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# Lincoln Land Co., LLC v. LP Broadband, Inc. Appellant's Brief Dckt. 44612

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# IN THE SUPREME COURT OF THE STATE OF IDAHO

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Supreme Court Docket No. 44612-2016  
Bonneville County Case No. CV-15-3927

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LINCOLN LAND COMPANY, LLC, an Idaho limited liability company,

Plaintiff-Appellant-Cross Respondent.

v.

LP BROADBAND, INC., a Colorado corporation, successor by merger to MicroServ, Inc., an Idaho corporation,

Defendant-Respondent-Cross Appellant.

---

LP BROADBAND, INC.,

Third-Party Plaintiff-Respondent.

v.

GENERAL MILLS, INC., and GENERAL MILLS OPERATIONS, LLC

Third-Party Defendants-Respondents.

---

## APPELLANT'S BRIEF

Appeal from the District Court of the Seventh Judicial District for Bonneville County.  
Honorable Dane H. Watkins, Jr., District Judge, Presiding.

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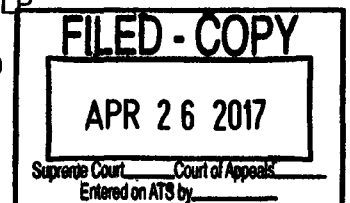
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I. **STATEMENT OF THE CASE**

This appeal involves the unauthorized use of grain silo rooftop space by LP Broadband, Inc. (hereafter "LP Broadband"), for the purpose of installation and operation of internet antennae and related equipment. The rooftop space is now owned by Lincoln Land Company, LLC (hereafter "Lincoln Land") and was leased by Lincoln Land to General Mills Operations, Inc. (hereafter "General Mills"), beginning June, 2010. See Lease, R. p. 281-88.

Prior to Lincoln Land's purchase of the grain silos in 2010, General Mills leased the grain silos from Evan's Grain and Elevator Company, the prior owner of the grain silos.

On March 20, 2000, General Mills signed a "Roof-top Rental Agreement", renting rooftop space on the grain silos to MicroServ (LP Broadband's predecessor in interest), with rent in the amount of \$50.00 per month. See Roof-top Rental Agreement, R. p. 27 (hereafter "the 2000 Sublease Agreement"). Pursuant to the 2000 Sublease Agreement, General Mills allowed LP Broadband to utilize the Rooftops as a location for placement of internet antennae for a period "of no less than 3 years, and up to 5 years with annual renewals after the first 3 years." See 2000 Sublease Agreement. R. p. 27.

For purposes of this appeal, and giving the greatest possible benefit of interpretation to LP Broadband, this Court should assume that the "up to 5 years with annual renewals" is in addition to the initial 3 years of guaranteed utilization. Using the interpretation most favorable to LP Broadband, the 2000 Sublease Agreement could extend **at most** for 8 years, or until March 20, 2008. Lincoln Land's Complaint seeks the disgorgement by LP Broadband of unjust enrichment benefits received after July, 2010 (See Complaint, para. 7, R. p. 17), more than two years after the last possible expiration date of the 2000 Sublease Agreement. Other than the 2000 Sublease Agreement, no valid, executed sublease agreement has been provided by LP Broadband.

During June, 2010, Lincoln Land, as the new owner of the grain silos, leased the silos to General Mills. See Affidavit of Doyle H. Beck, dated November 10, 2015, Para. 3, R. p. 44. Such lease agreement specifically prohibited General Mills from subletting the property or any part thereof without the prior written consent of Lincoln Land. *Id.*, Para. 4, R. p. 45. In June, 2010, Lincoln Land was not aware of LP Broadband's continuing unauthorized occupancy of the Rooftops. *Id.*, Para 5, R. p. 45.

Between July, 2010 and April 22, 2014, LP Broadband utilized internet antennae equipment on the Rooftops without

any authorization from Lincoln Land and without any payment to Lincoln Land for such use. See Responses to Requests for Admission 1-5 attached to the Affidavit of Mark R. Fuller, dated November 10, 2015, as Exhibit 'A', R. p. 36-38.

