DIRECT DIAL: 208.388.4975
DIRECT FAX: 208.954.5260

August 13, 2009

VIA UNITED STATES MAIL

**VIA CERTIFIED MAIL WITH
RETURN RECEIPT REQUESTED**

Donahoe Pace & Parnters, Ltd
800 W. Idaho Street, Suite 350
Boise, ID 83702

Timothy Pace, Guarantor
800 W. Idaho Street, Suite 350
Boise, ID 83702

Re: *Delinquent Rent for Lease of 800 W. Idaho Street, Suite 350, Boise, Idaho 83702*

Dear Mr Pace:

This law firm represents Boise Mode, LLC, the Landlord of those certain premises located at 800 Idaho Street, Suite 350, Boise, Idaho, which is leased to Donahoe Pace & Partners, Ltd., as tenant, pursuant to that certain Retail Lease Agreement dated November 3, 2006, (hereinafter the "Lease").

Previously, written demand was made upon you by Watermark Property Management, LLC ("Watermark Management") on behalf of the Landlord for payment of the delinquent rent and charges owed by you under the terms of the Lease. You failed to cure those delinquent sums which are past due and outstanding to Boise Mode, LLC.

Under the provisions of paragraph 20.1(a) of the Lease, you are hereby notified that payment in the amount of \$19,967.99 is due and owing to Boise Mode, LLC under the terms of

EXHIBIT A

43955-0011 1028313.1
000314

Donahoe Pace & Partners, Ltd.
Mr. Timothy Pace, Guarantor
August 13, 2009
Page 2

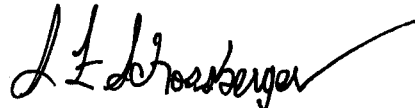
the Lease for the months of October 2008 through August 2009. A tenant statement showing the balance due of \$19,967.99 is attached hereto as Exhibit A.

DEMAND IS HEREBY MADE that on or before 5:00 p.m. on Monday, August 24, 2009, you remit to our office at 877 Main Street, Suite 1000, Boise, Idaho 83701, a check made payable to Boise Mode, LLC, in the amount of \$19,967.99. In the event you fail to pay the amount stated above on or before 5:00 p.m. on Monday, August 24, 2009, you are advised that our client has instructed us to proceed with a legal action against you to collect the delinquent rent payments and charges owed to it under the Lease, and to protect its rights thereunder. You are advised that our client will seek to recover all costs of suit, including attorneys' fees, incurred due to your default of the Lease.

You are furthermore reminded that the next scheduled rent payment under the terms of the Lease is due and payable on September 1, 2009. Please timely make this payment. If you have any question concerning this letter, please give me a call.

Sincerely,

HAWLEY TROXELL ENNIS & HAWLEY LLP



Steven F. Schossberger

SFS/bab
Enclosure
cc: Client

Tenant Ledger
Donahoe Pace

8/11/2009

<u>Date</u>	<u>Description</u>	<u>Charges</u>	<u>Payments</u>	<u>Balance</u>
	Balance Fwd			0
11/25/08	Unpaid 10/08 rent at Take over	7,685.00		7,685.00
11/25/08	Unpaid 11/08 rent at Take over	7,685.00		15,370.00
11/25/08	Unpaid 10/08 Storage Rent at Takeover	274.50		15,644.50
11/25/08	Unpaid 11/08 Storage Rent at Takeover	274.50		15,919.00
11/25/08	5/07 & 4/08 New entry keys, repair cold air dra	104.59		16,023.59
12/01/08	0 - Base Rent Office (12/2008)	7,685.00		23,708.59
12/01/08	0 - Storage Rent (12/2008)	274.50		23,983.09
12/17/08	12/08 late fee: 6% of \$7,959.50	477.57		24,460.66
12/18/08	Chk# 4658 - Payment		20,878.50	3,582.16
01/01/09	0 - Base Rent Office (01/2009)	7,685.00		11,267.16
01/01/09	0 - Storage Rent (01/2009)	274.50		11,541.66
01/09/09	Chk# 4725 - Payment		6,959.50	4,582.16
02/01/09	0 - Base Rent Office (02/2009)	7,685.00		12,267.16
02/01/09	0 - Storage Rent (02/2009)	274.50		12,541.66
02/10/09	Chk# 4787 - Payment		6,959.50	5,582.16
02/11/09	Concession for construction related issues	(1,000.00)		4,582.16
02/11/09	Reverse charge for new entry key	(76.00)		4,506.16
02/12/09	Reverse charge for cold air draft	(28.59)		4,477.57
03/01/09	0 - Base Rent Office (03/2009)	7,950.00		12,427.57
03/01/09	0 - Storage Rent (03/2009)	274.50		12,702.07
03/12/09	Late Fee 3/09, 5% of \$7,119.91	356.00		13,058.07
04/01/09	0 - Base Rent Office (04/2009)	7,950.00		21,008.07
04/01/09	0 - Storage Rent (04/2009)	274.50		21,282.57
04/11/09	April Late Fee	411.23		21,693.80
04/13/09	Payment		6,959.50	14,734.30
05/01/09	0 - Base Rent Office (05/2009)	7,950.00		22,684.30
05/01/09	0 - Storage Rent (05/2009)	274.50		22,958.80
05/12/09	May Late Fee: 5% of \$8224.50	411.23		23,370.03
05/22/09	Payment		7,224.50	16,145.53
06/01/09	0 - Base Rent Office (06/2009)	7,950.00		24,095.53
06/01/09	0 - Storage Rent (06/2009)	274.50		24,370.03
06/11/09	June Late Fee: 5% of \$8,224.50	411.23		24,781.26
06/15/09	Payment		7,224.50	17,556.76
07/01/09	0 - Base Rent Office (07/2009)	7,950.00		25,506.76
07/01/09	0 - Storage Rent (07/2009)	274.50		25,781.26
07/08/09	July late fee: 5% of \$8,224.50	411.23		26,192.49
07/10/09	Chk# 5194 - Payment		7,224.50	18,967.99
08/01/09	0 - Base Rent Office (08/2009)	7,950.00		26,917.99
08/01/09	0 - Storage Rent (08/2009)	274.50		27,192.49
08/07/09	Chk# 5275 - Payment		7,224.50	19,967.99

EXHIBIT

B

August 24, 2009

VIA FACSIMILE (208) 954-5260
AND VIA HAND DELIVERY

Mr. Steven F. Schossberger
Hawley Troxell Ennis & Hawley LLP
877 Main Street, Suite 1000
Post Office Box 1617
Boise, ID 83701-1617

Re: Boise Mode, LLC's Defaults of Office Lease Agreement for 800 W. Idaho Street,
Suite 350, Boise, Idaho 83702 (the "Premises")

Dear Mr. Schossberger:

I am writing in response to your letter dated August 13, 2009, in which you assert on behalf of Boise Mode, LLC ("Boise Mode") that Donahoe Pace & Partners, Ltd. ("Donahoe Pace") has breached the Office Lease Agreement, dated November 3, 2006, ("Office Lease") for failure to pay rent and sums due under it.

As explained herein, Donahoe Pace disputes that it is in default. Instead, the relationship between Boise Mode and Donahoe Pace has been one in which Boise Mode persistently has breached the terms of the Office Lease and our right to quiet enjoyment. As such, Donahoe Pace not only is excused from performance under the Office Lease, but also has a claim for damages that Boise Mode's breaches have caused it.

It is our position that Boise Mode has breached material terms of the Office Lease thereby nullifying Donahoe Pace's obligation to pay rent. These breaches also impinge on Donahoe Pace's contractual expectations and substantially interfere with its use and enjoyment of the Premises. Section 19.3 of the Office Lease states in full:

QUIET ENJOYMENT. Landlord agrees that Tenant, upon paying the rent and other monetary sums due under this Lease and performing the covenants and conditions of this Lease and upon recognizing purchaser as Landlord, may quietly have, hold and enjoy the Premises during the term hereof; subject, however, to loss by casualty and all restrictions and covenants contained or referred to in this Lease.

In this instance, subsequent to Donahoe Pace's payment of rent and all sums then due under the Office Lease, Boise Mode breached Section 19.3. First, Boise Mode has failed to ensure that the actions of the second floor tenant, Hijinx, do not interfere with Donahoe Pace's rights to quietly enjoy the Premises. In particular, and as evidenced by letters Donahoe Pace sent to your client and/or its agents, the excessive noise emanating from the second floor has forced Donahoe Pace to regularly hold meetings somewhere other than the Premises. *See* my letter to Angela Aeschliman, dated December 17, 2009, a copy of which is attached hereto as Exhibit "A." This inability to fully use the Premises has gone on since construction of The North Face space began and is a fact of which your client has been aware for approximately a year.

August 24, 2009

Page 2

Donahoe Pace's inability to conduct business into the evening has caused it to suffer significant lost revenue. Moreover, the excessive and unreasonable noise also has caused its video production unit to move out of the Premises. *See* emails from Jerry Long to Tim Pace, dated July 27, 2009 and August 19, 2009, copies of which are collectively attached hereto as Exhibit "B." Similarly, Donahoe Pace has endured countless disruptions from construction noise and utilities and elevator disruptions for which your client is responsible that have adversely impacted and substantially interfered with its ability to use and enjoy the Premises.

Boise Mode also breached section 10.1 of the Office Lease, which requires it to repair and maintain the roof and structural portions of the Facility, by incorrectly installing a ceiling fan. The foreseeable result of Boise Mode's breach was that water leaked into Donahoe Pace's lobby and damaged it. Other construction projects resulted in regular water leaks from March through June 2009. *See* my letter to David Baum, dated July 23, 2009, a copy of which is attached hereto as Exhibit "C." Donahoe Pace notified Boise Mode of that issue immediately. *See* my letter to Angela Aeschliman, dated March 6, 2009, a copy of which is attached hereto as Exhibit "D." Additionally, there have been countless times when construction projects have prevented or impeded Donahoe Pace's access to the Premises and otherwise have damaged its offices. *See* my letter to Angela Aeschliman, dated May 20, 2009, a copy of which is attached hereto as Exhibit "E." Again, Boise Mode's breaches are unequivocal and constitute clear examples of substantial interference with Donahoe Pace's use and enjoyment of the Premises.

Besides these examples of Boise Mode's pattern of breaching the Office Lease, it also has violated, on many occasions, its duty to notify Donahoe Pace with at least twenty-four hours notice of its intent to enter the Premises. As the foregoing exhibits evidence, there were many times when Boise Mode allowed contractors hired to renovate the second floor and other offices adjacent to Donahoe Pace inside the Premises despite the fact that Boise Mode had not provided the notice that the Office Lease requires.¹ Once more, each instance is a breach of the Office Lease and proof that Boise Mode has substantially interfered with Donahoe Pace's rights to the Premises since virtually the day it moved in.

What potentially is most unsettling about Boise Mode's actions is that these and other breaches have compromised Donahoe Pace's corporate security and perhaps, that of its clients. Donahoe Pace has documented instances when agents of Boise Mode actually have rifled through company drawers. Items have been stolen from Donahoe Pace's office. There has also been intrusion into Donahoe Pace's computer network. These examples comprise only what Donahoe Pace knows right now - not what it might learn if this dispute is not resolved in the near future.

As I believe the foregoing makes clear, Donahoe Pace has vigorous defenses to any breach of lease claim advanced by Boise Mode. This simply is not a situation where a tenant has wrongfully failed to pay rent. Rather, it is an example of a landlord failing to live up to the clear and certain obligations imposed by the lease.

¹ These intrusions likely constitute civil trespass as well.

August 24, 2009
Page 3

Notwithstanding the above, Donahoe Pace continues to be open to resolving this dispute without resorting to litigation. Donahoe Pace had offered to compromise its claims against Boise Mode provided that it reduce the amount due under the Office Lease by \$1,000.00 per month. In fact, until recently Donahoe Pace believed that Boise Mode agreed to such an arrangement. That offer still is an option. Another option is to mediate the dispute. Please let me know whether your client is amenable to one of these two alternatives.

I look forward to hearing from you. Please do not hesitate to contact me if you have any questions.

Very truly yours,

A handwritten signature in black ink, appearing to read 'Tim Pace', with a large, stylized flourish above the name.

Tim Pace
Donahoe Pace & Partners, Ltd.
Suite 350
The Mode Building
800 West Idaho Street
Boise, ID 83702

Enclosures

000320

December 17, 2009

A

Angela Aeschliman
Watermark Property Management
1030 West Chicago Avenue
Suite 300
Chicago, IL 60622

Re: Boise Mode LLC

Dear Angela,

Please accept this letter in response to the voice message you left for me last Thursday afternoon, December 11, as I was out of the office, and we've been unable to email in the interim.

We are enclosing payments as you requested for rent of our offices in Suite 350 during October, November, and December, based on our prior conversations. As you are aware, these rents were not paid previously as we've encountered numerous disruptions to our business since August as a direct result of construction in The Mode Building, including displacement from our offices of client conferences due to excessive noise levels emanating from the second floor.

On August 15, 2008, we formally advised the property management agent for Boise Mode LLC as to specific problems resulting from construction activities that make this situation untenable and inhibit our ability to conduct business as a professional services office, many of which remain unresolved today.

The right of Quiet Enjoyment for general offices to which we are entitled under the terms of our lease dated November 3, 2006, has been denied to us during the past five months, and our work continues to be disadvantaged daily by repeated disruptions from construction noise, as well as interruptions in utility and elevator services, obstructions to office entries, and miscellaneous construction projects left unattended after being initiated, among other continuing problems.

As you know, it was our prior understanding that construction would conclude with the opening of The North Face at the end of November, and we were not given any notice of new construction to begin at that time, nor have we received any response to our request for an updated construction schedule since then.

During the past five months, we have made every reasonable attempt to accommodate all of the lessor's requests of us in the course of construction for The Mode Building despite the negative impact it continues to create on our daily conduct of business.

It is our understanding that the lessor's intent is to provide for a reciprocal accommodation through rent abatement in proportion to the degree of disruption and displacement we've experienced as a result of construction, until such time as the current construction conditions return to a professional office status, which currently remains unknown. If we misunderstood the lessor's intent or if you have questions as to the scope of our construction concerns, please let me know.

Sincerely,



Tim Pace
Donahoe Pace & Partners Ltd.
Suite 350
The Mode Building
800 West Idaho Street
Boise, ID 83702

B

Tim Pace

From: Jerry Long [long_gerald@hotmail.com]
Sent: Monday, July 27, 2009 3:39 PM
To: Tim Pace
Subject: Office

Tim,

During the weeks of June 15-19 and June 29-July 1, most of those nights I had to listen to the comedy club through their entire set. It is so loud I had to put headphones on at times just to listen to what I was editing. During their "burlesque" show I kept my music down because I knew they would be able to hear it if it was too loud.

Also, some people choose to use the stairwell for health reasons. I use the stairs 90% of the time. I cannot bring clients up the stairwell, the back is always filthy and the front is often not presentable.

Jerry

Jerry Long
6918 W. Tobi Dr.
Boise, ID 83714-2425

(208) 853-3366 home
(208) 869-2936 cel

B

Tim Pace

From: Jerry Long [long_gerald@hotmail.com]
Sent: Wednesday, August 19, 2009 2:55 PM
To: Tim Pace
Subject: Office Space

Tim,

To follow up our conversation this morning, I am letting you know that I will be moving out of Suite 350 on or around Sept. 7 (Labor Day). I will continue on your current client project for now in this space.

It has become clear that I am not able to conduct my business in the way I need to. I moved in during construction of the 2nd floor space and figured after that was completed, the noise from underneath would stop and it hasn't. As you know I need to work during various hours of the day, sometimes having to work all night or into the evening at the very least. The noise from below has continued with sound levels that are not tolerable for me to edit and record sound or video when I need to.

Thanks for your attention to this matter.

Jerry

Jerry Long
Jerry Long Productions
Suite 350 / The Mode Building
800 W. Idaho / Boise, Idaho 83702

(208) 968-0052 home
(208) 869-2936 cel

July 23, 2009

David Baum
Boise Mode LLC
Summary of Tenant Dispute

We are providing an abbreviated summary of issues that have been previously communicated with the respective property managers for The Mode Building as regards conduct of our professional services business in Suite 350. This summary is not intended to be exhaustive; the issues as noted below demonstrate the scope of problems we've encountered, but do not constitute a full or complete list.

With the changes of property managers that have occurred since we moved in December 2006, it is not clear to us as to which issues may have been addressed with you or not, but now seems an appropriate time to provide an overview that reflects the ongoing concerns we have with offices we currently occupy.

As a professional services firm, we have a relatively low tolerance for the nature of disturbances created by construction crews since we moved in. Some of these issues may result from the perception among others that ours is a 9:00 am to 5:00 pm office, when in fact we operate 6:00 am to 6:00 pm daily, as well as nights and weekends to meet the demands of our clients as they arise.

We have been very patient in accommodating disruptions to our offices that occurred as the result of initial construction phases when you were remodeling Caprock and common areas, 8th Street and Idaho Street entrances, restrooms, etc.

Please note that through the course of the initial construction phases in the first two years, we repeatedly accommodated the 'inconveniences' of construction, as they were often referred, and did not assert the right of Quiet Enjoyment or 24 hours notice to which we are entitled under the terms of lease.

North Face Construction

Despite the construction problems created for us and our clients during the first two years, it was in August last year, after North Face construction began, that we were forced to confront Colliers as to the untenable level of disruption that displaced us from conducting the normal course of business in our offices.

Specifically on August 15, 2008, we met with Colliers to advise their agent of disruptions occurring during the prior week. As one example, we scheduled three meetings in our conference room on August 14th.

- Construction noise at 10:30 am was so loud we had to ask participants to repeat themselves across the conference room table because we couldn't hear each other clearly.
- In a second meeting at 2:00 pm, the noise was so disruptive we had to move out of our conference room entirely to be heard at all.
- By 4:00 pm, the construction noise had subsided, presumably because construction workers had left the building.

We continued to communicate with Colliers in subsequent weeks as to the disruption and displacement of our business created by construction, and we suggested alternatives that would help us accommodate the resulting problems, including advanced notice of construction schedules that might predict the potential embarrassment of conference room chaos. During this time, we scheduled conferences on numerous occasions outside of our offices to accommodate construction schedules.

As North Face construction continued into October, we asserted the right of Quiet Enjoyment under the lease and requested that Colliers advise you of our request for reciprocal accommodation, however, we did not receive any answer from Colliers other than they were awaiting response.

There are numerous other examples of disruptions to our business that we accommodated into the latter part of November, which was the time we understood North Face construction would be concluded. As examples, several projects that began with the North Face construction were left unattended and uncompleted for weeks and months at a time, many of which created safety hazards to our employees and clients, and utility services were frequently interrupted that required us to shut down office operations completely, and not always with the benefit of any advanced notice.

000324

Page 2

David Baum
Boise Mode LLC
Summary of Tenant's Disputes
July 23, 2009

Comedy Club Construction

After the first of December, we received word via second-hand sources that a night club was being constructed on the second floor beneath our offices; we never received advance notice of this construction, nor did we ever receive copies of any construction schedules, despite our repeated requests.

It soon became obvious the night club construction projects were not being professionally managed. During this time, we again asserted the right of Quiet Enjoyment under the lease and provided specific examples of construction problems we continued to encounter, including;

- Construction workers and inspectors repeatedly entered our offices without any advance notice or authorization in order to gain access to our ceiling and other areas.
- Constant construction noise emanated from the second floor that exceeded our employees' tolerance; on multiple occasions employees had to leave the office early in order to conduct their work from home.
- Faulty construction work resulted in recurring problems, such as monthly water leaks into our offices from March through June.

The first week of March was a particularly bad one for us. Not only did faulty construction workmanship on a roof fan leave us with leaks into our lobby after a heavy spring storm, but we arrived one morning to find a construction worker and his ladder, along with two large tool carts on wheels, prominently planted in the middle of our reception area with no room for a receptionist to even sit at the desk.

This was not the first incident of construction workers or others entering our space without advanced notice and without authorization; the construction worker in this instance demonstrated no respect for anyone's interest other than his own. Consequently we asserted the right to no less than 24 hours notice of entry as provided by the terms of the lease.

Since opening, the night club intermittently plays loud music prior to opening at 5pm, sometimes as early as 9am or throughout the morning. Nevertheless with the opening of the night club, our ability to schedule our offices for client projects after 5:00pm, such as conducting focus group research as we have in the past, is no longer viable due to night club disruptions during evening hours.

Security Breaches

Since moving into The Mode Building, we've experienced repeated breaches of our offices security, including pilfering of personal property from offices, rifling of office drawers caught on web cams, and violation of our computer network after hours; all of which have been reported to property management and maintenance services.

Since the opening of the night club on the second floor, security lapses in the building appear to be on the rise, including the elevator to the 3rd floor remaining unlocked after 6pm and weekends, the back door to the alley repeatedly left propped open throughout the day and into the evening hours for what one presumes to be the convenience of delivery services.

I have personally taken to checking the back alley door at the end of the day when I leave the office late and removing the prop after 6pm, as well as locking the elevator when I find it unlocked after 6pm or on weekends, as it was on July 12th.

2

David Baum
Boise Mode LLC
Summary of Tenant's Disputes
July 23, 2009

Remediation

We originally proposed remediation of these issues, among others, through rent abatement, as we believe the terms of the lease provide it should be; we agreed to \$1000 abatement of rents beginning with October until such time as conditions return to a professional office status, as our payments reflect.

Further, the failure on numerous occasions of property management to provide no less than 24 hours notice of entry as a condition of lease should be remediated; we withheld payment of March rents for violation of those rights under the terms of lease, as we advised property management at that time.

We've clearly and consistently communicated with the respective property managers that we believe primary responsibility to ensure the right of Quiet Enjoyment and to provide no less than 24 hours notice lies with the lessor, and not with any third party as has previously been suggested. We also believe the accounting of our record to date has not been accurately represented to you by the respective property managers.

Resolution

To be clear, for the first 20 months of construction, we had no issues with payment of rents for any months prior to August 2008, nor did we assert rights to which we are entitled under the lease until such time as we were no longer able to conduct our normal course of business due to multiple disruptions from construction projects managed by third parties.

Only after repeated requests for relief went unanswered did we withhold any payment of rents pending a more satisfactory resolution that respects the responsibilities of both parties under the terms of lease.

Today, equitable resolution provides \$1000 abatement from the time of our advisement as to violation of the right to Quiet Enjoyment in August, through the time of most recent damages to our offices in June; moving forward, abatement should compensate the loss of income potential resulting from night club operations without sound proofing.

Alternatively, we have offered to consider any other space options that you may have available for lease. Recognizing other space options may not otherwise be an ideal choice for our business, at this juncture, it would offer a welcome relief from the negative environment we've experienced over the past 12 months.

We also appreciate the fact that you may have alternate resolutions to consider, but we feel it imperative that our discussion reflect a full accounting of the respective record and responsibility of both parties under the terms of lease, and to this point that has not been fully accorded to us.

March 6, 2009

D

Angela Aeschliman
Watermark Property Management
1030 West Chicago Avenue
Suite 300
Chicago, IL 60622

Re: Boise Mode LLC

Dear Angela,

We are writing today to advise you as to the construction conditions that continue to create an untenable environment for our professional services offices at The Mode Building.

As we advised you in December, numerous disruptions during our daily business hours since August have frequently required us to remove employees from their offices to work from home and move agency conferences to alternate locations due to untenable construction noise emanating from the second floor.

Our frequent requests for a copy of the current construction schedule have gone unanswered, while construction tools and materials left unattended in hallways and entry areas have created a hazardous environment for our clients and employees, and we have yet to receive a corrected statement of our account delineating the abatement of \$1000 rents to which we previously agreed.

This past week has been particularly miserable. A new ceiling fan was improperly installed on the roof that allowed leakage into our lobby area during a particularly nasty storm. We arrived yesterday morning to find construction crew, tool carts, and ladder had literally taken over our front office reception area, with literally no room for a receptionist to sit. We did not authorize anyone's entry into our private offices, we received no request for such authorization or any notice from you that such invasion of our office space was imminent. The construction crew showed no respect for our offices or those who work here, and only after I asked Sid, did they remove their tool carts to a less conspicuous area, which of course was another one of our offices. We were interrupted again today in other office areas.

On August 15, 2008, we formally advised the property management agent for Boise Mode LLC as to specific problems resulting from construction activities that make our situation untenable and inhibit our ability to conduct business professionally, as the past week clearly demonstrates. The right of Quiet Enjoyment to which we are entitled under the terms of our lease dated November 3, 2006, continues to be denied us eight months later, and we continue to be disadvantaged daily by repeated disruptions from construction noise, interruptions in utility and elevator services, obstructions to building and office entries, and construction projects that are left unattended after being initiated.

During these past eight months, we have made every reasonable effort to accommodate the multiple problems created by construction schedules gone awry, and it is clear to us that there is no professional contractor or agent managing this process.

Due to the apparent lack of interest and resolution on the part of the lessor for our disadvantaged conditions, we are not paying any additional rents until such time as construction has been completed and the office areas to which we are entitled are returned to their full professional services status.

Sincerely,

Tim Pace
Donahoe Pace & Partners Ltd.
Suite 350
The Mode Building
800 West Idaho Street
Boise, ID 83702

000327

May 20, 2009

Ms. Angela Aeschliman
Director of Property Management
Watermark Property Management LLC
1030 West Chicago Avenue, Suite 300
Chicago, IL 60642

Re: Boise Mode LLC

Dear Ms. Aeschliman:

Please find enclosed our payment of rents due May 2009 for Suite 350 in The Mode Building at 800 West Idaho Street, Boise, Idaho, 83702, in accordance with provisions to which we have previously agreed.

As you know, we have disputed your accounting of rents due to ongoing disruption and displacement of our office services, employees, and clients, during the past ten months as a result of extensive construction to The Mode Building; we have clearly and consistently communicated with you and your predecessors at Colliers International to such effect since August 2008.

We previously agreed to accept \$1000 abatement of rents effective as of October 2008 as accommodation to the Landlord for its failure to perform the Quiet Enjoyment provisions of our lease since August 2008, and we have consistently advised you as agent of the Landlord as to the multiple recurrences of defects, most recently May 12, 2009.

In our initial communication with you as of December 17, 2008, we clearly delineated the understanding that \$1000 abatement of rents is effective, "until such time as the current construction conditions return to a professional office status," and stated at that time, "If we misunderstood the lessor's intent or if you have questions as to the scope of our construction concerns," that you should so advise us.

Our subsequent communications with you further reiterated this understanding, as well as advised you of recurring problems resulting from the new construction of a night club on the second floor located directly below our offices; yet your letter dated May 13, 2009, is the first advising us to the contrary?

We have on numerous occasions during the past ten months of construction yielded benefit of the doubt to the Landlord. Despite ongoing disruptions and displacement due to construction activities, construction crews entering our offices without notice, recurring interruptions in utility and elevator services (including again today), unsafe obstructions to building and office entries, extended delays in completing construction projects that were initiated but left unattended for months, recurring leaks and damages to our offices from faulty construction, and breaches of our office's security, we have nonetheless performed in good faith; this despite the conspicuous absence of professional construction managers or advance notice of construction schedules as we have repeatedly requested during this process, and notwithstanding the Landlord's own failure to cure its recurring defaults.

To assert at this juncture that default lies with a failure on our part to perform, given our consistent efforts to communicate clearly in these matters and the extent to which we have accommodated the Landlord's convoluted construction schedules, belies the degree to which your record of our respective performance is inaccurate. Any action on the part of the Landlord that does not acknowledge its own responsibilities under the terms of lease is neither fair nor reasonable.

Sincerely,

Tim Pace
Donahoe Pace & Partners Ltd.
800 West Idaho Street, Suite 350
Boise, Idaho 83702

000328

Tenant Ledger
Donahoe Pace

8/11/2009

<u>Date</u>	<u>Description</u>	<u>Charges</u>	<u>Payments</u>	<u>Balance</u>
Balance Fwd				0
11/25/08	Unpaid 10/08 rent at Take over	7,685.00		7,685.00
11/25/08	Unpaid 11/08 rent at Take over	7,685.00		15,370.00
11/25/08	Unpaid 10/08 Storage Rent at Takeover	274.50		15,644.50
11/25/08	Unpaid 11/08 Storage Rent at Takeover	274.50		15,919.00
11/25/08	5/07 & 4/08 New entry keys, repair cold air dra	104.59		16,023.59
12/01/08	0 - Base Rent Office (12/2008)	7,685.00		23,708.59
12/01/08	0 - Storage Rent (12/2008)	274.50		23,983.09
12/17/08	12/08 late fee: 6% of \$7,959.50	477.57		24,460.66
12/18/08	Chk# 4658 - Payment		20,878.50	3,582.16
01/01/09	0 - Base Rent Office (01/2009)	7,685.00		11,267.16
01/01/09	0 - Storage Rent (01/2009)	274.50		11,541.66
01/09/09	Chk# 4725 - Payment		6,959.50	4,582.16
02/01/09	0 - Base Rent Office (02/2009)	7,685.00		12,267.16
02/01/09	0 - Storage Rent (02/2009)	274.50		12,541.66
02/10/09	Chk# 4787 - Payment		6,959.50	5,582.16
02/11/09	Concession for construction related issues	(1,000.00)		4,582.16
02/11/09	Reverse charge for new entry key	(76.00)		4,506.16
02/12/09	Reverse charge for cold air draft	(28.59)		4,477.57
03/01/09	0 - Base Rent Office (03/2009)	7,950.00		12,427.57
03/01/09	0 - Storage Rent (03/2009)	274.50		12,702.07
03/12/09	Late Fee 3/09, 5% of \$7,119.91	356.00		13,058.07
04/01/09	0 - Base Rent Office (04/2009)	7,950.00		21,008.07
04/01/09	0 - Storage Rent (04/2009)	274.50		21,282.57
04/11/09	April Late Fee	411.23		21,693.80
04/13/09	Payment		6,959.50	14,734.30
05/01/09	0 - Base Rent Office (05/2009)	7,950.00		22,684.30
05/01/09	0 - Storage Rent (05/2009)	274.50		22,958.80
05/12/09	May Late Fee: 5% of \$8224.50	411.23		23,370.03
05/22/09	Payment		7,224.50	16,145.53
06/01/09	0 - Base Rent Office (06/2009)	7,950.00		24,095.53
06/01/09	0 - Storage Rent (06/2009)	274.50		24,370.03
06/11/09	June Late Fee: 5% of \$8,224.50	411.23		24,781.26
06/15/09	Payment		7,224.50	17,556.76
07/01/09	0 - Base Rent Office (07/2009)	7,950.00		25,506.76
07/01/09	0 - Storage Rent (07/2009)	274.50		25,781.26
07/08/09	July late fee: 5% of \$8,224.50	411.23		26,192.49
07/10/09	Chk# 5194 - Payment		7,224.50	18,967.99
08/01/09	0 - Base Rent Office (08/2009)	7,950.00		26,917.99
08/01/09	0 - Storage Rent (08/2009)	274.50		27,192.49
08/07/09	Chk# 5275 - Payment		7,224.50	19,967.99

EXHIBIT

C

STEVEN F. SCHOSSBERGER
ADMITTED TO PRACTICE LAW IN IDAHO AND CALIFORNIA
EMAIL: SFS@HTEH.COM

October 5, 2009

**THREE (3) DAYS' NOTICE TO PAY RENT
AND/OR TO QUIT AND VACATE THE PREMISES**

TO: Donahoe Pace & Partners, Ltd. (Tenant), Timothy Pace (Guarantor), and any subtenant, the entity/person(s) in possession of that certain real property described as 800 West Idaho Street, Suite 350, Boise, Idaho 83702.

YOU, AND EACH OF YOU, ARE HEREBY NOTIFIED that you are in default of your rent under the terms of the RETAIL LEASE AGREEMENT dated November 3, 2006 (the "Lease") with the Lessor/Owner of said premises, Boise Mode, LLC, in that you have failed to pay rent due in the total sum of Twenty Nine Thousand Two Hundred Forty Two Dollars and Forty Nine Cents (\$29,242.49). Your immediate payment of this rent is required.

YOU ARE FURTHER NOTIFIED that, pursuant to the provisions of Idaho Code § 6-303(2), you must, within three (3) days of service of this Notice upon you, comply by **paying to Boise Mode, LLC the sum of \$29,242.49, or you must quit and vacate the above-described premises.** A true and correct copy of your current Tenant Ledger is attached hereto as Exhibit A and incorporated herein by reference.

In the event that you fail to either pay rent in the amount stated above, or quit and vacate, pursuant to Idaho Code § 6-310, an Unlawful Detainer action will be promptly brought against you in the Ada County District Court for immediate possession of said premises, and for the reasonable attorney's fees and costs incurred thereby, which will be awarded by the Court to the prevailing party. Your landlord, Boise Mode, LLC, may also bring an action against you for its damages due to your failure to pay rent, and for the reasonable attorney's fees and costs incurred thereby, which will be awarded by the Court to the prevailing party. See I.C. § 6-324.


YOU ARE FURTHER NOTIFIED that within three (3) days of service of this Notice upon you, you must deliver your payment to BOISE MODE, LLC in the amount of \$29,242.49 by delivering said payment to the undersigned as follows: Attn: Steven F. Schossberger, Esq., Hawley Troxell Ennis & Hawley, LLP, 877 Main St., Ste. 1000, Boise, ID.

Donahoe Pace & Partners, Ltd.
Timothy Pace
October 5, 2009
Page 2

Please be guided accordingly.

Sincerely,

HAWLEY TROXELL ENNIS & HAWLEY LLP


Steven F. Schossberger

cc: client

Watermark Property Management
1030 West Chicago Avenue
Suite 300
Chicago, IL 60642

Tenant Statement

Make Payments to: **Boise Mode, LLC**
Dept. 5410
P.O. Box 745
Milwaukee, IL 53201-0745

Statement Date : 10/05/09

Tenant : Donahoe, Pace & Partners, Ltd. - donapace

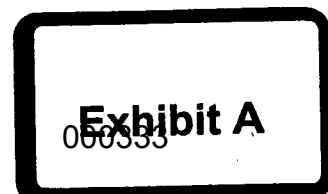
Donahoe, Pace & Partners Ltd.
Attn: Mr. Tim Pace
800 West Idaho Street, Suite 350
Boise, ID 83702

Property : modebldg
800 W Idaho St., Boise, ID
Unit : 350 & B10

Balance Due : \$29,242.49

Date	Description	Charges	Payments	Balance
	Balance Forward			17,556.76
07/01/09	0 - Storage Rent (07/2009)	274.50		17,831.26
07/01/09	0 - Base Rent Office (07/2009)	7,950.00		25,781.26
07/08/09	July late fee: 5% of \$8,224.50	411.23		26,192.49
07/10/09	Chk# 5194 - Payment		7,224.50	18,967.99
08/01/09	0 - Base Rent Office (08/2009)	7,950.00		26,917.99
08/01/09	0 - Storage Rent (08/2009)	274.50		27,192.49
08/07/09	Chk# 5275 - Payment		7,224.50	19,967.99
09/01/09	0 - Storage Rent (09/2009)	274.50		20,242.49
09/01/09	0 - Base Rent Office (09/2009)	7,950.00		28,192.49
09/10/09	Chk# 5371 - Payment		7,224.50	20,967.99
10/01/09	0 - Base Rent Office (10/2009)	7,950.00		28,967.99
10/01/09	0 - Storage Rent (10/2009)	274.50		29,242.49

This statement is provided to assist you in maintaining a current balance on your account. It contains all charges posted to your account through the statement date, including the recurring charges for the upcoming month. Other charges may be posted to your account before the end of the month. If so, they will be included on future statements. If you have any questions, please feel free to call us at 312.275.6006.



EXHIBIT

D

Steve Schossberger

From: Tim Pace [tpace@donahoepace.com]
Sent: Friday, October 09, 2009 4:28 PM
To: Steve Schossberger
Subject: RE: Boise Mode LLC

Mr. Schossberger,

Thank you for your email of October 8th, we can respond to your request by Monday, October 12th.

From: Steve Schossberger [mailto:sschossberger@hawleytroxell.com]
Sent: Thursday, October 08, 2009 10:05 AM
To: Tim Pace
Cc: Angela Aeschliman; David Baum; Steve Schossberger
Subject: RE: Boise Mode LLC

Mr. Pace:

Thank you for your email.
As you know, I represent Boise Mode LLC.

Donahoe Pace & Partners, LTD remains delinquent in the rent owed to Boise Mode LLC in the sum of \$22,017.99. You are personally liable for payment of this sum as the guarantor. The October payment has been credited. However, under the I.C. Section 6-303, the entire sum due and owing must be paid within three days of the served notice. Personal service of the Three Days Notice to pay rent or quit and vacate was accomplished Tuesday, October 6, 2009. Therefore, full payment must be received by me or Boise Mode LLC no later than 5 p.m. Friday, October 9, 2009.

Alternatively, as a compromise and settlement, covered under Idaho Rule of Evidence 408, Donaho Pace & Partners, LTD can sign and deliver the attached First Amendment to Office Lease Agreement and Services Agreement, which will provide credit of \$13,000 against the \$22,017.99 outstanding rent owed. Therefore, Donaho Pace & Partners LTD will need to deliver a check in the amount of \$9,017.99 along with these executed agreements. At this point, the terms of the First Amendment to Office Lease Agreement and Services Agreement are not negotiable. This is a very generous offer by Boise Mode LLC to resolve the issue of rent owed by Donahoe Pace & Partners, LTD, in the most amicable fashion.

Please inform me of the decision at your earliest convenience.

Regards, Steve

STEVEN F. SCHOSSBERGER
Partner
direct 208.388.4975
mobile 208-409-7922
fax 208.954.5260

EXHIBIT

E

October 12, 2009

VIA FACSIMILE (208) 954-5260
AND HAND DELIVERY

Mr. Steven F. Schossberger
Hawley Troxell Ennis & Hawley LLP
877 Main Street, Suite 1000
Post Office Box 1617
Boise, ID 83701-1617

Re: Boise Mode, LLC's Defaults of Office Lease Agreement for 800 W. Idaho Street, Suite 350,
Boise, Idaho 83702 (the "Premises")

Dear Mr. Schossberger:

I am writing to respond to your email dated October 8, 2009. On behalf of Donahoe Pace & Partners, Ltd. ("Donahoe Pace"), I appreciate Boise Mode, LLC's ("Boise Mode") efforts to amicably resolve this dispute. Despite this, however, Donahoe Pace cannot agree to resolve this dispute by signing the First Amendment to Office Lease Agreement and Services Agreement and paying Boise Mode \$9,017.99 of the \$22,017.99 in back rent it alleges it is due. Before presenting Donahoe Pace's counter-offer, let me explain the deficiencies in your client's settlement offer.

There are several problems with your client's most recent proposal. First, while I realize your client denies it, Donahoe Pace insists that it and your client previously agreed to an \$1,000 rent abatement for the eleven months comprising August 2008 through June 2009, inclusive. To some extent this understanding is reflected in your client's latest offer insofar as Boise Mode will credit Donahoe Pace \$13,000 against the total back rent Boise Mode alleges is due. But Boise Mode will grant this credit only if Donahoe Pace, in turn, agrees to sign the First Amendment to Office Lease Agreement and Services Agreement. Donahoe Pace cannot do this, nor believes that Boise Mode is entitled to such a concession in light of the parties' earlier agreement, which never contemplated such a condition.

Second, the October 8, 2009, proposal ignores the fact that your client's actions have caused Donahoe Pace at least \$7,065.00 in lost income. This figure in large part represents the \$1,100 per month that Donahoe Pace would have earned from operating a video production unit out of the Premises had it been able to do so if not because of Boise Mode's failure to adequately sound proof the area between Donahoe Pace and Hijinx. And third, the proposal omits the fact that in its accounting there are bookkeeping errors in its favor, including improperly charged late fees, equaling \$2067.26. Deducting these sums from the \$22,017.99 Boise Mode alleges it is owed, leaves only \$890.00.

In light of the foregoing, Donahoe Pace proposes the following counter-offer. First, Donahoe Pace will agree to pay Boise Mode \$10,420.00 in the form of a \$3,000 check and a waiver of any claim to the \$7,420.00 refundable security deposit that Boise Mode possesses. Second, the parties will terminate the Lease Agreement and Donahoe Pace will vacate the premises effective November 1, 2009. Third, both Donahoe Pace and Boise Mode will release all other claims and/or causes of action that each has against the other, including the threatened forcible detainer action.

Please let me know as soon as possible whether these terms are amenable to your client. I look forward to hearing from you. Please do not hesitate to contact me if you have any questions.

Very truly yours,



Tim Pace

EXHIBIT E

000337

EXHIBIT

F

STEVEN F. SCHOSSBERGER
ADMITTED TO PRACTICE LAW IN IDAHO AND CALIFORNIA
EMAIL: SSCHOSSBERGER@HAWLEYTROXELL.COM
DIRECT DIAL: 208.388.4975
DIRECT FAX: 208.954.5260

October 26, 2009

**VIA UNITED STATES MAIL
VIA E-MAIL**

Donahoe Pace & Partners, Ltd
800 W. Idaho Street, Suite 350
Boise, ID 83702

Timothy Pace, Guarantor
800 W. Idaho Street, Suite 350
Boise, ID 83702

Re: *Delinquent Rent for Lease of 800 W. Idaho Street, Suite 350, Boise, Idaho 83702*

Dear Mr Pace:

Please be advised that Boise Mode LLC has considered the counteroffer set forth in your letter dated October 12, 2009, and it is rejected. As stated in my email to you dated October 9, 2009, "The terms of the First Amendment to Office Lease Agreement and Services Agreement are not negotiable." Donahoe Pace & Partners, Ltd.'s alleged claim for damages in the amount of \$7,065.00 is meritless, and will be rejected by the Court under Idaho landlord-tenant law.

Therefore, prior to involving the Court to obtain a judgment for the delinquent rent owed by Donahoe Pace & Partners, Ltd., and you, Boise Mode LLC will leave the current offer open until this Friday, October 30, 2009, at 5 p.m., to either: (1) pay the full delinquent sum of \$22,017.99; or (2) pay \$9,017.99, and deliver the executed First Amendment to Office Lease Agreement and Services Agreement. The \$3,000.00 check you sent with your October 12, 2009, letter is being held pending your response to apply it to either option (1) or (2).

Donahoe Pace & Partners, Ltd.
Mr. Timothy Pace, Guarantor
October 26, 2009
Page 2

As alluded to in your October 12, 2009, letter, should you vacate the premises on November 1, 2009, Donahoe Pace & Partners, Ltd., and you, will remain obligated to make timely payments of the rent through the duration of the term of the Lease. Please be mindful that Boise Mode LLC is presently in a position to bring an unlawful detainer action for possession of the premises under Idaho Code § 6-303, and it can also bring a separate action to recover all unpaid rent. In both actions, Boise Mode LLC will be entitled to recover the full amount of its costs and attorney fees pursuant to Idaho Code § 6-324.

Sincerely,

HAWLEY TROXELL ENNIS & HAWLEY LLP



Steven F. Schossberger

cc: Client

Karen Foruria

From: Steve Schossberger
Sent: Monday, October 26, 2009 10:37 AM
To: 'tpace@donahoepace.com'
Subject: 800 W. Idaho Street, Suite 350
Attachments: DOC001.PDF

Attached is my October 26, 2009 letter to Donahoe Pace & Partners, Ltd. and to you, as Guarantor, which is also being sent via U.S. Mail.

Steven F. Schossberger
direct 208.388.4975
fax 208.954.5260
email sschossberger@hawleytroxell.com
web www.hawleytroxell.com

HAWLEY TROXELL
Attorneys and Counselors

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NOV 24 2010

J. DAVID NAVARRO, Clerk
By A. GARDEN
DEPUTY

Steven F. Schossberger, ISB No. 5358
HAWLEY TROXELL ENNIS & HAWLEY LLP
877 Main Street, Suite 1000
P.O. Box 1617
Boise, ID 83701-1617
Telephone: 208.344.6000
Facsimile: 208.954.5260
Email: sschossberger@hawleytroxell.com

Attorneys for Plaintiff/Counterdefendant Boise Mode, LLC,
successor-in-interest to Mode Building Limited Partnership

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

BOISE MODE, LLC, an Illinois limited liability company, successor-in-interest to Mode Building Limited Partnership, an Idaho limited partnership,

Plaintiff,

vs.

DONAHOE PACE & PARTNERS LTD, an Idaho corporation; and TIMOTHY PACE,

Defendants.

Case No. CV OC 1001093

MEMORANDUM IN SUPPORT OF
PLAINTIFF'S MOTION FOR
SUMMARY JUDGMENT ON THE
VERIFIED COMPLAINT

DONAHOE PACE & PARTNERS LTD, an Idaho corporation,

Counterclaimant,

vs.

BOISE MODE, LLC, an Illinois limited liability company, successor-in-interest to Mode Building Limited Partnership, an Idaho limited partnership,

Counterdefendant.

MEMORANDUM IN SUPPORT OF PLAINTIFF'S MOTION FOR
SUMMARY JUDGMENT ON THE VERIFIED COMPLAINT - 1

3

COMES NOW Plaintiff and Counterdefendant Boise Mode, LLC (“Landlord”), by and through its undersigned counsel of record, and respectfully submits this Memorandum in Support of Motion for Summary Judgment on the Verified Complaint.

**I.
INTRODUCTION**

Defendant and Counterclaimant Donahoe Pace & Partners LTD (“Tenant”) breached a commercial lease agreement entered into with Boise Mode by failing to timely pay rent in full and by abandoning the leased premises without paying the rent due. Pursuant to the terms of the lease agreement, Landlord is entitled to damages plus prejudgment interest thereon. In connection with the lease agreement, Defendant Timothy Pace (“Pace”) executed a personal guarantee whereby he guaranteed payment of all obligations owed by Tenant to Landlord. Pursuant to the terms of that guarantee, Landlord is entitled to recover from Pace the full amount owed by Tenant.

**II.
LEGAL STANDARD**

Summary judgment is appropriate where the affidavits, depositions, admissions, and other evidence in the record demonstrate that there are no genuine issues of material fact and that the moving party is entitled to judgment as a matter of law. I.R.C.P. Rule 56(c); *Heinz v. Heinz*, 129 Idaho 847, 934 P.2d 20 (1997). When considering a motion for summary judgment, the court “liberally construes the record in a light most favorable to the party opposing the motion and draws all reasonable inferences and conclusions in that party’s favor.” *Brooks v. Logan*, 130 Idaho 574, 576, 944 P.2d 709, 711 (1997).

Affidavits submitted in support of and in opposition to motions for summary judgment must be made on personal knowledge, set forth facts that would be admissible at trial on the

issue addressed, and demonstrate that the affiant is competent to testify to the matters stated therein. I.R.C.P. Rule 56(e). When a motion for summary judgment is supported by affidavits or deposition testimony, the non-moving party cannot rest on the allegations and/or denials in the pleadings, but must set forth specific facts demonstrating a genuine issue of material fact for trial. *Arnold v. Diet Center, Inc.*, 113 Idaho 581, 746 P.2d 1040 (Ct. App. 1987). While the moving party generally bears the burden of demonstrating the absence of material facts, a failure of proof on an essential element of the opposing party's case makes all other facts immaterial. *Badell v. Beeks*, 115 Idaho 101, 765 P.2d 126 (1988) (citing *Celotx v. Catrett*, 117 U.S. 317 (1986)). Creating only a slight doubt or presenting only a scintilla of evidence is insufficient to withstand a motion for summary judgment. *West v. Sonke*, 243 Idaho 133, 968 P.2d 228 (1998).

III. STATEMENT OF UNDISPUTED FACTS

1. On or about November 3, 2006, Tenant and Landlord entered into an Office Lease Agreement ("Lease") for the premises located at 800 Idaho Street, Suite 350, Boise, Idaho ("Premises"), together with lower level storage space in the same building. *See* Verified Complaint filed January 21, 2010 ("Verified Compl."), ¶ 6, Exh. A.

2. In connection with the Lease, Pace executed a Personal Guarantee of Lease ("Personal Guarantee") whereby he personally guaranteed all obligations owed Landlord by Tenant arising under or relating to the Lease. *See* Verified Compl., ¶ 6, Exh. A.

3. As of December, 2008, Tenant has failed and refused to make the required rent, operating costs and charges due and owing under the terms of the Lease to Landlord. *See* Verified Compl., ¶ 7.

4. On November 9, 2009, Landlord, by and through its counsel, sent a letter to Tenant confirming that Tenant had abandoned the Premises and notifying Tenant that pursuant to Article 20.3 of the Lease, the Lease remained in effect and Tenant remained obligated to pay all rent and other charges due under the Lease until Landlord re-leased the Premises. *See Verified Compl.*, ¶ 8, Exh. B.

5. Tenant has failed and refused to pay the full monthly rent, operating costs and other charges which are due, payable and delinquent for the months of December 2008 through, May 2010, the end of the term of the Lease. *See Verified Compl.*, ¶ 9, Exh. A, Article 1.9.

6. Landlord has attempted to mitigate its damages and locate a new tenant for the Premises. Landlord has successfully leased the Premises, but rent payments by the new tenant did not begin until June, 2010. *See Verified Compl.*, ¶ 9; *see Affidavit of Christopher Kiefor, CPA ("Kiefor Aff.")*, ¶ 5.

IV. ARGUMENT

A. Landlord is Entitled to Summary Judgment for Breach of Contract Damages.

Pursuant to the terms of the Lease, Tenant was contractually obligated to pay rent to Landlord through May 31, 2010, the expiration of the term of the Agreement. *See Verified Compl.*, Exh. A, Article 1.9 and Article 4 (Rent). Tenant breached the Lease when it ceased timely paying the rent in full in December, 2008, and when it abandoned the premises in November, 2009 and stopped paying rent altogether to Plaintiff.

Article 20 of the Lease (Default; Remedies) provides, in relevant part:

20.1 DEFAULT. The occurrence of any of the following shall constitute a material default and breach of this Lease by Tenant:

(a) Any failure of the Tenant to pay the Base Rent, additional rent, or any other monetary sums required to be paid hereunder. If

tenant fails to cure said default within five (5) days after written notice by Landlord to Tenant, Landlord shall be entitled to exercise its rights and remedies as provided in Article 20.3 herein, without further notice to Tenant.

(b) The abandonment of the Premises by Tenant without Tenant continuing to pay Base Rent in a timely manner.

...

20.3 REMEDIES. In the event of any such material default or breach by Tenant, Landlord may at any time thereafter without limiting Landlord in the exercise of any right or remedy at law or in equity which Landlord may have by reason of such default or breach:

(a) Maintain this Lease in full force and effect and recover the rent and other monetary charges as they become due, irrespective of whether Tenant shall have abandoned the Premises. In the event Landlord elects not to terminate this Lease, Landlord shall have the right to attempt to re-let the Premises at such rent and upon such conditions and for such a term, and to do all acts necessary to maintain or preserve the Premises as Landlord deems reasonable and necessary without being deemed to have elected to terminate this Lease, including removal of all persons and property from the Premises, and including entering upon the Premises for the purpose of making repairs and making the Premises ready for re-letting. . . . In the event any such re-letting occurs, this Lease shall terminate automatically upon the new tenant taking possession of the Premises, but Tenant shall nevertheless be responsible for damages, including but not limited to all rent and other sums then due with interest as provided herein, leasing commissions and alteration costs incurred by Landlord in securing the new tenant, and the difference in rent rates between this Lease and such re-letting if such re-letting is at lesser rates than provided by this Lease.

....

(c) In addition to the damages for breach of the Lease described above, Tenant agrees that Landlord shall be entitled to receive from Tenant any and all costs in connection with Tenant's default hereunder, including without limitation, administrative costs of Landlord associated with Tenant's default, costs of repairing and/or remodeling the Premises for new tenants and leasing commissions for any leasing agent engaged to re-let the Premises.

....

20.4 LATE CHARGES. Tenant hereby acknowledges that late payment by Tenant to Landlord of rent or other sums due hereunder will cause Landlord to incur costs not contemplated by this Lease, the exact amount of which will be extremely difficult to ascertain. Such costs include, but are not limited to, processing and accounting charges and late charges which may be imposed on Landlord by the terms of any mortgage or trust deed covering the Premises. Accordingly, if any installment of rent or any other sum due from Tenant shall not be received by Landlord or Landlord's agent within ten (10) days after Landlord's notice to Tenant that such amounts are due, Tenant shall pay to Landlord, in addition to interest as provided herein, a late charge equal to five percent (5%) of such overdue amount. The parties hereby agree that such late charge represents a fair and reasonable estimate of the costs Landlord will incur by reason of late payment by Tenant. Acceptance of such late charges by Landlord shall in no event constitute a waiver of Tenant's default with respect to any other overdue amount, nor prevent Landlord from exercising any of the rights and remedies granted hereunder.

Article 22 of the Lease (MISCELLANEOUS) provides, in relevant part:

22.15 INTEREST ON PAST DUE AMOUNTS. Except as expressly provided herein, any amount due to Landlord not paid when due shall bear interest at the lesser of (i) the reference rate set forth in Article 20.3(b) plus five percent (5%) per annum, or (ii) eighteen percent (18%), from the due date until the date paid. Payment of such interest shall not excuse or cure any default by Tenant under this Lease.

In *Idaho Power Co. v. Cogeneration, Inc.*, the Idaho Supreme Court held:

A breach of contract is non-performance of any contractual duty of immediate performance. *See Enterprise, Inc. v. Nampa City*, 96 Idaho 734, 740, 536 P.2d 729, 735 (1975) (quoting RESTATEMENT OF THE LAW OF CONTRACTS § 312 (1932)). It is a failure, without legal excuse, to perform any promise, which forms the whole or part of a contract. *See Hughes v. Idaho State Univ.*, 122 Idaho 435, 437, 835 P.2d 670, 672 (Ct. App. 1992) (quoting Black's Law Dictionary 188 (6th ed. 1990)). The burden of proving the existence of a contract and fact of its breach is upon the plaintiff, and once those facts are established, the defendant has the burden of pleading and proving affirmative defenses, which

legally excuse performance. *See O'Dell v. Basabe*, 119 Idaho 796, 813, 810 P.2d 1082, 1099 (1991).

134 Idaho 738, 746-47, 9 P.3d 1204, 1212-13 (2000).

There is no question that Tenant breached the Lease when it failed to timely pay the rent due in full beginning in December, 2008, and when it abandoned the premises in November, 2009, and subsequently failed to pay any rent. Subsequent to the abandonment, the facts are undisputed that Landlord did not terminate the lease and did not release Tenant of its continuing obligation to pay rent under the terms of the Lease. Plaintiff cannot prove any affirmative defense that legally excuses its duty of performance under the Lease. As a result, Landlord is entitled to summary judgment on its breach of contract claim.¹

B. Landlord Has Mitigated Its Damages.

In *Consolidated AG of Curry, Inc. v. Rangen, Inc.*, 128 Idaho 228, 912 P.2d 115 (1996), the Idaho Supreme Court held that when a tenant repudiates a lease and abandons the premises, the landlord “may take possession of the premises, [and] relet them. ... [D]amages will be the difference between the amount secured on the reletting and the amount provided for in the original lease.” 128 Idaho at 230 (citing *De Winer v. Nelson*, 54 Idaho 560, 567-68, 33 P.2d 356, 359 (1934)). The court further held that a lessor of real property must mitigate damages if the lessee has refused to pay rent and has abandoned the property. *Id.*

Here, Landlord retained Colliers International (“Colliers”) to locate a new tenant for the Premises. *See* Kiefor Aff., ¶ 5. *Id.*, ¶ 5, Exh. 3.

¹ The amounts of Plaintiff’s damages are testified to in the Affidavit of Christopher Kiefor filed contemporaneously herewith.

On or about March 5, 2010, Landlord entered into a lease with TEM Enterprises d/b/a Xtra Airways (“Xtra Airways”). *See* Kiefer Aff., ¶ 4, Exh. 2. Pursuant to that lease, Xtra Airways’ rent commenced June 1, 2010. *Id.* Because rent from Xtra Airways did not begin until after the Lease term ended, there is no amount of rent to offset the damages owed by Tenant.

C. Plaintiff Is Entitled To Summary Judgment On The Breach Of The Implied Covenant Of Good Faith And Fair Dealing Claim.

Under Idaho law, a breach of the implied covenant of good faith and fair dealing must be based upon an underlying breach of contract. *First Security Bank of Idaho v. Gage*, 115 Idaho 172, 176, 765 P.2d 683, 687 (1988). The Idaho Supreme Court explains the covenant as follows:

The implied covenant of good faith and fair dealing is a covenant implied by law in a party’s contract. ... The covenant requires the parties to perform, in good faith, **the obligations required by their agreement**, and a violation of the covenant occurs when either party violates, nullifies or significantly impairs any benefit of the contract.

Fox v. Mountain West Elec., Inc., 137 Idaho 703, 52 P.3d 848, 855-56 (2002) (emphasis added) (citation omitted).

It is clear in the record that Tenant breached the express terms of the Lease by its failure to timely pay the full amount of rent due and by its abandonment of the premises and failure to continue to pay rent to Landlord. By reason of these breaches, Tenant has deprived Landlord of the rights and benefits that arise under the specific terms of the Lease. This conduct by Tenant falls squarely within well-recognized Idaho case law triggering the application of the implied covenant of good faith and fair dealing. *See id.*

D. Landlord is Entitled to Summary Judgment on the Claim for Breach of Personal Guaranty of Lease.

Pursuant to the terms of the Personal Guarantee he executed on November 3, 2006, Defendant Pace is contractually obligated to pay all sums that Tenant owes Landlord in connection with the Lease. *See* Verified Compl., Exhibit H to Exh. A. As set forth above and in the attached affidavit of Christopher Kiefor, Tenant now owes Landlord sums totaling \$95,975.96. *See* Kiefor Aff., ¶ 7.

The Personal Guarantee provides, in relevant part:

1. GUARANTEE: The Undersigned jointly, severally, personally, and individually guarantee(s) payment when due, or upon demand after the due date, all obligations and the full amount of money that Tenant now or in the future owes Landlord arising under or relating to the Lease . . . plus interest, attorney fees, costs, penalties and expenses of collection incurred because of Tenant default, including post-judgment collection costs (“Liabilities”). The Liabilities shall not be reduced by any claim of setoff or counterclaim of Tenant or Undersigned, loss of contribution from any of the Undersigned, or any settlement or compromise between Tenant and Landlord.

2. PAYMENT: If Tenant shall fail to pay all or any part of the Liabilities when due, whether by acceleration or otherwise, the Undersigned, immediately upon written demand by the Landlord, will pay to the Landlord the full amount of the Liabilities as if the Liabilities constituted the direct and primary obligation of each of the Undersigned.

....

5. LEGAL ACTION AND ATTORNEY FEES: Landlord may proceed against one of the Undersigned before or after proceeding against any tenant, any co-guarantor, or other party, or any security.

Where a contract for guaranty is at issue, the rights of the parties are determined strictly from the terms of their agreement. “[W]here the language in the guaranty agreement is unequivocal, the agreement must be interpreted as a matter of law according to the language

employed therein.” *Valley Bank v. Larson*, 104 Idaho 772, 775-776, 663 P.2d 653, 656-657 (1983) (quoting *McGill v. Idaho Bank & Trust*, 102 Idaho 494, 498, 632 P.2d 683, 687 (1981)). “Plain and unambiguous terms dictate the intent of the parties and the obligations guaranteed.” *CIT Financial Servs. v. Herb’s Indoor RV Ctr., Inc.*, 118 Idaho 185, 187, 795 P.2d 890, 892 (Ct. App. 1990). For this reason, as with other contracts, the intent of the parties to a guaranty must be gleaned from the unambiguous language of the guaranty, without recourse to extrinsic evidence of the parties’ intent. *Valley Bank*, 104 Idaho at 775, 663 P.2d at 656; *Johnson Equip. v. Nielson*, 108 Idaho 867, 871, 702 P.2d 905, 909 (Ct. App. 1985).

There is no dispute that Tenant owes Landlord money “arising under or relating to the Lease,” nor that Pace has not paid such sums to Landlord. There is no dispute that the plain and unambiguous terms of the Personal Guarantee provide that Pace is liable for such debt. As a result, Landlord is entitled to summary judgment on its breach of contract claim against Pace.

E. Tenant’s Counterclaims Should not Prevent Summary Judgment on the Landlord’s Claims Against Tenant and Pace.

The fact that Tenant has filed counterclaims should not prevent summary judgment in Landlord’s favor on its claims against Tenant and Pace because, pursuant to the express terms of the Lease and Guarantee, Tenant has no right to offset the amount owed Landlord. The Lease provides, in Article 4.1, that “[e]xcept as specifically provided herein, there shall be no deduction, offset or abatement for any reason of the rent or any money payable by Tenant to Landlord.” *See* Verified Compl., Exh. A. And the terms of the Personal Guarantee likewise provide that “[t]he Liabilities shall not be reduced by any claim of setoff or counterclaim of Tenant or Undersigned.” *See id.*, Exhibit H to Exh. A. Pursuant to the plain and unambiguous terms, therefore, Tenant is not entitled to an offset of the amount it owes Landlord. Even if Tenant’s claims were meritorious – and, as the Memorandum in Support of Summary Judgment

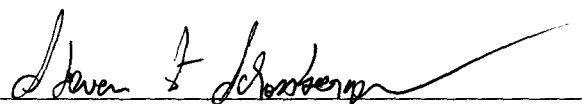
on Defendant's Counterclaims filed concurrently herewith establishes, they are not – Tenant's recourse would be a judgment on those counterclaims, not an offset in the amount it owes Landlord pursuant to the Lease.

**V.
CONCLUSION**

For the foregoing reasons, the record proves that Landlord is entitled to summary judgment on its breach of contract claims against both Tenant and Pace. Landlord is entitled to summary judgment and an order from the Court awarding damages in the amount of \$95,795.96, post judgment interest at the legal rate until the judgment is paid in full, and costs and attorney fees to be determined by the Court upon application under I.R.C.P. 54.

DATED THIS 24 day of November, 2010.

HAWLEY TROXELL ENNIS & HAWLEY LLP

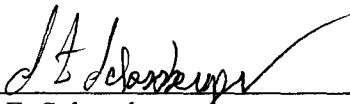
By 
Steven F. Schossberger, ISB No. 5358
Attorneys for Plaintiff/Counterdefendant Boise
Mode, LLC, successor-in-interest to Mode
Building Limited Partnership

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 24 day of November, 2010, I caused to be served a true copy of the foregoing MEMORANDUM IN SUPPORT OF PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT ON THE VERIFIED COMPLAINT by the method indicated below, and addressed to each of the following:

Michael E. Kelly
John J. Browder
LOPEZ & KELLY, PLLC
702 W. Idaho Street, Suite 1100
P.O. Box 856
Boise, ID 83701
[Attorneys for Defendants and Counterclaimant]

U.S. Mail, Postage Prepaid
 Hand Delivered
 Overnight Mail
 E-mail
 Telecopy: 208.342.4344



Steven F. Schossberger

NOV 24 2010

J. DAVID NAVARRO, Clerk
By A. GARDEN
DEPUTY

Steven F. Schossberger, ISB No. 5358
HAWLEY TROXELL ENNIS & HAWLEY LLP
877 Main Street, Suite 1000
P.O. Box 1617
Boise, ID 83701-1617
Telephone: 208.344.6000
Facsimile: 208.954.5260
Email: sschossberger@hawleytroxell.com

Attorneys for Plaintiff/Counterdefendant Boise Mode, LLC,
successor-in-interest to Mode Building Limited Partnership

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

BOISE MODE, LLC, an Illinois limited liability company, successor-in-interest to Mode Building Limited Partnership, an Idaho limited partnership,

Plaintiff,

vs.

DONAHOE PACE & PARTNERS LTD, an Idaho corporation; and TIMOTHY PACE,

Defendants.

Case No. CV OC 1001093

NOTICE OF HEARING

DONAHOE PACE & PARTNERS LTD, an Idaho corporation,

Counterclaimant,

vs.

