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H2O Environmental, Inc. v. Proimtu MMI, LLC Appellant's Reply Brief 2 Dckt. 44148

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IN THE SUPREME COURT OF THE STATE OF IDAHO

H2O ENVIRONMENTAL, INC., an Idaho Company, Plaintiff/Appellant, vs. PROIMTU MMI, LLC, a Nevada company, Defendant/Respondent.	Supreme Court No. 44143 District Court No. CV-0C-1505838 Supreme Court No. 44148 Supreme Court No. 44148

REPLY BRIEF OF DEFENDANT/RESPONDENT/CROSS-APPELLANT PROIMTU MMI, LLC

APPEAL FROM THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT

HONORABLE TIMOTHY HANSEN, DISTRICT JUDGE PRESIDING

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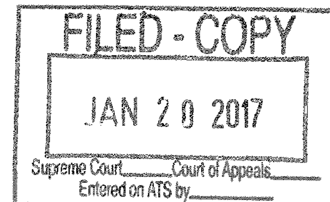

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ATTORNEY FEES ON APPEAL

Defendant/Respondent/Cross-Appellant Proimtu MMI, LLC ("Proimtu" or "Defendant") is seeking attorney fees on appeal pursuant to Idaho Code §12-120(1).

ARGUMENT

I. Plaintiff/Appellant/Cross-Respondent H2O Environmental, Inc.'s ("Plaintiff" or "H2O") arguments in Appellant's Reply Brief in support of its asserted issues on appeal should be dismissed as untimely and only Plaintiff's arguments in response to Defendant's sole issue for cross-appeal should be reviewed.

Plaintiff filed its Appellant's Brief (the "Brief") on November 4, 2016. Pursuant to Idaho Appellate Rule ("I.A.R.") 34(c), Defendant filed its Cross-Appeal and Answering Brief of Defendant/Respondent (the "Cross-Brief") on December 1, 2016,[1] within the 28-day deadline required for a combined response and cross-brief. I.A.R. 34(c) provides that a cross-respondent's brief, if any, "shall be filed within 28 days after the cross-appellant's brief." Furthermore, "**[a]ny** reply brief shall be filed within 21 days after service of any respondent's brief." I.A.R. 34(c) (emphasis added). Appellant's Reply Brief (the "Reply Brief") was filed December 30, 2016. Although Plaintiff styled and titled the Reply Brief as a "reply" in support of the issues upon which it appeals, Plaintiff addresses both the issues of its own appeal as well as the issues on cross-appeal. Plaintiff's response to the issues in the Cross-Brief could arguably have been filed timely, and for purposes of this Reply Brief, Defendant will address Plaintiff's

[1] The Cross-Brief was dated and mailed December 1, 2016; however, the Court has listed the filing date as December 2, 2016.

substantive arguments regarding Defendant's cross-appeal of the issue of the attorneys' fees. However, Plaintiff's untimely arguments which are a reply in support of the Brief and the issues specific to its appeal should be stricken as untimely. The brief is styled as a reply despite the fact that Plaintiff missed its reply deadline by seven (7) days and asserts arguments in response to Defendant's issue on cross-appeal. In the event the Court determines that such arguments are not to be stricken, Defendant responds to the substantive arguments below.

II. Defendant did not purposefully avail itself of the privilege of conducting activities in Idaho.

Even construed in the light most favorable to Plaintiff, Plaintiff fails to establish that Defendant's conduct connects it to the forum in a meaningful way as is required for a finding of purposeful availment to support the exercise of personal jurisdiction. *See Walden v. Fiore*, 134 S.Ct. 1115, 1125 (2014). Regardless of whether the facts are viewed in the light most favorable to Plaintiff, Plaintiff still has the burden of showing that Defendant purposefully availed itself of doing business in the forum and Plaintiff cannot and has not been able to meet that burden. *See Menkem v. Emm*, 503 F.3d 1050, 1057, 1057 (9th Cir. 2007).