During litigation, LP Broadband disclosed to Lincoln Land two unsigned documents, one entitled "Antenna Space Lease Agreement" and the other entitled "Tower Agreement". R. p. 42-43. The Antenna Space Lease Agreement purports to authorize the utilization of the Rooftops from June 1, 2004 through June 1, 2009, with automatic annual renewals (hereinafter referred to as "the 2004 Sublease Agreement"). *Id.* The Tower Agreement purports to authorize the utilization of the Rooftops from April 20, 2013 through March 31, 2018 (hereinafter referred to as "the 2013 Sublease Agreement"). *Id.* These 2004 and 2013 sublease agreements were never signed by LP Broadband, MicroServ, General Mills, Inc., General Mills Operations, LLC, Evans Grain & Elevator Co., or Lincoln Land. *Id.*

Lincoln Land filed a Complaint on July 20, 2015, seeking an order requiring LP Broadband (successor by merger to MicroServ) to disgorge the unjust profits realized by the unauthorized use of Lincoln Land's real property. See Complaint, R. p. 15-27. LP Broadband was unjustly enriched by its unauthorized use of Lincoln Land's property to locate



internet antennae equipment and by selling internet access to its customers. *Id.*

On March 4, 2016, Lincoln Land filed a Motion for Partial Summary Judgment RE: Unjust Enrichment Claim, seeking among other things, a determination that LP Broadband was unjustly enriched, but leaving the amount of such unjust enrichment for determination at a later date. R. p. 209-11. On March 16, 2016, LP Broadband filed its own Motion for Summary Judgment, seeking a determination that no benefit was conferred by Lincoln Land to LP Broadband. R. p. 239-40. Each party thereafter filed opposing and supporting briefing as permitted by Idaho Rules of Civil Procedure.

A joint hearing on these Motions was held on April 13, 2016. On May 18, 2016, the District Court entered its Memorandum Decision and Order denying Lincoln Land's Motion and granting LP Broadband's Motion. R. p. 493-504. Judgment was entered August 19, 2016. R. p. 512-14.

On September 28, 2016, Lincoln Land appealed the District Court's Judgment and Memorandum Decision and Order. R. p. 575-79. The District Court subsequently denied LP Broadband's request for attorney fees. R. p. 560-71. On November 15, 2016, LP Broadband filed a cross appeal from the District Court's denial of attorney fees. R. p. 584-87.

II. ISSUES ON APPEAL

- a. The District Court erred in granting Summary Judgment to LP Broadband by determining that no benefit was conferred to LP Broadband by Lincoln Land Company.
- b. The District Court erred in determining that the standard to establish a claim for unjust enrichment requires that the benefit conferred upon the party unjustly enriched must be provided directly by the party seeking to recover.

### III. ARGUMENT

A. THE DISTRICT COURT ERRED IN GRANTING SUMMARY JUDGMENT TO LP BROADBAND BY DETERMINING THAT NO BENEFIT WAS CONFERRED TO LP BROADBAND BY LINCOLN LAND COMPANY.

The first issue on appeal addresses the District Court's determination that Lincoln Land did not confer a benefit when LP Broadband used the Rooftop Space without authorization from Lincoln Land. In its Memorandum Decision and Order Re: Motion for Summary Judgment, the District Court made the legal determination that "General Mills, not Lincoln Land, conferred the benefit by granting LP Broadband permission to use the property's rooftop area." R. p. 500. As a matter of law, General Mills had no legal or contractual authority to confer access to the Rooftops to LP Broadband. The Lease between Lincoln Land and General Mills specifically stated that "Tenant will not sublet the Property, or any part thereof, and will not assign this Lease or any interest therein, nor permit this Lease to be transferred in any manner without the prior written consent of Landlord in each and every case of underletting or assignment..." R. p. 282. Without Lincoln Land's written approval, General Mills had no legal authority to confer any interest in the rooftops to LP Broadband.