BOISE MODE, LLC, an Illinois limited liability company, successor-in-interest to Mode Building Limited Partnership, an Idaho limited partnership,

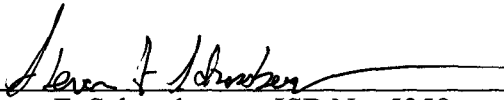
Counterdefendant.

TO ALL PARTIES AND THEIR COUNSEL OF RECORD:

PLEASE TAKE NOTICE that the Plaintiff/Counterdefendant Boise Mode, LLC, successor-in-interest to Mode Building Limited Partnership will call Plaintiff's Motion for Summary Judgment on the Verified Complaint for hearing before the above-entitled Court on the 22nd day of December, 2010, at 3:00 p.m., or as soon thereafter as counsel can be heard, before the Honorable Ronald J. Wilper, District Judge.

DATED THIS 24 day of November, 2010.

HAWLEY TROXELL ENNIS & HAWLEY LLP

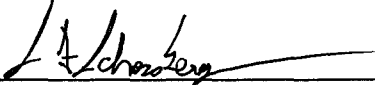
By 
Steven F. Schossberger, ISB No. 5358
Attorneys for Plaintiff/Counterdefendant Boise
Mode, LLC, successor-in-interest to Mode
Building Limited Partnership

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 24 day of November, 2010, I caused to be served a true copy of the foregoing NOTICE OF HEARING by the method indicated below, and addressed to each of the following:

Michael E. Kelly
John J. Browder
LOPEZ & KELLY, PLLC
702 W. Idaho Street, Suite 1100
P.O. Box 856
Boise, ID 83701
[Attorneys for Defendants and Counterclaimant]

U.S. Mail, Postage Prepaid
 Hand Delivered
 Overnight Mail
 E-mail
 Telecopy: 208.342.4344



Steven F. Schossberger

Michael E. Kelly, ISB #4351
John J. Browder, ISB #7531
LOPEZ & KELLY, PLLC
413 W. Idaho Street, Suite 100
PO Box 856
Boise, Idaho 83701
Telephone: (208) 342-4300
Facsimile: (208) 342-4344
7200.011/Affidavit of Service Colliers.wpd

NO. 10-419 FILED
A.M. _____ P.M. _____

DEC 03 2010

J. DAVID NAVARRO, Clerk
By CARLY LATIMORE
DEPUTY

Attorneys for Defendant

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

BOISE MODE, LLC, an Illinois limited liability company, successor-in-interest to Mode Building Limited Partnership, an Idaho limited partnership,

Plaintiff,

vs.

DONAHOE PACE & PARTNERS LTD, an Idaho corporation; and TIMOTHY PACE,

Defendant.

DONAHOE PACE & PARTNERS LTD, an Idaho corporation,

Counter-Claimant,

vs.

BOISE MODE, LLC, an Illinois limited liability company, successor-in-interest to Mode Building Limited Partnership, an Idaho limited partnership,

Counter-Defendant.

Case No. **CV OC 1001093**

**AFFIDAVIT OF SERVICE OF
SUBPOENA**

STATE OF IDAHO)
 : ss
County of Ada)

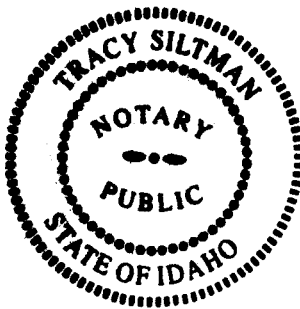
I swear under oath:

- 1) I am a resident of Ada County, State of Idaho, and over the age of eighteen (18) years.
- 2) On November 15, 2010, I served a copy of a *Subpoena Duces Tecum for Colliers Idaho Property Management LLC*, upon Christopher J. Beeson, by hand delivering a copy to his assistant, Tina Adornetto, personally at Colliers Idaho Property Management, 601 West Bannock St., Boise, Idaho 83702, at 1:26 p.m.

Keenan Kelly
Signature

Keenan Kelly
Printed Name

SUBSCRIBED AND SWORN TO before me this 3rd day of December, 2010.



Marcy Wittman
Notary Public for the State of Idaho
Residing at: Boise ID
My Commission Expires: 8-10-14

Michael E. Kelly, ISB #4351
John J. Browder, ISB #7531
LOPEZ & KELLY, PLLC
413 W. Idaho Street, Suite 100
PO Box 856
Boise, Idaho 83701
Telephone: (208) 342-4300
Facsimile: (208) 342-4344
7200.011/Affidavit of Service The Northface.wpd

NO. 10149 FILED
AM _____ PM _____

DEC 03 2010

J. DAVID NAVARRO, Clerk
By CARLY LATIMORE
DEPUTY

Attorneys for Defendant

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

BOISE MODE, LLC, an Illinois limited liability company, successor-in-interest to Mode Building Limited Partnership, an Idaho limited partnership,

Plaintiff,

vs.

DONAHOE PACE & PARTNERS LTD, an Idaho corporation; and TIMOTHY PACE,

Defendant.

DONAHOE PACE & PARTNERS LTD, an Idaho corporation,

Counter-Claimant,

vs.

BOISE MODE, LLC, an Illinois limited liability company, successor-in-interest to Mode Building Limited Partnership, an Idaho limited partnership,

Counter-Defendant.

Case No. **CV OC 1001093**

**AFFIDAVIT OF SERVICE OF
SUBPOENA**

STATE OF IDAHO)
 : ss
County of Ada)

I swear under oath:

- 1) I am a resident of Ada County, State of Idaho, and over the age of eighteen (18) years.
- 2) On November 15, 2010, I served a copy of a *Subpoena Duces Tecum for The North Face*, upon April Johnson, by hand delivering a copy to The North Face , 800 West Idaho St., Boise, Idaho 83702, at 1:12 p.m.

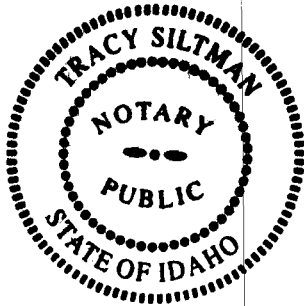


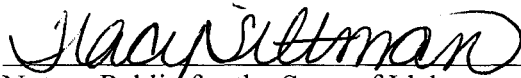
Signature

Keenan Kelly

Printed Name

SUBSCRIBED AND SWORN TO before me this 3rd day of December, 2010.





Notary Public for the State of Idaho
Residing at: PO Box 10
My Commission Expires: 8-10-11

NO. _____ FILED 1:34
A.M. _____ P.M.

DEC 10 2010

J. DAVID NAVARRO, Clerk
By J. RANDALL
DEPUTY

ORIGINAL

Michael E. Kelly, ISB #4351
John J. Browder, ISB #7531
LOPEZ & KELLY, PLLC
PO Box 856
Boise, Idaho 83701
Telephone: (208) 342-4300
Facsimile: (208) 342-4344
7008.001/Motion for Continuance.wpd

Attorneys for Defendants/Counter-Claimant

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

BOISE MODE, LLC, an Illinois limited liability company, successor-in-interest to Mode Building Limited Partnership, an Idaho limited partnership,

Plaintiff,

vs.

DONAHOE PACE & PARTNERS LTD, an Idaho corporation; and TIMOTHY PACE,

Defendants.

DONAHOE PACE & PARTNERS LTD, an Idaho corporation,

Counter-Claimant,

vs.

BOISE MODE, LLC, an Illinois limited liability company, successor-in-interest to Mode Building Limited Partnership, an Idaho limited partnership,

Counter-Defendant.

Case No. **CV OC 1001093**

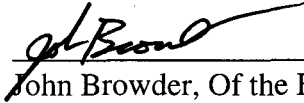
MOTION FOR CONTINUANCE

alb

COME NOW, Defendants, DONAHOE PACE & PARTNERS LTD, an Idaho corporation; and TIMOTHY PACE, by and through their attorneys of record, Lopez & Kelly, PLLC, and move to continue the hearing on Plaintiff's Motion for Summary Judgment on the Verified Complaint and Motion for Summary Judgment on Counterclaimant's Counterclaims on December 22, 2010, at 3:00 p.m., or as soon thereafter as counsel can be heard, before the Honorable Ronald J. Wilper, District Judge. This motion for continuance is made in part pursuant to Idaho Rule of Civil Procedure 56(f) and is supported by the attached Affidavit of Counsel, which is incorporated hereto by reference.

DATED this 8 day of December, 2010

LOPEZ & KELLY, PLLC

By: 
John Browder, Of the Firm
Attorneys for Defendants

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 8 day of December, 2010, I served a true and correct copy of the foregoing by delivering the same to each of the following individuals, by the method indicated below, addressed as follows:

Steven F. Schossberger
HAWLEY, TROXELL, ENNIS & HAWLEY
877 Main Street, Suite 1000
PO Box 1617
Boise, ID 83701-1617
Telephone: (208) 344-6000
Facsimile: (208) 954-5260
sschossberger@hawleytroxell.com

- | | |
|-------------------------------------|----------------|
| <input type="checkbox"/> | U.S. Mail |
| <input checked="" type="checkbox"/> | Hand-Delivered |
| <input type="checkbox"/> | Overnight mail |
| <input type="checkbox"/> | Facsimile |


John Browder

NO. _____ FILED 1/31
A.M. _____ P.M.

DEC 08 2010

J. DAVID NAVARRO, Clerk
By J. RANDALL
DEPUTY

Michael E. Kelly, ISB #4351
John J. Browder, ISB #7531
LOPEZ & KELLY, PLLC
PO Box 856
Boise, Idaho 83701
Telephone: (208) 342-4300
Facsimile: (208) 342-4344
7008.001/56(f) Affidavit of Counsel in Support of Motion for Continuance.wpd

ORIGINAL

Attorneys for Defendants/Counter-Claimant

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

BOISE MODE, LLC, an Illinois limited liability company, successor-in-interest to Mode Building Limited Partnership, an Idaho limited partnership,

Plaintiff,

vs.

DONAHOE PACE & PARTNERS LTD, an Idaho corporation; and TIMOTHY PACE,

Defendants.

Case No. CV OC 1001093

56(f) AFFIDAVIT OF COUNSEL IN SUPPORT OF MOTION FOR CONTINUANCE

DONAHOE PACE & PARTNERS LTD, an Idaho corporation,

Counter-Claimant,

vs.

BOISE MODE, LLC, an Illinois limited liability company, successor-in-interest to Mode Building Limited Partnership, an Idaho limited partnership,

Counter-Defendant.

ellb

STATE OF IDAHO)
 :SS
County of Ada)

JOHN BROWDER, being first duly sworn upon oath, depose and say:

1. That I am an attorney with Lopez & Kelly, PLLC, attorneys for Defendants/Counter-Claimant, and being familiar with this matter make this affidavit of my own personal knowledge.

2. The Plaintiff filed its Verified Complaint on or about January 20, 2010. The Verified Complaint alleges damages arising out of an alleged breach of lease.

3. Defendants/Counter-Claimant filed their Answer and Counterclaim on or about February 11, 2010. In the Answer and Counterclaim, the Defendants/Counter-Claimant alleged a variety of affirmative defenses and counter-claims including, without limitation: (1) discharge of contractual obligation for failure to disclose material facts; (2) recoupment/set-off; (3) breach of contract; (2) breach of covenant of good faith and fair dealing; (3) negligence; (4) tortious interference with contract; and (5) constructive eviction.

4. On or about April 8, 2010, Defendants/Counter-Claimant served their First Set of Interrogatories, Requests for Production of Documents and First Set of Requests for Admissions on Plaintiff/Counter-Defendant. This discovery requested information necessary to support Defendants/Counter-Claimant's affirmative defenses and counter-claims including, without limitation, information about tenant complaints in the subject building and Plaintiff/Counter-Defendant's relationship with its property manager(s) and janitorial service. This discovery also requested information relating to the Plaintiff/Counter-Defendant's relationship with one of its main tenants, The North Face, and how construction incidental to the North Face's build-out affected the rights of Defendants/Counterclaimant. See Plaintiff/Counterdefendant's Answers to

Defendant/Counterclaimant's First Set of Interrogatories Nos. 17, 18, 19; Responses to Defendant/Counterclaimant's First Set of Requests for Production of Documents No. 3 and Answers to Defendant/Counterclaimant's First Set of Requests for Admissions, copies of which are collectively attached and incorporated hereto as Exhibit "A." The Plaintiff/Counterdefendant raised a litany of specious objections to discovery requests and did not otherwise provide substantive responses to these essential discovery requests. *See* Exhibit A.

5. The information requested in this discovery was essential to justify the Defendants/Counter-Claimant's oppositions to the Plaintiff/Counter-Defendant's two motions for summary judgment. Specifically, the information sought is essential to further establishing that the Plaintiff/Counter-Defendant (1) breached express and implied terms of the subject lease, (2) duties implied by law and (3) constructively evicted the Defendants/Counter-Claimant by, without limitation: (i) failing to ensure that other tenants, their agents, employees, or visitors did not create improper noises or disturbances or interfere with Defendants/Counter-Claimant's rights; and (ii) preventing access to the leased premises; (iii) allowing intrusions to Defendants/Counter-Claimants computer and data processing systems; (iv) causing disruptions in utility and elevator services.

6. In order to obtain this essential information, the Defendants/Counter-Claimants were forced to serve subpoenas duces tecum on the Plaintiff's property manager, Colliers Idaho Property Management, LLC and a key tenant of the Plaintiff, The North Face, on November 15, 2010. The subpoenas duces tecum requested documents and information to be provided on December 1, 2010. *See* Subpoenas Duces Tecum and Affidavits of Service , copies of which collectively are attached and incorporated hereto as Exhibit "B."

7. The North Face did not respond to the subpoena duces tecum and did not attend the

December 1, 2010, deposition as scheduled. Nor did counsel for Plaintiff/Counter-Defendant attend the depositions scheduled. On or about December 7, 2010, its representative wrote to undersigned counsel and objected to service of the subpoena. *See* correspondence from Rafferty Jackson to John Browder, dated December 7, 2010, a copy of which is attached and incorporated hereto as Exhibit "C." As such, Defendants/Counter-Claimant will have to revise and re-serve the subpoena duces tecum to The North Face.

8. On or about November 16, 2010, Mike Attiani of Colliers International advised undersigned counsel that the files Defendants/Counter-Claimant requested in the subpoena duces tecum previously were returned to the Plaintiff/Counter-Defendant. [Recall that the Plaintiff/Counter-Defendant had refused in its discovery responses to provide information relating to its other tenants and any complaints made by them.] Mr. Attiani did, however, informally provide undersigned counsel a list of potentially relevant tenants of Plaintiff/Counterdefendant. *See* correspondence from Mike Attiani to John Browder, dated November 17, 2010, a copy of which is attached and incorporated hereto as Exhibit "D."

9. On Wednesday, November 24, 2010, at approximately 5:00 p.m., the Plaintiff/Counter-Defendant served the following documents on the Defendants/Counter-Claimant: (1) Motion for Summary Judgment on the Verified Complaint; (2) Motion for Summary Judgment on Counter-Claimant's Counterclaims; (3) Memorandum in Support of Plaintiff's Motion for Summary Judgment on the Verified Complaint; (4) Memorandum in Support of Motion for Summary Judgment on Defendant's Counterclaims; (5) Affidavit of Steven F. Schosssberg, Esq. (sic) In Support of Plaintiff's Motion for Summary Judgment; (6) Affidavit of David L. Baum In Support of Plaintiff's Motion for Summary Judgment; (7) Affidavit of Angela Aeschliman, CPM, CCIM In Support of Plaintiff's Motion for Summary Judgment; and (8) Affidavit of Christopher Kiefor, CPA,

In Support of Plaintiff's Motion for Summary Judgment.

10. Without consulting undersigned counsel, Plaintiff/Counter-Defendant set its motions for summary judgment for hearing on December 22, 2010, at 3:00 p.m.

11. Undersigned counsel Browder was out of the office on vacation from November 20, 2010, until December 1, 2010. Undersigned counsel was in Idaho Falls for another matter on December 6, 2010, and December 7, 2010.

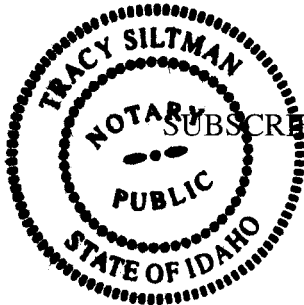
12. Undersigned counsel Kelly has been in depositions for another matter on December 2, 3, 6 and 7, and will traveling to Wisconsin for a deposition in a different matter on December 8, 9, and 10.

13. As a result of these pre-existing professional obligations and the inability to conduct discovery as detailed herein, the Defendants/Counter-Claimant cannot present by affidavit facts essential to justify its opposition to the Plaintiff/Counter-Defendant's motions for summary judgment. See Idaho Rule of Civil Procedure 56(f). As such, and based on the foregoing, the Defendants/Counter-Defendants move the court to continue the December 22, 2010, hearing until such time as the Defendants/Counter-Claimant can finish essential discovery and/or move to compel discovery.

DATED this 8 day of December, 2010

LOPEZ & KELLY, PLLC

By: [Signature]
John Browder, Of the Firm
Attorneys for Defendants



SUBSCRIBED AND SWORN TO before me this 8th day of December, 2010.


[Signature]
Notary Public for the State of Idaho
Residing at: 2018, ID
My Commission Expires: 8-6-11

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 8 day of December, 2010, I served a true and correct copy of the foregoing by delivering the same to each of the following individuals, by the method indicated below, addressed as follows:

Steven F. Schossberger
HAWLEY, TROXELL, ENNIS & HAWLEY
877 Main Street, Suite 1000
PO Box 1617
Boise, ID 83701-1617
Telephone: (208) 344-6000
Facsimile: (208) 954-5260
sschossberger@hawleytroxell.com

- U.S. Mail
- Hand-Delivered
- Overnight mail
- Facsimile



John Browder

EXHIBIT A

RECEIVED

MAY 10 2010

Steven F. Schossberger, ISB No. 5358
HAWLEY TROXELL ENNIS & HAWLEY LLP
877 Main Street, Suite 1000
P.O. Box 1617
Boise, ID 83701-1617
Telephone: 208.344.6000
Facsimile: 208.954.5260
Email: sschossberger@hawleytroxell.com

Attorneys for Plaintiff/Counterdefendant Boise Mode, LLC,
successor-in-interest to Mode Building Limited Partnership

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

BOISE MODE, LLC, an Illinois limited liability company, successor-in-interest to Mode Building Limited Partnership, an Idaho limited partnership,

Plaintiff,

vs.

DONAHOE PACE & PARTNERS LTD, an Idaho corporation; and TIMOTHY PACE,

Defendants.

DONAHOE PACE & PARTNERS LTD, an Idaho corporation,

Counterclaimant,

vs.

BOISE MODE, LLC, an Illinois limited liability company, successor-in-interest to Mode Building Limited Partnership, an Idaho

Case No. CV OC 1001093

PLAINTIFF/COUNTERDEFENDANT'S ANSWERS TO DEFENDANT/COUNTERCLAIMANT'S FIRST SET OF INTERROGATORIES

PLAINTIFF/COUNTERDEFENDANT'S ANSWERS TO DEFENDANT/COUNTERCLAIMANT'S FIRST SET OF INTERROGATORIES - 1

limited partnership,)
)
 Counterdefendant.)
 _____)

TO: DONAHOE PACE & PARTNERS LTD AND TIMOTHY PACE AND THEIR
 COUNSEL OF RECORD

COMES NOW Boise Mode LLC, Plaintiff/Counterdefendant ("Plaintiff") in the
 above-entitled action, by and through its counsel of record, Hawley Troxell Ennis & Hawley
 LLP, and, in accordance with the requirements of Rule 33 of the Idaho Rules of Civil Procedure,
 hereby files its response to Defendant/Counter-Claimant's First Set of Interrogatories.

INTERROGATORIES

GENERAL OBJECTIONS

The following General Objections apply to each and every Interrogatory and form an
 integral part of Plaintiff's response to each:

1. Plaintiff objects to the Interrogatories, including the definitions and instructions
 contained therein, to the extent that they are overly broad, unduly burdensome and/or seeking
 confidential information not pertinent to the present dispute between the parties.
2. Plaintiff objects to the Interrogatories, including the definitions and instructions
 contained therein, to the extent that they purport to impose requirements different from or in
 addition to the requirements of the Idaho Rules of Civil Procedure.
3. Plaintiff objects to the Interrogatories to the extent that they seek information that
 is subject to and protected by the attorney-client privilege, the work-product doctrine. The
 production of any information is without waiver of any privilege or claim of confidentiality. In
 the event any privileged information is produced by Plaintiff, its production is inadvertent and
 does not constitute a waiver of any privilege or immunity.

PLAINTIFF/COUNTERDEFENDANT'S ANSWERS TO
 DEFENDANT/COUNTERCLAIMANT'S FIRST SET OF INTERROGATORIES - 2

4. To the extent Plaintiff answers the Interrogatories, that answer shall be by and on behalf of Plaintiff and will be limited to information currently available to it. Plaintiff reserves the right to supplement or modify the information contained in these responses, including objections, should additional or different information become available. Plaintiff reserves the right to make use of, or to introduce in Court, documents or information responsive to the Interrogatories but discovered subsequent to the date of Plaintiff responses, including, but not limited to, any documents obtained during discovery.

5. Plaintiff has not yet completed discovery in this action and has not yet completed preparation for any hearings or trial. Accordingly, Plaintiff reserves the right to supplement, revise, correct, add to or clarify the objections, answers or responses set forth herein and any production made pursuant thereto. If Plaintiff identifies responsive documents or information at a future date, it reserves the right at that time to amend its objections, answers or responses and reserves the right to evaluate whether any privilege applies to those documents or information and to assert such privilege. Plaintiff also expressly reserves the right to redact documents produced in response to the Interrogatories.

6. These General Objections are incorporated by reference into each and every answer below to the extent applicable. Various objections may be referred to specifically in the answers below for purposes of clarity. However, failure to incorporate specifically an objection should not be construed as a waiver of any such objection.

SPECIFIC OBJECTIONS AND RESPONSES TO INTERROGATORIES

INTERROGATORIES

INTERROGATORY NO. 1: State the name, address and telephone number of all employees and/or agents involved in the transactions and events which are the subject of the pleadings.

ANSWER TO INTERROGATORY NO. 1: Plaintiff objects to this Interrogatory on the grounds that it is compound, vague, and ambiguous. Subject to and without waiving the foregoing objections and the General Objections, Plaintiff responds as follows:

Person	Contact Information
David Baum	C/O Hawley Troxell

INTERROGATORY NO. 2: Identify all persons responsible for furnishing any materials or information used to complete these Interrogatories.

ANSWER TO INTERROGATORY NO. 2: Plaintiff objects to this Interrogatory to the extent that it seeks information that is subject to and protected by the attorney-client privilege and/or the work-product doctrine. Subject to and without waiving the foregoing objections, Christopher Kiefor of Watermark Property Management.

INTERROGATORY NO. 3: State the name, address and telephone number of all persons who you believe may have knowledge or relevant information concerning each claim or defense disclosed in the Complaint and Answer.

ANSWER TO INTERROGATORY NO. 3: Plaintiff objects to this Interrogatory on the grounds that it is compound, vague, and ambiguous. Subject to and without waiving the foregoing objections, pursuant to I.R.C.P. 33(c), see the documents produced in this matter.

PLAINTIFF/COUNTERDEFENDANT'S ANSWERS TO
DEFENDANT/COUNTERCLAIMANT'S FIRST SET OF INTERROGATORIES - 4

INTERROGATORY NO. 4: Identify and list each document you believe may be relevant to each separate claim or defense disclosed in the Complaint and Answer. As to each of the documents identified, please provide the following:

- a. The location of the documents.
- b. The name, address, and telephone number of the individual with the custody or control over the documents.

ANSWER TO INTERROGATORY NO. 4: Plaintiff objects to this Interrogatory on the grounds that it is premature, given that discovery is ongoing. Subject to, and without waiving, the foregoing objections and the General Objections, see the exhibits attached to the Verified Complaint. Plaintiff may use any document produced by Defendant/Counterclaimant as evidence in this action. Pursuant to I.R.C.P. 33(c), see the documents produced in this matter.

Plaintiff reserves the right to supplement its response.

INTERROGATORY NO. 5: Do you contend there was a breach of the contract(s) which is (are) the subject of the pleadings? If so, for each breach, describe and give the date of every act or omission that you claim is a breach of the contract.

ANSWER TO INTERROGATORY NO. 5: See Verified Complaint, ¶¶ 7-9.

INTERROGATORY NO. 6: Do you contend there was a failure to pay money or debt when due? If so, for each contention of monies or debt being due, describe and specifically identify the monies or amounts due. Including the principal amount, the interest, and any other charges in your description.

ANSWER TO INTERROGATORY NO. 6: See Verified Complaint, Exhibit B, which amounts continue to accrue under the terms of the Lease through May 31, 2010.

INTERROGATORY NO. 7: Provide a detailed computation and/or disclosure of the amount you allege you are owed, and/or the contract performance or benefit you believe you are entitled to, and which you have not been provided. Identify all documents that support your calculation and/or disclosure and state the name of the person who has custody and control over the documents.

ANSWER TO INTERROGATORY NO. 7: See Answer to Interrogatory No. 6; Christopher Kiefor.

INTERROGATORY NO. 8: Is any contract alleged in the pleadings ambiguous? If so, identify each ambiguous contract, specifically identifying ambiguous term or provision, and state why it is ambiguous, and identify all documents that support your contention of ambiguity.

ANSWER TO INTERROGATORY NO. 8: Objection: Plaintiff has not alleged that any term of the Lease is ambiguous in the Verified Complaint, and Defendant/Counterclaimant has not asserted an affirmative defense that any term of the Lease is ambiguous.

INTERROGATORY NO. 9: For each contract alleged in the pleadings:

- a. Identify all documents that are part of the contract and for each state the name, address, and telephone number of each person who has the document.
- b. State each part of the contract not in writing, the name, address, and telephone number of each person agreeing to that provision and the date the part of the contract was made.
- c. Identify all documents that evidence each part of the contract not in writing and for each state the name, address, and telephone number of each person who has the document.
- d. Identify all documents that are part of each modification to the contract, and for each state the name, address, and telephone number of each person who has the document.

PLAINTIFF/COUNTERDEFENDANT'S ANSWERS TO
DEFENDANT/COUNTERCLAIMANT'S FIRST SET OF INTERROGATORIES - 6

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e. State each modification not in writing, the date, and the name, address and telephone number of each person agreeing to the modification, and the date the modification was made.

ANSWER TO INTERROGATORY NO. 9: See Answer to Interrogatory No. 4.

INTERROGATORY NO. 10: Do you contend that the Defendant/Counter-Claimant has made an admission or statement against interest, whether in writing, oral or recorded, regarding the events and circumstances giving rise to your Verified Complaint? If so, state? [sic]

- A. The name of the person making the statement or admission.
- B. The date of the statement or admission.
- C. The name and last known address of a person now in possession of a written or recorded statement.

ANSWER TO INTERROGATORY NO. 10: Plaintiff objects to this Interrogatory on the grounds that it is premature, given that discovery is ongoing. Subject to, and without waiving, the foregoing objections and the General Objections, see the exhibits attached to the Verified Complaint, and pursuant to I.R.C.P. 33(c), see the documents produced in this matter.

INTERROGATORY NO. 11: Please identify all facts that you contend support your First Affirmative Defense that the Counterclaim fails to state a claim against Plaintiff/Counter-Defendant upon which relief can be granted, and should be dismissed pursuant to Rule 12(b)(6) of the Idaho Rules of Civil Procedure.

ANSWER TO INTERROGATORY NO. 11: Plaintiff objects to this Interrogatory to the extent that it seeks information that is subject to and protected by the attorney-client privilege and/or the work-product doctrine. Plaintiff further objects to this Interrogatory on the grounds that it is premature, given that discovery is ongoing, and that the Interrogatory purports to require

PLAINTIFF/COUNTERDEFENDANT'S ANSWERS TO
DEFENDANT/COUNTERCLAIMANT'S FIRST SET OF INTERROGATORIES - 7

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Plaintiff to identify all facts or evidence with respect to a particular topic or issue without the benefit of sufficient discovery, investigation and evaluation. Subject to and without waiving the foregoing objections and the General Objections, Plaintiff contends that the Answer to the Counterclaim clearly speak for itself.

Plaintiff reserves the right to supplement its response.

INTERROGATORY NO. 12: Please identify all facts that you contend support your Second Affirmative Defense that the Counter-Claimant is barred from maintaining its action based upon the doctrine of estoppel.

ANSWER TO INTERROGATORY NO. 12: Plaintiff objects to this Interrogatory to the extent that it seeks information that is subject to and protected by the attorney-client privilege and/or the work-product doctrine. Plaintiff further objects to this Interrogatory on the grounds that it is premature, given that discovery is ongoing, and that the Interrogatory purports to require Plaintiff to identify all facts or evidence with respect to a particular topic or issue without the benefit of sufficient discovery, investigation and evaluation. Subject to and without waiving the foregoing objections and the General Objections, Plaintiff contends that the Answer to the Counterclaim clearly speak for itself.

Plaintiff reserves the right to supplement its response.

INTERROGATORY NO. 13: Please identify all facts that you contend support your Third Affirmative Defense that the Counter-Claimant is barred from maintaining its action against the Counter-Defendant because it has failed to mitigate the damages to which it asserts it is entitled.

ANSWER TO INTERROGATORY NO. 13: Plaintiff objects to this Interrogatory to the extent that it seeks information that is subject to and protected by the attorney-client privilege

PLAINTIFF/COUNTERDEFENDANT'S ANSWERS TO
DEFENDANT/COUNTERCLAIMANT'S FIRST SET OF INTERROGATORIES - 8

and/or the work-product doctrine. Plaintiff further objects to this Interrogatory on the grounds that it is premature, given that discovery is ongoing, and that the Interrogatory purports to require Plaintiff to identify all facts or evidence with respect to a particular topic or issue without the benefit of sufficient discovery, investigation and evaluation. Subject to and without waiving the foregoing objections and the General Objections, Plaintiff contends that the Answer to the Counterclaim clearly speak for itself.

Plaintiff reserves the right to supplement its response.

INTERROGATORY NO. 14: Please identify all facts that you contend support your Fourth Affirmative Defense that the Counter-Claimant is barred from maintaining its action against Plaintiff/Counter-Defendant because Plaintiff/Counter-Defendant's breach of contract, if any, is excused by Counter-Claimant's breach of contract.

ANSWER TO INTERROGATORY NO. 14: Plaintiff objects to this Interrogatory to the extent that it seeks information that is subject to and protected by the attorney-client privilege and/or the work-product doctrine. Plaintiff further objects to this Interrogatory on the grounds that it is premature, given that discovery is ongoing, and that the Interrogatory purports to require Plaintiff to identify all facts or evidence with respect to a particular topic or issue without the benefit of sufficient discovery, investigation and evaluation. Subject to and without waiving the foregoing objections and the General Objections, Plaintiff contends that the Verified Complaint and Answer to the Counterclaim clearly speak for itself.

Plaintiff reserves the right to supplement its response.

INTERROGATORY NO. 15: Please identify everything that the Plaintiff/Counter-Defendant did to mitigate its damages, if any, that you allege Defendants/Counter-Claimant caused.

PLAINTIFF/COUNTERDEFENDANT'S ANSWERS TO
DEFENDANT/COUNTERCLAIMANT'S FIRST SET OF INTERROGATORIES - 9

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ANSWER TO INTERROGATORY NO. 15: Plaintiff posted for lease signs, listed the property with a commercial broker, and recently signed a new tenant. The new tenant is Xtra Airways.

INTERROGATORY NO. 17 [sic]: Since the commencement of the Lease:

a. Identify each individual or entity who has provided property management services for the Plaintiff/Counter-Defendant.

b. For each individual or entity who has provided property management services for the Plaintiff/Counter-Defendant since the commencement of the Lease, explain all duties and tasks for which the individual or entity was responsible.

c. For each individual or entity who has provided property management services for the Plaintiff/Counter-Defendant since the commencement of the Lease, state whether the individual or entity was an employee of the Plaintiff/Counter-Defendant or an independent contractor. If the individual or entity who has provided property management services for the Plaintiff/Counter-Defendant since the commencement of the Lease is neither an employee of the Plaintiff/Counter-Defendant or an independent contractor, please explain in full detail the relationship between the Plaintiff/Counter-Defendant and the individual or entity providing property management services for the Plaintiff/Counter-Defendant.

d. For each individual or entity who has provided property management services for the Plaintiff/Counter-Defendant since the commencement of the Lease, state the dates that said individual or entity provided property management services for the Plaintiff/Counter-Defendant.

ANSWER TO INTERROGATORY NO. 17 [sic]:

Angela Aeschliman – 1030 West Chicago Avenue, Suite 300 Chicago, IL 60642; Phone: 312-275-6020. Daily management, including leasing, collections, deal with vendors, (11/1/08-

Present), employee of Watermark Property Management LLC, the property manager from 12/01/08 to present, and an independent contractor to Plaintiff.

Christopher Kiefor – 1030 West Chicago Avenue, Suite 300 Chicago, IL 60642; Phone: 312-275-3115. Asset management and accounting services - (2/14/06-Present); employee of Watermark Property Management LLC, the Asset manager from 2/14/06 to present, property manager from 12/1/08 to present, and an independent contractor to Plaintiff.

Sidney Rose – 6568 S Federal Way #148, Boise Idaho, 83716; (02/14/06-present), Maintenance person -- contractor name is Mountain Top Maintenance, and an independent contractor to Plaintiff.

Lew Manglos, 755 W Front Street Suite 300, Boise Idaho 83702 Phone: 208-472-2841 Works with property managers of the Mode building. Mr. Manglos helped lease the space to the tenant in 2006. Plaintiff is not sure how much management Mr. Manglos did because Colliers had different people working on the project. Mr. Manglos was employed by Colliers International in Boise, Idaho, when Colliers International held the management contract from 2/14/06 to 11/30/2008.

INTERROGATORY NO. 18 [sic]: Since the commencement of the Lease:

a. Identify each tenant, lessee, subtenant, their agent(s), employee(s) or visitor(s) who has complained to the Plaintiff/Counter-Defendant and/or its agent(s) or employee(s) about noise, disturbances, disruption, interruption or interference of any type or description at 800 West Idaho Street, Boise, Idaho 83702.

b. For each complaint identified in Interrogatory No. 18, subpart (a), describe the nature, type or character of the complaint.

c. For each complaint identified in Interrogatory No. 18, subpart (a), describe what action, if any, the Plaintiff/Counter-Defendant undertook to remedy or resolve the complaint.

ANSWER TO INTERROGATORY NO. 18 [sic]: Plaintiff objects to this Interrogatory on the grounds that it is vague, overly broad, and not relevant and not reasonably calculated to lead to the discovery of admissible evidence. Subject to and without waiving the foregoing objections, see the correspondence from Defendant to Plaintiff in the documents produced in this matter.

INTERROGATORY NO. 19 [sic]: State whether you and The North Face had an agreement or understanding in which you would be penalized if improvements to the portion of 800 West Idaho Street, Boise, Idaho 83702 that The North Face had agreed to lease from you were not completed by a specified date. If so:

a. State the date by which you agreed to have the improvements to the portion of 800 West Idaho Street, Boise, Idaho 83702 that The North Face had agreed to lease were supposed to be completed.

b. State what the penalty would be if you did not complete the improvements by the specified date to the portion of 800 West Idaho Street, Boise, Idaho 83702 that The North Face had agreed to lease.

c. State whether you completed the improvements to the portion of 800 West Idaho Street, Boise, Idaho 83702 that The North Face had agreed to lease by the specified date.

ANSWER TO INTERROGATORY NO. 19 [sic]: Plaintiff objects to this Interrogatory on the grounds that it is not relevant and not reasonably calculated to lead to the discovery of admissible evidence.

INTERROGATORY NO. 20 [sic]: If your response to any of the Requests for Admissions served concurrently herewith is anything but an unqualified admission, please state:


- a. All facts upon which you base your denial or qualified admission;
- b. The name, address and telephone number of each and every person having knowledge of each and every fact disclosed by you in your answer to (a) above; and
- c. A description of each and every document upon which you rely to support your denial or qualified admission.

ANSWER TO INTERROGATORY NO. 20 [sic]: See the responses to the requests for admission.

DATED THIS 10th day of May, 2010.

HAWLEY TROXELL ENNIS & HAWLEY LLP

By



Steven F. Schosberger, ISB No. 5358
Attorneys for Plaintiff/Counterdefendant
Boise Mode, LLC, successor-in-interest to
Mode Building Limited Partnership

PLAINTIFF/COUNTERDEFENDANT'S ANSWERS TO
DEFENDANT/COUNTERCLAIMANT'S FIRST SET OF INTERROGATORIES - 13

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VERIFICATION

David L. Baum, being first duly sworn upon oath, deposes and says:

That he is a Member of Baum Development, LLC, the Manager of Boise Mode, LLC the Plaintiff in the above-entitled action; that he has read the within and foregoing Answers to Defendant/Counterclaimant's First Set of Interrogatories; and that the statements therein contained are true to the best of his knowledge and belief.

David L. Baum
David L. Baum

STATE OF Illinois)
) ss.
County of Cook)

I, DRAGICA PERUNAC, a Notary Public, do hereby certify that on this ___ day of May, 2010, personally appeared before me David L. Baum, who, being by me first duly sworn, declared that he is the Manager of Boise Mode, LLC, that he signed the foregoing document as Manager of the company, and that the statements therein contained are true.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal the day and year in this certificate first above written.

Dragica Perunac
Notary Public for Illinois
Residing at 1030 W. Chicago Ave
My commission expires 6-29-2011




CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 16 day of May, 2010, I caused to be served a true copy of the foregoing PLAINTIFF/COUNTERDEFENDANT'S ANSWERS TO DEFENDANT/COUNTERCLAIMANT'S FIRST SET OF INTERROGATORIES by the method indicated below, and addressed to each of the following:

Michael E. Kelly
John J. Browder
LOPEZ & KELLY, PLLC
702 W. Idaho Street, Suite 1100
P.O. Box 856
Boise, ID 83701
[Attorneys for Defendants and Counterclaimant]

U.S. Mail, Postage Prepaid
 Hand Delivered
 Overnight Mail
 E-mail
 Telecopy: 208.342.4344



Steven F. Schossberger

RECEIVED
MAY 10 2010

Steven F. Schossberger, ISB No. 5358
HAWLEY TROXELL ENNIS & HAWLEY LLP
877 Main Street, Suite 1000
P.O. Box 1617
Boise, ID 83701-1617
Telephone: 208.344.6000
Facsimile: 208.954.5260
Email: sschossberger@hawleytroxell.com

Attorneys for Plaintiff/Counterdefendant Boise Mode, LLC,
successor-in-interest to Mode Building Limited Partnership

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

BOISE MODE, LLC, an Illinois limited liability company, successor-in-interest to Mode Building Limited Partnership, an Idaho limited partnership,

Plaintiff,

vs.

DONAHOE PACE & PARTNERS LTD, an Idaho corporation; and TIMOTHY PACE,

Defendants.

DONAHOE PACE & PARTNERS LTD, an Idaho corporation,

Counterclaimant,

vs.

BOISE MODE, LLC, an Illinois limited liability company, successor-in-interest to Mode Building Limited Partnership, an Idaho

Case No. CV OC 1001093

PLAINTIFF/COUNTERDEFENDANT'S RESPONSES TO DEFENDANT/COUNTERCLAIMANT'S FIRST SET OF REQUESTS FOR PRODUCTION OF DOCUMENTS

PLAINTIFF/COUNTERDEFENDANT'S RESPONSES TO DEFENDANT/COUNTERCLAIMANT'S FIRST SET OF REQUESTS FOR PRODUCTION OF DOCUMENTS - 1

limited partnership,)
)
 Counterdefendant.)
)
 _____)

TO: DONAHOE PACE & PARTNERS LTD AND TIMOTHY PACE AND THEIR
 COUNSEL OF RECORD

COMES NOW Boise Mode LLC, Plaintiff/Counterdefendant ("Plaintiff") in the
 above-entitled action, by and through its counsel of record, Hawley Troxell Ennis & Hawley
 LLP, and, in accordance with the requirements of Rule 34 of the Idaho Rules of Civil Procedure,
 hereby files its response to Defendant/Counter-Claimant's First Set of Requests for Production of
 Documents to Plaintiff.

Unless otherwise specified, inspection and copying will be permitted as requested, except
 that some other time and place which is mutually agreeable to the parties may be substituted for
 the time and place specified in the request.

GENERAL OBJECTIONS

The following General Objections apply to each and every Request for Production and
 form an integral part of Plaintiff's response to each:

1. Plaintiff objects to the Document Requests and the definitions and instructions
 contained therein to the extent they are overly broad, unduly burdensome and/or call for
 documents that are obtainable from some other source that is more convenient, less burdensome
 or less expensive.

2. Plaintiff objects to the Document Requests and the definitions and instructions
 contained therein to the extent they seek to impose obligations on Plaintiff beyond those required
 by the Idaho Rules of Civil Procedure.

PLAINTIFF/COUNTERDEFENDANT'S RESPONSES TO
 DEFENDANT/COUNTERCLAIMANT'S FIRST SET OF REQUESTS FOR PRODUCTION
 OF DOCUMENTS - 2

3. Plaintiff objects to the Document Requests to the extent that they seek discovery of information protected by the attorney-client privilege, the work-product doctrine, the business strategies immunity or any other applicable privilege or immunity. Any production of privileged or otherwise protected documents is inadvertent and will not constitute a waiver of any claim of privilege or other protection. Plaintiff reserves the right to obtain the return of inadvertently produced information and to prohibit its use in any manner.

4. Plaintiff objects to the Document Requests to the extent that they seek information that is neither relevant to the claim or defense of any party nor reasonably calculated to lead to the discovery of admissible evidence.

5. These General Objections are incorporated by reference into each and every Response below to the extent applicable. Various objections may be referred to specifically in the Responses below for purposes of clarity. However, failure to incorporate specifically an objection should not be construed as a waiver of any such objection.

SPECIFIC OBJECTIONS AND RESPONSES TO REQUESTS FOR PRODUCTION

REQUEST FOR PRODUCTION NO. 1: Please produce copies of all invoices, bills, statement of charges, document(s) and correspondence that Plaintiff/Counter-Defendant possesses relating to the maintenance and/or cleaning of the 800 West Idaho Street, Boise, Idaho, 83702, Suite 350.

RESPONSE TO REQUEST FOR PRODUCTION NO. 1: Plaintiff objects on the grounds that this request is vague, overly broad, burdensome, not relevant and not reasonably calculated to lead to the discovery of admissible evidence. Subject to and without waiving the foregoing objections, see the documents produced by Plaintiff.

PLAINTIFF/COUNTERDEFENDANT'S RESPONSES TO
DEFENDANT/COUNTERCLAIMANT'S FIRST SET OF REQUESTS FOR PRODUCTION
OF DOCUMENTS - 3

REQUEST FOR PRODUCTION NO. 2: Please produce copies of all documents evidencing any complaint received by you since the commencement of the Lease from any tenant, lessee, sub-tenant, their agent(s), employee(s), or visitor(s) regarding noise, disturbances, disruption, interruption, or interference of any type or description at 800 West Idaho Street, Boise, Idaho 83702.

RESPONSE TO REQUEST FOR PRODUCTION NO. 2: Plaintiff objects on the grounds that this request is vague, overly broad, burdensome, not relevant and not reasonably calculated to lead to the discovery of admissible evidence. Subject to and without waiving the foregoing objections, see the documents produced by Plaintiff.

REQUEST FOR PRODUCTION NO. 3: Please provide copies of all agreements and/or leases between you and The North Face.

RESPONSE TO REQUEST FOR PRODUCTION NO. 3: Plaintiff objects on the grounds that this request is not relevant and not reasonably calculated to lead to the discovery of admissible evidence.

REQUEST FOR PRODUCTION NO. 4: Please produce copies of all documents that you contend prove that the Defendants/Counter-Claimant have made an admission or statement against interest regarding the events and circumstances giving rise to your Verified Complaint.

RESPONSE TO REQUEST FOR PRODUCTION NO. 4: See Answer to Interrogatory No. 10.

REQUEST FOR PRODUCTION NO. 5: Please produce copies of all documents that you contend support your calculation of damages and/or the computation of damages set forth in your answer to Interrogatory No. 7.

PLAINTIFF/COUNTERDEFENDANT'S RESPONSES TO
DEFENDANT/COUNTERCLAIMANT'S FIRST SET OF REQUESTS FOR PRODUCTION
OF DOCUMENTS - 4

RESPONSE TO REQUEST FOR PRODUCTION NO. 5: See Answer to Interrogatory No. 7.

REQUEST FOR PRODUCTION NO. 6: Please produce copies of all documents identified in your answer to Interrogatory No. 4.

RESPONSE TO REQUEST FOR PRODUCTION NO. 6: See Answer to Interrogatory No. 4.

REQUEST FOR PRODUCTION NO. 7: Please produce copies of all documents used and/or identified in your answer to Interrogatory No. 20.

RESPONSE TO REQUEST FOR PRODUCTION NO. 7: See Answer to Interrogatory No. 20.

REQUEST FOR PRODUCTION NO. 8: Please produce copies of any statements or documents in any form whatsoever obtained by you, your attorney(s) or representative(s), or anyone acting on your or their behalf, from any person believed by you or your attorney(s) to have knowledge of any of the events or happenings referred to in the pleadings to the extent that such statements and documents are not privileged.

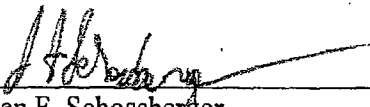
RESPONSE TO REQUEST FOR PRODUCTION NO. 8: Plaintiff objects on the grounds that this request is vague, and overly broad. Subject to and without waiving the foregoing objections, see the documents produced by Plaintiff.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 10 day of May, 2010, I caused to be served a true copy of the foregoing PLAINTIFF/COUNTERDEFENDANT'S RESPONSES TO DEFENDANT/COUNTERCLAIMANT'S FIRST SET OF REQUESTS FOR PRODUCTION OF DOCUMENTS by the method indicated below, and addressed to each of the following:

Michael E. Kelly
John J. Browder
LOPEZ & KELLY, PLLC
702 W. Idaho Street, Suite 1100
P.O. Box 856
Boise, ID 83701
[Attorneys for Defendants and Counterclaimant]

- U.S. Mail, Postage Prepaid
- Hand Delivered
- Overnight Mail
- E-mail
- Telecopy: 208.342.4344



 Steven F. Schossberger

PLAINTIFF/COUNTERDEFENDANT'S RESPONSES TO
DEFENDANT/COUNTERCLAIMANT'S FIRST SET OF REQUESTS FOR PRODUCTION
OF DOCUMENTS - 7

RECEIVED
MAY 10 2010

L & K P...

Steven F. Schossberger, ISB No. 5358
HAWLEY TROXELL ENNIS & HAWLEY LLP
877 Main Street, Suite 1000
P.O. Box 1617
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Telephone: 208.344.6000
Facsimile: 208.954.5260
Email: sschossberger@hawleytroxell.com

Attorneys for Plaintiff/Counterdefendant Boise Mode, LLC,
successor-in-interest to Mode Building Limited Partnership

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

BOISE MODE, LLC, an Illinois limited liability company, successor-in-interest to Mode Building Limited Partnership, an Idaho limited partnership,

Plaintiff,

vs.

DONAHOE PACE & PARTNERS LTD, an Idaho corporation; and TIMOTHY PACE,

Defendants.

Case No. CV OC 1001093

PLAINTIFF/COUNTERDEFENDANT'S ANSWERS TO DEFENDANT/COUNTERCLAIMANT'S FIRST SET OF REQUESTS FOR ADMISSIONS

DONAHOE PACE & PARTNERS LTD, an Idaho corporation,

Counterclaimant,

vs.

BOISE MODE, LLC, an Illinois limited liability company, successor-in-interest to Mode Building Limited Partnership, an Idaho

PLAINTIFF/COUNTERDEFENDANT'S ANSWERS TO DEFENDANT/COUNTERCLAIMANT'S FIRST SET OF REQUESTS FOR ADMISSIONS - 1

limited partnership,)
)
 Counterdefendant.)
)
 _____)

TO: DONAHOE PACE & PARTNERS LTD AND TIMOTHY PACE AND THEIR
 COUNSEL OF RECORD

COMES NOW Boise Mode LLC, Plaintiff/Counterdefendant in the above-entitled action,
 by and through its counsel of record, Hawley Troxell Ennis & Hawley LLP, and, in accordance
 with the requirements of Rule 36 of the Idaho Rules of Civil Procedure, hereby files its response
 to Defendant/Counter-Claimant's First Set of Requests for Admissions to Plaintiff.

REQUESTS FOR ADMISSIONS

REQUEST FOR ADMISSION NO. 1: Admit that for a time period subsequent to the
 commencement of the November 3, 2006, Office Lease Agreement ("Lease"), a copy of which is
 attached and incorporated by reference as Exhibit "A" to the Verified Complaint, you and/or
 your employee(s), agent(s), attorney(s), representative(s), or servant(s) assumed the
 responsibility for maintaining and/or cleaning 800 West Idaho Street, Suite 350, Boise, Idaho,
 83702, (hereinafter "Premises").

RESPONSE TO REQUEST FOR ADMISSION NO. 1: Objection: this request for
 admission is compound and vague and unclear as to the language "assumed the responsibility for
 maintaining." Subject to without waiving the foregoing objections, Denied. See Section 4.2 of
 the Lease Agreement providing, in relevant part, that: "Base Rent shall not include costs for
 Janitorial Services, which shall be the responsibility of Tenant."

REQUEST FOR ADMISSION NO. 2: Admit that you and/or your employee(s),
 agent(s), attorney(s), representative(s), or servant(s) drafted and/or prepared Exhibit A to the
 Verified Complaint.

PLAINTIFF/COUNTERDEFENDANT'S ANSWERS TO
 DEFENDANT/COUNTERCLAIMANT'S FIRST SET OF REQUESTS FOR ADMISSIONS - 2


RESPONSE TO REQUEST FOR ADMISSION NO. 2: Objection: this request for admission is compound. Subject to and without waiving the foregoing objection, Plaintiff admits Exhibit A to the Verified Complaint is its Lease Agreement.

REQUEST FOR ADMISSION NO. 3: Admit that Exhibit "E" to the Lease, which is entitled Building Rules and Regulations, paragraph 2, prohibits "[t]enants, their agents, employees, or visitors," from creating or making any improper noises or disturbances of any kind in the building or interfering in any way with other tenants or those having business with them.

RESPONSE TO REQUEST FOR ADMISSION NO. 3: Denied. This request paraphrases paragraph 2 of Exhibit E of Exhibit A of the Verified Complaint. Exhibit E of Exhibit A of the Verified Complaint speaks for itself and is the best evidence of its content.

DATED THIS 10th day of May, 2010.

HAWLEY TROXELL ENNIS & HAWLEY LLP

By 
Steven F. Schossberger, ISB No. 5358
Attorneys for Plaintiff/Counterdefendant
Boise Mode, LLC, successor-in-interest to
Mode Building Limited Partnership

PLAINTIFF/COUNTERDEFENDANT'S ANSWERS TO
DEFENDANT/COUNTERCLAIMANT'S FIRST SET OF REQUESTS FOR ADMISSIONS - 3

43355.0011.1875454.1

000393

VERIFICATION

David L. Baum, being first duly sworn upon oath, deposes and says:

That he is a Member of Baum Development, LLC, the Manager of Boise Mode, LLC the Plaintiff in the above-entitled action; that he has read the within and foregoing Responses to Defendant/Counterclaimant's First Requests for Admissions; and that the statements therein contained are true to the best of his knowledge and belief.

D Baum

David L. Baum

STATE OF Illinois)
) ss.
County of Cook)

I, DRAGICA PERUNAC, a Notary Public, do hereby certify that on this 10th day of May, 2010, personally appeared before me David L. Baum, who, being by me first duly sworn, declared that he is the Manager of Boise Mode, LLC, that he signed the foregoing document as Manager of the company, and that the statements therein contained are true.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal the day and year in this certificate first above written.

Dragica Perunac

Notary Public for Illinois

Residing at 1030 W. Chicago Ave

My commission expires 6-29-2011



PLAINTIFF/COUNTERDEFENDANT'S ANSWERS TO
DEFENDANT/COUNTERCLAIMANT'S FIRST SET OF REQUESTS FOR ADMISSIONS - 4

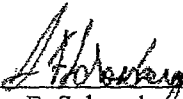
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 10 day of May, 2010, I caused to be served a true copy of the foregoing PLAINTIFF/COUNTERDEFENDANT'S ANSWERS TO DEFENDANT/COUNTERCLAIMANT'S FIRST SET OF REQUESTS FOR ADMISSIONS by the method indicated below, and addressed to each of the following:

Michael E. Kelly
John J. Browder
LOPEZ & KELLY, PLLC
702 W. Idaho Street, Suite 1100
P.O. Box 856
Boise, ID 83701

- U.S. Mail, Postage Prepaid
- Hand Delivered
- Overnight Mail
- E-mail
- Telecopy: 208.342.4344

[Attorneys for Defendants and Counterclaimant]



 Steven F. Schossberger

Steven F. Schossberger, ISB No. 5358
 HAWLEY TROXELL ENNIS & HAWLEY LLP
 877 Main Street, Suite 1000
 P.O. Box 1617
 Boise, ID 83701-1617
 Telephone: 208.344.6000
 Facsimile: 208.954.5260
 Email: sschossberger@hawleytroxell.com

Attorneys for Plaintiff/Counterdefendant Boise Mode, LLC,
 successor-in-interest to Mode Building Limited Partnership

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

BOISE MODE, LLC, an Illinois limited
 liability company, successor-in-interest to
 Mode Building Limited Partnership, an Idaho
 limited partnership,

Plaintiff,

vs.

DONAHOE PACE & PARTNERS LTD, an
 Idaho corporation; and TIMOTHY PACE,

Defendants.

Case No. CV OC 1001093

NOTICE OF SERVICE

DONAHOE PACE & PARTNERS LTD, an
 Idaho corporation,

Counterclaimant,

vs.

BOISE MODE, LLC, an Illinois limited
 liability company, successor-in-interest to
 Mode Building Limited Partnership, an Idaho
 limited partnership,

Counterdefendant.)
_____)

Pursuant to Rule 36 of the Idaho Rules of Civil Procedure, Boise Mode, LLC hereby gives notice that on May 10, 2010, said party served the original of Plaintiff/Counterdefendant's Answers To Defendant/Counterclaimant's First Set Of Requests for Admissions upon the following person or persons:

Michael E. Kelly
John J. Browder
LOPEZ & KELLY, PLLC
702 W. Idaho Street, Suite 1100
P.O. Box 856
Boise, ID 83701

DATED THIS 10 day of May, 2010.

HAWLEY TROXELL ENNIS & HAWLEY LLP


By Steven F. Schossberger
Steven F. Schossberger, ISB No. 5358
Attorneys for Plaintiff/Counterdefendant
Boise Mode, LLC, successor-in-interest to
Mode Building Limited Partnership

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 10 day of May, 2010, I caused to be served a true copy of the foregoing NOTICE OF SERVICE by the method indicated below, and addressed to each of the following:

Michael E. Kelly
John J. Browder
LOPEZ & KELLY, PLLC
702 W. Idaho Street, Suite 1100
P.O. Box 856
Boise, ID 83701
[Attorneys for Defendants and Counterclaimant]

- U.S. Mail, Postage Prepaid
- Hand Delivered
- Overnight Mail
- E-mail
- Telecopy: 208.342.4344



 Steven F. Schossberger

EXHIBIT B

Michael E. Kelly, ISB #4351
John J. Browder, ISB #7531
LOPEZ & KELLY, PLLC
PO Box 856
Boise, Idaho 83701
Telephone: (208) 342-4300
Facsimile: (208) 342-4344
7008.001/SDT North Face.wpd

ORIGINAL

Attorneys for Defendants

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

BOISE MODE, LLC, an Illinois limited liability company, successor-in-interest to Mode Building Limited Partnership, an Idaho limited partnership,

Plaintiff,

vs.

DONAHOE PACE & PARTNERS LTD, an Idaho corporation; and TIMOTHY PACE,

Defendants.

DONAHOE PACE & PARTNERS LTD, an Idaho corporation,

Counter-Claimant,

vs.

BOISE MODE, LLC, an Illinois limited liability company, successor-in-interest to Mode Building Limited Partnership, an Idaho limited partnership,

Counter-Defendant.

Case No. **CV OC 1001093**

SUBPOENA DUCES TECUM

THE STATE OF IDAHO TO:

**The North Face
800 West Idaho Street
Boise, ID 83702**

YOU ARE COMMANDED:

- To appear at the place, date and time specified below to testify in the above case.
- To appear at the place, date and time specified below to testify at the taking of a deposition in the above case.
- To produce or permit inspection and copying of the documents or objects attached hereto as Exhibit "A," including electronically stored information, at the place, date and time specified below.
- To permit inspection of the following premises at the date and time specified below.

PLACE: Lopez & Kelly, PLLC
413 W. Idaho Street, Ste. 100
Boise, Idaho 83701-0856

DATE: December 1, 2010

TIME: 11:00 a.m.

You are further notified that if you fail to appear at the place and time specified above, or to produce or permit copying or inspection as specified above that you may be held in contempt of court and that the aggrieved party may recover from you the sum of ONE HUNDRED DOLLARS (\$100.00) and all damages which the party may sustain by your failure to comply with this Subpoena.

DATED this 15 day of November, 2010.

LOPEZ & KELLY PLLC


By: *Michael E. Kelly* for
Michael E. Kelly, Of the Firm
Attorneys for Defendants

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 15 day of November, 2010, I served a true and correct copy of the foregoing by delivering the same to each of the following individuals, by the method indicated below, addressed as follows:

Steven F. Schossberger
HAWLEY, TROXELL, ENNIS & HAWLEY
877 Main Street, Suite 1000
PO Box 1617
Boise, ID 83701-1617
Telephone: (208) 344-6000
Facsimile: (208) 954-5260
sschossberger@hawleytroxell.com

- U.S. Mail
- Hand-Delivered
- Overnight mail
- Facsimile



Michael E. Kelly

EXHIBIT "A"

Your entire file, documents and/or objects whether tangible or in electronic form, relating to your lease of the premises located at 800 West Idaho Street, Boise, Idaho 83702 ("Premises"), and any construction and improvements that The North Face had performed prior to moving into the Premises including, without limitation, lease agreements, memoranda of understanding, and related documents.

Michael E. Kelly, ISB #4351
John J. Browder, ISB #7531
LOPEZ & KELLY, PLLC
PO Box 856
Boise, Idaho 83701
Telephone: (208) 342-4300
Facsimile: (208) 342-4344
7008.001/SDTColliers.wpd

ORIGINAL

Attorneys for Defendants

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

BOISE MODE, LLC, an Illinois limited liability company, successor-in-interest to Mode Building Limited Partnership, an Idaho limited partnership,

Plaintiff,

vs.

DONAHOE PACE & PARTNERS LTD, an Idaho corporation; and TIMOTHY PACE,

Defendants.

DONAHOE PACE & PARTNERS LTD, an Idaho corporation,

Counter-Claimant,

vs.

BOISE MODE, LLC, an Illinois limited liability company, successor-in-interest to Mode Building Limited Partnership, an Idaho limited partnership,

Counter-Defendant.

Case No. **CV OC 1001093**

SUBPOENA DUCES TECUM

THE STATE OF IDAHO TO:

**Colliers Idaho Property Management LLC
c/o Christopher J. Beeson
601 W. Bannock
Boise, ID 83702**

YOU ARE COMMANDED:


- To appear at the place, date and time specified below to testify in the above case.
- To appear at the place, date and time specified below to testify at the taking of a deposition in the above case.
- To produce or permit inspection and copying of the documents or objects attached hereto as Exhibit "A," including electronically stored information, at the place, date and time specified below.
- To permit inspection of the following premises at the date and time specified below.

PLACE: Lopez & Kelly, PLLC
413 W. Idaho Street, Ste. 100
Boise, Idaho 83701-0856
DATE: December 1, 2010
TIME: 9:30 a.m.

You are further notified that if you fail to appear at the place and time specified above, or to produce or permit copying or inspection as specified above that you may be held in contempt of court and that the aggrieved party may recover from you the sum of ONE HUNDRED DOLLARS (\$100.00) and all damages which the party may sustain by your failure to comply with this Subpoena.

DATED this 15 day of November, 2010.

LOPEZ & KELLY PLLC

By: 


Michael E. Kelly, Of the Firm
Attorneys for Defendants

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 15 day of November, 2010, I served a true and correct copy of the foregoing by delivering the same to each of the following individuals, by the method indicated below, addressed as follows:

Steven F. Schossberger
HAWLEY, TROXELL, ENNIS & HAWLEY
877 Main Street, Suite 1000
PO Box 1617
Boise, ID 83701-1617
Telephone: (208) 344-6000
Facsimile: (208) 954-5260
sschossberger@hawleytroxell.com

- U.S. Mail
- Hand-Delivered
- Overnight mail
- Facsimile



Michael E. Kelly

EXHIBIT "A"

Your entire file, documents and/or tangible objects whether tangible or in electronic form, relating to all services provided by Colliers Idaho Property Management LLC, and/or Colliers International and/or Leo Manglos to Boise Mode, LLC with regard to the premises located at 800 West Idaho Street, Boise, Idaho 83702 from 02/14/06 through 11/30/08.

Michael E. Kelly, ISB #4351
John J. Browder, ISB #7531
LOPEZ & KELLY, PLLC
413 W. Idaho Street, Suite 100
PO Box 856
Boise, Idaho 83701
Telephone: (208) 342-4300
Facsimile: (208) 342-4344
7200.011/Affidavit of Service Colliers.wpd

NO. _____
FILED
A.M. _____ P.M. _____

DEC 03 2010

J. DAVID NAVARRO, Clerk
By CARLY LATIMORE
DEPUTY

Attorneys for Defendant

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

BOISE MODE, LLC, an Illinois limited liability company, successor-in-interest to Mode Building Limited Partnership, an Idaho limited partnership,

Plaintiff,

vs.

DONAHOE PACE & PARTNERS LTD, an Idaho corporation; and TIMOTHY PACE,

Defendant.

DONAHOE PACE & PARTNERS LTD, an Idaho corporation,

Counter-Claimant,

vs.

BOISE MODE, LLC, an Illinois limited liability company, successor-in-interest to Mode Building Limited Partnership, an Idaho limited partnership,

Counter-Defendant.

Case No. CV OC 1001093

**AFFIDAVIT OF SERVICE OF
SUBPOENA**

STATE OF IDAHO)
 : ss
County of Ada)

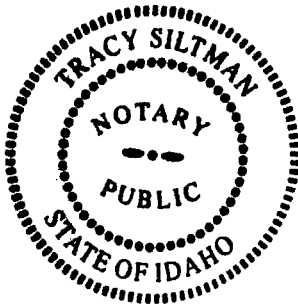
I swear under oath:

- 1) I am a resident of Ada County, State of Idaho, and over the age of eighteen (18) years.
- 2) On November 15, 2010, I served a copy of a *Subpoena Duces Tecum* for *Colliers Idaho Property Management LLC*, upon Christopher J. Beeson, by hand delivering a copy to his assistant, Tina Adornetto, personally at Colliers Idaho Property Management, 601 West Bannock St., Boise, Idaho 83702, at 1:26 p.m.

Keenan Kelly
Signature

Keenan Kelly
Printed Name

SUBSCRIBED AND SWORN TO before me this 3rd day of December, 2010.