First, Plaintiff claims that the District Court erred by not reviewing the totality of the alleged contacts with the forum. However, contrary to Plaintiff's assertions, the District Court not only separately analyzed each alleged contact, but the District Court's analysis also reviews the alleged contacts as a whole, and the District Court correctly determined that Defendant did not purposefully avail itself of the privilege of conducting business in Idaho. R. Vol. 1, P.

000155, L. 15-21. Plaintiff misinterprets organization and separate case law to address each type of contact as a failure to review the alleged contacts in their totality.

The contacts Plaintiff alleges as the evidentiary basis for its argument that Defendant had sufficient minimum contacts with Idaho (*i.e.*, the signature line on Mr. Sayre's email showed a Boise address, the W-9 with a Boise address, Plaintiff's intent to use a Boise bank branch to process payroll, and mailed payroll information and funds which Plaintiff then processed and distributed through the Boise bank branch) are as a whole insufficient to establish that Defendant purposefully directed its activity to Idaho. *Walden*, 134 S. Ct. at 1125; *Rupert v. Bond*, 68 F.Supp.3d 1142, 1168 (N.D. Cal. 2014); *Phillips v. Prairie Eye Ctr.*, 530 F.3d 22, 28 (1st Cir. 2008); *Machulsky v. Hall*, 210 F. Supp. 2d 531, 542 (D.N.J. 2002); *Barrett v. Catacombs Press*, 44 F. Supp. 2d 717, 729 (E.D. Pa. 1999); *Aaron Ferer & Sons Co. v. Atlas Scrap Iron & Metal Co.*, 558 F.2d 450, 455 (8th Cir. 1977); *Houghland Farms, Inc. v. Johnson*, 119 Idaho 72, 78, 803 P.2d 978, 984 (1990) (the location of residence of an employee or agent of the company is purely fortuitous and not determinative of whether minimum contacts have been satisfied); *see also Adv. Tactical Ordinance Sys., LLC*, 751 F.3d 796, 802-03 (2014); *See e.g., LAK, Inc. v. Deer Creek Enters.*, 885 F.2d 1293, 1300 (6th Cir. 1989), *cert. denied*, 494 U.S. 1056 (1990); *Am. Greetings Corp. v. Cohn*, 839 F.2d 1164, 1169 (6th Cir. 1988); *Kerry Steel, Inc. v. Paragon Indus., Inc.*, 106 F.3d 147, 151 (6th Cir. 1987); *Scullin Steel Co. v. Nat'l Ry. Utilization Corp.*, 676 F.2d 309, 314 (8th Cir. 1982); *accord Harlow v. Children's Hosp.*, 432 F.3d 50 (1st Cir. 2005).

Second, as discussed in the Cross-Brief, *Plaintiff's* unilateral acts do not support a finding of sufficient minimum contacts by Defendant. The District Court determined that the alleged contacts were unilateral acts of Plaintiff. R. Vol. 1, P. 000154, L. 9-15. The case law cited by the District Court and the Cross-Brief is clear that these contacts are insufficient. *Walden*, 134 S. Ct. at 1125; *Rupert*, 68 F.Supp.3d at 1168; *Phillips v. Prairie Eye Ctr.*, 530 F.3d at 28; *Machulsky v. Hall*, 210 F. Supp. 2d at 542; *Barrett*, 44 F. Supp. 2d at 729; *Aaron Ferer & Sons Co.*, 558 F.2d at 455; *see also Adv. Tactical Ordinance Sys., LLC*, 751 F.3d at 802-03; *See e.g., LAK, Inc.*, 885 F.2d at 1300; *Am. Greetings Corp.*, 839 F.2d at 1169; *Kerry Steel, Inc.*, 106 F.3d at151; *Scullin Steel Co.*, 676 F.2d at 314; *accord Harlow v. Children's Hosp.*, 432 F.3d 50.