Idaho Code Section 55-607 states that "A grant made by the owner of an estate for life or years, purporting to

transfer a greater estate than he could lawfully transfer...passes to the grantee all the estate which the grantor could lawfully transfer." Any attempt by General Mills (as owner of an estate for years) to confer the benefit of occupancy of the rooftop space without Lincoln Land's approval was in violation of Idaho Code Section 55-607 and was an illegal attempt to transfer a greater estate than General Mills could lawfully transfer. Because General Mills had no legal capacity to confer rooftop occupancy to LP Broadband, no estate could be transferred by General Mills to LP Broadband. Any claim that General Mills conferred such a benefit should have been rejected by the District Court. LP Broadband's use of Lincoln Land's property must necessarily constitute an appropriation from Lincoln Land, because **only** Lincoln Land had the legal and contractual authority to confer the use of Lincoln Land's property to LP Broadband.

The District Court relied heavily upon *Med. Recovery Servs., LLC v. Bonneville Billing & Collections, Inc.*, 157 Idaho 395, 336 P.3d 802 (2014), *reh'g denied* (Sept. 15, 2014). The District Court stated:

[I]t was not [Lincoln Land's] **conduct** that conferred a benefit on [LP Broadband]. General Mills, not Lincoln Land, conferred the benefit by granting LP Broadband permission to use the property's rooftop area. If...General Mill's decision to permit LP Broadband to use the

rooftop was in violation of the Lease Agreement, that decision is analogous to WSEC's mistake in *MRS*. Such a mistake or alleged breach of contract does not alter the fact that it was General Mills, not Lincoln Land, which conferred the benefit.

See Memorandum Decision and Order RE: Motions for Summary Judgment, p. 8 (emphasis added), R. p. 500. The District Court failed to recognize that the mistake in *MRS* related to personal property (money), not an interest in real property. Under Idaho Code 55-607, a tenant cannot "mistakenly" transfer a greater estate in real property than the tenant possesses and the holding in *MRS* is easily distinguished under applicable law.

The District Court also relied upon *Brewer v. Washington RSA No. 8 Ltd. Partnership*, 145 Idaho 735, 184 P.3d 860 (2008). The District Court interpreted the *Brewer* decision to mean that the "Idaho Supreme Court did not consider [the Defendant's] use of the property without the [Plaintiff's] authorization to be sufficient, by itself, to establish that the [Plaintiff] conferred a benefit on [the Defendant]." See Memorandum Decision and Order Re: Motions for Summary Judgment, p. 10, R. p. 502. The District Court here acknowledged "that, unlike the plaintiff in *Brewer*, Lincoln Land has clearly supported its allegation of a below-market value lease, sufficient to create a question of fact on that issue. The value of the lease, however,

relates more directly to the third element in a cause of action for unjust enrichment." *Id.* The District Court, relying upon *Brewer*, held that any unauthorized use of real property (trespass) will only give rise to a claim for unjust enrichment where the unauthorized use was conferred upon the trespasser by the lawful owner (which would of necessity mean the use is no longer **unauthorized**). Under the District Court's holding, if the trespasser received "permission" from a third-party intermeddler who lacks legal authority to grant such permission, no cause of action by the owner for unjust enrichment arises. This would create a loophole whereby any unjust enrichment claim could be thwarted simply by claiming a third-party interloper authorized the use of the owner's property.

The first element of a prima facie case for unjust enrichment requires that "there was a benefit conferred upon the defendant by the plaintiff". *Stevensen v. Windermere Real Estate/Capital Grp., Inc.*, 152 Idaho 824, 827, 275 p.3d 839, 842 (2012). As specifically noted by LP Broadband, "'A person confers a benefit upon another if he or she gives the other **some interest in** money, **land**, or possessions, performs services beneficial to or at the request of the other, satisfies the debt of the other, or **in any other way adds to the other's advantage.**' 42 C.J.S.