Nancy Siltman
Notary Public for the State of Idaho
Residing at: Boise ID
My Commission Expires: 8-10-14

Michael E. Kelly, ISB #4351
John J. Browder, ISB #7531
LOPEZ & KELLY, PLLC
413 W. Idaho Street, Suite 100
PO Box 856
Boise, Idaho 83701
Telephone: (208) 342-4300
Facsimile: (208) 342-4344
7200.011/Affidavit of Service The Northface.wpd

NO. _____
FILED
A.M. _____ P.M. _____

DEC 03 2010

J. DAVID NAVARRO, Clerk
By CARLY LATIMORE
DEPUTY

Attorneys for Defendant

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

BOISE MODE, LLC, an Illinois limited liability company, successor-in-interest to Mode Building Limited Partnership, an Idaho limited partnership,

Plaintiff,

vs.

DONAHOE PACE & PARTNERS LTD, an Idaho corporation; and TIMOTHY PACE,

Defendant.

DONAHOE PACE & PARTNERS LTD, an Idaho corporation,

Counter-Claimant,

vs.

BOISE MODE, LLC, an Illinois limited liability company, successor-in-interest to Mode Building Limited Partnership, an Idaho limited partnership,

Counter-Defendant.

Case No. CV OC 1001093

**AFFIDAVIT OF SERVICE OF
SUBPOENA**

STATE OF IDAHO)
 : SS
County of Ada)

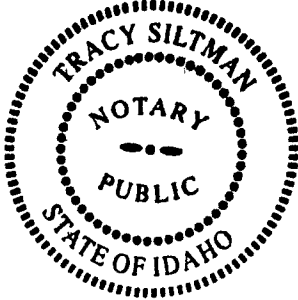
I swear under oath:

- 1) I am a resident of Ada County, State of Idaho, and over the age of eighteen (18) years.
- 2) On November 15, 2010, I served a copy of a *Subpoena Duces Tecum for The North Face*, upon April Johnson, by hand delivering a copy to The North Face , 800 West Idaho St., Boise, Idaho 83702, at 1:12 p.m.

Keenan Kelly
Signature

Keenan Kelly
Printed Name

SUBSCRIBED AND SWORN TO before me this 3rd day of December, 2010.



Tracy Siltman
Notary Public for the State of Idaho
Residing at: PO Box 10
My Commission Expires: 8-10-11

EXHIBIT C

John Browder

From: Rafferty_Jackson@vfc.com
Sent: Tuesday, December 07, 2010 6:53 AM
To: John Browder
Subject: Boise Mode LLC v. Donahoe Pace and Partners
Follow Up Flag: Follow up
Flag Status: Red

Dear Mr. Browder,

VF Outdoor, Inc., the owners of the The North Face, received an improperly civil subpoena duces tecum from your office seeking documents related to 800 West Idaho Street, Boise, Idaho.

We only accept service through our registered agent for service of process. No one in any store is authorized to accept service on behalf of VF Outdoor, Inc. Please send your properly served subpoena as follows:

Corporation Service Company
12550 W. Explorer Drive
Suite 100
Boise, ID 83713

Also, I wanted to note for you that we do not have any lease related to 800 West Idaho Street. We do have a lease with Boise Mode LLC dated July 3, 2008 for 802 West Idaho Street, Boise, Idaho.

Hope this helps and I will keep my eye out for your subpoena as it routes properly through our system after you serve CSC.

Thank you.

Sincerely,
Rafferty Atha Jackson
Vice President and General Counsel
VF Outdoor, Inc.
2011 Farallon Drive, San Leandro, CA 94577
Direct Dial: 510.614.4088 Cell Phone: 415.717.1461
Fax: 510.618.3549
rafferty_jackson@vfc.com

NOTE: This e-mail message and attachments may contain legally privileged and confidential information intended for use by the intended recipient only. If you are not the intended recipient, any reading, dissemination, distribution, copying or other use of this message or its attachments is strictly prohibited. If you have received this message in error, please notify the sender immediately by telephone (510.614.4088) or e-mail (rafferty_jackson@vfc.com) and please delete this message, its attachments and any copies. Thank you.

EXHIBIT D

John Browder

From: Mike Attiani [Mike.Attiani@colliers.com]
Sent: Wednesday, November 17, 2010 1:58 PM
To: John Browder
Subject: MODE tenant list
Follow Up Flag: Follow up
Flag Status: Red

Hi John.

The following is the tenant list we discussed yesterday. The building was pretty empty, so there weren't too many tenants to be affected by anything going on at the property.

THE MODE BUILDING

<u>Unit</u>	<u>Name</u>	<u>Sq.Ft.</u>
112	Koi	3,316
114	Piehole	809
120	The Grape Escape	1,732
300	The Caprock Group	3,706
350	Donahoe Pace & Partners LTD	6,360

Best regards.

- Mike

Mike Attiani, CPM

Director of Property Services

Dir +1 208 472 2862

Main +1 208 345 9000 | Fax +1 208 345 6321

Mike.Attiani@colliers.com

Colliers International

755 W. Front Street, Suite 300 | Boise, ID 83702 | USA

www.colliers.com



View the current issue of [Knowledge Leader](#).

DEC 15 2010

DAVID NAVARRO, Clerk
By L. AMES
DEPUTY

Steven F. Schossberger, ISB No. 5358
HAWLEY TROXELL ENNIS & HAWLEY LLP
877 Main Street, Suite 1000
P.O. Box 1617
Boise, ID 83701-1617
Telephone: 208.344.6000
Facsimile: 208.954.5260
Email: sschossberger@hawleytroxell.com

Attorneys for Plaintiff/Counterdefendant Boise Mode, LLC,
successor-in-interest to Mode Building Limited Partnership

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

BOISE MODE, LLC, an Illinois limited liability company, successor-in-interest to Mode Building Limited Partnership, an Idaho limited partnership,

Plaintiff,

vs.

DONAHOE PACE & PARTNERS LTD, an Idaho corporation; and TIMOTHY PACE,

Defendants.

Case No. CV OC 1001093

AFFIDAVIT OF STEVEN F. SCHOSSBERGER IN OPPOSITION TO MOTION FOR RULE 56(f) CONTINUANCE

DONAHOE PACE & PARTNERS LTD, an Idaho corporation,

Counterclaimant,

vs.

BOISE MODE, LLC, an Illinois limited liability company, successor-in-interest to Mode Building Limited Partnership, an Idaho limited partnership,

Counterdefendant.

σ

Steven F. Schossberger, being first duly sworn upon oath, deposes and says:

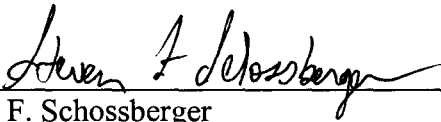
1. I make this affidavit based on my personal knowledge in opposition to Defendants' Donahoe Pace & Partners, Ltd and Timothy Pace's, and Counterclaimant's, Motion for Rule 56(f) continuance.

2. I am a partner of the law firm Hawley Troxell Ennis & Hawley LLP, counsel of record for Boise Mode, LLC.

3. Since the service of Boise Mode's responses to Defendants'/Counterclaimant's first set of interrogatories, request for production of documents, and requests for admission, on May 10, 2010, I have not received any telephone call, letter, or email from Defendants'/Counterclaimant's counsel putting me on notice that he wanted to discuss the sufficiency of any of the discovery responses.

4. On May 11, 2010, I hand delivered a CD to counsel Michael E. Kelly which contains Boise Mode's document production identified by Bates Nos. PLTF1-267, which is comprised of all relevant lease agreements, agreements, letters and emails in the possession of Boise Mode, LLC, and its authorized property manager, Watermark Property Management, regarding Boise Mode's complaint for failure to pay rent during the time period December 2008 through May 2010 and relating to Donahoe Pace & Partners' counterclaims.

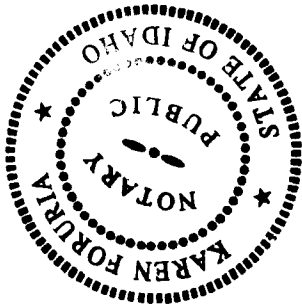
Further your affiant sayeth naught.



Steven F. Schossberger

STATE OF IDAHO)
) ss.
County of Ada)

SUBSCRIBED AND SWORN before me this 15th day of December, 2010.



Karen Forria

Notary Public for Idaho
Residing at *Bose, Idaho*


My commission expires *6-18-11*

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 15th day of December, 2010, I caused to be served a true copy of the foregoing AFFIDAVIT OF STEVEN F. SCHOSSBERGER IN OPPOSITION TO MOTION FOR RULE 56(F) CONTINUANCE by the method indicated below, and addressed to each of the following:

Michael E. Kelly
John J. Browder
LOPEZ & KELLY, PLLC
413 W. Idaho Street, Suite 100
P.O. Box 856
Boise, ID 83701
[Attorneys for Defendants and Counterclaimant]

U.S. Mail, Postage Prepaid
 Hand Delivered
 Overnight Mail
 E-mail
 Telecopy: 208.342.4344



Steven F. Schossberger

DEC 15 2010

J. DAVID NAVARRO, Clerk
By L. AMES
DEPUTY

Steven F. Schossberger, ISB No. 5358
HAWLEY TROXELL ENNIS & HAWLEY LLP
877 Main Street, Suite 1000
P.O. Box 1617
Boise, ID 83701-1617
Telephone: 208.344.6000
Facsimile: 208.954.5260
Email: sschossberger@hawleytroxell.com

Attorneys for Plaintiff/Counterdefendant Boise Mode, LLC,
successor-in-interest to Mode Building Limited Partnership

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

BOISE MODE, LLC, an Illinois limited liability company, successor-in-interest to Mode Building Limited Partnership, an Idaho limited partnership,

Plaintiff,

vs.

DONAHOE PACE & PARTNERS LTD, an Idaho corporation; and TIMOTHY PACE,

Defendants.

Case No. CV OC 1001093

MEMORANDUM IN OPPOSITION TO DEFENDANTS'/ COUNTERCLAIMANT'S MOTION FOR CONTINUANCE PURSUANT TO I.R.C.P. 56(f)

DONAHOE PACE & PARTNERS LTD, an Idaho corporation,

Counterclaimant,

vs.

BOISE MODE, LLC, an Illinois limited liability company, successor-in-interest to Mode Building Limited Partnership, an Idaho limited partnership,

Counterdefendant.

MEMORANDUM IN OPPOSITION TO DEFENDANTS'/ COUNTERCLAIMANT'S MOTION FOR CONTINUANCE PURSUANT TO I.R.C.P. 56(f) - 1

av

COMES NOW Plaintiff/Counterdefendant Boise Mode, LLC (“Boise Mode”), by and through its undersigned counsel of record, Hawley Troxell Ennis & Hawley LLP, and submits this memorandum in opposition to Plaintiff’s motion for Rule 56(f) continuance of the Court hearing scheduled December 22, 2010, on Plaintiff’s and Counterdefendant’s motions for summary judgment.

I.

INTRODUCTION

Defendants’ Donahoe Pace & Partners Ltd (“DPP”) and Timothy Pace (“Pace”) have failed to offer sufficient justification as to what evidence will be acquired through additional discovery that is needed to oppose Boise Mode’s motion for summary judgment on its Verified Complaint for breach of contract damages arising from DPP’s failure to pay rent, and against Pace as the guarantor, and to oppose Boise Mode’s motion for summary judgment on the counterclaims for breach of contract, breach of the implied covenant of good faith and fair dealing, negligent supervision, tortious interference with contract and constructive eviction. DPP and Pace seek to delay the summary judgment hearing for unsupported reasons.

DPP and Pace contend that they are dissatisfied with some of Boise Mode’s discovery responses which were served all the way back on May 10, 2010. However, prior to the filing of this motion, DPP and Pace have never raised any discovery issues with Boise Mode in a meet and confer letter or even in an email to counsel. (*See Schossberger Aff.*, ¶ 3). DPP and Pace also want a continuance because two third parties, the North Face and Colliers International, were provided with a subpoena which did not yield any documents. DPP and Pace fail to explain what evidence is in the possession of either the North Face or Colliers International which would create a genuine issue of material fact as to either of the motions for summary judgment.

MEMORANDUM IN OPPOSITION TO DEFENDANTS’/
COUNTERCLAIMANT’S MOTION FOR CONTINUANCE
PURSUANT TO I.R.C.P. 56(f) - 2

By stipulation, the Court issued its order setting proceedings and trial on August 10, 2010, setting the trial date on February 23, 2011, and further ordering that, “All motions, including ... motions for summary judgment, shall be heard no later than **sixty days prior to trial.**” *See* Court’s Order, p. 3, ¶ 4. On November 24, 2010, Boise Mode timely filed its motions for summary judgment and noticed the hearing for December 22, 2010, in compliance with the Court’s scheduling order. Boise Mode has produced all of the responsive documents relating to the verified complaint and the counterclaims asserted by DPP against Boise Mode. (*See* Schossberger Aff., ¶ 4). It is evident by DPP’s and Pace’s complete failure to oppose the motions for summary judgment as to any of the claims, along with its failure to even file a memorandum in support of its motion for a continuance, that neither DPP nor Pace have any factual or legal basis to argue against the motions. Accordingly, the Court should deny the instant motion for a continuance, and Boise Mode’s motions for summary judgment should be submitted and heard on December 22, 2010.

II.

ARGUMENT

Neither DPP nor Pace should be entitled to a continuance or to conduct additional third party discovery which is irrelevant to the motions for summary judgment. Rule 56(f) states:

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

I.R.C.P. 56(f).

MEMORANDUM IN OPPOSITION TO DEFENDANTS’/
COUNTERCLAIMANT’S MOTION FOR CONTINUANCE
PURSUANT TO I.R.C.P. 56(f) - 3

The Idaho Supreme Court has provided the following guidance as to the showing necessary to obtain a continuance based on Rule 56(f):

It has been noted that a party when invokes the protection of Rule 56(f) must 'do so in good faith by affirmatively demonstrated why he cannot respond to a movant's affidavits ... and how postponement of a ruling on the motion will enable him, by discovery or other means, to rebut the movant's showing of the absence of a genuine issue of fact.'

Allen v. Bridgestone/Firestone, Inc., 81 F.3d 793, 797 (8th Cir. 1996). Further, in order to grant a motion for additional discovery before hearing a motion on summary judgment, the plaintiff has the burden of setting out "what further discovery would reveal that is essential to justify their opposition," making clear "what information is sought and how it would preclude summary judgment." *Nicholas v. Wallenstein*, 266 F.3d 1083, 1088-89 (9th Cir. 2001).

Jenkins v. Boise Cascade Corp., 141 Idaho 233, 239, 108 P.3d 380, 386 (2005).

In *Jenkins*, the plaintiff's attorney filed an affidavit stating that additional written discovery and depositions were pending, "but did not specify what discovery was needed to respond to Boise Cascade's motion and did not set forth how the evidence he expected to gather through further discovery would be relevant to preclude summary judgment." *Id.* at 386. Moreover, the case had been pending for more than a year. *Id.* The court, therefore, refused to reverse the district court's exercise of its discretion in denying the motion. *Id.*

Similarly, DPP and Pace both fail to establish how any additional discovery, and especially from the third parties, the North Face and Collier's International, is necessary in order to rebut Boise Mode's showing of the absence of a genuine issue of fact as to both the complaint and the counterclaim. The affidavit of John Browder is just as conclusory as the affidavit which was rejected by the *Jenkins* court because it fails to specifically state "what further discovery

would reveal that is essential to justify their opposition” making it clear “what information is sought and how it would preclude summary judgment.” *Id.*

Additionally, the *Jenkins* court provided that, “Rule 56(c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party’s case, and upon which that party will bear the burden of proof at trial.” *Id.* Since the verified complaint was filed on January 20, 2010, over 11 months have passed providing more than adequate time for discovery by DPP and Pace. Now, just two months prior to trial, the entry of summary judgment is proper against both DPP and Pace because they have failed to make a showing sufficient to establish the existence of an element central to their defense against Boise Mode’s breach of contract and breach of guaranty causes of action, and have also failed to establish the existence of an element essential to DPP’s counterclaims, all on which they will bear the burden of proof at trial. *Id.*

A. DPP’s and Pace’s Motion for a Continuance Should be Denied as to Boise Mode’s Motion for Summary Judgment on the Amended Complaint.

On January 20, 2010, Boise Mode filed the verified complaint against DPP, as tenant, and Pace as guarantor, due to DPP’s breach of the commercial lease agreement by their failure to pay the rent owed under the lease. *See* Boise Mode’s Mem. in Supp. of Mot. for Summ. Judg., filed November 24, 2010. Boise Mode presented the Court with a Statement of Undisputed Facts, paragraphs 1-6, which are supported by the verified complaint, and the affidavit of Christopher Keifer, CPA, filed November 24, 2010. Mr. Keifer’s affidavit demonstrates the undisputed fact that Boise Mode is entitled to entry of judgment in the amount of \$95,975.96. *See* Keifer Aff., p. 3, ¶ 7.

DPP and Pace do not require additional discovery from any third party to oppose Boise Mode's motion for summary judgment on the verified complaint because it is their own proof that is needed to create a triable issue of material fact whether they failed to pay the amount of rent owing under the lease agreement. The record is uncontroverted that DPP has breached the lease agreement through its failure to pay rent, and that Pace has breached the personal guaranty by failing to pay Boise Mode all amounts due under the lease. Accordingly, the motion for continuance should be denied, and the motion for summary judgment should be granted.

B. DPP's and Pace's Motion for a Continuance Should be Denied as to Boise Mode's Motion for Summary Judgment on the Counterclaim.

In Boise Mode's memorandum in support of motion for summary judgment on DPP's counterclaims, it presented the Court with a concise and detailed Statement of Undisputed Facts, paragraphs 1-36. *See* Mem. in Supp. of Mot. for Summ. Judg. on Defs.' Counterclaims, pp. 4-12, ¶¶ 1-36. To date, Boise Mode's Statement of Undisputed Facts on the counterclaims remains undisputed. Significantly, the statement of undisputed facts includes quoted provisions from the lease agreement, and emails between DPP/Pace and David Baum, a member of Baum Development, LLC, the manager of Boise Mode, and emails between DPP/Pace and Angela Aeschliman, an employee of Watermark Property Management, the authorized property manager for the premises at all times relevant to DPP's asserted issues about construction or noise from the Fall of 2008 through the Spring of 2009. *See* Affidavits of David Baum and Angela Aeschliman, filed November 24, 2010. DPP and Pace are bound by the admissions made in their emails.

- 1. A Rule 56(f) continuance is not needed in order to oppose Boise Mode's legal argument that DPP lacks standing to bring its counterclaims for breach of contract, breach of the covenant of good faith and fair dealing, and**

constructive eviction because it failed to provide Boise Mode with the required notice pursuant to I.C. § 6-320(d).

In the motion for summary judgment, Boise Mode maintains that DPP's counterclaims for breach of contract, breach of the covenant of good faith and fair dealing, and constructive eviction should be dismissed as a matter of law because it failed to provide Boise Mode with the three-day notice required by the statute, Idaho Code § 6-320(d). DPP has completely failed to oppose this legal argument made by Boise Mode. Moreover, the record is undisputed that DPP did not provide Boise Mode with the required three-day notice prior to bringing these claims for damages against Boise Mode. *See* I.C. § 6-320(a), (d); *see* Mem. in Supp. of Mot. for Summ. Judg. on Counterclaims, pp. 12-14. Thus, the motion for continuance is irrelevant because each of these claims for breach of contract, breach of the covenant of good faith and fair dealing, and constructive eviction should be dismissed as a matter of law.

2. Because each of Defendants' counterclaims fails as a matter of law, the motion for continuance should be denied.

Boise Mode additionally argues that even if the Court addresses the counterclaims on the merits, each fail as a matter of law and should be dismissed on summary judgment. Boise Mode presents the Court with legal authority supporting that a tenant cannot maintain an action for breach of the covenant of quiet enjoyment, or for constructive eviction, if the tenant has not kept current on rent payments. *See* Mem. in Supp., pp. 14-19. Because it is undisputed that DPP was in default of the lease for failure to pay rent from December 2008 forward, the counterclaims of breach of contract and the implied covenant of good faith and fair dealing based upon the covenant of quiet enjoyment, and of constructive eviction are precluded as a matter of law. Thus, no additional discovery will assist DPP in opposing Boise Mode's motion for summary judgment, and the instant motion should be denied.

Additionally, Boise Mode has established that DPP's counterclaim for negligent supervision should be dismissed as a matter of law because the individuals whose conduct allegedly damaged DPP were neither employees of, nor in a "special relationship" with, Boise Mode. *See* Memo in Support, pp. 19-21. Again, these facts are undisputed and the motion for continuance to conduct additional discovery will have no bearing on the facts that DPP's alleged claims for negligent supervision are not based upon any employee-employer relationship. Consequently, this claim should be dismissed as a matter of law.

Lastly, Boise Mode submits that Defendants' counterclaim for tortious interference with contract fails because it cannot establish the four required elements: "The existence of a contract, knowledge of the contract on the part of the defendant, intentional interference causing breach of the contract, and injury to the plaintiff resulting from the breach." *BECO Const. Co., Inc. v. J-U-B Engineers, Inc.*, 145 Idaho 719, 723, 184 P.3d 844, 848 (2008); *see* Memo in Support, pp. 21-24. Again, DPP is not in need of additional third party discovery in order to establish the existence of the four required elements of its claim for tortious interference with contract. This is proof that DPP should have been in possession of at the time of the filing of the claim on February 11, 2010. DPP's absolute failure to present the Court with any opposition to Boise Mode's motion for summary judgment is telling that there is no evidence to create a triable issue of material fact, and that the Court should grant the motion for summary judgment.

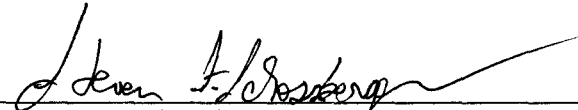
III.

CONCLUSION

Based on the foregoing, Boise Mode respectfully requests that the Court deny DPP's and Pace's motion for Rule 56(f) continuance.

DATED THIS 15th day of December, 2010.

HAWLEY TROXELL ENNIS & HAWLEY LLP

By 
Steven F. Schossberger, ISB No. 5358
Attorneys for Plaintiff/Counterdefendant Boise
Mode, LLC, successor-in-interest to Mode
Building Limited Partnership

MEMORANDUM IN OPPOSITION TO DEFENDANTS'/
COUNTERCLAIMANT'S MOTION FOR CONTINUANCE
PURSUANT TO I.R.C.P. 56(f) - 9

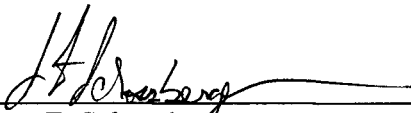
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 15 day of December, 2010, I caused to be served a true copy of the foregoing MEMORANDUM IN OPPOSITION TO DEFENDANTS'/ COUNTERCLAIMANT'S MOTION FOR CONTINUANCE PURSUANT TO I.R.C.P. 56(f) by the method indicated below, and addressed to each of the following:

Michael E. Kelly
John J. Browder
LOPEZ & KELLY, PLLC
413 W. Idaho Street, Suite 100
P.O. Box 856
Boise, ID 83701

[Attorneys for Defendants and Counterclaimant]

U.S. Mail, Postage Prepaid
 Hand Delivered
 Overnight Mail
 E-mail
 Telecopy: 208.342.4344



Steven F. Schossberger

ORIGINAL

NO. 1117 FILED
A.M. P.M.

DEC 21 2010

J. DAVID NAVARRO, Clerk
By CARLY LATIMORE
DEPUTY

Michael E. Kelly, ISB #4351
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Boise, Idaho 83701
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Facsimile: (208) 342-4344
7008.001/Reply Re Motion for Continuance.wpd

Attorneys for Defendants/Counter-Claimant

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

BOISE MODE, LLC, an Illinois limited liability company, successor-in-interest to Mode Building Limited Partnership, an Idaho limited partnership,

Plaintiff,

vs.

DONAHOE PACE & PARTNERS LTD, an Idaho corporation; and TIMOTHY PACE,

Defendants.

DONAHOE PACE & PARTNERS LTD, an Idaho corporation,

Counter-Claimant,

vs.

BOISE MODE, LLC, an Illinois limited liability company, successor-in-interest to Mode Building Limited Partnership, an Idaho limited partnership,

Counter-Defendant.

Case No. CV OC 1001093

REPLY TO MEMORANDUM IN OPPOSITION TO DEFENDANTS'/ COUNTERCLAIMANT'S MOTION FOR CONTINUANCE PURSUANT TO I.R.C.P. 56(f)

REPLY TO MEMORANDUM IN OPPOSITION TO DEFENDANTS'/COUNTERCLAIMANT'S MOTION FOR CONTINUANCE PURSUANT TO I.R.C.P. 56(f)-1

COME NOW, Defendants, DONAHOE PACE & PARTNERS LTD, an Idaho corporation; and TIMOTHY PACE (hereinafter collectively "DPP"), by and through their attorneys of record, Lopez & Kelly, PLLC, and submit their Reply to Memorandum in Opposition to Defendants'/Counterclaimant's Motion for Continuance Pursuant to I.R.C.P. 56(f).

I.

INTRODUCTION

The Plaintiff vehemently opposes DPP's Motion for Continuance and Rule 56(f) Affidavit in Support of Motion for Continuance ("56(f) Affidavit"). In particular, the Plaintiff argues that: (1) the 56(f) Affidavit does not adequately specify what evidence is needed to oppose the Plaintiff's motions for summary judgment; (2) DPP should have tried to resolve the discovery dispute with the Plaintiff instead of subpoenaing third-parties; and (3) DPP's counterclaims and defenses are, in any event, invalid as a matter of law.

For the reasons set forth herein and in the 56(f) Affidavit, DPP respectfully requests that the Court grant its Motion for Continuance. DPP was well within its rights when it subpoenaed information from third parties to support its claims and defenses. The 56(f) Affidavit sufficiently sets forth what evidence was needed for DPP's claims and defenses. The standing issue is unavailing and a red herring. And finally, Plaintiff's own supporting affidavits prove that the Plaintiff breached the Office Lease before the alleged December 2008 non-payment of rent. Because the Plaintiff's moving Affidavits prove that it breached the Office Lease, any non-performance by DPP is excused and the Plaintiff is estopped from pursuing its claims. Accordingly, the Court should deny the Plaintiff's motions for summary judgment.

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II.

LEGAL ANALYSIS

A. **Because the Rule 56(f) Affidavit is Sufficient and DPP Was Not Obligated to Procure Evidence Necessary for Its Claims and Defenses From the Plaintiff, the Court Should Grant DPP's Motion for Continuance.**

The Plaintiff's contention that the Court should deny DPP's Motion for Continuance because DPP never raised any discovery issue with Plaintiff is unavailing. As set forth in the 56(f) Affidavit of Counsel in Support of Motion for Continuance ("56(f) Affidavit"), DPP served Plaintiff with discovery seeking information about tenant complaints in the subject building and the build-out and construction of The North Face premises. The information requested was essential to further support DPP's claims and defenses. Specifically, as set forth in paragraphs 4, 5 and 6 of the 56(f) Affidavit, the information sought was needed to prove that Plaintiff (i) failed to ensure that other tenants, their agents, employees, or visitors did not create improper noises or disturbances or interfere with DPP's rights; (ii) prevented access to the leased premises; (iii) allowed intrusions into DPP's computer and data processing systems; and (iv) caused disruptions in utility and elevator services. While the Plaintiff incorrectly contends that the 56(f) Affidavit should have had more detail, the Plaintiff implicitly concedes that such information is needed for DPP's claims and defenses. Indeed, it is because the information is important to DPP's claims and defenses that it requested it twice: once from the Plaintiff in discovery, and once from the third-parties in the subpoenas.

Despite asking twice for the information, DPP has been unable to get it. The Plaintiff essentially stonewalled DPP's efforts by raising objections to DPP's discovery. As a result, DPP decided to try to go straight to the source of the requested information by subpoenaing documents from the Plaintiff's former property manager and The North Face. Not only was DPP entitled to take this action, it was under no obligation to try to resolve the discovery dispute with Plaintiff's counsel.

And if Plaintiff's counsel objected to the subpoenas DPP served on Colliers and The North Face, it could have done so. Instead, it ignored the subpoenas and, interestingly, did not even attend the scheduled records depositions. *See generally* 56(f) Affidavit.

In sum, the Plaintiff's position on this point lacks merit. It essentially boils down to the argument that DPP should be punished because it did not say "pretty please" to the Plaintiff and instead decided to utilize its right to subpoena under Rule 45. But what is clear is that DPP needs the information it sought about tenant complaints in the subject building and the build-out and construction of The North Face premises. And again, that is why DPP has asked for it twice: once from the Plaintiff and once from Colliers and The North Face. Before the Plaintiff's motions are ruled on, DPP should have the opportunity to obtain the information it has been requesting since it served its discovery requests in April 2010.

B. In the Event the Court Entertains the Plaintiff's Motions for Summary Judgment, the Court Should Deny Them Because the Plaintiff Does Not Meet Its Burden Under Rule 56.

As set forth herein, the Plaintiff's argument that DPP lacks standing to assert its claim lacks merit. In addition, the affidavits and attachments that the Plaintiff submitted in support of its motions for summary judgment on their face establish that the Plaintiff is not entitled to summary judgment either on its own claims or those of DPP.

1. The Plaintiff/Counterdefendant's Claim That DPP Lacks Standing to Bring Its Counterclaims Is Meritless and a Red-Herring.

The Plaintiff/Counterdefendant ("Plaintiff") contends that DPP lacks standing to assert all of its counterclaims because it allegedly did not provide the Plaintiff the 3 day notice required by Idaho Code § 6-320(d). The argument fails factually and legally.

First, it is abundantly clear from the exhibits attached to the Affidavit of Steven F.

Schossberg, Esq. [sic] in Support of Plaintiff's Motion for Summary Judgment (the "Schossberger Affidavit") that DPP gave the Plaintiff unequivocal notice of the many "failures or breach[es] upon which" an action would be predicated. For example, Exhibit B to the Schossberger Affidavit is a letter from Defendant Timothy Pace to Steven F. Schossberger, Esq., dated August 24, 2009. In that letter, which predated Donahoe Pace & Partners LTD's counterclaims by approximately six months, Donahoe Pace & Partners LTD specified ways in which the Plaintiff had breached the terms of the Office Lease and DPP's right to quiet enjoyment to the Premises. That letter, in turn, attached a variety of letters written by Defendant Timothy Pace that set forth the many ways that the Plaintiff had failed to live up to its obligations under the Office Lease. See Exhibits A, C, D & E to Exhibit B to the Schossberger Affidavit. To say that DPP did not provide notice sufficient to satisfy Idaho Code § 6-320(d), or that Plaintiff did not have fair notice to remedy its breaches (which is the policy justification for Idaho Code § 6-320(d)), is disingenuous and controverted by the attachments attached to the Schossberger Affidavit.

Second, even if DPP had not provided the requisite notice, Idaho Code § 6-320(d) is inapplicable because DPP's counterclaims are outside its purview. Idaho Code § 6-320(d) does not apply to DPP's constructive eviction, negligence, breach of the implied covenant of good faith and fair dealing, breach of contract and tortious interference claims. See I.C. § 6-320(d); see also *Action Collection Service, Inc. v. Haught*, 146 Idaho 300, 305, 193 P.3d 460, 465 (App. 2008) (quoting approvingly *Young v. Scott*, 108 Idaho 506, 700 P.2d 128 (App. 1985) statement that I.C. § 6-320(d) does not apply to a constructive eviction claim and further stating the requirement only applies to claims referenced in I.C. § 6-320).

Here, DPP is asserting a constructive eviction claim, negligence, breach of implied duty of good faith and fair dealing and tortious interference claims. None of these claims are subject to the requirement contained in Idaho Code § 6-320(d). Furthermore, DPP's breach of contract claim is

not subject to Idaho Code § 6-320(d)'s notice requirement because it primarily alleges that the Plaintiff breached the express terms of the Office Lease by failing to ensure that other tenants, their agents, employees, or visitors did not create improper noises or disturbances or interfere with DPP's rights. The essence of DPP's breach of contract claim is not the allegation that Plaintiff breached a term of the lease "materially affecting the health and safety of the tenant." As such, it is not within the province of Idaho Code § 6-320(d)'s requirement. *See* I.C. § 6-320(a)(5), (d)(requiring 3 day notice to assert breach of lease "materially affecting the health and safety of the tenant").

C. Because the Undisputed Facts Establish That Plaintiff Breached Express and Implied Duties Before December 2008, the Court Should Deny the Plaintiff's Motions for Summary Judgment.

In its Memorandum in Opposition, the Plaintiff states that the Court should deny DPP's Motion for Continuance because DPP's Counterclaims fail as a matter of law. Specifically, the Plaintiff contends that because it is allegedly undisputed that DPP was in default of the Office Lease for failure to pay rent from December 2008 onward, its "breach of contract and the implied covenant of good faith and fair dealing based upon the covenant of quiet enjoyment, and of quiet enjoyment are precluded as a matter of law." In support of this claim, the Plaintiff relies on section 19.3 of the Office Lease for the proposition that the right to quiet enjoyment is conditioned upon payment of rent and sums due under the Office Lease.¹

¹ Section 19.3 of the Office Lease states in full:
which states in full:

QUIET ENJOYMENT. Landlord agrees that Tenant, upon paying the rent and other monetary sums due under this Lease and performing the covenants and conditions of this Lease and upon recognizing purchaser as Landlord, may quietly have, hold and enjoy the Premises during the term hereof; subject, however, to loss by casualty and all restrictions and covenants contained or referred to in this Lease.

The fatal flaw with this argument is that the Plaintiff's own affidavits and attachments unequivocally demonstrate that DPP advised the Plaintiff as early as August 2008 that it was breaching the Office Lease. For example, in a letter from Defendant Timothy Pace to Angela Aeschliman dated December 2009, it states that on August 15, 2008, DPP advised the Plaintiff's property manager "as to specific problems resulting from construction activities that make this situation untenable and inhibit" its "ability to conduct business as a professional services office, many of which remain unresolved today." See Exhibit A to Exhibit B to the Schossberger Affidavit. This letter is proof that Plaintiff breached the Office Lease before any alleged withholding of rent occurred. As such, the contention that the Plaintiff has not breached duties it owed DPP lacks merit.

Indeed, the Plaintiff's own statements and admissions contained in its Affidavits prove that it breached the Office Lease. For example, Exhibit B to the Affidavit of Angela Aeschliman, CPM, CCIM in Support of Plaintiff's Motion for Summary Judgment ("Aeschliman Affidavit"), which is a letter to Defendant Timothy Pace from Ms. Aeschliman states that "[w]e are aware that the construction of the building has caused inconveniences" In Exhibit D to the Aeschliman Affidavit, the Plaintiff concedes that "there has been noise and disturbance" from the [North Face] construction. Accordingly, it is undeniable that the Plaintiff breached the Office Lease's rule barring "improper noises or disturbances of any kind in the building." See Office Lease, at Exhibit E, ¶2.

Furthermore, the Plaintiff's own admissions that it breached the Office Lease precludes granting summary judgment on its claims because it excuses DPP's performance. If a party materially breaches a contract, it excuses the other party's performance. *State of Idaho v. Chacon*, 146 Idaho 520, 524, 198 P.3d 749, 753 (Ct. App. 2008); *J. P. Stravens Planning Assoc., Inc. v. City of Wallace*, 129 Idaho 542, 545, 928 P.2d 46, 49 (Ct. App. 1996)(see also authority cited therein). Here, the Plaintiff repeatedly, admittedly and materially breached the Office Lease. Therefore, DPP was excused from performance. Because DPP's performance was excused, the Plaintiff cannot

prevail on its motion for summary judgment.

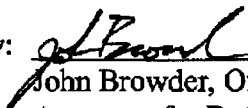
III.

CONCLUSION

For the reasons discussed herein and in the Rule 56(f) Affidavit, DPP respectfully requests that the Court grant its Motion for Continuance. In the alternative, the Court should deny the Plaintiff's Motions for Summary Judgment.

DATED this 20 day of December, 2010

LOPEZ & KELLY, PLLC

By: 
John Browder, Of the Firm
Attorneys for Defendants

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 20 day of December, 2010, I served a true and correct copy of the foregoing by delivering the same to each of the following individuals, by the method indicated below, addressed as follows:

Steven F. Schossberger
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sschossberger@hawleytroxell.com

- U.S. Mail
- Hand-Delivered
- Overnight mail
- Facsimile


John Browder

Michael E. Kelly, ISB #4351
John J. Browder, ISB #7531
LOPEZ & KELLY, PLLC
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PO Box 856
Boise, Idaho 83701
Telephone: (208) 342-4300
Facsimile: (208) 342-4344
7200.011/Affidavit of Service The Northface.wpd

N. _____
A.M. _____ P.M. _____ **4**

DEC 21 2010

J. DAVID NAVARRO, Clerk
By CARLY LATIMORE
DEPUTY

Attorneys for Defendant

ORIGINAL

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

BOISE MODE, LLC, an Illinois limited liability company, successor-in-interest to Mode Building Limited Partnership, an Idaho limited partnership,

Plaintiff,

vs.

DONAHOE PACE & PARTNERS LTD, an Idaho corporation; and TIMOTHY PACE,

Defendant.

DONAHOE PACE & PARTNERS LTD, an Idaho corporation,

Counter-Claimant,

vs.

BOISE MODE, LLC, an Illinois limited liability company, successor-in-interest to Mode Building Limited Partnership, an Idaho limited partnership,

Counter-Defendant.

Case No. CV OC 1001093

**AFFIDAVIT OF SERVICE OF
SUBPOENA**

STATE OF IDAHO)
 : ss
County of Ada)

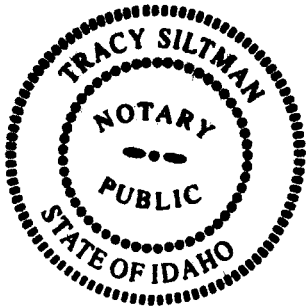
I swear under oath:

- 1) I am a resident of Ada County, State of Idaho, and over the age of eighteen (18) years.
- 2) On December 8, 2010, I served a copy of a *Subpoena Duces Tecum for The North Face*, upon C.S.C., by hand delivering a copy to The North Face c/o Corporation Service Company, 12250 West Explorer Drive, Suite 100, Boise, Idaho 83713, at 1:35 p.m.

Keenan Kelly
Signature

Keenan Kelly
Printed Name

SUBSCRIBED AND SWORN TO before me this 21 day of December, 2010.



Tracy Siltman
Notary Public for the State of Idaho
Residing at: Boise ID
My Commission Expires: 8-6-16

N. _____
FILED _____
A.M. _____ P.M. _____

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DEC 21 2010

J. DAVID NAVARRO, Clerk
By CARLY LATIMORE
DEPUTY

Michael E. Kelly, ISB #4351
John J. Browder, ISB #7531
LOPEZ & KELLY, PLLC
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Boise, Idaho 83701
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7008.001/Motion for Continuance.NOH.wpd

Attorneys for Defendants/Counter-Claimant

ORIGINAL

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

BOISE MODE, LLC, an Illinois limited liability company, successor-in-interest to Mode Building Limited Partnership, an Idaho limited partnership,

Plaintiff,

vs.

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Defendants.

DONAHOE PACE & PARTNERS LTD, an Idaho corporation,

Counter-Claimant,

vs.

BOISE MODE, LLC, an Illinois limited liability company, successor-in-interest to Mode Building Limited Partnership, an Idaho limited partnership,

Counter-Defendant.

Case No. CV OC 1001093

NOTICE OF HEARING


2

TO: PLAINTIFF AND ITS ATTORNEY OF RECORD:

YOU WILL PLEASE TAKE NOTICE that Defendants/Counter-Claimant, DONAHOE PACE & PARTNERS LTD, an Idaho corporation; and TIMOTHY PACE, will call on for hearing its Motion for Continuance on Wednesday, the 22nd day of December, 2010, at the hour of 3:00 p.m., or as soon thereafter as counsel may be heard, before the Honorable Ronald J. Wilper, Ada County Courthouse, 200 West Front Street, Boise, ID 83702.

DATED this 21 day of December, 2010

LOPEZ & KELLY, PLLC


By: 
John Browder, Of the Firm
Attorneys for Defendants/Counterclaimant

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 21 day of December, 2010, I served a true and correct copy of the foregoing by delivering the same to each of the following individuals, by the method indicated below, addressed as follows:

Steven F. Schossberger
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U.S. Mail
 Hand-Delivered
 Overnight mail
 Facsimile


John Browder

DEC 21 2010

J. DAVID NAVARRO, Clerk
By CARLY LATIMORE
DEPUTY

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Email: sschossberger@hawleytroxell.com

Attorneys for Plaintiff/Counterdefendant Boise Mode, LLC,
successor-in-interest to Mode Building Limited Partnership

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

BOISE MODE, LLC, an Illinois limited liability company, successor-in-interest to Mode Building Limited Partnership, an Idaho limited partnership,
Plaintiff,
vs.
DONAHOE PACE & PARTNERS LTD, an Idaho corporation; and TIMOTHY PACE,
Defendants.

Case No. CV OC 1001093

MOTION TO SHORTEN TIME ON
BOISE MODE'S MOTION TO STRIKE
IN PART DONAHOE PACE'S REPLY
MEMORANDUM RE MOTION FOR
CONTINUANCE PURSUANT TO
I.R.C.P. 56(f)

DONAHOE PACE & PARTNERS LTD, an Idaho corporation,
Counterclaimant,
vs.
BOISE MODE, LLC, an Illinois limited liability company, successor-in-interest to Mode Building Limited Partnership, an Idaho limited partnership,
Counterdefendant.

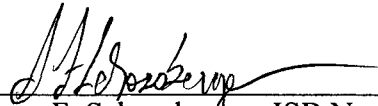
MOTION TO SHORTEN TIME ON BOISE MODE'S MOTION TO STRIKE IN PART
DONAHOE PACE'S REPLY MEMORANDUM RE MOTION FOR CONTINUANCE
PURSUANT TO I.R.C.P. 56(f) - 1

aw

Plaintiff/Counterdefendant Boise Mode, LLC ("Boise Mode"), by and through its counsel of record, Hawley Troxell Ennis & Hawley LLP, respectfully moves the Court for an order shortening the time for hearing on its Motion to Strike part of the argument sections provided in Donahoe Pace's reply memorandum regarding its motion for continuance pursuant to I.R.C.P. 56(f). Boise Mode requests that its motion to strike and disregard be heard by the Court at the time of hearing on December 22, 2010, at 3:00 p.m. before the Honorable Ronald J. Wilper.

DATED THIS 21st day of December, 2010.

HAWLEY TROXELL ENNIS & HAWLEY LLP

By 

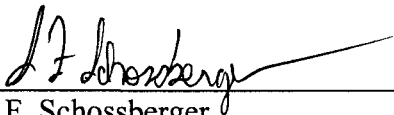
Steven F. Schossberger, ISB No. 5358
Attorneys for Plaintiff/Counterdefendant Boise
Mode, LLC, successor-in-interest to Mode
Building Limited Partnership

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 21st day of December, 2010, I caused to be served a true copy of the foregoing MOTION TO SHORTEN TIME ON BOISE MODE'S MOTION TO STRIKE IN PART DONAHOE PACE'S REPLY MEMORANDUM RE MOTION FOR CONTINUANCE PURSUANT TO I.R.C.P. 56(F) by the method indicated below, and addressed to each of the following:

Michael E. Kelly
John J. Browder
LOPEZ & KELLY, PLLC
413 W. Idaho Street, Suite 100
P.O. Box 856
Boise, ID 83701
[Attorneys for Defendants and Counterclaimant]

U.S. Mail, Postage Prepaid
 Hand Delivered
 Overnight Mail
 E-mail
 Telecopy: 208.342.4344



Steven F. Schossberger

FILED *Upes*
A.M. PM

DEC 21 2010

J. DAVID NAVARRO, Clerk
By CARLY LATIMORE
DEPUTY

Steven F. Schossberger, ISB No. 5358
HAWLEY TROXELL ENNIS & HAWLEY LLP
877 Main Street, Suite 1000
P.O. Box 1617
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Attorneys for Plaintiff/Counterdefendant Boise Mode, LLC,
successor-in-interest to Mode Building Limited Partnership

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

BOISE MODE, LLC, an Illinois limited liability company, successor-in-interest to Mode Building Limited Partnership, an Idaho limited partnership,
Plaintiff,
vs.
DONAHOE PACE & PARTNERS LTD, an Idaho corporation; and TIMOTHY PACE,
Defendants.

Case No. CV OC 1001093
MOTION TO STRIKE IN PART
DEFENDANT DONAHOE PACE
& PARTNERS' REPLY TO
MEMORANDUM IN OPPOSITION TO
DEFENDANTS' MOTION FOR
CONTINUANCE

DONAHOE PACE & PARTNERS LTD, an Idaho corporation,
Counterclaimant,
vs.
BOISE MODE, LLC, an Illinois limited liability company, successor-in-interest to Mode Building Limited Partnership, an Idaho limited partnership,
Counterdefendant.

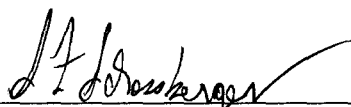
MOTION TO STRIKE IN PART DEFENDANT DONAHOE PACE & PARTNERS'
REPLY TO MEMORANDUM IN OPPOSITION TO DEFENDANTS' MOTION FOR
CONTINUANCE - 1

Plaintiff/Counterdefendant Boise Mode, LLC ("Boise Mode"), by and through its counsel of record, Hawley Troxell Ennis & Hawley LLP, respectfully moves the Court to strike and disregard sections B and C at pages 4-8 of the Reply Memorandum regarding Donahoe Pace's motion for continuance pursuant to I.R.C.P. 56(f).

These sections of the memorandum should be stricken and disregarded by the Court because Donahoe Pace impermissibly attempts to present argument in opposition to Boise Mode's motions for summary judgment under I.R.C.P. 56(c). Donahoe Pace's opposition argument provided in sections B and C of the Reply Memorandum is untimely given that Donahoe Pace's opposition was due no later than December 8, 2010. Donahoe Pace chose not to file any memorandum in opposition, or affidavits in opposition, to Boise Mode's motions for summary judgment on the complaint and on the counterclaims. Therefore, Donahoe Pace should be precluded by the Court from attempting to circumvent the time requirement of Rule 56(c) by attempting to include such argument in its Rule 56(f) reply memorandum.

DATED THIS 21st day of December, 2010.

HAWLEY TROXELL ENNIS & HAWLEY LLP

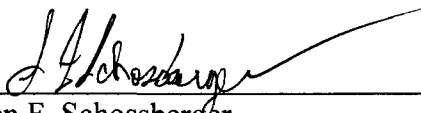
By 
Steven F. Schossberger, ISB No. 5358
Attorneys for Plaintiff/Counterdefendant Boise
Mode, LLC, successor-in-interest to Mode
Building Limited Partnership

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 21st day of December, 2010, I caused to be served a true copy of the foregoing MOTION TO STRIKE IN PART DEFENDANT DONAHOE PACE & PARTNERS' REPLY TO MEMORANDUM IN OPPOSITION TO DEFENDANTS' MOTION FOR CONTINUANCE by the method indicated below, and addressed to each of the following:

Michael E. Kelly
John J. Browder
LOPEZ & KELLY, PLLC
413 W. Idaho Street, Suite 100
P.O. Box 856
Boise, ID 83701
[Attorneys for Defendants and Counterclaimant]

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Steven F. Schossberger

FILED 4:25
P.M.

DEC 21 2010

J DAVID NAVARRO, Clerk
By CARLY LATIMORE
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Attorneys for Plaintiff/Counterdefendant Boise Mode, LLC,
successor-in-interest to Mode Building Limited Partnership

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

BOISE MODE, LLC, an Illinois limited liability company, successor-in-interest to Mode Building Limited Partnership, an Idaho limited partnership,

Plaintiff,

vs.

DONAHOE PACE & PARTNERS LTD, an Idaho corporation; and TIMOTHY PACE,

Defendants.

Case No. CV OC 1001093

NOTICE OF HEARING (MOTION TO STRIKE AND DISREGARD)

DONAHOE PACE & PARTNERS LTD, an Idaho corporation,

Counterclaimant,

vs.

BOISE MODE, LLC, an Illinois limited liability company, successor-in-interest to Mode Building Limited Partnership, an Idaho limited partnership,

Counterdefendant.

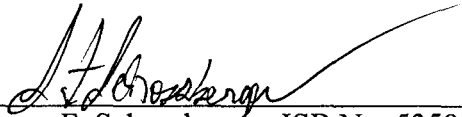
ar

TO: DEFENDANT/COUNTERCLAIMANT DONAHOE PACE & PARTNERS LTD AND
TIMOTHY PACE AND THEIR COUNSEL OF RECORD:

PLEASE TAKE NOTICE that Plaintiff/Counterdefendant Boise Mode, LLC (“Boise Mode”) will call up for hearing its Motion to Strike and disregard part of Donahoe Pace’s reply memorandum regarding its motion for continuance pursuant to I.R.C.P. 56(f) on the 22nd day of December, 2010, at 3:00 p.m., or as soon thereafter as counsel can be heard, before the Honorable Ronald J. Wilper, at the Ada County Courthouse, Boise, Idaho.

DATED THIS 21st day of December, 2010.

HAWLEY TROXELL ENNIS & HAWLEY LLP

By 
Steven F. Schossberger, ISB No. 5358
Attorneys for Plaintiff/Counterdefendant Boise
Mode, LLC, successor-in-interest to Mode
Building Limited Partnership

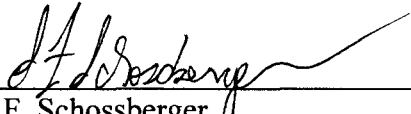
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 21st day of December, 2010, I caused to be served a true copy of the foregoing NOTICE OF HEARING (MOTION TO STRIKE AND DISREGARD) by the method indicated below, and addressed to each of the following:

Michael E. Kelly
John J. Browder
LOPEZ & KELLY, PLLC
413 W. Idaho Street, Suite 100
P.O. Box 856
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[Attorneys for Defendants and Counterclaimant]



Steven F. Schossberger

DEC 27 2010

J. DAVID NAVARRO, Clerk
By INGA JOHNSON
DEPUTY

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

Case No. CVOC-10-01093

BOISE MODE, LLC, an Illinois limited liability company, successor-in-interest to Mode Building Ltd. Partnership, an Idaho Limited partnership,
Plaintiff,

vs.

DONAHOE PACE & PARTNERS, LTD, an Idaho Corporation; and TIMOTHY PACE,
Defendants.

**ORDER GRANTING PLAINTIFF/
COUNTERDEFENDANT BOISE
MODE'S MOTIONS FOR
SUMMARY JUDGMENT**

DONAHOE PACE & PARTNERS, LTD, an Idaho Corporation,
Counterclaimant,

vs.

BOISE MODE, LLC, an Illinois limited liability company, successor-in-interest to Mode Building Ltd. Partnership, an Idaho Limited partnership,
Counterdefendant

This matter came before the Court on the Plaintiff/Counterdefendant Boise Mode, LLC's (Boise Mode) Motion for Summary Judgment of all claims asserted in its Verified Complaint and Motion for Summary Judgment against all claims asserted in Defendant/Counterclaimant Donahoe Pace & Partners, Ltd's (DPP) Counterclaim. The Court heard oral argument on Wednesday,

1 December 22, 2010. Steven Schossberger appeared for the Plaintiff; John Browder appeared for the
2 Defendants.

3 In association with the Motions for Summary Judgment, the Court heard DPP and Pace's
4 Motion for a Continuance brought pursuant to Idaho Rule of Civil Procedure 56(f) and Boise
5 Mode's Motion to Strike certain portions of DPP's Reply Memorandum filed in response to Boise
6 Mode's Opposition to DPP's Motion for Continuance. After studying the briefs and hearing oral
7 argument, the Court ruled from the Bench as to those two motions. In its discretion, the Court
8 denied the IRCP 56(f) motion and denied the Motion to Strike. As to the IRCP 56(f) Motion, the
9 Court notes that DPP and Pace did not provide sufficient reasoning as to why six months intervened
10 between the receipt of initial discovery answers which they allege were unsatisfactory and any
11 attempt to discover additional relevant information.
12

13 The Court took the motions for summary judgment under advisement. This Order now
14 grants both motions for summary judgment.

15 **BACKGROUND**

16 On or about November 3, 2006, Boise Mode and DPP entered into a commercial lease
17 agreement for certain space within a building owned by Boise Mode. The building is located at 800
18 W. Idaho St, Boise, Idaho. The lease term ran through May 31, 2010. On or about November 3,
19 2006, Timothy Pace personally guaranteed DPP's obligations under the lease by signing a "Personal
20 Guarantee of Lease." (Record at Verified Complaint, Exh. H) The personal guarantee stated that
21 should DPP fail to pay any of its obligations under the lease, Pace would pay Boise Mode the
22 amount due. The personal guarantee also stated that any obligations incurred under the lease "shall
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1 not be reduced by any claim of setoff or counterclaim of [DPP] or [Pace], loss of contribution
2 from...[Pace] or any settlement or compromise between [DPP] and [Boise Mode].” *Id.*

3 The Record reflects that at some point in 2008, DPP began expressing unhappiness with its
4 tenancy. By December 2008, DPP stopped paying the required rent. Pursuant to Idaho Code § 6-
5 303(2), on October 5, 2009, Boise Mode notified DPP that it had three (3) days to pay the full
6 amount of back rent due or vacate the premises. DPP did not pay the back rent, and, by November
7 2009, DPP vacated the premises.

8 Boise Mode filed the Verified Complaint in this lawsuit in January 2010. DPP answered and
9 filed its counterclaim in February 2010.
10

11 SUMMARY JUDGMENT STANDARD

12 “Summary judgment is appropriate if the pleadings, affidavits, and discovery documents on
13 file with the court . . . demonstrate no material issue of fact such that the moving party is entitled to
14 a judgment as a matter of law.” *Brewer v. Washington RSA No. 8 Ltd. Partnership*, 145 Idaho 735,
15 738, 184 P.3d 860, 863 (2008) (quoting *Badell v. Beeks*, 115 Idaho 101, 102, 765 P.2d 126, 127
16 (1988) (citing I.R.C.P. 56(c)). The burden of proof is on the moving party to demonstrate the
17 absence of a genuine issue of material fact. *Rouse v. Household Finance Corp.*, 144 Idaho 68, 70,
18 156 P.3d 569, 571 (2007) (citing *Evans v. Griswold*, 129 Idaho 902, 905, 935 P.2d 165, 168
19 (1997)). In construing the facts, the court must draw all reasonable factual inferences in favor of the
20 non-moving party. *Mackay v. Four Rivers Packing Co.*, 145 Idaho 408, 410, 179 P.3d 1064, 1066
21 (2008).
22

23 “Once the moving party establishes the absence of a genuine issue of material fact, the
24 burden shifts to the non-moving party,” to provide specific facts showing there is a genuine issue for
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1 trial. *Kiebert v. Goss*, 144 Idaho 225, 228, 159 P.3d 862, 864 (2007) (citing *Hei v. Holzer*, 139
2 Idaho 81, 85, 73 P.3d 94, 98 (2003)); *Samuel v. Hepworth, Nungester & Lezamiz, Inc.*, 134 Idaho
3 84, 87, 996 P.2d 303, 306 (2000).

4 The non-moving party's case must be anchored in something more than speculation; a mere
5 scintilla of evidence is not enough to create a genuine issue. *Zimmerman v. Volkswagon of America,*
6 *Inc.*, 128 Idaho 851, 854, 920 P.2d 67, 69 (1996). The non-moving party may not simply rely upon
7 mere allegations in the pleadings, but must set forth in affidavits specific facts showing there is a
8 genuine issue for trial. I.R.C.P. 56(e); see *Rhodehouse v. Stutts*, 125 Idaho 208, 211, 868 P.2d 1224,
9 1227 (1994). If the non-moving party does not provide such a response, "summary judgment, if
10 appropriate, shall be entered against the party." I.R.C.P. 56(f).
11

12 **MOTION FOR SUMMARY JUDGMENT: VERIFIED COMPLAINT**

13 Boise Mode seeks summary judgment of the claims it made in the Verified Complaint: (1)
14 Breach of Contract, (2) Breach of the Covenant of Good Faith and Fair Dealing, and (3) Breach of
15 Personal Guaranty of Lease.

16 A breach of contract is non-performance of any contractual duty of immediate performance.
17 *Idaho Power co. v. Cogeneration, Inc.*, 134 Idaho 738, 746-47, 9 P.3d 1204, 1212-13 (2000). The
18 burden of proving the existence of a contract and fact of its breach is upon the plaintiff, and once
19 those facts are established, the defendant has the burden of pleading and proving affirmative
20 defenses, which legally excuse performance. *Id.* In this case, Boise Mode met its burden of proving
21 both a contract and its breach. The Record includes a copy of the contract and documentation of
22 DPP's failure to pay full rent starting in December 2008 and continuing through the filing of this
23 lawsuit. While DPP pled affirmative defenses in its Answer, it failed to subsequently prove them.
24
25

1 Even construing the facts in a light most favorable to DPP, the Court finds no genuine issue of
2 material fact remains regarding the existence of a contract between the parties and the existence of a
3 breach of that contract by DPP. Therefore, Boise Mode's Motion for Summary Judgment as to
4 Breach of Contract is GRANTED.

5 When, as here, a tenant repudiates its lease and abandons the premises, the landlord "may
6 take possession of the premises, [and] relet them....[D]amages will be the difference between the
7 amount secured on the reletting and the amount provided for in the original lease." *Consolidated*
8 *AG of Curry, Inc. v. Rangen, Inc.*, 128 Idaho 228, 230, 912 P.2d 115, 117 (1996). Additionally, a
9 lessor of real property must mitigate damages if the lessee has refused to pay rent and has
10 abandoned the property. *Id.* In this case, the Record reflects that once Boise Mode had confirmation
11 of DPP's abandonment of the premises, it sought a property manager to assist in reletting the
12 premises. Subsequently, the property was relet; however, the new tenant did not take the premises
13 until June 2010, after the end of the lease that is the subject of this action. Therefore, while Boise
14 Mode did attempt to mitigate its damages, the mitigation resulted in no amount of rent to offset the
15 damages owed by DPP.
16

17 The covenant of good faith and fair dealing is implied by law; it requires parties to perform,
18 in good faith, the obligations required by their agreement. *Fox v. Mtn. West Elec., Inc.*, 137 Idaho
19 703, 710, 52 P.3d 848, 855-56 (2002). A breach of the covenant of good faith and fair dealing must
20 be based on an underlying breach of contract. *First Security Bank of Odhao v. Gage*, 115 Idaho 172,
21 176, 765 P.2d 683, 687 (1988). In this case, the Court has already found that the requisite
22 underlying breach of contract exists. That breach deprived Boise Mode of the benefits it contracted
23 for when it entered into the lease agreement with DPP. The Court finds this deprivation sufficient to
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1 meet the requirements of a Breach of the Covenant of Good Faith and Fair Dealing. After reviewing
2 the record, making reasonable factual inferences in favor of DPP, the Court finds that no genuine
3 issue of material fact remains regarding this issue. Therefore, Boise Mode's Motion for Summary
4 Judgment as to that claim is GRANTED.

5 Where a contract for guarantee is at issue, and the language of the guarantee is
6 unambiguous, the contract "must be interpreted as a matter of law according to the language
7 employed therein." *Valley Bank v. Larson*, 104 Idaho 772, 775-76, 663 P.2d 653, 656-57 (1983).
8 "Plain and unambiguous terms dictate the intent of the parties and the obligations guaranteed." *CIT*
9 *Financial Servs. V. Herb's Indoor RV Ctr., Inc.*, 118 Idaho 185, 187, 795 P.2d 890, 892 (Ct. App.
10 1990). In this case, the personal guarantee signed by Mr. Pace was clear and unambiguous. It states
11 that should DPP fail to meet any of its financial obligations under the lease, Mr. Pace will be
12 personally liable for those obligations. It is undisputed that DPP did not fully perform its financial
13 obligations under the lease; therefore, Mr. Pace's liability under the personal guarantee was
14 invoked. Subsequently, Mr. Pace failed to pay Boise Mode for DPP's unpaid obligations. After
15 reviewing the record, construing all factual inferences in favor of Mr. Pace, the Court finds no
16 genuine issue of material fact remains regarding Mr. Pace's liability under the Personal Guarantee.
17 Therefore, Boise Mode's motion for Summary Judgment as to Breach of Personal Guarantee of
18 Lease as against Mr. Pace is GRANTED.

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21 **MOTION FOR SUMMARY JUDGMENT: COUNTERCLAIM**

22 DPP filed a counterclaim against Boise Mode asserting: (1) Tortious Interference with
23 Contract, (2) Negligence/ Negligent Supervision, (3) Constructive Eviction, (4) Breach of Contract,
24

1 and (5) Breach of the Covenant of Good Faith and Fair Dealing. Boise Mode now moves for
2 Summary Judgment against all of these claims.

3 A tortious interference with contract claim requires a plaintiff to establish four elements: 1)
4 “the existence of a contract, 2) knowledge of the contract on the part of the defendant, 3) intentional
5 interference causing breach of the contract, and 4) injury to the plaintiff resulting from the breach.”
6 *BECO Constr. Co. v. J-U-B Engineers, Inc.*, 145 Idaho 719, 723, 184 P.3d 844, 848 (2008). In this
7 case, other than its inclusion of a claim of tortious interference with contract in the counterclaim,
8 DPP has failed to present any evidence supporting this claim. After reviewing the entire record, and
9 construing all reasonable factual inferences in favor of DPP, the Court finds no genuine issue of
10 material fact remains concerning DPP’s tortious interference claim. Therefore, Boise Mode’s
11 Motion for Summary Judgment as to this claim is GRANTED.
12

13 “A negligent supervision claim is based on an employer’s own negligence in failing to
14 exercise due care to protect third parties from the foreseeable tortious acts of employees.” *Mallonee*
15 *v. State*, 139 Idaho 615, 622, 84 P.3d 551, 558 (2004). Negligent supervision claims may be
16 appropriate where a special relationship exists between a supervisor and a supervisee, such that the
17 “supervisor takes charge of a third person whom he knows or should know to be likely to cause
18 bodily harm to others if not controlled.” *Podolan v. Idaho Legal Aid Services*, 123 Idaho 937, 945-
19 46, 854 P.2d 280, 288-89 (Ct. App. 1990). In this case, after thorough review of the record, the
20 Court finds no place where DPP or Pace alleges that any employee or other person under the direct
21 supervision of Boise Mode caused DPP harm. Construing all reasonable factual inferences in favor
22 of DPP, the Court still finds no genuine issue of material fact regarding the existence of this claim.
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1 Therefore, Boise Mode's Motion for Summary Judgment as to the Negligent Supervision claim is
2 GRANTED.

3 The final three claims in the counterclaim are related to each other. Certain claims by a
4 tenant against its landlord are required to comply with notice as prescribed by I.C. § 6-320. The
5 Court finds that the complaints equating the Constructive Eviction claim that DPP registered against
6 Boise Mode fall under the purview of I.C. § 6-320(d), which states:

7 Before a tenant shall have standing to file an action under this section, he must
8 give his landlord three (3) days written notice, listing each failure or breach
9 upon which his action will be premised and written demand requiring
performance or cure.

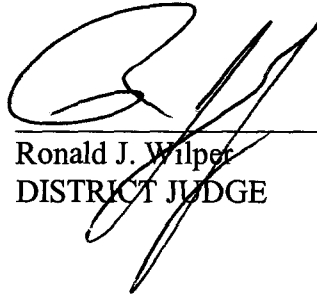
10 The Court finds that DPP did not comply with the notice requirement of I.C. § 6-320(d) and,
11 therefore, DPP lacks proper standing to bring its Constructive Eviction claim. Without the
12 Constructive Conviction claim, DPP's Breach of Contract and Breach of the Covenant of Good Faith
13 and Fair Dealing claims also fall away, as they are premised on a successful Constructive Eviction
14 claim. In reaching this decision, the Court has read the entire record and considered instructive case
15 law. Even construing reasonable factual inference in a light most favorable to DPP, the Court finds
16 no genuine issue of material fact remains regarding the claims for Constructive Eviction, Breach of
17 Contract, or Breach of the Covenant of Good Faith and Fair Dealing. Therefore, Boise Mode's
18 Motion for Summary Judgment as to each of those claims is GRANTED.
19

20 **SUMMARY**

21 Boise Mode's Motions for Summary Judgment as to its claims in the Verified Complaint
22 and as to the claims against it lodged in the Counterclaim are both GRANTED. Counsel for Boise
23 Mode is instructed to prepare a Judgment consistent with this Order.
24

IT IS SO ORDERED.

