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Lincoln Land Co., LLC v. LP Broadband, Inc. Appellant's Reply Brief 2 Dckt. 44612

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IN THE SUPREME COURT OF THE STATE OF IDAHO

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

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 REPLY BRIEF AND CROSS RESPONDENT'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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I. REPLY BRIEF

The issue presented to the Court on appeal is whether Lincoln Land has the legal right to control its own property and require those who use Lincoln Land's property without owner authorization to disgorge any unjust enrichment. The sole issue on appeal turns on whether Lincoln Land has satisfied the first element of a prima facie cause for unjust enrichment: "...there was a benefit conferred upon the defendant by the plaintiff..." *Brewer v. Washington RSA No. 8 Ltd.*, 145 Idaho 735, 739, 184 P.3d 860 (2008). Because of the issues framed by LP Broadband's Motion for Summary Judgment, the District Court's Memorandum Decision and Order Re: Motions for Summary Judgment only addressed the first element of unjust enrichment and specifically avoided making any findings of fact or conclusions of law regarding the other two elements (appreciation of the benefit and inequitable circumstances). Accordingly, the attempts by the LP Broadband and General Mills to address inequitability on appeal should be disregarded. The District Court erred when it determined "...that Lincoln Land did not, **as a matter of law**, confer a benefit on LP Broadband..." See Memorandum Decision and Order, p. 10, R. p. 502 (emphasis added). That legal finding is the subject of this appeal.

I.A.R. 35(b)(4) requires Respondent to identify any additional issues on appeal. "In Idaho, a timely notice of appeal or cross-appeal is a jurisdictional prerequisite to challenge a determination made by a lower court. Failure to timely file such a notice shall cause automatic dismissal of the issue on appeal." *Hamilton v. Alpha Servs., LLC*, 158 Idaho 683, 693, 351 P.3d 611 (Idaho 2015); citing *Miller v. Bd. of Trustees*, 132 Idaho 244, 248, 970 P.2d 512, 516 (1998). Inequity and lack of harm are not issues appealed by either party and cannot be considered.

The District Court determined as a matter of fact that a "benefit was conferred by General Mills..." *Id.* The factual determination that some benefit was conferred upon LP Broadband was not appealed by Respondents and is conclusively established for purposes of this appeal. Respondents did not assert any error by the District Court regarding the factual finding that a benefit was conferred. The sole issue on appeal is **who** conferred the benefit, as a matter of law.

Lincoln Land is seeking a disgorgement of the unjust enrichment LP Broadband obtained by use of Lincoln Land's property without owner authorization. LP Broadband reaped a windfall by its unauthorized use of Lincoln Land's property for LP Broadband's commercial operation, without paying a

fair market rent to Lincoln Land. LP Broadband acknowledges paying General Mills only \$50.00 per month to use Lincoln Land's property. See Affidavit of Adam Gillings, para. 11, R. p. 72. By contrast, examination of LP Broadband's invoices establishes considerable revenue, in an amount which cannot be disclosed in this brief. See Defendant's Supplemental Answers to Plaintiff's First Discovery Request, Response to Request for Production No. 5, R. Affidavit of Paul L. Fuller including Confidential Exhibit A (No Record page number is identified).

As the owner of the property, only Lincoln Land had the legal authority to permit occupancy and use of Lincoln Land's property. Lincoln Land never delegated **any** authority to General Mills to sublet the property on Lincoln Land's behalf. LP Broadband should not be allowed to justify its unauthorized use of Lincoln Land's property based upon an ultra vires agreement with General Mills. As owner of the property, only Lincoln Land could authorize LP Broadband to use Lincoln Land's property and **as a matter of law**, only Lincoln Land could confer the land use benefit received by LP Broadband.

1. CONFERRAL OF THE BENEFIT

The primary argument raised by LP Broadband and General Mills in their briefing, and the basis for the

District Court's decision, is that the benefit LP Broadband received by utilizing Lincoln Land's property was not given directly by Lincoln Land. Under the Lease Agreement between General Mills and Lincoln Land, General Mills had no authority to sublet any portion of the property to LP Broadband. See Affidavit of Doyle Beck, Exhibit 'A', para. 11, R. p. 383. LP Broadband and General Mills ask the Court to ignore Idaho Code Section 55-607, which expressly prohibits a tenant from transferring an estate in real property which exceeds the tenant's capacity to grant. Per Idaho Code Section 55-607, any grant by a tenant, which purports to transfer a greater estate than the tenant could lawfully transfer, passes to the grantee only that which the tenant could lawfully transfer.