*Implied Contracts* § 9 (2013).” See Defendant’s Memorandum in Support of Motion for Summary Judgment, p. 6 (emphasis added), R. p. 246. As noted in *Idaho Lumber, Inc. v. Buck*, 109 Idaho 737, 710 P.2d 647 (Ct.App. 1985), a defendant “should be required to make restitution of or for *property or benefits received, retained, or appropriated....*” *Idaho Lumber, Inc.*, 109 Idaho at 746 (emphasis added). It is undisputed that LP Broadband received, retained and **appropriated** Lincoln Land’s real property interest when after June, 2010 it installed and utilized antennae equipment on the rooftop space of Lincoln Land’s grain silos without Lincoln Land’s authorization. Providing that unjust enrichment may result from appropriation of property or benefits necessarily negates any requirement that the benefit must be authorized by the owner through conferral.

LP Broadband was conferred a property use benefit and was advantaged at the expense of Lincoln Land when LP Broadband received, retained, appropriated, occupied and utilized Lincoln Land’s property without authorization or permission from Lincoln Land. The two cases relied upon by the District Court should be distinguished from the present action for the following reasons:

- a. *Medical Recovery Services, LLC v. Bonneville Billing and Collections, Inc.*, 157 Idaho 395, 336 P.3d 802 (2014).

The facts in *Medical Recovery Services, LLC v. Bonneville Billing and Collections, Inc.*, are easily distinguished from Lincoln Land's unjust enrichment claim. In *Medical Recovery Services, LLC*, wages garnished from a debtor's employer by Medical Recovery Services, LLC, were mistakenly sent by the employer to Bonneville Billing and Collections, Inc., who also was owed money by the debtor. Medical Recovery Services then filed an unjust enrichment claim against Bonneville Billing. The Idaho Supreme Court determined "that Medical Recovery Services did not confer any direct benefit on Bonneville Billings and Collections." See *Medical Recovery Services, Inc.*, 157 Idaho at 399. This was technically true because the Court found that the benefit was conferred by the employer who sent the money directly to Bonneville Billings, and no benefit was conferred by Medical Recovery Services. *Id.* The 'benefit conferred' was personal property (money) which the **employer** mistakenly sent to the wrong collection agency. The basis of the holding was that at the time of the employer's mistake, Medical Recovery Services had no ownership interest in the personal property (money).

The District Court in the present action erred when it focused on the **conduct** of the parties ("...it was the plaintiff's **conduct** that conferred the benefit on the



defendant." See Memorandum Decision and Order Re: Motions for Summary Judgment, p. 8 (emphasis added), R. p. 500), rather than **who** actually owned the benefit (money) at the time it was conferred. Rather than focusing on the conduct of the parties, the correct analysis must focus on who had legal rights to the benefit being conferred. In *Medical Recovery Services*, at the time of conferral the benefit (money) belonged to the employer/employee and was never in the possession or ownership of Medical Recovery Services. Until the employer made payment, the funds belonged to the employer and Medical Recovery Services had no ownership interest in the funds which Medical Recovery Services could confer. Medical Recovery Services had no right to demand possession of the specific money conferred by the employer.

In the present action, the 'benefit conferred' was the right to occupy and utilize Lincoln Land's real property interest in the silo rooftops. General Mills had a lease with Lincoln Land to occupy and utilize the property, but Lincoln Land retained the right of subletting to all others, "...in any manner...in each and every case..." See Affidavit of Doyle Beck, Exhibit 'A', para. 11, R. p. 383. General Mills did not have the legal right to confer the benefit of rooftop occupancy upon LP Broadband because General Mills did not possess the right to transfer the