Dated this 21st day of December, 2010.



Ronald J. Wilper
DISTRICT JUDGE

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CERTIFICATE OF MAILING

I, HEREBY CERTIFY that on the 27 day of December, 2010, I caused a true and correct copy of the foregoing ORDER GRANTING PLAINTIFF/COUNTERDEFENDANT BOISE MODE'S MOTIONS FOR SUMMARY JUDGMENT to be served by the method indicated below, and addressed to the following:

Steven F. Schossberger
HAWLEY TROXELL ENNIS & HAWLEY, LLP
877 W Main St, Ste 1000
PO Box 1617
Boise, ID 83701-1617
Tel: (208) 344-6000

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- Facsimile

John J. Browder
LOPEZ & KELLY, PLLC
413 W Idaho St, Ste 100
PO Box 856
Boise, ID 83701-0856
Tel: (208) 342-4300
Fax: (208) 342-4344

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- Overnight Mail
- Facsimile

J. DAVID NAVARRO
Clerk of the District Court
Ada County, Idaho

By INGA JOHNSON
Deputy Clerk

RECEIVED
JAN 04 2011
Ada County Clerk

NO. _____
A.M. _____ FILED P.M. 2:44

JAN 05 2011
J. DAVID NAVARRO, Clerk
By RIC NELSON
DEPUTY

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

BOISE MODE, LLC, an Illinois limited liability company, successor-in-interest to Mode Building Limited Partnership, an Idaho limited partnership,

Plaintiff,

vs.

DONAHOE PACE & PARTNERS LTD, an Idaho corporation; and TIMOTHY PACE,

Defendants.

DONAHOE PACE & PARTNERS LTD, an Idaho corporation,

Counterclaimant,

vs.

BOISE MODE, LLC, an Illinois limited liability company, successor-in-interest to Mode Building Limited Partnership, an Idaho limited partnership,

Counterdefendant.

Case No. CV OC 1001093

JUDGMENT

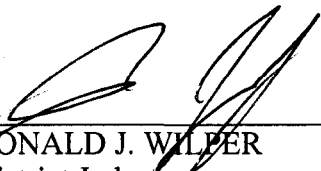
The Court having entered its Order granting Plaintiff/Counterdefendant Boise Mode's motions for summary judgment on December 27, 2010, and good cause appearing therefor,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that judgment is entered in favor of Boise Mode, LLC as follows:

1. Boise Mode is awarded damages against Donahoe Pace & Partners, Ltd, an Idaho corporation, and Timothy Pace, an individual, jointly and severally, in the amount of \$95,975.96, plus post-judgment interest at the legal rate until the judgment is paid in full; and
2. Donahoe Pace & Partners, Ltd's Counterclaim is hereby dismissed with prejudice.

The Court shall consider the issue of costs and attorney fees pursuant to Rule 54, Idaho Rules of Civil Procedure, upon application by Boise Mode within fourteen (14) days of the date of the Clerk's entry of this Judgment.

DATED THIS 5th day of January, 2011.



RONALD J. WILFER
District Judge

CLERK'S CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 5 day of January, 2011, I caused to be served a true copy of the foregoing JUDGMENT by the method indicated below, and addressed to each of the following:

Michael E. Kelly
John J. Browder
LOPEZ & KELLY, PLLC
413 W. Idaho Street, Suite 100
P.O. Box 856
Boise, ID 83701
[Attorneys for Defendants and Counterclaimant]

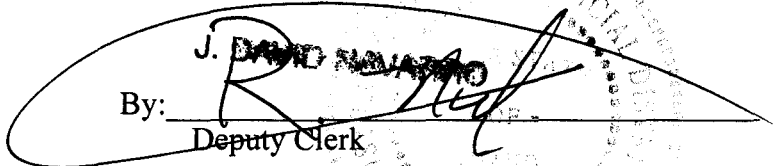
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Steven F. Schosberger
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LLC, successor-in-interest to Mode Building Limited
Partnership]

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CLERK OF THE COURT

By: J. David Navarro
Deputy Clerk



Michael E. Kelly, ISB #4351
John J. Browder, ISB #7531
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7008.001/Motion for Stay of Execution.wpd

NO. 0173 FILED
A.M. P.M.

JAN 11 2011

CHRISTOPHER D. RICH, Clerk
By JAMIE RANDALL
DEPUTY

Attorneys for Defendants/Counter-Claimant

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

BOISE MODE, LLC, an Illinois limited liability company, successor-in-interest to Mode Building Limited Partnership, an Idaho limited partnership,

Plaintiff,

vs.

DONAHOE PACE & PARTNERS LTD, an Idaho corporation; and TIMOTHY PACE,

Defendants.

DONAHOE PACE & PARTNERS LTD, an Idaho corporation,

Counter-Claimant,

vs.

BOISE MODE, LLC, an Illinois limited liability company, successor-in-interest to Mode Building Limited Partnership, an Idaho limited partnership,

Counter-Defendant.

Case No. CV OC 1001093


**MOTION TO STAY EXECUTION
OF JUDGMENT ENTERED ON
JANUARY 5, 2011**

SV

COMES NOW, Defendants/Counter-Claimant, DONAHOE PACE & PARTNERS LTD, an Idaho corporation; and TIMOTHY PACE, by and through their attorneys of record, Lopez & Kelly, PLLC, and moves this Court pursuant to I.R.C.P. 62(b) for an order to stay the execution of any proceedings to enforce judgment in favor of Plaintiff ordered on January 5, 2011 and received by Defendants on January 10, 2011, until such time as Defendants/Counter-Claimant file their Motion to Alter or Amend Judgment under Idaho Rule of Civil Procedure 59(e) and the Court reaches a decision thereon.

DATED this 11 day of January, 2011

LOPEZ & KELLY, PLLC


By: 
Michael E. Kelly, Of the Firm
Attorneys for Defendants

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 11 day of January, 2011, I served a true and correct copy of the foregoing by delivering the same to each of the following individuals, by the method indicated below, addressed as follows:

Steven F. Schossberger
HAWLEY, TROXELL, ENNIS & HAWLEY
877 Main Street, Suite 1000
PO Box 1617
Boise, ID 83701-1617
Telephone: (208) 344-6000
Facsimile: (208) 954-5260
sschossberger@hawleytroxell.com

- | | |
|-------------------------------------|----------------|
| <input checked="" type="checkbox"/> | U.S. Mail |
| <input type="checkbox"/> | Hand-Delivered |
| <input type="checkbox"/> | Overnight mail |
| <input type="checkbox"/> | Facsimile |


Michael E. Kelly

NO. _____ FILED _____
A.M. _____ P.M. *AW*

JAN 12 2011

CHRISTOPHER D. RICH, Clerk
By ABBY GARDEN
DEPUTY

Steven F. Schossberger, ISB No. 5358
HAWLEY TROXELL ENNIS & HAWLEY LLP
877 Main Street, Suite 1000
P.O. Box 1617
Boise, ID 83701-1617
Telephone: 208.344.6000
Facsimile: 208.954.5260
Email: sschossberger@hawleytroxell.com

Attorneys for Plaintiff/Counterdefendant Boise Mode, LLC,
successor-in-interest to Mode Building Limited Partnership

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

BOISE MODE, LLC, an Illinois limited liability company, successor-in-interest to Mode Building Limited Partnership, an Idaho limited partnership,

Plaintiff,

vs.

DONAHOE PACE & PARTNERS LTD, an Idaho corporation; and TIMOTHY PACE,

Defendants.

Case No. CV OC 1001093

BOISE MODE LLC'S VERIFIED
MEMORANDUM OF COSTS AND
ATTORNEY FEES

DONAHOE PACE & PARTNERS LTD, an Idaho corporation,

Counterclaimant,

vs.

BOISE MODE, LLC, an Illinois limited liability company, successor-in-interest to Mode Building Limited Partnership, an Idaho limited partnership,

Counterdefendant.

Steven F. Schossberger, being duly sworn upon oath, deposes and states as follows:

1. I have personal knowledge of the matters herein referred to, and pursuant to I.R.C.P. Rules 54(d)(1)(B), 54(d)(1)(C), 54(d)(5), 54(e)(1), 54(e)(3), 58, and Idaho Code § 12-120(3), and the Office Lease Agreement, § 22.7, (Verified Complaint, Exhibit A), I make this verified memorandum in support of Boise Mode LLC's request for an award of costs and attorney fees, as supported by the Court's Judgment filed January 5, 2011.

2. To establish the outstanding amount due and owing from a client, our law firm prepares time slips describing the particular legal services performed, together with the particular date such legal services were rendered, as well as designating the amount of time spent on the particular matter. The time slips are filed electronically for each client and on a periodic basis, the time is totaled, then multiplied by the applicable hourly rate to arrive at a bill for legal services performed. Also added in is the sum of any and all costs and expenses advanced through the particular date on behalf of the client. Only those costs awardable as a matter of right pursuant to I.R.C.P. Rule 54(d)(1)(C) are included in this request.

3. Since August 2009, Hawley Troxell Ennis & Hawley LLP has performed legal services for Boise Mode LLC in connection with the above-referenced action.

4. Since August 2009, Boise Mode LLC has incurred attorney fees in the sum of \$16,987.50. The sum of \$16,987.50 claimed for attorney fees is a reasonable sum, actually and necessarily incurred as provided below. Pursuant to I.R.C.P. Rule 54(d)(5), to the best of your affiant's knowledge and belief, the items are correct and the costs claimed are in compliance with this Rule.

5. The hours performed by the attorney and paralegal, and the hourly rate and the fees charged to Boise Mode LLC is as follows:

	<u>Attorney/Paralegal</u>	<u>Hours</u>	<u>Rate</u>	<u>Amount</u>
Partner	Steven F. Schossberger	38.2	\$250/2010	\$ 9,550.00
Partner	Steven F. Schossberger	7.6	\$240/2009	\$ 1,824.00
Associate	Matthew Gordon	34.9	\$140/2010	\$ 4,886.00
Paralegal	David Brown	2.6	\$130/hr	\$ 338.00
Paralegal	Christian Wamhoff	4.1	\$95/hr	\$ 389.50
	Total Attorney Fees:			\$16,987.50

COSTS AS A MATTER OF RIGHT


1.	Filing Fee Complaint	\$ 88.00
2.	Service of process Complaint	\$ 49.00
	Total Costs as a Matter of Right:	<u>\$137.00</u>

6. It is my opinion that the attorney fees charges in this action have been fair, reasonable and necessarily incurred to obtain Boise Mode LLC's Judgment. Each of the factors set forth in I.R.C.P. Rule 54(e)(3) weigh in favor of an award of attorney fees by the Court in the sum of \$16,987.50, and costs as a matter of right in the amount of \$137.00.

7. True and correct copies of Hawley Troxell's billing summaries showing the date, attorney, hours, amount and description of work performed are attached hereto as Exhibit A, and incorporated herein by reference.

8. Accordingly, Boise Mode LLC respectfully request that the Court award costs as a matter of right in the total amount of **\$137.00**, and attorney fees in the total amount of **\$16,987.50**.

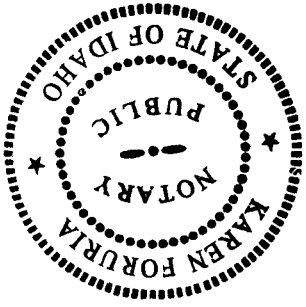
Further your affiants sayeth naught.



 Steven F. Schossberger

STATE OF IDAHO)
) ss.
County of Ada)

SUBSCRIBED AND SWORN before me this 12th day of January, 2011.



Karen Foruria
Name: Karen Foruria
Notary Public for Idaho
Residing at Boise, Idaho
My commission expires 6-18-11

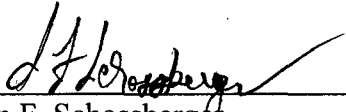
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 12th day of January, 2011, I caused to be served a true copy of the foregoing BOISE MODE LLC'S VERIFIED MEMORANDUM OF COSTS AND ATTORNEY FEES by the method indicated below, and addressed to each of the following:

Michael E. Kelly
John J. Browder
LOPEZ & KELLY, PLLC
413 W. Idaho Street, Suite 100
P.O. Box 856
Boise, ID 83701

[Attorneys for Defendants and Counterclaimant]

U.S. Mail, Postage Prepaid
 Hand Delivered
 Overnight Mail
 E-mail
 Telecopy: 208.342.4344



Steven F. Schossberger



Boise • Hailey • Pocatello • Reno

ATTORNEYS AND COUNSELORS

Remit to:
Hawley Troxell Ennis & Hawley LLP
877 Main Street, Suite 1000
Post Office Box 1617
Boise, Idaho 83701-1617
EIN: 82-0259668
208.344.6000 • Fax 208.954.5284
www.hawleytroxell.com

Boise Mode LLC
c/o Watermark Property Management, LLC
1030 West Chicago Avenue, Suite 300
Chicago, IL 60622

File No.: 43355-0011
Billing Attorney: SFS

January 11, 2011

Invoice No.: *****

INVOICE

For services from 08/01/09 through 01/11/11 in connection with the following:
Boise Mode LLC v. Donahoe Pace & Partners, LTD and Tim Pace (breach of contract litigation)

Table with 2 columns: Description, Amount. Rows: Legal Services: \$16,987.50; Disbursements & Other Charges: \$592.14; Total: \$17,579.64

Table with 5 columns: Date, Attorney/Paralegal, Hours, Amount, Description of Legal Services. Rows: 8/11/09, Steven F. Schossberger, 1.30, \$312.00, Telephone conference with D. Baum re take action against tenant for delinquent rent charges; telephone conference with J. Hillman re request lease documents and correspondence with tenant; review J. Hillman e-mail and attached documents. 8/24/09, Steven F. Schossberger, .50, \$120.00, Review letter and exhibits from Donahoe Pace written in response to demand for delinquent rent letter dated August 13, 2009. 10/5/09, Steven F. Schossberger, 1.30, \$312.00, Review A. Aeschliman e-mail with

PAYMENT DUE IN U.S. DOLLARS UPON RECEIPT OF INVOICE

Current charges only. Unpaid balances not included.

Disbursements not yet recorded will be included in future invoices.

After 30 days, a monthly interest charge of 1% per month from the invoice date (or such lower rate as required by applicable law) will be due.

Should a collection action or proceeding be necessary, attorney's fees and costs for such collection effort will also be due.

Hawley Troxell Ennis & Hawley LLP

000471

EXHIBIT A

Date	Attorney/Paralegal	Hours	Amount	Description of Legal Services
				attached letter from T. Pace; review second e-mail from A. Aeschliman re same; review updated tenant ledger; prepare three days notice to pay rent or quit and vacate the premises; service of three days notice on T. Pace.
10/7/09	Steven F. Schossberger	1.30	\$312.00	Review e-mail and attachments from T. Pace; review first amendment to lease and services agreement; telephone conference with A. Aeschliman re same.
10/8/09	Steven F. Schossberger	.80	\$192.00	Telephone conference with A. Aeschliman re situation with T. Pace; e-mail T. Pace re Boise Mode LLC's demand for delinquent rent or compromise of rent and execution of first amendment of lease and services agreement.
10/14/09	Steven F. Schossberger	.40	\$96.00	Telephone conference with D. Baum and A. Aeschliman re Donahoe Pace and Partners and T. Pace delinquent rent situation and future action to be taken.
10/26/09	Steven F. Schossberger	.70	\$168.00	Prepare letter to T. Pace; revise letter to T. Pace.
10/27/09	Steven F. Schossberger	.20	\$48.00	Telephone conference with A. Aeschliman re T. Pace move out.
11/9/09	Steven F. Schossberger	1.10	\$264.00	Review letter from T. Pace; review and respond to e-mail from A. Aeschliman re T. Pace; work on letter to T. Pace; e-mail letter to client.
1/5/10	Steven F. Schossberger	.80	\$200.00	Prepare memorandum to T. Lissner re Idaho law on landlord's damages for tenant's abandonment and breach of lease and duty to mitigate.
1/11/10	Steven F. Schossberger	.30	\$75.00	Telephone conference with T. Lisner re file suit and damages against Donahoe Pace and T. Pace.
1/20/10	Steven F. Schossberger	1.80	\$450.00	Prepare draft complaint against Donahoe Pace and T. Pace; review e-mail from T. Lissner re suggested edits to draft complaint; revise draft complaint and response e-mail to T. Lissner.
1/22/10	David Brown	.40	\$52.00	Research on valid address for Pace, and provide output to K. Foruria.
2/12/10	Steven F. Schossberger	.70	\$175.00	Review Pace's answer and counterclaim and comparison to allegations in the complaint.
2/23/10	Steven F. Schossberger	1.30	\$325.00	Draft Boise Mode's answer to Pace's counterclaim; review and revise draft answer and file with court.
3/2/10	Steven F. Schossberger	.20	\$50.00	Review court's notice of scheduling conference and calendar.

Date	Attorney/Paralegal	Hours	Amount	Description of Legal Services
4/9/10	Steven F. Schossberger	.70	\$175.00	Review Defendants' discovery requests.
4/29/10	Steven F. Schossberger	2.00	\$500.00	Work on draft discovery responses.
4/30/10	Steven F. Schossberger	.50	\$125.00	Telephone conference with C. Kiefor re Donahoe Pace's discovery requests.
5/7/10	Steven F. Schossberger	4.00	\$1,000.00	Telephone conference with C. Kiefor re Donahoe Pace's discovery requests; work on draft discovery responses.
5/7/10	David Brown	.10	\$13.00	Review .zip file, and create set up for database.
5/7/10	Christian Wamhoff	1.30	\$123.50	Download documents from Zip file, process and source code and create PLTF computerized database.
5/10/10	Steven F. Schossberger	2.50	\$625.00	Work on Plaintiff's responses to Defendant's discovery requests; review e-mails from C. Kiefor and review of documents to be produced to Defendant.
5/10/10	David Brown	.70	\$91.00	Query database for privilege documents; documents from HTEH; or other attorneys, tag, code.
5/10/10	Christian Wamhoff	2.00	\$190.00	Process, source code new documents, and to PLTF computerized database.
5/11/10	David Brown	1.40	\$182.00	Finalize privilege index; draft and finalize correspondence; provide cd for hand delivery to defendants.
5/11/10	Christian Wamhoff	.80	\$76.00	Produce tagged documents from computerized database, create privilege log.
6/23/10	Steven F. Schossberger	3.50	\$875.00	Work on Boise Mode's first set of discovery to Donahoe Pace and Partners Ltd. re interrogatories, requests for production of documents and requests for admission; analyze counterclaims for determination of motion for summary judgment; legal research re claims of negligent supervision and constructive eviction.
7/22/10	Steven F. Schossberger	1.00	\$250.00	Review court's order setting trial and pretrial deadlines to plan for upcoming discovery and motion practice; telephone conference with M. Kelly, Plaintiff's counsel, re vacate and reschedule trial date due to scheduling conflict; telephone conference with Judge Wilper's clerk, Inga, re available trial dates in 2011; telephone conference with M. Kelly re stipulate to new trial date; prepare stipulation to reschedule trial date and court order.
7/27/10	Steven F. Schossberger	.70	\$175.00	Telephone conference with M. Kelly's office re Defendant's request for extension discovery responses; review Defendant's

Date	Attorney/Paralegal	Hours	Amount	Description of Legal Services
				responses to Plaintiff's requests for admission; prepare letter to counsel M. Kelly re deficient responses to requests for admission and grant of two week discovery extension.
7/28/10	Steven F. Schossberger	.30	\$75.00	Review letter from counsel M. Kelly RE discovery extension; edit draft letter to M. Kelly.
10/25/10	Steven F. Schossberger	2.50	\$625.00	Review and analysis of Donahoe Pace's responses to Boise Mode's discovery requests, including production of documents; review Court's amended pretrial scheduling order and pretrial discovery and dispositive motion deadlines.
10/26/10	Steven F. Schossberger	1.50	\$375.00	Prepare notice of Rule 30(b)(6) deposition duces tecum of Donahoe Pace and Partners LTD and analysis of topic areas, issues presented by counterclaim and documents to be addressed and produced at the deposition; meet with associate M. Gordon re preparation of Boise Mode's motions for summary judgment on the complaint for damages and Donahoe Pace's counterclaim.
10/26/10	Matthew Gordon	.70	\$98.00	Confer with S. Schossberger re background of case and details of assignments.
10/27/10	Steven F. Schossberger	.20	\$50.00	Review and revise notice of Rule 30(b)(6) deposition duces tecum of Donahoe Pace.
10/27/10	Matthew Gordon	.30	\$42.00	Review and analyze pleadings and related documents.
10/29/10	Matthew Gordon	.50	\$70.00	Review documents in case file, including correspondence between parties.
11/2/10	Steven F. Schossberger	.30	\$75.00	Review letter from Donahoe Pace's counsel re subpoena's to be served on Collier's and North Face and review subpoenas; e-mail subpoenas to D. Baum and T. Lissner for review.
11/2/10	Matthew Gordon	1.50	\$210.00	Research case law re covenant of quiet enjoyment and doctrine of constructive eviction.
11/3/10	Matthew Gordon	3.30	\$462.00	Research case law from outside Idaho and secondary sources re requirements for maintaining an action for constructive eviction and whether action for constructive eviction lies as a result of noisy co-tenants; research Idaho case law re elements of negligent supervision claim; begin to outline legal arguments re defendant's counterclaims.
11/15/10	Matthew Gordon	3.80	\$532.00	Work on motion for summary judgment:

Date	Attorney/Paralegal	Hours	Amount	Description of Legal Services
				review facts of case; create outline of facts; begin to draft memorandum in support of motion for summary judgment.
11/16/10	Steven F. Schossberger	1.20	\$300.00	Telephone conference with A. Aeschliman re breakdown of damages amount and mitigation of damages for affidavit in support of motion for summary judgment and re factual information about the business of Donahoe Pace and Partners and use of the leased premises; review e-mails from A. Aeschliman re damages calculation and marketing of the space to obtain a new tenant; meet with associate Matt Gordon re preparation and inclusion of issues for Boise Mode's motion for summary judgment.
11/16/10	Matthew Gordon	1.20	\$168.00	Continue to draft memorandum in support of motion for summary judgment.
11/17/10	Matthew Gordon	.30	\$42.00	Draft affidavit of C. Kiefer.
11/18/10	Matthew Gordon	1.80	\$252.00	Work on motion for summary judgment; review additional documents in client file; additional case law research in support of motion; continue to draft memorandum in support of motion.
11/19/10	Matthew Gordon	6.70	\$938.00	Draft motion for summary judgment on complaint; draft motion for summary judgment on counterclaims; continue to draft memoranda in support of both motions; additional research of case law and secondary sources in support of memoranda.
11/22/10	Matthew Gordon	5.30	\$742.00	Revise affidavit of C. Kiefer; review terms of lease agreement with Xtra Airways; research case law re enforcement of personal guarantees; complete draft of memorandum in support of motion for summary judgment on verified complaint; revise draft of same; continue to work on draft of memorandum in support of motion for summary judgment on defendant's counterclaims.
11/23/10	Steven F. Schossberger	1.50	\$375.00	Review draft affidavit of C. Kiefer and attached exhibits in support of Boise Mode's motions for summary judgment; review draft affidavit of A. Aeschliman and attached exhibits in support of Boise Mode's motions for summary judgment; review draft affidavit of D. Baum and attached exhibits in support of Boise Mode's motions for summary judgment; review and revise draft memorandum in support of Boise Mode's motion for summary judgment on the verified complaint.

Date	Attorney/Paralegal	Hours	Amount	Description of Legal Services
11/23/10	Matthew Gordon	7.90	\$1,106.00	Draft and revise affidavit of A. Aeschliman; draft and revise affidavit of D. Baum; compile and prepare exhibits for each affidavit; complete draft of memorandum in support of motion for summary judgment on defendant's counterclaims; perform additional case law research in connection with memorandum; revise and supplement memorandum in support of summary judgment on defendant's counterclaims.
11/24/10	Steven F. Schossberger	3.50	\$875.00	Work on Boise Mode's summary judgment papers re review and revise draft memorandum in support of motion for summary judgment on Donahoe Pace's counterclaims; further revise memorandum in support of motion for summary judgment on the verified complaint; work with associate M. Gordon on exhibits to the affidavits; conference with M. Gordon on the legal issue of application of Idaho Code Section 6-320(d) requiring tenant to give landlord three days notice prior to filing an action for breach of the covenant of quiet enjoyment; final review of all motion papers for court filing and service on counsel.
11/24/10	Matthew Gordon	1.60	\$224.00	Draft affidavit of S. Schossberger and compile and prepare related exhibits; make final revisions and supplements to memorandum in support of motion for summary judgment on defendant's counterclaims.
12/14/10	Steven F. Schossberger	3.70	\$925.00	Prepare draft memorandum in opposition to Donahoe Pace's motion for continuance of summary judgment hearing; prepare affidavit of S. Schossberger; review and revise opposition memorandum and final documents for court filing.
12/20/10	Steven F. Schossberger	.30	\$75.00	Review and analysis of Donahoe Pace's Reply memorandum in support of motion for continuance of Boise Mode's motion for summary judgment.
12/20/10	Steven F. Schossberger	.50	\$125.00	Prepare motion to strike and disregard argument sections from reply memorandum in support of motion for continuance; prepare motion to shorten time and order.
12/22/10	Steven F. Schossberger	2.70	\$675.00	Prepare for court hearing on Boise Mode's motions for summary judgment and in opposition to Donahoe Pace's motion for Rule 56(f) continuance and motion to strike argument sections from Donahoe Pace's reply memorandum in support of motion for continuance; attend court hearing and present oral argument on the

Date	Attorney/Paralegal	Hours	Amount	Description of Legal Services
				motions; e-mail client re results of court hearing.

Summary of Legal Services	Title	Hours	Rate	Amount
Steven F. Schossberger	Partner	38.20	\$250.00	\$9,550.00
Steven F. Schossberger	Partner	7.60	\$240.00	\$1,824.00
Matthew Gordon	Associate	34.90	\$140.00	\$4,886.00
David Brown	Paralegal	2.60	\$130.00	\$338.00
Christian Wamhoff	Paralegal Clerk	4.10	\$95.00	\$389.50
	Total Hours:	87.40	Total for Legal Services:	\$16,987.50

Date	Disbursements and Other Charges	Quantity	Amount
1/11/11	Copying	1251	\$225.18
1/11/11	Computer Assisted Legal Research	2	\$88.50
1/11/11	Postage	2	\$22.16
5/11/10	Messenger	1	\$4.00
11/24/10	Messenger	1	\$4.00
10/9/09	CLIENT CHARGES - TRI-COUNTY PROCESS SERVING Service of Three Days' Notice to Pay Rent and/or to Quit and Vacate the Premises upon Donahoe Pace & Partners, Ltd. on 10/6/09	1	\$47.00
1/20/10	Client Charges - CLERK OF THE COURT Filing fee: Complaint	1	\$88.00
2/8/10	Client Charges - TRI-COUNTY PROCESS SERVING Services of Summons and Complaint upon Timothy Pace on 1/27/10	1	\$35.00
2/8/10	Client Charges - TRI-COUNTY PROCESS SERVING Services of Summons and Complaint upon Donahoe Pace & Partners, LTD on 1/27/10	1	\$49.00
2/22/10	Client Charges - LEXISNEXIS Advanced People Search, Flat Rate Comprehensive Report on 1/22/10	1	\$26.80
1/4/11	Court Fees - CLERK OF THE COURT Certified copy of Judgment	1	\$2.50
	Total For Disbursements and Other Charges:		\$592.14

Total Due This Invoice: \$17,579.64

JAN 13 2011

CHRISTOPHER D. RICH, Clerk
By INGA JOHNSON
DEPUTY

Michael E. Kelly, ISB #4351
John J. Browder, ISB #7531
LOPEZ & KELLY, PLLC
PO Box 856
Boise, Idaho 83701
Telephone: (208) 342-4300
Facsimile: (208) 342-4344
7008.001/Order Granting Motion for Stay of Execution.wpd

Attorneys for Defendants/Counter-Claimant

ORIGINAL

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

BOISE MODE, LLC, an Illinois limited liability company, successor-in-interest to Mode Building Limited Partnership, an Idaho limited partnership,

Plaintiff,

vs.

DONAHOE PACE & PARTNERS LTD, an Idaho corporation; and TIMOTHY PACE,

Defendants.

DONAHOE PACE & PARTNERS LTD, an Idaho corporation,

Counter-Claimant,

vs.

BOISE MODE, LLC, an Illinois limited liability company, successor-in-interest to Mode Building Limited Partnership, an Idaho limited partnership,

Counter-Defendant.

Case No. CV OC 1001093

**ORDER GRANTING MOTION TO
STAY EXECUTION OF JUDGMENT
ENTERED ON JANUARY 5, 2011**

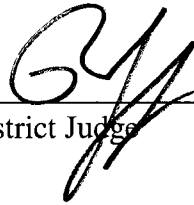
THIS MATTER having come before the Court on motion by the Defendants/Counter-Claimant, DONAHOE PACE & PARTNERS LTD, an Idaho corporation; and TIMOTHY PACE and good cause appearing therefore the Court hereby grants the Motion to Stay the Execution of Judgment entered on January 5, 2011 until such time as Defendants/Counter-Claimant file their Motion to Alter or Amend Judgment under Idaho Rule of Civil Procedure 59(e) and the Court reaches a decision thereon.

IT IS HEREBY ORDERED, ADJUDGED AND DECREED and this does hereby order, adjudge and decree that the motion to stay execution of judgment is granted.

DATED this 12th day of January, 2011

By: _____

District Judge



CLERK'S CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 13 day of January, 2011, I served a true and correct copy of the foregoing by delivering the same to each of the following individuals, by the method indicated below, addressed as follows:

Steven F. Schosberger
HAWLEY, TROXELL, ENNIS & HAWLEY
877 Main Street, Suite 1000
PO Box 1617
Boise, ID 83701-1617
Telephone: (208) 344-6000
Facsimile: (208) 954-5260

- U.S. Mail
- Hand-Delivered
- Overnight mail
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John J. Browder
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Boise, Idaho 83701
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Facsimile: (208) 342-4344

- U.S. Mail
- Hand-Delivered
- Overnight mail
- Facsimile

CHRISTOPHER D. RICH

INGA JOHNSON

Clerk of the Court

NO. _____ FILED _____
A.M. _____ P.M. 0184

JAN 19 2011

CHRISTOPHER D. RICH, Clerk
By CARLY LATIMORE
DEPUTY

ORIGINAL

Michael E. Kelly, ISB #4351
John J. Browder, ISB #7531
LOPEZ & KELLY, PLLC
PO Box 856
Boise, Idaho 83701
Telephone: (208) 342-4300
Facsimile: (208) 342-4344
7008.001/Motion Amend Judgment 59(e).wpd

Attorneys for Defendants/Counter-Claimant

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

BOISE MODE, LLC, an Illinois limited liability company, successor-in-interest to Mode Building Limited Partnership, an Idaho limited partnership,

Plaintiff,

vs.

DONAHOE PACE & PARTNERS LTD, an Idaho corporation; and TIMOTHY PACE,

Defendants.

DONAHOE PACE & PARTNERS LTD, an Idaho corporation,

Counter-Claimant,

vs.

BOISE MODE, LLC, an Illinois limited liability company, successor-in-interest to Mode Building Limited Partnership, an Idaho limited partnership,

Counter-Defendant.

Case No. **CV OC 1001093**

DEFENDANTS'/COUNTER-CLAIMANT'S MOTION TO AMEND JUDGMENT PURSUANT TO I.R.C.P. 59(e)

COME NOW, Defendants, DONAHOE PACE & PARTNERS LTD, an Idaho corporation; and TIMOTHY PACE, by and through their attorneys of record, Lopez & Kelly, PLLC, and move this Court to amend the Judgment entered on January 5, 2011 because it is predicated on errors in law. This motion is made pursuant to Idaho Rule of Civil Procedure 59(e) and is supported by the attached Memorandum in Support of Motion to Amend Judgment, which is incorporated hereto by reference.

DATED this 19 day of January, 2011

LOPEZ & KELLY, PLLC

By: 

Michael E. Kelly, Of the Firm
Attorneys for Defendants

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 19 day of January, 2011, I served a true and correct copy of the foregoing by delivering the same to each of the following individuals, by the method indicated below, addressed as follows:

Steven F. Schossberger
HAWLEY, TROXELL, ENNIS & HAWLEY
877 Main Street, Suite 1000
PO Box 1617
Boise, ID 83701-1617
Telephone: (208) 344-6000
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sschossberger@hawleytroxell.com

- U.S. Mail
- Hand-Delivered
- Overnight mail
- Facsimile



Michael E. Kelly

JAN 19 2011

CHRISTOPHER D. RICH, Clerk
By CARLY LATIMORE
DEPUTY

Michael E. Kelly, ISB #4351
John J. Browder, ISB #7531
LOPEZ & KELLY, PLLC
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7008.001/Memo Re Amend Judgment.wpd

ORIGINAL

Attorneys for Defendants/Counter-Claimant

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

BOISE MODE, LLC, an Illinois limited liability company, successor-in-interest to Mode Building Limited Partnership, an Idaho limited partnership,

Plaintiff,

vs.

DONAHOE PACE & PARTNERS LTD, an Idaho corporation; and TIMOTHY PACE,

Defendants.

Case No. CV OC 1001093

DEFENDANTS/COUNTER-CLAIMANT'S MEMORANDUM IN SUPPORT OF MOTION TO AMEND JUDGMENT PURSUANT TO I.R.C.P. 59(e)

DONAHOE PACE & PARTNERS LTD, an Idaho corporation,

Counter-Claimant,

vs.

BOISE MODE, LLC, an Illinois limited liability company, successor-in-interest to Mode Building Limited Partnership, an Idaho limited partnership,

Counter-Defendant.

COME NOW, Defendants/Counterclaimant, DONAHOE PACE & PARTNERS LTD, an Idaho corporation; and TIMOTHY PACE (hereinafter collectively "DPP"), by and through their attorneys of record, Lopez & Kelly, PLLC, and submit their Memorandum in Support of Motion to Amend Judgment Pursuant to Idaho Rule of Civil Procedure 59(e).

I.

INTRODUCTION

The Court granted the Plaintiffs' motions for summary judgment on December 27, 2010 and final judgment was subsequently entered (the "Judgment") on January 5, 2011. DPP respectfully contends herein that the Court committed legal errors in granting the Plaintiff's motions for summary judgment. Specifically, DPP believes the Court erred in concluding that: (1) DPP's constructive eviction, breach of contract and breach of implied good faith and fair dealing claims were within the province of I.C. § 6-320; (2) viewing the facts most favorable to DPP, the non-moving party, it did not comply with the notice of requirement of I.C. § 6-320(d); and (3) no material question of fact existed as to whether Plaintiff breached the Office Lease and, if so, whether that breach excused DPP's performance. Accordingly, DPP respectfully requests that the Court reverse the Judgment and enter an order denying the Plaintiff's motions for summary judgment pursuant to Idaho Rule of Civil Procedure 59(e).

II.

LEGAL ANALYSIS

Idaho Rule of Civil Procedure 59(e) ("Rule 59(e)") permits a party to move to amend or alter a judgment no later than 14 days after its entry. Rule 59(e) is a method to correct factual or legal errors in the proceedings. *Slaathaug v. Allstate Ins. Co.*, 132 Idaho 705, 979 P.2d 107 (1999). Relief under Rule 59(e) is matter of the court's discretion. *Id.*, 979 P.2d 107.

A. The Trial Court Committed an Error of Law in Holding that a Constructive Eviction Cause of Action is Within the Purview of I.C. § 6-320.

In its Order Granting Plaintiff/Counterdefendant Boise Mode's Motions for Summary Judgment, the Court dismissed DPP's constructive eviction claim. The Court reasoned that the constructive eviction claim was within the purview of the Idaho Code § 6-320 and that DPP did not comply with the three day notice requirement set forth in Idaho Code § 6-320(d). Therefore, according to the Court, DPP lacked standing to assert it.

Constructive eviction is not within the purview of Idaho Code § 6-320 and, as such, the Court erred in holding that it was. The causes of action within the contemplation of Idaho Code § 6-320 are limited to the following:

- (1) Failure to provide reasonable waterproofing and weather protection of the premises;
- (2) Failure to maintain in good working order electrical, plumbing, heating, ventilating, cooling, or sanitary facilities supplied by the landlord;
- (3) Maintaining the premises in a manner hazardous to the health or safety of the tenant;
- (4) Failure to return a security deposit as and when required by law;
- (5) Breach of any term or provision of the lease or rental agreement materially affecting the health and safety of the tenant, whether explicitly or implicitly a part thereof; and
- (6) Failure to install approved smoke detectors in each dwelling unit, to include mobile homes, under the landlord's control.

By the plain terms of the statute, constructive eviction is not within its ambit. Therefore, the Court committed a legal error when it held that it was.

As set forth in DPP's Reply to Memorandum in Opposition to Defendants'/Counterclaimant's Motion for Continuance, the case law is in accord with this conclusion. In *Young v. Scott*, 108 Idaho 506, 700 P.2d 128 (App. 1985), the Idaho Court of Appeals

addressed whether a tenant's counterclaim seeking "damages for constructive eviction and wrongful termination of the lease, due to the landlord's failure to complete the remodeling of a commercial facility in the time and manner prescribed by the lease agreement" fell within the purview of Idaho Code § 6-320. *Id.* at 509, 700 P.2d at 131. It held that it did not and, as a result, that the notice under Idaho Code § 6-320(d) was not required. *See id.*, 700 P.2d at 131; *see also Action Collection Service, Inc. v. Haught*, 146 Idaho 300, 305, 193 P.3d 460, 465 (App. 2008)(quoting approvingly *Young v. Scott*, 108 Idaho 506, 700 P.2d 128 (App. 1985) statement that I.C. § 6-320(d) does not apply to a constructive eviction claim and further stating the requirement only applies to claims referenced in I.C. § 6-320). Because DPP's constructive eviction claim does not fall within I.C. § 6-320, the court erred when it concluded otherwise and held that DPP lacked standing to assert the claim.

B. Because DPP's Breach of Contract and Breach of the Implied Covenant of Good Faith and Fair Dealing Claims Are Not Within the Province of I.C. § 6-320, the Court Erred When it Held that They Were.

The warrant for the Court's dismissal of DPP's Breach of Contract and Breach of Implied Covenant of Good Faith and Fair Dealing was the proposition that they were "premised on a successful Constructive Eviction" claim. *See Order*, at 8. For the reasons set forth in Part II (A), the Court erred in holding that DPP's Constructive Eviction claim should be dismissed. *A fortiori*, the rationale for the Court's dismissal of DPP's Breach of Contract and Breach of Implied Covenant of Good Faith and Fair Dealing is invalid.

Apart from this, because those claims allege that the Plaintiff breached the express and implied terms of the Office Lease by, among other things, failing to ensure that it, other tenants, their agents, employees, or visitors did not create improper noises or disturbances or interfere with DPP's rights, the gist of those claims is not the allegation that Plaintiff breached a term of the lease

“materially affecting the health and safety of the tenant.” As such, those claims are not mere recharacterizations of the constructive eviction claim and, in any event, are not within the province of Idaho Code § 6-320's notice requirement. DPP therefore respectfully requests that Court reverse the Judgment granting Plaintiff's Motions for Summary Judgment on those claims.

C. Even If DPP's Counterclaims Required Notice Under I.C. § 6-320, Notice Was Provided.

The notice requirement in I.C. § 6-320(d) states in relevant part:

Before a tenant shall have standing to file an action under this section, he must give his landlord three (3) days written notice, listing each failure or breach upon which his action will be premised and written demand requiring performance or cure.

The exhibits attached to the Affidavit of Steven F. Schossberg, Esq. [sic] in Support of Plaintiff's Motion for Summary Judgment (the “Schossberger Affidavit”) that DPP gave the Plaintiff satisfy this statute and provided unequivocal notice of the many “failures or breach[es] upon which” an action would be predicated. Exhibit B to the Schossberger Affidavit is a letter from Defendant Timothy Pace to Steven F. Schossberger, Esq., dated August 24, 2009, which is more than three days before DPP served its counterclaim. In that letter, DPP identified the myriad ways in which the Plaintiff had breached the terms of the Office Lease and DPP's right to quiet enjoyment to the Premises. Moreover, that letter contended that DPP had defenses to the Plaintiff's claims in addition to DPP's own claim of damages. The letter also set forth what would be required to cure DPP's claims of default and avoid litigation.

Mr. Pace's August 24, 2009 letter also attached a variety of letters written by him that set forth the many ways that the Plaintiff had failed to live up to its obligations under the Office Lease. See Exhibits A, C, D & E to Exhibit B to the Schossberger Affidavit. Taken together or individually, and viewing the facts in a light most favorable to the non-moving party, these letters provided notice sufficient under Idaho Code § 6-320(d). The Plaintiff had ample notice of the breaches and what

DPP required to remedy the Plaintiff's breaches.

D. Because the Plaintiff's Own Affidavits Establish That It Breached the Office Lease, a Question of Fact Exists as to Whether Plaintiff Breached the Office Lease and, If It Did, Whether Such Breach Excused DPP's Performance.

Assuming that the Court reverses itself on the standing issue, the Court should go on to deny Plaintiff's motions for summary judgment on the Verified Complaint and DPP's Counterclaim. At a minimum, a question of fact exists as to whether (1) the Plaintiff breached the Office Lease and, if so, (2) whether the breaches excused DPP's performance.

Summary judgment is appropriate where "the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." I.R.C.P. 56(c).

If a party materially breaches a contract, it excuses the other party's performance. *State of Idaho v. Chacon*, 146 Idaho 520, 524, 198 P.3d 749, 753 (Ct. App. 2008); *J. P. Stravens Planning Assoc., Inc. v. City of Wallace*, 129 Idaho 542, 545, 928 P.2d 46, 49 (Ct. App. 1996)(see also authority cited therein). If a party violates, significantly impairs or nullifies a benefit of the contract, it breaches the implied covenant of good faith and fair dealing. *Steiner v. Ziegler-Tamura Ltd., Co.*, 138 Idaho 238, 242, 61 P.3d 595, 599 (2002). Typically, whether a breach is material is a question of fact. *See Borah v. McCandless*, 147 Idaho 73, 79, 205 P.3d 1209, 1215 (2009).

Here, Plaintiff's own affidavits and attachments create a question of fact whether it breached the express terms of the Office Lease and/or the implied covenant of good faith and fair dealing. For example, Exhibit E to the Office Lease, the terms and conditions of which are incorporated into it, state in relevant part:

Tenants, their agents, employees, or visitors, shall not make or commit any improper noises or disturbances of any kind in the building, or make or define the water closets . . . or interfere in any way with other Tenants or those having business with them.

See Exhibit A to Verified Complaint, at Exh. E, ¶ 2.

Section 10.1 of the Office Lease obligates the Landlord “to repair and maintain the roof and structural portions of the Facility including the basis plumbing, air conditioning, heating and electrical systems, exterior paint and trim” unless the tenant caused the damage. See Exhibit A to Verified Complaint, at §10.1. Section 19.3 sets forth the right to quiet enjoyment. See Exhibit A to Verified Complaint, at §19.3.

Here, the record contains ample evidence that the Plaintiff was breaching the aforementioned express and implied terms of the Office Lease as of August 2008.¹ Defendant Timothy Pace wrote to Angela Aeschliman in December 2009, stating that on August 15, 2008, DPP advised the Plaintiff’s property manager “as to specific problems resulting from construction activities that make this situation untenable and inhibit” its “ability to conduct business as a professional services office, many of which remain unresolved today.” See Exhibit A to Exhibit B to the Schossberger Affidavit. Likewise, statements in the Plaintiff’s own affidavits prove that it breached the Office Lease. In Exhibit B to the Affidavit of Angela Aeschliman, CPM, CCIM in Support of Plaintiff’s Motion for Summary Judgment (“Aeschliman Affidavit”), which is a letter to Defendant Timothy Pace from Ms. Aeschliman states that “[w]e are aware that the construction of the building has caused inconveniences” In Exhibit D to the Aeschliman Affidavit, the Plaintiff concedes that “there has been noise and disturbance” from the [North Face] construction. Accordingly, it is undeniable that the Plaintiff breached the Office Lease’s rule barring “improper noises or disturbances of any

1. Before its Motion for Continuance was denied, DPP was also seeking, among other things, The North Face Office Lease. As discussed in the Rule 56(f) Affidavit, this lease was needed to establish that The North Face (and the Plaintiff by allowing The North Face to do so), violated Exh. E, ¶ 2. This violation also is a breach of the Office Lease under a third-party beneficiary analysis. See generally *Stewart v. Arrington Constr. Co.*, 92 Idaho 526, 446 P.2d 895 (1968)(one is a third-party beneficiary if the agreement reflects an intent to benefit that party).

kind in the building.” See Office Lease, at Exhibit E, ¶2.

Regardless of whether this is an express breach, a breach of the implied covenant of good faith and fair dealing or a breach in a term in a lease that is supposed to benefit DPP as a third-party beneficiary, the conclusion is the same. The Plaintiff acknowledged in an affidavit that it submitted in support of its own summary judgment motions that there were noises and improper disturbances. Whether these noises and improper disturbances constitute material breaches such that DPP’s performance was excused is an issue for a jury. See, *J.P. Stravens Planning Assoc., Inc. v. City of Wallace*, 129 Idaho 542, at 928 P.2d at 49, *Borah v. McCandless*, 147 Idaho at 79, 205 P.3d at 1215. Accordingly, the Court erred when it granted the Plaintiff’s motions for summary judgment.

III.

CONCLUSION

For the reasons discussed herein, DPP respectfully requests that the Court nullify the Judgment entered on January 5, 2011 and its December 27, 2010 Order.

DATED this 19 day of January, 2011

LOPEZ & KELLY, PLLC

By: _____



Michael E. Kelly, Of the Firm
Attorneys for Defendants

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 19 day of January, 2011, I served a true and correct copy of the foregoing by delivering the same to each of the following individuals, by the method indicated below, addressed as follows:

Steven F. Schossberger
HAWLEY, TROXELL, ENNIS & HAWLEY
877 Main Street, Suite 1000
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- Hand-Delivered
- Overnight mail
- Facsimile



Michael E. Kelly

Michael E. Kelly, ISB #4351
John J. Browder, ISB #7531
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7008.001/Motion Amend Judgment 59(e).NOH.wpd

NO. _____ FILED *3/3/11*
A.M. _____ P.M.

JAN 19 2011

CHRISTOPHER D. RICH, Clerk
By CARLY LATIMORE
DEPUTY

ORIGINAL

Attorneys for Defendants/Counter-Claimant

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

BOISE MODE, LLC, an Illinois limited liability company, successor-in-interest to Mode Building Limited Partnership, an Idaho limited partnership,

Plaintiff,

vs.

DONAHOE PACE & PARTNERS LTD, an Idaho corporation; and TIMOTHY PACE,

Defendants.

DONAHOE PACE & PARTNERS LTD, an Idaho corporation,

Counter-Claimant,

vs.

BOISE MODE, LLC, an Illinois limited liability company, successor-in-interest to Mode Building Limited Partnership, an Idaho limited partnership,

Counter-Defendant.

Case No. CV OC 1001093

NOTICE OF HEARING

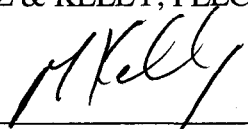
TO: PLAINTIFF AND ITS ATTORNEY OF RECORD:

YOU WILL PLEASE TAKE NOTICE that Defendants/Counter-Claimant, DONAHOE PACE & PARTNERS LTD, an Idaho corporation; and TIMOTHY PACE, will call on for hearing its Motion to Amend Judgment Pursuant to I.R.C.P. 59(e) on Monday the 28th day of February, 2011, at the hour of 11:30 a.m., or as soon thereafter as counsel may be heard, before the Honorable Ronald J. Wilper, Ada County Courthouse, 200 West Front Street, Boise, ID 83702.

DATED this 19 day of January, 2011

LOPEZ & KELLY, PLLC

By: _____


Michael E. Kelly, Of the Firm
Attorneys for Defendants/Counterclaimant

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 19 day of January, 2011, I served a true and correct copy of the foregoing by delivering the same to each of the following individuals, by the method indicated below, addressed as follows:

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7008.001/ObjectionAttyFees.wpd

RECEIVED
JAN 26 2011
Ada County Clerk

NO. _____ FILED _____
A.M. 10:40 P.M. _____

JAN 26 2011

CHRISTOPHER D. FICHL, Clerk
By KATHY BIEHL
Deputy

ORIGINAL

Attorneys for Defendant

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

BOISE MODE, LLC, an Illinois limited liability company, successor-in-interest to Mode Building Limited Partnership, an Idaho limited partnership,

Plaintiff,

vs.

DONAHOE PACE & PARTNERS LTD, an Idaho corporation; and TIMOTHY PACE,

Defendant.

Case No. CV OC 1001093

DEFENDANTS'/ COUNTER-CLAIMANT'S OBJECTION TO BOISE MODE LLC'S VERIFIED MEMORANDUM/ COSTS AND ATTORNEY FEES

DONAHOE PACE & PARTNERS LTD, an Idaho corporation,

Counter-Claimant,

vs.

BOISE MODE, LLC, an Illinois limited liability company, successor-in-interest to Mode Building Limited Partnership, an Idaho limited partnership,

Counter-Defendant.

I.
OBJECTION TO ATTORNEY FEES

When an award of attorneys' fees is mandatory, as is the case when a party prevails in an action to recover in a "commercial transaction," see Idaho Code § 120(3), the determination of the amount of attorneys' fees to award rests within the sound discretion of the trial judge and will not be overturned unless it reflects an abuse of such discretion. *See Davidson v. Beco Corp.*, 112 Idaho 560, 733 P.2d 781 (App. 1986); *see also Craft Wall of Idaho, Inc. v. Stonebraker*, 108 Idaho 704, 701 P.2d 324 (App. 1985).

Idaho Rule of Civil Procedure 54(e)(3) sets forth factors that the Court must consider in determining the amount of attorneys fees to award:

- (A) The time and labor required.
- (B) The novelty and difficulty of the questions.
- (C) The skill requisite to perform the legal service properly and the experience and ability of the attorney in the particular field of law.
- (D) The prevailing charges for like work.
- (E) Whether the fee is fixed or contingent.
- (F) The time limitations imposed by the client or the circumstances of the case.
- (G) The amount involved and the results obtained.
- (H) The undesirability of the case.
- (I) The nature and length of the professional relationship with the client.
- (J) Awards in similar cases.
- (K) The reasonable cost of automated legal research (Computer Assisted Legal Research), if the court finds it was reasonably necessary in preparing a party's case.
- (L) Any other factor which the court deems appropriate in the particular case.

Applying these factors, the Court should exercise its discretion and reduce the amount of attorneys' fees the Plaintiff requests. First, the October 26, 2010, time entries for attorneys Steven

F. Schossberger and Matthew Gordon contain what appear to be duplicative entries for time the attorneys spent conferring with each other about assignments. Mr. Schossberger includes in his entry for that day "meet with associate M. Gordon re preparation of Boise Mode's motions for summary judgment on the complaint for damages and Donahoe Pace's counterclaim." Mr. Gordon's entry for October 26, 2010, states: "Confer with S. Schossberger re background of case and details of assignments." It is customary that an attorney does not bill a client for the time spent explaining a project to an associate (or vice versa); it would be unreasonable to require DP&P to pay for double time. DP&P, therefore, respectfully requests that the Court make an appropriate downward adjustment for these entries.

Second, the same October 26, 2010, for attorney Schossberger includes time spent preparing a Rule 30(b)(6) notice of deposition duces tecum of DP&P. There was no 30(b)(6) deposition of DP&P taken and, therefore, such work was not required for the result obtained. Accordingly, the Court should cut that entry.

Third, the Court should exercise its discretion and cut the requested total attorneys' fees of \$16,987.50 because Mr. Schossberger's \$250.00 hourly rate exceeds the prevailing rate for similar work and because there was nothing novel or complex about this breach of lease matter.


II. CONCLUSION

For the foregoing reasons, DP&P respectfully requests that the Court exercise its discretion and reduce the amount of attorneys' fees the Plaintiff requests.

DATED this 25 day of January, 2011

LOPEZ & KELLY, PLLC

By: _____


Michael E. Kelly, Of the Firm
Attorneys for Defendants/Counterclaimant

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 25 day of January, 2011, I served a true and correct copy of the foregoing by delivering the same to each of the following individuals, by the method indicated below, addressed as follows:

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sschossberger@hawleytroxell.com

- U.S. Mail
- Hand-Delivered
- Overnight mail
- Facsimile



Michael E. Kelly

RECEIVED

JAN 26 2011

Ada County Clerk

Michael E. Kelly, ISB #4351

John J. Browder, ISB #7531

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7008.001/ObjectionAttyFees.NOH.wpd

NO. _____ FILED
AM. 10:40 PM

JAN 26 2011

CHIEF CLERK
by KATHY BIENL
Deputy

ORIGINAL

Attorneys for Defendants/Counter-Claimant

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT

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

BOISE MODE, LLC, an Illinois limited liability company, successor-in-interest to Mode Building Limited Partnership, an Idaho limited partnership,

Plaintiff,

vs.

DONAHOE PACE & PARTNERS LTD, an Idaho corporation; and TIMOTHY PACE,

Defendants.

Case No. CV OC 1001093

NOTICE OF HEARING

DONAHOE PACE & PARTNERS LTD, an Idaho corporation,

Counter-Claimant,

vs.

BOISE MODE, LLC, an Illinois limited liability company, successor-in-interest to Mode Building Limited Partnership, an Idaho limited partnership,

Counter-Defendant.

NOTICE OF HEARING-1

000498

KLB

TO: PLAINTIFF AND ITS ATTORNEY OF RECORD:

YOU WILL PLEASE TAKE NOTICE that Defendants/Counter-Claimant, DONAHOE PACE & PARTNERS LTD, an Idaho corporation; and TIMOTHY PACE, will call on for hearing its Objection to Boise Mode LLC's Verified memorandum/Costs and Attorney Fees on Monday the 7th day of March, 2011, at the hour of 1:30 p.m., or as soon thereafter as counsel may be heard, before the Honorable Ronald J. Wilper, Ada County Courthouse, 200 West Front Street, Boise, ID 83702.

DATED this 25 day of January, 2011

LOPEZ & KELLY, PLLC

By: 

Michael E. Kelly, Of the Firm
Attorneys for Defendants/Counterclaimant

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 25 day of January, 2011, I served a true and correct copy of the foregoing by delivering the same to each of the following individuals, by the method indicated below, addressed as follows:

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sschossberger@hawleytroxell.com

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| <input checked="" type="checkbox"/> | U.S. Mail |
| <input type="checkbox"/> | Hand-Delivered |
| <input type="checkbox"/> | Overnight mail |
| <input type="checkbox"/> | Facsimile |



Michael E. Kelly

FEB 08 2011

CHRISTOPHER D. RICH, Clerk
By LARA AMES
DEPUTY

Steven F. Schossberger, ISB No. 5358
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Attorneys for Plaintiff/Counterdefendant Boise Mode, LLC,
successor-in-interest to Mode Building Limited Partnership

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

BOISE MODE, LLC, an Illinois limited liability company, successor-in-interest to Mode Building Limited Partnership, an Idaho limited partnership,

Plaintiff,

vs.

DONAHOE PACE & PARTNERS LTD, an Idaho corporation; and TIMOTHY PACE,

Defendants.

DONAHOE PACE & PARTNERS LTD, an Idaho corporation,

Counterclaimant,

vs.

BOISE MODE, LLC, an Illinois limited liability company, successor-in-interest to Mode Building Limited Partnership, an Idaho limited partnership,

Counterdefendant.

Case No. CV OC 1001093

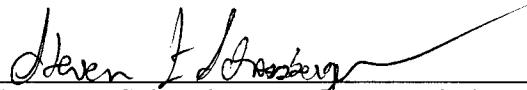
AMENDED NOTICE OF HEARING

TO ALL PARTIES AND THEIR COUNSEL OF RECORD:

PLEASE TAKE NOTICE that the Plaintiff/Counterdefendant Boise Mode, LLC, successor-in-interest to Mode Building Limited Partnership, will call up for hearing Defendants' Objection to Plaintiff's Memorandum of Attorney Fees before the Honorable Ronald J. Wilper, District Judge on the 28th day of February, 2011, at 11:30 a.m., or as soon thereafter as counsel can be heard, before.

DATED THIS 8 day of February, 2011.

HAWLEY TROXELL ENNIS & HAWLEY LLP

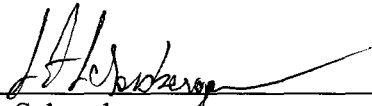
By 
Steven F. Schossberger, ISB No. 5358
Attorneys for Plaintiff/Counterdefendant Boise
Mode, LLC, successor-in-interest to Mode
Building Limited Partnership

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 8 day of February, 2011, I caused to be served a true copy of the foregoing AMENDED NOTICE OF HEARING by the method indicated below, and addressed to each of the following:

Michael E. Kelly
John J. Browder
LOPEZ & KELLY, PLLC
702 W. Idaho Street, Suite 1100
P.O. Box 856
Boise, ID 83701
[Attorneys for Defendants and Counterclaimant]

U.S. Mail, Postage Prepaid
 Hand Delivered
 Overnight Mail
 E-mail
 Telecopy: 208.342.4344



Steven F. Schossberger

RECEIVED
FEB 10 2011

NO. _____ FILED _____
A.M. 1:30 P.M. _____

FEB 10 2011

CHRISTOPHER D. RICH, Clerk
By PATRICIA A. DWONCH
DEPUTY

Michael E. Kelly, ISB #4351
John J. Browder, ISB #7531 **Ada County Clerk**
LOPEZ & KELLY, PLLC
PO Box 856
Boise, Idaho 83701
Telephone: (208) 342-4300
Facsimile: (208) 342-4344
7008.001/Motion Amend Judgment 59(e).Amended.NOH.wpd

ORIGINAL

Attorneys for Defendants/Counter-Claimant

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT

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

BOISE MODE, LLC, an Illinois limited liability company, successor-in-interest to Mode Building Limited Partnership, an Idaho limited partnership,

Plaintiff,

vs.

DONAHOE PACE & PARTNERS LTD, an Idaho corporation; and TIMOTHY PACE,

Defendants.

Case No. **CV OC 1001093**

AMENDED NOTICE OF HEARING

DONAHOE PACE & PARTNERS LTD, an Idaho corporation,

Counter-Claimant,

vs.

BOISE MODE, LLC, an Illinois limited liability company, successor-in-interest to Mode Building Limited Partnership, an Idaho limited partnership,

Counter-Defendant.

AMENDED NOTICE OF HEARING-1


000503

TO: PLAINTIFF AND ITS ATTORNEY OF RECORD:

YOU WILL PLEASE TAKE NOTICE that Defendants/Counter-Claimant, DONAHOE PACE & PARTNERS LTD, an Idaho corporation; and TIMOTHY PACE, will call on for hearing its Motion to Amend Judgment Pursuant to I.R.C.P. 59(e) on Monday the 28th day of February, 2011, at the hour of 3:00 p.m., or as soon thereafter as counsel may be heard, before the Honorable Ronald J. Wilper, Ada County Courthouse, 200 West Front Street, Boise, ID 83702.

DATED this 9 day of February, 2011

LOPEZ & KELLY, PLLC


By: 
Michael E. Kelly, Of the Firm
Attorneys for Defendants/Counterclaimant

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 9 day of February, 2011, I served a true and correct copy of the foregoing by delivering the same to each of the following individuals, by the method indicated below, addressed as follows:

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Michael E. Kelly

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Ada County Clerk

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FEB 10 2011

CHRISTOPHER D. RICH, Clerk
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ORIGINAL

Attorneys for Defendants/Counter-Claimant

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

BOISE MODE, LLC, an Illinois limited liability company, successor-in-interest to Mode Building Limited Partnership, an Idaho limited partnership,

Plaintiff,

vs.

DONAHOE PACE & PARTNERS LTD, an Idaho corporation; and TIMOTHY PACE,

Defendants.

DONAHOE PACE & PARTNERS LTD, an Idaho corporation,

Counter-Claimant,

vs.

BOISE MODE, LLC, an Illinois limited liability company, successor-in-interest to Mode Building Limited Partnership, an Idaho limited partnership,

Counter-Defendant.

Case No. **CV OC 1001093**


AMENDED NOTICE OF HEARING

TO: PLAINTIFF AND ITS ATTORNEY OF RECORD:

YOU WILL PLEASE TAKE NOTICE that Defendants/Counter-Claimant, DONAHOE PACE & PARTNERS LTD, an Idaho corporation; and TIMOTHY PACE, will call on for hearing its Objection to Boise Mode LLC's Verified memorandum/Costs and Attorney Fees on Wednesday the 9th day of March, 2011, at the hour of 4:00 p.m., or as soon thereafter as counsel may be heard, before the Honorable Ronald J. Wilper, Ada County Courthouse, 200 West Front Street, Boise, ID 83702.

DATED this 9 day of February, 2011

LOPEZ & KELLY, PLLC

By: 
Michael E. Kelly, Of the Firm
Attorneys for Defendants/Counterclaimant

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 9 day of February, 2011, I served a true and correct copy of the foregoing by delivering the same to each of the following individuals, by the method indicated below, addressed as follows:

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NO. _____ FILED 4:21
A.M. _____ P.M. _____

FEB 18 2011

CHRISTOPHER D. RICH, Clerk
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Attorneys for Plaintiff/Counterdefendant Boise Mode, LLC,
successor-in-interest to Mode Building Limited Partnership

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

BOISE MODE, LLC, an Illinois limited liability company, successor-in-interest to Mode Building Limited Partnership, an Idaho limited partnership,

Plaintiff,

vs.

DONAHOE PACE & PARTNERS LTD, an Idaho corporation; and TIMOTHY PACE,

Defendants.

Case No. CV OC 1001093

PLAINTIFF/COUNTERDEFENDANT'S
RESPONSE TO DEFENDANT/
COUNTERCLAIMANT'S MOTION TO
AMEND JUDGMENT PURSUANT TO
I.R.C.P. 59(e)

DONAHOE PACE & PARTNERS LTD, an Idaho corporation,

Counterclaimant,

vs.

BOISE MODE, LLC, an Illinois limited liability company, successor-in-interest to Mode Building Limited Partnership, an Idaho limited partnership,

Counterdefendant.

PLAINTIFF/COUNTERDEFENDANT'S RESPONSE TO DEFENDANT/
COUNTERCLAIMANT'S MOTION TO AMEND JUDGMENT PURSUANT TO
I.R.C.P. 59(e)

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Plaintiff/Counterdefendant Boise Mode, LLC (“Boise Mode”), by and through its undersigned counsel of record, hereby submits this Response to the Motion to Amend Judgment Pursuant to I.R.C.P. 59(e) (“Motion”) filed by Defendant/Counterclaimants Donahoe Pace & Partners Ltd. (“Donahoe Pace”) and Timothy Pace (collectively, “Defendants”).

I.