Because General Mills could not lawfully transfer **any** estate in Lincoln Land's property to LP Broadband, under I.C. 55-607 no estate transferred from General Mills. All arguments asserting that LP Broadband received a land use benefit from General Mills must be rejected as a matter of law. Only Lincoln Land could authorize LP Broadband to use Lincoln Land's real property. The District Court erred when it determined that General Mills granted an estate which Idaho Code Section 55-607 expressly prohibits General Mills from granting. Because LP Broadband could receive the

benefit of using the rooftop space only from Lincoln Land, Lincoln Land satisfied its obligations under the first element of a prima facie case of unjust enrichment.

Respondents seek to deflect the issue of the illegality of the LP Broadband-General Mills agreement by relying upon *Brewer v. Washington RSA No. 8 L.P.*, 145 Idaho 735, 184 P.3d 860 (2008). See LP Broadband's Brief, p. 11. *Brewer* involved competing rights of co-owners, a fact which easily distinguishes *Brewer* from the present case. LP Broadband asserts that because "the legality of the permission given was not an issue in *Brewer* the same is true for this matter." *Id.* at p. 11-12. LP Broadband admits that "[i]n evaluating the unjust enrichment claim, [the *Brewer*] Court **made no references** to the legal basis for Inland Cellular's occupancy of the property." *Id.* at p. 12 (emphasis added). LP Broadband's application of *Brewer* should be rejected. The fact that an issue was not addressed in *Brewer* does not make the issue irrelevant in the present case. Ownership of real property, and the authority to transfer real property to others, is directly relevant to who conferred, or alternatively who appropriated, a benefit.

In its Memorandum Decision, the District Court erroneously interpreted *Brewer* to "indicate that the Idaho

Supreme Court did not consider Inland Cellular's use of the property without the Brewers' authorization to be sufficient, by itself, to establish that the Brewers conferred a benefit on Inland Cellular." See Memorandum Decision and Order, p. 10, R. p. 502. This erroneous interpretation is echoed by LP Broadband ("The reading of the decision on *Brewer* shows that this occupancy of the property, by itself, was not sufficient to show a benefit conferred by the Plaintiffs." LP Broadband's Brief, p. 12) and General Mills ("[M]ere unauthorized use of land does not equate with plaintiff conferring a benefit to a defendant." General Mills' Brief, p. 13).

General Mills even goes so far as to misquote *Brewer* in order to misapply *Brewer's* actual holding. General Mills cites to *Brewer* quoting that the Brewers "provided no evidence that they had conferred a benefit on Inland Cellular or that it had received a benefit. Instead, they merely asserted that Inland Cellular's use of the land was a benefit." See General Mills' Brief, p. 12. However, the full quote finishes as follows: "Instead, they merely asserted that Inland Cellular's use of the land was a benefit *and that it was receiving a below market lease.*" 145 Idaho at 739. (Emphasis added). This surgically deleted language establishes that the *Brewer* decision considered

two elements simultaneously in reaching its determination regarding unjust enrichment. The three elements of unjust enrichment were not addressed separately. Respondents would have this Court interpret *Brewer* to hold that use of someone's real property is not a benefit at all. See General Mills Brief, p. 13. Such an interpretation defies logic. The District Court, LP Broadband and General Mills all rely upon this erroneous interpretation and misquoting of *Brewer*, and to the extent that the *Brewer* decision itself is unclear, it is requested that this Court clarify its holding.

Here the District Court erroneously applied the standard for establishing the third element of unjust enrichment found in *Brewer* (inequitable retention of benefit) to the first element (conferral of benefit). In *Brewer*, the District Court granted summary judgment against the Brewers because "there were no facts in the record suggesting Inland Cellular had received a below-market lease or that it had received a benefit **that would be inequitable** for [Inland Cellular] to retain." *Brewer*, 145 Idaho at 739 (emphasis added). Summary judgment was granted against the Brewers because they had failed to provide any evidence to meet the third element of a prima facie case of unjust enrichment. Brewers failed to provide any evidence

that Inland Cellular had received a benefit **which was inequitable**, such as a below-market lease. Inequitability applies only to the third element of unjust enrichment, not the first.

By contrast, the District Court here correctly held that "Lincoln Land has clearly supported its allegation of a below-market value lease, sufficient to create a question of fact on that issue." *Memorandum Decision and Order*, p. 10, R. p. 502. The standard for the third element had been met. The District Court held that the value of the lease "relates more directly to the third element in a cause of action for unjust enrichment." *Id.* This analysis was correct.