Rooftops under General Mills' lease agreement with Lincoln Land. See Affidavit of Jim Rooney, para. 6 and 8, R. p. 425. When LP Broadband received, retained and thereby appropriated Lincoln Land's real property occupancy right, a benefit was conferred upon LP Broadband which actually belonged to Lincoln Land. General Mills **could not** confer a right which General Mills did not legally possess and General Mills expressly informed LP Broadband that any rooftop lease required approval of the owner of the property. *Id.*

In *Medical Recovery Services, Inc.*, the Supreme Court noted that a mistake on the part of the employer was the source of the personal property benefit (money) which was conferred. 157 Idaho at 399. Contrary to the findings of the District Court here, the mistake in *Medical Recovery Services* is not analogous to the present facts. In *Medical Recovery Services*, the personal property (money) flowed directly from the employer to Bonneville Billing and Collections. There was no contract or protected interest in the personal property which prevented the employer from making that "conferral by mistake". In the present action, General Mills did not possess the contractual right to sublease the rooftops and Idaho Code Section 55-607 specifically prevents "mistaken" transfers of real property

interests by tenants. General Mills could not mistakenly or intentionally confer any real property benefit upon LP Broadband. See Para. 11 of Lease, attached as Exhibit 'A' to the Affidavit of Doyle Beck, R. p. 383. In addition, the 2000 sublease upon which LP Broadband relies had expired years before the subject time period. See Exhibit 'C' to the Complaint, R. p. 27; see also Affidavit of Jim Rooney, para. 4, R. p. 424. This Court should not sanction the appropriation of real property rights by trespass and the resulting unjustified enrichment, simply because an unauthorized third party was involved.

- b. *Brewer v. Washington RSA No. 8 Ltd. Partnership*, 145 Idaho 735, 184 P.3d 860 (2008).

The facts in *Brewer* are also distinguishable from the facts in this action. In *Brewer*, a co-tenant acting as manager of real property, leased property to the Defendant. Another co-tenant brought an action for unjust enrichment based upon the Defendant's use of the property at a below market lease rate. "[The District Court] noted that there were **no facts in the record** suggesting [the Defendant] had received a below-market lease or that it had received a benefit that would be inequitable for it to retain." *Brewer*, 145 Idaho at 739 (emphasis added). In response to the Defendant's Motion for Summary Judgment, the Trial Court held that *Brewer* "**failed to point to a single fact in**

**the record...**that creates a genuine issue of material fact" and "merely made unsubstantiated allegations relating to the lease." *Brewer*, 145 Idaho at 740 (emphasis added).

*Brewer* does not stand for the proposition asserted by the District Court here, to wit: that the use by trespass of real property owned by the Plaintiff is not a direct benefit to the Defendant. The *Brewer* Court granted the Defendant's Motion for Summary Judgment, determining that the Plaintiff only made allegations, unsupported by facts, regarding the elements of unjust enrichment. In fact, the Supreme Court identified the remedies available in a situation where a co-tenant leased the common property of another co-tenant: "Such a contract may be voidable by the non-leasing tenants in common. **Excluded tenants in common may also seek the fair rental value of common property.** Finally, co-tenants ousted by the lease of the common property (or some portion thereof) to another party by one co-tenant may seek partition of the property." *Brewer*, 145 Idaho at 738 (citations omitted)(emphasis added). The present action is not a case of two co-tenants managing common property, but of a landlord being deprived of its occupancy interest in its real property by a non-tenant, occupying without the landlord's authorization.

The District Court here was correct when it opined that the "value of the lease...relates more directly to the third element in a cause of action for unjust enrichment." See Memorandum Decision and Order Re: Motions for Summary Judgment, p. 10, R. p. 502. However, the District Court erred in relying upon the *Brewer* decision to hold that the use of real property alone was insufficient to meet the first element of a claim for unjust enrichment. In *Brewer*, the Idaho Supreme Court agreed with the lower court and found that "there were no facts in the record suggesting [the defendant] had received a below-market lease or that it had received a benefit that would be inequitable for it to retain." *Brewer*, 145 Idaho at 739. The *Brewers* "provided no evidence that they had conferred a benefit on [the defendant] or that it had received a benefit. Instead, they merely asserted that [the defendant's] use of the land was a benefit and that it was receiving a below market lease." *Id.*