INTRODUCTION

After oral argument, this Court granted Boise Mode’s motions for summary judgment on (1) its claims for breach of contract and breach of the covenant of good and faith and fair dealing against Defendant Donahoe Pace; (2) its claim for breach of guaranty against Defendant Timothy Pace; and (3) Donahoe Pace’s counterclaims. This Court explained its decision in a well-reasoned Order dated December 27, 2010 (“Order”), and entered Judgment for Donahoe Pace on January 5, 2011. Defendants now assert that this Court committed legal errors in that Order. However, Defendants’ argument in support identifies no legal errors. Rather, Defendants merely rehash the arguments they previously made to this Court - - arguments this Court correctly rejected the first time around. Instead of presenting new legal theories or new facts, Defendants merely seek another bite at the apple with the same set of teeth. Defendants’ arguments lacked merit the first time around, and they have not been helped by the passage of time.

II.

ARGUMENT

Defendants’ Memorandum in Support of their Motion (“Memorandum”) merely restates the arguments Defendants previously made to this Court in their Reply to Memorandum in Opposition to Defendants’/Counterclaimant’s Motion for Continuance Pursuant to I.R.C.P. 56(f) (“Reply”). This Court has, therefore, already considered and rejected these arguments once.

And the Defendants are unable to muster any new legal argument or point to any new facts not previously considered by this Court that would warrant a modification of the Judgment.

Moreover, Defendants make no argument that this Court erred in granting summary judgment for Boise Mode on Defendants' counterclaims for tortious interference with contract and negligent supervision, apparently conceding that the Court's ruling in favor of Donahoe Pace on those issues was correct. That leaves Donahoe Pace's counterclaims for constructive eviction, breach of contract, and breach of the covenant of good faith and fair dealing. As this Court correctly concluded, the latter two counterclaims are premised upon the first. As a result, for simplicity, they will be referred to collectively as the "Constructive-Eviction related claims."

A. The Court Correctly Ruled That Defendant Donahoe Pace Was Required To Give Notice Under Idaho Code § 6-320(d) Before Filing Its Counterclaim For Constructive Eviction.

Defendants argue that the Court erred by ruling that its Constructive-Eviction related claims were within the purview of Idaho Code § 6-320. Defendants' argument on this point is virtually unchanged from the argument it put forth in its Reply. *Compare* Memorandum at pp. 7-8 *with* Reply at p. 5. This Court correctly rejected Defendants' argument the first time around. Defendants have pointed to nothing that undermines the correctness of the Court's conclusion.

Defendants' argument that constructive eviction claims do not fall under § 6-320 still lacks merit and is contrary to the controlling authority. Defendants' reliance upon *Young v. Scott*, 108 Idaho 506, 700 P.2d 128 (Ct. App. 1985), is misplaced. Simply put, the Court of Appeals did not hold in *Young* that a constructive eviction claim of the type brought by Donahoe Pace falls outside § 6-320. Even if the *Young* court had so held, it would be trumped by two cases from the Idaho Supreme Court in which the Supreme Court was clear that a breach of the

covenant of quiet enjoyment – the type of constructive eviction claim brought by Donahoe Pace in this case – falls squarely within the purview of § 6-320(a)(5), and therefore implicates the § 6-320(d) notice requirements. *Silver Creek Computers, Inc. v. Petra, Inc.*, 136 Idaho 879, 882-883, 42 P.3d 672, 675-676 (2002) (tenant based its claim on § 6-320(5), alleging that landlord had violated breach of covenant of quiet enjoyment; court held that district court had erred by instructing jury that tenant needed to prove negligence on part of landlord because negligence was not required to prove case under § 6-320(5)); *Worden v. Ordway*, 105 Idaho 719, 722, 672 P.2d 1049, 1051 (1983) (if a landlord “substantially interferes with a tenant’s use and enjoyment of the premises,” the landlord’s tenant “would be entitled to bring an action under I.C. § 6-320(a)(5) for breach of the covenant of quiet enjoyment, after first giving the three days’ notice required by I.C. § 6-320(d)”) (emphasis added). Notably, although Boise Mode cited *Worden* in its brief in support of its motion for summary judgment on Donahoe Pace’s counterclaims, Defendants have not – despite two opportunities – addressed that case, let alone tried to distinguish it.

In short, the Court’s decision was consistent with and well-supported by precedent from the Idaho Supreme Court. The Court did not err.¹

¹ Even if the Court had not ruled that Donahoe Pace lacked standing to assert a counterclaim based upon an alleged breach of the covenant of quiet enjoyment, Donahoe Pace’s Constructive Eviction-related claims would fail for at least two additional independent reasons. First, a tenant cannot maintain an action for constructive eviction – or for breach of the covenant of quiet enjoyment – if the tenant has not kept current on rent payments. *Richard Barton Enterprises, Inc. v. Tsern*, 928 P.2d 368, 374 (Utah 1996); 49 AM.JUR.2D § 494. Second, constructive eviction does not apply if a tenant waits to abandon the leased premises until after a problem ceases. 49 AM.JUR.2D §§ 517-518. Here, it is undisputed that Donahoe Pace was deep in arrears on its rent payments at the time it asserted its counterclaims. It is also undisputed that the alleged problems cited by Donahoe Pace had long since ceased at the time Donahoe Pace vacated the premises in November, 2009.

B. The Court Correctly Found That Defendant Donahoe Pace Did Not Comply With The Notice Requirements Of Idaho Code § 6-320(d).

Defendants argue that the Court erred by ruling that Donahoe Pace failed to give the notice required by § 6-320(d). Again, Defendants' argument on this point is virtually unchanged from the argument it put forth in its Reply. *Compare* Memorandum at pp. 9-10 *with* Reply at pp. 4-5. Again, this Court correctly rejected Defendants' argument the first time. Defendants have pointed to nothing that undermines the correctness of the Court's conclusion.

Defendants' argument is just as unconvincing the second time around. Section 6-320(d) provides, in relevant part,

Before a tenant shall have standing to file an action under this section, he must give his landlord three (3) days written notice, listing each failure or breach upon which his action will be premised and written demand requiring performance or cure.

(Emphasis added.) Defendants point to correspondence between Donahoe Pace and individuals affiliated with Boise Mode in which agents of Donahoe Pace alleged certain problems during the course of the lease. But even if the August 24, 2009, letter identified by Defendants met the § 6-320(d) requirements for "listing each failure or breach upon which his action will be premised," Defendants have not even argued that they provided Boise Mode with the "written demand" required by § 6-320(d). The plain language of the statute is unequivocal: both notice of alleged breaches and a written demand are required. This Court did not err.

Moreover, Defendants do not mention that the letter of August 24, 2009, was preceded by correspondence from Donahoe Pace requesting an extension on its lease. Affidavit of David L. Baum filed in support of Boise Mode's Motion for Summary Judgment, Exh. A. Nor do they mention that the August 24, 2009 letter was followed by additional correspondence between Donahoe Pace and Boise Mode in which the parties exchanged offers for resolving the dispute.

When this additional correspondence is considered, it becomes clear that the August 24, 2009, was never intended to be a § 6-320(d) notice.

C. The Court Correctly Concluded That Defendant Failed To Prove Any Of The Affirmative Defenses It Asserted In Response To Boise Mode's Claims For Breach Of Contract.

In their Memorandum, Defendants argue that the Court erred by ruling that Donahoe Pace had breached its contract with Boise Mode. Again, Defendants' argument on this point is virtually unchanged from the argument it put forth in its Reply. *Compare* Memorandum at pp. 9-10 *with* Reply at pp. 4-5. This repeat argument was already properly rejected by the Court.

The Court correctly noted in its Order that, on summary judgment, a non-moving party such as Defendants "must set forth in affidavits specific facts showing there is a genuine issue for trial" and that if such party fails to provide such a response, "summary judgment, if appropriate, shall be entered against that party." Order at p. 4. Neither of the Defendants submitted an affidavit setting forth anything, let alone setting forth specific facts showing there is a genuine issue for trial. This Court considered and rejected Defendants' arguments about the evidence in the record. Defendants have provided the Court with no new information suggesting that the Court's conclusion was in error.

Moreover, Defendants' argument is misleading. Defendants claim that Boise Mode "acknowledged in an affidavit that is submitted in support of its own summary judgment motions that there were noises and improper disturbances." Memorandum at p. 8. Not true. In an attempt to give the Court an accurate picture of the correspondence between the parties, Boise Mode included as *exhibits* to affidavits records of correspondence indicating that Donahoe Pace had raised concerns about noise and that agents of Boise Mode had acknowledged that construction in the building had caused noise. But Boise Mode submitted nothing at all – let

alone any affidavit – acknowledging “improper disturbances.” For these reasons, Defendants’ claim that it is “undeniable” that Boise Mode breached the lease provision barring tenants from making “improper noises or disturbances,” Memorandum at pp. 10-11, is fanciful.

Finally, Defendants have cited no authority in support of their implicit contention that Donahoe Pace was excused from paying rent because of the alleged improper noises. In particular, Donahoe Pace has cited no authority demonstrating that a tenant who complains of noise can withhold rent at all, let alone withhold rent for multiple months. Not only is that argument unsupported by authority, it is contrary to the express terms of the lease between Boise Mode and Donahoe Pace, which, in Article 4.1, that “[e]xcept as specifically provided herein, there shall be no deduction, offset or abatement for any reason of the rent or any money payable by Tenant to Landlord.” *See Verified Compl., Exh. A.*

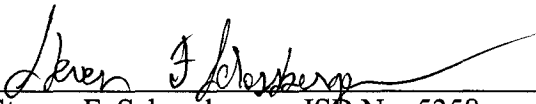
III.

CONCLUSION

Defendants have raised no new argument nor pointed to any new facts. Their arguments were correctly rejected by this Court the first time they were presented, and they should be rejected again. Far from erring, this Court followed the law and correctly applied it to the facts in evidence. For these reasons, Boise Mode respectfully requests that this Court deny Defendants’ Motion.

RESPECTFULLY SUBMITTED THIS 18 day of February, 2011.

HAWLEY TROXELL ENNIS & HAWLEY LLP

By 
Steven F. Schossberger, ISB No. 5358
Attorneys for Plaintiff/Counterdefendant Boise
Mode, LLC, successor-in-interest to Mode
Building Limited Partnership

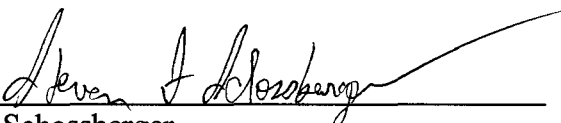
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 18 day of February, 2011, I caused to be served a true copy of the foregoing PLAINTIFF/COUNTERDEFENDANT'S RESPONSE TO DEFENDANT/ COUNTERCLAIMANT'S MOTION TO AMEND JUDGMENT PURSUANT TO I.R.C.P. 59(e) by the method indicated below, and addressed to each of the following:

Michael E. Kelly
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Steven F. Schossberger

MAR 02 2011

CHRISTOPHER D. RICH, Clerk
By INGA JOHNSON
DEPUTY

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

BOISE MODE, LLC, an Illinois limited liability company, successor-in-interest to Mode Building Ltd. Partnership, an Idaho Limited partnership,
Plaintiff,

Case No. CVOC-10-01093

vs.

**ORDER GRANTING DEFENDANTS/
COUNTERCLAIMANT DONAHOE
PACE & PARTNERS, LTD. AND
TIMOTHY PACE'S MOTION**

DONAHOE PACE & PARTNERS, LTD, an Idaho Corporation; and TIMOTHY PACE,
Defendants.

DONAHOE PACE & PARTNERS, LTD, an Idaho Corporation,
Counterclaimant,

vs.

BOISE MODE, LLC, an Illinois limited liability company, successor-in-interest to Mode Building Ltd. Partnership, an Idaho Limited partnership,
Counterdefendant.

This matter came before the Court on Defendants/Counterclaimant Donahoe Pace & Partners, Ltd. (DPP) and Timothy Pace's (collectively, "the Defendants") Motion to Amend both the Court's December 27, 2010 Order (Order) granting Summary Judgment to Plaintiff/Counterdefendant Boise Mode, LLC (Boise Mode) and the Court's corresponding January 5, 2011 Judgment (Judgment). The Court heard oral argument on Monday, February 28, 2011. Matthew

1 Gordon appeared for Boise Mode; John Browder appeared for the Defendants. While the
2 Defendants' motion was not so captioned, the Court deems this motion to be both an Idaho Rule of
3 Civil Procedure 11(a)(2)(B) Motion for Reconsideration of its Order and an I.R.C.P. 59(e) Motion
4 to Amend the Judgment. This interpretation is supported by arguments made in both parties'
5 briefing and at oral argument.

6 In addition to granting Summary Judgment to Boise Mode on all three of its claims: 1)
7 Breach of Contract, 2) Breach of the Covenant of Good Faith and Fair Dealing, and 3) Breach of
8 Personal Guaranty of Lease, the Order granted Summary Judgment to Boise Mode against all five
9 counterclaims made by the Defendants: 1) Constructive Eviction, 2) Breach of Contract, 3) Breach
10 of the Covenant of Good Faith and Fair Dealing, 4) Tortious Interference, and 5) Negligent
11 Supervision. At the February 28 hearing, Mr. Browder confirmed that the Defendants were not
12 seeking reconsideration of the Order and Judgment as to their tortious interference or negligent
13 supervision claims. Instead, the Defendants were moving the Court to reconsider its holding
14 granting summary judgment in favor of Boise Mode's three claims, and against the Defendants'
15 Constructive Eviction, Breach of Contract, and Breach of the Covenant of Good Faith and Fair
16 Dealing claims, as well as amending the corresponding Judgment.

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18
19 The Court took the motion under advisement and now grants the Defendants' Motion.

20 **BACKGROUND**

21 On or about November 3, 2006, Boise Mode and DPP entered into a commercial lease
22 agreement for certain space within a building owned by Boise Mode. The building is located at 800
23 W. Idaho St, Boise, Idaho 83702. The lease term ran through May 31, 2010. Also on or about
24 November 3, 2006, Timothy Pace personally guaranteed DPP's obligations under the lease by
25

1 signing a “Personal Guarantee of Lease.” The personal guarantee stated that should DPP fail to pay
2 any of its obligations under the lease, Pace would pay Boise Mode the amount due. The personal
3 guarantee also stated that any obligations incurred under the lease “shall not be reduced by any
4 claim of setoff or counterclaim of [DPP] or [Pace], loss of contribution from...[Pace] or any
5 settlement or compromise between [DPP] and [Boise Mode].” *Id.*

6 At some point in 2008, DPP began expressing unhappiness with its tenancy. Temporary rent
7 abatements were discussed. The Record includes numerous emails and letters exchanged between
8 the parties in 2008 and 2009 in which Pace expresses his discontent with elements of DPP’s
9 tenancy. By December 2008, DPP stopped paying the required rent.
10

11 Pursuant to Idaho Code § 6-303(2), on October 5, 2009, Boise Mode notified DPP that it
12 had three (3) days to pay the full amount of back rent due or vacate the premises. DPP did not pay
13 the back rent, and, by November 2009, DPP vacated the premises.

14 Boise Mode filed the Verified Complaint in this lawsuit in January 2010. DPP answered and
15 filed its counterclaim in February 2010. The parties’ first appearance before this Court was the
16 December 22, 2010 hearing during which they argued the Summary Judgment motion. The
17 Defendants filed the current motion on January 19, 2011, exactly fourteen (14) days after the
18 Judgment was entered.
19

20 **IDAHO RULE OF CIVIL PROCEDURE 59(E): MOTION TO ALTER OR AMEND**

21 As a means to circumvent an appeal, I.R.C.P. 59(e) provides a trial court a mechanism to
22 correct legal and factual errors occurring in proceedings before it. *First Security Bank v. Neibaur*, 98
23 Idaho 598, 603, 570 P.2d 276, 281 (1977). Specifically, I.R.C.P. 59(e) allows a party to move the
24 Court to alter or amend a judgment. An order denying a motion to alter or amend judgment will be
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1 reviewed for an abuse of discretion. *Slaathburg v. Allstate Ins.*, 132 Idaho 705, 707, 979 P.2d 107,
2 109 (1999). So long as the trial court recognized the matter as discretionary, acted within the outer
3 boundaries of the court's discretion, and reached its conclusion through an exercise of reason, this
4 Court will not disturb the decision on appeal. *Sun Valley Shopping Center, Inc. v. Idaho Power Co.*,
5 119 Idaho 87, 94, 803 P.2d 993, 1000 (1991).

6 **IDAHO RULE OF CIVIL PROCEDURE 11(A)(2)(B): MOTION FOR RECONSIDERATION**

7 The Idaho Supreme Court has repeatedly held that I.R.C.P. 11(a)(2)(B) provides a district
8 court with authority to reconsider and vacate interlocutory orders so long as final judgment has not
9 been entered. *Elliott v. Darwin Neibaur Farms*, 138 Idaho 774, 785, 69 P.3d 1035, 1046 (2003). If
10 final judgment has been entered, an Order may still be reconsidered for up to fourteen (14) days.
11 I.R.C.P. 11(a)(2)(B). District Courts may reconsider earlier rulings *sua sponte*. See *Elliott*, 138 Idaho
12 at 784, 69 P.3d at 1045.

13 **SUMMARY JUDGMENT STANDARD**

14 “Summary judgment is appropriate if the pleadings, affidavits, and discovery documents on
15 file with the court . . . demonstrate no material issue of fact such that the moving party is entitled to
16 a judgment as a matter of law.” *Brewer v. Washington RSA No. 8 Ltd. Partnership*, 145 Idaho 735,
17 738, 184 P.3d 860, 863 (2008) (quoting *Badell v. Beeks*, 115 Idaho 101, 102, 765 P.2d 126, 127
18 (1988) (citing I.R.C.P. 56(c)). The burden of proof is on the moving party to demonstrate the
19 absence of a genuine issue of material fact. *Rouse v. Household Finance Corp.*, 144 Idaho 68, 70,
20 156 P.3d 569, 571 (2007) (citing *Evans v. Griswold*, 129 Idaho 902, 905, 935 P.2d 165, 168
21 (1997)). In construing the facts, the court must draw all reasonable factual inferences in favor of the
22 non-moving party. *Mackay v. Four Rivers Packing Co.*, 145 Idaho 408, 410, 179 P.3d 1064, 1066
23 (2008).
24
25
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1 Idaho Code § 6-320 is a statutory version of the implied warranty of habitability. *Worden v.*
2 *Ordway*, 105 Idaho 719, 721, 672 P.2d 1049, 1051 (1983). “Under that section, a landlord can be
3 liable for damages for failure to keep the premises in good repair, or for any other breach of the lease
4 or rental agreement which materially affects the health and safety of the tenant.” *Id.* The code section
5 enumerates six specific things for which a landlord might be liable:

- 6 (1) Failure to provide reasonable waterproofing and weather protection of the
7 premises;
- 8 (2) Failure to maintain in good working order electrical, plumbing, heating,
9 ventilating, cooling, or sanitary facilities supplied by the landlord;
- 10 (3) Maintaining the premises in a manner hazardous to the health or safety of the
11 tenant;
- 12 (4) Failure to return a security deposit as and when required by law;
- 13 (5) Breach of any term or provision of the lease or rental agreement materially
14 affecting the health and safety of the tenant, whether explicitly or implicitly a part
15 thereof; and
- 16 (6) Failure to install approved smoke detectors in each dwelling unit.

17 The statute goes on to require a tenant to give his landlord three days written notice in order
18 to assert a claim under this code section. I.C. § 6-320

19 In *Worden v. Ordway*, the Idaho Supreme Court held that subsection five provided a cause
20 of action for a former tenant who had been locked out of her apartment by her landlord, even though
21 she had partially moved out already. That Court’s holding intimated that any substantial interference
22 with a tenant’s use of a leased space, even if that interference did not materially affect the health and
23 safety of a tenant, might appropriately give rise to a cause of action under this code section. 105
24 Idaho at 722, 672 P.2d at 1052. However, the *Worden* Court’s holding does not state that *all* breach
25 of contract causes of action brought by tenants against landlords must be brought under this code
26 section. Indeed, many issues which lead to landlord/tenant conflicts might constitute breach even
though they do not “materially affect the health and safety of a tenant.”

1 Upon reconsideration, this Court believes that the alleged breaches in this case are not the
2 kind which materially affect the health and safety of a tenant and, therefore, I.C. § 6-320 is not
3 implicated. The Record indicates that the Defendants' primary complaints with their tenancy involve
4 after-business hours' noise and building construction which took longer than originally anticipated,
5 neither of which invokes health or safety hazards. Because the Defendants' causes of action do not
6 fall under the purview of I.C. § 6-320, the Defendants would not have been responsible to provide
7 the three-day, written notice that is required by that section.

8 Therefore, in its discretion, this Court amends its December 27, 2010 Order which held that
9 the Defendants' causes of action fell under the purview of I.C. § 6-320 and that the Defendants were
10 required to have provided three-day written notice to Boise Mode. The Court now reverses itself on
11 these issues and holds that I.C. § 6-320 did not apply and notice was not required.

12 The ultimate holding of this Court's Order, that Boise Mode was granted summary judgment
13 as to all of its claims and as against all of the Defendants' claims, was predicated on the Court's
14 finding that I.C. § 6-320 applied to the Defendants' constructive eviction and breach claims.
15 Therefore, the Court must now re-evaluate whether summary judgment was proper considering I.C. §
16 6-320 does not apply. In conducting this analysis, the Court must construe the facts in the record so
17 that all reasonable factual inferences are drawn in favor of the non-moving party, the Defendants.

18 Upon review of the Record, the Court finds that genuine issues of material fact do exist
19 which make summary judgment inappropriate at this time. The record shows that DPP did in fact
20 stop paying rent, and the record includes the Guarantee which clearly states that Pace personally
21 guaranteed DPP's responsibilities under the lease. However, the record also includes Pace's repeated
22 complaints to Boise Mode about DPP's tenancy. When drawing all reasonable factual inferences in
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1 favor of the Defendants, the record indicates that DPP stopped paying rent and abandoned the
2 premises for reasons related to those complaints. Genuine issues of material fact remain as to why
3 the Defendants breached their obligation to Boise Mode, and as to whether Boise Mode breached its
4 obligations under the lease. These issues make summary judgment inappropriate at this time;
5 therefore, the Court's earlier Order granting summary judgment is now reversed. This new holding
6 voids the Judgment.

7
8 **SUMMARY**


9 The Defendants' Motion is GRANTED. The December 27, 2010 Order is reversed so that
10 Summary Judgment is denied as to Boise Mode's claims of (1) Breach of Contract, (2) Breach of the
11 Covenant of Good Faith and Fair Dealing, and (3) Breach of Personal Guaranty of Lease. Summary
12 Judgment is also denied as against the Defendants' claims of (1) Constructive Eviction, (2) Breach of
13 Contract, and (3) Breach of the Covenant of Good Faith and Fair Dealing. Therefore, these claims
14 are reinstated.

15 For clarification's sake, the Court reiterates that Summary Judgment as against the
16 Defendants' claims of Tortious Interference and Negligent Supervision remains granted.

17 Finally, the Court's January 5, 2011 Judgment awarding Boise Mode \$95,975.96, plus post-
18 judgment interest, and dismissing DPP's counterclaim with prejudice is voided.
19

20 IT IS SO ORDERED.

21 Dated this 20th day of March, 2011.

22
23 
24 _____
25 Ronald J. Wilber
26 DISTRICT JUDGE

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CERTIFICATE OF MAILING

I, HEREBY CERTIFY that on the 3 day of MARCH, 2011, I caused a true and correct copy of the foregoing ORDER GRANTING DEFENDANTS/COUNTERCLAIMANT DPP AND PACE'S MOTION to be served by the method indicated below, and addressed to the following:

Steven F. Schossberger
Matt Gordon
HAWLEY TROXELL ENNIS & HAWLEY, LLP
877 W Main St, Ste 1000
PO Box 1617
Boise, ID 83701-1617
Tel: (208) 344-6000

- U.S. Mail, Postage Prepaid
- Hand Delivered
- Overnight Mail
- Facsimile

John J. Browder
LOPEZ & KELLY, PLLC
413 W Idaho St, Ste 100
PO Box 856
Boise, ID 83701-0856
Tel: (208) 342-4300
Fax: (208) 342-4344

- U.S. Mail, Postage Prepaid
- Hand Delivered
- Overnight Mail
- Facsimile

CHRISTOPHER D. RICH
Clerk of the District Court
Ada County, Idaho

By  **INGA JOHNSON**
Deputy Clerk

RECEIVED

APR 14 2011

Ada County Clerk

NO. _____ FILED _____
A.M. 1109 P.M. _____

APR 14 2011

CHRISTOPHER D. RICH, Clerk
By JAMIE RANDALL
DEPUTY

Michael E. Kelly, ISB #4351
John J. Browder, ISB #7531
LOPEZ & KELLY, PLLC
PO Box 856
Boise, Idaho 83701
Telephone: (208) 342-4300
Facsimile: (208) 342-4344
7008.001/MTC.wpd

ORIGINAL

Attorneys for Defendants/Counterclaimant

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

BOISE MODE, LLC, an Illinois limited liability company, successor-in-interest to Mode Building Limited Partnership, an Idaho limited partnership,

Plaintiff,

vs.

DONAHOE PACE & PARTNERS LTD, an Idaho corporation; and TIMOTHY PACE,

Defendants.

DONAHOE PACE & PARTNERS LTD, an Idaho corporation,

Counter-Claimant,

vs.

BOISE MODE, LLC, an Illinois limited liability company, successor-in-interest to Mode Building Limited Partnership, an Idaho limited partnership,

Counter-Defendant.

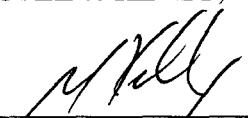
Case No. CV OC 1001093

DEFENDANTS/COUNTERCLAIMANT'S MOTION TO COMPEL

COME NOW, Defendants/Counterclaimant's, DONAHOE PACE & PARTNERS LTD, an Idaho corporation; and TIMOTHY PACE, by and through their attorneys of record, Lopez & Kelly, PLLC, and moves this Court for an Order compelling the Plaintiff to provide full, complete, non-evasive and accurate Answers and Responses to Interrogatories No. 18 and 19, as well as Request for Production No. 3 within ten days of the entry of the Order to Compel. Defendants/Counterclaimant request an award of reasonable costs and attorneys' fees associated with securing the Order to Compel.

DATED this 13 day of April, 2011

LOPEZ & KELLY, PLLC


By: 
Michael E. Kelly, Of the Firm
Attorneys for Defendants

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 13 day of April, 2011, I served a true and correct copy of the foregoing by delivering the same to each of the following individuals, by the method indicated below, addressed as follows:

Steven F. Schossberger
HAWLEY, TROXELL, ENNIS & HAWLEY
877 Main Street, Suite 1000
PO Box 1617
Boise, ID 83701-1617
Telephone: (208) 344-6000
Facsimile: (208) 954-5260
sschossberger@hawleytroxell.com

- U.S. Mail
- Hand-Delivered
- Overnight mail
- Facsimile


Michael E. Kelly

NO. 1109 FILED
A.M. 1109 P.M. _____

APR 14 2011

CHRISTOPHER D. RICH, Clerk
By JAMIE RANDALL
DEPUTY

ORIGINAL

Michael E. Kelly, ISB #4351
John J. Browder, ISB #7531
LOPEZ & KELLY, PLLC
PO Box 856
Boise, Idaho 83701
Telephone: (208) 342-4300
Facsimile: (208) 342-4344
7008.001/MTC.NOH.wpd

Attorneys for Defendants/Counterclaimant

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

BOISE MODE, LLC, an Illinois limited liability company, successor-in-interest to Mode Building Limited Partnership, an Idaho limited partnership,

Plaintiff,

vs.

DONAHOE PACE & PARTNERS LTD, an Idaho corporation; and TIMOTHY PACE,

Defendants.

DONAHOE PACE & PARTNERS LTD, an Idaho corporation,

Counter-Claimant,

vs.

BOISE MODE, LLC, an Illinois limited liability company, successor-in-interest to Mode Building Limited Partnership, an Idaho limited partnership,

Counter-Defendant.

Case No. CV OC 1001093

NOTICE OF HEARING


TO: PLAINTIFF AND ITS ATTORNEY OF RECORD:

YOU WILL PLEASE TAKE NOTICE that Defendants/Counter-Claimant, DONAHOE PACE & PARTNERS LTD, an Idaho corporation; and TIMOTHY PACE, will call on for hearing its Motion To Compe on Monday, the 23rd day of May, 2011, at the hour of 11:00 a.m., or as soon thereafter as counsel may be heard, before the Honorable Ronald J. Wilper, Ada County Courthouse, 200 West Front Street, Boise, ID 83702.

DATED this 13 day of April, 2011

LOPEZ & KELLY, PLLC

By: _____


Michael E. Kelly, Of the Firm
Attorneys for Defendants

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 13 day of April, 2011, I served a true and correct copy of the foregoing by delivering the same to each of the following individuals, by the method indicated below, addressed as follows:

Steven F. Schossberger
HAWLEY, TROXELL, ENNIS & HAWLEY
877 Main Street, Suite 1000
PO Box 1617
Boise, ID 83701-1617
Telephone: (208) 344-6000
Facsimile: (208) 954-5260
sschossberger@hawleytroxell.com

- U.S. Mail
- Hand-Delivered
- Overnight mail
- Facsimile



Michael E. Kelly

Michael E. Kelly, ISB #4351
John J. Browder, ISB #7531
LOPEZ & KELLY, PLLC
413 W. Idaho Street, Suite 100
PO Box 856
Boise, Idaho 83701
Telephone: (208) 342-4300
Facsimile: (208) 342-4344
7200.011/MTC Affidavit.wpd

NO. _____
FILED 4/12
A.M. _____ P.M.

APR 14 2011

CHRISTOPHER D. RICH, Clerk
By JAMIE RANDALL
DEPUTY

Attorneys for Defendant/Counterclaimant

ORIGINAL

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

BOISE MODE, LLC, an Illinois limited liability company, successor-in-interest to Mode Building Limited Partnership, an Idaho limited partnership,

Plaintiff,

vs.

DONAHOE PACE & PARTNERS LTD, an Idaho corporation; and TIMOTHY PACE,

Defendant.

DONAHOE PACE & PARTNERS LTD, an Idaho corporation,

Counter-Claimant,

vs.

BOISE MODE, LLC, an Illinois limited liability company, successor-in-interest to Mode Building Limited Partnership, an Idaho limited partnership,

Counter-Defendant.

Case No. CV OC 1001093

**AFFIDAVIT OF COUNSEL
IN SUPPORT OF
DEFENDANTS/COUNTERCLAIMANT'S
MOTION TO COMPEL**

for Production of Documents No. 3, copies of which are collectively attached and incorporated hereto as Exhibit "A." The Plaintiff/Counterdefendant objected to these discovery requests and/or otherwise did not substantively respond to them. *See* Exhibit A;

5. On Wednesday, November 24, 2010, at approximately 5:00 p.m., the Plaintiff/Counterdefendant served the following documents on the Defendants/Counterclaimant: (1) Motion for Summary Judgment on the Verified Complaint; (2) Motion for Summary Judgment on Counter-Claimant's Counterclaims; (3) Memorandum in Support of Plaintiff's Motion for Summary Judgment on the Verified Complaint; (4) Memorandum in Support of Motion for Summary Judgment on Defendant's Counterclaims; (5) Affidavit of Steven F. Schosssberg, Esq. (sic) In Support of Plaintiff's Motion for Summary Judgment; (6) Affidavit of David L. Baum In Support of Plaintiff's Motion for Summary Judgment; (7) Affidavit of Angela Aeschliman, CPM, CCIM In Support of Plaintiff's Motion for Summary Judgment; and (8) Affidavit of Christopher Kiefor, CPA, In Support of Plaintiff's Motion for Summary Judgment;

6. On December 27, 2010, the Court granted the Motions for Summary Judgment in their entirety and final judgment was subsequently entered (the "Judgment") on January 5, 2011.

7. After entry of the Judgment, the Defendants/Counterclaimant filed a Motion to Amend both the Court's order granting the Motions for Summary Judgment to Plaintiff/Counterdefendant and the corresponding Judgment;

8. In its March 2, 2011, Order Granting Defendants/Counterclaimant Donahoe Pace & Partners, Ltd. and Timothy Pace's Motion, the Court reversed the Motions for Summary Judgment in favor of the Plaintiff/Counterdefendant except that it did not reverse summary judgment in favor of the Counterclaimant's Tortious Interference and Negligent Supervision claims. As such, only those claims are dismissed;

AFFIDAVIT OF COUNSEL IN SUPPORT OF DEFENDANTS/COUNTERCLAIMANT'S MOTION TO COMPEL-3


9. In a letter to Plaintiff/Counterdefendant dated March 15, 2011, undersigned counsel requested Plaintiff/Counterdefendant to fully, completely and accurately answer Interrogatories Nos. 18 and 19, and Request for Production No. 3 within 10 business days. See March 15, 2011, letter from Michael E. Kelly to Steven F. Schossberger, a copy of which is attached hereto as Exhibit "B," by which your Affiant certifies that a good faith attempt to confer has been made to secure the Plaintiff's full, accurate and non-evasive discovery responses;

10. Plaintiff/Counterdefendant has not responded to undersigned counsel's March 15, 2011, letter and has not provided full, accurate and non-evasive responses to Interrogatories Nos. 18 and 19, and Request for Production No. 3;

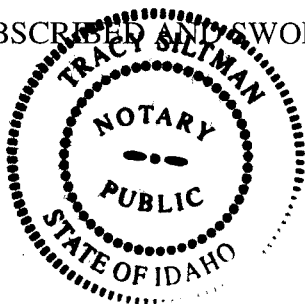
11. Defendants/Counterclaimants have a right to request and be provided full, accurate and non-evasive responses to Interrogatories Nos. 18 and 19, and Request for Production No. 3 pursuant to Idaho Rules of Civil Procedure 33(a),(b), 34(a), (b) and, therefore, request from the Court an order compelling the same.

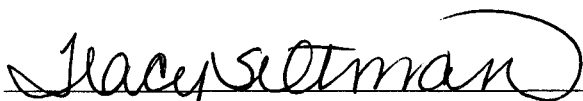
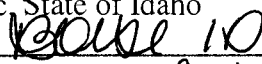
DATED this 14 day of April, 2011

LOPEZ & KELLY, PLLC

By: 
Michael E. Kelly, Of the Firm
Attorneys for Defendants/Counter-Claimant

SUBSCRIBED AND SWORN to before me this 14th day of April, 2011.



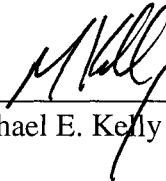

Notary Public, State of Idaho
Residing at 
My Commission expires 8-6-16

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 14 day of April, 2011, I served a true and correct copy of the foregoing by delivering the same to each of the following individuals, by the method indicated below, addressed as follows:

Steven F. Schossberger
HAWLEY, TROXELL, ENNIS & HAWLEY
877 Main Street, Suite 1000
PO Box 1617
Boise, ID 83701-1617
Telephone: (208) 344-6000
Facsimile: (208) 954-5260
sschossberger@hawleytroxell.com

- U.S. Mail
- Hand-Delivered
- Overnight mail
- Facsimile



Michael E. Kelly

EXHIBIT A

RECEIVED

MAY 10 2010

Steven F. Schossberger, ISB No. 5358
HAWLEY TROXELL ENNIS & HAWLEY LLP
877 Main Street, Suite 1000
P.O. Box 1617
Boise, ID 83701-1617
Telephone: 208.344.6000
Facsimile: 208.954.5260
Email: sschossberger@hawleytroxell.com

Attorneys for Plaintiff/Counterdefendant Boise Mode, LLC,
successor-in-interest to Mode Building Limited Partnership

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

BOISE MODE, LLC, an Illinois limited liability company, successor-in-interest to Mode Building Limited Partnership, an Idaho limited partnership,

Plaintiff,

vs.

DONAHOE PACE & PARTNERS LTD, an Idaho corporation; and TIMOTHY PACE,

Defendants.

DONAHOE PACE & PARTNERS LTD, an Idaho corporation,

Counterclaimant,

vs.

BOISE MODE, LLC, an Illinois limited liability company, successor-in-interest to Mode Building Limited Partnership, an Idaho

Case No. CV OC 1001093

PLAINTIFF/COUNTERDEFENDANT'S ANSWERS TO DEFENDANT/COUNTERCLAIMANT'S FIRST SET OF INTERROGATORIES

PLAINTIFF/COUNTERDEFENDANT'S ANSWERS TO DEFENDANT/COUNTERCLAIMANT'S FIRST SET OF INTERROGATORIES - 1

limited partnership,)
)
 Counterdefendant.)
 _____)

TO: DONAHOE PACE & PARTNERS LTD AND TIMOTHY PACE AND THEIR
 COUNSEL OF RECORD

COMES NOW Boise Mode LLC, Plaintiff/Counterdefendant ("Plaintiff") in the
 above-entitled action, by and through its counsel of record, Hawley Troxell Ennis & Hawley
 LLP, and, in accordance with the requirements of Rule 33 of the Idaho Rules of Civil Procedure,
 hereby files its response to Defendant/Counter-Claimant's First Set of Interrogatories.

INTERROGATORIES

GENERAL OBJECTIONS

The following General Objections apply to each and every Interrogatory and form an
 integral part of Plaintiff's response to each:

1. Plaintiff objects to the Interrogatories, including the definitions and instructions
 contained therein, to the extent that they are overly broad, unduly burdensome and/or seeking
 confidential information not pertinent to the present dispute between the parties.
2. Plaintiff objects to the Interrogatories, including the definitions and instructions
 contained therein, to the extent that they purport to impose requirements different from or in
 addition to the requirements of the Idaho Rules of Civil Procedure.
3. Plaintiff objects to the Interrogatories to the extent that they seek information that
 is subject to and protected by the attorney-client privilege, the work-product doctrine. The
 production of any information is without waiver of any privilege or claim of confidentiality. In
 the event any privileged information is produced by Plaintiff, its production is inadvertent and
 does not constitute a waiver of any privilege or immunity.

PLAINTIFF/COUNTERDEFENDANT'S ANSWERS TO
 DEFENDANT/COUNTERCLAIMANT'S FIRST SET OF INTERROGATORIES - 2

4. To the extent Plaintiff answers the Interrogatories, that answer shall be by and on behalf of Plaintiff and will be limited to information currently available to it. Plaintiff reserves the right to supplement or modify the information contained in these responses, including objections, should additional or different information become available. Plaintiff reserves the right to make use of, or to introduce in Court, documents or information responsive to the Interrogatories but discovered subsequent to the date of Plaintiff responses, including, but not limited to, any documents obtained during discovery.

5. Plaintiff has not yet completed discovery in this action and has not yet completed preparation for any hearings or trial. Accordingly, Plaintiff reserves the right to supplement, revise, correct, add to or clarify the objections, answers or responses set forth herein and any production made pursuant thereto. If Plaintiff identifies responsive documents or information at a future date, it reserves the right at that time to amend its objections, answers or responses and reserves the right to evaluate whether any privilege applies to those documents or information and to assert such privilege. Plaintiff also expressly reserves the right to redact documents produced in response to the Interrogatories.

6. These General Objections are incorporated by reference into each and every answer below to the extent applicable. Various objections may be referred to specifically in the answers below for purposes of clarity. However, failure to incorporate specifically an objection should not be construed as a waiver of any such objection.

SPECIFIC OBJECTIONS AND RESPONSES TO INTERROGATORIES

INTERROGATORIES

INTERROGATORY NO. 1: State the name, address and telephone number of all employees and/or agents involved in the transactions and events which are the subject of the pleadings.

ANSWER TO INTERROGATORY NO. 1: Plaintiff objects to this Interrogatory on the grounds that it is compound, vague, and ambiguous. Subject to and without waiving the foregoing objections and the General Objections, Plaintiff responds as follows:

Person	Contact Information
David Baum	C/O Hawley Troxell

INTERROGATORY NO. 2: Identify all persons responsible for furnishing any materials or information used to complete these Interrogatories.

ANSWER TO INTERROGATORY NO. 2: Plaintiff objects to this Interrogatory to the extent that it seeks information that is subject to and protected by the attorney-client privilege and/or the work-product doctrine. Subject to and without waiving the foregoing objections, Christopher Kiefer of Watermark Property Management.

INTERROGATORY NO. 3: State the name, address and telephone number of all persons who you believe may have knowledge or relevant information concerning each claim or defense disclosed in the Complaint and Answer.

ANSWER TO INTERROGATORY NO. 3: Plaintiff objects to this Interrogatory on the grounds that it is compound, vague, and ambiguous. Subject to and without waiving the foregoing objections, pursuant to I.R.C.P. 33(c), see the documents produced in this matter.

PLAINTIFF/COUNTERDEFENDANT'S ANSWERS TO
DEFENDANT/COUNTERCLAIMANT'S FIRST SET OF INTERROGATORIES - 4

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INTERROGATORY NO. 4: Identify and list each document you believe may be relevant to each separate claim or defense disclosed in the Complaint and Answer. As to each of the documents identified, please provide the following:

- a. The location of the documents.
- b. The name, address, and telephone number of the individual with the custody or control over the documents.

ANSWER TO INTERROGATORY NO. 4: Plaintiff objects to this Interrogatory on the grounds that it is premature, given that discovery is ongoing. Subject to, and without waiving, the foregoing objections and the General Objections, see the exhibits attached to the Verified Complaint. Plaintiff may use any document produced by Defendant/Counterclaimant as evidence in this action. Pursuant to I.R.C.P. 33(c), see the documents produced in this matter.

Plaintiff reserves the right to supplement its response.

INTERROGATORY NO. 5: Do you contend there was a breach of the contract(s) which is (are) the subject of the pleadings? If so, for each breach, describe and give the date of every act or omission that you claim is a breach of the contract.

ANSWER TO INTERROGATORY NO. 5: See Verified Complaint, ¶¶ 7-9.

INTERROGATORY NO. 6: Do you contend there was a failure to pay money or debt when due? If so, for each contention of monies or debt being due, describe and specifically identify the monies or amounts due. Including the principal amount, the interest, and any other charges in your description.

ANSWER TO INTERROGATORY NO. 6: See Verified Complaint, Exhibit B, which amounts continue to accrue under the terms of the Lease through May 31, 2010.

INTERROGATORY NO. 7: Provide a detailed computation and/or disclosure of the amount you allege you are owed, and/or the contract performance or benefit you believe you are entitled to, and which you have not been provided. Identify all documents that support your calculation and/or disclosure and state the name of the person who has custody and control over the documents.

ANSWER TO INTERROGATORY NO. 7: See Answer to Interrogatory No. 6; Christopher Kiefor.

INTERROGATORY NO. 8: Is any contract alleged in the pleadings ambiguous? If so, identify each ambiguous contract, specifically identifying ambiguous term or provision, and state why it is ambiguous, and identify all documents that support your contention of ambiguity.

ANSWER TO INTERROGATORY NO. 8: Objection: Plaintiff has not alleged that any term of the Lease is ambiguous in the Verified Complaint, and Defendant/Counterclaimant has not asserted an affirmative defense that any term of the Lease is ambiguous.

INTERROGATORY NO. 9: For each contract alleged in the pleadings:

- a. Identify all documents that are part of the contract and for each state the name, address, and telephone number of each person who has the document.
- b. State each part of the contract not in writing, the name, address, and telephone number of each person agreeing to that provision and the date the part of the contract was made.
- c. Identify all documents that evidence each part of the contract not in writing and for each state the name, address, and telephone number of each person who has the document.
- d. Identify all documents that are part of each modification to the contract, and for each state the name, address, and telephone number of each person who has the document.

e. State each modification not in writing, the date, and the name, address and telephone number of each person agreeing to the modification, and the date the modification was made.

ANSWER TO INTERROGATORY NO. 9: See Answer to Interrogatory No. 4.

INTERROGATORY NO. 10: Do you contend that the Defendant/Counter-Claimant has made an admission or statement against interest, whether in writing, oral or recorded, regarding the events and circumstances giving rise to your Verified Complaint? If so, state? [sic]

- A. The name of the person making the statement or admission.
- B. The date of the statement or admission.
- C. The name and last known address of a person now in possession of a written or recorded statement.

ANSWER TO INTERROGATORY NO. 10: Plaintiff objects to this Interrogatory on the grounds that it is premature, given that discovery is ongoing. Subject to, and without waiving, the foregoing objections and the General Objections, see the exhibits attached to the Verified Complaint, and pursuant to I.R.C.P. 33(c), see the documents produced in this matter.

INTERROGATORY NO. 11: Please identify all facts that you contend support your First Affirmative Defense that the Counterclaim fails to state a claim against Plaintiff/Counter-Defendant upon which relief can be granted, and should be dismissed pursuant to Rule 12(b)(6) of the Idaho Rules of Civil Procedure.

ANSWER TO INTERROGATORY NO. 11: Plaintiff objects to this Interrogatory to the extent that it seeks information that is subject to and protected by the attorney-client privilege and/or the work-product doctrine. Plaintiff further objects to this Interrogatory on the grounds that it is premature, given that discovery is ongoing, and that the Interrogatory purports to require

PLAINTIFF/COUNTERDEFENDANT'S ANSWERS TO
DEFENDANT/COUNTERCLAIMANT'S FIRST SET OF INTERROGATORIES - 7

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Plaintiff to identify all facts or evidence with respect to a particular topic or issue without the benefit of sufficient discovery, investigation and evaluation. Subject to and without waiving the foregoing objections and the General Objections, Plaintiff contends that the Answer to the Counterclaim clearly speak for itself.

Plaintiff reserves the right to supplement its response.

INTERROGATORY NO. 12: Please identify all facts that you contend support your Second Affirmative Defense that the Counter-Claimant is barred from maintaining its action based upon the doctrine of estoppel.

ANSWER TO INTERROGATORY NO. 12: Plaintiff objects to this Interrogatory to the extent that it seeks information that is subject to and protected by the attorney-client privilege and/or the work-product doctrine. Plaintiff further objects to this Interrogatory on the grounds that it is premature, given that discovery is ongoing, and that the Interrogatory purports to require Plaintiff to identify all facts or evidence with respect to a particular topic or issue without the benefit of sufficient discovery, investigation and evaluation. Subject to and without waiving the foregoing objections and the General Objections, Plaintiff contends that the Answer to the Counterclaim clearly speak for itself.

Plaintiff reserves the right to supplement its response.

INTERROGATORY NO. 13: Please identify all facts that you contend support your Third Affirmative Defense that the Counter-Claimant is barred from maintaining its action against the Counter-Defendant because it has failed to mitigate the damages to which it asserts it is entitled.

ANSWER TO INTERROGATORY NO. 13: Plaintiff objects to this Interrogatory to the extent that it seeks information that is subject to and protected by the attorney-client privilege

PLAINTIFF/COUNTERDEFENDANT'S ANSWERS TO
DEFENDANT/COUNTERCLAIMANT'S FIRST SET OF INTERROGATORIES - 8

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and/or the work-product doctrine. Plaintiff further objects to this Interrogatory on the grounds that it is premature, given that discovery is ongoing, and that the Interrogatory purports to require Plaintiff to identify all facts or evidence with respect to a particular topic or issue without the benefit of sufficient discovery, investigation and evaluation. Subject to and without waiving the foregoing objections and the General Objections, Plaintiff contends that the Answer to the Counterclaim clearly speak for itself.

Plaintiff reserves the right to supplement its response.

INTERROGATORY NO. 14: Please identify all facts that you contend support your Fourth Affirmative Defense that the Counter-Claimant is barred from maintaining its action against Plaintiff/Counter-Defendant because Plaintiff/Counter-Defendant's breach of contract, if any, is excused by Counter-Claimant's breach of contract.

ANSWER TO INTERROGATORY NO. 14: Plaintiff objects to this Interrogatory to the extent that it seeks information that is subject to and protected by the attorney-client privilege and/or the work-product doctrine. Plaintiff further objects to this Interrogatory on the grounds that it is premature, given that discovery is ongoing, and that the Interrogatory purports to require Plaintiff to identify all facts or evidence with respect to a particular topic or issue without the benefit of sufficient discovery, investigation and evaluation. Subject to and without waiving the foregoing objections and the General Objections, Plaintiff contends that the Verified Complaint and Answer to the Counterclaim clearly speak for itself.

Plaintiff reserves the right to supplement its response.

INTERROGATORY NO. 15: Please identify everything that the Plaintiff/Counter-Defendant did to mitigate its damages, if any, that you allege Defendants/Counter-Claimant caused.

PLAINTIFF/COUNTERDEFENDANT'S ANSWERS TO
DEFENDANT/COUNTERCLAIMANT'S FIRST SET OF INTERROGATORIES - 9

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ANSWER TO INTERROGATORY NO. 15: Plaintiff posted for lease signs, listed the property with a commercial broker, and recently signed a new tenant. The new tenant is Xtra Airways.

INTERROGATORY NO. 17 [sic]: Since the commencement of the Lease:

a. Identify each individual or entity who has provided property management services for the Plaintiff/Counter-Defendant.

b. For each individual or entity who has provided property management services for the Plaintiff/Counter-Defendant since the commencement of the Lease, explain all duties and tasks for which the individual or entity was responsible.

c. For each individual or entity who has provided property management services for the Plaintiff/Counter-Defendant since the commencement of the Lease, state whether the individual or entity was an employee of the Plaintiff/Counter-Defendant or an independent contractor. If the individual or entity who has provided property management services for the Plaintiff/Counter-Defendant since the commencement of the Lease is neither an employee of the Plaintiff/Counter-Defendant or an independent contractor, please explain in full detail the relationship between the Plaintiff/Counter-Defendant and the individual or entity providing property management services for the Plaintiff/Counter-Defendant.

d. For each individual or entity who has provided property management services for the Plaintiff/Counter-Defendant since the commencement of the Lease, state the dates that said individual or entity provided property management services for the Plaintiff/Counter-Defendant.

ANSWER TO INTERROGATORY NO. 17 [sic]:

Angela Aeschliman – 1030 West Chicago Avenue, Suite 300 Chicago, IL 60642; Phone: 312-275-6020. Daily management, including leasing, collections, deal with vendors, (11/1/08-

Present), employee of Watermark Property Management LLC, the property manager from 12/01/08 to present, and an independent contractor to Plaintiff.

Christopher Kiefor – 1030 West Chicago Avenue, Suite 300 Chicago, IL 60642; Phone: 312-275-3115. Asset management and accounting services - (2/14/06-Present); employee of Watermark Property Management LLC, the Asset manager from 2/14/06 to present, property manager from 12/1/08 to present, and an independent contractor to Plaintiff.

Sidney Rose – 6568 S Federal Way #148, Boise Idaho, 83716; (02/14/06-present), Maintenance person -- contractor name is Mountain Top Maintenance, and an independent contractor to Plaintiff.

Lew Manglos, 755 W Front Street Suite 300, Boise Idaho 83702 Phone: 208-472-2841 Works with property managers of the Mode building. Mr. Manglos helped lease the space to the tenant in 2006. Plaintiff is not sure how much management Mr. Manglos did because Colliers had different people working on the project. Mr. Manglos was employed by Colliers International in Boise, Idaho, when Colliers International held the management contract from 2/14/06 to 11/30/2008.

INTERROGATORY NO. 18 [sic]: Since the commencement of the Lease:

a. Identify each tenant, lessee, subtenant, their agent(s), employee(s) or visitor(s) who has complained to the Plaintiff/Counter-Defendant and/or its agent(s) or employee(s) about noise, disturbances, disruption, interruption or interference of any type or description at 800 West Idaho Street, Boise, Idaho 83702.

b. For each complaint identified in Interrogatory No. 18, subpart (a), describe the nature, type or character of the complaint.

c. For each complaint identified in Interrogatory No. 18, subpart (a), describe what action, if any, the Plaintiff/Counter-Defendant undertook to remedy or resolve the complaint.

ANSWER TO INTERROGATORY NO. 18 [sic]: Plaintiff objects to this Interrogatory on the grounds that it is vague, overly broad, and not relevant and not reasonably calculated to lead to the discovery of admissible evidence. Subject to and without waiving the foregoing objections, see the correspondence from Defendant to Plaintiff in the documents produced in this matter.

INTERROGATORY NO. 19 [sic]: State whether you and The North Face had an agreement or understanding in which you would be penalized if improvements to the portion of 800 West Idaho Street, Boise, Idaho 83702 that The North Face had agreed to lease from you were not completed by a specified date. If so:

a. State the date by which you agreed to have the improvements to the portion of 800 West Idaho Street, Boise, Idaho 83702 that The North Face had agreed to lease were supposed to be completed.

b. State what the penalty would be if you did not complete the improvements by the specified date to the portion of 800 West Idaho Street, Boise, Idaho 83702 that The North Face had agreed to lease.

c. State whether you completed the improvements to the portion of 800 West Idaho Street, Boise, Idaho 83702 that The North Face had agreed to lease by the specified date.

ANSWER TO INTERROGATORY NO. 19 [sic]: Plaintiff objects to this Interrogatory on the grounds that it is not relevant and not reasonably calculated to lead to the discovery of admissible evidence.

INTERROGATORY NO. 20 [sic]: If your response to any of the Requests for Admissions served concurrently herewith is anything but an unqualified admission, please state:

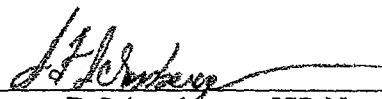
- a. All facts upon which you base your denial or qualified admission;
- b. The name, address and telephone number of each and every person having knowledge of each and every fact disclosed by you in your answer to (a) above; and
- c. A description of each and every document upon which you rely to support your denial or qualified admission.

ANSWER TO INTERROGATORY NO. 20 [sic]: See the responses to the requests for admission.

DATED THIS 10th day of May, 2010.

HAWLEY TROXELL ENNIS & HAWLEY LLP

By



Steven F. Schosberger, ISB No. 5358
Attorneys for Plaintiff/Counterdefendant
Boise Mode, LLC, successor-in-interest to
Mode Building Limited Partnership

VERIFICATION

David L. Baum, being first duly sworn upon oath, deposes and says:

That he is a Member of Baum Development, LLC, the Manager of Boise Mode, LLC the Plaintiff in the above-entitled action; that he has read the within and foregoing Answers to Defendant/Counterclaimant's First Set of Interrogatories; and that the statements therein contained are true to the best of his knowledge and belief.

David L. Baum
David L. Baum

STATE OF Illinois)
) ss.
County of Cook)

I, DRAGICA PERUNAC, a Notary Public, do hereby certify that on this day of May, 2010, personally appeared before me David L. Baum, who, being by me first duly sworn, declared that he is the Manager of Boise Mode, LLC, that he signed the foregoing document as Manager of the company, and that the statements therein contained are true.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal the day and year in this certificate first above written.

Dragica Perunac
Notary Public for Illinois
Residing at 1030 W. Chicago Ave
My commission expires 6-29-2011



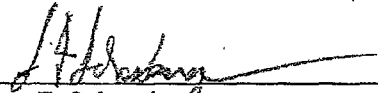
PLAINTIFF/COUNTERDEFENDANT'S ANSWERS TO
DEFENDANT/COUNTERCLAIMANT'S FIRST SET OF INTERROGATORIES - 14

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 10 day of May, 2010, I caused to be served a true copy of the foregoing PLAINTIFF/COUNTERDEFENDANT'S ANSWERS TO DEFENDANT/COUNTERCLAIMANT'S FIRST SET OF INTERROGATORIES by the method indicated below, and addressed to each of the following:

Michael E. Kelly
John J. Browder
LOPEZ & KELLY, PLLC
702 W. Idaho Street, Suite 1100
P.O. Box 856
Boise, ID 83701
[Attorneys for Defendants and Counterclaimant]

U.S. Mail, Postage Prepaid
 Hand Delivered
 Overnight Mail
 E-mail
 Telecopy: 208.342.4344



Steven F. Schossberger

RECEIVED

MAY 10 2010

Steven F. Schossberger, ISB No. 5358
HAWLEY TROXELL ENNIS & HAWLEY LLP
877 Main Street, Suite 1000
P.O. Box 1617
Boise, ID 83701-1617
Telephone: 208.344.6000
Facsimile: 208.954.5260
Email: sschossberger@hawleytroxell.com

Attorneys for Plaintiff/Counterdefendant Boise Mode, LLC,
successor-in-interest to Mode Building Limited Partnership

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

BOISE MODE, LLC, an Illinois limited liability company, successor-in-interest to Mode Building Limited Partnership, an Idaho limited partnership,

Plaintiff,

vs.

DONAHOE PACE & PARTNERS LTD, an Idaho corporation; and TIMOTHY PACE,

Defendants.

DONAHOE PACE & PARTNERS LTD, an Idaho corporation,

Counterclaimant,

vs.

BOISE MODE, LLC, an Illinois limited liability company, successor-in-interest to Mode Building Limited Partnership, an Idaho

Case No. CV OC 1001093

PLAINTIFF/COUNTERDEFENDANT'S RESPONSES TO DEFENDANT/COUNTERCLAIMANT'S FIRST SET OF REQUESTS FOR PRODUCTION OF DOCUMENTS

PLAINTIFF/COUNTERDEFENDANT'S RESPONSES TO DEFENDANT/COUNTERCLAIMANT'S FIRST SET OF REQUESTS FOR PRODUCTION OF DOCUMENTS - 1

limited partnership,)
)
 Counterdefendant.)
)
 _____)

TO: DONAHOE PACE & PARTNERS LTD AND TIMOTHY PACE AND THEIR
 COUNSEL OF RECORD

COMES NOW Boise Mode LLC, Plaintiff/Counterdefendant ("Plaintiff") in the
 above-entitled action, by and through its counsel of record, Hawley Troxell Ennis & Hawley
 LLP, and, in accordance with the requirements of Rule 34 of the Idaho Rules of Civil Procedure,
 hereby files its response to Defendant/Counter-Claimant's First Set of Requests for Production of
 Documents to Plaintiff.

Unless otherwise specified, inspection and copying will be permitted as requested, except
 that some other time and place which is mutually agreeable to the parties may be substituted for
 the time and place specified in the request.

GENERAL OBJECTIONS

The following General Objections apply to each and every Request for Production and
 form an integral part of Plaintiff's response to each:

1. Plaintiff objects to the Document Requests and the definitions and instructions
 contained therein to the extent they are overly broad, unduly burdensome and/or call for
 documents that are obtainable from some other source that is more convenient, less burdensome
 or less expensive.

2. Plaintiff objects to the Document Requests and the definitions and instructions
 contained therein to the extent they seek to impose obligations on Plaintiff beyond those required
 by the Idaho Rules of Civil Procedure.

PLAINTIFF/COUNTERDEFENDANT'S RESPONSES TO
 DEFENDANT/COUNTERCLAIMANT'S FIRST SET OF REQUESTS FOR PRODUCTION
 OF DOCUMENTS - 2

3. Plaintiff objects to the Document Requests to the extent that they seek discovery of information protected by the attorney-client privilege, the work-product doctrine, the business strategies immunity or any other applicable privilege or immunity. Any production of privileged or otherwise protected documents is inadvertent and will not constitute a waiver of any claim of privilege or other protection. Plaintiff reserves the right to obtain the return of inadvertently produced information and to prohibit its use in any manner.

4. Plaintiff objects to the Document Requests to the extent that they seek information that is neither relevant to the claim or defense of any party nor reasonably calculated to lead to the discovery of admissible evidence.

5. These General Objections are incorporated by reference into each and every Response below to the extent applicable. Various objections may be referred to specifically in the Responses below for purposes of clarity. However, failure to incorporate specifically an objection should not be construed as a waiver of any such objection.

SPECIFIC OBJECTIONS AND RESPONSES TO REQUESTS FOR PRODUCTION

REQUEST FOR PRODUCTION NO. 1: Please produce copies of all invoices, bills, statement of charges, document(s) and correspondence that Plaintiff/Counter-Defendant possesses relating to the maintenance and/or cleaning of the 800 West Idaho Street, Boise, Idaho, 83702, Suite 350.

RESPONSE TO REQUEST FOR PRODUCTION NO. 1: Plaintiff objects on the grounds that this request is vague, overly broad, burdensome, not relevant and not reasonably calculated to lead to the discovery of admissible evidence. Subject to and without waiving the foregoing objections, see the documents produced by Plaintiff.

PLAINTIFF/COUNTERDEFENDANT'S RESPONSES TO
DEFENDANT/COUNTERCLAIMANT'S FIRST SET OF REQUESTS FOR PRODUCTION
OF DOCUMENTS - 3

REQUEST FOR PRODUCTION NO. 2: Please produce copies of all documents evidencing any complaint received by you since the commencement of the Lease from any tenant, lessee, sub-tenant, their agent(s), employee(s), or visitor(s) regarding noise, disturbances, disruption, interruption, or interference of any type or description at 800 West Idaho Street, Boise, Idaho 83702.

RESPONSE TO REQUEST FOR PRODUCTION NO. 2: Plaintiff objects on the grounds that this request is vague, overly broad, burdensome, not relevant and not reasonably calculated to lead to the discovery of admissible evidence. Subject to and without waiving the foregoing objections, see the documents produced by Plaintiff.

REQUEST FOR PRODUCTION NO. 3: Please provide copies of all agreements and/or leases between you and The North Face.

RESPONSE TO REQUEST FOR PRODUCTION NO. 3: Plaintiff objects on the grounds that this request is not relevant and not reasonably calculated to lead to the discovery of admissible evidence.

REQUEST FOR PRODUCTION NO. 4: Please produce copies of all documents that you contend prove that the Defendants/Counter-Claimant have made an admission or statement against interest regarding the events and circumstances giving rise to your Verified Complaint.

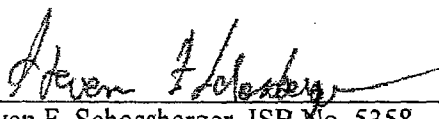
RESPONSE TO REQUEST FOR PRODUCTION NO. 4: See Answer to Interrogatory No. 10.

REQUEST FOR PRODUCTION NO. 5: Please produce copies of all documents that you contend support your calculation of damages and/or the computation of damages set forth in your answer to Interrogatory No. 7.

PLAINTIFF/COUNTERDEFENDANT'S RESPONSES TO
DEFENDANT/COUNTERCLAIMANT'S FIRST SET OF REQUESTS FOR PRODUCTION
OF DOCUMENTS - 4

DATED THIS 15 day of May, 2010.

HAWLEY TROXELL ENNIS & HAWLEY LLP

By 
Steven F. Schossberger, ISB No. 5358
Attorneys for Plaintiff/Counterdefendant
Boise Mode, LLC, successor-in-interest to
Mode Building Limited Partnership


PLAINTIFF/COUNTERDEFENDANT'S RESPONSES TO
DEFENDANT/COUNTERCLAIMANT'S FIRST SET OF REQUESTS FOR PRODUCTION
OF DOCUMENTS - 6

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 10 day of May, 2010, I caused to be served a true copy of the foregoing PLAINTIFF/COUNTERDEFENDANT'S RESPONSES TO DEFENDANT/COUNTERCLAIMANT'S FIRST SET OF REQUESTS FOR PRODUCTION OF DOCUMENTS by the method indicated below, and addressed to each of the following:

Michael E. Kelly
John J. Browder
LOPEZ & KELLY, PLLC
702 W. Idaho Street, Suite 1100
P.O. Box 856
Boise, ID 83701
[Attorneys for Defendants and Counterclaimant]

- U.S. Mail, Postage Prepaid
- Hand Delivered
- Overnight Mail
- E-mail
- Telecopy: 208.342.4344



Steven F. Schossberger

PLAINTIFF/COUNTERDEFENDANT'S RESPONSES TO
DEFENDANT/COUNTERCLAIMANT'S FIRST SET OF REQUESTS FOR PRODUCTION
OF DOCUMENTS - 7

EXHIBIT B

LOPEZ & KELLY PLLC
ATTORNEYS AT LAW
WITH ATTORNEYS LICENSED IN IDAHO
OREGON, NEW YORK & ARIZONA

THOMAS H. LOPEZ
MICHAEL E. KELLY
LOU PICCIONI
JOHN J. BROWDER

413 WEST IDAHO STREET
SUITE 100
PO BOX 856
BOISE, IDAHO 83701

TELEPHONE (208) 342-4300
FACSIMILE (208) 342-4344

March 15, 2011

www.idahodefense.com

Steven F. Schossberger
Hawley Troxell Ennis & Hawley LLP
877 Main Street, Ste. 1000
PO Box 1617
Boise, ID 83701-1617

RE: *Boise Mode LLC v. Donahoe Pace & Partners Ltd.*
Ada County Case No. CV OC 1001093
Our File No. 7008.001

Dear Mr. Schossberger:

In light of the Court's decision to reverse its granting of summary judgment to your client, it would appear this matter is most likely heading for trial. Based on the foregoing, my client has instructed me to offer to resolve this matter by each party executing a mutual release and agreeing to stipulate to dismiss the pending matter with prejudice, along with your client returning my client's \$7,500.00 security deposit on the lease at issue. Based on the current posture of this matter, I believe this is an appropriate resolution to this lawsuit.