The District Court found that a benefit was conferred (i.e. occupancy and use of land), but erroneously found that "the benefit was conferred by General Mills and not by Lincoln Land..." *Id.* Neither *Brewer*, nor the District Court held that occupancy of property is insufficient, in itself, to satisfy the requirement of the first element of unjust enrichment. The District Court's decision was based on who the District Court believed conferred the benefit, not whether a benefit was conferred. Any assertion by the Respondents that *Brewer* and the District Court's Memorandum Decision stands for the proposition that use of land is not

a 'benefit' for purposes of the first element of unjust enrichment is a mischaracterization of both holdings, defies common logic and does not conform to the undisputed facts in this case. The ability to **use** real property is the primary benefit of ownership. If use of Lincoln Land's property is not a benefit, then why was General Mills willing to pay Lincoln Land for the use, and why was LP Broadband willing to pay General Mills for use of just the rooftops? Each of the sticks in the bundle commonly used to describe property rights is designed to represent some use benefit possessed by the owner of the property. When any stick in the bundle is appropriated, unjust enrichment requires the appropriator to disgorge any benefit which was inequitably obtained.

2. PRIOR CASE LAW

The following are the unjust enrichment cases which General Mills and LP Broadband rely upon or attempt to distinguish in opposition to Lincoln Land's appeal:

a. *Med. Recovery Servs., LLC v. Bonneville Billing*, 157 Idaho 395, 336 P.3d 802 (2014).

This case involved a dispute over wage garnishment proceeds which were sent by an employer to the wrong collection agency. The funds were never owned or possessed by MRS and therefore no benefit was conferred by MRS. The benefit was provided by the employer/employee and no funds

were taken from MRS. MRS brought a claim based upon funds that it **anticipated** it would receive, but that claim was properly denied. Because MRS never had any rights in the money, it could not confer a benefit, as a matter of law. The lower court in MRS specifically held that MRS did not have an ownership interest in the garnished funds, *Id.* at 399, a fact which clearly distinguishes MRS from the present action.

b. *Beco Constr. Co. v. Bannock Paving Co.*, 118 Idaho 463, 797 P.2d 863 (1990).

This case involved two competing contractors bidding on a project. When the low bidder was determined to have not met the requirements applicable to bidders, the second lowest bidder (BECO) sought a claim for unjust enrichment. Because BECO never had any rights to the contract, it could not confer a benefit, as a matter of law. The *Beco* Court found that Idaho case law on unjust enrichment required a "contractual relationship or a claim to real property". *Id.* at 867. In the present action, the subject matter is Lincoln Land's claim to use of real property and therefore complies with the requirements outlined in *Beco* to support an unjust enrichment claim.

c. *Stevenson v. Windermere Real Estate/Capital, Inc.*, 152 Idaho 824, 275 P.3d 839 (2012).

This case involved a home buyer (Stevenson) placing a deposit with the seller's broker (Windermere), the funds were released to the seller pursuant to the Stevenson's authorization and then the seller paid Windermere a commission pursuant to an agreement between Windermere and seller. When the home sales transaction fell apart, Stevenson sought a claim for unjust enrichment against Windermere for the commission paid by the seller. Windermere was not unjustly enriched by Stevenson because at time of payment the funds belonged to the seller to do with as they wished. Stevenson had no rights in seller's funds, as a matter of law, and Stevenson did not confer a benefit.

d. *Brewer v. Wash. RSA No. 8 Ltd. P'ship*, 145 Idaho 735, 184 P.3d 860 (2008).

This case was addressed in prior briefing and above herein. Of the case law cited, only *Brewer* addresses unjust enrichment related to the use of real property, and *Brewer* is easily distinguished on the facts. See *supra.*, p. 5-8.

e. *Idaho Lumber, Inc. v. Buck*, 109 Idaho 737, 710 P.2d 647 (Ct.App. 1985).

Both LP Broadband and General Mills strain unsuccessfully to distinguish *Idaho Lumber, Inc. v. Buck*, 109 Idaho 737, 710 P.2d 647 (Ct.App. 1985). LP Broadband asserts that unjust enrichment was proper in *Idaho Lumber*

because there was a connection between the parties as "Idaho Lumber had supplied materials and services to improve...Buck's property." See LP Broadband's Brief, p. 15. LP Broadband then asserts that there is not a similar link between LP Broadband and Lincoln Land, in spite of the fact that the exact same real property link is present in this action. As discussed in the *Beco* case, *supra.*, a link between parties in unjust enrichment can be based on a claim to real property. By using Lincoln Land's property without owner permission, LP Broadband created the relationship which gives rise to unjust enrichment. *Idaho Lumber* stands for the legal holding that unjust enrichment may be had even if there is an intermediary, such as an occupying tenant. In *Idaho Lumber* the value of Buck's property was "unquestionably increased" (109 Idaho at 746); in the present case it is conclusively established that a benefit was conferred on LP Broadband by its use of Lincoln Land's property.