Once again, Plaintiff tried to bolster its argument by citing to *Southern Idaho Pipe & Steel Co. v. Cal-Cut Pipe & Supply, Inc.*, 98 Idaho 495, 567 P.2d 1246 (1977). Plaintiff's argument appears to rely upon restating its argument in the Brief and ignoring Defendant's case law and argument in the Cross-Brief responding to Plaintiff's misguided arguments. As noted in the Cross-Brief, Plaintiff's entire argument rests upon *Southern Idaho Pipe & Steel Co.*, a case involving a multitude of communications including contacts with more than one business in the state and affirmative solicitation via advertising circulars, not the vastly different alleged contacts **based on unilateral acts of Plaintiff** which occurred in this matter. 98 Idaho at 497, 567 P.2d at 1248. Thus, the case is vastly different from the minimal interactions and communications Plaintiff alleges in this lawsuit and cannot support Plaintiff's argument.

The unilateral activities of a plaintiff are irrelevant under a personal jurisdiction analysis. *Phillips*, 530 F.2d at 28 (requiring that a defendant's contacts "must be deliberate, and 'not based

on the unilateral actions of another party") (quoting *Adelson v. Hananel*, 510 F.3d 43, 50 (1st Cir. 2007)). Plaintiff's signature line of its own email, along with its choices of business location, bank branch to process payroll, and location to process mailed payroll information and distribute funds are all unilateral acts of Plaintiff and cannot establish personal jurisdiction over the *Defendant*.

Mere knowledge of such information is not enough to create minimum contacts as discussed above and does not transmute the unilateral acts of one party into the unilateral acts of the party that merely has information of the other party's location and actions. *Walden*, 134 S.Ct. at 1125; *see also Phillips*, 530 F.3d at 28. Plaintiff has not and cannot show specific acts that Defendant undertook which constitute sufficient minimum contact with Idaho. Plaintiff's rhetoric and argument solely alleges the same alleged contacts throughout this litigation in its failed motion practice which have been shown to be insufficient. *See* Reply Brief, at 4, 6.

Third, Plaintiff's argument that the minor contacts in which Defendant participated somehow imbue Defendant's mere potential knowledge of Plaintiff's location with greater import sufficient to establish minimum contacts is misguided. Plaintiff has not provided any case law which indicates that the actions which it alleges constitute minimum contacts (*i.e.*, the signature line on Mr. Savre's email showed a Boise address, the W-9 with a Boise address, Plaintiff's intent to use a Boise bank branch to process payroll, and mailed payroll information and funds which Plaintiff then processed and distributed through the Boise bank branch) is sufficient to exercise personal jurisdiction. In fact, Plaintiff urges the Court to reject the case law finding that mere knowledge is insufficient because of the other insufficient unilateral actions of

Plaintiff alleged in the Brief and Reply Brief. However, the District Court did not err in following established case law that determined mere knowledge is insufficient, unilateral activities of the Plaintiff are irrelevant (a point which Plaintiff has not disputed), minor emails and phone calls are insufficient, and intermittent correspondence is insufficient under a personal jurisdiction analysis to subject a defendant to a foreign forum. *Walden*, 134 S. Ct. at 1125; *Rupert*, 68 F.Supp.3d at 1168; *Phillips.*, 530 F.3d at 28; *Machulsky*, 210 F. Supp. 2d at 542; *Barrett*, 44 F. Supp. 2d at 729; *Houghland Farms, Inc.*, 119 Idaho at 78, 803 P.2d at 984; *Aaron Ferer & Sons Co.*, 558 F.2d at 455; *see also Adv. Tactical Ordinance Sys., LLC*, 751 F.3d at 802-03; *See e.g., LAK, Inc.*, 885 F.2d at 1300; *Am. Greetings Corp.*, 839 F.2d at 1169; *Kerry Steel, Inc.*, 106 F.3d at 151; *Scullin Steel Co.*, 676 F.2d at 314; *accord Harlow*, 432 F.3d 50.

Notably, Plaintiff fails to address or even respond to Defendant's argument and case law regarding the District Court's appropriate action in determining that Defendant did not submit to the jurisdiction of Idaho by filing its Statement of Costs and Fees. Thus, Plaintiff has abandoned its erroneous argument from its Brief and the issue need not be addressed in Defendant's Reply Brief.