Should your client be unwilling to resolve the lawsuit in this manner, and we must move forward with discovery, this letter will also serve as our I.R.C.P. 37(a) meet and confer letter in regard to Plaintiff's answers and responses to the Defendant's First Set of Interrogatories and Requests for Production. Specifically, the answers and responses you have provided to Interrogatory No. 18, Interrogatory No. 19, and Request for Production No. 3 are evasive and incomplete.

In your Answer to Interrogatory No. 18, Boise Mode, LLC simply refers Donahoe Pace & Partners to the documents produced in answer to its Request for Production. Because the documents produced in answer to the Requests for Production only contain complaints lodged from Tim Pace and do not contain evidence that any other tenant ever complained, the implication is that only Donahoe Pace & Partners ever has lodged a complaint. While this may be true, it is unlikely. Boise Mode, LLC should fully answer this interrogatory.

In your answer to Interrogatory No. 19, Boise Mode, LLC objected on the grounds that the interrogatory does not seek information that is relevant or reasonably calculated to lead to discovery

March 15, 2011

- Page 2

of admissible evidence at trial. Whether Boise Mode, LLC had an incentive to expedite tenant improvements in the portion of the Boise Mode building that The North Face was contracted to lease is relevant to the issue of whether or not construction and/or disturbances were occurring at unreasonable times and amounts at the Boise Mode building. Accordingly, Boise Mode, LLC should answer this Interrogatory completely. Similarly, Boise Mode, LLC's objection to the Request for Production No. 3, which requested all agreements and/or leases between Boise Mode, LLC and The North Face lacks merit. As such, Boise Mode, LLC needs to provide the information requested.

While again we would prefer to bring this matter to a resolution; however, should I not hear from you in that regard within the next 10 business days, I expect complete supplemental responses to the above discovery requests in that timeframe. Should I not receive that information as requested, I will have no choice but to file a Motion to Compel.

I look forward to hearing from you.

Very truly yours,



Michael E. Kelly
mek@idahodefense.com

MEK/ts
Schossberger.13.wpd

000559

NC _____ FILED _____
A.M. _____ P.M. 4:27

APR 27 2011

CHRISTOPHER D. RICH, Clerk
By LARA AMES
DEPUTY

Steven F. Schossberger, ISB No. 5358
Matthew Gordon, ISB No. 8554
HAWLEY TROXELL ENNIS & HAWLEY LLP
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mgordon@hawleytroxell.com

Attorneys for Plaintiff/Counterdefendant Boise Mode, LLC,
successor-in-interest to Mode Building Limited Partnership

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

BOISE MODE, LLC, an Illinois limited liability company, successor-in-interest to Mode Building Limited Partnership, an Idaho limited partnership,

Plaintiff,

vs.

DONAHOE PACE & PARTNERS LTD, an Idaho corporation; and TIMOTHY PACE,

Defendants.

Case No. CV OC 1001093

PLAINTIFF/COUNTERDEFENDANT
BOISE MODE LLC'S MEMORANDUM
IN SUPPORT OF MOTION FOR
RECONSIDERATION AND FURTHER
CONSIDERATION

DONAHOE PACE & PARTNERS LTD, an Idaho corporation,

Counterclaimant,

vs.

BOISE MODE, LLC, an Illinois limited liability company, successor-in-interest to Mode Building Limited Partnership, an Idaho limited partnership,

Counterdefendant.

PLAINTIFF/COUNTERDEFENDANT BOISE MODE LLC'S MEMORANDUM IN
SUPPORT OF MOTION FOR RECONSIDERATION AND FURTHER CONSIDERATION

2/1

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Plaintiff/Counterdefendant Boise Mode, LLC (“Boise Mode”) by and through its counsel of record, Hawley Troxell Ennis & Hawley LLP, hereby submits this Memorandum in support of its Motion for Reconsideration of this Court’s Order Granting the Motion to Amend Judgment filed by Defendants/Counterclaimant Donahoe Pace & Partners, Ltd. (“DPP”) and Timothy Pace (collectively, “Defendants”) and further consideration of the Plaintiff’s motion for summary judgment and Counterdefendant’s motion for summary judgment.

I.

INTRODUCTION

Boise Mode respectfully requests that this Court reconsider its decision to reverse its order granting summary judgment on Boise Mode’s claims against both Defendants and on Defendant DPP’s counterclaims against Boise Mode. Boise Mode is not requesting that this Court revisit the legal issues upon which it has already ruled; rather, it requests that this Court rule on the arguments that Boise Mode raised earlier but which the Court has not yet addressed, and it respectfully submits that those arguments compel summary judgment in Boise Mode’s favor on all counts in the Complaint and Counterclaim.

In particular, because the Court addressed only the threshold issue regarding Defendant DPP’s standing to assert counterclaims, it has not ruled on the arguments Boise Mode raised regarding the legal merits of the counterclaims, namely that, as a matter of law, DPP is precluded from asserting claim for constructive eviction. Moreover, although the Court ruled that a material question of fact existed regarding whether Boise Mode breached the terms of the lease between the parties, the Court did not consider Boise Mode’s argument that, irrespective of any such breach, DPP was not entitled to withhold rent under any circumstance.

It is undisputed that the terms of the parties’ lease expressly provided that DPP was not entitled to withhold rent. It is also undisputed, however, that DPP failed to pay rent for nearly a

year before it vacated the leased premises. Under the clear terms of the lease as well as clear principles of law, DPP's unquestioned failure to pay its rent merits summary judgment for Boise Mode on its claims and precludes DPP from asserting a claim for constructive eviction. Moreover, because DPP is obligated to pay the monies owed Boise Mode, Timothy Pace is also obligated under the terms of his Guaranty.

II.

FACTUAL AND PROCEDURAL BACKGROUND

Boise Mode previously set forth statements of undisputed facts in its memoranda in support of its motions for summary judgment on its claims and on DPP's counterclaims. Rather than restate all of those facts here, Boise Mode incorporates those facts by reference and merely summarizes, for the Court's convenience, the undisputed facts most pertinent to this memorandum.

On November 3, 2006, Boise Mode, as landlord, and DPP, as tenant, executed a commercial lease ("Lease") extending through May 31, 2010, for certain office space and storage (the "Premises"). The Premises are located in a building at the corner of Eighth Street and Idaho Street in downtown Boise, a bustling area filled with restaurants, bars, and other retail establishments. The Lease was for "General Office Use." In connection with the execution of the Lease, Defendant Timothy Pace executed a Personal Guarantee of Lease ("Personal Guarantee") whereby he personally guaranteed all obligations owed Boise Mode by DPP arising under or relating to the Lease.

Article 4.1 of the Lease provides:

Except as specifically provided herein, there shall be no deduction, offset or abatement for any reason of the rent or any money payable by Tenant to Landlord.

Timothy Pace's Personal Guarantee provides:

The Liabilities ["all obligations and the full amount of money that Tenant now or in the future owes Landlord arising under or relating to the Lease"] shall not be reduced by any claim of setoff or counterclaim of Tenant or Undersigned.

As of December, 2008, DPP stopped paying the rent required under the terms of the Lease. Between December, 2008, and November, 2009, DPP made some, but not all, of the rent payments due under the Lease.

On June 3, 2009, Angela Aeschliman, the Director of Property Management for Boise Mode's property manager, Watermark Property Management, informed DPP and Timothy Pace in a letter that "the construction has ended and has been complete now for almost 2 months." In that same letter, Ms. Aeschlimann informed Mr. Pace that the tenant below DPP's space did not operate its business until after 5:00 PM, and that shows did not begin until after 7:00 PM. Ms. Aeschlimann also informed Mr. Pace and DPP that none of the concerns raised gave DPP the right to withhold rental payments.

On June 8, 2009, Timothy Pace sent an e-mail to David Baum, a Member of Baum Development, LLC, the Manager of Boise Mode, stating that "we think now may be a time to consider rewriting the balance of our lease and extending into the end of next year. Is that an option you might consider." In that same email, Mr. Pace mentioned concerns about noise emanating from the "night club on the second floor."

On June 29, 2009, David Baum sent an e-mail to Timothy Pace in which he stated, among other things, "We have continued to improve the building for the benefit of all of our tenants. The improvements have improved the quality of the space and reduced operating expenses for both the tenants and the landlord. We have now completed our major improvements."

On August 14, 2009, Timothy Pace sent an e-mail to David Baum seeking a 10% rent reduction for August through June “as an acceptable resolution for the past limitations placed on our ability to conduct business due to construction problems.”

On or about November 3, 2009, DPP vacated the Premises and made no further rent payments. At that time, DPP owed Boise Mode more than \$20,000 in back rent and other charges.

On November 24, 2010, Boise Mode filed motions for summary judgment on its claims for breach of contract and breach of the covenant of good faith and fair dealing, as well as on each of Defendants’ counterclaims.

In support of its motion on its claims against DPP and Timothy Pace, Boise Mode argued that DPP had breached the Lease by failing to pay rent when due and that Mr. Pace had breached his Personal Guarantee by not paying the amount owed Boise Mode by DPP. *See* Memo in Support of Boise Mode’s Claims for Summary Judgment at 7-9. Boise Mode also argued that DPP was not entitled to withhold rent payments, in part because the Lease expressly provided that “there shall be no deduction offset or abatement for any reason of the rent or any money payable by Tenant to Landlord.” *Id.* at 10.

In support of its motion on the counterclaims for constructive eviction, breach of contract, and breach of the implied covenant of good faith and fair dealing,¹ Boise Mode argued (1) that DPP lacked standing to bring such counterclaims because it failed to comply with the notice requirements of Idaho Code § 6-320(a); and (2) that, **even if DPP did not lack standing, its counterclaims were precluded as a matter of law because: (a) a tenant can only maintain**

¹ DPP’s counterclaims for negligent supervision and tortious interference are no longer at issue and are not discussed in this Memorandum.

an action for constructive eviction if the tenant is current on his rent payments; and (b) a tenant cannot maintain an action for constructive eviction if he abandons the premises after the complained-of problem ceases. See Memo in Support of Motion for Summary Judgment on DPP's Counterclaims at 12-21.

On December 27, 2010, this Court issued an order ("First Order") granting Boise Mode's Motions for Summary Judgment on (1) its claims for breach of contract and breach of the covenant of good and faith and fair dealing against Defendant DPP; (2) its claim for breach of guaranty against Defendant Timothy Pace; and (3) DPP's counterclaims. In particular, the Court ruled that Boise Mode met its burden of proving both a contract and a breach, and that DPP failed to prove any of the affirmative defenses it pled in its Answer. See First Order at 5. The Court also found that Defendant Timothy Pace's guarantee was "clear and unambiguous." *Id.* at 6. As to Boise Mode's counterclaims for constructive eviction, breach of contract, and breach of the covenant of good faith and fair dealing, this Court found that such claims fell under the purview of Idaho Code § 6-320 and, as a result, DPP lacked standing to bring those counterclaims because it did not comply with the notice requirements of that Section. Because the Court ruled that DPP had no standing, the Court did not address or rule on Boise Mode's other arguments regarding those counterclaims. This Court entered Judgment for DPP on January 5, 2011.

Defendants moved the Court to amend its judgment pursuant to I.R.C.P 59(e) on January 19, 2011. On March 2, 2011, this Court issued an order granting Defendants' motion ("March Order"). As to Boise Mode's claims against DPP and Timothy Pace, the Court noted that "the record shows that DPP did in fact stop paying rent" and that Timothy Pace's Personal Guarantee "clearly states that Pace personally guaranteed DPP's responsibilities under the lease." March Order at 7. But, the Court concluded, genuine issues of material fact regarding "why

Defendants breached their obligation to Boise Mode” and “whether Boise Mode breached its obligations under the lease” precluded summary judgment. Order at 8.

As to DPP’s counterclaims, the Court ruled that “the alleged breaches in this case are not the kind which materially affect the health and safety of a tenant,” and, as a result, “the Defendants’ causes of action do not fall under the purview of I.C. § 6-320.” March Order at 7. The Court thus reversed its earlier ruling that the Defendants did not have standing to bring their counterclaims. The Court did not address Boise Mode’s arguments about the merits of the counterclaims.

III.

ARGUMENT

Boise Mode respectfully seeks reconsideration of the Court’s March Order, and further consideration of the motions for summary judgment, for two reasons. First, with regard to Boise Mode’s claims for breach of contract, breach of the covenant of good faith and fair dealing, and breach of Personal Guarantee, the Court has not addressed Boise Mode’s argument that, as a matter of contract and as a matter of law, DPP had no right to withhold rent even if Boise Mode had breached the terms of the Commercial Lease. Second, regarding DPP’s counterclaims, the Court addressed only the threshold issue of standing in each of its Orders. For that reason, the Court has not ruled upon the additional arguments asserted by Boise Mode, namely that DPP is precluded, as a matter of law, from asserting a counterclaim for constructive eviction because the undisputed evidence establishes that, at the time it abandoned the Premises, DPP was not current on its rent payments, and the condition that allegedly caused DPP’s abandonment had long since ceased.

A. Boise Mode Is Entitled To Summary Judgment On Its Claims Against DPP And Timothy Pace Because, As A Matter Of Contract And Of Law, DPP Was Not Entitled To Withhold Rent Payments.

This Court's decision in its March Order on Boise Mode's claims against DPP and Timothy Pace was premised upon its conclusion that the evidence in the record established questions of fact as to whether Boise Mode breached the Lease and why the Defendants breached their obligation to Boise Mode. Those are not, however, the relevant issues regarding Boise Mode's claims. Rather, the relevant question is whether there exists any genuine issue of material fact about whether DPP was entitled to withhold rent. The undisputed facts in this case establish that the answer to this question is clearly "no," under both the terms of the Lease and Idaho law.

It is undisputed that DPP withheld rent payments beginning in December, 2008, and that it ceased paying rent altogether no later than November, 2009, even though the Lease extended through the end of May, 2010. DPP's decision to withhold rent was directly contrary to its obligations under the Lease, and nothing in the Lease or in Idaho law gave DPP any right to withhold rent.

In fact, the Lease clearly and unambiguously provides that DPP could not withhold rent. In particular, Article 4.1 provides

Except as specifically provided herein, there shall be no deduction, offset or abatement for any reason of the rent or any money payable by Tenant to Landlord.

"When a contract is clear and unambiguous, the interpretation of that contract is a question of law to be decided by the trial court." *Empire Lumber Co. v. Thermal-Dynamic Towers, Inc.* 132 Idaho 295, 303, 971 P.2d 1119, 1127 (1998).

Article 4.1 of the Lease clearly and unambiguously provides that DPP cannot deduct, offset, or abate the rent due to Boise Mode under the Lease except as specifically provided in the

Lease. The Defendants have not argued that any specific provision in the Lease excuses DPP's nonpayment of rent. There is no such provision. Under the clear and unambiguous terms of the Lease, therefore, DPP was not entitled to withhold rent. *See American Foreign Ins. Co. v. Reichert*, 140 Idaho 394, 402, 94 P.3d 699, 707 (2004) ("the offset provision is unambiguous. When there is no ambiguity, there is no occasion for construction and coverage must be determined using the plain meaning of the words employed.").

As a result, Boise Mode is entitled to summary judgment on its claims against DPP for failure to pay rent and other monies due under the Lease. *See* 49 AM.JUR. 2D § 39 ("in deciding the rights of parties under a lease, a court is required to give effect to the unambiguously expressed intent of the parties"). There is no question of material fact as to whether DPP withheld rent payments, and the Lease must be enforced as written. *See id.* at § 49 ("In instances where the terms of a lease are unambiguous, they must be enforced as written, and no court can rewrite a lease to provide a better bargain to suit one of the parties.").

The Court need look no further than the clear terms of the Lease. In any event, the Lease terms are consistent with Idaho law, under which a tenant is entitled to withhold rent upon a breach by the landlord only in very limited circumstances. In fact, the *only* provision in Idaho law enabling a tenant to withhold rent is the provision establishing that a tenant may deduct from its rent monies spent on a smoke detector. ("If the landlord or the landlord's assignee fails to install working smoke detectors, the tenant may send written notice by certified mail, return receipt requested, to the landlord or the landlord's assignee that if working smoke detectors are not installed within seventy-two (72) hours of receipt of the letter, the tenant may install smoke detectors and deduct the cost from the tenant's next month's rent.") (emphasis added). The breach that DPP alleges here has nothing to do with smoke detectors, so DPP has no legal basis for withholding rent.

There is authority from other jurisdictions establishing that a tenant may withhold rent if the landlord breaches the implied warranty of habitability. *See, e.g.*, 49 AM.JUR. 2D § 613 (some jurisdictions “recognize that the landlord warrant that there are no conditions that materially affect the health and safety of tenants” and in such jurisdictions, “where conditions exist that adversely affect the health or safety of tenants . . . abatement of rent is appropriate”). Even if that was the law in Idaho, it would not help Defendants, however, because it is undisputed that Boise Mode did not violate Idaho’s implied warranty of habitability. As the Court noted in its March Order, Idaho Code § 6-320 is Idaho’s statutory version of the implied warranty of habitability. As noted above, subsection 6 of Idaho Code § 6-320 permits a tenant to deduct the cost of a working smoke detector from rent payments. Even if violations of subsections 1-5 of § 6-320(a) did permit a tenant to withhold rent, however, Defendants’ argument would be no stronger because Defendants have argued, and this Court has agreed, that the alleged breaches by Boise Mode in this case are not the kind of breaches that implicate § 6-320.

In other words, it is now settled that any breach by Boise Mode was not a breach of the implied warranty of habitability. For this reason, even if a violation of subsections 1-5 of § 6-320(a) did entitle a tenant to withhold rent, no such violation occurred here. As a result, even if the Lease did not unambiguously provide that DPP could not withhold rent, DPP had no such right under Idaho law.

DPP’s argument about an alleged breach by Boise Mode thus misses the point, and is a red herring. DPP seeks to improperly shift the focus from its conduct in breaching the Lease by failing to pay rent to Boise Mode’s alleged breach of the Lease. If DPP argued that Boise Mode had breached the Lease by failing to install a smoke detector, its argument would have some merit. Also, its argument might have some traction if DPP were asserting some other breach of Idaho Code § 6-320. However, that is not what DPP is arguing. Consequently, the breach

alleged by DPP has no impact on DPP's obligation to pay rent, both as a matter of contract and as a matter of law.

For all of these reasons, Defendants' argument is misguided. Because it is undisputed that Boise Mode did not violate Idaho Code § 6-320, the issue is not whether Boise Mode was in breach but rather whether DPP was entitled to withhold rent. Under the clear terms of the Lease, as well as Idaho law, DPP had no such right. Thus, because there is triable issue of fact, Boise Mode is entitled to summary judgment on its claims against Defendant DPP for breach of contract and breach of the implied covenant of good faith and fair dealing.

The terms of Defendant Timothy Pace's Personal Guarantee expressly provide that the liabilities owed under the Personal Guarantee "shall not be reduced by any claim of setoff or counterclaim of Tenant or Undersigned." It is undisputed that DPP withheld rent from Boise Mode, that the monies owed Boise Mode by DPP are liabilities that Timothy Pace guaranteed, and that, despite his Personal Guarantee, Timothy Pace has not paid DPP's debts to Boise Mode. Timothy Pace's guarantee obligates him to make good on DPP's obligations to Boise Mode. As a result, Boise Mode is likewise entitled to summary judgment on its claim against Timothy Pace for breach of guarantee.

B. DPP Is Precluded From Asserting A Claim For Constructive Eviction Because, At The Time DPP Abandoned The Premises, It Was Not Current On Its Rent Payments And The Alleged Problem Had Long Since Ceased.

In each of the Court's two Orders, the Court addressed only the threshold issue of DPP's standing to assert its counterclaims for constructive eviction, breach of contract, and breach of the implied covenant of good faith and fair dealing. The court's decisions on DPP's counterclaims did not address Boise Mode's arguments that, as a matter of law, a tenant cannot bring a claim for constructive eviction where it is behind on its rent payments and where it remains in the demised premises after the alleged problem ceases. It is undisputed that, as of the

date that DPP vacated the Premises, DPP was significantly in arrears on its rent payments and the issue that allegedly forced DPP to vacate – the construction in the building – had long since ceased. As a result, DPP is precluded, as a matter of law, from asserting a claim for constructive eviction.

As set forth in Boise Mode’s Memorandum in Support of Plaintiff’s Motion for Summary Judgment on the Verified Complaint, the law is clear that a tenant cannot maintain an action for constructive eviction or for breach of the covenant of quiet enjoyment if the tenant has not kept current on rent payments. 49 AM.JUR. 2D § 494 (“The payment of all required rent is a condition precedent to the maintenance of an action for breach of the covenant [of quiet enjoyment].”); *Richard Barton Enterprises, Inc. v. Tsern*, 928 P. 2d 368, 374 (Utah 1996) (“To establish a constructive eviction, however, the lessee had to vacate the entire lease-hold, *and only then* could the lessee withhold rent.”) (emphasis added). Moreover, constructive eviction does not apply if a tenant waits to abandon the leased premises until after a problem ceases. 49 AM.JUR. 2D § 517 (“However much the tenant may be disturbed in the beneficial enjoyment of the premises by the landlord’s wrongful act, there is no constructive eviction if the tenant continues in possession of the premises.”); *id.* at § 518 (“The tenant loses the right to abandon the premises if, before carrying out the intention to abandon, the cause for abandonment ceases to exist.”).

The factual questions material to determining whether DPP can assert a claim for constructive eviction are, therefore: (1) Had DPP withheld rent prior to abandoning the Premises?; and (2) Had the alleged cause of the abandonment ceased prior to DPP’s abandonment? If the answer to either question is “yes,” DPP cannot assert a claim for constructive eviction. Here, it is undisputed that the answer to both is “yes.”

First, it is undisputed that DPP had not paid all rent due at the time it vacated the Property in November, 2009. In fact, it is undisputed that DPP began withholding rent nearly one year

before vacating the Property and that it owed Boise Mode more than \$20,000 in back rent and other charges as of November, 2009. *See* Verified Compl., ¶ 7, Exh. B. In other words, it is undisputed that DPP withheld rent for many months before it abandoned the Premises. The undisputed facts therefore establish that DPP cannot bring a claim for constructive eviction.

Second, it is undisputed that the alleged cause of DPP's abandonment, the construction taking place in the building, had ceased at least several months prior to November, 2009. Two e-mails from representatives of Boise Mode and one from Timothy Pace establish that the construction ceased, at minimum, three months prior to DPP's abandonment. In particular, on June 3, 2009, Angela Aeschliman informed DPP that "the construction has ended and has been complete now for almost 2 months." On June 29, 2009, David Baum informed Timothy Pace that "We have now completed our major improvements." And on August 14, 2009, Timothy Pace asked David Baum for a 10% rent reduction for August through June "as an acceptable resolution for the past limitations placed on our ability to conduct business due to construction problems." (Emphasis added.)

This evidence, none of which has been disputed by the Defendants, demonstrates that DPP remained in possession of the Premises long after the construction ceased. It also demonstrates that, far from being constructively evicted, DPP actually wanted to extend the Lease and remain in the Premises even longer. In fact, less than a week after receiving the June 3, 2009 letter from Ms. Aeschliman indicating that construction had ceased, Timothy Pace informed David Baum that "we think now may be a time to consider rewriting the balance of our lease and extending into the end of next year. Is that an option you might consider." The record thus reveals that DPP was not constructively evicted at all; rather, it only filed a constructive eviction claim as an afterthought, after it had been sued by Boise Mode for breaching its obligations under the lease.

Even if DPP was not otherwise precluded from bringing a claim for Constructive Eviction, DPP has pointed to no alleged problem existing as of November 2, 2009, that caused it to abandon the premises. Furthermore, the evidence in the record forecloses any attempt by DPP to argue that it was constructively evicted by noise from the comedy club. Specifically, the August 14, 2009, e-mail from Timothy Pace demonstrates that any “limitations” on DPP’s ability to conduct business resulted from the construction and that such “limitations” were already in the past as of that date, more than two months before DPP vacated. Moreover, in the June 8, 2009, e-mail where Mr. Pace sought an extension of the Lease, he also mentioned concerns about noise emanating from the “night club on the second floor,” thereby clearly indicating that he was aware of the noise from the comedy club at that time. It would defy credulity to suggest that noise from the second floor club was sufficiently disruptive to cause DPP to abandon the Premises where DPP was aware of such noise no later than June 8, 2009, yet affirmatively sought to extend its lease beyond May 2010 on that date: if the comedy club was placing limitations on DPP’s ability to operate its business in the Premises, why would DPP have sought to extend its occupation of those Premises?

In any event, after-hours noise from a neighboring tenant cannot meet the high threshold for a constructive eviction. Constructive eviction occurs only where there is “an actual deprivation of the beneficial enjoyment of the premises.” *McCullough v. Cuthbert*, 267 P. 828, 829-830 (Idaho 1928). As the Lease was expressly for the purpose of “General Office Use,” after-hours noise did not deprive DPP of the beneficial enjoyment of the Premises. For this independent reason, DPP cannot base a constructive eviction claim on the alleged noise from the comedy club.

For all of these reasons, DPP’s claim for constructive eviction is untenable. DPP’s remaining counterclaims necessarily fall along with its claim for constructive eviction. This

Court has already recognized that those counterclaims are related to the claim for constructive eviction and that, without the constructive eviction claim, "DPP's Breach of Contract and Breach of the Covenant of Good Faith and Fair Dealing claims also fall away, as they are premised on a successful Constructive Eviction claim." December Order at 8. As a result, DPP's additional counterclaims fail as a matter of law, and Boise Mode is entitled to summary judgment on all of DPP's counterclaims.

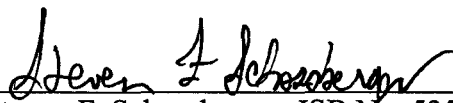
IV.

CONCLUSION

For each of the foregoing reasons, no genuine issue of material fact exists as to Boise Mode's claims against Defendants or DPP's counterclaims. Boise Mode respectfully requests that this Court reconsider its March Order, and upon further consideration grant Boise Mode's motions for summary judgment on its claims against Defendants and on DPP's counterclaims.

DATED THIS 27th day of April, 2011.

HAWLEY TROXELL ENNIS & HAWLEY LLP

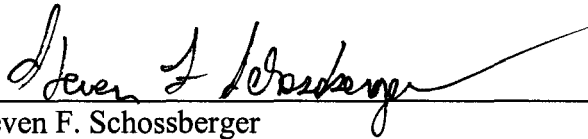
By 
Steven F. Schossberger, ISB No. 5358
Attorneys for Plaintiff/Counterdefendant Boise
Mode, LLC, successor-in-interest to Mode
Building Limited Partnership

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 27th day of April, 2011, I caused to be served a true copy of the foregoing PLAINTIFF/COUNTERDEFENDANT BOISE MODE LLC'S MEMORANDUM IN SUPPORT OF MOTION FOR RECONSIDERATION AND FURTHER CONSIDERATION by the method indicated below, and addressed to each of the following:

Michael E. Kelly
John J. Browder
LOPEZ & KELLY, PLLC
413 W. Idaho Street, Suite 100
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Boise, ID 83701
[Attorneys for Defendants and Counterclaimant]

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Steven F. Schossberger

APR 27 2011

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By LARA AMES
DEPUTY

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Attorneys for Plaintiff/Counterdefendant Boise Mode, LLC,
successor-in-interest to Mode Building Limited Partnership

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

BOISE MODE, LLC, an Illinois limited liability company, successor-in-interest to Mode Building Limited Partnership, an Idaho limited partnership,
Plaintiff,
vs.
DONAHOE PACE & PARTNERS LTD, an Idaho corporation; and TIMOTHY PACE,
Defendants.

Case No. CV OC 1001093

NOTICE OF HEARING ON MOTION FOR RECONSIDERATION AND FURTHER CONSIDERATION RE PLAINTIFF/COUNTERDEFENDANTS' MOTIONS FOR SUMMARY JUDGMENT

DONAHOE PACE & PARTNERS LTD, an Idaho corporation,
Counterclaimant,
vs.
BOISE MODE, LLC, an Illinois limited liability company, successor-in-interest to Mode Building Limited Partnership, an Idaho limited partnership,
Counterdefendant.

NOTICE OF HEARING ON MOTION FOR RECONSIDERATION AND FURTHER CONSIDERATION RE PLAINTIFF/COUNTERDEFENDANTS' MOTIONS FOR SUMMARY JUDGMENT - 1

MS

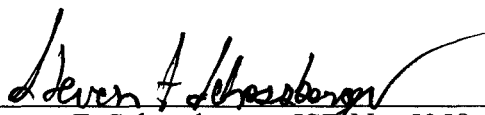
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TO ALL PARTIES AND THEIR COUNSEL OF RECORD:

PLEASE TAKE NOTICE that the Plaintiff/Counterdefendant Boise Mode, LLC will call its Motion for Reconsideration and Further Consideration Re Plaintiff/Counterdefendant's Motions for Summary Judgment for hearing before the above-entitled Court on the 23rd day of May, 2011, at 11:00 a.m., or as soon thereafter as counsel can be heard, before the Honorable Ronald J. Wilper, District Judge, at the Ada County Courthouse, 200 West Front Street, Boise Idaho.

DATED THIS 27th day of April, 2011.

HAWLEY TROXELL ENNIS & HAWLEY LLP

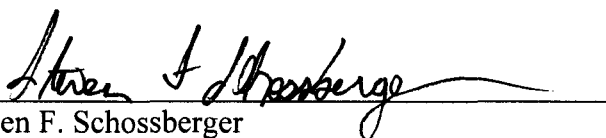
By 
Steven F. Schossberger, ISB No. 5358
Attorneys for Plaintiff/Counterdefendant Boise
Mode, LLC, successor-in-interest to Mode
Building Limited Partnership

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 27th day of April, 2011, I caused to be served a true copy of the foregoing NOTICE OF HEARING ON MOTION FOR RECONSIDERATION AND FURTHER CONSIDERATION RE PLAINTIFF/COUNTERDEFENDANTS' MOTIONS FOR SUMMARY JUDGMENT by the method indicated below, and addressed to each of the following:

Michael E. Kelly
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LOPEZ & KELLY, PLLC
413 W. Idaho Street, Suite 100
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[Attorneys for Defendants and Counterclaimant]

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Steven F. Schossberger

APR 27 2011

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Attorneys for Plaintiff/Counterdefendant Boise Mode, LLC,
successor-in-interest to Mode Building Limited Partnership

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

BOISE MODE, LLC, an Illinois limited liability company, successor-in-interest to Mode Building Limited Partnership, an Idaho limited partnership,

Plaintiff,

vs.

DONAHOE PACE & PARTNERS LTD, an Idaho corporation; and TIMOTHY PACE,

Defendants.

Case No. CV OC 1001093

MOTION FOR RECONSIDERATION
AND FURTHER CONSIDERATION RE
PLAINTIFF/COUNTERDEFENDANTS'
MOTIONS FOR SUMMARY
JUDGMENT

(Oral Argument Requested.)

DONAHOE PACE & PARTNERS LTD, an Idaho corporation,

Counterclaimant,

vs.

BOISE MODE, LLC, an Illinois limited liability company, successor-in-interest to Mode Building Limited Partnership, an Idaho limited partnership,

Counterdefendant.

MOTION FOR RECONSIDERATION AND FURTHER CONSIDERATION RE
PLAINTIFF/COUNTERDEFENDANTS' MOTIONS FOR SUMMARY JUDGMENT - 1

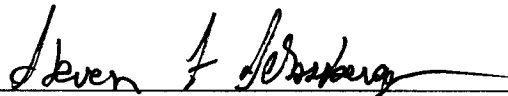
CR

Plaintiff/Counterdefendant Boise Mode, LLC (“Boise Mode”), by and through its counsel of record, Hawley Troxell Ennis & Hawley LLP, and pursuant to Rule 11(a)(2)(B) and Rule 56(c) of the Idaho Rules of Civil Procedure, moves this Court to reconsider its Order Granting Defendants/Counterclaimant Donahoe Pace & Partners, Ltd. and Timothy Pace’s Motion, and to further consider and make ruling on Boise Mode’s Motion for Summary Judgment on its claims for breach of contract, breach of the covenant of good faith and fair dealing, and breach of guarantee as well as on Boise Mode’s Motion for Summary Judgment on Defendant/Counterclaimant Donahoe Pace and Partners, Ltd.’s counterclaims for constructive eviction, breach of contract, and breach of the covenant of good faith and fair dealing.

This Motion for Reconsideration and Further Consideration is supported by the Memorandum filed concurrently herewith.

DATED THIS 27th day of April, 2011.

HAWLEY TROXELL ENNIS & HAWLEY LLP

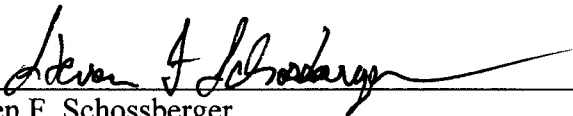
By 
Steven F. Schossberger, ISB No. 6358
Attorneys for Plaintiff/Counterdefendant Boise
Mode, LLC, successor-in-interest to Mode
Building Limited Partnership

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 27th day of April, 2011, I caused to be served a true copy of the foregoing MOTION FOR RECONSIDERATION AND FURTHER CONSIDERATION RE PLAINTIFF/COUNTERDEFENDANTS' MOTIONS FOR SUMMARY JUDGMENT by the method indicated below, and addressed to each of the following:

Michael E. Kelly
John J. Browder
LOPEZ & KELLY, PLLC
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Boise, ID 83701
[Attorneys for Defendants and Counterclaimant]

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 Telecopy: 208.342.4344



Steven F. Schossberger

MAY 16 2011

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By STEPHANIE VIDAK
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7008.001/Response Re Plaintiff's Motion for Reconsideration.wpd

ORIGINAL

Attorneys for Defendants/Counter-Claimant

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

BOISE MODE, LLC, an Illinois limited liability company, successor-in-interest to Mode Building Limited Partnership, an Idaho limited partnership,

Plaintiff,

vs.

DONAHOE PACE & PARTNERS LTD, an Idaho corporation; and TIMOTHY PACE,

Defendants.

Case No. CV OC 1001093

**RESPONSE TO PLAINTIFF /
COUNTERDEFENDANT BOISE
MODE LLC'S MOTION FOR
RECONSIDERATION AND
FURTHER CONSIDERATION**

DONAHOE PACE & PARTNERS LTD, an Idaho corporation,

Counter-Claimant,

vs.

BOISE MODE, LLC, an Illinois limited liability company, successor-in-interest to Mode Building Limited Partnership, an Idaho limited partnership,

Counter-Defendant.

2

COME NOW, Defendants, DONAHOE PACE & PARTNERS LTD, an Idaho corporation; and TIMOTHY PACE (hereinafter collectively “DPP”), by and through their attorneys of record, Lopez & Kelly, PLLC, and submit their Response to Plaintiff/Counterdefendant Boise Mode LLC’s Motion for Reconsideration and Further Consideration filed April 27, 2011.

I.

INTRODUCTION

Almost two months after the Court’s March 3, 2011, Order reinstating all of DPP’s claims except tortious interference and negligent supervision, and only after DPP filed a motion to compel Plaintiff to produce additional discovery, the Plaintiff has filed a Motion for Reconsideration and Further Consideration on April 27, 2011 (hereinafter “April 27, 2011 Motion”). It was purportedly filed pursuant to I.R.C.P. 11(a)(2)(B) and 56(c) and appears to be a hybrid between a motion for reconsideration and a motion for summary judgment. Regardless of its classification, it is procedurally improper because it is untimely. As such, the Court should disregard it in its entirety, as it is a thinly veiled attempt to improperly appeal this Court’s March 2, 2011 Order and to prevent DPP from doing the discovery to which it is entitled.

II.

FACTUAL BACKGROUND

As the Court will recall, on November 24, 2010 Plaintiff served motions for summary judgment on a variety of counts. In response to those motions, this firm filed a motion for continuance on the basis that there were genuine issues of material fact for which supplemental discovery was necessary. DPP had an outstanding subpoena duces tecum to The North Face when the Plaintiff filed its motion for summary judgment.

This Court granted Plaintiff’s motions for summary judgment on all counts in its December 27, 2010 Order (hereinafter “December Order”). On March 2, 2011, this Court reconsidered its

December Order and concluded that it was decided on an incorrect premise, namely that I.C. § 6-320 applied. This Court then reinstated all claims except DPP's claims of tortious interference and negligent supervision.

Since the March 2, 2011 Order (hereinafter "March Order") Plaintiff has declined DPP's request to supplement its discovery and, as a result, DPP filed the pending Motion to Compel. DPP also has served yet another subpoena duces tecum on The North Face on April 27, 2011 for May 24, 2011. In accordance with Idaho Rule of Civil Procedure 45, DPP wrote a letter to opposing counsel on April 14, 2011, advising of its intent to subpoena records from The North Face.

III.

LEGAL ANALYSIS

A. **Plaintiff's April 27, 2011 Motion fails because it lacks procedural jurisdiction.**

The procedural rules upon which Plaintiff's April 27, 2011 Motion is filed are I.R.C.P. 11(a)(2)(B) and I.R.C.P. 56(c). The text of the former Rule speaks for itself:

(B) Motion For Reconsideration. A motion for reconsideration of any interlocutory orders of the trial court may be made at any time before the entry of final judgment but *not later* than fourteen (14) days after the entry of the final judgment. A motion for reconsideration of any order of the trial court made after entry of final judgment may be filed within fourteen (14) days from the entry of such order; provided, there shall be no motion for reconsideration of an order of the trial court entered on any motion filed under Rules 50(a), 52(b), 55(c), 59(a), 59(e), 59.1, 60(a), or 60(b).

I.R.C.P. 11(a)(2)(B). Because Plaintiff's April 27, 2011 Motion was filed more than 14 days after this Court entered its March Order, it fails the procedural requirements of Rule 11(a)(2)(B).¹

Ade v. Batten, 126 Idaho 114, 878 P.2d 813 (App. 1994) (affirming that such motion must be made

¹Furthermore, Defendants'/Counterclaimant's Motion to Amend Judgment was filed pursuant to I.R.C.P. 59(e) and Rule 11(a)(2)(B) disallows motions for reconsideration for "an order of the trial court entered on any motion filed under Rules...59(2)..." However, because this Court classified that motion to be a Rule 11(a)(2)(B) motion as well, and Plaintiff fails to satisfy the procedural requirements under either classification, this may be a moot point.

not later than 14 days after entry of final judgment).

Nor is Plaintiff's reliance on Rule 56(c) proper. As a general proposition, Rule 56(c) sets forth the time by which a motion for summary judgment must be filed. In relevant part it states that "[t]he motion, affidavits and supporting shall be served at least twenty eight (28) days before the time fixed for the hearing." I.R.C.P. 56(c). The hearing is scheduled for May 23, 2011. Therefore, in the event Plaintiff's April 27, 2011 is treated as a motion for summary judgement it is untimely.

B. Plaintiff's renewed attempt to move for summary judgment on all of its claims fails because it is conclusory and presupposes that it had not rescinded its contract with DPP, a genuine issue of fact.

This Court's March Order denied summary judgment as to Plaintiff's claims of (1) breach of contract, (2) breach of the covenant of good faith and fair dealing, and (3) breach of personal guaranty of lease. Plaintiff attempts to circumvent that Order by reference to Article 4.1 of the subject lease which states "there shall be no deduction, offset or abatement for any reason of the rent or any money payable by Tenant to Landlord." It uses Article 4.1 to advance its argument that DPP's failure to pay rent equates to a breach of contract under any and all circumstances. That argument is unavailing because it fails to address the genuine issue of fact as to whether the subject lease had been rescinded due to Plaintiff's conduct.

As the pleadings show, DPP claims that Boise Mode was the first party to breach the subject lease. *See § C of Reply to Memorandum in Opposition to Defendants'/Counterclaimant's Motion for Continuance Pursuant to I.R.C.P. 56 (f)*. Its initial and subsequent breaches were material and therefore operated to rescind the contract and/or excuse DPP's performance thereunder. Thus, there is a triable issue of material fact as to whether Article 4.1 was in force at the time DPP began to withhold rental payments.

Rather than dispute that there may be a genuine issue of fact, Plaintiff's April 27, 2011 Motion simply argues that Article 4.1 clearly and unambiguously stated that DPP was not entitled

to withhold rent, that DPP withheld rent, and that therefore there is no genuine issue of fact as to whether it breached the contract. The issue is not whether DPP withheld rent - it did. The issue is whether Boise Mode's prior breaches operated to rescind the contract and/or excuse performance thereunder. Plaintiff fails to address that dispositive issue.

B. Plaintiff's April 27, 2011 Motion fails to address two of Defendants' claims reinstated by this Court's March 2, 2011 Order.

In its March Order, this Court reinstated three of DPP's claims against Boise Mode: (1) constructive eviction, (2) breach of the covenant of good faith and fair dealing, and (3) breach of contract. Plaintiff's April 27, 2011 Motion appears to address only the constructive eviction claim. In the event Plaintiff presumes that the breach of contract claim and breach of the covenant of good faith and fair dealing claim are conditioned on the constructive eviction claim, it is mistaken.

This Court acknowledged that it previously granted Boise Mode summary judgment with respect to those three claims based upon the incorrect premise that I.C. § 6-320 applied. It then stated that "[g]enuine issues of material fact remain as to...whether Boise Mode breached its obligations under the lease." *March Order, at 8*. To support its argument that constructive eviction is a condition precedent to all of DPP's claims, Plaintiff simply reverts back to this Court's previous (December) Order to re-argue the incorrect premise which was subsequently rejected. Plaintiff does not cite any authority to show that DPP's breach of contract claim and breach of the covenant of good faith and fair dealing claim cannot stand on their own.

C. Plaintiff cites inadequate authority for its argument that DPP is precluded from asserting a constructive eviction claim.

Plaintiff propounds two arguments to deny DPP's constructive eviction claim. First, it cites a line from *Richard Barton Enterprises, Inc. v. Tsern*, 928 P.2d 368, 374 (Utah 1996) which states "[t]o establish a constrictive eviction, however, the lessee had to vacate the entire lease-hold, and only then could the lessee withhold rent." The Utah court in *Tsern* is not citing a rule but rather a

litany of cases that have analyzed constructive eviction, however. The three most recently decided cases to which the above-cited quote is referring merely stand for the proposition that a tenant must vacate the premises within a reasonable time of the events giving rise to constructive eviction. *Id.*, citing *Brugger v. Fonoti*, 645 P.2d 647 (Utah 1982) (finding that tenant must abandon premises within a reasonable time after the events giving rise to constructive eviction arose); *Thirteenth & Washington Sts. Corp. V. Neslen*, 123 Utah 70, 254 P.2d 847 (1953) (holding that the cumulative effect of various interferences, including activity of third parties which inhibited client access to lease hold, constituted constructive eviction where tenant abandoned premises within a reasonable time); and *Barker v. Utah Oil Ref. Co.*, 111 Utah 308, 178 P.2d 386, 387-88 (1947) (referencing an uncited edition of Black's Law Dictionary which states "there is constructive eviction where the [landlord]...does some act which deprives the tenant of beneficial enjoyment of the demised premises or materially impairs such enjoyment"). This authority from Utah is neither controlling nor supportive of Plaintiff's argument that constructive eviction requires a tenant to be current on rental payments.

Secondly, Plaintiff argues that constructive eviction is inapplicable when tenant stays in possession of the lease hold until after the alleged problem ceases to exist. The foregoing caselaw to which it cites, however, concludes that a tenant has a reasonable time by which to abandon the premises. Moreover, discovery is incomplete as to the factual question of at what time the events giving rise to constructive eviction ceased.

DPP nevertheless concedes that Plaintiff's arguments against the constructive eviction claim may have merit. Plaintiff's noncompliance with discovery would render ruling on that claim premature, however.

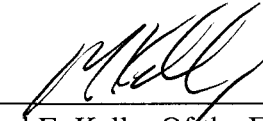
IV.

CONCLUSION

For the reasons discussed herein, DPP respectfully requests that the Court deny Plaintiff's April 27, 2011 Motion. In the alternative, the Court should treat said Motion as a one for summary judgment and hold that it was filed untimely.

DATED this 16 day of May, 2011

LOPEZ & KELLY, PLLC

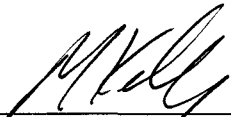
By: 
Michael E. Kelly, Of the Firm
Attorneys for Defendants

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 16 day of May, 2011, I served a true and correct copy of the foregoing by delivering the same to each of the following individuals, by the method indicated below, addressed as follows:

Steven F. Schossberger
HAWLEY, TROXELL, ENNIS & HAWLEY
877 Main Street, Suite 1000
PO Box 1617
Boise, ID 83701-1617
Telephone: (208) 344-6000
Facsimile: (208) 954-5260
sschossberger@hawleytroxell.com

- U.S. Mail
- Hand-Delivered
- Overnight mail
- Facsimile


Michael E. Kelly

FILED
MAY 16 2011
4:36

MAY 16 2011

CHRISTOPHER D. BISH, Clerk
By KATHY BISH, Deputy

Steven F. Schossberger, ISB No. 5358
HAWLEY TROXELL ENNIS & HAWLEY LLP
877 Main Street, Suite 1000
P.O. Box 1617
Boise, ID 83701-1617
Telephone: 208.344.6000
Facsimile: 208.954.5260
Email: sschossberger@hawleytroxell.com

Attorneys for Plaintiff/Counterdefendant Boise Mode, LLC,
successor-in-interest to Mode Building Limited Partnership

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

BOISE MODE, LLC, an Illinois limited liability company, successor-in-interest to Mode Building Limited Partnership, an Idaho limited partnership,

Plaintiff,

vs.

DONAHOE PACE & PARTNERS LTD, an Idaho corporation; and TIMOTHY PACE,

Defendants.

Case No. CV OC 1001093

AFFIDAVIT OF STEVEN F. SCHOSSBERGER IN OPPOSITION TO DEFENDANTS/COUNTERCLAIMANTS' MOTION TO COMPEL

DONAHOE PACE & PARTNERS LTD, an Idaho corporation,

Counterclaimant,

vs.

BOISE MODE, LLC, an Illinois limited liability company, successor-in-interest to Mode Building Limited Partnership, an Idaho limited partnership,

Counterdefendant.

ARB

Steven F. Schossberger being first duly sworn upon oath deposes and states as follows:

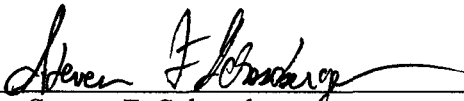
1. I am a partner with the law firm Hawley Troxell Ennis & Hawley LLP, counsel of record for Plaintiff/Counterdefendant Boise Mode, LLC in this action.

2. I make this affidavit based upon my own personal knowledge, and I am competent to testify hereto if called upon to do so.

3. Attached hereto as Exhibit A is a true and correct copy of Plaintiff/Counterdefendant's Supplemental Answers to Defendant/Counterclaimants' First Set of Interrogatories (Nos. 18 and 19).

4. Attached hereto as Exhibit B is a true and correct copy of the Subpoena Duces Tecum dated April 28, 2011 to The North Face.

Further your affiant sayeth naught.




Steven F. Schossberger

STATE OF IDAHO)
) ss.
County of Ada)

SUBSCRIBED AND SWORN before me this 16th day of May, 2011.





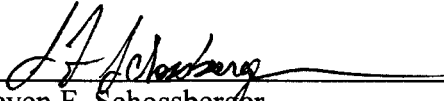
Name: Karen Foruria
Notary Public for Idaho
Residing at Boise
My commission expires 6-18-11

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 16th day of May, 2011, I caused to be served a true copy of the foregoing AFFIDAVIT OF STEVEN F. SCHOSSBERGER IN OPPOSITION TO DEFENDANTS/COUNTERCLAIMANTS' MOTION TO COMPEL by the method indicated below, and addressed to each of the following:

Michael E. Kelly
John J. Browder
LOPEZ & KELLY, PLLC
413 W. Idaho Street, Suite 100
P.O. Box 856
Boise, ID 83701
[Attorneys for Defendants and Counterclaimant]

U.S. Mail, Postage Prepaid
 Hand Delivered
 Overnight Mail
 E-mail
 Telecopy: 208.342.4344



Steven F. Schossberger

Steven F. Schossberger, ISB No. 5358
 HAWLEY TROXELL ENNIS & HAWLEY LLP
 877 Main Street, Suite 1000
 P.O. Box 1617
 Boise, ID 83701-1617
 Telephone: 208.344.6000
 Facsimile: 208.954.5260
 Email: sschossberger@hawleytroxell.com

Attorneys for Plaintiff/Counterdefendant Boise Mode, LLC,
 successor-in-interest to Mode Building Limited Partnership

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

BOISE MODE, LLC, an Illinois limited liability company, successor-in-interest to Mode Building Limited Partnership, an Idaho limited partnership,

Plaintiff,

vs.

DONAHOE PACE & PARTNERS LTD, an Idaho corporation; and TIMOTHY PACE,

Defendants.

DONAHOE PACE & PARTNERS LTD, an Idaho corporation,

Counterclaimant,

vs.

BOISE MODE, LLC, an Illinois limited liability company, successor-in-interest to Mode Building Limited Partnership, an Idaho

Case No. CV OC 1001093

PLAINTIFF/COUNTERDEFENDANT'S SUPPLEMENTAL ANSWERS TO DEFENDANT/COUNTERCLAIMANT'S FIRST SET OF INTERROGATORIES

PLAINTIFF/COUNTERDEFENDANT'S SUPPLEMENTAL ANSWERS TO DEFENDANT/COUNTERCLAIMANT'S FIRST SET OF INTERROGATORIES - 1

EXHIBIT A

limited partnership,)
)
 Counterdefendant.)
)
 _____)

TO: DONAHOE PACE & PARTNERS LTD AND TIMOTHY PACE AND THEIR
COUNSEL OF RECORD

COMES NOW Boise Mode LLC, Plaintiff/Counterdefendant (“Plaintiff”) in the
above-entitled action, by and through its counsel of record, Hawley Troxell Ennis & Hawley
LLP, and, in accordance with the requirements of Rules 26(e), and 33 of the Idaho Rules of Civil
Procedure, hereby files its supplemental answers to Defendant/Counter-Claimant’s First Set of
Interrogatories.

INTERROGATORIES

INTERROGATORY NO. 18 [sic]: Since the commencement of the Lease:

a. Identify each tenant, lessee, subtenant, their agent(s), employee(s) or visitor(s)
who has complained to the Plaintiff/Counter-Defendant and/or its agent(s) or employee(s) about
noise, disturbances, disruption, interruption or interference of any type or description at 800
West Idaho Street, Boise, Idaho 83702.

b. For each complaint identified in Interrogatory No. 18, subpart (a), describe the
nature, type or character of the complaint.

c. For each complaint identified in Interrogatory No. 18, subpart (a), describe what
action, if any, the Plaintiff/Counter-Defendant undertook to remedy or resolve the complaint.

SUPPLEMENTAL ANSWER TO INTERROGATORY NO. 18 [sic]: Subject to and
without waiving the previously stated objections, since the commencement of the Lease, neither
Plaintiff nor its agent(s) or employee(s) received complaints of any noise, disturbance,

disruption, interruption or interference from anyone other than Timothy Pace on behalf of Donahoe Pace & Partners LTD.

INTERROGATORY NO. 19 [sic]: State whether you and The North Face had an agreement or understanding in which you would be penalized if improvements to the portion of 800 West Idaho Street, Boise, Idaho 83702 that The North Face had agreed to lease from you were not completed by a specified date. If so:

a. State the date by which you agreed to have the improvements to the portion of 800 West Idaho Street, Boise, Idaho 83702 that The North Face had agreed to lease were supposed to be completed.

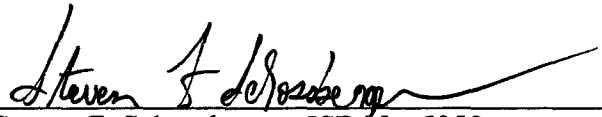
b. State what the penalty would be if you did not complete the improvements by the specified date to the portion of 800 West Idaho Street, Boise, Idaho 83702 that The North Face had agreed to lease.

c. State whether you completed the improvements to the portion of 800 West Idaho Street, Boise, Idaho 83702 that The North Face had agreed to lease by the specified date.

SUPPLEMENTAL ANSWER TO INTERROGATORY NO. 19 [sic]: Subject to and without waiving the previously stated objections, there was no agreement between The North Face and Boise Mode LLC, that Boise Mode LLC would be penalized if improvements to the leased premises were not completed by a specified date.

DATED THIS 16th day of May, 2011.

HAWLEY TROXELL ENNIS & HAWLEY LLP

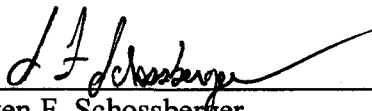
By 
Steven F. Schossberger, ISB No. 5358
Attorneys for Plaintiff/Counterdefendant
Boise Mode, LLC, successor-in-interest to
Mode Building Limited Partnership

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 16th day of May, 2011, I caused to be served a true copy of the foregoing PLAINTIFF/COUNTERDEFENDANT'S SUPPLEMENTAL ANSWERS TO DEFENDANT/COUNTERCLAIMANT'S FIRST SET OF INTERROGATORIES by the method indicated below, and addressed to each of the following:

Michael E. Kelly
John J. Browder
LOPEZ & KELLY, PLLC
702 W. Idaho Street, Suite 1100
P.O. Box 856
Boise, ID 83701
[Attorneys for Defendants and Counterclaimant]

U.S. Mail, Postage Prepaid
 Hand Delivered
 Overnight Mail
 E-mail
 Telecopy: 208.342.4344



Steven F. Schossberger

Michael E. Kelly, ISB #4351
John J. Browder, ISB #7531
LOPEZ & KELLY, PLLC
PO Box 856
Boise, Idaho 83701
Telephone: (208) 342-4300
Facsimile: (208) 342-4344
7008.001/SDT North Face.02.wpd

COPY

Attorneys for Defendants/Counterclaimant

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

BOISE MODE, LLC, an Illinois limited liability company, successor-in-interest to Mode Building Limited Partnership, an Idaho limited partnership,

Plaintiff,

vs.

DONAHOE PACE & PARTNERS LTD, an Idaho corporation; and TIMOTHY PACE,

Defendants.

Case No. **CV OC 1001093**

SUBPOENA DUCES TECUM

DONAHOE PACE & PARTNERS LTD, an Idaho corporation,

Counter-Claimant,

vs.

BOISE MODE, LLC, an Illinois limited liability company, successor-in-interest to Mode Building Limited Partnership, an Idaho limited partnership,

Counter-Defendant.

SUBPOENA DUCES TECUM -1

THE STATE OF IDAHO TO:

**The North Face
Corporation Service Company
12550 W. Explorer Drive
Suite 100
Boise, ID 83713**

YOU ARE COMMANDED:

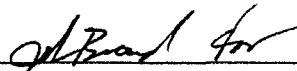
- To appear at the place, date and time specified below to testify in the above case.
- To appear at the place, date and time specified below to testify at the taking of a deposition in the above case.
- To produce or permit inspection and copying of the documents or objects attached hereto as Exhibit "A," including electronically stored information, at the place, date and time specified below.
- To permit inspection of the following premises at the date and time specified below.

PLACE: Lopez & Kelly, PLLC
413 W. Idaho Street, Ste. 100
Boise, Idaho 83701-0856
DATE: May 24, 2011
TIME: 10:00 a.m.

You are further notified that if you fail to appear at the place and time specified above, or to produce or permit copying or inspection as specified above that you may be held in contempt of court and that the aggrieved party may recover from you the sum of ONE HUNDRED DOLLARS (\$100.00) and all damages which the party may sustain by your failure to comply with this Subpoena.

DATED this 28 day of April, 2011.

LOPEZ & KELLY PLLC


By: 
Michael E. Kelly, Of the Firm
Attorneys for Defendants

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 28 day of April, 2011, I served a true and correct copy of the foregoing by delivering the same to each of the following individuals, by the method indicated below, addressed as follows:

Steven F. Schossberger
HAWLEY, TROXELL, ENNIS & HAWLEY
877 Main Street, Suite 1000
PO Box 1617
Boise, ID 83701-1617
Telephone: (208) 344-6000
Facsimile: (208) 954-5260
sschossberger@hawleytroxell.com

- U.S. Mail
- Hand-Delivered
- Overnight mail
- Facsimile



Michael E. Kelly

EXHIBIT "A"

1. Your 2008, lease with Boise Mode LLC (the "Lease") of the premises located at 802 West Idaho Street, Boise, Idaho 83702 ("Premises"), as well as all memoranda of understanding, notes, exhibits, amendments, correspondence, and all other documents related to the Lease;
and
2. Any and all documents, contracts, correspondence, agreements, memoranda of understanding or other writings regarding the construction build-out or improvements of your space which is the subject of the Lease at the Premises.

NO. _____ FILED 4:36
A.M. _____ P.M.

MAY 16 2011

CHRISTOPHER D. RICH, Clerk
By KATHY BIEHL
Deputy

Steven F. Schossberger, ISB No. 5358
HAWLEY TROXELL ENNIS & HAWLEY LLP
877 Main Street, Suite 1000
P.O. Box 1617
Boise, ID 83701-1617
Telephone: 208.344.6000
Facsimile: 208.954.5260
Email: sschossberger@hawleytroxell.com

Attorneys for Plaintiff/Counterdefendant Boise Mode, LLC,
successor-in-interest to Mode Building Limited Partnership

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

BOISE MODE, LLC, an Illinois limited liability company, successor-in-interest to Mode Building Limited Partnership, an Idaho limited partnership,

Plaintiff,

vs.

DONAHOE PACE & PARTNERS LTD, an Idaho corporation; and TIMOTHY PACE,

Defendants.

DONAHOE PACE & PARTNERS LTD, an Idaho corporation,

Counterclaimant,

vs.

BOISE MODE, LLC, an Illinois limited liability company, successor-in-interest to Mode Building Limited Partnership, an Idaho limited partnership,

Case No. CV OC 1001093
NOTICE OF SERVICE

SLB

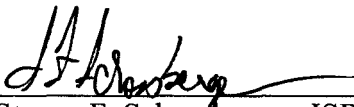
Counterdefendant.)
_____)

Pursuant to Rules 26(e) and 33 of the Idaho Rules of Civil Procedure, Boise Mode, LLC hereby gives notice that on May 16, 2011, said party served the original of Plaintiff/Counterdefendant's Supplemental Answers To Defendant/Counterclaimant's First Set Of Interrogatories upon the following person or persons:

Michael E. Kelly
John J. Browder
LOPEZ & KELLY, PLLC
702 W. Idaho Street, Suite 1100
P.O. Box 856
Boise, ID 83701

DATED THIS 16 day of May, 2011.

HAWLEY TROXELL ENNIS & HAWLEY LLP

By 

Steven F. Schossberger, ISB No. 5358
Attorneys for Plaintiff/Counterdefendant
Boise Mode, LLC, successor-in-interest to
Mode Building Limited Partnership

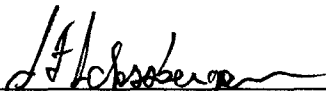
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 16 day of May, 2011, I caused to be served a true copy of the foregoing NOTICE OF SERVICE by the method indicated below, and addressed to each of the following:

Michael E. Kelly
John J. Browder
LOPEZ & KELLY, PLLC
702 W. Idaho Street, Suite 1100
P.O. Box 856
Boise, ID 83701

[Attorneys for Defendants and Counterclaimant]

U.S. Mail, Postage Prepaid
 Hand Delivered
 Overnight Mail
 E-mail
 Telecopy: 208.342.4344



Steven F. Schossberger

NO. _____ FILED *4:36*
A.M. _____ P.M.

MAY 16 2011

CHRISTOPHER D. RICH, Clerk
By KATHY BIEHL
Deputy

Steven F. Schossberger, ISB No. 5358
HAWLEY TROXELL ENNIS & HAWLEY LLP
877 Main Street, Suite 1000
P.O. Box 1617
Boise, ID 83701-1617
Telephone: 208.344.6000
Facsimile: 208.954.5260
Email: sschossberger@hawleytroxell.com

Attorneys for Plaintiff/Counterdefendant Boise Mode, LLC,
successor-in-interest to Mode Building Limited Partnership

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

BOISE MODE, LLC, an Illinois limited liability company, successor-in-interest to Mode Building Limited Partnership, an Idaho limited partnership,

Plaintiff,

vs.

DONAHOE PACE & PARTNERS LTD, an Idaho corporation; and TIMOTHY PACE,

Defendants.

Case No. CV OC 1001093

PLAINTIFF/COUNTERDEFENDANT'S
MEMORANDUM IN OPPOSITION TO
MOTION TO COMPEL

DONAHOE PACE & PARTNERS LTD, an Idaho corporation,

Counterclaimant,

vs.

BOISE MODE, LLC, an Illinois limited liability company, successor-in-interest to Mode Building Limited Partnership, an Idaho limited partnership,

Counterdefendant.

PLAINTIFF/COUNTERDEFENDANT'S MEMORANDUM IN OPPOSITION TO MOTION
TO COMPEL - 1

er

COMES NOW the above-named Plaintiff/Counterdefendant, by and through its undersigned counsel of record, and submits the following memorandum in opposition to Defendants/Counterclaimants' Motion to Compel.

I.

ARGUMENT

A. The Motion To Compel Interrogatory Nos. 18 and 19, Should Be Denied.

Whether to grant a motion to compel is within the sound discretion of the Court. *See Merrifield v. Arave*, 128 Idaho 306, 311 (Ct.App. 1996). A court will grant a motion to compel when a party fails to produce discovery information. *See, e.g., Lester v. Salvino*, 141, Idaho 937, 940 (Ct.App. 2005). Generally, any relevant information, no privileged, that is reasonably calculated to lead to the discovery of admissible evidence is discoverable. I.R.C.P. 26(b)(1).

On April 13, 2011, Defendants/Counterclaimants filed a Motion to Compel Supplemental Answers to Interrogatories Nos. 18 and 19, and Request for Production No. 3. Defendants/Counterclaimants did not file any supporting memorandum explaining how these discovery requests are reasonably calculated to lead to the discovery of admissible evidence in this action. The simple answer is that this discovery requesting information about other third persons and lease information from a third party is not relevant, and is not reasonably calculated to lead to the discovery of admissible evidence.

Nevertheless, on May 16, 2011, Plaintiff/Counterdefendant supplemented its answers to Interrogatory Nos. 18 and 19 as follows:

INTERROGATORY NO. 18 [sic]: Since the commencement of the Lease:

- a. Identify each tenant, lessee, subtenant, their agent(s), employee(s) or visitor(s) who has complained to the Plaintiff/Counter-Defendant and/or its agent(s) or employee(s)

about noise, disturbances, disruption, interruption or interference of any type or description at 800 West Idaho Street, Boise, Idaho 83702.

b. For each complaint identified in Interrogatory No. 18, subpart (a), describe the nature, type or character of the complaint.

c. For each complaint identified in Interrogatory No. 18, subpart (a), describe what action, if any, the Plaintiff/Counter-Defendant undertook to remedy or resolve the complaint.