In *Idaho Lumber*, the district court "held that it would be unjust for Buck to retain all of the enrichment without making some restitution." *Idaho Lumber*, 109 Idaho at 746. In citing 66 Am.Jur.2d, *Restitution and Implied Contracts* § 3 (1973), the Court of Appeals held that parties "should be required to make restitution of or for

property or benefits received, retained or **appropriated**, where it is just and equitable that such restitution should be made...." *Id.* (emphasis added). General Mills would have the Court limit the application of this language to the third element of a prima facie case for unjust enrichment (inequitability), however the language is clearly intended to identify how benefits are conferred and also applies to the first element of a claim for unjust enrichment (conferral of a benefit). How benefits are conferred (first element) and whether it is inequitable to keep the benefit (third element) are both addressed in the language quoted from *Idaho Lumber*. Whether a benefit was received, retained or **appropriated** is properly considered under the first element, whereas a determination of just and equitable retention is properly considered under the third element. The fact that the *Idaho Lumber* Court applied the language to the determination of unjust retention does not prevent the language from also applying to conferral of the benefit. It is unquestioned that LP Broadband appropriated Lincoln Land's property without legal authority.

3. GENERAL MILLS IS NOT A MIDDLEMAN.

LP Broadband seeks to avoid responsibility for using Lincoln Land's property without authorization by interposing a middleman, to wit: General Mills. Unlike the

Stevenson case, General Mills was not a middleman. LP Broadband wishes the Court to believe that Lincoln Land had a contract with General Mills and General Mills had a contract with LP Broadband. (Lincoln Land -> General Mills -> LP Broadband). However, because the alleged contract between General Mills and LP Broadband was ultra vires under Idaho Code Section 55-607, such a contract assertion is invalid. In fact, a relationship exists between Lincoln Land and General Mills based upon their lease agreement and a second relationship (though not a commercial transaction) is implied in law between Lincoln Land and LP Broadband by virtue of LP Broadband's appropriation of use of Lincoln Land's property. (Lincoln Land -> LP Broadband). Lincoln Land seeks a ruling that a party that uses real property without owner authority is accountable to the owner of the property, not the tenant, under unjust enrichment.

LP Broadband cannot interpose General Mills as a middleman to prevent a claim for unjust enrichment, because General Mills had no legal right to act as a middleman. Lincoln Land is not trying to "cut out the middleman" to create liability; LP Broadband is seeking to interpose a middleman to avoid liability. The result would be the same if LP Broadband tried to interpose any other stranger to this action. If anything, LP Broadband's arguments are

weaker, because Lincoln Land had specifically prohibited General Mills, by contract, from granting **any** estate to LP Broadband. General Mills is the sole entity contractually and statutorily prohibited from conferring a use benefit on LP Broadband, as a matter of law.

II. CROSS RESPONDENT'S BRIEF

The District Court acted properly when it denied LP Broadband's requests for attorney fees under Idaho Code Section 12-120 because there was no commercial transaction between Lincoln Land and LP Broadband.

1. **NO ATTORNEY FEES ALLOWED UNDER IDAHO CODE §12-120(3).**

Idaho Code Section 12-120(3) states as follows:

In any civil action to recover on an open account, account stated, note, bill, negotiable instrument, guaranty, or contract relating to the purchase or sale of goods, wares, merchandise, or services and in any commercial transaction unless otherwise provided by law, the prevailing party shall be allowed a reasonable attorney's fee to be set by the court, to be taxed and collected as costs.

The term "commercial transaction" is defined to mean all transactions except transactions for personal or household purposes. The term "party" is defined to mean any person, partnership, corporation, association, private organization, the state of Idaho or political subdivision thereof.