III. The analysis of traditional notions of fair play and substantial justice, while not required in this litigation, necessitate that the dispute be litigated in Nevada.

Plaintiff's claim in its untimely Reply Brief that Defendant did not address H2O's arguments and authority regarding whether personal jurisdiction comports with traditional notions of fair play and substantial justice ironically ignores its own lack of discussion of the topic and Defendant's comprehensive argument in the Cross-Brief. Plaintiff's own treatment of

the second major prong to its argument was reduced to merely two sentences in which Plaintiff acknowledges that the prong exists and that if Plaintiff meets its burden in proving the first prong, the burden to defend against the second prong shifts to Defendant. *See* Brief, at 10. Meanwhile, Defendant devoted one page of its Cross-Brief to the topic Plaintiff barely addressed in the Brief. *See* Cross-Brief, at 16.

First, Plaintiff's own authority in the Brief acknowledges that any burden to show that the exercise of personal jurisdiction would comport with fair play and substantial justice is only triggered if Plaintiff *first* satisfies the burden of showing that Defendant purposefully availed itself of Idaho jurisdiction. *See* Brief, at 10; *Menkem*, 503 F.3d at 1057 (9th Cir. 2007); *Ballard v. Savage*, 65 F.3d 1495, 1500 (1995) (citation omitted). The District Court determined that Plaintiff did not meet this burden and neither the Brief nor the Reply Brief provide adequate argument that such a burden has been met. Indeed they cannot, because as articulated in the Cross-Brief and above, Plaintiff is unable to meet this burden with the paltry acts it alleges somehow in totality equate to purposeful availment.

Second, Defendant addressed Plaintiff's two sentences of text on the topic in the Cross-Brief by delineating the reasons why Plaintiff failed to meet the first prong. The majority of the Cross-Brief is devoted to just this issue as is the argument above.

Third, Defendant's argument is not an attempt to circumvent the second prong analysis, but merely a response based on the case law presented by Plaintiff that such analysis was not required upon a finding by the District Court that purposeful availment does not exist in this case.

Finally, the exercise of personal jurisdiction would offend traditional notions of fair play and substantial justice here, as the District Court correctly found. Despite Plaintiff's wishful thinking and careful manipulation of facts in the Brief and the Reply Brief, this dispute is between two Nevada companies involving the salaries of Nevada construction workers who worked on a solar plant in Nevada. The exercise of personal jurisdiction over a party when the dispute is based upon contracts that were not intended to be performed within the purported forum state and without a substantial connection to the purported forum state offends traditional notions of fair play and substantial justice. *Aaron Ferer & Sons Co.*, 558 F.2d at 450. The District Court made a clear finding of fact that the Parties dispute involves a contract for Plaintiff "to hire and employ Nevada-based construction laborers for a solar project in Tonopah, Nevada." R. Vol. 1, P. 000151, L. 24-26. Plaintiff cannot circumvent this finding by now claiming that in contradiction to the District Court's Order that the contract involved a payroll contract to be performed in Idaho as argued in its Reply Brief. *See* Reply Brief, at 8. Plaintiff's business location and its unilateral choice of location to pre-screen Nevada construction workers performing work in Nevada is insufficient to convert a contract involving the payment and use of Nevada workers in Nevada to perform a Nevada contract into a contract to be performed in Idaho.

Traditional notions of fair play and substantive justice, while an unnecessary analysis given Plaintiff's failure to meet its burden of showing purposeful availment, necessitate that any litigation involving the dispute take place in Nevada where the parties and the center of the dispute are located.

IV. The District Court Erred in Denying Reasonable Attorneys' Fees and Costs to Defendant Pursuant to Idaho Code § 12-120(1).

Plaintiff's Reply Brief overlooks the mandatory nature of an award of attorneys' fees under Idaho Code §12-120. Instead, Plaintiff's Reply Brief focuses on Idaho Rule of Civil Procedure 54 ("Rule 54") and fails to even mention Idaho Code § 12-120. Plaintiff does not independently cite to any case law and cites solely to an excerpt of the District Court's Order and Rule 54.