SUPPLEMENTAL ANSWER TO INTERROGATORY NO. 18

[sic]: Subject to and without waiving the previously stated objections, since the commencement of the Lease, neither Plaintiff nor its agent(s) or employee(s) received complaints of any noise, disturbance, disruption, interruption or interference from anyone other than Timothy Pace on behalf of Donahoe Pace & Partners LTD.

INTERROGATORY NO. 19 [sic]: State whether you and The North Face had an agreement or understanding in which you would be penalized if improvements to the portion of 800 West Idaho Street, Boise, Idaho 83702 that The North Face had agreed to lease from you were not completed by a specified date. If so:

a. State the date by which you agreed to have the improvements to the portion of 800 West Idaho Street, Boise, Idaho 83702 that The North Face had agreed to lease were supposed to be completed.

b. State what the penalty would be if you did not complete the improvements by the specified date to the portion of 800 West Idaho Street, Boise, Idaho 83702 that The North Face had agreed to lease.

c. State whether you completed the improvements to the portion of 800 West Idaho Street, Boise, Idaho 83702 that The North Face had agreed to lease by the specified date.

SUPPLEMENTAL ANSWER TO INTERROGATORY NO. 19

[sic]: Subject to and without waiving the previously stated objections, there was no agreement between The North Face and Boise Mode LLC, that Boise Mode LLC would be penalized if improvements to the leased premises were not completed by a specified date.

See Schossberger Aff., Exh. A.

Given the supplemental answers, Defendants/Counterclaimants should withdraw the motion, or it should be denied.

B. The Motion To Compel Should Be Denied As To Request For Production No. 3.

Defendants/Counterclaimants seeks a copy of all agreements and leases between Boise Mode LLC and The North Face. Plaintiff has objected on the grounds that this request is not relevant and not reasonably calculated to lead to the discovery of admissible evidence. The Lease between Boise Mode LLC and Donahoe Pace & Partners LTD is the only lease that is relevant in this action for breach of contract for failure to pay rent, including any defenses which may be raised in accordance with the terms of the Lease. Defendants/Counterclaimants have not provided the Court with any supporting argument explaining how this third party lease is relevant and reasonably calculated to lead to the discovery of admissible evidence in this matter. On or about April 28, 2011, Defendants/Counterclaimants issued a subpoena duces tecum to The Northface to produce a copy of its lease on May 24, 2011. *See Schossberger Aff., Exh. B.* Because Defendants/Counterclaimants have subpoenaed these documents directly from The North Face, the present motion to compel is moot.

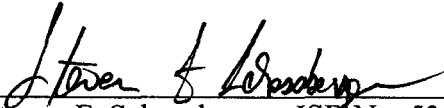
II.

CONCLUSION

For each of the foregoing reasons, Defendants/Counterclaimants' Motion to Compel should be denied.

DATED THIS 16th day of May, 2011.

HAWLEY TROXELL ENNIS & HAWLEY LLP

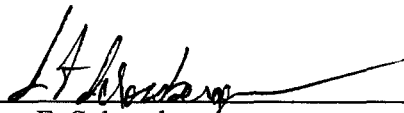
By 
Steven F. Schosberger, ISB No. 5358
Attorneys for Plaintiff/Counterdefendant Boise
Mode, LLC, successor-in-interest to Mode
Building Limited Partnership

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 16th day of May, 2011, I caused to be served a true copy of the foregoing PLAINTIFF/COUNTERDEFENDANT'S MEMORANDUM IN OPPOSITION TO MOTION TO COMPEL by the method indicated below, and addressed to each of the following:

Michael E. Kelly
John J. Browder
LOPEZ & KELLY, PLLC
413 W. Idaho Street, Suite 100
P.O. Box 856
Boise, ID 83701
[Attorneys for Defendants and Counterclaimant]

U.S. Mail, Postage Prepaid
 Hand Delivered
 Overnight Mail
 E-mail
 Telecopy: 208.342.4344



Steven F. Schossberger

MAY 17 2011

CHRISTOPHER D. FLEMING, Clerk
By JEFFREY S. HAYES
D. 0000

Steven F. Schossberger, ISB No. 5358
HAWLEY TROXELL ENNIS & HAWLEY LLP
877 Main Street, Suite 1000
P.O. Box 1617
Boise, ID 83701-1617
Telephone: 208.344.6000
Facsimile: 208.954.5260
Email: sschossberger@hawleytroxell.com

Attorneys for Plaintiff/Counterdefendant Boise Mode, LLC,
successor-in-interest to Mode Building Limited Partnership

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

BOISE MODE, LLC, an Illinois limited
liability company, successor-in-interest to
Mode Building Limited Partnership, an Idaho
limited partnership,

Plaintiff,

vs.

DONAHOE PACE & PARTNERS LTD, an
Idaho corporation; and TIMOTHY PACE,

Defendants.

DONAHOE PACE & PARTNERS LTD, an
Idaho corporation,

Counterclaimant,

vs.

BOISE MODE, LLC, an Illinois limited
liability company, successor-in-interest to
Mode Building Limited Partnership, an Idaho
limited partnership,

Counterdefendant.

Case No. CV OC 1001093

SECOND AFFIDAVIT OF STEVEN F.
SCHOSSBERGER IN OPPOSITION TO
DEFENDANTS/COUNTERCLAIMANTS'
MOTION TO COMPEL

SECOND AFFIDAVIT OF STEVEN F. SCHOSSBERGER IN OPPOSITION TO
DEFENDANTS/COUNTERCLAIMANTS' MOTION TO COMPEL - 1

CP

Steven F. Schossberger being first duly sworn upon oath deposes and states as follows:

1. I am a partner with the law firm Hawley Troxell Ennis & Hawley LLP, counsel of record for Plaintiff/Counterdefendant Boise Mode, LLC in this action.

2. I make this affidavit based upon my own personal knowledge, and I am competent to testify hereto if called upon to do so.

3. Attached hereto as Exhibit A is a true and correct copy of Plaintiff/Counterdefendant's Second Supplemental Answers to Defendant/Counterclaimants' First Set of Interrogatories (Nos. 18 and 19).

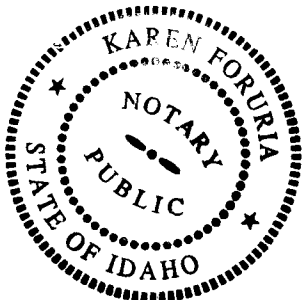
Further your affiant sayeth naught.

Steven F. Schossberger

Steven F. Schossberger

STATE OF IDAHO)
) ss.
County of Ada)

SUBSCRIBED AND SWORN before me this 17th day of May, 2011.



Karen Foruria

Name: *Karen Foruria*

Notary Public for Idaho
Residing at *Boise, Idaho*

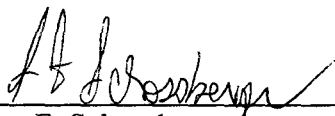
My commission expires *6-18-11*

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 17th day of May, 2011, I caused to be served a true copy of the foregoing SECOND AFFIDAVIT OF STEVEN F. SCHOSSBERGER IN OPPOSITION TO DEFENDANTS/COUNTERCLAIMANTS' MOTION TO COMPEL by the method indicated below, and addressed to each of the following:

Michael E. Kelly
John J. Browder
LOPEZ & KELLY, PLLC
413 W. Idaho Street, Suite 100
P.O. Box 856
Boise, ID 83701
[Attorneys for Defendants and Counterclaimant]

U.S. Mail, Postage Prepaid
 Hand Delivered
 Overnight Mail
 E-mail
 Telecopy: 208.342.4344



Steven F. Schossberger

Steven F. Schossberger, ISB No. 5358
 HAWLEY TROXELL ENNIS & HAWLEY LLP
 877 Main Street, Suite 1000
 P.O. Box 1617
 Boise, ID 83701-1617
 Telephone: 208.344.6000
 Facsimile: 208.954.5260
 Email: sschossberger@hawleytroxell.com

Attorneys for Plaintiff/Counterdefendant Boise Mode, LLC,
 successor-in-interest to Mode Building Limited Partnership

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

BOISE MODE, LLC, an Illinois limited
 liability company, successor-in-interest to
 Mode Building Limited Partnership, an Idaho
 limited partnership,

Plaintiff,

vs.

DONAHOE PACE & PARTNERS LTD, an
 Idaho corporation; and TIMOTHY PACE,

Defendants.

DONAHOE PACE & PARTNERS LTD, an
 Idaho corporation,

Counterclaimant,

vs.

BOISE MODE, LLC, an Illinois limited
 liability company, successor-in-interest to
 Mode Building Limited Partnership, an Idaho

Case No. CV OC 1001093

PLAINTIFF/COUNTERDEFENDANT'S
 SECOND SUPPLEMENTAL ANSWERS
 TO DEFENDANT-
 COUNTERCLAIMANT'S FIRST SET OF
 INTERROGATORIES

PLAINTIFF/COUNTERDEFENDANT'S SECOND SUPPLEMENTAL ANSWERS TO
 DEFENDANT-COUNTERCLAIMANT'S FIRST SET OF INTERROGATORIES - 1

limited partnership,)
)
 Counterdefendant.)
)
 _____)

TO: DONAHOE PACE & PARTNERS LTD AND TIMOTHY PACE AND THEIR
COUNSEL OF RECORD

COMES NOW Boise Mode LLC, Plaintiff/Counterdefendant (“Plaintiff”) in the
above-entitled action, by and through its counsel of record, Hawley Troxell Ennis & Hawley
LLP, and, in accordance with the requirements of Rules 26(e), and 33 of the Idaho Rules of Civil
Procedure, hereby files its supplemental answers to Defendant/Counter-Claimant’s First Set of
Interrogatories.

INTERROGATORIES

INTERROGATORY NO. 18 [sic]: Since the commencement of the Lease:

a. Identify each tenant, lessee, subtenant, their agent(s), employee(s) or visitor(s)
who has complained to the Plaintiff/Counter-Defendant and/or its agent(s) or employee(s) about
noise, disturbances, disruption, interruption or interference of any type or description at 800
West Idaho Street, Boise, Idaho 83702.

b. For each complaint identified in Interrogatory No. 18, subpart (a), describe the
nature, type or character of the complaint.

c. For each complaint identified in Interrogatory No. 18, subpart (a), describe what
action, if any, the Plaintiff/Counter-Defendant undertook to remedy or resolve the complaint.

SECOND SUPPLEMENTAL ANSWER TO INTERROGATORY NO. 18 [sic]: Subject
to and without waiving the previously stated objections, Plaintiff/Counterdefendant further
answers that in August 2008, The Grape Escape LLC wrongly asserted that the remodel

activities would encroach upon its usable space when, in fact, the western boundary of the Grape Escape's leased premises was actually expanded out into the Building's prior Common Area which provided 191 square feet of additional usable square footage and enlarged the leased premises at no extra cost. The Grape Escape incorrectly asserted that it was losing access to the Common Area restrooms when, in fact, the Landlord was constructing private restrooms in the tenant's expanded Premises, and the tenants still had access to the Common Area restrooms. The Grape Escape also improperly asserted that the Common Area access routes could not be reconfigured. Finally, the Grape Escape gave the Landlord a one-time verbal notice of a problem with the HVAC system, and on the same day the HVAC was inspected, any issue was resolved, and the HVAC system was confirmed to be functioning properly. Thereafter, the Grape Escape and Boise Mode entered into a Fifth Lease Supplement which extended the Lease term until January 31, 2012.

INTERROGATORY NO. 19 [sic]: State whether you and The North Face had an agreement or understanding in which you would be penalized if improvements to the portion of 800 West Idaho Street, Boise, Idaho 83702 that The North Face had agreed to lease from you were not completed by a specified date. If so:

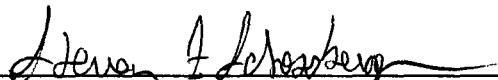
- a. State the date by which you agreed to have the improvements to the portion of 800 West Idaho Street, Boise, Idaho 83702 that The North Face had agreed to lease were supposed to be completed.
- b. State what the penalty would be if you did not complete the improvements by the specified date to the portion of 800 West Idaho Street, Boise, Idaho 83702 that The North Face had agreed to lease.

c. State whether you completed the improvements to the portion of 800 West Idaho Street, Boise, Idaho 83702 that The North Face had agreed to lease by the specified date.

SUPPLEMENTAL ANSWER TO INTERROGATORY NO. 19 [sic]: Subject to and without waiving the previously stated objections, there was no agreement between The North Face and Boise Mode LLC, that Boise Mode LLC would be penalized if improvements to the leased premises were not completed by a specified date.

DATED THIS 17th day of May, 2011.

HAWLEY TROXELL ENNIS & HAWLEY LLP

By 
Steven F. Schossberger, ISB No. 5358
Attorneys for Plaintiff/Counterdefendant
Boise Mode, LLC, successor-in-interest to
Mode Building Limited Partnership

VERIFICATION

David L. Baum, being first duly sworn upon oath, deposes and says:

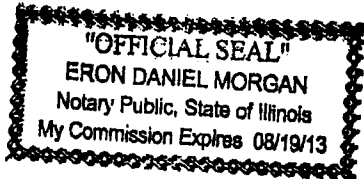
That he is a Member of Baum Development, LLC, the Manager of Boise Mode, LLC the Plaintiff in the above-entitled action; that he has read the within and foregoing Second Supplemental Answers to Defendant/Counterclaimant's First Set of Interrogatories; and that the statements therein contained are true to the best of his knowledge and belief.

[Signature]
David L. Baum

STATE OF Illinois)
) ss.
County of Cook)

I, Eron Daniel Morgan, a Notary Public, do hereby certify that on this 17th day of May, 2011, personally appeared before me David L. Baum, who, being by me first duly sworn, declared that he is the Manager of Boise Mode, LLC, that he signed the foregoing document as Manager of the company, and that the statements therein contained are true.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal the day and year in this certificate first above written.



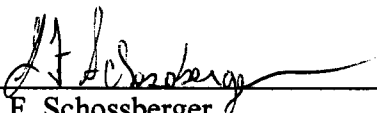
Eron Daniel Morgan
Notary Public for Illinois
Residing at Cook County, Illinois
My commission expires 8/19/13

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 17th day of May, 2011, I caused to be served a true copy of the foregoing PLAINTIFF/COUNTERDEFENDANT'S SECOND SUPPLEMENTAL ANSWERS TO DEFENDANT-COUNTERCLAIMANT'S FIRST SET OF INTERROGATORIES by the method indicated below, and addressed to each of the following:

Michael E. Kelly
John J. Browder
LOPEZ & KELLY, PLLC
702 W. Idaho Street, Suite 1100
P.O. Box 856
Boise, ID 83701
[Attorneys for Defendants and Counterclaimant]

U.S. Mail, Postage Prepaid
 Hand Delivered
 Overnight Mail
 E-mail
 Telecopy: 208.342.4344



Steven F. Schossberger

MAY 17 2011

CHRISTOPHER D. FUCH, Clerk
By JERI HEATON
DEPUTY

Steven F. Schossberger, ISB No. 5358
HAWLEY TROXELL ENNIS & HAWLEY LLP
877 Main Street, Suite 1000
P.O. Box 1617
Boise, ID 83701-1617
Telephone: 208.344.6000
Facsimile: 208.954.5260
Email: sschossberger@hawleytroxell.com

Attorneys for Plaintiff/Counterdefendant Boise Mode, LLC,
successor-in-interest to Mode Building Limited Partnership

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

BOISE MODE, LLC, an Illinois limited liability company, successor-in-interest to Mode Building Limited Partnership, an Idaho limited partnership,

Plaintiff,

vs.

DONAHOE PACE & PARTNERS LTD, an Idaho corporation; and TIMOTHY PACE,

Defendants.

Case No. CV OC 1001093
NOTICE OF SERVICE

DONAHOE PACE & PARTNERS LTD, an Idaho corporation,

Counterclaimant,

vs.

BOISE MODE, LLC, an Illinois limited liability company, successor-in-interest to Mode Building Limited Partnership, an Idaho limited partnership,



Counterdefendant.)
_____)

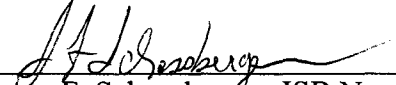
Pursuant to Rules 26(e) and 33 of the Idaho Rules of Civil Procedure, Boise Mode, LLC hereby gives notice that on May 17, 2011, said party served the original of Plaintiff/Counterdefendant's Second Supplemental Answers To Defendant/Counterclaimant's First Set Of Interrogatories upon the following person or persons:

Michael E. Kelly
John J. Browder
LOPEZ & KELLY, PLLC
702 W. Idaho Street, Suite 1100
P.O. Box 856
Boise, ID 83701

DATED THIS 17 day of May, 2011.

HAWLEY TROXELL ENNIS & HAWLEY LLP

By



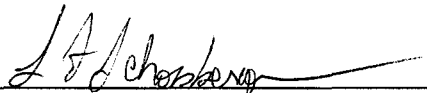
Steven F. Schossberger, ISB No. 5358
Attorneys for Plaintiff/Counterdefendant
Boise Mode, LLC, successor-in-interest to
Mode Building Limited Partnership

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 17th day of May, 2011, I caused to be served a true copy of the foregoing NOTICE OF SERVICE by the method indicated below, and addressed to each of the following:

Michael E. Kelly
John J. Browder
LOPEZ & KELLY, PLLC
702 W. Idaho Street, Suite 1100
P.O. Box 856
Boise, ID 83701
[Attorneys for Defendants and Counterclaimant]

U.S. Mail, Postage Prepaid
 Hand Delivered
 Overnight Mail
 E-mail
 Telecopy: 208.342.4344



Steven F. Schossberger

NO. _____ FILED _____
A.M. _____ P.M. *4/16*

MAY 18 2011

CHRISTOPHER D. RICH, Clerk
By JAMIE RANDALL
DEPUTY

Steven F. Schossberger, ISB No. 5358
HAWLEY TROXELL ENNIS & HAWLEY LLP
877 Main Street, Suite 1000
P.O. Box 1617
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Telephone: 208.344.6000
Facsimile: 208.954.5260
Email: sschossberger@hawleytroxell.com

Attorneys for Plaintiff/Counterdefendant Boise Mode, LLC,
successor-in-interest to Mode Building Limited Partnership

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

BOISE MODE, LLC, an Illinois limited liability company, successor-in-interest to Mode Building Limited Partnership, an Idaho limited partnership,

Plaintiff,

vs.

DONAHOE PACE & PARTNERS LTD, an Idaho corporation; and TIMOTHY PACE,

Defendants.

DONAHOE PACE & PARTNERS LTD, an Idaho corporation,

Counterclaimant,

vs.

BOISE MODE, LLC, an Illinois limited liability company, successor-in-interest to Mode Building Limited Partnership, an Idaho limited partnership,

Counterdefendant.

Case No. CV OC 1001093

REPLY IN SUPPORT OF BOISE MODE, LLC'S MOTION FOR RECONSIDERATION AND FURTHER RECONSIDERATION

REPLY IN SUPPORT OF BOISE MODE, LLC'S MOTION FOR RECONSIDERATION AND FURTHER RECONSIDERATION - 1

I.
INTRODUCTION/PROCEDURAL BACKGROUND

This Court got it right the first time in its Order granting Plaintiff/Counterdefendant Boise Mode, LLC's ("Boise Mode") motion for summary judgment filed December 27, 2010. Defendant/Counterclaimant Donahoe Pace & Partners Ltd ("DPP") and Defendant Timothy Pace ("Pace") know it. The Court's first application of Idaho Code § 6-320(d) to preclude DPP's counterclaims for lack of standing was harmless error. Regardless, looking at the record there is no triable issue of fact regarding the counterclaims for constructive eviction, breach of contract and breach of the implied covenant of good faith and fair dealing.

In the Court's discussion of Boise Mode's summary judgment against DPP on the Verified Complaint it stated that, "In this case, Boise Mode met its burden of proving both a contract and its breach." Order dated 12/27/2010, p. 4, LL. 21-22. Nothing in DPP's motion for reconsideration dated January 19, 2011, changed this finding by the Court. The Court further correctly made the finding that, "While DPP plead affirmative defenses in its Answer, it failed to subsequently prove them." *Id.* at L. 24. A review of the Defendant's Answer shows that the Court was absolutely correct. The Defendants specifically plead certain affirmative defenses as follows:

- First Defense: The Plaintiff failed to state a claim against these Answering Defendants upon which relief may be granted.
- Second Defense: Roman numerals I, II, III, IV, V, VI, VII, VIII and IX, providing general admissions and denials of the allegations in the complaint.
- Third Defense: Plaintiff has failed to mitigate its damages.
- Fourth Defense: Plaintiff acted with negligence, careless misconduct at the time of and in connection with the matters and damages alleged in the Plaintiff's complaint, which

negligence and misconduct proximately caused and contributed to said events and damages, if any.

- Fifth Defense: Plaintiff, through its actions or those of its agents, has waived any claims or is estopped from asserting against the Defendants any such claims under the Lease and personal guaranty, attached as Exhibit H to the Lease.
- Sixth Defense: Because Plaintiff was aware of and failed to disclose facts material to the Lease, Defendants are discharged of any obligation to perform under the Lease.
- Seventh Defense: Defendants are entitled to recoupment and/or set-off of Plaintiff's damages, if any, in an amount to be proven at trial.
- Eighth Defense: General reservation to assert additional defenses.

See Answer filed February 23, 2010.

Significantly, the Defendants did not submit any memorandum or affidavits in opposition to Boise Mode's motion for summary judgment. Summary judgment was properly entered by the Court. I.R.C.P. 56(c). Moreover, none of the affirmative defenses plead in the Answer are supported by the record before this Court, nor are any of them relevant to create a genuine issue of material fact regarding Boise Mode's claims for breach of contract and breach of the personal guaranty. Idaho Rule of Civil Procedure 8(c) (Affirmative Defenses) provides that in pleading to a preceding pleading, a party shall set forth affirmatively ... any other matter constituting an avoidance or an affirmative defense. Even though DPP did not plead an affirmative defense of a prior material breach by Boise Mode which excused the obligated performance to pay rent by DPP, as discussed in Boise Mode's opening memorandum in support of motion for reconsideration such a defense is entirely irrelevant to the facts presented in this case. Yet, on several occasions, the Defendants have misled the Court by making the argument as though the affirmative defense was present in the Answer. (*See, e.g., Reply to Plaintiff's memorandum in*

opposition to Defendant's motion for continuance pursuant to I.R.C.P. 56(f) dated December 20, 2010, p. 2). The Defendants additionally relied upon this falsely asserted affirmative defense in their motion to amend judgment/motion for reconsideration dated January 19, 2011. (*See* Memorandum, p. 2, "(3) No material question of fact existed as to whether Plaintiff breached the Office Lease and, if so, whether that breach excused DPP's performance).

Having been lured into the Defendants' improperly asserted affirmative defense which does not even exist, in the Court's Order dated March 2, 2011, it reversed its prior Order and stated that, "genuine issues of material fact remain as to why the Defendants breached their obligation to Boise Mode, and as to whether Boise Mode breached its obligations under the Lease." (*Id.* at 8, LL. 2-4).

This finding was erroneous, however, for two reasons: (1) Defendant's Answer does not plead the affirmative defense of a prior material breach by Boise Mode which excused DPP's performance to pay rent under the Lease; and (2) Article 4.1 of the Lease expressly provides that, "... there shall be no deduction, offset or abatement for any reason of the rent or any money payable by tenant to landlord." (*See* Verified Complaint filed January 20, 2010, Exhibit A).

Moreover, Pace's personal guaranty expressly states that:

The Liabilities ["all obligations and the full amount of money that tenant now or in the future owes landlord arising under or relating to the Lease"] shall not be reduced by any claim setoff or counterclaim of tenant or undersigned.

(*Id.*, Exhibit H attached to Exhibit A of the Lease).

The language of the Lease and of the personal guaranty is binding on the Defendants, and precludes them from raising the defenses of offset or abatement due to an alleged breach of the covenant of quiet enjoyment by Boise Mode. *See Idaho Power Co. v. Co-Generation, Inc.*, 134 Idaho 738, 746-47 (2000). Given the express provision of Article 4.1 **precluding any**

REPLY IN SUPPORT OF BOISE MODE, LLC'S MOTION FOR RECONSIDERATION AND FURTHER RECONSIDERATION - 4

deductions, offsets or abatements of rent for any reason, and the language of the personal guaranty that the **tenant's obligations to pay all money owed to landlord arising under the Lease should not be reduced by any claim of setoff or counterclaim of tenant**, the Defendants simply do not have any viable affirmative defense which could act to legally excuse DPP's performance to pay all rent owing under the Lease to Boise Mode. Defendants' red herring defense must now be rejected by the Court.

In the Court's Order dated December 27, 2010, it correctly found that DPP's breach of the Lease deprived Boise Mode of the benefits it contracted for when it entered into the Lease with DPP, and that this deprivation is sufficient to meet the requirements of a breach of the implied covenant of good faith and fair dealing. (*Id.* at p. 5, L. 22 - p. 6, L. 1). The Court then properly granted Boise Mode's motion for summary judgment as to that claim. The Court also made the correct findings that DPP did not fully perform its financial obligations under the Lease and, therefore, Mr. Pace's liability under the personal guaranty was invoked, and that Mr. Pace failed to pay Boise Mode for DPP's unpaid obligations. (*Id.* at p. 6, LL. 11-15). Accordingly, the Court properly granted Boise Mode's motion for summary judgment as to breach of the personal guaranty of Lease as against Pace. (*Id.* at p. 6, LL. 16-20).

Finally, as to Boise Mode's motion for summary judgment on the counterclaims for constructive eviction, breach of contract and breach of the covenant of good faith and fair dealing, the Court correctly stated that DPP's counterclaim of breach of contract regarding the covenant of quiet enjoyment, and related breach of the implied covenant of good faith and fair dealing, are premised on a successful constructive eviction claim. (*Id.* at p. 8, LL. 11-15). The Court correctly stated that, "Even construing reasonable factual inference in a light most favorable to DPP, the Court finds no genuine issue of material fact remains regarding the claims

for constructive eviction, breach of contract, or breach of the covenant of good faith and fair dealing.” (*Id.* at p. 8, LL. 16-18).

After the Court made this correct finding, the Defendants did not present any new evidence which could have changed this Court’s original finding of the absence of any triable issues of fact regarding these three counterclaims. Significantly, the absence of Idaho Code § 6-320(d) has absolutely no bearing on the undisputed factual record that these counterclaims fail both factually and as a matter of law given: (1) DPP’s undisputed breach of the Lease for failure to pay rent when due; (2) the contractual prohibition against any right of offset or abatement of rent (Article 4.1); (3) the contractual requirement to be current on the payment of rent in order to enjoy the right to have and assert the covenant of quiet enjoyment (Article 19.3); and (4) the clear record that DPP unreasonably waited more than seven months after the alleged construction had been completed in early April 2009, before moving out of the premises in November 2009. (*See* Memorandum in Support of Motions for Summary Judgment, Statement of Undisputed Fact No. 15, dated November 24, 2010; *see* Boise Mode, LLC’s Memorandum in Support of Motion for Reconsideration, p. 3, dated April 27, 2011). Moreover, on June 8, 2009, five months prior to the abandonment of the premises in November 2009, Pace sent an email to Boise Mode stating that “We think now may be a time to consider rewriting the balance of our Lease and extending into the end of next year. Is that an option you might consider.” (*See* Memorandum dated November 24, 2010, Statement of Undisputed Fact No. 16).

Not surprisingly, the Defendants’ response does not meet head on any of the factual or legal arguments raised in Boise Mode’s memorandum in support of this motion for reconsideration. It is clear by the response that the Defendants know that the Court correctly granted the motions for summary judgment in the first place, with the harmless exception of the

discussion on Idaho Code § 6-320, and they know Boise Mode's motion for reconsideration is well grounded in the undisputed facts and controlling law. The Defendants merely assert a spindly procedural argument that the present motion is untimely. However, under a proper reading of I.R.C.P. 11(a)(2)(B), and given that the parties are right back in the middle of this action without any pending trial date, this motion is timely.

II. ARGUMENT

Boise Mode's Motion for Reconsideration and Further Consideration Should be Granted

A. Boise Mode's Motion for Reconsideration and Further Consideration is Timely.

The Court should reject Defendants' argument that Boise Mode's motion is untimely under Idaho Rule of Civil Procedure 11(a)(2)(B). The Court deemed the Defendants' motion filed on January 19, 2011 to be both an Idaho Rule of Civil Procedure 11(a)(2)(B) motion for reconsideration of its Order and an I.R.C.P. 59(e) motion to amend the Judgment. (*See* Order dated March 2, 2011, p. 2, LL. 2-4). The Court was correct that the Defendants sought reconsideration of its Order granting Boise Mode's motions for summary judgment dated December 27, 2010. Plainly, Boise Mode's instant motion brought pursuant to I.R.C.P. 11(a)(2)(B) seeks reconsideration of the Court's Order reversing its prior Order granting the motions for summary judgment.

Idaho Rule of Civil Procedure 11(a)(2)(B), states that a motion for reconsideration of any interlocutory Order of the trial court may be made at any time **before the entry of final judgment but not later than 14 days after the entry of the final judgment**. Boise Mode's motion for reconsideration is timely because it has not been made 14 days after the entry of the Final Judgment. (*See* I.R.C.P. 58(a)). Because the parties were in the procedural stage of the motions for summary judgment, the Court's Order reversing the Order granting the motions for

summary judgment also had the effect of voiding the subsequently entered judgment. Therefore, Defendants' argument under I.R.C.P. 11(a)(2)(B) is misplaced.

Furthermore, the Defendants misconstrue the second part of Rule 11(a)(2)(B) providing that, "A motion for reconsideration of any Order of the trial court made after entry of final judgment may be filed within fourteen (14) days from the entry of such Order; provided, there shall be no motion for reconsideration of an Order of the trial court entered on any motion filed under Rules 50(a), 52(b), 55(c), 59(a), 59(e), 59.1, 60(a), or 60(b)." The Court's Order dated March 2, 2011 was not made after the entry of a final judgment in this case, and this part of Rule 11(a)(2)(B) is inapplicable. Rules 50(a), 52(b), 55(c), 59(a), 59(e), 59.1, 60(a) and 60(b) each involve request for relief by a party from action taken by the trial court during a trial or following the completion of a court or jury trial. *See, e.g., Watson v. Navistar Int'l Transp. Corp.*, 121 Idaho 643 (1992). Accordingly, the Court should address the merits of Boise Mode's motion for reconsideration.

B. The Court Should Reverse Its Order Dated March 2, 2011, and Enter a New Order Granting Boise Mode's Motion for Summary Judgment on the Verified Complaint for Breach of Contract, Breach of the Covenant of Good Faith and Fair Dealing, and Breach of Pace's Personal Guaranty.

In Boise Mode's memorandum in support of motion for summary judgment on the Verified Complaint, Boise Mode presented the Court with the on point authority presented in *Idaho Power Co. v. Co-Generation, Inc.*, wherein the Idaho Supreme Court held:

A breach of contract is non-performance of any contractual duty of immediate performance. *See Enterprise, Inc. v. Nampa City*, 96 Idaho 734, 740, 536 P.2d 729, 735 (1975) (quoting RESTATEMENT OF THE LAW OF CONTRACTS § 312 (1932)). It is a failure, without legal excuse, to perform any promise, which forms the whole or part of a contract. *See Hughes v. Idaho State Univ.*, 122 Idaho 435, 437, 835 P.2d 670, 672 (Ct. App. 1992) (quoting Black's Law Dictionary 188 (6th ed. 1990)). The burden of proving the existence of a contract and fact of its breach is upon

the plaintiff, and once those facts are established, the defendant has the burden of pleading and proving affirmative defenses, which legally excuse performance. *See O'Dell v. Basabe*, 119 Idaho 796, 813, 810 P.2d 1082, 1099 (1991).

134 Idaho 738, 746-47, 9 P.3d 1204, 1212-13 (2000). Boise Mode then correctly stated that, "Plaintiff cannot prove any affirmative defense that legally excuses its duty of performance under the Lease." *See* Memorandum dated November 24, 2010, p. 7. As illustrated in the above discussion, the Defendants did not specifically plead any affirmative defense which would act to legally excuse its duty of performance to pay rent under the Lease. *See* Answer filed February 23, 2010. Accordingly, the Court was absolutely correct in its Order granting Boise Mode's motion for summary judgment on DPP's claims for constructive eviction, breach of contract claims and breach of the implied covenant of good faith. *See* Order dated December 27, 2010 at pp. 4-6.

Even if the Defendants had plead the affirmative defense of a material breach by Boise Mode which legally excused the performance to pay rent by DPP, such a defense fails as a matter of law due to the governing provisions of Article 4.1 of the Lease, and pursuant to the same effectual language provided in the personal guaranty. In addition to the lack of any provable affirmative defenses which would excuse DPP's duty of performance to pay rent under the Lease, Boise Mode also argued in its motion for summary judgment that DPP's counterclaims should not prevent summary judgment in Boise Mode's favor on its affirmative claims against DPP and Pace because, once again, pursuant to the express terms of the Lease and guaranty, DPP has no right to offset the amount owed to Boise Mode. *See* Memorandum dated November 24, 2010, pp. 10-11.

Thus, given the above discussion of Article 4.1 of the Lease, the Defendants are flat wrong that there is a triable issue of material fact as to whether Article 4.1 was in force at the

time DPP began to withhold rental payments. *See* Response Brief dated May 16, 2011, at 4. DPP is bound by the language in Article 4.1. DPP admits that it withheld rent. There is no disputed issue of fact over the amount of the rent owed. DPP failed to plead any applicable affirmative defense in its Answer to the Verified Complaint which was not otherwise barred Article 4.1 -- let alone prove such an affirmative defense which could legally excuse its performance under the Lease. Consequently, there being no genuine issues of material fact on Boise Mode's affirmative claims for relief, the Court should reverse its Order and reinstate the original Order granting Boise Mode's motion for summary judgment. *See American Foreign Ins. Co. v. Reichert*, 140 Idaho 394, 402 (2004) ("The offset provision is unambiguous. When there is no ambiguity, there is no occasion for construction and coverage must be determined using the plain meaning of the words employed."); *see* 49 Am. Jur. 2d § 49 ("In instances where the terms of a Lease are unambiguous, they must be enforced as written, and no court can rewrite a Lease to provide a better bargain to suit one of the parties.").

C. The Court Should Reverse Its Order and Reinstate the Order Granting Boise Mode's Motion for Summary Judgment on DPP's Counterclaims for Constructive Eviction, Breach of Contract and Breach of the Covenant of Good Faith and Fair Dealing.

In the Court's Order dated March 2, 2011, after finding that Idaho Code § 6-320 is inapplicable to this case, the Court provided that it must now reevaluate whether summary judgment was proper for Boise Mode. The Court acknowledged that the record shows that DPP did in fact stop paying rent, and abandoned the premises for reasons allegedly related to those complaints, and then concluded that genuine issues of material fact remain as to whether Boise Mode breached its obligations under the Lease making summary judgment inappropriate at this time. *Id.* at pp. 7-8. However, Boise Mode presented in its motion for summary judgment the undisputed material fact that Article 19.3 of the Lease contains a covenant of quiet enjoyment,

which is expressly conditioned upon the tenant paying rent, and is expressly made subject to all restrictions and covenants in the Lease:

QUIET ENJOYMENT. Landlord agrees that Tenant, **upon paying the rent and other monetary sums due under this Lease and performing the covenants and conditions of this Lease** and upon recognizing purchaser as Landlord, may quietly have, hold and enjoy the Premises during the term hereof; subject, however, to loss by casualty and all restrictions and covenants contained or referred to in this Lease.

See Verified Compl., Exh. A (Emphasis added.). See Memorandum filed November 24, 2010, p. 4, ¶ 7. Furthermore, Boise Mode presented the Court with the undisputed material fact that Article 20.1 of the Lease specifies that the following occurrences “shall constitute a material default and breach of this Lease by tenant”:

(a) Any failure of the Tenant to pay the Base Rent, additional rent, or any other monetary sums required to be paid hereunder. If tenant fails to cure said default within five (5) days after written notice by Landlord to Tenant, Landlord shall be entitled to exercise its rights and remedies as provided in Article 20.3 herein, without further notice to Tenant.

(b) The abandonment of the Premises by Tenant without Tenant continuing to pay Base Rent in a timely manner.

See Verified Compl., Exh. A (emphases added). *Id.* at pp. 5-6.

Similar to the argument presented above regarding Article 4.1 of the Lease, DPP is likewise bound by Articles 19.3 and 20.1 of the Lease, and had no legal right to assert a breach of the covenant of quiet enjoyment when it was in default of its payment of rent owed under the Lease. DPP’s claims of constructive eviction, breach of contract and breach of the covenant of good faith and fair dealing are each premised upon the alleged breaches of Article 19.3 (quiet enjoyment) of the Lease. However, said claims are not viable because the facts are undisputed that DPP had failed to pay a substantial amount of rent owing under the Lease prior to its

abandonment of the premises in November 2009. Therefore, DPP had forfeited its right to invoke a covenant of quiet enjoyment under the Lease, and there being no genuine issue of material fact otherwise, the Court should reverse its Order and enter summary judgment for Boise Mode on these counterclaims.

In addition to these contractual hurdles which cannot be overcome by DPP, the law is also in accord that a tenant cannot maintain an action for constructive eviction or for breach of the covenant of quiet enjoyment if the tenant has not kept current on rent payments. 49 Am. Jur. 2d § 494 (“The payment of all required rent is a condition precedent to the maintenance of an action for breach of the covenant [of quiet enjoyment].”); see *Richard Barton Enterprises, Inc. v. Tsern*, 928 P.2d 368, 374 (Utah 1996) (“To establish a constructive eviction, however, the lessee had to vacate the entire Leasehold, and only then could the lessee withhold rent”). Defendants have failed in their attempt to distinguish the holding in the *Tsern* case, and of course the Defendants cannot take issue with the citation to Am. Jur.

Furthermore, the well recognized law is that constructive eviction does not apply if a tenant waits to abandon the Leased premises until after the problem ceases. 49 Am. Jur. 2d § 517 (“However much of the tenant may be disturbed in the beneficial enjoyment of the premises by the landlord’s wrongful act, there was no constructive eviction if the tenant continues in possession of the premises”) (*Id.* at § 518) (“The tenant loses the right to abandon the premises if, before carrying out the intention to abandon, the cause for abandonment ceases to exist”). The factual record before this Court is undisputed that all construction about which DPP could have complained was completed in April 2009. DPP did not vacate the premises until approximately seven months later in November 2009.

These facts are undisputed and warrant the Court's finding that Boise Mode's motion for summary judgment on these counterclaims is proper under Article 19.3 (quiet enjoyment) and as a matter of law, because Plaintiff is precluded from asserting its counterclaims for constructive eviction, breach of contract (covenant of quiet enjoyment) and breach of the implied covenant of good faith and fair dealing under the undisputed facts that as of December 2008, DPP failed to make the rent payments required under the Lease and was thereby in default of the Lease when it abandoned the premises in November 2009. Thus, there is no triable issue of material fact, and the Court should reenter the grant of summary judgment in favor of Boise Mode on these counterclaims.

D. There is No Triable Issue of Material Fact that DPP has Proven No Damages on Its Counterclaims.


Boise Mode also asserted in its motion for summary judgment on the counterclaims for constructive eviction, breach of contract and breach of the implied covenant of good faith and fair dealing that, "Even if the maintenance or construction-related issues did constitute a breach, Defendant cannot show any damages." See Memorandum dated November 24, 2010, p. 19. See *Badell v. Beaks*, 115 Idaho 101 (1988) ("A failure of proof on an essential element of the opposing party's case makes all other facts immaterial.") Following Boise Mode's motion for summary judgment on these counterclaims due to DPP's lack of damages, the burden shifted to DPP to prove its damages suffered as a proximate result of the alleged claims against Boise Mode. DPP failed, however, to make any showing of damages in opposition to the motion for summary judgment. Consequently, this failure of proof on this essential element of the counterclaims alone supports the Court's entry of summary judgment in favor of Boise Mode against DPP on the claims for constructive eviction, breach of contract and breach of the implied covenant of good faith and fair dealing.

**III.
CONCLUSION**

For each of the foregoing reasons, Boise Mode's motion for reconsideration and further consideration should be granted such that the Court enters an Order reentering the granting of Boise Mode's motions for summary judgment on the Verified Complaint and on the counterclaims.

DATED THIS 18th day of May, 2011.

HAWLEY TROXELL ENNIS & HAWLEY LLP

By 
Steven F. Schossberger, ISB No. 5358
Attorneys for Plaintiff/Counterdefendant Boise
Mode, LLC, successor-in-interest to Mode
Building Limited Partnership

Michael E. Kelly, ISB #4351
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LOPEZ & KELLY, PLLC
PO Box 856
Boise, Idaho 83701
Telephone: (208) 342-4300
Facsimile: (208) 342-4344
7008.001/Further Response Re Plaintiff's Motion for Reconsideration.wpd

NO. _____ FILED _____
A.M. _____ P.M. **416**

MAY 20 2011

CHRISTOPHER D. RICH, Clerk
By ELYSHIA HOLMES
DEPUTY

ORIGINAL

Attorneys for Defendants/Counter-Claimant

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

BOISE MODE, LLC, an Illinois limited liability company, successor-in-interest to Mode Building Limited Partnership, an Idaho limited partnership,

Plaintiff,

vs.

DONAHOE PACE & PARTNERS LTD, an Idaho corporation; and TIMOTHY PACE,

Defendants.

DONAHOE PACE & PARTNERS LTD, an Idaho corporation,

Counter-Claimant,

vs.

BOISE MODE, LLC, an Illinois limited liability company, successor-in-interest to Mode Building Limited Partnership, an Idaho limited partnership,

Counter-Defendant.

Case No. **CV OC 1001093**

**FURTHER RESPONSE TO
PLAINTIFF /
COUNTERDEFENDANT BOISE
MODE LLC'S MOTION FOR
RECONSIDERATION AND
FURTHER CONSIDERATION**

COME NOW, Defendants, DONAHOE PACE & PARTNERS LTD, an Idaho corporation;

RESPONSE TO PLAINTIFF/COUNTERDEFENDANT BOISE LLC'S MOTION FOR RECONSIDERATION AND FURTHER CONSIDERATION-1

000639

and TIMOTHY PACE (hereinafter collectively “DPP”), by and through their attorneys of record, Lopez & Kelly, PLLC, and submit their Further Response to Plaintiff/Counterdefendant Boise Mode LLC’s Motion for Reconsideration and Further Consideration filed April 27, 2011.

In its Reply in Support of Boise Mode, LLC’s Motion for Reconsideration and Further Reconsideration, the Plaintiff derides DPP’s contention that the Motion for Reconsideration and Further Consideration is procedurally improper and untimely. The Plaintiff misconstrues, misinterprets or apparently misunderstands I.R.C.P. 11(a)(2)(B). As set forth below, the ineluctable fact is that Plaintiff’s Motion for Reconsideration and Further Consideration is not warranted by law. Indeed, I.R.C.P. 11(a)(2)(B) expressly prohibits the type of motion that the Plaintiff has filed. As such, the Court should disregard the voluminous, irrelevant, vexatious, harassing and wrong argumentation that the Plaintiff has submitted to the Court.

I.R.C.P. 11(a)(2)(B) states:

(B) Motion For Reconsideration. A motion for reconsideration of any interlocutory orders of the trial court may be made at any time before the entry of final judgment but *not later* than fourteen (14) days after the entry of the final judgment. A motion for reconsideration of any order of the trial court made after entry of final judgment may be filed within fourteen (14) days from the entry of such order; **provided, there shall be no motion for reconsideration of an order of the trial court entered on any motion filed under Rules 50(a), 52(b), 55(c), 59(a), 59(e), 59.1, 60(a), or 60(b).**

(Emphasis added).


Plaintiff’s Motion for Reconsideration and Further Consideration seeks to review the Court’s March 2, 2011, Order granting DPP’s Motion to Amend Judgment Pursuant to I.R.C.P. 59(e) (“Motion to Amend”) and reinstating some of DPP’s causes of action. The Motion to Amend sought to amend the Judgment entered on January 5, 2011 because it was predicated on errors in law. It was filed pursuant to I.R.C.P. 59(e). *See Ross v. State*, 141 Idaho 670, 115 P.3d 761 (App. 2005)(holding motion to reconsider dismissal order “properly should be treated as a motion to alter or amend a

judgment under I.R.C.P. 59(e). The Motion to Amend was not filed pursuant to I.R.C.P. 11(a)(2)(b) because a final judgment had been entered. See I.R.C.P. 11(a)(2)(b)(restricting motions for reconsideration interlocutory orders).

Because I.R.C.P. 11(a)(2)(B) unequivocally proscribes a motion for reconsideration of an order entered on a motion filed under 59(e), which is exactly what the Plaintiff's Motion for Reconsideration and Further Reconsideration is, the Plaintiff's latest motion is not warranted by law. As such, the Court should deny it.

DATED this 20 day of May, 2011

LOPEZ & KELLY, PLLC


By: 
Michael E. Kelly, Of the Firm
Attorneys for Defendants

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 20 day of May, 2011, I served a true and correct copy of the foregoing by delivering the same to each of the following individuals, by the method indicated below, addressed as follows:

Steven F. Schossberger
HAWLEY, TROXELL, ENNIS & HAWLEY
877 Main Street, Suite 1000
PO Box 1617
Boise, ID 83701-1617
Telephone: (208) 344-6000
Facsimile: (208) 954-5260
sschossberger@hawleytroxell.com

- U.S. Mail
- Hand-Delivered
- Overnight mail
- Facsimile


Michael E. Kelly

JUN 22 2011

CHRISTOPHER D. RICH, Clerk
By JINGA JOHNSON
DEPUTY

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF

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

BOISE MODE, LLC, an Illinois limited liability company, successor-in-interest to Mode Building Ltd. Partnership, an Idaho Limited partnership,
Plaintiff,

Case No. CVOC-10-01093

vs.

**ORDER GRANTING
PLAINTIFF'S MOTION
FOR RECONSIDERATION
AND FURTHER
CONSIDERATION**

DONAHOE PACE & PARTNERS, LTD, an Idaho Corporation; and TIMOTHY PACE,
Defendants.

DONAHOE PACE & PARTNERS, LTD, an Idaho Corporation,
Counterclaimant,

vs.

BOISE MODE, LLC, an Illinois limited liability company, successor-in-interest to Mode Building Ltd. Partnership, an Idaho Limited partnership,
Counterdefendant.

This matter came before the Court on Defendants/Counterclaimant Donahoe Pace & Partners, Ltd., (DPP) and Timothy Pace's (collectively, "the Defendants") Motion to Compel and Plaintiff/Counterdefendant Boise Mode, LLC's, (Boise Mode) Motion for Reconsideration and Further Consideration. The Court heard oral argument on Monday, May 23, 2011. Steve Schossberger appeared for Boise Mode; John Browder and Nathan Ohler appeared for the Defendants. The Court took the matters fully under advisement. This Order now grants Boise

1 Mode's Motion for Reconsideration and Further Consideration, which, in turn, moots the
2 Defendants' Motion to Compel.

3 BACKGROUND

4 On or about November 3, 2006, Boise Mode and DPP entered into a commercial lease
5 agreement for certain space within a building owned by Boise Mode. The building is located at 800
6 W. Idaho St, Boise, Idaho 83702. The lease term ran through May 31, 2010. Also on or about
7 November 3, 2006, Timothy Pace personally guaranteed DPP's obligations under the lease by
8 signing a "Personal Guarantee of Lease." The personal guarantee stated that should DPP fail to pay
9 any of its obligations under the lease, Pace would pay Boise Mode the amount due. The personal
10 guarantee also stated that any obligations incurred under the lease "shall not be reduced by any
11 claim of setoff or counterclaim of [DPP] or [Pace], loss of contribution from...[Pace] or any
12 settlement or compromise between [DPP] and [Boise Mode]." *Id.*

14 At some point in 2008, DPP began expressing unhappiness with its tenancy. Temporary rent
15 abatements were discussed. The Record includes numerous emails and letters exchanged between
16 the parties in 2008 and 2009 in which Pace expresses his discontent with elements of DPP's
17 tenancy. By December 2008, DPP stopped paying the required rent.

19 Pursuant to Idaho Code § 6-303(2), on October 5, 2009, Boise Mode notified DPP that it had
20 three (3) days to pay the full amount of back rent due or vacate the premises. DPP did not pay the
21 back rent, and, by November 2009, DPP vacated the premises.

22 Boise Mode filed the Verified Complaint in this lawsuit in January 2010, alleging: 1) Breach
23 of Contract, 2) Breach of the Covenant of Good Faith and Fair Dealing, and 3) Breach of Personal
24 Guaranty of Lease. The Defendants answered and counterclaimed in February 2010, alleging: 1)

1 Constructive Eviction, 2) Breach of Contract, 3) Breach of the Covenant of Good Faith and Fair
2 Dealing, 4) Tortious Interference, and 5) Negligent Supervision. The parties' first appearance before
3 this Court was a December 22, 2010 hearing during which they argued Boise Mode's Summary
4 Judgment Motion and the Defendants' Motion for a Continuance. On December 27, 2010, the Court
5 issued an Order denying a continuance and granting Boise Mode summary judgment on all three (3)
6 of its claims. On January 5, 2011, a Final Judgment was entered which dismissed the Defendants'
7 Counterclaim. On March 2, 2011, upon the Court's consideration of the Defendants' Motion for
8 Reconsideration, the Order and Judgment were set aside except that summary judgment remained
9 granted in favor of Boise Mode as to the Defendants' allegations of Tortious Interference and
10 Negligent Supervision. The grant of reconsideration was based upon the Court's finding that I.C. §
11 6-320 did not apply in this case and, therefore, the Defendants had standing to assert their
12 counterclaims. In the instant motion, acknowledging that I.C. § 6-320 does not apply, Boise Mode
13 moves the Court to further analyze the remaining claims. Separately, the Defendants move the
14 Court to compel Boise Mode to answer several of their discovery requests.

16
17 **IDAHO RULE OF CIVIL PROCEDURE 11(A)(2)(B): MOTION FOR RECONSIDERATION**

18 The Idaho Supreme Court has repeatedly held that I.R.C.P. 11(a)(2)(B) provides a district
19 court with authority to reconsider and vacate interlocutory orders so long as final judgment has not
20 been entered. *Elliott v. Darwin Neibaur Farms*, 138 Idaho 774, 785, 69 P.3d 1035, 1046 (2003). If
21 final judgment has been entered, an Order may still be reconsidered for up to fourteen (14) days.
22 I.R.C.P. 11(a)(2)(B). District Courts may reconsider earlier rulings *sua sponte*. See *Elliott*, 138 Idaho
23 at 784, 69 P.3d at 1045.

SUMMARY JUDGMENT STANDARD

1
2 “Summary judgment is appropriate if the pleadings, affidavits, and discovery documents on
3 file with the court . . . demonstrate no material issue of fact such that the moving party is entitled to
4 a judgment as a matter of law.” *Brewer v. Washington RSA No. 8 Ltd. Partnership*, 145 Idaho 735,
5 738, 184 P.3d 860, 863 (2008) (quoting *Badell v. Beeks*, 115 Idaho 101, 102, 765 P.2d 126, 127
6 (1988) (citing I.R.C.P. 56(c)). The burden of proof is on the moving party to demonstrate the
7 absence of a genuine issue of material fact. *Rouse v. Household Finance Corp.*, 144 Idaho 68, 70,
8 156 P.3d 569, 571 (2007) (citing *Evans v. Griswold*, 129 Idaho 902, 905, 935 P.2d 165, 168
9 (1997)). In construing the facts, the court must draw all reasonable factual inferences in favor of the
10 non-moving party. *Mackay v. Four Rivers Packing Co.*, 145 Idaho 408, 410, 179 P.3d 1064, 1066
11 (2008).
12

13 “Once the moving party establishes the absence of a genuine issue of material fact, the
14 burden shifts to the non-moving party,” to provide specific facts showing there is a genuine issue for
15 trial. *Kiebert v. Goss*, 144 Idaho 225, 228, 159 P.3d 862, 864 (2007) (citing *Hei v. Holzer*, 139
16 Idaho 81, 85, 73 P.3d 94, 98 (2003)); *Samuel v. Hepworth, Nungester & Lezamiz, Inc.*, 134 Idaho
17 84, 87, 996 P.2d 303, 306 (2000).
18

19 The non-moving party’s case must be anchored in something more than speculation; a mere
20 scintilla of evidence is not enough to create a genuine issue. *Zimmerman v. Volkswagen of America,*
21 *Inc.*, 128 Idaho 851, 854, 920 P.2d 67, 69 (1996). The non-moving party may not simply rely upon
22 mere allegations in the pleadings, but must set forth in affidavits specific facts showing there is a
23 genuine issue for trial. I.R.C.P. 56(e); see *Rhodehouse v. Stutts*, 125 Idaho 208, 211, 868 P.2d 1224,
24
25

1 1227 (1994). If the non-moving party does not provide such a response, “summary judgment, if
2 appropriate, shall be entered against the party.” I.R.C.P. 56(f).

3 **ANALYSIS & HOLDING**

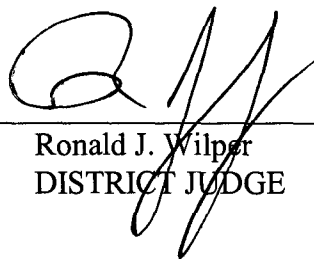
4 Upon consideration of the parties’ arguments, briefing, and the full Record, and drawing
5 reasonable inferences of the facts in the record in favor of the Defendants, the Court finds that the
6 lease agreement entered into by the parties clearly and unambiguously states that “there shall be no
7 deduction, offset or abatement for any reason” unless such is allowed by specific lease provisions,
8 none of which are relevant in the instant case. *Lease Agreement* at Art. 4.1. The Court also finds that
9 the lease agreement provides that the defendants had to be current on their lease payments in order to
10 preserve their rights under the lease. *Id.* at 19.1. Finally, the Court finds that the problems
11 complained of by the Defendants had ended well before the Defendants vacated the premises.
12

13 Considering all of this, the Court finds that no genuine issues of material fact remain with
14 respect to Boise Mode’s claims or with the Defendants’ counterclaims and that, therefore, summary
15 judgment is GRANTED in favor of Boise Mode with respect to its claims of 1) Breach of Contract,
16 2) Breach of the Covenant of Good Faith and Fair Dealing, and 3) Breach of Personal Guaranty of
17 Lease. Summary judgment is also GRANTED in favor of Boise Mode with respect to the
18 Defendants’ counterclaims of 1) Constructive Eviction, 2) Breach of Contract, and 3) Breach of the
19 Covenant of Good Faith and Fair Dealing.
20

21 This ruling has the effect of mootng the Defendants’ Motion to Compel.
22

23 IT IS SO ORDERED.

24 Dated this 21st day of June, 2011.
25



Ronald J. Wilper
DISTRICT JUDGE

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1 **CERTIFICATE OF MAILING**

2 I, HEREBY CERTIFY that on the 23 day of JUNE, 2011, I caused a true and correct copy
3 of the foregoing ORDER GRANTING PLAINTIFF'S MOTION FOR RECONSIDERATION AND
4 FURTHER CONSIDERATION to be served by the method indicated below, and addressed to the
5 following:

6 Steven F. Schossberger
7 Matt Gordon
8 HAWLEY TROXELL ENNIS & HAWLEY, LLP
9 877 W Main St, Ste 1000
10 PO Box 1617
11 Boise, ID 83701-1617
12 Tel: (208) 344-6000

U.S. Mail, Postage Prepaid
 Hand Delivered
 Overnight Mail
 Facsimile

13 John J. Browder
14 Nathan Ohler
15 LOPEZ & KELLY, PLLC
16 413 W Idaho St, Ste 100
17 PO Box 856
18 Boise, ID 83701-0856
19 Tel: (208) 342-4300
20 Fax: (208) 342-4344

U.S. Mail, Postage Prepaid
 Hand Delivered
 Overnight Mail
 Facsimile

21 CHRISTOPHER D. RICH
22 Clerk of the District Court
23 Ada County, Idaho

24 By  **INGA JOHNSON**
25 Deputy Clerk

NO. _____ FILED P.M. 4:22
AM. _____

JUL 13 2011

CHRISTOPHER D. FICHL, Clerk
By KERRY EICHL
Clerk

Steven F. Schossberger, ISB No. 5358
HAWLEY TROXELL ENNIS & HAWLEY LLP
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Telephone: 208.344.6000
Facsimile: 208.954.5260
Email: ssschossberger@hawleytroxell.com

Attorneys for Plaintiff/Counterdefendant Boise Mode, LLC,
successor-in-interest to Mode Building Limited Partnership

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

BOISE MODE, LLC, an Illinois limited liability company, successor-in-interest to Mode Building Limited Partnership, an Idaho limited partnership,

Plaintiff,

vs.

DONAHOE PACE & PARTNERS LTD, an Idaho corporation; and TIMOTHY PACE,

Defendants.

Case No. CV OC 1001093

BOISE MODE LLC'S VERIFIED MEMORANDUM OF COSTS AND ATTORNEY FEES RE ORDER GRANTING PLAINTIFF'S MOTION FOR RECONSIDERATION AND FURTHER CONSIDERATION

DONAHOE PACE & PARTNERS LTD, an Idaho corporation,

Counterclaimant,

vs.

BOISE MODE, LLC, an Illinois limited liability company, successor-in-interest to Mode Building Limited Partnership, an Idaho limited partnership,

Counterdefendant.

BOISE MODE LLC'S VERIFIED MEMORANDUM OF COSTS AND ATTORNEY FEES RE ORDER GRANTING PLAINTIFF'S MOTION FOR RECONSIDERATION AND FURTHER CONSIDERATION - 1

Steven F. Schossberger, being duly sworn upon oath, deposes and states as follows:

1. I have personal knowledge of the matters herein referred to, and pursuant to I.R.C.P. Rules 54(d)(1)(B), 54(d)(1)(C), 54(d)(5), 54(e)(1), 54(e)(3), and Idaho Code § 12-120(3), and the Office Lease Agreement, § 22.7, (Verified Complaint, Exhibit A), I make this verified memorandum in support of Boise Mode LLC's request for an award of costs and attorney fees, as supported by the Court's Order Granting Motion for Reconsideration and Further Consideration filed June 22, 2011.

2. To establish the outstanding amount due and owing from a client, our law firm prepares time slips describing the particular legal services performed, together with the particular date such legal services were rendered, as well as designating the amount of time spent on the particular matter. The time slips are filed electronically for each client and on a periodic basis, the time is totaled, then multiplied by the applicable hourly rate to arrive at a bill for legal services performed. Also added in is the sum of any and all costs and expenses advanced through the particular date on behalf of the client. Only those costs awardable as a matter of right pursuant to I.R.C.P. Rule 54(d)(1)(C) are included in this request.

3. Since August 2009, Hawley Troxell Ennis & Hawley LLP has performed legal services for Boise Mode LLC in connection with the above-referenced action.

4. Since August 2009, Boise Mode LLC has incurred attorney fees in the sum of \$25,792.50. The sum of \$25,792.50 claimed for attorney fees is a reasonable sum, actually and necessarily incurred as provided below. Pursuant to I.R.C.P. Rule 54(d)(5), to the best of your affiant's knowledge and belief, the items are correct and the costs claimed are in compliance with this Rule.

5. The hours performed by the attorneys and paralegals, and the hourly rate and the fees charged to Boise Mode LLC are as follows:

Summary of Legal Services	Title	Hours	Rate	Amount
Steven F. Schossberger	Partner	17.80	\$275.00/2011	\$4,890.00
Steven F. Schossberger	Partner	38.20	\$250.00/2010	\$9,550.00
Steven F. Schossberger	Partner	7.60	\$240.00/2009	\$1,824.00
Matthew Gordon	Associate	26.10	\$150.00/2011	\$3,915.00
Matthew Gordon	Associate	34.90	\$140.00/2010	\$4,886.00
David Brown	Paralegal Services	2.60	\$130.00/2010	\$338.00
Christian Wamhoff	Paralegal Services	4.10	\$95.00/2010	\$389.50
Total Hours:		131.30		
			Total for Legal Services:	\$25,792.

COSTS AS A MATTER OF RIGHT

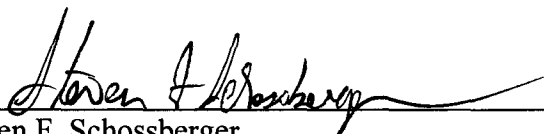
Date	Disbursements and Other Charges	Quantity	Amount	
10/9/09	CLIENT CHARGES - TRI-COUNTY PROCESS SERVING Service of Three Days' Notice to Pay Rent and/or to Quit and Vacate the Premises upon Donahoe Pace & Partners, Ltd. on 10/6/09	1	\$47.00	
1/20/10	Client Charges - CLERK OF THE COURT Filing fee: Complaint	1	\$88.00	
2/8/10	Client Charges - TRI-COUNTY PROCESS SERVING Services of Summons and Complaint upon Timothy Pace on 1/27/10	1	\$35.00	
2/8/10	Client Charges - TRI-COUNTY PROCESS SERVING Services of Summons and Complaint upon Donahoe Pace & Partners, LTD on 1/27/10	1	\$49.00	
			Total For Disbursements and Other Charges:	\$219.

6. It is my opinion that the attorney fees charges in this action have been fair, reasonable and necessarily incurred to obtain Boise Mode LLC's summary judgment on the complaint and counterclaim. Each of the factors set forth in I.R.C.P. Rule 54(e)(3) weigh in favor of an award of attorney fees by the Court in the sum of \$25,792.50, and costs as a matter of right in the amount of \$219.00.

7. True and correct copies of Hawley Troxell's billing summaries showing the date, attorney, hours, amount and description of work performed are attached hereto as Exhibit A, and incorporated herein by reference.

8. Accordingly, Boise Mode LLC respectfully request that the Court award costs as a matter of right in the total amount of \$219.00, and attorney fees in the total amount of \$25,792.50, for a total amount of \$26,011.50.

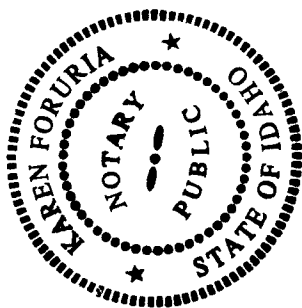
Further your affiants sayeth naught.

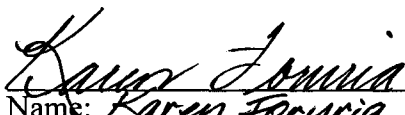


Steven F. Schossberger

STATE OF IDAHO)
) ss.
County of Ada)

SUBSCRIBED AND SWORN before me this 13th day of July, 2011.





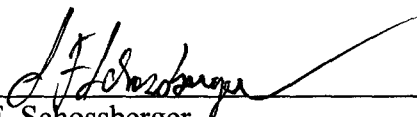
Name: Karen Foruria
Notary Public for Idaho
Residing at Boise, Idaho
My commission expires 6-18-17

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 13th day of July, 2011, I caused to be served a true copy of the foregoing BOISE MODE LLC'S VERIFIED MEMORANDUM OF COSTS AND ATTORNEY FEES RE ORDER GRANTING PLAINTIFF'S MOTION FOR RECONSIDERATION AND FURTHER CONSIDERATION by the method indicated below, and addressed to each of the following:

Michael E. Kelly
John J. Browder
LOPEZ & KELLY, PLLC
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[Attorneys for Defendants and Counterclaimant]

U.S. Mail, Postage Prepaid
 Hand Delivered
 Overnight Mail
 E-mail
 Telecopy: 208.342.4344



Steven F. Schossberger



Boise • Coeur d'Alene • Hailey • Pocatello • Reno

ATTORNEYS AND COUNSELORS

Remit to:
Hawley Troxell Ennis & Hawley LLP
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Post Office Box 1617
Boise, Idaho 83701-1617
EIN: 82-0259668
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www.hawleytroxell.com

Watermark Property Management, LLC
1030 West Chicago Avenue, Suite 300
Chicago, IL 60622

File No.: 43355-0011
Billing Attorney: SFS

July 13, 2011

Invoice No.: Recap

RECAP INVOICE

For services through 06/30/11 in connection with the following:
Boise Mode LLC v. Donahoe Pace & Partners, LTD and
Tim Pace (breach of contract litigation)

Legal Services: \$25,792.50
Disbursements & Other Charges: \$219.00
Total Due This Invoice: \$26,011.50

Table with 5 columns: Date, Attorney/Paralegal, Hours, Amount, Description of Legal Services. Includes entries for 8/11/09 and 8/24/09.