In *Bryan Trucking, Inc. v. Gier*, Docket No. 43461, 2016 Opinion No. 72 (Idaho, 2016), the Idaho Supreme Court stated that "[t]here must be a commercial transaction **between the parties** for attorney fees to be awarded." *Id.* at p. 5

(emphasis added); citing *Great Plains Equip. v. Northwest Pipeline Corp.*, 136 Idaho 466, 471, 36 P.3d 218, 223 (2001). The Supreme Court further stated that "only the **parties to the commercial transaction** are entitled to attorney fees under I.C. § 12-120(3)." *Id.* at p. 5 (emphasis added); citing *Printcraft Press, Inc. v. Sunnyside Park Utilities, Inc.*, 153 Idaho 440, 461, 283 P.3d 757, 778 (2012). In *Printcraft Press*, the Idaho Supreme Court stated that "[a]n award of attorney fees under Idaho Code § 12-120(3) is proper if a 'commercial transaction is integral to the claim, and constitutes the basis upon which the party is attempting to recover.'" 153 Idaho at 461, 283 P.3d at 778.

The *Printcraft Press* Court went on to state as follows:

This Court has held that only the parties to the commercial transaction are entitled to attorney fees under I.C. § 12-120(3). *E.g. BECO Constr. Co. v. J-U-B Eng'rs, Inc.*, 145 Idaho 719, 726, 184 P.3d 844, 851 (2008); *Soignier v. Fletcher*, 151 Idaho 322, 327, 256 P.3d 730, 735 (2011); *Harris, Inc. v. Foxhollow Constr. & Trucking, Inc.*, 151 Idaho 761, 778, 264 P.3d 400, 417 (2011). Thus, even though fees are available in cases involving a tort claim, a commercial transaction *between the parties to the lawsuit* must form the basis of the claim.

153 Idaho at 461, 283 P.3d at 778 (emphasis in original).

In *Printcraft Press*, the Plaintiff was the prevailing party and admitted at trial that there were no contracts between the Plaintiff and any named Defendant. *Id.* Plaintiff asserted that even though no contract existed between the

parties, it was entitled to attorney fees under Section 12-120(3) either as (1) a beneficiary of a contract between the Defendants and a third-party or (2) under a claim of the 'totality of the parties' dealings'. *Id.* Both claims were rejected by the Supreme Court. *Id.* The first claim was denied because the agreement was between the Defendants and a third party. "Thus, although [Plaintiff] was asserting rights created under that agreement, there was no commercial transaction between the parties that gave rise to this litigation." *Id.* The second claim was similarly denied as follows: "Here, even if there are several commercial transactions that created the circumstances underlying the claims, none of those transactions are between the parties. Therefore, we hold that [Plaintiff]'s claims were not based upon a commercial transaction between the parties and we affirm the trial court's denial of attorney fees under I.C. § 12-120(3)." 153 Idaho at 461-62, 283 P.3d at 778-79.

As in *Printcraft Press*, LP Broadband sought attorney fees under I.C. §12-120(3) claiming that LP is a beneficiary of a contract between Lincoln Land and General Mills ("The complaints of the Plaintiff centered around a commercial lease with the Third-Party Defendant and alleged violations of that lease." See Memorandum in Support of Motion for Attorney Fees and Costs, p. 2, R. p. 527), and asserting a

'totality of the parties' dealings' argument ("The gravamen of this action involved the use of the rooftop space by the Defendant for commercial usages." *Id.*). These arguments were both specifically rejected by the Idaho Supreme Court in *Printcraft Press*, were rejected by the District Court below, and should be similarly rejected by the Supreme Court.

This issue was expressly addressed in *Great Plains Equip. v. Northwest Pipeline*, 136 Idaho 466, 36 P.3d 218 (2001). As explained by the Court, "In this case, attorney fees were requested for the separate claim of unjust enrichment pursuant to I.C. §12-120(3), and the gravamen of that claim was a commercial transaction." *Id.* at 472. However, attorney fees were denied because there was no transaction between the subcontractors (who asserted materialman's liens) and Northwest Pipeline. Further, there was no contention that the plaintiff had alleged in its complaint that there was a transaction between it and Northwest Pipeline. For a detailed explanation of the *Great Plains Equip.* holding, the Court is directed to *Garner v. Povey*, 151 Idaho 462, 469-70, 259 P.3d 608 (2011). In order to recover under Section 12-120(3), a claimant must plead that Section as the law governing the action, must allege supporting facts in their pleadings, the commercial

transaction must be integral to the claim and it must be the basis upon which the claimant seeks to recover. *Id.* at 470.