The District Court here acknowledged that Lincoln Land clearly supported its allegation of a below-market value lease, sufficient to create a question of fact on that issue. See Memorandum Decision and Order Re: Motions for Summary Judgment, p. 10, R. p. 502. Where the Plaintiffs in *Brewer* were deficient in establishing issues of fact,

Lincoln Land has met its burden. Not only has LP Broadband admitted to occupying Lincoln Land's property, (see R. p. 188-90, Amended Answer, para. 4 and Affirmative Defense 'd': "Defendant occupied the premises"), LP Broadband has admitted to placing internet antennae equipment and profiting by selling access to the internet through the equipment placed on Lincoln Land's property. See R. p. 36, Defendant's Answers to Plaintiff's First Request for Discovery, Request for Admission No. 1, attached to the Affidavit of Mark R. Fuller, dated November 10, 2015: "Response No. 1. Admits installation of internet or other antenna equipment on the rooftop of property.... Defendant further admits that the equipment remained upon the grain elevators thereafter pursuant to a contract/lease with General Mills, until removal".

The facts supporting Lincoln Land's cause of action go well beyond the mere allegations which allowed the *Brewer* Court to dismiss that action. Lincoln Land has provided factual evidence of the value of the benefit, including below market rent and the monthly revenue received by LP Broadband. See Affidavit of Paul Fuller, Ex. A, R. p. 396 (sealed); see also Affidavit of Jim Rooney, para. 9, R. p. 426; see also Affidavit of Doyle Beck, para. 5, R. p. 379. Relying on its faulty *Brewer* analysis, the District Court

here concluded that appropriation of another's real property interest is not unjust enrichment if a third party has unlawfully "conferred" the occupancy benefit. See Memorandum Decision and Order Re: Motions for Summary Judgment, p. 10, R. p. 502. If such is the law, then any action for unjust enrichment by appropriation may be defeated by simply claiming a third party intermeddler authorized the use of the property. This was not the holding of the *Brewer* decision, and to the extent that the *Brewer* decision may be interpreted in this fashion, it is requested that the Idaho Supreme Court provide clarification.

B. THE DISTRICT COURT ERRED IN DETERMINING THAT THE STANDARD TO ESTABLISH A CLAIM FOR UNJUST ENRICHMENT REQUIRES THAT THE BENEFIT CONFERRED UPON THE PARTY UNJUSTLY ENRICHED MUST BE PROVIDED DIRECTLY BY THE PARTY SEEKING TO RECOVER.

In its Memorandum Decision and Order Re: Motions for Summary Judgment, the District Court cited to the following case law regarding claims for unjust enrichment:

"Unjust enrichment occurs where a defendant receives a benefit which would be inequitable to retain without compensating the plaintiff to the extent that retention is unjust." *Vanderford Co. v. Knudson*, 144 Idaho 547, 557, 165 P.3d 261, 271 (2007) (citing *Beco Constr. Co. v. Bannock Paving Co.*, 118 Idaho 463, 466, 797 P.2d 863, 866 (1990)). A prima facie case for unjust enrichment exists where: "(1) there was a benefit conferred upon the defendant by the plaintiff; (2) appreciation by the defendant of such benefit; and (3) acceptance of the benefit under circumstances that would be inequitable for the defendant to retain the benefit

without payment to the plaintiff for the value thereof." *Stevenson v. Windermere Real Estate/Capital Grp., Inc.*, 152 Idaho 824, 827, 275 P.3d 839, 842 (2012) (quoting *Vanderford Co.*, 144 Idaho at 558, 165 P.3d at 272). "A person confers a benefit upon another if he or she gives the other some interest in money, land, or possessions, performs services beneficial to or at the request of the other, satisfies the debt of the other, **or in any other way adds to the other's advantage.**" 42 C.J.S. *Implied Contracts* § 9 (2013).