PAYMENT DUE IN U.S. DOLLARS UPON RECEIPT OF INVOICE

Current charges only. Unpaid balances not included.
Disbursements not yet recorded will be included in future invoices.
After 30 days, a monthly interest charge of 1% per month from the invoice date (or such lower rate as required by applicable law) will be due.
Should a collection action or proceeding be necessary, attorney's fees and costs for such collection effort will also be due.
Hawley Troxell Ennis & Hawley LLP

EXHIBIT A

000654 45.0011.2465086.

Date	Attorney/Paralegal	Hours	Amount	Description of Legal Services
				2009.
10/5/09	Steven F. Schossberger	1.30	\$312.00	Review A. Aeschliman e-mail with attached letter from T. Pace; review second e-mail from A. Aeschliman re same; review updated tenant ledger; prepare three days notice to pay rent or quit and vacate the premises; service of three days notice on T. Pace.
10/7/09	Steven F. Schossberger	1.30	\$312.00	Review e-mail and attachments from T. Pace; review first amendment to lease and services agreement; telephone conference with A. Aeschliman re same.
10/8/09	Steven F. Schossberger	.80	\$192.00	Telephone conference with A. Aeschliman re situation with T. Pace; e-mail T. Pace re Boise Mode LLC's demand for delinquent rent or compromise of rent and execution of first amendment of lease and services agreement.
10/14/09	Steven F. Schossberger	.40	\$96.00	Telephone conference with D. Baum and A. Aeschliman re Donahoe Pace and Partners and T. Pace delinquent rent situation and future action to be taken.
10/26/09	Steven F. Schossberger	.70	\$168.00	Prepare letter to T. Pace; revise letter to T. Pace.
10/27/09	Steven F. Schossberger	.20	\$48.00	Telephone conference with A. Aeschliman re T. Pace move out.
11/9/09	Steven F. Schossberger	1.10	\$264.00	Review letter from T. Pace; review and respond to e-mail from A. Aeschliman re T. Pace; work on letter to T. Pace; e-mail letter to client.
1/5/10	Steven F. Schossberger	.80	\$200.00	Prepare memorandum to T. Lissner re Idaho law on landlord's damages for tenant's abandonment and breach of lease and duty to mitigate.
1/11/10	Steven F. Schossberger	.30	\$75.00	Telephone conference with T. Lisner re file suit and damages against Donahoe Pace and T. Pace.
1/20/10	Steven F. Schossberger	1.80	\$450.00	Prepare draft complaint against Donahoe Pace and T. Pace; review e-mail from T. Lissner re suggested edits to draft complaint; revise draft complaint and response e-mail to T. Lissner.
1/22/10	David Brown	.40	\$52.00	Research on valid address for Pace, and provide output to K. Foruria.
2/12/10	Steven F. Schossberger	.70	\$175.00	Review Pace's answer and counterclaim and comparison to allegations in the complaint.
2/23/10	Steven F. Schossberger	1.30	\$325.00	Draft Boise Mode's answer to Pace's counterclaim; review and revise draft answer and file with court.

Date	Attorney/Paralegal	Hours	Amount	Description of Legal Services
3/2/10	Steven F. Schossberger	.20	\$50.00	Review court's notice of scheduling conference and calendar.
4/9/10	Steven F. Schossberger	.70	\$175.00	Review Defendants' discovery requests.
4/29/10	Steven F. Schossberger	2.00	\$500.00	Work on draft discovery responses.
4/30/10	Steven F. Schossberger	.50	\$125.00	Telephone conference with C. Kiefor re Donahoe Pace's discovery requests.
5/7/10	Steven F. Schossberger	4.00	\$1,000.00	Telephone conference with C. Kiefor re Donahoe Pace's discovery requests; work on draft discovery responses.
5/7/10	David Brown	.10	\$13.00	Review .zip file, and create set up for database.
5/7/10	Christian Wamhoff	1.30	\$123.50	Download documents from Zip file, process and source code and create PLTF computerized database.
5/10/10	Steven F. Schossberger	2.50	\$625.00	Work on Plaintiff's responses to Defendant's discovery requests; review e-mails from C. Kiefor and review of documents to be produced to Defendant.
5/10/10	David Brown	.70	\$91.00	Query database for privilege documents; documents from HTEH; or other attorneys, tag, code.
5/10/10	Christian Wamhoff	2.00	\$190.00	Process, source code new documents, and to PLTF computerized database.
5/11/10	David Brown	1.40	\$182.00	Finalize privilege index; draft and finalize correspondence; provide cd for hand delivery to defendants.
5/11/10	Christian Wamhoff	.80	\$76.00	Produce tagged documents from computerized database, create privilege log.
6/23/10	Steven F. Schossberger	3.50	\$875.00	Work on Boise Mode's first set of discovery to Donahoe Pace and Partners Ltd. re interrogatories, requests for production of documents and requests for admission; analyze counterclaims for determination of motion for summary judgment; legal research re claims of negligent supervision and constructive eviction.
7/22/10	Steven F. Schossberger	1.00	\$250.00	Review court's order setting trial and pretrial deadlines to plan for upcoming discovery and motion practice; telephone conference with M. Kelly, Plaintiff's counsel, re vacate and reschedule trial date due to scheduling conflict; telephone conference with Judge Wilper's clerk, Inga, re available trial dates in 2011; telephone conference with M. Kelly re stipulate to new trial date; prepare stipulation to reschedule trial date and court order.

Date	Attorney/Paralegal	Hours	Amount	Description of Legal Services
7/27/10	Steven F. Schossberger	.70	\$175.00	Telephone conference with M. Kelly's office re Defendant's request for extension discovery responses; review Defendant's responses to Plaintiff's requests for admission; prepare letter to counsel M. Kelly re deficient responses to requests for admission and grant of two week discovery extension.
7/28/10	Steven F. Schossberger	.30	\$75.00	Review letter from counsel M. Kelly RE discovery extension; edit draft letter to M. Kelly.
10/25/10	Steven F. Schossberger	2.50	\$625.00	Review and analysis of Donahoe Pace's responses to Boise Mode's discovery requests, including production of documents; review Court's amended pretrial scheduling order and pretrial discovery and dispositive motion deadlines.
10/26/10	Steven F. Schossberger	1.50	\$375.00	Prepare notice of Rule 30(b)(6) deposition duces tecum of Donahoe Pace and Partners LTD and analysis of topic areas, issues presented by counterclaim and documents to be addressed and produced at the deposition; meet with associate M. Gordon re preparation of Boise Mode's motions for summary judgment on the complaint for damages and Donahoe Pace's counterclaim.
10/26/10	Matthew Gordon	.70	\$98.00	Confer with S. Schossberger re background of case and details of assignments.
10/27/10	Steven F. Schossberger	.20	\$50.00	Review and revise notice of Rule 30(b)(6) deposition duces tecum of Donahoe Pace.
10/27/10	Matthew Gordon	.30	\$42.00	Review and analyze pleadings and related documents.
10/29/10	Matthew Gordon	.50	\$70.00	Review documents in case file, including correspondence between parties.
11/2/10	Steven F. Schossberger	.30	\$75.00	Review letter from Donahoe Pace's counsel re subpoena's to be served on Collier's and North Face and review subpoenas; e-mail subpoenas to D. Baum and T. Lissner for review.
11/2/10	Matthew Gordon	1.50	\$210.00	Research case law re covenant of quiet enjoyment and doctrine of constructive eviction.
11/3/10	Matthew Gordon	3.30	\$462.00	Research case law from outside Idaho and secondary sources re requirements for maintaining an action for constructive eviction and whether action for constructive eviction lies as a result of noisy co-tenants; research Idaho case law re elements of negligent supervision claim;

Date	Attorney/Paralegal	Hours	Amount	Description of Legal Services
				begin to outline legal arguments re defendant's counterclaims.
11/15/10	Matthew Gordon	3.80	\$532.00	Work on motion for summary judgment: review facts of case; create outline of facts; begin to draft memorandum in support of motion for summary judgment.
11/16/10	Steven F. Schossberger	1.20	\$300.00	Telephone conference with A. Aeschliman re breakdown of damages amount and mitigation of damages for affidavit in support of motion for summary judgment and re factual information about the business of Donahoe Pace and Partners and use of the leased premises; review e-mails from A. Aeschliman re damages calculation and marketing of the space to obtain a new tenant; meet with associate Matt Gordon re preparation and inclusion of issues for Boise Mode's motion for summary judgment.
11/16/10	Matthew Gordon	1.20	\$168.00	Continue to draft memorandum in support of motion for summary judgment.
11/17/10	Matthew Gordon	.30	\$42.00	Draft affidavit of C. Kiefer.
11/18/10	Matthew Gordon	1.80	\$252.00	Work on motion for summary judgment; review additional documents in client file; additional case law research in support of motion; continue to draft memorandum in support of motion.
11/19/10	Matthew Gordon	6.70	\$938.00	Draft motion for summary judgment on complaint; draft motion for summary judgment on counterclaims; continue to draft memoranda in support of both motions; additional research of case law and secondary sources in support of memoranda.
11/22/10	Matthew Gordon	5.30	\$742.00	Revise affidavit of C. Kiefer; review terms of lease agreement with Xtra Airways; research case law re enforcement of personal guarantees; complete draft of memorandum in support of motion for summary judgment on verified complaint; revise draft of same; continue to work on draft of memorandum in support of motion for summary judgment on defendant's counterclaims.
11/23/10	Steven F. Schossberger	1.50	\$375.00	Review draft affidavit of C. Kiefer and attached exhibits in support of Boise Mode's motions for summary judgment; review draft affidavit of A. Aeschliman and attached exhibits in support of Boise Mode's motions for summary judgment; review draft affidavit of D. Baum and attached exhibits in support of Boise Mode's motions for summary judgment; review and revise draft memorandum in

Date	Attorney/Paralegal	Hours	Amount	Description of Legal Services
				support of Boise Mode's motion for summary judgment on the verified complaint.
11/23/10	Matthew Gordon	7.90	\$1,106.00	Draft and revise affidavit of A. Aeschliman; draft and revise affidavit of D. Baum; compile and prepare exhibits for each affidavit; complete draft of memorandum in support of motion for summary judgment on defendant's counterclaims; perform additional case law research in connection with memorandum; revise and supplement memorandum in support of summary judgment on defendant's counterclaims.
11/24/10	Steven F. Schossberger	3.50	\$875.00	Work on Boise Mode's summary judgment papers re review and revise draft memorandum in support of motion for summary judgment on Donahoe Pace's counterclaims; further revise memorandum in support of motion for summary judgment on the verified complaint; work with associate M. Gordon on exhibits to the affidavits; conference with M. Gordon on the legal issue of application of Idaho Code Section 6-320(d) requiring tenant to give landlord three days notice prior to filing an action for breach of the covenant of quiet enjoyment; final review of all motion papers for court filing and service on counsel.
11/24/10	Matthew Gordon	1.60	\$224.00	Draft affidavit of S. Schossberger and compile and prepare related exhibits; make final revisions and supplements to memorandum in support of motion for summary judgment on defendant's counterclaims.
12/14/10	Steven F. Schossberger	3.70	\$925.00	Prepare draft memorandum in opposition to Donahoe Pace's motion for continuance of summary judgment hearing; prepare affidavit of S. Schossberger; review and revise opposition memorandum and final documents for court filing.
12/20/10	Steven F. Schossberger	.30	\$75.00	Review and analysis of Donahoe Pace's Reply memorandum in support of motion for continuance of Boise Mode's motion for summary judgment.
12/20/10	Steven F. Schossberger	.50	\$125.00	Prepare motion to strike and disregard argument sections from reply memorandum in support of motion for continuance; prepare motion to shorten time and order.
12/22/10	Steven F. Schossberger	2.70	\$675.00	Prepare for court hearing on Boise Mode's motions for summary judgment and in opposition to Donahoe Pace's motion for Rule 56(f) continuance and motion to

Date	Attorney/Paralegal	Hours	Amount	Description of Legal Services
				strike argument sections from Donahoe Pace's reply memorandum in support of motion for continuance; attend court hearing and present oral argument on the motions; e-mail client re results of court hearing.
1/4/11	Steven F. Schossberger	.20	\$50.00	Prepare final judgment.
1/11/11	Steven F. Schossberger	1.50	\$412.50	Prepare draft Boise Mode's verified memorandum of costs and attorney fees and request for award of costs and attorney fees against Donahoe Pace and Tim Pace; review and revise draft Boise Mode's verified memorandum of costs and attorney fees and request for award of costs and attorney fees against Donahoe Pace and Tim Pace.
1/12/11	Steven F. Schossberger	.30	\$82.50	Review Donahoe Pace's motion to stay execution of judgment and proposed order.
1/19/11	Steven F. Schossberger	1.50	\$412.50	Review and analysis of Donahoe Pace's motion to amend judgment and memorandum in support; assign preparation of draft opposition memorandum and issues to address to associate M. Gordon.
1/19/11	Matthew Gordon	.70	\$105.00	Confer with S. Schossberger re Defendant's motion to amend judgment; review and analyze Defendant's memorandum in support of motion.
1/26/11	Steven F. Schossberger	.30	\$82.50	Review Donahoe Pace's objection to Boise Mode's motion for award of costs and attorney fees on the judgment.
2/14/11	Matthew Gordon	1.40	\$210.00	Review earlier filings re developing argument for response to Defendants' motion to amend judgment; outline response to same; research case law in support of same.
2/15/11	Steven F. Schossberger	.70	\$192.50	Review and revise draft response memorandum to defendants' motion to amend judgment.
2/15/11	Matthew Gordon	2.70	\$405.00	Outline response to Defendants' motion to amend judgment and draft same.
2/16/11	Matthew Gordon	1.40	\$210.00	Revise response to motion to amend judgment and perform additional research in support of same.
2/28/11	Matthew Gordon	2.40	\$360.00	Prepare for hearing on motion to alter or amend judgment; attend hearing and present oral argument at same; draft e-mail to S. Schossberger re hearing.
3/4/11	Steven F. Schossberger	1.50	\$412.50	Review and analysis of Court's Memorandum Decision granting

Date	Attorney/Paralegal	Hours	Amount	Description of Legal Services
				Defendants' motion to amend the judgment and outline issues for Plaintiff's motion for reconsideration; e-mail client re Court's decision and next steps to take to request reconsideration by the Court.
3/4/11	Matthew Gordon	.60	\$90.00	Review and analyze order granting motion to amend judgment; confer with S. Schossberger re strategy in light of order and possible legal arguments in motion for reconsideration; outline arguments for motion for reconsideration.
3/17/11	Matthew Gordon	.40	\$60.00	Research Idaho case law re circumstances under which tenant may withhold rent payments
3/28/11	Matthew Gordon	2.80	\$420.00	Research case law and secondary sources in support of motion for reconsideration; review prior court filings re framing arguments in motion for reconsideration; begin drafting memorandum in support of motion for reconsideration.
4/4/11	Matthew Gordon	.70	\$105.00	Work on memorandum in support of motion for reconsideration.
4/11/11	Matthew Gordon	.70	\$105.00	Research in support of motion for reconsideration.
4/13/11	Matthew Gordon	1.80	\$270.00	Draft memorandum in support of motion for reconsideration.
4/14/11	Steven F. Schossberger	.30	\$82.50	Review Donahoe Pace's motion to compel, memorandum in support, affidavit in support and notice of hearing.
4/14/11	Matthew Gordon	5.90	\$885.00	Additional research in support of motion for reconsideration; complete draft of memorandum in support of motion for reconsideration; review and analyze motions filed by opposing counsel and associated documents.
4/15/11	Matthew Gordon	2.30	\$345.00	Revise memorandum in support of motion for reconsideration.
4/18/11	Matthew Gordon	.40	\$60.00	Revise memorandum in support of motion for reconsideration.
4/19/11	Matthew Gordon	1.30	\$195.00	Confer with S. Schossberger re memorandum in support of motion for reconsideration; revise memorandum.
4/26/11	Matthew Gordon	.60	\$90.00	Draft motion for reconsideration and notice of hearing.
5/12/11	Steven F. Schossberger	.30	\$82.50	Work on Donahoe Pace's motion to compel and correspond with client re: same.
5/13/11	Steven F. Schossberger	.20	\$55.00	Telephone conference with Angela Aeschliman re: information in order to

Date	Attorney/Paralegal	Hours	Amount	Description of Legal Services
				supplement Boise Mode's discovery responses and oppose Donahoe Pace's motion to compel.
5/16/11	Steven F. Schossberger	2.30	\$632.50	Prepare Boise Mode's supplemental answers to interrogatories (.4); prepare memorandum in opposition to Pace's motion to compel discovery (.6); e-mails with general counsel Talia Lissner re: supplemental discovery responses and review attachments re: the Grape Escape tenancy issues with the build out of the North Face space (.7); prepare second supplemental discovery responses based upon new information about the Grape Escape (.6).
5/17/11	Steven F. Schossberger	5.20	\$1,430.00	Telephone conference with Talia Lissner re: Boise Mode's supplemental discovery responses (.2); work on draft reply memorandum in support of Boise Modes' motion for reconsideration and further consideration (4.7); prepare second affidavit of S. Schossberger in opposition to Pace's motion to compel (.3).
5/18/11	Steven F. Schossberger	1.30	\$357.50	Review and revise draft reply memorandum in support of Boise Mode's motion for reconsideration and further consideration.
5/19/11	Steven F. Schossberger	.30	\$82.50	Telephone conference with counsel for the North Face re: production of documents per Pace's subpoena.
5/20/11	Steven F. Schossberger	.20	\$55.00	Review Pace's further response in opposition to Boise Mode's motion for reconsideration and further consideration.
5/23/11	Steven F. Schossberger	1.70	\$467.50	Prepare for court hearing on Boise Mode's motion for reconsideration and further consideration; attend Court hearing and argue motion.

Summary of Legal Services	Title	Hours	Rate	Amount
Steven F. Schossberger	Partner	17.80	\$275.00	\$4,890.00
Steven F. Schossberger	Partner	38.20	\$250.00	\$9,550.00
Steven F. Schossberger	Partner	7.60	\$240.00	\$1,824.00
Matthew Gordon	Associate	26.10	\$150.00	\$3,915.00
Matthew Gordon	Associate	34.90	\$140.00	\$4,886.00
David Brown	Paralegal Services	2.60	\$130.00	\$338.00
Christian Wamhoff	Paralegal Services	4.10	\$95.00	\$389.50

Summary of Legal Services	Title	Hours	Rate	Amount
	Total Hours:	131.30		Total for Legal Services: \$25,792.50

Date	Disbursements and Other Charges	Quantity	Amount
10/9/09	CLIENT CHARGES - TRI-COUNTY PROCESS SERVING Service of Three Days' Notice to Pay Rent and/or to Quit and Vacate the Premises upon Donahoe Pace & Partners, Ltd. on 10/6/09	1	\$47.00
1/20/10	Client Charges - CLERK OF THE COURT Filing fee: Complaint	1	\$88.00
2/8/10	Client Charges - TRI-COUNTY PROCESS SERVING Services of Summons and Complaint upon Timothy Pace on 1/27/10	1	\$35.00
2/8/10	Client Charges - TRI-COUNTY PROCESS SERVING Services of Summons and Complaint upon Donahoe Pace & Partners, LTD on 1/27/10	1	\$49.00
			Total For Disbursements and Other Charges: \$219.00
			Total Due This Invoice: \$26,011.50

Interest on past due amounts will be due if this Invoice is not paid on or before 08/12/11

If payment is made by wire remittance, please direct to:

Hawley Troxell Ennis & Hawley LLP Depository Account
Wells Fargo Bank, N. A.
877 W. Main St., Boise, ID 83702
Bank Routing # 121000248
Account #003-00017-47
Please reference your Hawley Troxell Account No.

ORIGINAL

Michael E. Kelly, ISB #4351
John J. Browder, ISB #7531
LOPEZ & KELLY, PLLC
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PO Box 856
Boise, Idaho 83701
Telephone: (208) 342-4300
Facsimile: (208) 342-4344
7008.001/ObjectionAttyFees Re Order Granting Plaintiffs Motion Reconsideration.wpd

NO. _____
FILED _____
AM. _____ PM. 4

JUL 26 2011

CHRISTOPHER D. RICH, Clerk
By KATHY BIEHL
Deputy

Attorneys for Defendant

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

BOISE MODE, LLC, an Illinois limited liability company, successor-in-interest to Mode Building Limited Partnership, an Idaho limited partnership,

Plaintiff,

vs.

DONAHOE PACE & PARTNERS LTD, an Idaho corporation; and TIMOTHY PACE,

Defendant.

Case No. CV OC 1001093

DEFENDANTS'/ COUNTER-CLAIMANT'S OBJECTION TO BOISE MODE LLC'S VERIFIED MEMORANDUM OF COSTS AND ATTORNEY FEES RE ORDER GRANTING PLAINTIFF'S MOTION FOR RECONSIDERATION AND FURTHER CONSIDERATION

DONAHOE PACE & PARTNERS LTD, an Idaho corporation,

Counter-Claimant,

vs.

BOISE MODE, LLC, an Illinois limited liability company, successor-in-interest to Mode Building Limited Partnership, an Idaho limited partnership,

Counter-Defendant.

I.
OBJECTION TO ATTORNEY FEES

When an award of attorneys' fees is mandatory, as is the case when a party prevails in an action to recover in a "commercial transaction," see Idaho Code § 120(3), the determination of the amount of attorneys' fees to award rests within the sound discretion of the trial judge and will not be overturned unless it reflects an abuse of such discretion. See *Davidson v. Beco Corp.*, 112 Idaho 560, 733 P.2d 781 (App. 1986); see also *Craft Wall of Idaho, Inc. v. Stonebraker*, 108 Idaho 704, 701 P.2d 324 (App. 1985).

Idaho Rule of Civil Procedure 54(e)(3) sets forth factors that the Court must consider in determining the amount of attorneys fees to award:

- (A) The time and labor required.
- (B) The novelty and difficulty of the questions.
- (C) The skill requisite to perform the legal service properly and the experience and ability of the attorney in the particular field of law.
- (D) The prevailing charges for like work.
- (E) Whether the fee is fixed or contingent.
- (F) The time limitations imposed by the client or the circumstances of the case.
- (G) The amount involved and the results obtained.
- (H) The undesirability of the case.
- (I) The nature and length of the professional relationship with the client.
- (J) Awards in similar cases.
- (K) The reasonable cost of automated legal research (Computer Assisted Legal Research), if the court finds it was reasonably necessary in preparing a party's case.
- (L) Any other factor which the court deems appropriate in the particular case.

Applying these factors, the Court should exercise its discretion and reduce the amount of

attorneys' fees the Plaintiff requests. First, the October 26, 2010, time entries for attorneys Steven F. Schossberger (partner) and Matthew Gordon (associate) contain what appear to be duplicative entries for time the attorneys spent conferring with each other about assignments. Mr. Schossberger includes in his entry for that day "meet with associate M. Gordon re preparation of Boise Mode's motions for summary judgment on the complaint for damages and Donahoe Pace's counterclaim." Mr. Gordon's entry for October 26, 2010, states: "Confer with S. Schossberger re background of case and details of assignments." It is customary that an attorney does not bill a client for the time spent explaining a project to an associate (or vice versa); it would be unreasonable to require DP&P to pay for double time. DP&P, therefore, respectfully requests that the Court make an appropriate downward adjustment for these entries.

Second, the same October 26, 2010, for attorney Schossberger includes time spent preparing a Rule 30(b)(6) notice of deposition duces tecum of DP&P. There was no 30(b)(6) deposition of DP&P taken and, therefore, such work was not required for the result obtained. Accordingly, the Court should cut that entry.

Third, the Court should exercise its discretion and cut the requested total attorneys' fees of \$25,792.50 because Mr. Schossberger's current \$275.00 hourly rate exceeds the prevailing rate for similar work in the area and because there was nothing novel or complex about this breach of lease matter.

II. CONCLUSION

For the foregoing reasons, DP&P respectfully requests that the Court exercise its discretion and reduce the amount of attorneys' fees the Plaintiff requests.

DATED this 26 day of July, 2011

LOPEZ & KELLY, PLLC

By: *M. Kelly for*
Michael E. Kelly, Of the Firm
Attorneys for Defendants/Counterclaimant

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 26 day of July, 2011, I served a true and correct copy of the foregoing by delivering the same to each of the following individuals, by the method indicated below, addressed as follows:

Steven F. Schossberger
HAWLEY, TROXELL, ENNIS & HAWLEY
877 Main Street, Suite 1000
PO Box 1617
Boise, ID 83701-1617
Telephone: (208) 344-6000
Facsimile: (208) 954-5260
sschossberger@hawleytroxell.com

- U.S. Mail
- Hand-Delivered
- Overnight mail
- Facsimile

M. Kelly for
Michael E. Kelly

JUL 27 2011

CHRISTOPHER D. RICH, Clerk
By LARA AMES
DEPUTY

Michael E. Kelly, ISB #4351
John J. Browder, ISB #7531
LOPEZ & KELLY, PLLC
PO Box 856
Boise, Idaho 83701
Telephone: (208) 342-4300
Facsimile: (208) 342-4344
7008.001/Mot to Disallow Costswpd.wpd

Attorneys for Defendants/Counterclaimant

ORIGINAL

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT

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

BOISE MODE, LLC, an Illinois limited liability company, successor-in-interest to Mode Building Limited Partnership, an Idaho limited partnership,

Plaintiff,

vs.

DONAHOE PACE & PARTNERS LTD, an Idaho corporation; and TIMOTHY PACE,

Defendants.

DONAHOE PACE & PARTNERS LTD, an Idaho corporation,

Counter-Claimant,

vs.

BOISE MODE, LLC, an Illinois limited liability company, successor-in-interest to Mode Building Limited Partnership, an Idaho limited partnership,

Counter-Defendant.

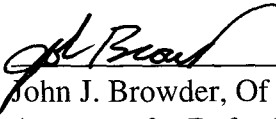
Case No. CV OC 1001093

**DEFENDANTS/COUNTERCLAIMANT'S
MOTION TO DISALLOW COSTS**

COME NOW, Defendants/Counterclaimant's, DONAHOE PACE & PARTNERS LTD, an Idaho corporation and TIMOTHY PACE, by and through their attorneys of record, Lopez & Kelly, PLLC, and move this Court to disallow costs claimed by Boise Mode LLC for the reasons set forth in the Defendants'/ Counter-claimant's Objection to Boise Mode LLC's Verified Memorandum of Costs and Attorney Fees re Order Granting Plaintiff's Motion for Reconsideration and Further Consideration filed on July 26, 2011 which is incorporated herein by reference.

DATED this 27 day of July, 2011

LOPEZ & KELLY, PLLC

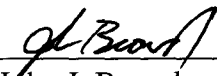
By: 
John J. Browder, Of the Firm
Attorneys for Defendants

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 27 day of July, 2011, I served a true and correct copy of the foregoing by delivering the same to each of the following individuals, by the method indicated below, addressed as follows:

Steven F. Schossberger
HAWLEY, TROXELL, ENNIS & HAWLEY
877 Main Street, Suite 1000
PO Box 1617
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John J. Browder

JUL 27 2011

CHRISTOPHER D. RICH, Clerk
By **LARA AMES**
DEPUTY

Michael E. Kelly, ISB #4351
John J. Browder, ISB #7531
LOPEZ & KELLY, PLLC
PO Box 856
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Telephone: (208) 342-4300
Facsimile: (208) 342-4344
7008.001/Costs.NOH.wpd

ORIGINAL

Attorneys for Defendants/Counterclaimant

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

BOISE MODE, LLC, an Illinois limited liability company, successor-in-interest to Mode Building Limited Partnership, an Idaho limited partnership,

Plaintiff,

vs.

DONAHOE PACE & PARTNERS LTD, an Idaho corporation; and TIMOTHY PACE,

Defendants.

DONAHOE PACE & PARTNERS LTD, an Idaho corporation,

Counter-Claimant,

vs.

BOISE MODE, LLC, an Illinois limited liability company, successor-in-interest to Mode Building Limited Partnership, an Idaho limited partnership,

Counter-Defendant.

Case No. **CV OC 1001093**

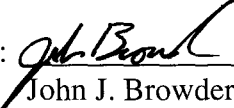
NOTICE OF HEARING

TO: PLAINTIFF AND ITS ATTORNEY OF RECORD:

YOU WILL PLEASE TAKE NOTICE that Defendants/Counter-Claimant, DONAHOE PACE & PARTNERS LTD, an Idaho corporation and TIMOTHY PACE, will call on for hearing their Motion To Disallow Costs on Monday, the 15th day of August, 2011, at the hour of 11:00 a.m., or as soon thereafter as counsel may be heard, before the Honorable Ronald J. Wilper, Ada County Courthouse, 200 West Front Street, Boise, ID 83702.

DATED this 27 day of July, 2011

LOPEZ & KELLY, PLLC

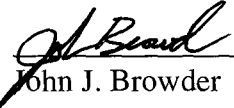
By: 
John J. Browder, Of the Firm
Attorneys for Defendants

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 27 day of July, 2011, I served a true and correct copy of the foregoing by delivering the same to each of the following individuals, by the method indicated below, addressed as follows:

Steven F. Schossberger
HAWLEY, TROXELL, ENNIS & HAWLEY
877 Main Street, Suite 1000
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John J. Browder

AUG 03 2011

CHRISTOPHER D. RICH, Clerk
By KATHY BIEHL
Deputy

Steven F. Schossberger, ISB No. 5358
HAWLEY TROXELL ENNIS & HAWLEY LLP
877 Main Street, Suite 1000
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Boise, ID 83701-1617
Telephone: 208.344.6000
Facsimile: 208.954.5260
Email: sschossberger@hawleytroxell.com

Attorneys for Plaintiff/Counterdefendant Boise Mode, LLC,
successor-in-interest to Mode Building Limited Partnership

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

BOISE MODE, LLC, an Illinois limited liability company, successor-in-interest to Mode Building Limited Partnership, an Idaho limited partnership,

Plaintiff,

vs.

DONAHOE PACE & PARTNERS LTD, an Idaho corporation; and TIMOTHY PACE,

Defendants.

DONAHOE PACE & PARTNERS LTD, an Idaho corporation,

Counterclaimant,

vs.

BOISE MODE, LLC, an Illinois limited liability company, successor-in-interest to Mode Building Limited Partnership, an Idaho limited partnership,

Counterdefendant.

Case No. CV OC 1001093

RESPONSE TO DEFENDANTS'
MOTION TO DISALLOW COSTS

Comes now Boise Mode, LLC, by and through its undersigned counsel, and submits the following response to the Defendants' motion to disallow costs filed July 27, 2011.

**I.
ARGUMENT**

Defendants only object to two time entries on October 26, 2010.

Defendants contend that Mr. Schossberger's time of (.8) to prepare the Notice of Rule 30(b)(6) deposition duces tecum of Donahoe Pace and Partners LTD, including an analysis of the topic areas and issues presented by the counterclaim and documents to be addressed and produced at the deposition, should not be awarded by the Court because the deposition was not conducted. The Defendants do not cite any authority for their assertion. This work was reasonably and necessarily done on behalf of Boise Mode at the time. Boise Mode made the determination that it could file the motions for summary judgment without incurring the costs of the deposition. Thus, the Defendants were actually spared additional litigation expense.

Next, the Defendants object to Mr. Schossberger's time of (.7) and Mr. Gordon's time of (.7), to discuss the preparation of Boise Mode's motions for summary judgment on the complaint and the counterclaim, including a summary of the factual background and issues to address. This was billable time by the partner and the associate, and provided the client with more efficient and cost effective legal representation.

Last, the Defendants object that Mr. Schossberger's 2011 hourly rate of \$275.00 "exceeds the prevailing rate for similar work in the area and because there was nothing complex about this breach of lease matter." The Defendants' assertion is conclusionary. The Defendants

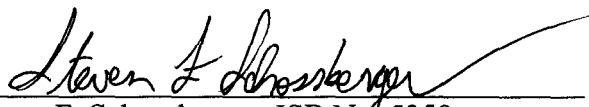
do not even offer a supporting affidavit from an expert.¹ It was the Defendants who overly complicated this breach of lease for failure to pay rent case by asserting unsustainable counterclaims for breach of contract, breach of the covenant of good faith and fair dealing, tortious interference with contract, negligent supervision, and constructive eviction. Under I.R.C.P. 54(e)(3)(D), the attorney charges set forth in the Verified Memorandum of Costs are prevailing charges for like work.

II. CONCLUSION

For each of the foregoing reasons, Boise Mode respectfully requests that the Court enter a total award of \$26,011.50, comprised of \$219 for costs as a matter of right, and \$25,792.50 for attorney fees, incurred by the prevailing party in this action.

DATED THIS 3rd th day of August, 2011.

HAWLEY TROXELL ENNIS & HAWLEY LLP

By 
Steven F. Schossberger, ISB No. 5358
Attorneys for Plaintiff/Counterdefendant Boise
Mode, LLC, successor-in-interest to Mode
Building Limited Partnership

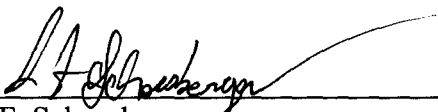
¹ A copy of Mr. Schossberger's CV is attached hereto as Exhibit A.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 3rd day of August, 2011, I caused to be served a true copy of the foregoing RESPONSE TO DEFENDANTS' MOTION TO DISALLOW COSTS by the method indicated below, and addressed to each of the following:

Michael E. Kelly
John J. Browder
LOPEZ & KELLY, PLLC
413 W. Idaho Street, Suite 100
P.O. Box 856
Boise, ID 83701
[Attorneys for Defendants and Counterclaimant]

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 Telecopy: 208.342.4344



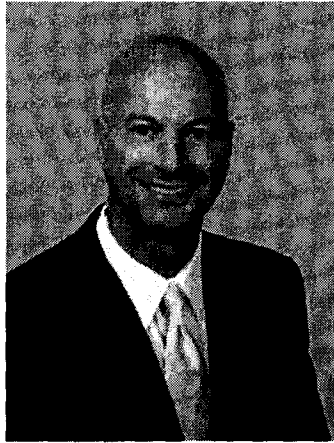
Steven F. Schossberger

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Steven F. Schossberger

Partner

PHONE 208.344.6000 FAX 208.954.5260 EMAIL sschossberger@hawleytroxell.com



Biography

Memberships & Accolades

Extensive experience in all phases of civil litigation in arbitration, state and federal trial courts, and the Idaho Supreme Court and Ninth Circuit Court of Appeals.

Served as sole defense trial counsel in over five jury trials, over five court trials, and over five arbitration proceedings in Idaho and California state and federal courts.

Presented oral argument to the Idaho Supreme Court in four successful cases.

Have taken or defended well over 100 depositions, and examined over 25 witnesses at trials, including experts.

Regularly serves as local counsel to assist out-of-state companies and their general counsel with state and federal court litigation.

Nationally certified by Kroll Ontrack in E-Discovery and document retention and destruction practices.

Co-inventor of an issued patent and federally registered trademark.

Significant Representation

Substantive areas of litigation experience include:

Trade secrets; trademark infringement; copyright infringement; Anti-Cybersquatting Consumer Protection Act.

Breach of contract (enterprise software development and licensing, State of Idaho contract awards, employment agreements — covenants of confidentiality, non-competition and non-solicitation, UCC sale of goods, construction, lease agreements, real estate purchase and sale agreements, intellectual property purchase and sale agreements, franchise agreements, distributor agreements).

Shareholder derivative suits (counsel for prevailing party at district court and supreme court levels of litigation).

Major Representative Clients

- State of Idaho (Department of Administration, Department of Health and Welfare)
- Microsoft Corporation
- URS (previously Washington Group International)
- SUPERVALU, Inc.
- Advantage Sales and Marketing
- Oregon Potato Company
- Western Mortgage
- Eniva Corporation
- Choice Hotels International
- Guru Denim, Inc.
- Home Warranty of America, Inc.
- Western Aircraft, Inc.
- Idaho Independent Bank

Limited liability company operating agreements (counsel for wrongfully terminated member of LLC and successfully obtained decision from Idaho Supreme Court holding that members of limited liability companies owe one another fiduciary duties of care and loyalty).

Partnership dissolution and winding up (counsel for prevailing party following the district court trial and two appeals to the Idaho Supreme Court).

Defamation (achieved no liability jury verdict for nationally known real estate brokerage company against one million dollar claims).

Product liability, tortious interference, negligence, trespass (co-lead defense counsel for helicopter applicator hired by the United States of America to apply herbicide provided by E.I. Dupont de Nemours and Co. to BLM land — achieved dismissal of all of plaintiffs' claims seeking over \$700,000,000 in damages).

- Windermere Real Estate Company
- PakSense, Inc.
- CNCPROS.Net, Inc.

Practice Areas

- Civil & Commercial Litigation
- Intellectual Property & Internet

Education

University of San Francisco School of Law, J.D., 1995

USF Law Review, Executive Articles Editor

Publication: *Survey of 1993 Nonprofit Case Law*, 29 U.S.F. L. Rev. 397 (1995)

Awarded Best Oral Argument, USF School of Law Moot Court Board

Pepperdine University, B.A., 1992, *cum laude*, major in Political Science with minor in Philosophy

Student Government Class President

Tennis team

Year abroad in Heidelberg, Germany, 1989-1990 (experienced fall of the Berlin Wall)

Community Activities

Boise Metro Chamber of Commerce, Leadership Boise Program graduate, 2000-2002

Main Office: 877 Main Street, Boise, Idaho 83702 208.344.6000 info@hawleytroxell.com



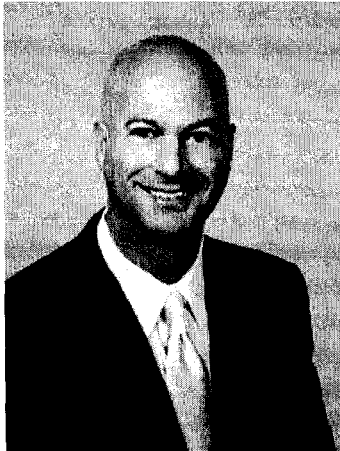
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[Home](#) > [People](#) > [Attorneys](#) > Steven F. Schossberger

Steven F. Schossberger

Partner

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sschossberger@hawleytroxell.com

Bar Admissions

California State Bar, 1995 (Litigation Section)

Idaho State Bar, 1996 (Litigation Section — served on the board and 3 years as an officer)

Federal Bar Association

American Bar Association

Biography

Memberships & Accolades

Professional Memberships

American Inns of Court No. 130

Idaho Association of Defense Counsel

International Association of Defense Counsel (prior member)

Accomplishments

Idaho Business Review, Accomplished Under 40 Award recipient, 2004

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AUG 17 2011

CHRISTOPHER D. RICH, Clerk
By INGA JOHNSON
DEPUTY

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

BOISE MODE, LLC, an Illinois limited liability company, successor-in-interest to Mode Building Ltd. Partnership, an Idaho Limited partnership,
Plaintiff,

Case No. CVOC-10-01093

vs.

ORDER GRANTING IN PART AND DENYING IN PART DEFENDANTS/ COUNTERCLAIMANT'S MOTION TO DISALLOW COSTS

DONAHOE PACE & PARTNERS, LTD, an Idaho Corporation; and TIMOTHY PACE,
Defendants.

DONAHOE PACE & PARTNERS, LTD, an Idaho Corporation,
Counterclaimant,

vs.

BOISE MODE, LLC, an Illinois limited liability company, successor-in-interest to Mode Building Ltd. Partnership, an Idaho Limited partnership,
Counterdefendant.

This matter came before the Court on Defendants/Counterclaimant Donahoe Pace & Partners, Ltd. and Timothy Pace's (collectively, "Defendants") Motion to Disallow Costs. The Court heard oral argument on Monday, August 15, 2011. Steven Schossberger appeared for Boise Mode; Nathan Ohler appeared for Defendants.

1 The Court took the motion under advisement and now grants in part and denies in part
2 Defendants' motion.

3 **BACKGROUND**

4 On or about November 3, 2006, Boise Mode and Donahoe Pace & Partners, Ltd. (DPP)
5 entered into a commercial lease agreement for a certain space within a building Boise Mode owned.
6 The building is located at 800 W. Idaho St, Boise, Idaho 83702. The lease term ran through May
7 31, 2010. Also on or about November 3, 2006, Timothy Pace personally guaranteed DPP's
8 obligations under the lease by signing a "Personal Guarantee of Lease." The personal guarantee
9 stated that should DPP fail to pay any of its obligations under the lease, Pace would pay Boise
10 Mode the amount due. The personal guarantee also stated that any obligations incurred under the
11 lease "shall not be reduced by any claim of setoff or counterclaim of [DPP] or [Pace], loss of
12 contribution from...[Pace] or any settlement or compromise between [DPP] and [Boise Mode]."

13
14 At some point in 2008, DPP began expressing unhappiness with its tenancy. Temporary rent
15 abatements were discussed. The Record includes numerous emails and letters exchanged between
16 the parties in 2008 and 2009 in which Pace expresses his discontent with elements of DPP's
17 tenancy. By December 2008, DPP stopped paying the required rent.

18 Pursuant to Idaho Code § 6-303(2), on October 5, 2009, Boise Mode notified DPP that it
19 had three (3) days to pay the full amount of back rent due or vacate the premises. DPP did not pay
20 the back rent, and, by November 2009, DPP vacated the premises.

21
22 Boise Mode filed the Verified Complaint in this lawsuit in January 2010. DPP answered and
23 filed its counterclaim in February 2010. The parties' first appearance before this Court was the
24 December 22, 2010 hearing during which they argued the Summary Judgment motion. On
25
26

1 December 27, 2010, this Court issued an Order granting Plaintiff's Motion for Summary Judgment.

2 A corresponding Judgment was entered January 5, 2011, awarding Boise Mode \$95,975.96.

3 Boise Mode submitted a Memorandum of Costs and Attorney Fees on January 12, 2011. DPP
4 filed an objection. DPP noticed their objection for hearing and submitted several amended notices of
5 hearing, but in light of the Court's March 2, 2011 decision on Defendants' Motion to Amend,
6 Defendants' objection to Boise Mode's memo of costs and fees was never heard. On March 2, 2011,
7 this Court issued an Order Granting Defendants' Motion to Amend Judgment pursuant to IRCP 59(e).
8 As a result of that March 2, 2011 order, the January 5, 2011 Judgment was voided. On June 22, 2011,
9 this Court issued an Order Granting Plaintiff's Motion for Reconsideration and Further
10 Consideration. In that order, this Court granted summary judgment in favor of Boise Mode.
11

12 Boise Mode submitted Boise Mode LLC's Verified Memorandum of Costs and Attorney Fees
13 RE: Order Granting Plaintiff's Motion for Reconsideration and Further Consideration on July 13,
14 2011. Boise Mode requested this Court award costs as a matter of right in the amount of \$219.00 and
15 attorney fees in the amount of \$25,792.50, for a total amount of \$26,011.50. Defendants filed a
16 Motion to Disallow Costs on July 27, 2011. Boise Mode responded on August 3, 2011.
17

18 **APPLICABLE LAW**

19 Idaho Code 12-120(3) states, "In any civil action to recover on an open account, account
20 stated, note, bill, negotiable instrument, guaranty, or contract relating to the purchase or sale of goods,
21 wares, merchandise, or services and in any commercial transaction unless otherwise provided by law,
22 the prevailing party shall be allowed a reasonable attorney's fee to be set by the court, to be taxed and
23 collected as costs."
24

1 Pursuant to I.R.C.P. 54(e)(3), in the event the court grants attorney fees to a party or parties in
2 a civil action it shall consider the following factors in determining the amount of such fees: the time
3 and labor required; the novelty and difficulty of the questions; the skill requisite to perform the legal
4 service properly and the experience and ability of the attorney in the particular field of law; the
5 prevailing charges for like work; whether the fee is fixed or contingent; the time limitations imposed
6 by the client or the circumstances of the case; the amount involved and the results obtained; the
7 undesirability of the case; the nature and length of the professional relationship with the client;
8 awards in similar cases; the reasonable cost of automated legal research (Computer Assisted Legal
9 Research), if the court finds it was reasonably necessary in preparing a party's case; and any other
10 factor which the court deems appropriate in the particular case.
11

12 The calculation of reasonable attorney fees is discretionary. *See, Parsons v. Mut. of Enumclaw*
13 *Ins. Co.*, 143 Idaho 743, 747, 152 P.3d 614, 618 (2007) . When awarding attorney fees, a district
14 court must consider the applicable factors set forth in I.R.C.P. 54(e)(3) and may consider any other
15 factor that the court deems appropriate. *Hines v. Hines*, 129 Idaho 847, 855, 934 P.2d 20, 28 (1997).
16 When awarding attorney fees in a civil action, the law is clearly settled that the district court must
17 consider the I.R.C.P. 54(e)(3) factors, but need not make specific written findings on the various
18 factors. *Lee v. Nickerson*, 146 Idaho 5, 11, 189 P.3d 467, 473 (2008).
19

20 Pursuant to I.R.C.P. 54(d)(1)(C), once determined to be a prevailing party, the prevailing
21 party is entitled to certain costs as a matter of right. These costs include, in pertinent part, court
22 filing fees and actual fees for service of any pleading or document in the action whether served by a
23 public officer or other person. Notwithstanding the determination that a particular party is entitled
24 to costs as a matter of right pursuant to I.R.C.P. 54(d)(1)(C), the trial court in its sound discretion
25 may, upon proper objection, disallow any of the above described costs upon a finding that said costs
26

1 were not reasonably incurred; were incurred for the purpose of harassment; were incurred in bad
2 faith; or were incurred for the purpose of increasing the costs to any other party.

4 DISCUSSION

5 As the parties do not dispute that Boise Mode is the prevailing party, there is no question
6 whether Boise Mode is entitled to attorney fees and costs. The only question before this Court is
7 what amount constitutes a reasonable fee award.

8 In its Motion to Disallow Costs, Defendants made three specific objections. Defendants
9 objected to the October 26, 2010 entries for attorneys Steven Schossberger and Matthew Gordon,
10 asserting they were duplicative entries of 0.7 hours for time attorneys spent conferring with each
11 other. Defendants objected to the October 26, 2010 entry for time Schossberger spent preparing a
12 Rule 30(b)(6) notice of deposition duces tecum of DPP for a deposition that never occurred. Finally,
13 Defendants objected to Schossberger's \$275 hourly rate, asserting it exceeds the prevailing rate for
14 similar work in the area. At oral argument, Defendants' counsel stated that although they had made
15 specific objections in their Motion to Disallow Costs, Defendants' main objection was to Boise
16 Mode's total requested fee amount, asserting it was unreasonable.

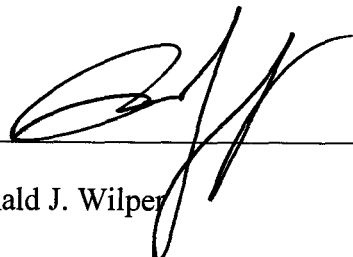
17
18 This Court has thoroughly reviewed the factors involved in determining an amount of
19 attorney fees as set forth in I.R.C.P. 54(e)(3). The only adjustment this Court will make to Boise
20 Mode's requested fee amount is the October 26, 2010 time entries for Steven Schossberger's and
21 Matthew Gordon's meeting will be cut in half. Mr. Schossberger will be awarded \$250 per hour at
22 0.35 hours and Mr. Gordon will be awarded \$140 per hour at 0.35 hours. Thus, Boise Mode's total
23 requested attorney fee amount will be cut by \$136.50 ($\$273/2 = \136.50).

1 Defendants did not make any objections to Boise Mode's claimed costs as a matter of right.
2 As the costs set forth are for court filing fees and service fees, this Court finds Boise Mode's costs as
3 a matter of right are reasonably incurred and awardable.

4 For the reasons stated above, Defendants Motion to Disallow Costs is GRANTED in part and
5 DENIED in part. Boise Mode is awarded attorney fees of \$25,656 and costs of \$219.00 for a total
6 amount of \$25,875.

7 IT IS SO ORDERED.

8 Dated this 16th day of August, 2011.

9
10 
11 _____
12 Ronald J. Wilper
13 DISTRICT JUDGE
14
15
16
17
18
19
20
21
22
23
24
25
26

CERTIFICATE OF MAILING

I, HEREBY CERTIFY that on the 17 day of AUGUST, 2011, I caused a true and correct copy of the foregoing ORDER to be served by the method indicated below, and addressed to the following:

Steven F. Schossberger
Matt Gordon
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Boise, ID 83701-1617
Tel: (208) 344-6000

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- Facsimile

John J. Browder
LOPEZ & KELLY, PLLC
413 W Idaho St, Ste 100
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Boise, ID 83701-0856
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Fax: (208) 342-4344

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- Facsimile

CHRISTOPHER D. RICH
Clerk of the District Court
Ada County, Idaho

By  **INGA JOHNSON**
Deputy Clerk

AUG 26 2011

CHRISTOPHER D. RICH, Clerk
By INGA JOHNSON
DEPUTY

Steven F. Schossberger, ISB No. 5358
HAWLEY TROXELL ANNIS & HAWLEY LLP
877 Main Street, Suite 1000
P.O. Box 1617
Boise, ID 83701-1617
Telephone: 208.344.6000
Facsimile: 208.954.5260
Email: sschossberger@hawleytroxell.com

Attorneys for Plaintiff/Counterdefendant Boise Mode, LLC,
successor-in-interest to Mode Building Limited Partnership

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

BOISE MODE, LLC, an Illinois limited liability company, successor-in-interest to Mode Building Limited Partnership, an Idaho limited partnership,

Plaintiff,

vs.

DONAHOE PACE & PARTNERS LTD, an Idaho corporation; and TIMOTHY PACE,

Defendants.

Case No. CV OC 1001093

JUDGMENT

DONAHOE PACE & PARTNERS LTD, an Idaho corporation,

Counterclaimant,

vs.

BOISE MODE, LLC, an Illinois limited liability company, successor-in-interest to Mode Building Limited Partnership, an Idaho limited partnership,

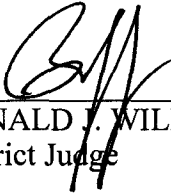
Counterdefendant.

The Court having entered its Memorandum Decision and Order on June 22, 2011 granting Plaintiff/Counterdefendant Boise Mode, LLC's motion for reconsideration and further consideration of the motions for summary judgment, and its Memorandum Decision and Order on August 17, 2011 granting in part and denying in part Defendants/Counterclaimants Donahoe Pace & Partners Ltd's motion to disallow costs, and good cause appearing therefor,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that judgment is entered in favor of Boise Mode, LLC as follows:

1. Boise Mode, LLC is awarded damages against Donahoe Pace & Partners, Ltd, an Idaho corporation, and Timothy Pace, an individual, jointly and severally, in the amount of \$95,975.96, plus post-judgment interest shall accrue at the legal rate until the judgment is paid in full; and
2. Boise Mode, LLC is awarded its attorneys' fees and costs against Donahoe Pace & Partners, Ltd, an Idaho corporation, and Timothy Pace, an individual, jointly and severally, in the amount of \$25,875.00, plus post-judgment interest at the legal rate until the judgment is paid in full; and
3. Donahoe Pace & Partners, Ltd's Counterclaim is hereby dismissed with prejudice.

DATED THIS 23rd day of August, 2011.



RONALD J. WILPER
District Judge

CLERK'S CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 26 day of August, 2011, I caused to be served a true copy of the foregoing JUDGMENT by the method indicated below, and addressed to each of the following:

Steven F. Schossberger
HAWLEY TROXELL ENNIS & HAWLEY LLP
P.O. Box 1617
Boise, ID 83701-1617
[Attorneys for Plaintiff/Counterdefendant Boise Mode, LLC, successor-in-interest to Mode Building Limited Partnership]

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Michael E. Kelly
John J. Browder
LOPEZ & KELLY, PLLC
413 W. Idaho Street, Suite 100
P.O. Box 856
Boise, ID 83701
[Attorneys for Defendants and Counterclaimant]

U.S. Mail, Postage Prepaid
 Hand Delivered
 Overnight Mail
 E-mail
 Telecopy: 208.342.4344

CHRISTOPHER D. RICH

CLERK OF THE COURT

By: _____
Deputy Clerk

INGA JOHNSON

SEP 30 2011

CHRISTOPHER D. RICH, Clerk
By KATHY BIEHL
Deputy

Michael E. Kelly, ISB #4351
John J. Browder, ISB #7531
LOPEZ & KELLY, PLLC
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Boise, Idaho 83701
Telephone: (208) 342-4300
Facsimile: (208) 342-4344
7008.001/Notice of Appeal.wpd

ORIGINAL

Attorneys for Defendants/Counter-Claimant

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

BOISE MODE, LLC, an Illinois limited liability company, successor-in-interest to Mode Building Limited Partnership, an Idaho limited partnership,

Plaintiff,

vs.

DONAHOE PACE & PARTNERS LTD, an Idaho corporation; and TIMOTHY PACE,

Defendants.

DONAHOE PACE & PARTNERS LTD, an Idaho corporation,

Counter-Claimant,

vs.

BOISE MODE, LLC, an Illinois limited liability company, successor-in-interest to Mode Building Limited Partnership, an Idaho limited partnership,

Counter-Defendant.

Case No. CV OC 1001093

NOTICE OF APPEAL

Fee Cat: L.4
\$101.00

Honorable Ronald J. Wilper

BT

TO: THE ABOVE-NAMED PLAINTIFF/COUNTER-DEFENDANT BOISE MODE, LLC, AND ITS ATTORNEY OF RECORD STEVEN SCHOSSBERGER, AND THE CLERK OF THE ABOVE ENTITLED COURT

NOTICE IS HEREBY GIVEN THAT:

1. Parties. Defendants/Counter-Claimant Donahoe Pace & Partners LTD, an Idaho Corporation, and Timothy Pace, appeal against Boise Mode, LLC to the Idaho Supreme Court from the Judgment entered on the 26th day of August, 2011, by the Honorable Ronald J. Wilper, District Judge.

2. Designation of Appeal and Jurisdictional Statement. Defendants/Counter-Claimant Donahoe Pace & Partners LTD and Timothy Pace hereby appeal as a matter of right to the Idaho Supreme Court from the above-referenced Judgment, which is deemed to include all interlocutory judgments, orders and decrees as provided under Idaho Appellate Rule 17(e). Defendants/Counter-Claimant Donahoe Pace & Partners LTD and Timothy Pace have a right to appeal because the Judgment referenced in paragraph 1 is an appealable order as defined in Idaho Appellate Rule 11(a)(1).

3. Issues on Appeal.

(i.) Did the Trial Court err when it denied Defendants/Counter-Claimant Donahoe Pace & Partners LTD and Timothy Pace's Motion for Continuance Pursuant to I.R.C.P. 56(f)?

(ii.) Did the Trial Court err in considering and ruling on Plaintiff/Counter-Defendant's Plaintiff's Motion for Reconsideration and Further Consideration?

(iii.) Did the Trial Court err in granting summary judgment in favor of Plaintiff/Counter-Defendant Boise Mode, LLC on all claims in its Verified Complaint?

(iv.) Did the Trial Court err in granting summary judgment in favor of Plaintiff/Counter-Defendant Boise Mode, LLC on all of Defendants/Counter-Claimant Donahoe Pace & Partners LTD and Timothy Pace's claims in its Counter-Complaint?

4. Reporter's transcript. The Appellant requests a transcript of the motion for summary judgment hearing on December 22, 2010 and the May 23, 2011 hearing on Defendants/Counter-Claimant Donahoe Pace & Partners LTD and Timothy Pace's Motion to Compel and Plaintiff/Counter-Defendant Boise Mode, LLC's Motion for Reconsideration and Further Consideration. The Appellant requests both a hard and electronic copy of the requested transcripts.

5. Clerk's Record. In addition to the standard record set forth in Idaho Appellate Rule 28(b), Appellant requests the following documents:

<u>Date filed</u>	<u>Description</u>
10/27/10	Notice of Taking Deposition
11/24/10	Motion for Summary Judgment on Counterclaimant's Counterclaims
11/24/10	Memorandum in Support of Motion for Summary Judgment on Counterclaimant's Counterclaim
11/24/10	Motion for Summary Judgment on Verified Complaint
11/24/10	Affidavit of Christopher Kiefor CPA
11/24/10	Affidavit of David Baum
11/24/10	Affidavit of Angela Aeschliman CPM
11/24/10	Affidavit of Steven Schossberg
11/24/10	Memorandum in Support of Motion for Summary Judgment on the Verified Complaint
12/08/10	Motion for Continuance
12/08/10	Affidavit in Support of Motion for Continuance
12/15/10	Affidavit of Steven F. Schossberger in Opposition to Motion
12/15/10	Memorandum in Opposition to Counterclaimants Motion for Continuance
12/21/10	Reply Memorandum in Opposition to Motion for Continuance
12/21/10	Motion to Shorten Time on Boise Mode's Motion to Strike in Part Donahoe Pace's Reply Memorandum re Motion for Continuance Pursuant to IRCP 56(f)
12/21/10	Motion to Strike in Part Defendant Donahoe Pace & Partners' Reply to Memorandum in Opposition to Defendants' Motion for Continuance
01/19/11	Motion to Amend Judgment
01/19/11	Memorandum in Support of Motion to Amend Judgment
02/18/11	Plaintiff's Response to Motion to Amend Judgment
04/14/11	Motion to Compel
04/14/11	Affidavit of Counsel in Support of Defendants/Counterclaimants Motion to Compel
04/27/11	Boise Mode LLC's Memorandum in Support of Motion for Reconsideration and Further Consideration

05/16/11 Response to Motion for Reconsideration
05/16/11 Affidavit in Opposition to Motion to Compel
05/17/11 Second Affidavit of Steven F. Schossberger in Opposition to
Defendants/Counterclaimants' Motion to Compel
05/18/11 Reply in Support of Boise Mode LLCs Motion for Reconsideration
and Further Consideration
05/20/11 Further Response to Plaintiff/Counterdefendant Boise Mode LLC's
Motion for Reconsideration and Further Consideration

6. I certify:

(a) That a copy of this Notice of Appeal and request for transcript has been served on the reporter.

(b) That the Clerk of the District Court has been paid the estimated fee for preparation of the reporter's transcript and any additional documents requested in the Appeal.

(c) That service has been made upon all parties required to be served pursuant to I.A.R. 20.

DATED this 30 day of September, 2011

LOPEZ & KELLY, PLLC

By: 

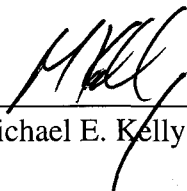
Michael E. Kelly, Of the Firm
Attorneys for Defendants/Counter-Claimant

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 30 day of September, 2011, I served a true and correct copy of the foregoing by delivering the same to each of the following individuals, by the method indicated below, addressed as follows:

Steven F. Schossberger
HAWLEY, TROXELL, ENNIS & HAWLEY
877 Main Street, Suite 1000
PO Box 1617
Boise, ID 83701-1617
Telephone: (208) 344-6000
Facsimile: (208) 954-5260
sschossberger@hawleytroxell.com

- | | |
|-------------------------------------|----------------|
| <input checked="" type="checkbox"/> | U.S. Mail |
| <input type="checkbox"/> | Hand-Delivered |
| <input type="checkbox"/> | Overnight mail |
| <input type="checkbox"/> | Facsimile |



Michael E. Kelly

NO. _____
A.M. 8:00 FILED P.M. _____

DEC 14 2011

CHRISTOPHER D. RICH, Clerk
By BRADLEY J. THIES
DEPUTY

Stephen W. Kenyon
Clerk of Supreme Court
451 W State Street
Boise, Idaho 83720

In re: Boise Mode v. Danahoe Pace, Docket No. 39229-2011

Notice is hereby given that on Monday, November 14, 2011, I lodged a transcript of 39 pages in length for the above-referenced appeal with the district court clerk of Ada County in the Fourth Judicial District.

The following files were lodged:

Proceeding 05/23/2011 and Proceeding 12/22/2010

David Cromwell
Tucker & Associates

cc: kloertscher@idcourts.net
PDF format of completed files emailed to Supreme Court

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

BOISE MODE, LLC, an Illinois limited liability
company, successor-in-interest of MODE BUILDING
LIMITED PARTNERSHIP, an Idaho limited
partnership,

Plaintiff-Counterdefendant-Respondent,
vs.

DONAHOE PACE & PARTNERS LTD, an Idaho
corporation,

Defendant-Counterclaimant-Appellant,
and

TIMOTHY PACE,

Defendant-Appellant.

Supreme Court Case No. 39229

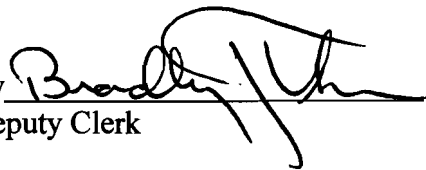
CERTIFICATE OF EXHIBITS

I, CHRISTOPHER D. RICH, Clerk of the District Court of the Fourth Judicial District of
the State of Idaho in and for the County of Ada, do hereby certify:

There were no exhibits offered for identification or admitted into evidence during the
course of this action.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of the said
Court this 14th day of December, 2011.

CHRISTOPHER D. RICH
Clerk of the District Court

By 
Deputy Clerk

CERTIFICATE OF EXHIBITS

000695

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

BOISE MODE, LLC, an Illinois limited liability
company, successor-in-interest of MODE BUILDING
LIMITED PARTNERSHIP, an Idaho limited
partnership,

Plaintiff-Counterdefendant-Respondent,

vs.

DONAHOE PACE & PARTNERS LTD, an Idaho
corporation,

Defendant-Counterclaimant-Appellant,

and

TIMOTHY PACE,

Defendant-Appellant.

Supreme Court Case No. 39229

CERTIFICATE OF SERVICE

I, CHRISTOPHER D. RICH, the undersigned authority, do hereby certify that I have personally served or mailed, by either United States Mail or Interdepartmental Mail, one copy of the following:

CLERK'S RECORD AND REPORTER'S TRANSCRIPT

to each of the Attorneys of Record in this cause as follows:

MICHAEL E. KELLY

ATTORNEY FOR APPELLANT

BOISE, IDAHO


STEVEN F. SCHOSSBERGER

ATTORNEY FOR RESPONDENT

BOISE, IDAHO

CHRISTOPHER D. RICH
Clerk of the District Court

Date of Service: DEC 14 2011

By 
Deputy Clerk

CERTIFICATE OF SERVICE

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

BOISE MODE, LLC, an Illinois limited liability
company, successor-in-interest of MODE BUILDING
LIMITED PARTNERSHIP, an Idaho limited
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Plaintiff-Counterdefendant-Respondent,
vs.

DONAHOE PACE & PARTNERS LTD, an Idaho
corporation,

Defendant-Counterclaimant-Appellant,
and

TIMOTHY PACE,

Defendant-Appellant.


Supreme Court Case No. 39229

CERTIFICATE TO RECORD

I, CHRISTOPHER D. RICH, Clerk of the District Court of the Fourth Judicial District of the State of Idaho, in and for the County of Ada, do hereby certify that the above and foregoing record in the above-entitled cause was compiled and bound under my direction as, and is a true and correct record of the pleadings and documents that are automatically required under Rule 28 of the Idaho Appellate Rules, as well as those requested by Counsels.

I FURTHER CERTIFY, that the Notice of Appeal was filed in the District Court on the 30th day of September, 2011.

CHRISTOPHER D. RICH
Clerk of the District Court

By 
Deputy Clerk

CERTIFICATE TO RECORD

000697