Lincoln Land has never asserted any claim that a commercial transaction existed between Lincoln Land and LP Broadband, and did not assert a claim for its own attorney fees under I.C. §12-120. See Complaint, p. 4-5, R. p. 18-19. This action seeks the disgorgements of profits which were unjustly retained as a result of LP Broadband's **failure** to engage in a commercial transaction with Lincoln Land. LP Broadband itself denies any contractual relationship with Lincoln Land: "There exists no privity of contract between the parties hereto. There is no contractual relationship or duty owed by Defendant to Plaintiff." See Amended Answer, Affirmative Defenses (a), R. p. 189. LP Broadband has repeatedly asserted that there was no direct benefit conferred by Lincoln Land, and the District Court adopted that position. See Memorandum Decision and Order Re: Motions for Summary Judgment, p. 8-10, R. p. 500-02.

Having successfully argued in the substantive litigation that no commercial transaction existed, LP Broadband cannot now characterize the action as one based upon a commercial transaction in order to support an award of attorney fees. If no benefit was conferred upon LP Broadband by Lincoln Land, then there could be no commercial transaction between Lincoln

Land and LP Broadband. Alternatively, when Lincoln Land is found to have conferred a benefit as a matter of law, Lincoln Land will have prevailed on appeal and LP Broadband will again have no entitlement to attorney fees.

Further, LP Broadband should be judicially estopped from now claiming that a commercial transaction existed between Lincoln Land and LP Broadband. In addressing judicial estoppel, the Idaho Supreme Court stated in *McCallister v. Dixon*, 154 Idaho 891, 303 P.3d 578 (2013), as follows:

Idaho adopted the doctrine of judicial estoppel in *Loomis v. Church*, 76 Idaho 87, 277 P.2d 561 (1954). Judicial estoppel precludes a party from advantageously taking one position, then subsequently seeking a second position that is incompatible with the first. *A & J Const. Co. v. Wood*, 141 Idaho 682, 684, 116 P.3d 12, 14 (2005). The policy behind judicial estoppel is to protect "the integrity of the judicial system, by protecting the orderly administration of justice and having regard for the dignity of the judicial proceeding." *Id.* at 685, 116 P.3d at 15 (quoting *Robertson Supply Inc. v. Nicholls*, 131 Idaho 99, 101, 952 P.2d 914, 916 (Ct.App.1998)). Broadly accepted, it is intended to prevent parties from playing fast and loose with the legal system. *Id.*; see also 31 C.J.S. Estoppel and Waiver § 186 (2012). Judicial estoppel protects the integrity of the judicial system, not the litigants; therefore, it is not necessary to demonstrate individual prejudice. *Wood*, 141 Idaho at 686, 116 P.3d at 16 (citing *Hamilton v. State Farm Fire & Cas. Co.*, 270 F.3d 778 (9th Cir.2001)).

McCallister, 154 Idaho 891, 894. In *McKay v. Owens*, 130 Idaho 148, 155, 937 P.2d 1222 (1997), the Idaho Supreme Court stated: "Judicial estoppel is meant to prevent taking

inconsistent positions, whether legal or factual, at least absent newly discovered evidence or fraud."

Throughout this litigation, LP Broadband has taken the consistent position that there was no relationship between LP Broadband and Lincoln Land, that LP Broadband only dealt with General Mills and it was unaware of Lincoln Land's ownership interests in the subject property. On Page 2 of LP Broadband's Memorandum for Attorney Fees, the very same page on which LP Broadband sought attorney fees under Section 12-120(3), LP Broadband stated: "Plaintiff sought an enormous recovery from Defendant **despite no connection what so ever.**" R. p. 527 (emphasis added). Having succeeded in convincing the District Court that there was no connection between Lincoln Land and LP Broadband, and continuing to assert that claim on appeal, now LP Broadband seeks to play fast and loose with the Court by claiming that there is a connection sufficient to create a "commercial transaction".

This Court should not allow LP Broadband to advantageously take the position that no commercial transaction exists for purposes of the merits of Lincoln Land's appeal, and then assert a second incompatible position that a commercial transaction did exist for purposes of attorney fees. LP Broadband's attempts at playing fast and loose with the legal system must be rejected to protect the

integrity of the judicial system. If as LP Broadband now claims on appeal a commercial transaction existed between LP Broadband and Lincoln Land, then Lincoln Land provided a benefit to LP Broadband as a matter of law and the District Court's Memorandum Decision and Order Re: Motions for Summary Judgment should be reversed and remanded for trial. LP Broadband cannot have it both ways. The principles of Judicial Estoppel are designed to prevent this exact tactic. Idaho Code 12-120(3) only applies to commercial transactions and by denying during trial that a commercial transaction existed, LP Broadband is precluded from asserting a claim for attorney fees under 12-120(3).