See Memorandum Decision and Order Re: Motions for Summary Judgment, p. 6, R. p. 498 (emphasis added); citing *Medical Recovery Servs., LLC v. Bonneville Billing & Collections, Inc.*, 157 Idaho 395, 398, 336 P.3d 802, 805 (2014), *reh'g denied* (Sept. 15, 2014).

The District Court went on to hold that "it was not the plaintiff's conduct that conferred the benefit on the defendant", but it was General Mills who "conferred the benefit by granting LP Broadband permission to use the property's rooftop area." See Memorandum Decision and Order Re: Motions for Summary Judgment, p. 8, R. p. 500. As discussed above, General Mills had no legal authority to confer such benefit. In its analysis of the *Brewer* decision, the District Court held that use of property without authorization (appropriation) is insufficient to establish a conferral of a benefit for purposes of the first element of an unjust enrichment claim, imposing a requirement that the



benefit must be intentionally conferred directly by the plaintiff.

The District Court requirement of a direct link between plaintiff and defendant is not supported by Idaho case law regarding unjust enrichment. As noted in *Idaho Lumber, Inc. v. Buck*, 109 Idaho 737, 710 P.2d 647 (Ct.App. 1985), a defendant "should be required to make restitution of or for property or benefits received, retained, or **appropriated**...." *Idaho Lumber, Inc.*, 109 Idaho at 746 (emphasis added). By the inclusion of the term "appropriated", the Court made it clear that there is no requirement that a benefit be willingly conferred directly by the plaintiff. According to Black's Law Dictionary, "Appropriate" is defined as: "To make a thing one's own; to make a thing the subject of property; to exercise dominion over an object to the extent, and for the purpose, of making it subserve one's own proper use or pleasure." See Black's Law Dictionary, 6th Ed., 1990. By inclusion of the term "appropriated", the Idaho Supreme Court held that a claim for unjust enrichment may be established without any intentional act on the part of the plaintiff when the defendant has **taken** a benefit to serve the defendant's own use or pleasure.

*Idaho Lumber* is consistent with the Restatement (Third) of Restitution and Unjust Enrichment, § 40, which states that one who "obtains a benefit by an act of trespass or conversion, by comparable interference with other protected interests in tangible property, **or in consequence of such an act by another**, is liable in restitution to the victim of the wrong." (emphasis added). It is not material whether LP Broadband appropriated Lincoln Land's real property rights or if General Mills is the actual wrongdoer. In either case, LP Broadband has, by wrongful conferral or appropriation, received a benefit it cannot justly retain. The principles set forth in Restatement (Third) of Restitution and Unjust Enrichment §40 were recently adopted in Montana, with the Supreme Court of Montana stating as follows: "Unjust enrichment may arise from interference with real property when the defendant has made valuable use of the plaintiff's property without paying for it." *Christian v. Atl. Richfield Co.*, 380 Mont. 495, 358 P.3d 131, 150 (Mont., 2015); citing Restatement (Third) of Restitution and Unjust Enrichment, §40, cmt. c. In *Christian*, a mining smelter emitted smoke and fumes containing arsenic and other toxic materials. *Id.* Particles of these materials settled on neighboring lands. *Id.* The owners of the neighboring lands brought suit,

claiming among other causes of action, unjust enrichment. *Id.* The Montana Supreme Court stated that an unjust enrichment had occurred ("This is exactly the circumstance alleged here."), but dismissed the cause of action based upon the applicable statute of limitations. *Id.*

It is clear that LP Broadband appropriated Lincoln Land's property interests when it continued to use Lincoln Land's property, knowing it did not have owner authorization. The token \$50 per month rental rate paid to General Mills was well below market rates and only adds to the evidence establishing that LP Broadband knew it was appropriating Lincoln Land's property interest without authorization. If I agree to rent the Brooklyn Bridge from a local vendor for \$50 per month, it is self-evident that I am renting at a below market rate.