The Statement of Costs was filed pursuant to Idaho Code § 12-120(1) mandating that "[i]n any action where the amount pleaded is thirty-five thousand dollars ($35,000) or less, there shall be taxed and allowed to the prevailing party, as part of the costs of the action, a reasonable amount to be fixed by the court as attorney's fees." Idaho Code § 12-120(1) does not specify that a specific manner or form of filing or that a separate attorney fee application be filed, but rather requires the court to fix a reasonable amount as attorneys' fees "as part of the costs of the action."

The case law cited by the District Court includes one case in which the court issued an award pursuant to the mandatory requirement to do so under Idaho Code § 12-120(1), despite some disagreement over the amount to be awarded, and another case in which the analysis is solely based upon Rule 54 and the discretionary Idaho Code § 12-121 and does not include a request for fees as part of the costs of the action under Idaho Code § 12-120(1). *See Medical Recovery Services, LLC v. Jones*, 145 Idaho 106, 109, 175 P.3d 795, 798 (App. 2007); *Hackett v. Streeter*, 109 Idaho 261, 262-63, 706 P.2d 1372, 1373-74 (App. 1985). Idaho Code § 12-120(1)

is not discretionary and the analysis as such should pertain merely to the amount of the award, not whether to award attorneys' fees. *Compare* I.C. § 12-120(1) *with* I.C. § 12-121.

In addition, Rule 54 case law does not require that the party seeking fees provide all of the information for the factors under a Rule 54 analysis to determine the amount of fees awarded. *See Hackett*, 109 Idaho at 264, 706 P.2d at 1375. Indeed, some of the information to determine the amount of the mandatory award "may come from the court's own knowledge and experience" and "some may come from the record of the case," while some information may be within the sole control of the attorney of the party requesting the fees. *Id.* However, this is not an action in which the party requesting a specified amount of fees as costs supplied absolutely no information. Defendant filed a Statement of Costs thereby providing the statutorily sufficient required information.

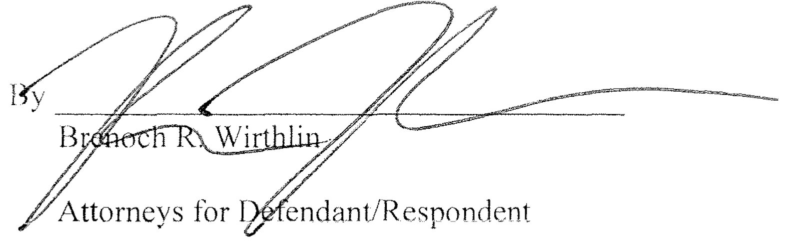
Plaintiff misinterprets the law when it claims that Defendant did not meet its burden for an award of attorneys' fees, as there is no burden required for a **mandatory** award of fees. The District Court did not have discretion under Idaho Code § 12-120(1) to decide not to award fees as costs. Thus, the District Court erred in denying reasonable attorneys' fees pursuant to Idaho Code § 12-120(1).

CONCLUSION

For the foregoing reasons Defendant requests that the Court deny Plaintiff's Appeal and grant Defendant's Cross-Appeal reversing the District Court's improper denial of attorneys' fees under Idaho Code § 12-120(1).

RESPECTFULLY SUBMITTED this 19th day of January, 2017.

FENNEMORE CRAIG, P.C.



By ______________________
Brenoch R. Wirthlin

Attorneys for Defendant/Respondent

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 19th day of January, 2017 the ORIGINAL and six COPIES of the foregoing Reply Brief of Defendant/Respondent/Cross-Appellant Proimtu MMI, LLC was sent Priority Overnight via Federal Express to be filed with the Clerk of the Court.

I HEREBY CERTIFY that on the 19th day of January, 2017, I caused to be served two COPIES of the foregoing Reply Brief of Defendant/Respondent/Cross-Appellant Proimtu MMI, LLC via U.S. Mail and one COPY via electronic mail on the following, in the manner indicated below:

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