2. NO ATTORNEY FEES ALLOWED UNDER IDAHO CODE § 12-121 and I.R.C.P 54(e) (2) .

With regards to attorney fees claimed under Idaho Code §12-121 and IRCP 54(e) (2), the Idaho Supreme Court has stated that "[a]n award of attorney fees pursuant to Idaho Code Section 12-121 is inappropriate where a party merely cites to the code section and fails to provide any argument as to why the party is entitled to the award pursuant to the code section." *Marek v. Lawrence*, 153 Idaho 50, 57, 278 P.3d 920 (2012); citing *Bagley v. Thomason*, 149 Idaho 799, 805, 241 P.3d 972, 978 (2010).

Idaho Rule of Civil Procedure 54(e)(2) specifically states that "[a]ttorney fees under Idaho Code Section 12-121 may be awarded by the court only when it finds that the case was brought, pursued or defended frivolously, unreasonably or without foundation, which finding must be in writing and include the basis and reasons for the award." The Idaho Supreme Court has further stated in *Phillips v. Blazier-Henry*, 154 Idaho 724, 302 P.3d 349 (2013) as follows:

In any civil action, the judge may award reasonable attorney's fees to the prevailing party." I.C. § 12-121. "An award of attorney fees under [I.C.] § 12-121 is not a matter of right to the prevailing party." *Michalk v. Michalk*, 148 Idaho 224, 235, 220 P.3d 580, 591 (2009). However, this Court "permits the award of attorneys fees to the prevailing party if the court determines the case was brought, pursued or defended frivolously, unreasonably or without foundation." *Commercial Ventures, Inc. v. Rex M. & Lynn Lea Family Trust*, 145 Idaho 208, 218-19, 177 P.3d 955, 965-66 (2008). When deciding whether attorney fees should be awarded under I.C. § 12-121, the "entire course of the litigation must be taken into account and if there is at least one legitimate issue presented, attorney fees may not be awarded even though the losing party has asserted other factual or legal claims that are frivolous, unreasonable, or without foundation." *Michalk*, 148 Idaho at 235, 220 P.3d at 591.

154 Idaho at 731, 302 P.3d at 356.

In seeking attorney fees under 12-121, LP Broadband simply cited the District Court to Idaho Code Section 12-121 and asserted that as prevailing party it is entitled to attorney fees, without providing **any** argument as to why LP Broadband is entitled to such an award, as expressly required

in *Merek*. LP Broadband's **entire** argument was expressed in the following two sentences: "Defendant successfully defended against the unfounded claims of Plaintiff. Plaintiff sought an enormous recovery from Defendant despite no connection what so ever." See Memorandum in Support of Motion for Attorney Fees and Costs, p. 2, R. p. 527. LP Broadband presented no argument to the District Court or on appeal that Lincoln Land's claims were brought frivolously or pursued unreasonably. LP Broadband failed to establish that the litigation was brought or pursued frivolously, unreasonably or without foundation. The District Court was correct to find that "[a]lthough Lincoln Land was unable to prevail against LP Broadband under a claim for unjust enrichment, its claim was not frivolous, unreasonable or without foundation." See Memorandum Decision and Order RE: Motion for Attorney Fees and Costs, p. 7, R. p. 566. Lincoln Land conferred a benefit on LP Broadband as a matter of law when LP Broadband appropriated Lincoln Land's property without authorization. Lincoln Land's unjust enrichment claim was not frivolous.

LP Broadband now seeks to impose a new standard under I.C. 12-121: "that there *must* be one legitimate issue." See LP Broadband's Brief, p. 18 (underlined emphasis in original; italicized emphasis added). LP Broadband asserts that the claim for unjust enrichment is itself the only issue

presented and that because Lincoln Land was unsuccessful on its unjust enrichment claim, that attorney fees are required under 12-121. This interpretation of case law is erroneous and should not be accepted. *McGrew* does not state that there **must** be one legitimate issue in order for a party to avoid attorney fees under 12-121, but states "if there is a legitimate, triable issue of fact, attorney fees may not be awarded under I.C. § 12-121 even though the losing party has asserted factual or legal claims that are frivolous, unreasonable, or without foundation." *McGrew v. McGrew*, 139 Idaho 551, 562, 82 P.3d 833, 844 (2003). This does not impose a requirement that at least one claim be legitimately **triable**, but states that if one issue is legitimately asserted, no attorney fees may be awarded. Even in the District Court's decision granting summary judgment in favor of LP Broadband the District Court held that Lincoln Land had "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, p. 10, R. p. 502. Thus a triable issue of fact was presented to the Court, however the unjust enrichment claim was dismissed on other grounds.