When the District Court imposed a requirement that the plaintiff must perform some intentional act to confer a benefit for purposes of a claim for unjust enrichment, the District Court erred. No such requirement has been imposed by applicable Idaho case law. As noted above, "Unjust enrichment occurs where a defendant receives a benefit which would be inequitable to retain without compensating the plaintiff to the extent that retention is unjust." *Vanderford Co. v. Knudson*, 144 Idaho 547, 557, 165 P.3d 261, 271 (2007).

The central issue is **receipt of** a benefit by defendant, not intentional conferral by the plaintiff. This action is a clear case where LP Broadband has received a benefit by appropriation which is inequitable for LP Broadband to retain, without compensating Lincoln Land for the unauthorized use of Lincoln Land's property interest in the grain silo rooftops.

### **CONCLUSION**

This Court should hold that the District Court erred when the District Court determined that no benefit was conferred to LP Broadband by Lincoln Land Company. It is undisputed that LP Broadband occupied property owned by Lincoln Land. It is undisputed that LP Broadband benefitted by the use of Lincoln Land's property. General Mills did not have authority under the lease between General Mills and Lincoln Land to authorize LP Broadband to occupy Lincoln Land's property. Under these facts, it is clear that LP Broadband appropriated Lincoln Land's property interest without authorization. "Unjust enrichment occurs where a defendant receives a benefit which would be inequitable to retain without compensating the plaintiff to the extent that retention is unjust." *See Medical Recovery Servs., LLC*, 157 Idaho at 398, 336 P.3d at 805 (2014); *see also Vanderford Co.*, 144 Idaho at 557, 165 P.3d at 271. LP

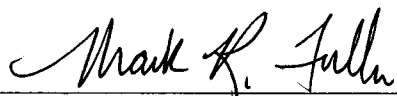
Broadband has appropriated a benefit which would be inequitable to retain without compensating Lincoln Land, the very scenario for which unjust enrichment claims are established.

This Court should also hold that the District Court erred when the District Court determined that direct conferral of a benefit was required in order to assert a claim for unjust enrichment. This requirement is not supported by Idaho case law, which allows unjust enrichment claims for benefits "received, retained, or appropriated..." *Idaho Lumber, Inc.*, 109 Idaho at 746. This requirement is also not supported by the Restatement, which recognizes unjust enrichment claims against a defendant who "obtains a benefit by an act of trespass or conversion, by comparable interference with other protected interests in tangible property, or in consequence of such an act by another..." Restatement (Third) of Restitution and Unjust Enrichment, §40. Requiring a direct link between the victim and wrongdoer only serves as a loophole to deprive the victim of a just recovery. Under such a standard, unjust enrichment claims can be defeated by simply claiming that a third party provided a benefit which rightfully belonged to the victim, exactly as LP Broadband has done in the present

case. This is not a standard which this Court should set in Idaho.

The District Court accepted the arguments presented by LP Broadband, which allowed the District Court to focus solely on the conduct of the parties. By focusing on the conduct of the parties, rather than the benefits received, the District Court ignored the underlying theory of unjust enrichment: The Defendant **received** a benefit which it would be inequitable to retain without compensation to the owner. The right to occupy real property belongs to the owner, to determine who may occupy and who must leave. LP Broadband never received lawful permission to use Lincoln Land's property, and received a valuable benefit which rightfully belonged to Lincoln Land. Unjust enrichment is designed to deter these appropriations by requiring the entity unjustly benefitted to disgorge the profits resulting from such unauthorized use. Lincoln Land's rights to all benefits of its real property must be protected from unauthorized use.

RESPECTFULLY submitted this 20 day of April, 2017.



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**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that I served a true and correct copy of Appellant's Brief by  
U.S. Mail or hand delivery to the attorneys listed below on this 20 day of April, 2017:

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