Under LP Broadband's interpretation, parties must be assessed attorney fees under Section 12-121 anytime their

claims are dismissed on summary judgment. LP Broadband's reading would completely ignore the requirements of "frivolously, unreasonably, or without foundation" whenever a summary judgment is granted. This interpretation also ignores the requirement that "the entire course of the litigation must be taken into account." *McGrew*, 139 Idaho at 562.

In addition to the District Court's consideration of legitimate issues of fact, an award of attorney fees under Section 12-121 is not appropriate if a party presents a legitimate issue of law. *Stevenson*, 152 Idaho at 380; citing *Kiebert v. Goss*, 144 Idaho 225, 228-29, 159 P.3d 862, 865-66 (2007). The District Court here ruled that Lincoln Land's claims were "based on a violation of Lincoln Land's rights as owner of the subject property." See Memorandum Decision and Order Re: Motion for Attorney Fees and Costs, p. 7, R. p. 566. The District Court also found that Lincoln Land's arguments "were supported by a good faith argument for an extension of existing law." *Id.* at p. 7-8, R. p. 566-67. After holding that Lincoln Land presented a legitimate issue of law, the District Court's determination to deny attorney fees under Section 12-121 was appropriate.

The District Court acted properly when it determined attorney fees were not justified under Idaho Code 12-120(3) and 12-121. For the same reasons, this Court should also deny

LP Broadband's claims for attorney fees on appeal. "We have repeatedly held that we will not consider a request for attorney fees on appeal that is not supported by legal authority or argument." *Bream v. Benscoter*, 139 Idaho 364, 369, 79 P.3d 723 (2003). LP Broadband has failed to meet its burden of proof and provide argument under either statute before both the District Court and on appeal. LP Broadband can only recover attorneys fees on appeal upon a determination that no commercial transaction exists between Lincoln Land and LP Broadband. LP Broadband has failed to present any argument that Lincoln Land brought, pursued or defended this appeal frivolously, unreasonably or without foundation, but merely cites to Idaho Code Section 12-121 and fails to provide any argument justifying attorney fees.

Finally, costs under I.A.R. 40 are only addressed after a determination on the merits by the filing of a Memorandum of Costs under I.A.R. 40(c). I.A.R. 41 does not provide a right to attorney fees, but merely provides the process to seek attorney fees. See *Bream v. Benscoter*, 139 Idaho 364, 369, 79 P.3d 723 (2003): "Idaho Appellate Rule 41 is not authority for the awarding of attorney fees on appeal."

CONCLUSION

"The essence of the quasi-contractual theory of unjust enrichment is that the defendant has **received** a benefit

which would be inequitable to retain at least without compensating the plaintiff to the extent that retention is unjust." *Beco Const. Co., Inc. v. Bannock Paving Co.*, 118 Idaho 463, 466, 797 P.2d 863 (1990); citing *Hertz v. Fiscus*, 98 Idaho 456, 457, 567 P.2d 1 (1977); *Continental Forest Products v. Chandler*, 95 Idaho 739, 518 P.2d 1201 (1974); *Bair v. Barron*, 97 Idaho 26, 539 P.2d 578 (1975); *Bastian v. Gifford*, 98 Idaho 324, 563 P.2d 48 (1977). As a summary judgment movant, the burden was on LP Broadband to show that there is no genuine dispute as to any material fact and that LP Broadband is entitled to judgment as a matter of law. I.R.C.P. 56(a).

The District Court committed reversible error when it granted LP Broadband's Motion for Summary Judgment because the very essence of this action is that LP Broadband received a benefit which would be inequitable to retain. Under Idaho Code 55-607 the District Court erred when it determined as a matter of law that LP Broadband's use of Lincoln Land's property was conferred by General Mills. Idaho Code 55-607 specifically prohibits tenants from conferring an estate which they do not have authority to confer. Because Idaho Code 55-607 prohibits General Mills from conferring a leasehold interest on the rooftop of Lincoln Land's property, Court must reverse the District

Court's determination and remand these proceedings to the District Court for trial.

The District Court acted properly in denying LP Broadband's claim for attorney fees and such decision should be affirmed on appeal. LP Broadband has failed to present any argument justifying an award of attorney fees on appeal and this Court should deny such request.

RESPECTFULLY submitted this 15 day of June, 2017.




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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I served a true and correct copy of Appellant's Reply Brief and Cross Respondent's Brief by U.S. Mail or hand delivery to the attorneys listed below on this 15 day of June, 2017:

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